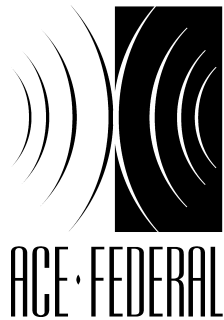


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SURFACE TRANSPORTATION BOARD

HEARING ON RECIPROCAL SWITCHING

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

PUBLIC HEARING

Tuesday, March 15, 2022 -- Day One

9:30 a.m.

Via Zoom

The above-entitled matter came on, pursuant to notice, at 9:30 a.m., Chairman Martin Oberman, presiding.

1 P R O C E E D I N G S

2 CHAIRMAN OBERMAN: Good morning, everyone,  
3 and welcome. Thank you all for joining us for this  
4 hearing on reciprocal switching, Docket Number EP  
5 711 (Sub-No. 1).

6 This proceeding has a long and storied  
7 history, but I'll do my best to summarize it.

8 In 2011 in Docket EP 711, National  
9 Industrial Transportation League filed a petition  
10 for rulemaking in which it proposed revisions to the  
11 Board's reciprocal switching rules.

12 In 2012, the Board opened a proceeding on  
13 that petition, and in 2014 held a hearing to explore  
14 further the issues raised by the petition and the  
15 comments.

16 In 2016, the Board closed EP 711 and  
17 opened EP 711 (Sub-No. 1). By the way, someday I  
18 hope to get the hang of how we figure out these  
19 numbers.

20 In 711 (Sub-No. 1), which is the present  
21 docket number, we issued a notice of proposed  
22 rulemaking proposing regulations under which the

1 Board would exercise its statutory authority to  
2 require rail carriers to establish switching  
3 arrangements in certain circumstances.

4 The Board received many comments on the  
5 NPRM, and since 2017, Board members have been  
6 participating in ex parte meetings with interested  
7 persons, summaries of which are posted on the  
8 docket.

9 Since the issuance of the NPRM and initial  
10 receipt of written comments in this docket, there  
11 have been significant changes in and affecting the  
12 freight rail industry, and we are now holding this  
13 hearing to update the record on this topic and any  
14 additional or modified views commenters may have.

15 Speaking only for myself, I want to  
16 emphasize a few points before beginning. First,  
17 it's been over 11 years since this proceeding  
18 started, and I think it's time for the Board to  
19 confront the issue of reciprocal switching head on  
20 and reach a decision in this docket.

21 Second, since joining the Board in January  
22 2019, I have been continually impressed by the need

1 to increase competition in the rail industry. As  
2 quickly became apparent to me in recent years,  
3 there's been a downturn -- downward trend in both  
4 the quality and quantity of service in the industry,  
5 and there's been upward trend in rates, up 25  
6 percent in inflation-adjusted dollars since the  
7 early 2000s, according to the Board's own Tornquist  
8 study. In my view, one means of dealing with these  
9 trends, and as I have stated on many occasions, a  
10 means to avoid more granular regulation of rates and  
11 service is to enhance the competitive landscape.

12 To me, this is a key to a healthy freight  
13 rail industry. For these reasons, nearly three  
14 years ago, I concluded that the Board ought to take  
15 up consideration of a long-pending proposed  
16 reciprocal switching rule and shortly after being  
17 named chairman a year ago in January, I determined  
18 that consideration of 711 should be a Board  
19 priority.

20 I am mindful that several months ago, the  
21 White House issued an executive order on competition  
22 which reaffirms the policy of the United States to

1 combat excessive concentration of industry, abuses  
2 of market power and the harmful effects of monopoly  
3 and monopsony. And because of my own concern about  
4 increasing competition in the rail industry, I  
5 welcome emphasis on this goal as part of national  
6 policy.

7 But it is important and essential to note  
8 that in the executive order, the White House  
9 underscored that the STB is an independent agency.  
10 I and the other Board members cherish that  
11 independence, and our discretion to reach decisions  
12 which we believe are in the public interest.

13 Reciprocal switching is obviously an  
14 important issue and one on which I and the rest of  
15 the Board are very interested in hearing from all  
16 concerned stakeholders and members of the public.

17 I would like to thank the witnesses in  
18 advance for their participation today and tomorrow  
19 and for their efforts to prepare for this hearing.

20 I would also like to say a special thank  
21 you to our IT folks and other Board staff who have  
22 worked so hard to make sure this hearing happens

1       successfully.

2                       Before we begin, let me briefly go over a  
3       few procedural and technical matters. Please  
4       silence your cell phones, turn off your cameras and  
5       mute yourselves in Zoom. When your panel is called  
6       up, please turn your camera on and keep it on for  
7       the duration of the panel.

8                       When you are presenting, a timer will  
9       appear counting down your allotted time. When the  
10      timer reaches zero, your time will have expired and  
11      we ask that you conclude your remarks.

12                      If the Board members have questions while  
13      you're presenting, be aware that they may ask those  
14      questions before your presentation is over. And let  
15      me underscore that we have a lot of people to hear  
16      from. And while we would like to stick to our  
17      schedule, it's not my style to cut people off in  
18      mid-thought. So you will have your time to tell us  
19      what you want us to hear.

20                      You have access to the chat function in  
21      Zoom, but please only use this for technical  
22      questions. If you become disconnected from the

1 hearing and are not able to reconnect via Zoom,  
2 there is a phone number you may use to call in,  
3 included in the hearing information you were  
4 provided.

5 If you do need to call in via phone,  
6 please e-mail us at hearing@STB.gov, with the phone  
7 number you see -- with the phone number you are  
8 calling from so that we can identify you and let you  
9 speak when it's your turn.

10 You can also refer to the frequently asked  
11 questions on the Board's Web site for any further  
12 troubleshooting or contact information.

13 This hearing is also being streamed on  
14 YouTube and the link is available on the Board's Web  
15 site. A transcript of this entire hearing will be  
16 placed on the Board's Web site after the close of  
17 the hearing and recording will be available as well.

18 For the benefit of our court reporters,  
19 please speak clearly into your microphone and  
20 minimize background noise. They are welcome to  
21 interject if they can't hear.

22 As noted in the decisions we issued two



1 weeks ago, today we will hear from the speakers from  
2 the initial speaker through Panel III. Tomorrow we  
3 will begin with Panel IV and go through to the end  
4 of the speakers list.

5 We will take a 30-minute break for lunch  
6 today at approximately 12:30 Eastern, depending on  
7 where we are in the speakers. We will also take  
8 several short breaks through the day as needed.

9 Finally, before we actually begin with our  
10 speakers, I want to ask if any of my colleagues on  
11 the Board have any other opening remarks they would  
12 like to make.

13 Hearing none, we will begin. We will turn  
14 to our first speaker, the administrator of the  
15 Federal Railroad Administration, Amit Bose.

16 Amit, you're on.

17 MR. BOSE: Chairman Oberman and members of  
18 the Board, thank you for the opportunity to appear  
19 here today. My name is Amit Bose, and I am the  
20 administrator of the Federal Railroad  
21 Administration, an operating administration for the  
22 U.S. Department of Transportation.

1 I am pleased to offer these remarks on  
2 behalf of the FRA. We appreciate the Board's  
3 continuing review of the reciprocal switching  
4 proposal, and we will be ready to assist the Board  
5 however we can as this matter proceeds.

6 DOT's primary concern will always be  
7 safety. In addition, we work closely with  
8 stakeholders to foster a healthy, fluid and  
9 competitive rail network. These goals are  
10 foundational to the Biden-Harris Administration's  
11 efforts to promote competition in the American  
12 marketplace, as explained in Executive Order 14036,  
13 promoting competition in the American economy,  
14 issued on July 9, 2021.

15 As you know, in that executive order, the  
16 President specifically called upon the Board to  
17 revisit the issue of reciprocal switching and to  
18 consider how the proposal may help to enhance  
19 competitions in the freight rail industry.

20 In considering the reciprocal switching  
21 proposal and the numerous submissions to the docket,  
22 DOT respectfully asks the Board to bear in mind some

1 key principles.

2 First, the adoption of any new revised  
3 switching requirements must ensure that switching  
4 operations are safely executed. This is  
5 particularly important because switches involve  
6 movements at interchange points that must be  
7 carefully planned and coordinated to avoid accidents  
8 and injuries.

9 FRA knows that these operations can be  
10 completed safely as access, interchange and  
11 switching activities are daily operations of Class 1  
12 railroads.

13 Of course, FRA will remain vigilant over  
14 the safety of the rail network and will take  
15 appropriate enforcement action where necessary, but  
16 we expect freight railroads to work collaboratively  
17 with one another in carrying out switching  
18 operations and effectively managing safety risks.

19 This includes necessary training of  
20 railroad employees, particularly those who may be  
21 called upon to execute reciprocal switches. Second,  
22 DOT recognizes the importance of promoting fair

1 access of efficient and cost-effective rail  
2 transportation to shippers. We want to clearly  
3 understand all the impacts to the flow of goods in  
4 the supply chain under the status quo, as well as  
5 under a potential reciprocal switching rule.

6 We are particularly concerned about the  
7 competitive landscape and its effect upon tactile  
8 shippers or shippers with limited or no access to  
9 competitive rail options.

10 DOT is also interested in the Board's  
11 conclusions upon the impact of reciprocal switching  
12 proposals on the supply chain that continue to  
13 respond to the challenges of the COVID-19 public  
14 health emergency.

15 Before I move to my final point, I want to  
16 raise a concern top of mind for FRA and DOT at the  
17 moment, the continuing challenge to the nation's  
18 supply chain and rail's role in moving freight,  
19 particularly intermodal containers.

20 Rail plays a crucial role in moving and  
21 clearing containers from our ports throughout the  
22 country and should further address the challenges to

1 take on an even greater share of that traffic.

2 To that end, where we can be helpful, FRA  
3 looks forward to continuing its participation with  
4 the STB and the Rail Shipper Transportation Advisory  
5 Council, as well as railroads, to facilitate and  
6 hopefully grow rail's share of container transport  
7 from our ports.

8 Finally, DOT recommends that the Board  
9 consider whether the reciprocal switching proposal  
10 is likely to have any adverse effects upon passenger  
11 rail operations.

12 As the Board knows, across most of the  
13 country, Amtrak and commuter rail services operate  
14 over host railroads. It is crucial to DOT to ensure  
15 that passenger service can continue to run  
16 efficiently and that it can be enhanced to the  
17 public's benefit.

18 DOT looks forward to hearing the views of  
19 other parties on the potential impacts of the  
20 Board's proposal. We may provide additional views  
21 to the Board at a later stage of the proceeding if  
22 we can aid in the Board's decisionmaking process.

1           On behalf of DOT and FRA, thank you for  
2 the opportunity to address the Board and for your  
3 consideration of our views in this proceeding.

4           CHAIRMAN OBERMAN: Amit, thank you very  
5 much.

6           Do any Board members have any questions  
7 for Amit?

8           BOARD MEMBER HEDLUND: I do, Mr. Chairman.

9           CHAIRMAN OBERMAN: Go ahead, Karen.

10          BOARD MEMBER HEDLUND: Administrator, you  
11 mentioned keeping in mind any impacts on passenger  
12 rail. You don't know of any particular place in the  
13 country where reciprocal switching would actually --  
14 you think would actually adversely affect passenger  
15 rail operations? I assume this is just a general  
16 concern?

17          MR. BOSE: It is a general concern. We're  
18 not aware of any specific locations in the country  
19 at the moment.

20          BOARD MEMBER HEDLUND: If it seemed to as  
21 a result impair on-time performance, would that be  
22 for the freight rails to fix or for Amtrak to fix?

1 MR. BOSE: Can you just repeat the last  
2 part about --

3 BOARD MEMBER HEDLUND: If there were an  
4 adverse impact on passenger rail on-time performance  
5 as a result of putting in a reciprocal switch, would  
6 that be something that the freight railroads should  
7 fix or would Amtrak have to pay for that?

8 MR. BOSE: Well, we're always hopeful that  
9 things can be done on a consensus basis, and I think  
10 that would be the starting point. But if there were  
11 impacts on-time performance, I think we would have  
12 to review that accordingly.

13 And again, we're available at FRA to work  
14 with the Board through these technical issues as  
15 you're going through the consideration of this.

16 BOARD MEMBER HEDLUND: Thank you.

17 CHAIRMAN OBERMAN: All right. Patrick?  
18 Michelle, did you have a question?

19 VICE CHAIR SCHULTZ: I do. I believe  
20 Patrick is on mute.

21 CHAIRMAN OBERMAN: Oh, okay.

22 Michelle, why don't you go ahead.

1                   VICE CHAIR SCHULTZ: Good morning,  
2 Administrator, and thank you for your testimony.  
3 I'd like to say that I, too, echo some of the  
4 concerns that have been raised by the DOT.

5                   My question to you this morning is with  
6 regard to the safety of railroad employees, and  
7 similarly to Karen, I'm wondering if there's  
8 anything in the language specifically that stood out  
9 to DOT or if this is just a general concern that DOT  
10 is highlighting for the STB to consider.

11                  MR. BOSE: It's a general concern, and I  
12 do want to highlight one aspect of safety  
13 specifically.

14                  In terms of the FRA, we expect rail  
15 operations to be done every day on a safe basis.  
16 And as my testimony highlighted, there are daily  
17 operations that include access, interchange and  
18 switching today and so it would not be something  
19 novel for railroads. So that definitely is  
20 something that we're factoring in.

21                  VICE CHAIR SCHULTZ: Thank you.

22                  BOARD MEMBER FUCHS: Administrator Bose,



1 thanks much for being here. You in your testimony  
2 alluded to issues at the Port of LA and Port of Long  
3 Beach, and, you know, that is obviously container  
4 traffic, which is exempt from Board regulation.

5 I'm wondering to what extent do you see  
6 the proposed rule affecting intermodal traffic,  
7 particularly at the ports that you mentioned?

8 MR. BOSE: As far as I know, I don't know  
9 of any specific instances related to intermodal  
10 traffic and reciprocal switching. It would depend  
11 on the shipper.

12 But I wanted to highlight that  
13 specifically because the audience that I have, I  
14 don't have access to every day, like the Board  
15 members today and all of you here.

16 I just wanted to highlight it because  
17 we're coming out of the Chinese Lunar New Year, and  
18 volumes are going to grow.

19 And I highlighted ports around the  
20 country, but you're right to bring up Los Angeles  
21 and Long Beach specifically. So I just wanted to  
22 note that.

1 BOARD MEMBER FUCHS: Thank you.

2 And one more question for me is, you know,  
3 DOT has obviously recently issued a report on the  
4 supply chain generally. And as I'm sure you're  
5 aware, railroads in their comments discuss a view  
6 that switching might have local operational impacts,  
7 which then can spread throughout the supply chain.  
8 And your testimony suggested interest in this topic.

9 I'm wondering what you make of that  
10 argument.

11 MR. BOSE: On that I think it's situation  
12 to situation. And again, at least from my knowledge  
13 and review of the material, my understanding is this  
14 would apply to specific situations at specific  
15 locations throughout the country. And so on that  
16 case-by-case basis, in a sense, the impacts to the  
17 wider supply chain, again from what I know right  
18 now, would be limited in a lot of respects.

19 But again, FRA is here to help you all if  
20 you need it to model that out.

21 BOARD MEMBER FUCHS: Thank you very much.  
22 And Amit, thanks very much for your engagement with

1 the Board on this and other issues.

2 CHAIRMAN OBERMAN: All right. Any other  
3 questions from the Board?

4 Amit, thank you much as always. I'm sure  
5 we will be in touch soon, as always.

6 MR. BOSE: Thank you so much.

7 CHAIRMAN OBERMAN: All right. Okay. We  
8 will now move on to Panel I, which consists of  
9 representatives of two organizations, the National  
10 Grain and Feed Association, Max Fisher and Tom  
11 Wilcox. And the Coalition Associations, which I  
12 assume that they will identify all the associations  
13 that they speak for. They are the ones we're all  
14 familiar with, represented by both Jeff Moreno and  
15 Karyn Booth of Thompson Hine.

16 So are you all present? I thought I saw  
17 you all at the same table a few minutes ago.

18 MR. MORENO: The Coalition Associations  
19 are together here. NGFA is separate.

20 CHAIRMAN OBERMAN: Okay. So where is  
21 NGFA?

22 There you are. So Max and Tom, are you

1 together?

2 MR. WILCOX: Yes, we are.

3 CHAIRMAN OBERMAN: Okay. All right.

4 We'll get the hang of this eventually. So why don't  
5 you start off first, Max or Tom or both, whoever is  
6 going to speak.

7 MR. FISHER: Good morning, Chairman  
8 Oberman, Vice Chairman Schultz, Board members Fuchs,  
9 Primus and Hedlund. We're joining you from NGFA's  
10 annual convention going on this week down in South  
11 Carolina, so it's a pleasure to be with you.

12 My name is Max Fisher, and I am the Chief  
13 Economist for the National Grain and Feed  
14 Association. Here to my right is Tom Wilcox, NGFA's  
15 Rail Transportation Counsel. He is here to help  
16 answer any questions that you might have.

17 The NGFA consists of more than 1,000 grain  
18 feed processing exporting and other grain-related  
19 companies that operate more than 8,000 facilities.  
20 I would like to begin by commending the Board for  
21 resuming its work in this proceeding for the purpose  
22 of increasing rail-to-rail competition through

1 reciprocal switching arrangements. Many of NGFA's  
2 members are captive to one railroad and have little  
3 bargaining power in the absence of rail-to-rail  
4 competition.

5           Reviewing the Board's precedents and rules  
6 governing reciprocal switching began with a petition  
7 for rulemaking filed in EP 711 by the National  
8 Industrial Transportation League in 2011.

9           The NIT League's position was an outgrowth  
10 of the Board's review of railroad competition EP705,  
11 where the Board received evidence and testimony from  
12 NGFA and many other pointing out the competition in  
13 the railroad industry had declined in the years  
14 after several major rail mergers.

15           NGFA wholeheartedly supported the  
16 positions goals of revising the rules and precedent  
17 implementing 49 USC 11102, to more closely reflect  
18 its pro competitive purpose. NGFA continues to  
19 support the positions of the NIT League and shipper  
20 coalition and their filings in this proceeding and  
21 the NGFA supported the notice of proposed rulemaking  
22 published by the Board in 2016.

1                   Since 2017 when NGFA submitted its last  
2 set of comments on the NPRM, the amount of grain  
3 transported by rail has been relatively steady and  
4 the long-running trend of shuttering small train  
5 loading facilities and building larger facilities  
6 has continued.

7                   This combination of steady grain volumes  
8 and fewer but larger facilities is in part the  
9 outcome of the class 1 changes to their operating  
10 plans caused by adopting the principles of so-called  
11 precision scheduled railroading.

12                   Meanwhile the need for increased  
13 rail-to-rail competition remains. The number and  
14 makeup of grain-handling facilities is evolving, but  
15 the ability remains low to locate facilities in  
16 places where more than one railroad can provide  
17 service. For example, grain origination facilities  
18 stay reasonably close to farms to keep truck freight  
19 costs manageable for the first movement from build  
20 to storage. This means grain handlers often must  
21 build in areas that are captive to a single  
22 railroad.

1           To summarize these trends, agricultural  
2           suitability for alternative rail service through  
3           reciprocal switching has improved. And the need for  
4           rail-to-rail competition remains.

5           With respect to the 2016 NRPM, the NGFA  
6           maintains that several primary objectives should be  
7           reflected in the final rules that the Board issues.

8           The first objective is to reaffirm the  
9           Board's conclusion in the proposed rule that the  
10          anticompetitive act standard applied by the  
11          Interstate Commerce Commission in the Midtec case  
12          and other decisions should be reversed.

13          Second, the procedures contained in the  
14          final rules should be as streamlined as possible so  
15          decisions on the establishment of reciprocal  
16          switching arrangements can be made without lengthy  
17          and costly administrative hearings.

18          Third, the NGFA continues to urge the  
19          Board to be adaptable and take into account the  
20          interchanges conducive to reciprocal switching can  
21          be established or reconstructed. The NGFA also  
22          commends the Board -- recommends the Board accompany

1 the final rules with a public process whereby  
2 existing and potential new interchanges eligible for  
3 reciprocal switching arrangements would be  
4 identified.

5 Fourth, the NGFA recently surveyed its  
6 membership and now more than one half of its  
7 members' rail origin in this nation facilities are  
8 located on a Class 1 railway that is within 100  
9 miles of a second Class 1 railway. Consequently, a  
10 determination in the final rules that 100 miles  
11 could be within a reasonable distance of interchange  
12 could potentially lead to increased rail-to-rail  
13 competition for a significant portion of grain  
14 shippers.

15 CHAIRMAN OBERMAN: Max, could I -- could  
16 you just give me that number again of how many  
17 shippers? I just didn't hear.

18 MR. FISHER: We did an informal survey,  
19 Mr. Chairman, and if we used 100 miles, NGFA found  
20 it would be well over half. Actually, it's the vast  
21 majority of grain shippers would be eligible.

22 Also, in case you're interested, if you



1 use 30 miles, it would be -- it would be less than  
2 half, but it would still be beneficial for grain  
3 shippers like on the whole.

4 CHAIRMAN OBERMAN: Okay. Thank you. I  
5 just didn't hear the number. Go ahead.

6 MR. FISHER: No problem. In any case, the  
7 NGFA is very pleased that the Board is  
8 simultaneously working to promulgate revisions to  
9 its rate reasonableness procedures for shippers and  
10 receivers that would be too far from an interchange  
11 to participate in reciprocal switching.

12 Finally, the NGFA encourages the Board to  
13 fashion workable and effective rules governing the  
14 compensation to be paid incumbent carriers in  
15 Board-directed reciprocal switching arrangements.  
16 These rules should apply to cases where the Board  
17 directs a reciprocal switch arrangement and the  
18 carriers cannot reach agreement on the conditions  
19 and compensation, and also cases where the Board  
20 directs an arrangement and the carriers do reach  
21 agreement but the shippers benefiting from the  
22 arrangement believe the agreed-upon amount is

1 unreasonably high.

2           As for the appropriate pricing  
3 methodology, NGFA remains generally in favor of the  
4 access pricing methodology because it appears to  
5 have the potential for the Board to develop and  
6 consistently apply a methodology that places rail  
7 carriers on a relatively level playing field to  
8 compete for business through reciprocal switching  
9 arrangements.

10           However, the NGFA recognizes that  
11 developing such a methodology will likely be easier  
12 said than done, and so the NGFA is also open to the  
13 shipper coalition's modified SSW approach, which  
14 appears to have addressed some of NGFA's concerns  
15 with the Board adopting that methodology.

16           In conclusion, the NGFA encourages the  
17 Board to maximize its opportunities to facilitate  
18 rail-to-rail competition and allow both origin and  
19 destination rail customers to attempt to obtain  
20 alternative rail service via reciprocal switching  
21 arrangements. In a highly consolidated and largely  
22 captive industry, this may be the best opportunity

1 to create some semblance of rail-to-rail  
2 competition.

3 The NGFA accordingly urges the Board to  
4 act with all deliberate speed to promulgate the  
5 final regulations in this proceeding.

6 Thank you for your attentiveness, and Tom  
7 and I would be happy to answer any questions if you  
8 choose to ask them now, or if you would rather wait  
9 to the end, we're perfectly fine with that as well.

10 CHAIRMAN OBERMAN: Thank you, Max.

11 Tom, did you want to add anything now or  
12 just be there for questions?

13 MR. WILCOX: I'm here for questions.

14 CHAIRMAN OBERMAN: Okay. Thanks.

15 Should we go to the Coalition Associations  
16 and then we can open it up to questions for  
17 everybody? Why don't we do that.

18 So Max and Tom, stand by because I do have  
19 a few questions. I know others will too.

20 MR. WILCOX: Yes, sir.

21 CHAIRMAN OBERMAN: Jeff, are you -- Karyn,  
22 who is starting off here?

1 MS. BOOTH: Thank you, Mr. Chairman.

2 We're ready to go. Good morning.

3 CHAIRMAN OBERMAN: Go for it.

4 Why don't you, Karyn, for the record  
5 identify the membership, or there you put it on the  
6 screen. Thank you.

7 MS. BOOTH: Yes, we're going to work  
8 through all that for you promptly here.

9 Good morning, Chairman Oberman, Vice Chair  
10 Schultz and Board members Primus, Fuchs and Hedlund.  
11 On behalf of the Coalition Associations, we thank  
12 you for conducting this hearing on the Board's  
13 proposal to promote competition in the freight rail  
14 industry by expanding reciprocal switching  
15 arrangement. I am Karyn Booth, I'm a partner at  
16 Thompson Hine. With me is my colleague, Jeff  
17 Moreno, also a partner at Thompson Hine, and we  
18 serve as counsel to the Coalition Associations. The  
19 Coalition Associations is comprised of the following  
20 five organizations, the American Chemistry Council,  
21 the National Industrial Transportation League, the  
22 Fertilizer Institute, the Corn Refiners Association

1 and the Chlorine Institute.

2 Each of these organizations does have a  
3 representative available today and participating on  
4 this hearing, and we would like to ask them to just  
5 do a very quick introduction. Three of those  
6 organizations are here with Jeff --

7 MR. SLOAN: I'm Jeff Sloan, Senior  
8 Director of Regulatory Affairs at the American  
9 Chemistry Council.

10 MR. MONAHAN: Eamon Monahan, Vice  
11 President of Environmental Affairs and Workplace  
12 Safety at the Corn Refiners Association.

13 MR. LOUCHHEIM: Good morning, everyone,  
14 Justin Louchheim with the Fertilizer Institute.

15 MS. BOOTH: Thank you.

16 Could we go to NIT League, please.

17 MR. CORTHELL: Good morning, everybody,  
18 and thank you for your time. This is Ross Corthell,  
19 I'm Vice President of Transportation for Packaging  
20 Corporation America, as well as the Rail Chair for  
21 the National Industrial Transportation League.

22 MS. BOOTH: And the Chlorine Institute.

1 MR. MCBRIDE: Good morning, Mr. Chairman,  
2 Madam Vice Chair, members of the Board. I'm Michael  
3 McBride, I'm a partner at Van Ness Feldman, outside  
4 counsel for the Chlorine Institute. I'm accompanied  
5 by Frank Reiner, the President of the Chlorine  
6 Institute.

7 MR. REINER: Good morning, I am Frank  
8 Reiner.

9 MS. BOOTH: Thanks, everybody.

10 So Mr. Moreno and myself and Mr. Sloan  
11 from ACC and Mr. Louchheim from TFI will present our  
12 testimony today, but all of the representatives of  
13 the Coalition Associations are available to answer  
14 your questions.

15 Now, we note that none of you were serving  
16 in your current roles when the Board first issued  
17 its reciprocal switching proposal in 2016, so our  
18 goal today is to answer your questions, address the  
19 points that you believe to be most important.

20 Now, we have requested and we will need 60  
21 minutes to cover all of our prepared remarks, but  
22 that's a lot of material and a lot of time, and so

1 we have planned to pause at certain times throughout  
2 our testimony to answer questions while they're  
3 fresh in your minds if that's your preference. But  
4 we will have to be mindful of the clock.

5 Now, the Board has scheduled this hearing  
6 to update the record and its longstanding EP 711  
7 docket. It has asked parties to address industry  
8 developments that have occurred since the Board last  
9 received written submissions on its proposal back in  
10 2017, and of course to respond to ex parte meetings  
11 that have occurred between Board members, some of  
12 you, and some of your predecessors that have been  
13 held with various shipper and railroad stakeholders  
14 and others.

15 And I think, Mr. Chairman, as you noted  
16 right at the outset, EP 711 has a long history.  
17 Notably, since the Board's proposal was first  
18 introduced in 2016, the Board has received many  
19 thousands of pages of comments, analysis, expert  
20 testimony from shippers and railroads and other  
21 stakeholders, including government agencies and  
22 officials. And of course, as mentioned, the Board

1 has engaged in one-on-one meetings with both  
2 supporters and opponents of the rule.

3 Those proceedings followed five prior  
4 years of extensive engagement over the initial  
5 reciprocal switching proposal made by NIT League,  
6 who petitioned the Board over a decade ago in 2011  
7 after then-STB Chairman Dan Elliott held a hearing  
8 on the state of rail competition in your EP 705  
9 proceeding.

10 In that hearing and at that time, Chairman  
11 Elliott solicited industry solutions to address the  
12 rising rates, insufficient service, inefficiencies,  
13 lack of negotiating leverage and other challenges  
14 involving captive rail customers and their service  
15 providers, and NIT League responded to that call.

16 Ultimately, the Board agreed that the 1985  
17 reciprocal switching rules are not working. They  
18 fail to give meaning to the reciprocal switching  
19 statute in a way that's relevant to today's far more  
20 concentrated and profitable rail industry than  
21 existed 35 to 40 years ago.

22 And of course, the Board issued its own



1 proposal, which remains pending to this day and is  
2 the subject of this hearing.

3           In recognition of the long history of EP  
4 711, the Coalition Associations very much appreciate  
5 the Board taking this step toward a final resolution  
6 of this proceeding. We remain extremely confident  
7 that the voluminous record developed over more than  
8 a decade strongly demonstrates that the Board's  
9 measured, case-by-case approach to evaluating  
10 reciprocal switching requests is lawful, it's  
11 rational, it's justified and it's workable with the  
12 minor modifications that we offered in prior  
13 comments when the Board first issued its proposal.

14           And we are not alone in our belief.  
15 Adoption of the Board's reciprocal switching rules  
16 is strongly supported by the Department of Justice  
17 and the Department of Agriculture. The Department  
18 of Transportation we just heard has expressed its  
19 own concerns "about the rail competitive landscape  
20 and its effect on captive shippers."

21           And, Mr. Chairman, you mentioned of course  
22 the Biden Administration's Executive Order 13725 on

1 promoting competition in the American economy issued  
2 last July, encouraging the Board to complete this  
3 rulemaking and promote rail-to-rail competition.

4 And of course there's the thousands of  
5 companies across this nation from many industries  
6 who depend on competitive and efficient rail service  
7 to meet their business needs and the needs of their  
8 customers but who operate facilities that are  
9 captive to only one railroad.

10 Now, as we begin our testimony, we want to  
11 urge you to consider the following five key points.  
12 Number one, the reciprocal switching statute and its  
13 legislative history reveal that Congress intended  
14 for reciprocal switching to be used as a tool to  
15 enhance rail competition to address railroad market  
16 power.

17 Number two, the record demonstrates there  
18 is a strong need to expand reciprocal switching at  
19 captive shipper facilities that qualify under the  
20 Board's proposal.

21 Number three, the Board has the authority  
22 and the discretion to change its 1985 reciprocal

1 switching policy that is clearly outdated in 2022  
2 and it can adopt these proposed rules today.

3           Number four, the Board has articulated  
4 rational justifications for the proposed rules that  
5 remain as strong today, if not stronger than they  
6 existed in 2016.

7           And number five, the rail industry's  
8 apocalyptic predictions for rail operations and  
9 investment are predicated upon inaccurate,  
10 exaggerated and unrealistic scenarios.

11           Now, for the most part, we believe that  
12 there's nothing in the record that's been recently  
13 provided to you that changes anything from where  
14 we've been. For the most part, what the rail  
15 industry has done is pile on more testimony from  
16 economists who largely repackage and restate the  
17 arguments already in the record.

18           To the extent they present new analysis,  
19 it's nothing that could not have been presented  
20 previously, and they essentially are seeking a  
21 second bite at the apple, contrary to the purpose of  
22 this hearing.

1           Now, some witnesses do reference current  
2 supply chain issues. DOT has referenced that as  
3 well. And we have already refuted that as being a  
4 reason not for you to move forward in our written  
5 testimony, and we will address that again today.

6           But ultimately, the railroad opposition  
7 depends on two flawed assumptions that they have  
8 relied on throughout this proceeding. First, the  
9 current rail markets are perfectly competitive and  
10 the free market already disciplines their behavior.  
11 And second, that reciprocal switching will cause  
12 severe operating disruptions and inefficiencies.

13           We have refuted that before, and we will  
14 refute that again today.

15           Unfortunately, the railroads fail to offer  
16 the Board any constructive feedback as to how this  
17 Board should implement a new reciprocal switching  
18 policy that makes sense in today's highly  
19 concentrated and profitable rail industry, but  
20 instead they continue to drill down on the problems  
21 of operational impacts that we believe are designed  
22 to freeze this Board into indecision and preserve

1 the status quo.

2 But preserving the status quo only serves  
3 the railroads' self-interests and not the broader  
4 public interests, which of course is expressly  
5 encompassed within the reciprocal switching statute  
6 itself.

7 So with that, we would like to start  
8 turning now to some of the more specific arguments  
9 that have been made by the rail industry, and of the  
10 many positions that they take in this proceeding,  
11 the claim that "reciprocal switching" is a solution  
12 in search of a "problem" is perhaps the most  
13 revealing, because it underscores best why we are  
14 sitting here today.

15 In truly competitive markets, the old age  
16 business mantra "customer is king" applies. And  
17 that is not to say that customers should dictate  
18 everything in a relationship, but it's as simple as  
19 when you purchase a service and perhaps that service  
20 is not meeting your satisfaction, you should have  
21 alternatives and options.

22 But here the railroads brazenly ignore the

1 detailed commentary from their own captive rail  
2 customers of all stripes who are seeking the  
3 opportunity to improve rail transportation  
4 efficiency, service, rates and practices through  
5 competition, not Board regulation.

6 The railroads claim that this proceeding  
7 is only about rates, but this is easily refuted from  
8 a review of the record.

9 Are rates an issue? Yes. Are rates the  
10 only issue? Clearly no. Rather, this is a  
11 calculated attempt to sidestep the reciprocal  
12 switching statute and limit shippers' remedies to  
13 costly and unworkable rate litigation at the Board.

14 Now, it's significant when we look at the  
15 statute, the Staggers Act separated rate remedies  
16 from competitive access. They are in distinct  
17 sections of the statute, they are governed by  
18 completely distinct statutory text, and they serve  
19 distinct purposes.

20 The legislative history of the Staggers  
21 Act unequivocally established Congress intended for  
22 reciprocal switching to be that tool to encourage

1 competition, and in recognition of the many benefits  
2 that flourish from competition beyond rates. The  
3 thousands of companies represented by the Coalition  
4 Associations want the competitive market to solve  
5 their rate and service issues.

6 And so with that, I do want to just turn  
7 briefly to Jeff Sloan and give him a chance to  
8 outline why there is such a need for reciprocal  
9 switching and the competition that it will bring.

10 MR. SLOAN: Good morning. Thank you for  
11 the opportunity to speak on behalf of ACC member  
12 companies. For our industry, the need for  
13 additional railroad competition is clear. Our  
14 companies see meaningful benefits where reciprocal  
15 switching is already available, and the Board's  
16 proposed rule presents new opportunities to obtain  
17 these benefits at additional production sites.

18 Without a doubt, ACC members hope that  
19 this added element of competition will help to  
20 moderate rail rates. However, just -- company  
21 testimony submitted for this hearing shows that  
22 reciprocal switching can also improve the efficiency

1 of routes and help to alleviate rail service  
2 concerns.

3           One of our member companies, Indorama,  
4 highlights their experience with interswitching at  
5 Canadian facilities. They note that since  
6 exercising this option in 2018, they have been able  
7 to obtain more reasonable rates. Not only has  
8 switching not degraded service, competing railroads  
9 have been more responsive to service needs. In one  
10 case Indorama obtained an additional service date to  
11 a highly congested junction, helping to maintain  
12 supply flow and decrease the bunching of railcars.  
13 Without competition from a second railroad, this  
14 crucial service need would likely have gone  
15 unfulfilled.

16           Another ACC member, Lyondell Basell,  
17 highlights their experience at U.S. facilities with  
18 access to reciprocal switching. The company has  
19 used switching to change routing, to alleviate  
20 service disruptions on numerous occasions. This has  
21 helped reduce the size of Lyondell Basell's private  
22 railcar fleet and the associated infrastructure



1 needs. It also avoids the need for emergency truck  
2 shipments to sustain customer operations during  
3 service disruptions.

4 The benefits of reciprocal switching are  
5 so significant that Lyondell Basell has made capital  
6 investments to add 2,200 storage and transit car  
7 spots across four of their facilities to allow  
8 access to competitive service options.

9 Dow Chemical's testimony highlights the  
10 potential efficiency benefits that they stand to  
11 gain from reciprocal switching. Railroads route  
12 traffic from Dow's captive facilities hundreds of  
13 thousands of unnecessary miles each year. In  
14 particular, Dow's Louisiana facilities are close to  
15 New Orleans, where the UP interchanges traffic with  
16 eastern carriers. However, UP routes the majority  
17 of Dow's gateway traffic to east St. Louis,  
18 resulting in excessively long routes for some  
19 customers in the eastern U.S.

20 Access to competitive switching could  
21 eliminate a large portion of this unnecessary  
22 mileage.

1           Dow also testifies that when a railroad  
2 does not have the resources to handle traffic  
3 levels, reciprocal switching would allow them to  
4 shift some traffic to another carrier to alleviate  
5 service challenges.

6           As a final point, I want to emphasize that  
7 while ACC members eagerly await the opportunity to  
8 seek competitive service, their testimony  
9 demonstrates that they intend to be selective and  
10 thoughtful at where they request reciprocal  
11 switching. Like other shippers, they have a strong  
12 incentive to seek switching only where it does not  
13 create inefficient movements or impair rail service.

14           Thank you.

15           MS. BOOTH: Thank you, Jeff.

16           And of course each of the association --

17           CHAIRMAN OBERMAN: Karyn, Patrick had a  
18 quick question for Jeff.

19           BOARD MEMBER FUCHS: A question for all  
20 the panelists that have spoken so far. I'm just  
21 sort of wondering, is it your contention that the  
22 current rules and particularly in light of the Midtec

1 precedent, do not allow for a switching order  
2 when a Complainant demonstrates inadequate service?

3 MR. MORENO: I think it's not an effective  
4 remedy to address the rail service problems.

5 BOARD MEMBER FUCHS: But if a Complainant  
6 were to show there was inadequate service, they  
7 could potentially win a switching order under the  
8 current rules?

9 MR. MORENO: The current rules do permit  
10 that but they also have to anticompetitive abuse  
11 associated with that.

12 And frankly, the way the current rules are  
13 structured, it would be very selective.

14 The plaintiff would have to wait until the  
15 rail service problem occurs, which is simply not  
16 practical. That's another reason why the Board's  
17 emergency service orders have not been used during  
18 this time, and that's even a faster, more effective  
19 way to get alternative service.

20 Reciprocal switching puts everything in  
21 place ahead of time. So when the problem occurs,  
22 the response can be immediate, otherwise, it does no

1 good.

2 BOARD MEMBER FUCHS: Jeff, I want to make  
3 sure I'm understanding your point. Are you saying  
4 that, you know, when you show -- to show that a  
5 carrier has acted anticompetitively, that the  
6 inadequacy of service is not sufficient evidence to  
7 show that the carrier has acted anticompetitively,  
8 but you would agree that it is palpable evidence of  
9 that fact?

10 MR. MORENO: I do agree it's palpable  
11 evidence, and perhaps even if it is adequate in and  
12 of itself to obtain an alternative routing, my point  
13 really is that it's too late if you wait until after  
14 the service is inadequate. The point of reciprocal  
15 switching is being able to respond in real-time to  
16 these service problems, otherwise it's really a  
17 meaningless remedy.

18 BOARD MEMBER FUCHS: Right. But I want to  
19 separate the timing versus if the inadequacy of  
20 service has occurred. What is it that makes getting  
21 the remedy so challenging?

22 So suppose, for example, the Complainant

1 could show that a carrier was providing inadequate  
2 service. What would be the barrier to the shipper  
3 getting a remedy?

4 MR. MORENO: To getting a through route  
5 or --

6 BOARD MEMBER FUCHS: A reciprocal  
7 switching remedy.

8 MR. MORENO: The barrier is really the  
9 need to bring the case and the need for immediate  
10 relief. It's a timing issue most of all.

11 MS. BOOTH: I would add to that Patrick,  
12 and I'm sorry to interrupt, but I think just  
13 historically, and again the way those prior  
14 precedents have existed, there was a burden to show  
15 more of a competitive abuse in conjunction with the  
16 inadequacy. And so that standard has been  
17 problematic, and that's sort of the point here;  
18 right? That standard that was set 35 years ago  
19 imposes that higher burden.

20 And the inadequacy is, you know, could be  
21 redefined, I guess you could even under the current  
22 rules. But that doesn't eliminate the additional

1 problems that go along with all of the prior  
2 precedent.

3 BOARD MEMBER FUCHS: Well, I want to  
4 keep -- Marty, if I could just tease this out for a  
5 second. Because I want to separate what's under Midtec  
6 versus the rules. But I just want to make sure  
7 I'm clear on this point.

8 The Circuit Court that reviewed Midtec  
9 said that evidence of a carrier's actual misconduct  
10 such as the adequacy of service it provides to a  
11 captive shipper is the most direct and probative  
12 evidence by which to say if the carrier has acted  
13 anticompetitively.

14 I guess I'm still missing, what is it that  
15 the shipper needs to show in addition to inadequate  
16 service to get the remedy? Is there any other --  
17 inadequate service and some degree of market power  
18 but not market dominance. But other than market  
19 power, what else does the shipper need to do to meet  
20 the standard?

21 Again, setting aside the timing issue,  
22 Jeff. I hear where you're coming from on that. But

1 I'm just talking about meeting the standard.

2 What else to show anticompetitive if that  
3 is what the Circuit Court said the most direct and  
4 probative evidence?

5 MR. MORENO: I think it's difficult for us  
6 to say because it's -- there's never been a  
7 circumstance where the Board has granted any  
8 reciprocal switching under that. So a lot of  
9 shippers simply aren't certain. We know the Board  
10 has -- really, foreclosure is the issue we're trying  
11 to address here, the foreclosure of downstream  
12 competition. But that's occurring, the very fact of  
13 the long haul statutes constitutes foreclosure.

14 BOARD MEMBER FUCHS: Jeff, the actions  
15 that you took or that you cited are some of the  
16 items that the ICC said could show anticompetitive,  
17 but then in the next sentence it said also  
18 inadequacy of service.

19 And you know when the Circuit Court  
20 reviewed it, it specifically looked at the adequacy  
21 of service, it looked at what Midtec alleged,  
22 circuitous routing, but it said that at the end of

1 the day, Midtec requested that routing. Failure  
2 to supply adequate cars, but Midtec didn't make  
3 the request.

4 And then that coal facilities -- coal had  
5 to be trucked in, but Midtec didn't have rail  
6 facilities for coal.

7 Those weren't -- so it wasn't that Midtec  
8 couldn't show inadequate service. It was just  
9 that the particular way they tried to show  
10 inadequate service was not strong enough evidence  
11 because of problems of their own.

12 But I guess I'm missing you know, if you  
13 had a situation where, say, a chemical shipper  
14 showed that a railroad was habitually providing the  
15 wrong cars or missing switches, what under Midtec  
16 and the existing rules would stop a shipper from  
17 providing that evidence and using that as the most  
18 direct and probative evidence to show  
19 anticompetitive behavior?

20 MR. MORENO: I don't think there's  
21 anything that would prevent the shipper from  
22 presenting that evidence. The big question mark is



1 would that evidence in and of itself be sufficient.

2 BOARD MEMBER FUCHS: But there's nothing  
3 in Midtec that would say that it wouldn't?

4 MR. MORENO: There's nothing either way,  
5 that it would or it wouldn't.

6 CHAIRMAN OBERMAN: Let me ask --

7 BOARD MEMBER FUCHS: Marty, thanks for  
8 your indulgence.

9 CHAIRMAN OBERMAN: That's okay, Patrick.  
10 I'm a little bit lost here, for Patrick or Karyn.

11 We've had a lot of complaints about poor  
12 service recently, mostly resulting from crew  
13 shortage, missed switches, late deliveries.

14 Do you imagine that the railroads, if you  
15 put on a case that said look, why are shippers  
16 getting bad service in there's no crews, they're  
17 missing switches, our services are late, and rested  
18 that you have proven that the railroad was  
19 anticompetitive or just that the railroad was  
20 understaffed or incompetent?

21 I mean, I'm not sure why just the bad  
22 service proves anticompetitive intent. As I read

1 Midtec, you have to show that they are trying to  
2 forestall competition as opposed to just being  
3 unable to run their own railroad.

4 Can you comment on that?

5 MS. BOOTH: Yeah, I mean, I think we agree  
6 that that is how we interpret the Midtec decision  
7 as well. Obviously with that higher burden of  
8 showing there's anticompetitive intent in performing  
9 the way they do, as opposed to just incompetence,  
10 negligence, poor planning, whatever the other  
11 alternatives may be.

12 CHAIRMAN OBERMAN: Well, I think we'll  
13 have some fun asking the railroads attorneys if they  
14 think the shipper can rest after putting on evidence  
15 of poor service.

16 BOARD MEMBER FUCHS: I have to jump in  
17 here, Marty.

18 Where is intent? I mean, where is intent  
19 in that Midtec decision? You know, isn't the fact  
20 that there's just inadequate service -- I think what  
21 Midtec stands for is if there's inadequate  
22 service, it shows that is one of the ways monopolist

1 typically behaves, either raising rates or through  
2 providing bad service.

3 I guess I'm still missing what of the  
4 intent part -- I mean, where is that? What does Midtec  
5 describe in order to show intent beyond  
6 inadequate service?

7 CHAIRMAN OBERMAN: Well, this is an  
8 interesting debate that maybe we can have. I would  
9 just say that by definition, the railroad that's  
10 involved here is a monopolist, otherwise, the  
11 shipper wouldn't be in there asking for reciprocal  
12 switching. So it would seem to me that Midtec  
13 requires that the railroad be something more than a  
14 monopolist, by definition, otherwise, everybody who  
15 was sole served would be automatically entitled to  
16 reciprocal switching under Midtec.

17 You have to show that they're acting in a  
18 way to forestall other competition. They have  
19 already forestalled competition by being in  
20 existence as a monopolist. So whether you have to  
21 show intent in some kind of usual legal sense or  
22 some other remedy, just being a sole monopolist

1 doesn't to my way of thinking wouldn't satisfy the  
2 Midtec standards.

3 BOARD MEMBER FUCHS: No, right. I'm  
4 suggesting that inadequate service is what Midtec  
5 and the Circuit Court said was the most direct and  
6 probative evidence. And when we're talking about  
7 why the bar is so high, it's clear, which I think is  
8 one of the underlying prerequisites for why we're  
9 engaged in this rulemaking, I think it's very  
10 important for us to get absolute clarity on what  
11 makes the bar so high.

12 CHAIRMAN OBERMAN: I don't disagree. I  
13 guess all I would say is that I read those papers by  
14 the Midtec court of dicta, since they held they  
15 hadn't proved inadequate service, so we don't know  
16 how much inadequate service would have satisfied the  
17 court or for that matter the Board going forward.

18 And the one thing that seems clear from  
19 what Jeff and Karyn are saying and what other  
20 lawyers have said is the bar has assessed the fact  
21 that these cases can't be proven and that's why they  
22 aren't brought. We've heard that repeatedly, which

1 is pretty powerful evidence of a high hurdle, it  
2 seems to me.

3 Karyn?

4 MS. BOOTH: I do think -- I think that's  
5 right. And as we know, there's been no recent  
6 cases. So we're talking about, you know, four cases  
7 that were basically decided back when these rules  
8 first were put into effect.

9 And Patrick, there's not clarity on what  
10 the burden of proof is for inadequate service. I  
11 believe that is a little bit of a question. But in  
12 each of those other four decisions, the denials  
13 otherwise are clear.

14 And so, you know, obviously, we're trying  
15 to address the whole package here, and so there is  
16 not a recent ruling on this. And maybe this Board  
17 would decide that differently. But there's no  
18 question that the bar in all of those prior  
19 decisions were set so high, there's never been  
20 relief granted under this statute or the rules. And  
21 obviously that's why we're here.

22 CHAIRMAN OBERMAN: Maybe one way of

1 thinking about it is that in the other service  
2 rules, 1147, there is no mention of anticompetitive  
3 impact. There's a mention only of bad service as  
4 the standard. And under those rules, service  
5 problems probably are sufficient if you could make  
6 that showing.

7           Whereas the Midtec rule expressly  
8 requires an anticompetitive showing.

9           Karen had her hand up.

10           BOARD MEMBER HEDLUND: Yes. For Karyn to  
11 maybe move over to the more practical realities as  
12 opposed to the legal issues, which as a lawyer I  
13 find fascinating, but could you talk about, you  
14 know, what the actual obstacles are to the shippers  
15 bringing a case? Are they concerned about the legal  
16 standard or the cost or the time or impairing  
17 whatever good relationships they have with their  
18 incumbent's carrier? And would establishing a new  
19 rule actually induce better relationships because  
20 they wouldn't have to bring a case, the railroads  
21 would be more responsive to a request for voluntary  
22 reciprocal switching?

1 MS. BOOTH: I think you have hit on that  
2 perfectly. I mean, I think it's all of the above.  
3 There's no question that as we've said from the  
4 outset, the bar of competitive abuse, which is what  
5 the current standard is for reciprocal switching,  
6 has never been met. And there's no question that to  
7 try and deal with that, given that history of the  
8 four cases I mentioned that we never -- no relief  
9 has been granted, that was obviously those are cases  
10 that have led to no other shipper even trying once  
11 those four cases shot everything down. And that of  
12 course was a very different time than we have today.

13 And so shippers are, frankly, not going to  
14 try to bring those cases. They don't think they can  
15 win them, and they're not going to invest the legal  
16 fees, the time, the expense to try to win something  
17 that, frankly, they believe is not winnable.

18 MR. WILCOX: If I could add for NGFA's  
19 members, there's a fear retaliation, there's the  
20 cost and time as you said. And so to shippers in  
21 general who are reluctant to bring cases to the STB  
22 for a variety of reasons. And so when they do, it's

1 important that they have clear standards to follow  
2 and so they can judge the outcome or potential  
3 outcome.

4 And in the case of the competitive abuse  
5 standard, it's 30 years of this standard sitting out  
6 there, which does -- you know, the Board cases that  
7 have been decided, it requires something in addition  
8 to bad service. It requires some sort of intent,  
9 which is very hard to prove. As Vice Chairman  
10 Miller called it, the smoking gun.

11 So I would agree with Karyn and Jeff on  
12 that.

13 MR. MORENO: If I can just add in here, I  
14 don't want to lose sight of the competitive forest  
15 for the service tree in this example.

16 The ultimate goal of reciprocal switching  
17 is the enhancement of competition, of which one of  
18 many benefits from enhanced competition is the  
19 ability to respond more quickly to service problems.  
20 But there are many other benefits.

21 We've also talked about negotiating  
22 service terms and contracts, having more leverage,



1 more level playing field when it comes to  
2 negotiating contracts. And of course there's the  
3 rates that everyone has talked about as well.

4 But there's no guarantee that any of this  
5 occurs without competition. And what we're trying  
6 to do is allow the market to make those decisions  
7 and not the regulator.

8 MS. BOOTH: Yes. All right. Well, maybe  
9 just kind of picking up on this point a little bit  
10 and then moving on. It's very clear that the rail  
11 industry is very wedded to competitive abuse, and  
12 that tells you something in and of itself. I mean,  
13 they basically are telling this Board you don't have  
14 discretion, you've got to keep this standard, this  
15 is what you're obligated to keep for a variety of  
16 reasons. And that's in our view ridiculous, because  
17 of course the statute itself does not mandate the  
18 competitive abuse standard. We all looked at the  
19 reciprocal switching statute. It's very broad.  
20 It's very flexible.

21 You know, you just have to be able to find  
22 that the arrangement is practical and in the public

1 interest, or, an alternative, or necessary to  
2 provide competitive rail service. And of course we  
3 believe that competition has to exist for it to be  
4 abused. But not being too slight here, I mean,  
5 under the Board's proposal, only traffic that would  
6 benefit from reciprocal switching is traffic for  
7 which there is no competition at the origin or  
8 destination.

9 So we're not talking about where  
10 competition exists, that there's got to be captivity  
11 shown under the Board's proposal for the shipper to  
12 bring a case.

13 And the structure of the reciprocal  
14 switching statute and the legislative history, which  
15 we've touched on, but it's very detailed in all of  
16 our findings, provides this Board with very broad  
17 discretion to modify this policy and basically find,  
18 as you have, that the competitive abuse standard is  
19 outdated today.

