

SURFACE TRANSPORTATION BOARD**Ex Parte 711 (Sub-No. 1)**

***Summary of Ex Parte Meeting held by video conference August 4, 2021
between
Shipper Associations
and Surface Transportation Board Chairman Martin Oberman***

ENTERED
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Public Record

Shipper Association Attendees:

- Karyn Booth, Counsel to the National Industrial Transportation League (NITL)
- Ross Corthell, Vice President-Transportation, Packaging Corporation of America
- Connor Hamburg, Manager of Government & Industry Affairs, Nutrien
- Jennifer Hedrick, Executive Director, NITL
- Brad Hildebrand, VP-Global Rail and Barge Lead, Cargill
- Justin Louchheim, Director, Government Affairs, The Fertilizer Institute (TFI)
- Jeffrey Moreno, Counsel to the American Chemistry Council (ACC) and TFI
- Randy Mullett, Senior Policy Advisor, NITL
- Jeffrey Sloan, Senior Director, Regulatory & Technical Affairs, ACC
- Alexander Stege, Director, Public Affairs, CF Industries
- Jason Tutrone, Counsel to ACC and TFI

STB Attendees:

- Martin Oberman, Chairman
- Stephanie Borges, Administrative Assistant to Chairman Martin Oberman and Board Member Patrick Fuchs
- William Brennan, Chief Economist and Director, Office of Economics
- Adam Kress, Attorney Advisor
- Valerie Quinn, Acting Deputy Director, Office of Proceedings

Meeting Summary:

The Shipper Associations began the meeting by explaining that the meeting's purpose was: to answer questions about the Board's options for advancing Ex Parte 711, especially in light of President Biden's recent executive order on competition; and to follow up on the 2019 ex parte meeting that ACC and NITL had with Chairman Oberman on Ex Parte 711.

Chairman Oberman asked about what mechanisms the STB had to deal with reciprocal switching. The Shipper Associations explained that it could proceed with completion of Ex Parte 711 on the current record, which is complete; solicit supplemental comments before advancing Ex Parte 711, or start from scratch. They also explained that the Board should proceed with completing Ex Parte 711 on the current record, which is extensive.

Chairman Oberman sought comments on whether it would be worthwhile to obtain more information in light of the adoption of precision scheduled railroading, service issues, and the

appointment of new Board members. The Shipper Associations commented that the record tackles service issues and precision schedule railroading and that the implementation of precision scheduled railroading creates a greater and more urgent need for competitive switching. The Shipper Associations also commented that the Canadian experience with interswitching shows that the likelihood of negative impact is low and that competitive switching has benefits.

Chairman Oberman sought comments on the Board's past concerns about including presumptions in a competitive switching rule. The Shipper Associations commented that the presumptions were intended to provide expedited access to competitive switching, but not to prevent shippers who could not satisfy the presumptions from accessing competitive switching altogether. The Shipper Associations also commented that, while it does not oppose the case by case approach reflected in the proposed rule, any final rule should include safeguards to prevent competitive switching cases from becoming excessively long and viable only for the largest shippers.

Chairman Oberman asked about the scope of traffic that would be affected by a competitive switching rule. The Shipper Associations explained that their prior analysis of the NITL proposal demonstrated that less than 4% of overall carloads would be eligible and that even fewer carloads were likely to qualify under the Board's proposed case-by-case approach. The Shipper Associations also explained that, even if competitive switching is available only to a small percentage of captive locations, it provides additional pressure for railroads to compete more broadly. Additionally, the Shipper Associations commented that the true scope of affected traffic would depend on how the Board interprets the reasonable distance factor under the proposed rule and that, even where competitive switching is made available, shippers may not use it because they are able to obtain a competitive rate from the incumbent. TFI commented that it is aware of reciprocal switching in the United States at two locations where its members operate, and that its members have operations in Canada, where switching is widely available and occurs without any known operational issues. Cargill commented that approximately 80% of its rail-served locations are captive to one railroad and that it is hard to say how many of these could be opened up for competitive switching without knowing what mileage limit would be set for a viable interchange.

Chairman Oberman sought comments on what would be a reasonable distance for reciprocal switching. The Shipper Associations commented that this could be determined by looking at how far an incumbent carrier operates local trains out of a relevant terminal. They also advised that the record contains discussion and proposed standards for the reasonable distance factor.

Chairman Oberman asked about how competitive switching relates to bottlenecks and the Board's authority to amend bottleneck restrictions. The Shipper Associations explained that competitive switching would break short distance bottlenecks, that an origin carrier's bottleneck is addressed by statute, and that attempting to address bottlenecks more broadly in Ex Parte 711 would significantly lengthen the proceeding. They also explained that the rates involved in competitive switching and a bottleneck segment are different insofar as the railroads would agree on the switching fee under competitive switching whereas a shipper can obtain a bottleneck rate directly from a carrier for a bottleneck movement.

