

HR 2125 IH

110th CONGRESS

1st Session

H. R. 2125

To amend title 49, United States Code, to ensure competition in the rail industry, enable rail customers to obtain reliable rail service, and provide those customers with a reasonable process for challenging rate and service disputes.

IN THE HOUSE OF REPRESENTATIVES

May 3, 2007

Mr. OBERSTAR (for himself, Mr. BAKER, Mr. BERRY, Mr. WALZ of Minnesota, Mr. FRANKS of Arizona, Mr. KIND, Mr. ALEXANDER, Mr. BOUSTANY, Ms. HIRONO, Mr. SIMPSON, Ms. HERSETH SANDLIN, and Mr. POMEROY) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

A BILL

To amend title 49, United States Code, to ensure competition in the rail industry, enable rail customers to obtain reliable rail service, and provide those customers with a reasonable process for challenging rate and service disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS; AMENDMENT OF TITLE 49, UNITED STATES CODE.

(a) Short Title- This Act may be cited as the 'Railroad Competition and Service Improvement Act of 2007'.

(b) Table of Contents- The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents; amendment of title 49, United States Code.

TITLE I--ENSURING COMPETITION IN THE RAIL INDUSTRY

Sec. 101. Clarification of rail transportation policy and directives for implementation.

Sec. 102. Requirement for Railroads to Provide Rates for Transportation.

Sec. 103. Elimination of barriers to competition between Class I, Class II, and Class III rail carriers.

Sec. 104. Reciprocal switching.

Sec. 105. Areas of inadequate rail competition.

TITLE II--IMPROVING SERVICE TO RAIL CUSTOMERS

Sec. 201. Rail service.

Sec. 202. Railroad obligation to serve.

Sec. 203. Rail customer advocate.

TITLE III--PROVIDING ACCESS TO A REASONABLE RATE PROCESS

Sec. 301. Rights of rail customers.

Sec. 302. Improvement of rate reasonableness standard.

Sec. 303. Filing fees on petitions for captive rate relief.

Sec. 304. Arbitration of rail disputes.

TITLE IV--AUTHORITY TO INVESTIGATE

Sec. 401. Authority of Board to investigate and suspend certain railroad actions.

(c) Amendment of Title 49, United States Code- Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 49, United States Code.

TITLE I--ENSURING COMPETITION IN THE RAIL INDUSTRY

SEC. 101. CLARIFICATION OF RAIL TRANSPORTATION POLICY AND DIRECTIVES FOR IMPLEMENTATION.

Section 10101 is amended--

(1) by inserting ` (a) In General- ' before ` In regulating'; and

(2) by adding at the end the following:

` (b) Implementation Directives- In implementing subtitle IV, the Board shall--

` (1) ensure, to the maximum extent possible, effective competition among rail carriers at origins and destinations;

` (2) ensure reasonable rates for rail customers in the absence of competition; and

` (3) ensure consistent, efficient, and reliable rail transportation service for rail customers, including the timely provision of rail cars requested by rail customers.'.

SEC. 102. REQUIREMENT FOR RAILROADS TO PROVIDE RATES FOR TRANSPORTATION.

Section 11101(a) is amended--

(1) by inserting ` (1)' after ` (a)';

(2) by redesignating the second and third sentences as paragraph (3)

and indenting accordingly; and

(3) by inserting a new paragraph (2) as follows:

` (2) Upon the request of a shipper, a rail carrier shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged. A carrier shall establish a rate and provide service upon such request without regard to--

` (A) the location of the movement on the rail system, including terminal areas;

` (B) whether the rate established is for part of a movement between a point of origin and a destination;

` (C) whether the shipper has made arrangements for transportation for any other part of that movement; or

` (D) whether the shipper has a contract with any rail carrier for part or all of its transportation needs over the route of movement.'.

SEC. 103. ELIMINATION OF BARRIERS TO COMPETITION BETWEEN CLASS I, CLASS II, AND CLASS III RAIL CARRIERS.

