

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**RECIPROCAL SWITCHING
FOR INADEQUATE SERVICE**

DOCKET NO. EP 711 (Sub-No. 2)

OPENING COMMENTS ON BEHALF OF CN

ENTERED
Office of Proceedings
November 7, 2023
Part of
Public Record

Olivier Chouc
CN
935 de la Gauchetière Street West
16th Floor
Montréal, QC H3B 2M9
CANADA

Allison C. Davis
Stephen S. Laudone
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

Kathryn J. Gainey
CN
975 F Street, N.W.
Washington, DC 20004

Counsel for CN

Dated: November 7, 2023

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF COMMENTS	1
I. THE NEW SWITCHING FRAMEWORK MUST QUALITATIVELY ASSESS THE ADEQUACY OF CURRENT SERVICE.....	4
A. Statutory Requirements Under Section 11102(c)	5
B. As Currently Constructed, the Proposed Switching Framework Is Not Aligned with the Statutory Standards	9
C. CN's Recommended Changes to the Proposed Switching Framework	14
1. Showing of Currently Inadequate Service for Which Switching Would be an Effective Remedy	16
2. Practicability Considerations, Including Safety	17
3. Well-Performing Lanes	20
4. Participation by the Alternate Carrier	21
5. Affirmative Defenses	23
6. Term of a Switching Order	25
7. Renewal and Termination of a Switching Order.....	27
8. Terminal Areas	28
II. THE DATA DISCLOSURE PROPOSAL LACKS MEANINGFUL LIMITATIONS AND IS INCONSISTENT WITH THE BOARD'S STATUTORY AUTHORITY AND LONG-STANDING PRACTICE.....	30
III. THE BOARD SHOULD FURTHER CONSIDER ISSUES RELATING TO EACH OF THE PERFORMANCE METRICS	35
A. Local Service (ISP)	37
B. Service Reliability (OETA).....	44
C. Service Consistency (Transit Time).....	45
D. Interline Traffic	47
E. Cross-Border Traffic.....	49
IV. CONTRACT TRAFFIC MAY NOT SERVE IN ANY WAY AS THE BASIS FOR FORCED SWITCHING	50
V. EXEMPT TRAFFIC IS NOT ELIGIBLE FOR A FORCED SWITCHING REMEDY	54
CONCLUSION.....	56

INTRODUCTION AND SUMMARY OF COMMENTS

The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter “CN”) respectfully submit these comments on the Surface Transportation Board’s (“STB” or “Board”) notice of proposed rulemaking issued in the above-captioned proceeding.¹

CN supports the Board’s decision to close the proceeding in Docket No. EP 711 (Sub-No. 1) and to instead address the circumstances when temporary forced switching would be an appropriate remedy for inadequate service. CN previously explained that it supported exploring alternatives to the 2016 proposal to avoid the adverse and unintended consequences of that proposal, and that it supported collaboration and dialogue with all stakeholders to develop appropriate solutions.² CN remains committed to those goals.

The NPRM has three core components. First, the agency proposes a new process for obtaining forced switching, pursuant to which shippers or receivers could obtain a forced switch for two to four years if service performance falls below three defined service metrics during any 12-week period, subject to several narrow affirmative defenses. The proposed metrics include one to assess service reliability based on original estimated time of arrival (“OETA”), one to assess service consistency based on transit time, and one to assess local service performance based

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 Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB Mar. 16, 2022), Tr. 1002:7–20.

on industry spot and pull (“ISP”). Second, the agency would require railroads to provide individualized, customer-specific performance records to a requesting shipper or receiver in order to allow that shipper or receiver to file a petition for forced switching. Finally, to assist the Board with general oversight, the agency proposes new permanent data reporting requirements to the Board for OETA and ISP.

Taken together, the NPRM raises a number of new and complex issues for public comment. The issues presented range from how to construct and implement new service metrics to the impact the new proposed framework could have on carriers, customers, and the entire rail network. But the Board has not provided sufficient time for parties to provide meaningful comment on the numerous issues and questions raised in the NPRM. In particular, the establishment of service metrics and performance thresholds requires significantly more empirical analysis and engagement with stakeholders than has been afforded. CN therefore urges the Board to provide additional opportunities for engagement—whether through an extension of the ex parte comment period, a technical conference, or a supplemental notice of proposed rulemaking—to address the issues and questions raised in the NPRM. Nevertheless, in the time provided, CN offers the following comments on the proposals in the NPRM.

In Section I, CN addresses the new proposed process for obtaining Board-ordered switching for inadequate service based on three performance metrics. CN agrees that metrics can be useful indicators of service levels. But the NPRM would

employ metrics not simply as a guide or potential indicators, but as the ultimate arbiter of whether current service is adequate or not. The proposed metrics, standing alone, cannot provide the needed context to evaluate service performance; rather, a more qualitative approach is needed to be consistent with the statutory requirements. To align the NPRM with the statutory standard, CN recommends several modifications to the proposed framework.

In Section II, CN explains its concerns with the novel proposal to require carriers to provide what amounts to pre-litigation discovery to shippers and receivers prior to the initiation of a proceeding, including its lack of statutory authority, vagueness, overbreadth, inconsistency with prior practice, and confidentiality implications. CN has proposed suggested changes that will promote the Board's goal of expediting proceedings under the new framework while adhering to the Board's long-standing practice and statutory authority.

In Section III, CN addresses details relating to the parameters of the three performance metrics and the Board's proposed collection of data for two of those metrics. CN explains its concerns with the ISP, OETA, and transit time metrics as proposed, and discusses particular issues raised by interline traffic and cross-border traffic.

Finally, in Sections IV and V, CN explains that the Board lacks authority to regulate contract and exempt traffic.

CN also joins in the comments filed today by the Association of American Railroads ("AAR"), which address additional issues raised by the NPRM.

I. THE NEW SWITCHING FRAMEWORK MUST QUALITATIVELY ASSESS THE ADEQUACY OF CURRENT SERVICE

CN understands that the Board's intention is to create an "easily administrable" and "clearer and more objective rule" to provide for forced switching that could remedy instances where customers are experiencing inadequate service.³ However, any framework for ordering switching under 49 U.S.C. § 11102(c) must ensure that such orders are tailored to the facts of a particular dispute and issued consistent with the statutory standard. Under the statute, the Board may order reciprocal switching between two rail carriers "where it finds such agreements to be practicable and in the public interest."⁴ The Board is not writing on a clean slate when it comes to those requirements. When adopting § 11102(c), Congress explained that the "practicable and in the public interest" standard under subsection (c) is "the same standard the Commission has applied in considering whether to order the joint use of terminal facilities" under subsection (a).⁵ Therefore, the agency's interpretation and application of those standards in terminal facilities cases must inform the Board's application of § 11102(c)'s remedy of reciprocal switching.

Below, CN provides a more detailed analysis of the statutory requirements under § 11102(c), which include a public interest finding, a practicability finding,

³ NPRM at 8–9.

⁴ 49 U.S.C. § 11102(c)(1). The NPRM invokes this standard, rather than the "necessary to provide competitive rail service" standard. *See* NPRM at 2–3, 6.

⁵ H.R. REP. NO. 96–1430, at 116 (1980) (Conf. Rep.); S. REP. NO. 96–470, at 42 (1979) (same).

and a finding that forced switching would be in a terminal area. CN then explains why the NPRM's reliance on service metrics and thresholds to determine public interest is not consistent with the statutory standard. Finally, CN offers suggestions on how to align the new switching framework with the statutory standard.

A. Statutory Requirements Under Section 11102(c)

Determining whether an order under § 11102 is “practicable and in the public interest” is not a perfunctory exercise. With respect to the public interest determination, the agency has explained that it “must take into consideration not only the interests of the particular shippers at or near the terminal considered, but also the interests of the carriers and of the general public.”⁶ A “mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them” is insufficient to support an order under § 11102's public interest standard.⁷ The agency thus requires that “some actual necessity or some

⁶ *Jamestown, N.Y., Chamber of Com. et al. v. Jamestown, Westfield & Nw. R.R. et al.*, 195 I.C.C. 289, 292 (1933) (citing *Mfrs. Assoc. of York, Pa. v. Pa. R.R. et al.*, 73 I.C.C. 40, 49 (1922)).

⁷ *Id.*; see also *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, Docket No. NOR 41550, 1996 WL 197602 (STB served Apr. 25, 1996), at *6 (“There have undoubtedly been times when [the rail carrier's] service was not to [the shipper's] satisfaction, but it has long been established that the section 11103(a) public interest requirement embodies more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them.”). Prior to recodification by the ICC Termination Act of 1995, the terminal facilities and reciprocal switching provisions were found at 49 U.S.C. § 11103.

compelling reason must first be shown before [it] can find such action in the public interest.”⁸

The logical corollary to the “actual necessity or compelling reason” test is that the shipper must be experiencing inadequate service to warrant relief.⁹ Following § 11102(a)’s enactment in 1920,¹⁰ the agency recognized that an order for joint use of terminal facilities is not in the public interest when there “is no showing that the shippers are *so inadequately served at present* that we are warranted, from the standpoint of the public interest, in depriving the carrier first on the ground of an important volume of the traffic originating along its line, by the direct and affirmative exercise of the power to require [it] to share its terminal facilities[.]”¹¹ Thus, there must be a current service inadequacy for which there is actual necessity or compelling reason to satisfy the public interest language of § 11102(a).¹² And

⁸ *Jamestown*, 195 I.C.C. at 292.

⁹ *Midtec Paper Corp., et al. v. Chi. & Nw. Transp. Co. (Use of Terminal Facilities & Reciprocal Switching Agreement)*, 1 I.C.C.2d 362, 364 (1985) (“*Midtec I*”) (“A corollary of this [actual necessity or compelling reason] requirement is that it must be shown that existing service is inadequate.”), *modified on other grounds by Midtec Paper Corp., et al. v. Chi. Nw. Transp. Co. (Use of Terminal Facilities & Reciprocal Switching Agreement)*, 3 I.C.C.2d 171 (1986) (“*Midtec II*”). Although the NPRM proposes to overrule *Midtec II*, it does not explain why that is justified or necessary, especially given that the Board previously adopted similar regulations for inadequate service at 49 C.F.R. pt. 1147, nor does it specify which aspect of that decision the Board seeks to overrule.

