

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

**COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

On December 28, 2021, the Board served formal notice of a public hearing to be held on March 15 and 16, 2022 (the “Hearing Notice”), intended for public input on switching access regulations first advanced in 2016, Reciprocal Switching, Docket No. EP 711 (Sub-No. 1) (STB served Dec. 28, 2021). The American Short Line and Regional Railroad Association (“ASLRRA”), throughout this and related proceedings, consistently has expressed its opposition to new rules that would mandate reciprocal switching, noting that such new regulations could harm the overall efficiency and productivity of the national rail system. If, however, the Board determines to impose new reciprocal switching regulations, the Board should categorically exclude Class II and III (“short line”) railroads from those new rules in keeping with the intent from the 2016 NPRM and the original proposal of the National Industrial Traffic League (“NITL”). The adverse effects of imposing the rule on short line railroads would be severe, and could threaten some smaller railroads with insolvency, an unintended consequence of the regulation that would, in turn, harm short line customers, the economy, and the environment.

ASLRRA is a non-profit trade association representing the interests of approximately 500 short line and regional railroad members and 500 railroad supply, contractor, and service company members in legislative and regulatory matters. Short lines operate 50,000 miles of track, or

approximately 30% of the national freight network, employing approximately 18,000 people, and connecting manufacturers, businesses and farmers in communities and small towns to larger markets, urban centers, and ports. Our railroad members operate in 49 states and in a few states account for the entire rail network. Short line railroads play a vital role in maintaining rail service over tens of thousands of miles of light density lines throughout the country that in many cases had been targeted for abandonment by their former owners. Short lines take that responsibility extremely seriously and do not take our critical role for granted.

Compared to larger railroad carriers, short lines have shorter lengths of haul, higher fixed costs, and larger capital needs for infrastructure investment, including the task of upgrading bridges and track to handle modern, heavier freight cars. Short line railroads provide high touch, customized service to a small number of customers (an average of 18 per railroad) compared to large Class I railroads, while facing pervasive competition from trucks, barges, and transloading operations for freight traffic.

Interest of the American Short Line and Regional Railroad Association

ASLRRA has participated in Docket No. EP 705, Competition in the Rail Industry (“EP 705”), Docket No. EP 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules (“EP 711”), and Docket No. EP 711 (Sub-No. 1), Reciprocal Switching. In EP 705, ASLRRA submitted extensive comments, testimony, and evidence clearly delineating why forced reciprocal switching and other proposals made by some shippers in that proceeding were contrary to the public interest. In particular, ASLRRA showed that short line railroads already face extensive competition, already go above-and-beyond to do right by our customers, have unique and fragile economics that would be put at risk if they were subject to a forced reciprocal switching rule, and that forced reciprocal switching that would apply to short line traffic is

unnecessary and unwarranted.

On July 7, 2011, NITL filed a petition seeking to modify the STB's standards for mandatory competitive switching, which specifically excluded short line railroads from the provisions of any such modified rules. In EP 711, ASLRRA continued to oppose rules mandating reciprocal switching as injurious to the national rail system and stated that if the Board determined to propose some sort of mandatory switching regime, short lines should be excluded. On July 27, 2016, the STB issued the NPRM (the "2016 NPRM") that is the subject of the Hearing Notice. ASLRRA filed comments in this proceeding on October 26, 2016, opposing the proposed rules, reiterating its longstanding position that mandatory switching should not be adopted, and pointing out that, if it were to be adopted, short line railroads must not be included within the scope of any rule so promulgated.

The 2016 Proposed Rule

49 U.S.C. § 11102(c) authorizes the Board to order "reciprocal" switching arrangements where such an arrangement is practicable and in the public interest, or where such agreements are necessary to facilitate competition. In 1985, the Board's predecessor agency, the Interstate Commerce Committee ("ICC"), adopted regulations (now set forth at 49 U.S.C. § 1144.2) to govern agency-prescribed competitive access, including switching arrangements. Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd sub nom Balt. Gas & Elec. V. United States, 817 F2d 108 (D.C. Cir. 1987). In 1986, the ICC decided its first competitive access case under the new regulations. Specifically, in Midtec Paper Corp. v. Chicago & North Western Transportation Co. (Midtec), 3 I.C.C.2d 171 (1986), the ICC, applying the rules it had adopted in Intramodal Rail Competition, explained that it would order competitive access in situations where the incumbent railroad "has engaged or is likely to

engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive.” Id. at 181.

