

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

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OPENING COMMENTS

submitted by

THE COALITION ASSOCIATIONS

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**I. INTRODUCTION AND SUMMARY**

The Coalition Associations<sup>1</sup> hereby submit these Opening Comments in response to the Notice of Proposed Rulemaking (“NPRM”) served in this docket by the Surface Transportation Board (“STB” or “Board”) on September 7, 2023. These comments are supported by the attached Exhibit 1, which is a Verified Statement of Thomas D. Crowley and Daniel L. Fapp (“Crowley/Fapp V.S.”), that addresses the appropriate methodology for setting a reciprocal switch rate, discusses the data needed to apply the proposed service standards, and illustrates their understanding of how the Board would apply the standards. In addition, in the attached Exhibit 2, the Coalition Associations present a redline of the proposed rules from Appendix A of the NPRM that contains specific language for modifying those proposals consistent with these comments.

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<sup>1</sup>The “Coalition Associations” are the American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), and The National Industrial Transportation League (“NITL”).

The NPRM closed Docket No. EP 711 (Sub-No. 1) (“Sub-Docket No. 1”), which had proposed regulations that would provide reciprocal switching pursuant to the standards in 49 U.S.C. § 11102(c) when “practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” In its place, the Board has opened this new sub-docket to provide for reciprocal switching solely to address “inadequate rail service” under the public interest standard of § 11102(c).

The scope of the NPRM is much narrower than the scope sought by The NITL in its Petition for Rulemaking in Ex Parte No. 711<sup>2</sup> and in the Board’s notice of proposed rulemaking in Sub-Docket No. 1.<sup>3</sup> Both proposals sought to implement the full scope of § 11102(c) by enhancing rail competition through reciprocal switching. It is through such competition that the Coalition Associations remain convinced that service inadequacies can be most effectively addressed. Moreover, rail competition also fosters reasonable rates, balanced commercial terms, greater innovation, and increased efficiency, which in turn furthers multiple aspects of the national Rail Transportation Policies.<sup>4</sup> Nevertheless, the NPRM proposes regulations that have the potential to be a significant improvement over the existing standards for reciprocal switching and have the support of the Coalition Associations with the modifications proposed herein.

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<sup>2</sup>Pet., July 7, 2011, *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711.

<sup>3</sup>*Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (Sub-No. 1) (served July 27, 2016).

<sup>4</sup>*See, e.g.*, 49 U.S.C. § 10101(1) (“to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”); 10101(2) (“Minimize the need for Federal regulatory control over the rail transportation system...”); 10101(4) (“ensure the development and continuation of a sound rail transportation system with effective competition among carriers...”); 10101(7) (“reduce regulatory barriers to entry into...the industry”); 10101(9) (“encourage honest and efficient management of railroads”); and 10101(12) (“prohibit predatory pricing and practices. [and] to avoid undue concentrations of market power...”).

In the following eight sections of these comments, the Coalition Associations respond to specific questions in the NPRM, comment upon the Board's proposals, and offer modifications to remove deficiencies in, and enhance the effectiveness of, those proposals for addressing inadequate rail service.

Part II responds to multiple questions the Board has asked about limitations that 49 U.S.C. § 10709(c) may impose upon its authority to consider contract traffic as part of these proposals. *First*, Board precedent in prior reciprocal switch cases makes clear that § 10709(c) does not impair the Board's authority to consider rail performance pursuant to contracts. Additional precedent also establishes that, when the Board exercises its statutory obligations with respect to rail service – which is the predicate for prescribing reciprocal switching in the NPRM – its decisions may implicate contract traffic without running afoul of § 10709(c). *Second*, the Board may and should permit shippers to request reciprocal switching at any time prior to the expiration of a contract with the incumbent carrier even when the shipper cannot use the switch prior to expiration of the contract. *Burlington Northern R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996), is inapposite because the rate reasonableness statutes in that case imposed constraints upon the Board's discretion to balance shipper and carrier interests that do not exist in the reciprocal switch statute. Moreover, the solely prospective nature of a reciprocal switch prescription – in contrast to the retroactive and prospective nature of a rate reasonableness prescription – warrant a different result as a matter of policy. Nevertheless, the Coalition Associations propose, as a matter of policy, that the Board require a shipper to notify it, within 30 days of a decision that prescribes a reciprocal switch, of the date the shipper desires the switch period to begin, provided that such date can be no more than one year from the date of the shipper's petition.

In Part III, the Coalition Associations comment upon the proposed service performance standards and offer several modifications to enhance their effectiveness. For service reliability, they propose the following four principal modifications:

- Increase the adequacy threshold for deliveries within 24 hours of the “Original Estimated Time of Arrival” (“OETA”) from 60% to 70%.
- Establish additional thresholds that are graduated so that the percentage of delivered railcars increases from 70% to 80% to 90% as the time from OETA increases to 24, 48, and 72 hours, respectively (collectively the “Fixed Thresholds”).
- Adopt alternative adjusting thresholds for the 24-, 48-, and 72-hour time bands that are equal to the average systemwide performance of all Class I carriers for those respective bands (collectively the “Adjusting Thresholds”).
- Clarify that the time bands are measured *before and after* the OETA, so shipments that arrive excessively early do not count as being delivered within the applicable time band and to remove any incentive for rail carriers to “game” this standard by artificially inflating OETAs.

For manifest traffic, the Board would prescribe a reciprocal switch when the incumbent carrier’s performance does not exceed either the Fixed or Adjusting Thresholds applicable to the 24-, 48-, or 72-hour time bands. The Board also should prescribe a reciprocal switch for unit trains when less than 90% of trains arrive within 24 hours of the OETA.

For service consistency, the Coalition Associations urge the Board to reduce its proposed threshold for transit time increases to no more than 15% year over year. Also, to avoid the compounding effect of excessive, prolonged transit-time increases, the Board should adopt a second threshold that would make reciprocal switching available if transit times increase more than 25% over three years. A rail customer would qualify for reciprocal switching if it demonstrates that the incumbent carrier has not met either the one-year or three-year threshold.

For the industry spot and pull (“ISP”) standard, the Coalition Associations propose two measures, one for missed cars and the other for service-window “no shows,” because the impact of ISP performance failures differs significantly depending on whether a single car was spotted



or pulled or the railroad's local crew did not show at all during the planned service window. The ISP car measure would require that up to 80% of railcar spots and pulls occur in the planned service window, with the remainder occurring in the immediately following service window. The "no-show" measure would require a carrier to provide ISP service for up to 90% of service windows, provided the carrier does not miss consecutive service windows. In addition to adopting the foregoing ISP service metrics, the Board also should adopt the following proposals:

- If a rail carrier unilaterally reduces the frequency of ISP service to a customer without a commensurate reduction in the customer's demand, the ISP adequacy thresholds for the car and no-show measures should increase for two years.
- Clarify how to calculate ISP performance for open gate customer facilities in accordance with the Coalition Associations' proposal.
- Apply the ISP standards based on service windows that are consistent with a carrier's established protocol rather than a standardized 12-hour window.
- Require carriers to provide 60 days' notice of a service window change.

In Part IV and the Crowley/Fapp V.S., the Coalition Associations comment upon the data format and content needed from railroads for a shipper to apply the proposed performance standards as modified in Part III. The data format is less important than the content and descriptions of the data fields. In addition, Messrs. Crowley and Fapp present hypothetical examples of the proposed service standards to demonstrate the data and calculations that a shipper would require to determine a railroad's satisfaction of those standards.

In Part V, the Coalition Associations support the Board's proposal for identifying a "terminal area" in which reciprocal switching may be prescribed. The function-based definition is consistent with precedent and forecloses a carrier's ability to "game" the proposals by establishing narrow geographic boundaries. In addition, the Board properly proposes to establish a heavy presumption that, when the incumbent already has a switching arrangement with another carrier within a terminal, a shipper's traffic would qualify for a switch prescription provided the

other conditions in the NPRM are satisfied. The Coalition Associations urge the Board to broaden that presumption to include any terminal where the incumbent and alternate carriers interchange traffic because the act of interchanging rail cars within a terminal is the same for interchanging cars moving via line-haul or reciprocal switch.

In Part VI, the Coalition Associations address the Board's proposals regarding the duration of, and termination process for, a reciprocal switch prescription. *First*, the minimum and maximum duration of a prescription should be 5 and 10 years, respectively, to provide sufficient incentives for alternate carriers to offer competitive service. This concern of the Coalition Associations is even greater in this sub-docket than it was in Sub-Docket No. 1 because the potential traffic available to an alternative carrier will be much less attractive under this new proposal. *Second*, the proposed process for terminating a switch prescription should be modified as follows:

- Set the window for petitions to terminate at 210 to 150 days before the end of the prescribed period, because the proposed window in the NPRM does not allow sufficient time for shippers to transition traffic back to the incumbent carrier if the Board terminates the prescription near the end of prescribed period.
- Continue the prescription in effect until 30 days after the Board serves a decision that grants a petition to terminate, instead of automatically terminating the prescription unless extended by the Board. It is crucial to preserve the status quo to avoid the "whip-lash" effect upon both shippers and carriers of multiple potential traffic shifts within a brief time, depending upon how and when the Board ultimately decides a petition to terminate.
- Require the incumbent carrier, as part of its petition, to provide the shipper with all data that are relevant to the standards that the incumbent must satisfy to terminate the prescription.

*Third*, the Board should require carriers to demonstrate compliance with all three service standards to terminate a switch prescription, not just the one that justified the initial prescription. Otherwise, if the showing is restricted solely to the latter, the Board could terminate a prescription even though the incumbent is still providing inadequate service that would merit

continuation of the prescription. *Fourth*, the Board should provide the following clarifications of “similar traffic” that carriers may consider in a petition to terminate:

- Similar traffic for the Service Reliability and Service Consistency standards of a manifest shipment should be other manifest traffic moving *between* the terminal where the reciprocal switch occurs and the terminal or local serving yard at the other end of the movement of the switched traffic. Only if there is an insufficient volume of similar traffic between those points should carriers be permitted to expand the geographic coverage for similar traffic in a petition to terminate. However, if the incumbent carrier is providing the line-haul service rather than an alternate carrier, a carrier should make the same showing the shipper made in its original petition – *i.e.*, the shipper’s own traffic.
- For the ISP service standard, there is no need to consider “similar traffic” at all because the incumbent carrier will continue to provide ISP service even for a reciprocal switch. Therefore, a carrier should make the same showing the shipper made in its original petition – *i.e.*, the shipper’s own traffic.

*Fifth*, if a petition to terminate is not filed or is denied, the switch prescription should renew for the same period as the initial prescription for all the same reasons that justify the initial prescription period. *Sixth*, if the incumbent experiences a subsequent service failure within one year after a prescription has been terminated, the Board should make the prescription permanent to provide a disincentive for carriers to request termination prematurely.

In Part VII, the Coalition Associations urge the Board to prohibit an incumbent carrier from reducing its switching service below levels that existed prior to the prescription unless a material reduction in the shipper’s traffic volume has a material adverse impact upon the incumbent’s operations. The incumbent would bear the burden of proof to demonstrate materiality.

In Part VIII and in the Crowley/Fapp V.S., the Coalition Associations renew their support for the “SSW Compensation Methodology” for setting the switch rate and explain how to adapt it for reciprocal switching. In addition, they urge the Board to clarify that shippers may challenge a switch fee using the same methodology that the Board adopts for switch fee disputes between carriers, and that the intramodal competition created by a reciprocal switch prescription

will not automatically preclude a finding of market dominance when a shipper challenges the reasonableness of the line-haul rate for the same traffic. Otherwise, carriers could collude over the switch fee to prevent reciprocal switching from achieving the Board's objective to redress inadequate service, while using the availability of the reciprocal switch also to avoid regulatory scrutiny of their line-haul rates.

Finally, in Part IX, the Coalition Associations provide three suggestions in response to the Board's request for comments on other actions it should consider with respect to competitive access. *First*, the Board should expand its current proposal to all bottleneck segments, pursuant to 49 U.S.C. § 10705(a)(2)(C), which, like § 10705(a)(2)(A), authorizes the Board to short-haul a carrier to address inadequate service in a through route prescription just as it can through a reciprocal switch prescription. *Second*, the Board should open a separate docket to consider the unique questions surrounding the prescription of trackage rights as an additional remedy for breach of the ISP service standard. *Third*, the Board should revisit the proposals in Sub-Docket No. 1, or develop and solicit new proposals, to implement the "necessary to provide competitive rail service" prong of 49 U.S.C. § 11102(c).

In closing, although the Board has chosen to close Sub-Docket No. 1, the Coalition Associations are reassured by the Board's acknowledgment that, "in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared toward increasing competitive options...is foreclosed, whether in this sub-docket or otherwise." NPRM 7. Like Board Member Primus, we "eagerly anticipate the Board's action to improve access to the statute's other prong, addressing reciprocal switching that is 'necessary to provide competitive rail service,'" and urge the Board to "act soon to ensure that reciprocal switching is available for competitive access to the extent authorized by

the language of the statute.” NPRM 34-35 (Primus, concurring). The full potential of reciprocal switching can only be realized when that occurs.

## **II. THE BOARD HAS AUTHORITY TO CONSIDER RECIPROCAL SWITCHING REQUESTS FOR TRAFFIC THAT IS UNDER CONTRACT.**

The Board has solicited comments on “whether, and under what circumstances, [it] has the authority to consider reciprocal switching requests from shippers that have entered into a valid rail transportation contract with the incumbent carrier.” NPRM 27-28. Within that rubric, the Board has posed two overarching questions: (1) whether it may consider performance data, based on service provided pursuant to a contract, as grounds for prescribing reciprocal switching that would become effective after the contract expired; and (2) when, prior to the expiration of a contract, the Board may prescribe reciprocal switching that would become effective after the contract expires. The Board has posed these questions considering 49 U.S.C. § 10709(c), which divests the Board of jurisdiction over contracts and transportation provided pursuant to such contracts. As discussed more fully below, Section 10709(c) is not an impediment to the Board’s implementation of the proposed rules.

### **A. The Board May Consider Performance Data Based On Service Provided Pursuant To A Contract.**

The Board’s first overarching question is whether its evaluation of the proposed performance metrics may consider the incumbent’s performance of service covered by a contract. NPRM 27. The Board also poses a corollary question whether it may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer’s request. *Id.* The answer to both questions is an unqualified “yes.”

**1. Precedent firmly establishes that the Board does not violate § 10709(c) when it considers evidence that is based on service provided pursuant to a contract.**

Section 10709(c) excludes from the Board’s jurisdiction contracts between a shipper and a carrier and the transportation under such contracts. This jurisdictional limit is clear and longstanding.<sup>5</sup> The Board’s reciprocal switching proposal, however, does not regulate contracts or transportation subject to a contract within the rubric of this precedent.

To the contrary, the proposed rules implicate contracts only to the extent that the service metrics that the Board would consider in a reciprocal switching case may include metrics for contract service. In considering such metrics, the Board is not regulating contract transportation; nor is the Board interpreting the contract, deciding whether the contract violates the statute, or resolving any contract dispute. A shipper remains subject to the terms of any contract until it terminates, including any contract restrictions upon the shipper’s use of reciprocal switching. Thus, considering data that includes contract movements is not the same as regulating such transportation or the contracts themselves.<sup>6</sup>

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<sup>5</sup>*Omaha Public Power District v. Union Pacific Railroad Company*, Docket No. NOR 42006 (served Oct. 17, 1997), at 2 (“It is well established that, under 49 U.S.C. 10709(c)(1), transportation under a rail contract may not be challenged on the ground that it violates the [Interstate Commerce Act]. Incorporation of tariff provisions into a contract does not alter this basic principle in any way.”); *H.B. Fuller Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 550, 553 (1997) (section 10709 “remove[s] transportation under a rail contract from any subsequent regulatory review”). See also, *Cross Oil Refining & Mktg., Inc. v. Union Pac. R.R. Co.*, Docket No. FD 33582 (served Oct. 27, 1998) (“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction”); *Union Pacific Railroad Company—Petition for Declaratory Order*, Docket No. 35021, at 2 (served May 16, 2007) (“However, that holding does not apply to any traffic handled under rail transportation contracts, because under 49 U.S.C. 10709 we have no authority to regulate rail rates and services that are governed by a contract.”); *Rail Fuel Surcharges*, Docket No. EP No. 661, at 13 (served Jan. 26, 2007) (“Under 49 U.S.C. 10709, we have no authority to regulate rates and services that are governed by a contract.”).

<sup>6</sup>The Board, for example, will consider contract traffic data in the exercise of its rate review regulatory authority. *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No.

This conclusion is confirmed by the Board’s reciprocal switching precedent applying the so-called “*Midtec*” standards and 49 C.F.R. Part 1144. In the two seminal *Midtec* and *Vista Chemical* decisions, the Interstate Commerce Commission (“ICC”) considered evidence based upon contract service.<sup>7</sup> In *Midtec*, the ICC noted that “this traffic moves under various joint, combination or *contract* rates” and that “CNW gives specific examples of its willingness to initiate and concur in...*rail transportation contracts*.”<sup>8</sup> In *Vista Chemical*, the ICC observed that Vista had seven contracts that covered over 95 percent of inbound and outbound rail traffic at Vista’s Oklahoma City facility and that “Santa Fe has consistently responded to Vista’s need for expanded contracts and allowances....”<sup>9</sup> The ICC’s consideration of evidence based on contract transportation service in those decisions cannot be distinguished from the Board’s current proposal to also consider evidence based on contract transportation service.

If that precedent alone were not sufficient to resolve this issue, the Board also has stated, in the exercise of its other statutory obligations with respect to the fluidity of the rail network, that its decisions may implicate traffic under a rail transportation contract without running afoul of § 10709(c).<sup>10</sup> The NPRM expressly links the grant of reciprocal switching to service

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1), at 83 (served Sept. 5, 2007) (holding that the Three-Benchmark rate comparison group could include contract movements).

<sup>7</sup>*Midtec Paper Corp., et al. v. Chicago and Northwester Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 3 I.C.C. 2d 171 (1986) (“*Midtec*”); *Vista Chemical Co. v. The Atchison, T. & Santa Fe Ry. Co.*, 5 I.C.C. 2d 331 (1989) (“*Vista Chemical*”).

<sup>8</sup>*Midtec* at 175 and 183 [emphasis added].

<sup>9</sup>*Vista Chemical* at 334 and 338-39. *See also, id.* at 343-44 (Appendix A provides details of all seven contracts).

<sup>10</sup>*See e.g., United States Rail Service Issues*, Docket No. EP 724 (STB Served Dec. 30, 2014), at 7 (“The national rail system carries both regulated and non-regulated traffic and the Board necessarily must look to the fluidity of that network.”); *United States Rail Services Issues – Performance Data Reporting*, Docket No. EP 724 (Sub No. 4) (STB served Nov. 30, 2016), at 17 (“Finally, AAR’s argument that coal traffic primarily moves subject to contracts beyond the Board’s jurisdiction does not take into account our statutory responsibility to advance the goals

performance and, more explicitly, the unprecedented problems that have plagued the national rail network for several years. NPRM 4-6. The NPRM states that the Board’s intent is “to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis.” *Id.* 5. The NPRM also proposes objective standards that are “intended to reflect a minimum level of rail service below which regulatory intervention may be warranted, considering shippers and receivers’ need for reliable, predictable, and efficient rail service as well as rail carriers’ need for a certain degree of operating flexibility.” *Id.* 2. That regulatory intervention is the prescription of a reciprocal switch that will provide an alternative rail option for affected traffic that lawfully is able to use the prescription, without making any judgment as to such lawfulness for any traffic.<sup>11</sup>

The network nature of the national rail system also means that service improvements resulting from the service incentives that the proposed rules would provide will resound to the benefit of all shippers who rely upon the same facilities for their rail service. For example, increased train velocity and lower terminal dwell times benefit all traffic that moves in those trains or through those terminals. Reciprocal switching for service inadequacies also allows

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of the RTP, which (as discussed above) includes monitoring service in order to ensure the fluidity of the national rail network. 49 U.S.C. § 10101(3), (4). The Board is not asserting jurisdiction regarding the rights and obligations of shippers and carriers associated with coal moving under contracts; rather, the Board is taking action to gain a better understanding of and insight into the general flow of traffic on the system.”); *Expedited Relief for Service Inadequacies*, STB EP No. 628 (served Dec. 21, 1998), at 10 (“[W]here no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts. Moreover, there may be other instances where it is possible and appropriate to exercise our broad regulatory authority to ensure that traffic can move, as in the recent UP/SP Service Order.”).

<sup>11</sup>Consistent with § 10709(c)(2), the Board is not proposing to decide any dispute about contract restrictions that prevent a shipper from using a prescribed switch. Jurisdiction over such disputes remains the provenance of “an appropriate State court or United States district court . . . .” 49 U.S.C. § 10709(c)(2).



traffic on a congested network to switch to a more fluid alternative network, thereby both improving service for the switched traffic and reducing congestion for other shippers on the congested network. Thus, there is a direct link between a reciprocal switch prescription under the proposed rules and the overall fluidity of the national rail network.<sup>12</sup>

Finally, if the Board could not consider rail performance metrics for contract transportation, that effectively would neutralize the use of reciprocal switching to address the adequacy of rail service, given the large proportion of rail traffic that moves pursuant to contracts. A contract shipper currently experiencing service below the service thresholds in the proposed rules would have to wait for its contract to expire and then ship pursuant to tariff rates while waiting to see if its service improves.

**2. The Board may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer's request.**

Nothing in § 10709(c) precludes the Board from requiring carriers to provide performance metrics to rail customers during the term of a contract. As discussed in the preceding section, §10709(c) does not prevent the Board from considering rail performance under a contract when deciding whether to prescribe reciprocal switching. It follows, therefore, that the statute also does not preclude the Board from requiring carriers to provide the relevant service data to its contract customer.

Furthermore, the Board recently required railroads to provide data about contract movements in another context. Specifically, the Board required rail carriers to provide “Original

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<sup>12</sup>Similarly, the Board also could, and presumably would, consider contract traffic when determining whether to terminate a reciprocal switch prescription based on service metrics for “similar traffic.” NPRM 30.

Estimated Time of Arrival,” or “OETA,” to their customers on all demurrage invoices.<sup>13</sup> The Board made no distinction between demurrage invoices for contract or common carriage. The intent of that requirement was “to ensure that rail users do not need to undertake unreasonable efforts to gather information that can be provided by carriers in the first instance.”<sup>14</sup> That requirement has the additional benefit of providing shippers with relevant data to understand whether they have a potential claim against the carrier for improper demurrage or storage charges. Notably, OETA is one of the three metrics the NPRM would require rail carriers to provide their customers in this rulemaking.

The Board’s justification for requiring that rail carriers provide OETA to their customers in EP 759 applies equally to this rulemaking. The three proposed performance metrics in this rulemaking already either are maintained by rail carriers or derived from data maintained by them. It is unnecessary and unreasonable, therefore, to impose this burden on shippers to track information that the railroad already maintains for a regulatory remedy the shipper may never need or choose to invoke. Indeed, any such imposition would severely undermine the incentive principle at the heart of the NPRM because, if shippers cannot easily track a carrier’s performance to the proposed metrics, they are less likely to pursue reciprocal switching, thereby undermining their carrier’s incentive to maintain adequate performance as measured by those metrics.

Also, the requirement is administratively more efficient because it avoids the prospect that shippers would file petitions for reciprocal switching with the Board to obtain the same data through discovery only to learn that the metrics do not satisfy the objective eligibility thresholds.

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<sup>13</sup>*Demurrage Billing Requirements*, Docket No. EP 759, at 17-18 (served March 30, 2021).

<sup>14</sup>*Id.* at 17.

Similarly, having these metrics prior to filing a petition will be critical to the success of the pre-filing negotiations required by proposed § 1144.1. NPRM 24.

**B. The Board Can Allow Shippers To Request Reciprocal Switching At Any Time Prior To The Expiration Of A Contract With The Incumbent Carrier Even When The Shipper Could Not Use The Switch Prior To Expiration Of The Contract.**

The Board's second overarching question is "when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires." NPRM 27. There is no statutory restriction upon the Board's authority in such instances, but the Coalition Associations nevertheless propose specific guidelines that make sense as a matter of public policy.

As a threshold matter, the Coalition Associations perceive an implicit assumption in the Board's request, namely that the existence of a contract forecloses any reciprocal switching until the contract has expired. However, many rail contracts do not contain 100% volume commitments. That means, regardless of the existence of a contract, there more than likely is some volume that a shipper can tender to an alternate carrier even before its contract with the incumbent carrier expires. In such circumstances, the Board's question as to when a shipper may file a reciprocal switch request is moot because the shipper can use the switch immediately. The guidelines proposed at the end of this section for permitting a shipper to determine the effective date of a reciprocal switching prescription, within limited temporal parameters, accommodates both situations where the shipper desires to use reciprocal switching before or after expiration of its contract with the incumbent carrier.

