

LAW OFFICE OF DAVID L. MEYER

WWW.MEYERLAWDC.COM

307692

1105 S STREET, N.W.
WASHINGTON, D.C. 20009
202-294-1399

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The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Ex Parte 711 (Sub-No 2) - *Reciprocal Switching for Inadequate Service*

Dear Ms. Brown:

The U.S. rail carrier affiliates of Canadian Pacific Kansas City, Limited (collectively “CPKC”) are submitting herewith the accompanying Reply Comments, supported by the Reply Verified Statement of Todd Workman and Brian Nelson. Those materials contain certain highly confidential traffic data and other information that is customer and lane specific, the disclosure of which to the public and/or competitors of CPKC would cause commercial and competitive harm.

CPKC is aware that on December 19, 2023, the Association of American Railroads filed a Motion for Protective Order in this docket. CPKC supports that Motion.

In anticipation of the Board’s entry of a Protective Order, CPKC is filing its Reply Comments and the supporting Workman/Nelson Reply Verified Statement under seal, and CPKC asks that the Board treat the unredacted version of its submission as Highly Confidential. CPKC is also filing in the public docket a redacted public version of the same materials.

Please contact me with any questions.

Respectfully submitted,



David L. Meyer

*Attorney for Canadian Pacific
Kansas City Limited*

REDACTED PUBLIC RECORD VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Reciprocal Switching for Inadequate Service

REPLY COMMENTS OF CANADIAN PACIFIC KANSAS CITY

CANADIAN PACIFIC KANSAS CITY

Cassandra P. Quach
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Cassandra.Quach@cpkcr.com
Telephone: (888) 333-6370

David C. Reeves
427 West 12th Street
Kansas City, MO 64105-1403
Email: David.Reeves@cpkcr.com
Telephone: (816) 983-1387

Charles W. Webster
11306 Franklin Avenue
Franklin Park, IL 60131
Email: Charles.Webster@cpkcr.com
Telephone: (630) 860-4161

David L. Meyer

LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

John M. Scheib
GENTRY LOCKE ATTORNEYS
101 West Main Street
Norfolk, VA 23510
Email: scheib@gentrylocke.com
Telephone: (757) 916-3511

Attorneys for CPKC

December 20, 2023

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The U.S. operating rail carrier subsidiaries of Canadian Pacific Kansas City Limited (collectively, “CPKC”)¹ respectfully provide these Reply Comments to address comments filed by other parties regarding the Board’s proposed rulemaking in this proceeding. *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (Notice of Proposed Rulemaking (“Proposed Rule” or “NPRM”)).

I. INTRODUCTION

As CPKC explained in its Opening Comments, the Board’s Proposed Rule is a constructive step towards providing an efficient remedy for demonstrated instances of inadequate railroad common carrier service. Within the legitimate scope for such a rule – *e.g.*, regulated common carrier traffic – the Board’s proposed framework sensibly seeks to use objective service metrics to identify those cases where further examination of potential service inadequacies is warranted. CPKC supports this basic approach.

However, many of the comments offered by interested shipper associations and other parties would move the Board’s Proposed Rule far away from its legitimate objectives, and those comments underscore that no rule should be implemented without (a) a more thorough examination – perhaps via a Technical Conference or other process – of actual data on the service outcomes realized on well-functioning manifest carload networks in calibrating the triggers for potential switching order proceedings and (b), when a switching order proceeding is triggered, allowing for a full and fair inquiry into the underlying facts, including both how the realized service outcomes compare to normal outcomes in the context at issue and whether an

¹ The U.S. operating rail carrier subsidiaries of CPKC Limited include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company.

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alternate carrier realistically would do better without adversely impacting the traffic of other customers on the incumbent or alternate carrier's network.

In these Reply Comments, CPKC attempts to present the Board with an introductory glimpse at the kind of real world data on lane-specific service outcomes that should be considered more comprehensively before adopting any rule, much less the modifications proposed by many Commenters that would trigger switching order proceedings more frequently. The accompanying Reply Verified Statement of Todd Workman and Brian Nelson (“Workman/Nelson R.V.S.”), two individuals with decades of extensive experience with railroad service design and data analysis, provides the Board with extensive movement-by-movement data on the operation of CPKC's U.S. manifest carload network in one of the most important corridors served by that network (the CP corridor connecting shippers in Minnesota with receivers in Illinois). That testimony, discussed in greater detail in Section II below, demonstrates that the goals of the Proposed Rule cannot be served by establishing regulatory service thresholds based solely on data reflecting the “average” outcomes experienced across an entire network. Nor can they be served by restricting the “affirmative defenses” available to the incumbent in those cases where a service metric threshold is crossed.

Fundamentally, Messrs. Workman and Nelson explain – and demonstrate with hard facts – that service outcomes on a well-functioning manifest carload network are inherently variable by virtue of the way those networks are designed to accommodate variable levels of demand by the 1000s of customers who draw on the network's services and the multitude of day-to-day variations in circumstances that can affect operations on the network. No shipper receives “average” service outcomes, and no shipper receives precisely the same outcomes day over day, week over week, or month over month. As Messrs. Workman and Nelson show using actual

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service outcome data, routine variation in service outcomes over time would swamp the tighter thresholds proposed by Commenters – and would even swamp those in the Board Proposed Rule. And the misalignment would be all the more severe for traffic that involved relatively shorter hauls and shorter planned transit times. The result would disserve the public interest: wasteful switching order proceedings would be triggered by “false positive” metric failures lacking any actual connection to potential service inadequacies, and railroads would be incentivized to redesign their networks to place more emphasis on avoiding metric failures, to the detriment of providing sound levels of service that support the needs of all of the customers served by the network as well as attracting new traffic to the network from the Nation’s highways.

Section II of these Reply Comments reviews the various proposals to modify the Board’s proposed metrics-based thresholds against the backdrop of real-world facts regarding the operation of well-designed and well-functioning manifest carload networks. Each proposal is on its face arbitrary and unsupported and should be rejected. Instead, CPKC urges the Board to give serious consideration to the kind of real-world evidence presented with these Reply Comments as it evaluates potential changes to the Proposed Rule. The Board should implement a Technical Conference or other process for undertaking a more systematic evaluation of real world lane-specific service data before implementing a rule that could have sweeping consequences for the railroad operations and the incentives railroads confront in designing services that meet shipper needs. Among the changes that the Board should consider making to the Proposed Rule is to modify the threshold percentage deterioration in transit time that would trigger a potential switching order by establishing a minimum absolute value of deterioration – perhaps 36 hours on average – necessary to trigger further inquiry. Section II also addresses a variety of other

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improvements that could help address the adverse impacts of a rule that is not calibrated to the real-world circumstances in which it would apply.

Section III discusses how the comments reveal the inappropriateness and unworkable nature of applying the Board's metrics-based framework to the complex and flexible operations that railroads undertake when providing first-mile last-mile ("FMLM") service.

Section IV discusses proposals made by some Commenters to expand the scope of the Proposed Rule in ways that would be unlawful or unsupported. These include the legal and practical implications of:

- Expanding the Proposed Rule into the world of rail service provided under transportation contracts;
- Expanding the Proposed Rule to exempt traffic;
- Extending the reach of the Proposed Rule to shippers located in rural and other areas outside terminal areas;
- Including unit trains in the Proposed Rule; and
- Applying the Proposed Rule to interline traffic.

Finally, Section V briefly explains why certain Comments proposing standards for imposition of financial and other terms for Board-ordered switching are misguided.

II. THE BOARD SHOULD TAKE INTO ACCOUNT REAL-WORLD FACTS REGARDING LANE-SPECIFIC SERVICE OUTCOMES IN DESIGNING AND IMPLEMENTING ANY RULE

The core and innovative features of the Proposed Rule are its combination of metrics-based triggers for potential switching orders, followed by a streamlined process providing an opportunity for incumbent railroads to offer affirmative defenses to avoid a switching order. In order for the Proposed Rule to achieve the legitimate objective of identifying service inadequacies that warrant a switching remedy, both of these steps must be appropriately

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calibrated to the underlying facts: the metrics-based triggers should not sweep in too many “false positive” indications of non-existent service failures and there should be an adequate (albeit streamlined) opportunity for railroads to submit explanation and evidence showing that a putative failure suggested by a metric in fact does not warrant a switching order.²

The Board sensibly requested input on the design of its Proposed Rule in light of available data on railroad service outcomes. Many of the non-railroad Commenters, unfortunately, have proposed significant revisions to the Proposed Rule without any foundation at all in data or other real-world facts.

As we demonstrate in this Section, examination of actual data on service outcomes on a well-functioning manifest carload network show that (1) the focus of the Commenters, like that of the Proposed Rule itself, on “average” levels of service performance ignores the inherent

² With Congress’s statutory preference to minimize regulation (49 U.S.C. 10101(b)), the legitimate goal of the Proposed Rule is to identify only those instances in which service is inadequate such that it requires regulatory intervention. The Board must make affirmative findings under the statute that a customer has met its burden of proof such that the Board ‘finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.’ 49 U.S.C. § 11102(c). The statutory provision at issue has been held by courts to have limited scope and cannot be used to restructure the industry. *See, e.g., Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988) (“If the [ICC] were authorized ... to prescribe reciprocal switching ... whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the [ICC] in this way to conform the industry more closely to a model of perfect competition.”). The ICC, federal courts, and Congress have all rebuffed numerous attempts to change forced access from a narrow tool to one used bluntly. The absence of any action by Congress expressly to alter the limited scope of the statute (and the *Midtec* decision) is powerful evidence that the scope of the statute is indeed limited. Congress has rejected 18 bills introduced in the House or Senate that would have relaxed the *Midtec* standard to make it easier for shippers to obtain an order to force reciprocal switching or terminal access. “Once an agency’s statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.” *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (congressional refusal to overrule agency construction of legislation is “evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’ attention through legislation specifically designed to supplant it”).

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variability in normal service outcomes; (2) proposals to tighten the Board’s triggers are unfounded and would yield extensive false positives; (3) the establishment of metrics-based thresholds should be informed by a more thorough examination of real-world data; and (4) no single metric will be capable of identifying a true service failure, meaning that incumbent railroads must have a full and fair opportunity to present facts putting a potential “metric failure” in context, without being cabined by the narrow affirmative defenses established by the Proposed Rule.

A. The Various Proposals for “Tightening” the Proposed Service Standards Are Not Grounded in any Data or Other Factual Appreciation of How Railroad Manifest Carload Networks Function

The Board received a wide range of comments on the three proposed metrics and the thresholds that the Board proposes to use as triggers for potential switching orders. We focus in this Section on the OETA and transit time metrics that relate directly to the incumbent’s line-haul service. We address the ISP metric in Section III below.

As to the OETA metric – for which the Board established a 60 percent performance threshold averaged across a 12-week reference period – Commenters provided no evidentiary support for the Board’s proposed threshold. Instead, shipper associations proposed a range of options for tightening the threshold level of OETA performance that would trigger a switching order, including OETA outcomes below 70 percent, 75 percent, 80 percent, 85 percent after 2

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years, 90 percent, and close to 100 percent.³ Commenters also proposed making these thresholds easier to trigger by shortening the reference period from 12 weeks to six or eight weeks instead.⁴

Similarly, as to the transit time metric – for which the Board established as its threshold of a 20 percent year-over-year increase in transit time averaged across 12 weeks – Commenters proposed thresholds that would trigger potential switching orders based on increases of only 15 percent, 10-15 percent, or even *zero percent*.⁵ Commenters also asked the Board to shorten the relevant comparison period to a six- or eight-week period.⁶

Each of these proposals is on its face unsupported and purely arbitrary. Collectively, they highlight how challenging it is to justify any threshold without a grounding in how well-functioning manifest carload networks deliver service outcomes. The Commenters provide no such grounding. They offer no data to support selecting one of these targets over another. There is no evidence that shows that any of these proposed levels will identify only those instances in which further inquiry might be warranted to determine whether there is a service inadequacy that justifies a regulatory action under the statute. None of these proposals is built upon any actual data regarding what levels of service – or what fluctuations in service levels relative to arrival-time estimates or prior-year levels – is inadequate or abnormal. Workman/Nelson R.V.S. at ¶ 7.

³ See, e.g., Opening Comments of The Coalition Associations (“Coalition OC”) at 22; Opening Comments of American Fuel & Petrochemical Manufacturers (“AFPM OC”) at 9; Opening Comments of Essential Minerals Association (“Essential Minerals OC”) at 5-6; Opening Comments of Glass Packaging Institute (“Glass Packaging OC”) at 3; Opening Comments of American Petroleum Institute (“API OC”) at 3-4; Opening Comments of National Grain & Feed Association (“NGFA OC”) at 11; Opening Comments of National Stone, Sand and Gravel Association (“NSSGA OC”) at 6; Opening Comments of Diversified CPC International (“Diversified OC”) at 3.; Opening Comments of Alliance for Chemical Distribution (“ACD OC”) at 3.

⁴ See, e.g., AFPM OC at 8; Essential Minerals OC at 6; Glass Packaging OC at 3; NSSGA OC at 7.

⁵ See, e.g., NGFA OC at 13; Opening Comments of Olin Corp. (“Olin OC”) at 6, ACD OC at 4; AFPM OC at 11; and Opening Comments of Freight Rail Customer Alliance (“FRCA OC”) at 2.

⁶ See, e.g., Essential Minerals OC at 7; AFPM OC at 10.

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The most these Comments can muster is allusion to evidence of average overall on-time performance as reported by Class 1 railroads in Ex Parte No. 770. *See, e.g.*, Coalition OC at 23-24. But as Messrs. Workman and Nelson demonstrate, and as discussed further in the next section, the inherent variability of service outcomes on a well-functioning network makes reliance on averages impossible. Manifest carload networks are not designed to be assembly lines that use a fixed ratio of inputs to spit out identical and repeatable outputs day after day, week after week, month after month. They are *designed* to adapt to varying inputs and other circumstances in ways that yield varying outputs as a matter of normal course. The fact that a network can achieve well in excess of 60 percent on-time performance *on average* says nothing about the likelihood that individual lanes will trip the Board's thresholds as the result of routine and indeed planned variations in service performance. *See* Workman/Nelson R.V.S. at 10; *see also* Section II.B., below. The evidence submitted by AAR regarding the proportion of lanes that would trip the Board's transit time threshold (AAR Reply Comments, Baranowski/Zebrowski R.V.S. at 6-13) demonstrates that CPKC is not remotely unique in this regard.

The unsupported and arbitrary nature of the Commenters' proposed revisions to the Board's thresholds is reinforced by the hyperbole some have used in ex parte meetings with Board members. For example, the American Forest & Paper Association ("AFPA") contended that "it believes that the rail service reliability bar in the NPRM was set too low because if a facility experiences a reliability service level of only 60 percent as contemplated by the NPRM, they would experience significant disruption and likely a production shut down." AFPA Ex Parte (filed Nov. 15, 2023). AFPA further asserted that "if a shipper provided its customers with 70 percent of its order within 24 hours, the shipper would not be in business." *Id.* This kind of

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rhetoric about the level of service reliability shippers would like to compel railroads to provide is unhelpful in the context of a rule designed to set a meaningful threshold applicable across the gamut of manifest carload service. To be sure, there may well be instances when particular shippers reasonably need a heightened degree of certainty about the arrival of their rail shipments, and CPKC certainly strives to meet those needs. But there is simply no evidence in the record supporting the imposition on the manifest carload network as a whole a set of regulatory thresholds based on any particular minimum level of performance – these kinds of assertions are at best mere anecdote, the plural of which is *not* data. If the statements of AFPA were founded in a real factual record, one would expect that the level of rail service provided by some Class 1s (as recounted in the Proposed Rule (*e.g.*, at 5), would have left a raft of examples of production shut-downs in its wake. But there is no such record.

Claims by these Commenters underscore that in assessing assertions made by proponents of tighter service-level regulation, the Board should be careful to separate fact and evidence from unsupported hyperbole, and CPKC offers the facts presented by witnesses Workman and Nelson in that spirit. Second, even these Commenters acknowledge that whether service levels are truly inadequate depends on the specific facts and circumstances relating to that shipper's traffic, including the industry context. And third, despite the many factors affecting how a particular shipment performs at on a particular portion of a railroad's network at a particular point in time, the Proposed Rule would treat all situations the same unless it is modified to ensure that metric threshold failures are used solely as trigger for further inquiry into whether service is actually inadequate rather than as dispositive proof of a service failure absent rebuttal proof supporting a narrow set of affirmative defense.

B. Real World Data Confirms the Arbitrariness of the Proposed Trigger Modifications

The Board's two line-haul service metrics – OETA and transit time – sensibly seek to examine how well a railroad's actual service outcomes compare to the estimates it provides its customers and its past levels of performance. These are certainly relevant metrics in assessing a railroad's service performance.

As Messrs. Workman and Nelson explain, however, the Board's proposed use of these metrics as triggers for potential switching orders – especially if the applicable thresholds are tightened as proposed by many of the Commenters – is not well aligned with the realities of how carload manifest networks are designed and executed to deliver service outcomes for a wide array of highly diverse customers under constantly changing conditions. Unless carefully aligned with real world facts and data pertaining to the normal functioning of manifest carload networks, the Proposed Rule would misidentify normal variations in service outcomes as service failures rather than spotlighting only those outcomes that represent real service inadequacies. The adverse consequences of that misalignment are real: all parties would incur wasteful expenditures on proceedings triggered by misaligned thresholds, operational inefficiencies would result from the added complexities and burdens of unnecessary switching, and the Proposed Rule would risk incentivizing alterations in railroad service design that would tend to shun traffic did not fit perfectly into a highly repeatable network operations, threatening progress towards carload growth.

The principal disconnect between the proposed thresholds and the realities of rail network operations is the thresholds' reliance on evidence of average performance to set metrics that

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would apply on a lane-by-lane basis.⁷ System-wide metrics are useful tools for assessing the overall health of a rail network, and CPKC uses such metrics – along with a host of other indicators – in its daily course of business. *Workman/Nelson R.V.S.* at ¶¶ 8-9. But averages must be handled with care and must not be asked to carry more weight than they are able. The “average” is not what any shipper receives on any given day, nor are the service outcomes a shipper receives on one day (whether average or not) likely to be the same as what that shipper receives the next. *Id.* at ¶¶ 9-10. Each individual shipper and each individual shipper lane is differently situated with respect to the precise way in which the rail network is designed to deliver the shipment from origin to destination. *Id.* at ¶¶ 12-13. And the outcomes experienced by the shipper will inevitably vary – often a great deal – from day to day, week to week, and month to month for a host of reasons. The ability to achieve (for example) 80 percent on-time performance for a large body of manifest carload traffic does not imply that every individual customer or lane will achieve that level most of the time. *Id.* at ¶¶ 50-52; *see also id.* at ¶¶ 26-27.

These variations arise because, in the real world, the manifest carload network is designed and resourced to serve not just one customer but a wide array of customers under a wide array of constantly-changing circumstances. *Workman/Nelson R.V.S.* at ¶¶ 12-13. For example, a typical manifest train in the CPKC’s U.S. network carries shipments for 40 or more different customers moving to an even greater array of destinations. *Id.* at ¶ 12. Each local switching service, each yard operation, the local trains that feed classification yards, and so on, all serve an array of shippers moving freight to an array of destinations. Each of these network

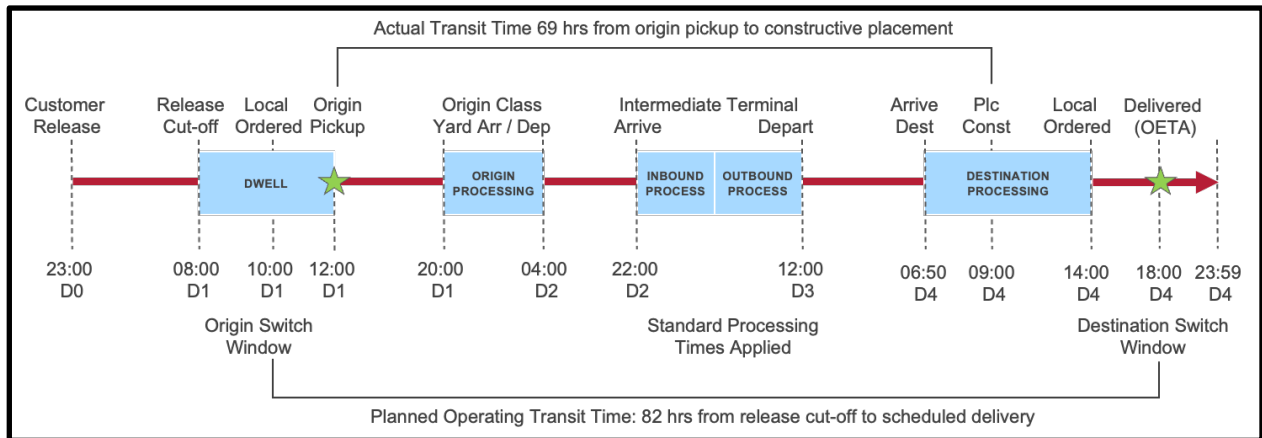
⁷ Another disconnect was identified by some Commenters who noted that the calculation proposed in the Proposed Rule on the OETA standard does not align with the methods used by some railroads to calculate the data reported to (and therefore erroneously relied on here) by the Board. Opening Comments of Union Pacific Railroad Company (“UP OC”) at 5.

