

Before the U.S. Surface Transportation Board

STB Docket No. EP 711 (Sub-No. 2)
Reciprocal Switching for Inadequate Service

Comments of the
U.S. Department of Agriculture

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Authority and Interest

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 entrust the Secretary of Agriculture with representing the interests of agricultural producers and shippers in improving transportation services and facilities. As one of many ways to accomplish this mission, the U.S. Department of Agriculture (USDA) initiates and participates in Surface Transportation Board (STB or Board) proceedings involving rates, charges, tariffs, practices, and services.

Introduction

USDA commends the Board for proposing a remedy to address inadequate rail service through reciprocal switching. Indeed, in March 2022, as the rail service crisis of 2022 was unfolding, the Secretary of Agriculture encouraged the Board to “finalize a reciprocal switching rule in EP 711 that provides shippers with relief in the form of an alternative rail option in the face of poor service from their incumbent railroad.”¹ While levels have improved since, rail service was poor throughout much of 2022 and into 2023. With some modifications, the notice of proposed rulemaking (NPRM) for reciprocal switching should enhance railroads’ incentives to provide good service and will provide shippers with valuable service data to help them in private negotiations with railroads.

Despite the potential to improve rail service, USDA is concerned that the Board proposes to close Docket No. Ex Parte (EP) 711 (Sub-No. 1) and thus defer indefinitely consideration on the use of reciprocal switching as a means of providing competitive rail service. USDA urges the Board to adopt this proposed rulemaking that institutes reciprocal switching when it is “practicable and in the public interest,” but also continue implementing a rulemaking that institutes reciprocal switching when it is “necessary to provide competitive rail service.”²

Summary

USDA’s main points, discussed in detail in these comments, include the following:

- The proposed reciprocal switching rule represents a good step toward remedying service, but the Board should take clear action to provide shippers with effective reciprocal switching options to address inadequate competition.
- The Board proposes to measure rail service using three service metrics. However, the Board should 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. The Board should consider additional metrics capturing service levels and monitor rail performance closely to ensure a more complete view of rail service.
- The Board should further distinguish the proposed rule (CFR 1145) from existing rules to remedy poor service (e.g., CFR 1146 and CFR 1147) by specifying eligible terminal areas and expediting the decision process.
- The Board should use terminal trackage rights to alleviate local service issues.

¹ Secretary Vilsack letter to the Board, March 30, 2022.

² 49 U.S.C. §11102(c).

- The Board should provide average transit times at the system and regional levels for public inspection and shipper comparisons.

The Need for Reciprocal Switching for Service *and* Competition

Intervention is Needed to Enhance Incentives Around Service Quality...

About 18 months ago, the Deputy Secretary of Agriculture testified before the Board in EP 770, Urgent Issues in Freight Rail Service. The Deputy Secretary highlighted ways in which rail service was failing to meet the needs of the Nation’s agricultural shippers. While rail service has improved from its worst levels, it is yet unclear whether this change reflects real investments and operational improvements by U.S. Class I railroads, or merely below-average rail volumes.

USDA acknowledges the many steps the Board has taken to address and improve rail service, and this proposed rule complements and enhances the Board’s previous efforts. Starting in 2014 (EP 724), the Board began collecting key service metrics from each Class I railroad on a weekly basis. In 2021, the Board sought comments on first-mile/last-mile (FMLM) service, and, in 2022 (EP 770), the Board expanded its rail performance data collection by requiring weekly submission of FMLM metrics and monthly railroad employment levels. These data collection efforts provide a foundation for this proposed rulemaking. USDA applauds the efforts the Board has taken to increase the amount of publicly available rail service data, as it adds transparency to the rail market and provides shippers with valuable information when negotiating contracts.

In addition to data collection, the Board has taken several steps to improve service. These efforts include opening a proceeding to examine private railcar use by railroads (EP 768)—the aforementioned public hearing on urgent issues in freight rail service (EP 770)—and proposing revised regulations to expedite relief for service emergencies (EP 762). Specific to agricultural shippers and receivers, the Board instituted an emergency service order on behalf of Foster Farms, which ensured that the company received adequate feed grain to continue operations (Financial Docket No. 36609).

