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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

REPLY COMMENTS

submitted by

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On Behalf of:
Diversified CPC International, Inc.

December 20, 2023

1.0 INTRODUCTION

Diversified CPC International, Inc. (Diversified CPC) commends the Board for proposing Reciprocal Switching as a potential remedy to address inadequate rail service. We have worked diligently with railroads to address service issues since the rail service crisis hit in 2022, while remaining cognizant of the fact that what we are only addressing today's issues; that capacity will continue to be a growing issue in the rail, transportation, and supply chain sectors.

Transportation capacity is a current and growing concern. The U.S. Department of Transportation predicts freight volumes in the United States will increase 40% to 69 million tons over the next thirty years.

When the railroads embraced Precision Railroading, they initiated significant personnel cuts. Then COVID hit so we did not feel the full impact of the labor shortage until business rebounded faster than expected, and we all, railroads and their customers, experienced the Rail Crisis of 2022. The railroads called people back to work, but some furloughed personnel decided to pursue other career paths, forcing the railroads to seek new hires in today's competitive labor market. Railroads report that once hired, it takes six to twelve months to train T&E personnel.

Currently, there is a shortage of about 80,000 truck drivers, and the industry has an aging workforce. Many drivers are approaching retirement age, and trucking companies are not able to replenish their workforce fast enough. As a result, the number of unfilled trucking jobs is expected to double by year 2030.

Shippers that do not have rail access are seeking ways to access rail transportation. Industrial Development projects have comprised a major part of Highroad's work the last few years, locating manufacturing plants with rail access, and connecting industries to rail through transloads and warehouses. Some shippers have told us that their truck rates doubled in 2022. We submit this capacity shortage is a growing trend that will not go away. It is impossible to build enough highways and roads to accommodate a 40% increase in freight volumes. As a result, there will be an increased reliance on rail transportation.

Although Diversified CPC is supportive of the Board's intent to establish a remedy for poor service, we are concerned that unless the focus of this proceeding shifts to establishing standards and rules to apply to an ideal solution that is workable

with a probability of success, that this could simply develop into a meaningless exercise in futility.

2.0 CONTRACT TRAFFIC AND EXEMPT SHIPMENTS SHOULD BE INCLUDED

As submitted in our Opening Comments it is important to define what constitutes a contract. Merriam Webster simply states it is a binding agreement between two or more persons or parties. Frequently, though a railroad simply publishes a rate in a non-distribution tariff with the word, "Contract", on the title page. The shipper may, or may not, see the rate until it is published. The railroads may contend that this type of non-signatory "Contract" becomes binding when the shipper moves traffic on the rate. However, the shipper has little choice since the rate(s) are presented on a take-it-or-leave-it basis.

The carriers' motives are clear, it removes the traffic from STB oversight. Contracts should be agreed to and signed by all parties to the agreement.

Railroad commenters contend that the Board may not even consider the adequacy of service for contract traffic for future prescriptions.¹ BNSF specifically states that, "using service performance under a contract to prescribe switching post-contract would also ignore the fact that contracts reflect commitments by both parties..."² Exactly! And that includes a commitment on the part of the railroad to provide service. The service failures discussed in this proceeding are not single events. Once is a mistake, beyond that, it is a behavior pattern. If the service failures progress to the point that the shipper files a petition for switching, then the railroad has not lived up to its commitment made when the contract was executed. Thus, the railroad's commitment to the customer is broken.

Exempt traffic should be included. It has been our position in numerous proceedings, including EP 704 and EP 704-1 that the time has come to remove the exemptions, and to give shippers of exempt traffic equal opportunity to seek relief from unreasonable rates and unreasonable practices. Industry protocols and shipping dynamics have changed since the exemptions were put into effect more than 25 years ago, so they are no longer valid. In fact, shippers of exempt traffic are

¹ AAR OP 32-41; CN OP 50-54; NS OP 17-20.

² BNSF OP 13.

penalized because they do not have the protection of common carrier obligation; in effect, those shippers become second class citizens.

Contract traffic and exempt traffic should be included in rules adopted by the Board to access competitive rail service through switching. It is possible and even likely that the traffic mix from and to a single industry will include contract traffic, while some shipments will move under tariff rates. There is no need or justification to segregate the two if the railroad customer is forced to maintain operations and production schedules in a toxic environment involving inadequate service.

