BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

REPLY COMMENTS

submitted by

THE COALITION ASSOCIATIONS

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On Behalf of:
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I. INTRODUCTION

The Coalition Associations[1] hereby submit these Reply 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 Reply Comments respond to the opening comments of the Association of American Railroads ("AAR") and the six Class I railroads.[2]

The reciprocal switching statute at 49 U.S.C. § 11102(c) contains two alternative standards for prescribing reciprocal switching. The first is "practicable and in the public interest"

[1]The "Coalition Associations" are the American Chemistry Council ("ACC"), The Fertilizer Institute ("TFI"), and The National Industrial Transportation League ("NITL").

[2] *See*, "Opening Comments of the Association of American Railroads" ("AAR Op."); "Comments of BNSF Railway Company" ("BNSF Op."); "Opening Comments on Behalf of CN" ("CN Op."); "Opening Comments of Canadian Pacific Kansas City" ("CPKC Op."); "Opening Comments of CSX Transportation, Inc." ("CSX Op."); "Opening Comments of Norfolk Southern Railway Company" ("NS Op."); and "Comments of Union Pacific Railroad Company" ("UP Op.").

and the second is "necessary to provide competitive rail service." Not only does the NPRM focus solely upon the first standard, but it also narrowly focuses the "public interest" standard upon just inadequate rail service. In contrast, the Board's original proposed rules in Sub-Docket No. 1 implemented the full scope of both standards, including a broader focus on the public interest than just inadequate service.[3] Further, as discussed in Part III.A. below, the "necessary to provide competitive rail service" standard is integral, even under the Board's narrower approach in the NPRM, to its objective that reciprocal switching provide "incentives" for rail carriers to render adequate service. The Board thus should embrace both statutory standards to support the final rule.

Despite attempting to simplify matters with its narrower proposal in this sub-docket, the Board has opened the door to new criticisms from the rail industry that are cumulative to those in Sub-Docket No. 1. Many of the railroad criticisms are meritless, exaggerated, or can be addressed with minor modifications to the proposed rules. But one criticism — the assertion that 49 U.S.C. § 10709 prohibits the Board from considering performance data from service provided pursuant to a contract — is especially alarming. This criticism raises a legal question that, if the railroad interpretation is given credence, would gut the effectiveness of the proposed rules. In Part II of these reply comments, the Coalition Associations respond to that criticism with both statutory and policy arguments.

[3] *Reciprocal Switching*, EP 711 (Sub-No. 1), Notice of Proposed Rulemaking (served July 27, 2016) ("Sub-1 NPRM").

The railroads also question the suitability of the EP 770 data[4] to assess the three proposed standards in the NPRM, which is beyond the ability of the Coalition Associations to evaluate. If this data concern is accurate, however, it too could undermine the efficacy of the proposed rules.

In Part III, the Coalition Associations respond to the rail industry's interpretation of the Board's authority under § 11102(c). The Associations specifically rebut the railroads' perpetuation of the same unduly narrow interpretation of § 11102(c) that they espoused in Sub-Docket No. 1, demonstrate that the Board's "incentive" objective is well-founded in the statute, and explain why the railroads' proposed modifications to the rule preserve the status quo for reciprocal switching in contravention of the Board's stated objectives in the NPRM.

The Coalition Associations next respond to rail-industry comments on the substance of the proposed rule and offer modifications to strengthen the final rule. In Part IV, they respond to rail-industry comments and modifications to procedural elements of the proposed rules. In Part V, they highlight railroad comments that support the Coalition Association proposal to continue a reciprocal-switch prescription until 30 days following a Board decision granting a petition to terminate. Part VI responds to rail-industry comments and modifications to the proposed service standards. Overall, the Coalition Associations express agreement with some railroad proposals, object to most, and offer alternatives to others.

Based upon the rail-industry comments, the Coalition Associations are very concerned that the Board's decision to close Sub-Docket No. 1 and begin the rulemaking process anew could produce reciprocal-switching rules that are no more effective than the status quo of the past 30 years, which prompted the Board to open Sub-Docket No. 1 in the first place. As the

[4] *Urgent Issues in Freight Rail Service – R.R. Reporting*, EP 770 (Sub-No. 1) (served May 6, 2022 and May 2, 2023).

Coalition Associations asserted in their opening comments, the most effective way to address inadequate rail service is to allow more competition through reciprocal switching. If the Board or the Courts were to determine that § 10709 precludes consideration of contract-performance data or that the EP 770 data is unsuitable for identifying inadequate service, that belief will become an undeniable fact.

Therefore, as discussed in Part VII below, the Coalition Associations urge the Board to return to the approach in Sub-Docket No. 1 by more broadly defining the "public interest" standard and giving more emphasis to the "necessary to provide competitive rail service" standard in § 11102(c). Because the "public interest" standard, as implemented in Sub-Docket No. 1, does not focus on inadequate service, it would not implicate § 10709 or any of the railroads' EP 770 data concerns. Also, the "necessary to provide competitive rail service" standard, as implemented in Sub-Docket No. 1, creates stronger incentives for railroads to achieve and maintain adequate service without implicating the railroads' § 10709 and EP 770 data objections. The Coalition Associations offer a scaled-down version of the Sub-Docket No. 1 proposals in Part VII to address the most significant concerns the Board previously has expressed about those proposals. In addition, they have attached Exhibit 1 to illustrate how this scaled-down proposal would significantly narrow the scope of potentially eligible traffic by avoiding the most likely inefficient reciprocal-switch scenarios, unless the shipper can rebut a presumption of inefficiency.

II. THE CONTRACT QUESTIONS ARE EXISTENTIAL TO ANY PROPOSAL TO ADDRESS INADEQUATE RAIL SERVICE THROUGH RECIPROCAL SWITCHING.

Rail-stakeholder claims that the proposed rules cannot apply based on any contract service are alarming.[5] Under the Board's proposal, a reciprocal-switching prescription would only be used upon expiration of the contract. However, railroad comments assert that the Board may not even consider the adequacy of service provided for contract traffic for such a future switching prescription. If the Board or a reviewing court were to accept those claims, the Board's entire proposal would be meaningless, and a decade of effort would have been for naught, because the overwhelming majority of rail traffic moves under contracts. The Board's alternative reciprocal-switch standards at 49 C.F.R. Parts 1144 and 1147 would be similarly useless because they too apply standards that consider the adequacy of contract service. Ironically, the *Midtec* line of precedent, which the Board has acknowledged "effectively operated as a bar to relief rather than as a standard under which relief could be granted," would constitute an even higher hurdle than previously understood.[6] The Board must not permit this to happen.

A simple illustration demonstrates why the proposed rules will be meaningless if the statute is determined to foreclose consideration of contract-service performance. Assume a shipper experiences inadequate service during the term of a contract that would merit a reciprocal-switch prescription under the proposed rules. That shipper could not rely upon that inadequate service to support a petition for reciprocal switching, even though the carrier involved provides rail service for that traffic in the same manner as common-carrier traffic. Instead, it would have to take the following prohibitive path just to have the opportunity to file a petition:

[5] *See, e.g.*, AAR Op. 32-41; BNSF Op. 12-14; CN Op. 50-54; NS Op. 17-20.

[6] Sub-1 NPRM 8.

- First, the shipper would have to wait for its contract to expire and then switch to common-carrier service.
- Second, the shipper would have to wait for *at least* 12 weeks of common-carrier service to accumulate the required service metrics that may, or may not, support a petition. That is, the shipper must subject itself to another bout of inadequate service.
- Third, if and when the common-carrier service standards support a reciprocal-switch prescription, the shipper may file its petition and obtain a prescription at the end of the procedural process.

During the entire time following expiration of its contract until a prescription becomes effective, the shipper is paying higher tariff rates. And the shipper must pursue this path without any assurance that it will be able to obtain a reciprocal-switch prescription because its rail service may improve during that time. Perversely, a shipper who chooses this path would hope that its service does not improve. Even if a shipper ultimately obtains a reciprocal switch after all that time, the rail industry insists that the prescription be terminated immediately upon restoration of adequate service.[7] With those limitations, the proposed rule would rarely, if ever, be used.

The Coalition Associations do not believe that Congress intended for § 10709 to impose the draconian constraints on the Board's authority to address rail-service inadequacies that the rail stakeholders claim. Congress has tasked the Board "to ensure the development and continuation of a sound rail-transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). There can be no dispute that fostering adequate rail service is essential to this task. Indeed, throughout this proceeding, the rail industry has defined the "public interest" standard for reciprocal switching in terms of adequate service, and the Board has framed its proposed

[7] AAR Op. 101-02; CN Op. 26; CSX Op. 49-50.

rules in this sub-docket in those same terms. But, if the Board cannot consider the adequacy of contract service, its ability to fulfill this task will be substantially weakened.

The primary tool that Congress gave the Board to ensure adequate service is the authority to prescribe through routes in 49 U.S.C. § 10705(a). By default, that statute guarantees a railroad its long-haul *unless* one of the following enumerated exceptions apply:

- 49 U.S.C. §§ 10741, 10742, or 11102;
- The long-haul would make the through route unreasonably long when compared with a practicable alternative; or
- The alternative through route is needed to provide adequate, and more efficient or economic, transportation.

The three statutory exceptions in the first bullet, respectively, prohibit discrimination by rail carriers; require "reasonable, proper, and equal facilities…for the interchange of traffic between" rail carriers; and require the use of terminal facilities or reciprocal switching "when practicable and in the public interest" or, only with respect to reciprocal switching, where "necessary to provide competitive rail service." It is notable that, of those three statutes, only § 10741 states that it shall not apply to contracts described in § 10709. A clear inference from this fact is that, although the Board may not consider discrimination that occurs in a contract to invoke its through-route prescription authority, it can consider the adequacy of interchange facilities and service for contract transportation when exercising its authority under §§ 10742 and 11102.[8]

[8] *Cf. Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (for the principal that all words in a statute are to be given force and meaning, otherwise they would be superfluous having been enough to have written the act without the words).

Similar conclusions follow from the other two exceptions. The Board may consider contract traffic when evaluating whether a through route is unreasonably long. In addition, the Board may consider contract traffic when considering whether a through route is needed to provide "adequate" transportation.

The foregoing exceptions constitute Congressional recognition that the Board is not regulating contracts when it exercises the enumerated authorities but is merely considering the totality of a railroad's service. This is a reasonable inference since railroads do not segregate their services and facilities between contract and common-carrier traffic. As the Coalition Associations discussed in their opening comments, the Board repeatedly has concluded that its duty to consider the fluidity of the national rail network requires it to consider both regulated and non-regulated traffic.[9]

That conclusion is logical because all manifest traffic – regardless of whether it is contract, tariff, or exempt traffic – moves in the same trains, over the same track, and through the same terminals. Therefore, the Original Estimated Time of Arrival ("OETA"), transit-time, and Industry Spot and Pull ("ISP") performance for common-carrier, contract, and exempt traffic necessarily are intertwined, which renders it impractical and unnecessary, if not impossible, to filter for any of these traffic types.[10]

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[9] "Opening Comments submitted by The Coalition Associations" 10-13 & n. 10 ("CA Op.").

