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(i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) *Other considerations.* (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

[67 FR 61290, Sept. 30, 2002, as amended at 81 FR 8855, Feb. 23, 2016]

§ 1144.3 General.

(a) These rules will govern the Board's adjudication of individual cases pending on or after the effective date of these rules (October 31, 1985).

(b) Discovery under these rules is governed by the Board's general rules of discovery at 49 CFR part 1114.

(c) Any Board determinations or findings under this part with respect to compliance or non-compliance with the standards of § 1144.2 shall not be given any res judicata or collateral estoppel effect in any litigation involving the same facts or controversy arising under the antitrust laws of the United States.

PART 1145—RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Sec.

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AUTHORITY: 49 U.S.C. 1321 and 11102.

SOURCE: 89 FR 38706, May 7, 2024, unless otherwise noted.

§ 1145.1 Definitions.

The following definitions apply to this part:

Affiliated companies has the same meaning as “affiliated companies” in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

Cut-off time means the deadline for requesting service during a service window, as determined in accordance with the rail carrier's established protocol.

Delivery means when a shipment is actually placed at a designated destination or is constructively placed at a local yard that is convenient to the designated destination. In the case of an interline movement, a shipment will be deemed to be delivered to the receiving carrier or its agent or affiliate when the shipment is moved past a designated automatic equipment identification reader at the point of interchange or is placed on a designated interchange track, depending on the specific interchange that is involved. For purposes hereof, constructive placement of a shipment at a local yard constitutes delivery only when:

(1) The recipient has the option, by prior agreement between the rail carrier and the customer, to have the rail carrier hold the shipment pending the recipient's request for delivery to the designated destination and the recipient has not yet requested delivery; or

(2) The recipient is unable to accept delivery at the designated destination.

Designated destination means the final destination as specified in the bill of lading or, in the case of an interline movement, the interchange where the shipment is transferred to the receiving carrier, its agent, or affiliated company.

Incumbent rail carrier means a Class I rail carrier that currently provides line-haul service to the petitioner to or from the point of origin or final destination that would be covered by the

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proposed reciprocal switching agreement.

Lane means a shipment's point of origin and designated destination. Shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane, regardless of which route(s) the rail carrier uses to move the shipments from origin to destination. In the case of an interline movement, the designated destination is the designated interchange.

Manifest traffic means shipments that move in carload or non-unit train service.

Original estimated time of arrival or *OETA* means the estimated time of arrival that the incumbent rail carrier provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from a delivering carrier.

Petitioner means a shipper or a receiver that files a petition hereunder for prescription of a reciprocal switching agreement.

Planned service window means a service window for which the shipper or receiver requested local service, provided that the shipper or receiver made its request by the cut-off time for that window.

Practical physical access means a feasible line-haul option on a rail carrier, including but not limited to: direct physical access to that carrier or its affiliated company; an existing switching arrangement between an incumbent rail carrier and another rail carrier; terminal trackage rights; or contractual arrangement between a local rail carrier and a line-haul carrier.

Receipt of a shipment means when the preceding rail carrier provides a time stamp or rail tracking message that the shipment has been delivered to the interchange.

Reciprocal switching agreement means an agreement for the transfer of rail shipments between one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company within the terminal area in which the rail shipment begins or ends its rail journey. Service under a reciprocal switching agreement may involve one or more intermediate

transfers to and from yards within the terminal area.

Service window means a window during which the incumbent rail carrier offers to perform local service (placements and/or pick-ups of rail shipments) at a shipper's or receiver's facility. A service window must be made available by a rail carrier with reasonable advance notice to the shipper or receiver and in accordance with the carrier's established protocol. For purposes of this part, a service window is 12 hours in duration, beginning at the start of the work shift for the crew that will perform the local service, without regard to whether the incumbent rail carrier specified a longer or shorter service window.

Shipment means a loaded railcar that is designated in a bill of lading.

Similar traffic means traffic that is of the same broad type (manifest traffic or unit train) as the traffic that is governed by a prescribed reciprocal switching agreement, and is transported by the incumbent rail carrier or its affiliated company to or from the terminal area in which transfers occur under the prescribed reciprocal switching agreement.

Terminal area means a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards. A point of origin or final destination on the rail system must be within a terminal area to be eligible for a prescription under this part.

Time of arrival means the time that a shipment is delivered to the designated destination.

Transit time means the time between a rail carrier's receipt of a shipment, upon either the tender of the bill of lading to that rail carrier or the rail carrier's receipt of the shipment from a delivering carrier and the rail carrier's delivery of that shipment to the

agreed-upon destination. Transit time does not include time spent loading and unloading cars.

