

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

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STB Docket No. Ex Parte 711 (Sub-No. 1)

NOTICE OF PROPOSED RULEMAKING

**REPLY OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EX PARTE 711 (Sub-No. 1)

**PETITION FOR RULEMAKING TO ADOPT
REVISED COMPETITIVE SWITCHING RULES**

**REPLY COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

Introduction

The American Short Line and Regional Railroad Association ("ASLRRA" or "Association") is an international trade organization with 973 active members consisting of 458 short line and regional, locally-based railroads ("Small Railroads") in 49 states¹, as well as 515 suppliers and contractors. The railroad members operate about 50,000 miles of track constituting 32 percent of the nation's rail system, largely connecting less populated, rural producing areas to major centers of consumption and import-export points. Small Railroads participate in 40 percent of all manifest freight movements but earn only five percent of the revenue generated on the national rail system. Small Railroads frequently provide the first and last mile of service on rail movements.

Small Railroads play a vital role in maintaining rail service over hundreds of miles of light density lines throughout the country that in many cases were candidates for abandonment by former Class I owners, many of which were divested subsequent to passage of the Staggers Act in 1980. The successor Small Railroads typically have short lengths of haul, high fixed costs of operation, and large capital needs for infrastructure investment, including the task of upgrading aging bridges and track to meet the current weight standard for loaded freight cars. They also face pervasive competition for freight traffic from trucks, barges, and intermodal transloading operations.

Executive Summary

ASLRRA continues to oppose the imposition of the proposed rules mandating reciprocal

¹ The ASLRRA also has railroad members in six Canadian provinces.

switching as proposed in a Surface Transportation Board ("STB" or "Board") Notice of Proposed Rulemaking ("NPRM"), as it would be extremely injurious to the national rail system. If, however, the Board determines to impose these forced access rules, it must completely exempt Small Railroads from the proposed rules. The adverse effects on Small Railroads would be financially devastating and could force some out of business, not only harming the carriers but potentially crippling the thousands of agricultural and industrial customers they serve.

Interest of the American Short Line and Regional Railroad Association

ASLRRA has participated in both Docket No. EP 705, Competition in the Rail Industry ("EP 705"), Docket No. EP 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules ("EP 711"), and combined in Docket No. EP 711 (Sub-No. 1), Reciprocal Switching ("EP 711, Sub-No.1"). In EP 705, ASLRRA submitted extensive comments, testimony and evidence clearly delineating why forced reciprocal switching and other proposals made by some shippers in that proceeding were not in the best interests of railroads, shippers, and the public. In particular, ASLRRA showed how Small Railroads face extensive competition and that imposition of forced reciprocal switching to facilitate more competition is not needed or warranted.

On July 7, 2011, the National Industrial Traffic League ("NITL") filed a petition seeking to modify the STB's standards for mandatory competitive switching. Its petition specifically exempted Small Railroads from the provisions of any such modified rules; however, the petition was ambiguous on such an exemption. In Ex Parte 711, ASLRRA continued to oppose imposition of rules mandating reciprocal switching as injurious to the national rail system. It also stated that if the Board determined to propose some sort of mandatory reciprocal switching, Small Railroads should be exempted from the proposed rules.

On July 27, 2016, the STB issued the NPRM, proposing rules that would allow a party to seek a reciprocal switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service, in accordance with 49 U.S.C. § 11102(c)(1). The NPRM established a procedural schedule pursuant to which opening comments were due by September 26, 2016, reply comments by October 25, 2016, requests for ex parte meetings by October 10, 2016, and ex parte meetings would take place beginning January 30, 2017.

Subsequent to the issuance of the NPRM, the Association of American Railroads ("AAR") and ASLRRA filed requests for an extension of time in the procedural schedule. In a

decision served on September 1, 2016, the STB extended the procedural schedule to provide for filing of comments to October 26, 2016, reply comments to January 13, 2017, requests for meetings with Board members to January 13, 2017, meetings with the Board members to occur between January 30 and February 17, 2017, and meeting summaries within two business days of the ex parte meetings.² ASLRRA intends to participate in the ex parte meetings with the Board members.

