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May 30, 2013

Via E-Filing

Ms. Cynthia T. Brown
 Chief, Section of Administration
 Office of Proceedings
 Surface Transportation Board
 395 E Street, S.W.
 Washington, DC 20423

Re: *Docket EP 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules*

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is the Joint Reply Submission of the National Grain and Feed Association, the Agricultural Retailers Association, National Barley Growers Association, USA Rice Federation, National Oilseed Processors Association, the National Chicken Council, the National Association of Wheat Growers, the National Council of Farmer Cooperatives, and the National Corn Growers Association.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,


 Thomas W. Wilcox

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 711

**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

JOINT REPLY SUBMISSION

**OF THE
NATIONAL GRAIN AND FEED ASSOCIATION, THE AGRICULTURAL
RETAILERS ASSOCIATION, NATIONAL BARLEY GROWERS ASSOCIATION,
USA RICE FEDERATION, NATIONAL OILSEED PROCESSORS ASSOCIATION,
THE NATIONAL CHICKEN COUNCIL, NATIONAL ASSOCIATION OF WHEAT
GROWERS, NATIONAL COUNCIL OF FARMER COOPERATIVES, AND NATIONAL
CORN GROWERS ASSOCIATION**

Pursuant to the decision served in this proceeding on July 25, 2012 (“*Notice*”), and the decision served in this proceeding on October 25, 2012, the National Grain and Feed Association (“NGFA”), the Agricultural Retailers Association, National Barley Growers Association, USA Rice Federation, National Oilseed Processors Association, National Chicken Council, National Association of Wheat Growers, National Council of Farmer Cooperatives, and National Corn Growers Association (all referred to herein as “Interested Agricultural Parties”) file their Joint Reply Submission in this proceeding. A description of each participating organization was provided in Exhibit 1 attached to the Interested Agricultural Parties’ Joint Opening Submission.

I. The Opening Comments of Agriculture Industry Stakeholders Confirm that the NITL Proposal Must Be Modified Before More Than a Very Small Percentage of Agricultural Commodity Shippers Could Be Eligible for Competitive Switching

A. The Empirical Analysis Demonstrates that Only Around 3% to 5% of Agricultural Shippers Potentially Would Be Eligible for Competitive Switching Under the Proposal, as Written

The opening submittals of rail shipper organizations reiterated again that the Board's current rules implementing 49 U.S.C. §11102(c) governing reciprocal switching essentially are useless for shippers seeking the option to utilize alternative rail carriers, and have been that way for many years. *See, e.g.*, Comments of the American Chemistry Council at 2-3; Comments of Alliance for Rail Competition, *et al.*, at 3-5; Initial Comments of Olin Corporation at 2-5. It is well past the time for the Board to reexamine the implementation of this statutory provision and to modify the agency's current rules to effectuate the Congressional intent in enacting this statute. The claims by shipper parties that the current rules are useless, which this Board has heard many times before - most recently in EP 705, *Competition in the Railroad Industry* - are not refuted by the railroad parties that filed opening submittals.¹ Instead, the railroads assert that the Board is powerless to change the existing rules no matter how useless they are to rail shippers, and they contend that *any* changes to the rules, even the relatively insignificant changes contemplated by the National Industrial Transportation League ("NITL") Competitive Switching Proposal (the "Proposal"), allegedly would have catastrophic consequences for the railroad industry and the United States economy.

The opening submittals of the Interested Agricultural Parties and other agricultural sector commenters, however, demonstrate (albeit within the limitations of available data) that only a

¹ Notably absent from the opening round were CP Railway and CN Railway, which operate primarily in the Canadian system of mandatory switching, the success of which is discussed in great detail by the NITL's witness, Mr. Thomas L. Maville.

very small percentage of rail shippers of agricultural commodities potentially would qualify for competitive switching under the Proposal as written. Specifically, the Interested Agricultural Parties conservatively estimated that less than 6% (and probably substantially less) of the 3,092,223 carloads of NGFA commodities in the 2011 Confidential Waybill Sample would be shipped to and from facilities that met the conclusive presumptions under the Proposal. Interested Agricultural Parties Op. at 5. The Interested Agricultural Parties' assertion that this estimate overstated the actual number of carloads and shippers that might benefit from the Proposal as written was confirmed by other shipper organizations that also made an effort to respond to the Board's request for data. For example, the NITL in its Opening Submission concluded that a mere 4% of shippers industry-wide potentially would qualify for competitive switching under its proposal. Opening Submission of the National Industrial Transportation League ("NITL Op.") at 43.

