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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 7, 2023
Part of
Public Record

Docket No. EP 711 (Sub No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

**OPENING COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

The National Grain and Feed Association (“NGFA”) hereby submits these Opening Comments on the Notice of Proposed Rulemaking (“NPRM”) served in this Sub-docket on September 7, 2023.

I. Identity and Interests of the NGFA

The NGFA, established in 1896, consists of grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation’s grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations

and is co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. Support for NGFA Comments from Other Collaborating Organizations

The NGFA has been authorized to convey that these opening comments are supported by the North American Millers' Association ("NAMA"), Agricultural Retailers Association ("ARA"), and the National Council of Farmer Cooperatives ("NCFC").

NAMA represents millers of wheat, corn, oats, and rye in the U.S. and Canada. NAMA has 37 members with 149 locations across 31 states, Puerto Rico, and Canada, and represents the milling industry before the White House, federal agencies, and Congress. ARA is a 501(c)(6) non-profit trade association that represents the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. ARA advocates, influences, educates, and provides services to support sellers of seeds, nutrients, crop protection products, farm equipment, precision technology and agronomic services. Since 1929, NCFC has been the voice of America's farmer cooperatives. NCFC members are regional and national farmer cooperatives, which in turn consist of 1,700 local farmer cooperatives across the country.

III. Introduction

In the NPRM the Surface Transportation Board ("STB" or "Board") has proposed regulations that would provide shippers and receivers captive to a single Class I railroad at origin or destination the opportunity for Board-directed reciprocal switching arrangements to address inadequate rail service by the serving railroad as measured by certain objective standards. The NPRM reflects a policy of the Board to develop incentives for railroads to provide better rail service. The NGFA agrees with the Board that the Class I railroads must have greater incentives to improve better rail service to all their customers, and to make the continued investments in

crews and equipment required to dependably meet reasonable service requests at a reasonable cost to the customer.

The NGFA believes one of the most effective ways to incentivize rail carriers to provide dependable service at reasonable rates, surcharges, fees, and service terms is to facilitate and maximize rail-to-rail competition wherever possible. If that occurs, then true market-based behavior achieves the desired result without Board intervention. For this reason, the NGFA respectfully requests that the Board reconsider its decision in the NPRM to end over 12 years of efforts to develop effective regulations to provide shippers with competitive alternatives via reciprocal switching in EP No. 711 (Sub-No.1), *Reciprocal Switching*, and before it, EP No. 711, *Petition for Rulemaking to Adopt Competitive Switching Rules*, (“*Competitive Switching*”), which also focused on increasing competition via reciprocal switching in certain situations. The Board should resume its efforts to promulgate needed revisions to its existing competitive access rules that would incentivize railroads to provide better service and reasonable rates through rail-to-rail competition.

As discussed below, another way the NGFA believes rail service can be improved is for the Board to issue proposed rules in Docket EP No. 768, *Petition for Rulemaking to Adopt Rules Governing Private Car Use by Railroads* (“*Private Railcars*”), that establish financial incentives for Class I railroads to utilize private railcars more efficiently to protect the substantial investment made by shippers and receivers in private railcars.

The NGFA offers the following comments on the NPRM and other measures the Board should take in conjunction with the NPRM to adequately pursue its development of increased incentives to Class I railroads.

IV. General Comments on the NPRM

A. Data Sharing

The NGFA commends 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. The NGFA strongly urges the Board to place no limits on data sharing. For instance, shippers/receivers should be able to request and receive service data as often as they believe it would be beneficial to their business and operations. The NGFA also believes the final rules adopted in this Sub-docket should ensure that a shipper requesting the data has the ability to effectively and efficiently challenge the veracity of the data it is provided without delaying the overall process.

