

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 711 (Sub-No. 2)

RECIPROCAL SWITCHING
FOR INADEQUATE SERVICE

Comments of BNSF Railway Company**I. Executive Summary**

BNSF Railway Company (“BNSF”) respectfully submits these comments in response to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB” or “Board”) in the above captioned proceeding on September 7, 2023 (“NPRM”). BNSF greatly appreciates the careful and substantial effort that went into crafting the Board’s new reciprocal switching proposal that seeks to address the importance of adequate service to rail shippers. The ability to provide consistent and reliable service is a prerequisite for BNSF to succeed in the highly competitive markets we serve. BNSF has distinguished itself over several decades by using innovative, market-responsive service products to grow our customers’ volumes, even while volumes for the rest of the freight rail industry over that time have remained flat.¹ As such, we share the Board’s goal to not only consistently meet our customers’ existing service needs but also provide service that increases our share of our Nation’s overall freight transportation volumes.² The Board’s new conduct-based proposal is appropriately more respectful of the market-oriented regulatory framework established by Congress that has enabled

¹ See BNSF Hearing Exhibits, EP 711 (Sub-No. 1) at 3 (filed Mar. 21, 2022).

² See BNSF Supplemental Service Recovery Plan, EP 770 (Sub-No. 1) at 11-12 (filed June 23, 2022); *see also* NPRM at 6.

BNSF's growth. The new proposal also correctly does more to recognize and minimize the potential for Board intervention that has unintended consequences for rail customers who are not involved in the switching proceeding.

Throughout the prior proceedings that considered changes to rules regarding prescribed switching, BNSF has advocated that the Board maintain an approach that allows markets to function and narrowly tailors regulatory interventions to solve specific, identified problems. This is BNSF's position because we know from our experience in the competitive markets we serve that market forces promote collaboration between railroads and their customers that results in the rail service quality customers need and, where necessary, remedies rail service issues more quickly and effectively than regulatory action. The Board is correct, however, to recognize that market forces do not always function properly, and the NPRM is a positive step towards a regulatory mechanism that is more appropriately limited to addressing those instances.

In short, the NPRM is a marked improvement from previous switching proposals and, with some adjustments, can be an effective pathway to regulatory relief in appropriate circumstances. In particular, BNSF suggests the following adjustments to the final rule:

- 1) Encourage collaboration between railroads and their customers before prescribing switching by establishing a brief 30-day prefiling period during which the incumbent can work to cure any service deficiencies. It would be in the interest of all shippers—both the complaining shipper and those who might suffer the unintended market consequences of regulatory intervention—to achieve better service, if possible, without the burdens that regulatory litigation imposes on them, the railroads involved, and the Board.

- 2) Clarify the rights and obligations of the alternate carrier to ensure that it can effectively integrate the new linehaul movement after issuance of a switching order without negatively impacting other shippers. Pre-existing shippers on the alternate carrier's network should not have to be concerned about negative impacts to them from a switching order in favor of new shippers to the alternate carrier's network, especially if service to those new shippers has the potential to devalue investments previously made in the alternate carrier's network or to disrupt the operation of market-based car supply programs. The alternate carrier should be consulted and permitted to participate fully in the proceeding to allow for an appropriate phasing in of service to the new shipper.
- 3) Consistent with the NPRM's recognition that not all service failures will be the incumbent carrier's fault, create an affirmative defense allowing the incumbent carrier to demonstrate that any deterioration of service metrics was caused by action or inaction within the reasonable control of the shipper or receiver.
- 4) Make additional changes to ensure that the final rule is consistent with the market forces and operating realities relevant to the shipper's request. These changes include: recognizing that the Board cannot regulate transportation performed under a contract or while traffic is exempt from Board regulation; not imposing switching in cases where the shipper clearly has effective access to trucks or other modes of transportation; limiting prescriptions to a defined term of two years; and clarifying that there can be no market dominance finding during the pendency of a switching prescription.

