September 2023

STB Proposes to Improve Shipper Access to Reciprocal Switching to Address Inadequate Rail Service

Key Notes:

- The STB issued a new proposed rule to improve shipper access to reciprocal switching when Class I railroads fail to satisfy certain service standards concerning on-time performance, transit-time increases, and first-mile/last-mile switch fulfillment.
- The proposed rule standardizes and requires Class I railroads to report service metrics related to the service standards for obtaining reciprocal switching.
- The STB has requested comments from shippers and other industry stakeholders on many aspects of the rule, including whether the service standards are appropriate. Comments are due by October 23. Reply comments are due November 21.

On September 7, 2023, the Surface Transportation Board (STB) proposed a new rule to improve freight-rail customers' access to reciprocal switching to address inadequate rail service. The rule also would establish and require permanent reporting of standardized metrics for measuring aspects of rail service that are important to shippers. These reforms respond to longstanding shipper efforts to address rate and service issues impacting rail shippers without access to rail competition.

Parties interested in commenting on the proposed rule must submit opening comments by October 23, 2023, and reply comments by November 21, 2023.

Background

Reciprocal switching provides a shipper served by one rail carrier with access to an alternate rail carrier to transport its shipments from an origin to an interchange or from an interchange to a destination that is served directly by the alternate carrier. The incumbent carrier charges a fee to the alternate carrier for "switching" the traffic at the interchange. The alternate carrier charges the shipper a rate covering the switch and its transportation of the shipment between the origin or destination and the interchange.

By statute, the Board may order rail carriers to enter a reciprocal switching agreement when practicable and in the public interest or necessary to establish competitive rail service. While the Board has regulations under which a shipper can seek reciprocal switching, no shipper has sought a reciprocal switching order from the STB for over 30 years. Shippers have asserted that the existing rules and precedent include insuperable evidentiary showings that effectively make reciprocal switching inaccessible.

In 2016, the Board proposed a rule to improve access to reciprocal switching by establishing new tests to determine whether switching was necessary to promote competition or practicable and in the public interest. Under the 2016 proposal, a shipper could obtain switching if, subject to carrier defenses and certain limitations, it could show a lack of effective intramodal and intermodal competition or that the benefits of a switch would outweigh its detriments.

While the Board received extensive comments and held a hearing on the 2016 proposal, the proposal went dormant until the Board sought additional comments in 2022.

The New Proposal

The new proposed rule would allow reciprocal switching as a remedy for inadequate rail service, which the STB says will serve the public interest. Unlike the Board's 2016 proposal, it does not offer a path to switching to address a lack of adequate competition. Although the Board has closed the docket for the 2016 rule, the Board has requested comments on possible future efforts to improve access to reciprocal switching when necessary for competitive rail service.

The proposed rule establishes three new performance service standards for Class I railroads, and a failure of any one standard could be used to support a reciprocal switching prescription by the STB. In the proposal, the Board observed that the standards, defenses, and definitions in its proposal, which are more objective and transparent compared to the 2016 proposal, would provide the certainty necessary to protect the public interest and the interests of rail customers in adequate service.

Standards for Obtaining Reciprocal Switching under the Proposed Rule

Under the new proposal, the STB would order a reciprocal switch for traffic if all the following are met:

- The incumbent is a Class I carrier or its affiliate.
- The switch is in the same terminal area as the origin or destination of the traffic.
- The shipper has practical physical access to only one Class I carrier that can serve the traffic.
- Concerning the traffic at issue, the incumbent carrier fails to meet one of the three performance standards.
- The incumbent carrier cannot demonstrate one of four affirmative defenses.
- The incumbent carrier or alternate carrier cannot demonstrate that: switching would impair either carrier's operations, or the alternate rail carrier's service for the traffic would be infeasible or unduly hamper the incumbent's or alternate carrier's service to existing customers.

The STB would evaluate petitions for switching on a lane basis, which it defines as an origin and destination pairing for a single commodity.

Under the terminal area requirement, the switch and origin or destination would have to be in the same area where the incumbent and alternate carrier both engage in local operations to facilitate line-haul service. To identify the terminal area, the STB would look at the location of the carriers' local infrastructure and traffic and whether the origin or destination is or can be reasonably integrated into the incumbent's terminal-area operation.

