(12) 40 U.S.C. 502(e), which provides for the use by the American National Red Cross and other qualified organizations, as defined in 40 U.S.C. 502(e)(3). Purchases under this authority by the American National Red Cross shall be used in furtherance of the purposes of the American National Red Cross set forth in 36 U.S.C. 300102. Purchases under this authority by other qualified organizations shall be used in furtherance of purposes determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency.

(13) 42 U.S.C. 247d, which provides for the use by State or local governments, as defined in 40 U.S.C. 502(c)(3)(A), when a public health emergency has been declared by the Secretary of Health and Human Services under section 319 of the Public Health Services Act. The GSA program implementing this authority is the Public Health Emergencies program.

(14) FAR subpart 51.1, which provides for the use by contractors, including subcontractors, when such use is authorized pursuant to FAR subpart 51.1.

(End of clause)

552.238–114 Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities.

As prescribed in 538.7005, insert the following clause:

Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities (Date)

(a) *Definition.*

Non-Federal entity, as used in this clause, means any state, local, territorial, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education); and any other non-Federal organization (*e.g.,* a qualified nonprofit agency as defined in 40 U.S.C. 502(b)).

(b) *Responsibilities.* Eligible non-Federal entities are responsible for complying with—

(1) FSS ordering guidance. Information about GSA's FSS contracts, including ordering guidance is available at *https://www.gsa.gov/schedules;* and

(2) Any conditions of the underlying authority(ies) supporting the use of FSS contracts (*e.g.,* 40 U.S.C. 502(c) limits purchases to specific supplies and services available under FSS contracts).

(c) *Acceptance.* (1) The Contractor is encouraged, but not obligated, to accept orders from eligible non-Federal entities under this contract. The Contractor may, within 5 business days of receipt of an order, reject an order from an eligible non-Federal entity for any reason. However, purchase card orders must be rejected within 24 hours of receipt of the order. Failure to reject an order within these timeframes shall constitute acceptance.

(2) The Contractor is encouraged, but not obligated, to enter into blanket purchase agreements (BPAs) with eligible non-Federal entities under the terms of this contract. The Contractor should respond to any requests to enter into a BPA within 5 business days of receipt of the request.

(d) *Conditions of acceptance.* If the Contractor accepts an order from or enters into a BPA with an eligible non-Federal entity under this contract, the following conditions apply:

(1) For orders, a separate contract is formed between the Contractor and the eligible non-Federal entity (herein ''the parties''). For BPAs, a separate agreement is formed between the parties.

(2) The resultant order or BPA shall incorporate by reference all the terms and conditions of this contract except for:

(i) FAR clause 52.233–1, Disputes, and

(ii) Paragraphs (d) Disputes, (h) Patent indemnity, and (r) Compliance with laws unique to Government contracts, of GSAR clause 552.212–4, Contract Terms and Conditions—Commercial Products and Commercial Services.

(3) The U.S. Government is not liable for the performance or nonperformance of any order or BPA entered into under this contract by the parties. Disputes which cannot be resolved by the parties may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations, and case law, and, if pertinent, the Uniform Commercial Code. To the extent authorized by law, the parties are encouraged to resolve disputes through alternative dispute resolution.

(4) Neither party will look to, primarily or in any secondary capacity, or file any claim against the U.S. Government or any of its agencies with respect to any failure of performance by the other party.

(e) *Additional terms and conditions.* Terms and conditions required by statute, ordinance, regulation, or as otherwise required by an eligible non-Federal entity may be made a part of an order or a BPA to the extent that these terms and conditions do not conflict with the terms and conditions of this contract. The Contractor should review any such additional terms and conditions prior to accepting an order or entering into a BPA with an eligible non-Federal entity.

(f) *Payment.* (1) The Contractor is responsible for obtaining all payments due to the Contractor from the eligible non-Federal entity under the terms and conditions of the order or the BPA entered into under this contract, without recourse to the U.S. Government or any of its agencies that awarded this contract or administer this contract.

(2) If an eligible non-Federal entity is subject to a State prompt payment law, the terms and conditions of the applicable State law apply to the orders placed under this contract by such entities. If an eligible non-Federal entity is not subject to a State prompt payment law, the terms and conditions of paragraph (i) of the GSAR clause at 552.212–4, apply to such entities in the same manner as to Federal entities.

(g) *Fee and sales reporting.* The requirements of the GSAR clause at 552.238–80, Industrial Funding Fee and Sales Reporting, apply to any sales to eligible non-Federal entities under this contract.

(End of clause)

[FR Doc. 2023–20098 Filed 9–15–23; 8:45 am]

BILLING CODE 6820–61–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1145

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

Reciprocal Switching for Inadequate Service

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: This decision proposes, in a new subdocket, 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. To help implement the new regulations, the Surface Transportation Board (Board or STB) proposes to require Class I carriers to submit certain data, which would be publicly accessible and generalized; and to adopt a new requirement that, upon written request by a customer, a rail carrier must provide to that customer individualized, machine-readable service data.

DATES: Comments are due by October 23, 2023. Replies are due by November 21, 2023.

ADDRESSES: All filings must be submitted to the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. Filings will be posted to the Board's website and need not be served on other commenters or any other party to the proceedings.

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

SUPPLEMENTARY INFORMATION:

Overview. In 2016, the Board issued a notice of proposed rulemaking in *Reciprocal Switching* (*2016 NPRM*), EP 711 (Sub-No. 1) et al. (STB served July 27, 2016), under which the agency would exercise its statutory authority to require rail carriers to enter into reciprocal switching agreements under 49 U.S.C. 11102(c). Due to developments in the freight rail industry since the Board's 2016 notice, including critical and ongoing service problems, the Board has decided to focus, at this time, its reciprocal switching reforms on more specific and objective remedies for

inadequate rail service. Therefore, the Board is closing Docket No. EP 711 (Sub-No. 1) and proposing a new set of regulations that would supplement the Board's existing provisions on reciprocal switching in cases where the rail carrier is providing inadequate service. A separate notice announcing the closure is being published concurrently.

The newly proposed regulations would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards. The proposed standards are intended to reflect a minimum level of rail service below which regulatory intervention may be warranted, considering shippers and receivers' need for reliable, predictable, and efficient rail service as well as rail carriers' need for a certain degree of operating flexibility. The Board proposes that—when an incumbent rail carrier's service fails to meet the performance standards, the incumbent carrier lacks an affirmative defense, and the prescription of a reciprocal switching agreement would be practicable—it is in the public interest to allow access to an alternate rail carrier through prescription of a reciprocal switching agreement, which is consistent with the public interest prong of section 11102(c). The use of objective performance standards would also provide predictability and efficiency in regulatory proceedings in which a petitioner seeks a prescription. 49 U.S.C. 10101(15).

To facilitate implementation of the new regulations, the Board proposes to require Class I rail carriers to provide, upon written request by a shipper or receiver, that customer's own individualized service data. Additionally, to ensure that the Board would have an informed view of service issues across the network, the agency proposes to make permanent the filing of certain data that the Board has collected on a temporary basis in *Urgent Issues in Freight Rail Service—Railroad Reporting,* Docket No. EP 770 (Sub-No. 1), and to provide for consistency in reporting that data.[1]

The Current Framework for Alternate Access through Reciprocal Switching. Alternate access generally refers to the ability of a shipper or receiver or an alternate railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the alternate railroad. The provisions of 49 U.S.C. 11102 and 10705 make three alternate access remedies available to shippers/receivers and carriers: the prescription of terminal trackage rights, the prescription of reciprocal switching agreements, and the establishment of through routes. As discussed below, reciprocal switching agreements provide for the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or ends its journey on the rail system. The incumbent rail carrier either (1) moves the shipment from the point of origin in the terminal area to a local yard, where an alternate carrier picks up the shipment to provide the line haul; or (2) picks up the shipment at a local yard where an alternate carrier placed the shipment after providing the line haul, for movement to the final destination in the terminal area. The alternate carrier might pay the incumbent carrier a fee for providing that service. The fee is often incorporated in some manner into the alternate carrier's total rate to the shipper. A reciprocal switching agreement thus enables an alternate carrier to offer its own single-line rate or joint-line through rate for line-haul service, even if the alternate carrier's lines do not physically reach the shipper's/receiver's facility. *See 2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 2.

A reciprocal switching agreement can be voluntary or may be prescribed by the Board as provided in section 11102(c). Section 11102(c) authorizes the Board to require rail carriers to enter into reciprocal switching agreements when practicable and in the public interest or when necessary to establish competitive rail service. 49 U.S.C. 11102(c)(1). Currently, the Board has two sets of regulations under which it considers whether to prescribe a reciprocal switching agreement in non-emergency situations.

Part 1147 of the Board's current regulations addresses reciprocal switching related to inadequate service. Under part 1147, the Board will prescribe a reciprocal switching agreement (or terminal trackage rights under section 11102(a) or a through route under section 10705) if the Board determines that there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service by the incumbent carrier. 49 CFR 1147.1(a). Part 1144 governs reciprocal switching to address a broader set of issues, including certain types of complaints about pricing and/or service. Under part 1144, the Board will prescribe a reciprocal switching agreement or through route as necessary to remedy or prevent an act that is contrary to the competition policies in 49 U.S.C. 10101 or is otherwise anticompetitive, provided that certain other conditions are also met. 49 CFR 1144.2(a)(1); 49 U.S.C. 10101.

The 2016 NPRM. In the *2016 NPRM,* the Board proposed to remove the references to reciprocal switching from part 1144 and to create new regulations at a new part 1145 to govern reciprocal switching. The new regulations would have eliminated the requirement that the petitioner show that the reciprocal switching agreement was needed to prevent an act that is contrary to the competition policies in section 10101 or is otherwise anticompetitive. Under part 1145 as proposed in the *2016 NPRM,* the Board would prescribe a reciprocal switching agreement when it either was practicable and in the public interest or was necessary to provide competitive rail service, based on certain criteria. *2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 16; *see also id.* at 9 (proposing to repeal part 1144 and to reverse the policy adopted by the Interstate Commerce Commission in *Midtec Paper Corp.* v. *Chi. & NW Transp. Co.* (*Midtec*), 3 I.C.C.2d 171 (1986), to the extent that the agency indicated an intent to treat the two standards in section 11102(c) as a single standard).

In assessing whether a reciprocal switching agreement would be practicable and in the public interest, the Board proposed a general test that would consider whether the benefits of the proposed agreement would outweigh its potential detriments, considering all relevant factors. *2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 18. Examples of potentially relevant factors included (1) whether the arrangement would further the rail transportation policy of section 10101; (2) the efficiency of the proposed arrangement; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. *2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 18. The Board proposed not to find that the prescription of a reciprocal switching agreement would be practicable and in the public interest if either of the affected rail carriers showed that service under the agreement is not feasible, is unsafe, or

[1] Following the completion of Docket No. EP 711 (Sub-No. 2), the Board intends to take further action in Docket No. EP 770 (Sub-No. 1) and in *First-Mile/Last-Mile Service,* Docket No. EP 767, in which the Board invited comments on first mile/last mile (FMLM) service issues.

will unduly hamper the ability of that carrier to serve its shippers. *Id.*

In assessing whether a reciprocal switching agreement would be necessary to provide competitive rail service for shippers served by a single Class I railroad, the Board proposed to consider whether intermodal and intramodal competition were effective with respect to the movements for which the agreement was sought. *Id.* at 27.[2] As with the other test, the Board proposed not to prescribe a reciprocal switching agreement based on certain feasibility, safety, or operational considerations.

The Board engaged the public on the proposal in various ways, including by receiving and reviewing filed comments, holding a public hearing, and subsequently inviting supplemental comments. Board Members also participated in ex parte meetings in which they received input from numerous interested parties.

The *2016 NPRM* and hearing generated a broad range of responses from those supporting reform and those opposing the reciprocal switching proposal. A fuller overview of the initial comments and replies submitted in response to the *2016 NPRM* can be found in the December 28, 2021 notice announcing the hearing. *See Reciprocal Switching,* EP 711 (Sub-No. 1), slip op. at 4–6 (STB served Dec. 28, 2021). Rail carriers generally objected to modifications to the Board's current reciprocal switching regulations. Other commenters suggested a streamlined approach to reduce complexity and provide more certainty. Some commenters recommended procedural changes, (*see* Shipper Coal. Comment 23–31, Oct. 26, 2016), and others raised concerns with various aspects of the proposal.

