

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Office of Chief Counsel
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Docket No. EP 788

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

OPENING COMMENTS OF CN

Grand Trunk Corporation on behalf of itself and its U.S. rail operating subsidiaries¹ (collectively, “CN”) respectfully submits these 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*”).

CN appreciates the Board’s anticipated focus in individual reciprocal switching and through route prescription cases on the “context of the specific circumstances” and its reference to an earlier rulemaking emphasizing that regulating by adjudication provides the opportunity to conduct “in-depth analys[e]s of unique fact patterns required by the statute.” *NPRM*, slip op. at 13-14. Thorough evaluation of the circumstances of each individual case would be crucial to reaching well-reasoned decisions if the Board finalizes the proposed repeal of 49 C.F.R. part 1144.

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.

CN recognizes 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. *Id.* at 13 n.22. Nonetheless, if the Board finalizes the proposed repeal, the Board should establish certain background principles as early as reasonably possible. Waiting until later to do so could risk wasting the resources of parties and the Board. For example, if a rail customer seeks a reciprocal switching prescription for transportation that moves under a contract, the Board should not wait until its merits decision to establish that such traffic is ineligible for the requested relief. Allowing such a case to be litigated to completion would not be in the interest of the Board or the parties.

Below, CN outlines several background principles that the Board should clarify for efficient use of case-by-case adjudication.

I. CONTRACT AND EXEMPT TRAFFIC ARE INELIGIBLE FOR PRESCRIPTION OF RECIPROCAL SWITCHING OR THROUGH ROUTES OR RATES

The plain language of 49 U.S.C. § 10709 removes from the Board’s jurisdiction the authority to regulate rail transportation provided pursuant to contract. Section 10709(c)(1) provides that a transportation contract—and the transportation under such contract—“shall not be subject to” Subtitle IV, Part A, which encompasses the reciprocal switching provision at 49 U.S.C. § 11102(c) and the prescription of through routes and through rates under 49 U.S.C. § 10705. The Board has explained that it “is well settled that the Board’s authority does not

extend to those movements conducted pursuant to transportation contracts.”

Ameropan Oil Corp. v. Canadian Nat’l Ry., NOR 42161, slip op. at 3 (STB served Apr. 17, 2019). Indeed, the Board “lacks regulatory authority over the terms and conditions related to that transportation, whether or not explicitly addressed in the contract.” *Id.*, slip op. at 4. Consequently, the remedies established by sections 11102(c) and 10705 cannot apply to transportation provided under a contract.

To the extent these remedies would depend on transportation that has already occurred—for example, to determine whether there was “inadequate service by the incumbent carrier” for purposes of the “practicable and in the public interest” standard in § 11102(c)²—that previous transportation may not be transportation under a contract. Regulating transportation based on service provided under a contract would impose a “duty in connection with services provided under such contract other than those duties specified by the terms of the contract,” in contravention of § 10709(b). As Congress explained, the statute excludes rail transportation contracts and “the service provided under th[ose] contract[s] . . . from *all regulation* and all of the requirements of the Interstate Commerce Act.” H.R. Rep. No. 1430, 96th Cong., 2d Sess. at 100 (1980) (Conf. Rep.) (alterations and emphasis added).

Similarly, the Board should confirm that the remedies established in sections 11102(c) and 10705 cannot apply to traffic that has been exempted from Board

² See *NPRM*, slip op. at 4 n.6.

regulation pursuant to 49 U.S.C. § 10502. As the Board has held, “even if a carrier’s conduct would constitute a statutory violation during a period of regulation, [an] exemption bars regulatory relief during the period when the exemption is in force.” *Pejepscot Indus. Park, Inc.—Pet. for Declaratory Ord.*, 6 S.T.B. 886, 891 (2003), *reconsid. granted in part on other grounds*, 7 S.T.B. 220 (2003). Although the Board retains jurisdiction over exempt traffic, it cannot apply regulatory consequences retroactively to service that was exempt at the time it was performed. *Id.*, 6 S.T.B. at 892 n.14. Doing so would be contrary to the principle that retroactive application of administrative determinations is disfavored. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998).

II. RECIPROCAL SWITCHING MUST OCCUR WITHIN A TERMINAL AREA

As the NPRM recognizes, “‘reciprocal switching’ refers to transfers between rail carriers that take place within the terminal area in which the shipment originates or ends and that are incidental to a line haul.” *NPRM*, slip op. at 3 n.5. This definition is consistent with the Board’s statutory authority under 49 U.S.C. § 11102(c) to prescribe reciprocal switching agreements, which is limited to switching that occurs within a terminal area. Section 11102 governs the “[u]se of terminal facilities,” and the reciprocal switching provision at subsection (c) does not contain any language suggesting that switching could be ordered outside of a terminal area. Where the statute reaches activity outside of a terminal area, it says so expressly—for example, section 11102(a) authorizes the Board to grant terminal trackage rights access to “main-line tracks for a reasonable distance outside of a

terminal” under certain circumstances, but section 11102(c) makes no such mention. And precedent confirms that “reciprocal switching” refers to switching within a terminal area served by more than one carrier.³

In determining what constitutes a terminal area, the agency has considered various factors, 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. *See, e.g., Midtec Paper Corp. v. Chicago & 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).

