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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE No. 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

**COMMENTS OF
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS**

I. Introduction

American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submits these comments on the Surface Transportation Board’s (“STB” or “the Board”) *Federal Register* notice titled, “Reciprocal Switching for Inadequate Service” (“Proposed Rule,” or “the 2023 NPRM”).¹ In accordance with 49 U.S.C. § 11102(c), the Board may require rail carriers to enter into reciprocal switching agreements where it finds such agreements to (1) be practicable and in the public interest (“public interest clause”); or, (2) where such agreements are necessary to provide competitive rail service (“lack of competition clause”).²

In the 2023 NPRM, the STB is proposing a new set of regulations that would provide for the prescription of reciprocal switching agreements to address inadequate rail service, as determined using objective standards based on a carrier’s original estimated time of arrival, transit time, and first-mile and last-mile service. In a related decision, the Board also chose to close a 2016 NPRM, which employed the lack of competition clause as its rubric for prescription of a reciprocal switching agreement.³ The Board’s new approach in the 2023 NPRM instead uses the public interest clause to determine whether such switch is merited but not the preferred clause. AFPM is supportive of the 2023 NPRM, with specific suggestions highlighted as follows:

- Reciprocal switching should be available when there is a lack of competition, a dire reality the Board has repeatedly recognized in the current rail market.⁴
- In the absence of broad access to reciprocal switching based solely on lack of competition, a service-based approach is in the public interest and will benefit the American people if crafted carefully. The service metrics proposed will allow rail shippers to hold railroads accountable for service that is wholly deficient.
- Specific thresholds to trigger reciprocal switching must be carefully considered to ensure that they adequately incentivize railroads to improve service and spare captive shippers the consequences of pervasive service failures. If the thresholds for railroad performance are set too low, it can be sure the railroads will improve no more than required, incentivized to do “just enough” to avoid reciprocal switching.
- In the absence of broad access to reciprocal switching based on lack of competition, the proposed reporting requirements must apply to contract shipments. Such metrics should be used as grounds for prescribing a reciprocal switching arrangement that would become effective after the contract expires.
- AFPM supports STB’s adoption of this public-interest framing in the 2023 NPRM, with suggestions detailed below, and further encourages the Board to continue to promote additional access to reciprocal switching based on the lack of competition clause.

¹ See 88 *Fed. Reg.* 63897, “[Reciprocal Switching for Inadequate Service](#)” Notice of Proposed Rulemaking; Docket No. EP 711 (Sub-No. 2), published September 18, 2023.

² See 49 U.S.C. 11102(c).

³ See 88 *Fed. Reg.* 63917, “[Reciprocal Switching](#)” Proposed rule; closure of Docket No. EP 711 (Sub-No. 1), published September 18, 2023.

⁴ More than 78% of rail shippers are captive to a single railroad. See letter from [U.S. House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads Pipelines, and Hazardous Materials](#), Re: Stakeholder Views on Surface Transportation Board Reauthorization” dated March 2, 2022.

II. AFPM's Interest in Reciprocal Switching

AFPM is the leading trade association representing manufacturers of the fuels that keep America moving and the base petrochemicals that are essential building blocks for plastic products that make modern life possible and improve the health, safety, and living conditions of humankind. AFPM members are committed to sustainably manufacturing safe, high-performing fuels and the petrochemicals and derivatives that growing global populations and economies need to thrive.

Refineries and petrochemical manufacturers rely on a healthy rail network as a vital part of their supply chains. Annually in the United States, over 2.3 million carloads of our members' feedstocks and products, including crude oil, natural gas liquids, refined products, plastics, and synthetic resins, are transported by rail.⁵ In fact, on average over the last decade 214 million barrels of crude oil, the main feedstock our members rely upon, are moved annually on railroads.⁶ Further, AFPM members are increasingly using rail to support renewable energy projects through the shipment of renewable feedstocks and renewable fuels. This is a rapidly growing segment of our business that is heavily reliant on reliable and competitive rail service. Consumers depend on affordable gasoline and petrochemical based products, and they foot the bill when railroads are allowed to hamstring and delay distribution of those products across the country.

Consumers and free markets also depend on internal industry competition to lower costs, improve service, and promote innovation. A conspicuous lack of all three aims defines today's freight rail industry, which has consolidated at the expense of customers, dictating unreasonable rates by fiat to rail shippers who are forced to choose appalling service over no service at all. With more than three-quarters of rail shippers captive to just one freight railroad, rail customers' inability to shop around is costing consumers dearly.

The Board's proposal is a powerful first step to make the rail system more efficient and responsive to consumers by requiring railroads themselves to report metrics reflecting their poor service. By then linking the railroads' performance against these metrics to reciprocal switching access, the Board is aiming to incentivize railroad service improvements, and this also is a step in the right direction. AFPM appreciates this progress but submits that future Board-led intervention should broadly expand access to reciprocal switching to all captive shippers to promote competition industry-wide, not just those that experience prolonged poor service below industry reporting metrics.

