ASSOCIATION OF
AMERICAN RAILROADS

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August 30, 2005

Mr. Andrew J. Heimert
Executive Director & General Counsel
Antitrust Modernization Commission
1120 G Street, N.W.
Washington, D.C. 20005

Re: Request for Public Comments (70 Fed. Reg. 28902)

Dear Mr. Heimert:

Attached for electronic filing in (pdf.) format with Antitrust Modernization Commission are the Comments for the Association of American Railroads in the above-referenced matter.

If there are any questions regarding this submission or if the Commission would like any additional information from the AAR, please contact me at [redacted] or at [redacted].

Very truly yours,

Louis P. Warchot

Attachment

Comments of the Association of American Railroads to the Antitrust Modernization Commission

Introduction

The Association of American Railroads (AAR) submits these comments to the Antitrust Modernization Commission (AMC) in response to the notice soliciting comments on a series of questions related to the antitrust laws. 70 Fed. Reg. 28,902 (May 19, 2005). AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 per cent of the rail industry's line haul mileage, produce 94 per cent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. Though a number of the issues raised by the AMC are of interest to the railroad industry, at this time AAR is limiting its comments to the subjects set forth in the notice that are of specific application to railroads: railroad-specific statutory antitrust immunities (Part V); and the interrelation between the antitrust laws and the federal government's economic regulation of the railroad industry (Part IX).

Rail Industry Characteristics

The freight railroad industry in the United States plays a substantial and important role in the nation's transportation network. From its beginnings in the early 19th century, the railroad industry grew within its first 100 years to be the nation's dominant mode of transportation. With the growth of extensive intermodal competition in the transportation marketplace, primarily from motor carriers, today the railroads have a significantly smaller share of the transportation market, but continue to be vital to the nation's economy and defense, and to the public interest.

Today, railroads account for approximately 42 percent of intercity freight ton-miles (more than any other mode of transportation) but generate less than 10 percent of intercity freight revenues. The rail industry's total annual revenues amount to approximately $38 billion.

U.S. freight railroads are, with minor exceptions, privately-owned, operated, and maintained (including the rights-of-way over which the trains operate). Unlike other transportation modes, such as the motor carriers which benefit from the publicly financed interstate and national highway systems, the railroads rely on private financing to pay for their infrastructure and equipment needs. From 1980 to 2004 the Class I railroads – the seven largest U.S. railroads – spent approximately $340 billion on capital expenditures and maintenance expenses related to infrastructure and equipment. By any measure of capital intensity railroads are at or near the top among all U.S. industries.

While individually owned, each railroad is part of a transportation system made up of 549 railroad companies, with 200,000 employees, operating over 140,000 miles of track as an integrated network.[1] It should also be noted that although there were more Class I railroads[2] several decades ago than there are today, the competitive environment in the rail industry and in the transportation industry in general remains intense. The "large" railroads of the past were primarily regional, with the consequence being that most freight had to be interchanged, perhaps

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[1] Association of American Railroads, Railroad Facts 3 (2004 ed.). In addition to covering all lower 48 states, the U.S. rail system links up with the major railroads of Canada and Mexico.

[2] Railroads are classified by the Surface Transportation Board in accordance with their revenues, with the largest being considered Class I railroads. *See* 49 C.F.R. Part 1202, 1-1.

multiple times, in order to reach its destination, a practice that frequently rendered rail transportation inefficient and uneconomical. Moreover, stringent legislative and regulatory requirements made it virtually impossible then for railroads to respond promptly to competitive pressures in the marketplace. The inefficiencies of the railroad network and the heavy-handed regulatory environment at the time led to serious financial difficulties for many railroads. The industry rationalization since that time (effected with the approval of the ICC and STB as further discussed below) that resulted in fewer larger Class I railroads – and well over 200 more smaller "short line" railroads – operating in a more efficient network was necessary to allow the railroads to remain viable and competitive in the transportation marketplace.

Nonetheless, because even the largest railroads do not own tracks that cover the entire country, many shipments must still move over the lines of more than one railroad to meet the needs of the nation's shippers. Nearly 1.3 million freight cars, making up trains powered by over 20,000 locomotives, operate on, and are interchanged throughout, this system.[3] In short, the national rail system is highly integrated and interdependent.

