

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

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

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:

- Vice Chairman Patrick Fuchs
- Lisa Novins, Attorney-Advisor

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 discussed the history of the proceeding, including the genesis of the competitive switching proposal and the record before the Board. ACC/NITL explained that the record includes extensive commentary and analysis that supports adoption of new competitive switching rules and that ACC/NITL has addressed all criticisms posed by railroad opponents.

ACC/NITL discussed the history of the existing rules and explained that they are no longer appropriate given changes in the railroad industry.

ACC/NITL offered to answer any questions from Vice Chairman Fuchs.

Vice Chairman Fuchs sought additional information about what ACC/NITL believes ought to constitute a working interchange and how many such interchanges exist. ACC/NITL explained in more detail the various scenarios that would constitute a working interchange, or an existing location where two railroads exchange traffic. ACC/NITL also explained that they were unable to answer at this meeting how many of those exist and that competitive switching is more likely to involve working interchanges as opposed to creation of new interchanges.

Vice Chairman Fuchs sought clarification about what ACC/NITL believes should be a reasonable interchange distance. ACC/NITL explained that reasonable distance determinations should be informed by Board precedent and railroad operations. For example, ACC/NITL explained that any interchange within the same terminal area should be a reasonable distance. How far beyond a terminal area is reasonable depends upon local train operations. In the simplest example, when the local train that serves a facility operates out of the same yard where the interchange occurs, that should be a reasonable distance, because the incumbent would handle the car movement between the yard and customer in the same way regardless of whether reciprocal switching occurs. In large terminal areas where the local train serving the customer operates out of a satellite yard and the interchange occurs at a hub yard, the distance should be reasonable so long as the car can be handled on an existing train that regularly operates between the hub and satellite yards. In such circumstances, because the incumbent is not required to change its operations to handle the switched car, the distance involved should be deemed reasonable. To the extent that handling of the switched traffic would raise capacity concerns, the Board should consider the impacts on a case-by-case basis as part of the operational objections that railroads may raise in challenge to any switching request.

Vice Chairman Fuchs asked which prong of the Board's proposed rule ACC/NITL believes would provide the most viable pathway to competitive switching. ACC/NITL explained that prong 2, which enables the Board to order competitive switching when necessary to provide competitive rail service, may be more likely to be used than prong 1, because the market dominance standard that is applied under prong 2 is well developed and could be applied on a lane-by-lane basis rather than applying prong 1 to all traffic at an origin or destination facility.

Vice Chairman Fuchs asked the extent to which the Canadian experience with competitive switching ought to inform the Board's proposal. ACC/NITL explained that the Canadian switching model is broader and provides an automatic right, but Canadian railroads still are very profitable and have highly desirable operating ratios. ACC/NITL also explained that the impact of the proposed rule may be similar to the Canadian model; however, the Canadian model generally is used by the shipper to access a new carrier. In contrast, ACC/NITL explained that the proposed rule would frequently be used to reduce the length of the anticompetitive bottleneck on a multi-carrier movement, which does not add a new carrier or interchange but merely changes the location of the interchange between the same two carriers.

Vice Chairman Fuchs asked about the impact of switching imposed under railroad mergers—in particular, the effects on operations and investment incentives—and data that may be available to demonstrate such impact. ACC/NITL explained that data from waybills and concerning geographic areas affected by mergers, such as Texas and Louisiana, I5 Corridor, and Conrail shared asset areas, demonstrate the impact of such switching. ACC/NITL also explained that switching imposed under the railroad mergers generally resulted in greater investment, because the affected railroads invested significantly to attract and retain traffic.

Vice Chairman Fuchs asked about how ACC/NITL believes a competing rail carrier would participate in a switching petition. ACC/NITL explained that it would not expect a competing carrier to participate, but the shipper would likely have conversations with the competing carrier and incumbent prior to petitioning the Board.

Vice Chairman Fuchs asked why, in the opinion of ACC/NITL, competitive switching would be preferable over prescribing trackage rights. ACC/NITL explained that competitive switching would likely be less burdensome for the affected carriers because it would require less complicated coordination.

