

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 711 (Sub-No. 2)

RECIPROCAL SWITCHING
FOR INADEQUATE SERVICE

Reply Comments of BNSF Railway Company**I. Introduction**

BNSF Railway Company (“BNSF”) respectfully submits these Reply Comments in the above-referenced proceeding. BNSF’s opening comments in this proceeding suggested modest adjustments to the NPRM that were necessary to establish a predictable, workable framework that would facilitate more communication between railroads and their customers, as well as incentivize improved service without creating unnecessary litigation. Building off the careful and substantial effort that went into crafting the NPRM, BNSF aimed to focus this proceeding within the market-oriented regulatory framework established by Congress and limit the likelihood that any new rule would negatively impact rail customers who are not involved in a switching proceeding. Most importantly in this regard, BNSF suggested that the Board add a brief, 30-day cure period to the rule that would encourage collaboration between railroads and their customers before commencing administrative litigation over prescribed switching. We believe that such a period would address what appear to be the universal goals of all stakeholders to facilitate additional communication, establish the most efficient path to improved rail service for the customer, and obviate the need for lengthy administrative litigation.

Consistent with BNSF's views, the majority of comments from shipper organizations generally recognize that the NPRM is a constructive step forward. *See, e.g.*, Coalition Associations Comments at 2; American Fuel & Petrochemical Manufacturers ("AFPM") Comments at 2. However, BNSF disagrees with shipper group comments that attempt to expand the proposed rule beyond the Board's statutory authority, resurrect the forced switching on demand and open routing proposals of earlier proceedings, or manipulate the proposed metrics to achieve the same result. Such proposals run counter to the Board's goals of fostering improved service and good communication among railroads and their customers, and would move the Board's proposal away from any common ground that has developed. By expanding the rule into areas of questionable legal authority, such proposals would invite protracted litigation, rather than serving as a practical tool to incentivize improved service.

II. BNSF's Cure Period Proposal Serves the Dual Purpose of Increasing Customer Communication and Avoiding Unnecessary Litigation

In our opening comments, BNSF suggested that the proposed procedural schedule be modified to allow a carrier time to work with its customer to improve an identified service deficiency. The suggestion was that if a carrier is notified by a customer that the customer's service metrics have fallen below the metrics set forth in the rule, the carrier would be given a brief 30-day opportunity to cure the service deficiency. During this period, Board staff from the Rail Customer and Public Assistance ("RCPA") program could perform oversight and mediation functions that facilitate immediate improvements without the need for formal administrative proceedings. This oversight would ensure that the period would not be used just for delay and that small shippers have an avenue to make sure their concerns are heard by their carrier.¹

¹ BNSF has long endorsed the work that RCPA staff does on a daily basis to help resolve issues between carriers and their customers *See, e.g.*, BNSF Comments, EP 767 at 10-11 (filed Dec. 17, 2021); BNSF Reply, EP 724 at 9 (filed Nov. 3, 2014).

Commenters agree that the best outcome of the proposed rule would be improved service, not increased administrative litigation. *See, e.g.*, Coalition Associations Comments at 12. A brief pre-litigation period that allows the incumbent carrier to improve an identified service deficiency would be consistent with shippers' expectation that the proposed rule could result in improved service even where cases are never litigated. *See* Coalition Associations Comments at 12; APFM Comments at 16. A pre-litigation cure period would also give effect to the data sharing procedures in the rule without necessarily resulting in administrative litigation, and would be consistent with NGFA's commendation of the "the Board's data sharing proposal as it has the potential to both inform and to incentivize railroad performance if the data is regularly shared." NGFA Comments at 4. Including a brief 30-day period to improve service would not unduly extend the procedural schedule contemplated by the NPRM, which already includes a five-day pre-filing requirement for a shipper to engage in good faith negotiations with the carrier. *See* NPRM at 24. The additional 25 days would allow the carrier to continue communicating with the customer and working to improve the service under the oversight of Board staff.

III. The Board Should Not Pursue Proposals Based on Questionable Legal Authority or that Would Otherwise Incentivize Unnecessary Litigation

Opening comments filed by shipper organizations ask the Board to ignore Congressional policy and extend the proposed rule to traffic moving pursuant to market-based rail contracts, traffic exempt from regulation, and to facilities outside of terminal areas. *See, e.g.*, Coalition Associations Comments at 9-15; National Grain and Feed Association ("NGFA") Comments at 8. Such action would plainly exceed the Board's legal authority and invite unnecessary litigation over the rule and over the application of the rule in prospective cases.

