

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

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

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

- Jeffrey Sloan, American Chemistry Council
- Jeffrey Moreno, Thompson Hine
- Karyn Booth, Thompson Hine
- Jason Tutrone, Thompson Hine
- Richard Couch, Thompson Hine

STB Attendees:

- Member Patrick J. Fuchs
- Lisa Novins

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. Member Fuchs stated that he had read 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. The CA explained that 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 1144 or 1147. The CA concluded that this would effectively neuter the

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).

entire purpose of a reciprocal switch prescription as a relief because of the amount of rail transportation that moves under a contract.

The CA continued by stating that the STB has observed, in executing its statutory duties regarding overall public interest and rail performance, there has been inclusion of contract traffic that was not violative of 49 U.S.C. § 10709. Member Fuchs discussed the focus of the cases, and whether a service component may be disaggregated, and he asked whether anticompetitive conduct is analogous to inadequate service. The CA responded that *Midtec* suggested that inadequate service could be indicative of competitive abuse, but a shipper could get relief from inadequate service without demonstrating competitive abuse. Member Fuchs stated he understood the point, and acknowledged that not 100% of rail traffic moves under a rail transportation contract.

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. Member Fuchs noted the difference between an average and an adequacy standard and asked whether 70% was the appropriate target given that railroads have averaged more than 70% over the past year. The CA responded that nearly all railroads are already performing over 70%, and added that a shipper and its customers already begin to feel impacts on operations when performance reaches 70%.

Member Fuchs stated he understood the point and hoped that rail service would improve over time. Member Fuchs added that it would be helpful to see comments explaining the specific impact and effects that a 70% OETA performance level has on shippers. The CA stated that it understood, but reiterated that the metrics in the NPRM were based on a time period when rail service was at its lowest.

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 further discussed their proposed alternative threshold that would be set by the average systemwide performance of all Class I railroads. Member Fuchs responded that part of the purpose of the transit time metric was to prevent manipulation of the OETA metric. The CA pointed to inadequacies in that goal and explained that measuring delivery before and after OETA is better-suited to that goal, in addition to acknowledging problems with excessively early deliveries.

The CA added that these metrics were calculated based on a period of historically poor rail service, and that as railroad service improves so should the metrics. Member Fuchs noted that what constitutes adequate service may change, but he questioned whether adequacy should be

considered based on railroad service improvement or on effects on shippers. The CA responded that the concern is locking in a level of inefficiency. The CA provided an example where a railroad increases service to 90% causing the shipper to rely on that level of service but if the service dropped to 70%, it would cause a massive disruption in the shipper's operations for which there would not be any remedy. The CA added that shippers want to hold the railroad to its representations and that carriers are in the best position to identify the service levels shippers should expect.

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 a cumulative 25% over three years. Member Fuchs responded that the Board could also consider basing it off of five years, given that the most recent three years were characterized by historically poor service. Member Fuchs added that the longer the period of time that is used to calculate the cumulative metric proposed by the CA, the more likely it would be an accurate representation of what constitutes average rail service. The CA responded that three years is likely sufficient time to eliminate outliers and provide an accurate representation of what constitutes average rail service. Member Fuchs stated he understood the CA's point.

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.

The CA also explained their position that service windows should be based on the carrier's established protocol. Member Fuchs responded that there was variability across railroads regarding the ISP metrics and that the Board is concerned with setting a standard where the switch windows are off by hours, potentially punishing a carrier with a tighter window. The CA responded that shippers can only plan to the extent a railroad tells them, and that if a carrier does not perform local service within the period it identifies to the rail customer, it can impede the customer's operations at its facility.

The meeting concluded with each side thanking the other for participating in the meeting.⁴

⁴ By email sent November 10, 2023, CA noted that Exhibit 2 of its opening comments submitted to the Board contains regulatory text that spells out the proposed alternative service metrics discussed during the meeting. The email is appended to this summary.

Exhibit 1: EP 711 (Sub-No. 2) – Summary of Coalition Association Opening Comments

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

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		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

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		• 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

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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

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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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		Apply the competitive enhancement objective in Section 11102(C) to expand reciprocal switching upon gaining experience with reciprocal switching for service inadequacies.	

From: [Moreno, Jeff](#)
To: [Perry, Shelia](#); [Borges, Stephanie](#)
Subject: Coalition Association Ex Parte Meetings
Attachments: [image001.png](#)
[image002.png](#)

Shelia and Stephanie,

Thank you for coordinating our meetings yesterday with Chairman Oberman, and Members Fuchs and Schultz. During our discussions, there appeared to be some confusion over our verbal explanations as to how some of our proposed alternative service metrics would work. We forgot to point out that Exhibit 2 of the Coalition Associations' opening comments contains regulatory text that spells this out in writing. We would appreciate it if you could share that fact with the Members. Thank you.

Best Regards,

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