

Surface Transportation Board
Ex Parte 711 (Sub-No. 1)

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April 11, 2019
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Summary of Ex Parte Meeting held April 4, 2019
between
the American Chemistry Council and National Industrial Transportation League
and Chairman Begeman

American Chemistry Council (“ACC”) and National Industrial Transportation League (“NITL”) Attendees:

- Spencer Pederson, Director, Federal Affairs, ACC
- Jeffrey Sloan, Senior Director, Regulatory & Technical Affairs, ACC
- Jennifer Hedrick, Executive Director, NITL
- Randy Mullett, Senior Policy Advisor, NITL
- Karyn Booth, Counsel to ACC/NITL
- Jeffrey Moreno, Counsel to ACC/NITL
- Jason Tutrone, Counsel to ACC/NITL

STB Attendees:

- Chairman Ann Begeman
- Valerie Quinn

Meeting Summary:

The meeting began with introductions, and ACC/NITL thanked the STB Attendees for the opportunity to meet and discuss the Board’s proposed rule and the issues in this proceeding.

ACC/NITL acknowledged that Chairman Begeman already was intimately familiar with the history of EP-711-1. Noting the Chairman’s dissent in the NPRM, ACC/NITL explained that they had tried to address each of her concerns in their comments and offered to address any concerns that Chairman Begeman may still harbor.

Chairman Begeman asked ACC/NITL to identify how rail network changes have impacted the access that could be available under the proposed rule. ACC/NITL explained that precision scheduled railroading likely would not impact competitive switching, because switches occur near origins and destinations rather than mid-route and observed that Canadian carriers were the first to implement precision scheduled railroading despite the Canadian switching rules.

Chairman Begeman asked about the number of competitive switching petitions the Board could expect in the first year. ACC/NITL explained that it does not expect a large number of cases because many shippers are reticent to be the first to file a petition, the purpose of the rule is to encourage behavior that would foster private solutions, traffic that is committed to multi-year contracts will ensure that petitions are spread out over time, and the Board’s experience with simplified standards for rate cases indicates that past fears that regulatory reforms would produce a flood of cases have not materialized.

Chairman Begeman asked whether ACC/NITL preferred clear thresholds for relief, like those in the NITL proposal. ACC/NITL explained that it prefers clear thresholds aimed at expediting relief in situations where competitive switching is clearly appropriate, but that the flexible standard in the proposed rule is still workable and acceptable from their members' perspective. In addition, the standards in the proposed rules, particularly the market dominance standard in prong 2, are based on established precedent that can be applied within a reasonable time frame. ACC/NITL also explained that shippers intend for the rules to encourage competitive conduct that would foster commercial solutions.

ACC/NITL explained that railroad opponents of the proposed rule overstated the operating impacts of competitive switching by focusing on switching scenarios that involve conversions from single-line to multi-line movements even though many competitive switching requests would merely involve changing the switch location of an existing multi-line movement from one existing interchange point to another. ACC/NITL also explained that railroad opponents of the proposed rule overstated the number of additional operations required to perform a switch, because switching that would occur at existing working interchanges would merely add cars to existing switching operations, without increasing the operational steps. They also noted that the railroad examples represented worst case scenarios that the Board can address through its case-by-case approach.

Chairman Begeman asked about the appropriate duration of a competitive switching order. ACC/NITL explained that each order should be permanent, subject to the affected railroad successfully petitioning for reopening the proceeding under which the order was issued. ACC/NITL also explained that if the Board desired to set a finite access period, the period should be sufficiently long to enable any operational adjustments to play out and to permit shippers to make sufficiently long contract commitments.

Chairman Begeman asked whether shippers who obtained competitive switching would use it on a shipment-by-shipment basis. ACC/NITL explained that shippers would enter long term contracts that would prevent shipment-by-shipment use of a competitive switching order, just as shippers with current competitive options do today.

