

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 711 (SUB-NO. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

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INTRODUCTION AND SUMMARY OF COMMENTS

A. CSXT wants to be a part of the solution and to help the Board reach a meaningful and well-informed final rule.

CSX Transportation, Inc. (“CSXT”) understands the Board’s objective in Ex Parte 711 (Sub-No. 2)¹ to identify the situations in which forced reciprocal switching could be ordered as a remedy for inadequate service and to set forth a clearer, more expeditious process for such proceedings. CSXT is aligned with the Board’s ultimate objective of encouraging consistent and reliable rail service and with many aspects of the proposed rule. The primary objective of these comments is to provide constructive advice and guidance. Our intent is to assist the Board with how it can identify the presence of an authentic service failure; how it can standardize the metrics in a meaningful way; and how it can apply the reciprocal switching remedy in a way that is informed and well-calibrated to improve the inadequate service. From the outset, the key focus needs to be on a model that is consistent with Congress’s requirement that there be “some actual necessity or compelling reason” for a forced switch.²

The NPRM proposes to identify a “service inadequacy” by calculating whether one of three newly proposed “service performance metrics” dip below a

¹ Notice of Proposed Rulemaking and Closure of Subdocket No. 1, *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (“NPRM”).

² *Jamestown, N.Y., Chamber of Com. v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933); *Del. & Hudson Ry. v. Consol. Rail Corp.—Reciprocal Switching Agreement*, 367 I.C.C. 718, 720 (1983) (same).

predetermined threshold over any 12-week period. That finding of inadequacy can only be overcome if the railroad successfully shows one of four affirmative defenses.

We respectfully submit that such a model is too mechanical and not a reliable way to identify actual service problems within a complex, interdependent rail network. While metrics should serve as a useful guide for the Board and can be relevant evidence of service quality, there are many situations where one of the proposed metrics could decline as a result of causes outside of a railroad's control, including large scale volume fluctuations, third party activity, and temporary railroad actions aimed at improving long-term service and network reliability. Further, one of the Board's metrics could decline for a short period in comparison to the prior year, even while the railroad was providing the best possible service under the circumstances. The rail network is never static, and any metric will fluctuate regularly, particularly on a lane-by-lane basis. Given this dynamic, the NPRM's mechanical approach is ill-suited to identify service problems that could be remedied by a forced switching arrangement.

As CSXT's Senior Vice President of Network Operations and Service Design Casey Albright explains in his attached verified statement, service performance metrics are tools that can be used to assess how the network as a whole is running and diagnose issues, but a single measure cannot determine whether a customer is receiving good service. Under the NPRM, the Board would not consider the overall quality of service provided to the petitioner when determining whether a forced switch was needed. It would not look at service metric levels for any time period

other than the 12-week-period selected by the petitioner. It would not consider whether the petitioner suffered any particular harm from the identified metric dip. And it would not consider whether the forced switch being requested would solve the asserted service deficiency. Instead, the metric would be treated as conclusive evidence of “service inadequacy,” which could only be overcome if a railroad proved one of the four listed “affirmative defenses.” However, the restrictive nature of the proposed affirmative defenses is such that in almost all cases the service performance metrics would effectively represent un rebuttable evidence of a service failure.³

A mechanical process of this kind would do little to address actual service problems on the network. And there are direct negative consequences from a regulatory regime that would require railroads to avoid dips in specific service metrics (as opposed to encouraging them toward a more holistic focus on customer needs). The NPRM proposal that a single metric trigger would be conclusive evidence of service inadequacy creates incentives against maintenance or capacity expansion projects designed to improve service over the long run (because those same projects could produce short-term metric dips). A rigid focus on a single metric

³ The proposed affirmative defenses are highly restrictive: the “extraordinary circumstances” defense only applies to “unforeseen track outages”; two defenses require evidence of significant changes in the petitioner’s traffic patterns; and one defense requires proof that a third party dispatcher caused delays. *See* NPRM at 25 (providing that “extraordinary circumstances” are limited to “the type of events that permit a railroad to qualify for an emergency trackage rights exemption”); 49 C.F.R. § 1180.2(9) (emergency trackage rights exemption only applies to “unforeseen track outage[s]”).

could also disincentivize changes to operating plans that decrease transit times or increase days of service, because the railroad would just be setting a higher performance bar for the future. And it would penalize railroads for allocating resources to respond to customer needs like volume surges, because such operational changes might have a short-term effect on a different customer's metrics (even if they had no impact on whether the railroad was serving that customer's actual needs).

The Board can avoid these unintended consequences by relying on a qualitative evaluation of whether a shipper is actually receiving inadequate service for its particular needs, the actual causes of the inadequacy, and whether a forced switch could alleviate the service problem. The Board should give both petitioners and railroads the flexibility to present evidence that they believe is relevant to these questions, including but not limited to any evidence from service performance metrics. A qualitative approach that considers metrics alongside other relevant circumstances associated with the service will provide a path for the Board to achieve its policy goals.

A qualitative approach is also essential to the lawfulness of the Board's approach. When Congress created what is now 49 U.S.C. § 11102(c), it made clear that adherence to the agency's long-established standards for granting joint use of terminal areas was required to support a prescription of reciprocal switching.⁴

⁴ H.R. Rep. No. 96-1430, at 116 (1980) ("The standard 'practicable and in the public interest' is the same standard the Commission has applied in considering whether

Congress thus limited orders of forced switching to situations where it finds “some actual necessity or some compelling reason” for such a forced switch.⁵

Even the existence of an actual service problem cannot create a compelling need for a forced switch if there is no evidence that the requested switch would remedy that service problem. To comply with Congress’s commands, the Board should ensure that forced switches are only ordered for actual service failures *that could be remedied by a Board-ordered switch*. Anything less would be a significant break from the agency’s prior decisions, and one that would be taken without a clear statement from Congress authorizing such a policy change.

B. CSXT’s proposed solutions

CSXT shares the Board’s ultimate goal of encouraging reliable rail service and seeks to be part of the solution. As a result, CSXT has proposed specific recommendations that would allow the Board to achieve its stated purpose of providing a clearer path for using § 11102(c) to remedy service failures, while conforming with the statute and sound regulatory policy.

to order the joint use of terminal facilities.”); S. Rep. No. 96–470, at 42 (1979) (same); *Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 668 (7th Cir. 1985) (“Congress intended that the standard to be used in applying the ‘practicable and in the public interest’ test be ‘the same standard the Commission has applied in considering whether to order the joint use of terminal facilities.’”); *Midtec Paper Corp., et al. v. Chi. & Nw. Transp. Co.*, 1 I.C.C.2d 362, 364 (1985) (“*Midtec I*”). (explaining that the public interest standard for prescribing the joint use of terminal facilities and forced switching “are identical”).

⁵ *Jamestown*, 195 I.C.C. at 292; *Del. & Hudson Ry.*, 367 I.C.C. at 720 (same).

First, rather than using a metric threshold as the single definitive determinant of whether there is a service inadequacy unless a railroad can prove a defined “affirmative defense,” the Board should allow a petitioner to present any evidence that it believes shows inadequate service that creates a compelling need for reciprocal switching. That evidence could include standardized metrics designed by the Board, other metrics designed by the petitioner, or qualitative evidence that the petitioner believes shows a service inadequacy. Railroads then could present any evidence that they believe shows that service was adequate or that there is no compelling need for the remedy. There may be cases where a particular metric or set of metrics is compelling evidence of either service adequacy or inadequacy. The Board could also identify upfront that it will find particular types of evidence probative. But the Board should make clear it will always be open to considering relevant qualitative evidence about the core statutory question of whether a service inadequacy creates an “actual necessity or compelling need” for a forced switch.

Second, CSXT agrees that standardized service performance metrics can be a useful tool for the Board to monitor the rail network and potentially useful evidence in individualized cases. But creating standardized industry-wide service performance metrics is a complex task, and it requires significantly more engagement with stakeholders and work to refine the details. Technical meetings or conferences like those the Board held in *Ex Parte 724* (Sub-No. 4) would be a useful part of this process. This process of developing reliable metrics need not delay the resolution of this proceeding, however. If the Board were to adopt CSXT’s core

suggestion to abandon the metrics-only approach, it could finalize this proceeding while it continues to work on a set of standardized performance metrics (either in a subdocket or a separate docket). The attached Verified Statement of Michael Cheatham identifies some initial issues with the metrics the Board has proposed and suggests some areas for improvement.

Third, the Board should require proponents of forced switching orders to demonstrate that the requested reciprocal switching would remedy the claimed service inadequacy. A service inadequacy cannot create a compelling need for forced switching if the forced switching would do nothing to resolve the inadequacy. In the same vein, the current NPRM would allow a metric dip over any 12-week period of time to justify a forced switch—even months or years after the identified 12-week period. There can be no compelling need to force switching for a service inadequacy that has already been resolved. Therefore the Board should require forced switching petitions to be filed contemporaneous with the claimed service inadequacy that is the basis for the request.

Fourth, the Board should ensure that it retains the flexibility to consider all relevant stakeholders and policy issues when determining whether to impose a forced switching order, including impacts on the alternative railroad, on passenger rail (including any on-time performance obligations of the incumbent railroad), on other customers, and on employees. Congress has made clear that the public interest test must consider the interests of all affected parties, and not just the petitioner's desire for a switch.

Fifth, the NPRM would leave such forced switches in place for two to four years—far longer than the 12-week period of the metric dip. This misalignment does not comply with the compelling need test, which only permits forced switches that are reasonably tailored to the time period over which those problems might persist. The Board should limit the time that a forced switching order is in effect to the time needed to remedy the claimed service inadequacy. Such a period could be determined on the facts of each case. Moreover, the NPRM proposes forced switching orders that would effectively be permanent until the railroad successfully petitions for them to be removed. The compelling need test cannot support what would essentially be a perpetual forced switching order imposed after a 12-week metric dip. The Board should remove the NPRM’s proposal to have forced switching orders automatically renew, and it should remove limits on the time when parties can file petitions to terminate forced switching orders. If a petitioner believes that the need for a forced switch persists after the time the original prescription expires, it can petition for an extension of the forced switch.

CSXT elaborates on these suggestions below. CSXT also joins in the comments being filed today by the Association of American Railroads (“AAR”), which address multiple important issues that CSXT did not include in these comments in the interest of avoiding repetition. These issues include the importance of restricting application of § 11102(c) to terminal areas; the statutory restrictions on service regulation of contract traffic; and the need for the Board to respect existing exemptions and not retroactively regulate.

I. MECHANICAL FORMULAS WILL NOT IDENTIFY INADEQUATE SERVICE OR PROVE AN ACTUAL NECESSITY OR COMPELLING REASON FOR A FORCED SWITCH.

The NPRM proposes three new “service performance metrics” that the Board would use to determine whether forced switching was necessary under the new proposed Part 1145. CSXT believes that certain metrics could be useful information for the Board to use in its monitoring of the industry and could be useful evidence in petitions seeking forced switching to address alleged service problems. CSXT has provided suggestions on how each of these new service performance metrics could be standardized if the Board is intent on moving in that direction.

While CSXT supports the Board’s efforts to refine service metrics, there is no perfect quantitative way to reliably divide service successes from service failures. Nor is it possible for the Board to predetermine the particular affirmative defenses that could explain metric results in all scenarios on a network with thousands of customers. The network is simply too complex, and the needs—and reciprocal responsibilities—of rail customers are too diverse for the Board to predetermine either a particular percentage threshold that would mark the divide between good and bad service or the particular “affirmative defenses” that would apply. For this reason, no metric should be used as conclusive proof of a railroad’s service quality to a shipper. While the Board should certainly take service metrics into account when evaluating service inadequacy, it should be considering all relevant evidence and not treating any single quantitative metric as conclusive proof.

Subsection A reiterates that Congress required the Board to find “some actual necessity or some compelling reason” to order a forced switch. While a real service problem could satisfy that statutory standard, a metric fluctuation alone cannot. It is impossible to devise one-size-fits-all thresholds that would reliably identify real service problems—and even more impossible to devise metrics that would single out the subset of service problems that could be solved by forced switching. Subsection B explores the metrics proposed by the Board and the reasons why they cannot, standing alone, be reliable guides to identifying service inadequacies. Subsection C recounts the important policy reasons counseling against a metrics-only approach, and Subsection D identifies additional legal concerns that would be raised by such an approach. And Subsection E presents CSXT’s solution—a qualitative approach that allows petitioners to present any evidence they believe would show a service inadequacy, and allows responding railroads to respond with any evidence they believe would be relevant. Metrics could be used where they were relevant and informative, but no metric should be treated as the single determinant of when service is adequate and when it is not.

A. An “actual necessity or compelling reason” must be found before prescribing a forced switch.

Under the “public interest” prong of 49 U.S.C. § 11102(c), the Board may prescribe a forced switch agreement “where it finds such agreements to be practicable and in the public interest.” The “public interest” part of this standard has an established meaning that must inform the Board’s regulations. Congress gave the Board unusually clear instructions that the “long-established standards”

used by the agency to grant joint use of terminal facilities under what is now section 11102(a)⁶ must be used when deciding whether to prescribe a forced switch under section 11102(c).⁷

Those “long-established standards”—which the agency has applied for over a century now⁸—require (i) a showing of “some actual necessity or some compelling reason” for the forced switch,⁹ and (ii) a determination that the switch would be in

⁶ Section 11102(a) was previously 49 U.S.C. § 11103(a), and before that, section 3(4) of the Interstate Commerce Act.

⁷ H.R. Rep. No. 96–1430, at 116 (1980) (“The standard ‘practicable and in the public interest’ is the same standard the Commission has applied in considering whether to order the joint use of terminal facilities.”); S. Rep. No. 96–470, at 42 (1979) (same); *Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 668 (7th Cir. 1985) (“Congress intended that the standard to be used in applying the ‘practicable and in the public interest’ test be ‘the same standard the Commission has applied in considering whether to order the joint use of terminal facilities.’”); *Midtec I*, 1 I.C.C.2d at 364 (explaining that the public interest standard for prescribing the joint use of terminal facilities and forced switching “are identical”).

