

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

RECIPROCAL SWITCHING RULES

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**REPLY COMMENTS OF
THE DOW CHEMICAL COMPANY**

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Dated: January 13, 2017

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The Dow Chemical Company (“Dow”) hereby submits these Reply Comments in the above-captioned rulemaking proceeding. Dow’s evaluation of the opening comments submitted by various parties in this proceeding, including comments from those who oppose reform of the existing reciprocal switching rules, has not changed the position set forth by Dow in its Opening Comments on October 26, 2016 (“Dow Opening Comments”). Revised reciprocal switching rules are sorely needed in the rail industry, and the rule changes proposed by the Surface Transportation Board (“Board” or “STB”) in the Notice of Proposed Rulemaking (“NPRM”) on July 27, 2016 go a long way toward creating a balanced application of the statutory standard in 49 USC § 11102(c) and facilitating the competition necessary for a more efficient national rail network.

As mentioned in the Dow Opening Comments, Dow is a member of the American Chemistry Council (“ACC”). Dow fully supports the reply comments jointly submitted by ACC, the National Industrial Transportation League, and other interested parties in this proceeding (the “Shipper Coalition”). Dow is submitting these Reply Comments separately from the Shipper Coalition for the purpose of emphasizing those issues of greatest concern to it and to provide

examples from Dow's own experience. Dow has already provided an explanation of its identity and interest in this proceeding, and will not repeat that information here.¹ Instead, Dow uses these Reply Comments to respond to several of the objections raised by certain railroad parties in their opening comments to the rules proposed by the Board in the NPRM.

These Reply Comments focus on three main issues. First, the Board should carefully scrutinize the dramatically exaggerated contention advanced by several railroad parties that adoption of the proposed rules would be catastrophic and disastrous for the railroad industry and the rail network. The challenging case-by-case method proposed by the Board, as well as Dow's experience in Canada, suggests that use of reciprocal switching will be selective and depend on careful evaluation of circumstances such as traffic level, feasibility, and efficiency. Second, the Board must reject the railroads' claim that reciprocal switching can only be ordered in terminal areas. No such restriction exists in the plain language of the statute, and many authorities use the term "reciprocal switching" without reference to terminal areas. Third, the Board should permit shortline railroads to participate in reciprocal switching movements as the new competing carrier, and should allow reciprocal switching in those situations where a shortline is involved in the existing rail movement but would not be affected by the proposed switching. The Board should also consider, on a case-by-case basis, that there may be situations where a shortline railroad could also be the incumbent carrier in a reciprocal switching scenario.

¹ See Dow Opening Comments at 1-2.

I. The Board Should Reject the Railroads' Claim of Catastrophic Impact.

A. The challenging process envisioned by the proposed rules would ensure that reciprocal switching will be used only in select circumstances.

Several railroad parties have asserted that the scope of the proposed rules would dramatically and negatively affect the rail industry.² The Norfolk Southern Railway Company ("NS") has claimed that the proposed rules would have widespread impacts, arguing that, based on AAR numbers, up to 2.3 million carloads of traffic per year may be eligible for "immediate forced access" under the competitive rail service prong, and "a breathtaking 11.4 to 12.6 million carloads" may be eligible under the public interest prong.³

These expressions of alarm fail to withstand scrutiny. The process envisioned by the proposed rules would require "particularized analysis" of the specific reciprocal switching sought by the applicant, a lengthy procedural schedule, and evaluation of numerous factors.⁴ Discovery would almost certainly occur.⁵ The Shipper Coalition has suggested that a 210-day procedural schedule would be reasonable, but even this schedule omits the possible need for Board establishment of terms and conditions for the reciprocal switching.⁶ In the words of the Board, "the availability of reciprocal switching would not be presumed based on one-size-fits-all criteria, but instead would be based on factual determinations derived from the evidence provided by the parties."⁷ Parties would be required to submit evidence relating to the relevant factors "with specificity" based on the "factual circumstances of each case."⁸

² See, e.g., Association of American Railroads ("AAR") Opening Comments at 33-34.

³ NS Opening Comments at 56.

⁴ See, e.g., NPRM at 17-20.

⁵ See, e.g., NPRM at 42; Shipper Coalition Opening Comments at 30 (proposing 60 days for discovery).

⁶ See, e.g., Shipper Coalition Opening Comments at 30.

⁷ NPRM at 17.

⁸ NPRM at 18.

This is hardly the recipe for a free-for-all, as claimed by the railroads. Instead, the Board has proposed a challenging, time-consuming, and potentially expensive case-by-case process with several hurdles that must be met in each case. Moreover, railroads would hold the final card in any reciprocal switching case; as proposed by the Board, reciprocal switching would not be ordered if either the incumbent railroad or the new competing railroad shows that the proposed switching “is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.” NPRM at 18-19.

