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SUBMITTED VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2)

Dear Ms. Brown:

I am attaching for e-filing in the above captioned proceeding the Petition for Reconsideration of the Commuter Rail Coalition.

If you have any questions, please do not hesitate to contact me.

Yours very truly,



Ayelet Hirschhorn

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

PETITION FOR RECONSIDERATION OF THE COMMUTER RAIL COALITION

Communications with respect to this document
should be addressed to:

Ayelet Hirschhorn
Charles A. Spitulnik
Grant M. Glovin
Kaplan Kirsch Rockwell LLP
1634 I (Eye) Street, NW
Suite 300
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
ahirschhorn@kaplankirsch.com
gglovin@kaplankirsch.com

Counsel for Commuter Rail Coalition

Dated: May 20, 2024

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

PETITION FOR RECONSIDERATION OF THE COMMUTER RAIL COALITION

The Commuter Rail Coalition (“CRC”)¹ respectfully submits this Petition for Reconsideration of the Board’s April 30, 2024, decision in the above-referenced proceeding (the “April 30 decision”)² promulgating a Final Rule for the prescription of reciprocal switching agreements (the “Final Rule”), in accordance with 49 C.F.R. § 1115.3. Specifically, the CRC requests that the Board reconsider its decision to reject CRC’s proposal to account for passenger rail interests in the Final Rule, or, alternatively, that the Board issue guidance clarifying the effect of a prescribed reciprocal switching agreement on existing third-party agreements.

As CRC noted in its November 7, 2023, Comments in this matter (the “CRC Comments”), CRC represents over twenty major commuter transit agencies (the “Agencies”), the majority of which share track with freight railroads on at least a portion of their rail lines. The Final Rule will cause delays to the Agencies’ commuter rail services operating on shared corridors, thereby impacting service reliability, on-time performance, and consequentially the Agencies’ ridership levels. Reciprocal switching moves can cause delays and degrade passenger rail service both in the immediate vicinity of the switching move and on other parts of the affected line. These delays

¹ The CRC is an association representing the interests, needs and benefits of the nation’s commuter railroads. The CRC was formed by industry leaders to engage and educate stakeholders and to advocate for the resources necessary to sustain commuter rail assets.

² *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Apr. 30, 2024).

can subsequently cause schedule disruptions that affect the entire local rail system, especially passenger trains on shared lines that rely on a predictable freight train schedule.

CRC appreciates the Board's careful consideration of and response to its proposed comments. Nonetheless, CRC believes the April 30 Decision is founded on material, erroneous assumptions. CRC hereby files this Petition to bring these errors to the Board's attention and ensure that the Final Rule does not inadvertently degrade passenger rail service. The Board should reconsider the Final Rule to incorporate the suggested amendments in the CRC Comments. Alternatively, the Board should issue guidance clarifying that a prescribed reciprocal switching agreement does not preempt any shared use or operating agreements between freight and passenger carriers.

I. The Board Committed Material Error by Assuming That Existing Shared Use and Operating Agreements Would Adequately Protect Third-Party Carriers and Should Reconsider Its Decision, or Alternatively Clarify the Impacts of a Prescribed Reciprocal Switching Agreement

First, the Board erred by promulgating regulations that are likely to adversely impact existing agreements between freight rail carriers and passenger rail carriers. As the CRC Comments noted, requiring reciprocal switching agreements between freight operators on corridors that are shared with passenger rail operations without accounting for the impact on the passenger operator will increase the potential for conflicts and delays for commuter rail. CRC accordingly requested that the Board consider impacts to passenger operators when determining whether a reciprocal switching agreement is practicable. If the Board fails to do so, service delays and potential penalties under existing shared use and operational agreements could result.

The Board, making a crucial and erroneous assumption, rejected CRC's comments. It stated that passenger rail carriers' existing shared use and operational agreements would provide adequate protection from operational impacts, because "[t]here is no reason to suppose that those

agreements would be nullified by the Board's prescription of a reciprocal switching agreement." April 30 Decision at 79. CRC questions the validity of this statement and believes it rises to the level of a material error that mandates a different result, making reconsideration appropriate under 49 C.F.R. § 115.3(b)(2).

