



Freight Rail
Customer Alliance

October 26, 2017

BY ELECTRONIC FILING

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Docket No. EP 711 (Sub-No. 1), Reciprocal Switching

Dear Ms. Brown:

The Freight Rail Customer Alliance (“FRCA”) is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. FRCA’s members include individual shippers as well as trade associations representing more than 3,500 manufacturing and agriculture companies, electric utilities, fuel suppliers, and their customers, all with an interest in affordable and reliable freight rail transportation.

FRCA strongly supports the reciprocal switching relief that the Surface Transportation Board (“Board” or “STB”) has proposed in the Notice of Proposed Rulemaking that it served in the above-captioned proceeding on July 27, 2016 (the “Notice”). The reciprocal switching proposed in the Notice is long overdue and has the potential to help harness the forces of competition to provide relief for captive shippers in fulfillment of the statutory requirement in 49 U.S.C. § 10701(d)(1), that rates for captive shippers “must be reasonable.” A meaningful reciprocal switching option is particularly vital for the many captive shippers that are unable to obtain any benefit from the stand-alone cost (“SAC”) test and the Board’s other existing unreasonable rate methodologies.

The Board plainly has authority to grant the relief specified in the Notice since 49 U.S.C. § 11102 expressly empowers the Board to order reciprocal switching. Moreover, the Board has the inherent ability to reassess and alter the approach it previously articulated in *Midtec Paper Corp. v. Chicago & North Western Transportation Co.*, 3 I.C.C.2d 171 (1986). There have been substantial changes within the railroad industry in the thirty years since that decision. Those changes include the:

- ✓ Substantial consolidation within the railroad industry;
- ✓ Related elimination of many functional interchanges among competing carriers and associated reduction in competition; and,



- ✓ Robust health that the industry has achieved, which, particularly in recent years, has occurred through rate increases, rather than increases in volumes or productivity.

The difficulties and limitations in the Board's regulation of railroad rates have also become more apparent during this 30-year period. The observed problems include the:

- ✓ Immense cost (financial and time allocation) to bring a rate case(s);
- ✓ Fact that SAC cases do not work for most shippers, particularly those that do not utilize unit train service; and,
- ✓ Lack of desirable or attractive alternatives to the SAC test.

Under these circumstances, it is certainly permissible and reasonable for the Board to conclude that reciprocal switching relief should be more readily available and that a showing of anti-competitive conduct should not be required.

The reciprocal switching proposed in the Board's Notice can hardly be said to be infeasible or unrealistic. To the contrary, such switching has been shown to be entirely viable and beneficial in Canada, where it is broadly available, as contrasted with the case-by-case approach that is proposed in the Notice. The feasibility is further confirmed by the successful operations in the Conrail Shared Asset Areas in the United States following the acquisition of Conrail (Consolidated Rail Corporation) by CSX Corporation (CSX) and Norfolk Southern Corporation (NS).

The notion of using competitive access where direct rate regulation is ineffective, infeasible, undesirable, or otherwise subject to limitations is hardly radical or even novel. To the contrary, introducing competition into segments of industries that were previously perceived to constitute "natural monopolies" has become a common practice. The electric utility industry provides instructive examples. The ***Public Utility Regulatory Policies Act of 1978*** required utilities to purchase power from qualifying facilities under specified circumstances. The ***Energy Policy Act of 1992*** gave the Federal Energy Regulatory Commission ("FERC") broad authority to order one utility to wheel another utility's power over its system. In 1996, just a few years later, FERC later established broad competition in wholesale power by adopting "functional unbundling" of power and transmission and requiring open access in the transmission of wholesale power in its Order No. 888. A number of states have also adopted open access regimes for the retail distribution of power and of natural gas. The ***Telecommunications Act of 1996*** similarly based regulation of substantial sectors of the telecommunications industry in large part on competitive access. Thus, the Notice is a relatively modest



Cynthia T. Brown, Chief
October 26, 2016
Page 3

step towards aligning railroad transportation with measures that have become common and accepted for regulation of common carriers in other industries.

