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Hon. Martin J. Oberman
Chair
Surface Transportation Board
395 E Street SW
Washington, DC 20423

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RE: The American Petroleum Institute's Comments in Response to the Surface Transportation Board request for comments on Reciprocal Switching for Inadequate Service (Docket No. EP 711 Sub-No.2) (September 5, 2023)

Dear Chairman Oberman:

The American Petroleum Institute ("API") submits this letter in response to the Surface Transportation Board ("STB" or "Board") September 5, 2023 Notice of Proposed Rulemaking and Closure of Subdocket No.1 ("2023 STB Notice") regarding a new set of regulations that would provide for the prescription of reciprocal switching agreements to address inadequate rail service, as determined using objective standards based on a carrier's original estimated time of arrival, transit time, and first-mile and last-mile service.

API is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, marine transporters, as well as service and supply companies that support all segments of the industry. Of interest to the STB, API members are also rail shippers, moving petroleum products across our nation's rail network. As part of its mission, API participates in proceedings before federal agencies, and in litigation in state and federal courts. Therefore, API has an interest in any changes to the STB's process as it relates reciprocal switching, first-mile/last mile service and other service and rates issues.

Introduction

We appreciate and support STB's commitment to improving the nation's freight rail network, engaging the shipper community to identify issues of critical importance, and taking proactive action to remedy some of the long-standing issues plaguing our nation's supply chain. API's members are committed to safe, efficient, and timely delivery of vital energy supplies to consumers through the utilization of our nation's rail network.

We are aware that the history of this issue is not lost on the Board, which has been evaluating proposals regarding reciprocal switching since 2016. The Board's unanimous decision to move forward with this NPRM is reflective of the importance of this issue and the need for decisive action in this regard.

In the Board's "Urgent Issues in Freight Service" hearing which was held in April of 2022, and the subsequent request for information on First Mile/Last Mile (FM/LM) Service (Docket No. EP 767), API and other shippers highlighted several of the concerns of regarding competition and rail service that supports the Board's efforts to advance this rulemaking. Further, we are greatly appreciative of the Board's efforts over the past year to continue to collect data and engage with the Class 1 carriers to solicit the information necessary to craft this proposal.

Shippers have long advocated for increased competition, transparency and increased access to service metrics and data and an adequate recourse to address issues with the service provided by the carriers. STB has rightfully acknowledged through this NPRM that the current system is not working, and it is the appropriate time to advance a new regulatory regime to address these outstanding concerns.

API had supported and endorsed the Board's previous reciprocal switching proposal (Docket No. EP 711 No.1) and while we realize that the Board's decision is to focus on service metrics as the driver behind the need for reciprocal switching, it is our hope that the Board will not lose sight of the issues that need to be addressed to drive competition in the industry beyond just service considerations. For the purposes of this comment letter, we will focus on the service-related issues, but we encourage the Board to continue to discuss with API and other shippers' future opportunities for regulatory updates that will further drive competition in the marketplace, including enhancements to this rulemaking in the future, along with terminal trackage rights, through routes, and essential facilities (bottleneck) doctrine.

API's Comments

API appreciates that as the Board has indicated in the NPRM, that in the intervening months between the resolution of the rail industry's labor contracts, and this proposal, the Class 1 carriers have made a concerted effort to publicly acknowledge a shortcoming regarding the service they provide to their customers. The carriers have recognized that they have significant work to do, which they have begun to address this through a drive to increase their workforce which was dramatically reduced in the years prior to the COVID-19 pandemic, and only exacerbated through the health crisis and subsequent labor negotiations crisis. While this trend is encouraging, there is much work still needed to be done on this front, and there remains a wide cavern between what the carriers consider adequate service and the realities faced by captive shippers.

It remains important to note that carriers continue to make decisions which result in a purposeful reduction of rail capacity to reduce carrier operational costs. This issue arises when there is an abrupt change to FM/LM service for a shipper in a certain locale. Carriers that adopted precision scheduled railroading (PSR) early revised their infrastructure to reduce operational costs by reducing siding and/or double track capacity, mothballing or reducing operations at classification yards and reducing their labor forces. These actions provided for a significant reduction in carriers' cost structure, but significantly reduced or eliminated the carrier's ability to respond and recover from service challenges.