A. Contract Traffic

Congress's intent to encourage the use of market-based contracts is clear. *See, e.g.*, S. Rep. No. 96–470, 96th Cong., 1st Sess. (Dec. 7, 1979) at 24 (the changes in the Staggers Act were “intended to clarify the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements”). The Board has recognized that “Congress in the Staggers Act broadly ‘encouraged’ shippers and carriers to transact their rail transportation service by contract.” *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1070 (1996) (citing H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 98-101 (1980)). As the Board has explained, “contracting provides a much better opportunity than common carriage for a rail carrier to address in detail a shipper’s particular service needs, to provide service tailored to those requirements, and . . . to qualitatively distinguish such service from that offered elsewhere.” *Id.* at 1070. Indeed, many of BNSF’s customer relationships involve service commitments that are the product of competitively sensitive factors that can only be addressed in a private contract, such as volume commitments, infrastructure investments, and the dynamics of the customer’s market. Extending reciprocal switching to contract service would discourage the use of such contracts by creating a blunt regulatory instrument that unnecessarily interferes with the parties’ ability to tailor service in light of all relevant market-based factors.

One of the ways that Congress sought to promote rail transportation contracts was to remove the agency altogether from the prescription or enforcement of contract terms. As explained in BNSF’s opening comments, using a reciprocal switching remedy based in any way on service performed under contract that is, in effect, deemed inadequate by the Board is in direct opposition to 49 U.S.C. § 10709 (b). The Board has repeatedly recognized that “Congress

expressly removed all matters and disputes arising from contracts from the ICC's (and now the Board's) jurisdiction." *See, e.g., Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, NOR 42095, slip op. at 2 (STB served July 27, 2006); *see also Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235, 247 (1997) ("[U]nder section 10709, contracting between rail carriers and shippers is permissive. Because we cannot direct contracting, railroads' decisions to enter into contracts must necessarily be driven by market forces and other considerations, not regulation.").

B. Exempt Traffic

Shipper comments seeking to extend the rule to exempt traffic likewise rest on a faulty legal foundation. *See, e.g.,* Freight Rail Customer Alliance Comments at 4; Private Railcar Food and Beverage Association Comments at 5. As BNSF explained in our opening comments, the Board cannot use the proposed switching rule to regulate conduct that occurred while the traffic was exempt. BNSF Comments at 13 (citing *Pejepscot Industrial Park, Inc.—Petition for Declaratory Order*, 6 S.T.B. 886, 891 (2003)). While the Board does retain jurisdiction to consider revocation of an exemption, the agency must conduct a two-step process to first partially revoke the exemption after an appropriate market analysis and only then proceed to apply the proposed rule prospectively.² This two-step analysis is consistent with the statutory text of Section 10502 that provides that the Board "shall" exercise its exemption authority "to the maximum extent" consistent with the statute and that it "may" revoke exemptions, in whole or in part, only when "necessary" to effectuate the Rail Transportation Policy goals in Section

² *See Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 1993 U.S. App. LEXIS 27747, at *12-13 (2nd Cir. 1993) ("the initial inquiry in a reregulation case is whether the carrier has market power."); *WTL Rail Corp. Pet. for Decl. Order & Interim Relief*; *WTL Rail Corp. Pet. for Partial Revocation of Exemption*, EP 230 (Sub-No. 9), slip op. at 3 (STB served Feb. 17, 2006) ("Reconciling the RTP with the statutory admonition to be liberal in granting exemptions when regulation is not necessary to protect against abuse of market power, we have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.").

10101. To base regulatory relief on a carrier’s conduct during the effectiveness of an exemption would contravene the established legal principle disfavoring retroactive application of administrative determinations absent clear congressional intent favoring such a result, and effectively intrude upon commercial dealings made in reliance upon a particular regulatory structure. *See Sanimax USA LLC v. Union Pac. R.R.*, NOR 42171, slip op. at 4 (STB served Feb. 25, 2022) (and cases cited therein). Such an approach would impermissibly hold a carrier responsible retroactively for conduct that was supposed to be free of regulatory oversight by imposing a forward-looking remedy based on that historical conduct.

