



SURFACE TRANSPORTATION BOARD

FOR RELEASE

April 30, 2024 (Tuesday)
No. 24-21
www.stb.gov

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STATEMENT FROM STB CHAIRMAN MARTIN J. OBERMAN REGARDING FINAL RULE FOR RECIPROCAL SWITCHING

Nearly 40 years ago, the ICC, by rule and by subsequent decisions, established what was perceived as a high bar for the issuance of a reciprocal switching order. Indeed, no reciprocal switching orders have been issued since before 1985, and none have even been sought since 1989. The rail network of 1985 is a far cry from that of today, and significant change is overdue.

Today, by unanimous vote, the Board took a crucial step to lifting these decades old barriers to reciprocal switching for captive shippers. The rule adopted today has broken new ground in the effort to provide competitive options in an extraordinarily consolidated rail industry.

Given the repeated episodes of severe service deterioration in recent years, and the continuing impediments to robust and consistent rail service despite the recent improvements accomplished by Class I carriers, the Board has chosen to focus on making reciprocal switching available to shippers who have suffered service problems over an extended period of time.

First, although limited to consideration of reciprocal switching petitions, for the first time, the Board has set easy to measure, objective service standards for carriers: maintaining 70% or better on-time performance, not increasing transit time by more than 20% year over year, or maintaining at least 85% success on “industry spot and pull” (effectively measuring first mile-last mile service).

Second, for the first time, the Board is mandating that these three service metrics be maintained on a standardized basis across all Class Is, permitting both rail customers and the Board to accurately measure service across the industry and quickly assess Class I carrier performance. Of equal importance, the carriers must make each shipper’s performance data readily available to the shipper on request.

Third, while the Board is allowing for a carrier whose service has fallen below a standard to prove that the failure was for certain reasons beyond its control, the new rule underscores that the railroad’s intentional reduction of its workforce levels and/or equipment availability

(particularly locomotives) will not excuse resulting poor service when the Board is considering a reciprocal switching petition.

Finally, to assure commercial practicality for both the shipper and the potentially competing railroad, reciprocal switching orders will be for a minimum of three years and a maximum of five years, and can be renewed if the incumbent carrier fails to show that its service performance can meet the service standards, or simply chooses not to seek a termination of the switching order.

Under this rule, even when a shipper has obtained a reciprocal switching order from the Board, the incumbent carrier is more than free to continue to compete to retain that shipper's business by improving its performance behavior and trying to keep the shipper from choosing—that is, “switching to”—the competing railroad. This competition between the incumbent and alternate carrier is central to the operation of the rule. It allows the introduction of competition to incentivize better rail service.

In my view, the most significant advantage to the new pragmatic approach will be the ease and speed of bringing and obtaining a switching order from the Board. Compared to existing rules and earlier reform proposals, the litigation process under the new rule will be much cheaper and faster. Rather than attempting to apply subjective and largely ill-defined criteria to a switching petition, the threshold for success under the new rule will be an easily ascertainable measure, e.g., either the carrier has provided an average of 70% or better on time performance over a 12-week period or it did not. The numbers will tell the story. The framework here—both the objective service standards and the potential carrier defenses—holds down needless litigation costs and delay.

For these reasons, I am confident that shippers who are suffering service below the rule's standards and who are otherwise eligible will have relatively little trouble in obtaining switching orders under this rule.

The new rule has been enacted after very careful consideration and deliberation by the Board, including the review of 57 comments by stakeholders amounting to over a thousand pages. After decades with no Board-ordered reciprocal switching and steadfast opposition by the rail industry to any change, the Board has chosen an incremental, but nevertheless concrete and substantive change to the competitive landscape. The Board chose this approach rather than trying to impose a sweeping reform in one fell swoop on an industry which doesn't always adapt well to rapid change.

Under this approach, the Board and stakeholders will have the opportunity to employ reciprocal switching in limited and controlled circumstances with objective measurements to evaluate its success. After making sure that this initial approach is, in fact, being utilized by eligible shippers and is working effectively to accomplish its goals, the Board can use what it has learned from this rule to explore additional opportunities to expand competitive access.

Some stakeholders had urged the Board to pursue a more far-reaching reform of the limitations to reciprocal switching—in particular, by making reciprocal switching applicable to

traffic moving under contract. I am sympathetic to that desire. Much of traffic moves under contract, and very few contracts contain service standards. However, the Board is prohibited by statute from applying the new rule to contract traffic. Had the Board attempted to do so, it would almost certainly have resulted in a court challenge that might have undermined the entire effort.

What is important to understand is that even though the new rule is limited to common carrier traffic, the institution of standardized performance standards is intended to, and I am confident will, incentivize Class I railroads to meet these standards in order to avoid being subject to reciprocal switching orders. And because of the network nature of rail traffic, particularly with one train often carrying both common carrier and contract traffic, improvements in Class Is' attention to meeting the new service standards should benefit many more shippers than just those who can petition for a reciprocal switch.

Since joining the Board more than five years ago, it has been apparent to me that a lack of competition in the rail industry has allowed monopolistic practices to cause not only an increase in rail prices but a severe deterioration in the quality of rail service. That deterioration in service quality has been a real depressant on the nation's economy and threatens our ability to compete in the international market. Less rail service also hampers the effort to control greenhouse gases since rail is so much more environmentally friendly than trucking.

The new reciprocal switching rule provides access to competition where there was none. And most importantly, we are allowing competition between carriers to be the driving force for better service, rather than heavy handed dictates by the Board. Indeed, the approach of the new rule furthers the transportation policy mandated by Congress in the Staggers Act – “to ensure the development . . .of effective competition among rail carriers” and to “minimize the need for Federal regulatory control.”

I hope that the Class I carriers will heed the call of this rule and not only improve their service levels but maintain them consistently over time. If they do, they will be fulfilling their critical obligations to both their customers and the public, while at the same time minimizing the need for the Board to enact even more far-reaching regulatory requirements.

The Board's decision in [Reciprocal Switching for Inadequate Service](#), Docket No. EP 711 (Sub-No. 2), may be viewed and downloaded here. The Board also issued a press release regarding this final rule, which is also posted on the Board's website here.

POSTED: 04/30/2024 11:30 AM