Chairman Begeman asked why shippers do not bring cases under the existing rules. ACC/NITL explained that the standard for relief under the rules, which is competitive abuse, is too high and circular, given that competitive abuse cannot exist where there is no competition to abuse. They explained that railroads that use their bottlenecks to foreclose competition from downstream carriers along a route are presently engaged in a form of competitive abuse, but that the statute's origin carrier long-haul rule sanctions such conduct unless the Board has granted reciprocal switching.

Chairman Begeman asked why NITL did not oppose the current access rules when the Interstate Commerce Commission adopted them. ACC/NITL explained that shipper concerns at the time were elsewhere since there were many more railroads and captivity to a single railroad was not a major concern, they never envisioned how the Board would apply those rules in the *Midtec* decision, and the railroad consolidation that created today's lengthy bottlenecks had not yet occurred.

ACC/NITL explained the relevance of railroad mergers to the proposed rule, observing that mergers extended bottleneck distances, carriers willingly agreed to provide geographically broad competitive access as a condition of many mergers, and carriers have invested heavily in traffic that is subject to such competitive access.

ACC/NITL explained that predatory pricing is not likely to result from competitive switching because both railroads involved must cover their costs and predatory pricing does not happen where railroads compete today.

ACC/NITL explained that a competitive switching grant should not prevent a shipper from bringing a rate case. Although reciprocal switching will make it more difficult to prove market dominance, the presence of reciprocal switching should not automatically preclude a shipper from being able to do so. Because current precedent does not automatically preclude market dominance when two railroads directly serve a location, it makes no sense that reciprocal switching should automatically preclude a finding of market dominance either.

The meeting concluded with each side thanking the other for participating in the meeting.

EP 711 Ex Parte Meetings: Key Messages

- 1. Congress intended reciprocal switching to address railroad market power where (1) practical and in the public interest, or (2) necessary to provide competitive rail service. (Op. at 14-16; Reply at 14-17, 37-42)¹**
- 2. There is a strong need for reciprocal switching to address the exercise of railroad market power over captive shippers (Op. at 5-14; Reply at 19-37, 55-67).**
- 3. Reciprocal Switching is Deregulatory (Reply at 55-60).**
 - a. Reciprocal switching is not “artificial” competition created through reregulation, but a statutory tool to prevent carriers from foreclosing competition that otherwise exists on large portions of routes beyond a short distance bottleneck segment.
 - b. Competition would limit the need for rate regulation to the shortest captive distances.
- 4. Operational impacts are greatly exaggerated (Reply at 60-61, 96-116).**
 - a. Railroads have created “worst case” scenarios and misrepresented them as typical.
 - i. There will be zero operating impacts when the incumbent retains the traffic.
 - ii. Reciprocal switching does not impose additional operating steps on the incumbent when it occurs at an existing interchange.
 - iii. Case-by-case approach allows STB to deny switching in the “worst case” circumstances posited by the railroads.
 - b. Operating plans are not static, inflexible, plans as portrayed by the railroads.
- 5. Competition does not discourage investment (Reply at 116-22).**
 - a. Competition will spur investment by creating powerful incentives for each railroad to attract and retain competitive traffic, whereas the incumbent otherwise would have little need to make such investments to retain captive traffic.
 - b. Railroads have made extensive investments in highly-competitive traffic, including in areas with large concentrations of reciprocal switching.
- 6. Including lost contribution (i.e. “Efficient Component Pricing”) in the switch fee would nullify the benefits of reciprocal switching reform (Op. at 53-54; Reply at 131-33).**
- 7. The Board has ample information to act on reciprocal switching.**
- 8. Case-by-case approach enables the Board to consider cumulative impacts (Op. at 20-23; Reply at 86-89).**

