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October 26, 2016

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *Reciprocal Switching*, STB Ex Parte No. 711 (Sub-No. 1)

Dear Ms. Brown:

Attached for filing in the above-captioned matter are the Opening Comments of the Association of American Railroads ("AAR") and supporting verified statements.

Electronic workpapers supporting the verified statement of Michael R. Baranowski, which is included with the filing, will be delivered separately to the Board by FTI Consulting. Those workpapers contain confidential waybill data and should be handled in accordance with the Board's procedures governing waybill data.

Sincerely,

Samuel M. Sipe, Jr.

Counsel for the Association of American Railroads

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No.1)

Reciprocal Switching

OPENING COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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October 26, 2016

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Reciprocal Switching

OPENING COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

These are the opening comments of the Association of American Railroads ("AAR") in response to the Board's July 27, 2016 Notice of Proposed Rulemaking ("Decision")[1] initiating a rulemaking proceeding to address proposed new reciprocal switching rules developed by the Board. AAR opposes the proposed rules and explains in these comments why they cannot lawfully be adopted.

I. INTRODUCTION AND SUMMARY OF COMMENTS

The proposed reciprocal switching rules are unlawful. They are contrary to established law dating back well before the Staggers Act[2] and providing that a shipper must show "actual necessity" to obtain an order of forced switching. *Jamestown, N.Y., Chamber of Commerce v. Jamestown, Westfield & N.W. R.R. Co.*, 195 I.C.C. 289, 292 (1933). They ignore the statutory language that itself requires a showing of necessity for a switching order. The rules give no weight to provisions of the Rail Transportation Policy ("RTP")[3] directing the agency to allow market forces to govern railroad commercial activity to the maximum extent possible and to minimize regulatory intervention into the market. In contrast to the existing competitive harm

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[1] *Reciprocal Switching*, STB Ex Parte No. 711 (Sub-No. 1)(served July 27, 2016).

[2] Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980).

[3] *See* 49 U.S.C. § 10101.

standard of the Board's Competitive Access Rules ("CARs"),[4] the proposed switching rules would allow a shipper to obtain a forced switching order without any showing of need to remedy a harm. They are a "no fault" recipe for regulatory intervention that turns the existing access regime upside down. The omission of the requirement that a shipper show need to obtain an order of forced switching is particularly puzzling in light of the Board's unambiguous statement in the Decision that a shipper seeking a switching order "would be required . . . to bear the burden of showing that reciprocal switching is needed. There would be no presumption of need." Decision at 19.

The Board in its Decision also acknowledges that granting access "on demand" is impermissible under the governing statute, Decision at 15, but the proposed rules contain no mechanism for preventing this admittedly unlawful result. As written, the rules would allow access on demand, particularly under the second prong where a sole-served shipper would only have to show that it is located near a working interchange and served by a market dominant railroad to justify a switching order. Even under the first prong, the Board does not reflect the governing law that limits its discretion to order forced switching. The Board's suggestion that it might tighten the access spigot on a case-by-case basis cannot remedy the rules' infirmities when there is no mechanism for accomplishing this result, no recognition of the statutory limits on the Board's authority, and no set of standards to guide the Board in complying with those statutory limits.

The Board avoids addressing the substance of the central policy directives that led the ICC to adopt the existing standard – the policies set forth in 49 U.S.C. § 10101(1)-(3) to rely on demand-based pricing, to "minimize the need for Federal regulatory control over the rail

[4] 49 C.F.R. § 1144.2.

transportation system," and to allow rail carriers "to earn adequate revenues." The Board's newly proposed reciprocal switching rules would undermine demand-based pricing, entail a significant increase in regulatory control, and threaten rail carriers' revenue adequacy by substituting artificial competition for marketplace decisions involving the routing of traffic and the setting of rates. It is not lawful for the Board to launch a program of increased regulatory activity without first assessing whether the program can be reconciled with the deregulatory policies set out in the RTP.[5]

The Decision refers repeatedly to the Board's discretion under the statute as justification for a rules change. But the Board's predecessor recognized that Congress's strong deregulatory intent in the Staggers Act and the RTP imposed significant constraints on the ICC's discretion to order reciprocal switching. The ICC and the courts clearly understood that whatever discretion the agency had under the statute, it did not include the discretion to create artificial competition, to restructure the rail industry, or to permit shippers to use forced switching to circumvent statutory requirements governing rate reasonableness. ICCTA,[6] which created the Board, reinforced the deregulatory approach Congress adopted in the Staggers Act.

The proposed rules are also legally flawed because the Board has failed to set forth a coherent rationale for moving from a model of access as a remedy for harm to a model where access can be granted without a demonstration of need. The Administrative Procedure Act requires a reasoned explanation of an agency's change in policy. But the reasons given by the Board for reversing long-standing policy – dearth of cases under the existing standards, increased industry concentration leading to reduced "naturally occurring" switching, improved financial

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[5] *See, e.g., Association of American Railroads v. Surface Transportation Board*, 237 F.3d 676, 680-81 (D.C. Cir. 2001)(remanding case because the Board had failed to consider "important language" from the RTP regarding deregulation).

[6] ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995).

health, and technological advances – are makeweights. They are not supported by salient facts. They are not connected to the substance of access policy. The Board has provided no rational explanation for changing its reciprocal switching rules.

The failure of the Board to articulate a reasonable justification for reversing established regulatory policy is accompanied by the inexplicable failure to conduct any assessment of the likely impact of its proposed switching rules. When the Board launched its original EP 711 proceeding,[7] it believed that assessing the likely impact of the National Industrial Transportation League's ("NITL") proposed rules was crucial. But once the Board had collected extensive information on impact from multiple parties, it essentially ignored it. Moreover, the Board failed to make any assessment of the likely impact of its proposed rules. AAR's witness Michael Baranowski shows that the Board's proposed rules potentially affect a significantly greater number of carloads than the NITL proposal, and even under the second prong of the proposed rules, the number of carloads potentially subject to forced switching substantially exceeds the level that the Board considers to be "significant." Decision at 34.

The Decision contains no analysis of the potential benefits and costs of the proposed rules, notwithstanding the clear legal requirement that an agency assess the costs imposed by new regulatory schemes. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). AAR's witness Mark Fagan explains why the Board's failure to analyze costs and benefits in its Decision has resulted in the formulation of rules that are not rational or grounded in sound policy.

Despite its failure to address the evidence of impact in EP 711, the Board acknowledges concerns over possible service impacts of forced switching, yet appears to believe that those

[7] *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711 (served July 25, 2012)("EP 711 Notice"). Hereafter, citations to items of record in that proceeding are referenced as "EP 711."

concerns can be addressed on a case-by-case basis. But as AAR's witness William Rennicke explains, the unintended consequences of expanded use of access remedies cannot be adequately addressed through case-by-case litigation.

The proposed rules are invalid. The Board should withdraw them and terminate this proceeding.

II. BACKGROUND

The ICC's Competitive Access Rules adopted in 1985 were an outgrowth of the RTP, including the policies to rely on market forces to the maximum extent possible, to allow demand-based differential pricing, to promote revenue adequacy, and to minimize the role of federal regulation in rail transportation markets.[8] Those policies remain unchanged by Congress. The courts recognized, when the CARs were first adopted and the first case under them was decided, that the agency had properly understood congressional policy and that its decision to impose access remedies only when they are needed to remedy competitive harm, *i.e.*, market failure, was sound. *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988)("*Midtec*").

Despite the lack of change in congressional policies, some shipper interests have continuously pled for greater regulatory largesse, and the agency has held proceedings to explore these shipper claims that a preferable policy would be to promote access ordered by the regulator that would presumably lead to lower rail rates. The first of these proceedings, *Review of Rail Access & Competition Issues,* STB Ex Parte No. 575 (served Apr. 17, 1998), is explicitly referenced in the Board's July 27 Decision in this docket. The Board characterizes the 1998 decision in EP 575 as "noting that [the] statute requires a showing of need for access remedies and does not permit such remedies merely 'on demand.'" Decision at 15.

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[8] *See Intramodal Rail Competition*, 1 I.C.C.2d 822, 823 (1985), *aff'd sub nom. Baltimore Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

In 2011, the Board initiated a new proceeding, *Competition in the Railroad Industry*, STB Ex Parte No. 705, "to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition. . . ." Decision at 4. The railroad industry presented extensive evidence showing that competition in the railroad industry remained vigorous and explained in great detail why unnecessary regulatory intervention into rail markets with the intention of "facilitating more competition" would be contrary to congressional policy and the public interest.[9] The Board never addressed the substantive issues raised in that proceeding.

Shortly after the public hearing in EP 705, NITL filed its Petition in EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules.* AAR argued that the NITL Petition should be assessed in the context of the broader EP 705 evidence.[10] But the Board then terminated the EP 705 proceeding without making any substantive decision on the merits.

In EP 711, after reviewing the NITL proposal, the Board sensibly concluded that it would be unwise to embark on approving a new forced switching rule based on NITL's petition unless it determined that such a rule would yield overall public benefits and not impose undue costs. The Board launched a major proceeding to assess the benefits and costs of NITL's proposal.[11]

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[9] *See, e.g.*, Initial Comments of the Association of American Railroads, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 6-23 (filed Apr. 12, 2011); Reply Comments of the Association of American Railroads, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 6-19 (filed May 27, 2011).

[10] Reply of the Association of American Railroads to the National Industrial Transportation League's Petition for Rulemaking, EP 711 (filed July 27, 2011).

[11] EP 711 Notice.

Responsive parties – including AAR[12] and its member railroads[13] – produced extensive data and evidence on the potential scope and impact of the NITL proposal. The Board has kept to itself what use, if any, it has made of the information submitted in EP 711. The Decision devotes one paragraph to the subject and draws no conclusions. Decision at 8.

AAR believes that fair consideration of the evidence submitted in EP 711 should have led the Board to conclude that it would be unwise to adopt new reciprocal switching rules that had the goal of making reciprocal switching more widely available. Instead the Board has proceeded down a path that is both unwise and unlawful.

III. THE PROPOSED SWITCHING RULES ARE UNLAWFUL BECAUSE THEY FAIL TO REQUIRE THE PROPONENT OF A SWITCHING ORDER TO SHOW THAT RECIPROCAL SWITCHING IS NEEDED TO SOLVE A PROBLEM OR REMEDY A HARM

The Board's proposed reciprocal switching rules are invalid because they are contrary to established law that requires a showing of need for the agency to order forced switching. In its decision, the Board acknowledges that such a showing of need is required but it fails to incorporate that requirement into the proposed rules as drafted. The rules as drafted would allow switching on demand for some shippers, which is unlawful, as the Board itself recognizes.

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[12] AAR submits it Opening and Reply evidence and comments from the original EP 711 proceeding as an appendix to these comments so that they will constitute part of the record in this docket, EP 711 (Sub-No. 1).

[13] *See, e.g.*, Opening Comments of CSX Transportation, Inc., EP 711, at 24-48 (filed Mar. 1, 2013)("CSX 711 Op."); Opening Comments of Kansas City Southern Railway Co., EP 711, at 14-16 (filed Mar. 1, 2013) and attached Verified Statement of Gregory Walling; Comments of Norfolk Southern Railway Co., EP 711, at 59-80 (filed Mar. 1, 2013)("NS 711 Op.") and attached Verified Statement of Fred M. Ehlers; Opening Comments and Evidence of Union Pacific Railroad Co., EP 711, at 22-57, 67-72 (filed Mar. 1, 2013)("UP 711 Op."); Reply Comments of CSX Transportation, Inc., EP 711, at 29-47 (filed May 30, 2013).

A. Established Law Requires a Showing of Need for an Order Directing Forced Switching

In exercising authority under section 11102(c), the Board is not writing on a blank slate. When it enacted the predecessor to that provision in the Staggers Act, Congress understood that the "practicable and in the public interest" language of section 11102(c) must be read to encompass the "actual necessity or compelling reason" test adopted by the ICC and endorsed by Congress. Since at least *Jamestown*, 195 I.C.C. at 292, a showing of "actual necessity" has been required before finding it in the "public interest" to require a carrier to provide terminal access under the statute. Congress intended that the standard used in applying the "practicable and in the public interest" test for reciprocal switching be "the same standard the Commission has applied in considering whether to order the joint use of terminal facilities." H.R. Rep. No. 96-1430, at 116-17 (1980). *See also* S. Rep. No. 96-470, at 42 (1979)(same); *Central States Enterprises, Inc. v. ICC*, 780 F.2d 664, 668 (7th Cir. 1985)(same). The ICC's decision in *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 367 I.C.C. 718, 720 (1983), recognized that the *Jamestown* standard of "actual necessity" applies to grants of reciprocal switching under what the Board characterizes here as the first prong.[14]

The pre-Staggers cases decided under the "practicable and in the public interest" language that now forms the basis for prong one of the Board's proposed switching rules consistently addressed forced access as a remedy for inadequate service.[15] In adding the

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[14] *Delaware & Hudson's* analysis under the need for competitive rail service prong, which the Board characterizes as the second prong, was overruled by the ICC in *Midtec Paper Corp. v. Chicago & Northwestern Transportation Co.*, 1 I.C.C. 2d 362, 367 (1985). The ICC found that refusal to consider forms of competition other than rail when evaluating whether switching was competitively necessary was inconsistent with the statute.

[15] *See, e.g., Spokane, Portland & Seattle Railway Co. and Union Pacific Railroad Co. – Control – Peninsula Terminal Co.*, 348 I.C.C. 109, 140 (1975)(finding "compelling reason" to grant

switching provision in Staggers, Congress recognized that "in areas where reciprocal switching is feasible, it provides an avenue of relief for shippers served by only one railroad *where service is inadequate*."[16] Accordingly, the ICC explained in its brief to the Seventh Circuit in *Central States* that "[t]he need to show inadequacy of service as a prerequisite for an award of either joint terminal use or reciprocal switching is dictated by the legislative history of Section [11102(c)] and precedent."[17]

Section 11102(c) also authorizes the Board to order forced switching when "*necessary* to provide competitive rail service." Thus, the requirement that a shipper show need to obtain the remedy of forced switching is contained in the statutory language that forms the basis for the Board's proposed prong two. The language plainly contemplates that switching would be granted only where it is "necessary," and not simply where it is desired.

The requirement that a shipper seeking forced switching show need for the remedy is grounded not only in the language of the statute at issue and the case law interpreting that language, but also in the provisions of the RTP enacted in Staggers. The RTP directed the agency to allow market forces as reflected in demand-based pricing to govern railroad commercial activity to the maximum extent possible and to minimize regulatory intervention into the market, limiting such intervention to those circumstances where it is needed to correct a market failure or abuse.[18] Further, when considering regulatory intervention, the Board must be

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terminal access because "current service . . . over this line of track is clearly inadequate and does not meet the needs of the shipping and receiving public").

[16] S. Rep. No. 96-470, at 42 (1979)(emphasis added).

[17] Joint Brief for the Interstate Commerce Commission and the United States of America, *Central States Enterprises, Inc. v. ICC*, Docket No. 84-2005, at 37 n.31 (7th Cir.)(filed November 15, 1984).

[18] *See, e.g.*, 49 U.S.C. §§ 10101 (1), (2), (6) & (12). The Board's Decision does not once refer to the policy set out in 49 U.S.C.§ 10101(2) "to minimize the need for Federal regulatory control

mindful of the impact on revenues necessary to sustain a safe and efficient rail transportation system.[19]

The agency has long adhered to these statutory imperatives. In its brief to the D.C. Circuit in the *Midtec* case, the ICC explained that the "central philosophy of the Staggers Act" is that "regulation should be reserved for situations where it is needed to protect against abuses."[20] The ICC adhered to this "central philosophy of the Staggers Act" as set out in the RTP in adopting rules that required that a shipper show need to obtain the remedy of forced switching. Under that standard, the role of government regulation in ordering forced switching is limited to when it is needed to rectify market failures or prevent abuse of market power. As the Board stated in the Decision, at 3, the "regulations provided that reciprocal switching would only be prescribed if the agency determines that it 'is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive,' and 'otherwise satisfies the criteria of . . . 11102(c).'"

