



November 7, 2023

The Honorable Martin Oberman
Chairman, Surface Transportation Board

The Honorable Karen Hedlund
Vice Chairman, Surface Transportation Board

The Honorable Patrick Fuchs
Member, Surface Transportation Board

The Honorable Robert Primus
Member, Surface Transportation Board

The Honorable Michelle Schultz
Member, Surface Transportation Board

Via electronic mail

Re: The Surface Transportation Board's Decision in Docket No. EP 711 (Sub-No. 1 & Sub-No. 2), Reciprocal Switching for Inadequate Service, 88 Fed. Reg. 63,917 (Sept. 18, 2023).

Dear Chairman Oberman, Vice Chairman Hedlund, and Members Fuchs, Primus, and Schultz,

The National Mining Association (NMA) appreciates the opportunity to provide comments on the Surface Transportation Board's (STB) recently issued Decision within Docket No. EP 711, closing Subdocket-No. 1, and opening new Subdocket-No. 2 (Decision).¹ Subdocket-No.2 issued a Notice of Proposed Rulemaking for the prescription of reciprocal switching agreements (proposed rule). The NMA is a national trade association that

¹ 88 Fed. Reg. 63,917 (Sept. 18, 2023), citing to STB Docket No. EP 711.

includes the producers of most of the nation's coal, metals, industrial, and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. The NMA's members conduct mining operations throughout the United States and rely on Class I rail carriers and other smaller carriers to transport mined products.

While the NMA agrees with the STB's goal to "reflect a minimum level of rail service below which regulatory intervention may be warranted, considering shippers and receivers' need for reliable, predictable, and efficient rail service,"² the NMA is concerned that if finalized as proposed, STB's rule would fail to achieve these objectives. Overall, the NMA is concerned that without significant changes, the proposed rule will only add further inefficiencies to an already fragile freight rail system.

I. Statement of Interest

America's mining industry supplies the essential materials necessary for nearly every sector of our economy – from technology and healthcare to energy, transportation, infrastructure, and national security. The NMA has a membership of more than 280 companies and organizations involved in every aspect of mining in the United States. The NMA's members work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security, and economic security, all delivered under world-leading environmental, safety, and labor standards. In addition to highlighting the importance of U.S. railroads remaining at-the-ready for domestic requirements, we also want to underscore the essential role the railroads play in facilitating U.S. exports.

The NMA has a direct and substantial interest in the proposed rule, as our members conduct mining operations throughout the United States that are reliant on freight rail carriers to get mined materials to both domestic and international markets. Our members are already facing disruptive rail service issues and inefficiencies at a crucial time in the nation's ability to provide the minerals necessary for infrastructure and electrification goals, and the coal resources needed for dependable baseload power that is critical for grid reliability and affordable consumer and industrial electricity.

² Decision, p. 2.

II. Specific Comments on the STB's Proposed Rule

On September 7, 2023, the STB issued its Decision which closed Docket No. EP 711 (Sub-No. 1)³ and proposed a new set of regulations that would provide for the prescription of reciprocal switching agreements to address inadequate rail service.⁴ The Decision invited comments on a number of issues associated with the proposed rule, including comments that are especially relevant to NMA members and their rail transportation operations.

Specifically, the STB invited comments on:

- 1) What other actions it should take with respect to competitive access, and in particular whether it should broaden the application of the public interest prong of 49 U.S.C. § 11102;⁵
- 2) Whether reciprocal switching agreements prescribed by the STB under its new rules should be limited to Class I railroads and their affiliated companies, or should the proposed rule cover third-party agents of a Class I railroad;⁶
- 3) Whether it should provide for the provision of terminal trackage rights in place of a separate path of a reciprocal switching agreement;⁷ and
- 4) Whether, and under what circumstances, the STB has the authority to consider reciprocal switching requests that have entered into transportation contracts with the carrier.⁸

³ Docket No. EP 711 (Sub-No. 1) addressed the National Industrial Transportation League's petition to adopt revised reciprocal switching regulations and proposed regulations that would have allowed a party to seek a reciprocal switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service. The STB stated it decided to temporarily close Docket No. EP 711 (Sub-No. 1) due to developments in the freight rail industry since 2016, including ongoing service problems. The STB indicated that following the completion of Docket No. EP 711 (Sub-No. 2), it will take further action in closed Docket No. EP 711 (Sub-No. 1). See Decision, p. 1, note 1.

