

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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August 18, 2022
Part of
Public Record

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

RECIPROCAL SWITCHING

**PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION REPLY IN
OPPOSITION TO MOTION TO SET POST-EX PARTE MEETINGS COMMENT
PERIOD**

The Private Railcar Food and Beverage Association (“PRFBA”) respectfully replies in opposition to Norfolk Southern Railway Company (“NS”) Motion to Set Post-Ex Parte Meetings Comment Period submitted in the above-captioned proceeding. This proceeding has been pending before the Surface Transportation Board (“STB” or “Board”) since 2011 and requires no further comments to be added to an already voluminous record.

The Board opened this specific proceeding by issuing a Notice of Proposed Rulemaking (“2016 NPRM”) on reciprocal switching on July 27, 2016. *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB served July 27, 2016). On August 10, 2016, the Association of American Railroads (“AAR”) filed a request to extend the procedural comment schedule by 80 days which the Board granted. Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017. Following these comments, the proceeding did not move forward except for ex parte meetings and remained essentially dormant for years.

The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011, petition for rulemaking by the National Industrial Transportation League. Petition for Rulemaking of the National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (filed July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014.

On December 28, 2021, the Board issued a notice stating its intent to “hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed” through the 2016 NPRM. *Reciprocal Switching*, EP 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 28, 2021). The Board’s stated intent for holding a public hearing and inviting comments was “[t]o allow interested persons to submit testimony to update the record,” and “[t]o ensure a full and updated record in this proceeding.” *Id.* at 2, 6. On January 10, 2022, the AAR filed a motion to extend the procedural schedule which the Board denied.

There are now over 600 filings in the docket since EP 711 began. The STB has held two major public hearings and numerous ex parte meetings with interested parties in this matter. This proceeding requires no additional information and certainly no further delay. It is time for a decision.

The Board forewarned in its Final Rule regarding ex parte communications as follows:

Indeed, as WCTL argues, post comment period ex parte communications are disfavored by ACUS [Administrative Conference of the United States] given the propensity of those communications to delay proceedings if significant information is presented to the agency late in the process. (See WCTL Reply 8; see also 2014 ACUS Recommendation, 79 Fed. Reg. at 35,994.) ACUS notes in 2014 ACUS Recommendation that “the dangers associated with agency reliance on privately-submitted information become more acute” after the comment period closes and may require an agency to reopen the comment period. Post-comment period ex parte communications are also generally discouraged at several other agencies. See Final Report at 57, 59-60, 64

(noting prohibition or discouragement of post-comment period ex parte contacts at DOT, the U.S. Coast Guard, the Department of Education and the Federal Trade Commission). In addition, RCC's suggestion that the Board could permit written responses limited to just the ex parte communication meeting summaries could lead to disputes between commenters as to whether the response is properly limited to the summaries and put the Board in the position of having to resolve such disputes, which would only add to the complexity of the rulemaking process.

Ex Parte Communications in Informal Rulemaking Proceedings, Docket No. EP 739, at 17-18

(STB served Feb. 28, 2018). While the Board felt it was wise to have these ex parte meetings after the hearing and submitted comments to improve the record, more comments at this juncture will only lead to the delay problems ACUS and the STB were concerned about in these types of proceedings.

Based on the foregoing discussion, PRFBA strongly urges the Board to reject the NS motion seeking to further delay these already lengthy proceedings.

Respectfully submitted,

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