USDA United States Department of Agriculture

Office of the Under Secretary
for Marketing and Regulatory Programs
Washington, D.C. 20250

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THE HONORABLE PATRICK FUCHS
Chairman
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

THE HONORABLE MICHELLE SCHULTZ
Vice Chairman
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

THE HONORABLE KAREN HEDLUND
Member
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

RE: STB Docket No. EP 788, Eliminating Regulatory Barriers To Competition: Review of Part 1144

Dear Hon. Chairman Fuchs, Hon. Vice Chairman Schultz, and Hon. Member Hedlund,

The U.S. Department of Agriculture (USDA) welcomed the Surface Transportation Board's (Board) January 7 notice of proposed rulemaking (NPRM) to repeal its regulations on "Intramodal Rail Competition" (49 CFR Part 1144)—hereafter Part 1144—which implements the Board's statutory authority to prescribe reciprocal switching agreements, through routes, and through rates. USDA supports the Board's proposal to repeal Part 1144.

As the NPRM noted, in the 40 years since Part 1144 was adopted, the Board has never issued a prescription under its framework, and USDA and other entities have long argued that the anticompetitive conduct requirement sets an unrealistically high bar for shippers to obtain relief. The Staggers Rail Act of 1980 (Staggers) gave the Board's predecessor—the Interstate Commerce Commission (ICC)—regulatory power to order reciprocal switching in two main cases: (1) when "practicable and in the public interest" or (2) "where such agreements are necessary to provide competitive rail service" (codified in 49 USC § 11102 (c)(1)). With the help of shippers and carriers, the ICC adopted Part 1144 and essentially merged Staggers' two main conditions for reciprocal switching into a single anticompetitive standard. In citing the "dearth of cases" and "continued shipper concerns about competitive options"—as well as industry changes like "improved economic health" and "increased consolidation"—the Board rightly concluded in its 2016 NPRM that Part 1144 "makes less sense in today's regulatory and economic environment" and "is overly restrictive." Thus, the Board's proposal to repeal Part 1144 is a promising first step in balancing the needs of carriers and shippers/receivers—as Congress intended in Staggers.

Over the past 15 years, the Board has held hearings and considered various reforms to reciprocal switching. USDA has supported those efforts, such as the Board's 2016 NPRM and 2024 rule (now vacated), to make reciprocal switching more accessible to shippers/receivers than it is currently. USDA continues to believe properly designed reciprocal switching enhances competition and incentivizes better service. Indeed, as the Board asserted in the NPRM, "increased access…may also incentivize carriers and shippers to privately negotiate competitive solutions."

USDA also recognizes the Board's challenge to implement the statute. Complex questions remain—on determining eligibility, the appropriate switching fees, definition of a terminal for switching, and definition of the "reasonable distance" for the switch to take place. As evident in the voluminous Ex Parte 711 (Reciprocal Switching) record, stakeholders' varied views make consensus-building difficult on any one of these questions. The Board's latest NPRM—as a key first step—would remove the insurmountable barrier to reciprocal switching. Next, the NPRM proposes to evaluate, case by case, the prescription of reciprocal switching (and other remedies), consistent with the underlying statutes and relevant to the specific facts of the case.

Making decisions case by case (as opposed to adopting "bright line" rules) has merit. For example—although a preset maximum switch distance provides clarity and may suffice for shipments originating from a terminal-adjacent factory—that distance may not suffice for a grain elevator in a remote region. However, a case-by-case approach also has drawbacks: for one, it gives shippers less clarity about whether their circumstances qualify them for reciprocal switching consideration. Also, their cases become much more costly to litigate.

Fortunately, there are ways for the Board to mitigate the drawbacks. For instance, shippers need assurance that, if they bring a petition to the Board, the case will be decided in a predictable and timely manner. Strict procedural deadlines and limits on discovery could help to minimize the costs spawned by a case-by-case approach. Furthermore, transparency would be critical in case-by-case proceedings on reciprocal switching—in the same way the Board has promoted transparency and accountability on other outstanding proceedings by providing regular updates. The Board's transparency would benefit all parties, as petitioners and respondents learn the circumstances and evidence brought and the ultimate outcomes. Publishing these details publicly boosts predictability, as prior cases (especially over time) provide loose guidelines on eligibility and reduce uncertainty on the chances of winning a case. A commitment to transparency also boosts fairness, as similarly situated cases are more likely to be treated similarly.

In evaluating cases, USDA encourages the Board to carefully consider the evidentiary burden on shippers that bring reciprocal switching petitions to the Board. In future cases, shippers should be expected to provide only information they have at hand or is publicly available, such as the economic benefits of a switch. If the Board deems the request has merit and is worth considering, then the burden of proving the costs of a reciprocal switching solution would outweigh the benefits, or that a switch is otherwise not practicable, should rest with the railroad respondent.

In conclusion, repealing Part 1144 is the right first step in making statutory relief available and finding solutions that better serve the public interest, or that correct for inadequate competition. Without any replacement regulation, petitions would be evaluated case by case. Such an approach may work well, provided the Board makes all relevant information public and places

any necessary evidentiary burdens on the party most able to meet the burden. However, USDA encourages the Board to continue judicious monitoring of shippers' use of reciprocal switching. If, for example, shippers continue to cite high rates or poor service—and still do not bring cases before the Board—STB may need to provide additional regulatory clarity as to eligibility, such as the guidelines it proposed in 2016.

Thank you for the opportunity to comment.

Sincerely,

Dudley W. Hoskins
Under Secretary
Marketing and Regulatory Programs