In its 2016 NPRM, however, the Board proposes, among other things, to replace the anticompetitive conduct prerequisite of Midtec with a more open-ended and case-specific public interest analysis. In so doing, the Board has relied upon the proposition that Section 11102(c) allows the agency to order switching arrangements where (1) it is practicable and in the public interest, or (2) it is necessary for purposes of competition. In either case, the Board said it must weigh and balance the various elements of its rail transportation policy at 49 U.S.C. §10101 as applicable.

Regarding the practicality and public interest prong, the Board proposes requiring a rail customer seeking such relief to show that:

- (1) the shipper’s or receiver’s facility is served by a Class I;
- (2) there is, or can be, a working interchange between the serving Class I and another Class I within a reasonable distance of the shipper’s or receiver’s facility;
- (3) the potential benefits of the proposed switching arrangement outweigh the potential harms – including a showing of operational feasibility and safety assessed against detrimental effects on the Class I.

Regarding the promotion of competition prong, the agency proposes requiring a shipper to show that:

- (1) the shipper’s or receiver’s facility is served by a single Class I railroad (presumably, also, the only carrier serving the facility, although that is not clear from the current phrasing, as discussed below);
- (2) the shipper lacks access to effective intermodal or intramodal transportation

alternatives; and

(3) there is, or can be, a working interchange between the serving Class I and another Class I within a reasonable distance of the shipper/receiver facilities.

Under either prong, the proposed rule provides that a railroad can offer affirmative defenses showing the proposed reciprocal switch is unsafe, infeasible or that it would interfere with service to other shippers.

Adverse Effects on the National Rail Network

Notwithstanding the unprecedented challenges faced by the nation's supply chain these past two years, America's freight railroads are the envy of the world when it comes to providing freight transportation safely, reliably, and efficiently. The national railroad system is totally interconnected, providing shippers quality service throughout North America.

While short lines often consider themselves "shipper representatives" and certainly have their share of frustrations with their Class I railroad partners, we see this rule as counterproductive and likely to cause more harm than good. We believe that the existing suite of STB remedies is sufficient to handle problematic cases and that the current balanced regulatory structure has resulted in the world's premier freight rail network.

The STB's proposed rule unnecessarily puts the nation's efficient rail network at risk and threatens future supply chain disruptions. The proposed rule would reduce railroad network velocity, potentially compromising freight transportation on-time performance. If freight railroad service were to deteriorate as freight carriers struggle to implement new and potentially complicated switching access mandates as a part of an already-complex rail network, shippers could revert to using trucks on already congested highways. All of these adverse effects, clearly unintended as they may be, inevitably would lead to diminished capital investments in the freight

rail network. In addition to negative consequences to the freight system lines imposed by the adoption of the proposed rule, the Board must consider the resulting impact to the efficiency and resiliency of the supply chain. A forced, non-efficient route may tie up assets in short supply such as railcars and locomotives for longer than is necessary, cause additional switching actions that give rise to additional safety concerns, and increase scheduling pressures on a finite system.

Switching not only impacts the velocity of the rail network, it has also historically been the area of highest employee safety incidents. A report by a joint labor-management railroad industry group formed by the US Federal Government to analyze railroad employee fatalities during switching operations concluded in 2010 that “the majority of fatal injuries incurred by on-duty railroad personnel occur during switching operations.”¹ It is considered axiomatic that less switching results in safer, more efficient operations.

Adverse Effects on Short Line Railroads

The Board has indicated that its rulemaking proposal is intended to apply only to Class I railroads and suggests that the agency does not intend any adverse impact to short line railroads. Excluding short line railroads from the scope of the Board’s proposed rule is both necessary and appropriate to achieve the Board’s intent. While a Class I carrier could potentially absorb a relatively small reduction in overall revenues due to mandated reciprocal switching, it would be a far different matter for short lines. Unlike larger railroads, the costs of short line railroads cannot be spread over a vast rail system or large customer base. All the freight revenues generated by customers on a Short Line are vitally necessary to sustain the financial viability of that line. Typically, three customers account for two-thirds of the rail traffic shipped on a short line railroad. Loss of all or a portion of the revenues from a single shipper could have a

¹ “Switching Operations Fatality Analysis,” International Railway Safety Conference 2010, Michael J. Martino, AAR, p. 1.

significantly adverse effect on the financial viability of a short line railroad given the high infrastructure and fixed costs that must be supported by those revenues.