The Board's question is prompted by the holding in *Burlington N. R.R. v. STB*, 75 F.3d 685, 687 (D.C. Cir. 1996) ("*Burlington Northern*"), that the Board's predecessor – the ICC – was

not authorized to order a carrier to file a tariff “more than a year before contract service was expected to end.” *Id.* at 27. This focus on *Burlington Northern* is misplaced. As the Board itself observes, *Burlington Northern* “is not directly applicable here, given that it examined different statutory language and pertained to a different form of (and basis for) intervention.” *Id.* at 28. Specifically, § 10709(c) was not the statutory basis for the court’s decision. Nevertheless, the Board asks whether it should consider similar legal or policy issues regarding the prescription of reciprocal switching prior to the expiration of a transportation contract. The Coalition Associations maintain that a reciprocal switch prescription prior to expiration of a contract does not implicate similar legal or policy issues that the Board must or should consider.

In *Burlington Northern*, the ICC had justified its order to file tariff rates well before the contract expiration on grounds that having to pay an unreasonably high rate for the typically lengthy duration of rate reasonableness litigation could have worked a hardship on the shipper. *Burlington Northern* 694. By requiring the carrier to publish a tariff rate well before it could be used by the shipper, the ICC sought to mitigate that hardship to “vindicate [shippers’] rights.” *Id.* 696. Although acknowledging that shippers are exposed to the hardships identified by the ICC, the Court held that Congress nevertheless had struck a different balance between shipper and carrier interests in the statute and, therefore, the ICC’s decision constituted an “end-run” around the statute. *Id.* 695 & 696 (“The problem...is that the [shipper] rights vindicated by the Commission’s order are directly at odds with [carrier] rights that were expressly established by the statute.”).

In contrast, Congress has not conducted any comparable balancing of interests in the statute that would constrain the Board’s discretion to conduct its own balancing with respect to reciprocal switching. As the *Burlington Northern* court observed, under “the statutory scheme

against which the Commission's action must be measured [, ...] the Commission had extremely limited authority to compel rail carriers to serve at rates other than those of their own choosing before completion of a Commission proceeding assessing rates" and that the ICC's decision "was no more than an end-run around the statutory scheme – jump-starting the rate review process well in advance of the earliest possible date at which common carrier service could begin, and thereby avoiding the practical force of the statutory limits on its authority." *Id.* 693-94. There are no comparable temporal limits upon the Board's authority to grant reciprocal switching.<sup>15</sup> Thus, allowing a shipper to request a reciprocal switching prescription prior to expiration of an existing contract does not contravene a different balancing of carrier and shipper interests by Congress.

There is another distinction between reciprocal switching and rate reasonableness review that vitiates application of the *Burlington Northern* holding to reciprocal switching. A successful rate case complainant, although required to pay an unreasonable rate for the duration of the rate review proceeding, could be made whole through monetary reparations at the end of the case. Indeed, this was an important component of the Congressional balancing of interests observed in *Burlington Northern*.<sup>16</sup> The same cannot be said for reciprocal switching.

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<sup>15</sup>Indeed, such limits do not make sense in several reciprocal switching contexts. Another rail carrier, for example, can request reciprocal switching. In addition, although the Board's current proposal would prescribe reciprocal switching for individual traffic lanes, its authority also extends to entire facilities or even an entire terminal area. The only similarity with rate cases is that both rate cases and the Board's reciprocal switching proposal are lane specific. But absent statutory restrictions upon the Board's reciprocal switching authority that are comparable to those on its rate review authority, the lane specific nature of the reciprocal switch proposal does not by itself pose issues comparable to those in *Burlington Northern*.

<sup>16</sup>*Id.* 693, quoting former 49 U.S.C. § 10707. In that statute, Congress severely constrained the ICC's rate suspension authority unless, among other factors, "(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section [providing for payment of reparations in the event of overpayment by a shipper] do not protect the protestant." [emphasis added]

Unlike rate reasonableness review, which provides a monetary remedy that can be applied retroactively from the date of a complaint, the proposed rules implement reciprocal switching as an alternative service remedy that can only be applied prospectively. Thus, a shipper cannot be made whole by monetary damages for any harm it suffers if precluded from filing a reciprocal switch request prior to the expiration of an existing contract with the incumbent railroad. Indeed, the harm to the shipper is exacerbated in such circumstances, because the shipper must continue to use the incumbent's inadequate line-haul service without the benefit of a contract until the Board issues a final decision on reciprocal switching and the shipper is able to negotiate transportation terms with the alternate carrier.

For example, if the Board prohibits shippers from requesting reciprocal switching until a contract expires and a shipper enters into a new contract with the incumbent during the litigation, the incumbent could seek to use that contract to dismiss the pending reciprocal switch petition. But absent a contract with the incumbent, the shipper must pay tariff rates, which are typically higher, without any ability to obtain reparations upon prescription of a reciprocal switch. That would place the shipper in a worse position than shippers who must pay tariff rates while their rate cases are pending. This consideration thus merits a different balancing of shipper and carrier interests.

Absent a conflicting Congressional balancing of shipper and carrier interests, the Board is free to develop a reciprocal switch rule based upon its independent assessment of the public interest. There are compelling policy reasons for the Board to permit shippers to request reciprocal switching before their current contract with the incumbent railroad expires. Most notably, shippers require some lead time to take advantage of a reciprocal switch prescription. First, a shipper must obtain and analyze the requisite data from the incumbent railroad to

determine if it can satisfy the objective standards established by the Board (NPRM 11), and then engage in good faith negotiations with the incumbent to resolve the service issues prior to filing a petition with the Board (*Id.* 24). Next, a Board proceeding to obtain a reciprocal switch prescription requires a minimum of 90 days (proposed § 1145.5(f)), the carriers then have up to 30 additional days to agree upon terms for reciprocal switching (proposed § 1145.6(d)), and shippers may need several additional months to negotiate transportation agreements with either or both the incumbent and alternate carriers. Moreover, although the Board would allow the switch service to begin while it resolves any compensation disputes (*Id.* 25), a shipper may be reluctant to use that service when it cannot make an informed decision between the two carriers. As discussed above, the shipper will be subject to higher tariff rates during this gap period, without any opportunity for reparations, if it cannot even initiate a case until its existing contract with the incumbent expires. In addition, this also delays the service benefits of reciprocal switching, which would undermine the primary objective of the proposed rules.

Therefore, to avoid these undesirable consequences and to maximize the benefits of reciprocal switching, the Board should require shippers to notify it, within 30 days of a decision that prescribes a reciprocal switch, when the shipper desires the switch period to become effective, provided that such date can be no more than one year from the date of the shipper's petition. This allows shippers who can use a new switch immediately to do so. In addition, it allows those shippers who either must wait, or choose to wait, until expiration of an existing contract before using the new switch to initiate a Board proceeding up to one year prior to the contract expiration and still receive the full benefits of the switch prescription. One year is a reasonable time to complete the Board proceeding under the proposed procedural schedule and still afford time to determine the switch rate and negotiate transportation arrangements that can

utilize the switch for the full prescription period. This does not preclude a shipper from filing a case more than a year prior to contract expiration, but any shipper who does so necessarily would truncate the period in which it could benefit from the prescription if the Board allows the prescription to become effective no later than one year after the date of the shipper's petition.

### **III. THE COALITION ASSOCIATIONS SUPPORT THE BOARD'S PROPOSED PERFORMANCE STANDARDS WITH MODIFICATIONS TO BETTER CAPTURE INADEQUATE SERVICE.**

The Board's proposed service standards cover the key indicators of inadequate rail service. But their adequacy thresholds are set too low and are too narrow to provide shippers with meaningful access to reciprocal switching to address service inadequacy. The Board has proposed to set the adequacy thresholds based on rail service that existed in May 2022, when railroads provided such inadequate service that the Board directed the four largest Class I railroads to submit service-recovery plans. Accordingly, the Coalition Associations propose increases and expansions to the adequacy thresholds to reflect inadequate service more accurately so that captive rail customers do not need to wait until they are receiving grossly inadequate service reminiscent of one of the worst widespread rail-service crises in decades before they have access to reciprocal switching.

In Exhibit 2, the Coalition Associations provide an updated version of the proposed rules that reflect the changes identified in this Part.

#### **A. Service Reliability**

The Board has correctly recognized that unreliable rail service is inadequate. Yet the Board's service-reliability performance standard allows railroads to continue providing the unreliable service that has plagued the national rail system for at least the last two years, which will continue to harm rail customers and the broader economy. To address this, the Coalition



Associations propose modifications to the adequacy thresholds under the standard and urge the Board to apply the standard to both manifest and unit-train traffic.

The Coalition Associations propose four main modifications to the service-reliability standard as it applies to manifest traffic. *First*, the Board should increase the adequacy threshold for deliveries within 24 hours of the “Original Estimated Time of Arrival” (“OETA”) from 60% to 70%. This would reflect that service reliability below this threshold is inadequate. *Second*, the Board should establish additional graduated thresholds of 80% for deliveries within 48 hours of OETA and 90% for deliveries within 72 hours of OETA. The 24-, 48-, and 72-hour thresholds (collectively the “Fixed Thresholds”) appropriately recognize that the consequences of failing to meet an OETA increase in magnitude as a car is delivered further in time from the OETA. *Third*, to ensure that the adequacy threshold adjusts to reflect changing service expectations as service continues to recover from recent lows, the Board should identify alternative adjusting thresholds for the 24-, 48-, and 72-hour time bands that are equal to the average systemwide performance of all Class I carriers for those respective bands (collectively the “Adjusting Thresholds”). A rail customer would be eligible for reciprocal switching if the carrier fails to meet one of the Fixed Thresholds or the alternative Adjusting Thresholds. *Fourth*, the Board should clarify that each time band is measured *before and after* the OETA, so shipments that arrive excessively early do not count as being delivered within the time band. This will remove any incentive for rail carriers to “game” this standard by artificially inflating OETAs.

In summary, with the foregoing modifications, a rail carrier would meet the service-reliability standard for manifest traffic when it satisfies each of the following metrics:

- The percentage of shipments delivered within plus or minus 24 hours of the OETA exceeds the greater of the 70% Fixed Threshold or the Adjusting Threshold, which is measured as the average of each Class I carrier’s percentage of systemwide shipments delivered within this time band.

- The percentage of shipments delivered within plus or minus 48 hours of the OETA exceeds the greater of the 80% Fixed Threshold or the Adjusting Threshold, which is measured as the average of each Class I carrier’s percentage of systemwide shipments delivered within this time band.
- The percentage of shipments delivered within plus or minus 72 hours of the OETA exceeds the greater of the 90% Fixed Threshold or the Adjusting Threshold, which is measured as the average of each Class I carrier’s percentage of systemwide shipments delivered within this time band.

In addition, the Coalition Associations also propose adding a success measure for unit-train traffic. Under this measure at least 90% of unit trains on a lane must arrive within 24 hours of the OETA.

**1. The service-reliability threshold for deliveries within 24 hours of OETA should be 70%.**

In the NPRM, the Board seeks comment on whether its proposed service-reliability threshold of 60% of deliveries occurring within 24 hours of OETA<sup>17</sup> is appropriate. For several reasons, the Board should set this threshold at 70%.

First, Class I railroads have demonstrated that they can achieve a 70% threshold. In *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1) (“*Urgent Issues*”), Class I railroads have reported their weekly percentage of manifest service rail cars placed within 24 hours of OETA. Under this metric, average performance of all Class I railroads since May 2022 is 73%. *See* Crowley/Fapp V.S. 23 tbl. 1 (displaying average of each carrier over total reporting period beginning in May 2022). Over the last year of reporting,<sup>18</sup> only BNSF Railway (“BNSF”) and Canadian Pacific Railway (“CP”) have averaged under 70%, with each

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<sup>17</sup> The proposed regulatory text indicates that this threshold is a “greater than” threshold (NPRM 39), while the illustrations in the NPRM apply the threshold as a “greater than or equal to” threshold (NPRM 46). Coalition Associations rely on the proposed regulatory text as the most accurate description of the threshold.

<sup>18</sup>The last year of reporting covers report dates of November 4, 2022, to October 27, 2023.

averaging 64.1 and 66.7% respectively. Crowley/Fapp V.S. 23 tbl. 1. Yet each of these carriers has reported performance exceeding 70% in multiple consecutive-week groups during this period, with CP's performance peaking above 80%. Weekly Service Compilation, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), <https://www.stb.gov/reports-data/rail-service-data/> (last visited Nov. 5, 2023).

Second, 70% is consistent with the service expectations that the largest Class I carriers have set for themselves. As the NPRM identifies, BNSF, CSX Transportation, Inc., Norfolk Southern Railroad, and Union Pacific Railroad each identified its target systemwide weekly percentage of manifest railcars placed within 24 hours of OETA that it would meet beginning May 2023, and these targets averaged 74.8%. NPRM 15. Further, only BNSF provided a target that was less than 70%, and its target, which is 65%, is reasonably close to 70%. *See id.* Additionally, Union Pacific has a similar network to BNSF, and it proposed a target of 70% (*id.*), which further indicates that 70% is a reasonable threshold for BNSF too.

Third, many of the Coalition Associations' members report that they begin to experience significant operational impacts when the percentage of deliveries occurring within 24 hours of OETA is within the 70%-80% range. At this performance level, they begin experiencing supply-chain disruptions, workload spikes related to railcar handling at their facilities (which causes facilities to reach their railcar-handling capacity), the need for significant manual intervention to keep their sites and their customers' sites supplied, and increased reliance on emergency truck shipments. Additionally, when performance drops to this level, rail customers increase shipment volumes to reduce the risk of a supply disruption, which increases railcar-fleet demands and leads to rail customers incurring increased storage and demurrage charges simply to avoid supply disruptions from unreliable service.

At bottom, the Board should adopt a service-reliability threshold of 70% within plus or minus 24 hours of OETA in lieu of its proposed 60% threshold. The 70% threshold is attainable, more consistent with Class I carriers' own expectations of their service, and better reflects the threshold at which poor service reliability has significant operational consequences for rail customers.

**2. The Board should adopt graduated service-reliability thresholds to account for OETA performance across most shipments.**

A fundamental shortcoming of the Board's service-reliability standard is that it deems a carrier adequately reliable if it delivers just 60% of shipments within 24 hours of OETA, regardless of when the remaining 40% arrive. *See* Crowley/Fapp V.S. 25. Even assuming that delivering 60% of shipments within 24 hours of OETA could be reliable (which it is not, as explained in Part III.A.1), a carrier that delivers the remaining 40% (or 30% under the Coalition Associations' proposed 70% threshold) scattered over weeks after the OETA is unreliable. For rail customers, having no certainty about when they will receive just 10% of their shipments, let alone up to 40% of them, would have significant consequences. To address this issue, the service-reliability standard must account for reliability across the vast majority of a lane's shipments. The Coalition Associations therefore propose graduated service-reliability thresholds where, as the period between OETA and delivery increases to plus or minus 24, 48, and 72 hours, the adequacy threshold increases to 70, 80, and 90%, respectively.

Service reliability is a critical measure of adequate rail service. Rail customers establish their operational strategies around fleet size, shipment volumes, and storage capacity with the assumption that railroads will deliver shipments at, or reasonably proximate to, the OETA. Thus, if a rail carrier does not deliver shipments consistent with the OETA, the customer can face serious consequences. For example, late deliveries could force the receiver of the shipments to

curtail or shut down operations due to inadequate supply. Also, a rail customer may not have adequate space or workers to accept a railcar that arrives early or late. It also may not have adequate capacity to unload the car. This could result in the carrier assessing the customer demurrage or storage charges, all because the carrier did not meet the OETA expectation that it set for the customer.

Even when a rail customer can take measures to mitigate unreliable service, these measures are burdensome, uneconomic, and not guaranteed to work. For example, a customer can arrange for emergency truck shipments to maintain supply, but truck capacity is not always available, and these shipments are expensive, especially considering that approximately four trucks are necessary to replace a single railcar. A customer also can maintain a greater safety stock of the goods it receives by rail, but this is not an option if the customer does not have space to store the goods or relies upon its railcars for storage. Also, the level, degree and frequency of rail-service unreliability can make determining the appropriate amount of storage to avoid supply disruptions difficult, if not impossible. Storage also is uneconomic because the customer must incur inventory costs and the cost of storage infrastructure. Similarly, acquiring infrastructure necessary to accommodate unexpected deliveries generally involves building or leasing track, if the facility even has the space to build track or the ability to lease track within a reasonable distance. Also, if the customer must lease track that is not adjacent to its facility, it typically will incur a switch fee to move cars from the track into its facility. Ultimately, these mitigation measures place a significant economic burden on rail customers' operations.

Additionally, for many commodities, like fertilizer and chemicals, unreliable rail service has far-reaching consequences for the broad public interest. In the case of fertilizer, the nation's rail system is vital to supplying American farmers. Nearly all fertilizer moves by rail at some

point along its way to a farm. Since farmers apply fertilizer typically during a few narrow application periods, supply disruptions from unreliable rail service could impair fertilizer application across large regions of the country. This could result in significantly lower crop yields, impacting food security for many Americans. Similarly, unreliable service for many chemical commodities has negative consequences for the public. Many chemicals and chemical products that move by rail are building blocks for consumer goods and necessary for critical public-health services, like water purification. If rail carriers do not deliver these commodities when they say they will, it can impact production of goods and place important public-health functions at risk.

The Coalition Associations' proposed graduated service-reliability thresholds appropriately encourage railroads to improve reliability and further reduce these negative consequences. First, this graduated approach incentivizes reliable service across nearly all shipments. While 10% of shipments would still fall outside the standard, the negative consequences of unreliable service for this volume of shipments would not be nearly as severe as those arising from unreliable service for 30% or 40% of shipments. Additionally, allowing only 10% of shipments to fall outside the standard reflects feedback from Coalition Association members indicates that they begin to experience significant supply-chain disruptions when more than 10% of their shipments are delivered more than 72 hours from the OETA.

Second, this graduated approach reflects that the consequences of unreliable service grow more severe as the actual delivery time deviates further from the OETA. For instance, the risk of operational disruptions and shutdowns increases as delay increases. Also, railcar and commodity storage needs increase as shipments are delivered further in time from the OETA. Feedback from Coalition Association members indicates that they or their customers experience significant risk

of supply disruptions, or other serious consequences of unreliable service, if they do not receive the vast majority of their shipments within three days of OETA, and their rail-served facilities that operate continuously are especially vulnerable to this unreliability. Member feedback also indicates concern that receiving 60% of shipments within 24 hours of OETA and another 30% (or even 20%) either three days before or after OETA would put receivers at risk of shutdown or could overwhelm receiving facilities with railcars for which they do not have the infrastructure to handle. Accordingly, the Board should adopt graduated service-reliability thresholds for deliveries within 24, 48, and 72 hours of OETA.

**3. To ensure the service-reliability standard reflects reasonable expectations based upon improving rail-network performance, the Board should adopt alternative Adjusting Thresholds based on industry-wide OETA performance.**

Fixed Thresholds for service reliability, like the ones proposed and discussed in the preceding two subparts, normalize recent service expectations, which are based on railroad performance that is still recovering after the worst period of widespread rail-service problems in decades. As rail service improves, so should the service reliability measure. Therefore, the Board also should adopt alternative Adjusting Thresholds for service reliability that are equal to the average of each Class I carrier's systemwide rail performance within 24, 48, and 72 hours of OETA. Adopting these Adjusting Thresholds would allow the service-reliability standard to adjust to changing norms while discouraging industry trends that lead to intrinsically inadequate service, like recent cost-cutting measures. Thus, the Board should prescribe a reciprocal switch if service reliability falls below *the greater of either* (a) the Fixed Thresholds proposed in the preceding two subparts, or (b) the corresponding systemwide Adjusting Thresholds proposed in this subpart.

The Board's service-reliability standard will not encourage adequate rail service if it reflects the poor reliability that rail customers have recently experienced. Instead, it will allow carriers to continue providing poor service with few consequences related to their captive traffic. This would leave captive rail customers exposed to significant supply-disruption risks and costs associated with mitigating the impact of unreliable service, as described in Part III.A.2. It also would overlook that rail customers design their operations, including fleet sizes, storage, and shipment timing and volumes, based on current and projected rail reliability.

Additionally, a standard that does not adjust to reflect changing reliability would discourage rail customers from making operational decisions based on reasonable rail-reliability expectations. To responsibly design their logistics strategies, rail customers must account for expected rail performance. If railroad reliability improves and is sustained for a 12-week period, it would be reasonable for a shipper to adjust its logistics strategies to eliminate inefficient measures that it had implemented when reliability was poor, like leasing extra storage track. The Adjusting Thresholds proposed in this subpart provide incentives for rail carriers to sustain reliability improvements so that rail customers can adopt more efficient logistics strategies based on the most current reasonable service-reliability expectations.

Thus, to encourage reasonable reliability, the Board should adopt Adjusting Thresholds under the service-reliability standard based upon average systemwide OETA performance of all Class I railroads within 24, 48, and 72 hours of OETA. These Adjusting Thresholds would indicate the reliability that railroads, on average, can achieve given then-current circumstances. Because these alternative self-adjusting thresholds are based on average performance, a rail carrier should be able to achieve them unless extraordinary circumstances unique to its network are significantly affecting its OETA performance, in which case the rules provide the carrier with



an affirmative defense to a reciprocal-switch petition if the extraordinary circumstances arose beyond the carrier's control. NPRM 41. Accordingly, alternative Adjusting Thresholds based on average systemwide performance of all Class I rail carriers would reflect a reasonable level of rail-service reliability and incentivize continued improvement in reliability performance.

In sum, a service-reliability standard that applies the greater of the Fixed Threshold or the Adjusting Threshold would provide a strong incentive to all railroads to achieve a reasonable level of service reliability that is consistent with changing industry conditions. A customer that demonstrates that a carrier did not satisfy either an Adjusting Threshold discussed in this subpart or a Fixed Threshold discussed in the preceding two subparts would be eligible for a reciprocal-switch prescription.

**4. Unexpected *early* deliveries should not count toward meeting the service reliability standard.**

Unexpected early deliveries can have significant economic and operational consequences for rail customers. Also, not accounting for excessively early deliveries would make the service-reliability standard vulnerable to "gaming" because a railroad could inflate its OETA to avoid breaching the standard. Thus, the Board should clarify that the service-reliability standard measures the percentage of deliveries within OETA *plus or minus* the applicable delivery-time period.

When railcars arrive unexpectedly early at a rail customer's facility, they cause congestion at the facility that can impair operations. For example, if a loaded car arrives days ahead of schedule, it might displace an empty railcar that would have arrived first and is needed to support continuous loading necessary to maintain facility operations. Early arrivals also can congest a customer facility with railcars, requiring operations to slow until the congestion abates.

Thus, early arrivals place rail customers at risk of operational disruptions that are comparable to supply disruptions due to late deliveries.

In many cases, unexpected early deliveries force rail customers to incur demurrage or storage charges. If the customer does not have the infrastructure to accept an early delivery or the early delivery prevents the customer from accepting subsequent deliveries, the customer is almost guaranteed to incur demurrage or storage charges. Only Norfolk Southern appears to recognize the burden of unexpected early deliveries because it is the only Class I carrier that allows a credit for each day a private railcar arrives before its NS OETA.<sup>19</sup>

Like with late deliveries, mitigating the risk of early deliveries places an unnecessary economic burden on rail customers. Mitigation involves building or leasing additional storage track or expanding a facility's capacity to move railcars, which is costly and, for some facilities, not possible due to space constraints. Moreover, because early deliveries are unexpected, a rail customer has no guarantee that this investment in additional capacity will be adequate or used.

Lastly, incorporating early deliveries into the service-reliability measure will discourage carriers from "gaming" this standard by artificially inflating OETAs because the Board could prescribe reciprocal switching for both excessive early and late performance. Although the Board observes that the transit-time standard would prevent the possibility that carriers will increase the OETA for a shipment just to ensure they meet the service-reliability standard (NPRM 9), the transit-time would not actually prevent this gaming because the transit-time standard is not based on OETA performance. Instead, by clarifying that the service-reliability standard measures both

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<sup>19</sup>See Norfolk S. Ry., Freight Tariff NS 6004-D, Item 950 ¶ 8 (effective Nov. 1, 2020) (allowing credits for early arrivals).

early and late deliveries, the Board will establish an appropriate incentive for carriers to provide OETAs that are as accurate and reasonable as possible.

**5. The standard should apply to unit-train traffic.**

In the NPRM, the Board seeks comments on whether it should apply the service-reliability standard to unit trains. NPRM 16. In response, the Coalition Associations assert that the standard should apply to unit trains, but the success measure should be set at 90% within 24 hours of OETA. A 90% adequacy threshold reflects that customers expect unit-train traffic to perform more reliably than manifest traffic since unit-train traffic is subject to few, if any, interchanges. It also reflects that a late or early unit train can significantly disrupt a rail customer since unit trains consist of 80 or more railcars.

**B. Service Consistency**

The Board proposes a service-consistency standard that would prescribe reciprocal switching when transit time increases by more than a specified annual threshold. The Board asks whether that threshold should be a year-over-year transit time increase not exceeding 20 or 25 percent. NPRM 18. It also asks whether it should adopt a different standard that captures prolonged transit-time problems. *Id.* The Coalition Associations urge the Board to adopt a threshold not exceeding 15% year over year. Also, to capture excessive, prolonged transit-time increases, the Board should adopt a second threshold that would make reciprocal switching available if transit times increase more than 25% over three years. These thresholds should apply to both loaded railcars and empty private or shipper-leased railcars. A rail customer would qualify for reciprocal switching if it demonstrates that the incumbent carrier did not meet either the one-year or three-year threshold.

