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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

OPENING COMMENTS

submitted by

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On Behalf of:
Diversified CPC International, Inc.

November 7, 2023

I. INTRODUCTION

Diversified CPC International, Inc. (Diversified CPC) hereby submits these Opening Comments in response to the Notice of Proposed Rulemaking (NPRM) served in this docket by the Surface Transportation Board (STB or Board) on September 7, 2023. The NPRM closed Docket No. EP 711 (Sub. No. 1) and opened this new sub-docket to provide reciprocal switching solely to address inadequate rail service under the public interest standard of §11102(c).

Diversified CPC is a leading manufacturer and distributor of liquefied gas aerosol propellants and specialty gas liquids in North America. Headquartered in Channahon, Illinois (Rail Station, Lorenzo, IL on BNSF), Diversified CPC has a total of six manufacturing and distribution facilities. Additional plants are located at Sparta, NJ (NYSW); Sebring, FL (CSX); Anaheim CA (UP); a distribution terminal at Ajax, ON (CN and CP); and a \$37.5 million manufacturing plant for a new product that is currently under construction in Beaumont, TX (rail station, Amelia) jointly served by BNSF and UP. The Beaumont terminal is currently operating as a transload until construction of the new plant is complete.

Rail is a critical part of our client's operation and the ability for Diversified CPC to be competitive. Diversified CPC relies on Class I railroads for efficient movement of inbound shipments of raw materials and return of empty tank cars, and timely delivery of products to Diversified CPC's customers.

Highroad has managed rail transportation for Diversified CPC for more than 25 years. Highroad personnel manage all movements of Diversified CPC's loaded and empty private cars on a daily basis. We track service performance and prepare reports, including carrier scorecards, and we have been successful, finding solutions to mitigate demurrage, so our comments herein are based on first-hand experience. The Diversified CPC/Highroad partnership has been very successful, and we have complete authority to make decisions and to speak on Diversified CPC's behalf.

II. AVAILABILITY OF SERVICE – RELATED RECIPROCAL SWITCHING

A. Definition of an Open or Closed Industry – A Practical Matter.

If I am interpreting the Board's proposal correctly, there will not be a clear definition of whether or not an industry is open or closed to reciprocal switching. Instead, service performance will be measured on a lane-by-lane basis, and some traffic such as commodities exempt from regulation or shipments that move on contract rates, would not have access to Reciprocal Switching. Therefore, a shipper that could decide to apply for Reciprocal Switching due to service failures, could be left with a split industry, i.e., some traffic open to an alternate carrier, while the remaining traffic will continue to be captive to the incumbent. This scenario presents numerous problems for the shipper *and* rail carriers, and it could serve as a barrier to securing alternative service.

At the very least, a split industry would be difficult for the shipper to administer. It will require Transportation personnel to know which routes can move on the alternate carrier. Furthermore, it will put the same onus on the rail carriers. Alternate carrier personnel will need a scorecard to know where they can and cannot compete; the incumbent carrier will need to be cognizant of what is open to the alternate carrier. If I were an incumbent, I would monitor the inbound and outbound shipments daily to confirm there are no violations. Still, even though everyone will have the information needed to make good decisions, for various reasons, whenever people are involved in a process, mistakes happen, and shipments will no doubt move erroneously on the alternate carrier.

Also, if Reciprocal Switching is ordered based on current individual lanes, what happens when new lanes are established, and the incumbent carrier does not comply with the service standards? Will the shipper be required to incur the time and expense to re-file for each and

every route? If so, and if ordered, then you would be establishing Reciprocal Switching with different terms. This may not seem so overwhelming for an industry with a limited number of lanes, but administrating these scenarios, all with different term dates, would be an onerous task for a manager with a dynamic traffic base involving hundreds of lanes.

Some people have expressed concern that it could be difficult to attract alternate carriers. Aside from the political concerns, would a potential alternate carrier be willing to commit to investing in equipment and personnel if it were only allowed to compete on part of the business? Most likely not.