(a) In General- Section 10901 is amended by adding at the end the following new subsection:

` (e)(1) The Board may not issue a certificate authorizing an activity described in subsection (a), section 10902, or section 11323, or exempt a person, class of persons, or a transaction or service from the applicability of this section with respect to such an activity under section 10502, if the activity involves a transfer of interest in a line of railroad, from a Class I rail carrier to a Class II rail carrier or Class III rail carrier and the activity directly or indirectly would--

` (A) restrict or limit the ability of the Class II or Class III rail carrier to interchange traffic with other rail carriers;

` (B) restrict or limit competition of rail carriers in the region affected by the activity in a manner that would violate antitrust laws of the

United States (notwithstanding any exemption from the applicability of antitrust laws that is provided under section 10706 or any other provision of law); or

` (C) require higher per car interchange rates for Class II or Class III rail carriers to interchange traffic with other rail carriers.

` (2) Any party to an activity described in paragraph (1) that has been carried out, or any rail shipper affected by such an activity, may request that the Board review the activity to determine whether the activity has resulted in a restriction described in that paragraph. If, upon review of the activity, the Board determines that the activity resulted in such a restriction, the Board shall declare the restriction to be unlawful and terminate the restriction unless the Board determines that the termination of the restriction would materially impair the ability of an affected rail carrier to provide service to the public or would otherwise be inconsistent with the public interest.

` (3) In this subsection, the term `antitrust laws' has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12 (a)), except that such term also means section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition.'

(b) Applicability- Paragraph (2) of section 10901(e) (as added by subsection (a) of this section) shall apply with respect to any activity referred to in that paragraph for which the Surface Transportation Board issued a certificate authorizing the activity under section 10502 before, on, or after the date of enactment of this Act.

SEC. 104. RECIPROCAL SWITCHING.

Section 11102(c) is amended--

(1) in paragraph (1)--

(A) by striking `may require' in the first sentence and inserting `shall require'; and

(B) by striking `may establish' in the second sentence and inserting `shall establish'; and

(2) by adding at the end the following new paragraph:

` (3) In making any finding under paragraph (1), the Board shall not require that there be evidence of anticompetitive conduct by a rail carrier from which access is sought.'

SEC. 105. AREAS OF INADEQUATE RAIL COMPETITION.

(a) Designation and Remedies-

(1) IN GENERAL- Chapter 105 is amended by adding at the end the following new section:

Sec. 10503. Areas of inadequate rail competition

` (a) In General- The Board shall designate any State or substantial part of a State as an area of inadequate rail competition after finding that--

` (1) the State or substantial part of the State encompasses rail shipping origins and destinations that are served exclusively by one Class I railroad; and

` (2) persons that ship by rail or receive rail shipments in the State or substantial part of the State--

` (A) pay rates for the rail shipments that exceed the rates necessary to yield recovery by the rail carrier of 180 percent of revenue-variable costs, as determined under standards applied in the administration of section 10707(d); or

` (B) have experienced competitive disadvantage in the marketplace or other economic adversity because of high cost or poor quality of rail service in the State or substantial part of the State.

` (b) Specific Commodities- An area of inadequate rail competition may be composed of the facilities of a group of shippers or receivers of one or more specific commodities within a geographic area.

` (c) Authorized Petitioners- A Governor of a State is authorized to petition the Board for a designation of a State or substantial part of a State as an

area of inadequate rail competition.

` (d) Actions- Upon designating a State or substantial part of a State as an area of inadequate rail competition, the Board shall resolve, not later than 60 days after the date of the designation, the conditions described in subsection (a) that justify the designation. In taking such action, the Board shall not require rates lower than those necessary to yield recovery of 180 percent of revenue-variable costs. In addition to providing other remedies authorized by law, the Board may order any of the following actions:

` (1) Provision of reciprocal switching as provided for in section 11102 (c) and terminal trackage rights beyond the limits specified in section 11102(a).

` (2) Haulage transportation of railroad cars by a rail carrier to or from facilities that such carrier physically serves on behalf of another rail carrier, for a fee prescribed by the Board.

` (3) Regarding rates on any rail segments within or connected to the area of inadequate rail competition on which rail service is susceptible to delay or interruption due to traffic congestion, expedited final offer arbitration under section 11708(e).

` (4) Expedited review of whether a rate violates the prohibition against discriminatory rates contained in section 10741, without regard to subsection (b)(2) of such section.

` (e) Procedures- In the case of a petition for an order for reciprocal switching or terminal trackage rights under subsection (d)(1), the Board may not require that there be evidence of anticompetitive conduct by a rail carrier as a prerequisite for ordering such action.'

