BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

U.S. WHEAT ASSOCIATES TESTIMONY

U.S. Wheat Associates ("USWA") respectfully submits its testimony in the above-captioned proceeding in accordance with the Surface Transportation Board ("STB" or "Board") Notice of Public Hearing ("Notice") served on December 28, 2021. The Board provided the opportunity for interested parties to provide testimony to update the record in this proceeding regarding its proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish reciprocal switching arrangements under certain circumstances. USWA thanks the Board for this opportunity to voice its strong support for these proposed new rules for reciprocal switching made even more necessary now by the changes in the rail industry since early 2017.

USWA INTEREST IN THE PROPOSED RULES

USWA is the export market development organization for the U.S. wheat industry. USWA promotes the reliability, quality, and value of all six U.S. wheat classes to wheat buyers, millers, bakers, food processors, and government officials in more than 100 countries around the world. Its mission is to "develop, maintain, and expand international markets to enhance wheat's profitability for U.S. wheat producers and its value for their customers." Funding is made possible through checkoff dollars, goods and services from 17 state wheat commissions, and cost-share grants from the U.S. Department of Agriculture's Foreign Agricultural Service.

USWA created an internal Transportation Working Group ("TWG") in 2018 after the realization that increasing rail rates were having a large impact on the wheat industry's export competitiveness. TWG is a working group with USWA that examines rail and other transportation issues on behalf of these member Commissions. Wheat is heavily reliant first on exports, exporting on average half of all US production, and second on rail transportation to move this commodity across the U.S. to feed the world. Rail rates have a disparate impact on wheat shippers vis a vis other bulk US commodities due to the large percentage of production that is exported and the major growing regions that are not generally adjacent to the Mississippi waterways. Distances from the central and northern plains wheat producing areas are far too great to truck wheat to export facilities, making railroads a crucial and irreplaceable link in the wheat export logistics chain.

The results of this increased dependance on rail for the movement of wheat exports have been clear. Over the last decade, rail rates have increased exponentially, and wheat continues to be charged higher rates than other commodities with similar handling characteristics – even for identical hauls. In work conducted by the TWG in 2020, quotes for rail service were collected from grain shippers for major US grain crops. These price indications were for the same origin/destination pairings and for the same dates of service. They documented a premium of between 22% and 39% for wheat movements compared to corn in four major regions. These results were corroborated by a June 2017 study by the U.S. Department of Agriculture's Agricultural Marketing Service which was able to find no underlying cause driving the increases in wheat rates. These premiums relative to these other commodities clearly demonstrate the current market power of the Class I railroads and the lack of any serious competition afforded to wheat shippers.

That unchecked market power has had serious implications for U.S. wheat's competitive position vis a vis other major world exporters, such as Canada. The Canadian comparison is particularly telling as the two spring wheat and durum growing regions are similarly positioned in the interior of each country, with nearly identical distances to traverse to export facilities in each country, with differing government rail policies (including more favorable terms for reciprocal switching) being one of the only large differences in market position. However, despite the similarities, work collected by one of USWA's member states showed similar origin to export point rail moves in Canada were 30% below the US moves at the time.

As has been demonstrated, wheat rail shippers have been adversely impacted by the lack of any options to obtain competitive rail access. Under the current process for the reciprocal switching remedy, wheat shippers do not bring forward cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain ultimately impacting not only wheat shippers, but their customers and consumers. With extensive coverage by multiple Class I railroads of the largest wheat growing areas in the U.S. and a limited number of export facilities capable of handling bulk grain exports, the US wheat industry is particularly well-positioned to benefit from policies better enabling competitive switching.

USWA appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. USWA urges the Board to breathe life into this remedy that has been essentially dormant for decades and to provide a method to counter the Class I railroads' unabated market power over wheat shippers.

BACKGROUND OF THE PROCEEDING AND THE PUBLIC HEARING

The Board opened this proceeding by issuing a Notice of Proposed Rulemaking ("2016 NPRM") on reciprocal switching on July 27, 2016. *Reciprocal Switching ("NPRM"),* STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016). Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017. Following these comments, the proceeding did not move forward except for ex parte meetings and has remained essentially dormant since that time.

The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011 petition for rulemaking by the National Industrial Transportation League. Petition for Rulemaking of the National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte 711 (filed July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014.

On December 28, 2021, the Board issued the Notice stating its intent to "hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed" through the 2016 NPRM. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 28, 2021). The Board's stated intent for holding a public hearing and inviting comments is "[t]o allow interested persons to submit testimony to update the record," and "[t]o ensure a full and updated record in this proceeding." *Id.* at 2, 6. Thus, the Notice specifically invites comments addressing certain topics, including:

- "[A]dditional or modified views on the effects and/or need for the proposed regulations" in light of "significant operational changes in and affecting the freight rail industry" in the time "[s]ince the issuance of the NPRM";
- "[N]ew developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments"; and
- "[T]opics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding."

Id. at 6.

