

June 10, 2011

The Honorable Cynthia R. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E. Street S.W.  
Washington, D.C. 20423

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RE: Ex Parte No. 705, *Competition in the Rail Industry*

Dear Ms. Brown:

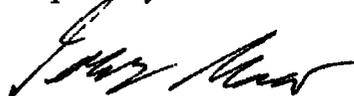
Pursuant to the Board's notice served on January 11 and February 4, 2011 in the above proceeding, the "Interested Parties," *i.e.*, the Alliance for Rail Competition, et. al., who filed Joint Comments and Joint Reply Comments on April 12 and May 27, 2011 respectively, hereby provide notice of their intent to participate in the hearing scheduled for June 22, 2011 in this proceeding. The Interested Parties respectfully request 30 minutes for their presentation, which will be given by Mr. Scott Stone, Mr. Jeffrey Moreno, and Mr. Michael McBride.

The Interested Parties intend to address the following issues at the hearing:

- I. Competitive Changes and the Railroads' Financial Condition
  - A. The arguments used to justify the current rail competition policy – that marketplace competition is adequate to "regulate" rates and that railroads need to exercise market pricing power because of poor finances and special capital needs, cannot today be justified.
  - B. The megamergers of the 1990's, and increasing parallel behavior during the past decade, have eliminated virtually all remnants of rail-to-rail competition, despite railroad claims in the merger cases that competition would be preserved and strengthened
  - C. Railroad prices in the past few years have been steadily rising in the face of the worst economic recession since the 1930's.
  - D. Railroad finances have become increasingly robust, placing railroads in the top ten percent of all industry groups in terms of profitability
  - E. Experience in the deregulation of the telecommunications industry has shown that requiring interconnection between systems and preventing monopoly pricing of interconnections not only results in effective competition that benefits consumers and the economy as a whole, but is consistent with large scale investment and financially healthy competitors

- II. The STB's Legal Authority to Modify Its Competition and Bottleneck Rules
- A. Administrative agencies have broad discretion to change their policies, with or without a change in circumstances
  - B. The Board has itself recognized that it has broad discretion to change its competition policies
  - C. Reciprocal Switching and Terminal Trackage Rights
    - 1. The statutory language gives the agency broad discretion
    - 2. The courts have recognized the agency's discretion in this area
    - 3. In 1980, the Congress desired to broaden the agency's power to grant competitive switching, and the agency's current rules are inconsistent with that purpose
    - 4. It would be unlawful to constrain the "practicable/public interest" test by the "necessary to provide competitive rail service" standard
  - D. Bottleneck Rules
    - 1. The courts have recognized the agency's discretion in this area
    - 2. The *Great Northern* decision is not a barrier to the Board changing its policy announced in the *Bottleneck* cases
  - E. The railroads' "ratification" argument is completely spurious
    - 1. With respect to reciprocal switching, trackage rights, and bottleneck rules, ICCTA kept the same general language as was in the Staggers Act, and thereby preserved the Board's discretion; it did not, as the railroads argue eliminate the Board's discretion
    - 2. The cases cited by the railroads are inapposite and easily distinguished
- III. Impacts of Railroad Rates and Practices on the U.S. Economy
- A. Railroads' role in the U.S. economy and their customers' business
  - B. The need for better balance in the regulatory system related to competition
  - C. Effect of railroads' rates and practices on the ability of the U.S. to compete with other nations and on U.S. jobs
  - D. The record in this proceeding shows that high rail rates are hurting U.S. competitiveness and U.S. jobs.
    - 1. Governmental filings
    - 2. Filings by industry associations
    - 3. Filings by individual companies
  - E. Greater reliance on competition is consistent with Congressional transportation policy

Respectfully submitted



Jeffrey O. Moreno  
Attorney for the Interested Parties

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