

**SURFACE TRANSPORTATION BOARD****Ex Parte 711 (Sub-No. 2)**

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**Summary of Ex Parte Meeting Between Association of American Railroads and  
Surface Transportation Board Member Patrick Fuchs**

**November 14, 2023**

AAR Attendees:

- Fred Miller, Associate General Counsel and Government Affairs Liaison
- Amber McDonald, Assistant General Counsel
- Ben Horwich, Counsel to Association of American Railroads
- Carson Scott, Counsel to Association of American Railroads

STB Attendees:

- Hon. Patrick Fuchs, Member
- Lisa Novins, Attorney Advisor

Summary:

AAR expressed its support for the Board's focus on whether a shipper is receiving inadequate service. AAR noted that the framework of the Proposed Rule ought to be one that identifies problems and deploys the right solutions to fix those problems. Specifically, AAR explained that it supports giving a shipper access to alternative service in the event that (1) a railroad consistently does not provide adequate service under the circumstances and cannot cure its failure; (2) a safe, practicable alternative service will remedy the service inadequacy; and (3) the shipper has a compelling reason for that alternative service, judged in the context of the interests of and effects on other stakeholders.

AAR further expanded on its view of the appropriate context in which the Board ought to assess a switching petition. Specifically, AAR explained its position that the incumbent railroad should be given a chance to explain a failure to meet one of the proposed metrics. AAR also emphasized that the Board ought to gauge the impact of any switching order on other stakeholders.

AAR and Member Fuchs discussed the manner in which the Board could operationalize the various considerations that ought to be taken into account in rendering an order under the Proposed Rule. Specifically, AAR discussed three mechanisms: the petition itself, the railroad's presentation of its affirmative defenses, and the ultimate Board findings. AAR explained its view that the guiding purpose in assigning the various considerations across these mechanisms should be to gather the necessary information from those best positioned to provide it and to most efficiently put it before the Board for consideration.

AAR and Member Fuchs discussed how safety ought to be considered under the Proposed Rule, including whether the Board was well equipped to assess the degree of safety involved in a proposed switching arrangement and weigh that against other values. Member Fuchs discussed and probed whether certain safety considerations would be addressed by private incentives working in tandem with the public regulatory regime administered by safety and security agencies. AAR expressed that the Board ought to be aware that, at least in some cases, mandated switching might result in a service design that is unsafe to a degree that it is not attractive to any parties involved.

AAR and Member Fuchs discussed the role of the alternate carrier in assessing a petition. AAR explained its position that the alternate carrier ought to be involved, as it is likely to have pertinent information, especially on issues such as safety. Member Fuchs noted that the alternate carrier's incentives should generally be aligned with positive outcomes.

AAR and Member Fuchs discussed the applicability of the rule to traffic under transportation contract. AAR expressed the view that the Proposed Rule cannot be applied to contract traffic. Member Fuchs emphasized the Board's requests for comment regarding the issue.

AAR and Member Fuchs discussed the manner in which service provided by an alternate carrier could remedy a service inadequacy. AAR explained its position that the alternate carrier ought to be able to remedy the specific service problem that the Board has identified with the incumbent, or else a shipper could be incentivized to engage in rent-seeking behavior rather than pursuing remedial action by the Board.