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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Ex Parte No. 711 (Sub-No. 1)

Reciprocal Switching

**FURTHER SUPPLEMENTAL COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS**

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The Association of American Railroads submits these Further Supplemental Comments in response to the Board's order of March 23, 2022.

**I. THE BOARD'S HEARING CONFIRMED THAT THE PROPOSED RULE
THREATENS CENTRAL PILLARS OF A SUCCESSFUL RAIL NETWORK**

A. The testimony at the Board's March 15–16, 2022 Hearing sheds additional light on the diverse and compelling reasons why AAR and its members have consistently opposed the Proposed Rule since its announcement by a divided Board in 2016. The current Board heard from railroads' top leadership and counselors—in operations, finance, marketing, and legal and regulatory matters—that the Proposed Rule would clog the network, discourage rail investment, and harm the public interest. Economists and other experts described how the Proposed Rule would introduce new points of failure, potentially apply to a large fraction of existing traffic, create holes in railroad revenues, and spawn endless disputes, all to generate the mere appearance of competition, without creating conditions that could endure without constant Board intervention. And yet the Proposed Rule would do nothing to improve the performance of the Nation's freight rail network.

Shippers, for their part, described concerns about rates and service, and they asked the Board (a neutral regulator) to give them raw commercial leverage over carriers to “negotiate contract service terms” (a matter on which the Board has no responsibility, 49 U.S.C. § 10709(c)). But they failed to connect those rate and service grievances to the 2016 proposal on the table. Some expressed a desire for any mechanism that would give them “prophylactic” options in the event of future service problems—with no explanation of who would pay to have unused backup plans in place or why new and complicated switching would be workable at the very moments when networks are under stress. Others sought prescribed service alternatives across distances of hundreds of miles, the addition of points of interchange that do not exist today, or the introduction of switching moves into traffic that is currently routed on a single line—all with no regard to operational feasibility. Some presentations emphasized the desire for any forced switching order to function as rate relief by tightly regulating the pricing of the switch movement—with no justification for why the Board should be picking winners and losers that way. And all these invitations came from shippers that had no interest in showing that any railroad had actually engaged in any abuse of market power. But in two long days of hearings, no shipper meaningfully answered the question that should be foremost for any proponent: Why will *this Proposed Rule* solve problems that are not and cannot be solved by existing rules, or improvements to those rules?

The stakes are very high. Hearing testimony confirmed the sheer volume of traffic eligible for forced switching under the Proposed Rule. Many shippers embraced that breathtaking reach because it excuses them from showing a particularized need for forced switching as a remedy. This is especially true under the “competitive access” pathway of the Proposed Rule, which would presumptively force switching on a bare showing of market

dominance—a showing that has no connection to service inadequacy, and only the most preliminary connection to a rate-related issue. As AAR emphasized at the Hearing, nearly 95% of carloads potentially eligible for relief under that competitive access pathway originate or terminate at a station that has not historically had service options from multiple Class I rail carriers. The end result is that a large volume of traffic that would *not* be entitled to rate relief, has made *no* showing of service inadequacy, and has *not* historically had multiple railroad service options, would nonetheless be able to use the Proposed Rule to demand the functional equivalent of multiple-carrier service.

B. AAR is always interested in improving the existing rules to augment, simplify, or expedite the process for resolving disputes about rates and service, when consistent with economic principles and governing law. But the bones of the existing reciprocal switching framework are sound: Railroads and shippers can negotiate in a free market for switching arrangements that benefit everyone involved. Forced switching is available as a remedy against a railroad that has abused its market power. *See Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1503 (D.C. Cir. 1988); 49 C.F.R. § 1144.2. Switching orders are one tool among many that the Board has to address both emergent and more chronic service inadequacies. *See, e.g.*, 49 C.F.R. pts. 1146, 1147. And where a shipper’s real concern is rates, the Board’s focus should be on rates—whether through longstanding principles of maximum rate regulation, recent innovations such as streamlined market dominance, or further improvements under consideration such as voluntary alternative dispute resolution.

The Proposed Rule is not an improvement on any of this. Indeed, the Hearing showed that adopting the Proposed Rule would set the Board on a course to disrupt or marginalize everything just mentioned: Free negotiations will disappear under the shadow of regulatory

forced switching. The Proposed Rule authorizes regulatory intervention without a showing that a railroad is abusing its market power or rendering inadequate service, diminishing the relevance of existing rules built around those concepts. And when a substantial fraction of traffic is potentially eligible for rate relief under the guise of a forced switching order, what purpose or policy will the statutory and regulatory principles of rate regulation serve?