Chairman Oberman presented a theoretical example of circuitous routing and asked how that might be addressed by reciprocal switching. TFI commented that it has a member whose shipments could be interchanged to another carrier 10 miles away from the origin, but the incumbent railroad routes them over a hundred miles to interchange with the delivering carrier. TFI also suggested that the Board might consider competitive switching and bottleneck restrictions in stages.

Chairman Oberman asked whether the Shipper Associations have identified in the record the changes they would like to see to the Board's proposed rule. The Shipper Associations responded that they did.

Chairman Oberman asked about whether the Shipper Associations have expressed views on a market dominance factor for competitive switching. The Shipper Associations explained that market dominance would not be required under the "practical and in the public interest" prong of the proposed rule, which is consistent with the statute and ensures that the rule works for a wide range of captive shippers.

Chairman Oberman asked about whether the SSW methodology used for determining rate reasonableness regarding trackage rights is adaptable to competitive switching. The Shipper Associations explained that there is sufficient precedent surrounding it that makes it adaptable for use in the competitive switching context, which they detailed in their written comments. They also explained that a flat rate or cost-plus compensation approach would be more appropriate than efficient component pricing, which undercuts the purpose of competitive switching.

Chairman Oberman asked if competitive switching might be ordered while the amount of the switching fee is litigated. The Shipper Associations commented that this is possible, but would increase the risk for the shipper.

The meeting concluded.

Bottleneck Extensions Through Mergers

Pre Merger

Shipper is captive at origin and destination, but has competitive options at first interchange (X1)



Post Merger

Scenario 1

Captivity at origin extended to interchange near destination (X2)



Scenario 2

Two RRs have equally efficient routes, but the origin RR can foreclose any competition from the destination RR

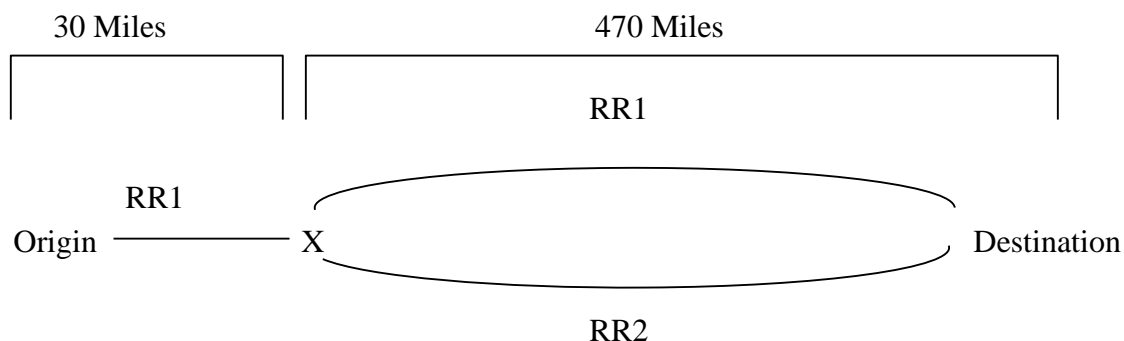


The STB's Ex Parte No. 711 Rulemaking Proceeding Is Deregulatory And Pro-Competitive

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

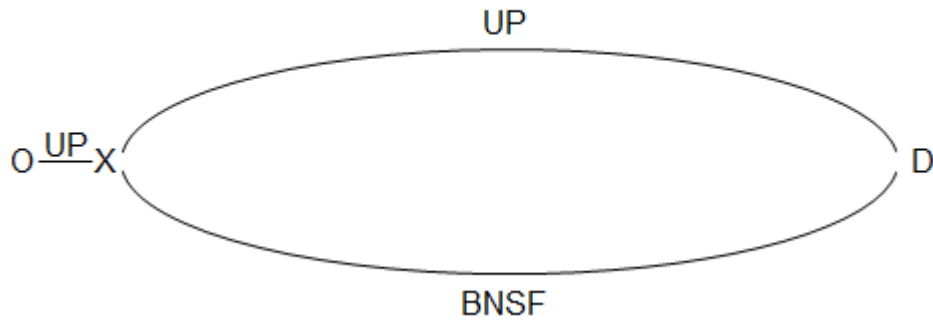


Figure 1, which is the only scenario the railroads address, converts single-line service to two-carrier service as a result of a reciprocal switch. Shippers are likely to request switching in this circumstance only when the competitive carrier offers other efficiencies to offset the additional handling.

