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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING

Docket No. EP 711 (SUB-NO. 1)

**MOTION TO SET POST-EX PARTE
MEETINGS COMMENT PERIOD**

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Dated: July 29, 2022

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Norfolk Southern Railway Company (“NS”) respectfully requests that the Surface Transportation Board (“STB” or “Board”) establish the post-ex parte meetings comment period that the Board previously announced would occur in this proceeding. Once established, NS intends to respond to the ex parte meeting summaries filed since February 14, 2022, including with its submission a special study of its reciprocal switching operations that it conducted in response to inquiries during its ex parte meetings.

I. Background

NS has actively participated in this long-standing proceeding and has explained its serious concerns with the 2016 Proposal¹ in prior written comments.² Most recently, NS participated in a two-day hearing held on the 2016 Proposal on

¹ *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB served July 27, 2016) (“2016 Proposal”).

² See Opening Comments of Norfolk Southern Railway Company, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (filed Oct. 26, 2016); Reply Comments of Norfolk Southern Railway Company, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (filed Jan. 13, 2017); Supplemental Comments of Norfolk Southern Railway Company, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (filed Feb. 14, 2022).

March 15-16, 2022, as well as ex parte meetings with individual Board Members following the hearing.³

At the March 2022 hearing, the Board raised for the first time a new idea not previously covered by the 2016 Proposal: the idea of limiting reciprocal switching eligibility to places where reciprocal switching is already occurring. Following the hearing, the Board Members explored this idea and surrounding issues with NS in ex parte meetings, with NS committing to looking into a question about data on what percentage of its customers who are open to reciprocal switch actually use it.⁴ The idea of limiting reciprocal switching eligibility to places where reciprocal switching is already permitted and questions about the current use of existing

³ See Hearing Transcript, Docket No. EP 711 (Sub-No. 1), at 840-969 (March 16, 2022); Summary of Ex Parte Meeting Between Norfolk Southern Railway Company and Member Robert Primus, Docket No. EP 711 (Sub-No. 1) (filed May 11, 2022) (Filing ID 304532) (“NS-Primus Ex Parte Summary”); Summary of Ex Parte Meeting Between Norfolk Southern Railway Company and Member Karen Hedlund, Docket No. EP 711 (Sub-No. 1) (filed April 25, 2022) (Filing ID 304424); Summary of Ex Parte Meeting Between Norfolk Southern Railway Company and Chairman Martin Oberman, Docket No. EP 711 (Sub-No. 1) (filed May 5, 2022) (Filing ID 304503) (“NS-Oberman Ex Parte Summary”); Summary of Ex Parte Meeting Between Norfolk Southern Railway Company and Vice Chairman Michelle Schultz, Docket No. EP 711 (Sub-No. 1) (filed May 2, 2022) (Filing ID 304483) & (filed April 19, 2022) (Filing ID 304328); Summary of Ex Parte Meeting Between Norfolk Southern Railway Company and Member Patrick Fuchs, Docket No. EP 711 (Sub-No. 1) (filed April 4, 2022) (Filing ID 304218).

⁴ NS-Oberman Ex Parte Summary at 1 (“Chairman Oberman suggested that permanence may be more of a theoretical problem than a real-world one. He asked whether Norfolk Southern had any data on what percentage of its customers who are open to reciprocal switch actually use it.”); NS-Primus Ex Parte Summary at 1-2 (“Member Primus questioned how impactful a no-fault reciprocal switching regime would be, noting that not all shippers who have the option of using a reciprocal switch actually do so.” They “also discussed the difficulty in providing data on the percentage of customers open to reciprocal switch who actually use it.”).

reciprocal switching arrangements were discussed repeatedly in ex parte meetings with other parties as well.⁵

II. The Board Should Establish the Post-Ex Parte Meeting Comment Period

When the Board issued the 2016 Proposal, it provided a limited waiver of the ex parte prohibitions that applied at the time. Because “ex parte communications in informal rulemaking proceedings require special procedures to maintain both fairness and accessibility,” that decision established procedures for ex parte communications with Board Members, requiring meeting summaries and a post-ex parte meeting comment period.⁶ The 2016 Proposal stated that the Board would “provide notice when all meeting summaries have been posted in the record, and set a comment period for replies to the meeting summaries in that decision.”⁷ In a

⁵ See Summary of Ex Parte Meeting Between Industrial Minerals Association-North America / Glass Packaging Institute and Chairman Oberman, Docket No. EP 711 (Sub-No. 1) (filed May 19, 2022); Summary of Ex Parte Meeting Between The Dow Chemical Company and Chairman Oberman, Docket No. EP 711 (Sub-No. 1) (filed May 13, 2022); Summary of Ex Parte Meeting Between Association of American Railroads and Member Primus, Docket No. EP 711 (Sub-No. 1) (filed May 11, 2022); Summary of Ex Parte Meeting Between Association of American Railroads and Chairman Oberman, Docket No. EP 711 (Sub-No. 1) (filed May 5, 2022); Summary of Ex Parte Meeting Between Coalition Associations and Chairman Oberman, Docket No. EP 711 (Sub-No. 1) (posted May 5, 2022); Summary of Ex Parte Meeting Between The National Grain and Feed Association and Member Hedlund, Docket No. EP 711 (Sub-No. 1) (filed May 4, 2022); Summary of Ex Parte Meeting Between CSX Transportation, Inc. and Member Fuchs, Docket No. EP 711 (Sub-No. 1) (filed Apr. 4, 2022).