B. Participation by the Alternative Carrier

The stated underlying policy goal of the NRPM is to incentivize Class I railroads to improve inadequate service levels. Specifically, “[t]hrough the approach that is proposed in this new subdocket, the Board intends to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis. The Board anticipates that the data access and standardization provisions in this proposal, which have no equivalent in the previous proposal, would ensure and enhance these benefits.” NPRM at 5. The Board also states the NPRM is being proposed “[t]o provide a clearer path to address the impact of service deficiencies on the network” *Id.* at 7. Under the NPRM, the primary regulatory incentive would be the threat of line-haul service to an incumbent railroad's customer being provided by an alternative railroad to the point at which the incumbent carrier solely serves the customer if the incumbent exceeds certain objective standards and other criteria warrant a prescribed reciprocal switching agreement. *See Id.* at 8 (the “prescription would facilitate future line-haul service by an alternate rail carrier but – of critical note – would not necessitate that result”). The term of a

prescription for a period of not less than two years “from the date on which reciprocal switching operations thereunder began.” *Id.* at 29.

The threat of alternative service through reciprocal switching is the sole regulatory incentive posed to rail carriers by proposed new Part 1145. Customers would be prohibited from utilizing the carrier’s failure to meet the objective standards in the new regulations to argue that a carrier’s inadequate service violates its common carrier obligations under 49 U.S.C. §11101, which provide customers with potential injunctive relief and money damages. *See Id.* at 10 (“the Board does not view it as appropriate to apply, or draw from, these proposed standards to regulate or enforce the common carrier obligation.”) and (“[d]ue to the specific purpose and form of regulatory intervention under part 1145, the performance standards set forth in this NPRM as constituting the standard for obtaining a reciprocal switching order from the Board are in no way to be construed as constituting standards by which a railroad’s compliance with the common carrier obligation under §11101(a) is to be measured”).

The underlying assumption and premise of the NPRM is therefore that the possibility of an alternate carrier providing line-haul service to an underperforming railroad’s customers through a reciprocal switching arrangement imposed pursuant to the new rules will pose a sufficient incentive to the incumbent to improve its service levels. However, the NGFA and other stakeholders have expressed in both *Competitive Switching* and *Reciprocal Switching*, that Class I carriers are reluctant to provide alternative service to shippers that are served solely by another railroad when the incumbent cannot provide the service. The Board recently acknowledged this dilemma in Docket No. 762, *Revisions to Regulations for Expedited Relief for Service Emergencies* (Served April 22, 2022)(“*Expedited Relief*”) at 5:

Proponents of a rule modification have expressed frustration with the requirement to secure an alternative carrier in advance (i.e., a commitment to be included in a petition) during a service emergency. These proponents report that potential alternative carriers are reluctant to participate in emergency alternative service (1) because taking on new business for a short and unknown period of time can be unattractive financially, (2) for fear of retaliation by the incumbent carrier (particularly where the alternative carrier is a railroad that depends on an ongoing working relationship with the incumbent), and (3) due to uncertainty in ensuring that alternative service can be provided safely and in accordance with applicable regulations and operating practices.

NGFA submits that the lack of interest on the part of the potential alternative carrier has been the primary reason that the few cases invoking the Board's existing emergency service rules – which date back to 1997 - have never resulted in alternative carrier providing rail service through a reciprocal switching arrangement or terminal trackage rights.

The Board does not directly address this threshold hurdle in the NPRM and provide a clear explanation of how the Board would resolve cases under the new rules where such reluctance occurs. This is despite the fact that under new proposed §1145.6(b) “the Board will not prescribe a reciprocal switching agreement if the . . . alternate rail carrier demonstrates that switching services under the agreement . . . could not be provided without unduly impairing either rail carrier's operations, or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the . . . alternate rail carrier's ability to serve its existing customers.” The NPRM does state the Board “would consider an objection by the alternate rail carrier,” and “[t]he objecting rail carrier would have the burden of proof of establishing infeasibility or undue impairment.” NPRM at 26-27. However, the actual regulatory language in proposed §1145.6(b) is silent on the burden of proof.