¹⁰ See Transportation Act of 1920, 41 Stat. 456, 479–80 (1920).

¹¹ *Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50 (emphasis added), *aff’d United States v. Pa. R.R.*, 266 U.S. 191 (1924).

¹² See, e.g., *Spokane, Portland & Seattle Ry. & Union Pac. R.R.—Control—Peninsula Terminal Co.*, 348 I.C.C. 109, 140 (1975) (explaining that “the evidence here clearly shows a compelling reason and an actual unfilled need” because the “current service” was “clearly inadequate and does not meet the needs of the shipping and receiving public”); *Midtec I*, 1 I.C.C.2d at 364–65 (concluding that there was “no showing on the record of inadequate service” or that the “rail service [was] so deficient that it seriously impair[ed] the shipper’s

this same standard applies in the context of forced switching under § 11102(c). Indeed, when enacting § 11102(c)(1), Congress explained that it “provides an avenue of relief for shippers where only one railroad provides service and *it is inadequate*.”¹³

A distinct but equally important finding that must be made before the Board can order carriers to enter a switching agreement is that such an agreement is practicable. Section 11102 contemplates an individualized, fact-specific finding when it comes to a Board finding on practicability,¹⁴ and consistent with the statute, the agency has long considered the totality of the circumstances when evaluating the practicability of the joint use of terminal facilities or a switching arrangement under § 11102.¹⁵

There are numerous factors that bear on practicability that the agency has historically considered. For example, the agency has considered existing track and yard usage, capacity, congestion, traffic density, existing switching arrangements, operational interference, safety, the potential for unduly hampering the ability of either carrier to serve its shippers, and the impacts to other carriers, shippers, and

ability to compete” such that the actual necessity and compelling reason standard was not met).

¹³ H.R. REP. NO. 96–1430, at 116 (1980) (Conf. Rep.) (emphasis added); S. REP. NO. 96–470, at 42 (1979) (same).

¹⁴ 49 U.S.C. § 11102(c)(1) (authorizing switching agreements in those instances “where it *finds* such agreements to be practicable”) (emphasis added).

¹⁵ See, e.g., *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.*, Docket No. FD 38891 (ICC served May 15, 1984), *aff’d Cent. States Enters., Inc. v. ICC*, 780 F.2d 664 (7th Cir. 1985))).

the public.¹⁶ In other words, the agency historically has not applied a bright line test to determine practicability and instead has conducted a multi-faceted approach in each case considering the circumstances.

Finally, under the statute, forced switching must be confined to a terminal area. Historically, and at the time of enactment, reciprocal switching was understood to occur at terminals and the reciprocal switching provision at § 11102(c) does not contain any language suggesting that switching could be ordered outside of a terminal area.¹⁷ The agency has a long history of considering whether the statutory criterion of a terminal area has been met on a case-by-case basis.¹⁸ In determining what constitutes a terminal area, the agency has considered various factors, including the use of the track, the nature of the facilities, the type of

¹⁶ See, e.g., *Del. & Hudson Ry. v. Consol. Rail Corp.—Reciprocal Switching Agreement*, 367 I.C.C. 718, 720 (1983) (considering feasibility, capacity of terminal facilities to handle both carriers' traffic, the need to avoid unduly hampering either carrier's ability to serve its shippers, and cost-benefit analysis between shippers and carriers); *Union Pac. Corp. et al.—Control—Mo. Pac. Corp. et al.*, 366 I.C.C. 462, 574–76 (1982) (considering capacity and delay implications of shared operations); *Use By Erie of Niagara Jct. Ry. Terminals*, 269 I.C.C. 493, 499–502 (1947) (considering concerns about yard usage, the extent of switching that would need to occur, and potential interference with interchange track switch charges).

¹⁷ See Comments and Written Testimony of CN, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 8 (filed Feb. 14, 2022); Opening Comments of AAR, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 45–46 (filed Oct. 26, 2016).

¹⁸ See NPRM at 11–12 & n.11 (citing *Rio Grande Indus., Inc.—Purchase & Related Trackage Rights—Soo Line R.R.*, Docket No. FD 31505, 1989 WL 246814, at *9 (ICC served Nov. 15, 1989); *Pa. Co. v. United States*, 236 U.S. 351, 359 (1915); *Midtec II*, 3 I.C.C.2d at 179; *Golden Cat*, Docket No. NOR 41550, 1996 WL 197602, at *7).

service performed, whether operations take place within yard limits, and whether service is performed within a cohesive commercial area, among others.¹⁹

B. As Currently Constructed, the Proposed Switching Framework Is Not Aligned with the Statutory Standards

Under the statute, the Board is tasked with conducting a meaningful inquiry into whether an order for reciprocal switching would be practicable and in the public interest. As discussed above, Congress intended this narrow remedy to remediate specific problems, and the standard requires the Board to make public interest and practicability findings in each adjudication under § 11102(c) based on the unique circumstances of that case. In so doing, the Board must ensure that there is a current service inadequacy for which there is actual necessity or compelling reason for forced switching and that imposition of this extraordinary remedy is practicable and will not unduly impair the carriers or negatively impact the broader network.

The NPRM, however, proposes one-size-fits-all service metrics and thresholds that would deem any service that falls below the thresholds inadequate and presumes that switching would be in the public interest, unless one of four narrow affirmative defenses is shown. Although the NPRM describes the framework itself as justifying the statutory public interest requirement,²⁰ these metrics cannot

¹⁹ *Midtec II*, 3 I.C.C.2d at 179; *CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Indus.*, 363 I.C.C. 518, 585 (1980); *Rio Grande Indus.*, Docket No. FD 31505, 1989 WL 246814, at *9.

²⁰ *E.g.*, NPRM at 9 (the OETA service reliability standard “would advance the public interest by establishing a reasonable expectation that . . . the carrier will customarily meet [the provided] estimated time of arrival”; the transit time standard “would promote the public interest by providing an incentive for carriers to maintain velocity through the rail

replace an individualized finding that a particular switching agreement is in the public interest as a result of a current service inadequacy rising to the level of an actual necessity or compelling reason.

Indeed, the proposed metrics do not necessarily indicate *any* inadequacy in rail service at all. Under the following hypothetical examples, the metrics would incorrectly signal a service inadequacy of such magnitude to justify the serious remedy of a temporary forced switch.

- On a particular lane, a railroad's average transit time for a shipper has consistently been 24 hours for multiple years. The shipper finds this to be adequate service. One year, overall traffic volumes across the railroad's network are down significantly, thus allowing the railroad to make certain service changes to optimize the plan in light of changing volumes and operate at higher than usual velocity. Average transit time on the lane decreases to 19 hours as a result. The following year, overall traffic volumes normalize, the operating plan is readjusted, and the average transit time for that particular lane returns to normal (24 hours). Because this would be a 20% increase in average transit time year over year, the NPRM would conclude that this was a service inadequacy.
- A railroad embarks on a significant capital project that lasts for 12 weeks to expand capacity, including double tracking and siding expansions. Prior to the project, the railroad works directly with customers that will be impacted to minimize disruptions, including providing sufficient notice so that shippers can arrange to move their product by truck during the project. During the course of the project, the railroad employs slows orders and re-routings to safely accommodate traffic during the project. As a result, average transit time to multiple customers served on the route increases by 20% during the course of the project compared to the prior year, but returns to normal once the project is completed. This would be a service failure under the Board's transit time metric.
- A shipper regularly requests local work for 50 cars per service window. Over a 12-week period, the shipper requests local service on 30 occasions. The railroad performs the work for all 50 cars within the service window on 23

system"); *id.* at 15 (stating that a 60% service reliability standard "would serve as a useful indicator of adverse effects on the public interest").

occasions, but on the other seven occasions, The railroad performs the work for 49 cars and misses 1 car. The railroad always ensures that the 1 missed car is placed the following service day. In total, the railroad has successfully performed local work for 1,493 cars, but has missed 7 cars, which were promptly placed the following service day. Because the ISP metric is based on service windows and not cars, this would be a local service failure.

- A railroad adjusts its operations to safely operate during colder periods when ambient temperature falls below a certain threshold, including slower train speeds and reduced train length. As a result of loss of velocity and network productivity associated with these safety measures, railroad deliveries occur on average 28 hours past OETA over a 12-week period. Because the railroad is on average 4 hours past the allowable service window established by the NPRM, the railroad has failed the OETA performance metric and this would be a service inadequacy.
- A railroad has been reliably serving a shipper with loaded cars for years. The loaded cars arrive regularly on-time, with consistent transit time, and reliable local service. The transit time on the shipper's private empty cars are variable, but this variability has no impact on the customer's business needs, which prioritize the consistent and regular delivery of loaded cars. Transit time on the private empty cars increases by 20% over a 12-week period compared to the prior year, thus justifying a forced switch for the shipper's loaded traffic, notwithstanding the fact that transit time, OETA, and ISP are well above the thresholds for the shipper's loaded traffic.
- A railroad has regularly been exceeding the OETA target for its customer. As a result of a severe weather event, the railroad's service is impacted, but it does not have a track outage. Additionally, traffic has accumulated at various points on the network due to the inability to move as it would under normal weather conditions. The railroad promptly works to eliminate the backlog, but due to the weather event and the time needed to recover, the railroad's OETA success rate over a 12-week period falls below the threshold, thus triggering a potential switch.

These scenarios should not represent service failures for which there is actual necessity or compelling reason for a forced switch. The metrics would treat dissimilar circumstances in the same manner—*e.g.*, treating cars delivered 25 hours after OETA the same as cars delivered 4 weeks after OETA—with no assessment of individualized circumstances or impact on the customer. And they would ignore

potentially crucial context that is needed to evaluate service performance—*e.g.*, by evaluating transit time without consideration of volume. While velocity, local service, or on-time arrival are factors that may inform an assessment of service performance, service below the proposed thresholds will not always correspond to inadequate service, which is required under the statute.

