

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE No. 711 Sub-No. 2

PROPOSED CHANGES TO RULES
REGARDING RECIPROCAL SWITCHING

**COMMENTS OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION/IBT, BROTHERHOOD OF RAILROAD SIGNALMEN, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT #19,
INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL
TRANSPORTATION WORKERS MECHANICAL DIVISION, INTERNATIONAL
BROTHERHOOD OF BOILERMAKERS, NATIONAL CONFERENCE OF FIREMEN
AND OILERS 32BJ/SEIU, AND TRANSPORT WORKERS UNION OF AMERICA**

The Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, International Association of Machinists and Aerospace Workers District #19, International Brotherhood of Boilermakers, National Conference of Firemen and Oilers 32BJ/SEIU, and Transport Workers Union of America respectfully submit these comments in response to the Board's September 7, 2023 Notice of Proposed Rulemaking in this docket (Sub No.2) regarding its proposal to establish a new rule concerning required reciprocal switching.

The unions have in the past opposed new mandatory reciprocal switching rules. The unions therefore applaud the Board's decision to withdraw the rules proposed in docket Sub No. 1. With respect to the regulations proposed in docket Sub No. 2, the unions continue to oppose new mandatory reciprocal switching rules; they believe that such rules will have an adverse impact on rail workers, will not meaningfully remedy the problems the Board says it desires to

address in the proposed rules; and that there are more effective and appropriate ways to address those problems. However, since the Board has proceeded with proposed new reciprocal switching regulations, the unions will comment on the proposed regulations.

INTERESTS OF THE UNIONS AND THEIR MEMBERS

These unions represent the Maintenance of Way Workers, Signalmen, Sheet Metal Workers, Machinists, Boilermakers, and Firemen and Oilers employed by all of the Class I railroads, Carmen employed by NSR and CSXT, as well as railroad workers on other railroads. The railroads are the employers of the members of the Unions. It is the experience of the unions that when there are changes to the industry like new mandatory reciprocal switching rules, and resulting financial losses for the railroads, the railroads try to shift some of those losses to their workers. The unions therefore have a significant interest in regulatory changes that may diminish railroad revenues. Additionally, reciprocal switching involves movements of trains and crews of one railroad over the tracks of another railroad. Railroad industry collective bargaining agreements (“CBA”) contain scope rules that reserve the work of various crafts on a particular railroad to employees of that railroad in that craft, and rules that require that work assignments be made in accordance with the seniority of craft employees on the railroad that owns (or leases) the track. To the extent that an STB rule might require a railroad to act in a manner inconsistent negotiated scope and seniority rules, that is highly problematic for the unions. In the 1990s, there was a great deal of litigation among rail unions, the STB and ICC, and rail carriers concerning whether and when ICC/STB orders can override or negate provisions of a CBA. The unions continue to reject the authority of the Board to override CBAs, and they oppose rules that would have such effect.

POSITION OF THE UNIONS

1. The Unions applaud the Board's decision to withdraw the regulations proposed in docket Sub No. 1.

As noted above, reciprocal switching involves movements of trains and crews of one railroad over the tracks of another railroad, generally in contravention of existing CBAs. The rules proposed in docket Sub. No. 1 would have involved substantial incursions of foreign trains and crews on the tracks of railroads party to CBAs covering operations on the tracks of that railroad. Additionally, under the CBA of the foreign railroad, train crews of the foreign railroad would have no right or obligation to operate over the tracks of another railroad. So, the unions are pleased that the rules proposed in docket Sub No. 1 have been withdrawn. However, the regulations proposed in docket Sub No. 2 raise similar, albeit less substantial, concerns in that regard; in that trains and crews of a foreign railroad could be operating over the yard tracks of another railroad.

2. The unions welcome the Board's statement that if the proposed regulations are adopted, assertions by a railroad that the service problems identified by a petitioning shipper are the result of insufficient workforce or motive power will not be a valid affirmative defense to a shipper's petition.

As the Board is well aware, and as the unions have repeatedly shown, in recent years, the poor service experienced by rail shippers that the Board seeks to address through the proposed reciprocal switching regulation is a direct result of the railroads' adoption of a ruthless cost-cutting business model at the behest of finance interests in derogation of the service obligations of the railroads. As documented in other Board proceedings, the four largest Class I railroads have cut their work forces by nearly 30% since 2016 and about another 10% since 2019. *See* rail labor filings in docket No. Ex Parte 770. The unions have also shown that railroads have

mothballed locomotives and dramatically reduced the number of shopcraft employees who perform inspections, maintenance and repairs on locomotives. *Id.* Simply put, most of the industry's service problems are self-inflicted in connection with the incessant push to reduce operating ratios; mindlessly slashing the number of employees who provide and support rail service is necessarily going to negatively affect rail service. And mothballing locomotives is necessarily going to result in inability to respond to surges and changes in demand that require additional motive power. Accordingly, the Board correctly proposes that insufficient manpower and motive power will not be an affirmative defense for a carrier defending against a petition for reciprocal switching under the new regulations, if they are adopted.

