

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE No. 711 Sub-No. 1

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PROPOSED CHANGES TO RULES
REGARDING RECIPROCAL SWITCHING

**COMMENTS OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION/IBT, BROTHERHOOD OF RAILROAD SIGNALMEN, AND
INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS/MECHANICAL DIVISION**

The Brotherhood of Maintenance of Way Employes Division/IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers/Mechanical Division (“Unions”) respectfully submit these comments in response to the Board’s notice of proposed rulemaking to modify its rules and standards for mandating reciprocal switching that were published on August 3, 2016.

INTERESTS OF THE UNIONS AND THEIR MEMBERS

The Unions represent the maintenance of way, signal and sheet metal workers on all of the Class I railroads, as well as railroad workers on other railroads. The railroads are the employers of the members of the Unions. When changes in the structure of the industry and regulation of the industry cause the railroads to incur financial setbacks or reduced earnings, they usually attempt to pass at least some of their losses on to their employees. In this regard, the Unions also note that one of the National Rail Transportation Policies is “to encourage fair wages and safe and suitable working conditions in the railroad industry”. 49 U.S.C. §10101(11).

Some describe the Staggers Act, deregulation, the 1980s permissive regulatory approach

to abandonments and line sales, and the 1990s consolidation of the railroads as rescuing the industry and preserving rail service for shippers. But railroad workers were devastated by those changes. Between 1980 and 2000 railroad employment was halved, thousands of jobs were eliminated through abandonments and line sales without employee protections, and Presidential Emergency Board recommendations and legislatively imposed resolutions to collective bargaining disputes (as well as threatened legislative imposition of PEB recommendations) resulted in dramatic changes to the rates of pay, benefits, rules and working conditions adverse to railroad workers. All of that was justified as necessary to improve and support the financial viability of the industry and to preserve service for shippers.

When the industry was substantially restructured in the 1990s culminating with STB approval of the BN-ATSF and UP-SP mergers, and of the CSXT and NSR division, acquisition and control of Conrail, pursuant to Board findings that the transactions were in the public interest, members of the Unions experienced substantial adverse impacts as consequences of those decisions. Many workers lost their jobs or suffered downgrades of their positions; others were required to relocate, often significant distances; and the railroads (perversely) used the employee protective conditions to force major modifications of collective bargaining agreements outside Railway Labor Act processes, almost always to the detriment to members of the Unions.

The result of those changes was improved financial health of the industry, substantial improvement of rail infrastructure through reinvestment by more financially sound railroads, and significantly improved rail service for shippers. As the Board noted in its August 3 decision and Notice of Proposed Rulemaking, the Senate Report on the Surface Transportation Board Reauthorization Act found that the railroad industry has evolved since the Staggers Act and the

financial viability of the industry has improved (*id.* at 51152), but neither the Committee on Commerce nor the Board recognized the toll that deregulation and consolidation had taken on railroad workers. Completion of the consolidations after two decades of unrelenting adverse changes did result in cessation of the constant decline in the standard of living of railroad workers. As the railroads regained financial strength, the conditions of railroad workers bottomed-out and plateaued, but the tremendous losses were certainly not recouped. Nonetheless, today, as the railroads experience a reduction in revenue off their peak years, while still doing much better than prior to 2000 and comparatively better than general post-2000 performance, the railroads are coming to the Unions in bargaining seeking major concessions in benefits and work rules while offering essentially flat compensation over several years.

Thus, it is the experience of the Unions that structural and regulatory changes to the industry and financial losses for the railroads have adverse consequences for their members. The Unions therefore have a significant interest in regulatory changes that are likely to diminish railroad revenues-- like the proposal of the National Industrial Transportation League (“NITL”) to change the rules regarding when the Board will require reciprocal switching by Class I railroads.

THE NITL REQUEST AND THE BOARD’S NOTICE

In 2011, the NITL sought changes to the Board’s rules governing when Class I railroads would be required to provide reciprocal or competitive switching for interchanges that would not otherwise be provided. Under the existing rules, the Board would not direct reciprocal switching unless a petitioner demonstrated anti-competitive acts.