II. Any Final Rule Should Encourage Collaboration Between Railroads and their Customers before a Prescription Becomes Necessary, Including an Opportunity to Cure Service Issues

The most efficient way to improve rail service will always be for the incumbent railroad to cure a service deficiency without the delay associated with regulatory proceedings and the complexities and risks associated with a prescribed switch. Any final rule in this proceeding should therefore provide a brief 30-day prefiling period to allow the incumbent railroad to work with its customer to attempt to cure the service issue.

This short prefiling period would confer many benefits to all stakeholders involved. Most importantly, giving the incumbent an opportunity to address service issues with its customer in the context of then-existing market conditions and their broader business relationship is most likely to be the fastest path to the result that the Board and the petitioner both seek. Even the expedited timelines proposed in the NPRM would result in an administrative proceeding that would take approximately six months to resolve.³ But if a carrier is notified by a customer that the customer's service metrics have fallen below the metrics set forth in the rule and the carrier is given a brief 30-day opportunity to cure the problem, that carrier may be able to take immediate action to improve service. During this period, Board staff from the Office of Public Assistance, Government Affairs, and Compliance could receive notice and perform oversight and mediation functions that facilitate immediate improvements without the need for formal administrative proceedings. Such a procedure would be consistent with the Board's long-standing preference for "the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, 'whenever possible.'" *Joint Petition for*

³ See NPRM at 24-25 (proposing a procedural schedule of 130 days and allowing 40 days for the carriers to negotiate an agreement and notify the Board).

Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, EP 765, slip op. at 11 (STB served Dec. 19, 2022) (citing 49 C.F.R. § 1108.2(a) and *Bos. & Me. Corp.—Appl. for Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R.*, AB 1256, slip op. at 10 (STB served Oct. 12, 2018)).⁴

The Board’s NRPM already requires the petitioner to “first seek to engage in good faith negotiations to resolve its dispute with the incumbent carrier” at least five business days prior to seeking a prescription. NPRM at 24. Expanding that period to 30 days would give the incumbent carrier a better opportunity to address the service problem without litigation. It would also create an earlier opportunity for the petitioner to confer with the identified alternate carrier about establishing a service plan with that carrier. Indeed, the Board should require that such consultation occur between the petitioner and the alternative carrier. Such consultation would help establish whether switching can be established practicably before a complaint is filed. Ultimately, a 30-day prefiling period that includes consultation with the alternate carrier should facilitate the ability of the alternate carrier to begin service more quickly if a proceeding does go forward, rather than waiting for formal proceedings to commence. Again, this represents a more efficient pathway to the result that both the petitioner and the Board seek.

Within the 30-day oversight period, the service issue may be remedied or the shipper may become comfortable with the corrective action plan offered by the incumbent carrier, and no further regulatory process would be needed. However, if after that 30-day period the metrics reflecting the 12-week period immediately preceding the petition remain below the minimum

⁴ BNSF has consistently supported Board efforts to implement regulatory frameworks that enable and encourage resolution of shipper complaints without the need for formal Board proceedings. For example, BNSF indicated its willingness to participate in the Board’s proposed Alternative Dispute Resolution program, which was widely supported by shippers, and has consistently supported and valued the efforts of the Board’s Rail Customer and Public Assistance staff.

thresholds set by the rule, the petition would follow and the parties would make their filings. A 30-day prefiling period would not prejudice shippers and such a process would serve the public interest in establishing improved service more quickly than administrative litigation. Moreover, a brief 30-day effort to improve service is reasonable in a process that could result in a multi-year prescription.

III. The Final Rule Should Clarify the Rights and Obligations of the Alternate Carrier to Ensure Minimal Impact on Other Customers

The NPRM naturally focuses on the conduct of the incumbent carrier that could give rise to a prescribed switching order. However, more attention should be given to the rights and obligations of the alternate carrier and the interests of the alternate carrier's customers. A final rule would be improved by requiring the petitioner to consult with the alternate carrier as early in the process as possible, by allowing the alternate carrier a reasonable time to ramp up new service, and by carefully considering car supply issues.

