

Before the  
SURFACE TRANSPORTATION BOARD

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STB DOCKET No. EP 711

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PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES

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STB DOCKET No. EP 711 (Sub-No. 1)

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RECIPROCAL SWITCHING

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COMMENTS OF THE TRANSPORTATION DIVISION OF THE INTERNATIONAL  
ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS

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The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”)<sup>1</sup> submits this as its comments opposing the Surface Transportation Board’s (“STB” or “the Board”) Notice of Proposed Rule Making (“NPRM”) in Docket No. EP 711 (Sub-No. 1).<sup>2</sup>

**I. INTRODUCTION**

Following a petition for rulemaking filed by the National Industrial Transportation League (“NITL”) seeking revised reciprocal switching regulations, on July 27, 2016, the STB issued an NPRM proposing new regulations which would allow a party to seek a reciprocal

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<sup>1</sup> The Sheet Metal Workers International Association and United Transportation Union (“UTU”) merged to become SMART. The former UTU is now the Transportation Division of SMART (“SMART-TD”).

<sup>2</sup> SMART-TD adopts and incorporates herein by reference the arguments set forth in the Comments filed on behalf of the Brotherhood of Maintenance of Way Employees Division/IBT (“BMWE”), the Brotherhood of Railroad Signalmen (“BRS”), and SMART Mechanical Division.

switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service, purportedly in accordance with 49 U.S.C. § 11102(c)(1). As demonstrated herein, the proposed changes are inconsistent with existing Board precedent and may lead to many uncertainties which would adversely impact labor. Accordingly, the Board should decline to adopt the proposed revised regulations. In the alternative, the Board should impose mandatory employee protective conditions along with any reciprocal switching arrangement.

## II. ARGUMENT

### A. The Proposed Regulations Depart From Longstanding Rules and Precedent

As set forth in the NPRM, the Board's longstanding existing regulations pertaining to competitive access, including reciprocal switching, were established in 1985 by the Interstate Commerce Commission ("ICC"), *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom Balt. Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).<sup>3</sup> The ICC first applied the new regulations in *Midtec Paper Corp. v. Chicago & Nw. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988). In that case, the shipper sought an order compelling the railroad to service its facilities via terminal trackage rights and/or imposition of a reciprocal switching agreement. *Id.* at 172. The ICC denied the shipper's petition, reasoning:

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<sup>3</sup> In the regulations, the Board's predecessor adopted the agreed-upon proposal between the NITL and American Association of Railroads ("AAR"), with some modifications. The regulations provide that reciprocal switching would be limited to situations where the ICC determined that it is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive," and "otherwise satisfies the criteria of . . . 11102(c)." 49 C.F.R. § 1144.2(a)(1); *see also Intramodal Rail Competition*, 1 I.C.C.2d at 830, 841. No longer happy with the agreed-upon arrangement, the NITL filed a petition for rulemaking, seeking changes that were more favorable to certain shippers (*NITL Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Docket No. EP 711 at 7).

[W]e think it correct to view the Staggers [Act] changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

*Id.* at 174. The ICC explained that the key to evaluating “whether conduct that is contrary to the rail transportation policy or is otherwise anticompetitive” was: “(1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service.” *Id.* at 181.

In the NITL's petition for rulemaking, it proposed regulations mandating Board-ordered competitive switching by a Class I rail carrier where the following four criteria are met:

(1) The shipper (or group of shippers) is served by a single Class I rail carrier; (2) there is no effective intermodal or intramodal competition for the movements for which competitive switching is sought; (3) there is or can be “a working interchange” between a Class I carrier and another carrier within a “reasonable distance” of the shipper's facility; and (4) switching is safe and feasible and would not unduly hamper the carrier's ability to serve existing shippers.

(*NITL Petition for Rulemaking* at 7). The Board determined that the NITL's proposal would benefit a subset of shippers and did not strike the appropriate policy balance (NPRM at 13-15), and has instead proposed a two-pronged approach it contends is based on the statutory language of § 1102(c).

