

201335

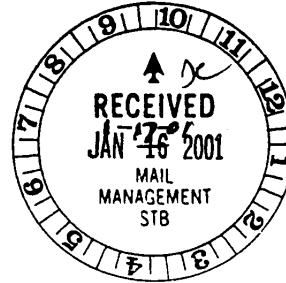
EDWARD J. RODRIGUEZ
ATTORNEY AT LAW
8 DAVIS ROAD WEST
POST OFFICE BOX 687
OLD LYME, CONNECTICUT 06371

ADMITTED IN CONNECTICUT
AND MASSACHUSETTS

TEL: (860) 434-4301
FAX: (860) 434-4306

January 12, 2001

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn- ExParte 582 (Sub.No. 1)
1925 K Street, NW
Washington, D.C. 20423-0001



Re: ExParte No. 582 (Sub. No. 1)
Major Rail Consolidations

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of Rebuttal Comments of Housatonic Railroad Company together with a WordPerfect diskette.

I request that you accept this late filing. The inability to meet yesterday's filing date was the result of a serious injury which I sustained in an accident which left me temporarily unable to complete the work. Please contact me by telephone if further information is required. The late filing will not prejudice any party nor the Board.

Thank you.

ENTERED
Office of the Secretary
JAN 17 2001
Part of
Public Record

Very truly yours,

Edward J. Rodriguez

20135

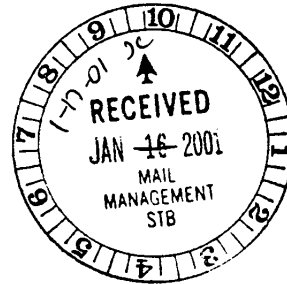
EDWARD J. RODRIGUEZ
ATTORNEY AT LAW
8 DAVIS ROAD WEST
POST OFFICE BOX 687
OLD LYME, CONNECTICUT 06371

ADMITTED IN CONNECTICUT
AND MASSACHUSETTS

TEL: (860) 434-4301
FAX: (860) 434-4306

January 12, 2001

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn- ExParte 582 (Sub.No. 1)
1925 K Street, NW
Washington, D.C. 20423-0001



Re: ExParte No. 58²1 (Sub. No. 1)
Major Rail Consolidations

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of Rebuttal Comments of Housatonic Railroad Company together with a WordPerfect diskette.

I request that you accept this late filing. The inability to meet yesterday's filing date was the result of a serious injury which I sustained in an accident which left me temporarily unable to complete the work. Please contact me by telephone if further information is required. The late filing will not prejudice any party nor the Board.

Thank you.

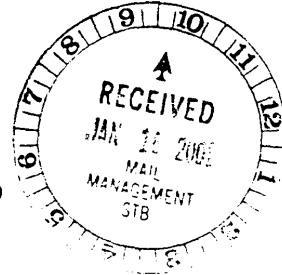
Very truly yours,

ENTERED
Office of the Secretary
JAN 17 2001
Part of
Public Record

Edward J. Rodriguez

HRRC-3

BEFORE THE
SURFACE TRANSPORTATION BOARD



Ex Parte No. 582 (Sub. No. 1)

REBUTTAL COMMENTS OF

HOUSATONIC RAILROAD COMPANY, INC.

JANUARY 11, 2001

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
P.O. Box 687
Old Lyme, Connecticut 06371
(860)-434-4303

ENTERED
Office of the Secretary
JAN 17 2001
Part of
Public Record

EDWARD J. RODRIGUEZ
ATTORNEY AT LAW
8 DAVIS ROAD WEST
POST OFFICE BOX 687
OLD LYME, CONNECTICUT 06371

ADMITTED IN CONNECTICUT
AND MASSACHUSETTS

TEL: (860) 434-4301
FAX: (860) 434-4306

January 16, 2001



Surface Transportation Board
1925 K Street, Room 713
Washington, DC 20423

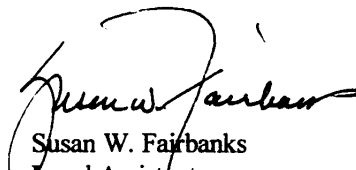
Attn: Mr. Timothy Cambridge

Dear Mr. Cambridge:

As discussed, enclosed please find a 3 ½" disk regarding Exparte Filing 582, containing HRRC 3.

Thank you.