LAW AND LEGISLATIVE HISTORY REGARDING RECIPROCAL SWITCHING

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The Board may require the establishment of a switching arrangement when it finds that the arrangement either (1) is practicable and in the public interest, or (2) is necessary to provide competitive rail service. 49 U.S.C. § 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period. The Board's implementation of § 11102 is guided by the rail transportation policy set forth in 49 U.S.C. § 10101. *See NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 16.

The Board's current regulations governing reciprocal switching were promulgated in 1985 by the Board's predecessor, the Interstate Commerce Commission ("ICC"), *see Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec. v. United States,* 817 F.2d 108 (D.C. Cir. 1987), and are codified at 49 C.F.R. § 1144. The regulations provide 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)." 49 C.F.R. § 1144.2(a)(1). The Board's regulations also provide relevant factors that the agency shall consider in determining whether to prescribe competitive access, along with a "standing" requirement. 49 C.F.R. § 1144.2(a)(1)-(2). The regulations do not address how the Board should establish compensation for Board-ordered switching when the carriers cannot reach agreement within a reasonable period.

In *Midtec Paper Corp. v. Chicago & North Western Transportation Co. ("Midtec"),* 3 I.C.C.2d 171 (1986), the first case where the ICC applied 49 C.F.R. § 1144.2, the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Id*. at 181. The ICC further explained that it would find anticompetitive behavior only when an incumbent carrier had "used its market power to extract unreasonable terms on through movements" or "because of its monopoly position . . . shown a disregard for the shipper's needs by rendering inadequate service." *Id.* The agency's competitive access regulations have not changed substantively since 1985 and few requests for reciprocal switching have been filed since then. In other words, *Midtec* caused the use of the reciprocal switching remedy to go dormant because rail shippers did not believe this standard could be met.

Under the Board's proposed regulations, there would be no need to show anticompetitive conduct, as had been required in the ICC's *Midtec* decision. Rather, under the Board's proposed regulations, the Board would require the establishment of a switching arrangement when the switching arrangement either was practicable and in the public interest or was necessary to provide competitive rail service. *NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 16. This approach would simply apply the language in the statute as written by Congress.

In assessing whether a switching arrangement would be practicable and in the public interest under the proposed regulations, the Board would consider whether the benefits of a proposed arrangement would outweigh its potential detriments. In making that determination, the Board would consider all relevant factors, such as (1) whether the arrangement would further the rail transportation policies in 49 U.S.C. § 10101; (2) the efficiency of the proposed route; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. *NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 18.

In assessing whether a reciprocal switching arrangement would be necessary to provide competitive rail service, the Board would consider whether intermodal and intramodal competition were effective with respect to the movements for which the switching arrangement was sought. The Board would evaluate the effectiveness of competition using quantitative and qualitative factors that the Board has developed in the context of assessing market dominance in rate challenges, but it would not consider product competition or geographic competition. *Id.* at 27.

The Board's proposed regulations also state that reciprocal switching would not be ordered, even if one or both of the foregoing standards were met, if the switching was not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers. As additional limitations, the Board would require the establishment of a switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier; and (2) there was or could be, within a reasonable distance of the shipper or receiver's facilities, a working interchange between the incumbent carrier and another Class I rail carrier. *Id.* at 19-21.

The 2016 NPRM sought comments on two alternatives regarding the compensation the Board could impose for switching service if the carriers could not agree within a reasonable time. Under the first alternative, compensation would be based on factors such as: (1) the geography where the proposed switch would occur; (2) the distance between the shipper/receiver and the proposed interchange; (3) the cost of the service; (4) the capacity of the interchange facility; and (5) other case-specific factors. The 2016 NPRM asked for comment on whether the agency should also consider what have been referred to as the incumbent carrier's lost contribution or opportunity costs. Under the second alternative, compensation would be based on the cost of providing the service plus a fair and reasonable return on the capital that was used to provide the service, analogous to the rental income that applies when the Board orders a carrier to provide trackage rights to another carrier (the Board's "SSW methodology"). *Id.* at 25-26; *see, e.g., New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC*, FD 35842 (STB served Oct. 31, 2017); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 4 I.C.C.2d 668 (1987); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.— Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984).

The rail transportation policy established by the Staggers Rail Act of 1980 ("Staggers") places great importance on the promotion of competition in the rail industry: "[i]n regulating the rail industry, it is the policy of the United States government…to allow, to the **maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail**." 49 U.S.C. § 10101 (1) (emphasis added). Congress emphasized the importance of competition in four additional sections setting out the policy underlying Staggers. *Id.* at (4), (5), (6), and (12). These provisions leave little doubt that Staggers intended to introduce competition as an alternative to regulation of rates and service. These proposed rules follow this rail transportation policy by making competitive access available to rail shippers who have had no real ability to obtain this remedy since *Midtec.*

The new proposed rules in the 2016 NPRM are exactly what Congress intended when it enacted the reciprocal switching remedy in Staggers. Not only do these proposed rules conform with their statutory basis, but they also use the exact language of the statute as noted. Consequently, the proposal would replace the Board's outdated regulations with ones that more closely adhere to Congress' deregulatory vision for the freight rail industry. The legislative history regarding this competitive access remedy makes that extremely clear.

