BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

NATIONAL STONE, SAND & GRAVEL ASSOCIATION REPLY COMMENTS

National Stone, Sand & Gravel Association (NSSGA) submits these Reply Comments in response to the Surface Transportation Board's (STB or the Board) Notice of Proposed Rulemaking (NPRM) in "Reciprocal Switching for Inadequate Service," Board action that focuses on providing rail customers with access to reciprocal switching as a remedy for poor service, based around three measures of carrier success or failure, namely: (1) service reliability; (2) service consistency; and (3) adequacy of local service. In its opening comments, NSSGA expressed its enthusiasm for the Board's action in this docket to hold rail carriers accountable, to provide rail shippers some measure of relief from poorly performing incumbent rail carriers, and to enforce, in the Board's own words, "unambiguous, uniform standards…consistently applied across Class I rail carriers and their affiliated companies." NSSGA continues to support this critical action and the NPRM as a whole, subject to the modifications NSSGA advanced in its Opening Comments. With that in mind, however, NSSGA feels compelled to address some of the arguments advanced by rail carriers through the Association of American Railroads (AAR), whose own opening comments and arguments contained therein NSSGA views as contrary to the central aims of this proposed rule.

At the outset, AAR attempts to problematize the proposed rule as inviting "complex tradeoffs among a variety of interests," arguing that reciprocal switches result in "service that is more operationally and economically complex than existing service" with accompanying

"potential downsides." AAR Opening Comments (Comments) at 2. There and throughout its Comments, AAR relies heavily on its interpretation of a standard promulgated in *Jamestown, N.Y., Chamber of Com. v. Jamestown, Westfield & N.W. R.R. Co.*, 195 I.C.C. 289 (1933), namely that shippers must substantiate "some actual necessity or some compelling reason" for relief. AAR emphasizes by quotation *Jamestown*'s clarification that such standard is a higher bar than "mere desire on the part of shippers." Comments at 5; *Jamestown* at 292. AAR's selective citation of that matter, however, erases the context of the Board's ruling therein. In *Jamestown*, the Board specifically recognized the service it confronted there was "exceptionally good" and that inadequate service, by contrast, *would* trigger Board action: "the record does not show that Jamestown shippers are so inadequately served at the present time as to warrant [prescribing relief]." *Id*. at 292.

AAR, in service of the same implication that shippers might pursue reciprocal switches merely for their own advantage, quotes *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 975, 978 (1998) as stating, "[i]ndividual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service." Both this and AAR's quotation from *Jamestown*, however, can be read only as *non sequiturs* in the context of the proposed rule, which far from addressing unjustified shipper whims is instead a self-stated long overdue remedy for rail carrier service inadequacy. As the Board is well aware, the proposed rule is now in its second permutation precisely because it is tailored to address unnecessarily poor performance by incumbents. To the extent that the rule addresses "individual service desires," such desire is only that the rail service paid for by shippers be timely completed – that is, far from a shipper asking for individualized preferential treatment, the desire is that rail carrier service be *competent*. There can be no doubt that the ongoing poor performance of rail carriers is precisely the "compelling reason"

contemplated by *Jamestown*, and indeed even a necessity for the many captive shipper members of NSSGA who depend on rail carriers to move their commodities.[1]

Complicating considerations further, AAR submits that there is a danger reciprocal switching would in fact make service worse, yet such argument appears to conflate prescription of a reciprocal switch with prescription for the shipper to pursue one and to use it. In fact, a shipper's successful demand for a switch will be necessarily predicated on poor incumbent performance. The incumbent carrier is not precluded from wooing back the customer it previously failed to properly service, nor is that shipper customer forever shackled to the competitor carrier to which it turned for relief. AAR further cautions "a deterioration in transit time for a lane could be associated with a service inadequacy warranting a forced switching order—but it could instead be the product of measuring this year's sound performance against last year's unusually expeditious service." *Id*. at 6. This proposed rule has not arrived on the heels of "unusually expeditious service" in past years nor is it clear what incentive a captive shipper would have to go through a lengthy petition process for a reciprocal switch when it was already receiving adequate service. Moreover, asking the Board to reflect on whether past service was "unusually expeditious," a conceptually amorphous standard, would only delay shipper relief in a prescription process with already ample information to contemplate and sufficient safeguards in place.

