BEFORE THE

SURFACE TRANSPORTATION BOARD

Reciprocal Switching	)	
Notice of Proposed Rulemaking	)	
March 15 & 16, 2022 Hearing	)	**Docket No. EP 711 (Sub No.-1)**

WRITTEN COMMENTS

OF THE

FREIGHT RAIL CUSTOMER ALLIANCE

Dated: February 14, 2022	Ann Warner Spokesperson Freight Rail Customer Alliance Managing Partner, Ann Warner LLC 300 New Jersey Avenue, NW Suite 900 Washington, DC 20001

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INTRODUCTION

The Freight Rail Customer Alliance (FRCA) includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. Through a growing coalition of industries and associations, the mission of FRCA is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices. More detailed information about FRCA can be found on its website: **www.railvoices.org**

FRCA welcomes this opportunity to submit written comments in response to the notice of the Surface Transportation Board (Board or STB) served December 28, 2021 ("Notice"). That notice scheduled a public hearing for March 15 and 16, 2022, and called for comments and written testimony to be submitted by February 14, 2022.

In the notice, the Board stated that the purpose of the of the hearing is two-fold for interested persons to submit testimony in this proceeding that:

1. Identify new developments since the Board previously requested public comments in this proceeding that a commenter finds relevant to the Board issuing a final decision and addresses any change or significant development since the previous round of comments.

2. Address topics that were discussed in ex parte communication that have taken place since October 25, 2016.

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.

On October 26, 2017, FRCA filed comments strongly supporting a Notice of Proposed Rulemaking (NPRM) in Docket No. EP 711 (Sub No.-1), *Reciprocal Switching*. The Board issued this NPRM on July 27, 2016.

The reciprocal switching proposed in this NPRM was long overdue in 2016 and is even more overdue almost six years later. It has the potential to help harness the forces of competition to provide relief for captive shippers in fulfillment of the statutory requirement in 49 U.S.C. § 10701(d)(1), that rates for captive shippers "must be reasonable." A meaningful reciprocal switching option is particularly vital for the many captive shippers that are unable to obtain any benefit from the stand-alone cost ("SAC") test and the Board's other existing unreasonable rate methodologies.

Moreover, FRCA is a co-signer of the 2011 National Industrial Transportation League (NITL) petition filed with the STB to allow competitive switching. FRCA continues to concur with the NITL's view, as articulated in its petition, that the STB's longstanding competitive shipping rules and processes are effectively a nullity. <u>No shipper has attempted to obtain a reciprocal switching order 20-plus years because of the burden of proving anticompetitive conduct under these procedures and the changed market conditions for both railroads and shippers during the past 30 years and during the more recent five-plus years</u>.

When there is a lack of competition in the marketplace, and where the lack of competition has only intensified since 2016, it is incumbent upon the government – in this case the Board – to facilitate competition in the market. The Board's proposal for reciprocal switching criteria, rules, and process is one effort that would do just that: facilitate competition in those markets where certain conditions are met as outlined in the NPRM.

NEW DEVELOPMENTS

In FRCA's view there are four developments that have changed since 2016 – and since the submission of FRCA's filed comments in 2017 – that are relevant to the Board's issuing a Final Rule and are significant. They are: 1) the financial strength of the Class I rail carriers; 2) implementation of "Precision Scheduled Railroading"; 3) further rail carrier consolidation; and 4) President Biden's Executive Order *Promoting Competition in the American Economy* (EO 14936). To highlight:

1. **Financial Strength of the Rail Carrier Industry**

A goal of the ***Staggers Rail Act of 1980*** (***Staggers Act***) was to restore financial stability to the U.S. rail system. By all accounts, this goal has been achieved, as demonstrated by the industry's continued high levels of capital investment and shareholder returns including dividends, buybacks, and stock appreciation.

Another key factor in helping to determine the financial health of a Class I rail carrier is the Board's annual determination of "revenue adequacy." The following chart from the STB's website shows the number of Class I carriers that have been deemed "revenue adequate" from 2000 through 2020.

