BEFORE THE
SURFACE TRANSPORTATION BOARD

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE	)	Docket No. EP 711 (Sub-No. 2)

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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The Western Coal Traffic League ("WCTL") submits these Comments in response to the Surface Transportation Board's ("STB" or "Board") Notice of Proposed Rulemaking ("NPRM") served in this proceeding on September 7, 2023. The Board's proposed regulations at 49 C.F.R. § 1145 are unlikely to provide a meaningful benefit to most unit train coal shippers and appear to contemplate a system in which already-poor rail service may further degrade over time without giving rise to any reciprocal switching rights. The Board's proposed approach also relies on an unnecessarily narrow geographic scope for potential relief.

Notwithstanding the sharp distinction that the Board identifies as between the subjects of railroad competition and railroad service, WCTL respectfully submits that the use of reciprocal switching to encourage competition between rail carriers would provide a collateral benefit in terms of overall railroad service quality.

IDENTITY AND INTEREST

WCTL is a voluntary association whose regular membership consists entirely of shippers of coal mined west of the Mississippi River and transported by rail. WCTL's

members include Ameren Missouri, Arizona Electric Power Cooperative, Inc., Austin Energy (City of Austin, Texas), CLECO Power LLC, CPS Energy, Entergy Services, Inc., Evergy, Inc., Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, and Western Fuels Association, Inc.

WCTL was founded to advocate the interests of consumers of western coal. Beginning in 1977, WCTL has advanced and protected the interests of western coal consumers before the United States Congress, the United States Departments of Commerce, Interior, Justice and Transportation; federal and state courts; and numerous federal and state regulatory departments and agencies including the U.S. Surface Transportation Board, the Bureau of Land Management and the Federal Trade Commission.

WCTL has appeared in many proceedings before the Board involving rail competition and rail service issues, including proceedings conducted by the ICC that resulted in the initial adoption in 1985 of what are not the Board's current reciprocal switching rules.

COMMENTS

A. The Board's Service-Focused Proposal is Not Likely to Provide Meaningful Relief for Most Unit Train Coal Shippers

WCTL appreciates the Board's effort to develop a potential approach for addressing inadequate rail service through reciprocal switching. It is unlikely, however, that the Board's proposal would provide a meaningful benefit for most unit train shippers of coal. The vast majority of unit train coal service occurs pursuant to contracts that are

outside the Board's jurisdiction. 49 U.S.C. 10709. As such, the Board's new focus on reciprocal switching as a remedy for poor service (as opposed to a tool for unlocking competition between carriers) will prevent most unit train coal shippers from obtaining any reciprocal switching relief.

To that end, WCTL agrees with Board Member Primus' observation that he "eagerly anticipate[s] the Board action to improve access to the statute's other prong, addressing reciprocal switching that is 'necessary to provide competitive rail service.'" NPRM at 34 (Primus concurring). "The Board should act soon to ensure that reciprocal switching is available for competitive access to the extent authorized by the language of the statute." *Id*. at 35. WCTL echoes that suggestion.

As a unit train coal shipper approaches the expiration of its current rail transportation contract, the question of whether competition exists necessarily arises. The availability of a reciprocal-switching remedy in that context would give the shipper some means of obtaining the benefits of competition that already may exist for the majority of the intended length of haul (limited, of course, by the incumbent carrier's monopoly control over the shipper's origin or destination).

However, that same shipper will be unlikely to be able to invoke relief under the Board's service-based proposal. Recourse to such regulations would be possible only where the incumbent carrier's service happened to suffer relative to some historic standard within an appropriate window of time at or near the contract's expiration. Under the Board's proposed regulations, a carrier facing the approaching termination of a transportation contract would know that – so long as its service did not appreciably

worsen at or around the time of the contract's expiration – the shipper would have no potential recourse to the Board. And while, in theory, a shipper could have some judicial or arbitral recourse for poor service under the contract's dispute resolution provisions, it nevertheless is the case that the absence of a meaningful regulatory check on poor service (through reciprocal switching or otherwise) would greatly lessen any rail carrier's willingness to agree to meaningful service terms in its contracts.

