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Via Hand-Delivery

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: Ex Parte 705 – Competition in the Railroad Industry

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter are an original and 10 copies of the Initial Comments of BNSF Railway Company.

Thank you for your assistance in this matter.

Sincerely,

Richard E. Weicher

Richard E. Weicher

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

INITIAL COMMENTS OF
BNSF RAILWAY COMPANY

The Staggers Act mandated that the government minimize federal regulatory control over the rail transportation system, and the ICC and the STB in their competitive access and bottleneck rules and decisions since the mid-1980s have endeavored to permit the industry to function without intrusive regulation except where it was necessary to address anticompetitive activity. The results, by every measure, have been impressive. The productivity of the industry has soared, service has improved dramatically, railroads have moved to much firmer financial footing, and they have reinvested hundreds of billions of dollars in rail infrastructure and equipment—while the industry's average rates are substantially lower in real terms than when the Staggers Act was passed.

In its January 11 Notice in this proceeding, the Board sought comments from interested parties on whether it would now be appropriate to modify its competitive access and bottleneck rules and policies. BNSF offers the following comments in response to the Board's request.

First, as shown recently in Ex Parte No. 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, there is substantial competition among the railroads and among other modes for shippers' traffic. Markets are working, both in situations where shippers or receivers are solely served by one railroad and in situations where they may be served by more than one railroad. As a general matter, railroads that solely serve shippers have every interest in working closely with those shippers to expand their markets, to provide efficient single-line service, and to cooperate with other railroads to provide efficient joint-line service. The ability of railroads post-Staggers to invest in efficient routes and services and benefit from enhancements in their terminal and long-haul operations has greatly benefitted the shipping public.

In the last decade alone, the rail industry as a whole poured more than $74 billion into capital expenditures to strengthen and expand the railroads' ability to provide competitive service. BNSF itself in the last decade made more than $29 billion in capital expenditures on its system. And the industry is continuing to invest heavily in the infrastructure necessary to keep rail service competitive. In 2010, the railroads spent a record $10.7 billion on capital expenditures, and they project capital expenditures of $12 billion in 2011. BNSF recently announced plans to invest approximately $3.5 billion in 2011 alone to maintain current infrastructure and improve the efficiency of operations.

Notably, some 600 shortline and regional railroads have been created nationwide since the passage of the Staggers Act, which has also helped preserve and strengthen rail service at many origins and destinations. BNSF has been involved in helping create many of those shortline and regional carriers, with which BNSF works closely to provide efficient through service. Moreover, like other railroads, BNSF has also been heavily involved in constructing or facilitating the construction of transload and intermodal facilities that further enhance the competitiveness of its services and give shippers more options for moving their traffic.

These improvements in BNSF's and other railroads' services and systems have resulted in much better service to shippers at much lower cost and much lower rates. And those improvements have been driven by market incentives, without unnecessary regulatory interference. Such reliance on competition and market forces to incentivize and develop the industry is precisely what the Staggers Act envisioned in 1980 and the ICC Termination Act (ICCTA) reinforced in 1995.

Second, in the limited instances where effective competition for a railroad's service does not exist, and a shipper claims that a railroad has abused its position by engaging in anti-competitive behavior, the STB's current regulatory framework provides remedies for any such abuse of market power. In almost all instances, a shipper's concerns are focused on the level of the rate they are being charged by the serving railroad. Under the STB's existing statutes and rules, a rail carrier has an obligation to provide a solely-served shipper with a reasonable rate for transportation, and that shipper has the right to bring a case before the STB to enforce that obligation. It has been BNSF's experience that shippers have made full and effective use of that right in formal rate reasonableness cases and informal proceedings before the Board, as well as in bilateral commercial negotiations with the railroad. The parties urging the Board and others to alter the competitive access provisions have never explained why the STB's existing robust rate reasonableness remedies do not adequately address shipper's concerns. Moreover, where there is a demonstrable anti-competitive problem that a railroad refuses to remedy, the STB's competitive access and bottleneck rules and decisional guidelines can provide appropriate recourse for the shipper. Finally, solely-served shippers are empowered with other regulatory options to address service and rate issues—including common carrier complaints, unreasonable practice complaints, informal complaints, and STB-sponsored mediation or arbitration. While BNSF might not always agree with the outcome of individual STB proceedings, the mechanisms for addressing alleged market abuses are available and real.

Significantly, all of the STB's rules are addressed to solving particular problems of market abuse. They assume, as the Staggers Act and the ICCTA require them to assume, that regulatory intervention is only necessary to protect shippers against the abuse of market power. Contrary to the suggestions of some shipper interests, the railroads' use of demand-based differential pricing is not an abuse of market power. Differential prices are market-based prices, and, as the ICC and the STB have long recognized, they are vital to the financial health of the industry. The fact that the railroads' financial health has improved—not simply through the use of differential pricing, but also through quantum leaps in productivity and the provision of much more competitive services—provides no ground for changing the fundamental economics of the rail industry through manufactured competition. Competitive access remedies are intended to address particular problems at particular locations. A railroad's overall financial condition is not determinative of the circumstances at an individual shipper's location on the railroad's network.

