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SURFACE TRANSPORTATION BOARD

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Ex Parte No. 712

IMPROVING REGULATION AND REGULATORY REVIEW

COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY AND MANUFACTURE ALABAMA

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Introduction

The Board instituted this proceeding in response to two Executive Orders,[1] seeking public comment on the following topics:

- specifically identify which of the Board's existing regulations or reporting requirements are outmoded, ineffective, insufficient, or excessively burdensome, and explain why;
- propose which regulations should be modified, streamlined, expanded, or repealed;
- provide evidentiary support to help the Board analyze the costs and benefits (both quantitative and qualitative) of any proposed changes; and
- suggest an appropriate timeframe for conducting the next retrospective review of the agency's regulations and reporting requirements.[2]

CURE and Manufacture Alabama are pleased to submit these Comments in response to the Board's request. CURE and Manufacture Alabama (CURE/MA) believe that, if the Board were to follow their suggestions, some of the most resource-intensive proceedings before the Board could be streamlined in a manner to reduce the burden on shippers, railroads, and the Board. CURE/MA also believe that the Obama Administration's call for greater transparency could be served by the Board providing additional information to the

[1] Executive Order 13563, 76 Fed. Reg. 3,821-23 (Jan. 31, 2011); Executive Order 13579, 76 Fed. Reg. 41,587-88 (July 14, 2011).

[2] *See* Decision served October 12, 2011 herein, at 2. In a Decision herein served December 21, 2011, at 1, the Board clarified that it "intends to focus its analysis in this proceeding on whether there are long-standing regulations that have been shown to be obsolete or are otherwise in need of revision."

public about railroad practices, such as "paper barriers." Significant testimony was received by the Board in its Ex Parte No. 705 proceeding last summer that the knowledge of the existence of "paper barriers" would be very important to rail customers as they determine their transportation options and negotiate transportation agreements with the major railroads.

Moreover, CURE/MA believe that, if the Board were to expedite any changes it is considering to its regulations or policies to improve the pro-competitive provisions of the Staggers Rail Act of 1980, this new policy would be responsive to the Executive Orders of the President by expanding the number of rail customers that do not need to call on the regulatory powers of the Board with respect to their transportation needs.

Interest of CURE and Its Members

CURE is an incorporated, non-profit advocacy group with the single purpose of seeking rail policy favorable to rail-dependent shippers, many of which are referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual rail-dependent rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national and state associations, as well as associations of governmental institutions whose members work to protect consumers. The issues that are the subject of this proceeding – improving

regulation and regulatory review -- potentially affect many if not all CURE and Manufacture Alabama members because many of them seek relief, or consider seeking relief, from the Board due to rates, charges, other terms of service, unreasonable railroad practices, and other railroad actions that harm them economically. If access to the Board is unreasonably difficult, complex or costly, the members of CURE and Manufacture Alabama are often left with no recourse in law for their rail transportation problems.

Interest of Manufacture Alabama and Its Members

Manufacture Alabama is Alabama's only trade association dedicated exclusively to the competitive, legislative, regulatory and operational interests and needs of manufacturers and their partner industries and businesses. Manufacture Alabama represents hundreds of companies in a wide range of industries that share common interests and goals and that face common competitive challenges in today's tough global marketplace. Some of its members are among the nation's largest, most recognized corporations. Many are mid-sized or small family-owned manufacturers or manufacturing suppliers and vendors. All of them are vital parts of a manufacturing base providing jobs and economic benefits that are crucial to the economy of Alabama and the nation.

Many of its member companies, particularly those in the pulp and paper sector, chemical sector, and steel industry, depend on Class I freight railroads to deliver their goods to customers reliably and at reasonable prices.

Unfortunately, most of the Manufacture Alabama members report that they are suffering from exorbitant rates and unreliable service from the railroads on a daily basis. The current rail regulatory program denies access to transportation competition for many American rail customers, including manufacturers. Manufacture Alabama's members believe this lack of competition has resulted in higher rates, inefficient service, reduced manufacturing profits and lost American manufacturing jobs. Manufacturers compete in the global marketplace. The transportation inefficiencies and the unreasonable rates manufacturers are being charged by freight railroads are placing Alabama manufacturers at a severe competitive disadvantage, jeopardizing existing jobs and undermining job growth opportunities.