Service Problems. As the Board was developing and considering the *2016 NPRM,* it was also addressing a series of major service problems plaguing the rail network. In April 2014, the Board announced that it would hold a hearing to provide interested persons the opportunity to report on recent service problems, to hear from rail industry executives on plans to address their service problems, and to discuss additional options to improve service. *U.S. Rail Serv. Issues,* EP 724, slip op. at 1 (STB served Apr. 1, 2014). Docket No. EP 724 ultimately led the Board to adopt rules requiring the Class I railroads, and the Chicago Transportation Coordination Office through its Class I members, to file weekly service data with the Board. *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4) (STB served Nov. 30, 2016).[3]

In April 2022, given widespread concern about rail service and deteriorating trends reflected in the data collected, the Board convened a two-day hearing to explore issues related to the reliability of the national rail network. *Urgent Issues in Freight Rail Serv.,* EP 770, slip op. at 1 (STB served Apr. 7, 2022). The Board stated that it had been hearing from a broad range of stakeholders about inconsistent and unreliable rail service related to tight car supply and unfilled car orders, delays in transportation for carload and bulk traffic, increased origin dwell time for released unit trains, missed switches, and ineffective customer assistance. *Id.* at 2. Shippers also expressed concern in the reciprocal switching proceeding that carriers' recently adopted operating procedures have introduced new service issues and that captive shippers have had little, if any, recourse during these disruptions. (Coal. Ass'ns Comment 10, Feb. 14, 2022; Priv. Railcar Food & Beverage Ass'n (PRFBA) Comment 20, Feb. 14, 2022; Indus. Mins. Ass'n-N. Am. Comment, Feb. 14, 2022; U.S. Wheat Assocs. Comments, Feb. 14, 2022; Am. Fuel & Petrochem. Mfrs., Feb. 14, 2022.)[4] The Coalition Associations further asserted that service disruptions following changes to a railroad's operating practices exposed the inadequacy of the Board's current regulations to remedy service disruptions effectively. (Coal. Ass'ns Comment 10, Feb. 14, 2022.) In Docket No. EP 770 (Sub-No. 1), the Board has required additional, temporary reporting of data needed for a timelier understanding of the extent and location of acute service issues and labor and equipment shortages and has required the four largest U.S. Class I rail carriers[5] to submit to the Board ''service recovery plans.'' *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (STB served May 6, 2022); *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (STB served May 2, 2023) (extending the temporary reporting period for all Class I rail carriers to December 31, 2023).

New Approach. Given the major service problems subsequent to the *2016 NPRM* and the history of recurring service problems that continue to plague the industry, the Board has concluded that it is appropriate, at this time, to focus reciprocal switching reform on addressing inadequate service. The Board recognizes that, over the past several months, Class I carriers have taken steps that are intended to improve service and that, in some cases, service has improved. These recent developments do not, however, 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. The Board expects that the more objective and transparent standards, defenses, and definitions in this proposal, compared to the previous proposal, would provide that certainty. Through the approach that is proposed in this new subdocket, the Board intends to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis. The Board anticipates that the data access and standardization provisions in this proposal, which have no equivalent in the previous proposal, would ensure and enhance these benefits.

Accordingly, to allow the Board to focus on service issues as provided herein, and to advance more objective standards and related defenses and definitions, the Board will not at this time adopt the rules proposed in the *2016 NPRM.* We will close Docket No. EP 711 (Sub-No. 1) and instead propose, in Docket No. EP 711 (Sub-No. 2), a new rule focused on more defined processes for the prescription of a reciprocal switching agreement in cases of inadequate service.

As discussed more fully below, under part 1145, the Board would find that prescription of a reciprocal switching agreement is ''practicable and in the public interest'' based on objective standards measuring the adequacy of rail service and a straightforward analysis regarding the practicability of the proposed agreement. 49 U.S.C. 11102(c). It is clear that both the reliable and timely delivery of rail shipments and the efficient movement of shipments through the rail system are essential to meeting the public need for adequate rail service. The public need

[2] The Board also proposed possible methodologies for determining how an incumbent carrier would be compensated if the incumbent carrier and the alternate carrier could not reach agreement on their own. *2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 24–26.

[3] *See also Revisions to Reguls. for Expedited Relief for Serv. Emergencies,* EP 762 (STB served Apr. 22, 2022) (proposing to amend the agency's emergency service regulations and noting that, since late 2013, railroad service challenges have periodically affected a wide range of geographic regions and commodities).

[4] A number of these parties sought reciprocal switching relief as part of the acquisition of Kansas City Southern and its railroad affiliates by Canadian Pacific Railway Limited. *Canadian Pac. Ry.—Control—Kan. City S.,* FD 36500 et al., slip op. at 83–85 (STB served Mar. 15, 2023).

[5] BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), and Union Pacific Railroad Company (UP).

for adequate rail service is, in turn, central to the design of the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803: an essential aspect of the rail transportation policy set forth in the Act is to ensure the development and continuation of a rail system that meets the needs of the public and the national defense. 49 U.S.C. 10101(4).

The Board's experience in recent service oversight proceedings reaffirms that carriers' failure to provide reliable, timely, and efficient delivery of rail shipments can result in serious consequences for the transportation network and beyond. For example, in the year following the *Urgent Issues* hearings in 2022, the Board has continued to closely monitor rail service performance data submitted in that docket and pursuant to 49 CFR part 1250.[6] That data showed that, for certain metrics, railroads did not meet the performance targets that the railroads themselves set for improving service. Overall, the data for key performance indicators—such as velocity, terminal dwell, FMLM service (*i.e.,* industry spot and pull), operating inventory, and trip plan compliance—showed that railroad operations remained generally challenged through much of the last two years, with associated impacts on shippers and the public. Poor performance by rail carriers can substantially impair shippers' ability to operate their businesses on an economic basis. That impairment in turn harms the United States' economy as a whole. *See, e.g.,* Am. Fuel & Petrochem. Mfrs. Written Testimony 4, Apr. 28, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (noting that its ''member companies have been forced to reduce facility throughput and subsequently inform their downstream customers that shipments may be delayed''). Inadequate rail service, particularly when it can be avoided or mitigated, is therefore contrary to the public interest. *See Oversight Hr'g Pertaining to Union Pac. R.R. Embargoes,* EP 772, slip op. at 2–3 (STB served Nov. 22, 2022).

Relationship to Other Access Rules. The new regulations at part 1145 would provide an independent basis for prescription of a reciprocal switching agreement, separate and apart from parts 1144 and 1147, rather than replacing aspects of part 1144 as proposed in the *2016 NPRM,* even though those parts, historically, have not been utilized frequently by the rail shipper community.[7] For the reasons set forth in this NPRM, the Board has determined that the proposed part 1145 would provide an essential addition to the current remedial framework. In particular, since part 1147 was promulgated, technological advancements have permitted railroads to track and to provide much more granular and timely service data, which in turn gives the Board and other stakeholders a better view of service difficulties. Accordingly, the Board's concerns in *Expedited Relief for Service Inadequacies* about delineating specific standards for service adequacy, *see Expedited Relief for Service Inadequacies,* 3 S.T.B. at 975, are far less pressing today. Worrisome and persistent declines in service reliability are more clearly demonstrated now than when the Board adopted part 1147 in 1998.

The Board notes, however, that, even after the enactment of the proposed new part 1145, shippers may still pursue access to an alternate rail carrier under parts 1144 and 1147 and that these parts do allow for continued development, including, as appropriate, reassessment by the Board of adjudicatory policies and the appropriate application of those rules in individual cases.

Indeed, in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared toward increasing competitive options—*e.g.,* further changes to the reciprocal switching regulations (either with regard to the public interest prong or the competition prong), or reforms regarding terminal trackage rights, through routes, or the so-called ''bottleneck'' doctrine—is foreclosed, whether in this subdocket or otherwise. For example, as discussed *infra* at note 27, the Board is considering whether the prescription of terminal trackage rights under 49 U.S.C. 11102(a) would be an appropriate remedy for proven failures in local service.

To provide a clearer path to address the impact of service deficiencies on the network, the new regulations at part 1145 would provide for prescription of a reciprocal switching agreement based on defined service standards pursuant to the ''practicable and in the public interest'' prong of section 11102(c). Further distinguishing the new approach from parts 1144 and 1147, the Board proposes to expressly overrule the standards and criteria regarding reciprocal switching established in *Midtec* as applying to any petition under the new part 1145. And a petition filed under the proposed part would not be required to address any of the standards or criteria established under part 1144.[8]

Proposed Standards. The standards that are proposed here are informed by the recent level of performance that carriers themselves have acknowledged largely do not meet the expectations or needs of the public. While, in some cases, an increase in shipping times might be due to circumstances beyond the carrier's control, some carriers have acknowledged that their service levels in recent years do not meet customer expectations and must be addressed through carrier improvement. *See, e.g.,* BNSF Supp. Serv. Recovery Plan 1, June 23, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (''[W]e note that BNSF's service has not been meeting our customers' expectations for several months.''); CSXT Revised Serv. Recovery Plan 2, June 23, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (citing crew shortages as the cause of ''ongoing congestion and delay on the CSXT network'' and discussing recovery efforts); UP Revised Serv. Recovery Plan 4, June 23, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (describing an inability to maintain transit schedules and continued efforts to achieving greater fluidity); NSR Revised Serv. Recovery Plan 2, June 23, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1) (describing its ''aggressive efforts to

[6] Rail service data collected pursuant to 49 CFR part 1250 is available on the Board's website at *www.stb.gov/reports-data/rail-service-data/.*

[7] Although concerns about reliability also underlie part 1147 of the Board's regulations, 49 CFR 1147.1, *see Expedited Relief for Service Inadequacies,* 3 S.T.B. 968 (1998), that rule does not appear to have had its full intended effect. Among other things, part 1147 does not include provisions that provide certainty to industry participants, such as by setting a minimum term for the duration of a prescription thereunder. Despite demonstrated widespread service failures across the national network, no petition for prescribed access has been pursued under part 1147 in many years. Separately, comments from shippers and their counsel indicate that they interpret current part 1144 as unduly restrictive as to a shipper's ability to obtain relief under part 1144. *2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 8.

[8] Based on the long history of the Board's consideration of issues stemming from *Midtec* and the ensuing caselaw, and the numerous comments submitted in response to the *2016 NPRM,* the Board recognizes that stakeholders may have broader views of what actions the Board should consider undertaking with respect to the residual application of part 1144, as well as the application of other competitive access statutes, regulations, and caselaw. In light of the approach proposed in the new part 1145, the Board welcomes comment on what other actions, if any, it should consider with respect to competitive access and, in particular whether it should further broaden the application of the public interest prong of section 11102. *See also infra* note 27.

restore our service to what we and our customers expect'').

The proposed standards are intended 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. Each standard would provide an independent path for a petitioner to obtain prescription of a reciprocal switching agreement under part 1145.

That prescription would facilitate future line-haul service by an alternate rail carrier but—of critical note—would not necessitate that result. Under part 1145, the petitioner would not be required to rely on the alternate carrier for any portion of the petitioner's traffic during the term of the prescription. As a result, even upon falling short of a performance standard in part 1145, resulting in an award of reciprocal switching to the petitioner, the incumbent rail carrier would have the opportunity (subject to contractual commitments by the petitioner) to continue to compete for the petitioner's traffic.

Original Estimated Time of Arrival. To address poor performance in timely delivery by a line-haul carrier, part 1145 would provide for the prescription of a reciprocal switching agreement (and would facilitate line-haul service by an alternate rail carrier) when the incumbent rail carrier failed to meet an objective service reliability standard. The Board finds that it is in the public interest to provide, by a more easily administrable rule, for the prescription of a reciprocal switching agreement when an incumbent carrier fails to provide reliable service, both because a clearer and more objective rule would create an incentive for rail carriers to provide adequate service in the first instance and because, if a rail carrier did not do so, the affected shippers and receivers would then have more certainty in their opportunities to obtain line-haul service from an alternate carrier. Rail carriers themselves recognized at the hearing in Docket No. EP 711 (Sub-No. 1) that prescribed access is an appropriate response to inadequate service. (*See* Hr'g Tr. 938:12 to 939:21, Mar. 16, 2022.)

The new service reliability standard, based on the rail carrier's OETA, would advance the public interest by establishing a reasonable expectation that, after a Class I rail carrier provides an estimated time of arrival for a line haul, the carrier will customarily meet that estimated time of arrival. The proposed rule also recognizes that, in some cases, delay may result from circumstances beyond the carrier's control. The proposed rule would not require perfection in rail carriers' operations, even in the absence of circumstances beyond the carrier's control. But the degree and frequency of delays that have recently characterized service by Class I rail carriers make clear that the public interest would be better served by targeted regulatory intervention that facilitates service by an alternate rail carrier when service reliability has fallen below certain levels.

