STB Chairman Martin J. Oberman
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Nearly 40 years ago, the ICC issued a rule which had the practical effect of establishing what, to date, has been a high bar for any shipper obtaining a reciprocal switching order. It worked. No reciprocal switching orders have been issued since before 1985, and no shipper has even applied for one since 1989. But life has changed in the last 40 years. The rail network of 1985 is a far cry from that of today, and significant change is overdue.

That change began yesterday. By unanimous vote, the Board took a crucial step to lifting decades old barriers. We broke new ground by providing practical competitive options for captive shippers in an extraordinarily consolidated rail industry.

As you all know, our Board has been steadfastly confronting repeated episodes of severe service deterioration in recent years. We have conducted detailed public oversight hearings focusing on poor service and the overuse of congestion embargoes. Despite the recent service improvements accomplished by Class I carriers, the industry faces continued threats to its ability to provide robust and consistent rail service our economy and national security deserve and require.

For these reasons, the Board has chosen to focus its reform, at present, on making reciprocal switching available to shippers who suffer from inadequate service.

For the first time, the Board has set easy to measure, objective service standards for carriers. There are three:

First, maintaining 70% or better on-time performance. What does this mean? The clock starts ticking when the shipper hands over a bill of lading and it does not stop until the cars are delivered or placed for delivery. This is an important metric because currently, some railroads boast of high percentage of so-called trip plan compliance but the trip plans are frequently changed to account for delays en route. So the car is treated as having complied if it meets the time in the final trip plan even though it may be delivered days after the initial estimated time of arrival was set when the shipper tendered the car. And the railroad must also not deliver the car too early as well as too late in order to meet the original ETA (OETA) metric.

Second, in order to protect against railroad's artificially lengthening the OETA in order to produce a better OETA performance, if a railroad's transit time increases by more than 20% year over year, then the shipper will also become eligible for a switch.

The third metric is that the railroad must maintain at least 85% success on "industry spot and pull" (effectively measuring first mile-last mile service).

Failure by the carrier to meet any of these metrics over a 12-week period will make the shipper eligible for a switch.

In addition—and this is particularly important—for the first time, the Board is mandating that these three service metrics be maintained on a standardized basis across all Class Is. This will permit both rail customers and the Board to accurately measure service across the industry, quickly assess a Class I's performance, and observe how the railroads are performing compared to each other. And carriers must provide each shipper its own performance data within seven days on request.

On the issue of reporting metrics, you may recall that the Board, in continuing the oversight started as a result of our Urgent Issues hearing in April 2022, recently eliminated reporting on some of those service metrics. One of the reasons is that the new reciprocal switching rule requires standardized metrics of OETA, transit time, and Industry Spot and Pull.

In my view, these new metrics will be more useful to all stakeholders and to the Board. And if they are not sufficient, the Board can re-visit requiring additional reporting in the future.

The Board is also allowing a carrier whose service fails the standard to prove that the failure was caused by forces beyond its control, though the new rule underscores that the railroad's intentional reduction of its workforce levels and/or equipment availability (particularly locomotives) will not excuse poor service and will not defeat a petition for reciprocal switching.

Finally, to make sure that there will be commercial practicality for both the shipper and the potentially competing railroad, reciprocal switching orders will be for a minimum of three years and a maximum of five years. These time periods can be renewed if the incumbent carrier fails to show that its service performance can meet the service standards, or simply chooses not to seek a termination of the switching order.

I want to emphasize that, under this rule, the incumbent carrier will not be excluded. When a shipper has obtained a reciprocal switching order from the Board, the current carrier is more than free to compete to retain that shipper's business by improving its performance behavior and trying to keep the shipper from choosing—that is, "switching to"—the competing railroad.

This competition between the incumbent and alternate carrier is central to the operation of the rule. It allows the introduction of competition—where there was none before—to incentivize better rail service.

