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BEFORE THE

SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

OPENING COMMENTS OF

ALLIANCE FOR RAIL COMPETITION
MONTANA WHEAT AND BARLEY COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO GRAIN PRODUCERS ASSOCIATION
IDAHO WHEAT COMMISSION
MINNESOTA FARMERS UNION
MONTANA FARMERS UNION
NEBRASKA WHEAT BOARD
NORTH DAKOTA FARMERS UNION
NORTH DAKOTA GRAIN DEALERS ASSOCIATION
OKLAHOMA WHEAT COMMISSION
OREGON WHEAT COMMISSION
SOUTH DAKOTA FARMERS UNION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
US GLASS PRODUCERS TRANSPORTATION COUNCIL
WASHINGTON GRAIN COMMISSION
WISCONSIN FARMERS UNION
WYOMING WHEAT MARKETING COMMISSION

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<u>INTRODUCTION</u>

Alliance for Rail Competition ("ARC"), Alliance For Rail Competition, Montana Wheat and Barley Committee, Idaho Barley Commission, Idaho Grain Producers Association, Idaho Wheat Commission, Minnesota Farmers Union, Montana Farmers Union , Nebraska Wheat Board, North Dakota Farmers Union, North Dakota Grain Dealers Association, Oklahoma Wheat Commission, Oregon Wheat Commission, South Dakota Farmers Union, South Dakota Wheat Commission, Texas Wheat Producers Board, US Glass Producers Transportation Council , Washington Grain Commission, Wisconsin Farmers Union and Wyoming Wheat Marketing Commission, (collectively "ARC, et al.") welcome the opportunity to comment on the proposal for expanded access remedies in the Board's decision served July 27, 2016 in this proceeding. ARC, et al. previously filed opening and reply comments in EP 711, Petition for Rulemaking to Adopt Revised Switching Rules, and those comments are incorporated here by reference. We also welcome the Board's decision to propose new regulations under which reciprocal switching can be sought. For too many decades, the relief provided for by Congress in 49 USC§ 11102 has been unavailable due to overly restrictive ICC-era decisions.

The new STB proposal, though offering an improvement over past years in which Section 11102 was effectively vitiated, could and should go further. The proposed rules are undercut by too many restrictions that are not required by the statute, and they subject too many shippers to excessive rail rates, poor rail service, or both.

Most of the parties making up ARC, et al. are committees, commissions and groups representing producers and shippers of agricultural commodities in the Western United States. ARC itself includes such entities as members, but ARC also includes shippers of other commodities, including shippers of sand and soda ash required for glass manufacturing. There are, among the interests represented by ARC, et al., those who may never be in a position to take advantage of switching remedies. Most Montana grain producers, for example, are captive to BNSF, which controls some 95% of rail freight in the State, and many are also too far from any other railroad to qualify for switching. However, some ag and non-ag shippers may be close enough to a second railroad to be potential beneficiaries of 49 USC§ 11102 switching remedies and new implementing regulations, particularly if the Board adopts less restrictive policies on such relief.

Proximity to a second railroad aside, there is the possibility that access to a second railroad would not always result in improved service or reduced rates. A shipper gaining access to a second railroad could find that it now has the choice of two railroads, both of which impose excessive rates and charges, provide poor service, and force the shipper to absorb burdens and costs formerly borne by the rail carriers.

It must also be recognized that the potential for competition is not the same as actual competition, and even actual competition may not be effective competition within the meaning of the Act, as the Board itself acknowledges (Decision at 22).

See also comments filed April 12, 2011 by Ameren Corporation in Ex Parte No. 705, Competition in the Railroad Industry. Ameren, which operates large coal-fired generating stations, made significant investments in building out new track in order to have access to two Class I railroads rather than one. The reported result was a refusal by the second Class I railroad to compete in a sustained way as to price or service with the incumbent railroad.

Obviously, switching remedies are not a panacea. Despite that fact, ARC, et al. are supporting the regulations proposed in this proceeding, and calling on the Board to adopt changes making switching remedies more effective. The reason for our position in this proceeding is simple. For many single-served shippers, the possibility of shifting their business to another railroad is the only hope the shipper has of getting reasonable rates and/or a reasonable level of service quality from the railroad they currently use.

