

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

**REPLY COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

In a decision served on September 7, 2023, the Surface Transportation Board (“STB” or “Board”) proposed 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.¹

ASLRRRA’s Comments

The American Short Line and Regional Railroad Association (“ASLRRRA”)’s Comments in this matter addressed a limited number of issues, summarized as follows:

1. If the Board determines to impose new reciprocal switching regulations, it should categorically exclude Class II and Class III railroads (“Short Lines”), as it has proposed in this proceeding.
2. To add clarity, the Board should modify its definition of “affiliated companies” as it proposed in its comments.

¹ *Reciprocal Switching (NPRM)*, EP 711 (Sub-No. 1) et al., slip op. at 1 (STB served Sept. 7, 2023).

3. The Board should also include a requirement that a Short Line be notified of a switch anticipated to impact its traffic.

4. The Board should not address terminal trackage rights in this proceeding although ASLRRA stands ready to comment on this option in a separate proceeding in the event the STB opens such a proceeding.

5. The performance standards set in the proposed regulations should not be construed as constituting standards for the common carrier obligation.

ASLRRA's Reply Comments

ASLRRA reiterates the conclusions in its Comments that if the Board determines to promulgate a reciprocal switching rule, that rule should completely exclude Short Lines from the scope of the agency's intended remedial authority, as it did in the NPRM. To add clarity, the Board should modify its definition of "affiliated companies" as proposed in the ASLRRA Comments. In order for Short Lines to continue providing excellent customer service, the Board should also include a requirement that Short Lines be notified of switches impacting their traffic.

A number of parties filed Comments in this proceeding, including the Association of American Railroads ("AAR"), individual Class I railroads, individual shippers, shipper associations, government agencies, and rail labor unions. In these Reply Comments, ASLRRA focuses on the Comments filed by the rail labor unions and the individual shipper and shipper associations. ASLRRA first addresses the Comments that relate to the unions' agreement that Short Lines be excluded from the any regulations pursuant to the NPRM. It then focuses on the Comments filed by five shippers or shipper associations that say Short Lines should be included.

In addition, ASLRRRA also endorses the portion of AAR's comments in this proceeding, which, *inter alia*, address reasons that Short Lines should be excluded from the proposed regulations.²

Reply to Rail Unions

Nine rail unions filed Comments in this proceeding (collectively, "the Unions").³ The common theme among the Unions regarding the proposed regulations is that while they appreciated the Board taking this proposed rule in a more targeted approach involving cases of inadequate freight service, the problem with proposing forced reciprocal switching is that forcing railroads to engage in forced reciprocal practice so that select shippers could lower rates on a specific route would undermine the ability of freight railroads to maintain a national network and serve all customers. The Unions argued that just as important, reciprocal switching could interfere with labor agreements in some cases and cause the dislocation of existing union-represented employees.

Rather than imposing forced reciprocal switching agreements, the Unions encouraged the Board to use this opportunity to further delineate the scope of the common carrier obligation, which, the Unions assert, would provide much needed clarity on an important legal obligation of the railroads, target the heart of freight rail service problems, and holistically address the ongoing issues with the Class I railroads. The Unions argue that by enforcing a

² Opening Comments of the Association of American Railroads, filed November 7, 2023, pg. 42.

³ The Transportation Trades Department, AFL-CIO, the Brotherhood of Maintenance of Way Employees Division/IBT, the Brotherhood of Railroad Signalmen, the International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, the International Association of Machinists and Aerospace Workers District #19, the International Brotherhood of Boilermakers, the National Conference of Firemen and Oilers 32BJ/SEIU, the Transport Workers Union of America, the Transportation Division of the International Association of Sheet Metal, Air, Rail and the Transportation Workers, and the Brotherhood of Locomotive Engineers and Trainmen.

robust common carrier obligation, rather than relying on forced reciprocal switching agreements would hold railroads collectively accountable for providing a higher quality of service and more effectively address many of the problems shippers continue to experience.

