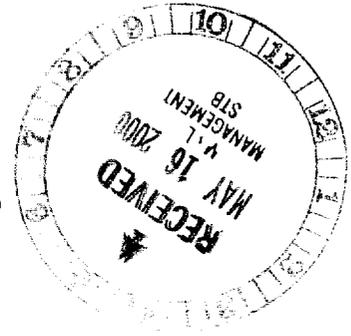


BEFORE THE
SURFACE TRANSPORTATION BOARD



Ex Parte 582 (Sub-No. 1)

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

COMMENTS

submitted by

THE FERTILIZER INSTITUTE

ENTERED
Office of the Secretary

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The Fertilizer Institute (“TFI”) respectfully submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPR”) of the Surface Transportation Board (“STB”) issued on March 31, 2000. TFI welcomes this opportunity to submit its views regarding possible revisions to the Board’s policies on rail mergers and, as noted further below, on rail regulation generally. TFI agrees that the agency’s policies on mergers needs to be re-evaluated in the context of a substantially-concentrated rail industry, and that significant changes need to be made in the Board’s approach.¹ TFI respectfully asks the Board to consider the following views as the agency develops its proposals for a Notice of Proposed Rulemaking in this proceeding.

I. Identity and Interest of The Fertilizer Institute

The Fertilizer Institute is the national trade association of the fertilizer industry. The Institute, which traces its roots back to 1883, represents more than 250 member companies,

¹ However, TFI believes that it was neither necessary nor lawful for the Board to impose a moratorium on all major rail mergers in order to accomplish the goal of reevaluating the agency’s merger policies. TFI applauds, however, the Board’s determination to take a fresh look at its merger approach in light of its experience with past mergers.

including virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many members of TFI utilize rail transportation, and thus have a vital interest in this proceeding.

II. Approval of Any Future Rail Consolidations Should Include a Condition Requiring the Merging Carriers to Provide Mandatory Expedited Arbitration to Resolve Rate, Service and Other Disputes

TFI strongly believes that the current mechanisms for resolving rate, service and other disputes between shippers and carriers are seriously in need of reform. In an extremely fast-changing fertilizer marketplace, for example, it is simply unacceptable for a rate case to take, at minimum, sixteen months and usually well longer. While American business has moved toward private methods for quickly resolving commercial disputes, such as mediation and arbitration, rail carriers have never generally consented to arbitration of rate and service disputes with shippers as a matter of right.

TFI believes that the Board should propose rules that would impose a condition on merging carriers to require mandatory arbitration, including strict time limits, as the means of resolving rate and service disputes between shippers and rail carriers. Such an arbitration procedure must include rates and service if it is to be of substantial use. Such a step, TFI believes, would provide an accessible and usable process for resolving problems in today's business environment.

TFI would note that carrier parties to merger proceedings have frequently adopted mandatory arbitration as a means of resolving disputes between them over merger-related conditions, and the Board has in the past directed carrier parties to resolve specific disputes in arbitration. TFI believes that this arrangement – whereby principles of general significance are

decided by the Board, but specific disputes between two parties are resolved through arbitration – is a sound one, and should be adopted for disputes between carriers and shippers.²

Thus, TFI believes that the Board should seriously consider requiring merging carriers, as a condition of their merger, to offer arbitration of rate and service disputes with shippers, at the option of the shipper, with the arbitrator(s) applying standards that the agency has developed over the years as the substantive rule to determine the outcome of a specific dispute. For example, in resolving a dispute over rail service, the arbitrators could apply rules promulgated by the Board in Ex Parte 628, *Expedited Relief for Service Inadequacies*. If such a structure were adopted, the Board could exercise general oversight (and fulfill all legal requirements and considerations of procedural fairness) through the use of an appeals process, under appellate standards similar to those that the Board has already adopted for voluntary arbitration. See, 49 C.F.R. §1108.11.

III. The Approval of Any Future Consolidation Should Be Accompanied By A Change in the Board's Rules on Terminal Access Through Reciprocal Switching

TFI believes that Board's overall policies with respect to rail carriers should give a heightened emphasis to both preserving and encouraging greater rail-to-rail competition. More specifically, TFI believes that significantly-increased rail-to-rail competition should include the right to reciprocal switching within a specified distance of a terminal. To implement this change, the Board should reevaluate its extremely restrictive competitive access rules, under which no shipper has ever succeeded in a competitive access case.