Moreover, it is especially significant that the Canadian Pacific Railway (CP) unilaterally and voluntarily proposed to extend terminal trackage rights and reciprocal switching, and other bottleneck relief to its United States operations as part of its recently proposed combination with NS. Whatever the merits of the proposed voting trust arrangements and other aspects of the proposed combination, the fact that CP, which has ample and successful experience with such arrangements in Canada, would propose to extend those arrangements broadly into the United States, is sufficient to demonstrate their feasibility and viability. It, however, should not take another proposed consolidation (or wave of consolidations) before such pro-competitive changes are implemented, particularly considering that the first element of the United States national rail transportation policy is “to allow, to the maximum extent possible, competition and the demand for serves to establish reasonable rates for transportation by rail.” 49 U.S.C. 10101(1).

The concern expressed by the Board in the Notice, that the railroads might respond to any loss in profits or margins associated with being required to grant competitive access by increasing the rates on other shippers, is misplaced. The railroads already have ample incentive – and demonstrated ability – to set the prices for those other shippers at profit-maximizing levels. If those rates are already optimized, any further rate increases would be offset by a volume decline that results in lower profits for the railroads. The fact that there may be some decline in volume associated with higher rates is by no means sufficient to demonstrate an absence of market dominance. *See, e.g., Arizona Public Service Co. v. United States*, 742 F.2d 644 (D.C. Cir. 1984).

The greater risk, in FRCA’s review, is that the carriers might respond to forced access on one segment of a movement by increasing their rates on ostensibly competitive segments, such that the shipper receives little or no benefit, despite the presumed availability of reciprocal switching relief. FRCA urges the Board to be alert and sensitive to this possible outcome and be prepared to take appropriate measures.

The Board’s proposed approach in this Notice is hardly perfect. First, particularly regrettable is the Board’s decision to proceed on a case-by-case basis and not present a specific pricing proposal for access to reciprocal switching. In contrast, “interswitching” is broadly available in Canada at rates that are specified in advance.

Second, the Board’s proposed approach in this Notice also has considerable potential to invite protracted litigation as the “rules,” such as they may be, are hashed out in individual cases. Whatever general pricing is eventually adopted will likely also require contested calculations and other



Cynthia T. Brown, Chief
October 26, 2016
Page 4

evidence from economists. In other words, the Board appears to be setting itself up to replicate the same problems and challenges that have come to characterize SAC rate cases.

Third, greater clarity is particularly needed to confirm that the potential availability, or even the actual award, of reciprocal switching relief should not serve to negate the existence of market dominance or otherwise reduce or compromise, in any way, a shipper's ability to pursue and obtain relief from unreasonable rates under the SAC test or other rate constraint(s). The possibility that reciprocal relief might be available should not establish the absence of market dominance. Similarly, the fact that reciprocal switching has been ordered and occurred does not establish or guarantee that the resulting rates constitute effective competition.

Fourth, the SAC test stands, by design, as the absolute maximum amount that any shipper should ever be forced to pay. Reciprocal switching should thus exist in addition to, not in lieu of, the availability of more direct relief for unreasonable rates. Substantial uncertainty attaches to both reciprocal switching and direct rate relief, which includes whether relief is available at all, the actual rates that result where relief is available, and the associated litigation cost and delay. In view of such uncertainty, a shipper should not be required to choose between the two, but should have the option to pursue either or both and select the outcome that is most favorable.

For the reasons noted, the reciprocal switching proposal in the Board's Notice is far from ideal, but it is certainly a long overdue step in the right direction, and it should be adopted. Accordingly, FRCA supports the revocations proposed in the Board's notice, recognizing that it leaves ample room for improvement, especially over time with the benefit of experience.

Respectfully submitted,

Ann Warner
Executive Director
Freight Rail Customer Alliance