

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 770 (Sub No. 1)

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URGENT ISSUES IN FREIGHT RAIL SERVICE – RAILROAD REPORTING

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REPLY OF THE ASSOCIATION OF AMERICAN RAILROADS TO  
THE PETITION FOR RECONSIDERATION

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The Association of American Railroads (“AAR”) replies in opposition to the petition for reconsideration (“petition”) filed jointly by the Freight Rail Customer Alliance (“FRCA”) and National Coal Transportation Association (“NCTA”) (collectively “Petitioners”).<sup>1</sup> The Petitioners seek reconsideration of the Surface Transportation Board (“Board”) decision, served on January 31, 2024, discontinuing the required reporting of service performance data.<sup>2</sup> AAR opposes the petition as the standard for granting a petition for reconsideration has not been met.

Background

In April 2022, the Board held a two-day public hearing to discuss what it termed “recent rail service problems and recovery efforts.”<sup>3</sup> Following the hearing, on May 6, 2022, the Board

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<sup>1</sup> FRCA & NCTA, Petition for Reconsideration, *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub. No. 1) (Feb. 20, 2024). The petition was supported by the Private Railcar Food & Beverage Association (“PRFBA”) and a coalition of labor unions. See PRFBA Letter to Ms. Cynthia T. Brown, *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub. No. 1) (Feb. 26, 2024) (“PRFBA Letter”); Unions’ Comment in Support of Petition for Reconsideration, *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub. No. 1) (Feb. 26, 2024) (“Union Comment”).

<sup>2</sup> See *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1) (STB served Jan. 31, 2024) (“Jan. 2024 Decision”).

<sup>3</sup> See *Urgent Issues in Freight Rail Service*, EP 770 (STB served Apr. 7, 2022).

served a decision requiring all Class I railroads to submit weekly performance data and monthly employment data.<sup>4</sup> The decision recognized the temporary nature of the service concerns and, therefore, limited the reporting to a six-month period.<sup>5</sup> In addition, the Board required the four largest U.S.-based railroads to submit service recovery plans and service progress reports, as well as to participate in biweekly conference calls with Board staff to discuss service improvements.<sup>6</sup>

On October 28, 2022, the Board ordered an extension of “the current temporary reporting period,” while also requiring interim updates for the four largest U.S.-based railroads.<sup>7</sup> However, recognizing that the railroads’ data showed “some signs of service improvement,” the Board discontinued the biweekly conference calls with Board staff.<sup>8</sup> On May 2, 2023, the Board again recognized improvement in some areas, but noted that challenges remained.<sup>9</sup> As such, the Board continued the temporary reporting period for all Class Is, while also modifying some reporting requirements.<sup>10</sup>

In the Board’s most recent decision, on January 31, 2024, the Board explained that the data showed “service has improved since April 2022” and that the railroads were meeting a

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<sup>4</sup> See *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1) (STB served May 6, 2022) (“*May 2022 Decision*”).

<sup>5</sup> See *id.* at 5-7.

<sup>6</sup> See *id.* at 4-5.

<sup>7</sup> *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1), at 5, 17. (STB served Oct. 28, 2022) (“*Oct. 2022 Decision*”).

<sup>8</sup> *Id.* at 2, 5.

<sup>9</sup> See *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1), at 6 (STB served May 2, 2023) (“*May 2023 Decision*”).

<sup>10</sup> See *id.* at 6-8.

majority of their service targets.<sup>11</sup> Based on that service improvement, the Board did not extend the service data reporting. However, the Board elected to temporarily extend its collection of certain employment data.<sup>12</sup> The *Jan. 2024 Decision* followed the Board's pattern of assessing the data submitted to date, then discontinuing certain requirements, while continuing others.

### Argument

Preliminarily, 49 U.S.C. § 1322 provides the Board's statutory authority for reconsideration, while 49 C.F.R. § 1115.3 is the applicable regulation for the present action.<sup>13</sup> Under both § 1115.3 and § 1322, a party's petition must either present new evidence or substantially changed circumstances that would materially affect the case, or demonstrate material error in the prior decision.<sup>14</sup> Petitioners fail to meet this standard.<sup>15</sup> Accordingly, the Board should deny the petition for reconsideration.

#### 1. Petitioners Fail to Present New Evidence or Substantially Changed Circumstances.

Under the Board's standard, "new evidence must in fact be new; it is not new if the 'same substance' could have been brought before us previously."<sup>16</sup> Petitioners do not present

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<sup>11</sup> See *Jan. 2024 Decision* at 1-2.

<sup>12</sup> See *id.* at 2, 8-9.