Title II of Staggers is the section which includes the reciprocal switching provision and "is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than [was] afforded them under existing law" at that time. H.R. Rept. 96-1430, 96th Cong. 2d sess. 80 (1980). To balance this new-found ratemaking freedom, "[a] number of provisions are included to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements." *Id.*

The Conference Committee Report on Staggers ("Committee Report") provided in relevant part as follows:

> Consistent with the new rail transportation policy of this Act, the conferees intend that competition be recognized as the best control on the ability of railroads to raise rates. The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The conferees believe that **by allowing the forces of the marketplace to regulate railroad rates wherever possible** the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Id. at 89 (emphasis added). Undoubtedly, Congress intended competition to be the most effective and desirable way to protect shippers.

With respect to the way Congress intended for competition to be used remedially, the Committee Report stated:

> The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where

> only one railroad provides service and it is inadequate. The standard "practicable and in the public interest" is the same standard the Commission has applied in considering whether to order joint use of terminal facilities.

Id. at 116. *See also* S. Rept. 96-470, Cong. 1st sess. 41-42 (1979) (same).

Similarly, the discussion of reciprocal switching in the Report of the House Committee on Interstate and Foreign Commerce stated:

> This section empowers the Commission to approve reciprocal switching agreements and joint service agreements upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, it provides competition to the benefit of shippers served. While the Commission now has the power to order the joint use of terminal facilities, its power to order reciprocal switching is less clear. In particular, reciprocal switching has been limited to situations where competition between rail carriers is not threatened. **The Committee intends for the Commission to permit and encourage greater competition.** Likewise joint service agreements should be encouraged in order to improve shipper service and efficiency.
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> The standard the Commission should use in approving agreements under this section should be where the requested action is "practicable and in the public interest."

H. Rept. 96-1035, 96th Cong. 2nd sess. 67 (1980) (emphasis added).

The Senate Committee on Commerce, Science and Transportation Report emphasized the importance of enhanced competition:

> The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 203 [the Senate reciprocal switching provision] deals with intramodal competition among railroads… As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. **Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.**

S. Rept. 96-470, at 41 (1979) (emphasis added). *See also* 126 Cong. Rec. H10079-87, 99 (daily ed. Sept. 30, 1980) (statement of Rep. Eckhardt) ("inclusion of provisions relating to entry and reciprocal switching which provide increased rail-to-rail competition"); 126 Cong. Rec. H5899-5914, 549 (daily ed. June 30,1980) (statement of Rep. Madigan) (reciprocal switching "will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory, thereby providing many shippers with competition in rail service that they presently do not enjoy."). The point of this legislation is "to encourage intramodal competition." S. Rept. 96-470, at 38.

The STB in the 2106 NPRM followed this broad two-part model set forth in the statute in creating the proposed rules for reciprocal switching. Instead of the narrow standard in place today, the Board followed the statutory language, the transportation policy, and the legislative intent by proposing to introduce greater competition into rail markets. The legislative language and history in Staggers urged the ICC to do exactly what the STB has done here.

NEW REASONS WHY THE PROPOSED RULES ARE NEEDED

1. The Historic Rail Industry Change to PSR since 2017 Makes these Proposed Rules Even More Necessary Now to Provide Shippers with a Remedy to Protect Them from this Dysfunctional Operating Model.

The developments regarding Precision Scheduled Railroading ("PSR") since the Board last sought comments in this proceeding clearly provide more justification than ever for the approval of these proposed rules on reciprocal switching. Implementation of PSR by nearly all the Class I railroads[1] (except for BNSF Railway) shortly after this last round of comments has made the need for this competitive access remedy even more compelling now than in early 2017. This widespread implementation and now use of PSR as the railroad operating model has caused a sea change in the way the rail network works and has resulted in generally poorer service and higher rates for rail shippers over the last 5 years.

The railroads claim "Precision" in PSR "refers to highly precise planning, examining, and fine-tuning of all processes related to the movement of rail cars, combined with disciplined, synchronized execution of the processes."[2] There are several elements to many of the PSR operating strategies claimed to be followed by the Class I railroads in the US. The first element is to "restructure local service" by "better utilize[ing] crews and locomotives, while asking more of

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[1] Canadian Pacific Railway and Canadian National Railway Company had already implemented PSR before 2017.

