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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 711 (Sub-No. 1)

RECIPROCAL SWITCHING

**REPLY COMMENTS OF
BNSF RAILWAY COMPANY**

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BNSF Railway Company (“BNSF”) respectfully submits these Reply Comments in the above-referenced proceeding. BNSF also joins in the reply comments filed by the Association of American Railroads.

I. Opening Comments from Shipper Groups Reinforce BNSF’s Concern that the Board’s Proposal Would Permit Unnecessary Intervention in Properly Functioning Markets.

As set forth in BNSF’s Opening Comments, a primary concern with the Board’s proposed reciprocal switching rules is that they would allow unnecessary Board intervention in properly functioning markets. Congress has made clear that Board action should be limited to instances where it is necessary to protect shippers from competitive harm. *See* 49 U.S.C. 10101(1)-(2). BNSF believes that the Board’s proposed two-pronged regime is inconsistent with this Congressional mandate because it fails to adequately consider, and defer to, market conditions. *See* Opening Comments of BNSF Railway Company, at 3-9. Suggestions appearing in the opening comments filed by shipper interests exacerbate this problem because they ask the Board to utilize lower standards than those initially proposed, which would provide even less protection against unnecessary Board regulation.

Shipper comments regarding the market dominance element of the proposed Necessary to Provide Competitive Rail Service Prong (“Prong 2”) provide an example of this concern. A critical flaw of Prong 2 is that it would effectively treat the existence of market dominance alone as justification for Board intervention via a reciprocal switching prescription. BNSF does not believe that the mere existence of market dominance should be considered a proxy for a compelling need for Board intervention in markets, especially considering the infirmities of the Board’s prevailing market dominance test.¹ Nevertheless, multiple shipper filings ask the Board to soften, or even

¹ *See* Opening Comments of BNSF, at 5. Notably, the arbitrary nature of failing to consider product and geographic competition in a market dominance inquiry is highlighted by the National Grain and Feed Association’s (“NGFA”)

eliminate, the market dominance requirement contained in Prong 2 so as to avoid the perceived complexity, time and costs associated with rate cases.² If the market dominance requirement is softened or eliminated altogether, however, Prong 2's already tenuous (and inadequate) connection between Board action and market realities would be severed altogether.

Shipper comments regarding the Board's proposed Practicable and in the Public Interest Prong ("Prong 1") similarly advocate impermissibly lowering the barriers to market intervention by the Board. A common theme amongst shipper comments is that pursuing a reciprocal switching order under Prong 1 would be too complicated, expensive and time-consuming under a case-by-case approach.³ Some shippers instead ask the Board to impose procedures that would effectively eliminate the burden on shippers to substantively demonstrate that reciprocal switching is needed, and impose upon railroads the affirmative burden to prove that reciprocal switching is not needed.⁴ In essence, these shippers believe their only burden under Prong 1 should be to make a minimal filing after which the incumbent railroad(s) should face the burden of demonstrating that regulatory intervention would be inappropriate and contrary to the public interest. Utilizing procedures that effectively eliminate the burden for shippers to demonstrate any sort of need would create an impermissible bias in favor of regulation that is highly likely to result in unnecessary Board action.

opening comments, in which NGFA recites a litany of factors that influence shipping needs in agricultural markets. Opening Comments of NGFA, at 6-7. Many of the factors that NGFA claims make grain markets different are the same factors that create real-world product and geographic competition that effectively constrains rail pricing.

² See, e.g., Opening Comments of NGFA, at 9; Joint Comments of Western Coal Traffic League and Minn. Power, at 4; Opening Comments of Alliance for Rail Competition, at 10.

³ See, e.g., Initial Comments of Sandy Creek Energy Associates, *et al.*, at 5; Initial Comments of INEOS USA LLC, at 5; Initial Comments of G3 Enterprises, Inc., at 5-6; Comments of Shipper Coalition for Railroad Competition, at 20.

⁴ As one example, G3 Enterprises, Inc. suggests that the Board should adopt a *prima facie* test under which shippers merely identify the facility and railroad(s) in question, and state how reciprocal switching would benefit the shipper, after which the burden would shift to the incumbent railroad(s) to prove why the shipper's *prima facie* case should not permit reciprocal switching. Initial Comments of G3 Enterprises, Inc., at 6.

II. If a Shipper Obtains Access to a New Carrier via a Reciprocal Switching Prescription, Allowing that Shipper to Later Pursue Rate Relief Would Constitute an Impermissible Regulatory Overreach.

Opening comments from shipper interests confirm that their focus is on using reciprocal switching as a means to obtain lower rates.⁵ BNSF believes this is legally improper for all of the reasons set forth in the AAR's comments. Since shipper interests' true intentions are clear, it is even more important that the Board not inject further regulation into market-based rates by letting shippers have two bites at the rate-reasonableness apple. If a shipper is able to obtain access to multiple carriers for the purpose of obtaining lower rates, any further Board intervention in the market for that shipper's traffic via a rate reasonableness case would be entirely unjustified, and contrary to Congress's deregulatory mandate.

III. Any New Switching Regime Must Apply Equally to Everyone.

If the Board were to adopt new reciprocal switching rules, which BNSF opposes, the Board should ensure that such rules are applied universally. Congress has directed the Board to override market forces only rarely and when absolutely necessary. BNSF believes that, as it stands, the Board's proposal would violate this Congressional direction. However, partially applying such a proposal would distort market forces significantly more because it would endow certain shippers and railroads with a competitive advantage. In addition to arbitrarily creating winners and losers amongst competing shippers and railroads, such a biased application of a revised reciprocal switching regime would suggest an incorrect assessment of the relative competitive presence of carriers with more limited geographic scope.

⁵ See, e.g., Opening Comments of Alliance for Rail Competition, *et al.*, at 10; Initial Comments of INEOS USA LLC, at 2-3.

IV. Conclusion.

BNSF believes that the Board's proposed revisions to its switching rules fail to strike the appropriate balance between the needs of shippers, railroads and the public for all the reasons set forth in BNSF's Opening Comments. The opening comments filed by shipper groups in this proceeding advocate that the Board adopt standards and procedures for obtaining reciprocal switching relief that are even lower than those contained in the Board's initial proposal, which would exacerbate that regulatory imbalance. In considering its reciprocal switching regime, the Board must maintain fidelity to Congress's deregulatory mandate and avoid adopting changes destined to increased unnecessary Board intervention in properly functioning markets.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'AW', is written over a horizontal line.

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