Very truly yours,


Susan W. Fairbanks
Legal Assistant

Enclosure
Via UPS Overnight Delivery

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub. No. 1)

REBUTTAL COMMENTS OF
HOUSATONIC RAILROAD COMPANY, INC.

January 11, 2001

On November 17, 2000, Housatonic Railroad submitted comments in this proceeding. Housatonic Railroad has reviewed the comments submitted on that date by other parties as well as the reply comments submitted in December. Housatonic Railroad hereby submits its brief rebuttal comments.¹

In general, the Board in this proceeding, and most of the commentators, have recognized the important role which Class III rail carriers play in the general rail transportation system. The recognition of Class III rail carriers as a constituency or an economic group whose interests must be addressed in connection with a major rail consolidation is a significant positive development for the entire industry. However, beyond this general principle, there is little agreement. In this filing Housatonic Railroad offers brief rebuttal comment on selected issues as they affect Class III railroads.²

¹ Housatonic Railroad is participating in this proceeding because it is interested in the public policy affecting rail transportation. No statement made by Housatonic in this proceeding should be interpreted as reflecting or describing its relationship with its Class I connection.

² Some of the commentators who submitted reply comments in December referred to Housatonic's November comments and apparently misunderstood Housatonic's position on some

Enhanced Competition In its NPR, the Board announced that it was considering requiring that parties to major rail consolidations demonstrate that the proposed transaction would not only preserve existing competition but would enhance rail to rail competition. Various Class I carriers have objected that such a requirement is not justified to address merger related harms and would constitute an additional cost to a proposed transaction.

To the extent that a major rail consolidation imposes additional burdens on rail competition that can not be adequately measured or, perhaps even identified, when the transaction is proposed, the requirement that the transaction enhance rail competition in other ways may counteract unmeasurable anti-competitive consequences of the transaction. However, that is not the only reason for requiring enhanced rail competition.

In the 19th century, railroads had monopoly power with respect to ground transportation. That monopoly power was the basis for the extensive regulation which was imposed on the industry. As the highway system developed, the monopoly power of railroads decreased and much of the regulation became unnecessary. However, Class I railroads continue to be monopolies with respect to rail transportation and Class III railroads in particular. The effect of a major rail consolidation is, and is intended to be, to extend the reach of the monopoly franchise.

The view of some Class I commentators is that Class I carriers have or should have the right to combine into larger monopolies provided that there is no demonstrable reduction in competition which is not remedied. There is no sound legal basis for asserting such a right. Similarly, there is no reason why the Board ought not to require a public benefit in the form of enhanced rail competition as a price for approving a major rail consolidation.

A major rail consolidation should not be viewed as an open invitation for Class III railroads to gain competitive advantages which they had not previously enjoyed. Rather, Housatonic Railroad believes that any enhancement of competition should take the form of removal of existing barriers to free market competition.

fundamental principles. See, e.g., NS Reply Comments at 49, fn 63, CSX Reply at 42.

The most important barrier to competition which faces the Class III having only one Class I connection is that the Class III has only one source from which to purchase network services. There is no competition for the provision of network services and the Class I is free to set the price. Without network services, the Class III can not serve its customers.

The solution favored by Housatonic is to require the Class I railroads to provide Class IIIs competitive, Board supervised, wholesale pricing of network services from the Class III interchange to other carriers and gateways. Some Board oversight role in pricing practices is appropriate when market competition is absent, as in this instance.³

Difference in Treatment of Class II Railroads and Various Class III Railroads.

Several of the Class I commentators objected to considering Class II and Class III railroads as one group deserving of the same level of protection. Housatonic Railroad was guilty of that error in its earlier Comments in this proceeding. Housatonic's comments applied only to Class III railroads, and these rebuttal comments apply only to Class III railroads.

Among Class III railroads there are substantial differences in the structure of the relationship with the Class I. Many, though certainly not all, Class III railroad properties were purchased from Class I's pursuant to Line Sale Agreements.⁴ Some of such Line Sale Agreements contained various restrictions upon operation of the new Class III including interchange and routing restrictions and, in some cases, revenue arrangements. Presumably, the restrictions on future conduct by the Class III were reflected in a reduced purchase price or by some other consideration.

³ This may be seen as a variation of the open access proposals. However, it merely requires the Class Is to provide the type of network pricing which would exist in a competitive market. It involves no Class III operation on Class I property and it allows connecting Class I railroads to preserve and enhance the traffic moving to the Class I from the Class III railroad

⁴ Some Class III railroads were formed out of the bankruptcy reorganizations of the eastern railroads, others have been formed by acquisition from Class II railroads or by reactivating lines which had previously been abandoned.