[2] [2] "*The Operational Nuts and Bolts of Precision Scheduled Railroading",* Carl Van Dyke, FHWA Webinar PowerPoint, at 6, March 2020, https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/march_2020/talkingfreight3_18_20cvd.pdf

customers and local crews." *Id.* at 8. The second element is to "increase car velocity" by "reduc[ing] switching, while using block swaps more and providing multiple outlets for traffic - focus on plan adherence and elimination of blocking (switching), connection, and train make-up errors." *Id.* The third element is to "minimize train miles and road locomotive and crew needs" by "run[ning] fewer, longer, more generic trains on a balanced network and filling out the trains to their maximum capacity, while focusing on crew and locomotive cycling." *Id.* The fourth element is to "change customer services" by "eliminat[ing] 'boutique' operating plan elements (blocks and trains) and standardizing product offerings." *Id.* In its purest form, this operating strategy should "bring[] together many core principles that should arguably be widely supported by both railroads and customers, driving to better asset velocity, overall efficiency, shipment speed, and reliability." *Id.* at 7.

Unfortunately, PSR has not been used in its purest form as the railroads have professed and has been widely opposed by rail shippers due to its adverse effects on their service and costs. As stated by Chair of the House Committee on Transportation and Infrastructure Peter DeFazio: "In recent years, numerous stakeholders have raised concerns about the railroad management strategy known as precision scheduled railroading (PSR). Using variations of this strategy, it appears that Class I railroads have streamlined operations and otherwise cut costs in pursuit of lower operating ratios for short-term revenue gains. Stakeholders are concerned that the rise of the PSR model has come at the expense of long-term capital investments, reduced rail infrastructure, affected service for some shippers, and caused dramatic workforce cuts and safety concerns."[3] Chair DeFazio was so concerned by this problematic use of PSR that a study by the U.S. General Accountability Office ("GAO") was passed by the House in his surface transportation reauthorization bill, the INVEST in America Act, to help find ways to address the impacts this railroad management strategy has had on workers, freight shippers, passenger railroads, and rail safety.

The facts clearly demonstrate that Chair DeFazio's impression of PSR is the accurate one. First and foremost, rail service has plummeted since this historical change in how railroads operate. In March 2017, CSX Transportation, Inc. ("CSXT") implemented PSR as its rail operating plan. This implementation led to countless service issues across its network almost immediately. Part of CSXT's PSR plan involved cutting a large number of jobs across its system. By July, the Board had taken a number of actions in response to the service problems resulting from CSXT's ongoing implementation of this new operating plan. The Board began closely monitoring CSXT's performance, including requesting that CSXT's senior management participate in weekly calls with the Board's Rail Customer and Public Assistance staff and that CSXT submit weekly specific service performance data to facilitate these calls.

On October 11, 2017, service on CSXT had become so unreliable that the Board ordered executive-level officials from CSXT to appear at a listening session at the STB to discuss their ongoing and future efforts to improve service and to provide an estimated timeline for recovery of normal service levels. The Board also asked impacted shippers to appear at the public listening session to discuss their service concerns and comment on the railroad's service recovery efforts.

[3] May 12, 2021 Letter from Chair DeFazio to U.S. Government Accountability Office, https://transportation.house.gov/news/press-releases/chairs-defazio-and-payne-jr-request-gao-study-on-the-impacts-of-precision-scheduled-railroading-on-workers-safety-and-shippers

On March 18, 2018, STB Chairman Ann Begeman individually wrote the Class I railroads about service issues across the US rail system. She stated that the Board had been closely monitoring freight rail service across the US and had become increasingly concerned about its overall state based on the weekly data collected under 49 C.F.R. pt. 1250. The data was indicating that service was deteriorating based on decreasing system average train speeds and increasing terminal dwell time. Other key metrics were also trending in a negative direction. The STB began holding weekly calls with the railroads and asked them to provide certain information with respect to their rail service.

Despite these monumental service issues on CSXT, most of the other Class I railroads, who were not already operating under PSR, also adopted this rail operating plan, including Norfolk Southern Railway ("NSR") in July 2019, Kansas City Southern Railway in January 2019, and Union Pacific Railroad ("UP") in October 2018. These changes led to further disruptions across the US rail network. Massive job cuts, like on CSXT, occurred on NS and UP as part of this plan, leading many to believe that any uptick in the need for rail service would leave them woefully unprepared. This eventually proved to be the case.

On August 24, 2020, the STB Chairman, as well as the Federal Railroad Administration Administrator, wrote the Class I railroads about both of their rail service concerns. These leaders of the rail regulatory agencies explained that they had been made aware of service issues, including missed industrial switches and excessively late or annulled trains due to crew availability issues. They noted that with both increasing intermodal and carload volumes and a projected robust harvest fast approaching, railroad employee availability, together with sufficient equipment resourcing, was essential for safe, fluid rail service in support of the nation's economic recovery from COVID-19. Given the challenges related to changing demand patterns and operating conditions, they stated that increased communication and transparency with rail shippers had become especially important to ensure they have the information needed to plan their businesses and meet their own customers' needs. They emphasized that it was their expectation that there would be heightened emphasis on improving employee availability, equipment resources, and robust communication to quickly resolve service issues as they arose and to prevent them from becoming widespread. The Class I railroads did not heed this warning as service issues became more rampant.

