

## **SURFACE TRANSPORTATION BOARD SEEKS PUBLIC COMMENT ON CHANGES TO ITS REGULATIONS GOVERNING PROPOSALS FOR MAJOR RAIL CONSOLIDATIONS**

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has issued an advance notice of proposed rulemaking (ANPR) instituting a rulemaking proceeding by seeking public comment on modifications to the Board's regulations governing proposals for major railroad consolidations. [FOOTNOTE 1: The Board's regulations governing proposals for major rail consolidations are codified in the Code of Federal Regulations at 49 CFR part 1180, subpart A. A "major rail consolidation" is a transaction involving the merger or control of two or more Class I railroads. A "Class I railroad" is a United States railroad with annual operating revenues (in inflation-adjusted 1991 dollars) of at least \$250 million.]

In the ANPR, the Board noted that, in its March 17 decision [FOOTNOTE 2: In the proceeding entitled *Public Views on Major Rail Consolidations*, STB Ex Parte No. 582. The March 17 decision also was discussed in Surface Transportation Board "News" release No. 00-17, likewise issued on March 17.] directing the Class I railroads not to pursue further merger activities before the Board until it has adopted new rules governing merger proceedings, the Board had announced that it would be issuing an ANPR to explore in detail how its merger rules can and should be revised. The Board indicated in its March 17 decision, and reiterated today in the ANPR, that--with the rail industry far more concentrated than it was when the Board's current regulations were fashioned; with the prospect that any further major rail merger would trigger strategic responses that could lead to a transcontinental rail duopoly; and with only limited opportunities remaining for significant merger-related efficiency gains--the time has come for the Board to consider whether its rail merger policy should be revised, as many have suggested, with an eye towards more affirmatively enhancing, rather than simply preserving, competition. And, given the service problems that have accompanied the last round of mergers, the Board also noted in the ANPR the need to reexamine its merger rules to address those concerns.

**Overview.** The Board indicated in the March 17 decision, and reiterated today in the ANPR, that it intends to revisit its approach to: competitive issues such as the "one-lump theory" and the "three-to-two" question; "downstream" effects; the important role of smaller railroads in the rail network; service performance issues; how the types of benefits to be considered in the balancing test should be examined, and how benefits should be monitored; how alternatives to merger, such as alliances, should be viewed; employee issues such as "cram down;" and international trade and foreign control issues that would be raised by any proposal by a Canadian railroad to combine with any large U.S. railroad.

**Request For Comments.** The Board is requesting public comment and more detailed proposals on the referenced issues and on any other ways in which its merger regulations should be modified to promote and enhance competition and/or other public interest goals. The Board discussed several particular issues at greater length.

**"Downstream" Effects.** The Board indicated that it intends to propose the elimination of the "one case at a time" rule [FOOTNOTE 3: This rule is codified at 49 CFR 1180.1(g).] to enable the consideration, in any future merger proceeding, of the likely downstream effects of a proposed transaction, including the likely strategic responses to that transaction by other railroads.

**Maintaining Safe Operations.** The Board stated that ensuring that rail safety concerns are addressed has been, and will continue to be, a primary goal of its environmental review in rail merger cases. The Board noted that, in recent major rail mergers, applicants have been required to work with the Federal Railroad Administration (FRA) to formulate Safety Integration Plans (SIPs) to ensure that safe operations will be maintained throughout the implementation process of any merger proposal approved by the Board, and that the Board has instituted a joint SIPs rulemaking with FRA in which the two agencies, working in conjunction, have proposed regulations designed to ensure adequate and coordinated

consideration of safety integration issues in railroad merger cases.[FOOTNOTE 4: The SIPs rulemaking was discussed in Surface Transportation Board "News" release No. 98-88 issued December 30, 1998.] The Board intends to continue to require SIPs on a case-by-case basis, where appropriate, until the SIPs rulemaking proceeding is concluded.

Safeguarding Rail Service. In view of the significant harms that have been caused by service disruptions that have been associated with recent mergers, the Board is seeking comment on how its merger rules might best be revised to protect customers and shortline railroads from merger-related service disruptions, and the loss of adequate infrastructure and capacity. In particular, the Board is seeking comment on such issues as the establishment of performance standards, the requirement for more detailed service integration plans, and a more focused assessment of the financial viability of the merger applicants.

Promoting and Enhancing Competition. Stating that the time has come to consider whether rail merger policy should be altered to place a greater emphasis on enhancing, rather than simply preserving, competition, the Board is seeking comment on whether competition-enhancing measures should be considered for incorporation into the Board's merger rules. The Board specifically referenced various proposed requirements suggested in the Board's STB Ex Parte No. 582 proceeding culminating in its March 17 decision, which include: requiring merger applicants to maintain open gateways for all major routings; requiring merger applicants to provide switching, at an agreed-upon fee, to all exclusively served shippers located within or adjacent to terminal areas; 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; requiring 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; and revising the application of the "one lump" theory to rail mergers to provide an exclusively served shipper with access to an additional carrier where the solely serving carrier is merging with one of several connecting carriers.