**1. The year-over-year service-consistency threshold should be a transit-time increase not exceeding 15%.**

Transit-time increases exceeding 15% year-over-year on a lane impose significant burdens on rail customers and the broader rail network. Thus, reciprocal switching should be available when a rail customer experiences transit-time increases of this magnitude.

Many of the Coalition Associations' members report that they would experience significant negative consequences as transit times increase by more than 15% year-over-year, with some indicating that these consequences would be significant if transit time on a lane increased just 5-10%. The Coalition Associations also received member feedback that transit times increased by approximately 12% during 2021-2022, having a negative impact upon on-time deliveries and railcar-fleet utilization.

A key consequence of transit-time increases for rail customers is increased railcar fleet demand. As transit times increase, more railcars must be in transit to maintain a constant rate of supply at the destination. For many shippers that rely on private cars, such as all tank-car shippers and many shippers that use covered hopper cars, a sustained 15% increase in transit times will mean that they must purchase or lease additional railcars and will incur additional railcar maintenance costs. Also, since the Coalition Associations' members are experiencing approximately one-year lead times on new railcar builds, some members may not be able to source railcars fast enough to avoid supply disruptions from a 15% transit-time increase.

Further, as shippers rely on more and more railcars to address longer transit times, these additional railcars can create network congestion that increases transit times even more, thereby requiring the shipper to acquire even more railcars. When the transit-time increase on a lane approaches 15%, many shippers will have begun increasing the number of railcars that they ship on the lane to avoid supply disruptions. Thus, providing shippers with access to reciprocal

switching at this point is imperative to facilitate decongestion of an incumbent carrier's network and discourage carriers from allowing transit times to increase to levels that are apt to aggravate congestion.

Also, as shippers' railcar fleets swell to address transit-time increases above 15%, corresponding rail-infrastructure requirements increase. Rail customers will need additional railcar-storage capacity to ensure they have enough spare railcars available, since increased transit times increase demand for railcars in transit as well as spares. Similarly, polymer shippers and other shippers that rely on storage-in-transit yards to hold cars pending customer orders will need to acquire additional yard capacity to hold the extra cars necessary to offset a transit-time increase.

Thus, to discourage transit-time increases that place excessive burdens on customers and can cause excessive rail-network congestion, the Board should set the adequacy threshold for year-over-year transit-time increases at 15%.

**2. The Board should adopt an additional service-consistency measure under which transit time should not increase by more than 25% cumulatively over three years.**

A critical shortcoming of the proposed service-consistency standard is that it allows for a large *cumulative* increase in transit times over a few short years. Crowley/Fapp V.S. 27-28. To illustrate, if the Board sets the year-over-year success threshold at 15%, a lane's transit time could increase exponentially up to 52% over just three years without it becoming eligible for reciprocal switching. The Coalition Associations thus urge the Board to adopt an additional, independent service-consistency measure that allows no more than a 25% cumulative increase in a lane's transit time over a three-year period.

As explained in Part III.B.1, just a 15% increase in transit times would have significant detrimental impacts on rail customers. If transit-time increases approaching this magnitude occur on a lane every year, it would compound these impacts.

The Coalition Associations' proposed three-year measure would mitigate this compounding while also providing carriers with year-to-year flexibility to adjust transit times in relation to operational demands. Specifically, it would discourage multiple year-over-year transit-time increases in close succession that, individually, would not exceed the year-over-year success threshold but, cumulatively, would result in a drastic transit-time increase that plainly constitutes inadequate service. Also, if a carrier experiences an operational issue that causes longer transit times over a prolonged period, the three-year measure would allow a lane's transit time to increase by no more than 15% annually for two years if, during the third year, transit time improves so that the three-year cumulative transit-time increase does not exceed 25%.

### **C. Industry Spot and Pull**

The Coalition Associations support the Board's decision to establish a service-performance standard for industry spots and pulls. Poor industry spot and pull ("ISP") performance can cause serious disruptions to rail customers' business operations even where a railroad's service-reliability and service-consistency performance is adequate. Because the impact of ISP performance failures differs depending on whether a single car was spotted or pulled or the railroad's local crew did not show at all during the planned service window, the Coalition Associations request that the Board adopt two ISP success measures, one for missed cars and the other for service-window "no shows." The Coalition Associations also request other adjustments to the ISP standard.

**1. The Board should adopt two ISP success measures: a car measure and a “no-show” measure.**

The Coalition Associations appreciate the simplicity of the Board’s proposed ISP standard, which treats a single missed spot or pull the same as not showing up to spot or pull cars during a service window. But the ISP standard should reflect that the impacts to rail customers of a single missed railcar and a no-show are significantly different. Accordingly, the Board should adopt two independent service measures recognizing this difference: a car measure and a no-show measure.

Generally, a railroad’s failure to spot or pull a single car is much less disruptive than its failure to show for spots or pulls during a rail customer’s planned service window. If a railroad fails to spot a railcar, a customer may have enough supply on hand to wait until the next planned service window for a railroad to deliver the car. In contrast, when a railroad does not show for a planned service window, its failure affects multiple railcars. A rail customer may not have enough supply to continue operating while it waits for the railroad to spot the cars again. It also might not have enough storage capacity to hold the cars that were not pulled and continue to load subsequent railcars, leading to reduced or suspended operations.

Since ISP no shows generally cause more severe disruptions to business operations of rail customers and to the supply of goods to consumers when compared to missed spots or pulls of individual cars, no shows should be subject to a higher adequacy threshold. The Coalition Associations’ members generally recognize that the Board’s proposed adequacy threshold of 80% for the ISP standard appropriately identifies the threshold between adequate and inadequate rail service when it is applied to individual spots and pulls. But showing up for just 80% of service windows would be grossly inadequate service. This would mean that a railroad could totally miss one serving window every week for facilities with 5-day service or force a facility

with a single service window per week to miss two service windows every 12 weeks. As explained in Part I.A.3, a railroad's failure to show up for anything less than 90% of planned service windows should constitute inadequate service.

**2. The ISP car measure should require up to 80% of railcar spots and pulls in the planned service window, with the remainder occurring in the immediately following service window.**

The Coalition Associations propose an ISP "car measure" under which up to 80% of railcars spots and pulls must occur within the planned service window, and all missed spots or pulls must occur in the service window immediately following the planned service window. This measure retains the Board's proposed 80% ISP success percentage as appropriate for railcar spots and pulls during the initial planned service window. In addition, this measure addresses the fact that severe operational disruptions will likely occur if a railroad subsequently fails to spot or pull a particular railcar during the next service window.

An 80% threshold for the planned service window is consistent with railroad ISP data reported in *Urgent Issues*. While the *Urgent Issues* data relates to systemwide spot-and-pull performance and carriers measure this in different ways, every Class I railroad except Norfolk Southern, has consistently reported ISP performance above 80%, with performance closely concentrated around 90%. Crowley/Fapp V.S. 29 tbl. 2.

Nevertheless, even if a carrier meets the 80% adequacy threshold for the planned service window, service would be inadequate if the carrier does not correct any failed spots or pulls by the next window. According to the Coalition Associations' members, a rail customer is more likely to face a shutdown or reduced operations if a railroad fails to spot a specific car twice in a row. For example, if a railroad fails to spot a car twice in a row for a customer with one serving window per week, the customer will not receive the car for three weeks. This customer almost certainly will need emergency truck shipments to hold it over until the railroad finally spots the



missing car or shut down if trucks are not a viable option. Even facilities that receive multiple switches per day are at a high risk of disruption if the carrier fails to spot a specific car twice in a row. These facilities typically receive a high volume of switches because they consume or produce a high volume of commodities. Thus, if a railroad fails to spot a railcar at these facilities twice in a row, the facility will be at a high risk of an operational disruption, especially if the railcar contains a commodity for which the facility receives few shipments.

Similarly, failing to pull a railcar twice in a row has negative consequences for rail customers. For one, it increases the risk of a supply disruption for the recipient. This is especially likely with low-volume recipients or shippers that have a low frequency of local service. For another, it will likely impair operations at the shipper's facility. Shippers plan for railcar pulls based upon orders from customers and available storage at the shipper's facility. When a carrier misses a railcar pull, the shipper must unexpectedly hold the railcar while juggling other loaded and empty cars at the facility to maintain continuous operations. This typically involves shifting the car around the facility to avoid interfering with positioning cars for loading and unloading, building blocks of cars for pulls, and accepting inbound cars. When a carrier fails to pull a railcar twice in a row, it forces shippers to continue this juggling act, increasing the likelihood that it will come crashing down before the carrier finally pulls the railcar.

For these reasons, the Board should adopt an ISP "car measure" that requires 80% of railcar spots and pulls to occur during the planned service window and discourages railroads from failing to perform a particular railcar spot or pull two serving windows in a row.

**3. The "no-show" measure should require carriers to provide spot-and-pull service for up to 90% of service windows, provided they do not miss consecutive service windows.**

The Coalition Associations also propose a no-show standard under which a railroad must provide ISP service at a rail customer's facility for up to 90% of planned service windows and

cannot miss two consecutive service windows. For customers that receive *spot* services and *pull* services separately, a carrier's failure to provide the *same* service in two consecutive planned service windows for *that* service would qualify as a failure to achieve the standard. Additionally, if a carrier arrives at a customer's facility but fails to spot or pull *any* cars for reasons that are not within the customer's control, the service event will be deemed a no show. This standard is appropriate for several reasons.

First, a 90% adequacy threshold appropriately balances the burden of ISP no shows on rail customers with the need for flexibility to account for inadvertent no shows. At a 90% adequacy threshold, a carrier could still no-show a customer that receives 5-days-per-week ISP service once every other week without breaching the standard. It also could no-show a once-per-week ISP customer once every three months.

Given the potentially extreme disruption that a single ISP no-show could cause a rail customer, an adequacy threshold under 90% would constitute inadequate service. A single ISP no show would likely deprive a rail customer of multiple loaded or empty cars needed to sustain its operations or delay multiple outbound railcars needed to protect their receivers from a supply disruption. It also could saddle a customer's infrastructure with loaded outbound cars, depriving the customer of needed track space to continue loading empty cars on hand. In addition, inbound cars that the carrier did not deliver because of the no show would "bunch" with inbound cars for the next spot event, potentially exceeding the facility's capacity to receive all the inbound cars and resulting in demurrage or storage charges. Moreover, a rail customer could need days or weeks to recover from an ISP no show depending on the volume of cars involved and frequency of local service to the customer.

Further, allowing carriers to perform to an ISP no-show threshold below 90% would place a high economic burden on a rail customer's operations. If a carrier performs below this performance level, a customer that loads railcars would almost certainly need to keep additional loaded and empty railcars on hand so that its facility can continue to operate after a no show, while it waits for the next switch. These additional railcars place greater demands on the facility's track infrastructure and could require the customer to build or lease additional storage track if that is even practical or feasible. It also increases the customer's railcar fleet demand, which could require the customer to purchase or lease additional railcars.

Second, a 90% ISP no-show adequacy threshold is attainable. The ISP performance that railroads have reported in *Urgent Issues* shows five of the seven<sup>20</sup> Class I railroads consistently performing near or above 90% of spots and pulls each week over the past year. Weekly Service Compilation, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), <https://www.stb.gov/reports-data/rail-service-data/> (last visited Nov. 5, 2023); see *Crowley/Fapp V.S. 29* tbl. 2 (showing each carrier's average performance over the past year). Of the remaining two, Canadian Pacific's weekly ISP performance has been consistently above 89% over the last two months. Weekly Service Compilation, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), <https://www.stb.gov/reports-data/rail-service-data/> (last visited Nov. 5, 2023). Further, Class I carriers' no-show performance likely exceeds this ISP performance because no shows are less common than missed railcar spots and pulls. *Crowley/Fapp V.S. 30*.

Third, the standard appropriately deems consecutive ISP no shows as a failure that would allow the customer to seek reciprocal switching. As explained above, the consequences of a

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<sup>20</sup>KCS reports separately from CP.

single no show are significant. Consecutive no shows would compound these already severe consequences, all but guaranteeing a severe disruption to the rail customer.

- 4. If a railroad unilaterally reduces the frequency of ISP service to a customer without a commensurate reduction in the customer's demand, the adequacy thresholds for the car and no-show measures should increase for two years.**

The Board has asked whether the ISP adequacy thresholds should increase if a carrier unilaterally reduces the frequency of local service to a customer for reasons other than a commensurate drop in customer demand. In this situation, the thresholds should increase to 90% under the car standard and 100% under the no-show standard for two years after the service reduction.

This situation would warrant higher adequacy thresholds because the carrier would be forcing shippers to assume increased risk and, in some cases, increased costs solely for the carrier's benefit. In recent years, carrier efforts to reduce local service so they can save costs and increase their profitability have harmed rail customers. These efforts have forced rail customers to shift traffic to other modes of transportation and to add infrastructure to accommodate more railcars at their facilities. These cost-cutting measures also have removed resiliency from the rail network, which has increased the risk and magnitude of service disruptions. Carriers should not be allowed to unilaterally force shippers to bear these consequences just so carriers can increase their bottom line. Thus, if carriers cut local service at a captive facility without being certain that they can perform to the reduced service level, they should risk losing the facility's traffic to an alternate carrier.

A reduction in service without regard for a customer's traffic volumes warrants a higher adequacy threshold also because ISP failures that occur after the reduction have greater consequences for shippers. With reduced local service, a rail customer will have to wait longer

for a carrier to correct a missed railcar spot or pull, which increases the risk of an operational disruption.

Thus, to reflect the increased risks and burdens that missed railcar spots and pulls place on rail customers after this type of service reduction, the adequacy threshold under the car measure should increase to 90%.

For the no-show standard, an adequacy threshold of 100% would be appropriate. Like with a missed railcar spot or pull, a service reduction causes the consequences of a no show to increase. For example, a no show after a service reduction from two-days-per-week service to one-day-per week service would mean that the rail customer must endure two weeks without service rather than one week. Considering that a no show carries severe consequences for a rail customer, carriers should be discouraged from reducing local service unless they are absolutely certain that they will show for each planned service window.

Additionally, after a unilateral local-service reduction without a commensurate reduction in a rail-customer's traffic, the higher thresholds should remain in place for 2 years. As already explained, the economic burden of mitigating the risk of missed railcar spots and pulls and no shows is significant. Additionally, the Coalition Associations' members indicate that the infrastructure and fleet design changes necessary to implement these mitigation measures can take two years to fully implement.

**5. The Board should clarify how to calculate ISP performance for spot-on-arrival railcars.**

The Board proposes to calculate ISP performance based on whether a spot or pull event occurs during the "planned service window," which it defines as "a service window for which the shipper or receiver requested local service, provided that the shipper or receiver made its request by the window's cut off time." NPRM 37. This definition does not account for spot-on-

arrival railcars, where the rail customer does not *request* spots, and instead, the carrier automatically delivers the car to the customer's facility if space is available.

To ensure proper calculation of ISP performance for spot-on-arrival railcars, the Board should clarify that, for these railcars, a spot is requested at the time the railcar reaches a local serving yard from which it provides local service to the destination facility. Thus, the planned service window for spotting a spot-on-arrival railcar that arrives in a local serving yard for the destination is the service window associated with the next cutoff time after arrival in the local serving yard. For example, if a facility has one serving window per day with a cutoff time of 5pm the preceding day for spot-on-arrival railcars and a spot-on-arrival railcar arrives at 4pm on day 1, the planned service window will be the service window on day 2. Using the preceding example, if another spot-on-arrival railcar arrives in the local serving yard at 6pm on day 1, the planned service window will be the service window on day 3 because the car will have missed the cutoff time for the service window on day 2, but arrived before the cutoff time for the service window on day 3.

**6. The Board should use a service window that is consistent with the carrier's established protocol.**

The NPRM asks whether the service-window duration should be based on a carrier's established protocol. NPRM 22. The Coalition Associations respond that using a service window that is consistent with the carrier's established protocol is more appropriate than adopting a standard 12-hour window.<sup>21</sup> It would encourage service that is consistent with customer expectations that carriers set for their service, and thus reduces disruption to shippers.

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<sup>21</sup>The Coalition Associations also agree with the Board's proposals to apply a 12-hour maximum limit on service windows (NPRM 22) and require carriers to provide customers with advanced notice of changes to service windows, which would prevent gaming (*id.*).

When a carrier fails to provide service reliably during the service window it sets for a customer facility, it disrupts the customer's operations. Feedback from the Coalition Associations' members indicates that railroads expect their customers to be ready for local service when the local crew arrives, regardless of whether they arrive early, late, or without providing advanced notice. So, where local service is unreliable, many customers stage cars for service the day before the service window and wait long after their service window for the carrier to pull staged cars. At many facilities, this extended staging impairs or prohibits facility operations because it uses track space that the facility needs to operate. Unreliable service-window performance also requires customers to maintain extra staff to ensure that enough employees are available to receive cars if the railroad does not deliver them during the receiving crew's shift.

Additionally, determining a carrier's established service-window protocol should be straightforward. The Coalition Associations' members indicate that carriers provide them with a "job plan," which shows the order that each local crew is supposed to serve rail-customer facilities along their route and provides time blocks for each customer's service. Because these job plans identify an efficient strategy for providing local service, they typically do not change day-to-day.

In sum, the Board should use a service window that is consistent with the carrier's established protocol because this encourages service consistent with its customer's understanding of when it will receive service and, thus, helps to avoid unnecessary burdens on a rail customer's operations.

**7. The Board should require 60 days' notice of a service-window change.**

The Board has sought comments on whether a carrier should be required to provide notice before changing a serving crew's scheduled on-duty time or a service window based on a

carrier's established protocol. NPRM 22. The Board should require 60 days' notice of these events.

A 60-day notice requirement will allow customers time to adjust their operations in response to a change to their service window. Customers build their facility operations around their serving windows. These windows dictate when a customer schedules labor necessary to set out and receive railcars. They also dictate operations schedules at a facility because many facilities operate at reduced capacity while waiting for local service, and production at many facilities is closely aligned to the timing of spots and pulls. Thus, even a relatively small change to a service window can require a significant redesign of a facility's staffing and operations plan.

#### **IV. DATA REPORTING REQUIREMENTS.**

The NPRM proposes to require a railroad "to record and – upon request by the shipper or receiver – provide to that customer all of the customer's data on traffic that was assigned OETAs and local service windows, along with the corresponding time stamps indicating performance." NPRM 31. The data must be machine-readable. The Coalition Associations support these requirements.

The Board also invites comment on what format and fields would be useful. *Id.* The Coalition Associations respond to this question and offer other comments through the Crowley/Fapp V.S., at pages 31-40. They observe that "the question of what format the data is provided is not as important as the content of the data and the information provided about the data." *Id.* at 31. This requires a clear and precise data description or data dictionary that accurately and simply defines the data contained within each field that is understandable to the shipper. The data also should be consistent both within the data fields and across railroads. Messrs. Crowley and Fapp provide examples of past problems using railroad data to illustrate the importance of these points. *Id.* at 32-33.



In addition, Messrs. Crowley and Fapp have developed hypothetical examples of the three proposed service standards, as the Coalition Associations propose to modify them in Part III above. *Id.* at 33-40. Those examples reflect the data and calculations that a shipper would require to determine a railroad's satisfaction of those standards.

**V. THE BOARD HAS PROPOSED A REASONABLE DEFINITION OF A "TERMINAL AREA."**

The Board's proposal to make reciprocal switching available in "terminal areas" is consistent with the statute and thus reasonable. The Board properly cites to its precedent for defining terminal areas by function. NPRM 12. Even if railroads published clearly defined geographic boundaries – for which there was no evidence that they do in Sub-Docket No. 1 – such boundaries should not conclusively exclude shippers located outside those boundaries if those shippers can demonstrate that they are located within an area that functionally satisfies the Board's precedent. This is necessary to prevent railroads from "gaming" the new rules by establishing artificial geographic boundaries for terminal areas.

The Board also properly proposes to establish a heavy presumption that, for any facility within a terminal area for which the incumbent railroad already has a reciprocal switching arrangement with another carrier, the shipper's traffic would qualify for a reciprocal switching prescription if the other conditions to prescription also are met. *Id.* But the Board can and should adopt an equally reasonable and broader presumption for any terminal where the incumbent and alternate carrier interchange traffic. A reciprocal switch is just a term for an interchange operation between two carriers when the interchange point and either the origin or destination are located within the same terminal. The act of interchanging railcars between the carriers otherwise is indistinguishable from line-haul interchanges.

The Board, in addition, has solicited comment on “whether the reciprocal switching tariff of an alternate carrier applicable to shippers in the same area [in addition to the incumbent’s tariff] should be considered as evidence, and how to reconcile inconsistencies in railroad tariffs (e.g., instances in which one railroad lists a location as open to reciprocal switching and another railroad does not).” *Id.* n. 12. *First*, an alternate carrier’s tariff plainly is relevant. If the alternate carrier already holds itself out to perform reciprocal switching with the incumbent carrier within a terminal, that too should establish a presumption of feasibility. *Second*, inconsistencies between the incumbent and alternate carrier tariffs are only a concern when no reciprocal switching is occurring at all between any facilities within the terminal. For example, if the incumbent’s tariff identifies only one of two terminal locations as open to reciprocal switching and the alternate carrier’s tariff identifies both locations as open, the fact that the incumbent has any open locations within the terminal should be sufficient to impose the presumption of qualification for any other facilities within that terminal that meet the other conditions to prescription. If, however, there is no switching currently taking place, and/or only one carrier has a tariff that permits reciprocal switching, the Board should resolve such inconsistencies by examining the history of interchanges between the carriers within that terminal.<sup>22</sup> Ultimately, the answer to the Board’s question would not dispositively foreclose a reciprocal switch request; it merely determines whether the shipper benefits from a presumption that it qualifies for reciprocal switching.

As discussed in Part IX.A below, the Coalition Associations also urge the Board to initiate a proceeding to make its proposed rules accessible to shippers outside terminal areas

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<sup>22</sup>Seemingly, a location can only be open to reciprocal switching if it is open in the incumbent’s tariff. Because the incumbent physically serves the location, no reciprocal switching can occur without the incumbent’s acquiescence.

pursuant to 49 U.S.C. § 10705(a)(2)(C), which allows the Board to short-haul an origin railroad when “needed to provide adequate, and more efficient or economic, transportation.” The same service standards that the Board proposes in this proceeding can readily be applied to determine eligibility for this statutory bottleneck remedy. If the Board adopts this approach, it will reduce the significance of, and thus the potential for, litigation over the boundaries of a terminal area.

**VI. THE TERM AND TERMINATION OF A RECIPROCAL SWITCH PRESCRIPTION MUST PROVIDE SUFFICIENT INCENTIVE FOR THE ALTERNATE CARRIER TO PROVIDE COMPETITIVE SERVICE.**

The Board solicits comment on multiple questions concerning the duration and termination of a reciprocal switch prescription. The Coalition Associations respond to those specific questions in this section and seek clarification of various related matters.

**A. The Minimum Duration of a Reciprocal Switch Prescription Should Be Five Years and the Maximum Duration Ten Years.**

The Board proposes that the minimum duration of a reciprocal switch prescription would be “two years from the date on which reciprocal switching operations thereunder began...” and that the Board could prescribe a longer term – up to four years – “if the petitioner demonstrated that the longer minimum term was necessary for the prescription to be practical given the petitioner’s or alternate carrier’s legitimate business needs.” NPRM 29. The Coalition Associations renew their Sub-Docket No. 1 position that the minimum term should be five years and the maximum term should be ten years.<sup>23</sup>

The Board accurately recognizes that “[i]t is essential that the duration of a reciprocal switching order is sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers.” *Id.* In addition to making alternative service feasible and

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<sup>23</sup>See, “Reply Comments submitted by The Shipper Coalition For Railroad Competition,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 125 (filed Jan. 13, 2017).

attractive to alternate carriers, it also must be feasible and attractive to the shipper. Two years is inadequate for either purpose, especially in view of the narrower focus of the current proposal upon just those origin-destination pairs that fail the minimum service standards.

The Board should begin its assessment of the minimum duration by looking to the duration of rail contracts. Although many rail contracts of Coalition Association members have 1-3 year terms, contracts for competitive rail service can be longer. That is understandable because rail carriers have strong incentives to lock-up competitive traffic for extended time periods, whereas there is no such incentive for captive traffic because there is little risk that a rail carrier will lose captive traffic upon expiration of a shorter-term contract. Furthermore, because competitive traffic tends to have lower rates, the time required for the alternate rail carrier to recover its investment in such traffic can be longer.

The narrower scope of the proposed rules compounds the foregoing concern. To obtain the best rate and service commitments from a rail carrier, shippers typically must include all, or nearly all, lanes in a contract.<sup>24</sup> But the NPRM proposes only to prescribe reciprocal switching for those lanes that fail the minimum service standards. Except for the ISP standard – which encompasses all traffic at a facility – the Service Reliability and Service Consistency standards are lane-specific. Therefore, the volume of traffic that a shipper may be able to offer an alternate carrier via reciprocal switch prescribed pursuant to the Service Reliability and Service Consistency standards could be substantially less than even half that shipper’s total traffic

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<sup>24</sup>The losing rail carrier in a competitive situation typically will retain lanes for which it can offer a single line route versus a joint line route via the alternative carrier. That is precisely why the Coalition Associations could assert with such confidence in Sub-Docket No. 1 that the rail industry was greatly exaggerating the volume of traffic that was most likely to benefit from, and thus actually use, reciprocal switching. See “Post-Hearing Comments submitted by The Coalition Associations,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 7-9 (filed April 4, 2022).

volume. Such reduced volumes are unlikely to be very attractive to alternate carriers and are likely to require longer-term contract commitments to justify the alternative carrier's investment of time and resources.