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elements is a part of a complex design the goal of which is to serve not just one customer's needs but best meet the needs of the collective group of customers who makes use of that network element. *Id.* at ¶¶ 12-13, 22-23 & Workman/Nelson Fig. 3. Individual customers' shipments are mapped against the network elements that were put in place to serve the overall body of manifest (and other) traffic on the network. *Id.* at ¶ 13.

Messrs. Workman and Nelson explain how this network design process functions by illustrating the anatomy of a typical trip plan, which is visually represented below. *See* Workman/Nelson R.V.S. at ¶¶ 13-15 & Workman/Nelson Fig. 1.

**FIGURE 1
ANATOMY OF A TRIP PLAN**



As shown in Figure 1, when an individual railcar moves through the network, it starts at its origin and gets moved by a local train to a yard where it can be aggregated with other cars into a block. Every customer and every yard are not necessarily served every day. A car released one day may move directly to a connecting train, or it may have to wait for the next train that serves that yard that is headed in the right direction. The same process happens at other yards until the

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car is finally delivered to its destination (and it may wait in the local yard until the next day on which the local train is scheduled to operate). *Id.* at ¶ 14.

This linear view of the trip plan for an individual carload shipment across the network may make it appear that the railroad runs in accord with a highly defined schedule. However, that perception would be oversimplified. In fact, there is a great deal of flexibility built into the network design in order to accommodate variability in a host of factors that influence how the network functions in practice, so that the network can meet the needs of all of the customers making use of it. Workman/Nelson R.V.S. at ¶ 15. Fundamentally, the plans formulated to move the shipments of individual customers must be implemented against the backdrop of the rest of the railroad's network, which introduces another major dimension of variability that CPKC's network design must accommodate. At every step in the movement of a carload from origin to destination, there is inherent and day-to-day potential for the proper functioning of the network to be affected by many variables, among them:

- The realities of railroads being an outdoor sport. *Id.* at ¶ 16.
- Inherent *planned* variability associated with when a railcar entering the network begins its trip – for example, depending on when the railcar is released by the customer into the CPKC network. *Id.* at ¶ 17.
- Unplanned dwell as a result of decisions by shippers that affect the release of their loads – or the number of loads released simultaneously – which can affect whether every car makes it onto the local service that the carrier planned. *Id.* at ¶ 21.
- Unplanned dwell as a result of volume fluctuations at a yard or elsewhere in the network (potentially resulting from actions of *shippers far upstream* in the

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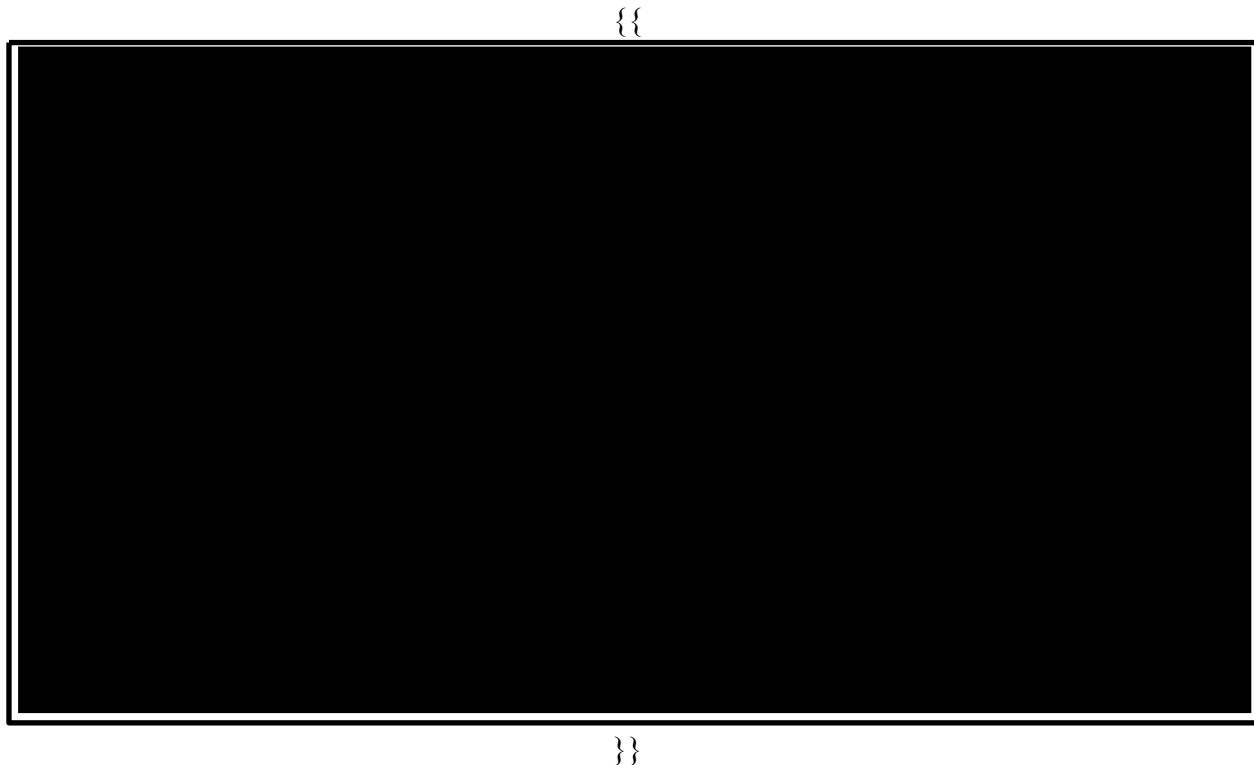
network) that can result in some traffic missing its first planned connection. *Id.* at ¶¶ 22-23 & Workman/Nelson Fig. 3.

- Shifts in the economy and a railroad's commodity mix that can changes in traffic handled on the network, from the swings in volumes of crude oil shipments to the swings in intermodal volumes based on the economy. *Id.* at ¶ 24.

For all of the reasons discussed above and undoubtedly many more, the service performance realized by individual lanes is far more variable than the average performance of the network as a whole, even when the network is performing well and individual shipments are moved fluidly and in accord with the network's service design. As a result, service order thresholds that are set with reference to what networks are capable of delivering "on average" will almost necessarily misidentify normal service levels as service failures. Workman/Nelson R.V.S. at ¶¶ 26-27.

This variability in service performance on a well-functioning manifest carload network is not merely conceptual. Messrs. Workman and Nelson present detailed data drawn from the portion of CPKC's former-CP network with the largest volume of state-to-state carload manifest traffic volume. Figure 2 below, which is drawn directly from that testimony, plots (as red and blue dots) the transit time performance of each of the {{[REDACTED]}} individual shipments in the Minnesota-to-Illinois corridor during the period between October 2022 and September 2023, a period when CP's network was generally functioning well. Workman/Nelson R.V.S. at ¶¶ 28-44 & Workman/Nelson Figs. 4-15. For each shipment (or dot), the specific transit days experienced correspond to the y-axis and the date the shipment arrived corresponds to the x-axis. Extensive normal variability is evident.

FIGURE 2
TRANSIT TIMES IN HOURS FOR MANIFEST CARLOAD SHIPMENTS
BETWEEN MINNESOTA AND ILLINOIS



Although some of the variability in Figure 2 above reflects differences between specific shipper lanes, the same pattern applies to individual shipper lanes as well. Each red dot represents one of the {{[REDACTED]}} shipments for a single customer moving between a single origin and a single destination over the course of a year. Digging deeper into the specifics of the service plan that CPKC builds for these shipments reveals that, because of the relatively modest volumes of traffic on the portions of the network used to provide these services (driven primarily by traffic placed on the network by *other customers*), the *planned* transit times for this traffic can vary by 20 percent or more simply based on the day of week on which that customer tenders its rail car. Workman/Nelson R.V.S. at ¶ 17 & Workman/Nelson Fig. 2; *see also id.* at ¶¶ 33-35 & Workman/Nelson Figs. 9-10.

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As Messrs. Workman and Nelson also explain, the variability of service outcomes is not neutralized by the proposals to compare transit times that have been averaged over some period of time – the Board proposed 12 weeks, whereas several Commenters urge downward revision of that period to six or eight weeks. None of these periods overcomes the inherently variable nature of *normal* manifest carload service performance. Whether the Board were to implement 12-week rolling average comparisons as set forth in the Proposed Rule or a six-week rolling average as some propose, the variability over time in service outcomes would swamp the 20-percent threshold for identifying potential service inadequacies, despite the fact that such variations are simply part of the normal workings of a manifest carload network. Workman/Nelson R.V.S. at ¶¶ 45-48, Workman/Nelson Figs. 13-15 & Workman/Nelson Table 2.

Figure 3 below shows the 12-week rolling average performance for the large customer's traffic represented by the red dots in Figure 2, and superimposed a red band the thickness of which is equal to a 20 percent increase in transit time from the overall average transit time outcome of {{[REDACTED]}} days. See Workman/Nelson Figure 15 & Workman/Nelson Table 2.

FIGURE 3
TWELVE-WEEK ROLLING AVERAGE TRANSIT DAYS FOR A SINGLE CUSTOMER

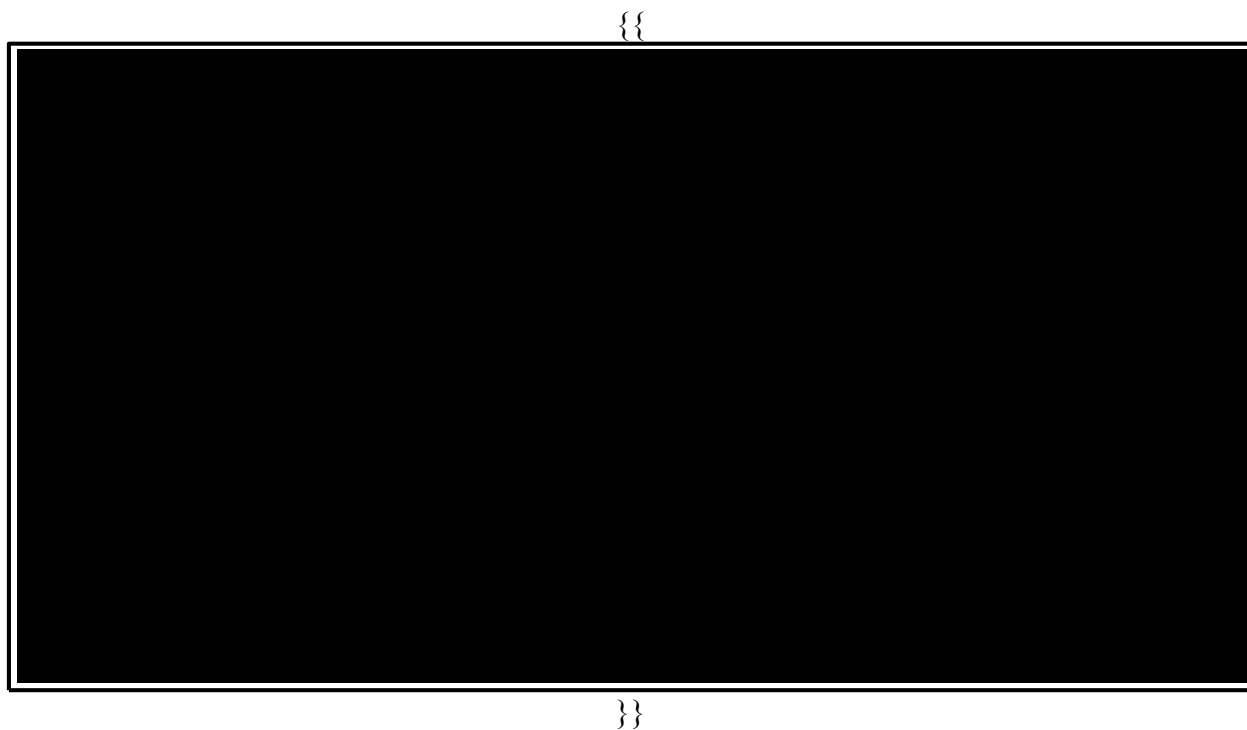
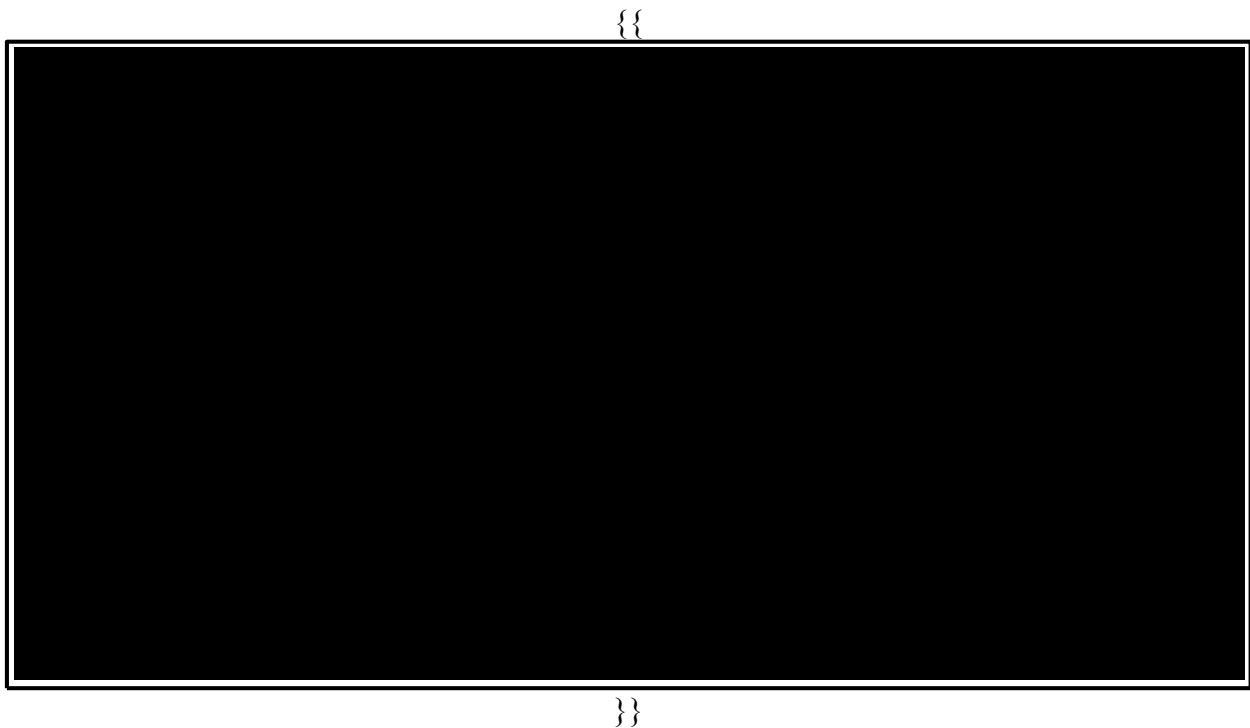


Figure 4 below does the same, but comparing variations in the six-week rolling average transit time outcomes with a band representing a 20-percent variation from the mean. *See* Workman/Nelson Figure 14 & Workman/Nelson Table 2.

FIGURE 4
SIX-WEEK ROLLING AVERAGE TRANSIT DAYS FOR A SINGLE CUSTOMER



As a comparison of Figures 3 and 4 shows, the effect of a longer period of aggregation (12 weeks instead of six) does smooth out somewhat the natural fluctuations in transit times over time, but the fundamental pattern (and problem) remains: transit times, even when averaged across periods of 12 weeks, fluctuate well in excess of 20 percent even in normal operating conditions. Workman/Nelson R.V.S. at ¶¶ 47-48 & Workman/Nelson Table 2. Table 1 below illustrates how often a 20-percent threshold would be triggered under various periods of aggregation: two weeks, six weeks and 12 weeks. In each aggregation, there are multiple points when the rolling average calculation would be more than 20 percent greater (longer) than the average transit time. This would occur even more frequently any given 12-week or six-week rolling average compared with the “best” average transit time achieved during the prior 12 months instead of with the overall mean.

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TABLE 1
STATISTICS SHOWING IMPACT OF ROLLING AVERAGES

{{

	2 weeks	6 weeks	12 weeks
Avg. Scheduled Transit (All)			
Avg. Actual Transit (All)			
Actual Average Minus 20%			
Actual Average Plus 20%			
Days More Than 20% Lower Than Average			
Days More Than 20% Higher Than Average			

}}

Workman/Nelson Table 2.

As Table 1 also shows, this feature of transit time comparisons obtains even where the actual average transit time experienced by the customer was exactly the same as the *scheduled transit time* developed by CPKC's network planning process and communicated to the customer. In other words, on average the customer materially *overperformed* the OETA standards of arrival within 24 hours of estimate. Nonetheless, the Proposed Rule – unless recalibrated -- would inappropriately misidentify numerous instances of presumptively inadequate service.

Workman/Nelson R.V.S. at ¶ 47 & Workman/Nelson Table 2.

Nor does the Board's OETA metric – which compares actual performance with estimated performance – avoid having to contend with this variability. As Messrs. Workman and Nelson explain, CPKC does not attempt to generate estimated arrival times that take into account all of the daily changes in conditions that are likely to affect the performance realized by a particular shipment. The estimates CPKC generates at the commencement of the shipment are instead normalized in the sense that they assume that the shipment will move according to plan and that capacity is available to handle normal levels of demand. Workman/Nelson R.V.S. at ¶¶ 25, 49.

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This means that even when transit time performance is proceeding according to plan, and shipments on average are experiencing on-time arrivals well in excess of 60 percent of the time, it is entirely normal for many individual shipments to experience periods when transit times exceed the normalized estimates provided at the outset of a move. *Id.* at ¶¶ 50-52.

C. Thresholds that Are Misaligned with the Way Manifest Carload Networks Actually Function Could Have Serious Adverse Consequences for the Rail Network and the Shippers Who Benefit from It

In a prior version of Ex Parte 711, Board members asked the parties to comment on the effect of the rule and the remedy. Docket No. EP 711 (Sub-No 1) (STB served July 27, 2016) at 32 (Miller commenting); *Id.* at 34-35 (Begeman dissenting). Although the Board has not done so here, such an analysis should be helpful to understand the risks associated with the unintended consequences of the Proposed Rule. Here, misalignment of the thresholds that would trigger potential service orders, coupled with narrow “affirmative defenses” that would constrain the ability of railroads to put potential “metric failures” in context would have at least two significant adverse consequences.

First, to the extent the Proposed Rule leads to unnecessary switching orders, it likely would result in greater operational complexity and potential disruption, hindering railroads’ ability to serve their existing body of customers and attract and serve new traffic. The cumulative impact of multiple switching orders would magnify these harms, and the incentives of individual shippers could not be relied upon to avoid the counterproductive operational and service implications of those orders. Individual shippers may perceive that they would benefit from obtaining greater operational optionality, without fully internalizing the network-wide impacts of the switching performed for their own traffic. *See Workman/Nelson R.V.S.* at ¶¶ 75-81.