⁸ The Seventh Circuit in *Central States* cited the following cases as “pre-Staggers Act cases” that were “all joint use cases that describe the public interest standard” ratified by Congress in 1980 (780 F.2d at 678): *Jamestown*, 195 I.C.C. at 292 (“some actual necessity or some compelling reason must first be shown before we can find such action in the public interest”); *Del. & Hudson Ry.*, 367 I.C.C. at 720 (relying on *Jamestown* standard); *Lehigh Valley R.R. Trackage Rights, Owego to Campbell Hall, N.Y.*, 312 I.C.C. 389, 392 (1961) (“*Lehigh Valley*”) (noting that the needs of the carriers must also be considered in determining the propriety of ordering a joint use of rail facilities); *Mfrs. Ass’n of York, Pa. v. Pa. R.R.*, 73 I.C.C. 40, 49 (1922) (needs of carriers and general public must be considered).

⁹ *Jamestown*, 195 I.C.C. at 292 (“The expression ‘in the public interest’ means more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them. . . . [S]ome actual necessity or some compelling reason must first be shown before we can find such action in the public interest.”) (emphasis added); *Del. & Hudson Ry.*, 367 I.C.C. at 720 (“an affirmative finding that joint terminal use is in the public interest requires a showing of ‘some actual necessity or compelling reason,’ meaning that ‘more than a mere desire on the part of shippers or other interested parties for something that would be convenient

the public interest in light of “not only the interests of the particular shipper[] [requesting the relief] but also the interests of the carriers and of the general public.”¹⁰

The current NPRM does not comply with these “long-established” standards. Rather, the Board has proposed that “when[ever] an incumbent rail carrier’s service fails to meet the performance standards, the incumbent carrier lacks an affirmative defense, and the prescription of a reciprocal switching agreement would be practicable—it is in the public interest to allow access to an alternate rail carrier through prescription of a reciprocal switching agreement.”¹¹ This approach leaves no room for considering whether there is a compelling need for a switch, which among other things requires some consideration of whether there is an actual service failure (not a mere metric dip) and whether a forced switch would address the claimed service deficiency. If the Board is not able to find that forcing access to an alternative carrier would solve the alleged service deficiency, there cannot

or desirable to them’ must be shown.”) (emphasis added); *Cent. States*, 780 F.2d at 678 (“some *actual necessity or some compelling reason* must first be shown before [the agency] can find such action in the public interest” under what is now § 11102(c)(1) (emphasis added)).

¹⁰ *Mfrs. Ass’n of York*, 73 I.C.C. at 49; *Jamestown*, 195 I.C.C. at 292 (same); *D&H*, 367 I.C.C. at 720 (same); *accord Hastings Com. Club v. Chi., Milwaukee & St. Paul Ry.*, 107 I.C.C. 208, 217 (1926) (concluding that, after “a severe car shortage on the Milwaukee, which had temporarily compelled the mill . . . to reduce its output,” complainant mill was seeking service by an additional railroad to “have the advantage of the Burlington’s car supply in the event of future car shortages,” but that such a mere desire did not justify forced joint use of terminal facilities where the record showed *significant cost and operational complexities* to the impacted carriers that *outweighed the benefit* to a small number of shippers).

¹¹ NPRM at 2.

possibly be an “actual necessity or compelling reason” for it to impose forced switching as a solution for that service problem. And as discussed below, even well-calibrated service performance standards can never be unimpeachable evidence of service quality.

B. Systemwide performance metrics are valuable tools, but they should not be treated as conclusive evidence of service quality on individual lanes.

Statistical metrics of rail service can be valuable monitoring tools that can help identify places on the network that need additional attention.¹² But no railroad would make major operational changes, especially at a lane level, based merely on a one-time, short-term change to a metric. At best, such a change would be cause to investigate more closely to determine if there is a service issue to address.

The Board itself has recognized that there is no definitive measure of service inadequacy; rather, such a determination must be made on a case-by-case basis in a flexible manner:

We do not believe that it is possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times. Rather *we remain convinced that such issues are best addressed on a case-by-case basis, under flexible general rules, because transportation needs and service difficulties can vary substantially.*

Expedited Relief for Serv. Inadequacies, 3 S.T.B. 968, 975 (1998) (emphasis added).

Likewise, the agency has made clear that when determining whether relief is warranted under section 11102 for inadequate service, “[t]here is no mechanical

¹² V.S. Albright at 2.

tests and the totality of the circumstances must be considered.”¹³ There is good reason to consider the totality of the circumstances: as the Board previously recognized, “there are significant differences between the railroads as to geography, network, customer base, traffic volumes, resources, operating practices, and business philosophy.”¹⁴ A flexible, case-by-case approach to remedying service inadequacies is consistent both with the Board’s precedent and with the public interest prong of section 11102(c).

The general principle that no single metric can reliably identify service inadequacies is particularly applicable to new metrics that the Board has never studied on a lane-by-lane basis. While two of the metrics proposed by the Board are somewhat analogous to metrics that CSXT has reported to the Board in Ex Parte 770 (Sub-No. 1), that proceeding was focused on measuring network-wide health and tracking service recovery, not performance on individual service lanes. Moreover, the Board’s proposed “Original ETA” and “Industry Spot and Pull” metrics differ in key ways from the Ex Parte 770 reported metrics, as is explained in the Verified Statement of Michael Cheatham.

Neither Ex Parte 770 nor any other Board proceeding has examined how to meaningfully apply these systemwide monitors on a lane-by-lane basis. For example, the Board might know that improving trip plan compliance from 80% to

¹³ *Midtec I*, at 364.

¹⁴ Supplemental Notice of Proposed Rulemaking, *United States Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 22 (STB served Apr. 29, 2016).

90% represents improving performance across the network, but it has no information on the particular level of trip plan compliance that would represent adequate service to an individual customer. Some customers that desire just-in-time performance and closely coordinate operations to match rail deliveries might value trip plan performance above all; some bulk customers might be less interested in trip plan compliance so long as their train sets were being cycled efficiently. Indeed, the answer likely will be different for every customer.

The third “service consistency” metric comparing transit time to the prior year is a new metric that has never been reported in any way. As with Original ETA, the Board has not fully explored the relationship between short-term transit time dips and actual service performance. And there has been no study of the impact of year-over-year volatility on the Board’s proposed transit time thresholds at a lane level.

As discussed below, while each of the Board’s proposed metrics would sometimes have evidentiary value, they could often indicate “service inadequacy” even for normal, high-quality rail service. Service falling below an arbitrary threshold should not be the sole trigger for identifying service inadequacies.

1. Original ETA

The Board’s proposed “Original ETA” metric would measure a railroad’s success in delivering a shipment near its original estimated time of arrival. The Original ETA metric is similar in many ways to CSXT’s Trip Plan Performance

metric, or “TPP.”¹⁵ As explained in the attached verified statements of Casey Albright and Michael Cheatham, TPP is a meaningful metric that CSXT has used internally to measure performance against trip plan. With some exceptions,¹⁶ each manifest car that moves over CSXT’s network is assigned a “trip plan,” which plans out that car’s path across the CSXT network to its destination and an estimated time of arrival.¹⁷ V.S. Cheatham at 2. For carload traffic, TPP is the percent of measured cars destined for a customer that complete their scheduled plan at or ahead of the original estimated time of arrival or interchange (as applicable). *Id.* TPP is a useful metric for CSXT’s customers to monitor their service. CSXT launched a TPP module in ShipCSX in 2019 as a tool to help CSXT communicate with customers and help them manage their business. *Id.* at 3.

¹⁵ TPP is sometimes referred to as “trip plan compliance” or “TPC.” TPP is also the basis for some of CSXT’s reporting in Ex Parte 770. In order to conform with the Board’s order that carriers report on cars placed “within 24 hours of the original estimated time of arrival the TPP that CSXT has reported in Ex Parte 770 has a 24-hour buffer. *Urgent Issues in Freight Rail Service—Railroad Reporting*, Docket No. EP 770 (Sub-No. 1), at 6 (served May 6, 2022). If the actual time of arrival is within 24 hours after the original ETA, it is counted as a success and reported as such. V.S. Cheatham at 4.

¹⁶ As Mr. Cheatham’s Verified Statement explains, CSXT does not calculate trip plans for all traffic, and thus TPP is not available for all traffic. V.S. Cheatham at 3. Trip plans are not calculated for unscheduled trains such as unit trains. *Id.* Nor are they calculated for certain specialized shipments like overloads and high/wide traffic that take more of a custom-designed service. *Id.* Moreover, CSXT resets trip plans in certain circumstances (such as bad order cars or customer exceptions). *Id.* at 9.

¹⁷ For open gate customers, the estimated time of arrival typically is the time of expected delivery to a customer facility. For closed gate customers, the estimated time of arrival typically is the time of delivery to the serving yard. V.S. Cheatham at 12.

While TPP is a useful tool for CSXT and its customers, the Board should not treat its analogous Original ETA as definitive proof of service inadequacy. Original ETA compliance would be useful evidence in some proceedings, but it will never tell the whole story. Three flaws are particularly clear.

First, the NPRM would not have the Board consider the extent of the Original ETA “miss” or its impact on the customer. Under the NPRM, a car that was delivered 25 hours after the Original ETA would be treated the same as a car delivered 25 days later. Put differently, a railroad that delivered 59% of cars at the precise Original ETA and 41% 25 hours after the Original ETA would conclusively be deemed to have “failed,” but a railroad that delivered 62% of cars within 24 hours of their Original ETA but did not manage to deliver the remaining 38% until three weeks after their Original ETA would conclusively be deemed to have “succeeded.” And a railroad that achieved 100% Original ETA for a year that dipped to 57% for a quarter and then returned to 100% would be deemed to have “failed” just the same as a railroad that did not manage to deliver a single car on time. A mechanical test that leaves the Board no room to consider the actual quality of service that a railroad is providing is destined to produce arbitrary results.

Second, the NPRM would provide essentially no cushion for the many customers who are not served every day of the week. For example, any deviation from the Original ETA for a Monday-Wednesday-Friday customer would result in a miss of over 24 hours (even if the car arrives at the next available serving window).

Third, the NPRM does not require any evidence that the customer relied on the Original ETA to its detriment—or even that it was aware of the Original ETA. Similarly, railroads get no credit for giving customers up-to-date service information. If a carrier updates the Original ETA 6 hours after the bill of lading and meets the new ETA, it is counted as a “miss”—regardless of whether the customer relied on the original ETA or even knew about it. The NPRM leaves no room for consideration of the full context of the railroad’s service and communications with its customers.

2. Transit Time

The “transit time” metric proposed in the NPRM would compare transit time over a 12-week period to the prior year, and it would deem a deterioration of 20% to be proof of “inadequate service.” This metric is not analogous to any measure that the Board has previously considered in Ex Parte 770 or to any metric that CSXT currently uses. There is good reason for this—fluctuations in transit time for individual lanes are normal on a dynamic network and not meaningful indicia of any service problem.

Customers have some ability in ShipCSX to view transit time information. But transit time is not a meaningful metric for CSXT’s manifest customers, who primarily are concerned with the predictability of CSXT’s service, both for trip plan performance and for local service. Nor is it possible to create a useful single transit time metric for unit train shipments. As explained in Mr. Albright’s verified

statement, unit train sets often move in complex patterns among multiple origins and destinations depending on the individual customer's needs. V.S. Albright at 5-6.

While transit time could potentially be useful information in particular proceedings, a transit time increase should never be used as definitive proof of a service inadequacy. Because most transit on CSXT is 5–6 days or less, a single day's increase in transit time often would trip the proposed 20% metric for “inadequate service” without any evidence of worse service or harm to shippers. Indeed, for many shorter hauls on CSXT's network where the average transit might be 1–2 days, a change of a few hours would be enough to trip the 20% threshold, as the table below demonstrates.

Average Transit Time	Additional Transit Time Needed for 20% Increase
5 days (120 hours)	24 hours
4 days (96 hours)	19.2 hours
3 days (72 hours)	14.4 hours
2 days (48 hours)	9.6 hours
1 day (24 hours)	4.8 hours

Transit time fluctuations of this length are not meaningful indicia of service issues. Moreover, a mere year-over-year comparison to prior transit time takes no account of other events that could affect the velocity of a particular shipment. For example, a railroad might be doing track work or capacity improvements designed to help service in the long run but that require short-term service design changes

that increase transit time. *Id.* at 7. Or there might be volume surges in other customers' traffic that temporarily slow down velocity. *Id.* at 8-9. Or slowdown on another railroad's network could have spillover effects on the serving railroad. *Id.* at 9. Or a railroad might have implemented a service design change designed to improve reliability but that slightly increases transit time. *Id.* There are far too many and diverse situations where transit time might change for it to ever be capable of being a conclusive indicator of service inadequacy.

3. Industry Spot and Pull

Finally, the "industry spot and pull" metric proposed by the Board would measure a railroad's success in performing spots and pulls within a service window. At a high level, the Board's ISP metric resembles the Customer Switch Data ("CSD") that CSXT uses to measure its own local service performance, although there are certain significant differences described below. CSD is made available to customers in ShipCSX (where it is referred to as "Local Service Performance"), so they can measure CSXT's current and recent historical local service performance. V.S. Cheatham at 4-6.

As explained in the Verified Statement of Michael Cheatham, CSD is generated based on CSXT's local plan and represents CSXT's assessment of work that could be achieved by a local crew. *Id.* at 5. When cars arrive in a local serving yard for delivery to a customer (or when CSXT receives a request to pull cars from a customer), CSXT has a local service planning tool that will determine which local train will perform the requested service in what window. *Id.* That planning tool

incorporates information on current customer capacity, and it will only assign work that could be completed by the crew that day. Therefore, if CSXT has ten cars inbound for a customer, but the customer's facility only has space for five, only five cars will be in the local plan for that day. The five that are excluded are "capacity exceptions" and would not be incorporated in CSD for that day. *Id.*

If the crew is not able to complete all the local work in the plan for that day, it records the reasons for the miss with "exception codes." *Id.* Some of the exception codes are attributed to the railroad: for example, crews running out of time, locomotive failures, and railroad track conditions are all classed as "railroad reasons" for a failure. *Id.* These codes are included in CSD as misses. *Id.* Other exception codes are attributed to the customer; such "customer reasons" include situations when a customer's track is full or obstructed or when it has not finished loading or unloading a car. *Id.* Those customer exceptions are not included in CSD for that day. *Id.* Neither customer capacity exceptions nor customer exceptions are permanently excluded from CSD calculations. If a car is not spotted or pulled on a particular day because of a capacity exception or customer exception, it will be included in the local service plan for the next available service day (assuming that the customer has capacity to receive the cars on that day), and CSD would be calculated for such cars based on whether the crew was able to execute that local plan.

