

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 767

FIRST-MILE / LAST-MILE SERVICE

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Reply Comments of BNSF Railway Company

I. Introduction & Summary

BNSF Railway Company submits these Reply Comments in response to the Surface Transportation Board's September 2, 2021 decision requesting comments on issues regarding first-mile/last-mile ("FMLM") service. *First-Mile/Last-Mile Serv.*, EP 767 (STB served Sept. 2, 2021). BNSF also supports and joins the Reply Comments of the Association of American Railroads regarding FMLM service.

The Opening Comments filed by shipper groups¹ in this proceeding discuss a wide range of topics, including many unrelated to FMLM service, but still fail to identify a problem that would be addressed by imposing new FMLM reporting requirements. There is no explanation for how the Board collecting additional data would have concrete benefits for shippers seeking to improve their supply chain logistics, especially considering that railroads like BNSF already provide shippers significant, detailed FMLM data. Those seeking new regulatory requirements also fail to

¹ The record citations used in this Reply Comment are to submissions made in this docket and identify shipper comments as follows: American Chemistry Council, American Fuel & Petrochemical Manufacturers, and Fertilizer Institute ("Shipper Associations"); National Industrial Transportation League ("NITL"); Diversified CPC International, Inc. ("Diversified CPC"); Private Railcar Food and Beverage Association ("PRFBA"); Western Coal Traffic League ("WCTL"); National Grain and Feed Association ("NGFA"); National Association of Chemical Distributors ("NACD"); Institute of Scrap Recycling Industries ("ISRI"); American Petroleum Institute ("API"); International Liquid Terminals Association ("ILTA"); and Industrial Minerals Association of North America ("IMA").

address the multitude of factors affecting FMLM service that would undermine the utility of any generalized data reports.

Providing no evidence that new data reporting would actually improve FMLM service, the Opening Comments from shipper groups instead confirm that the intended objective of new data reporting is to support future litigation over common carrier obligations. But those comments fail to explain how any aggregated FMLM data could be used to assess a specific railroad's compliance with its common carrier obligation to a specific shipper. There is also no explanation why current regulatory remedies and informal Board resources available to shippers are insufficient to address any concerns about FMLM service issues.

For these reasons, as explained more fully below, BNSF respectfully urges the Board not to impose FMLM data reporting obligations. Introducing inflexible regulatory requirements relating to highly variable and location-specific FMLM service would add new regulatory costs and burdens, and possibly restrain individualized market-based initiatives without producing any tangible benefits.

II. Additional Regulatory Requirements Are Not Justified, Especially Considering That BNSF Already Provides the Core FMLM Information Requested by Shipper Groups

While many of the Opening Comments range far beyond the scope of FMLM issues, several shipper associations seek to have the Board require the reporting of what could be considered core FMLM-related data. These core-data requests cover information on metrics such as dwell times (*see, e.g.*, Shipper Associations 23-28; Diversified CPC 6; NITL 5, 6); trip plan compliance (*see, e.g.*, PRFBA 26; WCTL 22; NITL 5-6; NGFA 10-11; NACD 6); and the percentage of on-time deliveries (*see, e.g.*, ISRI 9.)

As discussed in detail in our Opening Comments, BNSF already provides this core FMLM-related data to our customers through a sophisticated internal monitoring system that tracks our

FMLM performance at local serving yards and shipper facilities. (*See* BNSF 3-9.) Through our Customer Portal on www.BNSF.com, BNSF provides its customers with data such as dwell times (*Id.* at 6, 8), trip plan compliance (*Id.* at 4-6), and on-time deliveries (*see id.* at 6-7.). BNSF also provides customers with other FMLM-related information such as days of service, the time by which a customer must order car service to ensure same-day service, and train and track delivery details. (*See id.* at 4.) An average of 11,000 BNSF customers visit the Customer Portal every day. (*Id.* at 6.)

As we also explain in our Opening Comments, BNSF uses the FMLM information it provides to customers to measure its FMLM service through two metrics: the Industry Service Metric and the Local Service Performance Metric. The Industry Service Metric measures BNSF's adherence to each customer's individualized Base Service Plan, and the network-wide carload "Local Service" metric measures BNSF's adherence overall to customers' FMLM service plans. (*Id.* at 5.) As BNSF noted, we have met our Local Service performance metric in almost 90% of FMLM movements in 2021. (*Id.* at 6.) Given that BNSF already provides shippers the type of core FMLM service data described above, there is no justification to impose uniform regulatory requirements in a highly variable area that requires local, individualized, up-to-date customer, railroad, and local yard information.

III. Other Shipper Group Requests Sprawl Beyond the Scope of FMLM Service and Would Be Overly Burdensome

While some Opening Comments request core FMLM-related data as discussed above, several comments request data that are beyond FMLM-related information and include a level of detail that would be overly burdensome. These requests reflect little more than a broad wish list that does not seek to focus on data that might be relevant or helpful in evaluating FMLM issues. Curiosity alone does not justify regulatory action.