Transit Time. Part 1145 would provide for the prescription of a reciprocal switching agreement to address deteriorating efficiency in Class I carriers' movements, specifically when the incumbent rail carrier failed to meet an objective standard for consistency, over time, in the transit time for a line haul. This approach would promote the public interest by providing an incentive for carriers to maintain velocity through the rail system. This metric also helps to prevent the possibility that a rail carrier would increase the OETA for a shipment for the sole purpose of meeting the OETA performance standard—a practice that could obscure inadequate service.

Industry Spot and Pull. Part 1145 would provide for the prescription of a reciprocal switching agreement to address inadequate local service, specifically when the incumbent rail carrier has failed to meet an objective standard for completing the placement and removal of shipment at a shipper's or receiver's facility during a planned service window. As noted above, this local service is referred to as industry spot and pull or ISP. Failures to complete local work as scheduled impairs shippers' ability to conduct their business and therefore impairs the public interest. (PRFBA Opening Comments 18, Dec. 17, 2021, *First Mile/Last Mile Serv.,* EP 767; Sweetener User Assoc. Comment 2, Apr. 18, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (noting that issues with local service have forced companies to reduce production in key product lines and shut down manufacturing facilities).) In addition, because some OETAs are calculated based on constructive placement rather than actual placement, the ISP metric also captures aspects of service adequacy that might otherwise be missed.

Through reliance on these three performance standards (OETA, transit time, and ISP), part 1145 would enhance implementation of section 11102(c) and ultimately would help to advance the policies in section 10101. As suggested above, the application of objective performance standards for adequate rail service, as provided for in part 1145, would promote predictability and efficiency in regulatory proceedings thereunder, thereby reducing unnecessary regulatory costs and ultimately strengthening rail carriers' incentive to provide adequate service. Part 1145 therefore would advance the policies in section 10101 of having a rail system that meets the public need, of ensuring effective competition among rail carriers, of minimizing the need for regulatory control, and of reaching regulatory decisions on a fair and expeditious basis. *See* 49 U.S.C. 10101(1), (2), (4), (5), (14).

Part 1145 would likewise enhance implementation of §§ 11102(c) and 10101 by providing a minimum term for a prescribed reciprocal switching agreement. By establishing a minimum term, part 1145 would allow for more effective planning and investment both by rail customers and by alternate carriers, thereby encouraging their voluntary participation in providing service and promoting more workable opportunities for shippers. As discussed below, after the minimum term, the Board could terminate the prescription if the incumbent carrier demonstrates that it could meet the performance standards, for example by demonstrating that it consistently has been able to meet, over an appropriate period of time, the performance standards for similar traffic to or from the relevant terminal area.

By more effectively addressing the public need for adequate rail service, and by doing so specifically through a clearer and more certain regulatory process, proposed part 1145 would appropriately supplement other statutory provisions and regulations governing common carriage and bills of lading. But the common carrier obligation and laws governing bills of lading also have other implications. For example, they provide for a private party to be compensated for losses incurred by that party. *See* 49 U.S.C. 11101, 11706, 80111; 49 CFR part 1035, App. B. Thus, the common carrier obligation and laws governing bills of lading are, to some extent, concerned with private remedies against a railroad for past service failures. The Board recognizes that regulations with objective standards, even those that recognize and account for circumstances outside of a carrier's control, implicitly value the benefits of certainty and

clarity over a process that provides for a more open-ended and case-specific inquiry. Because of this trade-off, and the different and oftentimes more severe or rigid form of liability and intervention that would come with falling short under the common carrier obligation, the Board does not view it as appropriate to apply, or draw from, these proposed standards to regulate or enforce the common carrier obligation. *See, e.g., State of Montana* v. *BNSF Ry.,* NOR 42124, slip op. at 7 (STB served Apr. 26, 2013); *Granite State Concrete Co.* v. *STB,* 417 F.3d 85, 92 (1st Cir. 2005).

As suggested above, the objective of part 1145 would be to facilitate future service by an alternate rail carrier (without mandating the use of alternate service) to help ensure that the transportation system as a whole meets the public need. Part 1145 would rely on evidence of past performance by the incumbent carrier to identify patterns of deficient service that, due to the level and duration of the deficiency, indicate the need for regulatory intervention in the public interest. Due to the specific purpose and form of regulatory intervention under part 1145, the performance standards set forth in this NPRM as constituting the standard for obtaining a reciprocal switching order from the Board are in no way to be construed as constituting standards by which a railroad's compliance with the common carrier obligation under section 11101(a) is to be measured. In other words, a failure to comply with the performance standards under the proposed part 1145 does not, standing alone, establish a basis under other laws for seeking damages, or other remedies related to the common carrier obligation, for service problems. If the Board enacts part 1145, the Board does not intend the performance standards therein to serve as a standard for performance by rail carriers (whether as a baseline or as a cap) that would provide the basis for relief under laws of common carriage, for relief under laws that govern bills of lading, for prescribed access to an alternate rail carrier under part 1147, for the prescription of emergency service under part 1146, or for applying any other law.

Beyond the opportunity to seek prescription of a reciprocal switching agreement under the proposed part 1145, a shipper or receiver would continue to have the opportunity to seek prescription of a reciprocal switching agreement (or other forms of prescribed access, as applicable) under parts 1144 and 1147. Part 1144 provides for prescribed access on a permanent basis when the competitive standards therein are met. Part 1147 would accommodate temporary relief from service issues that are not covered by the specific performance standards in part 1145.

To implement part 1145, the Board would require Class I carriers to make certain data available to customers. As such, within seven days of a written request from a shipper or receiver, the incumbent rail carrier would be required to provide that customer all relevant individualized performance records necessary to bring a case at the Board (*i.e.,* the historical records necessary to ascertain whether a carrier did not meet the OETA, transit time, and/or ISP standards). To assist the Board with general oversight, the agency also proposes to codify the collection of certain data concerning service, some of which is currently being provided on a temporary basis in Docket No. EP 770 (Sub-No. 1). As a general matter, this material would also allow a reciprocal switching petitioner to compare its service to that of the industry or the incumbent carrier's service on a system and regional level to see whether service problems are systemic and/or worsening.

Part I: Availability of Service-Related Reciprocal Switching Under Proposed Part 1145

A reciprocal switching agreement provides for the transfer of a rail shipment between Class I rail carriers or their affiliated companies [9] within the terminal area in which the shipment begins or ends its journey on the rail system. Reciprocal switching is merely incidental to a line haul.[10] A terminal area is a commercially cohesive area in which two or more rail carriers undertake the local collection, classification, and distribution of shipments for purposes of line-haul service.[11] A terminal area is characterized by multiple points of loading/unloading and yards for local collection, classification, and distribution. *Pa. Co.,* 236 U.S. at 359; *Midtec,* 3 I.C.C.2d at 179; *Golden Cat,* NOR 41550, slip op. at 7. In case of a dispute under part 1145 over whether an area constituted a terminal area, the Board would consider evidence that the area met the foregoing description, including relevant evidence, such as whether the area was listed as a normal revenue interchange point in the Official List of Open and Prepay Stations issued by the Association of American Railroads through Railinc.[12] Subject to the foregoing definition, a particular point of loading/unloading would not be the appropriate subject of a prescribed reciprocal switching agreement under part 1145, if the point is not, or using existing facilities reasonably could not be, integrated into the terminal area operations. Further, if an incumbent railroad and alternate railroad have an existing reciprocal switching arrangement in a terminal area, and the petitioner's traffic is currently served within that same terminal area, the proposed operation would presumptively qualify for prescription of a reciprocal switching agreement and the incumbent railroad would bear a heavy burden of establishing why the proposed operation would not qualify, assuming that other conditions to the prescription were met.

As discussed below, the Board would prescribe a reciprocal switching agreement under part 1145 when (1) the petitioner demonstrates that the incumbent Class I carrier failed to meet one of the performance standards in part 1145 for the petitioner's shipments over that lane; [13] (2) with respect to the lane of traffic that is the subject of the petition, the petitioner (a shipper or receiver [14]) has practical physical access

[9] For purposes of this NPRM and the proposed regulatory text, ''affiliated companies'' has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A). However, the Board seeks public comment as to whether its definition should also include third-party agents of a Class I carrier.

[10] *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distrib. Rules & Pracs.,* 1 I.C.C.2d 700, 702–03 (1985); *Pa. Co.* v. *United States,* 236 U.S. 351, 355–57 (1915); *Chi., Indianapolis & Louisville Ry.* v. *United States,* 270 U.S. 287 (1926); *Port of Portland* v. *United States,* 408 U.S. 811, 820 n.8 (1972); *Colo. River W. Ry.* v. *Tex. & New Orleans R.R.,* 283 S.W.2d 768, 774 (Tex. Civ. App. 1955); *Del. & Hudson Ry.* v. *Consol. Rail Corp.,* 366 I.C.C. 845, 846–47 (1982); *Cent. States Enter., Inc.* v. *Seaboard Coast Line R.R.,* NOR 38891 (ICC served May 15, 1984), *aff'd sub nom. Cent. States Enter., Inc.* v. *I.C.C.,* 780 F.2d 664, 676 (7th Cir. 1985).

[11] *Rio Grande Indus., Inc.—Purchase & Related Trackage Rts.—Soo Line R.R.,* FD 31505, slip op. at 10–11 (ICC served Nov. 15, 1989) (''A 'terminal area' (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities''); *see also Golden Cat* v. *St. Louis S.W. Ry.,* NOR 41550, slip. op at 7 (STB served Apr. 25, 1996) (similar language).

[12] The Board specifically seeks comment as to whether the reciprocal switching tariff of an alternate carrier applicable to shippers in the same area should be considered as evidence, and how to reconcile inconsistencies in railroad tariffs (*e.g.,* instances in which one railroad lists a location as open to reciprocal switching and another railroad does not).

[13] The Board describes these standards in Part I and provides examples illustrating them in Appendix A.

[14] Under the proposed part 1145, the petitioner would need to be a shipper or receiver. Part 1147 of the Board's regulations also allows other rail carriers to petition for prescription of reciprocal

to only one Class I carrier that can serve that lane; (3) the carrier fails to establish an affirmative defense; and (4) the prescription would be practicable.[15] A prescription under part 1145 would facilitate a transfer within the terminal area as would enable an alternate carrier to provide line-haul service on behalf of the petitioner. The prescription would have a minimum term subject to renewal as discussed below.

(1) Performance Standards

The following performance standards would measure certain aspects of service by a Class I rail carrier or, for purposes of the industry spot and pull standard, an affiliated company that serves the relevant terminal area. These performance standards are to be uniform standards that employ terms that are defined by the Board, for consistent application across Class I rail carriers and their affiliated companies.

(a) Service Reliability: Original Estimated Time of Arrival

The service reliability standard would measure a Class I rail carrier's success in delivering a shipment near its OETA, *i.e.,* the estimated time of arrival that the rail carrier provided when the shipper tendered the bill of lading for shipment.[16] The original estimated time of arrival would be compared to when the car was delivered to the designated destination.[17] Application of the service reliability standard would be based on all shipments over a given lane [18] over 12 consecutive weeks. The service reliability standard would thus promote the completion of line hauls near the original estimated time of arrival.[19] The on-time completion of line hauls allows the shipper to conduct its operations on a timely basis while permitting effective coordination between rail service and other modes of transportation.

As a starting point for possible percentages in the service reliability standard, the Board notes that in Docket No. EP 770 (Sub-No. 1) it directed BNSF, CSXT, NSR, and UP to provide an indicator and target for trip plan compliance (TPC) as well as weekly data measuring manifest service, unit trains, and intermodal traffic placed at destination 24 hours past OETA. *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 4–6, item 7 (STB served May 6, 2022).[20] Although the carriers refer to the TPC indicator by different names and measure performance in different ways, these four carriers reported the below initial TPC metrics for manifest traffic (the largest category of non-intermodal traffic), initial six-month performance targets, and one-year performance targets.

TABLE 1—WEEKLY PERCENTAGE OF MANIFEST SERVICE RAILCARS PLACED WITHIN 24 HOURS OF ORIGINAL ARRIVAL ESTIMATE

Class I railroad	Initial performance (05/13/2022) [21] (%)	Initial 6-month performance target [22] (%)	1-Year performance target [23] (%)
BNSF	54.1	63	65
CSXT	69	80	82
NSR	48	61	82
UP	63	70	70

While the Board recognizes that these figures are system averages, each of the four carriers required to submit service recovery plans has acknowledged that their service fell short of public expectations or needs during the time when the carriers reported their initial performance levels. The Board finds that the carriers' performance levels during this challenged time are a reasonable starting point for setting standards for inadequate service and, as such, has used these levels to formulate

switching agreement. Here, however, because application of the performance standards pertains to customer specific information, the Board proposes to limit eligible petitioners to shippers and receivers.