In addition, the U.S. Department of Agriculture's ("USDA") analysis, which differed in some respects from the analysis presented by the Interested Agricultural Parties,² also produced a lower estimate of potentially qualifying shippers. For example, the USDA analysis estimated that, based upon 96% of the rail movements of farm products "STCC" classifications in the 2010 Confidential Waybill Sample, only between 99,032 and 102,022 carloads potentially would be affected, meaning shipments that meet the two conclusive presumptions of being within 30 miles of an interchange point and having rates with a revenue-to-variable cost ("R/VC") ratio exceeding 240%. USDA Op. at 11, Tables 2 and 2A. This is approximately 3% of the approximately 3 million carloads in the 2011 Waybill Sample covered by the Interested

² Most notably, the USDA analysis was based on the 2010 Waybill Sample. The USDA's analysis criteria were also more similar to the analysis conducted by NITL.

Agricultural Parties' analysis. While admittedly not calculated using 2010 carload figures, this percentage is comparable to the Interested Agricultural Parties and NITL's calculations.

The very minor value of the Proposal to agricultural shippers was echoed by the Opening Comments of the Alliance for Rail Competition and 11 other agricultural industry groups, which stated, ". . . many shippers, including many members of ARC, *et al.*, have little or no hope of taking advantage of competitive switching. They are too far from a potential competitor to qualify, or cannot offer freight volumes high enough to attract service by a second railroad, even assuming low access fees." ARC, *et al.*, Op. at 13.

B. The Board Should Modify the Proposal Before Issuing Competitive Switching Proposed Rules

As a threshold matter, the opening comments of shipper organizations were unanimous in urging that the Board not use a R/VC ratio threshold that is based upon the STB's Revenue Shortfall Allocation Method ("RSAM") figures. These commenters confirmed the conclusion of the Interested Agricultural Parties that application of the RSAM calculations virtually would eliminate any shippers of agricultural commodities from being potentially able to obtain competitive switching under the Proposal. Interested Agricultural Parties, Op at 14; Fauth Op. V.S. at 15-16.

Second, in their Opening Submission, the Interested Agricultural Parties stated their preference that the Board should instead adopt a R/VC threshold of 180% for a conclusive presumption of market dominance. Interested Agricultural Parties, Op. at 23. The Interested Agricultural Parties' analysis showed that utilizing this threshold would increase the number of

potentially eligible shippers while not significantly impacting Class I railroad revenues.³ The USDA, after conducting its analysis of 96% of the grains and oilseed movements in 2010 Waybill Data, reached a similar conclusion. USDA’s analysis determined that, even with “perfect competition” between railroads (“the highest theoretical level of potential impact on railroad revenue from allowing competitive switching for grain and oilseed movements”), utilizing a threshold of 180% R/VC would result in a reduction of only 2.2% in grain and oilseed revenues, and only 13.8% of Class I railroad net income from grain and oilseed revenues. USDA Comments at 9. Therefore, the Interested Agricultural Parties urge the Board to make this change should it issue proposed competitive switching rules.

Third, the Board should adopt a more liberal, case-by-case determination of when a shipper facility is deemed to be a “reasonable distance” from a working interchange point. The facilities of many captive agricultural shippers are located considerably farther than 30 miles from an interchange with another railroad. Yet, their individual circumstances may warrant a decision that reciprocal switching is the appropriate remedy for the Board to adopt.

