

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING  
INTERCHANGE COMMITMENTS

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OPENING COMMENTS OF  
ALLIANCE FOR RAIL COMPETITION  
MONTANA WHEAT & BARLEY COMMITTEE  
COLORADO WHEAT ADMINISTRATIVE COMMITTEE  
IDAHO BARLEY COMMISSION  
IDAHO WHEAT COMMISSION  
MONTANA FARMERS UNION  
NEBRASKA WHEAT BOARD  
OKLAHOMA WHEAT COMMISSION  
SOUTH DAKOTA WHEAT COMMISSION  
TEXAS WHEAT PRODUCER BOARD  
WASHINGTON GRAIN COMMISSION  
NATIONAL ASSOCIATION OF WHEAT GROWERS

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Dated: December 18, 2012

Alliance for Rail Competition (“ARC”) and the other shipper interests identified on the cover of these Comments (hereafter “ARC, et al.”) welcome the opportunity to address the Board’s proposal to require additional disclosure of interchange commitments (sometimes known as paper barriers) in certain notices of and petitions for exemption.

ARC is an association of shippers of freight, most of which are captive to a railroad for a large percentage of their transportation requirements. ARC members include large utility coal shippers (PPL, Western Fuels, Otter Tail), shippers of sand (including sand for hydraulic fracturing) and glass, and shippers and producers of agricultural commodities, mostly located in the West. Montana Wheat & Barley Committee and the other wheat, grain, barley and farmer groups filing jointly with ARC represent producer and farmer interests as to a broad range of issues, including but not limited to transportation issues, in Colorado, Idaho, Nebraska, Oklahoma, South Dakota, Texas and Washington State. National Association of Wheat Growers (NAWG) works, along with its 21 affiliated state associations, to represent the interests of producers across the United States.

ARC, et al. filed comments in many recent STB rulemaking and other proceedings affecting the interest of captive shippers by rail. Some of those comments have pointed out the shortcomings of relying on the possibility of competition between railroads as the sole remedy for abuses of railroad market power. There are too many smaller and more isolated shippers, including shippers of agricultural commodities represented by ARC, et al., which do not ship in sufficient volumes, or do not enjoy sufficient proximity to potential competitor railroads, to benefit from some pro-competitive measures.

In addition, there have been too many documented instances of railroads failing to compete for shippers’ business, by offering better service or lower rates, even when there were no

legal or physical barriers to such competition. This danger is particularly acute as to short line railroads, many of which serve as feeder railroads for Class Is, and may be reluctant to compete vigorously with Class Is. Where competition for the shipments handled by the incumbent rail carrier does not exist or is not effective, STB regulation of the rates, charges, practices and service quality of the incumbent railroad must be available.

The fact remains that eliminating or minimizing artificial barriers to rail-to-rail competition is desirable. The rule changes proposed by the Board in this proceeding therefore have the general support of ARC, et al. as a necessary (though not sufficient) response to the problem of interchange commitments that are unreasonable and anticompetitive.

The Board decided in 2007 not to adopt a general rule identifying impermissible interchange commitments.<sup>1</sup> However, it has expressed misgivings (as it should) about interchange commitments that insulate railroads from any possibility of competition from other railroads, particularly where such provisions are long-lasting or permanent. And if the Board and affected shippers, carriers and others are to be able to address problematic interchange commitments, there must be improved notice of the scope and nature of interchange commitments.

Moreover, if the existence and, to some extent, the scope of interchange commitments must be highlighted in exempt transactions, that fact, coupled with the Board's warnings about interchange commitments that may exceed reasonable limits, should affect the actions of the parties in the transactions in question. Presumably, fewer interchange commitments that are perpetual and/or foreclose competitive alternatives completely will be built into future rail line acquisitions and leases.

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<sup>1</sup> See the decision served October 30, 2007 in Ex Parte No. 575, Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League.

If these benefits occur under the proposed rule, shipper concerns about interchange commitment may be ameliorated, but they will not be eliminated. Railroads with monopoly power can be expected to preserve as much of that power as possible through interchange commitments that fall short of perpetuity, but last a long time, or that fall short of foreclosing all competitive access, but foreclose much if not most competitive access. Such interchange commitments, even if not presumptively unreasonable, would appear to benefit market dominant railroads, and possibly short lines, to the detriment of shippers.