[10] AAR disingenuously claims that "shippers can bargain for their own remedies in their contracts, which can then be enforced in court." AAR Op. 33. But contract commitments to provide a minimum level of service for manifest traffic are virtually non-existent. Most contracts merely obligate the railroad to transport "with reasonable dispatch," which is the same standard that applies to common carrier service. According to one shipper who is a member of ACC, the principal distinction between contract and common carriage is a better price for a volume commitment and, if a railroad is unable to provide adequate service for the volume tendered, the shipper's only remedy is relief from the volume commitment for traffic with a viable alternative. *See* Reply Comments of The Dow Chemical Company. The proposed rules would provide more traffic with a viable alternative.

This network characteristic strongly rebuts railroad claims that § 10709 precludes application of the proposed rules to contract traffic. The Board has described the intent of the proposed rules "to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis." NPRM 5. Contract service must be considered because so much rail traffic is under contract. The Board is evaluating and incentivizing adequate rail service across the entire rail network pursuant to its broad statutory duty to ensure the fluidity of the national rail network. The Board has identified reciprocal switching as an important statutory tool needed to fulfill that duty.

Ultimately, the Board is not regulating the contract in violation of § 10709 because a reciprocal-switch prescription could only be used upon expiration of the existing contract. Nevertheless, railroad stakeholders insist that the proposed rule "would effectively add or subtract contractual terms, despite the command of 49 U.S.C. § 10709(b) that '[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.'"[11] The Board's proposal, however, does not impose any duty to provide any specific level of contract service. Indeed, even with respect to common-carrier service, the Board expressly states that it "does not view it as appropriate to apply, or draw from, these proposed standards to regulate or enforce the common carrier obligation." NPRM 10. If this proposal does not impose any duty upon common-carrier service, it does not impose any duty upon contract service either.[12]

[11] AAR Op. 34. *See also,* BNSF Op. 12.

[12] In addition to objecting to consideration of contract performance, railroad stakeholders claim that the duty to provide a contract shipper with its contract performance data also imposes a duty in violation of § 10709(b). *See* AAR Op. 35-36. But the provision of data needed to establish the prerequisites for reciprocal switching no more violates § 10709 here than the duty to respond to discovery in rate cases does so when the rate case begins prior to expiration of a rail contract. Furthermore, if the Board adopts the Coalition Association pre-filing proposals in Part IV.E.

Rather, the Board merely proposes to establish the conditions pursuant to which it chooses to prescribe reciprocal switching under § 11102(c). Once the Board prescribes reciprocal switching, and upon the termination of any otherwise applicable contract, the shipper may engage the services of either the incumbent or alternate carrier as a common or contract carrier. The only result of the Board's decision to prescribe a reciprocal switch is to allow competition to work over those portions of a route where it already exists to incentivize better performance. The Board has designed its proposal to incentivize good performance, not to require it, as part of its broad-based duty to promote fluidity across the national rail network.

It is important not to lose sight of the forest for the trees when considering the Board's authority to consider contract-service performance when deciding to prescribe reciprocal switching. Nothing in § 11102(c) requires the Board to consider rail performance at all in such decisions. For example, if the Board were to establish standards based upon other "public interest" factors unrelated to service or to adopt standards to determine when reciprocal switching is "necessary to provide rail competition," the rail-industry objections based upon § 10709 would evaporate. But the adequacy of rail performance is a permissible consideration under the statute, and it is not possible to consider the performance of the rail network without including contract performance. It would be illogical, therefore, to conclude that Congress intended to deprive the Board of jurisdiction to consider contract performance in the exercise of its authority to prescribe a reciprocal switch as a tool to fulfill a broad-based statutory duty to the entire rail network. As addressed above with respect to § 10705(a) and the ensuing discussion, Congress did not do so.

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below, the provision of such data will be treated as discovery in the form of initial disclosures, which will be no different from rate case discovery.

III. RAIL-INDUSTRY COMMENTS RELY ON AN UNDULY NARROW INTERPRETATION OF § 11102(c) THAT WOULD EFFECTIVELY MAINTAIN THE *MIDTEC* STANDARD.

Railroad stakeholders pay lip-service to the proposed rules, but then advocate for modifications that eviscerate the very objectives that underlie those proposals. At the end of the day, those modifications would inject the current *Midtec* standards into the new rules to make them virtually indistinguishable and just as ineffective.[13] The Board must not be lured down this path which would be a waste of the enormous time and resources that the Board and other stakeholders have poured into this proceeding over more than a decade.

The NPRM makes abundantly clear that "[t]hrough the approach that is proposed in this new sub-docket, the Board intends to provide appropriate regulatory *incentives* to Class I carriers to achieve and to maintain higher service levels on an ongoing basis [and…] that the data access and standardization provisions in this proposal…would ensure and enhance these benefits." NPRM 5 (emphasis added). The Board also has declared that:

- its proposals are "an essential *addition* to the current remedial framework" in Parts 1144 and 1147,
- the proposals "provide a clearer path to address the impact of service deficiencies on the network," and
- by adopting "defined service standards," the Board is expressly overruling the standards and criteria in *Midtec* as being applicable to the new rules, and not requiring parties "to address any of the standards or criteria established under part 1144."

Id. 7 (emphasis added).

The Board intentionally has proposed objective service standards "both because a clearer and more objective rule would create an incentive for rail carriers to provide adequate service in the first instance and because, if a rail carrier did not do so, the affected shippers and receivers

[13] *Midtec Paper Corp. v. Chi. & N.W. Transp. Co.*, 3 I.C.C. 2d 171 (1986) ("*Midtec*").

would then have more certainty in their opportunities to obtain line-haul service from an alternate carrier." *Id.* 9. Moreover, the Board has concluded that "the application of objective performance standards for adequate rail service…would promote predictability and efficiency in regulatory proceedings thereunder, thereby reducing unnecessary regulatory costs and ultimately strengthening rail carriers' *incentive* to provide adequate service." *Id.* 9-10 (emphasis added).

The Board acknowledges that its proposals entail certain trade-offs because "regulations with objective standards, even those that recognize and account for circumstances outside of a carrier's control, implicitly value the benefits of certainty and clarity over a process that provides for a more open-ended and case specific inquiry." *Id.* 10. Those trade-offs are an essential part of the balancing of disparate interests that Congress has delegated to the Board. The Board "is free to make reasonable trade-offs between the quality and cost of possible regulatory approaches" and its judgement is owed "great deference" when it has "intelligibly explained why the trade-off chosen was reasonable."[14]

The rail-industry comments, however, reject the very trade-offs that are at the core of the proposed rules. *First*, by insisting that reciprocal switching may only be prescribed for remedial use, they object to the use of reciprocal switching as an "incentive" to provide adequate service.[15] *Second*, they claim that the Board can only find a compelling need under the public-interest standard by taking the same approach as *Midtec*.[16] *Third*, they reject the use of pre-defined service metrics, which are essential to the Board's balancing of stakeholder interests, in

[14] *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993). *See also, BNSF Ry. Co. v. STB*, 453 F.3d 474, 482 (D.C. Cir. 2006) (precision in rate cases must at some point give way to the constraints of time and expense, and it is the agency's responsibility to mark that point).

[15] *See, e.g.*, AAR Op. 18-19, 23-24; CN Op. 13; CSX Op. 34; NS Op. 7-8.

[16] *See, e.g.*, AAR Op. 15-18; CN Op. 4-7, 9, 12-13; CSX Op. 10-13, 33-34.

favor of the same approach as *Midtec*.[17] The Coalition Associations reply to each of these objections in the following subparts.

A. The Board's Objective To Create Incentives For Adequate Rail Service Through Reciprocal Switching Is Consistent With The Express Intent of Congress.

The proposed rules, first and foremost, would prescribe reciprocal switching as a "safeguard" against inadequate service by creating a strong "incentive" for railroads to be attentive to the service needs of their customers. That incentive is to expose a railroad's captive traffic to competitive rail options, when the railroad provides inadequate service, that the long-haul provisions of the statute otherwise foreclose. 49 U.S.C. § 10705(a)(2).

To the extent the railroad industry is arguing that the Board's incentive objective violates the statute, that is plainly wrong. Congress expressly intended for the competition enabled by reciprocal switching to provide an incentive for adequate service. The Senate Report on the Staggers Act expressly stated:

> The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition…As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. **Competition among railroads, or at least the realistic threat of competition, can serve as an important *safeguard* against inadequate service or unreasonably high prices**."[18]

It is important to note that the Senate bill to which this quote refers, did not even have the "necessary to provide competitive rail service" standard; this discussion pertains solely to the "practical and in the public interest" standard.

[17] *See, e.g.*, AAR Op. 15; CN Op. 4, 9-17; CSX Op. 13-15.

[18] S. Report No. 96-470, 96th Congress, 1st Session 41 (emphasis added).

The House bill added "necessary to provide competitive rail service" to the legislation. The House Report declares an intent "to permit and encourage reciprocal switching as a way to encourage competition."[19] The Conference Committee underscored the purpose of reciprocal switching to increase competition when it noted that "[a] number of provisions [in the bill] are included to foster greater competition by simplifying coordination, minor merger procedures, entry and *reciprocal switching agreements*."[20] Thus, enhancing competition is a permissible way to incentivize adequate service under the public-interest standard.

The Board has proposed to identify inadequate service and implement reciprocal-switching "safeguards" by assessing rail service on individual traffic lanes (*i.e.*, the Service Reliability and Service Consistency standards) and at shipper facilities (*i.e.*, the Industry Spot and Pull ("ISP") standard), and prescribing reciprocal switching for the affected lanes and facilities when the railroad's performance falls below specified thresholds. Although the Board will prescribe reciprocal switching based on service to individual shippers, the Board is keenly aware of the network nature of rail service and has designed the proposed rules "to address the impact of service deficiencies on the network…." NPRM 7. Due to the network nature of rail transportation – *e.g.*, manifest traffic shares common facilities and moves in the same trains regardless of whether the traffic is captive or competitive – incentives to maintain adequate service for traffic that is eligible for reciprocal switching will extend across the network to the benefit of all traffic that shares the same facilities and services. In this way, the Board has designed the rules with the intent to promote the broad "public interest," not just the interest of the individual shippers who may benefit from reciprocal switching. Thus, although reciprocal

[19] H. Report No. 96-1035, 96th Congress 2d Session 67.

[20] H. Report No. 96-1430, 96th Congress 2d Session 80 (emphasis added).

switching has remedial benefits for individual shippers, those benefits are collateral to the Board's primary objective "to create an incentive for rail carriers to provide adequate service in the first instance" to all shippers. *Id.* 9.