Among AAR's next arguments is a plea for more time to rectify the poor performance prompting a shipper's demand for a switch. AAR makes a seemingly reasonable request that "the

[1] It should be noted that in its opening comments to EP 711 *Sub No. 1*, and yet again in its Comments here AAR misstates such standard as the "actual necessity standard," omitting the more inclusive "compelling reason" portion. However fleeting the oversight, we submit that it may offer insight into AAR's reductive interpretation of a standard with which the proposed rule even without modification is wholly in keeping. *See* Opening Comments of the Association of American Railroads [on Sub No. 1] at 1; Comments at 13.

Board should adjust its pre-petition process and timeline to ensure an opportunity exists to cure the alleged inadequacy without board intervention." *Id*. at 8. However, such argument makes plain that carriers (a) are capable of improving service when threatened by a looming reciprocal switch proceeding; and (b) are interested in improving service only where they have been put on notice by the shipper that the shipper intends to pursue a reciprocal switch. The carriers' superficially benign request thus underscores that they simply will not improve service unless their bottom line is in threat. We submit that carriers have ample opportunity to provide adequate service *at all times*, an extension of time for carriers to cure their previous inaction is only another delay that many shippers cannot sustain, and that AAR's argument here serves only to emphasize that carriers are capable of better service when incentivized as the Board proposes to do with EP 711.

More specifically, AAR proposes that shippers be required to discuss the inadequacy of the carrier's service for at least four weeks, during which time the carrier can improve service, which supposed improvement the Board must consider in evaluating a prescription. *Id*. at 88. However, this time extension would only afford torpid carriers an opportunity to temporarily make the improvements they could have made all along, professing to the Board that the problem is moot when the carriers in fact have impermanently addressed the problem only to avert a switch. This practice of temporary improvement could continue *ad infinitum*, appearing to preclude any need by shippers repeatedly, but never earnestly addressing longer periods of poor service. AAR argues further that "unless the shipper has previously approached the incumbent carrier about the service issue, the subject is likely to be new," yet such (a) wrongly implies that shippers have inadequately alerted carriers to their own service inadequacies; and (b) suggests such inadequacies are not immediately apparent. *See id*. at 87. If carriers deliver customer goods days after the time they promised, those carriers should not need to be told that such is poor performance. Moreover, the

petition process already affords carriers time to improve, as filings are made over months and desperate captive shippers negotiate new arrangements. The proposed rule's reason for being is to alleviate unnecessary delays by incumbent carriers – carriers should not be allowed also to delay the very process meant to address that indolence.

AAR next would have the teeth of the reciprocal switch prescription removed entirely, arguing for (a) a shorter duration for the prescription and (b) the opportunity for the incumbent carrier to petition and end any prescribed and functioning switch *at any time*. As NSSGA emphasized in its initial comments, the proposed rule is strong only so long as it truly incentivizes incumbent carriers to provide better service, and that incentive itself depends on competitor carriers' sufficient economic motivation to pose a threat to the incumbents. It was for that reason that NSSGA believed then and now that a reciprocal switch prescription should endure for a minimum of five years. AAR argues for the converse — a shorter duration — for the same reason: a shorter duration removes the economic incentive for competitor carriers to invest in a reciprocal switch in the first place. AAR additionally takes the stance that switches are *punitive* where they are prescribed for any significant period beyond the absolute necessity therefore. *Id*. at 97. Here, however, AAR appears to conflate "punitive" with any negative impact on incumbent carriers. As AAR earlier recognizes, the "animating concern" of the proposed rule is to "actually give relief to the shipper."[2] *See id*. at 86. Providing such remedy requires (a) minimizing incumbent carrier attempts to escape consequences by calculated and temporary improvements; and (b) incentivizing competitor carriers to be willing to provide an alternative to the existing poor service, which itself requires a prescription of adequate length. AAR argues instead that no reciprocal switch should be

[2] This recognition is at odds with its previous coining of the term "overdeterrence," which it argues supposedly unnecessary switch prescriptions may reflect. *Id*. at 24.

of any certain length at all and rather should be prone to incumbent petitions that attempt to demonstrate the incumbent has rectified the abysmal service that prompted the prescription. This uncertainty would lay waste to any incentive for competitor carriers, on notice that if they expend capital to arrange a switch it may last only a moment, to offer switches at all.