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Of particular concern, the Board does not appear to have examined (or left open the possibility of examining in an individual case) whether existing infrastructure can support a forced switching order or the potential implications of an order on the service received by other customers on the network. The proposed limitation on affirmative defenses that a railroad can raise leaves no room for examination of whether the actual infrastructure in the location would support such an operation. *See* Proposed Rule at 25-26. Existing infrastructure limitations can impose limitations on the ability to interchange traffic under a switching regime. Interchanges or switching in a terminal area may operate well under current conditions, but depending on the location of the interchange, the volume interchanged, the amount of track capacity at and near the interchange site, the location of the railroads' yards, and other factors, many interchanges could not operate efficiently in the face of an increase in switching volume. Increased switching volumes at a particular capacity-constrained interchange would at a minimum increase intermediate dwell time for shipments that previously moved in single-system service and likely result in dwell times increasing for all traffic moving in the vicinity of the interchange. Increased dwell consumes car and track capacity and affects other customers, which could trigger further demands made pursuant to the Proposed Rule. *Workman/Nelson R.V.S.* at ¶¶ 55-56.

In addition, the Board does not appear to have provided any meaningful opportunity for the parties to address the potential cumulative impacts on the rail network from multiple forced switching orders. The immediate service impacts of introducing additional handlings, and the consequences of unanticipated shifts in traffic subject to forced switching, will worsen with each additional grant of forced switching. Each new interchange event mandated by the Board will inject another area of volatility into a railroad's network. The Board has no tools to foresee the

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magnitude of effect on the network of any one of its interventions into operations, much less the compounded effects of multiple interventions. Workman/Nelson R.V.S. at ¶ 81.

Second, and potentially even more problematic, even if the Proposed Rule does not lead to a large number of actual switching orders, it would create – indeed, it is designed to create – incentives on the part of railroads to alter their behavior. If the design of the thresholds for triggering a potential service order overemphasizes an unrealistic level of service consistency or predictability, it could lead railroad managements to alter the way they design network services in a way that is detrimental to the functioning of the network overall.

Currently, management focuses on metrics that demonstrate the health of the overall network. Workman/Nelson R.V.S. at ¶¶ 8-12. Were the Board to establish rigid metrics-based standards for permissible service outcomes that impugned the adequacy of service outcomes that stemmed from variability well within the current range of normal – as the current thresholds appear to do – and threatened severe consequences for failure to adhere to those standards, the result likely would be a redesign of manifest carload service plans in an effort to avoid the kinds of variability that would exceed the bounds of the new rule. To achieve this, railroads likely would need to explore approaches that reduced the flexibility of the network to attract a wide array of traffic from a wide array of customers, each with its own sources of demand fluctuations. Any such approach likely would discourage growth through efforts to bring into the carload network traffic currently moving by truck if that traffic was not a perfect fit for the kind of overly-rigid network design necessary to minimize the prospect of service variability. Likewise, a network service plan capable of avoiding the kinds of inherent variability associated with today's manifest carload network likely would need extensive additional resources to avoid

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metrics-based service “failures.” Those resources would come at a cost that must be borne by all shippers. *Id.* at ¶¶ 77-80.

And the more draconian the remedy, the more important these decisions become. Proposals by some Commenters to lengthen the duration of a switching order, for example, would raise the stakes of any potential “metric failure,” and thereby heighten the incentives to avoid those failures at the cost of a manifest carload network that functions well for all shippers. *See, e.g.,* Coalition OC at 47-48 (arguing for a 5-year minimum and a 10-year maximum). A short-term minor miss of a metric could result in a multi-year penalty. Proposed Rule at 29; *see also, e.g.,* Opening Comments of CSX Transportation, Inc. (“CSXT OC”) at 49-50 (proposing that Board re-evaluate the duration of switching prescriptions).

The Board should exercise great care to avoid imposing a new regulatory regime before it has thoroughly evaluated these potential harms. *See Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). The Board should not assume that these issues could adequately be addressed in individual follow-on “case-by-case” adjudication of switching order proceedings; indeed, the Board’s desire to streamline those proceedings as much as possible would seem to ensure that they will not provide an adequate forum for airing these concerns. *Cf. id.*, 135 S. Ct. at 2709 (“EPA argues that it need not consider cost when first considering whether to regulate power plants because it can consider cost later when deciding how much to regulate them Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at this stage.”). Accordingly, as the Board considers how to structure a rule for imposing switching orders as a remedy for service inadequacies, it should be mindful of the consequences for the rail network associated with the new incentives that any such rule will create.

D. Evidence of Normal Variability in Service Outcomes Should Lead the Board to Conduct a More Thorough Assessment of Real-World Facts and Data Before Implementing Any Final Switching Order Rule

The discussion above regarding the normal variability in rail service outcomes on a well-functioning manifest carload network warrants a more thorough data-based re-examination of (1) the proposed thresholds for triggering a switching order inquiry, (2) potential design features of the Proposed Rule that could advance its goal of identifying realistic instances of inadequate service, and (3) the need, in those instances where a metric failure is triggered, to allow for a broader array of “affirmative defenses to ensure a sufficient and fair opportunity for the railroad to establish the adequacy the service that it provided or the unlikelihood that a switching order would be beneficial.

Appropriately-Calibrated Thresholds

As should be apparent from the discussion above and in the Workman/Nelson R.V.S., real world facts and data concerning the normal range of variability on a well-functioning manifest carload network calls into question whether the thresholds in the Proposed Rule (in terms of percentage performance triggers of the time periods of aggregation or comparison) are set appropriately in order to achieve the Board’s goals without the adverse consequences of undue false positives.

That discussion should also make clear that reliance on the ability of railroads to provide a certain level of system-average performance is not a viable way to calibrate regulatory thresholds that would apply on a lane-by-lane basis.

CPKC believes that this evidence underscores the appropriateness of the Board conducting a further, more systematic, review of actual data regarding the function of manifest carload networks, perhaps through a Technical Conference process, with the aim of identifying

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the features of appropriate thresholds that would identify potential instances of service inadequacy without impugning broad swaths of normal railroad service.

Potential Additional Features to Improve the Functioning of the Proposed Rule against a Backdrop of Inherent Service Variability

In addition to the need to reevaluate how the proposed regulatory thresholds are designed in light of real-world data, there are a variety of ways that the design of the Proposed Rule could be improved to better align it with the Board's goals. First and foremost, CPKC supports proposals that would support constructive dialogue between railroad and customer about perceived service problems in lieu of litigation over metric failures. For example:

- CPKC endorses the proposal by Norfolk Southern ("NS") that a shipper provide advance notice of its perception that there is a service inadequacy to the railroad during the period upon which the petition is based, which would provide ample time for the parties to work the matter out privately before burdening the Board. Opening Comments of Norfolk Southern Railway Company ("NS OC") at 10.
- In the same vein, CPKC endorses the proposals of AAR and CSXT proposal that there be a cure period allowing the railroad to address any potential service inadequacy before the imposition of a switching order. Opening Comments of AAR ("AAR OC") at 75 & 86; CSXT OC at 35.

CPKC also supports adjustments that would better match any proposed switching remedy to the underlying service inadequacy. Such reforms could limit the incentives to exploit technical "metric violations" in situations where the underlying service is in the normal and adequate range. For example:

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- CPKC supports CSXT's proposal to more closely align the Proposed Rule's timing and duration of switching prescriptions to remedy needed to address a proven service problem. CSXT OC at 49.

Finally, CPKC sees ways that the structure of the metrics-based framework could be tweaked to improve its functioning across a range of different network circumstances. For example:

- One improvement discussed by Messrs. Workman and Nelson would be to revise the design of the proposed transit time threshold to take account of the likelihood that natural variations in transit times will general much greater percentage changes for shorter haul – or shorter transit – lanes. A routine 24-hour or greater delay – occasioned for example by a single missed connection – to a shipment scheduled to arrive in four days would exceed the 20-percent trigger for transit time degradation. Establishing a minimum absolute value for downward movement in in average transit times or perhaps 36 hours would go a long way towards addressing this flaw in the Proposed Rule, which would disproportionately affect carriers with smaller U.S. networks. Workman/Nelson R.V.S. at ¶¶ 38-39.
- Another improvement worthy of consideration is Canadian National's proposal that there be a limit to how far back a shipper can go to look for a 12-week period that trips a given metric. A well-functioning switching rule should support remedies for demonstrated service inadequacies rather than encouraging opportunistic fishing expeditions across the routine hills and valleys of past

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service performance in pursuit of “metric violations.” Opening Comments of Canadian National (“CN OC”) at 17.

A Full and Fair Opportunity to Refute a “Metric Failure”

Finally, and just as important as the need to set thresholds in the right place, regardless of where the Board ends up setting any triggering thresholds the Board should confirm that in any inquiry based on the regulatory thresholds railroads have a fair opportunity to present evidence that the metrics upon which the Board relies to open the inquiry do not represent a service inadequacy. *See also* AAR OC at 16.

Such an opportunity would need to encompass not only the “affirmative defenses” identified in the Proposed Rule, but also enable incumbent railroads to explain why the service levels experienced by a particular customer were within the normal and acceptable range of outcomes for the traffic at issue. That showing might include evidence of fluctuations in demand by the shipper as well as fluctuation in the other demands placed on the network *by other shippers*, along with a wide array of other factors. Workman/Nelson R.V.S. at ¶ 54.

The permissible scope of any such inquiry should also extend to facts bearing on whether a switching remedy would be beneficial, considering at minimum whether the “normal” service provided by an alternate carrier is really likely to be better and the impacts of the switching on the incumbent’s network and the service it is capable of providing to other shippers, as well as the impacts on other shippers served by the alternate carrier. Workman/Nelson R.V.S. at ¶¶ 57-60.

Unfortunately, the same Commenters that propose to tighten the thresholds for triggering a potential switching order support limitations on the right of railroads to defend against a claim of inadequate service. *See e.g.*, AFPM OC at 14-15. Other Commenters want to exclude

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evidence related to crew shortages generally, without regard to cause. *See, e.g.*, Opening Comments of the Private Railcar Food & Beverage Association (“PRFGA OC”) at 10 n.5; Essential Minerals OC at 9 n.5; NSSGA OC at 9-10 & n.4. Limiting the Board’s ability to truly understand the reasons for normal levels of service variability – or in some cases perhaps the root causes of a temporary shortcoming in the level of service a railroad is able to provide to certain shippers or in certain geographies – would interfere with the Proposed Rule’s ability to serve the public interest by remedying only those situations that represent true service inadequacies.

III. THE COMMENTS CONFIRM THE INAPPROPRIATENESS OF ESTABLISHING ANY FMLM METRIC IN THIS PROCEEDING

Many of the Comments on the “Industry Spot and Pull” (“ISP”) metric in the Board’s Proposed Rule highlight reasons why it would be inappropriate for the Board to include any regulation of first-mile/last-mile (“FMLM”) service in this proceeding. In addition to the fact that a switching order is incapable of remedying supposed inadequacies in the incumbent’s switching service (*see, e.g.*, AAR OC at 57-58), first-mile/last-mile services are too complex and require too much on-the-ground operating discretion and flexibility to warrant regulation via a single one-size-fits all metric as proposed in this proceeding. If it proceeds to impose new regulations governing such services, it should do so – if at all – via a proceeding that could examine in appropriate detail all of the complexities and potential adverse impacts associated with any such proposal.

As Messrs. Workman and Nelson explain, the functions associated with providing FMLM service call for a high degree of flexibility and adaptability in order to address local conditions and the needs of the customer. Those functions tend to involve significant day-to-day interaction between the customer and on-the-ground railroad operating personnel about such matters as the customer’s varying shipping volumes, work schedules, and plant conditions, with

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a concomitantly greater role for local operating discretion to adapt to day-to-day circumstances affecting each customer's local service. *Workman/Nelson R.V.S.* at ¶¶ 61-62. FMLM service is dependent on many factors uniquely within the control of the customer: when can the facility be accessed, what number of empty cars are needed for loading and on what cadence, when does the customer notify the railroad that loaded cars are available, what number of cars are made available at a given time, and so on. *Id.* at ¶ 61. Equally important is the fact that local operating personnel must have discretion to manage the sometimes competing demands of the various customers served by local switch crews in a terminal area because that work is inherently complex and challenging, and requires adjustments to operations to take account of day-by-day changes in circumstances relating to the needs of every customer in the terminal. *Id.* at ¶¶ 62-63.

Against this backdrop, the proposals of many Commenters highlight the inappropriateness of trying to regulate FMLM service in this proceeding using a one-size-fits-all metrics-based approach. Those Commenters propose an array of modifications to the Proposed Rule that would magnify the degree to which the Rule would effectively micro-manage, and in the process likely rigidify, the way railroads must provide FMLM service, in direct contravention of how local service functions best at meeting evolving and fluctuating customer needs.⁸ Calls to provide significant advance notice of changes in the service windows or to restrict adjustments to the days of service to reflect fluctuation in shipper demand are examples of regulatory rules that would get in the way of the flexibility that local on-the-ground operating employees – yardmasters, trainmasters, train crews, etc. – need to have to get the job done in the most efficient and effective way possible. *Workman/Nelson R.V.S.* at ¶ 63.

⁸ See, e.g., Coalition OC at 35-44; AFPM OC at 12-13; NSSGA OC at 8-9.

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IV. PROPOSED EXPANSIONS OF THE BOARD’S RULE ARE INAPPROPRIATE AND WOULD BE HARMFUL

A. The Board May Not Expand the Rule’s Scope to Encompass Traffic Under Contract

A number of Commenters suggest that the Board could and should permit application of the Proposed Rule to contract traffic. *See e.g.*, Coalition OC at 15; AFPM OC at 15; Opening Comments of National Mining Association (“NMA OC”) at 7. Some of these Commenters appear to contend that contracts are no obstacle to the Board’s regulation if a shipper moving traffic under contract would have contractual freedom to divert traffic to an alternative rail carrier if a new switching option were created. Coalition OC at 15. Others argue that the Board could require railroads to provide performance data to individual shippers about the service that is provided pursuant to transportation contracts. *See, e.g.*, Coalition OC at 13; FRCA OC at 4. Yet other commenters suggest that the Board should permit the use of performance data from a period in which a contract was in place to evaluate whether the performance metric triggers had previously been tripped the moment a customer is no longer under contract. *See e.g.*, Coalition OC at 10; AFPM OC at 16; FRCA OC at 4; Opening Comments of Western Coal Traffic League (“WCTL OC”) at 4-5. The law allows none of these options, and none would make sense as a matter of sound regulatory policy.

Where a Section 10709 contract exists, transportation services provided under that contract are not subject to the Board’s jurisdiction. 49 U.S.C. 10709(c); *see also Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 976 (1998) (“As for transportation that is provided

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under a rail transportation contract . . . we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract.”).⁹

Additionally, where a Section 10709 contract exists, the railroad’s duties are limited to those set forth in the contract. 49 U.S.C. § 10709(b) (“A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.”). The Board may not impose any further obligation on either party, whether or not the contract expressly covers a particular topic. All of the terms that govern the parties’ relationship are in the contract, including the presence, absence, or nature of any service commitment or commitment to ship. The Board cannot create new options under the contract that did not exist at the time in which the parties negotiated and entered into the contract. *See* 49 U.S.C. § 10709(b).

The Board also may not impose any remedy for performance under a contract. Instead, “[t]he exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.” 49 U.S.C. § 10907(c)(2).

Thus application of any aspect of the Proposed Rule to contract traffic would be unlawful: the Board may not scrutinize service performance provided under a contract for

⁹ *Fayus Enters. v. BNSF Ry.*, 602 F.3d 444 (D.C. Cir. 2010); *see also, e.g., Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, Docket No. 42031 (STB served May 26, 2000, and May 25, 2001) (Parrish); *Cross Oil Refining & Marketing, Inc. v. Union Pacific R.R.*, Finance Docket No. 33582 (STB served Oct. 27, 1998).

The Board has found only one instance, not implicated here and not reviewed by an appellate court, in which it could act despite the existence of a rail transportation contract – “where no transportation [wa]s being provided,” which would plainly not be the case under the Proposed Rule. *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 976 (1998). Even then, the Board noted that such a determination of whether Board action was needed so that “traffic can move” was “best left to a case-by-case examination and, again, our assertion of jurisdiction in any specific case will be subject to judicial review.” *Id.*

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purposes of assessing whether to provide a switching remedy, nor may the Board establish new regulatory obligations involving the delivery of customer-specific data regarding performance under a contract.

Even if the Board had the power to make aspects of the Proposed Rule applicable to contract traffic, doing so would be poor regulatory policy. The Board would effectively be inserting a new set of substantive provisions into every contract. Indeed some Commenters acknowledge this fact. The Freight Rail Customer Alliance, for example, suggests that the “NPRM proposal may become a baseline against which parties negotiate contracts.” FRCA OC at 4; *see also* AFPM OC at 15-16. Transportation contracts, like all private contracts, are negotiated against the backdrop of all of the market and regulatory circumstances and entail a mutuality of commitment. The potential for a switching order during the term of a contract – or a proceeding to establish one that would become effective at the contract’s expiration – would require that the parties negotiate over the potential implications of a switching order, thereby making it harder for railroads and shippers to enter into mutually-beneficial contractual arrangements in the first place, contrary to Congress’ desire to encourage such contracting.

The Coalition’s proposed work-around – *i.e.*, the suggestion that the Board merely establish switching during the pendency of a contract and then let the shipper use whatever contractual freedom it might have to shift volumes to an alternate carrier (Coalition OC at 10-12; *see also* NMA OC at 7 – is equally invalid. The proposed switching in this instance would be an impermissible remedy imposed by the Board based on service outcomes involving traffic subject to a transportation contract, and Congress has expressly ruled out providing any such remedy.

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49 U.S.C. § 10907(c)(2).¹⁰ There can be no doubt that reliance on evidence of service performance for traffic moving under a transportation contract to enter an order imposing on the carrier new reciprocal switching access by an alternate carrier would constitute regulation of the contract transportation by creating an extra-contractual remedy.¹¹ The fact that the shipper might not be prohibited by contract from availing itself of the potential benefits of that remedy *underscores rather than avoids* the fact of the regulation. In short, if the shipper's poor-performing transportation was under contract, it cannot be the basis for a forced switching remedy without "gutting" the statute's removal of contract transportation from the Board's regulatory authority.¹²

In addition, it would be bad policy to superimpose on transportation provided under contract whatever service performance thresholds the Board might establish in this proceeding. Service provided under contract is subject to all the terms and conditions of the contract, which

¹⁰ See also *Western Resources v. Union Pac. R.R.*, 2002 U.S. Dist. LEXIS 12422 (D. Kan. 2002) (noting that (1) "Congressional mandate precluding the STB from construing rail transportation contracts, breaches, and remedies" and (2) citing *Cleaves v. Thompson*, 122 Kan. 43, 45, 251 P. 429, 430 (1926) for the proposition that "a party seeking remedy for the breach of a contract has "two remedies, one legal and one equitable. He may affirm the contract and sue for damages, or he may disaffirm and sue for rescission").

¹¹ *Entergy Servs. v. Union Pac. R.R.*, 99 F. Supp. 2d 1080 (D. Neb. 2000) ("The parties in *Burlington Northern R.R. Co. v. Surface Transp. Bd.* chose not to enter into a renewed contract when the contract term expired, and in effect, elected to remove themselves from contract law and re-enter the arena governed by the Interstate Commerce Act. [Contrastingly], both Entergy and UP chose to be within contract law when it entered into these long-term contracts in 1983. They have not decided now to exclude themselves from contract coverage. Rather, in the instant situation, the possible cancellation of the contract comes about only as a result of the Court determining a proper remedy for a breach of contract, and as a result, cancellation of the contract is wound up with and inseparable from the Court performing its function of resolving breach of contract questions.").

¹² *In re Fuel Surcharge Antitrust Lit.*, 593 F. Supp. 2d 29 (D.D.C. 2008) ("Ensured enforcement of contracts is a basic premise of our economic system. But plaintiffs are not seeking contractual remedies here. Plaintiffs' desired remedies, through their state antitrust, consumer protection and unjust enrichment claims, are extra-contractual. To allow shippers access to extra-contractual state law remedies against a railroad, simply because they have a contract with the railroad, would gut the purposes of ICCTA.")

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in some cases includes specific service terms. The nature – or even the absence – of such service terms is the product of negotiations and the result of a consensual and necessarily win-win exchange of consideration. In arriving at that bargain, a shipper may well choose to do without express guarantees relating to line-haul service in exchange for other things that mean more to the shipper, such as more frequent switching of the shipper’s plant. Or it might simply choose to address the level of line haul service it has bargained for in ways that diverge from the metrics-based approach of the proposed Rule. In any of these contexts, it would do violence to the parties’ bargain to superimpose a top-down regulation of the service that the railroad provides to the customer.