The agency and the courts have recognized that grants of access that are not predicated on the need to correct competitive harm are unlawful and could result in an impermissible restructuring of the freight rail industry:

> "[W]e think it correct to view the Staggers changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of

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over the rail transportation system" or discuss why that factor, which strongly influenced the ICC's conclusion that access must be used only "to protect against abuses," might allow the Board to impose reciprocal switching without any showing of abuse.

[19] 49 U.S.C. § 10101(3).

[20] Joint Brief for Respondents Interstate Commerce Commission and United States of America, *Midtec Paper Corp. v. ICC*, Docket No. 87-1032, at 25 (D.C. Cir.)(filed Mar. 14, 1988)("ICC *Midtec* Brief").

> service to and within terminal areas solely to introduce additional carrier service."[21]

The Board now contends that it is free to abandon its prior competitive abuse requirement – and the underlying rationale for that policy – and adopt new rules "given the absence of any suggestion that Congress intended to limit the agency's discretion with regard to reciprocal switching." Decision at 13. The notion that Congress gave the Board unbounded discretion under section 11102(c) to ignore binding interpretations of the statutory language and the constraints imposed by the RTP when considering the standard governing the reciprocal switching remedy is patently unreasonable. The ICC explained in its defense of the existing competitive harm standard that regulatory "intrusion into carrier operations and pricing practices in the absence of some real or threatened abuse simply cannot be squared with a fair reading of the rail transportation policy."[22] The Board does not explain why it is no longer bound by the constraints on its authority to order forced switching that were binding on its predecessor.

The constraints on discretion that the agency recognized in *Midtec* were not relaxed by ICCTA. To the contrary, they were reinforced. In ICCTA, Congress "continue[d] the deregulation theme of the past 15 years."[23] ICCTA "builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector. . . . The [Act] keeps bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate."[24]

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[21] *Midtec Paper Corp. v. Chicago & Northwestern Transportation Co.*, 3 I.C.C.2d 171, 174 (1986)("*Midtec II*"), *aff'd*, *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

[22] ICC *Midtec* Brief, at 18 n.12.

[23] S. Rep. No. 104-176, at 5 (1995).

[24] H.R. Rep. No. 104-311, at 93 (1995). Indeed, the Senate made it clear it did not intend to redesign the existing regulatory structure: "Beyond weeding out outdated and unnecessary provisions, the bill generally does not attempt to substantively redesign rail regulation." S. Rep.

A critical corollary to the legal requirement that a shipper show need for the remedy of forced access is that access will not be granted merely "on demand," or on the basis of a shipper's desire to be served by two carriers rather than one. The Board acknowledges that the "statute requires a showing of need for access remedies and does not permit such remedies merely 'on demand.'" Decision at 15 (citing *Review of Rail Access & Competition Issues*, STB Ex Parte No. 575, slip op. at 6 (served Apr. 17, 1998)). Moreover, according to the Board itself, "[t]here is no indication that Congress intended the agency to prescribe reciprocal switching whenever it would enhance competition." Decision at 15 (citing *Midtec*, 857 F.2d at 1507).

The requirement of a showing of need to obtain an order forcing access through switching and the prohibition of access "on demand" are two sides of the same coin. That is, if a shipper were *not* required to show need and were able to obtain a switching order merely because it would prefer two carrier service, it would be obtaining access "on demand." The Board's existing competitive harm standard accommodates both principles; it requires a showing of need and precludes the grant of a switching remedy on demand. The Board's proposal to remove and replace that standard in switching cases violates both principles.

B. The Board's Decision Acknowledges that Need Will Not Be Presumed But Inexplicably Proposes Rules that Do Not Require a Showing of Need

The Board's Decision recognizes that the law requires a shipper to show need to justify the remedy of forced switching.[25] As noted above, the Decision quotes approvingly from Ex

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No. 104-176 at 6 (1995). The House stated that "The Committee intends that the Panel continue the policy of granting railroads the maximum possible freedom to set rates, routes, and divisions, so long as these actions are not anticompetitive." H.R. Rep. No. 104-311 at 98 (1995).

[25] The Decision is infused with the recognition that forced switching is a "remedy," using that term in reference to switching multiple times. *See, e.g.*, Decision at 6 (citing shipper support "to make the remedy more widely available), 9 ("important available remedies have become dormant"), 13 (Board prefers and approach that "makes the remedy more equally available to all shippers"), 13-14 ("bright-line cut-offs would make this remedy both over inclusive and under

Parte No. 575 the statement that the "statute requires a showing of need for access remedies." In the same paragraph of the Decision in which it addresses "removal" of the anticompetitive conduct requirement of the CARs, the Board states that, notwithstanding the removal, under the proposed new rules "shippers would be required . . . to . . . bear the burden of showing that reciprocal switching is needed. There would be no presumption of need." Decision at 19. Furthermore, in her separate comment, Commissioner Miller, who voted in support of the Board's 2-1 decision, states: "I believe that for shippers to obtain this [switching] remedy, a shipper should still have to demonstrate that reciprocal switching is needed based on one of the reasons articulated by Congress, rather than for it to simply be presumed to be needed." Decision at 32.

Despite this unambiguous recognition within the text of the Board's decision that the law requires a showing of need for a switching remedy, *the proposed rules as written omit the requirement of a showing of need*. *See* text of proposed 49 C.F.R. § 1145.2, Decision at 41-42. Whether or not this is an oversight, the omission of the requirement of need from the rules allows for outcomes that Congress forbade – regulatory intrusion into markets when there is no harm to be remedied and a grant of switching on demand.

C. Both Prongs of the Proposed Rules Would Impermissibly Authorize Forced Switching Without a Showing of Need

Both prongs of the Board's proposed rules fall short of requiring the showing of need that the Board itself recognizes is required. In different ways the two prongs hold out the possibility of switching on demand, which the Board acknowledges is contrary to law.

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inclusive"), 15 ("a remedy expressly authorized by Congress"), 20 ("NITL's proposal specifically limited the proposed remedy"), 26 ("availability of a reciprocal switching remedy"). Outside the medical context, "remedy" is defined as "a successful way of dealing with a problem or difficulty." In the legal context, "remedy" is defined as "[t]he means of enforcing a right or preventing or redressing a wrong." *Black's Law Dictionary* 1485 (10th ed. 2014).

1. Prong One – Practicable and in the Public Interest

As to the first prong, the Board proposes to give content to the term "practicable and in the public interest" by requiring the party seeking switching to show "that the potential benefits from the proposed switching arrangement outweigh the potential detriments." Decision at 18. The proposed rule then lists various "relevant factors" that the Board may consider in determining whether benefits outweigh detriments. The factors identified by the Board do not require that a shipper show "actual need" for forced switching. Thus a shipper could get relief under prong one as written without a showing of need, contrary to the long-standing legal requirement of such a showing.

The Board's proposal to implement the "practicable and in the public interest prong" through an open-ended benefits/detriments determination is unexplained and at odds with the accepted interpretation of this statutory language. As discussed above, "practicable and in the public interest" has been consistently construed as requiring a showing of "actual necessity" to obtain the remedy of forced switching The Board cannot simply ignore this long-standing construction of the statutory language.

Without a showing that a remedy is needed, a shipper could obtain an order of forced switching under prong one simply because it wants lower rates that might result from access by a second carrier. Reciprocal switching, however, is not an alternative vehicle for rate relief.[26] Moreover, the mere transfer of revenue from a railroad to a customer yields no public benefits; it is a private wealth transfer. As Mr. Fagan explains, public benefits are those that have value to society; they are broader than benefits realized by private parties. Fagan V.S. at 1 n.1.

[26] *Midtec*, 857 F.2d at 1505-06.

Although outcomes are completely unpredictable under the Board's first prong as drafted, a shipper could obtain a switching order with no showing of need. This outcome would amount to access implemented by regulatory intrusion into the market without good reason, contrary to the law and the RTP.

2. Prong Two – Necessary to Provide Competitive Rail Service

As to the second prong, "necessary to provide competitive rail service," the Board fails to give any weight to the word "necessary" that appears in the statute. The Board does not require that a shipper seeking an order of forced switching under prong two make a showing of need nor does it specify particular needs (*e.g.*, the need to remedy competitive harm or inadequate service) that could support a request for switching. Instead the actual requirements of prong two as written effectively say that the Board will *presume need* from a showing that a shipper is served by a single rail carrier that has market dominance. (Proposed 49 C.F.R. §1145.2(a)(2) (i, ii)). This is contrary to law and precisely the opposite of how the Board says the new rules would work in the text of the decision: "There would be no presumption of need." Decision at 19.

The status of being the sole rail carrier serving a shipper facility was a common one, not a problem in need of a remedy, at the time of the enactment of Staggers and it remains so today.[27] It would be unlawful and contrary to years of precedent for the Board to assume that the status of being sole served creates the need for a regulatory remedy. The Board's merger jurisprudence repeatedly recognizes the existence of shippers served by only a single carrier and adheres rigorously to the principle that merger conditions should not be used to create multiple service

[27] *See, e.g.*, ICC *Midtec* Brief, at 17 n.11 ("The repercussions of an open-ended use of forced switching, as Midtec and intervenors advocate here, should not be underestimated. The majority of the shippers in this country that receive rail service are served directly by a single rail carrier.").

options for those sole-served shippers.[28] Importantly, from the perspective of economic efficiency, the existence of sole-served shippers may represent an efficient, market-determined allocation of resources in many circumstances. AAR's witness Robert Willig explained in EP 705 that the existence of sole-served facilities is a logical result of rail industry economics and does not suggest any market failure requiring a regulatory remedy:

> A market where there is no evidence of abusive conduct and where there are also no competitive rail alternatives available to shippers may well indicate that there is no efficient role for a competitor. If there were an efficient competitive alternative, the market would either support two independent facilities *or* the incumbent railroad, recognizing the efficiency of a competitive entrant, would have incentives to agree to a negotiated access agreement. Therefore, in markets where there is only one participant and no competitive concern, regulator-imposed access coercively mandates arrangements for sharing facilities that are not sufficiently efficient to have emerged from market forces.[29]

Nor is a showing of market dominance sufficient to demonstrate a need for the remedy of reciprocal switching. Congress took pains to instruct the agency that a finding of market dominance "does not establish a presumption that . . . the proposed rate exceeds or does not exceed a reasonable maximum." 49 U.S.C. § 10707(d)(2). In other words, a finding of market dominance alone *cannot* establish even a presumption that a railroad has abused its market power by charging unreasonable rates. The complainant must separately prove that the rate exceeds a

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[28] *See, e.g., Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al. (Houston/Gulf Coast Oversight*), 3 S.T.B. 1030, 1032 (1998) ("Well established transportation law recognizes that some shippers are served by a single railroad. . . . Because the railroad industry is not an open-access industry, and because some shippers may pay more than others under the law that we administer, merger proceedings are not used as vehicles to equalize the competitive positions of shippers generally. . . . [C]onditions that the Board imposes in a merger proceeding are designed to ameliorate specific merger-related harm, not to simply add more competitors.").

[29] Initial Comments of the Association of American Railroads, *Competition in the Railroad Industry*, STB Ex Parte No. 705, Verified Statement of Robert Willig, at 17 (filed Apr. 12, 2011).

reasonable level.[30] The concept of market dominance in the statute is a threshold that must be cleared prior to showing that a rate is unreasonable, not, on its own, the basis for any regulatory relief. The Board proposes to extend its use of the concept of market dominance from the rate reasonableness context, where it is a statutory threshold requirement, and to treat a finding of market dominance as a justification for forced switching. It is completely illogical to propose, as the Board does, that a concept that does not even establish a presumption of market abuse with respect to rates could alone justify the remedy of reciprocal switching. Again, under the Board's second prong as drafted, a shipper could obtain a switching order with no showing of need.

The Board's proposed reliance on market dominance as the basis for forced switching under prong two is also irrational because market dominance as that concept is currently applied by the Board does not show the absence of effective competition. The Board's market dominance test excludes consideration of product and geographic competition.[31] Thus, under the current market dominance standards, the Board can find market dominance where no market power exists.[32] At least in the rate reasonableness context, the complainant must still prove that the challenged rates are unreasonable using standards that reflect competitive market principles. In the switching context, a finding of market dominance without evidence of harm, as proposed by the Board, would throw open the door to forced switching notwithstanding the presence of effective competition, a plainly arbitrary outcome.

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[30] The use of forced switching as an alternative vehicle for obtaining lower rates is unlawful because it circumvents the required showing of unreasonableness.

[31] *Market Dominance Determinations – Product & Geographic Competition*, 3 S.T.B. 937 (1998).

[32] *See Midtec*, 857 F.2d at 1513 ("it could hardly be doubted as a matter of economics that intermodal and geographic competition are relevant in determining whether there is the potential for anticompetitive conduct in a particular market").

If rates and service are both reasonable, it is not "necessary to provide competitive rail service" through a forced switching remedy and there is no justification for regulatory intrusion into rail transportation markets. However, the Board states in its Decision that "[t]he purpose of ordering reciprocal switching under this prong [two] is to encourage competition between two carriers." Decision at 27. This form of encouragement is contrary to the Board's own precedent. The Board previously explained in the *Bottleneck* cases[33] that the idea of "encouraging competition" does not extend to the creation of artificial competition.[34]

The Board was not breaking new ground in rejecting artificial competition in the *Bottleneck* cases. The D.C. Circuit had already ruled in its *Midtec* decision that artificial competition in the form of agency mandated switching is not permitted under Staggers and the RTP: "If the Commission were authorized . . . to prescribe reciprocal switching . . . whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the

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[33] *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059 (1996)("*Bottleneck I*"), *clarified, Central Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235 (1997)("*Bottleneck II*"), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

[34] *Bottleneck II*, 2 S.T.B. at 239. The distinction between naturally occurring competition and artificial competition is an important one that the Board itself recognizes. In the Decision, for example, the Board points to the phenomenon of "naturally occurring" switching that involves market transactions between consenting rail carriers. Decision at 9. Competition that occurs naturally is the "competition and . . . demand for rail services" that the Board is supposed to encourage under section 10101(1). Another example of market-based competition that the Board might properly encourage would be a proposed build-in to a sole-served facility by a second rail carrier. In contrast, artificial competition to create two carrier service where it would not otherwise exist is not authorized by the RTP except as a remedy for a competitive harm. As the D.C. Circuit stated in *Midtec*, "competition policy is not a matter of regulators handicapping would-be competitors in order to create an evenly matched contest." *Midtec*, 857 F.2d at 1503.

Commission in this way to conform the industry more closely to a model of perfect competition." 857 F.2d at 1507.[35]

For a significant category of shippers – those who are solely served by a market dominant rail carrier and within a reasonable distance of an interchange – the express requirements of prong two, which omit a showing of need, would allow for switching on demand, which is unlawful.

IV. THE BOARD'S PROPOSED RULES ARE NOT THE PRODUCT OF REASONED AGENCY DECISIONMAKING

When an agency changes long-standing policy, the Administrative Procedure Act ("APA") requires that the agency provide a reasoned explanation of the change in policy. *Motor Vehicle Mfrs. Assn of United States Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Supreme Court recently called this obligation "[o]ne of the basic procedural requirements of administrative rulemaking." *Encino Motor Cars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Further, when an agency reverses existing regulatory policy, the "agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'" *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 535 (2009)(Kennedy, J., concurring, agreeing with and quoting the dissent at 550). The agency must "'show that there are good reasons for the new policy.'" *Encino*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515).

The Decision here does not meet the requirements of the APA. The Board points to very few facts that purportedly support its change in policy, and there is no rational connection

[35] The Board tries to avoid the holding of *Midtec* by asserting that it is not authorizing "full" open access, but the substance of its proposed rules suggests that it is creating some version of access on demand, notwithstanding its recognition that "the statute . . . does not permit such [access] remedies merely 'on demand.'" Decision at 15. A rule that would grant access on demand without a showing of need for some shippers is not rendered lawful because it is a less egregious violation of the RTP than full open access.

between those facts and the Board's conclusion that the reciprocal switching rules need to be changed. The Decision also fails to consider the potential impact of a change in reciprocal switching rules on railroads and shippers, notwithstanding the Board's own recognition in EP 711 of the importance of knowing how a change in reciprocal switching rules would affect the industry and the legal requirements under the APA to consider the costs of new regulation. Finally, the Decision is flawed because the Board has failed to provide a coherent statement of what the new policy is.

