

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING FOR
INADEQUATE SERVICE

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

**REPLY COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE**

WESTERN COAL TRAFFIC LEAGUE

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In accordance with the governing procedural schedule, the Western Coal Traffic League (“WCTL”) hereby submits these reply comments.

SUMMARY

WCTL’s November 7 Comments explained that the Board’s proposal was unlikely to provide a meaningful benefit for most unit train coal shippers. Nothing in the comments filed by other parties in this proceeding provides any basis for greater optimism.

The Board’s proposal to use reciprocal switching as a remedy for poor service (rather than as a means for addressing the absence of competition) will not provide a feasible opportunity for coal shippers – even coal shippers at or near the expiration of coal transportation contracts – to obtain relief. As an initial matter, the Board’s proposed geographic scope for considering reciprocal-switching relief is improperly narrow and will prevent the contemplated reciprocal-switching remedy from providing meaningful relief. In that regard, the Board’s proposed geographic scope improperly conflates the

statutory restrictions of 49 U.S.C. § 11102(a) (terminal trackage rights) with the Board's broader authority to require reciprocal switching under 49 U.S.C. § 11102(c).

Even where reciprocal switching relief theoretically could be of benefit to a coal shipper whose location could be integrated into a terminal area, a risk exists that the Board's proposed standard would preclude such relief despite steadily worsening rail service (or despite service that remains at deficient levels without modification).

In its Comments, the Association of American Railroads ("AAR") proposes a series of modifications to the Board's September 7, 2023 Notice of Proposed Rulemaking ("NPRM") that would ensure the absence of any potential value for shippers. Most notably, the AAR repeatedly seeks to impose a new, heightened legal standard on any request for reciprocal switching; namely an "actual necessity or some compelling reason" standard that the AAR identified in a 1933 case (*Jamestown*) that has no factual relevance whatsoever to the Board's present inquiry. In addition, the AAR proposes a variety of other improper modifications that would prevent any actual use of the Board's proposed rules, as described below.

The individual railroads similarly propose modifications to the Board's NPRM that would prevent any meaningful relief for shippers burdened by inadequate rail service. Essentially, the various railroads have proposed changes that would lead to extensive administrative litigation, discovery, evidentiary submissions, market dominance disputes, etc., before the Board ever could prescribe reciprocal switching. Moreover, concerns expressed by the railroads regarding the supposed "burden" on the alternate carrier – *i.e.*, the burden of having the opportunity to participate in a reciprocal-

switching movement – suggest that the Board may be wrong to assume that alternate carriers will be eager to secure additional business. *See, e.g.*, Comments of Union Pacific Railroad Company (“UP Comments”) at 14-17.

Instead, it very well may be the case that one or more Class I carriers would prefer that each carrier maintain its own existing business – regardless of the adequacy of that service to the shipping public – without meaningful regulatory oversight and without the threat of competition from a fellow Class I. If that attitude actually exists in the industry, then experience under the proposed Section 1145 approach ultimately may indicate that the absence of competition (rather than merely the absence of adequate service) is the most significant issue facing shippers in the current transportation market.

A. The NPRM is Not Likely to Provide Meaningful Relief for Most Unit Train Coal Shippers

As WCTL explained in its initial Comments, the NPRM is not likely to provide meaningful relief for most unit train coal shippers.

1. The NPRM’s Terminal-Based Geographic Scope is Improperly and Unnecessarily Narrow

In the NPRM, the Board states that “a particular point of loading/unloading would not be the appropriate subject of a prescribed reciprocal switching agreement under part 1145, if the point is not, or using existing facilities reasonably could not be, *integrated into the terminal area operations.*” NPRM at 12 (emphasis added); *see also id.* at 2 (“[R]eciprocal switching agreements provide for the transfer of a rail shipment between Class I rail carriers or their affiliated companies *within the terminal area* in which the shipment begins or ends its journey on the rail system.”) (emphasis added).

