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BEFORE THE SURFACE TRANSPORTATION BOARD

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

COMMENTS OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

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The Institute of Scrap Recycling Industries (“ISRI”) hereby submits its comments in response to the notice of public hearing issued by the Surface Transportation Board (“STB” or “Board”) on December 27, 2021.¹ ISRI commends the Board for taking additional steps to advance this long-standing proceeding and recommends prompt adoption of the Board’s proposed reciprocal switching rules. ISRI strongly supports the expansion of reciprocal switching arrangements in the United States to allow competition to respond to rising rail rates, unreliable service, and other challenges at facilities that are captive to a single class I railroad. Although ISRI urges the Board to promptly adopt its reciprocal switching rules, as the Board well knows, the existing commodity exemption for ferrous scrap shipments creates an additional regulatory hurdle for ISRI’s members who operate captive rail facilities and endure the very same rail challenges as non-exempt rail traffic. This exemption is outdated and unreasonable and should be revoked promptly by the Board to provide ferrous scrap shippers with direct and equal access to the Board’s remedies, including reciprocal switching.

¹ *Reciprocal Switching*, STB Docket No. EP 711 (served December 28, 2021) (“Notice”).

I. Statement of Interest

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. The U.S. scrap recycling industry generates in excess of one-hundred billion dollars in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

The U.S. scrap recycling industry is heavily dependent on a reliable and cost-effective transportation network of rail, trucks, barges, and ships to receive and deliver scrap materials. Rail transportation is a critical mode for shipments of ferrous and nonferrous scrap, especially at longer distances beyond 200 miles. Due to the unique nature of shipping bulk scrap metal, there are many situations where rail is the only feasible shipment mode for this material. Many of our members are captive customers who are served by only one Class I rail carrier, and the adoption of the proposed reciprocal switching rules will allow competition to play a more significant role

in the negotiation of rail rates and responding to service challenges for some of ISRI members' captive facilities.

II. A Significant Portion of ISRI Member Facilities Are Captive to Class I Railroads and Could Potentially Benefit from Increased Reciprocal Switching

As demonstrated through a prior Waybill analysis conducted by the Board for the period 1992 through 2013 in its Ex Parte 704 proceeding, railroads exercise substantial market power over iron and steel scrap movements. Specifically, the Board determined that the volume of potentially captive iron and steel scrap traffic increased substantially from 22.1% to 44%—revealing that in 2013 almost one-half of all rail shipments of this commodity was priced at captive rate levels, i.e. the traffic had RVC ratios above the agency's 180% jurisdictional threshold for determining railroad market dominance.² The Board also found that increased pricing power over iron and steel scrap shipments is evidenced by an increase in the average length of rail movements for this traffic from 306 miles in 1992 to 420 miles in 2013.³ This conclusion is consistent with the practice of ISRI members who generally use rail instead of truck when the movement exceeds a certain distance.

Another Waybill analysis submitted in the Board's EP 704 proceeding by the Rail Customer Coalition also showed that there has been an increase in the railroads' market power over scrap shipments. Specifically, the RCC submitted on July 25, 2016 an Analysis of 2014 Freight Rail Rates for U.S. Shippers, prepared by Escalation Consultants, Inc. ("EC"), which showed that 69% of all scrap commodities shipped under STCC 40 (Waste or Scrap Materials)

² Notice of Proposed Rulemaking, STB Docket No. 704 (Sub-No. 1) (Served March 23, 2016) at 8.

³ *Id.* at 7.

are priced at captive levels based on RVC ratios above 180%.⁴ Further, EC compared the change in the volume of carloads and the pricing for STCC 40 traffic in the years 2005 to 2014. This comparison established that, while the volume of total carloads decreased by 25.3%, the amount of traffic that was priced above the 180% RVC threshold increased by 51.4%.⁵

In addition to the Waybill analyses, ISRI has shared the service, car supply, demurrage, and other challenges its members with captive rail facilities face on a regular basis in EP 704 and other STB proceedings involving rail service and demurrage that were initiated since 2016. Collectively, the data and information submitted to the Board in these proceeding plainly illustrates the rail pricing and service issues faced by ISRI's members who could clearly benefit from rail competition.

