

238285



ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, D.C. 20024

ENTERED
Office of Proceedings
April 29, 2015
Part of
Public Record

Timothy J. Strafford
Associate General Counsel

Phone: (202) 639-2506
Fax: (202) 639-2868
E-mail: tstrafford@aar.org

April 29, 2015

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 724 (Sub-No. 4), *United States Rail Service Issues – Performance Data Reporting*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served on December 30, 2014, the Association of American Railroads hereby files the attached reply comments in the above docketed proceeding.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 724 (Sub-No. 4)

UNITED STATES RAIL SERVICE ISSUES –
PERFORMANCE DATA REPORTING

REPLY COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Of Counsel:

Jeremy M. Berman
David L. Coleman
Paul A. Guthrie
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
John P. Patelli
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Greg E. Summy
Gayla L. Thal
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

*Counsel for the Association of
American Railroads*

April 29, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 724 (Sub-No. 4)

UNITED STATES RAIL SERVICE ISSUES –
PERFORMANCE DATA REPORTING

REPLY COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Pursuant to the schedule established in the Notice of Proposed Rulemaking (“NPRM”) served in this proceeding by the Surface Transportation Board (“Board” or “STB”) on December 30, 2014, the Association of American Railroads (“AAR”) hereby submits these reply comments on behalf of its Class I freight railroad members.

In opening comments filed in this proceeding on March 2, 2015, the AAR acknowledged the service issues caused by unforeseen shifts in demand for rail service and a historically difficult 2013-2014 winter season that led the Board to propose rules requiring Class I railroads to report operational data. In the context of proposed permanent reporting regulations, the AAR cautioned the Board to distinguish between metrics that have been useful in monitoring the specific service disruptions that have occurred and metrics designed to monitor the overall fluidity of railroad operations that may be useful on an on-going basis. The AAR recommended that the Board not make permanent by regulation the reporting of metrics at a granular, commodity-specific level that may not be germane to a specific future

service disruption while presenting a misleading view of rail service in normal times.

Instead, the AAR contended that the Board would be well served by monitoring macro-level system measures of operations and only seek more burdensome detailed information if and when the need arises. A regime of permanent macro-level monitoring and targeted issue-specific temporary metrics would ensure that the Board has access to the information it needs to fulfill its statutory responsibilities. The AAR comments also suggested that as service levels improve, the Board's need for the specific information requested in its October 8, 2014 decision ("Interim Order") decreases. This position is buoyed by the fact that the industry has emerged from another winter season in better position than last year with service trending in the right direction.

The opening comments filed by trade associations and interest groups that advocate on behalf of shippers generally support the proposed reporting requirements and suggest even more. But those comments do not articulate any specific benefits that the information reported since the Interim Order has had for particular rail customers or the additional benefits that the additional information sought will have. Though the shipper interests' opening comments generally refer to benefits of the reported data to "planning," those comments do not explain how railroad-wide statistics about traffic other than its own can aid a particular customer plan its own traffic. The shipper interests' opening comments fail to show how any railroad customer has used the six months of data compiled following the Interim Order for planning or otherwise. And the shipper interests' comments do not show any relation between the broad data reporting they seek and the Board's statutory authority to intervene in specific railroad service issues.

As discussed more fully below, the AAR notes that the comments filed on behalf of shipper interests reflect some misunderstanding of what operating metrics can practically show. Moreover, because the NPRM did not articulate what use the Board will put reported data to, there is a lack of connection between the shipper interests' opening comments and the Board's statutory responsibilities. The AAR contends that the Board should not take any action in this proceeding that would allow interest groups to seek regulatory advantage for specific commodities or regions of the country to the detriment of efficient and safe railroad operations. Finally, the AAR submits that the record in this proceeding illustrates that the best way for the Board to develop the most useful and least burdensome reporting requirements would be through a constructive dialogue between the railroads and Board staff.

