

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711 (Sub-No. 2)**

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**Reciprocal Switching for Inadequate Service**

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**REPLY COMMENTS OF  
THE ASSOCIATION OF AMERICAN RAILROADS**

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## ATTACHMENTS

Reply Verified Statement of Michael Baranowski and Nathan Zebrowski (“Baranowski & Zebrowski Reply V.S.”)

Reply Verified Statement of M. Rapik Saat (“Saat Reply V.S.”)

## PRIOR AAR SUBMISSIONS REFERENCED IN REPLY COMMENTS

### EP 704 (Sub-No. 1):

[Opening Comments of AAR, \*Review of Commodity, Boxcar, and TOFC/COFC Exemptions\*, EP 704 \(Sub-No. 1\) \(filed Jan. 29, 2021\)](#)

### EP 711 (Sub-No. 1):

[Opening Comments of AAR, \*Reciprocal Switching\*, EP 711 \(Sub-No. 1\) \(filed Oct. 26, 2016\)](#)

[Reply Comments of AAR, \*Reciprocal Switching\*, EP 711 \(Sub-No. 1\) \(filed Jan. 13, 2017\)](#)  
("AAR 711-1 Reply Comments")

### EP 711 (Sub-No. 2):

[Opening Comments of AAR, \*Reciprocal Switching for Inadequate Service\*, EP 711 \(Sub-No. 2\) \(filed Nov. 7, 2023\)](#) ("AAR 711-2 Opening Comments")

[Opening Comments of AAR, Verified Statement of Jonathan M. Orszag & Yair Eilat, \*Reciprocal Switching for Inadequate Service\*, EP 711 \(Sub-No. 2\) \(filed Nov. 7, 2023\)](#) ("Orszag & Eilat 711-2 V.S.")

### EP 722:

[Opening Comments of AAR, Verified Statement of Joseph P. Kalt, \*Railroad Revenue Adequacy\*, EP 722 \(filed Sept. 5, 2014\)](#)

### EP 768:

[Reply Comments of AAR, Reply Verified Statement of John T. Gray, \*Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads\*, EP 768 \(filed Sept. 8, 2022\)](#)

## **TABLE OF ABBREVIATIONS**

|                  |                                                                                                                                                                                                                                                                                                                                                                                                                     |
|------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ACD              | Alliance for Chemical Distribution                                                                                                                                                                                                                                                                                                                                                                                  |
| AF&PA/ISRI       | American Forest & Paper Association and Institute of Scrap Recycling Industries                                                                                                                                                                                                                                                                                                                                     |
| AFPM             | American Fuel & Petrochemical Manufacturers                                                                                                                                                                                                                                                                                                                                                                         |
| API              | American Petroleum Institute                                                                                                                                                                                                                                                                                                                                                                                        |
| ASLRRA           | American Short Line and Regional Railroad Association                                                                                                                                                                                                                                                                                                                                                               |
| BLET             | Brotherhood of Locomotive Engineers and Trainmen                                                                                                                                                                                                                                                                                                                                                                    |
| CN               | Canadian National Railway Company                                                                                                                                                                                                                                                                                                                                                                                   |
| Coalition Ass'ns | The Coalition Associations (American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League)                                                                                                                                                                                                                                                                                |
| CSXT             | CSX Transportation, Inc.                                                                                                                                                                                                                                                                                                                                                                                            |
| Diversified CPC  | Diversified CPC International                                                                                                                                                                                                                                                                                                                                                                                       |
| DOT/FRA          | United States Department of Transportation and the Federal Railroad Administration                                                                                                                                                                                                                                                                                                                                  |
| EMA              | Essential Minerals Association                                                                                                                                                                                                                                                                                                                                                                                      |
| FRCA/NCTA        | Freight Rail Customer Alliance and National Coal Transportation Association                                                                                                                                                                                                                                                                                                                                         |
| GISCC            | Glass Industry Supply Chain Council                                                                                                                                                                                                                                                                                                                                                                                 |
| GPI              | Glass Packaging Institute                                                                                                                                                                                                                                                                                                                                                                                           |
| ISP              | Industry Spot/Pull                                                                                                                                                                                                                                                                                                                                                                                                  |
| Labor Unions     | Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, International Association of Machinists and Aerospace Workers District #19, International Brotherhood of Boilermakers, National Conference of Firemen and Oilers 32BJ/SEIU, and Transport Workers Union of America |

|                 |                                                                                                                           |
|-----------------|---------------------------------------------------------------------------------------------------------------------------|
| LyondellBasell  | Lyondell Chemical Company, Equistar Chemicals, LP, LyondellBasell Acetyls, LLC, and LyondellBasell Advanced Polymers Inc. |
| NGFA            | National Grain and Feed Association                                                                                       |
| NMA             | National Mining Association                                                                                               |
| NS              | Norfolk Southern Railway Company                                                                                          |
| NSSGA           | National Stone, Sand & Gravel Association                                                                                 |
| OETA            | Original Estimated Time of Arrival                                                                                        |
| Olin            | Olin Corporation                                                                                                          |
| Portland Cement | Portland Cement Association                                                                                               |
| PRFBA           | Private Railcar Food and Beverage Association                                                                             |
| UP              | Union Pacific Railroad Company                                                                                            |
| USDA            | United States Department of Agriculture                                                                                   |
| WCTL            | Western Coal Traffic League                                                                                               |

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**I. INTRODUCTION**

The Association of American Railroads (“AAR”) respectfully submits these reply comments on the Board’s proposed rule for evaluating petitions for reciprocal switching orders to address inadequate rail service. *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (Notice of Proposed Rulemaking (“Proposed Rule” or “NPRM”)). AAR submitted opening comments in this proceeding. Opening Comments of AAR, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“AAR 711-2 Opening Comments”). Opening comments from stakeholders show that, in addition to many discrete questions addressed in detail in Part IV below, certain pivotal issues must command the Board’s attention as it evaluates how to move forward in a lawful and effective manner. Several key issues are:

*Can the Proposed Rule impose a switching remedy based on the performance of traffic served under a contract or add obligations to contracts (in the form of data reporting, for example)?* The statute says no, because contract service is outside the Board’s jurisdiction. *See* 49 U.S.C. § 10709. The Board cannot use Board-established performance standards under the Proposed Rule to evaluate contract service to arrive at an order under 49 U.S.C. § 11102(c) that alters the basic relationship between the railroad and its customer. Such regulation would be beyond the Board’s jurisdiction. 49 U.S.C. § 10709(c). And it would be contrary to 49 U.S.C.

§ 10709(b) because it would impose new duties—the performance standards—on contracts that do not contain them, for no railroad (or shipper) could ignore those standards in negotiating and performing a contract. Similarly, the Board cannot obligate the railroad party to the contract to provide data to the shipper party because, again, duties under a contract are limited to “those duties specified by the terms of the contract.” *Id.*

***Can the Proposed rule impose a remedy based on the performance of traffic at the time that traffic was exempt?*** Again, the statute says the answer is no. *See* 49 U.S.C. § 10502.

When traffic is exempt, the Board cannot judge its performance by regulation, and revoking an exemption to look backward at such traffic’s performance would be the purest form of impermissible retroactive regulation. The reason traffic is exempt from regulation is that competitive forces are sufficient to provide proper performance incentives. Congress’s direction to exempt traffic from regulation is not just about regulation being *unnecessary*; it is also about regulation being *counterproductive*. When rail competes with transportation modes that are not subject to economic regulation, exemption is beneficial because it unburdens rail from the regulatory obligations from which those competing modes are free. Where competition exists, competition will rule, and inadequate service will lose to other options. The Board always retains jurisdiction to reevaluate the premise about competition from another mode or source, but that question is not properly presented as to any commodity in this proceeding. Unless and until the premise is rejected, the Proposed Rule cannot apply.

***What ultimate questions must the Board answer to lawfully enter or withhold a switching order?*** The Board’s authority to order switching arises by statute, 49 U.S.C.

§ 11102(c), and its rules implementing that authority must be faithful to the statute. Here, the Board has stated that it is implementing the “practicable and in the public interest” language of

Section 11102(c)(1), which has a well-established meaning that Congress incorporated in enacting the Staggers Rail Act. *See* AAR 711-2 Opening Comments at 12–14. Thus, the Board must aim to answer the ultimate statutory question presented by any petition contemplated by the Proposed Rule: whether the shipper has “some actual necessity or some compelling reason” for a switching order. *Jamestown, N.Y., Chamber of Com. v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933).

Under that standard, the Board can give a shipper access to alternative service (in the form of a forced switching order) for regulated traffic in the event that (a) a railroad consistently does not provide adequate service under the current circumstances and cannot cure its failure; (b) a safe and practicable alternative service exists that will remedy the current service inadequacy; and (c) the shipper has a compelling reason for that alternative service, judged in the context of the interests of and effects on other stakeholders, including other shippers, freight railroads, and passenger railroads. Similar considerations must dictate the term and termination of any switching order, so that forced switching orders last only so long as the inadequacy that they were imposed to remedy persists. The Board has some flexibility in charting a procedural path to arriving at those findings. But the destination is clear, and a switching order entered under the Proposed Rule without such findings would be contrary to law. Accordingly, the Board should construct the Proposed Rule to ensure that the results of any adjudication will align with the underlying statute.

***How can the Proposed Rule’s metrics best promote the resolution of service inadequacies?*** Objective performance standards can be a starting point for addressing a request for a switching order. But they cannot tell the Board everything it needs to know to decide if a regulatory intervention is warranted in a particular case. Service needs, the causes and context of

actual or perceived service shortcomings, and the characteristics of individual traffic vary widely across the network. All those considerations are essential to the Board's evaluation of whether service on a given lane is inadequate and whether it can be remedied by prescribing a reciprocal switch. Accordingly, the Board's goal should be to select metrics—and to establish the particular parameters of those metrics—to efficiently identify service that may warrant regulatory attention, while recognizing that other facts and circumstances will need to be considered too. Accordingly, the Proposed Rule appropriately provides affirmative defenses—most significantly, recognizing that the Board will consider unenumerated affirmative defenses on a case-by-case basis. That framework can help bring to the Board's attention the context it needs to determine whether a service inadequacy exists and can be remedied by forced switching.

To examine how informative metrics can be in that regard, and in response to the Proposed Rule and stakeholders' opening comments, AAR developed an empirical analysis focusing on the likely operation of the Proposed Rule's transit time metric. *See infra*, Parts III, IV.C.3. That analysis is specific to that metric, and it cannot identify the share of the total network's traffic that would be subject to switching under the Proposed Rule; many other conditions beyond the metric itself must be met before switching could be ordered in any individual case. Instead, the analysis offers important insights into how the transit time metric might operate in practice and what the Board should have in mind if it proceeds to refine and adopt the Proposed Rule.

That analysis reinforces many of the key recommendations in AAR's opening comments. Among other things, it shows that a degree of variability in transit times is normal for lanes across the network. Depending on the particular parameters used (*e.g.*, percentage increase and

measuring period), it is likely—even *highly* likely—that carloads will travel on lanes that will experience year-over-year increases or decreases (or even both) in transit time that trigger the metric. That analysis also reveals that single-served lanes are no more or less likely than multiple-served lanes to trigger the transit time metric—there is no statistically significant difference between the two when the transit time metric is applied to traffic on the national network. That is a reminder that the Board must find—and not assume—that having the option of alternative service will actually remedy any service inadequacy it has identified.

***How can the Board best promote resolution of service issues without litigation?***

Railroads are in business to provide quality service to their customers, and they want to resolve service issues wherever possible. Shippers have offered intricate multi-tiered standards that they urge railroads must meet on six-week intervals, on pain of Board orders altering carrier-customer relationships for years or a decade or longer. But long lists of rigid rules do not resolve service issues—hard work and communication between railroads and their customers do. The Board should refine the Proposed Rule to promote early communication and mutually agreeable resolution between shippers and carriers. The Proposed Rule will be most effective if it helps facilitate the incumbent railroad’s cure of a service inadequacy, the earlier the better. Such resolutions avoid forced switching’s operational disadvantages, disincentives to investment, potential harm to the industry’s long-run economic health, and resource-intensive litigation before the Board. Thus, for example, shippers should be required to communicate their concerns to carriers as early as possible, and the Proposed Rule’s timeline for switching petitions should invite the incumbent railroad to cure any inadequacy before Board action is needed.

\* \* \*

AAR believes that the Proposed Rule—with some important refinements—can be beneficial in identifying service inadequacies that can be remedied by a switching prescription.

But the questions above speak to the challenge before the Board: how to structure the rule to provide relief where lawful and appropriate, in the most efficient way, while minimizing the downsides that come from introducing forced switching into an already-complex system.

Shipper comments have largely avoided addressing that challenge, focusing instead on asking for changes that would broaden their right to a switching order, with little regard for the limits of the law, the realities of the data, or the counsel of wise policy. AAR's opening comments were geared toward meeting that challenge, with clear views about the scope of the Board's authority and constructive suggestions for the sound exercise of that authority. AAR continues that effort in the reply comments that follow.

## **II. APPLICATION OF THE PROPOSED RULE MUST BE LIMITED TO REGULATED TRAFFIC**

### **A. The Proposed Rule Cannot Apply to Contract Traffic**

AAR's opening comments explained that 49 U.S.C. § 10709 bars application of the Proposed Rule to traffic moved under a transportation contract. Allowing a shipper to petition for switching relief based on the performance of contract traffic would impermissibly regulate that traffic. AAR 711-2 Opening Comments at 32–37. Likewise, the Board may not add terms to transportation contracts by requiring that carriers provide shippers' performance data for traffic moved under contract. *Id.* Those conclusions are dictated by the statute. The opening comments of various shipper interests argue to the contrary, and some offer even more radical proposals for regulating contract traffic. All of those comments are contrary to the clear language of Section 10709 and unsupported by judicial or Board precedent.

#### **1. The performance of contract traffic cannot be the basis for a switching petition**

AAR's opening comments explained that the statutory prohibition on the regulation of contract traffic sweeps broadly: It places a valid rail transportation contract—and the services

provided under it—beyond regulation. *See* 49 U.S.C. § 10709(b)–(c). Accordingly, the Board lacks authority to impose regulatory consequences based on its evaluation of the service that a carrier provides under contract. AAR 711-2 Opening Comments at 32. Moreover, applying the Proposed Rule to contract traffic means providing a remedy for the performance of contract traffic. But the Board cannot add terms to, or offer remedies other than, what the parties have agreed to in their contract. 49 U.S.C. § 10709(b), (c)(2).

Comments submitted by the Coalition Associations and other shippers argue otherwise based on a handful of agency decisions that mention contract service—some in the switching context and others outside of it. The Coalition Associations contend that “[i]n considering [whether contract service meets the Proposed Rule’s] metrics, the Board is not regulating contract transportation; nor is the Board interpreting the contract, deciding whether the contract violates the statute, or resolving any contract dispute.” Opening Comments of The Coalition Associations at 10, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Coalition Ass’ns”). That claim fails on its face: It is clear that imposing a regulatory remedy under Section 11102(c) if contract service fails to meet a regulatory performance standard regulates that service. And none of the decisions cited in the Coalition Associations’ comments supports their contrary claim.

**a.** The Coalition Associations rely most heavily on the ICC’s decisions in *Midtec Paper Corp. v. Chicago & North Western Transportation Co.*, 3 I.C.C.2d 171 (1986), and *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 5 I.C.C.2d 331 (1989). *Midtec* and *Vista Chemical* cannot bear the weight of the Coalition Associations’ arguments, for multiple reasons.

To begin, the purpose for looking at contract traffic here would be wholly different from—and far more intrusive than—the purpose in *Midtec* and *Vista Chemical*. Here, shipper

comments urge that the Proposed Rule should subject contract traffic to specific performance standards, with grave consequences for failing to meet such standards. That those consequences might be delayed until the contract terminates does not diminish their immediate effect on how contract service is provided. Indeed, the Board itself has stated that it intends the Proposed Rule to “incentivize” the service being provided, NPRM at 16, and that is exactly what shipper comments propose, *see, e.g.*, Opening Comments of American Fuel & Petrochemical Manufacturers at 16, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“AFPM”).

By contrast, *Midtec* looked at contract traffic not to pass judgment on whether that traffic met some Board-established test, but only for what it might indirectly reveal about whether the railroad was “a monopolist indifferent to the needs of its shipper.” *Midtec*, 3 I.C.C.2d at 183. Similarly in *Vista Chemical*, the agency remarked about the contracts between the shipper and carrier that “this competitive evidence is not dispositive of the case, but serves as a *background* against which to evaluate the defendant’s conduct and with which to assess the likelihood of future anticompetitive conduct.” *Vista Chemical*, 5 I.C.C.2d at 338 (emphasis added). In neither case did the Board examine whether the contract service had violated some specific regulation or failed to meet a particular standard; rather, the nature and terms of the contract service served only as evidence of the structure and behavior of the market.

In all events, neither *Midtec* nor *Vista Chemical* directly addressed the jurisdictional limits of Section 10709, so the Board’s consideration should begin and end with the clear command of the statute. The Board has so held in nearly identical circumstances. In *Central Power & Light Co. v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059 (1996), the Board considered whether it could “assess the reasonableness of [a] through rate in its entirety” “when one of the components of service over the through route is embodied in a transportation

contract.” *Id.* at 1074. The Board concluded that it could not do so; its authority was limited to the regulated non-contract portion of the rate. *Id.* The Board was presented with two post-Staggers ICC decisions that had authorized a reasonableness determination of the entire through rate despite “involving contract service over one part of [the] through rate.” *Id.* (citing *Metro. Edison Co. v. Conrail*, 5 I.C.C.2d 385 (1989)); *id.* at 1075 n.24 (citing *Ford Motor Co. v. ICC*, 714 F.2d 1157 (D.C. Cir. 1983)). The Board was unpersuaded by these cases, concluding that, because they “did not address the jurisdictional language of section 10709(c), neither *Ford* nor *Met Ed* changes our analysis.” *Id.* at 1075 n.24. Dispositive were “the clear statutory limitations on our authority over contract rates.” *Id.* at 1074. As it did in *Central Power & Light*, the Board should simply recognize that the principal decisions invoked by shippers here (*Midtec* and *Vista Chemical*) do not address the extent of the agency’s jurisdiction over contract traffic—and that the statute answers the question with clarity.

**b.** Shippers’ reliance on other authorities fares no better.

The Coalition Associations suggest that EP 724, *United States Rail Service Issues*, and EP 724 (Sub-No. 4), *United States Rail Service Issues—Performance Data Reporting*, stand for the proposition that “in the exercise of its other statutory obligations with respect to the fluidity of the rail network, [the Board’s] decisions may implicate traffic under a rail transportation contract without running afoul of § 10709(c).” Coalition Ass’ns at 11. But looking at network fluidity means looking at all traffic on the network together—it does not mean imposing regulatory consequences on a railroad because of the performance of particular traffic it moves under contract. EP 724 itself illustrates the difference. As relevant there, the Board ordered carriers to report data on weekly coal loadings—including for contract traffic—in order to “gain a better understanding of . . . the general flow of traffic on the system.” *U.S. Rail Serv. Issues—*

*Performance Data Reporting*, EP 724 (Sub-No. 4), 2016 WL 6999806, at \*16 (STB served Nov. 30, 2016). The final rule in EP 724 (Sub-No. 4) exerted no regulatory influence on contract traffic. It was merely concerned with “*monitoring* service in order to ensure the fluidity of the national rail network.” *Id.* (emphasis added). Indeed, the Board was clear that it was “not asserting jurisdiction regarding the rights and obligations of shippers and carriers associated with coal moving under contracts.” *Id.* Here, in contrast, the use of contract performance to assess a switching petition would certainly and directly affect “the rights and obligations of shippers and carriers associated with [traffic] moving under contracts”: It would examine the service provided under that contract—a key part of performance under any rail transportation contract—and use it to directly determine the manner and conditions under which transportation would take place in the future.

The Coalition Associations and the Western Coal Traffic League would also draw support from the Board’s use of contract rates to establish a benchmark in rate cases. *See* Coalition Ass’n’s at 10 n.6; Opening Comments of Western Coal Traffic League at 4–5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“WCTL”). That context differs from the situation here. In *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), 2007 WL 2493509, at \*69 (STB served Sept. 5, 2007), the Board looked to contract rates to help establish a benchmark—an average rate for similar service—used to determine the appropriate maximum rate for common carrier service. The Board’s use of data about contract traffic was purely for evidentiary purposes. Although certain railroads opposed that approach, their opposition was grounded less in the Board’s lack of authority to use contract rates as part of a rate benchmark, and more in the disutility of doing so, given the apples-and-oranges quality of comparing contract and tariff rates. Most fundamentally, the EP 646 (Sub-No. 1) approach does not assess the reasonableness of the

contract rate in any way, let alone regulate the rates being provided under the contract—it simply takes the contract rates as they are.<sup>1</sup>

c. The Coalition Associations suggest in passing that, if the Board does not order switching while service is provided under a contract, then a shipper may be incentivized to enter into another contract with the carrier so as to avoid paying tariff rates, which they assume would be higher than contract rates. Coalition Ass’ns at 18. Such a policy argument cannot overcome the law. Regardless, it wrongly treats transportation contracts as a vice to be avoided, when Congress viewed them as a virtue to be pursued. *See* H.R. Rep. No. 96-1430, at 98–99 (1980) (Conf. Rep.) (expressing congressional desire to “encourage carriers and purchasers of rail service to make widespread use of [contractual] agreements”). A central feature of the post-Staggers landscape is that a shipper can choose regulated common carrier service, which may be more costly and offers Board regulation; or it can choose contract service, which often offers more flexible terms and comes with contract remedies rather than Board oversight. Indeed, the most attractive feature of Section 10709 contracts is that they exist as an *alternative* to regulation. Withholding Board action while a contract is in place advances the policy of “minimiz[ing] the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2).

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<sup>1</sup> The Coalition Associations also cite EP 628, *Expedited Relief for Service Inadequacies*, as precedent for examining contract performance data under the Proposed Rule. Coalition Ass’ns at 12 n.10. But they quote the Board’s views on its authority in a hypothetical situation “where *no* transportation is being provided.” *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 976 (1998) (emphasis added). That statement is irrelevant here, because the Proposed Rule is premised on measuring the performance of service that *is* being provided under contract. The Coalition Associations’ comments omit the part of EP 628 that is directly relevant here: “AAR is correct that we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract.” *Id.*

d. The foregoing principles necessarily dispose of shippers' requests that the Board establish timelines and procedures allowing the filing of a petition prior to the expiration of a contract.<sup>2</sup> If the petition is premised on the performance of contract traffic, then Section 10709 forbids it. The Proposed Rule should be a remedial regulatory measure—it should seek to provide a regulatory remedy for inadequate regulated service. Unless and until a shipper requests regulated service (say, after a contract has terminated) and that service falls below the performance metrics' thresholds, there can be no inadequate service to remedy. There is therefore no value in establishing procedures governing a petition that cannot substantively be brought under the Proposed Rule.

The D.C. Circuit's decision in *Burlington Northern Railroad Co. v. STB*, 75 F.3d 685 (D.C. Cir. 1996), reinforces that conclusion. That case held that the Board lacks jurisdiction to regulate future non-contract traffic when traffic is presently moving under contract. In *Burlington Northern*, there was essentially agreement that Section 10709 (and its predecessor, former 49 U.S.C. § 10713) generally operated to strip the Board's regulatory authority over the contract at issue. *See Burlington Northern*, 75 F.3d at 687 ("Contract transport is an alternative to traditional common carrier rail transport; once the responsible agency . . . has passed on a contract, transportation proceeds under its terms, free from agency oversight.").<sup>3</sup> The court thus

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<sup>2</sup> *See* WCTL at 4 (arguing that a shipper ought to be able to petition for switching within the last calendar quarter of a contract); Coalition Ass'ns at 20 (advocating for *no* limit on when a shipper may file a petition).