A. The Board's Reasons for Reversing Policy Do Not Withstand Scrutiny

The Decision acknowledges, as it must, that the proposed new rules reflect a fundamental change in regulatory policy. The Board claims that it has the discretion to change the rules "because nothing in the plain language of § 11102 [formerly § 11103] required the agency in 1985 to adopt the anticompetitive act framework proposed by AAR and NITL." Decision at 10. AAR explains above that the statute and the RTP constrain the Board's discretion and the proposed rules are not consistent with those constraints. But even if the Board were correct that it has broad discretion to change the existing rules, the Board would be required by the APA to provide a rational explanation for its change in regulatory policy and for its adoption of the new approach. Here, the Board never identifies or explains the problem it is seeking to solve. The Board's perfunctory explanation of the reasons for a fundamental shift in policy falls far short of what is required under the APA.

1. "Dearth of Cases"

The primary reason cited by the Board for its reversal of policy is "[t]he sheer dearth of cases brought under §11102(c) in the three decades since Intramodal Rail Competition, despite continued shipper concerns about competitive options and quality of service." Decision at 8-9. According to the Board, the lack of litigation activity "suggests that part 1141 and Midtec Paper

Corp. have effectively operated as a bar to relief rather than as a standard under which relief could be granted." *Id*. The Board's inference that the regulatory standard is flawed based on the lack of cases is not reasonable and indeed makes no sense.

First, the railroad industry is a mature industry. Railroads and shippers have had decades to establish acceptable commercial arrangements. There have been build-ins and build-outs where economically feasible. There are voluntary reciprocal switching arrangements in locations where they make economic and operational sense. There are many voluntary interline arrangements where the market calls for multi-carrier service. Since the market already provides for multi-carrier access where such access is economically viable, there is no reason to expect many cases seeking to require it.

Second, the lack of cases under the existing standard merely confirms that railroads comply with the law. Under the current rules, carriers cannot engage in anticompetitive conduct without being subject to a claim for forced access. Where rail carriers comply with the law, very few, if any, cases should be expected. Indeed, given the RTP "to minimize the need for Federal regulatory control over the rail transportation system," 49 U.S.C. § 10101(2), it would be reasonable and desirable that an access remedy like reciprocal switching would be used sparingly. The lack of cases requiring regulatory intervention would suggest that the existing rule is valid because it is acting as a restraint both on carrier misconduct and on unnecessary regulatory intervention, not that it needs to be changed.

The lack of cases could also be explained by the fact that there is no underlying problem that needs to be addressed through the grant of forced access. The Board does not contend that the existing standard is too narrowly drawn to reach a commercial problem that could be remedied with an order of forced switching. Nor does the Board offer any basis for the inference

that the lack of litigation means that the existing standard is too complicated. There are many provisions in the statute that provide remedies that are used only rarely, if at all.[36] In fact, the case law that has arisen under the existing rules suggests that it is not the difficulty of establishing grounds for relief that has resulted in few cases but that shippers have not had a valid basis for seeking forced access relief under the existing standard.

For example, in *Midtec*, the shipper was denied an access remedy because it was clear that "Midtec's claim is really nothing more than a grievance that the C&NW's rates are too high." *Midtec*, 857 F.2d at 1508. But forced access is not a remedy for concern over rate levels.[37] If shippers have chosen not to pursue access relief because the ICC and the courts have made clear that access remedies are not available for complaints over rate levels, that would not be evidence of a problem with the existing rules. Instead, it would be evidence that the existing rules are doing precisely what they were intended to do, which is to limit access remedies to situations where access is needed to address a market failure and not to allow access to be used simply as an alternative to rate regulation.

Furthermore, the Board presents no evidence of recurring problems of competitive abuse that could justify a change to the existing rules. The Board cites "continued shipper concerns about competitive options and quality of service," Decision at 9, but most of the alleged

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[36] *See, e.g.*, 49 U.S.C. § 10742 (failure to provide proper facilities for interchange of traffic); § 11123 (directed service order).

[37] The same desire for rate relief was the factor driving other shippers that have sought reciprocal switching remedies. In *Central States*, the shipper sought reciprocal switching because "it could save approximately $948 in shipping charges per three car unit." 780 F.2d at 669. In *Vista Chem. Co. v. Atchison T. & S.F. Ry.*, 5 I.C.C.2d 331, 332 (1989), the shipper sought reciprocal switching because the incumbent railroad, Santa Fe, "allegedly uses its market power to maintain a high local rate for traffic moving between Vista's plant and Santa Fe's closest interchange points." The shipper also alleged that Santa Fe was foreclosing a more efficient route, but the shipper submitted no evidence other than mileage on this issue and the ICC found the allegation not to be meritorious.

"concerns" are so vague and general that they cannot be given any weight at all.[38] Where there is any concrete description of the actual concerns about a supposed lack of competition, it is clear that the concerns relate to rates. For example, the USDA statement cited by the Board refers to a concern over the supposed lack of "competitive rates provided through a well-functioning market based system."[39] If shippers' supposed concerns over competition are really concerns over rates, then the lack of forced access litigation can easily be explained by the fact that access is not a remedy for rate-related concerns, and the shippers therefore know that they would lose any rate-focused access case they brought. The lack of litigation is not the result of the supposed inadequacy of the regulatory standard but rather the result of shippers' realization that they will not succeed under the existing access standards in seeking forced access as a back-door mechanism to reduce rates.

The Board ignores relevant evidence showing that there has been no widespread abuse of market power by railroads that would be expected to lead to claims for forced access. The most comprehensive evidence available on this issue comes from a study that the Board itself commissioned – the Christensen Study. In response to vague and general complaints by shippers about supposed abuses of market power by railroads, Congress directed the GAO to study the issue. The GAO was unable to find evidence of widespread abuse of market power, but recommended that the Board conduct a more extensive empirical analysis to explore the

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[38] *See, e.g.,* Initial Comments of Consumers United for Rail Equity, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 12 (filed Apr. 12, 2011)(complaining without detail or support that the current rules have "prevented the free flow of traffic"); Comments of E.I. du Pont de Nemours & Co., *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 12 (filed Apr. 12, 2011) (contending that absence of cases "indicates the excessive nature of these rules"). The Board cannot possibly rely on such insubstantial evidence as the basis for reversing a policy that has been in place for over three decades.

[39] Comments of the U.S. Department of Agriculture, EP 711, at 2 (filed Mar. 1, 2013).

shippers' accusations.[40] The Board commissioned Christensen Associates, an independent research organization, to provide an unbiased analysis.

The Christensen Study concluded that there was no evidence of widespread abuse of market power by railroads.[41] As the Department of Transportation acknowledged, "[t]he Study's most fundamental conclusions are that railroad deregulation has been a success, that the industry must be able to engage in differential pricing to remain viable, and that overall there is no probative evidence of market power abuse – rate increases in recent years notwithstanding."[42] Thus, to the extent there is any probative evidence regarding the reasons for a scarcity of litigation over forced access, the evidence reveals no abuse of market power by railroads that might be expected to lead to such litigation. It is fundamentally irrational for the Board to ignore that evidence and assume instead, based on vague and unsubstantiated claims by shippers, that the lack of litigation results from an inappropriate regulatory standard governing reciprocal switching remedies.

At bottom, the logic of relying on the dearth of cases is mystifying. Commissioner Miller herself states that even under the new rules, she does not expect many cases to be brought. Decision at 33. Thus, the Board itself implicitly acknowledges that an effective rule is not one that results in widespread litigation, but just the opposite. And, the Board already has an effective rule that is fully consistent with Congress's intent regarding forced access and the RTP directives.

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[40] Government Accountability Office, *Freight Railroads: Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed*, 3-4 (Oct. 2006).

[41] *See* Laurits R. Christensen Associates, *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition: Revised Final Report*, ES-5 (2009) ("Christensen Study").

[42] Comments of U.S. Department of Transportation, *Study of Competition in the Freight Railroad Industry*, STB Ex Parte No. 680, at 1 (filed Dec. 19, 2008).

2. Rail Carrier Consolidation

The Board also seeks to justify its reversal of regulatory policy on grounds that rail carrier consolidation since the Staggers Act "likely reduces" the amount of reciprocal switching that occurs: "[T]he consolidation of Class I carriers and the creation of short lines that may have strong ties to a particular Class I likely reduces the chance of naturally occurring reciprocal switching as carriers seek to optimize their own large networks." Decision at 9. The Board presents no evidence at all to support its speculation. Regulatory policy should not be based on speculation, particularly where the agency proposes to fundamentally change a policy that has been in place for over 30 years.

The facts do not support the Board's speculation. The Board's long-standing policy in merger cases has been to preserve competition.[43] Moreover, the logic underlying the Board's speculation that the consolidation of railroads or the growth of short lines with ties to a particular Class I railroad would likely reduce reciprocal switching is highly questionable, and at the very least, totally unexplained. Even in short line spinoffs, the customers on the line being spun off have ended up with exactly the same number of carriers serving them as they had to start with.

Most important, the Board also fails to explain why it believes that a decline in "naturally occurring" switching would show a problem that requires replacing the existing competitive abuse standard. As traffic levels fluctuate, locations that might have been commercially attractive to carriers for reciprocal switching may become less so, which is why changes in switching (even if there were evidence of it) would not suggest there is a problem with the current standards. Moreover, introducing a switch into a movement increases the costs of a

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[43] *See, e.g., Norfolk Southern Railway Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Co.*, Docket No. FD 35873, slip op. at 17-18 (served May 15, 2015). *See also Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233, 351 (STB served Aug. 12, 1996).

movement and potentially reduces the efficiency of the movement. Indeed, the ICC's and the Board's approval of rail consolidation in the past has been based in large part on the agency's recognition of the efficiency of single-line movements.[44]

A decline in "naturally occurring" switching would therefore be consistent with the public interest goals that the ICC and the Board specifically sought to achieve in approving past rail consolidations, not evidence of a problem that needs to be addressed through a change in reciprocal switching rules. Even if the Board had a valid reason for concluding that the decline in "naturally occurring" switching is a problem (and it does not), the Board would still need to balance the impact of that problem against the recognized benefits of extended single-line service that have resulted from rail consolidations. Shippers, including shippers served by a single carrier, have benefitted substantially from enhanced single-line service. If the net benefit of increased single-line service outweighs the harm from loss in "naturally occurring" switching, then it would be arbitrary to promote artificial switching at the expense of efficient single-line rail service.

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[44] *See, e.g., Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Railway Co.*, 360 I.C.C. 788, 940 (1980)("One of the major benefits from this merger will be a reduction in the number of currently interlined shipments"); *CSX Corp. – Control – Chessie System, Inc. & Seaboard Coast Line Industries Inc.*, 363 I.C.C. 521, 552-53 (1980)(shift to single-line service would eliminate costs and enhance "speed, reliability, and handling"); *Union Pacific Corp. – Control – Missouri Pacific Corp. & Missouri Pacific Railroad Co.*, 366 I.C.C. 462, 489 (1982)(noting shipper preference for single line service); *Burlington Northern Railroad Co. – Control and Merger – Santa Fe Pacific Corp. & the Atchison, Topeka & Santa Fe Railway Co.*, 10 I.C.C. 2d 661, 741 (1995)(noting the importance of single-line service to shippers due to reduced costs, improved transit times, and the elimination of uncertainty from interchanging traffic); *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corp., et al.*, 1 S.T.B. 233, 381 (noting "unprecedented opportunities for improved routings and new single-line routes"). Union Pacific's opening comments in the original 711 proceeding provide a concise history of the joint efforts undertaken by railroads and regulators to shift to a national rail network with more single-line service. UP 711 Op., at 10-14.

It would also be arbitrary as a matter of law for the Board to seek to expand reciprocal switching as a counterbalance to large railroads' exercise of their congressionally recognized right to favor long hauls. There is a clear statutory policy allowing railroads to favor long-haul movements. *See* 49 U.S.C. § 10705. Since the early 20th century, regulation of rail carriers has been based on the policy that "[t]he road that initiates the freight and starts it on its movement in interstate commerce should not be required . . . to transfer its business from its own road to that of a competitor . . . when the commerce initiated by it can be as promptly and safely transported. . . by its road as by the line of its competitor." *Chicago, Milwaukee, St. Paul & Pac. R.R. v. U.S.*, 366 U.S. 745, 750-51 (1961) (quoting 45 Cong. Rec. 3475-3476). The Board's *Bottleneck* decisions recognize that Congress, in the Staggers Act, "retained and strengthened the specific statutory provisions allowing carriers to select their routes and to protect their long-hauls." *Bottleneck I*, 1 S.T.B. at 1067.

3. Improved Financial Health

The Board points to the railroad industry's improved financial health as an additional justification for a reversal of policy regarding reciprocal switching. The Board cites a recent Senate report noting that "'the industry has evolved and the railroads' financial viability has drastically improved.'" Decision at 9 (quoting S. Rep. No. 114-52, at 1-2 (2015)). But the Board fails to explain why the railroads' improved financial health justifies grants of reciprocal switching in the absence of a market failure. The RTP makes the Board responsible for helping carriers attain adequate revenues "to promote a safe and efficient rail transportation system." 49 U.S.C. § 10101(3). Indeed, Congress recently expanded this responsibility to include a requirement that the Board help carriers attain adequate revenues "for the infrastructure and

investment needed to meet the present and future demand for rail services."[45] Any notion that the railroads are healthy enough to withstand a few cuts imposed through forced access would be directly contrary to the RTP mandate of promoting sustained revenue adequacy and minimizing the role of federal regulation in railroads' commercial activity.

The Board's focus on the financial condition of the railroad industry as a justification for a change in the reciprocal switching rules is also flawed because the Board failed to consider recent changes in rail markets that have had a negative impact on railroad financial health. And Vice Chairman Miller acknowledged that "the railroads are currently facing changing economic conditions" and "railroads today find themselves in a difficult environment." Decision at 33. As Commissioner Begeman pointed out, "rail volumes have been down all of 2016, and are currently down nearly six percent from just a year ago." Decision at 36. But if the Board believes that past improvements in railroad financial health somehow justify a change in the rules (which they do not), the Board should have considered whether possible future changes in financial conditions, based on changing market factors that are known and present today, would counterbalance and perhaps outweigh those improvements.

The recent changes in freight rail markets make it particularly important for the Board to avoid creating new regulatory uncertainties that could impede railroads' ability to adapt to changing circumstances.[46] As traditional traffic patterns change, railroads need to have the flexibility to adjust spending and operating practices to new rail industry realities and they must continue to have the incentive to make the investments necessary to meet changing traffic flows

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[45] *See*, Surface Transportation Board Reauthorization Act of 2015, Pub. L. 114–110, § 16, 129 Stat. 2228, 2238 (2015).

[46] *See, e.g.*, Association of American Railroads, *Rail Time Indicators*, at 1, 3-4 (Oct. 7, 2016)(reporting lowest year to date railroad carload totals since before 1988 and describing pronounced shift in traffic patterns away from coal and petroleum products).

and changing demand. More aggressive regulation by the Board would be counterproductive because it would increase the costs and risks associated with investment and innovation that will be necessary to meet changing market conditions.

4. Increased Productivity and Technological Advances

The Board provides no rationale for its reliance on "increased productivity and technological advances" in the rail industry as a justification for a reversal of switching policy. Reciprocal switching by its very nature generates inefficiencies. The public interest would not be served by deliberately undermining through forced switching the recent improvements in productivity. In fact, by forcing railroads to surrender line-haul volumes and the associated economies of density, forced switching would prevent railroads from fully utilizing their investments in facilities such as state-of-the-art classification yards and distributed power for manifest trains which have contributed to recent productivity improvements.

B. The Board Failed to Consider the Impact of the Proposed Rules on Railroads and Shippers

In 2012, in response to NITL's petition, the Board determined that it lacked sufficient information to evaluate the impact that an increase in forced switching would have on industry stakeholders. As the Board explained, it was not able to "fully gauge [the] potential impact" of the NITL proposal.[47] According to the Board, "additional information is needed before we can determine how to proceed."[48] The Board initiated EP 711 to collect information that would allow it to assess the potential impacts of the NITL proposal.

The Board's decision in EP 711 to seek information on impact is consistent with the Board's recognition in other areas of the need to assess the impact of proposed regulation before

[47] EP 711 Notice, at 2.

