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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 705

COMPETITION IN THE RAIL INDUSTRY

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**COMMENTS OF
THE MARYLAND DEPARTMENT OF TRANSPORTATION**

Communications with respect to these Comments
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Dated: April 15, 2011

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The Maryland Department of Transportation, an executive administration of the State of Maryland, acting on behalf of the State of Maryland (“MDOT”) hereby submits its comments on issues related to competition in the rail industry.¹ MDOT directs and oversees the planning, construction and operation of Maryland's highway, transit, maritime and aviation facilities, as well as the Maryland Motor Vehicle Administration. MDOT is the public entity responsible for oversight of Maryland Port Administration, which includes the public facilities at the Port of Baltimore and for encouraging the presence in the State of a fully developed and competitive rail network (along with the web of highways that serve the Maryland shipping public). In addition, the Maryland Transportation Authority (MdTA)² owns the Canton Railroad Company, which operates along 16 miles of track and provides railroad access to the Seagirt Marine Terminal in Baltimore. The Canton Railroad Company serves the Port of Baltimore and southeast Baltimore City industries, providing rail connections to Class I railroads serving customers in one-third of the United States. MDOT also owns the rail facilities operated by the Maryland and Delaware Railroad Company on the Delmarva Peninsula in the states of Maryland and Delaware. As a

¹ MDOT acknowledges that this Comment is submitted 3 days after the filing deadline established in the Board's order in this proceeding served on February 4, 2011. MDOT is today filing a motion for leave to file this Comment out of time, and respectfully submits this Comment in the event of a favorable ruling on that motion.

² MdTA is an independent agency responsible for managing, operating and improving the State's toll facilities; the Maryland Secretary of Transportation serves as Chair of the Executive Board of MdTA.

result of this broad range of interests and responsibilities, MDOT has a direct interest in the issues the Board is considering in this proceeding.

According to the Notice that commenced this proceeding, issued on January 11, 2011 (the “January 11 Notice”), one of the issues into which the Board is inquiring in this proceeding is competitive access. That Notice states that the Board wants parties to address “what, if any, measures the Board can and should consider to modify its competitive access rules and policies....” *Id.* at 5. Although its interests and responsibilities extend to the rail (both passenger and freight), highway, aviation and maritime infrastructure within and serving the State of Maryland, MDOT’s interest in this proceeding is narrowly focused.

In Maryland, like in many other coastal or other states with substantial harbors, the State has invested significant resources in the development of publicly owned port facilities to enhance and encourage growth in the State’s economy. Similarly, like other states that support passenger or commuter operations, Maryland contributes to the ongoing maintenance and capital expansion of rail facilities used by the intercity and/or commuter operations that operate within its borders, to include privately owned rail systems. In both contexts, the State’s ultimate objective is to enhance the range, capacity and quality of transportation options available to its citizens – both the rail passengers and the shipping public.

In the context of the State’s port facilities, the objective of ensuring the existence of options for transportation includes taking steps to ensure that competitive access to or from those facilities is available. The question about access to publicly owned or publicly supported facilities raises questions that are in some ways similar to but in some ways different from questions related to access to private, commercial business enterprises. To be sure, when the

STB reviews cases involving a request by one freight railroad to use the lines of another in a terminal area, the statute requires the Board to examine whether “... that use ...[is] in the public interest...” but does not “... substantially ... [impair] the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.” 49 U.S.C. §11102(a).³

Currently there are many instances of shipper captivity, that is, circumstances throughout America’s railroad system where the shipper has access to only one connecting carrier. In those cases, the carrier enjoys monopolistic pricing powers. The STB has in the past held that reciprocal switching should not be ordered absent a showing of competitive abuse. More specifically, the complaining party must show that the incumbent railroad has used its market power to extract unreasonable terms or, because of its monopoly position, has disregarded the shipper’s needs by rendering inadequate service. *Midtec Paper Corp. v. Chi. & Nw. Transp. Co.*, 3 I.C.C. 2d 171 (1986), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

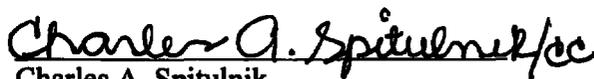
In the context of publicly owned or publicly managed facilities, though, the interest of the public means something different than the “public interest” in preserving competition for the benefit of private enterprise that is in most cases the focus of the inquiry in competitive access proceedings. Here, the public’s funds are at stake and the inquiry “where lies the public interest” should not be the same. The possible use of mandatory switching or enforced terminal-area trackage rights, each with reasonable rates to be determined by this Board if the parties are

³ MDOT notes that, although in this proceeding this Board is examining issues related to the exercise of authority under §11102 to address competitive access issues, the statute by its terms is not limited to remediation of anti-competitive behavior but has a broader application to any circumstance where one rail carrier seeks authorization from the Board to use “... facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part....” 49 U.S.C. §11102(a).

unable to agree on rates that truly establish a basis for competitive rates and access to these facilities, requires careful analysis by this Board in the context of service to publicly owned or managed port facilities. To be competitive the access rates must be at a level that would allow the two carriers (the "host" and the trackage rights tenant) to provide competitive rates in the eyes of the shipper.

Because of the broad scope of the instant investigation into the state of competition in the rail industry, MDOT respectfully submits that this proceeding is not the forum to develop the criteria that would guide the Board in making such an inquiry. MDOT suggests, instead, that the Board commence an investigation specifically into the issues related to ensuring the availability of competitive rail service to publicly-owned or publicly managed port facilities. That way, this Board can narrow the inquiry and ask interested parties to address the unique circumstances presented by such facilities and the extent to which, if at all, they are different from commercially-owned and operated facilities.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 15th day of April, 2011, I caused to be served a copy of the foregoing COMMENTS OF THE MARYLAND DEPARTMENT OF TRANSPORTATION to be served by first class mail, postage prepaid, upon all parties who have submitted comments in this proceeding.

Charles A. Spitulnik/cc
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