<sup>3</sup> Section 10709's bar on the agency's jurisdiction over contract traffic lay at the heart of the dispute in *Burlington Northern* at the agency and on appeal. The ICC decision below had explained: "The question raised in this case is whether the Commission's lack of jurisdiction over an effective rail transportation contract deprives it of jurisdiction to order the railroad to file a tariff to govern future non-contract traffic." *W. Tex. Utils. Co. v. Burlington N. R.R. Co.*, No. 41191, 1994 WL 559317, at \*2 (STB served Oct. 14, 1994). And the railroad, for its part, argued straightforwardly in its petition that "BN is [] a contract carrier, not a common carrier,

reasoned that the Board lacked authority to order a carrier providing contract service to file a tariff for that service prior to the expiry of the contract “unless there was statutory authority *elsewhere* to *require* the tariff filing ordered by the Commission.” *Id.* at 692 (first emphasis added). The only close question, then, was whether a *different* statute—in that case, a provision governing tariff filing—could overcome Section 10709’s jurisdictional bar by mandating carrier action *notwithstanding that* transportation was being provided under contract.<sup>4</sup> The D.C. Circuit concluded that the tariff statute did not overcome Section 10709. *Id.* at 696.

Here, no such “statutory authority elsewhere” exists; the analysis begins and ends with Section 10709. The Coalition Associations’ contrary argument (at 16) flips the logic of *Burlington Northern* on its head, suggesting that the decision is irrelevant because it focused on the statutory provision related to tariff publication rather than on Section 10709. But the *Burlington Northern* court examined the tariff statute only in the context of the agency’s explanation as to why it believed it could exercise jurisdiction *notwithstanding* the limitations of Section 10709. The situation here thus parallels *Omaha Public Power District v. Union Pacific Railroad Co.*, NOR 42006, 1997 WL 638221 (STB served Oct. 17, 1997). There, a shipper petitioned the Board for relief from an allegedly unreasonable switching fee being charged for

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with respect to this transportation, and, at least for the moment, *its entire obligation* to WTU . . . is circumscribed by the terms of that contract.” Brief of Petitioner at 23, *Burlington Northern*, 75 F.3d 685 (No. 94-1622).

<sup>4</sup> Specifically, the question was whether the statute that required carriers to file tariffs *mandated* that the carrier do so more than a year prior to the termination of an extant contract and the commencement of any common carrier service that it “may provide.” *Burlington Northern*, 75 F.3d at 692 (quoting former 49 U.S.C. § 10762(a)(1)). At the agency’s urging, the court examined—as a potential source of such mandatory authority—“former 49 U.S.C. § 10762, which provided that . . . ‘A carrier *providing* transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . *shall publish and file* with the Commission tariffs . . . established under this chapter for transportation or service it *may provide* under this subtitle.’” *Id.* (second emphasis added).

traffic moved under contract. *Id.* at \*1. The Board’s decision to dismiss the petition was straightforward. Without the complication of the tariff statute or any other mandatory authority, there was no need to scrutinize Congress’s balancing of interests in various statutory provisions. Instead, the Board simply noted that “[i]t is well established that, under 49 U.S.C. § 10709(c)(1), transportation under a rail contract may not be challenged on the ground that it violates the Interstate Commerce Act.” *Id.* at \*2. “[E]ven if it could be found that the expiration of the contract would subject [the shipper] to payment of the switch charge, this case could not go forward now.” *Id.* (citing *Burlington Northern*, 75 F.3d 685).

**2. Requiring carriers to provide data to shippers regarding traffic under contract would violate 49 U.S.C. § 10709(b)**

AAR’s opening comments also explained that the Board may not require a railroad to provide performance data to a shipper for traffic moved under contract, because such a requirement would insert an additional obligation into a rail transportation contract in violation of 49 U.S.C. § 10709(b). AAR 711-2 Opening Comments at 35–36.

The Coalition Associations urge otherwise, suggesting that “[n]othing in § 10709(c) precludes the Board from requiring carriers to provide performance metrics to rail customers during the term of a contract.” Coalition Ass’ns at 13. That argument about subsection (c) ignores the most relevant statutory provision, which is subsection (b). Subsection (b) could not be clearer: “A party to a [rail transportation] contract . . . shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.” If a shipper wants a railroad to furnish performance data for transportation moved under contract, it must negotiate for such a contractual term—as indeed some shippers do in connection with, for example, contracts for especially time-sensitive shipments where payment and remedies are keyed to service performance. Regardless, even focusing on subsection (c)

alone, the Coalition Associations’ argument lacks merit. As AAR explained in its opening comments, Section 10709(c) exempts any rail transportation contract—and “transportation under such contract”—from the jurisdiction of the Board. 49 U.S.C. § 10709(c)(1); *see* AAR 711-2 Opening Comments at 32.

Some comments would have the Board ignore the statute altogether and rely instead on agency decisions. *First*, the Coalition Associations point to the Board’s demurrage proceedings. Coalition Ass’ns at 13–14 (citing *Demurrage Billing Requirements*, EP 759, 86 Fed. Reg. 17735, 17741 (STB served Apr. 6, 2021)). But the Board’s decision in those proceedings includes no discussion of Section 10709 at all, and the only mention of the word “contract” comes in a passing reference to the fact that railroad contracts generally “do not guarantee transit times.” *Demurrage Billing Requirements*, 86 Fed. Reg. at 17741. The Coalition Associations wrongly suggest that the Board’s silence with respect to contract traffic constitutes an affirmative decision that it had jurisdiction to order contract carriers to provide original estimated times of arrival on invoices for contract traffic. But “drive-by jurisdictional rulings . . . have no precedential effect.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998). At most, *Demurrage Billing Requirements* illustrates that some practices that apply to regulated traffic will be voluntarily incorporated for use with contract traffic simply out of custom or convenience. Nothing in the demurrage regulation prevents a railroad from disclaiming contractual responsibility to provide that information on demurrage invoices provided pursuant to a contract.

Without support in the statute or agency precedent, shippers’ comments claim that regulating what performance information is provided under contract would promote various goals they view as desirable, such as encouraging or maximizing opportunities for regulatory intervention. Coalition Ass’ns at 14. Such policy arguments cannot overcome the law. And

regardless, encouraging shippers that *by their own choice* receive contract service to seek regulatory intervention is not some undisputed goal of the Proposed Rule—far from it. As AAR pointed out in its opening comments, it would be counterproductive to layer regulation on top of contracts, superimposing the Board’s view of incentives atop the terms of the parties’ contract, resulting in less contractual flexibility and less customization of service for individual shippers. *See* AAR 711-2 Opening Comments at 33–35.

### **3. Other comments relating to contracts**

**a.** Some commenters have suggested that contracts should be subject to performance standards simply because the parties do not always reach a commercial agreement to include performance standards in a contract. *See, e.g.,* Opening Comments of National Mining Association at 7, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“NMA”) (asserting, without authority, that “[i]f an issue is not clearly allowed by the transportation contract nor clearly prohibited by the contract, the issue should then be open to review by the STB under its regulatory authority”); AFPM at 15. That suggestion flatly contradicts Section 10709’s command that contracts are *not* subject to the statute and duties may *not* be added to them. Doing so would plainly violate both Section 10709(c) by exceeding the Board’s jurisdiction and Section 10709(b) by inserting an additional duty into a transportation contract. Section 10709(b) provides that the *only* duties under a contract are “those duties specified by the terms of the contract.” And the Board has held that a “natural reading of this provision” prohibits it from imposing additional duties, “even where those duties are not specifically addressed by the contract.” *Ameropan Oil Corp. v. Canadian Nat’l Ry. Co.*, NOR 42161, 2019 WL 1723082, at \*3 (STB served Apr. 17, 2019).

Those firm rules reflect an important policy: The freedom to negotiate contract terms without regulatory interference allows a railroad and a shipper to negotiate terms that fit the

particular situation—including, where desired, performance standards—as part of a commercial deal. Of course, a railroad would expect to receive other terms in exchange for committing to such standards and for agreeing to whatever contractual remedies might be imposed for failing to meet those standards. But it is false to suggest that railroads do not enter into such contractual terms. *Requiring* railroads to provide such standards in all contracts, by contrast, would forcibly alter the parties’ abilities to make tradeoffs among price, quality, and output, thereby shrinking the menu of commercial arrangements that a shipper and railroad can negotiate. *See* AAR 711-2 Opening Comments, Verified Statement of Jonathan M. Orszag & Yair Eilat ¶¶ 15–19 (“Orszag & Eilat 711-2 V.S.”).

A shipper is never *forced* to enter into a contract with a railroad. A shipper can always request regulated common carrier service and the various protections it affords, including limitations on rates and, potentially, the Proposed Rule. But the statute draws the line at having it both ways: The statutory regime is designed to offer the benefits of the free market that contract service provides. Once the Board begins to regulate contract service, those benefits evaporate, and contract service will begin to look more like common carrier service and a return to a pre-Staggers regime—one in which there were far fewer choices for shippers and railroads alike.

**b.** The FRCA/NCTA comments suggest that the Board should “consider whether new contracts that preclude the application of reciprocal switching relief for inadequate service are consistent with 49 U.S.C. § 11101(a),” specifically the rule that “[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” Opening Comments of the Freight Rail Customer Alliance and National Coal Transportation Association at 4, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“FRCA/NCTA”)

(quoting 49 U.S.C. § 11101(a)). The Board can easily reject this proposal because it comes with no substantive rationale. Even if the comment’s speculative premise about future contractual terms proved true, it is unclear why a carrier’s contract terms about whether one shipper could seek a switching order would create a danger of the carrier violating its common carrier obligation to other shippers. No reason exists to believe that a carrier that declined to incorporate the Proposed Rule into its contracts would find it more difficult to respond to a reasonable request for common carrier service than would a carrier that did incorporate the Proposed Rule into its contracts.

**B. The Proposed Rule Cannot Operate Based on the Performance of Exempt Traffic**

AAR’s opening comments explained why the Board must refrain from applying the Proposed Rule’s performance standards to traffic while it is exempt from regulation. AAR 711-2 Opening Comments at 37–41. Instead, the Board may apply the Proposed Rule only if and after the Board has properly revoked the exemption and the railroad’s service triggers a metric after the revocation. *Id.* The Board’s precedents are clear that the “exemption of a commodity . . . excuses carriers from virtually all aspects of regulation involving the transportation of that commodity.” *Pejepscot Indus. Park, Inc.*, 6 S.T.B. 886, 891 (2003). Although the Board has authority to revoke such exemptions, fundamental administrative law principles prevent the Board from doing so retroactively. *See Sanimax USA LLC v. Union Pac. R.R. Co.*, NOR 42171, 2022 WL 577808, at \*4 (STB served Feb. 25, 2022) (noting the application of “‘the traditional presumption’ against retroactive actions that would ‘impair rights a party possessed when [it] acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed’” (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278–80 (1994))). And as the Board has recognized, there is “no basis for overriding the presumption

against retroactive relief” in this context. *Id.* Accordingly, even after an exemption is revoked, the Board may not order reciprocal switching under the Proposed Rule on the basis of service provided while the exemption was in place.

1. Shippers of exempt commodities urge the Board to apply the Proposed Rule to exempt traffic, but their arguments are foreclosed by the statute. For example, several commenters emphasize the Board’s jurisdiction over exempt traffic. *E.g.*, Opening Comments of Diversified CPC International at 5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Diversified CPC”). But the Board’s jurisdiction and its authority to regulate are distinct concepts. *See* AAR 711-2 Opening Comments at 38–39. Although the Board’s jurisdiction over exempted transportation is a necessary condition for application of the Proposed Rule to such traffic, it is not sufficient. The Board must also have the *authority* to regulate, which it lacks unless and until it properly revokes the exemption under the procedures provided by Congress. *See* 49 U.S.C. § 10502(d).

Some shippers point to the Board’s power to revoke exemptions and assert that it would be appropriate for the Board to revoke the exemption for any exempt traffic that would otherwise trigger the metrics of the Proposed Rule. *See* FRCA/NCTA at 4. Such an approach would be unlawful retroactive regulation, as discussed above: Only in hindsight would the traffic be regulated. Equally bad, that proposal utterly ignores the revocation procedure and findings required by Section 10502(d), including that the carrier abused its market power. *See* Opening Comments of AAR at 7–8, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), (filed Jan. 29, 2021). FRCA/NCTA suggests that revocation would always be warranted in cases subject to the Proposed Rule, because, in its view, the existence of service inadequacies necessarily demonstrates that “market forces are demonstrably insufficient” and

that regulation is needed to protect shippers of exempt traffic from the abuse of market power and to carry out the policies of 49 U.S.C. § 10101. FRCA/NCTA at 4. That is incorrect, not least because a service inadequacy can arise for any number of reasons, many of which may have nothing to do with the presence or absence of competition. There is no reason to presume that meeting the criteria for a forced switch under the Proposed Rule satisfies 49 U.S.C. § 10502(d).

Other shipper interests propose the same conclusion as FRCA/NCTA, but suggest the exact opposite rationale: They contend that application of the Proposed Rule to all exempted commodities is appropriate because exemptions may have been issued “for reasons related to competition” but such a “rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service.” Opening Comments of the Private Railcar Food and Beverage Association at 5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“PRFBA”); Opening Comments of the National Stone, Sand & Gravel Association at 5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“NSSGA”). That contention correctly reflects that the Board is compelled to exempt traffic where regulation is “not needed to protect shippers from the abuse of market power.” 49 U.S.C. § 10502(a)(2)(B). But that has nothing to do with the scope of generally applicable exemptions, which are not limited to competition-related regulation, but rather extend to all forms of service regulation. *Cf. Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), 2016 WL 1164785, at \*10 (STB served Mar. 23, 2016) (noting that if exemption were revoked, the traffic would become subject to obligations of “service upon reasonable request, maintenance of reasonable practices and rates, and provision of adequate service”).

In short, the Board must assess, on an individualized basis and in a proper proceeding, whether revocation is appropriate for a specific commodity. It cannot do so wholesale in this

rulemaking or in tandem with an adjudication under the Proposed Rule. There are procedures for revoking an exemption, and those procedures require the consideration of certain facts relevant to evaluating an exemption—and the Proposed Rule addresses neither. And in all circumstances, the Board must refrain from retroactively regulating traffic moved while it was exempt.

2. Some shipper groups urge the Board to partially revoke the exemptions of specific commodities for purposes of eligibility for relief under the Proposed Rule. *See* Joint Opening Comments of American Forest & Paper Association and Institute of Scrap Recycling Industries at 6–7, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“AF&PA/ISRI”) (seeking revocation for a list of commodities including, *inter alia*, iron or steel scrap, wood particle board, and paper waste); Opening Comments of Portland Cement Association at 9–10, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Portland Cement”) (seeking revocation for cement).

Those proposals are an open invitation for the Board to commit multiple serious procedural errors. There is absolutely no record in this proceeding to support the findings required under Section 10502(d) for any of these commodities—or indeed, any commodity at all. Relatedly, under the Administrative Procedure Act, “an NPRM must ‘provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.’” *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (quoting *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004)) (interpreting 5 U.S.C. § 553). AAR and other interested parties are unable to comment on the appropriateness of revoking specific commodity exemptions because the Board has not proposed to revoke any exemptions or offered any rationale to support such an action. The shippers’ comments only underscore the point: AF&PA asserts that in *separate* proceedings addressing the revocation of exemptions for particular commodities, it submitted “substantial expert, industry, and historical evidence” supporting

revocation for those products. AF&PA/ISRI at 3 (footnotes omitted); *see also id.* at 4 (ISRI submitted “extensive evidence,” “substantial quantitative evidence,” “expert testimony,” and “industry-specific information” regarding other products). That confirms that evaluation of a request for revocation for a specific commodity requires consideration of detailed, commodity-specific facts that are wholly absent from the record here. Without any factual detail or any sort of proposed rationale from the Board, interested parties have nothing to respond to and no guidance about what evidence the Board might find persuasive in rendering a decision.

In addition to those clear obstacles to taking any action on exemptions here, the revocation of a specific commodity’s exemption would not be a “logical outgrowth” of the NPRM. A final rule qualifies as a logical outgrowth of a proposed rule only where “interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject.” *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003) (per curiam)). Here, the NPRM said that the Board “would”—in the hypothetical future—consider revoking exemptions “to the extent required” if shippers of exempt commodities filed petitions under the Proposed Rule. NPRM at 27. The notice did not propose the pre-emptive revocation of exemptions as part of the final rule in this proceeding *even before any actual petition is filed*, let alone the revocation of the specific commodities addressed by shipper comments. The NPRM thus did not put parties on notice that the Board could consider issuing partial exemptions for specific commodities in this proceeding.<sup>5</sup>

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<sup>5</sup> The AF&PA/ISRI comments cite *CSX Transportation, Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009), for support. AF&PA/ISRI at 7 n.16. But that case only reinforces that their proposal cannot be considered a logical outgrowth of the NPRM. In *CSX*, the notice of proposed rulemaking proposed that benchmark rates in certain rate reasonableness proceedings could be

AAR does not dispute that the Board has the power to revoke an exemption in a proper proceeding upon making the required findings based on the facts presented. If the Board is concerned that a shipper of an exempt commodity is receiving inadequate service and can make the findings necessary for revocation, then it should undertake proper proceedings, exempt the commodity if the facts warrant, and then apply the Proposed Rule if the newly regulated service indeed proves inadequate under the Proposed Rule's terms.

### **III. DATA ANALYSIS SUPPORTS KEY REFINEMENTS TO THE PROPOSED RULE RECOMMENDED BY AAR**

AAR previously informed the Board that it was working to perform an empirical analysis of how the Proposed Rule's metrics might apply to shipments on the national rail network. AAR 711-2 Opening Comments at 54–55. Given the time and data available, AAR has focused on illuminating how the transit time metric might operate in the context of the observed data about actual traffic. It has now completed a study using historical data to analyze how lanes experience changes in transit time, using the Proposed Rule's transit time metric (applying various parameters for measuring time period and percentage change, including those in the Proposed Rule and those suggested by various parties in their opening comments). *See* Reply Verified Statement of Michael Baranowski and Nathan Zebrowski ("Baranowski & Zebrowski Reply V.S."). AAR has also analyzed the historical relationship between volume of traffic on the national network and the velocity of shipments (which is indicative of transit time). *See*

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established using the prior year of data. *CSX*, 584 F.3d at 1078. The final rule, however, allowed parties to use the prior *four years* of data. *Id.* The D.C. Circuit held that the four-year standard was not a "logical outgrowth" of the notice. *Id.* at 1082. The shippers' request here—revoking exemptions in this rule for several specific commodities rather than on an individualized basis when petitions are filed—is even further removed from the rule proposed by the Board. Additionally, as in *CSX*, the NPRM here did not "ask[] for comments on [that] particular issue nor otherwise indicate[] that the Board was contemplating [this] particular change." *Id.* at 1081–82.

Reply Verified Statement of M. Rapik Saat (“Saat Reply V.S.”). The findings of those analyses reinforce some key recommendations outlined in AAR’s opening comments.

A. In the broadest sense, empirical data about transit time show that some amount of variation in service over time is an inherent characteristic of the dynamic national rail network. As AAR previously explained, the service provided to any individual shipper for any given shipment at a particular point in time is a function of many factors large and small, some within and others entirely outside an individual carrier’s control. AAR 711-2 Opening Comments at 48, 74, 80–81. Often, the service performance for a particular shipment will reflect carrier efforts to efficiently harmonize the different and sometimes competing demands of many shippers. As a result, many variations in service over time are not inherently problematic and result from factors that do not suggest persistently inadequate service by an incumbent carrier. And where a potential service inadequacy exists, factors also affecting the alternate carrier’s performance may indicate that a switching prescription will not remedy the inadequacy.

As one example, the data show that the overall volume of traffic on the national rail network has a strong and persistent inverse relationship to average train velocity across the network. *See* Saat Reply V.S. at 2–3. In other words, much as vehicle traffic on the roadways moves quickly at off-hours but slows at peak times, comparatively lower volumes of rail traffic tend to move at a higher velocity. *Id.* But as the rail network is used to move comparatively more traffic, it can become congested and traffic moves at lower velocities. *Id.* When the overall network sees substantially less or more traffic, systemwide train velocity can rise or fall by 10% or more year-over-year. *Id.* Such swings are not a sign of inadequate service, but rather a sign of the network’s healthy flexibility and sound decisions by all carriers to provide the best service to the largest number of customers by maximizing the network’s overall throughput.

Such large-scale, network-wide trends are relevant to the Board's evaluation of whether (or to what extent) triggering a metric indicates service that is inadequate for a particular shipper. Such systemwide factors also are relevant to whether alternative service will remedy any service inadequacy: If an increase in traffic across the network causes a decline in velocity on the network, there is no basis to presume that alternative service by an alternate carrier will be a useful remedy.

**B.** Looking at individual lanes, as the Proposed Rule does, empirical analysis also demonstrates that there are significant, natural variations in service over time. For example, analysis of the data across the national rail network generally shows that (depending on the particular parameters used to measure the change in transit time, including both the numerical threshold and the comparison interval) there is a substantial likelihood that a given carload of traffic will travel in a lane that experienced increases (or decreases) in transit time at some point over the course of a year. Baranowski & Zebrowski Reply V.S. at 7 (tbl. 1).<sup>6</sup> Indeed, it is fairly common for traffic to be on a lane that experiences *both* increases *and* decreases in transit time of 20% or more over the course of a year. *Id.* This natural variation means that, for example, under the Proposed Rule's parameters of a rolling 12-week average comparison interval and a 20% threshold, there is a 65.5% likelihood that a given carload in the last 12 months was in a

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<sup>6</sup> The analyses discussed here and in the Baranowski & Zebrowski Reply Verified Statement hew to the available data, in the sense that traffic is counted in the analysis only when the relevant data exist to perform a year-over-year comparison under the parameters specified in the Proposed Rule's transit time metric. As a result, a lane that saw traffic in only one of the past two years is not analyzed, because two years of data are needed to conduct the relevant comparison. For similar reasons, interline traffic is omitted because of a lack of traffic data capturing the time at which the originating interlining carrier's responsibility ends or the time at which the terminating interlining carrier's responsibilities begin.

lane that would have triggered the transit time metric at some point in those 12 months.<sup>7</sup> *Id.* at 8 (tbl. 2). Using a rolling 6-week average comparison interval and a 15% threshold, which is consistent with many of the opening comments submitted by various shipper interests,<sup>8</sup> this likelihood increases to 84.3%. *Id.* And even using a quarterly comparison interval and a 25% threshold as suggested by some carriers,<sup>9</sup> there is still a 37.3% likelihood that a given carload of traffic was in a lane that triggered the transit time metric. *Id.*

To be clear, the figures above and in the Baranowski and Zebrowski Reply Verified Statement are not evaluations of how much traffic would ultimately be subject to a switching order under the Proposed Rule as a whole. Like the Board, AAR did not attempt to answer that larger question, and such an analysis would depend on the operation of numerous other steps in the Proposed Rule and issues debated in the comments.<sup>10</sup> The reported figures address a

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<sup>7</sup> As discussed in these comments, a metric is “triggered” when a lane would fail the performance standard for that metric as defined in proposed 49 C.F.R. 1145.2, using a particular set of parameters for applying that metric.