The Board's reasoning fails to consider that a freight rail carrier may escape its obligations under its shared use or operating agreement with a passenger carrier under the Interstate Commerce Commission Termination Act ("ICCTA") by claiming that the agreements now unreasonably burden interstate commerce under a prescribed reciprocal switching agreement. Agreements between rail carriers and other parties are only enforceable if "they do not interfere with the carrier's operations and/or unreasonably burden interstate commerce." *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 228 F. Supp. 3d 1171, 1177 (W.D. Wash. Jan. 13, 2017). For example, the Board previously held that the ICCTA preempts certain remedies that a landowner had against a tenant railroad that had breached its lease, reasoning that, whether "looking at the authority of a public body to regulate a rail carrier under state and local law" or "the rights of a private party to remove a rail carrier [from leased property] under contract law[,] the principle is the same." *Pinelawn Cemetery—Pet. for Declaratory Order*, FD 35468, slip op. at 10 (STB served Apr. 21, 2015); *see also Fillmore & W. Freight Serv., LLC—Emergency Pet. for Declaratory Order*, FD 35813, slip op. at 3 (STB served Mar. 12, 2015) (noting that a contractual arrangement providing for the discontinuance of rail service cannot itself allow rail service to be terminated because the rail carrier must also obtain authority to terminate service from the STB). Similarly, contractual remedies or other integral operating terms in a shared use or operating agreement could be preempted by a reciprocal switching agreement when the terms of the reciprocal switching agreement conflict with the existing shared use agreement. A reciprocal switching order is a Board

mandate to provide certain service, leaving the passenger rail carrier unable to take action against a freight carrier to enforce the terms of its own shared use agreement. In such a case, passenger rail operators would be unable to rely on their negotiated shared use agreements to protect their interests. The Board's reasoning in the April 30 Decision ignores this reality and must be reconsidered to avoid harm to passenger rail service.

We urge the Board to reconsider the April 30 Decision and revise the Final Rule to incorporate the proposals in the CRC Comments. Specifically, CRC reiterates its recommendation that the Board amend 49 C.F.R. § 1145.6(a) to include a new paragraph (4), which would read "The reciprocal switching agreement will not cause any unreasonable and unmitigable delays to Potentially Affected Rail Carriers," and amend § 1145.6(b) to include "Potentially Affected Rail Carrier" wherever other rail carriers are mentioned. As the CRC Comments explained, "Potentially Affected Rail Carrier" would be defined to mean "any provider of either passenger or freight rail services that operates on shared track as one of the rail carrier parties to a prescribed reciprocal switching agreement." Adopting these proposals will ensure that any prescribed reciprocal switching agreement that preempts an existing operational or shared use agreement will adequately protect the interests of passenger rail carriers.

Alternatively, if the Board disagrees with CRC's assessment, it should, in response to this Petition, issue guidance clarifying that a prescribed reciprocal switching agreement does not preempt existing shared use and operating agreements. In doing so, the Board could draw on its line of precedent making clear that "a carrier cannot invoke the preemption provisions of 49 U.S.C. 10501(b) to avoid its obligations under a presumably valid and otherwise enforceable agreement that it has entered into voluntarily, where enforcement of the agreement would not unreasonably burden interstate commerce." *Pejepscot Industrial Park, Inc., d/b/a Grimmel*

Industries—Petition for Declaratory Order, FD 33989, slip op. at 15 (STB served May 15, 2003); *see also Township of Woodbridge, NJ v. Consol. Rail Corp.*, NOR 42053, slip op. at 5 (STB served Dec. 1, 2000) (“[V]oluntary agreements must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably burden interstate commerce.”); *Swinomish Indian Tribal Cmty.*, 228 F. Supp. 3d at 1178 (“[T]he existence of a voluntary agreement gives rise to an assumption that the railroad has already evaluated the effect of the promise and determined that it can perform under the contract without adversely impacting its common carrier obligations.”). In this case, an additional statement from the Board is necessary to reiterate that this line of precedent permits continued enforcement of a shared use or operating agreement even if the Board prescribes a reciprocal switching agreement with conflicting terms. Such a statement would ensure that the presumption against preemption created by a voluntary agreement continues to apply.

II. The Board Committed Material Error by Failing to Require That Petitions be Served on Third-Party Affected Carriers

The CRC Comments proposed ensuring the timely notification of affected passenger rail carriers by requiring that petitions for reciprocal switching agreements be served on Potentially Affected Rail Carriers. The Board rejected this proposal, reasoning that the posting of prescribed reciprocal switching agreements on carriers’ websites and the Board’s website would be sufficient to ensure adequate notice. The Board also noted that shippers or receivers might not be aware of all carriers sharing track, while a rail carrier would be and could voluntarily notify other carriers for help in developing its response to a petition. April 30 Decision at 86–87. However, governments do not generally rely on passive postings as sufficient notice and it is unreasonable to require affected parties to constantly monitor multiple websites, particularly if such information

is not readily available.³ *Cf.* Fed. R. Civ. P. 5(b)(2) (providing methods of service); 49 C.F.R. § 1105.7(b) (requiring parties to serve environmental reports on affected government agencies before making certain filings with the Board, notwithstanding that those reports will be available on the Board’s website). In addition, the interests of affected freight and passenger rail carriers may diverge based on the specifics of a given petition, leaving the freight rail carrier participating in a proceeding with little reason to alert affected passenger rail carriers.⁴

