

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Ex Part No. 711 (Sub-No. 1)

Reciprocal Switching

**MOTION OF THE ASSOCIATION OF AMERICAN
RAILROADS TO EXTEND THE PROCEDURAL SCHEDULE**

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The Association of American Railroads (“AAR”) respectfully moves the Surface Transportation Board (“Board”) for an extension of the procedural schedule in Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*. Specifically, AAR requests a 75-day continuance of the procedural schedule in this matter, including a corresponding continuance of the public hearing currently set for March 15 and 16, 2022, in order to give interested parties, including AAR, sufficient time to meaningfully update the record in a proceeding that has lay largely dormant since early 2017.

The Board has very recently clarified that the purpose of the public hearing, and its invitation of comments and written testimony in advance, is to reach a full and updated record that takes account of “significant operational changes,” among other developments, affecting the freight rail industry that have transpired in the five years since the Board last received comments in this proceeding. The Board has likewise announced that it contemplates closing the record following the hearing, meaning that this limited window for comment and testimony may be all that is available to interested parties. AAR respectfully submits that its proposed extension would not unduly prolong this proceeding and would support the Board’s goal in having a more complete and up-to-date record. In addition, an extension would increase the odds that the Board

could conduct this important hearing in person. Alternatively, if the Board declines to change the date of the public hearing, AAR requests a short extension of the deadline for written submissions prior to the hearing (without moving the hearing itself), and the opportunity to submit supplemental comments following the hearing.

BACKGROUND

The Board opened this docket by issuing a Notice of Proposed Rulemaking on reciprocal switching on July 27, 2016. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016) (“2016 NPRM”). Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017, relying on data from 2014 to assess the impact of the proposed rule. Following these comments, the proceeding did not advance to public hearings or a final rule and has remained essentially dormant in the time since.

The 2016 NPRM grew out of the Ex Parte No. 711 docket, which was initiated by a July 7, 2011 petition for rulemaking by the National Industrial Transportation League (“NITL”). *Petition for Rulemaking of the National Industrial Transportation League, Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte 711 (served July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014, with analyses relying on data from 2011 to assess the impact of NITL’s forced switching proposal.

On December 28, 2021, the Board issued a Notice of Public Hearing stating its intent to “hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed” through the 2016 NPRM. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1), at 1 (STB served Dec. 28, 2021) (“Notice”). It also set a deadline of January 27, 2022 for notices of intent to participate in the public hearing. *Id.* Although the Board had

previously issued a press release regarding the hearing, it had not indicated that it would entertain formal written comments prior to the hearing, or described the format for the hearing. *See STB, STB Chairman Announces Three Upcoming Public Hearings 2* (Nov. 12, 2021) (stating that “[i]nterested persons are invited and encouraged to engage in this public hearing”), <https://www.stb.gov/wp-content/uploads/PR-21-46.pdf>. In the later Notice, however, the Board set a deadline of February 14, 2022 for submitting “[w]ritten comments, including required written testimony by hearing participants.” Notice at 1. The Board further announced for the first time that comments and hearing presentations should be provided in a manner “so that . . . the record in this matter can be closed expeditiously.” *Id.* at 7.

The Board’s stated intent for holding a public hearing and inviting comments is “[t]o allow interested persons to submit testimony to update the record,” and “[t]o ensure a full and updated record in this proceeding.” *Id.* at 2, 6. Thus, the Notice specifically invites comments addressing certain topics, including:

- Any “additional or modified views on the effects and/or need for the proposed regulations” in light of “significant operational changes in and affecting the freight rail industry” in the time “[s]ince the issuance of the NPRM”;
- any other “new developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter’s views since the previous round of comments”; and
- “topics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding.” *Id.* at 6.

AAR’S REQUEST TO EXTEND THE PROCEDURAL SCHEDULE

AAR respectfully requests a 75-day extension of the procedural schedule—including the date of the public hearing—so that parties have sufficient time to meaningfully update the record in this proceeding in advance of the hearing. In the alternative, if the Board is not inclined to

grant an extension that impacts the date of the public hearing, AAR requests that (a) the deadline for submitting comments and testimony be extended from February 14 to March 7, 2022, a week prior to the public hearing; and (b) the Board allow parties the opportunity to submit additional written comments for a reasonable period following the public hearing in order to fully update the record in this proceeding. AAR believes that an extension to the procedural schedule is warranted—indeed, the only fair manner of proceeding—for the following reasons.

First, this proceeding has remained largely dormant since early 2017 and parties, their counsel, and experts need time to re-familiarize themselves with the record and prepare materials that supplement, rather than restate, previous submissions that date back to 2011. *See* Notice at 6. The Notice issued on December 28, 2021 set a deadline for submission of written testimony and comments updating a stale record just a few weeks out.* Some of the experts who have previously participated in this proceeding have retired or may otherwise be unavailable. It will naturally take time for parties to consider whether to work with a new expert and, if so, to select the most appropriate one in light of the focus of this phase of the proceeding. If no extension is granted, parties will be forced to identify and engage new experts, acquaint them with the voluminous yet outdated record in this proceeding, and work with them to prepare a written submission within a matter of only a few weeks.

