

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**Ex Parte 711 (Sub-No. 1)
RECIPROCAL SWITCHING**

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**COMMENTS OF
CARGILL, INCORPORATED**

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I. Introduction

Cargill, Incorporated (“Cargill”) hereby submits these opening comments in response to the Notice of Proposed Rulemaking (“Notice”) served by the Surface Transportation Board (“STB” or “Board”) in the above-captioned proceeding on July 27, 2016. Cargill is a member of the National Industrial Transportation League (the “League”) and fully supports the opening comments jointly submitted by the League, the American Chemistry Council, and other interested parties (the “Shipper Coalition”) in this proceeding. Cargill comments separately for the purpose of emphasizing those issues of greatest concern to it and to bolster those comments with examples from Cargill’s own experience.

A. Identification and Interest

Cargill, which is headquartered in Minnetonka, Minnesota, is an international provider of food, agricultural and risk management products and services. Founded in 1865 as a single grain elevator in the United States, today Cargill employs more than 150,000 people in 70 countries in areas of crop and livestock, food, animal feed, industrial, commodity trading, and financial and risk management.

Rail transportation is a critical part of Cargill's food and agriculture businesses and rail service and costs have a significant impact on their operations. Cargill ships commodities to or from over 200 rail-served facilities in the United States, of which historically about 80% are captive to a single railroad.

In any given year, Cargill may tender over 300,000 car loads to destinations throughout the entirety of the United States. Some of our largest volumes will move to export channels. Most of Cargill's rail movements either are not truck competitive at all, or move over long distances that render trucks impractical and/or uneconomical. Cargill relies upon rail transportation to haul dozens of agricultural commodities.

Due to its high dependence upon rail transportation, Cargill requires meaningful and effective regulatory constraints upon the exercise of market power by rail carriers at Cargill's captive facilities. Currently, such constraints are non-existent. The idea that existing regulations constrain rates on captive traffic is unrealistic, since the railroads know that the economics do not justify a rate case even at the exceedingly high levels of recent rate increases. Furthermore, Cargill would much prefer to rely upon competitive market forces to constrain rail rates and incentivize superior rail service.

B. Benefits of Reciprocal Switching to Agricultural Interests.

Although Congress included the reciprocal switching provisions of the statute in the Staggers Act of 1980, which substantially deregulated the rail industry, the Board, and the Interstate Commerce Commission ("ICC") before it, have imposed standards so far in excess of those in the statute itself that reciprocal switching may as well not have been included in the statute at all. This has remained the case for 36 years despite a national rail transportation policy "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); *see also*, 49 U.S.C. 10101(4)

& (5) (to ensure “effective competition” among rail carriers). During that time, the agency has given greater weight to competing rail transportation policies focused upon the revenue adequacy of rail carriers. *See*, 49 U.S.C. 10101(3), (4) & (5). The Notice correctly recognizes that the time has come for the Board to take a more balanced approach towards implementing the “effective competition” and “revenue adequacy” rail transportation policies.

This is one of the most significant STB proceedings in which Cargill has participated. Over several decades, Cargill has watched its rates and captivity increase steadily as the rail industry consolidated and carriers extended their bottleneck control over Cargill facilities to ever greater distances. Notably, the pace of rate increases has quickened dramatically over the past 15 years, shortly after the last major rail consolidations. Over that same time period, the financial condition of the rail industry has rocketed skyward to the point where rail revenue adequacy has not been seriously questioned by the financial markets for many years, even though the STB still sets a higher bar. Moreover, nearly all of the Class I rail carriers have cleared even the STB’s higher bar set in recent years. These developments have opened the door for the STB to adopt measures to enhance rail-to-rail competition and to restore some of the competition that has been lost through longer post-merger bottleneck segments by making reciprocal switching more widely available to rail customers.

