SURFACE TRANSPORTATION BOARD

49 CFR Part 1145

[Docket No. EP 711 (Sub-No. 2)]

Reciprocal Switching for Inadequate Service

AGENCY: Surface Transportation Board (the Board or STB).

ACTION: Final rule.

SUMMARY: The Board adopts new regulations that provide for the prescription of reciprocal switching agreements as a means to promote adequate rail service through access to an additional line haul carrier. Under the new regulations, eligibility for prescription of a reciprocal switching agreement will be determined in part using objective performance standards that address reliability in time of arrival, consistency in transit time, and reliability in providing first-mile and last-mile service. The Board will also consider, in determining whether to prescribe a reciprocal switching agreement, certain affirmative defenses and the practicability of a reciprocal switching agreement. To help implement the new regulations, the Board will require all Class I railroads to submit certain service data on an ongoing and standardized basis, which will be generalized and publicly accessible. Railroads will also be required to provide individualized, machine-readable service data to a customer upon a written request from that customer.

DATES: The rule will be effective on September 4, 2024.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 740–5567. If you require accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION:

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Introduction

In a decision served on September 7, 2023, the Board issued a new notice of proposed rulemaking that would provide for the prescription of reciprocal switching agreements with emphasis on how to address inadequate rail service. *Reciprocal Switching for Inadequate Serv.* (*NPRM*), 88 FR 63897 (proposed Sept. 18, 2023).[1] The Board explained that, given the major service problems that occurred subsequent to the 2016 proposal in Docket No. EP 711 (Sub–No. 1) and the history of recurring service problems that continue to plague the industry, it is appropriate, at this time, to focus reciprocal switching reform on service-related issues. *NPRM,* 88 FR at 63899.

As discussed in the *NPRM,* reciprocal switching agreements provide for the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or ends its journey on the rail system. *Id.* at 63898. In a typical case, the incumbent rail carrier either (1) moves the shipment from the point of origin in the terminal area to a local yard, where an alternate carrier picks up the shipment to provide the line haul; or (2) picks up the shipment at a local yard where an alternate carrier placed the shipment after providing the line haul, for movement to the final destination in the terminal area. *Id.* The alternate carrier might pay the incumbent carrier a fee for providing that service. *Id.* The fee is often incorporated in some manner into the alternate carrier's total rate to the shipper. *Id.* A reciprocal switching agreement thus enables an alternate carrier to offer its own single-line rate or joint-line through rate for line-haul service, even if the alternate carrier's lines do not physically reach the shipper/receiver's facility. *Id.*

The regulations as proposed in the *NPRM* would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver failed to meet one or more objective performance standards and when other conditions to a prescription were met. *Id.* The proposed standards addressed: (1) a rail carrier's failures to meet its original estimated time of arrival (OETA), *i.e.,* to provide sufficiently reliable line-haul service; (2) a deterioration in the time it takes a rail carrier to deliver a shipment (transit time); and (3) a rail carrier's failures to provide local pick-ups or deliveries of cars (also known as first-mile/last-mile service (FMLM)), as measured by the carrier's success in meeting an ''industry spot and pull'' (ISP) standard. *Id.* at 63901. The proposed regulations also addressed regulatory procedures, affirmative defenses, and practicability. *Id.* at 63908–10. In addition to proposing to provide for the prescription of a reciprocal switching agreement when the foregoing conditions were met, the Board sought comment on what methodology the Board should use in setting the fee for switching under a prescribed agreement, in the event that the affected carriers did not reach agreement on compensation within a reasonable time. *Id.* at 63909–10.

The proposed regulations would impose certain data requirements to aid in implementation of those regulations. In part, the proposed regulations would require a Class I carrier to provide to a customer, upon written request, that customer's own individualized service data. In addition, to ensure that the Board would have an informed view of service issues across the network, the proposed regulations would (1) make permanent the filing of certain data that is similar to the data the Board had collected on a temporary basis in *Urgent Issues in Freight Rail Service—Railroad Reporting,* Docket No. EP 770 (Sub–No. 1); and (2) require consistency in reporting that data. *NPRM,* 88 FR at 63910–11.

The Board solicited comments on the *NPRM* by October 23, 2023, and replies by November 21, 2023. *NPRM,* 88 FR at 63897. In response to requests for extensions, these dates were extended to November 7, 2023, and December 20, 2023, respectively. *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2)(STB served Sept. 29, 2023, and Nov. 20, 2023).

The Board received many comments and replies from interested parties, including public officials, railroads, shippers, trade organizations, and others.[2] As discussed below, overall, shippers and their supporting trade organizations strongly favor the Board's proposal, although many seek minor modifications or, in some instances,

[1] The Board also closed a sub-docket involving an earlier notice of proposed rulemaking from 2016. *Reciprocal Switching,* 88 FR 63917 (published Sept. 18, 2023) (closure of Docket No. EP 711 (Sub–No. 1)).

[2] A Table of Commenters with abbreviations the Board uses in the text and citations is provided below.

significant expansions to the scope of the proposed rule. The railroads and their trade organizations generally object to the Board's legal foundation for the proposed regulations and otherwise suggest significant changes to those regulations.

After reviewing the record, the Board is adopting a version of part 1145 that reflects certain modifications to the proposal in the *NPRM.* With respect to the performance standards in part 1145, some of the key modifications are as follows. First, based on numerous shipper comments and the data the Board had been collecting since 2022 in Docket No. EP 770 (Sub-No. 1), the Board is increasing the OETA standard for delivering within 24 hours of the OETA from 60% to 70% and the standard for performing ISP from 80% to 85%. Second, the Board is adopting a proposal whereby railcars that are delivered more than 24 hours before the OETA will count in assessing the rail carrier's performance. Third, the Board is establishing an absolute floor for the service consistency standard and will modify that standard to provide that certain deteriorations in transit time over a three-year period would also count as a failure. Fourth, the Board is withdrawing its proposal to combine lanes; the service reliability standard and the service consistency standard will be applied only to each individual lane of traffic to/from the petitioner's facility. Finally, in response to public comments, the Board makes other modifications to each performance standard. As discussed in the *NPRM,* the performance standards apply only to petitions under part 1145; the standards do not by themselves establish whether a carrier's operations are otherwise appropriate. The Board does not view it as appropriate to apply or draw from the standards when regulating or enforcing the common carrier obligation. *See NPRM,* 88 FR at 63902. Likewise, the performance standards do not define what constitutes adequate rail service. This also means that whether a carrier meets or fails to meet the standards in part 1145 is not determinative of whether a service-related prescription might be justified under part 1144 or part 1147 of the Board's regulations.

The Board is also clarifying issues concerning Class II and Class III rail carriers. Part 1145 pertains to shippers and receivers that have practical physical access to only one Class I rail carrier or its affiliated company. The affiliated company might be a Class II or Class III railroad. Part 1145 otherwise does not apply to Class II and Class III railroads.

As discussed in the *NPRM,* the Board will initiate an ongoing collection of data similar to a subset of the data that it had collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). That data must now be submitted using a standardized template to be developed by the agency. The Board will continue to require Class I railroads to provide data to a customer within seven days of receiving a request, but the Board is providing more clarity and specificity in regard to that requirement, as the original proposal could have impeded carriers' ability to provide timely responses. Based on comments, the Board also clarifies and modifies in certain respects the proposed provisions on affirmative defenses. The Board is also increasing the minimum duration of a prescribed reciprocal switching agreement from two years to three years and the maximum duration of a prescribed reciprocal switching agreement from four years to five years.

With respect to traffic that is or was moved under a transportation contract under 49 U.S.C. 10709, the Board explains that it will not prescribe a reciprocal switching agreement under part 1145 based on performance that occurs during the term of the contract. Concerning exempt commodities, the Board will not consider pre-revocation performance as the basis for a prescription under part 1145 but intends to prioritize petitions for partial revocation filed in furtherance of part 1145 cases in order to resolve expeditiously those petitions for partial revocation. The Board also intends to explore at a later date whether it should partially revoke exemptions on its own initiative to allow for reciprocal switching petitions, as is currently the case for the boxcar exemption. *See* 49 CFR 1039.14(b)(3) (expressly allowing for regulation of reciprocal switching for rail transportation of commodities in boxcars).

These issues, as well as numerous others, are discussed below. After considering the record, the Board hereby adopts the proposed regulations, with modifications as indicated below, as part 1145 of its regulations.

Various entities have asked that the Board take additional steps in this proceeding such as adopting a fourth performance standard that would measure whether the incumbent carrier reasonably met the customer's local operational and service requirements, (PCA Comments 12; *see also* PRFBA Comments 9 n.4; EMA Comments 8–9 n.4; NSSGA Comments 9 n.3; Olin Comments 6), or adopting a performance standard that would apply specifically to grain shippers, (USDA Comments 5–6). USDA and others ask the Board to grant terminal trackage rights based on a carrier's failure to meet the ISP standard, (USDA Comments 8; NGFA Comments 7; NSSGA Comments 9; ACD Comments 5; NMA Comments 6), or to open a new docket concerning terminal trackage rights, (Coal. Ass'ns Comments 8).

Others seek more sweeping reform, including: expanding part 1145 to all bottleneck segments (Coal. Ass'ns Comments 8); overturning the ''anti-competitive conduct'' test in *Midtec Paper Corp.* v. *Chicago & North Western Transportation Co.* (*Midtec*), 3 I.C.C.2d 171 (1986) (Coal. Ass'ns Comments 8; DOT/FRA Comments 3; ILWA Comments 1; FRCA/NCTA Comments 2; Celanese Comments 2; PCA Comments 4–7; Olin Comments 6–8; NMA Comments 4); adopting rules in *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads,* Docket No. EP 768, (NGFA Comments 9); and further delineating the scope of the common carrier obligation, (TTD Comments 3). The Coalition Associations, with support from ACD, also assert that, if the Board concludes it cannot consider the performance of contract traffic, the agency should reopen *Reciprocal Switching,* Docket No. EP 711 (Sub-No. 1), to adopt that proposal with several proposed modifications. (Coal. Ass'ns Reply 47–52; ACD Reply 3.)

The Board appreciates the Coalition Associations' efforts as well as the numerous additional suggestions from others about possible Board actions outside of this docket. However, the Board would like to gauge the effectiveness of this new rule before considering other ways to pursue the objectives of section 11102(c). As noted in the *NPRM,* in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared toward increasing competitive options is foreclosed. *Id.* at 63900. And, even with the adoption of part 1145, shippers may still pursue access to an alternate rail carrier under parts 1144 and 1147, and advocate for continued development, including, as appropriate, development by the Board of adjudicatory policies and the appropriate application of those rules in individual cases. *Id.*

The Board expects part 1145 to be a significant step in incentivizing Class I railroads through competition to achieve and maintain higher service levels on an ongoing basis. The objective and transparent standards, defenses, and definitions in this rule should also provide greater certainty

than the status quo. The Board also expects the new data collection to help ensure that it has an informed view of service issues across the network.

Legal Framework

Design of Part 1145

As discussed in the NPRM, part 1145 implements the Board's authority under 49 U.S.C. 11102(c) to prescribe reciprocal switching agreements when ''practicable and in the public interest.'' *NPRM,* 88 FR at 63899. There is a clear public interest in adequate rail service—a matter of fundamental concern under the Interstate Commerce Act. *See United States* v. *Lowden,* 308 U.S. 225, 230 (1939); 49 U.S.C. 10101 (in various policies referencing an ''efficient'' and ''sound'' rail system that can ''meet the needs of the public''); *see also* House Report No. 96–1430: Staggers Rail Act of 1980, Report of the Committee on Conference on S. 1946 at 80 (Sept. 29, 1980). Inadequate rail service can substantially impair rail customers' ability to operate their businesses, resulting in substantial harm to the United States economy as a whole. *NPRM,* 88 FR at 63899–900 (citing 49 U.S.C. 10101). The Board's decision to adopt part 1145 grows out of the Board's recognition that inadequate rail service can critically and adversely affect the national economy, yet the Board's existing regulations do not necessarily provide a sufficient response. *NPRM,* 88 FR at 63900 & n.7. Part 1145 addresses these concerns by providing a reasonably predictable and efficient path toward a prescription under section 11102(c) while, at the same time, providing for regulatory intervention only when there are sufficient, service-related signs of a public interest in intervention and when there would be no undue impairment to rail carriers' operations or ability to service other customers.

Part 1145 is designed specifically to promote the provision of adequate rail service to terminal-area customers that have practical physical access to only one Class I rail carrier or affiliate. *NPRM,* 88 FR at 63899. Under part 1145, upon petition by a shipper or receiver, the Board will prescribe a time-limited reciprocal switching agreement when (1) the prescription is in a terminal area and the petitioner has practical physical access to only one Class I rail carrier or affiliate, *see* 49 CFR 1145.1 (definition of ''reciprocal switching agreement''), 1145.6(a)(1); (2) the incumbent rail carrier failed to meet one or more performance standards, *see* 49 CFR 1145.2, 1145.6(a)(2); (3) that failure was not excused by an affirmative defense, *see* 49 CFR 1145.3, 1145.6(a)(3); (4) transfers under the reciprocal switching agreement would be operationally feasible and would not unduly impair service to other customers, *see* 49 CFR 1145.6(b); and (5) resulting line-haul arrangements would be operationally feasible and would not unduly impair a participating rail carrier's ability to serve its other customers, *see id.*

The performance standards in part 1145, which can be easily understood by shippers and carriers, address three fundamental aspects of adequate rail service: reliable timing in the arrival of line-haul shipments, consistent shipment times, and on-time local pick-ups and deliveries. The standards are set at levels such that performance below the standards would not meet many shippers' (and carriers') service expectations. *See* Performance Standards. Upon a petitioner's demonstration of such a failure and in the absence of an incumbent or alternate carrier's demonstration of an affirmative defense, infeasibility, or undue impairment as provided for in part 1145, *see* 49 CFR 1145.3, 1145.6(b), the Board would prescribe a reciprocal switching agreement, which would give the petitioner the opportunity to obtain line-haul service from an alternate carrier that may be able to provide better service. The prescription of a reciprocal switching agreement does not necessarily mean that the incumbent carrier would lose line-haul service because the incumbent carrier would continue to have the opportunity to compete to serve the petitioner. *NPRM,* 88 FR at 63901. The initial term of any prescribed agreement is for a limited duration of three to five years. 49 CFR 1145.6(c).

Part 1145 will promote the provision of adequate rail service, not only to a successful petitioner, but on a broader network basis. By providing a clearer set of conditions and procedures for the Board to prescribe reciprocal switching agreements, part 1145 will create an incentive for rail carriers to provide adequate service to terminal-area customers that lack another rail option. Part 1145 will also reduce regulatory risk and burdens under section 11102(c) by (1) enhancing the predictability of regulatory outcomes, (2) enabling potential petitioners to evaluate the costs and potential benefits of seeking a prescription, and (3) helping to contain the time and cost of petitioning for a prescription. *NPRM,* 88 FR at 63901. At the same time—because part 1145 provides for an appropriately defined and scoped switching agreement prescription only after careful consideration of affirmative defenses, infeasibility, and undue impairment—part 1145 will not result in the prescription of a reciprocal switching agreement when there is an insufficient basis or when the prescription would be unwise as a matter of policy. *See Midtec Paper Corp.* v. *United States,* 857 F.2d 1487, 1499 (D.C. Cir. 1988).

Comments

Class I rail carriers claim that adoption of part 1145 would exceed the scope of the Board's legal authority. These carriers assert that, as a condition to prescribing a reciprocal switching agreement, the Board must undertake a case-by-case analysis that would be far more elaborate than what is called for under part 1145. According to carriers, the Board must find that: (1) the incumbent carrier consistently provides inadequate service to the petitioner; (2) the incumbent carrier failed to cure the inadequacy after being given notice and a reasonable opportunity to cure; (3) the inadequacy continues to exist at the time of the Board's prescription; (4) service to the petitioner is worse than service to other customers; (5) the petitioner has a compelling need for alternate rail service, as indicated by demonstrated harm to the petitioner's planning and business needs; (6) alternate service would not impose greater harm on other stakeholders; (7) the alternate service would be safe and practicable; and (8) the alternate service would actually remedy the inadequate service. (*See* AAR Comments 2, 5, 8, 13, 17–18, 20–22, 62; *see also* CN Comments 16, 21; CN Reply 3–4; NSR Comments 8–10; CSXT Comments 10–12; CSXT Reply 4–5.)

In attempting to find a legal foundation for their approach, rail carriers look past the text of section 11102(c) to three cases in which the Board's predecessor, the Interstate Commerce Commission (ICC or Commission), applied the public interest standard: *Jamestown Chamber of Commerce* v. *Jamestown, Westfield, & Northwestern Railroad,* 195 I.C.C. 289 (1933); *Central States Enterprises, Inc.* v. *Seaboard Coast Line Railroad,* NOR 38891 (ICC served May 15, 1984), *aff'd sub nom., Central States Enterprises* v. *ICC,* 780 F.2d 664 (7th Cir. 1985); and *Delaware & Hudson Railway* v. *Consolidated Rail Corp.,* 367 I.C.C. 718 (1983). According to carriers, these cases indicate that, to find that a reciprocal switching agreement would be in the public interest, the Board must find that the petitioner has a ''compelling need'' for the agreement. (*See, e.g.,* AAR Comments 12–14.) AAR also relies on a statement in the legislative history suggesting that the

''practicable and in the public interest'' standard in section 11102(c) is ''the same standard the Commission has applied for many years in considering whether to order the joint use of terminal facilities.'' (*See* AAR Comments 14 (citing H.R. Rep. No. 1430 at 116 (1980)).)

Shippers respond that carriers' ''compelling need'' test misstates the law. According to NSSGA, the outcome in *Jamestown* (in which the ICC denied a request to prescribe terminal trackage rights) rested in part on the fact that the incumbent carrier there provided exceptionally good service. (NSSGA Reply 1–2.) Similarly, WCTL argues that *Jamestown* was premised in part on the fact that the proposed service arrangement was sought to aid a financially weak rail carrier. (WCTL Reply 10.) PCA asserts that any ''compelling need'' test would improperly impose an extra-statutory limitation on the Board's authority to prescribe reciprocal switching agreements. (PCA Reply 2, 5 (describing *Jamestown* as inapposite and stating that an ''actual necessity/compelling reason'' standard is found nowhere in the governing statute).) The Coalition Associations assert that the carriers' proposed ''compelling need'' test is overly narrow. They argue that the in-depth inquiry that carriers propose under the ''compelling need'' test would, as a practical matter, limit the availability of prescribed reciprocal switching agreements. According to the Coalition Associations, there is sufficient need for part 1145 given the public interest in creating an incentive to provide adequate rail service. (Coal. Ass'ns Reply 15–18.) The Coalition Associations add that the Board's authority to enact part 1145 flows not only from the ''practicable and in the public interest'' standard but also from the ''competitive rail service'' standard in section 11102(c). (*Id.* at 15–16.)

Class I carriers assert, not only that the Board must undertake a detailed case-by-case investigation as described above, but that, as a condition to prescribing a reciprocal switching agreement, the Board must find that the petitioner lacks an adequate intermodal transportation option (i.e., a transportation option via a mode other than rail). Carriers reason that, when there is an intermodal option, there is unlikely to be a compelling need for an alternate rail option. (*See* AAR Comments 78–79; *see also* BNSF Comments 14–15.) The Coalition Associations respond that intermodal options are not a realistic incentive to provide adequate rail service, reasoning that a customer might have structured its facilities and business model around rail transportation. (*See* Coal. Ass'ns Reply 22–23; *see also* AF&PA/ISRI Reply 7–8.)

On a separate tack, AAR asserts that part 1145 would inappropriately amount to direct regulation of the quality of rail service. AAR bases its assertion on the rule's use of defined performance standards. According to AAR, direct regulation of quality of service would contradict congressional policy to minimize the need for federal regulatory control over the rail transportation system. (AAR Comments 14–15.)

Finally, CPKC argues that the Board is precluded by the doctrine of legislative ratification from undertaking the approach taken in part 1145. Citing a statement in *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1507, that Congress did not intend the agency to undertake a radical restructuring of the rail sector through its switching authority, CPKC asserts that Congress ratified what CPKC calls the ''limited scope of the statute'' by not passing any of eighteen bills that, according to CPKC, would have relaxed the approach in *Midtec.* CPKC concludes on that basis that the Board may prescribe a reciprocal switching agreement only as a direct remedy to an inadequacy that is demonstrated on a case-by-case basis considering all relevant factors. (CPKC Reply 5 n.2.)

The Board's Assessment

Part 1145 reasonably implements the Board's authority to prescribe reciprocal switching agreements when practicable and in the public interest. Class I rail carriers' arguments to the contrary rest on a misinterpretation of the public interest standard in section 11102(c)—a misinterpretation that would effectively replace the statutory standard with a ''compelling need'' standard that, as interpreted by the carriers, would leave the Board little room to fashion its implementation of the public interest standard and the underlying congressional objectives according to the circumstances at hand. The carriers' generalized concerns about the prescription of reciprocal switching agreements are also misguided. Finally, because part 1145 is amply justified under the ''practicable and in the public interest'' standard, it is unnecessary to consider here whether part 1145 is also justified under the ''competitive rail service'' standard in section 11102(c), as some commenters have argued.

Governing Principles

The public interest standard in section 11102(c) gives the Board broad discretion to determine when to prescribe reciprocal switching agreements. In other contexts in which Congress has used the public interest standard, the United States Supreme Court has described the standard as ''expansive.'' *Nat'l Broad. Co.* v. *United States,* 319 U.S. 190, 219 (1943). The public interest standard serves as a ''supple instrument'' for the exercise of discretion by the expert body that Congress charged with carrying out legislative policy. *FCC* v. *Pottsville Broad. Co.,* 309 U.S. 134, 137–38 (1940); *see also McManus* v. *Civil Aeronautics Bd.,* 286 F.2d 414, 419–20 (1960) (citing *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 396 (1940)). The public interest standard allows the agency to respond to changes in the industry and to the interplay of complex factors, consistent with policy objectives that Congress established by statute. *Gen. Tel. Co. of Cal.* v. *FCC,* 413 F.2d 390, 398 (D.C. Cir. 1969); *Huawei Techs. USA, Inc.* v. *FCC,* 2 F.4th 421, 439 (5th Cir. 2021). In addition, both before and after the Staggers Act, there has been a recognition that the public interest in adequate transportation could be served through the introduction of another rail carrier. *See, e.g., Pa. Co.* v. *United States,* 236 U.S. 351 (1915) (pre-Staggers); 49 U.S.C. 11102(c); *Del. & Hudson,* 367 I.C.C. at 723 (post-Staggers).

In implementing the public interest standard in section 11102(c), the Board's discretion is to be guided by the policy objectives that Congress established through section 10101 (previously section 10101a) of the Act (the Rail Transportation Policy or RTP)). *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1499–500; *see also N.Y. Cent. Sec. Corp.,* 287 U.S. 24–25 (1932) (establishing that an agency's implementation of broad statutory authority is to be guided by policies set forth by Congress). Depending on the facts at hand, relevant considerations may include the potential to secure lower rates and/or better service, the expansion of shipping options, and possible detriments to affected carriers. *See, e.g., Del. & Hudson,* 367 I.C.C. at 723–24, 726. As needed, in considering whether a proposed action would advance the statutory objectives in section 10101, the Board weighs and balances the various elements of the RTP to ''arrive at a reasonable accommodation of the conflicting policies'' in the Act. *Ass'n of Am. R.Rs.* v. *STB,* 306 F.3d 1108, 1111 (D.C. Cir. 2002); *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500; *see also Vill. of Palestine* v. *ICC,* 936 F.2d 1335

(D.C. Cir. 1991) (agency looks to relevant and pertinent rail transportation policies).

Implementation of the Public Interest Standard Through Part 1145

Part 1145 advances the statutory goal of developing and continuing a sound rail transportation system. 49 U.S.C. 10101(4). Part 1145 does so by striking an appropriate balance between, on one hand, the shipping public's interest in securing better rail service and, on the other hand, the interest of rail carriers. *See* 49 U.S.C. 10101(1), (3), (4) and (5); *NPRM,* 88 FR at 63901. Part 1145 strikes this balance by providing for the introduction of an alternate rail carrier via an appropriately defined and scoped switching agreement prescription only when there are sufficient indications, based on the incumbent carrier's performance, that the introduction of a competing carrier would create the possibility of an improved service environment and when the affected carriers have not demonstrated that the proposed prescription would unduly impair their operations or ability to serve their other customers. As the ICC indicated in *Delaware & Hudson,* the introduction of an alternate rail carrier provides the potential to achieve better service. *Del. & Hudson,* 367 I.C.C. at 723; *see also NPRM,* 88 FR at 63901 (noting that part 1145 would ''advance the policies in § 10101 of having a rail system that meets the public need, of ensuring effective competition among rail carriers, of minimizing the need for regulatory control, and of reaching regulatory decisions on a fair and expeditious basis'').

The design of part 1145 takes into account carriers' need to earn adequate revenues. *See* 49 U.S.C. 10101(3). Its built-in limitations ensure that a prescription will not be issued if carriers demonstrate that a particular proposed prescription would unduly impair the carrier's ability to serve its existing customers. Other relevant considerations include that the rule does not apply to traffic moving under contract and that the initial duration of a prescription under part 1145 is limited to three to five years. While it is possible that a particular prescription could result in some reduction in an incumbent carrier's revenues (because a shipper chooses to use the alternate carrier after considering the service offerings of both the incumbent and the alternative carrier) such a potential concern is outweighed by the public interest in securing reliable and consistent rail service through an expeditious regulatory process for prescribing a reciprocal switching agreement when, as provided for in part 1145, no undue impairment would result. Part 1145 also balances consideration of the impact on non-petitioning shippers, as the Board will consider carrier arguments, if raised, about the impact on other shippers in determining whether a petition should be granted. Even with the potential concerns that any particular prescribed switch might raise, Congress expressly provided that the Board should have the authority to determine when such switches are ''practicable and in the public interest'' and part 1145 reasonably includes analysis of those statutory factors.

Part 1145 also gives reasonable effect to the statutory objectives of minimizing the need for federal regulation and of providing for efficient and fair regulatory proceedings. *See* 49 U.S.C. 10101(2), (15). First, part 1145 allows rail carriers to retain sufficient operational flexibility. While part 1145 could lead to some alterations in a carrier's operations, those alterations would be based largely on how the carrier chooses to respond to the potential of an alternate carrier, as part 1145 does not establish a service level for purposes of assessing common carrier or other statutory violations and remedies. *See NPRM,* 88 FR at 63902. Second, with respect to efficient and fair proceedings, part 1145 advances that interest through a targeted, service-based approach to regulatory intervention based on readily obtainable and understood information. The performance standards themselves are largely based on data that carriers and shippers use in the ordinary course of business and the assessment of performance is straightforward to calculate. Part 1145 provides specific affirmative defenses, which help to narrow the scope of a proceeding, and also allows for case-by-case consideration of other relevant issues when warranted. This ease of administration is an important policy goal, particularly where there have been concerns expressed about the efficiency of the Board's existing processes. *See, e.g., NPRM,* 88 FR at 63900 n.7.

In addition, as a condition to regulatory intervention under part 1145, there must be sufficient indications, in the form of the incumbent carrier's failure to meet a service-based performance standard and the absence of an affirmative defense or demonstration of undue impairment, that the introduction of an alternate rail carrier via an appropriately defined and scoped switching agreement prescription could be valuable in bringing about better rail service. *See* 49 CFR 1145.6. Part 1145 will lead to regulatory intervention only when, on balance, such intervention is specifically warranted and therefore does not implicate the D.C. Circuit's opinion in *Midtec Paper Corp.* v. *United States* about a radical restructuring of the rail sector. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1507. And even when that regulatory intervention occurs, given part 1145's express recognition of the incumbent rail carrier's ability to continue to compete for a successful petitioner's traffic even when a switch is prescribed, the rule furthers section 10101(4)'s goal of relying appropriately on competition among rail carriers. A shipper that obtains a prescribed switch after careful Board analysis will have the ability to elect the service provider that best addresses its needs. *See NPRM,* 88 FR at 63901; *see also Del. & Hudson,* 167 I.C.C. at 723 (''Additional rail competition is a clear public benefit . . . , one which is endorsed by rail transportation policy announced in the Staggers Act.'').

The Carriers' Proposed Approach Is Not Required by Law

The elaborate, case-by-case approach that rail carriers advocate is not required by law and, at the same time, would undermine the policy goals that the Board seeks to advance here. In the carriers' view, as a condition to prescribing a reciprocal switching agreement, the Board would need (1) to compare the quality of service to the petitioner versus the quality of service to other customers, (2) to assess whether any differences in the quality of service were reasonable, (3) to identify the petitioner's business needs, (4) to identify the level of transportation service that would reasonably meet those needs, and (5) to determine which rail carrier could provide better service. (*See, e.g.,* AAR Comments 19–23.) If this approach were required by law, as alleged by carriers, then the Board would lose the discretion that is inherent in section 11102(c)—the discretion to respond to different types of needs and to changing needs by prioritizing different objectives in section 10101 as appropriate to meet those needs. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500 (stating that the question is whether the agency arrived at a reasonable accommodation of the conflicting policies in its governing statute).

The most glaring deficiency in carriers' argument is that nothing in the text of section 11102(c) suggests that the Board's discretion is limited to where the Board undertakes carriers' elaborate

approach. Likewise, none of the cases that the carriers cite suggest that the carriers' approach is required by law. In *Jamestown,* the petitioners sought the prescription of terminal trackage rights under what is now section 11102(a). The requested prescription would have required the incumbent rail carrier to construct terminal-area facilities to enable the petitioners to directly reach another rail carrier (as it stood, the petitioners drayed their shipments to the other carrier). *Jamestown,* 195 I.C.C. at 289–91. In denying the prescription, the ICC noted that the prescription would have caused distortions by requiring the incumbent carrier to invest in facilities for the benefit of its weaker competitor. *Id.* at 291. The ICC concluded therefore that, while the prescription would have provided a convenience to the petitioners, more was needed to meet the public interest standard. To outweigh the harm that the prescription would cause, the petitioners would had to have shown more than a mere convenience:

> Where something substantial is to be taken away from a carrier for the sole benefit of [the petitioners], and with no corresponding benefit to the carrier, as in this case, we are inclined to the view that some actual necessity or compelling reason must be shown before we can find such action in the public interest.

Id.

The circumstances that led the ICC to look for a compelling need in *Jamestown* have no meaningful parallel to circumstances that could arise under part 1145. A prescription under part 1145 would not require the incumbent carrier to make investments for the benefit of a competitor, involves a limited form of intervention, and would be granted only if the carriers did not adequately demonstrate infeasibility or undue impairment to their operations or ability to serve other customers, among other limitations and protections under this rule. Of critical note, the *NPRM* made clear that a carrier's loss of a customer's business as a result of a prescription based on a failed performance standard is not a loss that needs to be redressed, (*see NPRM,* 88 FR at 63909), and part 1145 includes protections to avoid any associated undue impairment to the carrier's ability to service other customers, thus minimizing any potential concerns. Indeed, an incumbent carrier's financial losses in such a case would largely reflect its own service failure—it failed to meet one of three performance standards, and the carrier cannot offer an affirmative defense to excuse the service failure—and the shipper's election of the alternate carrier once given the option to choose rail providers. For these reasons, in the present context, there is no need for the Board to find, as a condition to a prescription, a heightened need that would outweigh harm to the incumbent carrier. As indicated by the ICC in *Delaware & Hudson,* the interest of the shipping public in securing better service is not a mere convenience. *Del. & Hudson,* 367 I.C.C. at 723 (stating that there is a light burden under the statute for a petitioner that seeks the potential to secure better rail service through the introduction of an additional rail carrier).

Like carriers' reliance on *Jamestown,* carriers' reliance on *Central States* is misplaced. There, the petitioner sought the prescription of either trackage rights or a reciprocal switching agreement so that the petitioner could have a shipment moved from the terminus of one carrier's tracks to a destination on another carrier's tracks 1.4 miles away. The ICC found that the proposed arrangement was intended to achieve business purposes unrelated to the adequacy of rail service and, moreover, would have threatened the affected carrier's already weak financial standing. The ICC denied the petition, reasoning that, in light of that harm, the public interest required more than a showing that the prescription would provide a convenience to the petitioner. *Cent. States,* 780 F.2d at 670–71, 679.

As with *Jamestown,* the circumstances that led the ICC to look for a compelling need in *Central States* have no meaningful parallel under part 1145. The harm that would have arisen in *Central States*—substantial harm to the affected carrier's already weak financial standing—is unlikely to arise under part 1145 because today each of the Class I carriers' financial standing is significantly stronger, *see R.R. Revenue Adequacy—2022 Determination,* Docket No. EP 552 (Sub-No. 27) (STB served Sept. 5, 2023); because a prescription under part 1145 would, at most, result in the incumbent carrier's loss of the petitioner's business for the limited duration of the prescription; and because of the numerous other protections and limitations in this rule. *See, e.g.,* 49 CFR 1145.6. For example, if the incumbent carrier were to demonstrate that a prescription under part 1145 would unduly impair operations or its ability to serve other customers, then the Board would not grant the prescription as provided for in 49 CFR 1145.6(b). Accordingly, the introduction of an alternate carrier through a prescription under part 1145 would only occur when there are potential public benefits and, given the Board's consideration of relevant issues, the risk of cognizable negative impacts is greatly minimized.

The ICC's decision in *Delaware & Hudson,* while cited by carriers, directly contradicts carriers' narrow approach to implementing the public interest standard in section 11102(c). There the ICC cited *Jamestown* for the proposition that the agency must find ''some actual necessity or compelling reason'' to prescribe a reciprocal switching agreement. At the same time, the ICC indicated the potential benefits of competition are not merely something convenient or desirable to a petitioner, as those benefits are normally presumed to be in the public interest. *Del. & Hudson,* 367 I.C.C. at 723. The ICC prescribed a reciprocal switching agreement in *Delaware & Hudson* based on these benefits plus the expansion of shipping options to customers in the terminal area and the lack of substantial harm to the complaining carrier. *Id.* at 723–24, 726.

In contrast, the ICC did not make the findings that AAR asserts are necessary pre-conditions to prescription of a reciprocal switching agreement. The ICC did not examine whether customers had a compelling need for the prescription as evidenced by regulatory determinations that customers had experienced consistently inadequate service or that the inadequacy persisted. The ICC did not examine whether customers' businesses had been harmed by existing service and whether any such harm was proportionally greater than harm to other customers. Finally, the ICC did not examine whether an inadequacy in service would be cured by alternate rail service. If anything, part 1145 is more conservative than the ICC's approach in *Delaware & Hudson* given that, under part 1145, prescription of a reciprocal switching agreement is available only if the incumbent carrier failed a performance standard and the other conditions to a prescription under part 1145 were met.[3]

[3] The approach and goals in part 1147 of the Board's regulations differ from those in part 1145 as well as from those in part 1144 of the Board's regulations. Part 1147 (''Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies'') was issued in conjunction with the Board's issuance of regulations on emergency service orders in 1998. Part 1147 was designed to create a regulatory option to address a service-based issue that was longer-term than an emergency service order (and distinct from the permanent prescription of access to an alternate carrier as provided for in part 1144). Part 1147 was designed specifically to replace an incumbent carrier for the duration of a service inadequacy. *See Expedited Relief for Serv. Inadequacies,* 3 S.T.B. 968 (1998), 63 FR 71396, 71396–97 (published Dec. 28, 1998). Therefore, part

Continued

All that remains of carriers' legal argument is an unremarkable statement in the legislative history that the ''practicable and in the public interest'' standard in section 11102(c) is ''the same standard the Commission has applied for many years in considering whether to order the joint use of terminal facilities.'' *See* H.R. Rep. No. 1430 at 116; *see also* 125 Cong. Rec. 15309, 15319 (1979). Without support, carriers contend that this general statement implies a host of restrictions on the Board's statutory authority. Properly understood, however, the statement merely points out a parallel between section 11102(a) on terminal trackage rights and section 11102(c) on reciprocal switching: both provisions use the ''practicable and in the public interest'' standard. Nothing in Congress's mere observation of that parallel suggests that henceforth, in implementing the public interest standard, the agency was to be bound by policy decisions or approaches that the agency had adopted in the past.

Rail carriers' interpretation of the ''same standard'' language fails on another level. Carriers imply that Congress meant to equate the public interest standard with the ''compelling need'' that the ICC looked for in *Jamestown,* even though neither the statutory text nor the legislative history includes any reference to a compelling need or to *Jamestown.* In fact, the ICC's inquiry in *Jamestown* grew out of the peculiar facts of that case; in other pre-Staggers cases in which the ICC applied the public interest standard, the ICC said nothing about a compelling need. *See, e.g., Seaboard Air Line R.R.—Terminal Facilities of Fla. E. Coast Ry.,* 327 I.C.C. 1, 7–8 (1965) (finding that the proposed service arrangement was in the public interest based on anticipated operating efficiencies, without reference to whether there was a compelling need for the arrangement).

Finally, even if a compelling need were required under the public interest standard in section 11102(c), a prescription under part 1145 would meet that standard. Part 1145 promotes adequate rail service both by introducing an alternate rail carrier via an appropriately defined and scoped reciprocal switching agreement when there have been sufficient indications of service issues (without the establishment of an affirmative defense or undue impairment) and by more broadly creating an incentive for rail carriers to provide adequate service. This approach—both for individual cases and at a broader systemic level—will help to mitigate the substantial harm that inadequate rail service imposes on the national economy. *NPRM,* 88 FR at 63900. At the same time and as noted throughout this decision, the Final Rule contains numerous protections against undue impairment, infeasibility, and operational impairment, including about carriers' investments and the ability to raise capital to the extent that results in undue impairment or an inability to serve other shippers. *See* Analytical Justification. Part 1145 further promotes adequate rail service by providing a clearer path to a prescription under section 11102(c), whereas carriers' approach would impose undue barriers.

Intermodal Competition

Carriers erroneously assert that, as a condition to prescribing a reciprocal switching agreement, the Board must find that the petitioner lacks an adequate option via another mode of transportation. (*See, e.g.,* AAR Comments 78–79; BNSF Comments 14–15.) Neither the text of section 11102(c) nor the legislative history suggests that the Board's discretion to prescribe a reciprocal switching agreement is limited to where there is an absence of intermodal competition.[4] *See Del. & Hudson Ry.* v. *Consol. Rail Corp.,* 366 I.C.C. 845, 854 (1982), *affirmed,* 367 I.C.C. at 727 (finding that the agency's authority to prescribe a reciprocal switching agreement is not limited to where there is an absence of intermodal competition). The presence or absence of intermodal competition might be relevant for purposes of part 1144, given that part 1144 seeks to remedy or prevent an act that is contrary to the competition policies of section 10101 or is otherwise anticompetitive. In that context, a finding of intermodal competition might inform whether the incumbent carrier could have abused market power for purposes of part 1144. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1513. As is well established, though, part 1144 does not reflect the full breadth of the Board's discretion under section 11102(c). The statute itself does not require a finding of conduct that is anticompetitive or contrary to the competition policies of section 10101, much less a finding that the incumbent carrier holds or abused market power. *See also* 49 CFR part 1147 (providing for a prescription without regard to whether the incumbent carrier holds or abused market power).

Here, there is no need either to find that the petitioner lacks an intermodal option or that the incumbent carrier holds or abused market power in serving the petitioner. To require those findings would be inconsistent with the specific concerns that the Board seeks to address through part 1145. The types of service-related problems that part 1145 seeks to address—insufficient reliability and excessive transit times—might reflect an abuse of market power vis-à-vis the petitioner but might also reflect broader management or operating decisions that are not well directed toward the development of a sound rail system. Part 1145 creates an incentive to avoid service issues, to the benefit of the rail system at large, by providing for the introduction of an alternate carrier in individual cases as would enable the shipper to choose a more efficient and responsive rail carrier.[5]

The Ratification Doctrine Does Not Preclude Adoption of Part 1145

CPKC's ratification argument—that, by not acting on legislative proposals after *Midtec Paper Corp.* v. *United States,* Congress mandated a narrow

1147 calls for the Board to (1) examine whether there has been a substantial, measurable deterioration or other demonstrated inadequacy in the incumbent carrier's service, and (2) consider whether another rail carrier is committed to providing alternate service. *See* 49 CFR 1147.1(a), (b)(iii).

While part 1147 is thus similar in some respects to the approach that AAR advocates here, part 1147 does not require several findings that AAR claims are required by statute. As examples, part 1147 does not require a finding of disproportionate harm to the petitioner or a finding that service to the petitioner is worse than service to other customers. But more importantly, as discussed above, none of part 1147, part 1144, and part 1145 seeks to define the absolute limits of the Board's discretion in implementing section 11102(c). The approach under each regulation is designed to address a specific concern; each approach reflects a particular prioritization or balancing of legislative objectives as reasonably appropriate to addressing the specific concern at hand. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500. The range of approaches across the Board's regulations and the case law underscores AAR's error in asserting that, by law, the Board's discretion to advance the public interest through section 11102(c) is limited to the overly restrictive approach that AAR advocates.

[4] The absence of a requirement in section 11102(c) to consider intermodal competition stands in contrast to other sections where Congress has expressly required the Board to consider intermodal competition. *See, e.g.,* 49 U.S.C. 10707 (requiring the Board to consider competition from other rail carriers and other modes of transportation when making market dominance determinations).

[5] It is beyond the scope of this proceeding to address whether, for the duration of a reciprocal switching agreement under part 1145, a carrier that served the petitioner necessarily would lack market dominance within the meaning of section 10707 and therefore would not be subject to rate review with respect to that carrier's line-haul rate to the petitioner. (*See, e.g.,* BNSF Reply 16; Coal. Ass'ns Comments 60; Coal. Ass'ns Reply 22–23.) The question of market dominance could be presented for consideration on a case-by-case basis, under the standards in section 10707, in the context of any challenge to the relevant line-haul rate.

interpretation of section 11102, (*see* CPKC Reply 5 n.2)—is unfounded. First, CPKC mischaracterizes the D.C. Circuit's decision in *Midtec Paper Corp.* v. *United States.* When the court suggested that Congress did not envision a radical restructuring of the rail sector, *see* 857 F.2d at 1507, the court did not suggest that the agency's discretion under the statute was limited to application of the standards in part 1144. To the contrary, the court noted that, through part 1144, *the agency* had narrowed its discretion. *Id.* at 1500; *see also Balt. Gas & Elec.,* 817 F.2d at 115 (leaving open the question whether a broader approach to implementing the agency's reciprocal switching authority would meet the objectives of the Staggers Act). CPKC's vague assertion that *Midtec Paper Corp.* v. *United States* confirmed ''the limited scope of the statute'' ignores the court's actual language.

Second, as relevant to part 1145, no reasonable inference can be drawn from legislative inaction on bills that were introduced after *Midtec Paper Corp.* v. *United States.* To find that Congress ratified or acquiesced to the interpretation of a statute, there must be *overwhelming* evidence that Congress considered and rejected the *precise* issue at hand. *See Rapanos* v. *United States,* 547 U.S. 715, 750 (2016). CPKC has failed to meet that burden, offering nothing to suggest that Congress has ever considered much less rejected an approach similar to the approach in part 1145. The inability to draw any relevant inference from legislative inaction after *Midtec Paper Corp.* v. *United States* is underscored by the lack of connection between part 1145 and the concern that the D.C. Circuit identified in *Midtec Paper Corp.* v. *United States.* Under part 1145, a prescription is not warranted merely by the fact that the petitioner has direct physical access to only one Class I carrier. A time-limited prescription would not be issued under part 1145 unless the shipper is only served by one Class I carrier, only in a terminal area, and only after the carrier failed to meet one of three performance standards, no affirmative defenses were established, and infeasibility or undue impairment were not demonstrated. The fact that part 1145 does not implicate the D.C. Circuit's concern about a radical restructuring further undermines CPKC's dubious theory that, by not acting after *Midtec Paper Corp.* v. *United States,* Congress precluded the approach in part 1145.

Finally, it would be unreasonable to conclude that—through inaction, with no indication of legislative intent—Congress reversed its affirmative decision to grant the agency broad authority to prescribe reciprocal switching agreements. If anything, Congress' reenactment of the public interest standard in section 11102(c) confirms the agency's broad authority in this context. *See Reciprocal Switching* (*2016 NPRM*), Docket No. EP 711 (Sub-No. 1) slip op. at 11–13 (STB served July 27, 2016), 81 FR 51149 (published Aug. 3, 2016).

Analytical Justification

Class I rail carriers suggest that the Board has failed to adequately support promulgation of part 1145. First, the carriers suggest that the Board must go farther than it does in analyzing the effects that the rule might bring about. Second, the carriers suggest that the levels of the performance standards in part 1145 are not adequately supported by record evidence. The following discussion addresses each argument in turn, explaining why each lacks merit.

Scope of Analysis

Comments

AAR asserts that, under principles of reasoned decision making, the Board must assess the cumulative advantages and disadvantages of promulgating part 1145 and must find that the advantages outweigh the disadvantages, even if the Board would later consider advantages and disadvantages in applying the rule on a case-by-case basis. (*See* AAR Comments 113–15 (citing *Michigan* v. *EPA,* 576 U.S. 743, 753 (2015)).)

AAR then directs a broad challenge at any rule that provides for the prescription of reciprocal switching agreements, without regard to the specific provisions of that rule. (*See* AAR Comments 113–15.) According to AAR, the promulgation of any such rule would create numerous disadvantages. First, in AAR's view, any expansion of ''forced switching'' would directly impair investment by increasing operational burdens, reducing resiliency, increasing costs, and reducing profits. (*Id.* at 115–21.) Second, in AAR's view, so-called ''sweeping'' switching requirements would distort the market for transportation service, in contradiction of congressional policy to achieve sound economics in transportation. AAR states that, where switching is economically efficient, it is likely to occur voluntarily. (*Id.* at 116–19, 123; *id.,* V.S. Orszag & Eilat at 14 (market distortions could result from regulatory intervention where there has been no demonstration of a deviation from efficient market outcomes); *see also* AAR Comments 9, 24–25 (asserting that, under part 1145, shippers could seek prescription of a reciprocal switching agreement, not because they needed alternate service, but as a means to extract rate concessions at others' expense).)

Third, in AAR's view, sweeping switching requirements would undermine the use of differential pricing, which AAR characterizes as critical to the health of the rail network. (*Id.* at 122 (citing *Pet. For Rulemaking to Adopt Revised Competitive Switching Rules* (*2012 Rulemaking*), EP 711, slip op. at 7 (STB served July 25, 2012)).) Additional disadvantages alleged by AAR include inefficient routing, increased congestion, environmental costs that are associated with increased use of fuel and emissions, train delays, higher risk of service failure due to increased ''touches,'' depressed incentives for future investment with resulting reductions in the quality of service, operational inefficiencies, safety risks, and threats to carriers' ability to recover the costs of their entire networks and to maintain financial viability. (AAR Comments 113.)

While naming a litany of alleged disadvantages, AAR asserts that provision for the prescription of reciprocal switching agreements would provide no public benefit. AAR suggests that the only benefit would be any benefit that accrued to the successful petitioner and that this benefit would impose burdens on others—for example, by causing disruptions or inefficiencies in rail service on a system-wide basis. (*Id.* at 119.)

AAR suggests that the alleged disadvantages of promulgating part 1145 can to some extent be quantified. (*Id.* at 114.) According to AAR, the Board has recognized the need for data-driven rulemaking. (*Id.* (citing *2012 Rulemaking,* EP 711).)

The Board's Assessment

The Board has engaged in reasoned decision-making, and AAR's arguments to the contrary lack merit. First, AAR mischaracterizes the standard for reasoned decision-making that applies in the present context. Second, the disadvantages that AAR alleges in connection with promulgation of part 1145 do not reflect the actual regulation.

AAR Mischaracterizes the Applicable Standard

An agency engages in reasoned decision making under the Administrative Procedure Act, 5 U.S.C. 551–559, when the agency reaches a logical conclusion based on relevant factors. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43 (1983). The factors that the

agency must consider are defined by the governing statute. *See Michigan* v. *EPA,* 576 U.S. 743. As discussed above, the relevant factors in implementing section 11102(c) are the RTP factors, which the Board has weighed as discussed in Legal Framework.