[15] The Board seeks public comment on whether such prescriptions should include a minimum level of switching service and, if so, whether the Board should establish a separate and specific penalty structure to be imposed on carriers that do not meet that level of service.

[16] A shipper's tender of a bill of lading notifies the rail carrier that a shipment is ready for service. It is at that point that the rail carrier must provide the original estimated time of arrival, regardless of whether the carrier has physical possession of the shipment. Some rail carriers use the term ''original trip plan'' instead of the term ''original estimated time of arrival.'' For the sake of consistency and clarity, we would use only the term ''original estimated time of arrival'' (or OETA), as defined herein, for purposes of part 1145. In Docket No. EP 770 (Sub-No. 1), the Board refers to this standard as ''trip plan compliance'' or TPC.

[17] Delivery occurs when the shipment actually arrives at the designated destination (meaning the final destination as specified in the bill of lading or, in the case of a joint-line movement, the interchange where the shipment is transferred to the interline carrier or its affiliate) or is constructively placed (meaning placed at a local yard that is convenient to the designated destination). For purposes of part 1145, constructive placement of a shipment at a local yard constitutes delivery only when (1) the recipient has the option, by prior agreement between the rail carrier and the customer, to have the rail carrier hold the shipment pending the recipient's request for delivery to the designated destination and the recipient has not yet requested delivery or (2) the recipient is unable to accept delivery at the designated destination.

[18] For purposes of part 1145, a lane is determined by the point of origin and the designated destination as well as by the commodity. Shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane. This is the case without regard to which route(s) the rail carrier uses to move the shipments from origin to destination. In the case of an interline movement, the designated destination is the designated interchange.

[19] The Board also discussed original estimated time of arrival as part of a rulemaking on demurrage billing. There, the Board found that use of original estimated time of arrival, as a means to identify when a rail carrier provided inadequate spacing between shipments, does not constitute a guarantee of delivery by the original estimated time of arrival. *See Demurrage Billing Requirements,* EP 759, slip op. at 18 (STB served Apr. 6, 2021). Here, as well, use of original estimated time of arrival does not constitute a guarantee. A guarantee might give a customer a cause of action against the rail carrier, whereas the prescription of a reciprocal switching agreement, based on a poor success rate relative to the original estimated time of arrival, is directed toward protecting the public interest in adequate rail service. Use of the original estimated time of arrival, as the basis for prescribing a reciprocal switching agreement, at the same time reflects the reasonable expectation that, when a Class I rail carrier or its affiliated company provides an original estimated time of arrival for a line haul, the carrier will customarily deliver freight in a manner consistent with that original estimated time of arrival. As discussed below, the industry spot and pull standard similarly reflects the reasonable expectation that a Class I rail carrier or its affiliated company would perform local service during the planned service window.

[20] The Board notes that PRFBA suggested in another docket that the railroads should also provide on-time performance metrics based on their car trip plans, allowing a 24-hour delivery window, PRFBA Reply 4, Feb. 17, 2022, *First Mile/Last Mile Serv.,* EP 767.

proposals for potential performance standards under part 1145.

One potential performance standard for part 1145 would be to ensure that at least 60% of shipments arrive within 24 hours of the OETA. This percentage falls near the average manifest traffic performance levels that the largest carriers themselves regarded as not meeting public expectations (among other problems) and thus would serve as a useful indicator of adverse effects on the public interest.

Another approach would be to set the success rate at 60% in delivering a shipment within 24 hours after the OETA during the first year following the effective date of the proposed part 1145. After the first year, the success rate would increase to 70% in delivering a shipment within 24 hours after the OETA. The Board seeks comment on whether, if it chooses this approach, the performance standard should be increased to an even higher level after the second year. By phasing in a higher success rate over time, the Board would be providing the Class I carriers with time to increase their work forces and other resources, as necessary, and/or modify their operations in order to meet the performance standards—the primary cause for poor service cited by the railroads during the Board's *Urgent Issues* proceeding was staff shortages. Indeed, one of the principal purposes of this proposed rule is to incentivize carriers to provide shippers with more reliable service.

The Board seeks comment on which approach to adopt. Stakeholders are also invited to comment more generally on the appropriate success rate for service reliability, including whether the proposed success rates would reflect the public need for adequate rail service and how use of the proposed success rates would affect the rail network. Shippers and receivers are further invited (1) to comment on how the proposed success rates would affect both their business operations and the likelihood that the shipper or receiver would file a petition under part 1145, and (2) to submit estimates as to what percentage of shippers (or traffic) overall is likely to be affected by the Board's proposal. In particular, the Board seeks comment on whether the standard should initially be higher than 60% and on whether it should escalate the standard after an additional period of time to higher than 70%—*e.g.,* to 75%—if it adopts an escalating standard for the success rate. The Board also specifically seeks comment on the grace period (*i.e.,* the proposed 24-hour window past the OETA), whether that should be increased or decreased (*e.g.,* 0 or 48 hours), and—if it should change—what is the appropriate success rate associated with the suggested grace period.

Types of service. The Board proposes to apply the service reliability (OETA) standard only to shipments that are moving in manifest service, not to unit trains. In the Board's experience, deliveries of unit trains do not give rise to the same type of concerns with respect to meeting OETA. Nevertheless, 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.[24]

For manifest traffic, the on-time success rate in the service reliability (OETA) standard would refer to the percentage of shipments delivered to the agreed-upon destination within the applicable number of hours after the OETA. Upon request by the customer, to allow the customer to calculate readily whether the incumbent rail carrier met the service reliability standard, the incumbent carrier must give the customer, in a machine-readable format, the OETA for each shipment and a timestamp of when the shipment was delivered to the agreed-upon destination.

For movements involving more than one rail carrier, the destination for the originating rail carrier would be considered the interchange location with the subsequent railroad. The reliability standard in part 1145 would measure the originating carrier's success in delivering the shipment to that interchange location by the OETA that the originating carrier provided when the shipper tendered the bill of lading. The reliability standard in part 1145 would separately apply to a subsequent rail carrier as to its portion of the trip, when the subsequent carrier or its affiliated company moved the shipment to its final destination in a terminal area. The subsequent carrier must issue an OETA to the shipper when the carrier receives the shipment at the interchange location, that is, when the subsequent carrier acknowledges physical receipt and control of the shipment. The Board may look to applicable interchange rules between carriers as to when this has occurred.[25]

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

For example, suppose that the Board adopts a minimum threshold of OETA + 24 hours below 60% and a shipper has a lane to Destination A and a lane to Destination B. During a 12-week period the 10-car shipment to Destination A has an on-time success rate of 50% and the five-car shipment to Destination B has an on-time success rate of 61%. The average of the 15 cars falls below the on-time success rate threshold of 60% during the 12-week period. If the switch would only be practicable and efficient if all cars shipped to Destination A and B were switched to the alternate carrier, and all other requirements were satisfied, the shipper could argue that cars for both destinations should be switched even though traffic moving to Destination B is above the proposed service standard.

[21] *See* NSR Performance Data at Row 163, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); UP Performance Data at Row 182, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); BNSF Performance Data at Row 163, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); CSXT Performance Data at Row 163, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1).

[22] *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 5, 8, 11, 13 (STB served Oct. 28, 2022).

[23] *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 3–6 (STB served May 2, 2023).

[24] It is the Board's understanding that unit trains run on trip plans that are based strictly on the expected running times for that type of train in each of the crew districts between origin and destination. Trip plans for unit trains therefore are not constructed in the same manner as trip plans for manifest traffic (less-than-trainload shipments). Due to operational differences, the arrival day or time of a unit train may not be the most critical performance measure, and measuring a carrier's success in maintaining the velocity of a unit train over time would be a more effective measure than OETA. As indicated above, the Board seeks comments on this issue.

[25] The Board would not expect for a gap to arise because the time of interchange of a shipment, whether that time is immediately accepted or agreed to by the receiving railroad or, rather, is settled after a dispute between the carriers, is the same for both carriers.

(b) Service Consistency: Transit Time

The service consistency standard would measure a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system. As discussed below, the service consistency standard would also apply separately to the return of empty private and shipper-leased railcars. For a loaded car, the service consistency standard 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. The relevant point of origin and destination and the relevant time stamps would be the same as for purposes of the service reliability (OETA) standard. Transit time would not include time spent loading or unloading a shipment.

A rail carrier's compliance with the service consistency standard would be determined by comparing (A) the average transit time for shipment over a period of 12 consecutive weeks to (B) the average transit time for the same shipment over the same 12-week period during the previous year. As with the service reliability standard, the Board's inquiry under the service consistency standard would extend to any consecutive period of 12 weeks. Significant deteriorations in transit time impair shippers' interests as well as the public interest by creating longer lag times in getting products to market and/or in businesses' receipt of needed resources and/or empty cars.

Based on its understanding of the rail network and available data,[26] the Board proposes that, 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% (to be determined in the final rule) over the average transit time for the same 12-week period during the previous year. Deliveries of empty system cars and empty private cars could also result in the prescription of a reciprocal switching agreement for the corresponding outgoing traffic. The Board specifically seeks comment on what level of increase in transit time should be the standard and whether the Board should adopt a different standard that also captures prolonged transit time problems, to the extent any such service inadequacy would not also be identified by poor performance under the OETA or ISP metrics.

Multi-Carrier Moves and Lanes. For the transit time standard, multi-carrier movements and lanes would be treated the same as under the service reliability standard. For multi-carrier movements, the destination for the upstream carrier would be treated as the interchange location with the subsequent railroad. In addition, as with the service reliability standard, the Board could in certain circumstances prescribe a reciprocal switching agreement for multiple lanes based on the average success rates in maintaining transit times.

Empties. The Board proposes to apply the service consistency standard to deliveries of empty private and shipper-leased railcars. If a rail carrier failed to meet the service consistency standard in delivering empty private and shipper-leased cars, and if all other conditions to a prescription are met, the Board would prescribe a reciprocal switching agreement that would govern the customer's outgoing traffic from the point at which the cars were to be delivered. While proposing to apply the service consistency standard to deliveries of empty private and shipper-leased railcars, the Board seeks comment on whether there would be data available to accommodate that application.

(c) Inadequate Local Service: Industry Spot and Pull

The third performance standard—ISP—would measure a rail carrier's success in performing local deliveries (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars during the planned service window. As noted above, the need for the industry spot and pull standard arises because, in many cases, the arrival time for a line haul means that the shipment has been constructively placed, without the shipment having actually arrived at the designated destination. For this reason, ''last mile'' performance would not necessarily be reflected in determining compliance with the service reliability standard under part 1145. The ISP standard would serve to determine the adequacy of rail service in those cases.[27]

Under part 1145, a rail carrier would fail the ISP standard if the carrier had a success rate of less than 80%, over a period of 12 consecutive weeks, in performing local deliveries and pick-ups during the planned service window. The success rate would compare (A) the number of planned service windows during which the carrier successfully completed the requested placements or pick ups to (B) the number of planned service windows for which the shipper or receiver, by the applicable cut-off time, requested a placement or pick-up. The carrier would be deemed to have missed the planned service window if the carrier did not pick up or place all of the cars requested by the shipper or receiver by the applicable cut-off time. This would include situations in which the carrier has ''embargoed'' the shipper or receiver as a result of congestion or other fluidity issues on the carrier's network, which results in reduced service to the shipper or receiver.[28] The Board proposes the 80% standard informed by data submitted in Docket No. EP 770 (Sub-No. 1). Although the carriers refer to industry spot and pull

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

[27] The Board recognizes that, if it were to prescribe a reciprocal switching agreement based on the incumbent rail carrier's failure to meet the ISP standard, the incumbent rail carrier would continue to provide local service to the petitioner; the prescription of a reciprocal switching agreement would simply facilitate alternate line-haul service to the petitioner. 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. Upon the prescription of terminal trackage rights, the incumbent rail carrier would be replaced in providing local service, whereas under a reciprocal switching agreement the carrier could be replaced in providing line-haul service. The Board seeks comment on whether it should provide for the prescription of terminal trackage rights for failure to meet the ISP standard, either in place of a separate path to a prescription of a reciprocal switching agreement in those circumstances or as an additional path that would be open to the petitioner.