If an industry is experiencing service issues with the incumbent carrier, it creates a ripple effect that can impact on all of the shipments to and from that terminal. Cars already in the pipeline may arrive on time, but they become backed up or bunched, resulting in demurrage while the cars wait in line until the raw materials are accessible for production.

Diversified CPC has a sophisticated system to plan and manage inventory. Some plants have storage while others are more reliant on railroad service. However, one cannot assume that storage is a cushion for delayed materials because of the different products, grades and blends. Diversified CPC's rail cars and storage tanks are dedicated to specific products and grades; those cars and tanks would have to be purged to hold another product. Therefore, storage is actually limited to a portion of the products used in production.

If a decision is made to offer Reciprocal Switching as a solution to inadequate rail service, industries should not be split. Instead, it should be straight forward; either the industry is open or it is closed to reciprocal switching.

Having an open industry will not preclude an incumbent railroad from competing for business with improved service. Obviously, the alternate will compete, and this simple approach will also be in place as shippers grow their business and establish new lanes.

B. Shipments Moving Under Contracts and Shipments Exempt from Regulation Should Be Included.

First of all, it is important to note that we still have not succeeded when requesting for a definition of *what is a rail contract?*

The term, "Contract" is applied indiscriminately by Class I railroads. Of course, some formal contracts are established. Frequently, however, a railroad simply publishes a rate in a non-distribution tariff with the word "Contract" on the title page. These are non-signatory documents that often include rates the shippers may not have agreed to. Instead, they are published on a take-it-or-leave-it basis. By doing so, the railroad unfairly exempts the shipments from regulation.

Again, we believe it would be problematic to split industries, so the decision should simply be predicated on whether or not to open the industry to Reciprocal Switching. As stated previously, this will not preclude the incumbent railroad from competing for business. If the incumbent railroad has already secured business in a contract, then the related shipments will continue to move via the routes in the contract. If the industry is open to Reciprocal Switching with no distinction of Contract or Common Carriage, when the contract term expires, both carriers, the incumbent carrier and the alternate carrier, can choose to compete for the business.

Also, considering the fact that the Board has full jurisdiction to deal with exempted transportation, there is no logical reason to exclude exempt shipments in the new Reciprocal Switching Rules.¹

III. PROPOSED SERVICE STANDARDS; SERVICE CONSISTENCY

A. Service Standards Based on Original Estimated Time of Arrival (OETA's) As An Indicator

The railroads change OETA's on 80% - 90% of shipments, once cars are in transit, so the

¹ "...it is well established that the Board can revoke the exemption at any time, in whole or in part, under §10502(d)." STB EP 711 (Sub-No. 2), Decided September 7, 2023, pp 27.

Plant Managers normally wait for the revised eta's when planning. They rarely comply with the original ETA schedule, so basing service performance on OETA's could set the railroads up for failure. On the other hand, increased transit times increase Diversified CPC's car costs and sizing of the rail car fleet. Of course, the railroads could react by increasing the OETA's, but a review of historical shipments defines the service problems, but they also seem to indicate that the current OETA's are achievable.

To gain an understanding of what to expect in terms of service standards, we compared actual arrival times against OETA's during the third quarter, 2023.

**Percent of Arrival Times
Complying with OETA's**

Location	Inbound	Outbound
Plant A	7.10%	33.70%
Plant B	46.10%	15.00%
Plant C	47.00%	47.30%
Plant D	44.00%	47.30%
Plant E	62.50%	40.00%
Distribution	55.50%	33.30%
Customer 1	32.00%	
Customer 2	0.00%	

There are four ways to interpret the data: (1) only one location is meeting the minimum standard of 60% on its inbound shipments; (2) it is possible that basing standards on OETA's is a valid approach; (3) considering the impact that late deliveries are having on Diversified CPC's operations and costs, the proposed standards are set too low; (4) the standards proposed by the Board are too low and could enable some railroads to maintain the status quo, and they could serve as a disincentive for carriers to achieve higher levels of performance.

