

Oral Statement of Charles D. Nottingham
Chairman of the Surface Transportation Board before the Senate Judiciary
Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
At a Hearing Entitled
“An Examination of S. 772, the Railroad Antitrust Enforcement Act”

October 3, 2007

Good morning Chairman Kohl, Ranking Member Hatch and Senator Feinstein. My name is Charles Nottingham, and I am Chairman of the Surface Transportation Board. I appreciate the opportunity to appear before this Subcommittee today to provide the Board's views on S. 772, the Railroad Antitrust Enforcement Act. I will briefly summarize my written testimony.

It is important to state at the outset that railroads today are already largely subject to the antitrust laws. For example, they face civil and criminal liability for violations of the Sherman Act such as price-fixing, market allocation, and bid rigging, and they have been successfully sued for violating that Act. Where the railroads do have express statutory immunities, they are narrowly drawn, and in administering the Interstate Commerce Act, the Board vigorously enforces core antitrust principles.

Rail carriers should be subject to the full weight of federal antitrust laws, except where the enforcement of the antitrust laws may conflict with the need for single, uniform, and integrated economic regulation of the rail industry by the Board.

The Board does not believe that immunities once granted under particular economic and legal circumstances should remain in place regardless of changes in the economic and legal environment that occur over time. For example, in May of this year, the Board used its discretion to terminate antitrust immunities for motor carrier rate bureaus that had been recognized for more than 70 years. The Board's decision in the area of motor carrier rate bureaus demonstrates our commitment to the antitrust laws and our willingness not to be constrained by past policy decisions or jurisdictional “turf” considerations.

We are concerned that at least two provisions of the proposed legislation would interfere with the Board's ability to effectively regulate this nation's interconnected rail network.

First, let me address Section 2 of the bill. Presently, only the Department of Justice or the STB may bring suit for injunctive relief against a common carrier subject to STB jurisdiction. The bill would permit private parties to obtain injunctive relief against rail carriers in individual Sherman or Clayton Act challenges. This proposal presents serious risks to centralized oversight of the national rail transportation system.

District courts are not responsible for meeting national rail transportation policy goals. Nor do the district courts possess the institutional expertise to consider how a

decision resolving one case will affect other carriers and shippers on that line, or on other lines in different parts of the country. Unlike many other industries, the national rail system – while comprising hundreds of individual railroads – nevertheless operates as a single integrated, complex, and interdependent network. Operational changes or issues arising in one location can have significant operational ramifications hundreds of miles away, including effects on other freight carriers as well as on Amtrak and commuter lines. Only the Board is charged with looking at the rail industry from a national perspective, and ensuring that remedies to resolve individual disputes comport with national rail policy objectives and do not cause unintended operational and service problems elsewhere.

Giving district courts injunctive power in rail-related disputes would also create a great potential for conflicting decisions from individual courts. The Board (and the ICC before it) has developed a consistent body of law that approaches competition issues with a viewpoint broadened by other rail transportation policy goals, and that provides the basis upon which both carriers and shippers shape their conduct and assess potential remedies. In contrast, district courts looking solely at the antitrust laws without regard to the many public interest considerations mandatory in Board review, might well come up with different rules and different remedies to fix competition issues. Finally, many of the injunctive remedies that a district court might order in an antitrust case may themselves require Board approval. In sum, we believe that Section 2 of the bill is antithetical to Congress' longstanding support for a rail regulatory system that charges a single economic regulatory body with oversight over the rail industry.

Let me now turn to the Board's concerns regarding Section 3 of the bill. In 1995, Congress declined to repeal the antitrust exemption for rail mergers, acquisitions and other transactions, choosing instead to keep that review with the agency that regulates the economic activity of the industry. Section 3 would subject rail mergers, acquisitions, leases, joint use, and trackage rights agreements to both the approval process and criteria of the Interstate Commerce Act and separate Clayton Act standards and procedures. We are concerned that this dual enforcement regime could result in some of the same problems raised by the potential for district court injunctions described above. We are also concerned that it would diminish the considerable benefits of a single comprehensive review in which the views of all parties, including those of DOJ and affected shippers, are transparent and considered.

From a substantive viewpoint, there is very little disagreement between the Board and the antitrust enforcers on the outcome of mergers. Although critics of the Board make much of those few instances of disagreement between the Board and DOJ, there has only been one recent case, in 1996, where the Board did not follow DOJ's recommendation that merger authority either be denied or conditioned on expansive divestitures. The benefit of hindsight shows that the Board made the right decision in that one recent case, the UP/SP merger – a decision supported by the vast majority of impacted rail customers.

Further, the Board's new merger rules anticipate the types of major rail merger proposals we could see in the future, which would likely involve the creation of a transcontinental railroad (by merging one carrier from the West with another carrier from the East). Under traditional merger analysis by DOJ or the FTC, such vertical integration of two partners with complementary (not overlapping) systems would not be perceived to carry as significant a risk of competitive harm as a horizontal merger of two direct competitors. However, under the new STB rules, to offset any harm that could not be mitigated, merging carriers would need to show how the proposed merger would enhance competition. We are concerned that dual merger review would frustrate the Board's ability to fashion merger conditions based on public interest concerns.

The Board has also found that continued oversight of larger rail mergers is critical to ensuring that remedies are working effectively. These types of chores are best left to a single decision-maker. That decision-maker should be the one that is least limited in both what it can consider and what conditions it can and will impose – which in this instance would be the Board.

I am concerned, therefore, that this bill is not targeted to remove just those exemptions that have grown outdated or are no longer useful, but rather is a sweeping change that removes them all. These changes would make it more difficult for the STB to perform its regulatory oversight responsibilities.

The Board understands, and is sensitive to, the concerns of rail customers about rail rates and service. During my 14-month tenure at the Board, we have implemented an unprecedented series of regulatory actions and reforms aimed at halting unreasonable rail industry practices, increasing access to the Board's dispute resolution procedures, and examining the accuracy of our industry cost of capital determination that impacts rates and affects many aspects of the relationship between railroads and their customers. We have also initiated a one million dollar national study of rail competition being managed by Christensen Associates, an economic consulting firm based in Madison, Wisconsin.

In conclusion, S.772 would make efficient, uniform regulation of the rail industry more difficult by creating duplicative and overlapping regulatory schemes. Likewise, subjecting the rail industry to a potential patchwork of judicial injunctions scattered across the country could cause a ripple effect of operational problems for freight, Amtrak, and commuter rail transportation. These complications could increase the cost of providing rail service – costs that likely would be passed on to rail customers in the form of higher rates. Therefore, I am concerned that the legislation may create more rate and service problems, not fewer problems.

Thank you for giving me the opportunity to testify here today, and I will be happy to answer any questions you may have.