

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES – PERFORMANCE DATA REPORTING)))))	Docket No. EP 724 (Sub-No. 4)
---	-----------------------	-------------------------------

**REPLY JOINT COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE,
AMERICAN PUBLIC POWER ASSOCIATION,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND
EDISON ELECTRIC INSTITUTE**

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Dated: April 29, 2015

Their Attorneys

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES –)	
PERFORMANCE DATA REPORTING)	Docket No. EP 724 (Sub-No. 4)
)	

**REPLY JOINT COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE,
AMERICAN PUBLIC POWER ASSOCIATION,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND
EDISON ELECTRIC INSTITUTE**

The Western Coal Traffic League (“WCTL”), American Public Power Association (“APPA”), National Association of Regulatory Utility Commissioners (“NARUC”), National Rural Electric Cooperative Association (“NRECA”), and Edison Electric Institute (“EEI”) (collectively “Coal Shippers/NARUC”) hereby submit their Reply Joint Comments in accordance with the Board’s order served December 30, 2014 in this Notice of Proposed Rulemaking (“NPRM”) proceeding.

BACKGROUND

On March 2, 2015, Coal Shippers/NARUC, the United States Department of Agriculture (“USDA”), other interested shipper groups, the Class I railroads,¹ and the Association of American Railroads (“AAR”) filed Opening Comments in this proceeding. The shipper groups and USDA universally support the Board’s proposed

¹ The Class I railroads filing comments were: BNSF Railway (“BNSF”), Canadian Pacific Railway (“CP”), CSX Transportation, Inc. (“CSXT”), Kansas City Southern Railway, Norfolk Southern Railway (“NS”), and the Union Pacific Railroad (“UP”).

service metrics reporting, with most groups proposing additional performance reporting metrics that the Board should require in any final rule. Coal Shippers/NARUC in particular proposed minor changes to the Board's proposal along with additional reporting metrics they believe are critical, including cycle time reporting for major corridors.

The railroads and the AAR generally urge the Board not to adopt any reporting standards at this time or to severely limit any reporting if the Board insists on moving forward. Alternatively, the railroads propose unnecessary delaying tactics, such as meetings with the Board where the railroads can privately detail what data they might be willing to regularly report.

Coal Shippers/NARUC, USDA and other shippers' Opening Comments amply demonstrate the need for regular reporting of railroad performance metrics. Thus, while there are slight differences in the exact data that shippers and USDA would like the railroads to report, there is no doubt that transparency into railroad performance metrics is needed and productive.

COMMENTS

I. THE BOARD'S PROPOSAL HAS BROAD SUPPORT AND ADDITIONAL REPORTING METRICS ARE WARRANTED

The eight (8) commenting shipper groups and USDA all support the Board proposal. The shipper groups encompass all major business sectors, especially the largest commodity categories, including coal, agricultural, and chemical shippers. Moreover, all

of the shippers and USDA noted the value that such data has to their members or governmental mission.

Coal Shippers/NARUC reiterate their concerns that the railroads' voluntary data reporting is too limited and entirely at the mercy of the AAR and its member carriers, such that even the limited data reported by the AAR today could be terminated at any time.² Voluntary reporting also does not carry as much assurance of accuracy and reliability. Thus, Coal Shippers/NARUC support the Board's proposal which should ensure that accurate, timely, and complete data reporting remains available to shippers and the Board alike, and they repeat their initial request that the Board consider certain refinements to the proposal, as well as additional reporting categories. Specifically, Coal Shippers/NARUC ask the Board to:

1. Modify its proposal so that carriers report interchange dwell times at each of their 10 largest interchange locations;
2. Modify its proposal so the "Other" category in the train held short reporting is more specific;
3. Modify its proposal to retain the weekly coal loadings versus plan reporting currently in effect under the *Interim Data Order*;³
4. Expand its proposal to include weekly average cycle times for coal trains over any portion of the carrier's ten (10) most frequently used coal train corridors (*e.g.*, Powder River Basin ("PRB") mines to Kansas City);
5. Expand its proposal to include the weekly average number of coal trainsets in service, broken down between shipper-supplied (private trainsets) and carrier-supplied trainsets;

² Coal Shippers/NARUC Opening Comments at 5.

³ See, *e.g.*, *United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3) (STB served Oct. 8, 2014) ("*Interim Data Order*").

6. Expand its proposal to include any restrictions on the utilization of shipper-provided equipment in coal service;
7. Expand its proposal to include general restrictions on the availability of crews for coal service; and
8. Expand its proposal to include general restrictions on the availability of locomotives for coal service.

Other commenters adopted similar positions. USDA's support of the Board's proposal is especially instructive as it demonstrates both the value of such data to a federal cabinet-level department seeking to carry out its duties *and* the benefits that inured to USDA's stakeholders during the enhanced data collection period.⁴ Indeed, USDA notes that it and "its stakeholders benefitted greatly from the data reporting" required through the Board's various data reporting orders of 2014.⁵ USDA also presses for consistency in data reporting "so that data are comparable across railroads and time periods." USDA even suggests additional reporting requirements for the Board, including rail car auction market data. *Id.* at 5. In other words, USDA plainly sees the need for timely comprehensive data reporting by the Class I railroads.