[48] *Id.*

taking regulatory action, including the need to conduct cost-benefit analyses to ensure that regulation will advance the public interest. In Ex Parte 712, the Board asked commenters to provide, in connection with a review of existing regulations, "evidentiary support to help the Board analyze the costs and benefits (both quantitative and qualitative) of any proposed changes."[49] In the Board's recent Supplemental NPRM concerning URCS, the Board invoked the cost-benefit principle from the Final Report of the Railroad Accounting Principles Board (RAPB), noting that it would be "guided by the 'practicality principle' set forth in the Final Report of the Railroad Accounting Principles Board (RAPB), which states that cost and related information . . . must generate benefits that exceed the costs of providing it."[50] The Board's focus on the potential impact of regulation in these proceedings is consistent with Executive Order 13579, which is addressed to independent agencies and provides that "[t]o the extent permitted by law, [regulatory] decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative)."[51]

The Supreme Court recently concluded in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), that an administrative agency acts arbitrarily when it ignores the potential costs of the regulations it proposes to adopt. There, the divided Court agreed that the EPA acted unreasonably when it

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[49] *Reducing Regulatory Burden; Retrospective Review Under E.O. 13563*, STB Ex Parte No. 712 (served Oct. 12, 2011).

[50] *Review of the General Purpose Costing System*, STB Ex Parte No. 431 (Sub-No. 4), at 6 (served Aug. 4, 2016).

[51] Executive Order 13579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587 (July 11, 2011).

"refuse[d] to consider cost" when finding that it was "appropriate and necessary" to regulate certain emissions from power plants. 135 S. Ct. at 2704.[52]

Justice Scalia, writing for the majority, held that an agency is obligated to engage in reasoned decisionmaking, that an agency does so only when the process by which it reaches its result is "logical and rational," and that the agency must therefore consider "the relevant factors" in reaching its decision. *Id.* at 2706. The agency failed in its obligation when it refused to consider cost: "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 2707. Similarly, Justice Kagan writing for the dissenters, agreed with the majority ("let there be no doubt about this") that EPA's regulation would be unreasonable if EPA gave no thought to cost. *Id.* at 2714. Justice Kagan explained that "[c]ost is almost always a relevant – and usually, a highly important – factor in regulation." *Id.* at 2716. According to Justice Kagan, unless following a contrary congressional directive, an agency acts unreasonably when it ignores costs because that could easily lead to imposing regulations where the costs far exceed the benefits. *Id.* at 2717. Justice Kagan concluded that unless Congress has dictated otherwise, "an agency must take costs into account in some manner before imposing significant regulatory burdens." *Id.*

AAR's witness Mark Fagan explains in his supporting verified statement that rational decisionmaking requires an evaluation of benefits and costs before adopting new regulations, particularly where an agency is changing long-standing rules. Mr. Fagan explains that "the rationale for using [a benefit-cost] analysis rests on simple logic. Any policy action undertaken by the government should generate more benefits than costs from a societal perspective." Fagan

[52] The core disagreement between the majority and the dissent was not whether the EPA *should have* considered cost, *but whether it did.* All of the justices agreed that the EPA was required to consider the potential cost its regulations would impose.

V.S. at 3. Without a benefit-cost analysis, the agency cannot determine whether the public interest will be advanced by the proposed regulatory action. Mr. Fagan explains why it would be particularly important to consider potential costs in the area of new access regulation given the experience in other countries where more aggressive access regulation has produced net public harm. *Id.* at 5.

Notwithstanding the Board's recognition in EP 711 of the importance of assessing the potential impacts of a change in reciprocal switching rules, the Board failed to address any of the EP 711 impact evidence in its Decision. The Decision summarizes the impact evidence that was developed in EP 711 in a single paragraph, Decision at 8, without any discussion of what the Board learned from it or how that evidence influenced the development of the Board's proposed rules. Indeed, Vice Chairman Miller acknowledged that the Board effectively ignored the comments and testimony developed in EP 711: "[T]oday's decision could have been made without this additional evidence, which was not heavily relied on in reaching today's decision." Decision at 33. As Commissioner Begeman similarly notes in her dissent from the Board's Decision, Decision at 36, the Board made no effort to gauge the impact of its proposed rule:

> We have no idea how the proposed rule would or even could be utilized. We don't know its potential impact on the shippers that would be granted a reciprocal switch or its potential impact on shippers that wouldn't benefit from a reciprocal switch. We also don't know the proposal's potential impact on the rail carriers. Nor do we know its potential impact on the fluidity of the rail network. *All* of these impacts matter.

Ignoring how a rule will affect the regulated entities and stakeholders who rely upon services offered by the regulated entities is not consistent with reasoned decisionmaking. As Commissioner Begeman pointed out in her dissent from the Decision, "[t]he Department of Transportation estimated that NITL's proposal would affect 2.1 percent of revenue and 1.3 percent of carloads, figures that are considered significant within the agency." Decision at 34.

The Board's proposed rules differ from the rules proposed by NITL that were the subject of EP 711. In fact, prong one on its face is broader than the NITL proposal. But the Board made no effort to determine how much larger the impact of its proposal would be than the original NITL proposal, which, even at the very modest level indicated by DOT, was at a level "considered significant within the agency." As explained below, the Board also failed to consider other important evidence developed in EP 711 regarding the possible impact of expanded mandatory switching on the industry and failed even to ask the question whether there were any public benefits that might justify the risk of adverse impacts on the rail network from relaxed standards for forced switching.

1. Scope of the Impact of the Proposed Rules

AAR's witness Michael Baranowski of FTI explains in his supporting verified statement that the potential scope of the Board's proposed rule is considerably broader than the potential scope of the NITL proposed rule that was the subject of evidence in EP 711. In particular, the Board's "public interest" test in prong one permits shippers to seek a forced switching order regardless of market conditions, rate levels, or current availability of transportation alternatives. Mr. Baranowski determined that over 75% of non-exempt carloads in the 2014 Waybill Data are originated or terminated within a station that is served by multiple carriers or within 10 miles of an interchange with another rail carrier, thus falling within the universe of carloads potentially subject to forced switching under the Board's proposed rules. Even under prong two, which limits the availability of forced switching to shippers served by a single carrier with market dominance, Mr. Baranowski shows that the number of carloads potentially subject to forced switching is more than three times the level that the Board considers to be "significant."

Decision at 34 (Commissioner Begeman noting that a proposal affecting 1.3 percent of carloads is considered "significant" by the agency).[53]

2. Impact on Network Cost and Efficiency

The Board is clearly aware that an expansion of mandated switching could adversely affect the efficiency of the rail network and the quality of rail service. Reduced efficiency and reduced quality of service impose costs on all rail shippers. The Board itself noted in EP 711 that "we need more precise information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations." EP 711 Notice, at 8. The evidence presented in EP 711 showed that an expansion in reciprocal switching could have a substantial adverse impact on the efficiency of rail service and service quality. The evidence presented in that proceeding was compelling and remains unrebutted.

AAR's witness William Rennicke explained in testimony he presented on behalf of AAR in EP 711 and reiterates in his supporting statement here how post-Staggers railroad service and productivity improvements were linked to rationalization of rail networks and reduction of interchanges, switches, and car handlings.[54] As Mr. Rennicke explains, "mandated switching would erode the operating cost and efficiency gains made by the rail industry since the 1980s." Rennicke V.S. at 7. Mr. Rennicke further explains that mandated switching requires an increase in car-handlings that inevitably increases the risk of a service failure, and the risk increases substantially as the complexity of the required switching operations increases, as it would in many terminal areas. *Id*. at 8-12.

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[53] Mr. Baranowski explains that, due to limitations in the Waybill Data, his estimate of impact under prong 2 is likely understated.

[54] See Opening Comments of the Association of American Railroads, EP 711, Verified Statement of William J. Rennicke (filed Mar. 1, 2013)("Rennicke 711 Op. V.S.).

In EP 711, AAR's member railroads also submitted substantial evidence on the impact of mandated switching on operations. CSX described the many steps railroads have taken to increase operating efficiency since the passage of Staggers, including the extensive use of "run-through" trains in interline movements, blocking of cars into groups that go to the same intermediate yard, serving yard, interchange point, or ultimate destination, focusing efforts on a limited number of high-volume interchange points, and, in general, aggressively managing traffic to ensure that traffic moves across the network as fluidly as possible.[55] CSX then detailed how mandated switching would disrupt these operations, degrading service and adversely affecting yard operations.[56] NS and UP submitted extensive comments emphasizing the same points.[57]

Railroad witnesses also testified at the March 26, 2014 hearing in EP 711 that such switching would disrupt service and congest the rail network and they described the vulnerability of the complex U.S. rail network to congestion.[58] Less than two weeks later, many of the same witnesses addressed in Ex Parte 724 the Board's questions about the serious service issues arising from the weather and the resulting Chicago-based congestion and its effects on rail service in much of the country. At the same hearing, shippers described how much they depended on reliable rail service and many expressed frustration about the lack of rail capacity

[55] CSX 711 Op., at 27-33.

[56] *Id.* at 29-37, 43-47.

[57] NS 711 Op., at 73-79, and attached Verified Statement of Fred M. Ehlers, at 6-9; UP 711 Op., at 22-28.

[58] *See, e.g.*, Testimony of Cressie Brown, CSX Transportation Inc.'s Vice President of Service Design, Tr. at 13-24; Testimony of Rush Bailey, Norfolk Southern Corp. Assistant Vice President of Service Management, Tr. at 24-33; Testimony of Tom Haley, Union Pacific Assistant Vice President, Networking Capital Planning, Tr. at 33-43.

adequate to deal with 2014 traffic surge compounded by weather-related disruptions.[59] The Board's Decision ignores all of this evidence.

For comparable movements, single-line service provided without a switch to another railroad is ordinarily more efficient and cost-effective than service involving a switch or interchange to another railroad. NITL itself admitted as much in its opening comments in the original 711 proceeding. Service involving a mandated switch is less efficient because, "[b]y its definition, it requires a switch to another carrier, a switch that costs both time and money."[60] NITL further acknowledged that "at the end of the day the transportation provided by the accessing carrier is unlikely in all cases to be as timely as the service provided by the carrier actually serving the shipper's facility, because of the need for the switch."[61] There is nothing new in these observations. As discussed above (*see* footnote 44), the advantages of single-line service were widely recognized and cited as justifications by the ICC and the Board for the consolidations and network rationalizations that occurred post-Staggers.

In addition to an overall degradation in the efficiency and productivity of the rail network, forced switching could produce damaging service failures. In the Decision, the Board expresses concern about the "potential for operational challenges in gateways and terminals that are vital to the fluidity of the rail network." Decision at 17. Indeed, the Board even cites service crises that are "stark reminders that local congestion can turn quickly into regional and national backlogs, affecting shippers of all commodities." *Id*.

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[59] *See, e.g.*, *United States Rail Service Issues*, STB Ex Parte No. 724, April 10, 2014 Hearing Tr. at 32, 42-44, 47-49, 52, 92-95, 123-24, 126, 128, 130, 330, 332.

[60] Opening Submission of the National Industrial Transportation League, EP 711, at 49 (filed Mar. 1, 2013).

[61] *Id.*

The Board's concern over the potential for a widespread decline in service as a result of expanded use of forced switching is well founded, as explained by Mr. Rennicke in EP 711 and in support of AAR's comments here. But instead of confronting the potential degradation in service and efficiency due to mandated switching, the Board offers nothing more than the expectation that its proposed "case-by-case" approach will permit "a greater degree of precision . . . mitigating the chance of operational challenges in a given area." Decision at 17. As Mr. Rennicke explains in his supporting verified statement here, a case-by-case approach to assessing potential network service impacts is wholly inadequate, even if the Board permitted broad evidence on potential network effects outside of the area directly involved in the switching operation.[62] It is very difficult to predict how inefficiencies or switching-induced delays in one part of the network will affect other areas of the network. Moreover, litigation in individual cases will not permit an evaluation of the cumulative impact of forced switching over time. In complex networks like the railroads, it is next to impossible to determine when the next delay or inefficiency will bring about widespread congestion.

3. Impact on Railroad Revenues and Ability to Invest

The Decision is silent concerning how the proposed rule would affect railroad revenues and the ability and willingness of railroads to continue to invest in infrastructure necessary to meet national transportation goals. The absence of any discussion of the impact of expanded switching orders on rail revenues and investments is particularly troubling given that the Board is required by statute to "make an adequate and continuing effort to assist" carriers in attaining

[62] The Decision, at 18, suggests that the Board would limit evidence of impact to the specific switching arrangement at issue: "Individual reciprocal switching proceedings would not be an appropriate forum to litigate, for example, the general merits of reciprocal switching as a statutory remedy, the general health of the rail industry, or revenue adequacy. Accordingly, we expect the parties' presentations would be focused on the particular proposed switching arrangement and would not attempt to litigate broad regulatory policies."

adequate revenue levels. 49 U.S.C. § 10704(a)(2). Through this provision, Congress has expressly directed the Board to consider the costs its regulations will impose on railroads. The Board cannot possibly satisfy its duty of assisting railroads in attaining adequate revenues if it has no idea, and has not even considered, what the effect of proposed regulations would be on railroad revenues.

Once again, the Board was keenly aware of the potential for mandated switching to adversely affect railroad revenues when it requested comments in the original EP 711 proceeding. The Board recognized that an expansion of forced switching would reduce or eliminate the ability of the incumbent railroad to engage in differential pricing, which the ICC and the Board have long understood to be critical for railroads to reach and sustain financial viability. The Board was explicit about its concern:

> [T]his Board must consider the impact of the proposal on the financial health of the railroad industry. To remain financially sound, carriers must be allowed to engage in "demand-based differential pricing" – that is, in order to recover the substantial joint and common costs of its network, a railroad must be able and permitted to charge different customers different prices based on their different levels of demand for transportation services. If a railroad is unable to recover these joint and common costs, it will not be able to earn adequate revenues.[63]

Responding to railroad concerns expressed in EP 705 that curtailing differential pricing through reciprocal switching orders would adversely affect railroad revenues, the Board indicated: "That concern merits careful consideration, as we want to ensure the rail industry is able to continue to invest adequately in rail network infrastructure improvements."[64] Despite the Board's recognition of the likely adverse impact on the availability of revenue to make investments, there

[63] EP 711 Notice, at 7.

[64] *Id.*

is no consideration of the revenue impact of the proposed rules in the Board's Decision. And the Decision does not even mention differential pricing.

The Decision also makes no effort to assess the impact of the proposed rules on the willingness and ability of railroads to make necessary investments.[65] Again, this is a factor that the Board is bound by statute to consider. The statute includes as part of its definition of "adequate" revenues those revenues sufficient "to support prudent capital outlays" and "permit the raising of needed equity capital." 49 U.S.C. § 10704(a)(2). More recently, Congress emphasized the point by adding language requiring that adequate revenues must cover "the infrastructure and investment needed to meet the present and future demand for rail services."[66]

Mandated switching could have serious adverse effects on investment. As Mr. Rennicke explained in his testimony in EP 711, railroad capital investment generally tracks revenues. Therefore, the reduction of revenues that would be produced by expanding mandated switching would inevitably affect the level of capital spending on rail infrastructure.[67] But perhaps more important, the uncertainty created by giving shippers the ability to seek forced switching without any showing of need would make it difficult to develop and implement an effective investment plan. The possibility that investments would be made available to a railroad's competitors could create disincentives to invest in areas potentially subject to forced switching even where market

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[65] Inclusion of an "investment" factor under the public interest prong does not satisfy the Board's obligation to evaluate the extent to which the proposed rule would impair the willingness and ability of railroads to make investments. Given the strictures the Board has placed on the evidence to be considered in individual cases, there might be no forum in which railroads could raise concerns about the broader impact of mandated switching on investment.

[66] The language was added to section 10704(a)(2) by the Surface Transportation Board Reauthorization Act of 2015, Pub. L. 114–110, § 16, 129 Stat. 2228, 2238 (2015).

[67] *See, e.g.*, Rennicke 711 Op. V.S., at 73-83. *See also* the comments of other railroads, including CSX 711 Op., at 47-48; UP 711 Op., at 67-72.

conditions would otherwise justify investments. The Board failed to consider any of these potentially serious impacts of the proposed rules.

