

**Surface Transportation Board
Ex Parte 711 (Sub-No. 2)—Reciprocal Switching**

Summary of Ex Parte Meeting held on November 9, 2023, between
The Fertilizer Institute, National Industrial Transportation League, and
American Chemistry Council and Chairman Oberman

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The Fertilizer Institutes (TFI), National Industrial Transportation League (NITL), and American Chemistry Council (ACC) Attendees:

- Jeffrey Sloan, American Chemistry Council
- Justin Louchheim, The Fertilizer Institute
- Jeffrey Moreno, Thompson Hine
- Karyn Booth, Thompson Hine
- Jason Tutrone, Thompson Hine
- Richard Couch, Thompson Hine

STB Attendees:

- Chairman Martin J. Oberman
- Ellen Erichsen
- Jetta Sandin

Meeting Summary:

The meeting began with introductions. TFI, NITL, and ACC (collectively the “Coalition Associations” or “CA”) thanked the STB Attendees for the opportunity to meet and discuss the Board’s Reciprocal Switching Notice of Proposed Rulemaking (“NPRM”).¹

The Coalition Associations outlined three overarching topics in the NPRM: the STB’s ability to consider reciprocal switching requests from shippers in a rail transportation contract; metrics in the NPRM and alternative metrics; and a process to terminate a reciprocal switch prescription. Chairman Oberman stated that he had read some of the CA’s comments and had questions.

The CA first addressed whether the Board can consider a reciprocal switch request from a shipper subject to a rail transportation contract, and whether the Board can consider service metrics of rail traffic subject to a rail transportation contract. The CA answered both questions in the affirmative and cited *Vista Chemical*² and *Midtec*³ in support. In both cases the Board (then the Interstate Commerce Commission) considered service metrics that were subject to a rail transportation contract. The CA added that if the Board cannot consider contract traffic because of 49 U.S.C. § 10709, then it calls into question whether the Board can act under either Parts

¹ Ahead of the meeting, a summary chart of the arguments in the Coalition Associations’ Opening Comments was provided to each Board Member. This summary chart is appended as Exhibit 1.

² *Vista Chemical Co. v. The Atchison, Topeka & Santa Fe Ry. Co.*, 5 I.C.C. 2d 331 (1989).

³ *Midtec Paper Corp., et al. v. Chicago and North Western Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 3 I.C.C. 2d 171 (1986).

1144 or 1147. The CA concluded that this would effectively neuter the entire purpose of a reciprocal switch prescription as a relief because of the amount of rail transportation that moves under a contract.

Chairman Oberman asked whether the Board's caselaw allowed the issuance of a reciprocal switch while a rail transportation contract was in effect. Chairman Oberman posed the example of a shipper that enters into a five-year rail transportation contract and at year four the service falls below a metric; the shipper could not use the data from the first four years of the contract.

The CA recognized the example, and stated that the vast majority of contract shippers don't have a 100% volume commitment which provides them with flexibility to use other modes of transportation, including alternative rail carriers. The CA proposed that shippers seeking a prescription would include the effective date of the reciprocal switch, which would have to be within one year of the reciprocal switch petition.

The CA next addressed the service metrics and stated that the metrics in the NPRM were based on a time period when rail service was at its worst level in decades. The CA proposed raising the original estimated time of arrival ("OETA") metric from 60% to 70% because of the significant impacts that shippers feel at 60%. CA cited an example where the shipper was required to curb production because of inadequate rail service. The CA stated that 70% was a level the railroads were capable of achieving and that many railroads have consistently averaged over 70% for the past year.

Chairman Oberman responded that there would be debate on what the number will be in the Final Rule and requested additional examples of what happens when a shipper does not get adequate rail service. The CA added that chemical manufacturers suffer considerable impacts on supply at 70% service which, in turn, impacts their customers.

The CA next proposed additional, graduated thresholds for the OETA metric, which would require 70% of deliveries to occur within 24 hours of the OETA, 80% within 48 hours, and 90% within 72 hours. The CA clarified that these metrics would apply to deliveries before and after the OETA set by the railroad. The CA also explained their alternative proposed threshold that would be set by the average systemwide performance of all Class I railroads.

The CA next addressed the transit time metric and proposed that the year-over-year target should be 15% instead of the 20 or 25% proposed in the NPRM. The CA noted that a shipper could experience a compounded effect of degraded service year-over-year if a longer term metric is not also established. To address the compounded effect of inadequate service, the CA proposed adding a second target of cumulative 25% over three years. The CA added that this would prevent normalizing poor performance. Chairman Oberman observed that whatever numbers are picked for these metrics should warrant remedial action, rather than average service. The CA responded that they understood the point and that a reciprocal switch should be an ongoing incentive for railroads and for them to increase reliability.