As such, the NPRM’s over-reliance on the metrics could result in situations where switching is ordered in the absence of an actual necessity or compelling reason for a specific shipper to receive forced switching on a particular lane. This over-reliance on metrics is exacerbated by certain procedural features of the NPRM. A petitioner, for example, is not required to allege inadequate service in its request for reciprocal switching,²¹ nor is there any constraint on the 12-week time period that could form the basis of the petition, such that the data may not actually speak to a petitioner’s current service levels. A petitioner is permitted to combine underperforming lanes with well-performing lanes in order to obtain switching for all traffic on those lanes, even the traffic for which there is no inadequacy. More concerning, the Board is not obligated to find that there is a *current* service inadequacy and that forced switching would be an effective remedy. Proposed § 1145.6(a)(2) requires only that the Board find “the incumbent rail carrier failed to meet one or more of the performance standards” with respect to the shipper’s traffic,

²¹ A petition need only “identify the performance standard the railroad failed to meet over the requisite period of time, and provide evidence supporting its claim” to comply with proposed § 1145.5(b)(1). NPRM at 42.

even though the 12-week period that failed the standard may be from a year prior and not illustrative of current service.²²

Because the proposed framework is not tailored to identify and remedy an actual service deficiency as required by § 11102(c), it veers toward establishment of performance standards that serve not as remedial tools but rather incentives for rail carriers to provide what the Board deems to be an appropriate level of service. *See, e.g.*, NPRM at 5 (through proposed Part 1145, “the Board intends to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis”); *id.* at 15 (baseline performance level for OETA will be incrementally increased because, “[b]y phasing in a higher success rate over time, the Board would be providing the Class I carriers with time to increase their work forces and other resources, as necessary, and/or modify their operations in order to meet the performance standards”). Proposed standards that do not serve to remedy a current service inadequacy, but rather seek to modify carrier conduct, are not consistent with the remedial nature of § 11102(c).

The standards are particularly concerning given that the proposed thresholds are not based on any data-driven, empirical analysis. The OETA threshold (60% or 70%) and ISP threshold (80% or 90% in certain circumstances) are based on system-wide metrics and performance targets provided temporarily in Docket No. EP 770 (Sub-No. 1) by four of the six Class I carriers (each of which tracks, collects, and utilizes performance data differently), where there appears to be significant

²² *Id.*

differences between how some of those carriers measured OETA and ISP and the metrics proposed in the NPRM.²³ The transit time threshold (20% or 25%) is not grounded in any prior data reporting or analysis.²⁴

A railroad like CN serves thousands of different customers shipping a wide variety of commodities in numerous supply chains that power the economy and connect customers to global markets. Each of those customers has different priorities when it comes to rail service—whether that be price, cycle time, volume, frequency of switching, damage-free handling, or proximity to supply chains. Given the varied circumstances and dynamic nature of railroading, the proposed metrics, standing alone, simply cannot provide a complete picture of a particular customer’s service.

C. CN’s Recommended Changes to the Proposed Switching Framework

When the Board adopted its rules at 49 C.F.R. pt. 1147, which likewise address temporary service inadequacies through reciprocal switching, the Board stated that it was 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.”²⁵ The Board was “convinced that such issues are best addressed on a case-by-case basis, under flexible general rules, because transportation needs and

²³ *Id.* at 15, 20. For example, based on the methodology documents submitted in Docket No. EP 770 (Sub-No. 1), it appears that most carriers measured ISP success at the car level rather than at the service window level, as proposed in this NPRM.

²⁴ *See id.* at 18.

²⁵ *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 975 (1998).

service difficulties can vary substantially.”²⁶ Nothing has changed that would alter that conclusion.

While the Board is correct that there have been technological advancements in the intervening years in terms of data capabilities,²⁷ the ultimate question that the Board must answer in a proceeding under § 11102(c) remains the same: whether there is a current service inadequacy that meets the statutory standard for ordering forced switching. While data may be more readily available to help inform that inquiry, data cannot pre-determine what constitutes adequate service for all traffic under all circumstances at all times. The Board must look at the nature of the alleged service inadequacy, the cause and context for that inadequacy, the impacts on the petitioner, other shippers, and the general public, and whether reciprocal switching will be an effective remedy.

The Board can align its proposed framework with the statutory standard by ensuring a qualitative approach to determining whether Board-ordered switching is practicable and in the public interest. There are several changes that the Board can make to bring its framework within the bounds of the Board’s § 11102(c) remedial authority. Fundamentally, the Board must ensure that it is evaluating each request for forced switching based on the totality of the circumstances, and making a finding consistent with the statutory standard described above. With that

²⁶ *Id.*

²⁷ NPRM at 7.

standard in mind, CN respectfully suggests that the Board make the following changes.

1. Showing of Currently Inadequate Service for Which Switching Would be an Effective Remedy

As constructed, the proposed switching framework does not require a petitioner to allege or establish that the service it is currently receiving is inadequate or that forced switching would be an effective remedy.²⁸ The Board should revise proposed § 1145.5 to require that a petitioner make such a showing, consistent with the statutory standard. As discussed above, the Board cannot rely on its proposed performance thresholds alone to determine the existence of inadequate service, let alone service “so inadequate[]” that there is a compelling need for the Board to order a switch. *See Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50. Of course, service metrics can be a relevant factor that the Board considers along with other evidence put forward by the shipper that its service is currently inadequate. But a necessary part of the public interest inquiry involves the shipper showing that there is an ongoing service inadequacy that is harming the shipper such that there is an actual necessity or compelling reason for a forced switching remedy.

Relatedly, to ensure that switching is only ordered when service is *currently* inadequate, the 12-week period must be close in time to the filing of the petition.

²⁸ A petition need only “identify the performance standard the railroad failed to meet over the requisite period of time, and provide evidence supporting its claim” to comply with proposed § 1145.5(b)(1). *Id.* at 42.

There is currently no limiting factor on the shipper's selection of a 12-week period: nothing in the NPRM prevents a petitioner from selecting a 12-week period from 6 months or even a year prior. A metric based on stale data cannot indicate a current service inadequacy.

Finally, it is important that a switching order be an effective remedy to the service inadequacy, which requires consideration of the specific facts of the case. If, for example, both the incumbent and the alternate carrier are experiencing slower velocity and cycle times, a forced switch to the alternate carrier will not provide an effective remedy. Forced switching must be able to remedy the alleged service inadequacy, otherwise there is no actual need or compelling reason for the switch.²⁹

2. Practicability Considerations, Including Safety

The NPRM appropriately acknowledges that practicability is a required finding.³⁰ However, the NPRM departs from the agency's long-standing approach to this statutory requirement by proposing a presumption that equates operational feasibility with practicability. The proposed regulation at § 1145.6(b) states that, if there is "an existing reciprocal switching arrangement in a terminal area in which the petitioner's traffic is currently served, the proposed operation is presumed to be operationally feasible, and the incumbent rail carrier will bear a heavy burden of

²⁹ For this reason, and as discussed in more detail below, the Board should eliminate the ISP metric from the proposed regulations because forced switching logically could not be an effective remedy for inadequate local service, and forced switching could further deteriorate local service performance by requiring the incumbent to perform additional switching operations in the terminal area.

³⁰ See, e.g., NPRM at 12.

establishing why the proposed operation should not qualify for a reciprocal switching agreement.”³¹

The NPRM is incorrect in presuming that any Board-ordered additional switching is practicable simply because rail carriers may have agreed to some level of voluntary switching in a terminal area. Just because a single shipper may be open to reciprocal switching in a terminal area under certain circumstances (*e.g.*, for particular commodities or particular volumes) does not mean that rail carriers have the ability to switch more traffic from additional shippers beyond what is currently being switched. Yard and track capacity, crew capacity, and traffic density serve as real physical constraints on how much switching can occur in a terminal area without jeopardizing operations for other customers.

CN agrees that existing voluntary reciprocal switching operations—and the extent of those and other operations in a terminal—would be one factor of many for the Board to consider when assessing practicability, consistent with agency precedent. *See, e.g., Del. & Hudson Ry.*, 367 I.C.C. at 720 (considering whether existing reciprocal switching agreements in the same terminal had resulted in operational problems). But there are numerous other factors that bear on practicability that the agency has historically considered, including existing track and yard usage, capacity, congestion, traffic density, operational interference,

³¹ *Id.* at 43. The NPRM also suggests that, because switching service under a prescribed agreement would occur within a terminal area, “there is reason to believe that those agreements would be practicable under § 11102(c).” *Id.* at 26. There is no basis for such an assumption, as switching *must* occur in a terminal area under the statute and is a threshold requirement. *See Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 670 (7th Cir. 1985) (a “terminal area is a prerequisite for switching”); *see also* Section I-A.

safety, the potential for unduly impairing the ability of either carrier to serve its shippers, and the impacts to other carriers, shippers, and the public.³²

The NPRM's omission of safety considerations is particularly problematic. In the 2016 proposal, the Board recognized that it should not prescribe switching without considering safety.³³ The record in the prior proceeding explains why safety is a critical consideration when it comes to forced switching, given the safety risk introduced with increased handling.³⁴

Reciprocal switching arrangements involving hazardous materials pose specific issues when it comes to practicability. Yet, under the NPRM's presumption, forced switching of hazardous materials would be presumed operationally feasible if voluntary switching of another product like grain occurred within the terminal area. Such a presumption would ignore the operational complexities associated with hazardous commodities under federal safety regulations, such as requirements

³² See *supra* n.12.

³³ Notice of Proposed Rulemaking, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 19, 41–42 (STB served July 27, 2016).

³⁴ Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB convened Mar. 15, 2022), Tr. 10:2–4 (statement of the Federal Railroad Administration's administrator, Amit Bose, that "the adoption of any new revised switching requirements must ensure that switching operations are safely executed"); Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), Tr. 717:21–718:8 (STB convened Mar. 16, 2022) (explanation by American Short Line and Regional Railroad Association's president that "switch points and handling cars is essentially the most dangerous thing railroads do" such that if a "rule creates more switch points, . . . it's pretty realistic to expect there to be some more accidents coming from that"); Opening Comments of the Association of American Railroads, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Docket No. EP 711 (filed Mar. 1, 2013), Verified Statement of William J. Rennie at 88–89 ("Rennie V.S.").

for secure handoff.³⁵ Further, it would ignore potential safety and security considerations associated with the handling and alternate routing of hazardous materials by the alternate carrier as a result of the prescribed switch.³⁶ The cooperation of the alternate carrier is essential to understanding the practicability of alternative service arrangements, as discussed herein, but it is particularly imperative in the context of alternative service involving hazardous materials.

To ensure the proper consideration of issues relating to practicability, including safety, the Board should revise proposed § 1145.6(b) to eliminate the presumption of feasibility and instead clarify, consistent with its precedent, that the Board will consider the totality of the circumstances, including safety, in evaluating practicability.

