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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION COMMENTS IN RESPONSE TO THE SURFACE TRANSPORATION BOARD'S NOTICE OF PROPOSED RULEMAKING

Private Railcar Food and Beverage Association (PRFBA) submits these comments in response to the Surface Transportation Board's (STB or the Board) Notice of Proposed Rulemaking (NPRM) in "Reciprocal Switching for Inadequate Service," which focuses on providing rail customers with access to reciprocal switching as a remedy for poor service, based around three measures of carrier success or failure, namely: (1) service reliability; (2) service consistency; and, (3) adequacy of local service.

PRFBA is comprised of 21 global food and beverage companies and manufacturers headquartered in North America. These members include Frito-Lay (PepsiCo), Molson Coors Beverage Company, KraftHeinz Food Company, General Mills, Inc., McCain Foods USA, Inc., Sysco Corporation, Nortera Foods/Bonduelle Americas, Tropicana Brands Group, Boardman Foods, Inc., G3 Enterprises, Inc., Lamb Weston Holdings, JD Irving/Cavendish Farms, Simplot, The Martin-Brower Corporation, Lamb Weston Holdings, Inc., Twin City Foods, Univar Solutions, Darigold, Inc., Kellogg Company, Land O' Lakes, Inc., National Sugar Marketing, LLC, and Leprino Foods. All are major rail shippers that rely on the railroads to produce and distribute their food and beverage products that are vital to the health and welfare of our nation and essential to feeding its citizens. Without adequate rail service, their food and beverages will not be on American store shelves.

Moreover, PRFBA members all own or lease railcars. As such, they absorb costs associated with equipment ownership, operation, and maintenance. Investing millions of dollars in rail cars also greatly restricts these members from other transportation modes. If a decision is made to change modes, it means “parking” assets which is seldom a wise financial decision. PRFBA members have skin in the game and deserve to be treated as such.

PRFBA members meet regularly to discuss opportunities and solutions to their similar challenges with railcar service. The membership collaborates with other trade associations with regard to industry changes and proposed legislation as well as regulations that directly impact PRFBA’s food and beverage transportation needs. PRFBA meets with the Class I North American railroads for group discussions on rail service issues unique to its membership. PRFBA provides its members with a forum to work together to break through railroad service challenges, providing a better industry foundation for private railcar food and beverage shippers across North America.

PRFBA members continue to be adversely impacted by horrendous rail service, as PRFBA testified at the *Reciprocal Switching* and *Urgent Issues in Freight Rail Service* hearings held by the STB. PRFBA emphasized that its member companies have been subjected to numerous plant shutdowns and slowdowns as well as countless other service-related problems. Also, these service issues subtract substantial value from owning or leasing these railcars as they sit idly or move slowly throughout the rail network. Under the current process for the reciprocal switching remedy, PRFBA members do not bring forward these types of cases because it is unattainable. They are often forced to modify operations to their detriment because no other viable options are present.

This results in negative impacts throughout the supply chain, ultimately hurting not only PRFBA members, but also their customers and the ultimate consumers or end-users.

PRFBA appreciates that the STB has an important role in overseeing freight rail policies on rail shippers and is encouraged that the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. PRFBA urges the Board to breathe new life into this remedy that has been underutilized for decades and to provide a method to counter the Class I railroads' lack of focus on the service needs and asset utilization of their customers. Given the ongoing and universal experience of poor railroad service, PRFBA is fully supportive of Board action to hold railroads accountable in this regard and to enforce, in the Board's own words, "unambiguous, uniform standards…consistently applied across Class I rail carriers and their affiliated companies." These proposed rules, if implemented with PRFBA's suggested modifications detailed below, will go some way to ensuring that the American consumer no longer foots such a high bill for rail carriers inadequately motivated to offer the service they are paid to provide. Although railroads should be held accountable in any case, PRFBA notes that reliable service is of particular importance for staple goods such as food and beverages, the availability of which is a basic necessity for all Americans. PRFBA members work tirelessly to make America's most popular food and beverage products, and it is time the railroads are better incentivized to approach that same standard.

