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February 14, 2022

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

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

Dear Ms. Brown:

In accordance with the decisions served December 28, 2021 and January 28, 2022 in the above-referenced proceeding, enclosed are the "Written Comments of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me at the telephone number or the e-mail address given above.

Thank you.

Sincerely,

DocuSigned by:
Adam Godderz
E8EE74FEF3FC408...

Adam J. Godderz

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

**WRITTEN COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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Dated: February 14, 2022

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SUMMARY

The Board should not adopt the forced switching rules contained in its Notice of Proposed Rulemaking (“NPR”).¹ Shipper testimony and ex parte meeting summaries over the past five years have reaffirmed that shippers seek forced switching simply as a form of rate regulation. Carriers’ duties, and the Board’s authority, with respect to railroad rates are carefully circumscribed by Congress in 49 U.S.C. §§10701-10709. Rules the Board proposes in this proceeding do not conform to those limitations, and therefore violate the statute.

The Board’s proposal will harm service. The Board’s current queries concerning first-mile/last-mile service are premised on the idea that switching to/from shipper facilities is important to quality service. Yet, the Board’s forced switching proposal will directly interfere with that service, creating more activity and making yard, terminal and interchange operations more complex. Moreover, the proposal will disincentivize carriers from investing in terminal facilities because their ability to recapture their investment and an acceptable rate of return will be at risk of being used for their competitors’ benefit, perhaps for artificially low payment.

¹ Reciprocal Switching, EP 711 (Sub-No. 1) (STB served July 27, 2016) (“EP 711 (Sub 1)”).

Finally, if carriers involved in forced switching cannot agree on the switch rate, the Board should set that rate using the Efficient Component Pricing (“ECP”) concept, in addition to recovery of variable cost. Unless the Board’s real purpose for forced switching is to constrain rates - in which case the proposal violates the Board’s governing statute - the Board should use ECP plus variable cost to set the switch rate so that investment in terminal facilities continues to be encouraged and so that forced switching is only used where significant efficiency and cost savings – not just rate compression - justify the forced switch.

DISCUSSION

The Kansas City Southern Railway Company (“KCSR”) comments here only briefly,² to reiterate three points it has previously made but that have been reinforced many times since KCSR’s last comments in January 2017.³

I. SHIPPERS' COMMENTS CONTINUE TO MAKE CLEAR THAT THEIR INTENT IS TO OBTAIN RATE RELIEF WITHOUT COMPLYING WITH THE STATUTE

This proceeding is intended by its proponents as an end run around rate regulation. That end run violates the Board’s governing statute.⁴

² Consistent with the Board’s direction that “[C]omments may identify new developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter ... and that repeating those same arguments in the written comments is strongly discouraged,” Reciprocal Switching, EP 711 (Sub-No. 1), served Dec. 28, 2021 at 6, KCSR focuses here on only three issues arising most frequently in summaries of ex parte meetings by Board members since KCSR’s January 2017 reply comments. However, while limiting these remarks, KCSR also reiterates and incorporates by reference its prior comments in this matter filed March 1, 2013; May 30, 2013; October 26, 2016 and January 13, 2017.

³ KCSR is a member of the Association of American Railroads (“AAR”), and also endorses AAR’s comments in this proceeding.

⁴ See also KCSR Opening Comments, EP 711, March 1, 2013 at 3 – 7; KCSR Opening Comments, EP 711 (Sub 1), October 26, 2016, at 4 – 12; KCSR Reply Comments, January 13, 2017, EP 711 (Sub 1), at 3 – 11.

Summaries of shippers' and shipper groups' ex parte meetings with Board members make plain that gaining leverage in rate negotiations is the purpose of the original EP 711 proposal and of their support for the Board's modified version of it. See, e.g., August 2021 Shipper Associations - Oberman ex parte meeting summary ("...even where competitive switching is made available, shippers may not use it because they are able to obtain a competitive rate from the incumbent"); August 2021 Shipper Associations - Schultz ex parte meeting summary ("The Shipper Associations explained that competitive switching is deregulatory because it would enable shippers to rely on competition rather than the Board's rate regulation to establish rates"); April 2019 ACC/NITL – Fuchs ex parte meeting summary at 3 (forced switching "helps shippers avoid rate cases and regulatory procedures by encouraging commercial agreements").

Section 11102(c), on which the Board's proposal is based, is not intended as a means of regulating rates. Rather, Subchapter I of Chapter 107 of Title 49 United States Code (49 U.S.C. §§10701-10709) contains the Board's authority to regulate rates. Among those provisions are 49 U.S.C. §10701(a) – rates must be reasonable; 49 U.S.C. §10701(d) – considerations in determining whether a rate is reasonable; and 49 U.S.C. §10707 – market dominance standards that are a prerequisite for a rate reasonableness challenge.⁵

The Board's EP 711 (Sub 1) proposal does not encompass these factors,⁶ relying instead on generalized notions of practicability, public interest or necessity for competitive service.

⁵ Compare August 2021 Shipper Associations - Oberman ex parte meeting summary ("The Shipper Associations explained that market dominance would not be required under the 'practical and in the public interest' prong of the proposed rule...")

