

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

303944

Docket No. EP -767

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FIRST MILE/LAST MILE SERVICE

RAIL UNION REPLY COMMENTS

The American Train Dispatchers Association, Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; International Association of Sheet Metal, Air, Rail and Transportation Workers-Transportation Division and National Conference of Firemen and Oilers, 32BJ/SEIU (“Unions”) submit these Reply Comments in response to the Board’s solicitation of comments and information regarding the quality and reliability of rail carrier First Mile/Last Mile service (“FMLM”), and to reply to comments submitted by the Association of American Railroads (“AAR”) and other Class I carriers.

1. AAR and BNSF assert that First Mile/Last Mile performance is affected by many factors outside the carriers’ control (“external factors”) so there is no real value in collecting FM/LM data. Among the external factors cited by AAR and BNSF are: a) that the carriers are interconnected with other rail carriers and others modes of transportation, so the FM/LM performance of individual carriers is affected by the rest of the transportation network, as well as by non-transportation events ; b) the railroads operate an “outdoor plant”, so their FM/LM performance is affected by weather and climate events; and c) carriers have to coordinate with shippers and receivers. AAR Comments at 2-3, BNSF Comments at 11-12.

These are specious arguments for opposing collection and reporting of FM/LM data. All of the cited external factors are inherent in railroading; and have been for over 150 years. And all of them are predictable aspects of railroading.

It is the responsibility of the carriers to plan for occasional events such as hurricanes and blizzards, and significant swings in the international economy; as well as for regular events such as heavy rains and run-off in the Spring, high heat and track buckling in the Summer, sustained cold and ice affecting switches in the Winter, and changes in seasonal demand such as harvest time in the Fall and demand for petroleum products in the Winter. That the railroads cite a fundamental aspect of their operations- that it is outdoors- as a reason for not collecting FM/LM data is disingenuous and insulting to the Board and other industry stakeholders.

Similarly, occasional problems with connecting carriers and connecting with other modes of transportation are also a fundamental part of the business and should be anticipated in any reasonable and responsible business plan. Likewise, that delays or issues at one shipper or receiver may affect service to other shippers is simply a fact of life in the industry. In essence, AAR and BNSF argue that FM/LM data should not be collected because it will reflect the consequences of reasonably predictable or anticipatable events that have always affected railroad performance. And, if a delay or other problem is caused by the shipper asserting inadequate service, that would be a defense to such a claim.

That external events or other actors can affect a railroad's performance has been true for as long as there have been railroads, and as long as there has been a common carrier obligation. What is new, is the comparatively high level of customer complaints regarding the service provided by the Class I railroads. And that comparatively high level of customer complaints has coincided with the implementation of the new ruthless cost-cutting business model and so-called Precision Scheduled Railroading ("PSR"), and the drive to reduce operating ratios to the sole benefit of investors. But, as common carriers, the railroads owe a duty to provide adequate

service to their customers. To assert that pick-up and delivery performance that would be measured by collection of FM/LM data would be irrelevant because factors external to the railroads affect that performance is a baseless contention because most of those factors are simply typical or reasonably foreseeable, and are inherent elements of railroading and performance as a common carrier.

It is up to the railroads as common carriers to plan for regular and reasonably foreseeable problems; to build resiliency and cushions into their operations in order to provide adequate service. One component of proper planning and ensuring resiliency is having a work force sized to be sufficient not only for when everything is going well, but also when frequently encountered, and infrequent but anticipatable, external factors come into play. That means having enough Signalmen to clear snow and ice from switches and to respond to malfunctioning crossings; enough Maintenance of Way employees to respond to right of way washouts, track obstructions and heat-buckled rails; enough shopcraft workers to do complete inspections and maintenance of equipment, especially when fleets of locomotives and cars have been reduced and much equipment has been mothballed; enough Dispatchers to handle all train movements, particularly as the railroads run longer trains and pack more cars into the same physical space; and enough operating employees so when there are delays which cause train crews to reach their Hours of Service limits, there are backup crews that can continue to move the trains to customers, and enough yard and local crews to bring cars from terminals to shippers. Some of the largest reductions of rail employment have been among yard and local crew employees and extra boards- the very employees likely to be most involved in service for the first and last miles. Declaration of SMART TD National Legislative Director Gregory Hynes ¶¶3-5. But the Class I

