BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

WRITTEN TESTIMONY

submitted by

THE COALITION ASSOCIATIONS

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February 14, 2022

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The Coalition Associations[1] hereby submit this written testimony in accordance with the Surface Transportation Board ("STB" or "Board") decision served on December 28, 2021 ("Hearing Notice"). That decision scheduled a public hearing for March 15 and 16, 2022, and called for written testimony to be submitted by February 14, 2022.

The purpose of the hearing is "[t]o allow interested persons to submit testimony to update the record…."[2] The Board has identified the following two areas for updating:

- "First, comments may identify new developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments."

[1] The "Coalition Associations" are the American Chemistry Council ("ACC"), The Chlorine Institute ("TCI"), the Corn Refiners Association ("CRA"), The Fertilizer Institute ("TFI"), and The National Industrial Transportation League ("NITL"). Except for CRA, each Association previously submitted comments in this proceeding as members of the Shipper Coalition for Railroad Competition ("Shipper Coalition").

[2] Hearing Notice, at 2.

- "Second, comments may address topics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding."[3]

The Board has discouraged parties from repeating the same arguments that they already have submitted in previous rounds of comments.[4]

The Coalition Associations have attempted to adhere to the foregoing scope outlined by the Board in the following written testimony. This testimony is presented in two parts. Part I challenges railroad arguments that the record is stale and needs updating by demonstrating that, if anything, developments over the past five years have strengthened the case for reciprocal switching. Part II responds to multiple topics that rail industry stakeholders have raised in ex parte meetings and their failure to rebut the facts and testimony presented in response to their objections to reciprocal switching. To minimize repetition of their previously submitted opening and reply comments in response to the Notice of Proposed Rulemaking,[5] the Coalition Associations have attached, as Exhibit 1, a single-page summary of their key arguments with cross-references to the opening and reply comments of The Shipper Coalition for Railroad Competition where the Board will find a detailed discussion.[6]

I. THE CASE RECORD IS NOT STALE; NEW DEVELOPMENTS OVER THE LAST FIVE YEARS HAVE STRENGTHENED THE CASE FOR RECIPROCAL SWITCHING.

The premise for this hearing is the rail industry's claim that additional data and analyses are needed to update a stale record. The Board already has a full and complete record upon

[3] Hearing Notice, at 6 (underline added).

[4] *Id.*

[5] *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), slip op. (served July 27, 2016) ("2016 NPRM").

[6] The summary in Exhibit 1 also was distributed as a hand-out at each of the ex parte meetings between members of the Coalition Associations and individual Board members.

which to issue a final decision in this rulemaking proceeding. Indeed, the voluminous written record dating back to 2011, and developed over 6 years, closed and was ready for a decision when reply comments were filed on January 13, 2017. In addition, ex parte meetings between industry stakeholders and Board members have occurred periodically through December 2021. At no time, however, has the rail industry presented any hypothesis as to how or why updating the analyses already in the record with more recent data will produce a materially different assessment of the proposed rules. And most notably, the Board's proposed case-by-case approach to deciding reciprocal switching requests is a "built-in" mechanism to assess the most current facts in real-time, rather than relying upon generalized industry analyses replete with assumptions that may not exist in the context of individual cases. Nevertheless, the Coalition Associations welcome this opportunity to demonstrate that the passage of five years has only served to strengthen the case for modifying the reciprocal switching rules.

A. **The Financial Health Of The Rail Industry Has Continued To Strengthen.**

Dating back to the original petition for rulemaking filed in July 2011, the vastly improved financial health of the rail industry has been an important factor in support of modifying the current reciprocal switching rules, which were adopted in 1985 when every Class I railroad was struggling financially, and revenue adequacy was a distant aspiration. While the statute does not impose a revenue-adequacy consideration, the ICC concluded that the railroads' financial needs at the time justified its decision to essentially bar the use of reciprocal switching as a pro-competitive tool. However, nearly three decades later, the vastly improved financial health of the rail industry was a compelling story for modifying the reciprocal switching rules in 2011, became even more compelling when the Board issued the NPRM in July 2016, and remains equally, if not more, compelling today.

The steady improvement in the financial health of the rail industry begins with the Board's annual measure of revenue adequacy and is reported in the chart below, which has been reproduced from the Board's web site: https://www.stb.gov/reports-data/economic-data/.

Docket No. Ex Parte 552 - Railroad Revenue Adequacy

Year	Industry Cost of Capital	BNSF Railway	CSX Transp. Inc.	Grand Trunk Corp. (CN)	KCS Railway	NS Railway	Soo Line Railroad (CP)	Union Pacific
		Based on Individual Railroad's Return on Investment						
2019	9.34%	**12.04%**	**12.84%**	7.47%	6.20%	**11.59%**	**11.34%**	**15.55%**
2018	12.22%	11.89%	**13.18%**	7.69%	8.03%	11.63%	**13.49%**	**15.80%**
2017	10.04%	**10.70%**	8.84%	7.69%	7.09%	**10.05%**	**10.71%**	**14.08%**
2016	8.88%	**10.11%**	8.62%	8.60%	6.23%	**9.20%**	**9.58%**	**13.39%**
2015	9.61%	**12.82%**	9.00%	**10.77%**	7.20%	9.03%	**14.50%**	**15.54%**
2014	10.65%	**12.88%**	10.18%	**11.30%**	8.18%	**11.69%**	† .-42%	**17.35%**
2013	11.32%	**14.01%**	10.00%	**11.84%**	8.67%	**12.07%**	**12.03%**	**15.39%**
2012	11.12%	***13.47%**	10.81%	10.19%	9.54%	**11.48%**	5.15%	**14.69%**
2011	11.57%	***12.39%**	11.54%	8.74%	10.76%	**12.87%**	7.13%	**13.11%**
2010	11.03%	*10.28%	10.85%	9.21%	9.77%	10.96%	8.01%	**11.54%**
2009	10.43%	8.67%	7.30%	6.04%	6.51%	7.69%	6.28%	8.62%
2008	11.75%	10.51%	9.34%	9.89%	7.72%	**13.75%**	9.29%	10.46%
2007	11.33%	9.97%	7.61%	10.11%	9.37%	**13.55%**	**15.25%**	8.90%
2006	9.94%	**11.43%**	8.15%	9.47%	9.31%	**14.36%**	**11.60%**	8.21%
2005	12.19%	**9.76%	6.23%	8.07%	5.89%	**13.21%**	8.89%	6.34%
2004	10.11%	5.84%	4.43%	5.95%	8.30%	**11.64%**	3.28%	4.54%
2003	9.40%	6.2%	4.0%	4.5%	3.7%	9.1%	0.9%	7.3%
2002	9.75%	6.4%	5.2%	3.1%	6.5%	9.1%	5.7%	8.6%
2001	10.19%	7.1%	4.6%	4.9%	7.0%	8.3%	5.9%	7.6%
2000	11.03%	8.8%	3.6%	5.9%	6.3%	5.5%	5.6%	6.9%

Colored cells indicates year in which railroad was Revenue Adequate

* indicates that figure was revised from original calculation, based on decision in FD-35506 (July 25, 2013)
** Indicates that figure was corrected from original calculation, based on notice in EP 552 Sub No. 10 (October 26, 2006)
† The negative ROI of the Soo Line Corp. is attributable, in part, to the sale of the Dakota, Minnesota & Eastern lines, to Rapid City, Pierre & Eastern Railroad. The sale resulted in a one-time loss.

In the nine years from 2011 through 2019, every Class I railroad except Kansas City Southern ("KCS") has achieved revenue adequacy in at least two of those years, and Norfolk Southern Railway ("NS"), BNSF Railway ("BNSF"), and Union Pacific Railroad ("UP") achieved revenue adequacy in seven, eight, and all nine of those years, respectively. The last of the Big Four U.S. rail carriers to achieve revenue adequacy, CSX Transportation, Inc. ("CSX"), has done so for the last two consecutive years. The pattern that existed in 2016 plainly has been sustained and further enhanced.