The availability of meaningful relief through the Board's proposed reciprocal switching rules also would depend upon the willingness of a second carrier to provide rail service at a rate that would remain competitive even after the payment of the reciprocal switching charge. The Board's NPRM does not consider the impact that its approach would have on contracting, but WCTL respectfully submits that the adoption of what amounts to only a loose regulatory service standard will adversely impact carrier-shipper contract negotiations.

With regard to timing, the NPRM seeks comment on "when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires." NPRM at 27. WCTL submits that – consistent with practice in maximum rate cases – the Board should allow shippers to seek agency reciprocal switching relief within the final calendar quarter of any given rail transportation contract's term.

In this same context, WCTL notes that – when assessing evidence regarding the stand-alone traffic group in a stand-alone cost-based maximum rate case – the Board

regularly considers the details of rail transportation contracts. That same principle supports the legitimacy of Board consideration of transit time data "by contract, as the grounds for prescribing a reciprocal switching agreement that would become effective after the contract expired." NPRM at 27.

B. A Properly Designed Reciprocal Switching Remedy Could Benefit Coal Shippers Lacking the Protection of a Binding Contract

As noted, the majority of rail shipments of coal used for the generation of electricity take place under negotiated commercial contracts that are outside the scope of the Board's jurisdiction. However, it appears that an increasing number of such shipments occur in common carrier service subject to tariffs unilaterally established by rail carriers. These are consequences of a carrier's decision to require the utility to use common carriage, an inability of the utility to negotiate reasonable contract rates and service terms with a market dominant railroad, or some combination of the two. These shippers lack the protection of binding contracts to govern serving railroads' performance, and therefore have to rely on the Board's authority and remedial resources to secure timely and reliable rail transportation of essential generation fuels.

Recently and currently, the Board has acted to enforce a railroad's common carrier obligations under Section 11101(a) in a variety of factual circumstances, through a combination of its authority to grant injunctive relief and its jurisdiction to award damages for proven violations of provisions of the ICCTA. *See*, *e.g.*, *Navajo Transitional Energy Co., LLC – Ex Parte Pet. for Emergency Service Order*, NOR 42178 (STB served June 23, 2023); *Foster Poultry Farms – Ex Parte Pet. for Emergency*

Service Order, FD 36609 (STB served June 17, 2022); *Sanimax USA LLC v. Union Pac. R.R.*, NOR 42171 (STB served Nov. 2, 2021); *Hasa, Inc. v. Union Pac. R.R.*, NOR 42165 (STB served Aug. 21, 2019). As the Board and the complainants in these proceedings know well, however, litigation to enforce Section 11101 under current rules and precedents can be very time-consuming and costly. For coal shippers under tariffs whose facilities are far removed from the lines of another railroad, reliance on existing remedies for inadequate railroad service would continue to be their primary option. For utilities with coal-fired generating stations that are reasonably proximate to a terminal area or interchange yard served by two or more railroads, a properly designed reciprocal switching remedy – or the prospect of such a remedy – in response to deteriorating service from an incumbent carrier could offer those shippers a more expedited and efficient response to service failures. As discussed in the next section, however, changes to the Board's proposed structure are needed.

C. The Board's Transit-Time Service Measure Would Allow for a Downward Service Spiral

The Board's proposed regulations appear to assume that a rail carrier's service in the immediately preceding calendar year necessarily represents adequate service. The Board's proposed transit-time standard would require that, for loaded manifest cars and loaded unit trains, "a petitioner would need to demonstrate that the average transit time for a shipper increased by either 20 or 25% (to be determined in the final rule) over the average transit time for the same 12-week period during the previous year." NPRM at 18; *see also id.* at 39 (proposed section 1145.2(b) ("A rail carrier meets the service

consistency standard when *A* is no more than [20] [25]% longer than *B*, where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year.").

This standard improperly assumes that the incumbent carrier's service during the prior year was adequate. There is no basis for such an assumption, particularly given the service-related difficulties that the Board has observed in recent years (*e.g.*, railroad-imposed reductions in labor, other precision-scheduled railroading cutbacks, etc.). *See* NPRM at 4 ("At the Board was developing and considering the 2016 NPRM, it was also addressing a series of major service problems plaguing the rail network."); *id*. at 5 (discussing the Board's two-day hearing in April 2022 to explore issues related to the reliability of the national rail network).

