

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING	)	EP 711 (Sub-No. 1)
	)	
RECIPROCAL SWITCHING FOR	)	EP 711 (Sub-No. 2)
INADEQUATE SERVICE	)	
	)	

**COMMENTS OF THE
PORTLAND CEMENT ASSOCIATION**

The Portland Cement Association (“PCA”) hereby submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking and Closure of Subdocket No. 1 (“NPRM”) served in the above referenced dockets on September 7, 2023.

SUMMARY

It has now been over six years since the Board proposed new rules to remove longstanding, unfair roadblocks preventing shippers from obtaining competitive service relief through carrier reciprocal switching arrangements as authorized under 49 U.S.C. § 11102(c)(1). This statute authorizes the Board to order carriers to enter into reciprocal switching agreements if the Board finds such agreements “to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” However, since 1985, no shipper has obtained any reciprocal switching relief due to rules requiring shippers to demonstrate the incumbent carrier is engaging in anticompetitive conduct before such relief will be granted. PCA has long supported changes to the Board’s rules which unfairly block shippers from obtaining competitive access relief.

In its NPRM, instead of acting on its long-delayed 2016 proposal, the Board proposes a different rule, to authorize as an independent basis the prescription of reciprocal switching agreements in terminal areas upon a showing of inadequate service. The Board's new approach, although more limited than previously proposed, appears to be a reasonable one and PCA supports many aspects of it, including the consideration of reciprocal switching requests on an expedited basis, a presumption that the proposed operation is operationally feasible, the removal of the anticompetitive conduct test, and that the prescription of reciprocal switching service shall be established for a period of up to two to four years. PCA however, respectfully requests that in its final rules, the Board incorporate some changes and clarifications to make them better suited for actual use by cement shippers, including the following:

- In addition to eliminating the outdated and unnecessary anticompetitive conduct test as the NPRM proposes, the final rules should also eliminate the anticompetitive conduct standard from its other existing Part 1144 competitive access rules, as well as from any other terminal access cases brought under 49 U.S.C. § 11102.
- In addition to the prescription of reciprocal switching, the final rules should authorize the prescription of terminal trackage rights for the failure to provide adequate rail service, at the election of the shipper.
- PCA strongly supports the Board's proposal to enable exempt traffic, including hydraulic cement, to be subject to a prescribed reciprocal switching agreement, and the Board should expressly incorporate this finding in its final rules.
- PCA has concerns that because the Board's proposed "objective" service performance standards are in large part based on criteria controlled by the carriers, the standards will create perverse incentives by carriers to ratchet downward their service over time as they seek to block the availability of terminal access relief for shippers. To guard against clear adverse regulatory incentives, PCA suggests that the Board address this issue and include in its final rules an additional performance standard that enables customers to show

on a case-by-case basis, that the incumbent carrier's service does not reasonably meet the shipper's operational and service requirements.

- PCA believes that the attempt to define "terminal area" in the manner set forth in the NPRM is unduly restrictive, and has no basis in the statute. In the final rule, the Board should ensure that that it sets forth a broad interpretation of terminal facilities consistent with precedent and in furtherance of the remedial purpose of 49 U.S.C. § 11102.
- The proposed rule correctly finds that it is inappropriate to set compensation for the prescription of reciprocal switching that would enable the incumbent carrier to recover any lost profits, and PCA respectfully submits that in establishing reciprocal switching fees as part of its final rules, the Board should continue to resist carrier efforts to obtain such lost profits and ensure that the fees are set at levels that facilitate effective competition and improved service.
- The Board should modify its proposed rules so that, in addition to applying to Class I railroads, the final rules also apply to Class II and Class III railroads.

If these revisions to its proposed rule are made, PCA submits that the proposal may prove beneficial for some cement shippers if the major railroads decide to aggressively compete for cement transportation business subject to Board-ordered reciprocal switching agreements.

IDENTITY AND INTEREST

Founded in 1916, PCA represents the majority of U.S. cement manufacturers. PCA members operate manufacturing plants in 32 states, with distribution terminals in all 50 states.

Portland cement is a manufactured powder that acts as the glue or bonding agent that forms concrete. As an essential construction material and a basic component of the nation's infrastructure, portland cement is utilized in numerous markets, including the construction of

highways, streets, bridges, airports, mass transit systems, commercial and residential buildings, dams, and water resource systems and facilities.

