The Surface Transportation Board

Ex Parte 738—Regulatory Reform Task Force Listening Session

July 25, 2017

STATEMENT OF JENNIFER HEDRICK, EXECUTIVE DIRECTOR, THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Good morning. I am Jennifer Hedrick, Executive Director of the National Industrial Transportation League. On behalf of the League, I want to thank the Board's Regulatory Reform Task Force for inviting industry stakeholders to share our views on regulatory reforms that would streamline STB processes and eliminate or improve outdated and burdensome regulations. We commend the Task Force for your efforts and look forward to working with you on this important matter.

The League is no stranger to the Board. Our organization and members routinely participate in Board proceedings representing the voice of the shipper community. League members range from some of the largest purchasers of transportation services to smaller companies engaged in the shipment and receipt of goods. The League's rail shippers are from a multitude of industries, including chemicals, petroleum, agricultural, and forest products and paper, among others.

Railroads are vitally important partners to NITL rail shippers. Our members strongly support a robust and financially sound rail industry that can invest in the national rail network for the benefit of the railroads, their customers, and the American economy. However, our members also need a competitive and efficient rail industry that can meet the demands of increasingly complex supply chains, and support American manufacturing and business growth.

When problems arise between railroads and their customers that require the Board's assistance, our members also need an agency that is readily accessible, and a regulatory system that is more user-friendly and cost-effective. Thus, we applaud your efforts to improve and streamline the Board's regulations and procedures.

NITL RECOMMENDATIONS TO ELIMINATE OUTDATED, UNNECESSARY OR BURDENSOME STB REGULATIONS

A number of the Board's current regulatory initiatives, such as its proposals to repeal and replace its reciprocal switching rules in EP 711, to revoke certain commodity exemptions in EP 704, and to consider alternative rate case procedures in EP 722, are all consistent with the Task Force's mission to "identify rules and practices that are burdensome, unnecessary, or outdated" which can be "repealed, replaced, or modified." Accordingly, within the spirit of President Trump's Executive Order 13777, we urge the Board to take the following actions:

First, the Board should move forward expeditiously to repeal and replace its outdated, burdensome and unworkable reciprocal switching rules.

The Board's existing reciprocal switching rules were adopted over thirty years ago before the major rail mergers in the 1990s that dramatically consolidated the rail industry and reduced competitive rail service for many American businesses.[1] Although Congress envisioned that competitive switching would be available when "practicable or in the public interest or when necessary for competitive rail service" the current rules have *never* resulted in the establishment of new competitive switching arrangements.[2] In fact, no shipper has even attempted to bring a competitive switching case in many years, despite the strong concerns voiced by captive shippers over their lack of competitive rail service.

In its EP 711 (Sub No. 1)—*Reciprocal Switching* rulemaking decision issued in July 2016, the Board granted in part a Petition filed in July 2011 by the League which asked the Board to adopt new switching rules consistent with the governing statute. In that decision, the Board proposed new switching rules based on its findings that the rail market has changed substantially and the current rules impose insuperable regulatory barriers that inhibit competitive switching

[1] *See Ex Parte 445 (Sub-No. 1); Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom., Baltimore Gas& Elec. Co. v. United States,* 817 F.2d 108 (D.C. Cir. 1987). The Board's current reciprocal switching rules are codified at 49 C.F.R. § 1144.5.

[2] *See Midtec Paper Corp. v. Chicago and N. Western Transp. Co.,* 3 I.C.C. 2d 171 (1986), *affirmed Midtec Paper Corp. v. United States,* 857 F.2d 1487 (D.C. Cir. 1988); *Vista Chem. Co. v. The Atchison, Topeka and Santa Fe Ry. Co.,* 5 I.C.C.2d 331 (1989); *Shenango Inc., et al. v. Pittsburgh Chartiers and Youghiogheny Ry. Co.,* 5 I.C.C.2d 995 (1989) (involving a prescription for terminal trackage rights); and *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.,* ICC Docket No. 41550, slip op. (served April 25, 1996).

arrangements. Specifically, the Board determined that applying a single competitive abuse standard in order to obtain a switching remedy "makes less sense in today's regulatory and economic environment."[3] It also found that its current reciprocal switching rules "have effectively operated as a bar to relief rather than as a standard under which relief could be granted."[4] The League strongly agrees with these conclusions which demonstrate that the current reciprocal switching rules are outdated and burdensome and must be modified.