Worse, the Proposed Rule is likely to backfire. It would choke locations with limited capacity for new forced switching, exacerbate supply chain challenges, and risk harming nearly all stakeholders—not just labor, passenger rail, and the general public, but also *other shippers*, all of which rely on the efficiency of the interconnected rail network. By creating uncertainty and depressing returns on equipment and facilities, the Proposed Rule would destroy incentives for railroads to invest in infrastructure and technology improvements that benefit all stakeholders, including shippers and the public. And by upsetting reliance interests built around the Board’s existing framework, the Proposed Rule would threaten the fair and equal treatment of all who work in and depend on the freight rail industry. On top of all this, the Proposed Rule would increase regulatory burdens on the network, its participants, and the Board itself. The Board should not adopt the Proposed Rule.

II. RELIANCE ON EXISTING VOLUNTARY SWITCHING TARIFFS WOULD BE PROBLEMATIC IN NUMEROUS RESPECTS

During the Hearing, Chairman Oberman probed whether the Proposed Rule could be modified to apply only to traffic that moves through a yard through which traffic from some other customer moves under a published reciprocal switching tariff. AAR supports efforts to craft an alternative to the 2016 Proposed Rules with the goal of increasing benefits and reducing costs, and AAR recognizes that an alternative could in theory help avoid a discrete set of especially inappropriate forced switching orders. AAR understands Chairman Oberman’s

“existing-tariff-location” concept as an exploration in that spirit, even though important details of that concept are unclear.

But the existing-tariff-location concept has emerged with so little warning, and is so lacking in important details, that AAR and other stakeholders have not been able to properly consider its potential application and consequences. There are many unanswered questions about how it would work, and the concept has significant potential to impact various carriers and shippers in different and unbalanced ways. Under those circumstances, proceeding directly to a final rule based on an existing-tariff-location concept would be arbitrary and capricious, because the Board has not allowed the time, offered the process, or engaged in the analysis that would be necessary to evaluate the effects of such a rule upon the industry. *See, e.g., Sorenson Communications Inc. v. FCC*, 755 F.3d 702, 707–09 (D.C. Cir. 2014) (rejecting final rule as arbitrary and capricious because agency’s adoption of late-arising suggestion lacked evidentiary support). What is more, even a preliminary assessment of the concept reveals that it could not alone result in an operationally workable rule, and it would not address a host of fundamental legal and policy issues.

A. As the Board has observed, this proceeding traces back over a decade to the 2011 hearing in Ex Parte 705 (*Competition in the Railroad Industry*) and to the National Industrial Transportation League’s petition for rulemaking filed in the same year. *See Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, at 4–5 (STB served July 27, 2016) (Notice of Proposed Rulemaking (“NPRM”)). In the intervening eleven years, the Board has received and reviewed multiple rounds of comments, has entertained numerous ex parte meetings, and has issued several decisions, including the 2016 NPRM and the accompanying Proposed Rule. Despite that extended history with ample opportunity for dialogue and

discussion, the very first time that the Board introduced the possibility of building a rule around the concept of locations related to existing voluntary switching tariffs was via live oral comment on March 15, 2022.

No stakeholder would have imagined, from the 2016 NPRM or any other Board decision in this proceeding, that the Board might rely on existing tariffs that support limited, voluntary switching arrangements (whether agreed to with shippers, or agreed to as a merger condition) as a reference point indicating the suitability of broad, involuntary switching. Instead, the concept arose without notice, meaning that despite the many years since this proceeding was initiated, no stakeholder has had any reason or ability to anticipate the proposal and provide relevant comments. And because the concept has only arisen now, so close in time to the Board's announced deadline for further comments and meetings, no stakeholder will have sufficient opportunity to properly evaluate the concept and share its analysis with the Board. Various shipper groups have, however, already voiced opposition to the proposal. *See, e.g.*, Summary of Ex Parte Meeting held Mar. 24, 2022 between the Coalition Associations and Member Karen Hedlund, at 2 (filed Mar. 29, 2022).

AAR, for its part, invested enormous time and resources in analyzing the scope and implications of the rule that was proposed in 2016. AAR engaged experts so it could provide the Board with rigorous empirical data about the proportion of traffic that would potentially be affected by each pathway of the Proposed Rule, based on informed albeit approximate assumptions about the "reasonable distance" to an interchange at which the rule would apply, and where "there is or can be a working interchange" between carriers. But no comparable analysis has been undertaken for an existing-tariff-location concept because of the way in which it was raised and the brief period for further comments.

