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Surface Transportation Board
Attn.: Docket No. EP 711 (Sub-No.1)
"Reciprocal Switching"
395 E St., SW
Washington, DC 20423-0001

Dear Chair Oberman, Vice Chair Schultz, and Members Fuchs, Hedlund and Primus:

On behalf of National Taxpayers Union (NTU) we are pleased to submit the following brief comments on EP 711, "Reciprocal Switching." It is our understanding that the Surface Transportation Board (STB) is at this time seeking input that reflects recent sector and economy-wide developments. NTU will therefore attempt to provide a few additional observations building upon its earlier work that the Board may find useful in its own deliberations. The observations largely concern both internal and external factors that STB may wish to consider in this complex area of policymaking.

Would There Be an Impact on the Highway Trust Fund? The question we pose in this section is not an academic one, nor a clear-cut one. However, formulating an answer, prior to implementation of any rule under EP 711, is important for STB to consider.

The federal government funds the majority of highway and transportation spending through the Highway Trust Fund (HTF). The overwhelming majority of HTF revenue – between 80 and 90 percent – is generated from excise taxes levied on the sale of gasoline and diesel fuel, currently imposed at a rate 18.3 cents per gallon and 24.4 cents per gallon respectively.

Although this user-pays system worked well for more than half of a century, fuel taxes have failed to keep up with highway maintenance costs, changing prices, and more fuel-efficient vehicles. On both sides of the balance sheet, the HTF faces challenges with dwindling revenue and growing outlays. The Congressional Budget Office estimates this imbalance will lead to cumulative deficits of $189 billion over the next ten year budget window. Because the Highway Trust Fund by law is not allowed to run a negative balance, it falls on every taxpayer to fund the general fund transfer from the regular budget into the HTF.

Some sources contend that a significant driver of the imbalance between inflows and outflows results from large trucks, because of what is claimed to be outsized damage to roadways from these heavy vehicles. More than 40 years ago, a Government Accountability Office analysis estimated, "a five-axle, tractor-trailer loaded to the 80,000-pound Federal limit, has the same impact on an interstate highway as 9,600 automobiles. In addition, as truck axle weights

increase, pavement damage increases at an even faster rate."[1] This study has been vigorously debated and disputed[2] over the years, with other research projecting various impacts on road systems from heavier vehicles.[3]

Although STB cannot serve as a final arbiter over the perspectives of highway engineers, clearly the Board should access and factor in this range of information in its own decisionmaking. If, for example, future decisions involving reciprocal switching create fluctuations in demand for other modes of freight transportation – such as businesses being more inclined to ship their products over roadways – would there be a long-term effect on HTF finances? How would other road users and the general taxpaying public be impacted as a result?

Impacts on Government-Subsidized Commuter Rail Services Should Be Considered. Taxpayer-subsidized public transportation systems, such as Amtrak and other local rail networks, [4] are in financial trouble. Even before the COVID-19 pandemic hit, many local transportation authorities were struggling thanks in part to unprofitable routes, high operating costs, and ballooning debt levels. COVID-19 has also caused ridership levels to plunge, and those levels are likely to be volatile for the foreseeable future.

STB should weigh whether and how the proposed rule would impact these transportation services. In fact, these concerns were presented in recent comments to the Board by commuter rail operators in California, where they noted this rule "would risk the progress we have made as a state and nation in sustainable passenger rail infrastructure investments and add unneeded complexity to passenger railroad operations."

In a reciprocal switching environment, STB would need to account for whether its decisions would have an impact on reliability of commuter and passenger service. If rail users were to seek different modes of transportation for travel, another decline in ridership – or a prolonged level of depressed ridership – could clearly harm revenues of commuter rail agencies that are already struggling to be in the black. As NTU can attest, one political response to decreasing ridership or routes that become less economical has often been to increase taxpayer subsidies for passenger rail operations.

Individual Proceedings Should Factor in Tax Impacts. Advocates of the rulemaking under Docket EP 711 stress that reciprocal switching requests would not be granted wholesale under some new sweeping regulatory edict, but would rather be considered on a flexible, case-by-case basis. If this is indeed the procedure that will come to pass, then STB's technical staff will be afforded the ideal opportunity to take the tax and regulatory burdens of all parties (and the resulting uncertainties surrounding their financial positions) into better account.

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[1] See Truck Weight and Its Effect on Highways | U.S. GAO.

[2] See, for example, Highway Legend: How a false stat about trucks & road damage is based on 60 years of distortion | American Trucking Associations.

[3] See, for example, Assessing the Effects of Heavy Vehicles on Local Roadways (lrrb.org); Effects of Truck Size and Weights on Highway Infrastructure and Operations: A Synthesis Report(FHWA/TX-0-2122-1) (utexas.edu); Truck Size and Weight Study - Executive Summary (dot.gov).

[4] For background, see Improving Intercity Passenger Rail Service in the United States (fas.org).