As the Board observed in its August 3, 2016 decision and Notice of Proposed

Rulemaking, mandated reciprocal switching orders (or competitive switching orders) allow a competing carrier to offer its own single-line rates, even if its lines do not physically connect with a shipper's facility. 81 Fed Reg. Vol. 81 No. 149 at 51150 (August 3, 2016). In filings in support of the NITL petition, the NITL and other shipper groups asserted that the proposed change would "introduce more competition into the rail transportation marketplace". *Id.* at 51151. Allowing a competing carrier to quote its own rate, that it could not have quoted absent a competitive switching requirement, is designed to provide shippers access to shipping rates not otherwise available to them. Reduced shipping rates is certainly the goal of proponents of the change. Principal commenters agreed that a reduction in rates would be a likely result of the proposed change, although they differed in their estimates on the potential reduction in rates. *Id.* at 51152. Thus, the intended outcome of modification of the competitive switching rules is lower costs for shippers and less revenue for the railroads.

POSITION OF THE UNIONS

The Unions oppose NITL's proposed changes to the Board's reciprocal shipping rules, as well as the type of changes discussed in the Board's August 3 Notice of Proposed Rulemaking.

While proponents of the changes characterize them as a narrow remedy for a specific alleged problem, they are, in actuality, an effort to partially re-litigate and revise the merger and control decisions of the 1990s that were deemed to be in the public interest after extensive proceedings in which the NITL and other large shipper interests were full participants. In each of those transactions, the applicants asserted that improved networks, elimination of interchanges and single-line service would provide significant public benefits; in particular, they claimed that shippers would benefit by the combinations as a consequence of the new hub and terminal

arrangements, enhanced through service, improved average speeds, reduced terminal delays and fewer interchanges. Many shipper groups supported the transactions; other shipper groups entered settlements with the applicants relatively early in the proceedings, obtaining little from the applicants. In particular, the NITL either supported the transactions, or settled for very modest concessions— like acceptance of several years of Board oversight. Having supported those transactions, or acquiesced in them by settlements that required very little of the railroads, the NITL now seeks revisions to the structure of the industry that was the outcome of those transactions by complaining that the resultant industry is insufficiently competitive such that current terminal and interchange arrangements should be changed. And the outcome of the proposed changes would be a reduction of revenue for the railroads and a commensurate gain in revenue for shippers.

Since NITL participated fully the proceedings of the 1990s and ultimately supported those transactions— which described in detail the planned network, terminal, single-line service, switching, and interchange arrangements planned by the applicants— NITL should not now be heard to complain of those arrangements. The Unions take particular exception to this effort because the Unions opposed the transactions of the 1990s that resulted in the current competitive environment while the NITL and other major shipper groups did not. Those transactions, which altered the structure of the industry and created the current competitive environment, were approved by the Board after analysis of the interests and concerns of participating stakeholders, and after consideration of requests for conditions, including conditions developed in settlements like those entered by the NITL. In each case, the impact of the merger or acquisition on competition was investigated, litigated and assessed by the Board. Those transactions were

ultimately approved subject to the conditions imposed based on findings that the public at large and shippers in particular would benefit. Those same public interest findings were driving factors in the reductions in employment and changes to collective bargaining agreements implemented by the railroads after the transactions were approved. Members of the Unions should not now face the prospect of further losses because certain shipping interests have buyer's remorse, or feel that current circumstances are such that they sense an opportunity to chip away at the product of the Board's balancing of competition, service, efficiency and other stakeholder interests.

The Unions further submit that nothing that has occurred since 2000 justifies revision of the rules regarding reciprocal switching orders. The structure of the industry remains as it was; there have been no new consolidations. While the financial viability of the industry has indeed improved as observed by the Senate Commerce Committee report, that was a major goal of deregulation and approval of the mergers and acquisitions. That the transactions accomplished what they were designed to accomplish (at a significant cost to railroad workers) does not constitute an unexpected development that would purportedly justify changing the economic balance struck by the Board between the railroads and their shippers.

Finally, the Unions note that issues like this are sometimes presented as conflicts between big railroads and small shippers. But in reality the major shipping interests are large corporations too; certainly major participants in the NITL are very large corporations. The Unions urge the Board to recognize that in this clash between corporate titans, the parties that are likely to be hurt are the employees of the railroads.

For all of the foregoing reasons, the Unions respectfully request that the Board decline to change its reciprocal shipping rules as requested by the NITL or as described in the Board's August 3 Notice of Proposed Rulemaking.

Respectfully submitted,

/s/Richard S. Edelman

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October 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused copies of the foregoing Comments of the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers/Mechanical Division to be served by First Class Mail on all parties identified on the official service list for Ex Parte No.711-Sub. No. 1.

October 26, 2016

/s/ Richard S. Edelman

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