⁶ While the Board has said that it will apply the market dominance test under Prong 2 of the proposal, see EP 711 (Sub 1) at 22, the Board has not said the same regarding Prong 1, and shipper testimony has opposed a market dominance test altogether. Id., at 6. Accordingly, it is not clear that a market dominance showing will actually be required under either Prong.

Congress did not authorize the Board to control rates based on these broad concepts, but rather on the specific principles of 49 U.S.C. §§10701, et seq.

Shipper interests have said multiple times that cases under this proposed regulation will be rare; that the mere existence of the regulation will provide them leverage to obtain concessions they want.⁷ But ICCTA does not authorize the Board to put its thumb on the shippers' side of the scale to tip the balance in rate negotiations. Rather, the statute only authorizes the Board to remedy problems resulting from artificial constraints on competition or proven abuses of competitive power. By acknowledging that they cannot meet the Midtec standard,⁸ shippers have confessed that they cannot show the types of artificial constraints on competition or abuses of competitive power that the Board is authorized to remedy.

Further, if shippers' predictions are true that this proposal will seldom be used because the existence of the regulation will give them leverage in rate negotiations,⁹ how will the Board avoid the conclusion that it has drawn about other rate procedures¹⁰ that because a remedy is not

⁷ August 2021 Shipper Associations - Oberman ex parte meeting summary (“...even where competitive switching is made available, shippers may not use it because they are able to obtain a competitive rate from the incumbent.”)

⁸ See Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986), aff’d sub nom. Midtec Paper Corp. v. U.S., 857 F.2d 1487 (D.C. Cir. 1988)).

⁹ August 2021 Shipper Associations - Oberman ex parte meeting summary (“[E]ven where competitive switching is made available, shippers may not use it because they are able to obtain a competitive rate from the incumbent”, and “The Shipper Associations also explained that, even if competitive switching is available only to a small percentage of captive locations, it provides additional pressure for railroads to compete more broadly.”); June 2019 CF Industries – Fuchs ex parte meeting summary (“CF further expressed its view that if competitive switching were allowed, it is likely that few cases would actually be brought to the Board...”); April 2019 ACC/NITL – Begeman ex parte meeting summary at 1 (“ACC/NITL explained that it does not expect a large number of cases because ... the purpose of the rule is to encourage behavior that would foster private solutions”).

¹⁰ See, e.g., Final Offer Rate Review, EP 755, and Expanding Access to Rate Relief, EP 665 (Sub-No. 2), served Sept. 12, 2019, at 2 – 4 (“In 1996, the Board adopted a simplified methodology, known as Three-Benchmark...A decade passed without any complainant bringing a case under that methodology. In 2007, the Board modified the Three-Benchmark methodology

being used, the remedy is deficient and needs to be broadened? How will the Board stop this proposal from being simply the camel's nose under the tent to ever-increasing regulatory interference with rail operations that previously led to disastrous consequences for the rail industry and its customers?¹¹ Compare 49 U.S.C. §10101(2) ("In regulating the railroad industry, it is the policy of the United States Government - ... (2) to minimize the need for Federal regulatory control over the rail transportation system").

The Board should address rate concerns through its pending EP 755 (FORR) and EP 765 (arbitration) proceedings, not by the generalized regulatory restructuring of industry operations¹² based on generalized notions of public interest that are untethered to the Board's statutory authority to regulate rates.

II. THE BOARD'S PROPOSAL WILL HARM SERVICE

Lately, shippers' discussions with the Board have been focused heavily on first-mile/last-mile service.¹³ See, e.g., First-Mile / Last-Mile Service, EP 767 (served Sept. 2, 2021) at 2-3

and also created another simplified methodology, known as Simplified-SAC... In 2013, the Board increased the relief available under the Three-Benchmark methodology and removed the relief limit on the Simplified-SAC methodology, among other things. ... Notwithstanding the Board's efforts to improve its rate review methodologies and make them more accessible, only a few Three-Benchmark cases have ever been brought to the Board, ... Accordingly, the Board has continued to explore ideas to improve the accessibility of rate relief.")

¹¹ See, e.g., American Chemistry Council and National Industrial Transportation League ("ACC/NITL") comment that Prong 1 may not be as usable as Prong 2 because the market dominance standard of Prong 2 is more predictable (see April 2019 ACC/NITL – Fuchs ex parte meeting summary at 2), setting up ACC/NITL's next round of arguments to broaden the remedy or make it more automatic if the regulation is enacted.

¹² E.g., April 2019 ACC/NITL – Oberman ex parte meeting summary at 2 ("Board Member Oberman asked whether certain railroads would benefit from competitive switching more than others. ACC/NITL acknowledged the potential for some carriers to have more opportunities to compete through reciprocal switching at some locations."). See also KCSR Opening Comments and Evidence, March 1, 2013, at 21 - 25

¹³ "[F]irst-mile / last-mile (FMLM) service ... refers to the movement of railcars between a local railroad serving yard and a shipper or receiver facility. So-called "local trains" serve customers in the vicinity of the local yard, spotting (i.e., placing for loading or unloading) inbound cars and

(“The Board has received a number of letters about FMLM service issues”, and “After hearing concerns raised by shippers across numerous industries ...”).