**B. The Proposed Performance Standards Based on OETA's Are Set Too Low;
The Impact of Late Deliveries on Diversified CPC Operations**

The problems resulting from late deliveries are not isolated to delivery of a single car or group of cars. A typical scenario is a vendor who releases one car a day to Diversified CPC over a five-day period. However, the cars become bunched at an intermediate terminal, which results in only two initial problems: (1) scheduling of the shipments were based on Diversified CPC's production plans, and the plant was running out of product; (2) the cars arrived all at once resulting in bunching. We did succeed at getting bunching relief to mitigate demurrage on these cars.

This scenario is a reoccurring problem that has a ripple effect on all shipments that are currently in Diversified CPC's rail network for ten days or more:

- The production schedule is disrupted so the product in those initial five cars have to be worked off or put into inventory.
- Other carloads of raw materials already in the pipeline start arriving at the same time, resulting in bunching and demurrage.
- The schedule for other purchased raw materials may need to be adjusted.

Managing space to accommodate inbound loaded shipments, and empty private tank cars (which are the next loads for the railroad) is not a simple task. Several years ago, Diversified CPC spent more than \$2 million to expand its rail yard, with the primary objective to mitigate demurrage, that was increasing at Lorenzo. Also, Diversified CPC has since converted its plant at Lorenzo to a 24-hour operation. My point is, Diversified CPC has made significant changes to help itself. Ironically, during this same time period, rail service has waned.

It is difficult to determine what the standard should be for on-time deliveries based on OETA's. Diversified CPC's commitment to their customers is 97% on time deliveries. The need for emergency trucking has increased in recent years; even that is not an ideal solution. First of all, emergency trucking is usually acquired at a premium. Also, Diversified CPC's products require dedicated trucks. The driver shortage is a continuing problem, and those emergency shipments use up truck capacity needed to serve other customers that do not have rail access.

The Board has acknowledged that rail service is currently inadequate, and our data underscores the Board's opinion. The standard of 60% proposed by the Board is too low. Think about the impact it would have on an organization if only 60% of its employees showed up for work, or for a manufacturer with a production line that is only functioning at 60%. How long could they survive at those rates? Inadequate rail service is having a serious impact on our nation's economy, so we should seize the opportunity here not to dance around the issues, but to get serious and respond to the Board's questions with recommendations on what is really needed.

Based on the data presented herein, while keeping in mind the commitment that Diversified CPC makes to its customers, the minimum standard for Year One should be 80%, with a revised standard of 90% for Year Two and beyond. Even 80% is problematic, but it is an improvement over present, and a good first step to where it should be, e.g., minimum 90%.

C. Industry Spot – Pull. The Board Should Establish a Standard to Measure Service Adequacy and Minimum Level of Switching Service for Prescribed Switches

The Board has asked if there should be a service standard for prescribed switches and, if so, whether or not a specific penalty structure should be imposed. Absolutely, but beyond prescribed Reciprocal Switching, standards for switching service should be included in the Board's evaluation when deciding whether or not to order Reciprocal Switching.

Poor switching performance, typically no-shows, has been a major issue that Diversified CPC has faced. While service has recently improved, at some locations, it still is not close to an acceptable level.

As an example, the switching schedule for Diversified CPC's plant at Lorenzo is five days/week, Monday through Friday. Within the last year, over a time period of about six months, BNSF failed to show one day/week due a labor shortage, so based solely on no shows, the railroad performed at 80%. However, Diversified CPC receives different products, so cars are ordered in by car number, based on the product needed and products are unloaded through

piping. We track switching performance and other incidents that are be factored in to deem a switch a *Successful or Failed Switch*, include whether or not cars ordered in were delivered, if cars were placed correctly on at the loading/unloading rack, or on the right track for staging, and failure to pull empties. So far, we have not established a minimum window for on-time switching because it's typically a matter of show or no show, when they do show it's usually about the same time.