For example, short line and regional railroads were recently buoyed by the Consolidated Appropriations Act of 2021, which made permanent the Section 45 federal tax credit for track maintenance. However, even though the credit is embedded in statute, the law calls for a reduction in its value from 50 percent this year to 40 percent in 2023. Presumably, the less generous credit will cause short line and regional railroads to make financial adjustments to their operations. What could be the impact of STB's reciprocal switching decisions on these business plans? While proponents of this industry segment have long called for a well-defined exemption from EP 711's proposed procedure, those particulars have yet to be established.

Furthermore, roughly six months from now a number of key provisions affecting the Highway Trust Fund will expire, including the excise and use taxes on heavy vehicles, the tax on heavy truck tires, and most of the taxes on motor fuels. How Congress resolves these taxes could significantly affect the operations of modal competitors to railroads, which in turn could ease or compound the economic fallout of railroads' and shippers' reactions to any future STB reciprocal switching decisions (see section above for elaboration).

More broadly, railroads could soon be affected by the January 31, 2022 expiration of changes made by the Tax Cuts and Jobs Act (TCJA) of 2017 to Sections 163(j) and 174. Unless these sections – affecting limits on businesses' interest tax deductions and full expensing for research and development costs – are addressed before the year ends, many industrial sectors could be hit with higher tax bills at a particularly sensitive point in the nation's economic trajectory. Railroads not only make investments with interest costs, but also to a lesser extent could engage in qualifying research. While STB certainly cannot control tax policy, the Board should weigh the implications of upcoming potential changes in tax burdens to the financial condition of railroads and their ability to accommodate individual reciprocal switching requests.[5]

The importance of such analysis would extend to rail customers as well, many of whom obviously benefit from Sections 174 and 163(j) of the U.S. Tax Code. Furthermore, some customers may experience economic and business model impacts from tax policies just recently enacted, but whose incidence will be manifested in many as-yet unmeasured ways. One example was the massive expansion in the Superfund excise tax enacted in the Infrastructure Investment and Jobs Act of 2021.[6] While the first-order costs of excise tax increases often reveal themselves in higher prices for end users of the products, other effects could include fewer orders for the producer – or cost-cutting in the producer's operations to remain price-competitive. Ultimately, such decisions could impact the economics of rail shipments, which STB must carefully consider in rate regulation proceedings or, if implemented, reciprocal switching requests.

Consider Practical Operational Matters in Advance. One issue of contention surrounding EP 711 is to what extent the proposed expansion of circumstances allowing reciprocal switching determinations would serve as a fiat for outright rate regulation. This is not a matter for which NTU can provide an analytical perspective; however, our experience with dispute resolution

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[5] For additional background, see Not All Tax Extenders Are Created Equal - 2021 - Publications - National Taxpayers Union (ntu.org)

[6] See, for example, Coalition Opposes Business Tax Hike Included in Senate Infrastructure Bill - Publications - National Taxpayers Union (ntu.org).

mechanisms in the tax space suggests that careful thought needs to be given to workloads that the rulemaking under EP 711 could eventually entail.

As we have noted in previous comments to STB on EP 755/EP 665 (Sub-No. 2), "Final Offer Rate Review/Expanding Access to Rate Relief" and EP 756, "Market Dominance Streamlined Approach,"[7] providing alternatives to costly proceedings that instead encourage voluntary dispute resolution are beneficial for both the parties involved and the government. The results can be more durable, less adversarial, and more economically efficient than a remedy proposed by a judicial or quasi-judicial body. We again urge the Board to embrace our recommendations from 2019 and apply them EP 711 – by learning from the failures of past arbitration mechanisms for railroads and shippers, creating more collaborative working processes (e.g. "job aids") and creating new conduits for stakeholder concerns.

Equally important to workload management will be a consideration of how STB would segment complaints in its various dispute proceedings. What criteria will be employed to differentiate a pure rate dispute case from one involving reciprocal switching? Will consolidation of cases be required to avoid "venue shopping"? Will there be a "fast track" proceeding to spare both parties time and expense if certain facts of the case are acknowledged? These important questions should be answered well in advance of implementing any NPRM, but especially EP 711.

The need to do so underscores an important point – as much as EP 711 is focused on a single aspect of STB's authority, a decision made in one area of the Board's purview could clearly have an effect on other areas.

As NTU has stated before, taxpayers have a deep and abiding interest in a robust freight rail sector that allows both railroads and their customers to prosper. Railroads must have the resources to continue private investment, and customers must be able to secure affordable, market-based shipping services. Without this synergy, taxpayers will witness another decline in one of the nation's most vital infrastructure components, and with it, increased pressure for direct federal involvement with loans, subsidies, and other strictures. We hope these comments are helpful to STB in maintaining this economically – and fiscally – vital balance.

Sincerely,

Pete Sepp, President

National Taxpayers Union

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[7] See NTU Submits Comments to the STB On Rate Relief and Market Streamlining - Publications - National Taxpayers Union