Fig. 2

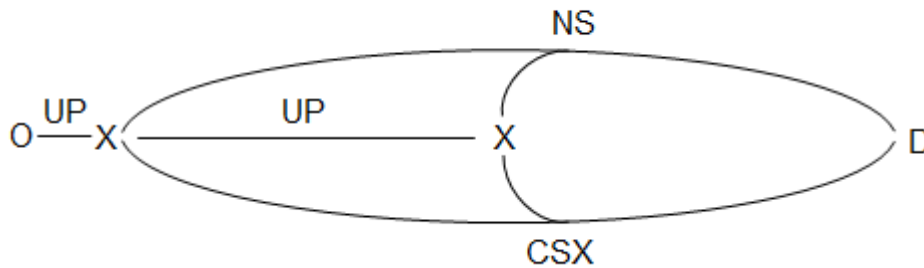
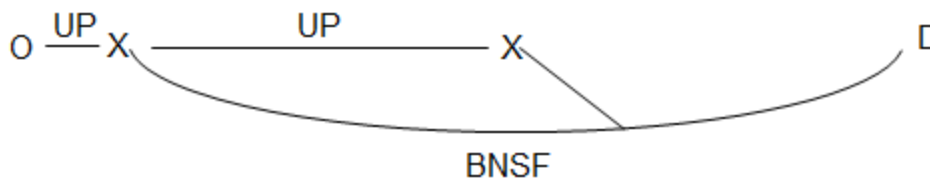


Fig. 3



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.

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).

**Surface Transportation Board
Ex Parte 711 Meetings
September 20, 2017**

Acting Chairman Ann Begeman

Participants

PotashCorp: Bob Felgenhauer

The Fertilizer Institute: Justin Louchheim
Jeff Moreno (Thompson Hine, TFI Outside Counsel)

STB: Acting Chairman Ann Begeman
James Boles
Alison C. Graab
Elika Naraghi

Meeting Summary

Meeting attendees expressed appreciation for the opportunity to engage with the Board in Ex Parte meetings.

Mr. Bob Felgenhauer with PotashCorp (PCS) shared that PCS is a Canadian based organization with a market cap of \$14.5 billion, transportation expenditures of approximately \$600 million (about \$350 million on rail), and a rail car fleet exceeding 10,000 cars.

PCS noted that many of its facilities in Canada are dual-served by railroads. However, one of its Canadian facilities located in Patience Lake is single served by the Canadian Pacific Railway (CP) and benefits from Canadian rules that permit reciprocal switching, known in Canada as inter-switching. PCS noted that the Patience Lake mine is located 29 km from the interchange point, 36 km from Canadian National yard, and 24 km from CP's yard (CN and CP yards are 12 km apart). PCS works with both railroads on three options to interchange traffic:

- 1) Patience Lake to Allan mine;
- 2) Downtown Saskatoon interchange yard; and
- 3) Mine to mine interchange

PCS indicated that the current operation agreed to by railroads at Patience Lake is alternating time frames to interchange in each other's yards. PCS noted that the ability to inter-switch in Canada gives PCS an opportunity to:

- 1) Negotiate competitive rates and service for Patience Lake;
- 2) Adjust traffic flow for potential service disruptions related to labor negotiations;
- 3) Adjust traffic due to other service disruptions because of track outages, or power shortages;
- 4) Improve transit times and service to specific geographic areas by using the most efficient routes (CN to BN in Western Washington through Vancouver or CP to UP in Eastern Washington/Idaho through Eastport)

PCS noted that Canadian railroads have publicly stated they have no issue with regulated inter-switching and would support its use in the United States. PCS also noted that both Canadian railroads had the lowest operating ratios in 2016 of all the class 1 carriers (CN: 55.9%, CP: 58.6%).

PCS also discussed its operations in the United States, including that competitive access already exists for its facilities in Aurora, NC, and Augusta, GA.

In Aurora PCS operates a phosphate mine that is dual served through a trackage rights agreement between the Norfolk Southern Corporation (NS), who is the track owner, and CSX Transportation (CSX). In Augusta, PCS operates a nitrogen plant and is served by a reciprocal switching agreement between CSX (delivering carrier) and the NS. Which rail carrier PCS uses for a particular movement to or from these locations depends upon whether the other end of the movement is captive to either carrier. On competitive gateway traffic, PCS routinely commits its traffic to one carrier for a fixed term contract after a competitive bidding process. PCS typically shifts traffic between carriers only when contracts expire or there are service problems.

PCS explained that inter-switching in Canada and reciprocal switching in in the United States in Aurora and Augusta work very well. Rail carriers continue to compete for business with PCS and the carriers work well together and with PCS to ensure cars are interchanged without any adverse impacts on their networks. Moreover, it was noted that the benefits to PCS customers were substantial as it promotes more timely and reliable shipments.

Acting Chairman Begeman asked if PCS has recently used reciprocal switching in Augusta or Aurora. PCS explained that, with respect to Augusta and Aurora, the availability of reciprocal switching has been very helpful in light of CSX service degradation issues. In this case, PCS has been able to switch traffic to NS as CSX works to resolve its operational challenges thereby providing more stability for PCS and its customers.