Shortline and Regional Railroad Issues. In view of concerns expressed by shortline and regional railroads, the Board is seeking comment on whether and how the concerns of shortline and regional railroads should be reflected in the Board's merger rules. The Board specifically referenced the "Bill of Rights" advocated by the American Short Line and Regional Railroad Association, which includes the right to compensation for service failures, the right to interchange and routing freedom (including the elimination of so-called paper and steel barriers), the right to competitive and nondiscriminatory pricing, and the right to fair and nondiscriminatory car supply.

Employee Issues. Noting that representatives of rail employees have suggested that merger applicants should be required to agree to forgo any effort to "cram down" post-merger changes in collective bargaining agreements, and/or to offer their employees expanded labor protection (e.g., 10, rather than 6, years of benefits), the Board is seeking comment on whether and how these and other concerns of rail employees should be addressed.

"Three-to-two" Issues. In view of the many suggestions that greater weight should be given to arguments of competitive harm in those situations where the number of rail carrier alternatives within a corridor would be reduced by a merger from three to two, the Board is seeking comment on whether and how its assessment of three-to-two effects should be reflected in its new merger rules, or whether this issue is best left to a case-by-case examination based on the individual circumstances of each case, as it has been in the past.

Merger-Related Public Interest Benefits. In view of the many suggestions that merger applicants' estimates of the synergies and other public interest benefits that would be produced by a proposed merger should be viewed with greater skepticism, the Board is seeking comment on how claims of public interest benefits should be treated under its merger rules, including how alternatives to merger should be considered in this context.

Cross-Border Issues. The Board also is seeking comment as to whether and how its merger rules should address various concerns regarding potential harm to American interests that might result from the merger of a Canadian railroad and a

large U.S. railroad. Such matters include concerns regarding the: adequacy, consistency, and effectiveness of extra-territorial oversight, especially regarding safety matters; national defense implications of foreign control of a large U.S. railroad; adverse impacts on U.S. ports and waterway systems; and adverse impacts on U.S. grain and lumber interests.

**Notice Of Intent To Participate.** Any persons interested in participating in the rulemaking proceeding instituted by the Board's ANPR (and in being placed on the service list and thus receiving copies of filings) must file a written notice of intent to participate with the Board by **April 20, 2000**, in accordance with the filing requirements set forth below.

**Service List.** A service list, identifying all parties that have filed notices of intent to participate, will be issued by the Board by **April 28, 2000**.

**Comments.** Comments are due on **May 16, 2000**. Each party submitting comments to the Board also must provide a copy to each person on the service list.

**Replies.** Replies are due on **June 5, 2000**. Each party submitting a reply to the Board also must provide a copy to each person on the service list.

**Paper Copies; Electronic Copies.** Each person filing a notice of intent to participate, comments, and/or a reply must file with the Board an original and 25 paper copies of: the notice of intent to participate (to be filed with the Board by **April 20, 2000**); the comments (to be filed with the Board and provided to all parties by **May 16, 2000**); and the reply (to be filed with the Board and provided to all parties by **June 5, 2000**). Each person must also submit, in addition to an original and 25 copies of each paper document (except the notice of intent to participate) filed with the Board, an electronic copy of each paper document. [FOOTNOTE 5: An electronic copy is not required for the notices of intent to participate.] The electronic copy should be on a 3.5-inch IBM-compatible floppy diskette, and should be in, or convertible by and into, WordPerfect 7.0. Any person may seek a waiver from the electronic submission requirement.

**Fax and E-Mail.** The Board will not accept facsimile submissions in this proceeding because of the additional administrative burden required to process such filings. Also, the Board will not accept e-mail submissions in this or any other proceeding because the Board has not developed policies, procedures, or standards for accepting documents in that format.

**Document Scanning.** The Board intends to make available to the public all filings submitted in this proceeding by publishing an image of each on the Board's website at [www.stb.dot.gov](http://www.stb.dot.gov) under the "Filings" link. To ensure that the highest quality image is captured during the scanning process, the following filing instructions apply: participants must submit comments according to existing rules requiring that all filings be clear and legible; on opaque, unglazed, durable paper not exceeding 8.5 by 11 inches; and reproducible by photography. The Board also requires that only white paper be used; that printing appear on only one side of a page; that parties not employ color printing, but use only black or dark blue ink; and that all pages of filings, including cover letters and any attachments, be sequentially paginated. The original document must be submitted unbound and without tabs to reduce possible damage to the document during Board processing and to facilitate the use of a high-speed mechanism for automated scanning. Multi-page documents may be paperclipped or held together by a similar removable fastener. All filings, including oversize or other non-scannable items, will be available for public inspection in the Board's Docket Room.

**Subsequent Stages Of This Proceeding.** As indicated in its March 17 decision, the Board intends to: issue a notice of proposed rulemaking (NPR) in this proceeding by **October 3, 2000**; provide a total of 100 days (ending **January 11, 2001**) for comments, replies, and rebuttal on the proposals contained in the NPR; and issue final rules by **June 11, 2001**.

The Board issued its ANPR today in *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1). It will be published in the *Federal Register* on April 6, 2000.

A printed copy of today's ANPR is available for a fee by contacting: **Da-To-Da Office Solutions, Room 405, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 466-5530**. The ANPR is also available for viewing and downloading via the Board's website at **[www.stb.dot.gov](http://www.stb.dot.gov)**.

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