The CA next proposed splitting the industry spot and pull (“ISP”) metric into two measures: one metric for missed cars, and the other for “no shows.” For the first, the CA proposed that 80% of car spots and pulls occur within the first service window and with 100% of the remaining spots and pulls occurring within the next service window. For the “no show” metric, the CA proposed that the carrier provide service for 90% of the service windows, but that the carrier cannot miss two consecutive service windows. For many shippers, especially those within one or two deliveries per week, the CA said that consecutive misses are catastrophic for production.

Chairman Oberman asked how consecutive misses would be measured. The CA responded that, for the first metric, a railroad failure to perform a spot or pull for a specific car in consecutive windows would be grounds for a reciprocal switch. The CA added that the standard for the “no show” metric is 90%, but that two consecutive no shows by a railroad would also be grounds for a reciprocal switch. The CA added that a reciprocal switch would be warranted because of the significant impact the failures have on shippers that only receive one delivery per week. The CA added that the missed service window could be for a commodity that is necessary to continue their operation, and that consecutive misses could result in a shutdown of operations. Chairman Oberman asked whether the measure was still 12 weeks and whether the CA explained this proposal in their comments. The CA responded that 12-weeks was still the period of time, and that a carrier could miss multiple railcar switches during this period, including in consecutive windows, provided that a railcar does not fail to perform a spot or pull of the same railcar in two consecutive windows. The CA also stated that the proposal was explained in their comments.

The CA next explained that there was some ambiguity regarding the definition of “similar traffic” and that the Board should clarify the definition in the Final Rule. As an example, the CA cited eastbound rail traffic and westbound rail traffic – the eastbound traffic does not share the same facilities as the westbound traffic and the operations are different. Chairman Oberman stated he understood the CA’s point regarding the definition.

The Chairman asked whether the length of remedy is addressed in the CA’s comments. The CA responded that it is addressed in their comments, and that the CA propose five to ten years as a length of time for a reciprocal switch prescription.

The CA next proposed that the status quo should be preserved when the Board evaluates whether to terminate a reciprocal switch. The CA stated that this is because shippers have lead times, and the current proposal would create a “whiplash” effect that would complicate the logistics of shippers, as well as the incumbent and alternative carriers.

The meeting concluded with each side thanking the other for participating in the meeting.

Issue	NPRM	Coalition Position	Page #
STB Authority To Consider Contract Service Performance	Whether, and under what circumstances, STB has the authority to consider reciprocal switching requests from shippers that have entered into a valid rail transportation contract with the incumbent carrier and to consider service metrics for such service. When, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires.	STB’s authority firmly established in <i>Midtec</i> and <i>Vista Chemical</i> decisions, which considered requests for reciprocal switching from shippers who had valid transportation contracts with the incumbents and the service provided pursuant to those contracts. There is no statutory restriction upon the timing of a prescription. Unlike the <i>Burlington Northern</i> decision cited in the NPRM, Congress has not conducted an independent balancing of shipper and carrier interests in the statute that constrains the STB’s ability to do so. As a matter of policy, to avoid various undesirable consequences and to maximize the benefits of reciprocal switching, the STB should require shippers to notify it, within 30 days of a decision that prescribes a reciprocal switch, when the shipper desires the switch period to become effective, provided that such date can be no more than one year from the date of the shipper’s petition.	9-20
OETA Metric	• Measure: Percentage of shipments constructively or actually placed at the destination (or interchange point) within 24 hours of the original estimated time of arrival (OETA), over a consecutive 12-week period • Target: >60%; option for 70% in year 2 and beyond	Apply the higher of the following two metrics: • Increase the adequacy threshold for deliveries within 24 hours of the OETA to 70% and establish additional thresholds of 80% for deliveries within 48 hours and 90% within 72 hours (collectively “Fixed Thresholds”). • Adopt alternative “Adjusting Thresholds” at 24, 48, and 72 hours that equal the average systemwide performance of all Class I carriers. Apply the 24, 48, and 72 hour time bands <i>before and after</i> the OETA.	20-31

Issue	NPRM	Coalition Position	Page #
		Adopt a unit train threshold of 90% arrival within 24 hours of OETA.	
Transit Time Metric	• Measure: Year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period and the same 12-week period during the previous year. • Target: ≤ 20% or 25%	Set the year-over-year target at 15%, because most shippers begin to experience significant impacts by that point. Adopt a 2nd target of a cumulative 25% increase over three years to avoid the compounding effect of prolonged transit time increases that otherwise do not exceed the single year threshold.	31-34
ISP Metric	• Measure: Success rate in performing all requested spots and pulls within the planned service window over a period of 12 consecutive weeks • Target: 80%; 90% for one year if carrier reduces frequency of local service absent a commensurate reduction in customer demand	Split this metric into two measures, one for missed cars and the other for service window no-shows. Car Measure: 80% of railcar spots and pulls occur in the planned service window, and 100% within the next planned window. No-Show Measure: Provide service for 90% of service windows, but carrier may not miss consecutive windows. Additional proposals: • Increase both thresholds for 2 years if rail carrier unilaterally reduces frequency of ISP service without a commensurate reduction in demand. • Clarify how to calculate ISP performance for open gate facilities.	34-44