Consultation with the Alternate Carrier

Under the proposed rule, an alternate carrier would learn of the potential for a switching prescription only upon receiving service of the petition. NPRM at 24-25 (requiring that a petitioner must "identify the potential alternate carrier" and serve its petition on the incumbent, the alternate carrier, and the Federal Railroad Administration). Moreover, no specific role for the alternate carrier is established in the procedural schedule. *Id.* at 25. Nonetheless, the Board does apparently contemplate alternate carrier participation in the proceeding because the NPRM states, "[t]he Board would also consider an objection by the alternate rail carrier or incumbent rail carrier that the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the objecting rail carrier's ability to serve its existing customers." *Id.* at 26-27. Any final rule should include mandatory consultation with the

alternate carrier as described in Section II above and clarify that the identified alternate carrier may thereafter participate in the formal Board proceeding by right.

The involvement of the alternate carrier will be crucial for prescribed switching to work in practice. If the Board intends a switching prescription to improve rail service for the petitioner without causing unintended consequences for the alternate carrier's pre-existing customers, that prescription must be consistent with the alternate carrier's operating practices and overcome the inherent efficiency advantages of single-line service. Switching often already occurs by agreement where there are operational efficiencies that benefit both carriers and their customers, and it is reasonable to assume that a prescribed switch will require significant operating changes by both carriers. Coordination between the petitioner, the incumbent railroad, and the alternate carrier will therefore be critical for the newly ordered switching operation to actually improve service to the petitioner.

The involvement of the alternate carrier at an early stage is also necessary to ensure that other shippers served by the alternate carrier are not harmed by the imposition of new service. BNSF's service design plans seek to maximize efficiencies in serving customers in an integrated fashion, particularly in terminals. Sudden changes to terminal operations can negatively impact service by misaligning crew and locomotive resources. Negative impacts to service in terminals not only degrade first mile / last mile service and increase terminal dwell times, but those impacts can ripple out from terminals onto mainlines affecting the broader network.

Ramp-Up Period

To ensure operational success for the petitioner and protection for other shippers, the Board should also clarify that an alternate carrier has a reasonable time period from when the prescription order is entered to establish regular linehaul service. Even in terminals where the

alternate carrier already receives switched cars from the incumbent, the provision of line-haul service to a new customer may take time for the alternate carrier to establish. For example, providing new linehaul service in a lane not previously served could require the alternate carrier to hire and train new crew members and/or qualify existing crew members on new service territories. The NPRM smartly recognizes that dynamic and contemplates a ramp-up period of six months for “substantial volume of traffic.” NPRM at 29 n.36.⁵ But even less “substantial” volumes of new traffic may take some time to be incorporated into the alternate carrier’s network without harming service to existing customers, and the actual amount of ramp-up time needed may turn on many factors that need to be considered. Any final rule should require the Board to understand these issues and allow it the ability to design a switching remedy that effectively addresses them.

Car Supply

The Board should also carefully consider car supply issues when weighing the practicability of a prescribed switch. Traditionally, the line-haul carrier supplies cars. Thus, the Board will necessarily need to consider the alternate carrier’s ability to supply cars and how added car supply responsibilities will impact the alternate carrier’s other customers when the Board determines the practicability of a prescribed switch. BNSF has innovated to create market-based programs that allow shippers to secure cars in times of peak demand. These well-established programs allow the market to pro-actively allocate equipment and improve utilization, and the Board will need to be careful not to undermine these market-based programs.

⁵ The NPRM includes several examples of reasons why a ramp up period would be necessary, including “investment in physical plant, additional employees, and additional locomotive maintenance capability.” NPRM at 29 n.36. While BNSF agrees that alternate carriers may decide that such investment is prudent in light of a switching prescription, the Board does not have authority to order such investment as part of a switching prescription. *See United States v. Pennsylvania Railroad Co.*, 242 U.S. 208 (1916).

For example, BNSF developed its Certificates of Transportation (“COTs”) program more than 30 years ago that allows agricultural shippers to bid on equipment months in advance of a shipping period. COTs has been successful in allowing market forces to spread peak demand over time and allocate cars more efficiently. The program creates benefits and obligations for both BNSF and our customers to ensure that car resources are allocated efficiently. Through auctions and secondary markets, rail customers have more control over their transportation and BNSF is able to better predict and plan car supply. The efficiencies created by this and other market-based programs in the agricultural market have supported and enhanced BNSF’s growth strategy, while at the same time giving BNSF’s agricultural shippers more and better access to the markets they need to serve. Market-based programs such as COTs have been much more effective in improving rail service than regulatory intervention.

