

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 711 (Sub-No. 1)

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RECIPROCAL SWITCHING

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REPLY COMMENTS OF CSX TRANSPORTATION, INC.

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REPLY COMMENTS OF CSX TRANSPORTATION, INC.

When the Board issued its Notice of Proposed Rulemaking (“NPRM”) in this proceeding, Commissioner Begeman observed that the NPRM was not supported by any “analyses that indicate the changes will not have unintended consequences for our stakeholders” and that it failed to address a series of “fundamental questions that the Board should have asked and answered.”¹ These fundamental questions included the “impact to revenue and carloads [that] would be permitted”; how the Board could provide “fair and consistent” decisions under an amorphous case-by-case approach; what evidence parties would have to present to prevail under that “flexible” approach; the scope of the “reasonable distance” within which switching would be allowed; and how the Board could “mitigate impacts on network efficiency and service, particularly at major gateways and terminals.”² Commissioner Begeman recognized that the NPRM easily “could cause greater harm than good” and thus that the Board needed to consider the potential consequences of such a major regulatory change.³ Simply put, the Board should look before it leaps.

¹ NPRM at 34 (Commissioner Begeman, dissenting in part).

² *Id.* at 34-35.

³ *Id.* at 36.

While some opening comments argued that the Board should adopt the NPRM's proposals, none of those commenters responded to Commissioner Begeman's wise call for an analysis showing that the NPRM's changes would not have negative unintended consequences for stakeholders. Several shipper groups advocated vigorously for a major expansion of regulatory controls that they believed would lower rail rates for certain shippers. But those groups provided no analysis showing that lowering rail rates for some shippers through involuntary switching would not have negative consequences for other shippers such as worse service, increased transit times, and reduced rail investments.

Similarly, the advocates of remaking the regulatory landscape ignored the important "fundamental questions" raised by Commissioner Begeman's dissent. Shipper groups made no efforts to quantify the revenue and carload impact of a regulatory proposal that is designed to reach far more traffic than the NITL proposal.⁴ Their answers to how the Board could produce "fair and consistent" decisions under an undefined case-by-case approach is to propose that the Board consistently let shippers win by shifting the burden of proof. And their answers to critical questions about the scope of the Board's proposed regulatory change is to propose massive expansions in the reach of the proposal—from arguing for a 100-mile "reasonable distance" from terminals within which involuntary switching would be allowed; to arguing for a rule allowing shippers to force construction of

⁴ NPRM at 13 ("The Board prefers a reciprocal switching standard that makes the remedy more equally available to all shippers, rather than a limited subset of shippers").

interchanges that do not currently exist; to advocating a rule allowing shippers to challenge switching price agreements that Congress specified should be governed in the first instance by private negotiations. None of these proposals can be reconciled with the statute or with sound regulatory policy. Rather, they are short-sighted proposals designed to transfer railroad earnings to certain shippers with virtually no consideration of the adverse consequences to railroads and other shippers.

These failures to answer the important questions posed by Commissioner Begeman amplify the overwhelming evidence demonstrating that the Board should abandon the NPRM. CSXT and other parties showed on opening that the NPRM would be a dangerous change in course that is irreconcilable with the Interstate Commerce Act and that would undermine Congress's successful deregulatory policies. The NPRM violates the Interstate Commerce Act by allowing the Board to order involuntary switching without proof of a "compelling need" for such switching and by allowing involuntary switching to be used as an alternative means of rate regulation.⁵ It ignores the overwhelming evidence that Congress has approved of the current regulatory framework.⁶ It is irreconcilable with multiple congressional and agency policies such as the need for differential pricing, the protection of railroad long hauls, and the promotion of operational efficiencies.⁷ Moreover, the law is clear that such a momentous change in direction must be supported by a

⁵ See CSXT Opening Comments at 10-20, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) ("CSXT Opening Comments").

⁶ See *id.* at 20-30.