20 CHAIRMAN OBERMAN: Karyn, let me -- Karyn,  
21 just to be clear, are you saying that in your view,  
22 under the statute, to be eligible for reciprocal

1 switching, you have to be in a captive situation at  
2 both ends?

3 MS. BOOTH: We're not saying that under  
4 the statute, but we're saying that's the Board's  
5 proposal that was the NIT League's proposal and we  
6 agree with that.

7 CHAIRMAN OBERMAN: Okay. Thank you. Just  
8 wanted to be clear, thank you.

9 VICE CHAIR SCHULTZ: Karyn, can we go back  
10 for a minute to a statement that was made earlier  
11 about the concern for retaliation. I wonder if you  
12 or any of your colleagues could speak to how the  
13 proposed rule would address that fear or is it just  
14 the fact that shippers would have a higher  
15 likelihood of prevailing under the proposed rule as  
16 compared to what it exists today?

17 MS. BOOTH: The Board's proposal doesn't  
18 expressly address retaliation, Michelle. I mean,  
19 that's a judgment that any shipper is going to have  
20 to make when it chooses to bring a case before the  
21 Board.

22 But I think certainly, when the outcome of

1 a case is competition that might motivate at least  
2 some captive shippers who think they can meet the  
3 standards of the rule to pursue that, just because  
4 those benefits of competition would have hopefully,  
5 you know, such a big effect and not having to come  
6 to the Board for a rate prescription or for other  
7 litigation, but rather to allow them to use those  
8 alternative carrier options to deal with rates and  
9 service.

10 So it doesn't address retaliation  
11 specifically. There may be some shippers who choose  
12 not to come forward for that reason, even after the  
13 Board adopts the rule, but we certainly think there  
14 would be others who would benefit and would give it  
15 a go.

16 MR. WILCOX: Let me, if I could, reinforce  
17 since I'm the one who mentioned retaliation. The  
18 retaliation fears come when there's consideration of  
19 a formal proceeding. You know, whereas if you -- if  
20 the Board has pro-competitive policies in place  
21 where there's commercial solutions outside of the  
22 Board because you've got a good, a valid regulatory

1 backstop, then the fear of retaliation drops  
2 considerably.

3 VICE CHAIR SCHULTZ: Can you speak to the  
4 regulatory backstop and perhaps the distinction  
5 between the proposed rule as it compares to what's  
6 in existence today?

7 MR. WILCOX: In terms of the regulatory  
8 backstop?

9 VICE CHAIR SCHULTZ: Yes. And how it  
10 differs.

11 MR. WILCOX: Well, there is really no  
12 backstop for reciprocal switching orders, for  
13 receiving a reciprocal switching order, and so  
14 therefore there is very little leverage for  
15 commercial solutions. You know, there's no threat,  
16 real threat to reciprocal switching in terms of  
17 going through the Board's processes.

18 So the proposed rule would, we believe,  
19 provide that backstop because it provides a more  
20 realistic path that adheres to the statute's  
21 pro-competitive intent, to have reciprocal switching  
22 in place.

1           And so when that real threat or  
2 possibility is there, then you have a greater chance  
3 of having commercial solutions.

4           VICE CHAIR SCHULTZ: Thank you.

5           BOARD MEMBER FUCHS: You know, I have to  
6 circle back because I think it is really one of the  
7 most essential points.

8           Tom, you alluded to a smoking gun. And  
9 just reading from Midtec, Midtec says that they  
10 were attentive to the classical categories of  
11 competitive abuse, and that's when they say  
12 foreclosure and that, and we also considered whether  
13 there was any evidence of abuses under the  
14 competitive standards of the RTP, including  
15 inadequate service or excessive prices, under either  
16 approach.

17           And so I'm wondering, and maybe not to put  
18 you on the spot, but at some point during the panel,  
19 could somebody kind of show me very clearly where  
20 Midtec provided that there needs to be something  
21 more besides inadequate service and some degree of  
22 market power? Not a market dominance standard but

1 some degree of market power inadequate service. It  
2 would be helpful if evident that the carrier  
3 intended to provide inadequate service for some sort  
4 of competition-rigging purpose. If that's what Midtec  
5 stands for, I would like to hear it directly.

6 Because Karyn, to your point, what I think  
7 I'm hearing is the bar is central to the practical  
8 reality. So I don't think you can disentangle to we  
9 have to understand what exactly shippers view as the  
10 bar.

11 MR. WILCOX: We can address your question  
12 in due course. It's just that we've had those --  
13 you know, the initial cases starting with Midtec,  
14 starting with the regulations. And you had not only  
15 the Midtec case, you had other cases where  
16 shippers tried to meet that standard, tried to see  
17 where the bar was, and nobody ever reached the bar.

18 And so it was the overall conclusion after  
19 that was that the bar is unreachable without this  
20 type of intent.

21 BOARD MEMBER FUCHS: But there are  
22 different approaches. One is you could clarify

1 what's required under Midtec. Second and you  
2 could overrule Midtec and just rely on the  
3 regulations which has different language than Midtec.  
4 You could arguably say that Midtec was even  
5 narrower than the regulations, which you could argue  
6 are even narrower than the statute. So you could  
7 not change the rules but overturn Midtec. You  
8 could interpret Midtec such as providing more  
9 clarity to shippers about what evidence would be  
10 sufficient to show inadequate service or you could  
11 change the rules.

12 And so there is options here, and we have  
13 to tease out what is causing the problem in order to  
14 figure out what exactly is the best option, I think.

15 MR. WILCOX: Understood.

16 MS. BOOTH: Okay. So I'll just kind of  
17 pick back up. We were talking about the Board's  
18 discretion to change the competitive abuse standard.  
19 And I guess we just did want to focus very quickly  
20 on at least how we interpret the railroad's  
21 position, which is that your discretion is very  
22 narrow and that you really don't have much wiggle



1 room to do that. We've talked about why we disagree  
2 from a statutory perspective. But they also rely  
3 upon another statutory provision, of course the long  
4 haul statute, that, you know, they really talk about  
5 the origin carriers almost right to the long haul  
6 under 10705A2 but they don't really focus on what we  
7 think is the most salient aspect of that statute,  
8 and that is that Congress expressly created a  
9 reciprocal switching exception to the long haul  
10 statute.

11           And so obviously, that's incredibly  
12 important when you're evaluating those arguments.  
13 And you know, I think the point of that is there was  
14 a recognition that despite the fact that the origin  
15 carrier has this -- there's sort of this general  
16 favoritism toward that long haul, there was a  
17 recognition that the Board would need to exercise  
18 discretion and draw those lines where it's more --  
19 in certain cases, where it's appropriate to promote  
20 competition and not only allow that long haul  
21 statute to take effect.

22           And, you know, of course -- and this gets

1 a little bit, Patrick, to I think the debate we're  
2 having. You know, the Board drew lines in a very  
3 different place. It was the ICC of course back in  
4 1985, where the discretion was exercised to apply  
5 reciprocal switching in very limited circumstances.  
6 It created that high bar that we're debating here to  
7 allow the railroads to engage in differential  
8 pricing over a larger volume of captive traffic.

9 But that made sense in 1985. There were  
10 more than 30 Class 1 railroads at that time. They  
11 were grappling with bankruptcies, there was  
12 financial distress. None of those carriers were  
13 revenue adequate.

14 So we believe today the Board is justified  
15 in making reciprocal switching more accessible,  
16 based on these significant changes. We're going to  
17 get into those in a little bit more detail. And  
18 that you should draw the lines in a different place.

19 And again, reciprocal switching allows  
20 competition to function where it already exists.  
21 We're not -- you know, that competition is there,  
22 but it's just being foreclosed.

1           Now, the other point of that is the  
2 railroads like to call this artificial competition,  
3 but it's quite real. And the statute again gives  
4 the Board the authority to determine where to bring  
5 that out.

6           Reciprocal switching allows competition  
7 along that route to solve rate and service issues  
8 and maximize efficiency, and of course it reduces  
9 the need for regulatory protection in a rate case  
10 over that entire long haul movement and would limit  
11 your regulation just to the bottleneck portion.

12           So it shrinks the need for Board oversight  
13 by allowing competition to set rates, you know,  
14 create those efficiencies, spur innovation, lead to  
15 better contracts, all those broad benefits.

16           The rail industry likes to rely upon more  
17 generalized studies, the Christianson report, to  
18 talks about things that are already very robustly  
19 competitive. But we've been able to point out some  
20 problems with those studies in terms of they look at  
21 aggregate data. The studies include competitive  
22 traffic and don't focus on really the most important

1 subset of captive traffic, which is of course what  
2 we're talking about here.

3 So I'm not going to repeat a lot of those  
4 arguments, but it is important to note when you're  
5 evaluating those arguments.

6 And so with that, we were going to pause  
7 here for Q&A, but I think in the interest of time,  
8 and we've had a dialogue going, I think Jeff, I'll  
9 turn it to you.

10 MR. MORENO: Thank you, Karyn.

11 The rail industry has presented extensive  
12 testimony from multiple economists on many different  
13 issues. The conclusions presented, however, are  
14 only as valid as the underlying assumptions.

15 The most significant of these assumptions  
16 that pervades nearly every railroad witness's  
17 testimony is the projected scope of the proposed  
18 rules in terms of the volume of traffic that will be  
19 affected.

20 That single assumption affects all the  
21 arguments with respect to revenue, investment and  
22 operating impact assessments. By grossly

1 misrepresenting the volume of traffic affected by  
2 the rules, the railroads and their witnesses  
3 similarly overstate all of these other impacts.

4           The railroad industry is wrong to equate  
5 reciprocal switching as a statutory right with  
6 switching on demand.

7           Shippers still must satisfy one of the two  
8 prongs that are required to grant switching only to  
9 the most deserving of traffic.

10           The prong 1 public interest standard  
11 requires a comprehensive cost/benefit analysis among  
12 its three factors. This permits consideration of  
13 any of the many detriments that the railroads allege  
14 will result from reciprocal switching, especially  
15 the impacts of a switch that has on the potential to  
16 create inefficiencies by increasing car handling or  
17 requiring car switching where it currently does not  
18 occur.

19           For this very reason, prong 1 is likely to  
20 be invoked sparingly, where a switch truly enhances  
21 efficiency. Moreover, if a requested switch under  
22 prong 1 is less efficient, there will have to be

1 significant offsetting benefits in order to grant  
2 such a request.

3 Prong number 2 requires the equivalent of  
4 a market dominance showing. Market dominance  
5 requires a shipper to prove the absence of effective  
6 inter- and intramodal competition. Furthermore,  
7 because market dominance is lane-specific, prong  
8 number 2 would have to be satisfied for individual  
9 movements in each origin destination pair.

10 As demonstrated in Ex Parte 756 where the  
11 Board adopted rules on streamline market dominance  
12 presentations, market dominance showings are  
13 complex.

14 And by the way, those streamline rules  
15 would not apply to the showing that has to be made  
16 under prong 2. Thus, prong 2 is likely to be  
17 invoked only with the most compelling facts, and  
18 even then only where the volume of traffic merits  
19 the shipper's time and investment to pursue a  
20 reciprocal switching case.

21 Now, the AAR in both its prior testimony  
22 and its most recent testimony submitted a waybill

1 study of what it calls potentially eligible  
2 reciprocal switch traffic. "Potentially eligible"  
3 is a pretty loaded term. I mean, you're either  
4 eligible or you're not, not just potentially  
5 eligible.

6 That demonstrates that AAR is casting the  
7 widest net possible to create the misimpression that  
8 reciprocal switching will be widespread.

9 The AAR's analysis is meaningless,  
10 however, because it is not representative of a  
11 realistic universe of qualified traffic that will  
12 request and then use reciprocal switching.

13 As a threshold matter, the AAR's updated  
14 waybill study suffers from the same critiques we  
15 presented of the original study because it uses the  
16 same methodology which causes it to overstate even  
17 the potentially eligible universe of traffic.

18 But let's put aside those criticisms for a  
19 moment here.

20 Even accepting the AAR analysis at face  
21 value, the measure of potentially eligible traffic  
22 is meaningless because shippers will not pursue or

1 the STB will deny the vast majority of potentially  
2 eligible switches identified by the AAR. Those will  
3 not occur for many different reasons.

4 One, the shipper may not be able to  
5 satisfy either prong 1 or prong number 2.

6 Number two, the shipper's traffic may be  
7 insufficient to justify the time, cost and burden of  
8 a reciprocal switch case.

9 Number three, the switch fee itself may be  
10 too uncertain for the shipper to bother bringing a  
11 case.

12 And finally, an inefficient switch will be  
13 undesirable to a poor shipper due to it's impact  
14 upon other costs on the shipper such as railcar  
15 ownership and inventory costs. The rail industry  
16 throughout this hearing has not explained why  
17 shippers would choose routings that are less  
18 efficient, that such choices would be widespread if  
19 they should occur or why the Board itself could not  
20 reject such switching requests under the proposed  
21 standards.

22 Frankly, the most significant conclusion



1 in the AAR's updated waybill analysis is that less  
2 than 10 percent of all potentially eligible traffic  
3 entails the most likely switch scenarios, which are  
4 in also the most efficient switch scenarios. Those  
5 are switches that change the location of an  
6 interchange without increasing the number of car  
7 handlings. Those are switches at existing  
8 interchange locations which occur via existing  
9 operations with existing crews and equipment, where  
10 the switch traffic is merely incremental to other  
11 traffic already interchanged between the rail  
12 carriers.

13 Of that 10 percent, the traffic volume  
14 still must be sufficient to justify pursuing  
15 switching. The shippers still must satisfy prongs 1  
16 and 2, and finally the shipper must actually choose  
17 the alternate railroad, all before any railcar  
18 actually switched.

19 In 2013, NIT League submitted an impact  
20 analysis to the Board of its proposal, showing that  
21 just 4.6 percent of railcars were likely to be  
22 affected. Because the NIT League proposal applied

1 objective criteria that were easy or that made it  
2 very easy for a shipper to identify its eligibility  
3 and claim reciprocal switching automatically, the  
4 impact analysis associated with the NIT League  
5 proposal would be greater than any impact affected  
6 by the Board's proposal.

7           Thus, it is reasonable to conclude that  
8 AAR's own analysis demonstrates the true universe of  
9 reciprocal switching will be less, probably much  
10 less, than the 10 percent of all rail traffic that  
11 AAR identifies fits within the most efficient  
12 switches.

13           The bottom line is that AAR's analysis of  
14 potentially eligible traffic is irrelevant and  
15 meaningless because that is a far larger number than  
16 qualified traffic, which itself is larger than the  
17 amount of such traffic that actually will request  
18 reciprocal switching, which, in turn, is larger  
19 still than the volume of traffic that actually will  
20 use a switch.

21           Once one takes a more rational and  
22 realistic view of the likely scope of reciprocal

1 switching, it is obvious that the rail industries  
2 hypothesized operating apocalypse is built on a  
3 house of cards. There is far less traffic at stake  
4 than the universe that the railroads claim, nearly  
5 all those switches will occur at locations where  
6 interchange operations already exist.

7           And just because the Board may grant  
8 reciprocal switching does not mean that the  
9 incumbent will actually lose the traffic because the  
10 switch rate may be too high or the incumbent may  
11 offer better rate and service.

12           Switches that increase car handlings or  
13 require creation of new interchange locations would  
14 be disfavored by shippers due to the very  
15 inefficiencies that the railroads describe. And  
16 that is backed up by experience. The Canadian  
17 experience supports this fact, where interswitching  
18 in Canada is virtually automatic but very small  
19 percentage of the eligible cars actually are  
20 interswitched.

21           There was analysis submitted in the  
22 pending merger of CP and KCS by Dr. Robert Majeure,

1 the applicant's witness there. His empirical  
2 analysis showed that shippers when offered a choice  
3 prefer single line service and the ability to offer  
4 fewer interchanges can significantly improve a  
5 railroad's ability to win the business of shippers  
6 and make a railroad service a more significant  
7 competitive force.

8 And that's consistent with what the Board  
9 has held in prior mergers, that the public benefits  
10 of creating single line service were a major  
11 justification for approving those mergers.

12 The railroads simply do not offer any  
13 explanation as to why shippers would flock to these  
14 allegedly inefficient interchanges.

15 Despite recent rail industry focus upon  
16 the emergence of COVID-related supply chain issues,  
17 those issues also do not alter the case for  
18 reciprocal switching.

19 Railroads cite to COVID supply chain  
20 issues to illustrate supply chain vulnerabilities  
21 and then to infer that reciprocal switching has the  
22 potential to cause the same types of problems or

1 exacerbate the current problems.

2           The potential to do either, however,  
3 exists only if shippers request and are granted less  
4 efficient forms of reciprocal switching.

5           It's not an issue at all when reciprocal  
6 switching occurs at existing interchanges or is part  
7 of existing interchange operations. If a shipper  
8 makes such an irrational request, the Board again  
9 can consider any such concerns when it reviews those  
10 individual switching requests.

11           But probably most significantly,  
12 COVID-related supply chain issues are temporal and  
13 thus are not a reason to reject the proposed rules.  
14 Final adoption of any new rule realistically is a  
15 year or more in the future, and the first cases are  
16 even further down the road.

17           If the COVID-related supply chain issues  
18 still exist when the Board is presented with an  
19 actual case, it can factor any such impacts into its  
20 decision at that time.

21           Because the rail industry has exaggerated  
22 a likely volume of reciprocal switching, they also

1 have exaggerated likely revenue and investment tax.  
2 Differential pricing of switch traffic will continue  
3 to exist, but to a lesser degree for the subset of  
4 traffic that has reciprocal switching.

5 That is because the resulting duopoly is  
6 not like a fully competitive market that prices to  
7 their marginal costs. Duopoly market power provides  
8 both carriers in a reciprocal switch with the  
9 ability to be disciplined in their pricing.

10 The competing railroad has its own  
11 extensive infrastructure which it must be able to  
12 recover its own fixed and variable costs, plus it  
13 must pay a reasonable switch fee to the incumbent  
14 railroad, which will be factored into the rate that  
15 the competing railroad offers.

16 Thus there's no reason to conclude that  
17 the railroad's fear that duopoly competition will  
18 entice much less compel either rail in a switch  
19 arrangement to price even close to its marginal cost  
20 or below its total cost.

21 As evidence of this very fact, I refer you  
22 to the testimony of a railroad economist in the

1 CP/KCS merger, Professor Steven Sallip, who is UP's  
2 witness, the economic witness in that proceeding, at  
3 paragraph 66 to 67 in his testimony, explained very  
4 thoroughly the limits of duopoly competition.

5           If marginal cost pricing were a realistic  
6 concern, one would expect the railroads to  
7 demonstrate that they currently already engage in  
8 marginal cost pricing on similarly competitive  
9 traffic, such as traffic with direct access or other  
10 traffic that does have reciprocal switching today.

11           They have not done so. But yet clearly  
12 some degree of differential pricing has continued,  
13 even for that competitive traffic.

14           Now, the rail industry in their latest  
15 testimony also attempt to undermine the STB's  
16 justifications for modifying the reciprocal  
17 switching rules.

18           The first one is the effects of rail  
19 consolidation over the last three decades. The AAR  
20 attempts to rebut this justification with a waybill  
21 analysis to show the number of single served rail  
22 stations today is comparable to the number in 1992.

1           But no one has claimed that reciprocal  
2 switching is needed because mergers created more  
3 single serve locations. Indeed, the results of the  
4 AAR's analysis aren't all that surprising because  
5 the STB sought to preserve rail competition at all  
6 two to one locations in prior mergers.

7           This is a strawman analysis created by the  
8 AAR that focuses upon the horizontal effects of  
9 mergers, whereas the proper focus is on the vertical  
10 effects. And the AAR cannot pretend to be  
11 enlightened by this statement. It's what we had  
12 claimed in our comments back in 2017. It's what we  
13 claimed in all our ex parte meetings. Yet the rail  
14 industry simply has ignored those claims.

15           The vertical effects of rail consolidation  
16 over three decades have steadily and cumulatively  
17 extended the lengths of origin and destination  
18 bottlenecks and have facilitated the ability of  
19 bottlenecked carriers to foreclose competition on  
20 downstream route segments.

21           As bottlenecks grew longer, competitive  
22 segments necessarily grew shorter, making it easier



1 for the bottlenecked railroad to execute a price  
2 squeeze on the competitive segments.

3 In prior mergers, the Board invoked the  
4 so-called one-lump theory to conclude that there  
5 would be no anticompetitive vertical merger effects.  
6 The one-lump theory holds that because a  
7 bottlenecked carrier is in a position to capture the  
8 entire monopoly profit, integration with a  
9 connecting carrier on a competitive route segment  
10 normally does not enable that bottleneck carrier to  
11 raise the profit maximizing price as a result of  
12 that merger. Thus for a movement from A to C where  
13 one carrier has a bottleneck from segment A to B but  
14 two carriers compete between B and C, the Board has  
15 held that a merger of those single A/B carrier with  
16 one of the downstream B/C carriers does not result  
17 in competitive harm because the bottleneck carrier  
18 already reached a monopoly profit for the entire A  
19 to C movement prior to the merger.

20 But the Board needs only to read the rail  
21 industry's own comments and requests for conditions  
22 filed on February 28 in the pending CP/KCS merger to

1 comprehend the limits of the one-lump theory.

2           While all Class 1 railroads raise  
3 foreclosure concerns to some extent in that  
4 proceeding, UP, BNSF and CM are particularly  
5 strident.

6           For the most comprehensive discussion of  
7 this problem, I again commend you to the testimony  
8 of UP's economic witness Steven Sallip in that  
9 proceeding, which thoroughly explains the  
10 probability of anticompetitive foreclosure resulting  
11 from past vertical mergers.

12           He testifies that although the STB relied  
13 on the one-lump theory as broadly accepted in  
14 economic circles, when the last major mergers  
15 occurred in the late 1990s, he states the one-lump  
16 theory, I quote, "is not broadly accepted today,"  
17 because it applies only under very limited market  
18 conditions.

19           That comes from paragraph 21 of his  
20 testimony.

21           Professor Sallip also notes that the  
22 Department of Justice and the Federal Trade

1 Commission issued new vertical merger guidelines in  
2 June 2020 that did not adopt the one-lump theory.  
3 He goes on to observe that pursuant to modern  
4 economic theory, unless both railroads pre-merger  
5 have perfect information about each other's costs  
6 and prices and, and are selling homogenous,  
7 undifferentiated products, "foreclosure by the post  
8 merger firm often is profitable and harmful to  
9 shippers."

10 In paragraph 6, he states, "imperfect  
11 information and differentiated products are the  
12 norm, not the exception."

13 Whether or not these essential conditions  
14 are satisfied for the one-lump theory to apply will  
15 differ across movements and on merging railroads.  
16 Professor Sallip notes that because carriers do not  
17 set uniform rates for all movements, a vertical  
18 merger can lead to a diversity of outcomes across  
19 commodity groups, routes and specific shippers.

20 He also goes on to state that the effects  
21 of a merger may differ across origin/destination  
22 markets and commodities, even within a single origin

1 destination market for a specific commodity, the  
2 fact that the carriers do not set the same rate for  
3 every shipper in every movement means that a merger  
4 may harm some shippers while benefiting others with  
5 different demand characteristics on those for whose  
6 shipments have different costs.

7 Thus, the Board's conclusions in prior  
8 mergers that there was no loss of competition from  
9 vertical combinations were at worst completely wrong  
10 and at best only partially correct for some traffic  
11 and wrong for all other traffic.

12 Ultimately, it is not necessary to  
13 conclude that past mergers had anticompetitive or  
14 vertical effects on every single affected movement.  
15 The fact that such impacts inevitably did occur on a  
16 multitude of movements and on a larger scale than  
17 previously imagined justifies the proposed rules.

18 Rail consolidation is a rational  
19 justification to employ reciprocal switching as a  
20 tool to mitigate the cumulative effects of  
21 foreclosure from those prior mergers.

22 AAR also presents an analysis of truck

1 competition to argue that there also is an abundant  
2 intermodal competition to rail.

3 That analysis suffers from multiple flaws  
4 of which the most notable are by measuring the  
5 revenue per ton mile across the entire rail  
6 industry, the analysis reveals nothing about the  
7 captive rail traffic. And I say that stands in  
8 stark contrast to prong number 2 of the Board's  
9 standard, which accounts for truck competition in  
10 the context of specific moves as part of a market  
11 dominance determination, and that is the relevant  
12 analysis.

13 I would also note that the measure of  
14 revenue per ton mile is misleading, because revenue  
15 per ton mile decreases with distance, and it is  
16 particularly notable that the average haul length  
17 for the rail industry has increased by 56 percent  
18 from 1985 to 2020, thereby suppressing the revenue  
19 per ton mile in this graph that you see in the slide  
20 from the AAR's analysis.

21 Revenue per ton mile also doesn't reflect  
22 the shifting of transportation costs from railroads

1 to shippers over the past three decades, which  
2 railcar ownership has been the most pronounced.

3 For example, private railcar ownership is  
4 far more prevalent today than in 1995 -- 1985,  
5 especially for the most captive traffic, as this  
6 slide shows.

7 Now, this particular slide stops at 2013  
8 because that's when AAR stopped publishing this  
9 information. However, if you refer to rulemaking  
10 petition in Ex Parte 768, that estimates the current  
11 level of private railcar ownership in North America  
12 at more than 73 percent of all railcars, which is  
13 more than twice the railcar ownership percentage in  
14 1985.

15 This has depressed the revenue per ton  
16 mile showing that we saw in the previous slide and  
17 in AAR's analysis.

18 The AAR truck rate analysis however is  
19 instructive in other areas. While the truck rates  
20 have fluctuated with economic conditions, the  
21 analysis shows the rail rates have not.

22 Although rail revenue per ton mile has

1 risen only slightly since 2004, it certainly would  
2 have been steeper but for the cost shifting  
3 associated with railcar ownership.

4 More significantly, however, revenue per  
5 ton mile hides the fact that the rail industry has  
6 been able to exert since 2004 -- hides the fact that  
7 the market power the rail industry has been able to  
8 exert since 2004, a more informative analysis is the  
9 inflation adjusted spread between revenues and  
10 operating expenses per ton mile.

11 In 2008, the Christianson report observed  
12 that 2004 appeared to mark a pivotal change in  
13 railroad pricing that merited continual observation.

14 We're now 18 years beyond that, and has  
15 proven quite prescient.

16 From 1985 to 2004, this graph showed that  
17 changes in real rail operating revenue per ton mile  
18 tracked changes in real expenses per ton mile.

19 Since 2004, real revenue per ton mile for railroads  
20 has increased 54 percent compared to only a 20  
21 percent increase for rail expenses.

22 Now, I'm sure that the AAR will be quick

1 to point out that despite 29 -- despite the  
2 increasing spreads, it says 2019 rail revenue per  
3 ton mile remains below 1985 even today. But  
4 remember that the railroads are also dramatically  
5 shifted car ownership costs during this time and  
6 increased the length of haul.

7           Consequently, revenue in 2019 does not  
8 need to recover this major cost, and it is spread  
9 over a much greater distance.

10           Taking this slide a step further, this  
11 shows the change in the inflation-adjusted spread  
12 between revenue per ton mile and operating expenses  
13 per ton mile. And what is significant here is that  
14 there has been a 313 percent increase in that spread  
15 since 2004, and even since 1985, the increased net  
16 spread has been 239 percent.

17           So why did 2004 mark this dramatic shift?

18           Well, I think it's important to note that  
19 the last major rail merger was approved by the Board  
20 in 1998, that was Conrail transaction. There were  
21 extensive service issues and integration took some  
22 time to resolve some of those service issues.



1 Several years were also needed for legacy contracts  
2 to expire before the railroads could fully exercise  
3 their expanded market power.

4 By 2004, we are now all -- we are now  
5 clicking on all cylinders. The ability that these  
6 mergers created to observe market power was now in  
7 full force, and we saw the railroads hit the  
8 accelerator, and that's the steep increase that you  
9 now see in this graph.

10 With that, I'm going to turn this back  
11 over to Karyn, who is going to talk about the  
12 financial justifications.

13 MS. BOOTH: Great. Thank you, Jeff.

14 And of course, you know, one of the bottom  
15 line implications from all these market changes that  
16 Jeff has kind of worked through, that's that the  
17 rail industry's financial strength today relative to  
18 1985 was another rational basis for adopting the  
19 proposed rules that the Board identified in its  
20 decision.

21 The dire financial state of the rail  
22 industry in 1985, as we've already touched on,

1 established that need at that time for the exercise  
2 of differential pricing over the largest segment of  
3 captive traffic. And that's of course why the ICC  
4 adopted that very high bar which we've been talking  
5 about, the competitive abuse standard in Midtec.

6 But the rail industry is much stronger  
7 financially today and the Board rationally concluded  
8 that it can and should achieve a greater balance  
9 between the different rail transportation policies  
10 that it administers and needs to find that  
11 reasonable accommodation. And the key issues here,  
12 of course, is balancing the policy to promote  
13 revenue adequacy and maximizing the reliance upon  
14 competition.

15 Four Class 1 railroads have been revenue  
16 adequate through an entire business cycle based on  
17 the Board's own high bar, and we have detailed all  
18 of the history over the past decade of revenue  
19 adequacy of each of the Class 1 carriers. I'm not  
20 going to walk through all that specifically. You  
21 have that information.

22 But again, in contrast, in 1985 there were

1 32 Class 1 railroads, none of which were revenue  
2 adequate. And of course Wall Street metrics that we  
3 also attached to our written testimony as Exhibit 2  
4 make an even more compelling case.

5 Railroad finances have strengthened  
6 despite the pandemic and despite fluctuating traffic  
7 volumes.

8 Therefore, as Congress envisioned in the  
9 Staggers Act, the Board has proposed to employ  
10 reciprocal switching to remove obstacles to  
11 competition over that non-bottleneck segment where  
12 that competition already exists.

13 Now, the railroad attempts to undermine  
14 the Board's assessment by comparing railroad  
15 finances to S&P 500 are irrelevant. There's been a  
16 lot of detail about that, of course, in the Ex Parte  
17 766 comments, and we have reproduced some of that in  
18 our written testimony, showing that that's a very  
19 flawed presentation.

20 But regardless, the financial condition of  
21 rail shippers is not a relevant factor in the  
22 reciprocal switching statute and the competition of

1 course brings benefits well beyond just rates.

2           And of course we've touched upon  
3 reciprocal switching is needed to address non-rate  
4 issues. Providing shippers with the ability to  
5 access alternative carriers in response to service  
6 disruptions, which we heard Jeff Sloan talk about  
7 earlier, allowing traffic to be diverted to routes  
8 where the greatest ability is to handle it  
9 efficiently.

10           Greater competition would require the  
11 railroads to consider the impacts of their operating  
12 decisions on their customers that today they can  
13 take for granted.

14           Competition provides the incentives for  
15 railroads to negotiate with their customers, service  
16 terms and contracts. That's something that was very  
17 common shortly after the Staggers Act brought in  
18 contracts between carriers and their customers. And  
19 those have all but disappeared in most agreements  
20 today.

21           So I did want to turn briefly to Justin  
22 Louchheim with the FI, who did just also want to

1 touch on these non-rate benefits of reciprocal  
2 switching.

3 CHAIRMAN OBERMAN: Karyn, before you do  
4 that, Patrick had a question.

5 BOARD MEMBER FUCHS: Karyn, in reference  
6 to your previous slide on revenue adequacy, you  
7 would agree, though, that the current rules  
8 explicitly state that a railroad being revenue  
9 inadequate is not the basis for denying a switching  
10 order?

11 MS. BOOTH: Correct, yes. We do, yep.

12 BOARD MEMBER FUCHS: And would you also  
13 agree that even under -- that's under the rules, but  
14 then the precedent which again could be argued is  
15 even more stringent than the rules could be argued.

16 Is there anything in the precedent that  
17 would suggest that shippers need to show any  
18 evidence about a railroad's revenue adequacy?

19 MS. BOOTH: No, no, not that they have to  
20 show evidence. It was a factor, Patrick. It was  
21 obviously an important factor that the ICC looked  
22 to, of course, in reaching its decision and where to

1 draw the lines, where to create the standards,  
2 et cetera.

3 BOARD MEMBER FUCHS: I agree with your  
4 characterization about the ICC's emphasis on trying  
5 to protect differential pricing. I agree with that.

6 I just wanted to be clear about what's  
7 part of the bar and what's not. It's sort of  
8 picking at it. So I appreciate that.

9 MS. BOOTH: Okay. I'm glad we're in  
10 agreement.

11 MR. LOUCHHEIM: So thanks, Karyn.

12 Hi, everyone, this is Justin Louchheim  
13 with the Fertilizer Institute. So appreciate the  
14 questions and back and forth a lot.

15 I have a case example I'll just share, and  
16 I'll begin reiterating a little bit of what Karyn,  
17 Jeff and others have stated, which is I think it's  
18 important to begin with the presumption that should  
19 the Board adopt this proceeding and finalize it, I  
20 think it's more than reasonable to presume that it  
21 would work well, it does work well in Canada, that's  
22 been discussed. TFI's members have extensive

1 operations in Canada with the Canadian railroads and  
2 it works very well up there.

3 They also have extensive operations and  
4 experience with a couple unique locations in the  
5 United States where reciprocal switching has been  
6 grandfathered into those locations.

7 As was well documented in 2017, CSX  
8 implemented PSR, and I'm not trying to pick it on  
9 CSX for those from CSX who are watching right now,  
10 but it's illustrative.

11 There was a service meltdown, and one of  
12 our members has two locations on the network where  
13 they have grandfathered situations where they can  
14 get reciprocal switching today, and back in 2017 and  
15 prior to 2017.

16 And they exercised those -- that ability  
17 in those locations during that service meltdown,  
18 they were able to switch some of the traffic, and  
19 that was -- that didn't completely resolve all their  
20 problems with CSX. They have lots of other  
21 locations. But it was extremely helpful in those  
22 locations. And that to some extent provided a

1 little bit of a pressure relief valve there during  
2 those challenges.

3 And to this day still does it in certain  
4 instances, as it does in Canada for our members.

5 So I wanted to focus on, just sort of cite  
6 that example. And I think as a general principle, I  
7 think the idea that I think everyone accepts that a  
8 little bit of competition injected into the rail  
9 marketplace is a positive way to, I'll just say,  
10 perhaps make the rail industry a little more  
11 customer-focused. It doesn't mean that our members  
12 are going to, you know, trip all over themselves to  
13 want to switch traffic all over the place.

14 But as Jeff Moreno pointed out, car  
15 ownership has radically shifted over the recent  
16 decades, and for our members as well, those cars are  
17 being very inefficiently utilized right now for  
18 shippers. Those are shipper assets. And there's  
19 really not much incentive given the lack of  
20 competition in the rail marketplace for those assets  
21 to be better utilized. Our members right now for  
22 fertilizer distribution, cycle times are down.



1 There's a lot of supply chain challenges. They're  
2 not able to move as much product right now because  
3 of poor cycle times. And so that's just an ongoing  
4 problem.

5 If this rulemaking were finalized right  
6 now, it wouldn't completely absolve everything, but  
7 it would certainly be very helpful, and it was in  
8 this particular case in 2017. Sorry, took a little  
9 more time than I anticipated.

10 MS. BOOTH: That's okay. Thank you,  
11 Justin.

12 BOARD MEMBER PRIMUS: If you don't mind, I  
13 want to go back to what Justin was talking about and  
14 open it up to everybody else in the group.

15 Justin, you alluded to 2016 and not just  
16 CSX but PSR in general.

17 And I would like to gain a better  
18 understanding from the group if PSR has actually  
19 exacerbated or even accelerated the need for this,  
20 and if you can, you know, explain each of your  
21 reasons why you think that that's so.

22 MR. LOUCHHEIM: I would definitely say it

1 has. I think it's underscored the need for this.

2 I refer to this as an update to existing  
3 regulations that govern reciprocal switching, so I  
4 think it underscores the need to modernize the  
5 current regulations. I think the way it's kind of  
6 laid out, I think the Board members can carefully  
7 analyze case-by-case as laid out, so as they would  
8 like.

9 But yeah, PSR has definitely underscored a  
10 greater need I think today than just five years ago.

11 BOARD MEMBER PRIMUS: Anybody else want to  
12 comment on that?

13 MR. FISHER: I would. Sorry about that.

14 Yes, so like currently we have some  
15 shippers, you know, they're calling us and telling  
16 us about issues they are having with getting corn  
17 and so forth into their facilities.

18 And, you know, they're captive to one  
19 railroad, and they had the option to be able to do a  
20 switch with a nearby railroad, that would help them  
21 out.

22 In the event that you have one railroad

1 that's suffering, having troubles for whatever  
2 reason, shippers would like to have the option to  
3 kind of have the ability to use another facility or  
4 another railroad.

5 That's I guess one of the main arguments  
6 from our standpoint is just that options are good,  
7 and especially when service is not the best, it's  
8 very good to have options.

9 BOARD MEMBER PRIMUS: So Max, just to  
10 follow up, your folks are seeing -- since the  
11 introduction of PSR, you know, you've seen greater  
12 reasons as to why this should happen? Is that  
13 basically what you're hearing from your folks?

14 MR. FISHER: Yes, yes.

15 MR. SLOAN: This is Jeff Sloan. I would  
16 just reiterate that. I mean, I think our members  
17 see the increasing need for this. And I think it  
18 goes to the fact that decisions that go into how PSR  
19 is implemented and the kind of reductions that are  
20 made to improve efficiency, there has to be a  
21 counterbalance of the ability to still meet the  
22 customer's needs.

1           And if there's not a legitimate fear of  
2    losing that traffic, I think that alters the  
3    decisions that are made as far as investments and  
4    employment levels and service levels.

5           MR. MC BRIDE:   This is Michael McBride.  
6    Can you hear me?  I just wanted to state that based  
7    on my experience at my shipper clients, it wasn't  
8    just PSR.  You know, when they reduced crews and  
9    power, voluntarily, the Board didn't make them do  
10   it, the shippers didn't make them do it.  Then they  
11   did that again in COVID.  And because of collective  
12   bargaining agreement issues or because of just  
13   general labor shortages, now they are having trouble  
14   getting enough crews.

15           Those were actions they put on themselves.  
16   Some of us didn't get rid of employees during COVID,  
17   the railroads did.

18           And for that reason, if they have now  
19   created service problems for shippers and another  
20   railroad can provide some relief, it seems to me  
21   it's a strong justification for you to loosen up  
22   these reciprocal switching rules.

1 BOARD MEMBER PRIMUS: Thank you.

2 MR. CORTHELL: Hi, Ross Corthell with the  
3 National Industrial Transportation League. I would  
4 add that the financial pressures that have come  
5 along with the implementation of PSR have really put  
6 a lot of pressure on the railroads to scale in the  
7 event that there is some sort of abnormal activity,  
8 like a pandemic. And they were very quick to scale.  
9 And I would say that scaling was under the same  
10 pressure that they themselves created by the  
11 implementation and the expectations set under PSR of  
12 both physical and human resource optimization.

13 And, you know, as we all know, the volumes  
14 came back faster than anybody expected, but the  
15 slack had been taken out based on the principles of  
16 PSR.

17 And so they just aren't able to recover.  
18 And to the Chairman's earlier point, your own  
19 customer assistance office has been inundated with  
20 phone calls. And this was discussed around the time  
21 that we were talking about, you know, whether that  
22 precipitated any shippers actually seeking relief

1 under the current set of rules.

2 I would advocate that, you know, if there  
3 was ever a time for shippers to pursue this, it  
4 would have been in the last 18 months. But they  
5 were so skeptical of any kind of positive outcome  
6 that you just didn't see any action taken in the  
7 face of tremendous service disruptions in the U.S.  
8 supply chains caused by the lack of human and  
9 physical resources needed to service the business.

10 BOARD MEMBER PRIMUS: Again, unless  
11 someone else has something to say, I would like to  
12 follow up with that, Ross, I appreciate those  
13 comments.

14 And I want to open it up again to  
15 everyone.

16 We often hear the economic benefits of the  
17 railroads today, you know, PSR and everything that  
18 they are doing. But what's the economic fallout for  
19 some of your membership? Again, it's for everyone.

20 As a result of the conditions, Ross, that  
21 you just described? I mean, that to me is just as  
22 important. You know, their success is very

1 important, but your success is just as important and  
2 should be not cast aside what I'm looking at.

3 So I see reciprocal switching as sort of  
4 that dire sort of life preserver that we're throwing  
5 out to help, but I want to understand sort of the  
6 economic situation that you guys are put in because  
7 of it.

8 MR. LOUCHHEIM: Thanks, Board member  
9 Primus. This is Justin again. It varies by the  
10 member, but in a general sense, you've got fewer  
11 days with pickups or deliveries. I know I'm using  
12 some of my lingo probably -- or using the wrong  
13 words perhaps, but I think you know what I mean.

14 There has been issues with bunching or did  
15 shipper facilities, were they properly configured to  
16 deal with the new -- the sudden change in -- sudden  
17 operational changes.

18 I would generally say too with PSR  
19 implementation, I think a more customer-focused rail  
20 industry would probably have rolled out PSR a good  
21 bit differently, is my guess.

22 I think that at the moment, I'm sure rail

1 labor would agree that they shed far too much staff  
2 and they have -- I think Ross was touching on it,  
3 their operational elasticity is how I refer to it is  
4 now vastly diminished or nonexistent.

5 So every time there's a minor issue pops  
6 up, and I don't to say that every issue is minor,  
7 there's some serious issues that are real legitimate  
8 challenge for the rail industry.

9 Let's take the COVID pandemic for example,  
10 or endemic or whatever we want to call it right now.  
11 I don't mean to make light of it either. That has  
12 affected, just like TFI's members, railroads have  
13 lost some staff because of the pandemic because they  
14 got COVID, eventually they returned, but there were  
15 not enough backup crews or backup staff to provide I  
16 would say acceptable service levels.

17 So in the first quarter of this year, our  
18 members, go back to cycle times, cycle times really  
19 is seriously diminished right now. And so as we go  
20 into the spring season for planting, our members are  
21 not able to preposition product for farmers to the  
22 degree that it needs to be done.



1           And that's partly because they don't have  
2 enough railcars that they own because they're not  
3 getting the cars back in time to ship the same  
4 volume of product anymore.

5           You can't always -- you know, the question  
6 I guess becomes is how many millions of dollars do  
7 shippers have to invest to have cars sitting on the  
8 side just in case the railroads can't perform the  
9 job they said they were going to perform when the  
10 contracts were signed.

11           It's a real challenge, it's pervasive and  
12 it is just getting worse.

13           There needs to be some kind of -- I don't  
14 know how we want to characterize it, I don't want to  
15 sidetrack this proceeding. I think this is perhaps  
16 the most important proceeding before the Board right  
17 now because I do think there needs to be a little  
18 bit of cultural shift for the rail industry, to be a  
19 little more customer-focused. I think this is a  
20 really key way to get at that a little bit.

21           I think market competition is the number  
22 one way to make that happen without having to

1 interject regulation, regulatory intervention into  
2 the market, if that makes -- I hope everyone is  
3 tracking with that.

4 MR. SLOAN: This is Jeff Sloan. I would  
5 just add that a service -- service challenges,  
6 service meltdowns, you know, on the railroads do  
7 have real impact on rail customers. The most  
8 extreme example is if a facility, either a  
9 production facility or a customer facility, has to  
10 shut down because of not getting the supplies they  
11 need to keep operating.

12 But short of that, there's a lot of costs  
13 to the shippers in just modifying their business  
14 operations to deal with the rail service challenges.  
15 You know, spot -- using spot market for trucks to --  
16 for emergency supplies, just additional staffing to  
17 track and manage the cars.

18 All of this is a significant burden that  
19 might not be obvious to everyone while it's  
20 happening, but it's certainly felt by a wide range  
21 of members.

22 CHAIRMAN OBERMAN: Jeff, I want to follow

1 up on I think some questioning that Patrick had with  
2 Jeff Moreno a little bit ago, and I want to make  
3 sure this is articulated as I understand it.

4           If you look either at 1147 or the  
5 possibility of using service failures to win a Midtec  
6 case, are you saying that in the real world of  
7 business of shippers, if you have to wait until you  
8 can amass enough evidence that might meet a Midtec  
9 standard or 1147 standard of service failures, by  
10 that time, the shipper has already suffered  
11 significant harm and losses. You have to first  
12 wait -- it can't be just a missed switch today and  
13 you run in on a case under 1147 or reciprocal  
14 switching. Some meaningful continuation of service  
15 problems. And then you've got to wait for the  
16 period until the litigation ends before you get  
17 relief, all the while you're suffering these service  
18 problems.

19           So in that sense, it may be a theoretical  
20 legal option, but it isn't much of an option for an  
21 actual shipper in the real world. Is that a fair  
22 way to understand the problem?

1 MR. MORENO: Yes.

2 Chairman Oberman, I think you've  
3 articulated better than I was trying to articulate  
4 in response to Patrick earlier the timing issue  
5 here. And we have -- we, these associations, my  
6 clients, have been in to visit the Board in ex parte  
7 meetings in a different proceeding where we have  
8 attempted to explain to you why even the Board's  
9 emergency service orders, which are meant to be  
10 applied on an expedited basis, are insufficient to  
11 address shipper service concerns.

12 Let alone reciprocal switching, which is  
13 by no means an expedited process, even under what  
14 the Board's proposal is now, it's not -- it would be  
15 longer than an emergency service order proceeding.

16 So the damage is done. The whole point of  
17 reciprocal switching and competition that it  
18 engenders is that it be prophylactic. And it's  
19 prophylactic in two ways.

20 The shipper who can actually take  
21 advantage of reciprocal switching obviously has the  
22 ability to shift its traffic to a carrier that may

1 be more capable of handling the business at that  
2 particular time.

3 But in addition, even a shipper who  
4 doesn't have access to reciprocal switching and  
5 remains captive to the carrier having service  
6 problems will benefit, because by one shipper  
7 shifting its traffic away, that frees up capacity on  
8 the congested carrier. And therefore will help that  
9 carrier recover more quickly and be able to serve  
10 the traffic that doesn't have the option for  
11 reciprocal switching.

12 So absolutely I agree with what you said  
13 100 percent.

14 CHAIRMAN OBERMAN: I suppose one way to  
15 think of this is on the other side of the ledger, in  
16 terms of the time is money aspect of this world of  
17 railroads and shippers, we just approved a rule  
18 speeding up the emergency trackage rights situation  
19 when there are problems with a rail network, a  
20 washout or fire or whatever, because the railroads  
21 want to get the situation back up and running as  
22 fast as they can.

1           So it seems to me this is the other side  
2 of the coin, that if you have a meaningful service  
3 problem, you want to get it solved immediately and  
4 not win a case a year from now, is what you're  
5 saying.

6           MR. MORENO: Absolutely.

7           BOARD MEMBER FUCHS: Marty, I want to  
8 explore the timing point a little bit.

9           Jeff, how long under the proposed rule, if  
10 it were adopted, how long would a case take? In  
11 your estimation?

12          MR. MORENO: Well, the Board doesn't have  
13 a timeline. Now, we in our comments back in 2016  
14 did propose a procedural schedule for reciprocal  
15 switching, which was seven months.

16          BOARD MEMBER FUCHS: So in some sense, the  
17 situations that you're describing, you know, I think  
18 and Justin described a plant shutdown, and you  
19 talked about the damage already being done. Even  
20 under the proposed rule, it would take seven months.

21          And so wouldn't the damage already be done  
22 in that instance? And so, you know, so that's kind

1 of the first point.

2 And the second point is just on a  
3 practical level, do you really expect a shipper  
4 under the proposed rule to come in for a switching  
5 order if their rate is reasonable and their service  
6 is adequate?

7 MR. MORENO: Let me take your first  
8 question and answer that.

9 I don't anticipate that a shipper is going  
10 to wait to request reciprocal switching in response  
11 to a current service problem.

12 The benefit of reciprocal switching lies  
13 in the fact that the shipper already has that  
14 switching access when the service problem occurs.  
15 And the examples that Justin presented for a TFI  
16 switch shipper who was able to do that with CSX/NSR,  
17 they already have the switching so they made the  
18 switch.

19 We're advocating competition; we're not  
20 advocating this for the purpose -- sole purpose of  
21 addressing service. So that's the first question.

22 Now, remind me what was your second

1 question?

2 BOARD MEMBER FUCHS: I think you in part  
3 answered it, but I was wondering whether or not you  
4 would expect, say, a shipper in a market dominance  
5 situation but was getting reasonable rates according  
6 to the Board's definition and had generally not had  
7 service failures so could not -- would not be able  
8 to bring evidence of inadequate service.

9 Would you expect that shipper to try and  
10 pursue something under the proposed rule as the  
11 prophylactic as you described it?

12 MR. MORENO: Justin, did you want to say  
13 something to that?

14 BOARD MEMBER FUCHS: Because the proposed  
15 rule is not really a right, you know, because you  
16 still have to win that case, you have to beat the  
17 carrier's argument when the carrier is trying to  
18 show unduly hinder operations. So it's not as  
19 though the proposed rule gives the shipper an  
20 unmitigated right -- that's what I'm sort of getting  
21 at is how realistic is it that a shipper would get  
22 the prophylactic as you describe it even under the



1 proposed rule.

2 MR. LOUCHHEIM: I'll let Jeff Moreno do  
3 cleanup duty and give an initial thought.

4 I will go back to efficient utilization of  
5 shipper assets. There are situations where cars get  
6 routed 1,000 miles in the wrong directions to get to  
7 an end location where if it had just switched, like,  
8 you know, you would have saved 1,000 miles of track  
9 usage. And that was just because the incumbent, I  
10 believe I'm saying this right, the incumbent  
11 railroad didn't want to allow a switch to therefore  
12 didn't switch to another railroad to get it to that  
13 destination point.

14 There's a lot of things to say when you  
15 send something 1,000 miles out of the way just so  
16 that people don't have to play together as much.

17 MS. BOOTH: Patrick, I'll just chime in  
18 too, I mean, I don't think it's an either/or  
19 scenario. I think the reality is if these rules  
20 took effect, you're going to have different  
21 scenarios. How long a case is is going to depend on  
22 the facts. You know, when the shipper seeks the

1 remedy is going to potentially vary.

2           You have shippers who have inconsistent  
3 service, right. It might not be just one major  
4 meltdown issue that leads a shipper to seek a remedy  
5 specific to a major meltdown, but they might be  
6 experiencing, and this happens actually pretty much  
7 very frequently, unreliable service, inconsistent  
8 service over time. And that may be enough,  
9 depending upon the facts and their ability to, you  
10 know, bring forth the evidence to win the case.

11           So I just don't think it's always going to  
12 be proactive or always going to be reactive to some  
13 major catastrophic event. It's really going to  
14 vary.

15           BOARD MEMBER FUCHS: I know Karen has a  
16 question, so this might -- I'll make a remark and  
17 conclude.

18           Jeff, you mentioned the emergency service  
19 regulations, I think you're referring to 1146, and  
20 then there's a kind of intermediate step at 1147 and  
21 we're, of course, talking more permanent at 1144.

22           I understand those options not to be

1 mutually exclusive. So you could pursue an  
2 emergency service, and I understand the critique  
3 about those things, those rules being too slow,  
4 right. I get that.

5 But I just want to point out that you  
6 could pursue an emergency service while an 1147 case  
7 was pending or an 1144 case was pending.

8 I just wanted to make that point. Sorry,  
9 Karyn.

10 MR. MORENO: We fully comprehend that, but  
11 it really just doesn't address the issue for us.

12 BOARD MEMBER FUCHS: I hear you, I hear  
13 you.

14 CHAIRMAN OBERMAN: Before Karen has her  
15 question, just to follow up on this discussion. I  
16 think what I'm hearing, Jeff, you and Karyn saying,  
17 is that the desire or motivation for a shipper to  
18 seek relief under a looser rule is going to vary  
19 widely with that shipper's circumstance.

20 In other words, I assume some shippers  
21 have a much more of a tolerance to be able to  
22 survive service interruptions. Others may be much

1 more delicate and don't have the kind of cushion, so  
2 they may be more motivated to seek the competitive  
3 option in advance of a problem or they may see their  
4 neighbor starting to get bad service, and that might  
5 clue them in to say this railroad is having trouble,  
6 I want to come in.

7 So I could see a wide variety of fact  
8 situations. And they may not be perfect. The  
9 shipper may suffer some loss while the case is  
10 pending.

