

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING FOR  
INADEQUATE SERVICE

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EP 711 (Sub-No. 2)

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**REPLY COMMENTS OF THE  
PORTLAND CEMENT ASSOCIATION**

The Portland Cement Association (“PCA”) submits these Reply Comments in further response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking (“NPRM”) served in the above referenced docket on September 7, 2023 (“Proposal”).

**SUMMARY**

As emphasized in its Opening Comments, PCA has long supported revisions to the the Board’s rules which unfairly block shippers from obtaining competitive access relief as authorized under 49 U.S.C. § 11102. Under its proposed rule, the Board would prescribe a reciprocal switching agreement when (1) the petitioner demonstrates that the incumbent Class I carrier failed to meet one of three defined, uniform “performance standards” for the petitioner’s shipments; (2) with respect to the lane of traffic that is the subject of the petition, the petitioner (a shipper or receiver) has practical physical access to only one Class I carrier that can serve that lane; (3) the carrier fails to establish an affirmative defense; and (4) the prescription would be practicable. While PCA is disappointed with the limited nature of the Proposal, PCA supports the Proposal with

some necessary changes and clarifications to make it more effective and practicable for actual use by cement shippers as set forth in its Opening Comments.

In addition to PCA, the Board received comments from the U.S. Department of Agriculture (“USDA”), the U.S. Department of Transportation (“USDOT”), and the Federal Railroad Administration (“FRA”), each generally supporting the Proposal. Other shipper organizations and individual shippers also filed comments, many of which are closely aligned with PCA’s Comments. Like PCA, shippers generally support the Proposal, with reasonable revisions to make them more suitable for actual use by shippers, and also urge the Board to take more proactive actions to ensure that the agency fairly enforces the clear statutory authority allowing competitive access relief for shippers as envisioned by Congress.

For their part, the railroads, led by the Association of American Railroads (“AAR”) seek to impose new heightened standards on any request for reciprocal switching relief, and seek a number of modifications that would create unnecessary new administrative and other roadblocks and prevent any meaningful relief for shippers.

These Reply Comments focus on the principal arguments advanced by the railroads, none of which are meritorious, and all of which should be rejected by the Board.

## **REPLY COMMENTS**

### **A. USDA and Most Shippers Agree with PCA's Comments**

In its Comments PCA generally supported the Board's Proposal, with modest improvements. The Board's Proposal, with some necessary modifications and clarifications as addressed by PCA in its Opening Comments, may prove useful for some cement shippers burdened by inadequate rail service. USDA and other shippers largely agree with PCA, and that the Board can and should do more to ensure the rules are practicable and generally available to ensure that the proposed remedy will be effective.

For example, PCA expressed concerns that because the Board's proposed "objective" service performance standards are in large part based on criteria controlled by the carriers, the standards will create perverse incentives by carriers to ratchet downward their service over time as they seek to block the availability of terminal access relief for shippers. To guard against clear adverse regulatory incentives, PCA suggested that the Board address this issue and include in its final rules an additional performance standard that enables customers to show on a case-by-case basis, that the incumbent carrier's service does not reasonably meet the shipper's operational and service requirements.

In its Comments, the USDA shared PCA's concerns and "in order to ensure a more complete view of rail service," it requested that the Board "include additional standards around service levels. Without that perspective, the railroads may satisfy the Board's current metrics, even as other vital, yet unmeasured, aspects of service fall below satisfactory thresholds." USDA Comments at 2.

USDA and many shippers proposed helpful improvements to the Board's service threshold requirements, consistent with PCA's requests:

USDA believes the NPRM could be improved by adding to the list of performance standards, such as the number of unfilled car orders. The Board, too, could consider other insightful ways to measure and incorporate other factors of service—such as the frequency and amount provided. If a railroad is not filling orders or is unilaterally reducing the frequency or amount of service, that should justify a reciprocal switching prescription.

USDA Comments at 5-6; *E.g.*, Comments of the Coalition Associations at 20-44 (“the Coalition Associations propose increases and expansions to the adequacy thresholds to reflect inadequate service more accurately so that captive rail customers do not need to wait until they are receiving grossly inadequate service reminiscent of one of the worst widespread rail-service crises in decades before they have access to reciprocal switching”); National Grain & Feed Ass’n. Comments at 11-14 (urging “higher performance standard[s] [that] will increase the incentive for the rail carriers to perform and will provide shippers and receivers a more responsive regulatory backstop to request alternative service when it is needed”); Western Coal Traffic Leage Comments at 6-9 (urging the Board to “broaden its proposed relief such that an underperforming carrier would not be in a position to benefit from its ability to claim that its service historically has been just as poor as the carrier is providing at the present time”).

PCA continues to believe, as does USDA and a number of other shippers, that the Board's proposed performance standard thresholds will not sufficiently incentivize a carrier to improve its service to shippers, and that additional improvements are in order.

PCA urges the Board to appropriately revise its Proposal as requested to ensure that a switching remedy is reasonably available to shippers when an incumbent carrier's service does not reasonably meet the shipper's operational and service requirements.