The Board’s EP 711 (Sub 1) proposal is specifically targeted to disrupt and degrade first-mile/last-mile service by adding more switching activity. The Board’s proposal would add new switch moves where none now exist. (E.g., “The Board would determine that there “can be” a working interchange ... regardless of whether switching operations are taking place or have taken place using that infrastructure”), EP 711 (Sub 1) at 20. See also August 2021 Shipper Associations - Oberman ex parte meeting summary (“The Shipper Associations commented that the presumptions were ... not to prevent shippers who could not satisfy the presumptions from accessing competitive switching altogether.”)¹⁴

The Board’s proposal also would relocate to origin or destination terminals existing switches that now occur between interlining carriers at facilities sized and staffed to handle the interchange. Relocations of existing switching will cause congestion, as well as possible staffing dislocations.

The proposal will also harm service by suppressing investment for shipper-specific facilities. Carriers, like shippers, make investment decisions based on obtaining certain rates of return. Due to uncertainty about returns on investment if a facility is built, only to be opened for a free-riding non-owner to cherry pick the most profitable traffic, incentive to invest in facilities to serve shippers will be reduced.¹⁵

pulling (i.e., picking up) outbound cars from each customer facility. A larger local yard may run numerous local trains serving many customers dispersed along separate branches; a smaller yard may run only a handful of local trains.” First-Mile / Last-Mile Service, EP 767 at 1.

¹⁴ See also KCSR Opening Comments and Evidence, March 1, 2013, at 14 – 17 and Exhibit A; KCSR Opening Comments, EP 711 (Sub 1), October 26, 2016, at 16 – 19 and Exhibit C at 6 - 8.

¹⁵ KCSR Opening Comments, EP 711 (Sub 1), October 26, 2016, at 19–21 and Exhibit C at 2–6.

III. IF THIS PROPOSAL IS NOT JUST ABOUT RATES, ECP PLUS VARIABLE COST IS THE CORRECT MEASURE FOR ANY BOARD-ESTABLISHED SWITCH RATE

Organizations representing hundreds of large shippers have told Board members that, “[i]ncluding lost contribution (i.e. “Efficient Component Pricing”) in the switch fee would nullify the benefits of reciprocal switching reform”.¹⁶ That statement – “nullify the benefits” - is only true if the only “benefit” of forced switching is rate compression.

ECP¹⁷ plus variable cost is the correct measure for the Board to use in setting rates for forced switching.¹⁸ If the real purpose of the Board’s proposal is to further the rail transportation policies in 49 U.S.C. § 10101, ECP helps ensure that. Holding the serving carrier’s return steady by using ECP would help ensure that the remedy is used only where it would result in more efficient routings, where the savings for the shipper come from efficiency (e.g., a significantly shorter route). ECP would ensure that the remedy would not harm the serving carrier’s financial ability to continue to provide adequate service to other shippers or its incentive or ability to invest in and operate terminal facilities.

Setting switch rates using ECP would also help avoid cherry-picking. Cherry-picking – obtaining forced switching only for the most profitable traffic while leaving the serving carrier to

¹⁶ EP 711 Ex Parte Meetings: Key Messages, attached to August 2021 summaries of Shipper Associations ex parte meetings with Chairman Oberman, Vice Chairman Primus, and Member Schultz.

¹⁷ See Eric Beshers, Hagler Bailly Services, Inc., Volpe National Transportation Systems Center, Efficient Access Pricing for Rail Bottlenecks (Volpe National Transp. Systems Center, June 1, 2000); and Nicholas Economides, Lawrence J. White, Access and Interconnect/On Pricing: How Efficient Is The “Efficient Component Pricing Rule”? (The Antitrust Bulletin, Fall 1995).

¹⁸ See KCSR EP 711 (Sub 1) comment, October 26, 2016 at 45 – 52. In another proceeding, KCSR discussed basing compensation for proposed terminal trackage rights on comparable, market-based rates, but noted that ECP is conceptually the correct methodology there, too. See June 25, 2018 KCS Reply in FD 32760 (Sub-No. 46), BNSF Railway Co.-Terminal Trackage Rights-The Kansas City Southern Railway Co. and Union Pacific Railroad Co., at 35-36.

handle less profitable traffic – harms the serving carrier, thereby tending toward market concentration. Using ECP principles to set forced switching rates would help ensure that the remedy is not invoked to route shipments over longer, less efficient routes just because they’re cheaper, and will ensure that if the remedy is invoked, it will not harm the soundness of the serving carrier’s financial ability to serve other shippers and to maintain its network. See 49 U.S.C. 10101(12) (“In regulating the railroad industry, it is the policy of the United States Government ... to prohibit predatory pricing and practices, to avoid undue concentrations of market power”.)

CONCLUSION

The Board should not adopt its proposed rules. The proposal is simply an attempt to regulate rates outside of the rate reasonableness process. Adopting the proposed rules will disrupt first-mile/last-mile service. If the Board adopts any of the rules proposed in this proceeding, the Board should incorporate ECP into its access price methodology.

Respectfully submitted,

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