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Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705
COMPETITION IN THE RAILROAD INDUSTRY



REPLY COMMENTS

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May 27, 2011

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REPLY COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these Reply Comments, in response to the decision by the Surface Transportation Board (STB), in the captioned proceeding, dated and served January 11, 2011, as amended February 4, 2011.^{2/}

UTU-NY submitted Initial Comments (IC), among an estimated total of some other 200 IC filings.^{3/}

It is clear that the overwhelming preponderance of the IC submissions filed with the STB take the position the rules govern-

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} Institution of the proceeding and opportunity for comment, were noticed in the Federal Register. 76 Fed. Reg. 2748-51. (Jan. 14, 2011).

^{3/} A number of these estimated 200 filings were pleadings in which multiple entities were participants, such that the total number of interested parties was very much greater than the 200 recorded filings.

4/

ing rail competition should not be revised at this time.

UTU-NY urges the STB to exercise caution before any rule change, particularly in light of the recent economic recession, and experience with lax performance of regulatory functions by other federal agencies in the current situation.^{5/} Our review of the IS materials submitted by the parties, although extensive, do not suggest alternative proposals--either formally or informally--which have not already been considered by the STB or its predecessor.^{6/} The prime concern of this commenter, at this time, is with the general practices and procedures of the Board in administering present dockets, rather than with vague suggestions to modify the substantive nature of the agency's rules governing railroad competition. Corrective action in the STB's procedures should go a long way toward the rendition of appropriate decisions.

Subsequent to needed reform of the STB's general procedures, ample time should become available to thoroughly review substantive matters of fairness, including any recommendations for legislative changes. For the present, the STB should not consider

4/ Of course, the instant proceeding is of an exploratory nature; any specific proposal(s) would require a prior notice and comment. See: Ex Parte No. 688, Policy Alternatives to Increase Competition in the Railroad Industry, Order discontinuing proceeding, at 2-3. (served Jan. 19, 2010).

5/ See: Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report (GPO, Washington, D.C., Jan. 2011).

6/ Some of the suggestions go beyond rail competition issues. For example, Western Coal Traffic League (WCTL) would clarify the market dominance rules (WCTL, 23-26; Ex. 4); North America Freight Car Association (NAFCA) suggests STB inquiry into the AAR's interchange rules. (NAFCA, 7-11).

revision of its current rules for dealing with railroad competition.

Participation by Rail Carrier Employees

UTU-NY's IC indicated aspects of rail carrier employee interests in the subject of this proceeding. (UTU-NY, IC at 3). The various IC filed by some other parties, and the STB's January 11, 2011 decision itself, named various agency proceedings and court review, in which these other parties have participated at length.^{7/}

A number of the proceedings, mentioned frequently by other parties, also involved active participation by rail carrier employee organizations, and their counsel. We call attention to employee interest, which may not be apparent from the STB's January 11 and February 4, 2011 decisions. These employee cases include, among others, the so-called Bottleneck cases, Central Power & Light Co. v. Southern Pacific, Et Al., 1 S.T.B. 1059 (1996), 2 S.T.B. 235 (1997); competitive access cases, Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987); Review of Rail Access and Competition Issues, 3 S.T.B. 92 (1998); Review of Rail Access and Competition Issues-Renewed Petition of the Western Coal Traffic League (10/29/07) (not printed); and rate cases, Rate Guidelines-Non-Coal Proceedings, 1 S.T.B. 1004 (1996); Shenango Inc. v. Pitts., Chartiers & Yough. Ry. Co., 5 I.C.C.2d 995 (1989); Simplified Standards for Rail Rate Cases (9/5/07) (not printed).

^{7/} For example, see: Alliance for Rail Competition, at 46-61; American Short Line & Regional Railroad Assn., 10-22.

ARGUMENT

1. Railroad Competition Should Be Evaluated For Its Proper Role Within a Unified National Rail System.

The comments by the major interested party groups suggest railroad competition is the key element to be considered in evaluating the condition and performance of the U.S. railroad industry. However, railroad competition since 1920 has played a secondary role in the development and regulation of the industry. In short, the preponderance of the comments have lost sight of the unification goals, as the path to railroad efficiency, economy, safety, fair wages, and other directives of national policy.

The numerous comments by shipper groups are directed to encouraging more competition within the railroad industry. However, the Congressional directive remains to encourage the unification of railroads, with competition "to be preserved as fully as possible" in that context. The shipper comments err in their emphasis. In short, railroad competition is secondary to the goal of unification. The policy to encourage railroad unification has been in place since 1920, with only the means to have changed, not the end. B. & O. R. Co. v. United States, 386 U.S. 372, 386-87 (1967); Penn-Central Merger Cases, 389 U.S. 486, 492-93 (1968); Northern Lines Merger Cases, 396 U.S. 491, 506-11 (1970).

To be sure, the Congress in 1976, 1980, and 1995, enacted amendatory legislation to enable rail carriers to be more competitive in certain respects, but not to override the aim of railroad consolidation provisions which, of course, frequently serve to reduce competition, while promoting other goals. The STB's decisions of January 11 and February 4, 2011, other than a single

footnote,^{8/} made no references to the 4-R Act of 1976, or ICCTA of 1995.

2. The Recent Increase in Short-Line Carriers. The U.S. does not have a special national policy to encourage the development of more short-line railroads as an incentive to provide additional competition for the larger Class I carriers. The short-line industry has a long and proud place in U.S. transportation. There are, of course, multiple and differing factors responsible for the creation of additional short-lines, and the employees of many short lines are represented by the standard rail carrier employee collective-bargaining organizations. This commenter suggests the recent increase in short line development is primarily due to the unification process by Class I carriers, wherein certain Class I facilities have been considered either duplicative or not otherwise deemed worthy of continuance in a merged system. The Final System Plan (FSP) devised by the U.S. Railroad Association (USRA) reduced the coverage of rail industry trackage, and related facilities, by Class I carriers, but with the opportunity for transfer of "excess" lines to smaller carriers, often accompanied by substantial federal, state, and local financial assistance. This divestiture and subsidy were extended from the Northeast to other regions.