<sup>8</sup> See Opening Comments of Glass Industry Supply Chain Council at 5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“GISCC”) (suggesting 4–6 weeks); PRFBA at 7 (suggesting 6 weeks); AFPM at 10–11 (suggesting 6 weeks and a 15% threshold); NSSGA at 7 (suggesting 6 weeks); Opening Comments of Essential Minerals Association at 6, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“EMA”) (suggesting 6 weeks); Opening Comments of Glass Packaging Institute at 3, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“GPI”) (suggesting 8 weeks); Opening Comments of Olin Corporation at 5–6, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Olin”) (suggesting 10% to 15% threshold); Opening Comments of the Alliance for Chemical Distribution at 4, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“ACD”) (suggesting 15% threshold); FRCA/NCTA at 2 (suggesting 15% threshold).

<sup>9</sup> See Opening Comments of Union Pacific Railroad Company at 19, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“UP”) (suggesting quarterly comparison interval); Opening Comments of Norfolk Southern Railway Company at 3, 12, 14, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“NS”) (same); *id.*, Ex. A, Verified Statement of Mark A. Israel ¶¶ 34–35, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (same).

<sup>10</sup> Those other steps include: (a) whether contract traffic is subject to the Proposed Rule, (b) whether exempt traffic is subject to the Proposed Rule, (c) whether (and if so, how) interline

different—but quite important—question about the operation of the transit time metric: How might setting different parameters for that metric inhibit or promote the Board’s ability to efficiently identify service warranting regulatory attention? As discussed below, different levels of likelihood of triggering that metric will affect the nature and circumstances of the cases subject to the Proposed Rule and brought to the Board, with implications for how the Board conducts proceedings under the rule. *See infra*, Part III.D.

C. AAR’s analysis also examined transit time changes for both single-served traffic (that is, traffic with access to only one Class I rail carrier that can serve the lane on at least one end of the movement) and multiple-served traffic (that is, traffic on lanes that can be served by more than one Class I carrier on both ends of the movement). The Proposed Rule applies only to traffic with practical physical access to a single Class I carrier and reflects assumptions by the Board about differences in service performance between single-served traffic and multiple-served traffic. *See* NRPM at 23. Similar expectations about differences between the two types of traffic may also underpin the Board’s expectations about alternative service as an effective remedy for an identified service inadequacy.

The data show that the Board cannot assume that, in general, multiple-served lanes receive “better” service and single-served lanes receive “worse” service. At least as measured by

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traffic is subject to the Proposed Rule, (d) whether (and if so, how) unit trains are subject to the Proposed Rule, (e) how much traffic is eligible under the Proposed Rule by virtue of originating or terminating in a “terminal area” where switching is sought, (f) how much traffic is eligible under the Proposed Rule by virtue of being served at a location with practical physical access to only one Class I carrier, (g) the existence of a safe and practicable alternative service, (h) what affirmative defenses exist and how they apply in a particular case, including case-by-case considerations, (i) whether the alternative service can remedy any service inadequacy, (j) whether the incumbent carrier is able to cure any service inadequacy, (k) the extent to which shippers find it desirable to invoke the procedures of the Proposed Rule rather than resolve their concerns through other means, and (l) the extent to which a shipper that obtains a switching prescription invokes that prescription by requesting service from the alternate carrier.

the transit time metric, single-served and multiple-served traffic are not statistically distinguishable—that is, they are equally likely to trigger that metric. *See* Baranowski & Zebrowski Reply V.S. at 12 (tbl. 5) (finding that 66.1% of single-served traffic triggered the 12-week/20%-increase transit time metric and 66.2% of multiple-served traffic triggered that metric); *id.* at 12–13 (describing regression analysis that is unable to find a statistically significant difference (at the 1% confidence threshold) between single-served and multiple-served traffic in its likelihood of triggering the transit time metric).

Those findings comport with the industry’s experience with the operational factors that affect transit time. There are not “trains carrying single-served traffic” and “trains carrying multiple-served traffic,” such that carriers can discriminate in the performance they offer to the two. Rather, manifest traffic from all customers and facilities—to and from single-served facilities and multiple-served facilities alike—passes through the same yards, is handled by the same crews, and is mixed together on the same line-haul trains. Thus, all manifest traffic—both single-served and multiple-served—is subject to many of the same operational factors that influence transit time. In short, the Board cannot simply assume that transit time will be less variable when a shipper has multiple options.

**D.** Taken together, the empirical evidence offers several key lessons for the Board’s consideration. *First*, the analyses underscore the need for the substance and procedures of the Proposed Rule to be attentive to the facts and circumstances of particular cases—not merely to whether service triggers a particular metric. Doing so will allow the Board to identify service that is persistently and distinctly inferior to what is available to similarly situated shippers, and thus enable the Board to address the ultimate statutory question presented by any petition contemplated by the Proposed Rule—whether the shipper has “some actual necessity or some

compelling reason” for a switching order. *Jamestown*, 195 I.C.C. at 292. The data show that lanes triggering metrics can be a widespread phenomenon inherent in the complex rail network—something that alone does not conclusively show that the shipper is receiving distinctly and persistently poor service meriting the Board’s intervention. Service metric failures might help the Board identify those situations that warrant closer scrutiny, but the Board will need to consider the particular facts and circumstances of the case before deciding whether service is inadequate for that particular shipper in the particular circumstances and whether a switching order will remedy that inadequacy. In making case-specific findings, moreover, the Board should be attentive to what the data show to be natural variation inherent in the rail industry and the diverse array of factors that influence service performance.

*Second*, setting metric parameters very aggressively, as suggested by a number of shipper interests, would raise serious concerns. It would turn normal up-and-down performance variation into a call for regulation. It would generate “false positives” that bury meritorious requests for switching beneath a mountain of switching claims based on entirely normal variation. And false positives are not beneficial. Most obviously, a shipper cannot benefit from a situation in which it mistakenly believes alternative service will be different, if that alternative service is in fact likely to perform in fundamentally similar ways—either because the metric has been triggered by entirely commonplace variation or because challenges facing the incumbent carrier are shared by potential alternate carriers as well.

*Third*, the empirical evidence highlights the importance of the alternate carrier’s participation and the need for the Board to consider the proposed alternative service design. The data show that changes in service over time may be the result of a wide number of factors, many of which may affect the network as a whole—including the operations of both the incumbent

carrier and any alternate carrier. The Board must evaluate the prospect that alternative service will remedy any identified service inadequacy in light of these network-wide realities. Further, because the data show striking parity between single-served and multiple-served traffic on the transit time metric, the Board cannot assume that a switching order will necessarily remedy the identified service inadequacy. Indeed, if the data support any presumption, it is that a shift to multiple service will *not* improve transit time consistency—a conclusion further reinforced by the operational reality that switching will necessarily introduce operational complexity relative to single-line service.

#### **IV. SPECIFIC ASPECTS OF THE PROPOSED RULE**

AAR previously offered views on a number of specific aspects of the Proposed Rule. *See* AAR 711-2 Opening Comments Part IV. Below are further comments on the same topics in response to opening comments filed by other stakeholders.

##### **A. Terminal Area**

As AAR explained in its opening comments, the Board may order reciprocal switching only within a terminal area. That limitation is required by statute. *See* AAR 711-2 Opening Comments at 25–27. Several shipper interests agree with AAR. The Coalition Associations, for example, correctly note that “[t]he very fact that Congress provided for reciprocal switching in terminal areas reflects its understanding that shippers outside of terminal areas could not achieve the same benefits as shippers inside terminal areas. Any other interpretation would vitiate the reciprocal switching statute.” Coalition Ass’ns at 61.

1. Other shippers disagree, arguing, for example, that “Congress did not limit the Board’s authority to order reciprocal switching only to terminal areas.” Olin at 5. But Section 11102, which includes the Board’s reciprocal switching authority, governs the “[u]se of terminal facilities.” 49 U.S.C. § 11102. When Congress wanted that section to reach activity

outside of a terminal area, it said so expressly. *See id.* § 11102(a); *see also* AAR 711-2 Opening Comments at 25–27 (further explaining Congress’s limitation of reciprocal switching to terminal areas).

For similar reasons, the statute does not authorize the Board to order reciprocal switching from facilities that are a “reasonable distance” from a terminal facility, as some commenters urge. *See* WCTL at 9–10; Olin at 5. The provision of the statute that requires an incumbent railroad to make “main-line tracks” available to another railroad “for a reasonable distance outside of a terminal” under certain circumstances, applies only to terminal trackage rights, *see* 49 U.S.C. § 11102(a), not to reciprocal switching, *id.* § 11102(c). *See generally* Opening Comments of AAR at 45–46, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016); Reply Comments of AAR at 22–26, EP 711 (Sub-No. 1) (filed Jan. 13, 2017) (“AAR 711-1 Reply Comments”).

2. AAR’s opening comments explained that the Board should not adopt a definition of “terminal area” in the regulatory text and that the Proposed Rule should instead simply incorporate existing case law. AAR 711-2 Opening Comments at 28–30. Adopting a definition can only risk unnecessary confusion. The Board has a long line of precedent that is up to the task. At least some shippers agree. *See* Portland Cement at 13 (labeling the Board’s proposed definition “unnecessary”). Indeed, no stakeholder has offered a reason that the Board’s definitional language is *preferable* to the existing case law. Some stakeholders may nevertheless be dissatisfied with both and inclined to litigate any differences between the two. That sort of controversy is not a good use of party or Board resources. It can be avoided by the Board making clear in the text of the Proposed Rule that the Board will prescribe switching *only* in

terminal areas, as Congress has instructed, as identified under standards articulated in the agency's case law.

3. As AAR explained in its opening comments, a terminal area should be identified based on the existence of switching activity; switching tariffs do not provide useful evidence of the boundaries of a terminal area. AAR 711-2 Opening Comments at 30–32.

The Coalition Associations suggest that the existence of a switching tariff in a particular location ought to create “a presumption of feasibility.” Coalition Ass'ns at 46. Their comments acknowledge, however, that inconsistencies between an incumbent carrier's and alternate carrier's tariffs could raise concerns and that those concerns should be resolved by looking to whether switching is in fact currently taking place as well as to “the history of interchanges between the carriers within that terminal.” *Id.* AAR agrees with the Coalition Associations to the extent they suggest that it is *actual* switching activity, rather than the content of any tariff, that sheds light on the practical extent of a terminal area.

The Coalition Associations' comments are mistaken, however, in asserting that the Board need examine actual switching activity only where there are inconsistencies in tariffs. As AAR explained in its opening comments, a switching tariff may not be indicative of reciprocal switching activity in a terminal area. *See* AAR 711-2 Opening Comments at 30–31. The Board has already recognized this issue in analogous circumstances. In *Golden Cat Division of Ralston Purina Co. v. St. Louis Southwestern Railway Co.*, FD 41550, 1996 WL 197602 (STB served Apr. 25, 1996), the Board explained that “[c]arriers have frequently given . . . names to plants located in rural areas for ease of tariff publication. That does not make such points ‘terminals;’ . . . much more is required.” *Id.* at \*5. Accordingly, relying on the existence of a tariff to identify a terminal area risks sweeping in areas that do not fall within a terminal area.

4. The Department of Agriculture’s comments suggest that the Board should provide a non-exhaustive list of “terminal areas” where the Proposed Rule would definitively apply. Opening Comments of U.S. Department of Agriculture at 7, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“USDA”). It further proposes that “the Board could still consider additional terminal areas through a more case-by-case approach . . . for shippers who . . . fell outside of the pre-defined areas” and that “[e]ven then, the burden of proof for showing why a terminal area should not qualify for a reciprocal switch should fall on the railroads.” *Id.*

Although AAR supports constructive suggestions to make the Proposed Rule operate more clearly and efficiently, USDA’s suggestion would be difficult to implement in practice. USDA is presumably not suggesting simply making a list of information that is already well-known and accessible to all (such as the fact that major commercial centers have terminal areas, which agency decisions already recognize). Anything beyond that would require evaluating smaller terminal areas and the outer boundaries of large terminal areas. But the Board would lack the requisite information to make comprehensive findings on those issues, absent submissions by actual parties in the context of a specific adjudication involving a particular area. Attempting to exhaustively map those areas by bringing stakeholders together to resolve disagreements in the abstract would involve considerable work and delay and would still risk determinations that are based on incomplete information. That in turn risks creating more confusion than clarity. And the Board would still be required to make a finding in each case that the proposed operations would indeed be within a terminal area.<sup>11</sup> *Cf. Golden Cat*, 1996 WL 197602, at \*5 (“As a threshold issue, before we impose relief under [the terminal trackage

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<sup>11</sup> For these same reasons, it would be inappropriate for the Board to make a blanket “declar[ation] that ports are terminal areas” in the final rule. Opening Comments of Virginia Port Authority at 12, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Virginia Port Authority”).

provision], we must find that the facilities [the shipper] seeks to have [the alternate carrier] use are terminal facilities.”).

Even if the Board did create a non-exhaustive list of terminal areas, it should not establish any corresponding presumption that any particular area qualifies. *See* USDA at 7 (arguing that the “burden of proof for showing why a terminal area should not qualify for a reciprocal switch should fall on the railroads”). There is no logical reason to presume that an area excluded from that list is nonetheless a terminal area; if anything, the opposite presumption should obtain. The only rationale provided by USDA’s comments is that “railroads . . . have all the information about the costs and operational difficulties associated with a switch.” USDA at 7. But costs and operational issues are not the only information necessary to establish whether an area is a terminal area (and they may not even be the relevant information). *See* AAR 711-2 Opening Comments at 25–32. Nor will the incumbent carrier have all of the necessary information, because the alternate carrier’s operations will be relevant too. In the end, the solution to any lack of shared information is to put the relevant information before the Board in the context of a particular case.

#### **B. The Proposed Rule Should Not Apply to Class II or Class III Carriers**

The Board is correct to limit prescriptions under the Proposed Rule to Class I carriers. NPRM at 24. The basis for the Proposed Rule—a new set of performance metrics growing out of data collected in EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service—Railroad Reporting*—is inapplicable to Class II and Class III railroads, which have “not been submitting service-related data to the Board under performance metrics dockets.” NPRM at 24; *see also* Opening Comments of the American Petroleum Institute at 8, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“API”) (urging that the Board should focus on data-reporting by Class I carriers at this time and revisit issues related to Class II and III carriers in the future). In addition, as AAR

explained in its comments and as further detailed in the opening comments of the American Short Line and Regional Railroad Association, short-line railroads generally have smaller customer bases over which they can spread revenue losses. Opening Comments of the American Short Line and Regional Railroad Association at 3–5, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“ASLRRA”). As a result, the loss of a Class II carrier’s or Class III carrier’s rare line-haul movement could threaten its financial viability and jeopardize service to other shippers that rely on it. AAR 711-2 Opening Comments at 42.

At least one commenter appears to suggest that the Board should be able to order alternate *first mile / last mile* service if a short-line is providing inadequate deliveries or pick-ups after taking cargo from a Class I railroad. *See* ACD at 2. But a reciprocal switching remedy involves a change in *line-haul* service. NPRM at 8 (prescription under Proposed Rule “would facilitate future line-haul service by an alternate rail carrier”). The Proposed Rule is thus not an appropriate tool for addressing local service concerns. *See generally* AAR 711-2 Opening Comments at 57–58. The Board’s original proposal to exclude Class II and Class III carriers from the Proposed Rule is sound.

The Proposed Rule also properly limits potential alternate carriers to Class I railroads and their affiliates. NPRM at 37 (proposed 49 C.F.R. 1145.1) (defining “[r]eciprocal switching agreement” as an agreement to transfer rail shipments between “one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company within the terminal area in which the rail shipment begins or ends its rail journey”). *Contra* ACD at 2; Portland Cement at 15. Class II and Class III railroads generally operate over shorter distances and rarely have networks that can serve routes also served by another carrier. For that reason, alternative service designs involving Class II or Class III railroads generally would be difficult or

impossible. In turn, most aspects of the Proposed Rule—ranging from practicability, to evaluation of the alternative service, to the terms of the switching agreement, to the termination process—would likely function quite differently in the rare instances where a Class II or Class III railroad could operate as an alternate line-haul carrier. Rather than depart from the NPRM and complicate the operation of the Proposed Rule, the Board should simply recognize that Part 1147 can be invoked to address the highly unusual situations in which a shipper might want switching to a Class II or Class III carrier.

Finally, at least one commenter expresses concern about relationships between Class I carriers and Class II or Class III railroads that operate as handling carriers. *See* NMA at 5–6. The scope of those comments is unclear. To the extent commenters urge that a Class I railroad should be responsible for the performance of other carriers (such as Class II or Class III handling carriers), AAR has previously explained why that would be inappropriate and ineffective. *See* AAR 711-2 Opening Comments at 76–77.<sup>12</sup> And to the extent commenters are concerned about relationships that may affect physical access to Class I carriers, the Board has appropriately committed to consider “on a case-by-case basis” various arrangements that may provide or limit access to more than one Class I carrier. NPRM at 24; *see* AAR 711-2 Opening Comments at 45.

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<sup>12</sup> In particular, the Board’s definition of “affiliated companies” should not include third parties. *See* AAR 711-2 Opening Comments at 76. The Board could make clear that an “affiliated company” is limited to one that is included in a Class I railroad’s annual combined rail reporting to the Board and that acts as an operating division of the railroad, as ASLRRRA suggests in its opening comments. ASLRRRA at 5–6. This approach would ensure that Class II and Class III carriers are not effectively included as “third-party agents” subject to the rule. *See id.* at 5–7. That approach would also draw an appropriate line in response to comments that are concerned about how belt or terminal railroads would be subject to the Proposed Rule. *Cf.* Virginia Port Authority at 9.

**C. Service Metrics and the Shipper's Opening Case**

**1. The role of metrics in the shipper's opening case and the Board's decision**

**a.** A central feature of the Proposed Rule is a set of performance standards that measure aspects of the incumbent carrier's service. As AAR previously explained, objective performance standards can be an appropriate starting point for the Board's evaluation of whether a prescribed switch is warranted. AAR 711-2 Opening Comments at 45. By helping focus the Board's and the parties' attention on situations that justify closer scrutiny, properly calibrated metrics can further the Board's goal of a predictable, certain regulatory regime. *Id.* at 46. Those metrics, however, cannot tell the Board everything that it needs to know to determine whether a regulatory intervention is warranted in any given case. *Id.* at 59–62. That is because service needs, the causes of service shortcomings, and the characteristics of traffic on a given lane can vary considerably. *See, e.g., id.* at 48–49. Reliance on metrics alone will not shed light on those issues, yet evaluating them is necessary to determine whether a proposed switch satisfies the governing legal standard. *Id.* at 15–18. Service metrics can therefore serve as a proper starting point for the Board's consideration, but they will not be the ending point. *Id.* at 45.

AAR's empirical analysis confirms that quantitative performance standards cannot fully answer the Board's inquiry into whether a switching prescription is appropriate. As explained above, AAR's analysis of rail traffic reveals considerable natural variation in performance within lanes across the Nation's rail network. While not an attempt to quantify the ultimate impact of the Proposed Rule, those data show that some amount of variation in transit time is an inherent feature of the network rail industry. *See supra*, Part III. Some of that variation is a function of the aggregate demand on the network's resources—velocity decreases as volume increases and vice-versa. *See Saat Reply V.S.* at 2–3. Some of it is likely associated with the different

operational characteristics of shipments of different sizes, under which smaller blocks of cars can see more variation in operational performance characteristics. *See* AAR 711-2 Opening Comments at 56 (citing Reply Comments of AAR, Reply Verified Statement of John T. Gray, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, EP 768 (filed Sept. 8, 2022)). These facts highlight the need for a context-specific inquiry that evaluates whether an incumbent’s failure to meet a service metric reflects natural variation that can be expected to subside on its own or instead whether it reveals a more persistent or serious problem that necessitates Board intervention. Examining the facts and circumstances of particular cases is also necessary for the Board to determine whether a switching prescription will effectively remedy a service inadequacy, and it will promote alignment between the Proposed Rule and the governing legal standard—*viz.*, whether the requested switching remedy is actually necessary or supported by a compelling need. *See* AAR 711-2 Opening Comments at 15–18.

**b.** Proposals for broad new performance standards advanced by some shippers are unnecessary additions to the Board’s Proposed Rule and, indeed, some are inconsistent with the governing legal standard. For example, one commenter proposes an “additional standard” that would provide for a mandated switch “upon a showing that the recent service provided by the incumbent carrier does not reasonably meet the local operational and service requirements of the customer that are consistent with the person’s needs and requirements for the efficient and reliable receipt, transportation, and delivery of property, and taking into account any physical or operational limitations or restrictions at a facility or location.” Portland Cement at 12. Other commenters urge a “broader” service standard for “unreasonable service.” PRFBA at 9 n.4; *see also* EMA at 8–9 n.4; NSSGA at 9 n.3. Those proposals do not align with the “actual necessity or compelling reason” standard, under which the Board must consider “not only the interests of

the particular shippers at or near the terminal considered, but also the interests of the carriers and of the general public.” *Jamestown*, 195 I.C.C. at 292; *see generally* AAR 711-2 Opening Comments at 12–14. “Individual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service.” *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 974 (1998). What a customer perceives as service that best meets its individual “needs and requirements” may run counter to the interests of other shippers and the health of the overall network that serves many shippers. A standard that bypasses consideration of other shippers or the network as a whole—or the question whether a switch would remedy the shipper’s service concerns—would not be consistent with the approach Congress directed.

Some commenters argue that a broad new performance standard is necessary to prevent carriers from engaging in gamesmanship and gradually lowering the quality of their service offerings. *See* Portland Cement at 10–12; Olin at 5–6. And the USDA argues that the Board should adopt a new service metric looking at grain-specific considerations. USDA at 5–6. But carriers already have strong incentives to provide quality service that will attract customers to their offerings, *see* AAR 711-2 Opening Comments at 43, including by providing accurate forecasting of arrival times and carrying all the carloads their customers request. Moreover, it is likely that many of those commenters’ underlying concerns would be better addressed (where they arise) using tools other than forced switching orders. And in all events, where forced switching is warranted but the Proposed Rule’s procedures are a poor fit, a shipper facing a substantial, measurable deterioration in service or other demonstrated inadequacy would continue to be able to seek relief under the existing Part 1147 procedures. *See* 49 C.F.R. 1147.1(a).

## **2. Service reliability metric (Original Estimated Time of Arrival)**

### **(a) The OETA metric cannot alone establish the need for a switching order**

AAR's opening comments agreed that a railroad's failure to meet a prescribed threshold for on-time deliveries could appropriately prompt the Board's review of whether a switching order would be appropriate. AAR 711-2 Opening Comments at 47. AAR also highlighted certain reasons why a carrier's compliance with a standard focused on OETAs may not indicate a service failure warranting a Board remedy. *Id.* at 47–48. That would be the case, for example, when delays result from factors beyond the carrier's control or where the observed fluctuation in arrival time as measured against the original estimate reflects the normal variability of freight rail traffic. *Id.* With respect to the latter point, one shipper observes that, because OETAs are updated for the great majority of shipments, “[p]lant [m]anagers normally wait for the revised [estimated times of arrival] when planning.” Diversified CPC at 5–6. That practice underscores that, in a case triggered by a failure to meet the OETA standard, the failure may not be fully informative of the need for a switching remedy. *See generally* AAR 711-2 Opening Comments at 47–49. In the example given, the shipper itself recognizes the variable nature of original estimates, maintains communication with the railroad, and plans its operations accordingly.

