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Surface Transportation Board
Attention: Docket No. EP 711
395 E Street, S.W.
Washington, DC 20423

The Alliance for Chemical Distribution submits the following comments in response to the Surface Transportation Board's (STB or "Board") Notice of Proposed Rulemaking (NPRM) regarding **Docket No. EP 711 (Sub-No. 2), Reciprocal Switching for Inadequate Service**, published in the *Federal Register* September 18, 2023.

About ACD

The Alliance for Chemical Distribution (ACD) supports and champions the chemical distribution experts the world depends on to safely, reliably, responsibly, and sustainably move the chemical products essential to our daily lives. ACD's more than 400 chemical distribution industry members are primarily small, multi-generational family-owned businesses. They provide critical chemical products used in medicine and health care, food and agriculture, clean water and sanitation, energy production, electronics, communication, and more to over 750,000 end users.

As leaders of the \$27 billion chemical distribution industry, ACD member companies have the extensive expertise, commitment to safety and sustainability, and access to a deep well of resources needed to ensure chemicals are moved safely and responsibly when and where they are needed. ACD owners and operators have a personal stake in the health, safety, and security of their employees, companies, and communities. They demonstrate their commitment through strict adherence to the highest standards in quality, safety, sustainability, and performance through compliance with ACD Responsible Distribution™.

The comprehensive Code of Management Practice, a condition of Responsible Distribution, requires each member company to have an active program designed to continuously improve safety and reduce incidents. This dedication, in addition to relationships with employees, involvement in local communities, including participation in Local Emergency Planning Committees (LEPCs), and careful compliance with numerous regulations on the federal, state, and local levels, empowers ACD members to navigate the ever-changing complexities of moving essential chemicals around the nation and the globe.

Moving goods through rail is critical to chemical distribution as it is the safest form of transportation for hazardous materials. The U.S. is reliant on this movement to transport chemicals such as chlorine, among others, which are essential to every industry including public safety, infrastructure, agriculture, and transportation.

Unfortunately, rail service has significantly deteriorated in recent years; and ACD members have struggled to receive consistent, on-time rail service. This has resulted in delays in the receipt of

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shipments, cost increases, and a general movement away from rail as a mode of transportation for goods where possible. The STB has acknowledged these issues and over the last several years has taken steps to address them. ACD is extremely appreciative of the Board's willingness to investigate the causes of poor rail service and to consider innovative ways to help improve the situation. ACD commends the Board for issuing the Reciprocal Switching for Inadequate Service proposal as it is a positive step in giving shippers an opportunity for relief when facing poor rail service. ACD has several additional suggestions for how the proposal can be improved to address rail service problems more directly and effectively.

Applicability

The proposed rule outlines several conditions that must be met in order for a shipper to be prescribed a reciprocal switch, regardless of if their rail service meets the performance standards established in the proposal. One of these conditions is the proposal's applicability only to Class I railroads. ACD understands the Board's reluctance to include smaller railroads in this proposal due to data reporting limits and burdens, and shortlines have typically provided better service than their Class I counterparts as evidenced by fewer shipper complaints. However, ACD worries that not providing a method for shortline rail service to be included may cause the rule's impact to be less significant for two reasons.

First, a sizeable portion of ACD members receive rail deliveries through shortline railroads that take cargo from Class I railroads and are then delivered to a shared railyard. These members only have functional access to one rail carrier to perform deliveries and pickups. Thus, they would not be covered by this rulemaking and would have no remedy if the shortline carrier servicing their facility was providing inadequate service. These members are effectively captive and experience many of the same issues addressed in this rulemaking. ACD urges the STB to include this shortline rail service in the scope of this rule as it would give a substantial number of shippers an important remedy to inadequate rail service. However, in light of the Board's concerns over the data reporting obligations on smaller carriers, ACD suggests that another option could be to limit the application of the rules only to Class II shortline carriers and exclude the smallest Class III carriers.

Second, we believe that shortline railroads should be considered alternative railroads when a switch is prescribed. Shortline railroads have historically provided superior service compared to Class I rail carriers and ACD believes allowing them to serve as alternative carriers would be beneficial. Moreover, many ACD members only move a small number of railcars at a time, raising concern that alternative Class I rail carriers may not be interested in picking up their shipments even when a reciprocal switch is prescribed. However, shortline rail carriers would likely be more receptive to accepting these smaller shipments.

