

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

WRITTEN COMMENTS OF BNSF RAILWAY COMPANY**I. Introduction**

BNSF Railway Company (“BNSF”) respectfully submits these comments in response to the Surface Transportation Board’s (“STB” or “Board”) December 28, 2021 Notice of Hearing in the above-captioned proceeding. BNSF will also have witnesses at the March 15-16 hearing in this proceeding who will address the points raised herein. Additionally, BNSF joins the comments filed separately by the Association of American Railroads.

BNSF has long believed that the Board should provide an effective process to address situations when rail customers experience a market failure in the form of unreasonably high rates. However, the Board’s forced switching proposal is not an appropriate response to such a market failure. BNSF urges the Board not to adopt its forced switching proposal because, if implemented, the broad scope of those regulations will likely cause operational problems that negatively impact all shippers on BNSF’s network in the effort to grant meaningful relief to a particular shipper. The Board’s proposal represents a misguided shift away from remedially regulating the output of a targeted market after demonstration of a market failure, to imposing new, artificial dynamics and entrants upon transportation and commodity markets that will likely produce operational challenges impacting all shippers. Instead, consistent with the Board’s Congressional mandate as

manifested in the Rail Transportation Policy, BNSF believes that the Board should continue to focus its efforts on addressing those specific circumstances where markets do not function by addressing the ultimate rates paid by solely served shippers.

To the extent the Board is motivated by a desire to provide shippers more efficient avenues to rate relief, the Board should focus its efforts on further improving the rate reasonableness process, including the reform proposals currently before it. BNSF has been a long-time supporter of the Board's efforts to improve its rate review processes, including recently expressing its enthusiastic support for the Board's arbitration approach. We believe the highest of the high rates should be open to regulatory scrutiny. But the solution for that problem must be focused on the rates themselves, not forcing painful operating changes on complex rail operating systems and intervening in fully functioning markets in the hope that the ultimate result will be some rate reductions for some shippers. Even if rate reductions could be artificially induced in some cases, their benefit would likely be greatly outweighed by the operational and administrative pain it took to achieve them. For these reasons, BNSF believes the Board's current proposal will ultimately hurt more shippers than it would help.

II. The Proposed Regulations Cause Issues Well Beyond Any Purported Market Failure

BNSF believes that smart and effective regulation focuses on areas where market forces are not present or have been shown to be ineffective, and BNSF has serious concerns about the specific switching proposal at issue in this proceeding. By failing to recognize the full spectrum of real-world competitive factors that constrain rates for shippers, the Board's proposal permits shippers to obtain Board intervention even when markets are functioning properly. As one example, under the "Practicable and in the Public Interest" prong of its proposal, the Board's vague

standard and contemplated criteria would permit imposition of a switching remedy for a shipper that already has access to multiple rail carriers (and possibly other transportation options) and pre-existing negotiated below market rates without that shipper having any burden to show, via a market dominance analysis or otherwise, that competitive forces are failing to appropriately influence the rate and service option the shipper has historically chosen.

The Board's current proposal would even drastically broaden the regulations originally proposed by the National Industrial Transportation League ("NITL") and endorsed by other shippers,¹ which were at least nominally tailored to address scenarios where there was an absence of effective competition. The Board recognized that an expansion of forced switching could have substantial adverse effects on the health of the railroad network and sought data on the potential scope of the regulations proposed by NITL. But then the Board disregarded the data that was submitted and expanded the scope of potential forced switching beyond even the more highly rated traffic that was targeted by the NITL proposal.² As a result, the Board's current proposal promises to solicit claims from shippers with no real market-based problem and positions the Board to intervene in fully functioning markets with little understanding of the operational and market consequences.

Worse, should the Board undertake to fully understand those potential consequences, it would necessitate a complex and time-consuming analysis and back and forth between the parties in each and every case, resulting in perpetuation of adjudication processes that shipper groups and

¹ See Pet. for Rulemaking, July 7, 2011, *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711.

² NITL used high rates, expressed using the ratio of revenue to variable costs, as a "conclusive presumption" that would indicate an absence of effective competition. See Pet. for Rulemaking at 48–49. While BNSF disagrees with the proposition that a rate that provides a high ratio of revenue to variable costs indicates a failure of competition, it warrants mentioning that even the shipper interests advocating for this proposal recognize that the remedy should be responsive to an absence of competition.

