

ENTERED
Office of Proceedings
February 14, 2022
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING	)	Docket No. EP 711 (Sub-No. 1)
	)	
	)	

**ADDITIONAL COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

William L. Slover
John H. LeSeur
A. Rebecca Williams
SLOVER & LOFTUS LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for the
Western Coal Traffic League

Dated: February 14, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING	)))	Docket No. EP 711 (Sub-No. 1)
----------------------	-------------	-------------------------------

**ADDITIONAL COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

The Western Coal Traffic League (“WCTL”) submits these Additional Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Public Hearing (“Notice”) served in this proceeding on December 28, 2021.

BACKGROUND

WCTL is a voluntary association comprised of member organizations that purchase and ship coal from origins west of the Mississippi River. Since its founding in 1977, WCTL has actively participated in all major Interstate Commerce Commission (“ICC”) and STB proceedings involving rates, service and competitive access issues impacting western coal shippers.

WCTL’s participation in this case goes back to the beginning: the 1985 *Intramodal Rail Competition* proceeding.¹ In its comments in *Intramodal Rail Competition*, WCTL informed the ICC that the access proposals the ICC was considering, and later adopted, would not provide any “meaningful relief to captive

¹ *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff’d sub nom. Balt. Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

shippers.”² The 1985 rules remain on the books today,³ and, just as WCTL predicted, the rules have provided zero relief for captive shippers.

In its 2016 NPRM kicking off the Board’s latest foray into reciprocal switching, the Board candidly acknowledged that no shippers had obtained any switching relief under the 1985 rules⁴ and proposed changes that, the Board asserted, might, if adopted, make it possible for some shippers to obtain reciprocal switching relief.⁵ The Board proceeded to solicit comments.

In its comments, WCTL supported the Board’s efforts to reform its 1985 rules, but emphasized that (i) the Board’s proposals needed to be modified and clarified in order for them to be of any potential benefit to captive coal shippers,⁶ and (ii) even if the Board changed the rules in a manner that might allow some shippers to obtain a prescribed reciprocal switch, switching relief in and of itself would not be of any real benefit to captive shippers unless the involved carriers offered competitive rates and service terms for competitive origin-to-destination hauls.⁷

² See Joint Comments of WCTL and Consumer Owned Power Coalition, Ex Parte No. 445 (Sub-No. 1), at 4 (May 31, 1985).

³ See *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), slip op. at 4 (STB served July 27, 2016) (“NPRM”) (“Since adoption of the agency’s competitive access regulations in 1985, the regulations have not changed substantively.”).

⁴ *Id.* (“Few requests for reciprocal switching have been filed with the agency since [1985], and in none of those cases has the Board granted a request for reciprocal switching.”).

⁵ *Id.* at 9.

⁶ See Joint Comments of WCTL and Minnesota Power at 3-4 (Oct. 26, 2016).

⁷ *Id.* at 23-24.

Following its receipt of comments, the Board proceeded to take no action in this proceeding. Fed up with the delays in this and other consequential rulemaking proceedings, WCTL filed a petition, which the Board denied, asking the Board to decide this proceeding, and others, promptly.⁸ Now, some five+ years after it issued its 2016 NPRM, the Board (under new leadership), has served its Notice scheduling a public hearing in this proceeding and has given the parties the opportunity to submit additional comments.

ADDITIONAL COMMENTS

The Board's Notice asks for comments on the following topics: (i) new developments since January 2017; (ii) matters addressed in recent *ex parte* communications with Board Members; and (iii) changes in the commenters' positions set forth in their prior comments, if any.⁹ The Board's Notice also "strongly discourage[s]" parties from repeating arguments made in their prior comments.¹⁰

A. New Developments

The most important new development is President Biden's recent Executive Order urging the STB to adopt more pro-competitive reciprocal switching rules.¹¹ This request is one component of the President's broader agenda to "promot[e] competition in

⁸ See *Pet. by the W. Coal Traffic League Regarding Four Regul. Dockets*, Docket No. EP 740 (STB served May 17, 2018).