Shippers have long complained that the Board's measure of revenue adequacy sets an artificially high benchmark and that financial measures used by Wall Street are much better. Those metrics confirm the trends in the Board's revenue adequacy data and reflect a rail industry that has continued to grow stronger financially since the 2016 NPRM. In Exhibit 2 to this testimony, the Coalition Associations have attached graphs of the following eleven financial metrics over time for UP, NS, CSX, Canadian Pacific Railway ("CP"), and Canadian National Railway ("CN"):[7]

- Stock Price
- Earnings Per Share
- Earnings Before Interest, Taxes, Depreciation, and Amortization
- Revenue
- Operating Income
- Net Income

[7] The Stock Price was generated using interactive graphs on the Charles Schwab website: www.schwab.com, and the other metrics were generated using the interactive graphs at www.macrotrends.net. Data was not available for BNSF, which is not publicly traded. KCS was omitted because of its pending merger with CP.

- Gross Profit
- Net Profit Margin
- Return on Assets
- Return on Equity
- Return on Investment

It is important to note that all the metrics in Exhibit 2 are current through the end of 2021 and thus reflect the effects of the Covid-19 pandemic. Every metric is as strong or stronger for all five railroads today relative to issuance of the NPRM in 2016.

B. The Foregoing Improvements To Rail Industry Financial Health Have Occurred Amidst Steady And Even Declining Traffic Volume.

It is notable that the financial metrics in the preceding section have improved despite traffic volumes holding steady or even declining. Rail carrier interests in this proceeding have claimed that the record in this rulemaking must be updated because 2014 Waybill Sample data was the most current when the Board issued the 2016 NPRM and that much has changed since then that requires renewed examination. The Covid-19 pandemic undoubtedly took a toll on traffic volumes in 2020 and the rapid economic recovery in 2021 caught supply chains off-guard. The latter factor is addressed separately in Part I.E of this testimony. Overall, however, rail traffic volume changes since 2014 have not been dramatic and they offer no justification for reconsidering the 2016 NPRM. Moreover, despite annual fluctuations in traffic volumes, rail industry finances have steadily improved.

The latest data that the AAR has published on carloads originated is for 2020. In 2014, which was the apex year for carloads originated in the last decade, the rail industry originated 30,221,358 carloads, and in 2020, which was both the depth of the pandemic and the nadir year for carloads originated in the last decade, the rail industry originated 26,235,905 carloads, for a

decline of 13.2%.[8] But in 2019, which was the last full year before the pandemic, the rail industry originated 28,242,948 carloads, which was just a 6.5% decline from the apex.[9] Excluding 2020, carloads originated have increased year-over-year twice and declined three times since 2014.[10]

The Board should resist railroad industry attempts to compare the apex of 2014 with the nadir of 2020, which are both atypical years. Because the rail industry experienced an unusually high number of carload originations in 2014, the declines in subsequent years are not as significant as rail stakeholders may choose to portray them. There is no downward trend; rather, there has been a seesaw of annual carload originations that suggests steady freight volumes over the past decade. Furthermore, these fluctuations do not, by themselves, provide any justification to reconsider the 2016 NPRM. Indeed, the fact that the financial health of the rail industry has continued to improve despite these volume fluctuations indicates that the 2016 NPRM remains firmly supported today.

Finally, if traffic volumes truly have been declining during a period in which the rail industry has sustained and improved its financial strength, rail carrier complaints that reciprocal switching will strain operations due to capacity constraints in yards and other facilities are lessened.[11] After all, fewer carloads originated means more capacity to absorb these alleged operational impacts of reciprocal switching. For reasons discussed in Part II.A, moreover, the

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[8] Association of American Railroads, "Railroad Facts 2021 Edition," p. 26.

[9] *Id.* That was the second lowest year for carloads originated since 2014, excluding 2020, with the lowest year being 2016.

[10] *Id.*

[11] *E.g.*, "Summary of Feb. 15, 2018 Ex Parte Meeting between AAR and Ann Begeman," pp.1-2 (served Feb. 23, 2018); "Summary of Feb. 15, 2018 Ex Parte Meeting between AAR and Deborah Miller," p.1 (served March 1, 2018).

alleged operational impacts of reciprocal switching are greatly exaggerated and can be considered on a case-by-case basis.

C. The Rail Industry Remains Highly Consolidated And May Consolidate Even More With The Merger Of CP And KCS.

In the 2016 NPRM, the Board cited consolidation in the rail industry as one of the many factors that support the proposed modifications to the reciprocal switching rules.[12] Through both their comments and ex parte meetings, the Shipper Coalition validated this fact with a detailed explanation of how rail consolidation has extended bottleneck segments ever longer distances, thereby reducing or eliminating competition provided by other carriers that previously could participate in alternative routings that were foreclosed by the extended bottlenecks.[13] Those are historical facts and thus have not changed since the 2016 NPRM.

One fact that has changed, however, is the application of CP to acquire KCS in the first major railroad merger in two decades.[14] That merger is a classic example of the lost competition through extended bottlenecks that the Shipper Coalition has described. The most frequently occurring example in this merger applies to routes between the United States and Canada where KCS is a bottleneck carrier and CN competes with CP for the non-bottleneck segment.[15] Pre-merger, KCS is neutral as to whether it connects with CN or CP. Post-merger, the consolidated

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[12] 2016 NPRM at 9.

[13] "Comments of the Shipper Coalition for Railroad Competition," pp. 10-11 (filed Oct. 26, 2016) ("Shipper Coalition Op."); "Reply Comments of the Shipper Coalition for Railroad Competition," pp. 19-20, 55-60 (filed Jan. 13, 2017) (Shipper Coalition Reply"). *See also,* "Summary of Aug. 4, 2021 Ex Parte Meeting between Shipper Associations and Robert Primus," p.2 (served Aug. 12, 2021).

[14] *Canadian Pac. Ry. Ltd, et al. – Control – Kansas City Southern, et al.*, FD 36500 ("*CP/KCS Control*").

[15] Interswitching, which is the Canadian equivalent of reciprocal switching, ensures that most origins and destinations in Canada have access to both CN and CP.

CP/KCS will have strong incentives to favor its long-haul route over most routes that include CN. Regardless of any potential conditions the Board may impose on this merger, this further rail industry consolidation strengthens the need for reciprocal switching to counter the harmful effects of these imminent newly extended bottlenecks.

D. Precision Scheduled Railroading Has Introduced New Service Issues That Reinforce The Need For Reciprocal Switching.

The most significant operational development over the last five years has been the widespread adoption and implementation of Precision Scheduled Railroading ("PSR) by nearly every Class I railroad. When asked by Member Schultz how reciprocal switching would impact PSR, UP responded that "it did not see much of a difference pre- and post-PSR, and the fact that Union Pacific has fewer work events through PSR does not mean that they will be able to handle reciprocal switching better."[16] UP's response demonstrates that PSR is not a new development that shifts the weight of the facts against the proposed reciprocal switching rules. If anything, PSR has reinforced a need for the proposed rules.

Reciprocal switching provides shippers with a competitive alternative when rail service problems emerge. The implementation of PSR has been accompanied by service disruptions of varying severity and duration. The 2017 disruptions on CSX have been the most notable and engendered direct STB involvement.[17] PSR has been blamed for service disruptions and demurrage charges on most of the Class I railroads.[18] A few fortunate shippers with facilities

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[16] "Summary of Nov. 10, 2021 Ex Parte Meeting between UP and Michelle Schultz," p.2 (served Nov. 18, 2021).

[17] *Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues*, Docket No. EP 742 (served Sept. 20, 2017).

[18] *See e.g.*, " Shippers complain to regulators about PSR-related charges," Trains.com (May 10, 2019), https://www.trains.com/trn/news-reviews/news-wire/10-shippers-complain-to-regulators-about-psr-related-charges/.

that already have reciprocal switching were spared the worst impacts. For example, Potash Corporation (currently known as "Nutrien" following a merger with Agrium), which was a TFI member, explained that "the availability of reciprocal switching" at its Augusta, GA facility was "very helpful in light of CSX service degradation issues."[19] By switching traffic to NS while CSX worked to resolve its operational challenges, Potash was able to provide greater stability for itself and its customers.[20]

The impact of PSR on rail service is likely to extend well beyond the growing pains associated with each railroad's initial transition. PSR has taken surge capacity out of the rail network and has caused service problems that are self-inflicted. Consequently, even service problems that are not self-inflicted, such as weather-related events, are likely to cause more disruptions that are longer and more severe. Captive shippers have had little, if any, recourse during these disruptions to mitigate the harms caused by those service disruptions. Indeed, the CSX service disruptions exposed the inadequacy of the Board's emergency service rules, at 49 C.F.R. Parts 1146 and 1147, as a tool to remedy service disruptions.[21] Reciprocal switching not only can offer more shippers an alternative, but the exercise of that option can accelerate the incumbent railroad's recovery by shifting traffic it is not prepared to handle off its network, which in turn can improve service for even those shippers that remain captive to the incumbent. Furthermore, knowing that more of their customers have options, railroads may give more

[19] "Summary of Sept. 20, 2017 Ex Parte Meeting between Potash and Ann Begeman," p. 2 (served Sept. 26, 2017).

