

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FIRST-MILE/LAST-MILE SERVICE	)	Ex Parte No. 767
	)	

**OPENING COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE,
THE FREIGHT RAIL CUSTOMER ALLIANCE, NATIONAL COAL
TRANSPORTATION ASSOCIATION, PORTLAND CEMENT
ASSOCIATION, AND STEEL MANUFACTURERS ASSOCIATION**

Bette Whalen
President, Western Coal Traffic League
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Ann Warner
Spokesperson, Freight Rail Customer
Alliance
Ann Warner LLC
300 New Jersey Avenue, Suite #900
Washington, D.C. 20001

John Ward
Executive Director
National Coal Transportation Association
1616 17th St., Suite 266
Denver, CO 80202

Portland Cement Association
Katy Hartnett
Director, Government Affairs
200 Massachusetts Ave., N.W., Suite 200
Washington, D.C. 20001

Philip K. Bell
President
Steel Manufacturers Association
1150 Connecticut Ave NW # 1125,
Washington, DC 20036

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Slover & Loftus LLP
224 Seventeenth Street, N.W.
Washington, D.C. 20036
202.347.7170

Attorneys for the Western Coal Traffic
League, Freight Rail Customer Alliance,
National Coal Transportation Association,
Portland Cement Association, and Steel
Manufacturers Association

Dated: December 17, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FIRST-MILE/LAST-MILE SERVICE	)	Ex Parte No. 767
	)	

**OPENING COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE,
THE FREIGHT RAIL CUSTOMER ALLIANCE, NATIONAL COAL
TRANSPORTATION ASSOCIATION, PORTLAND CEMENT
ASSOCIATION, AND STEEL MANUFACTURERS ASSOCIATION**

The Western Coal Traffic League (“WCTL”), Freight Rail Customer Alliance (“FRCA”), National Coal Transportation Association (“NCTA”), Portland Cement Association (“PCA”), and Steel Manufacturers Association (“SMA”) (collectively, “Shipper Associations”) submit these comments in response to the notice that the Surface Transportation Board (“Board” or “STB”) served on September 2, 2021, as modified September 21, 2021 (“Notice”).

I. INTRODUCTION AND SUMMARY

FRCA and NCTA are two of the original members of the Shipper Group that submitted the letters dated August 30, 2020 and October 8, 2020 that provided the impetus for the Board’s Notice. FRCA and NCTA, joined by WCTL, PCA, and SMA, strongly endorse and applaud the Board’s decision to institute a proceeding to review and address issues regarding first-mile / last mile (“FMLM”) service.¹

¹ Shipper Associations understand that the two other members of the original Shipper Group, the National Industrial Transportation League and the Private Railcar Food and Beverage Association, Inc., will be filing separate comments.

The Shipper Group letters explained that: (1) FMLM data is critical for measuring the end-to-end service being provided by the common carrier railroads; (2) without that data, shippers and the Board lack insight into the overall functioning of the rail network that shippers need for planning and operational purposes, and to assess whether any service problems are specific to them or more general, whether they are being singled out for any service problems, and whether service is improving, deteriorating, or remaining stable generally; (3) without that data, the Board lacks needed visibility as to whether railroads are properly discharging their common carrier obligation; (4) the railroads must necessarily already collect, monitor, and utilize the data, all the more so to the extent they seek to adopt the principles of so-called Precision-Scheduled Railroading (“PSR”); (5) since the railroads already collect, process, and utilize such data, the additional burden of reporting the data to the Board would not be excessive; and (6) the FMLM data is not currently being reported to the Board pursuant to *United States Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), apart from unit trains and intermodal service. Notice at 3-4, discussing Shipper Group Letters dated August 30, 2001 and October 8, 2020.

The recent service issues reinforce the need for the missing data. Reports of supply chain problems have become ubiquitous, and the problems are growing worse and more widespread, not better. Chairman Oberman has written to the Class I railroads repeatedly regarding service problems in the past few months, beginning with letters dated May 27, 2021, followed by letters regarding demurrage and accessorial charges the very next day, May 28, 2021, and letters regarding intermodal supply chain issues dated

July 22, 2021. The Chairman more recently sent a letter to CSX dated October 18, 2021, and another one to NS dated November 23, 2021.

As these letters indicate, the general systemwide service data currently being collected by the Board from the railroads under the rules adopted in EP 724 is insufficient for the Board to fully understand the severe service problems being experienced by shippers at the local level, resulting in major part from PSR changes. Nor does the EP 724 data currently available to the Board reflect problems such as reductions in days of service to customers, car order and switching errors, missed switch times, failure to meet planned trip or cycle times, general reductions in crew availability, locomotive power, and railroad cars, and the apparent shifting of crews, railroad power, and equipment by railroads across service territories to attempt to address service emergencies that are arising across the railroads' systems on a recurring basis.²

The FMLM issues are of particular concern to those Shipper Associations members that may ship via unit trains, for several reasons. First, part of PSR has entailed the forced conversion of unit train shippers to manifest service, even for large volume shippers. Second, the rail carriers are increasingly relying on "double" or "combination" trains, creating more issues as to the nature of service provided. Third, the problems with manifest and intermodal service often bleed over to unit trains. In particular, many unit

² The reported EP 724 data does provide some information on the number of trains held and the cause, but does not track the reductions in trains in service or the trainsets or cars (including shipper or private trainsets and cars) that have been parked because crew and/or locomotives shortages prevent the equipment from being in service in the first place.

train coal shippers have been subjected to mandatory train parking, even as those shippers have stable service requirements and would like to ship more coal, particularly in the face of spiking gas prices, and stockpiles have been shrinking. *E.g.*,

<https://www.wsj.com/articles/americas-power-plants-are-low-on-coal-11638268201>

(Nov. 30, 2021).

