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April 17, 2008

The Honorable Charles D. "Chip" Nottingham
Chairman, Surface Transportation Board
395 E. Street SW
Washington, DC 20423-0001

Re: STB Ex Parte No. 677 – Common Carrier Obligation of Railroads

Dear Chairman Nottingham:

I want to thank Chairman Nottingham and members of the Surface Transportation Board (Board) for holding this hearing to examine issues related to the common carrier obligation of railroads. This hearing is well timed for Oregon because Oregonians are facing a serious situation in the southern coastal region of my state related to a short-line railroad's refusal to comply with its common carrier obligation to provide service. Accordingly, I thank you for considering my testimony, and the testimony of others from across the country facing similar problems, and I appreciate your continued investigation into these important issues.

Although all of the topics identified in your Federal Register Notice are of interest to Oregonians, I plan to address only one of them – the proper use of rail embargoes. My attention is focused on this topic because a short-line railroad in Oregon, Central Oregon and Pacific Railroad, Inc., a subsidiary of RailAmerica, Inc., ("RailAmerica"), has embargoed a portion of one of its Oregon lines and refuses to re-open it without millions of dollars for capital improvements and operating subsidies from the State of Oregon, shippers, and other stakeholders.

For the reasons I discuss below, I believe that the Surface Transportation Board must exercise greater regulatory authority over rail embargoes. I believe that the cost and time associated with obtaining legal remedies available for unlawful embargoes and unlawful abandonment of service leaves communities and regions at risk for the type extortion and diminution of service now faced by the southern coast region in Oregon. Accordingly, I recommend that the Board adopt criteria regulating the use of embargoes.

I was heartened to see the Board's decision dated April 10, 2008, which directed RailAmerica to show cause why its ongoing failure to provide service should not be ruled an unlawful abandonment. By your discussion of the background, the Board is very aware of the details surrounding RailAmerica's action so I won't go into any details of what has transpired. But, I do want to look at the bigger picture and suggest some possible ways to help balance the system.

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I believe that RailAmerica's actions are a misuse of the industry practice of embargo and a violation of the statutory common carrier duty to provide service on reasonable request. While the State of Oregon, the affected shippers, and other affected entities such as the Port of Coos Bay do have remedies, they are costly and time-consuming. Costly, because the fee for filing a formal complaint with the Board alleging a violation of the common carrier duty to provide service upon reasonable request exceeds \$17,000. It is also time consuming for two reasons. First, complainants must make their way through the Board's contested case process before any relief can be obtained, which may take months. And, even if they are successful before the Board, the possibility exists that a complaint in federal district court would be necessary in order to get RailAmerica to comply with any Board order because of its lack of independent enforcement authority.

But perhaps more importantly, any remedy for an illegal embargo is lengthy because shippers and other entities injured by an embargo are forced to play a waiting game while a railroad unlawfully withholds service. This waiting game exists because industry standards and criteria used by this Board to determine whether an embargo is unreasonable are such that it is difficult to prove an embargo is unreasonable, and thus, obtain any remedy, until enough time has passed to make clear that the railroad has no intention of fixing the conditions necessitating the embargo. It is only after a significant amount of time has passed, during which shippers are forced to incur increased shipping costs and lost opportunity costs, that aggrieved parties may seek a remedy with the Board.

Furthermore, under the current regulatory framework, there is significant opportunity for railroads to misuse the industry practice of embargo for ends unrelated to safety or other purposes of a valid embargo. For example, a railroad could embargo a line in order to extort money from shippers and stakeholders for capital improvements and operating subsidies. Or, a railroad could embargo a line to force shippers to find alternate service, thus, laying the foundation for a finding by the Board that the public convenience and necessity would permit the railroad to abandon the line in a subsequent abandonment proceeding initiated by the railroad.

I believe the problems I have identified can be addressed if the Board adopts specific regulations for embargoes. Under these regulations, railroads would be required to apply to the Board for approval to maintain an embargo beyond a certain period of time, for example, one month. And, to obtain approval to maintain an embargo, the railroad would have to provide the Board sufficient information to demonstrate that the embargo is necessary for a valid purpose and also provide the Board with a plan for restoring service within a reasonable period of time.

As already discussed, the current regulatory environment does not provide sufficient protection to customers of railroads and other stakeholders from invalid embargoes. Accordingly, I recommend a modified regulatory scheme under which railroads have the burden of establishing that continued embargoes are valid and necessary, rather than a regulatory

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environment that forces shippers and other stakeholders to incur significant costs associated with diminished or non-existent rail service before they even have a realistic opportunity of pursuing any legal remedy for an invalid embargo.

To the extent the Board does not have authority to impose requirements on embargoes, or modify the regulatory scheme as I recommend, I urge you to ask Congress for this authority, and pledge my support if you do so

Again, thank you for attention to this matter which is of great importance to the citizens of Oregon. I look forward to working with the Board, stakeholders and congressional leadership on making the kinds of changes that will help level the playing field for shippers.

Sincerely,

A handwritten signature in black ink, reading "Theodore R. Kulongoski". The signature is fluid and cursive, with the first name "Theodore" being more prominent and the last name "Kulongoski" following in a similar style.

THEODORE R. KULONGOSKI
Governor

G7K ODXI cw/sh