⁷ See *id.* at 31-38.

clear and compelling justification, particularly when the Board proposes to alter policies on which stakeholders have relied to make investments.⁸ Here, no persuasive justification has been offered; on the contrary, the record contains substantial evidence that the proposal would negatively affect service, would discourage capital investment, and would seriously undermine the successful regulatory scheme adopted by Congress.⁹ And the NPRM fails to consider how involuntary switching could be reconciled with the Board's independent studies of its regulatory policies, the requirement to consider revenue adequacy, and the Board's obligation to weigh the benefits and costs of the proposal.¹⁰ And it simply ignores critical questions about how involuntary switching orders would be implemented and how the Board would address environmental and labor impacts.¹¹ Furthermore, the NPRM proposes arbitrary and illegal approaches to access pricing that would deprive railroads of the fair market value of their investments and violate the Takings Clause of the U.S. Constitution.¹²

CSXT's Opening Comments detailed all the above reasons why the proposed NPRM cannot be lawfully adopted, and CSXT will not reiterate all these arguments here. Instead, these Reply Comments point out the many areas where the

⁸ *See id.* at 38-40 (citing Supreme Court precedent requiring agency to provide more substantial justification for changing policies that have generated significant reliance interests).

⁹ *See id.* at 40-64 (detailing negative consequences of rule including degraded service quality and decreased incentives to invest).

¹⁰ *See id.* at 64-72.

¹¹ *See id.* at 72-76.

¹² *See id.* at 85-96.

proponents of involuntary switching have simply ignored the important issues raised by Commissioner Begeman's dissent and the most egregious ways in which proponents of involuntary switching would make the Board's proposal even more damaging.¹³

I. Proponents of Involuntary Switching Failed to Provide An Analysis Showing that Adoption of the NPRM Would Not Result in Harmful Unintended Consequences.

Commissioner Begeman correctly observed that the Board should not “casually embrace regulatory changes” and that “[a]ny altering of the Board’s existing switching rules must be balanced, fair, and supported by analyses that indicate the changes will not have unintended consequences for our stakeholders or the public.”¹⁴ The Board has a high burden to justify a change in course from a regulatory scheme that has generated major reliance interests.¹⁵ It cannot possibly meet that burden without compelling analyses showing that changing course will not cause collateral damage for stakeholders and will not upset settled reliance interests.

CSXT and other railroads presented evidence on opening that responded to Commissioner Begeman’s concerns by analyzing the potential impact of the proposal and showing that it would cause unacceptable levels of harm to rail service

¹³ CSXT also adopts and incorporates the Reply Comments of the Association of American Railroads being filed today.

¹⁴ NPRM at 34 (Commissioner Begeman, dissenting in part).

¹⁵ See CSXT’s Opening Comments for an explanation of the Board’s heightened legal obligation to justify a change from a regulatory policy that “has engendered serious reliance interests.” CSXT Opening Comments at 38-42 (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209-10 (2015)).

and investments.¹⁶ Railroads were joined in their concerns by other stakeholders, including shippers who depend on a high level of service,¹⁷ communities concerned about railroads' ability to meet changing demand for services,¹⁸ local ports and economic development organizations that recognize the danger that involuntary switching poses to efficient rail transportation,¹⁹ and Amtrak, which argued that

¹⁶ See CSXT Opening Comments at 40-64 (detailing negative consequences of rule including degraded service quality and decreased incentives to invest); *id.* at Verified Statement of Michael Ward (explaining the CSXT capital investments that have been made in reliance on the current regulatory scheme and how future capital investments would be impacted by regulatory changes affecting CSXT's ability to recoup its investments); *id.* at Verified Statement of Cindy Sanborn (explaining the ways in which the NPRM would undermine CSXT efforts to achieve efficiencies by consolidating traffic flows, limiting handlings, and streamlining service with run-through trains and power-sharing arrangements).