### **(b) Establishing and measuring the OETA success rate**

The Board's proposed OETA metric provides that a shipper may petition for a switching prescription if it shows that the incumbent carrier failed to deliver 60% of shipments on a given lane within 24 hours of the OETA during a 12-week period. NPRM at 39 (proposed 49 C.F.R. 1145.2(a)). Commenters urge numerous changes to that approach, pointing in all directions: to increase the 60% threshold either now or in the future, to elaborate the metric to capture the length of delay beyond the original arrival estimate, to change the benchmark against which the

carrier's performance is measured, to shorten the 12-week measurement period, and to find a potential service failure where shipments arrive *early* (that is, before the OETA). The record before the Board provides no basis to conclude that any of those changes would help the Board accurately and effectively identify situations where a service inadequacy exists and warrants regulatory intervention. Many would significantly complicate the Proposed Rule's operation. And many risk generating a large number of false positives.

i. With respect to the numeric metric for on-time deliveries, a number of commenters urge the Board to increase the minimum threshold above the 60% level in the Proposed Rule. Some ask the Board to adopt a 70% standard, a threshold on which the Board specifically requested comment. Coalition Ass'ns at 22–24; FRCA/NCTA at 2. Others request 80%. NSSGA at 6–7; PRFBA at 6–7. One recommends a standard “closer to 100%.” Opening Comments of National Grain and Feed Association at 12, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“NGFA”). Some commenters additionally ask the Board to adopt minimum standards that escalate over time. *E.g.*, ACD at 3 (recommending increase from 70% to 75% and then to 85% over two-year period); Diversified CPC at 8 (standard should start at 80% and grow to 90%); GPI at 3 (urging adoption of permanent 75% standard after application of 60% standard in the first year); AFPM at 9 (proposing standard that escalates to 80% over four years); API at 3 (second-year threshold should be 80–85%).

The source of these proposals is generally an expression of particular shippers' service desires. But as the Board itself has emphasized, “[i]ndividual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service.” *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 978. What matters is that the data before the Board do not support any of those proposals. Some comments cite no empirical evidence at all for their desired thresholds.

See NGFA at 11–12; FRCA/NCTA at 2; PRFBA at 6–7; NSSGA at 6–7; GPI at 3; AFPM at 9. Relying on data from EP 770 (Sub-No. 1), the Coalition Associations argue that the Board should look to carriers’ average trip-plan compliance measured over periods spanning one year or more or the carriers’ own performance targets. See Coalition Ass’ns at 22–24; *id.*, Verified Statement of Thomas D. Crowley and Daniel L. Fapp at 23–24 (filed Nov. 7, 2023) (“Crowley & Fapp V.S.”). But the purpose of the OETA threshold is not to establish a general performance standard for on-time arrivals or to mirror the level of service that carriers anticipate they will on average deliver to their customers. Cf. NPRM at 10–11 (“If the Board enacts part 1145, the Board does not intend the performance standards therein to serve as a standard for performance by rail carriers (whether as a baseline or as a cap) that would provide the basis for relief under [other statutory and regulatory provisions].”). Rather, the purpose of the OETA performance metric is to identify a threshold of distinctly poor service that may warrant the Board’s regulatory attention.

The shipper-proposed thresholds (of 70%–85% or higher) are plainly unsuitable when considered next to the systemwide averages and OETA targets reported in EP 770 (Sub-No. 1). The Board itself pointed to reporting with average performance targets (for the largest Class I carriers) of 61%–80% in six months, and 65%–82% in a year. NPRM at 15. The Coalition Associations report historical performance averages from EP 770 (Sub-No. 1) data of 63%–92%. Crowley & Fapp V.S. at 23 (tbl. 1). Choosing a threshold in the 70%–85% range would thus trigger the OETA metric for traffic that is around—or even *above*—the *average* performance for many railroads. Such a threshold is all but guaranteed to flag for the Board’s attention a large share of traffic that is well within (or even markedly above) the typical performance range across the network. It is doubtful that such typical service can ever be *inadequate* service. But even if

it were, there would be no reason to expect that the *alternative* service would be different—making a forced switching order an ineffective remedy. In short, the thresholds proposed by shippers would do nothing but bring a large volume of poor candidates for switching relief before the Board.<sup>13</sup>

ii. Some commenters ask the Board to elaborate the OETA standard to a complicated series of tiers that increase the required performance threshold based on the length of the shipment’s delay.<sup>14</sup> Certainly, longer delays are more likely to affect shippers than shorter ones, and longer delays reflect worse performance than shorter delays. But introducing a complex new “time band” system is not the answer. *See* Coalition Ass’ns, Ex. 2 at 3–4. Rather, for traffic failing the Board’s proposed 60% threshold, the length of delay is one of the case-specific factors that the Board can appropriately consider in evaluating the carrier’s service and in determining whether a switching remedy is warranted. The more serious the degree of delay, the more likely

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<sup>13</sup> In urging the Board to adopt a higher standard, some shippers express concern that the numeric thresholds in the Proposed Rule are based on systemwide averages during a time when rail carriers were facing unprecedented service challenges. *E.g.*, AFPM at 7–8; ACD at 3–4; GISCC at 5. Carriers have been candid about the service challenges many have faced. AAR 711-2 Opening Comments at 43. And they share the Board’s goal of improving service beyond those levels and have committed substantial resources to achieving that objective. *See id.* at 43–44. But, again, a Board-ordered switching prescription is not about systemwide average performance; it is about remedying a service inadequacy on a particular lane by involving an alternate line-haul carrier. *Id.* at 15, 59–62. The numeric threshold the Board selects must be calibrated to identifying cases that may meet *that* standard.

<sup>14</sup> Coalition Ass’ns at 24–27; *id.*, Ex. 2 at 3–4 (proposing standard of 70% for deliveries within 24 hours of OETA, 80% for deliveries within 48 hours, and 90% within 72 hours); *see also* Opening Comments of Lyondell Chemical Company, Equistar Chemicals, LP, LyondellBasell Acetyls, LLC, and LyondellBasell Advanced Polymers Inc. at 2, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“LyondellBasell”) (agreeing with Coalition Associations’ escalating percentages for OETA); ACD at 4 (asking Board to consider adopting thresholds that increase according to the length of delay following the OETA).

it will be that a shipper can present a compelling need for a Board-ordered remedy.<sup>15</sup> A contrary approach of examining a complex multi-tiered metric would unnecessarily complicate switching proceedings and could prove to be at odds with the straightforward communication that the Board seeks to promote. With little or no evidence supporting some of the most basic shipper proposals on this metric, the Board lacks a basis for adopting something even more complex.

iii. The Coalition Associations also ask the Board to modify the OETA standard by introducing a new measure that would compare the incumbent carrier's performance in the specific lane not only against a fixed threshold but also against a systemwide average. Coalition Ass'ns at 27–29; *see id.*, Ex. 2 at 3–4. That proposal is untenable and illogical, and the Board must reject it. Comparing lane performance to a systemwide average will not assist the Board in determining whether performance on a given lane is adequate or warrants a switching remedy.

To begin, the Coalition Associations' proposal implicitly promotes a regulatory objective of ensuring that all lanes perform above average. That is mathematically impossible. Moreover, the use of system averages is disconnected from the performance of individual lanes, which is the level at which the Proposed Rule would operate. As discussed in the Verified Statement of Jonathan Orszag and Yair Eilat that accompanied AAR's opening comments, performance level averages mask variations across lanes. Orszag & Eilat 711-2 V.S. ¶ 44. A systemwide average does not reveal, for example, if “most lanes are just better than the average and a few are much worse than it,” or if, instead, “the average is influenced by a small number of very high-performing lanes while a large number are only slightly worse than the average.” *Id.* A rule

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<sup>15</sup> Where the carrier's service meets the prescribed regulatory threshold, but a percentage of traffic under that threshold experiences more extended delays—for example, 20% of the shipments arriving beyond a 72-hour grace period—the Proposed Rule would not be triggered, but the procedures in Part 1147 would remain available.

setting the performance metric at the average, as the Coalition Associations propose, would invite switching petitions in a large number of cases—including in many likely to be false positives, where the service is unquestionably adequate but falls below the mathematical average for a relatively short period of time. Furthermore, there is no reason to expect that switching would actually remedy the purported inadequacy of below-average OETA performance: Because the proposal relies on network-wide averages of all carriers, a significant fraction of incumbent-carrier-operated lanes will have below-average performance, *and so too will a significant fraction of alternate-carrier-operated lanes*. In short, an average-based approach would guide the Board away from, not toward, providing remedies for shippers with an “actual necessity or compelling reason” for switching.

iv. Numerous commenters ask the Board to significantly shorten its proposed 12-week period for measuring a carrier’s service reliability. Some request a measure of six weeks. *E.g.*, AFPM at 9; NSSGA at 6–7; PRFBA at 6–7. Others propose time spans ranging from four to eight weeks. *E.g.*, GISCC at 5; GPI at 3.

The record before the Board does not support these proposals. To the contrary, it is clear that the shorter the period, the greater the potential for variation due to small samples and ordinary fluctuations in performance—and therefore, the greater the probability of false positives, where triggering a metric has no relationship to any possible service inadequacy. The Board’s goal should be to properly calibrate the Proposed Rule’s performance metrics to draw attention to those potential service inadequacies for which the remedy of a forced switch could potentially be appropriate and effective. AAR 711-2 Opening Comments at 16. In that regard, longer-lasting, persistent service issues demand the Board’s intervention more than transient, milder dips in performance do. *Id.* Service shortcomings that are the result of temporary

circumstances—such as weather or beneficial construction or maintenance projects—can cause a carrier’s service to decline for a short period of time. For lower-volume lanes, even a single delayed shipment could trigger the OETA metric. In none of those circumstances would a switching remedy be necessary or appropriate.

The Orszag and Eilat verified statement approaches those concerns from the perspective of sound economic regulatory policy. They explain that a metric that has the potential to trigger regulatory intervention based on temporary events creates a risk of unneeded intervention “because the market could self-correct.” Orszag & Eilat 711-2 V.S. ¶ 34. Indeed, in those cases, regulatory intervention is likely to be affirmatively harmful because it will lead to the inefficient allocation of resources. *See id.* ¶¶ 34–36. In contrast, longer observation periods reduce the risk of erroneous interventions. *Id.* ¶ 38. The Board should be sensitive to those concerns as it considers the parameters of the OETA standard.

v. Finally, at least two commenters ask the Board to change the OETA standard to count as a failure not only shipments delivered *after* the original estimated time of arrival but also those delivered *before* the estimated arrival time. Olin at 5; Coalition Ass’ns at 29–31. The issue of early deliveries was not part of the Board’s proposal, and the Board should decline to adopt this suggested change. Whatever operational inconvenience might be occasioned by an early delivery, AAR is unaware of any precedent for the idea that arriving ahead of time constitutes *inadequate service* that compels the use of an alternate carrier. If early deliveries are a concern, then shippers and railroads should be able to work together to manage flows into a customer facility—as they already do, using constructive placement. But altering the Proposed Rule to address early arrivals would inject serious complexity without any data to support such a metric. And doing so could very well promote the perverse consequence of encouraging carriers

to *slow* their traffic. At most, in a case that is otherwise suitable for examination under the Proposed Rule, a shipper might offer evidence about early arrivals as part of the surrounding facts and circumstances that the Board could consider.

**(c) The OETA metric should not be applied to unit trains**

Beyond seeking changes to how the proposed OETA metric operates with respect to manifest traffic, some commenters ask the Board to depart from its proposal by extending the service reliability standard to unit trains. *E.g.*, NGFA at 12; AFPM at 9 n.15; API at 3–4; NSSGA at 7. One commenter even asks the Board to apply the OETA standard to unit trains and to set the performance standard at 90% success. Coalition Ass’ns at 31. None of these proposals comes with a sound data-driven analysis or an examination of the many ways in which unit train service differs from manifest service.

As the Board recognizes, unit trains raise distinct concerns. NPRM at 16 & n.24. Importantly, the Board is correct that trip plans for unit trains are not constructed in the same way as trip plans for carload traffic. *See, e.g.*, Opening Comments of CSX Transportation, Inc., Verified Statement of Casey Albright at 5, EP 711 (Sub-No. 2), (filed Nov. 7, 2023) (“Albright V.S.”) (CSXT unit trains “do not have trip plans”); Opening Comments of Canadian National Railway Company at 44, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“CN”) (similar). Some carriers do not even provide an OETA for unit trains, relying instead on other methods to track the performance of unit train traffic. *See* Revised Service Recovery Plan for Norfolk Southern Railway Company at 26, EP 770 (Sub-No. 1) (filed June 23, 2022) (“EP 770-1 NS”) (unit train service evaluated in terms of cycle time and order fulfillment, not by OETA); CN at 44-45 (calculation and definitions used for tracking performance of estimated running time for unit trains different from OETA for carloads); Albright V.S. at 5 (unit trains do not have trip-plan performance metric).

The different measures used to track performance for unit trains reflect the fact that “the nature of the bulk network does not lend itself to standardized measurements.” Albright V.S. at 5. That is because a variety of circumstances specific to unit trains affect the approach to serving that traffic, including, for example, the geographic variability of grain harvests, fluctuations in market prices for commodities, and unit train customers’ decisions to redirect unit trains that are already en route. *Id.*

The different measures to track unit train performance also reflect that, as the Board observes, “the arrival day or time of a unit train may not be the most critical performance measure” for a customer. NPRM at 16 n.24. Because of the dynamic nature of unit trains, customers generally do not gauge a carrier’s performance for that traffic by adherence to an OETA. *See* EP 770-1 NS at 26; *see also id.* (noting NS customers instead request notification when a unit train reaches certain points along the route). For all these reasons, extending the OETA standard to unit train traffic would be impracticable and would not assist the Board in identifying service inadequacies in unit train performance.

### **3. Service consistency metric (Transit Time)**

A number of commenters address the thresholds set forth in the proposed service consistency standard. Some shippers endorse the Board’s proposed 20% measure for year-over-year transit time increases. *E.g.*, PRFBA at 8; EMA at 7–8. Others ask the Board to lower the measure, with some recommending 15% as the applicable standard. ACD at 4; FRCA/NCTA at 2; AFPM at 10–11; Coalition Ass’ns at 32–33. One argues that the threshold should be 10% to 15%. Olin at 5–6. Another says it should be virtually zero. NGFA at 12–13. Some commenters also ask the Board to measure the transit time metric over periods shorter than the twelve weeks currently proposed, with a number urging a six-week duration. PRFBA at 6–7 (proposing six weeks); AFPM at 9 (same); NSSGA at 6–7 (same); EMA at 6 (same); GISCC at 5 (suggesting

four to six weeks); GPI at 3 (eight weeks). All these proposals arrive without substantial data and without a convincing explanation for why they would actually improve the Proposed Rule's ability to efficiently identify places where forced switching could remedy a service inadequacy.

As discussed above, AAR has completed an analysis of the historical likelihood that a given carload travelled on a lane that triggered the transit time metric during the relevant period. Conceptually, that analysis does not measure the ultimate impact of the Proposed Rule in terms of actual switching orders, but it provides the Board a useful sense of how readily the transit time metric would be triggered both under the parameters in the Proposed Rule and under other parameters proposed by certain stakeholders (including shipper groups and AAR member railroads). *See supra*, Part III.

As noted above, under the Proposed Rule's rolling, 12-week average comparison interval at the 20% threshold, Baranowski and Zebrowski found a high likelihood—65.5%—that a given carload is on a lane that has traffic in consecutive years and triggered the transit time metric during the previous 12 months. Baranowski & Zebrowski Reply V.S. at 8 (tbl. 2). That likelihood increased to 84.3% under a rolling, six-week comparison interval at a 15% threshold, as proposed by shippers. *Id.* And even under the quarterly comparison interval proposed by some carriers, there was still a 37.3% likelihood that a given carload is on a lane that triggered the transit time metric during the previous 12 months even at the 25% threshold. *Id.* The complete matrix is reproduced below:

**Baranowski and Zebrowski Table 2:  
Likelihood that October 1, 2022 to September 30, 2023 Carloads  
Traveled on a Lane Triggering Transit Time Increase Metric  
Compared to the Prior Year Average Under Different Parameters**

|                            | Rolling 6-Week<br>Comparison Interval | Rolling 12-Week<br>Comparison Interval | Quarterly<br>Comparison<br>Interval |
|----------------------------|---------------------------------------|----------------------------------------|-------------------------------------|
| 15% Transit Time Threshold | 84.3%                                 | 75.5%                                  | 53.8%                               |
| 20% Transit Time Threshold | 80.0%                                 | 65.5%                                  | 44.5%                               |
| 25% Transit Time Threshold | 73.2%                                 | 59.2%                                  | 37.3%                               |

This analysis quantitatively confirms what AAR suggested as a qualitative matter in its opening comments: There is substantial natural variation in transit times, such that nearly any lane, observed enough times, may trigger a transit time metric. How the parameters of a transit time metric are set will affect the nature and quality of cases brought based on that metric. And to align with the ultimate statutory standard, there are especially strong reasons to balance a transit time metric with consideration of other relevant facts and circumstances of a particular case.<sup>16</sup>

#### 4. Industry Spot/Pull metric

AAR has previously explained that the ISP metric is out of place in the Proposed Rule. AAR 711-2 Opening Comments at 57–59. That metric measures the adequacy of *local* service, while the remedy under the Proposed Rule is alternative *line-haul* service. *Id.* at 57. The Board

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<sup>16</sup> One commenter asks the Board to consider petitions even where the 20% or 25% threshold is *not* met—where, for example, the carrier’s service falls far below average system velocity for the carrier or the carrier’s average velocity for a particular commodity. WCTL at 8. For reasons similar to those discussed above in connection with proposals to use averages as a benchmark for the OETA standard, comparing a particular shipper’s transit times against the carrier’s average is not a logical approach to determining whether service on a specific lane is inadequate or warrants a switching remedy. *See supra*, Part IV.C.2(b)(iii).

recognizes this issue. NPRM at 19 n.27. Some commenters do as well. *E.g.*, ACD at 5; USDA at 8; AFPM at 12 n.17. The Board should remove the ISP metric from the Proposed Rule.

If the Board nonetheless retains the ISP standard as a trigger for a potential switching order, then it would need to consider a number of issues related to the metric's specific terms and operation, including its numeric performance standard. There are many proposals.<sup>17</sup> And yet, as discussed above with respect to the service reliability standard, the data before the Board do not support these changes. *See supra*, Part IV.C.2 (urging that purpose of service metrics is not to establish general performance standard but to identify threshold of distinctly poor service that may warrant the Board's regulatory attention).

At least one commenter addresses the time period for measuring a carrier's ISP service performance and asks that the Board change the period from twelve weeks to six weeks. AFPM at 12. That proposal raises the same concerns with false positives as discussed in connection with the period for measuring compliance with the service reliability standard. *See supra*, Part IV.C.2(b). When a local service shortcoming is caused by temporary circumstances—such as infrastructure improvements or a holiday period with higher employee absences—a switching remedy would be clearly inappropriate.

AAR's opening comments also explained that, if the Board retains the ISP metric, its method of denominating success and failure raises concerns. AAR 711-2 Opening Comments at

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<sup>17</sup> At least one shipper endorses the Board's proposed 80% threshold. ACD at 5. Others urge the Board to increase it. *E.g.*, FRCA/NCTA at 2 (requesting 85% success rate); AFPM at 12 (seeking 90% success rate); LyondellBasell at 2 (same). At least one recommends that the Board initially adopt the proposed 80% standard and, within two years of implementation, reevaluate the threshold and increase it to 85–90% in subsequent years. API at 5. Another asks the Board to modify the rule to set 80% as the threshold for car spots and pulls while adding a new requirement that all missed spots or pulls must occur in the service window immediately following the planned service window. Coalition Ass'ns at 36–37.

59. That is because the standard appears to deny a carrier credit for cars that are timely spotted or pulled if any single car in the block is delayed—with the result of overstating the effect of the service failure. *Id.* The Coalition Associations also recognize that the impacts to rail customers of a single missed car are different than those resulting from a total failure to spot or pull cars. Coalition Ass’ns at 35 (failure to spot or pull a single car generally “much less disruptive than [carrier’s] failure to show for spots or pulls during a rail customer’s planned service window”). Refining the ISP metric to measure by car rather than by shipment would be sensitive to those differences while avoiding the substantial new complexity that would result from the Coalition Associations’ elaborate proposal to create two distinct ISP success standards with different performance thresholds (one based on cars and the other based on “no shows”). *See* Coalition Ass’ns at 35–40; *id.*, Ex. 2 at 5–6 (proposed new regulatory provisions).

Other commenters discuss the Board’s proposal to increase the required success rate to 90% for one year if a carrier reduces the frequency of local service and the reduction is not based on a commensurate decline in customer demand. *See* NPRM at 41 (proposed 49 C.F.R. 1145.2(e)(2)). A few commenters propose an even greater increase in the required success rate.<sup>18</sup> And at least one suggests that the higher thresholds should remain in place for two years, rather than the one year proposed by the Board. Coalition Ass’ns at 41. Those proposals would magnify concerns with this aspect of the Proposed Rule. As AAR explained in its opening comments, increasing the ISP standard when local service levels are reduced could discourage beneficial flexibility and adaptation. AAR 711-2 Opening Comments at 59. It could also make

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<sup>18</sup> *See* AFPM at 12–13 (suggesting 95% threshold); ACD at 5 (same); Coalition Ass’ns at 40–41 (urging 100% standard for proposed new “no-show” measure).

railroads more cautious before experimenting with increased local service levels. *Id.* A higher and longer-lasting threshold would only exacerbate those problematic effects.

Several commenters address issues related to the Proposed Rule's definition of service windows and carrier changes to those windows, as well as a number of other issues. *See* NPRM at 21–22 (posing questions relating to those issues).<sup>19</sup> The sheer number of issues raised and the intricacy of those proposals serve only to underscore AAR's concern with the proposed ISP standard: Board intervention into local service is likely to require it to delve into the details of carrier operations and highly varied arrangements with shippers that do not lend themselves to uniform treatment by rules and metrics. *See* AAR 711-2 Opening Comments at 57–58. Such micromanagement of carriers' operations would be inconsistent with statutory policy and Board precedent, and it would pose a significant risk of pushing carriers to inefficiently allocate carrier resources that are needed to serve a vast array of diverse shipping needs on an interconnected network. *Id.*

## **5. Additional issues the shipper's petition should address**

AAR's opening comments explain that, in evaluating a switching petition, the Board should consider how a failure to meet the given metric affects the petitioning shipper. AAR

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<sup>19</sup> One commenter maintains that using a service window “that is consistent with the carrier's established protocol is more appropriate than adopting a standard 12-hour window.” Coalition Ass'ns at 42 (footnote omitted); *see also id.* at 42 n.21 (also agreeing with Board proposal to apply a 12-hour maximum). Another “proposes that a window of +/- 2 hours from service time dictated by crew job plan (ETA to plant) would be more appropriate.” AFPM at 13. Some endorse a requirement that the carrier provide notice before changing service window times. API at 6; *see also* Coalition Ass'ns at 43–44 (urging Board to require 60-days' notice). One argues that railroads “should not be allowed to unilaterally change [crew job plans] without (1) agreement from a customer; or (2) going through a formal mediation process.” AFPM at 13. One set of comments asks the Board to address spot-on-arrival cars. Coalition Ass'ns at 41–42. Another urges that carrier employees not be permitted to request that shippers release cars or unit trains for shipments at certain times in order to facilitate favorable metrics. API at 6.

