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February 14, 2022

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. EP 711 (Sub - No. 1) – *Reciprocal Switching*

Dear Ms. Brown:

Pursuant to the decision served in the captioned proceeding on December 28, 2021, the National Grain and Feed Association (“NGFA”) hereby submits its written comments on the topics discussed in the decision. The NGFA also submits the written testimony of Mr. Max Fisher, its Chief Economist. Mr. Fisher will be in attendance for NGFA at the hearing scheduled on March 15-16, accompanied by its undersigned counsel. The NGFA has requested 10 minutes be allotted for its remarks.

Please do not hesitate to call me if you have any questions.

Sincerely,

Thomas W. Wilcox

*Transportation Counsel for The National
Grain and Feed Association*

NGFA COMMENTS



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 711 (Sub- No.1)

RECIPROCAL SWITCHING

COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

The National Grain and Feed Association (“NGFA”) is very appreciative of the opportunity to supplement its prior comments in this proceeding,¹ and the NGFA commends the Surface Transportation Board (“Board” or “STB”) for resuming its consideration of revising the current rules and regulations implementing 49 U.S.C. §11102(c)(1) to facilitate reciprocal switching for the purposes of potentially increasing rail-to-rail competition for the benefit of agricultural shippers and for society at large. Many of the NGFA’s members are captive to one railroad for service. While the alternative of truck transportation for most agricultural commodities

¹ On October 26, 2016 the NGFA submitted Opening Comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued in this Docket on July 26, 2016. On January 13, 2017, the NGFA submitted Reply Comments on the NPRM. The NGFA also participated in a joint filing in this and other dockets submitted on July 29, 2021 by a group of agricultural trade associations called the Agricultural Working Group in response to the July 9, 2021 Executive Order issued by President Biden which in part encouraged the Board to adopt initiatives such as reciprocal switching to encourage competition in the railroad industry. NGFA incorporates those prior filings by reference in these comments.

theoretically exists nearly everywhere, it is not an effective competitor to long haul shipments that predominate rail transportation. Thus, a revision of the rules governing Board-directed reciprocal switching arrangements to more closely adhere to the statutory language is not only long overdue, it would potentially provide relief for NGFA's members that is not currently available under existing rules and agency precedent.

I. Identity and Interests of NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations and is co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. Comments in Response to the December 27, 2021 Decision

A. New Developments in the Agricultural Industry Relevant to a Final Decision

Since 2017, when the written comment period on the NPRM closed, the amount of grain transported by rail has been relatively steady and the long running trend of shuttering smaller train loading facilities and building larger facilities has continued. This combination of steady grain volumes and fewer, but larger facilities, is in part the outcome of the Class I railroads' changes to their operating plans caused by adopting the principles of so-called "precision scheduled

railroading.” This change in the agricultural commodity transportation market has created an even greater need for reciprocal switching and makes the industry more conducive to trying to create rail competition through reciprocal switching.

Meanwhile, the need for increased rail-on-rail competition remains. The number and makeup of grain handling facilities is evolving, but the ability remains low to locate or move facilities to more favorable locations to try and obtain rail-to-rail competition. For example, grain origin facilities must stay reasonably close to farms to keep truck freight costs manageable for the first movement from field to storage. This means grain handlers often must build in areas that are captive to a single railroad.

In summary, agriculture’s suitability for reciprocal switching has improved and its need for rail-to-rail competition remains.

B. Comments on Topics Discussed in *Ex Parte* Meetings

The NGFA does not have any comments on topics that were discussed in *ex parte* meetings with the Board members and staff on reciprocal switching issues.

C. Other Matters Relevant to This Proceeding

The NGFA continues to maintain that final revised rules governing the Board’s establishment of reciprocal switching arrangements should have several primary objectives. The first objective is to reaffirm the Board’s conclusion in the NPRM that the “anticompetitive act” standard applied in the Interstate Commerce Commission’s rules in *Intramodal Rail Competition*² and in *Midtec Paper Corp. v. Chicago & North Western Transportation Co*³ should be reversed for the reasons discussed in the NPRM.⁴

² 1 I.C.C.2d 822 (1985), *aff’d sub nom Balt. Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

³ 3 I.C.C.2d 171 (1986).