[28] The Board notes that certain misses caused by embargoes would be covered by various affirmative defensives, discussed *infra* (*e.g.,* extraordinary circumstances such as floods, a bridge collapse, etc.). To be clear, as it pertains to the Board's other authorities, the Board will not determine the legality of an embargo based on whether a railroad qualifies for an affirmative defense.

indicators by different names (*e.g.,* Local Operating Plan Adherence or LOPA) and measure performance in different ways, these four carriers first reported ISP metrics and interim targets for manifest traffic as follows:

TABLE 2—INDUSTRY SPOT & PULL

Measure	Class I railroad	Initial performance (system) 05/13/2022 [29] (%)	Interim target [30] (%)
Local Service Performance	BNSF	88.2	91
FMLM	CSXT	83.0	87
Local Operating Plan Adherence	NSR	74.1	78
FMLM	UP	91.0	91

While the Board recognizes that these figures are system averages, each of the four carriers that were required to submit service recovery plans have acknowledged that their service fell short of expectations during the time when the carriers reported their initial performance levels. As such, these averages are a reasonable starting point for setting standards for poor or inadequate local service. Evidence from Docket No. EP 767 also indicates that ISP around this level can adversely affect a shipper.[31] As with the service reliability standard, however, the Board requests stakeholders and shippers/receivers to provide evidence and comment on the appropriateness of this percentage and whether it should be higher or lower.

For purposes of the ISP standard under part 1145, a rail carrier would be deemed to provide local service during the planned service window if (1) the shipper or receiver ordered a shipment to be placed or picked up before the cut-off time for that service window, and (2) the carrier provided the requested service during that window.

As an example, in the case where a rail carrier offers a service window for a customer on Monday, Wednesday, and Friday, the ISP ratio would be as follows during a twelve-week period, depending on the fact pattern (*i.e.,* type of misses):

(1) Customer requested service by the cut-off time for 36 service windows over a 12-week period and received the requested service during 30 of those 36 windows. The resulting ISP ratio is 83.3% (30/36).

(2) Customer requested service by the cut-off time for 36 service windows over a 12-week period, and for 28 of those windows, received service during the requested window. On two occasions, the carrier provided service during a different window, a day later than the requested window. The resulting ISP ratio is 77.8% (28/36).

(3) Customer requested service by the cut-off time for 36 service windows over a 12-week period and each time received service on the same day as requested. But, on ten of those occasions, the service was provided outside of the 12 hours that, for purpose of part 1145, constitute a service window. The resulting ISP ratio is 72.2% (26/36).

(4) Customer requested service by the cut-off time for 36 service windows over a 12-week period and received placements of the requested shipments during each of those windows. But, during 10 of the 36 planned service windows, the carrier failed to pull cars as requested by the customer. The resulting ISP ratio is again 72.2% (26/36).

In applying the ISP standard, the Board proposes to use a standardized service window of 12 hours (the maximum duration that a crew is allowed to work), starting from the relevant serving crew's scheduled on-duty time. However, the Board is concerned that a carrier could change the scheduled on-duty time on short notice and thereby evade the impact of the ISP standard. The Board therefore seeks comment from stakeholders on whether a carrier should be required to provide notice before changing the serving crew's schedule on-duty time—at least for the purposes of regulatory measurement—and, if so, how much notice should be required. In addition, the Board seeks to avoid any implication or encouragement that a carrier with a service window shorter than 12 hours ought to expand its window. The carrier would receive no regulatory advantage for doing so, and nothing in this proposal would prohibit a carrier from maintaining one window for its business purposes and another for the purposes of regulatory measurement. Nonetheless, considering the administrative overlap, the Board seeks comment on whether a standardized window would create adverse regulatory incentives and, if so, how best to avoid or minimize any adverse incentives.

As an alternative to using a standard, 12-hour service window, the Board seeks comment on whether it should use the service window that the rail carrier specified according to the carrier's established protocol, subject to two considerations. As noted, the Board is concerned that a carrier could change its service window on short notice and thereby evade the impact of the ISP standard. The Board therefore seeks comment from stakeholders on whether a carrier should be required to provide notice before changing a service window and, if so, how much notice should be required. The Board is also concerned that a carrier could unreasonably expand the duration of a service window as a means to evade meaningful measurement under the ISP standard. Accordingly, under the alternative to using a standard, 12-hour service window, the Board would use the window specified by the carrier not to exceed 12 hours in duration; under

[29] *See* NSR Performance Data at Row 78, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); UP Performance Data at Row 97, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); BNSF Performance Data at Row 78, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); CSXT Performance Data at Row 78, May 18, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1).

[30] *See* NSR Interim Update, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); UP Amended Serv. Recovery Plan, June 3, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); BNSF Interim Updates, May 5, 2023, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1); CSXT Interim Update, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1).

[31] As noted by one shipper in Docket No. EP 767:

By CSXT's own measure, it is performing at only a 76% switch rate versus its schedule and 87% car accuracy. It starts to impact the plant when the numbers get below 80% of switches performed. Moreover, GMI has rarely received its Saturday switch over the last six months. CSXT has explained this poor service is occurring due to crew shortages. Like at the Ohio plant, this poor service has caused production interruptions and labor utilization issues from the lack of ingredients due to poor switching service. GMI estimates this poor service can result in at least $200,000 per day in damages, conservatively.

PRFBA Opening Comments 18, Dec. 17, 2021, *First Mile/Last Mile Serv.,* EP 767.

this approach, a carrier would be deemed to perform local service within the relevant period only if the carrier performed the service within the window specified by the carrier according to its customary established protocol, provided that the window did not exceed 12 hours (the maximum duration that a crew is allowed to work). Although this approach would allow up to a 12-hour window for purposes of part 1145, this approach would not constitute permission or encouragement for carriers to adjust their service window operating protocols in the ordinary course of business up to 12 hours, if their normal protocol has been a shorter window.

A job that was canceled/annulled by the carrier would be counted as a miss in calculating compliance with the ISP standard, as none of the requested work would have been completed, unless another crew completed the requested work within the original window. A placement would not be considered completed if the customer does not have working access to the placed shipment. A miss not caused by the incumbent railroad would not be counted against it. The burden is on the carrier to provide the reason for the miss and prove that the miss was not caused by the carrier.

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 become 90% for a period of one year.[32] The test for applying this increased standard would look at the number of service windows that the carrier regularly makes available; the intent is not to create disincentives for carriers to accommodate shippers' needs by offering more frequent service windows during periods of seasonal or unusual demand by the shipper. A party may bring evidence and argument as to whether such circumstances invalidate use of the higher 90% ISP standard. Stakeholders are invited to comment on this exception and whether a reduction in the frequency of local work by the carrier should provide the basis for prescribing a reciprocal switching agreement regardless of the carrier's success rate in performing local service.

[32] If a case were filed alleging a failure to meet the 90% standard, the railroad would have the burden of showing that there were shipper/receiver projections, sound economic reasoning, or historical evidence that justify the expectation that there would be a decrease in demand.

(2) Practical Physical Access to Only One Class I Carrier

To obtain prescription of a reciprocal switching agreement under part 1145, the petitioner would need to show that, for the lane of traffic that is the subject of the petition, the shipper or receiver has practical physical access to only one Class I rail carrier that could serve that lane. Consistent with what the Board noted when adopting parts 1146 and 1147, the Board expects, as a general rule, that there would be little benefit from prescribing reciprocal switching agreements for petitioners that have practical physical access to another Class I carrier that is capable of handling their service needs. *Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 978. Although the Board's regulations do not foreclose a prescription under part 1146 or 1147 if the petitioner can already reach another Class I carrier, in case neither of those carriers is providing adequate service, the Board proposes here to require the petitioner to show that, for the lane that is (or lanes that are) the subject of the petition, the petitioner has practical physical access to only one Class I carrier that could serve that lane. A clear standard provides more certainty to a shipper or receiver considering whether to file a petition for relief.

For purposes of part 1145, ''practical physical access'' refers to a feasible shipping opportunity on a rail carrier, whether directly or through that carrier's affiliated company. A petitioner could have practical physical access to more than one Class I carrier (for the lane of traffic that is the subject of the petition) by any of several means. First, a petitioner could have practical physical access to more than one Class I carrier if the petitioner's facility is served directly by multiple Class I carriers or their affiliated companies, each of which could serve the relevant lane of traffic. Second, a petitioner could have practical physical access to more than one Class I carrier by virtue of an existing reciprocal switching arrangement that governs shipping to/from the shipper's facility. Third, a petitioner could have practical physical access to more than one Class I carrier by virtue of other types of arrangements, such as terminal trackage rights or a contract between a local rail carrier and an alternate rail carrier. The Board would consider these and other circumstances on a case-by-case basis.

In assessing whether a petitioner has practical physical access to more than one Class I carrier, the Board would consider independently the lanes at issue in the shipper's or receiver's petition, even if other lanes at the facility had practical physical access to another carrier. For example, if an existing reciprocal switching arrangement provides for switching for only one of several lanes at the shipper's facility, the Board would not regard the shipper as having practical physical access for the closed lanes. The shipper would be eligible to seek a prescription for any of those closed lanes (or for multiple closed lanes, as discussed above) notwithstanding that one lane at the shipper's facility was open.

The Board would also consider limitations that are part of an existing arrangement. For example, if an existing reciprocal switching arrangement provides for the switching of shipments on behalf of a shipper—but only for shipments between the shipper's facility and another location that the incumbent carrier does not serve—the Board would not regard the arrangement as establishing practical physical access to more than one Class I carrier for purposes of a prescription under part 1145. The shipper would be eligible to seek a prescription under part 1145 notwithstanding that the shipper's facility was already open to switching for purposes that were irrelevant to the shipper's petition. The foregoing is just one example; there could be other limitations that would preclude an existing arrangement from providing practical physical access to more than one Class I carrier for purposes of part 1145. The Board would evaluate limitations on a case-by-case basis.

The Board proposes that a petitioner could establish a prima facie showing by submitting a verified statement from an appropriate official attesting that it does not have practical physical access to more than one Class I carrier, taking into account the potential types of practical physical access described above. *See Mkt. Dominance Streamlined Approach,* EP 756, slip op. at 17 (STB served Aug. 3, 2020).

The Board proposes to limit prescriptions under part 1145 to situations in which the incumbent carrier is a Class I carrier or, for purposes of the industry spot and pull standard, an affiliated company that serves the relevant terminal area. The service data the Board has been examining in Docket No. EP 770 (Sub-No. 1) has been focused on Class I carriers. The Board has not received as many informal or formal complaints about smaller carriers. Moreover, data collection may be more burdensome for Class II and Class III carriers, as they have not been submitting service-related data to the Board under performance metrics dockets, such as Docket Nos. EP

724 (Sub-No. 4) and EP 770 (Sub-No. 1). Nevertheless, the Board seeks comment from stakeholders on whether its new part 1145 should be broadened to include Class II and Class III carriers who are providing inadequate service.

(3) Other Matters

(a) Negotiations

Similar to 49 CFR 1144.1, at least five business days prior to seeking the prescription of a reciprocal switching agreement, the petitioner that intends to initiate such action must first seek to engage in good faith negotiations to resolve its dispute with the incumbent carrier.

(b) Case Timeline and Alternate Carrier Service

Simultaneous with its petition for relief, a shipper or receiver must file a motion for protective order. In its petition for relief, a shipper or receiver must confirm that it attempted good faith negotiations, identify the performance standard the railroad failed to meet over the requisite period of time, and provide evidence supporting its claim. The petitioner must also identify the potential alternate carrier and include both carriers' reciprocal switching publications. Additionally, it must serve its petition on the incumbent carrier, the alternate carrier, and the Federal Railroad Administration.

A reply from the incumbent carrier is due 20 days after the petition for relief is filed, and a rebuttal from the petitioner may be filed 20 days after the incumbent carrier files its reply. The Board's target for issuing an order addressing the petition is 90 days after the petition is filed.

Under section 11102(c)(1), the affected rail carriers are responsible for establishing the terms and conditions that apply to prescribed reciprocal switching agreement, including compensation, provided that the carriers establish those terms within a reasonable period. Here, the Board expects that 30 days would be a reasonable period for the carriers to reach agreement on compensation, particularly in light of the Board's indication below of the possible approaches to compensation that the Board would take. Part 1145 therefore would provide for the carriers to reach agreement and to offer service under the prescribed agreement within 30 days of the prescription. The relevant location would also need to be included in the appropriate disclosure under 49 CFR part 1300. The carriers would have an additional 10 days after offering service to notify the Board that the agreement had taken effect. If the affected carriers could not agree on compensation within 30 days of the service of the prescription, then the affected rail carriers would be required (i) to offer service and (ii) to petition the Board to set compensation. As is the case with terminal trackage rights, a petition to the Board to set compensation is sufficient to allow service to begin while the compensation issues are pending. *See S. Pac. Transp. Co.* v. *ICC,* 736 F.2d 708, 723–24 (D.C. Cir. 1984).