Carriers have lauded their ability to manage an equivalent number of units with thousands of fewer employees; however, this causes an extremely delicate balance in the rail network. This balance can be shaken quickly due to inclement weather, natural disasters, or other service interruptions. These issues, and the carriers' desire to run on marginal resources, have caused service recovery times to lag because there is essentially little to no spare capacity in the rail supply chain the way PSR operates.

Competition drives quality service, and in this current environment poor service only drives increased pressure on supply chains, instability in markets and ultimately increased costs to consumers for all commodities from agriculture, to manufactured products, to energy. As such, API believes that the Board should remain diligent in addressing carrier issues regarding the inadequate number of crews or locomotives servicing a given location.

As the Board has rightfully noted in this proposal “failure to provide dependable, timely, and efficient delivery of rail shipments can result in serious consequences for the transportation network and beyond.” We concur with the Board’s assessment, based upon direct shipper experience, that the railroads have failed to meet their own performance targets or improving service among key service indicators including velocity, terminal dwell, FM/LM service, operating inventory, and trip compliance. These failures significantly affect our members’ ability to effectively run their operations.

Further we share the Board’s assessment that the prescription of a reciprocal switching agreement is “practicable and in the public interest” as determined by objective standards measuring the adequacy of rails service and a straightforward analysis regarding the practicability of the proposed agreement.

API strongly supports the Board’s efforts to standardize data collection, metrics, and access. This reflects a significant addition from previous proposals. In preceding years, API has suggested that the Board collect additional service metrics to measure FM/LM service. API contended in the past that the Board, in its effort review overall metrics, the metrics should be designed with input from the shipper community. Such shipper focused metrics design lend itself to better addressing the reality of the situation. Further, there may be a need for a neutral party to collect data from both shippers and carriers which would facilitate an unbiased overview of the service. API supports the development of additional metrics to further evaluate FM/LM service. The current data reported by carriers, facilitated by prior STB Docket No. EP 724, provides a framework for additional data collection that can be used to help drill down on metrics to identify FM/LM service issues.

API supports the three paths for a petitioner to obtain the prescription of a reciprocal switching agreement under the proposed part 1145. We agree that the proposed standards are a step forward to incentivize the carriers to address the issues related to failure to meet original estimated time of arrival; transit time; and FM/LM service.

PART I: Availability of Service-Related Reciprocal Switching Under Proposed Part 1145

(1) Performance Standards

(a) Service Reliability: Original Estimated Time of Arrival (OETA):

API appreciates the Board’s efforts to standardize OETA under service reliability standard. As the Board indicates, the carriers utilize differing trip plan compliance indicators and measure performance in different fashions. Standardization of this process would be beneficial to shippers and the Board alike in monitoring OETA. Additionally, while this was identified for manifest traffic the same standards should be applicable to unit trains. Additionally, if the Board moves forward with establishing a success rate standard of 60% in the first year with a ten percent increase after the first year, this still reflects a significant failure of the carriers to meet their obligation for on-time or near time delivery. API would assert that the second-year target be established for 80-85% percent. Adopting the carriers average manifest traffic performance

levels as the indicator of adverse effects on the public interest fails to recognize that even at higher levels of success there are significant adverse impacts on the public interest. It is not acceptable in any other arena to have this level of failure to meet obligations. If national package delivery services like UPS and FedEx failed to meet their delivery obligations, they would be out of business. UPS has had a reported the best on-time rate in the industry at 95.8%, according to ShipMatrix, besting FedEx's 84.8%.¹ Nearly 80% of consumers indicate that shipping performance influences their decisions which whom to ship, therefore incentivizing performance; however, none of these consumers are captive shippers to a single shipping company and can utilize competition to drive these levels of service.