The impossibility of meaningful comment is exacerbated by a lack of precise formulation of an existing-tariff-location concept. A number of fundamental questions would need to be answered before stakeholders could properly examine the proposal. For example:

- Would existing tariffs be used to define or limit the *proximity* of the shipper to switching by deeming a shipper to be “within a reasonable distance” of the carrier to which traffic would be switched (as used in proposed 49 C.F.R. § 1145.2(a)(1)(ii) and (2)(iii)) if that shipper’s traffic is served by a yard at which other traffic is reciprocally switched under an existing tariff? Or instead, would existing tariffs somehow be used to define and limit the *interchange locations* where “there is or can be a working interchange” between the carriers involved (as used in proposed 49 C.F.R. § 1145.2(a)(1)(ii) and (2)(iii)) even though those tariffs do not identify interchange locations? Or would the existing-tariff-location concept address *both* proximity and interchange locations?
- Would existing tariffs be used to identify and limit locations and shippers for which forced switching would *potentially* be available? Or would locations and customers *automatically* qualify for forced switching based on existing tariffs?
- Would an existing-tariff-location concept apply based on whatever voluntary switching arrangements are in place at the time forced switching is sought? (And if so, how would the existing-tariff-location concept treat instances in which a rail carrier removes a customer facility from a voluntary reciprocal switching tariff, removing the predicate for the original forced switching order?) Or would an existing-tariff-location concept instead apply based on the voluntary switching arrangements as they existed at a certain fixed point in time? (And if so, would that date be some time in the past, the date of the final rule, or something in between? And how would an existing-tariff-location concept

accommodate the fact that railroad operations are dynamic, and the yard serving a particular shipper's traffic may change over time?)

- How would an existing-tariff-location concept reconcile inconsistencies among different railroads' tariffs? For example, Railroad 1 may list a location as open to a switch for a customer on behalf of Railroad 2, but Railroad 2 may have no customer facilities open to Railroad 1 at that location.

The Board's obligation to engage in reasoned decision-making means that it is forbidden from taking action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Board must "explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). What this means, in practice, is that the Board must really grapple with the potential consequences of its decision. *See, e.g., Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). On the current record, a final rule based on an existing-tariff-location concept could not meet these standards, because the concept has arisen so late in time and with so little detail as to prohibit the requisite research and comment by stakeholders, and the corresponding fact-finding and reasoned analysis by the Board.

B. An existing-tariff-location concept would not address either the Proposed Rule's disincentives to rail investment or its threat to railroads' ability to adequately recover their fixed costs through differential pricing. AAR's prior discussion of those issues in written submissions and in testimony at the Hearing applies with full force, with or without the overlay of an existing-tariff-location concept.

Indeed, an existing-tariff-location concept could be a perverse *disincentive* to new investment or new service offerings. Today, railroads sometimes encourage shippers to locate on their lines by offering shippers a package of investment and service offerings. Where the shipper has traffic bound for destinations served by another railroad, those service offerings could include reciprocal switching to that destination railroad—an example of the sort of voluntary win-win-win arrangement that AAR has previously described, *see* AAR Supplemental Comments at 28 (Feb. 14, 2022). But a railroad would be much less likely to offer voluntary reciprocal switching to that destination railroad as part of the package, if the upshot of the existing-switching-tariff concept could be to force the railroad to open switching to a much larger group of shippers, cars, routes, and commodities in the area.

An existing-tariff-location concept also could create peculiar and seemingly unfair distinctions among shippers. In some instances, voluntary reciprocal switching tariffs may exist more as a matter of historical happenstance than current economic and operational wisdom. Some reciprocal switching tariffs, moreover, may have very limited scope as to shippers, destinations, commodities and/or number of railcars to which they apply. There may be very good reasons why a given tariff is limited; reciprocal switching tariffs often are adopted in contemplation of very narrow and specific circumstances—circumstances to which an existing-tariff-location concept would be insensitive. And yet, under an existing-tariff-location concept, the Board could potentially be ordering forced switching for a shipper based on whether its traffic happens to transit a railyard that happens to be used in serving other traffic that moves under a tariff that, by its terms, does not apply to that shipper. Those concerns may grow over time because railroad operations and service plans are dynamic and evolving (and the same is

true of the locations, industries, and conditions specified in voluntary reciprocal switching tariffs).

C. As explained above, given the lack of precise formulation and the narrow window for further comments, AAR cannot properly assess the operational effects of an existing-tariff-location concept. Still, AAR recognizes that an existing-tariff-location concept could avoid one discrete set of operational impacts, by forbidding forced switching orders at some locations that have no such existing operation, depending on how the proposal is formulated. But the more important point is that such a limitation would not alone result in an operationally workable rule.

1. Conceptually, limiting any new switching orders to places where a switching operation exists (or more precisely, is available by published offer) is one mechanism for weeding out some clearly problematic applications of the Proposed Rule, which by its terms applies very broadly to any location where “there is *or can be* a working interchange between [railroads],” 81 Fed. Reg. 51,149, 51,165 (proposed Aug. 3, 2016) (proposed 49 C.F.R. § 1145.2(a)(1)(ii), (2)(iii)) (emphasis added). Depending on its formulation, an existing-tariff-location concept might rule out forced switching orders at locations where a physical junction exists between two railroads, but where a forced switching order would require carriers to establish entirely new operations. The concept of looking at existing tariffs appears to recognize that operational interference and other disadvantages make a switching order wholly inappropriate at such locations. More generally, this sort of inquiry implicitly acknowledges that what is operationally possible in one location may be entirely unrealistic in another—the basic reason that, for example, the Canadian interswitching experience cannot be taken as positive support for the Proposed Rule (as particular railroads have explained and will continue to address).