(c) Affirmative Defenses

An incumbent rail carrier shall be deemed not to fail a performance standard under (1)(a), (1)(b), or (1)(c), above, if the carrier establishes an affirmative defense. If the incumbent carrier makes such a showing, the Board would not prescribe a reciprocal switching agreement. A carrier's intentional reduction or maintenance of its workforce at a level that itself causes workforce shortage, or, in the event of a workforce shortage, failure to use reasonable efforts to increase its workforce, would not, on its own, be considered a defense for failure to meet any performance standard. Similarly, a carrier's intentional reduction or maintenance of its power or car supply, or failure to use reasonable efforts to maintain its power or car supply, that itself causes a failure of any performance standard would not, on its own, be considered a defense. For any affirmative defense, the carrier would have the burden of proof. Affirmative defenses that do not fit within the categories below would be evaluated by the Board on a case-by-case basis. The Board seeks comment on what other affirmative defenses, if any, should be specified in the final rule.

Extraordinary Circumstances. The Board would not prescribe a reciprocal switching agreement if the incumbent carrier demonstrates that its service levels were significantly affected by extraordinary circumstances beyond a carrier's control. The Board would consider extraordinary circumstances to be the type of events that permit a railroad to qualify for an emergency trackage rights exemption at 49 CFR 1180.2(d)(9). *See Pet. for Rulemaking—R.R. Consol. Proc. Exemption for Emergency Temp. Trackage Rts.,* EP 282 (Sub-No. 21) (STB served Nov. 30, 2021). As explained in Docket No. EP 282 (Sub-No. 21), these events include unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts. *Id.* at 6; *Pet. for Rulemaking—R.R. Consol. Proc. Exemption for Emergency Temp. Trackage Rts.,* EP 282 (Sub-No. 21), slip op. at 5 (STB served May 28, 2021). The railroad must demonstrate that the event is the principal cause precipitating the service issue; the event cannot be non-causal (*e.g.,* minor or tangential).

Surprise Surge. The Board would not prescribe a reciprocal switching agreement 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 the petitioner should have alerted the carrier but did not do so. For non-seasonal traffic, a surprise surge would occur when the shipper's traffic increased by 20% or more in 12 weeks, compared to the 12 weeks before that, and the shipper did not provide written notice to the railroad at least 12 weeks before the surge. For seasonal traffic, such as agricultural shipments, applicable surges would be those where the petitioner's traffic increased 20% or more as compared to the same 12-week period during the previous year and where the shipper did not give written notice to the railroad of the surge at least 12 weeks before the increase occurred. The written notice shall clearly specify a reasonable estimate of the anticipated traffic.[33] The Board seeks comment on whether 20% and the 12-week notice period are reasonable, and whether (and, if so, how) the Board should consider any history of the shipper notifying the carrier of surges that did not come to fruition.

Highly Unusual Shipment Patterns. The Board would not prescribe a reciprocal switching agreement 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. For example, a pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but the shipper had a plant outage for three weeks and then requested shipment of 120 cars in a single week. What constitutes ''highly unusual'' would vary from case to case depending upon the characteristics of the traffic. A pattern could be highly unusual for this purpose even in the absence of a surprise surge as described above.

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. For

[33] A shipper's notification of an anticipated surge does not necessarily entitle the shipper to receive that level of service.

example, if a passenger rail entity controlling dispatching halted freight traffic for an extended time, and that delay caused the railroad to fail to meet the standard, the Board would not prescribe reciprocal switching.

(d) Practicability

Because switching service (transfers between carriers) under a prescribed reciprocal switching agreement would occur within a terminal area, in the context of integrated operations or operations that could reasonably become integrated, there is reason to believe that those agreements would be practicable under section 11102(c). Should a legitimate practicability concern arise, however, the Board would consider whether the switching service could be provided without unduly impairing the rail carriers' operations. The Board would also consider an objection by the alternate rail carrier or incumbent rail carrier that the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the objecting rail carrier's ability to serve its existing customers. The objecting rail carrier would have the burden of proof of establishing infeasibility or undue impairment.

(e) Exempt Traffic

The Board notes that some transportation that has been exempted from Board regulation pursuant to 49 U.S.C. 10502 could be subject to an order providing reciprocal switching under part 1145. The Board retains full jurisdiction to deal with exempted transportation, which includes considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part. This practice is consistent with Board precedent. Further, it is well established that the Board can revoke the exemption at any time, in whole or in part, under section 10502(d). *Sanimax USA, LLC* v. *Union Pac. R.R.,* NOR 42171, slip op. at 4 (STB served Feb. 25, 2022); *Pyco Indus.—Alt. Rail Serv.—S. Plains Switching,* FD 34889, slip op. at 5–6 (STB served Nov. 21, 2006); *G&T Terminal Packaging Co.* v. *Consol. Rail Corp.,* 830 F.2d 1230, 1235 (3d Cir. 1987), *cert. denied,* 485 U.S. 988 (1988). The Board would do so to the extent required.

(f) Contract Traffic

As to traffic that is the subject of a rail transportation contract under 49 U.S.C. 10709, section 10709(c)(1) generally prohibits challenges to a valid contract between a rail carrier and a shipper, as well as challenges to transportation performed pursuant to such a contract. 49 U.S.C. 10709(c)(1); *see also H.B. Fuller Co.* v. *S. Pac. Transp. Co.,* 2 S.T.B. 550, 553 (1997) (the statute ''remove[s] transportation under a rail contract from any subsequent regulatory review''). The Board seeks 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. While the Board welcomes comment on all legal and policy issues relevant to this question, the Board also specifically seeks comment on two issues.

First, the Board seeks comment on whether the Board may consider the performance data described above, based on service that a carrier provided by contract, as the grounds for prescribing a reciprocal switching agreement that would become effective after the contract expired. The Board also seeks comment on whether the Board may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer's request.

Second, the Board seeks comment on when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires. The United States Court of Appeals for the District of Columbia Circuit, in applying statutory language in effect prior to the enactment of the ICC Termination Act of 1995, held in 1996 that the Board was not authorized to order a carrier to file a common carrier tariff ''more than a year before contract service was expected to end.'' *Burlington N. R.R.* v. *STB* (*Burlington Northern*), 75 F.3d 685, 687 (D.C. Cir. 1996) (examining former 49 U.S.C. 10762, which required that rail carrier tariffs be filed with the agency). The Board later indicated that it did not interpret *Burlington Northern* as preventing the Board ''from ordering the establishment of a rate that is needed within a matter of weeks'' rather than years. *FMC Wyo. Corp.* v. *Union Pac. R.R.,* FD 33467, slip op. at 3 n.7 (STB served Dec. 16, 1997). Although *Burlington Northern* is not directly applicable here, given that it examined different statutory language and pertained to a different form of (and basis for) intervention, the Board seeks comment on what legal or policy issues should similarly be considered regarding the prescription of reciprocal switching prior to the expiration of a transportation contract that governs the traffic that would be switched even if the prescription would not become effective until after the expiration of the contract. Specifically, must the Board wait until the contract has actually expired before considering and ruling on a petition for prescription of reciprocal switching, or may the Board, prior to contract expiration, grant a prescription that would not go into effect until after expiration? If the latter, should the Board specify a maximum time period prior to contract expiration when petitions for prescription of a reciprocal switching agreement would be entertained?

(g) Compensation

The Board seeks comments on two methodologies for setting fees under a prescribed reciprocal switching agreement under part 1145, if the affected rail carriers fail to reach agreement on compensation within a reasonable time.[34] Both methodologies would reimburse the incumbent carrier for the cost of performing the switch, as determined by the carrier's embedded and variable costs of service. Reciprocal switching fees that allow the incumbent carrier to recover its cost of service are consistent with longstanding practices concerning switching fees. *See, e.g., Increased Switching Charges at Kan. City, Mo.-Kan.,* 344 I.C.C. 62 (1972). Because under this proposed part the Board would be prescribing reciprocal switching as a remedy for service failures, the Board finds it inappropriate to use a methodology that would allow the incumbent carrier to recover any lost profits for the line-haul portion of the movement being provided by the alternate carrier. Such a compensation methodology would be tantamount to rewarding the incumbent carrier for inadequate service.

Cost of Service. One option is setting switching rates based on the cost-of-service approach that has been used in past cases on switching rates. *Id.* This approach could either use the ICC

[34] In seeking comments on compensation under part 1145 as proposed herein, the Board notes that this iteration differs substantially from the proposal in the *2016 NPRM.* Due to the substantial differences, many of the comments on compensation that were provided in response to the *2016 NPRM* do not apply here. The Board seeks comments here only on compensation when (1) the prescribed reciprocal switching agreement facilitates the transfer of a shipment to an alternate rail carrier within a given terminal area, for the purpose of allowing the alternate carrier to provide line-haul service for that shipment; and (2) the basis for the prescription is the incumbent rail carrier's failure to provide adequate rail service. If comments on the *2016 NPRM* are helpful in that particular regard, then the commenting party is encouraged to provide a brief summary of those comments.

Terminal Form F, 9–64, Formula for Use in Determining Rail Terminal Freight Service Costs (Sept. 1964), or the Board's Uniform Rail Costing System (URCS) to develop costs.

SSW Compensation. Another option to set compensation for the non-line-haul portion of the movement is adapting the Board's ''SSW Compensation'' methodology to reciprocal switching fees. *See St. Louis SW Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984); *St. Louis SW Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 4 I.C.C.2d 668 (1987). Although SSW Compensation is used primarily in trackage rights cases where one rail carrier is actually operating over another rail carrier's lines, many of the principles that inform the methodology would apply in the reciprocal switching fee context as well. Thus, what the Board calls Rental Income in SSW Compensation would have an analogy in a directed switch in the form of Imputed Rental Income. The application of such methodology should not include any lost profit from the line-haul beyond the switching location.

(h) Term and Termination

A prescription under part 1145 would ordinarily have a term of two years from the date on which reciprocal switching operations thereunder began; the incumbent rail carrier normally could seek a termination date that would fall no earlier than the two-year anniversary of the date on which reciprocal switching operations began.[35] The Board could prescribe a minimum term longer than two years and up to four years if the petitioner demonstrated that the longer minimum term was necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.[36] It is essential that the duration of a reciprocal switching order is sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers. In all cases, the minimum term of the prescription would be stated in the Board's order granting the prescription. The Board seeks comment on whether a minimum term longer than two years and/or whether a maximum term longer than four years is necessary, across all prescriptions under part 1145, to make the proposed rule practicable and effective.

The incumbent rail carrier may file a petition to terminate no more than 180 days and no less than 120 days before the end of the prescribed period.[37] A reply to a petition to terminate shall be filed within 15 days of the petition, and a rebuttal may be filed within seven days after the reply. Subject to an appropriate protective order, the shipper/receiver has the right to access and examine the facts and data underlying a carrier's petition to terminate. If the Board does not act within 90 days from the close of briefing, the prescription automatically terminates at the end of the original term of the prescription; provided that, if the Board is unable to act within that time period due to extraordinary circumstances, the prescription would be automatically renewed for an additional 30 days from the end of the current term. In such cases, the Board would issue an order alerting the parties to the extraordinary circumstances and the renewal.

The Board would grant a petition to terminate if the incumbent rail carrier demonstrated that, at the time of the incumbent rail carrier's petition, the incumbent rail carrier's service for similar traffic on average met whichever performance standard served as the justification for the prescription. ''Similar traffic'' is defined as the broad category type (*e.g.,* manifest traffic) to or from the terminal area that is affected by the prescription.[38] This requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area.[39] In addition to challenging a carrier's submitted performance data, the shipper/receiver or alternate carrier—during the pendency of the petition to terminate—may show that the petitioning carrier's service degraded below the relevant performance standard.

For example, suppose the Board prescribes a reciprocal switching agreement because the incumbent railroad's reliability standard for certain manifest traffic from Yard X stood at 50%. During the period when termination petitions are permitted, the incumbent railroad files a petition to terminate in which it demonstrates that its average service reliability standard for manifest traffic from Yard X during the previous 24-week period is now 90%. Absent a successful reply by the shipper/receiver or alternate carrier, such as a showing that the incumbent railroad's service has deteriorated below the reliability standard during the pendency of the petition, the petition to terminate would be granted because the Board would have a basis to find that the shipper/receiver's traffic would achieve an acceptable reliability standard for the petitioner's traffic.