11 But it may be better than waiting until  
12 the disaster strikes before they even start a case.  
13 I gather that's the picture you're trying to paint  
14 for us.

15 MS. BOOTH: Yes.

16 MR. MORENO: Yes.

17 CHAIRMAN OBERMAN: Karen?

18 BOARD MEMBER HEDLUND: Going to Patrick's  
19 point about bringing a case will still take months  
20 and cost and expense. But isn't the fact that a  
21 shipper with a real complaint would have an adequate  
22 remedy before the Board encourage the incumbent

1 railroad to negotiate a switch on a much quicker  
2 basis voluntarily, that it will make the railroads a  
3 little bit more willing to consider a switch when  
4 they have to recognize there's a real problem there?

5 MS. BOOTH: Board Member Hedlund, yes, we  
6 agree with that as well. Just the mere fact that  
7 the rule changes, we would hope would change  
8 behavior in the industry, not in all cases. There's  
9 going to be different facts, as Chairman Oberman  
10 said.

11 But in general, we see that all the time.  
12 When policy shifts and changes are made, the  
13 industry will respond to that. And they will  
14 self-regulate, at least some carriers will in some  
15 circumstances. There will be others where they want  
16 to contest.

17 But we do think there will be benefits  
18 simply from the policy change in and of itself, yes.

19 MR. MCBRIDE: I wonder if I could add  
20 something. I've been doing this for 46 years, and I  
21 can tell you that I think the thing the railroads  
22 may fear more than anything else is the Board

1 setting an adverse precedent that may invite other  
2 shippers to come in.

3           So under the circumstances that I think  
4 the Chairman and you were asking about, and Board  
5 Member Fuchs, if a shipper has, let's say, spotty,  
6 inconsistent, inferior service but it's not yet a  
7 disaster, the railroad is probably going to respond  
8 out of fear thinking they may lose that case, and  
9 they are either going to up their game to come in  
10 and show service has improved or they are going to  
11 cut a commercial deal with the shipper and get rid  
12 of the case.

13           And there are just many, many examples  
14 over the decades before the ICC and the Board where  
15 when a shipper puts on an arguably meritorious case,  
16 it gets settled. And that's the reason.

17           CHAIRMAN OBERMAN: I want to just sort of  
18 underscore the points that were made just speaking  
19 on my own view of what this whole proceeding is  
20 about, as well as some of our other rulemakings.

21           To me, if we determine that we're going to  
22 adopt a different rule for reciprocal switching, the

1 purpose is not to deluge the Board with cases. The  
2 better outcome would be that by modifying the  
3 balance between shippers and railroads, better  
4 private behavior will be encouraged until the cases  
5 won't be brought. That would be the ideal outcome  
6 in my view, assuming we can figure out how to strike  
7 the right balance, which is why we're having these  
8 hearings and the challenge before all of us.

9 So I think I just wanted to underscore  
10 that as a matter of policy.

11 Now, and by the way, this is not new. I  
12 have said this repeatedly, to railroad groups and  
13 investor groups. Our goal is not for the Board to  
14 be stepping in every day and giving orders for how  
15 the parties should behave, but rather the parties  
16 settle their own cases.

17 Patrick, you had -- do you have a question  
18 you wanted to ask now or you wanted to hold it?

19 BOARD MEMBER FUCHS: Well, unless the  
20 panelists have more in their presentation, but I  
21 have I guess one more.

22 CHAIRMAN OBERMAN: All right. Because I

1 have a few too whenever we find out that the  
2 presentation ends. I'm not sure when that is. But  
3 I have a few I want to go back to.

4 MS. BOOTH: We can't see the clock with  
5 the way the slides are.

6 CHAIRMAN OBERMAN: The clock has exploded  
7 so don't worry about that.

8 (Laughter.)

9 MR. MORENO: We are prepared to abridge  
10 our testimony significantly. There are three topics  
11 we would like to make sure we have time to cover.  
12 One is the efficiency arguments of the railroads,  
13 and the other two are the reasonable distance and  
14 the switch fee issues.

15 CHAIRMAN OBERMAN: Well, those are all  
16 quite important, and that's a lot of where my  
17 questions are, so Jeff --

18 BOARD MEMBER FUCHS: Mine too, Marty.

19 CHAIRMAN OBERMAN: Go ahead with that,  
20 then we'll ask our questions.

21 MR. MORENO: Then we will proceed. Just  
22 to wrap up the topic that we had been talking about,



1 in terms of justifications, I want to point out --

2 CHAIRMAN OBERMAN: Actually, Jeff, let me  
3 interrupt you for a second. I see by this exploded  
4 clock that we've been going for two hours and 15  
5 minutes. Does anybody feel the need for a 10-minute  
6 break, particularly my fellow Board members?

7 BOARD MEMBER FUCHS: I say let's power  
8 through, Marty.

9 CHAIRMAN OBERMAN: Just thought that the  
10 youngest person on the panel and see if we can power  
11 through.

12 (Laughter.)

13 CHAIRMAN OBERMAN: There are differences.  
14 We will take a 10-minute recess, and we will be back  
15 at 11:55 East Coast time. Thank you.

16 (Recess.)

17 CHAIRMAN OBERMAN: All right. It is  
18 11:55. Is everybody back?

19 Jeff, do you want to pick up where we left  
20 off there?

21 MR. MORENO: Yes. Thank you, Chairman  
22 Oberman.

1 I want to address the rail industry's  
2 focus on economic efficiency and the fact that it's  
3 a very myopic focus because it's solely focused on  
4 alleged inefficiencies for them.

5 Reciprocal switching, well, first of all,  
6 economic efficiency is defined in terms of net  
7 societal costs and benefits. Reciprocal switching  
8 fosters greater economic efficiency by facilitating  
9 consider consideration of both railroad and shipper  
10 costs and routing decisions instead of just the  
11 railroad's costs. And significantly to a point we  
12 made earlier, it adds the cost of railcar ownership  
13 back into consideration following the shifting of  
14 those costs of shippers over the past three decades.

15 As I noted earlier, private railcar  
16 ownership has more than doubled since 1985 to  
17 account for 73 percent of all railcars in North  
18 America today.

19 And although railcar ownership costs would  
20 factor into routing assessments if incurred by the  
21 railroad, there's no incentive for the railroad to  
22 consider those costs being borne by the shipper.

1 And I also alluded to Mr. Sloan's earlier testimony  
2 about Dow Chemical, which has overestimated 335,000  
3 excess miles due to less efficient routing.

4 Therefore, because economic efficiency is  
5 defined in terms of net societal costs and benefits,  
6 what may be most efficient for the railroad may not  
7 be most efficient on net for society, and reciprocal  
8 switching brings these other costs and benefits into  
9 the equation.

10 BOARD MEMBER FUCHS: Jeff, this is a good  
11 point to pause for my question.

12 Is there ever a situation where a shipper  
13 receiving sole service from a railroad is the  
14 economically most efficient outcome?

15 MR. MORENO: Sure, sure. I wouldn't  
16 presume to say that would never be the case. And it  
17 may often be if it's single served versus joint  
18 served.

19 BOARD MEMBER FUCHS: Now, the necessary to  
20 provide competitive service prong provides for  
21 competition for, you know, basically any market  
22 dominant -- in any market-dominant situation. And

1 so I'm wondering, because, you know, as you  
2 identified, there might be a situation where the  
3 economically efficient outcome is for a  
4 market-dominant carrier, is there any need for the  
5 Board to tease out the situations where a  
6 market-dominant carrier is most efficient versus the  
7 ones that are not?

8 MR. MORENO: Well, I think some of that  
9 gets teased out in the operating effects factor  
10 where the Board has to consider that.

11 BOARD MEMBER FUCHS: Well, maybe. But  
12 suppose there weren't -- it didn't unduly impair  
13 carrier operations. Is there anything else that you  
14 think would protect the economically efficient  
15 service that is needed under the rules?

16 MR. MORENO: Well, I'm struggling to  
17 ascertain why the shipper would not favor that  
18 service, if it is more economically efficient.

19 BOARD MEMBER FUCHS: Well, it could be  
20 because a particular shipper might, especially  
21 depending on what the Board does on compensation,  
22 which I know you all will address, it could be a

1 shipper wants although a rate it may have, even if  
2 that's not the overall most economically efficient  
3 for society.

4 MR. MORENO: Well, if we're talking about  
5 the -- getting a lower rate, those other costs are  
6 going to be associated.

7 For example, if that is an inefficient  
8 routing for a shipper and a shipper is using private  
9 railcars, the shipper is going to have to maintain a  
10 larger fleet. That increases both its ownership and  
11 its maintenance costs to the railroad.

12 So the shipper also in many cases will  
13 have to carry more inventory costs. Take plastics  
14 shippers, for example. Their inventory is stored in  
15 their railcar the moment it's produced before they  
16 ever even have a customer.

17 BOARD MEMBER FUCHS: And Jeff, given what  
18 you've previously articulated in other proceedings  
19 about the difficulty of cost/benefit analysis within  
20 our economic regulatory sphere, would you agree that  
21 the more likely prong to actually be used is still  
22 necessary to provide competitive service under the

1 proposed rules than the practical and public  
2 interest?

3 MR. MORENO: I mean, my personal opinion  
4 is it's probably going to be used more, simply  
5 because of the cost/benefit analysis difficulties  
6 that we've talked about. But that also, I think,  
7 makes the prong 2, the competitive service prong,  
8 the less impactful in terms of the volume of  
9 traffic.

10 Because recall, under prong 1, a shipper  
11 could come in and seek reciprocal switching for an  
12 entire facility or for subsets of commodities. And  
13 prong 2, that market dominance showing has to be  
14 made on each individual origin destination pair.

15 So a shipper is not going to come in with  
16 every single lane that they have. They are going to  
17 focus on the lanes that are high volume, that have  
18 high return associated with that.

19 BOARD MEMBER FUCHS: Got it. Thank you so  
20 much.

21 MR. MORENO: You're welcome.

22 Now, I'd like to talk about the reasonable

1 distance factor, because I know that's something the  
2 Board had specifically requested comments upon.

3 Our definition of reasonable distance is  
4 that it should be defined by the actual operations  
5 of the incumbent between the facility for which  
6 switching is sought and the nearest working  
7 interchange.

8 Now, the rail industry has insisted that  
9 the statute restricts reciprocal switching to  
10 terminal areas.

11 I would point out, however, that nothing  
12 in the relevant portion of the statute even refers  
13 to terminals in those reciprocal switching contexts.  
14 Our reply comments also go into detail about how the  
15 railroads have misrepresented the STB precedent or  
16 ignored STB precedent that conflicts with their  
17 position.

18 Nevertheless, despite our differences on  
19 this interpretation of the statute and the  
20 precedent, there really isn't all that much daylight  
21 between our proposal and the railroad position, as  
22 has been portrayed in the comments.

1           In our opening comments back in October  
2 2016, we offered a detailed explanation about how  
3 our definition would work. Our proposal determines  
4 reasonable distance based on the functions of a  
5 terminal.

6           Now, according to STB precedent, a  
7 terminal area must contain and cannot extend  
8 significantly beyond recognized terminal facilities,  
9 such as freight or classification yards or team  
10 tracks and, and, a cohesive commercial area  
11 immediately served by those facilities.

12           Now, according to precedent, terminal  
13 facilities consist of any property of a carrier  
14 which assists in the performance of the functions of  
15 a terminal and the nature of the facilities and the  
16 character of the area in which they are located are  
17 as important as the use of the facility.

18           It's our belief that by identifying  
19 terminal facilities, a reasonable distance would  
20 encompass any shipper location served by trains  
21 operating out of those facilities.

22           Now, in most instances, that's going to



1 result in a general rule of thumb that will allow  
2 the Board to determine a reasonable distance by  
3 whether reciprocal switching can occur without  
4 movement in a road train, as opposed to a local  
5 train. This is because local trains tend to perform  
6 most of the terminal functions.

7 There essentially are two switching  
8 scenarios, therefore, that should always fall within  
9 this definition of reasonable distance. I'm going  
10 to lay out both a simple scenario and what I call  
11 the more complex scenario.

12 In a simple scenario, the local train that  
13 serves a customer facility operates out of the very  
14 same yard where the interchange occurred. So all  
15 that happens in that situation is at the yard, the  
16 railcar gets switched into the competitor's  
17 interchange train as opposed to the incumbent's line  
18 haul or road train.

19 Now, let's talk about the more complex  
20 scenario. In larger areas, you may have terminals  
21 with multiple yards and shippers may be served by  
22 local trains out of one yard, but yet the

1 classification yards where trains are built and  
2 interchange occurs may be in a different location --  
3 yard within the terminal.

4 Here, our position would be that the local  
5 train that serves a customer facility operates  
6 through a yard that is served by another local train  
7 that connects to the yard where the interchange  
8 occurs. That would be another automatic reasonable  
9 distance definition.

10 Such operations are plainly terminal  
11 functions that would qualify them for reciprocal  
12 switching, even under the rail industry's definition  
13 of reasonable distance.

14 In contrast, most switches that would  
15 require transportation on a road train to reach the  
16 interchange point would not constitute a reasonable  
17 distance.

18 BOARD MEMBER PRIMUS: Go ahead, Marty.

19 CHAIRMAN OBERMAN: I wanted to -- I did  
20 have a question, but I was waiting for Jeff to  
21 finish.

22 MR. MORENO: I'm just about at a good

1 stopping point for that question.

2 I would say this presumption with respect  
3 to road trains should be rebuttable because there  
4 may be switches involving road trains that also  
5 function as local trains for some movements.

6 A shipper therefore should at least have  
7 the opportunity to make that showing or present  
8 other evidence that the switch operation would be  
9 consistent with terminal functions.

10 Go ahead, Mr. Oberman.

11 CHAIRMAN OBERMAN: Jeff, I have been  
12 exploring this idea of trying to define what a  
13 terminal is. You seem to be further along than my  
14 research has shown. I think there's a lot of  
15 uncertainty or there could be a lot of uncertainty  
16 in a litigation setting as to what's a terminal.

17 But there doesn't seem to be much  
18 uncertainty about yards where reciprocal switching  
19 now takes place. It appears to me that all of the  
20 class 1s have a fair -- fairly large number of  
21 places, and I'm going to get into that a little  
22 later with them, where they are already doing

1 reciprocal switching.

2 Have you thought about defining the place  
3 where the reciprocal switching could take place  
4 under a Board order to be limited to places where  
5 it's already taking place by the Class 1 railroad  
6 that's involved?

7 MR. MORENO: Well, I wouldn't limit -- you  
8 mean reciprocal switching or interchange of traffic  
9 is already taking place?

10 CHAIRMAN OBERMAN: No, I'm talking about  
11 reciprocal switching. In other words, from what I  
12 can tell, there's a fair amount of reciprocal  
13 switching already either going on or at least agreed  
14 to by the Class 1s because they have elaborate  
15 tariffs setting that out. And all of that  
16 switching, from what I can tell, takes place in some  
17 yard someplace. That yard may or may not be inside  
18 what we would all think of as a terminal.

19 You seem to be saying if switching is  
20 taking place there, that by definition makes it a  
21 terminal.

22 MR. MORENO: Well, I think we are taking a

1 function-based approach because we agree with you.  
2 We don't want the litigation to turn into whether  
3 something is a terminal.

4 A definition of a terminal that is locked  
5 into fixed geographic boundaries is amenable to  
6 gaming by the railroads, frankly, under this rule.  
7 And even today, I'm hard-pressed to find any clear  
8 definition of a terminal boundary in any public  
9 railroad documents.

10 CHAIRMAN OBERMAN: Me too.

11 MR. MORENO: So our focus on how switching  
12 operation of line with terminal functions avoids  
13 reliance upon what we vaguely defined in arbitrary  
14 geographic boundaries. But coming back to your  
15 question -- therefore, we're not saying that  
16 terminals should be the determining factor. We're  
17 saying terminal functions should be the determining  
18 factor.

19 And basically, if it moves on a local  
20 train and doesn't have to move on a road train, that  
21 should always constitute qualification of a  
22 reasonable distance for a reciprocal switching.

1           The rule of thumb that we have up here on  
2 the screen should be -- should always be, put aside  
3 whether the railroads call it a terminal or not.

4           CHAIRMAN OBERMAN: You seem to be saying I  
5 think, and this is what has perplexed me, that if  
6 you were trying to draft a rule for the entire  
7 United States, there are so many variations in where  
8 shippers are located vis-a-vis their local yard that  
9 it would be sort of a fool's errand to try to come  
10 up with a mileage which made sense.

11           So you're saying how does the traffic from  
12 the shipper get sorted out in the first place to get  
13 to where it's going. And however far that is from  
14 that yard is a reasonable distance.

15           MR. MORENO: That's right. And there are  
16 situations I've come across where a local train runs  
17 out of a yard up to 100 miles in some cases. So it  
18 could be.

19           Now, that's probably not the norm. It's  
20 probably going to be shorter in most cases. But  
21 that 100 mile switch, if it wouldn't change the way  
22 that operates in terms of the yards it has to

1 access, why shouldn't that switch -- why shouldn't  
2 that customer be eligible?

3 CHAIRMAN OBERMAN: Well, when you get up  
4 to 100 miles or more, are you not getting into  
5 what's more accurately described as a bottleneck  
6 situation, though?

7 MR. MORENO: That's why we were drawing  
8 the distinction between whether it is served -- a  
9 shipper is served by a local train or a road train.  
10 If it is served by a road train, I think you are  
11 straight into the bottleneck situation. If it's  
12 served by a local train, that's performing terminal  
13 function. It's switching -- it's gathering and  
14 distributing traffic. That's a terminal function.  
15 And therefore, it should be included.

16 CHAIRMAN OBERMAN: And you are saying that  
17 there are some places where a road train doubles as  
18 a local train?

19 MR. MORENO: There may be circumstances  
20 where a road train may stop at a shipper facility to  
21 pick up traffic where it ordinarily would not, I  
22 mean, where most road trains would not stop in the

1 middle of their journey. And that should at least  
2 be an opportunity for the shipper to demonstrate  
3 that that is providing a terminal function and  
4 should be included.

5 CHAIRMAN OBERMAN: So it would be if we  
6 were to approach it the way you're suggesting, it  
7 would just be a question of defining this function  
8 really, how it's performed rather than the name of  
9 the train?

10 MR. MORENO: Right. And I think that the  
11 first question you asked is is it on a local train  
12 or is it on a road train. And if it's on a local  
13 train, end of inquiry. If it's on a road train,  
14 you've got to take -- you may have to do a little  
15 deeper dive.

16 BOARD MEMBER PRIMUS: Marty, if I could  
17 just chime in.

18 CHAIRMAN OBERMAN: So, go right ahead,  
19 Robert, sorry.

20 BOARD MEMBER PRIMUS: It's on the same  
21 line of thinking.

22 So Jeff, again, Marty alluded to that



1 we've got places all over the country that cannot  
2 necessarily be classified one way or another. But  
3 especially I'm looking at from the ag side of the  
4 world, you know, you've got these farms and these  
5 facilities that are -- that you're saying probably  
6 may be 100 miles apart or more. And they don't  
7 operate necessarily from a local standpoint.

8           So how would you -- would what you're  
9 saying apply to areas out in the Midwest, you know,  
10 in the Dakotas and the Idahos? How would that play  
11 out for the ag customer there?

12           MR. MORENO: It has the potential, but  
13 honestly, without knowing the facts, I couldn't say  
14 exactly how it would apply to any particular  
15 shipper.

16           But our standard for reasonable --  
17 definition of reasonable distance is flexible enough  
18 that if the operations support it, you could argue  
19 that those longer distances are switches. I'm not  
20 saying they definitely would in every situation, but  
21 I'm saying that the possibility is still present.

22           BOARD MEMBER PRIMUS: I understand that.

1 I was just inquiring because again that's one of the  
2 challenges that we have. I mean, everyone can  
3 say -- can look at more populated and busier areas  
4 and find those terminals or those areas where you  
5 have -- actually you have local lines and you have  
6 road. But, you know, some of these other folks,  
7 again, the grain folks are on the call, if you want  
8 to chime in, you can do that.

9 But the sort of challenge there is finding  
10 where you can interchange the spots to do it, not  
11 confining them and saying, oh, well, it's just a  
12 certain radius so we can't do it because we don't  
13 have folks within those radiuses, it's a lot  
14 further.

15 So -- just I think the flexibility is  
16 important. I want to know if you guys considered  
17 that aspect of it as well.

18 MR. MORENO: I would just like to add one  
19 other thing before NGFA chimes in there. And I  
20 think there is a distinction that perhaps needs to  
21 be drawn between an existing interchange -- where  
22 there is an existing interchange or where there can

1 be an interchange.

2 Because the rule does draw a distinction  
3 between the two.

4 If it's an existing interchange, we're not  
5 changing the geography of anything --

6 MR. WILCOX: I was going to add that in  
7 terms of the authority to be flexible, I think Jeff,  
8 the reason he was discussing terminals so much is  
9 because he's trying to make the argument and  
10 successfully that even if you used the railroad's  
11 position that you have to have a terminal, it's  
12 still what we proposed or what the shipper coalition  
13 has proposed still makes sense.

14 But the statute again says nothing about  
15 terminals and a legislative history provides the  
16 flexibility to go beyond terminals. And so in the  
17 ag realm, with NGFA, as Max said and as NGFA has  
18 said in its testimony, the relief particularly out  
19 west is available up to 100 miles, so we believe the  
20 Board has flexibility to put standards in place to  
21 let those type of shippers make their case, that  
22 they have an existing interchange or an interchange

1 can be feasibly created, and that switching can  
2 occur subject to the other aspects of the rule on  
3 efficiency and so forth.

4 CHAIRMAN OBERMAN: Tom, if you didn't use  
5 a mileage limitation but you used a functional  
6 description, as Jeff just talked about, would that  
7 provide relief to ag shippers out in the reaches of  
8 the west?

9 MR. WILCOX: Sorry, Marty, could you  
10 repeat the first part of that?

11 CHAIRMAN OBERMAN: Yeah. You know,  
12 instead of using a mileage limitation, you've  
13 suggested that you could be eligible for switching  
14 if you were within 100 miles of an interchange.

15 The reasonable distance was not defined by  
16 mileage, but if it was defined by how far the  
17 shipper is from the sorting yard or classification  
18 yard, whatever you want to call it, where it's  
19 traffic is taken, without saying how far that  
20 distance is because everybody is different, would  
21 that provide relief for ag shippers?

22 MR. WILCOX: Yes. You know, the 100 miles

1 was put in NGFA's submissions to show that's where a  
2 big part of their relief would come.

3 But the functionality test that the  
4 shipper coalition groups has proposed would work. A  
5 lot of to Board Member Primus's point, question a  
6 lot of reciprocal switching opportunities for ag  
7 particularly out west are at existing interchanges,  
8 where they could, for example, receive  
9 transportation from another origin.

10 One point that NGFA has made throughout  
11 this is that the grain industry is much -- they need  
12 much more flexibility, they have changing markets,  
13 global markets.

14 So that there are a lot of existing  
15 interchanges, I'm staying away from the use of the  
16 word "terminal," but existing interchanges in yards  
17 where they could switch to another carrier but are  
18 prevented from doing so.

19 CHAIRMAN OBERMAN: Jeff, let me ask a  
20 question. You had talked earlier about the AAR's  
21 overstating how much traffic might be eligible for  
22 switching. Do you remember that topic?

1 MR. MORENO: Yes.

2 CHAIRMAN OBERMAN: As I understand it,  
3 their calculation is based on just using a mileage  
4 ring around any interchange point on the planet.

5 Have you tried or anybody either at the  
6 Coalition or time with your clients tried to  
7 estimate if you allowed switching based on this  
8 concept of a functional terminal, to use that -- I'm  
9 not sure I like that term, but it's a shorthand and  
10 we all know what you were talking about.

11 Have you done any calculation to indicate  
12 the magnitude of traffic that would fall within such  
13 a definition?

14 MR. MORENO: No, that would be a herculean  
15 task, if not impossible altogether, especially since  
16 we don't have access to the operations of every  
17 single movement out there.

18 CHAIRMAN OBERMAN: Okay.

19 MR. MORENO: But I would like to -- I  
20 think you can take some comfort in what the NIT  
21 League analysis, what it had proposed as a 30-mile  
22 mark in its proposal, because the NIT League

1 proposal hit 4.6 percent of traffic. And that was a  
2 far more expansive proposal in terms of its  
3 applicability and the ease at which shippers could  
4 take advantage of that proposal.

5 So I think you could look at that as an  
6 outlier.

7 MR. WILCOX: Marty, let me add, NGFA  
8 participated with a number of agricultural groups  
9 and actually took a stab at that -- those type of  
10 statistics in response to the Board's request for  
11 data back in -- it's been so long ago -- 2014, '12,  
12 whenever.

13 And there is some data, some analysis  
14 based on the waybill data, but it's just that it's  
15 very, very difficult to do with a lot of detail,  
16 considering the data mostly resides in the  
17 railroads.

18 CHAIRMAN OBERMAN: All right. Thank you.

19 MR. MORENO: And Chairman Oberman, I don't  
20 think I ever actually answered the specific question  
21 you asked to kick this discussion off, and that was  
22 about limiting reciprocal switching to areas where

1 it already occurs.

2 And I do want to make it very clear, that  
3 would not be beneficial from our point. I mean,  
4 it's already occurring in those areas. Now, perhaps  
5 it's not reaching every single shipper in those  
6 particular areas, but in order for this to have the  
7 desired benefits, this has to be more widespread to  
8 interchanges more generally.

9 If there are no more questions on  
10 reasonable distance, I can proceed to talk about  
11 switch fee.

12 CHAIRMAN OBERMAN: Jeff, let me -- I think  
13 I inarticulately asked the question.

14 What I'm positing is a situation where a  
15 shipper who is now not -- does not have reciprocal  
16 switching available is served by a serving yard or a  
17 switching yard or a classification yard where other  
18 shippers do have reciprocal switching based on  
19 current tariffs.

20 And if you defined shippers who would now  
21 be eligible as those whose traffic is already going  
22 to a yard that is -- where it could be reciprocally



1 switched, it's just that the class 1 isn't allowing  
2 it, would that cover, you know, a similar number of  
3 shippers to the way you've defined it in terms of  
4 within a reasonable distance of a serving yard,  
5 because I assume we're talking about the same thing,  
6 the shipper's traffic has got to go to a switching  
7 yard before it moves on to its final destination.

8 MR. MORENO: I think my answer would have  
9 to be the same. I don't think it expanded enough,  
10 unless we're still talking past one another.

11 We're focused on anywhere -- any location  
12 where an interchange occurs, whether it involves  
13 reciprocal switching or just the interchange of  
14 traffic, that's our point. Because that's -- all  
15 you're doing is getting to the closest point at  
16 which you can put the switched traffic onto the  
17 competing railroad's train. And since that  
18 competing railroad is already building a train in  
19 that location and there's already cars being  
20 switched between the two railroads in that location,  
21 it's just an incremental addition to the existing  
22 operation.

1                   CHAIRMAN OBERMAN: Well, it's not  
2 incremental if there aren't trains going over to  
3 another railroad from that interchange.

4                   MR. MORENO: Well, that's our point. If  
5 it's an interchange, by definition, there has to be  
6 trains going to another area. Maybe our definitions  
7 of interchange are a little different. You may be  
8 thinking of interchange as interchanging between any  
9 set of trains within the same railroad. I'm not  
10 including interchanges where railroads switch cars  
11 between their own trains.

12                   I'm talking about interchanges where they  
13 switch cars between their trains and another  
14 railroad.

15                   CHAIRMAN OBERMAN: But isn't that almost  
16 always going to be a yard someplace?

17                   MR. MORENO: Yes.

18                   CHAIRMAN OBERMAN: That's what I'm talking  
19 about.

20                   MR. MORENO: But you said where they're  
21 all engaged in reciprocal switching of traffic, and  
22 I'm talking about there's a difference between

1 reciprocal switching of traffic and interchange of  
2 traffic. And that's where I think we're talking  
3 past one another.

4 CHAIRMAN OBERMAN: Yes. Well, not  
5 necessarily.

6 What I am saying is that it occurs to me  
7 that there are a very large number of places in this  
8 country where reciprocal switching is permitted by  
9 tariff at the local yard already, and that if you  
10 examined all those locations, which I have only  
11 briefly looked at, I was going to get into this with  
12 the railroads when they testify, you would have a  
13 pretty far reaching availability of reciprocal  
14 switching, it strikes me.

15 MR. MORENO: I can't answer your question.  
16 I do not believe that that's going to be significant  
17 enough from our perspective.

18 I'm not sure it's as broad as you say, but  
19 I can't say for sure because I haven't done that  
20 study.

21 CHAIRMAN OBERMAN: I would be interested  
22 when you have time, and I think we're going to be

1 having some ex parte discussions, take a look at all  
2 the current locations where railroads have existing  
3 tariffs for reciprocal switching and see if you and  
4 your clients -- and I would say this, Tom, to  
5 your -- the same, could come back to us as to what  
6 benefit you would see in having those locations be  
7 the places where you could -- a shipper could be  
8 eligible to file a petition for reciprocal  
9 switching.

10 MR. MORENO: I'll take a look at that.

11 MS. BOOTH: Chairman Oberman, this is  
12 Karyn. When you raise that issue, are you thinking  
13 about like that the Board would potentially freeze  
14 those locations? Because the tariff can change, of  
15 course, and the carriers can decide not to perform  
16 reciprocal switching any longer, where it may exist  
17 today in a tariff.

18 CHAIRMAN OBERMAN: You're a couple of  
19 steps ahead of me. I'm only thinking conceptually  
20 at this point. I'm only -- my thinking started out  
21 if reciprocal switching is already permitted in  
22 location X, then it would not seem to be -- I'm

1 asking really whether it would add any congestion if  
2 they're already doing it there for shippers in the  
3 general neighborhood, it wouldn't be much to add  
4 another shipper who doesn't have a reciprocal  
5 switching tariff right now.

6 MR. MORENO: I think we agree with that  
7 100 percent, but we also would agree that if they  
8 are doing any interchanging, it shouldn't be adding  
9 anything to their operations. So that's why we take  
10 a broader, wider view than you do.

11 CHAIRMAN OBERMAN: Well, there may -- but  
12 it may be that it is a very general overlap. That's  
13 what I would like you to look at. What these  
14 locations are.

15 If it's a good idea, Karyn, and I don't  
16 know that it is, then the next question would be,  
17 well, switching yards at what point in time?  
18 Because you raise an appropriate question that it  
19 could be a changing situation.

20 MR. MORENO: Any other reasonable distance  
21 questions?

22 I want to wrap up with a discussion of the

1 switch fee methodology, and I'd like to point out,  
2 first of all, that the Board has a concrete proposal  
3 for setting the switch fee in this proceeding. It's  
4 one that we presented in our October 2016 testimony  
5 through the verified statement of Thomas Crowley and  
6 Dan Pfaff.

7 We supported the SSW method that was  
8 offered up in the Board's original notice of  
9 proposed rulemaking with specific modifications to,  
10 number one, modify it from a tracking rights  
11 methodology to switching, given that a trackage  
12 rights situation, there's actually another carrier  
13 operating over the track, whereas in a reciprocal  
14 switch, the incumbent is still performing all the  
15 operations of certain recognitions of that fact were  
16 required to modify the methodology.

17 And secondly, we offered modifications to  
18 reduce the complexity, because applying SSW based on  
19 the precedent would require access to either  
20 information that is simply not available in the  
21 broader context would be required for reciprocal  
22 switching, and/or would require the equivalent of a

1 stand alone cost type of analysis, which is obviously  
2 undesirable for reasons we've expressed in many  
3 other proceedings.

4           The rail industry has criticized our  
5 proposal on various grounds to boil down to the fact  
6 that it doesn't preserve differential pricing. For  
7 reasons we previously addressed already, one reason  
8 for revising the reciprocal switch rules is because  
9 differential pricing is not needed to the same  
10 degree as it was in 1985 when the Board adopted the  
11 current competitive abuse standard.

12           Our proposal under SSW, therefore, focuses  
13 upon cost recovery by the incumbent.

14           I note that the rail industry -- and no  
15 one else has really put forth a complete proposal  
16 for switching in this. The rail industry basically  
17 settled into taking pot shots at our proposal and  
18 saying whatever the Board has adopted, must include  
19 efficient component pricing. And for reasons we've  
20 expressed in our many ex parte meetings, efficient  
21 component pricing is a nonstarter, I mean, it  
22 protects the market power that the railroad has and

1     therefore forecloses the benefits of switching so if  
2     the Board were to consider efficient component  
3     pricing as the means of setting the switch fee, it  
4     would completely blow up everything else that the  
5     Board is doing with respect to granting reciprocal  
6     switching.

7             Ultimately, however, I want to point out  
8     that the Board doesn't need to settle upon any  
9     methodology for setting a switching fee in this  
10    proceeding. Most notably, I want to point out that  
11    the current rules don't have any methodology and  
12    they have been in place for over 30-some-odd years.  
13    So the notion that we have to set one in this  
14    proceeding would be misplaced.

15            Secondly, I would note that the statute  
16    only calls for the Board to set the switch fee when  
17    there is no agreement. So there has to be an  
18    opportunity and only then if there's a lack of  
19    agreement does the Board have to apply any  
20    methodology. And that permits any reciprocal switch  
21    fee dispute that arises to be addressed on a  
22    case-by-case basis.



1           Now, I will say, ultimately in the long  
2 run, we think it is beneficial to have an  
3 understandable, predictable methodology for  
4 determining the switch fee because without that  
5 methodology, that's an additional risk that any  
6 shipper who requests switching is undertaking.

7           But the Board doesn't have to do so in  
8 this proceeding. And frankly, any early switch fee  
9 disputes that might arise could, in fact, become a  
10 laboratory for the Board to test different theories  
11 of how switching might, in fact, work.

12           So I would say I think we offered  
13 something for the Board to use. If the Board is not  
14 comfortable with what we have offered, it can  
15 conduct subsequent rulemaking and sub number 2 I  
16 would guess would be the case after it grants  
17 reciprocal switching in sub number 1.

18           CHAIRMAN OBERMAN: Jeff, I am hoping to  
19 get this rulemaking finished while I'm still alive,  
20 so --

21           (Laughter.)

22           CHAIRMAN OBERMAN: Not looking for a sub 2

1 if I don't have to.

2 Let me ask you a couple of questions about  
3 the fee. You know, the lawyer in me likes common  
4 law lawmaking case-by-case, it has a lot of merit,  
5 we all learned that in law school.

6 But I'm wondering if we set no  
7 methodology, who is the shippers going to be the  
8 first one out of the box? Because what I have  
9 wondered, if a client comes to -- if we change the  
10 rule to, you know, along the lines that you're  
11 recommending, to make it -- to remove some of the  
12 hurdles and a client comes to you and says I'd like  
13 to get reciprocal switching agreement with my  
14 carrier and they won't agree, bring a case, and they  
15 ask you how much it's going to cost and you're going  
16 to give them a number, and I'm not going to presume  
17 what that number will be, but it's not going to be  
18 cheap, particularly if it's the first case.

19 And the client says to you, and if I win,  
20 what have I won? It troubles me if you're going to  
21 have to say I don't know what you're going to win  
22 because I don't know what the fee is going to be,

1 the fee could be prohibitive.

2 So isn't it a disincentive for the client  
3 to bring the first case, not knowing whether it's  
4 going to benefit them?

5 MR. MORENO: I can't disagree with that at  
6 all. As a matter of fact, I do agree with it. I  
7 can't tell the client what that rate is going to be.

8 I would point out a couple things. One is  
9 we've already -- as we've enumerated throughout this  
10 proceeding, there are benefits to reciprocal  
11 switching aside from the rate element to this.

12 And I do think the absence of a rate is  
13 going to be a chilling factor on someone being the  
14 guinea pig.

15 Frankly, any client, any shipper who is  
16 the guinea pig in the first case is probably going  
17 to have to litigate more issues than might be  
18 required down the road.

19 But that is exactly why I've said I don't  
20 think the Board -- I believe in the long run, there  
21 is a strong benefit to having a predictable  
22 methodology. And I think the Board should proceed

1 with that.

2 The message I want to send is don't hold  
3 up granting reciprocal switching until that happens.  
4 What I fear more than anything else is that if  
5 there's a delay to continue figuring out switch fee  
6 at this point, then what we're going to have is the  
7 potential that we're back here another decade from  
8 now.

9 And I think we need to resolve the  
10 standard for access, even if we don't have a  
11 standard for the fee now. And I think you do, I  
12 think we've given you a standard. I think you can  
13 adopt that in this proceeding. There's been enough  
14 presentation and opportunity for notice and comment  
15 on that.

16 But if, and only if, you should have any  
17 reservations about doing so based on the current  
18 record, then grant reciprocal switching changing the  
19 rules, as we suggested here, and then continue on --  
20 continue this proceeding for the purpose of  
21 determining the switch fee methodology.

22 CHAIRMAN OBERMAN: Let me shift gears

1 slightly and address both you and Tom, because Tom  
2 mentioned this I think specifically in his opening  
3 remarks.

4 I think, Tom, you said something about the  
5 shipper having an ability to weigh in on the fee if  
6 the railroads agree on a fee that they don't like.  
7 And I'm trying -- I'm perplexed under the statute of  
8 how that happens.

9 In other words, what is both of your -- I  
10 don't mean to leave out Karyn's -- reactions to a  
11 situation where the railroads get together and agree  
12 on a fee that's prohibitive? And so the shipper has  
13 won the reciprocal switching order but the fee they  
14 are presented with makes it uneconomical?

15 How do we deal or should we deal with that  
16 situation?

17 MR. WILCOX: Well, I'll go first. NGFA's  
18 position, and it's reflected by the comments of  
19 other shippers in these proceedings, is that in  
20 today's concentrated rail market there are concerns  
21 that if reciprocal switching is ordered, I believe  
22 the extent to which you have duopolists in the East

1 and the West, will actually compete and achieve the  
2 desired result.

3 We're not the only party that's said that.

4 And so one of the issues is the statute  
5 clearly gives the railroads the right, I guess, to  
6 set compensation if they are ordered to order -- are  
7 ordered to enter into a reciprocal switch  
8 arrangement.

9 But -- and then so a lot of the discussion  
10 is so what should that methodology be if they don't  
11 agree.

12 But NGFA's belief is that that same  
13 process should apply if they do agree. And I think  
14 there is, under the general, you know, authority,  
15 that rates and charges must be reasonable, that the  
16 Board would have authority to look at that, and  
17 should include that as part of this process.

18 Now, we've also said -- quick to say that  
19 we would think that those instances would be very  
20 rare. We would hope they would be rare.

21 But it's a possibility that can't be  
22 ignored in today's concentrated rail market.

1           MR. MORENO: I'll just add on to what Tom  
2 has been saying, is there is always a concern that  
3 even two shippers won't compete -- I mean two  
4 railroads won't compete. And if the railroads get  
5 together and agree upon a rate that the shipper  
6 believes is not reasonable, we think the shipper  
7 should have the right to challenge that rate under  
8 the very same methodology that would apply in a  
9 dispute between the two railroads.

10           CHAIRMAN OBERMAN: Well, my question is  
11 under what statute would we hear such a matter?  
12 Because the reciprocal switching statute under which  
13 we'd be granting the petition is very clear that it  
14 says only if the carriers cannot agree does the  
15 Board step in.

16           So would you have to bring a rate case if  
17 you thought the fee was too high, set by collusion  
18 or however it was reached? And then would we be in  
19 the rate case arena?

20           MR. WILCOX: Well, that's the issue, is,  
21 you know, how would -- right. Would -- you'd have  
22 to have a different standard and have a full rate

1 case in a situation where they did agree versus when  
2 they didn't agree under the same, you know, 11102  
3 order to require reciprocal switching.

4 And our preference obviously would be not  
5 to go into the rate case realm, use the same  
6 standard for both.

7 CHAIRMAN OBERMAN: What is our statutory  
8 authority, I guess is my question, to hear a  
9 challenge to a rate, a reciprocal switch fee which  
10 has been agreed upon by the two carriers? I don't  
11 find anything in that statute that gives us  
12 authority to hear that, such a case.

13 MR. MORENO: Let's even assume for sake of  
14 argument that you do have to bring it under 10701  
15 as a rate case. That doesn't mean that you're  
16 still -- that the standard you have to apply is SAC  
17 or any of the existing standards.

18 You could say that in a switch case a  
19 shipper who challenges a rate under 10701 must meet  
20 the same standard as you apply in the reciprocal  
21 switching disputes between carriers.

22 CHAIRMAN OBERMAN: No, I don't disagree.



1 I think you could -- I don't know why you couldn't  
2 establish a particular methodology for rate  
3 challenges to switching fees. I think you -- I  
4 don't see why we couldn't. We haven't yet. And I  
5 suppose you could even, if we ever adopt arbitration  
6 or final offers, put it under there as well.

7 But I think what you're saying, Jeff, is  
8 that we probably have to use a different statutory  
9 authority to allow a shipper to challenge an  
10 agreed-upon rate.

11 MR. MORENO: I'm not prepared to concede  
12 that point yet at this time.

13 CHAIRMAN OBERMAN: I shouldn't say, by the  
14 way, that I don't think we have the authority. I  
15 don't see it on the face of the statute. But, you  
16 know, I'm not as creative as you guys, and I  
17 would -- if there is any further legal enlightenment  
18 that you can provide to us about how to -- how we  
19 deal with that situation.

20 You know, I will say, and I've said this  
21 publicly in speeches, I don't know that the class 1s  
22 are all that anxious to compete with each other.

1           And so I am concerned about the potential  
2           for a shipper to satisfy all the standards that we  
3           may enact in any rule or modification of a rule or  
4           whatever, and yet the competing carrier is not  
5           really interested and agrees to, you know, a rate  
6           that's not practical because they don't want to do  
7           it.

8           I don't know that that's going to happen.  
9           I'm just concerned that it could happen, and I don't  
10          know how we would deal with that situation.

11          MR. MORENO: I was going to say,  
12          ultimately, the issue between -- the statutory  
13          authority question may be more form over substance,  
14          because recall the prong -- really the only true  
15          difference is going to be that to exercise your rate  
16          regulatory authority you have to prove market  
17          dominance.

18          Well, if you bring your reciprocal  
19          switching request under prong 2, you're proving  
20          market dominance in that context already. So  
21          that -- you clear that hurdle.

22          It might be -- it might raise a little bit

1 more -- an additional step in a prong 1 scenario,  
2 but as I said earlier, I think prong 2 is going to  
3 be a more dominant -- more predominantly used of the  
4 two standards.

5 MS. BOOTH: And I would just add a little  
6 bit of a different angle on this. We would expect  
7 and hope that the rail industry will give meaning to  
8 any change that the Board does in a fair way. If  
9 there was, for whatever reason, something along the  
10 lines of gaming, where in every case the railroads  
11 agree on switch pricing that never allows a shipper  
12 to benefit, I think you'll be hearing a lot from the  
13 shipper community about that.

14 And if it meant that your authority, you  
15 know, wasn't able to address that effectively, for  
16 whatever reason, then I'm pretty certain that that  
17 would lead to other calls for changes in that  
18 authority to allow this to work as intended.

19 Hopefully we'd never have to get there,  
20 but I suspect that's what would happen.

21 CHAIRMAN OBERMAN: Well, I would hope we  
22 wouldn't get there either if we issued an order to

1 require reciprocal switching, that the railroads  
2 wouldn't try to undermine it.

3 I will say we have some guidance by the  
4 vast number of switching fees that they already  
5 specify in their reciprocal switching tariffs.

6 And so I think the rail and shipper world  
7 both have an idea of the general limits on what  
8 switching fees are. Some of them are -- there's a  
9 wide variety, but there's still a range that are in  
10 existing tariffs that give you a starting point to  
11 think about it anyway.

12 MR. WILCOX: That rate is the possibility  
13 of developing a methodology that's paid to existing  
14 voluntary reciprocal switching fees.

15 CHAIRMAN OBERMAN: Well, I'm not going to  
16 opine on telling you what rule to apply for, but it  
17 certainly is an obvious idea for us to think about.

18 MR. MC BRIDE: Mr. Chairman, this is Mike  
19 McBride. I just want to give you some reasons for  
20 hope there might be some competition out there.

21 In the UPSP docket, we had a case a few  
22 years ago for G3 Enterprises, and BN was shoulder to

1 shoulder with G3, which is the logistics arm for  
2 Gallo, trying to get business away from UP in the  
3 Central Valley in California.

4 You also see in that same proceeding BN  
5 competing for traffic down in the Gulf Coast against  
6 UP and KCS.

7 And then I would cite to you the fact that  
8 AAR filed 612 pages of comments in the most recent  
9 round here.

10 I would submit to you they're not worried  
11 about these rules ever being used, those comments  
12 might have been six pages long and not 612 pages  
13 long.

14 And then finally let me point you back to  
15 the CP/KCS merger proceeding where the other five  
16 class 1s that are not the applicants have all raised  
17 competitive issues and they're trying to preserve  
18 existing competition and not loosen.

19 So there is some reason to believe that  
20 there's really some competition out there in the  
21 rail industry.

22 CHAIRMAN OBERMAN: Well, Mike, I hope you

1 are correct, and I hope my cynicism is proven wrong.  
2 And I think there are probably places in the country  
3 where there is some competition, and there are  
4 places where there isn't. So it may be a problem  
5 that doesn't ever come into existence. I would hope  
6 that it would not.

7           It seems to me the bigger challenge for  
8 the Board now is the one that Jeff was addressing,  
9 and that is whether we say in advance what the  
10 methodology or the measuring stick would be for a  
11 fee in those cases where the railroads do not agree,  
12 so the parties all know what happens if they don't  
13 work it out.

14           And I think that is an open question, and  
15 I think Jeff defined it quite accurately.

16           Okay. I think you had one other topic,  
17 Jeff; right?

18           MR. MORENO: Actually, that was it. I  
19 have a rather pithy closing, but in the interest of  
20 time, I will rest.

21           CHAIRMAN OBERMAN: The next topic is  
22 lunch, but I don't want to cut anybody off who has

1 questions. So any board members have any questions?

2 All right. I will say, by the way,  
3 that -- and I don't know what the Board consensus  
4 will be on timing. You know, I made it clear I  
5 would like to move this whole process ahead  
6 expeditiously.

7 But we do anticipate, and I think there  
8 are some that are already scheduled, some additional  
9 ex parte opportunities for stakeholders, so some of  
10 these questions can be dealt with further, but we  
11 want to do it soon, sooner rather than later. I'm  
12 not putting a date on it, to get whatever --  
13 whatever other input any of you have, and of course  
14 that applies to all the other stakeholders who are  
15 going to appear here.

16 But I will say to the speakers today, this  
17 was very enlightening, very, very well prepared. I  
18 think I can say for all five of us we really  
19 appreciate your putting the effort into it.

20 You know, and I'll say this now and for  
21 everybody else. I have come to really value over my  
22 previous career the value of the contestants

1 educating the decisionmaker. We're good but we're  
2 not perfect and we really need the stakeholders to  
3 responsibly enlighten us. And we just can't make a  
4 good decision without it. And I think this panel  
5 has really done its share, and I'm confident the  
6 others will do too.

7 But it's really crucial to the  
8 decisionmaking process, so we or I appreciate it.

9 So if there is no other questioning, it is  
10 now 12 -- just about 12:50. Is a half hour  
11 sufficient for a lunch break for folks? We've got a  
12 pretty big agenda for this afternoon.

13 We will recess and reconvene at 1:20  
14 Eastern. Thank you all.

15 (Whereupon, at 12:50 p.m., the hearing was  
16 recessed, to be reconvened at 1:20 p.m. this same  
17 day.)

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1                                   AFTERNOON SESSION                   (1:21 p.m.)

2                   CHAIRMAN OBERMAN: All right. I think we  
3 are back in session. I hope everybody had their  
4 indigestion over the last half hour racing to get  
5 back here in time. Welcome back.

6                   So we will proceed with Panel II, which is  
7 BN, CP, UP, and specifically I want to make sure  
8 everybody is here. For BNSF, we have Jill Mulligan,  
9 Adam Weiskittel, I'm not sure I'm pronouncing that  
10 correctly and Stevan Bobb.

11                   Are you all here?

12                   MS. MULLIGAN: Commissioner Oberman --  
13 Chairman Oberman. We're here. Yep.

14                   CHAIRMAN OBERMAN: Okay. Very good. And  
15 for Canadian Pacific we have Tyme Wittebrood. Am I  
16 saying that right?

17                   MR. WITTEBROOD: Yeah, It's actually  
18 pronounced Tyme.

19                   CHAIRMAN OBERMAN: Pronounced how?

20                   MR. WITTEBOOD: It's pronounced Tyme, but  
21 I'll answer to --

22                   CHAIRMAN OBERMAN: Tyme. I'm just trying

1 to be phonetic here, but thank you.

2 And David Meyer I see.

3 I apologize for that, Tyme.

4 And for Union Pacific, Jennifer Hamann,  
5 Kenny Rucker, Eric Gehringer and Michael Rosenthal.

6 MR. WITTEBOOD: We are all here.

7 CHAIRMAN OBERMAN: You're all here. Okay.  
8 Let's begin.

9 Jill, we have you up first if you want to  
10 start.

11 MS. MULLIGAN: Great. Good afternoon and  
12 thank you for the opportunity to share BNSF's  
13 perspective on the Board's switching proposal. I am  
14 Jill Mulligan, general counsel for BNSF, I am joined  
15 by Stevan Bobb, our chief marketing officer, my  
16 colleague, Adam Weiskittel, associate general  
17 counsel.

18 BNSF will use our time to describe our  
19 role as a strong competitor in the dynamic markets  
20 we serve and the important role that the Board plays  
21 supporting that.

22 Regulatory action by the Board can either

1 reward that competitive behavior or it can undercut  
2 it. While it is important that the Board serve as a  
3 meaningful backstop when markets don't function, we  
4 would like to explain why we think the 2016 proposal  
5 lacks sufficient safeguards to ensure that existing  
6 competition is rewarded or at least left intact.

7 Where regulation holds out the potential  
8 or even the promise of intervention in functioning  
9 markets, that carries significant consequences for  
10 shippers and railroads.

11 At BNSF, our financial performance is not  
12 driven by returns, we are on solely served shippers.  
13 As Steve will describe, BNSF's success comes from  
14 offering market responsive services into competitive  
15 dynamic markets, including in areas that the STB's  
16 framework would label as captive. Retaining and  
17 growing volume in all our markets has been the  
18 hallmark of our success and is our imperative going  
19 forward. That's reflected in our growth story.

20 Our volume has outpaced the industry.  
21 That's also reflected in our rate structure. For  
22 example, the Board's own annual measures show that

1 the majority of our revenue is earned on traffic  
2 that moves at rates below 180.

3 We also compete on service. Steve will  
4 discuss how we design our service to be responsive  
5 to market needs, and that recently we haven't met  
6 our customers' expectations. He will describe the  
7 measures that we are taking, currently, to drive  
8 step level improvements, regain our customers'  
9 confidence and keep their business.

10 BNSF understands that the role -- the  
11 Board does have a role to play between customers and  
12 railroads. The Board does that by letting  
13 competition and dynamic markets set transportation  
14 rates and drive service innovations, and by being  
15 ready to put regulatory intervention up against  
16 market failures.

17 BNSF acknowledges our shipper concerns  
18 that the Board's existing rate mechanisms fall  
19 short, especially for small shippers.

20 And we've long supported regulatory reform  
21 aimed at effective oversight of the highest rates,  
22 including the Board's recent ADR proposal.

1                   However, the Board's 2016 proposal carries  
2 with it the high potential to disrupt functioning  
3 markets while also falling short on accomplishing  
4 the Board's goals.

5                   Steve is now going to talk about BNSF's  
6 experience in our markets, and the role we serve  
7 there for our customers, before Adam walks through  
8 the specifics of the 2016 proposal.

9                   MR. BOBB: Good morning. Thank you for  
10 the opportunity to speak with you today. BNSF is  
11 really a company that is focused on growth, and as  
12 BNSF's chief marketing officer it's my job to grow  
13 our existing customers' business on BNSF and attract  
14 new customers that are currently served by other  
15 railroads or other modes.

16                   We also grow by developing innovative  
17 service options to open new markets and cultivate  
18 railroad volumes that didn't previously exist. Our  
19 track record of volume growth illustrates a result  
20 of our growth strategy.

