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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

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

The American Short Line and Regional Railroad Association (ASLRRA) submits these comments in response to the Surface Transportation Board (STB or Board)'s proposed regulations mandating reciprocal switching. If the Board determines to impose new reciprocal switching regulations, the Board should categorically exclude Class II and Class III (short line) carriers, as it has proposed in this proceeding. To add clarity, the Board should modify its definition of "affiliated companies" as proposed in these comments. So that short line railroads can continue providing excellent customer service, the Board should also include a requirement that short line railroads be notified of switches impacting their traffic.

Background

On July 7, 2011, the National Industrial Traffic League (NITL) filed a petition seeking to modify the STB's standards for mandatory competitive switching. The Board issued a Notice of Proposed Rulemaking ("NPRM") on reciprocal switching on July 27, 2016, Docket No. EP 711, (Sub-No. 1), *Reciprocal Switching*, which grew out of the NITL petition. The Board received many comments on the 2016 NPRM and held a public hearing on that rulemaking in March 2022. On September 7, 2023, the Board closed EP 711 (Sub-No. 1), opened a separate

subdocket, Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*, and issued a new NPRM. The recent NPRM proposes a new regulatory approach that would authorize reciprocal switching prescriptions when a Class I rail carrier's service to a terminal-area shipper fails to meet any of three performance standards, including service reliability, service consistency, and adequate local service. In announcing the new proposal, the agency stated that the standards are intended to be unambiguous, uniform standards that employ Board-defined terms and are consistently applied across Class I rail carriers and their affiliated companies. Surface Transportation Board. (2023 September 9) *STB Issues Proposed Rule Regarding Reciprocal Switching for Inadequate Service* [Press release].
<https://www.stb.gov/news-communications/latest-news/pr-23-16/>.

Interest of the American Short Line and Regional Railroad Association

ASLRRA is a non-profit trade association representing the interests of approximately 600 short line railroads in legislative and regulatory matters. Short lines operate 50,000 miles of track, or approximately 30% of the national freight network, employing approximately 18,000 people, and connecting thousands of manufacturers, businesses, and farmers in communities and small towns to larger markets, urban centers, and ports. Short line railroads play a vital role in providing rail service by maintaining tens of thousands of miles of light density lines throughout the country that in many cases were at risk of abandonment by their former owners. Short lines take that responsibility extremely seriously and do not take their critical role for granted.

The Board has indicated that its new rulemaking proposal, like its 2016 NPRM and the original NITL petition, is intended to apply only to Class I railroads and suggests that the agency does not intend any adverse impact to short line railroads. Excluding short line railroads from the scope of the Board's proposed rule is both necessary and appropriate to achieve the Board's

intent and sound policy. While a Class I carrier could potentially absorb a relatively small reduction in overall revenues due to mandated reciprocal switching, the application of the reciprocal switching rule to short lines would be a far different matter. Unlike larger railroads, the costs of short line railroads cannot be spread over a vast rail system or large customer base. All the freight revenues generated by customers on a short line railroad are vitally necessary to sustain the financial viability of that line. In many cases, two or three customers account for two-thirds or more of the rail traffic shipped on a short line railroad. Loss of even a portion of the revenues from a single shipper could have a significantly adverse effect on a short line railroad and its ability to serve its customers given the high infrastructure and fixed costs that must be supported by those revenues.

The Board is Right to Exclude Class II and Class III Railroads from the Rule

The NPRM states that it is intended to apply only to Class I railroads and suggests that the agency does not anticipate any adverse impact to short line railroads. The NPRM further states that the Board has not received many formal or informal complaints about smaller carriers. In fact, short line railroads have a reputation for excellent customer service. With typically only a few customers and a dedicated local presence, responsive customized friendly service is not only doable but absolutely essential for short line success. Short lines pride themselves on a collaborative and service-oriented relationship with their customers. As Ross Corthell, Chair of NITL's Rail Committee, and Vice President, Transportation at Packaging Corporation of America, said in the April 2022 STB Hearing on Urgent Issues in Freight Rail Service, "One positive thing: Short lines have done their very best to help the customers work through these issues. And I commend them for that. The short lines are as constrained as the shippers in that they're dependent on the Class I's for service. But where customers have short lines in their first

mile last mile has made up for an awful lot of hassle. So, I commend the short lines, and their association, for their commitment to customers.” Corthell, Ross. STB Hearing on Urgent Issues in Freight Rail Service, 27 April 2022, Washington, D.C. Panel VIII.