3. Well-Performing Lanes

The regulation at proposed § 1145.2(c)(2) authorizes a shipper to petition for a forced switching order that governs “shipments to or from multiple lanes to or from the petitioner’s facility” if the “incumbent rail carrier’s average success rate for those lanes fails to meet [the OETA or transit time] performance standard[s].”³⁷ The shipper has sole control over which lanes to include in demonstrating the incumbent rail carrier’s average success rate, and the NPRM states that a shipper

³⁵ See 49 C.F.R. § 1580.205 (prescribing chain of custody and control requirements for hazardous materials); see also *id.* § 172.820(c)(1), (d)(1) (requiring railroads to conduct a yearly analysis of “the safety and security risks for the transportation route(s)” over which hazardous materials move, including the identification of “practicable alternative routes”).

³⁶ See, e.g., *Rennicke V.S.* at 84.

³⁷ NPRM at 39.

may include a lane “even though traffic moving [over that lane] is *above* the proposed service standard.”³⁸ In other words, a shipper may pair a well-performing lane with an under-performing lane such that the average performance falls below the NPRM’s metrics, resulting in forced switching over both lanes.

The NPRM fails to explain why imposing forced switching on a well-performing lane would be in the public interest. To satisfy the public interest standard, a shipper must identify “some actual necessity or some compelling reason” for forced switching. *Jamestown*, 195 I.C.C. at 292. A shipper cannot establish that it is “so inadequately served at present,” *Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50, that forced switching is warranted on a well-performing lane of traffic. The public interest requirement should be considered as to each lane and forced switching should not be ordered for lanes where there is no actual necessity or compelling reason for a switch.

4. Participation by the Alternate Carrier

The participation of the alternate carrier is crucial to the Board’s ability to make findings under the statutory standards discussed above. For the Board to find a compelling need for a forced switch, it must find that the alternative service will be an effective remedy. But the effectiveness of the alternate service is entirely contingent on the alternate carrier. If the alternate carrier is experiencing severe service degradation beyond what the incumbent carrier may be experiencing, prescribing a forced switch will be neither effective nor in the public interest.

³⁸ *Id.* at 17 (emphasis added).

The Board must also find that a forced switching arrangement is practicable. That requires consideration of the alternate carrier's ability to receive and handle the traffic, as well as any safety considerations associated with the handling or the alternate route.

The Board previously found, in the context of proceedings seeking alternative service arrangements, that the cooperation and participation by the alternate carrier is “essential.”³⁹ In procedures available at 49 C.F.R. pt. 1147—pursuant to which petitioners can obtain forced switching on a temporary basis for inadequate service—the petitioner is required to have obtained a commitment from another available railroad to provide alternative service.⁴⁰ When adopting that requirement, the Board explained the importance of the alternate carrier, emphasizing that “[a]dvance planning will be necessary to assure safe integration of the operations of the alternative carrier and the incumbent carrier” and that “it is appropriate for us to require the respective carriers to demonstrate that they have undertaken the requisite planning.”⁴¹ The Board also explained that “[f]orcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances.”⁴² The Board’s reasoning is equally valid in the context of the current NPRM, as nothing has changed to undermine the

³⁹ *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 977.

⁴⁰ 49 C.F.R. § 1147.1(b)(1)(iii).

⁴¹ *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 979 n.19.

⁴² *Id.* at 11; *see also id.* at 13 (“[T]he carriers involved need to discuss with each other how they can work together to make the alternative service work smoothly, and any problems or disputes should be raised and dealt with as early in the process as possible.”).

essential nature of the participation by alternative carrier when considering alternative service arrangements.

The Board should therefore modify its proposal to ensure the cooperation and participation of the alternate carrier. In addition to requiring good faith negotiations between the petitioner and the incumbent carrier (proposed § 1145.4), the NPRM should also require that the petitioner confer with the alternate carrier prior to filing a petition so as to ensure that the alternate carrier is willing and able to provide the alternate service.⁴³

5. Affirmative Defenses

Proposed § 1145.3 enumerates four affirmative defenses available to an incumbent carrier, and provides that the Board will also consider other affirmative defenses not enumerated in the proposed regulation on a case-by-case basis.⁴⁴ CN agrees that the enumerated affirmative defenses are circumstances that may be appropriate for the Board to consider in a forced switching proceeding to the extent they are relevant to § 11102(c)'s public interest or practicability requirement.

However, the NPRM omits a number of other scenarios where a railroad may be able to show that a switch should not be ordered. For example, the NPRM includes an affirmative defense for “severe weather events” causing “track outages.” Weather need not be severe or result in a total track outage to nonetheless impact

⁴³ Currently, the NPRM only requires a petitioner to identify a potential alternate carrier in its petition and serve its petition on the alternate carrier. *See* NPRM at 42 (proposed § 1145.5(b)(2) & (c)).

⁴⁴ *Id.* at 41.

rail operations. Normal weather conditions such as sustained colder ambient temperatures can likewise have impacts on operations and, in turn, on service quality. In cold temperatures, CN must reduce its train length and speed in order to safely operate, and those restrictions result in a loss of network productivity during the sustained cold temperatures. The impacts on operations during periods in which these winter restrictions are in place compound until the restrictions are removed, at which point CN must recover from winter operations by moving higher volumes of traffic. The impacts on operations resulting from cold temperatures are an expected and normal aspect of railroading, but those impacts vary from year to year, both in timing and extent.

Another example of an expected and normal aspect of railroading that can impact service is the routine, periodic maintenance that railroads must conduct on their infrastructure. CN, for example, devotes significant resources to its annual capital plan, including its maintenance work blocks, which it must schedule on the northern part of its network in summer months to avoid maintenance activities during winter. During work block season, velocity may be reduced or detours may be implemented to accommodate the hundreds of maintenance-of-way workers repairing miles of track at a time. Both of those actions are examples that can have an impact on service. Such work may not occur to the same extent each year on the same part of the network.

These and other scenarios are normal aspects of railroading which may cause temporary impacts to service. It would be inappropriate and detrimental to the industry if the Board ordered forced switching in these circumstances.

While the Board states that it “will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section,”⁴⁵ by enumerating just four narrow categories of affirmative defenses, the NPRM leaves rail carriers with significant uncertainty about whether the Board would accept as defenses other circumstances, such as those discussed above, that impact service performance.

Rather than attempt to define in advance an enumerated list of affirmative defenses, the Board should simply allow railroads in each case to present evidence and argument relevant to the statutory standard.

6. Term of a Switching Order

The NPRM proposes a minimum term for a switching order of between two to four years.⁴⁶ The Board asserts that a two to four year initial term for a switching order is “necessary for the prescription to be practical given the petitioner’s or alternate carrier’s legitimate business needs,” including “to make alternative service feasible and reasonably attractive to potential alternate carriers.”⁴⁷ But the

⁴⁵ NPRM at 41.

⁴⁶ *See id.* at 29.

⁴⁷ *Id.* Proposed § 1145.6(c) states that the Board can prescribe a minimum term of up to four years “if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner’s or alternate carrier’s legitimate business needs.” *Id.* at 43. Forced switching under the public interest standard is only appropriate to remedy inadequate service; that is the only legitimate need that should inform the minimum term. *Cf. Jamestown*, 195 I.C.C. at 292 (explaining a shipper’s desires and convenience are insufficient satisfy § 11102’s public interest standard).

Board does not explain how those specific spans of time achieve that stated goal, nor how it is consistent with the statutory requirements.

Two to four years is far too long a period and is disproportionate to the 12 weeks of service that would constitute the basis of a switching order. Prescribing a lengthy and inflexible period of forced switching with no ability for early termination is not consistent with the public interest standard requiring that a shipper be “so inadequately served *at present*” that a compelling reason for the switch exists.⁴⁸ Further, lengthy forced switching orders would implicate the negative incentives described in Docket No. EP 711 (Sub-No. 1), including disincentives to invest in the rail network because of increased uncertainty regarding volumes, density, potential impact on revenues, and return on investment.⁴⁹

To balance the concerns animating the Board’s desire for a standard switching period with the statutory demands of § 11102(c), CN recommends the Board establish a presumption that a switching order would be one year in duration after a finding of service inadequacy, while maintaining the flexibility to calibrate the duration of the term to the circumstances. A one-year duration for potential service via a forced switch should be more than adequate for an alternate rail

⁴⁸ *Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50; see also *See Muskegon Ry. & Navigation Co. et al. v. Pere Marquette Ry. et al.*, 148 I.C.C. 653, 661 (1928) (finding that a carrier that could once again provide adequate service was “entitled to serve the industries” located on its track under the public interest standard).

⁴⁹ See, e.g., Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB convened Mar. 16, 2022), Tr. 984:3–992:22 (testimony of Bernd Beyer explaining the impact of forced switching on investment incentives).

carrier. Indeed, there are several examples of operating arrangements with a one-year or less time horizon, whether through transportation contracts with one-year terms, emergency service orders (which are limited to a total of 270 days), or trackage rights agreements under 49 C.F.R. § 1180.2(d)(8) (which are one year or less).

7. Renewal and Termination of a Switching Order

The Board’s proposed automatic renewal provision at § 1145.7(a)⁵⁰ also contravenes the requirements of 49 U.S.C. § 11102 and agency precedent, and should be removed. The agency has rightly recognized that an order under § 11102 “might in [the] course of time cease to be ‘in the public interest’; and it is only so long as the desired use is in the public interest that we may require such use under these provisions of the act.” *Mo.-Kan.-Tex. R.R. v. Kan. City Terminal Ry.*, 198 I.C.C. 4, 7–8 (1933). Yet instead of carefully reviewing the conditions that led to the forced switch near or at the conclusion of the term to determine if they persist such that there is still an actual necessity or compelling reason for continued switching, the Board is proposing an automatic renewal (absent an action and showing by the incumbent carrier justifying termination).⁵¹

⁵⁰ Proposed 1145.7(a) states that a prescription “automatically renews at the end of the term” unless the Board grants a petition to terminate, and that “[a]utomatic renewal is for the same term as the original term of the prescription.” NPRM at 43.

⁵¹ The standard for granting a petition to terminate under proposed § 1145.7(b) is that the incumbent meets the performance standard that provided the basis for prescription for similar traffic, presumably on the assumption that the petitioner uses the switch. NPRM at 43. If the petitioner does not actually use the switch, that in itself should indicate that there is no compelling need for the switch.