Docket No. Ex Parte 552 - Railroad Revenue Adequacy								
Year	Industry Cost of Capital	BNSF Railway	CSX Transp. Inc.	Grand Trunk Corp. (CN)	KCS Railway	NS Railway	Soo Line Railroad (CP)	Union Pacific
		Based on Individual Railroad's Return on Investment						
2019	9.34%	**12.04%**	**12.84%**	7.47%	6.20%	**11.59%**	**11.34%**	**15.55%**
2018	12.22%	11.89%	**13.18%**	7.69%	8.03%	11.63%	**13.49%**	**15.80%**
2017	10.04%	**10.70%**	8.84%	7.69%	7.09%	**10.05%**	**10.71%**	**14.08%**
2016	8.88%	**10.11%**	8.62%	8.60%	6.23%	**9.20%**	**9.58%**	**13.39%**
2015	9.61%	**12.82%**	9.00%	**10.77%**	7.20%	9.03%	**14.50%**	**15.54%**
2014	10.65%	**12.88%**	10.18%	**11.30%**	8.18%	**11.69%**	† .-42%	**17.35%**
2013	11.32%	**14.01%**	10.00%	**11.84%**	8.67%	**12.07%**	**12.03%**	**15.39%**
2012	11.12%	***13.47%**	10.81%	10.19%	9.54%	**11.48%**	5.15%	**14.69%**
2011	11.57%	***12.39%**	11.54%	8.74%	10.76%	**12.87%**	7.13%	**13.11%**
2010	11.03%	*10.28%	10.85%	9.21%	9.77%	10.96%	8.01%	**11.54%**
2009	10.43%	8.67%	7.30%	6.04%	6.51%	7.69%	6.28%	8.62%
2008	11.75%	10.51%	9.34%	9.89%	7.72%	**13.75%**	9.29%	10.46%
2007	11.33%	9.97%	7.61%	10.11%	9.37%	**13.55%**	**15.25%**	8.90%
2006	9.94%	**11.43%**	8.15%	9.47%	9.31%	**14.36%**	**11.60%**	8.21%
2005	12.19%	**9.76%	6.23%	8.07%	5.89%	**13.21%**	8.89%	6.34%
2004	10.11%	5.84%	4.43%	5.95%	8.30%	**11.64%**	3.28%	4.54%
2003	9.40%	6.2%	4.0%	4.5%	3.7%	9.1%	0.9%	7.3%
2002	9.75%	6.4%	5.2%	3.1%	6.5%	9.1%	5.7%	8.6%
2001	10.19%	7.1%	4.6%	4.9%	7.0%	8.3%	5.9%	7.6%
2000	11.03%	8.8%	3.6%	5.9%	6.3%	5.5%	5.6%	6.9%

Colored cells indicates year in which railroad was Revenue Adequate

* indicates that figure was revised from original calculation, based on decision in FD-35506 (July 25, 2013)
** Indicates that figure was corrected from original calculation, based on notice in EP 552 Sub No. 10 (October 26, 2006)
† The negative ROI of the Soo Line Corp. is attributable, in part, to the sale of the Dakota, Minnesota & Eastern lines, to Rapid City, Pierre & Eastern Railroad. The sale resulted in a one-time loss.

From 2016 thru 2019, not only the number of Class I rail carriers determined to be "revenue adequate" (all but one and that is Kansas City Southern (KCS), which has been acquired into a voting trust at a massive premium), but the number of years deemed "revenue adequate" shows the significant <u>pattern</u> of railroad financial strength.

When reviewing the revenue adequacy determinations for the seven Class I carriers during the past several years, STB determined the following number of railroads revenue adequate:

- ✓ 2019: Five.
- ✓ 2018: Three.
- ✓ 2017: Five.
- ✓ 2016: (2015, and 2014): Four.
- ✓ 2020: Although not included in the above STB chart, there were five Class I carriers held to be "revenue adequate:" BNSF, CSX, Grand Trunk Corp., KSC, Soo Line, and UP.