As detailed in the opening comments filed April 12, 2011 by the U.S. Department of Agriculture in Ex Parte No. 705, Competition in the Railroad Industry, concentration in the railroad industry has led to significant reductions in rail-to-rail competition for grains, including wheat, barley and oilseeds, in recent decades. Railroad monopolies have become more prevalent. USDA's recommendation of mandatory access remedies with access charges based on cost, not monopoly rents, is an example of the kind of change deserving further consideration, and the Board may be considering such reforms in Ex Parte No. 711.

The Railroads need not fear that the sky will fall with more rail-to-rail competition. Truck competition is receding, not increasing, as capacity constraints, driver shortages, limits on Gross Vehicle Weights and other barriers to trucking industry productivity gains enable railroads to increase their market share. The Railroads are hardly ignorant of these developments, having lobbied in favor of many of them. Since goods must move somehow if the economy is to grow, concerns that Wall Street will abandon the Railroads in the wake of even the slightest increase in competitive exposure are pure hyperbole. The future of the railroad industry is bright.

More fundamentally, increased competition can have enormous benefits, including incentives to improve efficiency, adopt new technology, eliminate waste, and increase responsiveness

to the needs of customers and the marketplace, including changes in those needs. When Conrail was acquired, the benefits of competition were extolled. In a letter to shippers dated April 17, 1998, CSXT Executive Vice President John Anderson wrote “I know of no market for goods and services where increased competition hasn’t produce better offerings and better value.”

These benefits should not require extended discussion. They drove the great wave of deregulation in the 1980s and 1990s that included the trucking, natural gas, airline, telecommunications and natural gas industries, among many others. The contrast between trucking deregulation, universally recognized as a success, which has led to superior service quality at reasonable and competitive rates, and partial rail deregulation in the same year, which has led to eastern and western duopolies, and barriers neutralizing short lines as competitors, could not be starker. An instructive exception is rail intermodal service, where competition has forced railroads to improve service quality to such a degree as to produce record growth.

In implementing trucking deregulation, the Board acted commendably to eliminate the last vestiges of anticompetitive conduct when it terminated antitrust immunity for motor carrier collective ratemaking in 2007. See Ex Parte No. 656, Motor Carrier Bureaus – Periodic Review Proceeding, at page 15:

In assessing the public interest, we must give significant consideration to the interests of disadvantaged shippers – the parties least able to self-protect and therefore most likely to have artificially high rates set by collective action. Termination of Board approval is the best way to protect their interests. As the Board has explained, “[o]ne feature of more competitive markets is that the benefits of low prices are broadly spread among the entire market of consumers, regardless of the fact that submarkets of consumers would, in the absence of competition, be willing to pay more for a good or service rather than do without it.”

On the rail side, the Board has attempted to make do with inadequate measures such as the “management efficiency constraint” of CMP, which has no theoretical utility outside SAC

rate cases and little practical utility in such cases. Increased rail competition should be a far more effective remedy for managerial inefficiency by monopoly railroads.

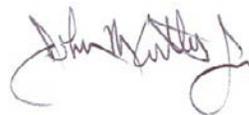
Arguing that monopoly is preferable to competition is not sustainable in 2012. A policy favoring monopoly would support a single railroad in North America, or support subordinating the transportation needs of shippers and receivers to operational efficiency and supra-competitive profit for the railroads. Products that should gain share in a competitive market might lose ground purely because a monopoly railroad's interests would be better served by the success of inferior products from preferred origins, or by reducing the number of participants in a market, with winners determined by location and railcar flow patterns. The Board therefore needs to move toward a new balance between the interests of railroads and shippers that better realizes the long-term goals of the Staggers Act and the ICCTA.

For the foregoing reasons, ARC, et al. support the rule changes proposed by the Board in this proceeding, and call on the Board to do more to support effective competition among railroads.

Respectfully submitted,



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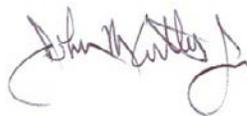


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Dated: December 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this 18<sup>th</sup> day of December, 2012, caused copies of the foregoing document to be served on all parties of record by first-class mail.

A handwritten signature in black ink, appearing to read "John M. Cutler, Jr.", written in a cursive style.

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John M. Cutler, Jr.