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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. EP 705**

**COMPETITION IN THE RAILROAD INDUSTRY**

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**JOINT REPLY COMMENTS OF  
CANADIAN NATIONAL RAILWAY COMPANY AND  
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: May 27, 2011

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Canadian National Railway Company and its U.S. subsidiaries (collectively, "CN") and Canadian Pacific Railway Company and its U.S. subsidiaries (collectively, "CP") submit these Joint Reply Comments in response to the Notice served in the above-captioned proceeding on January 11, 2011 (the "*January 11 Notice*").

Several commenting shipper parties suggest that the "solution" to their concerns regarding access to competitive rail service is for the Board to adopt a mandatory reciprocal switching requirement similar to the inter-switching performed by Canadian carriers pursuant to Section 127 of the *Canada Transportation Act*.<sup>1</sup> According to TPI, Canadian inter-switching is a "successful model" that "optimizes cost and service for all parties." TPI Comments at 5. The Fertilizer Institute asserts that its Canadian members report "positive experiences" with inter-switching, and argues that "the most effective form of reciprocal switching [for the United

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<sup>1</sup> Comments of E.I. du Pont de Nemours and Company ("DuPont") at 12. *See also* Comments of PPG Industries, Inc. ("PPG") at 10 (STB should consider the "Canadian inter-switching model"); Submission of Written Testimony of Total Petrochemicals USA, Inc. ("TPI") at 5 (STB should consider certain aspects of the "Canadian solution"); Comments of The Fertilizer Institute ("TFI") at 11 ("the most effective form of reciprocal switching would be to adopt a system that closely resembles Canadian inter-switching"); Comments of National Industrial Transportation League ("NITL") at 12-13; Comments of U.S. Department of Agriculture ("USDA") at 5-6 (urging Board to impose "mandatory reciprocal switching agreements" for a distance up to 30 miles, citing Canadian inter-switching).

States] would be to adopt a system that closely resembles Canadian inter-switching.” TFI Comments at 11.<sup>2</sup> These shipper parties predict that Canada’s inter-switching requirement could be superimposed on the United States rail network without adverse consequences.<sup>3</sup>

The commenting shippers’ reliance upon Canada’s inter-switching practice as a “model” for shipper relief is misplaced, for several reasons:

First, Canadian inter-switching is a statutory requirement promulgated by Parliament, not by administrative fiat. The inter-switching obligation currently set forth in Section 127 of the *Canada Transportation Act* traces its origin to Section 253 of the *Railway Act* of 1903. The Canadian Transportation Agency (“CTA”) regulations governing switching rates and other inter-switching terms were promulgated pursuant to an explicit statutory mandate set forth in current Section 127. As CP’s Initial Comments demonstrated, Congress has issued no such statutory mandate to this Board. To the contrary, Congress’ actions in the post-Staggers era reflect a determination that the Board’s existing competition policies are fully consistent with Congressional intent. In the absence of a clear policy directive from Congress, any initiative by the Board to impose an “open access” policy by requiring carriers to provide reciprocal switching on demand would be contrary to law.

Second, Canada’s inter-switching requirement was not adopted for the purpose of providing rate relief for “captive” rail shippers. To the contrary, the historical objectives of Canadian inter-switching were to improve shipper access to rail service (by requiring carriers to

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<sup>2</sup> See also NITL Comments at 12 (League’s Canadian members “have benefitted from that country’s inter-switching provisions”); PPG Comments at 10 (PPG’s facility at Beauharnois, PQ has benefitted from “the Canadian model”).

<sup>3</sup> See TFI Comments at 11 (“the sky has not fallen upon the Canadian railroads as a consequence of inter-switching”); NITL Comments at 13 (inter-switching has not caused “financial ruin” for Canadian railroads).

interchange traffic between their respective lines) and to avoid unnecessary duplication of facilities by CP and CN in urban areas. As a Panel commissioned by Parliament to conduct a policy review of the *Canada Transportation Act* (“CTA Review Panel”) observed, “[i]nterswitching rates originated in an era of rate regulation; they were designed to avoid overbuilding in urban areas and to ensure that a joint through rate could be calculated quickly and easily.”<sup>4</sup> Indeed, “[f]or most of their history, the Canadian mainline railways were prohibited from competing on price through uniform regulated prices and competed instead on service levels.”<sup>5</sup> Prior to the *National Transportation Act, 1987*, price competition between Canadian railroads was non-existent, as former Section 279 of the *Railway Act* encouraged them to share cost information and to agree upon common rates and charges. The inter-switching charges prescribed by the predecessor to Section 127 were merely an extension of the line haul rates imposed by the Canadian government pursuant to policies designed to promote rate parity among shippers and across regions rather than reliance upon market forces. Consistent with that heavy-handed regulatory approach, inter-switching was made available to all shippers, regardless of whether they otherwise had access to intramodal or intermodal competitive options.