AFPM appreciates the STB's important oversight over freight rail policy and its impact on rail shippers. We are encouraged that the Board is acting to address the failure of the railroads by employing this reciprocal switching remedy in line with the intent of Congress. Reciprocal switching is essential to provide rail shippers with a method to counter the Class I railroads' dominant market power over AFPM member companies. AFPM earnestly hopes this proposal will compel railroads finally to focus on providing quality, efficient service to their customers. After AFPM's years of advocating for more competition in freight rail, we welcome this progress and appreciate the opportunity to provide these comments.

⁵ See "[Freight Rail Facts and Figures](#)" updated October 2023.

⁶ See U.S. Energy Information Administration "[Movements of Crude Oil and Selected Products by Rail](#)" accessed April 20, 2022.

III. AFPM's Comments on the Proposed Rule

Rail competition has been decimated in the years since the Staggers Act was passed in 1980. In a country that boasted nearly 30 carriers in the 1980s, today just six Class I carriers serve all U.S. consumers, of which just four such carriers control 90 percent of U.S. rail traffic.⁷ In tandem with the broader picture, today 78 percent of rail customers are served only by a single railroad. That consolidated market marked by a fundamental dearth of competition existed when STB originally opened a docket on reciprocal switching in 2011 and has persisted and become even more competition constrained in 2023.⁸

In a vacuum, AFPM supports the 2023 NPRM, but we are disappointed in its apparent narrowing of circumstances wherein the Board will prescribe reciprocal switching.⁹ At base, AFPM prefers the 2016 NPRM's approach, which attacks the root cause of service issues –lack of competition. The 2023 NPRM by contrast may help to improve service, but only after rail shippers have felt the prolonged impacts of unreliability and delay. By the proposed 2023 NPRM standard, a rail shipper would need to experience potentially devastating service for twelve weeks before they could even begin the process of seeking a reciprocal switching remedy. Poor rail service for just one week severely hurts operations and can even shut down a refinery or petrochemical facility, and rail shippers should not have to wait until service is unacceptable for a predetermined duration to have access to reciprocal switching. For example, Ethanol primarily ships by rail and when a railroad fails to supply ethanol to a refinery for blending into fuels (which is a frequent occurrence) the local gasoline market will be impacted.

AFPM strongly advocates for broader access to reciprocal switching based solely on lack of competition given the utter lack of competition in the rail market. This 2023 NPRM is built on the premise that when faced with the fear of increased competition in the form of alternative access or reciprocal switching, railroads will do whatever it takes to avoid that outcome. This premise is concerning and yet another reason why broader access to reciprocal switching is needed. AFPM fears that without broad access to reciprocal switching for captive shippers, railroads won't have to do "whatever it takes" to avoid reciprocal switching, but rather "just enough" to avoid it.

Absent the 2016 NPRM's approach, however, AFPM broadly supports the 2023 NPRM, caveated by our comments and concerns discussed in general in this section, and followed by

⁷ See American Prospect, "[How America's Supply Chains Got Railroaded](#)" published February 2022.

⁸ On July 27, 2016, the Board issued a Notice of Proposed Rulemaking (the "2016 NPRM") on reciprocal switching on to better align the Board's regulations with the legislative intent discussed in the previous section. The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011, petition for rulemaking by the National Industrial Transportation League.³ In the 2016 NPRM the agency proposed to exercise its statutory authority to require rail carriers to enter into reciprocal switching agreements under [49 U.S.C. 11102\(c\)](#) based on the lack of competition. See "Reciprocal Switching ("NPRM"), STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016)." The Board engaged the public on the proposal in various ways, including by receiving and reviewing filed comments and subsequently inviting supplemental comments. Board Members also participated in Ex Parte meetings in which they received input from numerous interested parties. AFPM, as part of a larger shippers' coalition, filed [opening comments](#) and [reply comments](#) on the 2016 NPRM in late 2016 and early 2017.

⁹ AFPM notes that granting a reciprocal switch at the destination end of a move doesn't help if the origin side of the move is captive and the shipper has no alternatives to source product on the reciprocal carrier. This is yet another reason why the Board should continue to consider broad application of reciprocal switching rules in line with the 2016 NPRM as well as examine how to incorporate terminal trackage rights into the 2023 NPRM.

specific comments on each provision and service metric in the next. The Board’s proposal focuses on three measures of carrier success or failure, namely: (1) service reliability; (2) service consistency; and (3) adequacy of local service. The table below outlines each metric, and the thresholds railroads must meet. Failure to meet such threshold would result in rail shippers being able to pursue reciprocal switching remedies from the railroad.