Manufacture Alabama joins with CURE in all of the Comments herein, and most urgently encourages the STB to improve rail customer access to additional railroad transportation opportunities by adopting pro-competitive rules for reciprocal switching and access to terminal areas.

I

THE BOARD SHOULD EXPEDITE IMPROVEMENTS TO ITS PRO-COMPETITIVE REMEDIES, SUCH AS RECIPROCAL SWITCHING AND TERMINAL ACCESS, TO ACHIEVE THE INTENT OF CONGRESS IN THE STAGGERS RAIL ACT OF 1980 THAT COMPETITION, NOT REGULATION, SHOULD DETERMINE RATES TO THE "MAXIMUM EXTENT."

In 2009, the Board's own Rail-Shipper Transportation Advisory Council (RSTAC) issued a "white paper" advocating that the Board change its rules to permit "reciprocal switching" to be implemented in the manner rail customers

believe was intended by the Staggers Act.[3] The Board has not taken action to implement this recommendation.

In the first half of 2011, CURE/MA and other shippers, as well as the U.S. Department of Agriculture, assisted the Board in compiling a complete record on the anti-competitive practices of the railroads in Ex Parte No. 705, Competition in the Railroad Industry.[4]

In July 2011, the National Industrial Transportation League (NIT League) filed a Petition for Rulemaking in Ex Parte No. 711, which CURE/MA and other shippers and the USDA supported. Rail customers believe the proposed rules in the NIT League petition would permit effective use of the reciprocal switching/terminal access provisions of the Staggers Rail Act, as Congress intended and as the RSTAC recommended in 2009. In November 2011, the Board granted itself additional time to consider NITL's Petition, but has not yet acted on the merits of that petition.

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[3] October 16, 2009 "White Paper on New Regulatory Changes for the Railroad Industry," at 2 ("*The Railroads should be required* to open up shippers closed to reciprocal switching as long as they are within an acceptable mileage distance (suggest 30 miles) from an interchange with another railroad in a terminal area. Canadian railroads and shippers have long experience with such a system; it provides equity between "similarly situated" shippers who today may face different competitive circumstances due to historical accident. Application of such a system to the United States, where carriers are more numerous and switching operations more complex, requires consideration of the operational impacts and the financial implications to carriers. A universal reciprocal switching regime should allow carriers to charge each other fair rates that provide not only operating profits but also an acceptable return on terminal infrastructure. Short lines in particular require sound economics in this area as switching charges may comprise all or most of their revenue.")(emphasis in original). The RSTAC White Paper is accessible on the Board's website.

[4] We incorporate all of those filings here, by reference, rather than to re-submit them, as the Board suggested in its Decision herein served on December 21, 2011.

We encourage the Board to act as promptly as possible to improve its reciprocal or competitive switching and terminal access rule. Expanding access to railroad transportation alternatives, to the extent possible in our consolidated national rail system, will not only benefit the national economy but also expand the universe of rail customers who do not need to call on the Board for assistance in their relationships with the nation's major freight railroads. Reducing the need for access to the Board would be highly responsive to the President's recent Executive Orders.

II

SOME OF THE BOARD'S MOST "OUTMODED, INSUFFICIENT, INEFFICIENT, AND EXCESSIVELY BURDENSOME" REGULATIONS ARE THOSE THAT APPLY TO RATE-REASONABLENESS CHALLENGES.

Rail-dependent shippers are perhaps most in need of access to the Board when they are confronted with no economically viable alternative to transportation by a single railroad. In such instances, the rail customer normally is in a "take it or leave it" position in which rates and terms of service are dictated by the single rail carrier. If those dictated rates are unreasonably high, the only remedy in law available to the rail customer is to bring a rate complaint to the Board. Indeed, the need to protect captive rail customers from rail rates that are unreasonably high is one of the major reasons that the Board exists today.

Yet, the basic rate challenge standard of the Board, the Stand-Alone Cost (SAC) methodology, is well known to be enormously complex, extraordinarily time consuming and extremely costly to litigate. Rail customers have been complaining about the difficulty of litigation under the SAC methodology since the

methodology was adopted. For years the Board has recognized this reality. At least one Chairman of the Board testified to Congress, in 2004, that the rate standard was too difficult and costly for use by most captive rail customers.