[20] *Id.*

[21] *See, e.g.*, "Written Statement of The Fertilizer Institute," Docket No. EP 742, *Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues*, pp. 2-3 (filed Oct. 11, 2017); "Statement of Cal Dooley of The American Chemistry Council," Docket No. EP 742, *Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues*, p. 4 (filed Oct. 11, 2017).

weight to the impacts that their operating decisions have on customers, instead of focusing on how Wall Street will react. One can wonder whether any railroad would have handled its PSR roll-out differently if more shippers had access to reciprocal switching.

E. Pandemic-Related Supply Chain Issues Are Temporal Factors That Are Irrelevant To This Rulemaking.

In multiple ex parte meetings, railroad stakeholders have referenced recent supply chain issues related to the Covid-19 pandemic as a change in the railroad operating environment that should be considered in this proceeding.[22] The implication of these references is that changing the Board's reciprocal switching policy at this time will create even greater operational uncertainty than railroads previously have contended in this proceeding. That argument lacks merit.

First, the current supply chain disruptions are temporal in nature. The adoption and implementation of the proposed changes to the reciprocal switching rules are likely a year away. It will be even longer before the first reciprocal switch cases are initiated and litigated to a final decision. During that time, the current supply chain issues could abate or even be resolved. If the Board had to consider such temporal issues before making any policy change, it would be stuck in a perpetual state of indecision. If the recent supply chain issues continue to persist after the Board issues a final decision and are demonstrated to be relevant to a specific reciprocal switch request, the Board can consider any impact in the context of individual reciprocal

[22] *See* "Summary of Sept. 24, 2021 Ex Parte Meeting between AAR and Ann Begeman," p. 1 (served Sept. 29, 2021); "Summary of Sept. 22, 2021 Ex Parte Meeting between AAR and Martin Oberman," p. 1 (served Sept. 29, 2021); "Summary of Sept. 24, 2021 Ex Parte Meeting between AAR and Robert Primus," p. 1 (served Oct. 4, 2021); "Summary of Sept. 17, 2021 Ex Parte Meeting between AAR and Michelle Schultz," p. 1 (served Sept. 29, 2021); "Summary of Nov. 30, 2021 Ex Parte Meeting between NS and Martin Oberman," p. 1 (served Dec. 10, 2021).

switching requests. It should not, however, reject the proposed rules based on temporal issues and thereby bar reciprocal switching in any future scenarios.

Second, as the record in this proceeding already shows, the railroad industry's operational concerns with reciprocal switching are greatly exaggerated and, in many instances, plainly wrong.[23] Part II.A of this testimony further expounds upon this fact.

Third, just as reciprocal switching can alleviate service problems caused by PSR as discussed in Part I.D above, reciprocal switching has the potential to mitigate the harmful impacts of pandemic-related supply chain issues. If one railroad is less affected than a competitor, a shipper's ability to move its traffic via the competitor will enable that traffic to bypass problem areas on the incumbent carrier's network by switching to a more efficient alternative. In addition, shippers that are unable to use an alternate carrier will benefit from a less congested rail network that can recover more quickly.

II. IN EX PARTE MEETINGS, RAILROADS REPEAT THE SAME BASELESS CLAIMS THAT PERVADE THEIR COMMENTS.

The railroad ex parte meetings have been notable both for what the railroads did and did not address. They ***did*** continue to espouse the same baseless claims about the impact of reciprocal switching upon rail operations and investment. They ***did not*** attempt to rebut most of the facts and testimony that refuted those claims. Nor did they convincingly distinguish Canadian interswitching or reciprocal switching created through merger conditions. They also continue to insist that the current competitive abuse standard is appropriate without any acknowledgment that reciprocal switching is a remedy for the anti-competitive conduct of

[23] Shipper Coalition Reply, pp. 96-116.

foreclosure. Finally, in an attempt to further delay this proceeding, they call for new studies of competition.

A. Railroads Exaggerate The Operating Impacts Of Reciprocal Switching By Hypothesizing Worst-Case Scenarios And Misrepresenting Them As Typical.

In their ex parte meetings, rail stakeholders have continued to espouse the same apocalyptic predictions for rail operations that they alleged in their earlier comments on reciprocal switching. Despite extensive rebuttal of those predictions by the Shipper Coalition, the railroad ex parte meetings have doubled down on those predictions without offering any response.[24]

For example, UP has claimed that "reciprocal switching would lead to more service variability and more traffic on the network, exacerbating an already strained supply chain."[25] UP also claimed that reciprocal switching will increase transit times and presented slides to illustrate that longer transit times will increase car inventory which in turn will decrease network fluidity.[26] But UP focuses on a single reciprocal switch scenario – where the number of switch events performed on a rail car increases – that is the least likely to occur precisely because it is the least efficient scenario.[27] No railroad stakeholder has offered any response to evidence that most reciprocal switches will not add an interchange, but merely will change the location of the

[24] Shipper Coalition Reply, pp. 96-116.

[25] "Summary of Nov. 30, 2021 Ex Parte Meeting between UP and Robert Primus," p. 1 (served Dec. 9, 2021).

[26] "Summary of Nov. 10, 2021 Ex Parte Meeting between UP and Ann Begeman," p. 1 (served Nov. 18, 2021). UP made these same claims, supported with the same slide presentation in ex parte meetings with Chairman Oberman, Vice Chairman Primus, and Members Fuchs and Schultz.

[27] AAR also focuses on this same scenario when it states that "service would almost certainly deteriorate due to increased connections, would increase delay, and would likely impact other shippers." *See* "Summary of Sept. 17, 2021 Ex Parte Meeting between AAR and Michelle Schultz," p. 2 (served Sept. 29, 2021).

existing interchange between the same two railroads (*i.e.*, short-hauling the origin rail carrier by establishing the interchange closer to the origin).[28] Those scenarios will not require any additional handling of the switched rail car or increase the number of rail carriers in the route, and thus should have little, if any, of the adverse impacts on operating efficiency that railroads portend and even could foster greater efficiency by allowing the alternative railroad its long-haul when its service is more efficient.

Furthermore, even accepting that transit times will increase under UP's hypothesized scenario (which is not a given in all circumstances because the alternative route may be shorter or have more efficient operations), the longer transit time, higher car inventory, and decreased network fluidity will impact the competing railroad, not the incumbent, because the incumbent will only handle the rail car for short distances at the very beginning or end of a movement.[29] It is reasonable to expect the competing railroad to consider the effects on its network when deciding whether to offer competitive price and service terms.[30] If the competing railroad does not offer more competitive price and service terms, the traffic will remain on the incumbent railroad without any of the predicted operating effects. Furthermore, and perhaps most

[28] *See* Shipper Coalition Reply, pp. 99-101; "Summary of Aug. 10, 2021 Ex Parte Meeting between Shipper Associations and Michelle Schultz," p. 3 (served Aug. 13, 2021).

[29] In most instances of reciprocal switching, the total number of switches performed by the incumbent will not increase. The switch activity that the incumbent must perform will be **the same** as if it retained the traffic **with just one exception**: once in the rail yard, the final switch of a loaded car will be into a train taking interchange traffic to the alternate railroad instead of into the incumbent's line-haul train. When reciprocal switching occurs at an existing interchange location, that train carrying interchange traffic already exists; the switched car is merely added to that train's consist. Nor is there any need for the incumbent to add crews or yard capacity in such situations. Any need for additional switches, crews, or capacity will be the responsibility of the alternative railroad.

[30] Shipper Coalition Reply, p. 102.

importantly, a shipper has no incentive to request reciprocal switching in circumstances where the alternative route is less efficient and would impose additional costs upon it.[31]

Expanding upon the themes in UP's ex parte meetings, NS portrays railroad operations as delicately balanced, complex operations that will be thrown out of balance by reciprocal switching.[32] Similarly, AAR claims that reciprocal switching "would cause operational complexity and negatively impact network operations and other rail customers"[33] because "the railroads' infrastructure has been rationalized over the years to accommodate prevailing traffic patterns" and "disrupting those patterns…will be inefficient, costly, and lead to service delays."[34] Those statements are predicated in large part upon the same, least likely, reciprocal switch scenario that UP has invoked.