WCTL respectfully submits that there is no basis for the Board to narrow the geographic scope of its potential relief in this manner. In particular, the Board should decline to impose any terminal-based limit on the potential scope of reciprocal-switching relief. Under 49 U.S.C. § 11102, the “reasonable distance outside of a terminal” restriction applies only to the subject of terminal trackage rights, not to reciprocal switching. *Cf.* 49 U.S.C. §§ 11102(a) (terminal trackage rights) and 11102(c) (reciprocal switching). Section 11102(c) does not place any terminal-related limitation on the Board’s authority to require carriers to enter into reciprocal switching agreements. Given the variation in the forms of relief (*i.e.*, trackage rights vs. mandated switching), it is entirely appropriate and understandable for Congress to have defined the scope of terminal trackage rights relief in a manner that differs from the scope of reciprocal switching relief. Accordingly, there is no basis for imposing the “terminal-area” restriction from § 11102(a) on the language of § 11102(c).

Efforts to limit reciprocal switching to terminal areas find no support either in the legislative history of 49 U.S.C. § 11102 or in relevant case law. For example, the Staggers Act Conference Report stated – with respect to reciprocal switching – that what is now 49 U.S.C. § 11102(c) “has been expanded to include *all facilities, not just the joint use of terminals.*” H.R. Rep. No. 96-1430 at 117 (1980) (emphasis added); *see also* H.R. Rep. No. 96-1035 at 67 (1980) (“This section [Section 306 of H.R. 7235] empowers the Commission [now the Board] to approve reciprocal switching agreements and joint service agreements upon request of a carrier or shipper. *In geographic areas where*

reciprocal switching is feasible, it provides competition to the benefit of shippers served.”) (emphasis added).

Similarly, pre-Staggers Act case law generally defined reciprocal switching as switching that took place within a defined geographic area. *Absorption of Switching to or from High Point, N.C.*, 319 I.C.C. 522, 525 (1963) (“[r]eciprocal switching . . . effect[s] switching deliveries within a switching district or other defined area”). A “geographic area” can and does include areas other than terminal areas. *See Central States, Inc. v. ICC*, 780 F.2d 664, 682 (7th Cir. 1985) (Cudahy, J., dissenting) (“[a] ‘geographic area’ in the contemplation of Congress [under what is now 49 U.S.C. § 11102(c)] was territory having political, economic and legal definition (within which presumably reciprocal switching would be operationally and economically feasible).”)).

Notably, the Board had proposed in 2016 to make reciprocal switching available upon a showing, *inter alia*, that there “is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier *within a reasonable distance of the facilities* of the party seeking switching.” *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 18, 21, 41 (STB served July 27, 2016) (“*2016 NPRM*”) (emphasis added). WCTL respectfully submits that there is no need for the Board to limit potential relief in the present proceeding to terminal-area shippers. Instead, the Board should allow reciprocal switching as a remedy within a reasonable distance of a shipper’s *facilities*, not based on the concept of a “*terminal*.” Such an approach is more consistent with Congress’ intention in granting reciprocal-switching

authority to the Board. Such an approach also would better serve to facilitate relief from poor railroad service, which can occur either within or entirely outside of terminal areas.

2. The Practical Difficulty of Pursuing Reciprocal-Switching Relief

Most unit train coal shippers receive rail service pursuant to contract.

Accordingly, in order to being the process of seeking reciprocal-switching relief in response to poor rail service, a given coal shipper would need: (1) to allow its rail transportation contract to expire; (2) to request (and utilize) a common carrier rate from its rail carrier; and (3) to initiate reciprocal-switching proceedings at the Board. The overall process could prove to be extremely time-consuming, particularly in an “early” case under the Board’s proposed new regulations in which the subject railroad (or other railroad interests) would be expected to delay and/or to test the limits of impediments to any regulatory relief system. Moreover, absent an effort to litigate the maximum reasonable rate for unit train coal service, the petitioning shipper would be required to pay whatever common carrier rate the carrier elected to impose during the entirety of the anticipated reciprocal-switching litigation and thereafter as well (*i.e.*, during the pendency of any prescribed switching arrangement).