railroads have deliberately reduced employment. They should not be heard to complain about being assessed on FM/LM performance because external factors can affect that performance, when they have intentionally hindered their ability to respond to those external factors by reducing the work force that could mitigate the effects of the elements and actions of others.

2. AAR asserts that the Board has not identified an actual regulatory problem; that it has not described particular aspects of FM/LM service that it is concerned about (e.g. spotting inbound cars, pulling outbound cars, yard crew building); AAR claims the Board has just cited “vague” service concerns. AAR at 4-5.

The Board has explained that it has received many complaints about service from shippers and shipper associations. Apparently there has been a significant increase in those complaints and that was the impetus for this proceeding. As the regulatory agency for railroads and shippers it is entirely appropriate for the Board to investigate such complaints. The railroads’ dismissal of the mounting shipper complaints as “vague” is indicative of a cavalier attitude toward their customers and their statutory obligations.

Assessing the utility of collection of FM/LM data makes sense because the ultimate product “sold” by the railroads, and “purchased” by the shippers, is the actual pickup and delivery of cars. The railroads often deflect service complaints by citing data on system velocity and dwell time. But speed of movement between terminals does not measure performance for the shippers because transit time between terminals reveals nothing about actual pickup and delivery of cars. And dwell time can be, and is, manipulated by movement of cars out of yards and onto rail lines (so they are no longer counted as in terminals), but movement of cars out of yards is not a measure of actual service to the shippers. See Hynes Declaration ¶6.

3. BNSF contends that resolution of the alleged service problems should be left to the market, not handled by regulatory mandates. BNSF at 2, 14.

This contention, frequently advanced by the railroads (*e.g.* AAR letter to Chairman Oberman dated October 3, 2021), ignores some very basic characteristics of the railroad industry and the environment in which railroads operate. The Class I railroads are not actors in a free and open market. Today's Class I's are duopolies that exist as a result of ICC/STB approvals of consolidations of previously separate carriers. And creation or extension of rail lines comes at a significant capital expense. Additionally, entry to and exit from the industry requires Board approval or exemption. Furthermore, the merger and/or control transactions that created every one of the Class I railroads required ICC or STB approval based on findings that the transactions were consistent with the public interest. Accordingly, to assert that the Board has no place in assessing whether the public interest is still being served by the railroads that resulted from those transactions, when the railroads are exploiting their size and lack of competition that flowed from the authorized transactions, is to undercut the reasoning that was the basis for approval of those transactions.

Additionally, ICC/STB approval of those transactions came with exemption from anti-trust law and all other laws (which included immunity from Railway Labor Act claims) as “necessary” to the ‘carry[ing] out’ of those transactions (49 U.S.C. §11321), with the “carrying-out” and “necessity” broadly construed. *Norfolk & Western Ry v American Trains Dispatchers Ass’n*, 49 U.S. 117, 133 (1991); *American Train Dispatchers Ass’n v. ICC*, 26 F.3d 1157, 1164-65 (D.C. Cir. 1994); *United Transp. Union v. STB*, 108 F.3d 1425, 1430-31 (D.C. Cir. 1997). Simply put, the current Class I railroads would never have been allowed to come into existence (and never would have been able to ignore anti-trust restrictions and Railway Labor Act

requirements) if the railroad industry existed in the sort of open market environment the railroads pretend they are part of when they protest Board investigation of the quality of the service they provide. In asserting that the Board should defer to market-based solutions, the railroads deny the reality that they are government sanctioned duopolies (and to some extent monopolies) that are effectively immune from many legal challenges and effectively impervious to market-based challenges and corrections. The railroads want the advantages of government permitted consolidation that would not have been allowed in most other industries, and post-transaction immunity from anti-trust claims and claims under other laws, but they then want to cabin the role of the agency that allowed those consolidations and conferred on them such immunity. Having reaped the benefits of Board approval of their creation, the railroads are in no position to tell the Board to keep its nose out of their businesses.