More recently, BNSF has also developed Loading Origin Guarantees (“LOGs”), an online auction program by which BNSF guarantees the placement of empty equipment at the time of loading for shippers of metals, lumber products and boxcar commodities on BNSF’s merchandise network. LOGs is another innovative market-based program that facilitates rail growth and service improvements, and is available to shippers who are able to commit to weekly minimums of desired equipment types.⁶ Predictable car supply through these programs translates into more predictable crew planning and locomotive utilization and, as a result, BNSF is able to deliver a better service product to our customers.

Because the goal of these programs is to allow the market to efficiently allocate resources in the future, each program has substantial lead time from when auctions take place to when the transportation occurs. As such, the programs might not be able to immediately accommodate

⁶ For more information regarding BNSF’s LOGs program, see: https://www.bnsf.com/bnsf-resources/news-media/customer-notifications/pdf/LOGs_Reference_Guide_-_Revised.pdf.

new customers getting access to a BNSF line-haul move via a switching order. Any final rule should recognize and accommodate the lead times that car supply programs have built into them. The Board should ensure that successful programs adopted by alternate carriers that allow shippers and railroads to efficiently allocate cars—and the benefits those programs create for the alternate carriers’ customers—are not impacted by prescribed switching under a final rule.

IV. The Final Rule Should Explicitly Include an Affirmative Defense for Deterioration of Service Metrics Caused by Action or Inaction within the Reasonable Control of the Shipper or Receiver

The NPRM enumerated affirmative defenses for: (1) extraordinary circumstances beyond the incumbent carrier’s control, (2) a surprise surge in demand, (3) highly unusual shipment patterns, and (4) delays caused by the dispatching of a third party. These defenses all recognize that declines in service metrics may not be caused by the incumbent carrier and that it would be inappropriate to order switching in such a situation. Similarly, any final rule should include as an affirmative defense any deterioration in metrics attributable to actions or inactions of the shipper or receiver.

The Board has previously recognized that railroads and customers have a shared responsibility to efficiently use rail assets and that there are circumstances within a rail user’s reasonable control that affect service, especially local service. *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 11 (STB served Apr. 30, 2020). BNSF works closely with our customers to evaluate the facilities necessary to ensure efficient rail service and often invests along with those customers to establish or improve those facilities. The Board has also acknowledged that shippers have certain responsibilities, including, “taking reasonable steps to: ensure that its facility is right-sized for its expected volume of incoming traffic when it receives reliable, consistent service; manage its pipeline to mitigate incoming car volumes that exceed its capacity; and order and release cars in the manner specified by

reasonable tariff requirements.” *Id.* at 10 n.26. Given the recognized importance of shipper conduct in service quality, the final rule should include an affirmative defense that allows the incumbent carrier to demonstrate that the shipper or receiver did not take reasonable steps that would have avoided service deterioration.

V. Additional Changes are Necessary to Ensure that the Final Rule Respects Both the Market and Operating Realities Relevant to the Shipper’s Request, as well as the Board’s Deregulatory Mandate

The proposed rule can be improved in several additional ways to ensure that the Board adheres to Congress’s deregulatory mandate and to address specific restrictions regarding exemptions and contracts. The NPRM recognizes Congress’s direction and states that the proposal “would advance the policies in § 10101 of having a rail system that meets the public need, of ensuring effective competition among rail carriers, of minimizing the need for regulatory control, and of reaching regulatory decisions on a fair and expeditious basis.” NPRM at 10 (citing the Rail Transportation Policy (“RTP”) set forth in 49 U.S.C. §§ 10101(1), (2), (4), (5), (14)). BNSF operates in complex, competitive markets that influence and constrain BNSF’s rates and service. Direct competition often results not just from other transportation modes competing for business traditionally already moved by rail, but also from BNSF’s aggressive efforts to gain market share by providing shippers with a rail transportation alternative in markets not traditionally served by rail. The central tenet of the regulatory scheme established by Staggers and embodied in ICCTA is that regulatory intervention is reserved for those instances where the market is not functioning correctly. The RTP has thus allowed BNSF to capture new markets through innovative service offerings to compete in areas traditionally served by truck, vessel, and barge and not previously served by BNSF.