ASLRRA Comments

ASLRRA filed Comments in this proceeding on October 26, 2016, discussing the history of the proceedings and tracing its participation in them. In addition, ASLRRA iterated continued opposition to the proposed rules, again stating that mandatory switching should not be adopted and that Small Railroads must be exempted with specific, enforceable language should it be enforced.

ASLRRA also specifically addressed the STB's assertion that there is little information in the record on the potential detriment that would result to Small Railroads if they were made subject to the reciprocal switching prescriptions. ASLRRA cited at length evidence of record in Ex Parte 705, 711, and 711 (Sub-No. 1) about the adverse effect on Small Railroads if they are not exempted from the rules. It also provided explicit examples of the consequences of such rules for Small Railroads and stated that the exemption for Small Railroads proposed in the NPRM should be clarified.

Opening Comments or Statements by Other Parties

Over 114 Comments or Statements were submitted concerning the NPRM. Of those, 81 were Statements/Letters in support or opposition. Advocates gathered and caused to be filed 34 Statements/Letters supporting the proposed rules, seven of which were filed as late as January 4, 5, 6, 9, 11, 12, and 13, 2017. Adversaries gathered and caused to be filed 50 Statements/Letters in opposition to the proposed rules.

In general, supportive Statements/Letters say the change is needed because the anticompetitive rules now in place do not work because the Interstate Commerce Commission/STB has never ordered reciprocal access under it, the rail industry has changed dramatically since its promulgation, shippers need relief from the allegedly alleged monopolistic

² On December 27, 2016, the STB issued a Decision extending the deadline for ex parte meeting requests to a future date with new deadlines concerning the closure of the ex parte meeting period to be established in a future order.

practices of the Class I railroads, and variations on those themes. None of these Statements/Letters mentioned Small Railroads or opposed their exemption from the rules proposed in the NPRM.

The remaining filings ranged from relatively brief Comments opposing the NPRM to more extensive ones from the AAR and Class I railroads opposing it and relatively brief Comments supporting the NPRM. In addition, some shippers, shipper coalitions, and shipper associations filed more extensive Comments supporting it.

The ASLRRA Reply Comments focus generally on those Comments filed by supporters of the NPRM, specifically with the issue of whether Small Railroads should be exempted from the proposed rules. Insofar as some of the Comments suggest something that would adversely affect Small Railroads, such as setting fees for mandatory switching, ASLRRA will address those in the context of the suggestions that the STB should not exempt Small Railroads from the proposed rules. Because most of the Comments filed by the supporters address Class I issues, it is appropriate that the AAR and Class I carriers respond to them.

Exemption for Small Railroads

Seven Comments filed in support of the NPRM did not mention Small Railroads at all, while 15 argued in varying degrees that Class II and III railroads either should not be exempted or that the issue be decided on a case-by-case basis. The spectrum of views on this issue ranges from (1) do not exempt Small Railroads at all to (2) exempt Small Railroads from mandated reciprocal switching as the incumbent carrier but allow Small Railroads to seek access to a shipper served by an incumbent Class I carrier to (3) silence on the issue, the last inferring that they do not oppose exemption.

All those who advocate either no exemption for Small Railroads or a modified one start their argument with words to the effect that "given the lack of evidence about the adverse effects on Small Railroads" there should not be an exemption. This position totally ignores the overwhelming evidence of record adduced by ASLRRA in this proceeding and its predecessors. See, e.g., ASLRRA Comments and Testimony in Ex Parte 705 and 711 and Comments in this proceeding. The evidence contained in these documents shows in great detail the adverse effects that would arise if Small Railroads are not exempted from the proposed rules.

The lead supporter of the NPRM is the Shipper Coalition for Railroad Competition (the "Coalition")³. Most of its Comments address either its agreement with the NPRM or suggestions on how it should be changed or clarified. It argued that the STB's decision to reform its current reciprocal switching policy is justified legally and as a policy matter is based on the substantial consolidation and improved financial condition of the rail industry. The Coalition supports the Board's two-pronged approach but asked it to adopt procedures to govern reciprocal switch proceedings and to modify and clarify the two-prong criteria and urged expeditious finalization of the new rule. The Coalition's Comments are divided into nine categories, each with subcategories.