It is highly unlikely that a coal shipper could afford the risk of paying substantially elevated rates (with little or no potential rate recourse) while seeking relief from poor railroad service, particularly where the outcome of such a reciprocal-switching case would be decidedly uncertain. In addition, the subject coal shipper would face the risk that its rail carrier would retaliate against it for its willingness to seek reciprocal switching relief. That retaliation could take the form of the carrier declining to enter into

a new, post-litigation contract with shipper. There is, of course, no requirement for a carrier to offer to enter into a contract with any given shipper, and there is no reason to anticipate that railroads would be inclined to afford rate-certainty benefits to a complaining shipper without some offsetting value transfer. Instead, the carrier likely would be happy to price its services at 180% of its variable costs and to leave the shipper subject to an ongoing rate penalty for its willingness to challenge the railroad's service quality.

Any requirement that a reciprocal switching case utilize only post-contract service levels for purposes of the Board's intended service-quality comparison would serve only to magnify the foregoing difficulties. In particular, such a requirement would force a shipper to forego contract service (and contract rates) for well more than a year even *before* initiating a quality-of-service-based request for reciprocal-switching relief.

In light of the foregoing, WCTL reiterates its request – as first suggested by Board Member Primus – that the Board “act soon to ensure that reciprocal switching is available for competitive access to the extent authorized by the language of the statute.” WCTL Comments at 3. WCTL also echoes the observation of the U.S. Department of Agriculture, correctly observing that the Board's “responsibility to revise reciprocal switching is incomplete without a rule related to competition.” USDA Comments at 3; *id.* at 4 (“While USDA appreciates the Board's recognition that “consideration of additional reforms geared toward increasing competitive options...is [not] foreclosed,”

the Board should take immediate action to make reciprocal switching a remedy to promote competition.”).¹

In addition, WCTL notes its agreement with the observation of the Freight Rail Customer Alliance (“FRCA”) and the National Coal Transportation Association (“NCTA”) that the Board’s NPRM depends in large part upon the existence of a ready, willing, and able alternate carrier. Given the important role of the alternate carrier under the NPRM, the new approach arguably provides no additional benefit beyond the existing “bottleneck” process through which a shipper can seek to combine an upstream rail transportation contract with a destination-segment common carrier rate (all without the cumbersome and time-consuming process of seeking to demonstrate a long-term service decline). Comments of FRCA/NCTA at 3 (“One limitation of the reciprocal switching remedy is that it requires a second carrier that is ready, willing, and able to provide the replacement service and at an attractive rate. The availability is hardly assured.

Furthermore, if the second carrier desires to provide the service, nothing prevents that

¹ *See also* Comments of American Fuel & Petrochemical Manufacturers at 4 (“In a vacuum, AFPM supports the 2023 NPRM, but we are disappointed in its apparent narrowing of circumstances wherein the Board will prescribe reciprocal switching.[] At base, AFPM prefers the 2016 NPRM’s approach, which attacks the root cause of service issues – lack of competition. The 2023 NPRM by contrast may help to improve service, but only after rail shippers have felt the prolonged impacts of unreliability and delay.”); Comments of the National Mining Association at 2 (“While the NMA agrees with the STB’s goal to ‘reflect a minimum level of rail service below which regulatory intervention may be warranted, considering shippers and receivers’ need for reliable, predictable, and efficient rail service,’[] the NMA is concerned that if finalized as proposed, STB’s rule would fail to achieve these objectives. Overall, the NMA is concerned that without significant changes, the proposed rule will only add further inefficiencies to an already fragile freight rail system.”).

carrier, at least where it serves the origin, from offering a ‘bottleneck’ contract to the shipper that will effectively force the incumbent into providing reciprocal switching.”). Importantly, as FRCA/NCTA add in their Comments, “[t]he fact that such bottleneck rates are not generally available may undermine the effectiveness of reciprocal switching.” *Id.* Stated differently, the Board’s NPRM appears to assume the existence of a degree of railroad cooperation (with shippers) that seemingly has been absent for the nearly thirty years since the *Bottleneck* decisions.

