

**SURFACE TRANSPORTATION BOARD INITIATES REVIEW OF SEVERAL RAIL ACCESS
& COMPETITION ISSUES AFTER COMPLETING APRIL 2 & 3 PUBLIC HEARINGS**

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Surface Transportation Board (Board) Chairman Linda J. Morgan and Vice Chairman Gus A. Owen announced today that the Board has issued a decision initiating a review of several rail access and competition issues that were raised in the Board's recent hearings held on April 2 and 3, 1998. The Board's hearings, at which approximately 60 witnesses testified, were conducted at the request of Senators John McCain, Chairman of the Senate Committee on Commerce, and Kay Bailey Hutchison, Chairman of the Subcommittee on Surface Transportation and Merchant Marine.

In its decision, the Board reviewed the progress of the railroad industry since it was largely deregulated in 1980. It found that the regulatory program that Congress adopted at that time, when railroads were failing financially, has been successful in producing a revitalized railroad industry. At the same time, however, the Board noted the complaints of shippers dependent on rail service that, as a result of consolidation in the industry, their competitive options have not been expanded, and that the available regulatory remedies are burdensome, costly, and unresponsive. The Board found no basis for recommending at this time, without further public discussion, that Congress require a broad "open access" system (one under which railroads can fully compete for the business of shippers on the lines of other railroads, but which, as the Board noted, could result ultimately in a smaller system serving fewer customers, perhaps only those with more lucrative traffic). However, the Board found broad dissatisfaction with the performance of the railroad industry, noting that:

[N]o rail-dependent shippers or shipper groups participated [in the hearings] to express satisfaction with the present state of rail service. The Board cannot ignore the pleas of those many shippers that are concerned with the present state of affairs. . . . It is thus clear that we have reached a regulatory crossroads. Neither continuation of the status quo nor the immediate adoption of the more drastic measures suggested by some shippers (measures which, if not carefully implemented, risk completely undoing the progress made towards a healthy national railroad system capable of meeting customers' service needs) seems appropriate at this juncture. Therefore, we must take a careful, measured approach. We will start by accepting the offers made at the hearings by both rail industry and shipper representatives to re-examine certain aspects of our current regulatory scheme. We will also institute appropriate rulemaking proceedings to re-examine other issues that we believe we can address now.

After indicating that other actions were possible in the future, the Board identified the following measures that it will take immediately:

1. Revenue Adequacy. The law direct the Board to determine whether railroad revenues are “adequate.” Several shipper interests continued to express concern that the current test for “revenue adequacy” is not realistic because it does not reflect what they consider to be the railroads’ true, robust financial posture. The Board requested representatives of the shipping community and rail industry to meet, under the supervision of an Administrative Law Judge (ALJ), and select a mutually acceptable panel of three disinterested experts to examine the current and alternative measures of a railroad’s financial health, and to make recommendations as to an appropriate standard. The Board requested the parties to organize, meet, and select a panel by May 15, 1998, and it asked the panel to submit its report to the Board by July 15, 1998.

2. Competitive Access. The law provides means by which shippers served by one carrier can obtain service from another. In implementing these statutory “competitive access” provisions, the Board’s current court-approved regulations typically require a demonstration that the incumbent rail carrier has engaged in some sort of anticompetitive conduct. In response to shipper complaints at the hearings, and in the past, that the anticompetitive conduct standard of the competitive access regulations is too harsh given the current level of consolidation in the rail industry, and in the face of service failures such as those now being experienced in the West, the Board indicated that it will address competitive access on two fronts. First, it will expeditiously begin a rulemaking proceeding to consider revisions to the competitive access regulations to address quality of service issues. Second, the Board stated, it will consider revising the competitive access rules with respect to competitive issues that are not related to quality of service. As part of that process, however, instead of now starting a rulemaking proceeding itself, the Board directed the railroads to arrange ALJ-supervised meetings with a broad range of shipper interests to explore the issue and see if the parties can identify appropriate modifications to the non-service-related component of the standards that would facilitate greater access where needed. The Board requested the parties to report to it on this issue by August 3, 1998.

3. Market Dominance — Product and Geographic Competition. Another area of continuing concern for rail-dependent shippers that the Board addressed involves the difficulties associated with seeking rate relief from the Board. Under the law, a railroad’s rate cannot be found to be unreasonably high unless the carrier has market dominance over the traffic involved, that is, unless there is no effective competition for the traffic at issue. Under court-approved Board rules, in addition to showing “direct” competitive alternatives such as competition from other railroads or other modes of transportation, a railroad may defeat a rate complaint by showing that a shipper can use substitute products that can be obtained from another carrier, or that the shipper can either obtain its product from a different source or ship its goods to a different destination using another carrier. In response to complaints by shippers that the examination of this potential “product and geographic competition” unduly complicates the market dominance determination and places an enormous litigation obstacle to a shipper’s ability to pursue a rate complaint, the Board stated that it will institute a rulemaking proceeding expeditiously to consider eliminating product and geographic competition from the market dominance analysis.

4. Smaller Railroads. At the hearings, shippers suggested that, in a more competitive rail environment, there should be a greater role for short-line railroads and other smaller carriers, particularly in rural areas. The Board agreed that smaller railroads represent a potentially significant resource in addressing the issues that concern the shippers, and that to date their potential remains largely untapped. The Board noted that, at the hearings, it had been advised that the smaller railroads and the large railroads have initiated discussions to address these concerns. Recognizing that private-sector discussions and solutions can be more productive and effective than government intervention, the Board urged the parties to address and resolve these issues themselves, and it directed them to report on their progress in this regard by May 11, 1998. The Board noted that it is prepared to take administrative action as necessary and appropriate in this area to address the concerns that have been raised.

5. Formalized Dialogue. The Board observed that all sides had agreed at the hearings as to the need for greater communications, including more formalized discussions, between railroads and their customers. In addition to the forums that already exist to address issues of ongoing concern, such as the National Grain Car Council and the Railroad-Shipper Transportation Advisory Council, the Board pointed out that the railroads had proposed to establish a regular, formalized process for discussions about service planning and needs, with the Board as an overseer of the process. Reminding railroads to address the needs of both large and small shippers, and to include in their discussions representatives of railroad employees, the Board directed the railroads to report on their progress in establishing formalized dialogue with shippers and with their employees by May 11, 1998.

6. Board/Shipper Discussions. Finally, the Board noted that, at the hearings, Board members had referred to their efforts to meet with individual shippers and their willingness to continue to meet with shippers to address general issues concerning railroad service, but that one shipper representative had expressed concern about potential improprieties in the event that shippers were to meet informally with Board members. The Board stated that, so long as shippers limit their discussions at such meetings to general service and other issues of broad concern, rather than specific pending cases, the members would continue to welcome the opportunity to engage in dialogue with them.

The Board's decision was issued today in Review of Rail Access and Competition Issues, STB Ex Parte No. 575.

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