² Although the Board lacks jurisdiction to adjudicate loss and damage claims or contract disputes, it has sufficient authority to impose a mandatory arbitration requirement as a merger condition. Cf. Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 ICC 515, 540 (1972) (ICC had authority to establish procedures for the processing of claims); CSX Corp. et al.--Control and Operating Leases/Agreements--Conrail Inc. et al., STB Finance Docket No. 33388, Decision No. 89, p. 74 (served July 23, 1998) (preempting contracts as necessary to carry out a merger).

In its ANPR, the Board noted the possibility of requiring merger applicants to provide switching at an agreed-upon fee, to all exclusively-served shippers located within or adjacent to terminal areas. TFI supports this change, but believes that the Board should apply this change more broadly, and not just as a merger condition. Only in this way will the competitive benefits of reciprocal switching be applied not just to the shippers on the lines of the merging carriers, but to all other shippers as well.

Thus, the Board should consider adopting reciprocal switching rules of general applicability that would declare that reciprocal switching within a specified distance of a terminal presumptively is in the public interest and is necessary to provide competitive rail service; 49 U.S.C. §11102; and should define a “terminal” presumptively to exist within a specified distance of an interchange.

IV. The Board Should Revise Its Rules to Preserve Competitive Routings

TFI believes that STB should consider a variety of revisions to its merger and other rules in order to preserve and increase competition in the rail marketplace in the routing of traffic.

A. Preservation of Existing Gateways

In order to preserve even the existing level of competition in rail transportation, it is imperative for the Board to alter its merger rules to require any merging carriers to maintain “open” gateways. For example, if a point today is served by both BNSF and UP, traffic moving from or to that point from the eastern United States (even from a single-served eastern point, such as on CSX) can at least take advantage of competition between BNSF and UP on the movement from the interchange with the CSX to the competitively-served point. However, if UP were to merge with CSX, the competition between BNSF and UP for the portion of the move beyond the interchange with CSX would be lost.

Thus, the Board must act to preserve the routing competition that still exists between the remaining Class I rail carriers. This means not just preserving the physical ability to route traffic, but preserving the economic ability as well: routes can be “closed” not just by flatly restricting routing, but by pricing the traffic over the monopoly segment of the joint line route to prevent diversion to the competitor at the gateway.

B. Revision of Bottleneck Rules

If the Board is to “preserve” competition, much less “affirmatively enhance” it, the Board must review its bottleneck rules. Under the current rules as articulated in the Board’s two decisions in STB Docket No. 41242, *Central Power and Light Company v. Southern Pacific Railroad Company* and consolidated cases, decisions served December 31, 1996 and April 30, 1997, a shipper has no right to demand, and no right to challenge, any rate over a “bottleneck” if the bottleneck carrier can provide origin to destination service, unless the shipper brings and wins a competitive access case. Unfortunately, the agency’s competitive access rules have been so narrowly construed that a complaining shipper has never won a single case.

In a future vertical merger (and practically speaking, a vertical merger is the only kind of merger remaining), shippers will lose whatever rights they have had to route traffic over competing carriers, since the vertically-merging carriers will obtain the ability to provide origin to destination service to and from points served by each of them. In other words, under the Board’s bottleneck decisions, after a future vertical merger a shipper will have no right to route its traffic over currently-competitive routes, much less routes now closed but which could be competitive if the bottleneck rules were changed.

In its ANPR, the Board has suggested requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment. ANPR, slip op. at 7. The Board also suggested that it might require merger

applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment. Finally, the Board suggested revisions of the “one lump” theory to rail mergers.

TFI supports all of these approaches, and believes that they should be broadened to apply not just in merger settings, but for all carriers. Application of such rules would go far to forestall additional loss of competition through mergers, and restore competition in routing that has been lost in past mergers.

V. Conclusion

TFI appreciates the opportunity to make its views known to the Board, and respectfully requests the Board to consider these comments as it develops its Notice of Proposed Rulemaking in this proceeding.

Respectfully submitted

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By:

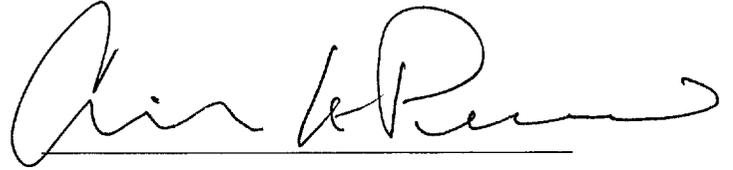

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May 16, 2000

Certificate of Service

I hereby certify that I have on this 16th day of May 2000 served a copy of the foregoing Comments on all parties identified in the Board's order in this proceeding, as required by the Board's order and rules of practice.



A handwritten signature in cursive script, appearing to read "Air K. P. [unclear]", written over a horizontal line.