Given this inherent characteristic, which requires railroads to exchange cars and work jointly to move traffic from origin to destination, over the years the industry has worked cooperatively to develop a set of rules (administered by the AAR) which apply to various aspects of operations. (The nation's fleet of freight cars are privately owned by individual railroads and by non-railroad car owners.) Mechanical standards for freight cars have been established to assure that the cars railroads are required to accept at interchange points meet minimal safety

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[3] *Id.* at 49, 51.

and interoperability standards.[4] In addition, a set of rules related to car service and car hire have been developed. Car service rules address the requirements as to how a rail car is used in its movement among railroads throughout the rail network. The car hire rules address payments made by railroads for using each other's equipment. The car hire rules are covered by a statutory antitrust exemption and will be discussed in more detail below. Given the complexities of the rail network and large number of railroads and car owners, the various sets of rules have helped create an efficient operating environment.[5]

The tradition of self-regulation in the railroad industry has developed alongside longstanding, comprehensive federal oversight. In 1887, before the first antitrust laws were enacted, Congress undertook to regulate the economic, operational and safety aspects of the railroad industry. This policy was effected with enactment of the Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (1887), under which the Interstate Commerce Commission (ICC), an independent federal agency, was given broad authority to regulate practically every aspect of railroad operations.[6] The railroads were the first U.S. industry subject to such a comprehensive scheme of regulation.

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[4] Railroads are required to accept loaded freight cars in interchange service. *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distribution Rules & Practice*, 362 I.C.C. 844 (1980).

[5] The ICC has recognized the benefits of industry-wide rules. In 1980, the ICC rescinded its own mandatory car service rules in favor of relying on the AAR to administer and enforce industry car service rules., *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules, and Practices* Ex Parte No. 241 (Sub-No. 1), 362 I.C.C. 844, 874-75 (1980).

[6] The ICC originally had jurisdiction over railroad safety. That role was transferred to the Department of Transportation in 1966.

This regulatory scheme developed against the backdrop of a common law common carrier obligation, which required a common carrier to "carry for all persons who applied," at "reasonable" charges. *See I.C.C. v. Baltimore & Ohio R.R.*, 145 U.S. 263 (1892). Today, that common carrier obligation is carried forward in the statutory requirement in the Interstate Commerce Act, as it has been amended, that railroads provide transportation or service "on reasonable request." 49 U.S.C. §11101(a)

As noted above, with the passage of the Interstate Commerce Act, the railroads became the first U.S. industry subject to regulatory oversight by an administrative agency. Over time, rigid and arcane regulation came to control nearly every aspect of railroad operations. By the 1970s, the cumulative effect of decades of stringent government control, combined with strong competition from other modes and changing shipping patterns, crippled the rail industry. Rail infrastructure was deteriorating, accident levels were rising, much of the nation's rail mileage was in bankruptcy, and the industry's rate of return on investment averaged only 2.0 percent.

Because the status quo was untenable, Congress passed the Staggers Rail Act of 1980. Pub. L. 96-448, 94 Stat. 1895. In the Staggers Act, Congress recognized that railroads faced intense competition for most freight traffic, but prevailing regulation prevented railroads from earning adequate revenues and competing effectively. Accordingly, the Staggers Act allowed the railroads to establish their own routes, tailor rates and services to market conditions, and differentiate rates on the basis of demand where there was effective competition while providing for rate regulation to continue where effective competition was absent.

Thus, the Staggers Act did not completely deregulate railroads. In addition to retaining authority over a variety of non-rate areas, the Interstate Commerce Commission – now the

Surface Transportation Board (STB) – retained the authority to set maximum rates or take other actions if a railroad was found to have market dominance or to have engaged in anti-competitive behavior. The Staggers Act established a "safety net," which still exists, to address the needs of rail customers for whose traffic there is no effective competition.[7]

The end result is that today, railroads are subject to the antitrust laws as well as extensive economic regulation by the Surface Transportation Board. The STB has jurisdiction over rail service, market entry, and a wide range of rate-related conduct, including the level and structure of rates where there is no effective competition. Contrary to what is at times implied in the political arena, the federal antitrust laws also apply to the railroads and prohibit anti-competitive agreements among railroad competitors to set rates, allocate markets, or otherwise unreasonably restrain trade. *E.g., In Re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3rd Cir. 1993). There are a few statutory antitrust exemptions applicable to the railroads which are discussed below, but they are very limited and narrowly applied. They exist to avoid dual and potentially conflicting regulation by the STB and the courts or other agencies.