¹⁷ See, e.g., Opening Comments of UPS at 1-2, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) ("UPS's experience in other contexts leads us to conclude that implementation of a new reciprocal switching scheme will lead to decreased network velocity, diminished capital investments into the freight rail network, and deteriorating rail intermodal service levels. . . . Ultimately, if rail intermodal service levels fall below UPS time in-transit obligation standards, we would have no business option but to move these containers and trailers back onto the highway"); Opening Comments of HUB Group at 1, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) ("strongly urg[ing] the STB to reject the forced access proposal," which would "inevitably cause rail operations and service to worsen" and "make intermodal less competitive versus truck service").

¹⁸ See, e.g., Letter from Representatives John J. Duncan Jr. and Chuck Fleischmann, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (Nov. 16, 2016) ("forcing freight railroads to open up their lines to other private competitors at below fair market rates could hinder freight railroads from reinvesting on improvements to their own infrastructure" and "slow down the efficiency of delivering goods throughout the system"); Opening Comments of Florida Department of Transportation at 1-2, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Nov. 29, 2016).

¹⁹ See, e.g., Opening Comments of Jacksonville Chamber of Commerce at 1, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (urging the Board to "consider the unintended consequences" to communities that depend upon rail service and to not "weaken the railroads' ability to maintain current service

involuntary switching could adversely affect on-time-performance for passenger trains.²⁰ But the proponents of reregulation provided no analysis showing that the change they advocated would not have unintended adverse impacts on these many stakeholders. The reason for this failure is an obvious one: analyzing the potential impact of an involuntary switching regime would show that the harms of remaking the regulatory landscape far outweigh any alleged benefits of such a change.

Indeed, the substantial evidence that has been presented over the years about the potential practical impact of altering involuntary switching rules made it all the more important for the parties seeking to remake the regulatory order to provide some analysis of the practical implications of reregulation. Yet they have not even attempted to do so.

From the agency's Ex Parte 705 consideration of competitive access policies, to the Ex Parte 711 proceeding on the NITL proposal, to the instant NPRM, one constant theme has been the need to be wary of the unintended adverse consequences of involuntary switching. For example, in almost every instance involuntary switching will create a less efficient rail movement because it is adding a handling event at a shipper-dictated location. This reduced efficiency impacts service and transit times for many other unrelated movements. In Ex Parte 711,

levels, deliver goods in an efficient manner, and make critical private investments in track, equipment and maintenance"); Opening Comments of Ohio Chamber of Commerce at 1-2, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016); Opening Comments of Port of Greater Cincinnati Development Authority at 1-2, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Nov. 10, 2016).

²⁰ See Letter from C.W. Moorman, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Nov. 22, 2016).

CSXT presented detailed evidence of the adverse impact that involuntary switching would have on train service and yard operations and of the harm it would cause to transit time, fluidity, and overall customer service.²¹ CSXT illustrated some of these harmful effects in a video exhibit submitted with its Reply Comments.²² Other railroads presented their own evidence of the effects that involuntary switching orders could have on their service.²³ And the Association of American Railroads presented a detailed analysis by William Rennie of the specific ways in which involuntary switching orders would increase car handlings, transit time, and the number of cars that failed to meet their service plan.²⁴

Similar evidence of the adverse effect that involuntary switching would have on service was presented in this proceeding by CSXT Executive Vice President and Chief Operating Officer Cindy M. Sanborn. Ms. Sanborn's Verified Statement showed that adoption of the NPRM "would result in a significant degradation of service for all shippers" because it would undermine many of the initiatives that

²¹ See CSXT Opening Comments at 33-47, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed Mar. 1, 2013).

²² See CSXT Reply Comments Ex. 1, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed May 30, 2013). This video exhibit is attached as Exhibit 1 to these Reply Comments.

²³ See, e.g., Norfolk So. Ry. Co. Opening Comments at 59-80, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed Mar. 1, 2013); Union Pac. Opening Comments at 22-56, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed Mar. 1, 2013).

²⁴ See Ass'n of Am. R.Rs. Opening Comments, Rennie V.S., *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed Mar. 1, 2013).

