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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Ex Parte No. 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules

Dear Ms. Brown:

Enclosed for electronic filing in the above captioned proceeding are the Opening Comments of BNSF Railway Company. Thank you for your attention to this matter.

Sincerely,

Jill K. Mulligan

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

OPENING COMMENTS OF
BNSF RAILWAY COMPANY

In a Notice issued July 25, 2013, the Surface Transportation Board ("STB" or the "Board") initiated this proceeding seeking public input on a proposal submitted by the National Industrial Transportation League ("NITL") to modify the Board's competitive access regulations relating to reciprocal switching. The Board requested that interested parties submit comments and additional information to permit the Board to more fully appreciate the potential impacts of the NITL proposal before taking any action in response to NITL's request for a rulemaking to implement its proposed switching regime. The Board has requested that parties provide additional information on areas that the NITL submission failed to address, such as the impact on rates and services for all rail shippers, including those who would not benefit from the new regime envisioned by the NITL proposal, and the operational and financial impacts on the railroad industry. BNSF Railway ("BNSF") appreciates the Board's desire to more fully understand the impacts of the NITL proposal on the industry, the broader shipper community, and on the public as a predicate to further action on the NITL proposal. The Association of American Railroads ("AAR") is submitting Opening Comments and Evidence which seek to address each of the specific questions posed by the Board it its Notice, in which BNSF also joins.

BNSF submits these additional initial comments in order to highlight several general principles that BNSF believes that the Board should remain focused on throughout this proceeding.

I. Regulation by the Board should be limited to circumstances where market forces have failed to protect shippers from abuses of market power.

The current statutory framework reflects Congress' long-time goal and directive to promote competition by allowing market forces to govern railroad behavior to the maximum extent possible, and to reserve regulatory interference for those specific instances when market forces have not adequately protected shippers from an abuse of market power. The Rail Transportation Policy directs the Board to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," (49 U.S.C. § 10101(1)), and "minimize the need for Federal regulatory control over the rail transportation system." *Id.* at § 10101(2). In the first instance, the Board must allow market forces to govern the commercial relationship between the railroads and their customers. Consistent with this statutory mandate, the Board, and the ICC before it, has historically implemented rules that generally adhere to the principle that the markets for rail service should be allowed to operate freely, and active regulation be reserved for situations where it was necessary to protect a shipper from the abuse of market power.[1] In the limited instances where effective competition for a railroad's service does not exist, and a shipper believes that a railroad has abused its position by engaging in anti-competitive behavior, the STB's current regulatory framework provides direct and meaningful remedies.

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[1] *See, e.g., MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1105 (8th Cir. 1999) ("*MidAmerican*") ("Congress believed that free competition for rail services would ensure that consumer demand dictated the optimal rate level, while facilitating enough long-term capital investment to maintain adequate service. Congress was also mindful, however, that the free market would protect consumers only if there was 'effective' competition. Therefore, the new enactments included provisions allowing regulatory intervention where competition would not control prices.").

NITL's proposal would mark a significant departure from the Board's statutorily mandated goal of seeking a balance between allowing market forces to determine rates and services and instituting focused regulatory protections where there are market failures. Under the current regime, access remedies are available, but like other specific performance measures, are limited to instances where a railroad's conduct has required such extraordinary corrective measures. Competitive access remedies have been properly focused on addressing individualized instances of competitive harm. In contrast to the current conduct-based regime, the NITL "one-size-fits all" proposal requires no individualized showing that there is a service issue, that access by another carrier is warranted, or that a rate reduction is appropriate. The proposal sets up a status-based regime where, because switching is theoretically possible, it is required if certain arbitrary measures are met. The sole attempt to reflect a railroad's conduct is through reference to the R/VC ratio of the rate charged by the railroad, but the R/VC ratio says nothing about the existence or exercise of market power, as discussed below. The apparent goal of the NITL departure from the current regulatory mechanisms is to circumvent the Board's existing rate reasonableness standards and obtain rate reductions for a group of favored shippers without any consideration of whether the underlying rate is in fact reasonable or not.

II. The Board is appropriately concerned that the elimination of a conduct-based regime results in the creation of a category of disfavored shippers negatively impacted by NITL's proposed status-based regime.