Customers have the ability to receive notifications of exception codes, and customers who sign up for such notifications can receive a report of any exceptions

by email as they are reported, including detail on what particular exceptions were observed (*e.g.*, track obstruction, car not finished loading, etc.). *Id.* at 6. If a customer disagrees with the causation for a miss, it can dispute the designation with CSXT's Customer Solutions Team. *Id.*

CSD differs in some key ways from the Industry Spot and Pull metric the Board proposes.

First, the proposed § 1145.2(e) language suggests that ISP would be calculated by comparing “requested spots and pulls” to actual placements, with no provision either for customer-caused misses or for customer requests that are beyond their capacity. As described above, the CSD metrics that CSXT has been reporting to the Board and its customers exclude customer exceptions and capacity exceptions. The Board appears to acknowledge that local performance should not be assessed purely by comparing requested spots and pulls to actual placements, as it states that “[a] miss not caused by the incumbent carrier would not be counted against it.”¹⁸ But it is not clear how the Board plans to implement that statement.

The Board should not adopt the suggestion in the NPRM that a railroad might face some additional burden to prove at a later date that the crew was right to attribute a miss to a customer.¹⁹ As mentioned above, at CSXT the cause of a miss is recorded by the crew at the field level. Customers are able to see any misses attributable to them and can dispute them if they wish. Evidence that a local

¹⁸ NPRM at 22.

¹⁹ *Id.*

service miss was attributed to a customer and that the customer did not dispute that designation should be treated as presumptive evidence that the crew's designation was correct.

Second, CSD is measured on a per-car basis. So if a crew places eight cars at a customer site but runs out of time to place two of them, the CSD would be 80%. Or if a crew delivered 98 out of 100 requested cars, the CSD would be 98%. ISP, in contrast, is calculated on a daily basis, and partial service on a day would be counted as a miss. So under ISP, delivering 98 out of 100 cars would count as failure. As with other metrics, the Board would not give itself the discretion to look behind the numbers to separate the metric misses that reflect real service problems from those that do not.

Third, while CSD measures CSXT's success in meeting its local plan, ISP is proposed to be controlled by a customer's requests for service—even if those requests are not reasonably achievable. If a customer orders in ten cars when it only has room for seven, ISP would appear to count the three unfulfillable requests as “misses.” The same would be true for shipments not delivered because of lawful embargoes, which the NPRM suggests would be ignored unless the embargo was caused by an unforeseen track outage.²⁰ The metric thus would be vulnerable to shipper gaming, because it measures the “success rate” of placements and pickups against shipper requests—regardless of whether the requests are reasonable.

²⁰ See NPRM at 20 n.28 (embargoes would only be excused if they constituted “extraordinary circumstances”); *id.* at 25 (“extraordinary circumstances” must be enough to qualify for § 1180.2(9), which is limited to “unforeseen track outage[s]”).

In short, while CSXT believes that each of the metrics can be useful evidence in some cases, none of them is reliable enough to constitute definitive evidence of a service inadequacy—let alone a service inadequacy sufficient to constitute a compelling need for forced switching.

C. A rule that overemphasizes service metrics at the expense of other evidence of service quality would discourage investment and create poor incentives.

The NPRM's mechanical approach to determining the adequacy of service based on metrics alone also creates poor incentives. Here, a rule that makes regulatory consequences turn upon *having consistent service metrics* rather than on *having good service* could create incentives to put an over-emphasis on metric performance rather than a more holistic focus on what customers need. An overreliance on metrics with quick trigger penalties would create incentives to prioritize stasis above all. Such a regulation would decrease incentives to invest in long-term growth and improved long-term service, because any temporary dip in a metric could lead to draconian consequences.

As Mr. Albright explains in his verified statement, capital investments like double-tracking or siding expansions are in the long-term interest of shippers and the broader network. V.S. Albright at 7. But in the short term they can lead to decreased velocity and reroutings, which could result in a carrier failing one of the NPRM's proposed metrics and having no available affirmative defense delineated. The current rule would punish railroads for making long-term improvements that might hurt short-term metrics.

Growth opportunities would also be disincentivized. *Id.* at 8. Adding more traffic to the network can slow down transit times. But the NPRM would evaluate transit time without consideration of the impact that volume levels have on velocity.²¹ This is a poor regulatory incentive for an industry trying to grow the amount of traffic moved by rail.

Similarly, a railroad considering how best to serve its whole network might consider an operational change that could improve service overall while slowing down service to a handful of customers. *Id.* at 9. A rigid transit time metric would discourage any such innovations.

As designed, the transit time metric creates disincentives to achieve faster transit times, which would only set a higher bar for that railroad to meet. Indeed, a less-efficient railroad might find itself well positioned to win traffic from a more-efficient competitor, for any slip-up by the more-efficient railroad would allow the less-efficient railroad to benefit from a forced switch.

Moreover, a rigid transit time metric could conflict with railroads' obligations to passenger and commuter traffic. A railroad seeking to improve customer on-time-performance for Amtrak trains might consider altering freight train schedules to better avoid potential conflicts, or might reroute or hold particular freight trains in order to ensure that the Amtrak train stays on schedule. But while each of these actions would serve freight railroads' statutory and contractual obligations to

²¹ The "surprise surge" affirmative defense only takes into consideration the petitioner's traffic increases under limited circumstances, even though traffic volumes from other customers can impact velocity and transit time. NPRM at 26.

accommodate Amtrak, each also could increase transit time for freight traffic, and thus under the NPRM would risk an automatic finding of service inadequacy for any affected lanes.

In the context of Original ETA, the proposed rule will incentivize carriers to provide Original ETAs that are “worst case scenarios,” given the significant penalty associated with arriving past Original ETA. Currently, CSXT sets its trip plans based on what is best for the network and all its customers. And one of the reasons that CSXT has been sharing TPP metrics with customers for years is that it is helpful to customers to see CSXT’s plan so that they can better manage their shipments. It is good for CSXT and for its customers to all be working with CSXT’s best trip plan estimates. But if the Board imposes a penalty for trip plan noncompliance, it would create instant incentives for railroads to provide Original ETAs that lean more towards “worst-case scenarios” rather than estimates based on a well-executed plan. That would not be good for customers, who need the most accurate information available so they can put resources in place for incoming shipments. Indeed, many customers have an interest in having shipments *not* arrive early, so that the customer can ensure that it has space to receive shipments and crews available for unloading.

CSXT emphasizes that none of these negative incentives would come about from a rule that is tailored to identify real service problems through consideration of the various factors that impact rail service. They rather originate from the mechanical approach of the NPRM, where a single metric dip would be treated as

conclusive evidence of a service failure absent an affirmative defense. Adopting CSXT's proposed qualitative approach is an effective path forward to a better policy solution.

D. A rule that treated service performance metrics as presumptive evidence of service inadequacy would be a break from precedent and congressional intent.

As discussed above, a metrics-only approach to service inadequacy is inconsistent with the statutory standard at § 11102(c). Such an approach also would contradict longstanding precedent and substantially change the regulatory scheme without clear congressional authorization. The STB can avoid these legal problems by taking a more flexible approach that aligns with its authority under section 11102(c).

First, the NPRM's proposal that a single dip below the performance standards in a 12-week period would be treated as definitive evidence of a service inadequacy is a substantial break from agency precedent. As discussed above in Section B, the Board has recognized that it is not "possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times," and that "*such issues are best addressed on a case-by-case basis, under flexible general rules, because transportation needs and service difficulties can vary substantially.*"²² And in Ex Parte 759, the Board recognized that Original ETA is provided to shippers as

²² *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 975; *see also Midtec I*, at 364 ("[t]here is no mechanical test and the totality of the circumstances [must] be considered").

helpful information for planning purposes but is not a guarantee of delivery *nor an enforceable service standard*.²³

Yet here, the NPRM is “attempt[ing] to delineate or define in the abstract what constitutes adequate service” based on a purely mechanical test. This is exactly the kind of one-size-fits-all performance standard that it previously held was not “possible or appropriate.” The fact that there have been “technological advancements” in tracking data is irrelevant to the fact that “transportation needs and service difficulties vary substantially”—which remains as true today as it did when the Board promulgated Part 1147.²⁴ The Board should align itself with its own precedent and take a flexible, case-by-case approach to remedying service inadequacies under the public interest prong of section 11102(c).²⁵

²³ Final Rule, *Demurrage Billing Requirements*, Docket No. EP 759, at 18 (STB served Apr. 6, 2021) (“The Board recognizes Class I carriers’ concern that rail users may misinterpret original ETAs as guaranteed transit times or as a service standard that would override private agreements between rail users and carriers, and clarifies here that that is not the purpose or effect of the original ETA requirement. The requirement to provide an original ETA established here obligates carriers only to provide rail users with this information on or with demurrage invoices; it does not constitute, or require carriers to provide, service guarantees. The requirement does not create a separate service standard for carriers. Finally, inclusion of an original ETA requirement in the final rule does not change the fact that the Board will determine whether demurrage charges are reasonable under § 10702 and comport with the statutory requirements specified in § 10746 in the context of case-specific facts and circumstances. Accordingly, the existence of the original ETA in the minimum information requirements does not establish whether a delay in shipment renders a demurrage charge unreasonable.”).

²⁴ See NPRM at 7.

²⁵ Moreover, the NPRM’s statement that “the Board proposes to expressly overrule the standards and criteria regarding reciprocal switching established in *Midtec* as applying to any petition under the new part 1145” is neither necessary to the NPRM nor an adequately justified departure from an agency precedent that

Second, the NPRM lacks sufficient evidence to support the Board’s conclusion that a failure of one of its performance standards within a 12-week period is proof of a service inadequacy. The NPRM does not reveal any data analysis on what thresholds would be meaningful on individual lanes or on whether it is possible to judge service adequacy for all shippers by a single quantitative standard. Instead, the NPRM relies on anecdotal evidence²⁶ and acknowledgements by some Class I railroads that their service (for a multitude of interacting reasons) was not up to *their own* service goals during a certain time period.²⁷ More evidence is required for the agency to draw yardsticks by which it proposes to measure the entire rail industry.

Third, the Board should be cautious about adopting a rule that would effectively impose quantitative nationwide service performance standards through the backdoor of § 11102(c), with no evidence that Congress has authorized such a

Congress expressly ratified in ICCTA. NPRM at 7; *see* Opening Comments of CSX Transportation, Inc., *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 20–28 (filed Oct. 26, 2016) (“*CSXT 2016 Opening Comments*”) (demonstrating that Congress legislatively ratified *Midtec*’s interpretation in ICCTA when it reenacted § 11102 without change and explicitly indicated in legislative history that it was not adopting proposals to increase “market access” and instead wanted to maintain “existing standards”). It is not necessary for the Board to address (let alone overrule) *Midtec* in order to adopt new regulations for inadequate service (something that the Board has already done in Part 1147). And there is no basis for the Board to overrule any part of a decision that appropriately interpreted the “necessary to provide competitive rail service” prong of § 11102(c) in a way that is consistent with the overall statute and that has been ratified by Congress. *CSXT 2016 Opening Comments* at 13-30.

²⁶ NPRM at 18, n.26; *id.* at 20–21, n.31.

²⁷ *Id.* at 15, 20–22.

departure from past policy. An agency that makes a “radical or fundamental change to a statutory scheme,” or that claims to have found some “newfound power” to adopt “sweeping and consequential” regulation, must point to “something more than a merely plausible textual basis for the agency action.”²⁸ Rather, the agency must have “‘clear congressional authorization’ for the power it claims.”²⁹

Here, there is no “clear congressional authorization” for imposing metrics-based minimum service standards for the entire rail industry. The NPRM cites the Board’s authority in sections 11102(c) and 1321, but neither provides a clear congressional authorization for adopting quantitative industry-wide service standards. Section 1321’s broad language does not help, because federal courts have made clear that section 1321 “simply authorizes the [Board] to take actions that are ‘direct[ly] adjunct to [its] *explicit* statutory power” and does not grant authority that would otherwise be “in excess of [the Board’s] statutory authority.”³⁰ And the “practicable and in the public interest” language in section 11102(c) has an established meaning that does not support systemwide service performance regulation³¹ and, in any event, is precisely the kind of “oblique” or “vague” language

²⁸ *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–2610 (2022) (internal quotation marks and citations omitted).

²⁹ *Id.* at 2609.

³⁰ *White v. United States*, 989 F.2d 643, 650–51 (3d Cir. 1993) (emphasis added).

³¹ *See supra* at I.A.

the U.S. Supreme Court has stated cannot grant “[e]xtraordinary grants of regulatory authority.”³²

The NPRM’s proposal to use § 11102(c) as a mechanism to impose systemwide metrics-based service regulation creates serious statutory and constitutional questions. It would be a departure from agency precedent; it would be undertaken without having reliable evidence of what metric thresholds are meaningful on individual lanes; and it would be adopted without any clear statutory evidence that the Board is authorized to impose one-size-fits-all service performance standards by shoehorning them into § 11102(c). To stay within the boundaries that Congress has prescribed, the Board should adopt a case-by-case approach to determining whether service inadequacies exist that could be remedied by a forced switch.

E. A qualitative test is workable and fair.

CSXT’s solution to the above problems is a simple one: The Board should make clear that service performance metrics are relevant evidence of service inadequacy, but no metric should be used as definitive proof of a service problem. The Part 1145 process should allow for flexibility by petitioners, who could point to Board-developed metrics if they wished, but could also present their own quantitative measures or qualitative evidence of service failures. The question for the proponent of forced switching would not be whether a particular metric was tripped or not tripped, but rather whether it could prove by a preponderance of the

³² *West Virginia*, 142 S. Ct. at 2609.

evidence that there is a service failure that creates a compelling need for reciprocal switching relief.