Under the "practical physical access" requirement, the shipper must not have a feasible shipping opportunity for the lane at issue with an alternate rail carrier, whether directly or through the carrier's affiliated company.

Under the service performance requirement, the shipper must demonstrate that the incumbent carrier failed to meet one of the standards in the following table.

Metric	Standard
Service Reliability (OETA Performance). Percentage of shipments constructively or actually placed at the destination (or interchange point) within 24 hours of the original estimated time of arrival, over a consecutive 12-week period. This applies only to manifest traffic.	Option 1: ≤60% Option 2: ≤60% for year 1; 70% year 2 and beyond
Service Consistency (Transit Time Changes). Year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period and the same 12-week period during the previous year. This metric apples to both loaded moves and empty private car moves.	>20% or 25%

Metric	Standard
Local Service Adequacy (Industry Spot and Pull) (ISP). Percent of requested spots (local deliveries) and pulls (local pickups) performed within the planned service window over 12 consecutive weeks. The shipper must order the spot or pull before the service window cutoff time. The carrier will be deemed to have missed a service window if it fails to pick up or place all cars requested by the shipper or receiver by the applicable cutoff time.	<80% <90% for one year if the carrier reduces frequency of local service without a commensurate reduction in customer demand.

The STB seeks comment on the proposed standards and whether it should provide for the prescription of terminal trackage rights for failure to meet the ISP standard, either in place of a reciprocal switching prescription or as an alternative.

Regarding affirmative defenses, the Board would not order reciprocal switching if the carrier proves one of the following caused the carrier to fail to achieve the service standard at issue.

- **Extraordinary circumstances.** Service levels were significantly affected by extraordinary circumstances beyond the incumbent carrier's control. The circumstance must be the principal cause of the carrier's failure to meet the service standard. Intentional reduction or maintenance of workforce or equipment at levels that cause a shortage of these items and failures to use reasonable efforts to address these shortages do not qualify as extraordinary circumstances on their own.

- **Shipper surge.** Petitioner's traffic increased by at least 20% during the 12-week period at issue if the traffic is not seasonal or during the 12-week period at issue compared to the prior year if the traffic is seasonal, and the shipper did not provide at least 12 weeks advanced notice.

- **Highly Unusual Shipping Pattern.** A highly unusual shipping pattern occurred on the lane during the 12-week period at issue.

- **Delay Caused by Dispatching Choice of a Third Party.** Dispatching by a third party caused the carrier's failure to meet the service standard.

Process for Obtaining a Reciprocal Switch Prescription

To obtain a reciprocal switch prescription, a shipper must attempt to negotiate a resolution with the incumbent carrier at least five business days before filing a petition with the STB seeking a switch. The Board intends to decide whether to prescribe a reciprocal switch within approximately 90 days after receiving the shipper's petition. If the Board prescribes a switch, the incumbent and alternate carriers must offer service within 30 days.

Duration and Termination of a Reciprocal Switch Prescription

The proposed rule provides that a prescribed reciprocal switching agreement will have a minimum term of two years. The Board may prescribe a minimum term of up to four years if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs. Prescriptions would automatically renew unless the STB grants a petition from the incumbent to terminate the prescription.

To terminate a reciprocal switching prescription, the incumbent carrier must seek termination from the STB 120 to 180 days before the end of the current prescription term. The Board will grant a petition to terminate if the carrier demonstrates that, for 24 consecutive weeks before filing, its service for similar traffic on average met the performance standard that was the basis for the prescription, and it consistently met the performance standards for similar traffic to or from the relevant terminal area.

Data Reporting

The proposed rule requires Class I carriers to provide shippers with individualized service data necessary to establish whether they are entitled to reciprocal switching under the proposed rule. The carriers must provide the data in machine-readable format within seven days of the shipper's written request.

The rule also requires each Class I carrier to report weekly to the STB systemwide service reliability data and the carrier's ISP performance for its system and each of its operating divisions.

Next Steps

As mentioned above, the STB has invited interested parties to comment on its proposed rule. In its decision to issue the proposed rule, it identifies many specific items for comment. These items include, but are not limited to, the service standard definitions and targets, application of the rule to exempt and contract traffic, and how the STB would set the switch fee that the incumbent carrier charges the alternate carrier if they cannot agree on it.

FOR MORE INFORMATION

For more information, about the proposed rule or for assistance with preparing comments on the proposed rule, please contact:

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