Consistent with the RTP and these market realities, the Board should clarify that: (1) the final rule will not apply to transportation provided under contract or while exempt from

regulation; (2) switching prescriptions will not be issued where the traffic is already subject to effective competition from other modes of transportation; (3) prescriptions will be for a defined term and not renew automatically; and (4) rates for transportation subject to a switching prescription may not be challenged as unreasonable before the Board.

Contract and Exempt Traffic

Congress' deregulatory intent is reflected in statutory provisions that prohibit the Board from regulating transportation provided by contract and in cases involving traffic exempt from the Board's regulation. The Board has asked interested parties to address the effect of these limitations on the scope of the proposed rules. As explained below and in the comments of AAR, the Board should make it clear that the proposed rule does not apply to contract or exempt traffic.

The NPRM specifically seeks comment on how rail transportation contracts should fit within the proposed rule. *See* NPRM at 27. Simply put, the Board has no authority to regulate service performed under a rail transportation contract and attempting to nonetheless do so would run counter to the very public interest that the Board's proposal intends to address. Section 10709(b) is clear: "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." The only remedies available to contract shippers are those available pursuant to the contract. Rail service under the contract is governed by the contract and is outside of the Board's regulatory authority.

As such, the Board cannot use service metrics for transportation provided under a contract as a basis for prescribing switching after a contract expires. Such a rule would have the same effect as directly regulating the service during the term of the contract. The threat of the

imposition of a regulatory penalty on the carrier after the contract expired would place constraints and obligations on the carrier during the term of the contract other than those specified by the contract, contrary to the statute. Using service performance under a contract to prescribe switching post-contract would also ignore the fact that contracts reflect commitments by both parties and that contract parties often consider service levels as part of their economic analysis. Such use of service performance in contract service would also reduce incentives for railroads to enter into contracts and thus run directly counter to Congress's intent to encourage the use of contracts. *See, e.g.,* S. Rep. No. 96-470, 96th Cong., 1st Sess. (Dec. 7, 1979) at 24 (noting that the changes in the Staggers Act were “intended to clarify the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements”).

The rules similarly cannot apply retroactively to traffic otherwise exempt from the Board's regulation, contrary to the assertions in the NPRM. *See* NPRM at 27. The Board retains the authority to revoke an exemption upon a proper showing, but agency precedent is clear that “even if a carrier's conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force.” *Pejepscot Industrial Park, Inc.—Petition for Declaratory Order*, 6 S.T.B. 886, 891 (2003). That is, the Board must conduct a two-step process. A shipper must seek, and the agency must grant, a petition to partially revoke the exemption. Only then would the rule apply on a prospective basis. Basing regulatory relief on a carrier's conduct during the effectiveness of an exemption would impermissibly apply regulatory scrutiny to the carrier's conduct regarding that exempt traffic. Such regulation would also contravene the principle that retroactive application of administrative determinations is disfavored absent clear congressional intent favoring such a

result. *See Sanimax USA LLC v. Union Pac. R.R.*, NOR 42171, slip op. at 4 (STB served Feb. 25, 2023) (and cases cited therein).

Effective Competition from Other Modes of Transportation

The NPRM acknowledges the competitive forces applied directly by other Class I railroads in stating that “the Board expects, as a general rule, that there would be little benefit from prescribing reciprocal switching agreements for petitioners that have practical physical access to another Class I carrier that is capable of handling their service needs.” NPRM at 23. BNSF agrees. The competitive pressure exerted by practical physical access to another Class I railroad already provides the incentives sought by the Board through the proposed rules.