Additionally, the Board has expressed concern that data collection would be burdensome for Class II and Class III carriers, as they have not been submitting service-related data to the Board under performance metrics dockets, such as Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1) and have limited staff to accommodate these information demands. Nevertheless, the Board seeks comment from stakeholders on whether its new part 1145 should be “broadened to include Class II and Class III carriers who are providing inadequate service.” NPRM at 24.

Excluding short line railroads from the scope of the Board’s proposed rule is both necessary and appropriate to achieve the Board’s intent. As explained above, while a Class I carrier could potentially absorb a relatively small reduction in overall revenues due to mandated reciprocal switching, short lines cannot. Unlike larger railroads, the costs of short line railroads cannot be spread over a vast rail system or large customer base. All the freight revenues generated by customers on a short line are vitally necessary to sustain the financial viability of that line. The light density operations, coupled with high infrastructure costs and fewer customers, would render the loss of revenue from any one customer as a result of imposed reciprocal switching devastating.

Because short lines typically exist to serve customers at remote locales over low-density railroad lines, extending mandated switching access to short line customers would threaten the very existence of many short lines and the essential transportation services they provide to numerous shippers and communities across the country. Instead of benefitting a short line’s shippers, it would have the opposite result, causing service disruption or even suspension for the

many smaller shippers who are most vulnerable to a reduction in the revenue necessary to maintain the line. For the short line railroad industry, that number of shippers is in the thousands. While the stated purpose of this rule is to address inadequate rail service and thereby help shippers, including short lines in the regulation would instead put thousands of shippers in harm's way and potentially jeopardize the very existence of viable rail service and access to it.

Finally, short line railroads cannot achieve the economies of scale that characterize Class I operations. Fixed costs per shipment are high for small railroads, and average productivity is also much lower than that of their Class I counterparts. Through innovative practices, attention to customer service, and careful cost control, many short lines have maintained and even grown freight traffic. Success is by no means guaranteed, however, and failures, even after many years of operation, do occur. The economics of small railroad operations, coupled with light traffic densities, make these carriers especially vulnerable to revenue declines.

**The Board Should Clarify the Definition of
“Affiliated Companies” to Ensure Short Lines Are Not Inadvertently Swept into the Rule**

While the Board has clearly stated that the rule should not apply to Class II and Class III railroads, the NPRM creates some unnecessary confusion and ambiguity in its definition of “affiliated companies.” The NPRM proposes in § 1145.1 that a reciprocal switching agreement “means an agreement for the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or ends its journey on the rail system. Reciprocal switching is merely incidental to a line haul.” The section also states that “affiliated companies” has the same meaning as “affiliated companies” in Definition 5 of the Uniform System of Accounts. 49 C.F.R. part 1201, subpart A. Although the Board states that the definition of “affiliated companies” has the same meaning as affiliated companies in Definition 5 of the Uniform System of Accounts (USA), ASLRRA finds that, upon review of

that definition further clarity in the final rule would be helpful to ensuring Class II and III carriers are not inadvertently covered under the new switching regulations.

The definitions regarding affiliated companies in Definition 5 of the USA provide:

5. (a) *Affiliated companies* means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier.

To provide further clarity with respect to this definition, ASLRRA suggests that the STB specify that an affiliated company is one that is included in a Class I railroad's annual combined rail reporting to the STB and that acts as an operating division of the railroad. This would ensure that short lines that are not owned by Class I railroads or that are independently operated as a short line are not inadvertently covered by the definition of "affiliated companies." The revised definition would read:

Affiliated companies means companies or persons that directly or indirectly through one or more intermediaries control, or are controlled by, or are under common control with the accounting carrier. For this rule, an affiliated company is one that is included in a Class I railroad's annual combined rail reporting to the STB and that acts as an operating division of a Class I railroad.