4. Failure to Consider Reliance Interests

As the Supreme Court recently stated, when an agency reverses an existing rule, it must "be cognizant that long standing policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515). Railroads' reliance on the Board's existing access standards in configuring their networks and targeting their capital investments should be readily apparent to the Board. Many of today's railroads made substantial investments in mergers in reliance on the basic configuration of the networks. They enhanced the value of these networks through post-merger investments that increased their ability to handle traffic efficiently. Given the CARs, there was no reason to expect that the Board would restructure these networks through forced switching orders, stranding the investments the railroads had made. There is plentiful evidence of railroad reliance. UP, for example, explained in its opening comments in EP 711 how it went to great lengths to reconfigure its network to provide efficient, single-line service.[68] Similarly, when approving the Conrail transaction, the Board recognized that the new opportunities for single-line service created by the transaction would "spur both CSX and NS to make substantial new investments in improving rail infrastructure."[69] The Board failed even to consider railroad reliance on the CARs.

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[68] *See* UP EP 711 Op., at 14-19. *See also* Comments of Union Pacific Railroad Co., *Competition in the Railroad Industry*, STB Ex Parte No. 705, Verified Statement of Lance M. Fritz (filed Apr. 12, 2011).

[69] *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, 3 S.T.B. 196, 249 (1998) (emphasis added).

5. Lack of Public Benefits

In addition to the Board's failure to estimate the magnitude of costs that would result from the proposed rules, the Board failed to consider whether there would be any countervailing public benefits. Mark Fagan explains in his supporting verified statement that the identification of potential public benefits from new regulation is key to ensuring rational regulatory policy. Particularly where costs could result from new regulation, it is critical not just to estimate the magnitude of those costs but to ensure that there are benefits to the public that would outweigh them.

To determine whether there are benefits to the public from a proposed regulation, it is first necessary to identify the problem sought to be addressed. Mr. Fagan explains that the fundamental flaw in the Board's Decision here is the failure to identify the problem to be solved with expanded forced switching, which makes it impossible to determine whether *any* public benefits will result from the proposed rules, let alone benefits that would outweigh the potential costs of more intrusive regulation. As Mr. Fagan explains, "there is no demonstration of the problem that has arisen in the intervening years, no discussion of the range of possible solutions to that problem or why mandated switching is the best of the possible solutions. In the absence of a clear problem statement, there is no basis for a reasoned analysis." Fagan V.S. at 2.

C. The Board's Failure to Articulate any Coherent Policy Underlying the Proposed Rules Renders Them Vague and Violates the APA

The Board's proposal to examine individual switching requests on a case-by-case basis is not a substitute for determining in advance of the proposed rule change whether the new rules will advance the public interest. In cases brought under prong two, the proposed rules do not even provide for an assessment of the public interest. Prong one calls for evidence relating to public interest considerations, but the Board provides no guidance on how it will assess the

evidence. The lack of any coherent policy underlying the proposed rules renders the rules impermissibly vague and inadequate under the APA.

Moreover, the Board fails to explain why it has chosen to eschew any regulatory framework for reciprocal switching orders and instead plans to rely on case-by-case litigation under broad and non-specific statutory language. The APA requires a reasoned and well explained justification for a change in regulatory policy. As the Supreme Court recently explained, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino*, 136 S. Ct. at 2125. But the Board fails to provide any explanation of why it is appropriate to leave the industry without any guidance as to how reciprocal switching requests will be addressed in the future.[70]

Commissioner Begeman's observations are directly on point here: "The question of impact, and the burden of analyzing that impact, cannot simply be avoided by promising to adjust or improvise other or new results on the fly."[71] The Board has not presented a clear vision of what it seeks to accomplish with the new rules or how it will avoid the problems and potential harms that could result from a change in the rules. When an agency does away with a regulatory framework that has existed for decades, it is imperative that the agency have a defined goal and a clear set of guidelines as to future implementation of its regulatory responsibility. The Board's reliance on case-by-case litigation is an excuse to avoid setting a clear regulatory agenda and it renders the Board's proposed rules invalid.

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[70] In contrast, when the ICC chose, in 1983, to rely on case-by-case litigation of reciprocal switching rather than adopt a regulatory framework, the ICC expressly justified its regulatory approach on grounds that there was no evidence of a problem in rail markets that would lead to significant litigation. *Standards for Intramodal Rail Competition*, ICC Ex Parte No. 445 slip op. at 8-10 (served July 7, 1983). Here, the Board appears to want to encourage the use of forced switching, which makes it all the more irrational to leave the rail industry and its users without a regulatory framework.

[71] Decision, at 35 n.31.

In many other ways, the proposed rules are impermissibly vague, as briefly outlined below:

Definition of Reciprocal Switching: The Board has confined the new rules to reciprocal switching, but it has not attempted to define the limits of reciprocal switching or explain how the Board will distinguish or address requests for forced switching that are really attempts to prescribe alternative through routes. Through route prescriptions remain subject to the existing competitive abuse standard.

Eligible Traffic/Facilities: The second prong of the proposed rule requires a showing of market dominance, which must be made with respect to individual traffic movements between specified origins and destinations. Thus, it appears that the Board considers switching orders under the second prong to be traffic-specific. But the first prong contains no express provision limiting the use of switching to particular movements, raising the question whether the Board intends for switching remedies under the first prong to cover all movements to or from a particular facility, and if so, what the rationale would be for imposing such a broad switching order.

TIH Traffic: The Decision recognizes that the safety of a forced switch would be relevant in determining whether to grant a switching request but the proposed rules do not indicate how the safety risks associated with the increased handling of TIH through forced switching will be evaluated or if TIH movements will be excluded because of the risks of subjecting those movements to increased handling.

Facilities Owned or Financed by Railroads: The proposed rules cover switching arrangements involving "the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought." The language of the proposed rules suggests that the rule is intended to

cover only facilities owned by shippers, but it is unclear whether a shipper could also seek a switching order from facilities that are owned by or have been financed by the railroad being ordered to provide a switch.

Labor Protection Costs: Railroads ordered to provide switching service could experience significant disruption in work assignments within and across yards, with railroads needing to increase work in some yards, perhaps over short or indeterminate time periods, and cutting back on job assignments in other yards. The proposed rules could also result in changed volumes of line-haul traffic, thereby affecting crew requirements on line-haul movements. The proposed rules are silent on the responsibility for any required labor protection costs.

Duration of Relief: The Board chose not to specify a limit on the duration of relief, choosing instead to leave access relief in place "as long as the criteria for each prong are met." Decision at note 21. This approach is inconsistent with the Board's primary remedial power under the statute to address unreasonable rail rates. There are defined time limits on rate prescriptions based on the recognition that regulatory interference is supposed to be limited in scope and time. Particularly since shippers appear to view forced switching as an alternative to rate regulation, there is no justification for an open-ended switching remedy that would remain in place indefinitely.

Further, given the broad and ambiguous nature of the criteria that might be considered under prong one, the Board's approach could leave switching orders in place indefinitely. A railroad seeking removal of a switching order would effectively have to mount an entire "public interest" case, which is the burden of the party seeking regulatory intervention. And, since the second prong of the proposed rules requires only a showing of market dominance, a forced switching order would effectively restructure the facility from a single-served facility to a facility

served by multiple railroads. As noted previously, it is clear that access remedies were not intended to be a vehicle to restructure the rail industry.

V. SPECIFIC ISSUES ON WHICH THE BOARD HAS SOUGHT COMMENT

For the reasons discussed above, AAR does not believe that the Board has justified any change in the existing CARs. Subject to this caveat, AAR provides the following comments on specific aspects of the Board's proposed rules in response to the Board's request for comments on these issues.

A. Reasonable Distance

Under both prongs of the proposed rules, the shipper seeking a reciprocal switching order must show that "there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching." The Board specifically invited parties to comment on the "reasonable distance" standard "in an effort to provide guidelines to parties that may seek switching under the proposed regulations." Decision at 21.

There is no basis in the statue for using the "reasonable distance" concept to expand reciprocal switching beyond terminal areas. In the terminal access context, section 11102(a) provides that terminal access rights may include access to "main-line tracks for a reasonable distance outside of a terminal." Section 11102(c), which authorizes the Board to order reciprocal switching, does not contain any "reasonable distance" language or other language suggesting that forced switching could be used to create what is in effect a forced interchange outside a terminal area.

Limiting reciprocal switching to terminal areas would also be consistent with the historical understanding of the term "reciprocal switching." The term "reciprocal switching" was a term of art in 1980, when Congress added the predecessor to § 11102 to the statute, that

spoke about switching within a terminal area. *See, e.g., Switching Charges and Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971). "It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry." The Seventh Circuit recognized that the language of the provision referring to "reciprocal switching," had significance in determining the scope of the new remedy: "Reciprocal switching occurs at stations or terminals served by more than one carrier. A common station or terminal area is, therefore, a prerequisite for such switching." *Central States*, 780 F.2d at 675. The ICC, in *Midtec II* noted that "[i]t is not clear whether reciprocal switching can be required outside a terminal area." 3 I.C.C. 2d at 178 n.17.

Restricting reciprocal switching orders to terminals would also distinguish them from requests for prescription of through routes under section 10705. Forcing a carrier to establish an alternative through route must follow the directives Congress laid out in section 10705, which are expressly designed to protect the long haul. An order to perform any switching services outside a terminal area should be required to satisfy the express terms of 10705(2)(b). It would not be appropriate to allow shippers to avoid the statutory requirements of section 10705 by simply calling such an interchange a "switch."

B. Compensation

The Board is supposed to play a limited role in setting compensation for switching agreements. Congress directed the Board to set compensation for a forced reciprocal switching agreement only "if the rail carriers cannot agree upon such conditions and compensation within a

reasonable period of time." 49 U.S.C. § 11102(c)(1). Although the agency's role is limited, the Board has acknowledged the "importance of the issue" of compensation because of "the impact of the [forced access] proposal on the financial health of the railroad industry." EP 711 Notice, at 7. The Board's reasoning was sound:

> To remain financially sound, carriers must be allowed to engage in "demand-based differential pricing" – that is, in order to recover the substantial joint and common costs *of its network*, a railroad must be able and permitted to charge different customers different prices based on their different levels of demand for transportation services. If a railroad is unable to recover these joint and common costs, it will not be able to earn adequate revenues.

Id. (emphasis added).

The Board asks for comments on two alternative access pricing methodologies, but neither satisfies the recognized need to preserve railroad differential pricing. The first methodology is based on a fully-allocated cost approach set out in *Switching Charges & Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65 (1971), which the ICC already rejected as "arbitrary and economically unsound." *Intramodal Rail Competition*, 1 I.C.C.2d at 835. The second approach, based on the agency's SSW methodology, has generally been restricted to circumstances "where trackage rights have been imposed to remedy anticompetitive effects of a consolidation." *Id*. Those circumstances are not relevant here.

Any consideration of compensation must be based on recognition of the central role of differential pricing in rail markets and the statutory directive for the agency to promote rail carriers' revenue adequacy and their ability to make investments necessary to meet demand. The ICC and the Board "have consistently recognized that differential pricing is crucial to the viability of the industry." *Intramodal Rail Competition – Proportional Rates*, 1990 MCC LEXIS 70 at * 7-8 (April 17, 1990). The agency has explained over and over why this is so:

> We start with the basic principle that rail carriers must differentially price their services. As explained more fully in *Coal Rate Guidelines,* there is a large amount of common (unattributable) costs inherent in the railroad industry cost structure, and the mix of competitive and captive traffic handled by railroads prevents a carrier from being able to recover a pro rata portion of those common costs from all traffic. Therefore, railroads must be able to price their services differentially so as to recover a greater percentage of their common costs from traffic with a greater degree of captivity (i.e., less demand elasticity).

Amstar Corp. v. ATSF, 1995 ICC LEXIS 256 at * 12-13 (Sept. 15, 1995) (internal citation omitted). As such, "the core regulatory principle in the rail industry is that a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn adequate revenues." *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 20 (served Oct. 30, 2006). The federal courts agree.[72]

Any mandatory compensation scheme that focuses only on the costs of switching, including the required reasonable return on the terminal facilities, misses the big picture. Privately owned and maintained U.S. freight railroads move the economy and drive commerce by safely, efficiently, and affordably connecting businesses, goods, and people with an expansive rail network. These networks are the backbone of the nation's economy and an enabler to many other industries. The rail industry proudly serves its role as the engine of economic growth by

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[72] *See, e.g.*, *Union Pacific R.R. Co. v. United States*, 637 F.2d 764, 767, n.2 (10th Cir. 1981) (Pursuant to the 4-R Act, "the railroads may propose a rate which includes a price increment over and above fully allocated costs in order to assist them [*sic*.] attain adequate revenue levels. This method of 'differential pricing' has been judicially approved as a valid means of achieving the ultimate goal of the 4 R Act which is to financially regenerate the nation's railroads."); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124-125 (2d Cir. 1983) (explaining that "Congress in the Staggers Act recognized that railroads must engage in 'differential pricing.'"); *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999) (explaining that the "Board has recognized that an important part of achieving revenue adequacy is differential pricing."); *Union Pacific R.R. Co. v. STB*, 628 F.3d 597, 600 (D.C. Cir. 2010) (by "statute, rail carriers are authorized to engage in a certain amount of demand-based differential pricing in order to earn 'adequate revenues'").

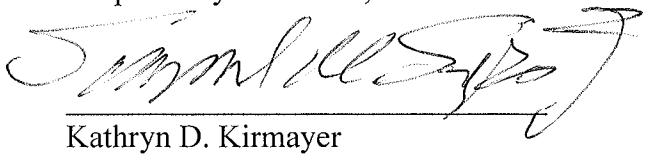
making massive private investment into these massive networks – more than $600 billion in the past 35 years, including $30 billion in 2015 alone. To remain financially sound, to continue to make these extraordinary levels of private investment, and to keep on driving economic growth in our economy, the Board must protect railroads' ability to engage in "demand-based differential pricing" to recover the substantial joint and common costs *of their networks*.

The Board must conform any compensation scheme to the core regulatory principle demanded by Congress since 1980. Forced access cannot be used as a regulatory cudgel to beat down the proper and lawful exercise of demand-based differential pricing that is "crucial to the viability of the industry." *Intramodal Rail Competition – Proportional Rates*, 1990 MCC LEXIS 70 at * 7-8 (April 17, 1990).

VI. Conclusion

The Board should repudiate its proposed rules and retain its existing competitive abuse standard. That standard clearly comports with the legal requirement that a shipper show need to justify an order of forced switching. The Board has identified no substantive defect with the existing competitive abuse standard. Nor did the Board provide any rational justification for replacing the existing rule. Replacing a valid standard with one that would allow some shippers to obtain forced switching on demand and that could fundamentally restructure the rail industry is contrary to law. A desire for two carrier service to artificially reduce rates does not rise to the level of a need for the regulator to mandate a switch. The DC Circuit *Midtec* decision is clear on this point: "If the Commission were authorized . . . to prescribe reciprocal switching . . . whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition." 857 F.2d at 1507.

Respectfully submitted,



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October 26, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No.1)

Reciprocal Switching

Verified Statement
of

Michael R. Baranowski

October 26, 2016

I. INTRODUCTION

I am Michael R. Baranowski of FTI Consulting, Inc. I am a Senior Managing Director and head of FTI Consulting's Network Industries Strategies (NIS) practice. I have been asked by the Association of American Railroads (AAR) to review the Surface Transportation Board's ("Board") July 27, 2016 decision in Ex Parte 711 (Sub-No. 1) Petition for Rulemaking to Adopt Revised Competitive Switching Rules and to estimate the number of 2014 carloads potentially subject to the reach of the new proposals outlined therein.

II. PROPOSED CHANGE TO RECIPROCAL SWITCHING REGULATION

The Board proposes new regulations in Docket No. EP 711 (Sub-No. 1) that would allow a party to seek a reciprocal switching prescription that, according to the Board, is either practicable and in the public interest or necessary to provide competitive rail service. Specifically, the Board is proposing a two-pronged approach that includes a practicable and in the public interest prong and a necessary to provide competitive service prong. For the practicable and in the public interest prong, the Board proposes three eligibility criteria that shippers must satisfy to obtain a switching prescription: (1) that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s); (2) that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching; and (3) that the potential benefits from the proposed switching arrangement outweigh the potential detriments. It also proposes three criteria that shippers must satisfy to show that switching is necessary to provide competitive rail service: (1) that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by a single Class I rail carrier; (2) intermodal and intramodal competition is not effective with respect to the

movements of the shipper(s) and/or receiver(s) for whom switching is sought; and (3) there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.

