

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE
SWITCHING RULES

COMMENTS OF THE CHLORINE INSTITUTE, INC.
IN SUPPORT OF THE PETITION

The Chlorine Institute, Inc.
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By its attorney:

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Dated: July 27, 2011

The Chlorine Institute, Inc. (the “Institute”) is a 200-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users and suppliers. The Institute’s mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, plus the distribution and use of hydrogen chloride. The Institute’s North American Producer members account for more than 96 percent of the total chlorine capacity of the U.S., Canada and Mexico.

During the Ex Parte 705 proceedings, the Institute and several of its members submitted testimony regarding the substantial reduction in rail to rail competition that has been observed over the last few years. This reduction in competition has resulted in very dramatic increases in the rail rates applied to the movement of chlorine and other chemical products shipped and received by Institute members, and similar, if perhaps less dramatic increases in rates paid by other shippers and receivers of other commodities as well. The reasons for this reduction in intramodal rail competition may be the subject of debate; however, there can be no debate as to the fact of its occurrence and of its effects.

There plainly is a need to restore the balance between railroad financial health and the rights of shippers to have their commodities moved at fair and reasonable prices. That balance has shifted over the course of time to a point where rail market concentration and related factors have severely limited the competition that was relied upon by the Staggers Act to largely regulate rail pricing. It is time to re-examine the situation to determine whether adjustments should be made to the railroad/shipper balance and if so, how.

We must expect, of course, that the rail industry will respond to the NIT League petition with the argument that the rules of the Interstate Commerce Commission adopted 25 years ago in Ex Parte 445 have been carved in stone and cannot be altered by this Board even in light of the substantial changes in market, pricing and profitability characteristics. There is no such legal doctrine and neither the Board nor the courts have ever engaged in so restricting the actions of subsequent administrative actions based solely on the actions of a predecessor agency faced with dramatically different facts and circumstances. To hold otherwise would be to put a straightjacket on every administrative agency and eliminate the ability to adjust policy to meet changing conditions, indeed, the very reason that administrative agencies exist in the first place.

The Institute strongly supports the NIT League petition and urges the Board to initiate a proceeding to examine its current reciprocal switching rules and precedents to allow for greater competition in the railroad industry and greater flexibility and fairer rates in the shipping industry. Although the Institute recognizes that revisions to reciprocal switching rules may be limited in their effects, it is one remedy that can be the first step in the process to restore competition among the various railroads, particular the big four carriers. It is likely that it will take many remedies to create an overall effective competitive fix but there is no reason to wait until an ideal comprehensive solution is created, as specific remedies can be implemented through a gradual process as they are developed. To deny the NIT League petition would be to pre-judge the issue and continue the current regulatory regime without the benefit of a full and complete record and without allowing the Board to weigh the options based on such a record.

The Board should grant the NIT League petition and initiate a proceeding to re-examine the Ex Parte 445 Rules and precedents flowing from those rules.

Respectfully submitted,

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