Moreover, the agency has previously stated that its actions under § 11102 “should be responsive to changing conditions.” *Mo.-Kan.-Tex. R.R.*, 198 I.C.C. at 8. For example, when an incumbent carrier reestablishes its ability to provide adequate service, “it will not be in the public interest to require joint use of such tracks.” *Muskegon Ry. & Navigation Co.*, 148 I.C.C. at 661. But instead of being responsive to changing circumstances, the NPRM would automatically renew without a demonstration or assessment of the level of service or a compelling need.

Furthermore, if an incumbent carrier files a petition to terminate under proposed § 1145.7(b), the process set out by the Board limits the considerations for a petition to terminate to the same service metric and would not consider whether service is adequate, whether there is a continued need for the switch, and whether it remains practicable.⁵² The proposal would not even allow consideration of observed, real-world impacts that the forced switching order may or may not be having on the rail network.

The Board should modify its approach to instead allow a forced switching order to automatically terminate absent a showing of some enduring actual necessity or compelling reason and practicability put forth by the petitioner.

For similar reasons, the Board should allow railroads to file petitions to terminate reciprocal switching at any point when an incumbent carrier

⁵² Proposed § 1145.7(b) states a petition to terminate will be granted only if “the incumbent rail carrier demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate, the incumbent rail carrier’s service for similar traffic on average met the performance standard that provided the basis for the prescription.” NPRM at 43.

reestablishes adequate service. At that point, there can no longer be any actual necessity or compelling reason for agency intervention and the public interest standard of § 11102(c)(1) is no longer met. *See, e.g., Muskegon Ry. & Navigation Co.*, 148 I.C.C. at 661.

8. Terminal Areas

The NPRM appropriately limits the availability of Board-ordered switching to terminal areas, and it cites to some of the many cases in which the agency has considered on a case-by-case basis whether the statutory criterion of a terminal area has been met.⁵³

Rather than simply relying on this body of precedent, however, the NPRM attempts to define “terminal area” for purposes of its newly proposed regulations. The proposed definition states that “[a] point of origin or final destination on the rail system is not suitable for a prescribed switching arrangement if the point is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent rail carrier’s terminal-area operation.”⁵⁴ To the extent the NPRM is suggesting that a point outside of a terminal area would be suitable for forced switching if, for example, it could be integrated into the incumbent’s terminal-area operations, that is not consistent with the case law. There is no basis for the Board to expand the availability of switching to points outside of a terminal area, and whether a point outside of a terminal area could or could not be reasonably

⁵³ *See* NPRM at 2, 11–12 & n.11.

⁵⁴ *Id.* at 38 (definition of “terminal area” in proposed § 1145.1).

integrated into terminal-area operations is irrelevant. *See Rio Grande Indus.*, 1989 WL 246814, at *9 (rejecting notion that a terminal area could extend to any shipper reached by a local train dispatched from a freight yard as “far too expansive”).

Rather than attempting to define terminal area for purposes of the newly proposed regulations, the Board should simply make clear that it will rely on its existing case law—as it does for other proceedings in which the Board’s authority is confined to terminal areas.

II. THE DATA DISCLOSURE PROPOSAL LACKS MEANINGFUL LIMITATIONS AND IS INCONSISTENT WITH THE BOARD’S STATUTORY AUTHORITY AND LONG-STANDING PRACTICE

The NPRM includes a requirement that railroads provide shippers or receivers with certain information upon request. Specifically, the proposed regulation at § 1145.8(a) states: “[w]ithin seven days of a written request from a shipper or receiver, the incumbent rail carrier shall provide that customer all relevant individualized performance records necessary to filed a petition under § 1145.5 with the Board.”⁵⁵

CN appreciates the Board’s desire to promote efficiency in regulatory proceedings,⁵⁶ but the NPRM’s proposal to compel railroads to provide extensive and burdensome data to entities on demand prior to the onset of a proceeding at the Board is problematic for multiple reasons.

⁵⁵ NPRM at 11, 44.

⁵⁶ *Id.* at 2.

First, as written, the data disclosure proposal is vague and potentially extraordinarily broad, with no meaningful limitations on who can request information, the extent of the information that can be requested, and the frequency of requests. For example, as written, a shipper or receiver could request data from the carrier for the prior three years. Similarly, as written, a shipper or receiver could request data for the prior 12 weeks on a rolling weekly basis, even if they are not experiencing a service inadequacy.

Further, the data disclosure proposal incorporates none of the constraints that the Board has proposed in the context of the framework for obtaining forced switching relief. For example, eligibility under the new framework is limited to terminal-area shippers or receivers with practical physical access to only one Class I carrier. Additionally, relief under the proposed switching framework is limited to certain types of traffic—*e.g.*, intermodal appears to be largely excluded, and unit trains are currently excluded from the service reliability (OETA) standard. Despite these exclusions in the context of the framework for forced switching, the data disclosure proposal would appear to require a Class I carrier to provide any “shipper or receiver” the information requested, even those that are otherwise ineligible for Board-ordered reciprocal switching.

Even if the language of the rule could be read to imply a limitation (to the extent it suggests that the carrier need only provide the records “necessary to file a petition under § 1145.5”), the vagueness of the proposal would leave carriers in an untenable situation, not knowing whether a refusal to provide data on the grounds

that a shipper was not eligible for relief would constitute non-compliance. If a shipper advises the railroad that it is concerned specifically about its local service performance and requests data relating to all three metrics pursuant to proposed § 1145.8(a), is the carrier obligated to provide records relating to only the ISP metric or to all three metrics? If a shipper's traffic is not handled within a terminal area, would the carrier be obligated to provide data to that shipper? If a shipper requests OETA records for both manifest and unit train traffic, would the carrier be obligated to provide unit train data even though unit trains are ineligible for relief? Is the phrase "all relevant individualized performance records" limited to data only on the three performance metrics, or could it encompass information for the customer's traffic that could be pertinent to issues of practicability and safety?

Second, the data disclosure proposal's requirement that the carrier provide information to a shipper or receiver prior to the filing of a petition is inconsistent with long-standing agency practice insofar as it amounts to pre-litigation discovery, untethered to any formal proceeding before the Board. The standard practice at the agency is for the exchange of information between parties to occur only after a formal case is brought before the Board.⁵⁷ Even when the Board in recent years has put in place new procedures in an effort to expedite cases, the exchange of

⁵⁷ See, e.g., 49 C.F.R. § 1111.10(a)(1) (discovery begins after a Simplified-SAC complaint is filed); § 1111.10(a)(2) (discovery begins after a Three-Benchmark complaint is filed); 49 C.F.R. § 1111.9(a)(1) (discovery begins after a SAC complaint is filed); 49 C.F.R. § 1114.21(a)(1) ("Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter *involved in a proceeding* other than an informal proceeding") (emphasis added).

information has still commenced with the petition or complaint actually being filed at the Board.⁵⁸

The Board's long-standing approach to the exchange of information is consistent with the practice of courts, where discovery follows the filing of a complaint except in very limited circumstances. For example, Federal Rule of Civil Procedure 27 allows a party to seek pre-complaint depositions to perpetuate testimony when they show that they expect to bring an action but cannot presently bring it. But this is a rare exception of narrow scope requiring the approval of a judge.⁵⁹

Third, while the Board could require the disclosure of information to a shipper after it filed a petition, the Board cannot require such disclosure outside the context of a proceeding.⁶⁰ The NPRM does not identify the statutory source of its authority to compel railroads to provide pre-petition information to third parties. The Board cites only to 49 U.S.C. § 11102 and 49 U.S.C. § 1321 as authority for the

⁵⁸ See *Final Offer Rate Review*, Docket No. EP 755, at 8 (STB served Sept. 12, 2019) (adopting notice of intent requirement and other procedures, but still requiring discovery to commence with the filing of the complaint); Final Rule, *Expediting Rate Cases*, Docket No. EP 733 (STB served Nov. 30, 2017) (adopting pre-complaint procedures and requiring discovery to occur earlier in the process, but still requiring the process to commence at the filing of a complaint); see generally 49 C.F.R. § 1111.10.

⁵⁹ See, e.g., *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) (“A Rule 27(a) deposition ‘may not be used as a substitute for discovery.’ Consequently, the party seeking to take the pre-litigation deposition must set forth in some detail the substance of the testimony it needs to preserve.”); *In re Storck*, 179 F.R.D. 57, 58 (D. Ma. 1998); “Rule 27 still has as its underlying purpose the preservation of evidence which would be unavailable otherwise. The rule is not designed to allow pre-complaint discovery”).

⁶⁰ See *Ass’n of Am. R.Rs. v. United States*, 371 F. Supp. 114, 118 (D.D.C. 1974) (three-judge panel) (noting that “*in a proceeding*” (i.e., a “dispute before the Commission”), the Commission has authority to require the disclosure of information “at issue”).

proposed rules, but neither supports the data disclosure proposal. Section 11102(c) is limited to terminal access remedies. While § 1321(b)(3) includes a provision for *the Board* to obtain information,⁶¹ the data disclosure proposal does not contemplate the Board receiving information—or indeed, any Board involvement at all. Nor can the agency rely on the general grant of rulemaking authority in 49 U.S.C. § 1321(a). That section “simply authorizes the [agency] to take actions that are ‘*directly adjunct to the [agency’s] explicit statutory power.*’”⁶²

The lack of an explicit authorization in these provisions is in contrast to other provisions of the Interstate Commerce Act. For example, under 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.” Thus, Congress knew how to authorize a requirement that a railroad disclose information to third parties, and it did not clearly delegate to the Board the authority to compel railroads to provide information to potential complainants in the statutes relied upon in the NPRM.

Finally, the data disclosure proposal raises concerns with regard to the confidential nature of the records at issue. The NPRM rightfully asks whether the Board could require a rail carrier to disclose data about past service to a shipper or receiver when a different entity paid for the service, and if so whether it should give that entity the opportunity to seek confidential treatment of the data.⁶³ The Board

⁶¹ 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”).

⁶² *White v. United States*, 989 F.2d 643, 650–51 (3rd Cir. 1993) (emphasis added) (quoting *ICC v. American Trucking Ass’ns*, 467 U.S. 354, 365 (1984)).