Additionally, the Board seeks public comment as to whether its definition should also include third-party agents of a Class I carrier. NPRM at 11. ASLRRA is concerned that including the term "third-party agent" in the scope of the regulations could theoretically capture any short line that contracts with a Class I to provide functions such as switching services or haulage, which would blatantly contradict the exclusion of Class II and Class III short line railroads. The term "third-party agent" is too amorphous and uncertain and should not be

included. ASLRRA appreciates that the Board does not intend to include Class II and III carriers in the new regulation and therefore seeks clarity from the STB on this issue in the final rule to ensure Class II and Class III carriers are not inadvertently included as “third-party agents.”

Short Lines Should be Notified of Switches Impacting Their Traffic

The NPRM provides the steps at § 1145.5 that a petitioner should take to file a petition for a prescription of a reciprocal switching agreement if it believes that a rail carrier providing it service failed to meet one of three performance standards described in § 1145.2. *Inter alia*, the section instructs the petitioner to serve the petition on the incumbent rail carrier, the alternate rail carrier, and the Federal Railroad Administration (FRA). Given the interconnected nature of the national rail network, any additional switch could result in a delay further down the line. Thus, in addition to the incumbent rail carrier, alternate rail carrier, and FRA, a short line railroad scheduled to receive a shipment subject to a reciprocal switch prescription earlier in its journey should be notified of the petition as well. With advanced notice, the short line will be better able to plan and carry out its own service, including keeping its customer informed of any change in the anticipated final delivery timeline.

The Board Should Not Address Terminal Trackage Rights Here but Stands Ready to Comment on This Option in a Separate Proceeding

In the NPRM, the Board states it is considering whether the prescription of terminal trackage rights would be an appropriate remedy for proven failures in local service. NPRM at 7. While the Board does not expressly ask for comment here, in footnote 27 on page 19, it repeats this consideration and there it does seek comment on whether it should provide for the prescription of terminal trackage rights for the failure to meet Industry Spot and Pull standard either in place of a separate path to the prescription of a reciprocal switch agreement or as an additional path for a petitioner. As the Board states in footnote 27, it is separately considering

this issue, which ASLRRRA agrees is the better course of action.

**The Performance Standards Set in this NPRM Should
Not be Construed as Constituting Standards for the Common Carrier Obligation**

In the NPRM, the Board explicitly states that “[it] does not view it as appropriate to apply, or draw from, these proposed standards to regulate or enforce the common carrier obligation.” Pg. 10. It further states, “...the performance standards set forth in this NPRM as constituting the standard for obtaining a reciprocal switching order from the Board are in no way to be construed as constituting standards by which a railroad’s compliance with the common carrier obligation under § 11101(a) is to be measured.” ASLRRRA agrees and submits any finding concerning performance standards under this NPRM should not be used to establish a basis under any other laws seeking damages or other remedies, including relief under the laws of common carriage.¹ This is especially important as the Board has limited the scope of this rule so that it does not apply to all railroads; however, all railroads are subject to the common carrier obligation.

Conclusion

If the Board determines to promulgate a reciprocal switching rule, that rule should completely exclude Class II and Class III carriers from the scope of the agency’s intended remedial authority, as it has done in the NPRM. To add clarity, the Board should modify its definition of “affiliated companies” as proposed in these comments. So that short line railroads can continue providing excellent customer service, the Board should also include a requirement that short line railroads be notified of switches impacting their traffic.

¹ In fact, in a separate proceeding the Board has addressed the common carrier obligation. *See*, Docket No. NOR 42179, Navajo Transitional Energy Company, LLC v. Burlington Northern Railway, Complaint and Petition for Declaratory Order. That Decision is currently on appeal in the DC Circuit Court of Appeals and the resolution of it further supports not using any standards developed in this NPRM in cases involving the common carrier obligation.

Respectfully submitted,

A handwritten signature in black ink that reads "Sarah Yurasko". The signature is written in a cursive, flowing style.

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