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STB ADOPTS FINAL RULE FOR RECIPROCAL SWITCHING

The Surface Transportation Board today announced that it has adopted a final rule, by unanimous vote, to implement new regulations at 49 CFR part 1145 which sets forth a path for shippers and receivers to petition the Board for the prescription of a reciprocal switching agreement. Today's final rule is designed to promote adequate rail service.

Under the final rule, customers within a terminal area that have access to only one Class I rail carrier may petition the Board to order a reciprocal switching agreement when the customer's rail service falls below specified levels. Board-prescribed reciprocal switching agreements will allow shippers or receivers to gain access to an additional line haul carrier, while still allowing the incumbent carrier to compete for the customer's traffic. Reciprocal switching orders by the Board will be for a minimum of three years and a maximum of five years. The Board considers the new reciprocal switching rule to be a significant step in incentivizing Class I railroads to achieve and maintain higher service levels on an ongoing basis by permitting a competing line haul carrier to offer better service to win the customer's business.

In a decision served on September 7, 2023, the Board issued a notice of proposed rulemaking (NPRM) that would provide for the prescription of reciprocal switching agreements with emphasis on rail service performance. The Board explained that, given the recurring service problems that plague the industry, it would focus reciprocal switching reform on service-related issues. The Board received many comments from interested parties.

Today, the Board adopts a version of part 1145 that reflects certain modifications to the proposal in the NPRM, as described below:

Final Rule Performance Standards

The final rule identifies three performance standards. If a rail carrier's service to a customer falls below any of these standards, that customer may petition the Board to prescribe a reciprocal switching agreement, assuming the other parameters of the rule are met.

(1) Service Reliability: Original Estimated Time of Arrival (OETA). The service reliability standard measures a Class I rail carrier's success in delivering a shipment on time. The rail carrier success will be judged based on the estimated time of arrival that the rail carrier provided when the shipper tendered the bill of lading for shipment or, in the case of an interline move, when the incumbent rail carrier receives the shipment from a delivering carrier. The OETA would be compared to when the car was delivered. The Board proposed in the NPRM a reliability standard of 60%, where a carrier would meet the standard if, over a period of 12 consecutive weeks, the carrier delivered at least 60% of the relevant shipments within 24 hours of the OETA.

Final Rule: The Board adopts the service reliability standard in the NPRM with the following changes: (1) the reliability standard will increase from 60% to 70%; (2) the definition of "delivery" will be clarified for purposes of interchange; (3) the reliability standard will measure early arrivals as well as late arrivals, in each case with a 24-hour grace period; (4) the reliability standard will be clarified for cross-border traffic; and (5) the reliability standard will only apply individually to each lane of traffic to/from the petitioner's facility.

(2) Service Consistency: Transit Time. The service consistency standard measures a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system, i.e., the time it takes for a shipment to travel from its origin to its destination. The Board proposed in the NPRM that, for loaded manifest cars and loaded unit trains, a rail carrier would fail the service consistency standard if the average transit time for a shipment over a 12-week period increased by either 20% or 25% as compared to the average transit time for that shipment over the same 12-week period during the previous year.

Final Rule: The Board adopts the service consistency standard that was proposed in the NPRM using a 20% standard. The Board also: (1) modifies the definition of delivery to better reflect custom and practice; (2) clarifies how it measures transit time performance on international lanes; (3) adds a three-year measure of 25% to guard against excessive cumulative increases in transit time; (4) creates an absolute floor for both the one-year and three-year measure of 36 hours; and (5) provides that the service reliability standard only applies to individual lanes of traffic to/from the petitioner's facility.

(3) Inadequate Local Service: Industry Spot and Pull (ISP). The third performance standard—ISP—measures a rail carrier's success in performing local deliveries ("spots") and pick-ups ("pulls") of loaded railcars and unloaded private or shipper-leased railcars during the planned service window.

Final Rule: The Board adopts the local service standard that was proposed in the NPRM using a 12-hour work window. The Board also: (1) increases the local service standard to 85%; (2) extends the period during which a 90% standard would apply to two years when a rail carrier unilaterally reduces service; (3) clarifies how success in spotting "spot on arrival" railcars will be measured; and (4) clarifies that the local service standard does not apply to unit trains or intermodal traffic.