Representatives of the US glass manufacturing industry report that their industry (a member of ARC) is particularly vulnerable to the lack of intramodal competition among major railroads. Such manufacturers' efforts to meet the nation's need for many types of glass -- glass bottles, containers, auto and architectural glass, health care glass products, etc. -- currently require them to pay over $1 billion per year to railroads for transportation of raw materials, primarily sand and soda ash, essential for glass manufacturing.

Soda ash is sourced principally from mines where the Union Pacific has an origin monopoly, and many US glass plants are also captive to a single railroad. For example, Owens-Illinois, the largest manufacturer of glass bottles in North America, faces 80% origin or destination captivity in supplying its 20 largest manufacturing facilities, and soda ash originating exclusively on UP is Owens-Illinois' largest volume and most expensive raw material, at 300%-500% more than the cost of the next major raw materials.

Glass producers report rail rate escalation almost doubling what sand and soda ash rates should be in a competitive market. At the same time, the nation's glass industry is facing increased import pressure from foreign competitors, which are able to obtain these raw materials at a fraction of the US delivered cost. The very future of the US glass industry, which is vital to many other industries, depends upon increased intramodal switching remedies available to all captive (origin, destination or both) shippers and receivers of rail shipments of sand, soda ash and other glass industry products.

The Board has heard, and will continue to hear, similar stories as to other large and small US industries. On the rail service front, we have only recently recovered from severe rail service issues that adversely affected thousands of producers and shippers of agricultural commodities, especially across the Upper Great Plains States. In addition, many wheat, barley, corn and pulse crop rail rates are too high.

These and other examples of abuses by powerful railroads aside, ARC, et al. regard rail-to-rail competition as desirable in itself. Virtually every other business in the US is subject to competitive forces that benefit customers and consumers, and also benefit the competitors themselves, who are forced by competition to pursue steady improvements.

The benefits of more competition are not recognized solely in the fields of business and economics. The antitrust laws penalize anti-competitive conduct. See also Executive Order No. 13725, issued by the White House on April 15, 2016, which directs federal agencies to promote competition. The Board mentions this Order in a footnote, but elects repeatedly to stop short of reforms that might lead to significantly more rail competition.

Competition, where it is effective, is recognized to provide a superior alternative to regulation. Unfortunately, rail-to-rail competition, for many rail customers and regions, is the exception rather than the rule. In 2010 the USDA/DOT Study of Rural Transportation Issues provided corroboration. In Chapter 6 of the Report, at pages 214-224, maps indicate that crop reporting districts in many Western States have lost the equivalent of 4.25 to 2.58 competing railroads serving grain and oilseed markets.

The Report also provides inverse Herfindahl-Hirschman Index (HHI) values for crop reporting districts, a widely accepted measure of competition. USDA and DOT explain (at 217) that an inverse HHI below 1.25 indicates weak rail-to-rail competition, with one of two railroads dominant, and a figure of 1.00 "indicates a rail monopoly". In the map at page 221, large swaths of Montana, the Dakotas, Idaho, Washington, Utah, Colorado and Nebraska are depicted as having inverse HHI values of 1.00, and much of the West shows values of 1.00-2.00.

While the Board's current proposal is therefore welcome, prior Board decisions and policies contributed to the current concentration of market power in four large Class I railroads operating as duopolies in the East and West. In addition to Midtec Paper Corp. v. Chicago & N. W. Transp. Co., 3 I.C.C. 2d 179 (1986), which the Board now proposes to overturn, the Board approved paper and other barriers to effective competition by short lines, declined to order increased competition in major rail consolidation proceedings, defined too narrowly the competition that must be preserved in such proceedings, took ineffective action as to the UP-SP meltdown and similar problems after the Conrail acquisition, and adopted ineffective Competitive Access rules.

Effective rate regulation might have offset some of the problems resulting from the consolidations that have led to some 95% of rail freight being controlled by the four largest Class I railroads (BNSF and UP in the West, and NS and CSX in the East). However, in over 35 years since the Staggers Rail Act of 1980, the ICC and STB have developed only one rate reasonableness methodology, full SAC, that has helped a handful of captive shippers obtain rate relief. And SAC is universally recognized (including by Congress) to be prohibitively expensive for 99% of captive rail customers.