2. But finding that a proposed switching location is free from one particularly acute operational problem (*viz.*, a total lack of existing interchange operations) does nothing to address the many other operational problems that can arise. In other words, an existing-tariff-location concept does not *affirmatively* identify any location as *suitable* for broad-based switching that exceeds what the railroads involved have found appropriate to offer to date. Answering whether a location is operationally suitable would at a minimum require assessing the particular switching facilities and operations including the serving yard, the classifying yard, the interchange locations, and capacity of available facilities. As AAR has explained, switching operations between railroads are significantly more complex—and require significantly more resources—than single-line railroad operations. Thus, for example, an existing-tariff-location concept would not avoid the operating inefficiencies introduced by forced switching of traffic that is currently single-line traffic. Nor would such a concept avoid any operating inefficiencies introduced by moving the interchange location for traffic that is currently interlined.¹ Other

¹ There were several colloquies at the Hearing regarding exactly how many “extra moves” reciprocal switching entails. The precise answer depends on the circumstances, but the basic factual point is that interchanging cars between railroads inevitably involves additional car handlings that exceed the car handlings required to provide single-line service; this is unavoidable. See Verified Statement of William J Rennie (“Rennie V.S.”) at 8, STB Ex Parte 711 (Mar. 1, 2013). The increase in car handlings associated with forced switching will vary with the precise circumstances, but the additional handlings affect both *inbound* empty railcars and *outbound* loaded railcars (or the opposite, at the destination end of a shipment). The operational evidence in the record shows that single-line car origination involves six distinct steps or car handlings—moving the empty car from the local yard to the origin and the loaded car from the originating customer back to the local yard before it gets joined to an outbound train headed to the destination. Rennie V.S. at 8. The simplest forced switch would increase the distinct steps or car handlings in this operation from six to ten, beginning with switching the empty car from the line-haul carrier to the switching carrier’s yard, before being moved from the yard to the originating customer, where the loaded car is then picked up and moved back through the local yard before being switched back to the line-haul carrier’s yard and joined to an outbound train headed to the destination. Rennie V.S. at 9. But that is a best-case scenario; many potential forced switches would occur in complex terminals where track configurations,

unforeseen operational issues could arise as well, depending on how an existing-tariff-location concept would be implemented.

For example, at the Hearing, testimony about switching in Decatur, Alabama from Cindy Sanborn, Executive Vice President and Chief Operating Officer of Norfolk Southern Railway Company, showed that real capacity limitations exist at yards and facilities currently used for reciprocal switching. In that specific location, the yard used for switching has only 4 short tracks, with a capacity of only 22 cars each. That is a relatively small capacity when a switching facility ordinarily must support bidirectional movements (for example, both inbound empty railcars and outbound loaded railcars), and the potential scope of the Proposed Rule runs into the millions of carloads annually. With multiple shippers whose volumes vary from day to day, it is easy to imagine days when shippers unpredictably tender more cars (or demand more inbound empty cars) than such a small facility can accommodate. Indeed, existing tariffed switching volumes may already sometimes exceed the capacity of the facilities involved.

Thus, even where voluntary reciprocal switching is offered by published tariff, the associated operations and facilities are not generally designed for high volumes of traffic. Nor does the existence of a tariff indicate how much reciprocal switching actually occurs (or, indeed, whether any occurs at all). By contrast, a comparatively small number of locations on the rail network continuously interchange high volumes of traffic, and to operate efficiently, many of those locations interchange traffic in larger blocks between line haul trains, which is fundamentally different from reciprocal switching of single cars or smaller blocks of railcars

service plans, or other physical or operational constraints increase the complexity of forced switching arrangements and require upwards of twenty distinct steps or car handlings. *Rennicke V.S.* at 10. Moreover, as car volume increases, the operational challenges increase because the blocks of cars being switched may exceed the capacity of any single yard or side track being used for switching.

near their origin or destination. Moreover, beyond mere track capacity, many other operational considerations can affect the extent to which an existing voluntary switching operation could be changed to handle additional traffic, including operational differences across commodity types, empty car supply considerations, and so on.