On May 27, 2021, the new Chairman of the STB, Martin Oberman, also felt compelled to write to the Class I railroads again about rail service issues. He explained that the Board had received concerning reports from a meaningful number of rail customers of subpar performance, including missed switches, railcars delayed at intermediate yards or interchanges, extended out-of-route movements, and prolonged dwell at origin for some unit train traffic. Additionally, he noted that the STB had been made aware of instances of significant congestion at various intermodal facilities, which has resulted in delayed train arrivals and disruptions to container availability. He recognized that these rail service challenges, at least to some extent, had been related to workforce reductions resulting from COVID-19 cases, quarantines, and furloughs based on the temporary decline in demand and the resultant adjustments made by railroads in nearly every facet of their businesses. **But he also expressed his concern about the extent to which these service issues may be related to or exacerbated by a broader trend of rail labor reductions that have been occurring over the past several years. He stated that a lack of personnel, including reserve personnel, has made it more difficult to scale-up operations to respond to increases in demand and to maintain reliable service in the face of unanticipated external events that disrupt ordinary operations or business expectations.** He said labor shortages could also delay or prolong the recovery period when such network disruptions inevitably occur.

As stated in previous STB letters, he said it is vital that freight railroads continue frequent, proactive communication with the Board and customers on their ability to meet demands for service as the economy recovers from the pandemic. He requested an updated and detailed description of the railroads' preparedness to meet anticipated future demand, including (1) the availability of train crew, yard, and maintenance employees (active, reserve, and furloughed workers) and their plans and time frames for employees to return to work and any re-training, if necessary, and (2) the availability of equipment resources (active and short-term / long-term stored locomotives and rail cars). **As part of this update, he specifically requested that the railroads also address whether they have any long-term plans, including their hiring plans for 2021 and 2022, to reverse any of the diminishing workforce levels which have resulted from their strategies in recent years.** He also asked them to identify any regions of their networks where they were experiencing or anticipating workforce challenges, and their plans to overcome these challenges.

Shortly thereafter, on July 22, 2021, STB Chairman Oberman again wrote the Class I railroads about significant disruptions within the international intermodal supply chain that involve the freight rail network. He stated that he was particularly concerned about significant increases in container congestion at key U.S. terminals, and substantial charges being levied by the railroads for container storage at these terminals. Specifically, in recent months, he asserted that the Board had received numerous reports related to the length of time that containers were being held in rail yards, and the sizeable storage fees some customers had been required to pay in order to obtain release of containers bearing their shipments. He said that he was particularly troubled about reports that Class I railroads were continuing to impose these charges even in circumstances when the receivers, as a practical matter, had no means to facilitate the release of their containers. Under these circumstances, he noted that demurrage fails to provide any constructive incentives, and perversely results in massive charges that can exceed the commercial value of the shipment. In order to better understand the magnitude of the current container congestion and the framework for the associated demurrage fees, he asked for information from each of the Class I railroads regarding policies and practices with respect to the assessment of demurrage fees on intermodal containers.

On October 18, 2021, Chairman Oberman focused on service issues on CSXT which again caused great concern to the Board, thereby precipitating a letter to the carrier seeking rail service performance information. He stated his reason for this information request was that over the past several months, the Board had continued to receive a steady stream of complaints about the adequacy of rail service provided by CSXT. In both private meetings and public settings, he said CSXT customers have relayed examples of substandard performance, including missed switches, extended transit times for both manifest and bulk shipments, unfilled car orders, and the inability to contact customer service and operating personnel. He stated that customers have also reported that service problems are sometimes resolved, only to recur weeks or months later. Taken together, he noted these complaints were of grave concern as it appeared that CSXT resources were surged to assist one customer, only to have problems arise with another. And, as a result of these problems, he explained that customers incurred premium freight costs, idled production, lost sales and damaged commercial relationships, typically without meaningful recourse from CSXT. In addition to anecdotal incidents, he noted CSXT's rail service performance data reported under STB Docket No. EP 724 tended to support that CSXT's network was underperforming compared to the benchmarks set in 2019. **He also noted that CSXT has approximately 1,000 fewer "transportation" employees for August 2021 compared to August 2019 (6,577 versus 7,543), as reported on STB Form C.**

This was followed with a similar letter to NS on November 23, 2021, emphasizing the railroad's deteriorating key operating metrics reported pursuant to EP 724. **He compared these numbers with the fact that NSR's number of "transportation" employees had continued to decline over the prior three months (8,281, 8,269, and 8,207, respectively), as reported on STB Form C.** Coinciding with the marked deterioration in NSR's performance metrics, he said the Board had received an increasing number of complaints from NSR's customers about poor performance, including missed switches, cars stranded at intermediate yards, longer transit times, operating plan changes without notice, and a lack of communication from customer service**. For these reasons, he requested that NSR provide the Board with a review of the current state of its network, and assessment of what factors are affecting NSR's ability to achieve past levels of fluidity and consistent service, and in particular the impact on customer service of previous headcount reductions for train, yard, and maintenance employees. He noted it would be most helpful if NSR could provide this review as a follow up to its June 18, 2021, letter, in which a "program of targeted hiring" to meet workforce needs, referenced measures to attract and retain operating employees was outlined. In light of the declining employee headcount since June as shown by the data supplied to the STB, he asserted this program does not appear to have succeeded in obtaining a workforce level sufficient to avoid the service challenges described above.**