⁹ Notice at 6.

¹⁰ *Id.*

¹¹ See Exec. Order 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987, 36996 (July 9, 2021) ("Executive Order").

the American economy.”¹² As the President observes, “Federal Government inaction has contributed to these problems,”¹³ and this proceeding constitutes a paradigm case of “Federal Government inaction.”

To his credit, Chairman Oberman has responded positively to the President’s Order,¹⁴ and the Board has scheduled public hearings. Of course, additional process in the form of hearings, receipt of additional comments, etc., is of no moment unless the Board adopts new rules that may allow some shippers to obtain reciprocal switching relief.

B. Ex Parte Communications

WCTL has reviewed available summaries of ex parte communications. It appears that shippers participating in these sessions continue to advocate that the Board promulgate new pro-competitive reciprocal switching rules that conform to the positions these shippers have advocated in their comments.¹⁵ The major railroads also appear to be continuing to advocate that no changes be made in the rules because they like the status

¹² 86 Fed. Reg. at 36987.

¹³ *Id.*

¹⁴ See Press Release No. 21-29, STB, Statement from STB Chairman Martin J. Oberman on Executive Order on Competition at 1-2 (July 9, 2021), available at <https://www.stb.gov/wp-content/uploads/PR-21-29.pdf> (“I welcome the nationwide policy contained in this new Executive Order. The President’s emphasis on improving the competitive landscape across the entire economy fits well with my view of the Board’s mission in the current rail environment.”).

¹⁵ See, e.g., Summary of Ex Parte Meeting between Shipper Associations and STB Chairman Martin Oberman (filed Aug. 12, 2021).

quo – a status quo where the Board’s reciprocal switching rules do not provide any relief to rail shippers.¹⁶

The railroads are also arguing that their own service problems, brought on by “precision railroading,” asserted supply chain issues, etc., constitute changed circumstances that require the Board to shelve any changes to its reciprocal switching rules.¹⁷ These contentions are just the rail industry’s latest cry of “wolf” over any regulatory changes that might be of some benefit to rail shippers.

C. Change in Positions

WCTL’s positions have not changed since it filed comments in this proceeding several years ago. WCTL supports the Board’s efforts to reform its reciprocal switching rules so that the rules may provide some relief to some rail shippers. However, the rules need to be modified along the lines previously articulated by WCTL to provide the opportunity for captive western coal shippers to obtain any prescriptive relief. Since the Board asked parties not to repeat their prior arguments, WCTL will not do so here.

WCTL also emphasizes, as it did before, that even if the Board’s rules are modified so that a captive shipper can obtain a prescribed switch, Board-ordered reciprocal switching provides no meaningful marketplace relief in the form of lower prices (or better service) unless the carriers effectively compete for the long-haul business

¹⁶ See, e.g., Summary of Ex Parte Meeting between Association of American Railroads and STB Chairman Martin Oberman (filed Sept. 29, 2021).

¹⁷ *Id.* at 1.

at issue.¹⁸ When the ICC first promulgated its access rules in 1985, western rail carriers were beginning to compete aggressively for long-haul coal business. That aggressive competition stopped circa 2003¹⁹ and has not returned. Unless competition returns, positive Board action in this proceeding will be of no practical benefit to western coal shippers.

CONCLUSION

WCTL appreciates the opportunity to file these Additional Comments.

Respectfully submitted,

By: /s/ John H. LeSeur
William L. Slover
John H. LeSeur
A. Rebecca Williams
SLOVER & LOFTUS LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for the
Western Coal Traffic League

Dated: February 14, 2022

¹⁸ See Notice at 2 (“Reciprocal switching . . . enables a competing carrier to offer its own single-line rate to compete with the incumbent carrier’s single-line rate, even if the competing carrier’s lines do not physically reach a shipper’s facility.”).

¹⁹ See *Competition in the R.R. Indus.*, Ex Parte No. 705, WCTL Comments, Richards V.S. at 13-20 (Apr. 12, 2011).