⁴ Decision, p. 1.

⁵ Decision, pp.7-8, note 8.

⁶ Decision, p.11, note 9.

⁷ Decision, p.19, note 27.

⁸ Decision, p. 27.

These four areas in which the STB seeks comments are important to NMA's members, including mining operation suppliers and customers, and each should be implemented as discussed below.

A. Broaden Application of Competitive Access

The STB indicated in its Decision that in light of the reciprocal switching approach proposed in the new part 49 C.F.R. § 1145, the Board welcomes comments 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 49 U.S.C § 11102.⁹ Competitive access is of key importance. Some of NMA's members are effectively captive to a single Class I railroad. This means that the mine operator currently has no other rail transportation options if the Class I carrier serving its facilities fails to provide timely and effective rail transportation services.

The public has a strong interest in ensuring access to effective and timely rail transportation. NMA's members produce not only thermal coal that is vital to grid reliability, but also the metallurgical used in steel production that is important domestically and overseas. NMA's members also produce the minerals that are essential to meeting the growing supply chain demands globally. Being captive to a Class I railroad has the potential to limit the ability of NMA's members to compete in world markets.

Indeed, NMA's members would benefit from having access to more than one single rail transportation supplier at its facilities. Poor service, such as extended transit times and failure to provide timely service by one railroad, can only be resolved through the use of a competing rail service. The STB should broaden the public interest prong and provide competitive rail access either through prescribed reciprocal switching, trackage rights or haulage rights to producers of the U.S. mined materials. Doing so will increase the competitiveness of our industry in providing these critical commodities shipped by rail.

B. Non-Class I Railroads

The STB states in the Decision that a reciprocal switching agreement provides the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or

⁹ Decision, pp. 7-8, note 8.

ends its journey on the rail system.¹⁰ The STB also states that “affiliated company” under its proposed new rule has the same meaning as “affiliated companies” in Definition 5 of the Uniform System of Accounts (“USOA”) contained in 49 C.F.R. § 1201.¹¹ Class I railroads identify in their Annual Report Form R-1 (“R-1”) to the STB at Schedule C the affiliated companies consolidated in their R-1, which consists of numerous subsidiary and associated companies, including Class III railroads.

Some Class III railroads set their own prices and operate as true entrepreneurs building business and often acting effectively as independent switch carriers. Other Class III railroads are beholden to a single Class I railroad through financial control, operational control or other types of restrictions including interchange restrictions. Interchange restrictions, or “paper barriers,” are contract terms between a small railroad and Class I carrier that restrict the small railroad’s ability to provide service to other Class I railroads with which it can interchange.¹²

Many short line railroads act simply as switching carriers for the Class I railroads with which they interchange. A switching carrier is in most cases a short line railroad that spots the railcar at the origin or destination but does not participate in the road haul portion of the movement. The switching carrier is not involved in the negotiations of the line haul rate, but instead receives a flat charge from the connecting railroad for its services.¹³

The STB’s proposal on reciprocal switching would have limited application to only Class I railroads and their affiliated companies as the term is defined in the USOA. However, in some NMA member situations, the local Class III that interchanges is not affiliated with a Class I and would therefore not fall under the STB’s proposed rule. Limiting the availability of reciprocal switching prescriptions to those situations that only involve Class I rail

¹⁰ Decision, p.11.

¹¹ Decision, p.11. Definition 5 of 49 C.F.R. § 1201, subpart A states “Affiliated companies means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier.”

¹² See, STB Ex Parte No. 575 (Sub-No. 1), Disclosure of Interchange Agreements, served Oct. 30, 2007.

¹³ See, for example, CSX’s definition of a Switching Carrier, (Spots the car at the consignee but does not participate in the road haul and receives only a switching charge for this service), <https://www.csx.com/index.cfm/about-us/company-overview/railroad-dictionary/?i=S> (last visited Nov. 7, 2023).

carriers or their affiliated companies means that Class I railroads could limit access to what would otherwise be an effective interchange location under the STB's proposed rule. Given the large number of Class III carriers that operate as handling carriers for the Class I railroads, this situation is not unique to NMA member's and their shipments. The STB should expand its proposed rule to cover Class II and Class III carriers.