<sup>13</sup> See 49 U.S.C. § 1322; 49 C.F.R. § 1115.3. Petitioners rely upon 49 C.F.R. § 1153.3(a), as the applicable authority for reconsideration. See Petition, at 1 ("Pursuant to 49 C.F.R. § 1153.3(a), the [Petitioners] jointly and respectfully seek reconsideration of the decision..."). Section 1153.3 is not an existing Board regulation. AAR also understands that 49 C.F.R. § 1110.10 provides for a petition for reconsideration, but that provision applies to a decision in a rulemaking proceeding and does not include a subsection (a); 49 C.F.R. 1115.3 applies to other decisions of the Board and does, however, contain a subsection (a).

<sup>14</sup> See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b).

<sup>15</sup> Neither Petitioners, PRFBA, nor the unions, allege any of their arguments meet the standard for a petition for reconsideration.

<sup>16</sup> *Tongue River R.R.--Construction & Operation--W. Alignment*, FD 30186 (Sub-No. 3), at 13 (STB served June 15, 2011) (citing *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989)).

any new evidence, much less evidence that is actually “new.” Indeed, Petitioners submit no evidence at all. Petitioners rehash their desire for more data and to make data reporting permanent—the very same requests that they made in their letter of November 17, 2022.<sup>17</sup>

The Board has previously addressed these requests, noting that, because the “data it is collecting is sufficient for its regulatory needs at this time, the Board declines to require additional data from Class I carriers. ... In addition, the Board intends to consider, via a rulemaking proceeding, whether to require additional permanent data reporting requirements for service performance metrics.”<sup>18</sup> Instead, Petitioners’ filing is merely a recitation of reasons why they would have preferred that the Board reached a different outcome, which is not grounds for reconsideration.<sup>19</sup>

Nor do the Petitioners allege any substantially changed circumstances to justify continued reporting. Petitioners do not even meaningfully dispute the Board’s statements that there has been an improvement in rail service. Instead of presenting any changed circumstances, Petitioners assert concerns about what *might* occur in the future regarding rail service.<sup>20</sup> The potential for changes in the future, however, do not amount to changed circumstances, much less those that the Board could find are “substantial.”

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<sup>17</sup> See FRCA and NCTA Letter to the Board, *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1), at 1-2 (STB served Nov. 17, 2022).

<sup>18</sup> *May 2023 Decision*, at 8, fn. 16.

<sup>19</sup> Petition, at 4.

<sup>20</sup> *Id.*, at 3-4. PRFBA makes vague, unsupported assertions that its members have experienced poor service in the last year. PRFBA Letter, at 2.

## 2. Petitioners Do Not Allege Material Error.

Petitioners do not make any substantiated claim of material error in the Board's decision. As noted, Petitioners and their supporters express a *desire* to have service data continued, lament that the Board discontinued the reporting without notice and comment, and claim in a footnote the Board "backtrack[ed]" on a prior statement "whether to require permanent data reporting requirements for service performance metrics."<sup>21</sup> Petitioners also allege that continuing the collection of such data will aid in identifying future service issues.<sup>22</sup> However, to allege material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error.<sup>23</sup> Moreover, the claim on reconsideration must be one that, if successful, "would mandate a different result."<sup>24</sup> Petitioners have alleged neither.

An unsubstantiated desire for continued data reporting does not rise to the level of a material error. The alleged grounds for reconsideration must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be

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<sup>21</sup> Petition, at 2-3, fn. 2. If the Petitioners would like the Board to collect certain data on a permanent basis, there is an administrative process for doing so, which has not been invoked here. Petitioners should not circumvent that process by requesting permanent reporting in this proceeding especially where the original data reporting requirement was not developed through notice and comment rulemaking.

<sup>22</sup> See *id.* at 4. As the Board has indicated in the past, relying on the most current information available, rather than speculation about what might occur in the future is not material error. See *Canadian Nat'l. Ry. Co.--Control--EJ&E West Co.*, FD 35087 (Sub No 8), at 13 (STB served Oct. 30, 2015).

<sup>23</sup> See *Canadian Pac. Ry.--Control--Dakota, Minn. & E. R.R.*, FD 35081, at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but instead restated arguments previously made and cited evidence previously submitted) ("*Canadian Pac. Ry.*").