Comments

I. 'The Opening Comments Filed By Shipper Interests Reflect a Misunderstanding of What Operating Metrics Data Can Show

It is not surprising that the trade associations and shipper interest groups that filed comments in this proceeding would support permanent railroad reporting regulations because such data may provide those entities with abundant statistics that they can select from and manipulate for regulatory purposes, while their members' own specific transportation-related metrics remain private. But the comments supporting the proposed rules reflect a misunderstanding of the usefulness of many of the proposed metrics to the Board and to any particular railroad customer. As explained in the AAR opening comments, operating data is not useful for comparing railroads because each railroad has a different traffic mix, different infrastructure, and different operating territory. Similarly, operating

metrics are not useful in comparing the service provided to commodities that move in different service and in different equipment. *See* AAR Opening Comments at 15.

Macro system-level metrics can reveal changes and trends on a given railroad, but even that data is of limited use because operating data is, by definition, historical. Historical data captures a snapshot in time; the same metrics, on the same railroad, related to the same commodity captured at different times may not offer valid comparisons of railroad service because of changes in markets, rail investment in infrastructure, labor slowdowns at ports, or other factors. Despite general support by the shipper interests' comments, the granular commodity and train-type reporting in subparagraphs (7)-(9) of proposed 49 CFR § 1205.3(a) is particularly susceptible to this type of distortion and therefore would provide little useful information to the Board about service levels. For example, the number of grain cars loaded by state – proposed 49 CFR § 1205.3(a)(7) – cannot provide a meaningful comparison over time even on a single railroad due to differences in weather, seasons, and harvest yields, and global grain markets. Similarly, many of the specific additional data points requested by shipper interests to be included in mandated reporting do not appear to serve a useful regulatory purpose.

The record in this proceeding does not support the conclusion that the proposed rules would have any public or regulatory benefit to justify their burden with very limited exceptions. Though the Board seeks reporting that it describes as “near real time,” service data can only show what has already occurred and cannot be reliably used to extrapolate the future. Metrics of railroad operations also cannot convey the full picture of a globalized supply chain that involves shipping companies, trucking companies, ports, shippers, receivers, and third-party intermediaries. Additional regulations proposed by shipper

interest groups would add reporting requirements for data with limited or no usefulness. For example, the American Chemistry Council (“ACC”) asks the Board to require counts of locomotives and crews by region. *See* ACC Opening Comments at 1. ACC posits that there might be correlation between sustained train speed and regional locomotive counts, but does not account for the fact that locomotives must move throughout the network to accomplish rail transportation.

The shipper interests’ opening comments confirm the AAR’s belief that there is no meaningful information gap that new rules are needed to fill. The joint filing of coal shipper trade associations (“Coal Shippers”) acknowledges that customers routinely get service information from their carriers. *See* Coal Shippers Opening Comments at 7 (“[A] shipper can usually track its own cargo.”). Railroads provide their individual customers with a wealth of micro-level information that is more useful than aggregated or regional information. *See, e.g.*, BNSF Railway Opening Comments at 2; Union Pacific Railroad Opening Comments at 7. On the macro-level, the shipper interests’ opening comments confirm that the Board has access to ample data to know when carriers’ networks are not running fluidly. *See* National Industrial Transportation League (“NITL”) Opening Comments at 2 (describing the Board’s monitoring of railroad service over the last year). These metrics could serve as an indicator that more information reporting is not warranted. Such an approach would be in keeping with the Board’s observation that “the Board views the network as whole, and seeks to better understand performance across the entire network.” Interim Order at 2.

II. Shipper Interests' Opening Comments Do Not Link Proposed Reporting Requirements to the Board's Statutory Authority

As explained in the AAR opening comments, any rules developed in this proceeding should be narrowly focused on the Board's statutory responsibilities. *See* AAR Opening comments at 9-12. The NPRM does not articulate why any particular data point is useful or meaningful to the Board's statutory responsibilities. Neither the NRPM nor any commenter explains how the proposed rules would "improve the Board's ability to identify and help resolve" service disruptions. NPRM at 2. The Fertilizer Institute ("TFI") "urges the Board to recognize that fertilizer supply chain requires consistent monitoring in order to avoid a repeat of the April 2014 crisis and therefore, TFI requests the Board include fertilizer as a reported commodity," TFI Opening Comments at 4. But TFI fails to explain how reporting detailed information about fertilizer shipments similar to the proposed requirements for grain would accomplish that purpose. TFI's request makes little sense, as fertilizer products often move in carload service in shipper supplied equipment. *See* letter from Union Pacific Railroad, EP 724 (filed Nov. 4, 2014).