Where exempt traffic is concerned, NSSGA reiterates that the proposed rule must also apply to exempt commodities. NSSGA members move some exempt commodities and are united in asserting that if their transportation is excluded from this rule, they will continue to experience the shoddy service this rule is meant to address. We are appreciative that the Board recognizes that such transportation, although exempted from Board regulation pursuant to 49 U.S.C. § 10502, nonetheless could appropriately be subject to an order providing reciprocal switching under part 1145. AAR for its part concedes the Board has recognized that past periods of exempt service may be rightly considered in future proceedings, yet it lodges (without citation) the curious argument that such consideration is inappropriate where it becomes too relevant, *i.e.*, "the central, gating question under the Proposed Rule." *Id*. at 40. NSSGA submits that such argument is unpersuasive and that although such commodities may have been exempted for reasons related to competition, that rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service.

NSSGA requests that the Board not interpret as exhaustive its brief reply to AAR's voluminous Comments, but rather as a selection of particular disagreements NSSGA has with the same. Moreover, NSSGA humbly submits that the sheer extent of AAR's comments is reflective of bloat that is tactical on the part of the carriers. In fact, AAR's comments rest on a central contradiction (a) that AAR is concerned that reciprocal switching as proposed may be a drain on Board resources; and (b) that the rule and the process for finalizing it should be Byzantine and

prolonged, substantially and unnecessarily requiring the Board's limited and valuable attention to innumerable irrelevancies. We submit that the rail carriers' strategy is delay by deconstruction: firstly, delay enactment of the rule by filling it with consideration pork,[3] contemplating minutiae at the expense of enactment; secondly, when a version of the rule is eventually put into force, delay any given prescription of a reciprocal switch by postmodernist interrogation of the factors that might absolve the carrier of responsibility.[4] Finally, AAR would have the Board predict the butterfly effect of unintended consequences theoretically accompanying shipper relief until the exercise in case-by-case-ism has afforded them adequate time to temporarily inflate performance and claim the switch prescription is unneeded. We submit that the Board should see this attempt by carriers to strategically swell the proposed rule and the process of finalizing it as an effort to

[3] A selection thereof: "the Board should consider requiring comparisons to a prior-three-year average transit time..." (57); "the Board should consider whether competition from trucks or barges obviates the need for regulatory intervention" (79); "service could get worse by introducing a switching operation into a local service design that is already not performing well" (23); "there could be circumstances in which an OETA metric using a 24-hour grace period might not reveal a service inadequacy warranting relief" (51); "[o]rdering a switch…could disincentivize the carrier from making future investments in service improvements" (55); "the Board's approach could have unfortunate unintended consequences" (59).

[4] A selection thereof: "…the Board should consider any facts that may bear on the reasons for the incumbent carrier's service levels" (18); "the Board should consider any relevant information from the alternate carrier about the operations, economics, and safety of the proposed alternative service—anything that bears on whether a switch is appropriate…" (79); "the Board should consider all relevant circumstances in evaluating the effects of unusual shipment patterns on a carrier's service" (85); "no rule could comprehensively enumerate all of the relevant circumstances in advance" (74); "a deterioration in transit time…could…be the product of measuring this year's sound performance against last year's unusually expeditious service" (6); "there also may be superficial inconsistencies among different railroads' reciprocal switching tariffs" (31); "a very small number of late shipments or slower-than-normal trains could cause a railroad to dip below a given service metric" (73).

As the Board emphasized in *Expedited Relief for Serv. Inadequacies*, "we reject AAR's attempt to exclude from the reach of these rules those service problems for which the incumbent railroad is not at fault. After all, the potentially ruinous impacts on affected shippers and connecting carriers of not having adequate rail transportation generally do not depend upon the root cause of the carrier's service problems." *Id*. at 7.

handicap any Board intervention, affording carriers the ability to maintain the dire *status quo*. The shippers of NSSGA cannot afford the delay and compromise in Board action that AAR is pursuing.

Unpersuaded by AAR's opening comments, and with deep appreciation for Board resources, NSSGA emphasizes the need for swift action on EP 711, and reiterates its desire that the proposed rule be put into force with only minor changes, chiefly that (1) reciprocal switch agreements should last a minimum of five years; (2) the service reliability standard should require 80% performance as opposed to just 60%, measured over a six-week period; (3) service consistency should be based on the entire move, and similarly measured over six-week periods rather than twelve-weeks such that carriers have less time to obscure what level of service they truly are providing; and, (4) that there be a slightly higher 90% standard for local service, reflective of one missed and/or incorrect switch per two-business-week period.

As ever, with those caveats, we fully support the Board instituting the proposed rule.

Respectfully submitted,

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