Finally, the USDA, NITL and other shipper organizations concur with the Interested Agricultural Parties that the Board must make it clear that the adoption of new rules for competitive switching that entail presumptions that “effective competition” exists at a particular location for switching purposes should have absolutely no bearing on whether there is effective competition between railroads for the transportation covered by the line-haul rates associated

³ *Id.* at 23, Note 47, and Fauth Op. V.S. at 7, Table 2. Specifically, using a threshold of 180% R/VC could theoretically, *at most*, result in 21.46% of NGFA Commodity Shippers being potentially eligible for competitive switching. However, the actual number would be significantly less for the reasons discussed in the Opening Submission.

with such switching. NITL Op. at 14-16; USDA Comments at 7; and Comments of The Chlorine Institute, Inc. at 3.

II. The Board Has Authority to Modify the Rules Implementing §11102(c)

The Interested Agricultural Parties continue to defer to and agree with the legal arguments made by the NITL and others for why the Board has the authority to modify the current rules implementing 49 U.S.C. §11102(c). As such, Interested Agricultural Parties are not responding in detail in this Reply Submission to the contrary arguments in the railroad parties' opening submissions. In general, however, the railroad parties do not seriously attempt in their opening submissions to argue that the plain language of §11102(c) supports their positions in this proceeding, since it clearly does not. ("The Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."). See, Opening Comments of Association of American Railroads ("AAR Op.") at 23-25 (discussion of Congressional intent without any references to statutory language). Instead, they rely almost exclusively⁴ on the decades-old precedent that has operated to make §11102(c)

⁴ The Association of American Railroads ("AAR") and railroad parties in this proceeding vigorously rely on *MidTec Paper Corp. v. Chicago & North Western Transp. Co.*, 3 ICC. 2d 171 (1986) and its progeny to establish the rules applying §11102(c). However, in pending Finance Docket No. 32760, *BNSF Railway – Terminal Trackage Rights – The Kansas City Southern Railway Company and Union Pacific Railroad Company*, the BNSF Railway ("BNSF") has relied exclusively on the statutory language of §11102(a) to ask the Board to use its authority to order The Kansas City Southern Railway Company ("KCS") and Union Pacific Railroad Company ("UP") to grant BNSF terminal trackage rights over their objection. See Petition at 11 ("Under 49 U.S.C. §11102(a) (and former 49 U.S.C. §11103(a)), the Board may require use of 'terminal facilities, including main-line tracks for a reasonable distance outside of a terminal,' if the Board finds that use to be 'practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.' *Id.* The requested terminal rights satisfy each of these criteria.") The BNSF Petition makes no mention of the ICC precedent that the railroads in this proceeding say must be applied to any request under §11102 with the same force as a federal statute.

useless for rail shippers. For the reasons argued by NITL and other parties, the Board has ample authority to overrule its past precedent and change its current competitive-access rules.

III. The Potential Adverse Effects of the Proposal Have Been Grossly Overstated by Rail Carriers and Ignore a Key Component of the Proposal

The opening submissions of the AAR and Class I railroad companies are, for the most part, not responsive to the *Notice* because they provide no “empirical evidence” on the impacts of the Proposal. *Notice* at 2. Whereas the Interested Agricultural Parties and other shipper groups attempted to provide the Board with responses to its requests for actual data and analysis within the limitations of the Carload Waybill Sample data, the railroad parties simply refused, claiming that doing so was “impossible,” among other excuses. *See, e.g.*, Opening Comments of CSX Transportation, Inc. (“CSX Op.”) at 3; Opening Comments and Evidence of Kansas City Southern Railway Company (“KCS Op.”) at 19; Comments of Norfolk Southern Railway Company (“NS”) at 7; and Opening Comments and Evidence of Union Pacific Railroad Company (“UP Op.”) at 58-61. Any “analysis” by the carriers of the number of shippers that might be affected by the Proposal and the potential impact of reciprocal switching was incomplete and not useful.⁵ Moreover, the railroad parties also refused to even entertain the notion of discussing an access-price formula, choosing instead to collectively take the position that §11102(c)(1) governs this component. *See, e.g.*, UP Op. at 61-63, NS Op. at 36.

