

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING

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

submitted by

THE COALITION ASSOCIATIONS

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On Behalf of:
The Chlorine Institute

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The Coalition Associations¹ hereby submit this Reply to the “Motion to Set Post-Ex Parte Meetings Comment Period,” which Norfolk Southern Railway Company (“NS”) filed on July 29, 2022 (“NS Motion”). The NS Motion asks the Surface Transportation Board (“STB” or “Board”) to schedule a period for all parties to respond to the ex parte meeting summaries that have been filed since February 14, 2022, at which time NS intends to submit “a special study of its reciprocal switching operations that it conducted in response to inquiries during its ex parte meetings.” NS Motion at 1. The NS Motion may be rendered moot by a decision that the Board intends to serve later this month which may solicit additional comments in this proceeding.² If

¹ The “Coalition Associations” are the American Chemistry Council (“ACC”), The Chlorine Institute (“TCI”), the Corn Refiners Association (“CRA”), The Fertilizer Institute (“TFI”), and The National Industrial Transportation League (“NITL”). Except for CRA, each Association previously submitted comments in this proceeding as members of the Shipper Coalition for Railroad Competition (“Shipper Coalition”).

² In its most recent quarterly regulatory report to Congress, dated July 1, 2022, the Board stated that the next action in this proceeding would occur in August, but did not state whether that

so, the Board should clearly articulate a narrow scope for any such comments. As it relates to the NS Motion, any such pronouncement should clarify that *new* evidence on matters that were the subject of prior rounds of comment, such as the NS special study, is not permitted.

Otherwise, such comments would provide railroads with a *fourth* bite at the apple to argue that reciprocal switching will impair railroad operations and investments.³

I. **BACKGROUND.**

This proceeding began with a petition for rulemaking filed by the National Industrial Transportation League (“NITL”) on July 7, 2011, to revise the Board’s reciprocal switching rules. A full year later, the Board solicited comments and empirical analysis on the NITL proposal in a decision served on July 25, 2012. The Board received two rounds of comments from multiple railroad and shipper interests that included extensive waybill analyses and testimony from economic, financial, and operating witnesses about the potential impacts of the NITL proposal.

The Board took no further action in this proceeding for five years, until July 27, 2016, when it served a Notice of Proposed Rulemaking (“2016 NPRM”) that granted in part the NITL petition but proposed a different set of reciprocal switching rules. The Board again received two rounds of comments on that new proposal that once again included extensive economic, financial, and operating evidence and testimony. In addition, the Board engaged in *ex parte* meetings with stakeholders following the submission of comments.

action would be a final rule or a request for supplemental comments. <https://www.stb.gov/wp-content/uploads/Report-on-Pending-STB-Regulatory-Proceedings-2Q-July-1-2022.pdf>. There would be no need for the NS Motion if the August action is not a final rule.

³ Round 1 occurred in 2012; Round 2 in 2016; and Round 3 in 2022. In all three prior rounds, all parties had at least two opportunities to submit written comments and participate in *ex parte* meetings.

Again, this proceeding remained dormant for five more years, until the Board served its December 28, 2021, decision, which announced that, “[t]o allow interested persons to submit testimony to update the record, the Board will hold a public hearing and invite comments.” Dec. 28 Decision at 2. The Board expressly solicited comments on “new developments...that...are relevant to a final decision in this matter and...any change or significant development...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. After the hearing, the Board also permitted all parties to submit post-hearing comments on any subject matter presented at the hearings or in the pre-hearing written materials.⁴

The Board’s public hearing extended over two full days and the voluminous written testimony submitted both before and after the hearing covered the *same* subjects as the prior two rounds of comments with the *same* degree of thoroughness. The reality is that there was very little “new” evidence or argument presented; instead, the comments mostly represented attempts to place a new spin on prior arguments and to bolster prior positions with additional testimony and analysis of more current data.

In its Dec. 28 Decision, at 7, the Board also paused any further ex parte meetings until after the public hearing. In allowing for the resumption of ex parte meetings following the hearing, the Board declared that “all interested persons should endeavor to make their hearing presentations, both written and oral, complete so that the hearing will be as comprehensive as possible, repetition can be avoided, and the record in this matter can be closed expeditiously.” *Id.* at 7 (underline added). This statement placed all stakeholders on notice that the Board

⁴ Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, slip op. (served March 23, 2022).

intended to promptly close the record and proceed to a final decision without further public input.

II. THE NS MOTION

As recited in Part I above, this proceeding has a voluminous written record, including responses to the initial round of ex parte meetings, that has been accumulated over eleven years and three prior rounds of opening and reply comments. Moreover, the third and most recent round of comments did not raise any new issues or facts that had not previously been thoroughly addressed in the first and second rounds. Nevertheless, NS ostensibly requests an opportunity to respond to the ex parte meeting summaries, filed since February 14, 2022, and submit a special study of NS's reciprocal switching operations that NS asserts "is directly responsive to questions and issues raised in ex parte meetings." NS Motion at 1, 7.