But to the extent these statements also refer to operating impacts caused by shifting traffic patterns, rail operations are not quite as delicate and sensitive as the NS and AAR would have the Board believe. The Shipper Coalition has rebutted such claims in detail through the

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[31] CP and KCS have made this very point in their merger application that is pending in *CP/KCS Control*, Finance Docket No. 36500. The application is supported by the "Expert Statement of W. Robert Majure, Ph.D." At pages 24-25, Dr. Majure presents empirical analysis of traffic where shippers had a choice of single-line versus joint line service and concludes that "shippers have a preference for single-line service" and "the ability to offer fewer interchanges can significantly improve a railroad's ability to win the business of shippers to these areas and can make a railroad's service a more significant competitive force." These conclusions are consistent with the Coalition Associations' assertion that shippers are least likely to pursue reciprocal switching that adds an interchange to the transportation.

[32] "Summary of Nov. 15, 2021 Ex Parte Meeting between NS and Ann Begeman," p. 1 (served Nov. 18, 2021); "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Michelle Schultz," pp. 1-2 (served Dec. 15, 2021).

[33] "Summary of Oct. 4, 2021 Ex Parte Meeting between AAR and Robert Primus," p. 1 (served Oct. 4, 2021); "Summary of Sept. 17, 2021 Ex Parte Meeting between AAR and Michelle Schultz," p. 1 (served Sept. 29, 2021).

[34] "Summary of Feb. 15, 2018 Ex Parte Meeting between AAR and Ann Begeman," pp. 1-2 (served Feb. 23, 2018).

testimony of John Orrison who held high level operating positions at both CSX and BNSF prior to his retirement and has over 40 years of experiencing in the switching of rail customers and establishing rail service plans.[35] Mr. Orrison notes that anyone can create hypothetical examples of potential switching arrangements to make the concept appear too complex for level-headed consideration – which he states is precisely what the AAR attempts to accomplish through the testimony of William Rennicke – but the reality is that railroads routinely coordinate interchange activities to minimize, or avoid altogether, the extra steps associated with interchanges and the alleged inefficiencies and complexities that the railroads have paraded before the Board.[36] Furthermore, the rail industry is well-trained and well-equipped with the technology to adjust operating plans in response to changing traffic volumes and patterns, which is something they do as often as weekly.[37] Indeed, railroads currently must make operational adjustments whenever there is new business or there are changes in traffic flows due to traffic that currently is competitive or to changing economic conditions.[38] Reciprocal switching merely would increase the potential volume of traffic that they must consider. The rail industry has not disputed any of the foregoing facts in their ex parte meetings.

In addition, the case-by-case approach in the proposed rules will enable the Board to consider and address any adverse operating impacts from reciprocal switching.[39] Mr. Orrison

[35] Shipper Coalition Reply, pp. 97, 101-07 and Reply Verified Statement of John Orrison, pp. 2-4 ("Orrison R.V.S.").

[36] Orrison R.V.S., pp. 5-6, 12-13, 19-20.

[37] Shipper Coalition Reply, pp. 103-05; Orrison R.V.S., pp. 5-9, 14-16

[38] Orrison R.V.S., pp. 18-19.

[39] Shipper Coalition Op., p. 21; Shipper Coalition Reply, pp. 107-110.

states that a case-by-case approach to review and address such impacts is reasonable and consistent with what railroads already do today when traffic patterns change.[40]

A common theme underlying the rail industry's dire predictions of operational catastrophe is that reciprocal switching will substantially reduce, if not eliminate, the "predictability" needed to operate efficiently. But Mr. Orrison observes that predictability is impossible to obtain even in the current state of the rail industry; rather, "adaptability" is far more important; and the rail industry has sophisticated procedures and tools that make railroads highly adaptable.[41] If a reciprocal switch renders "current" rail operations less efficient, the solution is to modify current practices to fit the new traffic patterns, not to deny reciprocal switching.

In the final analysis, the rail industry's operational objections really are to the disruptive effects that competition has when first introduced into any market. Competition undoubtedly is disruptive to the status quo, which is what the rail industry seeks to preserve. Once adjustments are made in response to the new competitive environment, however, the introduction of competition leads to greater efficiency. Under the Board's proposed rules, the introduction of competition through reciprocal switching will be gradual, limited, incremental, and case-by-case, which will foster a smooth transition to a more competitive rail marketplace.

[40] Orrison R.V.S., pp. 17-20.

[41] Orrison R.V.S., pp. 1, 8.

B. **Reciprocal Switching Will Not Eliminate Differential Pricing And Will Not Inevitably Reduce Investment.**

Railroads have argued that the proposed rules will disrupt their ability to engage in differential pricing.[42] On top of that, they claim that the erosion of differential pricing could reduce investment.[43] These claims are meritless.

First, to be clear, greater reciprocal switching will not destroy differential pricing; rather, it will reduce opportunities to differentially price some traffic to the same degree as the present. But that is not a proper reason standing by itself to reject those rules. Just as the Interstate Commerce Commission ("ICC") considered the poor financial health of railroads when it adopted the current reciprocal switch rules, the greatly improved financial health of the industry today is a relevant consideration in favor of revising those rules. That is because the rail industry's need for differential pricing to achieve and maintain revenue adequacy is less. There is no evidence in the record that the rail industry requires the same degree of differential pricing today as it did in 1985, when the ICC adopted the current rules. Furthermore, the consolidation of the rail industry into regional duopolies means that railroads will retain their ability to differentially price even traffic that benefits from reciprocal switching, just not to the same degree as they can absent the competition that reciprocal switching fosters, because duopolists continue to possess greater market power than fully competitive markets.[44]

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[42] "Summary of Nov 30, 2021 Ex Parte Meeting between NS and Martin Oberman," p. 2 (served Dec. 10, 2021); "Summary of Nov. 10, 2021 Ex Parte Meeting between UP and Michelle Schultz," p.2 (served Nov. 18, 2021).

[43] "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Michelle Schultz," p. 1 (served Dec. 21, 2021).

[44] The Shipper Coalition has debunked railroad economists' claims to the contrary through the testimony of Dr. Kevin Caves, which shows that the railroad economists' hypothetical illustrations of the impact that reciprocal switching will have on pricing and investment decisions depend upon the inaccurate assumption that the rail industry currently is pricing its captive traffic at fully competitive levels. Changing that one assumption results in these same hypothetical

Second, railroad claims that less differential pricing inevitably results in less investment are predicated upon overly simplistic logic that reduced revenue due to enhanced competition necessarily leads to reduced investment. The Shipper Coalition has presented economic testimony to show that the introduction of competition where it does not exist fosters greater investment.[45] Furthermore, when two railroads compete for a customer, they may need to make investments to win that competition. Extensive railroad investments in existing competitive rail markets, such as intermodal traffic and existing locations that have two-carrier competition, also belie railroad claims that competition will reduce investment. The absurdity of the rail industry's position is evident when taken to its extreme, which would dictate that investment is greater in monopoly markets than competitive markets.

C. Railroads Have Not Meaningfully Distinguished Reciprocal Switching Created Through Merger Conditions.

The comments in this docket have exposed a particular irony in the railroad allegations that reciprocal switching will be disastrous for rail operations and investments. Specifically, although stressing the inefficiencies of reciprocal switching in this proceeding, the Class I railroads have been strong advocates for reciprocal switching when seeking Board approval of past mergers.[46] Clearly concerned by this inconsistency, some rail interests have attempted to distinguish reciprocal switching created through mergers in their ex parte meetings. Their distinctions, however, do not withstand scrutiny.

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illustrations supporting the economic case for reciprocal switching. *See,* Shipper Coalition Reply, pp. 118-19; "Reply Verified Statement of Kevin W. Caves," pp. 15-21 ("Caves R.V.S.").

[45] Shipper Coalition Reply, pp. 116-123; Caves R.V.S., pp. 15-26.

[46] Shipper Coalition Reply, p. 57.

