

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 788

**ELIMINATING REGULATORY BARRIERS TO
COMPETITION: REVIEW OF PART 1144**

REPLY COMMENTS OF CN

Grand Trunk Corporation on behalf of itself and its U.S. rail operating subsidiaries¹ (collectively, “CN”) respectfully submits these reply comments on the notice of proposed rulemaking issued in this proceeding. *Eliminating Regul. Barriers to Competition: Rev. of Part 1144*, EP 788 (STB served Jan. 7, 2026) (“*NPRM*”).

In its opening comments, CN recommended that the Board clarify several background principles for efficient use of case-by-case adjudication: (1) contract and exempt traffic are ineligible for prescription of reciprocal switching or through routes; (2) reciprocal switching must occur within a terminal area; (3) reciprocal switching or through routes must be practicable to be prescribed; (4) remedies under case-by-case adjudication are not appropriate for “class action” petitions with multiple petitioners; and (5) petitioners should bear the burden of proof. How some

¹ Bessemer and Lake Erie Railroad Company, Cedar River Railroad Company, Chicago, Central & Pacific Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Iowa Northern Railway Company, The Pittsburgh & Conneaut Dock Company, and Wisconsin Central Ltd.

of these principles would apply is a matter for individual cases, but there is value for potential litigants in knowing that these principles would be part of the Board's determination.

In these reply comments, CN responds to several points made in opening comments as well as topics discussed in CN's April 2, 2026 ex parte meetings with Board Members.

Case-Specific Analysis. CN agrees with American Fuel & Petrochemical Manufacturers ("AFPM") that relevant issues vary widely across facilities and that the Board would need to consider the "complex, location specific factors, yard capacity, crew availability, interchange congestion, train make up, and local operating practices" involved in railroading. AFPM Comments 12. As AFPM observes, a case-by-case approach appropriately permits the Board to evaluate the specific characteristics of each movement. *Id.*

BNSF Railway Company ("BNSF") correctly notes the importance of narrowly tailoring regulatory interventions to remedy specific, identified problems. BNSF Comments 2-3. CN also supports the position of Norfolk Southern Railway Company ("NSR") that a final rule in this proceeding should not prejudice or foreclose future arguments regarding the substantive statutory standard that would apply in individual cases. NSR Comments 6. NSR's view is consistent with the Board's expectation that "the standards for the granting of a switching or through route prescription would be further developed through case-by-case adjudication."

See NPRM, slip op. at 13 n.22.

Contract and Exempt Traffic. The American Cement Association (“ACA”) requests removal of commodity exemption for hydraulic cement and argues more generally that exempt traffic should be eligible for relief under 49 U.S.C. §§ 11102 and 10705. ACA Comments 5-6. Changes to the exemption regulations are outside the scope of this proceeding; as the Board has indicated, a draft action is likely to be presented for consideration in a different docket in October 2026. *See* STB Q. Rep. on Pending Regul. Procs., Q1 2026, at 2. And permitting regulatory intervention as to otherwise-exempt commodities, outside the context of a case-specific revocation, would erode Congress’s deregulatory intent. *See, e.g., Brae Corp. v. United States*, 740 F.2d 1023, 1043 (D.C. Cir. 1984). Taking the step requested by ACA would not be consistent with “the agency’s statutory duty to utilize exemptions to the maximum extent permissible under the law.” *See* H.R. Rep. No. 104-311, at 96 (1995).

Terminal Areas/Terminal Facilities. Olin Corporation (“Olin”) argues that “Congress did not limit the Board’s authority to order reciprocal switching only to terminal areas” and instead “[t]he Board may grant reciprocal switching within a reasonable distance from carrier interchanges.” Olin Comments 7. CN recognizes that the phrase “terminal area” is not used in § 11102. But regardless of whether the relevant wording is “terminal area” or “terminal facilities,” the key concept is what Congress authorized in § 11102(c) by referring to “reciprocal switching.” As CN pointed out in its opening comments, precedent confirms that “reciprocal

switching” refers to switching within a terminal area served by more than one carrier.² Any ambiguity in that authorization should be interpreted with awareness of the title of § 11102, which indicates that Congress did not intend its authorization to extend beyond terminal facilities. *See* CN Comments 4; *see also*, *e.g.*, *Kulmer v. STB*, 236 F.3d 1255, 1257 (10th Cir. 2001) (looking to the title of a statutory section to interpret ambiguous text).

Also, as CN observed in its opening comments, the agency has considered various factors in determining what constitutes a terminal area, including the use of the track, the nature of the facilities, the type of service performed, whether operations take place within yard limits, and whether service is performed within a cohesive commercial area, among others.³ It would be appropriate to continue using such a multi-factor test to assist in determining whether the requested relief would

² CN Comments 5; *see, e.g.*, *Cent. States Enters., Inc. v. Seaboard Coast Line R.R.*, NOR 38891, slip op. at 2 (ICC served May 15, 1984) (“Reciprocal switching occurs at stations or terminals served by more than one carrier. A common station or terminal area is, therefore, a prerequisite for such switching.”), *aff’d sub nom. Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 675 (7th Cir. 1985); *R.R. & Warehouse Comm’n of Minn. v. Chi. Great W. Ry.*, 262 I.C.C. 437, 437–38 (1945) (“It is a common custom for carriers to publish switching charges for *intraterminal* movements between industries located upon private side-tracks on their lines and the point of interchange with other carriers The switching of cars in such service is called *reciprocal switching*.”) (emphasis added); *Switching Charges & Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971) (“It has long been a common practice among the railroads to participate *at commonly served terminal areas* in what is called *reciprocal switching*.”) (emphasis added).