21                   My primary message to you today is please  
22 carefully consider the unintended impacts your

1 proposal will have on BNSF's ability to compete for  
2 new business.

3 Our growth disproportionately comes from  
4 success in markets that are replete with direct  
5 modal competition and are heavily influenced by  
6 geographic competition as well as product  
7 competition.

8 Our growth is not driven by maximizing  
9 returns from solely served customers.

10 Further, the suggestion that our rates to  
11 solely served customers are not generally subject to  
12 significant competitive forces is wrong. Likewise,  
13 any suggestion that we don't vigorously compete with  
14 other railroads or other modes is also wrong.

15 We think our growth model matches the  
16 vision this agency has for how the rail industry can  
17 meet our country's increasing freight demands, but I  
18 worry that the current switching proposal works  
19 against that vision because it promises blunt Board  
20 intervention where none is needed. That will impede  
21 BNSF and our customers' ability to do what the  
22 markets want us to do.

1           Let me talk about how this might happen.

2           Our grain shuttle network is a million  
3 dollars over the past 21 years, to build a shuttle  
4 network that expanded our customer's access to  
5 regional and global markets. Those customers have  
6 invested alongside us and the results have been  
7 impressive. For instance, since 2010, we have  
8 increased our grain volumes to California markets by  
9 40 percent, and that was at a time when the  
10 consumption market was shrinking. Before BNSF,  
11 shuttle service destinations in those California  
12 markets were primarily supplied by origins that were  
13 solely served by the Union Pacific and had shoulder  
14 lengths of haul.

15           Together with our customers we invested in  
16 the resources necessary to support an efficient unit  
17 train operation with market-based pricing that  
18 allows our BNSF origin elevators to compete even  
19 when our length of haul is longer.

20           That pattern is reflected on an  
21 international scale by growing BNSF agricultural  
22 volumes into Mexico, and to export elevators in the

1 Pacific Northwest that serve Asian markets.

2 For our customers to compete in those  
3 international markets, we must consider all the  
4 dynamics that impact the delivered price of their  
5 grain when we set our rates, such as those from  
6 freight costs, commodity prices, geopolitics and  
7 world supply and demand.

8 For example, we stay nimble and adjust our  
9 rates to keep our customers competitive against  
10 facilities served -- that compete against origin  
11 countries for business into Asian destinations as  
12 well.

13 And finally, we often compete with more  
14 local markets, such as processors or feedlots, to  
15 originate the grain that we move to California,  
16 Mexico and Asia. That's geographic competition, and  
17 we can't ignore it in our pricing and service  
18 decisions, or we will lose the volume.

19 This is the kind of market responsive  
20 behavior that a balanced regulatory structure should  
21 reward, instead of jeopardizing with an  
22 indiscriminate framework that doesn't allow the



1 regulator to fully understand whether intervention  
2 is even warranted.

3           The current proposal doesn't consider the  
4 most relevant and significant market factors  
5 impacting our behaviors. Yes, it might sometimes  
6 lead to an artificial reduction for one shipper who  
7 gets the benefit of a below market rate vis-à-vis  
8 its own competitors, but that won't help BNSF or our  
9 broader customer base grow.

10           The ripple effect of that subsidy would  
11 instead make competing origins less competitive and  
12 devalue our customers' transportation investments.

13           BNSF's growth is also dependent upon  
14 competitive service offerings, and I fear the  
15 Board's proposal will lead to capacity degradation.

16           I understand that some shipper  
17 associations are advocating that reciprocal  
18 switching be used in a way that resembles open  
19 routing. History has unequivocally taught us that  
20 open routing is a bad idea for the rail industry and  
21 for our customers. Over time, markets drive  
22 naturally efficient transportation flows, which

1 mature and become institutionalized within those  
2 markets.

3           If the Board empowers shippers to drive  
4 routing decisions, it will be very difficult to  
5 effectively plan our interchange activity and  
6 infrastructure needs.

7           Pursuing inefficient routes in the idea of  
8 lower rates or better service for one shipper will  
9 result in less frequent interchanges at points where  
10 market forces and sound operating principles would  
11 otherwise dictate.

12           Again, perhaps one shipper benefits for a  
13 time from that, but our customers as a whole would  
14 ultimately be left with higher rates and less  
15 available capacity.

16           The service offerings that have driven our  
17 growth over time would be incompatible with the  
18 switching regime that ignores commonsense  
19 operational efficiencies and market realities. The  
20 markets in which we compete provide the answer to  
21 the routing and the rate questions we have before  
22 us. Forcing BNSF to establish new interchange

1 locations at 30, 50 or even 100-plus miles from  
2 origin will negatively impact capacity in the  
3 immediate area and unnaturally draw capacity away  
4 from other parts of our network.

5 The success of our agricultural shuttle  
6 network is only possible because it generates enough  
7 traffic density to justify allocating locomotives  
8 and maintaining crew bases at more remote parts of  
9 the BNSF network than otherwise might make sense.

10 The market-based returns we achieve there  
11 allow us to make investments that drive further  
12 efficiencies as well as capacity and keep our  
13 customers competitive.

14 Our service approach is that all shippers  
15 are treated with the same service and rate packages  
16 so as to maximize their competitiveness in the  
17 global market. A small farmer's co-op purchasing a  
18 shuttle train receives the same rate and service  
19 levels that a multibillion-dollar, multinational  
20 processor receives.

21 The Board's proposal would upset that  
22 equilibrium by unfairly advantaging those shippers

1 who have the time and resources to pursue complex  
2 regulatory relief that will subsidize its product  
3 and degrade service for its competitors.

4           Regarding service, I also want to take a  
5 moment to address our current service performance  
6 and what we are doing to improve it. The supply  
7 chain difficulties that occurred last year were hard  
8 on our network and we struggled to recover from  
9 those as we entered difficult winter conditions.

10           You may hear comments over the next two  
11 days that BNSF's service isn't very good right now,  
12 and those comments would be correct. We are not  
13 meeting our customers' expectations, but we are  
14 taking steps to fix that, including increasing our  
15 active locomotive fleet and available train crew  
16 personnel, while also reallocating resources to  
17 areas experiencing more critical service challenges.

18           A forced switching regime that allocates  
19 resources and capacity by regulatory mandate would  
20 only make it harder to do what is necessary to  
21 recover from intermittent service difficulties.

22           Given the expected downsides to the

1 Board's proposal, I think BNSF's customers would be  
2 better served if the Board instead made better use  
3 of the tools it already has available to support  
4 growth. The history of our industry shows that the  
5 best thing the Board can do is to foster growth by  
6 allowing markets to function and limit its  
7 interventions to identifiable market failures.

8 I'm not suggesting there is no role for  
9 the Board in our industry. BNSF absolutely believes  
10 that you should exercise your authority where market  
11 failures make it necessary to protect competitive  
12 conditions.

13 The highest of the high rates should be  
14 subject to scrutiny. Mergers must be carefully  
15 evaluated, and merger rights must be enforced.

16 Unfortunately, BNSF's experience at the  
17 Board on competitive access issues is largely a  
18 story of missed opportunity. For example, with our  
19 customers, we have asked the Board to enforce our  
20 merger access rights in Lake Charles, Louisiana.  
21 But after nearly a decade, we still haven't been  
22 able to directly serve a single new customer there.

1 Faced with a regulatory process that takes  
2 years of time, I can understand why it's hard for  
3 customers to commit to us. BNSF made suggestions in  
4 that case for how the Board's process could work  
5 better, and we've been supportive of the Board's  
6 efforts to improve its other processes.

7 I believe that is the path the board  
8 should pursue instead of the current switching  
9 proposal.

10 Thank you for your time today.

11 MR. WEISKITTEL: Good afternoon. I'd like  
12 to talk about specific aspects of the Board's  
13 proposal. Mr. Bobb just described the likely  
14 negative impacts on our growth strategy from the  
15 Board accidentally interfering with our  
16 well-functioning market-based customer  
17 relationships.

18 BNSF's biggest concern is that the  
19 proposal lacks structural safeguards that prevent  
20 that unnecessary intervention from happening.

21 This issue shows up in both prongs, albeit  
22 in slightly different ways. The practicable and in

1 the public interest prong, or prong 1, seems to be  
2 the most potentially problematic because it has no  
3 gatekeeping standards to prevent a shipper who  
4 already has the full benefit of competition from  
5 pursuing relief.

6 Under prong 1, a shipper could get relief  
7 even if it already had access to multiple railroads,  
8 to non-rail transportation options, and as a  
9 market-based rate shaped by these competitive  
10 forces, maybe even a rate that's below 180 RVC.

11 In other types of cases, those elements  
12 are screened in order to prevent unnecessary Board  
13 intervention, but here they are not. In this way  
14 the Board's 2016 proposal goes farther than NIT  
15 League's 2011 proposal, which recognized the need to  
16 assess competition proxies before Board action  
17 occurred, including an implicit acknowledgment that  
18 the highest rates, those above 240 RVC, are what  
19 should be targeted.

20 The necessary to provide competitive rail  
21 service prong, or prong 2, does at least include a  
22 market dominance analysis. But we are concerned

1 that it transforms market dominance from the  
2 gatekeeping function it serves in rate cases to an  
3 actionable conclusion about the need for Board  
4 intervention in a switching case.

5 We think that if the Board decides to  
6 change its switching standards, an RVC significantly  
7 higher than 180 should be used as a screen to start  
8 the inquiry, not a conclusion that ends it.

9 The lack of safeguards is extra concerning  
10 to us because the proposal rejects consideration of  
11 product and geographic competition. Failing to  
12 account for such competition ignores some of the  
13 biggest elements influencing our rates and service  
14 in the world.

15 The existing switching regulations at  
16 least let railroads submit evidence of geographic  
17 competition, but the current proposal eliminates any  
18 reference to indirect competition of any type.

19 When the Board rejected the AAR's request  
20 to consider indirect competition in coal cases about  
21 a decade ago, it did so in part because the Board  
22 assumed that if indirect competition actually



1     existed, the challenged rate would likely be found  
2     reasonable. A sort of no harm, no foul approach.

3             But if shippers intend to use switching as  
4     a shortcut to rate relief, nothing in this proposal  
5     provides a similar safeguard of further rate  
6     analysis. In fact, once a location is eligible for  
7     switching under either prong, it appears there would  
8     be no additional STB inquiry at all, no follow-up on  
9     whether rates have been driven below market levels,  
10    or on the impact to operation, or service to other  
11    shippers.

12            To me it's hard to square this approach  
13    with Congress's mandate to allow competition and  
14    demand, to establish rates and service to the  
15    maximum extent possible.

16            The second point we'd ask the Board to  
17    consider is whether the proposal is likely to  
18    actually solve any of the perceived problems the  
19    Board is trying to address.

20            We recognize the Board wants to give  
21    shippers a less complex path to rate or service  
22    relief, but based on BNSF's experience, the juice

1 from the Board's current proposal might not be worth  
2 the squeeze for most shippers, especially smaller  
3 ones.

4 From the beginning of this proceeding,  
5 shipper associations seemed driven by a desire to  
6 create a more efficient regulatory path to lower  
7 rates. The Board has done a lot of work to reform  
8 its rate case processes since 2016, and now appears  
9 poised to make even more significant positive  
10 changes with its ADR proposal.

11 We think the Board should continue  
12 focusing on ADR, because it seems unlikely that a  
13 complex operational remedy could be a more efficient  
14 path to rate relief for a deserving shipper.

15 As one example, under prong 1, the Board  
16 would consider evidence on about a dozen different  
17 complex issues plus the 15 RTP factors. We agree  
18 that those should all be considered, but as  
19 Commissioner Begeman pointed out in her 2016  
20 dissent, several other fundamental questions about  
21 the proposal remain unanswered.

22 If BNSF's history at the Board is any

1 guide, it may take years and millions of dollars in  
2 lawyer and consultant fees to work through a  
3 switching case under the 2016 proposals.

4 More recently, some shippers have turned  
5 their focus on service issues, but it seems equally  
6 unlikely that the Board's proposal would be a more  
7 effective remedy for that.

8 As you heard from Mr. Bobb, and you might  
9 hear from other railroad witnesses, the proposal  
10 feels more likely to make service issues worse, not  
11 better.

12 If the Board wants to address rate case  
13 complexity or the availability of service relief, we  
14 think the Board and its Staff would be better served  
15 by focusing its limited resources on initiatives  
16 that have a chance to actually achieve those goals.

17 BNSF has always appreciated that the Board  
18 and its staff works incredibly hard to tackle the  
19 issues brought before it. We've had particularly  
20 productive experience working through issues with  
21 the help of the Board's RCPA staff.

22 We have seen ADR processes, including our

1 Montana program, be very effective tools for  
2 resolving rate disputes. Instead of this switching  
3 proposal, we would encourage the Board to continue  
4 focusing on its existing tools and pursuing reform  
5 as it has for the last several years.

6 Thank you for the chance to offer these  
7 comments. We'd be happy to take any questions.

8 CHAIRMAN OBERMAN: Thank you.

9 I have a number of questions I'd like to  
10 ask. I'm not sure which of the three of you should  
11 answer them, so I will throw them out, and Jill, you  
12 can perhaps direct me to the correct person.

13 MS. MULLIGAN: Sure.

14 CHAIRMAN OBERMAN: Like the other  
15 railroads, BN in its written comments has argued  
16 that the reciprocal switching is legally limited to  
17 taking place in terminal areas.

18 What is the authority for that  
19 proposition?

20 MS. MULLIGAN: I'll jump in. So a couple  
21 things. I mean, I think you can -- you'll get some  
22 very sophisticated legal answers from some outside

1 counsel here, but, you know, from a sort of  
2 practical standpoint, there is a reference in the  
3 title of the statute to terminal, and then also  
4 there's a concept that's built in in terms of the  
5 idea of reciprocal switching.

6 And so there does really seem to be an  
7 element here of aiming at a remedy that's based in  
8 terminal areas.

9 And I think there's also a practical  
10 policy justification for that as well, despite the  
11 kind of stricter legal argument. And I do think  
12 some of the things --

13 CHAIRMAN OBERMAN: Jill, can we -- I don't  
14 want to cut you off from that.

15 MS. MULLIGAN: Sure.

16 CHAIRMAN OBERMAN: Being the strict  
17 constructionist that I am. I'd like to stick to the  
18 words of the statute first.

19 MS. MULLIGAN: Sure.

20 CHAIRMAN OBERMAN: So other than the title  
21 of the whole section, I'm just wondering where you  
22 get any statutory authority. Policy question is a

1 separate issue, which I want to hear. But I'm  
2 trying to figure out how to read the words of the  
3 statute.

4 MS. MULLIGAN: Yeah, I mean, the title,  
5 like you referenced, is use of terminal facilities,  
6 and so this is -- this falls within that area.

7 There is not a specific reference again in  
8 the subsection dealing with reciprocal switching  
9 that talks about use of terminal facilities in  
10 addition to what's in the title.

11 But it does talk about this idea of  
12 reciprocal switching. And so in terms of, you know,  
13 kind of general railroad understanding and just sort  
14 of a commonsense element, there is this -- when  
15 you're talking about a place where you're going to  
16 be doing reciprocal switching, that is likely going  
17 to be inside a terminal area where there are  
18 multiple carriers with the prospect of switching in  
19 between them.

20 Something that's 100 miles away in the  
21 middle of nowhere doesn't practically fit the idea  
22 of what a reciprocal switch is.

1                   CHAIRMAN OBERMAN: Are there interchanges  
2 with multiple carriers that are not inside a  
3 terminal, as you understand it?

4                   MS. MULLIGAN: There could be. I think  
5 practically, most of those are going to be within  
6 terminal areas, and certainly the places where we  
7 have historically done switching would predominantly  
8 be within those terminal areas, the traditional kind  
9 of terminal areas that railroaders think of or  
10 shippers think of and I think the Board has thought  
11 of too.

12                   CHAIRMAN OBERMAN: Well, you know, I know  
13 what railroads think -- I don't know what railroads  
14 think, I don't know what Board members think, I've  
15 talked about it with a lot of people, and, you know,  
16 a lot of people think they know what a terminal is.  
17 And then you ask them, well, is this particular  
18 location in or outside of that terminal, they say  
19 well, I don't know, I'd have to see the map.

20                   Then you look at the map, there's no line.

21                   So if we're limited to terminal  
22 facilities, I'm trying to figure out how we

1 determine what's in or out of a terminal facility.

2 But by definition, if you have reciprocal  
3 switching, you -- I'm not sure I disagree, there has  
4 to be more than one railroad there, otherwise  
5 there's nobody to switch it to; right?

6 MS. MULLIGAN: Absolutely.

7 CHAIRMAN OBERMAN: So if you have an  
8 interchange that has more than one railroad  
9 operating there, whether it's in a terminal facility  
10 or not, you could have reciprocal switching. So I  
11 don't see that the word "reciprocal" by itself  
12 carries with it the terminal limitation.

13 MR. WEISKITTEL: So maybe reciprocal is  
14 not the word to focus on there, Mr. Chairman, maybe  
15 it's the word "switching."

16 Because at some point if you get to a  
17 place where you're, as we heard this morning, 100  
18 miles out, you're really not talking about a switch  
19 in my view. You're talking about a line-haul  
20 movement that's part of a two-carrier move. And  
21 also --

22 CHAIRMAN OBERMAN: Let's leave the mileage



1 out of it for a minute. I'm trying to focus on the  
2 words first, just how to understand "terminal."

3 I mean, if you and the others are urging  
4 us, if we move ahead, to limit this to within  
5 terminals, I assume both you and the shipping world  
6 would like to know what we mean by terminal. And  
7 the word "terminal" itself, unless you tell me  
8 otherwise, doesn't tell me whether a shipper is in  
9 or out of a terminal. Just the use of the word  
10 "terminal." How do we know whether the shipper is  
11 eligible?

12 MR. WEISKITTEL: Well, I think there's  
13 certainly a lot of places across the national  
14 railroad network that everyone would agree  
15 constitute terminal areas, and then I think on an  
16 individual case-by-case basis -- that's not to  
17 suggest that there should be a strict definition of  
18 a terminal that would have to apply in every case.

19 I think you could certainly envision a  
20 world where you have some very obvious accepted  
21 places that are considered terminals, and then you  
22 have some --

1                   CHAIRMAN OBERMAN:  What about the ones  
2   that don't?  Are we going to litigate whether the  
3   location is in or out of the terminal?

4                   MS. MULLIGAN:  I think -- I mean, I think  
5   there's a couple things.  I think there's ways that  
6   you could come up with setting clear standards in  
7   terms of what terminal is.  I think that you even  
8   referenced with the prior panel the fact that we  
9   have publications of where switching takes place.  
10  We obviously know in terms of where we have  
11  high-volume switch locations, low-volume switch  
12  locations.

13                   I mean, this is -- it's something that's  
14  infinitely knowable, whether there's, you know, work  
15  on the front end to identify that, or handled on a  
16  case-by-case basis.

17                   Look, I do think for us, we are concerned  
18  that the Board, any time they have a regulatory  
19  option for customers, that it's something that's  
20  usable.  And so I get that -- you know, I identify  
21  with the instinct in terms of what you're asking for  
22  here.

1 I think one of the things about coming up  
2 with a definition of terminals that is usable, also  
3 helps in terms of cutting down some of the  
4 complexity of the proposal.

5 One of the things that we've thought about  
6 is, obviously with our experience in some of the  
7 other competitive access proceedings before the  
8 Board, there's -- you can get hung up in litigation  
9 on a lot of items. That's not our goal. We're here  
10 to talk about how to prevent that.

11 CHAIRMAN OBERMAN: Not my goal either.

12 MS. MULLIGAN: Yeah. And when you focus  
13 on a terminal area, I think there's other -- this is  
14 kind of the policy item I wanted to mention, I think  
15 there are benefits to when you focus the remedy on a  
16 terminal area, which you can spend more time  
17 defining what that is, it will simplify a lot of the  
18 operational questions, it will simplify a lot of the  
19 issues of operating plants.

20 There's something there that I think, by  
21 focusing on terminal areas, especially places where  
22 switching currently takes place, the showing that a

1 shipper has to make gets simplified because there  
2 is --

3 CHAIRMAN OBERMAN: Let me take you up on  
4 that idea, because it's something I've been thinking  
5 about and I would really like to be enlightened by  
6 you and the other rail representatives, but you're  
7 up now so I'm going to ask you.

8 I took a look at your tariff 8005D. I'm  
9 looking at the document now. BNSF switching book  
10 8005D, which is, as I understand it according to  
11 what it says, industries are listed in alphabetical  
12 order by rail station and are open to reciprocal  
13 switch via junction at that station unless otherwise  
14 noted.

15 It's about 16 pages long, and it has 126  
16 I'll call them towns, locations, whatever -- maybe  
17 it states the word, but they all look like towns to  
18 me. The first one is Aberdeen, South Dakota, and so  
19 on.

20 There are 126 places in your half of the  
21 country where it appears that you have a reciprocal  
22 switching tariff available to ship one or more

1 shippers in those areas.

2 Do you agree?

3 MS. MULLIGAN: I don't have it in front of  
4 me, but -- and you've obviously read it more  
5 recently than I have. But it sounds like it works  
6 the way our switching tariffs work, yes.

7 CHAIRMAN OBERMAN: I am reading it now. I  
8 am looking at it. So --

9 MS. MULLIGAN: You're ahead of me.

10 CHAIRMAN OBERMAN: So I don't know -- so  
11 in every one of these locations, you have a tariff  
12 for a named shipper and a rate for a switch, and the  
13 name of the railroad that you will switch them to.

14 Would I be right to say that you can't  
15 tell from looking at the tariff that every one of  
16 these shippers is actually using the switching?  
17 They just have the tariff rate if they choose to ask  
18 you to make the switch.

19 Is that a fair statement?

20 MS. MULLIGAN: Yes. There would be -- our  
21 tariff would just be the offering that's available  
22 to the customer to make use of. It wouldn't

1 indicate, you know, density of usage. Yeah, that's  
2 right.

3 CHAIRMAN OBERMAN: When we say "open," I  
4 mean, that's the terminology I've come to learn,  
5 that means if the customer is on this list as having  
6 a tariff and they call up BN and say I want to use  
7 that tariff rate to make this switch, you will do  
8 it.

9 Is that a fair understanding of how the  
10 system works?

11 MS. MULLIGAN: Yes.

12 MR. WEISKITTEL: Yes.

13 CHAIRMAN OBERMAN: Okay. So as I said, I  
14 counted up 126 locations, and I want to pick up on  
15 what Adam said because I don't disagree that there  
16 are many places in the country that most of us would  
17 agree are terminals, although we might not agree  
18 what the outer boundaries of the terminal are.  
19 That's one of the things I find mystifying.

20 I mean, I think about the Chicago  
21 terminal, we had a case which you know about,  
22 doesn't involve your railroad, involving CN and CP,

1 about an interchange in Spalding, and there was a  
2 debate at some level, was Spalding in or out of the  
3 Chicago terminal, because it's an intersection of  
4 CP, CN and METRA. And as the chairman of METRA, I  
5 might have said well, yes, if we go there, it must  
6 be in the Chicago terminal, but there were plenty of  
7 people that said no, it's not in the Chicago  
8 terminal, it's too far out.

9 I don't want to have a rule in which we  
10 litigate that.

11 So let me just ask you a question to give  
12 me an example -- I circled some small towns, and you  
13 tell me if you think everyone would agree these are  
14 terminals. Maybe they would.

15 In your tariff, I find two shippers in  
16 Muskogee, Oklahoma. Does anybody think Muskogee,  
17 Oklahoma, is a terminal?

18 MS. MULLIGAN: Mr. Chairman, I am going to  
19 have a hard time going location by location.  
20 Certainly some more information --

21 CHAIRMAN OBERMAN: I'm not going to ask  
22 about all 126. I just picked out ones that struck

1 me.

2           There's another one, there are two  
3 shippers in Grand Island, Nebraska, who have  
4 tariffs.

5           My only point here is that I wonder if the  
6 word "terminal" is the most useful piece of syntax  
7 to put in a rule, since you seem to permit switching  
8 at many, many locations that I doubt we would define  
9 as "terminals." But yet you're doing what --  
10 reciprocals --

11           MS. MULLIGAN: One thing I would point out  
12 is the -- we have various types of switching  
13 arrangements, so some locations are open because of  
14 merger conditions, and I believe they would appear  
15 in our rule book as well. Some are because of  
16 traditional commercial reciprocal switching.

17           And so the -- there are better people at  
18 the railroad who could talk about the sort of  
19 geographic location and nature of --

20           CHAIRMAN OBERMAN: The reason I'm asking  
21 this is that your railroad and others have talked  
22 about, and you talk about it again today, that



1 switching, if we ordered switching, there would be a  
2 capacity degradation, and we'd be inefficient, and  
3 so forth and so on.

4           However you got there, you're doing  
5 switching, or you're at least open to doing  
6 switching, at 126 locations, as I read your tariff.

7           Can we at least agree on that?

8           MS. MULLIGAN: Yeah. And I go further. I  
9 mean, I would not say that BNSF thinks that  
10 switching is something that, when it's done in the  
11 way that we do it currently or that we fight to get  
12 in terms of exercising our merger rights that we  
13 have with our customers, that that is something  
14 that's going to cause a catastrophic failure.

15           We've shown that we've been able to take a  
16 switch and be competitive and actually, you know,  
17 have it be something that's used by a customer in a  
18 real-world commercial environment.

19           I think one of the things that troubles us  
20 about the STB's proposal -- and I do think it's good  
21 that the Board is talking about ways to define where  
22 this is available, because as it's currently

1 proposed it is not limited in terms of geography.  
2 It's very broad. And so it does hold open the  
3 possibility of a whole lot of switching, and a whole  
4 lot of switching in places where we've never done it  
5 before, there's not sufficient interchange, there's  
6 not sufficient infrastructure. It's -- yeah.

7 CHAIRMAN OBERMAN: Let me see if we can  
8 help each other make some progress.

9 Put aside the current draft for the  
10 moment, because one of the purposes of this hearing  
11 is to see if the current draft should be enacted or  
12 scrapped or never dealt with, or come up with  
13 something new, and that's what I'd like to explore  
14 as part of my education into this industry.

15 So let me -- I've got some slides that I  
16 prepared, and it will be helpful. I'm not a good  
17 abstract thinker. So I would like to show you a  
18 slide and then ask you about it. So if I could ask  
19 Ian to put up the first slide, which is a page out  
20 of your tariff for the Denver area. And this is  
21 just one of the pages I was just referring to, it's  
22 for Denver, it says it's for Denver.

1           And we put an arrow next to Owens Corning,  
2           which is one of the open locations, right, the way  
3           you look at this slide.

4           Can you see it with me?

5           MS. MULLIGAN: Yeah.

6           CHAIRMAN OBERMAN: Okay. Now, let me ask  
7           Ian to put up the next slide.

8           Let me say this, by the way. I've got a  
9           few slides here which will be put in the record.  
10          All of the things that I am asking you to look at  
11          were in the public domain, and we picked a few  
12          examples mostly random, just so I could ask some  
13          questions and you could walk me through without  
14          having to do it in the abstract but actually looking  
15          at a picture. So this is a Google Earth.

16          So this is a picture of part of Denver,  
17          and there is Owens Corning, I guess that must be  
18          your line there, which is -- there's the  
19          highlighter, which is the location that's open to  
20          reciprocal switching. And it looks like a yard  
21          there where they go in and out to perform the  
22          switching.

1 All the pink lines are railroad tracks.

2 But then up above there, not very far  
3 away, couldn't be more than an eighth of a mile, is  
4 a Univar site which is not under reciprocal  
5 switching by BN.

6 So -- and by the way, I haven't talked to  
7 Univar, they haven't filed any petitions. I just  
8 picked them out of a hat to ask this question.

9 If the a rule had said that if you are a  
10 shipper whose traffic is now taken to a yard where  
11 you're already performing reciprocal switching for  
12 another shipper like Owens, you become eligible in  
13 terms of the geography. Leave aside the standards,  
14 whether it's market-dominant and service problems  
15 and so forth. Just in terms of the geography,  
16 rather than putting the number of miles down.

17 What would be the interference with the  
18 congestion -- how could it cause any congestion when  
19 you take Univar's cars to the same yard where you're  
20 taking the Owens cars to allow Univar to be switched  
21 to UP?

22 MR. WEISKITTEL: So I'll start by saying

1 it's a little hard to see this, but we'll do our  
2 best. And if we want to talk any specific examples  
3 later, we'd be happy to do that.

4 CHAIRMAN OBERMAN: And by the way, in your  
5 tariff, I didn't count up all the shippers. There  
6 have got to be several hundred, maybe a few  
7 thousand, locations in those -- shippers in those  
8 126 locations. So you can pick any example. This  
9 was one we sort of picked at random.

10 But go ahead, I'm sorry.

11 MR. WEISKITTEL: Sure, sure, of course.

12 So, you know, when you think about -- I  
13 think the premise here, I think if I understand  
14 where you're going, Mr. Chairman, is why wouldn't it  
15 be just as easy to switch the other facility as it  
16 is the Owens Corning facility.

17 It might be. It also might not be. It  
18 would depend on a lot of things.

19 You may have -- if this is a Denver  
20 terminal area, you may have an already maximum  
21 capacity terminal area. You may be thinking about a  
22 specific type of commodity that's being moved by

1 Univar, you might think about their particular  
2 capacity at their facility, different types of cars.

3 I mean, there's a lot of operational  
4 considerations you have to think about here.

5 And, you know, there are reasons, and if  
6 you look at our switching book, there are reasons,  
7 as Jill said, that many of these facilities are  
8 included there. There's lots of different reasons.  
9 It could be merger rights, it could be commercial  
10 negotiations. There may be a reason that Univar is  
11 not included in that, I don't know. We'd have to  
12 investigate.

13 CHAIRMAN OBERMAN: I'm going past how you  
14 got there, whether it was a merger or voluntary  
15 agreement or whatever. I'm only talking about that  
16 component of this issue which keeps being raised by  
17 the railroads about inefficient congestions and  
18 messing up the terminal area.

19 The Univar cars have got to go from their  
20 plant to your yard, even if they're going on a BN  
21 train, they don't go directly from the plant to the  
22 ultimate destination. They go to the yard, don't

1 they, and get made into a train?

2 MS. MULLIGAN: I actually don't know  
3 that's necessarily the case. It depends on the kind  
4 of service that we designed with them.

5 There are scenarios where local operations  
6 would bypass the yard, and -- unit train, other  
7 types of block shipments.

8 That's not to -- let me just step back and  
9 say, I do think you did hear me say earlier  
10 hopefully that I do think when you're in an existing  
11 terminal area where there is switching that takes  
12 place, that is a simpler case for the Board. That  
13 is -- that is definitely a lighter showing in terms  
14 of the things that a shipper needs to -- that the  
15 Board has asked the parties to present in  
16 discussion.

17 And so I do think there is -- there is  
18 something about being in a terminal area that  
19 definitely takes out a lot of the complexity  
20 compared to, say, creating a switching remedy at an  
21 interchange where there's never been that type of  
22 movement being handled.

1                   CHAIRMAN OBERMAN: How would you feel if  
2 you had a rule which said we would only entertain  
3 petitions for reciprocal switching, at least as a  
4 starting point, maybe someday we have a broader  
5 rule, if the shipper who is asking for the  
6 switching, cars are already going to a yard where  
7 other shippers are getting reciprocal shipping?

8                   You've got 126 locations. What if we just  
9 limited the rule to those 106 locations, for BN?

10                  MS. MULLIGAN: I think that would be an  
11 appropriate limitation. I think -- I don't think  
12 you agree with me on the statute, but I think it's  
13 more consistent with the statute.

14                  I think it also ends up being a  
15 methodology that functions better ultimately because  
16 of some of the elements that, because you're in a  
17 terminal area, are less complex.

18                  So I think that would be a meaningful  
19 limitation that would have good reason for the Board  
20 to do it.

21                  CHAIRMAN OBERMAN: Well, I appreciate  
22 that, Jill.



1 I would say the lawyer in me has the idea  
2 that if the Board were to choose this approach, it  
3 doesn't have to make a decision if we're limited to  
4 terminal areas or not. We could simply have a rule  
5 that says whether we are or not, we're only going to  
6 entertain switching applications if you are being  
7 switched at a yard where there already is switching,  
8 because that bypasses the question of whether  
9 Muskogee, Oklahoma, is a terminal.

10 If you're doing switching there, that's  
11 one of the 126 locations. That's why I asked the  
12 question the way I did. So I think you appreciated  
13 the point, and that's all I was trying to get at.  
14 And I am looking for some way to deal with the  
15 practical concerns that the railroads keep raising.

16 I'm not sure I agree with them, but if I  
17 can avoid the discussion, then maybe we can proceed  
18 to the other issues, which are also -- we'd have to  
19 resolve, if we are going to have a rule at all.

20 MR. BOBB: Mr. Chairman? Mr. Chairman,  
21 excuse me.

22 CHAIRMAN OBERMAN: Yeah, go ahead, Steve.

1           MR. BOBB: One thing I wanted to add to  
2 this example. When we broaden out to have  
3 conversation about open routing, I would be very  
4 concerned if one customer could choose to go from  
5 Denver to a place in the eastern U.S. over Chicago,  
6 and another customer would say I'm going from Denver  
7 to the same location in the eastern U.S. and I want  
8 to go via Kansas City.

9           I think the open routing isn't -- is -- as  
10 this proposal, as I understand it, does cause  
11 incredible complexity and impacts on capacity. So I  
12 think this example still calls into question  
13 concerns about the open routing possibilities.

14           CHAIRMAN OBERMAN: I didn't say anything  
15 about open routing, so I'm not sure what you're  
16 talking about. Can you elaborate on that? What are  
17 you talking about?

18           MR. BOBB: The panels this morning talked  
19 about open routing from a point -- essentially  
20 reciprocal switching growing to an open routing  
21 example. I just wanted to point out that for a  
22 straight-up reciprocal switch, I understood your

1 point. But to the open routing, I think that still  
2 is a concern here.

3 CHAIRMAN OBERMAN: That's a separate  
4 issue. I like to take things apart piece by piece,  
5 Steve. So all I'm trying to deal with right now is  
6 trying to define -- you know, we're all over the  
7 place in terms of the stakeholders as to where we  
8 can have switching. NGFA wants it 100 miles from any  
9 interchange. I think the coalition folks said a  
10 reasonable distance from any interchange. Most of  
11 the railroads say it has to be in a terminal area,  
12 completely undefined piece of language.

13 And I'm just trying to focus in on that  
14 aspect of this discussion right now. And I think we  
15 made some progress here, so I'm finished with my  
16 questioning on this point. I would turn it over to  
17 the other Board members.

18 BOARD MEMBER PRIMUS: Well, Marty, if no  
19 one else wants to go, I'll go.

20 I want to say thank you to everyone at  
21 BNSF for taking the time to sit through this. It is  
22 important, and I also just want to acknowledge the

1 fact that you did admit on more than one occasion  
2 that there is an issue between yourself and the  
3 customers.

4           You know, I do appreciate that, and I  
5 think it's good that folks are owning up to the  
6 reality that there are issues in the network and  
7 that your customers, you know, and stakeholders are  
8 coming to us to demand this type of change and to  
9 look at this issue.

10           I keep reminding in just about every ex  
11 parte and every meeting I have with everybody,  
12 including the railroads, that this is not a Board  
13 initiative. This is not something that the Board  
14 came up with. This came up as a result of concerns  
15 by your customers more than a decade ago.

16           And so whenever I hear the talk, and it  
17 was said during your presentation, that there are  
18 perceived problems, and that -- as if to say that  
19 there really isn't a problem, I think it's wrong. I  
20 think you guys have to acknowledge that there is a  
21 problem, and you said there was.

22           And we hear about it almost on a daily and

1 weekly basis within the Agency, you know, with  
2 respect to your service. You know, we've got --  
3 I've heard of the problems with metering out of  
4 Idaho, and going over to the Pacific Northwest,  
5 issues there. And we've had conversations about  
6 that and other issues.

7 So, you know, this is not something that  
8 we just sort of came out of nowhere about and we're  
9 just looking at this, putting our finger to the air  
10 and figuring out which way the wind is blowing,  
11 going to make that decision.

12 I think we are challenged, you know, in  
13 terms of where we're going to go. I think the  
14 Chairman made a number of very key points about how  
15 we're going to get there, and some of the  
16 methodology we're using and some of the issues.

17 I mean, again, this has been around for a  
18 while, and yes, 2016 and proposed rulemaking back  
19 then is out there, but that may not be the map that  
20 we're going to use to go forward. I think there are  
21 a lot of things we're going to have to consider.

22 I know we were talking about sort of

1 meeting expectations and the levels, talking about  
2 from 2016 forward, we have to raise the issue of  
3 what's been going on since then with labor issues,  
4 with the like.

5           And I guess what I'm saying is I  
6 appreciate you guys coming and what you're saying,  
7 but I think -- I hope that you guys understand where  
8 this is coming from and where we're trying to go.

9           You guys have said that you'd rather have  
10 the market make the changes and determine how best  
11 to move forward. Well, I think we've sort of  
12 exhausted that point.

13           We aren't at a good point now with  
14 service. We're not at a good point as you heard  
15 this morning from your customers and stakeholders,  
16 that they are still wanting to move forward. And I  
17 think we owe it to them and we owe it to, honestly,  
18 to the network, to do that.

19           And I hope that after these meetings that  
20 we continue to have that dialogue and figure out the  
21 best way forward.

22           MS. MULLIGAN: Commissioner Primus, we

1 appreciate that and we hear that.

2           And I hope that the Board understands that  
3 the place that we start from is a place that says to  
4 the Board we do recognize that there is a role for  
5 the Board, and we do recognize that there are  
6 shippers who are asking the Board to become more  
7 involved. And the message that we would leave with  
8 the Board is those that -- it's important in those  
9 individual circumstances that the Board does  
10 consider that there are situations where there are  
11 competitive forces, and that's not an area where the  
12 Board should be putting in place disruptive  
13 regulatory intervention. But there are potentially  
14 places where there aren't, and making sure that  
15 there are mechanisms that work in those instances.

16           And so I think our message to the Board is  
17 there's an important sorting function that the Board  
18 does in terms of when it acts and when it creates  
19 remedies. And we do not dispute that there should  
20 be remedies. We talk about high rates, we talk  
21 about service remedies.

22           And so we definitely meet the Board in

1 that space and meet our customers in that space.

2 But we do think it's important that when  
3 the Board is considering remedies, especially new  
4 remedies that have the impact of reworking networks,  
5 and also impact other shippers too, that they are  
6 being put in place when there's an understanding of  
7 a need, and they're tailored to be responsive to  
8 that need too.

9 That's really where we would like to  
10 engage with the Board on this.

11 CHAIRMAN OBERMAN: I think Patrick had a  
12 question.

13 BOARD MEMBER FUCHS: Robert, are you good?

14 BOARD MEMBER PRIMUS: Thanks, Patrick.

15 BOARD MEMBER FUCHS: I'm going to actually  
16 pick up where Robert left off, raising important  
17 points about the service and rate environment. And  
18 I also want to echo his point about, Jill, you and  
19 BNSF often come with constructive suggestions, so I  
20 appreciate your engagement on the definitional issue  
21 that Marty covered.

22 You know, thinking about rates and



1 service, one of the things that strikes me about the  
2 proposed rule, particularly the market dominance  
3 prong or the necessary to provide competitive  
4 service prong, is it doesn't appear to me that there  
5 needs to be any showing of a rate or service problem  
6 in order to succeed under that prong.

7 Now, the shippers have made the argument  
8 about a prophylactic and the timing issue that they  
9 put forward, and the potential for there to be a  
10 service problem, they're not waiting for that to  
11 occur.

12 That being said, I'm wondering if there's  
13 anything that you would add to the prong, the  
14 necessary to provide competitive service, beyond the  
15 market dominance standard or sort of standard that  
16 you express discomfort about, that in your view  
17 would make the prong less detrimental and  
18 potentially more effective, but while also  
19 preserving an effective mechanism for shippers.

20 MS. MULLIGAN: And I think we highlighted  
21 a few of those in our testimony, but to go back to  
22 them, I mean, I think you talked about -- you heard

1 Steve talk about that our markets, geographic  
2 competition is a real thing.

3 In fact, the ICC recognized that the Board  
4 has recognized that product -- sorry, geographic  
5 competition is a real influence. They have decided  
6 in rate cases it's too difficult.

7 It feels like something that here, where  
8 the Board is putting in place a remedy that involves  
9 interchange, all the sort of restructuring of the  
10 network that could occur here, that it's something  
11 more than straight traditional market dominance is  
12 required. And we would say looking at geographic  
13 competition is part of that.

14 BOARD MEMBER FUCHS: Jill, you would agree  
15 under the existing rule that geographic competition  
16 is considered?

17 MS. MULLIGAN: It is, yes, absolutely.

18 BOARD MEMBER FUCHS: Do you have a problem  
19 with the burden being on the carriers?

20 MS. MULLIGAN: No, I think the rule was  
21 fairly clear that the carriers are able to bring in  
22 evidence and show that. I think that that's

1 appropriate to retain.

2 I think both parties have information to  
3 offer in terms of product and geographic  
4 competition.

5 But in terms of the structure of the rule,  
6 we've lived with that, having that opportunity or at  
7 least bringing the evidence to the Board on that.

8 BOARD MEMBER FUCHS: And then the other  
9 items you mentioned, of course, raising the RVC a  
10 little higher and product competition, it strikes me  
11 that while product competition -- which the Board  
12 excluded under the current rule as you know, it  
13 strikes me that that gets at an indirect competitive  
14 force and that a 240 RVC might suggest that rates  
15 are certainly on the higher end compared to maybe  
16 some others.

17 But it doesn't actually establish that  
18 there's a rate for service problem per se. So  
19 imagine a rule in which product competition were  
20 added with the burden on the carrier, just like  
21 geographic competition, and there was a market  
22 dominance threshold, 240 instead of 180.

1                   Would that to you be sufficient to  
2 mitigate much of the downside impact?

3                   MS. MULLIGAN: I think it takes a big step  
4 towards doing that. I think there's a good reason  
5 why NIT League's proposal before the 2016 proposal  
6 talked about some of these presumptions that were  
7 intended to show, look, are we getting closer to a  
8 situation where there is actually an indication that  
9 there may be some abuse of market power. So they  
10 used 240. They used other indicators in terms of  
11 how much of the traffic a carrier had for a period  
12 of time.

13                   And that was because they felt the need to  
14 fill this space of -- is there an actual need for  
15 the regulation.

16                   So I think that there's some things that  
17 we could look back in that record. And I think like  
18 you said, certainly geographic competition, product  
19 competition, those are things that, look, they're  
20 very relevant to the rates that we establish in the  
21 marketplace, and so when the Board doesn't consider  
22 those, it's really getting half of a -- half of the

1 picture of what's going on.

2 And there's downside to that. There's  
3 downside to railroads, but there's also downside to  
4 other customers who are in those same competitive  
5 markets where one of the customers, because they  
6 have got the time and energy to pursue this remedy,  
7 may get a below-market rate. And then that's taken  
8 into their marketplace as a subsidy.

9 And so there's good reason to try to focus  
10 more and more narrowly on situations that really  
11 require action by the Board.

12 BOARD MEMBER FUCHS: But it doesn't sound  
13 to me that you find the Coalition Association --  
14 correct me if this is not the right interpretation,  
15 that you find the Coalition Associations's point  
16 about -- let's call it the prophylactic point, okay?

17 It doesn't sound to me that you don't find  
18 that objectionable.

19 MS. MULLIGAN: Oh, no, no, no. You're  
20 talking about when Mr. Moreno said let's put the  
21 remedy in place before there's a problem. We would  
22 absolutely have an issue with that.

1           BOARD MEMBER FUCHS: But if all we look at  
2 is -- let's say -- if all we look at is you're  
3 market-dominant, you -- let's say we continue to --  
4 we continue to consider geographic competition, we  
5 add product competition. Those are all competitive  
6 forces. So it all goes to competition.

7           And then the other thing I hear you say  
8 is, you know, just raise the RVC threshold a bit.  
9 But that doesn't necessarily show you -- doesn't  
10 definitively tell you that the railroad has done  
11 something wrong.

12           MS. MULLIGAN: Absolutely, yes. I  
13 completely agree with you on that.

14           BOARD MEMBER FUCHS: What I didn't hear as  
15 part of your proposal to make that prong better,  
16 let's say, or while maintaining effective remedy for  
17 a shipper while minimizing detrimental effect to the  
18 railroad, what aspect of it would actually -- you'd  
19 actually have to show that a railroad has done  
20 something wrong, I'm using shorthand of course, but  
21 what aspect. I don't hear that in your proposal,  
22 which led me to sort -- which suggested to me that

1 maybe the delta between what the coalition was  
2 saying and what you're saying is not -- you want  
3 more competitive forces considered and you want a  
4 hard RVC, but what else?

5 MS. MULLIGAN: I think it really goes back  
6 to the need to show that there is an abuse of market  
7 power that's showing up in the form of rate or  
8 service that's making the shipper noncompetitive.

9 BOARD MEMBER FUCHS: What would be -- I  
10 know Karen has a question. What to you would be a  
11 service issue that would meet a threshold for  
12 ordering a switch? Can you give me a concrete  
13 example?

14 MS. MULLIGAN: Yeah, I'll be honest, it's  
15 a little -- it's interesting, because the shift to  
16 the service focus is recent.

17 So in terms of what Midtec was originally  
18 focused on, it was more rate than service. There's  
19 not a huge record before the Board in terms of  
20 either the prior cases or currently how these rules  
21 apply to service. I don't know that they were  
22 actually designed thinking about service.

1           And so I think that there's maybe some  
2 room there to fill in. I don't know that doing it  
3 live on the fly in this hearing is maybe the best  
4 approach.

5           But I do think that there is -- I mean, if  
6 you look back, put aside arguing whether Midtec is  
7 anticompetitive, because I know there's a lot of  
8 discussion and disagreement on that.

9           I do think that in the D.C. Circuit case  
10 talking about Midtec, they did identify a pathway  
11 where shippers who were experiencing service  
12 failures that were a result of the market -- the  
13 market abuse of the carrier that served them had a  
14 path to a remedy under service.

15           And so I do think -- and there were  
16 actually fairly specific -- and I'm far enough away  
17 from it now, but there's guidance, there's  
18 principles, that the D.C. Circuit articulated  
19 separate and apart from the kind of single rule that  
20 everyone talks about as being anti -- has to be --  
21 show anticompetitive conduct. There is a real set  
22 of principles that the D.C. Circuit articulated



1     there that I think are really good guiding  
2     principles in terms of when they thought that the  
3     Agency would be going too far and when they thought  
4     there was conduct that would be concerning.

5             None of that is worked into the Board's  
6     current proposal, and that's one of the things that  
7     we struggle with as a proposal and one of the things  
8     we would encourage the Board and parties to go back  
9     and look at, is what really was -- what was the D.C.  
10    Circuit talking about in terms of principles,  
11    because I do think --

12            BOARD MEMBER FUCHS: I would encourage it  
13    not just for you but for the railroad panelists, to  
14    provide a concrete example of a type of service  
15    inadequacy that would pass muster. That would be  
16    great.

17            CHAIRMAN OBERMAN: I would like to just  
18    add onto that and then I'll call on Karen. I guess  
19    the question, I think what Patrick is suggesting --  
20    let me phrase what my question was this morning.

21            What would a shipper have to show beyond  
22    just inadequate service, if anything, to get relief

1 under Midtec?

2 MS. MULLIGAN: I think a couple things.  
3 Number one, a shipper has several different  
4 mechanisms already at the Board in terms of if they  
5 think that there's a service issue. You've spoke  
6 about some of them earlier, common carrier,  
7 emergency service order.

8 So you're really talking about an  
9 additional remedy that's additive to that.

10 CHAIRMAN OBERMAN: Yes, but if they're --  
11 I'm specifically asking, Jill, if they're bringing a  
12 reciprocal switching case, under the doctrine as it  
13 now exists under Midtec, if the shipper's argument  
14 is that they are getting bad service, would the  
15 shipper, as you understand it, have to show anything  
16 other than that the service was bad?

17 MS. MULLIGAN: I do think they will have  
18 to show more than that.

19 CHAIRMAN OBERMAN: What is it that they  
20 will have to show?

21 MS. MULLIGAN: There's plus factors to it,  
22 yeah. I think there's a difference between if a

1 shipper is experiencing poor service because of any  
2 number of things, a surge in the number of shipments  
3 that are being tendered, a derailment, all the  
4 things that can end up being service interruptions,  
5 that should not be a basis for a remedy of  
6 switching.

7 But if there's an element of -- there's a  
8 shipper -- there's a railroad that is providing  
9 subpar service, in order to compromise the  
10 competitiveness of the shipper, in order to --  
11 because in a sense they're abusing their power,  
12 they're not trying to be responsive. You know, I do  
13 think that's someplace where Midtec speaks to  
14 already.

15 CHAIRMAN OBERMAN: Jill, I understand the  
16 concept. What's the actual evidence that the  
17 shipper would have to come up with? What does a  
18 lawyer have to go out there and find to put on in a  
19 case before the Board to meet that standard? That's  
20 what I'm trying to find out.

21 Does he have to take the deposition of the  
22 chief marketing officer and say I don't really care

1 about this shipment, I don't have to because I'm the  
2 only railroad there? You're never going to get that  
3 evidence.

4 So what will the shipper show?

5 MR. WEISKITTEL: Yeah, I mean, I think  
6 it's a great question, I think it highlights  
7 something Jill was talking about before, which is  
8 there's just not a history in the case law under the  
9 11102 that deals with these service issues and  
10 could answer that question necessarily.

11 Like Jill was saying, this is a new  
12 concept that shippers have really brought into this  
13 discussion since 2016, actually in the last year or  
14 two really. So could we theorize what facts might  
15 lead to a successful claim? I guess you could do  
16 that.

17 But I think it sort of comes back to the  
18 point we were making, which is there's a lot of  
19 uncertainty around this proposal, and I don't think  
20 the mechanics of the current proposal answer that  
21 question.

22 BOARD MEMBER FUCHS: I'm not so sure how

1 new it is. There's a heading in the circuit court  
2 decision about the adequacy of service, one of the  
3 things they examined, and then they go through three  
4 examples that Midtec alleged and also point out part  
5 of Midtec's original complaint was about service in  
6 addition to rates. So I'm not so sure that service  
7 sort of comes -- I think service was -- even if you  
8 look at the text of the rule itself, it talks about  
9 the efficiency of routing.

10 Looking at costs. But overall efficiency,  
11 which was part of Midtec's complaint. So I'm not so  
12 sure that service is a completely new concept in  
13 terms of animating competitive access even under  
14 Midtec. I've interrupted Karen a number of times,  
15 Marty.

16 CHAIRMAN OBERMAN: No, Patrick, I'm glad  
17 you said it because that was exactly what I was  
18 going to point out. The only thing I would say, and  
19 Karen has been very patient, I want to get to her,  
20 whether we keep the current rule in place, have no  
21 rule, have a new rule. I don't want to have a rule  
22 which puts a burden of producing evidence on a

1 litigant that's impossible to get. That serves no  
2 one's purpose except for those people who don't want  
3 us to do anything.

4 So if anybody wants to promote the idea  
5 that a shipper can win under the current Midtec case  
6 law, I'd like to hear how that happens in the real  
7 world of litigation.

8 With that, Karen, you're up.

9 Karen, you're muted.

10 BOARD MEMBER HEDLUND: This is not so much  
11 a question perhaps as a comment.

12 In various places in considering whether  
13 there is adequate competition, it's been suggested  
14 that we should look at whether the shipper can be  
15 adequately served by trucking, does trucking serve  
16 as a reasonable alternative and cheaper alternative.

17 And my concern is in this day and age,  
18 should we be forcing shippers to put their product  
19 on trucks? We all know and all the railroads talk  
20 about the fact that the advantage of railroading is  
21 that we are removing product from trucks and we are  
22 reducing emissions as a result of that. So should

1 we be taking into account the fact that trucking  
2 might serve as an adequate competitive factor when  
3 we're looking at these cases?

4 MS. MULLIGAN: So I think there's maybe  
5 two concepts there to break apart. I think number  
6 one, we agree completely in terms of the vision of  
7 bringing freight to rail -- that is -- Steve Bobb's  
8 team wakes up every day trying to figure out how to  
9 make that happen. That's what has driven our  
10 growth, that we talked about, that's what's going to  
11 drive our growth forward.