It is noteworthy that this would not be concern in Sub-Docket No. 1, which is one reason why the Coalition Associations still firmly believe that enhanced competition through reciprocal switching would be more effective for addressing service issues. For Prong 1 of the Sub-Docket No. 1 proposal, the standard was facility-specific and thus provided a mechanism to obtain reciprocal switching for all traffic to and from such facility. Moreover, although the Prong 2 market dominance standard was lane-specific, an incumbent carrier's market dominance is unlikely to vary significantly across all lanes at a captive facility in contrast to the potential variance in OETA and transit time performance across those lanes under the current proposal. The standards in Sub-Docket No. 1 thus would enable a shipper to make more meaningful and attractive traffic commitments to alternate carriers than the Board's current proposal. The Board should recognize that deficiency in its current proposal and attempt to mitigate it by adopting a five-to-ten-year prescription period.

**B. The Proposed Process For Terminating Reciprocal Switch Prescriptions Should Be Modified in Three Respects.**

The Board proposes to allow incumbent railroads to "file a petition to terminate [a prescription] no more than 180 days and no less than 120 days before the end of the prescribed period." NPRM 29. An expedited procedural schedule would require the shipper's reply within 15 days and the incumbent's rebuttal 7 days thereafter. The Board would endeavor to act on the petition within another 90 days, but the prescription will terminate automatically if the Board fails to act before the prescription expires, unless the Board issues a decision extending the prescription for an additional 30 days due to extraordinary circumstances that prevent the Board

from acting in a timely manner. The Coalition Associations believe this process is reasonable with three crucial modifications: (1) the window for filing a petition to terminate should be 210 to 150 days before the end of the prescription period; (2) the prescription should continue in effect until 30 days after the Board serves a decision that grants a petition to terminate, instead of automatically terminating unless extended by the Board, and (3) the incumbent carrier must provide the shipper, as part of its petition to terminate, all data that are relevant to the performance standards for terminating the prescription.

**1. The window for filing a petition to terminate should be 210 to 150 days before the end of the prescription period.**

As discussed in Part II.B above, shippers need adequate lead time after obtaining a switch prescription, to solicit competitive offers from the incumbent and alternate rail carriers and then negotiate a contract. This also will be true upon expiration of a prescription because a contract with the alternate carrier cannot extend beyond that time. If the incumbent carrier files a petition to terminate just 120 days prior to expiration of a prescription, the foregoing process may not yield a Board decision for up to 112 days, which is just 8 days prior to expiration. That is insufficient time to negotiate a new contract with either the incumbent or alternate carrier based on the Board's decision. Therefore, the Board should add at least 30 days to the time periods that bracket the window for the incumbent to file a petition to terminate, so that a petition can be filed no more than 210 days and no less than 150 days before the end of the prescribed period.

**2. A prescription should continue in effect until 30 days after the Board serves a decision that grants a petition to terminate.**

Before a shipper can transition traffic between a routing with a reciprocal switch and one without a reciprocal switch, it will need to update its internal systems to reflect any expected transit time difference, determine the impact of this difference on its railcar fleet needs and its or its customer's safety stock needs, and make appropriate fleet and supply adjustments. A shipper

also would need to update its freight-bill audit systems with new carrier, route, and rate information so that the railroad invoices are paid. Further, if the original routing involves a joint-line movement with a carrier that would not be involved in the reciprocal switch, coordination and agreements may be needed with the connecting carrier. According to the Coalition Associations' members, approximately 30 days will be necessary for a shipper to perform the tasks necessary to use a reciprocal switch or transition back to an incumbent.

A reciprocal switch prescription, therefore, should remain effective until 30 days after the Board serves a decision terminating the prescription. This will require the Board to drop its proposal to terminate a switch prescription automatically if it fails to act on a petition to terminate prior to expiration of the prescribed period. It also would mean that a prescription could continue beyond the prescribed period when the Board grants a petition to terminate with less than 30 days remaining in that period. The potential for the latter to occur, however, should be reduced by the above-requested change to the time window for filing petitions to terminate.

These modifications are important to avoid a "whip-lash" effect upon shipper operations that the Board's current proposal could trigger. For example, pursuant to the NPRM, the prescription would terminate automatically if the Board has not acted on a petition to terminate prior to the end of the prescribed period. The shipper, therefore, must prepare to switch its traffic back to the incumbent carrier at least 30 days before the end of the prescribed period without knowing when or how the Board will act and thus not knowing if such actions are even necessary. If the prescription terminates automatically because the Board has not acted and the Board subsequently denies the petition to terminate, the shipper requires similar lead time to switch from the incumbent back to the alternate carrier. Even if the Board extends the prescribed period in 30-day increments, which the NPRM proposes only in "extraordinary circumstances,"

the shipper cannot avoid the “whip-lash” effects unless the Board grants an extension at least 30 days before the extended period even begins. Thus, preservation of the status quo pending the Board’s decision on a petition to terminate is critical.

Significantly, the possibility that shippers would use reciprocal switching to make abrupt switches between carriers also was a concern that the rail industry expressed in Sub-Docket No. 1.<sup>25</sup> Although the Coalition Associations demonstrated that this was an unfounded concern in Sub-Docket No. 1,<sup>26</sup> the Board’s current proposal, if left unchanged, would force that choice upon shippers. Upon automatic termination of a prescription due to the Board’s failure to act on a petition to terminate, the shipper would be required to switch its traffic from the alternate carrier to the incumbent and, if and when the Board ultimately denies the petition, the shipper could choose to switch its traffic back to the alternate carrier.

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<sup>25</sup>See the following railroad opening comments in Docket No. EP 711 (Sub-No.1), *Reciprocal Switching* (filed Oct. 26, 2016): UP Comments, Verified Statement of Thomas C. Haley, p. 9 (“reciprocal switching “would leave our network continually vulnerable to a new source of disruption as shippers in different locations seek forced switching whenever they believe it would provide them with an advantage.”); CSX Comments, Verified Statement of Cindy M. Sanborn, p. 11 (lamenting a lack of “predictability” because “the proposed regulations permit shippers to shift their traffic back and forth between...[carriers]...at any time”); NS Comments, “Verified Statement of Jeffrey H. Sliger, pp. 26-27 (describing “the inevitable inability to predict switching volumes” and equating reciprocal switching to “unanticipated traffic demands”), 29 (“consequences of unanticipated shifts in traffic subject to forced switching”).

<sup>26</sup>See “Reply Comments submitted by The Shipper Coalition for Railroad Competition,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 103-04 (filed Jan. 13, 2017). See also, “Written Testimony submitted by The Coalition Associations,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 14-15, n. 31 (filed Feb. 14, 2022) (citing railroad expert testimony and empirical analysis in the CP-KCS merger, FD No. 36500, that, where shippers had a choice of single-line versus joint line service, there was a demonstrable preference for single-line service).



**3. In its petition to terminate a switch prescription, an incumbent carrier must include all data that are relevant to the performance standards for terminating the prescription.**

The Board has proposed an expedited process for receiving evidence on petitions to terminate a switch prescription. That process affords shippers only 15 days to reply to a petition. There is no provision, however, for the data that the incumbent carrier must provide the shipper to be able to evaluate and respond to the petition within this abridged time. The Board, therefore, should explicitly require the incumbent carrier to provide the shipper with all data for “similar traffic” that are relevant to the standards that the incumbent must satisfy to terminate the prescription. This should be the same type of data that the proposed § 1145.8(a) would require the incumbent carrier to provide a shipper. Furthermore, due to the expedited procedural schedule for petitions to terminate, when the incumbent carrier fails to provide complete data, the due date for the shipper’s reply to the petition should be tolled until 15 days after the incumbent provides complete data.

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In summary, the Board should modify the process for terminating a prescription in three respects. To avoid the consequences of traffic shifting between carriers several times at the end of the prescribed period, the Board should

- require carriers to file petitions to terminate within a window of 210 to 150 days before the end of the prescription period to afford sufficient time for both the Board to decide the petition and the shipper to change rail carriers if and when the Board grants the petition; and
- to preserve the status quo to avoid the consequences of potentially requiring a shipper to switch rail carriers several times within a short time and to allow the shipper sufficient time to make a switch if and when the Board ultimately grants the petition to terminate, the Board should continue the prescription until 30 days after it serves a decision terminating the prescription instead of automatically terminating the prescribed period if it fails to timely decide a petition to terminate.

In addition to the two modifications above, the Board should require incumbent carriers to provide the shipper with all data for “similar traffic” that are relevant to the standards that the incumbent must satisfy to terminate the prescription.

**C. The Standard for Terminating a Reciprocal Switch Petition Requires Two Modifications.**

The Board proposes to grant a petition to terminate a reciprocal switch, “if the incumbent rail carrier demonstrate[s] that, at the time of [its] petition, the incumbent rail carrier’s service for *similar* traffic on average met whichever performance standard served as the justification for the prescription.” NPRM 30 (*emphasis added*). The Board defines “similar traffic” as a broad category of traffic to or from the terminal area affected by the prescription and identified manifest traffic as an example. *Id.* In addition, the Board describes this standard as requiring “a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area.” The Coalition Associations support this standard with the clarifications discussed below.

The first modification pertains to the Board’s two sentences partially quoted above that describe the required showing by the incumbent carrier. In the first of those sentences, the Board refers solely to “the standard [that] served as the justification for the prescription,” whereas the second sentence refers to “the performance standards for similar traffic to or from the relevant terminal area.” Although these appear to describe two different showings, the text of the proposed rule refers only to “the performance standard that provided the basis for the prescription.” NPRM 43 (proposed § 1145.7(b)).

The Coalition Associations, however, urge the Board to require the incumbent carrier to demonstrate compliance with all three standards for similar traffic. Otherwise, if the showing is

restricted solely to the standard that served as justification for the prescription, the Board could terminate a switch prescription even though the incumbent is still providing inadequate service that would merit continuation of the prescription. This is harmful to the shipper and administratively inefficient because a shipper would need to initiate a new request for reciprocal switching in a subsequent separate proceeding and experience a lengthy gap period while its new petition is pending during which it could not access the alternate carrier via reciprocal switch.

The second modification pertains to the Board's illustration of "similar traffic" as being "manifest traffic." This is an overly broad illustration that could lead to irrelevant comparisons. For example, the phrase "for similar traffic to or from the relevant terminal area" potentially encompasses all manifest traffic to or from a terminal area without regard to the origin or destination of the movements. To illustrate this concern in simple terms, although the reciprocal switch applies to lanes of outbound manifest traffic moving east, "similar traffic" could include lanes of outbound manifest traffic moving west that shares little, if any, of the operations and infrastructure of the switched traffic and thus may experience very different service conditions from the switched traffic.

The Board, therefore, should clarify that the permissible scope of "similar traffic" is narrower than the NPRM implies and that the relevant scope will differ depending upon which of the three service metrics is being measured. The Coalition Associations propose the following specific clarifications:

- As a baseline, similar traffic for the Service Reliability and Service Consistency standards for manifest shipments should be other manifest traffic moving *between* the terminal where the reciprocal switch occurs and the terminal or local serving yard at the other end of the movement of the switched traffic. Only if there is an insufficient

volume of similar traffic between those points should carriers be permitted to expand the geographic coverage for similar traffic in a petition to terminate and, even then, only so far as is needed to obtain a meaningful comparison group.<sup>27</sup>

- The baseline for the ISP service standard, in contrast, should be the same showing the shipper made in its original petition – *i.e.*, the shipper’s own traffic. That is because the incumbent carrier will continue to provide ISP service even for a reciprocal switch. Thus, there is no reason or need to rely upon similar traffic.

**D. If a Petition to Terminate is Not Filed or is Denied, the Reciprocal Switch Prescription Should Renew for the Same Period as the Initial Prescription.**

The Board proposes to renew a reciprocal switch prescription when the incumbent carrier either does not file a petition to terminate within the prescribed window of time or fails to sustain its burden of proof to terminate the prescription. NPRM 30. Although the Board proposes to renew the switch in such circumstances for the same period as the initial prescription, it has sought comment on whether the renewal should only be for one year. In addition, the Board has asked whether a subsequent service failure by the incumbent carrier within a specified period, such as one year, following termination of a switch prescription should result in a permanent prescription. *Id.* The Coalition Associations support the Board’s proposal to renew switch prescriptions for the same period as the initial prescription and to make a prescription permanent

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<sup>27</sup>There should be one exception to this baseline. Because a shipper could choose to continue using the incumbent carrier during the switch prescription period (NPRM 30), the Board should only consider the Service Reliability and Service Consistency standards for the actual traffic that is eligible to use the prescribed switch in such circumstances. There is no need to consider “similar traffic” just as “similar traffic” would not have been relevant to the shipper’s initial petition. In fact, it would be absurd to do so because the shipper immediately could file a new petition based on the service standards as applied solely to its own traffic.

if the incumbent experiences a subsequent service failure within one year after a prescription has terminated.

First, reciprocal switch prescriptions should renew for the same duration as the initial term for all the same reasons that support the minimum term for initial prescriptions as discussed in Part VI.A above. The feasibility and attractiveness of handling a shipper's traffic to an alternate carrier is inversely related to the potential contract duration regardless of whether access to that traffic is via an initial or renewed switch prescription. Thus, there is no rational basis for a switch renewal term that is less than the initial term.

Next, the Board's proposal to make a reciprocal switch permanent if the incumbent experiences a subsequent service failure within one year after a prescription has terminated is an important safeguard against an incumbent seeking to terminate a switch prescription prematurely. Absent this safeguard, an incumbent carrier has very little to lose and much to gain by always filing a petition to terminate a switch regardless of the state of service on its network.

Knowing when a switch prescription expires and the precise standards it must satisfy to terminate the prescription, an incumbent carrier could make a concerted effort to deploy resources to ensure it satisfies those standards even when its network fluidity remains fragile and suboptimal. This has consequences for the shipper with the switch prescription if the incumbent subsequently removes those resources upon termination of the prescription resulting in fresh service failures. And it also has consequences for other shippers on the incumbent's network who may have resources needed to serve them diverted to satisfy standards for terminating the switch prescription. The Board can discourage attempts to prematurely terminate a reciprocal switch prescription through such gamesmanship by making a prescription permanent when there is a subsequent service failure within one year after a prescription has terminated.

**VII. THE BOARD SHOULD ESTABLISH A MINIMUM LEVEL OF SWITCHING SERVICE FOR PRESCRIBED SWITCHES.**

The Board has asked whether reciprocal switch prescriptions “should include a minimum level of switching service and, if so, whether the Board should establish a separate and specific penalty structure to be imposed on carriers that do not meet that level of service. NPRM 12 n.15. Establishing a minimum level of switching is essential to prevent the incumbent carrier from penalizing the shipper by reducing service to the shipper’s facility.

Therefore, when the Board prescribes a reciprocal switch, it should prohibit the incumbent carrier from reducing its switching service (i.e., first-mile, last-mile service) below levels that existed prior to the prescription unless a material reduction in the shipper’s traffic volume has a material adverse impact upon the incumbent’s operations. The incumbent carrier should bear a heavy burden of proof to demonstrate materiality. If a carrier reduces service without either Board authorization or the shipper’s consent, the Board should make the switch permanent, deem such failure to be a violation of the common carrier obligation to provide service upon reasonable request, and award damages to the shipper.

**VIII. THE BOARD SHOULD ADOPT THE SSW METHODOLOGY FOR SETTING THE SWITCH RATE.**

The Board has solicited comment on two methods for setting fees for a prescribed reciprocal switch if the rail carriers fail to agree upon a rate within a reasonable time. NPRM 28. Both methods are based upon the incumbent carrier’s cost of performing the switch. The first approach could use either the ICC Terminal Form F, 9-64, or the Uniform Rail Costing System to develop costs. The second approach would adapt the Board’s “SSW Compensation” methodology for reciprocal switching. *See St. Louis S.W. Ry. – Trackage Rts. Over Mo. Pac. R.R. – Kan. City to St. Louis*, 1 I.C.C. 2d 776 (1984); *St. Louis S.W. Ry. – Trackage Rts. Over Mo. Pac. R.R. – Kan. City to St. Louis*, 4 I.C.C. 2d 668 (1987). In Sub-Docket No. 1, the

Coalition Associations previously explained how to adapt the SSW Compensation method for reciprocal switching, and they continue to support that approach in this proceeding.<sup>28</sup>

In further support of the SSW Compensation method, the Coalition Associations submit the Crowley/Fapp V.S., at pp. 6-20, to once again explain how to adapt SSW Compensation to reciprocal switching (*see* Ex. 1). Messrs. Crowley and Fapp discuss in detail the three cost components involved in the development of trackage rights fees under SSW Compensation and the modifications required to calculate a reciprocal switch fee. They analyze two alternatives for estimating the fixed and variable cost components of a railroad's reciprocal switching operation, using either the URCS 100% variable option or URCS variable costs and an allocation of the incumbent's fixed costs to the switching movement. They also discuss how to calculate a fair return on investment, analyzing the strengths and weaknesses of the agency's various methods discussed in the SSW decisions and propose an alternative. They suggest that the ROI component of SSW Compensation be applied on a system average basis. The Board should adopt their proposals for adapting SSW Compensation to reciprocal switch fees.

In addition, the Board should resolve two corollary issues related to the switch fee. First, in Sub-Docket No. 1, the Board inquired whether and under what terms a shipper could challenge a switch fee to which the carriers have agreed. But the NPRM in this sub-docket solicits comment only on methods for setting rates "if the affected rail carriers fail to reach agreement on compensation within a reasonable time." NPRM 28. It should be academic, however, that a shipper may challenge the switch fee even if the carriers do reach agreement. To conclude otherwise would ignore the rail transportation policies "to maintain reasonable rates,"

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<sup>28</sup>*See*, "Comments submitted by The Shipper Coalition For Railroad Competition," Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 50-53 (filed Oct. 26, 2016), and Verified Statement of Thomas D. Crowley and Daniel L. Fapp, at 14-27.

“to encourage honest and efficient management,” and “to avoid undue concentrations of market power,” by allowing carriers to collude over the switch fee to prevent reciprocal switching from functioning as intended to encourage competition.<sup>29</sup>

Second, it also should be academic that the Board can apply the same standards to switch fee disputes regardless of whether the dispute is between two carriers or a carrier and a shipper. The objective of preserving the benefits of reciprocal switching while adequately compensating the incumbent carrier is the same in both circumstances.

Therefore, the Coalition Associations ask the Board to clarify that shippers may challenge a switch fee using the same methodology that the Board adopts for switch fee disputes between carriers. In addition, because of the potential for collusion between two carriers when setting the reciprocal switch rate, the Board should clarify that, when it prescribes a reciprocal switch, the resulting intramodal competition will not automatically preclude a finding of market dominance when challenging the reasonableness of the line-haul rate for the same traffic.

#### **IX. OTHER ACTIONS THE BOARD SHOULD CONSIDER WITH RESPECT TO COMPETITIVE ACCESS.**

Although the newly-proposed reciprocal switching rules in this sub-docket are narrowly designed “to address the impact of service deficiencies on the [rail] network...based on defined service standards pursuant to the ‘practicable and in the public interest’ prong of § 11102(c)” (NPRM 7), the Board also has solicited comments on “what other actions...it should consider with respect to competitive access and, in particular whether it should further broaden the application of the public interest prong of § 11102.” NPRM n. 8. The Coalition Associations offer three suggestions in response.

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<sup>29</sup>49 U.S.C. § 10101(6), (9), & (12).



**A. The Board Should Expand Its Current Proposal To All Bottleneck Segments.**

The Board should give prompt and immediate attention to expanding the current proposal to all bottleneck segments. The current proposal is well-tailored to address service inadequacies for all captive shippers through general bottleneck relief, not just the subset of captive shippers with short distance terminal bottlenecks that are eligible for reciprocal switching. Moreover, the same legal predicate that authorizes the Board to short-haul an origin railroad through reciprocal switching also authorizes the Board to do so via a through route prescription when “needed to provide adequate, and more efficient or economic, transportation.” *Compare* 49 U.S.C. § 10705(a)(2)(A) *with* § 10705(a)(2)(C).

The Board always has understood the role that reciprocal switching can serve to address service inadequacies. But previously in this proceeding, the Board also solicited comments on the “fairness” to those shippers without access to reciprocal switching.<sup>30</sup> Of course, the fact that some shippers may be eligible for reciprocal switching and others may not be eligible is by itself an insufficient reason not to adopt the proposed rules. The very fact that Congress provided for reciprocal switching in terminal areas reflects its understanding that shippers outside of terminal areas could not achieve the same benefits as shippers inside terminal areas. Any other interpretation would vitiate the reciprocal switching statute. But Congress did not simply ignore the needs of shippers outside terminal areas; rather, it provided those shippers with a similar, but separate, statutory remedy for inadequate service.

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<sup>30</sup>*E.g.*, Docket No. EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, at 2 (served July 25, 2012) (soliciting comment on “the impact on rates and service for captive shippers that would not qualify under this [the NITL] proposal (because they are not located in a terminal area or within 30 miles of a working interchange)”; Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 13-15 (served July 27, 2016) (discussing comments regarding the impact of the NITL approach on shippers that would not qualify for reciprocal switching).

As a general matter, Congress has restricted the Board’s ability to “require a rail carrier to include in a through route substantially less than the entire length of its railroad” to a limited set of exceptions. 49 U.S.C. § 10705(a)(2). The standards for granting reciprocal switching constitute one such exception. *Id.* § 10705(a)(2)(A) (referring to § 11102). Another exception exists when “the Board decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation.” *Id.* § 11705(a)(2)(C). Both exceptions short-haul a carrier with the only difference being that the interchange for reciprocal switching is located within the same terminal area as the shipper facility whereas the interchange for a through route prescription is not. Congress plainly granted the Board authority to short-haul a rail carrier to address service inadequacies in both situations.<sup>31</sup>

The standards that the Board has proposed for prescribing a reciprocal switch to address service inadequacies pursuant to § 11102(c) would apply with equal force to the statutory exception to the long-haul rule for through routes in § 11705(a)(2)(C). Interpreting a prior codification of § 11705(a)(2)(C), the Supreme Court held that “adequate” transportation applies only to the interest of the shipping public, “efficient and economic” transportation embraces both shipper and carrier interests, and Congress intended that both interests be considered and fairly balanced. *Pennsylvania R.R. Co. v. U.S.*, 323 U.S. 588, 592-93 (1945). The Board’s reciprocal switching proposal considers these very same factors. Proposed 49 C.F.R. § 1145.2 establishes standards for determining the adequacy of transportation to the shipper; section 1145.3 establishes affirmative defenses that excuse the carrier when the service inadequacies are beyond

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<sup>31</sup>Although the reciprocal switch statute contains an additional exception to the long-haul guarantee “to provide competitive rail service,” which makes the reciprocal switch exception broader than the bottleneck exception, the Board’s decision in this sub-docket to focus solely on the common exception for inadequate service in both statutes allows it to easily apply the same service inadequacy standards for invoking either exception.

its reasonable control, and section 1145.6(b) considers the efficient and economic operations of the carrier. The first two sections can be applied directly to through route prescriptions under § 11705(a)(2)(C) without modification. The third section, with additional references to operational factors specific to new interchanges that would not occur at a point along the incumbent railroad's long-haul route (*e.g.*, route circuitry, yard capacity), also can be applied to through route prescriptions.

With one exception, the Board could apply all other aspects of its proposed rules to both reciprocal switching and through route prescriptions to address service inadequacies. The exception is that the Board could not set the incumbent's through route rate using either of the methodologies proposed in this docket but only could prescribe a rate based upon standards adopted pursuant to 49 U.S.C. § 10701 and only upon complaint. In all other respects, the Board can provide all shippers with a comparable remedy for inadequate service, not just those shippers fortunate enough to be within a terminal area.<sup>32</sup>

**B. The Board Should Explore Trackage Rights as an Additional Remedy for Breach of the ISP Service Metric.**

The Board has asked “whether it should provide for the prescription of terminal trackage rights for failure meet the ISP standard, either in place of a separate path to a prescription of a reciprocal switching agreement in those circumstances or as an additional path that would be open to the petitioner.” NPRM 19, n. 27. The Board observes that reciprocal switching is an indirect remedy for ISP service failures because the incumbent carrier still provides ISP service

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<sup>32</sup>Just as the Board has proposed “to expressly overrule the standards and criteria regarding reciprocal switching established in *Midtec* as applying to any petition under the new part 1145” (NPRM 7), it would need to do the same to apply part 1145 to through route prescriptions permitted by § 10705(a)(2)(C). *See Central P & L Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1065-66 (1996), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8<sup>th</sup> Cir. 1999).

for reciprocal switches. Rather, reciprocal switching serves as an incentive for the incumbent carrier to provide adequate ISP service or lose its long-haul. Trackage rights would be a more direct remedy by allowing an alternate carrier to provide ISP service. The Coalition Associations believe the Board should explore trackage rights as an *additional* path in a separate proceeding.