In any event, BNSF believes that the Board's current regulatory approach generally strikes an appropriate balance between shippers' desire for lower rates and the railroads' ability to earn a return sufficient to support future service. The Board's rate reasonableness rules protect shippers from paying rates that are unreasonable for the through service they receive, and the common carrier obligation ensures that shippers are offered service on reasonable request.

Third, smart regulation does not just serve the parochial interests of railroads and shippers. A vibrant railroad industry is critical to the global economic recovery of the United States. Freight rail provides a vital link between shippers and consumers across the country and around the world. Railroads carry one-third of all U.S. global exports. And the competitive advantage that efficient, low-cost rail service gives American producers helps create jobs. Railroad employment in 2010 was up over 5%, bringing total employment to more than 175,000.

BNSF expects that its own hiring will continue to grow in 2011 and beyond. Further, every rail job supports multiple jobs somewhere else in the economy, including rail suppliers and other manufacturing, retail and service firms and many other types of businesses.

It bears emphasizing as well that efficient rail service has substantial environmental and energy benefits. On average, rail service is two to three times more fuel efficient than truck service and produces one-third the emissions per ton-mile of freight carried. Moreover, rail service reduces highway congestion. A typical intermodal train takes the freight equivalent of several hundred trucks off of the nation's roads. This helps reduce automotive as well as truck emissions and also reduces public expenditures for wear and tear on the highways.

In short, in helping to revitalize the U.S. rail system, the current regulatory regime contributes in many vital ways to the nation's well-being.

Fourth, shipper interests looking for revisions to the Board's longstanding rules effectively seek a financial benefit (i.e., artificially low rates) for some shippers at the expense of the larger shipping community. Any approach that provides a minority of shippers with artificially low rates would negatively impact other shippers and the overall viability of the rail network. If misguided regulation forces rate reductions to shippers with higher demand, and railroads attempt to make up for the loss of contribution by raising rates to shippers with lower demand, many of the low-demand shippers will opt for cheaper service by trucks or other modes. To avoid that result, railroads can forego investment in their rail systems to make up for the loss of revenues from high-demand shippers, but this will exacerbate congestion on their systems, which will degrade service and cause shippers to choose other transportation options. The loss of contribution from those shippers will further constrict the railroads' investment capacity, which will in turn lead to more service degradation and the loss of more business. Ultimately, only the shippers with the highest demand will be left to either bear the burden of the railroads' fixed costs or watch the system deteriorate further.

Thus, whatever short-run benefit some high-demand shippers may realize from the misapplication of competitive access regulation, in the long run the entire rail system will suffer from unnecessary regulatory interference in the railroads' market-based rate and route decisions. It has taken decades for the rail industry to achieve the level of competitiveness and efficiency that the country currently enjoys. The ICC's and the STB's implementation of Congress's deregulatory mandate has been a demonstrable success.

Finally, and most importantly, in order to continue to meet the service expectations of current customers, as well as the growing need for additional transportation services, railroads cannot stand still. They must not only maintain their existing network and facilities, but also undertake the long-term investment in expansion required to serve future demand. The U.S Department of Transportation has previously estimated that demand for freight transportation will increase, in tons, by 88 percent by 2035. The 2007 Cambridge Systematics study found that an infrastructure investment of at least $148 billion (in 2007 dollars) over the next 28 years would be required to meet that projected demand.

It is imperative and critical to the U.S. economy that railroads make the capital investments that will permit them to maintain and increase physical infrastructure and service capability to meet this future demand. Simply put, the decision by a railroad to make maintenance and expansion investments requires two things: the ability to earn a reasonable return on that investment and regulatory certainty regarding that ability in the medium to long-term.

Neither of those pre-conditions to a healthy and growing rail system existed prior to passage of the Staggers Act. The ICC's regulatory micro-management, including the pervasive maintenance of an "open" routing system, was widely credited with bankrupting a significant portion of the U.S. rail industry and leaving the rest on life support. The renaissance of the industry can be traced directly to the ICC's implementation of Congress's deregulatory mandate in the Staggers Act. Private capital began to return to the industry because the ICC's market-based regulatory approach held out the prospect that voluntary restructuring, new investment, and innovation could yield the necessary returns. When Congress passed the ICCTA in 1995, it recognized the significant strides the industry had made under deregulation, and it required the STB to continue to refrain from regulation to the maximum extent possible.

The result has been the creation of a private freight rail system that is now the envy of the world. Shippers pay lower rates on average in the United States than in the rest of the world, and they do so without the public subsidies that governments elsewhere find necessary to pay for rail freight infrastructure. Continued private reinvestment in the rail industry in this country, however, depends on the continued opportunity to earn adequate returns and continued assurance that significant changes in the regulatory system will not undermine those returns. An environment characterized by regulatory uncertainty will certainly chill capital investment and now, more than ever, such capital investment is critical to the health of the railroads and shippers, and our nation's economic recovery.

The Board should, accordingly, scrutinize very closely any proposals to make significant changes to a regulatory approach that has served the country so well. BNSF understands that the STB at this point is simply seeking information to use to evaluate the effects of changes in the regulatory status quo and appreciates this opportunity to provide initial comments. While there are not yet any specific proposals for amendments to the Board's competitive access rules, the Board should not entertain changes to the current competitive access and bottleneck issues that compromise the ability of railroads to earn a return adequate to sustain critical investment now and in the future.

Respectfully submitted,

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