The *National Transportation Act, 1987* repealed former Section 279 and ushered in an era of greater reliance upon competition and market forces to establish rates for rail transportation in Canada.<sup>6</sup> While the inter-switching requirement (which had become engrained in the Canadian rail system both commercially and operationally) remained in place, it was

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<sup>4</sup> *Vision and Balance: Report of the Canada Transportation Act Review Panel* (June 2001) at 63.

<sup>5</sup> *Straight Ahead: A Vision For Transportation In Canada*, Transport Canada (2003) at 26 (emphasis added).

<sup>6</sup> With the repeal of Section 279, the inter-switching requirement, for the first time, facilitated price competition between CP and CN for traffic served exclusively by one carrier.

recognized that “forced switching” is a vestige of Canada’s regulatory past and is, to a large degree, inconsistent with current policies. In rejecting proposals by Canadian shippers to expand the availability of inter-switching in the new deregulated environment, the CTA Review Panel observed:

In the Panel’s view, expanding the interswitching limits would worsen the market-distorting aspects of the interswitching rate regime and would be a step backward. The proposal ignores market conditions and the averaging effects of a fixed rate – all shippers pay the same rate, regardless of their circumstances. Although interswitching rates have long been a feature of the regulatory landscape, the Panel sees them partly as an anomaly, representing a trade-off between regulation and the market . . . .

Government should be involved in regulating commercial relationships only when one party is abusing monopoly power. Proposals to extend the interswitching limit assume that railways are behaving in this manner. No evidence before the Panel suggests this kind of market power exists in every circumstance where expanded interswitching would be available.<sup>7</sup>

Transport Canada endorsed the CTA Review Panel’s findings, stating that “the government agrees with the assessment of the Canada Transportation Act (CTA) Review Panel that the fundamental direction of transport policy remains sound. Competition and market forces will continue to guide the development of the national transportation system.”<sup>8</sup>

Third, the suggestion that Canada’s inter-switching regime can readily be implemented in the United States ignores fundamental differences in the size, scope and structure of the U.S. and Canadian rail networks. During 2009, CP and CN collectively originated approximately

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<sup>7</sup> *Vision and Balance: Report of the Canada Transportation Act Review Panel* (June 2001) at 63 (emphasis added).

<sup>8</sup> *Straight Ahead: A Vision For Transportation In Canada*, Transport Canada (2003) at 28.

3.8 million carloads of rail traffic at points in Canada.<sup>9</sup> By contrast, more than 26 million carloads of rail traffic originated at points in the United States during the same year.<sup>10</sup> Thus, the number of cars potentially subject to reciprocal switching in the United States is many times the number that CP and CN are required to inter-switch in Canada today. Moreover, the Canadian and U.S. rail networks are structured differently. The extensive systems operated by U.S. Class I carriers connect with and cross one another both in large urban areas and at many secondary locations, thereby offering numerous potential points of interchange. The Canadian networks of CP and CN are more “linear” with significantly less overlap. As a result, inter-switching can potentially occur at a total of 67 interchange points across all of Canada. By contrast, there are more than 1,000 potential interchange locations across the U.S. rail system – indeed, Norfolk Southern has more than 150 points of interchange with CSXT alone. *See Norfolk Southern Comments at 7.*

Because inter-switching has been part of the Canadian regulatory landscape for more than a century, terminal facilities in Canada were designed and constructed to accommodate the volume of switching activity required to comply with Section 127. Rail terminals in the United States – many of which are already congested – are not built to handle the significant increase in switch movements likely to result from a mandatory reciprocal switching requirement. Moreover, CP and CN made their investments in terminal facilities with full knowledge of the inter-switching requirement (and in an environment that included a long history of public investment in Canada’s freight rail system). By contrast, the U.S. rail network has been

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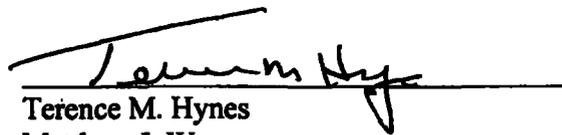
<sup>9</sup> *Railroad Facts*, Association of American Railroads (2010) at 72, 75, 78-79. CP originated a total of 2,001,800 carloads, of which 1,714,378 originated at points in Canada and 287,422 originated at points in the United States. CN originated a total of 3,373,024 carloads, of which 2,086,893 originated at points in Canada and 1,286,131 originated at points in the United States.

<sup>10</sup> *Railroad Facts*, Association of American Railroads (2010) at 24.

developed with private capital, which was invested in the absence of any expectation that such privately-owned facilities would be opened to competing carriers by administrative decree.

For these reasons, Canada's inter-switching practice is not an appropriate "model" for a mandatory reciprocal switching requirement in the United States, and shipper commenters' suggestions that Canadian-style switching could be adopted across the U.S. rail network without adverse impacts are misplaced.

Respectfully submitted,



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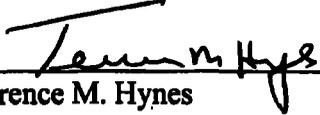
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Dated: May 27, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Joint Reply Comments of Canadian National Railway Company and Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 27th day of May 2011, to all parties of records.

  
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Terence M. Hynes