NS has had three months since the May 6, 2022, close of ex parte communications to review the ex parte meeting summaries and identify topics to address in post-meeting comments. But all that NS has presented in its Motion are: "(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." NS. Motion at 7. The inability of NS to address those topics from the most recent ex parte meetings does not pose the "fairness and accessibility" concerns that ordinarily might arise as a consequence of ex parte meetings.

The first topic that NS has identified pertains to an idea that Chairman Oberman first floated at the public hearing to limit eligibility for expanded reciprocal switching to locations where such switching already occurs today. NS Motion at 2. The fact that Chairman Oberman raised this idea at the public hearing means that all stakeholders, including NS, had the

opportunity to respond to it in their post-hearing comments, which several parties did. Just because this idea also was discussed in some ex parte meetings does not by itself warrant a comment period on those ex parte meetings because the 2016 NPRM does not propose Chairman Oberman's idea. However, if the Board's anticipated decision later this month proposes the Chairman's idea or another alternative, and solicits supplemental comments on such proposal, that would provide the opportunity for comment that NS seeks.

The second topic that NS has identified is hardly new. That topic, as articulated by NS, is "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." NS Motion at 7. This is neither an accurate characterization of shipper arguments nor a new issue that NS could not have addressed in any of the three prior opportunities for comment.

The shipper argument on operating impacts consistently has been that the rail industry is exaggerating any such impacts with unrealistic, over-inflated estimates of the traffic volumes that will be switched and by focusing solely upon worst-case hypotheticals that inject additional interchanges into every route, while ignoring the most probable scenarios where there is a shift in the interchange location instead of an added interchange.⁵ Shippers have not denied the potential for operating issues to arise in *some* situations, but have supported the 2016 NPRM proposal to consider such evidence in individual cases.⁶ Furthermore, shippers have predicated their

⁵ "Reply Comments submitted by The Shipper Coalition for Railroad Competition," at 96-107 (filed Jan. 13, 2017).

⁶ *Id.* at 86-89, 107-10.

investment impact arguments on economic testimony, not estimates of switching volumes.⁷ NS cannot justify its Motion by twisting these arguments into something they are not.

Furthermore, the issues of reciprocal switching's impact upon rail operations and investment have been addressed extensively in all three prior rounds of comments.⁸ Woven throughout those comments has been evidence that the impacts will be less than the rail industry has claimed because far less than all potentially eligible shippers ultimately will pursue, qualify, obtain, and use reciprocal switching.⁹ The rail industry has made extreme claims about the effect of reciprocal switching upon operations and investment based upon vastly over-inflated traffic diversion estimates. The curtain was pulled back on those estimates during the recent hearing, so now NS desires an opportunity to argue that operations and investment would be harmed even at the more realistic and drastically reduced levels that shippers have estimated. Because shippers have critiqued the railroad's traffic impact estimates from the outset of this proceeding and presented their own more realistic estimates, the rail industry has had multiple opportunities to argue that, even at the lower shipper estimates, the railroads' operating and investment concerns

⁷ "Reply Comments submitted by The Shipper Coalition for Railroad Competition," at 103-04, 116-23, and "Reply Verified Statement of Kevin W. Caves, PhD" (filed Jan. 13, 2017).

⁸ See, e.g., "Opening Submission of The National Industrial Transportation League," at 58-64 (filed March 1, 2013); "Reply Submission of The National Industrial Transportation League," at 30-34 (filed May 30, 2013); "Reply Comments submitted by The Shipper Coalition for Railroad Competition," at 86-123 (filed Jan. 13, 2017); "Written Testimony submitted by The Coalition Associations," at 13-19, 22-26 (filed Feb. 14, 2022); "Post Hearing Comments submitted by The Coalition Associations," at 14-16 (filed April 4, 2022).

⁹ See, e.g., "Opening Submission of The National Industrial Transportation League," at 58-61 (filed March 1, 2013); "Reply Submission of The National Industrial Transportation League," at 30-34 (filed May 30, 2013); "Reply Comments submitted by The Shipper Coalition for Railroad Competition," at 89-95, 104, 108, 111-12 (filed Jan. 13, 2017); "Written Testimony submitted by The Coalition Associations," at 17 (filed Feb. 14, 2022).

remain valid. NS's desire for another bite at that apple does not establish a need or justification for submitting more comments on those subjects.

Therefore, if the Board does solicit supplemental comments in this proceeding, the Coalition Associations urge it to clearly delineate and narrowly tailor the scope of such comments to avoid rehashing the same issues that already have been the subject of three rounds of comments. Such delineation should expressly foreclose the second of the two topics identified in the NS Motion and, also, the first topic, if it is not the subject of a specific proposal in the Board's decision anticipated later this month.

Respectfully submitted,

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