(2) CLERICAL AMENDMENT- The table of sections at the beginning of chapter 105 is amended by adding at the end the following new item:

` 10503. Areas of inadequate rail competition.'

(b) Study on Areas of Inadequate Rail Competition- Not later than 1 year after the date of enactment of this Act, the Rail Customer Advocate of the Department of Transportation shall--

(1) review the effectiveness of the procedures under section 10503 for

challenging and remedying conditions adversely affecting rail shippers of agricultural and forestry commodities and products, including commodities and products shipped by rail in annual volumes of 1500 rail cars or less, and the applicability of such procedures for ameliorating rail rate and service problems, in areas of inadequate rail competition; and

(2) report the results of the study, together with any recommendations that the Rail Customer Advocate may have for improving the procedures, to Congress.

TITLE II--IMPROVING SERVICE TO RAIL CUSTOMERS

SEC. 201. RAIL SERVICE.

(a) Public Notice- The Surface Transportation Board shall, within 7 days after receipt by the Board or any Member or staff of the Board of a complaint from a customer about rail service, post on the Board's Internet Web site a description of the complaint, including information identifying the railroad or railroads providing the service that is the subject of the complaint, the general geographic area of the customer's movement, the date upon which the service problem occurred and the date notice of the complaint was made to the Board or any Member or staff of the Board. The Internet posting shall identify the rail customer only upon the written consent of the rail customer. Not later than 5 days after the date the complaint is resolved, the Board shall update the information posted on the Board's Internet Web site to indicate that the complaint has been resolved, the means of its resolution, and the date of its resolution.

(b) Annual Report to Congress- Not later than March 15, 2008, and annually thereafter, the Surface Transportation Board shall transmit to Congress a report regarding the service complaints received by the Board, or any Member or staff of the Board, in the previous calendar year for each Class I railroad. The report shall include a description of each service complaint, including information identifying the railroad in question, the geographic area of the customer's movements, the date upon which the service problem occurred, the date notice of the service complaint was made to the Board or any Member or staff of the Board, and the date of, and a detailed description of, the resolution of the complaint. The report shall be posted on the Board's Internet Web site.

(c) Time Limits on Petitions for Injunctive Relief- Section 721(b)(4) is

amended by adding at the end the following: ` Where a complaint is filed and injunctive or similar relief is sought within 20 days after the publication of a new or revised rail rate, rule, or practice, based on an allegation of unlawfulness other than an allegation that a rate level is not reasonable within the meaning of section 10701(d), the Board shall determine, based on applicable law, not later than 90 days after receiving the request for injunctive or similar relief, whether or not to grant such relief. If the moving party establishes that the rule or practice involved in the complaint is unlawful per se, there shall be a strong presumption of irreparable harm regardless of the availability of monetary relief. The Board shall not deny injunctive or similar relief based in whole or in part on the absence of irreparable harm due to the availability of adequate monetary relief unless monetary damages have been awarded to the complaining party.'.

SEC. 202. RAILROAD OBLIGATION TO SERVE.

Section 11101(a) is amended by inserting ` The transportation provided shall be reliable and efficient.' after ` on reasonable request.'.

SEC. 203. RAIL CUSTOMER ADVOCATE.

(a) Amendment- Subchapter II of chapter 7 is amended by adding at the end the following new section:

` Sec. 728. Office of Rail Customer Advocacy

` (a) In General- The Office of Rail Customer Advocacy shall be an office in the Department of Transportation.

` (b) Rail Customer Advocate- The head of the Office of Rail Customer Advocacy shall be the Rail Customer Advocate, who shall be appointed in the competitive service by the Secretary of Transportation, in consultation with the Secretary of Agriculture.

` (c) Duties and Powers of Rail Customer Advocate- The Rail Customer Advocate shall--

` (1) accept rail customer complaints;

` (2) participate as a party in proceedings of the Board on petitions for action by the Board regarding the regulation of rail transportation, and may initiate such an action;

` (3) collect, compile, and maintain information regarding the cost and efficiency of rail transportation; and

` (4) carry out other duties and powers prescribed by the Board.

` (d) Access to Information- To carry out the duties and powers under subsection (c), the Rail Customer Advocate shall have access to information, including databases, of the Board.'