Cargill hopes to benefit from increased competition made possible by reciprocal switching in several ways. Cargill has several facilities in the United States that could benefit from reciprocal switching under the standards proposed in the Board’s Notice. A number of these facilities sell grain and other agricultural commodities into the global export market. The global market is highly competitive and consequently very price sensitive. According to a recent study by Escalation Consultants, Inc., over the past 12 years, the average rail transportation rates

charged by the Big Four domestic rail carriers have increased three times more than motor carrier rates and the inflation rate. This adversely affects the amount Cargill can pay farmers for their grain and other agricultural products.

Greater competition among rail carriers through reciprocal switching has the potential to open up more markets to American farmers in the interior. Rail carriers influence the markets available to a farmer by virtue of the rates they charge. For example, a bottleneck rail carrier that has a longer haul to west coast ports than to gulf coast ports may price its transportation to render the gulf coast export market uneconomical. Reciprocal switching that breaks the monopoly power of the bottleneck carrier will create more opportunities for the elevator to sell to the more profitable market. This is an overall more economically efficient and pro-competitive outcome by ensuring that supply goes to the market where demand is greatest, without rail carriers being able to tip the scales in favor of the market that gives them a greater rate of return or longer haul.

II. **Importance of a Streamlined Approach.**

Cargill's most significant concern with the proposals in the STB's Notice is that they not devolve into proceedings with the level of cost, time, and complexity that has come to exemplify rate cases. The original League proposal contained a series of conclusive presumptions that would have protected against that result for most shippers. Now that the Board has rejected that approach in favor of a case-by-case assessment, it is imperative that the Board consider other means of streamlining reciprocal switching cases, including rebuttable presumptions and procedural protections like those offered by the League in its opening comments.

The Board should clearly allocate the burden of proving the various factors that will be evaluated in a reciprocal switching case to the party asserting that factor in favor or against switching. This is of particular concern for the "practicable and in the public interest" standard where the Board has articulated seven non-exclusive factors plus the fifteen statutory rail

transportation policies as relevant considerations. Several of those factors are likely to be argued only by shippers (*e.g.*, new market access, service quality, amount of traffic) and other factors only by railroads (*e.g.*, capital investment, employee impacts, rail network impacts). In addition, the incumbent rail carrier should have the burden of proving a defense based upon allegations that the proposed switching is not feasible, is unsafe, or will unduly hamper the incumbent's ability to serve other shippers. The Shipper Coalition is offering proposals to streamline the discovery and evidentiary procedures for addressing these factors, which Cargill supports.

A streamlined and expedited approach also is critical because reciprocal switching cases may need to be conducted in two phases. First, there is the question of whether reciprocal switching should be required at all. Second, if reciprocal switching is required, there may need to be a second phase to determine reasonable conditions and compensation if the rail carriers cannot agree or if the shipper believes that the agreed-upon conditions and/or compensation are unreasonable.

In setting a reasonable time frame for adjudicating reciprocal switching cases, Cargill notes that 49 U.S.C. 11102, in addition to the reciprocal switching provisions in subpart (c), also provides for terminal trackage rights under subpart (a). Furthermore, the statute requires the Board to complete any trackage rights proceeding under subpart (a) within 180 days. 49 U.S.C. 11102(d). Although this mandatory time frame does not apply to reciprocal switching under subpart (c), it is a useful guide for the Board to adopt in this proceeding. The terminal trackage rights subsection contains the same "practicable and in the public interest" standard as reciprocal switching and the Board has proposed to adapt the same methodology it uses to prescribe trackage rights fees for the prescription of reciprocal switch rates. In other words, there is nothing inherently more complex or involved for reciprocal switching cases than for terminal

trackage rights cases that requires more than the same 180 days to complete that proceeding. The Shipper Coalition's proposed 210 day schedule for just deciding whether or not to grant reciprocal switching is eminently reasonable by this standard.

Cargill strongly urges the Board to avoid a process that results in reciprocal switching cases that are just as onerous as rate cases. Nor should the Board allow a case-by-case approach to become unwieldy over time, as has happened with rate cases. That would not be a meaningful regulatory remedy.

