

SERVICE DATE – SEPTEMBER 29, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Digest:¹ This decision partially grants a request to modify the procedural schedule.

Decided: September 29, 2023

In a decision served on September 7, 2023, the Board, among other things, proposed a new set of regulations that would provide for the prescription of reciprocal switching agreements to address inadequate rail service, as determined using objective standards based on a carrier's original estimated time of arrival, transit time, and first-mile and last-mile service. Reciprocal Switching (NPRM), EP 711 (Sub-No. 1) et al., slip op. at 1 (STB served Sept. 7, 2023). To help implement the proposed new regulations, the Board proposed (1) to require Class I carriers to submit certain data, which would be publicly accessible and generalized; and (2) to adopt a new requirement that, upon written request by a customer, a rail carrier must provide to that customer individualized, machine-readable service data. Id. The Board stated that comments on the proposal are due by October 23, 2023, and replies are due by November 21, 2023. Id.

On September 25, 2023, the Association of American Railroads (AAR) filed a motion seeking an extension of the comment and reply deadlines. Specifically, AAR requests a 90-day extension, until January 22, 2024, for submitting opening comments. (AAR Mot. 1.) Under that schedule, reply comments would be due on February 20, 2024. (Id.) AAR asserts that the proposed regulations are detailed and complex, requiring extensive effort to review and comment appropriately. (Id.) It further asserts that the current schedule will not allow interested parties sufficient time to analyze the issues under consideration in this proceeding or the impact of the proposed rule on the rail network and to prepare meaningful comments that will inform the Board. (Id. at 1-2.)

On September 27, 2023, Private Railcar Food and Beverage Association (PRFBA) replied in opposition to AAR's request. It asserts that the current comment period provides ample time for stakeholders to analyze the proposal while also considering the urgent need for relief due to the ongoing rail service crisis. (PRFBA Reply 3.) On the same day, the Freight

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Rail Customer Alliance also filed in opposition to AAR's motion, arguing that prompt action is needed so that rail customers have more readily available remedies to inadequate service.

This rulemaking proposal stems from what we noted are "critical and ongoing service problems" in the freight rail industry. NPRM, EP 711 (Sub-No. 1) et al., slip op. at 2. Accordingly, the Board must consider both the need for stakeholders and other interested persons—on all sides of these issues—to develop a record sufficient for sound, informed decision-making and the public interest in the Board's prompt, timely consideration of these critical issues. Weighing those considerations, the Board finds that AAR has not shown good cause for nearly tripling the current period for initial comments, which would substantially and unduly delay the Board's consideration of comments in this important proceeding.² At the same time, however, the Board appreciates that it solicited comments on many issues and proposed a detailed set of regulations. On balance, the Board finds that an extension of 15 days would reasonably accommodate potential commenters while also ensuring timely consideration of the issues. Under these circumstances, the Board will partially grant AAR's request and extend the due dates for comments and replies by 15 days, until November 7, 2023, and December 6, 2023, respectively.

It is ordered:

1. AAR's motion for extension is granted in part, as discussed above.
2. Comments in this proceeding are due by November 7, 2023, and replies are due by December 6, 2023.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

² In support of its request for an additional 90 days for initial comments, AAR relies on the verified statement of its retained experts, Mr. Michael Baranowski and Mr. Nathaniel Zebrowski. The verified statement asserts that these consultants will need "thousands of hours" and "at least several months" to complete their analysis. The verified statement, however, provides little to no detail as to how Messrs. Baranowski and Zebrowski computed the time they say is required to complete their analysis, nor do they explain why, even if "thousands of hours" of work are needed, the analysis could not be completed more expeditiously given the resources at their disposal. The railroads, themselves, have significant experience with data analysis, and these two consultants are members of a large consultancy with substantial resources to prepare comments within the time allotted. See FTI Consulting, <https://www.fticonsulting.com> ("What makes us unique? With more than 7,800 employees located in offices in every corner of the globe, we are the firm our clients call on when they are facing their greatest challenges and opportunities.") (last visited Sept. 29, 2023).