12 And so for us it's extremely important  
13 that we are positioning ourselves in the market to  
14 beat truck when it comes to service, when it comes  
15 to rate. So agree with you there.

16 I think your question, though, is talking  
17 about are trucks relevant in terms of the  
18 competitive landscape. And we would say absolutely,  
19 yes. The fact that we -- that our opportunity is to  
20 lose traffic to truck and our opportunity is to take  
21 more freight off of the highways and onto our rail  
22 means very much that when we're in a pricing

1 environment those are extremely relevant factors,  
2 and those ultimately serve as constraints on the  
3 rates that we put into the marketplace to win that  
4 traffic.

5           And so we certainly wouldn't want -- we  
6 agree completely with the Board that anything in the  
7 regulatory sphere that has the tendency to drive  
8 things back to truck is a really bad idea, and we  
9 think actually building in and understanding more  
10 how those forces inform our rates is something that  
11 improves the decisionmaking of the Board.

12           So I fully agree with the premise of your  
13 question in terms of our vision vis-à-vis competing  
14 with truck too.

15           BOARD MEMBER HEDLUND: Well, thank you for  
16 your very thoughtful answer.

17           CHAIRMAN OBERMAN: Jill, let me just  
18 follow up on that.

19           If in order to win a reciprocal switching  
20 case, a shipper might have to prove that the carrier  
21 was market-dominant, and the railroad comes in and  
22 says well, we're not because you have trucks, our



1 service is bad, you should use trucks, aren't you  
2 driving the shipper to the highways if that's the  
3 argument you're allowed to make?

4 MS. MULLIGAN: First of all, I can see  
5 Steve wanting to jump in here. We would never say  
6 to anyone that our service is bad so go use trucks.  
7 We might say you're going to improve our service so  
8 you stick with us instead of truck. But I'll let  
9 Steve jump in there.

10 CHAIRMAN OBERMAN: You might say it to the  
11 Board, not the shipper.

12 Go ahead, Steve.

13 MR. BOBB: Well, certainly trucks are a  
14 competitive threat to us, and I think one thing that  
15 has crossed my mind as we've been having the  
16 conversation today about service is that our  
17 customers in a very short period of time have a  
18 different set of options than they do over a longer  
19 period of time. And the goal for BNSF is to cure  
20 whatever service circumstance we may find at a point  
21 in time quickly, because we certainly don't want to  
22 lose that traffic.

1           But we also know that if we repetitively  
2 don't meet our customers' service needs, they will  
3 find other alternatives, be it shifting their  
4 manufacturing to a different location, making  
5 investments at different locations.

6           And so I think we have to think about this  
7 in both the here and now of the service situation as  
8 well as what the implications are for us long-term.  
9 And we don't want to lose the freight in the here  
10 and now or in the long-term, and we can lose it to  
11 truck or to our customers not making investments on  
12 our railroad.

13           BOARD MEMBER FUCHS: But Steve, you would  
14 agree it's not so easy for every customer to make  
15 those shifts?

16           MR. BOBB: On an individual customer, no,  
17 it's not. But we can't take that for granted.

18           BOARD MEMBER FUCHS: And to Marty's  
19 question, he had asked what in addition besides  
20 inadequate service. I think that Midtec -- I think  
21 Midtec is probably more narrow than the rules, or at  
22 least it interprets the rules in a certain way, that

1 you also have to show some degree of market power  
2 short of market dominance. But I'm thinking about  
3 what do we say to the shipper that experiences  
4 that -- experiences inadequate service over a period  
5 of time, I'm not talking about the derailment or  
6 wildfire or what have you, but a month, a quarter of  
7 missed switches. And can't shift the production to  
8 truck and can't open up a new facility elsewhere,  
9 these types of things.

10 You know, why is switching -- why ought  
11 switching not be available to that customer?

12 MR. BOBB: I think we have long said if we  
13 are unable to resolve that circumstance, that that  
14 is something for the Board to step in and take a  
15 look at. That's not a new statement by me, BNSF has  
16 said that in other venues before.

17 BOARD MEMBER FUCHS: I'm teasing out the  
18 intent and concept and trying to drive to another  
19 shipper, and these types of I think overlays to  
20 service inadequacy that is maybe not what you just  
21 suggested.

22 CHAIRMAN OBERMAN: All right. Does

1 anybody else have questions for our friends at BN?

2 VICE CHAIR SCHULTZ: I have one.

3 CHAIRMAN OBERMAN: Michelle, there you go.

4 VICE CHAIR SCHULTZ: Thank you. You spoke  
5 to unintended consequences of the proposed rule. I  
6 was wondering if perhaps you could highlight what  
7 you believe the biggest unintended consequences  
8 could be, and whether the Board should actually  
9 consider those consequences when considering a  
10 request for a reciprocal switch.

11 MR. BOBB: I was going to start and then  
12 you can clean me up, which is what lawyers do for me  
13 a lot.

14 What I would say is that the biggest  
15 unintended consequences again go to our perspective  
16 and concern that this is not just a rulemaking that  
17 is about reciprocal switching but it could  
18 potentially move to open routing, and the unintended  
19 consequences that I was talking about with Chairman  
20 Oberman are about the potential unintended  
21 consequences to network operations, to density, to  
22 interchange and ultimately to capacity and service.

1           So that was the first point that I would  
2           want to make around unintended consequences.

3           The second unintended consequence is to  
4           essentially in the case of agricultural markets, you  
5           could have larger customers who are capable of  
6           pursuing remedies that others aren't, gaining an  
7           advantage in cases where the market is fully  
8           functioning, but a larger customer might want to  
9           seek some kind of advantage in that environment.

10           So those were two that I was addressing in  
11           my testimony, and Adam and Jill may have some that I  
12           should be mentioning but didn't.

13           VICE CHAIR SCHULTZ: Steve, could you  
14           maybe follow up for a second and explain a little  
15           bit further as to how perhaps an agricultural  
16           shipper could have -- gain a bigger advantage?

17           MR. BOBB: In the case of the reciprocal  
18           switching or in the case of open routing?

19           VICE CHAIR SCHULTZ: I guess in the case  
20           of reciprocal switching, and I suppose if it would  
21           lead to open routing as well.

22           MR. BOBB: Okay. Well, I'll talk a little

1 bit generally about it. But if you have a market  
2 that we believe is functioning where our economics  
3 are providing competitive alternatives, competing  
4 against either other origins, competing to move our  
5 origins into competitive destinations or competing  
6 at origin to pull that grain into elevators that are  
7 served by BNSF.

8 And so we believe that there are  
9 competitive circumstances in play. Likewise, we  
10 don't believe that our grain rates are the highest  
11 of the high rates by any stretch. And so in that  
12 environment, you could have a larger grain company  
13 choose to come in and pursue making a case in this  
14 switching proposal that has a lot of open-endedness  
15 to it as we see it today, that the Board should  
16 intervene and have a solution that may fit their  
17 unique set of circumstances.

18 Meanwhile, they're competing in either the  
19 origin set of markets or in a destination set of  
20 markets against other customers who may not get that  
21 advantage.

22 MS. MULLIGAN: And I think Steve covered

1 the largest unintended consequences.

2 I think also, you know, we balance that as  
3 well with what I think we've been worried about in  
4 this context, is that there's a willingness to  
5 entertain some of those unintended consequences  
6 because it's an easier path than other regulatory  
7 remedies that are available.

8 And from our own experience, and Steve and  
9 Adam both referenced this, our own experience in  
10 these types of cases, they're extremely  
11 fact-intensive, they're very expensive, and we're  
12 still trying to figure out if we're going to get to  
13 take advantage of a lot of those rights.

14 And so the idea that this is sort of an  
15 easy button compared to some of the rate  
16 reasonableness, or common carrier or other types of  
17 remedies that are out there, that we know the Board  
18 has been very serious about improving in terms of  
19 the availability, the functionality, the time to  
20 decision for shippers, this really -- this doesn't  
21 feel like a step forward in terms of that mission of  
22 the Board.

1                   MR. WEISKITTEL: Yeah, and I think,  
2 Commissioner Schultz, I think part of your question  
3 was is this something we think the Board should  
4 consider as part of its process. And I think  
5 unequivocally the answer is yes.

6                   And I think the suggestions we've made  
7 about considering things like product and geographic  
8 competition on the front end, thinking about  
9 possible screens, those are things that would allow  
10 the Board to speak to these issues and consider  
11 those issues in a structured way on the front end of  
12 a case.

13                   Then obviously if you get into a case, you  
14 can think about those as well. But just wanted to  
15 make sure we hit that part of your question as well.

16                   VICE CHAIR SCHULTZ: Thank you.

17                   CHAIRMAN OBERMAN: Steve, at the risk  
18 of -- I thought we were just about finished, I'm  
19 going to ask Steve, walk me through this fear that  
20 you're raising about open routing from this rule.  
21 I'm really having trouble following how we get from  
22 here to there, depending on some version of the



1 reciprocal switching rule.

2 MR. WEISKITTEL: And I'm sorry to  
3 interrupt, Steve, but I wanted to maybe point out  
4 something, and then Steve you can get to your actual  
5 substantive fear about it, but how has that come up?

6 Because I think that Steve mentioned it  
7 earlier and you maybe, Mr. Chairman, had a question  
8 about that then.

9 If you go back and look at some of the ex  
10 parte meetings that the shipper associations have  
11 had with the Board since 2016, you look at some of  
12 the written comments, there's very specific  
13 suggestions in there, and I think it's in the  
14 Coalition Associations comments, about you're not  
15 going to be creating new switches, you're just going  
16 to be shifting the location where a current  
17 interchange occurs, from being perhaps somewhere out  
18 here to somewhere closer or something like that.

19 If you look at the charts that they have  
20 put in their ex parte meetings, there's a lot of  
21 concern we have when we see that that they're really  
22 not talking about consider reciprocal switching but

1 really are pushing more into what feels like a  
2 return to open routing.

3 So with that background Steve, maybe that  
4 will help explain it.

5 MR. BOBB: I don't know if I could add  
6 much to that. I guess, Chairman, it's because it's  
7 not excluded in the proposal. Certainly I'm not an  
8 attorney, but as our attorneys describe it to me,  
9 it's not off the table.

10 CHAIRMAN OBERMAN: Well, I guess I'm not  
11 understanding it. You're arguing for -- you know,  
12 we talked about the idea of limiting the switching  
13 to places where you're already doing reciprocal  
14 switching. If that happened, that would solve your  
15 open routing concern, wouldn't it?

16 MR. BOBB: I would go back to the Denver  
17 example that you showed of two customers in the  
18 Denver terminal. If one of those customers wanted  
19 to go to someplace in North Carolina, from Denver,  
20 and they wanted to go via Chicago, and the other  
21 customer said that I want to go to someplace in  
22 North Carolina but I want to go via St. Louis, that

1 would require us handling those two cars who are  
2 originated proximate going to the same place, they  
3 would actually have to handle multiple times across  
4 our network to make different connections in  
5 different geographies. That's the downside of open  
6 routing.

7 CHAIRMAN OBERMAN: Well, you're saying a  
8 switch would take place in St. Louis. Is that what  
9 you're saying?

10 MR. BOBB: I'm saying that potentially one  
11 car would need to be classified to move to Chicago,  
12 the other car would need to be classified to move to  
13 St. Louis. So they would move on separate trains.

14 CHAIRMAN OBERMAN: Do you understand that  
15 -- your reciprocal switching tariffs to allow the  
16 shipper to tell you which gateway to go through?

17 MR. BOBB: If it's moved in reciprocal  
18 service, it's going to go on those other carriers to  
19 those destinations.

20 CHAIRMAN OBERMAN: I don't really  
21 understand you. If they're switched at the yard in  
22 Denver, they're going on BN, they're not going on

1 UP.

2 MR. BOBB: And we're going to determine on  
3 which gateway we take them to the carrier given the  
4 destination, because we work with the connecting  
5 carriers to make sure we have the proper blocking.

6 CHAIRMAN OBERMAN: Aren't you going to  
7 shift them to BN right in the Denver yard if they  
8 have a reciprocal switch?

9 MR. BOBB: We are. And we're going to  
10 take them to North Carolina, to a connecting  
11 carrier, given where that carrier and us have agreed  
12 to do an interchange.

13 CHAIRMAN OBERMAN: I'm sorry, I'm getting  
14 it backwards. You're going to switch them to UP in  
15 the Denver yard. You're not taking them to  
16 St. Louis at all?

17 MR. BOBB: If they're going on the UP,  
18 then the routing -- that's not what I'm talking  
19 about. I'm talking about --

20 CHAIRMAN OBERMAN: But that's what  
21 reciprocal switching is. If the other shipper in  
22 Denver says I also want a reciprocal switch, I want

1 to go wherever I'm going on UP, you're done with  
2 them when they get to your yard in Denver. So what  
3 does that have to do with open routing?

4 MR. BOBB: Open routing as I understand it  
5 would be they're saying they want to go to North  
6 Carolina, and one customer says I want to go by BNSF  
7 via Chicago, and connect with an eastern carrier in  
8 Chicago, and the other customer says I want to go  
9 via St. Louis, and connect with an eastern carrier  
10 in St. Louis. That's the open routing concern.

11 CHAIRMAN OBERMAN: Well, but that's not  
12 what the reciprocal switching concept is about.  
13 It's about switching at the terminal in Denver, not  
14 in Chicago or St. Louis. I think you're setting up  
15 a straw man that doesn't exist. That's why I'm  
16 having trouble following it.

17 MR. WEISKITTEL: So, Mr. Chairman, maybe  
18 I'll offer this comment.

19 But the way you're describing it certainly  
20 sounds more like the way we have interpreted the  
21 concept. I think the concern that we have is if you  
22 look at where shipper association comments seem to

1 have been taking us in their last couple of filings  
2 and in their ex parte meetings, it has greatly  
3 expanded it beyond what you're describing there.

4 So your perspective that it should be more  
5 limited and work the way reciprocal switching  
6 typically works is certainly consistent with what  
7 our perspective is.

8 CHAIRMAN OBERMAN: I don't know what it  
9 should be. I'm just trying to understand how the  
10 railroads -- I'm still trying to learn this  
11 business, okay. So all I asked is that if Univar  
12 was allowed to go to the same yard in Denver that  
13 Owens is already allowed to and switch to UP, that's  
14 not open routing because they're leaving Denver on  
15 UP and not on BN.

16 MS. MULLIGAN: And it only really becomes  
17 open routing when the shipper starts to designate  
18 how the railroads operate with each other and how  
19 they want routing to go forward, which should not be  
20 a part of this rule, and it's encouraging that you  
21 seem to recognize that as well. But I do think that  
22 that is something that the shippers have encouraged

1 the Board to do.

2 CHAIRMAN OBERMAN: Whether that should or  
3 should not be, is there anything in any part of  
4 anybody's reciprocal switching proposals that would  
5 permit open routing?

6 MR. WEISKITTEL: I think if you look back  
7 at some of the things that -- I think it's the  
8 Coalition Associations have said, it does sound an  
9 awful lot like open routing, where they are talking  
10 about changing the location of an interchange to be  
11 further or closer, depending on where they could  
12 negotiate it.

13 MS. MULLIGAN: They provided some visuals  
14 of that that we would encourage the Board to look  
15 back at, and we will do the same if there's a mis --

16 CHAIRMAN OBERMAN: Okay. I think we spent  
17 a lot of time on an issue that doesn't belong in  
18 this rule, but I understand your concern.

19 Let me just say this, I'm expressing no  
20 concern of my own about whether open routing is a  
21 good idea, bad idea, we should do something about  
22 the bottleneck rules, we shouldn't. Those are

1 additional potential issues that perhaps the Board  
2 should deal with.

3 I just don't know that they belong in this  
4 rule. And I'd like to keep the discussion about  
5 reciprocal switching. You know, you said we all  
6 know what a terminal is, I'm not sure that's true.  
7 I thought we all knew what reciprocal switching was.

8 So let's keep it there.

9 All right, gang. Are we done with our  
10 five friends from BN now? They are very  
11 good-natured about it. All right. I think we  
12 can -- let's call up UP -- CP, I'm sorry, and  
13 that's -- I'm going to hope to get it right, Tyme  
14 Wittebrood, did I get it right?

15 MR. WITTEBROOD: That's perfect.

16 CHAIRMAN OBERMAN: And David Meyer.

17 MR. MEYER: Good afternoon. On behalf of  
18 Canadian Pacific, I am David Meyer, outside counsel  
19 to CP, and with me is Tyme. You pronounced his name  
20 very well. It took me a lot longer to get it right.  
21 He is CP's director of regulatory finance based in  
22 Calgary.



1 CP supports the comments in evidence  
2 submitted by the Association of American Railroads.  
3 You will hear from them later today I expect. We  
4 are here independently primarily to share CP's  
5 perspective and experience with the Canadian  
6 statutory and regulatory framework that supports  
7 so-called regulated interswitching in Canada.

8 As Mr. Wittebrood will explain, the  
9 ability of the Canadian rail network to function  
10 with regulated interswitching should not be seen as  
11 evidence that the regulatory proposals at issue in  
12 this proceeding could be implemented in the United  
13 States without having severe impacts on the strength  
14 of the U.S. rail network.

15 The lessons from the Canadian experience  
16 are, first, that the conditions we see today in  
17 Canada are entirely dependent on the unique  
18 historical context of regulated interswitching and  
19 the unique rail geography and economy of Canada.

20 And second, even with those features,  
21 forced switching in Canada still causes significant  
22 challenges that the regulatory framework and private

1 initiative have had to deal with flexibly.

2 I'll turn it over now to Mr. Wittebrood to  
3 speak to these issues in more detail.

4 MR. WITTEBROOD: Thank you, David.

5 And thank you, everybody, for this  
6 opportunity to provide some of my thoughts.

7 CP believes that open market competition  
8 in the transportation sector has been critical to  
9 the renaissance of North America's railroad  
10 industry, and it continues to be a key factor in  
11 CP's own success.

12 We believe that America's transportation  
13 industry greatly benefits when railway companies  
14 have the incentive and the ability to bring  
15 initiative and creativity to the markets to solve  
16 transportation problems and to improve service to  
17 our customers.

18 Transportation regulations are an  
19 important piece of this puzzle because they can work  
20 to either support or to diminish this competitive  
21 spirit.

22 In CP's experience, economic regulations

1 work best when they provide an incentive to invest  
2 and to compete and when market participants are  
3 allowed a degree of flexibility to develop solutions  
4 and best practices within the rules.

5 In this proceeding, we've heard a number  
6 of references to the Canadian interswitching  
7 regulations as a potential guide to understand how  
8 U.S. interswitching program might operate.

9 Since CP has more than a century of  
10 experience with these interswitching regulations,  
11 I'm here to offer some of our learnings and  
12 observations in the hope that it might assist the  
13 Board with its deliberations.

14 We've already heard Canada's rail industry  
15 has been shaped by interswitching since its infancy.  
16 Canada adopted interswitching regulations in 1904.  
17 Just for context, that was four years before  
18 Mr. Henry Ford began to produce the Model T. So  
19 this is truly still the days of the horse and buggy.

20 And since that time, every decision made  
21 by shippers and railways has been made with  
22 interswitching regulations as a backdrop. Shippers

1 have decided where and how to develop their  
2 production facilities with the knowledge that  
3 interswitching -- the interswitching regulations  
4 would be available to them.

5           And railway decisions about developing new  
6 markets, retiring redundant assets and improving  
7 network capacity have all considered the influence  
8 of interswitching. Even significant decisions made  
9 by regulators such as permitting CN to assume  
10 control of North America's -- sorry, of the north  
11 shore of Canada's largest marine harbor in Vancouver  
12 was made with the knowledge that these  
13 interswitching regulations would provide shippers  
14 with continuing access to those terminals.

15           The interswitching regulations have shaped  
16 Canada's rail industry through the cumulative impact  
17 of all of these decisions.

18           And for example, we estimate that 88  
19 percent of the customers that CP serves directly in  
20 Canada are sole-served by CP. It is likely that  
21 this number would be much lower if shippers were not  
22 able to rely on the interswitching regulations for

1 access to their key shipping destinations.

2 In addition to shaping the physical  
3 structure of Canada's rail network, interswitching  
4 has also influenced how Canada's railways operate  
5 every day. A railway network is a complex thing on  
6 its own, and interswitching magnifies this  
7 complexity by increasing the amount of interaction  
8 between separate railroads.

9 Canada's class 1 railroads have had years  
10 to develop solutions that help to reduce this  
11 complexity and to help to mitigate some of the  
12 inefficiencies inherent in interswitching.

13 Canada's regulators have permitted CP and  
14 CN to apply creativity and ingenuity to resolve  
15 operational problems as the volume of interswitching  
16 traffic has grown beyond anything that was  
17 contemplated when Canada's regulated interchanges  
18 were first established.

19 For example, we've developed integrate  
20 agreements in Vancouver and in Thunder Bay, which  
21 are two of Canada's busiest marine terminal areas,  
22 which allow us to streamline operations and avoid

1 running large unit trains through constrained  
2 interchanges, while protecting every customer's  
3 access to interswitching.

4           These types of agreements require years of  
5 experience as well as ongoing negotiations and  
6 cooperation between independent companies who are  
7 otherwise fierce competitors.

8           If interswitching were adopted in the  
9 U.S., it would be impossible to expect such  
10 arrangements to appear overnight. It will take  
11 years for railways to learn how best to cooperate in  
12 order to mitigate the operational challenges caused  
13 by regulated interswitching.

14           In the meantime, there will be a real risk  
15 of significant operational disruption.

16           Whatever the Board decides to do in this  
17 proceeding, we urge you to protect the railroads'  
18 ability and incentive to effectively manage such  
19 operational challenges in creative ways, and we urge  
20 you to move slowly so that rail carriers have time  
21 to understand the operational impacts, and to react.

22           In Canada, with Canadian interswitching,

1     there may be a common misconception that all  
2     interswitching in Canada is regulated, and that's  
3     not true.

4             There is a significant amount of activity  
5     that is not subject to the regulations at all, such  
6     as when a shipper doesn't have facilities within the  
7     30-kilometer radius of an interchange. But even the  
8     vast majority of interswitching activity that is  
9     ostensibly subject to the regulations is not a  
10    result -- does not result of direct regulatory  
11    intervention.

12            An interswitch move is truly a capital R  
13    regulated movement only if it results from a shipper  
14    application and an agency order. And in the last 10  
15    years, there's only been one order to the best of my  
16    knowledge instructing CP to interchange a specific  
17    customer's traffic.

18            The vast majority of interswitching in  
19    Canada occurs with no direct involvement of the  
20    agency.

21            CP and CN billed each other for  
22    approximately 355,000 unit switch carloads at the

1 regulatory rates in 2021. Most of this is what I  
2 refer to as structural interswitching activity.  
3 It's simply required in order to complete the  
4 movement because of how the Canadian rail network is  
5 structured.

6 Regulated interswitching is rarely used by  
7 Canadian shippers as a rate remedy. Canada's  
8 experience with interswitching does not inform us  
9 about how interswitching might be applied as a rate  
10 remedy in the United States.

11 And I'll talk a little bit about some of  
12 the costs of interswitching.

13 Interswitching imposes various types of  
14 costs, imposed on the Canadian transportation  
15 system. Some of those are directly observable and  
16 some are more insidious.

17 One of the more insidious costs is caused  
18 by a loss in the quantity and quality of the  
19 information available about the traffic moving on  
20 the network. Interswitching involves the exchange  
21 of carloads between two or more otherwise  
22 independent rail carriers with independent



1 operations.

2 Even when there's only one other carrier  
3 involved, CP cannot see the traffic that is being  
4 originated by other carriers today which CP will  
5 receive at the interchange tomorrow.

6 Therefore, when it comes to interchange  
7 traffic, it is difficult to proactively act to  
8 reduce operational problems when they arise.

9 For example, because CP cannot see both  
10 the origin and the destination for interswitched  
11 traffic, we can't predict congestion problems before  
12 they happen. We're not able to react to congestion  
13 until it's already a problem.

14 This was a contributing factor to an  
15 instance of widespread and long-lasting congestion  
16 in the Vancouver area in 2018. In that case, both  
17 CP and CN issued embargoes on interchanges and  
18 certain dual-served facilities so that we could work  
19 to resolve the congestion.

20 These embargoes were required because the  
21 railways were unable to work directly with shippers  
22 to avoid congestion before it became a problem.

1           So whatever the benefits may be, it may be  
2       said that interswitching regulations in Canada have  
3       created a rail network that is at least somewhat  
4       more fragile and prone to congestion and other  
5       disruptions.

6           Interswitching incurs more tangible costs  
7       as well. We've heard elsewhere interswitching  
8       requires at least two extra assignments in order to  
9       complete the movement. There is a significant  
10      amount of dwell time at the interchange as cars wait  
11      for receiving carrier to come and collect them.

12          And interswitching also creates  
13      significant overhead costs for railways. Employees  
14      of the railroads involved must be in constant  
15      communication in order to efficiently execute  
16      interchange traffic and avoid delays and congestion.  
17      Managers must maintain interswitching agreements and  
18      billing, and executives have to spend time  
19      negotiating interswitching agreements and operating  
20      practices.

21          Fortunately, our Canadian regulators have  
22      allowed the industry to develop creative solutions

1 in order to minimize the delays and the congestion  
2 caused by interswitching, while preserving shippers'  
3 rights.

4 CP will continue to compete vigorously by  
5 providing exceptional service and value to our  
6 customers, no matter how the regulatory environment  
7 evolves. But we urge the Board to consider  
8 carefully not only the anticipated benefits but also  
9 the potential costs and consequences of any rule  
10 changes.

11 We hope that our input will assist the  
12 Board to do this, and we hope that our experience  
13 illustrates that the Canadian rail industry is in a  
14 very different place as regards the ongoing impact  
15 of interswitching after more than 100 years of  
16 experience with this regulation.

17 So in conclusion, we urge the Board to  
18 move carefully.

19 CHAIRMAN OBERMAN: Thank you, Tyme. I  
20 just have a couple of questions.

21 You've said that reciprocal switching  
22 requires more touches or more moves and so forth.

1 If you followed the question I was asking of BN, if  
2 we were to decide to limit reciprocal switching to  
3 the yard where the cars are going anyway, it  
4 wouldn't be an extra move, it would just be which  
5 track you put them on; right?

6 MR. WITTEBROOD: Well, I mean, that helps  
7 to keep it in the area where the customer is being  
8 served and if there's an interchange in that  
9 location.

10 The reality is, though, that -- I'm not an  
11 operations expert, but I have been involved in some  
12 of these types of operations, reviewing them.

13 Even where the traffic originates very  
14 close to the interchange, there's often a separate  
15 assignment that will move the traffic from the  
16 classification yard, which is the railway's main  
17 yard, main serving yard, to the interchange.

18 The interchange may be physically  
19 connected to the railway's main yard or it may be  
20 somewhat separated.

21 And so there's quite a few examples where  
22 we do have an extra assignment specifically to

1 complete the interchange portion of the move.

2 CHAIRMAN OBERMAN: But that's not for  
3 every reciprocal switch; right? Just for some?

4 MR. WITTEBROOD: I couldn't say 100  
5 percent. I would tend to agree with you, it's not  
6 for every switch.

7 CHAIRMAN OBERMAN: The only other thing I  
8 would say, you urge us to smooth slowly. I would  
9 say on this docket, the Board has taken moving  
10 slowly to an art form. Eleven years -- just like we  
11 said we all know what a terminal is, we all know  
12 what moving slowly is, and I would say 11 years is  
13 slow.

14 I didn't have anything else, Tyme. I  
15 appreciate your comments.

16 MR. WITTEBROOD: Your point on that is  
17 taken, Mr. Oberman. I would just add, though, that  
18 I'm more talking about after -- if you begin to  
19 enact regulations, after we begin to enact them, not  
20 to open the floodgates all at once.

21 CHAIRMAN OBERMAN: Well, that's a good  
22 point. I have taken to heart what many of the

1 shippers have said, and that is that a likelihood  
2 that the floodgates are going to be open no matter  
3 what kind of rule you have is small because of the  
4 cost and the complexity of any kind of case that  
5 might be brought.

6           Anyway, thank you.

7           Are there other Board members that have  
8 any questions for Tyme?

9           BOARD MEMBER PRIMUS: I just have a quick  
10 one.

11           Tyme, again, I appreciate your comments.  
12 And I do agree as the Chairman did also about not  
13 opening the floodgates all at once. I want to ask  
14 you about that 2018 problem in Vancouver and I think  
15 that's also sort of symbolic.

16           I mean, if switching has been engaged for  
17 over 100 years and you're having a problem in 2018,  
18 that tells you that it's been working for long  
19 enough that maybe there's just a hiccup. If you  
20 could comment on that hiccup.

21           Obviously, you guys solved that problem  
22 and you continue to switch successfully. So how did

1 you solve that problem?

2 MR. WITTEBROOD: I wasn't directly  
3 involved in solving that problem, but I would say we  
4 solved the problem by working together as much as  
5 possible with shippers and with our partner railways  
6 in the interswitching in order to smooth out those  
7 traffic flows. We focused on the areas where  
8 congestion was, and we stopped sending traffic there  
9 for as long as it took in order to relieve that  
10 congestion.

11 Because in the railway world, once you  
12 have congestion in one location, it tends to stack  
13 up, it gets worse, not better, until you take  
14 proactive action.

15 I appreciate your question, and I don't  
16 think I'm here to tell you that Canadian  
17 interswitching is a nightmare scenario in Canada the  
18 way that it's been enacted.

19 BOARD MEMBER PRIMUS: Do you think it's  
20 successful?

21 MR. WITTEBROOD: I don't know how to  
22 qualify whether it's successful. We interswitch

1 every day with our partner railways, primarily with  
2 CN and with some of the U.S. class 1s. And we do  
3 interswitch primarily without major congestion  
4 issues.

5 Does interswitching apply costs, overhead  
6 costs, dwell time costs, the information problem  
7 that I discussed? Yes, it does. There are those  
8 downsides to it.

9 The initial objective in Canada of  
10 applying -- of creating those regulations back in  
11 1904, as I understand it, was to prevent railways  
12 from having to build in, you know, multiple network  
13 lines, into the same facilities.

14 So the railway and the shipper could rely  
15 on the interswitching regulations to take care of  
16 that for them.

17 That aspect of it I think was successful.  
18 We see, as has been pointed out before, we see that  
19 CP and CN's networks are relatively parallel, and I  
20 think that might be partly due to the interswitching  
21 regulations.

22 But as to say whether it was successful in



1 the long run in terms of are we in a better place  
2 today than we would have been without the  
3 interswitching regulations, I don't know.

4 I do feel that the network is somewhat  
5 more fragile. I did point out, as I say, we  
6 estimate that 88 percent of our own Canadian  
7 customers are sole-served by CP, and yes, many of  
8 those have access to the interswitching regulations.

9 But it kind of implies that in Canada  
10 we're more or less married to those interswitching  
11 regulations. We couldn't ever get rid of them or  
12 change them too drastically because the network has  
13 evolved with those interswitching regulations as a  
14 basic tenet of how we operate.

15 BOARD MEMBER PRIMUS: And at the same  
16 time, not all of your customers utilize it; is that  
17 correct?

18 MR. WITTEBROOD: No, that's correct. They  
19 don't all utilize it.

20 BOARD MEMBER PRIMUS: And last time I  
21 checked, both CP and CN seem to be doing pretty well  
22 financially.

1 MR. WITTEBROOD: Yes, I think that's fair.

2 BOARD MEMBER PRIMUS: Okay. Thank you.

3 Appreciate that.

4 MR. MEYER: If I may just say a few  
5 closing thoughts. Mr. Chairman, you're muted.

6 CHAIRMAN OBERMAN: Before you do, did  
7 anybody else have questions for Tyme?

8 VICE CHAIR SCHULTZ: I did. Just one  
9 quick question.

10 You indicated that switching, if  
11 implemented as we've set forth, would, in fact,  
12 potentially increase costs.

13 I was wondering if you could speak to how  
14 CP would handle those costs, and would it be  
15 possible that they would be passed on to the  
16 shippers?

17 MR. WITTEBROOD: I mean, to the first part  
18 of your question, I think we would try to handle  
19 them in much the same way that we handled them in  
20 Canada, and that is to work with our interswitching  
21 partners in order to come up with arrangements,  
22 whether it's formal agreements or more informal

1 operational practices, whatever they might be.

2 Interswitching does complicate the  
3 operational landscape, and you're going to have  
4 different circumstances to deal with everywhere that  
5 it occurs.

6 So every time that we get into an  
7 interswitching scenario, we'll probably have to  
8 spend some time working with our interswitching  
9 partners in order to maximize the efficiency of  
10 those movements, and that's what we would do.

11 And again, I would hope that any  
12 regulations that we had would permit that  
13 flexibility.

14 In terms of passing the costs on to  
15 customers, I mean, at CP we're generally -- not  
16 generally, always pretty much opposed to cost-based  
17 pricing. We don't price our service in order to hit  
18 a specific margin above cost.

19 We do price our service in order to  
20 achieve optimal market outcomes. We price our  
21 service in order to compete. We price our service  
22 in order to maximize the amount of traffic that

1 we're able to move.

2           So we're not going to directly pass on  
3 those costs, I don't think. I don't think I have  
4 the authority to specifically speak for CP and  
5 promise that's the case, but the way that CP  
6 operates, I don't believe we're going to look at the  
7 cost calculation and say okay, our costs to move  
8 this carload has gone up by 10 percent and  
9 therefore -- the interswitching portion of the move,  
10 and therefore our rate would go up by 10 percent.

11           However, at the end of the day, the costs  
12 have to land somewhere, and, you know, in my limited  
13 studies of economics as a science, I think  
14 realistically, some of it will land on the railways,  
15 and some of it will land on sort of the broader  
16 public stakeholder as a whole, and some of it will  
17 probably land on shippers.

18           VICE CHAIR SCHULTZ: Thank you.

19           CHAIRMAN OBERMAN: All right. Any other  
20 questions for Tyme?

21           David, you're on.

22           MR. MEYER: Thank you. I just wanted to

1 share a very brief thought before we go.

2           You know, I think what you've heard from  
3 Tyme is that the Canadian regulatory environment  
4 really is a regulatory environment that the  
5 railroads there -- railways, they say, have adapted  
6 to for over a century.

7           And our main point is whatever you see in  
8 Canada today is not evidence of what would happen if  
9 you flipped a switch and turned on the same  
10 regulatory environment in the United States. You  
11 see the end result of 100 years; you don't see the  
12 adjustments necessary that would occur in a system  
13 that's grown up without the kind of regulation that  
14 is being proposed here.

15           Now, CP is an enthusiastic supporter of  
16 marketplace competition, just like Congress was when  
17 it adopted or enacted the Staggers Act and the ICTA.  
18 And competition Congress has said is the best way,  
19 the best means, to ensure that the benefits of a  
20 strong and effective rail network are brought to  
21 rail customers and the broader economy.

22           As the Board knows, CP is in the midst of

1 a transaction of our own that we believe will inject  
2 significant new competition into the rail  
3 marketplace. This is not the time obviously to  
4 discuss that transaction.

5 But I can say that CP intends to use  
6 whatever tools are available to it in the  
7 marketplace to compete aggressively for the  
8 transportation for customers that we are able to  
9 serve, including whatever new tools the Board might  
10 end up creating as a result of this proceeding.

11 But respectfully, we share the view that  
12 you're going to hear from AAR much more about, which  
13 is that the forced access rights that are being  
14 discussed in this proceeding really are going to  
15 inject new regulation, not real marketplace  
16 competition, into the U.S. rail network. And we  
17 respectfully urge the Board not to take that step.

18 Thank you for your time.

19 CHAIRMAN OBERMAN: Thank you, David.

20 Anybody have any questions for David?

21 Okay. So it is now 3:07. We have to hear  
22 from UP and we are scheduled to hear from AAR. So

1 let's see if we can't make a stab at doing that, but  
2 I think we all need a break. So let's take a  
3 10-minute break and reconvene at 3:17. Thank you  
4 all.

5 (Recess.)

6 CHAIRMAN OBERMAN: All right. We are back  
7 in session. And our next group, same panel, is  
8 Union Pacific. There are four people, Jennifer  
9 Hamann, Kenny Rocker, Eric Gehringer and Michael  
10 Rosenthal.

11 Are you all there? Okay.

12 Who wants to lead off?

13 MS. HAMANN: I'm going to be the leadoff  
14 batter today. Good afternoon. Go ahead.

15 CHAIRMAN OBERMAN: Go ahead, no.

16 MS. HAMANN: Okay. Well, good afternoon,  
17 Chairman Oberman, Vice Chairman Schultz, Members  
18 Fuchs, Primus and Hedlund and Board staff. My name  
19 is Jennifer Hamann, I'm the executive vice president  
20 and chief financial officer at Union Pacific  
21 Railroad. I along with Eric Gehringer, executive  
22 vice president of operations, Kenny Rocker,

1 executive vice president of marketing and sales, and  
2 our counsel Mike Rosenthal, want to thank you for  
3 the opportunity to speak on behalf of Union Pacific  
4 about the reciprocal switching proposal currently  
5 before the Board.

6 My colleagues and I are here today to  
7 discuss how the switching proposal would financially  
8 and operationally impact what we have all learned  
9 over the last year or so is a very fragile and  
10 complex global supply chain, and more directly how  
11 it would impact Union Pacific's customers.

12 Specifically, let me outline how forced  
13 reciprocal switching adversely affects current and  
14 future capital investments along the railroad.

15 Without a doubt, our goals and our  
16 customers' goals are intrinsically linked. Our  
17 customers want their products delivered safely and  
18 on time with minimal variability, and Union Pacific  
19 is committed to meeting those expectations.

20 Beyond the immediate alignment, it is in  
21 Union Pacific's long-term strategic interests to  
22 grow the amount of traffic on our rails and to be



1 the partner of choice for our customers.

2 The current switching proposal appears  
3 intended to provide customers with increased carrier  
4 flexibility. However, I can unequivocally state  
5 that this increased flexibility will distort crucial  
6 signals that help us allocate capital effectively,  
7 and will disrupt the fundamental investment model of  
8 the rail network, a model that has produced the  
9 safest, most efficient and most effective national  
10 rail network in American history.

11 The impact of that distortion would limit  
12 or hinder the rail's ability to invest for growth,  
13 which, in turn, attracts investment to our industry.

14 During my 30-year tenure, Union Pacific  
15 has consistently established and communicated its  
16 desire to grow car loadings, setting annual growth  
17 targets and releasing multiyear plans that are  
18 rooted in a commitment to growth.

19 We want to grow and invest for the future,  
20 and, in fact, our owners want us to grow as well.  
21 And we must prudently allocate our dollars based on  
22 the information that is available to us and the

1 certainty of that information.

2 Our investment priority first and foremost  
3 is our infrastructure. Beyond that, Union Pacific  
4 is committed to a competitive dividend as well as  
5 responsible share repurchases.

6 We have been quite consistent in this  
7 capital allocation strategy, which is necessary for  
8 us to compete for capital against other publicly  
9 traded companies, including many of our customers,  
10 but also to compensate our shareholders for their  
11 investment.

12 To support our growth plans, Union Pacific  
13 routinely seeks areas of improvement along our rail  
14 to increase throughput and reliability. With our  
15 capital investments, we specifically target nodes  
16 with rising demand and operational delays. These  
17 capital investments serve as the catalyst to ensure  
18 our network is flowing efficiently and meeting our  
19 customers' needs.

20 Unfortunately, the switching proposal  
21 alters these crucial dynamics and creates  
22 uncertainty.

1           The risk of switched traffic reduces our  
2           incentive to allocate valuable capital dollars to  
3           areas where we could lose traffic, where there's  
4           uncertainty about traffic growth or where we could  
5           be forced to handle traffic for a competitor without  
6           adequate compensation.

7           Specifically, the proposal interferes with  
8           our ability to forecast and allocate resources. We  
9           are responsible for both network investments and  
10          investments benefiting individual customers. Under  
11          this proposal, a customer can focus on its own  
12          short-term interests without regard to the needs and  
13          demands of other customers or the network.

14          To its credit, the STB has said that it  
15          would act in each case to safeguard the interests of  
16          those other customers and the shared interest of all  
17          stakeholders in a fluid, well-functioning and  
18          capable network, however, Union Pacific cannot  
19          invest under the assumption that the STB will  
20          successfully defend those interests in every case,  
21          nor will investors assume that level of success.

22                 As currently proposed, reciprocal

1 switching would limit UP's ability to proactively  
2 invest in the network, and must then be accounted  
3 for by Union Pacific and its investors. This is  
4 especially concerning because it will inherently  
5 limit prospective investment needed to both maintain  
6 and grow an ever-burdened supply chain.

7           It would particularly impact the rail link  
8 in the chain, which funds its own infrastructure  
9 investments and is one of the most  
10 emissions-friendly transportation modes.

11           My concern about investment is not merely  
12 speculative or hypothetical. For example, we  
13 partner with our plastic customers to support their  
14 growth initiatives. In just the last five years,  
15 which includes the start of an industrial recession  
16 and a global pandemic, Union Pacific invested around  
17 \$115 million in storage and transit facilities in  
18 Texas and Louisiana. Here, Union Pacific evaluated  
19 both the gain in business and whether that  
20 investment would lead to an increase in network  
21 capacity.

22           This strategic investment has helped us,

1 and will continue to help us, serve our customers  
2 and improve network fluidity. However, these of  
3 investments are not made without careful planning  
4 and consideration, working with our customers to  
5 understand their long-term goals and objectives.

6 And the phrase "long-term" is important  
7 here. The average life of our rail assets is more  
8 than 40 years. If Union Pacific were performing  
9 this evaluation in a switching proposal environment  
10 with no certainty about returns, we would have  
11 needed to consider whether the infrastructure  
12 investment would result instead in decreased  
13 fluidity and loss contribution to the benefit of a  
14 competitor.

15 I liken it to allowing Burger King to use  
16 the grill in McDonald's. Would McDonald's invest in  
17 a larger grill with better cooking technology if  
18 there was a real possibility that Burger King would  
19 co-op the use of that grill? This is the added risk  
20 of the switching proposal, and would almost  
21 certainly have changed Union Pacific's cost-benefit  
22 analysis for the storage and transit facilities,

1 negating the viability of an investment that is  
2 helping our customers grow and improving network  
3 fluidity.

4 In addition, because of the network nature  
5 of our business, capital investments in one area  
6 directly impact the system as a whole. Thus, the  
7 switching proposal changes the paradigm across the  
8 network and makes all capital investments riskier.

9 The proposal degrades our ability to  
10 evaluate a project's margins and impedes  
11 identification of capital expenditures that would  
12 benefit our customers, the global supply chain and  
13 our commitment to zero carbon emissions by 2050.

14 If our underlying financial investment is  
15 hindered by this proposal, our ability to make  
16 investments like, in President Biden's words, the  
17 largest purchase of American-made battery electric  
18 locomotives in all of history would also be  
19 hindered.

20 I encourage the STB to maintain an  
21 environment where the U.S. rails are successful and  
22 are supporting a booming American economy through

1 massive investments for growth, better service and  
2 lower emissions.

3 Change is often valuable and should be  
4 welcomed as an opportunity. However, increased risk  
5 equates to less activity and a more conservative  
6 approach to network investment. This switching  
7 proposal limits the rail industry's ability and  
8 motivation to flex resources and make capital  
9 investments in the network, and ultimately will  
10 become another source of inflation in the U.S. --  
11 for the U.S. consumer.

12 I now pass the remainder of my time to  
13 Eric.

14 MR. GEHRINGER: Good afternoon, Chairman  
15 Oberman, Vice Chairman Schultz, Members Fuchs,  
16 Primus, Hedlund, and the Board staff. I like  
17 Jennifer would like to thank you for your time  
18 today. I'm going to focus on how the switching  
19 proposal will prevent us from providing the  
20 reliable, consistent and efficient service we must  
21 deliver to obtain our business.

22 Earlier today, you heard complaints about

1 PSR and first mile-last mile service. Switching is  
2 not a cure for those. Switching would magnify  
3 existing service challenges and make future problems  
4 more likely.

5 As I will explain, the switching proposal  
6 would build delay, longer cycles, greater congestion  
7 and increased complexity into the supply chain.

8 We would find it more difficult to plan  
9 and manage our network resources and our network  
10 would be more vulnerable to disruption. We would be  
11 using more resources to move the same amount of  
12 traffic, instead of using our resources to better  
13 serve existing and new business.

14 This proposal inherently complicates the  
15 supply chain network. It would make that network  
16 less agile and less predictable. As executive vice  
17 president of operations at Union Pacific, my job is  
18 to keep the railroad moving fluidly and efficiently  
19 while planning for market changes and keeping our  
20 employees safe.

21 The nation's supply chain is a delicate  
22 arrangement of movements and handoffs that must be



1 well-timed, closely synchronized, to maintain  
2 fluidity. Each increment of complexity is a source  
3 of error and dysfunction. Each increment of  
4 complexity also reduces transparency on the network  
5 for our customers.

6           The switching proposal makes the rail  
7 network and overall supply chain continuously  
8 vulnerable to new sources of disruption, while  
9 failing to promote the stated goal of improved  
10 service.

11           One of the key vulnerabilities for the  
12 supply chain is the handoffs between service  
13 providers. This is true for handoffs between  
14 logistic providers and the overall supply chain, as  
15 well as the handoffs within the rail network.

16           To maintain fluidity of the network, the  
17 handoffs must be well-timed and synchronized through  
18 significant planning and communication. Reciprocal  
19 switching increases the number of potential points  
20 of failure by injecting new handoffs into an already  
21 complex and challenging system.

22           This proposal would lead to

1 desynchronization and bottlenecks.

2           Additionally, this proposal will make  
3 proper resource planning and resource allocation for  
4 the complex network significantly more problematic.  
5 It takes time to adequately plan for resources to be  
6 sourced in the appropriate areas of the network.

7           Locomotives cannot be everywhere at the  
8 same time, and they do not appear overnight.

9           The proposal will inject unforeseen demand  
10 into the network due to the unavailability of  
11 certain equipment. These are long-term assets that  
12 need proper planning.

13           Also, people are not interchangeable. We  
14 staff our crews due to their qualifications and  
15 understanding of how to do work at certain areas or  
16 in a particular location. This proposal assumes  
17 that any crew can service any area of the network,  
18 and that is simply not the case.

19           Each crew goes through specific training  
20 to meet the needs and demands of the network in a  
21 defined area.

22           Moreover, we have received feedback that

1 our customers want the same crew serving them, so  
2 the crews do not make mistakes picking up, setting  
3 up, their cars. This continuity of talent is an  
4 integral point in sustaining fluidity in our  
5 network.

6 Our network is a series of tightly mapped  
7 outlinks. If one link goes missing, the chain or  
8 the rail network would be incomplete.

9 By decreasing traffic density and  
10 injecting inefficiency, the long-term health of the  
11 network will be affected by the proposal. Transit  
12 times will significantly increase. We don't have to  
13 speculate about that impact. Reciprocal switching  
14 that we currently perform typically adds 48 to 96  
15 hours of delays due to cars traversing the terminal  
16 twice.

17 The cars subjected to reciprocal switching  
18 would remain in the yards, consuming more capacity,  
19 interfering with service and diminishing our ability  
20 to build traffic density.

21 Let me address some misconception about  
22 current switching that occurs on our network.

1 Railroads already reciprocal-switch so how would  
2 this proposal be any different? There are many  
3 instances of reciprocal switching that currently  
4 exist on the railroad network, that is absolutely  
5 true. These situations differ from the proposal  
6 before the Board in that these situations were long  
7 planned and deliberate.

8           Additionally, because we were aware of  
9 these switching situations due to mergers and/or  
10 consolidations, we were able to evaluate the network  
11 to determine if it could sustain the switching and  
12 to plan adequately with resources to support these  
13 switches.

14           We utilize and leverage the appropriate  
15 resources in our network to address this voluntary  
16 switching. More important, these situations are  
17 narrowly tailored, limited in number and location,  
18 and mitigated in advance by significant changes in  
19 the physical network of the merger railroad. This  
20 switching proposal is not a solution for improvement  
21 of service. On the contrary, it will degrade  
22 service. And it will create very different

1 challenges over and above local traffic  
2 fluctuations, volume seasonality and increased  
3 response time to unpredictable events like weather  
4 and fires.

5 Under the proposal, Union Pacific could  
6 not mitigate the effects of forced switching through  
7 processes we normally use to try to anticipate and  
8 adjust for dynamic changes and uncontrollable  
9 events.

10 The proposal complicates the network,  
11 driving fragility and raising uncertainty. This  
12 will increase the customers' transit time as surge  
13 resources are not available at a moment's notice and  
14 not sustainable and again take time and planning.

15 Let me also say this. Union Pacific wants  
16 to compete and welcomes competition. The Board has  
17 received comments that railroads are against  
18 reciprocal switching because they fear competition.  
19 This is not the case.

20 We compete hard, and we welcome  
21 competition. We take business from one another all  
22 the time. We also welcome growth, and we welcome

1 continuing to have positive impact on the supply  
2 chain.

3 I urge the Board to consider the severely  
4 negative consequences this proposal will have on the  
5 overall U.S. supply chain, and our customers, rail  
6 service and experience. Thank you for your  
7 consideration of my deep concerns about forced  
8 switching. I look forward to addressing any  
9 questions you might have. I pass the remainder of  
10 my time to Kenny.

11 MR. ROCKER: Thank you for the opportunity  
12 to talk about the reciprocal switching proposal  
13 currently before the Board. First, let me begin by  
14 saying that we've been talking to our customers.

15 Based on their feedback, we better  
16 understand where they see pressure points in our  
17 network, and I can tell you today these points  
18 identified by our customers will only be exacerbated  
19 by the switching proposal, and our ability to  
20 improve those points will be frustrated.

21 We also have spent a great deal of time  
22 listening to our customers. We want to better

1 understand their processes, their needs, their plans  
2 and their challenges. We want to know how we can  
3 improve their customer experience with us.

4           What we've learned is simple. The most  
5 important value that customers seek is consistent  
6 and reliable service from their transportation  
7 provider.

8           With this switching proposal, there will  
9 be a higher potential for variability of service  
10 because forced switching increases the number of  
11 connections between two railroads.

12           One of our chemical customers has shared  
13 with us that the increased invariability of service  
14 will negatively impact its costs in several ways.  
15 In reviewing the feedback, we realized that this may  
16 be something that all customers understand and  
17 experience.

18           The biggest concern for our customers is  
19 in the loss of sales and production is slowed or  
20 halted because of delays in getting their railcars  
21 to their facility. Customers are also concerned  
22 that shipment delays may cause them to use truck

1 transportation at a higher cost to move their  
2 product to end receivers.

3           They are also sensitive to service  
4 variability because it causes increased cycle times,  
5 which forces customers to respond by requiring more  
6 railcars and increasing inventory carrying costs.

7           Those concerns can quickly create real,  
8 tangible and increased costs for our customers.

9           For instance, if we assume the cycle times  
10 for manifest traffic increase by 24 hours, then  
11 customers would need to increase their fleets by  
12 3200 railcars. A chemical customer shared that a  
13 one-day increase in transit time would translate to  
14 an additional railcar lease cost of 100,000  
15 annually, and 350,000 in annual inventory carrying  
16 costs.

17           Those general customer concerns would  
18 arise in the environment created by the switching  
19 proposal.

20           Our customers have also been demanding a  
21 seamless and transparent user experience, and Union  
22 Pacific has been working to meet that demand. We



1 have made significant investments to improve the  
2 customer experience.

3           When a customer ships on our network, they  
4 know the railcar ETA from the time the car is  
5 waybilled or received by Union Pacific. Our online  
6 shipping management and API service tools give  
7 customers increased shipment visibility. That  
8 visibility enables our customers to better manage  
9 their inbound railcars. The proposal would  
10 undermine that investment by hindering those  
11 transparency and technology tools.

12           For instance, we do not get an advanced  
13 ETA for interchanges from foreign railroads, to  
14 Union Pacific, at the final serving yard. The  
15 actual number of railcars being delivered on a train  
16 to Union Pacific from a foreign road is only known  
17 the day of train arrival. This is not allowing  
18 Union Pacific to plan for and manage the flow of  
19 railcars.