Housatonic Railroad believes that commitments made both by the Class I and by the Class III in a line sale transaction should be honored following a major rail consolidation. Accordingly, to the extent that the remedies advocated herein would be contrary to the express provisions of a line sale agreement in a particular case, they should not be applied.

Role of the Class III Railroad in the U.S. Rail Transportation System

Housatonic Railroad described the role of the Class III carrier in the rail transportation system and the special and conflicting relationship of the Class III railroad with the connecting Class I in its previous filing

Those comments are summarized as follows:

1. A Class III railroad is a rail carrier which provides local service but which must purchase network rail services from a Class I railroad.
2. With respect to the majority of Class IIIs which have only one Class I connection, the Class I is in a monopoly position with respect to the network services which it provides. There is no market, as such, for the network service and the Class I can control rates and routes, pricing practices and car supply.
3. As both a competitor of the Class III and its only access to the general transportation network, the Class I can engage in anti-competitive conduct to the disadvantage of Class IIIs and their customers.
4. The peculiar and conflicting aspects of the Class I/Class III /relationship require review by the STB and the development of policies and procedures to ensure a fair, efficient, and non-discriminatory transportation system for Class IIIs and their customers.
5. The group of businesses most likely to suffer adverse consequences from a major rail consolidation are the Class III carriers affected by the consolidation. Unlike shippers, Class III railroads can not alleviate anti-competitive merger consequences by turning to other modes of transportation.

6. To protect the vitality of the rail transportation system, Class III railroads should be protected from merger harms resulting from unfair competition caused by monopolistic, anti-competitive behavior of Class I railroads.
7. The vulnerability of Class III railroads to predatory or monopolistic behavior of Class I connections has been increased by the major rail consolidations which have occurred in the past and are likely to be increased still further by future major rail consolidations. Accordingly, it is appropriate to address the inherently monopolistic relationship of Class I railroads to Class III's in the merger context.
8. A goal of the transportation policy should be to promote and enhance the ability of Class III rail carriers to compete in the general transportation system. Achievement of that goal requires that Class I rail carriers be prevented from exercising monopoly power in the provision of network services to the detriment of Class III railroads.

Manner of Achieving Protection of Rail Transportation System

Housatonic Railroad does not believe that it is necessary or appropriate for the Board to prohibit or discourage future major rail consolidations in order to protect the rail transportation system or to protect shippers. The consolidation of the rail industry has and can continue to achieve efficiencies in certain areas. However, groups which are completely dependent on rail are likely to suffer anti-competitive consequences. The primary groups which are so dependent are Class III railroads and shippers for whom highway or water shipping alternatives are not competitive.

The Board should focus on those measures which will improve the competitive position of Class III carriers with the least adverse impact upon Class I's. The Board should recognize the cumulative effects which prior mergers have had and should strive to prohibit anti-competitive conduct of Class I railroads towards Class III's whether arising from a particular transaction or already existing.

The ALSRA has proposed a Short Line Bill of Rights. While Housatonic has not and does not endorse that proposal, the proposal is a useful starting point for identifying the specific issues which the Board should address.

Compensation for Service Failures.

Consolidating Class I carriers should be required to compensate Class III connections in those cases in which Class III connections can document lost traffic which existed prior to the consolidation because of service deterioration which occurred as a result of the consolidation transaction. This would include documented revenue lost to the Class III carrier because of traffic diverted to truck as a result of service failures.⁵

Interchange and Routing Freedom and Competitive Access

Competition would be enhanced if Class III carriers acquired complete interchange and routing freedom and competitive access to customers and gateways as proposed by ALSRA. This goal, however, should be generally achieved by competitive and nondiscriminatory pricing as discussed below. Specifically, Housatonic makes the following comments:

1. The imposition by the STB of trackage rights to Class III railroads over trackage of Class I railroads should be undertaken rarely and with special care. The imposition of additional traffic on Class I trackage will often have the potential of increasing congestion and decreasing safety. Where possible, access should be accomplished by haulage arrangement or competitive access rates and other commercial arrangements.
2. Class III railroads should be permitted to interchange traffic with any other railroad (Class I, II or III) at all junctions, terminal areas, and track connections, unless the provisions of a line sale agreement specifically prohibit such interchange.
3. Housatonic Railroad does not agree that barriers to interchange which were agreed to as a part of a line sale agreement and formed a basis for the sales price should be removed merely because the Class I is involved in a consolidation transaction. At the request of a Class III railroad, the Board should review the paper barrier in connection with a proposed transaction to determine whether the effect of the transaction upon the Class III causes