The wide range of data requests and other suggestions proposed by several shippers reflect the shippers' apparent understanding of this proceeding as a broad "brainstorming session"² and not an effort to produce concrete benefits for shippers regarding FMLM service.³ While the Board has previously used information-gathering proceedings to seek public comment and learn about a variety of topics of interest to the railroad community, *see, e.g., Common Carrier Obligation of Railroads*, EP 677 et al. (STB served Jan. 19, 2010), many of the suggestions are far too attenuated to the Board's objective of considering providing FMLM data to customers. For instance, overall transit performance data will not help inform a customer about expected delivery of a car that has arrived in a yard. (*See, e.g., Shipper Associations* 19-25.) Overall weekly performance data at multiple locations on a railroad's network will similarly not help a particular shipper plan for the arrival or origination of particular cars. (*See, e.g., API* 7.)

The central flaw in all of the shipper group comments is that they provide no valid explanation of how data reporting will provide shippers and/or the Board any level of utility that would outweigh the significant burden associated with designing systems to compile and report it. For instance, several of the comments advance network fluidity as a reason to require uniform FMLM data collection. (*See, e.g., ILTA* 7; *NGFA* 3; *Shipper Associations* 27-28; *WCTL* 22.) BNSF takes seriously network fluidity issues, as demonstrated by the efforts undertaken to alleviate congestion on our network and in our terminals during the COVID-19 pandemic and

² Diversified CPC stated that "[i]n its Decision opening this proceeding, the Board asked many good questions, so many it is not unlike opening a brisk brainstorming session." (Diversified CPC 2, Dec. 17, 2021.)

³ For example, ILTA went beyond the subject of data reporting to suggest the establishment of rigid "first-mile/last-mile" minimum service requirements where no deviations would be permitted unless agreed to by the terminal and documented in writing, with an appeal process for any disputes supported by the STB. (*See ILTA* 6.) In addition to being beyond the scope of this proceeding, uniform "first-mile/last-mile" minimum service requirements with no deviations permitted unless in writing with appeals to the Board would create an unrealistic and unworkable regime for the highly-variable circumstances of FMLM service.

recent supply chain issues.⁴ However, commenters do not explain how collecting uniform FMLM data will lead to any improvement in the fluidity of movements in local yards or, even if it were relevant to FMLM issues, fluidity concerns across the nationwide freight rail network. Broad data reporting as suggested by many shippers and shipper associations simply imposes burdens without any plausible benefits.

IV. Shipper Group Comments Confirm That Data Reporting is Just Intended to Facilitate Common Carrier Litigation

As discussed in BNSF's Opening Comments, aggregated data, even directly related to FMLM service, cannot be used to address local, on-the-ground FMLM issues. Since the data reports would produce no credible benefits for shippers in terms of service quality, the objective of the shippers seeking broad data reporting is apparently related to their desire to facilitate litigation over common carrier service. Indeed, several of the shipper group comments specifically address this issue. (*See, e.g.*, WCTL 18 ("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."); PRFBA 27 ("[T]he Board should consider creating regulations that identify violations of railroads common carrier obligation."); IMA 22 ("[T]he Board should consider creating regulations that identify violations of railroads' common carrier obligations.")) Not only is such an objective inappropriate for policy reasons, it is also misguided because the data they seek to have railroads report would be meaningless in assessing compliance with common carrier obligations.

⁴ *See, e.g.*, Response Letter from Katie Farmer, President and Chief Executive Officer, BNSF, to Martin J. Oberman, Chairman, STB (Aug. 4, 2021) available at <https://www.stb.gov/> (open tab at "News and Communications," select "Non-Docketed Public Correspondence" locate "August" select "BNSF Response Letter to Chairman Oberman Regarding Intermodal Supply Chain Issues, August 4, 2021").

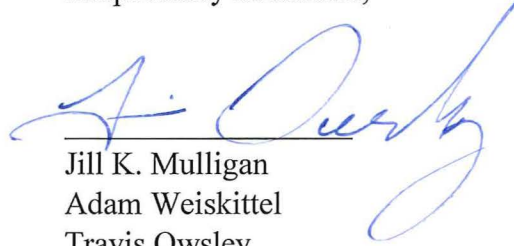
As we noted in our Opening Comments, the common carrier obligation is a highly fact-specific requirement that a railroad act reasonably under existing circumstances to provide adequate service. (BNSF 14.) Broad aggregated FMLM metrics cannot be used to assess compliance with such a fact-specific obligation. In general, “the Board tries to avoid micromanaging a carrier’s operational decisions.” *Montana v. BNSF Ry.*, NOR 42124, slip op. at 7 n. 28 (STB served Apr. 26, 2013). This longstanding precedent is based on the Board’s recognition that service quality is driven by a multitude of factors, including network issues and conditions at specific locations.

Moreover, shippers already have access to a toolbox of informal and formal remedies to address any FMLM service issues that may arise. Informal remedies include the Board’s Rail Customer and Public Assistance office and formal remedies include the Board’s formal complaint process. (See BNSF 10-11.) The Board should not inadvertently promote contentious and costly litigation over common carrier obligations by accepting the false premises that existing shipper remedies are inadequate or that aggregated data reporting would actually provide any value in such litigation.

V. Conclusion

Broad and burdensome regulatory data reporting provides no utility for improving highly variable and location-specific FMLM service. BNSF has already developed tools that help individual shippers manage their logistics chain and will continue to be responsive to our customers in refining those tools going forward. A separate system of FMLM data reporting will not provide the Board, shippers, or even railroads, with meaningful FMLM information. It will not benefit shippers or the Board to require railroads to devote substantial resources to the reporting of data that will not make a difference on the ground.

Respectfully submitted,



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