III. RECIPROCAL SWITCHING OR THROUGH ROUTES MUST BE PRACTICABLE TO BE PRESCRIBED

Section 11102(c) authorizes the Board to “require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable

³ *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).

and in the public interest, or where such agreements are necessary to provide competitive rail service.” The first prong inherently requires a finding that the remedy is practicable. Numerous factors bear on practicability, including the operational feasibility of the proposed operation, existing track and yard usage, capacity (including availability of adequate yard facilities), congestion, traffic density, operational interference, the existence of an active interchange that can accommodate the type and volume of traffic, the potential for unduly impairing the ability of either carrier to serve its shippers, and the impacts to other carriers, shippers, and the public.⁴

Safety must be a central consideration in any practicability analysis. The Board should consider the safety risks associated with any proposed switching arrangement, including chain of custody and control requirements for hazardous materials. A switch that cannot be performed safely is not a switch that is practicable.

Precedent also requires a determination of feasibility under the “necessary to provide competitive rail service” prong of section 11102(c). For example, in *Central*

⁴ See, e.g., *Del. & Hudson Ry. v. Consol. Rail Corp.—Reciprocal Switching Agreement*, 367 I.C.C. 718, 720-21 (1983) (considering feasibility, capacity of terminal facilities to handle both carriers’ traffic, the need to avoid unduly hampering either carrier’s ability to serve its shippers, and cost-benefit analysis between shippers and carriers); *Union Pac. Corp.—Control—Mo. Pac. Corp.*, 366 I.C.C. 462, 574–76 (1982) (considering capacity and delay implications of shared operations); *Use by Erie of Niagara Jct. Ry. Terminals*, 269 I.C.C. 493, 499–502 (1947) (considering concerns about yard usage, the extent of switching that would need to occur, and potential interference with interchange track switch charges).

States, the U.S. Court of Appeals for the Seventh Circuit said the following in reference to the “necessary to provide competitive rail service” prong:

Subsection (c) also provides that the Commission may require the parties to enter into a switching agreement if it is “necessary to provide competitive rail service.” The legislative history of subsection (c) reveals that Congress sought, in part, to encourage increased competition between railroads. . . . Thus, in enacting subsection (c), Congress attempted to increase competition “[i]n areas where reciprocal switching is feasible ...” and where the switching agreement would provide “an avenue of relief for shippers where only one railroad provides service and it’s inadequate.”

Cent. States, 780 F.2d at 669 (quoting H.R. Rep. No. 1430, 96th Cong., 2d Sess. 116-17) (emphasis added).

Notwithstanding Congress’s lack of express reference to practicability in the “necessary to provide competitive rail service” prong, it would not be good policy to exclude additional practicability factors—such as safety or impacts on other shippers and the public—from the analysis. Prescribing reciprocal switching that is unsafe or that will unduly impact shippers or the public is, at the very least, contrary to several provisions of the Rail Transportation Policy. *See* 49 U.S.C. § 10101 (establishing policies to operate transportation facilities and equipment without detriment to the public health and safety and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense).

Regarding through routes, the factors that the Board considers include (among others) the feasibility of the route and the practicality of the movement.

Canexus Chems. Can. L.P. v. BNSF Ry., NOR 42131, slip op. at 9 (STB served Feb. 8, 2012).

IV. REMEDIES UNDER CASE-BY-CASE ADJUDICATION ARE NOT APPROPRIATE FOR “CLASS ACTION” PETITIONS WITH MULTIPLE PETITIONERS

Because case-by-case determinations must focus on the petitioner’s individual circumstances, reciprocal switching and through route prescriptions are not appropriate remedies for proceedings involving multiple petitioners filing together as a group. Trying to consider the circumstances of multiple petitioners at once would hinder the Board’s ability to perform the “in-depth analysis of unique fact patterns required by the statute” referenced above and in the *NPRM*. *See NPRM*, slip op. at 13; *cf.* Fed. R. Civ. P. 23(a) (requiring questions of fact common to the group before a class will be recognized for a class action lawsuit).

Because the statutory standards require analysis of the specific facts and circumstances affecting each individual petitioner, and because any prescription must be tailored to remedy that petitioner’s circumstances, proceedings involving multiple petitioners seeking collective relief would not be conducive to the individualized assessment required.

V. PETITIONERS SHOULD BEAR THE BURDEN OF PROOF

If the Board chooses to set expectations regarding burden of proof, *see NPRM*, slip op. at 13 n.22, it should confirm that petitioners bear the burden. Doing so would be consistent with “the ordinary default rule that plaintiffs bear the risk of

failing to prove their claims.” *See Schaffer v. Weast*, 546 U.S. 49, 56 (2005). The statutory language of sections 11102(c) and 10705 is silent as to which party bears the burden in reciprocal switching or through route/rate cases. At least with respect to the former, however, precedent is clear that the burden is on the petitioner. *E.g.*, *Midtec*, 3 I.C.C.2d at 182 (burden of proof rests on party seeking terminal trackage rights or reciprocal switching); *cf. Sierra R.R. v. S. Pac. Transp. Co.*, 361 I.C.C. 819, 830 (1979) (complainant in division of joint rates case under section 10705 has burden of proof). As it typically does, the burden here should lie on the party seeking relief. *See Schaffer*, 546 U.S. at 57-58.

CONCLUSION

For the reasons set forth above, CN respectfully requests that the Board confirm the background principles stated above prior to issuance of a merits decision in an individual case under section 11102(c) or 10705.

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