As some of these STB communications seem to express, this massive decline in rail service since 2017 can clearly be tied to the use of PSR across the US rail network and the resulting job cuts that made the railroads incapable of providing adequate service and handling upticks in the need for service. CSX had 23,988 total employees and 9262 train and engine service employees in February 2017. CSX had 17,250 total employees and 6795 train and engine service employees in December 2021. UP had 44,652 total employees and 18,612 train and engine service employees in October 2018. UP had 32,494 total employees and 14,079 train and engine service employees in December 2021. NS had 24,594 total employees and 10,243 train and engine service employees in July 2019. NS had 18,011 total employees and 7521 train and engine service employees in December 2021. (These numbers were obtained from the STB Form C information on the STB website.) Job cuts of this magnitude can only result in one outcome which is poor service as the above-recounted facts clearly demonstrate.

Moreover, the operating ratios for these railroads continue to decline. UP has gone from an operating ratio of 63.7% in 2016 to 57.2 in 2021. CSX has gone from 69.2% in 2016 to 56.3% in 2021. NS has gone from 69.6% in 2016 to 60.1% in 2021.

While service has declined, rail rates have continued to rise. In a recent report published by the Rail Customer Coalition[4], evidence of skyrocketing rates and less competitive traffic is clear. The report finds:

- From 2004 to 2019, **real rates (adjusted for inflation) for all rail shippers increased 43%.**
- During the same period, real **railroad costs rose only 8%.**
- Rates for the largest U.S. railroads have jumped **more than twice as fast as inflation and rates for long-haul trucking**.

[4] Escalation Consultants, "*Economic Analysis: Consolidation and Increasing Freight Rail Rates*," June 2021. https://www.freightrailreform.com/new-report-finds-rail-customers-paying-a-steep-price-for-consolidation-and-dwindling-competition/

- **For major commodity groups, revenue from potentially non-competitive rates increased 230%**, while revenue from competitive rates increased only 24%.
- **In 2019, half of railroad revenue was generated from potentially non-competitive rates**, up from 27% in 2004.
- For significantly impacted sectors and commodities, the share of total rail revenue derived from non-competitive rates increased as follows**:**

Agriculture

Commodity	2004	2019
Food Products	15%	39%
Farm Products	34%	56%

Building & Construction

Commodity	2004	2019
Wood Products	8%	31%

Metal Products	17%	45%
Stone & Glass Products	36%	64%

Transportation & Infrastructure

Commodity	2004	2019
Transportation Equipment	13%	33%

- In a troubling indicator of the railroads' ever-growing market dominance and pricing power, **the average revenue-to-variable-cost (RVC) ratio increased from 135% to 167% for shipments of these commodities.**

Id.

Obviously, the implementation of PSR by the railroads since 2016 has made the need for these proposed rules more evident. In fact, before BNSF Executive Chairman Matt Rose retired, he predicted that "PSR, reducing service, and demarketing some types of traffic in pursuit of higher profits" would result in increased scrutiny by the STB. He stated that railroads "have this common carrier obligation to provide freight service to all customers in all markets. And what we're doing in PSR is redefining what we're willing to accept in the freight railroad industry on certain lanes. And I really do believe we're going to get in a lot of trouble by doing that." He added that "[w]hen you start redefining markets, I think the federal policy makers will look at this, and quite frankly, they will not be happy with us."[5]

As Chairman Oberman recently noted, "railroads' emphasis has not been on growth. Rather, the emphasis has been on cutting in pursuit of the almighty [operating ratio] down to below 60%." He added that '[i]t is clear that as a whole, railroads have foregone many kinds of carloads that they could carry profitably, only not at O.R.s as low as 55%, and instead have focused on only the most profitable traffic. No one is asking the railroads to focus on traffic that would only be carried at a loss. But surely it is not asking too much for railroads to actively seek profitable traffic, even if not as profitable as others."[6]

In other words, PSR railroads have resorted to only choosing rail traffic which fits within the PSR model to continue to drive down operating ratios. This practice leaves certain rail shippers out in the cold even though rail is their best transportation option. This practice is even more disruptive today when truck capacity due to a shortage of drivers is extremely limited. As a result, some rail shippers have nowhere to turn.