In my view, the most significant advantage to the new pragmatic approach will be the ease and speed of obtaining a switching order from the Board. Compared to existing rules and earlier reform proposals, the litigation process under the new rule will be much cheaper and faster. Rather than attempting to apply subjective and largely ill-defined criteria to a switching petition, the threshold for success under the new rule will be an easily ascertainable measure, e.g., either the carrier has provided an average of 70% or better on time performance over a 12-week period or it did not. The numbers will tell the story. The framework here—both the objective service standards and the narrowly construed potential carrier defenses—holds down needless litigation costs and delay.

For all of these reasons, I am confident that shippers who are suffering service below the rule's standards and who are otherwise eligible will have relatively little trouble in obtaining switching orders under this rule.

This is a world of difference compared to the past attempts to change reciprocal switching regulations.

The new rule has resulted from very careful consideration and deliberation by the Board. After decades with no Board-ordered reciprocal switching and steadfast opposition by the rail industry to any change, the Board has chosen an incremental, but nevertheless concrete and substantive change to the competitive landscape—rather than trying to impose a sweeping reform on an industry which doesn't always adapt well to rapid change.

Some stakeholders had urged the Board to pursue a more far-reaching reform—in particular, by applying reciprocal switching to traffic moving under contract. I am sympathetic to that desire. Much of traffic moves under contract, and very few contracts contain service standards.

But, to be clear, the Board is prohibited by statute from applying the new rule to contract traffic. Had the Board attempted to do so, it would almost certainly have resulted in a court challenge that might have undermined the entire effort.

What is important to understand is that even though the new rule is limited to common carrier traffic, the institution of standardized performance standards is intended to, and I am confident will, incentivize Class I railroads to meet these standards because, the railroads tell us, they want to avoid reciprocal switching orders.

That would be great—railroads providing improved service and never falling below the standards so they didn't lose reciprocal switching cases would be good for everyone. Good for the shippers, the economy—and the railroads themselves.

And because of the network nature of rail traffic, particularly with one train often carrying both common carrier and contract traffic, improvements in Class Is' attention to meeting the new service standards should benefit many more shippers than just those who can petition for a reciprocal switch.

Since joining the Board more than five years ago, it has been apparent to me that the lack of competition in the rail industry has allowed monopolistic practices to not only increase rail prices but to severely deteriorate the quality of service. That deterioration has been a real depressant on the nation's economy and threatens our ability to compete in the international market. Less rail service also hampers the effort to control greenhouse gases since rail is so much more environmentally friendly than trucking.

The new reciprocal switching rule provides access to competition where there was none. And most importantly, we are allowing competition between carriers to be the driving force for better service, rather than heavy handed dictates by the Board.

As I have said many times, and as the Board noted in this rule, this is not necessarily the end of the line in enabling more competitive options in the rail industry. Going forward, the Board and stakeholders will have the opportunity to employ reciprocal switching under the new rule in controlled circumstances with objective measurements to evaluate its success.

After making sure that this initial approach is, in fact, being utilized by eligible shippers and is working effectively to accomplish its goals, the Board can use what it has learned from this rule to explore additional opportunities to expand competitive access. And one of the factors which I'm sure will determine what additional measures the Board may consider in the future will be the state of service across the rail network.

And there is good reason for all of us to be on guard to threats to the rail network facing the country at this very moment.

I would have thought that the fiascos of the roll out of precision scheduled railroading (PSR) at CSX back in 2017, combined with the service crisis the STB confronted in 2021 and 2022 which led to our oversight hearings and mandated reporting of service recovery plans, would have been sufficient to have alerted the industry to the pitfalls of obsessing on lowering operating ratio—the worship of the Cult of OR as Tony has dubbed it—and instead focused railroads on better service and growth in carloads, and thereby growth in revenue, and therefore profits as the way to properly reward shareholders for their investments while fulfilling their public obligations, instead of railroads trying to cut their way to profitability, which wiser people than me have warned against.