PCA members rely on the railroads to move hydraulic cement from manufacturing plants to distribution facilities to market. Frequently, there are no practical, feasible modal alternatives to railroad service to meet the business needs of PCA's members. The average cement shipments by rail range between 250 and 500 miles, a distance that is not economically viable to ship by truck because of the high weight, low margin nature of cement. Additionally, most cement manufacturing plants and terminals are captive to one Class I railroad. Accordingly, most of the cement shipped in the United States is shipped by rail, making reliable, cost-effective rail service essential to the efficient and sustainable shipment of cement. PCA therefore has a strong interest in ensuring that outdated and unnecessary regulatory restrictions are removed to allow cement shippers to obtain competitive access relief in appropriate circumstances.

COMMENTS

A. The Anti-Competitive Conduct Test Should Be Eliminated As the NPRM Proposes, and It Should Also Be Eliminated In Any Other Reciprocal Switching or Terminal Trackage Rights Proceeding

As the Board has recognized, the Congressionally established option that captive shippers have attempted to utilize to achieve competitive rail service – pursuing a competitive-access case – is unfortunately unavailable because the Board has put in place a huge roadblock for shippers seeking to pursue such an option. Specifically, as codified at 49 U.S.C. § 11102, Congress explicitly granted the STB the authority to grant a carrier the right to operate over the line of a destination railroad in a terminal area to deliver freight (i.e., terminal trackage rights). *Id.* at § 11102(a). Under the same statutory section, Congress also

granted the STB the authority to require the destination railroad to perform delivery service for shipments received in interchange with another carrier for a specified fee (i.e., reciprocal switching). *Id.* at § 11102(c). Unfortunately, the STB's present rules governing the exercise of its competitive access jurisdiction make clear that the Board will not grant requests for access solely to create or promote competition, to improve service, or to enable a shipper to obtain lower rates.

In the landmark *Midtec* decision, the agency concluded that the public interest favors protecting railroads from intramodal competition, as such competition may hinder railroad efforts to obtain revenue adequacy.¹ Following the *Midtec* decision, and the Interstate Commerce Commission's ("ICC") adoption of the current access rules, no shipper has obtained any trackage rights or reciprocal switching access relief under the agency's oppressive standards and very few have even tried. In short, the STB has the clear statutory authority to afford competitive access relief for shippers as set forth by Congress under governing statutes. However, in practice, the Board's regulations and policies have precluded shippers from gaining competitive relief under these congressionally-authorized, but Board-rejected, competitive provisions.

The NPRM proposes new regulations, at 49 C.F.R. § 1145, to expressly remove the anticompetitive test to provide for a prescription of a reciprocal switching agreement, on a showing of defined service deterioration, which the Board has found necessary to "[t]o provide a clearer path to address the impact of service deficiencies on the network." NPRM

¹ *Midtec Paper Corp. v. Chicago & N. W. Transp. Co.*, 1 I.C.C.2d 362 (1985), as superseded, 3 I.C.C. 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

at 7. PCA strongly agrees with this approach, and that additional remedies are needed to address “the recent level of performance that carriers themselves have acknowledged largely do not meet the expectations or needs of the public.” *Id.* at 8.

As part of the NPRM, the Board requests that “[i]n light of the approach proposed in the new part 1145, the Board welcomes comment on what other actions, if any, it should consider with respect to competitive access and, in particular whether it should further broaden the application of the public interest prong of § 11102.” NPRM at 7-8 n.8. For the same reasons that the arbitrary anticompetitive conduct test should be eliminated from the Board’s new competitive access rules as proposed in the NPRM, PCA respectfully requests that, as part of its final rules the Board should also eliminate the anticompetitive conduct standard from its other existing Part 1144 competitive access rules, as well as from its 49 U.S.C. § 11102(a) terminal access requirements. The reasons for doing so have already been fully articulated in the NPRM and the *2016 NPRM*,² including:

- Nothing in the text of 49 U.S.C. § 11102 or in the legislative history of the provision requires a finding that a rail carrier has engaged in anticompetitive conduct.
- This extra-statutory requirement to obtain relief is found nowhere in the statute. 49 U.S.C. § 11102 provides the Board with discretion to require carriers to enter into competitive access arrangements when they are practicable and in the public interest or necessary to provide competitive rail service.
- The removal of the anticompetitive conduct test properly recognizes that the rail industry has changed dramatically since the rules were adopted in the 1980s, and takes into account the robust economic health of the rail industry and the reduced competitive options for many shippers.

² *Reciprocal Switching*, EP 711 (Sub-No. 1) et al. (STB served July 27, 2019).

- The STB may reasonably take such actions as a matter of law because it has provided a reasonable explanation for removing the anticompetitive conduct test, it has explained why removal is a permissible exercise of its jurisdiction, and the result constitutes a permissible construction of § 11102.

