



ASSOCIATION OF
AMERICAN RAILROADS

228673

Law Department
Louis P. Warchot
Senior Vice President-Law
and General Counsel

January 25, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

ENTERED
Office of Proceedings

JAN 25 2011

Part of
Public Record

Re: Ex Parte No. 705, Competition in the Railroad Industry

Dear Ms. Brown:

Attached for filing with the Surface Transportation Board is the Motion of the Association of American Railroads ("AAR") to Extend Procedural Schedule for Filing of Comments in the above proceeding. For the reasons set forth in the Motion, the AAR requests that the procedural schedule for the filing of initial comments by parties be extended for a period of 60 days (i.e., to April 19, 2011) and that the parties be provided a 45-day period after the filing of initial comments – in lieu of the 28-day period currently provided – for the filing of reply comments (i.e., to June 3, 2011). The AAR further requests that the current May 3, 2011 date scheduled for the public hearing be postponed accordingly and that the hearing be rescheduled for a date consistent with the new comment periods.

Please note that the AAR has also requested expedited consideration of its Motion.

Respectfully submitted,

Louis P. Warchot
Attorney for the Association of
American Railroads

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

**MOTION OF THE
ASSOCIATION OF AMERICAN RAILROADS
TO EXTEND PROCEDURAL SCHEDULE FOR FILING OF COMMENTS**

Of Counsel:

**Paul A. Guthrie
J. Michael Hemmer
James A Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
John Patelli
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Greg E. Summy
Richard E. Weicher
W. James Wochner**

**Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502**

**Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895**

***Counsel for the Association of
American Railroads***

January 25, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

MOTION OF THE
ASSOCIATION OF AMERICAN RAILROADS
TO EXTEND PROCEDURAL SCHEDULE FOR FILING OF COMMENTS

By this motion, the Association of American Railroads (“AAR”) respectfully requests that the Board extend the procedural schedule for filing comments and holding a public hearing in the captioned proceeding. The AAR requests that the schedule for the filing of initial comments in this proceeding be extended for an additional period of 60 days and that the parties be provided a 45-day period after the filing of initial comments (in lieu of the 28-day period currently provided) for the filing of reply comments. The AAR further requests that the current May 3, 2011 date scheduled for the public hearing be postponed and that the Board re-schedule the public hearing for a date consistent with the new comment periods. The requested extension is sought to allow sufficient time to prepare thorough and thoughtful comments on the numerous critical issues raised by the Board’s Notice and to assure that the hearing be based on a complete record.

BACKGROUND

In a Notice served January 11, 2011, the Board scheduled a public hearing on May 3, 2011 “to explore the current state of competition in the rail industry and possible policy

alternatives to facilitate more competition, where appropriate.” Notice at 1. The Board also sought written comments prior to the hearing addressing various “legal, factual and policy matters” described in the Notice. *Id.* As further explained by the Board:

This proceeding is intended as a public forum to discuss access and competition in the rail industry, and with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies; whether such modification would be appropriate given changes over the last 30 years in the transportation and shipping industries; the effects on rates and service these rules and policies have had; and the likely effects on rates and service of changes to these policies.

Notice at 5.

In its Notice, the Board requested the parties to comment in detail on a broad range of subjects, as follows:

- (1) **The Financial State of the Railroad Industry** (parties requested to specifically address the findings and conclusions of recent studies of the railroad industry including, but not limited to, the Christensen Study¹ and the joint study of the U.S. Departments of Agriculture and Transportation²;
- (2) **49 U.S.C. § 10705** (alternative through routes) (parties requested to address how to construe this provision in light of current market conditions-- including pre-Staggers practice, the effect of Staggers, and whether there are statutory constraints on the Board’s ability to change its policy at this time);
- (3) **49 U.S.C. § 11102 (a)** (terminal facilities access) (parties requested to address how to construe this provision in light of current market conditions-- including pre-Staggers practice, the effect of Staggers, and whether there are statutory constraints on the Board’s ability to change its policy at this time);
- (4) **49 U.S.C. § 11102 (c)** (reciprocal switching agreements) (parties requested to address how to construe this provision in light of current market conditions, including pre-Staggers practice, the effect of Staggers, and whether there are statutory constraints on the Board’s ability to change its policy at this time);

¹ A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition (November 2009) (Christensen Associates); An Update to the Study of Competition in the U.S. Freight Railroad Industry (January 2010) (Christensen Update); and Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (March 2009) (collectively “Christensen Study”).

² Study of Rural Transportation Issues, <http://www.ams.usda.gov> [(follow “Publications” hyperlink; then follow “Agricultural Transportation” hyperlink; then follow “Congressional Studies” from the dropdown menu; then follow “04-10: Study of Rural Transportation Issues” hyperlink).]