* To the extent of AAR's awareness, interested parties generally had not begun specific work in anticipation of further written submissions before the Board issued the Notice on December 28, 2021. Although Chairman Oberman generally indicated his desire to consider issues related to forced switching and had issued a press release on November 12, 2021 announcing upcoming public hearings in certain proceedings including Ex Parte No. 711, *Reciprocal Switching*, the press release did not suggest that parties would be expected to submit new evidence in the form of further written comments and testimony with updated analyses to supplement the record before the scheduled hearing. *See* STB, *STB Chairman Announces Three Upcoming Public Hearings* (Nov. 12, 2021), <https://www.stb.gov/wp-content/uploads/PR-21-46.pdf>.

Second, the evidentiary record in this proceeding is particularly stale, and the necessary updates to the evidentiary record from the past five years are likely to be substantial and demand more than a few weeks' time to adequately capture in testimony and comments. Indeed, the principal data used for parties' previous analyses and submissions are now more than seven years old; to AAR's knowledge, no analysis has been performed using fresher data. The Board cannot rationally proceed to a final rule based on data that cannot easily be presumed to reflect current conditions. But updated data analysis will require time to complete, especially given that the relevant data are not immediately accessible to interested parties.

Parties' earlier comments submitted in this proceeding and in Ex Parte No. 711 included analyses drawn from the Board's confidential Waybill Sample data. Due to the lapse of time and changes to parties' counsel and expert consultants (including several retirements) authorizations to use Waybill Sample data in this proceeding have expired. AAR, for its part, submitted new requests for authorization following receipt of the December 28, 2021 Notice (which remain pending with the Office of Economics as of this filing). Naturally, it will take time for the Board's staff to process such requests and to transmit updated data. Moreover, although annual Waybill Sample data are often released in December of the following year, the Board has yet to announce the release of 2020 Waybill Sample data. Thus, although the Board has expressed particular interest in understanding parties' views on the proposed rule in light of the "significant operational changes in and affecting the freight rail industry" in the time "[s]ince the issuance of the NPRM" (Notice at 6), the key data is already two years old and does not reflect significant and important developments in the industry, including any observable impacts from global supply chain challenges during the pandemic. The few weeks the Board has allotted for preparation of submissions will be insufficient for parties to gather, digest, analyze, and present

relevant data in a manner that is both helpful to the Board and responsive to the Notice's guidance.

As just one example, several recent ex parte meetings have addressed consolidation within the railroad industry and any associated impacts on competition and bottlenecks. *E.g.*, *Summary of Ex Parte Meeting held by video conference August 10, 2021 between Shipper Associations and Surface Transportation Board Member Michelle Schultz*, STB Ex Parte 711 (Sub-No. 1) (Aug. 13, 2021) at 2; *see also* NPRM at 9. The Notice specifically invites comments on topics “discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding.” Notice at 6. Because consolidation among Class I railroads has not occurred since the 1990s, it would be natural to address the issue through an analysis of STB Waybill Sample data going back to 1992—data that have not previously been authorized for use in this proceeding. It is not feasible to properly complete such an analysis within the current procedural schedule, especially given that AAR is awaiting authorization to access the necessary data for such an analysis.

Third, as the Board knows, significant activity is underway in many other important, industry-wide proceedings before the Board that requires engagement in the coming weeks by many parties and counsel associated with this proceeding. For instance, in the following proceedings opening comments and reply comments are due January 14, 2022 and April 15, 2022, respectively: Ex Parte No. 655 (Sub-No. 2), *Expanding Access to Rate Relief*; Ex Parte No. 755, *Final Offer Rate Review*; and Ex Parte No. 765, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*. In those proceedings the Board is considering a variety of new rate case procedures, including the proposed Final Offer Rate Review procedure and establishing a voluntary arbitration program for small rate disputes.

Because all of those proceedings have industry-wide implications and involve many of the same parties and counsel as Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*, it is critical that the Board give parties sufficient time to present their views and create a proper record in each proceeding for the Board to consider.

AAR's proposed modification to the schedule in this proceeding is intended to accommodate the press of business in those other matters without creating overlapping deadlines, and to allow sufficient time for the analysis, testimony, and comment that the Board seeks—all while remaining consistent with the Board's stated objective of conducting proceedings so that "the record in this matter can be closed expeditiously," Notice at 7.

* * *

For the foregoing reasons, AAR requests a 75-day extension to the procedural schedule in this proceeding, including a continuance of the public hearing currently set for March 15-16. If the Board is not inclined to adjust the date of the public hearing, in the alternative AAR requests a three-week extension to the deadline for submitting comments and testimony—such that written submissions would be due on March 7, 2022, a week prior to the public hearing—coupled with the opportunity to submit supplemental written comments within a reasonable time following the hearing.

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Respectfully Submitted,

/s/ Benjamin J. Horwich

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