To prepare these comments, ISRI conducted various interviews with its members with operations in every state who are reliant on rail service to move their products to understand if they would benefit from an expansion of reciprocal switching. Based on these interviews, ISRI understands that a significant portion of scrap yards in the nation are captive to a single Class I rail carrier, with no existing agreement on reciprocal switching, and that some of those facilities could likely benefit from reciprocal switching opportunities to address service challenges, car supply, and the negotiation of rail rates that continue to increase year-over-year.

For example, SA Recycling, which operates over 120 recycling facilities located through California, Texas, Arizona, Nevada, Georgia, Alabama, and Tennessee, Florida, Ohio, Mississippi, and Missouri. SA has 35 captive facilities served by a single Class-I railroad in both the eastern and western part of its operations. There are 10 captive facilities in the western states

⁴ Comments of the Rail Customer Coalition, STB Docket No. EP 704 (July 25, 2016), Analysis of 2014 Freight Rail Rates for U.S. Shippers ("EC Study") at 7.

⁵ *Id.* at 8.

of California, Nevada, and Arizona and 25 captive facilities in the eastern states of Georgia, Alabama, Florida, Tennessee, Ohio, Mississippi, and Missouri.

Additionally, while ISRI does not have an exact figure of the entire scope of its members' scrap yards that are captive to a single rail carrier, a number of ISRI members generally reported that it is very unusual for a scrap facility to have access to multiple rail carriers because many scrap facilities across the nation are typically smaller in size and can be family run businesses, and physical access of multiple railroads to a single scrap yard is uncommon. Further, many ISRI members reported that some of these captive facilities have potential access to a second railroad, either a Class I or a shortline railroad, at a nearby interchange, and thus could potentially benefit from expanded reciprocal switching.

III. Recent Developments in the Rail Industry Have Not Diminished the Need to Increase Rail Competition Through Reciprocal Switching

The lack of meaningful rail competition at many scrap yard facilities has significant adverse effects on both rail rates and service but also effects customer relations, facility investment, and dispute resolution between railroads and their captive customers. If adopted, the Board's measured case-by-case approach to reciprocal switching does not guarantee increased rail competition at captive ISRI member facilities but rather provides them the opportunity to pursue the benefits of competition where an alternative carrier who operates at a nearby interchange to the captive facility is currently foreclosed from competing for their rail traffic. Across the board, almost all ISRI members reported that they are having significant issues with rail rates and service at their captive facilities, without any meaningful alternative or remedy to alleviate their situation. Further, these disruptions have only increased since the Board issued its proposed rules in 2016.

Starting in 2017, the U.S. class I railroads began implementing Precision Scheduled Railroading (“PSR”) models. Although PSR was touted by the rail industry as a mechanism to improve rail service, the corresponding cost-cutting measures in labor and equipment has generally caused less efficient and reliable service. Following PSR implementation, ISRI’s members have experienced significant service disruptions, including congestion, missed switches, bunched railcars, insufficient railcar availability. These issues have been amply identified by various rail customers, including ISRI, in STB Docket Nos. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*,⁶ and EP 767, *First-Mile/Last-Mile Service*,⁷ and the shipper testimonies and upcoming hearing in this proceeding will further supplement the record evidence showing that the implementation of PSR has only made rail service worse since the Board proposed its reciprocal switching rules in 2016.

With the advent of COVID-19 in early 2020, railroads’ workforce reductions and furloughs contributed to significant service disruptions that hampered the railroads’ ability to respond adequately to increases in freight demand as the economy reopened from COVID related shutdowns. Class I railroads’ below-par service during the pandemic even prompted Chairman Oberman to send letters to each railroad asking for their plans on how to overcome the ongoing challenges.⁸

Being fully aware that captive facilities have no real leverage against the railroads and no meaningful remedy to switch to another rail carrier, Class I railroads did not expend adequate efforts to improve their service resulting in part from the implementation of PSR and COVID-19.