20           As a result, it could cause our serving  
21 yard to exceed capacity and not be able to provide  
22 timely and reliable service to our customers.

1           Our customers would face increased  
2 shipment times and not be able to properly service  
3 their customers.

4           Overall, the supply chain would continue  
5 to be overburdened by the inability to satisfy the  
6 customer demand due to a slow transit supply.

7           As Jennifer and Eric have both stated,  
8 railroads create vital links in the nation's supply  
9 chain. If you add more links to that chain, then  
10 there is added risk of failure inserted into the  
11 process. Variability is a customer's greatest  
12 concern. And adding complexity promises to increase  
13 that variability for our customers.

14           With multiple handoffs, there is an  
15 increased risk of service variability and a much  
16 greater shipment visibility challenge for our  
17 customers. With additional parties inserting into  
18 the movement, there will be less visibility for  
19 customers to know where the shipment is at any given  
20 time. This creates additional context for the  
21 customer to resolve issues.

22           The increase in service complexity

1 increases the likelihood of disruption and adverse  
2 ripple effects across the broader supply chain.

3 Over the course of these proceedings,  
4 we've heard arguments that forced switching works in  
5 Canada, so it must be able to work in the United  
6 States. I'll let our Canadian colleagues address  
7 their experience with how forced switching works in  
8 Canada. But I think it's fair to say that the U.S.  
9 rail network is different than the Canadian rail  
10 network in many ways that will -- forced switching  
11 would be more harmful to our customers.

12 With all due respect to our Canadian  
13 colleagues, the challenge they face is just not as  
14 complex as what we're dealing with here in the  
15 United States.

16 We estimate that Canada has approximately  
17 3700 rail-served customers. Union Pacific alone has  
18 more than 10,000. More customers mean more  
19 switches.

20 In addition to the far greater number of  
21 customers, the U.S. system is far more complex,  
22 interlocking and way of life. All of this greater

1 service and network complexity requires us to work  
2 closely with our customers to plan inbound  
3 shipments, and Union Pacific must keep an eye on the  
4 big picture the whole time so we can avoid the  
5 congestion and service inconsistencies that would  
6 create the negative experiences our customers  
7 particularly want to avoid.

8 We understand several customers might  
9 choose reciprocal switching. However, we are deeply  
10 concerned for the customers who are bystanders to  
11 that choice, because those bystanders would be  
12 negatively impacted by customers that chose  
13 reciprocal switching.

14 We are here today because Union Pacific  
15 values all of its customers and makes decisions that  
16 consider the entire network.

17 In closing, Union Pacific is working to  
18 improve our service product, to maintain consistency  
19 and reliability. We've invested in more technology  
20 solutions to enhance the customer experience.

21 I urge the Board not to inhibit those  
22 efforts.

1           Thank you for your time and consideration  
2 of my remarks.

3           MR. ROSENTHAL: Good afternoon. You've  
4 heard Union Pacific describe the harms that would  
5 result from adopting the proposed rule, both  
6 railroads and their customers would be worse off.

7           You'll be hearing from other panelists  
8 about why railroads don't believe the Board could  
9 lawfully adopt the proposed rule. Nonetheless,  
10 Union Pacific is interested in having a conversation  
11 with stakeholders, larger and smaller railroads,  
12 customers and their organizations to try to address  
13 the concerns that prompted the proposal, while  
14 avoiding its negative consequences.

15           We suggest drawing on the collaborative  
16 process that produced the current competitive access  
17 rules, which for all the criticism they have  
18 received in recent years once had widespread  
19 support.

20           We believe the Board should convene a  
21 committee with stakeholder groups and ask them to  
22 work to try to find some common ground.

1           Thank you for your time, and we'd be happy  
2 to address any questions you may have.

3           CHAIRMAN OBERMAN: Thank you all.

4           Michael, let me ask you first, have you  
5 discussed this idea of a committee with any of the  
6 shipper organizations?

7           MR. ROSENTHAL: I'm not sure that the  
8 topic has been broached yet with any of the shipper  
9 organizations.

10          CHAIRMAN OBERMAN: Do you think you could  
11 do the work in less than another 11 years?

12          MR. ROSENTHAL: I would hope so. I would  
13 think that if we were to move forward with this,  
14 this should be a reasonably fast time period to give  
15 us a chance to try to do this.

16          I think what we've seen even in this most  
17 recent round is a bit of a shift in position and  
18 some different concerns. And we want to understand  
19 what those are as well.

20          But I don't think you should expect to  
21 wait another 11 years. But I do think it's worth  
22 taking the time to develop a rule that has

1 wider-spread support, because in the long run that's  
2 more likely to be effective than to proceed with a  
3 rule that is going to face additional challenges  
4 before it could be implemented and serve its  
5 intended purpose.

6 CHAIRMAN OBERMAN: I appreciate that.  
7 I've been waiting for a constructive suggestion. So  
8 let's see if people are interested in pursuing it.

9 In the meantime, I have a few questions.  
10 I should have said, by the way, at the outset of  
11 this session for timing purposes, and I am as  
12 long-winded as anybody so I'm not at all  
13 criticizing, we have a very crowded agenda. And as  
14 I said it this morning, it's not my intent to cut  
15 anybody off, and I won't.

16 We're going to try to stay here tonight to  
17 finish both the UP presentation and AAR, may require  
18 us to work a little bit late, otherwise, I don't see  
19 how we're going to get through tomorrow. So I  
20 wanted to give everybody a heads-up. If it really  
21 gets too late, we'll have to just reconvene in the  
22 morning if we don't finish AAR's presentation today,

1 but I hope we can.

2 I'm not sure who I should direct these  
3 questions to, Kenny or Eric. But I wanted to talk  
4 to you about, as I did with BN, your existing  
5 reciprocal switching arrangements.

6 I've been looking at the UP Tariff Number  
7 8005F, which I assume you will recognize if you're  
8 reciprocal switching, you call it a circular, and it  
9 lists, I have roughly counted them up, somewhere  
10 between 5- and 600 customers in 77 different  
11 locations around the western half of the country, or  
12 your territory, a little bit eastern.

13 You mentioned -- one of you mentioned  
14 earlier, I think it was you, Eric, but I'm not sure,  
15 it may have been Jennifer, that you do a fair amount  
16 of reciprocal switching now because of merger  
17 agreements and other requirements.

18 But I don't think you're telling us that  
19 all of these 77 locations came about only as a  
20 result of being ordered to do so by the Board in a  
21 merger. Would that be fair?

22 MR. ROCKER: Yes.



1                   CHAIRMAN OBERMAN:  Kenny, do you want  
2 to -- I'm not sure who I'm talking to here, so you  
3 tell me who is the appropriate --

4                   MR. ROCKER:  I haven't looked over the  
5 entire 5- to 600 pages.  I think that's fair to say,  
6 your assessment, though.

7                   CHAIRMAN OBERMAN:  It's not 5- or 600  
8 pages that I have.  The actual list of customers and  
9 locations is about 16 -- or 12 pages.  But there are  
10 77 separate locations on it.  And all of the  
11 customers who have a right to reciprocal -- an  
12 agreement to reciprocal switching with UP are  
13 listed, and there are about 4- or 500 customers of  
14 those that I estimated by just a quick count.

15                   And I know that UP has taken the position  
16 that the other railroads have that reciprocal  
17 switching should only be in terminals, but I don't  
18 read these locations as all consisting of what most  
19 of us would think of as terminals.

20                   Would you agree, Kenny, that you have  
21 reciprocal switching going on at places that are not  
22 really terminals?

1 MR. ROCKER: I think each one is on a  
2 case-by-case basis. I would have to look at all 77.

3 CHAIRMAN OBERMAN: Well, let me give you a  
4 couple examples. Hope, Arkansas, you have a  
5 reciprocal switching agreement there with Tysons.  
6 That's not a terminal, is it?

7 MR. GEHRINGER: We have a terminal there.

8 CHAIRMAN OBERMAN: How about Enid,  
9 Oklahoma?

10 MR. GEHRINGER: Yes, sir.

11 CHAIRMAN OBERMAN: So you would regard  
12 every one of these as 77 locations as the terminal?

13 MR. GEHRINGER: Mr. Chairman, I wouldn't  
14 say that either. To Kenny's point, I would have to  
15 see the whole list. It happens to be the two that  
16 you selected, I know that we have terminals in both  
17 of those.

18 CHAIRMAN OBERMAN: All right. Well, I  
19 didn't want to go through all 77 or we'll be here  
20 all night. But I'm really trying to get at the  
21 point that isn't it more important if we're trying  
22 to figure out the feasibility of where reciprocal

1 switching can take place, as to where you've already  
2 made arrangements for it with existing customers?

3           Isn't that a better definition than just  
4 saying terminals?

5           MR. ROSENTHAL: Chairman Oberman, I would  
6 say there are two issues here. One, to the extent  
7 that Union Pacific has voluntarily agreed with a  
8 shipper to provide switching, that's one thing,  
9 that's a decision that Union Pacific could make.

10           I think that's separate from the question  
11 of what perhaps the Board could do under the statute  
12 were it to require reciprocal switching.

13           CHAIRMAN OBERMAN: Well, are you the  
14 person who makes the contention that the statute  
15 limits it to terminal areas?

16           MR. ROSENTHAL: We took that position in  
17 2016 filing, yes.

18           CHAIRMAN OBERMAN: What's the basis of it?

19           MR. ROSENTHAL: The basis is that the term  
20 reciprocal switching which is used in the statute,  
21 having well-understood meaning at the time, that  
22 reciprocal switching is something that occurs in

1 terminal areas. So that meaning, we assume, was  
2 part of a statute and is encompassed by the  
3 definition of reciprocal switching.

4 CHAIRMAN OBERMAN: When you say it was  
5 well understood, by whom?

6 MR. ROSENTHAL: It was under Board  
7 precedent. In our 2016 filing, we cite some cases  
8 that discuss it. And in fact, when you look at the  
9 Board's history or the ICC's history of dealing with  
10 these questions about terminals, you will see one of  
11 the earlier cases, Golden Cat, in fact, was  
12 dismissed because they concluded that the shipper  
13 who was requesting switching was outside the  
14 terminal area.

15 So it's an issue that's been litigated.  
16 There's precedent. Like any precedent, you have to  
17 look at facts and apply it. But we think it was  
18 understood at the time of the statute what  
19 reciprocal switching meant, that it was limited to  
20 terminal areas, and we've seen it applied in cases  
21 that have come before the Agency.

22 CHAIRMAN OBERMAN: I've looked at the

1 legislative history. I don't find any reference to  
2 any of those cases. I find Congress using a  
3 different term in subparagraph c than it uses in a  
4 and b where it specifically mentions terminals.

5 So I'm not sure where you're coming from.

6 BOARD MEMBER FUCHS: Wasn't Golden Cat  
7 a '96 case though? I think it's precedent --

8 MR. ROSENTHAL: That's exactly right.  
9 Some of the cases I'm talking about, mention,  
10 because they came and they were applying the  
11 decision. I'm talking about there were cases  
12 beforehand about what reciprocal switching was, and  
13 we think it was well understood that it was  
14 something that would occur in a terminal area.

15 The other point is if you look at other  
16 sections of the statute in talking about imposing  
17 terminal trackage rights, you see language about  
18 reasonable distance outside a terminal. And I think  
19 one of the basic principles of statutory  
20 interpretation is if you see language used in one  
21 part of the statute and it's not in another part,  
22 that it's going to mean something different.

1           So we think the area in which the Board  
2 could impose reciprocal switching is different from  
3 the area in which it can impose terminal trackage  
4 rights.

5           CHAIRMAN OBERMAN: I agree with you that  
6 when a legislature uses different language in a  
7 different section, it's intended to mean something  
8 different. And in the reciprocal switching  
9 paragraph, it doesn't use the same language that it  
10 uses in the terminal trackage rights area, it  
11 doesn't mention the word terminal at all. So I  
12 think the argument goes in both directions.

13           But what I'm really interested in is  
14 understanding the argument that's frequently made  
15 here is that it isn't practical as to where it is  
16 practical to do switching. I know there is a lot of  
17 criticism of the shippers' proposals about allowing  
18 it at any interchange.

19           But if you're already doing switching at  
20 these 77 locations, wouldn't it be fair to say it's  
21 hard to argue that it's impractical to do reciprocal  
22 switching at the places you're already doing it?

1 MR. GEHRINGER: But I think as you start  
2 thinking through that and the different factors, the  
3 fact that we do it, I would agree with you, that's a  
4 strong indication that that one thing, we could say  
5 yes, we do it today.

6 Where we go further, though, and many of  
7 the other members today have mentioned it, or the  
8 participants have mentioned it, is then getting  
9 beyond that to how do we think about the type of  
10 service that that particular customer is asking for,  
11 how do we think about the customers' dwell time,  
12 which we would argue is going to be significant, 48  
13 to 96 more hours, through reciprocal switching. How  
14 do we think about connection times to other  
15 railroads.

16 So I think it's an indication that, to  
17 your point, Chairman, we do it, so we can do it.  
18 But I think there's many more steps after that for  
19 us to consider, will it actually add to the service  
20 benefit of the customer.

21 CHAIRMAN OBERMAN: Let me ask you a  
22 question.

1                   BOARD MEMBER FUCHS: Marty, I don't want  
2 to go too far on this. I just want to circle back  
3 to the Golden Cat point because I think it's an  
4 important one that we should get absolute clarity on  
5 if you don't mind, because I think we're exploring  
6 the fact that a has terminal in it and c does not;  
7 right?

8                   And Michael, Mr. Rosenthal, isn't it the  
9 case that Golden Cat was a terminal trackage rights  
10 case? And I don't think Golden Cat in that case  
11 alleged a subsection c case, which is what we're  
12 discussing here, didn't make the case at all under  
13 that subsection.

14                   So is that -- is that case really proving  
15 a point?

16                   MR. ROSENTHAL: It wasn't a reciprocal  
17 switching point, but there was a question about  
18 whether you had a terminal area. So I'm just citing  
19 that, there are more definitions out there about  
20 what is a terminal area.

21                   BOARD MEMBER FUCHS: But I understood the  
22 Chairman's point to be a and c are different and we



1 should draw significance from that. So it doesn't  
2 strike me that an a case would necessarily disprove  
3 the point on c. I'm not saying it can't be  
4 disproven by other means, but I'm just sort of  
5 trying to figure out why Golden Cat was the one that  
6 disproved it.

7 MR. ROSENTHAL: No, Golden Cat doesn't  
8 disprove anything. As you say, Golden Cat was under  
9 a different section. The point was simply that  
10 there are -- it was going to the question of is  
11 there a definition of what is a terminal, is the STB  
12 precedents and ICC precedents for that. But no,  
13 section c talks about reciprocal switching, which  
14 we're saying implies a terminal. A is different  
15 because it talks about a terminal, and a reasonable  
16 area outside of the terminal. And I think c is  
17 different from all of that.

18 BOARD MEMBER FUCHS: I think that's a  
19 really helpful clarification. I appreciate that.

20 CHAIRMAN OBERMAN: Thank you, Patrick.

21 I am wise to call on my lawyer colleague  
22 on the Board to clarify these for me, because he had

1 read the case and I hadn't.

2 So thank you, I appreciate that.

3 But, Michael, I have seen ICC precedent  
4 which talks about reciprocal switching normally or  
5 usually taking place in terminal areas. I've never  
6 seen one that says only permitted in terminal areas.

7 MR. ROSENTHAL: Again, as I said,  
8 Mr. Chairman, as I said, if Union Pacific or some  
9 other railroad wants to voluntarily engage in  
10 reciprocal switching, I think that's a different  
11 question than what the Board could impose under the  
12 statute.

13 So it could well be that both of those  
14 things exist, but I think the question here is what  
15 the Board could impose under the statute.

16 CHAIRMAN OBERMAN: But you're arguing  
17 about how it was understood by the Congress when it  
18 adopted the bill, and that would be based on what  
19 actually happened in the real world, but it seems to  
20 me you can't really have it both ways.

21 MR. ROSENTHAL: I'm talking about -- I  
22 mean, if you could point to an example that happened

1 before Congress adopted it where that language came  
2 in, perhaps. But I think we're pointing to, and we  
3 do this in our 2016 filing, a lot of older cases  
4 that established I think a pretty clear  
5 understanding of where reciprocal switching works.

6 CHAIRMAN OBERMAN: Well, I'll read your  
7 filing again. I don't think I've ever seen a case  
8 that says the Board can only order it within a  
9 terminal area.

10 I'm more interested in it for the  
11 practicalities of it for this line of questioning.  
12 That's what we wanted to deal with because we've had  
13 a lot of assertions about -- you know, tying up the  
14 system.

15 So, Eric, I'm a little confused. Are you  
16 telling me that these 5- or 600 customers that you  
17 now provide reciprocal switching for in your 77  
18 locations all have 46 to 98 hours of dwell time when  
19 they do a reciprocal switch?

20 MR. GEHRINGER: So let's clarify one  
21 thing. So if we look across the system,  
22 Mr. Chairman, if you look at all the cars that we

1 deliver and pick up on a daily basis, only 6 percent  
2 of those are reciprocally switched, so 94 percent of  
3 the time we do not do reciprocal switching.

4 I'd have to look at every single one of  
5 those lists to confirm whether all the 5- or 600  
6 customers were being reciprocally switched. But for  
7 the ones that we do currently reciprocally switch,  
8 it's our experience at least in our railroad that  
9 because of the connection to another yard and  
10 dwelling there, that you're going to get 24 to 48  
11 hours on the outbound side of additional dwell and  
12 then you're going to get the same thing of course if  
13 it's a round trip back. That's how we come up with  
14 the 48 to 96 hours.

15 MR. ROCKER: And Mr. Chairman, I'd like to  
16 build upon what Eric just mentioned, I mean, for  
17 these new cases, we have significant concerns about  
18 it. We think it's a bad idea, primarily under the  
19 point that the variability will ultimately be  
20 harmful to our customers.

21 I pointed to some examples of where we've  
22 got higher inventory carrying costs, we've got, as

1 someone talked about earlier, customers investing in  
2 their railcars, more railcars that need to be  
3 acquired. Increased variability does not help us  
4 with competing against truck.

5 All those things really just make for a  
6 poor customer experience for our customers.

7 CHAIRMAN OBERMAN: Well, let me -- I  
8 appreciate that, Kenny. I want to get back, though,  
9 to Eric, you said I thought, and now I'm a little  
10 confused, that if we order reciprocal switching, it  
11 will result in 46 to 98 hours of delay.

12 That's what I wrote down when you were  
13 speaking.

14 MR. GEHRINGER: On a round trip, we would  
15 take 48 to 96 hours, is our current experience.

16 CHAIRMAN OBERMAN: All right. And you're  
17 saying you've got all of these customers who have  
18 opted for reciprocal switching, even accepting that  
19 they have got 46 to 98 hours of delay?

20 Let me ask this question. Is that more  
21 delay than they would have if they didn't  
22 reciprocally switch?

1           MR. GEHRINGER: I don't think I could go  
2 through 500 and tell you definitively right now  
3 whether they would get less delay or more delay if  
4 they did not have reciprocal switching.

5           CHAIRMAN OBERMAN: Well, you've got a  
6 dwell figure for reciprocal switching. What's your  
7 dwell figure for the people who aren't reciprocally  
8 switched?

9           MR. GEHRINGER: Then they would be --  
10 because they're not being reciprocally switched,  
11 they would not incur that additional time. When we  
12 think about that time, Chairman, what we're really  
13 talking about is the fact that I'm going to spend on  
14 average one additional day getting that car from the  
15 customer into a terminal, and then I'm going to  
16 spend another day as I switch that car into --  
17 excuse me, we're going to spend the first day  
18 switching the car into the yard and the next day  
19 getting it over to the other railroad.

20           CHAIRMAN OBERMAN: Let me see if you can  
21 walk me through this.

22           Most customers, the cars are picked up

1 either by a short line or a local train and they are  
2 taken to a switching yard; right?

3 MR. GEHRINGER: That's correct.

4 CHAIRMAN OBERMAN: And then they're put  
5 onto a track, and a train is built, most -- 94  
6 percent of the time it's a UP train?

7 MR. GEHRINGER: That's correct.

8 CHAIRMAN OBERMAN: Right? The reciprocal  
9 switching customer is taken to the same yard  
10 typically; right?

11 MR. GEHRINGER: Not necessarily.

12 CHAIRMAN OBERMAN: The local train takes  
13 them to a different yard?

14 MR. GEHRINGER: A local train from a  
15 different carrier would take them to their yard and  
16 then switch them into our yard, which is why we say  
17 that's 48 hours.

18 CHAIRMAN OBERMAN: Wait. You lost me  
19 there. If a different -- if a customer is going on  
20 a different carrier, why is the other carrier  
21 bringing him back to your yard?

22 MR. GEHRINGER: If we have the line-haul

1 share of that.

2 CHAIRMAN OBERMAN: So we're talking about  
3 somebody who is reciprocally switched, they're going  
4 on a line-haul on another railroad?

5 MR. ROSENTHAL: Mr. Chairman, just to  
6 clarify. It depends whether you're looking at it  
7 from the empty car coming in or the loaded car  
8 coming out.

9 CHAIRMAN OBERMAN: Let's take it one at a  
10 time, because I'm not a railroad person, you've got  
11 to walk me through this.

12 You've got a shipper -- you know what --  
13 well, I have some photographs I was going to show  
14 you, but I think you can walk through this.

15 You've got a shipper who has a loaded car  
16 that's on your line and it's ready to leave; right?  
17 A local train picks that car up. If it's not  
18 reciprocally switched, it's being taken to a UP  
19 yard, which it is installed on a UP train to be  
20 taken wherever it's going across the country;  
21 correct?

22 MR. GEHRINGER: That's correct.



1                   CHAIRMAN OBERMAN:  If that same car is  
2 going to be reciprocally switched, let's just take  
3 most of your reciprocal switching is going to be BN,  
4 is BN local train picking it up from your track?

5                   MR. GEHRINGER:  No.  Just to clarify,  
6 we're picking up that car, we're taking it to our  
7 yard, we're classifying it into a block for the BN.  
8 Who comes to our yard to pick it up, or we take that  
9 car to them to their yard to depart the train.

10                  CHAIRMAN OBERMAN:  Okay.  So -- and you're  
11 saying -- so for the most part, that car is coming  
12 to the same yard whether it was going on a UP or  
13 being reciprocally switched.  If it's not switched,  
14 it's going to get built into a UP train, and if it  
15 is switched, either UP or BN locomotive is going to  
16 take it over to a BN yard where it's put on a BN  
17 train; correct?

18                  MR. GEHRINGER:  Or the BN could come to  
19 our yard to pick it up, yes.

20                  CHAIRMAN OBERMAN:  Right.  And you're  
21 saying that adds 24 to 48 hours for that car?

22                  MR. GEHRINGER:  That's our current

1 experience with customers that get reciprocally  
2 switched.

3 CHAIRMAN OBERMAN: And the customer who  
4 has made that choice has obviously decided that's to  
5 their benefit, even to buy that much extra delay, or  
6 else they would go on your train?

7 MR. GEHRINGER: Well, the customer has  
8 made the choice for them that that's the best  
9 decision for us. But as we consider what we've just  
10 walked through, there's repercussions to first our  
11 terminal as we think about capacity, but then  
12 there's also the repercussions of the customers that  
13 aren't involved in reciprocal switching.

14 You've heard in testimony earlier today  
15 that we can see increased congestion by reciprocal  
16 switching at --

17 CHAIRMAN OBERMAN: How does this cause --  
18 just the simple -- I want to just stick with this  
19 simple example that I have. There's really only one  
20 extra move, and that is from your yard to the BN  
21 yard. How is that causing congestion in the system?

22 MR. GEHRINGER: So today if we weren't

1 doing reciprocal switching in this example, we  
2 followed the same process you and I just walked  
3 through, that local and its delivery into the yard  
4 is going to be timed up to be able to leave on that  
5 Union Pacific train, say within six to 10 hours.

6 In the case of reciprocal switching and  
7 the fact that either we have to take it to the BN or  
8 the BN has to come get it from us, now we're  
9 contending with two different schedules. We've got  
10 to sync those both up.

11 It's also -- one thing that I don't think  
12 anybody has mentioned today is we still -- it's not  
13 as simple as we just come and pick up the car. Or  
14 the BN just comes and picks up the car.

15 We still classify the vast majority of  
16 those cars, which means that on the day the local  
17 brings it in we're still spending another 24 hours  
18 as we get it into the proper block, so that the next  
19 day we can take it to the BN or the BN can come to  
20 us.

21 CHAIRMAN OBERMAN: Why does it take you 24  
22 hours to put it in a block for BN and only six hours

1 to put it in a block for your own train?

2 MR. GEHRINGER: Because in most cases,  
3 when we interchange across from yards, that's only  
4 done once in a single day. There are of course  
5 exceptions, Mr. Chairman, but in general, that is  
6 done once a day, versus if it was our terminal, and  
7 you have mainline trains coming through, not only  
8 could you originate the car at less than 24 hours,  
9 but you could also do a work event with an inbound  
10 train, that's just picking it up, maybe just a few  
11 hours after.

12 CHAIRMAN OBERMAN: All right. So let's  
13 take a situation where you now have an existing  
14 reciprocal switching customer who is willing to go  
15 through this 24-hour delay because obviously they  
16 think it's better for them to go on the BN, price,  
17 service or whatever.

18 Now we add another customer in the same  
19 area who decides they want to do reciprocal  
20 switching too, same local brings it into the yard  
21 and it's put into the block that's going over to the  
22 BN.

1                   Why does that add congestion?

2                   MR. GEHRINGER: Well, really for the same  
3 reasons. Depending on the schedule for taking it  
4 over to the BN and them taking it from us, you now  
5 have another customer that's bringing in those cars  
6 that's going to occupy track capacity until we take  
7 it over to the BN or the BN comes get it from us.

8                   CHAIRMAN OBERMAN: Yes. So? Are you  
9 assuming your yards won't have capacity for one more  
10 car?

11                   MR. GEHRINGER: So I think when you think  
12 about it in single digits, there are -- I would be  
13 hard-pressed to say that there is a yard in Union  
14 Pacific right now -- a single car. But I don't  
15 think we're talking about single cars.

16                   And certainly, as we think about running  
17 the railroad, I can't think about them as single  
18 cars. I've got to be thinking about it for the next  
19 two, three, years.

20                   And as Jennifer pointed out in her  
21 testimony, that's also how we're thinking about our  
22 investments. So I've got to be focused on the long

1 term and assume it's not a single car and plan  
2 accordingly for that, and there are terminals on the  
3 Union Pacific that could not handle that today.

4 CHAIRMAN OBERMAN: All right. Well, let  
5 me ask you this question. Are most of your  
6 shippers, whether they're on your own trains or  
7 reciprocally switched, switching back and forth  
8 every week, or are they making long-term  
9 arrangements with you as a railroad?

10 MR. GEHRINGER: I'm sorry, I'm not  
11 following your question.

12 CHAIRMAN OBERMAN: You have a reciprocal  
13 switching customer who has a right to be switched  
14 over to BN. Are they going back and forth between  
15 BN and UP every week, or are they making a long-term  
16 arrangement typically with BN and all their cars?

17 MR. GEHRINGER: You know, I would have to  
18 go through each one of those to know if we're doing  
19 that.

20 CHAIRMAN OBERMAN: Well, what's typical?

21 MR. GEHRINGER: With 500 customers, at  
22 least the ones you've listed, but only 4 percent of

1 our volume, I still don't think they're switching  
2 back and forth on any consistent basis. But I will  
3 say we would have to confirm that by going through  
4 those 4 percent of cars.

5 MS. HAMANN: I'm sorry, Mr. Chairman, if I  
6 could just interject. We were listening to the  
7 prior testimony, and certainly we heard the  
8 customers talking about their desire to have  
9 reciprocal arrangements completed and approved ahead  
10 of time so that they could make -- our  
11 interpretation, they could make moves back and forth  
12 if they were experiencing an issue that they didn't  
13 like on one carrier or another.

14 So --

15 CHAIRMAN OBERMAN: What I'm asking,  
16 Jennifer, is what happens in real life. I heard  
17 what the rhetoric was. I'm trying to understand how  
18 the railroad operates.

19 It would seem to me, from what -- my  
20 understanding of the way most arrangements are  
21 between shippers and class 1s, is that most make  
22 relatively long-term arrangements. It's not

1 efficient for the shipper to be on a different  
2 railroad every week to get customers.

3 MR. ROCKER: Well, Mr. Chairman, we've  
4 said this, all of us have been on the public  
5 earnings calls, and we do have about a third that  
6 can move their business day to day, a third that's  
7 annual and then the remainder are multiyear.

8 So there is a significant portion that  
9 could move back and forth, to what Jennifer and Eric  
10 are saying.

11 CHAIRMAN OBERMAN: Well, I think if you  
12 want to persuade us about the long-term planning  
13 difficulties, I need a little more information,  
14 because it doesn't seem to me that it's that hard to  
15 plan for these things.

16 Another question I had, Eric, is that most  
17 of the proposals for reciprocal switching, and  
18 certainly the current one, talk about the Board  
19 evaluating a request on a case-by-case basis.

20 Why do you think -- if the UP came to us  
21 in a reciprocal switching case and said look, this  
22 yard can't handle it, we've got a shipper over here



1 who wants to deliver five cars a day to us, we're  
2 filled up now, you don't think we would take that  
3 into consideration in determining whether reciprocal  
4 switching meant the standards, whatever the  
5 standards might end up being?

6 MR. GEHRINGER: I don't doubt that the  
7 Board would take it into consideration. But in the  
8 case-by-case approach, it doesn't dismiss, in our  
9 minds at least, that for the customer and for the  
10 customers who are not going to get reciprocally  
11 switched, that the impact is still intense for them,  
12 that they still will have an increased transit time.

13 Now, as we think about the fact that we  
14 may have those terminals like that, it's a  
15 consideration amongst many, but we would still call  
16 back to the fact that as we think about service  
17 today and the customers that we have, they're not  
18 asking us to take longer to go from point A to point  
19 B, they're asking us to be as -- most cases, to  
20 increase our transit time, or at least continue to  
21 sustain what we have today. This would not be --

22 CHAIRMAN OBERMAN: You've got 5- or 600

1 customers who according to you have been willing to  
2 buy a 24- to 96-hour delay, so at least some of them  
3 seem to want it. But the real question is -- the  
4 real question in my mind is all of these concerns  
5 that you've all raised here, why can't they be taken  
6 into account?

7 And if you are right, we will evaluate it.  
8 Other customers are going to come in in a reciprocal  
9 switching case, say don't do it, it's going to mess  
10 up our service, we'll be able to take that into  
11 account.

12 Why do you assume that the Board would  
13 willy-nilly just order reciprocal switching in a way  
14 that's detrimental to the rail network?

15 MS. HAMANN: Chairman Oberman, I don't  
16 think it's the concern about the Board acting, in  
17 your words, willy-nilly. It's about the uncertainty  
18 that's created.

19 Because what would be available then is  
20 for shippers to come forward at any point in time,  
21 at any potential location, depending on how  
22 obviously the proposal is put together, and ask for

1 reciprocal switch after we have potentially invested  
2 millions of dollars over decades to serve that  
3 particular customer. And now they're going to be  
4 asking for us to have essentially subsidized our  
5 competitor, for them to be able to come in and serve  
6 them.

7 That's the concern, sir.

8 CHAIRMAN OBERMAN: They may be asking for  
9 it, but you're assuming they're going to get it.  
10 I'm just not following your thinking.

11 MR. ROSENTHAL: But Chairman, you're  
12 saying you can address a service issue on a  
13 case-by-case basis. But what you can't address on a  
14 case-by-case basis is the issue that Jennifer was  
15 just raising, which is the investment. That's not a  
16 case-by-case basis. That's an effect that your rule  
17 is going to have the moment you put it into place,  
18 the signal that it's going to be in place. That's  
19 not something you can address on a case-by-case  
20 basis.

21 And what we do know on a case-by-case  
22 basis with regard to service, as Eric just said, is

1 that in every single case, it's going to result in  
2 worse service for the customer and risk the service  
3 you provide to other customers.

4 CHAIRMAN OBERMAN: Well --

5 MR. ROSENTHAL: That's not a case by case.  
6 That's an impact of the rule, it's an inevitable  
7 impact of the rule.

8 BOARD MEMBER PRIMUS: Marty, I didn't want  
9 to chime in, I know we're short for time.

10 CHAIRMAN OBERMAN: No, no, go ahead. I'm  
11 just going to say one more thing, Robert, and I'm  
12 happy to move it over to you.

13 I just don't assume that rail customers  
14 are going to come in and ask -- hire a lawyer, spend  
15 a lot of money, wait a long time, to get an order  
16 from us that's going to provide them with worse  
17 service than they're getting now. I just find that  
18 a hard inference to draw.

19 MR. ROSENTHAL: Chairman, the first panel  
20 essentially said that all these customers -- and the  
21 comments of the customers that came in, said we want  
22 this in place, we want it in place in case. And so

1 they have told you they are going to come in and  
2 file something so that they have this option in  
3 their pocket. And just haven't yet.

4 CHAIRMAN OBERMAN: If they can meet the  
5 standards. You already got 500 customers who have  
6 the option in their pocket. I don't see the  
7 difference.

8 MR. ROSENTHAL: Chairman, the difference  
9 is we don't know exactly what the situation is for  
10 those 500 customers. These are reciprocal switching  
11 situations that were put in place voluntarily over  
12 time. In many cases it's probably because it was  
13 more efficient, given the way the networks were  
14 structured, that a shipper actually switched to  
15 another carrier to make their route. In other  
16 words, Union Pacific might not have had an efficient  
17 route, so we agreed to open up the situation to  
18 another shipper. A shipper said we would like to  
19 locate here on you, but we also ship to a place  
20 served by BNSF. So if you could open up switching  
21 so on those routes where it's efficient, we'll use  
22 BNSF, and on the routes where it's efficient to use

1 UP, we will use UP.

2 And I suspect that's what you're seeing.  
3 It's not customers taking 24, 48, 96, hours just for  
4 the heck of it. It is because that is their best  
5 service option today.

6 CHAIRMAN OBERMAN: Well, let me just say  
7 this, Michael, with all due respect, I am interested  
8 in the actual experience of these people and not  
9 what you suspect or what's hypothetical. And that's  
10 really been the focus of my questions.

11 I have some more, but let me defer to the  
12 other Board members who want to weigh in here.  
13 Robert?

14 BOARD MEMBER PRIMUS: I'll just be quick.  
15 I'm a little disappointed in what I'm hearing in the  
16 sense that we all -- everyone thinks that we put  
17 this rule in place and everyone is going to run to  
18 reciprocal switching because now they have an  
19 option.

20 And I go back to what I've told you --  
21 your folks and every other railroad I've spoken to  
22 is that, you know, this issue, this problem is

1 self-inflicted. We're trying to figure out how to  
2 solve a service and a rate problem that was brought  
3 by your customers.

4 And so if you're worried that they are  
5 going to bolt, you know, that's something that you  
6 guys can fix internally.

7 And Marty has said before and I know other  
8 board members have said it. I don't want to be here  
9 regulating or passing rules. I would rather for the  
10 market to fix the problem.

11 But this has been 11-plus years that it's  
12 been before the Board. And you guys come today and  
13 say we want to sit down and be part of the solution.  
14 I mean, you're 11 years late.

15 To me saying now that oh, well, now we're  
16 worried about infrastructure and others, well if  
17 you're so worried about it, start delivering better  
18 service on that infrastructure, and better rates,  
19 and then we wouldn't have these folks before us  
20 asking us to do what they're asking us to do.

21 I hate being in this position because I  
22 would rather see you guys fix it. I'd rather not be

1 sitting here listening to you guys.

2 I'd rather see you guys the fixing the  
3 problem. But you're not.

4 That's what we're dealing with. When you  
5 guys give these examples and make these statements,  
6 you know, you're only making the case in my mind why  
7 we should go through with it, not why we should try  
8 to let you guys fix it on your own.

9 And again, I don't have a question and I  
10 want to keep my statements brief, but it's a little  
11 frustrating to hear what I'm hearing, because it  
12 doesn't sound like you guys really understand what's  
13 at stake and what your customers have been telling  
14 you for the last 11 years, 11-plus years.

15 CHAIRMAN OBERMAN: Patrick?

16 MR. ROCKER: Just real quick, Member  
17 Primus. You know, we've paid for third parties,  
18 J.D. Power to come in and survey our customers  
19 anonymously. We send them surveys twice a year. We  
20 look at our net promoter scores and take them very  
21 seriously.

22 Eric and I have spent time actually



1 surveying customers. We've inserted the whole  
2 company to have a very customer-centric culture.

3 So we do know our customers. We spend a  
4 lot of time with them and we know more than anything  
5 they do value that consistent, reliable service.  
6 That is the most important value for them.

7 What we're saying today is this forced  
8 switching would really create problems for us trying  
9 to accomplish that.

10 BOARD MEMBER PRIMUS: Well, Kenny, it's  
11 your customers that are coming to us. I've only  
12 been on the Board a little over a year. I've heard  
13 directly from your customers too.

14 I haven't heard from J.D. Power. I  
15 haven't heard from any other third party. I've  
16 heard directly from your customers as soon as  
17 actually last week when I was in Milwaukee at a  
18 conference about these issues.

19 And so again, we're not making it up. You  
20 know, this isn't something that I'm coming here  
21 saying I want to do this. This is as a result of 11  
22 years of submissions by your customers.

1           Michael, you can shake your head all you  
2 want, but it's true. This isn't our issue. We're  
3 asked to make a decision right now because of that,  
4 not one board member you can poll said they came to  
5 the Board saying that they want to do reciprocal  
6 switching. I didn't come to the Board saying I  
7 wanted to do it. And yet here we are because we are  
8 asked day in and day out by customers, not just from  
9 yours but from others, to fix the problems that are  
10 currently before the network.

11           I'm dealing with a problem right now  
12 dealing with one of your customers. It's just --  
13 again, I would much rather, Kenny, that you sit  
14 down, customer-centric, and fix this problem  
15 yourself.

16           I mean, you've got reciprocal switching  
17 going on, and maybe they're not using it. Well,  
18 that's a great testimony.

19           4 percent, Eric. That's a low number.  
20 And if you guys can deal with that and you say hey,  
21 you know, we can get around it, then that's fine.  
22 Give me an example of how you're working with it and

1 how you're convincing people not to do it.

2 But, you know, to say oh, well, you know,  
3 it's going to hurt our network and infrastructure  
4 and we're talking to our folks, well, we're talking  
5 to them too. We get the same response, the same  
6 visceral response, that it's not working.

7 All I keep telling you guys is hey, it's  
8 up to you to fix it. We're the last line. We're  
9 not the first line. We're the last line.

10 MS. HAMANN: Member Primus, make no  
11 mistake, we want to provide great service to our  
12 customers. We know that we need to do that to be  
13 able to grow with them, and that is very, very  
14 important to us.

15 This whole discussion is very important to  
16 us, that's why you have the four of us here speaking  
17 with you today.

18 But we do not believe that this proposal  
19 will improve service to our customers. In fact, we  
20 very adamantly believe the opposite will happen.

21 So while today is a point in time and  
22 there's a lot of different things, as I talked about

1 in my testimony, and I think Eric and Kenny both  
2 touched on it as well, that are going on in the  
3 supply chain today that are impacting customers. We  
4 are one link in that, and we're certainly not doing  
5 what we think we need to do, and we have every  
6 person at Union Pacific up against that today.

7 But this proposal will not fix that  
8 problem. This proposal will, in fact, make that  
9 problem worse, in my opinion and in the opinion of  
10 Union Pacific.

11 BOARD MEMBER PRIMUS: Fair enough.

12 CHAIRMAN OBERMAN: Patrick, did you have a  
13 question?

14 BOARD MEMBER FUCHS: Yeah. And I  
15 appreciate it, Marty, and appreciate, Robert, your  
16 points about certainly when there are service  
17 challenges on the network, we definitely hear more  
18 calls for regulation.

19 You know, I'm sort of thinking about UP's  
20 planning point. And, you know, one of the things  
21 that strikes me about the proposed rule is even if  
22 UP were providing adequate service to a particular

1 area and even if they were providing reasonable  
2 rates, it's possible that they could lose an access  
3 case.

4           And so even if they did fix it for  
5 particular shippers, they still remain vulnerable  
6 under the rule because of the circumstances of  
7 market dominance, as opposed to particular conduct  
8 of any type whether or not you call it  
9 anticompetitive or not. And I think that's part of  
10 the conundrum with the rule. And shippers made  
11 points as to why that is a feature and not a bug of  
12 the rule for sure.

13           But I just -- just thinking about I think  
14 your important points, Robert. It just strikes me  
15 that the proposed rule is not necessarily tied to  
16 any particular detrimental conduct, whether or not  
17 you want to define anticompetitive conduct in a  
18 certain way, even if you just say inadequate service  
19 with some degree of market power, that, you know,  
20 that doesn't -- even inadequate service doesn't need  
21 to occur for a railroad to lose a case under the  
22 proposed rule.

1           But on the other hand, and I think it's  
2 important to mention, I have a question in here, is  
3 that, you know, I think it's fair that a lot of  
4 shippers have difficulty planning when there are  
5 service disruptions, inadequate service, especially  
6 over a long period of time. You know, they have to  
7 invest in their facilities as well.

8           And so I guess my question, you know,  
9 Mr. Bobb in the previous panel indicated that when a  
10 shipper has inadequate service over a long period of  
11 time and does not have good competitive options, I'm  
12 not saying this in a market-dominant situation, but  
13 does it have good competitive options, is reciprocal  
14 switching on the table for something that could be  
15 welfare improving, understanding we also have to  
16 look at the operational effects on the railroad?

17           Is that the type of thing that you think  
18 should be available to a shipper like Mr. Bobb  
19 seemed to indicate?

20           MR. ROCKER: I can just kind of echo,  
21 Member Fuchs, what I mentioned earlier. It's really  
22 about the entire supply chain. That one customer

1 may have an adverse impact to the other bystanders  
2 and other customers that are in that area, and  
3 that's the concern that we're bringing up today when  
4 we talk about the links in the supply chain.

5 MS. HAMANN: But if you're talking about  
6 like I'll say episodic or unusual events that occur,  
7 I think we already work very well with one another  
8 in the rail industry to try to overcome those  
9 issues.

10 You know, I know when we had the wildfires  
11 last summer and fall, we worked very closely with  
12 the BNSF helping them out, they helped us out, so  
13 that we could continue to provide service.

14 So that is something when you have those  
15 episodic things or something that's going to have,  
16 I'll say, a very near-term real impact to customers,  
17 we work very closely with all of the railroads and  
18 all of the pieces and parts of that customer supply  
19 chain to help them out. That's something that we're  
20 quite familiar with and are willing to help jump in  
21 and help our customers with on a daily basis.

22 BOARD MEMBER FUCHS: I appreciate that.

1 But couldn't the current rules be read to provide  
2 for the scenario that I'm describing, inadequate  
3 service over a period of time when there's some  
4 degree of market power, and am I understanding the  
5 point that UP even thinks the current rules go too  
6 far? Or am I not reading the current rules  
7 correctly?

8 MR. ROSENTHAL: So I think the current  
9 rules do have some element of anticompetitive  
10 conduct or at least conduct baked into them, in  
11 looking at what is actually in the public interest  
12 and when is additional competition needed.

13 So again, not directly in the reciprocal  
14 switching context but in the closely related context  
15 of 10705, Union Pacific case involving access  
16 routing to a power plant in Arkansas. And part of  
17 the question was, you know, there were allegations  
18 about our service and there was evidence back and  
19 forth about what was the cause and what was Union  
20 Pacific's response and did we respond like a  
21 disinterested monopolist, did we take advantage of a  
22 monopoly position over this particular plant to give



1 it worse service than others or to ignore its needs.

2 That was a fact-based question that the  
3 Board looked at. So service is an issue, service  
4 over time is an issue. But I still think you have  
5 to look at why and what does that service actually  
6 tell you about whether intervention is in the public  
7 interest or intervention is needed to provide  
8 competitive service.

9 BOARD MEMBER FUCHS: What would be a  
10 concrete example where intervention would be  
11 justified via service?

12 MR. ROSENTHAL: I think if you look back  
13 to the Midtec case, if for example the question is  
14 are we providing poor service on a route where we're  
15 handing over traffic to BNSF at some interchange  
16 point because we would rather favor our own single  
17 line shippers, a foreclosure. I think that might be  
18 a case.

19 Are we providing poor service --

20 BOARD MEMBER FUCHS: Sorry to jump in --  
21 I'm sorry. No, no, continue, please.

22 MR. ROSENTHAL: No, I'm just saying, I

1 think there might well be cases where again we're  
2 acting anticompetitively to foreclose an efficient  
3 interchange because we want to -- we're indifferent  
4 or want to hold on to the traffic, but we're  
5 providing them forced service because we don't think  
6 we have to offer a joint rate, offer an interchange.

7 So I think there has to be an element of  
8 monopolistic indifference in addition to the  
9 service. I think you're still asking whether  
10 competition would matter. And you have to look at  
11 it on a case-by-case basis.

12 I do think there are cases that would meet  
13 the test. I think if you look back at the  
14 allegations in Midtec, at the allegations in a case  
15 like Vista Chemical, I think there are factual  
16 scenarios where a shipper could win, they just  
17 didn't in those cases because the allegations they  
18 were raising weren't true or when you look back at  
19 what the railroads were providing in terms of  
20 service, there was evidence that it wasn't  
21 indifferent, that they were competing.

22 BOARD MEMBER FUCHS: I want to just hone

1 in on this point just a little bit more, which is in  
2 the D.C. Circuit in reviewing what you said, people  
3 with market power will either raise rates or they  
4 will potentially ration or provide lower-quality  
5 service.

6 And Midtec itself said there was either  
7 approach, one was the classic anticompetitive  
8 conduct, and then it said or inadequate service,  
9 under either approach they fail.

10 So foreclosure was in the first part and  
11 not the second. And you know, the way that the D.C.  
12 Circuit described the actions of someone with market  
13 power was that they were providing bad service.

14 Now, the evidence of their indifference is  
15 that they're not being as responsive as you would  
16 expect in a competitive market, just like you would  
17 expect someone who is charging unreasonable rates to  
18 not charge anything close to marginal rate prices.

19 So I guess I'm still grappling or  
20 searching for what additional evidence does a  
21 shipper need to provide to show monopolistic  
22 indifference besides they don't have very good

1 options and service has been bad for a period of  
2 time.

3 MR. ROSENTHAL: I think the answer is that  
4 you have to look at least at the justifications for  
5 the service issue.

6 In the Entergy case that I'm thinking of,  
7 they were complaining about problems with the Powder  
8 River Basin, and what Union Pacific explained was  
9 these problems weren't specific to Entergy, they  
10 were affecting competitively served shippers as  
11 well.

12 So when you look at the issues were  
13 affecting both types of shippers, you can't conclude  
14 from that that the service is bad because one  
15 shipper is solely served by Union Pacific.

16 So I think --

17 BOARD MEMBER FUCHS: You compare whether  
18 or not competitively served shippers are -- I  
19 understand.

20 MR. ROSENTHAL: I think that might be an  
21 element to show that there is some element of  
22 anticompetitive conduct. You can't just say service

1 is bad. Service suffers in cases for many reasons,  
2 and it can be extended. So I think you have to look  
3 beyond just --

4 BOARD MEMBER FUCHS: To oversimplify, if  
5 UPS were suffering the same issues as a scrap steel  
6 shipper -- well, that actually wouldn't be a good  
7 example. As a grain shipper, that might be  
8 something to take a look at, if UPS was providing  
9 markedly better service, didn't have the same  
10 service failures as some sort of cargo shipper.

11 MR. GEHRINGER: We effectively do that  
12 today, even with UPS, with looking at your example,  
13 so you're exactly right.

14 BOARD MEMBER FUCHS: I appreciate that  
15 very much. Helpful discussion.

16 CHAIRMAN OBERMAN: Michael, just to follow  
17 up on that, I'm having a little trouble translating  
18 your answer in the real world what is a shipper,  
19 what kind of evidence does a shipper have to come up  
20 with to win a case under Midtec.

21 You said there's some anticompetitive  
22 aspect. How do they prove it?

1 MR. ROSENTHAL: I think like you would  
2 prove any other case as a lawyer. Depending on what  
3 the standard is, you have to focus on some cases  
4 beyond your own experience and you have to look at  
5 the experience of other shippers who are exclusively  
6 served and those who are not exclusively served.

7 If we're talking about again that specific  
8 example of the Entergy case, if it --

9 CHAIRMAN OBERMAN: We know what the  
10 standard is, whatever the Midtec court left us with  
11 is what the standard is. So I'm trying to figure  
12 out whether the Midtec court said that bad service  
13 is the best evidence of -- the most probative I  
14 think it said of anticompetitive behavior.

15 Is it sufficient, bad service?

16 MR. ROSENTHAL: No, I think where it  
17 becomes probative is if you look and see what the  
18 service is for shippers who actually do have  
19 competitive options and you compare them to the  
20 shippers that don't, and if you found a pattern  
21 where the shippers who don't have options are  
22 treated differently, that would be a pretty strong

1 factor that it has something to do with the  
2 competitive situation and not a larger problem  
3 that's affecting everybody equally.

4 CHAIRMAN OBERMAN: So in order to win a  
5 reciprocal shipping -- switching case under Midtec,  
6 the shipper has got to go out and do a whole bunch  
7 of discovery of other shippers and what their  
8 experience has been with the same railroad? Is that  
9 how I'd do it? Trying to get into the real world of  
10 what these cases are going to look like.

11 MR. ROSENTHAL: Yeah, I mean, I think the  
12 real world is that you have to be able to show that  
13 you're dealing with a situation that's affecting you  
14 because of your -- because of your need for  
15 competition. And I think that implies that somebody  
16 with competition is being served differently.  
17 Otherwise, you don't have a need for competition,  
18 that's not the solution.

19 CHAIRMAN OBERMAN: How many other shippers  
20 would they have to do discovery on to prove that  
21 pattern?

22 MR. ROSENTHAL: I don't know the answer to

1 that. That's going to depend on what the Board does  
2 when it's looking at the case and the inferences  
3 that the Board is willing to draw from the evidence.

4 CHAIRMAN OBERMAN: I'm talking about --  
5 you know, there's been a point made here that nobody  
6 has brought a reciprocal switching case and been  
7 able to win it in 40 years because the standard  
8 can't be met.

9 You know, there are a whole bunch of very  
10 good lawyers, as you are, on the other side who  
11 represent shippers and to a person they have  
12 evaluated the situation as it's a standard which  
13 can't be met.

14 MR. ROSENTHAL: So I -- sorry.

15 CHAIRMAN OBERMAN: No, go ahead.

16 MR. ROSENTHAL: So I would say two things.  
17 One, I think it's difficult to believe, having gone  
18 back and actually look at the way the Agency  
19 analyzed Midtec, analyzed Vista Chemical and  
20 analyzed Shenango, which are the three main cases,  
21 back in 1989 that somebody thought it was impossible  
22 to meet a case if the standards had been met.



1 I think the ICC pretty clearly laid out  
2 what had to be shown and the problem is people can't  
3 show it because railroads understand their  
4 obligations and meet them.

5 I mean, you said yourself that the whole  
6 idea here is to set up a standard as a backstop and  
7 then have people comply with the standard.

8 And I would argue that that's what you see  
9 happening. I'm not sure it's just compliance with  
10 the standard. I think what you've heard from the  
11 railroad witnesses here is that it's not just fear  
12 of a standard. It's that we need to serve the  
13 customers to grow, we need to operate efficiently  
14 because that's also in the railroad's best interest.

15 So I don't think in this particular case  
16 it's necessarily the backstop of having a rule  
17 looming over us. I think it's the imperative of the  
18 railroad to grow its business and to operate  
19 efficiently and to have the capacity to grow its  
20 business.

21 But I think the fact that you're not  
22 seeing cases doesn't mean the rule is a failure. It

1 means that people are behaving.

2           And I just don't for the life of me  
3 understand why the implication of people not coming  
4 and complaining or not bringing cases is that  
5 there's a problem. I think there's a sign that  
6 there isn't a problem that requires a rule change,  
7 because it's out there, it's understood, it was  
8 litigated, there were standards, there were  
9 decisions.