COMMENTS ON THE PROPOSED RULE

Reflecting the Board's primary focus, PRFBA's commentary related to the proposed rule chiefly relates to the three proposed measurement standards for carrier service to be standardized across all Class I carriers. However, at the outset, PRFBA notes that in order for the implementation of any version of these standards to truly affect and improve the nation's rail service, the resulting reciprocal switching agreements need to endure for significantly longer than the proposed minimum two-year and maximum four-year periods.

Indeed, PRFBA appreciates the Board singling out this very issue in soliciting comment regarding whether a longer period is necessary, as it very much is needed. PRFBA asks that the Board implement a five-year period as the absolute minimum duration of the reciprocal switching agreement. A period of some significance is necessary for competing carriers even to consider expending the capital necessary to implement a switch. If the potential new carrier can expect just two-years' benefit at bottom, the shortness of the arrangement is likely to dissuade any action at all. Moreover, the knock-on effect will be that incumbent carriers are less intimidated, leaving the proposed rule toothless. The proposed rule is strong only so long as it truly incentivizes incumbent carriers to provide better service; and that incentive itself depends on competitor carriers' sufficient economic motivation to pose a threat to the incumbents.

Secondly, PRFBA appreciates the Board's proposed requirement that carriers provide data to the Board on a weekly basis and to rail shippers within seven days of a request. This falls in line with PRFBA's request, jointly submitted with three other shipper groups on August 31, 2020, calling for improved transparency and data reporting to the Board regarding first-mile last-mile (FMLM) data. PRFBA, however, would add one important caveat: the data must be intelligible. Where rail carriers in the past have deigned or been forced to provide data, they have *technically* done so, but have organized the data in a manner calculated to be incomprehensible to even seasoned industry veterans. Thus, PRFBA appreciates and supports a requirement that carriers provide customer-individualized and machine-readable service data, but it cautions that the data should be *human*-readable too. The fact that, for example, data is organized into Excel spreadsheet tables or PDFs that do not require optical character recognition (OCR) is useful only so long as rail shipper employees are able to discern what a given table even represents. PRFBA submits that Board review of the data provided by carriers and the format in which it is presented is needed and appropriate and could be accomplished by instructing carriers as to a certain required format coupled with periodical Board audits. For too long, railroads have provided hieroglyphs when they are capable providing information plainly.[1]

As an additional caveat to ensure this rulemaking achieves its aim, PRFBA submits that the rule must also apply to exempt commodities. PRFBA is grateful that the Board recognizes that such transportation, although exempted from Board regulation pursuant to 49 U.S.C. § 10502, nonetheless could appropriately be subject to an order providing reciprocal switching under part 1145. Although such commodities may have been exempted for reasons related to competition, that rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service. PRFBA members move such exempt commodities and are united in asserting that if their transportation is excluded from this rule, they will continue to experience the shoddy service this rule is meant to address.[2]

[1] To assist the Board with general oversight and to facilitate implementation of part 1145, the Board proposes to make permanent the collection of certain data that is relevant to service reliability and inadequate local service, and that is currently being collected on a temporary basis in Docket No. EP 770 (Sub-No. 1*). See Urgent Issues in Freight Rail Serv.— R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 6 (STB served May 6, 2022) (items 5 and 7). The Board has found that this data is particularly helpful to understanding conditions on the rail network. The Board's permanent collection of this data under part 1145 would be adapted to the design of part 1145 as follows. The Class I carriers would be required to provide to the Board on a weekly basis: (1) for shipments moving in manifest service, the percentage of shipments for that week that were delivered to the destination within 24 hours of OETA, out of all shipments in manifest service on the carrier's system during that week; and (2) for each of the carrier's operating divisions and for the carrier's overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant division or system for that week. PRFBA strongly supports making the collection of this data permanent as proposed here.

[2] As a final note to ensure this rulemaking has its desired effect, PRFBA notes that a definition intrinsic to the rule would benefit from greater specificity. The phrase "improve service" or variations thereof naturally invites one to ask by what degree and rubric, among other questions. A more specific explanation of this term would be beneficial to any petitioner or respondent.