Table 1: Proposed Performance Metrics & Targets for Reciprocal Switching			
Category	Metric	Standard	Trigger / Target
Service Reliability	Original Estimated Time of Arrival - A rail carrier’s failure to meet its original estimated time of arrival (OETA), i.e., to have adequate on-time performance.	Percentage of shipments constructively or actually placed at the destination (or interchange point) within 24 hours of the OETA, over a consecutive 12-week period. ¹⁰	<i>Option A:</i> Success Rate of at least 60% of shipments arrive within 24 hours of the OETA. <i>Option B:</i> Success rate of at least 60% in delivering a shipment within 24 hours of the OETA during the first year then after the first year, the success rate would increase to 70% in delivering a shipment within 24 hours of the OETA.
Service Consistency	Transit Time - A deterioration in the time it takes a rail carrier to deliver a shipment (transit time)	Year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period and the same 12-week period during the previous year.	For loaded manifest cars and loaded unit trains, a petitioner would need to demonstrate that the average transit time for a shipment increased by either 20 or 25% over the average transit time for the same 12-week period during the previous year. Board is seeking comments on the trigger for empty cars.
Industry Spot and Pull (ISP)	ISP - A rail carrier’s failure to provide adequate local (or FMLM) service, as measured by the carrier’s success in meeting an ISP standard	A rail carrier’s success in performing local deliveries (“spots”) and pick-ups (“pulls”) of loaded railcars and unloaded private or shipper-leased railcars performed within the planned service window over 12 consecutive weeks.	A success rate of < 80%, over a period of 12 consecutive weeks, in performing local deliveries and pickups during the planned service window of 12 hours, starting from the relevant serving crews scheduled on-duty time. If a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in customer demand, then the standard would be 90% for a period of one year.

Finally, the Board also will require railroads to continue to report to it these minimum service metrics, and further would require railroads to provide to rail shippers needed standardized data specific to their operations. AFPM submits that while it is important such data be reported in

¹⁰ Only applies to Manifest Shipments.

machine-readable format, in must be standardized for all railroads and they also need to be reported so that *humans* can read them, recognizing railroads' past history of technically providing data that were extremely difficult to understand.¹¹

AFPM is grateful for the Board's ongoing efforts to provide the certainty that is needed to protect the public interest, as well as the interests of rail customers, in adequate service on a general and sustained basis. Despite AFPM's strong preference for the 2016 proposed rule, AFPM recognizes that providing rail shippers any real ability to pursue reciprocal switching as a remedy is a powerful step to counter the terrible service of railroads hired to move products on which Americans depend. Moreover, given our preference for the 2016 NPRM's approach, AFPM is additionally grateful that this NPRM will not preclude STB from pursuing and adopting broader reciprocal switching rules, including based on lack of competition, in a future docket.

Even as AFPM hopes and campaigns for a competition-based future rule, we believe a service-based approach could provide benefits if crafted carefully. That care includes setting a higher minimum for service levels than currently proposed by the Board. Over the past five years, rail shippers have experienced unacceptable and historically bad service. If the Board sets metrics using the last five years as a guidepost, it merely will cement grievously *substandard* service as the new *standard* operating procedure. Nothing in rail carriers' history suggests they will independently raise their own bar for service, and if the STB sets service metrics too low, those railroads will simply meet – and not exceed – whatever minimum. Therefore, AFPM prays the Board examine closely the best metrics set to indicate a service failure, and how long rail shippers must be subjected to such failure before the Board will prescribe a switch as respite. As proposed now, rail shippers would have to experience continuously bad service for months on end to have any hope of a rail alternative.

If STB adopts this service-based approach, such rules should be in addition to, and not in place of, current remedies, and the Board should continue to explore a competition-based approach. With that in mind, following the Board's completion of its work on 2023 NPRM (EP 711 Sub No. 2), AFPM heartily supports reopening a version of 2016 NPRM (EP 711 Sub No. 1). Given the Board's signal that closure of Sub No. 1 would not preclude it from pursuing additional mechanisms to access reciprocal switching remedies, we strongly believe the Board should continue work to not only incentivize railroads to provide acceptable service but also to introduce more competition for the over three quarters of rail shippers beholden to a single railroad.

¹¹ To assist the Board with general oversight and to facilitate implementation of part 1145, the Board proposes to make permanent the collection of certain data that is relevant to service reliability and inadequate local service, and that is currently being collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). See *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), slip op. at 6 (STB served May 6, 2022) (items 5 and 7). The Board has found that this data is particularly helpful to understanding conditions on the rail network. The Board's permanent collection of this data under part 1145 would be adapted to the design of part 1145 as follows. The Class I carriers would be required to provide to the Board on a weekly basis: (1) for shipments moving in manifest service, the percentage of shipments for that week that were delivered to the destination within 24 hours of OETA, out of all shipments in manifest service on the carrier's system during that week; and (2) for each of the carrier's operating divisions and for the carrier's overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant division or system for that week. AFPM strongly supports making the collection of this data permanent.

IV. AFPM Specific Comments on Reciprocal Switching Service Metrics

The Board has implicitly recognized by its action here that railroads simply are *choosing* to provide poor service. With that sad state of affairs in mind, the Board hopes to provide regulatory incentives to railroads to achieve, and to maintain, minimum service levels on an ongoing basis. AFPM agrees with the Board that the railroads do not have proper incentives to provide better service. In fact, AFPM already has noted publicly that well-thought-out reciprocal switching provisions will leave railroads “with a simple decision[:] provide better service to rail shippers or risk losing business to a competitor.”¹² In the absence of access to reciprocal switching based on competition for constrained rail shippers, a service-based approach could benefit captive shippers, but it is essential the service metrics are set at levels that incentivize good service, not mandated minimal service. As explained previously, the railroads will only *meet* the standard, so the bar must be high.