And for the same reason, even once the contract expires, it would be inappropriate to compare post-termination service with service provided while the contract was in place: such a comparison would inherently involve a comparison of apples with oranges. Service provided while a contract is in force – particularly where the contract involved commitments regarding premium service levels – is not a valid reference point for service provided when neither party has any contractual obligations and only regulatory obligations obtain.

B. The Board Should Not Expand the Rule’s Scope to Encompass Exempt Traffic Absent a Reasoned and Context-Specific Revocation of a Governing Exemption

There is no record in this proceeding that would support a revocation of any exemptions, despite the requests by a few Commenters. *See* FRCA OC at 4; Opening Comments of Portland Cement Association (“PCA OC”) at 9. Rather, the Board should continue its longstanding policy of evaluating whether an exemption requires revocation based on a case-by-case analysis.

Congress has encouraged the Board, “to the maximum extent consistent” with the statute, to exempt rail traffic from any or all of the governing statutory provisions insofar as compliance

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with those provisions “is not necessary to carry out the transportation policy” and the “application in whole or in part of the provision[s] is not needed to protect shippers from the abuse of market power.” 49 U.S.C. § 10502(a)(1)-(2). Consistent with its statutory mission, the agency has exempted certain traffic from regulation, and it should not expand the Proposed Rule to encompass that traffic.

Section 10502 authorizes the Board to “revoke an exemption, to the extent it specifies,” when it concludes that revocation is “necessary to carry out the transportation policy of section 10101.” 49 U.S.C. § 10502(d). To support such action, however, the Board must make these specific findings based on an adequate factual record. *See, e.g., Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte No. 704 (Sub-No. 1) (STB served Mar. 23, 2016). Where the Board has adopted an exemption by notice and comment rulemaking, it can only revoke the exemption wholesale by notice and comment rulemaking. *See Exclusion of Demurrage Regulation from Certain Class Exemptions*, Ex Parte 760 (STB served Feb. 28, 2020). Otherwise, the Board can revoke the exemption only with specific findings establishing that revocation is necessary to carry out the rail transportation policy in light of the facts of a specific case.¹³

There is nothing in this record of this proceeding to support the wholesale revocation of any exemption – even if such a revocation had been properly noticed. There is no data or other evidence to support a conclusion that revocation as to any entire class of traffic is “necessary to carry out the transportation policy of section 10101” under the tests established by the Board and

¹³ *E.g., Sanimax USA, LLC v. Union Pac. R.R.*, Docket NOR 42171 (STB served Feb. 25, 2022) at 4; *Pyco Indus. – Alt. Rail Serv. – S. Plains Switching*, Finance Docket No. 34889 (STB served Nov. 21, 2006) at 5-6; *G&T Terminal Packaging Co. v. Consol. Rail Corp.*, 830 F.2d 1230, 1235 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *see also WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, Docket NOR 42092 (STB served Feb. 17, 2006) (“*WTL Rail Corp.*”) at 3.

the courts. The Board would be required to engage in a much broader inquiry into competitive and other conditions to determine whether there is adequate justification to revoke a specific class exemption, if any. Such an inquiry would need to examine the specific commodity and the current market conditions relating to transportation of that commodity, and support a finding of such widespread impact to justify revoking the entire exemption rather than looking at case-by-case requests to revoke the exemption based on specific facts in specific situations. This record is devoid of any of that information.

Consistent with statute and policy favoring market forces and not regulation, CPKC urges the Board to examine whether revocation is appropriate on a case-by-case basis, in the context of a specific alleged service failure. In other words, the existence of an exemption need not prohibit fair inquiry. But the need for a revocation would have to be demonstrated in the specific context of the complaint. *See, e.g., WTL Rail Corp.* at 37.

And the need for revocation could not be justified based solely on an alleged service failure that flowed from the normal operation of the carrier's manifest carload network, or applied retroactively to regulate that service prior to the effectiveness of the revocation. Were a carrier exposed to potential switching orders based on the service outcomes for a shipper's exempt traffic during the period when an exemption is in force, that traffic would be subject to regulation in very real terms, effectively amounting to the de facto revocation of the exemption sub silentio, contrary to law.

C. The Board Should Not Attempt to Expand the Rule's Scope Outside Terminal Areas

Some Commenters ask the Board to expand the Proposed Rule to allow reciprocal switching beyond the limits of a terminal area. *See, e.g.,* Essential Minerals OC at 9-10 (arguing for expansion to rural areas); NGFA OC at 8-9 (same); *see also* WCTL OC at 9-10 (arguing for

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expansion to a “reasonable distance outside terminal”); PCA OC at 13-14 (same); Olin OC at 4-5 (same). Such an expansion would exceed the Board’s statutory authority for reasons set forth in AAR’s Reply Comments. Equally problematic, so-called “switching” orders imposed outside terminal areas would effectively require the redesign of railroads’ manifest carload networks, with serious operational consequences for all of the customers who are served by those networks.

As the AAR explains in detail (Reply Comments at 6-18), Section 11102 demonstrates that Congress did not give the Board the authority to expand forced switching outside a terminal area. In Section 11102(a), Congress gave the Board the authority to order one carrier to allow its “terminal facilities, including mainline tracks for a reasonable distance outside a terminal” to be “used by another rail carrier.” 49 U.S.C. § 11102(a) (emphasis added). This provision is inapplicable to reciprocal switching. The provision that authorizes the Board to order reciprocal switching – Section 11102(c) – did not include similar language.¹⁴ Where Congress includes particular language in one section of a statute, but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.¹⁵

As Messrs. Workman and Nelson explain, there are also good practical reasons for limiting the scope of potential reciprocal switching orders to terminal areas where there is routine exchange of railcars between carriers using terminal facilities already in place. Outside of terminals, the alternate carrier would not have yards or other facilities capable of receiving the

¹⁴ The limited scope of Section 11102(c) has been affirmed by courts as well. *See Central States Enterprises, Inc. v. ICC*, 780 F.2d 664, 674-80 (1985).

¹⁵ *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also, e.g., Nat’l Fed. of Ind. Business v. Sebelius*, 132 S. Ct. 2566, 2583 (2012); *Pacific Operators Offshore, Ltd. v. Valladolid*, 565 U.S. 207, 216 (2012); *Dean v. United States*, 556 U.S. 568, 573 (2009).

railcars, and the incumbent would not have the local switching services supporting the delivery of such cars. Instead, any new “switching” order would effectively require the redesign of both carriers’ manifest carload networks. For example, the incumbent would have to design a new service that moved the traffic via its own line-haul service for some distance to a new point of interchange with the alternate carrier. Such a requirement would fundamentally disrupt service patterns and require investment in new resources (local train service patterns, new yard/interchange trackage, etc.). *See Workman/Nelson R.V.S. at ¶¶ 68-70.* Using real-world facts, Messrs. Workman and Nelson demonstrate how a mandatory service redesign would impose significant burdens on CPKC’s ability to serve all of its manifest carload customers. *Id.* at ¶ 70.

D. The Board Should Not Expand the Rule’s Scope to Encompass Unit Train Service

A few Commenters seek to have the Board reconsider its thoughtful and proper exclusion of unit trains from the Proposed Rule. *See e.g., FRCA OC at 3; NGFA OC at 12.* They provide no support for such an expansion beyond their own desire to benefit from expanded Board regulation.

The Board should maintain the exclusion of unit train operations from the Proposed Rule. As Messrs. Workman and Nelson explain, the Board’s metrics-based approach is ill-suited to unit train operations, which are fundamentally different from manifest carload operations. Unit trains are operated in response to customer demand and customized in terms of equipment supply, origin and destination, staging en route to accommodate loading and unloading cadence, and many more operational features. *Workman/Nelson R.V.S. at ¶ 71.* As a result, they are not part of the railroad’s scheduled manifest carload network design. While some unit trains involve fixed equipment sets that cycle routinely between a given origin (e.g., a coal mine) and a given

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destination (e.g., a utility or bulk export facility), many (perhaps most) do not, as they exist to serve episodic and varying shipper demands. *Id.* at ¶¶ 72-74. The Board correctly acknowledges these operational distinctions. Proposed Rule at 16.

Any attempt to overlay the Board’s proposed metrics on unit train operations would be inappropriate given this context. Transit time comparisons, estimated times of arrival, and industry spot and pull metrics, if applicable at all, would provide relatively little valuable information about the railroad’s success in meeting the needs of specific shippers and specific shipments via unit train operation. Some Commenters appear to recognize that the Board’s framework would not be appropriate for unit trains, for which arrival day or time is unlikely to be the most critical performance measure. For example, FRCA (along with the National Coal Transportation Association) does not even argue for application of these metrics and instead seeks for expansion of the Proposed Rule to address “shipper desires to increase deliveries” and trainset availability. FRCA OC at 3.

E. The Board Should Not Apply the Rule to Interline Traffic

Many Commenters appear to assume that the Board’s Proposed Rule should apply as is to interline traffic, but none of them address the complexities that would be associated with doing so. *See, e.g.*, Coalition OC, Proposed Regulation Amendments at § 1145.1; API OC at 4; AFPM OC at 10.

CPKC urges the Board not to apply the Proposed Rule to interline traffic. The Proposed Rule is ill-suited to address manifest carload services that are dependent on connections involving multiple independent rail carriers, or even the portion of a carrier’s movement on its

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own network to or from the interchange.¹⁶ As Messrs. Workman and Nelson explain with reference to real-world facts about how manifest carload networks function, interline connections and the required interchange activities can introduce considerably greater variability than the Board's OETA and transit time metrics are not designed to take into account. That variability arises both from the need to make connections to or from another carrier – which is necessarily limited by the railroads' operational designs for serving the interchange and the physical constraints of the interchange facilities themselves among other factors – as well as unplanned fluctuations in the volumes of traffic delivered from a connecting carrier in interchange. The frequency of interchange arrangements and the dwell associated with the delivering carrier's placement of cars on an interchange track and the receiving carrier's pick up of those cars, not to mention placement of them on an outbound train, introduce both additional planned and unplanned dwell. Workman/Nelson R.V.S. at ¶¶ 64-66. Many of CPKC's interchanges, for example are relatively low-density and the arrangements between connecting carriers provide for less-than-daily service. These variations in performance are magnified by the fact that the receiving railroad has no control – and no real advance notice or ability to plan for – variations in the day-to-day fluctuations in the volume of traffic received in interchange. *Id.* at ¶ 66.

Addressing interline traffic would at minimum require the Board to adjust its thresholds to account for the much greater variability associated with interline connections. The Board should do so, if at all, only after a more thorough examination of data through a Technical Conference or other process.

¹⁶ For purposes of this rule, CPKC would anticipate that any metrics the Board ultimately adopts would apply to CPKC's entire U.S. network on a single-system basis.

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V. THE BOARD CANNOT ADDRESS THE TERMS OF A RECIPROCAL SWITCH AGREEMENT ABSENT INABILITY OF THE RAILROADS TO AGREE

Several Commenters have asked the Board to address the terms under which railroads must agree if the Board imposes forced switching. *See, e.g.*, Coalition OC at 59-60. Doing so would exceed the Board's authority. Section 11102(c)(1) expressly provides that, if the Board orders forced switching arrangements, "rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement. . . ." 49 U.S.C. § 11102(c)(1). The Board may "establish such conditions and compensation" only "if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time." *Id.* In short, the Board has no power to establish the conditions and compensation applicable to a forced switching order unless the rail carriers involved are unable to reach agreement within a reasonable period of time after the Board issues an order requiring forced switching.

CONCLUSION

CPKC urges the Board to give serious consideration to the kind of real-world evidence presented with these Reply Comments as it evaluates potential changes to the Proposed Rule. The Board should implement a Technical Conference or other process for undertaking a more systematic evaluation of real world lane-specific service data before implementing a rule that could have sweeping consequences for the railroad operations and the incentives railroads confront in designing services that meet shipper needs. Among the changes that the Board *should consider* making to the Proposed Rule is to modify the threshold percentage deterioration in transit time that would trigger a potential switching order by establishing a minimum absolute value of deterioration – perhaps 36 hours on average – necessary to trigger further inquiry.

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The Board should also recognize that first-mile/last-mile services are too complex and require too much on-the-ground operating discretion and flexibility to warrant regulation via a single one-size-fits all metric as proposed in this proceeding. If it proceeds to impose new regulations governing such services, it should do so – if at all – via a proceeding that could examine in appropriate detail all of the complexities and potential adverse impacts associated with any such proposal.

Finally, the Board should avoid calls to broaden the scope of the Proposed Rule.

Respectfully submitted,



CANADIAN PACIFIC KANSAS CITY

Cassandra P. Quach
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Cassandra.Quach@cpkr.com
Telephone: (888) 333-6370

David C. Reeves
427 West 12th Street
Kansas City, MO 64105-1403
Email: David.Reeves@cpkr.com
Telephone: (816) 983-1387

Charles W. Webster
11306 Franklin Avenue
Franklin Park, IL 60131
Email: Charles.Webster@cpkr.com
Telephone: (630) 860-4161

David L. Meyer

LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

John M. Scheib
GENTRY LOCKE ATTORNEYS
101 West Main Street
Norfolk, VA 23510
Email: scheib@gentrylocke.com
Telephone: (757) 916-3511

Attorneys for CPKC

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Reciprocal Switching for Inadequate Service

REPLY VERIFIED STATEMENT

OF

TODD WORKMAN AND BRIAN NELSON

REDACTED PUBLIC RECORD VERSION

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REPLY VERIFIED STATEMENT OF TODD WORKMAN AND BRIAN NELSON

1. My name is Todd Workman. I serve as CPKC's Managing Director of Resource Planning, Business Integration and Operations Technology. I have been a qualified locomotive engineer and have held other roles in my railroad career, including Director of Operations Analysis and Manager of Customer Service. This experience has given me extensive knowledge of railroading, network design, performance measurement, and how we monitor the health of our network to provide rail service to a wide array of customers.

2. My name is Brian Nelson. I serve as CPKC's Managing Director Service Design. I have held other roles in my 26-year railroad career at CPKC and other Class 1 railroads, including Brakeman, Conductor, Operations Manager, and various other roles in Service Design.

3. We have reviewed the Surface Transportation Board's proposed rule in Docket No. EP 711 (Sub-No. 2) (the "Proposed Rule") and the Comments submitted by various interested parties on that proposal. We have been asked to evaluate certain features of the Proposed Rule, and the proposed modifications suggested by certain Commenters, in light of how CPKC's manifest carload network is designed and delivers quality service outcomes to railroad customers.

4. In this statement we explain the following:

- The Board should reject calls by numerous Commenters to revise the thresholds in a direction that would make it more likely that normal railroad common carrier service outcomes would trigger a potential switching order. Those calls come in multiple forms, including both changes in the thresholds themselves and a shortening of the period of

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comparison. As we explain in this statement, variability in service outcomes (over time, relative to estimated times of arrival, etc.), is a *desirable feature* of flexible network design. Even the thresholds established by the Board's Proposed Rule are likely to trigger potential switching order adjudications based on entirely normal fluctuations in outcomes on a railroad's manifest carload network.

- Second, wherever the Board ultimately decides to set the thresholds for triggering a potential switching order case, the Board should allow incumbent railroads to demonstrate that the customer's service outcomes were within the range of normal without having to show a particularized "excuse" falling into one of the narrow categories established by the Board's proposed affirmative defenses.
- Third, several Commenters propose changes to the Board's proposed "industry spot and pull" metric that would further micromanage the way railroads provide first-mile, last-mile service. These comments underscore the inappropriateness of regulating first-mile, last-mile service at all in this proceeding. Nowhere is the need for a railroad's flexibility greater, and nowhere would the imposition of rigid service standards be more destructive of railroads' ability to meet the needs of all customers.
- Fourth, we address Comments seeking to expand the reach of the Proposed Rule –into rural areas outside terminals and to unit train service. We do not address the legal issues associated with these proposals, but instead focus on the practical implications. The proposed expansions

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would be unwarranted and do harm to railroads' ability to serve customers effectively.

- Finally, we close by explaining how the Board's effort to provide shippers with remedies for extreme adverse service outcomes could, if not carefully confined to that context, have the undesirable effect of regulating service in a way that makes it harder for railroads to design and execute network operations that facilitate service for a broad array of differently situated customers. Rules that overemphasize the need for precision and unduly penalize variability could inadvertently create incentives for railroads to steer clear of traffic that does not neatly fit into the network's design, discouraging efforts to attract new traffic to the rails. They might also make it more difficult to provide consistent service for existing customers; impede efforts to provide customers with estimated times of arrival that are meaningful and linked to the railroad's actual operating plan, lest the railroad be penalized for underperforming those estimates; and impose on customers the cost of over-resourcing the railroad to eliminate any possibility of service failure.

I. THE BOARD'S PROPOSED "THRESHOLDS" FOR USING METRICS TO IDENTIFY POTENTIALLY INADEQUATE SERVICE SHOULD TAKE INTO ACCOUNT THE INTRINSIC VARIABILITY IN SERVICE OUTCOMES ON A MANIFEST CARLOAD RAIL NETWORK LIKE CPKC'S

5. Several Commenters propose adjustments to the thresholds in the Proposed Rule for triggering a potential switching order. We focus here on the metrics relating to line-haul service – OETA and transit times – and discuss the ISP metric in Section III below.

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6. Some propose to require higher levels of service (*e.g.*, 90 percent on-time instead of 60 percent, or 15 percent increase in transit times instead of 20 or 25 percent). Others propose to examine the metrics over a shorter period of time (*e.g.*, six weeks instead of 12), which would have the effect of highlighting shorter-term fluctuations in metric-based performance measures.

7. None of these proposals is grounded in any actual data regarding what levels of service – or what fluctuations in service levels relative to arrival-time estimates or prior-year levels – is inadequate or abnormal. As we explain in this Section, even the thresholds set forth in the Proposed Rule would apply too broadly, calling into question the adequacy of service outcomes that are well within the range of normal on a well-performing manifest carload network. Like the thresholds in the Proposed Rule, all of the proposals for more stringent thresholds appear to be grounded in what railroads are *capable of achieving* when the performance outcomes for large volumes of traffic are averaged together. This is a fundamentally misguided way to assess the appropriate degree of variability in service outcomes for a particular customer in a particular lane. The ability to achieve (for example) 80 percent on-time performance for a large body of manifest carload traffic does not imply that every individual customer or lane will achieve that level most of the time. As we explain in the next section, the way well-performing manifest carload networks are designed to serve the diverse and variable needs of a large number of customers on a shared network virtually assures that individual outcomes will vary, often a great deal.

A. Variability in Service Outcomes Is a Necessary Aspect of a Well-Functioning Manifest Carload Rail Network Serving Thousands of Different Customers Efficiently and Effectively

8. CPKC has been a leader in the rail industry in implementing advanced service design innovations. CPKC's efforts are guided by the goal of operating a network that is as

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efficient and customer-focused as possible. To achieve that goal, we strive to maximize long-haul blocking, minimize car handlings and switches, and minimize the number of times a car must be handled in a yard. Daily, senior management at CPKC monitor the health of the network using a variety of reports and analytical tools. That review focuses on the fluidity and good functioning of the network as a whole rather than the performance realized by the thousands of individual shippers relating to movements between thousands of individual origin and destination pairs. That is because network health is paramount to all customers and is the most effective way to provide the best overall service levels to the entire universe of CPKC customers. A healthy network gives us the best opportunity to provide quality service that meets the needs of as many customers possible.

9. Metrics like those the Board proposes to use in this proceeding (on-time performance, transit times, and ISP success rates) are certainly one way to judge the effectiveness of CPKC's overall network operations. Those metrics can be relevant to the experience that the network provides to individual shippers. However, these metrics represent only a fraction of the key measures needed to fully appreciate the health of a railway network. Other metrics we commonly use to manage network performance include (among many others):

- On-time train performance and train speed;
- Railcar dwell, velocity and the number of railcars active on line;
- Locomotive availability, productivity, and the number of locomotives used in operating the network;
- Crew availability and utilization; and
- Train productivity, average length, and weight.

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Whether for the railroad's own network management or for regulatory purposes under the Proposed Rule or otherwise, it is not possible to focus on any one of these metrics to the exclusion of any other in developing an accurate and meaningful assessment of railroad service performance.

