SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub. No. 1)

Summary of Ex Parte Meeting Between Norfolk Southern Railway Company

and Surface Transportation Board Member Patrick Fuchs

December 15, 2021

Norfolk Southern Attendees:

- Jim Squires, Chairman and CEO
- Cindy Sanborn, Executive Vice President and Chief Operating Officer
- Vanessa Allen Sutherland, Executive Vice President and Chief Legal Officer
- Raymond Atkins, Counsel to Norfolk Southern
- Randy Noe, AVP Regulatory Affairs

STB Attendees:

- Patrick Fuchs, Board Member
- Lisa Novins, Attorney Advisor

Meeting Summary:

Norfolk Southern thanked Member Fuchs for the opportunity to meet with him and express its views on reciprocal switching. Member Fuchs thanked Norfolk Southern for meeting with him and for offering its perspective.

Norfolk Southern began by questioning the rationale for modifying the current legal standard. While competition in the industry has been offered by some stakeholder groups as a justification, the study commissioned by the Board in 2008 found that railroads were not earning above normal profits and rate increases were not the result of increased market power. Although Norfolk Southern's perspective is that competition in the industry has further intensified since 2008, Norfolk Southern suggested that if the Board believes there is an issue with competition it should commission a new study.

Member Fuchs asked what the rail environment would look like to justify the changes to the reciprocal switching rules proposed in Ex Parte 711 (Sub. No. 1). Norfolk Southern responded that if railroads were engaging in anticompetitive conduct and refusing to provide customers efficient routes, then forced switching remedies imposed by the Board would be justified, but that such remedies are already available in those circumstances under existing law. Norfolk Southern explained why the principle of differential pricing is important and expressed its belief that the Board already has well-developed mechanisms in place to test the lawfulness of rates.

Member Fuchs asked which of two downside effects of the proposal – the impact on operations or the impact on investment – does Norfolk Southern view as having the greatest impact. Norfolk Southern responded that it is concerned by both potential impacts and questioned the wisdom of adopting an operational measure to address a perceived pricing problem. Member Fuchs asked which of two approaches to addressing rates Norfolk Southern would prefer – reciprocal switching or rate review, including potential new methodologies. Norfolk Southern responded that it would prefer neither, reiterating that existing rate reasonableness tests are sufficient.

The meeting participants discussed potential operational impacts of the proposed rule. Norfolk Southern stated that introducing new operational complexities at a discrete location would have network and customer impacts beyond that location. Member Fuchs asked whether voluntary reciprocal switch arrangements would create the same network impacts. Norfolk Southern explained that where it opens a location to reciprocal switch voluntarily it is better able to assess the operational impact by evaluating the ease of interchange.

Member Fuchs asked how Norfolk Southern evaluates how to price a reciprocal switch fee when entered into voluntarily. Norfolk Southern responded that it would look at a variety of factors including the level of investment needed, the impacts on the operation, the impacts on capacity, how responsibilities will be allocated between the two carriers, and the amount of lost contribution.

Member Fuchs asked whether in the context of mergers reciprocal switching advanced the public interest or, in other words, made sense. Norfolk Southern responded that it might make sense in isolated cases. The meeting participants discussed particular examples in the merger context, but Norfolk Southern returned to the point that even in those cases opening a location to reciprocal switch undermines differential pricing and adds operational complexity.

Member Fuchs asked whether there are opportunities to minimize the downside risk of the proposal. Norfolk Southern responded that any systemic change is likely to carry significant risks. The operational risks would be especially acute in a post-pandemic economy, where there is greater uncertainty about customer demand.

Member Fuchs discussed a potential impact of the proposal on operational innovation. He asked whether, in light of potential technological advancements, expanded access to reciprocal switching remedies could create a disincentive to railroads providing more direct routes to customers. Norfolk Southern responded that innovation risk is a distinct possibility because once an operational regulation takes hold then operational arrangements will be locked in to comply with it and difficult to adjust thereafter.

Member Fuchs asked whether shippers should be foreclosed from other remedies if the Board opens a reciprocal switch for a customer. Norfolk Southern responded that if a switch is open, that customer should not be able to bring a rate case.

Member Fuchs asked what a well-designed pricing policy would look like if investment incentives are properly accounted for. Norfolk Southern responded that under the no-fault system as proposed in EP 711 (Sub. No. 1), the proper policy would be efficient component pricing. Under the fault system embodied in current law, something less than efficient component pricing might be justified.

Member Fuchs asked whether the cost-based approach in Canada has created network problems there. The meeting participants discussed differences between application of a no-fault reciprocal switching regime in Canada and the United States. Member Fuchs asked whether it would be possible to assess the investment impact of the Canadian regime. Norfolk Southern responded that it would be very difficult to hold other factors constant and isolate the investment impact.

Member Fuchs asked about the scope of the interchange limits and how downside risk could be limited. Norfolk Southern responded that the greater the limits, the greater the operational complexity and the greater the overall risk. Limiting the scope to terminal areas would limit the impact somewhat, but even then the proposal would still introduce operational complexity. Adding complexity to terminal areas creates difficulties in managing operations and infrastructure requirements. Norfolk Southern expressed concern that the mere possibility of a forced switch will necessitate planning for that possibility, which in and of itself will introduce uncertainty and therefore more complexity into the network.