III. **Access Price**

The access price, or switch fee, for reciprocal switching is the second most important issue in the Notice. Ultimately, whatever access the Board may grant through its proposed reciprocal switching rules, that access will have absolutely no value if the access fee is not a reasonable charge. A reasonable charge should provide no greater compensation to the incumbent than is necessary for it to recover the variable cost of its switching operation, a proportionate share of the fixed costs, and a reasonable return. An alternate carrier with a comparable or better cost and/or routing structure to the incumbent should be able to compete effectively. As a general matter, Cargill supports the comments of the Shipper Coalition with respect to the methodology for determining the access price. In these comments, Cargill raises certain corollary issues of substantial importance.

First, Cargill stresses its complete objection to including "lost contribution" in the access fee. Notice at 25. This concept, also known as efficient component pricing ("ECP"), was suggested by Union Pacific ("UP"). If the Board were to adopt ECP, it would completely undermine the very objective of reciprocal switching by setting an access fee that effectively ensures the shipper will pay the same price for the full origin to destination movement regardless of which carrier it uses. The recently released InterVISTAS report to the STB on freight rail rate

regulation reflects Cargill's objections to ECP, when it acknowledges that ECP "can perpetuate the unreasonable exercise of market power by the incumbent carriers" and notes that other federal agencies have rejected ECP because it "enables incumbent carriers to recover their full opportunity costs, including any monopoly profits."¹

Second, Cargill urges the Board to clarify that it will use the same standard for setting access fees for both disputes between the incumbent and alternate rail carriers and between the shipper and incumbent rail carrier. The reciprocal switching statute provides for the STB to set compensation "if the rail carriers cannot agree...within a reasonable period of time." 49 U.S.C. 11102(c)(1). Conceivably, the two rail carriers may reach agreement upon an access fee that the shipper believes is unreasonable and non-competitive. The shipper undoubtedly has a right to challenge that rate under the statute. It would be arbitrary to apply a different standard for the access fee based solely upon the status of the challenger as a shipper or another railroad.

Finally, the STB should adopt a short, 15 day, time period for the incumbent and alternate carrier to agree upon the access fee. After that time has elapsed, the shipper should have a right, but not the obligation, to ask the Board to set the rate. That way, if the shipper is persuaded that the two rail carriers are making progress, it could elect to allow that process more time without waiving its right to invoke the STB's jurisdiction if and when negotiations subsequently stall. Without a defined time period, a shipper could be deprived of the benefits of a reciprocal switching order for months or even years while waiting for the rail carriers to agree upon term in a process over which the shipper has no input or control.

¹ InterVISTAS Consulting Inc., "An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification," Project FY14-STB-157, pp. 109 & 110 (Sept. 14, 2016).

IV. Reasonable Distance Issue.

To obtain reciprocal switching, the Board proposes to require that “there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.” Notice at 18 & 19. The Board has invited comments on guidelines it may provide to parties on the definition of “a reasonable distance.” *Id.* at 21. Cargill supports the Board’s desire to maintain flexibility by defining a “reasonable distance” based upon the facts of each case, rather than rigid adherence to a fixed distance.

Cargill, however, also supports the Shipper Coalition comments on this subject, which offer guidance for how the Board should evaluate what is a reasonable distance. Specifically, the Board should consult existing precedent that defines a “reasonable distance” for terminal trackage rights in the same section of the statute as reciprocal switching. In doing so, the Board should consider the combined distance within a terminal and beyond the terminal. The same Board precedent also provides relevant guidance on how to define a terminal area. The Board also should be more liberal in its determination of a reasonable distance for reciprocal switching because switching is a far less intrusive form of competitive access than trackage rights, and thus creates less potential for interference with the incumbent’s operations than trackage rights.

In addition, the Board should be guided by the actual operations of the incumbent carrier between the facility for which switching is sought and the nearest working interchange when deciding a reasonable distance. Where those operations would be substantially the same regardless of whether the traffic is interchanged or retained by the incumbent, that distance should be deemed reasonable.