⁴ NPRM at 8-10.

Second, the final revised rules should be as streamlined as possible so decisions on whether a reciprocal switch arrangement should be established can be made without lengthy and costly administrative proceedings, while still fulfilling the statutory directives of §11102(c)(1) and principles of due process. The NGFA has previously commented that the final rules should be more explicit about the procedures for resolving reciprocal switching disputes. The NGFA also believes that the Board should reconsider its prior rejection of the concepts of rebuttable presumptions that was a key component of the original proposal of the National Industrial Transportation League in 2011. For example, the Board could establish a presumption that carriers should establish a reciprocal switching arrangement for shippers located within a defined distance of an established interchange, thus placing the onus on the incumbent rail carrier to demonstrate that a reciprocal switching arrangement was neither in the public interest nor necessary to provide competitive rail service. In such cases, evidence could include the extent to which the incumbent's investment in power, crews and track can create capacity that would overcome alleged switching challenges.

Third, the NGFA continues to urge the Board to be adaptable in determining qualifications for determining whether there “can be” a working interchange from which reciprocal switching can occur.⁵ The final rules should take into account that new interchanges can be established, and former interchanges rehabilitated and restored to service. The NGFA also recommends that the Board accompany the final rules with a public process whereby existing and potential new interchanges eligible for reciprocal switching arrangements would be identified starting from an appropriate baseline date preceding the effective date of the final rules.

Fourth, the NPRM chose to leave the determination of whether there is a working

⁵ The NGFA has previously commented it does not object to the NPRM's proposed identification of existing interchanges.

interchange “within a reasonable distance of the facilities of the party seeking switching” to be made on a case-by-case basis.⁶ The NGFA recently surveyed its membership and now more than one-half of its members’ rail origin and destination facilities that are located on a Class I railway are located within 100 miles of a second Class I railway. Consequently, a determination in the final rules that 100 miles is “within a reasonable distance” could potentially lead to increased rail-to-rail competition for a significant portion of grain shippers, and the NGFA reiterates its support for such a determination.

Grain shippers and receivers that are beyond a “reasonable distance” from an interchange would be relegated to trying to control their rail transportation costs through efforts to have the Board determine the maximum reasonable rate the railroad could charge under the law. For this reason, the NGFA is very pleased that the Board is simultaneously working to promulgate revisions to its rate reasonableness procedures and standards that are applicable to disputes that involve relatively small damage amounts.

Finally, the NGFA continues to encourage the Board to be vigilant in fashioning workable and effective rules governing the compensation to be paid incumbent carriers in Board-directed reciprocal switching arrangements. As the NGFA has explained in its prior comments in this proceeding, the Board’s rules should apply to both cases where (1) the Board directs a reciprocal switch arrangement and the carriers cannot reach agreement on the conditions and compensation applicable to the agreement; and (2) the Board directs an arrangement and the carriers do reach agreement but the shipper(s) benefitting from the arrangement believe the agreed upon amount is unreasonably high. The NGFA continues to be concerned that in today’s concentrated railroad industry the possibility exists that such fees and terms almost certainly will be set at levels that

⁶ Proposed Section 1145.2(a)(1)(ii).

maintain the *status quo* at a particular location instead of creating effective competition. In such cases, which the NGFA believes will be common despite the pro-competitive intent of §11102(c), shippers must have a clearly defined and efficient means to challenge the agreed-upon reciprocal switching fee at this Board. The most efficient and reasonable approach to address this issue would be for the final rules to establish that the standards for determining whether compensation agreed to by railroads under §11102(c) is appropriate shall be the same as the standards to be applied when they *cannot* agree.

NGFA continues to be in favor of an “access pricing” methodology (compensation determined on a case-by-case basis reviewing a specific set of factors - i.e., geography, distance, cost of service, capacity of interchange facility, etc.) – as proposed in the NRPM. By developing and then consistently applying an appropriate “access pricing” methodology, the Board would place all incumbent rail carriers on a level playing field to compete for business through reciprocal switching arrangements.