The rail-industry comments either ignore or lose sight of the Board's "incentive" objective. Rather, they narrowly focus on individual lanes and facilities when they insist that a reciprocal switch must remedy the inadequate service, a shipper must demonstrate harm resulting from the inadequate service, and a switch must be terminated immediately upon restoration of adequate service. Those factors may be pertinent to reciprocal-switch requests in Parts 1144 and 1147, but the proposed rules "provide an essential addition" to those parts through a broader approach that was born out of prolonged and widespread network service inadequacies and is designed to be prophylactic as well as remedial. *See* NPRM 4-7.

The proposed rules fill a void between Parts 1144 and 1147. Part 1144 provides a *permanent* prescription for systemic problems affecting a specific location that result from competitive abuse; part 1147 provides a *temporary* prescription for emergency situations regardless of the cause; and now, the proposed part 1145 would provide finite *medium-term* prescriptions as incentives to maintain barely adequate minimum service levels that are pegged to recent extremely poor rail service.

The Board's "incentive" objective finds support in the legislative history discussed at the beginning of this subpart. That legislative history, in turn, is predicated upon the entirety of § 11102(c) – *i.e.*, both statutory standards. Although the NPRM places greater emphasis on the "practical and in the public interest" standard, the incentive objective necessarily also implicates the "necessary to provide competitive rail service" standard even though the Board is applying

that standard more narrowly in this sub-docket than in Sub-Docket No. 1. A final rule, therefore, should make this connection abundantly clear.

B. Rail-Industry Comments Take An Unduly Narrow View of the "Actual Necessity or Compelling Reason" Test.

The rail industry's disregard for the Board's incentive objective is most acutely reflected in how it would determine a compelling "need" for reciprocal switching. Citing to the agency's decisions in *Central States* and *Jamestown*,[21] the rail industry claims that this is required by the "practicable and in the public interest" standard in § 11102(c), which requires an "actual necessity or compelling reason."[22] But just as they gave an overly narrow interpretation to that precedent in Sub-Docket No. 1, they continue to do so in this sub-docket.

The Coalition Associations have never disputed the requirement to show "need," but have objected to the rail industry's unduly narrow focus on how to demonstrate such "need."[23] Congress contemplated different and alternative demonstrations of "need" in the statute and granted the Board broad discretion to define the requisite showing of "need."[24] In this sub-docket, the Board has identified a "need" to incentivize adequate rail service based upon the prolonged and wide-spread service inadequacies of the past few years and the frequency with which similar widespread service problems have arisen in recent decades. NPRM 4-6.

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[21] *Central States Enterprises, Inc. v. ICC*, 780 F.2d 664 (7th Cir. 1985) ("*Central States*"); *Jamestown N.Y. Chamber of Commerce v. Jamestown, Westfield & NW R.R.*, 195 I.C.C. 289 (1933).

[22] *See, e.g.*, AAR Op. 12-18; CN Op. 5-7; CSX Op. 10-13.

[23] *See*, "Reply Comments submitted by The Shipper Coalition For Railroad Competition," Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, at 20-30 (filed Jan. 13, 2017) ("CA Sub-1 Reply").

[24] *Id.*

Furthermore, in the final round of comments in Sub-Docket No. 1, the Coalition Associations observed that railroad operating changes in the form of "Precision Scheduled Railroading" ("PSR") have been accompanied by service disruptions of varying severity and duration that have reinforced the "need" for reciprocal switching.[25] The Coalition Associations expressed concern that, because the railroads faced few, if any, competitive consequences from their decisions to implement PSR, they failed to consider the impacts upon their customers, but were focused primarily, if not solely, on their financial bottom lines. In addition, the Coalition Associations observed that PSR has taken surge capacity out of the rail network, which is likely to result in future service disruptions that are longer and more severe, as reflected in the extended recovery from the post-pandemic service disruptions. The proposed rules, therefore, respond to a "need" to create incentives for railroads to consider service impacts when making these types of decisions.

The Board's focus on "need" in the NPRM is broader than in cases decided over 30 years ago, because it has identified *additional* "needs" based on *current* factors. This is well within the Board's authority. Although past agency decisions deliberately took a narrower approach than the statute requires, the Board has broad discretion to modify its approach to reflect current circumstances.[26]

[25] "Written Testimony submitted by The Coalition Associations," Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, 9-11 (filed Feb. 14, 2022).

[26] *See*, "Comments submitted by The Shipper Coalition For Railroad Competition," Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, 16-20 (filed Oct. 26, 2016) ("CA Sub-1 Op."); CA Sub-1 Reply 17-20.

C. The NPRM Properly Proposes Objectively Defined Service Standards To Balance Conflicting Stakeholder Interests.

Rail industry commenters object to the use of pre-defined standards to identify inadequate service.[27] They would limit the role of defined performance standards to triggering a more in-depth inquiry into the details of an inadequate-service claim. But that type of detailed inquiry would eliminate a critical compromise in the proposed rules that "implicitly value[s] the benefits of certainty and clarity over a process that provides for a more open-ended and case-specific inquiry." NPRM 10. Because the national rail-transportation policies, as enumerated in 49 U.S.C. § 10101, reflect objectives that are often conflicting, the Board has substantial discretion when balancing those objectives.[28]

The NPRM proposed objective service standards after weighing shipper complaints that the more detailed inquiries required in Parts 1144 and 1147 have been inadequate to address service disruptions. NPRM 5. Furthermore, the main reason the NPRM gives for closing Sub-Docket No. 1 and proposing this new rule is "to advance more objective standards and related defenses and definitions…." *Id.* 6. Thus, absent these objective standards, there is little to distinguish the proposed rules from the existing rules because the type of inquiry the railroads propose already occurs under Parts 1144 and 1147. Ironically, the rail-industry proposals would add the extra hurdle of demonstrating a failure under the service standards as a *prerequisite* to those more detailed inquiries. That result would make reciprocal switching even less availing than the current standards, and even more so when combined with other railroad modifications discussed in Part IV below.

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[27] *See,* AAR Op. 15; CN Op. 4, 9-17; CSX Op. 13-15.

[28] *See, e.g., Balt. Gas & Elec. Co. v. U.S.*, 817 F.2d 108, 115 (D.C. Cir. 1987); *Market Dominance Determinations – Product and Geographic Competition,* Ex Parte No. 627, 2001 STB LEXIS 334, at *12-14 (served April 3, 2001).

The Board's decision to close Sub-Docket No. 1 is premised on the adoption of objective service standards to determine eligibility for reciprocal switching. Therefore, if the Board abandons this approach, it should close this sub-docket and reopen Sub-Docket No. 1. To the extent the railroad comments also insist upon fact-specific analysis of "practicability," the proposed rules already do that sufficiently. NPRM 42-43 (text of proposed § 1145.6). The Board considers performance standards that are specific to the traffic that could use the prescribed switch and the impacts of a switch prescription upon rail operations and other rail customers.

IV. THE COALITION ASSOCIATIONS OBJECT TO MOST OF THE RAILROAD MODIFICATIONS TO THE PROPOSED RULES BUT OFFER ALTERNATIVES TO ADDRESS SOME OF THEIR CONCERNS.

Rail-industry commenters offer multiple modifications to the proposed rules to address their concerns and objections. The Coalition Associations acknowledge some of those concerns and concur on the need for a few modifications. But they reject most of the railroad's proposed modifications.

A. There Is General Agreement On The Definition of "Terminal," But Consistent With Precedent, The Proposed Rules Should Apply To Locations Within A Terminal Or Common Station.

In their opening comments, the Coalition Associations supported the Board's proposed definition of a "terminal area."[29] To clarify that position, however, the Board's statutory authority to prescribe reciprocal switching, pursuant to 49 U.S.C. § 11102(c)(1), is ***not*** limited to terminal areas for all the reasons the Coalition Associations stated in Sub-Docket No. 1.[30] Lastly, the Coalition Associations urged the Board to extend its proposal to shippers outside terminal

[29] CA Op. 45.

[30] CA Sub-1 Reply 75-83.

areas by applying the same standards to through route prescriptions under 49 U.S.C.§ 10705(a)(2)(C).[31]

The Interstate Commerce Commission ("ICC") previously has stated that "[a] common station or terminal area is…a prerequisite for such [reciprocal] switching."[32] Consistent with this precedent, the proposed rules should apply to both terminal areas and common stations where the two carriers currently interchange traffic.[33] The Coalition Associations do not object to railroad-stakeholder comments that suggest the Board rely on precedent rather than define "terminal area," but they oppose any attempt to restrict reciprocal switching solely to terminal areas.[34]

B. The Coalition Associations Support The Early and Active Involvement of the Alternate Carrier, But Object to Requiring a Service Design Or Commitment Before Filing A Petition.

Nearly all railroad stakeholders expressed concern that the proposed rules do not involve the alternate railroad sufficiently early in the process.[35] They are concerned that the alternate railroad will not learn about a reciprocal-switch petition until it is filed and will not have sufficient time to evaluate its ability to participate in the switch and ensuing line-haul service to participate meaningfully in the proceeding. The Coalition Associations acknowledge this concern and concur in some, but not all, of the railroad proposals.

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[31] CA Op. 46-47, 61-63.

[32] *Central States*, 780 F.2d at 675, *quoting, Central States Enterprises, Inc. v. Seaboard Coast Line R.R. Co.*, 1984 ICC LEXIS 499 (May 11, 1984).

[33] A "common station" limitation would remain consistent with AAR's argument that Congress used the term "reciprocal" to denote "something that operates (or at least can operate) in equal and complementary fashion." AAR Op. 26.

[34] *Compare* AAR Op. 28-30 (objecting to definition) *with* 25-28 (claiming that statute imposes terminal restriction).

[35] AAR Op. 89-90; BNSF Op. 6-7; CN 21-23; CSX 37-38; UP 14-17.

As discussed in Part IV.E. below, the Coalition Associations concur with the 30-day pre-filing notice requirement and that the alternate carrier should be provided this notice in addition to the incumbent carrier. They also agree that the alternate carrier should inform the shipper prior to the petition whether it is able and willing to provide the requested switch service. If the alternate carrier can provide a service design, it should do so, but that should not be a prerequisite to the petition. Any such requirement would allow the alternate railroad to foreclose a petition without any scrutiny of its claims. Just as the Board will evaluate an incumbent carrier's feasibility claims, it also should evaluate such claims by the alternate carrier.

If the alternate carrier claims that the requested switching service is infeasible, it should provide a detailed justification that the shipper can evaluate and rebut if it so chooses. Similarly, if there are any conditions or prerequisites to the alternate carrier's ability or willingness to provide service, it should identify those in detail.

Ultimately, because the Coalition Associations propose that reciprocal switching be prescribed only at terminals or common stations where the two carriers already interchange traffic, they do not anticipate many situations where the alternate service would not be feasible. The above modifications appropriately inform all parties of such situations when they may exist.

