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Rail Update August 2011

Both the House and Senate are currently into their August recess; however, there is a possibility they could return to address the Nation's economic issues. Rail legislation, like everything else is off the radar until the economy is addressed. Congress is starting to realize that the power of the Railroads has caused industry to head overseas and many shippers are suffering the economic dictates of the rail dominance policies. This was extensively discussed in Ex Parte 705 Rail Competition hearings on June 22 and 23 by both large and small companies. Ex Parte 705 was one of the most heavily participated hearings ever held at the STB. Since that time the captive shippers filed extensive comments on the closing date of the record in Ex Parte 705 Rail Competition inquiry by the STB on July 25, 2011. Many of them focused on the fact that the railroads have contributed with excessive freight charges and rail service practicies to the U.S. losing its competitive edge.

In fact, the U.S. Departments of Transportation, Justice and Agriculture filed comments about the need for the Surface Transportation Board to take a serious look at how the lack of competition in the railroad industry is hindering U.S. exporters, particularly agricultural shippers. This provided the STB with administration support for fully exploring the lack of rail competition and its effects on the country. The Railroads had and continue to lobby hard for the STB to leave everything 'just the way it is.'

For many years, the Department of Agriculture has developed very defined data showing the detrimental effects of the lack of rail competition and the rise of the captive rail shipper in the U.S.

Highlights of the DOT, DOJ and USDA comments include:

- Despite the initial success of the Staggers Act, agricultural producers and shippers continue to express concern about decreased rail-to-rail competition, rapidly increasing rail rates, poor rail service, rail capacity constraints and the fair allocation of rail capacity (USDA).
- Almost 75 percent of agricultural crop reporting districts lost rail competition from 1992 to 2007, and the crop reporting districts in which a railroad had a monopoly in transporting grain and oilseeds increased from 10 to 15 percent (USDA).
- The Agencies believe it is appropriate to investigate the extent to which relevant circumstances (such as rail capacity constraints, industry consolidation, and increasing revenue adequacy) have changed, and whether a proper balance of these or other considerations warrants different policy choices (e.g., on rate regulation or access or trackage rights) to serve the same underlying statutory goals (DOT/DOJ).
- To compete effectively in increasingly competitive world markets, U.S. farmers must have access to efficient, reliable, and cost-competitive transportation. The rates agricultural shippers pay for rail transportation must be at a level that promotes, rather than penalizes, American competitiveness in world agricultural markets (USDA).
- Railroad termination of reciprocal switching services and rapid increases in reciprocal switching fees have precluded rail-to-rail competition in many instances (USDA).
- The Board report on rail competition in 2008 estimates that reciprocal switching will have a small effect on railroad profitability and investment incentives. In addition, the report identifies reciprocal switching as one of the methods most likely to result in shipper gains (USDA).
- Although captive shippers bear the brunt of the deregulated industry's differential pricing*, Coal Rate Guidelines, Nationwide,* 1 I.C.C.2d 520,526-27 (1985), the rates and services such shippers receive must nonetheless be

"reasonable" and must not reflect an abuse of market power. Yet captive shippers have consistently charged in recent years that their rates and/or services are often unreasonable and that existing precedent often offers them no real protection (DOT/DOJ).

In a Joint Statement, the Alliance for Rail Competition, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Kansas Wheat Commission, Nebraska Wheat Board, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producer Board, Washington Grain Commission and Montana Farmers Union worked on several points. The following are a brief summary dealing with the competitive issue of the US.

- "There are large regions of the country, including entire States such as Montana, North Dakota, Colorado and others, in which there is little or no likelihood of increased rail competition."
- "As might be expected from the absence of effective, or any, rail competition in these regions, many of which are west of the Mississippi River, the result is high rail rates, and mediocre or poor service quality.....The North Dakota Grain Dealers Association filed a June 24, 2011 letter to the Board about poor service, including trains arriving so much later than promised that the elevators must hold their crews for extra hours or send them home for a rest period and call them back later. ... We continue to hear reports of Shuttle elevators in Montana getting hit with extremely high demurrage charges caused in part by the railroads' inconsistent or untimely delivery of rail cars."
- "ARC et al urge the Board to eliminate relief caps for its simplified rate case remedies....In effect; railroads are rewarded for imposing rates that are more rather than less excessive. This anomaly must be eliminated."
- "If the U.S. cannot copy the Canadian model of **final offer arbitration** and inter-switching, the Board should nevertheless strive to maximize the effectiveness of voluntary mediation and arbitration. In particular, the

Board should facilitate alternative dispute resolution as a way to challenge unreasonably high railroad charges."