§ 1145.2 Performance standards.

The performance standards in this section apply only to petitions for prescription of a reciprocal switching agreement under this part.

(a) *Service reliability (original estimated time of arrival).* The service reliability standard applies to shipments that travel as manifest traffic. The service reliability standard measures a rail carrier's success in delivery of a shipment from its original or interchange location by the original estimated time of arrival, accounting for the applicable grace period. Determination of a rail carrier's compliance with the service reliability standard is based on all shipments from the same original or interchange location to the same delivery location over a period of 12 consecutive weeks. A rail carrier meets the service reliability standard when A/B ratio is greater than or equal to 70%, where A is the number of shipments that are delivered within 24 hours of the original estimated time of arrival, and B is the total number of shipments.

(1) A car that is delivered more than 24 hours before or after its OETA will not be considered as being delivered within 24 hours of OETA.

(2) Once a carrier has communicated an original estimated time of arrival to a customer, that time will not be changed by any subsequent changes to the original trip plan of the car, no matter what the cause of the changed trip plan may be.

(b) *Service consistency (transit time).* The service consistency standard applies to shipments in the form of a unit train and to shipments that travel as manifest traffic. The service consistency standard measures a rail carrier's success over time in maintaining the transit time for a shipment. A rail carrier fails the service consistency standard if it fails either the standard in paragraph (b)(1) of this section or the standard in paragraph (b)(2) of this section, with both paragraphs being subject to paragraph (b)(3) of this section.

(1) *Year-to-year comparison.* A is more than 20% 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.

(2) *Multi-year comparison.* A is more than 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 any of the previous three years.

(3) A carrier will not fail the service consistency standard if the increase in transit time between B and A is 36 hours or less, notwithstanding the percentages stated in paragraphs (b)(1) and (b)(2) of this section.

(c) *Lanes.* Compliance with the performance standards in paragraphs (a) and (b) of this section is determined separately for each lane of traffic to or from the petitioner's facility. Shipments of the same commodity from the same point of origin to the same designated destination are deemed to travel over the same lane, without regard to the route between the point of origin and designated destination. In the case of an interline movement, the designated destination is the designated interchange.

(d) *Empty railcars.* (1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in paragraph (b) of this section if the rail carrier's average transit time for delivering empty cars to a designated destination over a 12-week period increases by more than 20% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period during the previous year or by more than 25% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week periods during any of the previous three years. However, notwithstanding the previous sentence, a carrier will not fail the

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service consistency standard if the increase in average transit time for delivering empty cars is 36 hours or less.

(2) A rail carrier's failure to meet a performance standard as provided in this paragraph (d) provides the basis for prescribing a reciprocal switching agreement that governs both the delivery of the empty cars and the delivery of the associated shipments of loaded cars.

(e) *Industry spot and pull.* The industry spot and pull standard measures a rail carrier's success in performing local placements ("spots") and pickups ("pulls") of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window. The industry spot and pull standard does not apply to unit trains or intermodal traffic.

(1) A rail carrier meets the industry spot and pull standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 85% or more in performing requested spots and pulls within the planned service window, as determined based on the total number of planned service windows during that 12-week period.

(2) Failure to spot constructively placed cars that have been ordered in by the cut-off time applicable to the customer for a planned service window is included as a failure in calculating compliance with the industry spot and pull standard.

(3) Failure to spot "spot on arrival" railcars for a planned service window results in a missed service window only if the railcars arrived at the local yard that services the customer and are ready for local service before the cut-off time applicable to the customer.

(4) If a rail carrier cancels a service window other than at the shipper's or receiver's request, that window is included as a failure in calculating compliance with the industry spot and pull standard.

(5) When a rail customer causes a carrier to miss a planned service window, that window will not be considered a miss in determining the success rate under this paragraph (e).

(6) If a rail carrier reduces the frequency of its local service to a shipper's or receiver's facility, and if rail

carrier cannot demonstrate that reduction is necessary based on a commensurate reduction in customer demand, then the industry spot and pull standard increases to a success rate of 90% for two years.

(f) The performance standards in paragraphs (a) and (b) of this section apply to movements within the United States and to the U.S. portion of movements between the United States and another country, in the latter case when the carrier's general practice with respect to such movements is to record receipt or delivery of the shipment at a point at or near the U.S. border (including where the carrier receives the shipment from or delivers the shipment to an affiliated carrier).

§ 1145.3 Affirmative defenses.