The NITL proposal to move to a status-based regime presents serious policy issues for the Board. By relying on certain limited characteristics of rail accessible facilities (e.g., the proximity to an interchange) to trigger favorable treatment under the new NITL regime rather than the conduct of railroads, the Board would be creating categories of potential winners and losers among shippers. While NITL has described the impact of the NITL proposal as modest, the AAR's analyses show that the NITL proposal would have a substantial and widespread impact. What the Board has properly focused on is that any rate decrease for a group of favored shippers, and overall carrier revenue decrease, would come at the expense of the non-favored shippers who do not meet NITL's proposed qualifications. Even if the number of shippers favored under the NITL proposal represented a minority of the shipper community, the impacts on the non-favored shippers could still be significant. While it is difficult to predict what impact the NITL proposal would have on the rates paid by the favored shippers, any approach that provides a minority of shippers with artificially low rates would negatively impact other shippers and the overall viability of the rail network, be it through reductions in the amount of capital that railroads are able to reinvest in the rail infrastructure, and/or the need for increased rates on shippers falling outside the NITL proposal. Even if shippers falling outside the NITL proposal did not experience rate increases, they would suffer from the decline in rail service caused by the switching orders and they might also be at a competitive disadvantage in their own markets where they must compete with favored shippers who do qualify for access under the NITL proposal.

The AAR comments discuss in greater detail the other significant, real-world operational and service impacts that would inevitably flow from the NITL open access proposal. The ability of railroads post-Staggers to invest in efficient routes, facilities and services has greatly benefitted the shipping public, and the NITL proposal would substantially reverse that progress. However, the effects of this loss of efficiency and the associated costs are not limited to movements eligible for switching under the NITL proposal. As AAR witness Mr. Rennicke explains, these sub-optimal moves on behalf of a favored shipper will have filter down effects to a railroad's other shippers by undermining a railroad's ability to manage traffic flows, streamline operations, and maximize economies of density. The result will be disrupted traffic patterns and service schedules, yard congestion, longer transit times, longer dwell times and lower equipment utilization for the shipper community. Magnifying the impact on the non-favored shipper, there will be little incentive for railroads to make the investment in expanded infrastructure that would be needed to alleviate those service bottlenecks, or to invest in the infrastructure to expand the network to meet the growing demand for rail transportation services from favored and non-favored shippers alike.

III. The reliance of the NITL proposal on R/VCs as the justification for increased regulation is misplaced.

A key component of the NITL proposal is that a movement that exceeds 240% R/VC and that is within a prescribed distance from an interchange is eligible for switching. The basic assumption underlying NITL's selection of the 240% R/VC qualification is that a rail carrier's market power can somehow be assessed by reference to the R/VC level of a rate charged for a particular service. This assumption is simply not correct. BNSF sets rates based on market conditions, not based on costs, and market conditions may permit rates that are high, or that are low, relative to BNSF's costs. The relationship between those market rates and BNSF's costs says nothing about BNSF's market power or abuse of that market power. The Board should reject arguments that the R/VC level for a particular rate tells the Board anything about the competitive environment for that traffic.[2]

In addition to revealing nothing about the existence of effective competition, R/VCs, when incorporated directly into regulatory mechanisms, reward the higher cost, less efficient

[2] The Board has also asked about the possibility of replacing the 240% R/VC with a carrier's 4-year average Revenue Shortfall Allocation Methodology ("RSAM") benchmark, but the proposal has the same flaw. There is no logical connection between the proposed R/VC threshold (240% or RSAM) and the presence or lack of effective competition.

railroad, and have the perverse effect of discouraging capital investments that will improve rail productivity. Capital investments may substantially reduce a railroad's operating costs and therefore its URCS variable costs. For example, capital investments that reduce congestion or improve fuel efficiency can have a direct impact on a railroad's URCS formulaic variable costs—a primary objective of such an investment would likely be to reduce a carrier's operating costs. However, without any change in the rates, a reduction of direct operating costs produces an increase in the railroad's R/VC ratios. In those circumstances, nothing has changed for the shipper, except possibly that it will now benefit from more efficient transportation. Moreover, there has been no change in the railroad's market power. However, the R/VC ratio of the subject movement may go from below NITL's proposed 240% R/VC threshold to above that threshold simply because of the enhanced productivity. An increased emphasis on R/VC-focused regulation creates a disincentive for railroads to make the very type of capital investments that the Board should be encouraging.

IV. Movements that are not subject to STB regulation cannot be eligible for switching under the NITL proposal.

In its petition, NITL does not clearly address whether there are categories of movements that would be excluded from switching access under the proposal. For the purposes of their initial impact analysis, AAR witnesses Messrs. Baranowski and Brown included contract and exempt traffic because the NITL proposal does not appear to exclude such traffic, but they excluded intermodal traffic on the basis that intermodal traffic generally does not originate or terminate on the rail network at shipper facilities. While this approach is appropriate for an initial analysis that attempts to quantify the impacts of the switching regime as it has been outlined in NITL's proposal, no proposal can be considered that would apply to traffic that the STB does not have jurisdiction over, including exempt and contract traffic.

Respectfully submitted,

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March 1, 2013