Antitrust Immunities

As noted above, certain limited antitrust exemptions are available to railroads, the primary purpose of which is to avoid dual and potentially conflicting regulation by the STB and the courts and/or to promote national transportation policy. These limited statutory exemptions are consistent with and facilitate the comprehensive scheme of STB economic regulation of the

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[7]The ICC Termination Act of 1995 eliminated certain additional regulatory provisions, abolished the ICC and created, in its stead, the Surface Transportation Board to maintain continued regulatory oversight of railroad rates and operations.

railroads. Moreover, they allow railroads to work together in a limited way efficiently to address some of the issues raised by the industry's network characteristics.[8]

Of the thirty-one statutory antitrust exemptions about which the AMC seeks information, only one pertains specifically to railroads. Section 10706 of Title 49 provides that "certain rate" agreements that have been reviewed and approved by the STB are exempted from the antitrust laws. However, the scope of the exemption is severely limited (*e.g.*, the exemption does not apply to collective discussions of or agreements upon single-line rates nor does it apply to any joint-line rate discussions between railroads unless they can "practicably participate" in the movement underlying the rate). More importantly, railroads' pricing for their transportation services is not covered by this exemption as a practical matter because the so-called "rate bureaus" that once addressed such rates no longer exist. The exemption remains important, however, to foster coordination on matters that enhance network efficiency (and are not controversial), such as rules governing administration of compensation for rail car use.

A history of this Section can be illustrative to show that changes to the antitrust laws should be considered only in the context of the regulatory environment. As noted above, this provision exempts railroads from the antitrust laws with respect to making and carrying out

[8] In addition to the explicit exemptions, where the matters at issue are subject to the primary or exclusive jurisdiction of the STB, the courts, under long-standing precedent, may defer to the regulatory agency on otherwise antitrust related contentions. These court-developed implicit exemptions are dependent upon the comprehensiveness of regulatory oversight by the administrative agency and the need to avoid potential conflicts between that oversight and the outcome of private litigation. Similarly, in order to avoid inconsistent results as between courts and the STB, private parties are prohibited from seeking to enjoin alleged antitrust violations by common carriers related to matters that are within the STB's jurisdiction. 15 U.S.C. §26; (*See also, Central Transfer Co. v. Terminal R.R. Ass'n,* 288 U.S. 469, 475 (1933))

certain agreements which have been approved by the STB. Agreements which are to be submitted for STB approval under this provision include agreements between at least two rail carriers which relate to "rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them . . ."

In its original form, 49 U.S.C. §10706 goes back to 1948, a period of far more active and comprehensive regulation of the railroad industry than exists today.[9] Initially, when enacted, this provision granted antitrust immunity for the railroads to meet together in "rate bureaus" and collectively set rates with antitrust immunity. However, when Congress passed the Staggers Act providing a level of regulatory relief for the railroads, it also severely limited the scope of the statutory exemption under this provision. As noted above, the exemption does not apply to collective discussions or agreements upon single-line rates nor does it apply to any joint-line rate discussions between railroads unless they can "practicably participate" in the movement underlying the rate. 49 U.S.C. §10706(a)(3)(A)(i)&(ii).

There is currently in effect an industry agreement approved under §10706 that permits joint consideration and establishment of rates of compensation for both railroad and shipper furnished freight cars and other transportation equipment, and rules and regulations pertaining thereto. This agreement, which is administered by the AAR, was first approved by the ICC in 1950 (Section 5a Application, *Association of American Railroads, per Diem, Mileage,*

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[9] This provision was originally enacted as section 5b of the Interstate Commerce Act by the Reed-Bulwinkle Act of 1948, 62 Stat. 472.

Demurrage and Storage – Agreement, 277 I.C.C. 413 (1950).[10] Any common carrier by railroad subject to the jurisdiction of the Interstate Commerce Act may become a party to the agreement.

Today, this Agreement provides a framework for the rail industry only to establish rules and regulations that pertain to the charges, known as car hire, that railroads pay each other when using the equipment of other railroads.[11] These rules, known as the AAR Code of Car Hire, establish procedures for the administration and accounting of car hire payments. Virtually all railroads, including many non-AAR members, subscribe to the Code. The Agreement sets forth the procedures to be utilized for consideration and establishment of the rules that make up the Code.

