

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB EX PARTE NO. 690**

**TWENTY-FIVE YEARS OF RAIL BANKING:  
A REVIEW AND LOOK AHEAD**

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**SUPPLEMENTAL COMMENTS OF  
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

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**Dated: August 7, 2009**

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Arkansas Electric Cooperative Corporation (AECC) 1/ submits these supplemental comments to address issues that arose at the public hearing on July 8, 2009 regarding the impact, effectiveness, and future of rail banking. The issues addressed in these comments include:

- the relationship between the railroads' ability to control the disposition of unused right-of-way and the rights of "private property";
- whether the Board should be concerned about whether its actions might make it less attractive for railroads to pursue abandonments; and,
- the merits of a potential requirement that trail use agreements be filed with the Board.

Above and beyond their significance to rail banking, these issues are important because of the broader considerations they raise regarding the interface between the private incentives of the railroads and the public interest rationale for the Board's broad powers over railroad actions. The scope of the Board's authority and responsibility encompasses public interest considerations that may not always align with the railroads' private

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1/ AECC's interests in this proceeding were described in "Written Statement of Arkansas Electric Cooperative Corporation" (June 29, 2009) ("AECC Written Statement").

interests. Particularly In light of the extent to which carrier financial health has improved under the Staggers Act, it is timely and appropriate for the Board to give careful attention to public interest considerations that, by definition, assume greater relative significance as the policy goal of a financially sound industry is achieved.

#### Railroad Rights-of-Way and "Private Property"

A portion of the discussion at the public hearing concerned whether the property rights of railroads with respect to their rights-of-way are inferior or limited in comparison with the rights enjoyed by owners of "private property". As part of this dialogue, Vice Chairman Nottingham cited as an example his right not to mow his lawn if he so chooses.

AECC fully supports the rights of all Board members to mow or not mow their lawns however they may choose, and, if they elect to cease owning a lawn, to sell their property on whatever terms they may choose. However, AECC respectfully submits that this is not the standard against which the Board's handling of rail right-of-way issues can properly be assessed. Rather, the Board should view rail right-of way issues in the context of the unique public interest considerations and powers with which rail rights-of-way are infused.

When a homeowner mows (or chooses not to mow) his/her lawn, he/she has no say over the choices that other homeowners make regarding the mowing of their lawns. Irrespective of the homeowner's wealth, job title, standing in the community, etc., he/she has no direct control over the neighbors' yards. Indeed, the yard of one

neighbor may be kept as a thicket, while the yard of another neighbor may be maintained as a putting green.

This would all change if the homeowner were to acquire the certification from the Board needed to become a railroad. The “Homeowner Railroad” would benefit from the broad pre-emptive powers conferred by the certification from the Board, and would be able, through eminent domain, to acquire whatever swaths of neighboring land would reasonably be needed to support its railroad operations. The former owners of the land, regardless of the unanimity of their opposition to the Homeowner Railroad, would lose control over the use of their land.

Although railroads are privately-owned entities, they have historically received substantial public support, in the form of subsidies and land grants as well as eminent domain authority, because railroads’ activities are important to the public interest. This public support has provided the legal and economic foundation needed to create rail transportation corridors, even if such corridors could only be created at the expense of the rights of incumbent property owners.

Reflecting the significant public basis – including the sacrifice of individual property rights – on which the assemblage of rail corridors rests, Congress has imposed significant conditions on the uses of those corridors (including the common carrier obligation and rate reasonableness limitations), and has empowered the Board to exercise control over the cessation of rail service and the disposition of rights-of-way no longer needed for rail service. As custodian of the interstate rail network, the Board has full and legitimate authority to make decisions or impose requirements that run

contrary to the private interests of rail carriers seeking to end provision of the rail service that formed the basis for the public support which originally enabled the line to be created. Indeed, in this context, undue deference to the private interests of rail carriers may sell short the public interest considerations the Board is entrusted to administer.

#### Consequences of Board Actions that Affect Abandonments

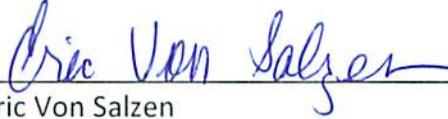
A portion of the discussion at the public hearing addressed a concern regarding Board actions that potentially would make it less attractive for rail carriers to pursue future abandonments. Specifically, it was hypothesized that such actions might somehow be detrimental to the public interest because they would keep rail lines from entering the rail bank. Such concern is misplaced, however, because the objective of rail banking is to preserve corridors for future restoration of rail service, and the effect of tightening abandonment requirements would be to prevent the loss of rail service in the first place.

#### Public Filing of Trail Use Agreements

A portion of the discussion at the public hearing addressed the issue of whether trail use agreements should be filed with the Board. AECC Written Statement described the railroads' opportunities and incentives to enter into trail use agreements that are contrary to the purpose of rail banking and/or other public interest considerations. The Board needs to know the content of trail use agreements to be able to determine the consistency of those agreements with the public interest.

Respectfully submitted,

Arkansas Electric Cooperative Corporation

A handwritten signature in blue ink that reads "Eric Von Salzen". The signature is written in a cursive style and is positioned above a horizontal line.

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