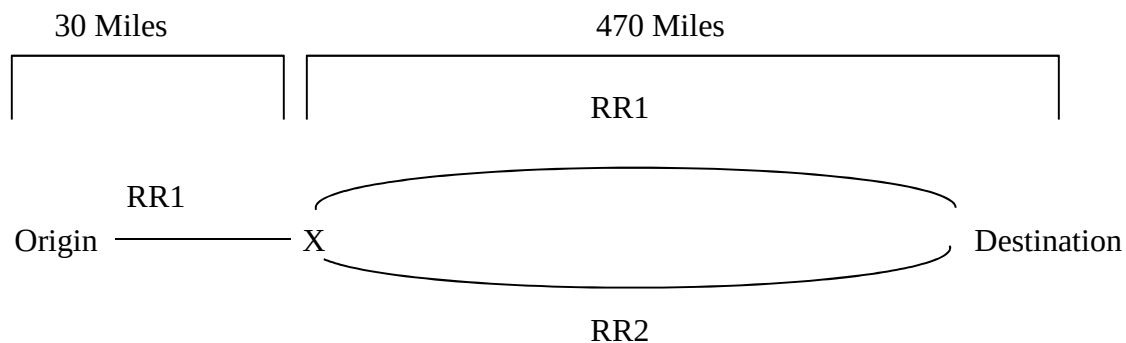
¹ References are to Shipper Coalition Op. Comments (filed Oct. 26, 2016) and Reply Comments (filed Jan. 23, 2017).

The STB's Ex Parte No. 711 Rulemaking Proceeding Is Deregulatory And Pro-Competitive

Objective: Allow competition to replace regulation of the rail industry when a competing railroad is accessible within a reasonable distance of an origin or destination that is captive to a single railroad.

How It Works: Upon a shipper's demonstration of a need for competitive rail service, the STB will grant a request for reciprocal switching, which requires a railroad to interchange the shipper's rail cars to a competing railroad within a reasonable distance of the captive origin or destination, provided that the interchange is safe and feasible.

Illustration:



Deregulatory

Impact: Today, existing regulations require the captive shipper to use RR1, in the above illustration, for the entire 500 mile distance, despite the ability of RR2 to compete for 470 miles. Therefore, to protect the captive shipper from monopoly pricing by RR1, the STB must regulate RR1's rate for the entire 500 mile distance.

Under EP 711, reciprocal switching will allow the STB to regulate just the first 30 miles of physical captivity to RR1, in the above illustration, and allow competition between RR1 and RR2 to determine the rate for the remaining 470 miles.

Additional

Benefits: Competition through reciprocal switching, instead of regulation, provides greater incentives for railroads to improve service and invest in new infrastructure that will make American businesses more competitive.

Competition through reciprocal switching will reduce reliance upon existing STB rate regulation, which requires incredibly complex litigation over several years and costs millions of dollars for an uncertain result. Because most captive shippers do not tender sufficient volumes between the same points over a sufficiently long time period to economically justify this time and expense, competition is a more effective constraint upon rail market power than rate regulation.

RECIPROCAL SWITCH SCENARIOS

Fig. 1

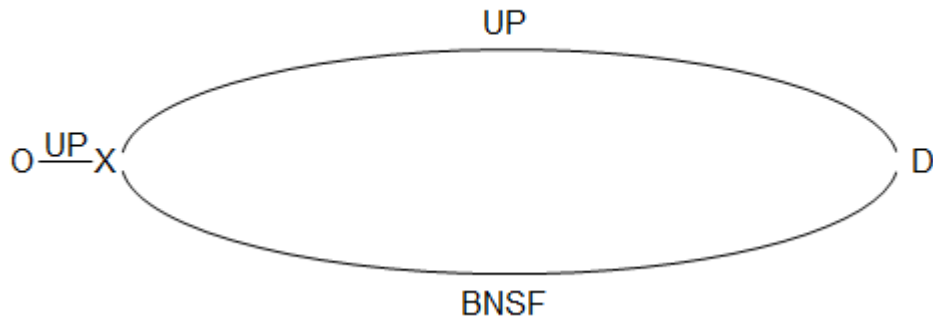


Figure 1, which is the only scenario the railroads address, converts single-line service to two-carrier service as a result of a reciprocal switch. Shippers are likely to request switching in this circumstance only when the competitive carrier offers other efficiencies to offset the additional handling.