Board members themselves have criticized as overly burdensome, complex and expensive. And yet such a thorough analysis would be required in each instance to reach a decision that even purported to protect against unintended harms. The Board need look no further than recent U.S. freight supply chain challenges and the complexities involved in trying to determine cause, effect and potential solutions to appreciate the cautionary tale it represents against pursuing the awkward remedies and complicated analysis proposed here.

III. Imposing Complex Operating Requirements Will Not Fix Perceived Problems with the Board's Rate Case Processes

Shipper association advocacy in this proceeding and others has made it clear that the primary goal of the competitive switching proposal is to achieve lower rates for solely served shippers.³ Shipper associations have long complained that the Board's rate reasonableness processes are too complex, time consuming and costly to be reasonable avenues to relief for most solely served shippers, especially smaller shippers, and they cite the relative lack of successful shipper rate challenges in recent years as evidence that the Board's rate cases processes are broken. Shipper associations argue that this justifies repurposing the Board's reciprocal switching authority as a substitute form of rate relief in the guise of introducing market forces. BNSF believes that instead of following that indirect path, the Board should continue to progress its rate reform process efforts.

³ See, e.g., Association of American Railroads' Reply Comments 5-7, Jan. 13, 2017, *Reciprocal Switching*, EP 711 (Sub-No. 1) (citing various shippers' and shipper associations' comments). Shipper *ex parte* meetings confirm that the shippers see forced switching as an alternative to rate regulation standards and procedures. See, e.g., Summary of Aug. 10, 2021 Ex Parte Meeting between Shipper Ass'ns & Bd. Member Schultz 2, *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB filed Aug. 13, 2021).

Indeed, since the Board proposed its forced switching regulations in July 2016, it has undertaken substantial and sustained efforts to reform its rate regulation standards and procedures.

Among other things, the Board has done the following:

- In 2017, the Board issued new rules pertaining to rate case procedures to help improve the rate review process. *Expediting Rate Cases*, EP 733 (STB served Nov. 30, 2017).
- In 2018, the Board established the Rate Reform Task Force to develop recommendations to reform and streamline the Board's rate methodology for large cases, and to determine how to best provide a rate review process for smaller rate cases. Stakeholder meetings were held throughout 2018, and on April 25, 2019 the Task Force issued a report recommending possible changes to the rate review methodologies and processes.
- In 2020, the Board adopted a final rule to establish a streamlined approach for pleading market dominance in rate reasonableness proceedings. *Market Dominance Streamlined Approach*, EP 756 (STB served Aug. 3, 2020).
- In 2020, the Board also implemented a recommendation of the Rate Reform Task Force to change the sampling rates for its Waybill Sample. *Waybill Sample Reporting*, EP 385 (Sub-No. 8) (Sept. 3, 2020).
- Most recently, the Board issued a supplemental notice of proposed rulemaking on its proposed Final Offer Rate Review procedures (a proposal that BNSF strongly opposes). *Final Offer Rate Review*, EP 755 (STB served Nov. 15, 2021); *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2) (STB served Nov. 15, 2021). At the same time, the Board proposed to modify its regulations to establish a voluntary arbitration program for small rate disputes (an approach that BNSF strongly supports). *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, EP 765 (STB served Nov. 15, 2021).⁴

⁴ As set forth in BNSF's comments in Ex Parte 755 and Ex Parte 765, BNSF strongly supports the Board's arbitration approach and urges the Board to continue pursuit of that program in place of continuing pursuit of the significantly problematic FORR proposal. See BNSF Comments, Jan. 14, 2022, *Final Offer Rate Rev.*, EP 755; BNSF Comments, Jan. 14, 2022, *Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, EP 765.

These recent efforts – undertaken after the development of the existing record in this proceeding – demonstrate that the Board can and should address rate regulation through measures addressed directly to the question of rate regulation, and not through tangential regulation of operations and service.

The premise of shipper arguments for an alternative to existing rate regulation is that the relative scarcity of rate cases is evidence of a problem with the existing standards and procedures. But this premise is misplaced. Nearly all rate disputes are settled through commercial negotiations. And even when negotiations are unsuccessful, shippers may choose not to challenge a rate for myriad legitimate reasons unrelated to Board processes.⁵ Three Benchmark cases are straightforward, and their outcomes are relatively predictable, yet only one has been filed since 2010. And while coal volumes by rail have dropped dramatically, largely due to product competition from low natural gas prices, coal shippers have nonetheless filed five rate cases in that time under the SAC constraint, which is the most complex process a shipper could choose. As such, the Board should reject the assertion that the number of successful or unsuccessful rate challenges can be considered an empirical indicator of the effectiveness of the Board's rate review processes.