As submitted in my Opening Comments shippers and railroads will be challenged if they are required to manage a split industry.³

3.0 WHAT IS THE BEST SOLUTION FOR INADEQUATE RAIL SERVICE?

To reiterate our concerns submitted in Opening Comments, Reciprocal Switching is not a good solution to address inadequate rail service because incumbent carriers will continue to be responsible for serving the industry. First of all, we question if the incumbent railroad will be motivated to improve service if an alternative carrier gains access to the industry through Reciprocal Switching. Also, if the incumbent is not providing adequate service today, how will that change if an alternate carrier interchanges cars to or from the incumbent for delivery or pickup?

Diversified CPC, along with others participating in this proceeding, have recommended Terminal Trackage Rights as a preferred option.⁴ We respectfully submit that the prescription of Terminal Trackage Rights is an important potential solution that will address the service problems.

NGFA and other stakeholders have expressed concern that Class I railroads may be reluctant to provide alternative service.⁵ Those are valid concerns. However, selection of an alternate carrier need not be limited to Class I railroads. It is not uncommon for highly qualified service providers, including short line railroad holding companies, to operate terminal switching operations. For this reason, short line railroads and terminal railroad operators should have the option to provide alternative

³ Diversified CPC International OP 3 – 44.

⁴NGFA OP 7 – 8. Olin Corporation OP 3 – 4; USDA OP 8

⁵ NGFA OP 5 – 6.

rail service when an incumbent carrier fails to provide adequate service as defined by the rules.

Terminal Trackage Rights must be an option and the operating agreement between the incumbent and the alternate carrier must include a planned schedule at interchange. A related standard should be established and enforced so gamesmanship does not occur.

3.0 ISSUES TO ADDRESS AND ADDITIONAL STANDARDS REQUIRED

3.1 Service Standards

We recently conducted a virtual meeting with a Class I carrier to review their service performance calculated on Diversified CPC's Service Performance Scorecard. There was a significant discrepancy in our calculations versus the railroad's interpretation of ETA compliance. Our records based on TMS records revealed that the railroad's OETA compliance on loaded shipments during the third quarter was 47%, empties 65.5%. However, the railroad stated their records show 97% compliance over the most recent 90 days. While they did not have third quarter data in hand, and they were not sure about the standard used, the only reasonable explanation for the significant variance is the railroad is basing their calculations on updated ETA's.

Shippers have been forced to expect eta's will be updated once cars are in transit, and the railroads frequently revise those updates. Diversified CPC plans its manufacturing operations, and service to their customers, based on the OETA's. One potential option would be to base planning on historical transit times, but there is such a high degree of variability in the transit times, that any standard based on historical moves would not be a reliable standard.

We agree with the Board's recommendation to establish a standard based on OETA's; however, as long as the railroads take comfort in their perception that updated ETA's are all the customers need, and unless they add discipline to their standards and measurements, a standard based on OETA's will simply set the railroads up for failure.

If the Board decides to go forward with rules for prescribed Reciprocal Switching, it will be important to establish standards to measure a minimum level of

switching service for prescribed switches; a standard of 80% is too low. To illustrate – the switching schedule at Diversified CPC’s headquarter plant, which ships and receives the highest rail volumes, is five days/week, Monday through Friday. If the railroad were to comply with a standard of 80%, switching service would be reduced to four days/week. To advance the conversation, when missed switches occur on Mondays or Fridays, Diversified CPC may not be rail-served until the fourth day. When this occurs, it has a significant impact on our manufacturing operations and there is a ripple effect on all of the inbound cars already in the pipeline, that will last ten days or more. The railroad has agreed to give us bunching relief but that does not address the fact that we cannot honor our service commitments to our customers.

We recommend a single standard for prescribed switching (Minimum 90% - 95%), similar to the standard that Highroad uses to measure switching performance at our plants; either they performed a successful switch, or they did not.⁶

Finally, there must be penalties associated with all of the standards, lest the standards become meaningless.

3.2 The Rules Should Not Create Split Industries

The Board has proposed measurements of OETA compliance on a lane-by-lane basis. Also, contract shipments and shipments exempt from regulation could be excluded. As a result, some traffic to an industry could be eligible for prescribed switching, while the incumbent carrier that is not providing adequate service would continue to hold captive, other traffic to the same industry. Assuming that scenario, would the industry be opened or closed?

Common sense tells us that this scenario would be difficult to manage. Also, what will happen when new business is secured in new lanes, and the incumbent is still not providing adequate service? Will the shipper be required to file a new petition for prescribed switching for the new lanes?

Establishing rules that will result in split industries has the potential to kill opportunities for shippers to access prescribed switching. NGFA in its Opening Comments expressed concern that Class I carriers are reluctant to provide alternative

⁶ Diversified CPC OP p. 9 and Appendix A.

service to shippers when an incumbent railroad is not providing adequate service.⁷ Alternate carriers will be required to invest in equipment and to commit personnel. A potential alternate carrier may not be willing to make the commitments required unless they have the opportunity to compete for all or most of the shipper's business. We commend the Board for initiating this groundbreaking initiative, but the likelihood of success is reliant on our ability to attract alternate carriers.