According to UP, "switching in the merger context is typically supported by pre-merger investments from multiple, overlapping railroads, resulting in circumstances supporting switching."[47] That is a misleading and inaccurate statement. Some of the most extensive reciprocal switching conditions were imposed in the BN/SF merger,[48] in which UP received extensive reciprocal switching rights, and the UP/SP merger,[49] in which BNSF received such rights. In both cases, there was very little network overlap near the sites subject to reciprocal switching. Many locations were hundreds of miles from the alternate carrier's physical track, with UP operating for long distances via trackage rights over the BNSF network and BNSF doing the same over the UP network. Extensive *post-merger* infrastructure investments were required at some locations where each trackage rights carrier was operating far from its own infrastructure and the objective was to replace direct rail-to-rail competition lost by a multitude of shippers in or near a terminal area because of those mergers. In other words, there was far less infrastructure in place to support reciprocal switching of far greater traffic volumes required by the merger conditions. The proposed reciprocal switching rules, by contrast, will involve incremental traffic volumes from locations within "a reasonable distance" of another railroad's physical infrastructure. Thus, individual reciprocal switching cases are unlikely to require any additional infrastructure, and in those exceptional cases, the Board's rules will consider such impacts on a case-by-case basis.

[47] "Summary of Nov. 30, 2021 Ex Parte Meeting between UP and Robert Primus," p. 2 (served Dec. 9, 2021).

[48] *Burlington N. Inc. et al. – Control and Merger – Santa Fe Pac. Corp. et al.*, FD No. 32549 [Decision No. 38], slip op. (served Aug. 23, 1995).

[49] *Union Pac. Corp. et al – Control and Merger – Southern Pacific Rail Corp. et al.*, FD 32670 [Decision No. 44], slip op. (served Aug. 12, 1996).

UP further claims that it has "no means of anticipating [reciprocal switching] requests that would be sufficient to support investment for either the EP 711 switching or the customers negatively impacted by that switching."[50] But UP's ability to anticipate reciprocal switch traffic volumes was far less in its merger with SP because another merger condition required UP to free up 50% of all contract volumes at reciprocal switch locations so BNSF would have the ***immediate*** opportunity to secure a critical mass of traffic to support its trackage rights service.[51] As a result, all UP locations that went from two rail carriers to one as a result of the merger had the ***immediate*** ability to shift half their traffic volume to BNSF. In contrast, reciprocal switch requests under the Board's proposal will be far fewer, spread over time, and must satisfy the standards established in the proposed rules before any traffic can be switched. Furthermore, UP's claim assumes additional investment is required even though that is unlikely to be the case for most reciprocal switch requests. Lastly, UP and all other railroads routinely use contracts to lock-up traffic volumes for extended time periods, thereby generating more predictable traffic flows upon which they can make investment decisions.

AAR also has attempted to differentiate reciprocal switching in mergers by stressing "the role of negotiations and offsetting benefits associated with [voluntary] transactions."[52] But as the Board itself has observed, the incentives for such "naturally occurring" reciprocal switching have declined as consolidation has increased and the obvious explanation is that railroads are

[50] "Summary of Nov. 10, 2021 Ex Parte Meeting between UP and Michelle Schultz," p. 1 (served Nov. 18, 2021).

[51] *Union Pac. Corp. et al – Control and Merger – Southern Pacific Rail Corp. et al.*, FD 32670 [Decision No. 44], slip op. at 146 (served Aug. 12, 1996).

[52] "Summary of Sept. 22, 2021 Ex Parte Meeting between AAR and Martin Oberman," pp.1-2 (served Sept. 29, 2021).

attempting to optimize their own large networks.[53] In such circumstances, the railroad industry is giving undue weight to the "benefits" on its side of the ledger and minimizing impacts on the shipper side. In mergers, railroads were willing to accept reciprocal switching as the price to get their merger approved. Even then, for many shippers, reciprocal switching was a lesser form of competition than the direct two-carrier competition that reciprocal switching replaced. For those shippers, this was not a "voluntary" transaction.

D. The Canadian Interswitching Experience Is Relevant to the Board's Evaluation of Alleged Risks of Operational Harms From Expanded Reciprocal Switching.

AAR and individual railroads argue that Canada's long-standing use of interswitching to protect captive shippers from monopoly harms is irrelevant to evaluating the risks of dire service and financial impacts that they claim will result from expanded reciprocal switching in the United States. The railroads base their position primarily on different characteristics between the Canadian and U.S. rail networks. Specifically, the railroads claim that population density, routing complexity, and infrastructure differences between the two rail systems renders any evaluation of the historic interswitching experience in Canada meaningless.[54]

The railroads, however, wrongly assume that, absent a perfect "apples-to-apples" comparison between the rail systems in Canada and the United States, there are no lessons that can be learned or reasonable inferences that can be drawn by the Board from Canada's use of interswitching for more than a century.[55] This is absurd. The railroads' position exposes their deep insecurity over the success of interswitching in Canada, which has helped to counter the

[53] 2016 NPRM at 9.

[54] *See* "Summary of Sept. 23, 2021 Ex Parte Meeting between AAR and Robert Primus," p. 2 (served Oct. 4, 2021).

[55] Interswitching regulations were instituted in Canada in 1904: https://www.otc-cta.gc.ca/eng/interswitching-rates.

risk of monopoly impacts at sole-served rail facilities in Canada since 1904, without causing widespread service disruptions or undermining railroad productivity or financial performance.[56] Throughout this proceeding, the Coalition Associations have encouraged the Board to review Canada's experience with interswitching because it involves rail carriers which operate in both jurisdictions and is instructive regarding potential impacts on rail operations — impacts that do not accord with the doomsday scenarios the railroads allege will occur in the United States if the Board adopts the proposed reciprocal switching rules.

Ironically, two very significant differences between the structure of Canadian interswitching and the Board's proposed rules provide the strongest rebuttal to the railroad arguments. First, in Canada, *any* traffic within a radius of 30 kilometers (~18 miles) of an interchange *automatically* is eligible to use interswitching. In contrast, the Board's proposed rules are far from automatic. They require individual shippers to present evidence to the Board on a case-by-case basis that satisfies specific criteria. In addition, the incumbent railroad can challenge that evidence or present evidence that the requested switching is not feasible or safe or that it will interfere with service to other shippers. These built-in safeguards in the Board's proposed rules ensure that the agency will carefully evaluate, in the context of a specific case, whether service or safety harms require denial of a requested reciprocal switching remedy.

Second, the switch rate, which is established and adjusted annually by the Canadian Transportation Agency ("CTA"), is known from the outset. In contrast, the reciprocal switch rate in the United States is established initially by the carriers and must be challenged by the shipper if it believes the rate is too high. Uncertainty as to the switch rate in the United States

[56] *See* Exhibit 2 financial metrics**.**

prevents shippers from knowing whether and to what extent reciprocal switching will be beneficial, and thus is likely to deter some requests.

Thus, the very structure of the Board's proposed rules directly addresses the railroads' concerns that terminal infrastructure differences in Canada and the United States will lead to different operational impacts. These factors will make reciprocal switching far less prevalent than Canadian interswitching and far less likely to cause the operational disruption alleged by the rail industry.

Moreover, during the pendency of this proceeding, Canada expanded access to interswitching when it amended the Canada Transportation Act on May 23, 2018,[57] to provide the CTA with authority to grant Long-Haul Interswitching as a remedy for shipper-railroad disputes.[58] Long-Haul Interswitching in Canada allows a captive shipper with a rate or service dispute with a Class 1 railway to petition for an interswitching order if the captive origin or destination is within 1200 kilometers (approximately 746 miles) of the interchange and other eligibility criteria are satisfied.[59] If granted, the order requires the local carrier to move the shipper's commodity to a connecting carrier which will perform the remainder of the movement.[60] This expansion of interswitching to much greater distances in Canada further demonstrates the weakness of the railroads' objections to the Board's consideration of interswitching experiences and impacts.

[57] *See*, the *Transportation Modernization Act*, S.C., 2018, c. 10.

[58] https://otc-cta.gc.ca/eng/long-haul-interswitching.

[59] For additional eligibility parameters for Long-Haul Interswitching: *See* https://otc-cta.gc.ca/eng/long-haul-interswitching-lhi-checking-your-eligibility.

[60] https://otc-cta.gc.ca/eng/long-haul-interswitching.