The League urges the Board to act expeditiously to revise its reciprocal switching rules to eliminate the "competitive abuse" regulatory barrier and allow the competitive marketplace to establish railroad prices. Despite the railroad industry's claims, facilitating reciprocal switching arrangements would be *deregulatory* (and not *re-regulatory*) because it would eliminate STB regulation over the entire origin to destination movement, reducing rate regulation, if any, to the shorter switching movement. Thus, revising the current switching rules would not only be consistent with the President's Executive Order, it would also be consistent with the National Rail Transportation policies "to allow, to the maximum extent possible, competition and the demand for services to establish

[3] EP 711 (Sub. No. 1) Decision at 9.
[4] *Id.* at 8.

reasonable rates for transportation by rail" and "to minimize the need for Federal regulatory control over the rail transportation system."[5]

Second, the Board should revoke outdated and unnecessary commodity exemptions as proposed in EP 704 (Sub No. 1)—*Review of Commodity Boxcar, and TOFC/COFC Exemptions*.

In the Ex Parte 704 proceeding, the Board has proposed to revoke a number of commodity exemptions that were determined to be outdated and no longer necessary; and representatives of exempt paper and forest products have asked the Board to revoke these commodity exemptions based on the submitted evidence. Citing its own economic analyses, the Board determined in EP 704, that "the dynamics of the particular transportation markets appear to have changed so significantly since the exemptions were first promulgated as to warrant the application of the Interstate Commerce Act in order to carry out the Rail Transportation Policy."[6]

The Board's finding that certain commodity exemptions were no longer warranted was also supported by "an increased likelihood of railroad market power for each of these specific commodity groups."[7] It is important to note that exempt

[5] 49 U.S.C. § 10101(1) and (2).
[6] EP 704 (Sub No. 1)--*Review of Commodity Boxcar, and TOFC/COFC Exemptions*, Decision at 6 (March 23, 2016).
[7] *Id.*

shippers are also forced to endure unnecessary regulatory burdens and costs, since they must first file and litigate petitions to revoke an exemption at the Board before they can access the Board's procedures to address rail pricing and service concerns or unreasonable practices. Certainly, eliminating outdated regulatory exemptions that subject American manufacturers, producers and receivers of goods to railroad market power and unnecessary costs would be consistent with President Trump's Executive Order.

Third, the Board should revise or develop an alternative standard to the burdensome and unworkable Stand Alone Cost (hereafter "SAC") rate case procedures.

Large SAC rate cases are widely-recognized for being incredibly complex, time-consuming, and costly. The League supports the Board's on-going efforts to improve SAC cases based on its evaluation of court procedures that could expedite such litigations at the Board. However, recent SAC cases have demonstrated that the remedy is unworkable for carload (or non-coal) traffic and simply expediting SAC cases will not address this problem. The Transportation Research Board recently completed a comprehensive study of the current freight rail regulatory structure, *Modernizing Freight Rail Regulation*, in which it was found "that more appropriate, reliable, and usable procedures for resolving rate disputes are needed to fulfill the regulatory interest in protecting shippers in markets that lack effective

competition from unreasonably high rates."[8] The Transportation Research Board suggested that a practical and pro-competitive benchmarking methodology be developed to replace SAC.[9] The League and other shipper organizations supported the development of such an alternative approach in the Board's pending EP 722 (Sub No. 2)—*Revenue Adequacy* proceeding. Accordingly, the League encourages the Board to not only look for ways to improve the workings of its large rate case proceedings but to develop a more workable, effective, and less burdensome alternative to the SAC standard itself.

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Finally, I would note that the League submitted additional regulatory reform recommendations in the Board's Ex Parte No. 712—*Improving Regulation and Regulatory Review* proceeding established in 2011 and continues to support those comments to the extent not already addressed by the Board or Congress. I would also ask that my statement today be included in the Ex Parte 738 docket and we will submit a copy to the Board later today. Again, the League greatly appreciates the efforts of the Board's Regulatory Reform Task Force. Thank you.

[8] Transp. Research Bd., Special Report 318, *Modernizing Freight Rail Regulation* (2015) at 4, available at https://www.nap.edu/download/21759# (hereafter "TRB Report").
[9] TRB Report, Chapter 3.