Indeed, in recent years, there has been much improvement in the way some Class Is are being managed to focus on growth rather than cost cutting, as exemplified by Joe Hinrichs at CSX, Tracy Robinson at CN, Keith Creel at CPKC, Katie Farmer at BNSF, and yes, Alan Shaw at NS.

They have all focused on growth and on keeping their railroads resilient by maintaining resources, both in terms of employees and equipment, to survive the well-known—I should add well known for the past 200 years since railroads were invented—ups and downs in the rail industry. Whether those challenges result from a falloff in traffic because of the economy or a pandemic, or are driven by natural disasters, bridges burning down, or polar vortexes.

In order for railroads to maintain service and their obligations to both their customers and the public, they cannot operate with only enough people and locomotives to meet the needs of the moment when the sun is shining and there are no problems.

But we are now confronting a situation where one group is either completely ignorant of these recent past lessons or has willfully chosen to ignore them in an effort to make a quick buck. Of course, I am talking about the proxy battle initiated and being fiercely—I might even say viciously—waged by Ancora against the current leadership of Norfolk Southern.

A battle that is coming to a head in the next nine days.

It's not my position to urge shareholders how to vote in this election. It **<u>is</u>** my responsibility to call out serious threats to the national rail network.

And everything about Ancora's campaign should cause serious concerns to all rail stakeholders. I do not have time to get into a detailed analysis of the many claims that Ancora and NS have been making in recent days, and others have already done that with considerable expertise. Notably, neutral Wall Street observers have found Ancora's analysis of NS data is—let's say—less than forthright. They have found so many misleading statements as to cast doubt on the overall integrity of Ancora's claims. I will leave it to others to make the final judgment on those issues.

What I have focused on is whether there is anything that Ancora is promoting that will fulfill national rail policy. I have read almost everything Ancora has said about its plans for NS. I find almost nothing in their plans about how they will obtain better service or actually grow their number of carloads. What they focus on is a claim that NS carries too much intermodal traffic and not enough manifest traffic. They want to de-emphasize intermodal—for only one reason. Manifest traffic is carried at a lower OR than intermodal.

Not that intermodal isn't profitable. It's just not as profitable, Ancora says, to make their shareholders richer faster. This is a short-sighted strategy which cannot be sustained in the long run.

Apparently Ancora is unaware of changes in the railroad industry over the last 20 years. It has become abundantly clear that the future of growth in the railroad industry will be in intermodal. Indeed, intermodal now accounts for about 50% of all rail traffic, and that is where the growth is.

One need look no further than the insightful analyses of Oliver Wyman—which no knowledgeable railroader has ever contested—which has repeatedly shown that if railroads continue on the pace they've been of losing intermodal volumes to trucks, railroads will leave $177 billlion dollars in revenue on the table between now and 2030. If railroads just hold on to their current percentage of intermodal, they will keep that $177 billion. But most importantly, if they simply employ their existing capacity, they can not only keep the $177 billion but add an additional $61 billion in intermodal by 2030. And that is profitable traffic.

Importantly, intermodal presents the greatest opportunity for growth, for moving trucks off the highway, and to replace the coal volumes which will continue to diminish. Some railroads—led particularly by BNSF and CPKC—have gotten that message and they are well into implementing strategies to dramatically grow intermodal.

Ancora's constant complaint is that NS focuses too heavily on growing intermodal, and Ancora plans to de-emphasize intermodal and look for some other traffic. Ancora appears to be operating on a different planet, or perhaps on a planet that is long long ago and far, far away.

Rather than detailing plans for adding carloads to the railroad, what you find in the endless pages of Ancora's presentations are detailed spreadsheets how they are going to cut, cut, cut resources and how fast their OR is going to come down in the next few years if they prevail.

Two of their assertions have most concerned me. At the recent STB service hearings, every stakeholder in the industry—railroads, shippers, and very importantly rail labor—emphasized that the fundamental cause of the service meltdowns has been a lack of employees and a lack of resiliency.