C. The Coalition Associations Support Two Additional Affirmative Defenses, But Object To The Remaining Railroad Proposals.

Although the railroad commenters uniformly support the proposed affirmative-defense categories, several complain that they are incomplete. They describe additional circumstances that warrant an affirmative defense.[36] The Coalition Associations do not object to some of those illustrations, but strongly object to others. Ultimately, however, it is not necessary that the Board

[36] AAR Op. 72-85; BNSF Op. 10-11; CN Op. 23-25.

create a comprehensive list of affirmative defenses because the proposed rule states that "[t]he Board will also consider on a case-by-case basis, affirmative defenses that are not specified in this section." NPRM 41 (text of proposed § 1145.3).

As a general matter, the Coalition Associations do not object to the following categories of additional affirmative defenses:

- Third party conduct. This would capture most situations that are beyond the reasonable control of the incumbent carrier.

- Scheduled maintenance and capital improvement projects, provided that these are not a defense for OETA failures because a railroad should be able to account for *scheduled* projects in the OETA.

The Coalition Associations expressly object to the following additional affirmative defenses:

- A railroad's cure of the service inadequacy. Once a service failure has reached the point of a petition, an intervening restoration of adequate service should not moot the petition. Otherwise, a railroad's service could see-saw continuously between adequate and inadequate levels every time a shipper files a petition, resetting the 12-week clock each time, which clearly would not constitute adequate service. Moreover, it would undermine the Board's overarching intent that these rules incentivize the achievement *and* maintenance of adequate service levels.

- The absence of market dominance. The only consideration of market dominance that is appropriate is the lack of intramodal competition that the proposed rule would consider, because reciprocal switching would have little benefit and provide little incentive to improve rail service where a shipper already has access to effective intramodal competition. Market dominance also is not suitable for the compressed procedural schedule. Furthermore, even where the short-term use of intermodal alternatives is possible for emergencies, such options are not realistic competitive threats, especially because shippers often design their facilities and business models around rail transportation. The incentive objective behind the proposed rules means that there must be a real risk to the incumbent carrier of losing the shipper's line-haul business. It also is notable that § 11102(c) permits reciprocal switching when "necessary to provide competitive *rail* service." (emphasis added)

- Embargoes. This defense must be considered on a case-by-case basis. For example, traffic embargoes due to congestion, like UP's recent embargoes, are precisely the type of situation where reciprocal switching may alleviate the

congestion. This stands in contrast to embargoes for events that prevent service altogether, such as a bridge collapse.

D. The Coalition Associations Object To Railroad Proposals Concerning The Duration and Termination of a Reciprocal-Switch Prescription.

The railroad comments generally oppose the proposed two-year minimum duration of a reciprocal-switch prescription as too long, although they seem willing to accept 1-2 years as a default minimum.[37] They also argue that the duration of a prescription should be commensurate with the 12-week period of inadequate service that would trigger a prescription.[38] Ultimately, they all argue for prescriptions that last no longer than is necessary to remedy the service inadequacy that gave rise to the prescription.[39] Melding these concerns together, the railroads argue that, even if there is a minimum term, the incumbent should be able to petition the Board to repeal a prescription earlier upon demonstrating that adequate service has been restored. The Coalition Associations believe that the NPRM strikes a more appropriate balance that is critical to the success of the proposed rules.

As discussed in Part III above, the primary goal of the proposed rules is to incentivize railroads to achieve and maintain adequate service. That goal requires more than providing a remedy for an individual shipper that lasts only as long as the inadequate service. There needs to be a real and sustained competitive threat. Association members advise that, to the extent railroads provide any form of service commitment, it is only on competitive traffic, and that the remedy for breach is the release of competitive traffic from the contract's volume commitment.[40]

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[37] AAR Op. 97-98 (1 year min, 2 years max); BNSF Op. 15 (2 years); CN Op. 26 (1 year with flexibility); CSX Op. 49.

[38] AAR Op. 96, 102; CN Op. 25; CSX Op. 49.

[39] AAR Op. 101; CN Op. 27-28; CSX Op. 49.

[40] *See*, Reply Comments of The Dow Chemical Company.

For reciprocal switching to have its desired effect on service, therefore, the alternate railroad must have the opportunity to compete for and serve the eligible traffic for a typical contract cycle of at least two years and potentially longer depending upon the volume of traffic and any investment requirements. This means that shippers must be able to offer volume commitments over a multi-year period to attract a service offer from the alternate carrier that can compete with the incumbent.

Furthermore, the NPRM appropriately requires the incumbent carrier to affirmatively petition the Board to terminate the prescription at the end of the prescribed period or the prescription will automatically renew for another term. It would be administratively inefficient to adopt railroad proposals to automatically terminate a switch at the end of the prescribed period and require the shipper to file a new petition if its service is still inadequate.[41] Automatic renewal for the same term keeps in place the competitive incentives to improve service until the incumbent carrier firmly establishes its ability *both* to achieve *and* maintain adequate service.

E. The Coalition Associations Offer a More Balanced Proposal To Address Railroad Questions About the Pre-Filing Process.

Rail-industry commenters pose important questions about the pre-filing process in the NPRM that should be fully considered. The most important of those questions concern the following matters:

- How long should the pre-filing notice be?
- How far back can shippers request service data from the incumbent?
- How frequently may a shipper request service data from the incumbent?

[41] AAR Op. 101-02; CN Op. 25-29; CSX Op. 49-51.

To address these matters, the railroad commenters propose a 30-day pre-filing notice, would limit data to the most recent 12-week or slightly longer period, and would require the shipper to file its petition before obtaining that data.[42]

Those proposals pose intractable problems for shippers. First, they would require a shipper to file a petition before it knows if the data even demonstrates the required service failures. Second, by restricting the shipper to using data for the most recent 12-week period preceding its petition, the railroad proposal converts the shipper's decision when to file a petition into a game of roulette that the shipper may have to play multiple times before making its case. For example, upon receiving the data after filing its petition, the shipper may learn that the railroad's service failures only have extended ten weeks. The shipper must wait two more weeks and refile its petition to see if the service failures have continued for a full consecutive 12 weeks. The inefficiency of this process is self-evident.

The Coalition Associations, therefore, offer this alternative proposal.

- Require the shipper to file a 30-day pre-filing notice with the Board and serve the notice upon both the incumbent and alternate carriers.
- The incumbent carrier will have 5 business days to provide the requisite service data for the six months preceding the pre-filing notice.
- The alternate carrier will have 21 calendar days to provide a service commitment and service plan or disclose its reasons for refusing to do so.
- The shipper can file a formal petition based upon any 12-week period in the data provided by the incumbent carrier at any time from 30 to 90 days following the pre-filing notice (the "Pre-Filing Window").
- If the shipper does not file a petition within the Pre-Filing Window, it may not file another pre-filing notice for the same traffic for 90 days following the close of the Pre-Filing Window (the "Black-Out Period").

[42] AAR Op. 86-88; BNSF Op. 4-6; CSX Op. 38-41.

The foregoing proposal accomplishes the following objectives:

- *First*, it provides the longer pre-filing notice period that the railroad commenters have requested.
- *Second*, it links a shipper's data request to the pre-filing notice with the STB and treats the data as a form of initial disclosure, thereby beginning the discovery process.
- *Third*, it involves the alternate carrier in the process from the outset.
- *Fourth*, it imposes time limits on the period for which a shipper can request data that balances the carrier's interest that the service inadequacy be relatively recent against the shipper's interest in not having to guess when a carrier's service failures have occurred for 12 consecutive weeks.
- *Fifth*, because the shipper will receive the data later in the process than the NPRM contemplates, the Filing Window affords the shipper time to evaluate the service data and alternate carrier's responses and incorporate them into a formal petition.
- *Sixth*, it imposes clearly defined limits upon a shipper's ability to make repeated data requests. The sum of the 90-day Filing Window and the subsequent 90-day Black-Out Period corresponds with the six-months of service data to effectively limit shippers to a single data request for the same traffic every six months.

The foregoing modifications recognize and account for the "incentive" objective underlying the Board's proposals while addressing most of the railroad concerns with the pre-filing process in a way that fairly balances the interests of shippers and carriers.

V. RAIL-INDUSTRY COMMENTS JUSTIFY THE COALITION ASSOCIATIONS' PROPOSAL THAT A PRESCRIPTION CONTINUE UNTIL 30 DAYS FOLLOWING A DECISION GRANTING A PETITION TO TERMINATE.

At pages 50-52 of their Opening Comments, the Coalition Associations explained that a prescription should continue in effect until 30 days after the Board serves a decision that grants a petition to terminate the prescription. They pointed out that it takes approximately 30 days for a shipper to perform the tasks necessary to switch rail carriers and that the Board's proposal could create a "whiplash" effect if the shipper is forced to change carriers over a short span of time.

Two of the railroad commenters confirm that railroads also need time to adjust their operations when a shipper switches from one carrier to the other. Specifically, BNSF stresses the importance of involving the alternate carrier early in the process and explains that "[s]udden

changes to terminal operations can negatively impact service by misaligning crew and locomotive resources." BNSF Op. 7. If a shipper has been using the reciprocal switch to access the alternate carrier, it is reasonable to expect the incumbent to have similar concerns when the traffic switches back to it. UP expresses similar concerns over the time it takes to accommodate new rail traffic without causing unintended consequences to its network. UP Op. 15-16.

Thus, both the Coalition Associations and two railroads have identified complications with changing rail carriers on short notice. Those complications strongly suggest that the Board should abandon its proposal to terminate a reciprocal-switch prescription automatically upon its expiration even though the Board has not yet decided the incumbent's petition to terminate, because the prospect that the Board might deny the petition could cause traffic to switch between carriers more than once in a short period. The best solution is to terminate a switch 30 days after the Board serves a decision to terminate the prescription so both the shipper and carrier have sufficient time to adjust to the resulting service changes and this process only occurs once.

VI. REPLY TO RAILROAD COMMENTS ON SERVICE-PERFORMANCE STANDARDS

Railroad commenters identify multiple concerns with the Board's service-performance standards. Some of these are concerns that the Coalition Associations share and have addressed in the revisions that they proposed to the performance standards in their opening comments. Most, however, either are misplaced or can be easily addressed.

A. Service Reliability Standard

1. Harmonization of the OETA Definition with the Board's Demurrage Rules

Railroad commenters propose that the Board harmonize the definition of OETA in the NPRM with the definition of OETA in the Board's demurrage rules.[43] The Coalition Associations' primary concern with this proposal is that the OETA for a shipment should not be issued after the incumbent carrier is notified that the shipment is ready for pickup. To the extent that railroad comments could be construed as proposing to change the OETA definition to allow incumbent carriers to issue the OETA after this event, the Coalition Associations oppose that change.