The Interested Parties[1] also filed extensive Supplemental Comments:

- **" Competition will benefit the Entire U.S. Economy, not just shippers....In actuality, the entire U.S. economy would benefit from easing the stranglehold that the big four railroads have over the shipment of basic commodities on which our economy depends - the products of agriculture, forestry, mining and industry"**
- "Increasing competition will not undermine railroad investment. ... A reasonable way of thinking about this is as an adjustment necessitated by the increased market power gained by the railroads in the mega-mergers, and the merging carriers' notable failure to keep their promises that they would compete vigorously after the mergers. ... In fact basic economics shows that investment is stimulated, not deterred, by increasing competition, and specifically by the type of access remedies at issue in this proceeding.
- "Railroads do not have unique capital needs. It is also a myth that rail carriers have unique capital needs that make them unlike other industries such as utilities and telecommunications. "
- "Increased access to rail-to-rail competition or improved rate regulatory process....we want increased access to rail-to-rail competition, but we need the rate regulatory process of the Board to be accessible to rail dependent shippers.
- "Even if the Board adopts all of the pro-competitive changes in its access rules that have been recommended by rail customers, we recognize that

[1] The Interested Parties include the following organizations: Alliance for Rail Competition, The American Chemistry Council, American Forest and Paper Association, American Public Power Association, The Chlorine Institute, Colorado Wheat Administrative Committee, Consumers United for Rail Equity, Edison Electric Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Kansas Wheat Commission, Large Public Power Council, Montana Farmers Union, Montana Wheat & Barley Committee, National Association of Wheat Growers, National Grain and Feed Association, The National Industrial Traffic League, National Rural Electric Cooperative Association, Nebraska Wheat Board, Oklahoma Wheat Commission, Portland Cement Association, South Dakota Wheat Commission, Texas Wheat Producer Board, The Fertilizer Institute, U.S. Clay Producers Traffic Association, and Washington Grain Commission.

some "captive" rail customers, primarily due to geographic location, will never gain access to potentially competing rail carriers....For shipper that must have access to the rate regulatory program of the Board, based on the testimony at the hearings and the questions posed by the Commissioners, we recommend one change to and one clarification of the current program."

- "We suggest...a simple policy statement by the Board clarifying that the market dominance test is met when a complainant can demonstrate the absence of effective transportation competition, even if the rail customers is physically connected to more than one railroad."
- Secondly, "remove the damage limits on the Board's Simplified Procedures for challenging the reasonableness of a rate."

- The Western Coal Traffic League - in its comments stated:coal traffic is the number one source of rail revenue in the West. Accordingly, one cannot engage in an exploration ofthe state of rail competition without also conducting a thorough review of the subject of rail competition for coal traffic.
- Following the unprecedented decisions of both BNSF and UP in 2004 to signal their coal pricing and market allocation aspirations to one another through their newly adopted public pricing mediums, coal transportation competition in the West came to an abrupt halt culminating in:
    - A 300% + or - rise in the market level for unit coal train transportation rates; The abolition of all meaningful rail service commitments and guarantees for coal shippers;
    - The de facto award of monopolist status to the incumbent carrier at every PRB coal-fired facility served by both BNSF and UP at origin and destination (Initial Comments, Richards at 18); and,
    - Finally the most illustrative circumstance of all indicating that competition does not exist; Competitive rail coal rates at levels higher than captive rates.

WCTL also sponsored expert economic testimony from two highly qualified industrial economists. These industrial market experts previously concluded, on the basis of circumstances Nos. 1 thm 4, that "strong evidence" exists that BNSF and UP have agreed to stop competing in their pricing and provision of coal transportation service. (Initial Comments, Warren-Boulton/Baseman at 9). WCTL would also note that many other rail shippers are contending in other forums that BNSF and UP have engaged in similar conduct (see In re Rail Freight Fuel Surcharge Antitrust Litigation, -MDL Docket No. 1869, Oxbow v. UP and BNSF, Docket No. 1 l-cv-01049, both pending in federal court in Washington, D.C)

In conclusion: The rail duopoly in the West, which the agency (STB) authorized over WCTL's repeated opposition, and which has enabled the current circumstances and conditions in the coal transportation market to transpire, cannot now be undone. In other words, the agency is now powerless to meet its statutory obligation to foster railroad competition. Because competition does not and cannot be made to exist by the STB, if railroads refuse to compete when they have the opportunity to do so, the goals ofthe Staggers Act to protect the interests ofthe carriers, the shippers, and the public must be realized by other means.

Editor's Note: The sense by captive and many non-captive shippers that were present at the hearing is that the monopoly railroads are dictating both market and dominance in the market place, setting market prices and continuing to the U.S. companies losing their competitive position in the market place at home and abroad all-the-while enhancing railroad revenues.