While I'm mentioning labor, I have noted that at every NAR, MARS, NEARS, SWARS, and SEARS conference I've spoken at, you never have speakers from rail labor. I think you're all missing out on important perspectives on the industry, and I urge you going forward to invite rail labor to your conferences to educate you on their perspective on industry issues. You will learn a lot.

The STB's oversight since that time has been to require the railroads to report on their progress in rebuilding their workforces and their service recovery plans.

And no one has made more progress in building a resilient railroad than NS, so that it will be able to handle the growth in traffic as the economy returns, which is inevitable in the foreseeable future for many reasons—including the movement of manufacturing back into the western hemisphere through re-shoring and onshoring.

But Ancora has missed the boat on resiliency. Indeed, its attack on NS is centered on its view that resiliency is a huge mistake and needs to be eliminated. Perhaps the single most significant statement from Ancora showing its near total ignorance of what is required came recently from its candidate to become the new NS CEO who used to run UPS.

He said that UPS used to hire 100,000 employees to handle holiday traffic but it always let them go because it didn't need all those people year round, and he could always find new employees at the next holiday season. No doubt. He says this is the wisdom he would apply at NS to end the drive towards resiliency.

But he has missed Railroading 101. As NS and all other railroads have pointed out, in the railroad industry, new employees are tightly screened and then require anywhere from three to six months of training. And most importantly, each new employee costs NS about $50,000 in training expenses. The same is generally true throughout the industry.

I doubt UPS would be in business if its 100,000 holiday employees cost $50,000 each year before they could work. Indeed, with due respect to the hard-working folks at UPS, it just doesn't take as much skill and training to load a cardboard carton into the back of a van as it does to drive a locomotive or handle complex rail car movements in a yard.

But what troubles me even more is the recent statement by Ancora's candidate to become the next Chief Operating officer, Mr. Boychuck. Just two weeks ago he told a group of investors, "what we really need to do is to really take it down to the studs." Ever since, I've been trying to figure out exactly what Mr. Boychuk means.

At the STB, we very carefully monitor performance at all the Class Is and we are in regular communication with top management of shippers and railroads. Not once in the five years I've been on the board have I heard anything about any railroad needing to be taken down to the studs.

Perhaps Mr. Boychuk has invented an entirely new approach. So, I looked for it in his experience. Ancora promotes Mr. Boychuk as having worked directly under "industry legend Hunter Harrison" in 2017 where, Ancora claims, he "implemented PSR, beginning with a full network and service plan redesign."

Actually, Ancora's presentations says Mr. Boychuk "worked with" Hunter Harrison, which only goes to prove that Ancora has no understanding of Hunter Harrison.

How did that work out?

What Ancora doesn't tell us is that the abrupt radical changes across the CSX network beginning in the spring of 2017—apparently led by Mr. Boychuk by his own claims—caused immediate and catastrophic consequences to customers, other railroads, the CSX workforce, and the public.

CSX's customers were forced to endure costly plant shutdowns, curtailment of production, exorbitant expenses to secure emergency transportation by other modes, and disruption of existing commercial relationships. CSX's missteps even threatened public health due to delayed delivery of purification chemicals for municipal water supplies.

Both Congress and the STB responded with increased oversight.

To me, the best predictor of what a person will do in the future is what he has done in the past. So I think the fear of an Ancora takeover of the entire or even a majority of the NS board and the installation of Mr. Boychuk to take NS down to its studs is real. At a minimum, based on actual history with Mr. Boychuk's approach, we at the STB and the industry at large would be foolish to assume there's nothing to worry about.

And it's not hard to understand why that might happen. Based on the STB's documenting the massive reductions in workforce at the Class Is as leading directly to the major service deterioration which ultimately caused significant harm to the US economy, the number one focus is on employees.

So let's put the "cutting down to the studs" in the context of employment. At the beginning of 2016, long before the implementation of PSR at NS, NS had approximately 26,000 <u>active</u> employees, the number I think is most important rather than the "total" employee number the railroads have been reporting for years. Since our April 2022 hearings we now require railroads to report on "active" employees, which tells us much more about how many people are actually on the job each day making the railroad run.