In the 2023 NPRM, the Board has proposed service metrics to address:

- 1) a rail carrier’s failure to meet its original estimated time of arrival (OETA), *i.e.*, to have adequate on-time performance;
- 2) a deterioration in the time it takes a rail carrier to deliver a shipment (transit time); and
- 3) a rail carrier’s failure to provide adequate local (or FMLM) service, as measured by the carrier’s success in meeting an “industry spot and pull” (“ISP”) standard.

The Board notes that each standard would offer an independent path for a petitioner to obtain prescription of a reciprocal switching agreement under Part 1145. AFPM supports this approach and believes that failure to meet any of the three standards warrants the ability to pursue reciprocal switching.

With respect to the three service standards, AFPM has some concerns that railroads will game the process and improve service for short periods of time whenever the numbers fall below the required standards, only to have service default back to poor service after a threat of a reciprocal switch case is raised and avoided. In addition, an extreme situation could arise when a shipper seeks an emergency service order seeking service from a competing carrier. This situation could result in better service provided by the competing carrier and stop any new data from the incumbent carrier. There does not appear to be a way forward for the shipper at that point if it wants to obtain a reciprocal switching order from the Board. The Board should seek to set a broader service standard for unreasonable service in addition to these three specific standards to cover these situations.

The Board also will require railroads to report this data to it and to provide rail shippers with this data, upon written request. The railroad-provided data would be machine-readable and specific to the rail shipper’s operations. AFPM strongly supports this and is confident such machine-readable data provision will be integral for rail shipper’s switch requests based on the rule underlying this proposal and will greatly enhance coordination among railroads and their shippers overall. AFPM additionally notes that if railroad data is to be utilized to determine

¹² See [“AFPM: Reciprocal switching needed to address lack of freight rail competition & years of poor service”](#) posted September 7, 2023.

compliance with standards, customers should have the ability to audit that data and provide additional data to the STB in the case of errors or misrepresentation.¹³ AFPM details its suggestions related to each metric as follows.

A. Service Reliability: Original Estimated Time of Arrival

In the 2023 NPRM, the Board’s proposed service reliability standard would measure a railroad’s performance in delivering a shipment near its Original Estimated Time of Arrival (“OETA”), *i.e.*, the estimated time of arrival that the rail carrier provided when the shipper tendered the bill of lading for shipment. That OETA would be compared to the actual time when the car was delivered to the designated destination. Application of the service reliability standard would be based on all shipments over a given lane over 12 consecutive weeks. The Board proposed two versions:

Table 2: STB Proposed Metric for Service Reliability	
Standard	Trigger / Target
Original Estimated Time of Arrival: Percentage of shipments constructively or actually placed at the destination (or interchange point) within 24 hours of the OETA, over a consecutive 12-week period. <i>Only applies to Manifest Shipments.</i>	<p><i>Option A:</i> Success rate of at least 60% of shipments arriving within 24 hours of the OETA.</p> <p><i>Option B:</i> Success rate of at least 60% in arriving within 24 hours of the OETA during the first year following the effective date, rising to 70% after the second year.</p>

AFPM has previously voiced our support for on-time placement service metrics as we noted this could help to alleviate FMLM problems and improve overall transportation service.¹⁴ AFPM is supportive of these metrics in general and in the context of this rulemaking.

However, although we believe the metric itself is appropriate, we believe the triggers and targets proposed in the 2023 NPRM merit revision, recognizing that the Board based its proposed percentages for the service reliability standard on data received in response to Docket No. EP 770 (Sub-No. 1). AFPM has great concerns with setting the “minimum standards” using just these data, as they represent a snapshot of a time at which rail service was historically bad. In numerous forums, rail shippers and even railroads themselves have identified the early 2020s as a period of particularly poor service, well below rail shippers’ justified expectations.

AFPM believes both proposed percentage standards are too low, and that the proposed 12-week duration is too long. Poor rail service requires significant intervention of railcars in transit to keep AFPM members’ production facilities from being impacted. This includes actively moving empty cars across the network as well as managing a shed list of customers and production to optimize usage of the current fleet. When service disruptions are severe over extended periods of time, rail shippers may be forced to increase fleet size, transition shipments from rail to truck (if

¹³ AFPM also recommends that the Board have a requirement to audit that data at regular intervals to ensure its accuracy in this rule.

¹⁴ See STB Docket No. EP 767, “[Opening Comments of the American Chemistry Council, American Fuel & Petrochemical Manufacturers, and The Fertilizer Institute](#)” posted December 17, 2021.

possible and at great cost) or to curtail or shutdown production. Poor service and unreliable OETA has driven some members to invest millions to construct Storage-in-Transit yards to handle the uncertainty and additional cars needed to weather that uncertainty. These impacts can be felt in a matter of days, not three months as proposed in the 2023 NPRM.