The definitions of OETA in the NPRM and the Board's demurrage rule differ on when the carrier must issue the OETA. The NPRM defines OETA as "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."[44] The demurrage rules define OETA as the estimated time of arrival "as generated promptly following interchange or release of shipment to the invoicing carrier and as based on the first movement of the invoicing carrier."[45] According to AAR, using the definition in the demurrage rules would allow carriers to issue the OETA when the railcar begins moving, not when the shipper begins waiting for the carrier to pick up the car.[46] The Board, thus, should not adopt the demurrage rule definition of OETA.

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[43] AAR Op. 51; CN Op. 45.

[44] NPRM 37.

[45] 49 C.F.R. § 1333.4(d)(1).

[46] AAR Op. 51-52.

Allowing carriers to issue OETA when a railcar begins moving would create a serious gap in the Service Reliability standard and undermine the benefit of an OETA. Specifically, it would prevent the standard from capturing unexpected delay in the time that it takes a carrier to pick up a railcar.[47] This delay could add days to a car's transit, creating an unanticipated supply disruption. Additionally, when a shipper does not receive an OETA promptly upon advising the carrier that it has a shipment for pickup, the shipper essentially has no way to know whether the shipment will arrive in time to avoid a supply disruption.

Therefore, as the Coalition Associations have stated above, the OETA must be issued no later than when the incumbent carrier receives notification from the shipper that the railcar is ready for pickup. That notification, whether it is a release or tender of a bill of lading, triggers the carrier to begin providing transportation and, thus, signifies when the carrier's transportation service begins. Further, requiring carriers to issue the OETA upon receiving notification that the railcar is ready for pickup appears consistent with several railroads' comments about when they should issue an OETA. UP implies that carriers should be allowed to generate the OETA when the railcar is ready for pickup, which UP indicates is the time of release by the shipper.[48] CSX states that carriers should be allowed to generate the OETA upon receipt of a correct bill of lading or initial car movement after receiving a railcar.[49] While CSX does not explain when one OETA trigger would apply instead of the other, its proposal to use alternative OETA triggers

[47] While the ISP standard would capture an unexpected delay in pulling a car, it does not capture the impact of those delays on OETA or incentivize carriers to provide an OETA that is accurate.

[48] UP Op. 5.

[49] CSX Op., Cheatham V.S. at 9.

seems intended to identify the different events where it would become aware that a railcar is ready for pickup and be in a position to issue the OETA.[50]

2. Delay Severity

Both CSX and NS suggest that the Service Reliability standard should be based on the severity of an OETA delay.[51] While the Coalition Associations share the same concern, the Board must also consider delay frequency alongside severity. In their opening comments, the Coalition Associations proposed graduated Service Reliability thresholds to accomplish this.[52]

The impact of delays on service adequacy depends on both delay frequency and severity. While a single long delay may have a severe impact on service adequacy, multiple shorter delays, collectively, could have the same impact. For example, a single ten-day delay on a lane that involves a ten-day transit could force the recipient to severely curtail its operations. But a dozen two-day delays on the same lane, collectively, could result in several operational slowdowns that equate to the same output reduction that the recipient would face from a ten-day delay. Similarly, a dozen delays ranging from two days to six days could create excessive variability, resulting in heightened shipping volumes, emergency truck shipments, and carrying additional inventory to mitigate the variability and delay.

Based on feedback from the Coalition Associations' members about the impacts of delays, the graduated Service Reliability thresholds that the Coalition Associations have

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[50] To the extent CSX suggests that it should be allowed to delay issuing an OETA until the initial car movement, despite having all necessary information from the shipper to generate an OETA at an earlier time, the Board should reject CSX's proposal. Once a carrier receives the shipper's information necessary to generate an OETA, it should be able to determine when it will be able to pickup the railcar and calculate when it will deliver the railcar.

[51] CSX Op. 17; NS Op., Israel V.S. 13. To address this issue, NS proposes a benchmarking analysis that is addressed at Part VI.A.5. below.

[52] CA Op. 24-27.

proposed appropriately account for the impact of both delay frequency and severity on service adequacy. The thresholds reflect a reduced tolerance for delay as severity increases. Specifically, they allow for up to 10% of delays to exceed plus or minus 72 hours; 20% plus or minus 48 hours; and 30% plus or minus 24 hours.[53]

3. Bad-Ordered Cars

Several railroad commenters suggest that the Service Reliability standard should exclude shipments involving bad-ordered cars.[54] But, bad-ordered cars are unlikely to be the difference between whether a railroad passes or fails a service metric. And when that is the case, the proposed rules adequately cover these events by allowing incumbent carriers to make unspecified affirmative defenses, which the Board will consider on a case-by-case basis.[55]

4. Quarterly Measurement Periods

NS proposes that the Board measure Service Reliability performance on a calendar-quarter basis.[56] The Coalition Associations oppose this proposal because it could mask inadequate service that does not align with a calendar quarter. Additionally, it would not simplify the information that carriers must gather, maintain, and provide to their customers, as NS contends.[57]

Calculating Service Reliability performance on a calendar-quarter basis is inconsistent with the purpose of the proposed rules to identify and discourage inadequate rail service. Inadequate rail service harms rail customers regardless of whether it fits neatly into a calendar

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[53] CA Op. 21-22.

[54] CSX Op., Cheatham V.S. at 9; UP Op. 6.

[55] NPRM 41 (proposed 49 C.F.R. § 1145.3) ("The Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section.")

[56] NS Op. 14.

[57] *Id.*

quarter. A myopic calendar-quarter assessment of service performance would thus deprive rail customers of reciprocal switching for inadequate service that happens to straddle different calendar quarters, diluting the incentive under the proposed rules to provide adequate rail service.

Additionally, a calendar-quarter calculation will not provide the benefits that NS claims. NS contends that using a calendar-quarter analysis will prevent cherry picking and simplify a carrier's data burdens.[58] The concern about cherry picking is misplaced because whether a shipper receives inadequate service over a calendar quarter or any 12-week period, the service is still inadequate, and the shipper must use 12 consecutive weeks of data to demonstrate a Service Reliability failure. Moreover, a calendar-quarter analysis does not reduce the information that a carrier must gather, maintain, and provide its customers, except by entirely eliminating claims that straddle two calendar quarters. It requires all the same data as the Board's proposed 12-week analysis but slices the data to show Service Reliability performance only on a calendar-quarter basis.

5. Competitive Benchmarking

NS proposes that the Board adopt a competitive-benchmarking approach to the Service Reliability standard.[59] While the Coalition Associations generally support the use of competitive benchmarking in rail regulation,[60] NS's proposal requires further development and evaluation

[58] NS Op. 14-15.

[59] NS Op. 15; NS Op., Israel V.S. ¶¶ 47-54.

[60] The American Chemistry Council has proposed a rate benchmarking proposal for rate reasonableness cases in *Final Offer Rate Review*, Docket No. EP 755, and *Hearing on Revenue Adequacy*, Docket No. EP 722. ACC Written Testimony, Nov. 26, 2019, *Hearing on Revenue Adequacy*, EP 722; ACC Opening Comment, Nov. 12, 2019, *Final Offer Rate Review*, EP 755.

that is beyond the scope of this proceeding. Nor should the Board delay this proceeding to consider the NS concept.

Most notably, NS fails to define the scope of traffic that would be used to develop the competitive benchmark. Yet defining the set of benchmark traffic is critical to ensuring that the benchmark is accurate. It also involves a complex exercise that requires consideration of many factors that relate to whether traffic qualifies as competitive, including commodity characteristics, limitations of loading and unloading facilities, and length of haul.

The Board's proposed standards, as modified by the Coalition Associations, are well-supported by carrier-performance targets, carrier-performance measurements, and statements of shipper impact. The Board, therefore, should not hold up a final rule to consider the NS suggestion.

6. ETA Updates

CSX contends that railroads should receive credit for providing updates to a shipment's estimated time of arrival. The Board should reject this proposal because it ignores the critical importance of an accurate OETA for avoiding supply disruptions.

Without an accurate OETA, a rail customer cannot effectively plan its shipments, operations, and fleet needs to avoid a supply disruption at the destination. As a result, rail customers must maintain additional storage and railcar fleet capacity to prevent transportation delays from causing supply disruptions.

Moreover, ETA updates do not make up for an inaccurate OETA. While an updated ETA may be helpful to allow a rail customer to mitigate the impacts of transit variability to OETA, mitigating delays while a shipment is in transit is challenging, and mitigation options typically dwindle as the shipment progresses to the destination. Thus, ETA updates do not reduce the additional inventory and railcars necessary to address delays. Also, mitigation typically involves

emergency truck shipments, which are less efficient than rail transportation. Further, for commodities that cannot move by other modes of transportation, a receiver's only "mitigation" option while a shipment is in transit is to reduce its operations.

In sum, allowing carriers a credit for providing ETA updates will merely reduce their incentive under the proposed rules to provide an OETA that is accurate.

B. Service Consistency

Railroad commenters' concerns about the Service Consistency standard are generally misplaced. Their primary concerns are that the standard fails to account for normal year-to-year transit-time variations and that, according to them, the standard is not meaningful to rail customers because they are primarily concerned with whether service is consistent with a railroad's service predictions. But the Coalition Associations addressed both concerns on opening by proposing a three-year Service Consistency measure and thresholds that reflect when transit-time increases are likely to have a serious impact on a rail customer.[61] In the following subparts, the Coalition Associations address these and several other railroad criticisms of the Service Consistency standard.

1. Multi-Year Measurement

AAR and other railroad commenters contend that the Service Consistency standard does not appropriately account for normal fluctuations in transit time because the standard adopts a year-over-year transit-time analysis.[62] To address this, AAR proposes to substitute a three-year

[61] CA Op. 32-34.

[62] AAR Op. 57; CSX Op. 19; UP Op. 10.

analysis. In their opening comments, the Coalition Associations similarly proposed to add, but not substitute, a three-year analysis to the Service Consistency standard.[63]

The Board still should retain the year-over-year measure in the NPRM. The year-over-year measure in the proposed rule is necessary to identify excessive transit-time fluctuations that are harmful to rail customers. While the members of the Coalition Associations expect some transit-time variability from year-to-year, annual transit-time increases of 15% or more are likely to place excessive burdens on them and can cause excessive rail-network congestion.[64] Thus, maintaining an annual measure of service consistency is imperative.

2. Empty Railcars

Several railroad commenters oppose considering empty-car movements under the Service Consistency standard. AAR, CN, and CSX contend that the proposed standard should not provide a rail customer with access to reciprocal switching for loaded railcars based on transit-time performance of empty railcars because both loaded and empty cars move differently.[65] CN and CSX further contend that empty-railcar movements are affected by too many variables for the Service Consistency standard to accurately reflect railroad service performance.[66] The Coalition Associations urge the Board to reject these railroad contentions for several reasons.

