



# Freight Rail Customer Alliance

## Competitive Switching (Access)

### FRCA Position

FRCA supports allowing shippers with direct access to only one railroad to have that carrier provide a “switch” for a nearby rail carrier under certain conditions.

FRCA supports the Surface Transportation Board’s (STB or Board) Notice of Proposed Rulemaking (NPRM) to determine the pros and cons of requiring railroads to provide the requested switching arrangements in [Docket No. EP 711 \(Sub No.-1\), Reciprocal Switching](#). This NPRM was issued on July 27, 2016.

Moreover, FRCA is a co-signer of the 2011 National Industrial Transportation League (NITL) petition filed with the STB allowing competitive switching.

### Issue Background

Since the U.S. Congress passed the *Staggers Rail Act of 1980* ([Staggers Act](#)), which partially de-regulating the freight rail industry, the number of major or Class I freight railroads has declined from 40 to seven, with four essentially operating like regional duopolies controlling 90 percent of all traffic.

While Congress included the concept of reciprocal shipping and terminal trackage rights in the [Staggers Act](#), the Interstate Commerce Commission (ICC and predecessor agency to the STB) actually made it more difficult for shippers to obtain competitive rail service.

The NITL and other shipper groups, including FRCA’s predecessor organization, filed a petition in 2011 asking the STB to issue new rules allowing a captive rail shipper to have that carrier provide a “switch” for a nearby rail carrier where a shipper must show: 1) captivity; 2) lack of inter/intra-modal competition (RVC ratio of 240% or more or a RR handles 75% of all traffic); 3) and reasonable distance to a reasonable distance to an interchange (30 miles). This petition also stated that a RR carrier could avoid switching if unsafe, infeasible or harmful to existing service

FRCA concurs with the NITL’s view, as articulated in its petition that STB’s longstanding competitive shipping rules and processes has been rendered meaningless. No shipper has attempted to obtain a reciprocal switching order for more than 15 years because of the burden of proving anticompetitive conduct under these STB procedures and the changed market conditions for both railroads and shippers during the past 30 years.

The STB has the statutory authority – again dating back to the [Staggers Act](#) – to modify its rules. No additional Congressional action is necessary. As such, the [STB Reauthorization Act of 2015](#), P.L. 114-110, is silent on this competitive access issue.

## **Actions**

### **1. The Administration**

On July 10, FRCA issued a response thanking President Biden for signing an [Executive Order Promoting Competition in the American Economy \(EO 14936\)](#). FRCA’s response can be [read here](#):

On July 10, 2021 the Chairman of the Surface Transportation Board (STB), Martin Oberman, issued a press release supporting the spirit and intent of President Biden’s EO 14036. Of note, the Chairman stated:

“...It is apparent that while consolidation may be beneficial under certain circumstances, it has also created the potential for monopolistic pricing and reductions in service to captive rail customers. Since consolidation, productivity gains often have been retained by the carriers in lieu of being passed on to customers, as would be expected in a truly competitive marketplace...”

The complete statement by Chairman Oberman can be [read here](#).

On July 9, 2021 President Biden signed the EO 14036 which included this directive regarding freight rail:

...To further competition in the rail industry and to provide accessible remedies for shippers, the Chair of the Surface Transportation Board (Chair) is encouraged to work with the rest of the Board to: (i) consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements pursuant to 49 U.S.C. 11102(c), if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service; (ii) consider rulemakings pertaining to any other relevant matter of competitive access, including bottleneck rates, interchange commitments, or other matters, consistent with the policies set forth in section 1 of this order...

### **2. Surface Transportation Board**

On October 26, 2017, FRCA filed comments supporting a Notice of Proposed Rulemaking (NPRM) to determine the pros and cons of requiring railroads to provide the requested switching arrangements in [Docket No. EP 711 \(Sub No.-1\), Reciprocal Switching](#). FRCA’s filed comments can be read [here](#).

On July 27, 2016, the STB announced the above discussed NPRM. This Board proposal would allow shippers with access to only a single rail line to request that carrier provide a switch for freight be moved by a nearby rail line, under certain conditions. This NPRM, granted in part the above discussed NITL petition by initiating this NPRM for new rules on competitive switching arrangements and remedies. The STB has proposed two possible paths for shippers to obtain a competitive switching remedy: 1) switching must be practicable and in the public interest or 2) be necessary to provide competitive rail service.

Reply comments were due by January 13, 2017, along with requests for ex parte meetings with Board Members.

### 3. U.S. Congress

On June 16, 2021, Senator Tammy Baldwin (D-WI) offered and then withdrew her draft ***Rail Shipper Fairness Act of 2021*** as an amendment to the [\*\*\*Surface Transportation Investment Act\*\*\*](#), S. 2016, during Senate Commerce, Science, and Transportation Committee consideration. The draft measure among other things, would have required the Board to require a Class I rail carrier to enter into a competitive switching agreement, provided a shipper or receiver, or a group of shippers or receivers, files a petition with the Board demonstrating to the satisfaction of the Board, that certain conditions exist.

### **Status**

On March 19, 2019, the STB resumed ex parte meetings. These meetings have continued to date especially in light of the [\*\*\*Executive Order Promoting Competition in the American Economy\*\*\*](#) (EO 14936).

FRCA understands that Senator Baldwin is continuing to find other legislative avenues to advance her draft ***Rail Shipper Fairness Act of 2021***, especially considering the [\*\*\*STB Reauthorization Act of 2015\*\*\*](#) expired on September 30, 2020.