Regarding Short Lines, the Unions assert if the Board adopts a rule under which a shipper may petition for a forced reciprocal switch based upon a showing of deficient service, the Board should clearly state that Class II and Class III railroads may not participate in a forced switch over the tracks of a Class I railroad or in any way be allowed by Board order to operate over the tracks of a Class I railroad.

In response to these arguments, ASLRRRA points out that the NPRM clearly and unequivocally states that the proposed regulations are intended to apply only to Class I railroads. Further, in support of its decision to exclude Short Lines, the NPRM further states that the Board has not received many formal or informal complaints about smaller carriers. Insofar as the Unions have any concerns about the Board's language that reciprocal switching would include an agreement for the transfer of a rail shipment between a Class I or their affiliates, it was addressed in ASLRRRA's Comments. ASLRRRA requested a clarification from the Board about how the STB defines an affiliate of a Class I, suggesting that the STB specify in any regulation adopted that an affiliated company is one that is included in a Class I railroad's annual combined rail reporting to the STB and that acts as an operating division of the railroad. This would ensure that Short Lines that are not owned by Class I railroads or that are independently operated as a Short Line are not inadvertently covered by the definition of "affiliated companies." The Unions apparently agree with this as they state that the Board should limit the meaning of "affiliated companies."

Further, in reply to the argument of the Unions that the STB clarify the common carrier obligation to allegedly improve service to customers instead of using the regulations in the NPRM, ASLRRRA submits the Board is correct on this issue when it explicitly stated, in the NPRM, that "[it] does not view it as appropriate to apply, or draw from, these proposed standards to

regulate or enforce the common carrier obligation.”⁴ Any finding concerning performance standards under this NPRM should not be used to establish a basis under any other laws seeking damages or other remedies, including relief under the laws of common carriage. This is especially important as the Board has limited the scope of this rule so that it does not apply to Short Lines so “clarifying” the definition of the common carrier obligation and using a new definition like the Unions suggest would sweep in all railroads as all railroads are common carriers subject to the common carrier obligation. Not only would that be contrary to the intent of the STB in the proposed regulations, but it is also not within the scope of the proceeding.

Regarding the Unions’ assertion that a Class II or Class III railroad should not participate in a forced switch or be allowed by the Board to operate over the tracks of a Class I railroad due to the nature of short line labor relationships, the ASLRRRA rejects that line of reasoning and points out that it has nothing to do with the substance or intended effects of this proposal. While ASLRRRA maintains the argument short lines should be largely excluded from this reciprocal switching rule for the reasons already discussed, there is no compelling reason to categorically exclude Short Lines from participating in a switching move as an alternative provider due to labor concerns, particularly given the positive service experienced by Short Line railroad customers. Furthermore, regardless of whether a Short Line has organized labor on its property or not (some do, some do not), all Short Lines take pride in their relationships with their employees and treat their employees well and fairly.

⁴ *Reciprocal Switching (NPRM)*, EP 711 (Sub-No. 1) et al., slip op. at 10 (STB served Sept. 7, 2023).

Reply to Shippers and Shipper Associations

Five shippers or shipper associations mentioned Short Lines in their Comments.⁵ Of those five, Diversified CPC International, Inc., merely added a brief sentence at the end of its Comments asserting that Short Lines should be included in the proposed regulations. The other four asserted Short Lines should be included but cited no legal arguments or facts supporting their position, only anecdotal conclusory statements.⁶

For example, the National Mining Association (“NMA”) asserted that Short Lines are beholden to a Class I through various methods, financial and otherwise. This assertion is not applicable to what the NPRM addresses, which is an attempt to provide better service metrics related to the line haul movement of freight. NMA seemingly recognizes this when it admits that Short Lines do not participate in the road haul portion of the movement. Likewise, NMA’s assertion that a Short Line might be a handling carrier has nothing to do with the proposed regulations. Again, the NPRM addresses line haul service by Class I railroads.