(b) Conforming Amendment- The table of sections for chapter 7 is amended by inserting after the item relating to section 727 the following:

` 728. Office of Rail Customer Advocacy.'

TITLE III--PROVIDING ACCESS TO A REASONABLE RATE PROCESS

SEC. 301. RIGHTS OF RAIL CUSTOMERS.

(a) Amendment- Chapter 107 of title 49, United States Code, is amended by inserting before section 10701 the following new section:

` Sec. 10700. Rights of rail customers

` Rail customers that are subject to railroad market dominance shall have a right of access to a process maintained by the Board for determining if the rate in question is reasonable. The Board shall ensure that the process is accessible by all affected rail customers and is cost effective.'

(b) Table of Section Amendment- The table of section for chapter 107 of title 49, United States Code, is amended by inserting before the item relating to section 10701 the following new item:

` 10700. Rights of rail customers.'

SEC. 302. IMPROVEMENT OF RATE REASONABLENESS STANDARD.

Section 10701(d) is amended by adding the following new paragraphs:

` (4)(A) Not later than one year after the date of enactment of this paragraph, the Board shall adopt a method for determining the

reasonableness of rail rates based on the railroad's actual costs, including a portion of fixed costs and an adequate return on debt and equity. The method adopted shall permit a final determination within 9 months after filing a complaint, shall ensure that necessary cost and operational information is available to the complainant, and shall not require excessive litigation costs.

` (B) The Board shall not use any method for determining the reasonableness of rail rates based on the costs of a hypothetical competitor, except that, in any rate reasonableness proceeding filed before the method required under subparagraph (A) is adopted, the complaint, upon the election of the complainant, shall be decided based on applicable rate standards in effect on the date of the filing, including small rate guidelines.

` (C) The Board shall adopt a method under this paragraph that applies the ` phasing constraint' in its existing rail rate method so that it can be practically administered without substantial litigation-related costs in any proceeding involving a challenge to a rail rate in which the Board determines that the phasing constraint applies.

` (5) Upon receiving notification of a challenge made by a shipper to the reasonableness of any rate established by a rail carrier, the Board shall determine the reasonableness of the rate without regard to--

` (A) whether the rate is for part of a movement between a point of origin and a destination;

` (B) whether the shipper has made arrangements for transportation for any other part of that movement; or

` (C) any other contract the shipper has with a rail carrier for any part of the rail traffic involved.'

SEC. 303. FILING FEES ON PETITIONS FOR CAPTIVE RATE RELIEF.

Section 721 is amended by adding at the end the following new subsection:

` (f) Limitation on Fees- The Board may not charge a fee for the filing of a complaint, protest, or other request for relief in an amount greater than fees charged by district courts of the United States for a comparable filing.'

SEC. 304. ARBITRATION OF RAIL DISPUTES.

(a) Amendment- Chapter 117 is amended by adding the following section after section 11707:

Sec. 11708. Arbitration of rail disputes

(a) In General- Whenever a dispute described in subsection (b) arises between a rail shipper and a rail carrier under this part, the Board shall, upon written request of any party to the dispute, submit the dispute to final offer arbitration.

(b) Covered Disputes- (1) Except as provided in paragraph (2), subsection (a) shall apply to any dispute between a party and a rail carrier that--

(A) arises under section 10701(c), 10701(d), 10702, 10704(a)(1), 10707, 10741, 10745, 10746, 11101(a), 11102, 11121, 11122, or 11706;

(B) involves the transportation of any agricultural product, including timber, paper, and fertilizer; and

(C) involves--

(i) the payment of money;

(ii) a rate or charge imposed by the rail carrier; or

(iii) transportation or other service by the rail carrier.

(2) Subsection (a) shall not apply to a dispute if the resolution of the dispute would necessarily involve the promulgation of regulations generally applicable to all rail carriers.

(c) Selection of Arbitrators- The rail carrier or carriers that are parties to arbitration under this section shall collectively name one arbitrator, and the rail shipper or shippers that are parties to the arbitration shall collectively name one arbitrator. The two arbitrators thus chosen shall select a third arbitrator from the roster of arbitrators established under subsection (d). If the arbitrators chosen by the parties fail to name the third arbitrator within 5 days after their first meeting, such third arbitrator shall be named by the Secretary of Transportation from the roster of arbitrators established under

subsection (d).