In the event the incumbent carrier does not file a petition for termination no more than 180 days, and no less than 120 days before the end of the prescription period, or files such a petition and fails to sustain its burden of proof, the reciprocal switching prescription would automatically renew for the same period as the initial prescription. The Board seeks comment on whether, alternatively, the renewal should be for only an additional one year. The Board also seeks comment on whether a subsequent failure by the incumbent railroad within a specified time period, such as one year, following the termination of a prescribed reciprocal switching arrangement should result in a permanent reciprocal switching order.

The Board emphasizes that the prescription of a reciprocal switching agreement does not prevent an incumbent rail carrier from competing to keep its traffic and attempting to win back the traffic by voluntary agreement of the petitioner during the prescription period by demonstrating that it will soon provide better service or offering the petitioner more favorable terms and conditions to win its business. Indeed, in addition to preventing service problems in the first place, the proposed rule intends to spur carrier improvement if it falls below these standards.

Part II: Data

The new part 1145 would require Class I carriers to make data available to customers. Within seven days of a written request from a shipper or receiver, the incumbent rail carrier would be required to provide that

[35] The running of the two years is not tolled by disputes about compensation.

[36] For example, if the prescribed reciprocal switching agreement would pertain to a substantial volume of traffic, and if the alternate carrier needed to make investments to accept that traffic, then a longer minimum term might be appropriate to give the alternate carrier more opportunity to recover and earn a return on that investment. Significant volumes of traffic might require investment in physical plant, additional employees, and additional locomotive maintenance capability. The ramp-up time for any of these processes is approximately six months, after which, given a two-year term, the alternate carrier would have only 18 months to earn a return.

[37] Therefore, if the Board prescribed a four-year term, the window for petitioning to terminate the prescription would fall during the third year.

[38] If a carrier has no such similar traffic, it may submit a comparison group of the same broad traffic type in the same geographic region.

[39] The Board would consider whether a failure to meet the performance standard for that 24-week period, or during the pendency of the petition, was due to conditions that were beyond the carrier's control and had been demonstrably resolved.

customer all relevant individualized performance records necessary to bring a case at the Board.[40]

Specifically, the railroad would be required to record and—upon request by the shipper or receiver—provide to that customer all of the customer's data on traffic that was assigned OETAs and local service windows, along with the corresponding time stamps indicating performance. As in *Demurrage Billing Requirements,* EP 759, slip op. at 3, the railroad must provide the petitioner with machine readable data, meaning ''data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.'' *Id.* at 3 n.9. Stakeholders are invited to comment on what format and fields would be useful.

Additionally, 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.[41] 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; [42] 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. Carriers would be required to collect and report this data using the terms that are defined in part 1145 and the associated provisions of 1145 on what constitutes a miss. As one example, a railroad would need to count as a miss a shipment that was not delivered within 24 hours of OETA as defined in part 1145. As a second example, a railroad would need to count as a miss a failure to provide local service on the planned-service window as defined in part 1145.

The Board finds that the collection of this data would not be unduly burdensome, as carriers are already providing similar data to the Board and use such data in the ordinary course of business. The comments in Docket No. EP 767 indicate that some railroads already provide dashboards showing shipment-specific data. For example, NSR asserts that ''AccessNS and the Trax mobile application offer Norfolk Southern's customers real-time, easy access to first-mile/last-mile data regarding each of their shipments on the Norfolk Southern system.'' NSR Opening Comments 2, Dec. 17, 2021, *First Mile/Last Mile Serv.,* EP 767.

If this data reporting requirement were to become permanent, there would no longer be a need to collect that particular data on a temporary basis in Docket No. EP 770 (Sub-No. 1). The Board will defer any decisions on whether to extend the Docket No. EP 770 (Sub-No. 1) collection as to other data until the conclusion of this proceeding. Should the Board ultimately conclude that the data reporting that it proposes to make permanent here is sufficient for regulatory purposes, the Board expects that it would close Docket No. EP 770 (Sub-No. 1) following the expiration of the current temporary collection.

Similarly, because the new part 1145 would address many first-mile/last-mile issues, the Board will defer any further action in Docket No. EP 767 until the conclusion of this proceeding. In Docket No. EP 767, the Board sought comments exploring whether additional metrics to measure first-mile/last-mile service would be useful and what the associated burdens would be. The Board expects that comments in this proceeding regarding the proposed part 1145 will address similar issues, but with respect to the particular metrics proposed here.

Environmental Review

The proposal of part 1145 is categorically excluded from environmental review under 49 CFR 1105.6(c).

Regulatory Flexibility Act

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

The regulations proposed here are directed at Class I railroads and their affiliated companies. As such, the regulations would not impact a substantial number of small entities.[43] Accordingly, pursuant to 5 U.S.C. 605(b), the Board certifies that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and Appendix B, the Board seeks comments about the impact of the proposed rules regarding: (1) whether the collection of information, as set forth in the proposed rule and further described in Appendix B, is necessary for the proper performance of the functions of the

[40] The Board seeks comment whether it could require a carrier to disclose data about past service to a shipper or receiver when a different entity paid for the service. The Board likewise seeks comment whether it should give the entity that paid for the service the opportunity to seek confidential treatment of service data that a carrier provides to a shipper or receiver upon request.

[41] Furthermore, many rail users indicated at the April 2022 hearing in Docket No. EP 770 that increased visibility into FMLM service and TPC data would be particularly useful. *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 3 (STB served May 6, 2022).

[42] The Class I railroads would no longer need to report this data for intermodal traffic.

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

Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The reporting of the data under 49 CFR part 1145 would be standardized. The reporting requirement would require an initial hourly burden for the initial programing as well as the weekly report output and submission (section 1145.8(b)). The petition seeking prescription of a reciprocal switching agreement (section 1145.5) and the petition seeking termination (section 1145.7) would be necessary to implement part 1145. Section 1145.8(a) will provide for Class I rail carriers to provide individualized service data to terminal-area shippers or receivers upon request.

The Board anticipates that the requirement for the Class I carriers to make updates to their internal data collections methodology to standardize and harmonize it with the Board's requirements for the proposed reporting would add an estimated cumulative total one-time hour burden of 480 hours across all six Class I railroads. The weekly reports are estimated to require an annual hour burden of approximately 2,564 hours, and the petitions to initiate and terminate the process are estimated to require approximately 800 hours. Requests for individualized service data by terminal-area shippers or receivers are estimated to require approximately 36 hours.

The Board welcomes comment on the estimates of actual time of its proposed collections requirements for Class I carriers and petitioners seeking reciprocal switching agreements, as detailed below in Appendix B. The proposed rules will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

It is ordered.

1. The Board proposes to amend its regulations as set forth in this decision. Notice of the proposed rule will be published in the **Federal Register**.

2. Comments are due by October 23, 2023. Reply comments are due by November 21, 2023.

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

4. Docket No. EP 711 (Sub-No. 1) is discontinued.

5. This decision is effective on its date of service.

Decided: September 5, 2023.

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

Board Member Primus, concurring:

Today's NPRM sets forth a promising new way to institute reciprocal switching when it is ''practicable and in the public interest.'' 49 U.S.C. 11102(c). This proposal appears to be an improvement over the *2016 NPRM*'s application of the public interest prong, and I look forward to the development of a comment record on it.

I also eagerly anticipate the Board's action to improve access to the statute's other prong, addressing reciprocal switching that is ''necessary to provide competitive rail service.'' *Id.* Rail customers have interpreted the standard in 49 CFR 1144.2—under which a reciprocal switching order requires a determination that it is ''necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive''—as setting an unrealistically high bar. *See 2016 NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 8. As a result, no petitions for reciprocal switching have been filed for many years, despite rail customers' expressions of concern about competition. *Id.* The Board should act soon to ensure that reciprocal switching is available for competitive access to the extent authorized by the language of the statute.

List of Subjects in 49 CFR 1145

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

Jeffrey Herzig,

Clearance Clerk.

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

PART 1145—RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Sec.

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

§ 1145.1 Definitions.

The following definitions apply to part 1145:

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

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

Delivery means when a shipment is actually placed at a designated destination or is constructively placed at a local yard that is convenient to the designated destination. In the case of shipments at interchange locations, a shipment is deemed to be delivered when the receiving carrier acknowledges receipt of a shipment. For purposes hereof, constructive placement of a shipment at a local yard constitutes delivery only when:

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

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

Designated destination means the final destination as specified in the bill of lading or, in the case of a joint-line movement, the interchange where the shipment is transferred to the interline carrier, its agent, or affiliated company.

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

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

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

Original estimated time of arrival or *OETA* means the estimated time of arrival that the incumbent rail carrier

provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from an interline carrier.

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

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

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

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

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

Alternative 1–A

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

Alternative 1–B

Service window means a window during which the incumbent rail carrier offers to perform local service (placements and/or pick-ups of rail shipments) at a shipper's or receiver's facility. A service window must be made available by a rail carrier with reasonable advance notice to the shipper or receiver and in accordance with the carrier's established protocol. For purposes of this part, a service window is the time specified according to the carrier's established protocol, not to exceed 12 hours, in duration, beginning at the start of the work shift for the crew that will perform the local service, without regard to whether the incumbent rail carrier specified a longer or shorter service window.

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

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

Terminal area means a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards. A point of origin or final destination on the rail system is not suitable for a prescribed switching arrangement if the point is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent rail carrier's terminal-area operation.

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

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

§ 1145.2 Performance standards.

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

(a) *Service reliability (original estimated time of arrival).* The service reliability standard applies to shipments that travel as manifest traffic. The service reliability standard measures a rail carrier's success in delivering a shipment from its original or interchange location to the designated destination by the original estimated time of arrival, accounting for the applicable grace period. Determination of a rail carrier's compliance with the service reliability standard is based on all shipments from the same original or interchange location to the same designated destination over a period of 12 consecutive weeks. A rail carrier meets the service reliability standard when *A/B* ratio is greater than 60%, where *A* is the number of shipments that are delivered within 24 hours of the original estimated time of arrival, and *B* is the total number of shipments. This ratio will increase to 70% after [DATE ONE YEAR AFTER EFFECTIVE DATE OF FINAL RULE].

Alternative 2–A

(b) *Service consistency (transit time).* The service consistency standard applies to shipments in the form of a unit train and to shipments that travel as manifest traffic. The service consistency standard measures a rail carrier's success over time in maintaining the transit time for a shipment. A rail carrier meets the service consistency standard when *A* is no more than 20% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year.

Alternative 2–B

(b) *Service consistency (transit time).* The service consistency standard applies to shipments in the form of a unit train and to shipments that travel as manifest traffic. The service consistency standard measures a rail carrier's success over time in maintaining the transit time for a shipment. A rail carrier meets the service consistency standard when *A* is no more than 25% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year.

(c) *Lanes.* (1) Except as provided in paragraph (c)(2) of this section, compliance with the performance standards in paragraphs (a) and (b) of

this section is determined separately for each lane of traffic to or from the petitioner's facility. Shipments of the same commodity from the same point of origin to the same designated destination are deemed to travel over the same lane, without regard to the route between the point of origin and designated destination. In the case of an interline movement, the designated destination is the designated interchange.

(2) The Board shall prescribe a reciprocal switching agreement that governs shipments to or from multiple lanes to or from the petitioner's facility if all the conditions in this paragraph (c)(2) are met.

(i) Each of the included lanes had practical physical access to only one Class I carrier that could serve that lane.

(ii) The incumbent rail carrier's average success rate for those lanes fails to meet a performance standard.

(iii) The Board determines that the prescribed agreement would be practical and efficient only when the agreement governed shipments to or from all of those lanes.

(iv) The petition meets other conditions to a prescription under this part.

(3) For purposes of paragraph (c)(2) of this section, the petitioner may choose which lanes of traffic to or from its facility to include in demonstrating the incumbent rail carrier's average success rate, including lanes of different commodities and/or lanes with different points of origin or designated destination.

Alternative 3–A

(d) *Empty railcars.*

(1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in paragraph (b) of this section if the rail carrier's average transit time for delivering empty cars to a designated destination over a 12-week period increases by more than 20% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period during the previous year.

Alternative 3–B

(1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in paragraph (b) of this section if the rail carrier's average transit time for delivering empty cars to a designated destination over a 12-week period increases by more than 25% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period during the previous year.

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

(e) *Industry spot and pull.* The industry spot and pull standard measures a rail carrier's success in performing local placements (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window.