The Board proposes two separate and distinct avenues for a shipper to obtain reciprocal switching: (1) when it is practicable and in the public interest; **or** 2) when it is necessary to provide competitive rail service.” (*Id.* at 15). Under the Board's proposal, in determining whether the proposed switching would be “practicable and in the public interest,” shippers must satisfy 3 criteria:

(1) that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s); (2) that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching; and (3) that the potential benefits from the proposed switching arrangement outweigh the potential detriments.

(*Id.* at 18). The Board notes that in assessing the third criteria, it will consider operational feasibility, safety, the efficiency of the route, access to new markets, the impact on capital investment, the impact on service quality, the impact on employees, the amount of traffic that would use the switching arrangement, the impact on the rail transportation network, and the RTP factors. (*Id.*). However, it does not specify how it will evaluate those factors and/or what weight it would give, for example, the impact on employees.

In determining whether the proposed switching is “necessary to provide competitive rail service,” shippers must satisfy 3 criteria:

(1) that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by a single Class I rail carrier; (2) intermodal and intramodal competition is not effective with respect to the movements of the shipper(s) and/or receivers(s) for whom switching is sought; and (3) there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.

(*Id.* at 19). The Board additionally notes that it will not order reciprocal switching if either rail carrier shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.” (*Id.*). However, the Board places the burden on the rail carriers to make this showing. (*Id.*). It is not clear how a carrier could demonstrate the potentially unsafe conditions arising from the reciprocal switching arrangement in the abstract, as an analysis of the particular facts – which may not be known – would be required, or what weight the STB would give to a carrier’s assertions, which may be speculative and not based on concrete evidence.

**B. SMART-TD is Concerned with the Potential Impact on Employees Due to the Proposal's Many Uncertainties.**

SMART-TD is the largest railroad operating union in North America, representing employees on every Class I railroad, as well as employees on many regional and short line railroads. Membership is drawn primarily from the operating crafts in the railroad industry and includes conductors, brakemen, switchmen, ground service personnel, locomotive engineers, hostlers and workers in associated crafts. As a result, SMART-TD has a strong interest in this proceeding, and is concerned with its potential impact on the safety and security of its membership and rail employees generally. In particular, SMART-TD has specific concerns regarding the uncertainties that this proposed rule may cause, including its potential to effect safety, allow crews to work in unfamiliar territories, and disrupt collective bargaining agreements, among other concerns. It is not clear which entity's employees would be performing the work where reciprocal switching is required, and, where such employees are not employees of the incumbent railroad, what familiarization training might be applied. Indeed, such may increase railroad congestion, which could lead to accidents.

The proposed regulations would further undermine the existing regulatory framework and could have a chilling ripple effect on areas affecting labor, including the wages, rules and working conditions of employees. Any reduction to railroads' revenue will directly impact employees' wages and benefits. In addition, the revisions may encourage railroads to abandon what were previously profitable lines, and depending on the structure of such transactions, circumvent the imposition of labor protection. While the statute authorizes the Board to impose employee protection for reciprocal switching, 49 U.S.C. § 1102(c)(2), the Board has not mandated employee protective conditions in its proposed regulations. Due to the uncertainties and potential unintended consequences arising from this departure from

longstanding precedent, SMART-TD encourages the Board to decline to adopt the changes proposed. To the extent that they are implemented, SMART-TD urges the Board to prescribe mandatory employee protective conditions to those who are adversely affected.

### **III. CONCLUSION**

Based upon the foregoing, the Board should decline to adopt the proposed changes to the existing regulations on reciprocal switching.

Respectfully submitted,

s/ Erika A. Diehl-Gibbons

Erika A. Diehl-Gibbons  
Associate General Counsel  
SMART – Transportation Division  
24950 Country Club Blvd., Ste. 340  
North Olmsted, Ohio 44070  
(216) 228-9400  
[ediehl@smart-union.org](mailto:ediehl@smart-union.org)

Dated: October 26, 2016

**CERTIFICATE OF SERVICE**

I certify that on this 26<sup>th</sup> day of October, 2016, I served copies of the foregoing document upon the following parties of record in this proceeding by first-class or electronic mail.

s/ Erika A. Diehl-Gibbons

Erika A. Diehl-Gibbons