AAR errs in suggesting that, under *Michigan* v. *EPA,* the Board must go farther than it does in addressing the impact of part 1145. In *Michigan* v. *EPA,* the EPA decided to subject power plants to certain minimum, regulatory standards under the Clean Air Act. The Court found that, under the ''appropriate and necessary'' standard in the Clean Air Act, the EPA should have considered what it would cost power plants to comply with the regulatory standards in question. The Court reasoned that, within the statutory framework, the ''appropriate and necessary'' standard was properly interpreted as calling for consideration of the cost of compliance. The Court relied in this respect on the fact that related provisions of the Act expressly directed the EPA to consider the cost of compliance. *Michigan* v. *EPA,* 576 U.S. at 749–54. The Court's assessment of the factors that the EPA needed to consider rested specifically on the relevant provisions of the Clean Air Act. *Id.*

Michigan v. *EPA* therefore does not suggest that other agencies, in implementing other statutory provisions, must consider the same factors. *See Env't Comm. of Fla.* v. *EPA,* 94 F.4th 77, 97–98 (D.C. Cir. 2024). Of equal significance, *Michigan* v. *EPA* left in place the principle that agencies have broad discretion in *how* to consider relevant factors.[6] Even in *Michigan* v. *EPA,* where the Court held that the agency must consider quantifiable costs, the Court declined to hold that the EPA must conduct a particular type of cost-based analysis: ''It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for costs.'' *Michigan* v. *EPA,* 576 U.S. at 759. Here, neither section 11102(c) nor any related statutory provision indicates that the Board must undertake a particular form of analysis when implementing section 11102(c).

Michigan v. *EPA* likewise does not suggest that the Board must speculate on the cumulative impacts of part 1145. As noted above, part 1145 establishes a framework for case-by-case consideration of the ''practicable and in the public interest'' standard in section 11102(c) in the context of a petition for prescription of a reciprocal switching agreement. While the Board expects that the number of petitions under part 1145 will not be significant, the actual number will depend on factors that the Board cannot now predict—factors that, among other things, will include rail carriers' management and operating decisions. Whether the Board grants a given petition will also depend on factors that the Board cannot now predict, such as whether the incumbent carrier had an affirmative defense and whether the carriers could demonstrate undue impairment as provided for under part 1145. Unlike part 1145, the regulatory scheme in *Michigan* v. *EPA* did not involve case-by-case consideration. The future action that the EPA contemplated would have imposed more stringent standards on power plants, beyond the minimum standards that resulted from the EPA's original decision to regulate. *Michigan* v. *EPA,* 576 U.S. at 756–57. *Michigan* v. *EPA* therefore does not suggest that—when a rule establishes requirements that will be implemented only on a case-by-case basis, and when the outcomes in individual cases will turn on variable facts that the agency cannot reasonably predict—the agency must nevertheless speculate on outcomes as a condition to promulgating the rule. In any event, as discussed in Legal Framework, the Board has considered the many positive impacts this regulation will have on the incentive for carriers to provide adequate service and the concerns that may arise from particular switching orders. The Board has found that the qualitative advantages of part 1145 under the RTP outweigh those concerns and, in reaching this conclusion, has appropriately considered the relevant factors.

AAR's reliance on the *2012 Rulemaking*—for the proposition that the Board should conduct a more data-driven analysis here—is similarly unpersuasive. Pending before the Board at that time was a proposal by the National Industrial Transportation League (NITL). NITL's proposal was to provide, by rule, for the prescription of a reciprocal switching agreement when four conditions were met: (1) the shipper was served by a single Class I rail carrier; (2) there was no effective intermodal or intramodal competition for the relevant line-haul movement; (3) there was or could be ''a working interchange'' within a ''reasonable distance'' of the shipper's facility; and (4) switching would be safe and feasible, with no adverse effect on existing service. The proposal would have established conclusive presumptions for when the second and third elements of the four-part test were met. For example, the Board would conclusively presume that there was no effective intermodal or intramodal competition for a movement if the incumbent carrier's associated revenues exceeded its variable costs by a given ratio or if the incumbent carrier had handled a given amount of the relevant traffic. *See 2012 Rulemaking,* EP 711, slip. op. at 4.

The Board found that these conclusive presumptions would tend to make only certain types of shippers eligible for a prescription and, indeed, would result more or less automatically in prescriptions on behalf of those shippers. *Id.* The Board expressed concern that—if those shippers obtained lower rates on a widespread basis, due to the widespread prescription of reciprocal switching agreements on their behalf—then other shippers (those that remained captive) might bear an excessive portion of system costs. *Id.* at 7. The Board therefore sought empirical evidence on three impacts of NITL's proposal: (1) the impact on rates and service for qualifying shippers; (2) the impact on rates and service for captive shippers that would not qualify; and (3) the impacts on the financial condition of the rail industry and on the efficiency of the industry's operations. *Id.* at 2.

In 2016, the Board rejected NITL's proposal, concluding that the proposal would unduly favor certain shippers. The Board decided, as part of the same decision, to propose a different approach to reciprocal switching—an approach that, rather than relying on conclusive presumptions, left the prescription of reciprocal switching agreements almost entirely to case-by-case basis evaluation. *See 2016 NPRM,* EP 711 et al., slip. op. at 13–15, 16, 20. Given the difference in the approach in the 2016 proposal, the Board did not call for empirical evidence on the impact of that proposal.

The Board called for a particular type of analysis in considering NITL's proposal because, due to the nature of the proposal, it seemed likely that the proposal would have a discernible and predictable impact on rates and service. The Board did not call for a comparable analysis in considering the 2016 proposal, which left implementation almost entirely to the Board's discretion on a case-by-case basis. It would have been impractical, in that context, to attempt to predict the impact of the proposal on rates or service. Part 1145

[6] *See Stilwell* v. *Off. of Thrift Supervision,* 569 F.3d 516, 519 (D.C. Cir. 2009) (''The [Administrative Procedure Act] imposes no general obligation on agencies to produce empirical evidence.''); *Sacora* v. *Thomas,* 628 F.3d 1059, 1067 (9th Cir. 2010) (an agency is entitled to rely on its own expertise in promulgating a regulation); *see also Northport Health Servs. of Ark.* v. *U.S. Dep't of Health & Hum. Servs.,* 14 F.4th 856, 874 (8th Cir. 2021) (an agency is entitled to rely on anecdotal evidence in promulgating a regulation).

is like the 2016 proposal in this sense. Under part 1145, the Board will prescribe a reciprocal switching agreement only on a case-by-case basis and only upon making specific determinations under the ''practicable and in the public interest'' standard.

AAR Mischaracterizes the Impact of Part 1145

The Board finds unpersuasive AAR's claim that promulgation of part 1145 would impose significant disadvantages. AAR's list of alleged disadvantages is notably directed at *any* regulation that the Board might promulgate on reciprocal switching, no matter what standards the Board established through that regulation. (*See* AAR Comments 113.) On that level alone, AAR's list of alleged disadvantages is flawed as a basis for challenging promulgation of part 1145; AAR has failed to establish a sufficient nexus between its list of alleged disadvantages and promulgation of part 1145.

Of particular note, a prescription under part 1145 would not ''force'' the incumbent carrier to relinquish the petitioner's shipment to another rail carrier. A prescription under part 1145 would merely establish the legal foundation for the petitioner's shipment to be transferred to the other rail carrier should the shipper elect to take service from that carrier. Whether a transfer actually occurred would be determined by the petitioner, who could choose between competitive options—the services of the incumbent railroad and those of the alternate carrier. Within this regulatory scheme, particularly in light of the numerous protections in the rule, a carrier that desires more certainty, for example with respect to its capital investment decisions, can ensure that it provides high level service, can negotiate suitable contracts when appropriate, and can otherwise work with its customers to avoid regulatory intervention under part 1145.

Nor will part 1145 result in ''sweeping switching requirements,'' given numerous limitations that are built into part 1145. First, under part 1145, the Board will prescribe a reciprocal switching agreement only on behalf of a shipper or receiver that is served by a single Class I rail carrier (or affiliate), only in a terminal area, and only after the incumbent carrier failed to meet one of three performance standards. Second, a prescription would not be available under part 1145 for movements that occur under valid transportation contracts or for movements of exempt commodities. As explained below, a shipper of an exempt commodity would need to obtain revocation of the exemption before obtaining prescription of a reciprocal switching agreement under part 1145. *See* Contract Traffic and Exempt Traffic. As a result of these limitations, only a relatively small portion of all Class I movements are even potentially eligible for a prescription under part 1145. *See* ''Freight Rail Pricing,'' Report to Congressional Committees by the U.S. Government Accountability Office, GAO–17–166 at 5 (December 2016). Third, under part 1145, the Board will not prescribe a reciprocal switching agreement when there is demonstrated infeasibility or undue impairment to a carrier's operation or ability to serve other customers as provided for in part 1145. Fourth, a reciprocal switching agreement that is prescribed under part 1145 would remain in place after its initial duration only to the extent that the carrier failed to meet standards for termination or chose not to seek termination. Fifth, the rule allows incumbent carriers to offer affirmative defenses regarding a failure to meet a performance standard. It not only specifically enumerates multiple affirmative defenses but also allows a carrier to offer additional affirmative defenses on a case-by-case basis. In all, due to the reasonably tailored approach in part 1145, there is no basis to assume that part 1145 will lead to significant adverse overall impacts.

Besides lacking a sufficient nexus to part 1145, AAR's list is flawed on another fundamental level. Underlying the list is a mischaracterization of the nature of reciprocal switching. Under the proper characterization, reciprocal switching is merely an incidental movement to the line-haul movement. When a customer chooses to rely on a reciprocal switching agreement, the incumbent carrier simply moves the customer's shipment to/from the alternate carrier's switching yard for the customer's terminal area rather than to/from the incumbent's yard for that terminal area. These types of movements are routine in the rail industry and are governed by applicable safety and related regulations. In addition, as described throughout this decision, part 1145 includes protections against infeasibility and undue operational impairment. Any change in fuel use or emissions would be minimal; shippers have incentives to select the route that is overall most efficient, which may often be the route that is most fuel efficient. (*See* AAR Comments, 113–21; *id.,* V.S. Orszag & Eilat at 15–17.) By extension, given that an individual prescription is unlikely to impose adverse impacts in these respects, it is unlikely that promulgation of part 1145 will impose meaningful cumulative, adverse impacts in these respects.

The protections that are built into part 1145 also will allow carriers to raise concerns about investments and the ability to attract capital (*see id.,* V.S. Orszag & Eilat at 6), in that the Board would consider arguments in individual cases that a proposed prescription would impair investments to the point of unduly impairing operations or the ability to serve other customers. Limited eligibility under part 1145 (for example, the fact that a prescription would be available under part 1145 only for points of origin or final destination in a terminal area) also protects against substantial, cumulative adverse impacts on carriers' revenues, ability to attract capital, and ability to engage in differential pricing.

Finally, the Board disagrees that the introduction of an alternate rail carrier under this framework, especially when there are sufficient indications that sub-optimal service was provided, could substantially distort the market. (*See, e.g.,* AAR Comments, V.S. Orszag & Eilat at 10 (suggesting that the Board's intervention when service dips below a certain threshold level could result in market distortions); *id.* at 14 (''Cases in which switching has not happened by voluntary agreement require an explanation for why that is the case if switching is indeed the operationally and economically efficient outcome.''); AAR Comments 123.) A voluntary agreement between carriers to transfer a shipment from one carrier to another might enable the carriers to maximize their profits, but that outcome does not necessarily determine whether the carriers have made efficient investment and operating decisions from the perspective of the rail network as a whole.

Levels of the Performance Standards

Part 1145 relies on conservative performance standards—standards that are set below common service expectations and goals—as indicators of where it might be beneficial, consistent with the purposes of part 1145, to introduce an alternate rail carrier via an appropriately defined and scoped reciprocal switching agreement. As described in the *NPRM,* 88 FR at 63900, the Board has used two points of reference in setting the levels of the performance standards in part 1145. The first point of reference is customers' service expectations. Through public hearings in early 2022 and through numerous ''ex parte'' meetings since then, the Board has collected extensive

information about customers' service expectations. *See, e.g.,* Hr'g Tr. 64:5 to 64:9, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770; Ex Parte Mtg. Summary, Mar. 31, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1). The record shows that, when customers expressed heightened concern about carriers' performance, carriers' performance was falling dramatically.[7] There is also significant consistency among customers in their service expectations.[8] These factors provide sufficient confidence in the context of part 1145, given its specific design and purposes, that the service expectations that customers have identified in these proceedings generally reflect a level of rail service that is needed for customers to conduct their businesses on a reasonably efficient basis. While the performance standards in part 1145 are set with reference to customers' service expectations, the standards are set at or below the level of service that many customers have said is needed to avoid serious disruptions in their operations. A carrier's failure to meet one or more of the performance standards therefore is strongly indicative that the introduction of another carrier (which would allow market forces to address those concerns, subject to appropriate protections) could be beneficial.

The Board's second point of reference in setting the levels of the performance standards is the evidence that the Board collected in 2022 and 2023 in reviewing the performance of Class I rail carriers. That evidence corroborates the service expectation levels that are suggested by customers. The Board began its recent service oversight during the early 2020s, when it was widely recognized that delays and other deficiencies in the transportation of freight were substantially impairing the national economy.[9] Due to the pervasiveness of poor rail service, testimony during a public hearing in March 2022—a hearing in Docket No. EP 711 (Sub–No. 1) that was meant to explore competitive access on a more general level—often turned to customers' need for better service. *See, e.g.,* Hr'g Tr. 105:4 to 105:17, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1) et al. At roughly the same time as that hearing, the Board received several reports—including from the Secretary of Agriculture, U.S. Senator Shelley Moore Capito, and stakeholders—about the serious impact that poor service was having on rail customers. *See Urgent Issues in Freight Rail Serv.,* EP 770, slip op. at 2 n.1 (STB served Apr. 7, 2022) (citing Honorable Thomas J. Vilsack, USDA Letter, Mar. 30, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1); Letter from Honorable Shelley Moore Capito, to Board Members Martin J. Oberman, Michelle A. Schultz, Patrick J. Fuchs, Robert E. Primus, & Karen J. Hedlund (Mar. 29, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence''); Letter from NGFA to Board Members Martin J. Oberman, Michelle A. Schultz, Patrick J. Fuchs, Robert E. Primus, & Karen J. Hedlund (Mar. 24, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence''); Letter from SMART–TD to Chairman Martin J. Oberman (Apr. 1, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence'')).

These concerns led the Board to establish a new docket, *Urgent Issues in Freight Rail Service,* Docket No. EP 770, and to hold a hearing in that docket in April 2022. Through that hearing and subsequent meetings, the Board sought to understand customers' need for service and to examine decisions by rail carriers that had contributed to carriers' failure to meet that need. *See Urgent Issues in Freight Rail Serv.,* EP 770 (STB served Apr. 7, 2022). Shortly after the April 2022 hearing, the Board began to collect data on Class I carriers' performances both in completing line hauls and in providing local service on a timely basis. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (STB served May 6, 2022); *see also NPRM,* 88 FR at 63904.

The evidence that the Board collected reveals that Class I carriers' system-average performances varied significantly from time period to time period and from carrier to carrier during the early 2020s. *NPRM,* 88 FR at 63903–04, 63906. The evidence does more, though, than reveal carriers' faltering and erratic service during those years. It identifies the level of service that Class I carriers themselves set as their short-term performance goals to bring them out of the crisis period.[10] For example, the 70% reliability standard in part 1145 is set above the average level of Class I carriers' system-wide performances during the early 2020s yet generally below the carriers' own performance targets. This evidence reinforces the conclusion that the reliability standard is set at a modest level that balances the public interest in adequate rail service with a measured approach to regulatory intervention. Application of the reliability standard would provide a reasonable basis to conclude that intervention here—the prescription of an appropriately defined and scoped reciprocal switching agreement—could be beneficial (provided that the affected carriers did not demonstrate an affirmative defense, infeasibility, or undue impairment to their ability to serve other customers).

The same is true of the service consistency standard in part 1145. It is clear from the carriers' reports that a 20% increase in transit time can indicate the presence of significant service issues. In Docket No. EP 770 (Sub–No. 1), the Board required BNSF, CSXT, NSR, and UP to report a target system velocity for the period coming

[7] *See e.g.,* Hr'g Tr. 544:21 to 545:4, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770. The evidence underscores the critical need for improved rail service reliability. When the Board held its hearing in EP 770, CSXT and UP had 69% and 63% OETA for manifest traffic, respectively. *See* CSXT Performance Data at Row 163, May 18, 2022, and UP Performance Data at Row 182, May 18, 2022, available at *www.stb.gov/reports-data/railservice-data/.* In addition, according to 10–K filings made with the U.S. Securities and Exchange Commission (SEC), CSXT had carload trip plan compliance of 64% in the 2022 fiscal year, and UP had manifest/automotive car trip plan compliance of 59% in the 2022 fiscal year, but 71% in fiscal year 2020. These SEC filings are available at *www.sec.gov* (open tab ''Filings'', select ''Search for Company Filings'', and then select ''EDGAR full text search'').

[8] (*See* Coal. Ass'ns Comments 22; LyondellBasell Comments 2; DCPC Comments 6–8; NGFA Comments 12; PRFBA Comments 7; GISCC Comments 5; AFPM Comments 8–9; API Comments 3–4; NSSGA Comments 6–7; EMA Comments 6 PRFBA Comments 6–7 (each seeking a reliability standard as defined in the *NPRM* of at least 70%); *see also* Coal. Ass'ns Comments 32; ACD Comments 5; NGFA Comments 12–13; Olin Comments 6 (each seeking a service consistency standard where a failure would result from an increase of 15% or less in transit time); *see, e.g.,* Coal. Ass'ns Comments 5; NSSGA Comments 9; AFPM Comments 12; EMA Comments 8; PRFBA Comments 9; DCPC Comments 10; API Comments 5; NGFA Comments 13; FRCA/NCTA Comments 2 (each seeking an ISP standard of 90%).)

[9] *See, e.g.,* Fed. Reserve Bank of Cleveland, Matthew V. Gordon and Todd E. Clark, ''The Impacts of Supply Chain Disruptions on Inflation,'' Number 2023–08 (May 10, 2023), *www.clevelandfed.org/publications/economic-commentary/2023/ec-202308-impacts-supply-chain-disruptions-on-inflation.*

[10] *See, e.g.,* BNSF Status Report, Interim Update 7, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Merchandise OTP = 65% and ISP (referred to as ''Local Service Performance'') = 91%); CSXT Status Report Interim Update 3, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Manifest TPC w/in 24 Hours = 82% and ISP/FMLM = 87%); NSR Status Report, Interim Update 5, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Merchandise TPC = 82% and ISP (referred to as Local Operating Plan Adherence) = 78%); and UP Status Report, Interim Update 4, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (TPC Manifest = 70% and ISP (referred to as FMLM) = 91%). *See also NPRM,* 88 FR at 63901 (the carriers recognized that their performance during the early 2020s fell below reasonable service expectations).

out of the crisis of the early 2020s.[11] The data that the Board has collected on train speed informs the reasonableness of the service consistency standard, even though that standard measures increases in transit time rather than decreases in train speed.[12] For each carrier, a 20% drop from the carrier's target velocity [13] would correspond to service as bad as or worse than the carrier's service during what clearly were highly problematic periods on the network, as indicated by average train speeds that the carriers reported for those periods. *See United States Rail Service Issues—Performance Data Reporting,* EP 724 (Sub–No. 5) and data submitted to the Board pursuant to 49 CFR part 1250.[14] Even where velocity was reduced by less than 20% from the carrier's target velocity, the carriers recognized that the reduction in velocity imposed significant burdens on shippers.[15]

This evidence is corroborated by testimony of shippers in Docket No. EP 770, which shows that shippers were complaining about drops in velocity of less than 20% during the early 2020s.[16] When a shipper uses railcars that the shipper supplies itself, any significant reduction in the velocity of those cars through the system means that the cars are substantially less productive, resulting in adverse impacts on the shipper's costs, revenues, or both. *See, e.g.,* Hr'g Tr. 551:6 to 551:14, 568:12 to 569:9, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770. Shippers that rely on carrier-supplied cars may not have the same concern about fleet productivity but, as with other shippers, would still be impacted by the inventory cost of undelivered freight. A significant reduction in velocity might also be associated with reduced availability of carrier-supplied cars, to a shipper's detriment.

In all, record evidence indicates the conservative nature of the service consistency standard in part 1145, which reserves federal intervention for an increase in transit time of more than 20%. In the absence of a proven affirmative defense, such an increase in transit time provides sufficient indicia of service problems that are inconsistent with meeting customer and carrier expectations. In effect, such an increase points sufficiently to the potential value of introducing an additional line haul carrier.

To the extent that some commenters argue that the performance standards in part 1145 might be overinclusive, *i.e.,* counting as a ''failure'' service that would not prove to be inadequate in the market, the public interest is protected both by the provisions in part 1145 for consideration of factors that could work against a prescription and by the specific and limited nature of regulatory intervention under part 1145. Regulatory intervention—again, the prescription of an appropriately defined and scoped reciprocal switching agreement—would give the petitioner a service option when there is a factual predicate for concluding that intervention is warranted. Petitioners have the incentive to select, over the duration of the prescribed agreement, the more efficient and responsive carrier. To the extent that the performance standards might be underinclusive, counting as a ''pass'' service that would have proven to be inadequate in the market, the public interest is protected by the opportunity for the affected shipper or receiver to seek a prescription under the Board's other regulations. In all cases, the public interest is protected not only by the performance standards themselves, but also by the opportunity that carriers would have, on a case-by-case basis, to demonstrate an affirmative defense, infeasibility, or undue impairment to their ability to serve other customers. By ensuring that application of the performance standards is not the end of the inquiry, part 1145 precludes a prescription when sufficient countervailing public interest has been

[11] The target system velocities that the carriers reported are as follows: BNSF—Overall Velocity = 26 mph (BNSF Status Report, Interim Update 7, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); CSXT—(STB LOR Velocity = 24.2 mph (CSXT Status Report Interim Update 3, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); NSR—System Velocity = 22 mph (NSR Status Report, Interim Update 5, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); and UP—Car Velocity = 207 (Status Report, Interim Update 4, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting* (note that UP reports its velocity as measuring the average daily miles a car moves on UP's network)).

[12] Train speed is based on the time that it took a train to cover the distance *between* two terminals. *See* 49 CFR 1250.2(a)(1). A reduction in train speed means that the train sat idle for a longer time between terminals, without saying anything about how long the train sat idle at a terminal. In contrast, an increase in transit time could arise out of increased delays at a terminal and/or increased delays between terminals. It is reasonable to conclude therefore that, during periods when a carrier's average train speeds were reduced by a significant percentage, transit times over the carrier's system likely increased by the same percentage or a higher percentage.

[13] The Board recognizes these velocity figures are system averages, and it explains below how its service consistency standard accounts for variability across lanes.

[14] For example, a 20% drop for BNSF from its target would be 20.8 mph. The lowest average train speed BNSF has experienced since reporting began under 49 CFR part 1250 occurred in the March 29, 2019 reporting week with a system velocity of 22.3 mph. This was due to extreme flooding in the Midwest at that time. *See* ''Railroads' flood-ravaged Midwestern tracks trigger emergency declaration,'' Progressive Railroading (Mar. 21, 2019), *www.progressiverailroading.com/class_is/news/Railroads-flood-ravaged-Midwestern-tracks-trigger-FRA-emergency-declaration—57161*. Even during the service problems of the early 2020s, BNSF's lowest average train speed was 24 mph—a drop of only 7.69% from BNSF's target velocity. For CSXT, a 20% drop from its target would be 19.36 mph. The lowest average train speed CSXT has experienced since reporting began under 49 CFR part 1250 occurred in the August 16, 2017 reporting week with a system velocity of 18.4 mph. The Board held a hearing on CSXT's service issues at this time. *See Public Listening Session Regarding CSXT's Rail Serv. Issues,* EP 742 (STB served Aug. 24, 2017). A 20% drop for NSR from its target would be 17.6 mph. NSR had an average train speed of 17.6 mph in the November 5, 2021 reporting week and 17.0 mph in the November 24, 2021 reporting week. The 17.0 mph is the lowest recorded average train speed for NSR since reporting began. For UP, its average train speed was 24 mph for the reporting week of May 5, 2023. A 20% drop from UP from this level would be 19.2 mph. The lowest average train speed that UP has experienced since reporting began in under 49 CFR part 1250 occurred in the March 29, 2019 reporting week with a system velocity of 21.3 mph. As with BNSF, this low velocity was due to extreme flooding in the Midwest at that time. Even during the service problems of the early 2020s, UP's lowest average train speed was 22.8 mph—a drop of only about 5% from UP's target velocity. To access data filed pursuant to 49 CFR part 1250 visit *www.stb.gov/reports-data/rail-service-data/* (in table under ''Individual Carrier Performance Data'' select the individual railroad; then click the most current hyperlink; then filter by date, average train speed, and carrier).

[15] For example, during the week of April 15, 2022, UP had an average train speed of 22.8 mph—only 5% below UP's target of 24 mph. *See id.* During the Board's hearing in April 2022, UP acknowledged that even that reduction in velocity represented a failure to meet reasonable public demand. *See* testimony of Eric Gehringer VP of Operations at UP at the Apr. 27, 2022 Urgent Issues hearing and Testimony of Steve Bobb Chief Marketing Officer at BNSF Hr'g Tr. 805:8–813:19, and 813:11–17, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (''We know we are not currently meeting our customer's expectations. I want to reinforce our commitment to restoring network velocity so that we can deliver the quality of service our customers have come to expect, and position ourselves to grow with our customers, long-term.'') *See also* UP's 10–K filing with the SEC, which is available at *www.sec.gov* (open tab ''Filings'', select ''Search for Company Filings'', and then select ''EDGAR full text search'').

[16] At the April 2022 hearing in Docket No. EP 770, several shippers testified about the burdens associated with increased transit times. *See, e.g.,* Hr'g Tr. 73:7–13, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (Cargill testifying that rail service deterioration since the fourth quarter of 2021 resulted in a 15% increase in transit time for its private fleet); Hr'g Tr. 364:18 to 367:15, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (increased transit days resulting from rail service issues ''has had a huge financial impact'' on Molson Coors); Hr'g Tr. 551:6–8, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (NITL testifying that ''transit times in the first quarter this year have increased by 15% over pre-pandemic levels due to crew and power shortages''); Hr'g Tr. 558:12–18, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (ASLRRA testifying that, since the fourth quarter of 2020, one member company ''experienced significant deterioration in rail service'' including transit times that increased by six days and variability of transit that made it ''impossible for shippers to plan their business'').

demonstrated. In addition, as discussed in Legal Framework, the Board's paramount interest in establishing an expeditious process for addressing service-based reciprocal switching petitions and fostering a sound rail transportation system is best supported by a process that does not require protracted litigation.

Carriers' Objections

According to Class I rail carriers, the levels of the performance standards in part 1145 are not adequately supported by record evidence. The carriers allege several errors in this respect. First, according to AAR, the levels of the standards were inappropriately derived from data in Docket No. EP 770 (Sub–No. 1) that shows system-average performance. According to AAR, system-average performance does not necessarily indicate the level of performance that constitutes adequate service over a given lane or at a given time. (AAR Comments 46–50; *see also* CPKC Reply at 2, 8; R.V.S. Workman & Nelson at 19–23.) In addition, according to AAR, system-average performance does not distinguish between common carriage service and contract service. AAR suggests that this distinction is relevant because, according to AAR, contract customers might have agreed to different levels of service. (AAR Comments 9, 49–50; V.S. Orszag/Eilat 7, 21–24; *see also* CN Comments 5–6; CSXT Comments 14–15.)

Second, according to UP, it is inappropriate to rely on the data in Docket No. EP 770 (Sub–No. 1) because UP used one-week periods to measure its performance (*i.e.,* UP reported for each week the percentage of shipments that it delivered on time during that week). UP asserts that a carrier's level of performance over one-week periods cannot reasonably be used to extrapolate a reasonable level of performance over 12-week periods as provided for in part 1145. (UP Comments 4–5.)

Third, according to UP, it is problematic to base the levels of the performance standards on the data in Docket No. EP 770 (Sub–No. 1) because the carriers did not necessarily report their performance in the same way that compliance with the performance standards in part 1145 will be measured. For example, UP considered itself to have succeeded in completing a line haul on time if UP met its original trip plan as adjusted to account for delays encountered en route. In contrast, under part 1145, a rail carrier will be considered to have succeeded only if it came within 24 hours of the original estimated time of arrival, without adjustment for delays encountered en route. UP implies that, due to how carriers reported their performance in Docket No. EP 770 (Sub–No. 1), the data there overstates actual performance as compared to how performance will be measured under part 1145. (UP Comments 6.)

Finally, in its attempt to show that the performance standards in part 1145 are not adequately supported, AAR conducted a study of transit times. AAR submitted the study in its reply comments, as a result of which other parties did not have the opportunity to comment on the study. The study was based on transit times for all movements over Class I rail carriers from 2020 to 2023, with some exclusions. (AAR Reply, R.V.S. Baranowski & Zebrowski at 5–6.) The study purported to show that a year-over-year decrease in velocity of 20% would capture about 53.9% of the movements in 2020, about 76.6% of the movements in 2021, about 82.5% of the movements during 2022, and about 65.5% of the movements during 2023. (*Id.* at 7.) AAR concludes, based on its study, that it is typical for shipments to experience increases (and decreases) in transit time from one year to the next and that therefore the transit time standard does not capture only inadequate service. (*Id.* at 4–5.) AAR adds that its analysis showed no difference between consistency in serving captive customers and consistency in serving other customers. AAR concludes on that basis that the prescription of a reciprocal switching agreement would not necessarily cure an increase in transit time. (*Id.* at 5–6.)

The Board's Assessment

The Board rejects each of the foregoing arguments. First, contrary to carriers' suggestion, it is reasonable for system-average performance to inform the levels of the performance standards in part 1145. In the Board's experience, system-average performance is a strong indicator of the capability of the rail system to meet the public need for transportation service. While there is heterogeneity in lanes and traffic, and while variations can impact different geographies and businesses differently, the specific performance measurements under part 1145 largely factor in these differences. For example, the reliability standard in part 1145 is based on the estimated time of arrival that the carrier originally predicted. In setting the OETA, the carrier can account for the characteristics of the given lane (and, by extension, the characteristics of the shipper's traffic [17]) and likely delays. As a result, this type of measurement essentially controls for lane and traffic characteristics, so service over one lane is no more likely than service over another lane to fail the reliability standard. The consistency standard in part 1145 is based on how long it took the carrier to deliver the shipment over the same lane and over the same 12-week period during the previous year. This approach essentially controls for differences between service over a lane that has a longer-than-average transit time and service over other lanes.

A similar analysis applies to seasonal variations in rail service. For example, because a railroad can account for likely delays in setting OETA, service in one season is no more likely than service in another season to fail the reliability standard. In the case of an extreme weather-related event, that event could provide an affirmative defense to the extent that the event could not reasonably be predicted or mitigated. As for the fact that the system-wide data in Docket No. EP 770 (Sub–No. 1) included service to contract customers, the Board finds that detail to be irrelevant. In the Board's experience, most contracts do not establish standards for quality of service and, in any event, the EP 770 data does not establish whether carriers were providing service consistent with any contractual commitments that might have applied.

Second, contrary to UP's suggestion, it is reasonable to use system-average performance as reported for one-week periods as the basis for assessing performance over a 12-week period. The Board has accounted for any volatility that might have resulted from week-to-week reporting by using records of system-average performance over the course of several years and by relying heavily on customers' reasonable service expectations and carriers' performance targets.

Third, the ''apples to oranges'' problem that UP describes is both substantially overstated and ultimately irrelevant. As would be expected, in Docket No. EP 770 (Sub–No. 1), railroads that adjusted their original trip plans for delays that they encountered en route appeared to perform better than carriers that did not make those adjustments. The incremental difference between the two groups of rail carriers

[17] Under the definition of the term ''lane,'' the Board states that ''shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane, regardless of which route(s) the rail carrier uses to move the shipments from origin to destination.'' 49 CFR 1145.1. Through this definition, the Board is eliminating potentially flawed comparisons between traffic of different characteristics (*e.g.,* differences by commodity) and between traffic with different origin-destination pairs.

tended to be fairly constant.[18] As a result, the Board can reasonably discern what system-average performance would have been across the industry if all carriers had reported their performance on the same basis.

Of equal importance are the details of the reliability standard in part 1145. A carrier would fail to meet the reliability standard only if, over a 12-week period, the carrier fell below 70% in meeting its OETA plus or minus 24 hours. The general range of the reliability standard recognizes that, in the ordinary course of rail service, a shipment might encounter a certain number of unanticipated delays en route. The specific percentage (70%) provides an additional cushion between ordinary service and the possibility of regulatory intervention, as suggested by the data that the Board collected in Docket No. EP 770 (Sub–No. 1)—data that was largely collected during the major service problems of the early 2020s. The Board reasonably expects that rail service in the ordinary course will be better than rail service during that period. The 24-hour grace period provides even more cushion. In effect, the reliability standard in part 1145 provides for regulatory intervention on a conservative basis. The 70% standard is not as conservative as the 60% standard that the Board inquired about in the *NPRM* but—in the Board's judgment, based on comments and further analysis—provides appropriate ground for considering whether to prescribe a reciprocal switching agreement. *See* Performance Standards.

Finally, AAR's study of transit times does not persuade the Board that the performance standards in part 1145 would capture typical rail service. One of the glaring deficiencies in AAR's study is that it compared transit times from year to year during the early 2020s, when rail service was faltering and erratic. It would be unreasonable to conclude that increases in transit times during that period reflected variations in transit times that might be expected in the ordinary course of rail operations; if the Board were to accept AAR's study, the Board would implicitly and unreasonably conclude that the years that AAR used in its study provide the proper baseline for assessing changes in transit time.

Performance Standards

Service Reliability: Original Estimated Time of Arrival

As discussed in the *NPRM,* the proposed service reliability standard would measure a Class I rail carrier's success in delivering a shipment near its OETA, *i.e.,* the estimated time of arrival that the rail carrier provided when the shipper tendered the bill of lading for shipment. *NPRM,* 88 FR at 63903. The OETA would be compared to when the car was delivered to the designated destination. *Id.* Application of the service reliability standard would be based on all shipments that the shipper tendered to the carrier over a given lane over 12 consecutive weeks. *Id.*[19]

Using data that Class I carriers provided in Docket No. EP 770 (Sub–No. 1) as a reasonable starting point, the agency proposed a reliability standard of 60%, where a carrier would meet the standard if, over a period of 12 consecutive weeks, the carrier delivered at least 60% of the relevant shipments within 24 hours of the OETA. *Id.* at 63903–04. The Board also suggested that the reliability standard could be set by rule to escalate one year after the rule took effect. *Id.* at 63904. The Board sought comment on the percentage at which the reliability standard should be set, what the applicable grace period should be, and other matters relevant to the reliability standard. *Id.* at 63903–04.

Reasonableness of Using OETA

CPKC questions whether OETA is a meaningful reference point. According to CPKC, nearly half of its shipments arrive a day or more after the OETA. CPKC claims that it is infeasible to try to provide a more accurate OETA because, according to CPKC, there are too many routine factors that contribute to variations from the company's original trip plan. (*See* CPKC Reply, R.V.S. Workman & Nelson 15–16.)

Contrary to CPKC's suggestion, it is reasonable to use OETA data over a 12-week period to provide indicia of the overall reliability of a carrier's service for purposes of part 1145. Rail carriers bring their considerable expertise to the task of developing OETAs. Carriers typically study the factors that affect transit time over a lane, account for those factors through seasonal or other appropriate tolerances, and apply those tolerances in setting OETAs. CPKC, which is the only carrier to question use of OETA, has failed to convince the Board that the company cannot adopt a similar approach.

OETA Percentage

Many shipper organizations ask the Board to set the reliability standard (when based on a 24-hour grace period) at more than 60%. For example, the Coalition Associations ask the Board to set the percentage at 70%. (Coal. Ass'ns Comments 22.) They claim that the 70% threshold is attainable, is more consistent with Class I carriers' own expectations of the quality of service that they should provide, and better reflects the threshold at which poor service reliability has significant operational consequences for rail customers. (*Id.* at 24.)

LyondellBasell urges the Board to adopt the 70% standard proposed by the Coalition Associations. (LyondellBasell Comments 2.) It asserts that the higher standard is more in line with the level of service customers require to conduct their business. (*Id.*) LyondellBasell notes that, when railroads fail to deliver shipments close to the OETA, it incurs: (1) increased costs from diverting traffic to other sub-optimal modes of transportation; (2) lack of products at distribution facilities, which in turn has required LyondellBasell to use inefficient distribution sites and means of transportation; and (3) reduced production rates, shutdowns, or both for its own and its customers' facilities. (*Id.*) Even at reliability levels at or above 70%, according to LyondellBasell, the company incurs a substantial burden on its operations. (*Id.*) For example, because most polymer plants produce materials coming off the production line directly into railcars as the storage receptacle, LyondellBasell will likely have already reduced its production rates at such polymer sites. (*Id.* at 2–3.)

Other shipper groups ask the Board either to set the reliability standard at more than 70% at the outset or eventually to escalate the standard to above 70%. (DCPC Comments 6–8 (80% in year 1 and 90% in year 2); NGFA

[18] For example, the Board observes a reasonably strong linear association between UP's reliability data and BNSF's reliability data as reported in Docket No. EP 770. UP and BNSF operate in similar geographical environments, with approximately the same route miles and employment levels. In reporting reliability, UP adjusted its estimated time of arrival to reflect delays that UP encountered en route when those delays were not caused by UP. (*See* UP Comments at 6.) BNSF did not do so. During 85 weeks of the reporting period (May 13, 2022 to December 22, 2023), there was a correlation of 0.55 between reliability data for UP and reliability data for BNSF. The magnitude of the difference between the two carriers was fairly constant after adjusting for natural shocks (such as weather-related incidents) that each carrier may individually have experienced; for 55 of the 85 weeks of the difference in the two carriers' reliability data fell within a 2.9% to 12.1% range. Overall, UP had 77 weeks of better performance than BNSF. The consistency of the difference indicates that the difference was due to the difference in how the two carriers reported their reliability data.

[19] Under part 1145, once a carrier has communicated an OETA to a customer, that time will not be changed to reflect any subsequent change to the original trip plan of the car, no matter the cause of that change. As a result, a carrier will be deemed to miss the OETA for cars that are delayed due to a cancelled or annulled train if cars are not delivered within 24 hours of the original estimated time of arrival.

Comments 12 (supports ''closer to 100%''); PRFBA Comments 7 (80%); GISCC Comments 5 (80%); AFPM Comments 8–9 (65% in year 1, 70% in year 2, 75% in year 3, and 80% in year 4).) API argues that the second-year standard should be set at 80% to 85% and that, even at higher levels of performance by rail carriers, there are adverse impacts on the public interest. (API Comments 3–4.) API adds that service levels affect labor decisions made by the shipper, and that late shipments result in lost production time; overtime labor; increased transportation costs, demurrage, administrative burden, storage costs, and private railcar fleets; and loss of business opportunities. (*Id.* at 4.) NSSGA and EMA, which seek a reliability standard of 80% or higher, claim that at 60% their members would need to curtail operations or ship by truck. (NSSGA Comments 6–7; EMA Comments 6.) EMA adds that, for some of its members, trucking is not an option at all. (EMA Comments 6.)

Railroads oppose the 60% reliability standard as well as any other reliability standard, arguing that there is insufficient record evidence to support such a standard. Railroads otherwise do not comment on the level at which the reliability standard should be set. As explained in the Analytical Justification section above, however, the Board has sufficient justification for setting its standards based on credible evidence of reasonable service expectations and evidence that the Board has collected since 2022 in investigating the performance of Class I rail carriers. AAR adds that what a customer perceives as service that best meets its individual ''needs and requirements'' may run counter to the interests of other shippers and the health of the overall network that serves many shippers. (AAR Reply 39.) According to AAR, a standard that bypasses consideration of other shippers or the network as a whole—or the question whether a switch would remedy the shipper's service concerns—would not be consistent with the approach Congress directed. (*Id.*)

The Board will set the reliability standard at 70%.[20] Although several shippers support a higher OETA standard based on the argument that it would be ''attainable'' by the railroads, that is not the basis for the Board's decision here. The reliability standard, like the other metrics, grows out of shippers' reasonable service expectations, carriers' performance records, and carriers' performance goals without specifically rendering judgment on the level of reliability that rail carriers might in theory attain. As discussed above, many shippers have commented that a reliability standard of 60% is too low, as service even above that level exposes shippers to significant problems, including increased costs and production delays. A number of shipper organizations indicate that their members are impacted by poor service even when the carrier provides service above 60% reliability (measured as OETA + 24 hours). For example, PRFBA explains:

> [T]hat 60%, and indeed even 70%, represent far too low a bar for service reliability. Under the proposed rule, even those carriers who meet the standard with 60% nearly on-time performance would force some PRFBA members to shut down their plants and still others frantically to seek out alternative transport by truck. There are not enough trucks or truck drivers to keep up with that demand, to say nothing of the greater expense passed onto the consumer and drastically greater polluting emissions caused by trucking goods as compared with rail shipping. Moreover, for some PRFBA members, trucking goods simply is not an option altogether. Also, all PRFBA members suffer from the underutilization of their railcars whenever service is poor.

(PRFBA Comments 6–7.)

The Board specifically requested that shippers identify the point at which there are negative business impacts from poor reliability in rail service, *see NPRM,* 88 FR at 63904, and the information provided by shippers supports a finding at this point that a 70% level of reliability is reasonable as a reflection of service expectations.

The 60% standard in the *NPRM* was also a conservative proposal. As the Board explained, much of the underlying Docket No. EP 770 (Sub–No. 1) data in the *NPRM* reflected a challenging service period. Indeed, overall on-time performance for BNSF, CSXT, NSR, and UP had fallen from a pre-pandemic average of 85% in May 2019 to just 67% in the last week of May 2022, as crew shortages plagued rail service. *See* Stephens, Bill, Data Reported to Federal Regulators Reveal Extent of Deterioration in Rail Service—Trains (June 9, 2022). The Board found that 60% was a reasonable potential starting point for determining the reliability standard because it reflected a level that even the carriers acknowledged was far below expectations, but the Board also proposed an alternate standard that would escalate to 70% one year after the effective date of the rule, reflecting the view that service during that challenging time might not be the appropriate long-term measure for service performance for purposes of part 1145. Not only is that view supported by shippers' comments detailing the negative impact of service even above the 60% reliability standard, Docket No. EP 770 (Sub–No. 1) data from last December does in fact show that carriers are performing better. Indeed, data for the week ending December 22, 2023, indicates overall on-time performance of the four carriers averaging 80.1%. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1), slip op. at 4 (STB served Jan. 31, 2024). Considering this data, the comments from shippers about negative impacts to their businesses, and the overall framework in which failure to meet a service standard acts as a mechanism—with appropriate protections—for switching (as opposed to a different, more intrusive, or more severe form of regulatory intervention), a 70% standard is therefore reasonable.

A 70% standard is also consistent with railroads' stated, near-term performance goals as reported in Docket No. EP 770. As noted in the *NPRM,* BNSF, CSXT, NSR, and UP each identified a target for its systemwide weekly percentage of manifest railcars placed within 24 hours of OETA (as reported in Docket No. EP 770 (Sub–No. 1)) that the carrier would meet beginning May 2023, and these targets average approximately 74%. *NPRM,* 88 FR at 63903. The 70% reliability standard in the final rule remains below that average [as well as the average in more recent Docket No. EP 770 (Sub–No. 1) reports]. *See* Analytical Justification.

While the current record supports a finding that a reliability standard of 70% is reasonable, the Board declines at this time to set the reliability standard at a higher level or to provide by rule for escalation of that standard as requested by some shipper interests. The Board concludes that the better course of action is to gain experience under the 70% standard and gauge the effectiveness of part 1145 before considering whether to raise the standard above 70%.

Observation Period

Several shipper groups ask that a petitioner be allowed to rely on less than 12 weeks of data. (EMA Comments 6 (six weeks); PRFBA Comments 7 (six weeks); GPI Comments 3 (eight weeks); GISCC Comments 5 (four to six weeks).) According to NSSGA, which requests a six-week period, 12 weeks of bad service would have a ''devastating

[20] As discussed later in this decision, the 70% reliability standard will apply not only to cars that arrive more than 24 hours after the OETA but also those that arrive more than 24 hours *earlier* than the OETA.

impact'' on NSSGA members' operations. (NSSGA Comments 7.) Similarly, AFPM asserts that allowing poor service to continue for even six weeks would severely hurt refiners and petrochemical manufacturers, causing curtailments in output and even shutdowns. (AFPM Comments 9.) AAR responds that the record before the Board provides no basis to conclude that any of those changes would help the Board accurately and effectively identify situations where a service inadequacy exists and warrants regulatory intervention. (AAR Reply 41.) According to AAR, such changes would significantly complicate the proposed rule's operation and risk generating a large number of false positives. (*Id.*)

The Board will use an observation period of 12 weeks as proposed in the *NPRM.* Using a 12-week observation period means that the OETA standard will not be triggered by a service problem of relatively short duration, unless the problem is of such severity that it nevertheless results in failure to meet the 70% standard over the 12-week period. This approach will tend to reserve regulatory intervention under part 1145 for cases in which there had been a more chronic problem in serving the petitioner. A chronic but not necessarily acute problem is the type of problem that, compared to other types of service problems, is more likely to benefit from the introduction of rail-to-rail competition as provided for in part 1145. For acute service problems, shippers may seek relief under parts 1146 and 1147, without waiting for a 12-week observation period to end.

NSR recommends measuring performance under the reliability standard over quarters of the calendar year, rather than over a rolling 12-week period. According to NSR, using a rolling 12-week period would allow shippers to petition for a prescription based on performance that did not reflect the carrier's typical performance or indicate an ongoing service problem. (NSR Comments, V.S. Israel 3, 14; *see also* UP Comments 19 (encouraging an approach based on the last calendar quarter to mitigate the burden of data production).) The Board declines to adopt NSR's recommendation. To use quarters of the calendar year as the observation period would make the standard less likely to identify service for which the public interest would be served by introducing an alternate rail carrier (*e.g.,* a carrier could miss the OETA for 22 weeks and would not fail the standard if half of those weeks were in one quarter and the other half were in the next quarter).

The Definition of OETA

AAR notes that the definition of OETA in the *NPRM* differs from the definition of OETA in the demurrage setting and asserts that the definition in part 1145 should conform to the definition that is used for purposes of demurrage. (AAR Comments 51–52.) Under proposed § 1145.1, OETA is provided upon tender of a bill of lading. *NPRM,* 88 FR at 63912–13. For purposes of demurrage billing, OETA is provided after the shipment is physically released to the carrier or received by the carrier in interchange and is based on the first movement of the origin carrier. *See* 49 CFR 1333.4(d)(1). AAR claims that having two different definitions creates risk of confusion and would lead to duplicative efforts. (AAR Comments 51–52.) Individual railroads also call for OETA to be measured at time of release. (CN Comments 45; UP Comments 6.)

The Board will not change the definition of OETA under part 1145. The demurrage OETA definition, while appropriate for part 1333's ''minimum'' informational purposes, does not meet the goals of this rulemaking. As noted by the Coalition Associations, to use the OETA that is based on the carrier's first movement of the shipment rather than tender of the bill of lading would not capture a carrier's delay in picking up a car that had been tendered for shipment. (Coal. Ass'ns Reply 29.) And, if the carrier failed the reliability standard due to the shipper's delay in releasing the car, that could be raised as an affirmative defense. *See* Affirmative Defenses.

Delivery at Interchange

In the *NPRM,* the Board proposed that, in the case of interline service where the shipment is transferred between line-haul carriers at an interchange en route, the shipment is deemed to be delivered when the receiving carrier acknowledges receipt of that shipment. *NPRM,* 88 FR at 63904, 63912. Several commenters raised concerns with this approach.

CN asserts that this approach fails to account for cases in which the shipment arrived at the interchange but the receiving carrier is unable to accept the shipment. (CN Comments 48–49.) UP similarly asserts that a car should be deemed to be delivered upon ''delivery in interchange.'' According to UP, ''delivery in interchange'' occurs when a railroad moves the car past a designated automatic equipment identification reader or places the car on a designated interchange track, depending on the specific interchange that is involved. (UP Comments 7.) UP claims that a car can potentially sit on an interchange track for several days after delivery and before the subsequent carrier acknowledges receipt, when the matter is out of the delivering carrier's control. (*Id.; see also* API Comments 4 (suggesting that the gap between delivery and receipt can last for several hours).) The Coalition Associations respond that no carrier offers a practical solution to address concerns about a gap, but that AAR's own rules for assigning responsibility for car hire provide a clear and appropriate framework for determining when interchange occurs, including in situations where the receiving carrier causes an interchange delay. (Coal. Ass'ns Reply 43.)