From 2016 on, NS, along with all the other Class Is, began steadily cutting their workforce. NS began implementing PSR in 2019 and by early 2020—just before the pandemic—NS had 9,000 fewer employees, or only approximately 17,000 active employees, a shocking 35% reduction. How you can maintain a business with a sudden reduction of 35% of your employees is a mystery to me. And of course, the business was not maintained.

But then, during the first few months of the pandemic, again along with all the other Class Is, NS dramatically cut another 3,000 employees, so that by April 2022, NS had just over 14,000 active employees. A dramatic cut of another 17.5% in just two years.

No wonder the national rail network was in a service crisis.

After the STB issued its service recovery reporting orders in May 2022, NS began to recover, and it has been a leader, with its most recent report to the STB showing 16,475 active employees, a 15% increase over the April 2022 low point.

As positive as this progress has been, NS still has no more employees now than it had at the beginning of the pandemic, which, remember, was 35% fewer employees in 2020 as result of PSR.

So this is the railroad Mr. Boychuk wants to take down to the studs. He doesn't have far to go.

He says he isn't going to fire anyone; he's just going to let the railroad die through attrition by reducing the number of current employees by another 1,750, or nearly 11%. But that will take NS back to just over 14,000 employees, the same number it had in April 2022 when NS and the entire system was in, as one leading Wall Street analyst properly labeled it, a "service crisis."

Keep in mind that NS has calculated that for Ancora to actually reach the OR levels it is promising shareholders, the actual reduction in employees would have to be 2,900. That would leave the railroad with just over 13,000 employees, a level below its worst service performance in recent years. A level which would likely be catastrophic for our economy and all the stakeholders—including other railroads—who depend on NS. Perhaps that's why 80% of shippers recently surveyed indicated that if Ancora' plan goes into effect, they will start moving their business away from NS.

And let's not leave out Mr. Boychuk's plan to cut the number of locomotives. He says NS can reduce its locomotives by 450. NS only has 2,681 locomotives in service, so this is a cut of nearly 17%.

So, boiling down Ancora's takeover plan: their goal of taking it down to the studs is not to rebuild it into the robust railroad needed for our economy, but to leave us with a much smaller railroad. Perhaps what Mr. Boychuk means by taking it down to the studs is that he will leave only the horse on the front of the NS locomotives.

What should further concern us all is that Ancora doesn't actually have a plan to run the railroad. They tell us in their slide presentation that in the first three months after they take control, to use their words, they're going to "understand and diagnose" the railroad, and then "develop a strategy and plan." Is this wing and a prayer really the bet that NS shareholders should make? And the risk that the rest of us should have to bear by one of the four major US railroads being taken over by a group that clearly is not in the business of running railroads. This group is only in the business of driving up their stock and getting out. I think we all know that, and I don't think we need to pretend otherwise.

Whoever ends up in control of NS, I hope they and all Class I carriers will heed the call and the underlying policy of the new reciprocal switching rule. It is essential that the railroads not only improve their service levels but maintain them consistently over time.

If they do, they will be fulfilling their critical obligations to both their customers and the public, while at the same time minimizing the need for the Board to enact even more far-reaching regulatory requirements.

On the other hand, the STB members who will remain on the Board have learned through all of the hearings and experiences we have had in the last few years that a robust service is essential to the wellbeing of our country.

And that it is the STB's role as the regulator of the industry to monitor that service and where appropriate to use our statutory authority to ensure that the railroads carry out their common carrier duty—which, remember, the U.S. Supreme Court long ago said means that railroads **"all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders."**
[United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 333 (1897).]

There is little doubt in my mind that if Ancora succeeds in taking control of NS and strips it down as it promises, service will suffer a significant deterioration. And the STB will undoubtedly consider even more significant regulation as necessary to protect the public.

The answer to the question of whether that will happen, my friend, is blowin' in the wind.

Thank you.