The proposed rule on reciprocal switching, as well as the efforts previously stated, demonstrate that the Board is serious about remedying poor rail service, and USDA appreciates the time and resources that the Board has devoted to this important effort, which support the livelihood of American producers and rural economies. USDA urges the Board to adopt the proposed rulemaking on reciprocal switching.

... but the Board Must Address and Improve Reciprocal Switching for Competition

Although USDA is supportive of reciprocal switching as a remedy for poor service, USDA believes the Board’s responsibility to revise reciprocal switching is incomplete without a rule related to competition. As referenced earlier, competition is one of two prongs grounded in statute. According to 49 U.S. Code § 11102(c)(1), the Board may require a reciprocal switching agreement “where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” Considerable progress had been made in this docket over the *past decade* to consider improved regulations around reciprocal switching for inadequate competition, yet it has gone unaddressed in this NPRM.

It is worth recalling that EP 711, through the National Industrial Transportation League’s 2011 petition, stemmed from the Board’s public hearing on the state of *competition* in the rail industry—not *service*. The proceeding then continued in that vein. For instance, in its 2016

NPRM, the Board sought to alleviate the overly burdensome “anticompetitive conduct” standard established by the Interstate Commerce Commission in 1985. USDA welcomed the Board’s proposed move away from that inaccessible standard. At that time, the Board proposed clearer paths for a shipper to obtain a reciprocal switch through the “public interest” *and* “competitive” prongs in the U.S. Code. Two Board members, with opposing views on the proposal as a whole, seemed to be in agreement that the “anticompetitive conduct” standard was ineffective.³ While USDA acknowledges that the Board has said that the anticompetitive standard does not apply to the current service proposal, the standard remains—decades later—a barrier to relief via 49 CFR Part 1144, as a remedy for inadequate competition.

Improving regulations around reciprocal switching and competition is even more urgent in today’s environment. The rail industry’s financial health has improved considerably since 1985—and at the same time, the industry has become only more consolidated. The Board recently approved a merger between two Class I railroads, an industry with few firms even before the combination. While outcomes from that merger are still taking shape, the competitive landscape is clearly evolving, likely in positive *and* negative ways. In 2021, Executive Order No. 14036 encouraged the Board to “strengthen regulations pertaining to reciprocal switching...if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service.”⁴ The Secretary of Agriculture underscored this point in his May 2023 letter urging the Board to “move forward on reciprocal switching. Following the Board’s approval of the merger between Canadian Pacific Railway and Kansas City Southern Railway, ensuring adequate industry competition is more important than ever. The Board’s ongoing oversight of the highly consolidated rail industry is key to this objective.”⁵ USDA has long maintained and continues to see reciprocal switching as an avenue to maintain the benefits of deregulation in the midst of industry consolidation.⁶

While USDA appreciates the Board’s recognition that “consideration of additional reforms geared toward increasing competitive options...is [not] foreclosed,” the Board should take immediate action to make reciprocal switching a remedy to promote competition.⁷ This effort could involve continuing Docket No. EP 711 (Sub-No. 1) or opening a new sub docket that specifically addresses the competition prong of reciprocal switching. Either way, the key is for the Board to take a step that demonstrates real commitment to returning to this issue. Otherwise, the timeline on “consideration of additional reforms” is indefinite, and years of progress and momentum will be lost. It is worth noting that, in 2016, Vice Chairman Miller expressed “frustration that it has taken the Board five years to reach this stage,” and—7 years later—there is still not a path on ordering reciprocal switching to address inadequate competition.⁸ Similarly,

³ Then Vice Chairman Miller, in concurring with the decision, wrote, “For shippers, the Board would remove the anticompetitive standard that was created in Intramodal Rail Competition and Midtec Paper Corp., which has proven to be a nearly impossible bar.” Then Commissioner Begeman, in dissenting with the decision, wrote, “there is no dispute that since the current rules were adopted in 1985, very few reciprocal switching requests have been filed and none have been granted. As such, it is hard to believe that the existing regulations adequately implement Congress’ intent that the Board order reciprocal switching when necessary.”