3. The NPRM Allows for Ongoing Downward Service Spirals

WCTL also explained in its initial Comments that the Board’s proposed transit-time metric would allow for ongoing downward service spirals. WCTL Comments at 6-9. In particular, WCTL explained that recurring, year-over-year degradations in railroad transit times could occur under the Board’s proposal without ever triggering any right to reciprocal-switching relief.

WCTL suggested that the Board should modify its proposal to allow petitioners to submit evidence regarding poor transit times (sufficient to justify the prescription of reciprocal switching) even where the transit times at issue do not meet the 20-25% threshold. *Id.* at 8. Instead, such evidence “could take the form of an aggregate showing of steady decline . . . or could rely on a particularly problematic transit-time performance even in the absence of year-over-year changes in transit times.” *Id.*

B. The AAR’s Proposed Changes Would Further Devalue the NPRM

In its Comments, the AAR raises a series of flawed arguments and proposes a substantial set of changes that would further devalue the Board’s NPRM.

1. The AAR’s Purported “Actual Necessity or Compelling Reason” Legal Standard has No Relevance to the Board’s Present Inquiry

In its Comments, the AAR argues that the Board should revise its proposed rule to implement what the AAR characterizes as the “longstanding legal standard.” AAR Comments at 4-5 (citing the ICC’s 1933 decision in *Jamestown N.Y. Chamber of Commerce v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289 (1933) (“*Jamestown*”)). In particular, the AAR contends that the Board should layer an additional “actual necessity or some compelling reason” test upon its proposed regulations to be used before affording any relief to a shipper. The AAR’s claim that the *Jamestown* case sets forth the “longstanding legal standard” regarding reciprocal switching is simply incorrect. The *Jamestown* case has nothing to do with the reciprocal switching at issue in the Board’s NPRM. The case instead pertains to an effort to improve the financial health of a failing carrier.

2. The AAR Repeatedly Misapplies the Board’s Expedited Relief Decision

The AAR also repeatedly invokes language from the Board’s 1998 decision in Ex Parte No. 628, in which the Board issued final rules under 49 C.F.R. Parts 1146 and 1147. See AAR Comments at 5, 12, 20, 35, 39 n.6, 57, 60, 65, 73, 74, 80, 86, 95, 97, and 102 (citing *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968 (1998) (“*Expedited Relief*”)). Such reliance is improper, however, insofar as the Board explains in its NPRM that the “new regulations at part 1145 would provide an independent basis for prescription of a reciprocal switching agreement, separate and apart from parts 1146 and 1147” NPRM at 6.

The AAR relies upon *Expedited Relief* in support of the argument that prescribed switching imposes risks on the railroad system. AAR Comments at 80 (quoting *Expedited Relief*, 3 S.T.B. at 977 for the proposition that “even temporary access is a serious remedy”). Importantly, however, the AAR’s quotation and argument overlook key distinctions drawn in the 1998 decision between different types of competitive access (with some being more intrusive and others less intrusive), including distinctions based upon the AAR’s own prior comments and upon the relative absence of any operational effect associated with prescribed reciprocal switching:

[A]s NITL notes, *there should be little effect on an incumbent carrier’s operations and safety when only reciprocal switching or through route/joint rate remedies are sought. . . .*

Finally, AAR argues that we should impose the least intrusive remedy that will address the particular service problem presented.²¹

²¹ *AAR notes that a new through route can be less disruptive or costly than other remedies, and that in most cases reciprocal switching is less intrusive than trackage rights.*

Expedited Relief, 3 S.T.B. at 979 & n.21 (emphasis added). Accordingly, it is evident that the AAR’s quoted language from Ex Parte No. 628 regarding the serious nature of “temporary access” should be understood in the context of the distinctions between different forms of competitive access. Properly read, the *Expedited Relief* decision actually undermines the AAR’s various present arguments regarding the supposedly adverse impact of reciprocal switching.

