

SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub. No. 1)

**Summary of *Ex Parte* Meeting Between Norfolk Southern Railway Company and Surface
Transportation Board Vice Chairman Michelle Schultz**

April 21, 2022

Norfolk Southern Railway Company Attendees:

- Thomas E. Zoeller, General Counsel, Markets & Regulation
- Randy Noe, Assistant Vice President for Regulatory Affairs
- Raymond Atkins, Counsel to NS

STB Attendees:

- Michelle Schultz, Vice Chairman
- Christopher Diamond, Attorney Advisor

Meeting Summary

Vice Chairman Schultz expressed her appreciation to Norfolk Southern Railway Company (NS) for the opportunity to continue the discussions on the Board's reciprocal switching proposed rulemaking. She expressed appreciation for the additional meeting to follow up on questions she had with respect to the discussions on 49 C.F.R. part 1147 during the Board's hearing in March.

The participants discussed to what extent, if any, the proposal in EP 711 (Sub-No. 1) could be narrowed in scope, and what, if any, burden would a shipper seeking relief be required to demonstrate. NS reiterated its long standing position that permanent prescriptions under 49 C.F.R. part 1144 must remain fault-based, and explained why the current standard is appropriate. This led to further discussions about the appropriate burden that a shipper must demonstrate.

The conversation transitioned to the Board's regulations at part 1147 and the standards for relief. Mr. Atkins provided some historical perspective with respect to the meaning of the statutory language "practicable and in the public interest," explaining that Congress used an existing standard which encompasses the "compelling need" test. Again, NS reiterated that this is a fault-based standard. There was discussion as to whether service failure/disruptions could be considered anti-competitive behavior. NS noted that a significant difference between the service inadequacy regulations at part 1147 and the 2016 proposal is that part 1147 provides temporary relief, while the proposal in EP 711 (Sub-No. 1) would provide permanent relief.

In discussing the relief offered at part 1147, the participants discussed the length of time that such relief would be necessary. NS suggested that relief could last, for example, 6 months or a year and a half, with an option to terminate early if circumstances support it. NS predicted, however, that shippers might want relief to last as long as 5 years. Vice Chairman Schultz expressed concern that 6 months of relief might not be realistic given how long the litigation would take.

Vice Chairman Schultz inquired as to what a shipper would need to present to the Board in seeking the relief under part 1147. In particular, she asked whether it would be necessary for a shipper to have a commitment from another available railroad prior to coming to the Board, and whether such a requirement is problematic from the standpoint of a shipper. NS indicated that there should be some showing by the other carrier that it was able and willing to accept the traffic, and that there should be some form of pre-notification by the shipper to the receiving carrier. NS and Vice Chairman Schultz discussed whether a 30 day period of some form of mediation could help determine whether the other carrier could accept the traffic and the details for any such alternate service.

Vice Chairman Schultz expressed concerns about picking winners and losers, about the voice of the smaller shippers in the debate, and about ensuring that regulatory remedies are fair and equally accessible to a variety of stakeholders.