A concrete example illustrates the problem. Consider two very different circumstances, both of which would seemingly be treated the same under an existing-tariff-location concept: (a) an existing operation (say, a seaport with multiple marine terminals) where nearly all shippers already have access to reciprocal switching, and use it frequently, and a new shipper wants access to reciprocal switching too; and (b) an existing operation (say, a mix of old and new industrial parks within a cohesive commercial area) where a handful of customers have legacy voluntary reciprocal switching for specific commodities, a small amount of traffic is currently switched, the switching operation uses a very small facility, and opening up switching to all the customers using the same yard would instantly overwhelm the capacity of the existing facilities and operation. No reasonable observer with a concern for operational impacts would treat those two circumstances alike, yet the competitive access pathway of the Proposed Rule does so, and looking at existing voluntary switching tariffs does nothing to distinguish between them.

D. Some may perceive an existing-tariff-location concept as a suitable response to comments (including AAR's) that reciprocal switching must be limited to a terminal area. See AAR Supplemental Comments at 67–70; 49 U.S.C. § 11102(c). That is incorrect because no clear correspondence exists between (a) the set of traffic originating within a given terminal area, and (b) the set of traffic moving through a yard used to perform reciprocal switching under a tariff. As elaborated below, a terminal area is defined by considerations such as the functions performed within a cohesive commercial area. By contrast, in deciding whether to force

switching for a given shipper, an existing-tariff-location concept would appear to ascribe significance to which yard that shipper's traffic moves through (although it is not clear whether the relevant yard would be a serving yard, a classifying yard, or an interchange yard). But most every shipper's traffic is served by *some yard somewhere*, even traffic that originates well outside any terminal area. Thus, even if Shipper 1 has access to reciprocal switching from one railroad to another in a given terminal area, and Shipper 2's traffic moves through the same yard as Shipper 1's traffic, it simply does not follow that Shipper 2 is also located within the same terminal area as Shipper 1. Accordingly, regardless of any existing-tariff-location concept, any rule must separately ensure that any forced switching order is limited to terminal areas—that is, a shipper is not eligible for relief under Section 11102(c) unless it and both railroads are present in the same terminal area.

1. The statute and prior interpretations overwhelmingly indicate that reciprocal switching is a practice that occurs only *within* a terminal area. Section 11102 governs the “[u]se of terminal facilities.” 49 U.S.C. § 11102. And where that statute refers to facilities *outside* terminal areas, it expressly states as much. *Compare* 49 U.S.C. § 11102(a) (requiring incumbent railroad to make “main-line tracks” available to another railroad “for a reasonable distance outside of a terminal” under certain circumstances) *with id.* § 11102(c)(1) (“The Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.”). Moreover, the common understanding of reciprocal switching has always been the switching of traffic originating or terminating *within* a terminal area among

railroads operating within that terminal area.² As the term is used in 49 U.S.C. § 11102(c)(1), two carriers can enter a “reciprocal switching agreement” with each other if both are in the same terminal area, but they cannot do so if only one is in the terminal area, and it must carry traffic outside the terminal on a line haul to reach the other railroad.³ When Congress used the words “reciprocal switching” in Section 11102(c), it imported the established meaning of that term into the statute. See AAR Reply Comments at 24 (Jan. 13, 2017). Thus, for a shipper located on the line of Railroad 1, a switching of traffic to Railroad 2 is, legally speaking, a reciprocal switch only if Railroad 2 itself also reaches the terminal area in which that shipper is located. Thus, whether a reciprocal switch is (legally) possible is a question about Railroad 2’s network—not a question about how Railroad 1 manages the shipper’s traffic (*i.e.*, which yard the traffic goes through, which is the focus of an existing-tariff-location concept).

² See *Railroad & Warehouse Comm’n of Minn. v. Chi. Great W. Ry.*, 262 I.C.C. 437, 437–38 (1945) (“It is a common custom for carriers to publish switching charges for *intraterminal* movements between industries located upon private side-tracks on their lines and the point of interchange with other carriers The switching of cars in such service is called *reciprocal switching*.”) (emphasis added); *Switching Charges & Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971) (“It has long been a common practice among the railroads to participate at *commonly served terminal areas* in what is called *reciprocal switching*.”) (emphasis added); *Increased Switching Charges at Kansas City, Missouri-Kansas*, 344 I.C.C. 62, 63 (1972) (“It is the practice for the railroads serving Kansas City to engage in *reciprocal switching*. This means that a carrier on whose lines an industry is located will switch cars to or from that industry as an incident to the road-haul movement of those cars by another carrier whose tracks *in the terminal area* do not extend to the industry in question.”) (emphasis added); *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distrib. Rules & Practices*, 1 I.C.C.2d 700, 702 (1985) (“*Reciprocal switching* involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at *commonly served terminal areas* in an arrangement under which one of the carriers acts as the switching carrier”) (emphasis added).