C. Terminal Trackage Rights

The STB invited commentors to discuss whether it should provide for the prescription of terminal trackage rights for the failure of a railroad to meet an industry spot and pull standard under its proposed new rule.¹⁴ The NMA believes that not only should the STB expand the scope of its proposed rule to include terminal trackage rights for a failure to meet spot and pull standards, it should also expand the proposed rule to include when and where it can prescribe trackage rights.

The STB also proposes to limit its access prescriptions for poor rail service to terminal areas served by more than one Class I railroad.¹⁵ However, NMA believes that a significant portion of rail customers are not located within defined terminal areas, and instead have facilities along main line routes of service or on branch lines. These shippers suffer from poor rail service just as much as customers located in defined terminal areas and may, in fact, suffer more. This is because many rail shippers located within terminal areas may have access to transload facilities adjacent to alternative railroads and could avail themselves to alternative rail services with minimal extra costs. In contrast, those shippers that are 50 to 100 miles from an alternative rail carrier cannot as easily reach transload facilities on other railroads. Therefore, the only way to remedy poor service in non-terminal areas is through access to another rail carrier via trackage rights on the incumbent railroad.

In addition, limiting the competitive option to trackage rights only when the incumbent railroad is not providing sufficient spot and pull services limits the options to resolve other service failures. The STB should prescribe other remedies that are more readily suited to meet the needs of the rail customer, especially when a shipper is not in a prescribed terminal area. Limiting the prescription only to reciprocal switching could deny a shipper the only means to resolve poor service from the incumbent carrier when an alternative prescription could help to eliminate the issue.

¹⁴ Decision, p. 19, note 27.

¹⁵ Decision, pp. 7-8.

D. Movements Under Transportation Contracts

The STB seeks comments on whether, and under what circumstances, it has the authority to consider reciprocal switching requests from shippers that entered into a valid transportation contract with the incumbent carrier.¹⁶ Historically, Class I railroads were amenable to including service standards into their rail transportation contracts, including, but not limited to, maximum transit times and maximum train cycle times in terms of unit train operations. Over the last decade, however, the railroads have largely eliminated any type of service standard in their rail transportation contracts. In place of defined transit time guarantees, maximum guaranteed cycle times and minimum number of days of service, the railroads have instead included vague references to providing service on a best available basis. In other words, the railroads have diminished any sort of service standard from their contracts.

From a policy perspective, the railroads should not be allowed to remove any sort of service standard from their rail transportation contracts and then hide behind a rail contract exemption from regulatory review. This is especially relevant for captive shippers. In addition, while rail transportation contracts are between shippers and railroads, reciprocal switching agreements are between two or more railroads and do not customarily include a shipper as a party to the switching agreement. In other words, the petitioning shipper does not have to be part of the switching contract or prescription between the incumbent and alternative railroads. The shipper could therefore maintain its contract with the incumbent railroad and, absent any type of minimum annual volume guarantee or exclusive use guarantee with the incumbent, ship with the alternative carrier. The STB noted such a scenario in the Decision when it stated that the petitioner, i.e., the shipper, would not be required to rely on the alternate carrier for any portion of the petitioner's traffic during the term of the prescription.¹⁷ If an issue is not clearly allowed by the transportation contract nor clearly prohibited by the contract, the issue should then be open to review by the STB under its regulatory authority.

III. Conclusion

NMA's members produce mined materials throughout the United States and are reliant on Class I rail carriers, and other smaller carriers. NMA's

¹⁶ Decision, p.27.

¹⁷ Decision, p.8.

members want to be part of the solution for rail inefficiencies. We need to be able to move responsibly sourced domestic coal to the utilities that keep the lights, heat, and air conditioning on. We need to be able to transport metallurgical coal to the industries that repair roads, bridges, and buildings to keep our infrastructure safe. We need to be able to move the critical minerals and materials that are imperative for our domestic supply chains. More important still, the United States is uniquely equipped to answer the call and come to the aid of key allies who find themselves facing intense and even unprecedented geopolitical turmoil in the search for reliable electricity, and other critically needed mined materials. These objectives depend on a high-performing rail system, and the NMA and its member companies stand ready to assist with this significant national priority in any way possible.

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at kmills@nma.org.

Sincerely,

Katie Mills

Katie Mills
Associate General Counsel