The National Industrial Transportation League ("NITL") echoes the concerns raised by Coal Shippers/NARUC. NITL, for example, notes that the Board's proposal lacks geographic specificity, and it, therefore, proposes that "each Class I railroad . . . provide information on average train speed over key corridors, or by

⁴ See *Interim Data Order and United States Rail Service Issues – Grain*, Docket No. EP 724 (Sub-No. 2) (STB served June 20, 2014) ("*Grain Order*").

⁵ USDA Opening Comments at 3.

region.”⁶ NITL’s suggestion is similar to Coal Shippers/NARUC’s proposal that the railroads provide cycle times over key corridors, and it suggests again that shippers have a keen interest in far more information than the generalized system-level data the railroads report through the AAR. Coal Shippers/NARUC support NITL’s proposal as an addition to the cycle time metric Coal Shippers/NARUC proposed in their Opening Comments.

Coal Shippers/NARUC note that shipper commenters also request, *inter alia*, additional data reporting by commodity,⁷ additional information on car handling,⁸ additional reporting on activities in Chicago,⁹ and additional data on resources availability for crew and locomotives.¹⁰ Coal Shippers/NARUC take no position at this time on the individual merits of each proposal. However, each of these proposals suggests that the railroad performance data available today is inadequate despite the claims of widespread data availability posited by most of the railroads in their Opening Comments.¹¹

⁶ NITL Opening Comments at 5.

⁷ *See, e.g.*, The Fertilizer Institute Opening Comments at 4-8.

⁸ *See, e.g.*, National Grain and Feed Association Opening Comments at 5.

⁹ *See, e.g.*, NITL Opening Comments at 4-5.

¹⁰ *See, e.g.*, American Chemistry Council Opening Comments at 1-2.

¹¹ *See, e.g.*, BNSF Opening Comments at 2-4 (suggesting that its excellent communications with customers obviates the need for such reporting).

II. THE RAILROADS' OBJECTIONS TO THE BOARD'S NPRM DO NOT OUTWEIGH THE NEED FOR PERFORMANCE DATA COLLECTION

The Class I railroads and the AAR raise a number of objections to the Board's proposal, and they propose additional steps the Board should take before adopting a final rule. The objections and alternative actions proposed by the railroads *do not* provide a basis for the Board to postpone or reduce the scope of its proposal.

a. The Board Should Not Limit Reporting to the AAR's Metrics

The AAR, NS, and UP all urge the Board to limit its final rule to the same three system-level metrics that the AAR currently reports: cars on line, train speed, and terminal dwell.¹² These three metrics are certainly important, but they are just a sliver of the data needed to understand and spot trends in real conditions on the railroads. As the recent service crisis plainly demonstrated – more is needed. If these three data points alone were sufficient, the Board's NPRM would be superfluous. Obviously, the Board, shippers, and USDA recognize that more detailed reporting on a regular basis is needed. The situation that existed before the most recent service crisis is simply unacceptable.

b. Commodity-Specific Reporting is Necessary

The AAR, BNSF, UP and NS also express concerns about providing commodity-specific reporting. For example, UP raises concerns that different commodities have different operating characteristics and therefore requiring commodity-specific data reporting will only confuse stakeholders and increase the likelihood of false

¹² AAR Opening Comment at 12; NS Opening Comments at 2; UP Opening Comments at 5.

service crisis alarms.¹³ BNSF suggests that commodity-specific reporting will somehow skew service in favor of certain commodities – without suggesting that any such thing has occurred since the *Interim Data Order* or the *Grain Order*.¹⁴ NS and the AAR contend that commodity-specific reporting should be limited to particular service crises and then discontinued.¹⁵ All of these suggestions are without merit.

Commodity-specific reporting is necessary precisely because each commodity has different operating characteristics. Consequently, the macro-level metrics are almost meaningless to Coal Shippers/NARUC. Instead, it is the coal-specific information, including the additional reporting proposed by Coal Shippers/NARUC that is critical to gaining a clear and concise understanding of conditions on their carriers. It is certainly relevant if performance for one commodity or regional sector has stayed the same or improved while another has deteriorated, especially in the absence of an apparent causal factor such as weather. Moreover, it makes little sense to examine commodity-level data only when the Board has officially recognized a service crisis exists, because by then it may be too late. Reporting during “good times” may provide a useful baseline to help identify where and when deterioration occurs. As USDA stated, “performance metrics may not be used all the time nor appreciated until a particular concern arises,” but

¹³ UP Opening Comments at 3.

¹⁴ BNSF Opening Comments at 4-5.