If STB is going to establish minimum adequate service levels, those minimums must improve – not codify – today’s historically bad percentages. Setting the bar too low, including at 60 or 70%, serves only to ensure that poor service continues. Nonetheless, AFPM understands that improvements will take time, and railroads may need to make operational changes that allow them to prioritize customer needs once again. As such, we are proposing a progression of yearly standards that rise eventually to 80% success at arriving within 24 hours of the OETA. Put in context, AFPM feels this is a reasonable request. An 80% success rate would equate to 2 days on a 10-day trip, which is manageable from a supply chain planning perspective, allowing us to meet our customer needs. To put such a delay in context, a delay of more than 48 hours (+/- 24 hours) on a critical shipment will likely result in AFPM members requiring emergency trucking (where available at an extremely high cost) to meet our customer commitments and needs.

Secondly, AFPM believes the 12-week period is far too long for refiners and petrochemical manufacturers. Sustained bad rail service for three straight months sets far too low a bar for what is acceptable. AFPM submits that the service reliability standard should be based on a six-week period. Anything beyond six weeks would severely hurt refiners and petrochemical manufacturers, curtailing facility output and even causing shutdowns.

The following table represents AFPM’s desired tiered approach to service reliability, based on a six-week comparison period, a compromise that gives railroads time to begin focusing on customer needs, while bringing the bar for reasonable service to a more appropriate level; . A tiered approach will give railroads time to modify operations while setting the bar for reasonable service at a more appropriate level. Further, for the reasons stated above, AFPM suggests shortening the duration of such disruptions. AFPM’s suggested changes¹⁵ from the STB proposal are highlighted in red:

Table 3: AFPM Proposed Metric for Service Reliability	
Standard	Trigger / Target
Original Estimated Time of Arrival: Percentage of shipments constructively or actually placed at the destination (or interchange point) within 24 hours of the OETA, over a consecutive 6-week period. <i>Only applies to Manifest Shipments.</i>	<ul style="list-style-type: none"> • Success Rate of at least 65% of shipments arrive within 24 hours of the OETA in year 1. • Success Rate of at least 70% of shipments arrive within 24 hours of the OETA in year 2. • Success Rate of at least 75% of shipments arrive within 24 hours of the OETA in year 3. • Success Rate of at least 80% of shipments arrive within 24 hours of the OETA in year 4 and beyond.

¹⁵ The Board proposes to apply the service reliability standard only to shipments that are moving in manifest service, not to unit trains. The Board seeks comments on whether the better approach would be to apply the same or similar service reliability standard to unit trains as applied to manifest traffic. AFPM urges the Board to apply these same service reliability standards here as proposed by AFPM. Otherwise, unit train shippers will lose the benefit of this standard despite being some of the largest shippers by rail in the US.

Finally, AFPM also seeks clarity from the Board on how it will handle multi-segment shipments and how the OETA is determined. AFPM suggests that for multi-segmented shipments (Rule 11), the service performance of the delivering/secondary carrier should be evaluated based on when the car is ‘offered’ at interchange. In addition, AFPM members have often experienced a sliding scale of arrival times related to OETAs. AFPM suggests that the Board more explicitly define the OETA and thereby restrict railroads’ ability to “move the goalpost” by shifting the OETA after it is originally set.¹⁶ AFPM suggests that the second carrier OETA starts at “accepted” at interchange but includes a requirement that carriers must accept a car offered at interchange within 24 hours of being offered.

B. Service Consistency: Transit Time

In the 2023 NPRM, the Board proposes transit time as a service standard that would measure a rail carrier’s success in maintaining efficient movement of a shipment through the rail system, to apply not only to loaded car movements but also to the return of empty private and shipper-leased railcars. Under the proposed standard, service consistency would be based on the average transit time for shipments over the relevant lane during a 12-week period, where transit time is the time between the shipper’s tender of the bill of lading and the rail carrier’s delivery of the shipment at the agreed-upon destination. It should be noted that “transit time” would not include time spent loading or unloading a shipment. The Board’s specific proposed standard and related targets and triggers for a potential reciprocal switching remedy are described as follows:

Table 4: STB Proposed Metric for Service Consistency	
Standard	Trigger / Target
Transit Time: Year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period and the same 12-week period during the previous year.	For loaded manifest cars and loaded unit trains, a petitioner would need to demonstrate that the average transit time for a shipment increased by either 20 or 25% over the average transit time for the same 12-week period during the previous year. The Board is seeking comments on the trigger for empty cars.

AFPM supports the use of transit time as a service metric and strongly believes this should apply to both loaded car movement and the movement of empty cars. That said, as was the case with the service reliability standards, AFPM has concerns with the proposed triggers and targets as well as with the suggested duration of the evaluation period.