Regarding its position on exempting Small Railroads, the Coalition expressed its view that eligibility to access a shipper through reciprocal switching should be extended to Class II and III carriers under Category VI, beginning on page 31 of its Comments. While it believes the Board is correct in not making Class II and III carriers subject to a request for access through reciprocal switching by another carrier, the Board should allow Small Railroads to seek access to a shipper served by an incumbent Class I carrier.

The Coalition stated that limiting reciprocal switching prescriptions only to Class I's is unnecessarily restrictive, arguing that excluding Class II and III's from serving as the incumbent carrier under the proposed rules is rational due to their size and reach as compared to Class I's. The Coalition says that excluding short lines from mandated reciprocal switching as the incumbent carrier will protect them from the encroachment and economic power of Class I's that could seek to serve a Small Railroad customer. That view is supported by Comments from M&G Polymers USA, LLC, Shell Chemical LP. Cargill; the I-69 International Trade Corridor Next Michigan Trade Corridor, and the Shipper Coalition for Railroad Competition.

This suggestion by the Coalition and other shippers fails to address the problems a Small Railroad would have if not exempted from the proposed rules. For example, when a Small Railroad merely provides contractual services to a Class I carrier as its "first mile/last mile" switch carrier, if the incumbent Class I reduces its switching charge to meet the requirements of mandated switching rules, the Small Railroad inevitably will be pressured to reduce its rate to

³ The Coalition consists of the National Industrial Transportation League, and The Agricultural Retailers Association, Alliance of Automobile Manufacturers, American Chemistry Council, American Fuel and Petrochemical Manufacturers, American Petroleum Institute, Chlorine Institute, The Fertilizer Institute, Glass Packaging Institute, and National Association of Chemical Distributors.

reflect the government-mandated access fee. In practice, it will be impossible to insulate the Small Railroad from simple market dynamics driving down the rate it currently receives for providing the actual terminal delivery or originating the rail shipment.

The Coalition and other shippers that adopt its pricing approach fail to understand that their notion of calculating a fee for a reciprocal switching order simply does not work for Small Railroads. First, its proposal is based on system average costs and the Uniform Railroad Costing System ("URCS"). System average costs and URCS are derived from Class I operations and have no relevance to Small Railroad costs reflecting lower traffic densities and consequently higher fixed-cost components. Second, a regulatory limit based on any kind of variable-cost analysis would deprive Small Railroads of any recovery of the real cost driver for terminal or switching movements. In fact, "cost variability" in the pricing model for most Small Railroads is completely different than for Class I rates based in large part on length of haul.

A few shippers advocate that Small Railroads should not be exempted at all from the proposed rules, simply stating "no exemption" without explaining their rationale. A few say in essence that Small Railroads are merely extensions of Class I carriers, such that the new rules should apply to all. Other Comments contend that Small Railroads should be exempted, but if an interchange commitment is involved, the STB should provide a means for the shipper to benefit from the proposed rules – in short, the rules would supersede the contractual obligation. Those shippers are concerned that if Small Railroads are totally exempt, a Class I could sell or lease the first or last mile of its rail line to a Small Railroad, thus thwarting the intent of the proposed rules.

This view totally ignores all the adverse effects to be suffered by Small Railroads as a result of being covered by the proposed rules. As written in the ASLRRRA Comments, among those ill effects are:

- Generally, only a few customers account for the vast majority of traffic on Small Railroads. For example, oftentimes three customers account for two-thirds of the rail traffic shipped on each Small Railroad. Loss of all or a portion of the revenues from any one of those shippers would have a dramatic adverse effect on the financial viability of a Small Railroad in view of the high infrastructure and fixed costs that must be supported by those revenues.
- Unlike Class I railroads, the costs of Small Railroads cannot be spread over a vast rail system or large customer base. All of the freight revenues generated by

customers on a line of a Small Railroad are vitally necessary to sustain the financial viability of that line.