The Board will define ''delivery'' at the interchange using UP's proposal. Although the Board suggested that in case of a dispute about a gap at the interchange it would be guided by interchange rules, *NPRM,* 88 FR at 63903, UP's approach is superior. While the car hire data is more accurate, it is more difficult to retrieve and can only be used after any disputes are resolved. In contrast, Delivery in Interchange data is routinely reported to the shipper on a real time basis. As such, based on UP's approach, a car will be deemed delivered at an interchange when it is moved past a designated automatic equipment identification reader or placed on a designated interchange track, depending on the specific interchange location involved. However, if there are disputes about the accuracy of a delivery time by either the customer or the receiving railroad, the Board can use car hire accounting records to decide the issue.

Delivery at Customer's Facility

For deliveries to a customer's facility, the Board proposed to define ''delivery'' as when a shipment either is actually placed at the designated destination or, in given circumstances, is constructively placed at a local yard that is convenient to the designated destination. *NPRM,* 88 FR at 63912.

UP notes that for traffic it delivers to customer facilities, UP's Trip Plan Compliance (TPC) measure for manifest traffic measures compliance based on when the car is delivered to the customer facility, regardless of whether it spends time in constructive placement. (UP Comments 8.) For ''order in'' customers—customers who by prior agreement have UP hold cars in serving yards pending the recipient's request for delivery—UP ''stops the clock'' during the time a car spends in constructive placement for purposes of measuring TPC. (*Id.*) If ''spot on arrival''

customers—customers with facilities where railcars may be placed without placement instructions—cannot accept delivery when their cars arrive, UP puts the cars into a hold status then adjusts the time of arrival under UP's trip plan when the car is released from that status. UP asserts that its calculation method reflects the customer's role in the delivery schedule and the full journey of the railcar. (*Id.*) UP asks that the Board conform to the railroad's practice. (*Id.*)

The Board will retain its approach from the *NPRM* and not adopt UP's proposal to define delivery as being at a customer's facility. The proposed definition of delivery takes into account both situations described by UP. For ''order in'' customers, the car would be ''delivered'' for purposes of OETA when the car is constructively placed at a local yard that is convenient to the designated destination, which is the time it arrives in the local serving yard and is ready for local service in accordance with the rail carrier's established protocol. *See NPRM,* 88 FR at 63903 n.17. The same would be true for ''spot on arrival'' customers that are not able to accept delivery at the designated destination. If the customer is not able to accept delivery, the car is ''delivered'' at the time it arrives in the local serving yard and is ready for local service in accordance with the rail carrier's established protocol. The Board recognizes that each carrier may currently define its trip plan compliance-like metric differently, but one of the objectives of this rule is to standardize the metrics that will be used for part 1145 so that they may be easily understood by shippers, carriers, the Board, and the public. The approach from the *NPRM* accomplishes this. *See also* Data Production to an Eligible Customer.

Unit Trains and Intercity Passenger Trains

The Board proposed to apply the reliability standard only to shipments that are moving in manifest service, not to unit trains. *NPRM,* 88 FR at 63904. The Board explained that, in its experience, deliveries of unit trains do not give rise to the same type of concerns with respect to meeting OETA. *Id.*

A number of shipper groups ask the Board to include unit trains. (API Comments 3; AFPM Comments 9 n.15; NSSGA Comments 7; *see also* FRCA/NCTA Comments 3.) NGFA disagrees that unit trains do not have the same need as manifest trains to be delivered on time. It adds that the failure of Class I carriers to deliver unit trains on time can result in significant harm to the shipper/receiver and the shipper's/receiver's customers. (NGFA Comments 12.)

The Coalition Associations recommend including unit trains and using a higher reliability standard (of 90%) for those trains. (Coal. Ass'ns Comments 31.) According to the Coalition Associations, a 90% standard would better reflect the nature of unit trains, which tend to go through few if any interchanges. (*Id.*) In addition, according to the Coalition Associations, a 90% reliability standard for unit trains would better reflect the fact that the early or late arrival of a unit train (which might consist of 80 or more cars) can have a proportionally greater adverse effect on the customer. (*Id.*)

The Board will not apply a reliability standard to unit trains for purposes of part 1145. Based on Board experience, while manifest traffic runs on scheduled trains, unit trains generally do not have schedules. They run at various, usually irregular times. And, although some railroads have trip plans based on the unique schedule for each unit train that are applied to each car on the train, CN, CSXT, and NSR do not currently produce trip plans for unit trains. (*See* CN Comments 44); *Urgent Issues in Freight R.R. Serv.—R.R. Reporting,* EP 770 (Sub–No. 1), slip op. 5 n.16, 6 n.19 (STB served Jan. 31, 2024). It would be unduly burdensome to require those carriers to produce trip plans (including an OETA) for unit trains for purposes of the reliability standard under part 1145, factoring in that problems with the delivery of unit trains can also be captured by the service consistency standard in part 1145.

One commenter asks the Board to apply the reliability standard to intercity passenger trains. (Ravnitzky Comments 1.) The performance of intercity passenger trains is beyond the scope of this proceeding. As proposed in the *NPRM,* part 1145 applies only to Class I freight carriers and their affiliates and provides only for the prescription of a reciprocal switching agreement, a regulatory action that would not be meaningful for intercity passenger trains. Regardless, other statutory provisions address on-time performance issues of intercity passenger trains. *See* 49 U.S.C. 24308(f); *Compl. & Pet. of Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak Sunset Ltd. Trains 1 & 2,* NOR 42175, slip op. at 1 (STB served July 11, 2023).

Severity of Delay

The Coalition Associations suggest significant additions to the OETA + 24 hours model. They ask the Board to establish graduated reliability standards, where the standard would increase as the differential between the OETA and the time of delivery increased. Under the Coalition Associations' approach, the reliability standard would be set at 70% at OETA + 24 hours, 80% at OETA + 48 hours, and 90% at OETA + 72 hours. (Coal. Ass'ns Comments 4; *see also* ACD Comments 4.) The Coalition Associations also ask the Board to base the standards for the 24-, 48-, and 72-hour time bands on the average systemwide performance of all Class I carriers for those respective bands. (Coal. Ass'ns Comments 4.) According to the Coalition Associations, these standards would provide a strong incentive to railroads to achieve a reasonable level of service reliability that is consistent with changing industry conditions. (*Id.*)

Others raise concerns that the reliability standard, when based on OETA + 24 hours, does not measure the severity of deficiencies in the carrier's performance. For example, CSXT suggests that, under the reliability standard, a delivery 25 hours after OETA would be treated the same as a delivery 25 days after OETA. (CSXT Comments 17–18.) NSR recommends replacing OETA + 24 hours with a standard that measures both whether a delay has occurred and the severity of delay. (NSR Comments, V.S. Israel 13.) NSR specifically recommends use of a service reliability ratio, which would measure by what percent of the actual duration of the shipment the carrier missed OETA + 24 hours. (*Id.*)

The Board will not at this time change the reliability standard to account for the severity of a delay. The Board appreciates that its approach does not distinguish between failed deliveries that are just past the 24-hour mark and cars that are many days past that mark, but the Board would like to gauge the effectiveness of its basic concept of OETA + 24 hours before considering changes or refinements to account for degrees of severity. And, if extremely late deliveries are frequent, that could result in the service consistency standard not being met. Part 1145 is also not the only course of action a shipper will be able to pursue. In the case of more egregious delays, the shipper could petition under part 1147 without waiting the 12 week-observation period provided by part 1145. Where appropriate, the shipper could also pursue a separate action based on the common carrier obligation.

Early Cars

The Coalition Associations ask the Board to clarify that shipments that arrive more than 24 hours early do not count as being delivered on time. The Coalition Associations suggest that this approach will remove any incentive for rail carriers to ''game'' the reliability standard by artificially inflating OETAs and note that early cars can cause congestion at a shipper's facility. (Coal. Ass'ns Comments 4, 29; *see also* Olin Comments 5.) AAR opposes application of the reliability standard to early arrivals and asserts that early deliveries were not addressed in the *NPRM.* (AAR Reply 46–47.) AAR argues that shippers and railroads should be able to work together to manage flow into a customer facility, including by using constructive placement. (*Id.*) AAR adds that applying the reliability standard to early deliveries could encourage carriers to slow down the movement of traffic through their systems. (*Id.*)

The Board will adopt the proposal and clarify that cars arriving more than 24 hours before the OETA will count against the carrier for purposes of the service reliability standard. While delivering cars excessively early could potentially disrupt a carrier's system, it remains a possibility that a carrier could seek to avoid failing the standard through such practices. The Board is also persuaded by the Coalition Associations' assertion that unexpected early deliveries can have significant economic and operational consequences for rail customers. (Coal. Ass'ns Comments 29.) When railcars arrive unexpectedly early at a rail customer's facility, they can cause congestion at the facility that can impair operations. (*Id.; see also* Dow Reply 2 (noting that when raw materials customers order from Dow by rail are delayed or arrive excessively early, the customers can experience production slowdowns or downtime or may not have appropriate staffing to handle the delivery).) Even if a customer has a yard or even some extra capacity, it may simply not be ready to accept that car for various reasons. And, if the customer does not have the infrastructure to accept an early delivery, the customer usually must incur demurrage or storage charges. (Coal. Ass'ns Comments 30.)

AAR claims that constructive placement prevents the problems that early arrivals can cause for customers, (AAR Reply 46–47), but the Coalition Associations' complaint suggests that constructive placement is not solving the problems the shipper groups identify. In the Board's experience, railroads usually only begin constructive placement of cars to a spot-on-arrival customer once that shipper's facility is full of cars and no more cars can be actually placed. *See Capitol Materials Inc.—Pet. for Declaratory Ord.—Certain Rates & Pracs. of Norfolk S. Ry.,* NOR 42068, slip op. at 10 (STB served Apr. 12, 2004); (*see also* Coal. Ass'ns Comments 29). Constructive placement is therefore often not a solution for a customer who is faced with an early arrival.

While the Board did not specifically propose to cover early deliveries in the *NPRM,* it made clear that it was open to approaches to assessing reliability other than the approaches that were specifically discussed in the *NPRM. See NPRM,* 88 FR at 63904. The *NPRM* stated that OETA ''would . . . promote the completion of line hauls near the original estimated time of arrival. The on-time completion of line hauls allows the shipper to conduct its operations on a timely basis while permitting effective coordination between rail service and other modes of transportation.'' *NPRM,* 88 FR at 63903. It was therefore foreseeable that the Board might consider early arrivals as a circumstance that could negatively affect shippers' operations and coordination, as reflected in the Coalition Associations' comments. Other parties had full opportunity to respond to the Coalition Associations' proposal. *See Logansport Broad. Corp.* v. *United States,* 210 F.2d 24, 28 (D.C. Cir. 1954); *Int'l Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

Cross-Border Traffic

CN raises concerns about the application of part 1145 to movements that cross into or out of the United States; CN suggests that part 1145 should apply only to movements that take place entirely within the United States. (CN Comments 49–50.) CN also argues that system-wide reporting should exclude cross-border traffic and notes that it only reported on domestic U.S. trains as part of its reporting for Docket No. EP 770 (Sub–No. 1). (*Id.*)

The Board will not exclude this traffic from either the service reliability standard or the service consistency standard. The Board's jurisdiction includes rail transportation ''in the United States between a place in . . . the United States and another place in the United States through a foreign country; or . . . the United States and a place in a foreign country.'' 49 U.S.C. 10501(a)(2)(E)-(F). As to cross-border traffic, the Board has jurisdiction to determine the reasonableness of a joint through rate covering international transportation in the United States and in a foreign country. *E.g., Can. Packers, Ltd.* v. *Atchison, Topeka & Santa Fe R.R.,* 385 U.S. 182, 184 (1966). However, the Board does not have jurisdiction over operations outside of the United States. *See* 49 U.S.C. 10501(a)(2) (the Board's jurisdiction ''applies only to transportation in the United States''). Given the Board's jurisdiction, retaining part 1145's coverage of such traffic furthers the rule's underlying goal of incentivizing carriers to provide a level of service that best meets the need of the public.

However, the Board will limit action under part 1145 to situations where there is a distinguishable movement in the United States, specifically when the carrier records receipt or delivery at or near the U.S. border (including where the shipment is transferred between affiliated rail carriers at that point).[21] At this time, CPKC does not record an event for the U.S.-only portions of moves into or out of Canada. (CPKC Comments 13.) And it does not appear that requiring CPKC to do so would advance the purposes of the rule because, for moves into or out of Canada, the record before the Board does not indicate that the border has operational significance to customers in terms of service reliability. However, if a customer is concerned about service for cross-border movements within the Board's jurisdiction but without a separately measured U.S. component, the customer could seek relief under other statutes or regulations (*e.g.,* part 1147).

Multiple Lanes

In the *NPRM,* the Board explained that the service reliability standard generally would apply individually to each lane of traffic to/from the petitioner's facility. *NPRM,* 88 FR at 63904. Nonetheless, in certain circumstances, the Board proposed that it would prescribe a reciprocal switching agreement that governs multiple lanes of traffic to/from the petitioner's facility, each of which has practical physical access to only one Class I carrier, when (1) the average of the incumbent rail carrier's success rates for the relevant lanes fell below the applicable performance standard, (2) the Board determines that a prescription would be practical and efficient only when the prescription governs all of those lanes; and (3) the petition meets all other conditions to a prescription. *Id.* The petitioner could choose which lanes to/from its facility to include in

[21] Kansas City Southern historically has used such an approach for movements with an origin or destination in Mexico. (CPKC Comments 13.)

determining the incumbent rail carrier's average success rate. *Id.*

AAR raises various concerns about this approach, including that it (1) would not satisfy the ''actual necessity or compelling reason'' standard, (2) would undermine the Board's goal of predictability, (3) would present serious complexities to the Board, (4) would undermine carriers' abilities to plan and invest, and (5) would allow the petitioner to use reciprocal switching only for some of the lanes even though the Board had found that the reciprocal switching agreement would be ''practical and efficient'' only if it governed all of the lanes. (AAR Comments 66–69 (quoting *NPRM,* 88 FR at 63904, 63914).) AAR therefore asks the Board to apply the performance standards in part 1145 only to individual lanes. (AAR Comments 69.) AAR adds that a shipper could aggregate lanes in its petition, as a means to increase efficiency in proceedings before the Board, provided again that the performance standards applied only to each lane individually. (*Id.; see also* CN Comments 20–21.)

The proposal to allow prescriptions that cover multiple lanes has raised a number of questions, (*see* AAR Comments 68–69), and drew no explicit support from shippers. Therefore, in order to keep the procedures under part 1145 simple and predictable, the Board will withdraw this proposal. Thus, the service reliability standard and service consistency standard will only apply individually to each lane of traffic to/from the petitioner's facility. This, however, does not foreclose the possibility that a petitioner could make a case for switching irrespective of particular lanes under another part of the Board's regulations, *e.g.,* part 1147.

Additional Proposals

NSR asserts that the Board should modify the reliability standard to incorporate data on rail performance from competitive markets, which NSR asserts could include movements of exempt commodities and movements of boxcars. NSR suggests that, by incorporating that data, the Board would have a more useful benchmark to evaluate the quality of service to a petitioner. (NSR Comments, V.S. Israel 15–18.) Under NSR's proposal, the reliability standard would be replaced with a standard that measured deviations from system-wide average performance in competitive markets. (*Id.,* V.S. Israel 17.)

The Board will not adopt NSR's proposal, which would undermine predictability and ease of administration by potentially requiring multiple OETA standards, the identification of the particular competitive movement(s) that would provide a benchmark for the petitioner's movement, and periodic revisions to the OETA standard(s). NSR's proposal is also flawed insofar as it suggests that the Board should not prescribe a reciprocal switching agreement when service falls below reasonable expectations and performance goals unless the carrier has singled out one or more captive shippers in failing to meet those expectations and goals. In effect, NSR's proposal is based on the incorrect premise that the Board's discretion to introduce an alternate carrier is limited to situations in which the carrier is engaged in a demonstrated abuse of market power.

UP argues that the reliability standard should allow adjustments for delays that are not service related, such as a customer's request while a car is en route to have the car delivered to a different destination. (UP Comments 6.) It is not necessary to incorporate such a ''time-out'' into the reliability standard. The Board has provided, in part 1145, for affirmative defenses, which can include that a shipment was diverted en route based on a customer's request. The Board can judge the merits of such a defense in the context of a specific case and it seems unlikely that a petitioner would bring a petition if its service were routinely affected by that issue in any given 12-week period.

CSXT raises concerns that part 1145 does not require evidence that the customer relied on the OETA to its detriment or even that the customer was aware of OETA. CSXT also suggests that railroads should get credit for providing updated OETAs. (CSXT Comments 17–18.) CSXT's concerns fail to grapple with the purpose of the reliability standard, which is to promote on-time deliveries vis-à-vis the schedule that the carrier originally provides unless an affirmative defense applies. As noted by the Coalition Associations, accurate OETAs help avoid supply disruptions. (Coal. Ass'ns Reply 33.) They submit that, without an accurate OETA, a rail customer cannot effectively plan its shipments, operations, and fleet needs to avoid a supply disruption at the destination. (*Id.*) As a result, rail customers must maintain additional storage and railcar fleet capacity to prevent transportation delays from causing supply disruptions. Moreover, ETA updates do not make up for inaccurate OETAs. (*Id.*) The Coalition Associations explain that, while an updated ETA may be helpful to allow a rail customer to mitigate the impacts of transit variability to OETA, mitigating delays while a shipment is in transit is challenging, and mitigation options typically dwindle as the shipment progresses to the destination. (*Id.*) Thus, ETA updates do not resolve the root problem or provide the additional inventory and railcars necessary to address delays. (*Id.*)

The Board appreciates that updated ETAs remain important to customers so that the actual status of the car and probable date of arrival are known. With that said, shippers have pointed to numerous valid reasons why failure to meet OETA is problematic for customers and harmful to business operations. Given the goal of part 1145, it is reasonable to hold a railroad accountable for its original trip plan. To not hold the railroad accountable would undermine one of the Board's goals of incentivizing carriers to provide service that meets their own and shippers' expectations and needs. The Board will therefore not modify the rule as suggested by CSXT.

Summary

In conclusion, the Board will adopt the service reliability standard in the *NPRM* with the following changes: (1) the reliability standard will increase to 70%; (2) the definition of ''delivery'' will be clarified for purposes of interchange; (3) the reliability standard will measure early arrivals as well as late arrivals, in each case with a 24-hour grace period; (4) the reliability standard will be clarified for cross-border traffic; and (5) the reliability standard will only apply individually to each lane of traffic to/from the petitioner's facility.

Service Consistency: Transit Time [22]

As discussed in the *NPRM,* the service consistency standard would measure a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system. *NPRM,* 88 FR at 63905. Based on the Board's understanding of the rail network and available data, the Board proposed that, for loaded manifest cars and loaded unit trains, a rail carrier would fail the service consistency standard if the carrier's average transit time for a shipment over a 12-week period increased by either 20% or 25% (to be determined in the final rule) as compared to the carrier's average transit time for that shipment over the same 12-

[22] As noted in the Delivery at Interchange section above, the Board is changing the definition of ''delivery'' for purposes of a movement that involves an interchange between carriers en route. This change also applies to the service consistency standard. Moreover, as discussed above in Cross-Border Traffic, the Board is clarifying how its service reliability and service consistency standard will apply to cross-border traffic.

week period during the previous year. *Id.* Deliveries of empty system cars and empty private cars could also result in a failure to meet the service consistency standard. *Id.* The Board sought comment on what level of increase in transit time should be used in the service consistency standard and whether the Board should adopt a different standard—in lieu of the proposed service consistency standard—that captures prolonged transit time problems, to the extent those problems would not be captured by the reliability standard or ISP standard. *Id.*

Whether To Adopt the Service Consistency Standard

Some carriers question the usefulness of the service consistency standard. For example, CSXT asserts that fluctuations in transit time for individual lanes are normal on a dynamic network and not meaningful indicia of a service problem. (CSXT Comments 18.) CSXT adds that a year-over-year comparison does not consider other events affecting velocity such as track work, capacity improvements, volume surges in other traffic, slowdowns on another railroad network, and service design changes. (*Id.* at 19–20.) Similarly, CPKC warns that, unless the service consistency standard is carefully aligned with real world facts and data pertaining to the normal functioning of manifest carload networks, the standard would misidentify normal variations in service outcomes as service failures rather than spotlighting only those situations that represent real service inadequacies. (CPKC Reply 10.) In CSXT's view, this would lead to wasteful expenditures on proceedings that are triggered by misaligned thresholds and, moreover, would cause operational inefficiencies. CSXT also claims that the service consistency standard could lead railroads ''to shun traffic that does not fit into repeatable network operations.'' (*Id.*)

Using a rolling 12-week observation period at a 20% service consistency standard, AAR's consultants project a high likelihood—65.5%—that any given carload would not meet the service consistency standards. (AAR Reply, R.V.S. Baranowski & Zebrowski 7, tbl. 2.) AAR argues that this study confirms that there are substantial natural variations in transit time, such that nearly any lane, observed enough times, could trigger the service consistency standard. (AAR Reply 50.)

Based on data that AAR submitted in its reply comments, NSR asserts that the service consistency standard is seriously flawed as a measure of inadequate service. Rather than identifying potential service problems, the standard (according to NSR) captures the majority of rail traffic, where normal variations in transit time do not indicate inadequate service. (NSR Reply 9–15.) NSR argues that, if the Board wishes to use a service consistency standard, the Board should suspend this proceeding to more carefully study transit time data, so that any service consistency standard is empirically supported. (*Id.* at 2.) NSR also suggests, as an alternative, that the Board request supplemental evidence in support of the service consistency standard. (*Id.*) CN makes a similar recommendation. (CN Reply 8.)

The Board will retain the service consistency standard. Taken at face value, Baranowski and Zebrowski's results seem to indicate normal variability in transit times. But that appearance is misleading. A majority of the analysis period primarily covers the pandemic and supply chain crises years (2020, 2021, 2022).[23] If those years included one ''fast'' year because shipments were down and then one ''slow'' year because the carriers had decreased their staff numbers, it would follow that a significant amount of traffic would have been captured under this standard. In any case, what Baranowski and Zebrowski show is that the service consistency standard may indeed capture a crisis on a carrier's system. The Board does not find that outcome to be problematic. Such a carrier crisis is among the problems that the Board wishes to address through this rulemaking. *See also* Analytical Justification.

The railroads have pushed our sites to take on more expense and change operations to match the new process and operating strategies. We have had to increase our railcar fleet by over 10 percent in the past couple of years solely due to inconsistency in the rail service and increased transit time. And we're about to increase our fleet again in the next six months by approximately seven to eight percent. This is again due to the inconsistency in the service and transit time.

Hr'g Tr. 792:19 to 793:6, Mar. 16, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1). Another shipper commented: ''Our plant in the Northeast lost production of over 57 million pounds during the first two months of 2022 mostly due to increased transit time and railroad delays resulting from crew shortages.'' *Id.,* Hr'g Tr. 795:7 to 795:10, Mar. 16, 2022.

Furthermore, as explained in the *NPRM,* the service consistency standard promotes the public interest in various ways. For example, it helps to prevent the possibility that a rail carrier would increase the OETA for a shipment for the sole purpose of meeting the OETA performance standard—a practice that could obscure inadequate service. *NPRM,* 88 FR at 63901. The standard also provides an incentive for carriers to maintain velocity through the rail system. *Id.* Declines in velocity can require shippers to procure more railcars. (LyondellBasell Comments 3.) Increased fleets are a burden on railroads, shippers, and the system as a whole. As UP explained at the Board's hearing concerning reciprocal switching in Docket No. EP 711 (Sub–No. 1), ''if we assume the cycle times for manifest traffic increase by 24 hours, then customers would need to increase their fleets by 3,200 railcars. A chemical customer shared that a one-day increase in transit time would translate to an additional railcar lease cost of $100,000 annually, and $350,000 in annual inventory carrying costs.'' Hr'g Tr. 287:9 to 287:16, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1).

NSR itself notes that transit time data is a useful tool:

[T]ransit time data is important to its customers, and it is important to NS—NS monitors transit time and uses it as a tool to diagnose and problem-solve network issues as part of its commitment to providing safe, reliable service to its customers. As such, NS believes transit time data can be valuable for monitoring service.

(NSR Reply 9.)

The Board appreciates the carriers' concerns that normal variants could be captured by the metric under certain challenging operating periods like those that occurred during the pandemic. But just because a situation is ''normal'' or has occurred before does not mean it is excusable or acceptable. That said, part 1145 has also left the door open to other affirmative defenses such as, for example, a velocity problem that was due to scheduled maintenance and capital improvement projects.[24] And,

[23] At the March 2022 hearing in *Reciprocal Switching,* EP 711 (Sub–No. 1), the Board heard testimony from shippers about the following types of problems encountered during this period:

[24] As discussed in the Affirmative Defenses section, the Board will consider ''scheduled maintenance and capital improvement projects'' on a case-by-case basis. The Board does not intend the rule to disincentivize capital investment and in fact expects that this rule will help promote investments necessary for adequate service. However, the nature of ''scheduled'' maintenance and capital improvement projects suggests that carriers have a degree of control over their execution, and the Board intends to ensure that carriers exercise that

Continued

any time that is customer-controlled time is not counted in computation of the velocity and not counted against a railroad.

Percentage

A number of shipper groups ask the Board to set the service consistency standard at a level that would capture smaller reductions in velocity from one year to the next. For example, based on member feedback, the Coalition Associations urge the Board to reduce the standard to 15%. (Coal. Ass'ns Comments 32.) They assert that a sustained 15% increase in transit times would mean that shippers must purchase or lease additional railcars and would incur additional railcar maintenance costs. (Coal. Ass'ns Comments 32.) And, as shippers rely on more and more railcars to address longer transit times, these additional railcars can create network congestion that increases transit times even more, thereby requiring the shipper to acquire even more railcars. (*Id.*) Also, as shippers' railcar fleets swell to address transit-time increases above 15%, corresponding rail infrastructure requirements increase. (*Id.* at 33.) Rail customers would need additional railcar storage capacity to ensure they have enough spare railcars available, because increased transit times increase demand for railcars in transit as well as spares. (*Id.*)

Other shipper groups also support a more rigorous service consistency standard. ACD agrees that the standard should be set at 15%, (ACD Comments 5), while NGFA believes the Board should intervene except where transit time is nearly equal to transit time during the preceding year, (NGFA Comments 12–13). Olin adds that a service consistency standard in the 10% to 15% range is appropriate because service has been especially bad in the last few years and hence the ''base'' transit times have already been skewed downwards. (Olin Comments 6.)

AAR responds that none of the proposed service consistency standards are supported by data and that therefore none of the proposed standards identify where prescription of a reciprocal switching agreement could relieve inadequate service. (AAR Reply 49; *see also* CPKC Reply 6–7 (asserting that the proposed service consistency standards are not based on data concerning fluctuations in transit time from year to year).)

The Board proposed in the *NPRM* to set the percentage at either 20% or 25%. *NPRM,* 88 FR at 63905. Based on the comments received, the Board will set the standard at 20%. The Board must guard against making the standard too lenient, as at 25%, and thus not intervening before problems with poor velocity become severe and clog a carrier's system with cars. As acknowledged by railroads themselves, poor velocity can trigger a vicious cycle that is harmful to shippers, the incumbent railroad, and the network as a whole. *See* Hr'g Tr. 287:9 to 287:16, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1); Hr'g Tr. 787:1 to 787:13, Apr. 27, 2022, *Urgent Issues in Rail Freight Serv.,* EP 770. On the other hand, the standard should not be too strict, as that could capture situations not warranting regulatory intervention under part 1145. Weighing these considerations, the Board finds that 20% is currently appropriate here.[25] The Board appreciates that a 20% standard is conservative given that some of the testimony considered in making this proposal referred to 15% drops in velocity, and given commenters' subsequent calls for a standard that is not met when a decrease is above 15%. However, the Board finds as a policy matter that, at this point, it would be preferable to use a standard that reserves part 1145 for somewhat more significant concerns about patterns of decreased velocity over time. This approach is reinforced by the Board's decision to capture, in the final rule, gradual increases in transit time as discussed below. The Board reiterates that stakeholders will continue to have access to other relief for service inadequacies, including under parts 1144, 1146, and 1147. And, while the railroads assert that the Board's general support for the part 1145 standards percentage is insufficient and not supported by data, as discussed in the Analytical Justification section, those arguments fail to adequately consider the purpose and built-in limitations of the rule and the reasonableness of the indicators that the Board has chosen based on record evidence. Here, not only has the Board considered data submitted by the carriers, the Board has testimony from shippers as well as comments from numerous shippers upon which to inform its decision.

Observation Period

As with the reliability standard, a number of shipper groups ask the Board to decrease the observation period for the service consistency standard. NSSGA submits that 12 weeks is too long a period of bad service, claiming that it could potentially ruin its members' businesses. (NSSGA Comments 8.) NSSGA instead proposes a six-week period. (*Id.; see also* PRFBA Comments 10 (six weeks); AFPM Comments 10–11 (six weeks).) EMA also suggests that the Board adopt a six-week period rather than 12 weeks so that carriers ''have less time to obscure what level of service they truly are providing.'' (EMA Comments 7–8, 9.)

The Board will retain the 12-week observation period. As noted early in the service reliability section, a shorter observation period would not as clearly signal the public interest in introducing an alternate rail carrier via switching as the means to allow the petitioner to choose the carrier that better met its needs. And, as noted earlier, stakeholders will continue to have access to other Board relief, including parts 1144, 1146, and 1147—without needing to wait for a 12-week observation period to end.

Empty Railcars

Various carriers claim that the service consistency standard should not be triggered by decreases in velocity for movements of empty railcars. According to CN, application of the service consistency standard to movements of empty railcars could give a shipper access to an alternate line-haul carrier for loaded cars when the incumbent carrier is performing well in delivering those cars. In that case, according to CN, the shipper's petition would not meet the ''actual necessity or compelling reason'' standard that carriers contend should apply. (CN Comments 47; *see also* AAR Comments 56–57.)[26] CN further asserts that there are differences in how empty cars are managed and moved and that these differences affect transit times for those movements. (CN Comments 46–47.) CN notes that variables such as car supply, customer behavior, diversions, and other effects unrelated to service performance can result in high variability in transit time for empty private cars. (*Id.* at 47.) CSXT makes similar arguments, noting that

control with reasonable consideration of shippers' service levels.

[25] The Board rejects CPKC's argument that normal fluctuations in transit time are so significant as to ''swamp'' a 20% change in transit time. (*See* CPKC Reply, R.V.S. Workman & Nelson at 19–23.) CPKC's argument fails to account for how the service consistency standard works. The standard assesses changes from year to year in the average transit time over a lane over the same 12-week period. This approach inherently accounts for normal fluctuations in transit time over the lane in question, identifying a failure to meet the service consistency standard only when the average transit time over that lane increased from one year to the next by more than 20%.

[26] As discussed in Legal Framework, the carriers' claims concerning the appropriate standard lack merit.

empty cars do not cycle between the same origin and destination and are often diverted. (CSXT Comments 36–37.)

The Coalition Associations urge the Board to reject railroad arguments that oppose considering empty-car movements under the service consistency standard. They assert that railroad concerns about the differences in how loaded and empty cars move are overstated. (Coal. Ass'ns Reply 35.) Even though empty railcars might not cycle between the same origins and destinations, the Coalition Associations note that railroads can still measure transit times on empty cars that do move between the same empty origin and empty destination, which the Coalition Associations claim is a substantial number of private cars. (*Id.* at 36.) The Coalition Associations add that transit time increases involving empty-car movements can have a significant impact on rail customers, and allowing transit time increases on empty railcar movements to justify reciprocal switching prescriptions for both the empty movement and the associated loaded movement is a practical solution to discourage inadequate service involving empty movements. (*Id.* at 36–37.)

The Board will continue to include movements of empty cars in applying the service consistency standard. Consistent transit time in returning private/leased empties to the original place of loading is critical to having cars available for loading at that location. Indeed, if a year ago a shipper's fleet cycled at the rate of two roundtrips per month and that deteriorated to, for example, 1.4 roundtrips per month while demand remained constant, the customer would be faced with either obtaining more equipment or reducing its delivery of product. As AFPM explains, increased transit times for empty railcars can interrupt a rail customer's supply of cars needed to support operations, deprive a rail customer of empty cars that it may need for the goods it produces, and ultimately prevent a rail customer from fulfilling its own customers' orders. (AFPM Comments 11.) In the direst situations, a disruption in empty-car supply may cause severe facility backups, requiring a reduction of or even stalling operations. (*Id.*) The Board will therefore provide for a prescription based on the velocity of empty cars. However, customer behavior and customer-ordered diversions could constitute an affirmative defense to a service consistency failure arising from empty-car movements. Finally, similar to loaded cars (as discussed below), the Board will apply the three-year, 25% standard and 36-hour floor to empty cars.

Lanes vs. Routes

UP asserts that the Board should apply the service consistency standard to routes as opposed to lanes. (UP Comments 9–10.)[27] UP claims that comparing transit times for a given route from year to year, as opposed to comparing transit times for a given lane from year to year, is necessary to avoid distorted results. UP appears to reason that, by comparing transit times for a given route, the Board could better account for unanticipated events that occurred over a given segment of the rail system. (*Id.*)

The Board will continue to apply the service consistency standard to lanes, not routes. It is true that different routes can have different run times and lead to different delivery dates. But those changes nonetheless can affect a shipper's or receiver's business. If a railroad has decided to downgrade a route and condense volume on a core route and that decision adds miles and days to the transit time, then there might be grounds to prescribe access to another line haul carrier, subject to other requirements in part 1145. As noted by the Coalition Associations, UP's proposal would not capture increases in transit time that resulted from the incumbent carrier's routing decisions. (Coal. Ass'ns Comments 39.) If a routing decision is a function of, for example, a bridge washing out, the Board has provided an affirmative defense for extraordinary circumstances, and the carrier has other affirmatives defenses available in other circumstances.

DCPC recommends making a customer's facility open to reciprocal switching for all lanes, presumably as long as the incumbent carrier failed to meet a performance standard for at least one of those lanes and as long as the other conditions to a prescription were met. (DCPC Comments 4.) The company reasons that otherwise the customer and the carriers would need to closely monitor which cars from the facility were eligible for reciprocal switching and which cars from the facility were not. (*Id.* at 3–4.)

The Board declines at this time to adopt DCPC's approach, which would represent a major change to the framework the Board proposed in the *NPRM.* Its approach could make reciprocal switching available for movements that were not necessarily implicated by the carrier's failure to meet a performance standard. As a result, this approach would go beyond the current design and purpose of part 1145. DCPC also asks what would happen if a carrier created a new lane and whether a petitioner would need to refile with the Board to seek to add that lane to any prescription. (DCPC Comments 3–4.) As noted in Multiple Lanes, however, the Board has decided not to allow petitioners to combine lanes.

Shorter Lanes

Several carriers raise the concern that the service consistency standard will disproportionately affect traffic that has relatively short running times. CN reasons that, for trips of twelve hours, the addition of only a few hours in transit time from year to year could mean failing to meet the service consistency standard. (CN Comments 46.) CPKC raises a similar concern, noting that a 24-hour or greater delay–occasioned for example by a single missed connection–over a shipment that is scheduled to arrive in four days would exceed the 20% service consistency standard. (CPKP Reply 26.) CPKC argues that establishing a minimum absolute value for downward movement in average transit times of ''perhaps 36 hours'' would help to address this flaw. (CPKC Reply 26, 41.)

The Coalition Associations respond that the service consistency standard should be based on a percentage of transit time. They reason (1) that increases in cycle time require proportional increases in the size of the fleet that the shipper needs to maintain the same delivery rate to the destination, and (2) that this increase in the required size of the fleet imposes significant economic consequences on shippers. Having said that, the Coalition Associations suggest that the Board could adopt a 24-hour floor for the service consistency standard because its shippers typically plan fleet needs based on days in transit rather than hours in transit. (*See* Coal. Ass'ns Reply at 38–39.)

The Board will adopt an absolute floor of 36 hours, meaning that an increase in transit time over a 12-week period will fail the service consistency standard only if the increase is more than 36 hours. This approach is grounded in practical considerations and the specific goals of part 1145. A reciprocal switching movement itself might add roughly 24 hours to a trip. It is therefore unlikely that it would serve the public interest to prescribe a reciprocal switching agreement under

[27] Movement over a lane (transportation from a given point of origin to a given destination) often can be accomplished over a variety of routes.

part 1145, as a means to introduce an additional line-haul carrier, based on an increase in transit time of 36 hours or less.[28] The 36-hour floor applies only under part 1145. A shipper would be free to seek to demonstrate under part 1144 or part 1147 that an increase in transit time of 36 hours or less justified prescription of a reciprocal switching agreement.

Calls To Measure the Entire Move

Some shipper groups raise concerns that the service consistency standard applies only to the incumbent carrier's portion of an interline movement and therefore does not account for increases in transit time over the entire interline movement. (PRFBA Comments 10; EMA Comments 9.) NSSGA suggests that applying the standard only to the incumbent carrier's portion is, in effect, to apply the standard to an ''arbitrary subset'' of the entire movement. (NSSGA Comments 8.) The Board disagrees that it is arbitrary to apply the service consistency standard only to the incumbent carrier's portion of the interline movement, given that the incumbent carrier has the most direct control over its portion of the movement. If the incumbent carrier provided sufficiently consistent transit times over its portion, yet there was an excessive decline in transit times over the entire movement, then this would very likely be due to factors beyond the incumbent carrier's reasonable control. Given this high likelihood, the Board sees no value in requiring the incumbent carrier to demonstrate, as an affirmative defense, that a decline in transit time over the entire movement was beyond the incumbent carrier's reasonable control.

Volume

AAR notes that the service consistency standard requires comparing transit time performance in a particular lane between two windows of time. (AAR Comments 56.) To make this an ''apples-to-apples'' comparison, it asks the Board to clarify that the selected windows must have seen reasonably equivalent volumes shipped, with shipments moving under non-exempt common carrier service in both windows. (*Id.*) AAR asserts that volume can significantly affect transit time for a variety of operational and economic reasons and that large blocks of cars will often move through the network faster than single carloads. (*Id.*) The Board will not adopt AAR's clarification. Requiring a shipper to compare volumes as well as observation periods would be more difficult to apply, and affirmative defenses provide an adequate and appropriate path for an incumbent carrier to address transit-time increases that primarily result from volume changes, including where the likelihood of this occurring is not clear or predictable. (Coal. Ass'ns Comments 37.)

Gradual Increases in Transit Time

A number of parties claim that comparing transit time from one year to the next might not capture a significant increase in transit time that develops over a period of several years. For example, AFPM notes that, using the standard's proposed 20% or 25% year-over-year increase for a shipment that takes 14 days today could result in an increase to 17.5 days in the first year and nearly 22 days in the second year, continuing to grow exponentially in perpetuity, nearly doubling its 14-day transit time to more than 27 days after just three years. (AFPM Comments 11; *see also* FRCA/NCTA Comments 3.) To avoid the compounding effect of increases in transit time, the Coalition Associations ask the Board to adopt an additional threshold that would make reciprocal switching available if transit time increases by more than 25% during the prior three years. (Coal. Ass'ns Comments 4, 31–32; V.S. Crowley/Fapp, Ex. 2 at 5; *see also* Dow Reply 3.) Although AAR also made this point in its comments, (AAR Comments, V.S. Orszag/Eilat 18), it later argues that a multi-year approach would not be useful because, according to AAR, it would still capture normal variations in transit time. (AAR Reply, R.V.S. Baranowski & Zebrowski 9.)

To capture a slow increase in transit time that becomes substantial over time, the Board will modify the transit time measure to include an additional metric, which a carrier would not meet if a petitioner's transit time over the lane increased by more than 25% over the prior three years. *See* 49 CFR 1145.2(b)(2). For example, if the base year average transit time over a twelve-week period in the summer was 20 days, the incumbent carrier would fail to meet the standard if in years one through three, the average transit time for the corresponding 12-week period in any of those three years increased by five days or more, *i.e.,* to 25 days or more. A rail customer would qualify for a reciprocal switching agreement if it demonstrated that the incumbent carrier did not meet either the one-year or three-year threshold. As the Board explained in the *NPRM,* part 1145 ''would provide for the prescription of a reciprocal switching agreement to address deteriorating efficiency in Class I carriers' movements, specifically when the incumbent rail carrier failed to meet an objective standard for consistency, over time, in the transit time for a line haul.'' *NPRM,* 88 FR at 63901. The Board's modification of the transit time measure is consistent with that approach.

Summary

The Board will adopt the service consistency standard that was proposed in the *NPRM* using a 20% standard. The Board will also: (1) change the definition of delivery to an interchange and customer facility; (2) clarify how it measures transit time performance on international lanes; (3) modify the transit time measure to add a measure for a 25% increase in transit time over the prior three years; (4) create an absolute floor for both the one-year and three-year measure of 36 hours; and (5) provide that the service reliability standard only applies individually to each lane of traffic to/from the petitioner's facility.

Inadequate Local Service: Industry Spot and Pull

The third performance standard—ISP—would measure a rail carrier's success in performing local deliveries (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars during the planned service window. *NPRM,* 88 FR at 63905. Under the *proposed rule,* a rail carrier would fail the ISP standard if the carrier had a success rate of less than 80% over a period of 12 consecutive weeks in performing local deliveries and pick-ups during the planned service window. *Id.* The success rate would compare (A) the number of planned service windows during which the carrier successfully completed the requested placements or pick-ups to (B) the number of planned service windows for which the shipper or receiver, by the applicable cut-off time, requested a placement or pick-up. *Id.* The carrier would be deemed to have missed the planned service window if the carrier did not pick up or place all the cars requested by the shipper or receiver by the applicable cut-off time. *Id.* Subject to affirmative defenses, this would include situations in which the carrier has ''embargoed'' the shipper or receiver as a result of congestion or other fluidity issues on the carrier's network, which results in reduced service to the shipper or receiver. *Id.* Below are responses on these matters as well as other issues that drew significant comment.

[28] For the same reason the 36-hour floor also will be applied to the three-year standard.

The Board proposed the 80% standard based on data submitted in Docket No. EP 770 (Sub-No. 1). *Id.* at 63906. As with the service reliability standard, the Board requested that stakeholders and shippers/receivers provide evidence and comment on the appropriateness of this percentage and whether it should be higher or lower. *Id.* The Board also sought comment on a number of other points, including two possible service windows. *Id.* at 63906–07.

Whether To Adopt the ISP Standard

A number of carriers challenge the appropriateness of the ISP standard. For example, CN asserts that the Board should eliminate the ISP standard from § 1145.2 on the ground that the prescription of a reciprocal switching agreement is not an effective remedy for inadequate local service. CN reasons that, even where the petitioner chose the alternate carrier for line-haul service, the incumbent carrier would continue to provide local service to the petitioner. (CN Comments 36.) AAR agrees, adding that the petitioner's choice to rely on the alternate carrier for line-haul service might exacerbate the inadequate local service. (AAR Comments 57–58.) AAR suggests that a more appropriate response to poor local service might be the prescription of terminal trackage rights. AAR adds, however, that providing for the prescription of terminal trackage rights in this proceeding would exceed the scope of the *NPRM.* (*Id.* at 58.)

AAR asserts that, if the Board retains the ISP standard, the Board should establish a technical working group to study and consider the matter. AAR reasons that there is significant technical complexity related to how carriers provide local service. (*Id.* at 109.) CPKC goes further and argues that local services are too complex and require too much on-the-ground operating discretion and flexibility to warrant the Board's application of a universal performance standard for local service. CPKC suggests that, if the Board might wish to adopt standards for local service, then the agency should first examine in appropriate detail all of the complexities and potential adverse impacts associated with any such standard. (CPKC Reply 28.)

The Board will retain the ISP standard. The record in this proceeding demonstrates a significant public interest in promoting adequate local service. As discussed below, a number of shipper groups advocate for higher standards for service. (*See, e.g.,* ACD Comments 5 (noting that the group is supportive of this performance standard as first-mile/last-mile service has been a significant issue for shippers for decades); *see also* NSSGA Comments 9; AFPM Comments 12; EMA Comments 8; PRFBA Comments 9; DCPC Comments 10; API Comments 5; NGFA Comments 13; FRCA/NCTA Comments 2.) The Class I carriers agree that local service is critical to meeting customers' needs and that nevertheless, due to a variety of operating decisions by those carriers, the quality of local service is not at times where it should be. The public interest in adequate local service is effectively advanced by providing for the introduction of an alternate rail carrier for purposes of line-haul service when, through the subpar quality of the local service that it provides, the incumbent carrier failed to meet reasonable service expectations. The incumbent carrier's potential loss of the line haul creates an appropriate incentive to meet local service expectations given that provision of the line haul is the carrier's main source of revenue. Indeed, due to the economics of providing local service, the incumbent carrier might be indifferent to losing that service if it retained the line haul. Potential loss of the line haul also reflects the fact that overall operation of the network is more fluid when local service and line-haul service are well-coordinated, for example, when a local drop-off occurs within a reasonable time of when the line haul is completed. While the Board supports the carriers' goal of retaining flexibility in how they provide local service, as a means to maximize efficiency, it is vital that their less successful experimentation not threaten the fluidity of the network. An incumbent carrier that had to coordinate with an alternate line haul carrier would be more pressed to provide adequate local service.

The Board declines to convene a working group to consider complexities and variations in the provision of local service. From the customer's perspective, what matters is whether the carrier delivers and picks up cars when it says it will. The Board expects that each carrier will take into account the complexities of its operations when making those communications to the customer.

Calls To Measure by Railcar and for a No-Show Standard

Under the ISP standard proposed in the *NPRM,* a rail carrier would be deemed to have missed the planned service window for purposes of the ISP standard if the carrier did not pick up or place all the cars requested by the shipper or receiver by the applicable cut-off time. *NPRM,* 88 FR at 63906–07. Several commenters recommend modifying that approach.

The Coalition Associations propose two standards for local service. One standard would measure how many cars, out of the cars that were scheduled to be delivered or picked up during a planned service window, were not delivered or picked up. (Coal. Ass'ns Comments 4–5.) The other standard would measure how many planned service windows during the observation period were ''no shows,'' where the carrier failed to provide any local service during the planned service window. (*Id.*) The Coalition Associations assert that these different types of failure have different impacts on customers. (*Id.*) Under the Coalition Associations' proposed measure, the threshold would be tripped if the carrier failed to perform at least 80% of scheduled spots (deliveries) and pulls (pick-ups) during the planned service window and did not perform the remaining spots and pulls within the service window that immediately followed the planned service window. (*Id.* at 5, 36.) The Coalition Associations' proposed ''no-show'' standard would require a carrier to provide local service during at least 90% of the planned service windows over the 12-week observation period and not to miss two consecutive service windows. (*Id.* at 5, 37–38.)

AAR asserts that any standard for local service should be based on the number of cars that were spotted or pulled as scheduled within the planned service window. (AAR Comments 59.) AAR claims that the approach in the *NPRM* (which would credit the carrier with a ''hit'' only if the carrier spotted and pulled all scheduled cars during the planned service window) would overstate the impact of a carrier's failure to perform a small portion of the scheduled spots and pulls during the planned service window. (*Id.* at 23, 57–59, 109; *id.,* V.S. Orszag/Eilat 13.) CN agrees. (CN Comments 40.) CN states that it tracks local performance on a per-car basis. According to CN, this approach provides better insight into its performance and into the reasons for any misses. (*Id.* at 40–41; *see also* CSXT Comments 23; UP Comments 11.)

The Board will retain the approach to local service that was proposed in the *NPRM.* This approach is straightforward, avoids the complexity of the Coalition Associations' proposal, and provides an appropriate incentive to provide adequate local service. Not showing up at all counts as a ''miss'' under the Board's simpler approach and, in some circumstances, could be

captured by the service consistency and service reliability standards the Board is also adopting in part 1145. With respect to AAR's approach based on the number of cars spotted and pulled within any service window, the Board finds that the Board's approach is not only simpler to measure and consistent with the expeditious and efficient handling of proceedings but also properly reflects the relative impacts that local service failures have on customers. For these reasons, while the Board recognizes AAR's observation that service windows might include varying numbers of cars, the Board finds that AAR's concerns regarding overstatement are not persuasive. Under this rule, a carrier has flexibility to establish protocols governing their local service, including when to constructively place cars, when and how to establish cut-off times, and other actions important to formulating a work order that they should execute.