Both proponents and opponents of forced switching orders should be allowed to present any evidence that they believe bears on that question. A shipper filing a petition may include some set of metrics if it wishes, along with other evidence that it believes shows service inadequacy that creates a compelling need for forced switching. If a shipper believed that certain information in a railroad's control would aid its presentation, it could be given the opportunity for discovery and to supplement its petition as needed. As discussed below, the Board could consider allowing for automatic initial disclosures of Board-designed service performance metrics upon the filing of a petition. Petitioners could cite Board-designed metrics if they wished, or other quantitative metrics that they believe could be useful.

A railroad's reply similarly could use metrics to argue that service is not inadequate, along with other qualitative evidence that it believes shows the lack of a compelling need (regardless of whether such evidence falls within a predetermined "affirmative defense"). Under this approach, the Board would not need to specify particular "affirmative defenses" it would consider. Instead, it could consider any defense that a railroad might raise that is relevant to the statutory standard.

The Board then would apply the statutory standard based on the evidence before it. A simple, clear methodology with flexibility for the shipper and the railroad is a better avenue to address actual service problems in a way that is

consistent with the statute. To be sure, the STB could provide guidance in the final rule on the types of evidence that it is likely to find highly probative in proceedings to determine whether a forced switch is necessary to address a service failure. But it should not establish definitive presumptions or attempt to shift the burden of proof on any issue. Both shippers and railroads should be free to present evidence that is relevant to the statutory standard, and the Board should not restrict itself in advance from considering such relevant evidence.

II. THE COMPELLING NEED TEST REQUIRES THAT FORCED SWITCHING ORDERS BE DIRECTED AT SOLVING SPECIFIC SERVICE INADEQUACIES.

Forced reciprocal switching for inadequate service should only be ordered where the record shows that a switching order would remedy the alleged inadequate service. Furthermore, such switching should not extend beyond what is needed to remedy the identified inadequacy. These principles flow from the statutory standard discussed above, under which switching can only be ordered if there is actual necessity or compelling reason. An order that is not tailored to remedy a particular service failure is not addressing a compelling need.³³ Indeed, this agency has been charged by the Supreme Court to “tailor the remedy” that it imposes “to the particular facts of each case so as to best effectuate [its] remedial

³³ See, e.g., *Bacon v. City of Richmond*, 475 F.3d 633, 638 (4th Cir. 2007) (“Our legal system is built on the foundational principle that remedies are a means of redressing wrongs. As the Supreme Court has long made clear, a remedy must be tailored to a violation.”); *Monieson v. CFTC*, 996 F.2d 852, 862 (7th Cir. 1993) (reversing sanctions where “the remedy selected has no reasonable relation to the practice found to exist” (cleaned up)).

objectives.”³⁴ These principles lead to four conclusions: (1) forced switching should not be imposed without a finding that the forced switching would help solve a service problem; (2) forced switching should only be imposed for current service problems; (3) forced switching should not be imposed for lanes without service problems; and (4) metric dips for empty cars should not be used to impose forced switching on loaded cars with no demonstrated service problem.

A. Forced switching must be shown to mitigate a particular service failure.

Under the NPRM, a petitioner could obtain a forced switching order by demonstrating a dip in a single rail service metric, but the shipper would not be required to present any evidence that forced switching would alleviate an alleged service problem. A shipper should be required to show—and the Board be required to find—that any requested reciprocal switching order would remedy a particular service inadequacy. If the Board is not able to find that a reciprocal switching order could mitigate a service inadequacy, no basis exists under the public interest prong for the Board to impose forced switching. If discovery is needed from the serving carrier or the proposed alternative carrier to make this showing, a shipper could use the Board’s ordinary discovery rules to obtain the needed information.³⁵

³⁴ *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962); see *Cape Air Freight, Inc. v. United States*, 586 F.2d 170, 180–82 (10th Cir. 1978) (reversing ICC for imposing remedy broader than required to accomplish remedial goal).

³⁵ See 49 C.F.R. pt. 1114.

B. Forced switching should only be imposed for current service problems.

The Board should require a petitioner to bring its complaint at the time of an alleged service inadequacy. As written, a petitioner could base a petition on a metric from any 12-week period at any point prior to its petition—even if the 12-week period occurred years prior.³⁶ For example, under the present proposal, a complainant whose shipments were delivered within 24 hours of the Original ETA 90% of the time over a 3-year period could nevertheless obtain a reciprocal switching order as long as the service reliability percentage dipped below 60% for any single 12-week period. The complainant could obtain this switching order even if the deficiency occurred years before its petition was filed. It could do so even if it received many subsequent months or years of good service. And it could do so even if it was continuously receiving sustained good service at the time of making its complaint.

The Board should only permit reciprocal switching petitions for alleged service deficiencies that are reasonably contemporaneous with the petition and exist at the time of the petition. There can be no compelling need to force switching to fix a service problem that no longer exists or that has been cured. CSXT encourages the Board to adopt the AAR's recommendation to provide incumbent carriers with the opportunity to cure any service inadequacy and to consider

³⁶ The NPRM does not specify any time limit on how far back a petitioner could go to find a 12-week period with a service dip. This represents a material defect in the proposal, since without such a limitation, CSXT is unable to fully assess the scope and potential impact of the proposed rule.

whether the alleged inadequacy has been cured before the agency orders a forced switch.

C. Forced switching should not include lanes that have adequate service.

For similar reasons, the Board should abandon the NPRM's proposal that a shipper could bundle lanes with adequate service together with lanes with inadequate service and obtain a forced switching order for all of them. A rule proposing "reciprocal switching for inadequate service" should not be extended to force switching for lanes with *adequate* service. Put differently, if a lane does not have a service problem, there cannot be an "actual necessity or compelling reason" to force switching on that lane. Nor could the imposition of forced switching on a lane with adequate service be a remedy that has been "tailor[ed] . . . to the particular facts of each case so as to best effectuate the [Board's] remedial objectives."³⁷

D. Forced switching should not be imposed for empty car movements.

In the same vein, the Board's suggestion that a transit time metric failure for empty cars could lead to a prescription of forced switching for loaded cars would violate the compelling need test. If a railroad's service for loaded cars is adequate, then there can be no compelling need to force a switch for that traffic. Moreover, there is no basis for the Board to assume that metrics for loaded cars would be informative for empty private cars. Loaded and empty movements are not the same:

³⁷ *Gilbertville Trucking*, 371 U.S. at 130.

loaded movements are revenue movements that are inherently more time-sensitive and loaded with product bound for a particular destination, while empty movements are non-revenue movements that by definition are not loaded with product bound for a particular destination. Empty movements often do not cycle back and forth between the same origins and destinations and, indeed, often are diverted while en route. Thus, even if service issues with empty movements could justify a forced switch for loaded movements (and they could not), there are substantial practical reasons why changing “transit times” for empty private cars are not indicia of a service failure.

III. ADDITIONAL PROCEDURAL IMPROVEMENTS TO PART 1145.

A. A petitioner should be required to obtain a commitment from the proposed alternative carrier before petitioning for forced switching.

The alternative railroad that a petitioner identifies for service under a potential forced switching order is a highly interested party whose views and operations need to be considered in any forced switching proceeding. The alternative railroad has its own customers and a service plan in the terminal that could be affected by an order that it provide service to a new customer via a forced switch. The imposition of a switching prescription would create a common carrier obligation in the alternative carrier to accept switched traffic, which could affect the alternative railroad’s ability to serve its existing customers. While one could expect that in many cases the alternative railroad would be eager to divert additional traffic from another railroad, in some cases the alternative carrier might be

concerned about impacts on its existing customers, and it should have a voice in deciding whether a forced switch is workable.

For these reasons, the Board should require a shipper to reach agreement with the alternative railroad on a plan for service before bringing a petition. As the Board has previously recognized, this practical requirement would reflect the reality that “the cooperation of the alternative carrier is essential.”³⁸ Reciprocal switching “is a serious remedy, given the potentially significant operational, safety, and financial implications for the carriers involved,” and “[f]orcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances.”³⁹ If the alternative carrier’s cooperation is essential to obtain for emergency 1147 orders, then it surely is just as essential for nonemergency 1145 cases.

B. The proposed rule should not require pre-complaint discovery.

Proposed section § 1145.8 (a) provides that railroads would be required to provide “individualized performance records” for any “shipper or receiver” at any time, regardless of whether that party has instituted a proceeding or made any kind of a service complaint. Adoption of this unusual provision would create a system for unlimited pre-litigation discovery, and thus would significantly depart from Board precedent and traditional legal practice. Shippers with no actual service problem (but an interest in improving their competitive leverage) could file repeated data

³⁸ *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 977.

³⁹ *Id.*

requests, waiting until they found a single metric dip on which to base a petition. The Board does not have legal authority to require this volume of pre-litigation discovery to be provided to any shipper or receiver—regardless of whether they have alleged an actual service inadequacy. The better approach would be for the Board to require that metrics be provided to parties who have filed petitions alleging service inadequacies, whether through a typical discovery process or through a streamlined initial disclosure process.

In the first place, the language of proposed § 1145.8(a) would require that “individualized performance records” be provided to large swaths of entities that are not subject to the NPRM as a whole. There is no requirement that the shipper or receiver be in a terminal area, or that it only have practical physical access to one Class I carrier, or even that it be a shipper of regulated traffic. A rule requiring railroads to disclose information to parties who are ineligible for relief under the terms of the rule would serve no clear regulatory purpose.

Moreover, proposed § 1145.8(a) breaks from standard agency practice of requiring discovery in the context of formal cases before the Board.⁴⁰ Even where the Board has created pre-litigation steps like a prefiling notice or mediation, it has never before attempted to create a process for pre-complaint discovery.⁴¹

⁴⁰ See, e.g., 49 C.F.R. § 1111.9(a)(1), § 1111.10(a)(1), and § 1111.10(a)(2) (discovery in SAC, Simplified SAC, and Three Benchmark cases always begins after a complaint is filed).

⁴¹ See *Expediting Rate Cases*, Docket No. EP 733 (STB served Nov. 30, 2017) (adopting pre-filing notice, but requiring discovery to be filed with the complaint—not prior to it).

Moreover, the NPRM does not identify any delegated authority from Congress that would permit the Board to require prelitigation disclosure of “individualized performance records.” Congress spoke clearly in the Interstate Commerce Act when it wished to compel the exchange of information. For example, Congress gave the Board wide discretion to obtain information for its own use.⁴² And Congress identified particular scenarios where railroads could be required to provide certain types of information to parties (such as common carrier rates and service terms).⁴³ But the NPRM does not identify any similarly clear delegation of authority to compel railroads to calculate metrics for shippers or receivers who have not filed a complaint of some kind. The only statutes that the NPRM cites as authority are 49 U.S.C. § 1321 and 49 U.S.C. § 11102. Section 1321(b)(3) allows *the Board* to obtain information,⁴⁴ but does not say anything about requiring railroads to prepare performance metrics for parties other than the Board. And § 11102 does not say anything at all suggesting that the Board has authority to compel unlimited pre-complaint discovery.

Customer that believe they are receiving inadequate service have many ways to make that determination without the need for preemptive discovery. As detailed

⁴² 49 U.S.C. § 1321(b)(3) (“The Board may . . . obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV”).

⁴³ 49 U.S.C. § 11101(b) (rail carriers are required to “provide to any person, on request, the carrier’s rates and other service terms”).

⁴⁴ 49 U.S.C. § 1321(b)(3) (“The Board may . . . obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV”).

by CSXT in Ex Parte 767, CSXT already provides many tools, data, and metrics to shippers through ShipCSX.⁴⁵

By filing a petition, shippers would be able to use the discovery process to obtain additional relevant information. Or the Board could potentially provide for initial disclosures of service metrics in response to such petitions. But there is no precedent or statutory authority for the Board to create a process in which railroads would have a constant obligation to provide an unlimited amount of information to an unlimited number of customers who have not instituted a proceeding seeking relief for inadequate service.

C. All relevant evidence should be reviewed when determining whether forced switching is “practicable.”

The Board has recognized correctly in the proposed rule that “practicability” is a requirement of section 11102(c). As with the compelling need test, there is established precedent for this determination that the Board should follow in individual cases. What it should not do is to adopt the NPRM’s assumption that the forced switching in a terminal area is presumptively practicable simply because it would be occurring in a terminal.⁴⁶

⁴⁵ CSXT Comments at 2-7, *First-Mile /Last-Mile Service*, Ex Parte No. 767 (filed Dec. 17, 2021).

⁴⁶ NPRM at 26.

The agency has consistently considered the totality of the circumstances to determine practicability.⁴⁷ For example, the agency has considered whether the terminal facilities are able to accommodate the traffic; whether the presence of switching would unduly hamper the ability of either carrier to serve its customers; capacity, congestion, and traffic density on the affected lines; frequency and duration of the incumbent carrier's use of the relevant track segment; past operational interference or lack thereof; and safety issues.⁴⁸

Therefore, the Board should eliminate its presumption that forced switching in a terminal area would be practicable.⁴⁹ As testimony in the now-closed sub-1 docket explained, the physical infrastructure and operational capacity put in place

⁴⁷ *Midtec I*, 1 I.C.C.2d at 364 (“There is no mechanical test and the totality of the circumstances may be considered in these matters” (citing *Cent. States Enters., Inc. v. Seaboard Coast Line R.R.*, No. 38891 (ICC served May 15, 1984)); see also *Hastings Com. Club v. Chi. Milwaukee & St. Paul Ry.*, 69 I.C.C. 489, 492 (1922), reversed based on a more complete record *Hastings*, 107 I.C.C. 208).