V. Identification of Working Interchange.

Cargill supports the Board's proposal that there "is" a working interchange if one already exists and is currently engaged in switching operations. Notice at 21. However, Cargill believes that the Board's determination of whether there "can be" a working interchange is unduly narrow.

Specifically, the Board proposes that "there 'can be' a working interchange only if the infrastructure currently exists to support switching, without the need for construction, regardless of whether switching operations are taking place or have taken place using that infrastructure." *Id.* This situation could arise in various scenarios, such as when the incumbent claims to have insufficient yard capacity to handle the additional switch traffic or the change in traffic flow, or when an interchange location only has sufficiently long tracks to interchange manifest traffic but not unit train switch traffic.

If and when the incumbent carrier proves that those or comparable situations exist, either the shipper or the alternate carrier should have the option of paying for the necessary infrastructure enhancements to provide reciprocal switching. In those situations, the Board should determine that there "can be" a working interchange.

VI. Applicability to Shortline Railroads

The Board has proposed "to limit the availability of reciprocal switching prescriptions to those situations that only involve Class I rail carriers due to the lack of specific information on this matter and the concerns raised by ASLRRA." Notice at 20-21. As noted by the Board, the ASLRRA asserted that the Board "should expressly limit the application [of reciprocal switching] to situations in which no Class II or Class III railroad participates at any point in the movement of the traffic whether or not the small railroad appears on the waybill." *Id.* at 20

(quoting ASLRRA Reply at 1-4) (underline added). Cargill takes issue with a portion of this proposal to restrict reciprocal switching to just Class I railroads.

First, the Board has not consistently articulated the scope of its proposed restriction. The Board purports to base its proposal upon the above-quoted ASLRRA statement. But that statement is far too broad because, as the underlined text demonstrates, it would prohibit reciprocal switching for any movement involving a Class II or III railroad anywhere in the route even if that railroad is not the incumbent carrier that is the subject of the reciprocal switch request, but merely a bridge carrier. Cargill does not believe that is the Board's intent. Indeed the actual text of the regulation proposed by the Board at 1145.2(a)(1)(i) and (2)(i) properly focuses upon whether the facilities for which switching is sought are served by a Class I rail carrier. The final rule should more closely resemble the proposed regulatory text rather than the ASLRRA comment.

Second, the Board's discussion of its proposed Class I rail carrier restriction suggests that the restriction should apply even when a Class II or III rail carrier is the alternate carrier as opposed to the incumbent. Specifically, the Board states that, "[u]nder both prongs of the proposed regulations, prescriptions of reciprocal switching would be limited to instances in which both the incumbent railroad and the competing railroad are Class I carriers." Notice at 20 (underline added). No grounds have been articulated as to why a Class II or III rail carrier should not be allowed to provide rail service as the competing railroad in a reciprocal switching arrangement. Again, the text of the proposed rules does not apply the restriction as broadly as the narrative discussion quoted above suggests. Cargill urges the Board to follow the text of the proposed rule over the restriction described in the narrative.

Finally, there conceivably are situations where, to immunize or exempt a major customer's facility from reciprocal switching, a Class I rail carrier might opt to divest a rail line to a Class II or III railroad. That sort of "gaming" should not be permitted. Therefore, Cargill urges the Board to accept and evaluate challenges to the shortline exemption on a case-by-case basis and to refuse to apply the exemption when it believes such gaming may have occurred.

VII. Conclusion.

Cargill commends the Board for proposing to modify and update its reciprocal switching standards to reflect the realities of today's rail transportation market. Cargill generally supports the direction of the proposed changes. However, Cargill cautions the Board against a case-by-case approach that is overly complex, lengthy and expensive or that establishes switching rates that render the alternative carrier non-competitive. Cargill also supports the modifications offered by the Shipper Coalition and as elaborated upon in the foregoing comments.

Respectfully submitted,

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Dated: October 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October 2016, I served a copy of the foregoing upon all parties of record via U.S. first-class mail, postage prepaid.



Jeffrey O. Moreno