Surface Transportation Board
Washington, D.C. 20423-0001

Member of the Board

October 5, 2016

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
425 Hart Senate Office Building
Washington, DC 20510

Dear Ranking Member Nelson:

Thank you for your recent letter sharing your concerns regarding regulatory initiatives pending before the Surface Transportation Board (Board). I understand and appreciate your views about the importance of maintaining a robust freight rail network.

As you stated in your letter, the Board has recently proposed altering certain long-standing regulations that could greatly affect freight rail operations in the long term.[1] These proposals, issued over my objections, include new competitive switching rules (that are so vague as to invite more questions than answers) and regulating commodities that have been exempt from agency regulation for over 30 years. If merely pushed forward to final rules, the agency will impose the most significant regulatory changes since implementing the Staggers Act. Enclosed please find copies of my separate comments that accompanied the Board's proposals.

While I do not subscribe to a view that any regulation is too much regulation, I firmly believe that the Board, as regulators, must be very thoughtful and informed in its approach to regulatory change. And we simply must listen to stakeholders—including the rail industry—to ensure that what may be good regulatory intentions do not result in unintended harm to carriers and shippers.

Again, thank you for taking the time to share your views. Please be assured that I will keep your comments in mind as the Board continues its work on these very important issues.

Sincerely,

Ann D. Begeman

Ann D. Begeman
Board Member

Enclosures
cc: The Honorable John Thune, Chairman

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[1] EP 711(Sub-No. 1), Reciprocal Switching, (STB served July 27, 2016) (Begeman dissenting in part) and EP 704, Review of Commodity, Boxcar, And Tofc/Cofc Exemptions, (STB served Mar. 23, 2016) (Begeman dissenting)

EP 711 (Sub-No. 1), RECIPROCAL SWITCHING

Board Member Begeman, dissenting in part:

I want to begin by commending the National Industrial Transportation League (NITL) for the considerable and thoughtful effort it went to—more than five years ago—in prompting the Board to revisit the agency's competitive switching rules. I have valued the views and knowledge of the NITL leadership and members since first meeting them when I was a young Senate staffer. Then, as now, NITL can be counted on to provide insight and to explain how businesses across the county are impacted by even the most arcane laws and regulations.

When stakeholders demonstrate that the agency's regulations or processes present too high a bar to allow their use, we have an obligation to examine whether we can improve those regulations or processes, while keeping the promotion of safe and efficient rail service at the top of our agenda. Although I have a number of questions and concerns about NITL's competitive switching proposal, many of which I shared during the April 2014 hearing, there is no dispute that since the current rules were adopted in 1985, very few reciprocal switching requests have been filed and none have been granted. As such, it is hard to believe that the existing regulations adequately implement Congress' intent that the Board order reciprocal switching when necessary.

While I may not be an advocate of the status quo, I do not casually embrace regulatory changes. Any altering of the Board's existing switching rules must be balanced, fair, and supported by analyses that indicate the changes will not have unintended consequences for our stakeholders or the public. I do not believe today's proposal meets those standards. This decision also ignores fundamental questions that the Board should have asked and answered before issuing today's proposal, and after five years, there has been ample time to do so. For example:

- The reciprocal switching proposal rejects the use of conclusive presumptions, which were argued by NITL as necessary to mitigate the complexity and costs of litigating competitive switching.[1] What does today's proposal offer to mitigate the complexity and costs? Should the Board use rebuttable presumptions to create a more predictable process for shippers and carriers?

- The Department of Transportation estimated that NITL's proposal would affect 2.1 percent of revenue and 1.3 percent of carloads, figures that are considered significant inside the agency. What impact to revenue and carloads would be permitted under today's proposal? Once that level is reached, will the Board no longer consider new switching applications?

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[1] This raises questions which have largely gone unanswered. What analysis did the Board conduct to determine that NITL's conclusive presumptions were unsound? Why is that Board assessment both unspecified in today's proposal and absent from the record?

- The proposal seems to suggest that if the Board acts on a case-by-case basis, there is no need to assess the potential impact it could have on the rail system overall. But how can the Board provide fair and consistent switching judgments on a case-by-case basis without creating complexity and cost impacts on the one hand, and not introducing more unpredictability to the rail network on the other?[2]

- How long will it take to process the cases envisioned under today's proposal? What is the procedural timeline? Do we have any projections for how long such a case will take to process inside the agency? Currently, the Board is struggling to determine how to meet new Congressional mandates for timeliness. How will this type of new access case (i.e., presumably time sensitive yet not subject to any specific Congressional timing mandate) fit into the Board's crowded priority list?

- Given the majority's stated position that it "will not attempt to formalize the precise showings" that parties would have to make in a given case because of its desire to be "flexible," what would a party seeking a reciprocal switch *really* have to demonstrate to the Board? What would the carrier have to demonstrate to convince the Board the requested switch should not be granted?