Percentage

Several shipper groups ask the Board to increase the threshold percentage used in the ISP standard. NSSGA argues that 80% is too low—that local service at that level causes a backup of products at the facilities of NSSGA members. (NSSGA Comments 9.) NSSGA asserts that 90% would be a more appropriate standard, which, if achieved, could protect against such backups. (*Id.*) AFPM also supports a 90% standard based on the adverse impacts that late or missed local service, as well as the spot or pull of incorrect cars, have on plant production and revenues. (AFPM Comments 12.) Others support setting the local service standard either at 90%, (EMA Comments 8; PRFBA Comments 9; DCPC Comments 10), or at 80% and providing by rule for an increase up to 85% or 90% after two years, (API Comments 5 (initial standard of 80% but 85% or 90% after two years)). NGFA recommends setting the standard at the ''high end of the interim performance targets'' from Docket No. EP 770 (Sub-No. 1). (NGFA Comments 13.) FRCA/NCTA recommend setting the standard at 85%. (FRCA/NCTA Comments 2.) AAR opposes these calls to increase the standard, asserting that the data does not support an increase. (AAR Reply 51.)

The Board will increase the local service standard. The 80% standard that was proposed in the *NPRM* would not have been triggered for many shippers until, on average over a 12-week period, the carrier had failed to fulfill a local work order for that shipper more than once per week. (EMA Comments 8.) The 80% figure, however, was too low to provide a useful indication of when it might be in the public interest to introduce an additional line-haul carrier through a prescription under part 1145. This point is clear both from shippers' comments and from data that the Board collected in Docket No. EP 770 (Sub-No. 1). The Rail Service Data page on the Board's website shows that, from May 13, 2022, to December 22, 2023, three of the four carriers that reported data for that period had average weekly ISP performance of between 89% and 91%, with highs between 93% and 97%. *See www.stb.gov/reports-data/rail-service-data/#Urgent%20Issues%20Rail%20Service%20Data.* While ISP performance was measured somewhat differently in Docket No. EP 770 (Sub-No. 1) as compared to how it will be measured under part 1145, the performance data from Docket No. EP 770 (Sub-No. 1) shows the high level of reliability that carriers seek to provide, and that customers expect, even during periods of major problems on the network. With this in mind, an 80% ISP standard would provide insufficient incentive for carriers to provide adequate local service. An 85% standard better reflects a level of service that is below what customers have consistently reported as their service expectations and what carriers appear to aim for in their service. *See id.* Although some shippers ask the Board to set a higher threshold, the agency would like to implement part 1145 before considering whether to increase the percentage.

Observation Period

AFPM argues that the 12-week observation period for the local service standard is too long for refiners and petrochemical manufacturers, adding that poor local service over such a sustained period will ''dramatically hurt'' their operations. (AFPM Comments 12.) For the reasons discussed above in the Observation Period sections concerning the service reliability standard and the service consistency standard, the Board will retain the 12-week observation for the local service standard.

Rebuttable Presumption

CSXT is concerned that the local service standard does not account for missed spots or pulls that were caused by the customer or resulted from the customer's request for service that exceeded the capacity of the customer's facility. (CSXT Comments 22.) CSXT asserts that the carrier should not be required to prove to the Board, after the event, that the miss was caused by the customer, arguing that the local crew's recorded determination at the time of the miss should be treated as presumptive evidence on that point. (*Id.* at 22–23.)

As stated in the *NPRM,* a miss caused by the customer would not be counted against the incumbent rail carrier. *NPRM,* 88 FR at 36907. The Coalition Associations asks the Board to include the phrase ''except due to a variation in its traffic,'' (Coal. Ass'ns Reply 44), but that suggestion will not be adopted. It is not clear without context why a miss caused by a variation in a customer's traffic should count against a carrier, but the Board can consider the relevance of the variation if presented as an affirmative defense.

The Board will not adopt CSXT's proposal to treat the local crew's determination of the cause of a miss as presumptive evidence of the cause. The burden should be on the railroad to provide persuasive evidence of the cause of the miss, given that the railroad would have the most direct knowledge of the cause. Persuasive evidence might include the local crew's determination at the time and can be provided by the railroad. The Board will consider this evidence but might find, based on the facts at hand, that the local crew's determination was insufficient.

Adjustment to the Local Service Standard Based on Reductions in Service

The Board proposed in the *NPRM* that, if a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in local customer demand, then the local service standard would become 90% for a period of one year. *NPRM,* 88 FR at 63907.

The Board will adopt this proposal in the final rule. AAR claims that an increase based on a reduction in the frequency of local service would limit carriers' flexibility and would make railroads more cautious to experiment with increased local service levels. (AAR Comments 59.) While the Board supports efforts to optimize rail service, it is important to disincentivize carrier efforts that, without collaboration with the shipper, reduce the quality of service to a shipper or receiver without corresponding increases in efficiency. A reduction in the frequency of local service can have substantial adverse effects on a shipper or receiver, especially if it does not reflect coordination with the shipper. For example, a shipper might need to build additional plant trackage to accommodate reduced pulls by the carrier. However, the Board may consider the impact of all customer

demand in the local serving area, not just that of petitioner, in considering whether a petitioner qualifies for this provision. The carrier will bear the burden to demonstrate that the drop in customer demand necessitated the reduction in local service.

The Board will extend to two years the period during which the increased local standard would apply. As the Coalition Associations explain, the burden of mitigating the risk of missed spots and pulls is significant and its members indicate that the infrastructure and fleet design changes necessary to implement these mitigation measures can take two years to fully implement. (Coal. Ass'ns Comments 41.) Although AFPM suggests a 95% standard, claiming that it recognizes some disruptions may occur while protecting shippers from service reductions that would result in poor ISP performance, (AFPM Comments 13), the Board will not adopt such a high standard. A 90% standard achieves the Board's goals, recognizing the high degree of accuracy that is appropriate in the context of local service while reserving the Board's introduction of an additional line-haul carrier for relatively significant local service issues.

The *NPRM* made clear, however, that the agency might find that the 90% ISP standard should not apply in a case. *NPRM,* 88 FR at 63907. The Board may consider, among other things, whether the carrier is offering more service during periods of seasonal or unusual demand to accommodate the demands of a shipper and whether such circumstances invalidate use of the 90% ISP standard. *Id.* Arguments such as these could be considered as affirmative defenses in response to a petition.

Service Window

The Board sought comment on two alternatives for what service window to use in applying the local service standard. *NPRM,* 88 FR at 63906. Under one alternative, the Board would use a standardized service window of 12 hours (the maximum duration that a crew is allowed to work), starting from the relevant serving crew's scheduled on-duty time. *Id.* Under the second alternative, the Board would use the service window that the rail carrier specified according to the carrier's established protocol, provided that the window did not exceed 12 hours. *Id.* at 63906–07.

The Coalition Associations recommend using service windows that comply with the carrier's established protocol rather than a standardized 12-hour window. (Coal. Ass'ns Comments 42.) They assert that using service windows that comply with the carriers' established protocol will encourage rail carriers to provide local service that meets the expectations that flow from the protocol, thus reducing disruptions to shippers. (*Id.*) The Coalition Associations note that when local service is unreliable, many customers stage cars for service the day before the service window and wait long after their service window for the carrier to pull staged cars. (*Id.* at 43.) At many facilities, this extended staging impairs or prohibits facility operations because it uses track space that the facility needs to operate and can lead to extra labor costs. (*Id.*)

The Board finds that, on balance, it is best to use a standardized 12-hour window for purposes of applying the local service standard. In response to the Coalition Associations' concern, the Board emphasizes that the 12-hour window that is used for purposes of the local service standard is not meant to override the rail carrier's protocols or to excuse carriers from complying with those protocols. The benefit of using a standardized 12-hour window for purposes of the local service standard is that it will result in uniform understanding of the point at which the Board would consider regulatory intervention. To use a carrier's shorter window would impose costs that the carrier might not have accounted for in setting that shorter window; the carrier might therefore be encouraged to lengthen the window beyond the window that is otherwise most efficient for that carrier. That outcome is inconsistent with the Board's intent, as it would undermine the public interest in efficient operation as well as the interests of the individual shipper or receiver. Likewise, for the sake of uniformity across railroads, the Board will decline AFPM's proposal to use a window that extends from two hours before to two hours after the estimated service time that was specified in the local crew's job plan. (AFPM Comments 13.)

Advance Notice

The Board sought comment from stakeholders on whether a rail carrier should be required to provide notice to the customer before the carrier changes the on-duty time for the local crew that serves the customer—at least for the purposes of regulatory measurement—and, if so, how much advance notice should be required. *NPRM,* 88 FR at 63906.

The Coalition Associations ask the Board to require carriers to provide 60 days' notice of a change to the service window. (Coal. Ass'ns Comments 43–44.) AFPM goes further and argues that railroads should not be allowed to unilaterally change a service window without (1) agreement from a customer, or (2) going through a formal mediation process. (AFPM Comments 13.)

The Board will not adopt these measures, which seem unnecessarily rigid and do not directly relate to the purpose and design of part 1145. The Board notes, though, that regular or unreasonably abrupt changes to a customer's service window might be relevant considerations under parts 1144 or 1147 of the Board's regulations.

Clarification for Spot on Arrival Cars

Per the Coalition Associations' request, the Board clarifies that the spot and pull standard includes ''spot on arrival'' railcars. (Coal. Ass'ns Comments 42.) However, failure to spot ''spot on arrival'' railcars for a planned service window results in a missed service window only if the railcars arrived at the local yard that services the customer and are ready for local service before the cut-off time applicable to the customer and in accordance with the carrier's established protocol.

Clarification of Applicable Traffic

CN asks the Board to clarify that the local service standard does not apply to unit trains or intermodal traffic. (CN Comments 43.) CN states that unit trains are not handled through the same process as manifest traffic—that unit trains are often staged in yards upstream from the destination while CN coordinates with the customer to determine the appropriate time for service. (*Id.* at 43–44.) Further, according to CN, the needs of unit train customers differ from those of manifest customers, as CN generally works to ensure that a certain number of unit trains are delivered based on monthly demand, as opposed to ensuring that unit trains are delivered according to planned service windows. (*Id.* at 44.) CN claims that intermodal traffic is not compatible with the local service standard because intermodal traffic presents unique factors and challenges associated with the transloading process. (*Id.*) With intermodal traffic, according to CN, containers are typically unloaded at an intermodal facility and then stacked at the facility until trucks arrive ingate to pick up the containers. (*Id.*)

The Board did not propose to apply the local service standard to unit trains or intermodal traffic and will not do so in the final rule. Unit trains are not switched or spotted and pulled in the same manner as other carload shipments. Similarly, when traffic is

transferred between a rail carrier and another mode of transportation, those transfers do not involve local service in the same manner as local traffic. The Board will clarify the exclusion of unit trains and intermodal traffic in the text of the adopted regulation, § 1145.2(e).

Summary

The Board will adopt the local service standard that was proposed in the *NPRM* using a 12-hour work window. The Board will also: (1) increase the local service standard to 85%; (2) extend the period during which a 90% standard would apply when a rail carrier unilaterally reduces service; (3) clarify how success in spotting ''spot on arrival'' railcars will be measured; and (4) clarify that the local service standard does not apply to unit trains or intermodal traffic. The Board also makes technical modifications, including reordering paragraphs and using more consistent terminology to describe service windows.

Data Production to the Board and Implementation

The Board proposed in the *NPRM* to continue to collect certain data that is relevant to service reliability and local service and similar to the data being collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). *NPRM,* 88 FR at 36911. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 6 (STB served May 6, 2022) (items 5 and 7). The Board's ongoing collection of this data under part 1145 would be adapted to the design of part 1145.

It is true that the Board did not extend the temporary data reporting as defined in Docket No. EP 770 (Sub-No. 1) because overall performance data, especially with regard to service, showed improvement and because BNSF, CSXT, NSR, and UP were meeting the majority of their one-year service targets. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 2–3 (STB served Mar. 14, 2024). However, as noted in the *NPRM,* the collection of the data as defined in part 1145 will assist with general oversight and facilitate implementation of part 1145. *NPRM,* 88 FR at 63911. As a general matter, this material would also allow a reciprocal switching petitioner to compare its service to that of the industry or the incumbent carrier's service on a system and regional level to see whether service problems are systemic and/or worsening. *Id.* at 63902. FRA and DOT support an ongoing collection, noting that it provides them with ''invaluable insight into factors that affect the safety, reliability, and efficiency of railroad operations.'' (DOT/FRA Comments 3.) Additionally, they assert that the Board's proposed data requirements would promote transparency among rail customers and the broader public. (*Id.*) Other groups also support ongoing reporting. (*See, e.g.,* PRFBA Comments 4.)

The Board will therefore adopt the data collection it proposed in the *NPRM.* As discussed below, all six Class I rail carriers must begin reporting based on the new, standardized definitions of OETA and ISP by September 4, 2024. The Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) will provide the Class I rail carriers with a standardized template for these new reporting requirements.

Technical Working Group

AAR agrees with the Board that reporting service data by individual rail carriers is ''helpful to understanding conditions on the rail network.'' (AAR Comments 106.) However, it asserts that there are some details and considerations that need to be worked through before the Board requires permanent reporting. (*Id.* at 107.) It notes that the reporting for part 1145 will be standardized, unlike the temporary reporting for Docket No. EP 770 (Sub-No. 1). AAR also raises a number of issues purportedly requiring a technical conference, including OETA matters the Board already discussed in the Performance Standards section, the technical complexities of ISP, as well as questions about empty cars, routing instructions, and bad order cars. (*Id.* at 107–09.) According to AAR, those and other such considerations would benefit from consideration by a working group. (*Id.* at 109.) AAR claims that doing so will allow Board staff and interested parties to better understand the issues, work out necessary details, and build a more complete record of the technical issues for the Board to consider as it finalizes a rule. (*Id.*)

Similarly, CPKC seeks a technical conference or other process for undertaking a more systematic evaluation of real-world lane-specific service data before implementing a rule that could have sweeping consequences for the railroad operations and the incentives railroads confront in designing services that meet shipper needs. (CPKC Reply 1, 3, 24, 40–41.)

The Board will not establish a technical working group or hold a conference before implementing the final rule. The Class I carriers have had experience reporting data in Docket No. EP 770 (Sub-No. 1) and in *Demurrage Billing Requirements,* Docket No. EP 759. Although the Board is standardizing the definition of OETA and ISP, these measures are not significantly different from the type of reporting required of the railroads in Docket No. EP 770 (Sub-No. 1). If specific issues arise, the Board can address those issues as needed. AAR's other concerns also do not warrant a technical conference. The Board addresses AAR's OETA and ISP points in the Performance Standards section. And, AAR's questions about bad orders or problems with routing instructions can be examined in the context of a particular case. Finally, the Board is rejecting in the Analytical Justification and Legal Framework sections the notion that the agency must develop per-lane performance standards.

Calls for More Data

A number of entities ask the Board to require the rail carriers to provide additional data. For example, FRA and DOT suggest that the Board consider maintaining intermodal traffic data as a reporting requirement, stating that, while intermodal is not rate-regulated traffic, it is a valuable metric to monitor supply chain efficiency. (DOT/FRA Comments 3.) The Board will not require the Class I rail carriers to report this data because the railroads measure this traffic differently from other traffic, and standardizing intermodal service measurement is not one of the purposes of this regulation. Intermodal traffic is also typically a one-train event from origin to destination with no terminal switching events at origin, intermediate points, or destination.

API encourages the agency to collect regional-level data. It claims that this data will better inform the Board as to what and where FMLM issues exist. (API Comments 8.) Similarly, USDA argues that the Board should also collect regional data for transit time. (USDA Comments 3.) It notes that data is critical to well-functioning markets. (*Id.* at 8.) Although the Board appreciates these comments, it will collect ISP data on an operating division basis, which will provide similar granularity to regional data. The Board will therefore not expand the collection of data to the regional level but may seek more data at a later point, if necessary.

Implementation

AAR claims that because the proposed rule's service metrics are new, railroads need time to modify their systems to conform to the new standards and to build new systems to support their obligations. (AAR Comments 111.) CSXT raises a similar point and adds that it would need to

build a process to respond to customer requests, which could take one year. (CSXT Reply 15–16; *see id.,* R.V.S. Maio.) CSXT discusses this issue because ''the Board should be aware of the likely realistic timeline for creating a new regulatory regime in which bespoke lane-by-lane performance metrics would need to be produced on demand for any of CSXT's more than 5,000 customers and 60,000 lanes in a matter of days.'' (CSXT Reply 16; *see also* CPKC Comments 10.) And, UP argues that time is necessary (1) to create a new systems for Board reporting, which UP claims would take one to two years, and (2) to design, program, test, and implement new methods for developing arrival-time estimates that would be consistent with the methods used to determine compliance with OETA standard. (UP Comments 18.) UP estimates that between one and two years would be required to complete the design, programming, and testing of such systems before they could be implemented, and ''not the 10-person/days estimated in the NPRM.'' (*Id.*)

CPKC adds that unique to it is the challenge of preparing to comply with the proposed rule at a time when the separate rail carriers that are part of the CPKC network continue to maintain separate systems that have yet to be fully integrated. (CPKC Comments 11.) In CPKC's judgment, the systems of its predecessors will require modification to be able to provide petitioners the data on a lane-specific basis from different 12-week periods in the way the proposed rule contemplates. (*Id.*) It notes that the Board has taken similar considerations into account when imposing new disclosure requirements on carriers. *See, e.g., Released Rates of Motor Common Carriers of Household Goods,* RR 999 (Amendment No. 5), slip op. at 2–3 (STB served Mar. 9, 2012) (extending by six weeks the original three-month period from issuance of decision to effectiveness, ''in order to provide additional time for affected parties to come into compliance, and in order to allow consumers to benefit from the changes as soon as possible.'').

The Board disagrees with UP's stated concern that an entirely new system will be needed to meet the reporting requirements of this rule and similarly disagrees with CSXT's assertion that it will take a year to update its existing software. While the Board recognizes that implementation of this new rule may require some software programming changes, the railroads fail to support their burden arguments. Specifically, the railroads do not adequately explain how the variances in measuring OETA using their current definitions would require such a significant reprogramming based on the definition of OETA the Board is adopting for part 1145. They also do not make such a showing as to modifying the definition of ISP and the underlying metrics in their systems.

Additionally, while CSXT raises a concern about building a reporting platform, the Board finds this claim to be overstated. CSXT's current platform already has a module, ''Trip Plan Performance,'' which ''provides customers with information on how well CSXT is complying with the trip schedules it generates for each container, trailer, and carload shipped by CSXT at the system, location, and lane level.'' CSXT Comments 6, Dec. 17, 2021, *First Mile/Last Mile Serv.,* EP 767. Similarly, CPKC's concerns also appear unfounded as CP appears to have had a sophisticated system for its customers. *See* Canadian Pac. Comments 2, Nov. 6, 2019, *Demurrage Billing Requirements,* EP 759 (''CP, as well as other railroads, already provide or make readily available a plethora of data that meet these [demurrage] objectives. Detailed data is accessible to the customer on a real time basis and in downloadable form.''). The Board will therefore not unduly delay implementation of part 1145. To promote a smooth transition though, railroads will have until September 4, 2024, the effective date of the final rule, to modify their software.

Additionally, AAR argues that, in light of policy and fairness concerns, the Board should not order a switching prescription based on a carrier's performance before the date on which any final rule is promulgated. (AAR Comments 111.) The Board finds this reasonable. Cases can therefore only be brought under part 1145 based on service occurring after the rule becomes effective.

Interline Traffic

AAR argues that the Board should gain experience applying performance standards to single-line traffic before applying performance standards to interline traffic, given the greater complexities with interline traffic. (AAR Comments 11.) The Board disagrees. There is no need to apply the rule first to single-line movements and then to interline movements as the standards measure an individual carrier's success in performing its own movement. However, as discussed in the Performance Standards section, the Board appreciates that there can be problems at an interchange and has adjusted its definition of when a shipment is delivered there.

CPKC also argues that the Board should defer application of part 1145 to interline movements based on similar concerns. (CPKC Comments 8; CPKC Reply 39–40.) When the Board does apply the rule to interline movements, CPKC seeks two modifications based on its fear that a petitioner could be incentivized to seek an alternate carrier to convert an interline movement into a single-line movement when an incumbent carrier only handles traffic for a minority of the origin to destination routing. (CPKC Comments 8.) One proposed modification involves limiting the eligibility of certain alternate carriers, and the second involves limiting the duration of the prescription. (*Id.* at 9.)[29] CPKC claims that both could be implemented in a manner that would preserve the central feature and purpose of the Board's rule as a service remedy while minimizing the potential for overreach. (*Id.*)

The Board will not adopt these adjustments concerning interline traffic. A prescription would be available under part 1145 with respect to the incumbent carrier's portion of an interline movement only if the requirements of part 1145 were met with respect to that movement. The prescription in that case would be consistent with the Board's goals in enacting part 1145. There is no cause, within this framework, to consider the petitioner's motivation in seeking access to an alternate carrier for the incumbent carrier's portion of the interline movement. To the extent that the incumbent carrier believed that the proposed prescription would cause undue impairment as provided for in part 1145, the Board would consider the carrier's objection in deciding whether to grant the prescription.

[29] The first approach would disqualify a proposed alternate carrier from switching access if (a) the incumbent serves only a minority of full origin-to-destination routes, (b) the alternate carrier's network would serve the entire origin-to-destination route after being granted switching access, and (c) the alternate carrier is not the only other Class I rail carrier serving the pertinent terminal. (CPKC Comments 9.)

The second approach could be applied in cases where the only available alternate carrier would serve the entire route after being granted switching rights. In those situations, according to CPKC, the Board should avoid an overreaching restructuring of the shipper's rail service options by limiting the duration of the order to that necessary to enable the incumbent to demonstrate that it can provide adequate service. According to CPKC, an appropriate limit might be that the order is effective initially for three months, during which time the incumbent would be entitled to demonstrate that its service had risen to an adequate level thereby terminating the alternate carrier's access. (*Id.*)

Data Production to an Eligible Customer

In the *NPRM,* the Board proposed to require Class I carriers to provide, within seven days of receiving a related written request from a shipper or receiver, all individualized performance records necessary for that shipper or receiver to file a petition under part 1145. 88 FR at 63902, 63910–11. The incumbent carrier would be required to record that data and, upon request from a shipper or receiver, would be required provide it to that customer. *Id.* at 63911.[30] The Board stated that the data disclosure requirement would facilitate implementation of part 1145 and provide customers with records ''necessary to ascertain whether a carrier did not meet the OETA, transit time, and/or ISP standards'' in order to bring a case at the Board. *Id.* at 63898, 63902. The Board also stated that railroads would be required to provide the shipper or receiver with machine-readable data, as defined in *Demurrage Billing Requirements,* EP 759, slip op. at 3 (STB served Apr. 6, 2021). *NPRM,* 88 FR at 63911 (inviting stakeholders to comment on what format and fields would be useful). The Board also sought comment on (1) whether carriers could be required to disclose data about past service to a shipper or receiver when a different entity paid for the service, and (2) whether the entity that paid for such service should be given an opportunity to seek confidential treatment of that service data. *Id.* at 63911 n.40.

CN and CSXT oppose the data disclosure proposal, arguing that it amounts to pre-petition discovery and that it improperly departs from both traditional litigation and standard Board practice. (CN Comments 32–22; CSXT Comments 38–39.) The carriers also argue that the *NPRM* did not identify a source of statutory authority that would allow the Board to require data disclosure outside the context of a Board proceeding and that neither section 11102 nor section 1321 support the data disclosure proposal. (CN Comments 33–34; CSXT Comments 39–40.) UP argues that shippers should not need data from the incumbent rail carrier to decide whether they are receiving inadequate service that justifies filing a petition under part 1145. (UP Reply 1–3 (stating that UP customers have online access to data allowing the customer to track and quantify UP's performance); *see also* CSXT Comments 40–41 (stating that CSXT already provides certain data to shippers).)

CN, CSXT, and UP also argue that the proposed data disclosure regulation at § 1145.8(a) is vague and overly broad. (CN Comments 31–32; CSXT Comments 39; UP Reply 2; *see also* AAR Comments 106–07 (urging the Board to provide details about the reporting requirements).) CN and CSXT state that the proposed regulation would not limit who can request data. They also raise concerns about the extent and potential frequency of data requests. (CN Comments 31; CSXT Comments 38–39 (arguing that requiring railroads to disclose information to parties not eligible for relief under part 1145 ''would serve no clear regulatory purpose'').) UP asserts that it is unclear whether a railroad will be ''expected to scour its records to identify any 12-week period in which standards were not met in a given lane'' and whether a carrier would satisfy the data disclosure requirement by producing no records if it determines that a standard was not violated. (UP Reply 2; *see* CN Comments 31–32.) These rail carriers suggest that the Board should instead require railroads to disclose certain performance records to customers only after that customer has filed a petition under part 1145. (CN Comments 35 (noting that the petitioner should also file a protective order); CSXT Comments 39 (stating that metrics could be provided through either the discovery process or an initial disclosure process); UP Reply 3 (suggesting an ''expedited discovery process'' following the filing of a petition).)

The Coalition Associations oppose requiring shippers to file a petition under part 1145 before a rail carrier is required to disclose individualized performance data. The Coalition Associations argue that such a procedure would require shippers to file a petition before knowing whether data demonstrates a service inadequacy that supports a petition under part 1145. (Coal. Ass'ns Reply 25.) As an alternative to the proposal to require a petition to be filed before a railroad would be required to disclose data, the Coalition Associations propose that shippers submit a 30-day pre-filing notice, after which the incumbent rail carrier would have five business days to provide the requisite service data for the six-month period preceding the pre-filing notice. (*Id.* at 25–26.) In contrast, NGFA argues that shippers and receivers should be able to request and receive data as often as they believe it would be beneficial and that shippers should be able to challenge the data that the carrier provides. (NGFA Comments 4.)

The Board declines to adopt proposals that would require railroads to disclose performance data to a shipper or receiver only after the shipper or receiver has filed a petition under part 1145. Section 1321(a) gives the Board broad authority to fashion means to carry out its duties under Chapter 13 and Subtitle IV of the Interstate Commerce Act, including the Board's duty to exercise its discretion under section 11102(c) in furtherance of the public interest. Indeed, as expressly provided in section 1321(a), the enumeration of particular powers in Chapter 13 and Subtitle IV does not exclude other powers that the Board may have in carrying out those provisions. More generally as well, the Board has broad discretion to fashion means to carry out its duties, even when those means are not expressly enumerated in the Act. *See ICC* v. *Am. Trucking Ass'ns,* 467 U.S. 354, 364–65 (1984) (citing *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978)) (stating that the ICC may exercise powers that are not expressly enumerated when those powers are legitimate, reasonable, and directly adjunct to the agency's express statutory powers); *Zola* v. *ICC,* 889 F.2d 508, 516 (3d Cir. 1989). Therefore, the Board is not persuaded that, absent express authorization in section 1321 or section 11102 to require railroads to disclose information to third parties, the Board lacks such authority. (CN Comments 34.) Such a narrow reading of the Board's authority would unduly hinder implementation of section 11102(c) by blocking the availability of information that the Board has determined is relevant to the public interest thereunder.

Here, the data disclosure requirement is a reasonable exercise of the Board's discretion and is narrowly tailored to implement a particular procedure under section 11102(c) effectively. As stated in the *NPRM,* the data disclosure requirement is intended to provide customers with records that are necessary to ascertain whether a carrier has met the OETA, transit time, and/or ISP standards. *NPRM,* 88 FR at 63902. In the context of part 1145, the requirement that rail carriers provide this information to shippers/receivers about their own traffic ensures that these customers have basic eligibility information that is otherwise in the hands of the carriers. In this way, the data disclosure requirement differs from traditional discovery. Without the data, a shipper or receiver may have difficulty in determining whether, if the shipper or receiver submitted a petition, the

[30] As explained in the *NPRM,* the data in question would include all of the customer's data on traffic that was assigned OETAs and local service windows, along with corresponding time stamps indicating performance. *NPRM,* 88 FR at 63911.

shipper or receiver could establish a failure to meet a performance standard. Ensuring that a shipper or receiver has access to evaluate basic eligibility before filing a petition will help to facilitate the Board's implementation of part 1145 and is consistent with the Board's authority under section 11102(c)(1), as it will reduce unnecessary litigation and facilitate the expeditious handling and resolutions of petitions for prescription of a reciprocal switching agreement. By promoting efficient regulatory proceedings and sound regulatory decisions, the data disclosure requirement is reasonably adjunct to the Board's statutory responsibilities while advancing the purposes of section 1321(b) and the RTP. *See* 49 U.S.C. 10101(2), (15).

Moreover, although some rail carriers argue that shippers already have access to carriers' online platforms containing data necessary to file a petition, rail users have complained that railroads often provide data in a way that is ''incomprehensible to even seasoned industry veterans.'' [31] Given the variability of individual carrier online platforms and current metric-related methodologies, the data disclosure requirement will ensure that shippers and receivers have access to standardized data clearly correlating to the standards in part 1145. Carriers remain free, however, to maintain their existing platforms and customer interfaces as long as they are also able to provide the standardized part 1145 data to shippers upon request.

Contrary to CN's argument, it would not be inconsistent with the Board's practices to require data disclosure before a regulatory proceeding. For example, the Board requires carriers to include specific information on demurrage bills to allow customers to more readily gauge whether to challenge their demurrage assessments. *See* 49 CFR 1333.4; *see Demurrage Billing Requirements,* EP 759, slip op. at 1, 9.

The Board also rejects the Coalition Associations' proposal to require a potential petitioner to submit a prefiling notice, with that notice serving as the basis for the potential petitioner to obtain data from its incumbent carrier. The purpose of the data disclosure requirement is to enable a potential petitioner to assess *before* initiating regulatory proceedings whether to initiate those proceedings. That objective would be undermined by requiring a potential petitioner to submit a pre-filing notice as a condition to obtaining relevant information. A pre-filing notice would be an additional step, one that could even discourage some shippers or receivers from moving forward under part 1145. At the same time, a pre-filing notice is not required as a matter of law. As discussed above, the Board has ample authority to require data disclosure without regard to whether related regulatory proceedings are pending.

However, the Board is persuaded that greater specificity in § 1145.8(a) would facilitate timely responses by carriers to requests for individualized performance records. The proposed regulatory text will be modified to require a response by the carrier when a shipper or receiver has practical physical access to only one Class I rail carrier with respect to the lane(s) in question and when the request identifies the relevant lane(s), the range of dates for which records are requested, and the performance standard(s) in question. The Board will also define ''individualized performance records'' as OETA, transit times, and/or ISP data related to the shipper or receiver's traffic, along with the corresponding time stamps.

The Board will not, as some rail carriers suggest, place limitations on the frequency of requests for individualized performance records or the time period during which data can be requested. (*See* CSXT Comments 38–39.) The record indicates that most, if not all, shippers already have access to similar data from carrier online platforms that provide performance information, though not on a standardized basis. (*See id.* at 40–41; UP Reply 2.) Therefore, the Board is not persuaded that the carriers' concerns about receiving voluminous requests for data are likely to come to bear, as shippers may choose not to formally request this information from railroads unless they are close to initiating a proceeding. (*See* CSXT Comments 38–39.) For the same reason, the Board finds that seven days is adequate for the incumbent rail carrier to provide individualized performance records upon written request from a shipper or receiver, given that the carriers already track this information in the ordinary course of business.[32] However, the data production is intended to implement part 1145, and the Board expects shippers and receivers to request individualized performance records based on a good faith belief that the Class I rail carrier has provided service that does not meet at least one performance standard in part 1145. In response to such a request, a carrier shall provide records for the identified standard(s). In a petition for prescription of a reciprocal switching agreement, a shipper or receiver may also challenge the veracity of the data provided.

Additionally, and as proposed in the *NPRM,* the Board will adopt a requirement that the data be machine-readable, ''meaning 'data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.''' *NPRM,* 88 FR at 63911 (citing *Demurrage Billing Requirements,* EP 759, slip op. at 3 n.9). As noted above, some rail users state that data provided by railroads is often incomprehensible. (NSSGA Comments 4; AFPM Comments 6.) A machine-readable data requirement will ensure that rail users have access to data that allows them to ascertain whether their individualized performance records meet the standards for a petition under part 1145. The Board will give Class I carriers the discretion to determine how to provide rail users with access to machine-readable data, including through a customized link, electronic file, or other similar option. In addition, to provide greater clarity as requested by carriers and more generally to facilitate the implementation of the rule, the Board will require Class I carriers to retain all data necessary to respond to requests for individualized performance records for a minimum of four years. (*See* AAR Comments 107; CPKC Comments 11.)

[31] (NSSGA Comments 4; *see also* AFPM Comments 6 (stating that rail carriers have a ''history of technically providing data that were extremely difficult to understand''); CSXT Comments 15–16 (noting that the Board's definition of OETA is ''similar'' to CSXT's TPP, which CSXT reports on ShipCSXT); UP Comments 6 (noting that in assessing a car's compliance with its trip plan, UP's TPC measure for manifest traffic adjusts for the impact of various events that delay or change a car's arrival time but are not caused by UP service issues).)

[32] CN argues that the data disclosure requirement raises confidentiality concerns. CN appears to suggest that, when the shipper or receiver that requests data is not the payor, the payor may wish to seek confidential treatment of the data. (CN Comments 34–35.) CN also asks the Board to consider 49 U.S.C. 11904, which prohibits rail carriers from disclosing certain information to persons other than the shipper or consignee without consent. (CN Comments 34.) CN suggests that the Board instead require data disclosure only in the context of a formal regulatory proceeding, after a petition has been filed and the Board has issued a protective order. (*Id.*) The Board rejects CN's suggestion. If the payor is concerned that the shipper or receiver will disclose the requested data to an unauthorized third party, the payor may address that concern through its agreement with the shipper or receiver. There is no need for the Board to initiate a regulatory proceeding to protect the payor's interest. As for the prohibition on carriers' disclosure of certain service-related data to parties other than the shipper or consignee under section 11904, that prohibition is not implicated by the data disclosure requirement. As clarified in the final rule, a carrier need only provide to a shipper or receiver data that pertains to the carrier's service to that shipper or receiver, which is already permissible under section 11904.

This approach will ensure that the Board, shippers, and receivers have available data that is relevant to implementation of part 1145, including the multi-year transit time standard in § 1145.2(b)(2).

Terminal Areas

In this proceeding, the Board proposed a rule that would permit shippers and receivers to seek prescription of a reciprocal switching agreement for a movement that begins or ends within a terminal area. The reciprocal switching agreement would provide for the shipment to be transferred within the terminal area in which the shipment begins or ends its journey on the rail system. *NPRM,* 88 FR at 63902; [33] *id.* at 63898 (''The newly proposed regulations would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards.''). As discussed below, some commenters urge the Board to go further and institute broader competitive-access initiatives, while others request clarification or express views on how various terms should be understood. Some assert that the rule should not include a definition of ''terminal area'' but, rather, should simply rely on existing case precedent. However, no commenter questions the permissibility or practicality of a terminal-based approach. In AAR's view, a terminal-area limitation ''is good policy'' because it is likely to eliminate from consideration a number of potential switching arrangements that would be ''highly impractical and inefficient.'' (AAR Comments 27.)

The Coalition Associations—joined by Celanese and AF&PA/ISRI—state that they support the Board's proposed definition of ''terminal area'' (the area in which a shipper or receiver must be located to be eligible for prescription of a reciprocal switching agreement under part 1145) because ''[t]he function-based definition is consistent with precedent'' and constrains carriers' ability to undermine the proposal by seeking to establish ''narrow geographic boundaries.'' (Coal. Ass'ns Comments 5, 45; *accord* Celanese Comments 2; AF&PA/ISRI Comments 2.) USDA suggests that the Board consider providing a non-exhaustive list of ''terminal areas'' to which the rule would apply. (USDA Comments 7.)

Several commenters approve of the overall switching proposal in the *NPRM* but state that it should not be limited to terminal areas. For example, NGFA (joined by three other organizations) [34] supports the policy underlying the *NPRM*—to provide incentives for railroads to provide adequate service—but states that the proposed rule ''could prove to be too narrow in scope to be of use to many agricultural shippers by applying only to 'service to a terminal area shipper or receiver.''' (NGFA Comments 2, 8–9 (noting that its members are often captive to Class I rail carriers at locations that are outside of ''terminal areas'' as the Board would define that term in proposed § 1145.1).) EMA echoes this view, asserting that a rule limited to ''terminal areas'' would leave many rural EMA members who are captive shippers without a remedy for poor service. (EMA Comments 9–10; *accord* NMA Comments 6 (calling for access remedies for rail customers not located within terminal areas).) Olin and PCA assert that limiting reciprocal switching to ''terminal areas'' as defined in the *NPRM* is unduly restrictive because the statute does not require such a limitation. (Olin Comments 4–5; PCA Comments 3, 13–14.) WCTL and the Coalition Associations express a similar view. (WCTL Comments 9–10; Coal. Ass'ns Reply 19–20.) WCTL also states that the scope of reciprocal switching relief should be assessed on a case-by-case basis that allows for consideration of the facts and circumstances of the particular case, rather than ''strict, geographic limits.'' (WCTL Comments 10.) These commenters and others urge the Board to return to the proposal in Docket No. EP 711 (Sub-No. 1),[35] or take other action to broaden the impact of reciprocal switching prescriptions.[36]

Conversely, AAR asserts that any prescription of reciprocal switching must be limited to traffic within a terminal area because ''the terminal-area limitation is required by statute.'' (AAR Comments 25–26; *accord, e.g.,* CN Comments 8.) AAR further suggests that ''[t]he Proposed Rule will most effectively embody the Board's intent to limit switching arrangements to terminal areas'' if it relies on case precedent to define a terminal area and ''makes clear in the regulatory text that the Board will prescribe switching *only* in such areas.'' (AAR Comments 29.)

As stated in the *NPRM,* the Board proposed a rule that ''would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards.'' *NPRM,* 88 FR at 63898. The proposed rule's focus on terminal-area shippers and receivers is consistent with prior cases on reciprocal switching. As a policy matter, the Board concludes that the same approach is appropriate to this rule. In the case of terminal-area shippers and receivers, access to another rail carrier tends to be limited by the difficulty of constructing even the minimal amount of new track that would allow the other carrier to reach the shipper or receiver directly. The new regulations in part 1145 are intended to address this relatively discrete need by focusing on terminal-area shippers and receivers. They are not intended to address circumstances in which, due to the shipper or receiver's location outside of a terminal area, a regulatory introduction of an alternate rail carrier to address service issues might have different policy implications.[37] Accordingly, the Board

[33] The *NPRM* proposed defining a ''terminal area,'' as a commercially cohesive area in which two or more railroads collect, classify, and distribute rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities such as freight or classification yards. The proposed definition further clarified that a point of origin or final destination on the rail system that is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent carrier's terminal-area operations would not be suitable for a prescribed switching arrangement. 88 FR 63913.

[34] NGFA's comments are supported by the North American Millers' Association, Agricultural Retailers Association, and the National Council of Farmer Cooperatives. (NGFA Comments 2.)

[35] (*E.g.,* Olin Comments 4–5; PCA Comments 3, 13–14.)

[36] (*E.g.,* NGFA Comments 3, 9–11 (calling for the Board to resume or take final action under multiple dockets); EMA Comments 9–10 (broaden definition or develop new rule to protect EMA members who are remote rural captive shippers); Coal. Ass'ns Comments 46–47 (initiate proceeding to expand the rule to shippers outside terminal areas pursuant to 49 U.S.C. 10705(a)(2)(c)); Coal. Ass'ns Reply 19–20 (include common stations where the two carriers currently interchange traffic); Ravnitzky Comments 2 (establish a default interchange point based on the nearest feasible location where both railroads can access each other's tracks).) GPI encourages the Board to be attentive to any concerns expressed from rural captive shippers after the rule goes into effect to help ensure that these shippers are not disadvantaged as Class I rail carriers ''focus their priorities in more competitive areas of the country.'' (GPI Comments 3.)

With respect to NGFA's comment concerning action in other dockets, the Board notes that a final rule was issued earlier this year in Docket No. EP 762 amending the emergency service regulations at part 1146; among other things, the new rule establishes a more streamlined and accelerated process for entertaining emergency service petitions under 49 U.S.C. 11123 and clarifies the Board's use of its regulations when acting on its own initiative to direct emergency service. *See Expedited Relief for Serv. Emergencies,* EP 762.

[37] *See* Laurits R. Christensen Assoc., Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition, 22–13 (rev. 2009) (discussing economic implications of different forms of regulatory intervention); *Midtec Paper Corp.* v.

will not adopt commenter proposals to reopen Docket No. EP 711 (Sub-No. 1) or expand the scope of part 1145 to shippers and receivers outside of terminal areas as defined in part 1145. This decision does not leave such customers without recourse for poor service; parts 1144 and 1147 both cover trackage rights and through routes as well as reciprocal switching agreements, and both parts can provide a remedy for poor service when the conditions therein are met.[38] Given that the Board has chosen as a policy matter to limit part 1145 to terminal-area shippers and receivers, it is unnecessary to resolve here whether 49 U.S.C. 11102(c) would accommodate a more expansive approach. Below, the Board addresses commenters' claims and contentions about the significance of various facts in determining what constitutes a ''terminal area,'' and other remarks or requests pertaining to this subject.

The Board underscores at the outset that, consistent with case precedent, the Board has taken a functional approach to defining ''terminal area'' for purposes of this rule. The agency has long understood ''terminal area'' in such functional terms: as a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service, characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. *NPRM,* 88 FR at 63902 (citing cases). A terminal area (as opposed to main-line track) must contain, and cannot extend significantly beyond, recognized terminal facilities, such as freight or classification yards. *Id.* at n.11. In other words, a ''terminal area'' is defined by the scope and nature of its functions, rather than, for example, distance limits, and the assessment of related issues may be fact-specific.[39] For this reason, the Board agrees with AAR that it would not be practical or productive to publish a list of ''terminal areas'' (as USDA suggests).[40]

While the regulatory text does not incorporate a list, the Board notes that, as a general matter, a normal revenue interchange point on the Open and Pre-Pay Stations List is often located within a ''terminal area.'' AAR asserts that inclusion on that list ''does not suggest there is'' a terminal area as described in the *NPRM.* (AAR Comments 29–30.) As the Board indicated in the *NPRM,* inclusion on the list as a normal revenue interchange point would be relevant (albeit not dispositive) evidence in identifying a terminal area. The list is a useful tool that could assist shippers and receivers in assessing whether their facilities are within a terminal area. Carriers would remain free to present—and the Board would also consider—evidence and argument that the area does not possess the attributes needed to qualify as a terminal area.

The Board also notes that the types of equipment and crew used to accomplish a movement that is incidental to a line-haul move do not dictate whether a particular origin or destination point is within a ''terminal area.'' AAR's suggestion to the contrary is misplaced.[41] *See, e.g., Midtec,* 3 I.C.C.2d at 179 (rejecting incumbent carrier's contention that the service it provided to the shipper was line-haul service—not switching—because it used road trains and crews rather than the switch engines and yard crews generally used in switching or terminal operations). The case law allows the Board to consider whether movements from the customer's facility are integrated into the incumbent carrier's local terminal area operations, whether service is performed within a cohesive commercial area, and other relevant characteristics. *See, e.g., Rio Grande Indus.,* FD 31505, slip op. at 10–11 (collecting cases).[42] As has long been the case, these questions will be assessed on a case-by-case basis in the event of a dispute. *See, e.g., Midtec,* 3 I.C.C.2d at 179 (''The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case.'').

For similar reasons, AAR's suggestion that a terminal area does not exist if one carrier serves all the industries in an area and ''must carry traffic on a line haul'' to reach the other carrier for purposes of the switch, (AAR Comments 26 n.3), is misguided. The Board would consider, on a case-by-case basis, taking into account all the pertinent facts, whether a particular switching interchange could be considered to be within a terminal area for purposes of this rule. FRCA/NCTA point out that ''[t]here are areas where a single railroad provides the terminal service for itself as well as its competitor(s),'' and assert that ''the requirement that two carriers perform terminal services in a given area appears overly restrictive.'' (FRCA/NCTA Comments 2.) The Board will maintain the two-carrier requirement in the final rule, without dictating what it would mean, in an individual case, for two carriers to perform terminal-area services. Consistent with the principles discussed above, in the event of a dispute, the resolution of whether a particular carrier or activity satisfies the rule's definition would be made based on case-by-case analysis.

Finally, it is unnecessary to amend the regulatory text of proposed §§ 1145.2(c) and 1145.6(a) to state, as suggested by AAR, that reciprocal switching will be prescribed only within a terminal area. (AAR Comments 27–28.) The existing definition of ''reciprocal switching agreement'' is clear—as are the *NPRM* and this final

United States, 857 F.2d 1487, 1502 (D.C. Cir. 1988) (describing the use of terminal trackage rights as a more intrusive remedy than switching).

[38] As stated in the *NPRM,* shippers may still pursue access to an alternate rail carrier that goes beyond reciprocal switching under 49 CFR parts 1144 and 1147, which also allow for continued development, including, as appropriate, the Board's reassessment of adjudicatory policies and the appropriate application of those rules in individual cases. *NPRM,* 88 FR at 63900. Moreover, the Board's action in this docket is not intended to suggest that consideration of additional reforms directed towards increasing competitive options will be foreclosed in other proceedings. *Id.*

[39] *See Midtec,* 3 I.C.C.2d at 179 (''The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case.''). Commenters recognize the merit of a flexible, functional approach. (*See, e.g.,* Coal. Ass'ns Comments 5, 45 (stating that the function-based definition is consistent with precedent and forecloses carriers from evading accountability by establishing artificial geographic boundaries for terminal areas); AAR Comments 27 (acknowledging that distance is a poor indicator of whether a switch will be operationally feasible or can be integrated into existing operations); CN Comments 8–9 (noting agency's ''long history'' of assessing terminal area issues on a case-by-case basis in light of the many types of factors that are considered).)

[40] (*See* USDA Comments 7 (suggesting that the Board publish a non-exhaustive list of ''terminal areas'' to which the proposed rule would apply); AAR Reply 32–33 (explaining why USDA's proposal would be time-consuming and difficult to implement).) VPA's request for a broad ''declar[ation] that ports are terminal areas,'' (VPA Comments 1, 12), will not be granted for similar reasons. (*See, e.g.,* AAR Reply 33 n.11.)

[41] (AAR Comments 28 (stating that industries ''served by road switchers from the terminal complex'' should not be covered by the proposed rule).) Conversely, whether a shipper or receiver can be ''reached by a local train dispatched from a freight yard'' does not determine the scope of a terminal area, and the agency has properly rejected suggestions to this effect. *See Rio Grande Indus.—Purchase & Related Trackage Rts.—Soo Line R.R.,* FD 31505, slip op. at 11 (ICC served Nov. 15, 1989). As discussed above, and consistent with long-standing practice, the Board would consider the totality of pertinent facts in determining whether a particular origin or destination point is located within a terminal area. The Board anticipates that, in most instances, determining whether that point is located in a terminal area should not be time consuming or controversial.

[42] The definition of ''terminal area'' proposed and adopted in this rule is not intended to exclude from consideration all areas across the network that have some portion of main-line track, if that track is used for local movements that are incidental to a line-haul move and other requirements for a terminal area are met. *See, e.g., Midtec,* 3 I.C.C.2d at 179–80.

rule—that prescriptions will be limited to terminal areas.[43]

Some commenters state that the final rule should omit a definition of ''terminal area.'' AAR asserts that the rule does not need to define this term because agency precedent already describes how to identify a terminal area; AAR maintains that adding a definition by rule could create confusion. (AAR Comments 28–29.) CN reiterates this view. (CN Comments 30.) Some shippers also favor omitting the definition. (*See, e.g.,* Olin Comments 4 (stating that the statute does not define ''terminal area'' and that such matters ''are determined on a case-by-case basis''); PCA Comments 13–14 (same; also stating that proposed definition is unnecessary and unduly restrictive).) The Board finds that it is useful and appropriate to provide stakeholders with a concise, readily accessible definition of ''terminal area'' in the regulation itself. Accordingly, the Board will reject suggestions to omit the definition. The Board notes that this definition relies on case precedent that reflects the functional, multi-factored approach the agency has long taken in considering issues involving terminal areas, and that these determinations turn on their particular facts. *See, e.g., Midtec,* 3 I.C.C.2d at 179 (agency must consider ''all the circumstances surrounding a particular case''). The Board thus finds unpersuasive AAR's claim about the risk of ''unnecessarily (and potentially erroneously) unsettling that existing body of law.'' (AAR Comments 29.) At the same time, including a concise, accessible definition in the rule does not mean the Board will depart from its long-standing practice of conducting a case-specific analysis of the pertinent facts in each proceeding, as CN, Olin, and PCA suggest the Board should—and the Board will—continue to do. (*See* CN Comments 8–9 (referencing agency's ''long history'' of considering terminal area issues on a case-by-case basis); Olin Comments 4; PCA Comments 13.)