The concern that carriers may decline the option to perform as an alternate carrier is a valid concern. However, if a carrier elects not to provide alternative service, it should provide detailed justification for its position, and the shipper should have the opportunity to challenge or address such justification.

There is no practical reason to exclude some of a shipper's rail shipments from prescribed switching. All of the traffic is being impacted by inadequate service provided by the incumbent.

4.0 THE CONTINUING NEED FOR COMPETITIVE ACCESS

We are concerned that the Board may close Docket No. Ex Parte 711 (Sub-No.1). While we appreciate the obvious intent of the Board to improve rail service with new rules and standards for prescribed switching, this proposal for prescribed switching to address inadequate rail service, should not be perceived as a compromise to replace the shipping industry's need for Reciprocal Switching to address a lack of competition.

We encourage the Board to continue EP 711 (Sub-No. 1), or to open a new sub docket, to address the competition prong of Reciprocal Switching.

5.0 CONCLUSION

Diversified CPC appreciates the Board's aggressive approach in recent years, to improve service to rail customers. We recognize that some of the points presented herein may be perceived as reiterations of topics covered in our Opening Comments. However, considering other participants submitted similar recommendations in Opening Comments, we believe them to be so important that they require emphasis.

⁷ NGFA Opening Comments, EP 711 (Sub No. 2, p. 5

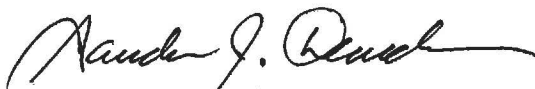
Shown below, is a brief summary of recommendations submitted in this document:

1. This proceeding is very significant and timely. The "Rail Crisis" and capacity shortage in the transportation sector is a growing issue that will not go away. The US Department of Transportation (DOT) predicts freight volumes in the United States will increase 40% to 69 million tons over the next thirty years. The preponderance of that growth will move on rail.
2. Shipments moving under contracts, and shipments exempt from regulation (except intermodal) should be included. The rationale behind the exemptions no longer exists. These shippers share common concerns with colleagues who are shippers of regulated traffic and their cars travel on the same manifest trains.
3. The definition of a rail contract needs to be confirmed to preclude carriers from arbitrarily exempting the "contract" shipments from regulation. Some rail "contracts" are nothing more than non-distribution tariffs; because they have the word, "contract" on the title page, they are termed as a contract. These are non-signatory documents that include rates and provisions that the shippers may or may not have agreed to. Instead, they are published on a take-it-or-leave-it basis.
4. Reciprocal Switching is not the best option to address railroad service issues because the incumbent railroad that is already providing inadequate service will continue to be responsible for pick up and delivery of the railcars. Terminal Trackage Rights is a good potential solution, as the alternate will replace the incumbent as the carrier to deliver quality service.
5. Rules and standards that will result in split industries are seriously problematic. An industry with some lanes approved for prescribed switching, while others are not, will be difficult to manage. It will also be difficult to recruit an alternate carrier, who will be required to invest in equipment and personnel, for a mere segment of the industry's business. Ideally, an industry should be deemed as Open or Closed. Finally, if the Board decides to move forward with rules that will result in split industries, that decision should present a protocol for adding new lanes.

6. Some are concerned that Class I railroads will not be willing to serve as alternate carriers. Prescribed switching should be structured so it is easier to recruit alternate carriers. Other contracting parties, such as short line railroads, holding companies that own and operate short line railroads, and terminal railroad operators should have the opportunity to perform as alternate carriers.
7. There is a continuing need for competitive access. We encourage the Board to continue EP 711 (Sub-No. 1), or to open a new sub docket, to address the competition prong of Reciprocal Switching.

Again, we commend the Board for their decision to propose "Switching" as a solution to inadequate rail service, and we appreciate this opportunity to present our views. However, this is not a simple matter. Considering the length of time EP 711 and Reciprocal Switching has been on the table, many of us would like some quick answers and a final decision. However, Prescribed Switching, whether Reciprocal Switching, or Terminal Trackage Rights, or offering both as potential solutions to inadequate rail service, raises numerous questions and concerns, so it is important that this is done right the first time. With that thought in mind, we encourage the Board to continue to prioritize EP 711 (Sub-No. 2) and to come to a decision as expeditiously as possible, recognizing that it will be important to think through all of the various issues and concerns.

Respectfully submitted,



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