Closely related, the railroads constitute networks, and the railroads have frequently responded to substantial crew and equipment shortages by shifting resources around their systems to address recurring local service “fires.” Significantly, they have taken these measures without providing affected customers or the public with any information regarding resources are being redeployed, which types of service or service territories are being favored and for how long, and when resources will be returned and service restored to “normal.” Also, the railroads are the only party with the knowledge as to the full network, which puts them in a position to exploit their asymmetrical informational advantage to their benefit and to the detriment of shippers by leaving them completely left in the dark as to why their service is suffering and when the problems will be fixed.

Furthermore, the linkage of management compensation to reductions in the operating ratio at the behest of major shareholders incents the carriers to exploit their market power and sacrifice service. Specifically, the operating ratio reductions depict the extent to which operating savings are retained by the carriers and not passed through to customers. If the railroads were operating in a competitive market, then competitive pressures would cause a pass through of savings and efficiency gains to customers. In

that regard, it bears noting that the recent service woes have been accompanied by record railroad profits and further operating ratio reductions. While shippers, receivers, downstream customers and producers, and employment may all be suffering, the railroads are profiting.

In the remainder of this filing, Shipper Associations will address the individual matters raised by the Board in its Notice.

II. IDENTITY AND INTEREST

WCTL is a voluntary association formed in 1976, whose regular membership consists of utility shippers of coal mined west of the Mississippi River. WCTL members currently ship by rail, receive, and pay freight charges on more than 90 million tons of coal each year.³ Many WCTL members are dependent on a single railroad for the transportation and/or delivery of their essential coal fuels, and look to the Board and its regulatory regime to constrain monopoly pricing practices and service issues by their serving railroads. WCTL is the only organization whose primary purpose is protecting and advancing the interests of rail-dependent coal shippers.

The Freight Rail Customer Alliance (FRCA), www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and

³ The members of WCTL are: Ameren Missouri, Arizona Electric Power Cooperative, Inc. CLECO Corporation, CPS Energy, Entergy Services, Inc., Evergy, Inc., Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, and Western Fuels Association, Inc.

their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

The National Coal Transportation Association, www.movecoal.org, is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities and entities that produce, repair, and manage all facets of railcar component parts and systems, as well as services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal.

PCA, www.cement.org, founded in 1916, is the leading voice for the U.S. cement manufacturing industry. Its members represent 91% of the United States' cement production capacity, with manufacturing plants in 33 states and distribution terminals in all 50 states. PCA members rely on the railroads to move hydraulic cement from manufacturing plants to distribution facilities to market and frequently have no practicable, feasible modal alternatives to railroad service. PCA ship using both unit train and carload/manifest service.

SMA, www.steelnet.org, is the largest steel industry trade association in the United States and is the primary trade association representing American EAF (electric arc furnace) steel producers. Accounting for over 70% of domestic steelmaking production, EAF producers are the most sustainable steelmakers in the world. By using an innovative, 21st century production process that is less energy-intensive, domestic steelmakers have up to 75% lower carbon emissions than traditional steelmakers. SMA's

24 producer members have operations in 35 states, and rely on the domestic railroads to efficiently and cost effectively transport inbound movements of raw materials, inter-plant movements of in-process products, and outbound movements of finished products all across the United States.

III. RESPONSES TO QUESTIONS PRESENTED BY THE NOTICE

A. Initial Questions

1. How often does the issue arise?

Shipper Associations wish that the issue of inadequate FMLM service and data arises only rarely, but the unfortunate reality is that service issues and the related need for reliable information about service arise constantly, and what varies is the intensity of the problem. There were particularly severe problems in the mid-2000s and 2013-2014, as well as currently. The current circumstance is more disturbing because it arises from a number of significant structural, operational, equipment, and personnel changes that the railroads made intentionally and that leave the railroads unable to reverse the resulting consequences of their decisions. The fact of the matter is that there were service problems even before the onset of the Covid pandemic. Indeed, PSR brought waves of disruptions, particularly as PSR amounted to , in the words of former Chairman Begeman, to “doing less with less” and entailed, among other things, the elimination of surge capacity in the interests of providing service that was neither precise nor scheduled, but good for their bottom line. *E.g.*,

<https://www.railwayage.com/freight/class-i/what-psr-is-and-isnt-nears-talk/> (Oct. 14, 2019).

One indication of the severity of the issue currently is that the Railinc have recently announced an “Advanced ETA” tool to enable shippers/receivers, at least intermodal ones, to obtain updated estimates times of arrival that are compiled using artificial intelligence. See <https://www.railwayage.com/analytics/new-from-railinc-advanced-eta/> (Dec. 7, 2021). The fact that such a tool should need to be developed confirms that existing service is not being provided on a precise or scheduled basis. Significantly, the Advanced ETA is being provided only for “the more stable and higher volume intermodal rail routes.” *Id.* Such movements appear to enjoy a substantially higher on-time performance than carload traffic, presumably at least in part because truckers/drayage is responsible for the first and last miles. The problems thus appear to be pervasive.