Given that shippers and the Board should anticipate alternative rail carriers will raise objections to participating in a Board-directed reciprocal switching arrangement, citing the broad

and difficult-to-define justifications in proposed §1145.6(b), any final rules issued in this proceeding should clearly establish how the Board will prescribe a reciprocal switching arrangement if it concludes the alternative rail carrier's claims of infeasibility or undue impairment are unfounded or not credible. Unless the final regulations adequately account for this threshold issue and address it in sufficient detail, the NGFA believes that, all things being equal, the NPRM's underlying premise that the potential threat of an alternative carrier through reciprocal switching provides sufficient incentive to improve and maintain inadequate service will be disproven in practice.

There are other issues concerning the participation of an alternative carrier to provide line-haul service to an interchange with the incumbent carrier that will serve the shipper at origin or destination via a reciprocal switching arrangement. For example, what if the movement involves railcars owned by the incumbent carrier? Would the alternative carrier haul the incumbent carrier's cars over the alternative railroad's system, and under what terms and conditions?

C. Terminal Trackage Rights

Another overall comment offered by the NGFA is that the final rulemaking should be expanded to include the remedy of terminal trackage rights in addition to reciprocal switching. The Board has asked for comments on this option in the NPRM, most particularly in conjunction with the "Industry Spot and Pull" standard. NPRM at 7 and 19. Terminal trackage rights must be an option in any scenario under which a shipper would seek relief under proposed new Part 1145 because, by definition, it entails a situation where the rail carrier that makes the final delivery to a shipper's captive facility or to a captive origin from an interchange has been consistently providing substandard service. If the sole remedy for such inadequate service is that the same carrier will continue to be the only railroad making the final deliveries or pickups - only less enthusiastically

under a Board-directed reciprocal switching arrangement - can it really be expected that service will improve in the short term?

Adding the remedy of terminal trackage rights would achieve a better policy balance of improving service to the customer in the short term and mitigating its business damages while providing an incentive for the incumbent to take steps to improve its service on a longer timeline. Terminal trackage rights would also be consistent with the NPRM's policy underpinnings for directed reciprocal switching because the standard for terminal trackage rights under §11102(a) is also in part whether it is "practicable and in the public interest." Section 11102(a)'s additional requirement that terminal trackage rights should also be "without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business" is consistent with the general purpose of proposed §1145(b)(6) above. Consequently, it would not seem difficult to the NGFA for the Board modify the NPRM to include terminal trackage rights under new Part 1145, although the NGFA acknowledges that the Board would need to account for the different standards for compensation in §11102(a) and §11102(c).

D. Definition of Terminal

Finally, the NGFA submits that the proposed rules could prove to be too narrow in scope to be of use to many agricultural shippers by applying only to "service to a terminal area shipper or receiver." NPRM at 2; *see also id.*, at 26 ("switching services (transfers between carriers) under a prescribed reciprocal switching agreement would occur within a terminal area, in the context of integrated operations or operations that could reasonably become integrated."). As the NGFA has stated in *Competitive Switching, Reciprocal Switching*, and other proceedings, its members are

often captive to Class I rail carriers at locations that are outside of “terminal areas,” as the Board would define that term in proposed §1145.1.¹

V. The Board Should Take Other Actions In Conjunction with this Rulemaking

A. The Board Should Overrule *MidTec* for All Aspects of §11102

In the NPRM the Board has proposed to “expressly overrule the standards and criteria regarding reciprocal switching established in [*MidTec Paper Corp. v. Chi & N.W. Transp. Co.* 3 I.C.C. 2d 171 (1986) (*MidTec*)] as applying to any petition under the new part 1145.” NPRM at 7. This would mean that a shipper seeking a directed reciprocal switching agreement for inadequate service would not have to attempt to meet the insurmountably high standard for showing anti-competitive behavior and inadequate service adopted by the Interstate Commerce Commission in that case. The NGFA believes that this Board should overrule *MidTec* for all purposes of §11102. First, the standards adopted in *MidTec* apply to both reciprocal switching and terminal trackage rights. *See, e.g. Reciprocal Switching* at 3. Consequently, expressly overruling *MidTec* as it applied to terminal trackage rights would be necessarily part of including that remedy in proposed new Part 1145. However, overruling *MidTec* for all other potential actions under §11102² would create an added incentive for railroads to provide better service to their captive shippers at reasonable rates and terms by reinstating the backstop of the statutory language of §11102 unhindered by the onerous standards adopted in *MidTec*.