The Alliance for Chemical Distribution (“ACD”) seemingly understands the Board’s exclusion of Short Lines from the proposed regulations when it states in its Comments that the exclusion is due to data reporting limits and burdens and the fact that Short Lines have typically provided better service than their Class I counterparts as evidenced by fewer shipper complaints. But ACD then goes on to say that the STB should include Short Lines in the scope of

⁵ These entities are the National Mining Association, the Alliance for Chemical Distribution, the Portland Cement Association, the American Petroleum Institute, and Diversified CPC International, Inc.

⁶ The Institute of Scrap Recycling Industries, Inc. did not discuss Short Lines in its Comments but only proposed inclusion in ex parte meetings at the Board when it proposed expanding the NPRM to Class II and III railroads who could qualify as alternative switching carriers.

the proposed regulation as it would give a substantial number of shippers an important remedy to inadequate rail service. In the alternative, ACD says if the Board wants to exclude Class III carriers from the scope of the proposed regulations, it should include Class II carriers. Of course, the suggestions to include all Short Lines or only Class II railroads in the scope ignores two important things: first – that Short Lines already provide better service (by ACD’s own admission) and second – that this proceeding is directed at line haul service.

The Portland Cement Association (“PCA”) asserted it had two answers to the Board’s question whether the regulations should be broadened to Short Lines. First, it said the Board should clarify that in instances where a Class I railroad provides origin or destination service, a Short Line partner should be able to participate in a reciprocal switch. Second, it said that since Short Lines 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 may create incentives for Class I carriers to include a Short Line as their agent in the transportation.

These two rationales do not provide cogent reasons for including Short Lines in the scope of the proposed regulations. As noted, the NPRM deals with line haul movements, not switching and few Short Lines are in a position to offer the type of line haul service involved here for many reasons – including equipment, crews, having to equip with PTC, and the location of the Short Lines’ routes, for example. Additionally, trying to exempt some percentage of traffic to allow Short Lines to participate in a line haul movement would not only be a logistical nightmare but also how to show what traffic is included or excluded from the traffic would be virtually impossible.

The American Petroleum Institute (“API”) also agrees with the Board when it states it 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. ASLRRA agrees with that statement wholeheartedly and API presents no arguments that the scope of the regulations should ever be expanded to Short Lines given Short Lines responsive services.

Diversified CPC International, Inc., only said in a single sentence that Class II and Class III carriers should be included as potential alternate carriers with no support or reasoning for the statement.

Conclusion

Nothing that the shippers or shipper associations have argued shows that the Board was incorrect in determining that the NPRM is intended to apply only to Class I railroads. The Board did not intend for there to be any adverse impact to Short Line based on the facts that there have been very few complaints about service by Short Lines, that imposing the metrics outlined in the NPRM would be burdensome on the Short Lines, and that Short Lines provide good service based on local connections with their shippers. Excluding short line railroads from the scope of the Board’s proposed rule is both necessary and appropriate to achieve the Board’s intent and sound policy.

As ASLRRA stated in its Comments, while a Class I carrier could potentially absorb a relatively small reduction in overall revenues due to mandated reciprocal switching, the results of the application of the reciprocal switching rule to Short Lines would be far different. Unlike Class I railroads, the costs of Short Lines cannot be spread over a vast rail system or large

customer base. All the freight revenues generated by customers on a Short Line are vitally necessary to sustain the financial viability of that line. In many cases, two or three customers account for two-thirds or more of the rail traffic shipped on a Short Line. Loss of even a portion of the revenues from a single shipper could have a significantly adverse effect on a Short Line and its ability to serve its customers given the high infrastructure and fixed costs that must be supported by those revenues.

If the Board determines to promulgate reciprocal switching regulations, the Board should completely exclude Class II and Class III railroads from the scope of the STB's intended remedial authority, as it did in the NPRM. To add clarity, the Board should also modify its definition of "affiliated companies" and also include a requirement that Short Lines be notified of switches impacting their traffic as proposed in ASLRRRA's Comments. Confirming the decision to exclude Short Line and modifying any reciprocal switching rule as proposed by ASLRRRA will allow Short Lines to continue providing excellent customer service.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sarah Yurasko".

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