

SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub-No. 1)

Summary of Ex Parte Meeting between Association of American Railroads and

Surface Transportation Board Member Michelle Schultz

September 17, 2021

303047

AAR Attendees:

- John Gray, Senior Vice President, Policy and Economics
- Tim Strafford, Associate General Counsel and Corporate Secretary
- Fred Miller, Assistant General Counsel and Government Affairs Liaison

**ENTERED
Office of Proceedings
September 29, 2021
Part of
Public Record**

STB Attendees:

- Michelle Schultz, Board Member
- Michael Small, Attorney Advisor

Meeting Summary:

AAR thanked Member Schultz for the opportunity to meet. AAR explained that it was there to provide its views of the operational impacts of and legal arguments against the proposed switching rule.

AAR noted the long history of interests representing some railroad customers seeking government intervention in railroad routing and operation and the staleness of the record considering the 2016 Notice of Proposed Rulemaking ("NPRM"). AAR noted that analysis of the 2016 NPRM in the record used 2014 data and that the last time the Board considered the impacts of forced switching was the 2013 proceeding, which relied on data from 2011. AAR highlighted changes in the railroad operating environment in the last 10 years including recent disruptions related to pandemic and uneven economic recovery around the world and its implications to the international supply chain. AAR also pointed to its filings that detail that forced switching should not be pursued by the Board as a means to circumvent its statutory responsibilities to regulate certain rates or judge a request for an alternate through route.

AAR highlighted key points in the written record, explaining that the 2016 NPRM did not set out a coherent rationale to change the existing competitive access rules and was legally deficient. Forced mandatory switching on-demand as considered in the 2016 NPRM would cause operational complexity and negatively impact network operations and other rail customers.

When asked about what the appropriate standard for ordering switching should be, AAR expressed its view that the appropriate standard for switching was a showing of anticompetitive conduct. Because switching is not intended to be a forum for reducing rates, it should be used to remedy abuses of market power other than unreasonable rates.

The conversation also incorporated examples of where switching agreements were included as conditions to merger approvals and the inherent benefits and trade-offs in a large transaction. Member

Schultz also asked how switching compares to trackage rights, and we discussed the differences between switching and terminal trackage rights.

When asked about overall impact to service that reciprocal switching would have, AAR responded that service would almost certainly deteriorate due to increased connections, would increase delay, and would likely impact other shippers.

Member Schultz asked about what a reasonable interchange distance would be. AAR expressed that distance is not the most relevant metric; the Board should take into account whether the switching is in a terminal area and the ability of the rail infrastructure to accommodate certain types of traffic. AAR noted that it was unaware of private switching agreements based on distance.

AAR also explained the different characteristics of Canada and the U.S. when it comes to switching, including the differences in the two countries' economies and population densities and the corresponding differences in their respective rail networks, the history of Canadian and American railroading, and the number of interchange points in each country where terminal switching can potentially occur.

Association of American Railroads
EP 711 and EP 711 (Sub-No. 1)
Reciprocal Switching
Comment Key

- Forced switching cannot be used as back door price regulation.
 - AAR Reply Comments EP 711-1, pgs. 5-15 (1/13/2017)
 - AAR Reply Comments EP 711, pgs. 37-38; Reply V.S. Eakin and Meitzen 12-15 (5/30/2013)
 - AAR Opening Comments EP 711, pgs. 29-33 (3/1/2013)
- There is no need to change the Competitive Access Rules.
 - History of Competitive Access Rules and through routes.
 - AAR Opening Comments EP 711, pgs. 24-29 (3/1/2013)
 - Competition in the rail industry is fierce and railroads face both direct and indirect competition. Switching already occurs between carriers where it makes economic sense and the facilities exist to accommodate it.
 - AAR Opening Comments EP 711-1, pgs. 15-18, 20-21 (10/26/2016)
 - AAR Opening Comments EP 711, pgs. 33-35, 40-43 (3/1/2013)
 - Neither a lack of cases, nor consolidation in the industry, indicate a problem that require rule changes.
 - AAR Opening Comments EP 711-1, pgs. 20-27; V.S. Rennie 5-8 (10/26/2016)
 - AAR Opening Comments EP 711, V.S. Rennie 19-23 (3/1/2013)
 - Improved financial health of the rail industry is no justification for changing the rules without showing of abuse of market power.
 - AAR Opening Comments EP 711-1, pgs. 27-29 (10/26/2016)
 - AAR Reply Comments EP 711, V.S. Fagan 6-7 (5/30/2013)
 - AAR Opening Comments EP 711, V.S. Rennie 6-18 (3/1/2013)
- AAR's filings in this proceeding have made clear the legal deficiencies of forced switching.
 - Forced switching should only be used as a remedy in instances of market failure or competitive abuse. The anticompetitive conduct standard is consistent with precedent that requires a showing of necessity for intervention.
 - AAR Opening Comments, EP 711-1, pgs. 7-13; V.S. Fagan 1-3 (10/26/16)
 - AAR Reply Comments EP 711, Reply V.S. Fagan 3-6 (5/30/2013)
 - AAR Opening Comments EP 711, pgs. 36-42 (3/1/2013)
 - Both prongs of the proposed rule would authorize switching without a compelling showing of need to address an abuse of market power.
 - AAR Opening Comments, EP 711-1, pgs. 13-19; V.S. Fagan 4-5 (10/26/16)
 - Forced switching cannot be used to restructure the competitive landscape of the rail industry.