⁴ Executive Order No. 14036.

⁵ Secretary Vilsack letter to the Board, May 12, 2023.

⁶ See, for instance, USDA’s 2013 comments in EP 711: Petition for Rulemaking to Adopt Revised Competitive Switching Rules.

⁷ STB Decision, EP 711 (Sub No. 2): Reciprocal Switching for Inadequate Service, September 7, 2023.

⁸ STB Decision, EP 711 (Sub No. 1): Reciprocal Switching, July 27, 2016.

Member Primus recently expressed concern and hope that the “Board should act soon to ensure that reciprocal switching is available for competitive access.”⁹ While USDA believes the proposed rulemaking is a good first step on service, it is only the first step. The Board should finish revising its rules for reciprocal switching with respect to competition.

Reciprocal Switching for Inadequate Service

Notwithstanding the need for the Board to return to reciprocal switching as a competitive access issue, USDA believes the current proposed rule is a good step forward toward better incentivizing improved rail service. USDA has a few recommendations to strengthen the proposal.

The Board’s Proposed Metrics Capture a Limited View of Service Quality

Rail service is multifaceted and is reflected in various aspects of a railroad’s operations, such as “transit times,” “reliability,” and “level of service,” as well as “proper handling of the cargo,” and “good customer service.”¹⁰ It is important that the Board structure the proposed rule such that railroads are incentivized to improve overall service quality rather than shift attention between different aspects of service. Reliability and transit times are certainly key service metrics, so USDA appreciates the Board’s focus on these metrics in granting a reciprocal switching decision. The proposed metrics complement each other, in that, they prevent a railroad from, for example, attempting to improve reliability by lengthening shipment times. Nevertheless, USDA is concerned that the current rule is missing needed metrics to adequately capture service levels. Without these key metrics, railroads may be incentivized to reduce service levels in order to improve transit times and reliability.

The Board recognized this possibility when describing the industry spot and pull (ISP) metric. The Board notes that “if a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in customer demand, then the standard would become 90% for a period of one year.”¹¹ This example could describe a situation in which a carrier has maintained “reliability” (as defined by the ISP metric) at the expense of a reduction in “service levels.” USDA contends that this is not simply a concern that impacts the ISP metric. Rather, it could affect all three service metrics proposed by the Board.

USDA encourages the Board to incorporate additional measures of service levels in its rulemaking. One service metric that is of particular concern to agricultural shippers is unfilled grain car orders, which saw two periods of severe service degradation from the spring of 2022 until earlier this year.¹² Lowering overall service levels (e.g., leaving orders unfilled) is one way in which a railroad could improve service (e.g., transit times) on filled orders. However, such a decision does not necessarily improve service overall: overall, shippers may actually be worse off (despite, in this example, the better transit times). As an addition or alternative to unfilled

⁹ STB Decision, EP 711 (Sub No. 2): Reciprocal Switching for Inadequate Service, September 7, 2023.

¹⁰ See, for instance, Holguín-Veras, José, Lokesh Kalahasthi, Shama Campbell, Carlos A. Gonzalez-Calderon, and Xiaokun Cara Wang. "Freight mode choice: Results from a nationwide qualitative and quantitative research effort." *Transportation Research Part A: Policy and Practice* 143 (2021): 78-120.

¹¹ STB Decision, EP 711 (Sub No. 2): Reciprocal Switching for Inadequate Service, September 7, 2023.

¹² The number of unfilled grain car orders in manifest service grew to new highs in March 2022, peaked in June 2022, before falling through October 2022. Unfilled orders then grew again, experiencing a new record in January 2023.

orders, the Board could include a metric on the *frequency* of service (e.g., the number of times per week a railroad places or picks up cars) and/or the number of unit train turns.

In that vein, “frequency” and “volume” are important aspects of service that are missed in the Board’s proposed metrics. To illustrate with an example, suppose a railroad (Scenario 1) delivered (or picked up) 100 cars three times a week and was 90 percent on time. The railroad could appear to improve service if (Scenario 2), instead, it delivered (or picked up) 100 cars twice a week and was 95 percent on-time. In this way, the railroad has improved according to the Board’s proposed on-timeliness measure, but at the expense of reduced service to the shipper. Alternatively (Scenario 3), the railroad could deliver (or pickup) 25 cars five times a week with a 95 percent success rate. In Scenario 3, compared to Scenario 1, the railroad has improved its on-time performance and frequency but reduced the number of cars.