The AAR also relies on *Expedited Relief* in support of the claim that the Board cannot “enforce, *interpret*, or disturb [rail transportation] contracts.” AAR Comments at 35 (quoting *Expedited Relief*, 3 S.T.B. at 976) (emphasis in AAR Comments). The AAR’s comment takes *Expedited Relief* out of context and also ignores the Board’s historic willingness to interpret contracts. In fact, on the same page of the *Expedited Relief* decision that the AAR quotes, the Board explained that “as in the recent *UP/SP Service Order* . . . we are not inclined to disavow in advance any possible exercise of jurisdiction.” *Expedited Relief*, 3 S.T.B. at 976. The simple act of considering whether service had suffered as between: (1) then-current contract service; and (2) now-current common carrier service does not constitute an act of either “enforc[ing]” or “disturb[ing]” a railroad contract. *See, e.g., Navajo Transitional Energy Co. v. BNSF Ry.*, Docket No. NOR 42178, at 6-7 & n.10 (STB served June 23, 2023) (rejecting claim that the Board was “impos[ing]” contract terms); *Navajo Transitional Energy Co. v. BNSF Ry.*, Docket No. 42178, at 6-7 (STB served Aug. 14, 2023).

3. The AAR’s Contract-Related Arguments Overlook Agency Precedent and Ignore the Rate-Setting Initiative of Common Carrier Railroads

In its Comments, the AAR raises three principal arguments regarding contract service. *See* AAR Comments at 32-37. WCTL respectfully submits that the Board should reject each of these AAR arguments.

a. Historic Contract-Service Levels

The AAR contends that any Board consideration of railroad service quality provided under a contract would violate 49 U.S.C. § 10709 and would constitute “bad

policy.” AAR Comments at 32-34. The AAR is mistaken. Section 10709 prohibits challenges to services provided under contract. 49 U.S.C. § 10709(c). Nothing about the Board’s NPRM would invite or permit challenges under Title 49 to service provide under contract.

Moreover, the AAR’s bad-policy argument and its various hypothetical negotiation examples are misdirected. AAR Comments at 34. Under common carrier service, the railroad has the discretion (in the first instance) to set its rate at the level and in the form of its own choosing. And in the vast majority of cases, that initial rate-setting discretion goes entirely unchallenged. Accordingly, there is no basis for the AAR to claim that the effect of considering historic service levels provided under a contract would force a rail carrier to continue to provide quality service without the supposed rate advantages of a contract. Railroads have tremendous rate flexibility in the common carrier context and any suggestion that railroads suffer financially from providing common carrier service is wrong. *See, e.g.*, 49 U.S.C. §§ 10701(d)(1) and 10707(d)(1)(A) (180% jurisdictional threshold).

In addition, the Board routinely evaluates the details of rail transportation contracts when considering the reasonableness of rates provided for common carrier service. *See Western Fuels Ass’n, Inc. and Basin Elec. Pwr. Coop. v. BNSF Ry.*, NOR 42088, at 38-39 (STB served Sept. 10, 2007) (relying on existing transportation contracts to determine railcar-supply responsibility and required railcar spare margin); *Ariz. Elec. Pwr. Coop., Inc. v. BNSF Ry. and Union Pac. R.R.*, NOR 42113, at 25 (Nov. 22, 2011) (BNSF and UP argue for the use of a contract-based methodology for determining the

proper ratios of total revenues to fuel surcharge revenues for intermodal and automotive traffic).

b. Rail Performance-Data Reporting

The AAR next claims that “[t]o require a carrier to provide information in a contract context would be to insert an additional duty into the contract, beyond those bargained for by the parties.” AAR Comments at 35. As noted above, the Board has the authority to require reporting by rail carriers. 49 U.S.C. § 11145. The Board routinely requires rail carriers to provide reports (for example the R-1 report) including data pertaining to contract service.