III. OVERVIEW OF ANALYSIS

A. Data Sources

For this proceeding the Board has made available to AAR the 2014 Carload Waybill Sample (CWS) data. The CWS is a stratified sample of carload waybills compiled by the Board for all U.S. rail traffic submitted by those rail carriers terminating 4,500 or more revenue carloads annually. The file contains some details of each railroad shipment including the origin, destination, commodity, revenue, identification of railroads participating in each shipment, the junction points between railroads for interline moves, miles, railroad car type and a host of other shipment related data. It is not possible, due to data limitations, to carry out a shipper-specific or terminal-specific analysis of the potential impact of the Board's proposals using the 2014 CWS. This is because the CWS does not associate movement data with specific shippers or otherwise disclose the identity of specific shippers. Therefore, while the effects of the Board's proposal will occur at the specific shipper level, the analysis using the CWS must be carried out at the reported station location level.

In addition, although the CWS identifies stations or junctions at which traffic was interchanged during 2014, it does not provide a complete list of working interchanges or pinpoint their geographic locations. Because the CWS did not contain this data, my analysis relied on location information in the Centralized Station Master ("CSM") and Junction Interchange File ("JI") to identify the relative proximity of junctions to stations reported in the CWS. The CSM is a geographic location file which contains data about rail and motor carrier points for North

America and international areas. This file is primarily used by railroads to help plan freight movements from origin to destination in an efficient and timely manner. CSM rail station records are uniquely identified by combination of the Standard Carrier Alpha Code (SCAC) field and Freight Station Accounting Code (FSAC) field. They can also be identified uniquely by their respective Standard Point Location Code (SPLC). The CSM contains geographic latitude and longitude coordinates for corresponding locations identified in the CWS.

The JI file is the basis for identification of inter-carrier activities. This file contains records for each junction that identify the reporting marks of the railroad carriers that interchange at that junction. It also describes physical locations and defines the types of activities which occur at that location including boundary crossings, per diem relief points, rail to rubber interchange, shop interchange, water interchange and traditional rail to rail interchange.

There are limitations within the available datasets that affect my estimates of the number of carloads potentially affected under the two prongs of the Board's proposal. As mentioned above, the CWS does not identify individual shippers. As such, it is not possible to use it to identify particular shippers located at multi-served stations that might today be closed to reciprocal switching or may not be otherwise accessible to all of the carriers serving a particular station. My analysis does not consider any carloads originated or terminated at multi-served stations to be served by only one railroad and therefore my estimate understates the potential carloads eligible under the competitive access prong for shippers that are open only to one rail carrier at stations that are served by more than one railroad. It is also not possible from the CWS to identify specific shippers whose facilities are currently accessed by more than one carrier that might not have an incentive to seek a switching prescription even if they are eligible to do so. As

a result, my analysis may overstate the number of shippers potentially affected under the Board's public interest prong.

B. Analysis Details

For the analysis, I started with the confidential, unmasked, version of the 2014 CWS provided by the Board to identify SPLCs served in 2014 by single rail carriers. I removed all intermodal shipments since intermodal rail traffic originates and terminates at facilities owned by railroads rather than at shipper facilities. I also removed other exempt traffic that is not currently subject to Board jurisdiction. In addition to the CWS, I relied on the CSM and JI files to identify active railroad junctions and publicly-available information from railroad websites regarding the location and types of various rail-related facilities, such as automotive terminals, coal wharves, and iron ore wharves. These steps produced the starting point for my analysis of the potential carloads affected under Prong 1 – the public interest prong and Prong 2 – the competitive rail service prong.

1. Public Interest Prong

For my analysis of the number of carloads potentially affected by the Board's public interest prong, I identified all of the non-exempt Class I railroad carloads originating or terminating at stations served by more than one Class I railroad and at single-served stations within three distinct rail mileage bands from junctions. The mileage bands I used are 10, 15 and 30 rail miles from the nearest junction. Table 1 below summarizes my results.

Table 1
Summary of 2014 Non-Exempt Carloads Potentially Affected by Board's Prong 1 Proposal

	Distance to Junction		
	Within 10-Rail Miles	Within 15-Rail Miles	Within 30-Rail Miles
Potentially Affected Non-Exempt Class I Carloads Under Public Interest Prong	11,344,308	11,764,416	12,548,942
Percent of All Class I Carloads	55.8%	57.9%	61.8%
Percent of Non-Exempt Class I Carloads	75.7%	78.5%	83.7%

As Table 1 shows, approximately 76 percent of non-exempt carloads are potentially affected by the Board's Prong 1 proposal at the 10 mile mileage threshold.

2. Competitive Access Prong

For my analysis of the potential number of carloads affected by the Board's competitive rail service prong, I identified all of the non-exempt Class I railroad carloads originating or terminating at single-served stations with revenue to variable cost ratios at or above 180 percent within the same three distinct rail mileage bands from junctions. Table 2 below summarizes my results.

Table 2
Summary of 2014 Non-Exempt Carloads Potentially Affected by Board's Prong 2 Proposal

	Distance to Junction		
	Within 10-Rail Miles	Within 15-Rail Miles	Within 30-Rail Miles
Potentially Affected Non–Exempt Class I Carloads Under Competitive Access Prong	992,435	1,477,304	2,454,418
Percent of All Class I Carloads	4.9%	7.3%	12.1%
Percent of Non-Exempt Class I Carloads	6.6%	9.9%	16.4%

As Table 2 shows, almost seven percent of non-exempt carloads are potentially affected by the Board's Prong 2 proposal at the 10 mile mileage threshold.

VERIFICATION

I, Michael R. Baranowski, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I am qualified and authorized to file this statement.

Executed: October 26, 2016

Michael R. Baranowski

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No.1)

Reciprocal Switching

Verified Statement
of

Mark Fagan

October 26, 2016

VERIFIED STATEMENT OF MARK FAGAN

1. Introduction

I am Mark Fagan. I am a Lecturer in Public Policy at Harvard Kennedy School, Harvard University, where I teach courses on management, policy and advocacy. Previously I was a Senior Fellow at the Center for Business and Government at Harvard Kennedy School where I conducted research on the impacts of open access on the railroad industry. I am also a founding partner of Norbridge, Inc., a management consulting firm with distinctive expertise in transportation and logistics.

My research at Harvard University includes examining the impact of regulation on markets. A recent focus has been the impact of open access regulation on public value creation. In prior research, I wrote about the impact of deregulation in the railroad industry, including a paper published by *Transportation* examining the impact of regulatory differences on rail freight share between the United States and the European Union. I have also published research results on the risk externality of hazardous materials transportation. I have also examined the impact of electricity restructuring in the United States. The electricity work has been published in the *Electricity Journal* and cited in the *New York Times*.

I have worked with shippers and carriers as a management consultant for more than 30 years. As Vice President of Mercer Management Consulting (now operating as Oliver Wyman), I helped clients in a range of industries improve their supply chain efficiency and cost effectiveness. During my time at Mercer, I developed a distinctive expertise in sourcing strategy, helping clients negotiate lower total lifecycle costs with suppliers, including transportation providers. Since co-founding Norbridge, Inc., I have worked with Class I and shortline railroads in the United States and a major freight railroad in Australia to enhance their operational and commercial performance.

I submitted a verified statement to the Surface Transportation Board (STB) in Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, on behalf of the Association of American Railroads. That submission highlighted the need for a benefit-cost analysis to determine if the mandated switching proposal under consideration in that proceeding was in the public interest. The statement also identified the concern that mandated switching would likely lead to a wealth transfer from railroads to shippers, not a gain in social welfare.[1] The basis for these conclusions was research I conducted evaluating the impacts of Australia's mandated access regulation.

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[1] The term "public value creation" refers to an actual increase in economic value rather than a simple transfer of wealth between entities. Thus, to create public value, competition must lead to sustained competition-driven efficiencies, cost reductions, service improvements, investments, innovations and/or expansion of rail traffic attracted from more expensive transportation modes, not simply reduced railroad margins.

The purpose of this submission is to highlight four critical flaws in the STB's Notice of Proposed Rulemaking (NPR)[2] in this proceeding regarding mandated switching. First, the NPR fails to clearly define the problem that the rule is intended to solve. Without a clear articulation of the problem, it is impossible to create effective policy. Second, the NPR lacks a macro-level benefit-cost analysis to support mandated switching. Sound policy making requires a rigorous evaluation, especially of a change in longstanding policy to ensure that a change in policy is necessary and that the policy change will produce net public benefits. Third, the Board's proposed methodology for evaluating mandated switching on a case-by-case basis is not a substitute for macro-level benefit-cost analysis. The railroad system is a network; failure to look at mandated switching in total rather than case-by-case can lead to suboptimal decisions. Finally, the STB does not learn from failings of mandated access in Australia, where costs of mandated access outweighed public benefits.

The STB's mission is to promote reliable service, reasonable rates, and a financially healthy railroad industry within the confines of its statutory power, court interpretations of that power, the structure of the industry, the economic foundations of scale, scope, and density and differential pricing, and the need for a network industry to cover its fixed and common costs. Paraphrasing Vice Chairman Miller, the goal of the STB in this rule making proceeding is to define a proposal for reciprocal switching that satisfies this mission.[3] In my opinion, however, the proposed rules fail to achieve this goal as outlined above and endanger the financial and operational future for rail transport in the United States. These failures are detailed below.

2. Lack of Clear Problem Definition

The STB acknowledges that its proposed rule represents a significant change in decades of policy on reciprocal switching and that such a dramatic shift in statutory interpretation must be based on "reasoned analysis." Yet it never offers such an analysis – there is no demonstration of the problem that has arisen in the intervening years, no discussion of the range of possible solutions to that problem or why mandated switching is the best of the possible solutions. In the absence of a clear problem statement, there is no basis for a reasoned analysis – and the Board never provides such an analysis.

The STB seems to be acting for the sake of acting. What aspect of the STB's mission is not being fulfilled under the current and long-standing reciprocal switching rules? The Board already has the authority to require switching "if the agency determines it 'is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive.'"[4] Moreover, the Board has authority to use its rate reasonableness process to ensure rates reflect competitive conditions. Why is change needed? This question is not answered in the NPR. In the absence of a clearly articulated problem, it is impossible know that the proposed policy will address a valid

[2] *Reciprocal Switching*, STB Ex Parte No. 711 (Sub-No. 1)(served July 27, 2016).
[3] NPR at 31.
[4] NPR at 3.

concern that needs to be addressed. Moreover, without problem clarity it is impossible to analyze the range of possible solutions to that problem or why mandated switching is the best of the possible solutions. Again, the NPR lacks such an analysis.

3. Lack of Benefit-Cost Analysis

Benefit-Cost Analysis (BCA) has been an important tool for developing public policies for more than 40 years. From President Nixon to Presidents Ford, Carter, Clinton and Obama, BCA has been a core principle of rulemaking for Cabinet departments and independent agencies codified thorough a mix of legislation and Executive Orders.[5]

The rationale for using BCA rests on simple logic. Any policy action undertaken by the government should generate more benefits than costs from a societal perspective. While it is not always easy to calculate benefits and costs, a variety of agencies from the Environmental Protection Agency to the Securities and Exchange Commission to the Federal Communications Commission, have defined approaches to BCA.[6] These approaches often reflect not only quantitative but also qualitative factors.

Complementing the logic for BCA is the associated benefit of forcing policy makers to establish a rigorous thought process for defining and evaluating the proposed policy. This begins with an articulation of what is to be accomplished – what is the problem to be solved? As I noted above, this critical step for ensuring appropriate regulatory action is missing here. The BCA continues with an enumeration of the policy evaluation criteria – how will we know the policy is a success? A detailed specification of policy options is defined. Finally, the options are evaluated and policy is set.

Over the span of four decades, the process for conducting BCA has been formalized with guiding principles and structured methodologies. A good example is OMB Circular A-4.[7] The circular highlights the need to (1) clearly define the need for the proposed action; (2) demonstrate that the agency examined relevant alternatives; and (3) evaluate the benefits and costs of the proposed action.[8]

The STB itself calls for a BCA, although not by that name in the NPR: "…the Board must appropriately balance the competing policy considerations in proposing new regulations."[9] BCA is a routinely used methodology to meet the Board's own standard. The Board references the need for a reasoned analysis and to appropriately balance competing policy considerations in its EP 711 Decision. However, the Board fails to offer an approach for achieving these objectives. Specifically, the STB fails to provide a

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[5] Cost-Benefit and Other Analysis Requirements in the Rulemaking Process, Maeve Carey, Congressional Research Service, 7-5700, December 9, 2014 ("Cost-Benefit Requirements").
[6] *Id*.
[7] OMB Circular A-4, "Regulatory Analysis," September 17, 2003.
[8] *See* Cost-Benefit Requirements, note 5 above.
[9] NPR at 13.

concrete and measureable objective for the policy change, at least in part because it has failed to specifically identify the underlying problem. Moreover, the STB does not consider a range of policy options to achieve the objective. Finally, the order fails to include a BCA of the options. In the absence of a rigorous application of the BCA methodology used by numerous government agencies and regulators, the STB is "flying blind" in its proposed mandated switching rule.

4. Case-by-Case Litigation Is Not a Substitute for Macro-Level BCA

The Board proposes a case-by-case process, after the rules are adopted, as its means to "weigh and balance the various rail transportation policy factors..."[10] Case-by-case sounds appealing in as much as it recognizes that the best remedies often depend on the specific circumstances. However, the case-by-case approach is not a substitute for BCA when establishing macro-level policy such as mandated switching. Policy making requires analysis of proposed actions and their impacts on social welfare before an idea is adopted as a policy. Macro-level BCA would enable the STB to understand its proposed rules' impacts prior to their adoption. Such insight would increase the likelihood the right rule is enacted.

Once the right macro-level policy is determined based on BCA, a case-by-case approach might be appropriate for implementing a rule. However, the case-by-case methodology in lieu of BCA is especially troubling considering Prong 2 of the NPR. Here there will be no BCA, not even a consideration of the case-by-case issues that the Board is substituting for a macro-level BCA under Prong 1. The second "necessary to provide competitive rail service" prong provides for no weighing of costs and benefits. Prong 2 requires only that the STB find that intermodal and intramodal competition is not effective for the shipments in question. This criterion has been developed in the STB's rate reasonableness proceedings. In the name of reducing the burden of the rate reasonableness proceedings, geographic and product competition have been excluded despite the important leverage they provide shippers in many situations.

The case-by-case approach is not a substitute for BCA even in the case of Prong 1. First, the STB must show that compelled access generates benefits greater than costs to justify the mandate. The BCA framework enables this determination. Second, the Board has stated that it does not even intend to consider in case-by-case litigation the broad and important policy objectives that would be the subject of a macro-level BCA, like Congress's desire to minimize regulatory intrusion into rail markets.[11] Third, even where the Board looks at a case and determines that mandating reciprocal switching is justified, the cumulative impact of many such rulings could negatively impact service quality to shippers and efficiency of the rail system as a whole. Railroads are networks. Small

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[10] NPR at 15.

[11] NPR at 18 ("we expect the parties' presentations would be focused on the particular proposed switching arrangement and would not attempt to litigate broad regulatory policies.")

impacts in one area can quickly permeate the entire system as was seen during some merger consolidations and as recently as during the winter of 2013/14.