As a result of the challenging process proposed by the Board, shippers will be forced to be selective in where they seek reciprocal switching. In order to offset the expense and effort involved in a reciprocal switching case, the traffic level involved must be sufficient in volume and the anticipated benefits of the new rail movement (in better service, faster service, lower rates, etc.) would need to be ample. Based on the appropriate internal cost-benefit analysis of the relevant shipper, it is possible that reciprocal switching would be used for select movements, with a focus on plant origins that have volume density.

B. Reciprocal switching would facilitate efficiency and competition.

The railroads have advanced various scenarios, believing that the proposed rules would enable shippers to unilaterally and repeatedly shift their traffic to new railroads in unforeseen ways. Union Pacific Railroad Company (“UP”) asserted that “[o]ur network would be continually vulnerable to this new source of disruption, as shippers unilaterally elect whether and when to shift their traffic.”⁹ Similarly, CSX Transportation, Inc. (“CSXT”) referred to “pop-up traffic” that “could appear or disappear at any time.”¹⁰ These concerns lack plausibility. As an initial matter, most shippers are not capable of having their traffic changing back and forth from

⁹ UP Opening Comments at 43.

¹⁰ CSXT Opening Comments at 58.

one railroad to the next in rapid-fire fashion; predictability is just as important to shippers as it is to railroads. Dow and many other shippers frequently make use of on-site and off-site storage of loaded railcars before outbound shipment to customers. This intricate supply chain requires careful planning by shippers such as Dow, not to mention detailed coordination between the shipper and the serving railroad. This sort of arrangement cannot easily be transferred between multiple railroads as some of the opening comments have alleged.

Moreover, for reciprocal switching to occur, the applicant must first participate in an elaborate process at the Board with a procedural schedule of at least seven months likely.¹¹ The new competing railroad must want to provide the service, and this railroad would likely not be interested in a new rail movement unless there is a firm commitment from the shipper with sufficient duration and volumes. Therefore, the new railroad will likely require use of a medium-term or long-term contract.¹² In fact, Dow has experienced this exact phenomenon in Canada, where inter-switching often accompanies execution of a contract with a volume commitment.

Many railroad parties have asserted that the proposed rules, if adopted, would lead to unprecedented negative consequences for the rail industry. For example, NS claimed that the proposed rules would “wreak havoc on operating efficiency” and “harm all customers” due to “unforeseeable” impacts.¹³ A witness testifying for NS asserted that the rules would “put a significant strain on the future investment in U.S. rail infrastructure and the ability of the industry to meet the transportation needs of the U.S. economy.”¹⁴ Similarly, the AAR contends

¹¹ See, e.g., Shipper Coalition Opening Comments at 30.

¹² If the shipper refused to enter a contract, the tariff transportation rate established by the new, competing railroad could simply be established at a prohibitively high level.

¹³ NS Opening Comments at 50 and 54.

¹⁴ NS Opening Comments, Verified Statement of Michal Grajek, page 3.

that the proposed rules would allow “access on demand,” leading to a “restructur[ing of] the rail industry” as well as “an overall degradation in the efficiency and productivity of the rail network” and “damaging service failures.”¹⁵ According to the AAR, the proposed rules could also have “serious adverse effects on investment” because it would be “difficult to develop and implement an effective investment plan.”¹⁶ Both UP and CSXT expressed similar sentiments.¹⁷

Any theoretical reciprocal switching movement that would cause operational nightmares for either the incumbent or the competing carrier would not be ordered by the Board because the affected railroad could simply show that the proposed switching is not feasible, is unsafe, or would unduly hamper its ability to serve existing shippers. See NPRM at 19. Moreover, the new competing railroad would simply not be interested in any proposed reciprocal switching that caused operational problems. This lack of interest could be expressed by refusing to enter into a transportation contract with the shipper and/or setting a tariff rate at a prohibitively high level.

The Canadian experience is instructive. As the Board knows, inter-switching in Canada relies on a zone-based system without the need for individualized adjudication of every reciprocal switching request. The process is much simpler than that proposed in the NPRM. Despite this ease of use, a “wild west” free-for-all has not occurred in Canada. Instead, contracts are utilized, railroads work together, and efficiencies are gained.

The railroads expressing alarm about the NPRM also forget that there are many possible scenarios where reciprocal switching could create *more efficiency*. The railroads contend that

¹⁵ AAR Opening Comments at 2, 3, and 36.

¹⁶ AAR Opening Comments at 39.