In Section 102(a) of the Interstate Commerce Commission Termination Act of 1995,[5] Congress required that the STB adopt, within one year of enactment, a simplified methodology for determining maximum reasonable rail rates where the cost of the proceeding would otherwise exceed the value of the case.[6]

In response to Section 102(a) of ICCTA, the STB completed Ex Parte No. 347 (Sub-No. 2) and adopted its "Non-Coal Rate Guidelines" ("Non-Coal Guidelines").[7] While those Non-Coal Guidelines were an improvement over the SAC methodology for nearly all shippers, they suffer from an obvious shortcoming: the "Three-Benchmark" methodology is subject to a cap on rate relief of $1 million over a five-year period, and the "Simplified Stand-Alone Cost" ("SSAC") methodology is subject to a cap on rate relief of $5 million over a five-

[5] Pub. L. No. 104-88, 109 Stat. 803 (1995).
[6] Section 102(a), as codified at 49 U.S.C. ¶ 10701(d)(3), states: "The Board shall, within one year after the effective date of this paragraph, complete the pending Interstate Commerce Commission non-coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."
[7] Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996), appeal dismissed as unripe sub nom. Association of American Railroads v. STB, 146 F.3d 942 (D.C. Cir. 1998).

year period.[8] These remedy caps prevent most shippers from utilizing the SSAC or "Three-Benchmark" Guidelines to challenge rates, even where the rates are unreasonably high. Thus, despite the Board's effort to improve rail customer access for rate challenges, even the simplified rate challenge methodologies remain too complicated and costly for use by most rail customers.

III

THE BOARD SHOULD ELIMINATE THE REMEDY CAPS FOR THE SIMPLIFIED RATE CHALLENGES.

CURE/MA recommends that the Board simply remove the damage limitations on the simplified rate challenge procedures. Congress did not establish any limits on remedies available under Section 102(a) of ICCTA. The simplified procedures are surrogates for the SAC rate standard methodology of the Board. Experience shows, as the Board's economic staff can clearly verify, that a shipper, confronted with an unreasonably high rate, would likely prove a lower rate to be reasonable using the SAC methodology than if it were using one of the simplified rate challenge procedures. Rail customers recognize this reality and would always challenge under the SAC methodology, but for the extremely high cost of litigation and the time required to litigate a SAC case.

By removing the damage limitations on its simplified procedures it would open access to the Board for more rail customers confronted with unreasonably high tariff rates. A rail customer confronted with an unreasonably high rate would

[8] SSAC has never been applied by the Board in response to a rate challenge. The only SSAC complaints filed with the Board – by U.S. Magnesium -- were settled. Shippers are unsure how expensive the SSAC methodology would be to implement, given that the railroads are likely to litigate every new issue under that new methodology.

have a choice: (1) Pay the well-documented high cost of litigating under the standard SAC methodology, but obtain the lowest reasonable cost possible under the Board's current standards if successful or (2) Commit less financial resources and time to litigate under one of the simplified procedures, but accept a higher reasonable rate if the litigation is successful.

As the Board recognizes, to date the only successful litigants under the SAC methodology have been unit train shippers of coal. In such cases, the power plant is built to burn a certain type of coal, normally found in a relatively small geographic area, and the coal supply contracts tend to be for multiple years. Time committed to litigating a rail rate in this relatively static situation is tolerable because the commercial arrangements between the shipper and the coal company and the shipper and its sole railroad carrier are established, normally multi-year in nature and somewhat "set." However, for most captive rail customers, their commercial arrangements with suppliers and buyers is often far less "set", with the economic viability of the rail shipper depending on its ability to access quickly alternative suppliers and various markets. These captive rail customers do not have the luxury of extensive time to litigate under the SAC methodology.

Thus, a decision by the Board to remove the damage limitations of its simplified procedures should result in greater rail customer access to the Board as more captive rail customers use the simplified procedures, more access to the Board through the simplified procedure methodologies should lead to more negotiated rates for captive rail customers – who will use their expanded access

to the Board in their negotiations with their sole rail carrier -- and a resulting boost in American jobs and the American economy.

CURE/MA strongly encourage the Board to lift all damage limitations from its simplified rate challenge procedures. While Section 102(a) of the ICCTA may or may not authorize the removal of all damage limitations, CURE/MA are confident that the basic authorities of the Board established in the Staggers Rail Act of 1980, and applicable to the Board through the ICCTA, do provide such authority.