10           CHAIRMAN OBERMAN: With all due respect,  
11 Michael, if I accepted your description of what's  
12 the situation with the rail industry today, as a  
13 responsible shepherd of the taxpayers' dollars, I  
14 would fold up our RCPA office and lay all those  
15 people off, because we wouldn't have any problems in  
16 the rail industry.

17           And as Robert said, and I've heard it  
18 since I joined the Board, shipper after shipper  
19 complaining about both service and rates. And we're  
20 in the midst of a rate reform not because everybody  
21 is happy with their rates and haven't brought any  
22 cases but because they can't win cases under the

1 current standard.

2 So I just don't accept the notion that  
3 everything is hunky-dory because nobody is bringing  
4 any cases.

5 Let's move on because we're going to run  
6 out of time here.

7 Eric, I had one question, I just wanted to  
8 be clear on.

9 Is it UP's position that in the 77  
10 locations where you now have reciprocal switching in  
11 place, there is no congestion on your network? But  
12 if we add any more shippers to those 77 locations,  
13 there will be congestion? I just want to make sure  
14 I nailed this down.

15 MR. GEHRINGER: What I was saying was in  
16 the event that you actively use reciprocal switching  
17 and if you were to grow that reciprocal switching,  
18 it would potentially create congestion in areas  
19 where we may not have congestion today.

20 CHAIRMAN OBERMAN: You know, when I had an  
21 ex parte meeting with representatives from UP on  
22 this issue a few months ago, I asked the question of

1 whether there was any congestion. You say that  
2 you've got a lot of voluntary reciprocal switching  
3 arrangements, but you also have a lot that were  
4 ordered by the Board that I assume you wouldn't have  
5 taken but for the merger.

6 And I asked the UP representatives if they  
7 could point to me any place where reciprocal  
8 switching was causing congestion, and they said they  
9 would get back to me and I'm still waiting.

10 So it either is causing congestion or it's  
11 not as currently implemented. And I would like to  
12 pin that down.

13 MR. GEHRINGER: And we can do that  
14 follow-up with you and ensure we do that. But I  
15 think right now I'll tell you, you can't -- at least  
16 we don't think you can answer that today, in a time  
17 in a single day where you can say well, this is what  
18 it looks like.

19 When we make these changes and people  
20 start to use reciprocal switching while we're still  
21 trying to grow parts of the business, as well as our  
22 current customers trying to grow, what is not

1 congested today could be congested in six months, 16  
2 months from now. That's --

3 CHAIRMAN OBERMAN: Well, you've got  
4 experience here over the last year, two, three,  
5 four, whatever period you want to look at. Tell me  
6 if any of these 77 locations the reciprocal  
7 switching movement itself caused any congestion.  
8 I'd like to know the facts there. Not just a  
9 generality. I'd like specifics. All we've really  
10 heard are generalities.

11 I have one more area that I want to  
12 pursue, Michelle, if you don't mind, then I'm going  
13 to finish.

14 VICE CHAIR SCHULTZ: I was just going to  
15 piggyback off your question. In those instances  
16 where you currently have reciprocal switching, have  
17 you had any occasions where it's led to a request  
18 for a higher number of cars?

19 MR. GEHRINGER: Where the customer has  
20 asked to -- had to buy -- yes, with the extension of  
21 taking more time to be able to handle the same  
22 amount of volume, they're going to have more cars

1 generally speaking.

2 VICE CHAIR SCHULTZ: And one more  
3 question. In those instances, have you actually  
4 experienced a higher level of congestion or no?

5 MR. GEHRINGER: We absolutely have. And  
6 we go back though to the same answer to Chair  
7 Oberman.

8 When we look at congestion and think about  
9 yards, again, we can look at it today and say it's  
10 not congested, but through just a handful of events,  
11 you can get to a congested state, and that's outside  
12 of the growth. So yes, in those locations, that's  
13 every single one of them until we see the entire  
14 list and come back to you, we have absolutely seen  
15 periods of congestion where increased reciprocal  
16 switching would push us beyond the capacity of the  
17 yard.

18 VICE CHAIR SCHULTZ: Thank you.

19 CHAIRMAN OBERMAN: Were you done,  
20 Michelle?

21 VICE CHAIR SCHULTZ: Yeah, that was it,  
22 Marty. Thank you.

1           CHAIRMAN OBERMAN: No problem. I have a  
2 question, and I think this is for you, Kenny, but  
3 Eric, you may want to weigh in, because there's been  
4 a lot of talk here about having the most efficient  
5 network and how reciprocal switching is going to  
6 interfere with that and cause inefficiencies in the  
7 network.

8           And I am looking at the comments that were  
9 filed in this docket by Dow Chemical. I don't know  
10 if you've read them. They're your customers, so I  
11 would assume you wanted to read them.

12           And Dow points out that at their  
13 facilities -- they have two facilities at Taft and  
14 Plaquemine that do quite a bit of freight traffic.  
15 And because of UP's unwillingness to allow switching  
16 in New Orleans for much of that traffic, according  
17 to their comment, 60 percent of Plaquemine's traffic  
18 is routed by Union Pacific to East St. Louis, and a  
19 large percentage of the Taft traffic as well. And  
20 as a result of this routing, they add hundreds of  
21 miles on every one of their trains.

22           So instead of -- I guess this is an

1 interchange, not a switch.

2 But the point is that it's UP's routing  
3 decisions in terms of the interchanges from just  
4 these two Dow locations, which according to Dow's  
5 comment results in adding hundreds of miles to each  
6 of these trips to their destinations.

7 And they point out that if they had simply  
8 been allowed to route these trains through New  
9 Orleans rather than East St. Louis by UP, they would  
10 have eliminated 335,000 route miles in just 2021.

11 And so UP locomotives and then the eastern  
12 locomotives are adding to the atmosphere, there's  
13 wear and tear on the railcars.

14 And as Dow points out, just as you said  
15 what happened to customers if you allowed reciprocal  
16 switching, Dow says they have had to maintain a  
17 larger railcar fleet and product inventory just to  
18 deal with these routing decisions by UP.

19 And the question I'd like to put, Kenny,  
20 is does it promote the public interest, in your  
21 view, for UP to add 335,000 miles a year to Dow  
22 traffic which it wouldn't have to do if it would



1 route it through New Orleans?

2 MR. ROCKER: Mr. Chairman, I think in this  
3 case, context matters. We would need to get into  
4 the details to understand where the end receivers  
5 are. We're moving something through East St. Louis  
6 and it's going to Maine, that might be the right  
7 route. If it's going to Florida --

8 CHAIRMAN OBERMAN: They tell you, Kenny,  
9 they tell you. I didn't want to read the whole  
10 thing.

11 Union Pacific routes traffic from Taft to  
12 Carteret, New Jersey, on a 1930-mile rail trip via  
13 East St. Louis, even though routing the traffic  
14 through New Orleans would increase the route  
15 distance by 492 miles. Union Pacific routes traffic  
16 from Plaquemine to Institute, West Virginia, on a  
17 1451-rail mile trip via East St. Louis, even though  
18 routing that traffic through New Orleans would save  
19 227 miles. I'm just reading from Dow's comment in  
20 this docket.

21 For the top 10 Taft and Plaquemine lanes  
22 by volume, Union Pacific routes through East

1 St. Louis -- I'm sorry, instead of New Orleans, if  
2 they had gone to New Orleans instead of East  
3 St. Louis would have eliminated over 335,000 route  
4 miles just in 2021.

5 Is that in the public interest for UP to  
6 cause those extra route miles?

7 MR. ROCKER: Again, Mr. Chairman, the  
8 context matters. I would want -- I have not read  
9 all of that. I would need to read it and look at  
10 those and circle back with you on that.

11 CHAIRMAN OBERMAN: Can you think of any  
12 context in which adding 335,000 route miles would be  
13 an advantage to the public?

14 MR. ROCKER: Yeah, I can tell you, when  
15 we're working with our interline partners, it may be  
16 a faster route, even though the miles may be  
17 different. There could be other instances where it  
18 could be advantageous. We would have to look at --

19 CHAIRMAN OBERMAN: Do you think Dow came  
20 in here and complained to us about the situation  
21 because they're getting the fastest route? You  
22 don't have to answer that question. I don't really

1 have any other questions.

2 MR. GEHRINGER: Can I make a comment on  
3 that, Mr. Chairman?

4 CHAIRMAN OBERMAN: Be my guest.

5 MR. GEHRINGER: In part of my prepared  
6 statement, we were talking about the fact of  
7 building density. So when we think about those  
8 examples, and Kenny is right, we can get you a more  
9 specific example, but going through East St. Louis  
10 is how we build density into having that efficient  
11 interchange with the eastern carrier.

12 Now, I understand from just a distance  
13 perspective that that would look like more miles, in  
14 fact it is more miles. But Kenny is right. From a  
15 timing perspective, we would be able to provide them  
16 the most efficient service. It still may make more  
17 sense to go through East St. Louis. In our case,  
18 because we have the density coming through East  
19 St. Louis, it does make most sense for us.

20 CHAIRMAN OBERMAN: Eric, I'm just going to  
21 say this. It's really difficult for me to imagine  
22 that a company the size of Dow and a company the

1 size of Union Pacific need me to try to bring the  
2 two of you together to resolve a major shipping  
3 problem. We're not talking about some mom-and-pop  
4 shipper spending a few dollars.

5 The fact that I have to raise it at this  
6 hearing strikes me that there's a failure by  
7 somebody to communicate and work things out. I  
8 would assume Dow is one of your major customers.  
9 And it's just remarkable to me that this is how this  
10 issue gets raised, at a public hearing.

11 I would expect businesspeople of your  
12 sophistication and experience, and I don't mean you  
13 specifically, Eric, I mean your company's, to work  
14 these matters out.

15 But it certainly caught my attention. You  
16 know, we have a public interest standard that's  
17 built right into the statute. We've got a climate  
18 crisis, and the railroad seems to be oblivious to it  
19 from what I can tell. But I would like an answer.

20 MR. ROSENTHAL: Chairman Oberman, let me  
21 just add one point on this. This is actually  
22 sounding like what BNSF's witness was talking about,

1 about looking at open routing and the issue of  
2 routing. And there is already a statutory remedy.  
3 Under 10705, this is exactly what the Entergy case  
4 was about, the argument that we should be  
5 interchanging at a different point.

6 This is an issue that Dow has raised since  
7 the beginning of this proceeding, it was in the  
8 papers in 705, and we have explained just what Eric  
9 has said before, that the route going through New  
10 Orleans with all of its service complications and  
11 congestion and getting over the bridge down there,  
12 is not efficient compared to the route over East  
13 St. Louis.

14 And I think if it were an issue, we  
15 wouldn't keep seeing it in the papers, there would  
16 have been a discussion between Kenny and the folks  
17 from Dow.

18 I just don't think this is a real issue.  
19 There is a Board statute that addresses inefficient  
20 interchanges, so if something is really inefficient,  
21 that case can be brought, that was the Entergy case.

22 CHAIRMAN OBERMAN: Well, Michael, pardon

1 me for being a novice in the railroad industry, but  
2 I'm having a hard time understanding how 335,000  
3 miles a year more than is necessary to move the  
4 product from A to B is efficient. Maybe in your  
5 world it's efficient. It doesn't strike me that it  
6 is. And if there's trouble moving traffic through  
7 New Orleans, then it seems to me the railroads,  
8 which have been making billions and billions of  
9 dollars in stock buybacks, not only you but CSX,  
10 need to improve the infrastructure.

11 So I don't find it very persuasive to say,  
12 well, there's more space in East St. Louis so we'll  
13 just send the trains further.

14 You know, the railroads didn't like the  
15 fact that labor people wanted firemen on locomotives  
16 after they stopped burning coal. I don't understand  
17 why it's in the public interest for the railroads to  
18 take trains thousands of miles farther than they  
19 have to go to get from here to there just because  
20 they make more money doing it that way.

21 So somebody is going to have to persuade  
22 me otherwise.

1 Any other board members have any questions  
2 for UP?

3 Anything any of you want to say to us that  
4 you haven't said?

5 MS. HAMANN: No. Thank you for your time.

6 CHAIRMAN OBERMAN: Thank you. Appreciate  
7 it.

8 It is 4:48. We have I assume a major  
9 presentation from AAR.

10 What's the pleasure of the Board? Should  
11 we take a short break or keep moving? Short break.

12 Let's recess to 5:00. Thank you all.

13 (Recess.)

14 CHAIRMAN OBERMAN: We are back in session.  
15 Thank you, everybody. And I'm going to call on AAR.

16 We are going to make every effort, Ian,  
17 and your team, to finish with your presentation  
18 before we go home tonight. So we're all well  
19 advised to see if we can make that happen.

20 MR. JEFFERIES: Sounds good.

21 CHAIRMAN OBERMAN: Present on your panel,  
22 Ian, are yourself, Ian Jefferies, Mark Fagan, Debra

1 Aron and Benjamin Horwich. It's all yours, Ian.

2 Take it away.

3 MR. JEFFERIES: Chairman Oberman, thank  
4 you on behalf of the members of the Association of  
5 American Railroads for the opportunity to speak with  
6 you today. This is a very important issue for the  
7 rail industry as a whole and we are mindful of the  
8 Board's request that we provide new, updated  
9 information and we have done so.

10 The Board will hear from new voices making  
11 new points. However, there are certain rock solid  
12 fundamental truths about this proposal that cannot  
13 be swept aside just because the industry has been  
14 warning the Board about them consistently for a  
15 decade.

16 Before introducing our panel of experts, I  
17 want to underscore some of those fundamental  
18 concerns. The proposed rule would require one  
19 railroad to hand business off to a competitor even  
20 though that railroad has done nothing wrong, that  
21 needless intervention into the complex rail system  
22 will clog the rail network, reduce investment and



1 harm the public interest.

2           Railroads today maximize operational  
3 efficiency and network fluidity. More switching  
4 will mean more congestion and more potential points  
5 of failure. This will lead to delay in the network  
6 which will reverberate across the wider supply  
7 chain, a supply chain that is already strained.

8           More switches will also hurt the  
9 environment, longer wait times will increase  
10 emissions from rail traffic, and inefficient  
11 railroads means more traffic will shift to trucking,  
12 which is less fuel-efficient and generates  
13 comparatively more emissions.

14           The proposed rule would discourage future  
15 investment by railroads by creating uncertainty and  
16 depressing returns on equipment and facilities. It  
17 would also increase safety risks by adding complex  
18 switching operation, which are relatively riskier  
19 than line-haul operations.

20           Any desire by the Board to intervene in  
21 the market absent any allegation of abuse in order  
22 to provide some shippers with commercial leverage

1 that the marketplace does not offer is misguided and  
2 dangerous.

3 Sole-served shippers have legal protections  
4 from unreasonable rates and several pathways to  
5 obtain that protection. Backdoor rate regulation is  
6 not better. It is worse. It will come at the  
7 expense of differential pricing that is necessary  
8 for railroads to recoup their investments and  
9 continue to develop and sustain their networks.

10 And here it will transfer wealth from  
11 railroads to shippers that are already significantly  
12 more profitable.

13 Simply put, the proposed rule is unsound  
14 policy and AAR is joined in its views by many other  
15 stakeholders, passenger railroads, economists,  
16 environmental advocates, labor groups, short line  
17 railroads, elected officials, consumer groups, tax  
18 groups and more.

19 And this afternoon you will hear from our  
20 panel of experts that further elaborate on the  
21 points I just made. And with that, I am pleased to  
22 introduce Mark Baranowski, who is senior managing

1 director at FTI Consulting. He will discuss the  
2 detailed analyses that he and his teams have  
3 completed using the Board's carload waybill sample  
4 data as well as data from other sources analyzing  
5 both the basis for and scope and impact of the  
6 proposed rule.

7 Jonathan Orszag, senior managing director  
8 at Compass Lexecon. He will elaborate on his  
9 economic assessment of the proposed rule, including  
10 its effects on competition and critical future  
11 investments by railroads in their networks.

12 Mark Fagan, lecturer and public policy at  
13 the Harvard Kennedy School, Harvard University. He  
14 will elaborate on the flaws of the proposed rule  
15 from a public policy perspective and how it will  
16 affect the supply chains of which railroads are a  
17 key part.

18 Debra Aron, vice president in Charles  
19 River Associates's competition practice, with  
20 extensive experience around competition policy,  
21 including in the telecommunications industry, she  
22 will discuss important lessons from competitive

1 access policies in the telecommunications industry  
2 that the Board may wish to consider as it evaluates  
3 a proposed rule.

4 And Benjamin Horwich is outside counsel  
5 for the AAR in this proceeding and will address  
6 legal and policy issues with the proposed rule.  
7 I'll turn it over to Ben from here.

8 MR. HORWICH: Thank you, Ian, and  
9 especially thank you to the Board for hearing us  
10 today.

11 Being mindful of the time, Mr. Chairman,  
12 our hope is to spend five or 10 minutes with each of  
13 our panelists, and that should actually come in  
14 significantly shorter than our requested time, so  
15 our goal there is we can maximize the time we have  
16 to respond to the Board's questions.

17 CHAIRMAN OBERMAN: Just to be clear, Ben,  
18 I don't want anybody to feel shortchanged. So do as  
19 you --

20 MR. HORWICH: No, I understand. But  
21 sometimes shorter is more effective, though there's  
22 a lot of issues, we are trying to be focused.

1                   CHAIRMAN OBERMAN:   Awesome.

2                   MR. HORWICH:   Let me just give an overview  
3 of a few points before our panelists get deeper into  
4 their areas of expertise.

5                   The first point is that overall the Board  
6 should think methodically about adopting the  
7 proposed rule, and that process would include first  
8 clearly identifying what precisely is the need for  
9 the proposed rule change, what's the problem that  
10 would be solved by taking action.

11                   And then second, once you know that, what  
12 are the advantages and disadvantages of the revised  
13 approach versus the existing approach.  And we've  
14 been talking some today about the existing approach  
15 and the revised approach.  Mark Fagan will speak in  
16 some more detail about those points about policy  
17 development.

18                   But I do think it's right that we should  
19 do some level setting around what the existing rule  
20 does and what the proposed rule would do.

21                   So the existing rule.  So we've heard the  
22 concerns that the existing rule doesn't cover

1 anything meaningful, and we really disagree with  
2 that. I mean, we really take the ICC and the  
3 D.C. Circuit at their word when they say that it  
4 covers a variety of potential abuses of market  
5 power.

6           It's a remedy for exclusionary conduct  
7 that prevents a competitor from competing on other  
8 routes not involving the switching line, it can be  
9 remedy for substantially inefficient routing or  
10 inadequate service, we've been talking about those  
11 things, when those are the product of an abuse of  
12 market power.

13           Now, we know the rule doesn't address  
14 rates that are unreasonably high due to an abuse of  
15 market power. That's because there is a more direct  
16 remedy for that problem in the statute already  
17 through maximum rate regulation. And John Orszag  
18 will go into that.

19           But I would point out when you think about  
20 what's left after that, you know, if there's no  
21 evidence of abuse of market power, which is what  
22 those existing rules aim to identify, then the Board

1 has been right to let the free market function.  
2 That is the point of the Staggers Act, is to avoid  
3 that intervention.

4 And as Mr. Orszag will explain also,  
5 that's sound economics. So that's the existing  
6 rule.

7 Now the proposed rule. Obviously no one  
8 on this Board wrote the proposed rule, and we think  
9 the Board should have a clear picture of the  
10 problems with the proposal.

11 We think we see it has two parts, right.  
12 And they pose overlapping but somewhat distinct sets  
13 of concerns. So I want to make sure we think about  
14 them separately.

15 So first there's what we have called the  
16 public interest pathway. That's the part that  
17 proposes to do things case by case in light of all  
18 relevant factors.

19 And that has the potential to apply almost  
20 anywhere. And we heard some discussion this morning  
21 from shippers about maybe they're prophylactic  
22 orders, and then you get into hypothetical costs and

1 benefits, and even if it's not hypothetical you get  
2 this problem that some of the things that are really  
3 important to the public interest are difficult or  
4 impossible to judge case by case.

5           And then you have this concern that when  
6 everything is relevant, nothing is dispositive. And  
7 then everybody is going to disagree when nobody  
8 knows what the outcomes really can be predicted to  
9 be. So that's kind of the set of issues we think  
10 about around the public interest pathway.

11           And then separately there's the  
12 competitive access pathway. And so that's the part  
13 that proposes to say if a shipper meets the  
14 threshold requirements for a maximum rate case, then  
15 we're not going to actually make the shipper prove  
16 the rate case. Instead, we're going to grant forced  
17 switching unless there's a serious practicability or  
18 safety problem that arises.

19           And I want the Board to recognize that the  
20 proposal as drafted does not say that operational  
21 inefficiency would be a reason to then refuse  
22 switching. You know, it doesn't say that an obvious



1 distortion of investment incentives would be a  
2 ground for refusing switching under that pathway.

3 So the Board is tying its hands in that  
4 pathway in a way that I think it needs to be mindful  
5 of.

6 And together the upshot is that the Board  
7 would be handing out switching as a sort of new  
8 regulatory entitlement. It would have to be  
9 something that's being bestowed upon shippers even  
10 in situations where a railroad has not done anything  
11 wrong in an identifiable way.

12 So then we ask what's changed that might  
13 favor that change in the rule. And there have been  
14 several justifications there, and I think we'd be  
15 happy to address any of them.

16 There's one that I think in the newest  
17 papers and some of the ex parte discussions seems to  
18 have captured significant attention is this idea  
19 that the rule was originally adopted in the  
20 mid-1980s and then there were some important rail  
21 mergers that continued into the 1990s and that those  
22 supposedly reduced competition. And that's an

1 interesting theory, but we really want to emphasize,  
2 it's just factually false, and of course the Board  
3 wants to rely on facts to make policy. And Mike  
4 Baranowski will go into that.

5 At a very high level, basically three  
6 points to remember there. The first is where  
7 mergers threaten to eliminate that sort of  
8 intramodal competition, the ICC or this Board  
9 imposed a condition, and those conditions were  
10 supported by shippers, and we heard that again even  
11 from the shipper groups this morning.

12 The second thing to remember, and this is  
13 just an important background point that may be easy  
14 to lose, is that a clear majority of traffic has  
15 always been single-served as far as its rail options  
16 are concerned. Now, that doesn't mean that there's  
17 no competition, and Mr. Orszag can talk about that.

18 But the point is that single rail service  
19 was like really normal before the mergers, it's  
20 really normal today. And the industry has organized  
21 around there being a significant fraction of single  
22 service.

1           And then the third thing I would say is we  
2 heard some complicated theories this morning about  
3 vertical effects of mergers and long routes. And  
4 look, the proposal here, though, is specifically  
5 about regulating short segments over which there's  
6 single service. And that's what we've tried to look  
7 at.

8           Because you say -- that's what  
9 Mr. Baranowski will talk about. The proportion of  
10 traffic moving to or from single-service stations  
11 has dropped since the 1990s, meaning that since  
12 those mergers, there's this greater percentage of  
13 traffic moving between multi-serve stations than  
14 there was before. So you can't say the merger has  
15 caused single service to increase and now we have to  
16 combat that because single service actually had  
17 decreased.

18           Then we think about the rule's downsides,  
19 and I think today there has been a lot of focus on  
20 operational concerns and the Board has already heard  
21 from other witnesses, it will tomorrow hear from  
22 other witnesses about that.

1           Another place to look at that I think the  
2 Board won't hear during the hearing but I think is  
3 worth taking a look at is the Brotherhood of  
4 Locomotive Engineers and Trainmen's comments. Those  
5 are the people closest to the disruption that this  
6 proposal can create, and they're the ones literally  
7 on the ground. So I think that's a really valuable  
8 voice on this issue.

9           So let me just kind of make three  
10 high-level points on operations and my fellow  
11 panelists will probably have some more to say on  
12 this.

13           The first one is that the operational  
14 complexity is real, and I hope the Board has seen  
15 the diagrams or the videos about the railcar having  
16 to get moved from A to B to C to D, just to get onto  
17 the line-haul train. And we heard some of those  
18 discussions earlier I think on other panels.

19           But the notion that this is just going to  
20 be swapping one switch here for another switch  
21 somewhere else, that turns out to be false, and Mike  
22 Baranowski will explain that the data really show

1 that. So we're adding switches.

2 And then as the lawyer, I should add that  
3 it's legally problematic to talk about regulatory  
4 interventions that are kind of picking and choosing  
5 between particular routings and switching choices,  
6 because that is generally the carrier's choice  
7 absent that abuse of market power that we talk  
8 about.

9 The second point is that that operational  
10 complexity and those risks are widespread. And I  
11 mean that in two senses.

12 Now, first there's -- as the slide shows,  
13 there's a vast number of places where a shipper  
14 could theoretically argue for an interchange, and  
15 that doesn't make it a good idea in practice, as I  
16 think, Mr. Chairman, you've recognized today in some  
17 of your observations.

18 And then, you know, there's also the  
19 question which I'm happy to get into if the Board is  
20 interested in questions about places that are  
21 outside of terminal areas where the shipper is  
22 located.

1           But the other sense in which the  
2 complexity is widespread is that it's not just about  
3 where it's going to be felt but it's going to be  
4 felt up and down supply chains. And as others have  
5 alluded to, it kind of feels like particularly  
6 disastrous as an idea when we've seen what kind of  
7 external disruptions, COVID-19 or global events,  
8 what they can do to complex systems.

9           And we really do in North America have the  
10 best freight rail system in the world, and the sort  
11 of experimentation that this would cause I think is  
12 something we should really pause on.

13           Mark Fagan will have some more to say  
14 about that.

15           And then the third thing I'd say is when  
16 you think about these risks, the proposed rule as  
17 it's written really lets the genie out of the  
18 bottle and it doesn't let the Board have enough  
19 control over it.

20           The problem is a little bit different  
21 under those two different pathways. Under the  
22 public interest pathway, the Board kind of has a

1 blindfold on, that's how I think about it. It's  
2 going to look at this particular location, but as  
3 you've heard and as we'll also probably discuss some  
4 more, the concern really is cumulative effects  
5 across the network.

6           Railroads can make something happen at a  
7 particular location. When you're having  
8 interventions at a wide number of places that have  
9 these knock-on effects, you really get unpredictable  
10 results. Under the competitive access pathway,  
11 little bit of a different issue. As I said before,  
12 it's more about the Board tying its hands, or even  
13 if the operation looked really foolish and  
14 inefficient, the Board is leaving itself without the  
15 ability to say no, unless they get to be downright  
16 impracticable, I think is one of the backstops  
17 there.

18           So look, in the end here, I do want to  
19 come back to the sense that a prime motivation,  
20 maybe the prime motivation for the proposed rule, is  
21 about shippers' desire for lower rates. I mean, the  
22 whole thrust of the presentation earlier today from

1 the shipper coalition about the switch fee, for  
2 example, if you remember that, was about well, you  
3 have to set the switch fee in a way that will make  
4 sure we get lower rates.

5 So that's how we really do know this is  
6 ultimately about rates. And we can talk about the  
7 other issues too, but rates is a big part of it, so  
8 I wanted to close my observations by speaking  
9 directly about that.

10 Using an operational change, a forced  
11 switching framework, to produce lower rates just  
12 depends the statutory rate reasonableness framework.  
13 And the easiest place to see that I think is in the  
14 competitive access pathway. Because it actually  
15 sort of parallels that rate framework. It starts  
16 out in the same place that a rate case would start,  
17 with the existing market dominance test.

18 And we think that is a very plausible  
19 place to start. That's a good screen. But under  
20 the proposal, the forced switching essentially ends  
21 there. And the effect is that a significant  
22 proportion of cases that would proceed at least



1 under that pathway get something that looks like  
2 rate relief via forced switching without any showing  
3 that the rates were ever too high under the Board's  
4 actual adopted rate methodologies in the statute.

5 So you have this weird sense that like the  
6 shipper gets to the starting line in a rate case and  
7 then all of a sudden gets given the gold medal  
8 without ever running the race that we would have or  
9 that we would see in a rate case.

10 And that's this like internal  
11 contradiction that kind of predictably results in  
12 courts thinking something is not rate and vacating  
13 the rule. We've been talking about not wanting to  
14 be here years from now and I think we really worry  
15 about that as being a scenario where we're back here  
16 in three or four years without any progress, and I  
17 don't think anybody wants that.

18 To be clear, this is not competition  
19 producing lower rates, and John Orszag will talk  
20 more about this. The basic points is that lower  
21 rates and competition are not the same thing. Lower  
22 rates can't be an end unto themselves. Because what

1 justifies regulatory intervention are market power  
2 abuses that are preventing the benefits of  
3 competition that would arise in a free market.

4           And the rule as it's written is just a  
5 regulatory intervention that kind of produces this  
6 faux competition where everyone is going to stop  
7 doing what they would do in a free market, start  
8 focusing on what switching would lead them to do and  
9 start focusing on the Board's intervention, the  
10 Board's price and how that shifts things. And this  
11 is before Debra Aron will really speak, because it's  
12 very much what happened I've learned from her in the  
13 telecommunications space.

14           And just forcing an incumbent to share the  
15 facilities it's made investments in is not actually  
16 rate competition, it's kind of the opposite. It's  
17 what the D.C. Circuit kind of derided as synthetic  
18 competition, is the phrase it used in one of its  
19 decisions overturning the Federal Communications  
20 Commission's approach.

21           That then leads into Dr. Aron's other  
22 points, because the proposal isn't deregulatory,

1 it's kind of the opposite if it produces all these  
2 waves of regulatory litigation about which forced  
3 switching is going to be ordered, at what price and  
4 how do you mediate the operational complications.  
5 And then that's kind of a lesson from the forced  
6 sharing in the telecommunications industry.

7 So we think of this as like the old  
8 saying, if you can't be a good example, then you'll  
9 just have to be a horrible warning. And I would  
10 urge the Board to heed that warning and listen to  
11 what Dr. Aron has to say.

12 So let me turn it over to Mike Baranowski  
13 first and then John Orszag and Mark Fagan and Debra  
14 Aron and then I might take a minute to wrap up, but  
15 we really do want to get to the Board's questions.

16 CHAIRMAN OBERMAN: Before you do that it,  
17 I'd like to ask you two questions, a couple  
18 questions. Earlier on in your remarks, you talked  
19 about providing an order for switching even if the  
20 railroad hadn't done anything wrong, or words to  
21 that effect. And that there's no basis for that.

22 Isn't a basis for that the statute itself,

1 which doesn't mention anything about railroads'  
2 wrongdoing in terms of whether we may order  
3 reciprocal switching?

4 MR. HORWICH: I think there's a couple  
5 ways to see that. This is always -- the provisions  
6 and their predecessors kind of where Congress drew  
7 on them from have always been about showings of  
8 necessity and then of course Staggers's overall  
9 thrust to minimize regulatory intervention.

10 This is a point that actually I think in  
11 some ways John Orszag can speak best to, because it  
12 is kind of a point about when regulation should be  
13 triggered, that regulation needs to be a response to  
14 an identified abuse of market power, some sort of  
15 failure of the behavior to promote the public  
16 interests.

17 But when you generally are relying on the  
18 free market, you have to identify something that the  
19 free market is not doing that it ought to be doing  
20 and then intercede on that basis.

21 And so, for example, in the way the  
22 competitive access pathway is written, it identifies

1 conditions of market dominance in which a railroad  
2 could act inconsistently with the public interest or  
3 competitive principles, but it doesn't actually take  
4 the further step that you would, for example, in a  
5 rate case to say well, wait a minute, let's actually  
6 look at what the railroad is doing, and we have a  
7 test here to say whether that's in bounds or out of  
8 bounds. And then we call the balls and strikes and  
9 say well, the railroad is out of bounds, the rate is  
10 too high, we're going to have a rate prescription.

11 It's that two-step kind of thinking that  
12 structurally is throughout the statute here and sort  
13 of leads to my view that there has to be some  
14 identified -- something identifiable about the  
15 railroad having done something or could be failed to  
16 do something, I suppose.

17 But actual conduct on the railroad's part  
18 as opposed to the mere circumstance of happening not  
19 to have a competitor around. It could be behaving  
20 appropriately.

21 CHAIRMAN OBERMAN: Wouldn't that be an  
22 argument better directed to the Congress? I mean,

1 you're asking that a language practicable and in the  
2 public interest to carry a lot of load, put all of  
3 that into a requirement for a rulemaking.

4 I realize there's been rules since then  
5 and there's a proposal now. But I would like to  
6 start with the statute. And I don't find any  
7 insistence by the Congress on market dominance or  
8 wrongdoing or anything else. They just say do it  
9 when it's practical and in the public interest.

10 You know, you're asking us to read all of  
11 what you've just said into the public interest  
12 language. And you may be right, but I don't see it  
13 in the statute itself.

14 MR. HORWICH: I think the way we see it  
15 fitting together, and I expect that Mark Fagan will  
16 have something to say about this, but we think a lot  
17 about public interest generally in crafting  
18 regulations and how to serve that.

19 But what we see the public interest echoes  
20 what the ICC said in the Jamestown decision, for  
21 example, something can't be a mere private benefit,  
22 it has to be something that accrues to the public as

1 a whole.

2 In fact, that standard even goes back  
3 before Jamestown, we're almost at its hundredth  
4 anniversary this summer I think of the board  
5 articulating that principle. And I think it's clear  
6 enough that Congress incorporated that concept, that  
7 was certainly what was kind of the understanding at  
8 the time this provision was added.

9 And under an act like this, where market  
10 forces are presumptively thought to promote the  
11 public interest, there's kind of -- there's a bias  
12 towards saying well, we think market forces will  
13 promote the public interest, kind of until shown  
14 otherwise.

15 And so I don't think that the Board has  
16 kind of a rigid constraint on exactly how it  
17 determines that something has been shown otherwise,  
18 but I do think that it can't simply be a simple  
19 market dominance test that says well, you're in a  
20 position where you might be diserving the public  
21 interest.

22 Because as we've talked about today, one

1 of the significant and hopeful effects of any  
2 regulation in setting outer boundaries is that  
3 people -- the market actors will observe those  
4 boundaries and might not be dis-serving the public  
5 interest.

6 So there's kind of a reason that the Board  
7 needs to find something more, I guess is what it is.

8 CHAIRMAN OBERMAN: And one other question.  
9 When the Congress said to us we can do it if it's  
10 necessary or may do it if it's necessary to provide  
11 competitive rail service, is it your argument that  
12 the Congress intended us to provide competitive rail  
13 service in every respect except with regard to  
14 rates?

15 MR. HORWICH: I think --

16 CHAIRMAN OBERMAN: Doesn't competition  
17 imply all aspects of whatever it is that the  
18 supplier is supplying?

19 MR. HORWICH: Oh, I see. Yes.

20 No, we absolutely agree with that view  
21 about the benefits of competition, which is why I  
22 said what I said about the existing standard, which



1 recognizes that although money and rates is always  
2 kind of probably there in the background of any  
3 case, there can be circumstances certainly where the  
4 real harm -- an abuse of market position really  
5 could be visited through the inadequate service. We  
6 agree with that.

7 CHAIRMAN OBERMAN: Service or rates;  
8 right? I mean, competition is an all-encompassing  
9 concept, isn't it?

10 MR. HORWICH: Yeah. No, I do agree with  
11 that.

12 The question, of course, is which kind  
13 of -- which tool is the best one for the job.

14 CHAIRMAN OBERMAN: That's a separate  
15 question.

16 MR. HORWICH: When you're talking rates,  
17 that's a different set of tools too.

18 CHAIRMAN OBERMAN: That's a separate  
19 question of what's the best tool. The argument the  
20 AAR is making is we can't use reciprocal switching  
21 as a tool at all to deal with rates as I understand  
22 it. And I don't know how you can separate out the

1 concept of competition, which the Congress directed  
2 us to deal with, from both rates and service, the  
3 whole product that's being offered.

4 MR. HORWICH: Well, I agree. I think  
5 maybe John Orszag will have an opportunity --

6 CHAIRMAN OBERMAN: Before we do that,  
7 Karen Hedlund had a question.

8 Karen?

9 BOARD MEMBER HEDLUND: Thank you. And  
10 maybe one of your economists should address this.

11 You know, we talk about should there be  
12 relief in the absence of an abuse of market power,  
13 but how do you go -- how does a shipper prove abuse?  
14 In fact, we know that the railroads have been  
15 stressed over the last couple of years, and the  
16 result has been that there has been a decline in the  
17 quality of service to many shippers.

18 And that may be a result of the railroads  
19 preferring to provide better service to customers  
20 where they make more money, there is a bigger margin  
21 over customers that don't provide them the  
22 equivalent margins. And is that an abuse of market

1 power? But how do you go about proving that?

2 So that's a concern that I have.

3 One other point about the switch fees, and  
4 you indicated that that's an indication that this is  
5 all about rates.

6 I think it's about how the shippers can  
7 get better service without incurring higher costs  
8 for paying a larger switch fee that more than  
9 offsets any cost savings they may get from the other  
10 railroad but where they're really just seeking  
11 better service.

12 MR. HORWICH: Well, I think -- I guess I'd  
13 make the observation on the second point there that  
14 one challenge I think with the way the rule is  
15 written is that if it's intended to be a response to  
16 a service issue, then you would want a rule that is  
17 written with some particular sensitivity towards the  
18 service issue.

19 But that's not actually what's written  
20 into the rule. And so the inquiry isn't focused  
21 there, the regulated parties that are trying to  
22 observe the rule don't kind of have notice about

1 what that is and so forth. So that's sort of the  
2 challenge that --

3 BOARD MEMBER HEDLUND: Service for  
4 competition, you compete on rates and you compete on  
5 service.

6 MR. HORWICH: I certainly appreciate that  
7 point that it's part of competition.

8 But -- and again, take the competitive  
9 access pathway. A showing of market dominance  
10 doesn't actually answer the question -- doesn't  
11 actually answer the question well, is your service  
12 good or is your service bad, right.

13 And so by contrast, something constructed  
14 in the way that we think the current rule operates,  
15 which is, well, if you're market dominant and you've  
16 abused your market power to, so to speak, get away  
17 with inadequate service and there's kind of a causal  
18 connection between your abuse of market power and  
19 the service that's not merely oh, it's a little less  
20 than ideal but it's actually inadequate and, you  
21 know, we've got a strong connection there, that we  
22 think is the showing of relief that Midtec leaves

1 open.

2 I thought that Mr. Rosenthal's discussion  
3 of that on the previous panel is pretty well in  
4 accord with how I would describe it. It's difficult  
5 to come up with the hypotheticals that isolate  
6 service from rates, for all the reasons we've just  
7 been talking about. But I don't think it's -- I  
8 certainly don't think it's impossible.

9 I again think that it's an understanding  
10 that railroads have under the current regime that  
11 this is out of bounds to give this kind of abusive  
12 treatment towards the particular shippers over whom  
13 you may have market power because then you're  
14 subject to this and you need to reign it back in  
15 later.

16 Maybe we should let -- I'm sorry.

17 BOARD MEMBER FUCHS: I know you want the  
18 other panelists to speak. So one quick follow-up, I  
19 think it's a natural follow-up to Karen's so I want  
20 to jump in.

21 One of the things that struck me about  
22 Mr. Rosenthal's presentation is that, and I think

1 you recognize that the D.C. Circuit said it's really  
2 hard to assign quantitative values to service. So  
3 when he's calling for comparing a particular  
4 shipper's service to a shipper that's in a more  
5 competitive situation and identifying the delta, I  
6 read that as the attempt to quantify that would be  
7 quite a burden on a shipper.

8 So I'm wondering what your reaction is to  
9 how that would properly be done in light of what the  
10 D.C. Circuit said about qualitative judgments.

11 MR. HORWICH: Well, I think it's -- I  
12 actually think it's unavoidable that there have to  
13 be some comparisons done in that factual showing.  
14 And the reason is this, is that, as I think we've  
15 recognized in some of the earlier discussions with  
16 other panels about this, is that the causes of  
17 degraded service -- I don't want to say inadequate  
18 service because I think inadequacy actually is a  
19 fairly significant charge to level against someone.

20 But even degraded service, just speaking  
21 about that, there can be different causes of that;  
22 right? There can be kind of external factors that

1 cause service disruptions. There can be  
2 well-intended but improvident decision-making by a  
3 given railroad, where they thought the traffic flows  
4 were going to go east this year and it turns out  
5 there was some weather pattern that resulted in  
6 westward flows of some commodity or something,  
7 right.

8           And you can just guess wrong and then be  
9 out of position or something.

10           There could be obviously abuses of market  
11 power at the root of something like that.

12           And I think we can imagine other  
13 permutations. And I think it's impossible to  
14 actually make that causal connection without some  
15 reference point within the broader market.

16           I mean, just for a loose analogy, we were  
17 speaking about on the previous panel, talking about  
18 well, 24 or 48 hours or 96 hours of dwell time.  
19 Well, we all have I think an intuitive sense of like  
20 oh, well, that's longer than a shipper might like,  
21 but it's not an outrageous period so it's something  
22 someone might tolerate.

1           But where did we get that idea? We got  
2           that idea from some comparison how we understand  
3           other movements to go.

4           And so I think there has to be some sort  
5           of level setting of that nature. Otherwise, the  
6           Board's decisions will just be aiming at a too high  
7           or too low if the Board doesn't have some kind of  
8           calibration relative to other circumstances.

9           CHAIRMAN OBERMAN: All right. You want to  
10          proceed, then, with your panel?

11          MR. HORWICH: Sure.

12          Mike, do you want to take over?

13          MR. BARANOWSKI: Thank you, Ben. Sure.

14          Good afternoon. My name is Mike  
15          Baranowski, and I appreciate the opportunity to  
16          speak here today.

17          My testimony will focus on three areas of  
18          data analysis. First, there has been much  
19          discussion about railroad industry consolidation  
20          leading to single-served stations. My analysis show  
21          that less traffic originates and terminates at  
22          single-served stations after the industry



1 consolidation than before.

2 Second, I look at class I carrier access  
3 for new stations appearing in the Board's carload  
4 waybill sample for the first time in the postmerger  
5 period and find that those stations are  
6 overwhelmingly single-served.

7 Third, I address claims that have arisen  
8 in shipper comments in this proceeding that the  
9 operational effects of the proposed rule involve  
10 simply trading one switch for another.

11 The data show that this is simply not the  
12 case for the vast majority of shipments potentially  
13 affected by the rule.

14 The most recent round of railroad  
15 consolidation occurred in the late 1990s. I  
16 conducted an analysis of the prevalence of  
17 single-served stations in the STB's confidential  
18 carload waybill sample. I looked at it  
19 preconsolidation, for which I used 1992 to 1996  
20 waybill data, and postconsolidation, for which I  
21 used 2015 to 2019 waybill data.

22 The demonstrative summarizes the results

1 of my analysis and shows that the amount of carload  
2 traffic originating and terminating at stations  
3 served by single class I carrier in the postmerger  
4 period declined from the premerger period.

5 For all carload shipments, 55.6 percent  
6 originated or terminated at single-served stations in  
7 the premerger period compared to 52.2 percent in the  
8 postmerger period. A decline of 3.4 percentage  
9 points.

10 Nonexempt carload shipments show a higher  
11 percentage of shipments originating and terminating  
12 at single-served stations than all carload shipments  
13 in both the pre- and postmerger periods, as well as  
14 a higher percentage reduction.

15 Nonexempt carload shipments with R/VCS  
16 above 180 percent, the shipments most likely  
17 affected by the proposed rule, show the most  
18 significant decline, 8.7 percentage points.

19 This bears repeating. A smaller share of  
20 traffic originates or terminates at single-served  
21 stations than before the mergers.

22 Next I look at new stations that have come

1 online in the postmerger period. Overall, my  
2 analysis found 542 new stations that reported  
3 volumes for the first time in the 2015 to 2019  
4 postmerger period.

5 Of those 542 stations, the vast majority,  
6 438, or 81 percent, are stations with access to only  
7 a single class I carrier. Bear in mind my last  
8 point. The share of traffic originating or  
9 terminating at multi-served stations increased over  
10 this period.

11 So what does it mean that there are lots  
12 of single-served stations being added? Presumably,  
13 this reflects shippers' own strategic economic  
14 choices.

15 They have options. They can make  
16 trade-offs between the advantages of multiple rail  
17 carrier access on the one hand and other industrial  
18 development costs and benefits on the other.

19 Shipper decisions are also likely  
20 influenced by industrial development efforts by  
21 class I carriers that include economic incentives  
22 for shippers to locate lines served exclusively by

1 those railroads, on lines served by those railroads.

2           What else does this mean? Most  
3 fundamentally, it means that the proposed rules  
4 would afford shippers that made economic and  
5 strategic choices for single carrier service costless  
6 access to other class I carriers.

7           To give these findings some perspective, I  
8 looked at the number of carloads in the 2019 carload  
9 waybill sample potentially affected by the  
10 competitive access pathway under the proposed rule  
11 at the 10-, 15- and 30-mile distance thresholds from  
12 the nearest potential interchange.

13           I found that at each mileage interval,  
14 well over 90 percent of the stations never had  
15 access to multiple railroad service in the first  
16 place.

17           What does this show? It shows that it is  
18 very rare for existing stations to lose multiple  
19 service through mergers or otherwise and that new  
20 stations normally come online as single-served.

21           Last, I evaluated what I understand to be  
22 certain shipper comments suggesting that the

1 proposed rules will have little effect on operations  
2 because they will result in the shifting of switches  
3 from one location to another.

4 I understand the notion is that there is  
5 an interchange somewhere in the middle of the route  
6 now but there could instead be a switch closer to  
7 the point of origination or termination.

8 First, this idea works only for shipments  
9 that currently experience an interchange from one  
10 railroad to another. As the table shows, however,  
11 approximately 70 percent of the shipments  
12 potentially affected under the competitive access  
13 pathway do not currently require an interchange with  
14 another carrier.

15 What does this mean? It means there is no  
16 underlying switch to trade for. It means that these  
17 new switches will not be saving a switch somewhere  
18 else.

19 Next, I looked to see whether there are  
20 some existing local switching operations already in  
21 place near the origin and destination potentially  
22 affected by the proposed rule.

1           This table shows that the vast majority of  
2 the volumes potentially affected under the  
3 competitive access pathway are located beyond where  
4 local switching operations occur and would require  
5 new local switching operations be established.

6 Finally, what happens if you combine these two? The  
7 idea is to look at the proposition -- the proportion  
8 of potentially affected traffic that might meet the  
9 shipper view of requiring only a shifting of an  
10 existing interchange to some possible local  
11 operation.

12           My last table shows that only about 6  
13 percent of the potentially affected shipments are  
14 both currently interchanged and located proximate to  
15 where local switching currently occurs.

16           What does this mean? It means that the  
17 trade one switch for another theory is refuted by  
18 the data. It is potentially available only for a  
19 small fraction of traffic. So for the great  
20 majority of traffic, it really is true that new  
21 operations will be needed.

22           Thank you again for your time. I will now

1 turn it over to John Orszag.

2 CHAIRMAN OBERMAN: Michael, I have a  
3 couple of questions for you before you turn it over.

4 MR. BARANOWSKI: Yes, sir.

5 CHAIRMAN OBERMAN: I'm trying to  
6 understand. There's a statement I think in your  
7 written comments that you looked at 1500 potential  
8 places for interchanges; is that right?

9 MR. BARANOWSKI: Yes.

10 CHAIRMAN OBERMAN: So your tables there  
11 were based on measuring against those 1500  
12 locations?

13 MR. BARANOWSKI: All of the potential  
14 locations that would qualify under the proposed rule  
15 as I understand it.

16 CHAIRMAN OBERMAN: I take it you did not  
17 do an analysis of how much traffic would be eligible  
18 for switching if we were doing -- we limited it the  
19 way we've been discussing today to only to  
20 interchange or yards where reciprocal switching  
21 currently is subject to an existing reciprocal  
22 switching tariff. You didn't look at that, I take

1 it; right?

2 MR. BARANOWSKI: I did to the extent it  
3 can be done in the context of the level of  
4 granularity available in the STB carload waybill  
5 sample. And if we can go back to one of my tables,  
6 the second-to-last table, what that table shows is  
7 that around 80 percent of the shipments that are  
8 potentially affected under the competitive access  
9 pathway are outside the areas of where local  
10 switching or reciprocal switching could occur today.

11 And I say could again because of the lack  
12 of granularity in the waybill data. You can get  
13 what I would describe as a high-level sense of the  
14 magnitude by looking at the centralized station  
15 master, which has an indication at each individual  
16 station for those stations that are within the  
17 switching limits of another station.

18 So it's not a precise metric, but it gives  
19 you a general representation of where these kinds of  
20 things could occur.

21 CHAIRMAN OBERMAN: Could you go to your  
22 last table?



1 MR. BARANOWSKI: Sure.

2 CHAIRMAN OBERMAN: So I'm trying to  
3 understand the table. Are you saying that only 6.8  
4 percent of the carloads are within -- are near an  
5 existing interchange? What are you trying to tell  
6 us here?

7 MR. BARANOWSKI: These are the carloads  
8 that meet two criteria. One is they're within  
9 proximity of an existing interchange, and two, they  
10 already experience an interchange, they're already  
11 an interline shipment.

12 So this is the relative percentage of  
13 potentially affected traffic that would qualify for  
14 the -- for the shippers' categorization of the trade  
15 one switch for another theory.

16 CHAIRMAN OBERMAN: Well, if we were to  
17 proceed on the idea at least at the outset of  
18 permitting reciprocal switching, this is a question  
19 I've been asking all day, to take place in yards  
20 where reciprocal switching is already approved by  
21 the railroads, if we have those locations in their  
22 tariff. Because this chart doesn't really answer

1 that question of how much traffic would qualify.

2 MR. BARANOWSKI: I think the chart before  
3 that, again with no level of precision, but the  
4 chart before this one comes closer to that specific  
5 metric. These are -- and it's the reciprocal of  
6 this, no pun intended. But what this is saying is  
7 that between 78 and 82 percent of the potentially  
8 affected shipments under the competitive access  
9 prong are outside areas where the local switching  
10 occurs, meaning that 22 -- 18 to 22 percent would  
11 fall in as defined by the centralized station master  
12 areas where this kind of switching could be  
13 occurring.

14 CHAIRMAN OBERMAN: But it would be even a  
15 smaller number if you assume that not every place  
16 where there's an interchange now actually has  
17 reciprocal switching approved there, not a hundred  
18 percent of those places are subject to a tariff;  
19 right?

20 MR. BARANOWSKI: That's -- that's correct.

21 CHAIRMAN OBERMAN: So something under 23  
22 percent of carloads would be eligible for reciprocal

1 switching if we were to limit reciprocal switching  
2 to existing places where reciprocal switching has a  
3 tariff?

4 MR. BARANOWSKI: As a very, very, very  
5 rough estimate. Again, the real answer is in the  
6 details, and the waybill data and the centralized  
7 station master aren't sufficiently granular to get  
8 you to the detailed level to give you a precise  
9 number.

10 CHAIRMAN OBERMAN: I have one other  
11 question. You told us that there were 482 new  
12 single-served stations since the mergers took place?  
13 Is that what I understood that chart to mean?

14 MR. BARANOWSKI: Not -- these were  
15 stations that showed as reporting volumes in what I  
16 described as the postmerger period for which I used  
17 the 2015 to 2019 waybill data. So these are  
18 stations that showed up in the -- showed as  
19 reporting volumes in the 2015 to 2019 period that  
20 didn't report any shipments in the 1992 to 1996  
21 period.

22 CHAIRMAN OBERMAN: So those are stations

1 your inference is they didn't exist before 2015.

2 MR. BARANOWSKI: They weren't shipping any  
3 volumes, whether the station was physically there or  
4 not.

5 CHAIRMAN OBERMAN: And your prior chart to  
6 this one, which showed us how many fewer  
7 single-served stations there were, can you put that  
8 up again? Here's my question.

9 There's nothing in these charts to tell us  
10 whether there was a net increase in the number of  
11 single-served stations. In other words, there were  
12 480-some new ones, but you didn't tell us how many  
13 may have disappeared. So in the 2015 to 2019  
14 period, how many total single-served stations are  
15 there as compared to the prior period?

16 MR. BARANOWSKI: My recollection from the  
17 analysis is there are fewer in the 2015 to 2019  
18 data. I don't remember the number specifically, but  
19 that number is included in the work papers and the  
20 buildup of the relative traffic levels that we  
21 showed in this chart. So we can get you that  
22 number.

