

SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub. No. 1)

Summary of Ex Parte Meeting Between Norfolk Southern Railway Company

and Surface Transportation Board Chairman Martin Oberman

November 30, 2021

Norfolk Southern Attendees:

- Jim Squires, Chairman, President, and CEO
- Vanessa Allen Sutherland, Executive Vice President and Chief Legal Officer
- Raymond Atkins, Counsel to Norfolk Southern
- Randy Noe, AVP Regulatory Affairs

STB Attendees:

- Martin Oberman, Board Chairman
- Ellen Erichsen, Chief of Staff
- Adam Kress, Attorney Advisor

Meeting Summary:

Norfolk Southern thanked Chairman Oberman for the opportunity to meet and to engage in a constructive dialogue about an important issue with potentially wide-ranging impacts. Norfolk Southern expressed a desire to better understand what problems the Board is trying to address and resolve by modifying its reciprocal switching regulation.

Chairman Oberman stated there is significant interest in the shipper community for modifying the rule. He is interested in it because he generally wants the market to determine things and to the extent modifying the rule could create greater competition in the industry it could ameliorate service and other problems.

Norfolk Southern expressed concern about moving forward with the rule proposed in Ex Parte 711 (Sub. No. 1) given how much the railroad operating environment has changed in the last few years. At a time when supply chain shocks are causing disruption, a new regulatory model could create even greater difficulties. The meeting participants discussed whether and how supply chain challenges could be worsened by reciprocal switching and discussed an example of a reciprocal switch on Norfolk Southern's network that causes congestion.

Norfolk Southern raised a concern about imposing a new rule without fully understanding its operational impacts. Chairman Oberman was skeptical that a shipper would ask for a remedy that causes its service to deteriorate and that the Board would impose reciprocal switching where it would negatively impact a railroad's network. The meeting participants discussed whether shippers would fully understand the operational impacts of a forced switch.

Chairman Oberman relayed that most complaints he hears from shippers are about service rather than rates but he does not believe that "endless rate cases" are the best way to address a lack of

competition. He would prefer a mechanism that induces the private sector to solve its own problems and would be happy if that mechanism were never formally used.

The meeting participants discussed whether a reciprocal switching remedy would be effective at resolving service issues, with Norfolk Southern wondering why the existing regulation does not give shippers an adequate avenue for relief. Chairman Oberman responded that no new cases have been brought since *Mid-Tec* and the shipper's bar has expressed the belief that reciprocal switching cases are not winnable under the *Mid-Tec* standard. The meeting participants discussed whether the lack of cases brought under the *Mid-Tec* standard signals a problem with the standard and is sufficient justification for changing the rule.

The meeting participants discussed whether making a reciprocal switching remedy more widely available to shippers is really designed to avoid existing rate reasonableness mechanisms and place pressure on rates. Norfolk Southern expressed the concern that the economic well-being of the industry depends upon the ability of railroads to engage in differential pricing, and that a regulation disrupting that principle could have a negative impact upon the health of the industry. Chairman Oberman agreed that differential pricing is an important principle, but expressed concerns about existing rate reasonableness standards, which in his view have tended to favor the railroads since the early 2000s. He expressed a desire to change that dynamic without eliminating all opportunities for differential pricing. He also expressed the view that railroads do not appear to be in danger of not having enough money. Norfolk Southern responded that the proper measure of the industry's financial health is not cash flow but return on invested capital, and the rail industry's returns are not anticompetitive as evidenced by comparison to other industries with robust competition. Chairman Oberman replied that railroads are not like other industries because rail is regulated pursuant to a mandate from Congress and given the railroads' market power in many parts of the country.

The meeting participants discussed whether the Board should set standards for switching fees or be left for the Board to determine on a case-by-case basis. Norfolk Southern and Chairman Oberman agreed there are concerns with a case-by-case approach for setting compensation. Chairman Oberman expressed the view that all of a railroad's lost opportunity cost is not a good starting point for discussion because it would remove all incentives for a shipper to use reciprocal switching as a remedy.

Chairman Oberman thanked Norfolk Southern for meeting with him and for expressing its views on reciprocal switching.