4. The railroads say that aggregated FM/LM data is not useful, that the issues for one shipper are not necessarily related to the issues for another shipper; and that FM/LM issues are inherently customer-specific. AAR at 6-7, BNSF at 11-12, CN at 13, CSXT at 2, NSR at 9-11.

Nearly all the Class I's dismiss the need for collection of FM/LM data by asserting that their FM/LM interactions with each shipper are specific to that shipper, so shipper allegations of FM/LM problems are not appropriately addressed by a broad-based solution like collection, aggregation and analysis of FM/LM data on a carrier basis. But this argument makes unfounded assumptions about the nature of the FM/LM problems.

The carriers contend that there are no systemic FM/LM issues, and that each shipper complaint should be separately analyzed. However, the only way to tell whether the service problems alleged by shippers and shipper associations are systemic or shipper specific is to

collect system information. Furthermore, many shippers contend that their service issues began with, or were exacerbated by, the implementation of so-called Precision Scheduled railroading and the new cost-cutting business model. If many shippers across various systems are experiencing similar problems, then that suggests that the service issues are not shipper-specific but a result of carrier policy decisions. And, if the service complaints are related to the railroads' slashing of their payrolls in recent years, then collection of data on a carrier basis will be relevant to assessment of the service complaints, since the reductions of employment have been driven by decisions at the headquarters of the carriers, not at the level of particular divisions. *See e.g.* J.J Ruest statement following termination of CN bid for KCS, *Toronto Globe and Mail* September 17, 2021; *Progressive Railroading*, September 13, 2017- "CSX Cuts Workforce 2700 Jobs So Far in 2017. In urging the Board not to collect and examine aggregated data, the carriers are attempting to artificially constrain the scope of the inquiry, effectively precluding any determination that there are systemic service problems.

5. AAR and NSR argue that the Board must make a cost/benefit assessment in deciding whether to collect FM/LM data; and they claim that such a requirement would be costly, create administrative burdens, and necessitate a lot of unproductive paperwork. AAR at 9-10, NSR at 12-13.

The railroads act as if they are still keeping track of cars with paper and pencil; and that it will take an army of clerks to organize the information for meaningful analysis. Having eliminated tens of thousands of clerk jobs over the last three decades, and having replaced those clerks with ever more sophisticated computers, the assertions of administrative burdens and costs should be given little weight. The railroads collect and manipulate all sorts of data on service (how do they calculate the system velocity and dwell time data they tout if they are not collecting

data on where cars are at what times?). In fact, the railroads know when cars are picked up and delivered because that data is entered by railroad employees. Hynes Declaration ¶ 2. Indeed, one argument the railroads make against the collection of FM/LM data is that they all have monitoring tools by which shippers can tell where trains are at any given time (BNSF at 3-10, CN at 3-12, CSXT at 2-8, and NSR at 1-8). If these programs are as informative and easy to use as the railroads claim, then it should not be burdensome to use those programs to provide the FM/LM data that the shippers seek.

And the railroads ignore the benefits side of the costs-benefits scale. Since the product that the railroads “sell” and that the shippers “buy” is pickup and delivery of rail cars, collection of data on when cars are actually picked up and delivered in relation to when they were supposed to be picked up or delivered goes to the very essence of the product; and the benefit of having that information is substantial as it is essential to assessing the quality of service.

The railroads cost/benefits argument should be discounted since it exaggerates the costs and downplays the obvious benefits of collection of this data.

6. The railroads contend that collection of FM/LM data is unnecessary because the railroads already have software that allows shippers to know the progress of the trains that will serve their facilities. BNSF at 3-10, CN at 3-12, CSXT at 2-8, and NSR at 1-8.