10. Additionally, great care must be taken in interpreting system-wide averages for these metrics. The “average” is not what any shipper receives. Instead, for reasons we discuss below, not only is each individual shipper and each individual shipper lane differently situated with respect to the precise way in which the rail network is designed to deliver the shipment from origin to destination, but the outcomes experienced by the shipper will inevitably vary – often a great deal – from day to day, week to week, and month to month for a host of reasons.

11. CPKC's operational success in recent years owes a lot to its embrace and sound implementation of precision scheduled railroading (“PSR”) principles. Those principles are often misunderstood, however. A manifest carload network that adheres to PSR principles *does not* mean that every carload of traffic will move across the network in accord with a “precise schedule,” such that every delay or late arrival can be attributed to some sort of operational failure. To the contrary. Adhering to PSR principles means that the network resources (locomotives, crews, track infrastructure, equipment) assigned to move each carload are identified and planned for in advance, so that each carload is assigned a specific trip plan for its movement across the network from origin to destination.

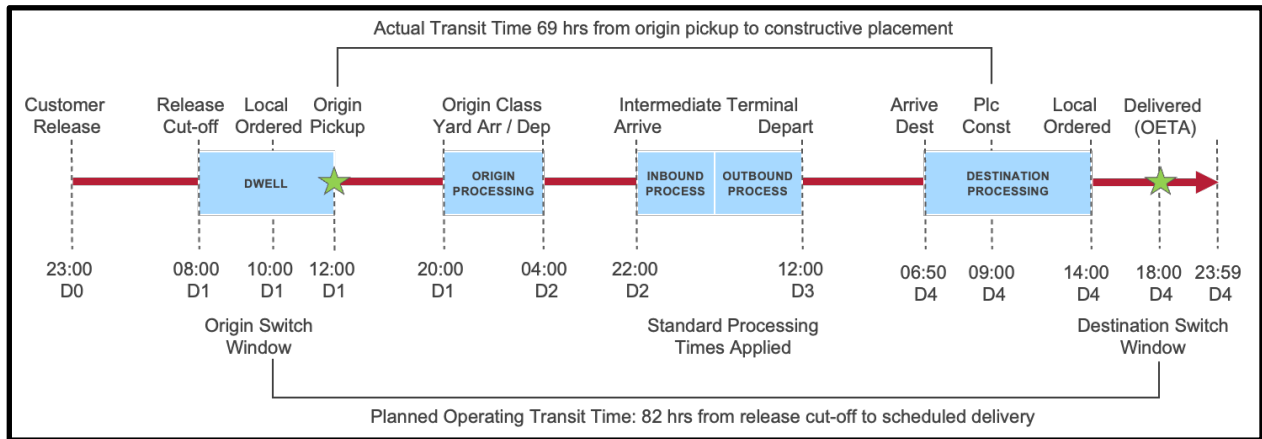
12. But the manifest carload network that serves each customer is designed and resourced to serve not just one customer but a wide array of customers. On CPKC, for example, a typical manifest train in the United States carries shipments for 40 or more different customers moving to an even greater array of destinations. The same is true of every other network

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element: local switching service, local trains that feed traffic to intermediate classification yards, the yards themselves, the blocks of cars that the yards make up, and so on. Each and every one of these elements is part of a complex design the goal of which is to serve not just one customer's needs but the needs of every customer who makes use of that network element.

13. When CPKC builds trip plans for an individual customer's shipments, it essentially maps the customer's needs against the network elements that were put in place to serve the overall body of manifest (and other) traffic on the network. Those trip plans generally identify (1) the schedule of the local switching service that will pick up the car from the customer's facility, (2) the work and time required for processing in the local serving yard and to build that car into a group (or "block") with other cars heading in the same direction, (3) the identity and schedule of the road train that will handle the block and move it in the direction of the next network node – likely a classification yard, where (4) the car will be processed, or "classified," into a different block with other cars headed for the same intermediate or final destination; (5) the time required at the classification yard to make up the new block and have that block picked up by another road train heading in the direction of the ultimate destination, and so on. Ultimately, the shipment reaches the destination terminal, where it is handled for the final time and moved to the customer or to a connecting carrier at an interchange point.

FIGURE 1
THE ANATOMY OF A TRIP PLAN



14. Figure 1 above illustrates the components of a CPKC manifest trip plan. The plan starts with customer release, which is defined against a cut-off time. In order to be handled on the next scheduled service the car must be released prior to the release cut-off. The next event is the ordering of the local train that is scheduled to pick up the customer's shipment. This assigns a crew to the local train. Once the local is operating the next event scheduled is the actual pick up, which can occur at any time during the local's operating window but which has a specific time set for each customer the local serves. This is followed by processing in the origin classification yard, and then departure. Once en-route the car may be handled at one or more intermediate terminals where it will be processed inbound, and classified or processed outbound to the next scheduled train which handles the block to which the car is classified. On arrival at destination the car may be constructively placed if the customer cannot receive it immediately or on their next scheduled service. Finally, the shipment is delivered to the receiver on the destination local train.

15. This linear view of the trip plan for an individual carload shipment across the network may make it appear that the railroad runs in accord with a highly defined schedule. However, that perception would be oversimplified. In fact, there is a great deal of flexibility

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built into the network design in order to accommodate variability in a host of factors that influence how the network functions in practice, so that the network can meet the needs of all of the customers making use of it. The result is that actual service outcomes are far more variable than this linear “trip plan” might suggest.

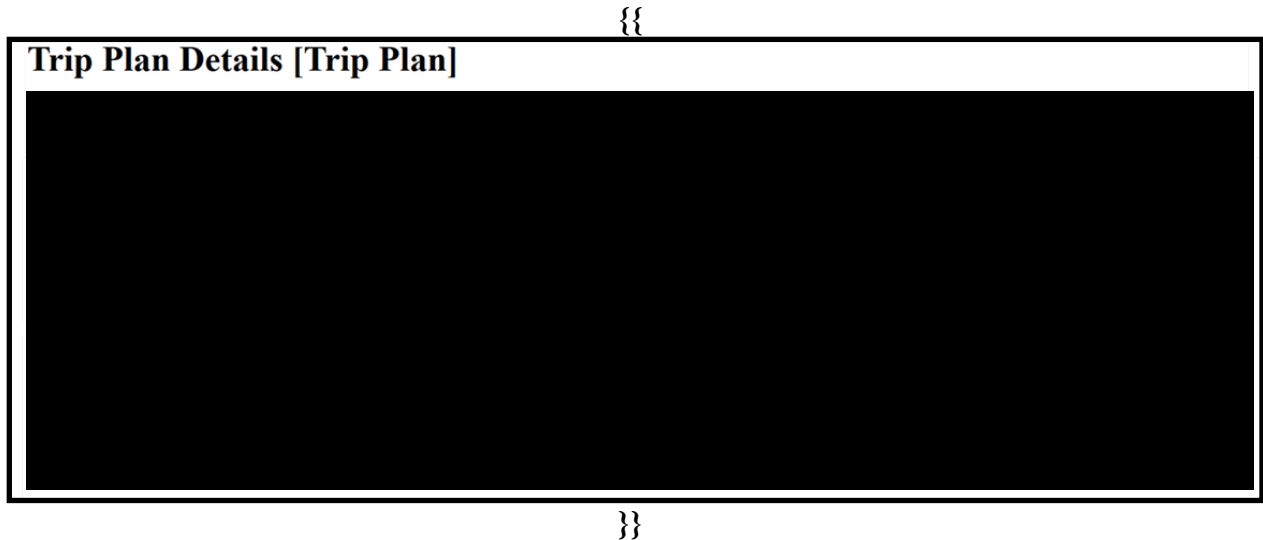
16. First, railroading is an outdoor activity and thus subject to innumerable potential disruptions – from weather events to equipment breakdowns to maintenance outages. Unplanned delays anywhere on the network can ripple outwards, leading to delayed connections or congestion or the unavailability of critical resources far downstream.

17. Second, there is inherent *planned* variation in transit time associated simply with the timing of the release of the railcar, which signifies the beginning of its trip. The two trip plan designs set forth in Figure 2 below illustrate the point with a real-world example. Figure 2 shows the variation in *planned* trip time for a movement from the same origin to the same destination depending on when the railcar is released by the customer into the CPKC network (and holding all other factors constant). The example is taken directly from CPKC’s network design planning system for a car moving from {{[REDACTED]}} to {{[REDACTED]}} in Chicago, in a lane that we will feature later on in our presentation. In the first instance (the top panel), the car is picked up from the customer on Sunday, December 10 at 6:15 CT. (The trip plan in the upper panel of Figure 2 shows a trip start time of Saturday 12/9 at 12:00, and the trip time calculations shown also include an additional five hours cut off prior to the trip start time.) If the shipment makes all planned connections without delay, its transit time is {{[REDACTED]}}. In the second instance, when the car is released a day later, and the trip starts on Monday December 11 at 6:15 CT, the planned transit time is only {{[REDACTED]}} This example

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represents a relatively simple manifest trip plan with only two processing events required (at La Crosse and Bensenville). Some trip plans involve as many as three or more processing events, adding to the complexity.

FIGURE 2
TRIP PLAN DETAIL FOR CAR MOVING FROM {{HASTINGS TO CLEARING YARD}}



18. The difference here stems from a feature of CPKC's network design applicable to this geography. Most traffic from {{[REDACTED]}} is headed northbound, whereas this customer's traffic to an ultimate destination in Illinois – approximately {{[REDACTED]}} – moves on to an interchange at Chicago. On CPKC's network, the most efficient path is to the east on a local (which operates daily except during summer months when volumes are down). Because the customer's volumes do not support a direct block to Chicago, its traffic must be combined with other Chicago-destined traffic at La Crosse, WI, connecting to a {{[REDACTED]}} road train that operates between Tracy, MN and Chicago.

19. With this service design as a backdrop, both shipments must await the once-per-day local service, and thus the car released earlier in the day incurs more delay awaiting pick up. Once picked up, both are planned to make it from {{[REDACTED]}} to La Crosse on the local train

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between those points in under six hours. But whereas one of the two shipments has planned dwell at La Crosse of just short of {{[REDACTED]},}} the shipment that departed {{[REDACTED]}} a day earlier will dwell at La Crosse (by plan) for an additional {{[REDACTED]}} awaiting the next scheduled road train for Chicago.

20. In total, the difference in *planned* transit times is {{[REDACTED]}} – or {{[REDACTED]}} of the shorter planned transit – just depending on the release day when everything runs exactly as planned – with no unplanned dwell, no weather issues, no mechanical issues, and no other factors affecting transit time. This example does not fully reflect the degree of variation in real-world planned transits. For instance, CPKC’s trip plans for shipments in this lane vary – again, by design – by as much as {{[REDACTED]}} depending solely on the timing of the customer’s release of the railcar into the network.

21. Third, and perhaps most important, both the conceptual view of a typical trip plan provided in Figure 1 and the details associated with two designed trip plans shown in Figure 2 provide perspectives that isolate narrowly on the specific shipments to which the plans apply. But these plans must be implemented against the backdrop of the rest of the railroad’s network, which introduces another major dimension of variability that CPKC’s network design must accommodate. At every step in the movement of a carload from origin to destination, there is potential – which routinely becomes reality in day-to-day operations – for the proper functioning of the network to result in unplanned dwell. At origin, decisions by shippers affecting the release of their loads – or the number of loads released simultaneously – can affect whether every car makes it onto the local service that the carrier planned.

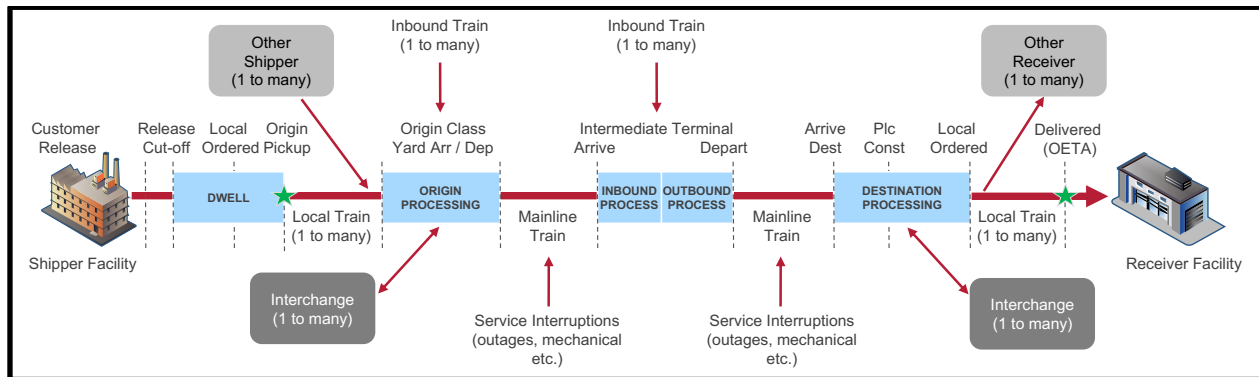
22. Likewise, dwell can result from the decisions of *other shippers to release more traffic than usual*, thereby magnifying the workload of the origin switching service, potentially

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exceeding its capacity to complete its work during a service window. There is no mechanism through which CPKC can control the number of cars released by a customer on any given day – excepting the number of cars provided to the customer for loading. At the local serving yard, where the initial line-haul blocks are made up, volume fluctuations at that yard or elsewhere in the network (potentially resulting from actions of shippers far upstream in the network, or interchange volumes from other railroads) can result in some traffic missing its first planned connection. Again, there is little the railroad can do to control these sources of variation. These blocks of cars ride on scheduled trains which have the capacity to carry only a certain amount of traffic. When the train is full on a given day, some number of cars may have to wait – or dwell – until the next scheduled train takes it further into its route. These and many other circumstances routinely lead to fluctuations in transit times over time, and relative to the estimated transit times generated at the outset of the move, through no fault of the railroad. Sustained changes in the shipping patterns of customers both on line and on other railroads can thus have a profound effect on the transit times experienced by customers far downstream.

23. Figure 3 below illustrates how the movement of a railcar for one shipper across the manifest carload network is inherently impacted by railroads' simultaneous need to accommodate the needs of the multitude of shippers whose traffic calls upon the same railroad resources.

FIGURE 3
PERFORMANCE OF TRIP PLAN IS DEPENDENT ON OTHER TRAFFIC
SHARING SAME NETWORK RESOURCES



24. Over time, of course, if volumes in a particular corridor increase (or decrease) materially and persistently, CPKC will adjust its network design and resourcing to accommodate the change. If volumes are up in a particular area, CPKC may add local switching services, add capacity in local serving yards, revise line-haul scheduling to allow additional capacity to move cars in the affected corridors, revise blocking plans at intermediate classification yards to send certain traffic more directly towards its destination, and so on. But these network design changes do not happen on a day-to-day, or even week-to-week basis, and they do not occur at all when average traffic levels are reasonably stable. The goal of effective service design is to build and execute an operating plan that is flexible enough to accommodate day-to-day and week-to-week fluctuations in the volume, timing, and mix of shipments – but with the consequence that service outcomes will vary up and down with these and many other factors.

25. One manifestation of this is that CPKC does not attempt to generate estimated arrival times that take into account all of the conditions that will affect the performance realized by a particular shipment. The estimates we generate at the commencement of the shipment are normalized in the sense that they assume that the shipment will move according to plan, and that the capacity required to handle the shipment will be available – in other words, that the volumes

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presented from the various customers and interchanges will result in a “normal” level of demand for the train service required, allowing the planned intermediate connections without material delay or unplanned dwell en route. This means that nearly half of all shipments will arrive “late” – even late by a day or more. That is why we provide updated arrival times while a shipment is en route, once the actual pace of the shipment across the network has been established. It would be infeasible to try to predict arrival times more precisely because there are so many variables that contribute to variations from plan even in the absence of specific failure events.

B. If Modified as Suggested by Commenters – and Even As Currently Designed – the Board’s Proposed Triggers Appear Likely to Misidentify Normal Variations in Service Outcomes as Potential Service Failures

26. It is our understanding that in evaluating the thresholds that would trigger a potential switching order under the Proposed Rule, the Board examined data submitted to the Board in response to Ex Parte 770. To the extent that Commenters proposing revisions to the Board’s thresholds have relied on any data regarding railroad service levels in support of their proposals (and many have not done so at all), they likewise appear to rely on system average levels of performance. However, there is a fundamental disconnect between system average metrics and the way the Proposed Rule would function. System averages are irrelevant under the Proposed Rule; instead, potential service orders would be triggered based on data reflecting service outcomes for individual shipper-specific origin-destination pairs.

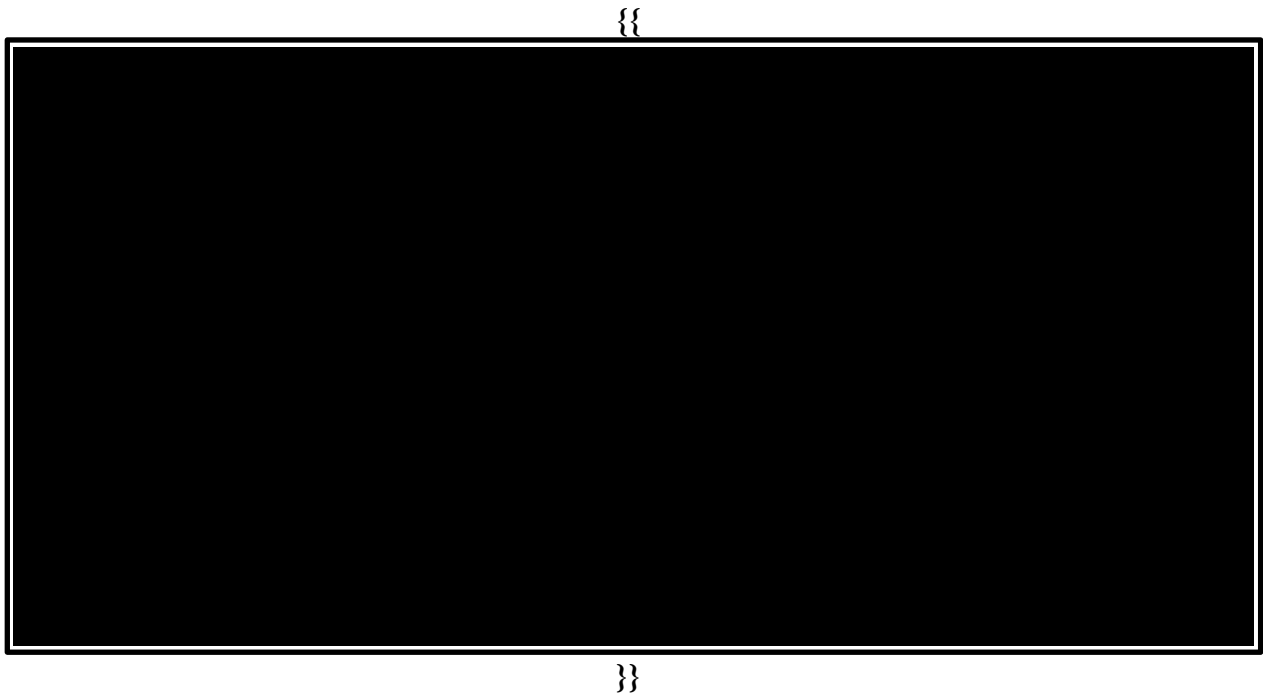
27. For all of the reasons discussed above, however, the service performance realized by individual lanes are far more variable than the average performance of the network as a whole, even when the network is performing well and individual shipments are moved fluidly and in accord with the network’s service design. As a result, service order thresholds that are set

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with reference to what networks are capable of delivering “on average” will almost necessarily misidentify normal service levels as service failures.

28. To illustrate the point, we examine one of the highest density manifest corridors on CP’s U.S. rail network: shipments from Minnesota to Illinois. Figure 4 below plots all of the {{ }} individual shipments in that corridor during the period between October 2022 and September 2023, a period when CP’s network was generally functioning well.¹

FIGURE 4
TRANSIT TIMES IN HOURS FOR SHIPMENTS ON CP NETWORK
BETWEEN MINNESOTA AND ILLINOIS



29. As Figure 4 illustrates, transit times for shipments in this corridor (or the portions of shipments on CP’s network)² are highly variable.