Failure for on-time or near-time service failures reverberate throughout shippers' operations. Teams which were on duty specifically to receive railcars from the carrier may be limited to hours of service for safety reasons. If labor is not available when the switch does ultimately occur, shippers may have to call in labor specifically for escort or gate-opening purposes and could incur unnecessary railroad demurrage costs.

On-time service failure typically equates to immediate increases in costs per unit over and above the planned transportation costs. Some general costs associated with service failures include: lost production time; overtime labor; increased transportation costs due to switching to a higher-cost mode; increased demurrage/constructive placement cost exposure; increased administrative burden for data gathering and disputing automated demurrage bills generated by carriers; offsite railcar storage costs to absorb extreme variability; special/extra switch fees; overall loss of immediate and future business opportunities; and increase in private railcar fleets.

The Board has recommended that for instances where movements involve more than one rail carrier, the destination of the originating rail carrier would be considered the interchange location with the subsequent railroad, and the success rate would be based on delivery to the interchange, and then would separately apply to the subsequent railroad carrier as to its portion of the trip. However, this approach fails to address the "blackhole" time between delivery to the interchange and the time it took the connecting carrier to continue the cat's trip. This "blackhole" period can last several hours and can have a dramatic impact on the overall on-time service from point of origin to destination. The Board should develop a requirement to capture and evaluate this unaccounted for a period and apply it into the overall performance evaluation.

Further, API would support the adoption of a pathway to prescribe a reciprocal switching agreement that governs multiple lanes of traffic to/from a facility allowing the petitioner for a reciprocal switch to choose which lanes to/from its facility to include in determining the incumbents rail carrier average success rate.

(b) Service Consistency: Transit Time

API supports the application of the service consistency standard to the return of empty and shipper owned and leased railcars. In determining transit time under the service consistency standard, API would encourage the Board to further review the integrity of the data utilized to determine transit time. The Board needs to be confident that the data collection processes are standardized, that there is

¹ [https://about.ups.com/us/en/our-stories/people-led/ups-on-time-performance.html#:~:text=What's%20new%3A%20UPS%20is%20sporting,USPS%20is%20at%2098.5%25\).](https://about.ups.com/us/en/our-stories/people-led/ups-on-time-performance.html#:~:text=What's%20new%3A%20UPS%20is%20sporting,USPS%20is%20at%2098.5%25).)

not opportunity for retroactive manual revision to any transit time data, and that all data logs can be audited and verified for the purposes of ensuring the integrity of transit time data for which recourse may be sought. As with OETA, the Board should look to address the “black box” time at the interchange between carriers.

(c) Inadequate Local Service: Industry Spot and Pull (ISP)

As detailed in length in API’s FM/LM comments in Docket No. EP 767, the carriers have been historically challenged in successfully performing local deliveries and pick-ups of loaded and empty private or shipper leased railcars during the planned service window. This remains a critical concern to our industry. API supports the initial success rate determination of less than 80% overall period of 12 consecutive weeks; however, we would recommend that, within two years of implementation of this regulation, that the Board reevaluate this success rate threshold and increase the standard to 85-90% in subsequent years. We are encouraged that the Board has recognized to include situations where the carrier has embargoed the shipper or receiver. Additionally, the Board should ensure the standardization of ISP metrics, with the integrity and audit capabilities as outlined above in our transit time comments.

As laid out in the Board’s proposal, for the purpose of the ISP standard, it would look at the service window to provide local service during a given 12-week period. However, the Board fails to recognize that carriers have routinely altered the service window.

Carriers establish internal metrics or formulas based on facility volumes and other factors to determine service frequency and each carrier uses a different rationale to determine how many days of service they will provide. Depending on the shipper and volumes, service revisions could happen several times per year. Most of the service changes come in the form of a written notification of change of service without any input or discussion with the shipper. In some instances, there is no notification of a days-of-service change at all. The shippers do not necessarily know why this issue occurs or what triggers the service reviews and changes. From a frequency perspective, API members observed facility service schedules have changed more over the past five years than years prior. If facilities require service for additional service days, some carriers will require additional information about shippers’ business and will request additional commercial concessions such as minimum volume commitments.