IV

THE BOARD SHOULD ISSUE POLICY STATEMENTS THAT (A) THE MERE FACT THAT A SHIPPER'S FACILITY IS PHYSICALLY SERVED BY TWO RAILROADS DOES NOT PRECLUDE THE POSSIBILITY THAT THE SHIPPER MAY DEMONSTRATE MARKET DOMINANCE AND (B) THAT IT WILL PROTECT CAPTIVE SHIPPERS WHO ARE LITIGATING THE MAXIMUM LEVEL OF A RATE FROM RAILROAD ACTIONS THAT DRIVE UP THE COST OF THE LITIGATION UNREASONABLY.

A. The Board Should Clarify That There is Not a Conclusive Presumption of Rail-to-Rail Competition When Two Railroads Serve a Facility.

Rail customers perceive that, over the years, the presumption at the Board has been that any shipper facility served by two railroads is, by definition, not captive.[9] During the Ex Parte No. 705 proceedings in 2011, the Board received ample testimony that it is not always true that a physical connection to two railroad systems means that the rail customer has access to transportation competition.

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[9] *See, e.g.*, Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, 945-46 (1998), discussing 49 U.S.C. § 10707(a)'s requirement that the Board determine whether "any mode of transportation provides effective competition 'for the transportation to which the rate applies.'"

CURE/MA encourage the Board to issue a policy statement clarifying that, while there may be a presumption that a rail customer physically connected to two rail systems has access to transportation competition, that presumption can be overcome with convincing testimony that the two railroads are not competing for the transportation business of the rail customer. CURE/MA believe that, under 49 U.S. C. § 10707 (b), the Board must make a factual determination in every rate challenge case that no "effective" transportation alternative exists. Thus, we believe the suggested policy statement by the Board would remove a wide-spread misperception in the rail customer community that the Board believes that physical connection to two rail systems means the rail customer has access to transportation competition. Removing this mistaken impression would expand rail customer access to the Board.

B. Railroads Should Not Be Allowed to Drive Up the Costs of Challenging the Maximum Level of a Rate.

In the Ex Parte No. 705 proceeding, the Board received a significant amount of testimony on a problem that results from the lack of access to transportation alternatives in the national rail system: bundling. Rail-dependent customers that may move freight on a number of "lanes" of a single major railroad, for some of which there are competitive transportation alternatives and for some of which there are not those alternatives, are often subject to "bundling" by their major rail carrier. The major carrier will offer contractual rate terms for all the freight movements of the rail customer that are higher than the market for the competitive lanes but lower than the extraordinarily high tariff rates the railroad is threatening to establish for the captive routes. If the rail customer opts to litigate

the extraordinarily high tariff rates on its captive movements rather than sign a contract that includes the package of rates, the extraordinarily high tariff rates for the captive movement and, often, tariff rates for the competitive movements that are somewhat above market go into effect and remain in effect throughout the litigation before the Board. The Board received testimony about this problem from several chemical companies in the Ex Parte No. 705 proceeding, one of which testified that this practice by its railroad carrier drove its litigation costs at the Board to $20 million, when the tariff rates are considered – and only the tariff rates on the captive routes are subject to rate reduction by the Board.

The railroads are able to pursue this destructive strategy only because they possess market power over the rail customer in question and are exempt from the nation's antitrust laws for this practice. Were the railroads subject to the antitrust laws with regard to this practice, CURE/MA are convinced that this "bundling" practice would be an illegal "tying" agreement. Although this issue was brought to the Board's attention in an earlier proceeding, the Board declined to address it on the merits, stating that railroads have a common carrier obligation to quote tariff rates and that shippers could challenge bundling by specific complaint, apparently as an "unreasonable railroad practice."[10]

CURE/MA believe that this "bundling" practice is wide-spread and is having the effect of denying rail customer access to the rate challenge processes of the STB because many shippers cannot incur the increased costs caused by "bundling", some of which are not recoverable, to pursue a rate challenge

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[10] Rail Transportation Contracts Under 49 U.S.C. 10709, Ex Parte No. 676 (served Jan. 6, 2009), at 6-7.

process that itself offers no assurance of success. We strongly encourage the Board to take appropriate action to protect its jurisdiction by addressing this abuse of railroad market power. A first step might be a public statement by the Board recognizing this problem and warning that appropriate action will be taken by the Board if and when the Board determines that this practice is denying rail customer access to the Board's rate-reasonableness challenge process.[11]

V

THE BOARD SHOULD ISSUE A POLICY STATEMENT THAT A SHIPPER OF AN EXEMPT COMMODITY MAY STILL FILE A COMPLAINT SEEKING THE ENFORCEMENT OF THE COMMON CARRIER OBLIGATION TO PUBLISH A RATE, NOTWITHSTANDING THE EXEMPTION, BECAUSE THE COMMON CARRIER OBLIGATION IS STATUTORY AND MAY NOT BE EXEMPTED FROM REGULATION BY THE BOARD.

