THOMPSON HINE

Transportation Update

May 2024

Surface Transportation Board Adopts New Reciprocal Switching Rules to Address Inadequate Rail Service

On April 30, 2024, the Surface Transportation Board ("STB" or "Board"), after nearly 13 years of proceedings, adopted new reciprocal switching regulations. The STB's decision finalizes its modified rulemaking proposal issued in September last year to prescribe a reciprocal switch when service to a terminal-area shipper fails to meet certain minimum performance standards.[1] The STB intends to incentivize adequate rail service by Class I railroads by allowing captive shippers in terminal areas to access a nearby rail carrier when the incumbent carrier's service falls below any one of three metrics over 12 consecutive weeks. The new rule, which focuses solely on rail service, differs substantially from a previous proposal to prescribe reciprocal switching to foster greater rail competition. The new rule will take effect September 4, 2024.

The Board will order a reciprocal switch when:

1. The prescription is in a terminal area and the petitioner has practical physical access to only one Class I rail carrier or affiliate;
2. The incumbent rail carrier failed to meet one of three performance standards;
3. That failure was not excused by an affirmative defense; and
4. The resulting switching and alternative line-haul arrangements would be operationally feasible and would not unduly impair a participating rail carrier's ability to service its other customers.

To facilitate application of the new regulations, the STB is requiring all Class I railroads to submit service data on a continuing basis which will be publicly accessible. Railroads also are required to provide machine-readable service data for individual traffic lanes to customers upon written request.

Significantly, however, traffic that moves pursuant to a rail transportation contract cannot be used to show that a rail carrier's performance metrics fall below the new standards. Even though more than 75% of rail traffic moves pursuant to a rail transportation contract,[2] the Board concluded that it lacked statutory authority to analyze this data because it would be tantamount to regulating rail traffic that moves pursuant to a rail transportation contract, which the statute prohibits. The Board declined to permit a shipper to petition for a reciprocal switch during the term of a contract and determined that the shipper must wait until the contract expires to begin accumulating the 12 weeks of service data that might support a reciprocal switch under the new regulations. Thus, determining if a Class I rail carrier has failed any of the service metrics can be based only on traffic that is transported pursuant to railroad tariff rates and rules, and not contracts.

The Board also declined to apply the new reciprocal switching rules to commodities that are exempt from STB regulation. Instead, the Board will prioritize petitions for

[1] *Reciprocal Switching for Inadequate Service*, STB Docket EP 711 (Sub No. 2), 88 Fed. Reg. 63897 (Sept. 18, 2023) ("NPRM").

[2] *Freight Rail Pricing*, GAO (Dec. 2016), https://www.gao.gov/assets/gao-17-166.pdf, at 17.

partial revocation of commodity exemptions that are filed in furtherance of a reciprocal switching case.

I. Performance Standards

The performance standards address three aspects of rail service: (1) timing in the arrival of line-haul shipment (service reliability), (2) consistent shipment times (transit times), and (3) on-time local pickups and deliveries (industry spot and pull). If a shipper or receiver demonstrates that the rail carrier failed to meet any one of these service performance standards, and in the absence of an affirmative defense, infeasibility, or undue impairment, the Board would prescribe a reciprocal switch. The STB clarified that these metrics will not be used for other purposes, such as to determine whether a railroad is meeting its common carrier obligation, and that the metrics themselves are not determinative of whether a service-related prescription might be justified under other Board regulations.

a. Service Reliability

The "service reliability standard" measures a rail carrier's success in delivering a shipment near its original estimated time of arrival (OETA), which is the estimated time of arrival the rail carrier provided when the shipper tendered the bill of lading to the rail carrier for shipment. To satisfy this metric, the rail carrier must deliver all shipments that the shipper tendered to the carrier over a single lane over 12 consecutive weeks within 24 hours of the OETA at least 70% of the time. Shipments that arrive more than 24 hours early also do not count as being delivered on time for purposes of the reliability standard.

b. Service Consistency

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. To determine the rail carrier's success in this metric, the Board looks at the year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period to the same 12-week period during the previous year. This metric apples to both loaded moves and empty private car moves. The threshold for a carrier to satisfy this metric is a transit time increase of no more than 20%.

c. Inadequate local service

The Board's "industry spot and pull" (ISP) standard measures a rail carrier's success in performing local deliveries (spots) and pickups (pulls) of loaded and unloaded railcars during a planned service window. If the carrier's success rate is less than 85% over a consecutive 12-week period, the carrier would fail the ISP standard.

II. Affirmative Defenses

The Board adopted five affirmative defenses that carriers could invoke to avoid a reciprocal switching agreement: (1) extraordinary circumstances that were beyond the incumbent's control; (2) shipper surge that increased the incumbent carrier's traffic by at least 20%; (3) highly unusual shipper patterns; (4) dispatching by a third party that caused the carrier to fail to meet the performance standard; and (5) third-party conduct that is outside the reasonable control of the incumbent carrier. The Board clarified that it would consider other affirmative defenses on a case-by-case basis.

III. Duration and Termination of a Reciprocal Switch Agreement

The Board determined that a reciprocal switch agreement will last a minimum of three years and a maximum of five years. The switching arrangement will renew automatically unless the carrier petitions the Board no less than 150 days before the end of the prescription period to terminate the prescription. If the Board grants a termination petition, the switching agreement will terminate 30 days thereafter or after the end of the prescription period, whichever is later.

Under the new regulation, the Board will grant a petition to terminate a switching prescription if the incumbent carrier can demonstrate that, for the most recent 12-week period prior to the filing of the petition, the carrier's service for similar traffic, on average, meets all three performance standards (i.e., service reliability, service consistency, and inadequate local service).

FOR MORE INFORMATION

Thompson Hine has been actively involved since the initiation of the Board's proceedings on reciprocal switching reforms. For more information or for assistance regarding the impact of the STB's reciprocal switching regulations, please contact:

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