Data

Data reported by railroads plays a significant role in this proposal as this information would be used to verify if a rail carrier has met the performance metrics in question. ACD appreciates the STB's decision to require data reporting by rail carriers and establish standardization to minimize data

manipulation by the Class I railroads. It is crucial for the data to be accurate, easily accessible, and understandable.

Still, ACD does have concerns as members have often experienced inaccurate and confusing data reports from Class I railroads. This is troublesome as the effectiveness of ensuring performance standards are met relies on this data, meaning inaccurate data from rail carriers would effectively undermine this rule. To combat this, ACD urges the STB to establish a system where shippers can dispute data provided by railroads. If this data is found to be inaccurate, there should either be penalties for railroads, or remedies for shippers. ACD believes this is necessary to ensure the enforcement of performance standards is effective and accurate.

Performance Metrics

For a shipper to successfully request a reciprocal switch to be prescribed by the STB the shipper must show that the Class I railroad servicing them has failed to meet one of three different performance metrics. These metrics cover adequate on-time performance, transit time, and local service.

Original Estimated Time of Arrival

The first service standard considered by the STB depends on a rail carrier's ability to fulfill its original estimated time of arrival (OETA). For a rail carrier to satisfy this standard it would have to successfully meet its OETA, which is defined as delivering the agreed railcars within 24 hours of the day and time that was initially estimated, at least 60 percent of the time in any given 12-week period. The Board is also considering increasing this threshold to 70 percent after the first year.

ACD strongly supports the STB's inclusion of OETA in this rulemaking. It is common for railroads to fail to deliver shipments by the time they initially promised, and including this as a performance metric can hold railroads accountable for these failures. However, ACD is concerned by the low threshold included in this proposal. A success rate of 60 or 70 percent should not be considered acceptable and equivalent to "reliable" rail service. If ACD members had a delivery success rate this low, they would be out of business. Still, ACD acknowledges the dismal success rate railroads currently operate with, and the difficulty for rail carriers to immediately improve their service to an acceptable level. Considering this, ACD recommends that the STB set increasing thresholds for a period of two years, starting at 70 percent then moving up to 75 percent after one year, and ultimately ending at 85 percent after two years. This would allow the thresholds to rise to a level relatively close to acceptable rail service while also giving rail carriers adequate time to realistically meet these thresholds. This is practical as each rail carrier's one-year performance target included in this proposed rule is 65 percent or higher, with some as high as 82 percent, meaning they should easily be able to reach the 85 percent success rate by the time this rule has been in effect for two years. If rail carriers cannot meet these higher thresholds, then their performance targets were empty promises, and they should be liable to be prescribed a reciprocal switch.

The current on-time delivery performance of railroads is simply not acceptable. According to data in this proposal, Norfolk Southern Railroads' initial performance data showed less than half of their shipments were delivered within 24 hours of when they were promised. This is egregious. ACD is concerned that railroads are essentially being rewarded for their current inability to deliver shipments as promised since it allows them to argue for extremely low success rates as the norm. Due to this, we urge the STB to work with the Class I railroads and establish realistic goals they can meet over time so they can eventually deliver shipments with relative success. While ACD would argue that the end success rate of 85 percent that we recommend is still far below what we would consider acceptable, especially considering a 24-hour grace period, we recognize that the remedy of taking away rail traffic is significant. We believe an end success rate of 85 percent after two years should be easily attainable and it is reasonable that falling below this would amount to inadequate rail service worthy of a reciprocal switch.

Alternatively, because the impact of late deliveries increases with the duration of the delay, the STB should consider establishing increasing baseline targets for the OETA standard when there are extended delays in delivering all or the remaining cars beyond the 24-hour buffer. For example, the STB could consider adopting baseline targets as follows: >70 percent delivered within 24 hours; >80 percent within 48 hours of OETA; >90 percent within 72 hours of OETA.

Service Consistency

The second service standard in this proposal concerns a rail carrier's efficiency moving shipments through the rail system. This is measured by comparing the average transit time over a 12-week period to the same 12-week period the year prior. A shipper would be able to request a reciprocal switch if the rail carrier's average transit time has increased by either 20 percent or 25 percent, with the STB considering both options in this proposal.

ACD appreciates the STB's inclusion of this performance standard in the proposed rule as our members have consistently seen deteriorating rail service. For example, one member reports that their Class I carrier's average transit time has increased from 11 days in 2019 to 21 days so far in 2023, and it continues to worsen. Establishing a metric through which rail carriers are held accountable for worsening transit times over longer periods is necessary. Still, ACD does have some concerns with this performance standard as written. First, ACD members believe that both considered 20 percent and 25 percent increases in transit time are too high and allow for significant increases year over year. ACD urges the STB to adopt a threshold of 15 percent. This would still give substantial flexibility to railroads to provide slower transit times for just causes while preventing extreme deteriorations in rail service.