As with the service reliability standard, AFPM believes the Board’s proposal to consider a year-over-year percent increase in average transit time on a lane, comparing a consecutive 12-week period and the same 12-week period during the previous year, is a bar that would allow for a continued and prolonged decline in service due to increased transit times. Regarding duration, AFPM submits that the 12-week period of sustained bad rail service is far too long for refiners and petrochemical manufacturers to endure and supports instead a 6-week period.

¹⁶ Similarly, the measurement of OETA on joint through routes could raise the same concerns and the Board should clearly define how OETA should be measured in these situations.

Most glaringly, however, using the standard’s 20 or 25% year-over-year increase, transit time for a shipment that takes fourteen days today could increase to 17.5 days in the first year and nearly 22 days in the second year, continuing to grow exponentially in perpetuity, nearly doubling its 14-day transit time to more than 27 days after just three years. The Board footnoted several quotes from shippers’ testimonies regarding the impact of transit times on operations, which indicated that even just a 15% year-over-year increase would have “huge financial impact” on rail shippers. AFPM believes that any percentage greater than 15% merely endorses poor rail service. Therefore, AFPM submits that a 15% increase in transit time would be the absolute highest increase in transit times that should be permitted. Moreover, to further avert such runaway transit time increases, AFPM suggests that the Board use a rolling average of three years when determining the percentage increase that will be permitted.

Additionally, the movement of *empty* cars can be as consequential as the movement of *loaded* cars and as such, AFPM strongly endorses the inclusion of empty movements when considering this service metric. AFPM members have long faced problems with the movements of empty tank cars, including railroad surcharges for the movement of empty cars (challenge to which is currently pending), demurrage fees for empty cars, and increased turn times for empty cars. As tank car ownership has shifted almost exclusively to rail shippers, these issues have required AFPM members to increase fleet size and in some cases, build or lease additional rail storage space. Increased transit times for empty rail cars can interrupt a rail customer’s supply of cars needed to support operations, deprive a rail customer of empty cars that it may need for the goods it produces, and ultimately prevent a rail customer from fulfilling its customers’ orders. In the direst situations, a disruption in empty-car supply may cause severe facility backups, requiring a reduction of or even stalling operations.

AFPM details in the table below what it believes to be a more appropriate metric, one which measures transit time over a three-year average baseline, shortens the duration of the review period, and decreases the trigger percentages, to apply to both loaded and empty car movements; AFPM’s suggested changes to the Board’s proposal are highlighted in red:

Table 5: AFPM Proposed Metric for Service Consistency	
Standard	Trigger / Target
Transit Time: Year-over-year percent Increase in average transit time on a lane compared against the average transit time over that lane the previous three years, comparing a consecutive 6-week period and the same 6-week period during the previous years.	For loaded manifest cars, loaded unit trains, and empty cars a petitioner would need to demonstrate that the average transit time for a shipment increased by 15% over the average transit time for the same 6-week period during the previous three years. This applies to both loaded and empty car movement.

C. *Inadequate Local Service: Industry Spot and Pull*

With the aim of addressing inadequate first mile/last mile service, the Board’s proposed Industry Spot Pull (“ISP”) service standard would measure a rail carrier’s success in performing local deliveries (“spots”) and pick-ups (“pulls”) of loaded railcars and unloaded private or shipper-leased railcars during the planned service window. The ISP standard would serve to determine the

adequacy of rail service for those local deliveries and fulfillments. The Board’s specific proposed standard and related targets and triggers for a potential reciprocal switching remedy¹⁷ related to ISP are as follows:

Table 6: STB Proposed Metric for Inadequate Local Service	
Standard	Trigger / Target
Industry Spot Pull: A rail carrier’s success in performing local deliveries (“spots”) and pick-ups (“pulls”) of loaded railcars and unloaded private or shipper-leased railcars performed within the planned service window over 12 consecutive weeks.	<p>A success rate of less than 80% over a period of 12 consecutive weeks in performing local deliveries and pickups during the planned service window of 12 hours, starting from the relevant serving crew’s scheduled on-duty time.</p> <p>If a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in customer demand, then the standard would be 90% for a period of one year.</p>

First, as was the case with the service reliability standard and service consistency standard, AFPM notes the 12-week period for ISP is far too long for refiners and petrochemical manufacturers, as such sustained poor service will dramatically hurt their operations. AFPM supports the inclusion of a 6-week period.

As noted above, the Board proposes two triggers, one when the incumbent carrier continues to provide first-mile/last-mile service and a second when the incumbent carrier continues to provide first-mile/last-mile service but unilaterally chooses to reduce the frequency of the local work that it makes available to a customer. AFPM supports the bifurcation of this trigger and has the following comments regarding each of the two scenarios.

Where the incumbent carrier continues to provide first-mile/last-mile service and has not reduced the frequency of its local service, the Board proposed standards of a success rate of 80%, over a period of 12 consecutive weeks. AFPM opposes the 80% threshold and suggests a threshold of 90% (measured over a consecutive 6-week period). Late or missed service as well as incorrect car delivery or placement results in delayed or missed shipments and inability to meet customer expectations. Inability to load planned railcars also impacts plant production and results in lost revenue from stranded products. While some variation in service is expected and impacts can be minimized, consistent poor service (<90%) severely hurts plant operations and the customers who depend on the product.

