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Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. Ex Parte 711 (Sub-No. 1)

RECIPROCAL SWITCHING

COMMENTS OF FINGER LAKES RAILWAY CORP.

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Dated: February 14, 2022

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Finger Lakes Railway Corp. (“FGLK”) files these Comments pursuant to the Board’s December 28, 2021 Notice soliciting written and/or oral comments to ensure a full and updated record in this proceeding. *Reciprocal Switching* Docket No. EP 711 (Sub-No. 1), Notice of Public Hearing, slip op. 6-7 (“Dec. 28, 2021 Notice”). FGLK has not previously provided comment on the Board’s proposed reciprocal switching rule issued in this proceeding as a Notice of Proposed Rulemaking on July 25, 2016 (“NPRM”).

Identity and Interest

FGLK is a Class III railroad headquartered in Geneva, New York that has been operating since 1995 in the Central and Finger Lakes region of New York. FGLK operates 167 miles of track in Ontario, Seneca, Cayuga, Onondaga, Yates, and Schuyler counties serving over 90 rail customers. FGLK connects with two Class I railroads, CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”), and with Class III railroad New York Susquehanna & Western Railroad.

Comment

FGLK is a member of the American Short Line and Regional Railroad Association (“ASLRRA”) and incorporates ASLRRA’s comments herein. FGLK joins the ASLRRA

opposition to the rule. But if the Board were to adopt the rule, FGLK also joins ASLRRRA in requesting that the Board specifically exempt Class II and III railroads from its application. The purpose for FGLK's comments as articulated in the attached testimony of Michael V. Smith ("Smith Testimony") is to explain, from a Class III operator's perspective, the negative impact that the rule as currently written would potentially have on FGLK and other similarly situated Class III railroads.

The proposed rule establishes a reciprocal switching arrangement "if the Board determines that such arrangement is either practicable and in the public interest, or necessary to provide competitive rail service."¹ Under these two prongs, the party proposing the reciprocal switching arrangement must show "that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s)"² or are served by a "single Class I rail carrier."³

According to the Board's Dec. 28, 2021 Notice, it appears that the Board does not intend for the proposed rule to apply to Class II and Class III railroads. The Board states, "[a]s additional limitations, the Board would require the establishment of a switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier."⁴ (Emphasis Added). However, the proposed rule as written, does not explicitly exempt Class II and Class III railroads.

These conditions precedent as proposed would potentially include facilities served by both FGLK and Class I carriers because the proposed rule does not negate application of the rule if a

¹ *NPRM* at 41, Appendix B proposed Part 1145.2(a).

² *NPRM* at 41, Appendix B proposed Part 1145.2(a)(1)(i).

³ *NPRM* at 41-42, Appendix B proposed Part 1145.2 (a)(2)(i).

⁴ Dec. 28, 2021 Notice at 4.

Class II or Class III also serves a facility; it only states that the rule will apply if a facility is served by a Class I carrier. As explained further in the Smith Testimony, in certain circumstances, FGLK shippers have a competitive option to receive service offered by either FGLK and either CSXT or NSR.⁵ Because the facilities can receive access from a Class I, the rule as written would potentially apply to FGLK's served customers.

In addition, the proposed rule is potentially applicable to a facility if a working interchange exists between the Class I carrier servicing the party seeking switching and another Class I carrier within a reasonable distance of the facilities of the party seeking switching.⁶ Under the proposed rule, the Board has left undefined the definition of a "reasonable distance." For a Class III railroad such as FGLK, this rule could be applicable to a significant percentage of carloads currently shipped on behalf of its clients. As explained in the Smith Testimony, on the 167 miles of track on which FGLK operates, every FGLK customer is within 40 miles of a Class I interchange. FGLK moves 7500 carloads for shippers located within 10 miles of a Class I interchange. This proposed rule as written puts those FGLK carloads at risk.

If the Board moves forward with the proposed rule, FGLK respectfully requests that the Board affirmatively exempt Class II and Class III railroads from the rule's application by revising the proposed rule to clearly state that it only applies to facilities physically served exclusively by a Class I carrier. Further, the Board should include a preamble to the rule stating that the rule does not apply to a facility physically served by a Class II or Class III carrier.

⁵ Only FGLK physically serves the customers; however, both CSXT and NSR have the right to offer rates directly to the customers.

⁶ *NPRM* at 41-42, Appendix B proposed Part 1145.2 (a)(1)(ii) and (a)(2)(iii).

Conclusion

For the foregoing reasons, FGLK respectfully requests that the Board decline to promulgate the proposed rule. In the alternative, if the Board decides to implement the rule, the Board should revise the rule to explicitly exempt Class II and Class III railroads, and facilities physically served by Class II and Class III railroads.

