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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING

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

COMMENTS OF CLEVELAND-CLIFFS INC.

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Dated: February 14, 2022

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Cleveland-Cliffs Inc. (“Cliffs”) submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Public Hearing (“Notice”) served in this proceeding on December 28, 2021.

IDENTITY OF INTEREST

Cliffs is the largest flat-rolled steel producer in North America. Founded in 1847 as a mine operator, Cliffs also is the largest manufacturer of iron ore pellets in North America. The Company is vertically integrated from mined raw materials, direct reduced iron, and ferrous scrap to primary steelmaking and downstream finishing, stamping, tooling, and tubing. Cliffs is the largest supplier of steel to the automotive industry in North America and serves a diverse range of other markets due to its comprehensive offering of flat-rolled steel products.

In March 2020, Cliffs completed its acquisition of AK Steel (“AK”). AK’s assets included seven steelmaking and finishing plants, two coke-making operations, three tube manufacturing plants, and ten tooling and stamping operations. In December

2020, Cliffs completed its acquisition of ArcelorMittal USA (“AMUSA”), another large steel company. AMUSA’s assets included six steelmaking facilities, eight finishing facilities, two iron ore mining and pelletizing operations, one coal mining complex, and three coke-making operations. The AK and AMUSA facilities Cliffs acquired are located in Minnesota, Ohio, West Virginia, Pennsylvania, Indiana, Michigan, North Carolina, Alabama, Kentucky and Ontario.

Cliffs has successfully vertically integrated its legacy iron ore business with quality-focused steel production. Cliffs offers the most comprehensive flat-rolled steel product selection in the industry, along with several complementary products and services. Cliffs’ fully integrated portfolio includes custom-made pellets and Hot-briquetted Iron (HBI); flat-rolled carbon, stainless, electrical, plate, tinplate and long steel products; as well as carbon tubing, stainless steel tubing, hot stamping, cold stamping, hot tooling and cold tooling.

In November 2021, Cliffs acquired Ferrous Processing and Trading Company, including certain related entities (“FPT”). FPT is a leading prime ferrous scrap processor in the United States with 22 locations, primarily in Michigan and Ohio. FPT currently processes approximately three million tons of scrap per year.

Cliffs is headquartered in Cleveland, Ohio and employs approximately 26,000 people across its mining, steel and downstream manufacturing operations with 68 operating facilities in the United States and Canada. Many of Cliffs’ facilities are rail-dependent and are served by only one railroad. Cliffs supports increasing effective rail competition, and improving rail service, at its facilities.

COMMENTS

Cliffs has not previously filed comments in this proceeding and appreciates the opportunity to do so now. In these Comments, Cliffs joins other shippers in asking the Board to adopt new pro-competitive reciprocal switching rules. Cliffs also urges the Board to focus on one very important “new development”¹ – the Biden Administration’s recent directive that the STB exercise its independent regulatory authority to “promot[e] competition in the American economy.”² The Board should respond to the President’s directive by promulgating new pro-competitive reciprocal switching rules *now*.

A. The Board Should Reform Its Reciprocal Switching Rules

In 1980, Congress gave the STB’s predecessor – the Interstate Commerce Commission (“ICC”) – the statutory authority to prescribe reciprocal switching arrangements.³ The ICC proceeded to adopt a very restrictive set of implementing rules.⁴ Among other things, these rules required a shipper to demonstrate it had been subjected to “anticompetitive” conduct by a serving carrier to secure reciprocal switching relief.⁵

¹ Notice at 6 (asking parties to address “new developments”).

² See Exec. Order 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021) (“Executive Order”).

³ See Staggers Rail Act of 1980, Pub. L. No. 96-448, § 223, 94 Stat. 1985, 1929.

⁴ See *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff’d sub nom. Balt. Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

⁵ 49 C.F.R. § 1144.5(a)(1) (2001) (current version at 49 C.F.R. § 1144.2(a)(1) (2021)); *Midtec Paper Corp. v. Chi. & Nw. Transp. Co.*, 3 I.C.C.2d 171, 181 (1986), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

In 1995, Congress sunset the ICC and transferred the ICC’s authority to prescribe reciprocal switching to the STB,⁶ an authority currently codified at 49 U.S.C. § 11102(c). The STB subsequently adopted, without substantive change, the ICC’s reciprocal switching rules.⁷ These rules are currently codified at 49 C.F.R. § 1144.2. Since 1985, no shipper has prevailed in a reciprocal switching case.⁸

In 2016, the Board issued a Notice of Proposed Rulemaking (“NPRM”) in this proceeding.⁹ Therein, the Board stated it was proposing to reform its current reciprocal switching rules for two principal reasons. First, the Board observed that standards set forth in its current rules – particularly the anticompetitive conduct standard – “ha[ve] proven, over time, to set an unrealistically high bar for shippers to obtain reciprocal switching, as demonstrated by the fact that shippers have not filed petitions for reciprocal switching in many years, despite expressing concerns about competition.”¹⁰

Second, the Board found that “there have also been many changes that have occurred in the rail industry” since its current reciprocal switching rules were adopted in 1985, including “the improved economic health of the railroad industry,” the “increased consolidation in the Class I railroad sector,” and “the creation of short lines that may have

⁶ See *ICC Termination Act of 1995*, Pub. L. No. 104-88, § 102, 109 Stat. 803, 831.