The effects of this new rail operating strategy have devastated the rail workforce and resulted in correspondingly poor rail service and sometimes no service at all. While the railroads will assumedly argue that the pandemic is the cause of their service issues over the last two years, this claim is obviously only a part of the story. USWA does not dispute that the pandemic has had a historic impact on the world's supply chain. However, the railroads by slashing jobs have

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[5] Trains, *Analysis: Former BNSF Executive Matt Rose's Warning Comes True,* July 22, 2021. https://www.trains.com/trn/news-reviews/news-wire/former-bnsf-executive-matt-roses-2019-warning-comes-true/

[6] Trains, *Top Regulator Urges Railroads to Focus on Growth,* September 9, 2021. https://www.trains.com/trn/news-reviews/news-wire/top-regulator-urges-railroads-to-focus-on-growth/

directly caused the situation to be much worse by making them incapable of adjusting to upticks in the need for rail service. As a result, many rail shippers, especially captive ones, have suffered from plant shutdowns and slowdowns and other adverse impacts that have damaged their businesses despite paying higher and higher rates. These shippers have little recourse except through informal channels to hold these railroads accountable for the harms they suffer at the hands of the railroads. If the new proposed rules are adopted by the Board, some rail shippers would finally have a path to remedy some of these problems. In sum, there never has been a time since the enactment of Staggers where Congress's intent to introduce competition through reciprocal switching was more needed.

2. Increased Use of Reciprocal Switching Arrangements Will Lead to Increased Revenues for the Class I Railroads.

Railroads claim that reciprocal switching will not allow them to properly invest in their infrastructure and would deter them from investing where reciprocal switching allowed another carrier access to its captive customers. However, with the proposed rules, new rail shippers and an overall increase in contribution to overhead could be attracted with the prospect of competitive linehaul service and stable switching service. In other words, railroads could be the financial beneficiaries from reciprocal switching because it may make rail more attractive to shippers who can get better rates and service due to the new competition.

As discussed in the previous section, railroads have slashed jobs and expenses under the guise of PSR. Continuing down this path will eventually lead to the complete destruction of rail service in the US. In other words, cutting expenses can only go so far. At some point, railroads will have to begin to look to other ways to impress Wall Street besides cost cutting because there will be nothing left to cut. The only other way to do this would be to increase revenues. Despite the railroads total opposition to any change to the reciprocal switching remedy as proposed in this proceeding, this view is shortsighted when one considers the benefits of reciprocal switching to an industry that has recently lost one of its main sources of revenue in coal.

Railroads like to emphasize how capital intensive its industry is and how much money it invests in its infrastructure. This claim is certainly a main talking point by the railroads and undisputedly warrants careful examination because proper investment in the rail network is essential to provide this crucial service to the nation. However, concerning the general state of capital investment by Class I railroads, capital investment claimed by the seven Class I railroads during the decade 2010-to-2019 is approximately $152.1 billion, $26.6 billion of which represents the portion of those capital expenditures that was discretionary and spent in order to increase the railroad's rate of return, where the $125.5 billion difference is comprised of non-discretionary items that would not increase the railroad's rate of return and would not be classified as capital expenditures in other industries[7]:

- $85.4 billion spent on track and bridges, primarily replacements in kind;
- $30.9 billion spent on locomotives and freight cars, again almost entirely replacements in kind, where locomotives were not new Tier 4 environmentally compliant, but re-built lower Tier motive power and where locomotive work, as measured by gross ton-miles of freight moved, was flat[8] during the decade, and where replaced cars did not keep up with retired cars—railroad-controlled car fleets decreasing 24% from 2010 to 2019[9]; and

[7] Comments of Rail Cents Enterprises, Inc., EP 711 (Sub-No. 1), at 6 (filed February 1, 2022).
[8] Freight ton-miles moved by the seven Class I's was basically flat from 2010 (2.21 trillion) to 2019 (2.29 trillion).
[9] Freight cars owned and leased by Class I's decreased 24% from 461,849 in 2010 to 351,032 in 2019.

- $9.2 billion spent on Positive Train Control, a safety technology mandated by Congress in 2008,

Id.

While these numbers touted by the railroads appear impressive on their face, they are not as substantial as claimed. The question then becomes what are the railroads doing with all the monies that they are earning from these massive cuts in expenses. Distributions to shareholders by the seven Class I railroads during the same decade, 2010-to-2019, was approximately $164.2 billion. That is, the Class I's returned over six times[10] as much money to shareholders during the decade before the Covid-19 crises as they spent on projects to increase their rates of return. *Id.* "Implication: senior management at the Class I's has had great difficulty in finding investments with returns in excess of their cost of capital, hinting that a new strategy based on carload traffic growth could open up new vistas of franchise growth." *Id.* Reciprocal switching could make this strategy more obtainable by introducing competition, thereby creating better service and lower rates.

Railroads have been accused of demarketing certain types of traffic as discussed in the previous section, since the advent of the PSR revolution, that do not fit within this model. Many shippers have sought new rail service or sought to continue rail service only to have the railroads express little interest in their business. Railroads can easily deter shippers from using rail by quoting extremely high rates or offering limited service. While railroads know that rates are required to be reasonable by statute, they also know that the STB rate case process provides little hope to the shippers who would like to challenge these rates as the Board has admitted in recent

[10] $164.2 billion divided by $26.6 billion is 6.2, which changes very little (to 6.1) if all numbers for the decade are converted into constant dollars in order to erase the effects of inflation.

proceedings. Therefore, if rail traffic does not fit within the PSR model, railroads can easily sidestep their common carrier obligation by offering these unreasonable take it or leave it rates to shippers.