ARC, et al. understand that this proceeding, along with EP 733, Expediting Rate Cases, EP 665 (Sub-No. 2), Expanding Access to Rate Relief, and EP 722, Railroad Revenue Adequacy, hold out the hope of a better balance between the interests of railroads and captive rail customers going forward.

That being the case, it is disappointing to see the Board propose certain limitations in its approach to implementing 49 USC§ 11102 in the July 27, 2016 decision. There are good things in that decision. The Board's decision to reverse

Midtec is an important step in the right direction, even if long overdue. ARC, et al. also support the Board's decision that it will not assume the availability of switching means the affected shipper necessarily enjoys effective competition (Decision at 23). As noted above, access to a second railroad can mean that two railroads provide poor service at excessive rates, where one did before.

However, there are aspects of the current decision that should be changed. One is the Board's decision to consider switching remedies only where an existing interchange is available, but not where a new interchange could be constructed. Decision at 21. We understand that the Board has phrased the test as whether there "is or can be" a working interchange, which sounds more flexible. However, the Board goes on to say that there "can be" a working interchange only where there is infrastructure to support switching "without the need for construction". The Board's interpretation of Section 11102 is misguided.

If a shipper and a Class I railroad can come to the STB with plans and commitments for a new interchange under circumstances the otherwise justify switching relief, the Board should not automatically reject a shipper application that has support from a railroad willing to put in a new interchange.

One of the few ways the ICC and STB have helped enhance rail competition in the past has been the agency's receptiveness to and willingness to grant shipper applications to build out to a second railroad. It would be arbitrary as well as anti-competitive for the Board to support buildouts but refuse to grant switching relief where a new interchange is needed and the parties are willing to build it. The Board's position also gives the incumbent railroad too much power to avoid switching even if the abuses warranting relief are clearly shown.

Another aspect in which the Board has erred is its insistence on a showing of market dominance (intermodal or intramodal competition) by shippers seeking switching relief. As the Board acknowledges (Decision at 21-23) there is no such requirement in 49 USC§ 11102.

The Board's concern seems to be that switching relief might be sought as a means to obtain competitive rail rates. ARC, et al. regard such efforts as entirely legitimate, given the shortcomings of rate case alternatives currently offered by the STB. Moreover, the Transportation Research Board and the railroads themselves argue that the goal of regulation should be to set maximum reasonable rates that mimic competitive rates. See the TRB's June 10, 2015 Special Report 318, <u>Modernizing Freight Rail Regulation,</u> at page 91, where the TRB urges the Board to base maximum reasonable rate standards on "unregulated, market-based rail prices", as to which the Board has extensive information in its Confidential Waybill Sample.

In any event, however, the Board's position ignores the fact that shippers, including captive and non-captive shippers, should be able to obtain switching relief based on a proven need for a remedy for poor rail service by their current rail carrier, rather than high rates. The incumbent railroad might be charging unobjectionable rates (possibly in keeping with its poor service), but the Board would still require extensive and expensive litigation over market dominance as a prerequisite to considering a petition under 49 USC§ 11102.

The Board could even find itself in the anomalous position of refusing to grant switching, despite a clear need based on poor service, because the incumbent railroad is charging rates below the 180% R/VC threshold of STB jurisdiction. In such a situation there is a legal presumption of effective competition, and therefore of no market dominance, under 49 USC§ 10707(d)(1)(A). Shippers in such a situation must not also be presumed to be unable to satisfy the tests of Section 11102. In short, switching relief may be warranted despite the absence of market dominance.

For the foregoing reasons, the Board should modify its proposals in this proceeding as urged above. With the recommended changes, and possibly with other improvements called for by other shipper interests in this proceeding, the Board should adopt new rules implementing 49 USC§ 11102, in order to give effect to the intent of Congress to provide for rail switching where necessary for competition or to serve the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of October, 2016, caused copies of the foregoing document to be served on all parties of record by first class mail or by electronic means.