5. Failings of Mandated Access in Australia

The STB should learn from the failings of mandated access in Australia. A comprehensive BCA assessment of the mandated access policy was not conducted in Australia. However, a retrospective BCA that I conducted revealed that the costs of coordination were greater than the benefits once wealth transfer was eliminated.[12]

Mandated access had been in place for over a decade in Australia at the time of my study. There were some rate reductions but social welfare gains were questionable at best. The rate reductions appeared to be small relative to the increased coordination problems and costs associated with access including increased handlings, wheel-rail interface issues, access prioritization, etc.[13] Moreover, the Australian experience suggests that the rate reductions, which were concentrated on the heavyhaul segment of the rail freight market, did not increase the volume shipped by rail. Given that prices for Australia's key rail commodities, coal and ore, are world market prices, the rail rate reductions were largely a wealth transfer from railroads to shippers rather than a welfare or efficiency gain for society as a whole.[14]

A summary of my study findings are: (1) the primary outcome of mandating access was a wealth transfer from railroads to shippers, rather than public value creation; (2) the costs of coordination (a term used to refer to the full range of costs associated with access, from redundant terminal capacity to extra interchange expenses to longer transit times for shippers) were significant; (3) the promise of competition leading to efficiency, investment, innovation, new services and the like had not materialized.

The bottom line is that a thoughtful BCA, that recognized that access driven rate reductions are merely a wealth transfer not a creation of public value, could have led to better public policy decisions.

6. Conclusion

I suspect that the unspoken motive for mandated switching is that the Board has heard from shippers that some of them do not like their rates. If that is the problem to be addressed, then the Board must clearly define the problem, determine whether it is a

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[12] Introducing Competition into Natural Monopoly Industries: An Evaluation of Mandated Access to Australian Freight Railroads, Mark Fagan, Regulatory Policy Program, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, RPP-2007-05, 2007.

[13] *See* Reply Comments of the Association of American Railroads, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Verified Statement of Mark Fagan (filed May 30, 2013).

[14] *See id.*

legitimate problem, assess the options, and then measure the benefits compared to the costs, which would include undermining differential pricing and the ability of railroads to have revenues to contribute to fixed and common costs. The STB also must ensure that the benefits are social welfare gains not wealth transfers.

The introduction of the proposed rules in the absence of a BCA represents a significant risk for both shippers and railroads. In the words of Commissioner Begeman, detailed analysis is required to ensure "unintended consequences" will not result.[15] Defining the problem, conducting a benefit-cost analysis, and learning from the failings of Australia's mandated access policy can lead the STB to the right policy.

[15] NPR at 34.

VERIFICATION

I, Mark Fagan, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I am qualified and authorized to file this statement.

Executed: October 26, 2016

Mark Fagan

Mark Fagan

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

OPENING COMMENTS OF

William J. Rennicke

October 26, 2016

CONTENTS

1. Introduction

I, William J. Rennicke, submit this verified statement in support of the Opening Comments of the Association of American Railroads ("AAR") in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Surface Transportation Board ("Board") on July 27, 2016.

I have 40 years of experience in operations and network planning, with a focus on improving railroad operations and profitability. I began my direct involvement with railroad network planning in 1978, when I was a vice president in the executive department at the Boston & Maine Railroad; it was at this time that the railroad hosted the Federal Railway Administration's Freight Car Utilization Program (FCUP). I was directly responsible for the multi-year joint government and industry effort and was a member of the Class I steering committee. FCUP addressed the catastrophic rail operating problems in the 1970s and became the government-funded foundation for many of the positive network and operations changes that were pursued by most Class I railroads in the ensuing decades.

Oliver Wyman, where I have been a partner for 20 years, is a leading management consulting firm to the rail industry with decades of experience in rail operations and network planning and firsthand knowledge of the penalties that could be incurred for shippers and service levels in the event of random and unplanned-for changes to switching. In addition, Oliver Wyman's Multimodal specialty unit has provided network and operations planning software to five of the seven North American Class I railroads to enhance network performance.

On March 1, 2013, I provided a Verified Statement to the STB on behalf of AAR in the matter of Ex Parte 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, and on May 30, 2013, I provided a Reply Verified Statement in the same proceeding. In this

proceeding, the AAR asked me to review the NPRM, and to comment on how the proposed mandated switching rules might impact the operating issues I presented in my prior statements. After reviewing the NPRM for the current proceeding, I continue to have serious reservations regarding the potential impairment of US railroads' operating performance that would follow from the implementation of mandated switching. Mandated switching would increase operating complexity and the risk of service failures and ultimately would reduce the capital available for the nation's freight rail infrastructure.

Furthermore, I have new concerns about the Board's belief that addressing requests for switching on a case-by-case basis would "allow the Board a greater degree of precision when mandating reciprocal switching."[1] Railroads are not a collection of isolated yards that can be reviewed independently, but rather a highly interconnected network. Without careful, centralized planning, a change at one location can have negative consequences in multiple other locations – and changes in multiple locations can engender compounding effects that lead to widespread service failures. Case-by-case examination of individual switching requests will not enable a full or adequate review of potential service impacts, to the detriment of all users of the rail network.

In summary, the potential issues raised by the current proposed rulemaking approach include:

- <u>Inevitable reductions in efficiency and increased risk of service failures:</u> The Board's decision clearly contemplates an increase in mandated switching. As stated in the NPRM, "The proposed regulations would revise the Board's reciprocal switching rules to promote

[1] Surface Transportation Board, Decision, Docket No. EP711 (Sub-No.1), Reciprocal Switching, July 26, 2016, p. 15 ("Reciprocal Switching NPRM").

further use and availability of reciprocal switching."[2] Thus, there can be no doubt that the Board's objective is to expand reciprocal switching under the proposed rules, and since every switch adds additional work and complexity, mandated switching will have a negative effect on railroad efficiency and lead to an increased risk of service failures.

- Increased railroad uncertainty due to greater shipper control: The lack of specificity in the NPRM would provide shippers with more control over terminal and traffic routing decisions, creating a less stable environment for railroad planning and operations, since railroad operating and infrastructure planners would not be able to predict where and when mandated switching would occur. Shippers would act in their own best interests and likely exploit the rules by frequently altering volumes and carrier choice when they perceive there are tactical advantages in doing so. This creates a situation where the railroads would be faced with a lack of even basic volume planning information at potential mandated switching locations.

- Risk of cumulative service problems: The Board assumes it can adequately identify service problems that would arise from switching on a case-by-case basis. But operational failures are inherently unpredictable, and network effects could arise almost anywhere. The service meltdowns arising after even well-planned mergers or the escalating collection of one-off service failures from a major weather event have shown how easily fragile operating plans can be disrupted. Similarly, compounding service failures could be an unintended consequence of a case-by-case approach. These effects cannot be identified or dealt with in case-by-case litigation over particular switching requests.

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[2] *Id*. at p. 16.

It is undeniable that decreased efficiency and inferior service would result from mandated switching. But nothing the Board says about proceeding on a case-by-case basis mitigates concerns about efficiency and service at all. An insular focus on switch locations provides no opportunity to effectively address broader service implications, particularly those which may be cumulative or that would require complex analysis to weigh service and network impacts. And the rules do not even contemplate that decreased efficiency would be a factor in deciding whether to impose a switch in particular cases under Prong 2 of the Board's proposed rules.

2. Incremental Switching Unavoidably Reduces Efficiency and Increases Risk of Service Failures

The Board's proposal to adopt relaxed switching standards contemplates increased switching operations on the nation's rail network, in the form of government-mandated, non-consensual switching. No one knows exactly how much incremental switching would occur as a result of the proposed rules, but the Board's premise seems to be that there is insufficient government-mandated switching under its current rules. The Board's objective in changing the rules is apparently to increase government-mandated switching. It is indisputable that increased switching would result in:

- Increased operating costs: A switch involves both direct expenses (crew time, locomotive time, track time, fuel usage, etc.) and indirect expenses (train delays due to congestion, increased fleet size due to lower railcar utilization, etc.), just to move the same number of loads.
- Reduced operating efficiency: Railcars that are switched have longer trip times. This reduces car velocity and increases track occupancy, just to move the same number of loads.

- Increased risk of service failure: Every event that occurs on the railroad has a probability of being successfully executed. As the number of events increases – such as the multiple events involved in an added switching move – the cumulative probability of all events for a trip being successful would decrease, thus leading to more service failures.

A. Historical Improvement in Efficiency Through Reduced Interchanges

The operating and financial performance of the US railroad industry has dramatically improved over the past several decades. This performance improvement has been the result of many interrelated factors, but two key drivers have been: 1) the ability of the railroads to simplify their operations by reducing the amount of traffic interchanged with other railroads, and 2) achieving economies of density and scale by concentrating volume. Improving performance by reducing switching is a well-known fact in the industry, as the Board's predecessor, the Interstate Commerce Commission ("ICC") observed over 35 years ago:

> "Interchanging traffic adds to the total cost of handling traffic, including operational cost (car-switching) and clerical costs (recordkeeping). Interchanging freight also adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars."[3]

A more recent analysis of potential service degradation and increased service failures presented below confirms that the ICC observations remain true today.

A reduction in the number of Class I railroads, combined with the elimination of inefficient and often duplicative routes and efforts to close redundant and little-used interchange locations,

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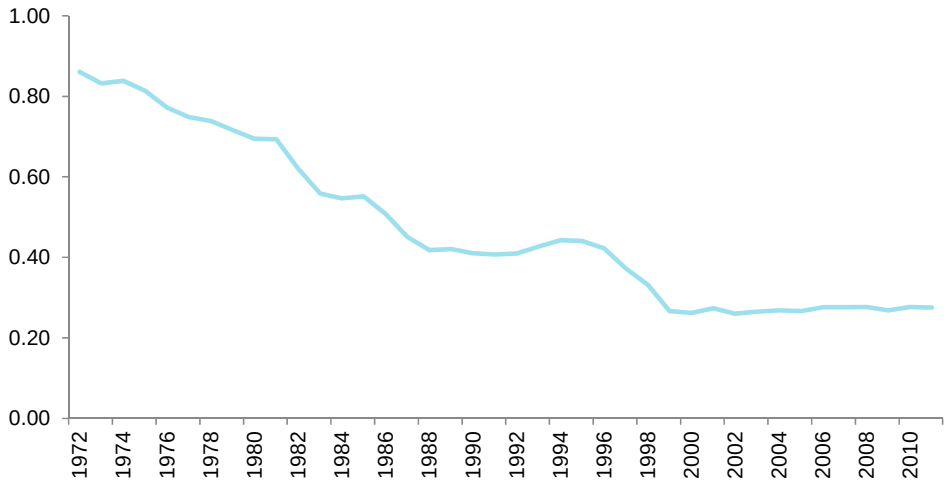
[3] Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co., 360 I.C.C. 788, 940 (1980) ("BN/Frisco").

has over time reduced the amount of traffic interchanged between railroad operators. Exhibit 1 presents the historical perspective: a steady decline in the average number of interchange events per railcar through the late 1990's and the maintenance of these low interchange event levels since.[4] Between 1972 and 2011, the average number of interchange events per railcar declined from 0.86 to 0.28. This reduction greatly streamlined railroad operations, making them more reliable, and helped support the change to more schedule-based operating plans that offered improved customer service.

Exhibit 1: Average Interchange Events per Car, 1972-2011[5]



Much of the improvement in railroad efficiency is attributable to the rationalization and consolidation of railroad network flows, which has permitted railroads to move increasing amounts of traffic over a network of efficient, high-density main lines with fewer work events per shipment. As shown in Exhibit 2, historically there has been an almost perfect negative

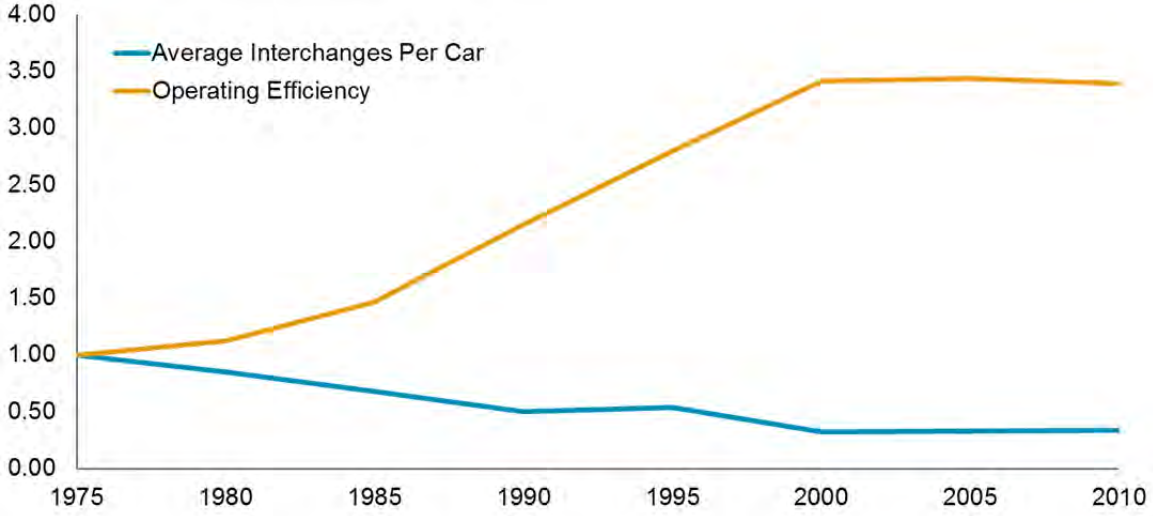
[4] Interlining is defined as moving on more than one railroad. A railcar moving from origin to destination over three different railroads is counted as one interline move and two interchanges.

[5] Source: Freight Commodity Statistics, 1972- 2011, US carload movements excluding intermodal traffic (STCCs 42, 43, 44 and 46), Association of American Railroads; Oliver Wyman analysis.

correlation between the average number of interchange events per railcar trip and the amount of ton-miles a railroad can move per dollar of operating expense (inflation adjusted).[6]

Exhibit 2: Indexed Average Interchange Events per Railcar vs. Operating Efficiency, 1975-2010[7]

Operating Efficiency = revenue ton-miles/$ of inflation-adjusted operating expense
Pearson correlation coefficient: -0.95



As described in my prior submissions under EP711, mandated switching would erode the operating cost and efficiency gains made by the rail industry since the 1980s. For every additional railcar switched under the proposed rules, operating efficiency would decline – since the same quantity of revenue ton-miles would be moved, but would entail higher operating costs.

I am not claiming that all switching is bad or should be discouraged. Voluntary switching arrangements between carriers are generally in the public interest because the parties to such switching arrangements enter into them knowing that they will affect operations, but confident

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[6] The -0.95 correlation coefficient means that historically as the railroads reduced the average number of interchanges, productivity increased. Although it is not possible to prove that a reduction in interchanges caused productivity to rise, there is strong evidence that reducing interchanges and the switching required to process these interchanges was an important part of simplifying the network and thus was a significant contributing factor.

[7] Source: Rail Fact Book, 2012 edition, Association of American Railroads, pp. 14 and 27 (opex and RTM); Association of American Railroads email (avg. interchanges); ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (CPI); Oliver Wyman analysis. Values are reported in 5-year increments. The correlation coefficient was generated from actual values, not indexed values.

that the benefits will exceed any added operational costs. When those benefits do not exceed the costs or circumstances change, the parties can terminate the switching arrangement. Consensual switching arrangements have sufficient definition and stability to allow for network planning by the involved carriers to minimize costs. In the case of mandated switching, however, shippers would control the frequency and volume of switches, making it difficult for railroads to minimize operational costs and increase transit reliability through careful network planning.

B. Increased Switching Events Increase the Risk of Service Plan Failure

The process of interchanging cars between railroads unavoidably involves numerous car handlings that exceed – in some instances by multiples – the car handlings required to provide single-line service. Exhibits 3 through 5 show a set of examples I provided in my prior submissions, illuminating how switching rapidly escalates the number of events involved in moving a car versus single-line service – and thus greatly increases the probabilities of service failure.

Exhibit 3 provides an example of the typical number of events involved in originating a car for single-line service – six steps are required to move the empty car from the local yard to the origin and the loaded car back to the local yard to be switched into an outbound train headed for the destination. And in this case, all the steps are controlled by a single railroad.

