

SUMMARY OF THE STB's PROPOSED NEW RECIPROCAL SWITCHING RULES

On July 27, 2016, the Surface Transportation Board (STB) issued its long-awaited decision on the NITL's petition requesting a rulemaking on its proposal for new competitive switching rules. The Board granted the League's petition in part and instituted a rulemaking proceeding on proposed modifications to the existing reciprocal switching rules.¹ This memorandum provides a summary of the revised reciprocal switching regulations proposed by the STB.

STB Authority and Reversal of the Competitive Abuse Standard. In the NPRM, the STB rejected railroad arguments that the Board lacked authority to change its existing switching rules and found that it is "appropriate to revisit" the current rules given the extreme lack of reciprocal switching cases in the past several decades which suggests the current rules create too high of a barrier. The Board also found that the current rules makes less sense today based on "significant changes" in the railroad industry since the current rules were adopted in the 1980's; most importantly, railroads are in much better financial health now and have benefited from productivity and technological advances since then. Thus, in a significant victory for shippers, the Board reversed the current requirement that shippers prove "competitive abuse" in order to obtain a switching remedy.

STB Proposals to Obtain a Switching Remedy. The STB found the NITL competitive switching proposal to be a valuable starting point, but stated that the conclusive presumptions included therein were problematic because of fairness concerns. Therefore, the STB has proposed a reciprocal switching remedy that would be available "more equally...to all shippers."

Under the STB's proposed rules, a shipper has two paths to obtain reciprocal switching based on a case-by-case evaluation of factual evidence provided by the parties. Both paths are based upon the switching statute set forth in 49 U.S.C. § 11102(c). Specifically, the Board proposed that shippers and receivers could seek to obtain reciprocal switching under two separate options or "prongs."

First, the Board proposed that a shipper or receiver could seek to show that the proposed switching "would be practicable and in the public interest." Second, the Board proposed that a shipper or receiver could seek to show that the proposed switching "is necessary to provide competitive rail service."

¹ See Notice of Proposed Rulemaking ("NPRM") issued in Ex Parte No. 711 (Sub-No. 1), Petition for Rulemaking to Adopt Revised Competitive Switching Rules (served July 27, 2016).

The two options proposed in the NPRM are summarized below:

	Switching Remedy Is Practical and In the Public Interest	Switching Remedy is Necessary to Provide Competitive Rail Service
Required Evidence		
Criterion #1	Facility(ies) for which switching is sought is/are served by Class I railroad(s).	Facility for which switching is sought is served by a single Class I railroad.
Criterion #2	There is or can be a working interchange between the serving Class I railroad and another Class I railroad ² within a reasonable distance of the relevant facility.	
Criterion #3	Potential benefits from the proposed switching outweigh the potential detriments.	No effective intermodal & intramodal competition exists as to the shipper /receiver movements for which a switching remedy is requested.
Factors informing Criterion #3 include:	<ol style="list-style-type: none"> 1. feasibility and safety 2. efficiency of the route 3. access to new markets 4. impact on capital investment 5. impact on service quality 6. impact on employees 7. amount of traffic that would use the switching arrangement 8. impact on the rail transportation network 9. RTP factors of § 10101 10. any other relevant evidence 	<p>Market dominance test from rail rate cases, including:</p> <ol style="list-style-type: none"> 1. quantitative: R/VC over 180% 2. qualitative: no effective competition exists, i.e. there are no feasible transportation alternatives (inter-modal or intramodal) that can constrain the railroad's rates to competitive levels
Affirmative Defense to Switching Remedy	<p>No switching is ordered if either railroad shows that:</p> <ol style="list-style-type: none"> 1. the proposed switching is not feasible or is unsafe; or 2. the presence of switching would unduly hamper the ability of the railroad to serve its shippers 	

² The League's proposal limited switching remedies to be against a Class I railroad but would have permitted short-line carriers to serve as the alternative competing carrier.

	Switching Remedy Is Practical and In the Public Interest	Switching Remedy is Necessary to Provide Competitive Rail Service
Factors informing affirmative defense include:	<ul style="list-style-type: none"> • traffic density • the line’s capacity • yard capacity • right-of-way widths • characteristics (rural, urban, etc.) of the surrounding area 	<ul style="list-style-type: none"> • grade separations • drainage • hazardous materials • network effects

Access Pricing. Under the governing statute, 49 U.S.C. § 11102(c)(1), the railroads involved in competitive switching are provided the initial right to agree on the applicable access fee to be paid by the new serving railroad to the incumbent railroad for the incumbent’s movement of the rail cars between the relevant facility and the interchange point. If the railroads cannot agree, the Board will set the access fee. The Board has proposed two alternative access fee approaches:

Option #1: Consideration of Various Factors Related to Switching Fee

Factors to be considered include:

1. geography where the proposed switch would occur
2. distance between the relevant facility and the proposed interchange
3. the cost of the service
4. capacity of the interchange facility
5. other case-specific factors

Option #2. Variation of Board’s Methodology for Setting Trackage Rights Fees (SSW Compensation Methodology)

A switching fee set by the Board could seek to compensate the incumbent for the:

1. expenses incurred to provide the service, and
2. a fair and reasonable return on capital employed.

Interchange. The Board proposes that there “is” a working interchange if one currently exists and is being utilized. The Board proposes that there “can be” a working interchange if the infrastructure exists “without the need for construction,” regardless of whether any switching operations have taken place there.

Rate Cases. There is no need for a “blanket rule” that a reciprocal switching order would (or would not) preclude a finding of market dominance in a rate case. Instead, a reciprocal switching order would be treated the same as any other transportation alternative when evaluating market dominance in a rate case.