An incumbent rail carrier shall be deemed not to fail a performance standard in § 1145.2 if any of the conditions described in this section are met. The Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section.

(a) The rail carrier experiences extraordinary circumstances beyond the carrier's control, including but not limited to unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts. A carrier's intentional reduction or maintenance of its workforce at a level that itself causes workforce shortage, or, in the event of a workforce shortage, failure to use reasonable efforts to increase its workforce, would not, on its own, be considered a defense for failure to meet any performance standard. A carrier's intentional reduction or maintenance of its power or car supply, or failure to use reasonable efforts to maintain its power or car supply, that itself causes a failure of any performance standard would not, on its own, be considered a defense.

(b) The petitioner's traffic increases by 20% or more during the 12-week period in question, as compared to the preceding 12 weeks (for non-seasonal traffic) or the same 12 weeks during the previous year (for seasonal traffic such as agricultural shipments), where the

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petitioner failed to notify the incumbent rail carrier at least 12 weeks prior to the increase.

(c) There are highly unusual shipments by the shipper during any week of the 12-week period in question. For example, a pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but the shipper had a plant outage for three weeks and then requested shipment of 120 cars in a single week.

(d) The incumbent rail carrier's failure to meet the performance standard is due to the dispatching choices of a third party.

(e) The incumbent rail carrier's failure to meet the performance standard was directly caused by the conduct of a third party. This defense will be narrowly construed to avoid undue delay of the proceeding and unnecessary litigation costs. When presenting a defense under this paragraph (e), the incumbent rail carrier must prove that such conduct was outside its reasonable control. The incumbent rail carrier must also prove that it took reasonable steps to prevent and mitigate the impact of the third-party conduct or, if the impact could not be reasonably prevented, that the incumbent carrier took reasonable steps to mitigate the impact of the third-party conduct.

§ 1145.4 Negotiations.

At least five days prior to petitioning for prescription of a reciprocal switching agreement hereunder, the petitioner must seek to engage in good faith negotiations to resolve its dispute with the incumbent rail carrier.

§ 1145.5 Procedures.

(a) If a shipper or a receiver believes that a rail carrier providing it service failed to meet a performance standard described in § 1145.2, it may file a petition for prescription of a reciprocal switching agreement.

(b) The petition must include the information and documents described in this paragraph (b).

(1) Confirmation that the petitioner attempted good faith negotiations as required by § 1145.4, identify the performance standard the railroad failed

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to meet over the requisite period of time, identify the requested duration of the prescription of a reciprocal switching agreement, and provide evidence supporting its claim and requested prescription.

(2) Identification of at least one possible rail carrier to provide alternative service.

(3) Identification of any relevant switching publications of the incumbent rail carrier and the potential alternate carrier(s).

(4) A motion for a protective order that would govern the disclosure of data that the rail carrier provided to the petitioner under this part.

(c) The petition must have been served on the incumbent rail carrier, the alternate rail carrier(s), and the Federal Railroad Administration.

(d) A reply to a petition is due within 20 days of a completed petition. The burden of proof of establishing infeasibility and/or undue impairment is on the rail carrier (either the incumbent or the alternate) that is objecting to the petition.

(e) A rebuttal may be filed within 20 days after a reply to a petition.

(f) The Board will endeavor to issue a decision on a petition within 90 days from the date of the completed petition.

§ 1145.6 Prescription.

(a) The Board will prescribe a reciprocal switching agreement under this part if all the conditions in this paragraph (a) are met.

(1) For the lane of traffic that is the subject of the petition, the petitioner has practical physical access to only one Class I carrier that could serve that lane.

(2) The petitioner demonstrates that the incumbent rail carrier failed to meet one or more of the performance standards in § 1145.2 with regards to its shipment.

(3) The incumbent rail carrier fails to demonstrate an affirmative defense as provided in § 1145.3.

(b) Notwithstanding paragraph (a) of this section, the Board will not prescribe a reciprocal switching agreement if the incumbent rail carrier or alternate rail carrier demonstrates that the agreement is not practicable,

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including: switching service under the agreement, *i.e.*, the process of transferring the shipment between carriers within the terminal area, could not be provided without unduly impairing either rail carrier's operations; switching service under the agreement would be operationally infeasible; or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly impair the incumbent rail carrier or the alternate rail carrier's ability to serve its existing customers. If the incumbent rail carrier and alternate rail carrier have an existing reciprocal switching arrangement in a terminal area in which the petitioner's traffic is currently served, the proposed operation is presumed to be operationally feasible, and the incumbent rail carrier will bear a heavy burden of establishing why the proposed operation should not qualify for a reciprocal switching agreement due to infeasibility.