The NPRM would not layer a common carrier obligation upon transportation provided pursuant to contract. Instead, the NPRM would require a carrier to provide data regarding its service. The provision of data does not fall within the definition of transportation under 49 U.S.C. § 10102.

c. The AAR’s Timing Claim

Finally, the AAR argues that the Board “cannot consider a petition for prescription of reciprocal switching with respect to service that remains under contract, even if switching would not go into effect until *after* expiration.” AAR Comments at 36. Instead, the AAR claims that the Board “must wait until the contract has expired, and until sufficient *additional* time has passed such that the Board can assess the performance of service provided after the expiration of the contract.” *Id.* (emphasis added).

Accordingly, the AAR’s Comments suggest that the Board should have no authority even to begin *considering* a petition for reciprocal switching relief under well-

more than one year after the expiration of a rail transportation contract. During such post-expiration time, of course, the carrier would be free to charge whatever common carrier rate it chooses (subject to the shipper concluding a successful maximum rate challenge).

Essentially, the AAR's argument and its interpretation of the *Burlington Northern v. STB* case (75 F.3d 685) would render the Board's NPRM useless for any shipper lacking the ability to pay whatever rates the carrier elects to charge over the course of multiple years. WCTL respectfully submits that the Board has the authority to impose reciprocal switching remedies for poor service without first affording the subject carrier a multi-year common-carrier revenue bonanza.

4. The AAR Seeks to Impose Multiple, Improper Barriers to Any Reciprocal Switching Relief

The AAR seeks to impose a number of additional barriers upon shippers and upon the Board that, in all likelihood, would preclude any potential prescription of reciprocal switching under 49 C.F.R. Part 1145. Each is improper.

First, the AAR raises several "cart-before-the-horse" arguments to the effect that the impacted shipper must prove – and the Board must find – that reciprocal switching actually *will* remedy (not merely that it could remedy, should remedy, or is likely to remedy) the existing service inadequacy. AAR Comments at 5-6. There is no basis in administrative law for a requirement that the Board and/or the subject shipper guarantee, in advance, that prescribed reciprocal switching will remedy a given service inadequacy.

The AAR fails to offer any legal support for the existence of such a requirement and WCTL is aware of no such requirement.

Second, the AAR argues that reciprocal switching relief should be available only where a given shipper can meet the supposedly “central” requirement that the carrier at issue provides service to other shippers that is superior to what it provides for the complainant: “But it is surely central for the Board to consider whether service falls outside the range of reasonable variation inherent in the kind of service the shipper receives – something *persistently and distinctly inferior to that available to similarly situated shippers.*” AAR Comments at 5 (emphasis added). The AAR’s proposed requirement is illogical and inappropriate. Essentially, the AAR would preclude any reciprocal switching relief in circumstances in which the poorly performing rail carrier could accurately advise the Board that its service is equally poor for all similarly situated shippers.

Third, the AAR urges the Board to adopt somewhat of a “no harm, no foul” rule and to place the burden of showing “material” anticipated harm upon the shipper. In particular, the AAR suggests that “a shipper should explain in its petition under proposed 49 C.F.R. 1145.5(b) how it has been *materially* harmed by the potential service inadequacy.” AAR Comments at 7 (emphasis added); *see also id.* (“a receiver that has a large stockpile of units delivered by rail may be more affected by whether its overall stockpile dwindles below a certain level than by the timing of any individual shipment.”). The AAR’s proposal to distinguish between shippers effectively would punish shippers who have taken affirmative steps to ameliorate the adverse impact of poor railroad

service. The AAR proposal would create an improper incentive for shippers to allow inventory levels to fall to dangerously low levels in order to satisfy the AAR's "material harm" requirement. The Board should reject this proposed modification.