Again, it is important to note that under the Code, the railroads do not collectively establish the rates that users of freight cars pay to the car owners. These rates are established through bi-lateral negotiations between the owners and users of the equipment, or through binding arbitration if agreement cannot be reached, pursuant to the ICC's deprescription orders. Ex Parte No. 334 (Sub-No. 8) *Joint Petition for Rulemaking on Railroad Car Hire Compensation*, 9 I.C.C.2d 80 (1992); 9 I.C.C.2d 582 (1993); 9 I.C.C.2d 1090 (1993).[12] The car hire rules are promulgated, amended and enforced through the actions of committees, designated by the approved Agreement, which are composed of representatives of AAR member railroads

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[10] The Agreement initially covered demurrage and storage charges, rates paid by shippers for the detention of freight cars or for use of other transportation equipment or facilities. However, that authority was subsequently withdrawn by the ICC.

[11] This Agreement also is occasionally used to take up matters related to allowances provided when non-railroad cars are used.

[12] The Code does include a rule that addresses the negotiation and arbitration process.

and small railroads (which generally are not AAR members). Committee meetings where substantive discussions occur are open to all interested parties, typically are attended by representatives of several non-railroad car owners and lessors, and serve as a forum for all parties to express their views and concerns on matters related to the rules.[13]

This process works effectively to assure that there is a uniform set of rules–not rates–pertaining to the payment of car hire. Given the large number of railroads and car owners, the rules, and the process under which they are promulgated, administered and enforced, provide an orderly and accepted system for (1) apportioning financial responsibility for making payment in various situations, (2) governing collection, (3) adjustment of accounts and (4) handling of claims. While not all parties always favor all proposed rule changes, the process is well-accepted, not controversial, and is seen as beneficial by all participants.

AAR believes the conduct undertaken today pursuant to the industry §10706 agreement would pass muster under a rule of reason analysis. Nonetheless, the statutory immunity is beneficial because it enables railroads collectively to address matters that arguably relate to rates without fear that they will be subject to antitrust lawsuits aimed at disrupting that conduct.[14] STB oversight pursuant to the statute, 49 U.S.C. §10706(a)(3)(C),[15] assures that the conduct

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[13] While the Code of Car Hire only pertains to railroad owned equipment, much of the equipment owned by non railroads is leased to railroads and travels under their "marks," thereby making them the equivalent of railroad owned equipment for the purpose of the rules.

[14] Unlike the car hire rules, the industry car service rules are not promulgated pursuant to explicit antitrust immunity. As with the car hire rules, AAR believes that the car service rules also would survive a rule of reason analysis.

[15] All meetings are sound recorded or transcribed, and are available to the STB.

under §10706 remains within the confines of the Agreement and is consistent with transportation policy.

Another antitrust immunity, not specifically referenced by the AMC, pertains to STB approved pooling agreements. 49 U.S.C. §11322.[16] Under that provision, a railroad may not agree with other railroads to pool traffic or services without STB approval. The STB may only approve such "pooling" agreements if it "will be in the interest of better service to the public or of the economy of operation; and will not unreasonably restrain competition." Moreover, the STB may impose conditions on the approval of such an agreement. There are three extant pooling agreements that have been approved by the ICC (and over which STB now retains jurisdiction).

In 1981, the ICC approved an agreement to permit the central distribution of "multilevel" rail cars. Interstate Commerce Commission Finance Docket No. 29653, *The Baltimore and Ohio Railroad Company et al, – Pooling of Car Service Regarding Multi-Level Cars* (1981). In approving that agreement, the ICC found that the proposed pooling agreement "will be in the interest of better service to the public and the economy of operation, and will not unreasonably restrain competition."

Multilevel cars, which are the primary subject of the agreement, are used to transport automobiles and light trucks.[17] As a result of the agreement, when multilevels are unloaded at

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[16] Approved pooling agreements are granted antitrust immunity under the same statutory provision that provides immunity for approved consolidation transactions. 49 U.S.C. §11321.

[17] The agreement also covers boxcars that transport automotive parts. Traditional automobiles are transported in one type of multilevel car and minivans, SUVs and light trucks in another. Beyond that, there is a great degree of universality among the cars, though one shipper requires cars with a particular type of securement device.

destination, rather than having them return empty all the way to origin, they are directed to a nearby location for reloading. The "pooling" of this equipment has resulted in tremendous improvements in efficiency, reducing substantially the amount of miles that multilevel cars travel empty. The automobile manufacturers whose products are shipped in the multilevels have supported the pooling arrangement and acknowledge the benefits of the arrangement. The railroad participants in the pool meet regularly with the manufacturers to review and discuss issues related to the multilevel pool. The agreement does not permit joint consideration of commercial matters, such as rates or other terms of service, and these matters never are addressed at pool-related meeting.