Trackage rights are a more complex form of competitive access than reciprocal switching that requires the Board to consider factors that have not been relevant in this docket. For example, what are the operating issues, and could they impact service to other shippers; what STB, Federal Railroad Administration, and Pipeline and Hazardous Materials Safety Administration regulatory issues are implicated; and could ISP service via trackage rights be provided economically by an alternative carrier to just a single shipper facility? The answers to those questions and more are essential to determine the feasibility and effectiveness of a trackage rights remedy.

Lastly, because the answers to the foregoing questions may indicate that trackage rights will work in some situations but not others, a trackage rights remedy for ISP service failures should be in addition to reciprocal switching, not merely a substitute.

**C. The Current Proposal Should Be an Initial Step in a “Crawl, Walk, Run” Approach That Ultimately Implements the “Necessary To Provide Competitive Rail Service” Prong of § 11102(c).**

As noted at the outset of these comments, the Coalition Associations continue to urge the Board to propose standards for prescribing reciprocal switching pursuant to the “necessary to provide competitive rail service” prong of § 11102(c). This sub-docket should be the initial step in what Board Member Primus has described as a “crawl, walk, run” approach to implementing the full statutory scope of reciprocal switching.

Despite the best intentions of the Board to employ reciprocal switching narrowly as a remedy for service inadequacies, these comments demonstrate significant hurdles to that objective which could be overcome through implementation of the full statutory scope. *See*, Part VI.A. Congress plainly intended for reciprocal switching to address far more than service inadequacies.<sup>33</sup> Furthermore, the rail industry has evolved and matured well beyond its struggling financial condition when the ICC first adopted a narrow interpretation of Section 11102(c) and has become much more concentrated through decades of mergers.<sup>34</sup> These changes have created a greater “need” to enhance competition through reciprocal switching and a lesser “need” to financially subsidize railroads by protecting their captive traffic franchises from competition. The enhanced competition that could result from implementing the full scope of the reciprocal switching statute would better address service inadequacies along with all the other well-established economic benefits of competition.

The Board need not, and should not, reinvent the wheel as it considers how to do this. Sub-Docket No. 1 already lays a strong foundation. Therefore, as the Board gains experience with the current more narrowly tailored proposal in this sub-docket, it should revisit the proposals in Sub-Docket No. 1, which is a result that also would advance the “practicable and in the public interest” prong of § 11102(c) in a broader context as intended by Congress.

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<sup>33</sup>*See*, “Reply Comments submitted by The Shipper Coalition For Railroad Competition,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 14-17, 20-24. (filed Jan. 13, 2017).

<sup>34</sup>*Id.* at 19-20, 55-60, 65-67; “Comments submitted by The Shipper Coalition For Railroad Competition,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 9-16 (filed Oct. 26, 2016); “Post-Hearing Comments submitted by The Coalition Associations,” Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 2-7 (filed April 4, 2022).

## **X. CONCLUSION**

The Coalition Associations support the Board's objectives in the NPRM to prescribe reciprocal switching to address inadequate rail service under the "public interest" standard in 49 U.S.C. § 11102(c), but they are greatly disappointed that the Board has opted, at least for now, not to implement reciprocal switching under the "necessary to provide competitive rail service" standard in the same statute. The three principal service standards that the Board has proposed focus upon the most appropriate indicators of inadequate rail service, but the proposed metrics establish thresholds that are too low and insufficiently complete to capture inadequate rail service fully and accurately. The Coalition Associations urge the Board to remedy those deficiencies by adopting the modifications to those standards proposed in these comments. In addition, the Board should adopt the Coalition Associations' other substantive and procedural modifications to enhance the effectiveness of the proposed rules to address inadequate rail service and avoid unintended consequences. The Coalition Associations look forward to implementation of these rules and progressing to consideration of standards for implementing the full scope of reciprocal switching under the statute "to provide competitive rail service."

Respectfully submitted,

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*On Behalf of:*  
American Chemistry Council  
The Fertilizer Institute  
The National Industrial Transportation League

November 7, 2023

# **Exhibit 1**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte 711 (Sub-No. 2)

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**RECIPROCAL SWITCHING FOR  
INADEQUATE SERVICE**

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Verified Statement

of

Thomas D. Crowley  
President

and

Daniel L. Fapp  
Senior Vice President

**L. E. Peabody & Associates, Inc.**  
ECONOMIC CONSULTANTS

On Behalf Of

The American Chemistry Council  
The Fertilizer Institute  
The National Industrial Transportation League

Due Date: November 7, 2023



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**LIST OF EXHIBITS**

<b><u>EXHIBIT NO.</u></b>	<b><u>EXHIBIT TITLE</u></b>
1	Thomas D. Crowley Statement of Qualifications
2	Daniel L. Fapp Statement of Qualifications
3	Railroad Estimated Market Value, Gross Investment Value and Net Investment Value – 2022
4	Pre-Tax Required Return On Investment Per Car-Mile - 2022
5	OETA Performance Analysis
6	ISP Performance Analysis

## I. INTRODUCTION

We are Thomas D. Crowley and Daniel L. Fapp. We are economists and, respectively, the President and a Senior Vice President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. Mr. Crowley has spent most of his consulting career of over 50 years evaluating fuel supply issues and railroad operations, including railroad costs, prices, financing, capacity and equipment planning issues. His assignments in these matters were commissioned by railroads, producers, shippers of different commodities, and government departments and agencies. A copy of his credentials is included as Exhibit No. 1 to this verified statement (“VS”).

Mr. Fapp has been with L. E. Peabody & Associates, Inc. since 1997. During this time, he has worked on numerous projects dealing with railroad revenue, operations and financial issues. Prior to joining L. E. Peabody & Associates, Inc., Mr. Fapp was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, where he also served as an officer of the three (3) BHP Copper Inc. subsidiary common carrier railroads. A copy of his credentials is included as Exhibit No. 2 to this VS.

We previously evaluated the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking (“NPRM”) in Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*, served July 27, 2016 (“*EP 711-1*”) as it pertained to the STB’s two (2) proposed access fee alternatives for reciprocal switch moves.<sup>1</sup> Specifically, we evaluated the STB’s *EP 711-1* proposal to determine reciprocal switch pricing based either on a specified set of factors or to develop reciprocal switching access fees as a variant of the trackage rights compensation methodology used in Finance Docket No. 30000 (Sub-No. 16), *St. Louis Southwestern Railway Company* –

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<sup>1</sup> See, Verified Statement of Thomas D. Crowley and Daniel L. Fapp, filed October 26, 2016 on behalf of The Shipper Coalition for Railroad Competition (“*EP 711-1 VS*”).

*Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, (“SSW Compensation Methodology”).*<sup>2</sup>

We were asked by Counsel for the American Chemistry Council (“ACC”), the Fertilizer Institute, and the National Industrial Transportation League (hereafter “ACC/TFI/NITL”) to evaluate the STB’s NPRM in Ex Parte No. 711 (Sub-No. 2), *Reciprocal Switching For Inadequate Service*, served September 7, 2023 (“*EP 711-2*”) as it pertains to the use of the *SSW Compensation Methodology* for setting compensation for the STB’s imposition of a reciprocal switch due to a carrier’s inadequate service.<sup>3</sup> We were also asked to evaluate the content and substance of the data that a railroad would be required to provide a shipper upon a complaint of inadequate service by the incumbent railroad.

The results of our evaluation are summarized in the remainder of this VS and accompanying Exhibits and are organized under the following topical headings:

- II. Summary of Findings
- III. SSW Compensation Methodology
- IV. Railroad Data Requirements
- V. Data Requirements and Reporting

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<sup>2</sup> The Interstate Commerce Commission (“ICC”) issued three (3) decisions in its SSW cases under the same Docket Number, i.e., FD No. 30000 (Sub-No. 16). The first decision was issued in 1984 that we refer to as “*SSW-1*.” The ICC issued the second decision in 1987 that we refer to as “*SSW-2*” and the third decision in 1989 that we refer to as “*SSW-3*.” Collectively, all three (3) decisions encompass the *SSW Compensation Methodology* that we discuss in this VS.

<sup>3</sup> The STB invited comments in this proceeding that were first presented in the STB’s *EP 711-1* NPRM if those comments are germane to the current proceeding. See, *EP 711-2* at p. 28, note 34. We include a summary and updates to our comments from our *EP 711-1* VS as they pertain to the *SSW Compensation Methodology* and its application to establishing reciprocal switch fees in this VS.

## II. SUMMARY OF FINDINGS

A summary of our findings is included below, which are supported by the remainder of this VS and accompanying Exhibits.

1. The development of the reciprocal switch fees involves the identification of costs incurred by the incumbent carrier in providing direct or indirect access to another railroad. These costs include the cost of the incumbent's operations "above the rail" and "below the wheel" and an allocated share of the return on investment ("ROI"). Additionally, regulatory delay must be considered in developing the compensation procedures related to service issues as time is of the essence in a service issue proceeding.
  - a. The variable cost components of reciprocal switch compensation in a service issue proceeding should be based on the incumbent carrier's Uniform Railroad Costing System ("URCS") Phase III model, while the fixed cost component should be based on either URCS or a modified STB Average Total Cost ("ATC") revenue division methodology, which is explained in this VS below.
  - b. The ROI component of reciprocal switch compensation in a service issue proceeding should be based on system average ROI per car-mile multiplied by the movement miles, which will simplify the process without distorting the outcome.
2. In order for a shipper to request a reciprocal switching arrangement under the EP 711-2 proposed procedures, the shipper has to demonstrate that one of the following three (3) standards have been violated:
  - a. The incumbent railroad failed to meet the original estimated time of arrival ("OETA" standard); or
  - b. The incumbent railroad's time to deliver a shipment deteriorated ("transit time" standard); or
  - c. The incumbent railroad failed to provide adequate local service as measured by the industry spot and pull relationship ("ISP" standard).
3. The STB's proposed OETA standard measures whether or not more than 60 percent of shipments arrive within 24 hours of the OETA. The STB based the 60 percent initial success rate on manifest data submitted by the railroads. Based on this railroad data and as demonstrated below, we suggest that the OETA threshold within a 24-hour period should be set at the higher of 70 percent or the average OETA within a 24-hour period for all reporting railroads. In addition, the Board should set targets for 48-hour and 72-hour OETA at 80 percent and 90 percent,

respectively, or the industry average 48-hour and 72-hour OETA if higher than the Board's targets.

4. The STB's proposed transit time standard measures the change in transit time from the time a shipment leaves the origin until it arrives at destination during a 12-week study period. To qualify for potential relief using the transit time standard, the average transit time during the 12-week study period needs to be more than 20 to 25 percent greater than the transit time for all shipments moving between the same origin and destination during the same 12-week period in the prior year. The STB does not explain how the 20 to 25 percent threshold was developed but rather, cites shipper evidence in *EP 770-1* that demonstrates that a 15 percent increase in transit time caused many problems for the shippers.<sup>4</sup> We suggest that the STB's threshold for qualifying for the transit time standard be based on a transit time change exceeding 15 percent for one year or exceeding a 25 percent cumulative increase over three (3) years.
5. The STB's proposed ISP standard is measured by a railroad's local service and whether or not the delivery of a shipment (spot) or the pick-up of a shipment (pull) at industry is accomplished within a 12-hour service window. To qualify for use of the ISP standard, a shipper must demonstrate that, over a 12-week period, the average time of all spots and pulls was accomplished by the railroad less than 80 percent of the time within the 12-hour planned service window. The STB stated that it based its 80 percent threshold on initial performance standards reported by the railroads and suggested that the threshold could be as low as 75 percent. The *EP 770-1* railroad data used, in part to generate the ISP standard, suggest that the threshold should be an 80 percent railcar spot and pull rate for the first service window and 100 percent within the second service window. In addition, to deal with railroad no-shows while switching, the STB should institute a target rate of 90 percent for planned service windows with no more than one no-show in any two (2) consecutive windows for spots and pulls.
6. In those cases where a shipper is facing inadequate ISP services from the incumbent railroad, the Board should allow the prescription of terminal trackage rights to an alternative carrier in addition to a prescription of reciprocal switching, when operationally and economically feasible.
7. The STB must require that the railroads provide consistent and well explained data when providing service data to shippers. The format in which the railroads provide the data, i.e., Microsoft Excel files, text files, etc. is not as important as the content of the data and the information provided about the data. The railroads must provide clear and precise data descriptions or data dictionaries that accurately and simply define the data contained within each field in a manner that a shipper can understand. Additionally, the data provided by the railroads must be

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<sup>4</sup> See, STB Ex Parte No. 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*, served May 6, 2022 ("*EP 770-1*").

uniform and consistent, both within the provided data fields and also across the railroads.

### III. SSW COMPENSATION METHODOLOGY

As we indicated in our *EP 711-1 VS*, a fair and reasonable access fee for competitive access involving reciprocal switching is one which provides the incumbent firm sufficient revenue to recover its variable and fixed operating costs (including maintenance), and to provide a sufficient return on and of its capital investment.<sup>5</sup> The development of the reciprocal switch fees involves the identification of the costs incurred by the incumbent carrier in providing direct or indirect access to another railroad. As noted by the Railroad Accounting Principles Board (“RAPB”), the establishment of reciprocal switching fees involves the identification and quantification of costs associated with the use of specifically identified facilities and services.<sup>6</sup> The RAPB observed that the ICC reviewed a carrier’s cost of providing various switching services within a particular terminal when developing reciprocal switch fees, including the carrier’s variable costs, allocated fixed costs and ROI.<sup>7</sup>

In *SSW 2*,<sup>8</sup> the ICC articulated the general terms for establishing fair and competitive access fees. The ICC stated that a landlord railroad was entitled to recover its costs of operations stemming from another railroad operating on its track plus rent based on an allocated share of the return on the value of the property.<sup>9</sup>

The economic precepts included in the ICC’s *SSW Compensation Methodology* also hold true when determining the reasonable price for a reciprocal switch. While another carrier would

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<sup>5</sup> See, Finance Docket No. 30000 (Sub-No. 16), *St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis*, 1 ICC 2d 776 (1987) (“*SSW 1*”) at page 782. This approach is consistent with the STB’s direction to consider a railroad’s revenue adequacy, which seeks revenues to cover a railroads’ total operating expenses, including depreciation and obsolescence, plus a reasonable economic profit or return (or both) on capital employed in the business.

<sup>6</sup> See, RAPB Final Report Volume 2, September 1, 1987 (“*RAPB Final Report*”) at page 71.

<sup>7</sup> The RAPB notes that the ICC, at one time, used the now defunct Terminal Form F to develop the estimated switching costs. See, *RAPB Final Report* at page 76.

<sup>8</sup> See, Finance Docket No. 30000 (Sub-No. 16), *St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis*, (“*SSW 2*”) 4 ICC 2d 668 (1987).

<sup>9</sup> See, *SSW 2* at page 669.



not be operating over a carrier's line in a reciprocal switching case, the incumbent carrier would still be entitled to recover its operating costs from providing the switching operations. The carrier would also be entitled to a return on its deployed capital used in the switching operation, which is analogous to the rental component paid as part of a trackage rights fee.

In addition to the reciprocal switch fee being fair and reasonable to the incumbent railroad from an economic perspective, the fee, and how and when it is developed, must also be fair and reasonable to the shipper whose traffic will be switched. The ICC stated in developing its *SSW Compensation Methodology* that an access fee would not be reasonable if it were so high as to preclude its use by the tenant carrier (and by extension the shipper). Specifically, the ICC stated:

Finally, we noted that, since the purpose of the trackage rights was to maintain a competitive balance...any terms so onerous to the tenant as to defeat the purpose of the trackage rights cannot be considered just and reasonable.<sup>10</sup>

To keep a reciprocal switch fee reasonable, the shipper (or the alternative carrier) must not be forced to pay more than the costs for the railroad to provide the requested switching services, plus a reasonable return on the investment. It would also not be fair and reasonable to a shipper if the time it took to develop and agree upon an access fee precluded the shipper's use of the reciprocal switch in a timely manner.

Regulatory delay, or the time it takes for regulators such as the STB to come to a decision, has real world costs to the parties involved in the proceeding, a point recognized by the railroads. As the BNSF Railway ("BNSF") explained in Ex Parte No. 582 (Sub-No. 1),<sup>11</sup> regulatory delay inflicts real world costs on the parties involved. BNSF stated that parties placed in regulatory limbo are unsure how to plan for the future or how to respond to other opportunities. Regulatory

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<sup>10</sup> See, *SSW 2* at page 669 (internal quotes omitted).

<sup>11</sup> See, Ex Parte No. 582 (Sub. No. 1), *Major Rail Consolidation Procedures*, served June 11, 2001, at page 110.

delay also impacts capital markets since these markets cannot tolerate uncertainty or delay. Given the time value of money, a long delay in gaining a decision can turn a good deal into a bad deal.<sup>12</sup>

While addressing the impact of regulatory delays on railroads, BNSF's statements apply equally to shippers impacted by delays. A shipper cannot effectively plan if the shipper does not know if a movement is available, if the shipper may incur higher capital costs, or if the shipper may lose out on access to capital altogether if the determination of a reciprocal switching rate is delayed.

It would be unfair for a shipper to wait in regulatory limbo for the STB to determine a reasonable reciprocal switching fee. As noted above, there are real-world costs associated with such a delay. Therefore, any access fee procedure that the STB adopts must allow the STB to set the fee in a timely and expedited manner.

While the *SSW Compensation Methodology* was initially used to develop trackage rights fees, the methodology's underlying logic can also be applied to develop a reciprocal switching fee. Since a reciprocal switching fee will reflect the costs for a railroad operating over its own rail line and not the costs of another carrier operating over a landlord's lines, adjustments to the *SSW Compensation Methodology* must be made to develop reciprocal switching fees. The primary modification is the development of the incumbent railroad's incremental fixed and variable costs associated with transporting the issue traffic from the origin or destination to the terminal interchange location with the alternative carrier.

In *SSW I*,<sup>13</sup> the ICC outlined the three (3) components involved in developing trackage rights fees. These include:

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<sup>12</sup> See, *Major Rail Consolidation Procedures* at page 110.

<sup>13</sup> See, *SSW I*, pages 779-780.

1. The fixed and variable costs incurred by the landlord railroad as a result of the tenant railroad's operations on the landlord's rail line;
2. The tenant railroad's share of the landlord's fixed and variable "below the wheel" maintenance and operation costs; and
3. The tenant railroad's share on a usage basis of an interest rental component representing the required ROI.<sup>14</sup>

We discuss each of these three (3) components and the modifications required to apply them in the context of a reciprocal switch fee below.

#### **A. VARIABLE AND FIXED COSTS**

Unlike a trackage rights access fee, a reciprocal switch fee will involve capturing both the incumbent carrier's "below the wheel" and "above the rail" fixed and variable costs, and not just the "below the wheel" costs, as is the case in a trackage rights situation. In our *EP 711-1 VS*, we proposed two (2) different alternatives for estimating the fixed and variable components of a railroad's reciprocal switching operation. The first approach for calculating the variable and fixed cost components of the reciprocal switching fee develops the costs of the movement assuming 100 percent URCS variability. The second potential approach to calculating the variable and fixed costs involved in a reciprocal switching movement uses the STB's URCS Phase III variable costs and an allocation of the railroad's fixed costs to the switching movement using the STB's ATC revenue division methodology applied to crossover traffic in maximum reasonable rate cases.

We continue to believe these two (2) alternatives provide practicable and efficient means to estimate a railroad's variable and fixed costs of switching operations for use in establishing a reciprocal switch fee, and will not repeat our reasons why in this VS.

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<sup>14</sup> See, *SSW 1* at pages 779-780.

## **B. RETURN ON INVESTMENT**

The interest rental component of the *SSW Compensation Methodology* compensates the railroad for the cost of capital inherent in its road and equipment investments used during the reciprocal switch operation. The ICC/STB developed the ROI component of the *SSW Compensation Methodology* by applying the railroad industry's pre-tax nominal cost of capital to the estimated value of the rail line over which the trackage rights traffic operated, and then spreading the ROI costs evenly over each car-mile moving on the issue rail line.<sup>15</sup>

The primary issue with the development of the ROI component is the estimation of the value of the rail line. In Finance Docket No. 22218, *Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co.*, 8 I.C.C. 2d 297 (1992), (“*ATSF Trackage Rights*”), the Southern Pacific Transportation Company (“SP”) asked the ICC to determine the appropriate trackage rights fee the Atchison, Topeka & Santa Fe Railway Company (“ATSF”) should pay under the *SSW Compensation Methodology* for ATSF's use of SP's Tehachapi line in Southern California. The ICC indicated in *ATSF Trackage Rights* that there could be four (4) ways to estimate the fair market value of the rail line for use in the *SSW Compensation Methodology*.<sup>16</sup> Specifically:

1. A capitalized earnings approach that develops the line value relative to the overall market value of the railroad. First, the value of the entire rail system is determined. Next, the estimated overall railroad market value is allocated to the specific line segment used for competitive access based on the line's relative earnings as compared to the railroad's total earnings. This was the ICC's preferred methodology;
2. A Reproduction Cost New Less Depreciation (“RCNLD”) approach. This was the ICC's second alternative if the capitalized earnings approach was unavailable;

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<sup>15</sup> See, STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation*, Decision No. 109 (“*Conrail 1999*”) at page 78.

<sup>16</sup> See, *ATSF Trackage Rights* at pages 304-305.

3. A market comparable approach that based the estimated value on the market value of comparable line sales. The ICC stated that the drawback to this approach was finding a truly comparable similar rail line; and
4. A Stand-Alone Cost (“SAC”) approach that developed the replacement costs of the line that eliminated any inefficiencies. The ICC stated the drawback of this approach was determining the line inefficiencies.

There are issues with each of the ICC/STB’s approaches for developing the estimated market value of the segments making up the reciprocal switch route that could make them unusable in developing a reasonable access rights fee. However, as we indicated in our *EP 711-1 VS*, we believe there is a consistent and readily available valuation approach that could be applied in the same manner in all cases, regardless of the carriers involved, that would overcome the flaws in the ICC/STB’s historic valuation methodologies. We discuss the issues with each of the ICC/STB’s four (4) approaches plus our proposed approach below.

### **1. Capitalized Earnings**

The STB’s capitalized earnings approach for a line segment valuation is based on allocating the railroad’s overall enterprise value to the rail line(s) used for the switching operation based on the proportion of the subject rail line’s pre-tax earnings to the railroad’s pre-tax earnings. This requires not only the development of the estimated earnings of a specific rail line(s) on the railroad, but also the railroad’s total market value.

The ICC/STB have used two (2) approaches to develop the railroad market values under the *SSW Compensation Methodology*. In *SSW 2*, the ICC relied upon the purchase price that the Union Pacific Railroad Company (“UP”) paid for the Missouri Pacific Railroad (“MP”) (the railroad over which St. Louis and Southwestern Railroad (“SSW”) would operate via trackage rights), which was based on purchase accounting values developed as part of the acquisition. Under purchase accounting, the assets of the acquired company, MP in this case, are placed on the

books of the purchasing company (UP) at their estimated current fair market value. The estimated current fair market value for MP was determined through accounting and engineering studies of the acquired assets.

The STB used a different approach in *Conrail 1999* to develop the estimated market value of Conrail's assets. Instead of using the purchase accounting value that they advocated in *SSW 2*, the STB relied upon the prices the CSX Transportation Company ("CSXT") and the Norfolk Southern Railway ("NSR") paid for the Conrail common stock and the market value of the assumed Conrail debt. This is a form of enterprise valuation that is commonly used in valuation practices, and assumes that the prevailing stock price and market value of debt is the market's best estimate of the current value of the company's assets on a going concern basis.

The ICC/STB were able to estimate the total railroad values in these two (2) cases because they had either, a relatively recent railroad asset valuation (*SSW 2*), or a recent stock and debt valuation that reflected the entire railroad (*Conrail 1999*). Neither is available for all of the current Class I railroads. While we do have current common equity and debt values for the publicly traded UP, NSR and CSXT, we do not have current common equity values for the privately held BNSF, which is now a wholly owned subsidiary of Berkshire Hathaway, Inc., nor do we have current common equity values for the Kansas City Southern Railway ("KCS"), which is now a subsidiary of CPKC.

In addition, the equity and debt valuation approach used in *Conrail 1999* would not work in the case of the U.S. portion of the Canadian National Railway Company ("CN") and CPKC, which are regulated by the STB, since a majority of the parent companies' assets and revenues lie, or are generated, outside the United States. This means the stock price of the publicly traded

holding companies reflect presumed value of assets outside the United States and outside the regulation of the STB.

Exhibit No. 3 to this VS compares the estimated market values of the Class I railroads (except BNSF and KCS) based on their 2022 equity market cap and debt levels to the gross-value of the railroad companies' assets reported in each railroad's Annual Report Form R-1.<sup>17</sup> This comparison shows that the enterprise values for CN and CP are significantly larger than the gross book values of their United States rail operations due to their significant operations in Canada.<sup>18</sup> Attempting to use CN and CP's overall market values would improperly impute foreign valuations on United States regulated operations, which the STB held is inappropriate.<sup>19</sup> Because of these significant operations outside the United States and the complete lack of current common equity information for BNSF and KCS, enterprise value cannot be reliably calculated for three (3) of the six (6) remaining Class I railroads. Therefore, another valuation approach should be used to place carriers and shippers on a level playing field.