Because short lines typically exist to serve customers at remote locales over low-density railroad lines, extending switching access to short line customers would threaten the very existence of many short lines and the essential transportation services they provide to numerous communities across the country. This would be particularly harmful to the many smaller shippers who are most vulnerable to a reduction in the revenue necessary to maintain the line. For the short line railroad industry as a whole, that number of shippers is in the thousands. The stated purpose of this rule is to help shippers, but including short lines would put these thousands of shippers in harm's way. As exemplified in the attached verified statements, short lines are known for their responsive and customer-focused service, further negating any rationale for mandated reciprocal switching that would cover all railroads. See Clelland VS and see Flint VS.

Finally, short line railroads cannot achieve the economies of scale that characterize Class I operations. Fixed costs per shipment are high for small railroads, and average productivity is also much lower than that of their Class I counterparts. The large number of small railroads indicates the confidence investors have in entering the business. Through innovative practices, attention to customer service, and careful cost control, many short lines have maintained and even grown traffic. Examples of this abound in our industry. See Claussen testimony, pages 20-27 of ASLRRRA's testimony in this Docket.

Success is by no means guaranteed, however, and failures, even after many years of operation, do occur. The economics of small railroad operation, coupled with light traffic densities, make these carriers especially vulnerable to revenue declines. Additionally, ASLRRRA

estimates that up to 90% of traffic that short line railroads handle is single car traffic that is subject to intense competition from trucks and barges. Since the overwhelming majority of short line railroad traffic already is subject to modal competition, there is no competitive basis for putting short lines at economic risk. See Clarke testimony, pages 8-19 of ASLRRA's testimony in this Docket.

Response to Previous Comments

In its January 13, 2017 Reply Comments, ASLRRA addressed arguments made by certain commenters who suggested that short line railroads either should not be excluded from the proposed rule, or, in effect, that they should enjoy, at most, a rebuttable presumption of exclusion, which presumption could be overcome on a case-by-case basis. ASLRRA would like to respond more fully to a specific comment offered at the time. Specifically, certain commenters speculated that if short lines were to be categorically excluded, a Class I railroad could attempt to sell or lease the first or last mile of a rail line otherwise subject to (or the focus of) a switching access request to a short line, thereby thwarting competitive access efforts. ASLRRA respectfully submits that such a hypothetical subterfuge is unlikely because it ignores the complexities and many factors that play into the economics of Class I railroad line spin-offs.

And even if such a hypothetical concern were to be pursued, the Board's own processes and procedures are such that the Board could intervene to withhold or condition authorization of a railroad line transaction involving a short line operation if the Board were concerned about negative outcomes, given that such transactions are subject in all instances to the Board's advance approval processes under 49 U.S.C. §§ 10901 and 10902, and either the individual petition for exemption procedures provided for under 49 U.S.C. § 10502, or the Board's class exemption processes at 49 C.F.R. Part 1150, subparts D and E.

Proposed Clarification of the Rule Text

If, despite ASLRRRA's opposition, the Board determines to adopt its proposed reciprocal switching rule, it should completely exclude short lines from the scope of the rule in keeping with the Board's intent and the intent of NITL's original proposal, with some modest wording modifications of the proposed rule, discussed below, to protect against unintended harms to short lines.

"Exclusively" Served by Class I Railroads

Among other things, proposed 49 C.F.R. § 1145.2(a)(1)(i) would require a shipper to show that the "facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s)." Similarly, proposed 49 C.F.R. 1145.2(a)(2)(i) contemplates potential access to competitive switching options for railroad customers that are currently served by a single Class I railroad. Such language may not fully account for instances where a shipper's facility is served by one Class I (or more than one Class I railroad, in the case of proposed Section 1145.2(a)(1)(i)) and a short line. If switching arrangements were mandated in such a scenario, it could inadvertently subject the short line railroad to revenue losses. ASLRRRA presumes that the rule was intended to apply to situations where one or more Class I carriers – and only Class I carriers – serve the facilities in question. For this reason, ASLRRRA proposes that the rule clarify the intended scope of the rule by changing the pertinent part of proposed Section 1145.2 to extend to facilities served "exclusively" by one or more Class 1 carrier(s).