` (d) Roster of Arbitrators- The Secretary of Transportation shall establish, maintain, and revise as necessary a roster of arbitrators who--

` (1) are experienced in transportation or economic issues;

` (2) satisfy requirements for neutrality and other qualification requirements prescribed by the Secretary;

` (3) consent to serve as arbitrators under this section; and

` (4) are not officers or employees of the United States.

` (e) Rules for Arbitration- The arbitrators shall organize and select and make all necessary rules for conducting hearings. The arbitrators shall give the parties to the dispute a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may elect.

` (f) Prohibited Methods of Decision- Disputes concerning rates and charges shall not be considered or decided under this section using any method based on stand-alone cost or the costs of a hypothetical competitor, or in reliance on precedent adopting or applying such methods.

` (g) Decision- The decision of the arbitrators shall be the final offer of one of the parties to the dispute.

` (h) Revenue-Variable Cost Percentage- The decision may not provide for a rate for transportation by a rail carrier that would result in a revenue-variable cost percentage of such transportation that is less than 180 percent, as determined under standards applied in the administration of section 10707(d).

` (i) Consideration of Other Rates or Charges- The arbitrators, in making an award on the dispute, shall consider the rates or charges that are imposed by rail carriers for the transportation of similar goods under similar circumstances in rail transportation markets where there is effective competition, as determined under standards applied by the Board in the administration of section 10707(a).

- ˘ (j) Duration of Rates Prescribed- A rate prescribed under this section may not remain in effect for longer than 5 years after the date on which the arbitrators' decision becomes final.
- ˘ (k) Copies of Award- The arbitrators shall furnish a certified copy of its award to the parties to the dispute, and shall transmit the original, together with the paper and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the Board, to be filed in its office. Not later than 7 days after receiving an award under this subsection, the Board shall make the award and all supporting documents available to the public.
- ˘ (l) Oaths; Subpoenas- All testimony before arbitrators under this section shall be given under oath or affirmation, and any arbitrator shall have the power to administer oaths or affirmations. The arbitrators shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be necessary to a just determination of the matters submitted to arbitration, and may request the district court of the United States for the district where the arbitration is being conducted to issue the necessary subpoenas. Any witness appearing before arbitrators under this section shall receive the same fees and mileage reimbursement as witnesses in courts of the United States, to be paid by the party securing the subpoena, or in the case of a subpoena secured by the arbitrators, to be paid by the Board.
- ˘ (m) Time for Issuance of Arbitration Decision- The arbitration panel shall issue a final decision on a dispute under this section not later than 180 days after the date on which the panel of arbitrators is completed to resolve the dispute.
- ˘ (n) Regulations- Not later than 90 days after the date of enactment of this section, the Secretary of Transportation shall issue final regulations establishing procedures for the resolution of disputes submitted for arbitration, in accordance with the requirements of this section.
- ˘ (o) Applicability of Title 9- The following provisions of title 9, United States Code, shall apply to an arbitration decision issued in a dispute under this section:
- ˘ (1) Section 9 (relating to confirmation of an award in an arbitration decision), which shall be applied as if the parties had entered into an agreement under title 9 to submit the dispute to the arbitration and

had provided in that agreement for a judgement of an unspecified court to be entered on the award made pursuant to the arbitration.

` (2) Sections 10 and 11 (relating to judicial vacation, modification, or correction of an award in an arbitration decision).'

(b) Clerical Amendment- The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 11707 the following:

` 11708. Arbitration of rail disputes.'

TITLE IV--AUTHORITY TO INVESTIGATE

SEC. 401. AUTHORITY OF BOARD TO INVESTIGATE AND SUSPEND CERTAIN RAILROAD ACTIONS.

Section 11701(a) is amended to read as follows:

` (a)(1) The Board may begin an investigation under this part on its own initiative. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

` (2) When the Board receives a complaint alleging that a rail carrier may be violating this part, the Board shall initiate an investigation. When the alleged violation applies to more than one person and the Board has substantial reason to believe that the allegations in the complaint are likely to have merit and, if the allegations prove to have merit, it will be difficult to make complete restitution for the damage, the Board shall suspend the rail carrier activity in question, and shall not revoke that suspension unless the rail carrier justifies the practice to the satisfaction of the Board.'

END