Where the incumbent carrier continues to provide FMLM service and unilaterally reduces serving days, the Board proposed a success rate of 90% for a period of one year. Railroads unilaterally reducing days of service has occurred frequently alongside the widespread adoption

¹⁷ While that remedy might serve as an incentive for the incumbent rail carrier to provide adequate local service, the Board is considering whether the prescription of terminal trackage rights under 49 U.S.C. § 11102(a) would be a more appropriate remedy for failure to meet the ISP standard. Logically, the extension of the terminal trackage rights standard to a failure to meet the local service standard is necessary. Otherwise, the shipper will be forced to continue to use the incumbent carrier for local service under the reciprocal switching remedy who has failed to provide adequate service during the recent past.

of Precision Scheduled Railroading (“PSR”). When a railroad unilaterally reduces service days, they are telling the rail shipper that their volume does not warrant additional days. In fact, railroads often cite this in writing as their justification to the rail shipper for those reductions. Such statements necessarily imply that railroads can meet the customer needs (which includes good service) with fewer days of operation. As such, railroads that unilaterally reduce serving days should be able to meet a 100% standard. Nonetheless, realizing that perfection is a stringent standard, AFPM suggests a 95% threshold for an incumbent carrier that provides FMLM service and unilaterally reduces serving days. This success rate recognizes some disruptions may occur while protecting shippers from service reductions that would result in poor ISP performance.

The Board applies this ISP standard and its target/trigger to local deliveries and pickups during the planned service window of 12 hours, the maximum duration that a crew is allowed to work. AFPM proposes that a window of +/- 2 hours from service time dictated by crew job plan (ETA to plant) would be more appropriate. Refinery and petrochemical facility employees often work 12-hour shifts and as such if our spots occur +12 hours, AFPM members will lose a full day of production that we are unable to make up.

Finally, the Board also seeks comment from stakeholders on whether a carrier should be required to provide notice before changing the serving crew’s schedule on-duty time and, if so, how much notice should be required. AFPM submits that changes to the crew job plan should be agreed to before the railroad implements such changes. Time of service can create significant churn at a customer’s facility, altering manufacturing plans and leading to disruptions. Railroads should not be allowed to unilaterally change without (1) agreement from a customer; or (2) going through a formal mediation process.

AFPM details in the table below what it believes to be a more appropriate metric for inadequate local service; its suggested changes to the Board’s proposal are highlighted in red:

Table 7: AFPM Proposed Metric for Inadequate Local Service	
Standard	Trigger / Target
Industry Spot Pull: A rail carrier’s success in performing local deliveries (“spots”) and pick-ups (“pulls”) of loaded railcars and unloaded private or shipper-leased railcars performed within the planned service window over 6 consecutive weeks .	For loaded and empty shipments , a success rate of less than 90% , over a period of 6 consecutive weeks , in performing local deliveries and pickups during the planned service window of +/- 2 hours from service time dictated by crew job plan . If a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in customer demand, then the standard would be 95% for a period of one year.

V. AFPM Comments on Other Related Matters

A. Case Timeline and Alternate Carrier Service

The Board proposes a schedule for case timelines summarized as follows:

Timeline	Action
-5 Days	Petitioner files Notice of Intent to File for Relief & Protective Order
0 Days	Petitioner files Petition for Relief
20 Days	Deadline for reply from incumbent carrier
40 Days	Deadline for rebuttal from Petitioner
90 Days	Target For Issuing Order
Final decision + 30 Days	Rail Carrier agrees to terms and conditions, including compensation

The Board proposes that a petitioner that intends to initiate a reciprocal switching case as required by these proposed rules would need to provide notice at least five business days prior to seeking the prescription. This is consistent with other types of negotiations prescribed in 49 C.F.R. 1144.1, and AFPM supports this 5-day notice.

AFPM also generally supports the remainder of the proposed timeline, provided the 12-week duration contained in the three performance standards is reduced to 6-weeks. If the proposed 12-week duration is adopted, the Board should condense the case timeline as an imperfect counter to the excessive 12-week duration. Without any changes, a rail shipper would be faced with inadequate service for a minimum of seven months (12 weeks to meet the standard's bar, followed by a minimum 90 days to issue the remedy, and another 30 days to reach terms) before the Board would prescribe access to reciprocal switching.

B. Affirmative Defenses

As proposed, an incumbent railroad can be absolved of the reciprocal switching method if the railroad establishes an "affirmative defense," for which the railroad would have the burden of proof. The Board seeks comment on what affirmative defenses, if any, should be specified in the final rule, proposing specifically the following potential defenses:

- **Extraordinary Circumstances.** The Board would not prescribe reciprocal switching if the incumbent carrier demonstrates that its service levels were significantly affected by extraordinary circumstances beyond the carrier's control. Such extraordinary circumstances would be the type of events that permit a railroad to qualify for an emergency trackage rights exemption at 49 CFR 1180.2(d)(9).
- **Surprise Surge.** The Board would not prescribe reciprocal switching if the incumbent rail carrier demonstrates that there was a surprise surge in the petitioner's traffic, meaning a significant increase in traffic to which petitioner should have alerted the carrier but did not.
- **Highly Unusual Shipment Patterns.** The Board would not prescribe reciprocal switching if the incumbent carrier demonstrates that the shipper's traffic during the relevant 12-week period exhibited a pattern that, for that shipper, was highly unusual.