Moreover, it would be entirely possible under the proposed standard that an incumbent carrier could allow its transit-time performance to degrade each year by, for example, 19% (or whatever other figure falls just below the threshold that the Board ultimately chooses). Over the course of several years of compounded transit-time percentage increases, that carrier would provide what amounts to a profoundly lower quality of service without triggering any shipper right to seek reciprocal switching:

	Transit Time (hours)	Percentage Increase	Aggregate % Increase
Year 1	100.0	N/A	N/A
Year 2	119.0	19.0%	19.0%
Year 3	141.6	19.0%	41.6%
Year 4	168.5	19.0%	68.5%
Year 5	200.5	19.0%	100.5%

To its credit, the Board adds that it "seeks comment on what level of increase in transit time should be the standard and whether the Board should adopt a different standard that also captures prolonged transit time problems . . . ." *Id*. at 18. WCTL respectfully submits that the Board should modify its proposed regulations to permit petitioners to submit evidence regarding poor transit times (sufficient to justify the prescription of reciprocal switching) even where the transit times at issue do not meet the 20-25% threshold. Such evidence could take the form of an aggregate showing of steady decline (as shown in the foregoing chart) or could rely on a particularly problematic transit-time performance even in the absence of year-over-year changes in transit times. For example, a shipper could attempt to demonstrate that its service (measured on the basis of average velocity) falls far below system average for the carrier or falls far below the carrier's average velocity for a particular commodity.[1]

Regardless of the particular measure invoked, the Board should broaden its proposed relief such that an underperforming carrier would not be in a position to benefit

[1] In such circumstances, the Board should allow the shipper to obtain relevant comparison information from the carrier to the extent such information is not already publicly available.

from its ability to claim that its service historically has been just as poor as the carrier is providing at the present time.

D. The Board Should Expand its Unnecessarily Restrictive Geographic Scope of Relief

The Board proposes to make reciprocal switching available in a "terminal area." NPRM at 2 ("The newly proposed regulations would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards"). According to the NPRM, a terminal area is a "commercially cohesive area in which two or more rail carriers undertake the local collection, classification, and distribution of shipments for purposes of line-haul service." *Id*. at 11-12 (citing *Rio Grand Indus., Inc. – Purchase & Related Trackage Rights – Soo Line R.R.*, FD 31505, slip op. at 10-11 (ICC served Nov. 15, 1989)). The Board distinguishes terminal areas from "main-line track" (*id*. at 38) and adds that a "terminal area is characterized by multiple points of loading/unloading and yards for local collection, classification, and distribution." *Id*. at 12. The Board states that it will consider evidence that the subject area met the foregoing definition, but that "a particular point of loading/unloading would not be the appropriate subject of a prescribed reciprocal switching agreement under part 1145, if the point is not, or using existing facilities reasonably could not be, integrated into the terminal area operations." *Id*.

WCTL respectfully submits that the Board's proposed geographic scope of relief is unnecessary restrictive and should be expanded. Section 11102 of Title 49 authorizes the Board to require terminal facilities, "including main-line tracks for a reasonable

distance outside of a terminal," to be used by another carrier if the Board finds that use to be practicable and in the public interest without impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. 49 U.S.C. § 11102(a); *see also* 49 U.S.C. § 11102(c)(1).

A more appropriate geographic scope would include – like Section 11102 – main-line tracks for a reasonable distance outside a terminal. In addition, or in the alternative, allowing consideration of the exact geographic scope of reciprocal switching relief on a case-by-case basis would permit the Board to consider whether the facts and circumstances of any given situation could allow for reciprocal switching relief in poor-service situations outside the strict, geographic limits of the Board's proposed new standard.

CONCLUSION

WCTL respectfully requests that the Board: (1) take action to update its regulations regarding reciprocal switching as a means of addressing the absence of competition; (2) find that its proposed service-related regulations allow contract shippers to seek reciprocal switching prior to the expiration of their contracts; (3) tailor the transit time standard (as described herein) to eliminate the existing loopholes that otherwise would allow poorly-performing rail carriers to perpetuate their low-quality service as long as that service does not become appreciably worse in any given year; and (4) expand the proposed geographic scope of reciprocal switching relief.

Respectfully submitted,

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