⁴⁸ See, e.g., *Del. & Hudson Ry.*, 367 I.C.C. at 720–21; *Union Pac. Corp.—Control—Mo. Pac. Corp.*, 366 I.C.C. 462, 575–76 (1982) (considering capacity and delay implications of shared operations on a single-track CTC line); *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, Docket No. NOR 41550, 1996 WL 197602 at *7 (STB served Apr. 25, 1996) (finding relief inappropriate due to high traffic density on the incumbent carrier's main line and the competition for track space that would result); *Mo. Pac. R.R. v. La. & Ark. Ry.*, 332 I.C.C. 569, 583 (1968) (declining to order relief because “congested conditions . . . would impair the ability of the [incumbent] carrier to handle its own business”); *Hastings*, 69 I.C.C. at 492 (considering car handling, directness of transfers, and interference with train movements, among other issues).

⁴⁹ See NPRM at 26–27; see also *id.* at 43 (proposed § 1145.6(b)).

to accommodate existing, known levels of reciprocal switching traffic cannot just be assumed capable of accommodating additional forced switching traffic.⁵⁰

The NPRM's suggestion that the Board would presume that forced switching in terminal areas would be practicable is particularly problematic because of the safety and security implications of forced switching orders. Previously the Board has acknowledged the key role of safety considerations in forced switching.⁵¹ In Ex Parte 711 (Sub-No. 1), numerous parties explained why safety is an important consideration.⁵² Increased car handlings increase the risk of accidents and employee

⁵⁰ See Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), (STB Mar. 16, 2022), Tr. 846:22–847:3; 848:8–851:5 (testimony of Cindy Sanborn, Norfolk Southern Railway, explaining that existing infrastructure can be insufficient to support additional reciprocal switching volumes); Union Pacific Railroad Company's Supplemental Comments, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) at 4 (filed Apr. 4, 2022) (explaining that forced switching would consume capacity and operating resources, and could lead to congestion, in existing reciprocally switched areas where broad-based forced switching was not originally envisioned); Further Supplemental Comments of the Association of American Railroads, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) at 114 (filed Apr. 4, 2022) (explaining that determining the operational suitability of existing tariff locations for forced switching “would at a minimum require assessing the particular switching facilities and operations including the serving yard, the classifying yard, the interchange locations, and capacity of available facilities”).

⁵¹ See *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 978 (“Petitions for relief under these rules must show how the alternative carrier would provide the service safely and without degrading service to its existing customers or unreasonably interfering with the incumbent’s overall ability to provide service.”); *Seaboard Air Line R.R.—Use of Terminal Facilities of Fla. E. Coast Ry.*, 327 I.C.C. 1, 5–6 (1965) (evaluating whether joint use would “raise any new traffic hazard”), *aff’d sub. nom. Fla. E. Coast Ry. v. United States*, 256 F. Supp. 986, 989 (M.D. Fla. 1966); *City of Milwaukee v. Chi. & N. W. Ry.*, 283 I.C.C. 311, 316 (1951) (considering whether use of terminal facilities would “occasion[] unsafe conditions”); *Hastings*, 69 I.C.C. at 492 (considering “the question of safety” regarding the proposed operation).

⁵² See Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), (STB Mar. 16, 2022), Tr. 717:21–718:22 (testimony of Chuck Baker, American Short Line

injuries. Safety and security concerns are particularly acute with hazardous materials and TIH shipments.⁵³ In any final rule, the Board should make clear that it will carefully evaluate safety issues before it orders a forced switch.

The burden is on the petitioner to prove practicability, as the advocate of agency action.⁵⁴ To be sure, railroads often will be in the best position to opine on safety and feasibility, and the Board could consider mechanisms to ensure that the shipper has the ability to prove this element. One option would be to require the railroad to inform the reciprocal switching petitioner during the negotiation period whether the railroad intends to contest practicability and the basis for its position, and to permit the petitioner to conduct limited discovery for the purpose of proving practicability if it wishes.

and Regional Railroad Association, explaining that reducing extra switches, handling, and touch points lowers accident risk); Opening Comments of the Association of American Railroads, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (filed Oct. 26, 2016), Verified Statement of William J. Rennie, at 88–90 (explaining that the number of injuries to Class I railroad employees in rail yards is closely correlated to the number of cars interchanged, and that if the number of cars interchanged increased from forced switching, injuries to rail yard employees would also be expected to increase).

⁵³ See *CSXT 2016 Opening Comments*, Ex. 2 at 14–18 (noting that hazardous chemicals shipments may make up a disproportionate share of carloads subject to forced switching orders, and highlighting how additional handling would counteract the regulatory and enforcement efforts of three federal agencies aimed at making TIH routings more direct, efficient, and secure.).

⁵⁴ *Golden Cat*, 1996 WL 197602 at *7 (considering complaint filed under 11103(a) and ultimately finding that relief was not appropriate because Golden Cat “ha[d] not demonstrated that granting MPRR access to the GCRP facilities would be practicable, and would not impair SSW’s abilities to conduct its own business”).

D. The public interest determination should consider the interests of other parties and the network as a whole.

When acting in the “public interest,” the Board should ensure that it is considering all relevant interests. As written, however, the proposed rule needlessly limits the Board’s discretion by making switching orders automatic as long as certain criteria are met, without providing the Board with any opportunity to consider the effects of such orders on other affected stakeholders and on important policy interests. Any final rule instead should accommodate a flexible process that allows the Board to consider the interests of key stakeholders. A flexible consideration of factors is consistent with the Board’s § 11102(c) precedent and would ensure that forced switching orders are only applied when they are in the public interest.

1. The Board should consider impacts on other customers.

The Board should consider the effects of a forced switching order on service to other customers in the terminal, as longstanding precedent requires.⁵⁵ As CSXT has previously explained, every forced switch would increase car handlings.⁵⁶ Those extra handlings would not only slow any train affected by the extra switching—

⁵⁵ See *St. Louis Sw. Ry.—Purchase (Portion)—William M. Gibbons, Tr. of the Prop. of Chi., Rock Island & Pac. R.R., Debtor*, 363 I.C.C. 323, 370 (1980) (“In determining the public interest, we consider not only the parties directly involved, but also the interests of other carriers, shippers, and the general public.”); *Hastings*, 107 I.C.C. at 217 (“That [an order] would be to the interest of Hastings and its shippers is apparent, but we must consider both the convenience of shippers at Hastings and of shippers elsewhere who depended upon these carriers for service.”).

⁵⁶ See *CSXT 2016 Opening Comments* at 53.

trains that will usually carry cars destined for numerous shippers, not just for the shipper seeking involuntary switching—but would also decrease the overall fluidity of the rail network, affecting other customers both in the local terminal and across the country.⁵⁷ These delays would not merely affect the switching petitioner; they would affect other rail customers, because all cars on a train would be affected and any traffic moving through a terminal would be slowed.⁵⁸ For these reasons, the Board should consider the needs of all terminal and network customers when ruling on a petition.⁵⁹

2. The Board should consider whether the petitioner’s behavior contributed to service issues.

Another factor that may be relevant in particular cases is the extent to which the petitioning customer’s behavior contributed to any service inadequacy. Railroads and customers are partners in ensuring a healthy rail network. When customers are able to communicate with CSXT effectively about their needs and provide accurate forecasts, that helps CSXT have resources in place to meet those forecasted needs. And when customers load and unload on schedule so that they are ready when local CSXT crews arrive for requested spots and pulls, that helps CSXT serve those customers and other local customers consistently. Conversely, if a customer’s forecasts are significantly higher or lower than its actual service

⁵⁷ *Id.* at 53.

⁵⁸ *Id.*

⁵⁹ *See Cent. States*, 780 F.2d at 670 (“[T]he interest of a single shipper is not necessarily synonymous with the public interest.”) (internal citation omitted).

requests, or if it is inconsistent about having cars ready to pull when the local crew arrives to perform service, that can have detrimental effects on CSXT's service. In short, without both partners holding up their end of the bargain, rail service to all customers suffers.

The NPRM appropriately recognizes that incorrect customer forecasts and unusual shipment patterns are relevant factors to consider when assessing service inadequacy petitions.⁶⁰ In the flexible approach that CSXT believes the Board should take, it should be open to considering evidence of situations where a shipper's conduct may have contributed to the service inadequacy that it alleges.

3. The Board should consider impacts on passenger service.

Where it is relevant, the Board also should be open to considering the impact that a forced switching order might have on passenger and commuter service. Just as a forced switching order can affect other customers in a terminal, it could have impacts on passenger and commuter railroads. Metrolink's proposal that potentially affected passenger and commuter railroads be notified of forced switching proceedings and have the opportunity to comment is a reasonable one, as is Metrolink's suggestion that the Board consider impacts on passenger and commuter railroads in its public interest analysis of whether forced switching is appropriate.⁶¹

⁶⁰ See NPRM at 41 (proposed § 1145.3(b) & (c)).

⁶¹ Metrolink Comments, *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2) (filed Oct. 20, 2023).

4. The Board should consider impacts on railroad employees.

The Board should address the effects of forced switching orders on rail employees and address whether labor protections are needed. In practice, Board orders for involuntary switching would shift work from the serving carrier's employees to the alternative carrier's employees, displacing the former's employees in the process. In other contexts, the Board specifies labor protective conditions that will apply to displaced employees.⁶² The Board should do the same for employees displaced by mandatory switching orders, specifying what conditions it will impose and how those conditions will be funded. A uniform, industry-wide approach is necessary to ensure employees affected by reciprocal switching orders are treated fairly.

5. The Board may need to consider environmental impacts.

In certain situations, forced switching orders could have environmental implications. As CSXT has explained in prior comments,⁶³ involuntary switching has the potential of leading to additional car handlings, yard activity, and transit delays. Depending on the scope and breadth of the Board's final rule, that can equate to more emissions and greater environmental impacts from rail operations. Declines in overall rail network efficiency due to the potential of substantial amounts of forced switching across the network will also push time-sensitive traffic

⁶² See, e.g., 49 U.S.C. § 10903(b)(2) (abandonments); *id.* § 11326(a) (mergers and line acquisitions).

⁶³ *CSXT 2016 Opening Comments* at 74.

to trucks, which would further increase transportation emissions and decrease road safety. Forced switching has the potential to significantly alter traffic patterns for TIH and PIH traffic or prompt high-volume shippers to add significant new traffic to alternative routes, which could trigger the Board's NEPA thresholds at 49 C.F.R. § 1105.7(e). Though environmental review may not be necessary in every case, the Board should require environmental documentation for forced switching actions that have the potential to create significant environmental effects, pursuant to the Board's authority at 49 C.F.R. § 1105.6(d).

E. The length of forced switching prescriptions should correspond to the remedial need.

1. Forced switching orders should not extend beyond a reasonable time needed to remedy the service inadequacy.

The Board should more closely align the timing and duration of its switching prescriptions to the time that a service problem actually exists. If the rule were adopted as proposed, a dip in a single service metric measured over a 12-week period of the shipper's choice would be grounds for a forced switching order lasting at least 2 to 4 years. The proposal thus could automatically institute forced switching regimes for periods 8 to 17 times longer than the period of the alleged service inadequacy giving rise to the petition. A prescription of this length would be severely disproportionate to the harm that the NPRM purports to address.⁶⁴

⁶⁴ See *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1101–02 (D.C. Cir. 1993) (an agency sanction is “arbitrary and capricious” if “clearly disproportionate to the error committed”); *Bryant v. Nat’l Sci. Found.*, 105 F.3d 1414, 1416 (Fed. Cir. 1997) (an

Because a compelling need must justify a switching order, once the compelling need has passed, the order should end. There cannot be a compelling need to impose a forced switching order that remains in place long after the need for it has been resolved.

For each case brought before it, the Board should tailor the duration of the switching order to a period that is long enough to resolve whatever service problem caused the harm, in light of the evidence presented by the parties. CSXT acknowledges the Board's concern that there be some level of certainty about the duration of a switching order, but a default 2-to-4-year rule is disproportionate.

2. The “automatic renewal” provision should be removed and there should be no restrictions on when petitions to remove forced switching can be brought.

The Board should also abandon the proposed rule's presumption that a switching order would automatically renew until a railroad successfully petitions for its cancellation. Automatic renewal of this sort is plainly inconsistent with the statutory standard.⁶⁵ When a prescription ends, a petitioner may argue that the order should be extended, and the petitioner should bear the burden of establishing a continuing compelling need that justifies ongoing forced switching.

agency penalty cannot be “so ‘outrageously disproportionate’ to the charged offense in light of all relevant factors as to constitute an abuse of discretion”).

⁶⁵ *Jamestown*, 195 I.C.C. at 292 (“[T]he record does not show that Jamestown shippers are so inadequately served *at the present time* as to warrant us, from the standpoint of the public interest, to require [the sharing of facilities].”) (emphasis added); *accord Hastings*, 107 I.C.C. at 216; *Mfrs. Assoc. of York*, 73 I.C.C. at 50, *aff’d United States v. Pa. R.R.*, 266 U.S. 191 (1924).

Relatedly, a railroad should be allowed to petition the Board to lift a forced switching prescription at any time. As proposed, the rule would bar railroads from petitioning the Board to lift switching orders until a defined number of days prior to the end of a 2-to-4-year default prescription period.⁶⁶ In some cases, however, the compelling need for forced switching could end well before the initial prescription ends. Just as a shipper can petition for a prescription whenever service is poor, the carrier should have a fair opportunity to petition for, and receive, the termination of a prescription once an adequate level of service is restored.⁶⁷ Therefore, the Board should allow a railroad to make its case for lifting a prescription at any time, and if the Board deems the railroad's evidence convincing, the Board should terminate the prescription at that time.

F. Any Board decision on access pricing should be governed by core economic principles.

If the Board finds that a forced switch is warranted under the statute, the railroads are to negotiate a switch fee. In the event that an agreement could not be reached, the NPRM requested that the parties comment on two alternative approaches to access pricing: a proposal to use a cost of service approach or a proposed modification of the SSW Compensation methodology. Neither approach is sufficiently detailed for CSXT to fully and adequately comment. What can be

⁶⁶ NPRM at 43–44 (proposed § 1145.7(c)).