As is noted above, the assertion that all necessary data are available to shippers via the carriers’ software undercuts the assertion that collection of FM/LM data would be costly and burdensome. Moreover, knowing where a train is in real time is not knowledge of why the train is where it is. Learning a train is 8 hours away when it was supposed to be at a shipper’s facility does not explain why the train is late. Additionally, random checks on status of trains does not even provide aggregated data for the individual shipper. Also the argument that provision of

FM/LM information to the Board is not necessary because individual shippers can learn about the trains servicing them through the carriers' software programs has the same infirmities as the arguments discussed in points 3 and 4 above-- the carriers erroneously assume there is no legitimate role for the Board in collecting data that can provide information relevant to service complaints; and they falsely assert that there is no need for the Board to see aggregated service data to assess service issues on carrier basis.

7. BNSF argues that FM/LM performance is not a legitimate basis for assessing compliance with the common carrier obligation; and that breach of the common carrier obligation must be assessed on an individual shipper basis. BNSF at 13.

Apparently attempting to preemptively preclude use of FM/LM data to assess service, BNSF argues that such data is irrelevant to determining whether a carrier is in compliance with its common carrier obligation. This argument is absurd.

Actual pickup and delivery of cars within a reasonable time frame relative to what was promised is necessarily a key factor in assessing whether a railroad is complying with its common carrier obligation. It matters not to a shipper that a train is speeding over main lines if the train does actually arrive on time. No one cares about good system velocity if pickup or delivery is substantially delayed. And BNSF cites no authority for the assertion that a carrier's compliance with its common carrier obligation may only be determined on a specific shipper basis (BNSF cites a case in which the Board stated that it tries to avoid micro-managing a carrier's operational decisions; that statement does not support the argument advanced by BNSF).

The fundamental problem with BNSF's contention is that there can be (and indeed have been) decisions about service made at railroad headquarters levels that adversely affect service-

such as cutting the number of workers who actually provide the service on a system- wide basis, mothballing or selling equipment that is used to provide the service, and closing and selling yards that are integral to FM/LM service. A fact-specific inquiry into problems experienced by an individual shipper may reveal actions or affirmative decisions relative to that shipper that indicate breach of the common carrier obligation. But the problems of that shipper may be the result of system-wide policies or programs such as PSR and the ruthless cost-cutting business model. Since the decisions were deliberate and systemic, they might support a finding of a breach of the common carrier obligation; whereas the facts regarding an individual shipper may show only a frustrating sequence seemingly unrelated incidents of poor service. Collection of FM/LM data can be a powerful tool for shippers and the Board in common carrier obligation cases; and BNSF's objections to collection of that data on that basis are actually arguments in favor of its collection.

For the foregoing reasons, and the reasons stated in the Unions original comments, the Unions support a Board requirement that rail carriers report FMLM data.

Respectfully submitted,

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February 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served copies of the foregoing Rail Union Reply Comments by First Class Mail to the offices all Parties of Record in this Docket.

Date: February 17, 2021

/s/Richard S. Edelman
Richard S. Edelman

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FIRST MILE/LAST MILE SERVICE

DECLARATION OF GREGORY HYNES

I, Gregory Hynes, declare under penalty of perjury pursuant to 28 U.S.C. §1746, that the following is true and correct.

1. I am the National Legislative Director of the International Association of Sheet Metal, Rail, Air and Transportation Workers Transportation Division (“SMART TD”) which represents train and engine service employees of the Class I railroads including conductors, engineers, trainmen, yardmen and yardmasters. Before holding full-time positions with the Union, I was a conductor for the BNSF for 14 years. In this declaration, I will describe various positions held by employees represented by SMART TD who have historically been heavily involved in pickup of cars from, and delivery of cars to shippers, which is essentially First Mile/Last Mile (“FM/LM) service. I will also explain some basic facts about yard operations and local train movements important to FM/LM service; and I will respond to some of the points made in comments filed by railroads in this proceeding.