Similarly, nowhere in the opening comments does any party explain what value the specific proposed metrics provide for planning purposes. The opening comments express support for "free" data to allow for planning. But that data is compiled and submitted outside the course of normal business at a cost to the railroads. The shipper interests' comments do not articulate any specific use that the data compiled under the Interim Order has been put to, nor do they suggest how the data they request could be used by a particular railroad customer to make planning decisions. "Transparency" is a virtue for government action, but requiring private businesses to bear the cost of providing information should be

justified by some legitimate government purpose and should be crafted to limit the burden on reporting parties. Simply compiling data for data's sake or for government agencies to ponder, *see* United States Department of Agriculture Opening Comments at 2-3, does not justify placing burdens on rail carriers to compile and report operational data.

The shipper interests' comments reveal that much of their interest in service data is establishing a new paradigm for litigation at the Board. Such comments go far beyond the Board's stated goals in this proceeding to "improve the Board's ability to identify and help resolve future regional or national service disruptions more quickly." NPRM at 3. Texas Trading and Transportation Services *et al* ("TTMS Group") sees this proceeding as setting the predicate for a sweeping arbitration system that somehow would "promote alignment between demand and capacity" better than market forces. TTMS Group Opening Comments at unnumbered page 5. Neither TTMS Group nor any other shipper interest comment explains how commodity-specific or regional-specific data that do not include all parts of the supply chain could serve as the basis for arbitration or other forms of dispute resolution including litigation at the Board. Aggregated service data cannot aid such dispute resolution because it tends to distort, rather than clarify the service picture. Similarly, the Coal Shippers posit in a footnote without explanation that metrics data "can also aid in determining whether carriers are able to meet their common carrier obligation." Coal Shippers Opening Comments at 10 & n. 10. But the Coal Shippers do not elaborate on how aggregated service data could inform an analysis of whether a rail carrier has met the reasonable dispatch standard. The test to be applied is one of reasonableness under all the circumstances surrounding a "reasonable request." *See, e.g., United Transp. Sys. V. PIE Import Export*, 889 F. Supp. 94 (1995) and 49 U.S.C. § 11101(a) ("A rail carrier providing

transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request."). Therefore, these metrics are of limited, if any, utility in determining anything related to the common carrier obligation.

Finally, some of the shipper interests' requests for mandatory data reporting seek information for litigation purposes that would be beyond the Board's regulatory jurisdiction. For example, the Coal Shippers fail to square their requests for disproportionate reporting of coal traffic with the fact that most coal moves by rail via rail transportation contract pursuant to 49 U.S.C. § 10709. Service pursuant to such contracts is governed by the contracts' terms and any remedies for breach are available only through the courts. Similarly, the National Grain and Feed Association's ("NGFA") call for reporting of operations in Canada should be rejected as outside the Board's jurisdiction. The Board, indeed the United States Government, has no authority to regulate the transportation services of a railroad in a foreign country. *See* 49 U.S.C. § 10501 (a)(2) "jurisdiction under paragraph (1) applies *only* to transportation in the United States . . ." (emphasis added).