⁶⁷ The Board allows petitions to terminate relief at any time under 49 C.F.R. pt. 1147 and should do so here. *See Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 982 (“[T]he incumbent railroad will be free to petition to terminate the relief as soon as the emergency is over, regardless of when that occurs.”)

gathered from the information the Board provided, however, demonstrates that both approaches are deeply flawed. Because the statute requires the Board to first allow the affected railroads to attempt to negotiate an access price before the Board may weigh in, the Board should forbear from developing its own specific access pricing methodology.

The two proposals offered in this proceeding are virtually identical to the two proposals aired in Ex Parte 711 (Sub-No. 1). As the now-deceased Professor Robert Willig explained, however, neither a cost of service approach or some ill-defined SSW variant “sufficiently protects railroads’ ability to recover their full fixed and common costs.”⁶⁸ Both approaches “seem to be embracing the mistaken idea that it is appropriate to limit the price of bottleneck services to some measure of replacement costs (including some ‘reasonable’ return) for the bottleneck asset.”⁶⁹ But there are long-term adverse implications of a regulatory approach that only compensates railroads for the costs—plus a reasonable rate of return—for providing bottleneck services.⁷⁰ Currently, intramodal competition on the non-bottleneck portion of a move pushes its price to incremental cost, leaving the recovery of fixed costs for a movement’s whole route to the charge on the bottleneck segment.⁷¹ Without the ability to price in that fashion, as railroads have been doing for

⁶⁸ *CSXT 2016 Opening Comments* at 15 (internal quotations omitted).

⁶⁹ *Id.* (same).

⁷⁰ See *id.*

⁷¹ See *id.*

decades, carriers will be unable to recoup those fixed costs.⁷² The ensuing harm to revenue adequacy from that inability would also hinder the capacity of railroads to attract necessary capital.⁷³

⁷² See *id.*

⁷³ *Id.* at 88–89.

CONCLUSION

For the reasons above, the Board should amend the NPRM to adopt a qualitative approach for assessing service inadequacy, and make the other amendments that CSXT suggests.

Respectfully submitted,

/s/ Matthew J. Warren

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November 7, 2023

DOCKET NO. EP 711 (SUB-NO. 2)

**RECIPROCAL SWITCHING FOR
INADEQUATE SERVICE**

**VERIFIED STATEMENT OF
CASEY ALBRIGHT**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 711 (SUB-NO. 2)

**RECIPROCAL SWITCHING FOR
INADEQUATE SERVICE**

**VERIFIED STATEMENT OF
CASEY ALBRIGHT**

My name is Casey Albright, and I am Senior Vice President of Network Operations and Service Design for CSX Transportation, Inc. ("CSXT"). In that role I oversee CSXT's Network Operations and Service Design group, which is focused on ensuring fluid traffic flow across CSXT's network by designing viable service plans that improve performance and meet customer needs. I joined CSXT in 1998 as a dispatcher, and throughout my career I have held positions of increasing responsibility in Service Planning, Locomotive Management and Network Operations. I also served as the terminal superintendent and superintendent of train operations on CSXT's Jacksonville and Nashville divisions.

CSXT appreciates the Board's interest in service metrics and clarifying how it will evaluate a service inadequacy. I am submitting this verified statement to offer my perspective on the ways CSXT uses metrics to improve customer service. Metrics are valuable tools for us to monitor the network and identify areas for improvement and for us to communicate with our customers about our service. And I believe that service metrics can be useful tools for the Board to perform its

regulatory functions. But no service metric should be treated as the single determining factor for whether service is good or bad. There are many circumstances in which a particular service metric could decline even where the railroad was providing the best possible service under the circumstances. The Board can view appropriately calibrated metrics as signals when evaluating a railroad's service, but it must be willing to consider all relevant evidence and should not treat any single metric as conclusive. We do the same at CSXT.

I. Operating Metrics Are a Key Tool for Monitoring CSXT's Network.

Operating metrics provide important insight into the health of our network and allow us to respond to issues as they arise. We review key metrics every day, several times a day. For example, we check train velocity to see if there are issues on specific subdivisions or crew segments. If we see a metric trending in the wrong direction, we drill down to see what the cause might be: is the decline indicating a need for crews or power? Are we missing train meets? Is a mechanical issue having an impact? Our answer to that causation question helps us know what issues to address. We also monitor terminal dwell closely to determine whether cars or trains are moving as planned. When we see slowdowns, we respond as needed.

We also regularly review holistic traffic reports to develop insights about how our network is performing over time. Those reports help CSXT direct operating resources in the short-term to optimize the entire network, and they inform longer-term investments in hiring, locomotives and equipment, and capital improvements.

On a customer level, reported metrics have provided customers an important way to track the service we provide. We have been a leader in making metrics available to customers via our ShipCSX portal.¹ In 2019, CSXT became the first Class I railroad to offer a Trip Plan Performance (“TPP”) tool to our customers, providing an unprecedented level of transparency into our service. Originally created as an internal measurement tool to support operations improvement, TPP now enables customers to see detailed data on our delivery performance for every carload, container, and trailer shipped on CSXT in manifest service (with a few exceptions explained in Michael Cheatham’s verified statement). Each trip plan is an end-to-end plan based on the original estimated time of notification of shipment arrival or the estimated time of interchange with another carrier. A shipment’s trip plan is created based on train schedules; terminal handling standards; terminal hours of operation; and, for intermodal customers, the intermodal reservation system. Sharing this information with our customers enables them to closely monitor our service and their own pipelines.

TPP is just one of the high-quality metrics that we have developed in response to customer feedback. Another is Customer Switch Data (“CSD”). CSD is generated based on CSXT’s local service plan and represents CSXT’s assessment of work that could be achieved by a local crew. CSD is a way for CSXT and our customers to track our local performance against the plan. When a planned spot or

¹ See <https://www.csx.com/index.cfm/customers/resources/tools/shipcsx-com/>.

pull is not completed, the crew codes the reason, and we can track the instances attributable to CSXT and those attributable to a customer (such as a customer track being full or a gate being closed). CSD excludes these customer exceptions and represents CSXT's performance against its local service plan. Customers have access to CSD in ShipCSX (where the tool is called "Local Service Performance").²

We provide our customers high-quality metrics like TPP and CSD in ShipCSX in part because good communication about service helps us to work together with our customers. Consistently good rail service requires a partnership between railroads and our customers. This partnership is vital to the performance of the network – and the responsibilities run both ways. When we are communicating well about our service plans, delivering when we say we will, and performing high-quality local service, customers are able to rely on our service and plan their operations accordingly. Likewise, when customers accurately forecast their rail needs, we are able to have the resources needed to serve them. And when customers load and unload on schedule so that they are ready for service when they ask for it, our crews are better able to serve them and other customers consistently. Without both partners holding up their end of the bargain, all rail service suffers.

II. Unit Trains Have Unique Features.

CSXT operates both a scheduled network for carload traffic and an unscheduled bulk network of unit trains for commodities like coal, grain, and

² Michael Cheatham's Verified Statement contains more detailed information on TPP and CSD and how these metrics compare to the Board's proposals.

ethanol. The metrics that CSXT has developed for its scheduled carload network do not translate well to the unit train network. Unit trains do not have trip plans (and thus do not have a TPP metric) and they are not part of the local service plan (and thus CSD is not calculated for unit train customers).

CSXT prides itself on providing high-quality service to unit train customers, but the nature of the bulk network does not lend itself to standardized measurements. For example, the geography of every grain harvest is different. The amount of grain produced in different regions will vary year over year depending on factors like which areas received too much rain, not enough rain, or just the right amount of rain. As a result, from year to year grain customers will ask for unit train service at differing levels in different regions. Fluctuations in market price are also a critical factor for coal customers and grain customers, who understandably will alter their service requests in order to obtain the most favorable pricing.

CSXT's Bulk Operations team works hand-in-hand with customers to meet their dynamic service needs. Indeed, customers will commonly redirect unit trains that are already en route. During grain season CSXT typically receives several requests every week to divert enroute grain trains to different destinations. Customers will shift between various origins or various destinations regularly based on their needs and changing market dynamics.

In this complex, shifting landscape of diverse traffic flows, it would be a mistake to assume that unit train customers have standard back-and-forth movements between the same origin and destination.

As an example, the Appendix illustrates freight flows for just one of CSXT's several major grain customers in South Carolina from 2018 through 2023. From year to year this customer sources grain from a number of different origins, shifting each year based on harvest quality and market conditions. As the Appendix illustrates, tracking year over year transit time for this customer would not be a meaningful exercise, because every year the customer has different service patterns. Evaluating unit train service requires a holistic assessment of the customer's particular needs and circumstances, and it cannot be boiled down to a single metric comparison.

III. No Metric Is a Definitive Indicator of Service Quality.

Performance metrics help CSXT identify potential issues on our network and help us design plans to improve our performance and meet our customers' needs. But metrics are not the be-all and end-all. Our goal is not simply to post good metrics; our goal is to meet our customers' needs so that we can retain and grow our traffic base.

No single metric can tell us if we are meeting, or not meeting, customers' needs. Sometimes a metric "miss" has zero customer impact. A classic example involves a closed-gate customer that is served on Tuesdays and Thursdays. Traffic arriving to the serving yard on a Friday would ordinarily not be delivered until the following Tuesday. If an inbound shipment whose trip plan called for a Friday delivery was not delivered until Sunday or Monday, the actual service to the

customer would not be affected at all (since they were not expecting to see the shipment until Tuesday), but it would nevertheless be included in TPP as a “miss.”

Moreover, a metric might decrease for a number of reasons that do not indicate a service problem. Capital improvements, necessary maintenance, or customer demand spikes can all cause service fluctuations.

Capital Investments. CSXT undertakes capital investments, like double-tracking or siding expansions, in the long-term interest of serving our customers better. Over a 12-week period, these activities may lead to slower-than-average service or traffic re-routings. But some short-term disruption can produce major gains for customers in the long term. For example, several years ago, CSXT experienced recurring congestion over the New Orleans gateway, due in part to crew shortages and in part to infrastructure constraints. As we addressed crew shortages, we also studied ways to increase our capacity in the region, and in 2021 we began a project to add sidings to increase capacity between New Orleans and Montgomery. As with any track project, there were some short-term fluidity impacts while the work was being done, but over the long term we are seeing improved performance, and our customers are reaping the benefits.

With respect to growth projects, CSXT can better time its capital investments if the customer has provided a detailed long-term volume forecast. However, deviations from that forecast could have negative short-term impacts on service metrics during a planned capital investment project that will ultimately benefit that same customer. A proposed rule that exclusively relied on short-term metric

changes would punish railroads for making long-term improvements like these. The Board should be sure that its rule encourages long-term network health and growth that ultimately benefits customers.

Maintenance Activities. A robust maintenance program is essential for maintaining CSXT's network health, velocity, and safety. For larger-scale maintenance and rehabilitation projects, we deploy "megablocks" (also known as curfews) to manage maintenance more efficiently and safely. When we have a megablock in place, we may take the track we are working on out of service for up to 10-12 hours per day, sometimes for weeks, so that intensive maintenance work can be conducted with maximum speed, efficiency, continuity, and safety. During megablock activity, traffic may be rerouted and schedules adjusted, which can adversely impact service metrics in the short term. Nevertheless, customers ultimately benefit from a more reliable network and better service once the maintenance is complete.

Demand Fluctuations. CSXT also occasionally experiences unexpected increases in demand that can require temporary adjustments to service elsewhere in the network. For example, harvest season typically leads to spikes in demand from grain customers. The timing and size of those spikes depends on the timing and size of the harvest. Although we plan in advance to handle that demand, the significant increase in the number of unit grain trains our customers require at the height of harvest can affect service patterns for our other traffic. The recent labor strike against automakers is another example of an unanticipated disruption that

has affected CSXT's traffic. Plant idlings have led to traffic pattern changes that have affected various portions of the rail network. When another railroad that we interchange with experiences congestion, backlogs can develop at interchange and create the need to hold trains at intermediate yards elsewhere on our network. That can impact customers on our network, but it has nothing to do with a service inadequacy caused by CSXT. While CSXT does its best to minimize the impact to customers from these disruptions, changes to the network can have ripple effects on metrics.