⁵ For example, in its Opening Comments, the AAR asserts that over one third of all shippers potentially could be eligible for relief. AAR Op. at 3. However, this estimate is merely the total amount of rail shippers that AAR’s experts determined physically had a facility within 30 miles of a junction point of a railroad. That analysis completely ignores the critical limiting factor in the proposal that a movement must have a R/VC threshold greater than 240%, as well as the other limiting factors in the Proposal. As Interested Agricultural Parties and other commenters demonstrated, applying the R/VC threshold significantly reduces the percentage of rail shippers that even would be eligible to seek competitive switching under the proposal. *See, e.g.*, Interested Agricultural Parties Op. at 10-13. As such, the AAR’s incomplete analysis grossly overstates the total potential shippers who would qualify under the Proposal, and therefore provides no useful information to the Board in response to the Decision.

The railroads likely did not perform actual calculations because to do so would have required them to reach the same general conclusion of the parties that did so. That incontrovertible conclusion is that only a very small fraction of rail shippers would qualify for relief under the Proposal as written. This truth undercuts the opening submissions of AAR and railroad commenters, which collectively have presented the Board with a “parade of horrors” of how *any* easing of the current useless rules governing reciprocal switching by the Board allegedly will result in the demise of all of the Class I railroads and the U.S. economy. Among the “horrors” alleged by the carriers is their portrayal of reciprocal switching as a “forced switching” mechanism - a newly introduced rail industry argument that alleges any change will result in “a massive volume of litigation for the agency.” CSX Op. at 2. Rather than attempt to address such hyperbole, and all of the myriad alleged negative consequences of changing the current reciprocal switching rules by adopting the Proposal or any other version of it proposed by the Board, the Interested Agricultural Parties make the following four points in this Joint Reply Submission:

First, as the NITL and others point out, reciprocal switching is extremely common in the railroad industry today, and occurs hundreds of times on a daily basis without mishap or service breakdowns. Many agricultural commodity movements are via joint line movements that involve reciprocal or other switching arrangements.

Second, the Interested Agricultural Parties believe the AAR and other railroad parties have greatly overstated the extent to which an incumbent railroad providing single-line service will lose the traffic to a competing railroad that must access the facility via a switch movement. *See* AAR Op. at 33-34. CSX Op. at 48, 55, KCS Op. at 21-22. This erroneous allegation is the basis for a significant proportion of the railroads’ voluminous complaints. The incumbent

railroad has all the advantages, and a competing railroad without direct physical access primarily represents a constraint on the amount the incumbent can charge. These advantages, combined with the probable outcome that the incumbent carrier would retain the business, are something the Board recognized in overseeing implementation of the UP/SP merger, when it granted trackage and other rights to BNSF Railway and imposed other competitive conditions on the merger. *See* Docket 32760 (Sub No. 21), Oversight Decision No. 10 (STB Served October 27, 1997) at 5 and Oversight Decision No. 15 (STB Served November 29, 1999) at 8.

Moreover, the NITL's Opening Submission and the accompanying Verified Statement of Thomas L. Maville demonstrate that in Canada, where mandated switching has long been applied with great success, the incumbent railroad retains the business in the overwhelming majority of times, and less than one-tenth of the total traffic that qualifies for interswitching in Canada is actually interswitched and moves over the new competitive route. *See* NITL Op. at 60 and, Maville Op. V.S. at 20.

Third, as the Interested Agricultural Parties and other parties stated in their opening submissions, there is no guarantee in today's highly concentrated railroad industry that effective competition will occur in all cases even if shippers obtained competitive options under this, or any other, proposal to change the current rules implementing §11102(c). *See* Interested Agricultural Parties Op. at 15-16; USDA Comments at 8-9; Comments of the Chlorine Institute, Inc. at 2; and Opening Submission of Entergy Arkansas, Inc. at 11. Indeed, while supporting revisions to the current rule as recommended in their Joint Opening Submission, the Interested Agricultural Parties' analysis showed that in areas where reciprocal switching is now present, line-haul rates can be higher than areas where no switching exists and shippers are truly captive to one railroad. Interested Agricultural Parties Op. at 17; Fauth Op. V.S. at 16-18.