AAR asserted in ex parte meetings that, "where interswitching regulations forced traffic to move against the flow of the network over facilities that were not designed to accommodate the traffic, service problems developed both for the customer forcing the switch and for other customers that shared facilities."[61] AAR ignores, however, that no shipper reasonably will pursue a switching remedy at the Board if the existing infrastructure means that the shipper's rail service will deteriorate and become less efficient. Even if, *arguendo*, a shipper would pursue reciprocal switching in such circumstances (which is highly unlikely), as explained above, the Board's case-by-case approach would enable the Board to deny the remedy if adverse service or operational impacts would result, which is a feature that is not available in Canada. Similarly, the railroads' concern that network complexities in the United States as compared to Canada renders consideration of the impacts of interswitching meaningless is belied by the fact that interswitching in Canada can and does occur in and near more congested urban districts, such as Vancouver, Toronto, and Montreal.[62]

The railroads also attempt to identify network differences in the extreme to persuade the Board that Canada's interswitching experience is irrelevant to evaluating the impacts of expanded reciprocal switching in the United States. However, they avoid the obvious point that both the United States and Canada are large countries with transnational rail networks that traverse diverse terrains, regions, and operating environments. In other words, there is no one single scenario involving interswitching, nor would there be for reciprocal switching, because the location of shipper facilities, terminal infrastructure, and levels of traffic varies substantially

[61] "Summary of Feb. 15, 2018 Ex Parte Meeting between AAR and Ann Begeman," p. 2 (served Feb. 23, 2018).

[62] https://www.cn.ca/-/media/Files/Customer-Centre/Shipping/9001-CTA-Interswitching-Points-Canada.pdf?la=en&hash=4AB761F12DBAF60C5D44BEA4016F6A373DD9FF96

amongst rail shippers in both countries. Thus, the Board's case-by-case approach to expanding reciprocal switching appropriately accounts for these differences and undermines the railroads' claims that the Canadian experience is immaterial to the Board's assessment of reciprocal switching impacts.

Also relevant is that the Canadian carriers were the first to implement PSR in North America without the occurrence of significant operational disruption despite the existence of interswitching. Thus, it is reasonable to expect that the more recent implementation of PSR by the U.S. Class I carriers should not in and of itself increase the risk of operational harms occurring from an expansion of reciprocal switching.

For the foregoing reasons, the Coalition Associations argue not that the interswitching experience in Canada is the deciding factor in any impact analysis of increased reciprocal switching in the United States, but rather that it is a relevant factor from which reasonable inferences can be drawn — inferences that indicate that the railroads' concerns of widespread operational harms are misplaced and exaggerated. The Coalition Associations are aware that all of the Board's members engaged recently in ex parte meetings directly with staff from the CTA about the workings and impacts of the Canadian interswitching model.[63] The Board has the expertise to weigh the information it received in those meetings, along with other information provided throughout this proceeding, regarding interswitching in Canada to draw appropriate inferences that the risks of service disruptions from expanded reciprocal switching in the United States are both low and can be mitigated under the safeguards included in the Board's proposal.

[63] *See* Ex Parte No. 711 (Sub No. 1)—*Reciprocal Switching*, ex parte meeting summaries with staff of the Canadian Transportation Agency, (served Feb. 1, 2022).

E. Reciprocal Switching Is A Remedy For The Anticompetitive Conduct of Foreclosure.

Throughout this rulemaking, the rail industry has defended the "competitive abuse" standard that the Board currently requires reciprocal switching requests to meet. In recent *ex parte* meetings, the AAR stated that "the appropriate standard for switching was a showing of anticompetitive conduct, and not merely a customer desire for another railroad option."[64] This comment disregards that the very purpose of reciprocal switching is to remedy the anticompetitive conduct of "foreclosure."

Foreclosure occurs when a rail carrier exploits its control over a bottleneck segment to protect its long-haul by refusing to interchange with rail carriers that can provide service over non-bottleneck route segments, thereby foreclosing competition from those carriers. Although the long-haul provision in the statute, 49 U.S.C. § 10705(a)(2), permits this anticompetitive behavior, reciprocal switching is an exception to this long-haul right that is expressly established in the very same statutory section.

Absent the long-haul protections in the statute, the foreclosure behavior of railroads would be subject to the antitrust laws. This absence of antitrust scrutiny imposes a greater responsibility upon the Board to exercise its reciprocal switching authority to restrict such anti-competitive behavior to a level that is reasonably necessary to achieve and maintain revenue adequacy. That, in turn, fosters the national rail transportation policies "to allow, ***to the maximum extent possible***, competition and the demand for services to establish reasonable rates

[64] "Summary of Sept. 24, 2021 Ex Parte Meeting between AAR and Ann Begeman," p. 1 (served Sept. 29, 2021). *See also*, "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Patrick Fuchs," p. 1 (served Jan. 4, 2022) ([I]f railroads were engaging in anticompetitive conduct and refusing to provide customers efficient routes, then forced switching remedies imposed by the Board would be justified…").

for transportation by rail" and "***to minimize*** the need for Federal regulatory control over the rail transportation system…."[65]

F. Calls For Various Competitive Studies Are An Unwarranted Attempt To Further Delay This Proceeding.

In recent ex parte meetings, NS attempts to delay this proceeding beyond the decade it already has been pending by calling for two studies of competition. First, NS contends that the Board should commission a new study to update the competition study prepared for the Board by Laurits R. Christensen Associates, Inc. in 2008 and subsequently updated in 2010 (the "Christensen Report").[66] Second, NS contends that the Board should reopen the record to re-examine the state of truck competition. The Board should reject both suggestions.

The NS suggestion to study changes in competition since the Christensen Study is a challenge to the Board's determination that consolidation among Class I railroads over the past three decades since the ICC adopted the current reciprocal switching rules provides justification to revise those rules. According to NS, the Christensen Study "found that railroads were not earning above normal profits and rate increases were not the result of increased market power."[67] NS therefore concludes that, "if the Board believes there is an issue with competition it should commission a new study."[68] This argument is unpersuasive for multiple reasons.

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[65] 49 U.S.C. § 10101(1) & (2) [emphasis added].

[66] Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* (rev. 2009) (hereafter cited as "2008 Study" and "2010 Study").

[67] "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Patrick Fuchs," p.1 (served Jan. 4, 2022). *See also*, "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Michelle Schultz," p.1 (served Dec. 21, 2021).

[68] *Id.*

First, reciprocal switching is not about the state of competition generally in the rail industry; it is a tool for implementing the national rail transportation policies "to allow, ***to the maximum extent possible***, competition and the demand for services to establish reasonable rates for transportation by rail" and "***to minimize*** the need for Federal regulatory control over the rail transportation system…."[69] The statute permits the introduction of competition through reciprocal switching only in circumstances where "it is practicable and in the public interest" or "necessary to provide competitive rail service."[70] The proposed rules apply these standards case-by-case, not to the rail industry generally. The NS position would be the same as arguing that the Board should not regulate rail rates for any traffic because, in the aggregate, rail rates are reasonable, or railroads are not earning above normal profits.

Second, in relation to the first point, the conclusions reached by the Christensen Report as to the state of competition were predicated upon industry-wide data and trends. For example, the study concluded that there is no "overall" railroad pricing abuse based upon "average" rates while also observing that the averages are composed of a very wide range of R/VC ratios.[71] In addition, the Study's use of "median" rates likely hid substantial rate increases in rates above the median if the number of rates below the median did not change and the Study gave little or no weight to more recent higher rate levels in the available data. Indeed, the Study found that, on a tonnage basis, the percent of tons being transported at rates exceeding 300% of variable costs in 2004-2006 constituted 17% of all traffic, which had increased from 12% just five years earlier.[72]

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[69] 49 U.S.C. § 10101(1) & (2) [emphasis added].

[70] 49 U.S.C. § 11102(C)(1).

[71] 2008 Study, pp. ES-11 & 38. In addition, the Study's reliance upon rates in the Costed Waybill Sample means that fuel surcharges and other non-line haul revenues were not considered.

[72] 2008 Study, p. ES-11.