Also, ACD is concerned with how the performance standard only accounts for changes over one year at a time. As proposed, a rail carrier could have an increase in transit time just one percent below the threshold for multiple years and never be liable for a reciprocal switch prescription, despite significantly worse rail service over a multiple-year span. To account for this, ACD recommends that the STB also consider changes in transit times over two years in addition to year-over-year changes. Allowing shippers to request a reciprocal switch if the transit times have increased by a significant amount in two subsequent years can ensure railroads cannot continuously provide worse service by narrowly avoiding the service consistency threshold each

year. ACD recommends that the threshold be a 15 percent increase in transit times when comparing a 12-week period to the same 12 weeks one year prior and an additional threshold of a 25 percent increase in transit times when comparing a 12-week period and the same 12 weeks two years prior. This added two-year difference will prevent continuous drops in service just below the yearly threshold.

Industry Spot and Pull (ISP)

The last performance standard included in this proposal measures a carrier's success in performing local deliveries and pick-ups of loaded/unloaded railcars during the planned service window. This proposal would allow shippers to request a switch if the carrier has a success rate below 80 percent over a period of 12 consecutive weeks. The STB is also considering increasing this threshold to 90 percent for one year if a carrier decides to reduce the frequency of these services made available to a shipper based on considerations outside of a drop in customer demand.

ACD is supportive of this performance standard as first-mile/last-mile service has been a significant issue for shippers for decades, causing a multitude of impacts to ACD members, their customers, and broader communities. ACD has applauded the STB's past efforts to gather more information regarding the poor service concerning first-mile/last-mile movements and investigate methods to address these issues. We appreciate the Board's continued attention to these critical matters.

ACD is in favor of the proposed 80 percent performance standard because this threshold is reasonable without being overly burdensome. It is still high enough to capture inadequate first-mile/last-mile service and, at the same time, is a realistic threshold given that three out of four Class I railroads' initial performance evaluations are over 80 percent.

ACD also urges the STB to adopt the considered mechanism of increasing the threshold in circumstances where carriers decrease service on considerations outside of a drop in customer demand. This additional provision is necessary as carriers would be able to significantly reduce their service as a mechanism to make it easier to meet the 80 percent success threshold otherwise. This is counter to the goals of this proposed rule and would essentially incentivize worse service. Due to this, ACD recommends that the STB raise the threshold in these circumstances to 95 percent instead of only the 90 percent proposed. There should be a strong consequence for rail carriers unilaterally reducing local service.

Also, in the proposed rule the STB considers whether it should provide for the prescription of terminal trackage rights in the event that a carrier fails to meet this performance standard. ACD believes that this step is necessary as without it the incumbent would still be providing local service after the reciprocal switch is prescribed. Shippers would still be receiving the same poor service from the incumbent despite proving it has been inadequate, making any ultimate switch ineffective. Providing the prescription of terminal trackage rights would ensure an alternative rail carrier is servicing the lane and can provide better rail service. However, to avoid additional delays in finalizing the rules on reciprocal switching prescriptions for inadequate service, ACD urges the

Board to complete this rulemaking and then address the award of trackage rights for ISP failures in a separate proceeding.

Conclusion

ACD appreciates the opportunity to provide input as the STB moves forward with establishing a system for rail shippers to request a reciprocal switch when experiencing inadequate rail service. ACD strongly supports the intention of this rulemaking and believes it is a positive step towards improving rail service.

ACD also urges the STB to make the recommended changes to this proposal to ensure that this rule is effective. This rulemaking is an important opportunity for the Board to begin correcting rail service that has been declining for decades, however setting thresholds too low will cause the rule to not have any substantive impact. An effective rule is necessary considering how crucial rail service is to transporting goods critical to American safety, well-being, and the economy. For example, in the summer of 2022, a Class I carrier's failure to make a timely delivery of chlorine to an ACD member's facility caused the company to enlist the assistance of several federal agencies to narrowly avoid forcing entire communities to face boil water orders. If rail service does not improve, there will be more examples of necessary goods not reaching their destinations in time, putting public well-being and the U.S. economy in jeopardy.

ACD commends the Board for addressing the important issue of inadequate rail service and for issuing this proposal as a positive step to improve the situation. We look forward to working with the Board to continue to develop solutions to make critical rail service more dependable. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,



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