CSXT has undertaken to improve transit time and service reliability.²⁵ Other parties submitted evidence that echoed this conclusion.²⁶

All this evidence has been largely uncontradicted by the advocates of involuntary switching, who simply ignore the operational consequences of the regulatory changes they seek. Neither the so-called “Shipper Coalition for Railroad Competition,” nor the National Grain and Feed Association, nor the Western Coal Traffic League, nor the Alliance for Rail Competition, nor the individual shippers who filed in support of the NPRM have addressed the massive body of evidence submitted in Ex Parte 711 showing that involuntary switching would reduce efficiency, increase transit times, and generally create worse rail service for shippers.

In addition to these well-documented impacts on service, the Board has received copious evidence that involuntary switching removes the incentive for railroads to invest in their infrastructure. In Ex Parte 705, CSXT urged the Board to remember that railroads and rail customers had made substantial investments in rail facilities “in reasonable reliance on existing regulation” and that “[s]uch investments might well have gone elsewhere, if rail carriers operated in an environment, or had the expectation of a regulatory environment, where

²⁵ See CSXT Opening Comments, Sanborn V.S. at 2.

²⁶ See, e.g., Opening Comments of Kansas City So. Ry. Co. at 16-19 & Songer V.S. at 6-8, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“KCSR Opening Comments”); Opening Comments of Norfolk So. Ry. Co. at 50-55 & Sliger V.S., *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“NS Opening Comments”); Opening Comments of Union Pac. R.R. Co. at 40-44 & Haley V.S. at 4-9, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“UP Opening Comments”).

competitors could readily access and use those carriers' private property and assets.”²⁷ In Ex Parte 711, CSXT again explained that an involuntary switching regime would strand past and chill future capital investments.²⁸ And in this proceeding, CSX Chairman and Chief Executive Officer Michael J. Ward explained that the NPRM's proposal for involuntary switching “could significantly hamper CSXT's ability to make needed capital investments going forward and strand investments that were made in reliance on the regulatory landscape that's been in place for thirty-five years.”²⁹ Again, CSXT's comments were echoed by other parties.³⁰

In short, all of the opening comments that analyzed the potential impact of the NPRM concluded that it would have serious negative consequences for stakeholders and the public. The proponents of the rule simply ignore those consequences, and instead focus single-mindedly on their hope that the NPRM will allow shippers to obtain lower rail rates without having to prove that those rates are unreasonable.

The Board, however, cannot lawfully adopt a change like the NPRM while ignoring the substantial and extensive evidence that the change would have

²⁷ CSXT Opening Comments at iii-iv, *Competition in the Rail Industry*, Ex Parte 705 (filed Apr. 12, 2011).

²⁸ CSXT Opening Comments at 47-48, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Ex Parte 711 (filed Mar. 1, 2013).

²⁹ See CSXT Opening Comments, Ward V.S. at 2-3.

³⁰ See, e.g., KCSR Opening Comments at 19-21 & Songer V.S. at 2-6; NS Opening Comments at 48-50 & Friedmann V.S. & Grajek V.S.; UP Opening Comments at 45-50 & Panzer V.S. at 7-10.

harmful effects on both service and capital investment. In the face of substantial evidence that the NPRM “could cause greater harm than good,”³¹ the Board must withdraw the NPRM.

II. Proponents of Involuntary Switching Failed to Give Satisfactory Answers to Fundamental Questions About the NPRM.

The advocates of involuntary switching similarly ignored the important fundamental questions that Commissioner Begeman posed about the NPRM, including questions about the revenue and carloads that could be subject to involuntary switching; the impacts on service levels; the ability of the Board to be fair and consistent under a vaguely-defined case-by-case approach; the distance within which switching would be allowed; and generally whether the NPRM risked causing more harm than good.

A. How Much Revenue and Carloads Could the NPRM Affect?

Commissioner Begeman recognized the importance of understanding the “impact to revenue and carloads” of the proposal and how it might compare to DOT’s estimate that “NITL’s proposal would affect 2.1 percent of revenue and 1.3 percent of carloads.”³² The AAR answered this question by analyzing the waybill sample and calculating that a significantly high percentage of traffic would be eligible for involuntary switching. Under the NPRM’s “Prong 1,” over 75% of non-exempt Class I carloads are potentially eligible for involuntary switching; under the NPRM’s “Prong 2,” 6.6% of non-exempt Class I carloads are eligible—over three

³¹ NPRM at 36 (Commissioner Begeman, dissenting in part).