Data Production and Implementation: The Board adopts the data collection it proposed in the NPRM. All six Class I rail carriers must begin reporting based on the new, standardized definitions of OETA and ISP.

The Board also requires Class I railroads to provide, within seven days of receiving a request from a shipper or receiver, all individualized performance records necessary for that shipper or receiver to file a petition under part 1145.

Class II and III Railroads: Part 1145 pertains to shippers and receivers that have practical physical access to only one Class I rail carrier or its affiliated company. The affiliated company might be a Class II or Class III railroad. Part 1145 otherwise does not apply to Class II and Class III railroads.

Affirmative Defenses: The Board will excuse an incumbent rail carrier's failure to meet a performance standard if such a failure was caused by: (a) extraordinary circumstances, such as acts of God; (b) a surge in the shipper's/receiver's traffic of more than 20% about which the shipper/receiver did not give the incumbent rail carrier advanced notice; (c) highly unusual shipment patterns by the shipper/receiver; (d) dispatching choices of a third-party; or (e) third-party conduct outside the incumbent carrier's reasonable control. The Board also will consider, on a case-by-case basis, affirmative defenses not specified in part 1145. The Board spells out that an incumbent carrier's intentional reduction or maintenance of its workforce at a level that itself results in a workforce shortage causing the carrier to fail specified service standards would not, on its own, be considered a defense.

Duration and Termination of Prescription: In prescribing a reciprocal switching agreement, the Board shall prescribe a minimum term of three years and may prescribe a longer term of service up to five years when circumstances warrant a longer prescription (rather than the two to four years that was proposed).

The incumbent rail carrier may petition the Board to terminate the prescription at the end of the prescribed term if the incumbent rail carrier is able to demonstrate that its service for similar traffic met all three performance standards for the most recent 12-week period prior to the filing of the petition to terminate (rather than the prior 24-week period that was proposed). If the petition to terminate is denied, then the Board will extend the prescription for up to the same period as the initial prescription. If the incumbent carrier does not file a petition for termination, the prescribed agreement will automatically renew at the end of its term for the same period as the initial prescription.

Contract Traffic: For traffic that is moved under a transportation contract pursuant to 49 U.S.C. 10709, the Board will not prescribe a reciprocal switching agreement under part 1145 based on the incumbent carriers' performance occurring during the term of the contract. The Board determines that use of contract performance data as the basis to prescribe a reciprocal switching agreement under the rule would be inconsistent with the statutory limitations imposed by section 10709.

Exempt Commodities: The Board will not prescribe a reciprocal switching agreement under part

1145 for movements of exempt commodities. Rather, a shipper or receiver would need to obtain partial revocation of the exemption before filing a petition under part 1145. The Board clarifies that it will not rely on pre-revocation performance as the basis for a prescription of a reciprocal switching agreement under the rule. Recognizing the potential hardship this process might cause, the Board will prioritize petitions for partial revocation. The Board also intends to explore, at a later date, whether it should partially revoke exemptions on its own initiative to allow for reciprocal switching petitions, as is currently the case for the boxcar exemption.

In choosing to focus reciprocal switching reform on service issues at this time, the Board has not foreclosed further consideration of additional reforms geared toward increasing competitive options. And, even with the adoption of part 1145, shippers may still pursue access to an alternate rail carrier under parts 1144 and 1147, and advocate for continued development, including, as appropriate, development by the Board of adjudicatory policies and the appropriate application of those rules in individual cases.

This decision will be effective 120 days from the date of publication in the Federal Register. For details regarding today's Board decision, please refer directly to the decision itself. Board Member Robert Primus commented with a separate expression. The Board's decision in [Reciprocal Switching for Inadequate Service](#), Docket No. EP 711 (Sub-No. 2), may be viewed and downloaded here. Chairman Martin J. Oberman also released a statement regarding this final rule, which is posted on the Board's website.

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