⁶ See e.g., Comments of ISRI, STB Docket No. EP 754 (May 8, 2019); see also Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. 757 (Served April 30, 2020) (identifying the railroad service disruptions associated with the implementation of the PSR, “such as bunched railcars and insufficient locomotive availability.”).

⁷ Comments of ISRI, STB Docket No. EP 767 (Dec. 17, 2021) at 3-5.

⁸ See e.g., Letter from Chairman Oberman to CSX Corporation (May 27, 2021).

Despite this, however, freight rates have continued to increase. In any other competitive industry, service providers who under-perform are not usually able to reward themselves with rate increases from their customers.

For example, an ISRI member with scrap facilities primarily captive to a single class I railroad reported that they have been in negotiations for a new rail contract with a class I rail carrier. Despite below-par service since 2016, which was exacerbated with COVID-19 disruptions, one Class I railroad has asked again asked for a rate increases for 2022. In a competitive market environment, a service provider that consistently fails to provide reliable service would be expected to keep the rates flat, or possibly even reduce its rates, to ensure that the customer does not move to a competing carrier. Because of the lack of any meaningful competition for this scrap metal shipper, the railroad apologized for the inconsistent service and then offered a 7% rate increase. This example underscores the need for increased competition in the rail industry to help address unreasonable and detrimental monopolistic behavior.

IV. Increased Rail Competition Will Produce Significant Benefits

Reciprocal switching will have significant benefits for rail customers with captive facilities, including ISRI members. The best indicia of this are the experiences of very few individual ISRI members who can achieve some improved leverage with their class I railroads when they have competitive access at some (albeit few) facilities. Interviews with these members, who tended to be larger companies who operate multiple facilities and ship significant volumes throughout the country, revealed that they have an increased ability to work with their

service providers to address their service problems, and to negotiate to *reduce the level of rate increases* in some cases.⁹

For example, one ISRI member that has a switching agreement with two Class I carriers reported that having competition at their facility made a significant difference in rail service and that it was a “game changer.” This company is physically captive to one class I railroad but has been able to improve its car supply and reliability in rail service because it can also access the Kansas City Southern Railway through reciprocal switching at a nearby interchange. Another ISRI member which operates a national scrap brokerage business reported that its steel mill customers that have competitive access at their facilities have the “most robust chances at business and opportunities” because they have more leverage against an incumbent railroad serving their facilities, thereby getting better service at competitive rates. Similarly, another ISRI member reported that one facility with access to an alternate carrier has “good commercial competition and the rates reflect that.”

Further, the ongoing supply-chain crisis as an outcome of the COVID-19 pandemic is a good example of the significant benefits reciprocal switching can produce. ISRI members reported that permitting facilities to obtain competitive access through reciprocal switching would provide a mechanism to avoid regional disruptions in service. In other words, if a shipper had the ability to move its traffic to a competing railroad, it would be able to bypass bottlenecks of an incumbent carrier. The ability to avoid regional congestion experienced by the incumbent railroad that can occur due to weather events, the pandemic, or other factors benefits both the shippers and the incumbent railroad by increasing the fluidity of the network.

⁹ Even ISRI members with some degree of rail competition typically incur year-over-year rate increases.

Additionally, reciprocal switching will naturally decrease rail customers' forced reliance on trucking as a result of "learned helplessness" as response to bad rail service and anticompetitive rates at captive facilities. As a result, it will reduce carbon pollution from the transportation sector by increasing rail usage, which is consistent with the current administration's climate change policy.¹⁰ Further, it will increase the competitiveness of the scrap metal industry, which supplies the inputs for 70% of all steel made in the U.S., ultimately benefiting national security considerations associated with domestic steel production.¹¹

V. Railroad Concerns About Inefficiencies Are Meritless

Railroads have argued throughout this proceeding that competitive switching will cause them to lose traffic and engage in unnecessary switches that will create inefficiencies in their network.¹² Contrary to the railroads' contentions, the few ISRI members with competitive access at their yards reported that they did not experience any operational or service disruptions because of the switching arrangements.