Accordingly, PCA urges the Board to adopt final competitive access rules that remove the anticompetitive conduct test in all competitive access cases.

B. The Prescription of Trackage Rights Should Be Authorized

As part of the NPRM, the Board requests comment on whether terminal trackage rights might be necessary either as “a separate path to a prescription of a reciprocal switching agreement . . . or as an additional path that would be open to the petitioner.” NPRM at 19.

PCA strongly supports the Board revising its proposed NPRM to enable the prescription of terminal trackage rights for the failure to provide adequate rail service as an additional path that would be open to the petitioner. The Board suggests that the prescription of reciprocal switching by the incumbent rail carrier “might serve as an incentive for the incumbent . . . to provide adequate local service.” Respectfully, it is highly questionable whether an incumbent carrier that has already failed to adequately serve a location over an extended period of time would actually be properly incented or able to improve its poor service when ordered to reciprocally switch the traffic to a competitor. Without the option of trackage rights, the shipper may be left in a similar service predicament than it was in prior to the prescription of reciprocal switching.

The Board’s proposed rule also does not require any minimum level of switching service by the incumbent carrier, although the Board seeks comment on that aspect. NPRM at 12 n.15. PCA supports establishing such a requirement, along with a specific penalty structure to be imposed on carriers that do not meet the customer’s level of service

requirements, as a necessary means of incenting the incumbent carrier to provide reasonable switching service. Still, PCA believes that remedying poor service by an incumbent carrier who has already failed to provide adequate service, by allowing it to continue to serve, even if only to facilitate alternative line-haul service to a second carrier, in many instances will not adequately address the service problems the proposed rule is intended to address.

Accordingly, PCA requests that the Board incorporate into its final rules the prescription of alternative direct service through terminal trackage rights under 49 U.S.C. § 11102(a) as an alternative remedy to the prescription of reciprocal switching, at the election of the shipper.

C. Suggested Revisions and Clarifications to the NPRM

Under its proposed rule, the Board would prescribe a reciprocal switching agreement when (1) the petitioner demonstrates that the incumbent Class I carrier failed to meet one of three defined, uniform “performance standards” for the petitioner’s shipments; (2) with respect to the lane of traffic that is the subject of the petition, the petitioner (a shipper or receiver) has practical physical access to only one Class I carrier that can serve that lane; (3) the carrier fails to establish an affirmative defense; and (4) the prescription would be practicable. PCA supports this proposed rule, with several modest revisions and clarifications.

1. Exempt Traffic

As an initial matter, PCA is pleased that the Board recognizes in the NPRM that so-called exempt traffic “could be subject to an order providing reciprocal switching under part 1145.” The ICC exempted the transportation of hydraulic cement from regulation in 1995.

Rail General Exemption Authority – Exemption of Hydraulic Cement, EP 646 (Sub-No. 34),

1995 WL 438371 (ICC served July 26, 1995) (“*Cement Exemption Decision*”); *see also Rail General Exemption Authority – Exemption of Hydraulic Cement*, 1 S.T.B. 875 (1996).

In its NPRM, the Board explains:

The Board retains full jurisdiction to deal with exempted transportation, which includes considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part. This practice is consistent with Board precedent. Further, it is well established that the Board can revoke the exemption at any time, in whole or in part, under § 10502(d). *Sanimax USA, LLC v. Union Pac. R.R.*, NOR 42171, slip op. at 4 (STB served Feb. 25, 2022); *Pyco Indus.—Alt. Rail Serv.—S. Plains Switching*, FD 34889, slip op. at 5-6 (STB served Nov. 21, 2006); *G&T Terminal Packaging Co. v. Consol. Rail Corp.*, 830 F.2d 1230, 1235 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988). The Board would do so to the extent required.

PCA agrees that the Board has the authority to revoke an exemption at any time, and to order prescribed access under its proposed rules. Nevertheless, PCA stresses that the entire justification for exempting hydraulic cement no longer exists, as the Board has previously recognized. *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (Board served March 23, 2016). (“*Cement Exemption Removal NPRM*”). When the ICC first exempted hydraulic cement from regulation almost three decades ago, it based its decision on a finding that railroads faced “pervasive competition” in the transportation of hydraulic cement, that few rates exceeded the agency’s rate reasonableness jurisdiction, and that associated tariff filing requirements were potentially costly and burdensome. *Cement Exemption Decision*, 1995 WL 438371 at *4. Conditions have changed significantly. Cement manufacturers are shipping cement longer distances than ever before, and potentially burdensome agency tariff filing requirements have long been eliminated. Meanwhile, competition among railroads and alternative shipping options has shrunk.