While somewhat simplified for conciseness, these scenarios effectively show that specifying a threshold (e.g., “ISP must be at least 80 percent”) is just one coarse measure of service. The Board’s proposed metrics do not take into account the frequency *or* the amount of service provided—two other important elements of service. Yet, as the scenarios show, they interact in important ways, where a railroad could show improvement along some service dimensions (those measured by the Board) at the sacrifice of other dimensions (those not measured). Because the Board is focusing on *minimum* service quality standards, shippers should not have to trade off service levels for service quality.

In general, 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.

The Board Should Further Distinguish the NPRM from Existing Remedies

In general, the Board should provide more guidance on how CFR 1145, 1146, and 1147 are related to each other and when shippers should consider using each path for service relief.

USDA believes the current proposal is a worthy addition to the Board’s current set of options for shippers to receive a reciprocal switching prescription. As the Board has recognized, Part 1147 (alternative rail service for service inadequacies) has largely gone unused. Part 1146 (alternative rail service for service emergencies) has also been underused, which led the Board to propose (in EP 762) modifications to expedite an emergency service order. The existence of an option to use 1146 and 1147 places an important emphasis on distinguishing the currently proposed 1145 from the relatively quick, but emergency-based remedy in 1146, and from the more case-by-case approach taken in 1147.

USDA views the currently proposed changes, and their relation to 1147, as similar to the Board’s efforts to streamline determinations of market dominance in recent years. There, the Board provided a tiered approach in determining market dominance, where the clearest cases received a streamlined procedural schedule through a *prima facie* presumption, granted if certain well-defined “metrics” were met. Similarly, in the current proposal, 1145 represents a kind of streamlined reciprocal switching prescription, compared to 1147, for those cases where poor service is clearly represented in well-defined service metrics.

USDA believes the addition of 1145 to the Board’s reciprocal switching options will better incentivize railroads to provide good service in the first place, and will enable shippers to obtain reciprocal switches more easily by directly working with the railroads. USDA agrees with the Board when it says, “the application of objective performance standards for adequate rail service, as provided for in part 1145, would promote predictability and efficiency in regulatory proceedings thereunder, thereby reducing unnecessary regulatory costs and ultimately strengthening rail carriers’ incentive to provide adequate service.”¹³

List of “terminal areas.” To further enhance predictability and efficiency in the regulatory process, the Board should consider providing a list of “terminal areas” where this NPRM would apply. Such a list would make eligibility much clearer but need not be exhaustive. Similar to the streamlined market dominance approach, the Board could still consider additional terminal areas through a more case-by-case approach (still under 1145) for shippers who met the poor service metrics standards but fell outside of the pre-defined areas. Even then, the burden of proof for showing why a terminal area should not qualify for a reciprocal switch should fall on the railroads, who have all the information about the costs and operational difficulties associated with the switch.

Shorter timeline for remedy. The Board should also consider distinguishing 1145 through a shorter timeline. Service issues tend to be temporary, so the length and cost of litigation can make obtaining a prescription from the Board problematic. In the current proposal, a shipper would have to endure poor service for at least 174 days (12 weeks plus 90 days), almost 6 months, for the Board’s decision to be an effective remedy.

The service issues in 2022 were telling. For grain shippers, service was particularly problematic early in the year, but improved over the summer. The railroads appeared optimistic over the summer that they could handle the upcoming harvest.¹⁴ However, service again worsened in September, and the problems lasted through the beginning of 2023. Depending on the metric used, a shipper who had brought a case under 1145 in the beginning of the year may have had acceptable service by summer, around the time a decision would have been made. Similarly, a case started in September may have not been decided by the beginning of 2023 when service improved.