CN additionally expresses confusion about the meaning of the last sentence of the proposed definition of ''terminal area'' in § 1145.1. (CN Comments 29.) As proposed, that sentence states: ''A point of origin or final destination on the rail system is not suitable for a prescribed switching arrangement if the point is not integrated into *or, using existing facilities, reasonably cannot be integrated into* the incumbent rail carrier's terminal-area operation.'' *See NPRM,* 88 FR at 63913 (emphasis added). According to CN, the italicized clause might be read to suggest that a point outside of a terminal area could, in some circumstances, be suitable for a prescribed reciprocal switching agreement. As discussed above, prescriptions under part 1145 will be limited to points of origin or final destination that are located within terminal areas. The Board will revise the regulatory text to make this point clear.

The *NPRM* invited comments as to whether the reciprocal switching tariff of an alternate carrier applicable to shippers in the same area should be considered as evidence that the area is a terminal area. *NPRM,* 88 FR at 63902 n.12. AAR asserts that ''[t]here are many reasons that the existence of a tariff describing switching is not evidence of the geography of a terminal area.'' (AAR Comments 30.) Specifically, AAR says, the existence of a tariff that is not used (in AAR's terms, a ''legacy'' tariff) ''would not speak to the operational realities that define a terminal area'' because, according to AAR, it would not be indicative of ''actual switching practice that the capabilities of infrastructure within a commercially cohesive area support.'' (*Id.*) AAR also remarks that tariffs may be labeled ''reciprocal switching'' that ''do not reflect 'reciprocal switching' in the statutory sense (*i.e.,* in a terminal area).'' (*Id.*) Finally, AAR argues that even reciprocal switching tariffs that ''otherwise align with the statutory definition of reciprocal switching'' may not support the conclusion that a particular location is within a terminal area. (*Id.* at 30–31 (commenting that these tariffs ''may exist more as a matter of historical happenstance than current economic and operational reality,'' or ''may have limited scope as to shippers, destinations, commodities, or number of railcars to which they apply'').) AAR maintains that construing such tariffs as evidence of a terminal area ''risks sweeping in areas that cannot meet the Board's established definition of that term.'' (*Id.* at 31.)

To the extent that AAR is arguing that the Board should not consider the existence of such a tariff as relevant evidence at all, the Board disagrees.[44] As the Coalition Associations point out, an alternate carrier's tariff plainly is relevant. (Coal. Ass'ns Comments 46.) The publication of a reciprocal switching tariff may indicate that the carriers have the ability to engage in transfers that are incidental to a line-haul move—which could constitute useful evidence pertinent to determining whether there is a terminal area for purposes of this rule. Furthermore, carriers would always have the opportunity to demonstrate that a particular location should not be considered part of a ''terminal area,'' that a particular prescription would not be practicable (which appears to be at the core of AAR's concern), or that regulatory requirements under the rule were not otherwise met. For these reasons, the Board concludes that it is appropriate to consider the existence of a reciprocal switching tariff, applicable to shippers or receivers in the same area, in determining what constitutes a terminal area. Similarly, the Board would consider evidence, apart from the publication of a tariff, that carriers in that area were engaged in reciprocal switching arrangements.

The Board also invited comments on how to reconcile inconsistencies in tariffs. *NPRM,* 88 FR at 63902 n.12. AAR states that it is not aware of any systematic issue relating to inconsistencies that would be amenable to treatment in a general rule; it suggests that any such issues would need to be addressed on a case-by-case basis. (AAR Comments 31.) The Coalition Associations maintain that inconsistencies between incumbent and alternate carrier tariffs are only a concern when no reciprocal switching is occurring between any facilities in the terminal area—in which case, they state the Board should examine the history of interchanges between the carriers within that terminal. (Coal. Ass'ns Comments 46.) The Coalition Associations suggest that inconsistencies should otherwise be resolved in favor of a presumption that any point within the terminal area could qualify for a prescription. (*Id.*) Based on the comments received, the Board concurs with AAR that any issues that may arise concerning tariff

[43] A reciprocal switching agreement is an agreement for the transfer of rail shipments between one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company *within the terminal area* in which the rail shipment begins or ends its rail journey. Service under a reciprocal switching agreement may involve one or more intermediate transfers to and from yards *within the terminal area. NPRM,* 88 FR at 63913 (emphasis added); *see also, e.g., id.* at 63915 (proposed § 1145.6(b), describing switching service under the agreement as ''the process of transferring the shipment between carriers within the terminal area''); *id.* at 63909 (stating that switching service under a reciprocal switching agreement under part 1145 would occur within a terminal area).

[44] Contrary to AAR's implication, (AAR Comments 31–32), the Board is not suggesting that the publication of a tariff would be dispositive in defining the existence or scope of a terminal area. It is one piece of evidence, among others, that the Board would consider. Indeed, AAR appears to acknowledge that tariffs are useful in defining the scope of reciprocal switching services, (*id.* at 31), which is one factor, among others, that would bear upon the Board's assessment of the existence and scope of a terminal area.

inconsistencies should be resolved on a case-by-case basis.

Practicability

The Board stated in the *NPRM* that, because switching service under a prescribed reciprocal switching agreement would occur within a terminal area,[45] there is reason to conclude that those agreements would be practicable under section 11102(c). *NPRM,* 88 FR at 63909. The Board added, however, that, should a legitimate practicability concern arise, it would consider whether the switching service could be provided without unduly impairing the rail carriers' operations. *Id.* The Board also stated that it would consider an objection by the alternate rail carrier or incumbent rail carrier that the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the objecting rail carrier's ability to serve its existing customers.[46] As explained in the *NPRM,* the objecting rail carrier would have the burden of proof of establishing infeasibility or undue impairment. *NPRM,* 88 FR at 63909.[47] The Board further proposed that, if the carriers had an existing reciprocal switching arrangement in the petitioner's terminal area, the incumbent carrier would bear a heavy burden in demonstrating why the proposed reciprocal switching agreement would be operationally infeasible. *See id.* at 63902, 63915.[48]

AAR and CSXT argue that a petitioner under part 1145 should be required to address practicability in its petition. According to AAR, the Board has recognized that shippers must affirmatively address feasibility concerns in other access proceedings.[49] AAR argues that the Board should take a similar approach here and require the petition to address practicability. (AAR Comments 63–64.) AAR also states that the Board would be prevented from making ''an affirmative finding'' with respect to practicability if this issue is not addressed in the petition. (*Id.* at 63.) CSXT asserts that ''the burden is on the petitioner to prove practicability, as the advocate of agency action.'' (CSXT Comments 44.)[50] CSXT itself recognizes, however, that rail carriers are often in the best position to opine on safety and feasibility. (*Id.*)[51] CSXT suggests therefore that the Board require rail carriers to inform the petitioner during the pre-petition negotiation period whether the carriers will contest practicability and, if they intend to do so, permit the petitioner to conduct limited discovery on that issue. (CSXT Comments 44.)

The Board rejects the suggestion that practicability must be addressed in a petition filed under part 1145. Under the rule, the prescription would only occur in a terminal area, thereby lowering the likelihood of infeasibility and undue operational impact (as compared to a more expansive form of potential regulatory intervention). If an objection to practicability were raised, it would be, therefore, reasonable to require the objecting rail carrier to bear the burden of proof of showing that transfers under the proposed agreement would be infeasible. Placing this obligation on the rail carrier would also promote the RTP by allowing efficient and expeditious handling of a petition under part 1145. *See* 49 U.S.C. 10101(2), (15). The same is true with respect to carriers' obligation to demonstrate that resulting line-haul arrangements would be infeasible or would unduly impair the ability to serve other customers. For both the switching services and line-haul arrangements, the carriers—not the petitioner—would have direct knowledge of the relevant information. Notwithstanding the aforementioned, however, a petitioner may seek discovery on practicability issues after the filing of a petition—in anticipation of an objection to practicability from either the incumbent or alternate rail carrier—and the Board itself can require additional information from carriers in particular cases. There is therefore no need to provide for pre-petition discovery on practicability issues, which would create an unnecessary hurdle and delay for potential petitioners. Moreover, although AAR suggests that the Board would be prevented from making ''an affirmative finding'' with respect to practicability if this issue is not addressed in the petition, (*see* AAR Comments 63), this assertion is mistaken. Any final decision, including findings on practicability, if raised, would be issued at the conclusion of the proceeding, based on the full record before the Board. Further, due to the characteristics of a switching arrangement, as explained above and as defined and scoped by this rule, in a case where no party raised practicability as an issue, the Board would be justified in ''find[ing] [the] agreement[ ] to be practicable'' as required by the statute. 49 U.S.C. 11102(c).

Nor is it necessary for part 1145 to follow the approach in part 1147, which does require that an initial petition discuss practicability. A petition filed under part 1147 requires an advance commitment from another available railroad to provide the alternative service, *see* 49 CFR 1147.1(b)(1)(iii)—meaning the petitioner there would have direct access to information bearing on practicability considerations before the petition is filed. The advance commitment requirement is not a feature of part 1145, making it less likely that the petitioner will have access to such information at the beginning of a case.

[45] As discussed above, *see* Terminal Areas, the last sentence of the definition of ''terminal area'' in § 1145.1 will be modified to promote clarity. However, because that modification does not expand the definition of terminal area beyond the *NPRM* or precedent, it does not impact the discussion below.

[46] *Id.; see id.* at 63915 (proposed § 1145.6(b), stating that notwithstanding paragraph (a), the Board will not prescribe a reciprocal switching agreement if the objecting carrier demonstrates that switching service under the agreement ''could not be provided without unduly impairing either carrier's operations; or the alternate carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the incumbent carrier or the alternate carrier's ability to serve its existing customers''). For purposes of consistency, § 1145.6(b) will be modified to replace ''*unduly hamper*'' with ''*unduly impair*'' (emphasis added). This modification does not substantively change the regulatory text; the terms as used in the final rule are essentially the same. ''Hamper'' is defined to mean ''to interfere with the operation of'' or ''to restrict the movement of'' and ''impair'' is defined to mean to ''diminish in function, ability, or quality.'' *See* Hamper, Merriam-Webster Dictionary, available at *www.merriam-webster.com/dictionary/hamper; see also* Impair, Merriam-Webster Dictionary, available at *www.merriam-webster.com/dictionary/impair.*

[47] Section 1145.5(d) will be modified to make clear that the burden of proof of establishing infeasibility and undue impairment will be on the objecting carrier. Evidence relating to the types of infeasibility and undue impairment referenced in the rule would be relevant in determining whether an objection to the practicability of a prescription was meritorious.

[48] Minor clarifying changes have been made in the regulatory text of § 1145.6(b) to more closely correspond to the descriptions of these concepts provided in the preamble of the *NPRM* and the final rule.

[49] (AAR Comments 63 (citing 49 CFR 1147.1(b)(1)(iii), which requires, inter alia, that a petition filed under part 1147 contain ''an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service'').)

[50] CSXT cites *Golden Cat Division of Ralston Purina Co.* v. *St. Louis Southwestern Railway* (*Golden Cat*), NOR 41550 (STB served Apr. 25, 1996), as support for this proposition. However, *Golden Cat* involved a complaint proceeding brought directly under former 49 U.S.C. 11103(a)—not the establishment of a new regulatory framework to efficiently and effectively address requests for reciprocal switching prescriptions under a defined service-based framework. Moreover, in that case, issues relating to which party bore the burden of proof on a particular issue (such as practicability) were not raised or contested, and thus were not before the agency for decision.

[51] AAR similarly recognizes that the issue of practicability ''would likely . . . be addressed in the carrier's reply'' to a petition. (AAR Comments 63.)

AAR asserts that, in assessing practicability under part 1145, the Board should apply the standards that were articulated in *Delaware & Hudson.*[52] (AAR Comments 64.) AAR's underlying assumption is that the prescription of a reciprocal switching agreement under part 1145 could have significant operational impact. AAR argues that added transfers increase operational complexity and introduce a higher risk of failure—effects that, according to AAR, could adversely affect the rail network. (*Id.*) CN argues that under the established test for practicability, relevant factors include existing track and yard usage, capacity, congestion, traffic density, operational interference, safety, the potential for unduly impairing the ability of either carrier to serve its shippers, and the impacts to other carriers, shippers, and the public. (CN Comments 18–19.)

There is, in fact, no significant difference between the standards that the ICC applied in *Delaware & Hudson* and the provisions of part 1145 on practicability. What differs, with respect to practicability, is the level of inquiry that was warranted in *Delaware & Hudson* versus the level of inquiry that will be warranted under part 1145. The reciprocal switching agreement in *Delaware & Hudson* covered all customers in the terminal area, on the tracks of the affected carriers, throughout the city of Philadelphia. It made sense in *Delaware & Hudson* for the ICC to explore, on a broad scale, the possible impacts of the proposed agreement given the wide scope of the agreement. In contrast, a reciprocal switching agreement under part 1145 would be limited in scope because it would apply only to the successful petitioner's facility.

Carriers also oppose the presumption that was proposed in the *NPRM.* Under that presumption, which the incumbent railroad would bear a ''heavy burden'' to overcome, operation under a reciprocal switching agreement would be presumed to be operationally feasible if the incumbent railroad and the alternate railroad had an existing reciprocal switching arrangement in the petitioner's terminal area. *NPRM,* 88 FR at 63915 (proposed § 1145.6(b)). CN suggests that existing voluntary reciprocal switching operations would be only one factor in determining whether a proposed agreement would be practicable. (CN Comments 18–19 (citing *Delaware & Hudson,* 367 I.C.C. at 720).) CSXT asserts that all relevant evidence should be reviewed when determining whether an agreement would be practicable; CSXT contends that the Board therefore should eliminate the use of any presumption.[53] (CSXT Comments 42–44.)

Conversely, the Coalition Associations support the presumption of operational feasibility when a reciprocal switching arrangement already exists in a petitioner's terminal area. (Coal. Ass'ns Comments 5–6, 45.) The Coalition Associations argue, however, that the Board should adopt a similar requirement for any location where the incumbent and alternate carrier interchange traffic. The Coalition Associations reason that the transfer of railcars at an interchange en route on a line haul is operationally the same as the transfer of railcars within a terminal area for a reciprocal switch. (*Id.* at 5–6.) AAR responds that the Coalition Associations' argument is untenable. (AAR Reply 57.) According to AAR, the existence of an interchange that is not associated with reciprocal switching cannot establish that it is feasible to add other switching at that interchange. (*Id.*)

The Board will retain the presumption of operational feasibility based on an existing reciprocal switching arrangement in the petitioner's terminal area. That presumption pertains only to operational feasibility of the reciprocal switch, not to other potential elements of impracticability (such as undue impairment of the incumbent carrier's operations, the infeasibility of the alternate carrier's line-haul service, or undue impairment of the incumbent rail carrier's or the alternate rail carrier's ability to serve its existing customers). An existing reciprocal switching arrangement would demonstrate that railcars could be transferred between carriers within the terminal area. The presumption is rebuttable and the carriers will have the opportunity to demonstrate that the petitioner's traffic could not reasonably be added to switching operations. Further, the Board will retain flexibility to assess all relevant information bearing on the issue of practicability. *See* 49 CFR 1145.6(b).

With respect to the Coalition Associations' proposal to presume operational feasibility at any location where the incumbent and alternate carrier interchange traffic, the Board finds that such a proposal is outside the scope of this proceeding. This rulemaking is limited to establishing criteria for the prescription of reciprocal switching agreements within terminal areas as defined in part 1145.

Some commenters argue that the Board should consider safety as part of its assessment of practicability. (*See, e.g.,* CN Comments 18–19.) The federal government's primary safety agency for freight rail transportation, FRA, and its parent department, DOT, state that the Board should consider safety in assessing a petition under part 1145 but note that, in general, they do not foresee safety concerns with reciprocal switching. (DOT/FRA Comments 3 n.3 (explaining that railroads are required to operate safely and in compliance with all applicable FRA safety regulations at all times, which would include while conducting reciprocal switching moves).) AAR agrees that compliance with relevant safety regulations and practices ''will do much to mitigate safety concerns,'' but argues that unforeseen safety issues may arise in a specific proceeding. (AAR Reply 56.) AAR suggests the Board clarify in the regulatory text that ''the Board will not find a switching arrangement to be practicable and in the public interest if it is unsafe.'' [54]

Part 1145 does not preclude the Board from considering safety in its assessment of a petition filed under part 1145. The proposed rule requires any petition for prescription of a reciprocal switching agreement to be served on FRA. *NPRM,* 88 FR at 36908 (proposed § 1145.5(c)). Therefore, FRA would receive notice and have an opportunity to comment on any petition if it deemed

[52] In *Delaware & Hudson,* the ICC stated that reciprocal switching is ''practicable and in the public interest'' when it generally meets the following criteria: ''(1) interchange and switching must be feasible; (2) the terminal facilities must be able to accommodate the traffic of both competing carriers; (3) the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its shippers; and (4) the benefits to shippers from improved service or reduced rates must outweigh the detriments, if any, to either carrier.'' *See Del. & Hudson,* 367 I.C.C. 718, 720–22.

[53] Specifically, CSXT states that ''the Board should eliminate its presumption that forced switching in a terminal area would be practicable.'' (CSXT Comments 42.) CSXT misdescribes the presumption, which applies only to operational feasibility, and arises only when the incumbent and alternate carriers have an existing reciprocal switching arrangement in the petitioner's terminal area.

[54] (*Id.* (quoting with modifications *2016 NPRM,* EP 711 et al., slip op. at 18; *see also* CN Comments 22 (asserting that a finding of practicability requires consideration of safety issues associated with the handling of traffic or the alternate route); CSXT Comments 43–44 (noting risk of accidents and employee injuries from increased handlings and safety/security concerns with hazardous materials and TIH shipments).)

BLET also raises concerns that switching ''would impair the safe operations of crews on both the host and guest railroads.'' (BLET Comments 2.) This concern, however, seems to address a trackage rights scenario as opposed to reciprocal switching, as BLET later refers to a guest railroad traversing the tracks of a host railroad. (*Id.*) The Board declines to address the issue raised by BLET here as it appears to go beyond the scope of this proceeding.

necessary. The Board would take FRA's comments into account in determining whether the proposed reciprocal switching was *practicable* and in the public interest. In light of the foregoing, it is not necessary to amend part 1145 to require a specific determination as to safety.

CRC and Metrolink express concern that a reciprocal switching agreement under part 1145 could adversely impact existing agreements between freight rail carriers and passenger rail carriers, including agreements regarding shared use of facilities, on-time performance goals, safety, and dispatching priorities. CRC and Metrolink assert that, given the potential impact reciprocal switching agreements may have on a shared rail corridor, the Board must consider the interests of passenger rail carriers in a proceeding under part 1145. (CRC Comments 4–6; Metrolink Comments 1–2.) To that end, CRC suggests that the Board modify proposed § 1145.6(b) to permit a ''potentially affected rail carrier'' to bring practicability concerns before the Board. (CRC Comments 7–8.)

The Board declines to modify proposed § 1145.6(b) as suggested by CRC. As CRC notes, freight rail carriers and passenger rail carriers already have existing shared use and/or operational agreements. There is no reason to suppose that those agreements would be nullified by the Board's prescription of a reciprocal switching agreement. To the contrary, the Board may assume that the alternate carrier under the prescribed agreement would provide line-haul service to the petitioner in accordance with the alternate carrier's operating agreements with other carriers. In all events, freight rail carriers are in a position to make the Board aware of any practicability issues involving passenger carriers.

Finally, BNSF urges the Board to consider car supply issues when weighing the practicability of a proposed reciprocal switching agreement, including the alternate carrier's ability to supply cars and how added car supply responsibilities will impact the alternate carrier's other customers. (BNSF Comments 8.) BNSF notes that its existing, market-based car-supply programs have substantial built-in lead times and argues that the Board should ensure that these programs are not adversely affected by a prescribed reciprocal switching agreement. (*Id.* at 9–10.)

Although BNSF urges the Board to consider car supply issues when considering the practicability of a reciprocal switch, the Board notes that it is possible that the petitioner and the alternate carrier will have addressed car supply issues in advance of the filing of a petition. Nevertheless, the Board reiterates that, under § 1145.6(b), the Board will not prescribe an agreement if the alternate carrier demonstrates that the provision of line-haul service to the petitioner would be infeasible or that it would unduly impair the alternate rail carrier's ability to serve its existing customers—and will consider evidence, for example, of whether the alternate carrier would be unable to accommodate the car supply needs of the petitioner in the event a reciprocal switching agreement were ordered.

Service Obligation

The Board sought comment on whether a prescription should include a minimum level of switching service, and if so, whether the Board should establish a separate and specific penalty structure to be imposed on carriers that do not meet that level of service. *NPRM,* 88 FR at 63903 n.15.

The Coalition Associations and PCA support establishing such a requirement, along with a specific penalty structure to be imposed on carriers that do not meet the customer's level of service requirements. (Coal. Ass'ns Comments 58; PCA Comments 7–8.) AAR asserts that no such requirement or ''penalty structure'' is appropriate, as the prescribed service will be subject to the common carrier obligation under 49 U.S.C. 11101, and the usual remedies for a failure to provide adequate service upon reasonable request will be available. (AAR Comments 94.)

While the Board expects movements under a prescribed reciprocal switching agreement to occur on a timely and efficient basis, the Board will not attempt through this rule to anticipate or set standards for resolving related disputes. The Board will leave enforcement of carriers' obligations under a prescribed reciprocal switching agreements to other proceedings, should a dispute arise.[55]

Procedures

Negotiations

The *NPRM* proposed that, at least five days prior to filing a petition under part 1145, the petitioner must seek to engage in good faith negotiations to resolve its dispute with the incumbent rail carrier. *NPRM,* 88 FR at 63914. Several rail carriers argue that five days is insufficient for an incumbent carrier to cure a service issue. They urge the Board to extend the negotiation period or require additional pre-filing communication between carriers and petitioners. (*See, e.g.,* AAR Comments 86; CPKC Reply 25; CSXT Comments 35; NSR Comments 11.)

NSR suggests that customers should be required to communicate with the incumbent carrier during the period of the alleged service issue upon which a petition is based. (NSR Comments 11 (stating that it is consistent with the RTP of 49 U.S.C. 10101(2) to promote the private resolution of disputes); *see* AAR Reply 67 (encouraging the Board to adopt NSR's recommendation); CPKC Reply 25 (endorsing NSR's suggestion).) Similarly, AAR suggests that shippers be required to notify an incumbent carrier of the concerns in question as soon as practicable after the 12-week period during which the carrier allegedly failed to meet a performance standard, and that shippers also be required to engage with the incumbent carrier for a reasonable period—such as four weeks—during which the incumbent carrier would be encouraged to remedy the problem.[56] (AAR Comments 88; *see* CSXT Comments 35 (endorsing AAR's recommendation).) According to AAR, allowing an incumbent carrier to cure a service issue is the most efficient approach to achieving ''the Board's ultimate objective.'' (AAR Comments 86–87.)

[55] More broadly, as described in the *NPRM* and throughout this rule, the Board has recognized that the form of intervention, the characteristics of the appropriately defined and scoped switching prescription here, the numerous protections in this rule, and other aforementioned factors enable the Board to balance the aspects of the RTP and set these performance standards in this specific context. As the Board stated in the *NPRM,* it does not view it as appropriate to apply or draw from these standards to regulate or enforce the common carrier obligation. *See, e.g., State of Montana* v. *BNSF Ry.,* NOR 42124, slip op. at 7 (STB served Apr. 26, 2013) (stating what constitutes a reasonable request depends on all relevant facts and circumstances); *Granite State Concrete Co.* v. *STB,* 417 F.3d 85, 92 (1st Cir. 2005); *Union Pac. R.R—Pet. for Declaratory Ord.,* FD 35219, slip op. at 3–4 (STB served June 11, 2009).

[56] CSXT also argues that the Board should only permit petitions for alleged service inadequacies that are ''reasonably contemporaneous with the petition and exist at the time of the petition'' because there is no compelling need for a switching prescription where a service inadequacy no longer exists. (CSXT Comments 35.) As suggested above, though, carriers have misstated the law in suggesting that the Board must find a compelling need as a condition to a prescription under section 11102(c). *See* Legal Authority. Even putting aside the applicable standard, part 1145 properly does not require demonstration of an ongoing service issue as a condition to a prescription. Given the fluid nature of rail operations, what had been an ongoing problem could be temporarily fixed or could recur. It therefore would undermine the purposes of part 1145 to require demonstration of an ongoing service issue. That approach would undermine predictability for shippers and receivers that were considering whether to file a petition under part 1145 and, by undermining predictability, would negate the incentives that part 1145 is designed to introduce.

Rail carriers also argue that an incumbent rail carrier would be better situated to cure a service issue if the Board extended the five-day negotiation period. According to UP, a 30-day negotiation period would allow the customer and carrier ''to resolve issues and make longer-term, permanent changes to address the concerns.'' (UP Comments 14.) BNSF also suggests a 30-day negotiation period and states that, during the 30-day period, Board staff from the OPAGAC or the Rail Customer and Public Assistance Program (RCPA) could assist in resolving disputes. (BNSF Comments 4–5; BNSF Reply 2–3; *see also* AAR Reply 67 (stating that the Board should encourage shippers and carriers to utilize OPAGAC).)

NSSGA responds that carriers' request for additional time to cure a service deficiency shows that carriers can improve service if threatened with the possibility of a reciprocal switching proceeding and are only interested in improving service when a shipper intends to pursue a switching prescription. (NSSGA Reply 4.) NSSGA argues that carriers can improve service at any time, that providing carriers with additional time to cure would delay service improvement, and that carriers may make only temporary improvements to avert a switching prescription. (*Id.*) AFPM also supports the proposed five-day negotiation period. (AFPM Comments 14.)

The Board rejects proposals to extend the five-day negotiation period or to require additional pre-filing communication between rail carriers and shippers or receivers, including during the period of alleged service inadequacy. As a practical matter, the Board expects that—given both the regulatory requirement that a petitioner must seek to engage in good faith negotiations to resolve its dispute and the practical dynamics of the business relationship between carriers and their customers—a shipper or receiver would have communicated with the incumbent carrier during the period of alleged service inadequacy, and parties are encouraged to seek assistance from RCPA to informally resolve disputes.[57] But requiring such communication or resolution would only impose an unnecessary hurdle on petitioners and could result in delaying service improvement. Moreover, AAR errs in asserting that the Board's ''ultimate goal'' in enacting part 1145 is merely to provide for resolution of an immediate service problem. The Board's broader goal is to create appropriate regulatory incentives for Class I railroads to achieve and to maintain higher service levels on an ongoing basis. *NPRM,* 88 FR at 63899. Requiring petitioners to seek private resolution of an ongoing service issue—which is a remedy already available to them—would not accomplish these goals.

Replies and Rebuttals

AAR argues that the Board did not explain why it proposed a 20-day period to reply to a petition, rather than a 30-day period as permitted under 49 CFR 1147.1(b)(2). (AAR Comments 89); *see NPRM,* 88 FR at 63914. AAR states that a 30-day reply period would allow an incumbent railroad to provide a well-informed pleading. (AAR Comments 89.) Similarly, Ravnitzky suggests a 30-day period for both replies and rebuttals. (Ravnitzky Comments 2); *see NPRM,* 88 FR at 63915 (proposing a 20-day period to file a rebuttal to a reply).

The proposed 20-day reply period is consistent with the Board's general regulations, which permit a party to file a reply to any pleading within 20 days after the pleading is filed, unless otherwise provided. *See* 49 CFR 1104.13. As to the rebuttal period, Ravnitzky does not explain why a period longer than 20 days is necessary. Consistent with the RTP, *see* 49 U.S.C. 10101(2), (15), the Board also finds that the 20-day deadlines will promote more efficient proceedings, reflect the guidance in the rule itself regarding the scope of available arguments, and will allow the Board to meet its target for issuing an order addressing a petition within 90 days of it being filed. *See NPRM,* 88 FR at 63908 (proposed § 1145.5(f)). Nevertheless, the Board maintains discretion to extend any deadline upon request and for good cause. *See* 49 CFR 1104.7(b).

Alternate Carriers

Rail carriers urge the Board to clarify the alternate carrier's role in a proceeding for a switching prescription under part 1145. (*See, e.g.,* AAR Comments 89; BNSF Comments 6–7; UP Comments 14–15.) BNSF argues that the Board should require petitioners to engage in pre-petition consultations with the alternate carrier to establish, before a petition is filed, whether switching would be practicable. (BNSF Comments 5–6 (proposing a 30-day pre-filing negotiation period).) BNSF also states that the Board should clarify that an alternate carrier has a right to participate in a formal Board proceeding brought under part 1145. (*Id.* at 7.) According to BNSF, such participation by the alternate carrier would ensure that a new switching prescription improves the petitioner's service without harming service to the alternate's existing customers. (*Id.*)

Other rail carriers argue that the proposed rule should require petitioners to obtain a commitment from the alternate carrier before filing a petition. (*See, e.g.,* AAR Comments 10, 90 (stating that the commitment should include a design plan, which is central to the Board's consideration of issues such as practicability, safety, and impact on other shippers).) CN, CSXT, and UP note that part 1147 requires petitioners to obtain a commitment from an alternate carrier and that, in adopting part 1147, the Board stated that an alternate carrier's participation was ''essential.'' (CN Comments 22; CSXT Comments 37–38; UP Comments 16–17); *see Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 977, 979 n.19; 49 CFR 1147.1(b)(1)(iii). CSXT states that, if cooperation by the alternate is essential under part 1147, it is essential for nonemergency cases filed under part 1145. (CSXT Comments 38.) Similarly, CN argues that the Board's reasoning in *Expedited Relief for Service Inadequacies* that '''[f]orcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances' . . . . is equally valid in the context of the current NPRM.'' (CN Comments 22 (quoting *Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 977).) UP also argues that a commitment requirement would incentivize shippers to provide alternate rail carriers with sufficient time to evaluate impacts of the proposed service and would allow the shipper and alternate carrier to negotiate about service and volume. (UP Comments 17.) Alternatively, UP suggests that the Board clarify that it would not require an alternate carrier to provide service if the carrier would need to change service plans, hire crews, or assume capital investments. (*Id.*)

ACD responds that a commitment requirement is unnecessary, as the *NPRM* already requires a switch to be practicable and in the public interest, and that a commitment requirement would delay petitions and make them more difficult to complete. (ACD Reply 5.) WCTL argues that a commitment requirement would essentially require a shipper to contract with what may be the only alternate rail carrier available, providing the alternate with ''significant leverage over the shipper and . . . little incentive to afford substantial value to the aggrieved shipper.'' (WCTL Reply 19.) Other rail users suggest that a potential alternate carrier may be unwilling to enter into an alternate

[57] RCPA can be reached at (202) 245–0238 and *rcpa@stb.gov.*

service commitment. (*See* NGFA Comments 6 (asserting that a lack of interest by the potential alternate carrier is a primary reason that few cases invoking the emergency service rules under part 1147 have not resulted in alternate carrier service); DCPC Reply 7 (stating that, absent an opportunity to compete for all or most of a shipper's business, an alternate may be unwilling to invest in and commit to alternate service).)

The Board will not adopt the suggestion that petitioners should obtain a commitment from an alternate rail carrier before filing a petition. However, for the Board to best meet its information needs and carry out the regulations, the Board will require that an alternate carrier participate in a proceeding under part 1145 by filing a reply to a petition. *See NPRM,* 88 FR at 63914 (proposed § 1145.5(c), requiring a petitioner to serve the petition on the alternate carrier);[58] *see also Revisions to Reguls. for Expedited Relief for Serv. Emergencies,* EP 762, slip op. at 11 (STB served Jan. 24, 2024). In such a reply, an alternate carrier may raise concerns pertaining to practicability. As stated in the *NPRM,* in determining whether to issue an order granting a reciprocal switching prescription, the Board would consider any alternate rail carrier's objections that the provision of line-haul service to the petitioner would be infeasible or unduly hamper the alternate carrier's ability to serve its existing customers.[59] *NPRM,* 88 FR at 63909. And if an alternate carrier needed to make certain investments to accept a petitioner's traffic, the Board would consider whether a longer minimum term for the prescription was necessary for the prescription to be practical. *Id.* at 63910. To ensure carriers have necessary information for their replies, the Board will amend its proposal to require the petitioner to identify the requested duration of the prescription of a reciprocal switching agreement and provide supporting evidence for any request for a prescription longer than the minimum term specified in § 1145.6(c).

The procedures in this rule allow an alternate carrier to meaningfully participate in a Board proceeding while reducing barriers to petitioners. Additionally, requiring an alternate carrier to file a reply to a petition will allow the Board to better assess any concerns relating to practicability and to weigh those concerns against the public interest. In short, the Board rejects rail carriers' assertions that, in the absence of a commitment requirement, an alternate carrier would be forced to offer line-haul service where there are legitimate practicability concerns that would unduly impair the alternate carrier's operations. Finally, requiring a commitment from the alternate carrier would contradict the design of part 1145, which seeks to allow the successful petitioner to choose between available rail carriers as the petitioner sees fit.

Shippers and Receivers

VPA, while noting that the Board ''has appropriately focused its proposed rulemaking on shippers and receivers of freight,'' nevertheless argues that the Board should ''modestly expand the scope'' of the entities eligible to seek a reciprocal switching prescription ''to include ports and port facilities.'' (VPA Comments 5.) VPA asserts that a port, in effect, is the originator or terminator of traffic because every rail movement involving a port either starts or ends at the port, and that ports have a need for reliable, predictable, and efficient rail service similar to that of shippers and receivers. (*Id.* at 6.) VPA also argues that poor rail service creates operational issues at ports, as was shown by the problems experienced recently at West Coast ports. (*Id.* at 6–7.) VPA asserts that any portion of a port facility that is served by only one Class I rail carrier should be eligible for relief; this, VPA argues, would be consistent with the Board's definition of ''practical physical access'' and the proposed rule's coverage of a shipper's traffic in a single eligible lane even if the shipper enjoys practical physical access to multiple carriers with respect to other lanes. (*Id.* at 7–8.)

AAR opposes VPA's request to expand eligibility to ports, arguing that shippers and receivers ''are the entities with the essential economic and operational relationships with the carrier,'' and that expanding eligibility ''would raise numerous questions about how the entities with those economic and operational relationships would properly be heard'' and would ''pose complicated issues related to data confidentiality.'' (AAR Reply 66 n.21.)

While it may be, as VPA suggests, that port facilities can bear certain similarities to shippers and receivers from an operational perspective, it is also true that they serve a distinct function as links in the national and international supply chain. (*See* VPA Comments 5 (noting that The Port of Virginia ''works hard to be an important part of the national intermodal system for the benefit of the shippers, the economy of Virginia, and the nation.'').) And the Board is sensitive to the concerns AAR raises regarding the economic and operational relationships between railroads and the shippers and receivers who are their ultimate customers and users of the supply chain of which ports are a part. Moreover, VPA has not identified any particular reason why it would not be equally effective for the shipper/receiver to petition, or how a port would implement a switch, as it is not a purchaser of common carrier rail service. Therefore, based on the comments received, the current record does not support modifying the rule to expand eligibility to ports or portions thereof. Because the Board is not modifying the rule to include ports as eligible petitioners, the other changes VPA requests need not be addressed, as they would directly flow from those modifications. (*See id.* at 8–12.)

DCPC raises whether a group of shippers in the same terminal area could file for a prescription of a reciprocal switching agreement, giving as an example a group of shippers located in an industrial park. (DCPC Comments 13.) DCPC asserts that groups of shippers served by the same incumbent railroad in the same terminal area that demonstrate inadequate service according to the established standards should be allowed to seek a prescription. (*Id.*) While the Board does not foreclose the possibility that a group of similarly situated shippers could jointly seek a prescription, it need not attempt to define in the abstract a specific set of circumstances, if one exists, wherein individual shippers each would qualify for the same relief in such a similar way that a joint petition would be appropriate. The Board therefore will consider the suitability of a joint petition on a case-by-case basis in the event such a petition is filed.

AAR urges the Board to clarify that ''if the party with the economic relationship to the carriers [*e.g.,* payor of freight] is not the same as the party with the operational relationship to the switching, they *both* need to be before the Board as both interests will be

[58] Consistent with its approach in Docket No. EP 762, *Revisions to Regulations for Expedited Relief for Service Emergencies,* the Board will require a petition to identify at least one possible rail carrier to provide alternative service. Given that a petitioner may have two or more options if it were to receive a reciprocal switching agreement prescription, the Board will amend the proposal to clarify that a petitioner can identify, and must serve the petition on, one or more alternate carriers, and each identified alternate carrier will be required to reply to the petition.

[59] As stated in the *NPRM,* the objecting carrier would have the burden of proof of establishing infeasibility or undue impairment. *NPRM,* 88 FR at 63909. The final regulatory text has been modified to clarify that the objecting rail carrier bears the burden of proving infeasibility or undue impairment. *See* 49 CFR 1145.5(d).

affected.'' (AAR Comments 91.) The Board disagrees. The real parties in interest for these regulations are the shippers and receivers that have directly experienced the service issue. Moreover, considering the business relationship between payors of freight and the shipper or receiver (to the extent those entities are different), and the costs to a shipper or receiver of bringing a case, the Board notes that petitioners would have an incentive to communicate and coordinate as necessary with the payor of freight and to avoid filing cases in which the petitioner could not pursue a switching arrangement from an economic perspective. Based on the record here, the Board sees little value in requiring another entity beyond those parties to also join in a proceeding.

Short Lines, Passenger Rail, and Commuter Rail

Under proposed § 1145.5(c), a petitioner would be required to serve the petition for prescription of a reciprocal switching agreement on the incumbent rail carrier, the alternate rail carrier, and FRA. Several commenters encourage the Board to recognize that other entities may be affected by a prescription and to require that the petition should be served on them also.

AAR argues that shippers should serve notice on short lines and passenger railroads to prevent complications, and that those parties should be permitted to submit comments on a petition if needed. (AAR Reply 65–66.) Similarly, ASLRRA argues that short lines should be notified of switches impacting their traffic—so a short line railroad scheduled to receive a shipment subject to a reciprocal switch prescription earlier in its journey should be notified of the petition as well. (ASLRRA Comments 1, 7.) CSXT supports ASLRRA's proposal to notify short lines of petitions that could affect ''joint line traffic handled by that short line.'' (CSXT Reply 14.) CSXT also argues that pre-Staggers standards for joint use of terminal facilities, which Congress ''imported'' when adopting section 11102(c), made clear that a determination as to whether a prescribed reciprocal switching is in the public interest requires consideration of the relief's impact on other parties. (*Id.* at 13.)

CRC asks the Board to add a definition of ''Potentially Affected Rail Carrier'' that would include any rail carrier—freight or passenger—that operates on track shared with one of the rail carrier parties to a prescribed reciprocal switching agreement, and to amend § 1145.5 to require that the petition be served on potentially affected rail carriers. (CRC Comments 7–8.) CSXT supports CRC's suggestion about notifying affected passenger railroads. (CSXT Reply 14.) Metrolink asks that commuter rail and intercity passenger rail entities be given notice of a proceeding and the ability to comment. (Metrolink Comments 1.) Within a case, Metrolink also asks that the Board consider impacts on passenger rail and those entities' shared-use agreements with Class I carriers. (*Id.* at 1–2.)

With respect to commenter requests for post-prescription notifications, the Board notes that voluntary reciprocal switching arrangements involving a Class I rail carrier are reflected on that carrier's public website,[60] and other rail carriers could observe that a voluntary reciprocal switching agreement is in place. Like a voluntary reciprocal switching arrangement, a prescribed reciprocal switching agreement also would be reflected on the carrier's website and observable; moreover, the fact that it was prescribed would be available on the Board's website. *See also* § 1145.6(d), as amended below. From an operations perspective, given the definitions and protections in this rule, there are substantial similarities between a voluntary reciprocal switching arrangement and one that is prescribed and their resulting impacts. As such, the record does not support requiring special notice to other rail carriers of either prescribed reciprocal switching agreements or the filing of a petition. Furthermore, a shipper or receiver may not be aware of all the rail carriers that use a shared track; it could be burdensome or nearly impossible for the petitioner to ascertain all possible rail carriers using that track because they do not have access to the applicable agreements. The Board also notes that carriers are free to notify any affected entity and consult them in formulating their replies, including in considering or addressing practicability. For those reasons, the Board declines to expand § 1145.5(c) to require notice to entities other than the incumbent carrier, the alternate carrier, and FRA. Should there be concerns with how a prescription could affect other rail carriers, the parties should raise and address them in their pleadings.

Disclosure Under 49 CFR Part 1300

Proposed § 1145.6(d) provides, in part, that upon the Board's prescription of a reciprocal switching agreement, the affected rail carriers must ''include, in the appropriate disclosure under 49 CFR part 1300, the location of the petitioner's facility, indicating that the location is open to reciprocal switching, and the applicable terms and price.'' *NPRM,* 88 FR at 63915. AAR comments that this phrasing is ambiguous and could result in confusion about the proper disclosure, as ''information about a switching agreement is not itself subject to disclosure under 49 CFR part 1300.'' (AAR Comments 95 (asserting that no provision in part 1300 describes such carrier-to-carrier agreements and that terms of switching agreements are generally not disclosed to the public).) AAR also asserts that agreements may include information about a shipper's specific lanes, which could raise confidentiality concerns for the shipper. (*Id.*) AAR argues that, in this context, the only relevant disclosure under part 1300 would be the alternate carrier's line-haul rate and terms for a movement that utilizes the switching services of the incumbent carrier. AAR suggests that ''[t]he Board may wish to refine 1145.6(d) to avoid confusion.'' (*Id.*)

This provision was intended to ensure a measure of public notice in the ordinary course of business (apart from the Board's prescription proceeding itself) that a particular location has become open to reciprocal switching. The Board acknowledges AAR's concern, however, that the *NPRM*'s reference to ''the appropriate disclosure under Part 1300'' is ambiguous and possibly confusing. For that reason, the Board is clarifying this provision to instead require that, in the event of a prescription, the incumbent carrier promptly amend its switching publication(s)[61] as appropriate to reflect the availability of reciprocal switching under the prescription.

Prioritization

USDA suggests that the Board develop a ''ranking component'' to prioritize proceedings under part 1145 based on the severity of the performance lapses and ''help expedite extraordinary cases.'' (USDA Comments 7.) The Board appreciates suggestions for potential ways to enhance the efficiency of Board proceedings. However, the type of system described by USDA would itself be time-consuming (and, in all likelihood, complicated and contentious) to develop. Moreover, the Board is not anticipating a high volume

[60] *See, e.g., https://c02.my.uprr.com/scs/index.html#/external/search* (for UP's website) and *www.bnsf.com/bnsf.was/SCRSWeb/SCRSCentralController* (for BNSF's website).

[61] Here, the term ''switching publication'' refers to the instrument used by a railroad to document for its customers and other railroads which customers are covered by a reciprocal switching agreement and the applicable terms.

of cases under part 1145 each year. *See* Paperwork Reduction Act section. The Board will defer development of any prioritization approach and will devote its resources at this time to expeditiously resolving part 1145 proceedings as they are filed.

Affirmative Defenses

The Board explained in the *NPRM* that an incumbent rail carrier shall be deemed not to fail a performance standard if the carrier demonstrates that its apparent failure to meet a performance standard was caused by conditions that would qualify as an affirmative defense. 88 FR at 63908. If the incumbent carrier makes such a showing, the Board would not prescribe a reciprocal switching agreement.[62] 88 FR at 63908. The Board set forth four affirmative defenses in proposed § 1145.3: (1) extraordinary circumstances beyond a carrier's control; (2) surprise surge in petitioner's traffic; (3) highly unusual shipment patterns; and (4) delays caused by dispatching choices of a third party. *Id.* at 63908–09. The Board further noted that defenses that do not fit within those categories would be evaluated on a case-by-case basis. *Id.* at 63908. The Board also sought comment on what other affirmative defenses, if any, should be specified in the final rule. *Id.*

Several railroads and AAR urge the Board to consider all relevant evidence that may bear on the reasons for the failure to satisfy the relevant performance standard. The carriers also assert that the incumbent railroad must have the opportunity to put the metric-based showing into case-specific context, whereby the incumbent railroad would try to establish that there was no service inadequacy. (AAR Comments 75; CSXT Comments 32; NSR Comments 7; CN Comments 25; CPKC Reply 27; NSR Reply 19–21 (proposing language that would allow for ''any defense relevant to whether there is a service inadequacy for which there is actual necessity or compelling reason for a prescribed switching agreement''); CN Reply 12 (same).) Some carriers and AAR also assert that the proposed affirmative defenses are highly restrictive, reasoning that service quality may be influenced by a variety of factors that are varied and difficult to predict. (AAR Comments 73–74; *see also* CSXT Comments 3 n.3, 9.) They urge the Board to broadly interpret the specified defenses to account for circumstances that were beyond the rail carrier's control or for which the rail carrier could not reasonably prepare. (AAR Comments 80–85; *see, e.g.,* AAR Comments 82–84 (urging an interpretation of ''surprise surge'' to include spikes in demand of shippers other than the petitioner); *see also* CSXT Comments 25 n.21.)

Some railroads and AAR propose additional affirmative defenses that would address situations they contend are likely to recur: the incumbent carrier's curing of the potential service inadequacy during the course of the proceeding, (AAR Comments 75; UP Comments 14); scheduled maintenance and capital improvement projects undertaken by the incumbent, (AAR Comments 75–76; CN Comments 24); conduct of third parties, including action or inaction by the shipper that led to failure to meet a performance standard, (AAR Comments 76–77; BNSF Comments 10–11);[63] valid embargoes, (AAR Comments 77–78); effective intermodal competition, (AAR Comments 78–79); and alternate carrier objections, (AAR Comments 79–80). In reply, the Coalition Associations state that they do not oppose the affirmative defenses proposed by AAR pertaining to third-party conduct or scheduled maintenance and capital improvements, but they oppose the defenses regarding cured service inadequacies, valid embargoes, and intermodal competition. (Coal. Ass'ns Reply 22–23.) PCA opposes AAR's proposed defenses, asserting that they are without legal support and impose barriers in obtaining relief. (PCA Reply 7.)

AFPM generally supports delineating a limited number of affirmative defenses but notes that these should be clearly defined and understood, as ambiguous affirmative defenses could weaken the usefulness of this proposal. (AFPM Comment 15.) AFPM further suggests that the ''surprise surge'' and ''highly unusual shipment patterns'' affirmative defenses are redundant and could potentially be combined. (*Id.*)

The Board will adopt one of the additional affirmative defenses proposed by commenters as part of the final rule. As noted above, the Board already proposed to include a defense for delays caused by dispatching choices of a third party. The suggestion to include, as an affirmative defense, other conduct by third parties is consistent with the reasoning for including the dispatching-related defense, to the extent that conduct is outside the control of the incumbent carrier. *See NPRM,* 88 FR at 63908–09; (*see also* AAR Comments 76–77.) As such, the Board will adopt a separate affirmative defense for third-party conduct that is outside the reasonable control of the incumbent carrier. The Board notes that several shipper groups do not oppose including this defense. (Coal. Ass'ns Reply 22–23.)

To be clear, the affirmative defense for third-party conduct will be narrowly construed to prevent this or any defense from being used as a frivolous tactic to unduly prolong or delay, or unnecessarily increase the cost of the proceeding so as to deter the current or future petitioners from bringing proceedings under this rule. This third-party conduct affirmative defense will include only conduct that had a direct, cognizable impact on the incumbent carrier's meeting the applicable performance standard, and that was outside the reasonable control of the incumbent carrier. To the extent that the impact of the conduct could not have been reasonably prevented, the defense will not apply if the incumbent carrier failed to take reasonable steps to mitigate the impact of the third-party conduct. To the extent the conduct could have been reasonably prevented, the defense will not apply if the incumbent carrier failed to take reasonable steps to prevent and mitigate the impact of the third-party conduct. As with the other affirmative defenses, the burden will be on the incumbent carrier to prove each of these elements.

The Board declines to adopt the other additional affirmative defenses proposed by commenters. The Board is adopting a number of specific affirmative defenses, designed to cover scenarios that should be considered when evaluating whether a reciprocal switching agreement should be prescribed and the Board will also, under proposed § 1145.3, consider on a case-by-case basis affirmative defenses that are not specified in the rule. Though the Board recognizes the variability of rail customers, many of the other suggested defenses undermine the underlying purposes of the rule.