¹⁷ See, e.g., UP Opening Comments at 40-43 (warning of “gridlock[ed]” terminals, “los[ing] “control” over traffic flows, and possible “service meltdowns”); CSXT Opening Comments at 59-60 (referring to a “cascading effect across the entire rail network...[thereby] harming all customers”).

reciprocal switching would inevitably create more car handlings and interchanges¹⁸, but this is plainly not true. Many scenarios exist where reciprocal switching would merely result in shifting the location of an existing interchange, not the creation of a new interchange. In these scenarios, the option of a different interchange location would enable the more efficient routing (and the more efficient railroad) to gain the traffic. This is how it should be – reciprocal switching would facilitate rail competition and efficiency.

Dow has a large manufacturing facility in Taft, Louisiana, captive to UP, that is less than 30 miles west of New Orleans. As Dow mentioned in its Opening Comments, a substantial portion of loaded shipments leaving Taft are gateway shipments that UP must interchange with other railroads.¹⁹ For nearly all of this gateway traffic, UP first takes the cars to its Livonia, LA yard (85 miles northwest of Taft), inserts them into long-haul trains, and then transports the cars to various distant gateways for interchange to other railroads. This operational method creates some lengthy rail movements that would be noticeably shorter if reciprocal switching at New Orleans were available.

In other words, UP takes the cars to distant gateways, creating longer hauls, even though UP could interchange with the same railroads in New Orleans, thereby facilitating shorter rail movements. For example, one such movement extends approximately 1782 rail route miles from Taft to the ultimate destination at Mountain Top, PA (a location where NS coordinates destination service). The routing for this 1782-mile movement is UP from Taft to East St. Louis, and then on NS from East St. Louis to the destination at Mountain Top. If reciprocal switching via New Orleans were available, this movement could be only 1378 miles in length, for a

¹⁸ See, e.g., CSXT Opening Comments at 52 (“the negative operational impacts of involuntary switching orders include increased car handlings”).

¹⁹ See Dow Opening Comments at 6-7.

movement from Taft to New Orleans on UP, and then New Orleans to Mountain Top on NS.

This reduction in mileage also comes about with no additional interchanges, thereby showing the fallacy of the railroads' claim that reciprocal switching inevitably increases car handling.

In the aggregate, Dow has estimated that approximately one million route miles could be saved annually for shipments from the Taft facility and a similarly captive Dow facility at Plaquemine, LA if reciprocal switching enabled interchanges to occur nearby rather than at distant gateways. All other things being equal, a decrease in route miles will reduce the time that shipments spend in transit, thereby reducing the number of rail cars that Dow must use to complete its shipping needs. With fewer cars on the rail network, congestion should be reduced, thereby leading to greater efficiency. In other words, reciprocal switching would create network-wide benefits where the incumbent railroad has historically forced the creation of inefficient routing in order to extend the length of its haul. Efficiencies can be facilitated by implementing blocking practices for those cars subject to reciprocal switching, something Dow already does for UP at Taft.

There are at least two other ways in which the railroads have greatly exaggerated the impact of the proposed rules. First, the incumbent railroad in any reciprocal switching scenario will not necessarily lose the traffic to the new competing railroad. In other words, any order of reciprocal switching by the Board only means that competition occurs between the incumbent and the new railroad. Based on the service terms, service details, and rates offered by the two railroads, the incumbent railroad may retain the shipper's business. Dow experienced this phenomenon in Canada at a large Dow facility served by Canadian National Railway but open to Canadian Pacific Railway through inter-switching.

Second, widespread use of reciprocal switching will inevitably be narrowed by the circumstances of individual rail movements. In particular, a shipment that is local to the serving railroad will almost certainly not be the subject of reciprocal switching because it would require two additional interchanges where previously there were none.

II. Reciprocal Switching Should Not Be Restricted to Terminal Areas.

Many railroad parties have argued that reciprocal switching can only be ordered inside terminal areas.²⁰ This fatally flawed argument is directly contradicted by the plain language of the governing statute, which includes no geographic limitation of any kind. Due to this plain language, the railroads' effort to include a terminal area limitation in 49 USC § 11102(c) fails as a matter of basic statutory interpretation.²¹ A brief glance at the remainder of 49 USC § 11102 confirms that no terminal area limitation was intended for reciprocal switching because a terminal limitation *is* explicitly included in §§ 11102(a) and (b), revealing that Congress intentionally omitted such a limitation from § 11102(c). “[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quotation and citation omitted).