5. Transit-Time Metric Proposals

In its discussion of the Board's transit-time metric, the AAR argues that, in practice, it will be impossible for the Board to determine whether any given carrier actually is at fault for a 20% or 25% year-over-year degradation in transit-time performance or to determine whether a reciprocal switching remedy would itself contribute to service problems. AAR Comments at 52-57. WCTL respectfully submits that the Board should reject the AAR's effort to characterize railroad operations as being impossibly complex and as being too opaque for the Board to understand or to address. The Board has the benefit of well more than one hundred years of agency experience considering and addressing railroad service issues. The Board need not accept the AAR's invitation simply to throw up its hands and assume that the railroads necessarily have provided as high-quality service as may be possible.

WCTL also submits that the Board can dispense easily with the AAR's expression of concern that "an observed decline may be the product of comparing a prior year's new or *exceptional* service produced through enhanced investment, to a current year's solid (but *less stellar*) performance when the carrier's resources were spread to other shipments." *Id.* at 55. In light of the highly compromised level of railroad service seen in recent years, the Board need not constrain its rulemaking initiative out of concern that "exceptional" railroad service has become so common that it would be unfair to punish

railroads for providing somewhat “less stellar” service in future years. WCTL anticipates that a shipper fortunate enough to have enjoyed exceptional or even slightly less stellar service would not rush to the agency to pursue reciprocal switching litigation.

Finally, WCTL also submits that the Board should reject the AAR’s suggestion (*id.* at 57) that a three-year historic service average is appropriate. The AAR’s request would serve only to add an additional buffer beyond an established 20% or 25% decline in year-over-year service quality.

C. The Individual Class I Carriers Similarly Seek Modifications that Would Further Devalue the NPRM

Like the AAR, the individual Class I carriers also seek to impose modifications upon the NPRM that would further devalue that proposal for shippers. WCTL will not catalogue each of those individual proposals here, but WCTL notes that in a context in which carrier cooperation will be essential to afford any reciprocal switching benefit to a shipper experiencing poor service, the carriers’ collective resistance to the Board’s NPRM raises significant concerns. Stated differently, there appear to be multiple respects in which recalcitrant carriers could preclude any meaningful reciprocal switching remedy.

For example, BNSF Railway Company (“BNSF”) proposes that the Board require shippers to engage in preliminary market dominance litigation prior to obtaining relief. BNSF Comments at 14-15. While BNSF suggests that such a process “need not be detailed,” the Board certainly is familiar with the manner in which market dominance litigation grew beyond reasonable limitations in the Board’s stand-alone cost cases.

Likewise, Union Pacific Railroad Company (“UP”) argues that the Board does not adequately consider the burdens placed upon alternate carriers and UP suggests that the Board require a shipper “to obtain a commitment from an alternate carrier to provide alternative service before it can file a petition for relief” UP Comments at 16. Essentially, UP would require any shipper seeking relief from poor service to enter into a contract with what may be the only alternative carrier available. Such a carrier would have significant leverage over the shipper and would have little incentive to afford substantial value to the aggrieved shipper.

CONCLUSION

WCTL respectfully submits that the Board’s NPRM is unlikely to provide any meaningful benefit for shippers generally or for coal shippers in particular. The Board’s proposal contemplates an improperly and unnecessarily narrow geographic scope (*i.e.*, terminal areas) relative to the language of the statute. Moreover the Board’s proposal offers little prospect of relief for coal shippers approaching the termination of existing rail transportation agreements. WCTL requests that the Board take action to make reciprocal switching available to address the absence of competition. To the extent that the Board moves forward with its current proposal in the meantime, WCTL respectfully requests that the Board reject the NPRM modifications that the AAR and the individual Class I railroads have proposed.

Respectfully submitted,

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