First, railroad concerns about the differences in how loaded and empty cars move are overstated. CN contends that empty-car movements are impacted by car supply, customer behavior, and diversions.[67] CSX contends that empty cars often do not cycle between the same

[63] CA Op. 33-34.

[64] CA Op. 32-33.

[65] AAR Op. 56-57; CN Op. 47; CSX Op. 36-37.

[66] CN Op. 46-47; CSX Op. 36-37.

[67] CN Op. 47.

origins and destination and often are diverted.[68] But neither railroad explains why these characteristics of empty cars should prevent measurement under the Service Consistency standard. Even though empty railcars might not cycle between the same origins and destinations, railroads can still measure transit times on empty cars that do move between the same empty origin and empty destination, which is a very substantial number of private cars. Additionally, customer behavior and customer-ordered diversions would constitute an affirmative defense to a Service Consistency failure arising from empty-car movements.

Second, transit-time increases involving empty-car movements can have a significant impact on rail customers. These increases typically tie up empty railcars in transit for longer periods, which limits the number of loaded and empty cycles that they can perform. This causes customer demand for railcars to increase.[69] Further, to mitigate disruption from potential transit-time increases, a rail customer must acquire or build sufficient storage for the additional railcars necessary to maintain supply when transit times increase.[70] Additionally, once transit times increase to a level where a rail customer must significantly increase its shipment volumes to maintain supply, excessive rail-network congestion can develop.

Third, allowing transit-time increases on empty railcar movements to justify reciprocal-switching prescriptions for both the empty movement and associated loaded movement is a practical solution to discourage inadequate service involving empty movements. A reciprocal-switch prescription *solely* for an empty movement would force the alternate carrier to carry the empty railcar disproportionately longer than the loaded movement without compensation

[68] CSX Op. 37.

[69] CA Op. 32.

[70] *Id.* at 33.

because the rate for loaded cars includes return of the empty car. Allowing the carrier to compete for the loaded movement would resolve this issue, while still having the desired effect of discouraging the incumbent's transit-time increases on the empty movement.

3. Reasonably Equivalent Measurement Periods

AAR seeks a change to the Service Consistency standard that would require the measurement windows for calculating transit-time increases to have reasonably equivalent shipment volumes.[71] According to AAR, this is necessary because changes in volume alone can significantly impact transit time.[72] The Board should reject AAR's request for several reasons.

First, carriers should be able to accommodate reasonable changes in shipment volumes without a significant increase in transit time. As AAR recognizes, traffic volumes typically fluctuate.[73] Thus, as part of providing adequate service, a rail carrier should be able to accommodate some increases to a lane's traffic volume without a material increase in transit-time performance. In fact, the Board's affirmative defense for surprise surges reflects this expectation by requiring at least a 20% increase in traffic volume before it becomes applicable.

Second, affirmative defenses provide an adequate and appropriate path for an incumbent carrier to address transit-time increases that primarily result from volume changes. The connection between volume and transit-time increases on a lane turns on many lane-specific factors, including railroad infrastructure capacity on the lane. Evaluating this connection requires a lane-by-lane analysis that is congruent with the case-by-case approach that the proposed rules contemplate for affirmative defenses.

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[71] AAR Op. 56.

[72] *Id.*

[73] *See id.*

Third, injecting a reasonableness standard undermines the certainty that is essential to the proposed rules' success. The rules encourage adequate service by adopting clear standards so that rail carriers and their customers have certainty about when the Board will prescribe reciprocal switching. A reasonable-equivalent standard is unclear, however, and will leave carriers and their customers guessing about whether certain transit-time increases would make traffic eligible for reciprocal switching. This will weaken the ability of the proposed rules to encourage adequate service.

4. Application to Short-Duration Shipments

Both CN and CSX express concern that the Board's proposed threshold would provide little margin for error for short-duration shipments.[74] CSX further suggests that, for these shipments, the threshold would be exceeded by transit-time fluctuations that are benign.[75] These comments overlook that, even for short-duration shipments, transit-time increases above the percentage thresholds that the Coalition Associations proposed, which are lower than the Board's proposed threshold, have significant consequences for rail customers.

The impact of a transit-time increase generally corresponds to the *percentage* increase. A few additional hours may not matter on a lane with transit times of 10-15 days. But for lanes with short transits of a few hours or days, a few additional hours of transit could have a significant economic and operational impact because the increase represents a larger proportion of the overall transit. In fact, a 15% increase in cycle time will generally result in a 15% increase in the number of railcars necessary to maintain the same delivery rate, regardless of the number of days involved in the transit. Accordingly, applying a percentage-increase threshold under the

[74] CN Op. 46; CSX Op. 19.

[75] CSX Op. 19

Service Consistency standard appropriately identifies excessive transit-time increases, regardless of shipment duration.

Although using a percentage-increase threshold is appropriate for short-duration lanes, the Board could consider coupling this type of threshold with an alternative hours-based threshold that addresses short-duration lanes. Under this approach, the year-over-year threshold would be a maximum increase of 15% or 24 hours, whichever is greater; the three-year threshold would be a maximum increase of 25% or 24 hours, whichever is greater. Using an alternative threshold of 24 hours would be consistent with feedback from the Coalition Associations' members that they generally plan fleet needs based on full days in transit rather than hours in transit. Additionally, an alternative threshold of 24 hours is appropriate for both the year-over-year and three-year thresholds because it would allow for a large percentage increase in transit time, even over three years. The Board should not, however, adopt a higher hours threshold because it would allow for excessive increases on shorter movements.

5. Route Measurement

UP suggests that measurement of the Service Consistency standard should be route specific rather than lane specific.[76] The Board should reject this proposal for at least two key reasons. First, the proposal is fundamentally inconsistent with the purpose of the standard, which is to make reciprocal switching available for transit-time increases within the incumbent carrier's control. UP's proposal could prevent the standard from capturing transit-time increases arising from the incumbent carrier's routing decisions. Second, UP does not explain how the Board would resolve situations where transit-time increases exceed the performance threshold for only

[76] UP Op. 9-10.

some routings for a lane's traffic. This ambiguity reduces the incentive for incumbent carriers to provide adequate Service Consistency performance.

6. Importance of Consistent Service

CSX downplays the importance of consistent service, contending that shippers are concerned with service predictability, not consistency.[77] CSX is incorrect. For shippers, service predictability and consistency are near-equivalent primary concerns.

Consistency is a critical element of adequate service. When predicted OETA swings from week to week, rail customers need to constantly adjust the cadence of their shipments to prevent supply disruptions at the destination. For many reasons, making these adjustments is impractical, if not impossible. It requires constant OETA monitoring by shippers. It also can require constant shifts in production volumes at origins, which has multiple upstream supply-chain consequences. Additionally, it requires having additional railcars available at a moment's notice to accommodate an OETA increase. While maintaining a higher inventory of goods at the destination can mitigate this risk, this involves carrying more inventory and building and maintaining storage infrastructure, which is not always possible.

In sum, inconsistent service is disruptive to the entire supply chain, even if it is predictable. The Board thus should maintain the Service Consistency standard, subject to the modifications that the Coalition Associations proposed in their opening comments.

[77] CSX Op. 18.

C. Industry Spot and Pull

1. Basis of Measurement

Several railroad commenters suggest that the ISP standard measure local performance on a railcar basis.[78] The Coalition Associations agree with this suggestion, which is consistent with the changes to the ISP standard that the Coalition Associations proposed in their opening comments. However, as the Coalition Associations explained in their opening comments, the Board also should adopt an alternative ISP no-show standard.[79]

2. Correlation to Local Plan

CN and UP propose that the service windows used under the ISP standard correlate to the incumbent carrier's local service plan.[80] This is consistent with the Coalition Associations' proposal that the Board tie service windows to the local service plan that the incumbent carrier communicates to the customer.[81] Still, the Coalition Associations support a 12-hour limit on service windows, which is necessary to prevent carriers from "gaming" the ISP standard by establishing excessively long service windows. Further, excessively long service windows are harmful to rail customers because, as the Coalition Associations explained in their opening comments, many customer facilities must operate at reduced capacity during their service windows while they wait for their switch.[82]

[78] CN Op. 40-41; CSX Op. 23; UP Op. 12.

[79] CA Op. 35-36.

[80] CN Op. 38-39; UP Op. 13.

[81] CA Op. 42-43.

[82] CA Op. 43-44.

D. General Matters

1. Interline Traffic

Several carriers criticize the proposed rules for not adequately identifying when interchange occurs on interline movements. They contend that this could create measurement gaps related to OETA and transit-time performance and cause improper attribution of delays to a delivering carrier when the receiving carrier does not accept a railcar for reasons beyond the delivering carrier's control.[83] While no carrier offers a practical solution to address its concern, AAR's own rules for assigning responsibility for car hire provide a clear and appropriate framework for determining when interchange occurs, including in situations where the receiving carrier causes an interchange delay. Accordingly, the Board can address these carrier concerns by using the time of interchange under the car hire rules.

Assigning responsibility for car hire among carriers involves the same interchange considerations that exist under the Board's proposed rules. Car hire refers to the charges that a railroad assesses other railroads for use of its railcars on their lines. Because car hire can be charged hourly, the proper assessment of car hire requires a clear definition of the time of interchange and a mechanism to account for situations where the receiving carrier causes an interchange delay. Without a mechanism for addressing interchange delays, the delivering carrier would be responsible for hourly car hire arising from these delays even if they are caused by the receiving carrier. Thus, car hire presents the same interchange time and delay concerns that exist when measuring OETA and transit-time performance.

To identify the time of interchange and allocate responsibility for interchange delays in the car hire context, the railroad industry has established standardized rules under AAR Circular

[83] CN Op. 47-48; CSX Op., Cheatham V.S. at 8-9; UP Op. 9

No. OT-10, which comprises the Code of Car Service Rules and Code of Car Hire Rules. Rule 7 of the Car Service Rules identifies when interchange occurs. Rule 15 of the Car Hire Rules addresses responsibility for interchange delays caused by the receiving carrier by stating:

> Unless otherwise agreed to between the roads involved, when interchange cannot be accomplished due to a road's failure to receive promptly from a connection cars on which it has laid no embargo, the receiving carrier shall be responsible to the car owner for the car hire on cars so held for delivery, including cars owned by either the delivering or receiving line.[84]

Circular OT-10 also contains provisions for resolving disputes between carriers related to the time of interchange and interchange delays.

Since all Class I railroads subscribe to Circular OT-10 and Circular OT-10 resolves the same interchange issues that exist under the proposed rules, the Board should use Circular OT-10 to address these interchange issues. Specifically, it should specify that the time of interchange will be deemed to occur at the time that the receiving carrier would become responsible for car hire under Circular OT-10. Not only does this avoid creating a conflict between the proposed rules and the established car-hire process, but it applies the railroad industry's own solution to dealing with interchange issues in an analogous context.

