

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING

POST HEARING COMMENTS

Submitted by

DIVERSIFIED CPC INTERNATIONAL, INC.

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On Behalf of:
Diversified CPC International, Inc.

Diversified CPC International, Inc. (Diversified CPC) hereby submits these supplemental comments in response to the Surface Transportation Board (STB or Board) decision served on March 23, 2022. In compliance with that decision, these comments are limited to issues discussed at the hearing on March 15 – 16.

There has been exhaustive debate over the last eleven years, to determine if there is adequate justification to modify the switching rules. During that time span, the effects of the loss of competition from past rail mergers has been exacerbated due to railroads exerting their market power, sometimes to the point the term evolves into market abuse.

Testimony presented in this hearing confirms the need to modify the reciprocal switching rules. While the new rules will not solve all of the problems, there is a critical need for positive change to protect the future health of the industry. These new rules will be an important milestone to the achievement of that objective.

I. PROOF OF MARKET DOMINANCE AND A CONDUCT FAULT-BASED STANDARD FOR RECIPROCAL SWITCHING ARE NOT PRACTICAL NOR ARE THEY NECESSARY.

A standard that would require proof of market dominance in a reciprocal switching application is not practicable nor manageable. Market dominance tests on lanes from the same plant are not a practical.¹ Also, a conduct-based standard would detract from the overall objective of reciprocal switching, i.e., to establish a new competitive environment. Both of these standards would require lengthy and costly litigation. In the meantime, service could improve, or the shipper will sustain serious damage from repetitive plant shutdowns and loss of sales, to the point the shipper may be

¹ Diversified CPC International, Inc. Comments, EP 711 (Sub-No. 1), February 14, 2022, p.4.

forced to make a decision to close or relocate his plant. We question if there are any benefits to adding a conduct standard or a market dominance test to the new rules when the objective is to reverse the loss of competition which is pervasive throughout the railroad industry. The loss of competition has already been established, so just what are we trying to prove?

II. THE RAILROADS' ASSERTION THAT RECIPROCAL SWITCHING DIMINISHES CUSTOMER COMMITMENT THEREBY THREATENING RAIL INVESTMENT, CONFLICTS WITH THEIR EXISTING POLICIES AND PRACTICES.

At the hearing the Chief Financial Officer for CSX presented a scenario that required ten years to recoup its investment, when they only had a three-year contract commitment from the shipper. Like the railroad, when shippers locate new manufacturing plants, or make capital investments to add or expand rail infrastructure, they look to the railroad for a long-term commitment to rates and quality service, to justify their investment. However, in recent years, the barrier has been newly adopted policies, limiting multi-year contracts. In the past, it was not unusual for shippers and railroads to negotiate five-year or even ten-year agreements. Without a doubt, there are exceptions, but today the railroads frequently resist multi-year contracts, and when they are established, they are subject to senior management approval. We have succeeded at negotiating multi-year contracts, but the longest term has been three years. This seems to contradict the CSX theory that they require long-term commitments from their customers to justify investments in rail infrastructure.

Canadian Pacific's statement that it will take years for the railroads to learn how to cooperate is preposterous! Railroads work with their connecting carriers today, and Reciprocal Switching is not a new concept.

The US Department of Transportation has forecasted dramatic growth in freight volumes by the year 2035, and the agency predicts the preponderance will move on rail. Railroads announce aggressive capital investment programs annually, and they will continue to invest in their networks to simply keep up with the capacity requirements and revenue potential from the increased volumes.

III. SWITCH FEES SHOULD BE AGREED TO ON A CASE-BY-CASE BASIS.

The Board queried how it should set the level of the switch fee when stakeholders cannot agree. As submitted in my previous comments, considering the numerous potential variables, reciprocal switch fees should be considered and agreed to on a case-by-case basis.

Of course, The Board could opt to develop complex switch fee methodology that would require interpretation of the individual railroad's costs (not to discount other potential factors). However, shippers do not have access to the railroads' costs, other than system average costs. Not having information to challenge the costs, they would be required to hire experts to guide them through the negotiations. Experience has already taught us that costly and lengthy proceedings can become barriers to most shippers.

A simpler and reasonable option would be to benchmark the railroad's reciprocal switch fees that already exist in the terminal and/or region. Since the only reason the Board would be required to intervene is failure on the part of the stakeholders to agree, this would be a common-sense approach to settling the matter fairly and expeditiously. Also, simply knowing that this is the Board's option could facilitate a stakeholder agreement, precluding the need for the Board to intervene.

Whatever the decision, it should be included in the new rules, eliminating further delay in this proceeding caused by the need to decide on a switch fee methodology.

IV. THE NEED FOR MODIFIED RECIPROCAL SWITCHING RULES IS NOW.

Shippers, nationwide, are struggling on a daily basis with supply chain issues, and rail service has declined to the lowest level, reportedly due to a shortage of labor. Basically, the railroads message "*we're working on it!*" However, the current crisis has been happening for more than eight months with no improvement in service. In fact, in a recent conversation with a railroad representative, I asked about their labor count at the end of the previous month. At least he was honest when he told me it had declined further. It is not getting better.

Since Staggers, the rail network has undergone significant change due to a long list of rail mergers and abandonment of rail lines. This tremendous consolidation has constrained competition while railroad profitability has increased. The current supply chain disruption should not have been a surprise – it has been developing for more than a decade, but it seems the railroads took status quo for granted. So, here we are with Status Quo sliding back at an alarming rate!

There are some indications that the railroads are acknowledging the need for change. Canadian Pacific in their testimony advised they support market based competition; BNSF advised they agree with Prong 1 standards; and UP's Rosenthal opined that the current rules have some semblance of anti-competitive conduct.

I personally have a lot of respect for railroad managers and know how they can respond positively to competition. Reciprocal Switching can be the catalyst to positive change. Unfortunately, Union Pacific's proposed olive branch to form a stakeholders group to address issues raised in this proceeding is too little, too late.

While we prefer to work collaboratively with the railroads to achieve mutual success, it's been eleven years, and we do not have a finished product at a time when we are dealing with a national capacity crisis.

We appreciate the Board's interest and the opportunity to present our views in this extremely important and lengthy proceeding. The financial health of the railroads desired by Congress when the Staggers Rail Act was enacted has surpassed expectations. However, during that same time, there has been a steady decline in competition in the railroad industry, which brings us to, today.

Reciprocal Switching is an important first step towards achieving more balanced transportation policies. We encourage the Board to push forward and to issue a decision in an expeditious manner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra J. Dearden", with a long horizontal flourish extending to the right.

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