Exhibit 3: Example Steps Involved in Single-Line Car Origination[8]

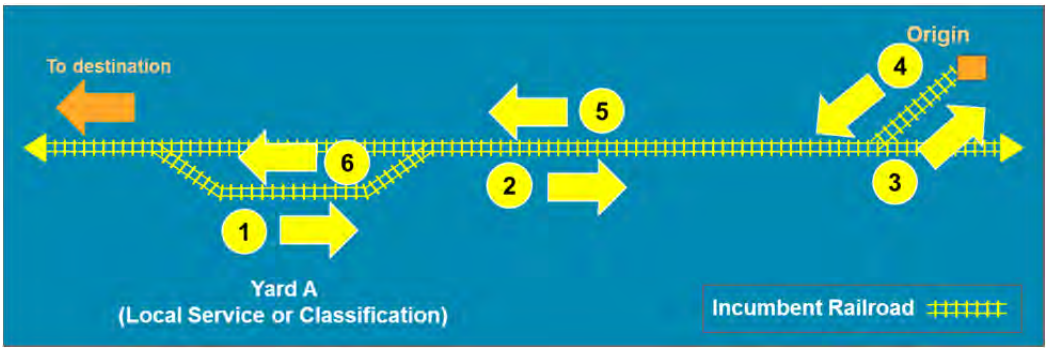
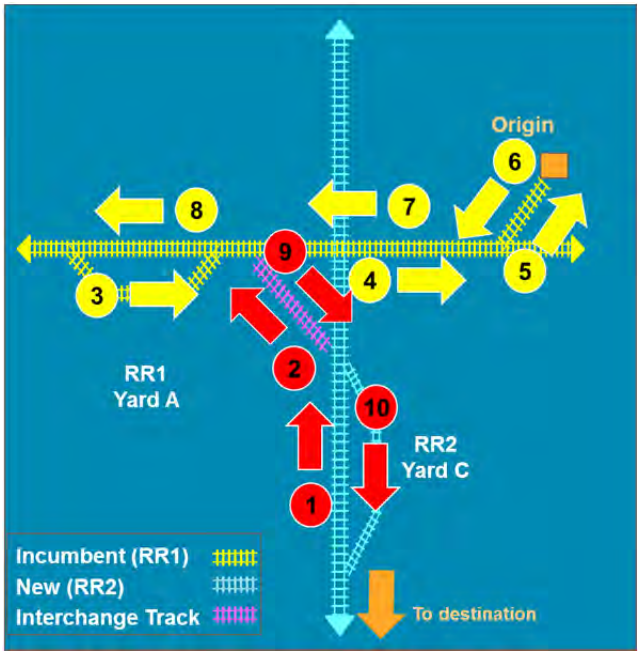


Exhibit 4 provides an example of the simplest mandated switch, which raises the total number of events to ten, and now involves coordination between and planning by two railroads. The additional steps are shown in red.

Exhibit 4: Example Steps Required for the Simplest Mandated Switch[9]

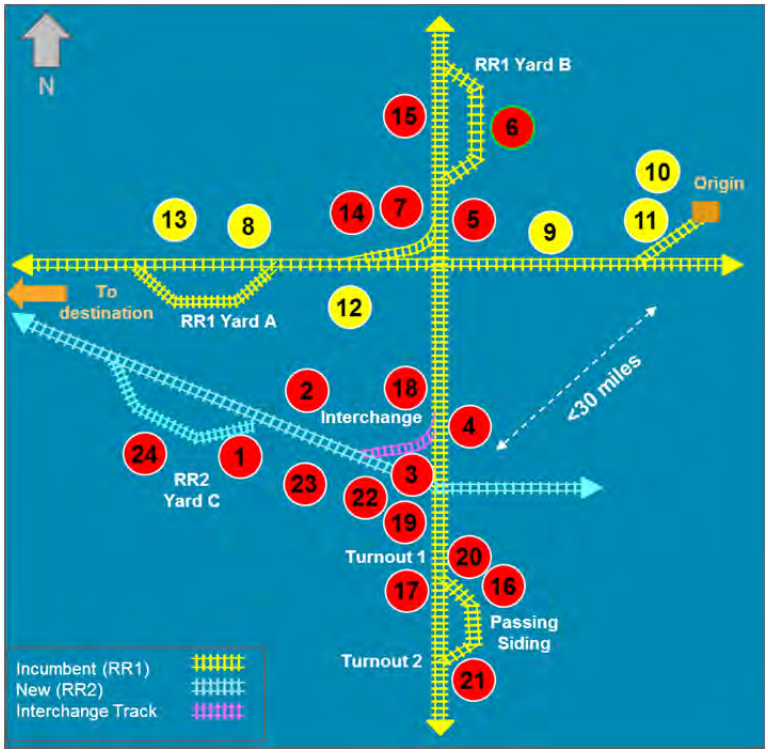


[8] Before the Surface Transportation Board, Ex Parte No. 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Public Hearing Testimony of William J. Rennicke – Exhibits, March 25, 2014, p. 2 ("Rennicke Hearing Exhibits").

[9] *Id*. at p. 3.

However, most mandated switches would occur in complex terminals, where neither the track configuration nor the service plans of the railroads involved are necessarily configured to accommodate a new mandated switch. Exhibit 5 provides a likely example of such switching, where 24 events are required to implement the interchange. Such switches would be typical in many urban areas. The additional steps versus single-line service are shown in red.

Exhibit 5: Example Steps for Complex Mandated Switching (Such as in Urban Areas)[10]



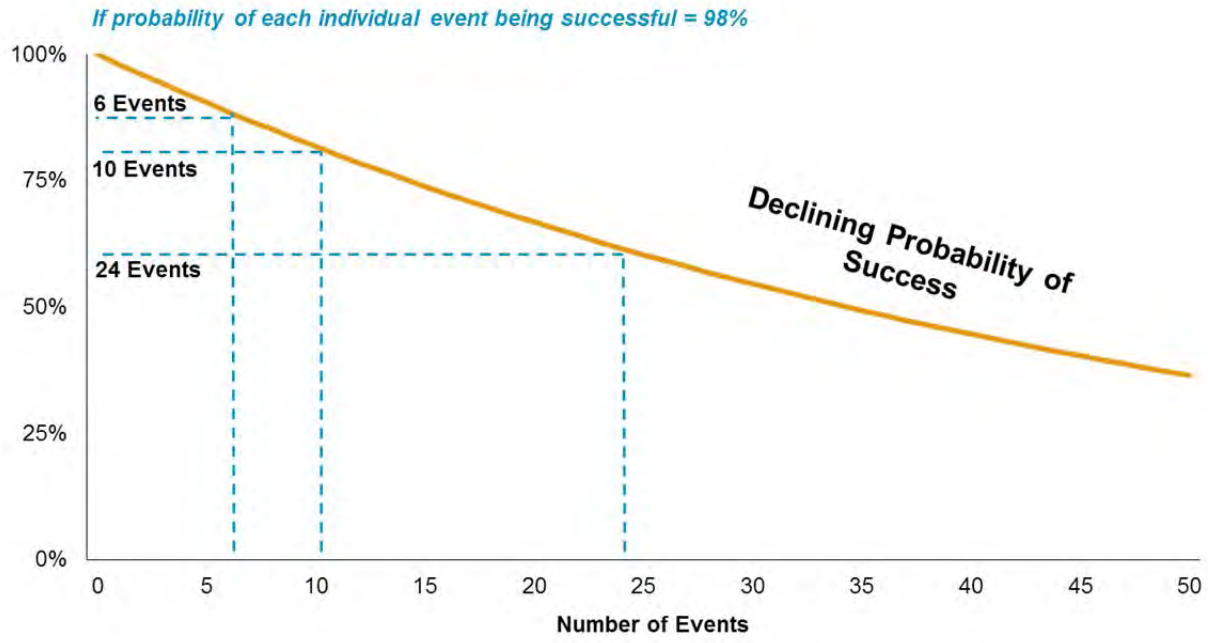
The above hypothetical examples show how the complexity of interchanges can quickly grow as a second railroad becomes involved in a movement. Real-world examples are even more complex, as railroads must fine-tune operations to leverage available capacity and balance workloads in a given region. Union Pacific provided the Board with actual case studies, for

[10] *Id*. at p. 4.

example, in which it described the intricacy of operations for yards in and around Houston, Kansas City, and Sioux City.[11]

Each new added event increases the risk of failure, in other words the risk that a railroad will not be able to meet its service plan for a car. In Exhibits 3 through 5 above, the probability of meeting the service plan declines from 88.6 percent for a single-line origination to 81.7 percent for a ten-step mandated switch, and to 61.6 percent for a 24-step mandated switch, if each event has a 98 percent chance of being successful (Exhibit 6).

Exhibit 6: Declining Probability of Successfully Executing a Trip Plan as Switch Events Increase[12]



Cars that miss their trip plan are not only at high risk of missing their planned delivery date, but of adding to congestion in yards and terminals, further imperiling the trip plans and schedules

[11] Before the Surface Transportation Board, Opening Comments and Evidence of Union Pacific Railroad Co., Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Ex Parte No. 711, (filed Mar. 1, 2013), pp. 29-52.

[12] Rennicke Hearing Exhibits at p. 5.

of other cars. Thus reliability is reduced not only for shippers and their cars under a mandated switching order, but potentially for all customers and carloads on the network.

The examples above of complexity for discrete switching instances substantially understate the level and pace of service deterioration that could potentially occur. Each described example would repeat itself multiple times, leading to the unintended consequence of cascading failures not only in the origin yard but throughout the network, undermining railroads' ability to develop and implement service plans, and eroding shippers' confidence in rail as a reliable and efficient transport mode. This situation would be exacerbated if frequent changes in switch traffic were to occur, or even worse, splitting of traffic between the incumbent and new routes randomly on a daily basis, so that what was once single-line service now must be duplicated. And, all of this would be dictated by each shipper based on its own interests, without regard for or knowledge of the network-wide impacts of its actions.

3. Increased Uncertainty and Risk of Cumulative Service Problems

The Board assumes it can adequately identify service problems that would arise from mandated switching under the proposed rules through case-by-case litigation in individual cases under open-ended rules. But the lack of specificity in the NPRM would only increase uncertainty for rail operations and planning, while case-by-case switching assessments would not permit the Board to determine the cumulative impact of individual switch orders on the rail system as a whole. The cumulative impact of mandated switching across the rail network and over time cannot be assessed in individual cases. A future succession of switching requests would be unpredictable, and granted switching orders that are not immediately used could be activated suddenly in times of congestion to gain preferential treatment for a shipper's traffic, at the cost of

further service deterioration over the network as a whole. None of these adverse effects can be addressed through case-by-case litigation under the broad and uncertain parameters of the Board's proposed rules.

A. The NPRM Increases Uncertainty in Rail Planning and Operations

Commissioner Begeman notes in her dissenting statement that "Today's proposal, in my view, is full of gaps by design."[13] I concur with this assessment, since many of the criteria contained in the NPRM are left open to interpretation by current and future Boards. The Board appears to believe that this uncertainty would allow it to act with more "precision" to avoid adverse service impacts. I believe the contrary is true, since shippers granted mandated switching rights would have control over the volume and frequency of switches. The result of the Board's approach would be a less stable environment for rail planning and operations – one where volumes could change dramatically day to day, impacting not just switched traffic but also all other traffic at interchanges and downstream yards. Some of the most critical uncertainties introduced by the NPRM, and their potential impacts on planning and operations, are listed in Exhibit 7.

Exhibit 7: Factors That Would Contribute to Railroad Operating Uncertainty

Factors Adding Uncertainty	Potential Planning and Operating Impacts
"Reasonable distance" from an interchange is unknown	Without defining "reasonable distance," the Board would have the authority to grant mandated switching anywhere in the country. This would increase operational uncertainty throughout the rail network and the risks associated with capital investments, since the railroads would never be certain that investments in capacity expansion at any location would result in the traffic volumes they projected to justify the investment.
Once switching rights are granted, a shipper could add	While the condition for ordering mandated switching "necessary to provide competitive service" (Prong 2) would seem to imply a specific origin, destination, and commodity, the condition of switching that is "practical and in the public

[13] Reciprocal Switching NPRM at p. 36.

Factors Adding Uncertainty	Potential Planning and Operating Impacts
other locations and commodities	interest" (Prong 1) could be interpreted to apply to all destinations and all commodities if an origin location is granted mandated switching. A shipper could apply for mandated switching for a subset of traffic, but then expand that to other destinations and other commodities once the switching rights were obtained, adding to rail operating uncertainty.
The shipper could frequently change railroads	Once a shipper chooses to use a new route under a mandated switching order, there is no defined time period in which it must use the option (e.g., weeks/months). The shipper could move traffic back and forth between railroads on a daily basis at will, creating a situation where the railroads would face a rolling lack of even basic volume planning information.
The shipper could wait to exercise mandated switching rights months or years after they are granted	A shipper might seek, and be granted, mandated switching rights at a location, yet never exercise those rights because the desired outcome of lower rail rates had been obtained. However, consider a scenario such as the winter of 2013-2014, where the railroads faced huge backlogs due to record traffic demand together with an exceptionally harsh winter – all of which led to months of rail congestion and service failures. In such a scenario, a shipper facing congestion on its legacy carrier might believe that using the mandated switching option it had already been granted would expedite movements. Such sudden changes as each shipper tries independently to improve its own position, coming on top of existing service problems, could be catastrophic, with new traffic flows demanding attention at the same time that carriers are already struggling to deal with existing congestion. Thus the problems of high volumes and poor weather would only be compounded by the uncertainty of a constantly changing traffic base, stifling system-wide recovery efforts.
The shipper could split traffic between railroads	Once a shipper is granted mandated switching, the shipper could split traffic so X percent goes to the incumbent carrier on any given day and Y percent to the new switch carrier route. Without volume stability, it will be challenging and expensive for the railroads to maintain the correct crew and equipment capacity at a location for traffic that could be diverted.

It is worth noting that all of the questions above illustrate the undeniable decrease in efficiency and increased uncertainty that would result from mandated switching. The Board's proposed rules provide no mechanism for addressing these obviously negative consequences of mandated switching.

B. Case-by-Case Switching Rulings Increase the Potential for Cumulative Service Failures

Class I railroads operate thousands of miles of track in a highly interconnected network, where congestion and delays in one portion of the network can have ripple effects throughout the

entire network. To establish the impact of a change, such as an increase or decrease in volume, requires understanding not just the situation at the origin location, but also at all downstream locations, as well as how the changed traffic will interact with other traffic on the network.

The NPRM states that "Imposing reciprocal switching on a case-by-case basis would allow the Board a greater degree of precision when mandating reciprocal switching."[14] But while a case-by-case basis might address the specifics of one situation in a vacuum, layer upon layer of additional switch traffic could result in the aggregate. The cumulative effects could exponentially compound the potential for service failure, undermining service planning and reliability on a widespread basis.

Each railroad has a service design department armed with sophisticated planning software to evaluate how a single change may have unintended consequences in other parts of the network. The process varies from railroad to railroad, but typically involves rigorous, iterative simulation of potential trip planning impacts, with feedback adjustments, until the service designer is assured the plan is feasible and that the impacts of an isolated change on the network are fully understood. It should also be noted that the service design process is so complex and critical to operations that only a small number of people, typically fewer than five, have permission to change the plan at a Class I railroad.

If the Board wishes to understand whether or not mandated switching is feasible and ensure it can identify and head off service problems in advance, a case-by-case analysis will not be sufficient. Identifying potential points of operational failure and network effects is inherently difficult, and the unintended consequences of cumulative mandated switching orders are likely

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[14] Reciprocal Switching NPRM at p. 15.

impossible to model. Furthermore, this modeling process would have to be done not just for the Class I receiving new traffic, but also for the incumbent railroad, to understand how a loss of traffic impacts downstream trains and yard workloads. In short, the uncertainty over future changes in demand and cumulative network effects would make it difficult for a railroad to demonstrate in individual cases the full impact of a mandated switching order.

Finally, consider a location with multiple shippers served by one Class I railroad. One of the shippers at the location petitions the Board under the proposed rule and is granted switching rights, but decides to keep the traffic on the incumbent railroad. Seeing a successful decision for the first shipper, a second shipper petitions for switching rights, followed by a third, then a fourth, etc. Should analysis to determine the practicality of these subsequent requests assume that the first shipper continues to not switch traffic, or should the analysis assume the shipper may decide to switch all of the traffic to the competitor railroad? At some point, the amount of switching the incumbent railroad is asked to perform at the local yard becomes impractical due to capacity constraints; however, since the shippers would control switching volumes and frequencies, it would be difficult for the railroads to accurately determine the impact of any one individual case before the Board.

VERIFICATION

I, William Rennicke, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I am qualified and authorized to file this statement.

Executed: October 26, 2016

William Rennicke