Vice Chairman Fuchs asked what was the assessment of ACC/NITL as to the legal risk regarding some parties' view that Congress ratified the existing rules. ACC/NITL explained that the statute has always granted the Board clear legal authority and broad discretion to adopt its proposed rule and that there is absolutely no evidence that Congress intended to narrow that discretion in more recent legislation.

ACC/NITL explained that the railroad criticisms of the proposed rule overstate the operational burdens of competitive switching. ACC/NITL further explained that it is focused on obtaining competitive switching at locations where switching already occurs, thereby having little if any operational impact, but that there may also be cases where the shipper or an alternative carrier would be interested in making necessary investments at interchanges to ensure feasibility. Also, ACC/NITL explained that railroad concerns that competitive switching would result in artificial competition are misplaced because the rate offerings resulting from competitive switching would be the result of the competitive market, in contrast to a Board rate prescription in a rate case, which truly is artificial and the result of government regulation.

Vice Chairman Fuchs sought additional information on how existing switching fees are determined. ACC/NITL explained that most of the fees were set in mergers or are voluntarily agreed upon and set forth in the carriers' tariffs. ACC/NITL also explained that tariff switch rates do not reflect any lost contribution charge associated with switches required under mergers.

Vice Chairman Fuchs asked about the use of SSW Compensation to set a switch fee and the extent to which it would result in different rates than those in Canada or than those established by the market in the United States. ACC/NITL explained that SSW Compensation is a cost-plus method and that Canadian switch fees are based on cost studies that are reviewed and updated every 5 years. ACC/NITL explained that they were unable to answer at this meeting the precise difference between SSW Compensation and the switch fee established by the market, but the Board may have available to it some market data on switch fees.

Vice Chairman Fuchs asked whether ACC/NITL believe there ought to be a mechanism for reassessing switching orders to avoid unintended impacts. ACC/NITL explained that any review period would need to be long enough for operational adjustments to play out and that railroads can always ask the Board to revisit a switching order by filing a petition to reopen based upon new facts or changed circumstances.

ACC/NITL commented that competitive switching helps shippers avoid rate cases and regulatory procedures by encouraging commercial agreements. It also commented that competitive switching provides options when service problems arise, and even benefits those who do not have competitive switching by alleviating congestion on the troubled carrier.

Vice Chairman Fuchs asked ACC/NITL to estimate how many switching petitions Board would receive in the first year, if the Board were to adopt the changes sought by ACC/NITL.

ACC/NITL explained that it would not expect a large number because a significant portion of traffic is under contract and railroads will likely adjust their behavior in a manner that would reduce the need for competitive switching orders. Rather, any transition is likely to play out over an extended time period.

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).**

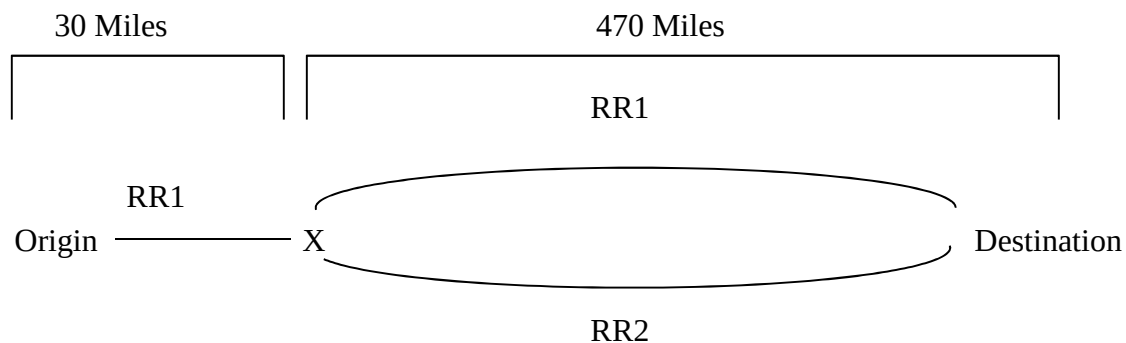
¹ References are to Shipper Coalition Op. Comments (filed Oct. 26, 2016) and Reply Comments (filed Jan. 23, 2017).