711-2 Opening Comments at 7, 61–62. AAR also observed that this inquiry should be part of the shipper’s initial case, because the shipper will be in the best position to provide the Board with relevant information. *Id.* This inquiry is essential to applying the governing legal standard, ensuring that where relief is provided, it is because the shipper has an “actual necessity or compelling reason” for a forced switching order. *Id.* at 61.

Other comments in this proceeding confirm that AAR’s previous suggestions are sound. In discussing the Proposed Rule, many shippers have noted effects on their operations from what they believe is inadequate service. *E.g.*, PRFBA at 2; Coalition Ass’ns at 23; NSSGA at 2; API at 2. In such circumstances, where service issues are impacting the shipper’s own operations, the shipper should first bring the issue to the carrier’s attention to promote constructive communication that may lead to a swift solution. *See infra*, Part IV.F. Failing that, shippers may present information about the harms of inadequate service to the Board, which can assess those effects, evaluate them in the context of potential impacts on other interested parties, and determine whether a switching order is an appropriate remedy based on a concrete record. AAR 711-2 Opening Comments at 61.

Other comments confirm the importance of addressing, in any given switching proceeding, whether the proposed alternate service will actually alleviate the shipper’s demonstrated harm. As AAR previously explained, a prescribed switching arrangement that does not actually result in better service will not remedy the shipper’s harm and will not satisfy the statutory requirement that the shipper have an “actual necessity or compelling reason” for a switching order. *Id.* at 60. That inquiry into the alternative service is particularly important because, as a general matter, a prescribed switch injects delays, complexity, and inefficiency in a movement—as at least one shipper’s comments recognize. *See* NGFA at 11–12 (“even if

shippers/receivers were granted the ability to freely use reciprocal switching with no OETA performance standard hurdle, the incumbent carrier would still be highly likely to maintain the shipper's or receiver's traffic due to the inherent advantages of having the shipper/receiver on its track"). To avoid entering switching orders that can only slow rather than improve service, the Board will need to consider whether the proposed alternate service design will remedy an identified service inadequacy.

## **6.      Practicability**

Under Section 11102, the Board may prescribe a reciprocal switch only if it makes an affirmative finding that the arrangement is practicable. 49 U.S.C. § 11102(c)(1); *see* AAR 711-2 Opening Comments at 63. Because a forced switch can have operational effects that ripple throughout the interconnected rail network, the Board should retain flexibility to consider all relevant facts in deciding whether a proposed switch is practicable. AAR 711-2 Opening Comments at 64.

Many comments confirm the importance of a broad and flexible inquiry into the practicability of a proposed switch. The Commuter Rail Coalition notes, for example, that reciprocal switching moves can cause delays to passenger service in areas both near to and far from the switching move. Opening Comments of Commuter Rail Coalition at 3, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) ("Commuter Rail Coalition"). That coalition also expresses the very real concern that forced switching arrangements have the potential to affect existing shared-use or operational agreements between freight and passenger rail carriers. *Id.* at 4; *see also* Comments of Metrolink at 1–2, EP 711 (Sub-No. 2) (filed Oct. 20, 2023) ("Metrolink") (urging Board to consider as part of the petition process impacts on passenger railroads and on shared-use agreements between passenger and Class I railroads). The U.S. Department of Transportation and the Federal Railroad Administration likewise emphasize that it is "critical

that any reciprocal switching proposal would not hinder the ability of passenger rail service to run smoothly.” Opening Comments of United States Department of Transportation and the Federal Railroad Administration at 3, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“DOT/FRA”). All of those concerns bear on whether a switch is practicable, and they must be taken into account when the Board considers a switching petition.

Other comments reinforce the importance of the Board considering safety as part of its assessment of practicability. *See* AAR 711-2 Opening Comments at 64–65. Most prominently, DOT and FRA properly emphasize that “any new or revised switching requirements must ensure that switching operations are safely executed.” DOT/FRA at 3 (footnote omitted). The agencies do “not foresee safety concerns” because carriers must comply with applicable safety regulations. *See id.* at 3 n.3. AAR agrees that compliance with relevant safety regulations and practices will do much to mitigate safety concerns. But safety issues that are unforeseen in this general rulemaking may become quite evident in a specific proceeding, and the Board should address them as they arise. It is therefore critical for the Board to have before it a proposed alternative service design that will inform the Board’s assessment of whether the specific service proposed raises unacceptable safety risks. AAR therefore suggests that, in 49 C.F.R. 1145.6(b), the Board make clear, just as the Board itself proposed in EP 711 (Sub-No. 1), that “the Board will not find a switching arrangement to be practicable and in the public interest if . . . [it] is unsafe.” *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* at 18, EP 711 (STB served July 25, 2012) (“EP 711 Notice”).

Finally, for the reasons AAR explained in its opening comments, the Board should decline to impose on incumbent railroads a “heavy burden” of establishing that a proposed arrangement does not qualify for a prescribed switch if the incumbent and alternate carriers have

an existing switching arrangement in a terminal area. NPRM at 43 (proposed 49 C.F.R. 1145.6(b)); *see* AAR 711-2 Opening Comments at 65–66. The Coalition Associations urge the Board to adopt an even “broader presumption for any terminal where the incumbent and alternate *interchange* traffic.” Coalition Ass’ns at 45 (emphasis added). That proposal is untenable because the existence of a traffic interchange that is not even associated with reciprocal switching plainly cannot establish that adding new or different switching at that interchange is feasible. *See* AAR 711-2 Opening Comments at 65–66.

## **7. Multiple-lane switching**

AAR’s opening comments explained that the Proposed Rule’s provisions relating to multiple-lane switching are not well-suited to achieving the Board’s goals of fostering regulatory certainty and assuring adequate service. AAR 711-2 Opening Comments at 66–69. Those provisions risk the Board entering switching orders that do not satisfy the “actual necessity or compelling reason” standard because they would allow a shipper to secure switching even on well-performing lanes if other lanes are under-performing. *Id.* at 67. And multiple-lane switching petitions are likely to be difficult for the Board to evaluate in practice. *Id.* at 67–69.

AAR’s concerns about multiple-lane switching apply as well to proposals to allow shippers (or even third parties) to seek switching for an entire industry or for groups of shippers in the same general area. *See* Diversified CPC at 3–4, 13; Virginia Port Authority at 5–7. Although such proposals do not provide specifics on the standards or procedures the commenters envision, they would appear to invite petitions that sweep in potentially large numbers of well-performing lanes. Such an approach would contradict the governing legal standard. *See* AAR 711-2 Opening Comments at 67. In addition, the balance of considerations in a case seeking a mass switching prescription is likely to decidedly tip away from forced switching. That is because the burdens and disadvantages of a potentially vast switching operation are likely to far

outweigh the benefit for that subset of individual shippers in the group that could demonstrate a compelling need with respect to particular lanes. *Id.* at 118–21 (discussing complexities of forced switches). Broad switching requests are also likely to be difficult for the Board to evaluate because the practicability of a given request will depend on the specifics of the alternative service design for each affected lane, and different lanes may well require different alternate carriers and very different alternative service designs. Moreover, industry-wide switching orders will not relieve administrative burdens on shippers in the way one commenter contends, *see* Diversified CPC at 3–4, because there is no assurance that any given shipper will use either the incumbent or alternate carrier. To the contrary, each shipper will retain the discretion to use, or not use, the alternative service.

## **8. Interline traffic**

AAR’s opening comments highlight the significant challenges with addressing interline traffic in the Proposed Rule. AAR 711-2 Opening Comments at 69–72. Interline movements present distinctive challenges and complexities absent from single-line service, including the need to determine the appropriate measuring points for when the originating carrier’s service ends and the destination carrier’s service begins. *Id.* at 69–70. As AAR explained, those points may be different for the two carriers in light of the detailed mechanics associated with interline movements, which include inspections and acknowledgement of receipt when a shipment is interchanged. *Id.* at 69–72, 108. Indeed, AAR has been unable even to apply the transit time metric to interline traffic because of a lack of traffic data defining the time at which the originating interlining carrier’s responsibility ends or the time at which the terminating interlining carrier’s responsibilities begin. *See* Baranowski & Zebrowski Reply V.S. at 5 n.8.

Some shipper comments recognize this issue as well, and their efforts to address it only underscore how much of a challenge it would be to finalize any rule governing interline traffic.

One shipper asks the Board to develop a requirement to measure and evaluate the gap in time between the originating carrier's delivery to the interchange and the start of the destination carrier's journey and then apply that requirement "into the overall performance evaluation." API at 4 (discussing OETA standard); *id.* at 5 (asking Board to also address issue for transit time standard). Another asks the Board to clarify how it will determine OETA for multi-segment shipments and, in so doing, actively intervene in operations by requiring destination carriers to accept cars within 24 hours of being offered at interchange. AFPM at 10. These proposals vividly illustrate AAR's concern that it is unreasonable to expect that the "time of interchange of a shipment" would establish a clear time when the originating carrier's clock would end and the destination carrier's clock would start. *See* AAR 711-2 Opening Comments at 69–70 (citing NPRM at 17 n.25). As AAR previously noted, the logical time for the destination carrier's clock to begin is when the carrier actually accepts the cars, which generally occurs after that carrier's inspection. *Id.* at 70; *see also* UP at 7–8 (explaining why the originating carrier's performance should be measured upon delivery of car at interchange rather than upon receiving carrier's acknowledgement of receipt of shipment). Further, interchange operations vary from location to location, operating on different cadences depending on considerations such as the volume of traffic interchanged and the frequency of service to and from the point of interchange. But the Board has not evaluated or developed a record on any of these timing issues or the relevant industry practices for interchange of traffic. Without the necessary factual record, any new regulatory requirement addressing carrier interchange times risks unintentionally disrupting efficient industry interchange practices.

It would only make matters worse, not better, to address concerns about gaps in timing at interchange by imposing a switching order for both legs of a trip if the service on only one of the

legs is deficient, as two commenters appear to suggest. *See* PRFBA at 7; NSSGA at 8. To be sure, what typically matters most to a shipper is whether the entire origin-to-destination service is adequate. AAR 711-2 Opening Comments at 70. But that concern cannot be properly addressed by ordering a switch on both legs of the journey if only one is even arguably demonstrating inadequate performance. In that circumstance, the poorly performing carrier's service reveals nothing about the other carrier's service; and no switch could be needed or appropriate with respect to the adequately performing part of the journey. The Proposed Rule properly recognizes that different railroads have different operational responsibilities for an interline shipment at different points in time.

In short, the complications for the Proposed Rule arising from the involvement of multiple carriers may or may not be insurmountable. But any attempt to examine those complications would need to happen after the Board gains experience with the Proposed Rule for more straightforward single-line moves and has before it a record to inform how that experience applies to interline movements. At the present time, the Board lacks both that experience and record, and it should not apply the Proposed Rule to interline traffic.

#### **D. Affirmative Defenses and the Railroad's Reply Case**

The Proposed Rule correctly provides that the Board will consider "on a case-by-case basis" affirmative defenses that are not specifically enumerated in the regulation. NPRM at 41 (proposed 49 C.F.R. 1145.3). As the Board has previously recognized, transportation needs and service difficulties can vary significantly. *See* AAR 711-2 Opening Comments at 71–75. Fair process demands the ability to present context-specific facts and circumstances that will be essential for the Board to evaluate whether a proposed switch is an appropriate remedy for a service inadequacy. *Id.*

One shipper’s comments urge the Board to delineate a limited number of clear affirmative defenses, which the commenter asserts will help avoid ambiguity in switching proceedings. AFPM at 15. That proposal fails to strike a reasoned balance among the goals of regulatory clarity, fair proceedings, and the need for the Board to have all relevant information before it when evaluating a particular switching request. As proposed, the rule would set forth the contours of some recurring situations—such as extraordinary circumstances and surges in demand—but also provide for case-by-case consideration of unenumerated defenses. *See* NPRM at 25 (“Affirmative defenses that do not fit within the categories [enumerated] would be evaluated by the Board on a case-by-case basis.”). AAR has proposed some additional affirmative defenses to address what may be recurring fact patterns, but the Board should (through the case-by-case affirmative defense and otherwise) be willing to hear relevant facts and circumstances, because no rule can predict in advance all the varied circumstances that bear on whether a switching remedy is warranted in an individual case. *See* AAR 711-2 Opening Comments at 73 (highlighting some of those circumstances). Confining the Proposed Rule to only specifically enumerated defenses would exclude from the Board’s consideration a host of potentially relevant and important facts that bear on the incumbent carrier’s performance, thus hindering the Board’s ability to determine whether a switching remedy is appropriate in a given case.

For similar reasons, the Board should not categorically exclude crew or power shortages from consideration, as a few commenters request.<sup>20</sup> AAR understands the concern that carriers

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<sup>20</sup> *See* PRFBA at 10 n.5; EMA at 9 n.5; NSSGA at 9–10 n.4; *see also* Opening Comments of Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, International Association of Machinists and Aerospace Workers District

maintain an adequate workforce and sufficient power supply to provide quality service. But a range of circumstances affect carrier decisions on workforce and power supplies, and those circumstances should be considered as part of the context for understanding if a switch is warranted. For example, consider an extended economic downturn that results in removing locomotives from active service, followed by an unexpectedly rapid improvement in economic conditions and a systemwide spike in shipper demand. Railroads would react by restoring locomotives to service as quickly as possible, but that process would certainly take more than the matter of weeks on which service metrics may be applied, causing some lanes to initially trigger those metrics. Yet those conditions would likely exist for the incumbent carrier and the alternate carrier alike, and they would be likely to improve within a matter of months—making a multi-year switching prescription ineffective and unnecessary. Similar circumstances could arise as a result of a regional shift in demand that required railroads to move crew resources from one part of their network to another, triggering metrics for a period of time but soon giving way to more normal operations.

Finally, with respect to the Board’s specific affirmative defenses, one commenter asserts that the surprise surge and highly unusual shipments defenses are redundant and suggests that the two could be combined. AFPM at 15. The Board has correctly recognized that the two defenses capture different situations. The surprise surge defense addresses unexpected jumps in demand, while the highly unusual shipment defense concerns atypical patterns “even in the absence of a surprise surge.” NPRM at 26.

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#19, International Brotherhood of Boilermakers, National Conference of Firemen and Oilers 32BJ/SEIU, and Transport Workers Union of America at 3–4, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Labor Unions”) (insufficient workforce or power should not qualify as an affirmative defense); Opening Comments of the Brotherhood of Locomotive Engineers and Trainmen at 3, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“BLET”) (similar).

## **E. The Board's Findings**

AAR's opening comments explained that the statute granting authority to the Board requires the Board to make certain findings before it prescribes switching under the Proposed Rule. As relevant to the framework described in the Proposed Rule, the statute requires that the Board "find[] such agreement[]" to be "practicable and in the public interest." 49 U.S.C. § 11102(c)(1). In that context, a reciprocal switching agreement in the public interest means that there is an "actual necessity or compelling reason" for the agreement, and whether such a need exists considers (among other things) the interests of other members of the public—in this case, other shippers, other freight railroads, and passenger railroads, to name a few. *See* AAR 711-2 Opening Comments at 15–18. And here, where the Board seeks to exercise its remedial statutory authority to address inadequate service, the Board must also find that its exercise of authority will remedy that problem. *See id.* at 19–23. The information relevant to those determinations may come from diverse sources—the shipper, the incumbent carrier, the alternate carrier, the Board's own knowledge, others who rely on the rail network, and so on. But ultimately, it is the responsibility of the Board to make the findings required by the statute.

Accordingly, it is AAR's view that before the Board may prescribe reciprocal switching under the Proposed Rule, the Board must find that (a) a railroad consistently does not provide adequate service under the current circumstances and cannot cure its failure; (b) a safe and practicable alternative service exists that will remedy the current service inadequacy; and (c) the shipper has a compelling reason for that alternative service, judged in the context of the interests of and effects on other stakeholders, including other shippers, freight railroads, and passenger railroads.

**F. Pre-Petition and Petition Procedures and Timeline, Including Ability for the Incumbent Railroad to Cure**

A number of commenters ask the Board to modify its procedures for considering switching petitions. *See, e.g.*, ASLRRA at 7; USDA at 7. AAR shares other commenters' goal of making switching proceedings as efficient and well-informed as possible, but it believes that communication between railroads and shippers is a key component of any framework in this area. The best approach to remedying service inadequacies while conserving Board resources is to avoid the need for formal adjudicative proceedings in the first place. As AAR explained in its opening comments, that goal would be furthered by a regulatory timeline that encourages and facilitates discussion between the shipper and incumbent and encourages the incumbent to cure a service deficiency on its own, before any switching petition is filed. AAR 711-2 Opening Comments at 85–88. By giving the incumbent carrier the notice, incentive, and opportunity to cure service issues raised by the shipper, the Proposed Rule would further the Board's goal of remedying service inadequacies while limiting the need to draw on the Board's limited adjudicative resources. In cases where carrier-shipper discussions do not resolve the matter, that pre-petition-filing dialogue will help focus the proceedings and facilitate the Board's efficient resolution of a request for Board-prescribed switching. *Id.*

1. In cases where a shipper needs to pursue a switching petition, AAR does not object to some of the modifications proposed by other commenters that would facilitate efficient and fully informed decision making, although AAR opposes changes that could truncate the development of the necessary record. USDA proposes that the Board consider ranking petitions based on the severity of the allegations of service inadequacy, including in cases where a shipper demonstrates that a carrier has failed two service metrics. USDA at 7. While the Board will ultimately decide how to allocate its adjudicative resources, AAR notes that ranking would be

counterproductive if it resulted in rushed proceedings or incomplete records in cases that might be relatively better candidates for the Board's intervention.

AAR also agrees that the Board should require switching petitions to be served on short-line and passenger railroads that may be affected by a proposed switching prescription. *See* ASLRRRA at 7 (requesting that petitions be served on a short-line railroad scheduled to receive a shipment subject to a reciprocal switching prescription earlier in its journey); Metrolink at 1 (asking that commuter and intercity passenger railroads that may be affected by a switching proposal receive formal notice of switching proceeding); Commuter Rail Coalition at 6–7 (requesting that petition be served on passenger railroads that operate on shared track). AAR agrees that third parties like short-line railroads and passenger railroads—which also operate on the Nation's interconnected rail network—have interests in a proposed switch. That is because, as AAR has explained, new switching prescriptions can have effects that ripple throughout the network. AAR 711-2 Opening Comments at 64, 118–21. Short-line and passenger railroads may have specific information about such effects that would be especially useful to the Board in evaluating the practicability of a proposed switching arrangement and answering the ultimate question whether the shipper has an “actual necessity or compelling reason” for a switching order.

To facilitate short-line and passenger railroads' ability to provide relevant information while at the same time avoiding unnecessary complications in a switching proceeding, the shipper should serve notice of its petition on those carriers at the same time that it serves the incumbent carrier, alternate carrier, and the FRA as provided under the Proposed Rule. *See* NPRM at 42 (proposed 49 C.F.R. 1145.5(c)). In addition, short-line and passenger railroads

could be permitted to submit comment on the petition with supporting written evidence, if needed, but would not be made full parties to the adjudication unless they so requested.<sup>21</sup>

With respect to the timeline for considering switching petitions, the Board should reject suggestions to expedite proceedings if doing so would shorten the already-limited time that carriers have to respond to a petition. *See* AFPM at 14; USDA at 7. The proposed 20-day period for a carrier's reply is already shorter than the timeframe provided in Part 1147 proceedings. If relief is truly required on a tighter timeframe, the more appropriate tool is to seek expedited relief for a service emergency under 49 C.F.R. Part 1146 (a process that the Board is continuing to evaluate in *Revision to Regulations for Expedited Relief for Service Emergencies*, EP 762). Condensing carriers' time to reply under the Proposed Rule would impair their ability to provide the Board with the information needed to decide a switching petition. That concern would be even more acute if the Proposed Rule does not otherwise provide for a meaningful opportunity for the shipper and incumbent to engage in substantial discussions *before* the shipper's petition is filed. Again, communication between railroads and shippers is key: Without such pre-petition discussions, the shipper's petition could be the first time that a carrier has been notified of the

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<sup>21</sup> AAR's opening comments also discussed the role of shippers and receivers as parties in a switching proceeding. AAR 711-2 Opening Comments at 90–91. The Proposed Rule provides that both shippers and receivers may bring switching petitions. *See* NPRM at 37 (proposed 49 C.F.R. 1145.1) (defining “[p]etitioner” as “a shipper or a receiver that files a petition hereunder for prescription of a reciprocal switching agreement”). One commenter proposes to expand the entities that may petition for a switching prescription. Virginia Port Authority at 5–8. The limitation in the Proposed Rule is appropriate because shippers and receivers are the entities with the essential economic and operational relationships with the carrier. *See* AAR 711-2 Opening Comments at 90–91 (discussing those relationships). Inviting other entities to petition would raise numerous questions about how the entities with those economic and operational relationships would properly be heard. Doing so would also pose complicated issues relating to data confidentiality. *See* 49 U.S.C. § 11904; AAR 711-2 Opening Comments at 91.

shipper's concerns, and the carrier will need adequate time to analyze and respond to the shipper's claim and requested remedy. AAR 711-2 Opening Comments at 89.

Indeed, to avoid such unnecessary "surprise" petitions, the Board should adopt Norfolk Southern's proposal that a petitioning shipper "must have communicated with the [incumbent] carrier to address the alleged service inadequacy during the period upon which its petition is based." NS at 11. That approach would ensure that shippers share their concerns promptly, which would improve communication between shipper and carrier, maximize the opportunity for the incumbent carrier to address the shipper's concerns directly, and minimize the need for regulatory intervention. Similarly, in line with BNSF Railway's suggestion, the Board should expressly encourage shippers and railroads to call on the Board's Office of Public Assistance, Government Affairs, and Compliance for assistance. *See* Opening Comments of BNSF Railway Company at 4, EP 711 (Sub-No. 2) (filed Nov. 7, 2023). Whether that occurs during the period of supposed service inadequacy or in the period immediately after the railroad has failed to meet a metric, doing so should enhance communication between shippers and carriers and reduce the need for litigation.

2. The Proposed Rule properly makes the alternate carrier a party to the proceeding, NPRM at 42 (proposed 49 C.F.R. 1145.5(c)), and the alternate's participation is important for ensuring that the Board has full information about the practicability of a proposed switching arrangement. AAR 711-2 Opening Comments at 89–90. At least one comment expresses concern that alternate carriers will press undue objections to the practicability of a proposed switch, and it asks the Board to clarify how it will address situations in which the alternate carrier's concerns of infeasibility are not well founded. *See* NGFA at 6–7.

Those concerns are misplaced because alternate carriers have every interest in serving a new customer when they can do so safely and feasibly. In addition, AAR's proposed pre-filing discussion period would provide shippers with an effective tool for raising and addressing feasibility questions and concerns. *See* AAR 711-2 Opening Comments at 86–88. As detailed in its opening comments, AAR recommends that the Board build in time, before a petition is filed, for discussions between the shipper and the incumbent carrier as well as between the shipper and the alternate carrier. That discussion period not only would allow an opportunity for the incumbent to cure the shipper's service concern but also would facilitate discussions between the shipper and the alternate regarding the safety and practicability of the potential alternative service. *Id.* at 87–88. In cases where that pre-filing period does not yield a cure by the incumbent carrier, the product of the discussions between the shipper and the alternate carrier would help inform the Board and focus the parties on any remaining unresolved issues concerning the alternative service. Those discussions could also address specific technical issues, including those identified by one commenter related to car usage, *see* NGFA at 7, with the goal of resolving them before a petition is filed or, at a minimum, narrowing the questions that the Board proceeding will have to address.