And this makes sense. Under the new reciprocal switching rules, shippers will not seek a switching remedy if the route will be less efficient, or it will impede service. In some cases, reciprocal switching will address scenarios where a captive shipper will merely request a change in the location of the interchange, not to add an interchange to a route. It is not in the interest of

¹⁰ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

¹¹ See e.g., <https://sgp.fas.org/crs/natsec/IF11897.pdf> (explaining the national security considerations of domestic steel production and stating that "minimills ... which primarily [use] recycled steel scrap melted in an electric arc furnace—accounted for 70% of all domestically produced raw steel.").

¹² See, e.g., Summary of Ex Parte Meeting between Norfolk S. Ry. and Board Member Schultz 1-2 (Dec. 21, 2021); Summary of Ex Parte Meeting between Union Pac. R.R. and Board Member Schultz 4, 8 (Nov. 18, 2021); Summary of Ex Parte Meeting between Ass'n of Am. R.Rs. and Board Member Schultz 2, 4 (Sept. 28, 2021).

a captive shipper to decrease the efficiency of a given route in cases where the incumbent carrier can typically provide more reliable service and faster transit. In ISRI members' experience, when there is no alternative, however, the service quality decreases, and railroads start engaging in anticompetitive pricing.

The whole premise for new reciprocal switching rules is to prevent these behaviors. Having the option to request switching to a competing carrier will certainly increase service levels and reduce unreasonably high rates of the incumbent carrier but will not necessarily result in inefficiencies, because shippers favor consistency and predictability, and it is not realistic that traffic would routinely switch year over year.

Further, to the extent that additional switches occur, it would not produce operational inefficiencies either. Reciprocal switching is a common operation that occurs every day, and railroads are experts at finding the most efficient way to conduct the required switches. They have systems in place that make the communication and transmissions of EDI/waybill info seamless. In fact, the Board's proposal itself addresses railroads' operational concerns, establishing that switching would not be ordered if it is not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers.¹³ Provided that the required showing is made as required by the proposed rules, Board-ordered switching would not cause any inefficiencies, but instead would allow significant benefits of competition to apply to the captive rail traffic that otherwise is subjected to monopolistic behaviors by the incumbent carrier.

VI. The Scrap Recycling Industry Needs Direct Access to Board Regulation

As noted above, many ISRI members who own and operate scrap yards across the U.S. are captive to a single Class-I railroad and experience unreliable service, increasing rail rates,

¹³ Notice at 4.

unbalanced contract negotiations, poor customer service, and other challenges. ISRI generally believes that its members experience these types of problems to the same extent as shippers of other non-exempt commodities. If adopted, expanded reciprocal switching will provide immense benefits that are derived from the effects of competition to many industries who depend on freight rail to meet their business needs and those of their customers. Nevertheless, iron and steel scrap commodities are currently exempt from the Board's regulation,¹⁴ and will not be able to benefit from the Board's new reciprocal switching rules without first litigating the revocation of the exemption at significant additional cost and uncertainty. This additional hurdle makes no sense given today's highly concentrated rail market and unfairly reduces ISRI's members' access to the Board's procedures to address rail challenges that cannot be resolved commercially. Accordingly, in addition to adopting its reciprocal switching rules, ISRI urges the Board to promptly revoke the outdated class exemption for ferrous scrap shipments that is pending in the Board's EP 704 proceeding. This will ensure that the scrap metal industry fully benefits from the Board's regulation, including any future rules that will benefit the shippers at large, including the proposed reciprocal switching rules.

Respectfully submitted,

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¹⁴ 49 C.F.R. § 1039.11(a).