2. Why does the issue occur?

In a narrow sense, the issue arises from the profit motive, *i.e.*, the desire of railroad investors, and management’s need and desire to serve those investors, which drives the railroads to maximize their profits, which at times can result in sacrificing service by restricting investment and reducing operating expenses. But the profit motive alone is not the problem because the profit motive leads to good and even excellent service and transparency in other markets and situations.

The rail service problems are facilitated and enabled by the combination of the market power that the railroads possess, the lack of effective competition that might limit that market power, and a lack of effective regulation that might otherwise check railroad abuses in the absence of effective competition. If competition were effective, the

railroads would lose market volume and profits when service suffers or transparency is avoided. If regulation were effective, then the railroads would face regulatory consequences if service suffered, such as regulatory fines for failing to meet the common carrier to provide service upon reasonable request.⁴

The reality is that the lack of competition and regulation (including the large segments of traffic that have been exempted and the very limited regulation that remains for traffic that has not been exempted) enables and encourages the railroads to exploit their advantages, and if incumbent management fails to do so, replacements are readily available.

Ultimately, the alignment of these incentives causes the railroads to look inward and favor their profit goals over their customers' service needs and requirements. New service plans are developed at national headquarters to meet internal PSR financial goals; plans ignore local operational needs and cooperative approaches developed over years in favor of rigid, single-factor approaches that disregard the experiences, circumstances, and complexities of individual customers' business and service requirements at the local level; and the carriers largely refuse to consult or coordinate with customers before developing and dictating new centralized service plans without any meaningful discussion of service changes ahead of time.

⁴ More effective regulation could also bring with it incentives to engage in more adequate investment, such as the Avrech-Johnson effect that the railroads have referenced with respect to the revenue adequacy constraint.

3. How does the issue affect your operations?

The impact of the operations varies by shipper. For many manifest shippers, FMLM issues have arisen or become much worse because of the adoption of PSR. PSR has not resulted in improved service reliability. Instead, the railroads have: replaced daily scheduled service in defined windows with less frequent service that is provided at random times of day; replaced experienced local crews with new crews serving multiple service territories that have little or no training or experience serving the local customers; downsized customer support staffing and implemented new software “tools” that are not followed and fail to improve service or communication regarding impaired service; failed to make pick-up or drop-off “Scheduled for Today” deliveries; and assessed unjustified demurrage charges on cars ordered, even where the railroad fails to deliver cars that the manifest shippers have ordered.

For unit train shippers, the railroads used to provide trip/cycle times that could be used for business planning purposes, including determining the number of train sets needed to cover the desired annual volume. Today, cycle times may vary substantially on a weekly, monthly, and quarterly basis, and the railroads have unilaterally parked sets, with no explanation, other than lack of power or crews, or with a further explanation that power or crews have been devoted to other parts of their systems, leaving shippers unable to predict the volume of deliveries that they will actually receive.

While PSR was depicted as providing reliable, repetitive daily service, with a focus on moving cars to meet customer needs, and not trains for the sake of moving trains, the railroads moved quickly to reduce daily service in many instances, due in part

to resource constraints of the railroads' own creation, with a focus on moving trains to customers to meet management and shareholder financial goals, instead of moving cars or trains to meet customer needs. Some shippers, such as utilities, traditionally have been able to arrange for substantial stockpiles to guard against periodic service shortages, although the carrying costs are substantial. Today, that planning strategy has largely become fruitless, as the railroads have parked trainsets, and assigned resources to other parts of their systems, thwarting any such "self-help" initiatives by customers. As of September, utility coal stockpiles had reached their lower level since 1978. See <https://www.eia.gov/todayinenergy/detail.php?id=50558> (Dec. 7. 2021). Some utilities have been forced to shut down their generating units and put them in full conservation mode, at considerable expense to the public and risk to system reliability.

Some manifest shippers seek to operate on a lean, just-in-time basis, and risk being forced to curtail or suspend their operations if there are inadequate deliveries of feedstock or takeaway of output. Indeed, as noted above, even coal-burning electric utilities, including FRCA and NCTA members, are being forced to curtail coal consumption and substitute more expensive natural gas or purchased power in the current environment. Such reductions become more likely when the railroads insist on parking trainsets, which is particularly punitive for those shippers that have expended substantial capital to acquire those trainsets so as to protect their supply chain. Other shippers invested heavily in unit train capability, only to have the railroads switch to manifest service.

Some so-called competitive shippers may appear to have some option to substitute truck service on a limited basis, but even that option is often illusory because plants are often primarily designed for rail service, and such alternatives are often cost-prohibitive or infeasible in the current environment in light of the shortages of truck drivers, the cost of fuel, and, at times, congestion on the highways and in cities.

Even for those shippers that do have some viable competitive options, better insight into the quality of service of the railroads would be useful in determining whether to attempt to exercise those options.