Both the Board's prior analysis and PCA's independent analysis have demonstrated that rail shipping rates for cement have increased significantly, far above costs, the majority of all cement traffic is potentially captive, and cement rates have been increasing dramatically. *Cement Exemption Removal NPRM* (STB served Mar. 23, 2016); *Cement Exemption Removal NPRM*, Comments of the PCA (filed July 26, 2016); Reply Comments of the PCA (filed Aug. 26, 2016); Summary of Ex Parte Meetings Between PCA and Chairman Ann Begeman, Vice Chairman Patrick Fuchs, and Board Member Martin Oberman (filed June 21, 2019). These factors warrant removal of the hydraulic cement exemption in fulfillment of the national Rail Transportation Policy.

While PCA supports the proposed NPRM that authorizes exempt commodity shippers to seek access relief, respectfully, it is fundamentally unfair to require cement shippers to have to seek revocation of the exemption at the outset of a proceeding when the access remedies proposed in the NPRM are openly available to other similarly situated shippers who experience a demonstrated degradation in service. PCA suggests that the final rules remove the regulatory exemption for purposes of any future access proceeding brought by a cement shipper under 49 U.S.C. § 11102, including under the proposed new rules. PCA also urges the Board to finalize its long overdue *Cement Exemption Removal NPRM* as soon as possible, and permanently remove hydraulic cement as an exempt commodity.

2. The Proposed Service Performance Standards Create Adverse Regulatory Incentives That Require Addressing

Under the proposed rule, in order to obtain a prescription of reciprocal switching, the Board requires a showing that rail service "fails to meet certain objective performance standards that the Board believes to be the minimum level of rail service that is compatible

with the public need.” The Board’s objective, data driven approach, while perhaps efficient, has an obvious and fundamental flaw: it relies on carrier-controlled service performance criteria that may eviscerate the availability of the relief sought, and which may incent a downward spiral of decreased railroad service over time. The first proposed service performance criterion is based on the incumbent rail carrier’s failure to meet its estimated time of arrival (“OETA”) over a 12-week period. However, by leaving it to the carrier to self-select a OETA, rather than what is a reasonable estimated time of arrival, this standard appears arbitrary and would create perverse incentives by carriers to greatly expand estimated service arrival times over time, to be able to avoid a terminal access prescription.

The second criterion, transit time, evaluates the average transit time for shipments over a 12-week period against the same 12-week period during the previous year. Unfortunately, this criterion, like OETA, would discourage railroads from establishing improved transit times for individual shippers over time for fear of the overhang of an access remedy in the following year should a carrier’s service deteriorate. It perversely incents carriers to decrease transit times over time, but by a slightly lower percentage than the proposed 20 percent or 25 percent service consistency standard in order to avoid a terminal access prescription. In addition, in recent years, rail carriers have experienced some of their worst service in recent decades. Many shippers have experienced substantial increases in transit times in the very year that the Board is proposing to establish as the baseline for performance going forward.

The third “objective” service performance criterion proposed, industry spot and pull, is based on the carrier’s success rate in performing requested spots and pulls within a planned service window over a 12-week period. However, this proposed performance

criterion also fails to recognize or address the fact that just like with the OETA and transit time criteria, the carrier remains in sole control of establishing “planned service windows” for individual customers. As with the other two criteria, the proposed industry spot and pull standard would perversely incent carriers to decrease service through revision and expansion of their “planned service windows” as they seek to guard against the possibility of a terminal access prescription.

Unfortunately, under each of the three proposed “objective” performance standards it appears that the main objective proposed by the NPRM, improved service, would be thwarted.

To its credit, the Board appears to recognize that its proposed criteria may “create adverse regulatory incentives” and has asked for comments on “how best to avoid or minimize any adverse incentives.” PCA suggests that, in addition to revising the proposed “objective” criteria to specifically address the unintended consequences discussed above, the Board should also include in its final rules an additional, separate proposed performance standard. The additional standard would provide for access relief upon a showing that the recent service provided by the incumbent carrier does not reasonably meet the local operational and service requirements of the customer that are consistent with the person’s needs and requirements for the efficient and reliable receipt, transportation, and delivery of property, and taking into account any physical or operational limitations or restrictions at a facility or location. PCA respectfully submits that, only by adding such an additional standard which properly takes into account the needs for reasonable service by individual customers, can the Board hope to mitigate the unintended, adverse regulatory incentives that are built into each of the proposed “objective” service performance criteria that all are under

the control of the railroads, and subject to unfair manipulation as carriers seek to avoid the access relief being proposed by the Board.