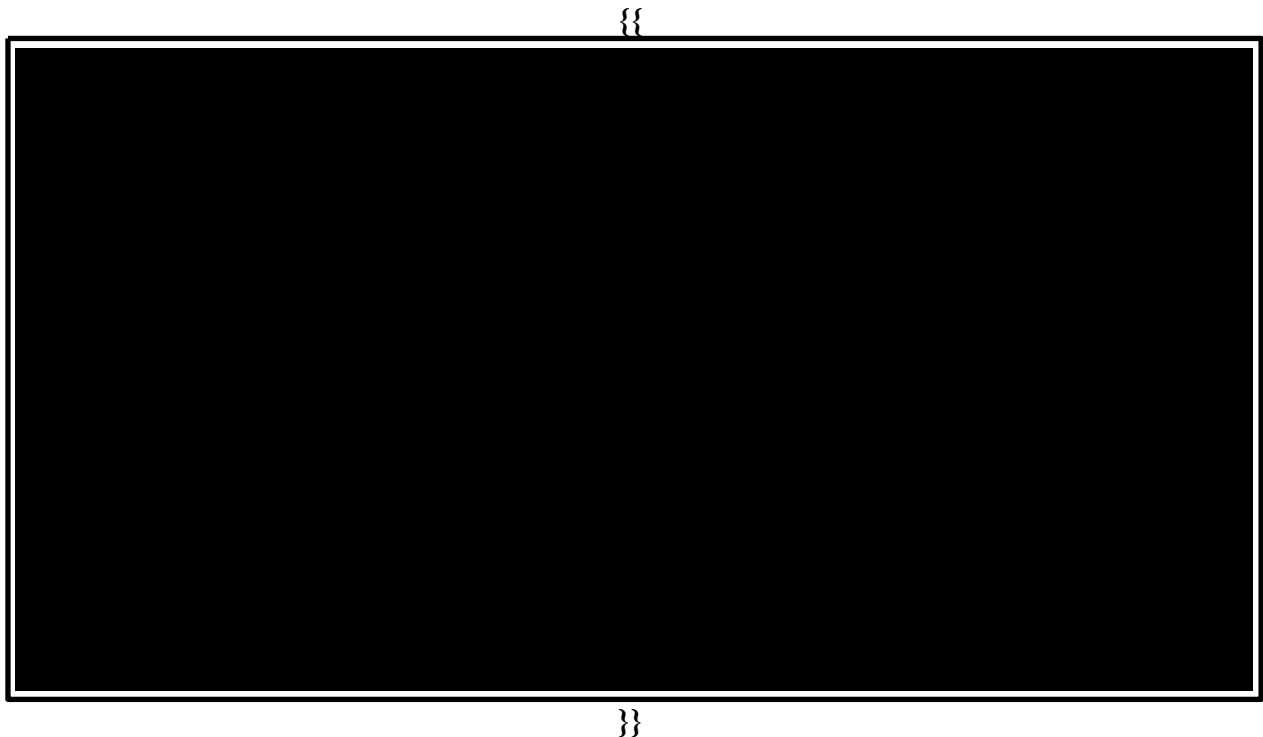
¹ Figure 4 plots shipments that terminated during the indicated period.

² Many of these shipments were delivered to other carriers in interchange at Chicago. The transit times shown in Figure 4 are those on the CP-portion of the movement.

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30. Figure 5 below shows the distribution of the individual transit time outcomes in this corridor.

**FIGURE 5
DISTRIBUTION OF TRANSIT TIMES SHOWN IN FIGURE 4**



31. As the scatter of transit time outcomes shown in Figure 4 also illustrates, that variability does not go away when outcomes are examined across periods of varying length. Figures 6, 7, and 8 below confirm this by slicing the same transit time data into periods of varying duration and portrays the distribution of transit time outcome during each period: Figure 6 shows transit time outcomes broken into periods of two weeks' duration; Figure 7 shows the data on a monthly basis; and Figure 8 shows the data on a quarterly basis. Each of these figures uses a “box and whiskers” format to show:

- the mean transit time (marked with red asterisk);

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- the median transit time (shown by the bar between the green and yellow boxes);
- the 5th percentile transit time, with 5 percent of transits being shorter (the bottom of the “whisker”);
- the 25th percentile transit time (the bottom of the green box);
- the 75th percentile transit time (the top of the yellow box); and
- the 95th percentile transit time (the top of the “whisker”).

32. Each of the Figures reveals significant variation both across periods and within each period – with the 75th-percentile transit time often nearly double the duration of the median and mean transit time.

**FIGURE 6
DISTRIBUTION OF MINNESOTA-ILLINOIS TRANSIT TIMES: BI-WEEKLY**

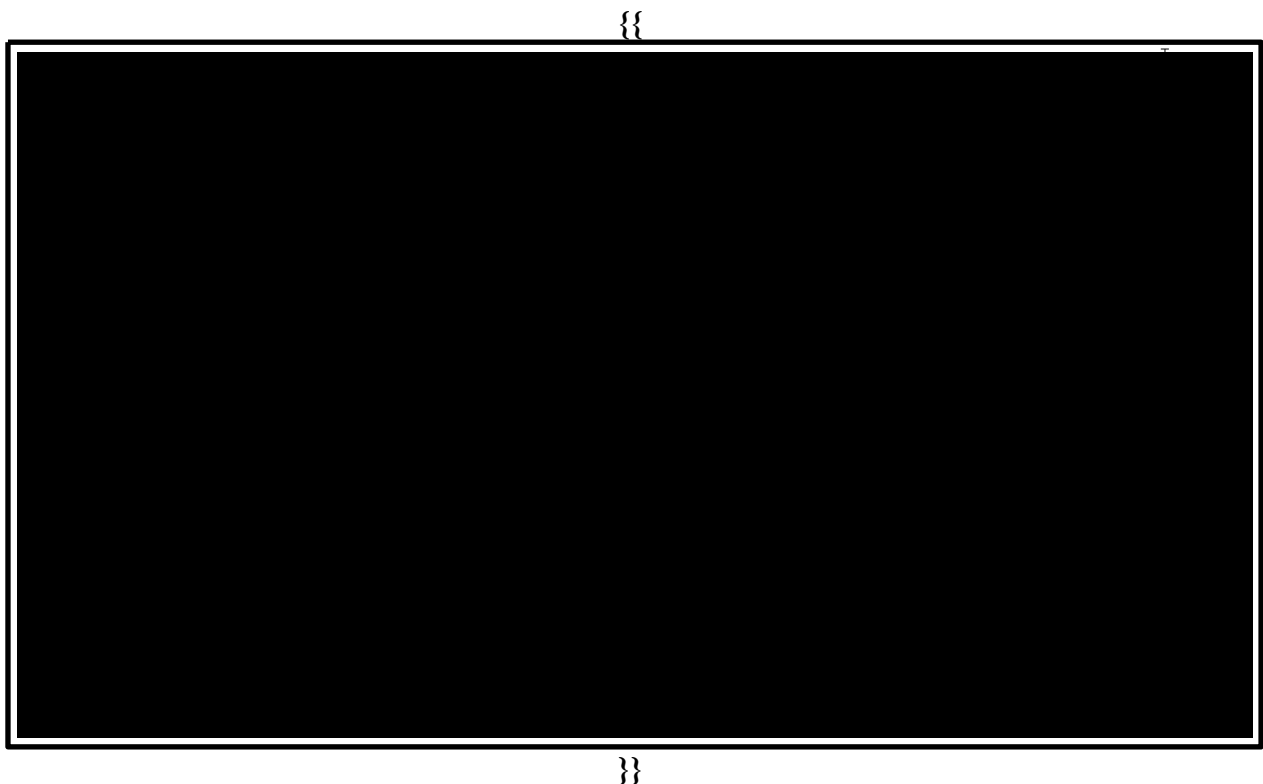


FIGURE 7
DISTRIBUTION OF MINNESOTA-ILLINOIS TRANSIT TIMES: MONTHLY

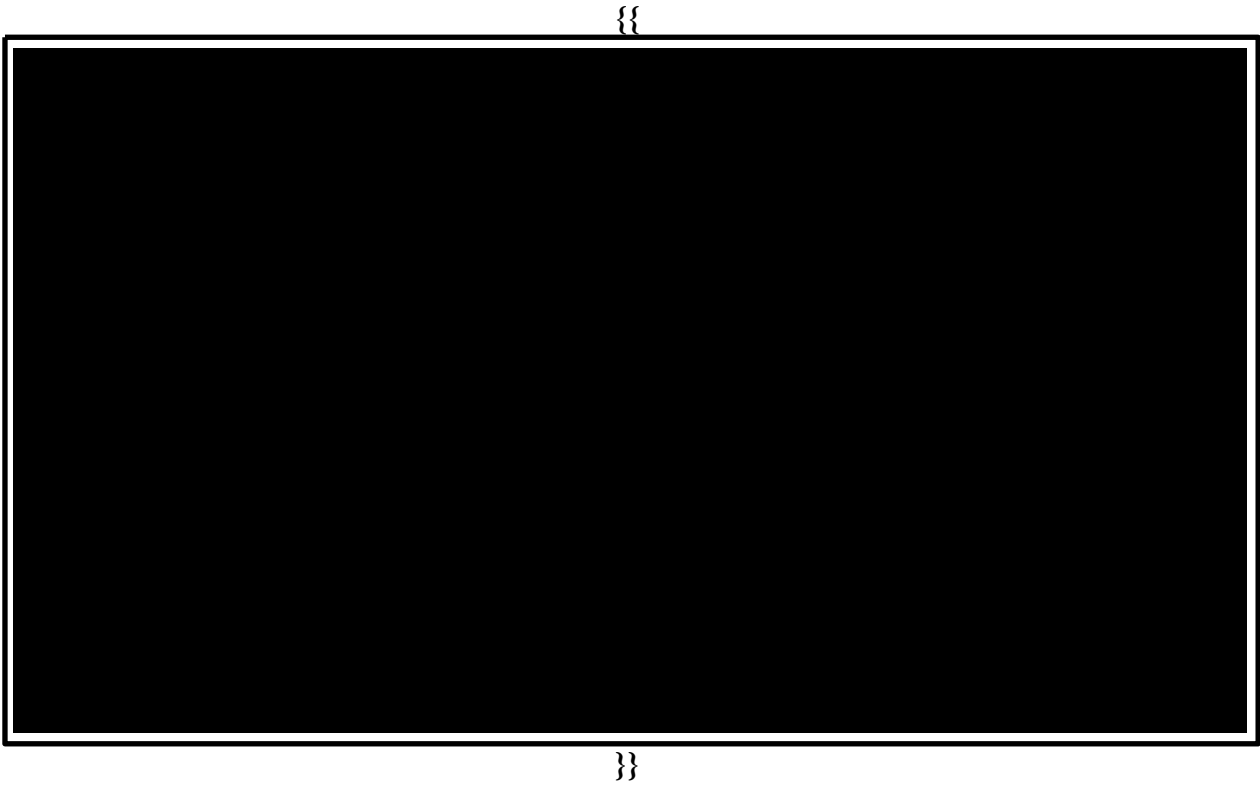
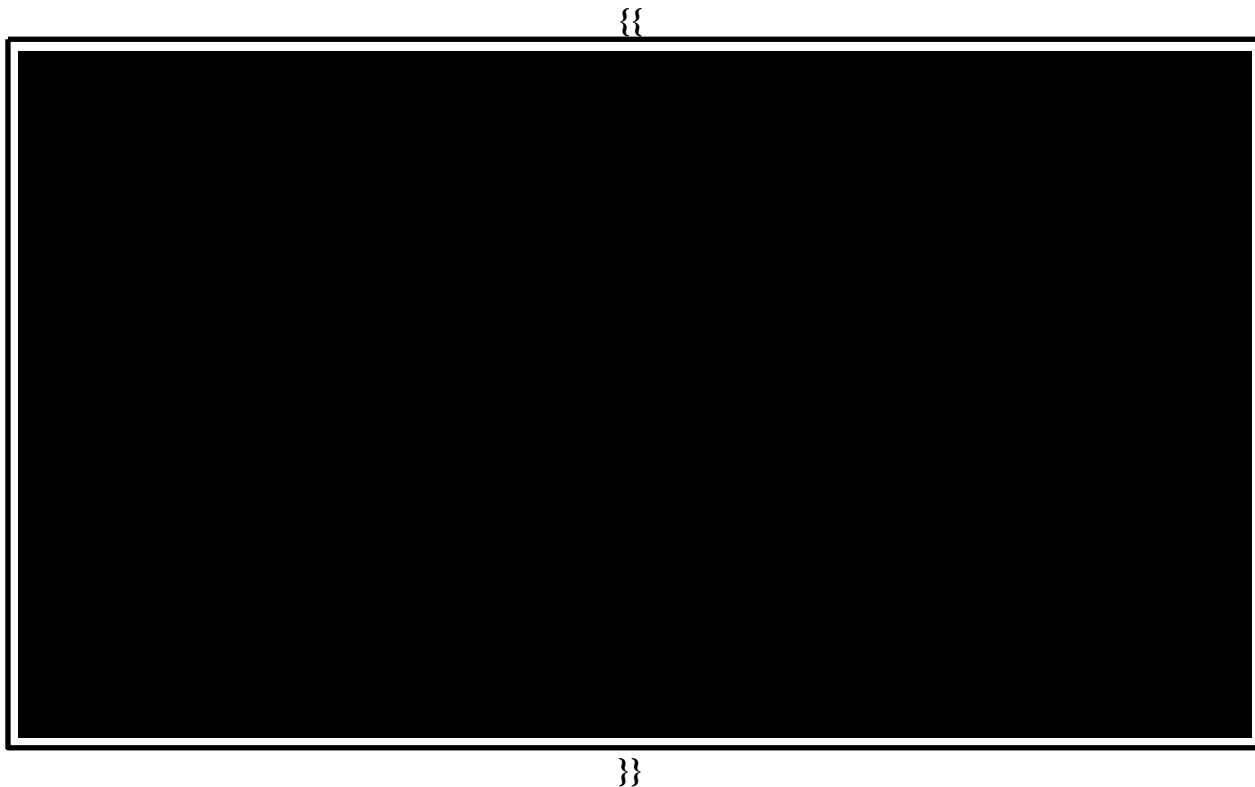
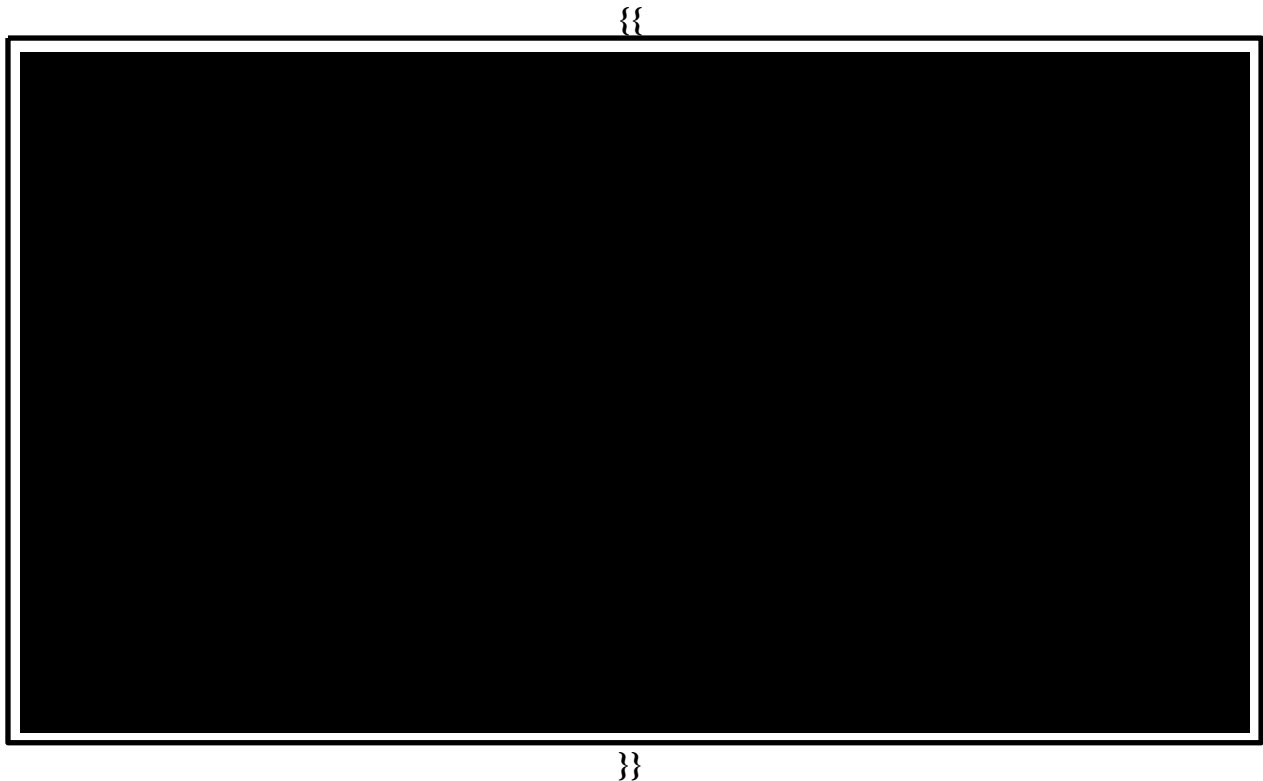


FIGURE 8
DISTRIBUTION OF MINNESOTA-ILLINOIS TRANSIT TIMES: QUARTERLY



33. Some of the variation in the transit times shown in the above figures stems from diversity among the shipments themselves, which have a variety of different origin and destination points on the network (though as noted many share the Chicago interchange destination). As a result, some shipments have planned transits that are shorter and others longer than average. Figure 9 below examines variability in transit time outcomes controlling for the factors that influence planned transit time.

FIGURE 9
DISTRIBUTION OF MINNESOTA-ILLINOIS TRANSIT TIMES:
RELATIVE TO PLANNED TRANSIT TIME



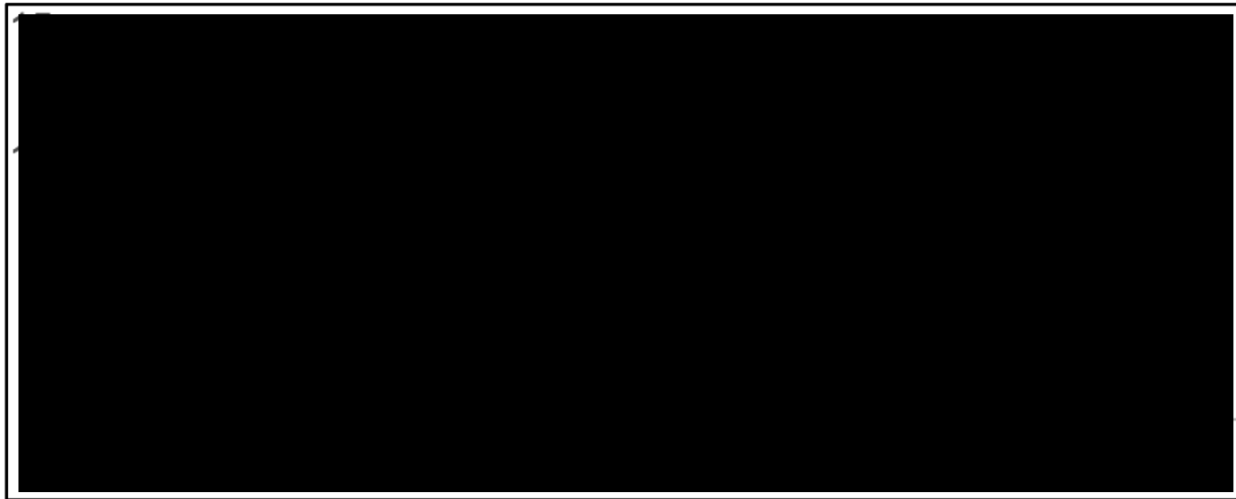
34. The transit time distributions in Figure 9 are informative in at least two respects. First, they evidence a well performing network, with mean and median actual transit days that are shorter – often by a considerable margin – than scheduled transit days. Second, as expected, they exhibit a considerable spread of outcomes, with the variation between the high end of the central distribution (the box comprising one half of all outcomes) being 100 percent longer than the low end of the distribution. For example, for shipments with scheduled transits of four days, 25 percent arrived in 2.5 days or less, but another 25 percent took roughly 100 percent longer, arriving in five days or more.

35. Figure 10 below zooms in on the portion of Figure 9 covering shipments scheduled for 1-6 days. It superimposes the range of transit time variation equivalent to the 20

percent threshold of the Board's Proposed Rule (shown in blue) and the 15 percent variation range that some Commenters have proposed (shown in red). It is evident that this range of percentage variation is swamped by the normal variability of transit times.