- (5) **Bottleneck Rates** (parties requested to address, *inter alia*, whether the Board could and should change its precedent finding only narrow authority to compel a railroad to quote a separately challengeable rate for a portion of a movement and how the Supreme Court's decision in *Great Northern Railway* holding that the reasonableness of a through rate may only be challenged and evaluated from origin to destination rather than on a segment basis "can reasonably be applied in today's transportation world");
- (6) **Access Pricing** (parties requested to address the applicable tools and principles that should be used to determine access prices if the Board were to modify its competitive access rules);
- (7) **Impact** (parties requested to address "the positive and negative impact any proposed change would have on the railroad industry, the shipper community, and the economy as a whole"); and
- (8) **Any Other Aspects of the Board's Competitive Access Rules** (parties welcome to offer comments on any other aspect of the Board's competitive access rules, including comments "on the specific questions in the Board's prior (rescinded) order, Policy Alt. to Increase Competition in the R.R. Indus., EP 688 (STB served Apr. 14, 2009)."

Pursuant to the Board's Notice, initial comments are due February 18, 2011 and reply comments are due March 18, 2011. Notices of Intent to Participate in the May 3, 2011 public hearing are due April 4, 2011.

ARGUMENT

A proceeding of such broad scope and public significance as that proposed here calls for thorough and thoughtful input from the parties. The issues raised by the Board in the Notice are both complex and of vital importance to the financial health, competitiveness and efficiency of the railroad industry, including the ability of the rail industry to ensure that the Nation's rail infrastructure network continues to effectively meet the expanding needs of the shipping community in domestic and international commerce and continues to foster the Nation's ability to remain competitive in the global economy. In light of the complexity and importance of the issues raised, the AAR requests more time than the 30-day comment period currently provided to fully address the specific matters raised in the Notice—including the numerous specific factual

questions raised by the Board. The AAR also requests more than a 28-day period to respond to the comments of the numerous other parties likely to participate in this proceeding.³

The AAR further notes that the Board has already scheduled a public hearing for February 24, 2011 pursuant to its Notice served in Ex Parte No. 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (served October 21, 2010; as amended November 19, 2010) and that the AAR is currently in the process of preparing its written testimony for that proceeding (due January 31, 2011). The issues in Ex Parte No. 704 also encompass core regulatory principles, the application and interpretation of which are vital to the continued viability of the railroads as effective and efficient competitors in the transportation marketplace.

Without an extension of the procedural schedule in the present proceeding, the AAR and its members would not be able to direct all of the necessary resources and attention to each of the two proceedings which are of vital importance to the industry, and thus not be able to present to the Board as comprehensive a record as these proceedings deserve and require.

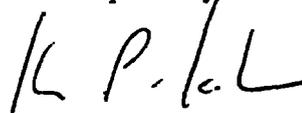
For the above reasons, and in light of the breadth, complexity and the importance of the legal, factual and policy matters at issue in this proceeding, the AAR respectfully urges that its request for extension of the procedural schedule by 60 days be granted. Pursuant to the AAR's request, initial comments would be due on April 19, 2011; reply comments would be due 45 days

³ AAR's request is also consistent with, and supported by, the regulatory principles enunciated in Executive Order No. 12866, *Improving Regulation and Regulatory Review*, issued by President Obama on January 18, 2011 ("Executive Order"). The Executive Order requires agencies to recognize the principle that it is essential that the federal regulatory system provide the opportunity for meaningful public participation in the regulatory process and that "each agency shall afford the public a meaningful opportunity to comment...on any proposed regulation, with a comment period that should generally be at least 60 days." Executive Order, Section 2 (b). Although the Board is not proposing specific regulations in this proceeding as yet, the Board's explicit intent is to solicit relevant information from the rail industry and the public on various "legal, factual and policy" matters set forth in the Notice so that the Board may consider "what, if any, measures the Board can and should consider to modify its competitive access rules and policy." Notice at 5. The AAR submits that, in light of the importance of this proceeding to the railroad industry and the shipping public, and the range of issues set forth in the Notice, the Board should allow the public more opportunity to *provide* the comprehensive information that the Board needs to consider before it takes any further steps.

thereafter on June 3, 2011; and the dates for Notices of Intent to Participate and for the public hearing would be postponed and rescheduled by the Board consistent with the new comment periods.

In order for the AAR to be in a position to properly allocate appropriate time to each of the numerous issues raised in the Board's Notice, the AAR respectfully requests that the AAR's Motion to Extend the Procedural Schedule be provided expedited consideration by the Board.

Respectfully submitted,



Of Counsel:

Paul A. Guthrie
J. Michael Hemmer
James A Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
John Patelli
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Greg E. Summy
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of
American Railroads*

January 25, 2011