Of particular concern, the data showing significant rate increases in the most recent years in the Study (2004-2006) indicated a significant discontinuity with respect to previous years in which rates generally either were stable or declining.[73] Furthermore, the Study relied upon the Lerner Index to judge market power, while conceding that there are "both theoretical and practical difficulties" to doing so, with one highly anomalous result being the Study's conclusion that rail market power peaked in the 1980s.[74] This is only a sampling of the flaws underlying the Christensen Study. The Coalition Associations refer the Board to the comments filed in Docket No. EP 680, *Study of Competition in the Freight Railroad Industry* (filed Dec. 22, 2008), for greater detail. The key takeaway for the purpose of this testimony is that, even if the Christensen Study accurately portrayed the state of competition in overall terms, that does not diminish the needs of the multitude of shippers without competition for reciprocal switching. When coupled with other factors, such as the vastly improved financial health of the rail industry,[75] allowing greater competitive opportunities through reciprocal switching can establish a reasonable and more equitable balance between the national rail transportation policies to allow competition "to the maximum extent possible" and "to allow[] rail carriers to earn adequate revenues…."[76]

Third, just as the NS argument ignores the service benefits that competition fosters, so did the Christensen Study by focusing solely on rates to evaluate the state of competition. In

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[73] 2008 Study, pp. 8-13 to 15, 8-53 to 54, 10-12 (From 1988-2003, rates and miscellaneous revenue increased less than ½ percent annually on average but increased 8.8% on average from 2004-2006 and the 2006 increase "noticeably exceeded industry cost."). *See also,* Section of Econ., STB, *Study of Railroad Rates: 1985-2007,* at 1 (2009) (Inflation-adjusted rail rate increases from 2005-07 represent a significant change from 1985-2004 when inflation-adjusted rates declined in all but one year.).

[74] 2008 Study, p. 10-8.

[75] 2010 Study, p. 3-26 ("There is no evidence that the Class I rail industry is under-capitalized.").

[76] 49 U.S.C. § 10101(1) and (3). *See also,* §10101(4, 5, 7, 12).

doing so, it ignored the decline in contract performance standards, the rise of shipper minimum volume commitments without a corresponding railroad commitment to transport those volumes, the lack of remedies for poor rail performance, and increased shipper indemnity and insurance requirements. It also ignored the trend of railroads to shift more of their costs to their customers (*e.g.*, rail car ownership), which in turn distorts the Study's rate trend conclusions.

Finally, the Christensen Study concluded that "reciprocal switching and terminal access agreements[] are more likely to create favorable economic benefit/cost conditions than more sweeping access reforms" such as bottleneck rates and trackage rights.[77] Consistent with shipper comments in this proceeding that reciprocal switching could enhance operating efficiencies,[78] the Christensen Study has noted potential gains for economies of density.[79] The Study also concluded that adverse impacts on length-of-haul economies, vertical economies, investment incentives, railroad profitability, and coordination costs would be "small" and that competitive responses and shipper gains were "most likely."[80] For all those reasons, the original NITL Petition for Rulemaking that inaugurated Docket No. EP 711 expressly cited the Christensen report to support modifying the reciprocal switching rules.[81]

Next, NS calls for reopening the record to reexamine the state of truck competition which NS contends is pervasive throughout the industrial products franchise.[82] As a threshold matter,

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[77] 2008 Study, p. ES-40.

[78] Shipper Coalition Reply, pp. 100, 103.

[79] 2008 Study, p. ES-39.

[80] *Id.*

[81] "Petition for Rulemaking of The National Industrial Transportation League," Docket No. EP 711, pp. 28-29 (filed July 7, 2011).

[82] "Summary of Nov. 15, 2021 Ex Parte Meeting between NS and Ann Begeman," p.1 (served Nov. 18, 2021).

the proposition that there is pervasive truck competition for the long-distance transportation of bulk commodities by rail, including hazardous materials, can be readily dismissed. The Board need only refer to its market dominance determinations in rate cases brought over the past decade, and the evidence submitted therein, to see that fact. Furthermore, because the Prong 2 standard in the proposed rules is akin to a rate case market dominance requirement, the Board will have the opportunity to consider truck competition when evaluating each reciprocal switch request. Such individual assessments are far more valuable and instructive for reciprocal switching requests than a generalized, industry-wide study. The NS suggestion is an unwarranted attempt at delay.

G. Efficient Component Pricing Must Not Be A Factor In Setting Reciprocal Switch Rates.

In several ex parte meetings, Board members have asked stakeholders how the Board should establish reasonable switch rates. The Shipper Coalition has advocated for application of the Board's trackage rights compensation methodology adopted in FD No. 30,000 (Sub-No. 16), *St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pac. R.R. Co – Kansas City to St. Louis* ("SSW Methodology"), with certain modifications to reflect differences between trackage rights and reciprocal switching (*e.g.*, trackage rights compensates the incumbent carrier for operation by an alternate carrier over the incumbent's track, whereas reciprocal switching compensates the incumbent for its own operations over its own track to connect with the alternative carrier).[83] This is a form of cost-plus pricing. The railroad stakeholders have not proffered a specific methodology but have insisted that any methodology must apply the economic principle of "efficient component pricing" ("ECP"), which would set switch rates

[83] Shipper Coalition Op., pp. 50-53, Joint Verified Statement of Thomas D. Crowley and Daniel L. Fapp, pp. 14-28.

equal to a railroad's direct cost of providing the switch service plus the net contribution foregone by not providing the line-haul service. They have continued to insist upon ECP in their ex parte meetings.[84]

ECP is an economic concept that functions properly only under a stringent set of assumptions that do not apply to the rail industry.[85] The most significant of these assumptions is that the incumbent carrier currently is pricing at the fully competitive level. By changing that assumption, the hypothetical illustrations of the railroads' economists in support of ECP are reversed to demonstrate why the Board must not adopt ECP. This is because, if the incumbent railroad is not currently pricing at the competitive level, ECP locks in the existing monopoly rent. That result would completely undermine the competition that reciprocal switching allows to function.

The statute provides for reciprocal switching when it is "necessary to provide competitive rail service." Consequently, this very predicate for reciprocal switching is that competition is lacking, which means that rates are not set at a competitive level. Hence, it is inappropriate to set switch rates based upon ECP.

[84] *See*, "Summary of Nov. 10, 2021 Ex Parte Meeting between UP and Michelle Schultz," p.2 (served Nov. 18, 2021); "Summary of Dec. 15, 2021 Ex Parte Meeting between NS and Patrick Fuchs," p.1 (served Jan. 4, 2022).

[85] Shipper Coalition Reply, pp. 131-33; Caves R.V.S., pp. 6-12.

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February 14, 2022

Exhibit 1

EP 711 Ex Parte Meetings: Key Messages

1. **Congress intended reciprocal switching to address railroad market power where (1) practical and in the public interest, or (2) necessary to provide competitive rail service. (Op. at 14-16; Reply at 14-17, 37-42)[86]**

2. **There is a strong need for reciprocal switching to address the exercise of railroad market power over captive shippers (Op. at 5-14; Reply at 19-37, 55-67).**

3. **Reciprocal Switching is Deregulatory (Reply at 55-60).**

    a. Reciprocal switching is not "artificial" competition created through reregulation, but a statutory tool to prevent carriers from foreclosing competition that otherwise exists on large portions of routes beyond a short distance bottleneck segment.

    b. Competition would limit the need for rate regulation to the shortest captive distances.

4. **Operational impacts are greatly exaggerated (Reply at 60-61, 96-116).**

    a. Railroads have created "worst case" scenarios and misrepresented them as typical.

        i. There will be zero operating impacts when the incumbent retains the traffic.

        ii. Reciprocal switching does not impose additional operating steps on the incumbent when it occurs at an existing interchange.

        iii. Case-by-case approach allows STB to deny switching in the "worst case" circumstances posited by the railroads.

    b. Operating plans are not static, inflexible, plans as portrayed by the railroads.

5. **Competition does not discourage investment (Reply at 116-22).**

    a. Competition will spur investment by creating powerful incentives for each railroad to attract and retain competitive traffic, whereas the incumbent otherwise would have little need to make such investments to retain captive traffic.

    b. Railroads have made extensive investments in highly-competitive traffic, including in areas with large concentrations of reciprocal switching.

6. **Including lost contribution (i.e. "Efficient Component Pricing") in the switch fee would nullify the benefits of reciprocal switching reform (Op. at 53-54; Reply at 131-33).**

7. **The Board has ample information to act on reciprocal switching.**

8. **Case-by-case approach enables the Board to consider cumulative impacts (Op. at 20-23; Reply at 86-89).**

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[86] References are to Shipper Coalition Op. Comments (filed Oct. 26, 2016) and Reply Comments (filed Jan. 23, 2017).