- While a Class I carrier may absorb a token reduction in overall revenues that generally compensate it for long haul moves as a result of re-regulation of switching charges, it is a far different matter for Small Railroads. The median length of haul for Class III railroads is only 15 miles, and switching operations represent almost all Small Railroad revenues if switching is defined as movements of less than 30 miles.
- When a Small Railroad is merely providing contractual switching services to a Class I carrier as its "first mile/last mile" switch carrier, if the Class I is either (a) required to provide another Class I carrier access or (b) reduces its switching charge to meet the requirements of a mandated switching rule, as a practical matter the Class I carrier will pressure the Small Railroad to renegotiate its contract to a lower rate reflecting the regulatory limitation applicable to the Class I carrier.
- In practice, simple market dynamics will eventually drive the price paid to the small railroad providing the actual terminal delivery or originating the rail shipment to the government mandated rate. It will be impossible to insulate the small railroad from the pressure to reduce switching rates to the level of a government-mandated access fee.
- A single fee schedule imposed upon Small Railroads would be an insurmountable calamity for most small carriers. It would inevitably be much lower than the revenue generated now, and there would be no place to find an offsetting increase in revenue or a matching reciprocal arrangement.
- The potential loss of Class I railroad revenue would be a small percentage of overall carrier revenues. The problem for Small Railroads is that a significant revenue reduction from even one large customer has an outsized impact.

For these reasons, the proposal to exempt Small Railroads from the application of the proposed rules should be, with the modifications suggested below, adopted.

Intermodal and Intramodal Competition Must be Considered

Some shippers supporting the proposed rules advocate that the STB not consider intermodal and intermodal competition when determining whether to impose reciprocal switching under the proposed rules. ASLRRRA submits that those two elements are imperative with respect to its members. Small Railroads face intense competition from trucks, barges, transload operations, and other railroads. They handle single-car traffic

largely subject to severe competition from trucks and barges. The very presence of the Small Railroad is strong evidence that competition to the interchange already exists. Before the Board orders mandatory switching, it needs to consider whether intermodal or intramodal services create competitive options for the shipment of goods. If they do, no forced reciprocal switching order should be issued.

The Exemption Must be Clarified and Enforceable

The proposed exemption language is ambiguous as written and needs to be clarified the avoid decimating Small Railroads. The STB should expressly limit the application to situations in which no Class II or Class III railroad participates in any situation where a Small Railroad participates in the movement of the traffic such as when a shipper seeks mandated switching at an origin or destination, regardless of whether the Small Railroad appears on the waybill.

Absent the addition of clarifying language described above to the NITL petition, one likely example of how Small Railroads would be drawn inadvertently into any mandatory switching rules involves movements in which the Small Railroad is not shown on the waybill, but still sets its own pricing for the final few miles of transportation to and from the customer. In this circumstance, the Small Railroad effectively is operating as a switch carrier. As originally written, if its connecting Class I railroad must offer a competing Class I access to the Small Railroad (as a function of its relationship with the original Class I railroad, which must comply with the rules), it may be forced to grant access over the Small Railroad route. Though unintended by the rules, the Small Railroad would involuntarily exchange its compensatory short-haul rate for a modest government-imposed access fee that would likely impact the overall viability of the small railroad.

The Board should expressly limit the application of the rules to situations in which no Class II or Class III railroad participates at any point in the movement of the traffic whether or not the Small Railroad appears on the waybill.

Additional issues arise if Small Railroads are not exempted from the proposed rules. The distinctive characteristics of countless railroad interchange and switching operations guarantee that a rigid set of government regulations imposed upon some participants will inevitably generate unintended and unforeseeable consequences for all, but particularly for the Small Railroads. If a mandatory switching scheme is adopted, Small Railroads will be

disproportionately affected because they play such a key role in short-haul and switching operations. As a practical matter, it is impossible for Small Railroads to remain exempt when they are such ubiquitous and active participants in the activity to be otherwise regulated.

Conclusion

ASLRRA submits that proponents of the proposed rules have not shown any cogent reasons to change a system that works well for railroads and shippers. The proposal would result in costly and lengthy litigation before the Board and would be injurious to the national rail system. If, however, the Board determines to impose these forced access rules, it must completely exempt Small Railroads from the proposed rules. The adverse effects of imposing the proposed rules on Small Railroads would be a devastating financial blow to them and could force some out of business, which would be harmful not only to them but more importantly to the customers they serve.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Linda Bauer Darr".

Linda Bauer Darr

President

American Short Line and Regional Railroad Association