³² *Id.* at 34.

times the amount that Commissioner Begeman observed was “considered significant inside the agency.”³³ Each of these figures only includes shipments with an origination or termination within 10 miles of an interchange point; if the Board were to heed calls to expand involuntary switching over large “reasonable distances,” the number of affected carloads would increase.³⁴

The failure of the NPRM’s proponents to address the question of how much traffic would be eligible for involuntary switching is telling, because in Ex Parte 711 many of the same shipper groups did not deny that involuntary switching would have negative impacts on efficiency and transit time. For example, the witnesses for NITL conceded at the 2014 public hearing that “[w]hen you engage in switching, it obviously is going to involve some additional handling,” “could increase traffic time,” and thus implicated “service consideration[s].”³⁵ But NITL and others argued that the impact of such service considerations would be mitigated because its proposal would apply to “a very small fraction of traffic.”³⁶ NITL criticized railroad evidence about the negative service impact of involuntary switching primarily on the ground that railroads supposedly “overstate[d]” the number of carloads eligible for switching.³⁷ But the Board’s proposal makes far more traffic

³³ NPRM at 34 (Commissioner Begeman, dissenting in part); Opening Comments of Ass’n of Am. R.Rs., Baranowski V.S. at 5, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“AAR Opening Comments”).

³⁴ *See id.*

³⁵ Ex Parte 711 Hrg. Tr. at 62 (Mar. 25, 2014).

³⁶ *Id.* at 28.

³⁷ *See, e.g., id.* at 67 (“AAR is wrong about the impacts of CSP on our rail network, because they over-state carloads”); Ex Parte 711 Hrg. Tr. at 107 (Mar. 26, 2014)

eligible for involuntary switching than did the NITL proposal—over 75% of non-exempt carloads under the “Prong 1” approach.³⁸ The universe of traffic potentially eligible for involuntary switching is not “limited” or “a very small fraction”—it is a substantial majority of non-exempt carload traffic. Opening that broad universe of traffic up to involuntary switching could irreparably harm the rail network and those that depend upon it.³⁹

B. How Would the NPRM Affect Network Efficiency and Service?

Commissioner Begeman also asked how the Board’s decision would “mitigate impacts [on] network efficiency and service, particularly at major gateways and terminals.”⁴⁰ The Commissioner’s concern about network efficiency and service is well founded, because the record contains substantial evidence that involuntary switching would cause serious operational problems and inefficiencies. Indeed, much of this evidence was elicited by the Board itself, which in 2012 asked the

(“Competitive switching also is not the death [knell] for differential pricing. NIT League has demonstrated that the univers[e of] traffic potentially eligible for competitive switching is limited”).

³⁸ AAR Opening Comments, V.S. Baranowski.

³⁹ In addition to claiming that the NITL proposal would not affect much traffic, some commenters in Ex Parte 711 also claimed that Canada’s interswitching regime showed that involuntary switching might not result in operational problems. But “implementation of forced switching in the United States would be vastly more complex from an operating standpoint than the inter-switching that takes place in Canada,” in part because the U.S. rail network has considerably more interchange points than the Canadian rail network. CSXT Reply Comments at 42-43, Ex Parte 711 (filed May 30, 2013). Moreover, Canada’s rail network “was designed and constructed with the regulated inter-switching rule in mind,” and Canadian railroads have made investments against the background of that century-old regulatory regime. *Id.* at 44-47. Railroads in the United States, on the other hand, have made investments in reliance on a much different regulatory regime.