It's important to note that switching service at Lorenzo has improved, which is reflected in the data below. These statistics are for switches performed during the third quarter 2023:

Good v Failed Switches by Location

Location	Failed	Switch Success
1	20.60%	79.40%
2 (Open Gate)	7.70%	92.30%
3	26.30%	73.70%
4	0.00%	100.00%
5	0.00%	100.00%

We recommend a single standard similar to the standard that Highroad uses to measure switching performance at Diversified CPC's plants (Appendix A), i.e., either they performed a successful switch, or they did not.

When the railroad at Lorenzo was performing below 80%, it had a major impact on Diversified CPC operations. A significant number of Diversified CPC's outbound shipments feed materials to other Diversified CPC plants. Again, there was a ripple effect and since this was a weekly occurrence, that ripple caused a major disruption in operations at Lorenzo and the other plants for weeks and months. It was obvious that we had to address failed switches and even if the railroad's success rate was 80%, that meant it impacted on 20% of Diversified CPC's production, and that 20% escalates because of the ripple effect.

Obviously, our goal is for the railroads to achieve 97% but knowing things happen, the standard set must be realistic. We recommend a minimum standard for successful switches (with definition) at 90%. Considering two of the carriers are already performing at 100%, we submit that this is a reasonable and realistic standard.

If the Board decides to order Reciprocal Switching (which is discussed later in this document), this same standard should apply on Prescribed Switching². It is important to set a standard to prohibit the incumbent railroad from arbitrarily reducing switching service with no-shows, etc.

The Board has asked if the ISP success measure should increase if a railroad unilaterally reduces frequency of local service. This should include quality of reciprocal switching, scheduled service at interchange with the alternate railroad, and the possibility that a railroad can use its dispatching authority to inhibit alternate carrier operations and service.

Actions like these warrant consequences and cause one to wonder whether or not the prescription should be permanent. If this were to happen, the focus should be on protecting the shipper's interests and the future viability of that industry. If the incumbent were to show this type of behavior, the Board should have the right to eliminate the term and to order Reciprocal Switching as a permanent option. If not permanent, the term should be extended by five years.

IV. SELECTION OF AN ALTERNATE CARRIER TO PROVIDE COMPETITIVE SERVICE

A. The Minimum Term of a Prescription Should Be Five Years With a Potential Longer Term of Ten Years

The Board proposes a minimum term of two years for a reciprocal switching prescription, and a potential longer term of up to four years.

² This author's definition of "Prescribed Switching" is competitive access prescribed based on Reciprocal Switching, or direct access (aka, Trackage Rights).

First, let me reiterate, a prescription will not preclude incumbent carriers from serving their on-line customers, nor will a prescription preclude an incumbent carrier from competing for the customer's business with improved service. The incumbent railroad will still be in place, and it will continue to have access to their customer.

We submit that the term of any prescription considered in this proceeding must provide sufficient incentive for an alternate carrier to make a commitment to incur the investment costs of set up, including equipment and personnel. Also, as with any new operation and business relationship there is a learning curve which subsequently evens out. It is unlikely that shippers will be able to attract potential alternate carriers if the offer is for a two-year operation.

I sense there may be some sensitivity about the need to protect the incumbent railroad; however, we cannot allow those concerns to override the objectives of this proceeding. Without alternative carriers, this simply will not work, so we need to focus on the overall objective for shippers to have a potential solution to address inadequate rail service. If service provided by the incumbent deteriorates to the point that the shipper files for relief, then the incumbent has already given up on the business and the shipper and the Board will be justified in moving on.

We believe a longer term of five to ten years is needed, and the confirmed term should be based on the complexity of the switching operation, and the financial commitment required on behalf of the alternate carrier. (For example, the scope of operations with volumes that require three day/week switching service versus an industry that is switched three times/day, seven days/week, are totally different.)

B. What is the Best Solution for Inadequate Rail Service?

The ideal solution would be for the incumbent railroad to respond to customer's concerns and service requirements with improved service, but if it has progressed to the point that the shipper is looking to the Board for relief, then that train has already left the depot.