Similar pressure is also exerted in many markets by other modes of transportation, especially truck. It would make little sense—and indeed could be harmful—to invoke the regulatory process for prescribed switching in such cases. Therefore, a final rule should require a petitioner to make a *prima facie* showing that it does not have an effective truck (or pipeline, barge, or vessel) alternative. This showing need not be detailed, and could mirror the Board’s approach in its streamlined market dominance process by requiring the petitioner to submit a verified statement from an appropriate official attesting that it has shipped 10% or fewer of the movements in the relevant lane(s) by truck over the last five years, and that it does not have other modal alternatives. *See Mkt. Dominance Streamlined Approach*, EP 756, slip op. at 19-20 (STB served Aug. 3, 2020). Alternatively, the Board could borrow from The National Industrial Transportation League’s (“NITL’s”) original switching proposal and require that the petitioner establish that the incumbent railroad has handled at least 75% of the traffic volumes over the previous 12 months. *See NITL Petition for Rulemaking*, EP 711, at 35 (filed July 7, 2011).

Similarly, the source of competitive constraints will often not be obvious by looking simply at the rail portion of a particular movement. In many markets there are extensive multi-modal movements that involve rail-truck, rail-barge or rail-pipeline combinations, where the rates charged by the rail carrier for the rail portion of the movement are heavily constrained by competition for the entire multi-modal movement. As such, the final rule should likewise require a petitioner to attest that 10% or fewer of its movements in the relevant lane over the last five years have been transloaded.

Term of Switching Prescription

While the NPRM generally recognizes the wisdom of narrowly tailored regulatory intervention, the term for switching prescriptions is a notable departure. The proposal is unduly long and possibly perpetual.⁷ The NPRM contemplates a minimum initial term for a switching prescription of at least two years, and for as long as four years, with automatic renewal. NPRM at 29-30. The NPRM's rationale for such a long period is that "[i]t is essential that the duration of a reciprocal switching order is sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers." *Id.* at 29. But any situation where it would take two years (or more) for an alternate carrier to make service feasible cannot, by definition, satisfy the statutory requirement that switching be practicable. And where switching is practicable, a two-year prescription is sufficient to meet the Board's goal. As such, any switching order should expire at the end of two years. If a shipper wishes to extend the order, it should petition for a new prescription and demonstrate the public interest justifies the extension.

⁷ There is ambiguity in the language of the proposed rule regarding renewal. Proposed 49 CFR §1145.7(a) states that "[a] prescription hereunder automatically renews *at the end of the term established under § 1145.6(c).*" NPRM at 43 (emphasis added). One could read that language to mean that the automatic renewal only applies to the original term prescribed under section 1145.6(c) and not a term established by renewal under section 1145.7(a). At a minimum, the Board should clarify that only the original term automatically renews and that the second, renewed term does not.

Rate Cases

Finally, shipper advocates have long claimed that the availability of prescribed switching is a way to constrain rail rates. *See, e.g.*, Comments of Arkansas Electric Cooperative Corporation, EP 711, at 16 (filed Mar. 1, 2013); Comments of The Coalition Associations, EP 711 (Sub-No. 1), at 4-7 (filed Apr. 4, 2022). The NPRM explains that the proposed rule satisfies 49 U.S.C. § 10101, in part, by “ensuring effective competition among rail carriers.” NPRM at 10. Under this rationale, once the Board has intervened in a market to create artificial competition through a switching order, there is no longer any justification for allowing a shipper to also challenge the rates charged for the transportation at issue as unreasonable. Indeed, with two available carriers to serve from origin to destination, the market dominance requirements of 49 U.S.C. § 10707 cannot be met. Congress clearly sought to minimize regulatory intervention, not to give the Board multiple and overlapping regulatory tools to constrain rates, and respecting the market dominance requirement is a key to that regulatory scheme. As such, the Board should clarify that for the duration of the prescription, rates cannot be challenged as unreasonable.

VI. Conclusion

BNSF greatly appreciates the consideration and significant effort that went into developing the NRPM, which is a marked improvement over past proposals. BNSF believes that with appropriate modifications, including those suggested herein, the NPRM can become a useful regulatory process for rail shippers in instances where the market is not functioning properly.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Adam Weiskittel', is positioned above a horizontal line.

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