2. Although the railroads contend that they do not maintain FM/LM data or that it would be burdensome for them to collect and provide that data, the railroads collect such data in the regular course of business. All the major Class I's report the set outs or pick-ups from customers via electronic means (Zebra phone on UP and CN, DWORS/OBWO [via ipad] on CSXT, MTR or Mobile Train Reporting via an Ipad on BNSF and NS, and the AIR 2.0 or Automated Inventory Reporting via Ipad tablet on the CP).

3. Some of the largest cuts in rail employment have been to employees who have performed work most directly involved in FM/LM service: yard crews, local crews, yard masters and extra board crews. Yard crews and yardmasters are directly involved in assembly of trains and movement of trains out of terminals. Historically, yard crews, local crews and yardmasters have been directly involved in pickup and delivery of cars. Generally speaking, pre-PSR, when through/over the road trains arrived in a terminal, it was the yard crews that broke up those trains and either delivered cars to yards in the terminal or assembled local trains for delivery to facilities outside the terminal by local crews. The movements were overseen by a yard master. Similarly, pre-PSR, yard crews and local crews picked up cars from shippers and assembled them into through/over the road trains under the supervision of a yardmaster. And when the amount of work exceeded the capacity of the assigned workers, or if assigned crews were at or near their Hours of Service limits, extra board employees could fill in to handle pickups and delivery

4. More specifically:

Yardmasters are responsible for coordinating safe movements within a rail yard. Yardmasters are an essential part in the planning and coordinating of service with customers according to their operating needs. This is accomplished with continual communication with not only the customers and railroad management, but with the actual train crews that service the customers daily. Railroads are currently attempting to combine or abolish any and all yardmaster positions as possible.

Yard switching crews are responsible for executing the directives received from the Yardmaster to include the safe movement of cars into the proper classification tracks and servicing local customers within the immediate yard or terminal areas. The Yardmaster and the yard switching crews work in unison to ensure that customers are serviced in a timely manner all the while ensuring that safety is a top priority.

Local crews are responsible for moving rail cars to and from the customer industries (shippers) that are on the main lines outside of yard terminals, the safety inspection of cars being picked up from customers, and the reporting of activities by electronic tablet in real time at each customer.

Extra board employees are on standby to supplement any of the crafts due to manpower related issues like hours of service, vacation or personal time off and when traffic has increased to the point there are no regular crews rested and available to handle the immediate work.

5. Since the implementation of the ruthless cost-cutting business model and PSR, the railroads have closed many yards and furloughed yardmasters, yard crew employees, local crews and nearly eliminated extra boards. Indeed, one of the goals of PSR is inflexible scheduling, so extra boards are not needed, and yard crews are needed less as over the road crews are assigned to pick up from and deliver to shippers. But this means that cars or a train may be in the vicinity of a shipper, but cars are not delivered or picked-up because the railroad does not have the yard or local crews to handle the pickup or make delivery and/or because the primary responsibility of over the road crews is long

distance movements, not local service. To the extent that over the road crews have been required to make pickups and deliveries in and near terminals that affects their long distance movements. Elimination and reduction of these yard, local and extra board jobs has directly impacted FM/LM service because these employees historically handled the pickups and deliveries in and near terminals.

6. Railroads focus on statistics concerning system velocity and dwell time in deflecting complaints about service. But system velocity is based on movements between terminals, so it is not a useful statistic for assessing actual service to shippers in the form of pickups and deliveries. And dwell time measures time in terminals or yards, it does not actually measure idle time for cars. Railroads sometimes move trains out of terminals and on to a rail line just to get them out of the yards (thereby avoiding tabulation in dwell time, but that does not mean the cars in the consist are actually moving (and moving productively). FM/LM data will more accurately portray the actual service that matters- pickup and delivery of cars.



February 14, 2022

Gregory Hynes