4. How does the issue affect your facilities and/or production?

As explained above, the impact on facilities and production varies by shipper and, in particular, type of shipper. Coal-burning utilities may be able to guard against impacts by attempting to stockpile coal, but the cost is considerable, and the approach is not always effective, as evidenced by the FRCA and NCTA members that have been forced to curtail coal generation even in the face of high gas prices. Some of the railroads have said they will allocate service so that plants do not run out of coal, which can create a disincentive to stockpile and punish those utilities that do curtail generation. The cost of stockpiling can include not only the delivered cost of coal in inventory and the cost of managing that inventory, but also the cost of acquiring substitute power or natural gas as well as the cost of having railcars that the railroads have idled.

Other shippers have been forced to idle production, particularly if they cannot store feedstock or output on site and/or their markets cannot absorb a more expensive alternative such as truck transportation.

The problems are particularly pernicious in that the problems could be avoided if the railroads maintained adequate capacity. For the railroads, the lack of capacity is a matter of choice as they certainly have the capital to reinvest and maintain adequate staffing and keep the equipment they already own in use, although they have chosen instead to focus on reducing their costs and to devote large portions of their profits for dividends and/or stock buybacks.

The most plausible inference is that the railroads have deliberately chosen to avoid investing in capacity and reliability in order to maximize profits and, especially, lower their operating ratios. The problem has been exacerbated by PSR, which has entailed, among other things, shifting from unit trains to manifest service and eliminating surge capacity, both of which render their systems more vulnerable to service problems, including FMLM delays.

Additionally, the railroads have singled out individual customers for reduced deliveries and consolidated service territories in order to make more efficient use of their resources, which is directly counter to the railroads' professed objective to increase next-day service. Customers are faced with more inconsistent service with new crews and are unable to discuss changes and scheduling with local trainmasters. Local trainmasters are instead focused on implementing new centralized, "data-driven" service plan changes dictated from the railroads' headquarters that largely ignore the actual

business needs of individual customers. Those models assume that the railroad's service is planned, precise, and always reliable, which is absolutely not the case.

5. How does the issue affect your labor schedule?

For utilities and coal mines such as FRCA and NCTA members, unloading and loading activities consume relatively little labor as the product can generally be stored on site with relatively little difficulty and the output consists of electrical energy that moves by wire. Many other shippers are not able to store such enormous volumes on site. Rather than provide scheduled service as they had previously in a fixed window of time, service is now often unscheduled and delivered at various random times of the day (when it is provided at all), causing significant business disruption and harm. Unreliable or unpredictable deliveries forces them to bring in labor at irregular hours and at additional cost. Still others will have to shut down production, but may be obligated to continue paying a labor force that has no work to do. For many shippers, a shortfall in deliveries translates into a loss of output or sales that can never be recovered. Furthermore, acquiring a reputation as an unreliable supplier can result in a permanent loss of customers or even a shutdown of operations altogether. Again, these problems could be avoided if the railroads invested in adequate capacity, or actually provided scheduled service, for which they have more than adequate capability.

6. What is the financial impact associated with this issue?

As noted above, the cost of having to shut down production or try to find transportation alternatives can be enormous for shippers, especially those with substantial sunk investments or other fixed costs. Customers have long worked in cooperation with

the railroads, at the local level, to design and implement infrastructure and operations to ensure that railcars are properly placed, removed, and spotted, with a focus on meeting the shippers' needs and growing the business. PSR has changed that, with service changes and reductions causing cascading complications. The railroads are thrusting their rigidly adopted new business models on customers, but in doing so, are forcing on customers fundamental business changes, many of which are simply infeasible. Many customers simply do not have the track infrastructure, staffing, and offloading capacity to withstand the railroads' erratic service performance, and there is little they can do to improve the situation. The result is to place railroad customers in significant financial and business peril with little or no meaningful recourse options.

As explained, some shippers might have options for abating service risks, but those options are usually limited and carry substantial burdens. For example, most coal-burning electric utilities, including FRCA and NCTA members, maintain coal stockpiles, but at substantial costs. For example, a stockpile with 400,000 tons with coal that costs \$14/ton and transportation that costs another \$18/ton would represent an investment of approximately \$13 million, not to mention the cost of the equipment and the cost of maintaining the stockpile. An electric utility may be able to burn other fuels or purchase power, but the cost can be substantial. At the current time, the cost of gas can be more than double the delivered cost of coal.

In practice, Shipper Group members have had little or no ability to obtain effective protections for the disruptions caused by poor service. Railroads use their market power to deny meaningful service performance standards in contracts and have

very little, if any, legal financial exposure in event of poor service. Where available, liquidated damages might be a percentage of the cost of the railroad transportation, and actual or special damages may be precluded. The same market power that enables the railroads to charge a substantial mark-up over the variable costs also enables them to limit their potential liability and put the financial risk on the shipper.

7. Has this issue changed with the implementation of operating changes generally referred to as precision scheduled railroading?

As noted in the general comments, service and reliability have often deteriorated under PSR, despite railroad claims to the contrary. Fewer crews and fewer locomotives necessarily mean cuts to service and service reliability, resulting in longer and more variable train delays and car deliveries. To the extent a schedule is adhered to, it is one that is convenient for the railroad, *e.g.*, reduced delivery days, rather than something designed or intended to meet the shipper needs. Some shippers have been forced to shift from unit train to manifest service, which leaves those shippers more exposed to the vagaries of the overall rail network. In practice, PSR has been neither precise nor scheduled, but just poor and unreliable.