There is also no record on which the Board could grant shipper requests in this proceeding to partially revoke exemptions of specific commodities for purposes of the proposed rule. *See* American Forest & Paper Association and Institute of Scrap Recycling Industries, Inc. Comments at 6; Portland Cement Association Comments at 10. Such requests must independently satisfy the requirements of 49 U.S.C. §10502(d), which shipper groups have not met. Moreover, the revocation of a specific commodity’s exemption would not be a “logical outgrowth” of the NPRM.

C. Terminal Areas

Similarly, shipper groups seeking to expand reciprocal switching beyond terminal areas fail to explain how such action is authorized by 49 U.S.C. § 11102. *See, e.g.*, NGFA Comments at 8-9. Even the Coalition Associations recognize the undeniable legal reality that the reciprocal switching statute only applies to terminal areas: “The very fact that Congress provided for reciprocal switching in terminal areas reflects its understanding that shippers outside of terminal areas could not achieve the same benefits as shippers inside terminal areas. Any other

interpretation would vitiate the reciprocal switching statute.” Coalition Associations Comments at 61.

This statutory scheme makes practical sense. The term “reciprocal switching” has long been recognized as switching within a terminal area. *See, e.g., Switching Charges and Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971) (“In practice [reciprocal switching] means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry.”). Limiting reciprocal switching to terminal areas is thus also consistent with industry custom.

Restricting reciprocal switching orders to terminals also distinguishes such orders from the prescription of through routes under 49 U.S.C. § 10705. Section 10705 has explicit requirements that are expressly designed to protect a carrier’s long haul, reflecting the fact that the facilities and related investments present in terminal areas are manifestly different than the infrastructure and investments necessary to support a railroad’s line-haul networks. A rule that encompasses switching services outside a terminal area would have to satisfy the express terms of 49 U.S.C. § 10705(2)(b). Nonetheless, shippers not located in terminal areas still have regulatory protections against inadequate service under the common carrier obligation and existing competitive access rules as noted by Western Coal Traffic League (“WCTL”). *See* WCTL Comments at 5.

IV. BNSF Supports Efforts to Further Define Service Metric Methodologies in a Manner That Appropriately Reflects Operational Realities

Many commenters focus on the mechanics by which the NPRM’s proposed metric thresholds should be calculated, and BNSF agrees that it would be appropriate to further define

the service metrics to ensure they will be rational and effective triggers for regulatory intervention. To avoid any such adjustments generating unnecessary regulatory litigation and disparate treatment of various railroads, however, those efforts must account for the following three considerations.

First, the Board should reject shipper organization proposals to tighten the metrics-based triggers in ways that would arbitrarily and improperly expand the universe of potential switching cases. *See, e.g.*, Essential Mining Association Comments at 6-8. Such attempts to manipulate the proposed service metrics to sweep in nearly all regulated traffic are a thinly veiled attempt to have the Board engage in widescale restructuring of the commercial arrangements in the railroad industry, which is not contemplated by the statute. *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988). (“If the Commission were authorized, as Midtec’s argument entails, to prescribe reciprocal switching or terminal trackage whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.”).

Second, opening comments illustrate that the service levels reported in the EP 770 proceeding are based on varied reporting practices among railroads and any final rule must appropriately account for those differences. This variation creates a tension between the possible desire for some standardization of reporting to ensure consistent application of the metrics across railroads and the importance of maintaining flexibility for individual railroads as to their market-responsive reporting practices. With this tension in mind, BNSF supports efforts to clarify the calculation of metrics with a goal of ensuring those metrics are connected to operating realities and can lead to more predictable outcomes for shippers and railroads alike. Because the issues

around service metrics and related reporting practices are complex, BNSF supports the Association of American Railroads' call for a technical working group to address questions relating to standardized reporting.