As a general matter, the Board's specified affirmative defenses are focused on reasons that a carrier's service might be below a metric during the relevant 12-week period. The Board

[62] If the incumbent carrier establishes that its failure to meet a performance standard was excused by an affirmative defense, the Board could in its discretion, *see* 49 CFR 1104.11, allow the petitioner to amend its petition to address a 12-week period of service that was unaffected by the affirmative defense.

[63] In response to the Board's request for comment as to whether the definition of ''affiliated companies'' should include third-party agents of Class I carriers, *see NPRM,* 88 FR at 63902 n.9, AAR asserts that the definition should not include third parties, as it might include a Class II or Class III rail carrier serving as a handling carrier at the customer location, thus potentially assigning responsibility to a Class I carrier for failures to meet a metric that were caused by a third party. (AAR Comments 76–77.)

sees less value in potential affirmative defenses that instead focus on whether there is a service inadequacy with certain largely undefined effects based on allegations of a petitioner's particularized service needs or whether the carrier cured the cause of its failure to meet a performance standard. These types of considerations would not inform why the carrier could not meet the relevant performance standard nor would they appear to further the underlying purposes of the rule. Consideration of the presence or absence of intermodal transportation options and/or market dominance is likely to raise similar issues. *See* Legal Framework. As discussed above, part 1145 is designed to provide a shipper with an alternative rail option if the incumbent railroad's performance falls below a defined standard. The rule is not punitive; rather, it mainly serves to introduce an additional rail carrier as a means to provide the appropriate level of service while more broadly incentivizing rail carriers to avoid the drops in network performance that the carriers themselves have recognized as unacceptable. *See* Legal Framework; *see also NPRM,* 88 FR at 63900–01. Finally, the Board declines to treat as an affirmative defense information from the alternate carrier about the possible impact of the proposed reciprocal switching agreement on the alternate carrier's operations and economics. (AAR Comments 78–79.) Related concerns could be raised under the provisions in part 1145 on impracticability, including operational feasibility and undue impairment. *See* 49 CFR 1145.6(b).

The Board clarifies that the ''extraordinary circumstances'' defense in § 1145.3(a) would not be interpreted broadly to include *any* event beyond a railroad's control, as AAR suggests. (*See* AAR Comments 81.) Rather, as indicated in the *NPRM,* the extraordinary circumstances defense will be narrowly construed as applying to the type of events that would qualify a railroad for an emergency trackage rights exemption, including natural disasters, severe weather events, flooding, accidents, derailments, and washouts, though not necessarily resulting in a track outage. *See NPRM,* 88 FR at 63908, 49 CFR 1180.2(d)(9).

The Board appreciates the carriers' suggestion to include ''scheduled maintenance and capital improvement projects'' as an affirmative defense and recognizes that several shipper interests do not oppose such an addition, but the Board finds that such instances are better addressed on a case-by-case basis. The Board does not intend for the rule to disincentivize capital investment and in fact expects that this rule will help promote investments necessary for adequate service. However, the Board observes that the nature of ''scheduled'' maintenance and capital improvement projects suggests that carriers have a degree of control over their execution, and the Board expects carriers to exercise that control with reasonable consideration of shippers' service levels.

Lastly, the Board clarifies that the affirmative defense pertaining to a surprise surge in a petitioner's traffic is distinct from the affirmative defense regarding a petitioner's highly unusual shipment patterns. For the former, a surprise surge is defined by rule as an increase in traffic by 20% or more during the 12-week period in question (compared to the 12 weeks prior for non-seasonal traffic or the same 12-week period during the previous year for seasonal traffic), without timely advance notification from the shipper. *See* § 1145.3(b). In contrast, a shipment pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but due to a plant outage for three weeks, the shipper then requests shipment of 120 cars in a single week. *See* § 1145.3(c). Thus, the former would apply to an unexpected increase in traffic of 20% or more over the 12-week period in question, whereas the latter would apply to other types of atypical shipping patterns involving a single week within the 12-week period.

Compensation

The *NPRM* sought comment on two methodologies that the Board could use to set compensation under a reciprocal switching agreement under proposed part 1145, in the event that the affected rail carriers failed to reach agreement on compensation within a reasonable time, as contemplated in 49 U.S.C. 11102(c). Both proposed methodologies would establish a fee based on the incumbent carrier's cost of performing services under the reciprocal switching agreement, as determined by the carrier's embedded and variable costs of providing that service. *NPRM,* 88 FR at 63909.

Cost of Service. One proposed methodology is to set reciprocal switching fees based on the cost-of-service approach that has been used in past cases on switching fees. *See, e.g., Increased Switching Charges at Kan. City, Mo.-Kan.,* 344 I.C.C. 62 (1972). This approach could either use the ICC Terminal Form F, 9–64, Formula for Use in Determining Rail Terminal Freight Service Costs (Sept. 1964), or the Board's Uniform Rail Costing System (URCS) to develop the cost of service.

SSW Compensation. The other proposed methodology would adapt the Board's ''SSW Compensation'' methodology to reciprocal switching fees.[64] The Board noted in the *NPRM* that, while SSW Compensation is used primarily in trackage rights cases, where one rail carrier operates over another rail carrier's lines, many of the principles that inform the methodology would apply in the reciprocal switching context as well. *NPRM,* 88 FR at 63910.

AAR and NSR assert that, as under part 1147, the Board should take a case-by-case approach to setting fees under part 1145. AAR and NSR reason that the Board plays a limited role in setting compensation under section 11102(c) and that cases in which the Board would need to set compensation would be rare. (NSR Comments 15, 17; AAR Comments 92; *see also* CSXT Comments 52.) AAR also suggests that the methodologies proposed in the *NPRM* would be insufficient to achieve appropriate compensation. AAR contends that compensation based on cost of service would fail to account for differential pricing and revenue adequacy, including the ability of rail carriers to make investments necessary to meet demand. (AAR Comments 92–93 (citing *Intramodal Rail Competition,* 1 I.C.C.2d 822, 835 (1985)); *see also* NSR Comments 15–16.) CSXT adds that neither of the proposed methodologies would enable carriers to recover their full fixed and common costs. (CSXT Comments 52–53.) AAR also asserts that the Board should analyze the impact of part 1145 on revenue adequacy before deciding how to set compensation under part 1145. (AAR Comments 92.) With respect to the SSW Compensation methodology, AAR and NSR assert that the *NPRM* provides no clear explanation for how a methodology that is used to develop trackage rights fees could be used to calculate a reciprocal switching rate. (AAR Comments 94; NSR Comments 16–17.)

The Coalition Associations support the Board's use of the SSW Compensation methodology, (Coal. Ass'ns Comments 59), and suggest that

[64] The SSW Compensation methodology, which has been used by the Board for setting trackage rights compensation, involves calculating the sum of three elements: (1) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (2) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (3) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. *See St. Louis SW Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1987), 5 I.C.C.2d 525 (1989) (*SSW Compensation III*), 8 I.C.C.2d 80 (1991), and 8 I.C.C.2d 213 (1991), *aff'd sub nom. Union Pac. Corp.* v. *ICC,* 978 F.2d 745 (D.C. Cir. 1992), *cert. denied,* 508 U.S. 951 (1993).

the SSW Compensation methodology could be adapted for setting reciprocal switching fees as follows: To develop the incumbent carrier's variable costs of transporting the petitioner's traffic between the origin or destination and the point of transfer with the alternate carrier, the Board would use the incumbent carrier's URCS Phase III model. (*Id.,* V.S. Crowley/Fapp 9.) To develop the incumbent carrier's fixed costs of providing the service in question, the Board would use either URCS or a modified STB Average Total Cost (ATC) revenue division methodology. (*Id.*) Finally, under the Coalition Associations' approach, the interest rental component would be based on system average return on investment per car-mile, multiplied by the number of miles that were involved in the reciprocal switching movement. (*Id.,* V.S. Crowley/Fapp 17–20.)

AAR disagrees with the Coalition Associations' proposal because it attempts to set fees based on the incumbent carrier's fully allocated costs, an approach that AAR claims contradicts the Board's precedent. (AAR Reply 70.) According to AAR, approaches that are based on fully allocated costs of service inappropriately use depreciated historic costs rather than forward-looking costs. AAR also argues that these approaches fail to account for revenue adequacy and the ability to engage in demand-based differential pricing. (*Id.* at 70–71.)

LyondellBasell stresses the need for an efficient regulatory process to set a reciprocal switching fee, noting that, while the regulatory process to set compensation is underway, a petitioner that has successfully obtained a reciprocal switching prescription would bear a provisional fee either as a pass through or as part of the alternate carrier's rate for line-haul service. (LyondellBasell Comments 3–4.) According to LyondellBasell, this outcome would discourage use of the reciprocal switching agreement. (*Id.* at 4.) LyondellBasell further asserts that the incumbent carrier would have an incentive to demand an excessive reciprocal switching fee as an indirect means to retain the petitioner's traffic and to apply differential pricing to that traffic. (*Id.* at 3.)

PCA asks the Board to set reciprocal switching fees at levels that facilitate effective, aggressive competition and improved service. (PCA Comments 14–15.) PCA also requests that the final rule incorporate the *NPRM*'s finding that it would be inappropriate to use a methodology that would allow the incumbent carrier to recover any loss in profits that the incumbent carrier incurred as a result of losing the petitioner's line-haul service to the alternate carrier. (*Id.* at 15.)

Ravnitzky proposes that, unless otherwise agreed by the parties or determined by the Board based on compelling evidence, the Board should establish a default reciprocal switching fee based on the average cost of providing switching service in similar circumstances. (Ravnitzky Comments 2.)

The Coalition Associations urge the Board to clarify that, even when the carriers agree to a reciprocal switching fee, the petitioner may challenge that fee before the Board using the same methodology that the Board adopts for setting reciprocal switching fees itself. (Coal. Ass'ns Comments 60.) AAR replies that there is no legal basis for allowing the petitioner to challenge a reciprocal switching fee that was mutually agreed upon by the carriers. (AAR Reply 69.) AAR reasons that the Board has no role in establishing a reciprocal switching fee unless the carriers fail to reach agreement within a reasonable period. (*Id.*) AAR further reasons that shippers may not challenge a division of rates between carriers. (*Id.*)

The Board encourages rail carriers that are party to a Board-prescribed reciprocal switching agreement to reach agreement on compensation within a reasonable period, as contemplated in section 11102(c). The Board has concluded that, if the carriers fail to do so, it is appropriate to determine the compensation methodology on a case-by-case basis because the relevant circumstances in a particular case might warrant the use of one methodology over the other.

While the Board thus declines to choose a single methodology by rule, the Board expects that, in individual cases, the two proposed methodologies will be considered in establishing compensation. As stated in the *NPRM,* reciprocal switching fees that allow the incumbent carrier to recover its cost of service are consistent with longstanding practice.[65] While the Board has accounted for differential pricing in rate reasonableness proceedings, the Board has consistently viewed it as appropriate to set reciprocal switching fees based on the direct cost of providing service and not include any lost profits from lost line-haul service. *See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.,* FD 33388, slip op. at 13 (STB served May 20, 1999) (considering the actual cost of providing a switching service in approving a switching fee). AAR's assertion that reciprocal switching fees should also account for differential pricing appears to be a variation on AAR's assertion that fees for reciprocal switching should account for lost profits, an assertion that the Board fully rejects. *See NPRM,* 88 FR at 63909. To compensate the incumbent carrier for that loss would seem to defeat the purpose of introducing a competing carrier and associated legislative objectives and could be tantamount to rewarding the incumbent carrier for inadequate service. *See id.*

With respect to the SSW Compensation methodology, the Board continues to find that, in some cases, this might inform the Board's determination of the appropriate compensation. The SSW Compensation methodology is a flexible approach that can be (and has been) modified to account for the particular facts of each case, including difficulties in valuation, various types of costs, and the specific nature and extent of the line's use. *See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.,* 3 S.T.B. 196, 344–45 (1998); *Ark. & Mo. R.R.* v. *Mo. Pac. R.R.,* 6 I.C.C.2d 619, 622–27 (1990), *aff'd sub nom. Mo. Pac. R.R.* v. *ICC,* 23 F.3d 531 (D.C. Cir. 1994); *SSW Compensation III,* 5 I.C.C.2d at 529. This methodology therefore might be useful when there is a significant difference between the incumbent carrier's historic costs and the value of the facilities that would be used for reciprocal switching. The Board remains open to evidence and argument on these points as they apply to a particular case. The Board notes that the facilities that are used to perform reciprocal switching within a terminal area, the value of which might appropriately be considered under the SSW Compensation methodology, are far more limited in geographic scope compared to the facilities that would be used to provide the line-haul. However, the Board reiterates that it would be inappropriate to set reciprocal switching fees to allow the incumbent carrier to

[65] *NPRM,* 88 FR at 63909; *see Increased Switching Charges at Kan. City, Mo.,* 356 I.C.C. 887, 890 (1977) (''[T]he cost of performing the service is the most important factor in determining the justness and reasonableness of a proposed switching charge.''); *Intramodal Rail Competition,* 1 I.C.C.2d 822, 834 (1985) (noting the ''increasing trend for carriers to price each element of their services, including switching, in accordance with its cost''). In *Intramodal Rail Competition,* the ICC stated that compensation for reciprocal switching would be determined on a case-by-case basis. *Id.,* 1 I.C.C.2d at 835. The ICC declined to adopt a proposed methodology that set a price ceiling for reciprocal switch rates because the ICC, in considering the agency's prior costing methodology (Rail Form A), assessed at that time that it did not have ''a satisfactory accounting method of allocating the substantial joint and common costs in the rail industry.'' *Id.*

recover any lost profits associated with line-haul service to the petitioner, as discussed above. *See NPRM,* 88 FR at 63909.

The Board declines to address the Coalition Associations' request (1) to clarify that a petitioner could challenge a reciprocal switching fee that was mutually agreed upon between the carriers, and (2) to identify what methodology the Board would use in such a case. The associated issues are outside the scope of this proceeding.

Duration and Termination

Duration

The Board proposed that a prescribed agreement under part 1145 would ordinarily have a term of two years from the date on which reciprocal switching operations thereunder began and could have a term of up to four years if the petitioner demonstrated that the longer minimum term was necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs. *NPRM,* 88 FR at 63910. The Board stated that it was essential that the duration of a prescribed agreement be ''sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers.'' *Id.* The Board sought comment on whether a minimum term longer than two years and/or a maximum term longer than four years is necessary to make the proposed rule practicable and effective. *Id.*

AAR and some rail carriers assert that a two-year term would be disproportionate to the 12 weeks of service that constituted the basis for the order. (AAR Comments 96; CN Comments 26; CSXT Comments 49.) AAR and CSXT state that the Board should determine the initial duration of a prescribed switching agreement on a case-by-case basis and tailor the remedy to the service problem to ensure that the term corresponds to the actual need that the shipper has shown. (AAR Comments 97; CSXT Comments 50.) CN asserts that a lengthy prescription term with no option for earlier termination would be contrary to the public interest of addressing a ''service inadequacy at present'' and may disincentivize investment in the rail network because of increased uncertainty regarding volumes, density, potential impact on revenues, and return on investment. (CN Comments 26.)

AAR asserts that one year is sufficient to make alternative service attractive and feasible to potential alternate carriers, as an attractive alternate would most likely involve integrating the shipper's lane into the alternate carrier's existing traffic, using existing assets. (AAR Comments 97–98; *see also* CN Comments 26–27 (proposing a presumption that a switching order would be one year in duration).) BNSF argues that, where a switch is practicable, a two-year duration is sufficient to meet the Board's goal. (BNSF Comments 15.)

AAR asserts that the Board should make clear that authorizing a term longer than two years would apply only in cases where such a term is absolutely necessary to remedy the service inadequacy shown, such as situations involving a particularly persistent service failure that would be expected to last for a long time. (AAR Comments 98–99.) BNSF contends that any situation where it would take two years (or more) for an alternate carrier to make service feasible cannot, by definition, satisfy the statutory requirement that switching be practicable. (BNSF Comments 15.)

Shipper interests assert that a five-year minimum term is necessary to provide sufficient incentive for an alternate carrier to make the investment to implement the switch. (Coal. Ass'ns Comments 47 (also proposing a ten-year maximum term); DCPC Comments 11 (same); EMA Comments 3; NSSGA Comments 4; PRFBA Comments 10; *see also* AFPM Comments 16 (supporting a two-year minimum term but removing any maximum term so that the prescription remains in place until the service inadequacy is resolved); Ravnitzky Comments 2 (proposing a four-year term).)

The Coalition Associations argue that, in considering the minimum term, the Board should look to the duration of rail contracts for competitive traffic, which may be longer than three years, as the carrier has an incentive to ''lock up'' competitive traffic for an extended period. (Coal. Ass'ns Comments 48.) The Coalition Associations further note that a longer period may be required for the alternate carrier to recover its investment in competitive rail traffic, as such traffic ''tends to have lower rates.'' (*Id.*) The Coalition Associations also assert that, given the narrow scope of the rule, lower volumes of traffic would likely move under the prescription, thus requiring a longer term to justify an alternate carrier's investment of time and resources. (*Id.*) DCPC asserts that the prescription duration should be based on the complexity of the switching operation and the financial commitment required on behalf of the alternate carrier. (DCPC Comments 11.)

The Board will modify the proposed rule such that, in prescribing a reciprocal switching agreement, the Board shall prescribe a minimum term of three years and may prescribe a longer term of service up to five years, depending on what is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.[66] As noted by the Coalition Associations, the duration of rail contracts for competitive traffic provides useful guidance as to the term of an arrangement that would make alternative rail service feasible and attractive to a potential alternate rail carrier. (Coal. Ass'ns Comments 48.) To this end, the Board finds that a term of three-to-five years would be an adequate duration to facilitate a commercial rail option through prescription of a reciprocal switching arrangement. (*See* Coal. Ass'ns Comments 48 (noting that contracts for competitive rail service may be longer than one to three years); Coal. Ass'ns Reply 24 (asserting that ''the alternate railroad must have the opportunity to compete for and serve the eligible traffic for a typical contract cycle of at least two years and potentially longer depending upon the volume of traffic and any investment requirements''); *see also* DCPC Comments 11 (proposing a five-year minimum term); EMA Comments 3 (same); NSSGA Comments 4 (same); PRFBA Comments 10 (same); Ravnitzky Comments 2 (proposing a four-year prescription term).) At the same time, the Board does not conclude that a five-year minimum term is necessary, as the Coalition Associations and others suggest. The flexibility to prescribe a three-to-five-year term is sufficient to achieve the Board's goal in providing a shipper a rail option consistent with commercial practices.

[66] BNSF comments that the Board should ''clarify that an alternate carrier has a reasonable time period from when the prescription order is entered to establish regular linehaul service.'' (BNSF Comments 7.) BNSF asserts that, although the *NPRM* contemplates a ramp-up period of six months for a ''substantial volume of traffic,'' even less ''substantial'' volumes of new traffic may take some time to be incorporated into the alternate carrier's network (to account for, *e.g.,* possible hiring and training of new crews or qualifying existing crews on new service territories), and the actual amount of ramp-up time needed may turn on many factors that need to be considered. (*Id.* at 8 (citing *NPRM,* 88 FR at 63910 n.36).) BNSF urges that any final rule should allow the Board to design a switching remedy that effectively addresses these issues. (BNSF Comments 8.) As noted in the *NPRM,* the Board recognizes that the legitimate business needs of an alternate carrier (including, among other things, the possible need to hire, train, and/or qualify crews) can bear on the appropriate duration of a reciprocal switch prescription. *See NPRM,* 88 FR at 63910 & n.36. Accordingly, the final rule provides a range within which the Board may set the duration of a reciprocal switch prescription so as to take the relevant considerations into account.

While rail carriers argue that a prescription term should correspond to the time needed to remedy a service inadequacy, the duration of a prescribed reciprocal switching agreement reflects what the Board considers at this time sufficient to introduce competition through a commercial rail option in the petitioner's case and incentivize adequate service throughout the rail industry in general. For the same reason, the duration of a prescribed agreement need not be proportionate to the 12-week period that served as the basis for the Board's prescription.

Moreover, the Board finds that a set time period promotes transparency and certainty for petitioners and carriers and therefore helps ensure the effectiveness of the rule. Setting a clear minimum helps petitioners, who are served by a single rail carrier, better assess whether to incur the costs of bringing a case and changing carriers, (Coal. Ass'ns Comments 50–52), and it helps alternate carriers make complex business decisions about investments needed to provide service on a relatively short-term basis. Meanwhile, a clear maximum helps incumbent carriers plan their businesses and reduces negative effects, if any, that may come from intervention, relative to an indefinite switching arrangement.

Termination Process

Under the timetable set forth in the *NPRM,* the incumbent rail carrier may file a petition to terminate no more than 180 days and no less than 120 days before the end of the prescribed period. *NPRM,* 88 FR at 63915.[67] The Board would endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing. *Id.* If the Board does not act within 90 days from the close of briefing, the prescribed agreement would automatically terminate at the end of the original term. *Id.* If the Board is unable to act within that time period due to extraordinary circumstances, the prescribed agreement would be automatically renewed for an additional 30 days from the end of the current term. *Id.* In such cases, the Board would issue an order alerting the parties to the extraordinary circumstances and the renewal. *Id.*

AAR and some rail carriers assert that the incumbent carrier should be allowed to seek termination once it establishes adequate service. (AAR Comments 101–02 (proposing that, to terminate a switching order, the incumbent demonstrate ''materially changed circumstances'' if it has addressed the circumstances that led to the imposition of a switching order); CN Comments 28–29 (proposing that a switching order automatically terminate ''absent a showing of some enduring actual necessity or compelling reason and practicability put forth by the petitioner''); CSXT Comments 51.) BNSF argues that the switching prescription should automatically terminate after two years, and if the petitioner would like to extend the switching prescription past two years, the petitioner should be required to demonstrate, at the end of the term, that an extension would be in the public interest. (BNSF Comments 15.)

The Coalition Associations express the need for adequate time for a shipper to transition its operations from an alternate carrier to the incumbent carrier upon termination of a switch prescription. (Coal. Ass'ns Comments 50–52.) They assert that time is needed for a shipper to, among other things, negotiate a new contract with the incumbent carrier, update the shipper's internal systems, and assess the need for fleet and supply adjustments. (*Id.*) Given these concerns, the Coalition Associations propose: (1) allowing a switch prescription to continue in effect until 30 days after the Board serves a decision that grants a petition to terminate; and (2) moving the window for the incumbent to file a petition to terminate, so that a petition can be filed no more than 210 days and no less than 150 days before the end of the prescribed period. (*Id.*)

The Board recognizes that a shipper needs adequate lead time prior to the end of a prescription arrangement to switch its operations from the alternate carrier to the incumbent carrier. To this end, the Board will modify the rule by requiring a petition to terminate to be filed no less than 150 days before the end of the prescription period.[68] In doing so, should the Board issue a decision granting a petition to terminate within 90 days from the close of briefing (or not issue a decision within 90 days, such that the prescribed agreement automatically terminates at the end of the prescription period), a shipper would have at least 30 days to transition its operations prior to the expiration of a prescription. (*See* Coal. Ass'ns Comments 50 (noting that, under the proposed process, a Board decision may be issued with only eight days left before the switch prescription expired).) Similarly, the Board will modify the rule to allow for the prescribed agreement to continue in effect until 30 days after the Board serves a decision that grants a petition to terminate or after the end of the prescription period, whichever is later.[69]

The Board declines to adopt the modifications proposed by rail carriers that would allow the incumbent carrier to petition to terminate at any time once it has established adequate service or allow a prescribed agreement to automatically terminate absent a showing of compelling need by the shipper. Rail carriers assert that these proposals are consistent with the notion that a prescription must correspond to a remedial need. However, as discussed, the purpose of the rule is to provide for a rail option as a means to avoid drops in network performance, both with respect to a given petitioner when the incumbent carrier's service failed to meet a performance standard and more generally throughout the network. As noted, the transparency and certainty of a set time range for a switching arrangement are important components for incentivizing performance. Indeed, the duration of three-to-five years is appropriate to securing a rail option as a means to address service issues; the possibility of earlier termination would be less consistent with providing that option and therefore could undermine the purposes of this rule. As also noted in the *NPRM,* the prescription of a reciprocal switching agreement does not prevent the incumbent rail carrier from competing to keep its traffic and attempting to win back the traffic by voluntary agreement of the petitioner at any time during the prescription period. *NPRM,* 88 FR at 63910.

[67] Under proposed § 1145.7, a reply to the petition to terminate would be due within 15 days of the filing of the petition, and a rebuttal may be filed within seven days of the filing of the reply. *NPRM,* 88 FR at 63915. AAR urges the Board to allow more time for the incumbent carrier to reply to a shipper's objections to termination. (AAR Comments 104.) The Board will extend the rebuttal period and finds ten days to be sufficient and consistent with the streamlined process set forth in the rule.

[68] The Board declines to adopt the Coalition Associations' proposal to allow a petition to terminate to be filed 210 days before the end of the prescription term. As proposed in the *NPRM,* a petition to terminate may not be filed more than 180 days before the end of the prescription term so that such petitions are not filed prematurely. 88 FR at 63910. Thus, the final rule provides for a 30-day window of time to file a petition to terminate rather than a 60-day window.

[69] AAR requests that the Board explain the circumstances under which it would extend its timeframe for deciding a pending request for termination. (AAR Comments 104–05.) While the Board finds it unnecessary to delineate specific extraordinary circumstances under which additional time would be required, the Board emphasizes that it expects such circumstances, by their very nature, to arise infrequently, if ever. If the Board does not decide the termination proceeding within 90 days from the close of record, and does not issue an extension order, the switching arrangement will automatically terminate. *See NPRM,* 88 FR at 63910.

Termination Standard

As set forth in the *NPRM,* the Board would grant a petition to terminate a prescribed agreement if the incumbent rail carrier demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met the performance standard that provided the basis for the prescription. *NPRM,* 88 FR at 63915. Under the proposed rule, this requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area. *Id.* The Board defines ''similar traffic'' as the broad category type (*e.g.,* manifest traffic) to or from the terminal area that is affected by the prescription. *Id.* at 63910.

AAR proposes that, rather than examining ''similar traffic,'' as defined in the rule, the Board should consider the incumbent carrier's performance on any traffic that would cast light on the relevant question before the Board, *i.e.,* whether the carrier has addressed the causes of the prior service shortcoming in such a way to assure adequate service for the traffic then subject to the prescription. (AAR Comments 103.) AAR also proposes that, in a petition to terminate, the rule should require the incumbent to demonstrate that it has met the performance standard over a 12-week period rather than a 24-week period, as, AAR argues, a 24-week period is disproportionate to the 12-week period that served as the basis for the prescription. (*Id.*) AAR states that the language of the standard is ambiguous and requests that the Board clarify that it will grant a termination petition if the carrier's performance for similar traffic on average satisfies the specific service metric that triggered the initial switching prescription (rather than with respect to multiple metrics) during the 24-week period immediately prior to filing the petition. (*Id.* at 103–04.)

The Coalition Associations urge the Board to adopt a narrower definition of ''similar traffic,'' depending on which of the service metrics is being measured, as the proposed definition could lead to ''irrelevant comparisons.'' (Coal. Ass'ns Comments 55.) The Coalition Associations assert that, for the OETA and transit time standards, ''similar traffic'' should be defined as other manifest traffic moving between the terminal where the reciprocal switch occurs and the terminal or local serving yard at the other end of the movement of the switched traffic. (*Id.* at 55–56.) For the ISP service metric, the Coalition Associations assert that only the shipper's own traffic is relevant because the incumbent still provides ISP service for switched traffic. (*Id.* at 56.) The Coalition Associations also propose modifying the rule to require the incumbent carrier to demonstrate compliance with all three standards for similar traffic, reasoning that otherwise the Board could terminate a switch prescription when the incumbent was providing service that would merit a prescription. (*Id.* at 54–55.) AAR opposes this proposal, reasoning that a termination proceeding should be focused on whether the particular service inadequacy that formed the basis of the initial prescription has been remedied. (AAR Reply 79.) AAR asserts that the Board's determination of whether a prescription was warranted for other reasons would be more readily answered in the context of the Board's evaluation of a new petition. (*Id.*)

The Board declines to modify its proposed definition of ''similar traffic.'' While AAR urges the Board to consider *any* traffic relevant to its inquiry, (*see* AAR Comments 103), the Board finds that the incumbent carrier's performance with respect to ''similar traffic,'' as defined in the *NPRM,* provides a strong indication as to whether the incumbent has demonstrated its commitment and ability to provide adequate service, as shown in its service with similar traffic. *NPRM,* 88 FR at 63910. The Board notes that parties having a clearer, common understanding of similar traffic is consistent with the expedited nature of a termination proceeding. The proposed definition also makes it more likely that the incumbent carrier will have a relevant pool of operational data on which to base its petition; limiting what the Board would consider to be ''similar traffic,'' as proposed by the Coalition Associations, (*see* Coal. Ass'ns Comments 55–56), may hamper an incumbent carrier's ability to provide a meaningful representation of its current operations.

The Board will, however, modify the standard for a petition to terminate by requiring an incumbent carrier to demonstrate that it has met all three performance standards for similar traffic on average, rather than only the performance standard that provided the basis for the prescription. As the Coalition Associations note, it would undermine the goal of the rule to terminate a prescribed agreement when an incumbent carrier is providing service that would otherwise warrant a reciprocal switching prescription. (*See* Coal. Ass'ns Comments 54–55.) Moreover, it would be inefficient for the Board to terminate a prescription, only to then have the shipper file a new petition based on operational shortcomings that would have otherwise come to light in the termination proceeding.

The Board will also modify the rule such that the Board would grant a petition to terminate a prescribed agreement if the incumbent rail carrier demonstrates that its service for similar traffic met performance standards for the most recent 12-week period prior to the filing of the petition to terminate, rather than the prior 24-week period. The Board finds that a 12-week period is sufficient to provide the Board an accurate representation of the incumbent carrier's operations, and that it is reasonable to ''harmonize'' the time period that serves as the basis for the prescription to the period examined for purposes of a petition to terminate, as AAR suggests. (*See* AAR Comments 103.) The Board clarifies that this 12-week time period shall be the most recent 12-week period prior to the filing of a petition to terminate.[70]

Automatic Renewal

Under the proposed rule, in the event the incumbent rail carrier does not timely file a petition for termination, or files such a petition and fails to sustain its burden of proof, the prescribed reciprocal switching agreement would automatically renew for the same period as the initial prescription. *NPRM,* 88 FR at 63910. The Board sought comment on whether, alternatively, the renewal should be for only one additional year. *Id.*

AAR and some rail carriers assert that automatic renewal is not consistent with the need for a switching order to address an actual necessity or compelling need. (AAR Comments 99; CN Comments 27–28; CSXT Comments 50.) AAR proposes that, rather than automatic renewal, the Board should provide for an orderly opportunity for the shipper to show that the term of the switching order should be extended, with no break in service. (AAR Comments 100; *see also* CSXT Comments 50 (asserting that the petitioner should bear the burden of establishing a continuing compelling need that justifies ongoing forced

[70] The Board notes that nothing in this rule prevents a shipper/receiver from informing the Board of any changes in relevant circumstances during the pendency of the petition to terminate. The Board may consider such information when determining whether the incumbent railroad has met its burden to demonstrate that the prescription is no longer warranted.

switching); CN Comments 28 (proposing automatic termination absent a showing of some enduring actual necessity or compelling reason and practicability put forth by the petitioner).) AAR asserts that, if the Board declines to remove the automatic renewal provision, ''it should limit the automatic renewal to the period of the initial prescription or a single additional year, whichever is shorter,'' to ''give the incumbent carriers more frequent opportunities to seek to terminate the prescription.'' (AAR Comments 101.)

The Coalition Associations support automatic renewal for the same duration as the initial term, noting that the feasibility and attractiveness of handling a shipper's traffic to an alternate carrier is directly related to the potential contract duration, whether access to that traffic is via an initial or renewed switch prescription. (Coal. Ass'ns Comments 57; *see also* Coal. Ass'ns Reply 24 (''Automatic renewal for the same term keeps in place the competitive incentives to improve service until the incumbent carrier firmly establishes its ability both to achieve and maintain adequate service.'').)

Under the final rule, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew at the end of its term for the same period as the initial prescription. However, the Board will modify the proposed rule so that, if a petition to terminate is denied, the Board will determine, on a case-by-case basis, the appropriate renewal period based on the evidentiary record, but for a duration no longer than the initial prescription. This will allow the Board to account for the unique circumstances presented in a particular termination proceeding. (*See* CN Comments 28.) At the end of the renewed term, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew for the same number of years as the renewed term.[71]

While AAR and rail carriers argue that automatic renewal is inconsistent with the need for a prescription to address an actual necessity or compelling need, the purpose of the rule, as discussed, is to introduce a second rail option when there is sufficient cause based on application of the performance standards in part 1145. Automatically renewing the prescribed agreement, absent a petition to terminate, furthers this goal and is consistent with rule's placement on the incumbent railroad of the burden of demonstrating that the prescription is no longer warranted. Further, the Board reiterates that nothing in the rule prevents the incumbent carrier from competing to keep its traffic or attempting to win back the traffic by voluntary agreement during the prescription period. *See NPRM,* 88 FR at 63910.

Other Issues

Permanent Prescription

The Board sought comment on whether the Board should prescribe a reciprocal switching agreement on a permanent basis when an incumbent rail carrier had been subject to a prescription under part 1145 and when, within a specified time after termination of the prescribed agreement, that carrier again failed to meet a performance standard under part 1145 (without demonstrating an affirmative defense or impracticability as provided for in part 1145). *NPRM,* 88 FR at 63910. The Coalition Associations support the imposition of a permanent prescription following a subsequent failure, as such a provision would serve as a safeguard against an incumbent carrier who may ''deploy resources'' to meet the termination criteria but subsequently remove those resources upon the prescription terminating. (Coal. Ass'ns Comments 57.) AAR asserts that a permanent prescription would ''go well beyond what is necessary to remedy the identified inadequacy.'' (AAR Comments 100.)

The Board declines at this time to adopt a provision that would impose a permanent switching order following a subsequent failure by the incumbent carrier. The Board is not persuaded that ''gamesmanship'' by an incumbent carrier is likely, particularly given that the termination process will require proof that incumbent carrier's operations for similar traffic meet all three standards set forth in this rule for a 12-week period.

Access to Data

The Coalition Associations propose to require the incumbent carrier to provide the shipper with all data for ''similar traffic'' that are relevant to the standards the incumbent must satisfy to terminate a prescription, and assert that this should be the same type of data the incumbent carrier is required to provide to a shipper under proposed § 1145.8(a). (Coal. Ass'ns Comments 53.) AAR urges the Board to reject this proposal, arguing that it is unnecessary, burdensome, and raises significant confidentiality concerns. (AAR Reply 78.) The Board anticipates that an incumbent carrier seeking termination will provide the Board with the relevant data to support its petition to terminate. As noted in the *NPRM,* in a termination proceeding, the shipper/receiver has the right to access and examine the facts and data underlying a carrier's petition to terminate, subject to an appropriate protective order. *NPRM,* 88 FR at 63910. The Board will determine on a case-by-case basis whether any deadlines in the procedural schedule should be adjusted in an individual proceeding based on, for example, time needed to resolve a potential discovery dispute involving a shipper's effort to obtain data from the carrier relevant to a termination petition. The Board expects any discovery requests to be narrowly tailored to the issues presented and that the parties will work diligently to resolve any disputes. To the extent a dispute is brought to the Board, the Board will work expeditiously to resolve it and minimize any potential delay affecting the expected timing of a decision as provided in this rule.

Contract Traffic

In the *NPRM,* the Board requested comments about the application of the proposed rule to traffic that is the subject of a rail transportation contract under 49 U.S.C. 10709. The Board sought comment on ''all legal and policy issues relevant to this question.'' *NPRM,* 88 FR at 63909. In addition, the Board posed two main questions. First, the Board sought ''comment on whether the Board may consider the performance data described above, based on service that a carrier provided by contract, as the grounds for prescribing a reciprocal switching agreement that would become effective after the contract expired.'' *Id.* Related to this first question, the *NPRM* sought comment on ''whether the Board may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer's request.'' *Id.* Second, the Board requested comment on ''when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires.'' *Id.* The Board noted that the D.C. Circuit had held, under a different statutory scheme, that the Board was not authorized to order a carrier to file a

[71] BNSF seeks clarification as to whether automatic renewal would apply only to the original term prescribed and not a term established by renewal under proposed § 1145.7. (BNSF Comments 15 n.7.) The Board clarifies that a prescribed agreement would continue to automatically renew until the incumbent seeks, and the Board grants, termination or until the prescribed agreement automatically terminates under § 1145.7(f). As discussed, automatic renewal is consistent with the placement of the burden on the incumbent railroad when formulating a petition to terminate.

common carrier tariff more than a year before contract service was expected to end. *Id.* (citing *Burlington N. R.R.* v. *STB,* 75 F.3d 685, 687 (D.C. Cir. 1996)). The Board asked whether any similar ''legal or policy issues'' should be considered when determining how far in advance of contract expiration, if at all, the Board may prescribe reciprocal switching that would go into effect after expiration. *Id.*

Use of Contract Service Data To Determine Whether an Incumbent Carrier Failed To Meet a Performance Standard

With respect to the first question, AAR and all Class I rail carriers oppose the use of performance data for contract service as the basis for determining that an incumbent carrier is not meeting the performance standards and therefore prescribing a reciprocal switching agreement that would become effective when the contract expires.[72] Their main argument is that 49 U.S.C. 10709 prohibits the use of performance data regarding contract service for this purpose. The subsections of section 10709 relevant to their arguments provide that a party to a contract entered into under section 10709 has no duty in connection with services provided under the contract other than those duties the contract specifies and the contract and transportation under such contract, is not subject to title 49, subtitle IV, part A], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of part A. The only remedy for any alleged breach of a contract is an action in an appropriate State court or United States district court, unless the parties otherwise agree.

AAR and several carriers argue that, in light of section 10709(b), the Board may not use performance data for contract traffic as the basis for finding that the performance standards were not met and prescribing post-expiration reciprocal switching because doing so would create a new ''duty''—compliance with the performance standards—that is not ''specified by the terms of the contract.'' (*See, e.g.,* AAR Comments 34; BNSF Comments 12; AAR Reply 1–2, 6–7; CN Reply 14; NSR Reply 4; CPKC Reply 31.) Also, AAR and several carriers argue that evaluating the performance of an incumbent carrier under contract as a basis for reciprocal switching would violate section 10709(c)(1) because it would make the contract traffic ''subject'' to the rule and section 11102(c)(1) and because a reciprocal switching petition would amount to a ''challenge[]'' to contract transportation before the Board. (*See, e.g.,* AAR Comments 33; CN Comments 50–52; AAR Reply 1, 6–7; CN Reply 13–14; NSR Reply 4–5.) CN says that the statutory bar on regulation of ''transportation'' under contract also bars challenges to the ''terms and conditions'' related to that transportation, including allegations of failure to provide adequate service. (CN Comments 52 (citing *Ameropan Oil Corp.* v. *Canadian Nat'l Ry.,* NOR 42161, slip op. at 2, 4 (STB served Apr. 17, 2019)).) In addition, AAR and several carriers argue that reciprocal switching would be a regulatory ''remedy'' for poor performance, which they say would violate section 10709(c)(2)'s requirement that the ''exclusive remedy'' for any alleged breach of contract is an action in court. (*See, e.g.,* CN Comments 51; NSR Comments 19; AAR Reply 7; CN Reply 14; CPKC Reply 31; NSR Reply 5.) In light of section 10709, AAR argues, a shipper under contract may pursue reciprocal switching only by allowing the contract to expire, using common carrier service, and then seeking reciprocal switching if the common carrier service fell short of the performance standards. (AAR Comments 36.)

AAR argues that its position is consistent with the two cases cited in the *NPRM, Burlington Northern* and *FMC Wyoming Corp.* v. *Union Pacific Railroad,* FD 33467 (STB served Dec. 16, 1997). (AAR Comments 36–37; AAR Reply 12–14.) AAR distinguishes *FMC Wyoming*—in which the Board indicated that it could require a railroad to establish a common carrier rate when the contract was set to expire ''in a matter of weeks,'' *FMC Wyo.,* FD 33467, slip op. at 3 n.7—on the ground that ordering a carrier to establish a rate does not ''require any examination of the service provided under the contract,'' whereas ''ordering switching under the Proposed Rule plainly would'' require such examination. (AAR Comments 36–37.) Regarding *Burlington Northern,* AAR says that the D.C. Circuit accepted as a general principle that the Board lacks authority over contract traffic and that, therefore, the only issue before the court was whether the statute that required carriers to file a common carrier rate could overcome section 10709's jurisdictional bar, specifically when the contract was expected to expire in ''more than a year.'' (AAR Reply 12–14.) Here, AAR explains, there is no statute that arguably could overcome section 10709. (*Id.*)

AAR and several carriers also say that applying the proposed rule to traffic that is subject to a transportation contract is bad policy, primarily because they say it would interfere with contract negotiations. (*See, e.g.,* AAR Comments 33–34; BNSF Comments 13; CN Comments 53; NSR Comments 19–20; AAR Reply 16–17; CPKC Reply 33–34.) AAR and CPKC argue that the proposed rule would deny a contracting shipper the option to forgo performance guarantees in exchange for something that the shipper might value more, such as lower rates. (AAR Comments 33–34; CPKC Reply 33–34; *see also* NSR Comments 19–20 (arguing that the rule will require contracting parties to adjust the rate to reflect the ''risk'' that reciprocal switching may be prescribed based on performance); BNSF Comments 13 (''contract parties often consider service levels as part of their economic analysis'').)[73] AAR and several carriers contend that the availability of reciprocal switching based on contract performance would deter carriers from entering contracts, which they say would contravene Congress's intent to promote the use of rail transportation contracts. (BNSF Comments 13; NSR Comments 18–19; AAR Reply 11; BNSF Reply 4.) CN highlights language in the legislative history of section 10709's predecessor that said that ''[r]ail carriers and shippers should be free to negotiate and enter into contracts without concern'' about regulatory interference. (CN Comments 53 (quoting H.R. Rep. No.

[72] (*See* AAR Comments 32–37; BNSF Comments 12–13; CN Comments 50–54; CSXT Comments 8; NSR Comments 17–20; AAR Reply 6–18; BNSF Reply 4–5; CN Reply 12–17; CPKC Reply 30–34; CSXT Reply 7 n.14; NSR Reply 3–9.) Although UP did not mention the contract issue specifically, it joined the opening and reply comments of AAR in their entirety. (*See* UP Comments 1; UP Reply 1 n.1.)

[73] AAR, CN, and CPKC also argue that, because of how the metrics work, using contract data as the basis for reciprocal switching could deter carriers from negotiating contracts that ensure *better* performance. AAR presents a hypothetical example of a contract that requires a railroad, in exchange for a premium rate, to move shipments in half the time it had moved similar shipments in the past. (AAR Comments 34.) When the contract expires and the carrier reverts to its usual transit time, the higher level of performance under contract would become the baseline against which to compare the subsequent common carrier service, creating a risk that the carrier would fail the ''service consistency'' metric. (*Id.*) AAR says that ''no carrier would enter into such a contract,'' as least without insisting on more concessions from the shipper. (*Id.* at 34–35; *see also* CN Comments 53–54 (stating that comparing contract data with non-contract data is especially problematic with the transit time metric); CPKC Reply 34 (stating that comparing contract service with post-expiration service is particularly problematic for contracts that require premium service levels).)

96–1035, at 58 (1980)).) NSR suggests that ''[e]ven unresolved questions'' about the application of the proposed rule to contract traffic could deter the use of contracts. (NSR Comments 20.)

Shippers and shipper organizations that address the contract issue argue that the Board can and should use an incumbent carrier's contract performance data as the basis for post-expiration reciprocal switching prescriptions.[74] The Coalition Associations argue that using contract performance data for this purpose is consistent with section 10709 because it would not amount to regulating or interpreting the contract, nor would it modify any party's contractual obligations or purport to find that the contract violates the law. (Coal. Ass'ns Comments 10; *see also* Coal. Ass'ns Reply 6, 9; WCTL Reply 12–13.) In response to AAR's and the carriers' argument that using contract performance as a basis for post-expiration reciprocal switching would violate section 10709(b) by imposing an additional ''duty'' on the contracting carrier, the Coalition Associations say that the proposed rule would not require the carrier to provide ''any specific level of contract service.'' (Coal. Ass'ns Reply 9.)[75] The Coalition Associations also say that there is no conflict with section 10709(c)(2) because ''Board is not proposing to decide any dispute about contract restrictions that prevent a shipper from using a prescribed switch.'' (Coal. Ass'ns Comments 12 n.11.)

The Coalition Associations make an additional statutory interpretation argument regarding section 10709. They point out that 49 U.S.C. 10705 says that the Board may require a rail carrier to include substantially less than the entire length of railroad in a through route only in certain limited situations, including when required under sections 10741, 10742, or 11102. (Coal. Ass'ns Reply 7.) The Coalition Associations note that section 10741 expressly states that it shall not apply to contracts covered by section 10709, whereas section 11102 (which includes the reciprocal switching provision) and section 10742 have no such statement. (*Id.*) Thus, the Coalition Associations argue, the ''clear inference'' is that the statutory scheme provides that the Board can consider contract transportation when exercising its authority under section 11102. (*Id.*)

The Coalition Associations and other commenters argue that there is precedent for the Board's use of contractual performance data to address service issues. The Coalition Associations and ACD claim that in two decisions—*Midtec* and *Vista Chemical Company* v. *Atchison, Topeka & Santa Fe Railway,* 5 I.C.C.2d 331 (1989)—the ICC considered evidence regarding contract service when deciding whether to prescribe reciprocal switching. (Coal. Ass'ns Comments 11; ACD Reply 3.) The Coalition Associations also point to two decisions involving the fluidity of the rail network in which the Board specifically said that it would examine contract and non-contract traffic. (Coal. Ass'ns 11–12 n.10 (citing *U.S. Rail Serv. Issues,* EP 724, slip op. at 7 (STB served Dec. 30, 2014), and *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 17 (STB served Nov. 30, 2016)).) They also point out that the Board's 1998 decision adopting 49 CFR parts 1146 and 1147 said that ''where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts.'' (Coal. Ass'ns Comments 11–12 n.10 (quoting *Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 976).) WCTL says that the Board ''routinely evaluates the details of rail transportation contracts when considering the reasonableness of rates provided for common carrier service,'' (WCTL Reply 13–14 (citing cases)), and the Coalition Associations similarly argue that the Board ''will consider contract traffic data in the exercise of its rate review regulatory authority,'' (Coal. Ass'ns Comments 10 n.6 (citing *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 83 (STB served Sept. 5, 2007))).[76]

Shipper organizations also make policy arguments in favor of considering contract performance data as the basis for post-expiration reciprocal switching. They say that the overwhelming majority of rail traffic moves under contract and that the proposed rule will provide little benefit to the overall rail network if contract traffic is excluded. (*See, e.g.,* Coal. Ass'ns Reply 5, 9; AFPM Comments 15; WCTL Comments 2–3, 5; ACD Reply 2.) The Coalition Associations say that the contract questions are ''existential'' for any proposal to address inadequate rail service and that ''the Board's entire proposal would be meaningless'' if contract performance cannot be considered. (Coal. Ass'ns Reply 5.)[77] The Coalition Associations also claim that excluding contract performance would set a precedent that would render the alternative reciprocal switching standards in 49 CFR parts 1144 and 1147 ''similarly useless.'' (Coal. Ass'ns Reply 5.) Shipper organizations say that the path proposed by AAR and the carriers—that shippers should allow their rail contracts to expire, accept common carrier service, and wait to see if the carrier meets the performance standards—would be so cumbersome that the proposed rule would rarely, if ever, be used. (*See* Coal. Ass'ns Reply 5–6; WCTL Reply 14–15; ACD Reply 2.) Shipper organizations also explain that railroads do not segregate services and facilities between contract and common carrier traffic, and any proposal to improve the fluidity of the national rail network needs to consider contract traffic performance. (*See* Coal. Ass'ns Reply 8.) AFPM argues that, because facilities often are used for both contract and tariff traffic, it will be ''very difficult for a shipper to show specific poor service only applies to . . . just the tariff shipments.'' (AFPM Comments 15–16; *see also* Coal. Ass'ns Reply 8 (arguing that metrics are necessarily intertwined for common carrier and contract traffic, which ''renders it impractical and unnecessary, if not impossible, to filter for any of these traffic types''); DCPC Comments 3, 5 (discussing logistical problems that limiting the rule to non-contract traffic

[74] (*See, e.g.,* Coal. Ass'ns Comments 9–20; AFPM Comments 15–16; DCPC Comments 5; FRCA/NCTA Comments 4; NMA Comments 7; WCTL Comments 4–5; Coal. Ass'ns Reply 5–10; ACD Reply 2–3; Dow Reply 5; WCTL Reply 6–7, 12–15.)