Furthermore, PSR has meant the elimination of surge capacity, as the carriers have no ability to recover when things, internal or external, go wrong. In many instances, the railroads have reduced the number of weekly trips to a customer's facilities, which in turn impedes the shipper's other options at its facility. Missed switches, etc., may not be so consequential with service that is five or seven days a week, but become quite consequential when service is only three days a week or less, creating

service bottlenecks. Examples include *Hasa, Inc. v. Union Pacific R.R.*, NOR 42165 (STB served Aug. 21, 2019), and *Sanimax USA LLC v. Union Pacific R.R.*, NOR 42171 (STB served Nov. 2, 2021).

In addition, the railroads have cut back substantially on support and customer service staffing, especially at the local level, which further contributes to a lack of responsiveness. Again, the railroads have not been forced to make these changes, but have done so voluntarily in order to make more money.

8. How do you typically try to address the issue? What is communication regarding this issue like between shippers and carriers?

Shippers always try to work with the carrier first, as the railroad has the best access to the information and ultimately is the only party that can provide the needed service or remedy a problem. However, this approach has become less efficacious because the railroads have reduced support staffing as well as the service itself as part of PSR. Moreover, PSR has been implemented by the railroads unilaterally, with little or no notice of service changes. There has been no meaningful discussions with customers on potential impacts to their business requirements. The railroads have refused to provide customers any time to consider changes or to undertake measures in a manner that would allow its operations to function adequately and adjust to any service changes. Shippers are often steered to websites, rather than dealing with individuals that know the situation and have the ability to help. When railroad people are involved, they are often located further away from the local conditions, impairing their effectiveness.

OPAGAC and its Office of Rail Customer Assistance has been immensely helpful at times, despite its lack of real authority. However, OPAGAC would be less needed if the railroads had not embraced PSR so fully and/or if they maintained adequate capacity or at least support staff.

In some instances, shippers have resorted to filing unreasonable practice complaints at the Board. For contracts, court litigation and arbitration are sometimes an option as well, but the expense is considerable, as is the delay.

One of the reasons that shippers seek FMLM data is to have a better sense of the overall service situation and the likelihood that it will improve any time soon.

9. What remedies are available to you?

In general, as explained above, little in the way of effective remedies is available. The lack of leverage and the railroads' market power means that the contracts and other arrangements generally offer little in the way of legal remedies. An unreasonable practice complaint, or injunctive relief request are possible options, but only in particularly difficult circumstances.

Moreover, the railroads pursuit of efficiency, or at least lower ratios, leaves them without any ability to improve service in the short-run, or with an adverse trade-off in terms of further impairing service for others. It would be helpful if the common carrier obligation were fleshed out and/or if the Board imposed meaningful penalties or other consequences on railroads that provide poor, inadequate, and/or unreliable service.

B. Design of Metrics

1. What, if any, existing information or metrics (collected by the Board or maintained by carriers) facilitate an understanding of the issue?

The reason that the Shipper Group submitted its August 30 letter to the Board is that the data currently reported in EP 724 (Sub-No. 4) does not separately include any FMLM data, except to the extent that unit train metrics necessarily incorporate (or should incorporate) FMLM data as part of the origin to destination transit time, and intermodal trains do not incorporate FMLM data because another mode, typically truck, handles any non-rail segments where the FMLM service component occurs.⁵

The absence of the data means that shippers and the Board lack important visibility into the operation of the networks and the service that they do, or do not, provide on an end-to-end basis. Simply stated, the Board and shippers have a blind spot regarding how long it takes non-unit train, non-intermodal freight to move from origin to destination, whether such deliveries are being made on-time or not, and whether the transit time is getting better, worse, or remaining stable. This gap in knowledge is a

⁵ Yet, those explanations incorporate some oversimplification. Unit trains are subject to FMLM-like delays, *e.g.*, when a double or combination unit train needs to be formed or disassociated or when unit a unit train is interchanged. Similarly, intermodal containers may sit in a railroad's intermodal yard waiting for pickup by a motor carrier for an extended period, something that appears to happen with increasing frequency lately. The calculations for containers presumably track only the time between when a container leaves the initial rail yard and reaches the destination yard, but further confirmation or clarification would be useful.

massive one, which is made more serious by the shift from unit train to manifest service that is part of at least some carriers' implementation of PSR.

It stands to reason that carriers have and utilize that data, particularly insofar as their compensation is tied to actual deliveries, some segments of shippers are able to negotiate or demand meaningful service requirements, and the railroads have their own incentives to conduct FMLM activities effectively or at least efficiently.

Significantly, some of the carriers do publicly provide trip plan compliance data. BNSF's efforts may be the most extensive or granular, although it is still not very detailed. BNSF provides a weekly measure of "Local Service" on its website, expressed as a "percentage measuring adherence to customers' first/last mile service plan," with a comparison of the "[p]ercent change versus prior week" and "versus prior month average." BNSF provides weekly information for intermodal, industrial products, coal, and automotive, although the data appears to be identical for each traffic segment.⁶ It is unclear, at least to Shipper Associations, whether the metric reflects just FMLM or end-to-end specifically (the later seems more likely), how the customer plan is made, and how often it is adjusted, how it is weighted, etc. Also, the data is not broken down regionally. Nonetheless, the depiction of the data indicates that the carriers do maintain and have the ability to track the raw data and thus have the capability to present it and utilize it in different ways.