A railroad is a common carrier by statute.[12] As such, we believe that the Board has no power to exempt a railroad from the statutory common carrier obligation to provide a rate for moving a shipper's freight.

The Board's commodity and service exemption authority is intended to exempt a railroad from regulation of the level of its rates for particular commodities or services in those instances where such regulation is not necessary to protect the public.[13] The effect of commodity and service

[11] July 15, 2011 Letter from PPG Industries, Inc., filed in Ex Parte No. 705, Competition in the Railroad Industry.

[12] 49 U.S.C. § 11101; *see, e.g.*, Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir.), cert. denied, 454 U.S. 1047 (1981) (railroad has common carrier obligation to publish rates, even on traffic it does not wish to carry); Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980) (same).

[13] *See generally* Coal Exporters Ass'n of U.S. v. United States, 745 F.2d 76 (DC Cir. 1984). The statute makes clear that exemptions must either be of limited scope or that regulation, especially rate regulation, is not needed to protect

exemptions on the common carrier obligation is not entirely clear and, to the best of our knowledge, has not been the subject of a Board decision. In a related matter, the Board has recognized that a railroad's common carrier obligation to provide service is not extinguished during a lawful embargo, but rather is "excused" only for the period of the embargo, and continues to apply so long as the line of the railroad in question has not been abandoned.[14] By analogy, the Board should make clear that exemptions do not excuse railroads from complying with their common carrier obligation to quote a rate, even if the rate itself is not necessarily subject to regulation because of the exemption.

Thus, rail customers confronting railroad conduct that violates the common carrier obligation for a movement that is covered by a commodity or service exemption could still have access to the Board for a complaint that the alleged violation of the common carrier obligation is an "unreasonable rail practice."

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shippers from abuse of market power. *Id.* at 90(discussing rate-regulatory policy in section 10101 of Title 49); 49 U.S.C. § 10502 (a)("... the Board, *to the maximum extent consistent with this part,* shall exempt a person, class of persons, or a transaction or service, whenever the Board finds that the application in whole or in part of a provision of this part -- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either – (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.").

[14] GS Roofing Products Co., Inc., et al. v. Arkansas Midland Railroad, et al., 2 S.T.B. 89, 90 n.5 (1997)("During an embargo, the carrier's service obligation is temporarily excused, *although the obligation is not extinguished until the carrier has obtained abandonment authority from the agency.* Gibbons v. United States, 660 F.2d 1127, 1134 (7th Cir. 1981) (emphasis added)."); *see also* Service Obligations over Excepted Track, 2 S.T.B. 679, 682 (1997)("As the participants recognize, insofar as the common carrier obligation is concerned, excepted track is no different from other track. A railroad must provide service over it upon reasonable request.").

VI

THE BOARD SHOULD CLARIFY THAT IT IS NOT NECESSARY TO REVOKE, IN WHOLE OR IN PART, A COMMODITY OR OTHER EXEMPTION IN ORDER TO DECIDE A CLAIM THAT A RAILROAD IS ENGAGED IN AN UNREASONABLE PRACTICE.

There is no question that the Board can revoke, or partially revoke, an exemption in order to permit a shipper to seek relief with respect to an otherwise-exempt commodity or service. In addition to many rail shippers interpreting the fact of a commodity or service exemption as a strong signal that the Board is unlikely to grant relief with respect to that commodity or service, a shipper that gets past this view and brings a complaint despite the exemption faces two burdens of proof: one to revoke the exemption and one on the merits of its case. These two "proofs" add to the difficulty of and are barriers to rail customer access to the Board for relief from unreasonable rail practices.

To overcome this problem, the Board should issue a policy statement that the fact that a commodity or service is exempt does not mean that the Board will not entertain a complaint alleging an unreasonable rail practice with respect to such commodity or service without the necessity of also revoking or partially revoking the exemption. In this way, shippers who are victims of an unreasonable practice may be assured that their complaint will be addressed on

the merits, rather than possibly rejected at the threshold because the Board may decline to revoke or partially revoke an exemption.[15]

In response to the argument that, in a competitive market, the railroads could not, or at least would not, engage in unreasonable practices, there is every reason to believe that railroads may engage in unreasonable practices with respect to a particular commodity or service, even if there is a competitive market that determines the rates applicable to that commodity or service.