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

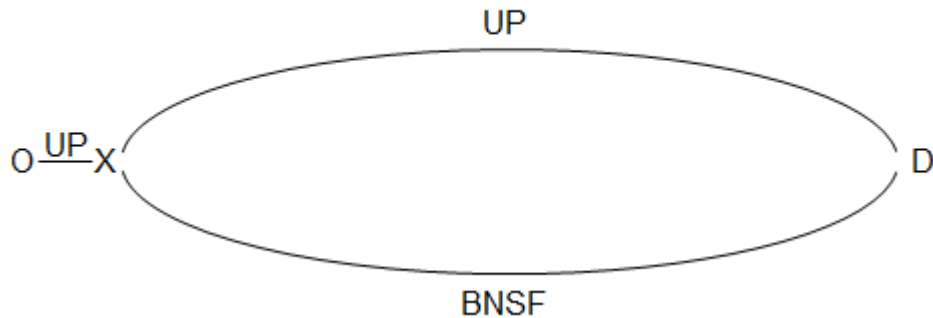


Figure 1, which is the only scenario the railroads address, converts single-line service to two-carrier service as a result of a reciprocal switch. Shippers are likely to request switching in this circumstance only when the competitive carrier offers other efficiencies to offset the additional handling.

Fig. 2

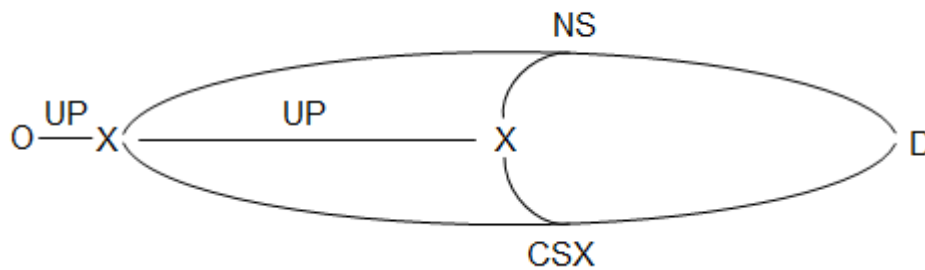
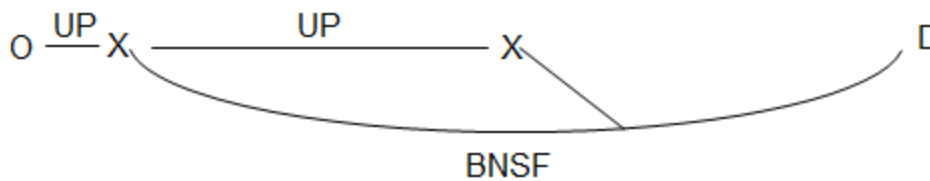