[75] The Coalition Associations note that the Board said that it does not view it as appropriate to ''apply, or draw from'' the rule's proposed performance standards to regulate or enforce the common carrier obligation. (Coal. Ass'ns Reply 9 (quoting *NPRM,* 88 FR at 63902).) They argue that ''[i]f this proposal does not impose any duty upon common-carrier service, it does not impose any duty upon contract service either.'' (Coal. Ass'ns Reply 9.)

[76] Although the Coalition Associations' discussion of *Burlington Northern* focuses primarily on the second question raised in the *NPRM* (how long in advance of contract expiration the Board may consider a reciprocal switching petition), their arguments suggest that they view *Burlington Northern* as irrelevant to the first question. (*See* Coal. Ass'ns Comments 16–18.) They argue that *Burlington Northern* was not based on section 10709 and that the balancing of carrier and shipper interests in that statutory scheme has no parallel in the reciprocal switching context. (Coal. Ass'ns Comments 16.)

[77] The Coalition Associations propose that if the Board cannot definitively conclude that the proposed rules allow consideration of contract performance, it should reopen Docket No. EP 711 (Sub-No. 1). (Coal. Ass'ns Reply 47–48.) The Coalition Associations also propose modifications that aim to address potential problems with the proposal in the *2016 NPRM.* (Coal. Ass'ns Reply 47–52.)

would create in industries that ship both contract and non-contract traffic)).

Numerous shippers and shipper organizations respond to the arguments made by AAR and the carriers about the purported effects that relying on contract performance data will have on contract negotiations. They argue that shippers, especially captive shippers, are at a disadvantage in contract negotiations with railroads, with contracts often presented on a take-it-or-leave-it basis. (*See, e.g.,* AFPM Comments 15; DCPC Comments 5.)[78] As a result, they say, contractual commitments to maintain a minimum level of service are virtually non-existent. (*See, e.g.,* Coal. Ass'ns Reply 8 n.10; NMA Comments 7; AFPM Comments 15; Dow Reply 5.) DCPC notes that the Board has not defined the word ''contract,'' and it says that some purported contracts are rates published in a non-distribution tariff with ''Contract'' stamped on the title page. (DCPC Comments 5; DCPC Reply 3.)[79] DCPC objects to the railroads' use of this type of ''non-signatory 'Contract' '' and says that contracts ''should be agreed to and signed by all parties to the agreement.'' (DCPC Reply 3.) Some shipper organizations support the proposed rule in part on the ground that the potential for a reciprocal switch will help them in contract negotiations with railroads. (AFPM Comments 16; FRCA/NCTA Comments 4.)

After considering the comments, the Board will not use incumbent carriers' contract performance data as the basis for reciprocal switching prescriptions under part 1145. Using contract performance data as the basis for reciprocal switching under the rule would attach the potential for a regulatory consequence to the carriers' failure to meet Board-specified numerical performance standards while under contract, which the Board views as inconsistent with the limitations that section 10709 imposes. Given the particular design of part 1145, this would effectively create a ''duty'' that was not present in the contract, which does not reasonably align with section 10709(b)'s statement that contracting parties shall have ''no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.'' Shipper organizations are correct that the availability of reciprocal switching would not *require* carriers under contract to comply with the performance standards, (*see, e.g.,* Coal. Ass'ns Reply 9). Even for non-contract traffic, part 1145 does not create a service standard with which carriers must comply; rather, it identifies the service levels under which the Board concludes it is appropriate to consider the introduction of an additional line-haul carrier as a means to address service concerns. *See* Legal Framework. But with regard to traffic moving under contract, the application of part 1145 would introduce a new incentive for carriers to meet those standards, even if their contracts contain different performance requirements or none at all based on negotiated bargaining.[80] Even though the Board recognizes that the potential for future application of a regulation may influence contract negotiation and compliance already, the likely effect on the carriers' incentives if the prescription of a reciprocal switch under part 1145 could be based on contract traffic would be specific and significant enough to implicate section 10709(b).[81] For similar reasons, the Board also agrees with carriers that basing reciprocal switching on contract traffic raises concerns under section 10709(c)(1), which says that contracts and contract transportation ''shall not be subject'' to the entirety of Part IV of the Act, which includes the reciprocal switching statute. Creating numerical standards that apply to contract performance, and prescribing reciprocal switching when performance fell short of the standards, would be tantamount to subjecting the contract transportation to the reciprocal switching statute.[82]

The Coalition Associations' argument based on 49 U.S.C. 10705 is not persuasive. Section 10705 provides that the Board may require a rail carrier to include in a through route substantially less than the entire length of railroad only in certain limited situations, including when required under 49 U.S.C. 10741, 10742, or 11102. The Coalition Associations point out that section 10741 (a discrimination provision) specifically states that the provision shall not apply to contracts described in section 10709, in contrast to section 11102, which is silent as to section 10709 contracts. (Coal. Ass'ns Reply 7–8.) Relying on the principle that ''where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'' the Coalition Associations argue that the lack of a reference to contracts in section 11102 should be interpreted as an intentional congressional choice to allow the Board to apply reciprocal switching to contract traffic. (*Id.* at 7–8 & n.8 (quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983)).) But inferences based on the statutory structure are appropriate only when the statute's meaning is not clear from the statutory text. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.,* 34 F.4th 1, 9 (D.C. Cir. 2022) (explaining that statutory interpretation begins ''with the language of the statute itself'' and then, ''if necessary,'' ''may turn to other customary statutory interpretation tools, including structure, purpose, and legislative history'' (quoting *Genus Med. Techs. LLC* v. *FDA,* 994 F.3d 631, 637 (D.C. Cir. 2021))). Section 10709 is clear that the Board may not add duties to the contract or subject contract transportation to ''this part,'' which includes section 11102. In light of this language, it is unnecessary to make inferences based on the statute's structure.

The cases cited by shipper organizations where the agency discussed contract performance in

[78] AFPM says that ''almost three quarters of AFPM members are captive shippers,'' with the result that railroads have all the leverage and the resulting contracts are ''tremendously advantageous'' for the railroads. (AFPM Comments 15.)

[79] DCPC says railroads contend that this kind of purported contract ''becomes binding when the shipper moves traffic on the rate,'' but the shipper has little choice because the rate is presented on a take-it-or-leave-it basis. (DCPC Reply 3.)

[80] Several shipper organizations emphasize that many contracts lack any performance standards. (Coal. Ass'ns Reply 8 n.10; NMA Comments 7; AFPM Comments 15.) But the fact that a contract does not address an issue does not open the door to regulation of that issue. *See, e.g., Ameropan Oil Corp.,* NOR 42161, slip op. at 4 (''[W]here transportation is provided pursuant to a contract, the Board lacks regulatory authority over the terms and conditions related to that transportation, *whether or not explicitly addressed in the contract.*'') (emphasis added).

[81] As noted above, the Coalition Associations argue that if applying the performance standards to common carrier service does not create a duty under the common carrier statute (which they claim is what the *NPRM* meant when it said that the Board would not ''apply, or draw from'' the performance standards to enforce the common carrier obligation), applying the performance standards to contractual service would not create a ''duty'' under section 10709(b) either. (Coal. Ass'ns Reply 9 (quoting *NPRM,* 88 FR at 63902).) This argument misconstrues the *NPRM.* The Board's point was that finding that a carrier violated the common carrier obligation could have consequences beyond a reciprocal switching prescription, such as an obligation to pay compensation to a private party, and, for these and other reasons described in this rule, the proposed rule is not intended (and it would not be appropriate) to apply or draw from these standards to expose carriers to those additional consequences.

[82] Because other provisions of section 10709 bar the application of the rule to contract performance, the Board need not decide whether considering performance during the term of a contract would violate section 10709(c)(2) by creating a non-judicial ''remedy'' for an alleged breach of contract. (*See* CN Comments 51, NSR Comments 19; AAR Reply 7; CN Reply 14; CPKC Reply 31; NSR Reply 5.)

connection with (and ultimately denied) reciprocal switching requests are clearly distinguishable and do not support the conclusion that the Board should use contract performance as the basis for a post-expiration reciprocal switching order under the proposed rule. (*See* Coal. Ass'ns Comments 11; ACD Reply 3.) First, neither *Midtec* nor *Vista Chemical* considered section 10709 (or its predecessor, 49 U.S.C. 10713). Cases in which the Board did not consider the potential implications of section 10709 do not provide meaningful guidance as to the proper interpretation or application of that section. *See, e.g., Cent. Power & Light Co.* v. *S. Pac. Transp. Co.,* 1 S.T.B. 1059, 1074–75 (1996).

Second, *Midtec* and *Vista Chemical* do not stand for the proposition that the Board may prescribe a reciprocal switching agreement based on a determination that a carrier provided inadequate service during the term of a contract. In those cases, the Board considered whether the carrier's commercial practices, as reflected in contracts offered by the carrier, contradicted an allegation that the carrier had engaged in anticompetitive conduct. *See, e.g., Midtec,* 3 I.C.C. at 183; *Vista Chemical,* 5 I.C.C.2d at 338–39. If the agency had prescribed a reciprocal switching agreement in those cases (which it did not), presumably it would have arisen out of a finding of anticompetitive conduct, not out of a determination that the carrier's contract service was inadequate.

In *Midtec,* the shipper asked the ICC to impose a reciprocal switching agreement under part 1144, which provides in relevant part for the prescription of a reciprocal switching agreement based on anticompetitive conduct. The shipper's alleged ground was that the incumbent Chicago and North Western Transportation Company (CNW) was engaging in ''monopolistic'' conduct. *Midtec,* 3 I.C.C.2d at 172. CNW argued that its commercial conduct demonstrated that it did not behave in an anticompetitive manner, pointing out the fact that it had been willing to ''initiate and concur in joint rate proposals and rate reductions in tariffs or rail transportation contracts.'' *Id.* at 183. The ICC agreed, based on CNW's evidence, that ''[t]his is hardly the picture of a monopolist indifferent to the needs of its shipper.'' *Id.* This type of general consideration of the incumbent's commercial conduct in respect of contracts—as one piece of evidence regarding whether the incumbent was acting in an anticompetitive manner that might warrant reciprocal switching—is very different from shippers' proposal here that the Board rely on part 1145's numerical standards for performance under contract as the basis for a reciprocal switching prescription.

Similarly, in *Vista Chemical,* the shipper asked the ICC to prescribe reciprocal switching under part 1144. *Vista Chemical,* 5 I.C.C.2d at 331. The ICC considered whether the incumbent carrier was likely to engage in anticompetitive conduct, taking into account any past anticompetitive conduct by the incumbent. *Id.* at 337–42. The ICC noted that the incumbent carrier had offered contracts at reduced rates and had shown a willingness to amend contracts to make them more favorable to shippers. *Id.* at 338–39. Based on this and other evidence that the incumbent carrier had not engaged in anticompetitive conduct, the ICC declined to prescribe the proposed reciprocal switching agreement. The ICC therefore did not reach the question of whether the agency could have prescribed the proposed agreement under part 1144 based on a determination that the incumbent carrier's contract rates were excessive. Without the ICC having reached that question, nothing in *Vista Chemical* suggests that the Board may apply performance standards to contract traffic as the basis for prescribing a post-termination reciprocal switching agreement.

Nor do *United States Rail Service Issues,* EP 724 (STB served Dec. 30, 2014), and *United States Rail Service Issues—Performance Data Reporting,* EP 724 (Sub-No. 4) (STB served Nov. 30, 2016) support the shipper organizations' position. (*See* Coal. Ass'ns Comments 11 n.10.) Those decisions required reporting of data regarding contract traffic to the Board as part of overall network reporting,[83] but they did not take further action that would regulate contract traffic. In the 2014 proceeding in Docket No. EP 724, BNSF opposed certain proposals made by a party to the proceeding on the ground that ''[t]he Board does not have authority to impose service recovery obligations on BNSF that would over-ride'' contractual obligations. BNSF Reply 13, *U.S. Rail Serv. Issues,* EP 724 (Nov. 3, 2014). While the Board acknowledged that this was a ''significant concern'' and that ''[section] 10709 could have an impact on the scope of any prospective relief,'' it also explained that ''[t]he national rail system carries both regulated and non-regulated traffic and the Board necessarily must look to the fluidity of that network.'' *U.S. Rail Serv. Issues,* EP 724, slip op. at 7. The Board's order required production of data to the Board but did not adopt the farther-reaching service recovery obligations that were the primary focus of BNSF's objections. *Id.* In the 2016 proceeding in Docket No. EP 724 (Sub-No. 4), the Board adopted a final rule requiring Class I railroads to report certain service performance metrics. AAR objected to the requirements on the ground that most coal transportation takes place under contract, but the Board responded that this argument ''does not take into account our statutory responsibility to advance the goals of the RTP, which . . . includes monitoring service in order to ensure the fluidity of the national rail network.'' *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 18 (citing 49 U.S.C. 10101(3), (4)). The Board went on to say: ''The Board is not asserting jurisdiction regarding the rights and obligations of shippers and carriers associated with coal moving under contracts; rather, the Board is taking action to gain a better understanding of and insight into the general flow of traffic on the system.'' *Id.*

Neither decision supports the use of contract performance data as the basis for prescribing a reciprocal switching agreement under part 1145. Both decisions merely affirm that the Board itself may collect general network data that may include contract movements for the purpose of monitoring and understanding network fluidity. Indeed, the 2014 decision in Docket No. EP 724 cautions that section 10709 will limit the scope of prospective relief that the Board can provide with respect to contract traffic, describing this issue as a ''significant concern.'' *U.S. Rail Serv. Issues,* EP 724, slip op. at 7. Thus, the Board recognized that, even though it has broad authority to monitor contract traffic, its authority to order relief with respect to contract traffic, even to promote network fluidity, is far more limited.

The Coalition Associations also argue that language in the Board's decision in *Expedited Relief for Service Inadequacies* supports their position that the Board's actions to promote network fluidity may extend to contract traffic. (Coal. Ass'ns Comments 11–12 & n.10.) In that decision, the Board said that:

> As for transportation that is provided under a rail transportation contract, AAR is correct that we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract. 49 U.S.C.

[83] The Board has authority to require carriers to report information pursuant to 49 U.S.C. 1321 and 49 U.S.C. 11145(a)(1).

10709(b), (c). However, where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts. Moreover, there may be other instances where it is possible and appropriate to exercise our broad regulatory authority to ensure that traffic can move, as in the recent *UP/SP Service Order.* Thus, we are not inclined to disavow in advance any possible exercise of jurisdiction. Such jurisdictional issues are best left to a case-by-case examination and, again, our assertion of jurisdiction in any specific case will be subject to judicial review.

Expedited Relief for Serv. Inadequacies, 3 S.T.B. at 976.[84]

The Board disagrees that this passage from the Board's 1998 decision in *Expedited Relief for Serv. Inadequacies* supports the Coalition Associations' position. First, the proposed rule here is not designed to provide ''temporary emergency service'' in situations where ''no transportation is being provided,'' so that language has little relevance here. Second, regarding the Board's statements that it would not ''disavow in advance any possible exercise of jurisdiction'' and that it would consider such issues via a ''case-by-case examination,'' the Board does not foresee any situations where it would order reciprocal switching under the proposed rule based on the failure of contract traffic to meet the performance standards for the reasons discussed above. Accordingly, the Board does not need to preserve a ''case-by-case examination'' of this sort with respect to contract traffic under this rule.

Nor do *Burlington Northern* and *FMC Wyoming* support the use of contract performance data as a basis for post-expiration reciprocal switching. Taken together, these cases suggest that the Board can require a carrier to establish a common carriage rate while still under contract—as long as the contract would expire ''within a matter of weeks,'' *FMC Wyo.,* slip op. at 3 n.7, rather than ''more than a year,'' *Burlington N.,* 75 F.3d at 688.[85] But requiring a carrier to file a tariff rate prior to expiration does not attach any regulatory consequences to the carrier's conduct while under contract. Thus, it is not analogous to the use of contract performance data for reciprocal switching, which conflicts with section 10709 precisely because it creates consequences for contractual performance.

The Board's use of contract data in ''Three Benchmark'' rate cases also does not support the use of contract data as the basis for a reciprocal switching prescription under the proposed rule. (*See* Coal. Ass'ns Comments 10 n.6; WCTL Comments 4–5; WCTL Reply 13–14.) The Coalition Associations point to language in *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), in which the Board decided that it would look to contract traffic rates to establish a benchmark to determine the maximum lawful rate for the challenged movement in rate cases.[86] (Coal. Ass'ns Comments 10 n.6.) The use of contract rates for this purpose in rate cases is distinguishable from the possible use of contract performance data under the proposed rule. In rate cases, the Board uses contract traffic data as the basis for possible regulatory consequences for similar common carrier traffic, not for the traffic moving under contract. In contrast, using contract traffic data as the basis for reciprocal switching under part 1145 would attach potential regulatory consequences based on performance under the contract itself. Similarly, in the cases that WCTL cites, (*see* WCTL Reply 13–14), the Board looked to contract traffic only as evidence and not as the basis for regulatory action with respect to that traffic. *See W. Fuels Ass'n, Inc.* v. *BNSF Ry.,* NOR 42088, slip op. at 38–39 (STB served Sept. 10, 2007); *Ariz. Elec. Power Coop., Inc.* v. *BNSF Ry.,* NOR 42113, slip op. at 25 (STB served Nov. 22, 2011).

The Board appreciates the concerns of shippers and shipper organizations that the Board's decision not to consider the performance of contract traffic may limit the impact of the proposed rule.[87] As these commenters have noted, a large percentage of rail traffic is shipped under contract, and the rule will be less effective at promoting overall network fluidity if poor contract traffic performance is beyond the direct reach of the rule. (*See, e.g.,* Coal. Ass'ns Reply 5, 9; AFPM Comments 15; WCTL Comments 2–3, 5; ACD Reply 2.)[88] The Board also recognizes the concerns of shipper organizations that excluding contract performance data will create a cumbersome path for contract shippers to take advantage of the rule, requiring them to allow their contracts to expire and accept a period of common carrier service before becoming potentially eligible to seek relief under the rule. (*See* Coal. Ass'ns Reply 5–6; WCTL Reply 14–15; ACD Reply 2.) Congress has limited the Board's statutory authority with respect to contract traffic, as discussed above.[89] To the extent the

[84] In its 2024 decision revising its emergency service regulations, the Board said that it saw ''no reason to revisit'' its statements about contract traffic in *Expedited Relief for Serv. Inadequacies. Expedited Relief for Serv. Emergencies,* EP 762, slip op. at 28.

[85] In the ICC decision that led to the D.C. Circuit decision in *Burlington Northern,* the ICC found that ordering Burlington Northern to file a common carrier rate while still under contract would not violate the former 49 U.S.C. 10713 (the predecessor to section 10709). *W. Tex. Utils. Co.* v. *Burlington N. R.R.,* NOR 41191, slip op. at 4 (ICC served Oct. 14, 1994). The ICC reasoned that it could order carriers to file common carrier rates while still under contract because this was an exercise of authority with respect to future common carrier transportation, not over contract transportation. *Id.* at 4 & n.9. The D.C. Circuit's ruling did not specifically address the ICC's conclusion about section 10713, instead finding that other components of the statutory scheme limited the ICC's ability to order the filing of common carrier rates more than a year before the contract expires. The D.C. Circuit did not, however, suggest that section 10713 or any other provision requires the Commission to wait until *after* expiration to issue such an order.

[86] In that case, carriers argued that contract movements ''cannot be easily compared with a challenged common carrier movement.'' *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 82 (STB served Sept. 5, 2007). The Board rejected the argument, observing that contract rates may provide useful information as to the maximum lawful rate and that excluding contract rates may, in some cases, ''leave insufficient movements in the Waybill Sample to perform a statistically meaningful comparison analysis.'' *Id.* at 83.

[87] The Board does not agree with the Coalition Associations, however, that ''the Board's entire proposal would be meaningless'' if contract performance cannot be considered. (*See* Coal. Ass'ns Reply 5.) The Board's jurisdiction is focused on common carrier traffic by congressional design; thus, if the rule can achieve its objectives with respect to common carrier traffic, this would make it worthwhile.

[88] Several shipper organizations argue that common carrier traffic and contract traffic are so intertwined that the rule would be difficult to administer if contract traffic is excluded. (*See, e.g.,* AFPM Comments 15–16; Coal. Ass'ns Reply 8; DCPC Comments 3, 5.) To the extent that these commenters are concerned that it will be difficult to filter the performance of common carrier traffic from that of contract traffic, (*see* AFPM Comments 15–16; Coal. Ass'ns Reply 8), the Board does not share this concern. It is reasonable to expect that shippers will have access to the information they need to know which of their traffic moves under contract and which moves under common carriage, as that is a key factor for Board regulation in general. DCPC argues that shippers will find it difficult to ensure that contract shipments are never inadvertently moved via the alternate carrier because ''for various reasons, whenever people are involved in a process, mistakes happen.'' (DCPC Comments 3.) In light of section 10709, the extension of the rule to contract traffic is not a viable solution to this problem, to the extent it exists.

[89] DCPC suggests that the Board should apply part 1145 to contracts because the term ''rail contract'' is not defined and that railroads sometimes publish rates in non-distribution tariffs, with the word ''contract'' on the title page, that railroads deem binding ''when a shipper moves traffic on the rate,'' even when the shipper has not signed or otherwise agreed to the terms. (DCPC Reply 3; *see also* DCPC Comments 5.) DCPC's concern is beyond the scope of this proceeding. *See Rail Transp. Conts. Under 49 U.S.C. 10709,* EP 676, slip op. at 5 (STB served Jan. 22, 2010) (determining that the Board will ''continue to address on a case-by-case basis the issue of whether a document constitutes'' a contract

rule achieves its objectives with respect to common carrier traffic, the Board expects that it will improve network performance overall, which could benefit contract shippers in this interconnected industry. The Board notes that many trains haul both common carrier and contract traffic, and a congested yard or line can degrade the performance of both types of traffic, whether hauled together or separately. Incentives for the reliability and consistency of common carrier transportation may therefore positively affect both types of traffic by promoting the fluidity of shared facilities.

Requiring a Carrier To Provide Performance Data to a Shipper During the Term of a Contract

Related to the first question, the Board requested comment in the *NPRM* on whether the agency may require a railroad to provide performance metrics to a rail customer during the term of a contract upon that customer's request. *NPRM*, 88 FR at 63909. AAR argues that requiring a rail carrier to provide information to a customer while under contract is barred by section 10709(b) because that would add an additional ''duty'' to the carrier's existing contractual obligation. (AAR Comments 35–36; AAR Reply 14–15.) AAR argues that, if a shipper wants a carrier to provide metrics for performance under contract, then it can bargain for them in contractual negotiations. (AAR Comments 36.) Although AAR recognizes that the Board's decision in *Demurrage Billing Requirements,* EP 759, did not distinguish between contract and common carrier traffic when it required carriers to provide information to their customers in demurrage invoices, AAR says that the decision contains no discussion of section 10709 and is therefore a ''drive-by jurisdictional ruling[]'' that has ''no precedential effect.'' (AAR Reply 15 (quoting *Steel Co.* v. *Citizens for a Better Env't,* 523 U.S. 83, 91 (1998)).)

The Coalition Associations argue that because the Board has authority, in their view, to consider contract performance data when deciding whether to prescribe reciprocal switching, it follows that the Board has authority to require carriers to provide performance data to contract customers. (Coal. Ass'ns Comments 13.) The Coalition Associations point to *Demurrage Billing Requirements,* EP 759, as precedent for requiring railroads to provide information to contract customers, noting that one item required on demurrage invoices is OETA, which is also one of the performance metrics under this rule. (Coal. Ass'ns Comments 13–14.) WCTL notes that the Board requires railroads to provide data to the Board regarding contract service pursuant to 49 U.S.C. 11145 and suggests that requiring them to provide data about contract service to shippers is no different. (WCTL Reply 14.) In addition, WCTL argues that providing data is permitted by section 10709 because it does not fall within the definition of ''transportation'' under 49 U.S.C. 10102. (WCTL Reply 14.)

The Board need not address whether it has statutory authority to require carriers to provide, to the relevant customer, data regarding the railroad's performance under a contract. Because the Board will not prescribe reciprocal switching under part 1145 based on performance during the term of a contract, the Board sees no basis to require railroads to provide the data in question to customers that are not eligible to file a petition under the rule. Though the Board values open communication between carriers and shippers generally and encourages carriers to voluntarily provide performance data relevant to transportation under contract, in this proceeding commenters did not identify any purpose for requiring the provision of contract performance data other than using it as the basis for a petition under part 1145.

Whether a Reciprocal Switching Petition May Be Filed Prior to Contract Expiration

Regarding the second question in the *NPRM*—''when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires''—the Board received only a few comments. AAR asserts that the Board cannot consider a prescription for reciprocal switching until the contract has expired (and any petition must be based on common carrier service that the shipper received after expiration). (*See* AAR Comments 36.) WCTL proposes that, ''consistent with practice in maximum rate cases,'' the rule should allow shippers to seek agency reciprocal switching relief within the final calendar quarter of any given rail transportation contract's term.'' (WCTL Comments 4.) The Coalition Associations propose a schedule that would allow contract shippers to file petitions while the contract is in effect, and the reciprocal switching prescription, if granted, would go into effect no more than one year from the date of the shipper's petition. (Coal. Ass'ns Comments 19.) This would allow shippers to file up to one year before contract expiration and receive the full benefit of the prescription. (*Id.* at 19–20.) CN opposes the Coalition Associations' proposal on the ground that a petition filed one year before the contract expires ''will have no bearing on whether service to that shipper is inadequate one year later.'' (CN Reply 16–17.)

Given the Board's decision not to rely on performance that occurs during the term of a contract as the basis for a prescription under part 1145, it is unnecessary to consider how far in advance of contract termination the Board may issue such a prescription. Because a prescription under part 1145 must be based on common carrier transportation performance, shippers will need to petition under part 1145 after contract termination and after experiencing service under common carriage for at least 12 weeks.

Other Issues

Commenters made additional contract-related suggestions that were not directly related to one of the questions above: (1) allowing reciprocal switching prescriptions to go into effect before contract termination, with respect to volume that exceeds the shipper's minimum volume commitment as specified in a contract; and (2) treating contractual provisions that preclude the application of reciprocal switching relief as violations of the common carrier obligation.[90]

First, the Coalition Associations ''perceive an implicit assumption'' in the *NPRM* that ''the existence of a contract forecloses any reciprocal switching until the contract has expired.'' (Coal. Ass'ns Comments 15.) They argue that this assumption is incorrect because ''many rail contracts do not contain 100% volume commitments,'' and, absent such a commitment, ''there more than likely is some volume that a shipper can tender to an alternate carrier even before its contract with the incumbent carrier expires.'' (*Id.*) Similarly, NMA argues that ''absent any type of minimum annual volume guarantee or exclusive

under section 10709 or a tariff). Consistent with this case-by-case approach, a shipper may seek a determination from the Board as to whether a particular arrangement is not a section 10709 contract, notwithstanding how the document is labeled.

[90] In addition, the Coalition Associations suggested reopening Docket No. EP 711 (Sub-No. 1) as a way of addressing contract performance, given that they view the application of part 1145 to contract performance as ''fraught with appellate risk.'' (Coal. Ass'ns Reply 47–48.) The Board addresses this proposal in the Introduction.

use guarantee with the incumbent,'' a shipper could ''maintain its contract with the incumbent railroad'' and still ''ship with the alternative carrier.'' (NMA Comments 7.) CPKC responds that even if the contract does not specifically prohibit the use of an alternate carrier, the Board cannot prescribe a reciprocal switching agreement that would go into effect during the term of a contract because it would need to base such a prescription on contract performance data. (CPKC Reply 30–33.)

The Board will not extend part 1145 to allow prescribed reciprocal switching agreements to go into effect prior to the expiration of a contract, even with respect to a volume of traffic that exceeds the contract minimum. Doing so would require the Board to use contract performance as the basis for action under part 1145, which, as the Board has explained, is inconsistent with section 10709. Moreover, the *NPRM* did not propose allowing reciprocal switching prescriptions to go into effect during the term of a contract. *See NPRM,* 88 FR at 63909 (asking whether the Board may consider performance data as the grounds for a reciprocal switching agreement ''that would become effective *after the contract expired,*'' and when the Board may prescribe a reciprocal switching agreement ''that would not become effective until *after the contract expires*'' (emphasis added)).[91]

Second, FRCA and NCTA argue that: ''It may become appropriate to consider whether new contracts that preclude the application of reciprocal switching relief for inadequate service are consistent with 49 U.S.C. [] 11101(a) ('Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.').'' (FRCA/NCTA Comments 4.) This suggestion arises in connection with their observation that ''the *NPRM* proposal may become a baseline against which parties negotiate contracts.'' (*Id.*) AAR says that the Board should reject this proposal because ''it comes with no substantive rationale,'' and ''it is unclear why a carrier's contract terms about whether one shipper could seek a switching order would create a danger of the carrier violating its common carrier obligation to other shippers.'' (AAR Reply 17–18.) This issue is beyond the scope of this proceeding. Indeed, FRCA and NCTA do not appear to argue that the Board should act on their proposal in the final rule, framing it instead as something that ''may become appropriate'' in the event that the *NPRM* proposal becomes a baseline against which parties negotiate contracts. (FRCA/NCTA Comments 4.)

Exempt Traffic

In the *NPRM,* the Board noted that ''some transportation that has been exempted from Board regulation pursuant to 49 U.S.C. 10502 could be subject to an order providing reciprocal switching under part 1145.'' *NPRM,* 88 FR at 63909. The Board explained that it retains ''full jurisdiction to deal with exempted transportation, which includes considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part.'' *Id.* The Board further explained that it is ''well established that the Board can revoke the exemption at any time, in whole or in part, under section 10502(d),'' and that the Board ''would do so to the extent required.'' *Id.*

Comments from railroads and AAR focus primarily on three arguments. First, they contend that the Board cannot use performance metrics from the incumbent carrier's exempt traffic as the basis for reciprocal switching prescriptions. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) Even if the Board revokes the exemption, they argue, the Board cannot rely on pre-revocation performance data as the basis for a reciprocal switching prescription because this would amount to unlawful retroactive regulation. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) Instead, they say, a shipper must petition for partial revocation of an exemption to the extent necessary to permit reciprocal switching, and then, if the Board grants partial revocation, the shipper may file a petition for reciprocal switching in the future based solely on the incumbent carrier's post-revocation performance. (*See, e.g.,* AAR Comments 41; CN Comments 56; BNSF Comments 13; AAR Reply 23; BNSF Reply 5.) In support of this argument, they rely on *Pejepscot Industrial Park—Petition for Declaratory Order,* 6 S.T.B. 886 (2003), and *Sanimax USA LLC* v. *Union Pacific Railroad* (*2022 Sanimax Decision*), NOR 42171 (STB served Feb. 25, 2022), both of which concluded that the Board could not award damages for conduct that took place while the relevant traffic was exempt. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.)

Second, AAR and some railroads argue that the Board cannot grant partial revocation to allow reciprocal switching based solely on a carrier's failure to meet the performance standards. (*See, e.g.,* AAR Comments 37; AAR Reply 19–20; CPKC Reply 36.) They contend that poor service does not by itself demonstrate that revocation is necessary to carry out the RTP of 49 U.S.C. 10101, as required by the statutory standard for revocation in 49 U.S.C. 10502(d). (*See, e.g.,* AAR Reply 19–20; CPKC Reply 36.) AAR also contends that poor service is not enough to establish that the carrier abused its market power, which AAR says is a required showing for revocation. (*See* AAR Reply 19; *see also* BNSF Reply 5 n.2 (citing cases that discuss the significance of market power in revocation proceedings).) Third, AAR and several railroads reject the arguments of some shippers that the Board could revoke exemptions to the extent necessary to permit reciprocal switching in the final rule, as opposed to in a separate proceeding in the future. (*See, e.g.,* AAR Reply 20–23; BNSF Reply 6; CPKC Reply 34–35.)

Shipper organizations that commented on the issue argue that shippers of exempt traffic should be able to obtain a reciprocal switching prescription without the need for cumbersome proceedings, and they offer various suggestions regarding how the Board could facilitate this. FRCA and NCTA argue that the Board should partially revoke an exemption whenever the performance of exempt traffic becomes ''inadequate,'' because poor service demonstrates that market forces are insufficient to carry out the RTP and to protect shippers from the abuse of market power. (FRCA/NCTA Comments 4.) PCA as well as AF&PA and ISRI urge the Board to revoke certain exemptions[92] in the final rule to the extent necessary to allow reciprocal switching, because this would ensure that shippers will not need to initiate time-consuming revocation proceedings

[91] NMA appears to argue that the *NPRM* did provide notice of this option, stating: ''The STB noted such a scenario in the Decision when it stated that the petitioner, *i.e.,* the shipper, would not be required to rely on the alternate carrier for any portion of the petitioner's traffic during the term of the prescription.'' (NMA Comments 7 & n.17 (citing *NPRM,* 88 FR at 63901).) This statement, which appears outside the contract section of the *NPRM* and makes no reference to contracts, is not enough to provide notice that the Board was contemplating reciprocal switching agreements that would go into effect prior to expiration.

[92] Specifically, AF&PA and ISRI argue for partial revocation of exemptions for certain forest and paper products and scrap metal commodities, as well as the boxcar exemption to the extent it covers transportation of these commodities, and PCA argues for partial revocation of the hydraulic cement exemption. (AF&PA/ISRI Comments 6; PCA Comments 10.) PCA and DCPC, as well as AF&PA and ISRI, also urge the Board to revoke certain exemptions in their entirety, although not necessarily as part of the final rule. (PCA Comments 10; AF&PA/ISRI Reply 15; DCPC Reply 3.)

before they can pursue reciprocal switching. (PCA Comments 10; AF&PA/ISRI Comments 6–7, 10–15.) [93] AF&PA and ISRI argue that partially revoking these exemptions in the final rule would be a logical outgrowth of the *NPRM.* (*See* AF&PA/ISRI Comments 6–7; AF&PA/ISRI Reply 13–15.) [94]

Moreover, AF&PM and ISRI reject the contention that consideration of pre-revocation performance as a basis for reciprocal switching is impermissibly retroactive. (AF&PA/ISRI Reply 10–13.) They point out that the Board's *2022 Sanimax Decision* said that ''prospective relief,'' unlike damages, may be based on pre-revocation facts. (AF&PA/ISRI Reply 12 (citing *2022 Sanimax Decision,* NOR 42171, slip op. at 4).) They argue that reciprocal switching is prospective because it ''would only affect *future* movements and *future* competition between the incumbent and the alternate carrier.'' (AF&PA/ISRI Reply 11; *see also* NSSGA Reply 6 (''[T]he Board has recognized that past periods of exempt service may be rightly considered in future proceedings.'').)

Finally, some shipper organizations suggest that the Board could prescribe a reciprocal switching agreement with respect to some exempt traffic *without* partially revoking the exemptions, because the ''commodities may have been exempted for reasons related to competition,'' but ''that rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service.'' (*See* NSSGA Comments 5; EMA Comments 4–5; PRFBA Comments 5.) AF&PA and ISRI point out that in *PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd.* (*June 2006 PYCO Decision*), FD 34802 et al. (STB served June 21, 2006), the Board announced that it could order alternative rail service with respect to exempt traffic when traffic consists of a mix of regulated and exempt commodities and it would not be practical to provide separate service for the two types of traffic. (AF&PA/ISRI Reply 11–12 (citing *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 1, 3–4).) [95]

First, the Board will not, as a general matter, prescribe reciprocal switching or require the production of data under § 1145.8(a) with respect to exempt traffic unless it first revokes the exemption at least to the extent necessary to do so. Although NSSGA, EMA, and PRFBA suggest that the Board may prescribe reciprocal switching with respect to exempt commodities that were exempted ''for reasons related to competition'' rather than service issues, (NSSGA Comments 5, EMA Comments 4–5, PRFBA Comments 5), the Board's commodity exemptions do not make such a distinction. Rather, the commodity exemptions apply to all of Subtitle IV of Title 49 of the U.S. Code, except where otherwise indicated in the exemption or required by statute. Because the reciprocal switching statute, 49 U.S.C. 11102, falls within Subtitle IV, regulations promulgated under this provision generally cannot be applied to these commodities, regardless of the original rationale for the exemption or the purposes of this rule. The only exception is the boxcar exemption, which expressly retains Board regulation with respect to reciprocal switching.[96] With respect to the production of data, the Board will not require carriers to provide performance data for exempt traffic because, as discussed below, the Board will not rely on the performance of exempt traffic as the basis for reciprocal switching under the rule.

As AF&PA and ISRI point out, the Board ordered alternative rail service with respect to exempt traffic in the *PYCO* matter. (*See* AF&PA/ISRI Reply 11–12 (citing *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 1, 3–4).) In *PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd.* (*January 2006 PYCO Decision*), FD 34802 (STB served Jan. 25, 2006), without addressing the presence of exempt commodities because it had not been raised by the parties, the Board initially issued an emergency service order under 49 U.S.C. 11123 and 49 CFR part 1146 that covered a mix of exempt and regulated traffic without revoking the exemption. *See January 2006 PYCO Decision,* FD 34802, slip op. at 9. After the exemption issue was raised, the Board extended the emergency service order, stating that when ''the rail traffic at issue consists of both regulated and exempt commodities and it would not be practical to provide separate service for the two types of traffic,'' it could ''order alternative rail service as to all of the shipments.'' *See June 2006 PYCO Decision,* FD 34802 et al., slip op. at 4. Nevertheless, the Board revoked the exemption to the extent necessary to order alternative rail service, *id.,* and did so again in a subsequent alternative rail service order under 49 U.S.C. 11102(a) and part 1147, *PYCO Indus.—Alt. Rail Serv.—S. Plains Switching, Ltd.* (*November 2006 PYCO Decision*), FD 34889 et al., slip op. at 5–6 (STB served Nov. 21, 2006). At most, the *PYCO* decisions indicate that when it is not practical to separate exempt and regulated traffic, the Board could consider issuing an order that affects traffic generally rather than abstaining from regulating the non-exempt traffic, particularly in emergency situations. But it is significant that the Board ultimately revoked the exemption in *PYCO* after the issue was raised. For purposes of part 1145, shippers in a *PYCO*-like situation (with movements that involve both exempt and regulated traffic) should generally obtain revocation before filing a petition for a prescription.[97]

Second, the Board will not partially revoke any exemptions as part of this final rule, as some shipper organizations have requested. (PCA Comments 10; AF&PA/ISRI Comments 6–7, 10–15.) AF&PA and ISRI argue that the *NPRM*'s statement that the Board ''would'' revoke exemptions ''to the extent required,'' *NPRM,* 88 FR at 63909, along with the *NPRM*'s statements indicating that the Board was assessing how to deal with exempt traffic, are sufficient to justify a partial revocation to carve out reciprocal switching in the final rule. (AF&PA/ISRI Reply 13–15.) It was not the Board's intent to propose an exemption revocation in this proceeding, nor did the *NPRM* identify any specific exemptions that it intended to revoke. Thus, the Board concludes that partial revocation in the final rule would not be an appropriate option.[98]

[93] AF&PA and ISRI argue that the procedure proposed by carriers—requiring shippers to petition for revocation, wait at least 12 weeks until the newly regulated service fell short of a performance metric, and then petition for reciprocal switching—would ''effectively exclude[]'' shippers of exempt traffic from the benefits of the rule. (AF&PA/ISRI Reply 15.)

[94] AF&PA and ISRI also argue that if the Board does not partially revoke these exemptions in the final rule due to concerns that it is not a logical outgrowth of the *NPRM,* the agency should issue a supplemental notice of proposed rulemaking or open a new sub-docket to address the issue. (AF&PA/ISRI Reply 15.)

[95] As AF&PA and ISRI acknowledge, the Board in *PYCO* revoked the exemption even though it said that revocation was not necessary. (AF&PA/ISRI Reply 12 (citing *June 2006 PYCO Decision,* FD 34802 et al.).) But AF&PA and ISRI note that the Board initially prescribed alternative rail service without revocation, ''and the Board never stated that that decision was in error.'' (*Id.*)

[96] *See* 49 CFR 1039.14(b)(3). The Board may therefore require the production of data and prescribe reciprocal switching with respect to any traffic that is subject only to the boxcar exemption.

[97] Nothing would prevent shippers with *PYCO*-like mixed traffic from seeking a partial revocation with respect to their exempt traffic to the extent necessary so that the Board can order reciprocal switching with respect to the non-exempt traffic. Shippers would not need to wait until a service issue arises to file such a petition.

[98] AF&PA and ISRI say that if the Board is concerned that partial revocation is not a logical

Continued

As discussed below, however, the Board is exploring future actions that would facilitate swifter access to part 1145 for petitioners with exempt commodities.

Third, regarding the standard the Board will use to evaluate petitions for partial revocation to the extent necessary to permit a prescription of a reciprocal switching agreement, (*see* AAR Comments 37; AAR Reply 19–20; CPKC Reply 36), the Board concludes that a rail carrier's likely failure to meet a performance standard (based on data available from carrier online platforms or other sources) would be strong evidence to support partial revocation, but parties would be allowed to present counterbalancing evidence to demonstrate why partial revocation would not be warranted. The statutory standard for revocation provides that the Board may revoke an exemption when it finds that regulation ''is necessary to carry out the transportation policy of section 10101 of this title.'' 49 U.S.C. 10502(d). Although the statements in the *NPRM* about the RTP of section 10101 could provide support for revocation, *see, e.g., NPRM,* 88 FR at 63898, 63900, 63901, the Board would not prevent parties from making other arguments in revocation proceedings to develop a fuller record. Accordingly, in a proceeding to adjudicate a petition for partial revocation (either in a specific case or on a commodity-wide basis), the Board will consider other evidence that the affected parties believe is relevant regarding whether revocation is necessary to carry out the RTP. Failure to meet a performance standard would be relevant to this inquiry, but it would not necessarily be dispositive.[99] Moreover, evidence of poor service may be relevant to this inquiry even if it would not establish that a rail carrier likely has failed to meet a performance standard. For example, a period of bad service could be relevant to a revocation inquiry even if it would not be long enough to cause a carrier to fail a performance standard.

In addition to RTP evidence, parties in some revocation proceedings also submit evidence regarding whether revocation is necessary to address the potential for abuse of market power. *See, e.g., Sanimax USA LLC* v. *Union Pac. R.R.,* NOR 42171, slip op. at 3, 5 (STB served Nov. 2, 2021). Although the market power inquiry is not required by the statute, the Board may consider and has considered such evidence in case-specific revocation proceedings, and the potential for abuse of market power generally weighs in favor of granting revocation.[100] *See generally Exclusion of Demurrage Regul. From Certain Class Exemptions,* EP 760, slip op. at 6–7 (STB served Feb. 28, 2020). FRCA and NCTA argue that the existence of service inadequacies is sufficient proof that regulation is necessary to protect shippers from abuse of market power, (*see, e.g.,* FRCA/NCTA Comments 4), and carriers retort that service inadequacies might occur for reasons unrelated to market power, (*see, e.g.,* AAR Reply 19–20). Service inadequacies certainly can be indicative of market power, but there may also be other evidence in specific cases. Accordingly, in case-specific revocation proceedings, the Board will consider any relevant evidence submitted by the parties, including evidence, if any, about the existence of (and potential for abuse of) market power.[101]

Fourth, should the Board partially revoke an exemption, the Board clarifies that it will not rely on pre-revocation performance as the basis for a prescription of a reciprocal switching agreement under this rule. As noted above, AAR and several carriers argue that the Board cannot rely on pre-revocation performance as the basis for a prescription under part 1145 because this would amount to retroactive regulation. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) AF&PA and ISRI respond that the Board has considered pre-revocation conduct as the basis for relief in other cases and that reciprocal switching is prospective in nature. (AF&PA/ISRI Reply 10–13.) Given the specific features of this rule, the Board concludes that using pre-revocation data as the basis for a prescription would be retroactive in a way that raises fairness concerns. Although AF&PA and ISRI are correct that the Board has relied on pre-revocation conduct in the past as the basis for relief, the Board will not do so here because of how closely the rule links specific pre-revocation conduct to post-revocation relief.

In *Pejepscot* and *Sanimax,* the Board said that pre-revocation conduct cannot be the basis for damages under the common carrier obligation. *Pejepscot,* 6 S.T.B. at 892–93, 899; *2022 Sanimax Decision,* NOR 42171, slip op. at 4. In *Pejepscot,* the Board reasoned that the railroad's conduct while an exemption was in effect could not have violated the common carrier obligation and that, therefore, the Board could not award damages for violation of the common carrier obligation based on that conduct. *Pejepscot,* 6 S.T.B. at 892–93, 899. *Pejepscot* says that the appropriate path for a shipper in such circumstances is to obtain partial revocation, after which the carrier could be liable for violations of the common carrier obligation based on post-revocation conduct. *Id.* at 893 n.15. Like *Pejepscot, Sanimax* held that a shipper is not entitled to ''relief, including damages,'' for conduct that occurred prior to the Board's revocation of the exemption. *2022 Sanimax Decision,* NOR 42171, slip op. at 4. *Sanimax* explained that ''[p]ermitting regulatory relief for the period the exemptions were in effect'' would be ''contrary to the principle that retroactive application of administrative determinations is disfavored,'' noting that there is a presumption against actions that would ''increase a party's liability for past conduct, or impose new

outgrowth of the *NPRM,* it should issue a supplemental notice of proposed rulemaking or open a new sub-docket to clarify that the Board is contemplating revoking the exemptions in the final rule. (AF&PA/ISRI Reply 15.) As discussed below, the Board will deal separately with any possible exemption revocations and avoid unnecessary delays to the implementation of this rule.

[99] Reliance on a railroad's past conduct as a basis for revocation is not impermissibly retroactive, and carriers do not contend otherwise. Congress expressly gave the Board the power to revoke exemptions and placed no limitations on the type of evidence that the Board may consider when determining whether regulation is necessary to carry out the RTP. Accordingly, the Board must be able to examine carrier actions as the basis for revocation.

[100] The Board has issued exemption revocation decisions without mentioning market power. *See Exclusion of Demurrage Regul. from Certain Class Exemptions,* EP 760, slip op. at 6–7. Nothing in this decision should be construed to suggest that a shipper or receiver needs to argue, let alone prove, that a carrier has market power to succeed on its petition to revoke an exemption.

[101] In the *PYCO* decisions, the Board relied on poor service as the basis for revocation, stating in one decision that ''[w]e view SAW's rail service as having been so inadequate as to amount to an abuse of market power,'' and that revocation will ''ensure the continuation of a sound rail system to meet the needs of the shipping public,'' consistent with 49 U.S.C. 10101(4). *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 4; *see also November 2006 PYCO Decision,* FD 34889 et al., slip op. at 5 (relying on the analysis in the June 21, 2006 decision as the basis for revocation). There were myriad service issues considered in the *PYCO* decisions, based on the record developed by the parties in that case. *See, e.g., January 2006 PYCO Decision,* FD 34802, slip op. at 5 (explaining that the carrier had significantly reduced the number of cars that the shipper could load per day, that the carrier had halted shipping entirely for a six-day period without an adequate explanation, and that the service was so bad that the shipper would need to ''curtail or close operations'' if there was no improvement). There was also evidence that the railroad was not likely to take measures to improve future service. *See, e.g., June 2006 PYCO Decision,* FD 34802 et al., slip op. at 5–6 (describing evidence that the carrier appeared to be unable and unwilling to provide adequate service in the future). Thus, while the *PYCO* proceedings show that bad service can be the basis for revocation under some circumstances, they do not suggest that the Board should treat failure to satisfy a performance standard as dispositive in a partial revocation proceeding.

duties with respect to transactions already completed.'' *Id.* (quoting *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 280 (1994)).