The ICC also has approved a pooling agreement related to box cars, which, like the multilevel pool agreement, permits centralized distribution of the cars contributed by participating railroads to the pool. This agreement was approved in 1987, with the ICC finding that the it "will not unreasonably restrain competition." Interstate Commerce Commission Finance Docket No. 30969, *Railroad Car Service Pooling Application (Boxcars)* (1987). The pool was operated for several years after approval; however, because the railroad participants did not perceive that significant benefits were being achieved the pool ceased to operate for a period of time. The pool was reconstituted in 2003 under the existing pooling authority and is currently in operation, with efficiency-related benefits now being realized.

Both the multilevel and boxcar pools are open to all railroads that wish to contribute cars. These pools have resulted in significant improvements to efficiency in the railroad industry. No party has made a case that either pool has unreasonably restrained competition in any way.[18] In fact, by enhancing the efficiency of operations, the pools are procompetitive. Neither pooling arrangement involves any collaboration on, or consideration of, the rates charged to rail shippers or other terms on which rail services are offered. Moreover, the STB retains oversight authority with respect to the approved pooling agreements.

The third agreement approved under §11322 is an agreement that provides authority for the pooling of flatcars by the TTX Company (formally know as Trailer Train Company), which is owned by several railroad companies. TTX owns and manages for the benefit of the ten participating Class I and smaller railroads an extensive fleet of specialized flat cars that are used in transportation of, among other things, containers, truck trailers, lumber, extra dimensional loads and automobiles (which are transported in "multilevel" superstructures, owned by individual railroads, that are attached to the flat cars). The TTX agreement was initially approved in 1974 for a period of 15 years, and has been subsequently approved, with some modifications, by the ICC and STB on several occasions. It was approved for a new ten year period last year.

The agreement has enabled TTX to efficiently distribute flat cars to its owning railroads which has benefitted both the railroads and the shippers using their services, and has been an factor in the phenomenal growth of intermodal traffic. In considering TTX's latest application for extension of its pooling authority, the STB found that "TTX has adapted and consistently has produced significant, undeniable benefits to railroads and shippers that could not have been

[18] In 1994, the Department of Justice opposed a proposed amendment to the multilevel pooling agreement. After discussion with the Department, the proposed amendment was modified and DOJ withdrew its opposition. The ICC approved the amendment in 1995.

achieved as easily, if at all, in the absence of the TTX flatcar pool." STB Finance Docket No. 27590 (Sub-No. 3), *TTX Company, et al.–Application For Approval of Pooling of Car Service With Respect to Flatcars.* (2004). It also noted that the pooling of flatcars by TTX promotes research and development of new and innovative equipment, permits standardized fleet repair and maintenance to reduce costs, permits TTX members to spread the risk of investment of equipment and to effectively and efficiently respond to the dynamics of the North American railroad network, and produces substantial capital savings by maximizing the efficient use and distribution of pooled equipment. Id. Moreover, in approving the extension of TTX's pooling authority last year, the STB concluded that it had not found "that any adverse competitive impacts result from pooling to warrant adjustment to TTX's authority" and that "for many years, TTX has served an important role in satisfying the growing demand for railroad cars." *Id.*

Regulated Industries

The AMC's notice raises a number of questions related to the role that antitrust enforcement should play in regulated industries and the respective roles of the antitrust enforcement agencies and the regulatory agency with jurisdiction over the regulated industry. The notice directs attention to several industry-specific statutory provisions, requesting that comments be framed in the context of those provisions. Among the provisions referenced are those that address mergers and acquisitions of rail carriers.

As discussed above, with the exception of a few limited antitrust exemptions rail roads generally are subject to the antitrust laws. However, the Interstate Commerce Act grants to the STB exclusive jurisdiction over railroad mergers and acquisitions. 49 U.S.C. §§11321, 11323 and 11324. Rail mergers, consolidations, and pooling agreements approved by the STB are exempted from the antitrust laws. *Id.* § 11321(a). Such agreements are subject to regulatory scrutiny under legislatively prescribed public interest standards, including competitive and market considerations. The STB regulatory process for assessing mergers, consolidations, and pooling agreements provides for the development of a detailed record, with affected parties (including DOJ) having the opportunity to participate.

When the STB considers a proposed merger of two or more Class I railroads, it must consider, among other things, (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest, and (3) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. In order to approve a transaction, the STB must find that it is consistent with the public interest. The STB may impose conditions on an approved transaction including divestiture of tracks or the granting of trackage rights[19] or access to other facilities.