These erroneous assumptions are material errors because, without proper notice, passenger rail carriers will be effectively precluded from participating in proceedings that affect their interests and the Board will not account for the significant adverse impacts to passenger carriers. CRC therefore petitions the Board to revise the Final Rule to require that Potentially Affected Rail Carriers be served with petitions for prescribed reciprocal switching orders. CRC recognizes the Board's concern that freight rail carriers are better positioned than shippers or receivers to know when a passenger carrier needs to be served, and therefore suggests requiring a respondent freight carrier, rather than a petitioning shipper or receiver, to serve Potentially Affected Rail Carriers.

III. The Board Committed Material Error by Declining to provide for Compensation for Third-Party Affected Carriers

Finally, the Board committed material error when it rejected CRC’s proposal to amend § 1145.6(e) to provide compensation to Potentially Affected Rail Carriers who incur costs “for training, certification, systems integration and testing, or the provision of pilots or other personnel required to permit tenant operations over a third-party host railroad,” and the Board should therefore reconsider the April 30 Decision. The Board failed to respond to CRC’s Comments

³ CRC also notes that at least some Class I carriers, including CSX, Norfolk Southern, Canadian Pacific Kansas City, and Canadian National, appear to place their reciprocal switching agreement data behind log-in pages for customers, rendering them not easily available to the Agencies.

⁴ The Board similarly erred by assuming that, to the extent that the prescribed reciprocal switching agreement affected passenger rail operations, freight carriers would inform the STB during the petition proceedings.

regarding this proposal. “The requirement that agency action not be arbitrary or capricious includes a requirement that the agency respond to relevant and significant public comments.” *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (cleaned up). To reiterate, passenger railroads will incur costs from testing and integration of Positive Train Control (PTC) systems, training and certification of engineers and conductors, and the provision of host railroad employees to support these activities. Such costs should be incorporated into the Board’s analysis when it evaluates petitions for reciprocal switching. It was, therefore, material error for the Board to provide for compensation for certain rail carriers’ costs and ignore the costs on passenger rail carriers. Moreover, the Board’s failure to otherwise account for the interests of third-party carriers provides all the more reason to ensure they are fairly compensated.

CONCLUSION

The Final Rule rests on erroneous assumptions that create material errors with the potential to adversely impact commuter railroads. CRC therefore petitions the STB to reconsider the Final Rule, or alternatively to issue guidance clarifying the scope of the preemptive effect of a prescribed reciprocal switching agreement.

Respectfully submitted this 20th day of May, 2024.



Ayelet Hirsch Korn
Charles A. Spitulnik
Grant M. Glovin
Kaplan Kirsch Rockwell LLP
1634 I (Eye) Street, NW
Suite 300
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
ahirschorn@kaplankirsch.com
gglovin@kaplankirsch.com

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2024, I caused a true and correct copy of the foregoing PETITION FOR RECONSIDERATION OF THE COMMUTER RAIL COALITION to be served by ECF on all parties of record.

Terry Whiteside
372 Zion Circle
Billings, MT 59102
Terryofmontana@gmail.com

James Nolan
51 Campus Dr. Dept. of Agricultural and
Resource Economics
Saskatoon, SK S7N 5A8
Canada
james.nolan@usask.ca

Jeffrey Moreno
1919 M Street, N.W.
Suite 700
Washington, DC 20036
jeff.moreno@thompsonhine.com

Paul Hartman
200 Massachusetts Ave NW
Washington, DC 20001
Hartmanp@api.org

Sean O'Neill
200 Massachusetts Ave. NW, Suite 200
Washington, DC 20001
soneill@cement.org

Richard S Edelman
1920 L Street NW
Suite 400
Washington, DC 20036
redelman@mooneygreen.com

Michael C. Seyfert
1400 Crystal Drive, Suite 260
Arlington, VA 22202
mseyfert@ngfa.org

William L. Slover
1828 L Street, N.W.
Suite 1000
Washington, DC 20036
wls@sloverandloftus.com

Jay Strother
2800 S. River Road
Suite 260
Des Plaines, IL 60018
samantha@elevatega.com