1           CHAIRMAN OBERMAN: Yes. But what I'm  
2 trying to figure out is this doesn't tell us that  
3 stations that were single-served in '92 to '96  
4 became dual-served. It just may mean there were  
5 fewer places shipping on rail; right?

6           MR. BARANOWSKI: It means that there were  
7 fewer traffic volumes moving from stations served by  
8 a single class I carrier.

9           CHAIRMAN OBERMAN: Right. But one of the  
10 reasons that may have happened is that places which  
11 had been shipping on a single-served carrier before  
12 stopped shipping altogether or went out of business  
13 or are only using trucks. I mean, we don't know the  
14 reason for the reduction.

15           MR. BARANOWSKI: We don't know -- I  
16 haven't looked to try and find the reason. It  
17 was -- this analysis, as I tried to explain, was  
18 more to just take a look at what's going on with  
19 single-served stations and volumes moving from  
20 single-served stations in the premerger and  
21 postmerger period, as I have defined them.

22           CHAIRMAN OBERMAN: Well, we can't really

1 draw an inference, can we, from this data alone that  
2 the mergers did not cause a reduction in  
3 single-served stations?

4 I mean, it seems to me the inference  
5 you're trying to get us to draw is that you can't  
6 blame the mergers for an increase in captive  
7 shippers. But some of these captive shippers may  
8 have just stopped shipping. That may account for  
9 the decrease. That's all; right? May have stopped  
10 shipping on rail?

11 MR. BARANOWSKI: That's possible. And  
12 you're right, there hasn't been a detailed study of  
13 competition and what might be underlying these  
14 numbers since the Christianson study.

15 CHAIRMAN OBERMAN: But just -- it's of  
16 limited use to understand the point of whether the  
17 mergers had anything to do with this, that's all I'm  
18 trying to get at. I find --

19 MR. BARANOWSKI: I think it's of some --  
20 it's not of zero use, but --

21 CHAIRMAN OBERMAN: Well, I wouldn't want  
22 you to say your own work was of zero use, but I find

1 it leaving me up in the air as to why there are  
2 fewer single-served stations, particularly because I  
3 have been getting an endless amount of anecdotal  
4 evidence of demarketing since I've been on the  
5 Board, a lot of such evidence.

6 And so I can't tell you that that's why  
7 there are fewer single-served stations. But it's an  
8 alternative explanation, that people have just  
9 stopped using rail.

10 MR. BARANOWSKI: Sure. But I would also  
11 again remember the second -- the slide after that  
12 one, which shows the number of new stations  
13 reporting in the postmerger period are  
14 overwhelmingly single-served.

15 CHAIRMAN OBERMAN: Yes. But in terms of  
16 the overall use of shipper -- use of rail by  
17 shippers, that's also of limited -- provides limited  
18 insight, that's all I'm saying. It doesn't really  
19 conclusively answer the question. It's just an  
20 interesting piece of data.

21 MR. BARANOWSKI: Sure, that's not unfair.  
22 And there's only so much that one can garner from

1 the waybill data itself.

2 CHAIRMAN OBERMAN: Yeah, I understand.  
3 Very helpful. Thank you very much. I don't know if  
4 anyone else has -- I don't know if any other board  
5 members had questions for you, Steven.

6 BOARD MEMBER FUCHS: It would also be fair  
7 to say just because of the limitation of the waybill  
8 data, you have difficulty identifying customers,  
9 right, and so you can't necessarily tease out any  
10 loss of geographic competition from the data. Or  
11 can you?

12 MR. BARANOWSKI: There is no customer  
13 visibility in the waybill data. You can do some  
14 high-level metrics related to geographic competition  
15 by looking at commodity flows.

16 BOARD MEMBER FUCHS: Thank you.

17 MR. BARANOWSKI: Sure. I thought I was  
18 handing things over to Mr. Orszag.

19 MR. HORWICH: Are you muted?

20 MR. ORSZAG: Sorry about that.

21 Is that working now? You can hear me?  
22 Okay, great. Thank you.



1                   How is that? Great.

2                   Thank you, and I want to thank the  
3 chairman and entire Board for having me here to talk  
4 to you about this important regulatory issue. And I  
5 just want to start with three key critical points.

6                   First, low prices cannot and should not be  
7 the sole goal of any regulatory approach. Such a  
8 goal could not serve the long-term interests of  
9 either shippers or the public. Any regulatory  
10 policy here must balance short-term lower prices  
11 while maintaining incentives to invest, which are  
12 crucial for the long-term availability and quality  
13 of the network, as well as longer-term lower prices.

14                   Second, mandatory switching is not going  
15 to enhance true natural competition. Indeed,  
16 competition under this regulatory approach will be  
17 faux or synthetic because it will not spark market  
18 forces.

19                   At most, it will give shippers more  
20 "options." But options and competition are not the  
21 same thing, and I'll explain more about how the  
22 policy will require continued and ongoing regulatory

1 intervention by the Board.

2 Third, if it were the case that  
3 competition today is failing and some shipping rates  
4 are too high and economically efficient, then the  
5 best policy response is the most direct one, direct  
6 rate regulation to curb excessive rates.

7 If I may, I'm going to go into a little  
8 bit more detail about each of these.

9 As a general economic matter, not all  
10 shipments can be priced at incremental costs. The  
11 costs -- the extra costs incurred from just adding  
12 that shipment. Some shipments, and this is  
13 important, some shipments must be priced above  
14 incremental costs.

15 And I heard this morning someone claim  
16 that differential pricing just isn't that important  
17 anymore. That perspective is inconsistent with  
18 sound economics.

19 Indeed, from an economic perspective,  
20 differential pricing, that some shippers pay more  
21 than others, is absolutely essential to ensure that  
22 the railroad can invest in infrastructure safety,

1 quality. It's also consistent with sound economics,  
2 that those who need rail more pay more for it, while  
3 the railway could still compete over those who need  
4 the railway less.

5 This ensures that the railroads earn a  
6 competitive rate of return. That is an amount that  
7 covers both their fixed and incremental costs.

8 Now, the concept of differential pricing  
9 and the fact that service must be charged above  
10 incremental costs is present in industry after  
11 industry.

12 Imagine, let's just say, a cell phone  
13 company were forced to price at a level that it  
14 couldn't cover its fixed cost investments. It  
15 wouldn't be able to buy new spectrum and build  
16 and/or lease new towers, with an obvious harm to  
17 consumers as services degrade over time. The can  
18 you hear me line would become even more prevalent in  
19 that situation.

20 Moving prices towards incremental costs  
21 here as the mandatory switching policy would do if  
22 implemented the way I understand proponents to

1 suggest creates a similar risk that railroads will  
2 not be able to earn a competitive rate of return and  
3 will lack the incentive and ability to make  
4 desirable investments to the detriment of shippers  
5 and consumers in the medium to long run.

6           The goal in any market should therefore be  
7 to have prices that are low enough for customers, in  
8 this case shippers, and high enough for firms,  
9 railroads here, to earn a competitive rate of  
10 return. In creating -- without creating any  
11 additional distortions to resource allocation.

12           Market forces typically balance these  
13 issues best. But when it fails and regulatory  
14 intervention is needed, it needs to still focus on  
15 these principles.

16           (6:00 p.m.)

17           It's also important to emphasize that just  
18 because there may be a single class I railroad on a  
19 route, that does not mean that that railroad owns a  
20 monopoly position.

21           Indeed, shippers often have other options,  
22 whether via truck or river or otherwise,

1 disciplining the prices of that railroad on that  
2 route.

3           To be clear, imposing mandatory switching  
4 policy on routes where competition exists today is  
5 extremely problematic from an economic perspective.  
6 It's a central principle of economics, and in the  
7 absence of a market failure, regulatory intervention  
8 will produce suboptimal outcomes and raise real  
9 risks of unintended consequences.

10           Now, even if there is a market failure,  
11 more than 20 years ago Joe Stiglitz and I wrote a  
12 paper, and for those of you that don't know Joe, Joe  
13 won the Nobel Prize in economics for his insights  
14 into market failures.

15           In that paper, we talked about how when  
16 there is a regulatory intervention, it's important  
17 that the benefits of the regulation exceed the  
18 costs.

19           That means here even if you thought a  
20 railroad had no competitive constraints at all on  
21 some route, you still need to consider if the  
22 railroad is abusing its position on that route

1 because you don't want the cure to be worse than the  
2 disease. And there might be no disease at all.

3 From an economic perspective, that is what  
4 best serves the public interest.

5 Now, to help illuminate why mandatory  
6 switching will produce synthetic and not real  
7 competition, one needs to consider the costs and  
8 implications of the policy.

9 To begin with, switching is complex.  
10 We've heard about that today. It has real costs,  
11 such as crew time, locomotive time, track time, fuel  
12 usage, as well as technical costs and planning  
13 costs. We've heard about that.

14 It has safety risks, the risks associated  
15 with switching are relatively greater than those  
16 associated with line-haul operations.

17 It is correct that we observe switches  
18 today. But the complexity and cost of switching  
19 under this new regulatory policy would be even  
20 greater since the switches would have to occur at  
21 locations they haven't happened at historically.

22 Now, this factor would be attenuated to

1 some degree, depending on if and how the Board  
2 limits the location of the switches as suggested by  
3 the chairman throughout today's discussion.

4           Given that, it wouldn't be surprising that  
5 a rail carrier forced to engage in switching might  
6 have views about the questions of where, how and how  
7 much compensation.

8           So the railroads will need to negotiate  
9 rates against a backdrop of a regulatory process  
10 that kicks in if the negotiations break down. And  
11 this is a very important fact.

12           In that scenario, economics shows that  
13 what governs these negotiations is the expected end  
14 result if the negotiations reach the regulatory  
15 phase. Any uncertainty over the outcome of this  
16 regulatory phase, which is heightened when it's  
17 considered on a case-by-case basis and increase when  
18 the issue is complex, such as mandatory switching,  
19 will translate into uncertainty during the  
20 negotiations. And again, as a matter of economics,  
21 if both sides have different predictions over the  
22 outcome, negotiations are more likely to break down,

1 which will lead to a dispute resolution process.

2 Thus, it hopefully is clear to you that  
3 the Board would likely have to step in, creating an  
4 ongoing regulatory rule.

5 Indeed, the rule does not "create"  
6 competition since the regulatory needs to stay  
7 involved in the process. That means there's not  
8 true market or competitive forces at play, nothing  
9 that could survive in, say, the wild without the  
10 Board's continued intervention.

11 That increases the role that you will have  
12 to play even beyond the occasional need to engage in  
13 rate setting. It therefore may actually be a real  
14 step backwards by sidelining true competitive  
15 forces.

16 But here there's a better policy approach.  
17 There should be a direct remedy for extreme pricing  
18 on routes involving a bottleneck. That would  
19 achieve a worthwhile policy goal but in a far more  
20 direct and transparent way, without the  
21 inefficiencies of switching and without many of the  
22 complexities and indirect costs of introducing a



1 whole new policy regime.

2           So if I can just show a slide quickly,  
3 this is a comparison that you need to keep in mind,  
4 and I'm showing it using the usual diagram here.

5           First, as I said a few minutes ago, low  
6 prices cannot be the only goal because prices that  
7 are too low may discourage investment.

8           Second, maximum rate regulation allows  
9 recovery of all economic costs, the costs of the  
10 switch move and both the incremental costs and a  
11 share of the fixed costs on the B-C segment here.

12           Now, you can debate the right methods and  
13 procedures for doing this, but from an economic  
14 perspective, it strikes the right balance.

15           Third, the problem under the proposed rule  
16 is that you might recover enough on the A-B move,  
17 but that leaves the red piece, fixed costs on B-C,  
18 in jeopardy.

19           And to be clear, mandatory switching has  
20 other costs too that direct pricing regulation does  
21 not, environmental costs, network distortion issues  
22 which could reduce quality and efficiency. And we

1 cannot forget that railroads are a network industry.  
2 And that means changes in one part of a network have  
3 effects on other parts of the network.

4           Mandatory switching would also create  
5 uncertainty regarding returns to investment, and the  
6 economics literature shows that uncertainty  
7 depresses the types of irreversible investments made  
8 by the railroad industry.

9           Finally, the basic problem here, which is  
10 unavoidable with a rule, that artificially separates  
11 part of a route, is when you focus on just one part,  
12 that's the A-B part, you may lose sight of the other  
13 part, the B-C part.

14           So that's a very important consideration  
15 here in looking at this issue.

16           In conclusion, mandatory switching is an  
17 inferior policy along all of these dimensions, in my  
18 opinion, compared to direct rate regulations in the  
19 rail industry.

20           With that, I will either take your  
21 questions or pass it to Mark, depending upon if you  
22 have questions.

1                   CHAIRMAN OBERMAN: Jonathan, I have one  
2 question. Your focus was entirely on reciprocal  
3 switching's impact on rates. There's been a lot of  
4 discussion today as motivation for people to seek it  
5 for bad service.

6                   So do you have a different conclusion if  
7 that's what -- the wrong that's attempting to be  
8 corrected here?

9                   MR. ORSZAG: No, I -- and Chairman, I  
10 appreciate the question and the opportunity to  
11 discuss that issue. It is absolutely correct to  
12 consider competition can have an effect on price or  
13 quality. Now, service will be reflected in cost, so  
14 to the extent that the railroads are earning  
15 supracompetitive rate of return, that is prices are  
16 significantly above costs, accounting for each of  
17 the pieces as necessary, if you are degrading the  
18 quality of the service, that could be reflected in a  
19 lower-cost structure and then the gap between the  
20 price and the costs would reflect some weakening of  
21 competition or a problem with competition that would  
22 be appropriate for you to consider as part of a

1 regulatory intervention.

2 CHAIRMAN OBERMAN: What would that  
3 intervention be if it doesn't involve setting a  
4 rate?

5 MR. ORSZAG: Well, you're setting rates  
6 relative to costs. Costs are going to reflect the  
7 quality of the service, because generally speaking,  
8 the more money you spend, the higher the quality of  
9 the service. And so you are --

10 CHAIRMAN OBERMAN: I'm not anticipating a  
11 shipper coming in and saying I'm filing a petition  
12 with us saying we're getting bad service, please  
13 order the railroad to raise my rates.

14 MR. ORSZAG: No. But in some sense, just  
15 as there's a trade-off between -- there's a  
16 trade-off between price and quality. So if you're  
17 getting a -- what we care about from a competition  
18 perspective is the gap here.

19 And so if you are getting a price  
20 commensurate with the service that you are paying if  
21 that were in fact shown to be correct, and that's an  
22 important element, then it would make sense that

1 you're adjusting the price to reflect the quality of  
2 the service that's being offered.

3 CHAIRMAN OBERMAN: I understand. But what  
4 would the regulatory intervention be for the poor  
5 service under those circumstances?

6 MR. HORWICH: I might -- oh, sorry.

7 MR. ORSZAG: I was just going to say a  
8 price that's commensurate with it would be -- but  
9 you'd have to first show that it's due to  
10 competition because if it's not due to competition,  
11 for the reasons that I have already articulated, you  
12 would be intervening in a market, and that  
13 potential -- in a way that would actually be -- have  
14 unintended consequences.

15 Because to the extent that the market is  
16 functioning properly and just for whatever reason  
17 the shipper is unhappy about the service, then  
18 that's not -- it's not due to competition, it's just  
19 due to exogenous factors.

20 MR. HORWICH: I would -- Mr. Chairman --

21 CHAIRMAN OBERMAN: I'm at a loss here. I  
22 thought I understood you to say that if there was a

1 service problem, that would warrant regulatory  
2 intervention. And I was just --

3 MR. ORSZAG: No, I said that if -- let's  
4 just back up.

5 If you first -- there has to be a problem  
6 due to -- the first principle has to be there has to  
7 be a competition issue, because if the market is  
8 functioning, then intervening into functioning  
9 markets has significant unintended consequences.

10 CHAIRMAN OBERMAN: When you say -- you've  
11 lost me -- if the market is functioning, what do you  
12 mean? You're assuming the conclusion.

13 This whole exercise is presumably in  
14 places where there are captive shippers.

15 MR. ORSZAG: Let's -- we have to parse  
16 this, sir, because to the extent -- you see a lot --  
17 there is a lot of industries in which are highly  
18 competitive that somebody may complain about  
19 service. So you can't -- just because there is a  
20 complaint about the quality of service, that does  
21 not tell you that there is a competition issue.

22 And so to intervene --

1                   CHAIRMAN OBERMAN: Wait, wait. When you  
2 say "competition issue," you mean lack of  
3 competition?

4                   MR. ORSZAG: Precisely.

5                   CHAIRMAN OBERMAN: I just wanted to get  
6 the terminology straight.

7                   So you're saying if there is a problem  
8 with service but it's not because of a lack of  
9 competition, we should do nothing?

10                  MR. HORWICH: Might I try to answer,  
11 Mr. Chairman?

12                  CHAIRMAN OBERMAN: Sure.

13                  MR. HORWICH: I think it's going to have  
14 to be sensitive to the actual dynamic in the facts  
15 of that case.

16                  So, for example, we certainly don't  
17 disagree that you can imagine a service problem that  
18 might be resolved by switching, right, that could be  
19 caused by an abuse of market power and then could be  
20 caused -- and then could be resolved by switching.  
21 And we could come up with a hypothetical for that.

22                  But what I'm hearing is the point that not

1 all service problems are going to trace to a  
2 competition problem as opposed to some other  
3 factors, which I mentioned before, but also that in  
4 not all instances is providing the switching  
5 actually going to solve whatever the problem is,  
6 right. So --

7 CHAIRMAN OBERMAN: Where I'm having --  
8 Patrick, let me just finish this then.

9 You know, I feel like we're going around  
10 in circles here. There's been a lot of discussion  
11 today about shippers who are suffering from  
12 inadequate service and a lot of questions about  
13 whether for that shipper to get relief, they have to  
14 prove some kind of anticompetitive impact under  
15 Midtec or some "wrong" of some kind that the  
16 railroad is engaging in.

17 But we have a number of rules, and I think  
18 the statutes are there to enable us to make sure  
19 that shippers who are getting bad service get some  
20 relief under the appropriate circumstances. And I  
21 thought I heard Mr. Orszag say after telling us that  
22 we shouldn't do reciprocal switching just to affect



1 rates, that if there were service problems, it would  
2 warrant regulatory intervention.

3 MR. ORSZAG: If I may, if there is --

4 CHAIRMAN OBERMAN: And you're saying but  
5 if that -- if the service problem isn't caused by a  
6 person being monopolistic or abusing their power,  
7 then we shouldn't intervene, we should just let the  
8 bad service continue. Is that your position? I'm  
9 just trying to understand.

10 MR. ORSZAG: From an economic perspective,  
11 and again I can only speak as an economist here,  
12 from an economic perspective, in well-functioning  
13 markets, there can be service problems. So let's  
14 just start there.

15 But to the extent there is no market  
16 failure, government intervention is more likely to  
17 create more harms than benefits.

18 MR. HORWICH: Could I try to give a  
19 concrete --

20 CHAIRMAN OBERMAN: Here's my problem and  
21 then I'll move over to Patrick.

22 This is not purely a question of

1 economics. I think there's a misapprehension on the  
2 part of most of the rail interests I've heard from  
3 today.

4 We exist to make sure that we have a  
5 healthy network that serves the best national  
6 interest and our economy. So it isn't a pure  
7 question of picking up my old Samuelson book and  
8 deciding whether I should intervene if a shipper is  
9 having terrible service problems.

10 We have an obligation when we can, when  
11 there's a solution, to improve the levels of  
12 service, to make sure shippers get service so the  
13 economy thrives.

14 So I don't see how this question can be  
15 answered purely by an economist, with all due  
16 respect. It's not unimportant, but, you know, if  
17 it's not -- you're saying if it's not a monopoly  
18 problem, it's not an economist problem, so you're  
19 leaving me at a loss. Am I supposed to go home, or  
20 am I supposed to deal with this shipper's legitimate  
21 service problems?

22 Suppose they're only caused by what we see

1 here, and that is a lot of railroads choosing to lay  
2 off thousands of workers years ago and now they  
3 don't have enough workers, whether they're  
4 monopolists or not, that's what they chose to do.  
5 We're powerless to try to provide that shipper with  
6 a different railroad who can perhaps provide better  
7 service?

8 MR. ORSZAG: Here I think history should  
9 help guide us. There is a long history of evidence  
10 that shows that in balancing the short-term  
11 interests of lower prices and higher quality with  
12 the longer-term interests of investments, incentives  
13 to invest, which in the long run matter to quality  
14 and long run matter to prices, that market forces  
15 are the best approach to balance those interests.

16 CHAIRMAN OBERMAN: I can tell you I'm  
17 still waiting to see increased investments to solve  
18 some of these service problems. It's been a long  
19 time since some of these -- many of these service  
20 problems have come into existence. And I'm still  
21 waiting to see the increased investment.

22 In fact, what I see is the opposite. But,

1 you know, I think we're beating a dead horse here.

2 Patrick had some questions he wanted to  
3 ask.

4 BOARD MEMBER FUCHS: Well, I think I just  
5 want to get clarity from Mr. Orszag.

6 You're not suggesting that if the Board  
7 were to find a shipper is getting inadequate service  
8 relative to somebody who -- a shipper that doesn't  
9 have good competitive options relative to somebody  
10 that has better competitive options and the Board  
11 were to find that that person is getting adequate  
12 service, are you suggesting that the railroad should  
13 have the opportunity to go back and price that  
14 person higher once competition is ordered compared  
15 to what they were pricing when they're providing  
16 inadequate service?

17 MR. ORSZAG: No, I don't think so, as I  
18 understand your question.

19 BOARD MEMBER FUCHS: Right.

20 MR. ORSZAG: The point is that there has  
21 to be differential pricing, because there's some  
22 people who have lower prices than others. That's a

1 necessary element of putting together a network with  
2 different elements of different shippers, et cetera.  
3 That is a necessary component here.

4 And there will be some who are charged  
5 more and some who are charged less.

6 What we should be concerned about is for  
7 those shippers who don't have choice, choice being  
8 either another railroad or another form of shipping  
9 that's truck, river or otherwise, for those, if the  
10 price that they are paying is excessive, then -- and  
11 there is a supracompetitive profit that is being  
12 earned, those would be ripe for consideration for a  
13 regulatory intervention.

14 BOARD MEMBER FUCHS: Right. Now, what  
15 about the rationing or decreasing quality of  
16 service? How should we be thinking about the rate  
17 in that context? Whereas if you just looked at the  
18 top line rate, you wouldn't -- it wouldn't  
19 necessarily, for example, be found unreasonable  
20 under the Board's rate reasonableness, but under a  
21 service lens, we find the service to be  
22 unreasonable.

1           You know, how should the Board be thinking  
2 about the rate in that instance where competition is  
3 ordered in to deal with the service but the rate was  
4 lower than what the railroad would charge in a --  
5 with more pricing power because they chose to ration  
6 service as opposed to increase rates as high as they  
7 could perhaps?

8           MR. ORSZAG: But it's going to be price --  
9 I mean, in thinking about whether those prices are  
10 excessive, it's relative to a cost. And if they're  
11 ratcheting down the service, that's reducing their  
12 costs and that makes the gap relatively larger so  
13 they're earning now a larger profit on those  
14 customers relative to other customers.

15           And so it's all being reflected in that  
16 analysis of price versus costs.

17           BOARD MEMBER FUCHS: Right. And I think  
18 where I'm kind of going with this is, you know, I  
19 think Mr. Horwich and Mr. Rosenthal have talked  
20 about, well, it's inadequate service coming out of  
21 market power, right, and that's what Midtec -- you  
22 look for in Midtec. So you can't just look at

1 inadequate service, you can't just look at  
2 inadequate service relative to what the shipper had  
3 before. You've got to sort of make a judgment  
4 versus other shippers that are competitively  
5 situated compared to the person who might not have  
6 as good a competitive option, whether or not they're  
7 market-dominant under Midtec.

8           So that was sort of how they articulated  
9 it. But I think what you're touching on is another  
10 even layer of complexity to that, which is not only  
11 do you have to compare the service of the shipper  
12 that's not in as good of a competitive situation to  
13 the ones that are, you also have to adjust it for  
14 the rates. And Midtec has some language along those  
15 lines, and Midtec was hit by the ICC for not  
16 providing that evidence.

17           So now stepping to another layer of  
18 complexity, how does the Board go about not only  
19 comparing service between shippers but comparing  
20 rate-adjusted service?

21           MR. ORSZAG: So there are -- I mean,  
22 beyond the scope of probably just talking about this

1 today, because it will take some time, but there's a  
2 variety of tools economists have used to what I'll  
3 say quality-adjust prices.

4 And so you can use those sorts of tools.  
5 But one thing I want to emphasize again, in thinking  
6 about comparing one shipper to another, we can't  
7 lose sight of the fact that -- I can't emphasize  
8 this enough given the nature of the business, there  
9 has to be some in which there's differential pricing  
10 and that you're keeping in your mind covering, say,  
11 in the diagram I used, the fixed costs of B-C.

12 Because if one just says okay, the shipper  
13 should be identical or they should be comparable,  
14 you may lose sight that somebody has to cover that  
15 fixed cost of B-C in these examples.

16 So I just -- I know that's not precisely  
17 the question you asked, but I wanted to rehighlight  
18 that because in thinking about these comparisons,  
19 you do have to cover the joint and common costs of  
20 the railroad.

21 BOARD MEMBER FUCHS: Right. I do wonder  
22 whether or not -- I mean, if you just look at -- you



1 know, I think BNSF submitted that our rate case  
2 process is already very complex, and our current  
3 most simplified methodology, 3B, basically you  
4 establish a comparison group over 180 and you adjust  
5 for the revenue shortfall allocation method to try  
6 and figure out what the railroads need for their  
7 enterprise.

8 That's already seen and BNSF conceded that  
9 that was too complex.

10 I wonder whether or not when you're  
11 talking about something like rate-adjusted service  
12 comparison groups, that strikes me as it could be  
13 seen as even more complex than 3B. And I do wonder  
14 whether or not the compensation portion of the  
15 statute was meant to kind of include all of those  
16 very complex factors or whether or not we're  
17 starting to approach something that I think BNSF  
18 stated they weren't necessarily looking for was a  
19 bar that was too hard for a shipper to meet. And is  
20 it really realistic. Especially small shippers.  
21 Think about the small shippers, whether or not they  
22 can come in with quality-adjusted service

1 comparisons.

2 MR. ORSZAG: I'll make two observations if  
3 I may.

4 Number one, I haven't analyzed the statute  
5 and your rate regulations relative to this. But I  
6 think one thing that's critical here, and I think  
7 it's one of -- in the reciprocal switching policy  
8 that you have, you're going to have to go through  
9 all of that plus the work on figuring out where the  
10 switch occurs, et cetera, et cetera, and all of the  
11 issues that arise from that process.

12 And to the extent that there is a problem  
13 on the bottleneck and there's a problem with pricing  
14 on a particular route, it's much more efficient to  
15 just regulate that price and not go through all of  
16 the costs associated with the mandatory switching  
17 policy.

18 From an economic perspective, you're going  
19 to have to do both plus, and you might as well do a  
20 simpler version.

21 BOARD MEMBER FUCHS: You do a simpler  
22 version, but then one of the things that's always

1 struck me about rate regulation is you can regulate  
2 rates, but then the railroad can ration service. So  
3 what do you do in that situation then? So you're  
4 back to the service problem.

5 MR. HORWICH: Can I make an observation  
6 about some of the evolution in the rate proceedings,  
7 which I think maybe applies here too, is that we're  
8 very supportive of finding ways that are kind of  
9 consistent with the economics that Mr. Orszag is  
10 talking about but which sort of streamline things  
11 like the order of proof or what have you; right?

12 So I -- forgive me for not having a  
13 solution at hand immediately to propose for that.  
14 But some of these issues about if you have this  
15 feeling that like the problem is over here and then  
16 the problem was over there, you'd have to ask  
17 questions of could you address that with like burden  
18 shifting; right? Somebody has to show X, then  
19 somebody else can show Y. Who has better access to  
20 proof on this or that.

21 Those are kind of things that the Board  
22 has already I think thought about in constructing

1 existing rate cases, has thought about it in some of  
2 the more recent evolutions.

3           And look, like there may be debates about  
4 whether certain things are consistent with the  
5 statute or actually get to the economic reality.  
6 But this is the sort of thing that courts have to  
7 deal with too, right, as they try to structure proof  
8 in a way that sort of gets to the truth but in a  
9 sensible fashion that doesn't overload one side or  
10 the other.

11           And I think the Board has some latitude in  
12 thinking creatively about those, and it's the kind  
13 of thing the parties should talk about.

14           BOARD MEMBER FUCHS: Right. I think  
15 that's a very good point. And not to get on a  
16 soapbox a little bit about it, but it is of  
17 course -- it's the very shippers that have the least  
18 ability to negotiate across geography and it's the  
19 very shippers that have the least ability to pay for  
20 lawyers to mount a complex case, those are the  
21 shippers that, could be argued, are the most  
22 vulnerable situation from a competitive standpoint.

1           So I think it's always important as we're  
2     discussing this and as we're thinking about rulings,  
3     there is the economically perfect solution, which is  
4     extraordinarily important to inform our actions, but  
5     we also have to take into account administrative  
6     complexity.

7           CHAIRMAN OBERMAN:   Where are we?

8           Ben, do you have --

9           MR. ORSZAG:   It's now Mark's turn.

10          VICE CHAIR SCHULTZ:   Just a quick question  
11     for Mr. Orszag before we move on.

12          You mentioned that changes in one part of  
13     the network have an impact on other parts of the  
14     network.  I wonder if you could perhaps elaborate on  
15     that or give an example.

16          MR. ORSZAG:   Well, whenever you're  
17     operating a network, and this is -- you see this in  
18     all network industries, whether it's an airline,  
19     whether it's a railroad, whatever it may be.  And  
20     this has been well studied in economics and perhaps  
21     some of the railroads specifically can address this.

22          When you make changes, say a train is late

1 in one part of the network, that has effects on  
2 other parts. And the most tangible thing for  
3 probably everybody is we've experienced that  
4 would -- airplanes, if a flight comes in late from  
5 point A to B and it affects the B to C leg of the  
6 airline.

7 So to the extent, and we heard a little  
8 bit about this, the potential delays that are  
9 associated with a switch, that may have an effect  
10 then on what happens next.

11 And so my point there is you can't ignore  
12 in any discussion of costs that we're operating a  
13 network and in a network, one part of it has an  
14 effect on another part.

15 VICE CHAIR SCHULTZ: Thank you.

16 MR. FAGAN: Well, good evening, everyone.  
17 My name is Mark Fagan, I'm on the faculty at Harvard  
18 University's Kennedy School of Government. I thank  
19 the Board for the opportunity to share my concerns  
20 about the proposed rule, which I believe introduce  
21 significant risks to railroad operations and the  
22 supply chains they participate in.

1 I also believe that a clearer definition  
2 of the problem is required to ensure that forced  
3 switching is, in fact, the best solution to be  
4 pursued.

5 My written testimony details concerns  
6 about the proposed rules increase in service  
7 failures by adding a handoff, in particular at a  
8 place not designed for it, and thus failures can  
9 have knock-on effects which will negatively impact  
10 shippers and consumers.

11 And to the point that was just raised by  
12 the member and Mr. Orszag's response, I'll elaborate  
13 a little bit more on the network effects that I'm  
14 concerned about.

15 Every node or link introduces risk. And  
16 as an example to have seen that in the context of  
17 the switching proposed regulation here, I can point  
18 you to this exhibit. This was submitted previously  
19 in this proceeding, and you can see even in a  
20 relatively simple switch, you've got 10 steps in  
21 order to achieve the objective.

22 A more complex example on the next slide

1 shows more than 20 steps in order to achieve a  
2 successful switch.

3           If I can use a track-and-field analogy for  
4 you, the proposed rule in essence turns a single  
5 runner 880-meter race into a relay race with all its  
6 challenges.

7           The image you're seeing here is from the  
8 2008 Olympics, where you can see the baton being  
9 dropped, which lost the race. Baton handoffs and  
10 railroad switches take time, effort and training.  
11 Expecting a perfect handoff at facilities not  
12 designed for that purpose creates undue risk of  
13 service failures.

14           We can actually estimate or quantify the  
15 magnitude of those risks using the concept of role  
16 through put yield. For example, if we have a  
17 process that only has five steps and each individual  
18 step operates at 95 percent, the full system will  
19 only be operating at about 78 percent.

20           You can see here, therefore, the impacts  
21 of adding steps, adding complexity can have at a  
22 system level a significant concern.



1           Recent events from the grounding of the  
2 Ever Given containership in the Suez to the computer  
3 chips failure or shortage that we're seeing right  
4 now demonstrates to us that even small disturbances  
5 or poor forecasts in a supply chain can cause  
6 significant impacts throughout the entire supply  
7 chain.

8           I want to use the Ever Given as an  
9 example. So the Ever Given was operating in the  
10 global supply chain. The global supply chain  
11 consists literally of thousands of ships, tens of  
12 thousands of miles, hundreds of ports, et cetera.

13           You can see in this image that blocking  
14 just one quarter of a mile of a segment in that  
15 supply chain froze an estimated \$42 billion of  
16 commerce for a week.

17           Now, while it only took four days for the  
18 waiting ships to pass the canal, it took more than a  
19 month for the global supply chain to restabilize.

20           The stylized image I'm showing here shows  
21 the impact and the knock-on effects of the Ever  
22 Given. As I mentioned, there were, as a result of

1 the blockage, about 450 ships which needed to pass  
2 through the Suez. Typically, they move 50 ships a  
3 day, but they were able to move the 400-plus ships  
4 and clear them out in four days.

5 So if you're sitting in this supply chain  
6 and you're just the Suez Canal Authority, you're  
7 done, this is great, I've resolved the problem.

8 But you aren't just the Suez. You are  
9 part of a broader supply chain.

10 And so what I'm showing you in the other  
11 line is the impact on Rotterdam. Rotterdam was the  
12 next port of call for the Ever Given as it transited  
13 the Suez.

14 Here you can see two impacts as a result  
15 of the Ever Given. First, you see for a week the  
16 nine ships a day that should have been coming to  
17 Rotterdam, they have the capacity to handle and are  
18 planning on handling, don't show up. So we have  
19 idle resources.

20 Then you see the spike of ships that  
21 emerge waiting at Rotterdam now because Rotterdam  
22 can only handle nine a day.

1                   Now, I'm only showing you one initial  
2 knock-on. From there, the Ever Given was headed to  
3 Felixstowe. And then there's another port of call  
4 and another.

5                   So I'm hoping this illustrates for you  
6 that a small impact in one portion of a large  
7 network can have a sizable effect.

8                   The analog for us in the railroad side is  
9 if I have a supply chain problem in one terminal, it  
10 can easily migrate and permeate through not only the  
11 specific railroad where it happens but the rail  
12 network and then beyond to the broader supply chain.

13                   The rule as it's proposed is also  
14 inconsistent with the operation of effective supply  
15 chains. Successful supply chains are those where we  
16 decrease complexity, not increase it by adding a  
17 forced switch.

18                   Success also requires accurate and  
19 desirably stable forecasts. The proposed rule makes  
20 forecasting more difficult and increases the safety  
21 stock, whether that's crews, rolling stock,  
22 terminal, line of road capacity necessary in order

1 to ensure that if a larger number of cars are  
2 tendered and require shipping, that they can be  
3 accommodated.

4 And finally, and perhaps the most  
5 important, successful supply chains require  
6 extensive collaboration.

7 This is unlikely as it is both time  
8 sensitive, it's predicated on trust and often  
9 requires aligned interests. I have a hard time  
10 seeing that in this case.

11 A second thrust of my testimony addresses  
12 the lack of a clear problem definition where  
13 reciprocal switching is intended to solve.

14 Without a very clear articulation of what  
15 is the problem we're solving, it's very hard to know  
16 whether this intervention or another is the best way  
17 to solve the problem.

18 Now, you may argue that the case-by-case  
19 method helps address that, and it does have some  
20 advantages. However, one still needs to understand  
21 the macro level impact of benefits of costs across  
22 the entire rail network and its associated supply

1 chains.

2           There are, as has been mentioned by  
3 several speakers today, a number of potential  
4 solutions beyond the mandated switching. If it's a  
5 service issues, there are Board existing authorities  
6 to remedy that. We've talked quite a bit about rate  
7 reasonableness, also to address if the rates are the  
8 issue.

9           In closing, I'd like to observe that a  
10 private wealth transfer from railroads to shippers  
11 does not a priori create public value. We create  
12 public value as a result of the regulatory action.  
13 We see sustainable, long-term cost reductions that  
14 can be passed on to consumers as a result of  
15 productivity gains, improvements in service, modal  
16 diversion and the like.

17           In the description that we've seen about  
18 forced service, excuse me, forced switching, it is  
19 very hard to see those sustained improvements taking  
20 place.

21           In a analog, Australia a number of years  
22 ago moved to an open access regime. Now, there is

1 an important difference, which is in their case,  
2 they are opening access above rail or below rail,  
3 and it's allowing multiple competitors above rail.

4 And we did, in fact, see a wealth transfer  
5 from the mining companies -- excuse me, from the  
6 railroads to the much more profitable mining  
7 companies.

8 But what we didn't see was we didn't see  
9 improvements that were sustained in terms of  
10 efficiencies, new services and the like.

11 So with that, I thank you for your  
12 attention. Seeing the practice so far, I'm happy to  
13 answer questions now or if you'd prefer, we can turn  
14 to Debra Aron and share her perspectives.

15 CHAIRMAN OBERMAN: Mr. Fagan, I have a  
16 couple of questions. Could you put that chart back  
17 up on the number of moves which you shared?

18 MR. FAGAN: Yes.

19 CHAIRMAN OBERMAN: So how many moves are  
20 required here?

21 MR. FAGAN: So this is a 10-step process  
22 in this particular example to handle a switch.

1                   CHAIRMAN OBERMAN:  Were you listening to  
2 the UP presentation today?

3                   MR. FAGAN:  I was.

4                   CHAIRMAN OBERMAN:  Did you hear the UP  
5 operations people say that to move a car into an  
6 existing yard that's going to be reciprocally  
7 switched requires one more move, and that is to put  
8 it on the track that's going to go over to the other  
9 yard?  Were you listening?

10                  MR. FAGAN:  I was.  And what I think --

11                  CHAIRMAN OBERMAN:  That's the only  
12 question I have, is whether you were listening.

13                  MR. FAGAN:  Yes, sir.

14                  CHAIRMAN OBERMAN:  You didn't hear him say  
15 it would take 10 moves, did you?

16                  MR. FAGAN:  I didn't hear him say it would  
17 take 10 moves, and I'm not suggesting that the  
18 number of moves he was referring to is comparable to  
19 what I'm referring to.

20                  I'm referring to the individual actions or  
21 steps that are required in order for this change to  
22 take place.  And the reason I'm highlighting it is

1 every one of those has the potential for a failure.  
2 And what I'm concerned about is creating increased  
3 failures in a system that is integrated so that we  
4 are able to provide the service level that the  
5 shippers anticipate getting.

6 CHAIRMAN OBERMAN: But if there are nine  
7 more moves on your chart than are actually made,  
8 there are nine fewer times for a failure. Would you  
9 agree?

10 MR. FAGAN: No, because what we are  
11 talking unfortunately about apples and oranges, and  
12 perhaps we can define the nomenclature a little bit  
13 more carefully.

14 I'm referring to the actual individual  
15 activities that need to take place, and so you can  
16 see number one is a yard switch move to move the  
17 empty car to an interchange train at yard C.

18 You can walk down each of these.

19 What he was referring to I think is an  
20 aggregate of getting the car from the initiating  
21 origin location and handing it to the railroad that  
22 will take it on from there.



1                   CHAIRMAN OBERMAN: He was -- well, you  
2 know, it's late, I'm not going to go back over, we  
3 all heard what he said.

4                   I did not have the time getting ready for  
5 this to read your resume. Do you come to this  
6 testimony as a person experienced in railroad  
7 operations?

8                   MR. FAGAN: I come to this person --  
9 excuse me, to this testimony with a variety of  
10 expertises.

11                   I have worked for a number of years  
12 consulting to railroads, and in that capacity have  
13 had the opportunity to understand how switches do  
14 take place.

15                   I would not proffer myself as an expert in  
16 the order of the gentleman, Mr. Gehringer from Union  
17 Pacific, and certainly we could turn our questions  
18 back to him to make sure that our nomenclature  
19 aligns or if I am mistaking or misspeaking, that he  
20 could correct it.

21                   But yes, I do have a basic understanding.

22                   CHAIRMAN OBERMAN: Well, I understand.

1 But you're coming here and explaining to us what you  
2 say is involved with a switch as somebody who has  
3 had a railroad operations person explain it to you.  
4 You're not an operations person yourself. Would  
5 that be fair?

6 MR. FAGAN: That is a true statement. The  
7 point of my -- may I, with your indulgence, may I  
8 finish my statement?

9 What I'm here to do is to explain that the  
10 addition of this switch increases the risk in the  
11 supply chain, and that risk in the supply chain has  
12 to be accounted for in thinking about whether the  
13 switch -- the mandatory switching is the best  
14 solution to the problem that you face.

15 CHAIRMAN OBERMAN: Well, with all due  
16 respect, I don't think we've learned much by saying  
17 how the Suez Canal was blocked up by the Evergreen.  
18 It really doesn't enlighten us very much, but I  
19 appreciate your time being with us.

20 Does anybody else have any questions for  
21 Mr. Fagan?

22 All right. Let's go ahead.

1 MS. ARON: I think that's me then. I'm  
2 Debra Aron. Hello, members of the Board, and thank  
3 you for the opportunity to speak to you today.

4 I'm very aware that today's hearing is not  
5 about telecommunications and that I am a  
6 telecommunications expert, not a freight rail  
7 expert. But I do have years of experience with  
8 forced sharing requirements in the telecom industry,  
9 and I've been asked to provide that perspective as  
10 one that may be useful to the Board in evaluating  
11 the potential unintended effects of requiring forced  
12 switching in rail.

13 The telecom act of 1996 was passed with  
14 the good intentions of reducing prices, increasing  
15 quality and encouraging innovation. The forced  
16 sharing aspect of the telecom act was intended to  
17 create competition where competition was purportedly  
18 impeded by monopoly bottlenecks.

19 It even built in rewards to incumbents by  
20 allowing them to enter new markets if they  
21 cooperated with the sharing obligations.

22 But the envisioned competition is not what

1     came to pass. Instead, the telecom industry in the  
2     U.S. underwent a gruelling decade of regulatory  
3     morass, legal disputes and wasted resources.

4             To set the stage, here's a schematic of  
5     the wire line telephone network. Wire line  
6     telephone service is provided over a physical  
7     transmission path from a hub to a home or a  
8     business, and that physical transmission path is  
9     called in the telecom world the local loop.

10            The local loop is dedicated only for use  
11    by the home or business to which it connects.

12            The hub is the local switching center  
13    where the call is routed in a process in telecom  
14    called switching over long-haul or short-haul  
15    facilities to the switching center serving its final  
16    destination.

17            From there the call is delivered to the  
18    recipient's home or business over the dedicated  
19    transmission path or the local loop at the other  
20    end.

21            Multiple carriers have networks that may  
22    be able to transport traffic from point A to point

1 B, but at the time of the telecom act, all homes and  
2 offices in a local area were connected to the  
3 telephone network via dedicated transmission paths  
4 provided by only one company.

5 The components of the network that were  
6 largely at issue in the forced sharing regime under  
7 the telecom act were the local loop and switching,  
8 which are circled in red on my graphic.

9 So that's to set the context. The  
10 telephone network and the freight rail network  
11 obviously carry very different kinds of traffic.  
12 But both are network industries, both have high  
13 fixed costs that require long-term investment, both  
14 have a long regulatory history that has affected  
15 pricing, both have significant shared and common  
16 costs, and both have a federal regulator that would  
17 have to enforce and live with its policies.

18 Indeed, you might think that sharing would  
19 be easier when the task being shipped is just data  
20 over telecom wires and not physical products over  
21 rails or roads. But it was not easy or successful.

22 So I offer this history to educate those

1 who know that history doesn't repeat itself but it  
2 often rhymes.

3           So to implement forced sharing of network  
4 components, the FCC first had to determine which  
5 network components incumbents were required to share  
6 with their competitors and where.

7           The FCC also had to determine what pricing  
8 methodology would govern the prices for the forced  
9 sharing arrangements.

10           A very brief sketch of the ensuing  
11 struggles provides an image of how costly, lengthy  
12 and ultimately futile this process was in the  
13 telecom industry.

14           The FCC first issued a 700-plus-page order  
15 with its rules on, one, which elements have to be  
16 shared and when and, two, how to set prices. The  
17 FCC required that if a network element could be  
18 shared, it had to be shared on the premise that the  
19 broadest standard would do the most to promote  
20 competition.

21           The incumbents responded by taking the FCC  
22 to court, focusing on the FCC's failure to properly

1 limit the sharing obligations. When this litigation  
2 reached the Supreme Court a few years later, the  
3 Court rejected the FCC's sharing rules and  
4 instructed the FCC to go back and try it again.

5 Over the ensuing six years, the FCC tried  
6 to respond to the Court's instructions to provide a  
7 limiting standard for forced sharing, and the Courts  
8 rejected the FCC's new standards two more times.

9 Was the FCC just being incompetent? I  
10 would say no, the FCC consulted with industry  
11 parties, consumer groups, business groups,  
12 government agencies, elite economists on all sides  
13 and devoted what it called enormous amounts of time  
14 and resources to its efforts, and it was doing  
15 roughly what the law called for, which was to  
16 promote competition.

17 But the Courts repeatedly found that  
18 instead of promoting competition, what the FCC was  
19 doing was attempting to create what the Court called  
20 and what economists call synthetic competition,  
21 meaning that the alternative supply that they were  
22 creating was a result only of forced sharing of the

1 incumbent's resources at regulated low rates.

2 The competition they were promoting was a  
3 regulatory construct, not organic competition.

4 Finally, nine years after the passage of  
5 the telecom act, the FCC released an order that  
6 abandoned the most contentious sharing requirement.

7 Now, at the same time that the industry  
8 participants and the regulator were tied up in court  
9 back and forth over where and when forced sharing  
10 must occur, the incumbents and their competitors  
11 were also battling over the implementation and  
12 interpretation of the pricing methodology that the  
13 FCC came up with.

14 Initially, the FCC expressed a naive  
15 expectation that the incumbents and their  
16 competitors would be able to negotiate the prices.  
17 In almost all cases, however, the negotiations broke  
18 down and the pricing ended up back on the  
19 regulators' doorstep.

20 The parties entered into difficult and  
21 again lengthy, highly detailed and costly regulated  
22 arbitrations over pricing, and again this was even



1     though the incumbents faced attractive incentives to  
2     cooperate with the sharing obligations, as I said  
3     earlier.

4             After seeing how its pricing rules were  
5     playing out in practice over several years, the FCC  
6     was concerned about the effect that the low prices  
7     that were being set seemed to be having on industry  
8     investment. So the FCC itself issued an NPRM to  
9     reconsider its own pricing methodology.

10            And many of the issues highlighted by the  
11     FCC in that NPRM are still unresolved.

12            There are other lessons from telecom's  
13     attempt to promote competition with forced sharing  
14     that you may, I hope, find instructive. For one,  
15     despite other incentives to cooperate, incumbents  
16     did not necessarily want to spend their own money to  
17     make it easy and fast for competitors to take their  
18     customers away.

19            Predictably, disputes arose over how to  
20     monitor the incumbents' compliance with the forced  
21     sharing rules and how to make sharing work in  
22     practice. This led to costly, lengthy and highly

1 detailed proceedings regarding the performance of  
2 the incumbents' operation support systems regarding  
3 the proper policy solution to the question of who  
4 should bear the cost of those systems and regarding  
5 the ongoing monitoring of those systems.

6 For another, while the FCC and the Courts  
7 were going back and forth for nearly a decade, the  
8 industry was being whipsawed. Companies made  
9 investments and other business decisions based on  
10 the FCC's policies, only to have those policies  
11 overturned or challenged.

12 The resulting instability in the industry  
13 contributed to its ultimate upheaval.

14 So after all of that, did the sharing  
15 obligations and favorable pricing methodology the  
16 FCC adopted at least advance competition? The data  
17 say no.

18 Regulators attempted to jump start a  
19 certain form of competition and ensure its success.  
20 But once the FCC issued its fourth attempt to comply  
21 with the Court's reprimands, the form of competition  
22 envisioned by the regulators did not materialize.

1 There was a lot of industry upheaval, but the number  
2 of customers served by shared lines today is  
3 exceedingly small in the context of the overall  
4 industry.

5 Thank you, and I will either return the  
6 floor to Ben or be very happy to entertain your  
7 questions.

8 CHAIRMAN OBERMAN: Thank you very much.

9 Do any of the board members have any  
10 questions for Ms. Aron?

11 Okay. Thank you. Very lucid  
12 presentation, I appreciate it.

13 MS. ARON: My pleasure.

14 MR. HORWICH: I might just wrap up and see  
15 if the Board has any additional questions. I  
16 just -- I think our takeaway here is that the Board  
17 should remember that there are a lot of stakeholders  
18 that are likely to suffer if this rule is adopted in  
19 its present form because we have to remember, the  
20 shippers -- you know, the shippers say that they  
21 won't ask for these orders where it hurts them, but  
22 they don't say that they won't ask for these orders

1 where it benefits them and it hurts someone else, it  
2 hurts everyone else in ways.

3 Those people who can be harmed are  
4 shippers who aren't getting a benefit here but still  
5 have to use this -- an operationally compromised  
6 network today, have to use a network that suffers  
7 reduced investment for the future. We haven't even  
8 talked about passenger rail during this session.  
9 That's facing the same issues.

10 I mentioned labor earlier. Labor knows  
11 that there's not anything good in this rule for  
12 them.

13 The public, I think we actually haven't  
14 seen a rigorous case for why ultimately the public  
15 is better off here, especially if you have to tell  
16 them this is making supply chains worse, not better,  
17 if these new switching operations are invoked.

18 And then we just heard from Dr. Aron about  
19 how this Board may face these contentious  
20 proceedings that could be as bad or worse than what  
21 the telecom regulators had to address, and that's  
22 even without speaking at all about the members of

1 the railroad industry.

2           And so in that game of winners and losers,  
3 we think about who are the winners, and I will  
4 remind the Board that this data has been presented  
5 in the revenue adequacy proceeding, but this is a  
6 chart of the very profitable shippers that are most  
7 zealous advocates here and comparing them to the  
8 railroads in terms of relative return on investment  
9 above cost of capital. And that green line that's  
10 way above there is the median number of the American  
11 Chemistry Council, and the blue line at the bottom  
12 that sometimes drifts below zero, sometimes barely  
13 above, sometimes below, is the median class I  
14 carrier here. We can put that down, but this is  
15 what Mark Fagan was talking about in terms of  
16 sustainable and true public benefits.

17           So I think we'll leave it there. I know  
18 it is late. But we are certainly happy to answer  
19 questions.

20           CHAIRMAN OBERMAN: I'm questioned out,  
21 Ben. I don't know about the rest of the Board  
22 members.

1 BOARD MEMBER HEDLUND: I've got one last  
2 comment.

3 CHAIRMAN OBERMAN: Karen.

4 BOARD MEMBER HEDLUND: You talk about we  
5 have to consider, you know, the impacts on other  
6 parties, et cetera. If a shipper because of poor  
7 service can't get its good to market, everybody  
8 suffers, the economy suffers. It's a failure in the  
9 supply chain that's caused by poor service by the  
10 railroads. So let's keep that in mind too.

11 We need to get the shippers' goods to  
12 market. Thank you.

13 CHAIRMAN OBERMAN: Anybody else?

14 All right, folks. Well, it's been a very  
15 successful endurance contest for all concerned. I  
16 appreciate all of your bearing with us. If there  
17 were some sharp questioning, that's because I think  
18 it's our job, but I certainly appreciate everybody's  
19 presentation today and the work that went into it.

20 We will recess until 9:30 Eastern time  
21 tomorrow, when we will begin with panel 4. And I  
22 think -- well, they all know who they are because

1 they have gotten the order.

2 And we will do our level best to finish  
3 this tomorrow. So thank you all. Appreciate it.

4 (Whereupon, at 6:58 p.m., the hearing was  
5 adjourned, to be reconvened at 9:30 a.m., on  
6 Wednesday, March 16, 2022.)

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