³ Carriers might, of course, voluntarily agree to offer *interterminal* service as a way of exchanging traffic. But for purposes of Section 11102(c), such operations would not properly be regarded as reciprocal switching any more than would other interchanges of traffic beyond the limits of the terminals in which it originates and terminates.

What constitutes a terminal area also is a well-defined concept in Board and ICC precedent—even if its application is unavoidably fact-specific.⁴ Certainly, the scope of areas where existing switching occurs may be relevant to this inquiry—overlapping switching operations and reciprocal arrangements may, for example, be evidence of “service ... performed within a cohesive commercial area.” *Golden Cat*, 1996 WL 197602, at *5. And the presence of traffic being switched *between* two railroads would be the reciprocity associated with a terminal area, because the word “reciprocal” denotes something that operates (or at least can operate) in equal and complementary fashion, *see Webster’s Third New International Dictionary* 1895 (1971) (defining “reciprocal” as “corresponding to each other: being equivalent or complementary”).

2. Under the Board’s existing standard, voluntary switching is one of several activities that may be relevant to identifying a terminal area (and whether a shipper’s facility lies within it). But it does not follow that all traffic moving through a given yard comes from a

⁴ *See, e.g., CSX Corp.—Control—Chessie System, Inc., & Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 518, 585 (1980) (“The act does not define terminals or terminal facilities, but it does say that ‘terminal areas’ are areas within which carriers ‘transfer, collect or deliver’ freight. 49 U.S.C. 10523. The Commission has traditionally included in the term ‘terminal facility’ any property of a carrier which assists in the performance of the functions of a terminal.... In classifying a track as a terminal facility, we look to the use to be made of the track.”); *Rio Grande Indus., Inc., et al.—Purchase & Related Trackage Rts.—Soo Line R.R. Co. Line Between Kansas City, Mo. & Chi., IL*, FD 31505, 1989 WL 246814, at *9 (ICC Nov. 13, 1989) (*RGI/Soo*) (“[W]hile use ... is an appropriate starting point in defining terminal facilities, it is not the only factor bearing on the question of what constitutes terminal track. Circumstances the Commission have held significant include whether operations take place within railroad yard limits and whether service is performed within a cohesive commercial area. The presence of team tracks, freight houses or assembly facilities has also been given significant weight. Thus, the nature of the facilities and the character of the area in which they are located are as important as the use of the facility. A ‘terminal area’ (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities.”) (citations and footnotes omitted); *see also Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, FD 41550, 1996 WL 197602, at *5 (STB Apr. 17, 1996) (similar).

single terminal area, especially when (a) some shippers may be located in relative isolation as noted above, and (b) multiple yards (*e.g.*, a serving yard, a classifying yard, an interchange yard) may be used to handle any one shipper's traffic. As the ICC explained, the "view of a terminal area as extending to any rural shipper that can be reached by a local train dispatched from a freight yard is far too expansive." *RGI/Soo*, 1989 WL 246814, at *9; *see Golden Cat*, 1996 WL 197602, at *5 (relying on *RGI/Soo* to conclude that a shipper facility is not a "cohesive commercial area" where there were "no major communities, switching or classification yards, or [other] shippers ... located at or anywhere near the [particular] facility"). In those circumstances, any transfer of traffic to another railroad would be a line-haul interchange, and the legally relevant question would be whether the Board should prescribe a through route for such traffic under 49 U.S.C. § 10705, not whether the Board should order reciprocal switching under 49 U.S.C. § 11102(c). Importantly, those two statutes have different standards and limitations, and the Board cannot use one to avoid the limits Congress set through the other. *See also infra*, Part IV.

In short, whether or not the Proposed Rule is modified to incorporate an existing-tariff-location concept, the same statutory limit must be applied: A shipper cannot receive Board-compelled switching from one railroad to another unless the shipper and both railroads are all present in the same terminal area.

III. THE BOARD SHOULD EVALUATE THE PROPOSED RULE IN LIGHT OF ITS FULL TOOLBOX OF REMEDIES—AS TO RATES, SERVICE, OR OTHERWISE

A sentiment expressed by some stakeholders—both in comments and at the Hearing—is that a broad entitlement to reciprocal switching would address a wide range of perceived ills. Those views are misguided on the facts, as AAR has explained elsewhere. But apart from that, it is just bad public policy—and in many ways, contrary to the statute—to grant a broad and

untested regulatory entitlement when the Board already has a robust set of statutory tools and regulations specifically designed to remedy each of the various and shifting concerns that shippers have voiced to justify the Proposed Rule. Colloquies during the Hearing suggested that stakeholders and the Board may not have fully accounted for the true range of those tools. AAR describes some of the key authorities below.