#### **G. Terms of the Switching Agreement**

AAR previously provided comments on issues relating to the terms embodied in the switching agreement between the incumbent carrier and alternate carrier. *See* AAR 711-2 Opening Comments at 91–95. Other stakeholders have addressed a few of those issues, to which AAR responds below.

##### **1. Conditions and compensation**

**a.** By statute, “[t]he rail carriers entering into [a reciprocal switching] agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail

carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation.” 49 U.S.C. § 11102(c)(1). The Proposed Rule conforms with this principle by providing that, “[u]pon the Board’s prescription of a reciprocal switching agreement . . . , the affected rail carriers must: set the terms of the agreement.” NPRM at 43 (proposed 49 C.F.R. 1145.6(d)).

Some comments nonetheless urge that shippers should be able to challenge switch fees under the Proposed Rule, despite no mention of such proceedings in the statute. *See* Coalition Ass’ns at 59–60. There is no legal basis for that request. Under the statute’s plain terms, the Board has no role in establishing a switching fee where the carriers otherwise agree. Here, as elsewhere, the Board is prohibited from prescribing the divisions on joint routes at a shipper’s request. *Great Northern Railway v. Sullivan*, 294 U.S. 458, 462–63 (1935), establishes the bedrock principle that a shipper cannot challenge a division or other compensation between carriers. “The shipper’s only interest is that the joint rate [from origin to destination] be reasonable as a whole.” *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925) (a shipper has no right to challenge the reasonableness of a portion of a joint through rate).

**b.** Some commenters also express views on the method for setting compensation in the event the carriers involved do not agree. The most elaborate suggestion is described in the Crowley & Fapp Verified Statement appended to the Coalition Associations’ comments. *See* Coalition Ass’ns at 58–60; Crowley & Fapp V.S. Pt. III. Those comments urge a methodology loosely based on the agency’s SSW methodology. Generally speaking, this would have the Board set compensation for forced switching based on (1) the incremental fixed and variable costs of providing the forced switch, and (2) a rental component based on the system-wide

average return on investment per car-mile, calculated from the annual R1 reports. As the Crowley & Fapp Verified Statement acknowledges, that proposal actually departs from the SSW methodology more than it embraces it. That alone strongly suggests that the Board has no off-the-shelf methodology available to it. The best course would be for the Board to defer compensation questions to be decided case-by-case when they arise—if they arise at all.

Regardless, the Crowley & Fapp proposal is defective for at least three reasons. *First*, it reflects a fully allocated cost approach, which has been thoroughly rejected by the ICC, the Board, and renowned economists. *See* AAR 711-2 Opening Comments at 93–94. *Second*, the use of backwards-looking depreciated historic costs rather than forward-looking current costs is inconsistent with Board precedent,<sup>22</sup> sound economics,<sup>23</sup> and Congress’s own instructions to the

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<sup>22</sup> The Board “has consistently stated its preference for using the best valuation of a carrier’s assets in performing its regulatory functions.” *Western Coal Traffic League—Petition for Declaratory Order*, FD 35506, 2013 WL 3834052, at \*19 (STB served July 25, 2013). And the agency has explained that “carriers cannot attract and retain capital unless they are given the opportunity to be compensated for the real value of property, not just the book value.” *Conrail Acquisition Order*, 3 S.T.B. 196, 265 (1998).

<sup>23</sup> The weight of economic support for using the current value of rail assets is overwhelming. Numerous economists, Nobel laureates among them, have advised the agency that it should use replacement costs. *See* Opening Comments of CSX Transportation, Inc., *Railroad Revenue Adequacy*, EP 722 (filed Sept. 5, 2014); *id.*, Attachment 1, Verified Statement of William J. Baumol and Robert D. Willig, *Standards for Railroad Revenue Adequacy*, I.C.C. EP 393 (Sub-No. 1) (filed Aug. 4, 1986), Appendix A, Economists’ Statement in Support of the Staggers Act at 2 (dated Feb. 25, 1985). And in EP 722, Professors Kalt, Cornell, and Murphy testified that the economic theory on this issue remains as sound today as it was 30 years ago. *See* Opening Comments of AAR, Verified Statement of Joseph P. Kalt at 28–32, EP 722 (filed Sept. 5, 2014); Opening Comments of Union Pacific Railroad Company, Verified Statement of Kevin M. Murphy at 7–25, EP 722 (filed Sept. 5, 2014); Opening Comments of Norfolk Southern Railway Company, Verified Statement of Bradford Cornell at 13–19, EP 722, (filed Sept. 5, 2014). The report prepared by InterVISTAS Consulting Inc. for the Board is to the same effect. *See An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification* 122 (Sept. 14, 2016).

Board.<sup>24</sup> *Third*, the proposal comes with no attempt to square the methodology with revenue adequacy concerns that can arise whenever the Board intervenes in ways that may affect railroads' ability to engage in demand-based differential pricing. *See* AAR 711-2 Opening Comments at 92–93. For all those reasons, the Board should not embrace it and should instead defer the compensation question to a case-by-case decision.

## **2. Minimum performance**

At least two commenters urge the Board to adopt, as part of the Proposed Rule, a minimum level of switching service. Coalition Ass'ns at 58; Portland Cement at 7–8; *see* NPRM at 12 n.15 (requesting comment on the question). The Coalition Associations further ask that, when a switch is prescribed, the Board should “prohibit the incumbent carrier from reducing its switching service (i.e., first-mile, last-mile service) below levels that existed prior to the prescription unless a material reduction in the shipper’s traffic volume has a material adverse impact upon the incumbent’s operations,” with the incumbent “bear[ing] a heavy burden of proof to demonstrate materiality.” Coalition Ass'ns at 58. In cases where the carrier reduces service without shipper consent or Board permission, the Coalition argues, “the Board should make the

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<sup>24</sup> Section 16 of the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2234, amended 49 U.S.C. § 10704(a)(2) to add the italicized language:

The Board shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under this part that are adequate, under honest, economical, and efficient management, *for the infrastructure and investment needed to meet the present and future demand for rail services and* to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business.

That new language can only be given effect, and its ordinary and natural meaning, if it is interpreted to require the Board to use a forward-looking, current cost approach.

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.” *Id.*

This requested change to the Proposed Rule is both unnecessary and inconsistent with the governing legal standard. It is unnecessary because the prescribed service will already be subject to the common carrier obligation under 49 U.S.C. § 11101, and the usual remedies for discrimination in the provision of common carrier service or failing to provide adequate service upon reasonable request (including damages, when appropriate) will be available. AAR 711-2 Opening Comments at 94. The Coalition Associations offer no precedent for the Board preemptively establishing a service level in the way they suggest. The proposed approach is also inconsistent with the statute. A permanent switching order based on any reduction in switching service (with limited exceptions) would authorize perpetual switching prescriptions without a showing of an “actual necessity or compelling reason” for such a drastic intervention and would almost certainly go far beyond what is necessary to remedy the identified inadequacy. *See id.* at 100. If the incumbent carrier provides inadequate local switching service, the Board has sufficient tools to address harms to shippers without prejudging the need for such a far-reaching remedy as part of the Proposed Rule.

### **3. Labor protections**

Comments submitted by rail worker unions express a variety of concerns related to the Proposed Rule. *E.g.*, BLET at 1–3; Opening Comments of Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers at 2, EP 711 (Sub-No. 2) (filed Nov. 7, 2023). As AAR previously noted, Section 11102 provides that the Board may require reciprocal switching agreements to contain provisions for the protection of affected employees. 49 U.S.C. § 11102(c)(2); *see generally* AAR 711-2 Opening Comments at 94. If the Board does not address issues related to employee interests in the Proposed Rule, it

should clarify that it will address them on a case-by-case basis, including by considering both the costs involved and the means by which any needed protections will be implemented. AAR 711-2 Opening Comments at 95.

## **H. Duration, Renewal, and Termination of the Switching Prescription**

### **1. Duration of the initial switching prescription**

AAR explained in its opening comments that, instead of establishing a mandatory two-year minimum term, the Board should determine the initial duration of a switching prescription on a case-by-case basis and set a term that is needed to remedy the service inadequacy. AAR 711-2 Opening Comments at 96–97. That approach would help align proceedings under the Proposed Rule with the governing “actual necessity or compelling reason” standard by ensuring that the switching remedy is properly tailored to the identified service inadequacy. *Id.* In any given case, that term is likely to be shorter than two years, and only in highly unusual cases would it reach the four-year maximum that the Board proposed. *Id.* at 97.

A number of commenters urge the Board to adopt a term longer—much longer—than the two-year minimum and four-year maximum in the Proposed Rule.<sup>25</sup> Orders with default durations of such great length would lead, in many cases, to a switching prescription that continues far beyond the identified service inadequacy. *See* AAR 711-2 Opening Comments at 96–97. As the USDA observes in its comments, “[s]ervice issues tend to be temporary.” USDA at 7. A switching order that endures far beyond a temporary problem would cease to be

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<sup>25</sup> *See* Coalition Ass’ns at 47 (requesting five-year minimum and ten-year maximum); Diversified CPC at 11 (seeking term of five to ten years); PRFBA at 4 (suggesting minimum five-year term); *see also* AFPM at 16 (endorsing terms with a two-year minimum and no maximum).

remedial and would instead become an improper punitive sanction. *See* AAR 711-2 Opening Comments at 96–97.<sup>26</sup>

In proposing longer-term switching orders, the Coalition Associations suggest that a shorter prescription will be less feasible and attractive to both the alternate carrier and shipper. Coalition Ass'ns at 48–49; *see also* PRFBA at 4 (arguing longer term needed to incentivize alternate carrier). But as the Coalition itself recognizes, rail contracts are often of limited duration, demonstrating that carriers are willing to establish new service arrangements without extended service commitments. Coalition Ass'ns at 48 (many Coalition members' rail contracts have one- to three-year terms); *see also* AAR 711-2 Opening Comments at 97 (contracts often last one year). Moreover, the Coalition's concern that longer-term switching orders are necessary to justify the alternate carrier's investment of time and resources to serve the lanes that may be the subject of a switching order under the Proposed Rule, *see* Coalition Ass'ns at 48–49, is not likely to arise with frequency in cases where a switching prescription would be warranted. That is because alternative service designs that will be safe, practicable, and likely to resolve the service inadequacy will typically be those where the alternate carrier can integrate the shipper's lane into the alternate's existing traffic using existing assets. AAR 711-2 Opening Comments at 97–98. And in those unusual cases where a longer term may be needed, the Board can consider

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<sup>26</sup> The concerns raised in the text also arise with respect to one commenter's proposal to lengthen or make permanent a switching order in cases where the incumbent is perceived to be providing substandard switching service or using its dispatching authority to impair the alternate carrier's service. *See* Diversified CPC at 10, 12. A switching prescription under the Proposed Rule should be used as a remedy for an incumbent carrier's failure to provide adequate line-haul service. However else the Board might address such concerns, the Proposed Rule should not be a device for penalizing perceived shortcomings in dispatching or switching service.

those distinctive facts in determining both whether a prescribed switch is merited and, if so, its proper term. *Id.* at 98.<sup>27</sup>

## **2. Renewal of the switching prescription**

The Proposed Rule should not provide for presumptive automatic renewal of switching prescriptions. AAR 711-2 Opening Comments at 99–100. Automatically renewing a switching order, without a present finding of “actual necessity or compelling reason,” would be contrary to the governing legal standard. *Id.*

If the Board maintains any kind of automatic renewal provision, however, that renewal should extend only for either the period of the initial prescription or a single additional year, whichever is shorter. *Id.* at 101; *see* NPRM at 30 (seeking comment on whether renewal term should be for only one additional year). The Coalition Associations assert that there is “no rational basis for a switch renewal term that is less than the initial term.” Coalition Ass’ns at 57. To the contrary, if the Board maintains an automatic renewal provision, a shorter renewal term would allow the Board to determine at more regular intervals whether a compelling reason continues to justify its regulatory intervention. AAR 711-2 Opening Comments at 101.

The Board should also decline to modify the Proposed Rule to permit the imposition of a permanent switching order if the incumbent carrier experiences a service failure within a short time after a prescription has ended. *See* NPRM at 30. The Coalition Associations’ submission

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<sup>27</sup> The Coalition Associations also propose allowing shippers to postpone the effective date of a switching prescription for up to one year. Coalition Ass’ns, Ex. 2 at 8 (proposed regulatory text). They seek this change to allow shippers to petition for a reciprocal switch prior to the expiration of a contract. *Id.* at 19–20. For the reasons explained above, their proposals to regulate contract traffic are barred by Section 10709. *See supra*, Part II.A. To the extent their proposed language would allow shippers of *regulated* traffic to unilaterally delay the effective date of a switching prescription, the proposal is also without merit. If a shipper does not demonstrate a compelling need to remedy a *current* service inadequacy, there would be no basis to enter a switching order in the first place.

urges the Board to adopt such a provision based principally on the speculation that incumbent carriers will strategically allocate resources sufficient to win termination of a shipper's switching prescription only to later divert those resources elsewhere, leaving the shipper vulnerable to new service failures. Coalition Ass'ns at 57. That suggestion is at odds with the data analysis discussed above, which shows that (when measured by the transit time metric) no difference exists in the performance of single-served and multiple-served traffic. *See supra*, Part III. And in any event, the Board would retain discretion to impose a new switching order in response to any new inadequacy.

### **3. Termination of the switching prescription**

#### **(a) Procedures for considering termination petitions**

AAR explained in its opening comments that the appropriate framework for termination proceedings will depend on whether the rule as finalized provides for switching orders to terminate according to their terms, as AAR suggests, or instead provides for automatic renewal, as described in the NPRM. AAR 711-2 Opening Comments at 101. If switching orders terminate according to their terms unless renewed, the incumbent should be permitted to seek early termination at any time there are materially changed circumstances. *Id.*

If the Board adopts a framework under which switching prescriptions renew automatically, however, then the procedures for termination petitions become more consequential, *id.*, and a variety of commenters ask the Board to revise aspects of its proposed approach. *First*, the Coalition Associations argue that the window for filing a petition to terminate should be changed from the period between 120 and 180 days before the end of the switching prescription to the period between 150 and 210 days before the order's expiration. Coalition Ass'ns at 50. If the Board does not allow prescriptions to expire according to their own terms, then the timeframe the Board proposes for seeking termination is more reasonable

than the Coalition Associations’ proposal. Requiring termination petitions to be filed between six and four months before a prescription’s conclusion strikes a proper balance between the parties’ interests in timely resolution of a termination request and the Board’s need to have before it current information about the carrier’s service.

*Second*, the Coalition Associations propose that the Board allow a switching prescription to remain in effect for 30 days after the Board serves a decision terminating the prescription. Coalition Ass’ns at 50–51. As a general matter, AAR does not object to the Board allowing a 30-day period after a decision for the decision to become effective, in order to permit the orderly transition of traffic back to the incumbent. But the Coalition Associations’ specific proposal—which would remove the rule that a termination petition is deemed granted if the Board does not act on the termination request before the prescription expires—should be rejected. *See id.* at 51; *id.*, Ex. 2 at 10. That approach could permit switching orders to continue well past their original terms if there are any material delays in the Board’s decision-making process. And such presumptive continuation of a switching order would pose many of the same concerns as the Board’s proposal to automatically renew switching prescriptions. *See* AAR 711-2 Opening Comments at 99–100 (explaining why automatic renewal of a switching prescription, without a finding of present compelling need, is inconsistent with the applicable statutory standard). The Board was appropriately sensitive in the Proposed Rule to the benefit of clear timelines and prompt action on regulatory applications; it should resist the invitation to retreat from that good practice.

*Third*, the Coalition Associations ask the Board to require an incumbent carrier to provide the shipper “with all data for ‘similar traffic’ that are relevant to the standards that the incumbent must satisfy to terminate the prescription.” Coalition Ass’ns at 53. In the Coalition

Associations' view, that "should be the same type of data that the proposed § 1145.8(a) would require the incumbent carrier to provide a shipper." Coalition Ass'ns at 53. The data required under proposed § 1145.8(a) are "all relevant individualized performance records necessary to file a petition under § 1145.5 with the Board." NPRM at 44 (proposed 49 C.F.R. 1145.8(a)).

The Board should reject this proposal because it is unnecessary, burdensome, and raises significant confidentiality concerns. Under the Proposed Rule, a carrier moving to terminate a switching prescription must demonstrate that it has met the relevant performance standard for similar traffic, either "on average" or "consistently." *Id.* at 43 (proposed 49 C.F.R. 1145.7); *see* AAR 711-2 Opening Comments at 104 (asking Board to clarify that that standard looks at service "on average"). That standard looks at the carrier's overall performance with respect to similar traffic; it does not call for an analysis of the service provided to any individual shipper or any shipper's individualized performance records. Furthermore, requiring a railroad to provide one shipper's service data to another shipper would raise serious confidentiality concerns. That is especially true under the capacious rule proposed by the Coalition Associations, which would compel the incumbent carrier to provide the shipper, as part of a termination petition, "all data that are relevant" to the performance standards for terminating a prescription. *See* Coalition Ass'ns, Ex. 2 at 10 (proposed regulatory text). And while the Board may issue protective orders to address confidentiality concerns, producing and protecting the large volume of data apparently contemplated by the Coalition Associations' proposal would impose significant burdens on carriers that would not be justified by the marginal benefit to the shipper of individualized shipper performance data for the purpose of the termination petition.

**(b) Substantive standards governing termination requests**

The Coalition Associations also request modifications to the substantive standards governing termination requests. Coalition Ass'ns at 54–56. Their two proposed changes should

not be adopted because neither would assist the Board in evaluating whether continuation of a switching prescription is appropriate.

*First*, the Coalition Associations urge the Board to require the incumbent carrier to demonstrate in its termination petition that it satisfies all three service metrics for similar traffic—not just the metric that formed the basis of the shipper’s initial petition. Coalition Ass’ns at 54–55. The Coalition Associations contend that “if the showing is restricted solely to the standard that served as justification for the prescription, the Board could terminate a switch prescription even though the incumbent is still providing inadequate service that would merit continuation of the prescription.” *Id.* But as AAR explained in its opening comments, the Board may enter or continue a switching order only based on a showing of “actual necessity or compelling reason,” and that showing requires the Board to understand the impacts of the inadequate service on the petitioning shipper in the context of all the other effects of a forced switching order. AAR 711-2 Opening Comments at 7. That analysis may differ depending on which metric is at issue. For example, for shippers that have an adequate or even an over-supply of the material they are moving, transit time would be a poor measure of their need for alternative service. *Id.* at 61. For other shippers, departures from an original estimated time of arrival might have little or no impact on their operations. *Id.* In other words, the questions the Board must answer in determining if a switch is warranted will depend on the particular inadequacy claimed. Those questions can be more readily answered in the context of the Board’s evaluation of a new switching petition rather than in a termination proceeding, which is properly focused on whether the particular service inadequacy that formed the basis of the initial switching order has been remedied.

*Second*, the Coalition Associations ask the Board to narrow the scope of “similar traffic” that the Board will consider in evaluating a termination petition. Coalition Ass’ns at 55–56; *see id.*, Ex. 2 at 2. This elaborate proposal would unnecessarily complicate the Board’s evaluation of a termination request and unduly constrain the Board’s inquiry, particularly in cases where the volume or nature of the carrier’s traffic at the time the termination petition is filed differs from that at the time the switching prescription was entered. Among other things, the Coalition Associations’ proposal would require parties and the Board to apply a new multi-tiered definition of “similar traffic” and pose new questions such as what qualifies as a “reasonable distance” from the point of origin or designated destination. And yet those new inquiries would not help the Board evaluate the relevant question before it in a termination proceeding—*viz.*, whether the carrier has addressed the causes of the prior service shortcoming in such a way to assure adequate service for the traffic then subject to the switching prescription. Rather than narrowing the term “similar traffic,” the Board should make clear that it will consider the incumbent carrier’s performance on any regulated traffic that would cast light on that question. *See* AAR 711-2 Opening Comments at 103.<sup>28</sup>

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<sup>28</sup> The Coalition Associations additionally argue that, if the shipper continues to use the incumbent carrier during the switch prescription, the termination petition should consider only the shipper’s own traffic. Coalition Ass’ns at 56 n.27 (arguing that it would be “absurd” to consider “‘similar traffic’” “because the shipper immediately could file a new petition based on the service standards as applied solely to its own traffic”). But in that circumstance—where the shipper is not using the alternate service its switching petition sought—there would be no justification for maintaining the prescription at all, as the shipper’s decision to continue using the incumbent carrier’s service would demonstrate the absence of a compelling need for an alternative service. Additionally, because a shipper has discretion whether to tender its traffic to the incumbent carrier or to the alternate carrier (or both), looking solely to the shipper’s own traffic would also create a risk of looking at an anomalous (or worse, manipulated) slice of traffic, when much better evidence is available from other similar traffic.

The Coalition Associations are also mistaken in arguing (at 13 n.12) that contract traffic should be considered as “similar traffic” for purposes of determining whether to terminate a switching

## **I. Data Collection and Reporting**

AAR previously recommended that the Board promptly convene one or more technical working groups with representatives from all stakeholder groups to work through detailed issues regarding the proposed data collection and reporting regime. *See* AAR 711-2 Opening Comments at 105–09. Opening comments filed by other parties confirm the merit and value of AAR’s suggestion. A successful technical working group process would improve the usefulness of the data and would be directly responsive to many of the concerns raised regarding understandability and uniformity of the data and requests for input from shippers. It would also ensure clarity in the specific measures being used for the Proposed Rule’s metrics.

For example, a number of stakeholders emphasize that the data need to be intelligible, in a format that is useful and understandable, not simply machine readable as required by the Proposed Rule, and with clear descriptions and a data dictionary as necessary. *See* PRFBA at 4–5 & n.1; EMA at 4 & n.1; NSSGA at 4–5 & n.1; Coalition Ass’ns at 44; Crowley & Fapp V.S. at 31–32. Another commenter recommends that the data metrics “be designed with input from the shipper community.” API at 3. A technical working group process will expeditiously and successfully engage all interested parties, including the shipper community and Board staff, in focused discussion of technical details regarding the data. Such a process will promote constructive dialogue among shippers and carriers and foster mutual understanding by addressing questions, concerns, and open issues regarding the data. That process should, in turn, help encourage future conversations between shippers and carriers about particular traffic (leading to fewer cases brought to the Board) by allowing interested parties to better understand

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arrangement under the Proposed Rule. That is because it would not be reliable or appropriate for the Board to compare, for example, traffic moving under particular contractual rate and performance terms with common carrier traffic in a neighboring lane.

the relevant data and performance issues. No shipper and railroad should find themselves in a dispute before the Board purely because of a lack of effective communication between them.

Similarly, parties emphasize the need for consistency and uniformity in the data, both across carriers and within each field over time. *See, e.g.,* Coalition Ass'ns at 44; Crowley & Fapp V.S. at 31–32; API at 6–9; AFPM at 6 & n.11, 8. AAR agrees that standardized and uniform data metrics across the industry will be important for a robust and durable framework. As the Board recognizes, however, the data reported in EP 770 (Sub-No. 1) are not standardized across carriers and do not necessarily align with the service metrics defined in the Proposed Rule. *See* AAR 711-2 Opening Comments at 106–07; NPRM at 14. It was precisely for this reason, and in light of the fact that the reporting requirements of EP 770 (Sub-No. 1) were themselves never subject to notice-and-comment rulemaking, that AAR previously emphasized the need for additional process, including one or more technical working groups, before the Board orders permanent data collection and reporting. *See* AAR 711-2 Opening Comments at 106 & n.16 (discussing process of EP 724 (Sub-No. 3), *United States Rail Service Issues—Data Collection*, and EP 724 (Sub-No. 4)). A technical working group process is the best way to promote data uniformity and build the necessary record to inform the Board on these issues.<sup>29</sup> A thoughtful process also would help avoid the unintended consequences of adopting a regulation that freezes data reporting formats at one point in time. Although data consistency over time is

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<sup>29</sup> *See* AAR 711-2 Opening Comments at 107 (“[H]eterogeneity may be acceptable for an emergent, temporary reporting regime, but it should be rationalized into something uniform if the Board is to adopt a permanent reporting obligation and rely on data for triggering a right to petition for relief under the Proposed Rule.”); Crowley & Fapp V.S. at 32–33 (“[D]ifferences in naming conventions and performance measures would be unacceptable in attempting to show the Board an incumbent railroad’s deficient service.”).

important, especially when comparing data from different periods, it must also be balanced against the possibility of stifling innovation in the industry.