III. The Board Should Avoid Promulgating Regulations that Would Allow Interest Groups to Seek Regulatory Advantage for Specific Commodities or Regions

The record in this proceeding thus far supports the concerns raised in the AAR opening comments that narrowly focused granular level reporting requirements may incentivize litigation and interest groups seeking to prioritize certain favored business or commodities through political influence rather than sound and safe railroad operations. NGFA's comments recognize this danger as well. "NGFA believes it is unwise and counterproductive for any segment of rail traffic – including agriculture – to seek a general regulatory preference or priority designation over other industry sectors." NGFA Opening

Comments at 4. Indeed, by focusing on some commodities and not others, the NPRM caused interest groups representing shippers of other commodities to seek additional reporting. *See, e.g.*, TFI Opening Comments; Coal Shippers Opening Comments at 12 & n. 15; *see also* letter from National Pasta Association, EP 724 (filed Dec. 17, 2104).

IV. The Best Way For the Board to Craft the Most Useful and Least Burdensome Service Metrics Is to Meet and Confer with Railroad Personnel

When the Board issued its temporary Interim Order seeking the reporting of service metrics from Class I railroads for the stated purpose to help “better understand the scope, magnitude, and impact of the current service issues,” Interim Order at 1, the AAR expressed the belief that the public, the Board and the railroad industry would have benefited from a dialogue to develop reporting requirements designed to reach specifically defined regulatory goals. *See* Letter from AAR on behalf of six Class I freight railroads (filed Oct. 22, 2014). That remains true today and the potential value of such a dialogue is reflected in the comments filed by shipper interests.

Many of the comments filed in this proceeding reflect a broad understanding that railroads are best placed to craft meaningful service metrics that will allow the Board to monitor service in the railroad industry in a way that both does not unduly burden the industry with reporting for reporting’s sake and informs the Board with meaningful information that fits within its regulatory authority. For example, TTMS Group notes that “[r]ailroads know far better than shippers what data truly provides a meaningful measure of performance.” TTMS Group Opening Comments at unnumbered page 3. Similarly, NITL urges the Board to work with the railroads to better understand how railroads monitor service and find areas of agreement with the railroads. NITL Opening Comments at 5. The

Alliance for Rail Competition *et al.* (“ARC”) admits that it is not in a position to evaluate whether particular metrics are burdensome to report. ARC Opening Comments at 9. These comments support the position of the AAR that the Board should not promulgate permanent regulations without the benefit of a detailed understanding of: (1) the value of what is being reported; (2) the use it will be put to; and (3) the burden it will place on the entity under the mandate to report. The best way to get that understanding is to meet with the railroads. *See* TTMS Group Opening Comments at unnumbered page 6.

There are several procedural ways the Board could achieve this common sense result. The Board could direct its staff to meet with representatives of the railroad industry, either separately or together, to discuss metrics. Though the Board takes a strict approach to its rules regarding *ex parte* communications, discussions between Board staff and railroad personnel would be both appropriate and consistent with those rules and the law concerning *ex parte* communications. Nevertheless, if the Board were to conclude that such discussions would generally be prohibited under its rules, otherwise prohibited *ex parte* communications can be allowed by order of the Board. 49 CFR § 1102.2(b)(1). The Board could do so here. The Board could also waive those rules for good cause in this proceeding. *See* 49 CFR § 1110.9.

The Board could also take additional steps if it believed it necessary. For example, the Board could direct staff from its Office of Public Affairs, Consumer Assistance and Compliance (OPAGAC) to meet with representatives of the railroad industry and have that staff develop a formal report to the Board, which the Board could make public. While the AAR believes such a procedure to be unnecessarily complex, it would be preferable to not having a constructive dialogue at all.

Conclusion

Based on the foregoing, the Board should not adopt the rules as proposed in the NPRM and should instead direct its staff to meet with the railroads to develop service metrics reporting. The AAR and its Class I freight railroad members stand ready to work with the Board and its staff to carefully balance the practical utility of the information being sought from the Class I railroads with the burdens that reporting will impose.

Of Counsel:

Jeremy M. Berman
David L. Coleman
Paul A. Guthrie
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
John P. Patelli
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Greg E. Summy
Gayla L. Thal
Richard E. Weicher
W. James Wochner

Respectfully Submitted,



Louis P. Warchot
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

*Counsel for the Association of
American Railroads*