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Before the  
SURFACE TRANSPORTATION BOARD

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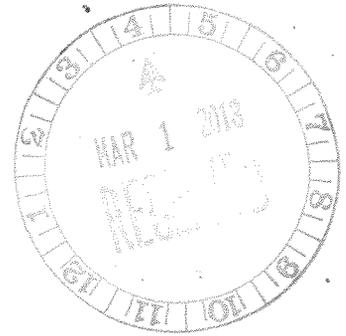
Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES

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COMMENTS

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March 1, 2013

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these comments in response to Notice of Commencement of Proceeding and Request for Comments (NCP&RC), decided and served July 25, 2012. 77 Fed. Reg. 45327 (July 31, 2012).

The NCP&RC does not advance any proposed rules for application by the Surface Transportation Board (STB or Board); rather, the NCP&RC seeks comments on a "competitive switching" proposal advanced by The National Industrial Transportation League (NITL). Persons are particularly invited to submit information on four topics, (1) The impact on rates and service for shippers that would qualify under the NITL's proposal; (2) the impact upon on rates and service for captive shippers that would not qualify under the proposal (because they are not located in a terminal

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<sup>1/</sup> New York State Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY, 12205.

area or within 30 miles of a working interchange); (3) the impact on the railroad industry, including its financial condition, network efficiencies or inefficiencies (including the potential for increased traffic); and (4) an access pricing proposal.

The NITL's proposal would mandate competitive switching if four conditions are met. First, the rate on traffic for which switching is sought equals or exceeds 240% of R/VC cost; second, the Class I carrier handling the traffic for switching is sought handled 75% or more of the traffic; third, a workable interchange exists within a reasonable distance of the shipper's facility--30 miles being deemed a conclusive presumption; fourth, switching is safe and feasible, with no adverse effect upon existing service.

The STB's July 25, 2012 notice states the sought information would be used to augment the Board's analysis of NITL's proposal, as well as other issues raised in Ex Parte No. 705, Competition in the Railroad Industry.

#### Interest of UTU-NY

UTU-NY has an interest in all of the four items for which information is sought by the NCP&RC, particularly (3) dealing with the impact upon the railroad industry--railroad employees have an obvious interest in the various railroad affairs set forth in the rail transportation policy, 49 U.S.C. 10101, and in many other provisions of the Interstate Commerce Act, as revised by ICCTA. Moreover, UTU-NY is a participant in Ex Parte No. 705, Competition in the Railroad Industry, submitting four pleadings,<sup>2/</sup> and present-

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<sup>2/</sup> Filed April 12, May 27, June 10, and July 25, 2011.

ing testimony at the oral hearing.<sup>3/</sup> The NITL proposal appears motivated primarily by rail rate concerns, rather than with any inadequacy of railroad service.

I. MANDATORY EMPLOYEE PROTECTION SHOULD BE REQUIRED FOR ANY REVISION OF SWITCHING RULES.

The NITL urges that the Board eliminate the current competitive access rules, together with associated precedent, insofar as they apply to reciprocal switching. (NITL, 65). These rules were established in Ex Parte No. 445 (Sub-No. 1), Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), a major industry-wide proceeding, embracing 78 opening and 41 reply statements, 1 I.C.C.2d at 823, and which was sustained on judicial review. Baltimore Gas and Elec. Co. v. U.S., 817 F.2d 108 (D.C. Cir. 1987). Rail employees<sup>4/</sup> actively participated in the agency and court proceedings.

The current reciprocal switching rules make no mention of employee protective conditions, although the statute, 49 U.S.C. 11102(c)(2), authorizes the STB to require employee protection for reciprocal switching. NITL proposes to substitute mandatory rules in lieu of the existing fairly open regulatory scheme. UTU-NY is not convinced at this stage of the proceeding for any need to eliminate the current system; however, mandatory employee protective conditions should follow any mandatory reciprocal switching particularly where, as here, NITL's proposal would involve at least one Class I carrier.

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3/ Held June 22, 2011.

4/ See: 817 F.2d at 113-14, n.5.

II. EMPLOYEE PARTICIPATION SHOULD BE  
ALLOWED IF THE RULES ARE CHANGED.

If the reciprocal rules are eliminated in favor of "competitive switching," the Board should make it clear that railroad employees may seek redress at the Board for any perceived unlawfulness in administration of the provisions. Such a condition would ratify the position taken by ICC counsel, in the reviewing court, during review of Baltimore Gas and Elec. Co., *supra*, 817 F.2d at 113-14 n.5. Moreover, apart from statutory power or lack of statutory power to impose protective conditions, railroad employees are to be considered in determining the "public interest" and "public convenience and necessity." ICC v. Railway Labor Assn., 313 U.S. 373, 376-77 (1942); United States v. Lowden, 308 U.S. 225 (1939); Great Northern Ry. Co. Discontinuance of Service, 307 I.C.C. 59, 74 (1959).

Respectfully submitted,



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