Rates. If rates are too high and should be lower—a question that can only be answered by reference to particular rates—then the answer to that perceived problem lies in the Board’s statutory rate reasonableness tools used to examine whether a challenged rate exceeds the reasonable maximum. *See* 49 U.S.C. § 10707(c), (d); *see also id.* §§ 10701, 10704, 10707. If the Board believes its existing methodologies for this inquiry are too administratively cumbersome or require reforms in other areas, it should consider such reforms consistent with sound economics. But regulating rates *indirectly* via forced switching—rather than *directly* via maximum rate regulation—can only be more complex and require more protracted regulatory intervention by the Board; that is the lesson of regulatory economics and painful past experience in other industries. *See* Verified Statement and Written Testimony of Jonathan M. Orszag & Yair Eilat ¶¶ 8, 30–37; Verified Statement and Written Testimony of Debra J. Aron *passim*.

The Board has adopted, and continues to consider, reform proposals to its rate methodologies and processes. *See generally* Ex Parte 756, *Market Dominance Streamlined Approach*; Ex Parte 755, *Final Offer Rate Review*; Ex Parte 765, *Voluntary Arbitration Program for Small Rate Disputes*. Like any stakeholder, AAR does not agree with all the specifics of those proposals, but reform efforts of that kind are a much better investment of the Board’s resources than subjecting itself and stakeholders to endless contested forced switching cases under the Proposed Rule.

Service. If the Board is concerned about adequacy of service—a more recent justification for the Proposed Rule raised in ex parte meetings and at the Hearing—the Board has tools for responding to serious service problems. See AAR Supplemental Comments at 26.

Of special importance, the Board adopted the regulations codified at 49 C.F.R. §§ 1146.1 and 1147.1 in 1998 after holding “hearings, at the request of Congress” and where “[a] recurring complaint voiced by rail shippers ... was the delay and ineffectiveness of existing procedures for obtaining relief from localized service failures.” *Final Rule—Expedited Relief for Service Inadequacies*, 63 Fed. Reg. 71,396 (Dec. 18, 1998). Those procedures are designed “to provide temporary relief from serious, localized railroad service problems more quickly and effectively.”

Id. The Board has explained that those regulations and the competitive access regulations (which the Proposed Rule would upend) were to be complementary “sets of rules under which parties may seek alternative rail service. Each set of rules will serve a different purpose. The Part 1146 rules will apply to requests for expedited, short-term emergency relief under [49 U.S.C. §] 11123. The Part 1147 rules will apply to requests for temporary alternative service under [49 U.S.C. §§] 10705 or 11102, on a more fully developed record, to address serious (but not necessarily emergency) service problems. The Part 1144 [competitive access] rules will remain available for requests for more permanent alternative service under sections 10705 or 11102 to address competitive abuses.” *Id.* at 71,397.

The Board “believe[d] that the resulting selection of procedures—Part 1146 for expedited, short-term emergency relief; Part 1147 for temporary, service-based access; and Part 1144 for permanent, competition-based access—will be both fair to the interests of the affected railroads and responsive to the transportation needs of the shippers involved.” *Id.* Under those regulations, the Board can order remedies including terminal trackage rights, reciprocal

switching, and through routes under certain circumstances. See 49 C.F.R. §§ 1146.1(a) and 1147.1(a); see also 49 U.S.C. §§ 11123(a), 11102(a), 11102(c), 10705(a); *Joint Petition for Serv. Ord. (Rail Service in the Western United States)*, 2 S.T.B. 725 (1997). Of course, as the Board recognized in recently streamlining the process for allowing emergency temporary trackage rights to take effect, service disruptions due to external factors, such as extreme weather events, often can be addressed most effectively by voluntary cooperation among carriers, with relatively light Board involvement. *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, 86 Fed. Reg. 68,926 (Dec. 6, 2021) (adding 49 C.F.R. § 1180.2(d)(9)).

Every one of those service remedies is geared toward identifying a genuine problem and tailoring a solution that will actually improve the situation, and in a manner that minimizes potential adverse consequences of regulatory intervention. Direct responses to service issues using these tools are preferable to the blunt forced-access entitlement in the Proposed Rule, which would often apply *without regard* for whether inadequate service exists and threaten further disruptions from the mandated switching itself. The targeted approach of the existing regulations also better responds to concerns raised at the Hearing about the timeline on which proceedings under the Proposed Rule would occur.

Abuse of Market Power. Finally, if the Board is concerned about anticompetitive conduct or abuse of market power by railroads—manifested in various combinations of rate or service issues—that is precisely the focus of the standard under *Midtec*. That standard is relatively insensitive to the operational concerns that may accompany a forced switching order. But that is by design and warranted when there is an overriding need to ensure that a railroad does not act anticompetitively or abuse its market power. The baseline, though, is that “to the

maximum extent possible, competition and the demand for services [should] establish reasonable rates for transportation by rail.” 49 U.S.C. § 10101(1). The D.C. Circuit made clear in *Midtec* that regulatory interventions must be cabined: “If the Commission were authorized ... to prescribe reciprocal switching ... whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.” 857 F.2d at 1507.