## **2. RCNLD and SAC Reproduction Costs**

The ICC stated that RCNLD and SAC approaches may be used in developing the estimated values of specific rail lines.<sup>20</sup> RCNLD is a form of replacement cost, which uses an estimate of the cost of replacing or reproducing the existing facilities as a measure of value. This amount is then reduced to reflect the amount of depreciation that has accrued to the assets being valued. SAC

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<sup>17</sup> Because the STB had not ruled on the Canadian Pacific Railway Company ("CP") and KCS merger by the end of 2022, KCS continued to file a separate Annual Report Form R-1 with the Board for year 2022. We included the 2022 KCS Form R-1 data in Exhibit No. 3 to this VS even though the STB subsequently approved the merger creating CPKC.

<sup>18</sup> See, Exhibit No. 3, Line 7 – Ratio of market value to gross investment for each Class I Railroad in 2022. These ratios for CN and CP are considerably higher than any other Class I Railroad.

<sup>19</sup> See, Ex Parte 458, *Railroad Cost of Capital – 1984*, 1 I.C.C. 2d 989 (1985) at pages 1003-1004.

<sup>20</sup> See, *ATSF Trackage Rights* at page 305.

is a different form of replacement cost that looks at the current cost to replace the existing facilities, while removing any inefficiencies from the existing infrastructure and operations.

The RCNLD and SAC approaches should not be used to establish switching fees because these approaches develop reproduction or replacement costs for the rail line rather than the rail line's estimated market value. In addition, both RCNLD and SAC require an extensive amount of time to develop the estimated market value.

As we explained in our *EP 711-1 VS*, the Association of American Railroads ("AAR") sought to change the approach the STB used in the Board's annual railroad revenue adequacy determination in *Ex Parte No. 679*,<sup>21</sup> from using an historic value approach to reflect railroad assets to a replacement value approach of asset valuation. The AAR developed its railroad replacement cost valuations based upon the STB's Simplified Stand-Alone Cost ("Simplified SAC") valuation approach for developing road property investment ("RPI") values, which relies on the average RPI values from recent SAC cases to estimate the value of a specified rail line or network. As support for its *EP 679* position, the AAR calculated the replacement costs for the four (4) primary United States based railroads – BNSF, CSXT, NSR and UP – based on the replacement costs developed in the Board's then most recent SAC decisions. As shown in Exhibit No. 4 to our *EP 711-1 VS*, the AAR's 2006 replacement cost valuations for the four (4) railroads ranged between \$66.8 billion and \$93.3 billion.

The major flaw in a replacement cost approach is demonstrated by comparing the AAR's 2006 railroad replacement values to the actual 2006 railroad market values calculated by the STB in its 2006 cost of capital proceedings. The STB's cost of capital procedures develop each

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<sup>21</sup> See, *Association of American Railroads – Petition Regarding Methodology for Determining Railroad Revenue Adequacy*, filed May 1, 2008 ("*EP 679*").



railroad's equity market capitalization and market debt value for use in determining the railroad industry capital structure. Exhibit No. 4 to our *EP 711-1 VS* showed that the STB determined market values for the BNSF, CSXT, NSR and UP that ranged from \$19.3 billion to \$34.9 billion in 2006, indicating the replacement values developed by the AAR overstated the true market value of the railroads' assets in 2006 by 129 percent to 245 percent.<sup>22</sup>

In addition to producing inappropriate values, RCNLD and SAC approaches can be relatively complex and time consuming. Both approaches require the identification of the specific assets along the route being reproduced and the condition of the specific assets. This requires, in most cases, physical inspections of the track and infrastructure by engineers, economists and/or land appraisers in order to determine the number and condition of the assets. This is not a simple process and can take months to develop.

### **3. Market Comparable Approach**

The Market Comparable approach uses sales of comparable properties to determine the value of the property to be acquired. The standard used in this type of valuation is the amount that would be paid for the rail facilities in their highest and best use as determined in a competitively structured market. A competitively structured market is a market with a large number of buyers and sellers where no buyer or seller is sufficiently large relative to the size of the market to be able to affect the market price, and new buyers and sellers are free to enter and exit the market.

While providing a current market value for the target assets, this approach for appraising the value is challenging and not usable in the current situation. First, because there is typically not an active market for the sale of rail systems, it is difficult to determine what the current market

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<sup>22</sup> 2006 BNSF Railway AAR calculated Replacement Value at \$79,904,900 compared to 2006 STB calculated Railroad Market Value of \$34,870,009 results in an overstatement of 129 percent. 2006 CSXT AAR calculated Replacement Value at \$66,769,000 compared to 2006 STB calculated Railroad Market Value of \$19,322,592 results in an overstatement of 245.5 percent.

value would be for large rail systems like the Class I railroads or portions thereof at any particular time.<sup>23</sup> Second, when rail systems (or portions of rail systems) do sell, they are often sold for reasons that impact their selling price. For example, the Class I railroads will sell low-density branch lines to short-line operating companies for below their estimated current market value in return for a guarantee that the short-line will only interchange traffic with the selling carrier.

For these reasons, we believe that a Market Comparable approach is not justified in developing the ROI component for these purposes.

#### **4. The Railroads' Gross Investment Values Provide an Acceptable Alternative**

Each of the STB's preferred methodologies has issues or flaws that make their use in developing the ROI component of the *SSW Compensation Methodology* problematic and contentious. An alternative to the STB's current approaches to developing an estimated market value is the use of the railroads' gross investment values that we identified in the railroads' Annual Report Form R-1 filings. While we acknowledge that the use of historic values has not been a preferred approach to valuation, we believe the advantages of using the gross book value outweigh the disadvantages.

First, each of the railroad's gross book values are readily available for all of the railroad holding companies' United States operations, including BNSF, CN, CP and KCS. As discussed above, it is not possible to develop an estimated market value for the BNSF and KCS using the common stock and debt valuation approach used by the STB in the Conrail acquisition because their common stock is not actively traded. The common stock for CN and CP is publicly traded,

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<sup>23</sup> While the recent CP acquisition of KCS provides some information on Class I market values, the fact that a large portion, if not majority, of KCS's value came from its Mexican operations makes it an inappropriate benchmark for valuing companies with primarily United States-based assets and operations.

but the implied market value inherent in each of these company's common equity reflects a majority or near-majority of assets outside the United States and may not be reflective of the asset values used in a reciprocal switching movement within the United States. Using gross investment provides a valuation common to all of the railroads and focuses only on the United States portion of the rail systems which are subject to STB jurisdiction.

Second, unlike the RCNLD and SAC approaches, the gross investment values can be developed in a short time providing administrative efficiency. In contrast, both the RCNLD and SAC approaches would require extensive discovery to obtain the information necessary to develop the replacement costs of the rail line in question. Shippers would then need to hire outside engineers, economists, land appraisers and railroad operating experts to estimate the market value of the rail line and equipment used in the reciprocal switching operation. The railroads may not need to hire outside experts to develop their valuations, but diverting in-house engineering, economic and operating staff to develop these values does come at a cost. One need only look at the time it takes to develop evidence in maximum reasonable rate cases brought under the SAC-constraint to see the time required to develop valuations under the RCNLD and SAC approaches. The extensive time and costs needed to develop this type of valuation can be easily avoided by using each railroad's gross book value.

**5. The ROI Component of the SSW  
Compensation Methodology Should  
be Applied on a System Average Basis**

The STB developed the required ROI component of the *SSW Compensation Methodology* in *Conrail 1999* on a segment specific basis.<sup>24</sup> To do this, the STB calculated the market value of the trackage rights segment over which CP would operate and divided the market value by CSXT's

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<sup>24</sup> See, *Conrail 1999* at pages 80-84.

share of Conrail's pre-tax earnings to develop what the STB termed a "Times Earning Multiplier." The STB then multiplied the Times Earnings Multiplier by pre-tax earnings associated with the trackage rights segment to develop an estimated line segment market value.<sup>25</sup>

The primary issue with the *SSW Compensation Methodology's* approach for developing the value of the line segment is the requirement to estimate line-specific earnings. Developing the line-specific earnings requires the identification of several specific economic factors that are not readily available. To start, parties would have to identify all of the traffic moving over the line segment and the revenue associated with that traffic to begin developing line specific earnings.<sup>26</sup> This information can only come from the railroad's traffic and revenue records and, as shippers in maximum reasonable rate cases have testified, collecting this information is a time-consuming and expensive process.<sup>27</sup> Next, parties would need to develop the operating costs associated with operating the line segment including the line segment's depreciation expenses associated with the traffic moving on the line segment. While these costs could be developed using the STB URCS program,<sup>28</sup> this is still a time-consuming process since the URCS costs must be applied to each piece of traffic operating over the line segment.

An alternative approach for developing the ROI component for the access fee would simplify the process without distorting the outcome. Specifically, instead of attempting to

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<sup>25</sup> The approach the STB took is mathematically the same as dividing the line segment's pre-tax earnings by the railroad's total pre-tax earnings and multiplying by the railroad's estimated market value.

<sup>26</sup> One would need to apply ATC to attribute revenues to the segment (need to cost every move from Origin to Destination and need density data for all moves for all segments). For a busy terminal, the analysis could cascade to where you need data for nearly the entire system, not just the issue traffic and the issue traffic route.

<sup>27</sup> See, for example, STB Docket No. NOR 42130, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*, Opening Evidence and Argument, Exhibit III-A-2 (2012) and STB Docket No. NOR 42125, *E.I. Dupont De Nemours & Company v. Norfolk Southern Railway Company*, Opening Evidence, Exhibit III-A-2 (2012).

<sup>28</sup> Under the STB's Simplified SAC procedures, operating costs for the traffic group are developed using the STB's URCS cost. See, Ex Part No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, decided September 4, 2007, at page 50.

calculate line specific earnings to allocate the railroad's estimated market value to a specific rail line, we believe using a system average required ROI per car-mile, and multiplying this ROI cost per car-mile by the movement miles, provides an alternative with several advantages.

First, calculating a system average ROI per car-mile is a straightforward calculation. As shown in Exhibit No. 4 to this VS, we calculated the 2022 system average ROI per car-mile for the seven (7) Class I railroads based on their 2022 gross investment. These calculations produced ROI costs ranging from \$1.80 to \$3.05 per loaded car-mile.<sup>29</sup> These costs can then be applied to the loaded miles involved in the switching movement to develop an allocated ROI per carload.

Second, the use of a system average ROI cost is consistent with the STB's use of system average URCS variable costs used in the *SSW Compensation Methodology* and in other STB regulatory proceedings. In calculating the "below the wheel" costs for the derivation of the trackage rights fee in the Conrail decision, the STB accepted the use of Conrail's system average cost.<sup>30</sup>

The STB also uses system average costs in its other regulatory proceedings. The STB uses system average URCS variable costs to determine quantitative market dominance in rate reasonableness proceedings. The STB also uses system average variable costs when developing ATC revenue divisions and the Maximum Markup Methodology ("MMM") rates in SAC cases as well as in developing the comparison revenue to variable cost ratio benchmark under the STB's Three-Benchmark ("3BM") methodology.

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<sup>29</sup> To place these figures in perspective, the STB estimated CSXT's portion of the Conrail ROI in the East of Hudson lines at \$0.318 per car-mile in 1999. *See, Conrail 1999* at page 85.

<sup>30</sup> *See, Conrail 1999* at page 77.

In sum, the use of a system average ROI per car-mile provides an efficient way to develop the ROI component of a reciprocal switch fee calculated under the *SSW Compensation Methodology*.

#### IV. RAILROAD DATA REQUIREMENTS

Under Part 1145, as proposed in *EP 711-1*, “the Board would prescribe a reciprocal switching agreement when it either was practicable and in the public interest or was necessary to provide competitive rail service, based on certain criteria.”<sup>31</sup> Given the service issues railroads have faced in recent years, the STB proposed new regulations in *EP 711-2*. The STB shifted its reciprocal switching reform to focus on inadequate service. The proposed regulations “would provide for prescription of a reciprocal switching agreement based on defined service standards.”<sup>32</sup> If a shipper can demonstrate to the STB that one of the following three (3) proposed standards has not been met by the incumbent railroad, then that shipper may qualify for a prescribed reciprocal switch from a non-serving railroad.<sup>33</sup> The proposed three (3) standards include:

1. The incumbent railroad failed to meet its original estimated time of arrival (“OETA”), i.e., inadequate on-time performance; or
2. A deterioration in the time it takes a rail carrier to deliver a shipment (“transit time”); or
3. The incumbent railroad failed to provide adequate local (or FMLM<sup>34</sup>) service, as measured by the railroad’s success in meeting an “industry spot and pull” (“ISP”) standard.<sup>35</sup>

Performance related to two (2) of the above standards, i.e., OETA and ISP, are currently monitored for each Class I railroad in total by the STB. As Class I railroads faced declines in service performance, the STB opened Ex Parte No. 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*, served May 6, 2022 (“*EP 770-1*”). The STB’s *EP 770-1* decision

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<sup>31</sup> See, *EP 711-2* at page 3.

<sup>32</sup> *Id.* at page 7.

<sup>33</sup> The STB also stated that an impacted shipper must have practical access to only one Class I railroad and the prescription would be practicable. See, *EP 711-2* at page 12.

<sup>34</sup> FMLM means first mile last mile.

<sup>35</sup> See, *EP 711-2* at page 8.

required all Class I railroads to submit weekly status reports containing seven (7) different pieces of weekly performance data.

OETA and ISP closely reflect two (2) of the performance metrics that the STB required railroads to report weekly for their entire rail systems. Specifically, the railroads were to report “(i) [f]or rail cars moving in manifest service, the percentage of cars constructively or actually placed at destination within 24 hours of the original estimated time of arrival,” i.e., the OETA standard. Also, the railroads were required to report “[f]or each operating division and for the system, the percentage of scheduled spots and pulls that were fulfilled,” i.e., the ISP standard.<sup>36</sup>

The STB relied heavily on the weekly *EP 770-1* data submitted by the railroads to develop its proposals for potential OETA and ISP performance standards in this proceeding. The OETA and ISP performance standards, as well as the transit time performance standard, are each discussed in more detail below. For each proposed performance standard, we provide our understanding of the proposed STB approach and include a hypothetical example of how each standard is to be calculated.

**A. SERVICE RELIABILITY:  
ORIGINAL ESTIMATED TIME OF  
ARRIVAL (OETA)**

The STB proposed two (2) different OETA approaches. The first approach ensures that at least 60 percent of shipments arrive within 24 hours of the OETA. The second approach ensures that 60 percent of shipments arrive within 24 hours of the OETA during the first year following the effective date of the proposed rules. After the first year, the STB would increase the threshold to ensure that 70 percent of shipments arrive within 24 hours.

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<sup>36</sup> See, *EP 770-1* at page 6.



The STB based this OETA success rate on the initial performance data submitted by four (4) Class I railroads (BNSF, CSXT, NSR and UP) in *EP 770-1*. The initial performance data was submitted by the railroads on May 13, 2022, a time when:

[E]ach of the four carriers required to submit service recovery plans has acknowledged that their service fell short of public expectations or needs...[and] [t]he Board finds that the carriers’ performance levels during this challenged time are a reasonable starting point for setting standards for inadequate service and, as such, has used these levels to formulate proposals for potential performance standards under part 1145.<sup>37</sup>

The STB based the initial success rate of 60 percent on manifest data submitted by railroads. However, the same data shows that all of the Class I railroads are capable of performing well above these levels. In *EP 770-1*, the seven (7) railroads were required to submit weekly data showing the percentage of manifest service railcars placed within 24 hours of the OETA. Table 1 below compares the STB proposed standard to the average OETA percentage for the May 13, 2022 to October 27, 2023 time period (“Total Reporting Period”) and the last full year, reported from November 4, 2022 to October 27, 2023.

<b>Class I Railroad</b>	<b>STB Proposed Standard</b>	<b>Total Reporting Period</b>	<b>November 2022 through October 2023</b>
(1)	(2)	(3)	(4)
1. BNSF	60%	62.9%	64.1%
2. CSXT	60%	85.6%	91.7%
3. NSR	60%	68.4%	70.9%
4. UP	60%	70.4%	71.6%
5. KCS	60%	72.0%	70.3%
6. GTC	60%	83.9%	84.5%
7. SOO	60%	69.7%	66.7%

Source: Exhibit No. 5.

<sup>37</sup> See, *EP 711-2* at page 15.

As shown in Table 1, Column (3) and Column (4), each of the railroads had average OETA percentages for the Total Reporting Period above the 60 percent threshold based on the STB's summarized performance data. In addition, all seven (7) of the Table 1 railroads are above the OETA target of 60 percent, on average, for the full year reported.<sup>38</sup>

### **1. The OETA Target**

The STB should not set an OETA standard of 60 percent and allow railroads to fall back to their lower performance levels. Shippers continue to face problems and not receive shipments on time.<sup>39</sup>

The data presented by the railroads in *EP 770-1* clearly show that the proposed 60 percent target for the first year is too low and instead supports an initial target of 70 percent OETA. While two (2) of the reporting railroads, BNSF and SOO, show average OETA slightly below the 70 percent target for the last full-year reported, the underlying data shows that both railroads reported multiple weeks in which their average OETA was above 70 percent. There is no reason to excuse these railroads from meeting the 70 percent target on a consistent basis.

As performance across the industry improves, the target levels should be adjusted to reflect the new norms in the industry. Specifically, target levels should be set such that all carriers are expected to meet the average OETA success rate for all rail carriers across the industry or 70 percent, whichever is higher. The minimum 70 percent baseline threshold guards against any potential gaming to lower the average OETA average across the industry.

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<sup>38</sup> See, Exhibit No. 5, Column (5) for six-month performance targets and Column (6) for actual six-month performance. Column (6) actual performance is based on four-week average of weekly data reported in *EP 770-1* for the weeks 10/14/22, 10/21/22, 10/28/22, and 11/4/22.

<sup>39</sup> See, "TD Cowen: 3Q23 Surveys Say ...," *Railway Age*, October 16, 2023 available at <https://www.railwayage.com/freight/td-cowen-3q23-surveys-say/>. According to the survey, shippers stated that their average OETA is 54 percent. The article also states that while system-wide OETA levels were relatively robust, the OETA metrics submitted by the railroads have high variances indicating many individual shippers are not receiving levels of service close to the reported system-wide averages.

## **2. Target Periods**

The Board's approach for measuring the impact of missed OETA within a 24-hour period assumes that if a railroad provides a certain level of service within a 24-hour period, then the railroad is performing at an adequate level. This approach ignores the impact of non-delivered railcars on a customer's operations. For example, assume a shipper expects delivery of ten (10) railcars at its facility every week but the railroad consistently delivers only six (6) of the railcars within 24-hours of the OETA and does not deliver the remaining four (4) railcars until days or even weeks later. Under the Board's proposed methodology, the railroad would be considered to have provided adequate service because it successfully delivered 60 percent of the railcars within 24-hours of the OETA. This ignores the impact of the remaining 40 percent of the railcars that were not delivered.

To guard against this issue, the Board should use a graduated success percentage to ensure that the vast majority of railcars are delivered within a reasonable period. We recommend that, as a baseline, shippers receive 70 percent of their railcars within 24-hours of the OETA, 80 percent of their railcars within 48-hours of the OETA and 90 percent within 72-hours of the OETA. These percentages would only establish a baseline under which all railroad performance must not fall. As the industry performance improves, the targets would increase to the industry average delivery percentage for 24-hour OETA, 48-hour OETA and 72-hour OETA. This ensures a high-level of consistency and performance across the industry.

## **3. Data Requirements and Timing**

In addition to the 60 percent OETA standard proposed by the STB, the STB's proposal states that:

[T]he on-time success rate in the service reliability (OETA) standard would refer to the percentage of shipments delivered to the agreed-upon

destination within the applicable number of hours after the OETA. Upon request by the customer, to allow the customer to calculate readily whether the incumbent rail carrier met the service reliability standard, the incumbent carrier must give the customer, in a machine-readable format, the OETA for each shipment and a timestamp of when the shipment was delivered to the agreed-upon destination.<sup>40</sup>

Based on the above, shippers will not have access to the data necessary to determine whether the service reliability standard is being met. Shippers must request the data from the railroads after the shipper believes the on-time success rate is not being met. Shippers will then have to calculate themselves whether the service reliability standard was met. The Board must ensure the railroads provide this data in a timely manner.

**B. SERVICE CONSISTENCY:  
TRANSIT TIME**

The STB's proposed second performance standard is based on the transit time of shipments. The STB is attempting to measure the deterioration in the time it takes the incumbent railroad to deliver a shipment. The STB describes the transit time standard as follows:

[The transit time standard w]ould measure a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system...For a loaded car, the service consistency standard would be based on the average transit time for shipments over the relevant lane during a 12-week period, where the transit time is the time between the shipper's tender of the bill of lading and the rail carrier's delivery of the shipment at the agreed-upon destination...A rail carrier's compliance with the service consistency standard would be determined by comparing (A) the average transit time for shipment over a period of 12 consecutive weeks to (B) the average transit time for the same shipment over the same 12-week period during the previous year.<sup>41</sup>

In order for a violation of the transit time standard to occur, the STB proposes that the transit time would need to increase by either 20 or 25 percent (as determined by the final rule) over the same 12-week period during the previous year. The STB bases the 20 or 25 percent increase

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<sup>40</sup> See, *EP 711-2* at page 16.

<sup>41</sup> *Id.* at page 17.

“on its understanding of the rail network and available data.”<sup>42</sup> The only support for this STB position is shipper testimony in *EP 770-1*, which references a 15 percent increase in transit time and the troubles that has caused.<sup>43</sup>

### **1. Short-Term Transit Time Target**

We suggest that the STB adopt the 15 percent increase in transit time as the measure for requesting relief under this standard. As indicated in the *EP 770-1* hearing, a 15 percent increase in transit times causes significant issues to shippers. Setting the target at a level higher than 15 percent would cause significant harm to rail shippers.

### **2. Long-Term Transit Time Target**

The Board acknowledges that shippers indicated that a 15 percent increase in transit time has a significant impact on their operations. By looking at only short-term changes in transit time and not considering the longer-term impact from even small increases in transit times over time, the Board misses a significant danger to shippers. This is because the Board did not account for the impact that exponential growth can have on transit times.

Assume the STB sets its annual growth in transit time target at less than 25 percent and a shipper experiences a year-over-year increase in transit time of 20 percent from one week to 1.2 weeks. The Board would presume, under its 25 percent target level, that this is an acceptable level of transit time growth. If over the next year, transit times increased by another 20 percent, average transit times would now be at 1.44 weeks after two (2) years.<sup>44</sup> Given the exponential nature of the growth, it would take only four (4) years for the transit time to increase from one week to two

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<sup>42</sup> *Id.* at page 18.

<sup>43</sup> *See, EP 711-2* at page 18, footnote 26. The STB cites *EP 770* shipper testimony related to transit times. The STB identifies four (4) sources, among many, that testified at the April 26-27, 2022 hearing and that provided testimony regarding increases in railroad transit times.

<sup>44</sup>  $1.2 \text{ weeks times } (1.0 + 20 \text{ transit time growth rate}) = 1.44 \text{ weeks of transit time.}$

(2) weeks.<sup>45</sup> Even at a 15 percent annual growth rate, it would only take five (5) years before transit times more than double.<sup>46</sup>

To guard against the negative impact of exponential growth in transit times, the Board should also institute a long-term target of no more than a 25 percent increase in transit time over any three (3) year period. This equates to an average annual increase in transit times of approximately 7.7 percent per year, or about half of the 15 percent short-term transit time increase target.

**C. INADEQUATE LOCAL SERVICE:  
INDUSTRY SPOT AND PULL**

The third performance standard proposed by the STB is ISP, which “would measure a rail carrier’s success in performing local deliveries (“spots”) and pick-ups (“pulls”) of loaded railcars and unloaded private or shipper-leased railcars during the planned service window.”<sup>47</sup> The STB proposed an ISP standard of 80 percent and states that:

Under part 1145, a rail carrier would fail the ISP standard if the carrier had a success rate of less than 80%, over a period of 12 consecutive weeks, in performing local deliveries and pick-ups during the planned service window.<sup>48</sup>

As discussed above, ISP is a performance metric that is currently monitored by the STB in *EP 770-1*. Similar to OETA, the STB based the proposed 80 percent ISP standard on May 13, 2022 initial performance data submitted by BNSF, CSXT, NSR, and UP. Table 2 below compares the proposed 2022 ISP standard to the average ISP percentage for the Total Reporting Period and the last full year, reported from November 4, 2022 to October 27, 2023.

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<sup>45</sup> One week transit time x (1.0 + 20 percent transit time growth rate)<sup>4 years</sup> = 2.07 weeks transit time.

<sup>46</sup> One week transit time x (1.0 + 15 percent transit time growth rate)<sup>5 years</sup> = 2.01 weeks transit time.

<sup>47</sup> See, *EP 711-2* at page 19.

<sup>48</sup> *Id.*

Table 2  
**STB's ISP Performance Standard Data**

<b>Class I Railroad</b>	<b>STB Proposed Standard</b>	<b>Total Reporting Period</b>	<b>November 2022 through October 2023</b>
(1)	(2)	(3)	(4)
1. BNSF	80%	89.1%	90.0%
2. CSXT	80%	89.5%	93.4%
3. NSR	80%	74.1%	74.2%
4. UP	80%	91.3%	91.4%
5. KCS	80%	94.1%	93.4%
6. GTC	80%	90.5%	91.7%
7. SOO	80%	87.1%	86.9%

Source: Exhibit No. 6.

