

S 953 IS

110th CONGRESS

1st Session

S. 953

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 SENATE OF THE UNITED STATES

March 21, 2007

Mr. ROCKEFELLER (for himself, Mr. CRAIG, Mr. DORGAN, Mr. VITTER, Ms. KLOBUCHAR, Mr. TESTER, Ms. LANDRIEU, Mr. CRAPO, Mr. BAUCUS, and Ms. CANTWELL) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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.

(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.

Sec. 2. References to 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. Damages due to the failure of timely delivery.

Sec. 204. 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 certain rail rate, service, and other disputes.

TITLE IV--AUTHORITY TO INVESTIGATE

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

SEC. 2. REFERENCES TO 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'; 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 striking 'A rail carrier shall not' and inserting the following:

'(3) A rail carrier may not'; and

(3) by inserting after paragraph (1) the following:

'(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 2 points on the system of that carrier at which 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:

'(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, a class of persons, a transaction, or a 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 or Class III rail carrier, and the activity would directly or indirectly--

'(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 the Board determines, upon review of the activity, 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), 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' and inserting `shall require';

(B) by striking `where it finds' and inserting `if the Board

determines';

(C) by striking `where such' and inserting `if such'; and

(D) by striking the second sentence and inserting the following:
`The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement. If the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board shall establish such conditions and compensation.'; and

(2) by adding at the end the following:

`(3) In making any finding under paragraph (1), the Board may not require 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:

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 1 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 in a 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 1 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 the State, or of a substantial part of the State, as an area of inadequate rail competition.

` (d) Actions- Not later than 60 days after designating a State, or substantial part of a State, as an area of inadequate rail competition, the Board shall resolve the conditions described in subsection (a) that justify the designation. In taking such action, the Board may 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 the 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 1,500 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 to Congress, including any recommendations that the Rail Customer Advocate may have for improving the procedures.

TITLE II--IMPROVING SERVICE TO RAIL CUSTOMERS

SEC. 201. RAIL SERVICE.

(a) Public Notice-

(1) IN GENERAL- Not later than 7 days after receipt by the Surface Transportation Board, or any member or staff of the Board, of a complaint from a customer about rail service, the Board shall post a description of the complaint on the Board's Internet website, including--

(A) information identifying the railroad or railroads providing the service that is the subject of the complaint;

(B) the general geographic area of the customer's movement;

(C) the date upon which the service problem occurred; and

(D) the date notice of the complaint was made to the Board or any member or staff of the Board.

(2) 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 website to indicate that the complaint has been resolved, the means of its resolution, and the date of its resolution.

(b) Annual Report to Congress-

(1) IN GENERAL- Not later than March 15, 2008, and annually thereafter, the Surface Transportation Board shall submit 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.

(2) CONTENTS- Each report submitted under paragraph (1) shall include a description of each service complaint, including--

(A) information identifying the railroad in question;

(B) the geographic area of the customer's movements;

(C) the date on which the service problem occurred;

(D) the date notice of the service complaint was made to the Board, or any member or staff of the Board; and

(E) the date of, and a detailed description of, the resolution of the complaint.

(3) PUBLICATION- A copy of the report submitted under paragraph (1) shall be posted on the Board's Internet website.

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

(1) by redesignating paragraphs (1) through (4) as subparagraphs (A) through (D);

(2) by inserting ` (1)' before `The Board may'; and

(3) by adding at the end the following:

` (2)(A) If, not later than 20 days after the publication of a new or revised rail rate, rule, or practice, a complaint is filed, and injunctive or similar relief is sought, 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, not later than 90 days after receiving such a complaint, shall determine, based on applicable law, whether or not to grant the relief sought.

` (B) If the party requesting relief 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.

` (C) The Board may 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. DAMAGES DUE TO THE FAILURE OF TIMELY DELIVERY.

Section 11704(b) is amended by inserting `, including damages due to the failure of timely delivery' after `violation of this part'.

SEC. 204. RAIL CUSTOMER ADVOCATE.

(a) Amendment- Subchapter II of chapter 7 is amended--

(1) by redesignating section 727 as section 728; and

(2) by inserting after section 726 the following:

` Sec. 727. Office of Rail Customer Advocacy

` (a) In General- There is established, within the Department of

Transportation, the Office of Rail Customer Advocacy.

