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## **HOW LEGISLATION SUPPORTED BY CURE WOULD INCREASE RAIL CUSTOMER ACCESS TO COMPETITION**

### **OVERVIEW**

Lack of access to competitive rail service is a major concern of rail customers.

Since 1980, the railroad system in the United States has shrunk significantly due to track abandonments by the major railroads. Consolidation of the major rail industry has resulted in only four remaining major railroads that control most of the rail traffic in the nation; two in the west and two in the east. Over 500 short line railroads have been formed since 1980, but in most cases these short lines, even if they have the physical ability to move freight to or from more than one major railroad, are restricted by contract to doing business with only one major railroad. Finally, beginning in 2004, demand for freight rail transportation exceeded the capacity of the major railroads to provide that transportation.

Federal legislation cannot reverse the consolidation that has already occurred or replace the track that has been abandoned and removed. However, federal legislation can address the anticompetitive rulings of the federal rail regulatory agency that have allowed the major railroads to prevent rail customer access to competition.

Two bills that are supported by CURE are pending in the United States House of Representatives and United States Senate to address the lack of competition in the rail industry. One bill, the Railroad Antitrust Enforcement Act of 2007, S.772/H.R.1650, would remove the railroad industry's exemptions from the nation's antitrust laws. The second bill, the Railroad Competition and Service Improvement Act of 2007, S.953/H.R.2125, would reverse the anticompetitive decisions of the Surface Transportation Board, the federal railroad regulatory agency.

### **CURRENT LEGAL BARRIERS TO COMPETITION**

Two of the major impediments to railroad competition today are:

- the refusal by major railroads to provide a rate to move their customer's freight to a competing railroad; and
- tie-in agreements between short line railroads and major railroads.

The federal railroad regulatory agency has approved both of these anti-competitive practices and refuses to reverse these bad public policies.

### **QUOTE A RATE**

Few rail customers are served directly by two major railroads. Many rail customers, however, have physical access by rail to a nearby competing railroad. They can reach that competing railroad only if the railroad serving them will provide a rate to move the customer's freight to that competing railroad. Major railroads, relying on the December 1996 "bottleneck" decision by the Surface Transportation Board (STB), refuse to provide rates to move their customers' freight to competing railroads. Without these rates, the rail customer is captive to its rail carrier for the entire length of the freight movement.

The Railroad Competition and Service Improvement Act of 2007 reverses the December 1996 STB decision and requires a major railroad to provide a rate for moving its customers' freight to that competing railroad. (Section 102 of S.953; Section 102 of H.R.2125.)

In addition, based on a 2004 letter from the Department of Justice to the Chairman of the House Judiciary Committee, removing the railroad industry's antitrust exemptions will subject the railroad industry to antitrust standards. The Department of Justice letter strongly suggests that the failure to provide a rate to a competing railroad could be a violation of Section 2 of the Sherman Antitrust Act. Thus, if the Railroad Antitrust Enforcement Act of 2007, S.772/H.R.1650, were to become law, rail customers or state attorneys general on behalf of the citizens of their state could file an antitrust action against this practice pursuant to Section 2 of the Sherman Antitrust Act.

### **TIE-IN AGREEMENTS/PAPER BARRIERS**

The second major barrier to competition in the rail industry is the "tie-in" agreements between major railroads and most short line railroads established since 1980 that prevent the short line from moving freight to or from any railroad other than the major from which it is leasing its track. These contractual provisions are contained in the track lease agreements between the major and short railroads. The federal railroad regulatory agency approved each of these transactions through a public process, although these documents were never made public.

The Railroad Competition and Service Improvement Act of 2007, S.953/H.R.2125, directs the STB to remove any of these restrictions from existing agreements, upon either its own motion or upon petition by an interested party, unless there are specific strong public policy reasons to allow the restriction to remain in place. (Section 103 of S.953; Section 103 of H.R.2125.)

Again, based on the 2004 letter from the Department of Justice to the Chairman of the House Judiciary Committee, there is reason to believe that these “tie-in agreements” violate Section 1 of the Sherman Antitrust Act. If the Railroad Antitrust Enforcement Act of 2007, S.772/H.R.1650, is enacted, the railroad industry’s exemptions from the antitrust laws of the nation would be removed and either a rail customer or the state attorney general could bring an antitrust action in federal district court to remove the restriction as being a violation of Section 1 of the Sherman Antitrust Act.

### **OTHER PRO-COMPETITIVE PROVISIONS**

The Railroad Competition and Service Improvement Act of 2007 also underscores to the STB that one of their dominant objectives is to “ensure, to the maximum extent possible, effective competition among rail carriers at origins and destinations.” (Section 101 of S.953; Section 101 of H.R.2125.)

The legislation also requires the STB to ensure that switching facilities that facilitate the movement of traffic between major railroads are operated in a pro-competitive manner, which does not always happen today. (Section 104 of S.953; Section 104 of H.R.2125.)

Finally, the removal of the rail industry’s antitrust exemptions will require the STB to implement its railroad regulatory program in a manner consistent with the antitrust laws of the nation. The purpose of the nation’s antitrust laws is to ensure competitive markets in all goods and services in all parts of the nation.

### **INVESTMENT TAX CREDITS FOR RAILROAD INFRASTRUCTURE**

Legislation is pending in Congress (S. 1125/H.R. 2116) to provide a twenty-five percent investment tax credit for railroad infrastructure investments. The legislation does not contain any provisions that ensure that the investments receiving the tax credit will be pro-competitive or result in more competitive transportation for rail customers. CURE cannot support this legislation unless and until the concerns of rail customers with the current rail system are addressed and provisions are added to this legislation that ensure that this investment of taxpayer dollars will result in a more competitive rail system.