- **Delays Caused by Dispatching Choices of a Third Party.** The Board would not prescribe reciprocal switching if the incumbent carrier demonstrates that its failure to meet the relevant performance standard was caused by third-party dispatching.

AFPM generally supports delineating a limited number of affirmative defenses, but these should be clearly defined and understood. Ambiguous affirmative defenses could weaken the usefulness of this proposal. AFPM suggests the “surprise surge” and “highly usual shipment patterns” are redundant and could potentially be combined. AFPM notes a discrepancy that while railroads for years have been making drastic changes to their service offerings with little to no notice, rail shippers will now be required to provide notice to railroads of any shipping changes.

Lastly, AFPM suggests that if a railroad utilizes congestion and capacity issues as their defense against a reciprocal switching petition, it should be required to identify the specific underlying cause of the issue and present a plan for immediate resolution. As was revealed and emphasized in the UP-embargo hearings, many of the congestion and capacity issues railroads claim they experience have been wholly of their own doing and were caused by the massive operational changes implemented as part of PSR.¹⁸

C. Contract Traffic

While the 2023 NPRM would apply to tariff rail traffic, the Board is seeking comment on whether, and under what circumstances, the Board has the authority to consider reciprocal switching requests from shippers that have entered into a valid rail transportation contract with the incumbent carrier, specifically, whether the Board may consider the performance data described above, based on service that a carrier provided by contract, as the grounds for prescribing a reciprocal switching agreement that would become effective after the contract expired. Additionally, the Board is seeking comment on whether it may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer’s request.

Given almost three quarters of AFPM members are captive shippers, they are entering into contract negotiations wholly disadvantaged to railroads that have all the leverage, and that know that they have all of the leverage. Railroads predictably have used this grip on captive shippers to negotiate contracts that are tremendously advantageous for them at the expense of their rail shipper customers who must simply take-it-or-leave-it. AFPM notes that railroads almost universally and explicitly reject performance terms and conditions in these contracts given their leverage. If the railroads won’t add such performance assurances to their contracts, the contract becomes nothing more than a price document and the expectation of 49 USC should still apply.

AFPM supports the Board requiring railroads to provide performance metrics to a rail customer during the term of a contract upon that customer’s request, giving rail shippers needed insight in an arrangement in which they are already entirely disadvantaged. AFPM also notes it is not uncommon for a facility to utilize both contract and tariff shipments. Given this common scenario, it will be very difficult for a shipper to show specific poor service only applies to the just the tariff shipments. The railroads may also move to favor tariff traffic over contract traffic. As

¹⁸ See Docket No. EP 772 (Sub-No. 1) *Oversight Hearing Pertaining to Union Pacific Railroad Company’s Embargoes*.

such the reporting requirements must be applied to both contract and tariff shipments. AFPM also supports allowing such metrics to be used as grounds for prescribing a reciprocal switching arrangement that would become effective after the contract expires. This information and the potential for a reciprocal switch will encourage railroads to provide better service to all their customers and to negotiate future contracts in good faith. Such information, shared among rail shippers, could also better arm those shippers in negotiating future contracts.

D. Terms and Termination

Regarding the term of any prescribed reciprocal switching arrangement, the Board is proposing that the agreement would last a minimum term of two years, and up to four years if the petitioner demonstrated that that longer minimum term was necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.

AFPM supports a duration no shorter than two years. Regarding any cap on the duration of the remedy including the four-year term proposed, AFPM submits that if the purpose of this rulemaking is to incentivize better rail services and operational decision making to improve rail service long-term, then there should be no such limit. The remedy should remain in place for a minimum of two years and then until the service metrics are no longer inadequate. Otherwise, rail shippers will be forced to seesaw between bad service, improved service due to reciprocal switching, and bad service once the remedy disappears.

VI. Conclusion

AFPM appreciates the Board's attention on this important issue and its consideration of AFPM's comments. As noted throughout these comments, AFPM strongly believes reciprocal switching should be available when there is a lack of competition, which is the harsh reality for more than three quarters of the rail market. In the absence of broad access to reciprocal switching based solely on lack of competition, a service-based approach would be practicable, in the public interest, and could provide benefits if crafted carefully with targets that incentivize good service, rather than codifying the poor service of the past. AFPM supports greater transparency through service metrics, and we are confident that information will provide valuable insight into railroad performance. We urge the STB to act expeditiously on this longstanding issue and to pursue additional access to reciprocal switching that addresses the widespread lack of competition in rail markets. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,



Rob Benedict,
Vice President, Petrochemicals & Midstream
Regulatory Affairs