The questions posed by the AMC presuppose some degree of dual authority over mergers between the antitrust enforcement agencies and the regulatory agencies. This is not the case with railroad mergers. The STB having exclusive jurisdiction over approval of consolidations is an outgrowth of Congress' decision to have rail consolidations considered in the context of the national transportation policy which, while most certainly including the interest of promoting competition, also includes other important considerations.

The railroad consolidation provisions originated in the Transportation Act of 1920, 41 Stat. 456. Under that law, Congress sought to balance the policies embodied in the antitrust laws

[19] Trackage rights are the rights of one carrier to use the track of another carrier.

with those embodied in the national transportation policy. "[T]here can be little doubt that the [ICC] is not to measure proposals for all-rail . . . consolidations by the standards of the antitrust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy." *McLean Trucking Co., Inc. v. United States*, 321 U.S. 67, 84-85 (1944). The Supreme Court explained that in relieving parties to approved consolidations from the requirements of the antitrust laws, Congress "presumably took into account the fact that the business affected is subject to strict regulation and supervision . . . an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed." *Id.* at 85. Given the context in which railroad consolidations are to be considered, Congress determined that the regulatory agency with substantive expertise and responsibility for implementing national transportation policy is in the best position to evaluate proposed consolidations in the railroad industry.

In recent years, with the competitive environment in which the railroads operate, the focus of the national transportation policy has reflected a greater reliance on competition and market forces. See 49 U.S.C. §10101(1) & (2). As a result, STB oversight of the railroad industry permits railroads far greater flexibility with respect to their rates and services than was the case in the past. This change has also been recognized by the STB with respect to its consolidation policy.

In 2001, the STB revised its regulations pertaining to railroad mergers to elevate the importance of preserving competition as a condition for approval of a transaction. *See generally* 49 C.F.R. Part 1180. The STB's stated policy is to ensure "balanced and sustainable competition in the railroad industry." 49 C.F.R. §1180.1(a). The regulations further state that the STB "does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." *Id.* The STB requires that merger applications include "provisions for enhanced competition." 1180.1(c). Moreover, the STB is prepared to use its authority to "preserve and/or enhance competition." *Id.* Applicants seeking approval of a transaction are required to explain "how they would at a minimum preserve competition and market options" and to "propose remedies to mitigate and offset competitive harms." §1180.1(c)(2)(I). Thus, while the STB retains exclusive jurisdiction to approve rail merger, the agency continues to take into account policies embodied in the antitrust laws along with other public interest factors.

The STB also has authority, which it has frequently exercised in the past and maintains today, to impose conditions on merging railroads and to exercise significant oversight when it approves rail consolidations, see 49 U.S.C. 11324(c)("The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities."). At least since 1980, the Board has consistently imposed merger conditions to preserve two-railroad service where it existed prior to a proposed merger. *E.g., Union Pac. Corp., Union Pac. R.R. Co., and Missouri Pac. R.R. Co. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and Denver and Rio Grande Western R.R. Co. [General Oversight]*, STB Finance Docket No. 32760 (Sub-No. 21), Decision 13 (1998). In addition, the Board has exercised its authority by maintaining oversight of transactions for a period of time after approval. For example, a five year oversight period was made a condition of approval of the acquisition of Conrail by CSX and Norfolk Southern. *See CSX Corp. and CSX Transp., Inc., Norfolk Southern*

Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail, Inc., and Consolidated rail Corp., Decision No. 89, Finance 18Docket No. 33388 (3 S.T.B. 196) (1998). *aff'd., Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 247 F.3d 437 (2^{nd} Cir. 2001).

The assigning of jurisdiction over railroad consolidations to the STB is an outgrowth of the longstanding regime of economic regulation. As a result, the agency that is charged with carrying out the national transportation policy, and which, along with its predecessor, possesses well over one hundred years of accumulated expertise, continues to have the final say over rail consolidations.

Conclusion

Antitrust exemptions for the railroads exist because the railroads are subject to economic regulation. If the goal is to treat the railroads like other unregulated businesses with respect to the antitrust laws, it would be unfair to consider eliminating the exemptions in isolation without also considering them in the context of the entire current regime of economic regulation over the railroads. If one is to assess whether the antitrust exemptions should be eliminated, one should also assess whether the remaining regulatory regime should be treated likewise.

Respectfully submitted,

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