Fig. 2

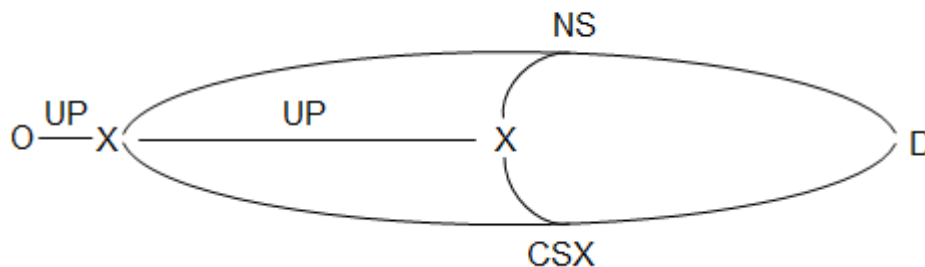
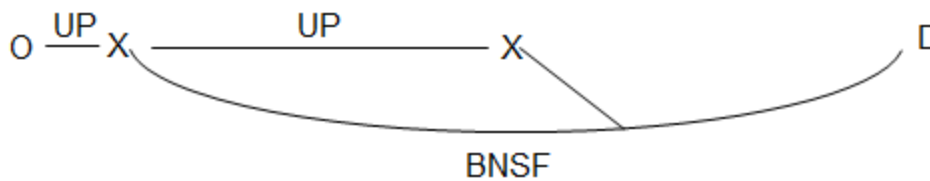


Fig. 3



Figures 2 and 3 reflect more common scenarios where reciprocal switching does not increase the number of interchanges or carriers in the route, but merely changes the interchange location.

- ❖ Figure 2 is a movement that occurs on east-west (and vice-versa) gateway movements where the origin carrier achieves its long-haul by handling the traffic in the north-south direction (and vice versa) for the longest distance that is practical before interchanging to the east-west carrier.
- ❖ Figure 3 is common in the west between BNSF and UP, in the east between NS and CSX; and along the Mississippi River between BNSF, UP, CN and KCS.
- ❖ In both Figures, reciprocal switching allows the destination railroads that participate in the route to claim a longer haul when they can be more efficient, without any additional handling.