Instead, it is BNSF's experience that competition is more pervasive, effective, and ongoing than the Board recognizes. In large part, this is due to competitive forces that the Board does not formally evaluate in rate challenges. Product competition and geographic competition are pervasive in rail markets, and these competitive forces are highly effective in keeping rates to reasonable levels and in preventing the abuse of market power by rail carriers. That is not to say

⁵ As described in BNSF's comments in Ex Parte 765, predictable outcomes driven by a mature dispute resolution process that considers real-world market factors, as embodied by BNSF's Montana ADR Program, fosters more direct engagement between party principals and encourages pre-litigation settlement on commercially reasonable terms.

that improvements cannot be made to existing standards and procedures. But that is where the Board should focus, and recently has focused, its attention; not on a remedy involving operations and service that is highly likely to cause more problems than it solves.

IV. Shippers' Intended Use of Forced Switching Has Become Disconnected from its Original Intent

At the outset of this proceeding, shipper interests were supportive of a “reasonable, workable and predictable” terminal switching remedy that they believed would provide them the opportunity to drive down rail rates.⁶ That initial position was at least facially consistent with the Board’s statutory authority under 49 U.S.C. § 11102 to require “reciprocal switching” in “terminal facilities.” But recent shipper advocacy seeks a significant departure from what was originally contemplated, and would seemingly grant shippers the ability to select interchange points without consideration for the operational difficulties that would inevitably result.⁷ In essence, shippers appear to now intend to substitute widespread open routing for the core STB function of determining the reasonableness of rates.

Resurrecting the failed open routing scheme that was rejected by Congress decades ago is unsupported by the Board’s statute and contrary to case law and sound regulatory policy. *See Canexus Chem. Canada L.P. v. BNSF Rwy. Co.* (STB NOR 42131) (Feb. 7, 2012) (“Through the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress ended the ‘open-routing’

⁶ Statement of the American Chemistry Council, at 2, July 27, 2011, EP 711; *see also*, Comments of National Grain and Feed Association, July 27, 2011, EP 711.

⁷ *See, e.g.*, Summary of Aug. 4, 2021 Ex Parte Meeting between Shipper Ass’ns & Chairman Oberman, *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB filed Aug. 12, 2021); Summary of Aug. 4, 2021 Ex Parte Meeting between Shipper Ass’ns & Vice Chairman Primus, *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB filed Aug. 12, 2021); Summary of Aug. 10, 2021 Ex Parte Meeting between Shipper Ass’ns & Bd. Member Schultz, *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB filed Aug. 13, 2021).

system. Rail carriers no longer have to establish and maintain interchanges and through routes on practically all combinations of railroad tracks between two points.”). Congress in the Staggers Act, and the ICC shortly after adoption of Staggers, soundly repudiated open routing schemes as inherently inefficient and contrary to market-based principles. *See, e.g., Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *aff’d in relevant part sub nom. Detroit T. & I. R.R. Co. v. United States*, 725 F.2d 47 (6th Cir. 1984).

The Board should not entertain an open routing regime for a number of reasons, including the potential for significant operation disruption across networks, both within and outside of terminal areas. Whatever economic benefits that could be obtained by an individual shipper seeking a reduction in rates (even where there is no evidence of any potential abuse of market power) would be vastly outweighed by the larger regional or system-wide significant service detriments, which would impact all shippers including those who see no benefits from a proposed open-routing regime.

V. The Board’s Proposal Would Have Significant Negative Impacts on Service to All of BNSF’s Customers

While it is entirely unclear that the Board’s proposal would only address real competitive harm being suffered by a petitioning shipper, there can be little doubt that imposing a new forced switching remedy at that shipper’s location will substantially increase the complexity and uncertainty of operations planning and ultimately degrade service. Even without the specter of a forced switching regime, the ability to anticipate future traffic volumes and flows is complicated by the dynamic nature of railroad markets and the impact on rail freight of changes in overall economic activity.