⁷ See *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), slip op. at 4 (STB served July 27, 2016) (“2016 NPRM”).

⁸ *Id.*

⁹ See 2016 NPRM, Docket No. EP 711 (Sub-No. 1).

¹⁰ *Id.* at 8.

strong ties to a particular Class I,” changes which “likely reduce[] the chance of naturally occurring reciprocal switching as carriers seek to optimize their own large networks.”¹¹

Cliffs agrees that the Board should reform its existing reciprocal switching rules for the reasons set forth in the 2016 NPRM: the current rules simply set too high a bar for shippers to obtain any reciprocal switching relief and they do not reflect changes in the rail markets since 1985. Other commenters concur.¹²

B. The Board Should Eliminate the Anticompetitive Conduct Standard

The Board’s proposed new rules eliminate the requirement that shippers prove anticompetitive conduct as a prerequisite for obtaining reciprocal switching relief. That is a much-needed change. As a practical matter, rail carriers serving captive shipper facilities do not need to engage in “anticompetitive conduct” to protect their monopoly pricing and service powers because, in most instances, there is no effective market competition to begin with. Cliffs joins other shippers in urging the Board to eliminate the anticompetitive conduct standard.¹³

¹¹ *Id.* at 9.

¹² *See, e.g.*, Comments submitted by The Shipper Coalition For Railroad Competition at 5-16 (Oct. 26, 2016) (“Shipper Coalition Comments”); Joint Comments of Western Coal Traffic League and Minnesota Power at 2-3 (Oct. 26, 2016) (“WCTL/MP Comments”); Opening Comments of the National Grain and Feed Association at 1 (Oct. 26, 2016) (“NGFA Comments”); Comments of the U.S. Department of Agriculture at 1-6 (Oct. 26, 2016) (“USDA Comments”); Freight Rail Customer Alliance Letter Comments at 1 (Oct. 26, 2016) (“FRCA Comments”).

¹³ Shipper Coalition Comments at 7; WCTL/MP Comments at 6-10; NGFA Comments at 3-4; USDA Comments at 6; FRCA Comments at 2; Opening Comments of Alliance for Rail Competition et al. at 8-9 (Oct. 26, 2016) (“ARC Comments”).

Railroad parties have argued that the Board does not have the legal authority to remove the anticompetitive conduct test. The Board clearly has the discretion to remove the anticompetitive conduct test for the reasons set forth in the 2016 NPRM.¹⁴

C. The Board Should Take Additional Actions to Facilitate Effective Reciprocal Switching Relief

Cliffs agrees with many commenters, for the reasons set forth by these commenters, that (i) the Board’s jurisdiction to order reciprocal switching relief is not limited to shipper facilities in “terminal areas;”¹⁵ (ii) the Board should modify its proposed rules to permit reciprocal switching with non-Class I rail carriers;¹⁶ (iii) reciprocal switching should encompass both existing and new interchanges (including ones where new investment may be required);¹⁷ (iv) the determination of “reasonable distances” for reciprocal switching should be made on a case-by-case basis in a manner

¹⁴ See 2016 NPRM at 10-13; *accord* Shipper Coalition Comments at 16-20; Shipper Coalition Reply Comments at 13-55 (Jan. 13, 2017); NGFA Reply Comments at 2-11 (Jan. 13, 2017).

¹⁵ WCTL/MP Reply Comments at 9-14 (Jan. 13, 2017); Shipper Coalition Reply Comments at 75-82.

¹⁶ Shipper Coalition Comments at 4 (“the Board should allow Class II and III carriers to access a shipper’s facility through reciprocal switching by serving as the competing carrier”); *id.* at 32-34; NGFA Comments at 5 (“Class II and Class III railroads should be subject to the new reciprocal switching rules”); USDA Comments at 8 (“The Board should not *ex ante* exclude Class II or Class III railroads.”).