- AAR Opening Comments EP 711, pgs. 23-29 (3/1/2013)
 - AAR Reply Comments EP 711, pgs. 34-42 (5/30/2013)
 - AAR Reply to Petition EP 711, pgs. 9-15 (7/27/2011)
- Forced switching would cause operational complexity and negatively impact network operations.
 - How switching rail cars between railroads works.
 - AAR Opening Comments EP 711-1, V.S. Rennie 8-12 (10/26/2016)
 - Testimony of William J. Rennie: Exhibits 2-4 (3/25/2014)
 - AAR Opening Comments EP 711, V.S. Rennie 24-39 (3/1/2013)
 - Forced switching on demand would degrade network.
 - AAR Reply Comments EP 711-1, pgs. 15-20 (1/13/2017)
 - AAR Opening Comments EP 711-1, pgs. 29-37; V.S. Baranowski 4-6; V.S. Rennie 8-12 (10/26/2016)
 - Testimony of William J. Rennie: Exhibits 5-7 (3/25/2014)
 - AAR Reply Comments EP 711, pgs. 20-23, 29-31, 35-41; Reply V.S. Eakin and Meitzen 15-20; Reply V.S. Rennie 4-16, 24-33 (5/30/2013)
 - AAR Opening Comments EP 711, pgs. 14-16; V.S. Eakin and Meitzen 6-7, 11-13; V.S. Rennie 40-90 (3/1/2013)
 - AAR Reply to Petition EP 711, pgs. 8-9 (7/27/2011)
 - Forced switching would impose unnecessary cost hurting all users of the rail network.
 - AAR Reply Comments EP 711-1, pgs. 15-20 (1/13/2017)
 - AAR Opening Comments EP 711-1, pgs. 37-41; V.S. Rennie 12-16 (10/26/2016)
 - Testimony of William J. Rennie: Exhibit 8 (3/25/2014)
 - AAR Reply Comments EP 711, pgs. 7-9, 17-31, 41; Reply V.S. Baranowski and Brown, 1-10; Reply V.S. Eakin and Meitzen, 1-2, 7-12; Reply V.S. Rennie 16-23 (5/30/2013)
 - AAR Opening Comments EP 711, pgs. 16-22; V.S. Baranowski and Brown, 5-10; V.S. Eakin and Meitzen 3-17, Appendix; V.S. Rennie 91-112 (3/1/2013)
- Interswitching in Canada does not support the NPRM proposals.
 - Canada has a different, less complex network.
 - Testimony of Phil Ireland EP 711, Exhibits 1-5 (3/25/2014)
 - AAR Reply Comments EP 711, pgs. 31-34, Reply V.S. Ireland and Case, 16-25, 27-40; Reply V.S. Eakin and Meitzen 12-15 (5/30/2013)
 - Canada's rail network was built with interswitching in mind.
 - AAR Reply Comments EP 711, Reply V.S. Ireland and Case, 11-15, 25-26 (5/30/2013)

- The structuring of compensation imposed by the Board must recognize the importance of differential pricing to a healthy railroad industry.
 - AAR Reply Comments EP 711-1, pgs. 35-40 (1/13/2017)
 - AAR Reply Comments EP 711, pgs. 14-19 (5/30/2013)
 - AAR Reply to Petition EP 711, pgs. 7-8 (7/27/2011)