FIGURE 10
RANGE OF TRANSIT TIME VARIATION COMPARED TO
PROPOSED TRANSIT TIME THRESHOLDS

}}



}}

36. Note also that the Board's proposed 20 percent threshold, or any lower threshold proposed by others, would regulate much more tightly for shipments with relatively shorter actual transit times. For shipments that average five transit time days, a 20 percent increase would be equivalent to about one day. For anything shorter than five days, a 20 percent threshold would be triggered by an increase of less than a day, which as we have discussed is commonplace in carload network service designs (such as those shown in Figure 2 above).

37. This feature of the Board's rule – regardless of where the threshold is set – would have particularly acute implications for CPKC, for two reasons. First, a simple review of the rail map shows that much of the traffic served by CPKC's U.S. network entails relatively short line-

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hauls compared to the larger Class 1 railroads, meaning relatively shorter transit times and thus less room for allowable variation under the structure of the Board's Proposed Rule.

38. Second, CPKC's network is relatively less dense in most corridors than those of the other Class 1 railroads. As discussed above, the inherent potential for missed connections is a normal part of any efficient and well-run manifest carload network, and the impact of those missed connections will inherently be greater the less frequent the connecting service is. For example, as discussed in more detail below, the single largest traffic flow making up the traffic shown in Figure 4 is traffic moving from a customer at {{[REDACTED]}} to interchange at Chicago. That traffic connects at La Crosse, WI to a road train (CPKC 254) that is scheduled to operate {{[REDACTED]}} from Tracy, MN to Chicago and stops at La Crosse to pick up cars delivered from {{[REDACTED]}} (and other intermediate points). CPKC 254 is built around interchange traffic received from the Rapid City, Pierre & Eastern Railroad at Tracy, MN. If there is no interchange at Tracy on a given day, the train typically is annulled, meaning that cars delivered to La Crosse for a connection with CPKC 254 could dwell for up to {{[REDACTED]}} even if there would have been room on the train to take the {{[REDACTED]}} customer's traffic to Chicago had the train operated.

39. Under the Board's Proposed Rule, however, the "grace" period for deterioration in transit times on short haul lanes with planned transit days of five days or less would be less than a day, whereas even one missed connection would cost a full day in dwell because corridor density typically does not support more than one manifest train or block per day between network nodes. We would recommend that the Board revise its Proposed Rule to establish tiered thresholds that take into consideration the degree of intrinsic variability in the transit times associated with normal service levels. The Board should examine available data and consider,

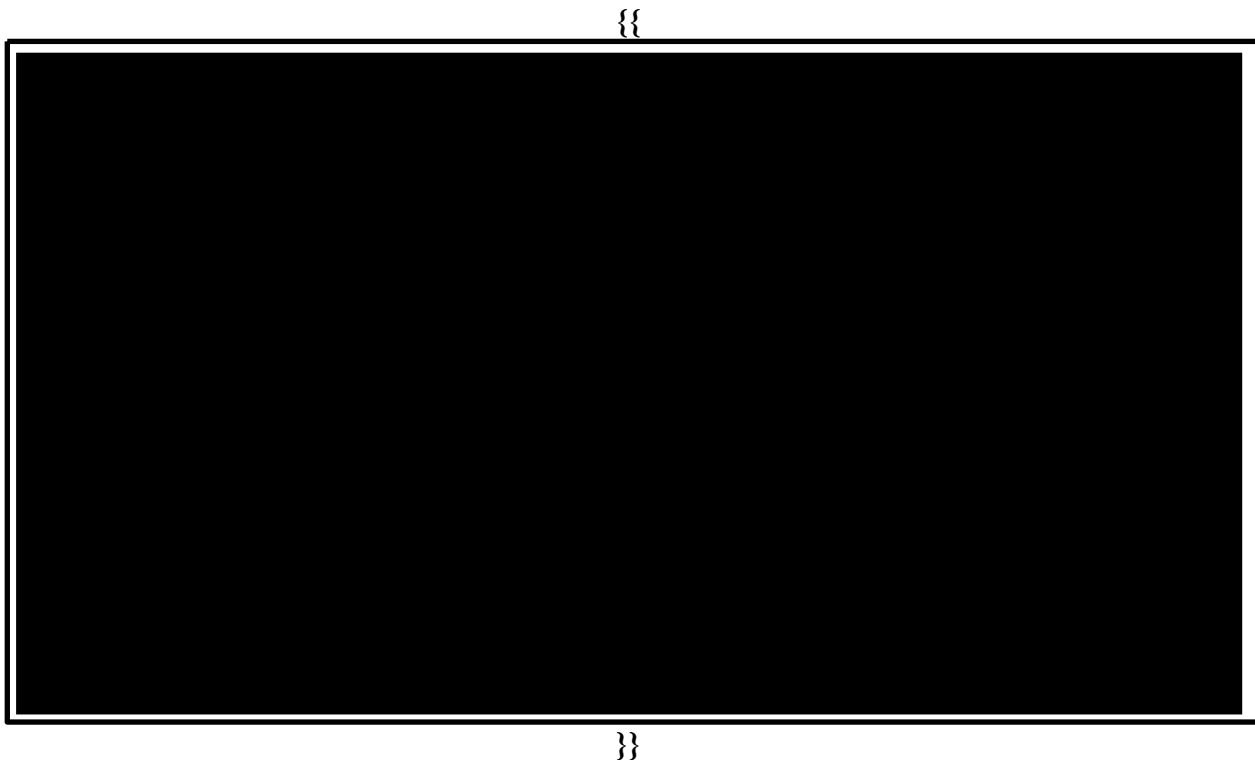
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for example, a floor on the extent of adverse deviation in transit times necessary to trigger a switching order proceeding. One possible approach would be to require that the negative deviation be at least 36 hours below the mean for the preceding year, so as to take into account that dwells of 24 hours or more are commonplace on lines that do not support multiple daily manifest services between network nodes.

40. To demonstrate further that the inherent variability discussed above is not an artifact of lumping together shipments involving different customers and different origin-to-destination “lanes,” we examine the traffic of a single customer and single lane represented in Figure 4 above. We chose the largest single customer to avoid having the results heavily influenced by small numbers of shipments (though we note that the way the Board’s rule would function small numbers of variable outcomes could routinely trigger a potential switching order).

41. Figure 11 reproduces the transit time data shown in Figure 4, but colors the dots representing a single origin-destination pair for the largest customer in the corridor in red. Each red dot represented one of the {{ }} shipments for that customer between its origin facility in {{ },}} MN and {{ }} in Chicago, where CP delivers the traffic to {{ }}
{{ }} (with the shipments ultimately delivered {{ }} to the receiver’s facility in {{ }} IL).

FIGURE 11
TRANSIT TIMES IN HOURS FOR SHIPMENTS OF SINGLE CUSTOMER
FROM {{[REDACTED]}}



42. Table 1 below provides the summary statistics for these shipments, and Figure 12 shows the same statistics using a box-and-whiskers format described above. Figure 12 also depicts the average scheduled transit time for these shipments, and shows that the variability in these outcomes occurs despite the actual average transit times being *almost identical to the scheduled transit times*.

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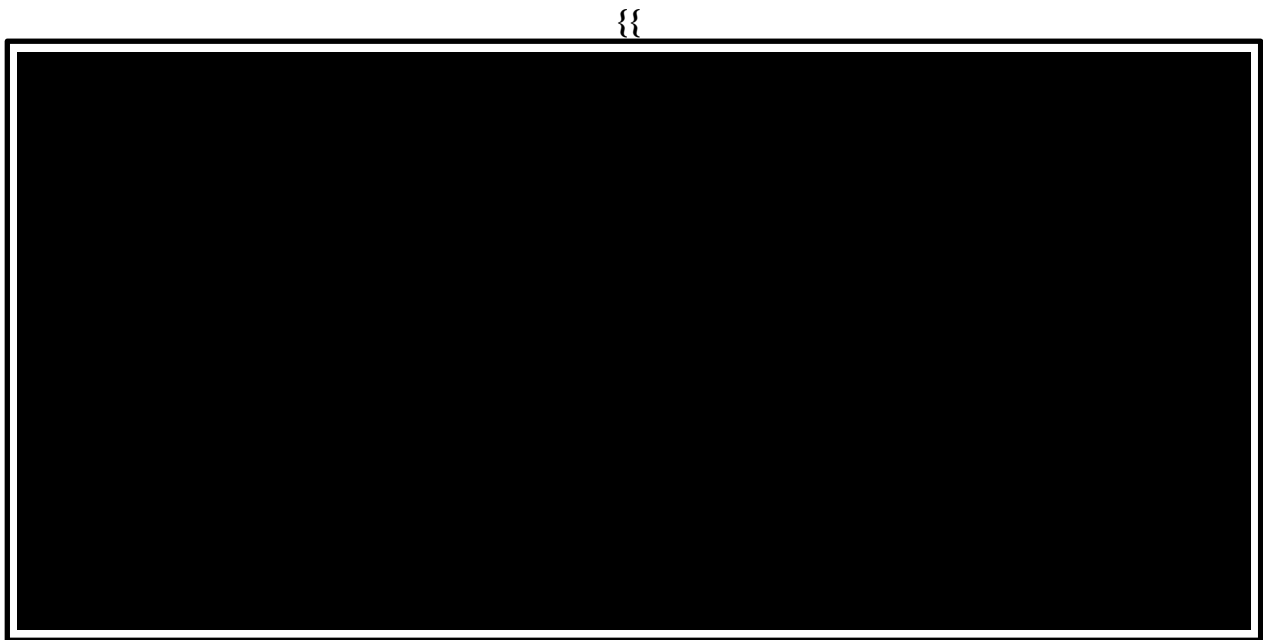
TABLE 1
SUMMARY STATISTICS FOR SHIPMENTS SHOWN IN FIGURE 11

{{

STATISTIC	LARGE CUSTOMER (RED)	ALL OTHER SHIPMENTS (BLUE)	ALL SHIPMENTS
Count			
Mean (Transit Days)			
Standard Deviation			
5 th Percentile			
25 th Percentile			
75 th Percentile			
95 th Percentile			

}}

FIGURE 12
BOX AND WHISKERS PLOTS FOR DATA SHOWN IN FIGURE 11



43. Despite having somewhat different mean values and distribution statistics, the distributions of outcomes for these two groups of shipments illustrate well the degree of variation inherent in the execution of service on CPKC's manifest carload network. As discussed earlier,

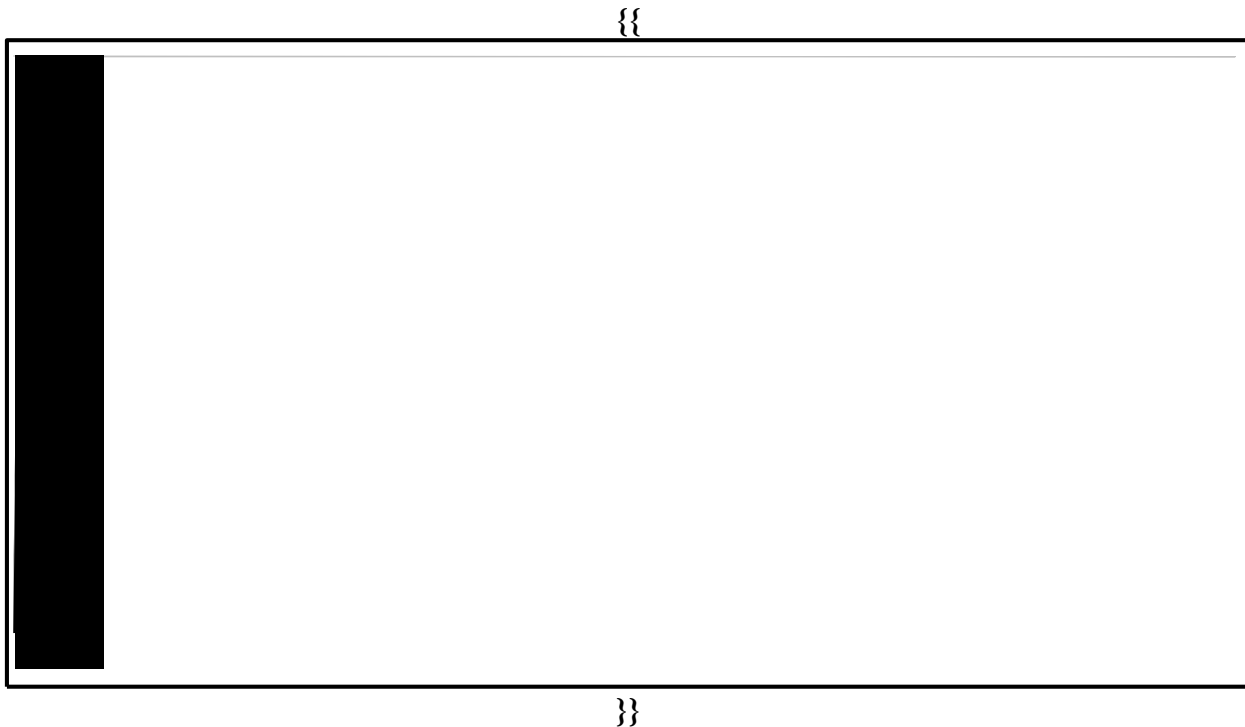
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this variation can be a function of many different factors, some of which are in the control of the customer (*e.g.*, the timing of shipment releases, or the number of cars released at any one time) but others of which are in control of third parties – including *other customers* on the railroad whose traffic moves in trains or blocks shared by a particular customer. The impact of other customers' traffic can be seen most systematically in the scheduled frequency of network services, many of which vary seasonally. For example, the local service (J 20) that picks up the {{ }} customer's traffic operated only five days per week during the summer months when aggregate volumes for this service (between St. Paul, MN and La Crosse, WI), are down significantly.

44. The real-world data reflecting service outcomes for this traffic are the manifestation of CPKC's service design for this customer's traffic destined for Illinois – as shown in the trip plans discussed above and shown in Figure 2 – coupled with real-world factors that influence actual service outcomes.

45. Figures 13, 14, and 15 below examine the same traffic from a perspective of changes over time in the average transit times experienced by this customer on this lane. Figure 13 plots the two-week rolling average transit time for this customer's shipments (with the volume of shipments shown in the bars). A red band indicating 20 percent variation (from a starting point of the average transit time of {{ [REDACTED] }}) is shown in red. As is readily apparent, despite an overall trend toward faster transit times, this customer experienced significant fluctuation – well in excess of 20 percent – over the period examined.

FIGURE 13
TWO-WEEK ROLLING AVERAGE TRANSIT DAYS FOR SINGLE CUSTOMER



46. Figures 14, and 15 provide the same view, but for different time periods of aggregation. Figure 14 shows six-week rolling averages, matching the time period proposed by several Commenters for transit time comparisons. Figure 15 shows 12-week rolling averages.

FIGURE 14
SIX-WEEK ROLLING AVERAGE TRANSIT DAYS FOR SINGLE CUSTOMER

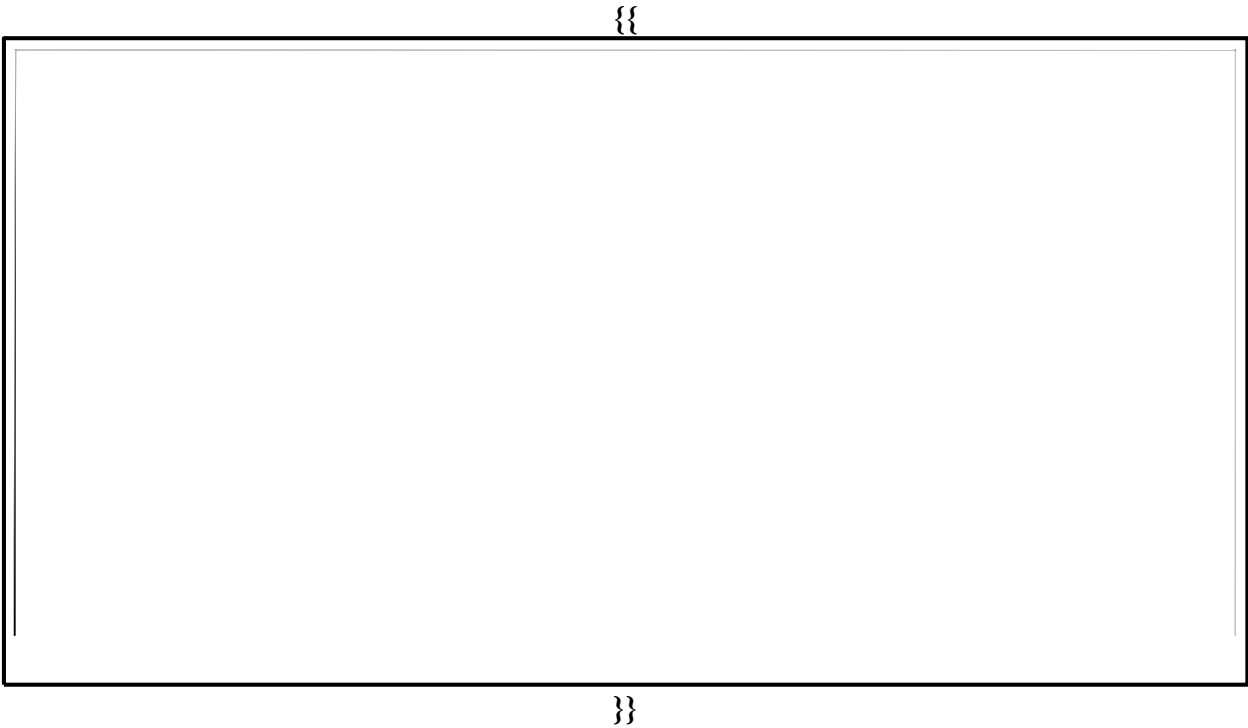
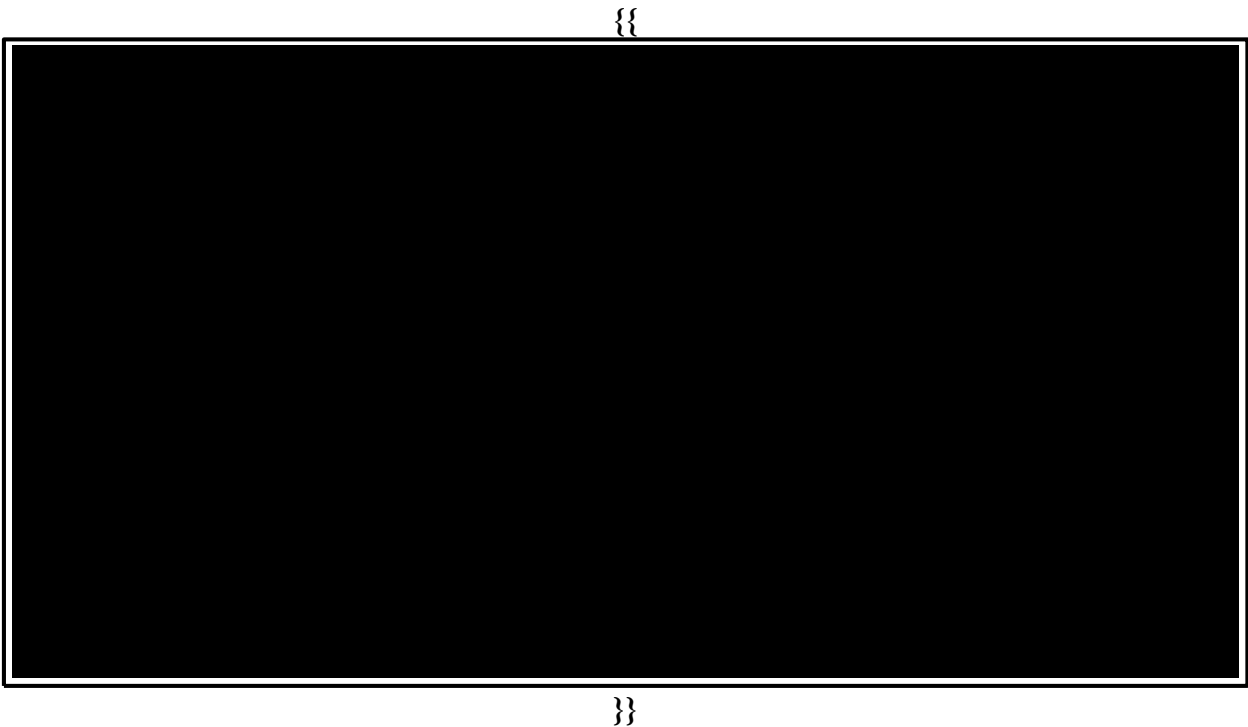


FIGURE 15
12-WEEK ROLLING AVERAGE TRANSIT DAYS FOR SINGLE CUSTOMER



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47. We offer several observations about these Figures. First, the effect of longer periods of aggregation is to smooth out somewhat the fluctuations in transit times, but the fundamental pattern remains: transit times, even when averaged across periods of 12 weeks, fluctuate well in excess of 20 percent even in normal operating conditions. Table 2 below illustrates how the 20 percent threshold applies in the two-week, six-week and 12-week aggregations. In each aggregation, there are multiple points when the rolling average calculation would be more than 20 percent greater (longer) than the scheduled transit time (which happens to be identical to the actual overall average transit time for this customer as well).