As shown in Table 2, Column (3) and Column (4), six (6) of the seven (7) railroads are well above the 80 percent threshold based on the STB's summarized ISP performance data. NSR is the only railroad that is not above the STB's proposed standard

**1. Railcar Spot and Pull**

The 80 percent ISP standard proposed by the STB is acceptable, but only within the first service window. An 80 percent target is reasonable when compared to the *EP 770-1* data, which show six (6) of the seven (7) reporting Class I railroads currently reporting success at these levels.

In addition, even at an 80 percent success rate, 20 percent of the railcars could not be placed and pulled and a railroad would still be deemed to be providing adequate service. To guard against this, we recommend that the ISP metric be adjusted so that 80 percent of the cars be spotted or pulled within the first service window and 100 percent within the first or second service window. In this way, 20 percent of the railcars are not left to languish in rail yards or rail sidings.

**2. Railroad No-Shows**

There is a significant difference between a railroad arriving to spot or pull only a portion of the railcars expected and a railroad that fails to provide any switching at all, or in other words,

a no-show. Shippers will generally face less severe consequences when railroads miss some railcars from a switch than missing the switch window completely.

The *EP 711-1* data show that most railroads are meeting their ISP standards approximately 90 percent of the time as discussed above. While the railroads did not provide information on the number of missed switch windows, we assume that missed switches occur less frequently than a missed railcar spot or pull. Based on this assumption, we recommend that the STB set a railroad no-show target based on meeting planned windows 90 percent of the time and not missing more than one consecutive spot or pull event. Where a railroad provides spot and pulls over separate visits to a facility, the consecutive switch opportunity must be for the same type of service, i.e., two (2) consecutive pull events or two (2) consecutive placement events.

### **3. Alternative Competitive Access**

The Board recognizes that the failure of a Class I railroad to provide adequate local service is fundamentally different than a failure to meet total train transit time and delivery expectations and would require different or additional remedies.<sup>49</sup> Specifically, the prescription of a reciprocal switch to gain access to an alternative railroad has only an indirect effect upon inadequate ISP service because the incumbent carrier will continue to provide ISP service for a reciprocal switch. We believe that, in the case of a railroad's failure to provide adequate ISP service to a shipper, the shipper should have the right to seek the prescription of terminal trackage rights for ISP and line haul services from an alternative carrier when operationally and economically feasible. Such a prescription would provide direct relief for the impacted shipper in addition to the incentive that reciprocal switching creates for the incumbent railroad to provide better ISP service.

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<sup>49</sup> See, *EP 711-2* at page 19, note 27.



## V. DATA REQUIREMENTS AND REPORTING

The Board's proposed new rules would require an incumbent railroad to provide to a requesting customer all the relevant individualized performance records necessary to bring an inadequate services case to the Board within seven (7) days of a written request. The specific information would include, but not be limited to, customer data that was assigned OETA and local service windows, along with corresponding time stamps indicating performance. The Board requested comments on what data fields and formats would be useful in developing the information to present a case to the Board.<sup>50</sup>

We discuss our understanding of the STB's request for information in data requirements and examples of proposed data submissions and service metric calculations below.

### A. DATA REQUIREMENTS AND FORMATS

The Board requested parties to comment on what data format and fields would be "useful." We assume that this means the information required by shippers to develop the OETA, transit time and ISP metrics necessary to seek a terminal reciprocal switch prescription from the Board.

At a fundamental level, the question of what format the data is provided is not as important as the content of the data and the information provided about the data. Even small, relatively unsophisticated companies can use standard workplace software programs such as Microsoft Excel to import and manipulate data from various sources.<sup>51</sup> However, even large sophisticated data users have great difficulty working with information if the content of the data is not uniform and information on what the data represents is not provided.

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<sup>50</sup> See, *EP 711-2* at page 3.

<sup>51</sup> See, for example, <https://www.customguide.com/excel/how-to-import-data-into-excel> and <https://support.microsoft.com/en-us/office/tutorial-import-data-into-excel-and-create-a-data-model-4b4e5ab4-60ee-465e-8195-09ebba060bf0>, which provide simple tutorials for importing or exporting data to Microsoft Excel.

Every data user must start with an understanding of what each piece of data means within the context of the data presented. In other words, a clear and precise data description or data dictionary must be provided when receiving service data from the railroads that accurately and simply defines the data contained within each field in a manner that a shipper can understand. For example, in a case before the STB, NSR provided a data field named “TRANS\_WB\_SN,” and provided a definition of the field as “Transportation WBSN. Created from WBSN. One waybill per car – e.g., a single unit train WB will be broken down into one Trans WBSN for each car in the train.”<sup>52</sup> While the description of the data field may have been clear to a NSR employee who works with the data on a daily basis, such a data field description provided to a shipper without intimate knowledge of NSR internal data systems would not be useful.

Additionally, any data provided by the railroads must be consistent, both within the provided data fields but also across the railroads. Shippers in past cases before the Board have noted that railroads will, in some cases, inconsistently report data contained in the same data field.<sup>53</sup> It is critical in supplying data to shippers under the proposed rules that the data in the provided data fields be consistent throughout each dataset. The data the Board ultimately decides to require railroads to provide under its new rules must also be consistent across railroads. The STB noted in its NPRM that the railroads reported trip plan compliance indicators by different names and measured performance in different ways.<sup>54</sup> Such differences in naming conventions

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<sup>52</sup> See, STB Docket No. NOR 42130, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*, Opening Evidence and Argument of Sunbelt Chlor Akali Partnership (Public Edition), August 1, 2012, Exhibit III-A-2, page 6 of 14.

<sup>53</sup> See, STB Docket No. NOR 42130, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*, Opening Evidence and Argument of Sunbelt Chlor Akali Partnership (Public Edition), August 1, 2012, Exhibit III-A-2, page 4 of 14.

<sup>54</sup> See, *EP 711-2* at page 14.

and performance measures would be unacceptable in attempting to show the Board an incumbent railroad's deficient service.

**B. HYPOTHETICAL EXAMPLES OF DATA USE**

The Board proposed three (3) standards intended to address different aspects of an incumbent railroad's inadequate service and provided somewhat broad interpretations of their measure. We developed the hypothetical examples below that show our recommended adjustments to the Board's standards and the data and calculations required to demonstrate that a railroad is not providing adequate service.

**1. Hypothetical Example of OETA Data Requirements and Application**

In order to calculate the OETA for a specific movement, a shipper needs to obtain specific data from the serving railroad related to the issue movement during, at least, a 12-week period.<sup>55</sup> As we interpret the Board's metric, the specific data for each shipment includes: (a) original estimated time of arrival; (b) the actual time of arrival; and (c) the number of cars. With this data, the shipper can calculate whether or not the 70 percent 24-hour, 80 percent 48-hour and 90 percent 72-hour thresholds have been violated.

Table 3 below is a hypothetical example of the calculation of the OETA standard using the minimum of 12 weeks of hypothetical shipment data.

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<sup>55</sup> *Id.* at page 39.

Table 3  
**Hypothetical Example of Calculation of  
Percentage of Cars Placed at Destination Within 24 hours of the OETA**

Week	Shipment	Original Estimated Time of Arrival 1/	Actual Time of Delivery 1/	Difference (Hours) 2/	Number of Cars 1/
(1)	(2)	(3)	(4)	(5)	(6)
1. Week 1	Shipment 1	1/23/23 4:51 PM	1/23/23 11:30 PM	6.65	10
2. <b>Week 1</b>	<b>Shipment 2</b>	<b>1/26/23 11:10 AM</b>	<b>1/25/23 7: 35 AM</b>	<b>27.58</b>	<b>8</b>
3. <b>Week 2</b>	<b>Shipment 3</b>	<b>1/31/23 12:05 AM</b>	<b>2/1/23 3:33 PM</b>	<b>39.47</b>	<b>10</b>
4. Week 3	Shipment 4	2/5/23 4:15 PM	2/6/23 2:15 PM	22.00	12
5. Week 3	Shipment 5	2/8/23 12:00 PM	2/9/23 1:05 AM	13.08	15
6. <b>Week 4</b>	<b>Shipment 6</b>	<b>2/14/23 3:30 PM</b>	<b>2/17/23 2:30 AM</b>	<b>59.00</b>	<b>12</b>
7. Week 5	Shipment 7	2/20/23 8:50 AM	2/20/23 10:30 PM	13.67	10
8. <b>Week 5</b>	<b>Shipment 8</b>	<b>2/22/23 10:00 AM</b>	<b>2/23/23 11:15 PM</b>	<b>37.25</b>	<b>10</b>
9. Week 6	Shipment 9	3/1/23 6:00 AM	3/1/23 6:30 PM	12.50	12
10. <b>Week 7</b>	<b>Shipment 10</b>	<b>3/7/23 7:30 AM</b>	<b>3/9/23 8:15 AM</b>	<b>48.75</b>	<b>15</b>
11. <b>Week 8</b>	<b>Shipment 11</b>	<b>3/17/23 5:15 AM</b>	<b>3/18/23 5:20 PM</b>	<b>36.08</b>	<b>11</b>
12. Week 9	Shipment 12	3/23/23 11:00 AM	3/24/23 6:00 AM	19.00	12
13. <b>Week 10</b>	<b>Shipment 13</b>	<b>3/28/23 12:30 PM</b>	<b>3/29/23 5:40 PM</b>	<b>29.17</b>	<b>11</b>
14. Week 11	Shipment 14	4/4/23 1:00 PM	4/5/23 1:20 AM	12.33	10
15. Week 12	Shipment 15	4/11/23 2:40 PM	4/12/23 12:10 PM	21.50	8
16. Total Cars 3/					166
17. Cars Arriving Within 24 Hours of OETA 4/					89
18. Percent of Cars Arriving Within 24 Hours of OETA 5/					54%
19. Cars Arriving Within 48 Hours of OETA 6/					139
20. Percent of Cars Arriving Within 48 Hours of OETA 7/					83%
21. Cars Arriving Within 72 Hours of OETA 8/					166
22. Percent of Cars Arriving Within 72 Hours of OETA 9/					100%

1/ Provided by serving railroad.

2/ Column (4) minus Column (3).

3/ Sum of Lines 1 through 15.

4/ Sum of Lines 1, 4, 5, 7, 9, 12, 14 and 15

5/ Line 17 ÷ Line 16.

6/ Sum of Lines 1,2, 3, 4, 5, 7,8, 9,11, 12, 13, 14 and 15

7/ Line 19 ÷ Line 16.

8/ Sum of Lines 1 to 15

9/ Line 21 ÷ Line 16.

Table 3 above demonstrates that over the 12-week period, the serving railroad had a 54 percent OETA (Line 18, Column (6)), which is below the 70 percent 24-hour threshold. The hypothetical example also shows that the serving railroad reached 83 percent OETA within 48 hours and 100 percent OETA within 72 hours (Line 20, Column (6)).

Table 4 below is a hypothetical example of the calculation of the railroad industry average of railcars placed at destination within 48-hours of the OETA. As we indicated above, as industry

performance increases, the baseline targets established by the Board, i.e., 70 percent of railcars within 24-hours, 80 percent of railcars within 48-hours and 90 percent of railcars within 72-hours of the OETA, would increase to the industry average delivery percentage.

Table 4  
**Hypothetical Example of Railroad Industry Average of Cars Placed at Destination Within 48 Hours of OETA**

<b><u>Week</u></b> (1)	<b><u>BNSF 1/</u></b> (2)	<b><u>CSXT 1/</u></b> (3)	<b><u>NSR 1/</u></b> (4)	<b><u>UP 1/</u></b> (5)	<b><u>KCS 1/</u></b> (6)	<b><u>GTC 1/</u></b> (7)	<b><u>SOO 1/</u></b> (8)	<b><u>Weekly Average 2/</u></b> (9)
1. Week 1	84.5%	95.8%	85.1%	82.1%	86.4%	85.1%	76.8%	85.1%
2. Week 2	85.6%	95.2%	84.9%	83.4%	86.1%	84.3%	77.8%	85.3%
3. Week 3	86.4%	94.2%	85.6%	84.0%	86.9%	83.3%	78.4%	85.5%
4. Week 4	85.1%	93.9%	85.5%	83.7%	86.9%	82.3%	78.1%	85.1%
5. Week 5	85.6%	94.7%	86.2%	83.5%	86.6%	82.1%	77.8%	85.2%
6. Week 6	85.1%	94.8%	85.9%	83.5%	86.6%	83.1%	78.3%	85.3%
7. Week 7	85.9%	94.6%	85.2%	83.1%	87.5%	82.9%	79.0%	85.5%
8. Week 8	85.9%	93.9%	86.1%	82.6%	88.5%	83.6%	79.1%	85.7%
9. Week 9	86.8%	92.9%	86.9%	83.0%	88.5%	84.5%	78.5%	85.9%
10. Week 10	84.5%	95.8%	85.1%	82.1%	86.4%	85.1%	76.8%	85.1%
11. Week 11	84.9%	95.7%	84.8%	82.9%	86.3%	84.3%	77.4%	85.2%
12. Week 12	85.6%	95.2%	84.9%	83.4%	86.1%	84.3%	77.8%	<u>85.3%</u>
13. Overall Average of All Railroads								85.4% 3/

1/ Weekly system percentage of cars placed within 48 hours of OETA.

2/ Simple average of Column (2) through Column (8).

3/ Simple average of Line 1 through Line 12.

As shown in Table 4 above, the industry average of cars placed at destination within 48 hours of the OETA for the 12-week period under review is 85.4 percent. Since this average is above the baseline average of 80 percent, a shipper that experiences an average delivery percentage of cars placed at destination within 48-hours of the OETA of less than 85.4 percent but higher than 80 percent would be eligible for a reciprocal switch prescription.

## **2. Hypothetical Example of Transit Time Application**

As discussed above, transit time would be based on the time between when the shipment departs the origin until the time the rail carrier delivers the shipment to the agreed-upon destination. Railroads would be required to provide the time each shipment departed the origin and time the

shipment arrives at destination during both the 12-week current period and the same 12-week period one, two (2) and three (3) years earlier.

Table 5 below is a hypothetical example of the calculation of the transit time standard using the minimum of 12 weeks of hypothetical shipment data.<sup>56</sup>

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<sup>56</sup> Due to space limitations, we only show the hypothetical example for the first-year calculations in Table 5. The comparison of prior year transit times would follow the same logic shown in Table 5.

Table 5  
**Hypothetical Example of Calculation of  
Average Transit Time for Current Period vs. Historical Period**

Week	Shipment	Time Departed Origin 1/	Time Arrived Destination 1/	Transit Time (Days) 2/	Number of Cars per Shipment 1/
(1)	(2)	(3)	(4)	(5)	(6)
<b>Current Year</b>					
1. Week 1	Shipment 1	1/13/23 10:51 PM	1/23/23 11:30 PM	10.03	3
2. Week 2	Shipment 2	1/17/23 8:15 AM	2/1/23 3:33 PM	15.30	10
3. Week 3	Shipment 3	1/22/23 3:10 PM	2/6/23 2:15 PM	14.96	1
4. Week 4	Shipment 4	2/1/23 6:00 AM	2/16/23 2:30 AM	14.85	6
5. Week 5	Shipment 5	2/4/23 6:30 AM	2/20/23 10:30 PM	16.67	5
6. Week 6	Shipment 6	2/15/23 11:00 AM	3/1/23 6:30 PM	14.31	12
7. Week 7	Shipment 7	2/20/23 5:15 AM	3/8/23 10:15 PM	16.71	4
8. Week 8	Shipment 8	3/5/23 7:15 AM	3/18/23 5:20 PM	13.42	11
9. Week 9	Shipment 9	3/12/23 10:00 AM	3/24/23 6:00 AM	11.83	9
10. Week 10	Shipment 10	3/15/23 1:30 PM	3/29/23 5:40 PM	14.17	1
11. Week 11	Shipment 11	3/23/23 10:00 PM	4/5/23 1:20 AM	12.14	10
12. Week 12	Shipment 12	4/1/23 5:00 AM	4/12/23 12:10 PM	<u>11.30</u>	<u>8</u>
13. Average Transit Time-12 Week Current Period 3/				13.24	xxx
<b>Prior Year</b>					
14. Week 1	Shipment 1	1/10/22 8:40 PM	1/19/22 10:15 PM	9.07	1
15. Week 2	Shipment 2	1/19/22 6:15 AM	1/28/22 11:30 AM	9.22	2
16. Week 3	Shipment 3	1/25/22 7:05 PM	2/3/22 4:15 PM	8.88	5
17. Week 4	Shipment 4	2/3/22 7:20 AM	2/12/22 9:30 AM	9.09	11
18. Week 5	Shipment 5	2/8/22 10:30 AM	2/17/22 9:10 AM	8.94	6
19. Week 6	Shipment 6	2/18/22 11:40 AM	3/1/22 11:30 AM	10.99	1
20. Week 7	Shipment 7	2/21/22 9:15 AM	3/2/22 7:15 PM	9.42	8
21. Week 8	Shipment 8	3/3/22 5:15 AM	3/13/22 5:25 AM	10.01	4
22. Week 9	Shipment 9	3/9/22 12:00 PM	3/20/22 6:45 AM	10.78	9
23. Week 10	Shipment 10	3/15/22 4:30 PM	3/25/22 6:40 PM	10.09	2
24. Week 11	Shipment 11	3/25/22 2:00 PM	4/5/22 1:00 PM	10.96	7
25. Week 12	Shipment 12	3/30/22 7:00 AM	4/9/22 9:10 AM	<u>10.09</u>	<u>3</u>
26. Average Transit Time-12 Week Period Prior Year 3/				9.76	xxx
27. Percent Change in Transit Time 4/				35.6%	xxx

1/ Provided by serving railroad.  
2/ Column (4) minus Column (3).  
3/ Week 1 through Week 12 Column (5) weighted on Column (6).  
4/ ((Line 13 ÷ Line 26) – 1) x 100.

Table 5 above demonstrates that over the 12-week period, the serving railroad had a 35.6 percent increase in transit time when compared to the same 12-week period from the prior year. An increase of 35.6 percent is above the 20 or 25 percent threshold recommended by the STB.<sup>57</sup>

<sup>57</sup> As noted above, we suggest that this threshold should be 15 percent.

For the “three-year standard” that we identified above, the third year before the current year would be substituted for the prior year in Table 5.

### **3. Hypothetical Example of ISP Application**

To calculate the ISP for a specific movement, a shipper needs to obtain specific data from the serving railroad related to the issue movement during, at least, a 12-week period.<sup>58</sup> The specific data for each shipment includes: (a) relevant serving crew’s scheduled on-duty time; (b) whether the service was performed on the scheduled day, on the day after the scheduled day or not at all; and (c) if performed on the scheduled day, time stamps indicating the time the local service was performed

Table 6 below is a hypothetical example of the calculation of the ISP for the railcar delivery standard using the minimum of 12 weeks of hypothetical shipment data.

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<sup>58</sup> See, *EP-711-2* at page 40.



Table 6  
**Hypothetical Example of Calculation of Railcar Industry Spot and Pull Percent (ISP Standard)**

<u>Week</u> (1)	<u>Shipment 1/</u> (2)	<u>Local Delivery ("Spot")</u>			<u>Local Pick-Up ("Pull")</u>			<u>Total 1<sup>st</sup> Service Window</u> (9)	<u>Total 2<sup>nd</sup> Service Window</u> (10)
		<u>Local Service Requested</u> (3)	<u>Performed within 1st Service Window 2/</u> (4)	<u>Performed within 2nd Service Window 2/</u> (5)	<u>Local Service Requested</u> (6)	<u>Performed within 1st Service Window 2/</u> (7)	<u>Performed within 2nd Service Window 2/</u> (8)		
1. Week 1	Shipment 1	1/11/2023	Y	Y	1/25/2023	N	Y	xxx	xxx
2. Week 1	Shipment 2	1/12/2023	N	Y	1/29/2023	Y	Y	xxx	xxx
3. Week 2	Shipment 3	1/15/2023	N	N	1/30/2023	Y	Y	xxx	xxx
4. Week 3	Shipment 4	1/20/2023	Y	Y	2/4/2023	Y	Y	xxx	xxx
5. Week 3	Shipment 5	1/25/2023	Y	Y	2/7/2023	N	Y	xxx	xxx
6. Week 4	Shipment 6	1/30/2023	N	Y	2/14/2023	Y	Y	xxx	xxx
7. Week 5	Shipment 7	2/2/2023	Y	Y	2/18/2023	Y	Y	xxx	xxx
8. Week 5	Shipment 8	2/9/2023	N	N	2/21/2023	Y	Y	xxx	xxx
9. Week 6	Shipment 9	2/13/2023	Y	Y	2/27/2023	Y	Y	xxx	xxx
10. Week 7	Shipment 10	2/18/2023	Y	Y	3/6/2023	N	Y	xxx	xxx
11. Week 8	Shipment 11	3/3/2023	Y	Y	3/16/2023	Y	Y	xxx	xxx
12. Week 9	Shipment 12	3/10/2023	Y	Y	3/22/2023	Y	Y	xxx	xxx
13. Week 10	Shipment 13	3/13/2023	Y	Y	3/27/2023	Y	Y	xxx	xxx
14. Week 11	Shipment 14	3/21/2023	N	N	4/3/2023	Y	Y	xxx	xxx
15. Week 12	Shipment 15	3/30/2023	Y	Y	4/10/2023	N	Y	xxx	xxx
16.	No. of times Local Service Requested 3/		15	15		15	15	30 5/	30 6/
17.	Times Service Performed w/in Window 4/		10	12		11	15	21 5/	27 6/
18.	Spot and Pull Percent 7/							70 %	90 %

1/ For this hypothetical example, each "shipment" contains one railcar.

2/ STB proposes a service window of 12 hours (the maximum duration a crew is allowed to work).

3/ Count of Lines 1 through 15.

4/ Count of "Y" in Lines 1 through 15.

5/ This line, Column (4) + Column (7).

6/ This line, Column (5) + Column (8).

6/ Line 17 ÷ Line 16.

Table 6 above demonstrates that over the 12-week period, the serving railroad had a 70 percent ISP for railcars for the first service window and a 90 percent ISP for the second service window (Line 18, Column (9) and Column (10), respectively).

Table 7 below is a hypothetical example of the calculation of the ISP for the no-show standard using the minimum 12 weeks of hypothetical shipments.

Table 7  
**Hypothetical Example of Calculation of Railcar Industry Spot and Pull No-Show Percent (ISP Standard)**

<u>Week</u> (1)	<u>Shipment Group</u> (2)	<u>Local Delivery ("Spot")</u>			<u>Local Pick-Up ("Pull")</u>			<u>Total 1<sup>st</sup> Service Window</u> (9)	<u>Total 2<sup>nd</sup> Service Window</u> (10)	
		<u>Local Service Requested</u> (3)	<u>Railroad No-Show 1st Service Window 1/</u> (4)	<u>Railroad No-Show 2nd Service Window 1/</u> (5)	<u>Local Service Requested</u> (6)	<u>Railroad No-Show 1st Service Window 1/</u> (7)	<u>Railroad No-Show 2nd Service Window 1/</u> (8)			
1.	Week 1	Shipment 1	1/11/2023	N	N	1/25/2023	N	N	xxx	xxx
2.	Week 1	Shipment 2	1/12/2023	N	N	1/29/2023	N	N	xxx	xxx
3.	Week 2	Shipment 3	1/15/2023	Y	N	1/30/2023	Y	N	xxx	xxx
4.	Week 3	Shipment 4	1/20/2023	N	N	2/4/2023	N	N	xxx	xxx
5.	Week 3	Shipment 5	1/25/2023	N	N	2/7/2023	N	N	xxx	xxx
6.	Week 4	Shipment 6	1/30/2023	N	N	2/14/2023	N	N	xxx	xxx
7.	Week 5	Shipment 7	2/2/2023	N	N	2/18/2023	N	N	xxx	xxx
8.	Week 5	Shipment 8	2/9/2023	N	N	2/21/2023	N	N	xxx	xxx
9.	Week 6	Shipment 9	2/13/2023	N	N	2/27/2023	N	N	xxx	xxx
10.	Week 7	Shipment 10	2/18/2023	N	N	3/6/2023	N	N	xxx	xxx
11.	Week 8	Shipment 11	3/3/2023	N	N	3/16/2023	N	N	xxx	xxx
12.	Week 9	Shipment 12	3/10/2023	N	N	3/22/2023	N	N	xxx	xxx
13.	Week 10	Shipment 13	3/13/2023	N	N	3/27/2023	N	N	xxx	xxx
14.	Week 11	Shipment 14	3/21/2023	Y	Y	4/3/2023	Y	N	xxx	xxx
15.	Week 12	Shipment 15	3/30/2023	N	N	4/10/2023	N	N	xxx	xxx
16.	No. of times Local Service Requested 2/			15	15		15	15	30 4/	30 5/
17.	Number of No-Shows 3/			2	1		2	0	4 4/	1 5/
18.	No-Show Percent 6/								13 %	3 %

1/ Was the railroad a now-show during its service window?  
2/ Count of Lines 1 through 15.  
3/ Count of "Y" in Lines 1 through 15.  
4/ This line, Column (4) + Column (7).  
5/ This line, Column (5) + Column (8).  
6/ Line 17 ÷ Line 16.