(1) A rail carrier meets the industry spot and pull standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 80% or more in performing requested spots and pulls within the planned service window, as determined based on the total number of planned service windows during that 12-week period. If a rail carrier cancels a service window other than at the shipper's or receiver's request, that window is included as a failure in calculating compliance with the industry spot and pull standard. Failure to spot constructively placed cars that have been ordered in by the cut-off time for a planned service window results in a missed service window.

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

§ 1145.3 Affirmative defenses.

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

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

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

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

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

§ 1145.4 Negotiations.

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

§ 1145.5 Procedures.

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

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

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

(2) Switching publications of the incumbent rail carrier and the potential alternate carrier.

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

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

(d) A reply to a petition is due within 20 days of a completed petition.

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

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

§ 1145.6 Prescription.

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

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

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

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

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

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

(d) Upon the Board's prescription of a reciprocal switching agreement under this part, the affected rail carriers must: set the terms of the agreement and offer service thereunder within 30 days of service of the prescription; include, in the appropriate disclosure under 49 CFR part 1300, the location of the petitioner's facility, indicating that the location is open to reciprocal switching, and the applicable terms and price; and notify the Board within 10 days of when the carriers offered service that the agreement has taken effect.

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

§ 1145.7 Termination.

(a) A prescription hereunder automatically renews at the end of the term established under § 1145.6(c), unless the Board grants a petition by the incumbent rail carrier to terminate the prescription. Automatic renewal is for the same term as the original term of the prescription.

(b) The Board will grant a petition to terminate a prescription if the incumbent rail carrier demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met the performance standard that provided the basis for the prescription. This requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area.

(c) The incumbent rail carrier may submit a petition to terminate a prescription not more than 180 days and not less than 120 days before the end of the current term of the prescription. In the event the incumbent carrier does not file a petition for termination no more than 180 days, but no less than 120 days, before the end of the prescription period or files such a petition and fails to sustain its burden of proof, the reciprocal switching prescription would automatically renew for the same period as the initial prescription.

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

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

(f) The Board will endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing. If the Board does not act within 90 days, the prescription automatically terminates at the end of the original term of the prescription; provided that, if the Board does not issue a decision due to extraordinary circumstances, as determined by the Board, the prescription is automatically renewed for 30 days from the end of the current term. When there are extraordinary circumstances, the Board will issue an order alerting the parties that it will not issue a decision within 90 days.

§ 1145.8 Data.

(a) Within seven days of a written request from a shipper or receiver, the incumbent rail carrier shall provide that customer all relevant individualized performance records necessary to file a petition under § 1145.5 with the Board.

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

Note: The following appendices A and B will not appear in the Code of Federal Regulations.

Appendix A

Tables and Illustrations

1. Overview of Part 1145

Performance standard	Focus	Measure of success	Effect of prescription
Service Reliability (OETA) § 1145.2(a)	Success in delivering shipments near the OETA.	[60] [70]% success in delivering shipments within 24 hours after OETA, measured over a 12-week period.	Access to alternate line haul carrier.
Service Consistency (Transit Time) § 1145.2(b).	Success in maintaining the average velocity of shipments over a lane from one year to the next.	Maintains velocity over a lane without a deterioration of more than [20] [25]%, as measured over a 12-week period.	Access to alternate line haul carrier.
Industry Spot and Pull (ISP) § 1145.2(e)	Success in performing local service during the planned service window.	80% success in performing local service during the planned service window, measured over a 12-week period.	Access to alternate line haul carrier.

2. Service Reliability (Original Estimated Time of Arrival)—§ 1145.2(a)

Option 1

A rail carrier fails to meet the service reliability standard when A/B is less than 60%, where:

A = the number of shipments over a lane during a 12-week period that are delivered within 24 hours after the OETA and

B = the total number of shipments over the same lane during the same 12-week period.

Option 2

The same as Option 1, except that A/B is less than 60% during the first year after enactment of part 1145 and less than 70% after the end of the first year.

Illustration

Over a 12-week period, a carrier moves a total of 23 shipments (each a loaded car) over a given lane. The cars are shipped and delivered in four groups as shown below, with each group delivered on a different day during the summer. Here, A (successful shipments) equals 12 and B (total shipments) equals 23, resulting in a service reliability ratio (A/B) of 52%. The carrier fails to meet the service reliability standard.

OETA	Delivery	Difference from OETA (hours)	Successful shipments	Total shipments
8/25/23, 20:24	8/27/23, 8:24	+36	0	5
7/25/23, 18:19	7/27/23, 21:55	+51.6	0	6
6/25/23, 12:19	6/26/23, 6:19	+18	2	2
7/26/23, 7:01	7/25/23, 6:01	−25	10	10
			A = 12	B = 23

3. Service Consistency (Transit Time)—§ 1145.2(b)

A rail carrier fails to meet the service consistency standard when an increase from B to A is more than [20] [25]%, where:

A = the average transit time for all shipments over a lane during a 12-week period and

B = the average transit time for all shipments over the same lane during the same 12-week period during the prior calendar year.

Illustration 1

The average transit time during the period complained of is 13 days. The average transit time for the historical reference period is 11 days. Here, A equals 13 and B equals 11. The increase from B to A is two days, which is 18% of B. The carrier meets the service consistency standard.

Illustration 2

The average transit time during the period complained is 13 days. The average transit time for the historical reference period is 10 days. Here, A equals 13 and B equals 10. The increase from B to A is three days, which is 30% of B. The carrier fails to meet the service consistency standard.

4. Industry Spot and Pull (ISP)—§ 1145.2(e)

A rail carrier fails to meet the industry spot and pull standard when A/B is less than 80%, where:

A = the number of planned service windows over a 12-week period during which the carrier performed the requested local service and

B = the total number of planned service windows over the same 12-week period.

For this purpose, a ''planned service window'' is a day for which the customer requested local service by the applicable cut-off time. A planned service window is 12 hours from the start of the work shift of the crew that is to perform the local service.

Illustration

The customer submits a timely request for local service on 14 occasions over a twelve-week period. On four of those occasions, the carrier fails to perform all of the requested local service during the planned service window, that is, within 12 hours of the start of the relevant crew's work shift. Here, A equals 10 and B equals 14, resulting in an ISP ratio (A/B) of 71%. The carrier fails to meet the ISP standard.

Appendix B

Information Collection Under the Paperwork Reduction Act

Title: Reciprocal Switching Agreements.

OMB Control Number: 2140–00XX.

STB Form Number: None.

Type of Review: New Information Collection.

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval (1) to collect certain service data from Class I rail carriers, (2) to provide for Class I rail carriers to provide individualized service data to terminal-area shippers or receivers upon request, (3) to provide for those shippers and receivers to file petitions for the prescription of a reciprocal switching agreement in a case of inadequate rail service, and (4) to provide for the affected rail carrier to petition to terminate a prescription.

Respondents: Class I railroads and terminal-area shippers and receivers.

Number of Respondents: Six Class I railroads for weekly reporting and one shipper, receiver, or carrier for each individualized request or petition.

Estimated Time per Response: The estimated time is set forth in the table below.

Frequency: Weekly and on occasion.

Total Burden Hours (annually including all respondents): The total hour burdens are set forth in the table below.

TABLE—TOTAL ESTIMATED BURDEN HOURS FOR RESPONDENTS

Type of filing	Estimated hours per response	Number of respondents	Estimated frequency	Total burden hours
One-time update to data collection software to standardize with the Board's data definition for service reliability and industry spot and pull	80	6	1	480
Weekly reporting on service reliability and industry spot and pull (new 49 CFR 1145.8(b))	4	6	52	1,248
Occasional request and response to request for individualized service data (new 49 CFR 1145.8(a))	3	12	1	36
Petition for Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.5)	140	5	1	700
Petition to Terminate Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.7)	50	2	1	100

TABLE—TOTAL ESTIMATED BURDEN HOURS FOR RESPONDENTS—Continued

Type of filing	Estimated hours per response	Number of respondents	Estimated frequency	Total burden hours
Total Burden Hours	.....	.....	.....	2,564

Total ''Non-Hour Burden'' Cost: There are no non-hourly burdens, as the reports will be submitted electronically.

Needs and Uses: A reciprocal switching agreement provides for the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or ends its journey on the rail system. An agreement facilitates line-haul service by a rail carrier that serves the terminal area, other than the rail carrier on whose tracks the shipment begins or ends its journey. Several years ago, the Board began to consider new regulations to require rail carriers to enter into reciprocal switching agreements. Those proposed regulations were never promulgated. Due to subsequent developments in the rail sector, including the emergence of service problems as a critical and ongoing issue, the Board is now considering a new set of regulations to prescribe reciprocal switching agreements in cases of inadequate rail service.

The newly proposed regulations would allow for terminal-area shippers or receivers to seek the prescription of a reciprocal switching agreement when service to them fails to meet certain objective performance standards. The standards reflect what the Board believes to be the minimal level of rail service that is compatible with the public need, considering shippers and receivers' need for reliable, predictable, and efficient rail service as well as rail carriers' need for a certain degree of operating flexibility. When an incumbent rail carrier's service fails to meet the performance standards, and when other conditions to a prescription are met (including the absence of a valid affirmative defense), the Board will consider if it would be in the public interest to allow access to an alternate rail carrier through prescription of a reciprocal switching agreement. To facilitate implementation of the new regulations, the Board proposes to require weekly reporting of certain service data by Class I carriers and to grant shippers and receivers the right to receive their own individualized service data from a Class I carrier. The proposed reporting and submissions are necessary to the purposes of the proposed regulation and therefore to enable the Board to implement its statutory authority in this important area.

[FR Doc. 2023–19543 Filed 9–15–23; 8:45 am]

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SURFACE TRANSPORTATION BOARD

49 CFR Parts 1144 and 1145

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

Reciprocal Switching

AGENCY: Surface Transportation Board.

ACTION: Proposed rule; closure of Docket No. EP 711 (Sub-docket No. 1).

SUMMARY: On July 27, 2016, in Docket No. EP 711 (Sub-No. 1), the Surface Transportation Board (Board or STB) proposed to revise its reciprocal switching regulations. After considering the full record and the developments in the freight rail industry, the Board has decided not to pursue those revisions and to close Docket No. EP 711 (Sub-No. 1). Instead, in Docket No. EP 711 (Sub-No. 2), the Board is proposing a new set of regulations that would provide access to reciprocal switching when there is inadequate service. The Board will continue to assess what other action, if any, the Board should take with respect to reciprocal switching.

DATES: September 18, 2023.

ADDRESSES: All filings must be submitted to the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. Filings will be posted to the Board's website and need not be served on other commenters or any other party to the proceedings.

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

SUPPLEMENTARY INFORMATION: On July 27, 2016, the Board granted in part a petition for rulemaking filed by the National Industrial Transportation League seeking revised reciprocal switching regulations. The Board proposed regulations in Docket No. EP 711 (Sub-No. 1) that would provide for prescription of a reciprocal switching agreement when either practicable and in the public interest or necessary to provide competitive rail service. Due to developments in the freight rail industry since the Board's 2016 notice, including critical and ongoing service problems, the Board has decided to focus, at this time, its reciprocal switching reforms on more specific and objective remedies for inadequate rail service. *See Reciprocal Switching,* EP 711 (Sub-No. 1) et al., slip op. at 1–21, 31 (STB served Sept. 7, 2023). *See also id.* at 7 n.8 (welcoming comment on what other actions, if any, the Board should consider with respect to competitive access and, in particular, whether the Board should further broaden the application of the public interest prong of 49 U.S.C. 11102). Accordingly, for the reasons discussed in *Reciprocal Switching,* the Board is closing Docket No. EP 711 (Sub-No. 1) and is instead proposing, in Docket No. EP 711 (Sub-No. 2), a new rule focused on more defined processes for the prescription of a reciprocal switching agreement in cases of inadequate service. Notice of the rule proposed in Docket No. EP 711 (Sub-No. 2) is being published concurrently with this notice. That concurrent notice includes the full discussion from the Board's September 7, 2023 decision, which is fully incorporated by reference herein.

It is ordered:

1. Docket No. EP 711 (Sub-No. 1) is discontinued as of the service date of the Board's decision in *Reciprocal Switching,* EP 711 (Sub-No. 1) et al.

Decided: September 13, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023–20137 Filed 9–15–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 230912–0217]

RIN 0648–BM31

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing an amendment to the Atlantic Large Whale Take Reduction Plan (Plan) to expand the boundaries of the Massachusetts Restricted Area to include the wedge between State and Federal waters