Bottleneck Extensions Through Mergers

Pre-Merger



Post-Merger Scenario 1



Post-Merger Scenario 2

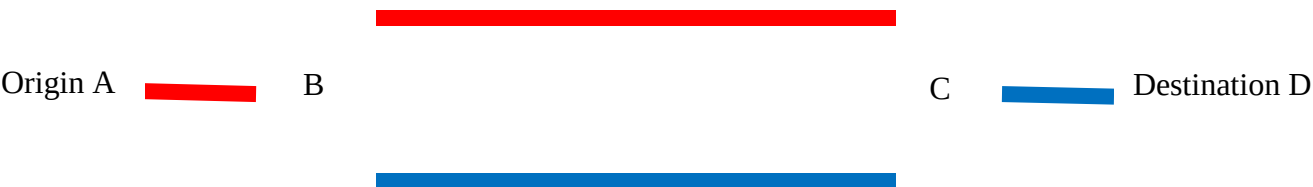
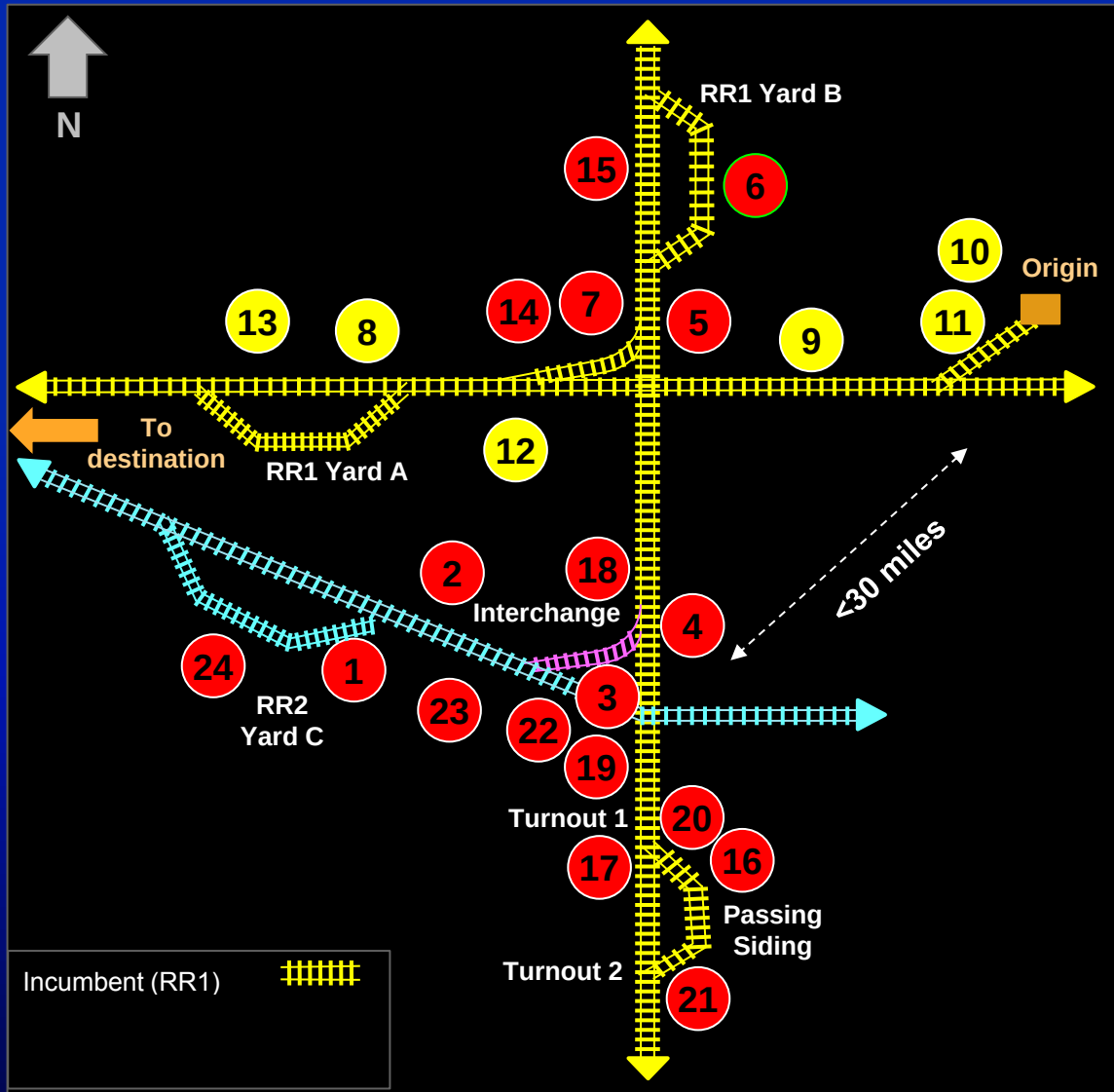


Exhibit 4: Many Forced Switches Will be Much More Complex



Step	Description
1	Yard switch to move empty car to way train at Yard C
2	Way train moves empty car to interchange track
3	Interchange switch to spot empty car on interch. track
4	Interchange switch to retrieve empty car from interchange track
5	Way train moves empty car to Yard B
6	Yard switch to move empty car to way train serving Yard A
7	Way train moves empty car via Connection to Yard A
8	Yard switch to move empty car to way train serving Consignor
9	Way train moves empty car to Consignor
10	Industry switch to place empty car into Consignor's siding
11	Industry switch to retrieve loaded car from Consignor's siding
12	Way train moves loaded car to Yard A
13	Yard switch to move loaded car to way train serving Yard B
14	Way train moves loaded car to Yard B
15	Yard switch to move loaded car to way train serving interchange
16	Way train moves loaded car to passing siding
17	Way train locomotive runs around train and couples to the end of the train
18	Way train moves to clearance point beyond Interchange
19	Interchange switch to spot loaded car on interch. track
20	Way train backs to passing siding
21	Way train locomotive runs around way train, couples to front and proceeds
22	Interchange switch to retrieve loaded car from interchange track
23	Way train moves loaded car to Yard C
24	Yard switch to move loaded car into outbound road train