* * *

In short, CSXT operates a dynamic rail network that serves more than 5,000 customers whose requirements are changing all the time. We work hard to partner with and balance the needs of customers across the whole network while striving to serve each customer according to its requests. That said, volatility is natural and inherent in railroading. Volatility will, at times, affect service metrics, but that does not mean there was a service failure. Metrics are an important tool that we use to measure our service and improve our performance, but they are a means to an end, not the end itself. It would be counterproductive for the Board to adopt a rule that prioritizes maintaining high metrics over taking the steps needed to serve the broader interests of customers across the network.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

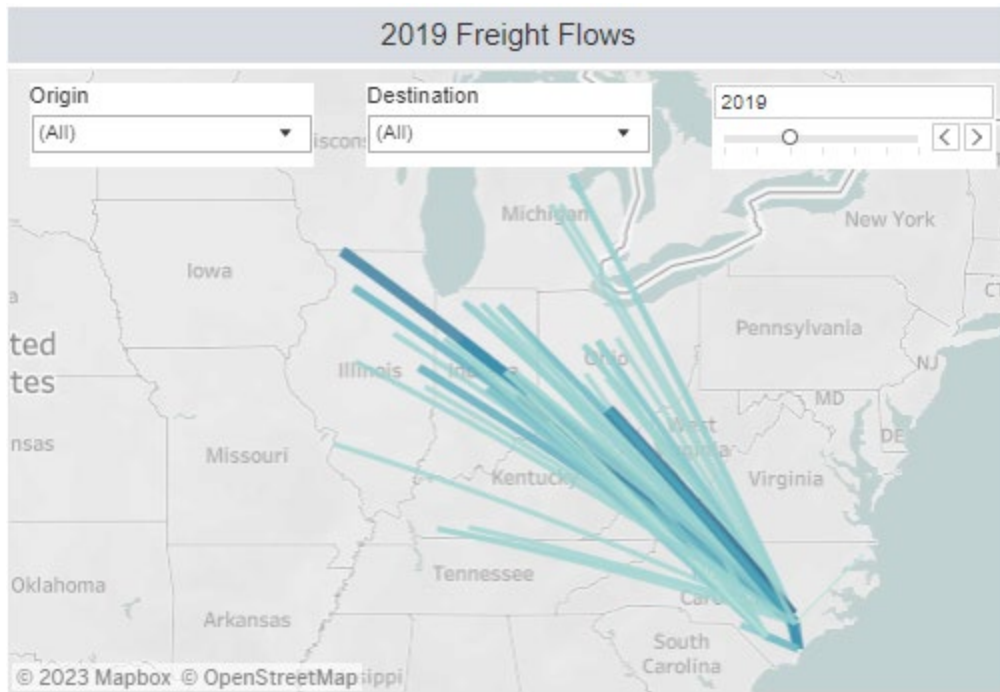
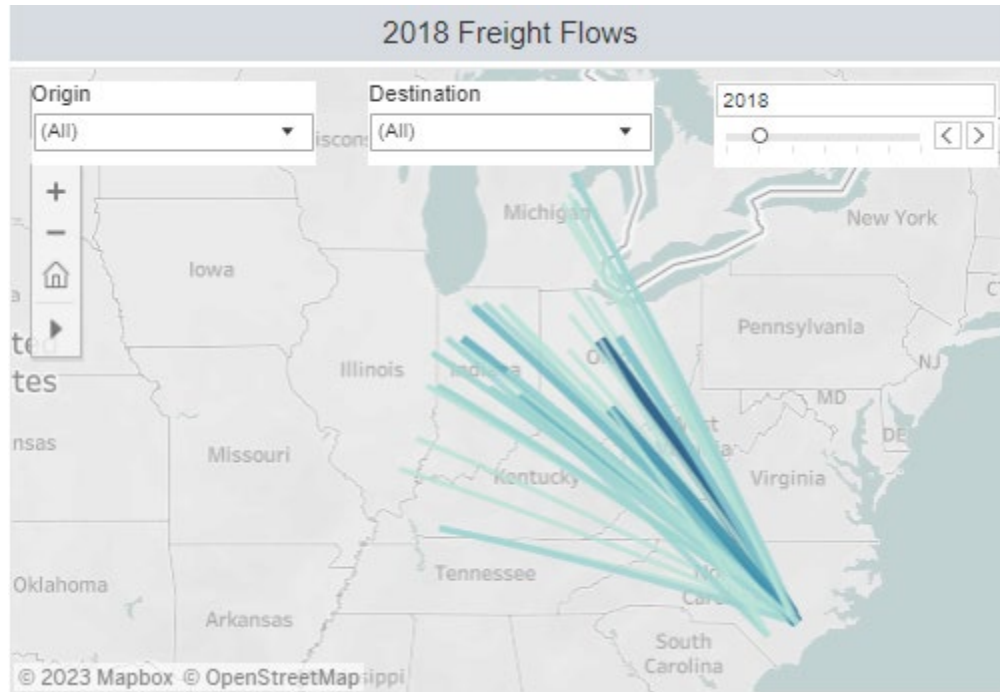
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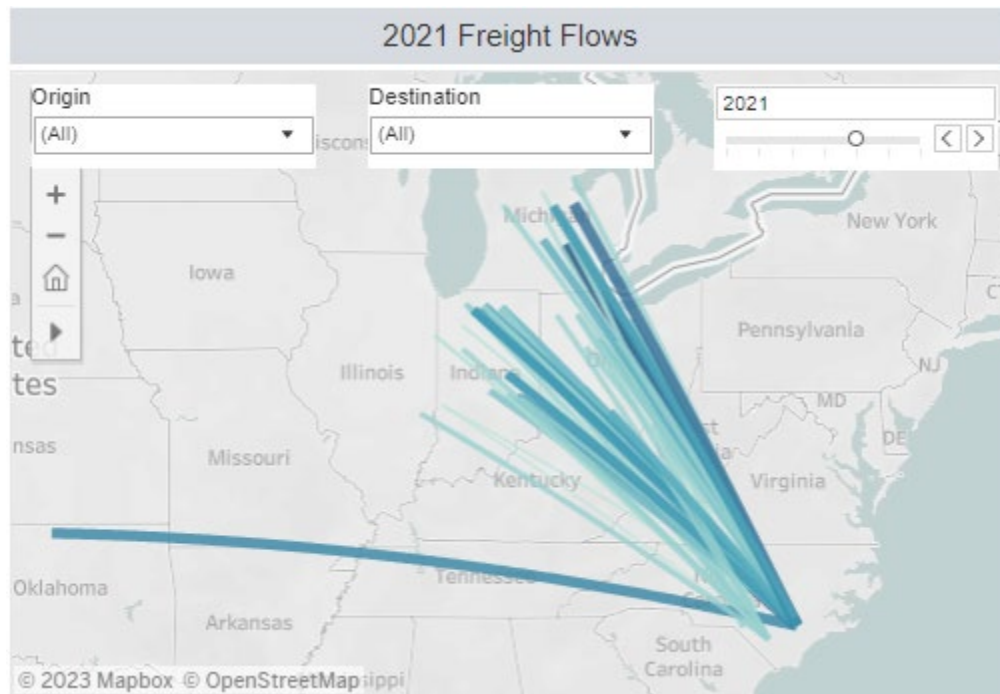
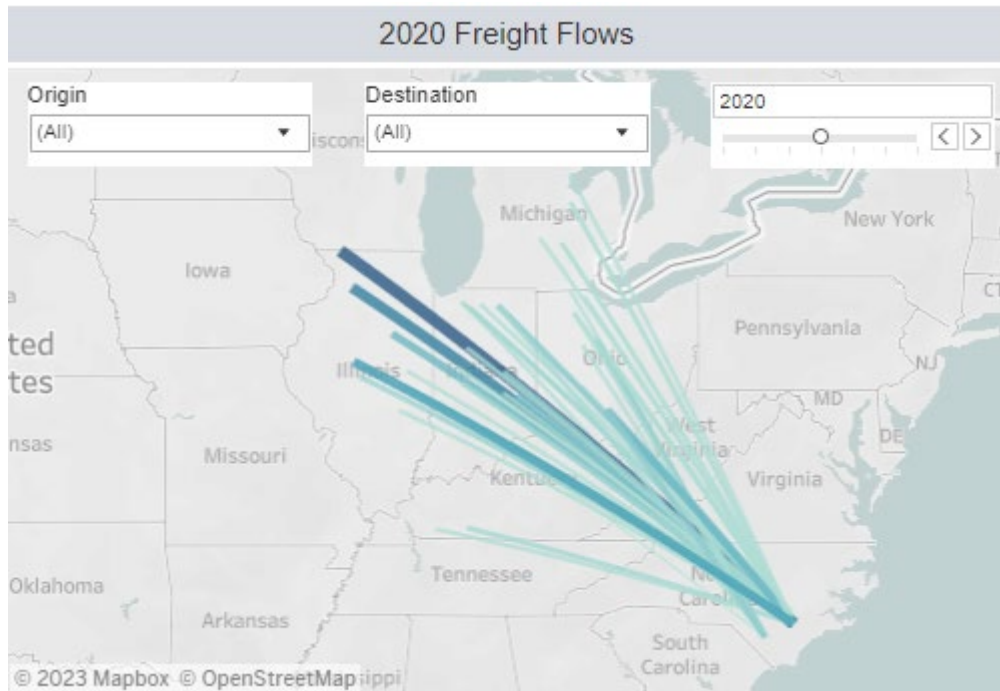
/s/ Casey Albright

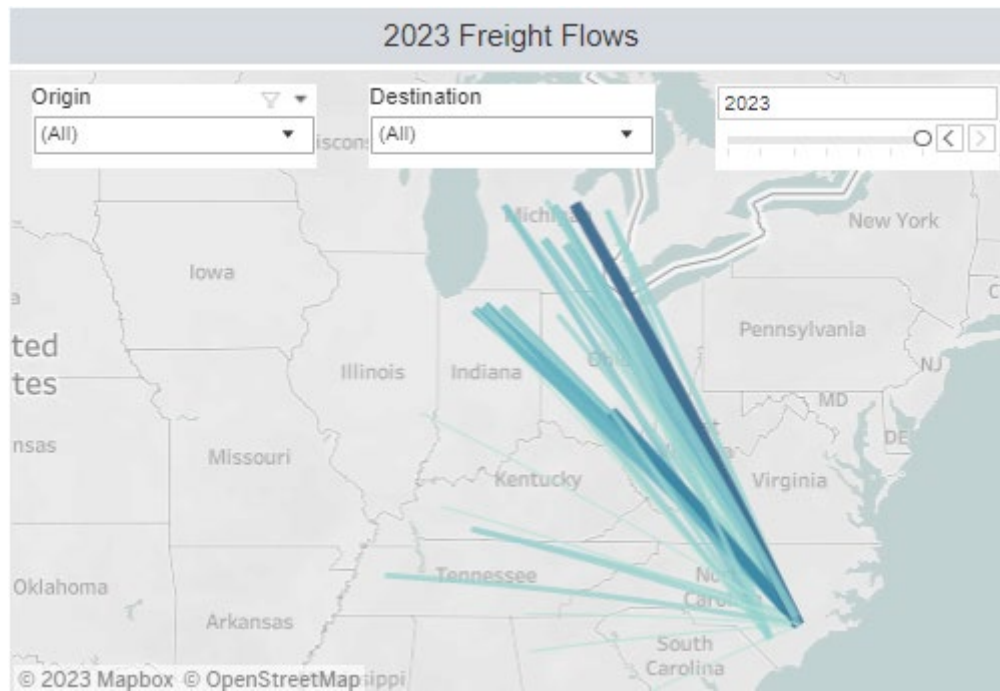
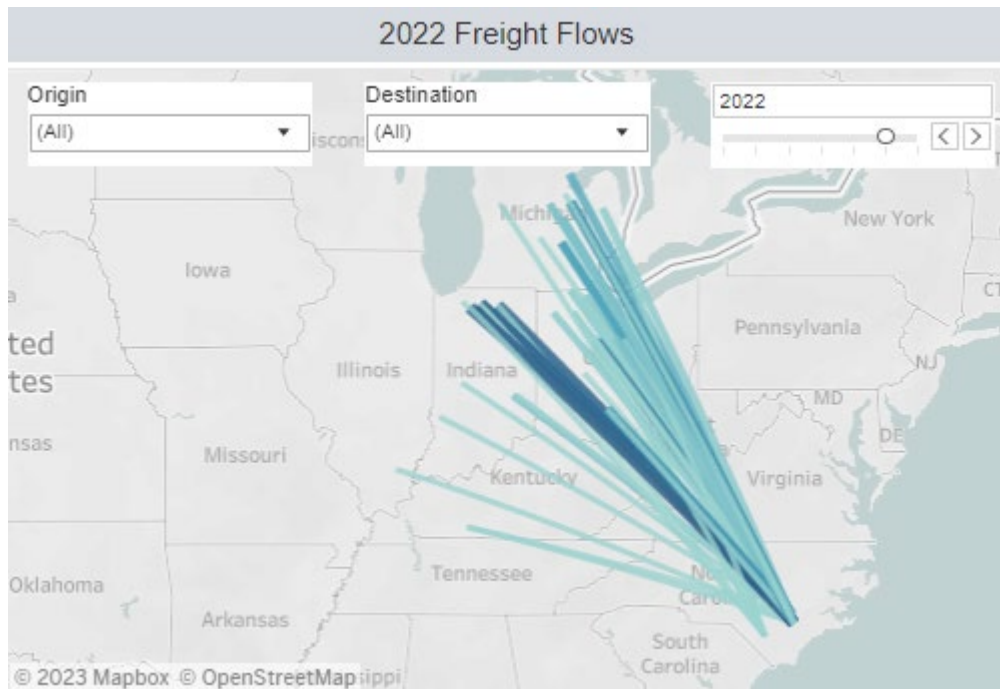
Casey Albright

APPENDIX

ILLUSTRATIVE ANNUAL FREIGHT FLOWS FOR A GRAIN RECEIVER IN SOUTH CAROLINA







DOCKET NO. EP 711 (SUB-NO. 2)

**RECIPROCAL SWITCHING FOR
INADEQUATE SERVICE**

**VERIFIED STATEMENT OF
MICHAEL CHEATHAM**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 711 (SUB-NO. 2)

**RECIPROCAL SWITCHING FOR
INADEQUATE SERVICE**

**VERIFIED STATEMENT OF
MICHAEL CHEATHAM**

My name is Michael Cheatham, and I am the Director of Service Measures at CSX Transportation, Inc. (“CSXT”). I lead a team responsible for recording, monitoring, and reporting CSXT’s performance metrics, including metrics reported to the Board and provided to customers via our ShipCSX portal. I have been with CSXT nearly 14 years, working in management roles spanning performance metrics, car scheduling, service design, customer operations, and business systems. This experience has given me familiarity with the data we generate across the railroad and the ways we use data to drive positive outcomes for our customers.

In this Verified Statement, I will describe some of the key performance indicators CSXT has developed to manage its business, including Trip Plan Performance (“TPP”)¹ and Customer Switch Data (“CSD”). I then compare those measures to the Board’s proposed metrics and offer some suggestions on steps that

¹ Trip Plan Performance (“TPP”) is sometimes referred to as “trip plan compliance” or “TPC.” I will generally use the term “TPP” in this verified statement.

the Board should take if it wishes to create reliable and standardized metrics for the rail industry.

I. TPP and CSD are effective measures of performance.

CSXT develops and maintains a number of performance metrics to support the management of the business. Versions of some of those metrics are also made available to customers through ShipCSX and are publicly reported to the Board. In all our data collection, analysis, and reporting, our primary goals are accuracy and usability. This focus gives our data users confidence that they have the best information possible as they make decisions. Developing metrics is a complex process that requires careful consideration of different types of traffic, different data sources, and the needs of our data users. We continuously improve our internal metrics to better the accuracy and usability of the data we report. Key measures that we have developed include Trip Plan Performance and Customer Switch Data.