Finally, the railroad parties ignore that the Proposal specifically contemplates that alleged service and inefficiency problems associated with the introduction of competitive switching would be addressed when competitive switching is sought. Specifically, the Proposal contains the requirement that “competitive switching will not be imposed if either rail carrier between which competitive switching is to be established shows that the proposed switching is not feasible or is unsafe; or that the presence of such switching will unduly hamper the ability of that carrier to serve its own shippers.” Proposal at 7. The exaggerated claims of alleged disastrous consequences that are replete within the AAR and railroad parties’ opening submissions should be discounted heavily in any event. But this “safeguard” component of the proposal clearly provides ample protection to address any service and system problems that might arise from a potential competitive switching arrangement.

IV. The Comments of Parties Opposing the Proposal Affirm the Need for the STB to Increase Competition in the Railroad Industry

The Interested Agricultural Parties find troubling – as we believe the STB should – the opening submissions of the AAR and the railroad parties for several reasons, not the least of which is their collective rejection of *any* notion of the Board taking any further steps to increase competition in the railroad industry. This collective position is notable especially because such efforts, like modifying the rules implementing 49 USC §11102(c) to increase competition, would provide opportunities for all railroads to increase their market share and business opportunities by expanding their respective customer bases. *See* NITL Op. at 54-56.

Also troubling is the general theme of such submissions that the Proposal, which would only *potentially* increase the competitive options of a small fraction of the Nation’s rail shippers, should be rejected out of hand because, if adopted, it allegedly would benefit a “favored class” of

rail shippers. AAR Op. at 16-17. This status is derogated as being detrimental to railroads and all other shippers simply because such “favored shippers” might obtain a competitive advantage over other shippers and improve their productivity and profitability. According to the AAR, increasing the competitive options to this small group of rail shippers also allegedly would stifle investment and force the railroads to drive up rates to all other shippers. Taken to its logical conclusion, this position would require the Board to adopt a policy that condones the systematic elimination of competition everywhere it currently exists or might be established, since such shippers also are, or could become, “favored.” Thus, the correct public policy apparently being advocated by the railroads is that *no* shipper should be “favored” with competition, and that the railroads in the first instance, subject only to STB rate-reasonableness rules, would ensure that all shippers have exactly the same market opportunities and competitive advantages and disadvantages.

Such a policy would be directly opposite of Congress’ intent in passing the Staggers Rail Act of 1980, as well as the ICC and Board’s implementation of the law’s pro-competitive provisions. For example, the Board, and the ICC before it, long has encouraged the establishment of competition by rail shippers through the approval of rail buildouts and approval to cross the tracks of the incumbent railroad with such new construction over the carrier’s objection. 49 U.S.C. §10901(d). This regulatory option historically has been available only to a small number of shippers at limited locations where it was economically and physically feasible. Prior to 2004, such investment typically paid significant dividends in the form of lower rail rates established via competitive bidding, which enabled the shipper to lower, sometimes significantly, the costs of its product and increase its profitability. Under the rationale articulated by the AAR in this proceeding, the ICC and the STB’s rules encouraging the establishment of competition in

this limited manner were and are bad policy, since they lead to the creation of “favored shippers.” If the STB was to apply the AAR’s rationale in this proceeding to future buildout projects that involved a rail crossing, the STB would deny shipper efforts to construct rail lines to create competition, and would condone the refusal of the railroads to compete at such locations where such buildouts currently exist. This of course is absurd, and would overturn well-established STB precedent concerning the introduction of competition in limited situations where it did not exist before. In deciding such cases, the Board has dismissed the notion that the creation of competition will result in “favored shippers,” or would result in economic harm to the railroads or the economy. The Board has also recognized the adverse impact on the prospective competitive carrier. Both of these policy views were expressed by the Board in one representative rail crossing case:

We disagree with BN's claim that its compensation formula is justified because railroads have inadequate revenues. It is, of course, a given that one of our policy objectives is to assist the railroad industry in attaining adequate revenues. But BN's approach will not enhance railroad revenue adequacy in the manner in which Congress intended. The line that OPPD is building simply facilitates competition among railroads and gives two carriers an opportunity to earn profits where only one had the opportunity before. By proposing exorbitant crossing fees, BN would discourage OPPD from building the line, a result that, if effective, would limit UP's ability to provide service and hence constrain UP's ability to earn adequate revenues. Enhancing one carrier's opportunity to earn profits at the expense of another's does not advance the Congressional policy that we assist the railroad industry in achieving revenue adequacy.