Data collection and customer communication at BNSF is a market-driven, dynamic process, and we continue to innovate and improve the tools we make available to customers. BNSF currently utilizes more than 40 application programming interfaces (“APIs”) to offer a simple, cost-effective way to provide shipment visibility, streamline processes, and allow customers to execute real time shipment actions.³ Recent innovations include enhancements to our Trace tool that shows the customer's entire freight portfolio on BNSF with the ability to drill in for additional information where needed. Along with Trace, we continue to improve BNSF's Railcar Management tool to allow carload customers to coordinate freight in and out of a local facility. This pipeline management tool allows facilities to see all the freight cars coming to them, how many cars are at the nearby BNSF yard, and how many cars are at their own facility. This gives customers the power to better order-in cars, but also includes a day-by-day pipeline view of cars destined for the facility over 20 days for planning purposes.⁴

Based on BNSF's experience developing our data collection and sharing tools, we believe that while some standardization would be useful, carriers should not be required to make drastic changes to existing data collection and reporting practices that have been shaped by core business needs and customer feedback. Equally important, regulatory actions should not hamper the further development of innovative and customer-focused metrics. To that end, requirements for standardized metrics should be minimized to achieve articulated, narrowly-tailored goals.

³ See *BNSF API Center*, <https://www.bnsf.com/ship-with-bnsf/support-services/customer-api/>.

⁴ See *Creating a Superior Customer Experience with New, Improved Technologies* (Sept. 11, 2023), <https://www.bnsf.com/news-media/railtalk/service/customer-experience.html>.

Third, application of the proposed rule raises particularly difficult questions for joint-line service and the Board should take a cautious approach to such traffic. As an example, few opening comments focused on the narrow but important question of measuring Original Estimated Time of Arrival (“OETA”) and transit time for traffic moving in joint-line service. However, AFPM’s comments recognized the uncertainty in the proposal for joint-line service and asked for “clarity from the Board on how it will handle multi-segment shipments and how the OETA is determined.” AFPM Comments at 10. BNSF shares the concern that joint-line service presents unique challenges to measuring service based on metrics and the Board must ensure that all such movements are measured fairly and consistently among railroads.

Should the Board proceed with a final rule that includes joint-line service, the Board must ensure that delivery and multiple carrier OETAs and transit times are calculated consistently across the industry. The NPRM defines “delivery” as occurring “when the shipment actually arrives at the designated destination (meaning the final destination as specified in the bill of lading or, in the case of a joint-line movement, the interchange where the shipment is transferred to the interline carrier or its affiliate) or is constructively placed (meaning placed at a local yard that is convenient to the designated destination).” NPRM at 13 n.17. The NPRM then goes on to state that in joint-line service “[t]he subsequent carrier must issue an OETA to the shipper when the carrier receives the shipment at the interchange location, that is, when the subsequent carrier acknowledges physical receipt and control of the shipment. The Board may look to applicable interchange rules between carriers as to when this has occurred.” NPRM at 17. The footnote that follows states that “[t]he Board would not expect for a gap to arise because the time of interchange of a shipment, whether that time is immediately accepted or agreed to by the receiving railroad or, rather, is settled after a dispute between the carriers, is the same for both

carriers.” NPRM at 17 n.25. But it is unclear why that is so, when delivery is based on when the shipment actually arrives at interchange and the subsequent OETA and transit time are based on the time the shipment is acknowledged by the second carrier, which may not be the same.

BNSF suggests that the Board consider a shipment delivered for purposes of OETA and transit time for an originating carrier when both the shipment is physically spotted on the interchange location and the originating road transmits a message to the receiving road that the shipment has been spotted at the interchange location. Correspondingly, the Board should begin the clock for a receiving carrier at the same time (i.e., when the shipment has been spotted and the message has been transmitted). Such an approach would eliminate any chance of gamesmanship with the metrics for interline traffic. At a minimum, any final rule should articulate a consistent approach to both delivery and subsequent OETA and transit time in joint-line service to prevent the potential for inconsistent measurements of the metrics. Such an approach could be tasked to the metrics working group suggested by the Association of American Railroads.

V. Conclusion

The Board’s NPRM reflects thoughtful and careful analysis aimed at adding a regulatory tool to address inadequate rail service, while also appropriately respecting the market-oriented regulatory framework established by Congress. These objectives can be advanced by considering the modest adjustments outlined in BNSF’s opening comments, including provisions that will encourage communication between railroads and their shippers, will facilitate service changes without the need for litigation, and will limit the likelihood of unintended consequences to rail customers who are not involved in the switching proceeding. The Board should also consider suggestions for improvements to the proposal focused on the goal of providing a

predictable, workable framework. However, the Board should reject calls from shipper groups to expand the proposal that would invite litigation.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Adam Weiskittel', is positioned above a horizontal line.

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December 20, 2023

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