¹ *See, e.g.,* Opening Comments of NGFA in *Reciprocal Switching*, filed October 26, 2016 at 6-9

² For example, a shipper could argue in a formal complaint proceeding that terminal trackage rights were practical and in the public interest in situations that are not limited to the criteria in new Part 1145, or that reciprocal switching was necessary to provide competitive rail service. The standards in *MidTec* presently impose an insurmountable barrier to such actions.

B. The Board Should Accompany Final Rules in this Proceeding with Proposed Rules in *Private Railcars*

For the reasons set forth above, the NGFA maintains that the degree to which the rules as proposed in the NRPM will provide an incentive to Class I railroads to improve service at captive origins and destinations may prove to be limited in practice. As such, the rules must be accompanied by the creation of other incentives that are also aimed at improving service. The NGFA believes that the financial incentives to improve the Class I railroads' inefficient use of private railcars proposed by NGFA and several other shipper organizations in *Private Railcars* would provide an important and effective addition to the limited focus of the NPRM and result in achieving the service improvements the Board is seeking to encourage.

On April 1, 2022, the Board served a decision in EP No. 768 requesting public comment on the Petition and posing a number of questions about the regulations proposed therewith. Comments were submitted to the Board and the administrative record completed on September 8, 2022. The NGFA urges the Board to accompany its efforts concerning the NRPM with the publication of proposed rules in *Private Railcars* that would establish financial incentives for Class I railroads to utilize private railcars more efficiently in order to protect the substantial financial investment in private cars made by shippers and private car lessor companies. The "allowable transit idle time" charge proposed in *Private Railcars* would provide an added incentive to improve inadequate service that would compliment and bolster the Board's objectives in the NPRM.

C. The Board Should Finalize the Regulations Proposed in *Expedited Relief*

Another action the Board should take in conjunction with finalizing the regulations proposed in this NPRM is to expeditiously finalize the regulations the Board proposed in *Expedited Relief*. The NGFA enthusiastically supported the Board's rapid action in issuing the proposed rules

in tandem with the public hearing held on April 27-28, 2022 on the nationwide service problems occurring last Spring. As stated above, *Expedited Relief* recognized the issue of obtaining the participation of an alternative carrier. The proposed regulations would attempt to address that issue by modifying the respective burdens of shippers and rail carriers to take steps to alleviate a service emergency. The Board should expeditiously finalize the proposed regulations in *Expedited Relief* so they are in place if and when another railroad service crisis occurs, so that shippers that are placed in extreme situations because of the failure to receive rail service may have an effective means to seek and obtain emergency relief.

VI. Comments on The Proposed Standards

The overarching question presented by the NRPM is whether the objective standards the Board has proposed will (1) result in improved service initially, and (2) incentivize railroads to make the investments necessary to provide predictable and reliable service levels and create sufficient surge capacity to mitigate or avoid service meltdowns. According to the NPRM, the proposed standards “are informed by” service levels in 2022 that the Board concedes largely did not meet the needs of the public. NPRM at 8. This raises the question of how utilizing these low standards will sufficiently incentivize a carrier to improve its service to a captive shipper.

A. Original Estimated Time of Arrival (OETA)

The final rules should include a performance standard that is significantly higher than “at least 60% of shipments arrive within 24 hours of the OETA,” NPRM at 15, in order to make reciprocal switching opportunities more prevalent where there is inadequate service. The NGFA notes that even if shippers/receivers were granted the ability to freely use reciprocal switching with no OETA performance standard hurdle, the incumbent carrier would still be highly likely to

maintain the shipper's or receiver's traffic due to the inherent advantages of having the shipper/receiver on its track. Accordingly, the NGFA believes that utilizing a low 60% performance standard will provide little incentive for the incumbent to improve its service. Given the inherent advantages of incumbent Class I carriers, NGFA recommends utilizing a performance standard closer to 100%. A higher performance standard 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.