* * *

AAR welcomes leadership from the Board and ideas from other stakeholders, and it works to foster constructive dialogue among its own members on the appropriate standards for rate, service, and competition-related remedies. The important point for the Board at this moment, however, is that it has historically met such issues with tailored and calibrated remedial frameworks that can address specific, demonstrated problems. The Proposed Rule would be a striking departure from decades of that approach—and thus a departure from more than just the existing competitive access rules and *Midtec*. As AAR previously explained, AAR Supplemental Comments at 9–11, such radical changes in policy demand compelling justifications and exceedingly persuasive explanations. Those justifications are absent here.

IV. ANY APPLICATION OF RECIPROCAL SWITCHING MUST BE TARGETED AND CABINED IN A MANNER THAT RESPECTS CONGRESS’S REJECTION OF AN OPEN ROUTING REGIME

At the Hearing, panelists appearing on behalf of the railroads described the very real danger that the Proposed Rule portends a regression back toward an open routing regime. The prospect of open routing is both practically worrisome and flatly inconsistent with the statute.

By driving the industry back toward open routing, the Proposed Rule would resurrect the very evil that Congress interred when it enacted the Staggers Act.

Some history and context merit the Board's attention. Before the Staggers Act, controlling regulations effectively prohibited railroads from making rate decisions that were responsive to market forces and from rationalizing their routes to handle traffic in the most efficient manner. As the D.C. Circuit recounted, the result was that "[b]y the mid-1970s, the railroad industry had evolved into a system characterized by 'open routing' ... [which] refers to the practice whereby through routes were created on practically all combinations of railroad tracks between two points." *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 110 (D.C. Cir. 1987). Shippers' written comments and express testimony at the Hearing headed in exactly that direction, through a combination of (a) their aim of establishing prophylactic switching orders, which create multiple available routings for a given origin-destination pair using mix-and-match combinations of different railroads' networks; (b) their desire for "switching" orders that would extend out to shippers located potentially hundreds of miles from points of interchange; and (c) their insistence that forced switching be granted without a showing of fault, thus removing any control a railroad may have over whether a given route or interchange may be established.

Open routing was rightly consigned to the ash-heap of regulatory history. "Much of the railroad industry and many shippers became greatly dissatisfied with open routing" and its companion, rate equalization, wherein "all routes between the same two points—including single-line routes—were offered to shippers at the exact same rates, without regard to the actual cost of providing the service." *Id.* at 110–11. Under those constraints, railroads were unable to pursue efficient routing or adjust prices in accordance with costs, and many shippers were forced

to pay artificially high rates in order to cross-subsidize artificially low rates charged to other shippers. The result was a reduction in railroads' "ability to attract capital needed to maintain and revitalize existing facilities" and "an overall financial crisis in the railroad industry." *Id.* at 111. The Staggers Act withdrew the regulatory strictures that had enforced open routing and rate equalization. *See id.* at 112. By vesting routing decisions in the carriers and the free market, Congress gave railroads "the flexibility to make individual ratemaking and routing choices." *Traffic Protective Conditions*, 366 I.C.C. 112, 119 (1982), *aff'd in relevant part sub nom. Detroit, T. & I. R.R. Co. v. United States*, 725 F.2d 47 (6th Cir. 1984). The ICC heeded Congress's desire to limit regulation and pursue efficiency, noting in one salient example that if its decision "result[ed] in the loss of some routes and a consequent reduction in the number of routing options available to shippers, that effect [wa]s outweighed by the desirability of more efficient routing." *Western Railroads—Agreement*, 364 I.C.C. 635, 649 (1981).

What exists under the statute today is very different from what existed in the 1970s. The system now avoids open routing, and thereby promotes efficiency (often in the form of shorter routes, though other considerations such as time and resource utilization bear on efficiency too). Within that system, Congress crafted specific exceptions under which the agency could regulate and require particular routing *where circumstances demanded such a remedy*. Under Section 10705(a), the Board may prescribe through routes in a proper case, even to the point of requiring "a rail carrier to include in a through route substantially less than the entire length of its railroad." Section 10705 also explicitly requires the Board to "give reasonable preference" to the originating carrier. 49 U.S.C. § 10705(a)(2). Likewise, Section 11102(c) stands as a narrow exception to an overall policy that commits routing decisions to the free market. Any rule that allows shippers to broadly demand a "reciprocal switch" at a wide range of locations would

indefensibly circumvent Congress's deliberate effort to disapprove regulated and redundant open routing.

V. CONCLUSION

For the foregoing reasons, and those stated in AAR's previous submissions, the Board should not adopt the Proposed Rule.

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Respectfully Submitted,

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