However, at some point, railroads will have to change their shortsighted path in order to make Wall Street happy by increasing revenues as this present strategy is unsustainable in the long run. An increase in reciprocal switching could help to make this inevitable path more of a reality. For example, railroads may only provide a shipper facility with three days of switching service per week. However, the shipper may want to increase the number of days of service to move more of its product by rail. If an interchange with another railroad is within a reasonable distance, that competing railroad could fill in that void and provide service on those additional days. The result would be more rail business. Moreover, by offering more competitive rates, railroads could obtain more business that presently moves by other modes of transportation.

With the recent loss of revenue from the large decrease in coal traffic, Class I railroads will have to turn to new markets to increase revenue. That market could easily be carload traffic. As a result, while this proposed change to the reciprocal switching rules may be strongly opposed by the rail industry now, it may eventually lead to increases in business brought on my better rates and improved service, thereby making this a win-win situation for all involved.

3. During this Historic Disruption of the Global and U.S. Supply Chains Brought on by the Pandemic, the Need for More Efficient and Flexible Rail Service Has Never Been More Evident which these Proposed Rules Will Allow to Happen.

As the Board is aware, the global supply chain has been completely disrupted by the pandemic that has changed the world as we know it over the last two years. This supply chain crisis has wreaked havoc across all forms of transportation including maritime, trucking, and rail. The unpredictability of the demand for goods and the workforce supply, among other things, has brought on events in the supply chain never seen in the past. Unfortunately, there is no certain time when this disruptive situation will end.

Obviously, railroads are crucial to the supply chain in the U.S. and North America. An efficient rail system is extremely important now to help solve these supply chain issues. However, with the pandemic and corresponding difficulties in keeping the workforce fully staffed brought on by devastating illness and quarantine requirements across the U.S., the railroads have had an extremely difficult time providing adequate service to rail shippers in dire need of their services during these unprecedented times. These workforce difficulties were compounded by the large job cuts described above that made the railroads woefully unprepared for these challenges brought on by the pandemic. Moreover, the railroads seemed reluctant to bring back workers as the numbers quoted by Chairman Oberman in his letters to CSX and NS last year demonstrate.

Reciprocal switching could certainly be a cure for some of these troubles when a railroad is understaffed and cannot adequately provide service to its customers. First, when an incumbent railroad serving a captive shipper is not prepared for a surge in business due to job cuts, a competing railroad with a nearby interchange may have the resources to provide this service. The proposed new rules could allow the captive shipper to obtain this service through a reciprocal switching arrangement. At present, it is highly unlikely that the incumbent would allow the competing railroad access to its captive customer. As a result, the captive customer would have no other choice but to rely on the unprepared railroad and receive inadequate service.

Second, in some instances, the incumbent railroad may not have access to the most efficient rail route for its captive customer. Therefore, when rail service crises occur, the captive shipper would be required to rely on the incumbent carrier's less efficient route even though a competing railroad with a nearby interchange can provide better service. The inefficiency of this result would only be compounded if the incumbent railroad was suffering from service issues across its network brought on by its unpreparedness for a surge in business.

While railroads do at times have a difficult balancing act when trying to determine the resources they need to be prepared for changes in business, examples of major rail service problems have been common over the last decade despite the financial health of the industry. In 2013 and 2014, the rail network struggled mightily with the upsurge in business in North Dakota brought on by fracking and crude by rail. *See United States Rail Service Issues, et al,* EP 724 (STB served Aug. 18, 2014). These issues became even worse with poor weather in Chicago and a strong harvest that had to compete for service with the crude oil traffic. *Id.* As noted, CSX had severe service problems as it implemented PSR on its network in 2017 which continue to this day. *See Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues, et al,* EP 742 (STB served Aug. 24, 2017). The implementation of the proposed rules might not have been able to eliminate all these issues over the years, but it certainly could have helped in certain situations by allowing rail customers to use a better prepared or suited railroad that might not have been available because of the lack of this competitive access remedy.

Generally, the implementation of these proposed rules will make the rail network more efficient by allowing captive shippers within a reasonable distance of a competing railroad to obtain better routes or better service as discussed above. It also would create competition which would require railroads to provide better service to rail shippers or risk losing business. There never has been a time since the passage of Staggers that this remedy has been more needed. The railroads have decided to implement PSR and make cuts to their workforces and other needs that have generally left them unprepared to provide adequate rail service. The railroads have not been responsive to the Board's inquiries and warnings about their hiring issues. As a result, rail shippers have suffered from poor service resulting in plant shutdowns and slowdowns on an unprecedented basis. This use of reciprocal switching on an increased basis will make the rail system more efficient and hopefully compel the railroads to provide better service and to be more prepared by introducing more competition into the rail industry.

CONCLUSION

Based on the foregoing discussion, USWA strongly urges the Board to adopt the proposed rules for reciprocal switching. The case for the implementation of these rules has never been stronger than now.

Respectfully submitted,

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