⁶³ NPRM at 31 n.40.

must also consider the statutory prohibition against disclosing “the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation” without the consent of the “shipper or consignee” in 49 U.S.C. § 11904. Concerns relating to the prohibition in § 11904 within individual proceedings are addressed through submission of information to the Board and standard protective orders,⁶⁴ but these protections are unavailable outside the context of a Board proceeding, as envisioned in the data disclosure proposal.

For all of these reasons, CN urges the Board to modify the proposal at § 1145.8(a). CN believes that the Board can achieve its goal of expediting proceedings under its newly proposed regulations in a way that is consistent with the Board’s long-standing practice and its statutory authority. For example, the Board could modify proposed § 1145.8(a) to require the railroad to disclose the individualized performance records relevant to the nature of the alleged service inadequacy within a certain period of time after the filing of a petition under 49 C.F.R. § 1145.5 and an appropriate protective order. A disclosure requirement framed in this way would address the concerns noted above by helping to ensure that the disclosures are provided to eligible petitioners, that confidentiality issues are appropriately considered, and that the Board is available to address any issues relating to scope.

⁶⁴ See, e.g., *Grenada Ry.—Rail Line in Greanada, Montgomery, Carroll, Holmes, Yazoo & Madison Cntys., Miss.*, Docket No. FD 35247 (Sub-No. 1) (STB served Sept. 20, 2013).

III. THE BOARD SHOULD FURTHER CONSIDER ISSUES RELATING TO EACH OF THE PERFORMANCE METRICS

The NPRM proposes three performance metrics for use in a forced switching proceeding: OETA, ISP, and transit time. The NPRM also proposes a new, permanent data collection by the Board at § 1145.8(b) for two of those suggested metrics: OETA and ISP. Variations of these metrics are currently being reported to the Board by CN and the other Class I carriers on a temporary basis pursuant to the Board's order in Docket No. EP 770 (Sub-No. 1) since May 2022. While some experience has been gained on versions of OETA and ISP in the context of the EP 770 (Sub-No. 1) temporary service reporting, the new versions of OETA and ISP differ in key ways from what CN has been reporting to the Board. The proposed data collection is "to assist the Board with general oversight" and "understanding conditions on the rail network."⁶⁵

Efforts to develop service-related metrics are complex and nuanced. In Docket No. EP 724 (Sub-No. 4), the Board ultimately adopted various service performance data reporting requirements after issuing a detailed notice of proposed rulemaking and supplemental notice of proposed rulemaking, providing lengthy comment periods, and holding numerous technical meetings between interested parties and STB staff. This deliberate and detail-oriented process was necessary to address the complexities inherent in new service performance data reporting to the

⁶⁵ NPRM at 31.

Board, and because “the manner in which railroads collect and maintain data has a number of technical aspects and varies between carriers.”⁶⁶

Indeed, CN has built tracking and customer-facing systems specific to CN’s needs and its customers’ feedback. These systems are the product of years of work and refinement, and differ in many respects from what the Board has proposed. Additionally, many of CN’s processes are based on and tailored to its real-world experience with various operating complexities.

The NPRM attempts to address the nuances of various operating scenarios.⁶⁷ However, ambiguities remain and there are numerous aspects of the proposal that could be clarified or improved. CN respectfully requests that the Board convene a technical conference or provide additional time for ex parte meetings with STB technical staff on the proposed metrics and proposed reporting requirements. Nevertheless, in the limited time afforded, CN offers the following comments on the three proposed metrics, as well as issues relating to interline traffic and cross-border traffic.

⁶⁶ Decision, *United States Rail Serv. Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 2 (STB served Nov. 9, 2015).

⁶⁷ While the NPRM attempts to address some issues, such as those related to constructive placement and interchange, it declines to address the manner and form of reporting entirely. See NPRM at 44 (providing that the proposed data collection will be “in a manner and form determined by the Board” at a subsequent time). The Board should not wait until after it adopts a final rule to provide carriers with details on its reporting requirement, but rather should follow its precedent and offer proposals for public comment.

A. Local Service (ISP)

The NPRM proposes a local service metric that would measure the carrier's success in performing requested spots and pulls within the service window. The NPRM proposes ISP as a performance threshold for ordering forced switching (proposing an 80% threshold, or 90% in certain circumstances) and also proposes aggregated reporting to the Board.

As discussed above, any forced switching order must be able to remedy the alleged service inadequacy, otherwise the order would not satisfy the statutory standard of actual necessity and compelling need. For this reason, the Board should eliminate the ISP metric from proposed § 1145.2, as Board-ordered switching is logically not an effective remedy for inadequate local service as the carrier performing the local service would not change. In fact, adding this operational complexity could further deteriorate local service. The Board itself recognizes the incongruity of imposing an order which changes the line-haul carrier but keeps local service with the same carrier which is experiencing a local service deficiency.⁶⁸

In the event the Board chooses to move forward with the ISP performance standard, CN believes that the metric should be modified in four key ways.

First, an ISP metric should not be based simply on what is requested by a customer,⁶⁹ but rather based on the local operating plan. CN customers can place

⁶⁸ *Id.* at 19 n.27.

⁶⁹ *Id.* at 19 (emphasizing comparison against “requested placements or pick ups” and assessing local service against “all of the cars requested by the shipper or receiver”); *id.* at 47 (describing ISP as being based on whether “the carrier performed the requested local service”).

orders for pick-up or setoff of railcars through the CN One customer service dashboard. But not every action on the daily operating plan is based on customer request—for example, if CN was unable to place a car the prior day, CN will automatically assign that car to the next service day’s daily operating plan without the need for the customer requesting service. Each day, CN local operations personnel review the daily operating plan for upcoming local assignments and adjust the plan as necessary based on circumstances on the ground, customer needs, and real-time knowledge of capacity on a customer’s site and elsewhere on CN’s network. For example, if a customer has 20 cars at CN’s local serving yard but only has space on-site at its facility for 15 cars, CN’s local operating personnel will only assign 15 cars to the daily operating plan. The remaining 5 cars would be constructively placed for order-in in a subsequent assignment. CN local personnel also consider customers with sensitivity needs—for example, if particular cars are needed to continue plant production, while other cars are needed on a less urgent timeline. This hands-on process enables CN to appropriately establish the plan for operations at customer facilities based on capacity and needs, as well as the interests of other customers in a given area, with the demands on the greater CN network. In making such decisions, CN local personnel engage with multiple CN departments and directly with customers. Once the local plan is set, the customer receives a Local Service Notification detailing the planned work on a car-specific basis for their facility during the next service window. An example of a Local Service Notification is below.

Figure 1: Local Service Notification

 | 

LOCAL SERVICE NOTIFICATION



CN iAdvise - Local Service Notification

Customer:

Location:

Log Reference ID:

Assignment:

Track Range:

Date:

The following work will be completed on today's assignment:

Car Summary: 2 to spot, 0 to pull, 0 requiring other work

Work Order	Car	L/E	Commodity	Destination Track
SPOT	3439	L	SANDFRAC3050MES	SX01
SPOT	8093	L	SANDFRAC3050MES	SX01

For more information, please contact your Customer Service Representative at CNWEST@cn.ca / 1-866-926-7245 or CNGrain@cn.ca / 1-877-208-5019.

The information provided in these notifications is for general information purposes only. Reasonable effort has been made to ensure that the information is comprehensive, accurate and timely, however it is understood and agreed that under no circumstances shall CN be liable for damages of any kind incurred as a result of the use of or reliance on, the information provided.

Second, any ISP metric should be evaluated on a car basis rather than a service window basis.⁷⁰ CN's existing system tracks the local service performance on a car basis. If the daily operating plan includes work to place 100 railcars and CN places 99 railcars, with 1 railcar missed as a result of railroad fault, CN's Local Service Commitment Performance ("LSCP") metric would be 99%, rather than 0%.⁷¹

⁷⁰ Under the NPRM, a carrier is "deemed to have missed the planned service window if the carrier did not pick up or place *all of the cars requested* by the shipper or receiver by the applicable cut-off time." *Id.* at 19 (emphasis added); *id.* at 21 (providing examples based on service windows).

⁷¹ As discussed below, LSCP excludes customer-caused failures.

This is a better measure of local service performance. Further, CN provides its customers with both the details of their local service plan on a car-specific basis in the Local Service Notification and a car-level Service Exception Notification notifying them of any instance where work for a specific car on the local operating plan was not performed, and the reason why it was not performed. An example of a Service Exception Notification is below. In this way, evaluating local service at the car level provides better insight into a railroad's local service for the customer as well as the causes of service misses.

Figure 2: Service Exception Notification



SERVICE EXCEPTION NOTIFICATION



CN iAdvise - Service Exception Notification

Customer: [REDACTED]

Cars: 8

Location: [REDACTED]

Date: [REDACTED]

Log Reference ID: [REDACTED]

Due to issues at your facility, the service planned for the equipment listed below will not be carried out.

Reason: Customer has cancelled the car pull request

Recovery Plan: Returned to Placed status, please release again via [eBusiness](#)

Car	Work Type	CCO	ZTS
[REDACTED] 971003	PULL		[REDACTED]
[REDACTED] 105480	PULL		[REDACTED]
[REDACTED] 105149	PULL		[REDACTED]
[REDACTED] 953324	PULL	[REDACTED]	[REDACTED]
[REDACTED] 33332	PULL	[REDACTED]	[REDACTED]
[REDACTED] 105007	PULL		[REDACTED]
[REDACTED] 32301	PULL	[REDACTED]	[REDACTED]
[REDACTED] 953326	PULL	[REDACTED]	[REDACTED]

For more information, please contact your Service Delivery Representative at CNWEST@cn.ca or 1-888-926-7245.

The information provided in these notifications is for general information purposes only. Reasonable effort has been made to ensure that the information is comprehensive, accurate and timely, however it is understood and agreed that under no circumstances shall CN be liable for damages of any kind incurred as a result of the use of or reliance on, the information provided.

Please do not reply to this automated message. This mailbox is not monitored.