⁶ *E.g.*, <https://www.bnsf.com/news-media/customer-notifications/notification.page?notId=coal-network-update-for-friday-november-19-2021> (showing 88.7%).

UP also includes a figure in its weekly status of the railroad for “Manifest trip plan compliance (on-time performance).”⁷ CSXT also includes carload and intermodal trip plan performance figures in its quarterly financial reports, where compliance represents the percent of cars and carloads that arrive at or ahead of the original estimate.⁸

It appears that NS once maintained a Service Delivery Index (“SDI”) as a more customer-based alternative to trip plan compliance.⁹ More recently, however, NS appears to have abandoned that metric, apparently because it was not managing to it, in order to focus on car velocity instead.¹⁰

In short, the data is being measured, but it is being depicted with very little transparency or detail. That said, the levels of trip plan compliance that the carriers are achieving for non-intermodal traffic appear highly problematic.

2. What new information or metrics would illuminate the issue? The Board asks for specificity in any suggestions, including specific definitions for different types of services (e.g., transportation involving one carrier vs. multiple carriers) and facilities (e.g., open- vs. closed-gate).

⁷ *E.g.*, <https://www.up.com/customers/announcements/customernews/generalannouncements/CN2021-65.html> (showing a figure of 56%, as contrasted with an intermodal trip compliance of 78%, for the November 23, 2021 posting).

⁸ *E.g.*, https://s2.q4cdn.com/859568992/files/doc_financials/2021/q3/Q3-2021-QFR-Final.pdf (showing 68% for carload and 88% for intermodal for 3Q21).

⁹ See <https://www.supplychaindive.com/news/norfolk-southern-psr-transition/548231/>.

¹⁰ See [1q2021 transcript.pdf \(nscorp.com\)](#) (EVP and COO Sanborn responding to Credit Suisse Analyst Landry at 12).

First, Shipper Associations submit that more transparency should be provided regarding the trip plan compliance data that the carriers, or at least some of them, make available. In particular, the definitions of compliance and noncompliance should be made explicit, and the data should be broken down beyond carload traffic, and should include manifest traffic explicitly (as UP may already do). Weighting should also be made explicit, particularly as the traffic mix is likely to change at least seasonally.

Second, the data should be provided weekly and over time.

Third, the FMLM component should be broken out specifically, rather than grouped together with the origin-destination data, although the origin-destination data should be retained.

Fourth, data should be provided about the amount of time, or percentage of time, that the traffic failed to meet the standard, for example, whether it was one minute, one hour, or one day. At some point, it may also be useful to consider to what extent deliveries were made early since an early delivery can be just as problematic as a late delivery, although that is not the most pressing issue in the current environment. Nonetheless, an issue exists whether the compliance threshold was set too generously.

Fifth, and related, data should be provided for the average time or speed for FMLM. Shippers and others are rightly interested in fluidity as well as reliability. Indeed, on-time compliance may be a function of having set an excessively low standard for compliance.

Sixth, it would be useful to subdivide the traffic by freight type or category in some way. This breakdown would be particularly useful for being able to adjust in changes in the aggregate traffic mix by season and/or by year.

Seventh, in addition to providing averages, it would also be useful to provide a standard deviation or some other measure of variance. A violin plot is also a possibility, but seems unneeded at the outset. When averages are used, the basis of averaging should be made explicit.

Eighth, in addition to the carrier-wide figure, some measure of geographical breakdown would be useful as well for the types of reasons previously noted. An overall average may not be informative for individual regions, individual regions may be influenced by different transitory factors such as weather, and use of an aggregate average may conceal or exaggerate such influences, particularly in the context of changes in the traffic mix. Discussions would be useful to determine what is the number and of locations to be aggregated for each carrier and how to account for geographic and volume disparities.

With respect to interchanged traffic, it should be much more feasible and useful to track each carrier individually, rather than attempt to require two or more carriers to combine their data for a specific category of movements. At the same time, it may prove useful to develop a separate metric for interchanges so that the data does not fall into the equivalent of a crack or a seam between two railroads. At least one Shipper Association member has experienced substantial delays while its trains sit in interchange.

In addition, the times spent in interchange will not necessarily be representative of more typical FMLM activities, and vice versa.

For open-gate traffic, separate reporting should not be needed. For closed-gate traffic, a metric for the gap between (a) when the car is ordered and the next available slot, and (b) when the car is actually delivered (or removed) may prove to be useful. At the same time, it should be recognized that bunching by the carrier may prevent the shipper from being able to order in cars that are ostensibly available.

3. How and at what level should any metrics be reported (individual shipper, local, regional, or national)?

Shipper Associations do not believe that data for the individual shipper is practicable or particularly useful for broad reporting purposes. Shippers typically are aware of their own service experience and can typically access information about their individual movements through the carrier's customer interface.