Additionally, the NGFA urges the Board to reconsider the NPRM's proposal to exclude unit trains from the OETA standard, and by extension, the data that would be made available to rail shippers. NGFA disagrees that unit trains do not have the same need to be within specified service windows as manifest trains. The failure of Class I carriers to deliver unit trains in a timely manner can result in significant harm to the shipper/receiver, the shipper's/receiver's customers, and in some cases harm to livestock dependent on feedstock delivered by railroad in unit trains, as the Board experienced in 2022 with Docket No. FD 36609, *Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*.

B. Service Consistency Standard - Transit Time

The Board proposes to adopt a second, "service consistency standard" involving "Transit Time," defined as: "the time between the shipper's tender of the bill of lading and the rail carrier's delivery of the shipment of the agreed-upon destination," excluding time spent loading or unloading a shipment. Under this standard, potential reciprocal switching relief would be granted if the average transit time increased by either 20% or 25% for the same 12-week period during the previous year. As with OETA, the effectiveness of this standard will depend in large part on the starting point from which increases are measured. If the transit times for the preceding year were

below the historical transit times for the movement, then allowing a 25% increase in the time before granting any relief would mean no relief but the shipper is still receiving poor service. NGFA believes a transit time standard nearly equal to the year prior will help provide a more responsive regulatory backstop when alternative service is needed.

C. Inadequate Local Service – Industry Spot and Pull

The final standard for seeking reciprocal switching relief under the NPRM would entail measuring service against a “planned service window” during which local deliveries and pick-ups are scheduled to be made.³ Board-directed reciprocal switching agreements would arise if an incumbent carrier had a success rate of less than 80% over a period of 12 consecutive weeks. Failure would be defined as the carrier not picking up or placing all cars requested by the shipper or receiver by the applicable cut-off time. As with the NPRM’s proposals regarding OETA, the Board concedes that the 80% success rate falls short of the interim performance targets submitted by some Class I carriers in Docket No. EP No. 770, but nevertheless posits that this is still “a reasonable starting point for setting standards from poor or inadequate local service.” NPRM at 20. NGFA respectfully disagrees with this assessment and recommends setting success rates at the high end of the interim performance targets from EP No. 770, which according to the NPRM range as high as 91%. NPRM at 20 (table). Otherwise, reciprocal switching could be avoided by maintaining the substandard success rate of 80% for any part of a 12-week consecutive period. The NGFA maintains this would provide little incentive to improve service. Finally, as stated

³ The Board proposes a default standardized service window of 12 hours, which is the maximum duration a crew is allowed to work. However, carriers would be held to their shorter service windows.

above, the Board should include terminal trackage rights as potential relief violations of the Industry Spot and Pull Standard.

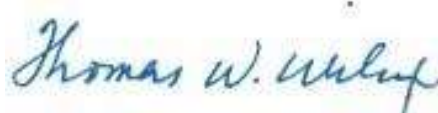
VII. Conclusion

The NGFA supports the efforts of the Board to provide shippers and receivers with performance data and urges the Board to place no limits on data sharing. The Board's efforts to develop service incentives are appreciated, but the NGFA urges the Board to incorporate competition enhancing concepts considered in *Competitive Switching* and *Reciprocal Switching* in the NPRM. Lastly, the NGFA urges the Board to issue proposed regulations in *Private Railcars* aimed toward the establishment of financial incentives for Class I railroads to utilize private railcars more efficiently. The NGFA believes the incentives that would be established in *Private Railcars* have great potential for improving rail service performance for private railcars. The Board should also take the other actions related to improving railroad service mentioned in these comments.

Respectfully submitted,



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November 7, 2023