Throughout this document we have raised concerns about some potential loopholes of a Reciprocal Switching operation, primarily the ability of incumbent railroads to negatively impact on an alternate carriers' operations by providing inefficient local service. Also, if Reciprocal Switching is prescribed, the incumbent carrier will still be required to pick up and deliver cars to the customer. This raises the question, if the incumbent carrier is not providing adequate service today, how is that going to change? Especially, when we add in the fact that the alternate carrier will be relying on timely switches at interchange with the incumbent.

We submit direct access via Trackage Rights as a potential and preferred option to inadequate rail service. We still support the original intent of EP 711, to address inadequate competition with Reciprocal Switching. However, we believe Trackage Rights is a better solution to address inadequate rail service.

A Trackage Rights operation would eliminate the possibility of delays at interchange between the incumbent carrier and alternate carrier. It would also reduce or eliminate the need for the customer to depend on the incumbent railroad for timely and efficient switching service on cars received at interchange from the alternate carrier.

Class II and Class III carriers should be included as potential alternate carriers. The only remaining topic is the possibility that incumbent railroads could inhibit operations of alternate carriers by abusing their dispatching authority. However, that can be addressed with monitoring and reporting procedures. If an incumbent takes advantage of its dispatching authority and inhibits alternate carrier's operation, then the term of the prescription should be doubled.

V. ADDITIONAL POINTS TO CONSIDER

A. We Agree With the Board That a Petitioner's Traffic Will Qualify When Reciprocal Switching Exists for Other Industries In the Same Area³

³ "Further, if an incumbent railroad and alternate railroad have an existing reciprocal switching arrangement in a terminal area, and the petitioner's traffic is currently served in that same terminal area, the proposed operation would presumptively qualify for prescription of a reciprocal switching agreement and the incumbent railroad would

This also raises the question of whether or not a group of shippers in the same terminal area can file for a prescription of a reciprocal switching agreement (or trackage rights agreement). An example is a group of shippers located in an industrial park. All are closed industries, they are all served by the same crews of the incumbent railroad, and they all share similar service issues. Groups of shippers served by the same incumbent railroad in the same terminal area that demonstrate inadequate service according to the established standards should be allowed to seek a prescription.

B. As a Next Step, the Board Should Consider Competitive Access

The scope for this NPRM is much narrower than the original scope sought by NITL in its Petition for Rulemaking to enhance competition through reciprocal switching. We are assured by the Board's acknowledgement that "in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared towards increasing competitive options...is foreclosed, whether in this sub-docket or otherwise." (NPRM 7.)

"Reciprocal Switching" has been an extremely lengthy topic involving several applications and dockets. In July 2016, after five years of proceedings before the STB, the Board granted NITL's petition in part and proposed new competitive switching rules. The rulemaking proceedings and supporting materials are docketed at the STB as Ex Parte 711 (EP 711).

This current proceeding that focuses on inadequate rail service is certainly a good first step. However, we urge the Board to act soon to ensure that reciprocal switching is a potential remedy for the lack of competition.

bear a heavy burden of establishing why the proposed operation would not qualify, assuming that other conditions to the prescription were met." STB Decision Docket No. EP 711 (Sub-No. 2) p. 12

VI. CONCLUSION

In this decision, the Board has posed a number of questions and as a result, additional questions, concerns, and suggestions have morphed during the thought process. We commend the Board for its decision to open this new sub-proceeding as a potential solution to inadequate rail service, and we appreciate this opportunity to submit our comments.

The overall fluidity of the national rail network cannot be understated. Shipper personnel, from those that load and unload cars, all the way up to the C-suite, take it as a personal affront, and it becomes a major corporate issue, when railroads fail to provide quality service and shipments are delayed or when there are failed switches over an extended period of time, because those people cannot do their jobs and meet service commitments made to their customers.

Recognizing the numerous issues that must be considered when deciding on the best remedy and related standard, we encourage the Board to proceed as expeditiously as possible to develop a final ruling that will confirm the options and standards.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra J. Dearden", with a stylized, flowing script.

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Appendix A

Highroad Consulting, Ltd. Characteristics of a Failed Switch

- Failure to show up to perform a switch.
- Cars ordered in not delivered.
- Cars not spotted as ordered.
- Released cars not pulled.