However, surprisingly, many, even most, shippers are unaware of what the railroads utilize as the actual trip plan or cycle time standard for the shipper's individual shipments, *i.e.*, the baseline that the railroads utilize for assessing trip plan compliance. As has been stated, "precision" and "scheduled" railroading is misnomer and a misrepresentation of what PSR causes in actual practice. If there is no actual trip plan or cycle time schedule, how does a railroad or customer know if its service is precise? The reason that railroads generally refrain from providing such information is obvious: not disclosing the standard prevents the railroads from being held accountable for their

actions, and providing such information would highlight the extent to which their service is anything but scheduled and precise.

Accordingly, a railroad should be required to disclose its trip plan or cycle time standard upon request as part of its common carrier obligation, and also provide data regarding its actual performance under that plan to the affected shipper. A carrier that refuses to provide such information should be presumed to be in violation of its common carrier obligation.

What the customer cannot ascertain is FMLM and related information involving other shippers, and this is the data requested, particularly to ascertain the extent to which the individual shipper's experience is typical, whether it is likely to improve or deteriorate, whether service and resources are being diverted to other places or types of service, whether the carrier is experiencing broader problems, etc. As explained above, the data should be provided for the carrier as a whole, for various categories of traffic, and for various regions and potentially other local locations.

4. Should metrics only measure FMLM service, or should additional metrics more broadly measure service that may relate to or involve FMLM service, such as metrics on car trip plan compliance? Who would use any such information or measurements, and how?

As explained above, there is value in measuring and reporting both FMLM separately and also total trip data, both in total and relative to the trip plan target. The FMLM is valuable for determining the extent to which the problems are, or are not, confined to the first-mile and last-mile. The overall trip plan is useful for measuring the

end-to-end performance. Simply measuring FMLM and not the total trip would present problems in terms of matching the data to that reported for terminals.

The data would be of immediate value to help shippers benchmark the service they receive against both local performance and performance generally. Shippers would have some insight into whether good or bad service was temporary or likely to persist, which would be valuable for planning operations (or lack thereof) and considering alternatives. The information would be useful to the Board for similar reasons and for ascertaining compliance with the common carrier obligation.

The information would also benefit the railroads themselves. To the extent they are providing quality service, they should be able to attract additional business and/or obtain premium pricing for premium service.¹¹ For example, if two railroads are competing to serve a movement, the carrier with superior FMLM service and trip plan compliance could use that as a factor to help win the business. Conversely, a carrier with inferior metrics might discount its rates to obtain or retain business. A carrier with inferior metrics would also know where it needed to be able to demonstrate improvement. The data would thus help to make transportation more efficient.

5. What are the specific benefits, if any, that would arise from the use of any suggested metrics?

¹¹ *E.g.*, <https://www.trains.com/trn/news-reviews/news-wire/the-future-of-the-rail-industry-is-up-for-grabs-consultant-says/> (Oliver Wyman partner Adriene Bailey explaining at RailTrends 2021 that growth requires a reduced focus on the operating ratio and more focus on reliability and customer friendliness).

The specific benefits of the data in the context of who would use the information and how are addressed immediately above. In a nutshell, shippers/receivers, the Board and the railroads themselves would all have improved visibility as to the level of service being provided, its compliance with targets (however they are set), whether the service is changing and how, and whether service in an individual instance is representative of larger trends. The data is useful for planning and operations of both shippers and railroads, for investors to know how to allocate their funds, and for the Board to discharge its responsibilities.

6. Would reports to the Board, shipper surveys, reports directly to individual shippers, or some other type of information be helpful to clarify the issue?

What is most needed is for the railroads to report the FMLM and trip plan compliance data directly to the Board on a weekly basis, which should then post the information so that it will be available to the public, as is currently done with other EP 724 (Sub-No. 4) data.

Otherwise, shipper surveys have the potential to supplement the railroad data and put it into context. In that regard, FRCA and NCTA have worked with their members and others to compile such data and present it in discussions with Board members and at presentations in more public forums such as meetings of the Board's Rail Energy Transportation Advisory Committee ("RETAC"). Such data is at least illuminating, although it is often a challenge to maintain consistent participation and data consistency, particularly since the information is provided individually and voluntarily and there are also concerns about preserving confidentiality, which requires aggregation

and anonymity. In contrast, the railroads are common carriers that are subject to direct Board regulation, including reporting requirements, as well as to the duty to comply with the common carrier obligation.

C. Carrier data tracking

1. What data do Class I carriers track that are relevant to FMLM service?

This question is best addressed directly by the carriers. However, the Class I carriers do, as addressed above, track enough data in order to comply with the EP 724 (Sub-No. 4) requirements, and it appears that they also track enough data to be able to calculate trip plan/cycle time compliance.

The ability of Railinc to develop its Advanced ETA tool indicates that full data regarding car and train movements does exist and is accessible. It is very difficult to imagine that the universe of available data does not encompass FMLM service. Logically, the railroads must have access to that data in order to be able to organize and conduct their local operations.

2. What aspects of these data do Class I carriers make available to their customers?

As discussed above, the reality is that railroads generally do not make information about their general or local operations available to shippers, including the railroads' own internal trip plan for the individual shipper. The lack of information is what led to the adoption of the performance data reporting in EP 724 (Sub-No. 4). As further noted above, some of the carriers do make trip compliance plan figures available,

but only at a highly aggregated level. That data has limited utility for the individual shipper.