We recognize that carriers in competitive markets are less able to price differentially than carriers in monopoly situations, and that differential pricing is one way in which carriers can move toward revenue adequacy. But, while it was aware of the potential conflict between revenue adequacy and competition, Congress determined that the public would benefit from increased competition. Staggers Act Conference Report at 114. Indeed, while it clearly sought to promote

railroad earnings, Congress concluded that the best “way to attain revenue adequacy [was] by means of the interaction of competitive forces.”⁶

Adopting rules interpreting §11102(c) that encourage the establishment of competition in the limited manner contemplated by the Proposal is conceptually no different than the rules applying §10901(d) that encourage a similar outcome for rail buildouts. The opening submissions of the AAR and the railroad parties recycle arguments about the alleged harm of the Board’s efforts to increase competition that have been rejected long ago. We believe the Board should reject such protestations even more emphatically in this proceeding, particularly given the more highly concentrated rail industry that exists today, the fact that revenue adequacy largely has been achieved, and the railroads’ clear aversion in this proceeding to more competition.

V. The Railroad Positions in Response to the Proposal Affirm that the Board Must Modify Its Rate Reasonableness Rules to Make Them More Accessible to Rail Shippers and to Facilitate Determinations of When Rail Rates Are Unreasonable.

Finally, the opening submissions of railroad parties in this proceeding also make it abundantly clear that the Board must strive to put in place an effective and useable set of rules for determining the reasonableness of railroad rates. First, as stated previously, the opening submissions of railroad parties make it clear that they collectively reject *any* notion of the Board taking *any* further steps to increase competition in the railroad industry. Their comments instead attempt to narrowly constrain the Board’s role to solely judging the reasonableness of rail rates where the Board has jurisdiction. *See e.g.*, KCS Op. at 2-7 (“The solution” to “unreasonable rates” is not through modified switching rules, but to challenge them in a rate case); CSX Op. at 2. Second, although they provide no empirical data or quantifiable justification, the railroad

⁶ Finance Docket No. 32630 *Omaha Public Power District – Petition under 49 U.S.C. 10901(d)* (STB Served July 18, 1996) *citing American Short Line R.R. Association v. United States*, 751 F.2d 107, 113 (2d Cir.1984).

parties state that *any* change in the rules that results in increased access and competition between them allegedly *will* result in rate increases for other rail shippers who do not have viable alternatives.

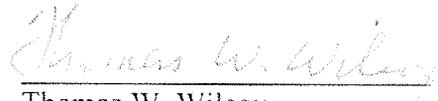
The Board obviously should vigorously resist the efforts of the Class I railroads to narrowly pigeonhole the Board's role to be only for the purpose of processing rate cases. Sections 10901, 11102 and other provisions of ICCTA clearly provide the Board with broad authority to increase rail-to-rail competition. Nevertheless, in addition to modifying its existing access rules, preferably via a modified version of the Proposal along the lines recommended by the Interested Agricultural Parties, it is imperative that the Board redouble its efforts to ensure that its rate-regulatory rules are meaningful and accessible to rail shippers, and that they provide a real check against unreasonable railroad pricing practices. In this regard, the Interested Agricultural Parties implore the Board to consider strongly the comments of the NGFA and other rail shipper parties in EP 715, *Rate Regulation Reforms*, and issue final rules that increase the usefulness and accessibility of all of the Board's rate-reasonableness rules to agricultural and other rail shippers.

IV CONCLUSION

In conclusion, the Interested Agricultural Parties wholly support the replacement of the current Board rules concerning reciprocal switching, as well as a decision by the Board to overrule the prior precedent applying those rules and 40 U.S.C. §11102(c) to requests for such relief. The NITL Proposal, modified as recommended by the Interested Agricultural Parties,

presents a potential replacement to the current rules that the Board should further explore in a formal rulemaking proceeding.

Respectfully submitted,



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