⁵ Some Class I carriers have expressed concern that the STB would be burdened by numerous amorphous claims by Class III railroads. Claims should be limited to specific traffic losses which can be documented.

the barrier to be more burdensome than at the time that it was negotiated or whether the transaction otherwise diminishes the value received by the Class III in the line sale transaction. If such special circumstances exist, the Board should eliminate or modify the contractual provision as circumstances may require.⁶

4. In no case should the Board permit the expansion of paper or steel barriers or the creation of new ones in connection with a consolidation transaction. All Class III carriers should have the right to interchange with any new additional carriers which operate through a junction or physical track connection with the Class III as a result of the consolidation transaction.
5. Required access by Class III railroads to customers situated on Class I trackage is unwarranted and just as objectionable as would be Class I access to customers on Class III trackage.

Competitive and Nondiscriminatory Pricing.

The cornerstone to insuring the Class III rail carriers the opportunity to compete fairly with other rail carriers and with other transportation modes is the provision of competitive and nondiscriminatory pricing. Competitive and nondiscriminatory pricing can, to a large extent, solve the competitive access and gateway issues.

As indicated above, the competitive balance can best be achieved by requiring Class I Network Providers to price Network and Local services separately and by prohibiting them from using their network monopoly to extract monopoly profits. Class I railroads should be required to provide wholesale network services to Class III carriers at prices that reflect the marginal cost of providing the service plus a reasonable return to the Class I.

Class I pricing of overhead services between a Class III and another carrier should not be permitted to be used by the Network Provider to disadvantage one route compared to another nor to attempt to profit from Local Services provided by the Class III.

⁶ Housatonic Railroad has never advocated the abrogation of these agreements in connection with rail consolidations as suggested but not explicitly stated in CSX Reply Comments at 42.

Reasonable overhead rates should be provided to all gateways and other Class I interchange points. By requiring Class I railroads to provide such rates, Class III railroads will achieve effective access to other Class I carriers.

Class I railroads often use differential pricing for "captive customers" whose non-rail alternatives are limited or expensive.⁷ Differential pricing is a form of discriminatory monopoly pricing. Class I railroads should not be permitted to use differential pricing for network services provided to Class III railroads, which in all cases will have no non-rail alternatives.

Conclusion.

Housatonic Railroad does not advocate that the STB rewrite or invalidate contracts between Class I and Class III railroads, change the terms of line sale agreements, allow Class III carriers to operate on Class I trackage, or allow Class III railroads to obtain access to customers situated on Class I trackage. Housatonic Railroad does not suggest that Class III railroads be protected from fair competition.

Housatonic Railroad does advocate that the STB require Class I railroads to treat Class III railroads in a fair and non-discriminatory manner with regard to pricing and car supply. Housatonic Railroad advocates that Class I railroads be prohibited from tying local service with network service,⁸ from price discrimination against shippers on Class III railroads, and from unfairly using its monopoly power to compete with Class III connections.

⁷ "This means charging proportionately higher rates to those shippers who have fewer competitive alternatives to rail service." NS Reply at 19-20.

⁸ Failure to make network services available to Class III's at a price which excludes all of the Class I expense and profit on the local service component is analogous to Microsoft selling an operating system and tying in the internet browser for no additional cost. It attempts to capture the competitive local service (internet browser) portion by tying it with the monopoly network (operating system) portion.

The Class I carriers should be required to provide connecting Class III railroads with competitive, wholesale overhead rates to all of the Class I interchange points with other carriers. The rates should reflect the marginal cost of providing the network service plus a reasonable profit component and should not be discriminatory with respect to gateways except as dictated by actual costs. The merger context is an appropriate one to address these issues.

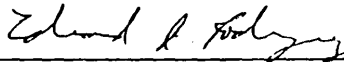
Respectfully submitted,



Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
P.O. Box 687
Old Lyme, Connecticut 06371
(860) - 434-4303

Certificate of Service

I hereby certify that a copy of the foregoing Comments has been served upon all parties of record.



Edward J. Rodriguez, Esq.