(c) In prescribing a reciprocal switching agreement, the Board shall prescribe a term of service of three years, provided that the Board may prescribe a longer term of service of up to five 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.

(d) Upon the Board's prescription of a reciprocal switching agreement under this part, the affected rail carriers must set the terms of the agreement and offer service thereunder within 30 days of service of the prescription and notify the Board within 10 days of when the carriers offered service that the agreement has taken effect. Additionally, the incumbent carrier must promptly amend its switching publication(s) as appropriate to reflect the availability of reciprocal switching under the prescription.

(e) If the affected carriers cannot agree on compensation within 30 days of the service of the prescription, then the affected rail carriers must offer service and petition the Board to set compensation.

§ 1145.7 Termination.

(a) If the incumbent carrier does not timely file a petition for termination,

a prescription hereunder automatically renews at the end of the term established under § 1145.6(c). Automatic renewal is for the same term as the original term of the prescription. If the Board denies a petition to terminate the prescription, it will determine, on a case-by-case basis, the appropriate renewal term based on the evidentiary record, not to exceed the original term of the prescription. At the end of the renewal term, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew for the same number of years as the renewed term.

(b) The Board will grant a petition to terminate a prescription if the incumbent rail carrier demonstrates that, for the most recent 12-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met all three performance standards under this part. This requirement includes a demonstration by the incumbent carrier that it has been able to meet, over the most recent 12-week period, the performance standards for similar traffic to or from the relevant terminal area.

(c) The incumbent rail carrier may submit a petition to terminate a prescription not more than 180 days and not less than 150 days before the end of the current term of the prescription.

(d) A reply to a petition to terminate is due within 15 days of the filing of the petition.

(e) A rebuttal may be filed within 10 days of the filing of the reply.

(f) The Board will endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing.

(1) If the Board does not act within 90 days from the close of briefing, the prescription automatically terminates at the end of the current term of the prescription.

(2) If the Board does not issue a decision due to extraordinary circumstances, as determined by the Board, the prescription is automatically renewed for 30 days from the end of the current term. When there are extraordinary circumstances, the Board will issue an order alerting the parties that it will not issue a decision within the required time period. Under such

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circumstances, the Board will issue its decision as expeditiously as possible.

(3) A prescribed agreement will continue in effect until 30 days after the Board serves a decision that grants a petition to terminate or after the end of the prescription period, whichever is later.

§ 1145.8 Data.

(a) A shipper or receiver with practical physical access to only one Class I carrier serving the lane of traffic for which individualized performance records are sought, and based on a good faith belief that the Class I carrier has provided service that does not meet at least one performance standard from § 1145.2, may submit a written request to the incumbent rail carrier for all individualized performance records relevant to the performance standard(s) the shipper or receiver believes the rail carrier has failed.

(1) In the request to the rail carrier, the shipper or receiver must identify the specific performance standard(s) that it believes the rail carrier has failed, and the corresponding date range and lane(s).

(2) Within seven days of the written request, the incumbent rail carrier shall provide the shipper or receiver with the requested individualized performance records.

(3) For purposes of this section, "individualized performance records" means the original estimated times of arrival, transit times, and/or industry spot and pull records related to the shipper or receiver's traffic, along with the corresponding time stamps.

(b) All Class I carriers shall report to the Board on a weekly basis, in a manner and form determined by the Board, data that shows: the percentage of shipments on the carrier's system that moved in manifest service and that were delivered within 24 hours of OETA, out of all shipments on the carrier's system that moved in manifest service during that week; and, for each of the carrier's operating divisions and for the carrier's overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant divi-

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sion or system for that week, all within the meaning of this part.

(c) Class I carriers shall provide, in the format of their choosing, machine-readable access to the information listed in this section.

(1) *Machine-readable* means data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.

(2) *Open format* is a format that is not limited to a specific software program and not subject to restrictions on reuse.

(d) Class I carriers shall retain all data necessary to respond to a request under paragraph (a) of this section for a minimum of four years.

PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES

Sec.

1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.

1146.2 Accelerated process.

AUTHORITY: 49 U.S.C. 1321, 11101, and 11123.

§ 1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.

(a) *General.* Alternative rail service, or directed action by an incumbent carrier, will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. In prescribing the relief described herein, the Board may act on its own initiative or pursuant to a petition.

(b) *Procedure for petition for relief—(1) Petition for relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of both the petitioner's discussions with the incumbent carrier of the service problems (including a description of the efforts