TABLE 2
STATISTICS SHOWING IMPACT OF ROLLING AVERAGES

{{

	14 days	6 weeks	12 weeks
Avg. Scheduled Transit (All)			
Avg. Actual Transit (All)			
Actual Average Minus 20%			
Actual Average Plus 20%			
Days More Than 20% Lower Than Average			
Days More Than 20% Higher Than Average			

}}

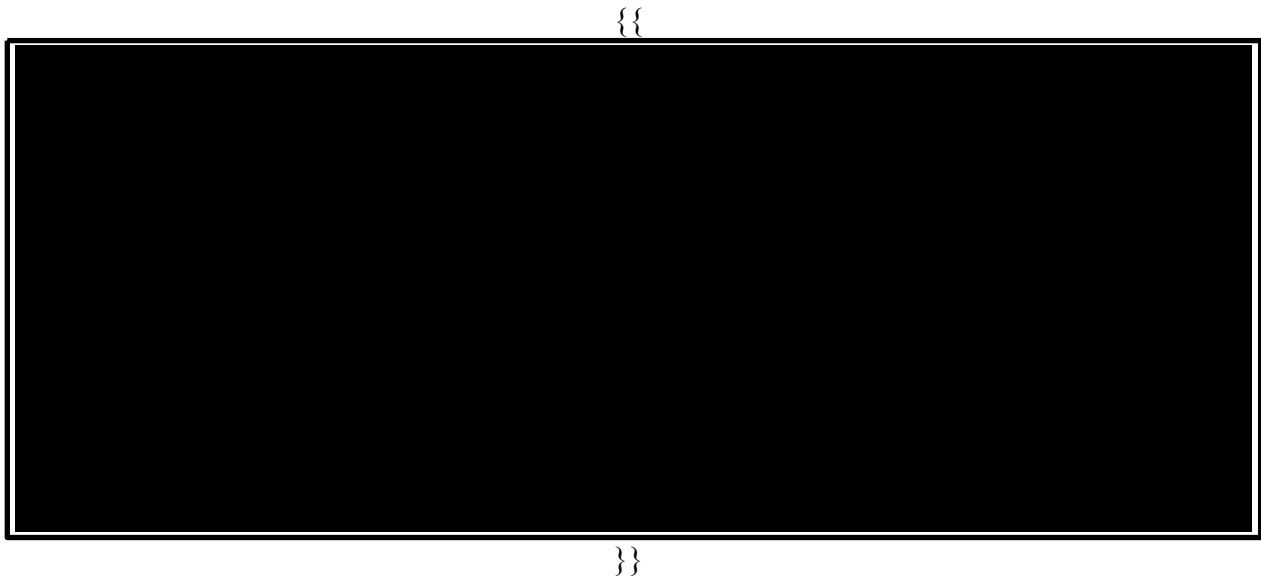
48. Second, as the period of aggregation is extended from two weeks to 12 weeks, the number of points at which the rolling average is 20 percent above or below the average shrinks, but note that the shrinkage is greater when examining transits below average than for transits above average. This illustrates the intuitive point that it is more likely to see a variance over time above the mean than below, since going faster than scheduled is less likely than having unplanned dwells that elongate transit times.

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49. The same variability that affects actual transit times is also reflected in customer- and lane-specific on-time performance metrics. As discussed above, CPKC does not adjust the transit time estimates it generates to reflect granular forecasts of day-to-day network conditions. The customer's trip plans drive the transit time estimate, and those trip plans are not altered day by day. This means that variance from estimated transit time is built into the system – any deviation from the trip plan that exceeds 24 hours will show up as an “on-time” performance failure, even though the underlying network was running fluidly and efficiently.

50. Figure 16 below shows the distribution of “on-time” performance (variance to scheduled transit time of 24 hours or less) for each of the individual shipments reflected in Figure 4 above. The left-hand panel shows the distribution for all customers in the corridor, with each bar reflecting the number of shipments that experienced the indicated amount of variance relative to scheduled time plus 24 hours. (For example, the bar labeled “-2.5” reflects the number of shipments that arrived between 2.0 and 2.5 days prior to the scheduled transit time plus 24 hours.). The right-hand panel shows the distribution for just the single large customer discussed above.

FIGURE 16
VARIANCE FROM ON TIME (SCHEDULED TRANSIT TIME + 24 HOURS)



51. Comparing the two distributions illustrates a fundamental feature of manifest carload network performance: the larger the population, the tighter the distribution of outcomes. The median outcome in both distributions is approximately the same – roughly half a day “early” – and in both roughly 65 percent of shipments were “on-time.” But the individual customer experienced a higher percentage of shipments farther from the median outcome.

52. This further underscores the importance of re-examining the various threshold proposals against the backdrop of actual data reflecting normal manifest carload network performance. Mere assumptions about how a network that “averages” 80-plus percent “on-time” can perform for each and every customer-specific lane will almost certainly be invalid.

53. As the Board examines the data to determine what thresholds are appropriate, it should consider a tiered approach that would apply different thresholds for shorter-haul (or shorter trip plan) traffic than for longer-haul, longer transit time traffic. As shown above, a

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single percentage-based threshold will tend to call into question service variability on short-haul lanes when regulatory scrutiny of those outcomes is unwarranted.

II. WHEREVER THE “TRIGGERS” FOR METRIC FAILURE ARE SET, THE BOARD’S PROCESSES SHOULD ALLOW A FULLER EXAMINATION OF THE UNDERLYING FACTS

A. The Board Should Allow a Broader Inquiry into the Causes of an Alleged Service Failure, Lest Normal Service Fluctuations Erroneously Lead to Switching Orders

54. Our discussion above regarding the normal variability in rail service outcomes on a well-functioning manifest carload network warrants a data-based re-examination of the proposed thresholds for triggering a switching order inquiry. Beyond that, and regardless of where the Board ends up setting the triggering thresholds, the Board should confirm that in any inquiry based on the regulatory thresholds railroads have a fair opportunity to present evidence putting in context the metrics upon which the Board relies to open the inquiry. Such an opportunity would have to encompass not only the “affirmative defenses” identified in the Proposed Rule, but also enable incumbent railroads to explain why the service levels experienced by a particular customer were within the normal and acceptable range of outcomes for the traffic at issue. That showing might include evidence of fluctuations in demand by the shipper as well as fluctuation in the other demands placed on the network *by other shippers*, along with a wide array of other factors.

B. The Board Should Allow a Broader Inquiry into the Implications of Interchange Facility Limitations

55. In addition, the Board should ensure that any rule provides railroads with flexibility to explain how existing infrastructure limitations would limit the ability to interchange traffic under a switching regime. Interchanges or switching in a terminal area may operate well under current conditions, but depending on the location of the interchange facilities, the volume

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of traffic interchanged, the amount of track capacity at and near the interchange location, the location of the railroads' serving yards, and other factors, the additional burdens imposed by new switching volumes could cause those interchanges to become less efficient – for both the issue traffic and all other traffic that depends on those operations.

56. Increased switching volumes at a particular capacity constrained interchange would at minimum increase intermediate dwell time for shipments that previously moved in single-system service and likely result in dwell times increasing for all traffic moving in the vicinity of the interchange. Increased dwell consumes car and track capacity and affects other customers, which could trigger further demands made pursuant to the Proposed Rule. In short, the Board's proposed regulatory intervention should be mindful of the potential adverse impacts both locally and across the network and allow for the necessary case-by-case examination before new switching is imposed.

C. The Board Should Require a Robust Inquiry into Whether an Alternative Carrier Could Provide Materially Superior Service

57. The Board should ensure that any switching rule it implements provides for a comparison between the service provided by the incumbent carrier and that which would be provided by the alternate carrier via switching. The {{ }} traffic discussed above provides a useful illustration of why this is so important.

58. There are no interchange facilities at {{ }}. It should not be considered a terminal area. The nearest such facilities – an interchange with UP and BNSF – are at St. Paul, MN, {{ [REDACTED] }}. But delivering railcars there would be out of route, and require an entirely new local service design as the current flow of traffic is to the southeast – towards {{ [REDACTED] }} as shown in the trip plans set forth in Figure 2 above. Were one nonetheless to assume that BNSF could provide alternate service via a switch, that service would fundamentally

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redesign the movement of the traffic in question. If CPKC delivered Chicago-bound cars to BNSF at St. Paul, those cars would first move north across the Minneapolis-St. Paul region to BNSF's Northtown Yard for classification, then move back across the Twin Cities in a train bound for Chicago. This routing would entail considerable additional mileage, with multiple crossings of a busy terminal area.

59. The only other way for this traffic to move via BNSF would be for it to be delivered to BNSF at La Crosse, {{ }}. Of course, that would not be "switching" in a terminal area. But the hypothetical illustrates another issue: the La Crosse interchange between CPKC and BNSF is a three day-per-week interchange. Cars from the {{ }} customer bound for BNSF would experience considerably greater planned dwell as they accumulated on a track there (blocking other uses for that track in the meantime) waiting for the BNSF interchange. And once BNSF picked up the cars, they would need to move through BNSF's Galesburg, IL classification yard en route to Chicago, which would entail significantly more miles than on CPKC's direct path from La Crosse to Chicago.

60. This illustration shows the kind of considerations that would need to be undertaken in any case where a customer proposed a switching order, lest the proposed remedy actually make rail operations more complex and less efficient, while failing to remedy any demonstrated inadequacies in the incumbent carrier's service.

III. THE BOARD'S PROPOSED RULE SHOULD NOT ATTEMPT TO REGULATE THE COMPLEXITIES OF LOCAL "FIRST-MILE, LAST-MILE" SERVICE BASED ON ANY SIMPLISTIC METRIC-BASED APPROACH

61. Many of the Comments on the "Industry Spot and Pull" ("ISP") metric in the Board's Proposed Rule highlight reasons why it would be inappropriate for the Board to include any regulation of first-mile/last-mile ("FMLM") service in this proceeding. The functions

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associated with FMLM service are quite distinct from those associated with line-haul service. Perhaps most significantly, those functions tend to involve a much greater interaction with the customer and a concomitantly greater role for local operating discretion to adapt to day-to-day circumstances affecting each customer's local service. As the Commenters point out, FMLM service is dependent on many factors within the control of the customer: when can the facility be accessed, what number of empty cars are needed for loading and on what cadence, when does the customer notify the railroad that loaded cars are available, what number of cars are made available at a given time, and so on.

62. Managing the sometimes competing demands of the various customers served by local switch crews in a terminal area is inherently complex and challenging, and performing that job well requires delegating discretion to local operating personnel to adjust operations to take account of day-by-day changes in circumstances relating to the needs of every customer in the terminal.

63. The Commenters propose an array of modifications to the Proposed Rule that highlight the fact that any regulation based on an FMLM metric would tend to rigidify the way that railroads are able to adapt their FMLM services to meet evolving customer needs. Calls to provide significant advance notice of changes in the service windows and proposed requirements that the days of service not be adjusted to reflect fluctuation in shipper demand are examples of regulatory rules that would get in the way of the flexibility that local on-the-ground operating employees – yardmasters, trainmasters, train crews, etc. – need to have to get the job done in the most efficient and effective way possible.

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IV. APPLYING THE RULE TO INTERLINE TRAFFIC WOULD ENTAIL SIGNIFICANT COMPLEXITIES THAT ARE NOT ADEQUATELY TAKEN INTO ACCOUNT IN THE PROPOSED RULE

64. The Board should also understand that, wholly apart from the issues we have discussed above, the Proposed Rule is ill-suited to address manifest carload services that are dependent on interline services involving multiple rail carriers. Interline connections and the required interchange activities can introduce considerably greater variability that the Board's OETA and transit time metrics are not designed to take into account. This variability arises in at least two separate contexts, both of which are illustrated by the {{[REDACTED]}} example discussed above.

65. If the Board were to attempt to apply these metrics to "lanes" involving interline connections at an intermediate interchange, it would have to adjust the thresholds to account for the much greater variability associated with interline connections. The frequency of interchange arrangements and the dwell associated with the delivering carrier's placement of cars on an interchange track and the receiving carrier's pick up of those cars, not to mention placement of them on an outbound train, introduce both additional dwell and additional *designed variability* in dwell. Many of CPKC's interchanges, for example are relatively low-density and the arrangements between connecting carriers provide for less-than-daily service, like the three-days-per week arrangements between CPKC and BNSF at La Crosse, WI discussed above.

66. These variations in performance are magnified by the fact that the receiving railroad has no control – and no real advance notice or ability to plan for – variations in the day-to-day fluctuations in the volume of traffic received in interchange. The natural and typical result of interchange volumes at the high end of the range will be additional dwell at the interchange point or nearby yards.

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V. THE BOARD SHOULD REJECT CALLS TO EXPAND THE REACH OF THE PROPOSED RULE

67. Several Commenters propose to expand the Proposed Rule to traffic that would be ill-suited to inclusion within the scope of the rule: traffic outside terminal areas and unit trains.

A. Application to Traffic Outside Terminals

68. The Board's limitations of the Proposed Rule to traffic within "terminal" areas make good sense from an operating perspective. We are not expressing a view on the legal definition of a terminal area, but we understand that concept to refer (at least) to commercial areas where there are multiple rail customers and facilities of multiple railroads capable of exchanging traffic between them.

69. Expanding the reach of the Proposed Rule to "rural" areas far from terminals would make no sense from an operating perspective. If the idea is to require the incumbent carrier to switch traffic to another Class 1 so that other railroad can provide an alternative line-haul path between origin and destination to remedy a service failure, applying the Rule to rural customers outside of terminal areas would not achieve the Board's objectives. Outside of terminals, the alternate carrier would not have yards or other facilities capable of receiving the railcars. This means that the incumbent would have to move the traffic in its own line-haul service for some distance to a point of interchange with the alternate carrier. Such a requirement would fundamentally disrupt service patterns, requiring investment in new resources (local train service patterns, new yard/interchange trackage, etc.).

70. As one illustration of the problem, consider the {{ }} service discussed above. There are no interchange facilities at {{ [REDACTED] }}. It should not be considered a terminal area. The nearest such facilities – an interchange with UP and BNSF – are at St. Paul, MN, {{ [REDACTED] }}. But delivering railcars there would be out of route, and require an entirely new local service design as the current flow of traffic is to the southeast –

towards La Crosse, WI, as shown in Figure 2 above. If instead CPKC were required to move this traffic to La Crosse, {{ [REDACTED] }}, CPKC would effectively be required to participate in line-haul transportation with a forced short-haul interchange at La Crosse, where there is no interchange of similar traffic today. This sort of mandatory service redesign would impose significant burdens on CPKC's ability to serve all of its manifest carload customers.

B. Application to Unit Trains

71. Several Commenters propose to modify the Board's Proposed Rules to make them applicable to unit train traffic. As the Board appears to recognize, this is a misguided idea. No metrics exist that could reliably be used to judge the performance of unit trains on the CPKC network. CPKC refers to those trains as "demand" trains, in the sense that they are operated only in response to a customer having a "demand" to run a train from some origin to some destination in order to take advantage of demand for its commodity at that destination. Some unit trains operate in routine cycles from a single origin to a single destination – such as coal from mines in British Columbia to the Roberts Bank export terminal. But the unit trains on CPKC's U.S. network generally are not fixed consists that cycle back and forth in the same origin-destination lane.

72. The "on-demand" character of unit trains distinguishes them from shipments that tap into CPKC's pre-designed manifest carload network. For unit trains, CPKC essentially establishes a bespoke service plan that takes into account the shipper's desired timing, the shipper's preference for obtaining equipment for loading (often in private cars), and the shipper's desired destination (where it has managed to obtain the best price for its commodity).

73. In addition, the operation of these trains often must accommodate unique constraints imposed by the customer. For example, if grain or another bulk commodity is

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moving to an export or other terminal, the train typically cannot be delivered until there is a vessel available for loading and/or terminal capacity sufficient to accommodate the train. This means that unit trains often must be staged en route in order to meet the customer's needs.

74. In this context, it would not be appropriate to apply metric-based thresholds to assess the adequacy of the service performance. In essence, unit trains are "one-offs" that do not fit within the framework of the Board's Proposed Rule.

VI. THE BOARD SHOULD BE MINDFUL OF THE ADVERSE CONSEQUENCES OF ANY REGULATORY APPROACH THAT WOULD CREATE NEW OPERATIONAL COMPLEXITY OR INCENTIVES TO REDESIGN NETWORKS TO SUPPRESS SERVICE VARIABILITY

75. As the Board considers how to structure a rule for imposing switching orders as a remedy for service inadequacies, it should be mindful of the consequences for the rail network associated with the new incentives on the part of incumbent railroads that any such rule will create, as well as the new switching activity that the rule's application may impose.

76. These considerations underscore the importance of limiting switching orders to situations where they are truly necessary to remedy service failures that are proven on a complete factual record, and not imposing such orders based on metrics that are likely reflective of routine variability in service outcomes on a complex manifest carload network.

A. Incentives Created by the Proposed Rule Would Be at Cross Purposes with Flexible Service Design that Supports Traffic Growth

77. Were the Board to establish rigid metrics-based standards for permissible service outcomes that applied to service outcomes within the current range of normal, with severe consequences for failure to adhere to those standards, the result likely would be a redesign of manifest carload service plans in an effort to stay within the bounds of the new rule. This would inevitably have adverse consequences for the rail network and many rail customers.

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78. A network service plan capable of avoiding the kinds of inherent variability associated with today's manifest carload network likely would need extensive additional resources to avoid metrics-based service "failures." Those resources would come at a cost that must be borne by all shippers.

79. In addition, and likely more problematic, railroads would face incentives to severely limit access to the network in ways that mitigated day-to-day fluctuations in volume. Shippers' ability to call upon network resources to meet their own fluctuating demand might need to be controlled more tightly. And potential new traffic might need to be screened more rigorously to ensure that it did not threaten metrics-based measures of performance for existing customers. Measures such as these likely would make the network more rigid and less accommodating of individual customer needs and less open to serving new traffic of the sort that CPKC has been striving to attract.

80. In today's world manifest carload rail networks must attempt to accommodate all of the traffic delivered to them by customers and interchange partners. In that sense they are quiet unlike, for example, passenger airlines, which limit available capacity to the seats on the aircraft and have reservation systems that ensure that the available seats are not oversold. One possible consequence of service-related regulation that penalized the kinds of service outcomes that come along with the weakly-controlled variability of traffic volumes on today's network could be exploration by railroads of reservation-style systems that would necessarily introduce rigidity that many customers would dislike – for example, the added burden of having to pay for a "seat" on the train up front, then be on "stand by" if they are not ready to ship when their reservation requires.

B. The Board Should Consider Cumulative Operational Impacts from Switching Orders.

81. The Proposed Rule does not address the potential cumulative impacts on the rail network from multiple forced switching orders. The immediate service impacts of introducing additional handlings, and the consequences of unanticipated shifts in traffic subject to mandated switching – will worsen with each additional grant of forced switching. Each new interchange event mandated by the Board will inject another area of volatility into a railroad’s network. The Board has no tools enabling it to foresee the magnitude of effect on the network of any one of its interventions into operations, much less the compounded effects of multiple switching mandates.

VERIFICATION

I, Todd Workman, declare certify 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 20th day of December 2023

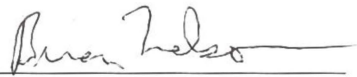


Todd Workman

VERIFICATION

I, Brian Nelson, declare certify 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 20th day of December 2023



Brian Nelson