For example, there is substantial evidence that railroads apply fuel surcharges even to the transportation of exempt commodities. In Ex Parte No. 661, the Board concluded that fuel surcharges are a "practice," not a rate.[16] Thus, a shipper, even of an exempt commodity, may be paying a market rate for the movement of its exempt commodity, but may believe that the manner in which the railroad is applying the "fuel surcharge" is an "unreasonable rail practice". The rail customer should have access to the Board for that complaint, without first achieving a ruling from the Board revoking the exemption for purposes of allowing the complaint.

If the Board were to adopt this policy, it would in no way defeat the primary purpose of an exemption, *i.e.*, to permit a railroad to set its rates without regard to regulation. A shipper seeking to challenge a rate quoted by a railroad for an

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[15] *Compare* Granite States Concrete Co., et al. v. Boston & Maine Corp., 7 S.T.B. 834, 838 (2004)(STB partially revoked exemption to rule on claim of unreasonable practice, and left partial revocation in place to permit Complainants to have "immediate access to the Board's processes to protect the shipper from market power abuse" in the event Respondents' actions amounted to a violation of statutory common carrier obligation).
[16] Rail Fuel Surcharges, Ex Parte No. 661, ___ S.T.B. ___ (served Jan. 26, 2007), slip op. at 7.

exempt commodity would still need to seek to revoke the exemption, in whole or in part, in order to challenge the rate as exceeding a maximum reasonable level.

VII

THE BOARD SHOULD PUBLISH A LIST OF ALL RAILROAD INTERCHANGE AGREEMENTS THAT CONTAIN SO-CALLED "INTERCHANGE COMMITMENTS" (A/K/A "PAPER BARRIERS").

Shippers filed comments and testimony in Ex Parte No. 705, Competition in the Railroad Industry, that the lack of knowledge of the existence of "paper barriers" (or "interchange commitments," the Board's preferred terminology) adversely affects the ability of rail customers to identify their transportation options and to negotiate commercial contracts with railroads. Testimony was also received in the Ex Parte No. 705 proceeding that a list of such agreements has been developed.

CURE/MA strongly encourage the Board to publish this list, without inclusion of any specifics about the agreements, as a simple act of "transparency." Transparency will ensure that rail customers will have the information that will assist at least some of them to work out their rail transportation arrangements without accessing the Board through a costly and time consuming proceeding.

CONCLUSION

While rail customers are not the subject of most of the regulatory powers of the Board, the Board is invested with the only extant legal authority that can assist rail customers who have no access to transportation competition and can

assist rail customers to gain access to alternative railroad transportation. As such, these powers of the Board are crucially important to the economic well-being of the nation. When manufacturers, producers and service providers cannot gain access to reliable transportation at reasonable prices, American jobs suffer, American competitiveness suffers and the national economy suffers. Access to many of the Board's regulatory authorities of importance to rail customers is often shielded by burdensome and complicated procedures, lack of readily available and reliable information necessary for rail customers to either determine their options or pursue their remedies at the Board, and widely held misunderstandings in the rail customer community regarding key features of the Board's regulatory program.

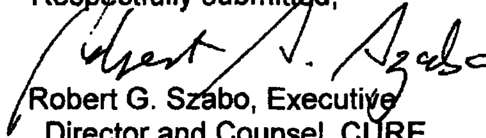
We believe the Board can address this situation by adopting improved competitive access rules as soon as possible, removing the damage limitations on its simplified rate challenge procedures, issuing several clarifications of its program and publishing information that is important to rail customers while protecting the reasonable confidentiality expectations of the railroads.

We ask the Board to focus on the fact that it establishes the "rules of the road" for the daily market negotiations that occur between rail customers and their rail carriers. Where a rail customer is "captive", those rules of the road are often the only leverage the rail customer has in its negotiations with its railroad carrier. In such cases, if "negotiations" fail, then access to the Board is the only remedy in law available to a rail customer facing rail transportation terms or conditions that are intolerable from a commercial perspective. If access to the

Board is not reasonably available, then the rail customer simply has no remedy in law and the local, state and national economies suffer.

Thank you for initiating this proceeding and for your attention to our recommendations.

Respectfully submitted,



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