- What is the "reasonable distance" that is surprisingly left undefined in the proposal? While the language that dismisses the NITL's conclusive presumptions implies that the Board's proposal could involve switches of more than 30 miles, my briefings suggest it may be only a very short distance (i.e., the distances that have historically been involved with reciprocal switching). How could historical norms of switching be relied on while the decision cites massive industry changes that would make those historical norms uninformative at best?

- How does today's decision mitigate impacts on network efficiency and service, particularly at major gateways and terminals? The Board has required weekly performance data reports on the Chicago hub since October 2014 because of its importance to national rail operations and the impact that congestion in that gateway can have on rail service nationwide. Should Chicago and other major gateways be excluded from new reciprocal switching requirements?

- Is permanence for a switching arrangement under the proposed new rule, which may not require robust evidence, fair to either the carrier or the other shippers impacted by that switching arrangement?

Today's decision incorporates a concern I expressed after seeing an earlier version of the proposal, which is that short line carriers be exempted from the requirements. The decision also

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[2] The question of impact, and the burden of analyzing that impact, cannot simply be avoided by promising to adjust or improvise other or new results on the fly. The Board made such promises for some aspects of the Union Pacific/Southern Pacific merger and is still struggling with the implications of new cases arising out of that more than 20 year old transaction.

waives the Board's rigid ex parte rules to allow the members to hear from stakeholders, as the Vice Chairman and I insisted. However, I cannot support the rest of it. We have no idea how the proposed rule would or even could be utilized. We don't know its potential impact on the shippers that would be granted a reciprocal switch or its potential impact on shippers that wouldn't benefit from a reciprocal switch. We also don't know the proposal's potential impact on the rail carriers. Nor do we know its potential impact on the fluidity of the rail network. *All* of these impacts matter. After all, rail volumes have been down all of 2016, and are currently down nearly six percent from just a year ago. I firmly believe that what we do here, ultimately, could cause greater harm than good. Or, it may result in nothing more than an empty promise to prospective applicants.

It is incumbent on the Board Members and staff to listen to all interested stakeholders on these issues if there is to be any hope for adopting meaningful, lawful regulations designed to better implement the agency's statutory reciprocal switching authority. And I certainly recognize that stakeholders are at a disadvantage because today's proposal, in my view, is full of gaps by design. The goal appears to be that we can slip these and other unanswered questions by now and figure them out later. I implore our stakeholders to fully engage this agency and not allow such an outcome.

I support only those aspects of the decision that waive the Board's ex parte prohibitions and exclude Class II and Class III carriers from reciprocal switching prescriptions. Otherwise, I dissent.

EP 704, REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

Board Member Begeman, dissenting:

This record was created over half a decade ago, before two of the three current Board members were even appointed (and my five-year term since expired). For this Board to take informed action now, we should first ask interested stakeholders to update the docket, and then propose whatever changes are necessary. And, importantly, we should commit to completing final action by a timely date certain.

Although I appreciate the Board staff's recent review of waybill rate data from 1992 through 2013, I am not convinced that analysis sufficiently supports altering the exemption landscape. The "record" the majority is relying on to support its proposed changes is a waybill-based hunch using limited information on these commodities. Today's decision also begs the question: if waybill data are sufficient basis for a proposed rule, then why didn't the Board act years ago? Nothing in this decision suggests that the case for action has markedly changed since 2011.

The proposed rule also fails to account for the present. Considerable and important events have taken place since the February 2011 hearing and the 2013 waybill cutoff, including the 2014 rail service crisis that impacted shippers and carriers across the country and the significant shifts in service demand for coal, oil, and other important commodities. Fuel prices have also changed dramatically. Unfortunately, today's proposed rule is completely uninformed by any of these or other current market considerations.

The law directs the Board to exercise its exemption authority broadly, and that directive was unchanged with passage of the recent STB Reauthorization Act, P.L. 114-110. Therefore, we shouldn't narrow or revoke exemptions granted under that authority absent compelling circumstances. Instead, the majority is proposing changes without really knowing whether the revocations are justified.

Even if a commodity is exempt, however, the Board is not uninterested. We still conduct broad oversight of exempt commodities and take action when we deem it necessary. For example, when the Board directed the carriers to provide weekly service reporting, we included reporting on intermodal and automobiles, which are exempt. The Board's Rail Shipper Transportation Advisory Council has included shippers of exempt commodities who also provide the Board with key rail service demand information. The Board's Rail Customer and Public Assistance Program also helps resolve the questions and problems of exempt commodity shippers whenever possible.

Clearly, stakeholders have waited far too long for Board action on this docket. But we should be asking the parties to update the record so that the Board can propose an informed rule based on up-to-date information. Instead, the majority appears to be taking the path of least resistance to close a languishing docket. I dissent.