"Directly and Physically" Served by Class I Railroads

Also, ASLRRRA urges the Board to modify 49 C.F.R. §§ 1145.2(a)(1)(i) and (a)(2)(i) to specify that switching access is a potential remedy for shipper(s) and/or receiver(s) whose facilities are served "directly and physically" by a single Class I railroad (in the case of proposed

Section 1145.2(a)(2)(i)) or one or more Class I railroad (in the case of Section 1145.2(a)(1)(i)). As currently written, while the language seems to be intended to mean that the facilities of the shipper(s) or receiver(s) must be served by a Class I rail carrier(s), it is not sensitive to the nuances in the accounting and billing practices in use by short line railroads under their various relationships with their Class I connections. For example, some short line railroads do not appear on the subject transportation waybill, even when they provide the first-mile or last-mile freight transportation. In these circumstances, while the short line is the railroad providing the service directly to the customer, upon examination of the waybill only, it could appear that the facilities were served by the Class I carrier, when they are not. The Board can easily remedy this potential confusion by specifying in § 1145.2(a)(1)(i) that “the party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are exclusively, directly and physically served by Class I rail carriers,” (emphasis added) and in § 1145.2(a)(2)(i) that “the party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are exclusively, directly and physically served by a single Class I carrier” (emphasis added).

ASLRRA’s requested wording changes are depicted in the attached appendix. They reflect the intent of the original NITL petition and advance the Board’s stated objective to exclude Class II and Class III railroads from the scope of the proposed switching access rules. Additionally, these changes are even consistent with the dissenting opinion in the July 25, 2016 Decision, which opposed the entire proposal but supported the determination to exclude Class II and Class III carriers from the reciprocal switching prescriptions, making the short line exclusion the only part of the 2016 proposal that was unanimously supported by the full Board at the time.

Conclusion

ASLRRA and its member railroads oppose new regulations mandating prescribed switching access due to serious concerns that such a regime would harm the safety and efficiency of the national rail system, unduly complicate railroad freight service, and cause new supply chain disruptions. If, however, the Board determines to promulgate a reciprocal switching rule, that rule must completely exclude short lines from the scope of the agency's intended remedy. In order to do that, the Board should include the modest wording edits ASLRRA has proposed, as set forth in the attached appendix.

Respectfully submitted,

A handwritten signature in black ink that reads "Sarah Yurasko". The signature is written in a cursive, flowing style.

Sarah G. Yurasko
General Counsel
American Short Line and Regional Railroad Association
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Washington, DC 20001

February 14, 2022

Appendix

1145.2 Establishment of Reciprocal Switching Arrangement

(a) *General.* A reciprocal switching arrangement shall be established under 49 U.S.C. 11102(c) if the Board determines that such arrangement is either practicable and in the public interest, or necessary to provide competitive rail service, except as provided in subsection (a)(2)(iv).

(1) The Board will find a switching arrangement to be practicable and in the public interest when:

- (i) The party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served **exclusively, directly and physically** by Class I rail carrier(s);
- (ii) The party seeking such switching shows that there is or can be a working interchange between the Class I carrier **exclusively, directly and physically** servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching; and
- (iii) The party seeking such switching shows that the potential benefits from the proposed switching arrangement outweigh the potential detriments. In making this determination, the Board may consider any relevant factor, including but not limited to:
 - (A) Whether the proposed switching arrangement furthers the rail transportation policy of 49 U.S.C. 10101;
 - (B) The efficiency of the route under the proposed switching arrangement;
 - (C) Whether the proposed switching arrangement allows access to new markets;
 - (D) The impact of the proposed switching arrangement, if any, on capital investment;
 - (E) The impact of the proposed switching arrangement on service quality;
 - (F) The impact of the proposed switching arrangement, if any, on employees;
 - (G) The amount of traffic the party seeking switching would use pursuant to the proposed switching arrangement; and
 - (H) The impact of the proposed switching arrangement, if any, on the rail transportation network.

(iv) Notwithstanding the provisions of (a)(1)(i)-(iii) of this section, the Board shall not find a switching arrangement to be practicable and in the public interest under this section if either rail carrier between which such switching is sought to be established shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.

(2) The Board will find a switching arrangement to be necessary to provide competitive rail service when:

- (i) The party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served **exclusively, directly and physically** by a single Class I rail carrier;
 - (ii) The party seeking such switching shows that intermodal and intramodal competition is not effective with respect to the movements of the shipper(s) and/or receivers(s) for whom switching is sought; and
 - (iii) The party seeking such switching shows that there is or can be a working interchange between the Class I carrier **exclusively, directly and physically** servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.
 - (iv) Notwithstanding the provisions of (a)(2)(i)-(iii) of this section, a switching arrangement will not be established under this section if either rail carrier between which such switching is sought to be established shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.
- (b) *Other considerations.*
- (1) In considering requests for reciprocal switching under (a)(2) of this section, the Board will not consider product or geographic competition.
 - (2) In considering requests for reciprocal switching under (a)(2) of this section, the overall revenue inadequacy of the defendant railroad will not be a basis for denying the establishment of a switching arrangement.
 - (3) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

VERIFIED STATEMENT

BRYAN CLELLAND

My name is Bryan Clelland and I am the Corporate Purchasing and Logistics Manager for Washington Penn Plastic Company, Inc., ("Washington Penn"). I have the responsibility of arranging for the transportation of the commodities we ship and receive at our plant in Frankfort, Kentucky.