A reduction in service generally delays the movement of shipments and negatively impacts fleet utilization. When shipper equipment utilization is reduced, shippers must weigh the impacts of increasing fleet size. In some circumstances shippers are forced to find alternate third-party locations to transload their products because their primary facility is not receiving the needed service frequency. In other situations, shippers are forced to find offsite railcar storage to help absorb the variability of the carrier’s service thereby creating additional switching movements between two separate FM/LM locations.

Reduced days of service typically results in reduced throughput through facilities unless the facility has sufficient trackage or available additional onsite commodity storage to absorb the increased variability that will come with less service. Carrier’s service schedules dictate when facilities schedule their shifts and may cause labor supply issues if the schedule is changed. Shippers indicate the frequency of facility schedule service changes has increased significantly over the past five years which would match up with several carriers implementing PSR.

When a facility's service is reduced, typically the burden is on the facility to make a business case to the carrier as to why it should provide a certain level of service frequency. In some situations, facilities are forced to pay a special switch fee to regain the frequency of service they once had. If the facility location is not at least dual served by another carrier, the facility does not have recourse to find another rail service option.

There are no standard notifications by Class 1 carriers regarding changes in days of service. The short line carriers typically collaborate with the shipper facility on its service needs and work together to find the best service solution for both parties. The Class 1 carriers typically dictate any changes in service they desire based on internal metrics. Shippers are fortunate to receive notification of a change in service prior to it happening. Shippers may request extra days of service from the carrier or a change in the time of day, but the ultimate decision will be made by the carrier's marketing and operations departments. The shipper has no recourse to increase the frequency of service and must rely on other modes of transport if available.

While a comparison of like service windows is important under this proposed ISP it fails to address the inadequacy of the service windows provided, or the additional burdens faced by shippers to obtain additional days of service.

Additionally, API concurs with the Board's concerns that a carrier could change the scheduled crew's on-duty time to manipulate the impact of ISP. Therefore, we would support the requirement of providing notice before changing the serving crew's schedule on-duty time, not only for regulatory management, but for the full transparency to the shipper. Additionally, API would support counting a job that was cancelled/annulled by the carrier to be counted as a miss in calculating the ISP standard, and the reasons for the miss should be clearly delineated to the shipper in real-time. To maintain confidence in all metrics, we strongly urge the Board to make clear that carrier employees are not permitted to request shippers release cars or unit trains for shipment at certain times to facilitate favorable metrics for the carriers. These requests occur from carriers to shippers today and although a shipment or unit train is ready to be released by the shipper, shippers feel obligated to hold back the release to align with the carrier's release time requests. Put simply, shippers should be able to freely release cars or unit trains for shipment when they are ready, regardless of the carrier's preference as to a certain release time.

We would additionally support the increase of the standard to 90% in instances where the carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer.

PART II: Data

API fully supports the Board's proposal to require the Class I carriers to make data and all relevant individualized performance records available to customers within seven days of written request. However, API would recommend that this requirement be extended for all inquiries and not just those to support the bringing of a case before the Board.

Additionally, API supports the Board's proposal to make permanent the collection of data that is relevant to service reliability and inadequate local service that is currently being collected under a temporary basis in Docket No. EP 770 (Sub-No.1). API would recommend that the Board extend this requirement to all manifest and unit trains for both the OETA and the service windows evaluations.

Currently, API members note there are differences between carriers and what data is tracked, what each carrier's definition of success is, and what is reported to shippers. In most cases, shippers manually track different data points to provide counter-data to the carrier's data. One valuable piece of data - which carriers track and is not provided to shippers, - are reasons for delays and/or missed switches. Shippers are often kept in the dark as to why FM/LM was not performed as planned. This data should be accessible to shippers, so the shipping community is aware of what reason is causing service failures, such as lack of crews, lack of locomotives, carrier convenience, or customer prioritization.

Carriers typically collect 2 main types of data.