⁴⁰ See NPRM at 35 (Commissioner Begeman, dissenting in part).

parties to provide “rigorous empirical analyses” of the impact of involuntary switching on “network efficiency.”⁴¹ CSXT and other railroads responded with detailed analyses of the specific kinds of harms that involuntary switching would cause, from increased car handlings that would delay not just the switched car but all cars on the affected train; to reduced fluidity and flexibility at yards and interchanges; to increased transit times; to reduced predictability of traffic flows and a lessened ability to adhere to efficient operating plans.⁴² The NPRM failed to address any of this evidence.

In this proceeding, CSXT has again presented detailed evidence of the specific kinds of harms that involuntary switching would pose to operational efficiency. The Verified Statement of CSXT Executive Vice President and Chief Operating Officer Cindy M. Sanborn demonstrates that the NPRM’s “impacts in network efficiency and service” would include:

- “[A]dd[ing] several switch events to even the simplest car movements” and thus increasing transit time by approximately 48 hours for even a simple involuntary switch⁴³;
- Degrading service for all cars that happen to be on trains with cars subject to involuntary switching, because the entire train must make additional stops to switch out cars⁴⁴;
- Increasing the costs of local service for all customers by adding switches and undermining service planning designed to maximize efficiency⁴⁵;

⁴¹ *Petition for Rulemaking to Adopt Competitive Switching Rules* at 9, Ex Parte 711 (July 25, 2012).

⁴² *See supra* at 7-8 & nn. 21-24 (citing evidence presented in Ex Parte 711).

⁴³ CSXT Opening Comments, Sanborn V.S. at 8-9 & n.3.

⁴⁴ *Id.* at 9-10.

- Forcing circuitous movements where involuntary switches would require cars to be diverted to different shipper-chosen yards and interchange points⁴⁶; and
- Creating a lack of predictability that would make it difficult for railroads to adhere to yard blocking plans, allocate appropriate resources at classification yards, and provide scheduled and reliable rail service to customers.⁴⁷

In short, CSXT and several other parties have responded to Commissioner Begeman's call by presenting compelling evidence that involuntary switching will degrade rail service and disincentivize rail investment. But as discussed in Section I, the proponents of involuntary switching have done nothing to address the impact of involuntary switching on network efficiency and service. It is no answer for these parties or the Board to suppose that these impacts could be addressed in the future or on a case by case basis. As Commissioner Begeman observed, "[t]he question of impact, and the burden of analyzing that impact, cannot simply be avoided by promising to adjust or improvise other or new results on the fly."⁴⁸ After focusing so intently on rail service improvements over recent years, the Board should not consider a proposal that by its very nature will make the rail network less efficient and more susceptible to service problems.

⁴⁵ *Id.* at 10-11.

⁴⁶ *Id.* at 12-13.

⁴⁷ *Id.* at 14-15.

⁴⁸ See NPRM at 35 n.31 (Commissioner Begeman, dissenting in part). Indeed, the NPRM's suggestion at page 17 that the Board would mitigate adverse impacts by proceeding case by case would only encourage shippers to file many involuntary switching complaints as soon as they can, so that they could lock in involuntary switching orders before network fluidity and other concerns cause the Board to rethink how it approaches such requests.

C. How Will the Board Be Fair and Consistent?

Commissioner Begeman also asked how the undefined “case-by-case” approach suggested by the NPRM could lead to fair and consistent judgments, and what evidence parties would really have to present to prevail in an involuntary switching case.⁴⁹ The amorphousness of the NPRM is a matter of serious concern, and indeed the proposal is so vague as to be arbitrary and capricious on that ground alone.⁵⁰ But the proponents of involuntary switching have answered the serious questions about how such a vague proposal could be applied “fair[ly] and consistent[ly]” by ignoring fairness and proposing that the Board consistently put a thumb on the scales for involuntary switching.

Some shippers argue that the Board should eliminate the need for shippers to demonstrate market dominance.⁵¹ Others proposed “simplifying” market dominance, such as by presuming that a railroad has market dominance over any shipment with a revenue-to-variable cost ratio above 180% (despite crystal clear statutory language forbidding such presumptions).⁵² Some argue that shippers

⁴⁹ See NPRM at 35 (Commissioner Begeman, dissenting in part).