2. Customer-Caused Failures

Several railroad commenters express concern that the Board's service-performance standards would capture poor performance caused by customer decisions. For example, CSX and

[84] Although this language does not affect the delivering carrier's responsibility for car hire when the receiving carrier rejects the car because it has embargoed it, adopting this approach in the context of the proposed rules would not impact the incumbent carrier because its inability to deliver the car in interchange would be due to the *customer's* failure to abide by the receiving carrier's embargo. In this situation, the incumbent could make an affirmative defense based on interchange delays that the customer caused, and the Board would evaluate the defense on a case-by-case basis.

UP contend that the Service Reliability standard does not exclude delays arising from customer diversions.[85] CN, CSX, and UP contend that the ISP standard does not properly exclude missed switches caused by the rail customer or a carrier's decision not to comply with a customer's request to spot a railcar when the customer does not have capacity to receive the car.[86] These concerns are misplaced for several reasons.

First, regarding the ISP standard, the NPRM clearly states that a miss does not count against an incumbent unless the incumbent causes it.[87] So, if a shipper causes a miss because it does not have space available to complete its request, it does not provide access to a car for pickup, or it makes it impossible for the carrier to switch a car, the miss would be excluded when calculating ISP performance.

If the Board desires to add clarity on customer-caused misses, the Coalition Associations do not oppose adding language to the regulatory text that, when a rail customer causes a miss, except due to a variation in its traffic, the miss will not count against the incumbent carrier. While the Coalition Associations do not oppose this clarification, the Board should not adopt CSX's proposal to shift the burden of proof on the customer or create a rebuttable presumption that misses that a railroad attributes to customers are accurate unless the customer disputes them.[88] Shifting the burden of proof in this manner would require customers to prove a negative, which is inherently difficult. For this reason, shifting the burden of proof also would invite "gaming" by carriers. Similarly, establishing a presumption that a designation that a missed

[85] CSX Op., Cheatham V.S. at 9; UP Op. 7.

[86] CN Op. 39, 42-43; CSX Op., Cheatham V.S. at 6, 13; UP Op. 11.

[87] NPRM 22 ("A miss not caused by the incumbent railroad would not be counted against it.")

[88] CSX Op. 22-23.

switch was customer caused is accurate unless the customer disputed it places an unfair burden on shippers to dispute these designations.

Second, regarding the Service Reliability standard, customer diversions would not impact calculation of Service Reliability performance. A diversion would shift the shipment off the original lane and, thus, the shipment would not count toward this standard in the original lane. Further, because the proposed rules do not contemplate issuing a new OETA to the new destination for a diverted shipment, the diversion also would not impact Service Reliability performance between the shipment's origin and the diversion destination. Nevertheless, the Coalition Associations do not oppose clarifying that customer-diverted shipments are excluded from calculating Service Reliability performance. Also, since customer diversions could impact Service Consistency performance, the Coalition Associations do not oppose the same clarification for the Service Consistency standard.

Third, the proposed rules adequately cover customer-caused failures by allowing incumbent carriers to make unspecified affirmative defenses, which the Board will consider on a case-by-case basis.[89] The Board, however, should not indicate in the final rule that carriers would have affirmative defenses for all carrier failures caused by a rail customer. Such broad language would excuse an incumbent carrier from failing to meet a performance standard merely due to an action by the customer that the carrier should be able to accommodate without resulting in inadequate service, like a modest increase or slight fluctuation in traffic volume. Further, such a broad defense is unnecessary because proposed rule § 1145.3 allows carriers to raise unspecified affirmative defenses for a case-by-case evaluation.

[89] NPRM 41 (proposed 49 C.F.R. § 1145.3) ("The Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section.")

3. Cross-Border Traffic

CN proposes to eliminate cross-border traffic from the Service Reliability and Service Consistency standards because it contends that the Board's jurisdiction applies only to transportation taking place in the United States. But CN's position is at odds with precedent on the scope of the Board's jurisdiction. Additionally, even if CN were correct about the Board's jurisdiction, it fails to explain why the Board cannot look at OETA and transit-time performance for the portion of cross-border moves that occur *within the United States*. Thus, the Board should reject CN's proposal.

The Board's jurisdiction includes rail transportation "in the United States between a place in . . . the United States and another place in the United States through a foreign country; or . . . the United States and a place in a foreign country." 49 U.S.C. § 14501(a)(2)(E), (F). Courts have construed this liberally to allow the Board and its predecessor to regulate aspects of an international movement occurring outside the United States when necessary to allow the Board to regulate effectively. *United States v. Pa. R.R.*, 323 U.S. 612, 621-22 (1945). For example, courts have long held that the Board has jurisdiction to determine the reasonableness of a joint through rate covering international transportation in the United States and in a foreign country. *E.g., Can.Packers, Ltd. v. Atchison, Topeka & Santa Fe R.R.*, 385 U.S. 182, 184 (1966). If courts had instead adopted a wooden construction of the geographic limits on the Board's jurisdiction, the Board would be unable to exercise authority over any joint rates involving international transportation.

Here, CN's construction of the Board's jurisdiction is inconsistent with precedent because it would prevent the Board from prescribing reciprocal switching for any cross-border transportation by an incumbent carrier, frustrating the Board's ability to regulate traffic in the United States. Congress expressly authorized the Board to prescribe reciprocal-switching

agreements where they are practicable and in the public interest or where they are necessary to provide competitive rail service.[90] This authorization does little to achieve its stated goal to protect the interest of U.S. rail customers and the U.S. public if the Board cannot direct a carrier in the United States to engage in reciprocal switching *in the United States* to address a service or competition issue occurring abroad. Accordingly, the Board should reject the notion that it cannot require carriers in the United States to issue an OETA to an interchange or destination outside the United States, measure transit performance to this foreign location, or order reciprocal switching based on transit performance to this foreign location.

Further, even if the Board's jurisdiction is as narrow as CN contends (which it is not), CN's proposal to exclude all cross-border traffic from the Service Reliability and Service Consistency standards is excessive and unnecessary. The Board could address CN's concern for U.S.-origin cross-border movements by requiring carriers to issue an OETA to the U.S. border and measuring transit performance to the border. Similarly, for foreign-origin cross-border movements into the United States, the Board could require the incumbent carrier to generate an OETA at the border crossing and the Board could measure transit performance for the portion of the transportation that occurs within the United States. None of these approaches would involve regulation of transportation occurring outside the United States.

VII. IF THE BOARD CANNOT DEFINITIVELY CONCLUDE THAT THE PROPOSED RULES ALLOW CONSIDERATION OF CONTRACT-SERVICE PERFORMANCE, THE BOARD SHOULD REOPEN SUB-DOCKET NO. 1.

The Board is at a critical juncture in this proceeding that has included nearly a dozen rounds of comments, two hearings, and numerous *ex parte* meetings over the past twelve years. Although the Coalition Associations believe the current iteration of proposed reciprocal-

[90] 49 U.S.C. § 11102(c)(1).

switching rules can be meaningful, they are very concerned that the Board is headed down a path that is fraught with appellate risk – *i.e.,* consideration of contract-service performance – that could render the work of the past twelve years meaningless. If the Board cannot consider contract-traffic performance, it cannot employ reciprocal switching as an effective response to inadequate rail performance. To avoid that scenario, the Board's best option is to focus on reciprocal switching to enhance rail competition as an appropriate performance incentive.

The Coalition Associations believe the Board has a very defensible proposal in Sub-Docket No. 1 that could address inadequate service more meaningfully through enhanced competition. They recognize, however, that the Board has concerns about the potential scope of the Sub-Docket No. 1 proposals that led it to narrowly focus the current iteration of proposed rules. In Sub-Docket No. 1, the Coalition Associations offered ways to narrow the potential scope of reciprocal switching. The Coalition Associations renew and refine those proposals here as an alternative path forward that does not require the Board to gamble the past decade of work to reform reciprocal switching upon a single legal issue.

The Sub-Docket No. 1 proposals would give effect to *both* statutory standards for prescribing a reciprocal switch: "practicable and in the public interest" and "necessary to provide competitive rail service." 49 U.S.C. § 11102(c)(1). The ICC independently evaluated reciprocal-switch requests under those two standards prior to its decision in *Midtec* to narrow the scope of its inquiry.[91] Sub-Docket No. 1 proposed to reestablish two independent tests to which the Board referred as "Prong 1" and Prong 2," respectively. Because neither Prong 1 nor Prong 2 would link reciprocal switching to the provision of contract service pursuant to minimum performance

[91] *E.g., Central States*, 780 F.2d at 670-71, 678-79; *Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement*, 367 I.C.C. 718 (1983) ("*D&H*").

standards, they do not implicate the § 10709 objections that threaten the efficacy of the current proposal.

Prong 1 would implement the "practical and in the public interest" standard consistent with the Board's pre-*Midtec* decision in *D&H*, at 720-21, in which the ICC applied the following four criteria:

1. the interchange and switching must be feasible;
2. the terminal facilities must be able to accommodate the traffic of both competing carriers;
3. the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its shippers; and
4. the benefits to shippers from improved service or reduced rates must outweigh detriments, if any, to either carrier.

The Prong 1 criteria in Sub-Docket No. 1 mirrors this precedent. Specifically, the Prong 1 requirements that the proposed switching be feasible, safe, and not unduly hamper the ability of a carrier to serve its shippers cover the first three *D&H* factors, and the requirement that the potential benefits from the proposed switching arrangement outweigh the potential detriments covers the fourth factor dealing with the public interest.

Thus, far from creating a standard out of whole-cloth, Prong 1 would determine whether there is a "need" for reciprocal switching under the "practicable and public interest" standard by applying the *same* test that the ICC employed in *D&H,* prior to adopting the current Part 1144 rules and the ensuing *Midtec* decision. The fourth factor notably would moot the latest railroad objections in this sub-docket that shippers should be required to demonstrate that reciprocal switching will improve service and not cause more harm than good.[92] Furthermore, all four

[92] AAR Op. 60; CN Op. 16; CSX Op. 12; NS Op. 8.

factors permit the type of individualized, fact-specific analysis that the railroads claim the statute requires.[93] And the fact that these standards were employed successfully in *D&H* shows that they can work to provide a meaningful remedy.

Prong 2 would implement the "necessary to provide competitive rail service" standard by applying the same market dominance standard that the Board applies in rate reasonableness cases. The Board has expressed concern that a market-dominance test could make reciprocal switching available to a broader swath of shippers than it is comfortable doing without more experience with the impacts, since so many shippers are captive. That concern undoubtedly has been fueled by analyses performed by the AAR of "potentially eligible non-exempt traffic" constituting up to 16% of carloads at a radius of 10 miles and 67% at 100 miles.[94] The Coalition Associations, however, demonstrated that, by excluding traffic where the resulting switch would be significantly less efficient and focusing on a more reasonable 30-mile radius, a more realistic upper-bound projection of traffic that would even consider requesting reciprocal switching in the AAR analysis is 6.7%.[95] Nevertheless, the Board may not want to gamble upon the Coalition Associations' projection of likely shipper behavior.