⁶ 2016 Proposal at 28.

⁷ *Id.* at 29.

subsequent order, the Board affirmed that “the period for comments on meeting summaries will be set by separate decision.”⁸

However, the agency has not issued a decision regarding the period for comment on the ex parte meeting summaries now that the ex parte period has closed.⁹ In its 2021 notice of public hearing, the Board modified the procedures for ex parte communications established by the 2016 Proposal, but only insofar as it permitted communications with up to two Board Members at the same meeting.¹⁰ It did not modify the 2016 Proposal’s procedures regarding notification that summaries had been posted and a period for comment on the meeting summaries. That decision did provide an opportunity to comment on ex parte communications that took place since October 25, 2016, with those written comments due February 14, 2022.¹¹ But no period has been established to comment on the many ex parte communications that have occurred since that time—for which there have

⁸ Decision, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 2 (STB served Sept. 1, 2016).

⁹ The agency announced in its quarterly regulatory report that the next action in this proceeding would occur in August, but did not specify the nature of the next action. *See Report on Pending STB Regulatory Proceedings, Second Quarter 2022*, Surface Transportation Board (July 1, 2022), <https://www.stb.gov/wp-content/uploads/Report-on-Pending-STB-Regulatory-Proceedings-2Q-July-1-2022.pdf>.

¹⁰ Notice of Public Hearing, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 7 (STB served Dec. 28, 2021).

¹¹ *Id.* at 6.

been over 50.¹² The period for ex parte meetings closed on May 6, 2022,¹³ and the latest meeting summary was posted to the docket on May 19, 2022.

In addition to having previously committed to providing such a period, the Board has repeatedly emphasized the importance of post-ex parte written comment periods. For example, in announcing a waiver of the prohibition ex parte communications in *U.S. Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 3 (STB served Nov. 9, 2015), the Board stated that “ex parte communications in an informal rulemaking proceeding requires special procedures to ensure fairness and accessibility,” including “the opportunity to file written comments on information presented during discussions.”

In 2018, the Board again emphasized the importance of such special procedures when it prospectively revised its regulations to permit ex parte communications in informal rulemaking proceedings.¹⁴ The Board recognized that ex parte communications can raise concerns, including “that interested persons may be unable to reply effectively to information presented in ex parte communications.”¹⁵ The Board stated that those concerns could be “remedied by

¹² The Board provided an opportunity to submit post-hearing written comments on April 4, but those comments were explicitly “limited to issues raised at the hearing or in written materials submitted in response to the Board’s December 28, 2021 [hearing] notice”—not ex parte communications. *Reciprocal Switching*, EP 711 (Sub-No. 1), at 1 (STB served March 23, 2022). In any event, numerous ex parte communications have occurred since April 4, 2022.

¹³ Decision, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB served Apr. 15, 2022).

¹⁴ Final Rule, *Ex Parte Communications in Informal Rulemaking Proceedings*, Docket No. EP 739 (STB served Feb. 28, 2018); 49 C.F.R. § 1102.2(g).

¹⁵ *Ex Parte Communications in Informal Rulemaking Proceedings*, Docket No. EP 739, at 7 (STB served Sept. 28, 2017).

implementing safeguards to ensure ... that parties have an opportunity to respond.”¹⁶ Specifically, the safeguards included “providing parties an opportunity to submit written comments in response to the summaries at the conclusion of the ex parte meeting period.”¹⁷

The Board affirmed this basic principle of fairness in the final rule in that proceeding, noting post-comment period ex parte communications are disfavored. For this reason, the final rule “incorporate[d] safeguards to ensure the rulemaking process remains fair and transparent, such as ... providing parties an opportunity to submit written comments in response to those summaries.”¹⁸

It would be highly unusual, if not unprecedented, for the Board to deny the public an opportunity to submit written comment following the ex parte communication period.¹⁹ Having held ex parte meetings in this proceeding pursuant to announced safeguards and procedures, it would be unfair and unwarranted for the agency to abandon those safeguards.

Given the number of ex parte communications that have occurred in this proceeding, NS suggests a 20-day comment period. That is consistent with the post-ex parte comment period established in *Final Offer Rate Review*, Docket No. EP 755, at 3 (STB served May 15, 2020) (20 business days)—a proceeding which has

¹⁶ *Id.*

¹⁷ *Id.* at 7-8.

¹⁸ Final Rule, *Ex Parte Communications in Informal Rulemaking Proceedings*, Docket No. EP 739, at 17-18 (STB served Feb. 28, 2018).

¹⁹ See *Final Offer Rate Review*, Docket No. EP 755, at 3 (STB served May 15, 2020); *Review of Commodity, Boxcar & TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1), at 2 (STB served Mar. 19, 2019); 2016 Proposal, at 28-29; *U.S. Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 3 (STB served Nov. 9, 2015).

been pending for far shorter than this proceeding, and in which there were fewer ex parte communications.

Once established, NS intends to respond to various aspects of the summaries of ex parte meetings filed since February 14, 2022, including: (1) the idea of limiting reciprocal switching eligibility to locations where reciprocal switching already occurs and (2) the flawed perception that expanding eligibility for reciprocal switching will have limited effect on railroad operations and investment incentives because few rail customers take advantage of current reciprocal switching options. A special study by NS of its reciprocal switching operations is directly responsive to questions and issues raised in ex parte meetings.

III. Conclusion

NS respectfully requests that the Board establish the post-ex parte written comment period that was previously announced in this proceeding.

Respectfully submitted,

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