

SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub-No. 2)

Summary of Ex Parte Meeting Between Association of American Railroads and

Surface Transportation Board Chairman Martin Oberman

November 28, 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. Martin Oberman, Chairman
- Ellen Erichsen, Chief of Staff to Chairman Oberman
- Jetta Sandin, Attorney Advisor

Summary:

AAR expressed its support for the Board's focus on remedying inadequate service. AAR explained its view that the Proposed Rule's framework can be used to identify problems and to put the right information before the Board to determine the appropriate solution to those problems. AAR noted that it supports switching as a solution where: (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, considering the context of the interests of other stakeholders.

AAR and Chairman Oberman discussed the Proposed Rule's treatment of alternative service proposals. AAR expressed its view that alternative service ought to address the identified service inadequacy. Chairman Oberman asked whether this issue might not best be dealt with through communication between the incumbent carrier and the shipper about the capabilities of a proposed alternate carrier. AAR expressed agreement with the idea that, in general, railroads and shippers should communicate to avoid unnecessary proceedings, but noted its view that the Board must nonetheless make a finding on this issue if it is presented with a case under the Proposed Rule.

AAR and Chairman Oberman discussed the extent of the Board's statutory requirements with respect to reciprocal switching orders. AAR expressed its view that the Board must find, among

other things, that there is “actual necessity or a compelling reason” to order reciprocal switching. A discussion followed regarding the source of this requirement. AAR explained its view that the requirement originates from a string of ICC decisions that Congress chose to incorporate into the statute in providing for reciprocal switching, a rule that has been recognized by relevant precedent.

Chairman Oberman expressed views on the importance of making the petition process accessible to shippers. He noted that excessive litigation risk could make the process less accessible and could disrupt the incentive structure promoted by the Proposed Rule. AAR noted that it understood the Board’s interest in trying to make the process accessible, and that its comments were aimed at finding the right places to promote accessibility. AAR also expressed the view that the Board nonetheless ought to take a deliberative approach to ensuring that it was prescribing an appropriate remedy in particular cases.

AAR expressed its view that where the metrics levels are set will impact what cases are brought before the Board and the nature and circumstances of those cases. AAR noted that it is continuing to work on an empirical analysis of the Proposed Rule’s metrics.

AAR and Chairman Oberman discussed the role of affirmative defenses in the Proposed Rule. AAR noted that it proposed several additional affirmative defenses in its opening comments. It also noted that affirmative defenses can offer important context for the Board by highlighting relevant circumstances not necessarily captured by the metrics alone.