3. Correcting Unnecessary “Terminal Facility” Restrictions

Under the NPRM, the prescription of reciprocal switching is available in a “terminal area.” Under the proposed rule, the STB defines terminal area as:

a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards. A point of origin or final destination on the rail system is not suitable for a prescribed switching arrangement if the point is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent rail carrier’s terminal-area operation.

NPRM at 38.

PCA has concerns that the Board’s proposed “terminal area” definition is unnecessary and unduly restrictive, and goes beyond the parameters set forth in 49 U.S.C. §11102 and agency precedent for seeking access relief. In contrast, the Board’s 2016 NPRM proposed the availability of access relief where a shipper facility was within a “reasonable distance” of a carrier interchange, to be determined on a case-by-case basis. *Id.* at 14. Additionally, the proposed definition appears to assume that ICCTA itself already contains such restrictive language. However, ICCTA does not define “terminal facility,” “terminal area,” or what is a reasonable distance outside of a terminal – issues that are determined on a case-by-case basis. A terminal under § 11102 has been liberally construed to include areas that include freight or classification yards or team tracks, and a “cohesive commercial area immediately

served by those facilities.” *See, e.g., Rio Grande Indus., Inc. et al. – Purchase and Related Trackage Rights – Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, FD 31505 (ICC served Nov. 15, 1989) at 10-11.

Also, under governing precedent, the phrase “terminal facilities” must be given a broad interpretation in view of the remedial purpose of 49 U.S.C. § 11102. *See, e.g., Rio Grande Indus., et al. – Purchase and Trackage Rights – Chicago, Missouri & Western Ry. Co. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C. 2d 952, 979-80 (1989). Additionally, the statute under § 11102(c)(1) does not address where reciprocal switching is permitted to occur, that is, whether the switching must take place within a “terminal” or whether it may occur within a “reasonable distance” outside of a terminal.³

For these reasons, PCA respectfully submits that the attempt to define and restrict “terminal area” in the manner set forth in the NPRM appears unnecessary, unduly restrictive, inconsistent with the statute, and contrary to case authority requiring a broad interpretation of terminal facilities to further the purpose of this remedial provision, and it should be clarified and corrected in the final rule.

4. Implementing Fair Compensation

Reciprocal switching fees – either fees agreed upon by the carriers or those set by the Board – must be set at competitive levels for reciprocal switching to provide an

³ In contrast, the section governing “trackage rights” explicitly states that the Board “may require terminal facilities, including main-line tracks for a *reasonable distance outside of a terminal*, . . . to be used by another rail carrier” 49 C.F.R. § 11102(a) (emphasis added).

effective competitive alternative. Under the NPRM, the Board generally follows 49 U.S.C. § 11102, with the carriers entering into a STB prescribed reciprocal switching agreement establishing the applicable compensation, and in the event of disagreement, the Board may establish such compensation. NPRM at 24. PCA strongly agrees that it is “inappropriate to use a methodology that would allow the incumbent carrier to recover any lost profits for the line-haul portion of the movement being provided by the alternative carrier . . . [which] would be tantamount to rewarding the incumbent carrier for inadequate service.” *Id.* at 28. PCA respectfully submits that the final rules incorporate this finding, and also specify that, in establishing reciprocal switching fees, the Board will ensure the fees are set at levels that facilitate effective, aggressive competition and improved service.

5. Application to Class II and Class III Rail Carriers

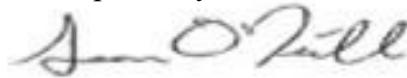
The Board’s proposed rules do not apply to situations where the incumbent carrier is a Class II or Class II shortline railroad, although the Board seeks comment on whether it should broaden its proposal to include shortlines who are providing inadequate service. NPRM at 24. PCA has two responses. First, at a minimum, the Board should clarify that in instances where a Class I railroad provides origin or destination service, but a shortline carrier is able to participate in a reciprocal switching arrangement, that a reciprocal switching agreement may be prescribed under Part 1145 to allow for the transfer of rail shipment between a Class I rail carrier and a Class II or Class III rail carrier. Second, since shortlines originate or terminate roughly one quarter of all domestic rail traffic, exempting them from these rules would potentially affect a large amount of traffic, and it may create perverse incentives for Class I carriers to include a shortline as their agent in the transportation

shipments to avoid the rules altogether. Respectfully, there does not appear to be any valid basis for excluding shortline railroads, and PCA submits that shortlines should be included and covered under the final rules.

CONCLUSION

PCA appreciates the opportunity to file these Comments and urges the Board to adopt final rules that are consistent with the views set forth above.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sean O'Neill", is positioned above the printed name.

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