To change or turn off these notifications at any time, please update the settings in your eBusiness account. [Learn More](#)

Third, the Board should ensure that proposed § 1145.2(e) provides what the NPRM otherwise acknowledges: that “[a] miss not caused by the incumbent railroad

would not be counted against it.”⁷² When CN is unable to perform work on the daily operating plan, the local crew provides an explanation for the miss. CN is responsible for some of the misses (*e.g.*, locomotive failure or crew ran out of time), while customers are responsible for others (*e.g.*, broken rail on customer track or gates locked). Regardless of responsibility, whenever work is not performed, the customer receives a Service Exception Notification explaining the reason for the miss. The NPRM’s proposal to place the burden on carriers to “prove that the miss was not caused by the carrier” is unwarranted and unnecessary—the Board should not require carriers to litigate potentially hundreds of instances of local service misses in the context of a fast-tracked adjudication where the carrier assigns the reason for the miss contemporaneously in the normal course of business. This is especially true where the carrier provides that information soon thereafter to the customer. In addition, any aggregated ISP data reported to the Board should exclude misses due to customer responsibility, as that would lead to an inaccurate picture of a railroad’s local service performance.

Fourth, the Board should ensure that any proposed ISP metric clearly excludes unit trains and intermodal traffic.⁷³ Unit trains are not handled through the same process as manifest traffic, as unit trains are often staged in yards upstream while CN coordinates directly with the customer to determine when the

⁷² *Id.* at 22.

⁷³ The proposed regulation refers only to the success of spotting or pulling “railcars” within a service window, and does not specifically appear to exclude unit trains and intermodal traffic. *See id.* at 40.

current unit train at the facility will be released and ready for pickup and thus the appropriate time for service. Further, the needs of unit train customers are different from those of manifest customers, as CN generally works to ensure that a certain number of trains are delivered based on monthly demand as opposed to according to a plan for each service window. Similarly, intermodal traffic is not compatible with an ISP metric, given the nature of intermodal traffic and the unique factors and challenges associated with the transloading process. Typically, with intermodal traffic, the containers are unloaded at an intermodal facility and then stacked at the facility until trucks arrive ingate to pick up the containers.

B. Service Reliability (OETA)

The proposed service reliability performance standard requires a carrier to deliver greater than 60% (or 70%) of its shipments with the same O-D pair (or interchange location-destination pair) within 24 hours of their OETA within a 12-week period. This performance standard would apply to manifest traffic, but the Board asks whether it should apply the service reliability/OETA standard to unit trains.⁷⁴ Further, it would apply to only loaded carloads and not to empty cars.⁷⁵

First, the Board should not apply the OETA performance standard as proposed to unit trains due to differences in how unit trains are operated and scheduled versus manifest traffic. CN does not use trip plans for unit trains. Instead, CN uses an active schedule that provides an estimated running time (*e.g.*,

⁷⁴ *Id.* at 39 (proposed § 1145.2(a)).

⁷⁵ *Id.* at 38–39 (proposed § 1145.2(a) applies to shipments, and shipment is defined as “a loaded railcar” in proposed § 1145.1).

the unit train will run at 8:00 AM tomorrow and should take two days to run to destination). CN tracks its performance with regard to that estimated schedule, but it is calculated and defined in a way that is different from OETA for carloads. For this reason, when reporting weekly data for traffic placed at destination 24 hours past OETA in response to the Board’s mandated temporary reporting in Docket No. EP 770 (Sub-No. 1), CN explained that it was providing that information for unit trains based on train event history.⁷⁶

Second, the NPRM should reconsider its approach to OETA, which is defined as meaning the OETA that the carrier provides “when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from an interline carrier.”⁷⁷ In its regulations on demurrage, the Board defines OETA as the estimate “as generated promptly following interchange or release of shipment to the invoicing carrier and as based on the first movement of the invoicing carrier.”⁷⁸ The Board should align its proposed definition with the definition in § 1333.4 so that OETA can be generated at the time a shipment is released by the customer or received from an interline carrier.

C. Service Consistency (Transit Time)

The proposed service consistency standard would require a rail carrier to achieve an average transit time for all shipments over a lane during a 12-week

⁷⁶ CN Status Report, *Urgent Issues In Freight Rail Service—Railroad Reporting*, Docket No. EP 770 (Sub-No. 1), ¶ 7 (filed May 18, 2022) (“CN Status Report”).

⁷⁷ See NPRM at 37.

⁷⁸ 49 C.F.R. § 1333.4(d)(1).

period that is no more than 20% (or, alternatively, 25%) higher than the average transit time for all shipments over the same lane during the same 12-week period during the prior calendar year.⁷⁹ This performance standard would apply to unit trains and manifest traffic, as well as private or shipper-leased railcars. Unlike the other two metrics, the Board does not propose a system-wide data collection for this metric. If the Board chooses to use the transit time metric, it should further consider the following issues.

First, the transit time metric, with its 20% (or 25%) threshold, is problematic because it will disproportionately impact traffic with shorter running times. The running time for some of CN's traffic is 12 hours or less. For that subset of traffic, any slow orders or network or customer issues that result in an average delay of even a few hours year-over-year would exceed the transit time threshold and appear to be inadequate service. Further, any additional handling, such as an additional switching event being added to a trip plan, could add up multiple hours to a trip plan, which could easily cause a 20% increase in transit time for these shorter lanes. Such service changes to optimize the operating plan in light of changing volumes or terminal congestion are normal aspects of railroading.

Second, the transit time performance metric should not apply to empty private cars. There are differences in how empty cars are managed and moved and

⁷⁹ See NPRM at 38–39 (proposed § 1145.2(b)). A “lane” is defined as “[s]hipments of the same commodity from the same point of origin to the same designated destination,” without regard to “the route between the point of origin and designated destination,” and for interline movements, “the designated destination is the designated interchange.” *Id.* at 39 (proposed § 1145.2(c)).

how that impacts their transit time—differences that the NPRM does not consider. In particular, empty private car transit time is impacted by variables such as car supply, customer behavior, diversions, and other effects unrelated to service performance but that can result in high variability in transit time. Private car owners or lessees can provide instructions on the movement of private empties, and CN occasionally has arrangements with private car owners or lessees regarding the operation of private empties, both of which can impact transit time performance. The NPRM’s proposed 20% (or 25%) threshold is unsupported generally, but even if the NPRM had conducted an empirical analysis to support a particular threshold for loaded cars, that would not necessarily be appropriate for empty cars or other subsets of traffic that may have unique operating characteristics.

Further, there is no basis for prescribing a forced switch for *loaded* cars that are performing well on the basis of *empty* cars falling below the transit time threshold because, as discussed above, the statute requires a finding of “actual necessity or compelling reason” before the Board can order reciprocal switching.⁸⁰

D. Interline Traffic

There are significant complexities associated with interline movements that are not accounted for in the proposed rule in the context of the OETA and transit

⁸⁰ See *id.* at 40 (stating that, under proposed § 1145.2(d)(2), a failure to meet the performance standard for empty cars provides the basis for a reciprocal switch governing both empty and loaded cars). While the ISP metric would also apply to “unloaded private or shipper-leased railcars,” there is no similar language stating that the failure to meet the ISP metric for private empties could result in a prescription for loaded traffic. See *id.* at 40–41. In any event, as CN has explained, there is no basis for prescribing a switch based on the ISP metric, regardless of whether it includes loaded or empty cars.

time metrics. Simply determining when “delivery” has occurred for purposes of assessing a carrier’s success with OETA and transit time involves complexities not recognized by the Board. The Board, for example, assumes that there would not be a “gap” in the OETA between two carriers “because the time of interchange of a shipment . . . is the same for both carriers.”⁸¹

But for purposes of considering the adequacy of an individual carrier’s service, with potentially significant consequences under the proposal, it is imperative that the Board properly define “delivery” so that it is not penalizing delivering carriers for interchange issues involving another carrier. For example, if a receiving carrier that interchanges with CN experiences congestion and is unable to pick up interline traffic at the assigned interchange location, CN may be unable to physically deliver cars to the interchange and would have no choice other than to offer the cars for interchange at the next best operationally feasible location. In this scenario, measuring success in “delivery” based on “when the *receiving carrier* acknowledges receipt of a shipment”⁸² would penalize the delivering carrier who has offered cars for interchange on time but where the receiving carrier may reject the offer of interchange. In this situation, the metric would inaccurately indicate a service inadequacy with the delivering carrier.

⁸¹ *See id.* at 17, n.25.

⁸² *Id.* at 36 (definition of “delivery” in proposed § 1145.1 (emphasis added)).

Thus, unless the Board excludes interline movement, the Board should revise its proposal to address situations where delivery to interchange is delayed because the receiving carrier is unable to accept the interchange traffic.

E. Cross-Border Traffic

The NPRM does not address issues relating to cross-border traffic for its OETA and transit time metrics. In the context of a proceeding seeking forced switching to remedy a service inadequacy, there would be a number of complex and difficult issues associated with a request for relief for a cross-border lane, none of which are addressed in the NPRM. Further, the Board’s jurisdiction “applies only to transportation [by rail carrier] in the United States,”⁸³ and in the case of traffic moving “between a place in . . . the United States and a place in a foreign country,”⁸⁴ the Board’s statutory authority to regulate “extends to transportation only so far as it takes place in this country.”⁸⁵ As the Board has recognized, “[w]ith regard to Canadian railroads’ operations in Canada, the Board is necessarily governed by its statutory jurisdictional limitations.”⁸⁶

Similarly, to the extent that OETA is part of the proposed aggregated data reporting, that system-wide reporting should likewise exclude cross-border traffic. CN informed the Board as part of its temporary reporting in Docket No. EP 770

⁸³ 49 U.S.C. § 10501(a)(2).

⁸⁴ *Id.* § 10501(a)(2)(F).

⁸⁵ *St. Louis, B. & M. Ry. v. Brownsville Nav. Dist. of Cameron Cnty.*, 304 U.S. 295, 300 (1938) (citation omitted); see *United States v. Pennsylvania R.R.*, 323 U.S. 612, 621 (1945).

⁸⁶ Supplemental Notice of Proposed Rulemaking, *United States Rail Serv. Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 21 (STB served Apr. 29, 2016).

(Sub-No. 1) that it was including domestic U.S. traffic only for its manifest reporting.⁸⁷ By only including domestic U.S. trains (with origin and destination in the U.S.), the Board would ensure that it is obtaining information on the U.S. network.