3. To the extent that Class I carriers collect certain information, what uniformity issues may exist related to that data that may affect reporting to the Board?

Uniformity among carriers may be difficult to achieve, but appears unimportant, provided that the basis for reporting the data is made clear and explicit for each carrier. (On the other hand, the Railinc Advanced ETA appears to utilize AEI data from all of the carriers, which may support compilation of equivalent and consistent FMLM data across all nodes of all carriers.) Geography, topography, and numerous other system and local factors are going to mean that an hour delay at one location on one carrier may not be fully comparable to an hour delay at another location on the same or another carrier. Furthermore, carriers may differ in how they formulate their targets for trip plan compliance. Not all targets need be the same, especially as some shippers may be more willing to pay for faster or more on-time service, even though carriers have sometimes contended that their network operations preclude them from providing preferential service to favored customers. What is more important will be the ability to ascertain if service is improving, worsening, or remaining stable, particularly for a shipper that seeks to assess the impact of service on output or whether to pursue alternatives.

D. Trade-Offs

1. Factoring in the information that carriers already track, what additional burden would be associated with providing any suggested information or measurements?

While only the carriers know exactly what data they already track, the additional burden of tracking and reporting the additional data should not be disproportionate. In order to track trip plan compliance, the railroads must necessarily collect data on the total transit time, and they already report time between terminals. Of necessity, the first-mile/last-mile metrics must already be collected to gauge trip plan compliance. Moreover, it is very difficult to imagine that they could be running their networks and terminals effectively without having such information at their disposal, especially as they have promised that the implementation of PSR actually means that they will provide “scheduled” and “precis[e]” service.

The additional burden, if any, should not be significant, especially compared to the disruption that the adoption of PSR inflicted, and continues to inflict, on many shippers.

2. If aggregated reports are suggested, what, if any, are the drawbacks of aggregation?

The drawback of aggregation is that the reporting becomes less representative of individual or even regional experience and thus considerably less useful. Accordingly, Shipper Associations suggest a combination of carrier-wide and more local data.

3. If individual reports directly to shippers are suggested, what, if any, are the drawbacks of such approach, particularly in comparison to reporting directly to the Board, as was required in United States Rail Service Issues—Performance Data Reporting, Docket No. EP 724?

As noted, Shipper Associations believe that it would be better to report the information directly to the Board, so as to facilitate consistency (subject to individual carrier differences in reporting), accountability, and accessibility.

4. How should the Board consider relative burden based on the type of carrier involved in the transportation (e.g., Class II or III railroad)?

Shipper Associations believe that it is most important to begin with the Class I railroads since they directly handle the overwhelming portion of traffic originations and deliveries, meaning the first miles and the last miles. For Class II and Class III carriers, it is appropriate to begin with a single aggregate figure for trip plan compliance, with some opportunity for carriers to seek an exemption and for shippers to seek greater detail. Class II and III carriers are supposed to be more customer-oriented, and their activities consist more of FMLM activities to begin with, but shippers have definitely experienced problems with Class II and Class III carriers.¹² Class II carriers are sufficiently large to have the resources to be able to provide the information, and many Class III organizations are part of larger, sometimes very large, railroad families, which should also have the capability to provide the needed information.

¹² *E.g., Central Valley Ag Grinding v. Modesto & Empire Traction Co.*, NOR 42159 (STB served June 12, 2018) (enjoining a Class III carrier from conditioning train switching and interchange (FMLM) services on prepayment).

There may be some individual Class II or Class III carriers for which the information is not needed or readily available or may represent a disproportionate burden. In such cases, the carrier should be allowed to apply for an individual exemption, to which other parties would have an opportunity to reply. This waiver approach is more appropriate than a blanket exclusion, especially as Class II and Class III carriers are also subject to the common carrier obligation to provide service upon reasonable request.

IV. CONCLUSION

Shipper Associations commend the Board for issuing the Notice on this important and all too timely subject. Shipper Associations urge the Board to proceed to propose and adopt a FMLM component as part of the EP 724 (Sub-No. 4) service data reporting in accordance with the comments presented above.

f

Respectfully submitted,

Bette Whalen
President, Western Coal Traffic League
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Ann Warner
Spokesperson, Freight Rail Customer
Alliance
Ann Warner LLC
300 New Jersey Avenue, Suite #900
Washington, D.C. 20001

John Ward
Executive Director
National Coal Transportation Association
1616 17th St., Suite 266
Denver, CO 80202

Philip K. Bell
President
Steel Manufacturers Association
1150 Connecticut Ave NW # 1125,
Washington, DC 20036

Portland Cement Association
Katy Hartnett
Director, Government Affairs
200 Massachusetts Ave., N.W., Suite 200
Washington, D.C. 20001

William L. Slover
/s/ Robert D. Rosenberg
Peter A. Pfohl
Slover & Loftus LLP
224 Seventeenth Street, N.W.
Washington, D.C. 20036
202.347.7170

Attorneys for the Western Coal Traffic
League, Freight Rail Customer Alliance,
National Coal Transportation Association,
Portland Cement Association, and Steel
Manufacturers Association

Dated: December 17, 2021