

Surface Transportation Board

**Docket No. EP 738
Regulatory Reform Task Force
July 25, 2017**

Written Statement of The Fertilizer Institute

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The Fertilizer Institute ("TFI") submits these comments for the record of the July 25, 2017 Regulatory Reform Task Force ("RRTF") Listening Session announced in a decision served in this docket on June 20, 2017.

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI's members play a key role in producing and distributing vital crop nutrients, such as nitrogen, phosphorus and potassium, which facilitate the production of healthy and abundant supplies of food, fiber and fuel. Fertilizers make it possible for farmers to grow enough food to feed the world's more than 7 billion people. TFI members rely heavily upon rail transportation to produce fertilizers and transport them to farms. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, and economic information and public communication programs.

TFI supports the RRTF mission to identify rules and practices that are burdensome, unnecessary, or outdated, and to recommend how they should be addressed. Through these comments, TFI brings to the RRTF's attention certain existing regulations that are outdated, unnecessary and burdensome, resulting in collateral burdens and consequences in other regulatory areas also within the Board's jurisdiction. Those rules pertain to reciprocal switching and rate regulation.

In EP 711, *Reciprocal Switching*, the Board is considering repealing and replacing its existing regulations for prescribing reciprocal switching. Those rules, currently codified at 49 C.F.R. Part 1144, were originally adopted in Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), which was prior to most of the rail mergers that have consolidated the rail industry into eastern and western duopolies. Moreover, the Board has applied those rules to set an unattainable bar for obtaining reciprocal switching by requiring a showing that is equivalent to establishing a violation of the antitrust laws. *E.g.*, *Midtec Paper Corp. v. Chicago and N.W. Transp. Co.*, 3 I.C.C. 2d 171 (1986). This unattainable bar allows rail carriers with relatively short distance origin or destination bottlenecks to foreclose existing competitive options over non-bottleneck portions of their routes. Due to industry consolidation, the distances over which such competition is foreclosed has grown vastly longer than they were in 1985.

Setting a reasonable and attainable standard for reciprocal switching by replacing the current rules, as proposed in EP 711, will have significant deregulatory effects. Currently, captive rail shippers with rate and/or service problems must rely upon Board regulation to address those problems. Such regulation involves the Board in prescribing rates and directing alternative rail service. These regulatory remedies themselves are expensive and difficult to

pursue in a timely and cost-effective manner, which effectively leaves most captive shippers without any remedies at all. Reciprocal switching would alleviate the need for regulation of rates and service at all by allowing competition in the marketplace to resolve those issues where such competition already exists but is foreclosed by the incumbent rail carrier's short distance bottleneck.

Even in situations where the need for regulation is not completely eliminated, reciprocal switching still can significantly reduce the scope of such regulation. For example, in the absence of reciprocal switching, a bottleneck origin rail carrier is entitled to its long haul. If the actual bottleneck distance is just 30 miles out of a 500 mile movement on that rail carrier, and competition exists for the remaining 470 miles, the Board still must regulate the rate over the entire 500 mile route to protect the captive shipper from market power. In contrast, reciprocal switching at the origin would reduce the need for rate regulation to just the 30 mile bottleneck segment, allowing competition to determine a rate for the other 470 miles.

Although reducing the burdens of the current reciprocal switching rules would have a substantial deregulatory effect, such action will not completely eliminate the need for regulation. The Board's existing standards for ensuring reasonable rail rates are particularly cumbersome, time-consuming and expensive. The heart of the problem is the Board's use of stand-alone costs ("SAC") to measure rate reasonableness, which requires a shipper to design, construct, and operate a hypothetical alternative to the incumbent's rail service. The SAC process was created 30 years ago for unit train coal traffic and a very different rail industry and marketplace. Moreover, the Board has required shippers to present SAC evidence for the incumbent's entire route instead of just the truly captive bottleneck segments, which often are much shorter. As a consequence of this burdensome process, many captive shippers are without a truly effective means to redress unreasonable rates.

TFI, therefore, urges the RRTF to consider how replacing the outdated and burdensome reciprocal switching rules with new rules that reflect today's rail markets can have a positive deregulatory impact simply by allowing competition to function where it already exists. In addition, TFI supports efforts to develop alternatives to SAC that better reflect today's rail markets and are less arcane, costly and lengthy.

Respectfully submitted,



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