Although AF&PA and ISRI correctly point out that *Sanimax* left the door open to some consideration of pre-revocation conduct in connection with ''prospective relief,'' (*see* AF&PA/ISRI Reply 12–13), there are important differences between how pre-revocation conduct would be used under part 1145 and how *Sanimax* contemplated that it would be used. In *Sanimax,* the Board said that ''UP's actions prior to [revocation] may be relevant to the Board's ultimate determination about what kind of prospective relief is warranted, if any.'' *2022 Sanimax Decision,* NOR 42171, slip op. at 4. *Sanimax* explains that the Board's ''broad'' discovery regulations allow parties to ''obtain discovery on any matter that is relevant'' and that some ''relevant facts giving rise to the complaint'' may have occurred prior to revocation. *Id.* But, although reciprocal switching under the rule is ''prospective'' in some respects,[102] the rule's numerical performance standards establish a more direct link between pre-revocation conduct and post-revocation regulatory consequences that would have hallmarks of retroactive regulation. If the Board adopts AF&PA and ISRI's approach, pre-revocation performance would be a decisive factor that would serve as the direct basis for a prescription of a reciprocal switching agreement, effectively creating new legal consequences for pre-revocation conduct. This would go beyond merely looking at pre-revocation conduct to the extent it ''may be relevant'' to the scope of prospective relief; rather, it effectively ''[p]ermit[s] regulatory relief for the period the exemptions were in effect.'' *See 2022 Sanimax Decision,* NOR 42171, slip op. at 4.[103]

The two *PYCO* decisions on which AF&PA and ISRI rely, (AF&PA/ISRI Reply 11–12), do not compel the conclusion that the Board should rely on pre-revocation conduct as the basis for a prescription under part 1145. In those decisions, the Board relied on pre-revocation conduct as the basis for prescribing alternative rail service under parts 1146 and 1147.[104] But, under its part 1147 regulation, the Board did so primarily as part of a broader inquiry into the incumbent railroad's conduct, acknowledging the carrier did not oppose PYCO's request for temporary alternative service on the merits. *November 2006 PYCO Decision,* FD 34889 et al., slip op. at 2. In both decisions, the Board determined that service was not likely to improve—a determination that was based primarily on the fact that the incumbent carrier all but refused to serve the petitioner—and ordered prospective relief under parts 1146 and 1147. *See June 2006 PYCO Decision,* FD 34802 et al., slip op. at 5–6; *November 2006 PYCO Decision,* FD 34889 et al., slip op. at 4–5.[105] In contrast, under shippers' proposed application of part 1145, the Board would focus on a single aspect of the railroad's pre-revocation conduct—failure to satisfy a performance standard—and would use that conduct as the very basis for prescribing a reciprocal switching agreement rather than a piece of evidence that supports predictions about future conduct. In effect, in contrast to the *PYCO* rulings, applying part 1145 to pre-revocation performance would specifically create consequences for that past performance.

The Board understands that this determination means that a shipper or receiver would need to obtain partial revocation of the exemption, and then wait until the newly regulated service fell short of the performance standards in part 1145, before filing a petition under part 1145. To mitigate impediments arising from this two-step process, petitions for partial revocation filed in furtherance of part 1145 cases will be prioritized in order to resolve them expeditiously. Moreover, the Board intends to explore whether it should partially revoke all exemptions, on its own initiative, to allow for reciprocal switching petitions, as is currently the case for the boxcar exemption. *See* 49 CFR 1039.14(b)(3) (expressly allowing for regulation of reciprocal switching for rail transportation of commodities in boxcars).[106]

Class II Carriers, Class III Carriers, and Affiliates

The Board proposed to limit prescriptions under part 1145 to situations in which the incumbent rail carrier is a Class I carrier or, for purposes of the industry spot and pull standard, an affiliated company[107] that serves the relevant terminal area. *NPRM,* 88 FR at 63907. The Board explained that the service data the Board had been examining in Docket No. EP 770 (Sub-No. 1) focused on Class I rail carriers and that the Board has not received as many informal or formal complaints about smaller carriers. *Id.* Moreover, the Board noted that data collection may be more burdensome for Class II and Class III rail carriers, as they have not been submitting service-related data to the Board under performance metrics dockets, such as Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1). *Id.* at 63907–08. Nevertheless, the Board sought comment on whether proposed part 1145 should be broadened to include Class II and Class III rail carriers that are providing inadequate service. *Id.* at 63908.

Some shipper groups fear that the Board's proposal is too limited. NMA asserts that, for a number of its members, the interchanging Class III rail carrier is not affiliated with a Class I rail carrier. (NMA Comments 5.) ACD raises similar concerns, noting that a sizeable

[102] Part 1145 is ''prospective'' in that it is not designed to punish carriers for poor performance or compensate shippers for losses incurred due to poor performance, but rather is intended ''to help ensure that the transportation system as a whole meets the public need.'' *NPRM,* 88 FR at 63902. And, as AF&PA and ISRI point out, reciprocal switching prescriptions ''would only affect *future* movements and *future* competition between the incumbent and the alternate carrier.'' (AF&PA/ISRI Reply 11.)

[103] The Board granted the parties' joint motion for voluntary dismissal in the *Sanimax* proceeding on February 15, 2024. *Sanimax USA LLC* v. *Union Pac. R.R.,* NOR 42171 (STB served Feb. 15, 2024). At the time of dismissal, the Board had not granted prospective relief or addressed in further detail how pre-revocation conduct can be used when determining prospective relief.

[104] Because the *PYCO* decisions partially revoked the exemptions and ordered alternative service in the same decision, they necessarily relied on pre-revocation conduct as the basis for the alternative service. *See June 2006 PYCO Decision,* FD 34802 et al. (partially revoking the exemption to the extent necessary to grant emergency relief under 49 U.S.C. 11123 and 49 CFR part 1146 *and* ordering emergency alternative service in the same decision); *November 2006 PYCO Decision,* FD 34889 et al. (same, with respect to alternative service under 49 U.S.C. 11102(a) and 49 CFR part 1147).

[105] The alternative rail service regulations at issue in the *PYCO* decisions, 49 CFR 1146.1 and 1147.1, require the petition to explain why the incumbent is unlikely to provide adequate rail service in the future. *See* 49 CFR 1146.1(b)(1)(ii) (requiring the petitioner to provide ''the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable time''); part 1147.1(b)(1)(ii) (same, with minor wording differences).

[106] The Board also notes that its NPRM proposing to revoke certain exemptions in their entirety remains under consideration. *See Rev. of Commodity, Boxcar, & TOFC/COFC Exemptions,* EP 704 (Sub-No. 1) (STB served Mar. 23, 2016); *see also Rev. of Commodity, Boxcar, & TOFC/COFC Exemptions,* EP 704 (Sub-No. 1) (STB served Sept. 30, 2020) (requesting comment on an approach developed by the Board for use in considering revocation issues).

[107] For purposes of the *NPRM* and the proposed regulatory text, the Board proposed that ''affiliated companies'' has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A): ''*Affiliated companies* means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier.'' The Board also sought public comment as to whether its definition should also include third-party agents of a Class I carrier. *NPRM,* 88 FR at 63902 n.9.

portion of its members ''receive rail deliveries through short line railroads that take cargo from Class I railroads and are then delivered to a shared railyard.'' (ACD Comments 2.) It asserts that these members are effectively captive and experience many of the same issues addressed in this rulemaking. (*Id.*) NMA also suggests that Class I railroads could limit access to what would otherwise be an effective interchange location. (NMA Comments 6.) Similarly, PCA claims that exempting short lines from these rules may create perverse incentives for Class I carriers to include a short line as their agent in the transportation shipments to avoid the rules altogether. (PCA Comments 15–16; *see also* VPA Comments 8 (seeking clarification of definition of ''affiliated companies'' to specifically include belt railroads in which a Class I carrier has controlling authority).) ACD, NMA, and PCA therefore ask that the Board permit petitioners to seek a prescription based on a short line's service. However, in light of the Board's concerns about smaller railroads being required to comply with the data reporting obligations, ACD suggests that another option could be to limit the application of the rules only to Class II rail carriers, excluding Class III rail carriers. (ACD Comments 2.)

Some groups also argue that the Board should allow a Class II or Class III rail carrier to be an alternate carrier. For example, PCA argues that the Board should allow a reciprocal switching agreement to be prescribed under part 1145 where a Class I railroad provides origin or destination service, but a short line railroad is able to participate in a reciprocal switching arrangement. (PCA Comments 15; *see also* DCPC Comments 12.) ACD adds that short line railroads have historically provided superior service compared to Class I railroads and that it believes short lines would be more receptive to accepting its members' smaller shipments. (ACD Comments 2.)

AAR and ASLRRA oppose permitting a petition under part 1145 to be filed against a short line. ASLRRA asserts that none of the shipper comments cite legal authority or facts supporting their position, only anecdotal conclusory statements. (ASLRRA Reply 6–8.) ASLRRA also argues that there have been very few complaints about the service provided by short lines, that imposing the metrics outlined in the *NPRM* would be burdensome on the short lines, and that short lines provide good service based on local connections with their shippers. (*Id.*) In response to suggestions that an alternate carrier could be a Class II or Class III railroad, AAR suggests that, rather than departing from the *NPRM* and complicating the proposed rule, the Board should simply recognize that part 1147 can be invoked to address the highly unusual situations in which a shipper might want reciprocal switching to a Class II or Class III railroad. (AAR Reply 36; *see also* ASLRRA Reply 5.)

ASLRRA also proposes a definition for ''affiliated companies'' to ensure Class II and III rail carriers are not ''inadvertently covered'' under the new regulations:

> Affiliated companies means companies or persons that directly or indirectly through one or more intermediaries control, or are controlled by, or are under common control with the accounting carrier. . . . [A]n affiliated company is one that is included in a Class I railroad's annual combined rail reporting to the STB and that acts as an operating division of [a Class I] railroad.

(ASLRRA Comments 6.)[108] ASLRRA is also concerned that including the term ''third-party agent'' in the definition of ''affiliated companies'' could theoretically capture any short line that contracts with a Class I railroad to provide functions such as switching services or haulage, which would blatantly contradict the exclusion of Class II and Class III short line railroads from the rule. It asserts that the term ''third-party agent'' is too amorphous and uncertain and should not be included. (ASLRRA Comments 5–7.)

The Board will not extend its rule to permit a petitioner to seek prescription of a reciprocal switching agreement based on a Class II or Class III rail carrier's service. While there are surely times when short line railroads provide a lower level of service, they are historically not a significant source of the service problems this rule seeks to address, and the record here has not demonstrated a need to expand part 1145 to include the smaller carriers.[109] *See NPRM,* 88 FR at 63907; (*see also* ACD Comments 2.) As proposed in the *NPRM,* the final rules adopted here generally will not apply to Class II and Class III rail carriers, except to the extent those carriers are ''affiliated companies'' as defined in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).[110] For example, the final rule will not apply to a Class II and III rail carrier where a Class I rail carrier holds a stake but the Class II or III carrier is not an affiliated company of the Class I rail carrier (*e.g.,* the New York, Susquehanna & Western, Railway Corporation or the Indiana Rail Road Company). The Board therefore does not agree with ASLRRA that the definition of ''affiliated companies'' should be revised.[111] As such, the definition of ''affiliated companies'' that was proposed in the *NPRM* will be adopted. The Board will gain experience with this final rule before considering whether to expand the definition to include Class II, Class III, or third-party agents of a Class I carrier.

The Board also will not prescribe a reciprocal switching agreement under part 1145 if the alternate line haul carrier would be a Class II or Class III rail carrier, other than Class II or Class III carriers that are affiliated companies of a Class I carrier. To allow an unaffiliated Class II or Class III rail carrier to serve as an alternate line haul carrier would raise a question of fairness in applying part 1145; a Class I railroad could lose its line haul to a Class II or Class III carrier under part 1145, but the Class II or Class III carrier would not be subject to the same possibility under part 1145. This determination is not meant to address whether a shipper could seek prescription of a reciprocal switching agreement under part 1144 or

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[108] To the extent a regulation would permit a switch involving an affiliated company, BMWE argues that the Board should limit the meaning of ''affiliated company'' to subsidiaries or affiliates that are themselves Class I railroads (or are covered by a Class I railroad collective bargaining agreement). (BMWE Comments 4.) BMWE's argument, however, seems to stem from its belief that a Class II or Class III railroad would participate in a switch over the tracks of a Class I railroad or operate over the tracks of a Class I railroad. (*Id.*) BLET also raises concerns about Class II and Class III railroads operating on Class I lines and how that could infringe on collective bargaining rights, (BLET Comments 3), but these organizations' concerns seem to relate to trackage rights rather than reciprocal switching. The Board notes, however, that the Board may impose employee protective conditions on a reciprocal switching order under 49 U.S.C. 11102(c)(2).

[109] ASLRRA also explains that a reciprocal switching prescription resulting in the loss of revenue from even one customer could be financially difficult for short lines because of their light density operations, high infrastructure costs, and smaller number of customers. (ASLRRA Comments 4.) However, if an independent Class II or independent Class III rail carrier is providing poor service, shippers can seek relief under parts 1146 and 1147.

[110] As to PCA's concern that the final rule will create perverse incentives for Class I rail carriers to include a short line as their agent to avoid the rule altogether, the Board finds that scenario unlikely. However, the Board would consider such arguments if they were more developed based on a specific situation.

[111] VPA asks that the Board clarify the definition of ''affiliated companies'' to specifically include belt railroads in which a Class I carrier has controlling authority.'' (VPA Comments 8.) Nothing on the face of the definition excludes belt line railroads, where other conditions in the definition are met. A separate question—one to be addressed on a case-by-case basis, based on the facts of the case at hand—is whether the Board could prescribe a reciprocal switching agreement that would require a belt line railroad to switch traffic with a given Class I carrier.

part 1147 where the alternate carrier would be a Class II or Class III rail carrier.

Labor

AAR suggests that the *NPRM* is unclear on how labor's interests would be taken into account and who would bear the cost of labor protection requirements. (AAR Comments 94.) AAR asserts that, if the Board does not address those matters in this proceeding, it should do so in individual cases. (*Id.* at 95.) Labor interests also raise concerns about reciprocal switching prescriptions. For example, TTD asserts that reciprocal switching can interfere with labor agreements in some cases and cause the dislocation of existing operating employees. (TTD Comments 1.) SMART–TD also expresses concern about the specifics of how reciprocal switching prescriptions would work within the boundaries of its long-established collectively bargained agreements, and how it could be done without treading on the seniority rights that have long been established in the industry's workforce. (SMART–TD Comments 2.)

The Board appreciates these concerns but does not anticipate that the prescription of a reciprocal switching agreement would frequently conflict with the scope clauses of a collective bargaining agreement. Under 49 U.S.C. 11102(c)(2), the Board may require a prescribed agreement to contain provisions for the protection of the interests of affected employees. The Board will consider on a case-by-case basis whether any such provision is appropriate based on the facts of that case.

Environmental Matters

CSXT argues that the potential additional car handlings, yard activity, and transit delays from a Board-ordered switch could lead to more emissions and environmental impacts.[112] (CSXT Comments 48.) It asserts that declines in network efficiency due to more switching could also push traffic to trucks. (*Id.* at 48–49.) CSXT further argues that switching could also alter traffic patterns for toxic by inhalation/poisonous by inhalation (TIH/PIH) traffic or prompt high-volume shippers to add significant new traffic to alternative routes, which could trigger the Board's thresholds for environmental review. (*Id.* at 49.) It claims that the Board should require environmental documentation for switching with the potential to create significant environmental effects pursuant to 49 CFR 1105.6(d).

Environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4370m-11, for operational changes is only required where the Board's thresholds for environmental review would be met. The thresholds for assessing environmental impacts from increased rail traffic on rail lines are an increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains per day. 49 CFR 1105.7(e)(5)(i). For rail lines located in areas that are in nonattainment status under the Clean Air Act (42 U.S.C. 7401–7671q), the threshold for air quality analysis is an increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least three trains per day. 49 CFR 1105.7(e)(5)(ii). Here, however, the Board doubts that a shipper choosing to reroute its traffic to an alternate carrier based on a Board prescription would result in enough rerouted traffic to reach any of these thresholds. Most switches would likely involve additional cars per day rather than additional trains per day.[113] Moreover, because a prescription under this rule would ''involve interchange between two carriers,'' it would be ''closely analogous'' to an order providing for the common use of rail terminals, which is categorically excluded from environmental review under 49 CFR 1105.6(c)(3). *Cape Cod & Hyannis R.R.—Exemption from 49 U.S.C. Subtitle IV,* FD 31229, slip op. at 2 (ICC served Mar. 25, 1988).[114]

For these reasons, the Board will not require specific environmental documentation for proceedings under part 1145 unless a showing is made in a particular case that there is enough potential for environmental impacts to warrant an environmental review. *See* 49 CFR 1105.6(d). Nevertheless, petitioners bringing cases under part 1145, and/or alternate carriers, should address whether environmental review may be needed under § 1105.7(e)(5) at the outset of the proceeding if they have reason to believe the case has the potential for environmental impacts.

Environmental Review

The final rule is categorically excluded from environmental review under 49 CFR 1105.6(c).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop. Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The final rule is directed at Class I railroads and their affiliated companies. As such, the regulations will not impact a substantial number of small entities.[115] Accordingly, pursuant to 5 U.S.C. 605(b), the Board again certifies that the regulations will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

[112] CSXT does not contest that the rulemaking itself is categorically excluded from environmental review. *See NPRM,* 88 FR at 63911 (citing 49 CFR 1105.6(c)).

[113] The Board also doubts that there would be an increase in truck traffic based on prescriptions under part 1145. As discussed in Performance Standards, a number of shippers seeking reciprocal switching reform do so because poor rail service forces them to ship by truck. The better service that could be created by a prescription could therefore lead to less truck traffic, as shippers that experienced rail service problems gain a new rail alternative. And, while CSXT raises concerns about TIH/PIH traffic, as noted in the Practicability section, carriers will be handling traffic subject to existing safety and health regulations. FRA itself, who will be served with all petitions, notes that, in general, it does not foresee safety concerns with reciprocal switching. (DOT/FRA Comments 3 n.3.)

[114] Indeed, the Board may explore whether to propose revising its environmental regulations specifically to include prescriptions made under part 1145 as categorically excluded from environmental review under 49 CFR 1105.6(c).

[115] For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a ''small business'' as including only those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016). Class III rail carriers have annual operating revenues of $46.3 million or less in 2022 dollars. Class II rail carriers have annual operating revenues of less than $1.03 billion but more than $46.3 million in 2022 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Ann. Operating Revenues of R.Rs.,* EP 748 (STB served June 29, 2023).

Paperwork Reduction Act

The Board sought comments in the *NPRM* pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3) about the impact of the collection for the Reciprocal Switching for Inadequate Service Regulations (OMB Control No. 2140–00XX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described in Appendix B, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. *NPRM,* 88 FR at 63911–12.

In the *NPRM,* the Board estimated that the proposed requirements would add an hourly annual burden of 2,564 hours for six respondents, all Class I railroads. *NPRM,* 88 FR at 63916–17. This estimate consisted of the cumulative total of five types of filings required to collect information and allow the Board to implement the reciprocal switching regulations under part 1145. First, the Board anticipated that the requirement for the Class I railroads to update their internal data collections systems in order to standardize and harmonize them with the proposed reporting requirements would add an estimated total one-time hourly burden of 480 hours across all six Class I rail carriers. *NPRM,* 88 FR at 63912, 63916. Second, the weekly reports on service reliability and industry ISP were estimated to require an annual hour burden of approximately 1,248 hours. *NPRM,* 88 FR at 63916. Third, requests for individualized service data by shippers or receivers were estimated to require approximately 36 hours. *NPRM,* 88 FR at 63912, 63916. In calculating this estimate, the Board assumed that the Class I rail carriers could provide this information by making a minimal number of selections within a computer program once their systems had been updated. Fourth, petitions to initiate a reciprocal switching agreement were estimated to require approximately 700 hours, and fifth, the petitions to terminate a prescription were estimated to require about 100 hours. *NPRM,* 88 FR at 63912, 63916.

The Board received comments from AAR and a number of carriers addressing the Board's burden analysis for two types of collections of information under the PRA.

First, UP challenges the *NPRM*'s estimate of 480 hours (80 hours per carrier) for the ''one-time update to data collection software to standardize with the Board's data definition for service reliability and industry spot and pull.'' As noted above in the Implementation section, UP estimates that between one and two years would be required to complete the design, programming, and testing of such systems before they could be implemented. (UP Comments 18.) Similarly, as also discussed in that section, CSXT contends that ''designing and implementing such a platform could take a year.'' (CSXT Reply 16.) As a result, both carriers argue that the required system updates will constitute a significant undertaking, estimating broadly one to two years of burden hours as opposed to the 480 hours estimated in the *NPRM.*[116]

For the reasons explained in the Implementation section, the Board disagrees with UP's stated concern that an entirely new system will be needed to meet the reporting requirements of this rule and similarly disagrees with CSXT's assertion that it will take a year to update its existing software. It is true that the new rule creates a standardized definition of OETA for purposes of part 1145. But, because the railroads' systems already have the code in place to measure OETA (under the demurrage definition), the new definition of OETA should require limited changes to their system codes. Therefore, to meet the new rules, the only change that should be required is an update to the OETA and ISP definitions within the railroads' existing software.

In their conclusory claims about the need for extreme alternatives—creating a whole new system or engaging in a year-long software update—UP and CSXT fail to provide a reasonable basis for the Board to update its estimate of hourly burdens based on either carrier's actual system requirements. Even so, upon further consideration, the Board recognizes that the update of definitions may require more time to edit, test, and implement than estimated in the *NPRM.* For example, the Board recognizes that the change will require some coding, testing, and validity checks upon updating their current software, and that the estimates in the *NPRM* may not have accounted for some of the complexities raised by UP and other railroads. Thus, the Board will revise estimates upwards to reflect that additional complexity. The estimated one-time hourly burden for an update to the carriers' systems will increase from 480 hours (80 hours per carrier) to 1,440 hours (240 hours per carrier). *See Table—Changes in Total Burden Hours from the NPRM to Final Rule.*[117]

Second, CN, CSXT, and UP challenge the data disclosure requirement of proposed § 1145.8(a) (concerning shipper/receiver requests for data from railroads) as vague and overly broad. (CN Comments 35; CSXT Comments 39; UP Reply 3; *see also* CPKC Comments 2 (claiming that its systems are not set up to generate shipper and commodity-specific lane-by-lane statistics but not providing hourly burden data).) As proposed, this information collection would require Class I rail carriers to respond to requests for individualized service data from shippers and receivers. The Board addresses the railroads' broad arguments in the Data Production to an Eligible Customer section and is modifying those requirements.

AAR contends that the estimates in the *NPRM* significantly underestimate the burden to Class I carriers of responding to requests for data from shippers and receivers. (AAR Comments 110.) AAR fails to provide specific hourly estimates to support its contentions, and there is also little or no data in the carriers' comments to support what hourly burden might be required. At the same time, in the adopted regulations, the Board is modifying the data disclosure requirements that were proposed in § 1145.8(a) to make the written data request more limited and specific. These modifications should address AAR's concern about workload burden. In addition, out of an abundance of caution, the Board will increase its estimate of the annual number of written data requests to 72 (12 per carrier) and its estimate of the hourly burden per request to 16 hours. The total estimate for written requests is

[116] Despite UP's and CSXT's general estimate that the proposed rule will take them one to two years to implement, the railroads fail to provide a specific estimate of burden hours.

[117] In *Demurrage Billing Requirements,* the Board recognized a similar one-time burden, which included the time Class I carriers would need to undertake the software redesign necessary to provide minimum information to be included on or with Class I carriers' demurrage invoices. *See Demurrage Billing Requirements,* EP 759, slip op. at 34–35. While the Board estimated a burden of 80 hours per respondent in that case, the Board recognizes that the one-time update in this reciprocal switching rule may pose a greater level of complexity. As noted, the individual burden per carrier is being adjusted to 240 hours, for a total of 1440 hours.

therefore increased to 1,152 hours. *See Table—Changes in Total Burden Hours from the NPRM to Final Rule.*

TABLE—CHANGES IN TOTAL BURDEN HOURS FROM THE NPRM TO FINAL RULE

Type of Filing	NPRM	Final Rule
	Total burden hours	Total burden hours
One-time update to data collection software to standardize with the Board's data definition for service reliability and ISP	480	1,440
Weekly reporting on service reliability and ISP (new 49 CFR 1145.8(b))	1,248	1,248
Written request identifying the specific 12-week period and lane and response to request for individualized service data (new 49 CFR 1145.8(a))	36	1,152
Petition for Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.5)	700	700
Petition to Terminate Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.7)	100	100
Total Burden Hours	2,564	4,640

This collection, along with the comments from AAR and the railroads and the Board's response, will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. That submission will also address the comments discussed above as part of the PRA approval process.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

Table of Commenters

Alliance for Chemical Distribution ACD
American Forest & Paper Association and the Institute of Scrap Recycling Industries AF&PA/ISRI
American Fuel & Petrochemical Manufacturers AFPM
American Petroleum Institute API
American Short Line & Regional Railroad Association ASLRRA
Association of American Railroads AAR
U.S. Senators Baldwin and Capito
Brotherhood of Locomotive Engineers and Trainmen BLET
Brotherhood of Maintenance of Way Employes Division/IBT, et al. BMWE
BNSF Railway Company BNSF
Canadian National Railway Company CN
Canadian Pacific Kansas City Limited CPKC
Cargill, Incorporated Cargill
Celanese Corporation Celanese
The Coalition Associations Coal. Ass'ns [118]
Commuter Rail Coalition CRC
CSX Transportation Company, Inc. CSXT
Diversified CPC International, Inc. DCPC
U.S. Department of Transportation and the Federal Railroad Administration DOT/FRA
The Dow Chemical Company Dow
Essential Minerals Association EMA
Freight Rail Customer Alliance and the National Coal Transportation Association FRCA/NCTA
Glass Industry Supply Chain Council GISCC
Glass Packaging Institute GPI
International Warehouse Logistics Association IWLA
Lyondell Chemical Company, et al. LyondellBasell
Metrolink Metrolink
National Grain and Feed Association NGFA
National Mining Association NMA
National Stone, Sand, and Gravel Association NSSGA
Dr. James Nolan
Norfolk Southern Railway Company NSR
Olin Corporation Olin
Portland Cement Association PCA
Private Railcar Food and Beverage Association, Inc. PRFBA
Michael Ravnitzky Ravnitzky
Transportation Division of the International Association of Sheet Metal, et al. SMART–TD
Transportation Trades Department, AFL–CIO TTD
Union Pacific Railroad Company UP
United States Department of Agriculture USDA
Virginia Port Authority VPA
Western Coal Traffic League WCTL

[118] The Coalition Associations include the American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League. The Board refers to these organizations as the Coalition Associations except when citing to one of their filings.

List of Subjects in 49 CFR Part 1145

Common carrier, Freight, Railroads, Rates and fares, Reporting and recordkeeping requirements, and Shipping.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register**.

2. This decision is effective on September 4, 2024.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER PRIMUS, concurring:

The final rule adopted today is unlikely to accomplish what the Board set out to do under the statute's authorization of reciprocal switching that is ''practicable and in the public interest.'' *See* 49 U.S.C. 11102(c). And, despite my urging, the Board is not taking action to improve access to the statute's other prong, addressing reciprocal switching that is ''necessary to provide competitive rail service.'' *Id.* I am voting for the final rule because something is better than nothing. But there is far less ''something'' here than I had hoped there would be.

This final rule relies on service performance standards, which the incumbent carrier must fail during a 12-week period before a petitioner can seek a reciprocal switching order. The *NPRM* requested comment as to whether the Board may consider performance data based on service provided under a contract. *NPRM,* 88 FR at 63909. In this way, the *NPRM* left open the possibility that a petitioner would already know, before taking any steps towards filing its petition (aside from requesting the data), that 12 weeks of data are available to demonstrate failure under one of the performance standards.

The same is not true, however, with respect to the final rule. A large proportion of rail traffic moves under contract, and the final rule establishes that the Board will not prescribe a reciprocal switching agreement under part 1145 based on performance that occurs during the term of a contract. *See* 49 U.S.C. 10709. In other words, a customer receiving substandard service under a contract cannot seek relief under part 1145. A prospective petitioner would instead need to shift from transportation under a contract to transportation under a tariff and then

receive 12 weeks of substandard service before it could seek relief. Changing from contract to tariff transportation is something that rail customers generally prefer to avoid, as tariff rates can be substantially higher than contract rates. *See, e.g.,* Occidental Chem. Corp. Comments 2–3, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715; PPG Indus., Inc. Comments 3–4, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715.

A would-be petitioner under the final rule could incur this ''tariff premium'' indefinitely; 11 weeks into the customer's payment of tariff rates, for example, the carrier's average performance for the period could move above the threshold before falling again. Depending on the magnitude of this blip in the data, the 12-week period could effectively begin again. Rather than incurring the costs of tariff transportation indefinitely—before knowing whether a reciprocal switching petition is even a possibility—I expect contract customers will simply avoid trying to use part 1145.[1]

The decision opines that, ''if the rule can achieve its objectives with respect to common carrier traffic, this would make it worthwhile.'' As the decision acknowledges, however, only a small percentage of traffic moves in common carrier service. And part 1145 does not even apply to all common carrier traffic; the traffic must also be non-exempt, among other requirements.[2] Because the decision ''clarifies that [the Board] will not rely on pre-revocation performance as the basis for a prescription of a reciprocal switching agreement under this rule,'' customers whose transportation is exempt will face obstacles similar to those of contract customers should they wish to seek reciprocal switching. Such a customer would need to obtain partial revocation of the exemption—litigation that may be costly and time-consuming in itself, given the Board's statement that ''parties would be allowed to present counterbalancing evidence to demonstrate why partial revocation would not be warranted'' [3]—before potentially usable performance data even begins to accrue. Similar to contract customers, a customer who litigates and wins a partial revocation would do so unaware of whether it would ever become eligible to file a petition attempting to obtain reciprocal switching.

I disagree with the conclusion that aiming so low is worthwhile, given that the Board could have implemented the public interest prong without the deterrent effect I have described. *See 2016 NPRM,* slip op. at 17–18 (proposing a ''practicable and in the public interest'' test that did not require 12 weeks of performance data). And that is not to mention the fact that the Board is ''choosing to focus reciprocal switching reform on service issues at this time,'' while deferring to some uncertain future date any action on the competitive rail service prong. *Cf. id.,* slip op. at 19, 21–23 (proposing a ''necessary to provide competitive rail service'' test).

Contrary to an assertion in the decision above, the final rule therefore does not provide most rail customers with a reasonably predictable and efficient path toward a prescription under section 11102(c). I also do not share the optimism reflected in the decision's expectation that part 1145 will be a significant step in incentivizing Class I railroads through competition to achieve and maintain higher service levels on an ongoing basis. Rather, the Board's action is likely to have far less benefit than it intends.

This is a missed opportunity. Almost 13 years after the National Industrial Transportation League filed its petition for rulemaking with regard to reciprocal switching, the Board is adopting rules that do nothing with respect to the statute's competitive rail service prong and may not do very much under the public interest prong. We should do more, we should do better, and we should do it without letting another decade pass.

Jeffrey Herzig,

Clearance Clerk.

Final Rule

■ For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, of the Code of Federal Regulations by adding part 1145 to read as follows:

PART 1145—RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Sec.

Authority: 49 U.S.C. 1321 and 11102

§ 1145.1 Definitions.

The following definitions apply to this part:

Affiliated companies has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

Cut-off time means the deadline for requesting service during a service window, as determined in accordance with the rail carrier's established protocol.

Delivery means when a shipment is actually placed at a designated destination or is constructively placed at a local yard that is convenient to the designated destination. In the case of an interline movement, a shipment will be deemed to be delivered to the receiving carrier or its agent or affiliate when the shipment is moved past a designated automatic equipment identification reader at the point of interchange or is placed on a designated interchange track, depending on the specific interchange that is involved. For purposes hereof, constructive placement of a shipment at a local yard constitutes delivery only when:

(1) The recipient has the option, by prior agreement between the rail carrier and the customer, to have the rail carrier hold the shipment pending the recipient's request for delivery to the designated destination and the recipient has not yet requested delivery; or

(2) The recipient is unable to accept delivery at the designated destination.

Designated destination means the final destination as specified in the bill

[1] The decision refers to concerns that this process will be ''cumbersome,'' a term that understates the final rule's expectation that prospective petitioners would pay the ''tariff premium'' for an undetermined period of time based on a chance that they might eventually become eligible to file a petition that attempts to secure reciprocal switching. (*See* Coal. Ass'ns Comments 13 (''[I]f the Board could not consider rail performance metrics for contract transportation, that effectively would neutralize the use of reciprocal switching to address the adequacy of rail service, given the large proportion of rail traffic that moves pursuant to contracts. A contract shipper currently experiencing service below the service thresholds in the proposed rules would have to wait for its contract to expire and then ship pursuant to tariff rates while waiting to see if its service improves.''); Coal. Ass'ns Reply 5–6, 47–52 (reiterating these concerns and asking the Board to reopen Docket No. EP 711 (Sub-No. 1)—the docket containing the *2016 NPRM*).)

[2] According to the decision, part 1145 is expected to improve network performance overall, which could benefit contract shippers in this interconnected industry. But this speculation—relying, for example, on the idea that the rule will promote the fluidity of shared facilities—loses sight of just how small the pool of potentially eligible traffic will be. As the decision itself points out, ''only a relatively small portion of all Class I movements are even potentially eligible for a prescription under part 1145,'' because the rule excludes not only contract and exempt traffic, but also shippers and receivers that are served by more than one Class I railroad or are outside a terminal area.

[3] The Board's stated intent to prioritize petitions for partial revocation filed in furtherance of part 1145 cases will have limited effect if the counterbalancing evidence, permitted under today's decision, is sufficiently voluminous or complex.

of lading or, in the case of an interline movement, the interchange where the shipment is transferred to the receiving carrier, its agent, or affiliated company.

Incumbent rail carrier means a Class I rail carrier that currently provides line-haul service to the petitioner to or from the point of origin or final destination that would be covered by the proposed reciprocal switching agreement.

Lane means a shipment's point of origin and designated destination. Shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane, regardless of which route(s) the rail carrier uses to move the shipments from origin to destination. In the case of an interline movement, the designated destination is the designated interchange.

Manifest traffic means shipments that move in carload or non-unit train service.

Original estimated time of arrival or *OETA* means the estimated time of arrival that the incumbent rail carrier provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from a delivering carrier.

Petitioner means a shipper or a receiver that files a petition hereunder for prescription of a reciprocal switching agreement.

Planned service window means a service window for which the shipper or receiver requested local service, provided that the shipper or receiver made its request by the cut-off time for that window.

Practical physical access means a feasible line-haul option on a rail carrier, including but not limited to: direct physical access to that carrier or its affiliated company; an existing switching arrangement between an incumbent rail carrier and another rail carrier; terminal trackage rights; or contractual arrangement between a local rail carrier and a line-haul carrier.

Receipt of a shipment means when the preceding rail carrier provides a time stamp or rail tracking message that the shipment has been delivered to the interchange.

Reciprocal switching agreement means an agreement for the transfer of rail shipments between one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company within the terminal area in which the rail shipment begins or ends its rail journey. Service under a reciprocal switching agreement may involve one or more intermediate transfers to and from yards within the terminal area.

Service window means a window during which the incumbent rail carrier offers to perform local service (placements and/or pick-ups of rail shipments) at a shipper's or receiver's facility. A service window must be made available by a rail carrier with reasonable advance notice to the shipper or receiver and in accordance with the carrier's established protocol. For purposes of this part, a service window is 12 hours in duration, beginning at the start of the work shift for the crew that will perform the local service, without regard to whether the incumbent rail carrier specified a longer or shorter service window.

Shipment means a loaded railcar that is designated in a bill of lading.

Similar traffic means traffic that is of the same broad type (manifest traffic or unit train) as the traffic that is governed by a prescribed reciprocal switching agreement, and is transported by the incumbent rail carrier or its affiliated company to or from the terminal area in which transfers occur under the prescribed reciprocal switching agreement.

Terminal area means a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards. A point of origin or final destination on the rail system must be within a terminal area to be eligible for a prescription under this part.

Time of arrival means the time that a shipment is delivered to the designated destination.

Transit time means the time between a rail carrier's receipt of a shipment, upon either the tender of the bill of lading to that rail carrier or the rail carrier's receipt of the shipment from a delivering carrier and the rail carrier's delivery of that shipment to the agreed-upon destination. Transit time does not include time spent loading and unloading cars.

§ 1145.2 Performance standards.

The performance standards in this section apply only to petitions for prescription of a reciprocal switching agreement under this part.

(a) *Service reliability (original estimated time of arrival).* The service reliability standard applies to shipments that travel as manifest traffic. The service reliability standard measures a rail carrier's success in delivery of a shipment from its original or interchange location by the original estimated time of arrival, accounting for the applicable grace period. Determination of a rail carrier's compliance with the service reliability standard is based on all shipments from the same original or interchange location to the same delivery location over a period of 12 consecutive weeks. A rail carrier meets the service reliability standard when *A/B* ratio is greater than or equal to 70%, where *A* is the number of shipments that are delivered within 24 hours of the original estimated time of arrival, and *B* is the total number of shipments.

(1) A car that is delivered more than 24 hours before or after its OETA will not be considered as being delivered within 24 hours of OETA.

(2) Once a carrier has communicated an original estimated time of arrival to a customer, that time will not be changed by any subsequent changes to the original trip plan of the car, no matter what the cause of the changed trip plan may be.

(b) *Service consistency (transit time).* The service consistency standard applies to shipments in the form of a unit train and to shipments that travel as manifest traffic. The service consistency standard measures a rail carrier's success over time in maintaining the transit time for a shipment. A rail carrier fails the service consistency standard if it fails either the standard in paragraph (b)(1) of this section or the standard in paragraph (b)(2) of this section, with both paragraphs being subject to paragraph (b)(3) of this section.

(1) *Year-to-year comparison. A* is more than 20% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year.

(2) *Multi-year comparison. A* is more than 25% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during any of the previous three years.

(3) A carrier will not fail the service consistency standard if the increase in

transit time between *B* and *A* is 36 hours or less, notwithstanding the percentages stated in paragraphs (b)(1) and (b)(2) of this section.

(c) *Lanes.* Compliance with the performance standards in paragraphs (a) and (b) of this section is determined separately for each lane of traffic to or from the petitioner's facility. Shipments of the same commodity from the same point of origin to the same designated destination are deemed to travel over the same lane, without regard to the route between the point of origin and designated destination. In the case of an interline movement, the designated destination is the designated interchange.

(d) *Empty railcars.* (1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in paragraph (b) of this section if the rail carrier's average transit time for delivering empty cars to a designated destination over a 12-week period increases by more than 20% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period during the previous year or by more than 25% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week periods during any of the previous three years. However, notwithstanding the previous sentence, a carrier will not fail the service consistency standard if the increase in average transit time for delivering empty cars is 36 hours or less.

(2) A rail carrier's failure to meet a performance standard as provided in this paragraph (d) provides the basis for prescribing a reciprocal switching agreement that governs both the delivery of the empty cars and the delivery of the associated shipments of loaded cars.

(e) *Industry spot and pull.* The industry spot and pull standard measures a rail carrier's success in performing local placements (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window. The industry spot and pull standard does not apply to unit trains or intermodal traffic.

(1) A rail carrier meets the industry spot and pull standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 85% or more in performing requested spots and pulls within the planned service window, as determined based on the total number of planned service windows during that 12-week period.

(2) Failure to spot constructively placed cars that have been ordered in by the cut-off time applicable to the customer for a planned service window is included as a failure in calculating compliance with the industry spot and pull standard.

(3) Failure to spot ''spot on arrival'' railcars for a planned service window results in a missed service window only if the railcars arrived at the local yard that services the customer and are ready for local service before the cut-off time applicable to the customer.

(4) If a rail carrier cancels a service window other than at the shipper's or receiver's request, that window is included as a failure in calculating compliance with the industry spot and pull standard.

(5) When a rail customer causes a carrier to miss a planned service window, that window will not be considered a miss in determining the success rate under this paragraph (e).

(6) If a rail carrier reduces the frequency of its local service to a shipper's or receiver's facility, and if rail carrier cannot demonstrate that reduction is necessary based on a commensurate reduction in customer demand, then the industry spot and pull standard increases to a success rate of 90% for two years.

(f) The performance standards in paragraphs (a) and (b) of this section apply to movements within the United States and to the U.S. portion of movements between the United States and another country, in the latter case when the carrier's general practice with respect to such movements is to record receipt or delivery of the shipment at a point at or near the U.S. border (including where the carrier receives the shipment from or delivers the shipment to an affiliated carrier).

§ 1145.3 Affirmative defenses.

An incumbent rail carrier shall be deemed not to fail a performance standard in § 1145.2 if any of the conditions described in this section are met. The Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section.

(a) The rail carrier experiences extraordinary circumstances beyond the carrier's control, including but not limited to unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts. A carrier's intentional reduction or maintenance of its workforce at a level that itself causes workforce shortage, or, in the event of a workforce shortage, failure to use reasonable efforts to increase its workforce, would not, on its own, be considered a defense for failure to meet any performance standard. A carrier's intentional reduction or maintenance of its power or car supply, or failure to use reasonable efforts to maintain its power or car supply, that itself causes a failure of any performance standard would not, on its own, be considered a defense.

(b) The petitioner's traffic increases by 20% or more during the 12-week period in question, as compared to the preceding 12 weeks (for non-seasonal traffic) or the same 12 weeks during the previous year (for seasonal traffic such as agricultural shipments), where the petitioner failed to notify the incumbent rail carrier at least 12 weeks prior to the increase.

(c) There are highly unusual shipments by the shipper during any week of the 12-week period in question. For example, a pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but the shipper had a plant outage for three weeks and then requested shipment of 120 cars in a single week.

(d) The incumbent rail carrier's failure to meet the performance standard is due to the dispatching choices of a third party.

(e) The incumbent rail carrier's failure to meet the performance standard was directly caused by the conduct of a third party. This defense will be narrowly construed to avoid undue delay of the proceeding and unnecessary litigation costs. When presenting a defense under this paragraph (e), the incumbent rail carrier must prove that such conduct was outside its reasonable control. The incumbent rail carrier must also prove that it took reasonable steps to prevent and mitigate the impact of the third-party conduct or, if the impact could not be reasonably prevented, that the incumbent carrier took reasonable steps to mitigate the impact of the third-party conduct.

§ 1145.4 Negotiations.

At least five days prior to petitioning for prescription of a reciprocal switching agreement hereunder, the petitioner must seek to engage in good faith negotiations to resolve its dispute with the incumbent rail carrier.

§ 1145.5 Procedures.

(a) If a shipper or a receiver believes that a rail carrier providing it service failed to meet a performance standard described in § 1145.2, it may file a petition for prescription of a reciprocal switching agreement.

(b) The petition must include the information and documents described in this paragraph (b).

(1) Confirmation that the petitioner attempted good faith negotiations as required by § 1145.4, identify the performance standard the railroad failed to meet over the requisite period of time, identify the requested duration of the prescription of a reciprocal switching agreement, and provide evidence supporting its claim and requested prescription.

(2) Identification of at least one possible rail carrier to provide alternative service.

(3) Identification of any relevant switching publications of the incumbent rail carrier and the potential alternate carrier(s).

(4) A motion for a protective order that would govern the disclosure of data that the rail carrier provided to the petitioner under this part.

(c) The petition must have been served on the incumbent rail carrier, the alternate rail carrier(s), and the Federal Railroad Administration.

(d) A reply to a petition is due within 20 days of a completed petition. The burden of proof of establishing infeasibility and/or undue impairment is on the rail carrier (either the incumbent or the alternate) that is objecting to the petition.

(e) A rebuttal may be filed within 20 days after a reply to a petition.

(f) The Board will endeavor to issue a decision on a petition within 90 days from the date of the completed petition.

§ 1145.6 Prescription.

(a) The Board will prescribe a reciprocal switching agreement under this part if all the conditions in this paragraph (a) are met.

(1) For the lane of traffic that is the subject of the petition, the petitioner has practical physical access to only one Class I carrier that could serve that lane.

(2) The petitioner demonstrates that the incumbent rail carrier failed to meet one or more of the performance standards in § 1145.2 with regards to its shipment.

(3) The incumbent rail carrier fails to demonstrate an affirmative defense as provided in § 1145.3.

(b) Notwithstanding paragraph (a) of this section, the Board will not prescribe a reciprocal switching agreement if the incumbent rail carrier or alternate rail carrier demonstrates that the agreement is not practicable, including: switching service under the agreement, *i.e.,* the process of transferring the shipment between carriers within the terminal area, could not be provided without unduly impairing either rail carrier's operations; switching service under the agreement would be operationally infeasible; or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly impair the incumbent rail carrier or the alternate rail carrier's ability to serve its existing customers. If the incumbent rail carrier and alternate rail carrier have an existing reciprocal switching arrangement in a terminal area in which the petitioner's traffic is currently served, the proposed operation is presumed to be operationally feasible, and the incumbent rail carrier will bear a heavy burden of establishing why the proposed operation should not qualify for a reciprocal switching agreement due to infeasibility.

(c) In prescribing a reciprocal switching agreement, the Board shall prescribe a term of service of three years, provided that the Board may prescribe a longer term of service of up to five years if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.

(d) Upon the Board's prescription of a reciprocal switching agreement under this part, the affected rail carriers must set the terms of the agreement and offer service thereunder within 30 days of service of the prescription and notify the Board within 10 days of when the carriers offered service that the agreement has taken effect. Additionally, the incumbent carrier must promptly amend its switching publication(s) as appropriate to reflect the availability of reciprocal switching under the prescription.

(e) If the affected carriers cannot agree on compensation within 30 days of the service of the prescription, then the affected rail carriers must offer service and petition the Board to set compensation.

§ 1145.7 Termination.

(a) If the incumbent carrier does not timely file a petition for termination, a prescription hereunder automatically renews at the end of the term established under § 1145.6(c). Automatic renewal is for the same term as the original term of the prescription. If the Board denies a petition to terminate the prescription, it will determine, on a case-by-case basis, the appropriate renewal term based on the evidentiary record, not to exceed the original term of the prescription. At the end of the renewal term, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew for the same number of years as the renewed term.

(b) The Board will grant a petition to terminate a prescription if the incumbent rail carrier demonstrates that, for the most recent 12-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met all three performance standards under this part. This requirement includes a demonstration by the incumbent carrier that it has been able to meet, over the most recent 12-week period, the performance standards for similar traffic to or from the relevant terminal area.

(c) The incumbent rail carrier may submit a petition to terminate a prescription not more than 180 days and not less than 150 days before the end of the current term of the prescription.

(d) A reply to a petition to terminate is due within 15 days of the filing of the petition.

(e) A rebuttal may be filed within 10 days of the filing of the reply.

(f) The Board will endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing.

(1) If the Board does not act within 90 days from the close of briefing, the prescription automatically terminates at the end of the current term of the prescription.

(2) If the Board does not issue a decision due to extraordinary circumstances, as determined by the Board, the prescription is automatically renewed for 30 days from the end of the current term. When there are extraordinary circumstances, the Board will issue an order alerting the parties that it will not issue a decision within the required time period. Under such circumstances, the Board will issue its decision as expeditiously as possible.

(3) A prescribed agreement will continue in effect until 30 days after the Board serves a decision that grants a petition to terminate or after the end of the prescription period, whichever is later.

§ 1145.8 Data.

(a) A shipper or receiver with practical physical access to only one Class I carrier serving the lane of traffic for which individualized performance records are sought, and based on a good faith belief that the Class I carrier has provided service that does not meet at least one performance standard from § 1145.2, may submit a written request to the incumbent rail carrier for all individualized performance records relevant to the performance standard(s) the shipper or receiver believes the rail carrier has failed.

(1) In the request to the rail carrier, the shipper or receiver must identify the

specific performance standard(s) that it believes the rail carrier has failed, and the corresponding date range and lane(s).

(2) Within seven days of the written request, the incumbent rail carrier shall provide the shipper or receiver with the requested individualized performance records.

(3) For purposes of this section, ''individualized performance records'' means the original estimated times of arrival, transit times, and/or industry spot and pull records related to the shipper or receiver's traffic, along with the corresponding time stamps.

(b) All Class I carriers shall report to the Board on a weekly basis, in a manner and form determined by the Board, data that shows: the percentage of shipments on the carrier's system that moved in manifest service and that were delivered within 24 hours of OETA, out of all shipments on the carrier's system that moved in manifest service during that week; and, for each of the carrier's operating divisions and for the carrier's overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant division or system for that week, all within the meaning of this part.

(c) Class I carriers shall provide, in the format of their choosing, machine-readable access to the information listed in this section.

(1) *Machine-readable* means data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.

(2) *Open format* is a format that is not limited to a specific software program and not subject to restrictions on re-use.

(d) Class I carriers shall retain all data necessary to respond to a request under paragraph (a) of this section for a minimum of four years.

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