

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte 711 (Sub-No. 1)

RECIPROCAL SWITCHING

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COMMENTS

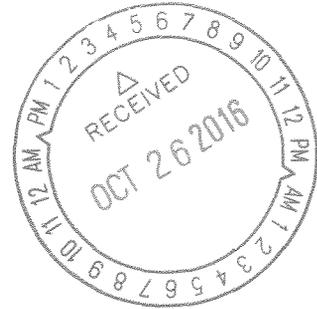
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COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits these comments in response to Surface Transportation Board (STB or Board) Notice of Proposed Rulemaking (NPRM), dated July 25, 2016 (served July 27), 81 Fed. Reg. 51149-65 (Aug. 3, 2016), schedule extended by decision dated and served September 1, 2016.

The July 27, 2016 Board decision discontinues the Ex Parte 711 proceeding (Decision, 2, 31), which had been pending since July 25, 2012, and sets forth the

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instant new NPRM, a new proceeding, instituted as Ex Parte 711 (Sub-No. 1). The Ex Parte 711 proceeding had followed an earlier Ex Parte 705, Competition in the Railroad Industry.

Background

SMART/TD-NY has been an active participant in Ex Parte 711,^{2/} as well as in Ex Parte 705. SMART/TD-NY continues to oppose the major modifications to competitive access proposed by NITL and other interests. Moreover, it has been a bedrock principle of railroad regulation that the originating rail carrier is entitled to enjoy its long haul, enshrined in Section 15(4) of the Interstate Commerce Act, and carried forward without substantive change by the 1978 codification into the current 49 U.S.C. §10705. Of course, there have been added certain limited exceptions, such as where reciprocal switching agreements are required under §11102.

1. Procedural Schedule and Ex Parte Waiver.

The Board's decision initiating the instant rulemaking has improperly waived the ex parte contact prohibition

^{2/}Among many others. (Decision, 37-38).

so as to set-up private meetings between private practitioners and individual agency Members concerning reciprocal switching arrangements. It is anticipated that agency personnel, which will embrace individual Board Member office staff as well as other agency staff, will participate in the individual meetings. (Decision, 28-29). This is manifestly highly improper, and is prejudicial to many parties to this rulemaking. All private participants in these meetings should hear the remarks of all other private participants, as well as the comments of all agency staff and all agency Members. The preparation of meeting summaries is wholly unsatisfactory. The fact that the agency employed this divisive tactic to a lesser extent last year in Ex Parte 724 (Sub-No. 4), United States Rail Service Issues- Performance Date Reporting, provides no sound basis to ratchet up this secrecy scheme for rules governing adversarial parties to switching arrangements. Moreover, rulemaking in Ex Parte 724 (Sub-No. 4), aimed at reorganizing data reporting, is far different from the now-proposed establishment of rules to govern the mandatory interchange and short-haul of rail traffic,

greatly affecting the railroad industry, and harming railroad employees. The NPRM recognizes there has been no significant change in policy regarding reciprocal switching in more than 30 years; and there are many different and often conflicting views regarding the potential benefits of reciprocal switching to shippers and impacts to carriers, which are complicated and often inter-related. (Decision, 28).

The public deserves an open and transparent railroad regulatory agency, rather than a secret tribunal. The STB should vacate its procedural and ex parte waiver, and adopt the usual open rulemaking hearing process (Decision, 28). The proposed secret meetings would be prejudicial to railroad employees.

2. The NPRM Should Not Be Adopted. The position of SMART/TD-NY in the recent competitive access proceedings leading up to the instant NPRM, i.e. Ex Parte Nos. 705 and 711, has been generally that also currently taken by the railroad industry on substantive matters regarding competitive access, which we understand is in opposition to mandatory reciprocal switching. After review of the major class I carrier

positions in this proceeding, SMART/TD-NY will advise if it has any different positions when reply SMART/TD-NY comments become due.

On the merits, SMART/TD-NY considers the reciprocal switching proposed rules would be harmful to its members and to the rail industry. The Board should not adopt the proposed reciprocal switching rules.

3. The Interest of Rail Employees Should Be Considered and Conditions Provided. If despite the numerous objections to the proposed reciprocal switching rules, they nevertheless are adopted, the STB should require that the switching agreements contain employee protective conditions. 49 U.S.C. §11102(c)(2):

The Board may require reciprocal switching agreements entered into by rail carriers pursuant to this subsection to contain provisions for the protection of the interests of employees affected thereby.

SMART/TD-NY has raised the matter of employee protection, and that it should be included in any prescription of reciprocal switching by the Board, in the various proceedings predessor to the instant NPRM,

principally in Ex Parte 705 and in Ex Parte 711.^{3/}

A. Consideration of Employee Interests. The NPRM recognizes that the impact upon employees is to be considered by the STB in evaluating the public interest under §11102(c)(1), in deciding whether to approve the reciprocal switching agreement. (Decision, 18).

B. Provisions for Protection of Interests of Employees. As indicated from the language of §1102(c)(2), set forth above, the STB can require employee protective conditions on reciprocal switching. The railroad parties have amply demonstrated in Ex Parte 711, that mandatory reciprocal switching would visit major changes in railroad operations, virtually comparable to merger, acquisition, or control proceedings. SMART/TD-NY need not again prove the point. The impact upon railroad employees, particularly operating employees, would be devastating. Just as the STB is required to consider employee impact in

^{3/} SMART/TD-NY and/or its predecessor UTU-NY, filed written pleadings in Ex Parte 705 on April 12, 2011 (ID 229225); May 27, 2011 (ID 229634); and July 25, 2011 (ID 230677). Witten pleadings in Ex Parte 711 were filed March 1, 2013 (ID 233889); and May 30, 2013 (ID 234342). In addition, the organization appeared at hearings in both proceedings.

determining whether to approve Class 1 carrier transactions under §11324(b), and thereafter impose mandatory employee conditions on approval under §11326, so too the STB should impose employee protective conditions when the STB requires reciprocal switching.

The precise language of the employee protective conditions may best be determined at a later stage in this rulemaking proceeding.

CONCLUSION

The Board should not adopt the rules set forth in the NPRM. If reciprocal switching nevertheless is to be required, the Board should require provisions for the protection of the interests of employees affected thereby.

Respectfully submitted,



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