Washington Penn with seven facilities located in the United States and Mexico, five of which are served by short line railroads. We receive polypropylene and polyethylene inbound at our Frankfort facility and modify them with a variety of property-enhancing reinforcements such as mineral, fiber, and glass reinforcement agents. About 65% of the products we produce are then shipped to the automotive manufacturers and suppliers to be used by them in applications in the interior, exterior, and under the hood of vehicles. The balance of our products to appliance manufacturers and to the building and construction sector.

Our Frankfort facility is served by RJ Corman Railroad Group Central Kentucky Lines ("Central Kentucky"), a short line that has been providing service to us since 2003. It leased the rail line from a Class I railroad that previously provided rail service and the level of service and responsiveness to us since Central Kentucky began serving us has vastly improved.

Central Kentucky switches our plant five days a week and, if we request it, sometimes six days a week. On average, we receive 48 inbound cars and ship 10 outbound cars a month. If we need to know the time cars will be delivered, spotted or picked up, I can find that out immediately by contacting Central Kentucky. It also provides storage for our cars as needed, does track maintenance for us, and promptly interchanges our freight in Winchester, Kentucky. This personalized, local service is invaluable to us as rail transportation is our lifeline for inbound and outbound shipment. We view Central Kentucky as a key partner that helps us be successful.

Washington Penn supports the position of the American Short Line and Regional Railroad Association that the Surface Transportation Board not adopt the proposed reciprocal switch rule at all as being potentially harmful to the rail network. We believe the current regulatory structure has promoted the development of a viable and sustainable national rail network in general, and in particular for short line railroads. In our view, adoption of the proposed rule could result in adverse effects on the rail network, including disruptions to rail customers and the supply chain.

If, however, the Board decides to impose the rule, it must exclude short lines from the rule. We are concerned that the imposition of the rule would jeopardize the continuation of service by short line railroads. Washington Penn now uses the rail services provided by Central Kentucky because those services are reliable, efficient, and competitive. Imposition of the proposed rule could endanger the viability of short lines like Central Kentucky.

We urge the Board to consider the interests of small railroads in this proceeding and, at the least, exclude short line railroads from the proposed rule to assure that the critical role played by small railroads like Central Kentucky in the transportation system is not harmed.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 11 day of February 2022.


Bryan Clelland

VERIFIED STATEMENT OF DOUG FLINT

I am Doug Flint, Facility Manager of the Sturgis, Michigan facility of Atlantic Packaging Corporation ("Atlantic"). I have been with Atlantic for 38 years and am, among other responsibilities, responsible for arranging for the transportation of our products from the Sturgis facility. At this facility, we produce rolls of paper that are used to produce such items as greeting cards, menus, and signs

We are served by the Michigan Southern Railroad, a short line railroad. It provides us with responsive and flexible service, including on-demand switching, car storage as needed, . In 2020 we met with Michigan Southern to find ways to use rail rather than trucks to move our freight as we were experiencing problems shipping products. As part of our discussions, we supported Michigan Southern in its application for a grant to improve the infrastructure at our facility and to put together a service plan to meet our needs. Michigan Southern works with us every day to ensure great service to us and to resolve any problems that may arise. In fact, I look at them as an extension of my workforce. As a result of our teamwork together, we were able to convert freight from trucks to rail. In 2020, we shipped 300 cars and 500 in 2021, a 37% increase. So far in 2022, we have already shipped 64 cars so we are on pace to increase the use of rail in 2022.

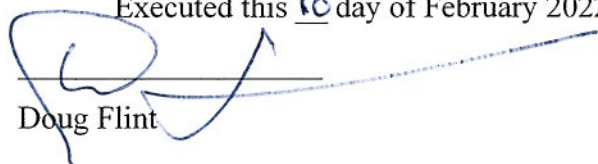
We support the position of the American Short Line and Regional Railroad Association in this proceeding at the Surface Transportation Board that the proposed rule on reciprocal switching should not be adopted as it could be harmful to the national rail network but if the Board does decide to impose the rule, that it exclude short lines from the rule.

We urge the Board to consider the interests of small railroads in this proceeding and, at the least, exclude short line railroads from the proposed rule to assure that the critical role played by small railroads like Michigan Southern in the transportation system is not harmed.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 10 day of February 2022.



Doug Flint