<sup>24</sup> See *Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *Or. Int'l Port of Coos Bay--Feeder Line Application--Coos Bay Line of Cent. Or. & Pac. R.R.*, FD 35160, at 2 (STB served Mar. 12, 2009).

granted.<sup>25</sup> As outlined, from the outset of this proceeding the reporting of service data was always intended to be temporary.<sup>26</sup> The procedural history of the proceeding shows the Board has reduced or eliminated certain reporting requirements when it deemed doing so appropriate under the circumstances.<sup>27</sup> In its most recent decision, the Board explained that its analysis of all the data to date “indicates that the Four Carriers’ service performance levels have improved since the Board initiated this proceeding...[and] overall performance data shows improvement reflected in several key performance indicators, especially with regard to service.”<sup>28</sup> As such, the Board did not require continued submission of performance data. This was a decision within the Board’s discretion, and Petitioners’ desire to have data for their own benefit does not change that, much less rise to the level of a material error. As the Board has explained “summarily asking the Board to reweigh the evidence is not sufficient to justify overturning the decision under review.”<sup>29</sup>

Petitioners’ concern that the discontinuation of data reporting happened without notice and comment is also not material error. The data reporting in this matter was not implemented through notice and comment. Whether or not that procedural approach was correct—and AAR expressed concerns about it—discontinuing the data reporting, just like the Board’s prior

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<sup>25</sup> See *Montezuma Grain*, at 541-42; *R. J. Corman RR Property, LLC--Abandonment Exemption--In Scott, Campbell, and Anderson Counties, TN*, AB 1296-X, at 4-6 (STB served May 3, 2021) (“*R.J. Corman*”); *Canadian Nat’l Ry.--Control--EJ&E W. Co.*, FD 35087 (Sub-No. 8), at 4 (STB served Dec. 21, 2018).

<sup>26</sup> See *Oct. Decision*, at 17-18 (“Extension of *Temporary Reporting Period*”)(emphasis added); *May 2023 Decision*, at 6-7 (“Extension of *Temporary Reporting Period*”)(emphasis added); *Jan. 2024 Decision*, at 7-9 (“Extension of *Temporary Reporting Period*”)(emphasis added).

<sup>27</sup> See *supra* “Background” at 1-3.

<sup>28</sup> *Jan. 2024 Decision*, at 4, 7.

<sup>29</sup> *R.J. Corman*, at 5 (citing *Canadian Pac. Ry.*, at 4).

discontinuation of biweekly staff briefings, and discontinuation of other reporting requirements, should not now require notice and comment.<sup>30</sup> As Petitioners are aware, the appropriate place to require, or not require, data reporting are the current pending rulemaking proceedings that address various aspects of railroad reporting, each of which have undergone notice and comment.

Furthermore, the Board did not “backtrack” on any of its prior statements, much less in a manner that would amount to a material error.<sup>31</sup> The Board’s statement in a footnote of the *Jan. 2024 Decision* that it “may also consider whether it should undertake a rulemaking to make this [employment data] or a similar collection permanent” does not “backtrack” on its previous statement that it “intend[ed] to consider, via a rulemaking proceeding, whether to require permanent data reporting requirements for service performance metrics.”<sup>32</sup> Both of the Board’s statements can be true at the same time. Indeed, between the time of the *May 2023 Decision* and the *Jan. 2024 Decision*, the Board proposed in a separate rulemaking docket to make certain data reporting for service performance metrics permanent, and, in doing so, referenced

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<sup>30</sup> See AAR Letter to Ms. Cynthia T. Brown, *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1), at 1-3 (May 18, 2022); see also *Oct. 2022 Decision*, at 17-18 (extending employment and performance related data reporting but not continuing to require certain railroads to participate in biweekly briefings with Board staff); *May 2023 Decision*, at 6-7 (extending employment and performance related data reporting, while alleviating one railroad from the requirement to submit biweekly service reports); *Jan. 2024 Decision*, at 7-9 (directing the continued submission of employment-related data while not requiring the weekly submission of performance data).

<sup>31</sup> Petition, at 2, fn. 2.

<sup>32</sup> *Jan. 2024 Decision*, at 8, fn. 26; *May 2023 Decision*, at 7, fn. 16

the instant proceeding.<sup>33</sup> Petitioners' claims are not substantiated, as they even admit it is an "apparent backtracking."<sup>34</sup>

### Conclusion

The Board should deny the petition for reconsideration, as Petitioners have not met the standard for a petition for reconsideration.

Respectfully submitted,



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<sup>33</sup> See *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2), at 31-32 (STB served Sep. 7, 2023) (specifically stating that "[i]f this [service-related] data reporting requirement were to become permanent, there would no longer be a need to collect that particular data on a temporary basis in Docket No. EP 770 (Sub-No. 1)). It should also be noted that other service data regarding first-mile/last-mile service is under consideration in a separate docket as well. See *First Mile / Last Mile Serv.*, EP 767 (STB served Sep. 2, 2021).

<sup>34</sup> Petition, at 2, fn. 2 (emphasis added).