Various commenters advocate for more data being reported publicly, recommend that the Board place no limits on the sharing of data, and suggest that third parties should also be able to request service data from carriers. *See, e.g.*, USDA at 8; NGFA at 4; Virginia Port Authority at 9. But as other commenters correctly recognize, significant confidentiality concerns arise from the data collection and reporting contemplated by the Proposed Rule. *E.g.*, API at 8 (recommending that “customer-level data collected should be kept confidential between the carrier and the customer”). Carriers cannot lawfully provide data regarding individual service metrics to unauthorized third parties. *See* 49 U.S.C. § 11904.

## **V. REQUESTS FOR BOARD ACTION ON OTHER REGULATORY INITIATIVES**

In addition to their requests to modify the terms of the Proposed Rule, a number of commenters ask the Board to take action on other regulatory initiatives. *Cf.* NPRM at 7–8 n.8 (inviting comment on other actions, if any, the Board should consider with respect to competitive access and whether the Board should further broaden application of the public interest language in Section 11102(c)). Because the actions proposed by commenters involve distinct legal, factual, and policy considerations—none of which was meaningfully explored in the NPRM—the Board must decline to address them in the context of the current rulemaking. *See generally supra*, Part II.B.2 (discussing “logical outgrowth” principle of administrative law).

**A.** Some commenters (like AAR) agree with the Board’s decision to close EP 711 (Sub-No. 1). Others express disappointment with that decision or ask the Board to reconsider it. Some request that the Board take specific actions related to competitive access in the current

rulemaking. Others ask the Board to address competition-related issues in a future proceeding or new subdocket.<sup>30</sup>

The Board properly closed EP 711 (Sub-No. 1) in favor of a new approach aimed at remedying inadequate service. AAR 711-2 Opening Comments at 2–3. That is because the broad proposal considered in that proceeding risked magnifying many of the drawbacks of forced switching without countervailing benefits. *See generally id.* at 113–23 (Appendix) (discussing some of those drawbacks). The Board’s orientation toward inadequate service in EP 711 (Sub-No. 2) offers the potential—if appropriately implemented—to provide benefits in particular cases where a reciprocal switching order can remedy an identified service inadequacy and do so without imposing undue costs on railroads, other shippers, and the public. Some shippers express general discontent that the Proposed Rule does not go far enough, but the Board should not prejudge that question before any rule even takes effect—especially in light of the significant legal, policy, and practical issues raised by on-demand switching orders.

**B.** Some commenters urge the Board to incorporate terminal trackage rights into the current Proposed Rule as a remedy for a failure to satisfy the ISP standard or either of the other performance metrics. *See* USDA at 8; Portland Cement at 7–8; NGFA at 7–8. That proposal should be rejected because terminal trackage rights present distinct economic and operational issues that have not been examined in, and go beyond the scope of, the present rulemaking proceeding. AAR 711-2 Opening Comments at 58. As the Coalition Associations note,

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<sup>30</sup> *See, e.g.,* Labor Unions at 3 (supporting closure); FRCA/NCTA at 2 (expressing disappointment at closure); NGFA at 3 (same); Portland Cement at 6 (urging Board to revise Part 1144 standards); NGFA at 9 (asking Board to overrule *Midtec*, 3 I.C.C.2d 171, for all purposes); USDA at 3–5 (expressing views on future competition-related proceeding); AFPM at 6 (same); Coalition Ass’ns at 65 (same); Opening Comments of International Warehouse Logistics Association at 1, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (same).

“[t]rackage rights are a more complex form of competitive access than reciprocal switching that requires the Board to consider factors that have not been relevant in this docket.” Coalition Ass’ns at 64 (noting some operational, regulatory, and economic questions that would need to be answered). Accordingly, if the Board believes that regulatory intervention to address local service may be warranted, it must investigate the question in a separate proceeding. *See* AAR 711-2 Opening Comments at 58; *cf.* Coalition Ass’ns at 64 (recommending that the Board explore trackage rights as an additional remedial path in a separate proceeding); ACD at 5–6 (arguing that, to avoid delays in finalizing Proposed Rule, Board should “complete this rulemaking and then address the award of trackage rights for ISP failures in a separate proceeding”).

C. Other commenters ask the Board to take action with respect to shippers that are not in terminal areas. *See supra*, Part IV.A (discussing comments by Olin and WCTL); *see also* NMA at 6 (asking Board to prescribe other remedies, “especially when a shipper is not in a prescribed terminal area”). Even if those requests had merit, they would be misplaced in this proceeding. The remedy those commenters discuss is not a reciprocal switching order under 49 U.S.C. § 11102(c) at all, but instead would be the prescription of a through route under 49 U.S.C. § 10705(a).

The Coalition Associations specifically recognize that fact, and they urge the Board to apply the Proposed Rule to not only reciprocal switching but also prescriptions of through routes. Coalition Ass’ns at 61–63; *see also* AFPM at 10 n.16 (requesting a definition of OETA for through routes). The Board should reject that proposal because through routes are governed by a different statute and raise different concerns. As AAR has previously explained, Section 10705 sets limits on the prescription of a through route, including the protection of the originating

carrier's right to its long haul and a respect for the originating carrier's routing preferences. AAR 711-1 Reply Comments at 25–26. The Board has not examined any of those essential legal, practical, and policy questions in connection with the Proposed Rule. And while the Coalition Associations contend that many aspects of the Proposed Rule could nevertheless apply to through route requests, their comments concede that through routes raise issues that the Board has not addressed. *See* Coalition Ass'ns at 63 (stating that Proposed Rule's approach to practicability would need "additional references to operational factors specific to new interchanges that would not occur at a point along the incumbent railroad's long-haul route (*e.g.*, route circuitry, yard capacity)" and recognizing that pricing methodologies discussed in Proposed Rule could not be applied to through route prescriptions).

**D.** Other requests for regulatory action involve considerations even farther afield. For example, NGFA asks the Board to publish proposed rules in EP 768, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, in tandem with finalizing the Proposed Rule here. NGFA at 3, 10. That rulemaking involves a wholly different statute, 49 U.S.C. § 11122, and practical and policy issues that have very little overlap with reciprocal switching. There is no legal or practical reason why the Board needs to tie consideration of the present rulemaking to its consideration of private railcar issues in EP 768.

**E.** Finally, some commenters that express concern about the Proposed Rule urge the Board to address service issues through enforcement of railroads' common carrier obligations. *See, e.g.*, Labor Unions at 6–7; BLET at 3. The Board has correctly concluded that the Proposed Rule does not set standards for a railroad's common carrier obligation. *See* NPRM at 10–11. And where a carrier fails to satisfy its common carrier obligations, including the requirement to provide adequate service upon reasonable request, the usual remedies (including damages, when

appropriate) will be available. The need to keep the Proposed Rule distinct from common carrier issues reinforces that the Proposed Rule should be aimed at the specific question of how to efficiently identify cases where a switching prescription is legally and practically appropriate and can remedy a demonstrated service inadequacy. Because other tools—including remedies for carriers’ existing common carrier obligations—remain available, the Board should decline commenters’ invitation to broaden the Proposed Rule beyond that specific goal.

## **VI. CONCLUSION**

AAR appreciates this further opportunity to provide comments on this important matter, and it looks forward to continuing to support the Board’s process as the Board evaluates input from all stakeholders. If the Board decides to proceed to a final rule, AAR urges that the final rule conform with the changes discussed above and in AAR’s opening comments.

Dated: December 20, 2023

Respectfully Submitted,

/s/ Benjamin J. Horwich

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**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711 (Sub-No. 2)**

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**Reciprocal Switching for Inadequate Service**

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**Reply Verified Statement of Michael R. Baranowski and Nathaniel S. Zebrowski**

**December 20, 2023**

We are Michael R. Baranowski and Nathaniel S. Zebrowski of FTI Consulting. Mr. Baranowski and Mr. Zebrowski have previously submitted a verified statement in the proceeding EP 711 (Sub-No. 2) on September 22, 2023 and a verified statement and written testimony in the predecessor proceeding EP 711 (Sub-No. 1) on February 14, 2022. Mr. Baranowski has previously submitted testimony in the predecessor proceeding EP 711 (Sub-No. 1) on October 26, 2016 and in the predecessor proceeding EP 711 on March 1, 2013. Details of our credentials are provided in these prior submissions.

## **I. ASSIGNMENT**

We have been asked by the Association of American Railroads (“AAR”) to evaluate different measurement approaches put forward by the Surface Transportation Board (“Board”) and various parties in opening comments for implementing the service standards as formulated in the Notice of Proposed Rulemaking issued on September 7, 2023. *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (Notice of Proposed Rulemaking (“Proposed Rule” or “NPRM”)). We also examine how the Proposed Rule’s service performance measurements relate to the number of Class I carriers that are accessible to individual customers. Due to data availability issues related to two of the three proposed service performance standards,<sup>1</sup> we focus on assessing the service consistency standard, which we refer to as the transit time metric. In particular, we assess the likelihood that carload traffic historically would have triggered the transit time metric as formulated in the Proposed Rule

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<sup>1</sup> We are not able to present analysis of the proposed service reliability and local service standards, i.e., the Original Estimated Time of Arrival (OETA) and First-Mile/Last-Mile (FMLM) metrics, at this time. The OETA and FMLM data reported to the Board in Ex Parte 770 are too aggregated for determining individual lane eligibility, and it has proven infeasible to obtain, or cause to be created, sufficient lane-specific data from the individual carriers within the comment period in this proceeding.

under different measurement parameters put forward by the Board and in stakeholders' opening comments.

To be clear about what our study does and does not measure: The results below generally reflect all domestic carload traffic for which necessary data are available, and they do not account for other criteria that must be satisfied in order for a particular traffic movement to qualify for consideration or ultimate relief under the Proposed Rule.<sup>2</sup> Accordingly, our present study is not an impact study and thus does not provide an indication of the total amount of nationwide carload traffic that may be subject to the Proposed Rule. Thus, our study focuses on providing a data-driven view of how specific measurement parameters would support efforts to effectively use quantitative screening tools to identify what traffic is experiencing service characteristics that may merit examination under the Proposed Rule.<sup>3</sup>

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<sup>2</sup> Certain traffic—such as exempt commodities or traffic moving in certain car types or under transportation contracts—may not be eligible under the Proposed Rule; we understand this is a subject of legal discussions in the comments. Because the Board has not resolved those issues, our analysis simply looks at all traffic. Moreover, the Railinc trip data on which we rely, as discussed below, does not report the pricing authority information required to determine what traffic moves under contract, which is an additional reason why our analysis simply considers all carload traffic. Likewise, our analysis does not attempt to identify the portion of traffic that could ultimately be found to originate or terminate within a terminal area. This is due to the impracticability of accurately determining, within the scope of the present nationwide study, what traffic meets the definition of a terminal area under the Proposed Rule. Again, our analysis simply considers all carload traffic. Additionally, the Proposed Rule applies additional criteria or requires additional case-specific determinations in evaluating whether to grant relief. Because of the uncertainty and inability to analyze the foregoing issues, our results are not presented as an impact study of the absolute volume of potentially affected traffic. Rather, they are intended as a focused assessment of the transit time metric, using historical data, to quantify the likelihood that a carload within a population of traffic traveled on a lane that would have triggered the transit time metric under certain parameters, at some point within a given period of time.

<sup>3</sup> Studying all carload traffic to make assessments of service conditions pertaining specifically to the subset of carload traffic subject to the Proposed Rule relies on the reasonable assumption that qualifying traffic experiences similar service conditions as other traffic moving over the same rail network. This assumption is in line with the reality of rail network

## II. ANALYTICAL METHODOLOGY

Broadly speaking, the transit time metric identifies lanes where transit time has increased above a certain threshold over a particular period compared to that same period in the prior year. Implementing that comparison depends on a few additional parameters, which have been the subject of the Board's proposal and various opening comments. The Board's formulation of the Proposed Rule requires that, for a lane to become eligible, the average transit time during any rolling 12-week period in the current year increase at least 20% or 25% compared to the average transit time during that same 12-week period in the prior year. Various commenters have advocated using a threshold of 15% and/or a rolling 6-week time period to apply the metric.<sup>4</sup> Other commenters have recommended using quarterly comparison intervals instead of rolling weekly comparisons.<sup>5</sup> Accordingly, to capture and compare the range of suggested formulations

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operations where, regardless of the specific location where a movement starts and ends, traffic travels in common on many of the same linehaul trains, is collectively worked on at common intermediate points, and is expected to be influenced by the same factors determining overall service performance on that network. Moreover, as discussed further in this statement, we test whether service outcomes measured under the transit time metric for traffic with access to a single Class I carrier at one or both ends of the movement differs from service outcomes for traffic with access to multiple Class 1 carriers. We find that it does not, which supports the approach of broadly studying all carload traffic to make assessments that are particularly relevant to the specific subset of traffic eligible under the Proposed Rule, which cannot be readily identified.

<sup>4</sup> Glass Industry Supply Chain Council Opening Comments at 5 (suggesting 4–6 weeks); Opening Comments of Private Railcar Food and Beverage Association at 6–7 (suggesting 6 weeks); American Fuel & Petrochemical Manufacturers Opening Comments at 9–11 (suggesting 6 weeks and a 15% threshold); National Stone, Sand & Gravel Association Opening Comments at 6–7 (suggesting 6 weeks); Essential Minerals Association Opening Comments at 6 (suggesting 6 weeks); Olin Corporation Opening Comments at 5–6 (suggesting 10% to 15% threshold); Alliance for Chemical Distribution Opening Comments at 4 (suggesting 15% threshold); Freight Rail Customer Alliance and National Coal Transportation Association Opening Comments at 2 (suggesting 15% threshold).

<sup>5</sup> Union Pacific Railroad Opening Comments at 19 (suggesting quarterly comparison interval); Norfolk Southern Railway Opening Comments at 3, 12, 14 & Ex. A (Israel V.S.) ¶¶ 34–35 (same).

of this metric, our analyses account for scenarios under various parameters, namely the 15%, 20%, and 25% transit time thresholds, and the rolling 6-week, rolling 12-week, and quarterly comparison intervals.

Our analysis is based on Railinc trip data.<sup>6</sup> Our analysis looks across the entire population of domestic carload movements. In order to understand historical changes in service as measured by the transit time metric—negative and positive—we analyze not only year-over-year increases in transit time (which is the focus of the Proposed Rule) but also year-over-year decreases in transit time. We use the following methodology to determine what portion of traffic is on lanes that trigger the transit time metric under different measurement approaches:

- Start with all domestic carload movements in Railinc trip data where the origin and termination carrier is a Class 1 railroad. Each individual carload moving from ultimate origin to ultimate destination has one record in the Railinc trip data that includes selected movement information, including start and end timestamps from which transit time may be derived.<sup>7</sup>

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<sup>6</sup> Railinc trip data is individual movement data that aims to cover a select number of movement parameters for all rail freight movements over the North American freight rail system and is derived primarily from car event data maintained by Railinc in its TRAIN II system. Unlike Carload Waybill Sample data used in our prior EP 711 and EP 711 (Sub.-No. 1) impact assessments, the trip data reports baseline shipper and receiver information for individual movements where available and includes the full population of shipments rather than a sample.

<sup>7</sup> In the trip data, start timestamps are typically release loaded events (specifically, for 92% of all moves analyzed) and end timestamps are generally actual placement events (specifically, for 93% of all moves analyzed). In limited instances, where these events are unavailable, other events associated with origin service, such as when the car is actually pulled, or other events associated with destination service, such as constructive placement, are used to, respectively, determine start and end times for computing trip transit time. Although the Proposed Rule states that transit time should begin when the shipper tenders a bill of lading, we are unable to do so with existing trip data. Were the transit time measure to include the time between when the railroad receives the bill of lading and when the shipper releases the load, which may in some cases conflict with a separate requirement under the Proposed Rule that loading time is not counted, this would be expected to increase variance in transit time due to adding an additional time interval subject to operational variability.

- Remove trip records where end-to-end transit time is greater than 30 days to control for irregular operations such as bad order or storage events.
- Remove trip records where waybill and event locations differ at the ultimate origin or destination.
- Aggregate trip records by week, as defined based on each trip's start time on a week-ending-Friday convention, and by lane, as defined by unique combinations of ultimate origin and termination station and railroad, shipper and receiver name (Customer Identification File ("CIF") number, specifically), and 7-digit Standard Transportation Commodity Code ("STCC").
- Calculate, for each local<sup>8</sup> lane that both originates and terminates on the same Class I or its affiliates,<sup>9</sup> the 12-week rolling average transit time for each week.<sup>10</sup> We run a version of this same calculation using a 6-week rolling average period for every week. We also run a version of this same calculation at the quarter-end convention, i.e., the quarterly average for every quarter compared to the same quarterly average for the prior year.
- Determine, for each lane, which periods have year-over-year average transit times that are, respectively, below and above the 15%, 20%, and 25% thresholds at rolling 6-week, rolling 12-week, and quarterly comparison intervals.
- Isolate lanes which have traffic in both the current and prior year periods where at least one year-over-year comparison can be made for a given comparison

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<sup>8</sup> The transit time metric as formulated under the Proposed Rule would separately evaluate transit times for each carriers' segment of an interline route. Trip data does not provide timestamps related to intermediate interchange events. Accordingly, we are unable to calculate segment-specific transit times for interline movements required to analyze such movements under the transit time metric as formulated under the Proposed Rule. As stated in the text, we omit those movements from this study.

<sup>9</sup> Affiliated companies are those listed in Schedule C of each Class I carriers' 2022 annual R-1 report which, per Schedule 330 of these same reports, are not controlled by multiple Class I carriers.

<sup>10</sup> Thus, the 12-week rolling average time for week 12 of a given year is based on all shipments between week 1 and 12, the 12-week rolling average transit time for week 13 is between weeks 2 and 13, etc.

interval.<sup>11</sup> The year is defined on a year-ending-September 30 convention,<sup>12</sup> where, depending on the comparison interval, it is possible that year-over-year transit time comparisons may be made.

- For those lanes where comparisons may be made, summarize which lanes have increases and/or decreases at given transit time thresholds and comparison intervals at least once in the base period being analyzed and compute the associated likelihood percentages based on overall relative shares of traffic that are reported below.

### **III. RESULTS**

#### **A. Results of Analysis Using the Board's Proposed Parameters**

Using trip data provided to us by Railinc from January 2018 to September 2023, we determined, for each year ending on September 30 from 2019 to 2023, the percentage of traffic (on lanes with traffic in both the current and prior year where a transit time comparison could be made) that, compared to the prior year, triggered the transit time metric in one or more instances. As shown in the below table, we assess the likelihood that a given carload traveled on a lane with year-over-year transit time increases and/or decreases greater than 20% in a least one rolling 12-week period during the year shown. Although only transit time increases would trigger the transit time metric, we show both increases and decreases to provide a more complete view of how the percentage threshold metrics operate in the context of transit time variance on lanes of

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<sup>11</sup> Approximately 17% of all carloads travel on lanes that do not have volumes in the prior year. Regardless of the comparison interval being used, no year-over-year comparison could be made under the transit time metric for such lanes. Accordingly, we omit those from our analysis so that our results focus on the operation of the transit time metric where it can actually be applied. Some smaller portion of traffic will be omitted by virtue of the fact that even though the lane has traffic in both years, it did not have traffic in the relevant comparison interval. For example, if a lane only had traffic in week 10 during the prior year and week 40 during the current year, no comparisons could be made under the 6-week rolling, 12-week rolling, or quarterly comparison intervals, and this lane would be omitted under each.

<sup>12</sup> September 2023 is the most recent month for which complete Railinc data were available at the time we performed this study. Accordingly, a year-ending-September-30 convention allows us to make use of the most recent data.

railroad traffic. It is expected that, all else equal, there will be a bias toward a higher percent share of transit time increases than decreases for two reasons. *First*, the arithmetic of percent changes requires a smaller absolute increase than decrease to cross the same percentage threshold, e.g., 5 to 6 days is a 20% increase but 6 to 5 days is only a 17% decrease. *Second*, an asymmetry exists between the range of increases and decreases in transit time because it is not realistic to decrease transit time beyond a certain optimal level. For example, a lane with optimal performance of four-days transit time cannot decrease any further, while the theoretical room for increase on this same lane has a much higher upper boundary under our approach, which includes all moves with transit times up to 30 days. The following table includes all nationwide carloads analyzed (*see supra*, notes 2–3), and it is limited to lanes where at least one year-over-year comparison is made in the stated year (*see supra*, note 11).<sup>13</sup>

**Table 1: Likelihood that a Given Carload in the Stated Year Traveled on a Lane With Year-Over-Year Transit Time Changes Over 20% in at Least One Rolling 12-Week Period Compared to the Prior Year Average**

| Year End<br>September 30 | 20%<br>Transit Time<br>Increases | 20%<br>Transit Time<br>Decreases | Transit Time<br>Increases and<br>Decreases | Transit Time<br>Increases<br>and/or<br>Decreases |
|--------------------------|----------------------------------|----------------------------------|--------------------------------------------|--------------------------------------------------|
| 2020                     | 53.9%                            | 76.7%                            | 38.5%                                      | 92.1%                                            |
| 2021                     | 76.6%                            | 53.7%                            | 38.9%                                      | 91.5%                                            |
| 2022                     | 82.5%                            | 41.9%                            | 31.3%                                      | 93.1%                                            |
| 2023                     | 65.5%                            | 62.3%                            | 38.9%                                      | 88.8%                                            |

<sup>13</sup> We ran this same analysis including interline shipments which, given the data limitations discussed (*see supra*, note 8) was limited to analyzing the entire origin to destination shipment, not carrier-specific segments. This analysis yielded results within a few percentage points of those figures reported in Table 1 for local shipments only, suggesting that results for carrier-specific segments of interline traffic may also not vary materially from the results in Table 1.

**B. Results of Analysis Applying Other Thresholds and Measuring Periods**

We also consider the impact of different transit time thresholds and comparison intervals (as proposed by the Board and various stakeholders) on the relative likelihood of triggering the transit time metric. For each of the 15%, 20%, and 25% thresholds, using the rolling 6-week, rolling 12-week, and quarterly comparison intervals, the below table analyzes traffic moving between October 1, 2022 and September 30, 2023 and assesses the likelihood that a given carload traveled on a lane with a year-over-year transit time increase that would trigger the stated threshold. Again, the following table includes all nationwide carloads analyzed (*see supra*, notes 2–3), and it is limited to lanes where at least one year-over-year comparison is made (*see supra*, note 11).