` (b) Rail Customer Advocate- The Office of Rail Customer Advocacy shall be headed by 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- The Rail Customer Advocate shall have access to information, including databases, of the Board to carry out the duties and powers under subsection (c).'

(b) Clerical Amendment- The table of sections at the beginning of chapter 7 is amended by striking the item relating to section 727 and inserting the following:

` 727. Office of Rail Customer Advocacy.

` 728. Definitions.'

TITLE III--PROVIDING ACCESS TO A REASONABLE RATE PROCESS

SEC. 301. RIGHTS OF RAIL CUSTOMERS.

(a) In General- Chapter 107 is amended by inserting before section 10701 the following:

` 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) Clerical Amendment- The table of sections for chapter 107 is amended by inserting before the item relating to section 10701 the following:

` 10700. Rights of rail customers.'

SEC. 302. IMPROVEMENT OF RATE REASONABLENESS STANDARD.

(a) In General- Section 10701(d) is amended by adding at the end the following:

` (4)(A) Not later than 1 year after the date of the 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--

` (i) shall permit a final determination not later than 9 months after a complaint is filed;

` (ii) shall ensure that necessary cost and operational information is available to the complainant;

` (iii) shall not require excessive litigation costs; and

` (iv) shall require, upon a showing by the shipper of market dominance (as defined in section 10707), that the rail carrier prove that the challenged rate is reasonable.

` (B) The Board may 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 shipper 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.'.

(b) Definition of Market Dominance- Section 10707(a) is amended to read as follows:

` (a) In this section, ` market dominance' exists if a complainant shipper demonstrates that the challenged rate results in a revenue-variable cost percentage for the transportation to which the rate applies that is not less than 180 percent.'.

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

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

` (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 CERTAIN RAIL RATE, SERVICE, AND OTHER DISPUTES.

(a) In General- Chapter 117 is amended by adding at the end the following:

` **Sec. 11708. Arbitration of certain rail rate, service, and other disputes**

- ˘ (a) Election of Arbitration- A dispute described in subsection (b) shall be submitted for resolution by arbitration upon the election of any party to the dispute.

- ˘ (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) Arbitration Procedures- Not later than 1 year after the effective date of this section, the Board shall promulgate regulations governing voluntary arbitration that are consistent with the provisions of this section. Such modifications shall include the following:
 - ˘ (1) Arbitration shall be mandatory if either party elects arbitration in lieu of filing a formal or informal complaint before the Board. Challenges to the reasonableness of rail rates or charges may not be subjected to arbitration at the sole election of a rail carrier imposing such rates or charges.
 - ˘ (2) Arbitration shall be before an administrative law judge of the Board, or arranged for by the Board, unless the parties to the arbitration each select an arbitrator and the 2 selected arbitrators agree on a third arbitrator from a list of neutral arbitrators maintained by the Board.

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

` (4) Standards for rate reasonableness developed under section 10701 (d)(3) shall apply in arbitration under this section. The arbitrator or arbitrators shall adopt the final offer of 1 of the parties, without amendment or compromise, if such position is consistent with this section.

` (5) A rate may not be prescribed in an arbitration if such rate would result in a revenue-variable cost percentage below 180 percent or if market dominance is not found. A rate prescription may not remain in effect for longer than 5 years after the date on which the arbitrator's decision becomes final.

` (6) If a party to arbitration under this section seeks damages from a rail carrier that do not exceed \$500,000 per year based on a claim of excessive rates or charges, the arbitrator shall consider evidence of rates or charges on comparable shipments.

` (7) Decisions issued in arbitration under this section shall not be subject to appeal to the Board unless all parties to the arbitration agree to such appeal. Appeals to a court, or to the Board if both parties agree to Board review, shall be based on a clear error standard, and consistency with the requirements of this section.'

(b) Clerical Amendment- The table of sections at the beginning of chapter 117 is amended by adding at the end the following:

` Sec. 11708. Arbitration of certain rail rate, service, and other 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) If the Board receives a complaint alleging that a rail carrier may be violating this part, the Board shall initiate an investigation.

` (3) If the alleged violation under paragraph (2) applies to more than 1 person, 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--

` (A) shall suspend the rail carrier activity in question; and

` (B) may not revoke such suspension unless the rail carrier justifies the practice to the satisfaction of the Board.'

END