⁵⁰ See CSXT Opening Comments at 81-84 (NPRM “raises serious due process concerns” because it “fails to provide railroads and shippers with any notice of how the Board would resolve any request for reciprocal switching” and “fails to provide any meaningful standards to guide the exercise of the Board’s discretion”).

⁵¹ See, e.g., Opening Comments of Alliance for Rail Competition at 10, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016); Opening Comments of Western Coal Traffic League at 4, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016).

⁵² See, e.g., Opening Comments of National Grain and Feed Association at 11, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“NGFA Opening Comments”); see 49 U.S.C. § 10707(d)(2)(A) (“a revenue-variable-cost

ought to be able to force railroads to construct switching infrastructure where it does not exist.⁵³ And others ask the Board to shift the burden of proof to railroads for many critical issues, thus requiring railroads to prove that involuntary switching is not in the public interest (rather than shippers having to prove that it is in the public interest).⁵⁴

Putting a thumb on the scale for the proponents of involuntary switching is no way to make the process “fair.” If these groups had their way, the default would be that involuntary switching would be deemed to be in the public interest unless a railroad proved it was not. And even shippers who already have effective competitive alternatives would be free to use government regulations to artificially depress rail rates that Congress has decreed are effectively disciplined by the market.

In the end, the advocates of the NPRM seek to make sole-served status a wrong to be remedied. They seek to transform the privately held structure of the freight rail network to have the absolute minimum of sole-served locations and the absolute maximum of multi-served stations. They care not about the havoc that this transformation will cause to infrastructure investment, efficient operations, the basic need for differential pricing, and congressional intent underlying the current

percentage . . . that is equal to or greater than 180 percent does not establish a presumption that such rail carrier has or does not have market dominance”).

⁵³ See Opening Comments of Shipper Coalition at 40-41, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016) (“Shipper Coalition Opening Comments”).

⁵⁴ See, e.g., Shipper Coalition Opening Comments at 27-29; Opening Comments of Dow Chem. Co. at 4-5, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016).

statutory framework. Indeed, the whole point of involuntary switching for these parties is to undermine differential pricing by allowing shippers to force lower rail rates without having to prove that those rates are unreasonable under the Board's standards. Ultimately these advocates are seeking a transfer of earnings from railroads to themselves—a transfer that they seek notwithstanding the absence of any harm or wrongdoing caused by railroads. It is hard to see how such a regime could in any way be characterized as “fair.” And one can only imagine how fiercely these same parties would resist a regulation that required them to share infrastructure and equipment at their respective facilities with their competitors and provide mandated service to those competitors as the result of a government determination that the facility had sufficient “market power” or that forced sharing would be in the “public interest.”

D. What Is the Geographic Scope of the NPRM?

Another important fundamental question is the “reasonable distance” from a terminal within which the Board says it will allow involuntary switching.⁵⁵ As CSXT argued on opening, the proposal to allow involuntary switching outside commonly served terminal areas exceeds the Board's statutory authority. In 49 U.S.C. § 11102, Congress specifically distinguished between the geographic scope of terminal access under subsection (a)—which extended to “a reasonable distance outside a terminal”—and the geographic scope of subsection (c)—which contains no such language. It was well established at the time of Staggers that “reciprocal switching” was limited to commonly served terminal areas, and Congress adopted

⁵⁵ See NPRM at 35 (Commissioner Begeman, dissenting in part).

that well-established and geographically-limited meaning when it enacted § 11102(c).⁵⁶ Congress limited involuntary switching to terminal areas, and the Board simply does not have the power to order switching at any distance outside a terminal, whether arguably “reasonable” or not.

Proponents of reciprocal switching not only ignore this statutory limitation, but also seek to expand “reasonable distance” to reach virtually the entire rail network. Several shipper groups suggest that anything within 100 miles of a terminal is a “reasonable distance.”⁵⁷ Others say that no shippers should be disqualified based on distance to the nearest interchange and suggest that shippers located 140 miles from an interchange should be allowed to obtain involuntary switching.⁵⁸ Others suggest that any yard on the train’s route with a working interchange be deemed an appropriate point for involuntary switching (regardless of where it is located). These proposals ignore the clear statutory limits on the Board’s powers and are further evidence that these shippers’ goal is to move the Board closer to a brave new world of open access for all shippers.