Chris Greissing
4250 North Fairfax Dr.
Suite 600
Arlington, VA 22203
chrisgreissing@ima-na.org

Katie E. Mills
101 Constitution Avenue
Washington, DC 20001
kmills@nma.org

Max Fisher
1400 Crystal Drive
Ste 260
Arlington, VA 22202
mfisher@ngfa.org

Sarah Yurasko
50 F Street NW
Suite 500
Washington, DC 20001
syurasko@aslrira.org

Kathryn J. Gainey
975 F Street NW.
Suite 550
Washington , DC 20004
kathryn.gainey@cn.ca

Rob Benedict
1800 M St., NW Suite 900
Washington D.C., DC 20036
rbenedict@afpm.org

Landon Schale
222 W. Las Colinas Blvd.
Suite 900N
Irving, TX 75039
landon.schale@celanese.com

Michael Ravnitzky
1905 August Drive
Silver Spring, MD 20902
mikerav@verizon.net

Amitabha Bose
1200 New Jersey Avenue, SE
Washington, DC 20590
amitabha.bose@dot.gov

Peter A. Pfohl
1828 L Street, N.W.
Suite 1000
Washington, DC 20036
pap@sloverandloftus.com

Benjamin Horwich
560 Mission Street, 27th Floor
San Francisco, CA 94105
Ben.Horwich@mto.com

Sarah McCoy
101 W Main Street
Norfolk, VA 23510
smccoy@portofvirginia.com

Darren M. Kettle
900 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017
dunnj@scrra.net

Scott DeFife
4250 N. Fairfax Drive
Suite 600
Arlington, VA 22203
sdefife@gpi.org

Daniel Elliott
1055 Thomas Jefferson Street NW, Suite 620
Washington, DC 20007
delliott@gkglaw.com

Adam Weiskittel
2500 Lou Menk Drive
AOB-3
Fort Worth, TX 76131
adam.weiskittel@bnsf.com

Allison C. Davis
1501 K Street, N.W., Suite 600
Washington, DC 20005
allison.davis@sidley.com

David L. Meyer
1105 S Street NW
Washington, DC 20009
David@MeyerLawDC.com

Michael Briley
One SeaGate
Suite 1700
Toledo, OH 43604
mbriley@ralaw.com

Brock Lautenschlager
15407 McGinty Rd W
Wayzata, MN 55391
b_lautenschlager@cargill.com

Raymond A. Atkins
1501 K Street NW
Washington, DC 20005
ratkins@sidley.com

Sandra J. Dearden
9011 Indianapolis Blvd.
Suite A
Highland, IN 46322
sandra@takehighroad.com

Scott Campbell
1221 McKinney Street
Suite 300
Houston, TX 77010
scott.campbell@lyondellbasell.com

Mike Gebo
2211 H.H. Dow Way
Midland, MI 48674
MAGebo@dow.com

Thomas W. Wilcox
1629 K Street NW
Suite 300
Washington, DC 20006
tom@twilcoxlaw.com

Greg Regan
815 Black Lives Matter Plaza NW
Washington, DC 20006
katherynw@ttd.org

Ann Warner
300 New Jersey Avenue, NW
Suite 900
Washington, DC 20001
ann@annwarnerllc.com

John Ward
9880 S. 300 W, Suite 200
Sandy, UT 84070
John@movecoal.org

Jennifer Moffitt
1400 Independence Ave., SW
c/o Transportation Services Division,
Agricultural Marketing Service
Washington, DC 20250
Austin.Hunt@usda.gov

Jennifer Gibson
4201 Wilson Blvd.
Suite 0515
Arlington, VA 22203
nbreslin@acd-chem.com

Joshua D. McInerney
14 E. Gay Street, Fl 4
Columbus, OH 43215
jmcinerney@lawforlabor.com

Matthew J. Warren
1501 K Street NW
Washington, DC 20005
mjwarren@sidley.com

Karyn A. Booth
1919 M Street, NW
Suite 700
Washington, DC 20036
karyn.booth@thompsonhine.com

Herman Haksteen
11620 Red Run Blvd.
Reisterstown, MD 21136
hhaksteen@prfba.org

Michael L. Rosenthal
850 Tenth Street N.W.
Washington, DC 20001
mrosenthal@cov.com

Jeremy Ferguson
6060 Rockside Woods Blvd N.
Suite 325
Independence, OH 44131
dbanks@smart-union.org

A handwritten signature in blue ink, appearing to read "Ayelet Hirsch Korn", written over a horizontal line.

Ayelet Hirsch Korn