Issue	NPRM	Coalition Position	Page #
		• Apply standards to carrier’s established service protocol, with a maximum service 12 hour service window. • Require 60 days’ notice of a service window change.	
Terminal Area Definition	Relies upon precedent to apply a function-based definition of a “terminal.” Establishes a presumption of qualification when a reciprocal switching arrangement already exists within a terminal area. Asks how to reconcile inconsistencies between incumbent and alternate carrier tariffs.	Support NPRM’s function-based definition. Support NPRM’s presumption and proposes to expand it to encompass any terminal where the incumbent and alternate carriers interchange traffic. Resolve tariff inconsistencies by reference to past switching history.	45-47
Duration of Prescription	2 year min; 4 year max	5 year min; 10 year max	47-49
Process to Terminate Switch Prescription	Incumbent must petition to terminate w/i 180-to-120-day window prior to expiration of prescribed term. If STB does not act by expiration date, prescription automatically terminates unless STB extends prescription by 30 days due to extraordinary circumstances.	Incumbent must petition to terminate w/i 210-to-150-day window prior to expiration of prescribed term. Preserve the status quo by continuing a switch prescription until the latter of expiration of the prescribed period or 30 days after the Board serves a decision terminating the prescription. Add a requirement that the incumbent provide relevant data for the service standards with its petition, and if it fails to provide complete data, the shipper’s reply is tolled until 15 days after the incumbent provides that data.	49-54

Issue	NPRM	Coalition Position	Page #
Standard to Terminate Switch Prescription	Incumbent must demonstrate that, at the time of its petition, its service for <i>similar</i> traffic on average met whichever performance standard served as the justification for the prescription over the most recent 24-week period.	The definition of “similar traffic” is overbroad and, with respect to the ISP metric, inapplicable. The incumbent must demonstrate that its service, on average, met <u>all three performance standards</u> over the most recent 24-week period. - For the <u>OETA and Transit Time metrics</u>: the measure shall be of “similar traffic” defined as other manifest traffic moving <i>between</i> the terminal where the reciprocal switch occurs and the terminal or local serving yard at the other end of the movement of the switched traffic. If there is no other traffic between those points, the incumbent may include traffic to/from terminals or other locations within a reasonable distance of the point of origin or designated destination. - For the <u>ISP service metric</u>: Only the shipper’s own traffic is relevant because the incumbent still provides ISP service for switched traffic.	54-56
Switch Prescription Renewals	If incumbent does not file petition to terminate or fails to bear its burden of proof, renew switch for same duration as initial prescription. But STB asks whether the renewal should be only for one year. If incumbent experiences a service failure w/i one year after termination, should STB make switch permanent?	Renewal term should match original prescription term because the same factors that influence the original term apply to renewal terms. Yes, a service failure within one year after termination merits a permanent prescription as a safeguard against incumbent’s requesting termination prematurely.	56-57

Issue	NPRM	Coalition Position	Page #
Minimum Service Levels for Prescribed Switches	Should the STB prescribe minimum service levels for switch prescriptions and, if so, should it establish penalties?	The STB should prohibit the incumbent from reducing its switching (i.e., first-mile, last-mile) service below levels that existed prior to the prescription absent a material reduction in the shipper's traffic volume that has a material adverse impact upon the incumbent's operations. If a carrier reduces service without either Board authorization or the shipper's consent, the Board should make the switch permanent, deem such failure to be a violation of the common carrier obligation to provide service upon reasonable request, and award damages to the shipper.	58
Switch Rate	STB seeks comment on two potential methodologies for setting switch fees when the affected carriers fail to reach agreement within a reasonable time: Cost-of-Service or SSW Compensation.	STB should adopt the SSW Compensation approach with the adaptations proposed in the Crowley/Fapp V.S. to apply this standard to reciprocal switch rates. Clarify that shippers may challenge a switch fee using the same methodology for carrier disputes. Clarify that, when the STB prescribes a reciprocal switch, the resulting intramodal competition will not automatically preclude a finding of market dominance when challenging the reasonableness of the line-haul rate for the same traffic.	58-60
Other Actions for Consideration	What other actions should the STB consider with respect to competitive access and, in particular, whether it should further broaden the application of the public interest prong of § 11102.	STB should exert its authority under 49 USC 10705(a)(2)(C) to extend its proposed rules to all bottlenecks. Explore trackage rights as an additional remedy for breach of the ISP Service Metric.	60-65

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Issue	NPRM	Coalition Position	Page #
		Apply the competitive enhancement objective in Section 11102(C) to expand reciprocal switching upon gaining experience with reciprocal switching for service inadequacies.	