³ CN Comments 5; *see, e.g.*, *Midtec Paper Corp. v. Chi. & N.W. Transp. Co. (Use of Terminal Facilities & Reciprocal Switching Agreement)*, 3 I.C.C.2d 171 (1986), *aff’d sub nom. Midtec Paper Corp. v. U.S.*, 857 F.2d 1487 (D.C. Cir. 1988); *CSX Corp.—Control—Chessie Sys., Inc.*, 363 I.C.C. 518, 585 (1980).

be within terminal facilities as required by § 11102. The weight afforded each factor could vary from case to case based on the circumstances—as opposed to picking out one factor that would control in every case regardless of the others.

For example, railroads’ voluntary reciprocal switching tariffs would not be controlling (or even, in many instances, compelling) evidence in making these determinations. In the marketplace, a railroad or railroads may agree to add a location or customer to a voluntary reciprocal switching tariff even when the circumstances are outside terminal facilities. In other words, under some circumstances for various commercial and operating reasons, a carrier may find it expedient to voluntarily utilize reciprocal switching at a location without consideration of whether it would occur within terminal facilities. Ultimately, that reflects their voluntary nature and not a recognition that a particular customer or location is within terminal facilities as provided in the statute. Requiring reciprocal switching by order in reliance on these voluntary tariffs could create perverse incentives in the underlying negotiations, with the prospect of future Board orders potentially deterring solutions that would otherwise be mutually acceptable.

Practicability. CN agrees with Union Pacific Railroad Company (“UP”) that the Board must ensure the remedy does not disrupt overall network fluidity or operational efficiency. UP Comments 1. A reciprocal switching order that has these effects would create unwarranted impacts on service to other customers and may even turn out to be counterproductive for the petitioning party.

The Brotherhood of Locomotive Engineers and Trainmen (“BLET”) makes an important point about potential communication problems. BLET Comments 2 (warning against solutions that add complexity and increase the probability of poor communication). If the Board finalizes the repeal, this issue should be considered in evaluating whether the requested relief is practicable in any particular case.

CN also appreciates BLET’s reminder of input provided by the U.S. Department of Transportation (“DOT”) and the Federal Railroad Administration (“FRA”) in a previous docket that “any new or revised switching requirements must ensure that switching operations are safely executed.” BLET Comments 2 (quoting DOT & FRA Comments 3, Nov. 7, 2023, *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2)). As CN mentioned in its opening comments, a switch that cannot be performed safely is not a switch that is practicable. CN Comments 6. The most straightforward example is where the requested relief under § 11102(c) or § 10705 could violate a safety law, rule, or order. But the Board should remain open to safety-related evidence and argument in other cases as well, consistent with its intent to rely on the context of the facts of each individual case. Not every requested order under § 11102(c) or § 10705 would present safety concerns, but in some cases the record may reflect a demonstrable safety impact that should not be disregarded.

Burden of Proof. The National Grain and Feed Association (“NGFA”) proposes that in a reciprocal switching proceeding, “the incumbent and alternative railroad provider should bear the burden of proof to demonstrate that the requested

reciprocal switching arrangement is not ‘necessary to provide competitive rail service.’” NGFA Comments 3-4. As CN pointed out in its opening comments, however, because §§ 11102(c) and 10705 are silent as to burden of proof, the default rule places the burden on the party seeking relief. CN Comments 8-9. Requiring the defendant to disprove the underlying merits standard would not merely diverge from the default rule—it would reverse it, with significant implications for the procedural adequacy of the case.

Ways to Communicate Background Principles. In its opening comments, CN recognized the Board’s expectation that “the standards for the granting of a switching or through route prescription would be further developed through case-by-case adjudication,” in contrast to procedural suggestions that the Board would consider incorporating into a guidance document. *NPRM*, slip op. at 13 n.22. CN recommended that the Board should establish certain background principles (as listed above) as early as reasonably possible to limit inefficient use of resources by the parties and the Board. *See* CN Comments 2.

One way to establish such background principles would be to identify them in a final decision repealing part 1144, should the Board choose to do so.

Alternatively, the Board could post a “frequently asked questions” page on the Board’s website.⁴ And yet another avenue would be to receive and rule on motions

⁴ *Cf.* <https://www.stb.gov/wp-content/uploads/Major-Merger-Frequently-Asked-Questions.pdf>.

to dismiss within individual proceedings. This would be the least efficient of the possibilities raised here, but it could still save substantial litigation resources by resolving cases, where appropriate, at an early stage.

CONCLUSION

CN appreciates the Board's careful consideration of CN's opening comments and these reply comments. CN respectfully requests that the Board confirm the background principles provided in its opening comments prior to issuance of a merits decision in an individual case under § 11102(c) or § 10705.

Respectfully submitted,

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