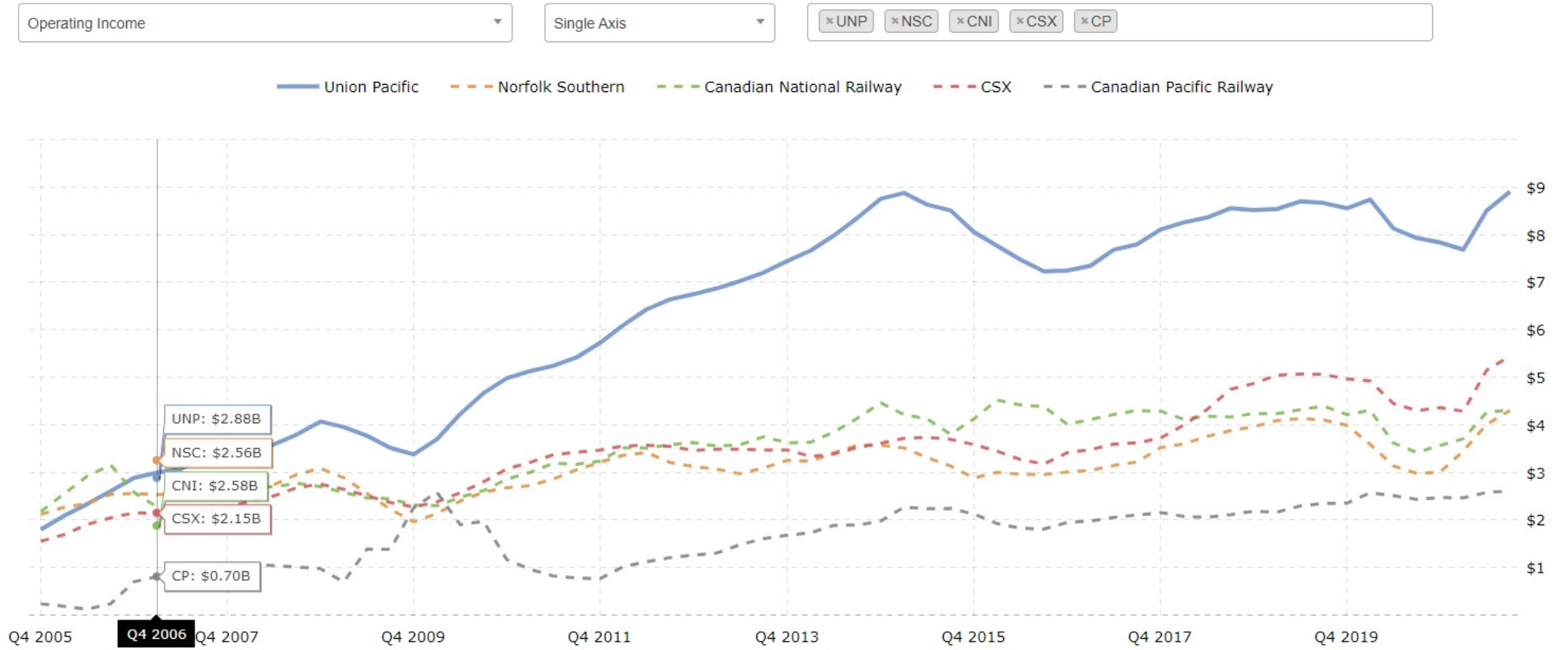
Exhibit 2

Ten Year Stock Performance


EPS - Earnings per Share
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$20
$18
$16
$14
$12
$10
$8
$6
$4
$2
NSC: $3.11
CNI: $1.15
UNP: $0.96
CP: $0.56
CSX: $0.28
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


EBITDA
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$12
$10
$8
$6
$4
$2
UNP: $3.28B
NSC: $3.04B
CNI: $2.69B
CSX: $2.61B
CP: $0.67B
Q4
Q1 2006
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


Revenue
Single Axis
×UNP
×NSC
×CNI
×CSX
×CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$24
$22
$20
$18
$16
$14
$12
$10
$8
$6
$4
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019

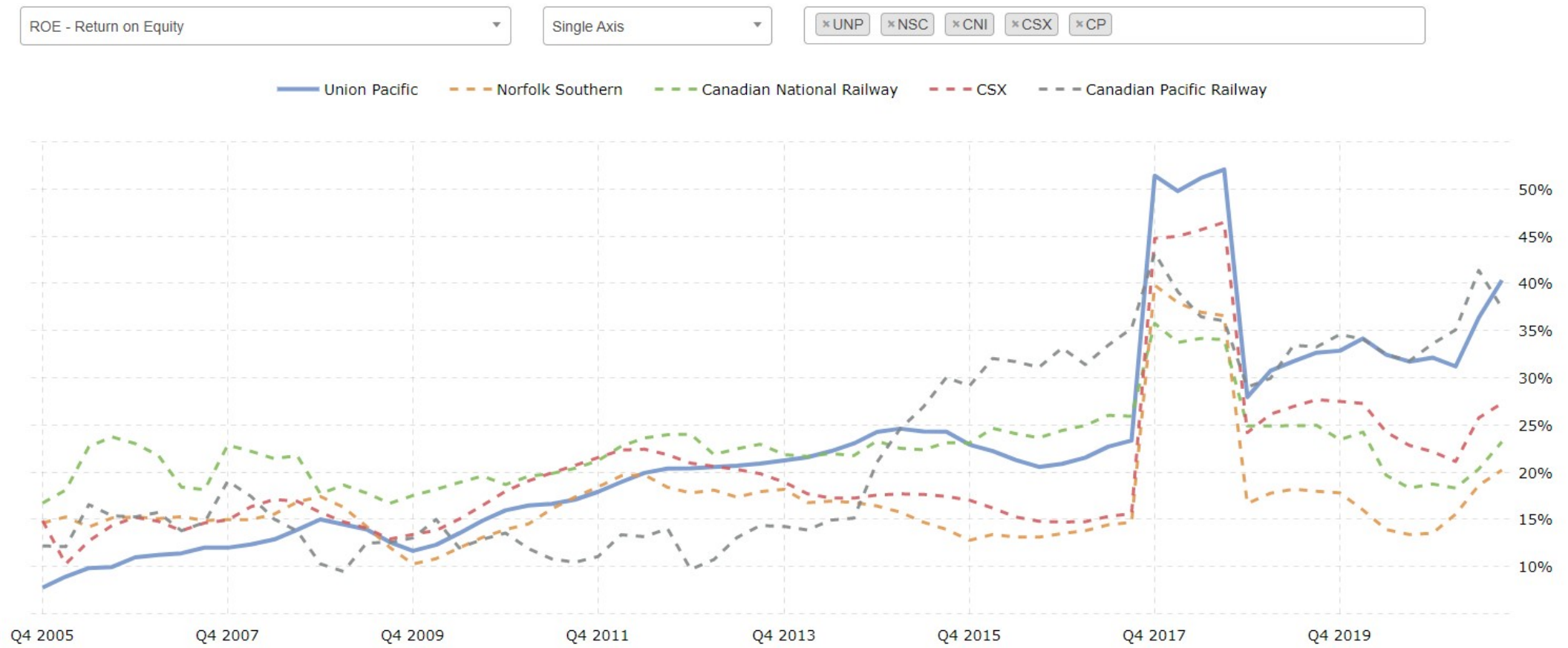

Operating Income
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$9
$8
$7
$6
$5
$4
$3
$2
$1
UNP: $2.88B
NSC: $2.56B
CNI: $2.58B
CSX: $2.15B
CP: $0.70B
Q4 2005
Q4 2006
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


Net Income
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$12
$10
$8
$6
$4
$2
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


Gross Profit
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
$14
$12
$10
$8
$6
$4
$2
UNP: $10.09B
CSX: $7.64B
NSC: $7.29B
CNI: $4.95B
CP: $3.32B
Q4 2005
Q4 2007
Q4 2009
Q2 2012
Q4 2013
Q4 2015
Q4 2017
Q4 2019


Net Profit Margin
Single Axis
×UNP
×NSC
×CNI
×CSX
×CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
55%
50%
45%
40%
35%
30%
25%
20%
15%
10%
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


ROA - Return on Assets
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
20%
18%
16%
14%
12%
10%
8%
6%
4%
2%
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019


ROE - Return on Equity
Single Axis
UNP
NSC
CNI
CSX
CP
Union Pacific
Norfolk Southern
Canadian National Railway
CSX
Canadian Pacific Railway
50%
45%
40%
35%
30%
25%
20%
15%
10%
Q4 2005
Q4 2007
Q4 2009
Q4 2011
Q4 2013
Q4 2015
Q4 2017
Q4 2019

ROI - Return on Investment

Single Axis

×UNP ×NSC ×CNI ×CSX ×CP