Several railroad parties contend that “reciprocal switching” is a term of art that always means switching within a terminal area.²² Although the cases cited by the railroads describe reciprocal switching in terminal areas, there are many other cases where reciprocal switching is

²⁰ See, e.g., CSXT Opening Comments at 77; NS Opening Comments at 36; UP Opening Comments at 55.

²¹ See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984) (When a court reviews an agency construction of a statute, the court must first ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (citation omitted).

²² See, e.g., CSXT Opening Comments at 78; AAR Opening Comments at 45-46.

described without any reference to terminal areas. In a decision from the time period immediately prior to the creation of the reciprocal switching standard in the Staggers Act, a railroad sought reciprocal switching over extensive rail lines of a second railroad with no mention of a terminal area limitation.²³ Later Board decisions also use the term without reference to terminal areas.²⁴

Finally, many railroad parties assert that their long-haul rights under 49 USC § 10705 necessarily must prohibit the Board from ordering reciprocal switching outside terminal areas,²⁵ but Congress already provided for the possible conflict between § 10705 and the reciprocal switching statute. The plain language of § 10705(a)(2)(A) states that the Board may require a railroad to shorten its length of haul when “required under section....11102 of this title.” Therefore, a railroad’s long-haul rights are not violated by a reciprocal switching order outside of a terminal area.

III. Shortline Railroads Must Be Permitted to Participate in Reciprocal Switching.

In its Opening Comments, the American Short Line and Regional Railroad Association (“ASLRRA”) asserted that shortline railroads must be “completely exempt” from the proposed reciprocal switching rules.²⁶ ASLRRA contended that the rules would cause a “devastating financial blow” to shortline railroads because, generally, each such small railroad relies on only a few customers and because most shortline railroads cannot endure even a “token reduction” in

²³ Boston & Maine Corp., Debtor – Trackage Rights over Consolidated Rail Corporation between Rotterdam Junction, NY and Buffalo, NY, 360 ICC 239, 240-241 (1979).

²⁴ See, e.g., Illinois Central Railroad Company – Construction and Operation Exemption – In East Baton Rouge Parish, LA, STB Docket No. 33877, slip op. at 8 (n. 17) (served Feb. 20, 2002) (describing a reciprocal switching arrangement where “KCS, for a fee, transports the cars of other carriers over its lines to destination, thereby permitting those other carriers to establish single-line rates for this customer”).

²⁵ See, e.g., UP Opening Comments at 55.

²⁶ ASLRRA Opening Comments at 3.

revenues.²⁷ ASLRRRA also asserted that any reciprocal switching rule would “inevitably disproportionately hurt small railroads, regardless of an exemption in a rulemaking petition, because small railroads play such a key role in short-haul and switching operations.”²⁸

ASLRRRA was silent on the issue of whether a shortline railroad should be permitted to be new competing carrier in a reciprocal switching scenario. For the reasons advanced by Dow and other parties in the opening round, the Board should clearly state in the final rule that a shortline can be the new competing carrier.²⁹ Dow also agrees with the Shipper Coalition’s comment that, where a shortline is involved in an existing rail movement, but not as the incumbent carrier who would be paid the switching fee by the new carrier, then that existing rail movement should nonetheless be potentially subject to reciprocal switching.³⁰ For example, if a shortline railroad is the *destination* switching carrier for the final ten miles of a 1200-mile rail movement, then there should be no prohibition on reciprocal switching at the *origin* of the rail movement because the shortline would be unaffected.

Finally, Dow agrees with the comments of certain parties that the Board must retain the option to evaluate situations where a shortline is the incumbent railroad in order to prevent potential gaming or manipulation of the reciprocal switching rules.³¹ Such gaming could occur if evidence exists that a rail line was leased to a shortline solely for the purpose of avoiding reciprocal switching.

²⁷ Id. at 3, 8, and 9.

²⁸ Id. at 12.

²⁹ See, e.g., Dow Opening Comments at 9; Opening Comments of M&G Polymers USA, LLC at pages 3-4 (“M&G Polymers Opening Comments”); Shipper Coalition Opening Comments at 33.

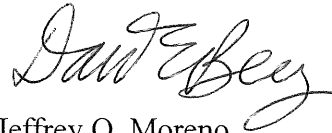
³⁰ Shipper Coalition Opening Comments at 33-34.

³¹ See, e.g., M&G Polymers Opening Comments at 5-8.

IV. Conclusion.

Dow appreciates the opportunity to participate in this rulemaking proceeding, and urges the Board to adopt the rules proposed in the NPRM with the minor refinements described herein. The proposed rules would enable rail competition, facilitate greater efficiencies, and improve the functioning of the nation's rail network.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David E. Benz". The signature is fluid and cursive, with the first name "David" and last name "Benz" clearly distinguishable.

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