Ranking component to help expedite. For the aforementioned reasons, the Board should consider ways to expedite its decision process. One possible strategy for expediting the decision process for 1145 is to introduce a ranking component to how cases are decided. For example, if a shipper can demonstrate that the railroad has failed to meet two of the three service metrics, that case will be expedited more than cases where the railroad only failed to meet one service metric. Additionally, the Board could consider the severity of the service issues. For example, the Board could rank transit-time-related cases based on the percentage change in average transit time compared to last year. In this scenario, a case where transit times were reduced by 50 percent would have a stronger case than one where transit times were reduced by only 30 percent. The idea behind the introduction of a ranking component is not to reduce the Board’s ability to decide cases on a case-by-case basis, but rather to help expedite extraordinary cases.

¹³ STB Decision, EP 711 (Sub No. 2): Reciprocal Switching for Inadequate Service, September 7, 2023.

¹⁴ August 25, 2022, National Grain Car Council meeting minutes.

USDA believes that by providing an explicit list of terminal areas that are presumed to qualify for a reciprocal switch, and by expediting the Board’s decision process, the proposed Part 1145 will be an effective complement to the existing reciprocal switching remedies.

The Board Should Consider Terminal Trackage Rights

As the Board recognizes, switching still relies on service from the incumbent carrier that was having service problems in the first place. For this reason, USDA believes the Board should consider using a combination of reciprocal switching and terminal trackage rights as a remedy to service issues. For example, terminal trackage rights should be an option for ISP service issues. As the Board acknowledges, “if it were to prescribe a reciprocal switching agreement based on the incumbent rail carrier’s failure to meet the ISP standard, the incumbent rail carrier would continue to provide local service to the petitioner.”¹⁵ USDA encourages the Board to prescribe terminal trackage rights as an additional path open to the petitioner when the carrier fails to meet the ISP standard. In those cases, a reciprocal switching agreement is not enough to ensure shippers and receivers receive adequate local service.

The Board Should Clarify What Data Will be Available for Public Inspection

USDA applauds the Board’s efforts to collect and disseminate timely rail service metrics. USDA strongly supports the Board’s proposal to make permanent some of the temporary data requirements in EP 770 and looks forward to the Board’s further action in EP 770 and EP 767.

With respect to the NPRM, the Board’s proposal would require carriers to provide two types of data. The first type is individualized data, that is specific to a shipper and will allow shippers to bring a case before the Board. The second type of data is collected at the regional/system level (currently being collected on a temporary basis in EP 770). USDA agrees with the Board that the system-level data “would also allow a reciprocal switching petitioner to compare its service to that of the industry or the incumbent carrier’s service on a system and regional level to see whether service problems are systemic and/or worsening.”¹⁶

USDA seeks clarification from the Board on what data will be collected and made available to the public. Currently, both the “Original Estimated Time of Arrival” and the ISP metrics are collected at the system level through EP 770. The third metric, “Transit Time,” is not explicitly collected by the Board, though the Board does appear to collect related metrics, such as train speeds (miles per hour), terminal dwell time (for manifest trains), and origin dwell time (for unit trains). USDA seeks clarification on whether the Board will collect and publish new system-level and regional transit time metrics. As indicated in past comments, data are critical to well-functioning markets. USDA would encourage the Board to make as much data available for public inspection as possible—especially at a more granular, regional level.

Conclusion

USDA appreciates the Board’s efforts over the past several years to improve service for rail shippers. With some modifications, specified in these comments, the proposed rule on reciprocal switching is likely to help shippers obtain a reciprocal switching agreement when it is “in the public interest.”

¹⁵ STB Decision, EP 711 (Sub No. 2): Reciprocal Switching for Inadequate Service, September 7, 2023.

¹⁶ *Ibid.*

At the same time, USDA strongly urges the Board to take concrete steps to establish rules that better allow shippers to obtain a reciprocal switching agreement when it is “necessary to provide competitive rail service.” As noted previously, EP 711 was opened with the intent of providing reciprocal switching in order to increase competition. Closing EP 711 (Sub-No. 1) at this time would leave the Board’s work unfinished. USDA looks forward to participating in further proceedings that address this important issue for agricultural shippers.

Respectfully submitted,



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