Table 7 above demonstrates that the incumbent railroad had a 13 percent no-show rate for its ISP planned service windows and a three (3) percent no-show rate for the second service window (Line 18, Column (9) and Column (10), respectively).

**VERIFICATIONS**

I, Thomas D. Crowley, verify under penalty of perjury that I have read this Verified Statement on behalf of the American Chemistry Council, the Fertilizer Institute and the National Industrial Transportation League, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Thomas D. Crowley

Executed on 11/7/23

\* \* \*

I, Daniel L. Fapp, verify under penalty of perjury that I have read this Verified Statement on behalf of the American Chemistry Council, the Fertilizer Institute and the National Industrial Transportation League, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Daniel L. Fapp

Executed on 11/7/2023

**LIST OF EXHIBITS**

<b><u>EXHIBIT NO.</u></b>	<b><u>EXHIBIT TITLE</u></b>
1	Thomas D. Crowley Statement of Qualifications
2	Daniel L. Fapp Statement of Qualifications
3	Railroad Estimated Market Value, Gross Investment Value and Net Investment Value – 2022
4	Pre-Tax Required Return On Investment Per Car-Mile - 2022
5	OETA Performance Analysis
6	ISP Performance Analysis

**THOMAS D. CROWLEY**  
**STATEMENT OF QUALIFICATIONS**

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737, and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and a Life Member of the American Railway Engineering and Maintenance-of-Way Association ("AREMA").

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive economic consulting practice since 1971 and my participation in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers and the traffic they move over the major rail routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, cost of capital, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of traffic by rail.

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for

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state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with single car and multiple car movements, unit train operations for coal, grain, oil and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of numerous commodities handled by rail.

I have frequently been called upon to develop and coordinate economic and operational studies relative to the rail transportation of various commodities. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

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I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Railroad Administration, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also

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presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Chemistry Council, American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, the Chlorine Institute, Coal Exporters Association, Edison Electric Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence



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supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company.*

**DANIEL L. FAPP**  
**STATEMENT OF QUALIFICATIONS**

My name is Daniel L. Fapp. I am a Senior Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, VA 22314; 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737; and 7 Horicon Avenue, Glens Falls, New York 12801.

I received a Bachelor of Science degree in Business Administration with an option in Marketing (cum laude) from the California State University, Northridge in 1987, and a Master of Business Administration degree from the University of Arizona's Eller College of Management in 1993, specializing in finance and operations management. I am also a member of Beta Gamma Sigma, the national honor society for collegiate schools of business.

I have been employed by L. E. Peabody & Associates, Inc. since December 1997. Prior to joining L. E. Peabody & Associates, Inc., I was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, and where I also served as an officer and treasurer of the three BHP Copper Inc. subsidiary common carrier railroads, The San Manuel Arizona Railroad, the Magma Arizona Railroad (also known as the BHP Arizona Railroad) and the BHP Nevada Railroad. I have also held operations management positions with Arizona Lithographers in Tucson, AZ and MCA-Universal Studios in Universal City, CA.

While at BHP Copper Inc., I was responsible for all financial and administrative functions of the company's transportation group. I also directed the BHP Copper Inc. subsidiary common carrier railroads' cost and revenue accounting staff. This included preparation of the subsidiary railroads' budgets and financial statements, reconciliation of revenues issued to and received from other railroads through junction settlement and interline settlement, and oversight of the electronic systems used to communicate and share documents with other railroads. I also

**DANIEL L. FAPP**  
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managed the San Manuel Arizona Railroad's and BHP Arizona Railroad's dispatchers and the railroad dispatching functions. I served on the company's Commercial and Transportation Management Team and the company's Railroad Acquisition Team where I was responsible for evaluating the acquisition of new railroads, including developing financial and economic assessment models.

I have directed and managed sourcing and core carrier engagements as both a consultant and as an industry practitioner. These engagements have involved the selection of primary and secondary rail, truckload, less-than-truck load, air express and parcel carriers. I have participated in and managed consortium sourcing projects in the small package express and fleet management fields. I have served on the management team overseeing the implementation of a core carrier program and have been involved in and directed negotiations with regional and national truckload carriers.

In my tenure at L. E. Peabody & Associates, Inc., I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, volume commitments, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

As part of my work for L. E. Peabody & Associates, Inc., I have performed and directed numerous projects and analyses undertaken on behalf of utility companies, short line railroads, bulk shippers, and industry and trade associations. Examples of studies which I have participated in organizing and directing include, traffic, operational and cost analyses in connection with the rail movement of coal, metallic ores, pulp and paper products, and other

**DANIEL L. FAPP**  
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commodities. I have also analyzed multiple car movements, unit train operations, divisions of through rail rates and switching operations throughout the United States. The nature of these studies enabled me to become familiar with the operating procedures utilized by railroads in the normal course of business.

Since 1997, I have participated in the development of cost of service analyses for the movement of bulk and non-bulk commodities over all the major U.S. Railroads. I have conducted on-site studies of switching, detention and line-haul activities relating to the handling of coal and chemicals. I have also participated in and managed projects assisting short-line railroads. In these engagements, I assisted short-line railroads in their negotiations with connecting Class I carriers, helped short-line railroads with revenue and cost accounting issues, performed railroad property and business evaluations, and worked on rail line abandonment projects.

I have developed numerous variable cost calculations utilizing the various formulas used by the Surface Transportation Board (“STB”) for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System (“URCS”). I have submitted testimony on the behalf of shippers before the STB which developed stand-alone costs, traffic forecasts, revenue and contract forecasts, and fuel surcharge forecasts.

I have been frequently called upon to perform financial analyses and assessments of railroad and other transportation companies. I have determined the Going Concern Value of privately held freight and passenger railroads, including developing company specific costs of debt and equity for use in discounting future company cash flows. My consulting assignments

**DANIEL L. FAPP**  
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regularly involve working with and determining various facets of financial issues, including cost of capital determinations and railroad accounting issues. In these assignments, I have calculated capital structures, market values, cost of debt, cost of preferred equity and common equity. I am also well acquainted with and have used financial industry accepted models for determining a firm's cost of equity, including Discounted Cash Flow Model ("DCF") models, Capital Asset Pricing Model ("CAPM"), Cost Build-Up models and Arbitrage Pricing Models.

I have also lectured in graduate level finance and economics classes discussing corporate capital theory and costs of equity determination and am a member of the Professional Advisory Council for the Eller School of Management Finance Department at the University of Arizona.

I have developed different economic analyses regarding transportation matters for numerous electric utility companies located in all parts of the United States, and for major associations, including the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies major industries companies in solving various transportation-related problems.

In my tenure with L. E. Peabody & Associates, Inc., I have presented evidence in numerous proceedings before the STB and have presented evidence and expert reports before state and Federal courts and in private arbitrations. In conjunction with other L. E. Peabody & Associates, Inc. officers, I have worked on and directed expert reports in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, operating procedures and other economic components of specific contracts.

**Railroad Estimated Market Value , Gross Investment Value and Net Investment Value - 2022**

<b>Item</b>	<b>Source</b>	<b>BNSF</b>	<b>CSXT</b>	<b>Canadian National</b>	<b>Canadian Pacific</b>	<b>Kansas City Southern</b>	<b>Norfolk Southern</b>	<b>Union Pacific</b>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
<b><u>HOLDING COMPANY - Estimated Market Value</u></b>								
1. Equity Market Cap (000)	CompStat	1/	\$65,114,400	\$80,588,800	\$69,376,200	2/	\$57,049,700	\$127,511,400
2. Long-Term Debt (000)	Form 10-K/Annual Reports	<u>21,543,000</u>	<u>16,135,000</u>	<u>10,430,131</u>	<u>13,073,631</u>	<u>3,303,800</u>	<u>13,846,000</u>	<u>28,100,000</u>
3. Estimated Fair Market Value (000)	Line 1 + Line 2	1/	\$81,249,400	\$91,018,931	\$82,449,831	2/	\$70,895,700	\$155,611,400
<b><u>RAILROAD COMPANY - Gross Investment</u></b>								
4. Gross Road Property (000)	Schedule 200, Line 23	\$66,370,352	\$34,649,707	\$15,146,580	\$5,037,856	\$5,765,046	\$33,214,551	\$63,677,141
5. Gross Equipment Property (000)	Schedule 200, Line 24	<u>15,937,396</u>	<u>8,000,832</u>	<u>4,200,467</u>	<u>1,259,962</u>	<u>2,124,852</u>	<u>10,649,587</u>	<u>14,209,524</u>
6. Total Gross Road and Equipment (000)	Line 4 + Line 5	\$82,307,748	\$42,650,539	\$19,347,047	\$6,297,818	\$7,889,898	\$43,864,138	\$77,886,665
7. Ratio of Market Value to Gross Investment	Line 3 ÷ Line 6	1/	1.9	4.7	13.1	2/	1.6	2.0

1/ BNSF is a wholly owned subsidiary of Berkshire-Hathaway, Inc., and the market value of its common equity cannot be calculated based on the current market price of its common equity.

2/ At the end of 2022, KCS's common equity was held in trust pursuant to its merger with the Canadian Pacific, and the market value of its common equity cannot be calculated based on the current market price of its common equity.

**Pre-Tax Required Return On Investment Per Car-Mile - 2022**

<b>Item</b>	<b>Source</b>	<b>BNSF</b>	<b>CSX</b>	<b>Canadian National</b>	<b>Canadian Pacific</b>	<b>Kansas City Southern</b>	<b>Norfolk Southern</b>	<b>Union Pacific</b>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1. Gross Road Property (000)	Schedule 200, Line 23	\$66,370,352	34,649,707	\$15,146,580	\$5,037,856	\$5,765,046	\$33,214,551	\$63,677,141
2. Gross Equipment Property (000)	Schedule 200, Line 24	<u>15,937,396</u>	<u>8,000,832</u>	<u>4,200,467</u>	<u>1,259,962</u>	<u>2,124,852</u>	<u>10,649,587</u>	<u>14,209,524</u>
3. Total Gross Road and Equipment (000)	Line 4 + Line 5	\$82,307,748	\$42,650,539	\$19,347,047	\$6,297,818	\$7,889,898	\$43,864,138	\$77,886,665
4. 2022 Pre-Tax Cost of Capital	Ex Parte No. 558 (Sub-No. 19)	13.2%	13.2%	13.2%	13.2%	13.2%	13.2%	13.2%
5. Required Return On Investment (000)	Line 3 x Line 4	10,856,392	5,625,606	2,551,875	830,682	1,040,678	5,785,680	10,273,251
6. Loaded Car-Miles (000)	Schedule 755, L. 30 + L. 64	6,024,252	2,355,154	836,801	415,863	413,599	2,208,770	5,603,417
7. ROI Per Loaded Car-Mile	Line 3 ÷ Line 4	\$1.80	\$2.39	\$3.05	\$2.00	\$2.52	\$2.62	\$1.83

**OETA Performance Analysis**

Class I Railroad	STB Proposed Standard 1/	4 Week Average 2019 2/	Initial Performance (5/13/22) 4/	Initial 6-Month Performance		1-Year Performance		Total Reporting Period 7/	November 2022 through October 2023 8/
				Target 4/	Actual 5/	Target 4/	Actual 6/		
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1. BNSF	60.0%	66.125%	54.1%	63.0%	63.8%	65.0%	57.8%	62.9%	64.1%
2. CSXT	60.0%	3/	69.0%	80.0%	86.5%	82.0%	93.8%	85.6%	91.7%
3. NSR	60.0%	3/	48.0%	61.0%	73.2%	82.0%	54.1%	68.4%	70.9%
4. UP	60.0%	80.75%	63.0%	70.0%	70.3%	70.0%	71.8%	70.4%	71.6%
5. CN-GTC	60.0%	xxx	75.0%	xxx	83.8%	xxx	83.0%	83.9%	84.5%
6. KCS	60.0%	xxx	68.7%	xxx	75.7%	xxx	77.0%	72.0%	70.3%
7. CP-SOO	60.0%	xxx	75.0%	xxx	74.0%	xxx	71.5%	69.7%	66.7%

1/ Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service* , served September 7, 2023, page 15.

2/ Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* , served October 28, 2022.

3/ Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* , served October 28, 2022, footnote 42. In regards to the 2019 four week average, "CSXT, NSR, and UP did not provide certain historical data to the Board that was not retained in the normal course of business."

4/ Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service* , served September 7, 2023, page 15 (Table 1). CN-GTC, KCS, and CP-SOO 5/13/22 initial performance calculated using EP 770 (Sub-No. 1) data.

5/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* . Four-week average based on weekly data reported for 10/14/22, 10/21/22, 10/28/22, and 11/4/22.

6/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* . Four-week average based on weekly data reported for 4/14/23, 4/21/23, 4/28/23, and 5/5/23.

7/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* . Total Reporting Period average based on weekly data reported for 5/13/22 through 10/27/23.

8/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting* . November 2022 through October 2023 average based on weekly data reported for 11/4/22 through 10/27/23.



**ISP Performance Analysis**

Class I Railroad	STB Proposed Standard 1/	4 Week Average 2019 2/	Initial Performance (5/13/22) 3/	Initial 6-Month Performance		1-Year Performance		Total Reporting Period 7/	November 2022 through October 2023 8/
				Target 4/	Actual 5/	Target 4/	Actual 6/		
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1. BNSF	80.0%	89.4%	88.2%	90.0%	88.6%	91.0%	90.7%	89.1%	90.0%
2. CSXT	80.0%	90.4%	83.0%	85.0%	85.8%	87.0%	96.0%	89.5%	93.4%
3. NSR	80.0%	84.7%	74.1%	75.0%	73.3%	78.0%	74.1%	74.1%	74.2%
4. UP	80.0%	92.8%	91.0%	90.0%	90.8%	91.0%	92.5%	91.3%	91.4%
5. CN-GTC	80.0%	xxx	84.0%	xxx	89.8%	xxx	88.0%	90.5%	91.7%
6. KCS	80.0%	xxx	95.1%	xxx	95.0%	xxx	92.5%	94.1%	93.4%
7. CP-SOO	80.0%	xxx	89.4%	xxx	88.3%	xxx	88.3%	87.1%	86.9%

1/ Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*, served September 7, 2023, page 19.

2/ Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*, served October 28, 2022.

3/ Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*, served September 7, 2023, page 20 (Table 2). CN-GTC, KCS, and CP-SOO 5/13/22 initial performance calculated using EP 770 (Sub-No. 1) data.

4/ Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*, December 2, 2022 interim update filings for each railroad.

5/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*. Four-week average based on weekly data reported for 10/14/22, 10/21/22, 10/28/22, and 11/4/22.

6/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*. Four-week average based on weekly data reported for 4/14/23, 4/21/23, 4/28/23, and 5/5/23.

7/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*. Total Reporting Period average based on weekly data reported for 5/13/22 through 10/27/23.

8/ Calculated using data reported in Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service-Railroad Reporting*. November 2022 through October 2023 average based on weekly data reported for 11/4/22 through 10/27/23.

# **Exhibit 2**

## Proposed Changes to Regulatory Text

### § 1145.1 Definitions.

The following definitions apply to part 1145:

*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 shipments at interchange locations, a shipment is deemed to be delivered when the receiving carrier acknowledges receipt of a shipment. 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 a joint-line movement, the interchange where the shipment is transferred to the interline 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 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, [point of origin or](#) 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 an interline 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. For spot-on-arrival railcars, a request for local service will be deemed to have been made when the railcar arrives at a local yard from which the carrier provides local service to the facility.

*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 part 1145, a service window is ~~12 hours~~ ~~for~~ the time specified according to the carrier's established protocol, not to exceed 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~~ between the terminal area in which transfers occur under the prescribed reciprocal switching agreement: and the terminal area of the point of origin or designated destination. If the point of origin or designated destination is not within a terminal area, similar traffic may include traffic to/from the same local serving yard, or in the absence of such traffic, from terminals or other locations within a reasonable distance of the point of origin or designated destination.

*Spot-on-arrival railcar* means a railcar that the incumbent rail carrier delivers at the designated designation when space is available, without the customer having to request delivery.

*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 is not suitable for a prescribed switching arrangement if the point is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent rail carrier's terminal-area operation.

*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 an interline 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 1145.

(a) *Service reliability* for manifest traffic (original estimated time of arrival). ~~The~~This service reliability standard applies to shipments that travel as manifest traffic. ~~The~~This service reliability standard measures a rail carrier's success in delivering a shipment from its original or interchange location to the designated destination by within time bands of plus or minus 24, 48, and 72 hours of 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 designated destination over a period of 12 consecutive weeks. A rail carrier meets the service reliability standard when  $A/B$  ratio ~~is greater than~~ {60}% for each time band, where  $A$  is the number of shipments that are delivered within ~~24 hours of the original estimated time of arrival band~~ and  $B$  is the total number of shipments. ~~[This ratio will increase to 70% one year after the effective date of this rule.]~~ is greater than the higher of the average of each Class I carrier's weekly percentage of systemwide manifest shipments delivered within the time band, as reported under 49 C.F.R. § 1145.8(b), or:

(1) For the 24-hour time band, 70%.

(2) For the 48-hour time band, 80%.

(3) For the 72-hour time band, 90%.

~~(b)~~(c) *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 meets the service consistency standard when both:

(1) A is no more than ~~20~~ ~~25~~ 15% 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.: and

(2) A is no 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 three years prior.

(c) *Lanes.*

(1) Except as provided in paragraph (c)(2) of this section, compliance with the performance standards in § 1145.2(a) and (b) 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.

(2) The Board shall prescribe a reciprocal switching agreement that governs shipments to or from multiple lanes to or from the petitioner's facility if all the conditions in paragraph (c)(2) are met.

(i) Each of the included lanes had practical physical access to only one Class I carrier that could serve that lane.

(ii) The incumbent rail carrier's average success rate for those lanes fails to meet a performance standard.

(iii) The Board determines that the prescribed agreement would be practical and efficient only when the agreement governed shipments to or from all of those lanes.

(iv) The petition meets other conditions to a prescription under this part 1145.

(3) For purposes of paragraph (c)(2) of this section, the petitioner may choose which lanes of traffic to or from its facility to include in demonstrating the incumbent rail carrier's average success rate, including lanes of different commodities and/or lanes with different points of origin or designated destination.

(d) *Empty railcars.*

(1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in § 1145.2(b) 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]~~~~[25]~~either:

(i) 15% 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

(ii) 25% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period three years prior.

(2) A rail carrier's failure to meet a performance standard as provided in paragraph (d) of this section 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.*

(1) Railcar standard. The ~~industry railcar~~ spot and pull standard measures a rail carrier's success in performing local placements ("spots") and pick-ups ("pulls") of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window.

~~(1)~~ (1i) A rail carrier meets the ~~industry railcar~~ spot and pull standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 80% or more in performing requested spots and pulls within the planned service window, as determined based on the total number of railcars with planned service windows during that 12-week period, and does not fail to perform a spot or pull during both the planned service window and the next scheduled service window for that type of service (i.e., spot, pull, or both). 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. Failure to spot constructively placed cars that have been ordered in by the cut-off time for a planned service window results in a missed service window.

~~(2)~~ (2i) If a rail carrier reduces the frequency of its local service to a shipper's or receiver's facility, and if that reduction is not based on a commensurate reduction in customer demand, then the ~~industry railcar~~ spot and pull standard increases to a success rate of 90% for ~~one year~~two years.

(2) No-show standard. The spot and pull no-show standard measures a rail carrier's success in performing any spots and pulls of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window.

(i) A rail carrier meets the spot and pull no-show standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 90% or more in performing any 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, provided that the carrier does not fail to perform any requested spots and pulls for two consecutive service windows in which it provides the same service (i.e., spot, pull, or both). If a rail carrier cancels a service window other than at the shipper's or receiver's request, arrives at a facility during the planned service window to perform spots and pulls but does not perform any of the requested spots or pulls for the service window due to reasons beyond the shipper's or receiver's control, or does not perform any of the spots or pulls for a planned service window until after the end of the service window due to reasons beyond the shipper's or receiver's control, that window is included as a failure in calculating compliance with the spot and pull no-show standard. If a rail carrier performs any requested spot and pull within the planned service window, the service window is included as a success in calculating compliance with the spot and pull no-show standard.

(ii) If a rail carrier reduces the frequency of its local service to a shipper's or receiver's facility, and if that reduction is not based on a commensurate reduction in customer demand, then the spot and pull no-show standard increases to a success rate of 100% for two years.

### **§ 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 is 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 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.

#### **§ 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 petitioner 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 to meet over the requisite period of time, and provide evidence supporting its claim.

(2) Switching publications of the incumbent rail carrier and the potential alternate carrier.

(3) A motion for a protective order that would govern the disclosure of data that the rail carrier provided to the petitioner under this part 1145.

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

(d) A reply to a petition is due within 20 days of a completed 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 part 1145 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: 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; or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper 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~~interchange traffic 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.

(c) In prescribing a reciprocal switching agreement, the Board shall prescribe a term of service of ~~two~~five years, provided that the Board may prescribe a longer term of service of up to ~~four~~ten 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. Within 30 days after the Board serves its decision prescribing a reciprocal switching agreement, the shipper shall inform the Board of the date on which the prescription period shall become effective, provided that such date can be no later than one (1) year after the shipper filed its petition. If the shipper fails to inform the Board within 30 days, the prescription shall become effective immediately thereafter.

(d) Upon the Board's prescription of a reciprocal switching agreement under this part 1145, the affected rail carriers must: set the terms of the agreement and offer service thereunder ~~within 30 days of service of the prescription~~by the effective date established pursuant to § 1145.6(c); include, in the appropriate disclosure under 49 C.F.R. part 1300, the location of the petitioner's facility, indicating that the location is open to reciprocal switching, and the applicable terms and price; and notify the Board within 10 days of when the carriers offered service that the agreement has taken effect.

(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.

(f) If the Board prescribes a reciprocal switch pursuant to this Part 1145 for the same traffic based upon the incumbent carrier's service failures occurring within one (1) year

after a previous prescription was terminated pursuant to § 1145.7, the prescription shall be permanent.

(g) When the Board prescribes a reciprocal switch pursuant to this Part 1145, the incumbent carrier may not reduce its local service to the shipper's facility below levels that existed prior to the petition unless there is a material reduction in the shipper's traffic volume that has a material adverse effect upon the incumbent carrier's operations. The incumbent carrier shall bear the burden to prove materiality. If the incumbent carrier reduces local service without Board authorization, the prescription shall become permanent.

### **§ 1145.7 Termination.**

(a) A prescription hereunder automatically renews at the end of the term established under § 1145.6(c), unless the Board grants a petition by the incumbent rail carrier to terminate the prescription. Automatic renewal is for the same term as the original term of the prescription.

(b) The Board will grant a petition to terminate a prescription if the incumbent rail carrier demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate,:

(1) the incumbent rail carrier's service for ~~similar traffic~~ Similar Traffic on average met the performance ~~standard that provided the basis for the prescription. This requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area.~~ standards for service reliability and service consistency in §§ 1145.2(a) and (b), unless the shipper has continued to use the incumbent's line-haul transportation service for the Lanes to which the prescriptions apply during the 24-week period, in which case only those Lanes shall be considered; and

(2) the incumbent rail carrier's service on average met the performance standards for Industry spot and pull in § 1145.2(e).

(c) The incumbent rail carrier may submit a petition to terminate a prescription not more than ~~180~~210 days and not less than ~~120~~150 days before the end of the current term of the prescription. In the event the incumbent carrier does not file a petition for termination no more than ~~180~~210 days, but no less than ~~120~~150 days, before the end of the prescription period or files such a petition and fails to sustain its burden of proof, the reciprocal switching prescription would automatically renew for the same period as the initial prescription.

(d) A reply to a petition to terminate is due within 15 days of the petition. If the incumbent rail carrier fails to provide complete data in accordance with § 1145.8(b), the reply is due within 15 days after the carrier provides complete data.

(e) A rebuttal may be filed within seven 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. If the Board does not ~~act within 90 days, the prescription automatically terminates at~~ decide the petition at least 30 days prior to the end of the ~~original term of the prescription; provided that, if the Board does not issue a decision due to extraordinary circumstances, as determined by the Board~~ established under § 1145.6(c) or any renewal term under § 1145.7(a), 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 90 days.~~ shall continue until 30 days after the Board serves a decision terminating the prescription.

#### **§ 1145.8 Data.**

(a) Within seven days of a written request from a shipper or receiver, the incumbent rail carrier shall provide that customer all relevant individualized performance records necessary to file a petition under § 1145.5 with the Board. The data shall be machine-readable and accompanied by clear and understandable descriptions of each field.

(b) As part of a petition to terminate a reciprocal switch prescription pursuant to § 1145.7, the incumbent rail carrier shall provide all data that are relevant to the performance standards for terminating a switch pursuant to § 1145.7(b). The data shall be machine-readable and accompanied by clear and understandable descriptions of each field.

~~(b)~~ (c) 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 plus or minus 24, 48, and 72 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 division or system for that week, all within the meaning of part 1145.

## Summary Report

<b>Changes:</b>	
<u>Add</u>	63
<del>Delete</del>	41
<del>Move From</del>	0
<u>Move To</u>	0
<u>Table Insert</u>	0
<del>Table Delete</del>	0
<u>Table moves to</u>	0
<del>Table moves from</del>	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
<b>Total Changes:</b>	104