¹⁵ AAR Opening Comments at 15; NS Opening Comments at 2-3.

nevertheless “performance metrics need to be collected on a continuous basis and not just when needed.”¹⁶

c. The Burdens of Compliance are Minimal Versus the Need for Data

The AAR, UP, and CSXT also express concerns about the burdens of complying with the NPRM as proposed by the Board. The AAR provides no statistics or analysis to suggest that the railroads cannot readily comply with the Board’s proposal. Indeed, it seems to ignore the fact that the Class I railroads were able to start submitting reports to the Board just two weeks after the Board’s *Interim Data Order*. Yet, the AAR goes so far as to suggest that the proposal will somehow “divert[] railroad operating personnel from their principal mission of running the railroad”¹⁷ – a point not repeated by any of its members.

CSXT suggests that the Board not require compliance for a year so that it can realign IT priorities and budget for the expenses, but it provides no justification for such a delay or quantification of the costs.¹⁸

UP alone describes the so-called burden it anticipates: 224 hours a year to provide reports and 360 hours of start-up work to automate the process.¹⁹ With all due respect to the railroads’ concerns, the burden is plainly minimal, and most of the start-up work has likely been accomplished already.

¹⁶ USDA Opening Comments at 3.

¹⁷ AAR Opening Comments at 10.

¹⁸ CSXT Opening Comments at 7-8.

¹⁹ UP Opening Comments at 22-23.

BNSF, CSXT, NS and UP combined for **\$71.5 billion** in revenues in 2014.

Devoting a small number of hours (equivalent to roughly one full time employee for the Class I railroads) to report to the Board and their own shippers (who provide that massive revenue stream) with a few data points each week (or quarterly for infrastructure reports) is imminently reasonable, and the value of such performance data greatly outweighs the *de minimis* burden.

d. The Board Should Not Halt this Proceeding

CSXT also proposes that the Board halt this proceeding and either leave the *Interim Data Order* in place or call a series of informal meetings with the railroads to “determine whether a voluntary set of reporting standards might be worked out and implemented through agreement.”²⁰ CSXT’s proposal is unnecessary and counterproductive. First, the railroads have the opportunity in this proceeding to provide their full input on what data should be reported or not reported and why. Second, a series of informal, private meetings is unnecessary, especially where such meetings would exclude shippers, and such meetings present *ex parte* communications concerns. Third, voluntary standards are meaningless. As soon as the reporting requirement no longer suits the railroads, the railroads can simply refuse to produce the data. The Board should not countenance such an untenable outcome.

²⁰ CSXT Opening Comments at 3.

e. The Railroads' Technical Objections Should Not Interfere with the Adoption of the Proposed Reporting Requirements

The railroads also raise a number of technical objections such as the exact day that the weekly reports should be made and the precise method of filing. The railroads also point out various minor differences between the way data is kept in the ordinary course of business and the way in which the Board has asked for it to be reported. These objections should not hinder the Board's adoption of enhanced reporting requirements. Naturally, there is no perfect data collection rule that will reconcile all of the railroads' or the shippers' concerns. Regardless, the railroads have not presented any technical objections that the Board could not overcome with a few minor adjustments if needed (*e.g.*, if Friday is a better reporting day than Tuesday then the precise day can be switched).

III. THE AAR MISCHARACTERIZES THE BOARD'S SERVICE-RELATED AUTHORITY

While not directly suggesting that the Board does not have the power to implement the performance data reporting it has proposed, the AAR nevertheless takes the opportunity to erroneously redefine the Board's authority over rail service. Specifically, the AAR suggests that the Board has: (i) limited authority to address service issues; (ii) that there is good reason that the Board has limited authority over service; and (iii) that the actions that the Board can take are somehow limited to the problems of a single railroad.²¹

²¹ AAR Opening Comments at 10-11.

Coal Shippers/NARUC strongly disagree with the AAR's assertions. The Board has extraordinary powers to direct rail service during a crisis, including the ability to "direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or *other railroad lines.*" See *Joint Petition for Service Order*, 2 S.T.B. 725, 729-30 (1997) (emphasis added). Likewise, the AAR's suggestion that there is good reason for such limitations is also false. The Board has, as the AAR itself points out, simply been cautious and avoided directed service orders where possible under the reasonable assumption that in most cases the railroads are better equipped to manage themselves than the Board (although it should also be noted that any problems arose under the railroads' watch in the first place).

Coal Shippers/NARUC also note that the AAR's description of the Board's service-related authority is a red herring. The Board's NPRM is not grounded in its emergency service powers under 49 U.S.C. § 11123(a), but instead in 49 U.S.C. §§ 721(b) and 11145(a), which provide the Board with the undisputed and broad authority to direct the reporting requirements sought in the NPRM. See *United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3), slip op. at 2 (STB served Oct. 14, 2014) (noting the Board's authority under the cited statutes to order CP to provide certain data).

CONCLUSION

Coal Shippers/NARUC again urge the Board to adopt the performance data reporting proposal with the modifications that Coal Shippers/NARUC propose in their Opening and Reply Comments.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE
AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION
EDISON ELECTRIC INSTITUTE

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

Dated: April 29, 2015

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

A handwritten signature in cursive script that reads "Daniel Jaffe". The signature is written in black ink and is positioned to the right of the typed name "Daniel M. Jaffe".