- Car Location Message (CLM)
 - o CLM data is railcar movement/location data that is produced when railcars pass Automatic equipment identification (AEI) detectors and is also sometimes tied to internal reporting of train movements between AEI detector locations such as control point or locomotive GPS records.
- Scheduled trip plan

When the carriers receive a notification of an empty or loaded release from a shipper, a baseline trip plan is created, and the trip plan will be continually updated throughout the railcar's journey and any delays or bypasses will usually be modified into the trip plan thereby erasing the original trip plan data. Historical data of this type is not typically provided by carriers to shippers. API members would recommend that carriers utilize their existing locomotive GPS technologies to provide an increase in reporting locations for railcars located within their GPS equipped trains and switch engines.

To best exemplify future data needs, it is important to highlight the realm of current data collection.

As outlined below, here are some examples for the Board's reference:

- a. Shipper data collection:
 - i. In the case of receiving a load/empty
 - 1. Time of railcar release from origin facility
 - 2. Time of railcar departure from origin facility
 - 3. Time of railcar arriving serving yard
 - 4. Time of railcar placed at destination facility.
 - ii. In the case of releasing a load/empty
 - 1. Time of railcar release
 - 2. Time rail crew arrives site.
 - 3. Time of railcar departure from facility
 - 4. Time railcar reaches intended destination.
- b. Class I carrier data made available to customers.
 - i. CLM data along the route for the arriving/departing shipment.
 - ii. Original trip plan ETA
 - 1. Some carriers provide data showing variances from the original trip plan, but it is not aggregated nor accessible historically by customer.

2. Some carrier trip plan variances will re-set each time there is a delay between CLM records.
3. No consistent way for shippers to easily determine actual shipment transit versus original trip plan other than keying in real time data and variances.

API acknowledges that there may be data uniformity issues and that is why standardization of reporting is important to communicate to the stakeholders clearly and consistently where and what issues may exist in a certain locale, region, or carrier.

Currently, rail carriers are the only party in the supply chain who have 100% of the information surrounding the shipment. Carriers solely determine days of service, the trip plan, and determine acceptable transit standards. Carriers are also the only party in the supply chain that knows the exact reason for delays in shipment. Because there is no minimum level of service guaranteed to rail shippers, API members believe the requested metrics regarding OETA and local FM/LM service will contribute to a positive discourse between the Board, carriers, and shippers to drive to solutions for improving service rather than just reporting aggregated results.

API believes the data and technology are available to support the requested metrics and this data collection would not create additional burdens for the carriers. It further contends that customer-level data collected should be kept confidential between the carrier and the customer. Local data (as most likely defined by the serving yard) should be produced publicly by carrier to the Board. As the data is applied in a broader fashion (regional, national, etc.) it will become less useful. API members believe the most useful data for the Board to determine what and where FM/LM exists will be on the local and regional levels by carrier.

Information given directly to shippers regarding service metrics under this proposal would hopefully foster conversation and collaboration to rectify systemic service failures.

API agrees that the Board should focus on Class I reporting at this time. Traditionally the Class II and III carriers have been more responsive to shipper FM/LM concerns and have fostered collaborative conversations to respond to service challenges. Once this reporting regime has been implemented for the Class I carriers, API members suggest the Board revisiting the FM/LM discussion for Class II and III carriers.

Conclusion

API applauds the Board for advancing a comprehensive proposal to establish reciprocal switching for inadequate service. API appreciates the Board's efforts to understand these issues more fully from a shipper's perspective. We stand ready to serve as a resource in future policy development in this area and look forward to working with the Board and the carriers of achieving the mutual goal of timely, efficient, and cost-effective rail freight shipping. Should you have any questions or wish to follow-up on any of these points, please do not hesitate to me at HartmanP@api.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul Hartman", with a stylized, flowing script.

Paul Hartman
Director
Midstream

Cc: Hon. Michelle A. Schultz
Hon. Patrick J. Fuchs
Hon. Karen J. Hedlund
Hon. Robert E. Primus