IV. CONTRACT TRAFFIC MAY NOT SERVE IN ANY WAY AS THE BASIS FOR FORCED SWITCHING

The NPRM acknowledges that 49 U.S.C. § 10709 removes from its jurisdiction the authority to regulate rail transportation provided pursuant to contract, but nonetheless seeks comment on a variety of issues relating to that statutory prohibition.

The plain language of 49 U.S.C. § 10709 makes clear that transportation provided under contract is not subject to Title 49, Subtitle IV, Part A, which encompasses 49 U.S.C. § 11102(c).⁸⁸ The Board has previously acknowledged that it “is well settled that the Board’s authority does not extend to those movements conducted pursuant to transportation contracts.”⁸⁹ Indeed, “the Board lacks

⁸⁷ CN Status Report ¶ 7.

⁸⁸ 49 U.S.C. § 10709(c)(1); *see also id.* § 10709(b) (“A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.”); H.R. REP. NO. 96–1430, at 100 (1980) (Conf. Rep.) (explaining that once a contract is subject to § 10713 (now § 10709), “*the service provided under the contract is exempt . . . from all regulation and all of the requirements of the Interstate Commerce Act.*” (emphasis added)).

⁸⁹ *Ameropan Oil Corp. v. Canadian Nat’l Ry.*, Docket No. NOR 42161, at 3 (STB served Apr. 17, 2019) (citation omitted); *see also Cross Oil Refin. & Mktg., Inc. v. Union Pac. R.R.*, Docket No. FD 33582, at 1, 3 (STB served Oct. 27, 1998); *Union Pac. R.R.—Petition for Declaratory Order*, Docket No. FD 35021, at 2 (STB served May 16, 2007) (“under 49 U.S.C. 10709 we have no authority to regulate rail rates and services that are governed by a contract.”).

regulatory authority over the terms and conditions related to that transportation, whether or not explicitly addressed in the contract.”⁹⁰ That includes allegations concerning “frequency of service” and the “failure to provide adequate service.”⁹¹ Therefore, a shipper’s “exclusive remedy for any alleged breach of a [rail transportation] contract” is a suit in the appropriate federal or state court, or an alternate dispute forum agreed to in the contract, 49 U.S.C. § 10709(c)(2), and that includes any dispute over “whether there has been adequate performance” under the contract.⁹²

Despite the clear statutory prohibition on regulating traffic under contract, the NPRM seeks comment on whether the Board may prescribe forced reciprocal switching for contract traffic prior to the termination of that contract if the switch order only becomes effective after the contract expires.⁹³ The answer is no. Any order for forced switching must be premised on a finding that such agency action would be in the public interest, 49 U.S.C. § 11102(c)(1), which means the Board must find that service is “so inadequate[] . . . at present” that regulatory intervention is justified. *Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50; *see* H.R. REP. NO. 96–1430, at 116 (1980) (Conf. Rep.). Therefore, to comply with this statutory requirement, the Board would need to premise any order for future switching that

⁹⁰ *Ameropan Oil Corp.*, Docket No. NOR 42161, at 4.

⁹¹ *See id.* at 2, 4–5 & n.6.

⁹² *Kan. City Power & Light Co. v. Union Pac. R.R.*, Docket No. NOR 42095, at 2 (STB served July 27, 2006); *see also Interpretation of the Term “Contract” in 49 U.S.C. § 10709*, 72 Fed. Reg. 16316, 16316 (Apr. 4, 2007).

⁹³ NPRM at 27.

would take effect after the expiration of the contract on an evaluation of the adequacy of service under that existing contract. This is expressly forbidden by 49 U.S.C. § 10709(c)(1), which prohibits both the contract and “transportation under such contract” from being challenged in, or the subject of, a proceeding before the Board. And as just explained, the bar on the Board’s authority extends to “the terms and conditions related to that transportation, whether or not explicitly addressed in the contract,” including the “failure to provide adequate service.”⁹⁴

The NPRM highlights *Burlington Northern Railroad Co. v. Surface Transportation Board*, 75 F.3d 685 (D.C. Cir. 1996),⁹⁵ when asking whether it has the ability to issue a forced switching order prior to the expiration of a contract.⁹⁶ As the NPRM acknowledges, that case is not directly applicable, as it pertained to the question of issuance of a tariff rate on the assumption that a shipper would be moving under tariff at the conclusion of a contract. Here, the problem with prematurely prescribing forced switching while a contract is still effective is that, by necessity, that order would be based on service provided under the contract and thus would be regulating transportation that was provided under contract in contravention of the statute.

⁹⁴ *Ameropan Oil Corp.*, Docket No. NOR 42161, at 2, 4.

⁹⁵ In the later challenge to the Board’s decision on the reasonableness of the rate, the D.C. Circuit stated that the agency “lacked authority to require Burlington Northern to publish a tariff because, at the time of the order, [the shipper’s] traffic was still moving under contract.” *Burlington N. R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997).

⁹⁶ NPRM at 27–28.

Setting aside the statutory bar, the Board's premature consideration of a petition for forced switching for traffic currently subject to a contract will chill negotiations between the contracting parties with respect to amending or renewing the contract. In enacting § 10709's predecessor, Congress explained that "[r]ail carriers and shippers should be free to negotiate and enter into contracts without concern" about regulatory interference. H.R. REP. NO. 96-1035, at 57-58 (1980). Inviting shippers to file petitions for forced switching during the term of a contract would result in significant uncertainty and discourage the use of contracts.

Finally, the NPRM seeks comment on the consideration of performance data based on service that a carrier provided under contract. The performance data for contract traffic should not serve as a basis for a reciprocal switching order. Contracts by nature involve bargaining between the parties to reach a mutually agreeable business arrangement. To do that, a party may compromise on a less important issue in order to obtain favorable terms on a more important one. For example, a shipper may prioritize rates rather than service levels in its negotiations. In that scenario, a shipper may accept service terms that could be different from what the Board considers adequate in the NPRM in exchange for concessions from the carrier on rates or other commercial terms. The inverse is also true. In the context of a contractual relationship, a rail carrier may be able to provide a certain level of service above what it could normally provide in the absence of a contract based on concessions the shipper is willing to accept, including volume commitments.

The tradeoffs contracting parties are willing to accept render performance data for contract traffic not useful for imposing forced switching under § 11102(c) for tariff traffic. It would be inappropriate for the Board to compare the service quality of non-contract traffic, which is subject to Board regulation and the performance standards proposed in the NPRM, against traffic from the previous year that was both outside the Board’s jurisdiction and performed under standards set by mutual agreement of the parties. This is especially true in the context of the transit time metric, where performance is assessed on a year-over-year basis.

Section 10709 “entitles a contract shipper to . . . ‘the benefit of its bargain’” free from regulatory second-guessing by the Board. *Union Pac. R.R. v. Surface Transp. Bd.*, 202 F.3d 337, 342 (D.C. Cir. 2000). To the extent a shipper is unhappy with a rail carrier’s performance under a contract, its recourse is to pursue the remedies provided by the contract, such as arbitration or a suit in federal or state court for breach of contract, or it can work with the carrier to renegotiate the contract’s terms. The Board should not undermine congressional intent by relying on performance data for contract traffic in forced switching cases.

V. EXEMPT TRAFFIC IS NOT ELIGIBLE FOR A FORCED SWITCHING REMEDY

The Board mistakenly claims in the NPRM that “some transportation that has been exempted from Board regulation pursuant to 49 U.S.C. § 10502 could be subject to an order providing reciprocal switching under part 1145,” stating that “[t]he Board retains full jurisdiction to deal with exempted transportation, which

includes considering whether service received by the petitioner prior to filing the petition meets the performance standards” under the NPRM.⁹⁷

While it is true that the Board retains jurisdiction over exempt traffic, jurisdiction does not equate to having the authority to regulate. Rather, the agency and the courts have been clear that exempt traffic is not subject to regulation. *See, e.g., Alliance Shippers, Inc. v. S. Pac. Transp. Co.*, 673 F. Supp. 1005, 1008 (C.D. Cal. 1986) (“Once the [agency] exempts a service pursuant to 49 U.S.C. § 10505 [now § 10502], that service is no longer subject to the provisions of Subtitle IV of Title 49.”); *Pejepscot Indus. Park, Inc.—Petition for Declaratory Order*, 6 S.T.B. 886, 891 (2003) (“[E]ven if a carrier’s conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force.”); *id.* at 892 n.14 (“exemptions . . . do not extinguish the Board’s subject matter jurisdiction over such transportation” but rather are “excluded from our regulatory review”).

Nor can the Board regulate exempt traffic retroactively. While the Board does have the authority to revoke an exemption at any time when the statutory criteria for revocation are satisfied, *see* 49 U.S.C. § 10502(d), the Board has confirmed that it cannot grant relief for service problems that occurred while the traffic was exempt, explaining that “[p]ermitting regulatory relief for the period the exemptions were in effect would be . . . contrary to the principle that retroactive

⁹⁷ NPRM at 27.

application of administrative determinations is disfavored . . . and could raise due process concerns.”⁹⁸

Thus, contrary to the NPRM’s statement, the Board should make clear that it cannot consider whether service for exempt traffic meets the performance standards. It is only *after* the Board revokes an exemption that the Board could consider service adequacy under the proposed switching framework, so long as the service was provided *after* revocation.

CONCLUSION

For the reasons set forth above, CN respectfully requests that the Board amend the NPRM as recommended in these comments. Further, CN urges the Board to provide additional opportunities for engagement—whether through an extension of the ex parte comment period, a technical conference, or a supplemental notice of proposed rulemaking—to address the complex issues in the NPRM.

⁹⁸ *Sanimax USA v. Union Pac. R.R.*, Docket No. NOR 42171, at 4 (STB served Feb. 25, 2022) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998)).

Olivier Chouc
CN
935 de la Gauchetière Street West
16th Floor
Montréal, QC H3B 2M9
CANADA

Kathryn J. Gainey
CN
975 F Street, N.W.
Washington, DC 20004

Respectfully submitted,

/s/ Allison C. Davis
Allison C. Davis
Stephen S. Laudone
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for CN

Dated: November 7, 2023

VERIFICATION

I, Greg Hartley, declare under penalty of perjury under the laws of the United States that the factual statements concerning CN's service metrics in the foregoing Section III of the Opening Comments on behalf of CN are true and correct to the best of my knowledge, information, and belief.

A handwritten signature in cursive script that reads "J Hartley".

Greg Hartley
Director, Asset Planning and Quality