Fig. 3



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

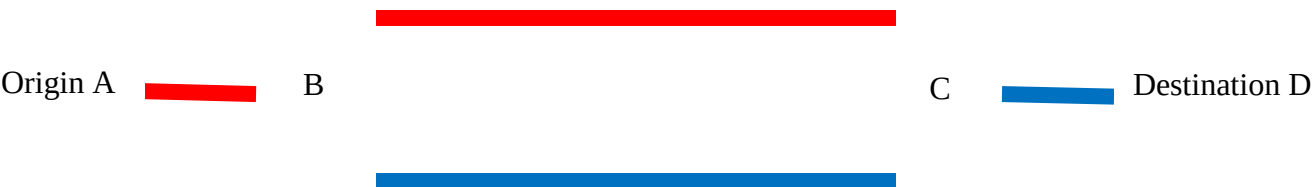
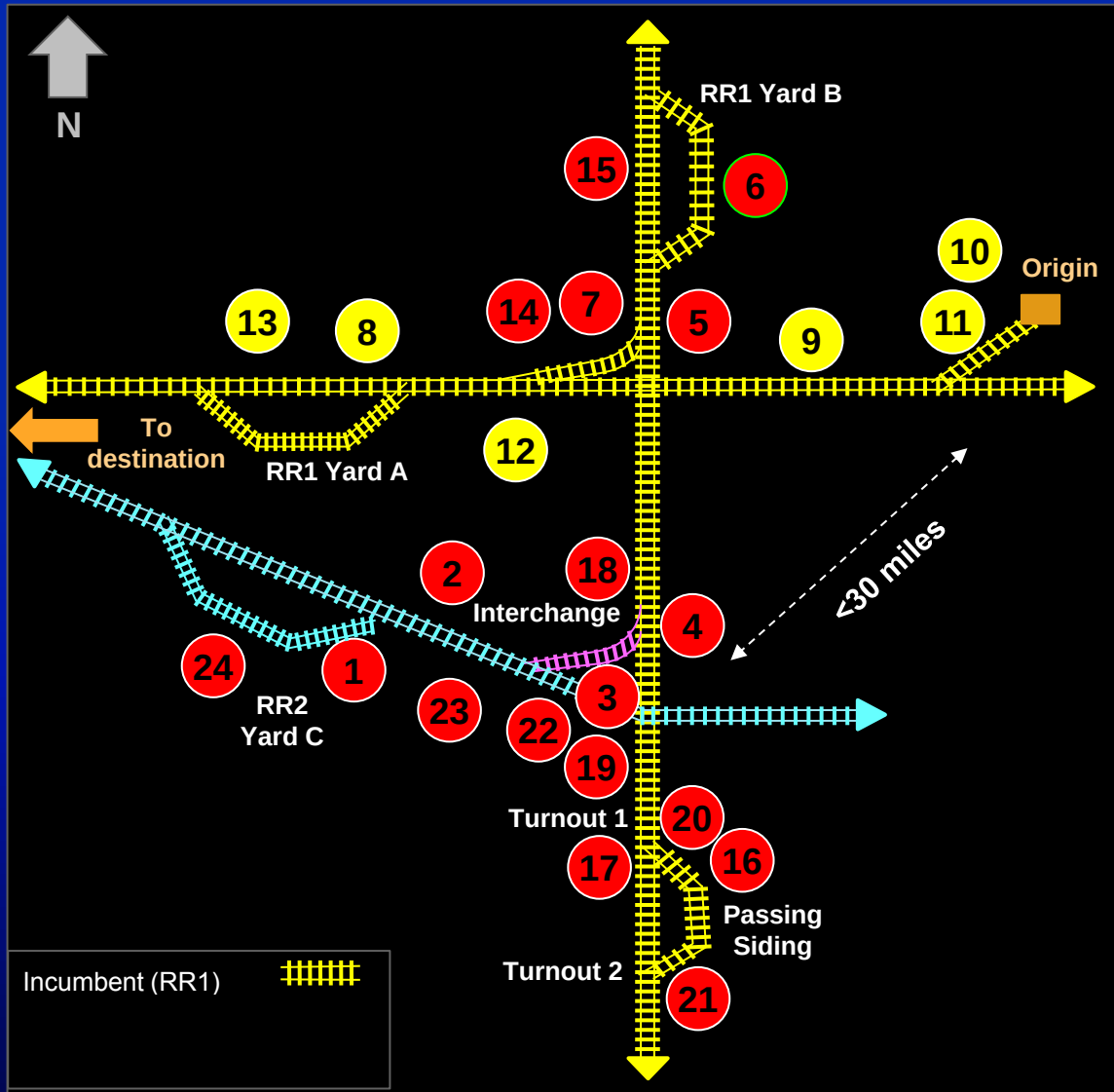


Exhibit 4: Many Forced Switches Will be Much More Complex



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