¹⁷ Shipper Coalition Comments at 40-41 (asking the Board to remove its proposed requirement that a new interchange be limited to ones where no new construction is required); WCTL/MP Comments at 14-15 (noting that “the Board’s concerns would be mooted in cases where a shipper or shippers, or the non-incumbent carrier, agree to fund any necessary new infrastructure”); ARC Comments at 9-10 (same).

that encourages rail competition;¹⁸ (v) the Board should provide additional guidance on how shippers can meet their burden of proof in reciprocal switching cases;¹⁹ and (vi) the Board should set reciprocal switching fees using reasonable cost-based metrics (not lost-contribution metrics).²⁰

Cliffs also encourages the Board to affirmatively address the issue of the application of its new reciprocal switching rules to exempt traffic by adopting its pending proposal to revoke the current class exemptions applicable to coke, steel products, and scrap metals²¹ and by announcing in this proceeding that in cases where a shipper seeks reciprocal switching relief, the shipper may present, and the Board will decide, partial exemption revocation requests.²²

¹⁸ Shipper Coalition Comments at 36-40; WCTL/MP Comments at 17 (proposing the Board adopt a rebuttable presumption that a “reasonable distance” be the greater of 30 miles or 10 percent of the total route miles from the movement origin to the movement destination); NGFA Comments at 7 (proposing “a maximum distance of 100 miles,” subject to case-specific longer distances); USDA Comments at 5 (supporting the determination of reasonable distance “on a case-by case basis” based on the “needs of the shippers and the circumstances they individually face”).

¹⁹ Shipper Coalition Comments at 20-29; NGFA Comments at 9-12; USDA Comments at 6-7.

²⁰ Shipper Coalition Comments at 50-54 (proposing that the Board adopt a “modified SSW approach”); NGFA Comments at 16-17 (“the Board should summarily reject . . . [proposals] that the incumbent railroad should be paid for lost contribution or opportunity costs”); USDA Comments at 7-8 (STB should set reciprocal switching fees based on “accounting costs” not lost “opportunity costs”).

²¹ *See Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1) (STB served Mar. 23, 2016); Comments of AK Steel Corp., Docket No. EP 704 (Sub-No. 1) (July 26, 2016) (supporting the Board’s proposals).

²² *Cf. Sanimax USA LLC v. Union Pacific R.R.*, Docket No. NOR 42171 (STB served Nov. 2, 2021) (granting a shipper’s partial exemption revocation request in an unreasonable practice case).

D. The Time for Action Is Now

On July 7, 2021, President Biden issued an Executive Order entitled “Promoting Competition in the American Economy.”²³ The President observed that “[r]obust competition is critical to preserving America’s role as the world’s leading economy. Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy”²⁴

The President also emphasized that “Federal Government inaction has contributed to these problems”²⁵ and stated that the Federal Government “must act *now* to reverse these dangerous trends, which constrain the growth and dynamism of our economy, impair the creation of high-quality jobs, and threaten America’s economic standing in the world.”²⁶

The President’s Executive Order contains specific recommendations that Federal agencies, including the STB, should consider to “reverse these dangerous trends.”²⁷ The President specifically referenced the present proceeding as one where the Board can and should consider undertaking immediate remedial actions:

To further competition in the rail industry and to provide accessible remedies for shippers, the Chair of the Surface

²³ Exec. Order, 86 Fed. Reg. at 36987.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 36988 (emphasis added).

²⁷ *Id.*

Transportation Board (Chair) is encouraged to work with the rest of the Board to:

(i) consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements pursuant to 49 U.S.C. 11102(c), if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service²⁸

On July 9, 2021, Chairman Oberman issued a statement responding to President Biden’s Executive Order.²⁹ The Chairman agreed that the STB is one of the independent federal agencies “charged with protecting the conditions of fair competition through the exercise of its [statutory] authority,”³⁰ and stated that he “welcome[d] the nationwide policy contained in this new Executive Order” because “[t]he President’s emphasis on improving the competitive landscape across the entire economy fits well with my view of the Board’s mission in the current rail environment.”³¹ The Chairman went on to state:

In harmony with the White House’s policy that the federal government should seek to boost competition nationwide, . . . I intend to urge my fellow Board members to prioritize and strongly consider the concepts embodied in several measures which are already pending or have been recommended by Board staff or stakeholders, including but not limited to reforming the Board’s competitive access policies³²

²⁸ *Id.* at 36996.

²⁹ Press Release No. 21-29, STB, Statement from STB Chairman Martin J. Oberman on Executive Order on Competition (July 9, 2021), available at <https://www.stb.gov/wp-content/uploads/PR-21-29.pdf>.

³⁰ *Id.* at 1 (internal quotation marks omitted).

³¹ *Id.* at 1-2.

³² *Id.* at 2.

If the Board promptly adopts new pro-competitive reciprocal switching rules, it will have properly exercised its independent authority in a manner that advances the policies set forth in the President's Executive Order.³³

CONCLUSION

Cliffs respectfully requests the Board to adopt final rules that are consistent with the views set forth in these Comments.

Respectfully submitted,

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³³ In the end, of course, the involved carriers must decide to effectively compete for the long-haul traffic subject to Board-ordered reciprocal switching for the switching remedy to provide meaningful rate or service relief to rail shippers. *See* WCTL/MP Comments at 23 (“[f]or reciprocal switching to be effective, rail carriers must aggressively compete for the shipper’s long-haul business”).