

SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub-No. 2)

Summary of Ex Parte Meeting Between Norfolk Southern Railway Company

and Surface Transportation Board Member Michelle Schultz

November 15, 2023

Norfolk Southern Attendees:

- Tom Zoeller, General Counsel Markets and Regulation
- Randy Noe, AVP Regulatory Affairs
- Raymond Atkins, Counsel to Norfolk Southern

STB Attendees:

- Michelle Schultz, Board Member
- Jessica Caine, Attorney Advisor

Meeting Summary:

Norfolk Southern began the meeting by thanking Member Schultz and staff for meeting and for working to develop an approach to reciprocal switching that is superior to EP 711 (Sub-No. 1). Norfolk Southern then offered some suggestions for further improving the metrics-based approach the Board has taken in (Sub-No.2).

First, Norfolk Southern focused on how the proposal could be better tailored to fit the legal framework of the Interstate Commerce Act, specifically, by devising methods to tie the metrics to what Norfolk Southern believes is the applicable legal standard – the compelling need test. The discussion turned to ways in which the proposed framework could be adapted to account for the legal standard, including by allowing respondents to present evidence on whether a shipper is actually harmed by identified metrics and whether a reciprocal switch will remedy any identified harm.

Second, Norfolk Southern raised the possibility of benchmarking against competitive traffic to test for market failure and suggested the proposal permit railroads to present evidence on this point, perhaps as an affirmative defense.

Finally, the meeting participants discussed the rule's application to contract traffic and its pre-action discovery feature (i.e., upon customer request, the incumbent rail carrier would provide that customer all relevant individualized performance records necessary to file a petition), as well as the alignment of these provisions with the powers granted to the Board by Congress.

Norfolk Southern thanked Member Schultz and staff for the opportunity to discuss the Board's proposal in Sub-No. 2, and Member Schultz thanked the Norfolk Southern team for meeting with her and offering its perspective.