3. If the Board adopts the proposed regulations or similar regulations, it should exclude Class II and Class III railroads as carriers that can participate in a forced reciprocal switch involving the tracks of a Class I railroad and cars moving on a Class I railroad.

If Board adopts new regulations under which a shipper may petition for a forced reciprocal switch based upon a showing of deficient service, the Board should clearly state that Class II and Class III railroads may not participate in a forced switch over the tracks of a Class I railroad, or in any way be allowed by Board order to operate over the tracks of a Class I railroad. Employees of many Class II and III railroads do not have the benefit of union representation and the protection of collective bargaining agreements. And employees of Class II and III railroads who have the benefit of union representation generally are not covered by agreements that equal the agreements between the unions and Class I railroads. Accordingly, not only would movement of Class II and III railroad crews over the tracks of a Class I railroad by STB order infringe on the rights of employees covered by Class I agreement CBAs, movement of Class II and III railroad crews over the tracks of a Class I railroad by STB order would undercut the terms of

agreements between the unions and Class I railroads, and involve the Board in devaluation of the unions' agreements with the Class I railroads. As noted above, in the 1990s there was a great deal of litigation, as well as strikes and strike threats because of ICC/STB orders that undercut negotiated agreements (including order authorizing the line sales that created many of the Class II and III railroads); the Board should not invite a recurrence of that strife by allowing Class II and III railroads to participate in STB ordered forced reciprocal switching.

Although the Board's definition of a Reciprocal Switching Agreement in the proposed regulations describes such an agreement as an agreement between one Class I rail carrier or its affiliated companies and another Class I rail carrier or its affiliated companies, the Board should include in a final rule a clear statement that, under the new regulations, Class II and III railroads may not participate in a forced switch over the tracks of a Class I railroad, or in any way be allowed by Board order to operate over the tracks of a Class I railroad. For similar reasons, to the extent a regulation would permit a switch involving an affiliated company, the Board should limit the meaning of "affiliated company" to subsidiaries or affiliates that are themselves Class I railroads (or are covered by a Class I railroad CBA), because some rail carrier subsidiaries or affiliates are not parties to the same levels of CBAs as are the Class I railroads. In the late 1980s and early 1990s, the Guilford railroads engaged in a series of mislabeled intra-corporate lease transactions that roiled the industry, disrupted and damaged the work lives of thousands of rail workers, extremely negatively impacted rail service in New England, and engendered 10 years of contentious litigation before the ICC, district courts and courts of appeals; the Board should

avoid repetition of that debacle.¹

4. Shippers have valid complaints, but required reciprocal switching is not the answer to their complaints.

In the last several years there have been increasing complaints by shippers regarding the quality of rail service. The unions are sympathetic to those shippers. Implementation of the new ruthless cost-cutting business model and PSR has indeed degraded the quality of service from the Class I railroads. Cutting over 30% of the work force (who provide, or support, the actual service), mothballing of equipment, reductions in inspection and maintenance of equipment and infrastructure, and the moves from unit trains to manifest trains and from manageably sized trains to three- and even four-mile-long trains necessarily negatively impacted rail service. With the proposed new regulations, the Board has decided to address the recent service problems by providing for forced reciprocal switching in terminals when service for a shipper that has practical physical access to only one Class I carrier falls below certain metrics. But required reciprocal switching is not the answer to the problems of rail shippers today.

Successful petitions for forced reciprocal switching would result only in tinkering around the edges of the problem of poor service under the new ruthless cost-cutting business model. Perhaps some limited number of shippers would gain in some limited number of situations. But, that will have only minimal impact on the overall problem of decline in the quality of rail service.

Shippers and the Board should instead look to holding railroads accountable to provide

¹ In its decision at p. 11 fn 9, the Board solicited public comments on whether third party agents of Class I carriers should be included as eligible participants in a compelled reciprocal switch. The unions are unsure of what entities the Board may have been referring to. But the unions oppose inclusion of any entity that is not party to a CBA between the unions and a Class I railroad in a compelled reciprocal switch. Inclusion of such entities would likely have the same impact as including a Class II or III railroad in a forced reciprocal switch.

the quality of service historically required of, and provided by, rail common carriers; the quality of service that was promised in the mega-merger and control transaction applications of the 1990s and the ICC/STB decisions approving those transactions, and that existed prior to the railroads' implementation of the new cost-cutting business model. What is needed to remedy the service problems experienced by shippers under the new business model is better definition of the common carrier obligation and better enforcement of that obligation; adoption of the proposed new regulations will not make a dent in those service problems.

Respectfully submitted,

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