The various short-line spin-offs from Class I rail carriers. for the most part, remain in close collaborative relations with their carrier parent or affiliate. It is common practice for the

8/ Decision (1/11/11), at 7n.8, mentions ICCTA.

short-line affiliates or connections with a Class I carrier to get together collectively at meetings, for discussion of common concerns. For example, within the past year, the Norfolk Southern Ry. short-lines met July 11-13, 2010 at Roanoke, VA. and are scheduled this year July 10-12 at the same location.^{9/} The Kansas City Southern short-lines will meet September 27-28, 2011 at Kansas City.^{10/} The Canadian National short-lines met May 13, 2010 at Montreal, and are scheduled this year November 9, at the same location.^{11/}

The CSTX short-lines "work shop" was held March 6-8, 2011 at St. Augustine.^{12/} Union Pacific held its short line work shop with 330 short lines in attendance on August 22-24, 2010 in Omaha.^{13/} BNSF organized its "Short Line Caucus" with 14 representatives serving staggered terms, the ASL&RRA President being the fifteenth and permanent member, with meeting held November 1-2, 2010 at Grapevine, TX.^{14/}

It is clear the smaller and short-line rail carriers have no demonstrated need for additional railroad competition. Indeed, the ASL&RR comments in this proceeding do not suggest any change in the STB's regulations in this regard. The STB is urged to give considerable consideration to the ASL&RRA's submission.

^{9/} ASL&RRA, Views & News, Vol. 79, No. 13; Vol. 80, No. 8.

^{10/} Ibid. Vol. 80, Nos. 8, 10;

^{11/} Ibid. Vol. 79, No. 7; Vol. 80, No. 8.

^{12/} Ibid. Vol. 80, No. 4.

^{13/} Ibid. Vol 79, Nos. 17 & 18.

^{14/} Ibid. Vol. 49, Nos. 8 & 23.

The various major shipper urging for greater competitive access rules, increased routing provisions, terminal switching and reciprocal switching, appear to contemplate the use of short lines or shipper-control carriers to perform the desired tasks. However, traffic for the typical short-line is highly dependant upon one or two principal shippers. The major shippers should resist the opportunity to bring unusual pressure upon such carriers; in any event, any vulnerability should not be augmented by revision in STB regulations.

3. Revisions in General STB Procedures. The STB can provide a more meaningful regulation of railroad competition by improving and augmenting the agency's procedures. UTU-NY, which has participated in numerous ICC/STB proceedings over the years, advances certain suggestions, primarily addressed to transparency:

A. Publications. The most recent volume of STB reports, No. 7, covers the period June 2003 to December 2004. The subsequent seven-year delay in future publication of the agency's decisions is inexcusable, particularly when combined with a failure to publish an index of decisions. It is appropriate that the public have ready access to agency decisions without resort to non-print copies. The present secrecy may serve interests of agency staff vis-a-vis agency Members and the public. However, reluctance to afford such public access is not proper or new to a federal bureaucracy. Indeed, the failure of the former ICC to prepare proper digests of its decisions with indices, resulted in a 1927 Resolution by the U.S. Senate directing the agency to correct this situation. (Later known as Interstate Commerce Acts

Annotated) (Aitchison Digest). ^{15/}

B. Confidential Treatment. The agency should eliminate its practice of according confidential treatment for virtually every document for which secrecy is requested. The result is that the carriers and agency staff have a private docket, hidden from the public. The former ICC, until the late 1970's, conducted its proceedings without necessity for confidential treatment, rarely sought and rarely granted. Today, most major proceedings have critical matter under seal.

C. Restoration of Secretary. The agency recently abolished its Secretary, replaced by a staff member in its Office of Proceedings, the latter office being part of the decisional process. This has served to cut-off an avenue of discourse between practitioners and the agency's Chairman, as well as between the public and the agency, including its Chairman.

D. Annual Reports. The STB should reinstate or introduce the requirement that Class II and Class III carrier file annual reports. The agency and the public simply do not have the financial and operative data for rail carriers subject to its jurisdiction. It is insufficient that agency staff personnel may contact the Washington DC trade association offices--such information frequently is insufficient--and lack transparency for the public. Such annual reports, in addition to financial and operating data, should include carrier officers, and carrier personnel salaries at certain levels, as well as the principal shareholders.

^{15/} The Senate Resolution and transmittal are set forth in Vol. 1. (1929).

E. Interlocking Directors. The STB should require notification of interlocking directors and officers between all rail carriers, with prior approval required for director/officers outside a single rail system.

F. Tariff Filing. The STB should devise means to require rail carrier tariff filing, in order that the agency and the public may have access to rates offered by various rail carriers. There may be issues in this regard for contract rates, but such should not excuse filing schedules for many rates, and legislative relief may become appropriate. Although revenue/cost relationships may be critical for market dominance, the good general definition of a reasonable rate is one that is justly and fairly related to other just and reasonable rates.^{16/} If a major goal of railroad competition is attainment of reasonable rates, is important to have knowledge of the rates--not merely the cost of service. The agency's emphasis upon revenue/cost relationships ignores the real world of railroading.

Respectfully submitted,


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16/ Midwest Assn. of Meat Packers v. Alton R. Co., 220 I.C.C. 227, 249 (1937). For background, see: Shinn, Glenn L., Reasonable Freight Rates (Traffic Serv. Corp., 1952).