**Table 2: Likelihood that October 1, 2022 to September 30, 2023 Carloads Traveled on a Lane Triggering Transit Time Increase Metric Compared to the Prior Year Average Under Different Parameters**

|                            | Rolling 6-Week<br>Comparison Interval | Rolling 12-Week<br>Comparison Interval | Quarterly<br>Comparison<br>Interval |
|----------------------------|---------------------------------------|----------------------------------------|-------------------------------------|
| 15% Transit Time Threshold | 84.3%                                 | 75.5%                                  | 53.8%                               |
| 20% Transit Time Threshold | 80.0%                                 | 65.5% ( <i>See Table 1</i> )           | 44.5%                               |
| 25% Transit Time Threshold | 73.2%                                 | 59.2%                                  | 37.3%                               |

**C. Results of Analysis Applying Three-Year Average Benchmark**

Some commenters have suggested that comparing the current period average transit time to the average transit time over the same period in the prior three years combined may provide a

more meaningful comparison due to controlling for short-term fluctuations.<sup>14</sup> Accordingly, to quantify the effect of this measurement approach, we compare the current year’s average transit time to the combined average transit time for the relevant comparison interval in the prior three years. The following table includes the same lanes as in Table 2—namely, all nationwide carloads analyzed (*see supra*, notes 2–3) where at least one year-over-year comparison is made (*see supra*, note 11)—but adjusts the average transit time calculation to include all shipments within a given comparison interval over the prior three years rather than the prior one year.

**Table 3: Likelihood that October 1, 2022 to September 30, 2023 Carloads Traveled on a Lane Triggering Transit Time Increase Metric Compared to the Prior Three Year Average Under Different Parameters**

|                            | Rolling 6-Week Comparison Interval | Rolling 12-Week Comparison Interval | Quarterly Comparison Interval |
|----------------------------|------------------------------------|-------------------------------------|-------------------------------|
| 15% Transit Time Threshold | 84.3%                              | 75.4%                               | 57.0%                         |
| 20% Transit Time Threshold | 80.0%                              | 69.0%                               | 49.4%                         |
| 25% Transit Time Threshold | 73.5%                              | 61.9%                               | 41.9%                         |

#### **D. Results of Analysis Using Two-Year Observation Period**

Given the substantial likelihood that a lane will trigger the transit time metric under a variety of measurement approaches in only a single year of year-over-year comparisons, we examined whether additional lanes would trigger the transit time metric if observed over longer periods. The table below reports results for traffic on lanes with two years of year-over-year comparisons (three years total of transit time data) and estimates the likelihood that a given

<sup>14</sup> American Fuel & Petrochemical Manufacturers Opening Comments at 10–11 (suggesting a rolling, 3-year average); Association of American Railroads Opening Comments at 57 & Orszag & Eilat V.S. ¶ 32 n.16 (suggesting a rolling, 3-year average).

carload in the third year traveled on a lane that triggered the transit time metric at any point in the prior two-year period. Thus, for example, the statistics shown for 2023 reflect year-over-year comparisons in 2023 (comparing to 2022) and in 2022 (comparing to 2021). This is calculated for the parameters of a 20% transit time threshold and a rolling 12-week comparison interval as formulated under the Proposed Rule. Again, the following table includes all nationwide carloads analyzed (*see supra*, notes 2–3), and it is limited to lanes where at least one year-over-year comparison is made in the prior two years (*see supra*, note 11).

**Table 4: Likelihood that a Given Carload in the Stated Year Traveled on a Lane With Year-Over-Year Transit Time Changes Over 20% in At Least One Rolling 12-Week Period Compared to Prior Year Average in the Past Two Years**

| Year End<br>September 30 | 20%<br>Transit Time<br>Increases | 20%<br>Transit Time<br>Decreases | Transit Time<br>Increases and<br>Decreases | Transit Time<br>Increases<br>and/or<br>Decreases |
|--------------------------|----------------------------------|----------------------------------|--------------------------------------------|--------------------------------------------------|
| 2021                     | 85.2%                            | 79.8%                            | 68.6%                                      | 96.4%                                            |
| 2022                     | 90.7%                            | 67.6%                            | 62.1%                                      | 96.2%                                            |
| 2023                     | 86.0%                            | 74.5%                            | 64.4%                                      | 96.1%                                            |

\* \* \*

The statistics reported in Tables 1–4 suggest that it is reasonable to expect that the transit time metric would be triggered at some point during a year or two of year-over-year comparisons for a fairly large percentage of carload traffic on a nationwide basis. Based on the reasonable assumption that the subset of all nationwide carload traffic that is eligible under the Proposed Rule would resemble this overall pattern (*see supra*, note 3), the transit time metric may be anticipated to filter out a relatively small fraction of traffic otherwise eligible under the Proposed Rule, although this filtering effect would be influenced significantly by what thresholds and comparison intervals are used.

#### **E. Comparison of Single-Served and Multiple-Served Traffic**

The Proposed Rule applies to situations where a customer has practical physical access to only a single Class I carrier and grants a remedy that effectively gives the customer access to multiple Class I carriers. Accordingly, to gain insight into how the Proposed Rule might affect service performance, we examine how transit time metrics compare between single-served and multiple-served lanes.

We infer which Class I carriers are accessible at a given location based on the service options that have been utilized for some meaningful amount of traffic in the past 5 years.<sup>15</sup> When only one Class I carrier (or its affiliates) serves a given customer facility, we define the location as having practical physical access to only a single Class I carrier.<sup>16</sup> We then partition the traffic population into (a) lanes involving a customer facility with access to a single Class I

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<sup>15</sup> We count a Class I carrier as serving a given customer facility when it is reported in Railinc trip data as the originating or terminating linehaul carrier for at least 500 carloads between October 1, 2018 and September 30, 2023. We selected this 500-carload level to prevent occasional movement records in trip data with apparently anomalous information on the linehaul carrier serving the facility from leading us to misclassify single-served locations as multiple-served locations. For example, if a location had 10,000 carloads on carrier A and 10 carloads on carrier B, we would not view the mere 10 carloads as proof of a valid alternative service option. It is possible in certain instances there are unused or rarely used linehaul carriers with access to a given location that our analysis has not accounted for; the result is that our analysis may be slightly over-inclusive in our list of single-served facilities. In limited cases where the customer facility is not reported in Railinc trip data, we instead perform this same analysis using the station Standard Point Location Code (“SPLC”).

<sup>16</sup> Our understanding is that even when the Class I carrier accesses the customer via a handling carrier, reciprocal switching, trackage rights, or other handling arrangement, it would still be reported in the Railinc trip data as the originating or terminating linehaul carrier for that movement. Thus, our classification of service status accounts for these various types of access to the extent the linehaul carrier information is reported as expected in the available data, and such options have been utilized for a meaningful amount of traffic.

carrier at one or both ends of the movement and (b) lanes involving customer facilities with access to multiple Class I carriers on both ends of the movement.<sup>17</sup>

Table 5 reports that traffic in each group has a similar likelihood of traveling on lanes that trigger the transit time metric. This result suggests that, at least as measured under the transit time metric formulated by the Board, customers with access to a single Class I carrier experience similar service performance as customers with access to multiple Class I carriers. Again, the following table includes all nationwide carloads analyzed (*see supra*, notes 2–3), and it is limited to lanes with traffic in both the current and prior year (*see supra*, note 11).

**Table 5: Likelihood that a Given Carload Traveled on Single- or Multiple- Served Lanes With a Year-Over-Year Transit Time Increase Greater than 20% in At Least One 12-Week Period Compared to Prior Year Average (Traffic from October 1, 2022 to September 30, 2023)**

| Comparison Group                  | Likelihood of Triggering Transit Time Metric |
|-----------------------------------|----------------------------------------------|
| Single-Served on One or Both Ends | 66.1%                                        |
| Multiple-Served on Both Ends      | 66.2%                                        |

This finding is consistent with the fact that, regardless of the particular access options on either end of the lane, rail cars move across the same rail network with all other traffic and are subject to the same operating conditions affecting service outcomes (*see supra*, note 3).

To further examine these findings, we applied a probit regression model to the October 1, 2022 to September 30, 2023 trip data on which Table 5 is based in order to assess whether

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<sup>17</sup> In order to provide a clean comparison group, we exclude traffic involving customers served by non-affiliated shortline carriers or where historical traffic patterns are insufficient to readily identify Class I service options. We also exclude a small number of records where length of haul and/or STCC information is not reported in the Railinc trip data.

single-served lanes are statistically more likely to experience transit time increases above 20% for any given weekly comparison on a 12-week rolling average year-over-year basis. After controlling for commodity, lane density, length of haul, and whether the shipment appeared to move in unit train service, we found there is no difference in the probability of triggering the transit time metric between single-served and multiple-served lanes that is statistically significant at the 1% confidence level.<sup>18</sup> Details of this analysis are in Appendix A. We thus are unable to conclude that being single-served or multiple-served has a meaningful effect on a lane's performance under the Proposed Rule's transit time metric. This evidence tends to suggest that the Board should not expect as an overall pattern that shifting from single- to multiple-service will itself result in a change in performance (as measured by the transit time metric) in cases where a remedy is provided under the Proposed Rule.

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<sup>18</sup> Single-served lanes have an average marginal effect of increasing the likelihood of triggering the transit time metric of 0.985% that is not statistically significant at the 1% confidence level; it is statistically significant at the 5% confidence threshold. Given the low predictive power of the regression model discussed in Appendix A, and the finding reported in Table 5 that more than 60% of both single-served and multiple-served lanes will trigger the transit time metric at some point in the reported period, this effect of less than one-percent is negligible in terms of comparing overall service outcomes.

## APPENDIX A

A probit regression model predicts the probability of a binary outcome based on the influence of the selected independent variables.<sup>19</sup> We specified a model that operates on weekly records for individual lanes reporting the binary outcome of either triggering the transit time metric or not for that week. The records included in the model cover the same set of lanes and carloads as in Table 5 and are fitted to the following equation using maximum likelihood estimation<sup>20</sup>:

$$E(y) = \Phi(\beta_0 + \beta_{1,2}SingleServedStatus + \beta_3UnitTrain + \beta_{4,5}DensityGroup + \beta_{6,7}LengthOfHaulGroup + \beta_{8-31}STCC)$$

Specifically,  $E(y)$  is the probability that the lane will fail in a given week, where a failure is defined as a transit time increase above 20% on a 12-week rolling average year-over-year basis. We apply the following control variables to account for the influence on the probability of failure among different groups of rail traffic:

- Length of Haul: Include discrete binary variables for length of haul between 500 and 1,499 miles and over 1,500 miles. These variables express the effect on probability of failure compared to lanes with a length of haul less than 500 miles.
- Commodity: Include discrete variables for the 24 different 2-digit STCC commodity codes appearing in the data analyzed. These variables express the effect on probability of failure compared to lanes with 2-digit STCC of “01” for grain.

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<sup>19</sup> Peter Kennedy, *A Guide to Econometrics* 259–68 (5th ed. 2003).

<sup>20</sup> Specifically, we used the following package in the statistical software platform R to estimate the model: R Core Team (2023). *\_R: A Language and Environment for Statistical Computing\_*. R Foundation for Statistical Computing, Vienna, Austria. <<https://www.R-project.org/>>.

- Unit Train Service: Include discrete binary variable indicating whether the shipment appears to move in unit train service.<sup>21</sup> This variable expresses the effect on probability of failure compared to non-unit train shipments.
- Lane Density: Include discrete binary variables for annual lane carload density between 366-3650 carloads (i.e., 1-10 average cars per day) and over 3,650 carloads (i.e., over 10 average cars per day). These variables express the effect on probability of failure compared to lanes with less than 365 carloads per year (i.e., less than 1 car per day).

As a baseline, we first run the model using only these control variables. The results reported in Table A1 below indicate that while many of these variables are statistically significant, collectively they have minimal influence on the ability to correctly predict transit time failures.<sup>22</sup>

**Table A1: Probit Model Regression Results Not Controlling for Single Service:**

| Term                  | Estimate | P-Value |
|-----------------------|----------|---------|
| (Intercept)           | -0.569   | 0.000   |
| LOH_Group1500+        | -0.403   | 0.000   |
| LOH_Group500_1499     | -0.148   | 0.000   |
| Unit_Train_Flag       | 0.189    | 0.000   |
| Density_Group3651+    | -0.258   | 0.000   |
| Density_Group366_3650 | -0.054   | 0.000   |
| STCC_08               | 0.605    | 0.335   |
| STCC_10               | 0.346    | 0.000   |
| STCC_11               | -0.079   | 0.003   |
| STCC_14               | -0.145   | 0.000   |
| STCC_19               | -3.208   | 0.811   |
| STCC_20               | -0.251   | 0.000   |

<sup>21</sup> Although unit train shipments are not identified as such in trip data, we treated as unit train shipments all movements with at least 50 cars sharing the same ultimate origin and termination station and railroad, shipper and receiver name (CIF number, specifically), and 7-digit STCC commodity.

<sup>22</sup> The McFadden's pseudo-R-squared value of less than 0.02 indicates that outcomes predicted by the model with predictors are only marginally more accurate than the model without predictors.

|         |        |       |
|---------|--------|-------|
| STCC_23 | 1.148  | 0.000 |
| STCC_24 | -0.376 | 0.000 |
| STCC_26 | -0.315 | 0.000 |
| STCC_28 | -0.280 | 0.000 |
| STCC_29 | -0.193 | 0.000 |
| STCC_32 | -0.196 | 0.000 |
| STCC_33 | -0.331 | 0.000 |
| STCC_34 | -3.356 | 0.885 |
| STCC_35 | 0.385  | 0.421 |
| STCC_36 | -0.529 | 0.000 |
| STCC_37 | -0.403 | 0.000 |
| STCC_40 | -0.279 | 0.000 |
| STCC_41 | -0.406 | 0.163 |
| STCC_42 | 0.114  | 0.057 |
| STCC_46 | -3.356 | 0.885 |
| STCC_48 | -0.815 | 0.000 |
| STCC_49 | -0.328 | 0.000 |
| STCC_50 | 0.053  | 0.817 |

This suggests that there are many other factors affecting individual service outcomes as measured by the transit time metric other than those we are able to control for using the available Railinc trip data, which, generally speaking, account for typical features of different groups of traffic in the rail industry. Notably, these data do not allow for identification of what shipments move under contract, much less the service terms specified under the contract for those shipments, so these results are not surprising.

Next, to see whether access to a single Class I carrier at one or both ends affects the prediction of transit time failure, we add a control variable for whether the lane is singled-served and re-run the model. As shown in Table A2, the results of this model including measures for single-served status are very similar to the results of the prior model that did not include such a measure. The coefficient of the single-served variable is not significant at the 1% confidence

interval<sup>23</sup> and the predictive power of the model remains very low.<sup>24</sup> Based on this, we are unable to conclude that lanes that are single served at one or both ends perform differently under the transit time metric compared to lanes that are served by multiple Class I carriers at both ends in any meaningful way.

**Table A2: Probit Model Regression Results Controlling for Single Service:**

| Term                    | Estimate | P-Value |
|-------------------------|----------|---------|
| (Intercept)             | -0.607   | 0.000   |
| Single_Served_Lane_Flag | 0.039    | 0.021   |
| LOH_Group1500+          | -0.404   | 0.000   |
| LOH_Group500_1499       | -0.149   | 0.000   |
| Unit_Train_Flag         | 0.189    | 0.000   |
| Density_Group3651+      | -0.257   | 0.000   |
| Density_Group366_3650   | -0.054   | 0.000   |
| STCC_08                 | 0.605    | 0.335   |
| STCC_10                 | 0.345    | 0.000   |
| STCC_11                 | -0.079   | 0.003   |
| STCC_14                 | -0.146   | 0.000   |
| STCC_19                 | -3.208   | 0.811   |
| STCC_20                 | -0.249   | 0.000   |
| STCC_23                 | 1.148    | 0.000   |
| STCC_24                 | -0.376   | 0.000   |
| STCC_26                 | -0.312   | 0.000   |
| STCC_28                 | -0.279   | 0.000   |
| STCC_29                 | -0.189   | 0.000   |
| STCC_32                 | -0.196   | 0.000   |

<sup>23</sup> While significant at the 5% level, the average marginal effect of the single served coefficient is 0.985%.

The following package was used to estimate the average marginal effects of this coefficient: Fernihough, A. (2019). Mfx: Margial effects, odds ratios, and incidence rate ratios for GLMs. R package version 1.2-2. <https://CRAN.R-project.org/package=mfx>.

<sup>24</sup> Similar to the prior model, the McFadden's pseudo-R-Squared is likewise less than 0.02. This suggests the model's predictive power is not improved by accounting for single-served status.

|         |        |       |
|---------|--------|-------|
| STCC_33 | -0.327 | 0.000 |
| STCC_34 | -3.357 | 0.885 |
| STCC_35 | 0.385  | 0.420 |
| STCC_36 | -0.530 | 0.000 |
| STCC_37 | -0.403 | 0.000 |
| STCC_40 | -0.278 | 0.000 |
| STCC_41 | -0.406 | 0.163 |
| STCC_42 | 0.114  | 0.058 |
| STCC_46 | -3.357 | 0.885 |
| STCC_48 | -0.815 | 0.000 |
| STCC_49 | -0.327 | 0.000 |
| STCC_50 | 0.053  | 0.819 |

**VERIFICATION**

I, Michael R. Baranowski, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement.

Executed on December 20<sup>th</sup>, 2023.

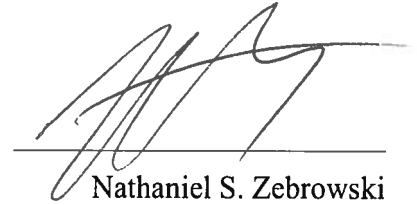
A handwritten signature in cursive script, appearing to read "Michael Baranowski", written in dark ink.

Michael R. Baranowski

**VERIFICATION**

I, Nathaniel S. Zebrowski, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement.

Executed on December 20<sup>th</sup>, 2023.



Nathaniel S. Zebrowski

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711 (Sub-No. 2)**

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**Reciprocal Switching for Inadequate Service**

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**Reply Verified Statement of M. Rapik Saat**

**December 20, 2023**

1. I am M. Rapik Saat, currently Director of Operations Analysis for the Association of American Railroads (AAR). I initiate, design, direct and conduct technically complex research, data analysis and evaluation of regulatory proceedings and legislative proposals for AAR. I work extensively with Railinc to develop and utilize very large and complex data structures for development of information on rail operations. Previously, I led an analytics research group as Research Assistant Professor at the Rail Transportation and Engineering Center (RailTEC) at the University of Illinois at Urbana-Champaign (UIUC). I have a BS, MS and Ph.D. in Civil Engineering, all from UIUC, with concentrations on rail transportation and operations research. I also have an MS in Applied Economics from Johns Hopkins University.

2. I am submitting this Reply Verified Statement to report my findings on the effect of traffic volume variance on average train speed as it relates to the proposed transit time service standard in the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“Board”) on September 7, 2023 entitled Reciprocal Switching for Inadequate Service, EP 711 (Sub-No. 2) (“NPRM” or “Proposed Rule”) and the opening comments filed in that docket.

3. I use the rail service data from EP 724 and the following methodology to estimate the correlation between the systemwide total traffic volume and the overall rail network velocity:

- Calculate the U.S. total weekly carloads and intermodal units by summing up the Weekly Carloads By 22 Commodity Categories measure for all Class I railroads.
- Calculate the 12-week rolling average of U.S. total traffic for each week.<sup>1</sup>
- Calculate the weekly U.S. average train speed as the average of each Class I railroad’s systemwide train speed weighted by their total cars on line.

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<sup>1</sup> The latest data downloaded from the STB website on December 4, 2023 include weekly service performance measures from March 29, 2017 to November 29, 2023.

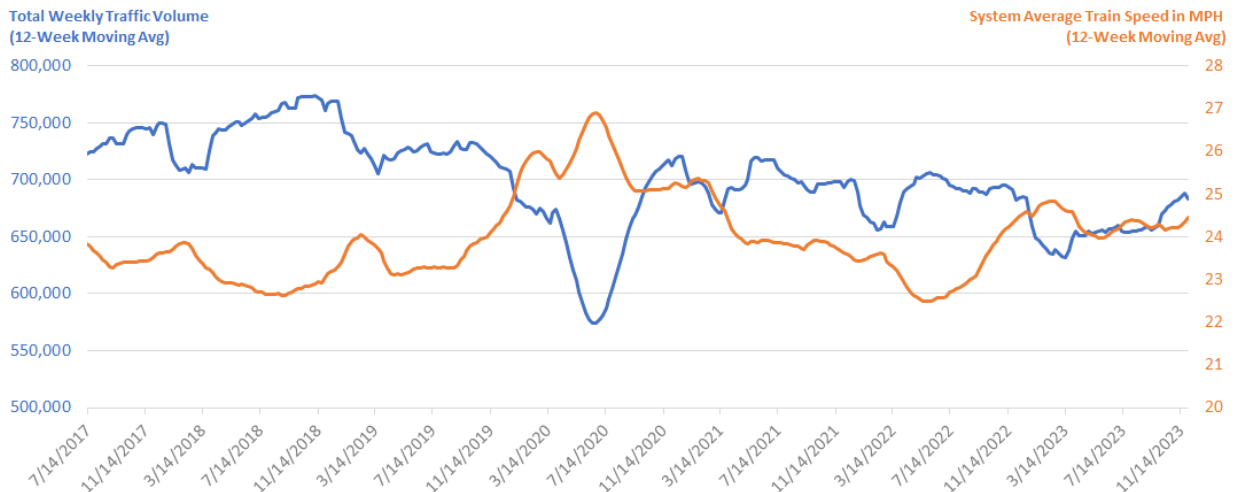
- Calculate the 12-week rolling average of U.S. train speed for each week.
- Calculate the correlation between the 12-week rolling averages of the U.S. total traffic and the train speed.

4. Figure 1 shows that the higher the systemwide total traffic volume, the lower the overall network speed—traffic volume and train speed are highly negatively correlated at -0.71.

**FIGURE 1**

As traffic volume increases, train speed decreases due to congestion

**-0.71** correlation between Traffic Volume and Train Speed



Source: AAR Analysis of Surface Transportation Board Rail Service Data - Ex Parte No. 724 (Sub-No. 5), downloaded 12/5/2023

5. Rail transportation differs slightly from the highway system due to unique railroad operating characteristics. However, not unlike the highway system, the more railcars enter the network the lower the overall network velocity. Increased traffic can be accommodated by running more trains, but a key relationship with railroad traffic is that higher traffic densities (e.g., trains per day) lead to higher congestion and lower overall network velocity.

Fundamentally, “[a]t low [rail] traffic levels the headways between trains are great enough that passes are limited and excess siding capacity allows for efficient meets and passes. However, as

traffic volume increases beyond this, meets become more frequent and headways shorter, thereby magnifying the differing characteristics and creating additional conflicts.”<sup>2</sup>

6. The key takeaway from Figure 1 is the transit time for any shipment could be affected by changes in the systemwide total traffic volume. Accordingly, any party in a proceeding should have the flexibility to present evidence regarding the impacts on the NPRM’s service metrics defined by the Board due to changes in the systemwide total traffic volume affecting the overall rail network velocity and traffic levels from other customers on the same routes.

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<sup>2</sup> Mark H. Dingler, Yung-Cheng (Rex) Lai and Christopher P.L. Barkan, *Effect of Train-Type Heterogeneity on Single-Track Heavy Haul Railway Line Capacity*, 228 Proc. Inst. Mech. Eng’rs, Part F: J. Rail & Rapid Transit 845, 851 (2014).

## VERIFICATION

I, M. Rapik Saat, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 20<sup>th</sup> day of December, 2023.



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M. Rapik Saat