This has never been clearer than in the last year as difficulties in the national supply chain significantly stressed the national rail network and BNSF's ability to consistently provide the high levels of service that our customers require. BNSF has invested significant resources to design efficient interchanges and routings that create the most predictable and reliable service for our customers possible. Forcing random and unnatural interchanges for the purpose of manufacturing lower rates for shippers, not for the purpose of creating additional operational efficiencies, has the potential to reverse much of those gains. Perversely, this would make it more difficult for railroads to pass through rate savings driven by those efficiencies.

We urge the Board to consider how a forced switching remedy at one location will negatively impact service to other BNSF customers in that area by impairing BNSF's ability to match resources with anticipated needs. It will also negatively impact service to customers on other parts of the network whose freight must now pass through a location where Board intervention has unnaturally increased congestion. The potential for such service disruptions should be particularly important to the Board given its necessary focus on rail service.⁸ It seems contrary to the Board's current focus on service to consider adopting broad new regulations that have the potential to introduce operating uncertainties and inefficiencies into the rail network for the benefit of a limited number of individual customers.

The proposal's negative impact on rail service could also have consequences that it does not appear the Board has adequately considered, including making rail less competitive with faster

⁸ The Board is seeking comments on issues regarding first-mile / last-mile service in EP 767 (STB served Sept. 2, 2021). The Board held hearings on demurrage and accessorial charges, and followed up with a policy statement on demurrage and new rules on demurrage billing requirements. *See Oversight Hearing on Demurrage and Accessorial Charges*, EP 754 (STB served Apr. 8, 2019); *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757 (STB served Apr. 30, 2020); *Demurrage Billing Requirements*, EP 759 (STB served Apr. 30, 2020) and (STB served Apr. 6, 2021). Chairman Oberman has corresponded frequently with Class I railroads about service issues, encouraging the improvement of rail service. *See, e.g.*, STB Rail Service Letter to Class I Railroads (May 27, 2021).

and more environmentally impactful trucking options. Moreover, many of the innovative service products that BNSF has developed with our customers over the years have been made possible as BNSF improved its control over rail operations and partnered with customers to invest in facilities that support how BNSF's service to that customer has been designed. Untailored switching would introduce uncertainties in our operations planning that would make it more difficult for us to continue developing new, innovative service products and less attractive for our shippers to invest in BNSF-served facilities.

As one example, BNSF has a robust unit train network, and our agricultural customers have invested heavily to institutionalize our unit train service as part of their supply chains. A forced switching regime would jeopardize those customer investments by both negatively impacting their own service and disrupting the larger market by advantaging their competitors who are granted an access remedy without any indication that the market has failed. The resources needed to implement a forced switching regime would divert efforts that are better focused on developing new service products that will improve the competitiveness of our customers and will expand our rail business.

Asking shippers that are not involved in an access proceeding to suffer from broader negative service impacts is particularly indefensible because BNSF's history at the Board litigating interchange and competitive access issues suggests that a forced switching remedy may not even work as well as the Board envisions for the petitioning shipper itself. The Board would not be trading complicated rate relief for simple switching relief—our experience shows that it is extraordinarily complicated to implement effective switch access against the wishes of an

incumbent rail carrier.⁹ Also, a process that puts shippers in a position to have to argue with the carriers as to how to best run a railroad is likely not going to be satisfying to many shippers.

VI. Conclusion

For the reasons discussed above, BNSF does not believe that the Board's proposed rules are appropriate. Forced switching should only even be considered as a remedy in instances where a market failure or competitive abuse has been shown to exist, and the Board's current proposal would not respect the Board's Congressional mandate to intervene only after such a showing has been made. To the extent that the Board views its competitive switching proposal as a means to effect a new form of rate relief, BNSF cautions the Board to fully consider the unintended operational impacts that would result and look to BNSF's experience that unnatural and complex operational plans may not provide shippers an effective tool to fix legitimate market-based concerns. BNSF instead urges the Board to continue its efforts to improve its rate reasonableness processes.

Respectfully Submitted,



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⁹ Two recent examples are illustrative of how extraordinarily difficult it can be for the Board to implement a competitive access remedy involving complicated operating considerations against the wishes of an incumbent railroad or railroads: *BNSF Ry. Co.—Terminal Trackage Rights—Kansas City S. Ry. Co. & Union Pac. R.R. Co.*, FD 32760 (Sub-No. 46) and *BNSF Ry. Co. & Musket Corp. v. Union Pac. R.R. Co.*, FD 35740.