E. What Principles Should Govern The Pricing of Involuntary Switching?

One final area where Commissioner Begeman’s call for the Board to not “cause greater harm than good”⁵⁹ is particularly apt is pricing of charges for

⁵⁶ See CSXT Opening Comments at 77-81.

⁵⁷ See NGFA Opening Comments at 6-7; Shipper Coalition Opening Comments, Crowley and Fapp V.S. at 31-32.

⁵⁸ See Opening Comments of National Mining Association at 2, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016).

⁵⁹ NPRM at 36 (Commissioner Begeman, dissenting in part).

providing involuntary switching. To be sure, the Board does not need to reach the issue of pricing, because the NPRM's proposals are unlawful and unwise and the Board should discontinue this proceeding. But if the Board were to adopt the NPRM despite its irreconcilability with the law and with sound regulatory policy, it has an obligation to not "cause greater harm than good" with unwise pricing policy. For this reason, CSXT's Opening Comments urged the Board to be mindful of the statutory requirement that railroads negotiate these charges in the first instance, the importance of adhering to economic principles, and the constitutional requirements that any price the government might ultimately have to set provide just compensation.⁶⁰ CSXT's Opening Comments encouraged the Board to act in accordance with its narrow statutory role of determining switching charges only where railroads cannot agree and to not develop its own specific pricing methodology. And CSXT urged the Board to follow basic economic principles so that any prices that the Board might have to determine would reflect demand-based differential pricing and include the full market value of the assets and services being provided, including lost contribution.⁶¹ That is not just wise regulatory policy—it is the bare minimum that the Constitution requires for requiring a railroad to provide switching access to its competitors.⁶²

Advocates of involuntary switching took a different approach, asking the Board to guarantee below-market fees in order to drive down rates. Several parties

⁶⁰ See CSXT Opening Comments at 85-96.

⁶¹ See *id.* at 92-93 & Willig V.S.

⁶² See *id.* at 94-96.

suggested simplistic cost-based approaches to compensation designed to result in rock-bottom prices.⁶³ And advocates of involuntary switching unanimously argued that the Board should not include any lost contribution because “the very objective of reciprocal switching” is to reduce rail rates.⁶⁴

It could not be clearer that “the very objective” of these shippers is not to promote “competition,” but rather to eliminate demand-based differential pricing by giving access to multiple railroads at artificially low regulator-determined prices. The true danger of the NPRM is revealed through these pricing proposals, which would risk the operating efficiency and financial sustainability of the entire rail network in order for a subset of shippers to obtain lower rail rates without having to prove that their rates are unreasonably high.

* * *

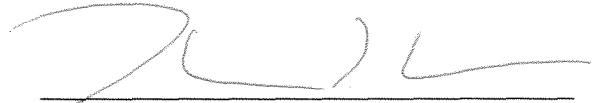
It is entirely appropriate for this agency to reexamine its regulatory policies from time to time to ensure that the regulatory scheme is consistent with Congress’s design. But when it does so, the Board must adhere to the statute and follow the evidence. It certainly should not rewrite important aspects of its regulations when the evidence is overwhelming that the change would have significant negative consequences. And it should not consider the complete restructuring of rail regulation when the proponents of the change already have a well-established, congressionally-approved remedy for their concerns—namely, the

⁶³ See, e.g., Shipper Coalition Opening Comments, Crowley and Fapp V.S. at 15-27.

⁶⁴ Opening Comments of Cargill, Inc. at 7, *Reciprocal Switching*, Ex Parte 711 (Sub-No. 1) (filed Oct. 26, 2016).

right to challenge the level of rates they believe are unreasonably high. Here, it is clear that the substantial harm that the NPRM would cause far outweighs any purported benefits, and the Board should close this proceeding with no further action.

Respectfully submitted,



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