Therefore, the Coalition Associations offer two concrete restrictions that would foreclose shippers from pursuing inefficient reciprocal-switch prescriptions under either Prongs 1 or 2, thereby keeping the actual amount of potentially eligible traffic below even the 6.7% of traffic that the Associations had identified as most likely to be the subject of a switching petition.

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[93] CN Op. 9; NS Op. 7.

[94] "Verified Statement and Written Testimony of Michael R. Baranowski and Nathaniel S. Zebrowski," pp. 4-14 (filed Feb. 14, 2022).

[95] "Post-Hearing Comments submitted by the Coalition Associations," *Reciprocal Switching,* EP 711 (Sub No. 1) 7-9 (filed April 4, 2022).

First, in lieu of making reciprocal switching available where "there is or can be a working interchange within a reasonable distance" of a shipper facility, ***the Board can limit switching to "shipper facilities located within a terminal or station served by more than one rail carrier where those rail carriers currently interchange traffic."*** This standard is consistent with the ICC's determination in *Central States*, at 675, that "[r]eciprocal switching occurs at stations or terminals served by more than one carrier" and it will encompass far less than the 100-mile radius measured by AAR. Furthermore, it eliminates the need under the current iteration of the Sub-Docket No. 1 proposals to litigate what is a "reasonable distance" or if "there can be a working interchange" when one does not already exist. Thus, the starting point for identifying potentially eligible traffic is far narrower than the starting point in the AAR's analyses and eliminates two significant litigation issues under the Sub-Docket No. 1 proposals.

Second, ***the Board can establish a rebuttable presumption that any reciprocal switch that increases the number of interchanges between carriers in an existing route is inefficient (and thus contrary to the public interest) unless the switch will be the only interchange between all carriers in the route.*** This would eliminate most inefficient switches that are unlikely to improve rail service unless the shipper can rebut the presumption. For example, a shipper may demonstrate that the greater efficiency of the alternate carrier's route offsets the extra time for a reciprocal switch, or that the incumbent's service is so poor that the additional switch still constitutes better service.

The Coalition Associations have prepared the attached Exhibit 1 to illustrate precisely what would, and would not, be presumed to be efficient reciprocal switches under their proposal to narrow the potential scope of Sub-Docket No. 1. Figures 1, 2, and 3 in Exhibit 1 illustrate presumptively permissible reciprocal switches, and Figures 4, 5, and 6 illustrate presumptively

impermissible switches. These will limit most reciprocal-switch prescriptions to scenarios where the switch changes the location of an interchange without adding an interchange or converts a single-line route to a joint line route with just a single interchange.

Respectfully submitted,

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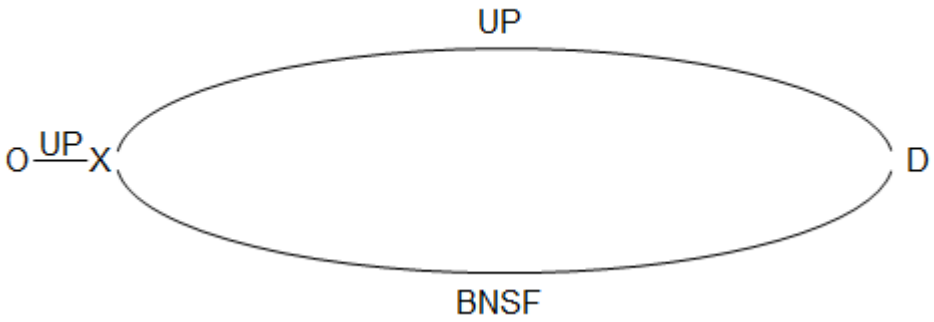
On Behalf of:
American Chemistry Council
The Fertilizer Institute
The National Industrial Transportation League

December 20, 2023

Exhibit 1

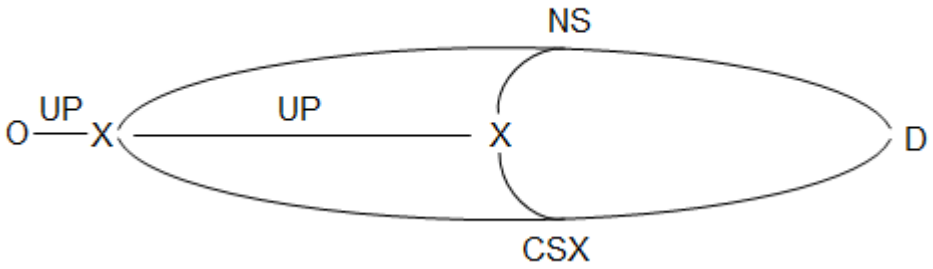
Presumptively Efficient Switches Under Coalition Associations' Proposal

Fig. 1



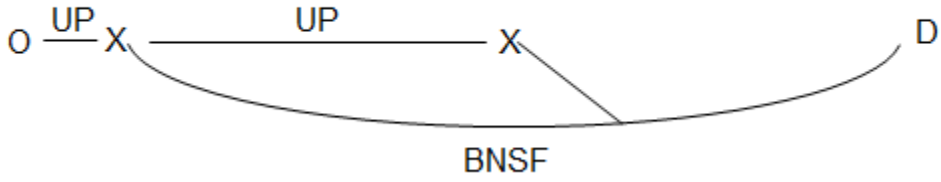
In Figure 1, a switch from UP to BNSF at the origin would be permissible because the route requires only one interchange between carriers.

Fig. 2



In Figure 2, a switch from UP to either NS or CSX at origin is permissible because there is no additional interchange; the single existing interchange is merely relocated to give a longer haul to NS or CSX.

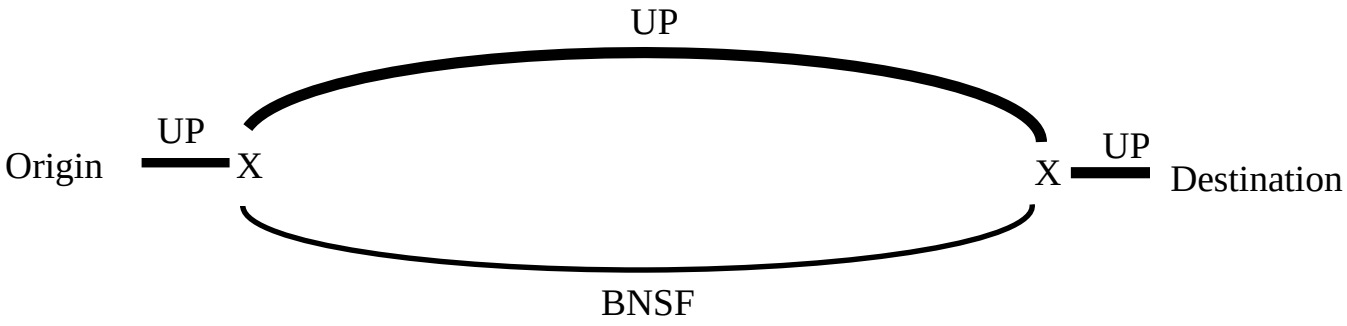
Fig. 3



In Figure 3, a switch from UP to BNSF at the origin is permissible because there is no additional interchange; the single existing interchange is merely relocated to give a longer haul to BNSF.

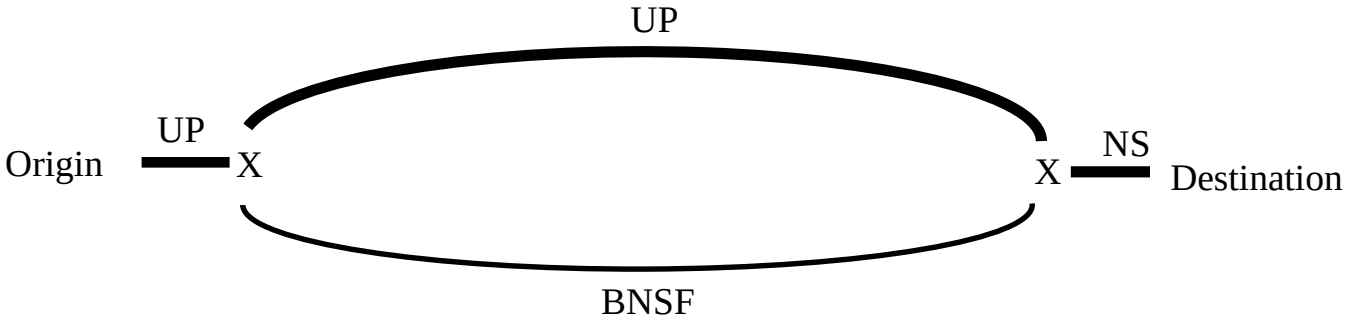
Presumptively Inefficient Switches Under Coalition Associations' Proposal

Fig. 4



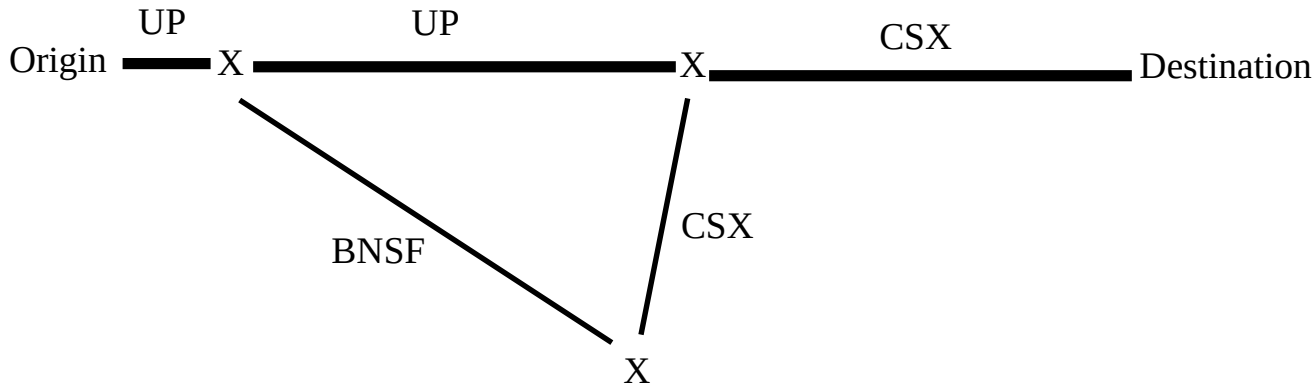
In Figure 4, a switch to BNSF at the origin would be impermissible because it would inject two interchanges into a single-line route.

Fig. 5



In Figure 5, a switch to BNSF at the origin would be impermissible because it would increase the number of interchanges from one to two.

Fig. 6



In Figure 6, a switch to BNSF at the origin would be impermissible because it would increase the number of interchanges from one to two and results in an unduly circuitous route.