A. Trip Plan Performance (“TPP”)

CSXT’s TPP metric is used internally by CSXT to measure performance against trip plan. With some exceptions (explained below), each manifest car that moves over CSXT’s network is assigned a “trip plan,” which plans out that car’s path across the CSXT network to its destination. The trip plan makes assumptions about factors such as which trains will transport the car, the time that will be needed for blocking and switching, and plans a time for local delivery and estimated time of arrival. TPP compares the actual time that a car reaches its final destination (or interchange point) with this original trip plan ETA. CSXT’s TPP

metric has no buffer time—in other words, the metric is calculated based on the original ETA and it is counted as a success if the car is delivered before or at that original ETA. As such, TPP is a useful way for CSXT to measure its performance against its plan.

TPP is also a useful metric for CSXT’s customers to monitor their service. CSXT launched a TPP module in ShipCSX in 2019 as a tool to help us communicate with customers and help them manage their business. In addition to having access to the original ETA, customers in ShipCSX can see the current ETAs, so that if the original ETA changes customers will have real-time notice that a shipment is expected to be early or late. Current ETA can change several times as a shipment progresses over the CSXT network, but TPP will always be calculated based on the original ETA. The only exception to that general rule is when CSXT resets the trip plan. For example, when a car is bad ordered, the trip plan for that car will be canceled, and a new trip plan with a new original ETA will be created once the car is released. Similarly, if a car cannot be pulled from a customer location because of a customer exception (*e.g.*, if the customer’s track cannot be accessed or the customer had not finished loading it), then the trip plan for that movement would be canceled and a trip plan with a new original ETA would be created.

Because CSXT does not calculate trip plans for all traffic, TPP is not available for all traffic. Trip plans are not calculated for unscheduled trains such as unit trains. Nor are they calculated for certain specialized shipments like overloads and high/wide traffic that require more of a custom-designed service.

TPP is the basis for some of CSXT's temporary reporting to the STB in Ex Parte 770. In order to conform with the STB's request that carriers report on cars placed "within 24 hours of the original estimated time of arrival,"² the TPP that CSXT has reported in Ex Parte 770 has a 24-hour buffer. If the actual time of arrival is within 24 hours after the original ETA, it is counted as a success and reported as such.

As CSXT has explained in its Ex Parte 770 filings,³ the TPP that is reported pursuant to Ex Parte 770 excludes shipments destined for interchange. CSXT excluded such shipments because there are complexities in measuring the endpoint of movements destined for interchange that could not be resolved in the short timeframe needed to stand up CSXT's Ex Parte 770 temporary reporting protocols. While those complexities could be resolved with guidance from the Board, they have been left out of CSXT's Ex Parte 770 reporting to ensure apples-to-apples comparisons, consistent with the service recovery purpose of Ex Parte 770 monitoring.

B. Customer Switch Data

Customer Switch Data ("CSD") is a measure of CSXT local service performance that is used by CSXT internally and made available to customers in

² *Urgent Issues in Freight Rail Service—Railroad Reporting*, STB Ex Parte 770 (Sub-No. 1), at 6 (served May 6, 2022).

³ CSXT Explanation of Methodology, *Urgent Issues in Freight Rail Service—Railroad Reporting*, STB Ex Parte 770 (Sub-No. 1) (filed May 18, 2022).

ShipCSX.⁴ CSD is generated based on CSXT's local plan and represents CSXT's assessment of work that could be achieved by a local crew. When cars arrive in a local serving yard for delivery to a customer (or when CSXT receives a request to pull cars from a customer), CSXT has a local service planning tool that will determine which local train will perform the requested service in what window. That planning tool incorporates information on current customer capacity, and it will only assign work that could be completed by the crew that day. Therefore, if CSXT has ten cars inbound for a customer, but the customer's facility only has space for five, only five cars will be in the local plan for that day. The five that are excluded are "capacity exceptions" and would not be incorporated in CSD for that day.

If the crew is not able to complete all the local work in the plan for that day, it records the reasons for the miss with "exception codes." Some of the exception codes are attributed to the railroad: for example, crews running out of time, locomotive failures, and railroad track conditions are all classed as "railroad reasons" for a failure. These codes are included in CSD as misses. Other exception codes are attributed to the customer; such "customer reasons" include situations when a customer's track is full or obstructed or when it has not finished loading or unloading a car. Those customer exceptions are not included in CSD.

Customers have the ability to receive notifications of exception codes, and customers who sign up for such notifications can receive a report of any exceptions

⁴ On ShipCSX, CSD is referred to as Local Service Performance.

by email as they are reported, including detail on what particular exceptions were observed (*e.g.*, track obstruction, car not finished loading, etc.). If a customer disagrees with the causation for a miss, it can dispute the designation with CSXT's Customer Solutions team, or, in the event the disagreement relates to a supplemental charge, the customer can dispute the charge directly through ShipCSX.

Customer exceptions are thus based on field-level data reporting, and customers have a full opportunity to object to those field-level designations. CSD therefore represents the best available evidence of whether the local service plan was successful. It would be a mistake for the Board to adopt a rule that required railroads to assemble additional data to prove the correctness of customer exceptions after the fact.

I would note that both customer capacity exceptions and customer exceptions are not permanently excluded from CSD calculations. If a car is not spotted or pulled on a particular day because of a capacity exception or customer exception, it will be included in the local service plan for the next available service day (assuming that the customer has capacity to receive the cars on that day), and CSD would be calculated for such cars based on whether the crew was able to execute that local plan.

CSD thus calculates CSXT's success in achieving the local service plan by comparing the actual spots and pulls performed to the plan. As mentioned, the customer exceptions discussed above are excluded from CSD. The capacity

exceptions discussed above are also excluded, because a capacity exception by definition would not be in the local plan. And because CSD is based on the local service plan, it does not measure instances where CSXT provides service that is not specified in the local service plan, such as when a customer verbally requests some form of specialized work.

Moreover, because CSD is a measure of compliance with the local service plan, it does not include shipments that are not part of the local service plan, such as unit train shipments.

CSD is calculated on a per-car basis. Thus, if the local crew successfully spotted eight cars on one day but timed out before it could pull two cars the next day, the CSD for those two days would be 80%.

II. The NPRM's proposed metrics.

The NPRM proposes three new “service performance metrics” that the STB would use to determine whether forced switching was necessary: a “service reliability” metric, measuring compliance with Original ETA; a “service consistency metric,” measured by comparing transit time to the prior year’s; and an “inadequate local service” metric, measuring Industry Spot and Pull. Below are my comments on each of these metrics and ways that the STB could improve them if it chooses to move forward with standardized performance metrics. The STB may want to convene some technical discussions with railroads to work through these issues, and CSXT would be happy to participate in those conversations.

I am focusing my comments on some technical issues that I see with the proposed metrics as they compare to what CSXT currently does. Casey Albright's Verified Statement and CSXT's Comments identify reasons why a temporary dip in one of the proposed metrics cannot be relied upon as conclusive evidence of service adequacy or inadequacy.

A. Original ETA

Original ETA is analogous in many ways to CSXT's TPP metric, but there are key differences. First, as detailed above, CSXT's reported TPP in Ex Parte 770 does not include traffic bound for interchange. The NPRM proposes to include such traffic for TPP, but there are significant technical complexities in determining the precise moment of interchange between railroads that do not have visibility into each other's data. For example, CSXT's TPP calculations for interchange traffic are based on its own internal data. So for interchange traffic that CSXT receives from another carrier, CSXT's shipment cycle begins with the received interchange event in CSXT's system ("REC"), and for interchange traffic that CSXT delivers to another carrier, CSXT's shipment cycle ends with an interchange offer to the other carrier ("OFF"). While in some situations it is fair to assume the time of the delivering carrier's offer event will match the time of the receiving carrier's received event, that is not always the case.

If the Board were to require reporting of Original ETA for interchange traffic, it should allow carriers to base the calculations on their own data systems, and to use their offer events and received events as reasonable endpoints in Original ETA

calculations. CSXT would be pleased to participate in technical discussions with the STB about how to create a more consistent metric for interchange traffic.

Second, TPP excludes some movements that Original ETA would include. As noted, TPP does not include manifest shipments that do not receive trip plans (such as overloads and high/wide traffic). Some shipments are also excluded from TPP while en route (such as when a customer requests a diversion). It would make sense for Original ETA to also exclude such shipments. The NPRM does propose to exclude unit trains from Original ETA, which matches CSXT's practice in TPP.

Third, TPP resets a shipment's original ETA in certain situations, such as where there is a bad order car or a customer diversion. It is not clear how the Original ETA metric would address those situations, but it would make sense for Original ETA to permit resets in appropriate situations as CSX does for TPP.

Fourth, while the STB assumes that the original ETA would be provided at the time that the railroad receives the bill of lading, the receipt of a bill of lading is not the only event that triggers issuance of a trip plan and original ETA. For example, in some cases a bill of lading will contain incomplete or incorrect information that makes it impossible to generate a trip plan—such as an consignee that does not exist—and CSXT will have to obtain additional information before it can generate a waybill and a trip plan. In other cases, CSXT will generate trip plans once a shipment has been tendered to CSXT even if the waybill for the shipment is not yet available (so long as CSXT has sufficient information to generate the trip plan). For example, trip plans are often generated when our system sees a

departure event for a particular car. The STB should clarify that the triggering event for issuing the original ETA should be, depending on the circumstances, either (1) receipt of a correct bill of lading, or (2) the initial car movement events following receipt of the shipment in interchange or from the customer, such as departure events.

Fifth, the delivery time that the Original ETA is targeting should reflect the particularized service to the customer, which can differ based on individual circumstances. In general, for “open gate” customers (*i.e.*, customers for whom CSXT delivers inbound traffic directly to the customer facility without a specific customer request to “order-in” particular cars for delivery), CSXT calculates a trip plan and ETA based on the time of expected delivery to the customer facility. This generally mirrors the NPRM’s expectation that delivery would reflect “when the shipment actually arrives at the designated designation.”⁵ But for closed-gate customers, (*i.e.*, customers that choose to have CSXT notify them when cars are ready for delivery and then order in particular cars for delivery), CSXT calculates a trip plan and ETA based on arrival to the local serving yard or other ending events, as deemed appropriate. I note that many customers are not solely open gate or closed gate, for example, some customers might be open gate for some commodities and closed gate for others. I encourage the Board to be sensitive to the nuances of particular service situations when evaluating Original ETA performance.

⁵ NPRM at 13 n.17.

B. Transit Time

The “transit time” metric proposed in the NPRM would compare transit time over a 12-week period to the prior year, and deem a deterioration of 20% to be proof of “inadequate service.” This metric is not analogous to any metric that CSXT currently uses. There is good reason for this—fluctuations in transit time for individual lanes are normal on a dynamic network and not meaningful indicia of any service problem.

Customers have some ability in ShipCSX to view transit time information. But transit time is not always a meaningful metric for CSXT’s manifest customers, who primarily are concerned with the predictability of CSXT’s service, both for trip plan performance and for local service. Nor is it possible to create a useful single transit time metric for unit train shipments, which often move in complex patterns among multiple origins and destinations depending on the individual customer’s needs. Mr. Albright’s verified statement gives some examples from CSXT’s experience.

I would also note that the 20% threshold for transit time deviations is likely to be tripped by relatively small year-over-year changes in transit time. Because most transit times on CSXT are 5 days or less, a single day’s increase in transit time would constitute an increase over 20%. For shorter hauls, where average transit times might be 1-2 days, a change of a few hours would be enough to trip the 20% threshold. In my experience, fluctuations of that length are common and not a sign of a service failure; indeed, shifting a service window temporarily to

accommodate maintenance or an Amtrak window could cause a 20% increase in overall CSXT transit time. Sometimes the customer might request changes in days of service or the window of service, which could cause a change in transit time.

All that said, if the Board were to adopt some form of transit time metric, it should take steps to clarify how that metric should be calculated. For example, the Board should take care to ensure that it is standardizing the starting and delivery events for any shipments whose transit time is being measured. As mentioned above when discussing TPP, there are instances where original ETA is first calculated from the time of a waybill and instances where it is first calculated from another event such as receipt in interchange or departure. Any transit time comparison that is considered by the Board for a particular lane would need to measure movements from the same beginning event to the same ending event. As discussed above, an original ETA could be issued at the time of a waybill or at the time of another event, such as a departure event. Any transit time comparison for a lane should use similar beginning events. And the endpoint for an original ETA calculation could be delivery to the customer facility for open gate customers; for closed gate customers, it could be arrival to the local serving yard or other ending events. Any transit time comparison should use similar closing events.

C. ISP

The “industry spot and pull” metric proposed by the Board would measure a railroad’s success in performing spots and pulls within a service window. As such, it resembles CSD, with some key differences.

First, the proposed NPRM language suggests that ISP would be calculated by comparing “requested spots and pulls” to actual placements, with no provision for either customer-caused misses or for customer requests that are beyond their capacity. As described above, the CSD metrics that CSXT has been reporting to the Board and its customers exclude customer exceptions and capacity exceptions. I note that the Board states elsewhere that misses not caused by carriers would not be counted against them.⁶ It would be important for the Board to implement that provision in the final rule, particularly if it intends to rely on Ex Parte 770’s reported CSD levels to make any conclusions about a reasonable threshold for ISP. CSXT’s CSD metrics would look quite different if customer-caused misses and capacity exceptions where customers lacked the space to accept shipments were somehow counted against CSXT as local service failures. And a metric that failed to exclude instances where local service misses were not CSXT’s fault would not be a meaningful measure of CSXT’s service.

Second, CSD is measured on a per-car basis. As discussed, if a crew places eight out of ten cars, the CSD would be 80%. ISP, in contrast, is calculated on a daily basis, and partial service on a day would be counted as a miss. So under ISP, delivering 99 out of 100 cars would count as failure. In the same vein, placing one car at the wrong spot would be treated the same as not delivering it at all. A per-car

⁶ NPRM at 22 (“A miss not caused by the incumbent railroad would not be counted against it.”).

metric is a much better measure of actual service, and I recommend that the STB adjust the proposed ISP metric accordingly.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 7th day of November, 2023.

/s/ Michael Cheatham

Michael Cheatham