**B. The Railroads Unfairly Seek to Neuter the Proposal**

Perhaps not surprisingly, the AAR and individual railroads seek to burden the proposal substantially with new legal standards and impose multiple barriers to obtaining relief. The Board should resist such initiatives.

**1. The Railroads' Proposed New Legal Standard is Unavailing**

The AAR argues that the Board's Proposal should be revised to implement a new legal hurdle requiring a shipper seeking relief to first demonstrate that reciprocal switching is an "actual necessity" or there is "some compelling reason" to require the remedy, citing a 1933 decision, *Jamestown N.Y. Chamber of Commerce v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289 (1933) ("*Jamestown*"). AAR Comments at 4-5. The *Jamestown* decision is makeweight and inapposite. Such an extra-statutory requirement to obtain relief is found nowhere in the governing statute. 49 U.S.C. § 11102 provides the Board with discretion to require carriers to enter into competitive access arrangements when they are practicable and in the public interest or necessary to provide competitive rail service. Such an "actual necessity/compelling reason" standard has no validity here.

Additionally, the AAR repeatedly insists that the Board's standards for emergency service relief under 49 C.F.R Parts 1146 and 1147 are applicable here and are designed to ensure that "relief is not a punishment against the incumbent railroad," which AAR

intimates is the purpose of the Board's Proposal. AAR Comments at 12. However, the Board's proposal is clearly not designed to "punish" but rather to help restore adequate service and provide competitive options to adversely impacted shippers brought about by the incumbent's service inadequacies.

Notwithstanding AAR's arguments to the contrary, neither Board precedent nor principles of administrative law require the Board to impose such legal roadblocks when implementing new reciprocal switching regulations. The Board's Proposal is a permissible exercise of its jurisdiction, and the result constitutes a permissible construction of § 11102.

## **2. The Multiple Additional Hurdles Sought by the Railroads are Unwarranted**

The AAR and individual carriers propose multiple other substantial restrictions on obtaining reciprocal switching relief, including that the Board require:

- That a shipper show that "it has been materially harmed by the potential service inadequacy" (AAR Comments at 7);
- That a shipper show that it is receiving service that is "persistently and distinctly inferior to that available to similarly situated shippers" (AAR Comments at 5);
- That a shipper show that the switching order will "improve the shipper's situation" and that switching relief "actually remedies the service inadequacy" (AAR Comments at 4-6);
- That a shipper "obtain a commitment from an alternate carrier to provide alternative service" prior to seeking a switching remedy (UP Comments at 16); and
- That a shipper satisfy the Board's "market dominance" standards applied in rate cases prior to seeking switching relief (BNSF Comments at 14-15).

Similarly, the AAR seeks that the Board authorize a much broader set of affirmative defenses than included in the Proposal, to allow individual railroads to thwart switching relief for service inadequacies upon a showing of scheduled maintenance and capital improvement projects, “cured” service inadequacies, third party conduct, embargoes, intermodal competition options, and other objections. AAR Comments at 72-80.

Again, such extra-statutory requirements to obtain relief are found nowhere in the statute and are unwarranted. All of these proposed new requirements are without legal support and amount to an improper, thinly-veiled attempt by the railroads to preclude any potential prescription of reciprocal switching under 49 C.F.R. Part 1145, or at a minimum, make cases as difficult and expensive as possible. They should be rejected.

### **3. The AAR’s Service Level Standard Concerns are Unavailing**

AAR argues that the STB’s proposed service level standards are too restrictive on carriers because “an observed decline may be the product of comparing a prior year’s new or exceptional service.” AAR Comments at 55. It argues that a year-over-year degradation in service performance is unfair because railroading is complex, and there are many reasons for service declines. *Id.* at 52-57. However, the Board obviously knows that the railroads have hardly provided “exceptional” service in recent years, and clearly if a shipper somehow is fortunate enough to experience such stellar service in the future, there is little likelihood that it would go so far as to seek a switching remedy before the Board under 49 C.F.R. Part 1145. Additionally, the AAR’s suggestion that a three-year historic service average be used seeks to place an additional barrier in front of

shippers to obtaining relief. The Board has more than enough experience addressing rail service issues to determine if service failures are sufficient enough to warrant reciprocal switching relief and, again, it should resist efforts by the railroads to chip away at and undermine its Proposal

## **CONCLUSION**

The NPRM Proposal seeks to provide for a prescription of a reciprocal switching agreement, on a showing of defined service deterioration, which the Board has found necessary to “[t]o provide a clearer path to address the impact of service deficiencies on the network.” NPRM at 7. For the reasons set forth in its Opening Comments, and further herein, PCA strongly agrees with this approach, and that additional remedies are needed to address “the recent level of performance that carriers themselves have acknowledged largely do not meet the expectations or needs of the public.” *Id.* at 8. USDA, DOT/FRA, and other shippers agree.

Predictably, the railroads are seeking to restrict as much as possible the Proposal. However, nothing in the text of 49 U.S.C. § 11102, the legislative history of the provision, or in the case law precedent, warrants such unwarranted constraints.

For the reasons stated above and in its Opening Comments, PCA supports the Board's Proposal with the modifications PCA has proposed, and urges its adoption.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sean O'Neill", written in a cursive style.

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