III. Conclusion

The NGFA encourages the Board to maximize this opportunity to facilitate rail-to-rail competition and allow both origin and destination rail customers to attempt to obtain alternative rail service via reciprocal switching arrangements. In a highly consolidated and largely captive industry, this may be the best opportunity to create some semblance of effective rail-to-rail competition. The NGFA accordingly urges the Board to act with all deliberate speed to promulgate final regulations in this proceeding.

Respectfully submitted,

Sincerely,



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February 14, 2022

NGFA TESTIMONY



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 711 (Sub- No.1)

RECIPROCAL SWITCHING

TESTIMONY OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Good morning, my name is Max Fisher, and I am the Chief Economist for the National Grain and Feed Association. The NGFA consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities.

I would like to begin by commending the Board for resuming its work in this proceeding for the purpose of increasing rail-to-rail competition through reciprocal switching arrangements. Many of NGFA's members are captive to one railroad and have little bargaining power in the absence of rail-to-rail competition.

Since 2017, when NGFA submitted its last set of comments on the NRPM, the amount of grain transported by rail has been relatively steady, and the long running trend of shuttering smaller train loading facilities and building larger facilities has continued. This combination of steady grain volumes and fewer, but larger facilities is in part the outcome of the Class I railroads' changes

to their operating plans caused by adopting the principles of so-called “precision scheduled railroading.”

Meanwhile, the need for increased rail-to-rail competition remains. The number and makeup of grain handling facilities is evolving, but the ability remains low to locate facilities in places where more than one railroad can provide service. For example, grain origin facilities must stay reasonably close to farms to keep truck freight costs manageable for the first movement from field to storage. This means grain handlers often must build in areas that are captive to a single railroad.

To summarize these trends, agriculture’s suitability for alternative rail service through reciprocal switching has improved and its need for rail-to-rail competition remains.

With respect to the 2016 NPRM, the NGFA maintains that several primary objectives should be reflected in the final rules the Board issues. The first objective is to reaffirm the Board’s conclusion in the proposed rule that the “anticompetitive act” standard applied by the Interstate Commerce Commission in the MidTec case and other decisions should be reversed.

Second, the procedures contained in the final rules should be as streamlined as possible so decisions on the establishment of reciprocal switching arrangements can be made without lengthy and costly administrative proceedings.

Third, the NGFA continues to urge the Board to be adaptable and take into account that interchanges conducive to reciprocal switching can be established or reconstructed. The NGFA also recommends that the Board accompany the final rules with a public process whereby existing and potential new interchanges eligible for reciprocal switching arrangements would be identified.

Fourth, the NGFA recently surveyed its membership and now more than one-half of its members’ rail origin and destination facilities are located on a Class I railway that is within 100

miles of a second Class I railway. Consequently, a determination in the final rules that 100 miles is “within a reasonable distance” of an interchange could potentially lead to increased rail-to-rail competition for a significant portion of grain shippers.

In any case, the NGFA is very pleased that the Board is simultaneously working to promulgate revisions to its rate reasonableness procedures for shippers and receivers that would be too far from an interchange to participate in reciprocal switching.

Finally, the NGFA encourages the Board to fashion workable and effective rules governing the compensation to be paid incumbent carriers in Board-directed reciprocal switching arrangements. These rules should apply to cases where the Board directs a reciprocal switch arrangement but the carriers cannot reach agreement on the conditions and compensation; and also cases where the Board directs an arrangement and the carriers do reach agreement but the shipper(s) benefitting from the arrangement believe the agreed upon amount is unreasonably high.

The NGFA is remains in favor of the “access pricing” methodology in the proposed rule. By developing and consistently applying an appropriate “access pricing” methodology, the Board should be able to place rail carriers on a relatively level playing field to compete for business through reciprocal switching arrangements.

In conclusion, the NGFA encourages the Board to maximize this opportunity to facilitate rail-to-rail competition and allow both origin and destination rail customers to attempt to obtain alternative rail service via reciprocal switching arrangements. In a highly consolidated and largely captive industry, this may be the best opportunity to create some semblance of rail-to-rail competition. The NGFA accordingly urges the Board to act with all deliberate speed to promulgate final regulations in this proceeding.