With that as preamble, PRFBA offers the following insights regarding specifics of the Board's three measurement standards:

I. <u>Service Reliability</u>

The Board proposes to measure a Class I rail carrier's success in delivering a shipment by comparing the original estimated time of arrival (OETA) that was provided by the rail carrier with the actual time of delivery to the designated destination, based on all shipments over a given lane during a period of 12 consecutive weeks. One proposed approach would set the success rate during the first year following enactment of the rule at 60% (*i.e.,* that 60% of shipments arrive within 24 hours of the OETA). The Board has alternately and additionally proposed that that percentage be raised to 70% after the second year in order to give carriers additional time to meet that still meager standard.

PRFBA is grateful for the Board's focus, explicit in its proposal, on carriers' existing abysmal service performance: "The standards that are proposed here are informed by the recent level of performance that carriers themselves have acknowledged largely do not meet the expectations or needs of the public." Put in other words, railroad service today is so abjectly poor that delivery by railroads of 60% of goods *only one day late* is an *aspiration* in need of Board enforcement. To say the least, such is a sad commentary on North American railroad service at present and reflects the dire need for just this sort of action.

With deep respect for the Board's step in the right direction, PRFBA submits that 60%, and indeed even 70%, represent far too low a bar for service reliability. Under the proposed rule, even those carriers who meet the standard with 60% *nearly* on-time performance would force some PRFBA members to shut down their plants and still others frantically to seek out alternative transport by truck. There are not enough trucks or truck drivers to keep up with that demand, to say nothing of the greater expense passed onto the consumer and drastically greater polluting emissions caused by trucking goods as compared with rail shipping. Moreover, for some PRFBA members, trucking goods simply is not an option altogether. Also, all PRFBA members suffer from the underutilization of their railcars whenever service is poor.

With that in mind, PRFBA submits that the Board should implement the service reliability standard such that it requires no less than 80% of deliveries to reach their designated destination within 24 hours of the OETA. The Board should also consider the entire route when more than one railroad is involved, ensuring that railroads do not attempt to hide time during the interchange process by blaming the other railroad for any delays.

Such, it should be noted, is already a compromise, as that B-minus performance will still cause headaches for PRFBA's members as they try to distribute their essential staple goods from coast to coast. Additionally, PRFBA asks that the Board reduce the 12-week comparison period to six weeks. The proposed 12 weeks provides a given carrier too much opportunity to point to a sudden uptick in service after nearly three months as if such absolves it of responsibility for previous months of poor service and the consequences thereof. Moreover, any 12-week period of poor service would have devastating impact on PRFBA member operations, causing plant shutdowns that could cut off supply for months.[3] This is especially true when considering the extra 90 days to litigate the case to decision as well as another 30 days for the carriers to negotiate a switch rate. Having to endure poor rail service for 8 months is simply unacceptable.

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[3] The Board proposes to apply the service reliability standard only to shipments that are moving in manifest service, not to unit trains. The Board seeks comments on whether the better approach would be to apply the same or a similar service reliability standard to unit trains as applied to manifest traffic. PRFBA urges the Board to apply this same service reliability standard to unit trains. Otherwise, unit-train shippers will lose the benefit of this standard despite being some of the largest shippers by rail in the US.

II. ***Service Consistency***

As a measure of service consistency, the Board proposes to gauge a rail carrier's success in maintaining efficient movement of goods through the rail system by noting the time between a shipper's tender of the bill of lading and the rail carrier's actual or constructive placement of the shipment at the contemplated destination. Such, the NPRM proposes, would allow the shipper relief where the average transit time for loaded cars, unit trains, and empties increases by a certain percentage such as 20% or 25% as compared to the average transit time for the same 12-week period during the previous year.