Respectfully submitted,



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TESTIMONY OF MICHAEL V. SMITH

My name is Michael V. Smith. I am President of the Finger Lakes Railway Corp. (FGLK) and have been so since FGLK was formed. FGLK is a Class III short line railroad established in 1995 and headquartered in Geneva, New York. FGLK operates 167 miles of track in six counties in the Central and Finger Lakes regions of upstate New York. FGLK interchanges traffic with CSX Transportation, Inc. (CSXT), Norfolk Southern Railway (NSR) and New York, Susquehanna & Western Railway.

FGLK is a member of the American Short Line and Regional Railroad Association (ASLRRA) and agrees with ASLRRA's comments provided in this docket. FGLK joins the ASLRRA opposition to the rule because we believe that the Board should approach the concept of reciprocal switching carefully and consider the potential harm that this rule could cause the railroad industry. However, if the Board were to adopt the rule, FGLK also joins ASLRRA in requesting that the Board specifically exempt Class II and III railroads from its application. Our concern is that the rule, as written, could expose FGLK and similar Class III railroads to the application of the rule.

FGLK began operations through its acquisition of rail lines from the Consolidated Railroad Corporation (Conrail). FGLK was typical of Conrail line sales at that time in that all

FGLK stations were also retained as Conrail stations. Conrail could establish rates to and from any FGLK station with FGLK receiving a per car switching allowance based upon commodity, car supply, and distance. A key part of the allowance arrangement was that whatever the Conrail tariffs were to its directly served customers on its line, customers at those same stations served by FGLK were afforded the same rates.

Under this arrangement, customers served by FGLK paid no “upcharge” reflecting FGLK’s allowance paid by Conrail. This arrangement protected both FGLK and its directly served customers from “differential” pricing at common stations that would normally favor the connecting Class I carrier. When CSXT and NSR acquired Conrail, CSXT and NSR assumed the Conrail/ FGLK agreement, and the joint station and allowance arrangements. As a result, all FGLK-served customers have access to both CSXT and NSR. Customers physically served by FGLK can negotiate with either CSX or NSR or both in order to secure their best combination of equipment, service, and rates.

Under the Board’s proposed rule, because FGLK customers are served by both FGLK and either CSXT or NSR, FGLK served facilities may potentially fall within the Board’s proposed rule. This is true because the rule can apply to facilities “served by Class I rail carrier(s)”¹ or are served by a “single Class I rail carrier.”² Because FGLK customers, although physically served only by FGLK, can receive service from CSXT or NSR under the allowance arrangements, this proposed language rule does not clearly exempt FGLK or facilities physically served by FGLK.

In addition, the proposed rule would apply if a working interchange exists between the Class I carrier servicing the party seeking switching and another Class I carrier within a

¹ *NPRM* at 41, Appendix B proposed Part 1145.2(a)(1)(i).

² *NPRM* at 41-42, Appendix B proposed Part 1145.2 (a)(2)(i).

reasonable distance of the facilities of the party seeking switching.³ Under the proposed rule, the Board would determine on a case-by-case basis how it would define a “reasonable distance.”

For perspective, on the 167 miles of track on which FGLK operates, every FGLK customer is within 40 miles of a Class I interchange. To provide the Board further perspective, FGLK moves 7500 carloads for shippers located within 10 miles of a Class I interchange. The proposed rule as written potentially puts those FGLK carloads at risk.

FGLK supports the ASLRRRA comments and its suggested revisions to the proposed rule because it is feasible that the rule, as currently written, could include facilities physically served by FGLK. Further, depending on how a future Board would determine the definition of a “reasonable distance,” FGLK could be at risk of losing a substantial number of carloads to CSXT and NSR.

FGLK opposes the proposed rule because FGLK customers already have competitive access to more than one carrier – FGLK and either CSXT or NSR. Other customers located on short lines across the national network may also have such competitive access. A broad-based imposition of reciprocal switching could “harm” short lines such as FGLK that already have secured - as a result of negotiations with connecting Class I carriers - the competitive access currently being considered by the STB.

Further, the STB should delay any decision on reciprocal switching until it has, in a thoughtful and deliberate manner, investigated the unique characteristics of current negotiated competitive access in the rail marketplace to ensure that the imposition of the proposed rule does not result in unintended harm to the marketplace. However, if the Board were to adopt the proposed rule, short lines and their directly-served customers should be affirmatively excluded from its applicability, as proposed by the ASLRRRA.

³ *NPRM* at 41-42, Appendix B proposed Part 1145.2 (a)(1)(ii) and (a)(2)(iii).

VERIFICATION

I, Michael V. Smith, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on February 14, 2022.

A handwritten signature in black ink, appearing to read "M.V. Smith", is written above a horizontal line.

Michael V. Smith
President
Finger Lakes Railway Corporation