However, FRCA has long been concerned that the Board's annual determinations of "revenue adequacy" for Class I carriers does not reflect the true health of the overall railroad industry and its individual carriers. FRCA believes that the health of the rail carriers is actually much stronger and healthier than what the figures and pattern from above illustrate.

2. Precision Scheduled Railroading

The healthy financial condition among the Class I carriers has been achieved despite a reduction in overall traffic volume and a reduction in efforts to enhance overall capacity. This is due in large part to six of the seven Class I rail carriers implementing an operational practice known as "Precision Scheduled Railroading" (PSR) which began on a broad basis in 2016.

Freight rail shippers, notably rail-dependent shippers, continue to experience a wide array of service problems and increased costs ranging from missed switches, late deliveries, wrong cars being delivered, crew shortages, doubling of unit trains, and insufficient communications with shippers. The challenges were present prior to 2016 but have been made worse due to PSR. The pandemic, coupled with our nation's supply chain problems, have further demonstrated the vulnerabilities, inefficiencies, and devastation of PSR.

Especially under PSR, the rail carriers lack the vision, commitment, and labor to plan, mitigate, or recover from weather events, natural disasters, customer/shipper needs and expectations.

The rail carriers always highlight to their investors their reduced operating ratios, which they have continued to reduce since the implementation of PSR. Those reductions do not result from growing volumes and improving service. Instead, they result from raising rates, reducing quality, and lowering costs, often on the backs of their workers. Under these circumstances, operating ratio reductions reflect how service reductions, not cost savings, are being passed through to customers.

When there is no rail carrier competition, or, for the purposes of this hearing, there is no access to rail competition, a shipper is simply stuck. A potential remedy, such as would be afforded under the Board's proposed reciprocal switching proposal in certain cases, is needed even more today than it was in 2016. While the railroads may claim that reciprocal switching will impair local service, the fact is that the railroads have set the bar too low, and the threat of competition is what is needed to spur incumbents to compete on the basis of service as well as rates and meet the common carrier obligation.

3. Further Consolidation in the Railroad Industry

Since the NPRM was issued in 2016, there are two pending proceedings before the Board dealing with two major proposed acquisitions – one of which involves two Class I carriers and the first of its kind in 20 years.

There are only has seven Class I carriers, which might be reduced to six, where four of them are responsible for 90% of our nation's rail freight traffic. The monopolistic behaviors inherent to today's rail carrier industry concentration promise to become worse unless the STB fosters competition. This NPRM is one avenue to instill competition for those shippers who meet the proposed criteria, satisfy the requirements, and follow the process.

4. Executive Order Promoting Competition in the American Economy

On July 9, 2021, President Biden signed 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…

EX PARTE COMMUNICATIONS

The available ex parte summaries of the meetings with Board Members that the railroads have filed do not reveal anything new. While the railroads warn of the service disruptions that might occur, the fact is that the service is already poor due to their PSR practices, as confirmed by the (very limited) on-time performance/trip plan compliance information that the carriers make available.

Furthermore, shippers are not seeking "forced" switching per se. Instead, they seek the opportunity to benefit from competition in order "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(a). There will be no local disruptions if the incumbents compete effectively. Conversely, disruption can occur only if incumbents fail to compete. The railroads' conjectures regarding disruption hinge on a continuation of market failures, which are problems of their own creation and exploitation. They provide no basis for the Board to hesitate from proceeding with the NPRM and adopting a final rule.

CONCLUSION

FRCA urges the Board to proceed with the proposal in its NPRM and proceed to a Final Rule as expeditiously as possible.

Dated: February 14, 2022	Respectfully submitted, Ann Warner Spokesperson Freight Rail Customer Alliance Managing Partner, Ann Warner LLC 300 New Jersey Avenue, NW Suite 900 Washington, DC 20001