As discussed in the context of Service Reliability, PRFBA submits that again the 12-week comparison period provides carriers too much opportunity to give the false impression of improvement that will not in fact last. Also, 12 weeks is too long a period of poor service for a shipper to withstand, especially, as noted, where it takes another 3 months to litigate and another month to negotiate a switch rate. Therefore, as before, PRFBA submits that a six-week period is appropriate, in order to avoid carriers distorting the quality of their performance given a longer runway in which to do so, and to ensure shippers including PRFBA members are not forced to endure a period so long as to potentially ruin their businesses. Additionally, lest there be any doubt, PRFBA believes it important, as noted, to insert language into the Service Consistency standard stating that the variability in transit time is based on the *entire move* rather than any arbitrary subset thereof. Unless such language is inserted, one can be sure the railroads will seize the chance to contort the supposed relevant period to skirt their responsibilities, perhaps even doing so inconsistently across their various disputes with shippers. With the aforesaid caveats, PRFBA is comfortable with variability set at 20%.

III. Inadequate Local Service

In an effort to provide rail customers with information on all first mile/last mile service, the STB proposes to measure a rail carrier's success at performing local deliveries and pickups of loaded railcars or unloaded private or shipper-leased railcars within the applicable service window and to hold those carriers to a standard of 80% over a 12-consecutive-week period. Such service would have to be completed within the customary operating window of the affected shipper, not to exceed 12 hours.

Here again, PRFBA and its members appreciate the Board's attention to what it rightly identifies as "long sought-after information." However, PRFBA again submits that the standard as proposed provides too low a bar for rail carriers. As in the case of the proposed Service Reliability standard, at least one PRFBA member expressed that an 80% standard for local service would trigger a backup of their product, a backup that would only exacerbate if service remained consistent at that 80% bar.

Understanding the proposed 80% first mile/last mile standard to mean one missed and/or incorrect switch per business week (assuming one scheduled switch per business day), PRFBA submits that a 90% standard, reflective of one missed switch per two-business-week period, is a more appropriate compromise. As the Board has recognized, a violation of such standard would still result in the negligent carrier providing carriage in first mile/last mile situations.[4] As a result,

[4] With respect to the three service standards, PRFBA has some concerns that railroads will game the process and improve service whenever the numbers fall below the required standards, only to have service immediately become poor once the threat of a reciprocal switch case has subsided. In addition, an extreme situation could arise when a shipper obtains an emergency service order utilizing service from a competing carrier. This situation could result in better service provided by the competing carrier and stop any new data from the incumbent carrier. There would not appear to be a way forward for the shipper at that point if it wanted to obtain a reciprocal switching order from the Board. The Board should set a broader service standard for "unreasonable service" in addition to these three specific standards, in order to cover these situations, which are not contemplated by the proposed rule.

PRFBA supports prescription of terminal trackage rights such that the competing carrier can provide that service.

CONCLUSION

The Board's proposed rulemaking is a welcome and necessary action to counteract the lamentable service of American rail carriers. The poor quality of that service is reflected not only in the need for the rule, but also even in the still-low aspirational standards that PRFBA requests be included therein.[5] With that in mind and with gratitude for the Board's action here, PRFBA asks that the Board build on its proposed rules to hold carriers to a higher standard than that initially proposed, one reflective of the owners of railcars and the needs of carriers' customers and of the American consumer. In service of that aim, PRFBA proposes (1) reciprocal switch agreements lasting a minimum of five years; (2) a service reliability standard that requires 80% performance as opposed to just 60%, and measured over a six-week period; (3) service consistency based on the entire move, and similarly measured over six-week periods rather than twelve-weeks such that carriers have less time to obscure what level of service they truly are providing; and, (4) a slightly higher 90% standard for local service, reflective of one missed and/or incorrect switch per two-business-week period.

We fully support the Board instituting the new rules as suggested here by PRFBA.

[5] The Board has determined that much of the blame for the service issues over the last several years stemmed from the railroads' massive job cuts under the guise of Precision Scheduled Railroading, thereby leaving them without enough crew members to handle the needs of their shippers. Crew shortages certainly should not be an affirmative defense under these circumstances.

Respectfully submitted,

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