PCS expressed support for an approach that more closely resembles inter-switching in Canada. PCS also expressed concerns about the case-by-case approach as currently drafted could be unworkable for shippers if it is not efficient. It was also noted that the Board should consider an approach that removes some of the burden from itself so the Board does not have to review every request for a reciprocal switch.

PCS noted that it competes extensively with fertilizer imports which are significantly less expensive to transport by ocean vessel and barge than rail transportation in North America. Reciprocal switching could improve the competitiveness of U.S. manufacturers through better rate and service options.

PCS summarized that it will continue to have a strong relationship with all rail carriers. PCS also expressed that, based on its experience, rail carriers are more competitive in their rates and more responsive in their service when competition via inter- and reciprocal switching are available.

August 3, 2021

The Honorable Maria Cantwell
Chair
Committee on Commerce, Science & Transportation
U.S. Senate
Washington, D.C. 20510

The Honorable Roger Wicker
Ranking Member
Committee on Commerce, Science & Transportation
U.S. Senate
Washington, D.C. 20510

Dear Chair Cantwell and Ranking Member Wicker:

The undersigned agricultural organizations write to express strong support for Karen Hedlund's nomination to serve as a Board Member of the Surface Transportation Board (STB or Board).

The STB provides oversight of the freight rail marketplace, which has consolidated tremendously since the early 1980s. Most agricultural rail shippers and receivers are captive to a single rail carrier and do not have price-competitive access to other modes of transportation, such as trucks or barges, either because they are landlocked or the distances involved in the movement are too great given the large volumes of agricultural commodities, products and farm inputs being shipped.

Rail industry implementation of precision scheduled railroading (PSR) has reduced the number of locomotives, crews, and other human and capital assets to reduce railroad operating costs, but often at the expense of their customers. The agricultural sector, which accounts for more than \$160 billion of America's trade exports, has been adversely impacted by railroad market power and by these recent changes to railroad operations.

During the past few years, the Board has responded to these developments with proactive oversight and long-overdue efforts to modernize its regulatory oversight. In particular, the agency has developed momentum in attempting to create more rail-on-rail competition and a more streamlined method for freight rail customers to challenge unreasonable rates.

The ability of the STB to follow through and pursue a modern and more balanced approach is dependent upon it having members that are knowledgeable and objective. We respectfully believe Karen Hedlund exemplifies these principles. Ms. Hedlund, a native of Illinois, and graduate of Harvard University and Georgetown University, has significant rail transportation experience having served as the Federal Railroad Administration's Deputy Administrator and Chief Counsel and presently as an advisor for rail transportation projects. In addition, she has served as Chief Counsel for the Federal Highway Administration. Her distinguished career qualifies her to serve on the Board, and she will also complement the thoughtful and pragmatic Members currently serving.

Given the important matters pending at the Board, we urge the Senate Committee on Commerce, Science & Transportation to approve Ms. Hedlund and for the full Senate to confirm her nomination as soon as possible.

Thank you for your consideration,

Agricultural Transportation Working Group

National Associations:

Agricultural Retailers Association
Agriculture Transportation Coalition
American Farm Bureau Federation
American Forest & Paper Association
American Soybean Association
Corn Refiners Association
Growth Energy

Institute of Shortening and Edible Oils
Meat Import Council of America
National Aquaculture Association.
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Farmers Union
National Grain and Feed Association
National Milk Producers Federation
National Oilseed Processors Association
National Pasta Association
North American Meat Institute
North American Millers' Association
North American Renderers Association
Pet Food Institute
Specialty Soya & Grains Alliance
The Fertilizer Institute
USA Rice
U.S. Hide, Skin and Leather Association
US Rice Producers Association

State and Regional Associations:

AgriBusiness Association of Kentucky
Agribusiness Council of Indiana
California Grain and Feed Association
Far West Agribusiness Association
Florida Fertilizer & Agrichemical Association
Kansas Agribusiness Retailers Association
Kansas Grain and Feed Association
Michigan Agri-Business Association
Minnesota Grain and Feed Association
North Dakota Grain Dealers Association
Northeast Agribusiness and Feed Alliance
Ohio AgriBusiness Association
Pacific Northwest Grain and Feed Association
Renew Kansas Biofuels Association
Rocky Mountain Agribusiness Association
South Dakota Agri-Business Association
South Dakota Grain & Feed Association
Texas Grain and Feed Association
TN Feed & Grain Assn
Wisconsin Agri-Business Association
Wyoming Ag Business Association
Wyoming Wheat Marketing Commission

Cc: Committee on Commerce, Science & Transportation
The Honorable Chuck Schumer, Majority Leader, U.S. Senate
The Honorable Mitch McConnell, Minority Leader, U.S. Senate