MAYER • BROWN

US Railroad Regulatory Experience

Mayer Brown has substantial experience in the United States counseling railroads and other common carriers and representing them in regulatory proceedings, business transactions, arbitrations, court actions and appeals. Our lawyers have represented most of the major US and Canadian railroads, as well as the Association of American Railroads and a number of smaller, regional railroads.

We have participated in virtually every major regulatory and structural development in the industry in the United States since the passage of the Staggers Rail Act of 1980.

Mergers, Acquisitions and Spin-Offs

We have extensive experience with the evolution of the merger rules of the Surface Transportation Board (“STB”) and the theory and conduct of merger proceedings, which today involves not only transportation and competition issues but also significant environmental and social issues. We have been involved in most of the major merger and acquisition proceedings before the STB and its predecessor, the Interstate Commerce Commission—including BN/SF, UP/SP, CN/IC, Conrail/NS/CSX, BNSF/CN and CP/DM&E.

In addition to mergers and acquisitions, we have been extensively involved in spin-offs of rail lines to short-line and regional railroads—both on the regulatory approval process and on the types of sale and lease transactions that will pass regulatory and legal muster.

Competitive Access

We have been involved in the continuing debate about the prescription of through-routes, joint rates, reciprocal switching, terminal trackage rights and “bottleneck” rates that are taking place in the legislative, regulatory and adjudicative arenas. We were involved in litigating many of the seminal cases on these issues and participated in the rulemaking proceedings leading to the adoption of the current competitive access regulations and in subsequent rulemaking proceedings concerning competitive access law and policy.

Our experience covers the enforceability of interchange limitations, overhead trackage rights and joint venture agreements. It includes not only the regulatory parameters of competitive access, but also the application of antitrust principles (including exclusive dealing, tying and leveraging) to access claims.
Federal Preemption
We have handled a wide variety of federal preemption cases at the STB, and in state and federal trial and appellate courts all over the country, involving efforts by states and localities to engage in economic regulation, environmental regulation, zoning and land use regulation, “nuisance” regulation, condemnation, construction permitting, state antitrust and other regulation of railroad facilities, operations and services. We have also been involved in matters pertaining to federal preemption of state and local law under the ICC Termination Act of 1995, the Federal Railroad Safety Act, the Locomotive Inspection Act, the Safety Appliance Act and the Clean Air Act as well as the Commerce Clause, including the “municipal proprietor” exception. Further, we have extensive experience with applying the special federal preemption arising from STB-approved merger transactions to invalidate conflicting state or federal laws as necessary to carry out the merger transaction. We also advise on the application of the primary jurisdiction doctrine and the treatment of cases referred by courts to the STB.

Construction Projects
We have handled dozens of proceedings involving regulatory approvals and conditions for the construction of new rail lines, rail build-ins, line relocations, rail connections, rail crossings and line upgrades. We have experience with most every type of ownership and operating rights scenario, including leases, trackage rights, contract operations and state and local ownership, and have handled matters involving the scope of the STB’s approval authority over rail line construction projects, the legal standards and evidentiary requirements for a finding of public convenience and necessity, the environmental review requirements, the interplay between federal, state and local permitting requirements, special requirements involving construction across international borders, the alternative for exemption from many regulatory requirements, procedural options, and common carrier obligations attendant to rail line construction. We have also prosecuted and defended court appeals and injunction proceedings relating to rail line construction projects.

Discontinuances and Abandonments
We have handled every aspect of rail line discontinuances and abandonments, including distinguishing “jurisdictional” from “non-jurisdictional” track, handling all aspects of environmental and historic preservation review, addressing transportation-related issues and handling offers of financial assistance, public use conditions, Trails Act conditions and public use conditions. We have extensive experience with “adverse abandonment” proceedings, with claims of “de facto” abandonment and with conditions for embargoing a line. We are also experienced handling the acquisition of abandoned or out-of-service rail lines for public use, navigating the interplay between federal abandonment law and state law, and with the claims of reversionary property owners regarding lines subject to abandonment or trail use.
Common Carrier Obligation

We have handled numerous cases involving the scope of the common carrier obligation, particularly with respect to the carriage of hazardous materials and toxic-by-inhalation chemicals, and counseled extensively on what constitutes a reasonable request for service and what conditions a railroad may impose on service. We are able to advise on when a railroad may embargo service, when it may allocate service, when emergency service may be ordered, what frequency or regularity of service is required, what facilities (interchange track, switch facilities, team track, transload facilities) a railroad must provide, what equipment it must provide and what prices it may charge.

Car Service, Car Hire, Demurrage and Storage

We have handled seminal cases on the parameters of the railroads’ obligation to provide rail cars, to handle other railroads’ cars, to handle shippers’ and car companies’ private cars, and the car hire, demurrage, allowance and storage charges and practices associated with the railroads’ obligation. We are well-versed on the AAR car service rules and procedures, the law and regulations regarding bi-lateral car service agreements, the application of the industry-wide tank car agreement and “departure tariffs,” the use of “flat-rate” agreements and the inter-carrier tariffs placed on the timing or condition of car interchanges.

Exempt and Contract Traffic and Transactions

We are very experienced in handling issues concerning traffic that has been exempted from regulation or that is subject to a contract, including the scope of the exemption and the extent to which the STB’s jurisdiction continues to protect such traffic from state and local regulation. We regularly consult on the standards for exemptions as well as the standards for revocation of exemption, and we have extensive experience in both new exemption and revocation proceedings.

Rate Reasonableness

We were heavily involved in the development of the modern standards for assessing rate reasonableness, including both the large rate case guidelines and the small rate case guidelines. We were also involved in developing the standards for both qualitative and quantitative market dominance that are predicates to a rate reasonableness case. We have litigated virtually every aspect of the application of rate reasonableness and market dominance standards.

Revenue Adequacy

We were heavily involved in the development of the modern revenue adequacy standards for the rail industry, and work extensively on matters related to rate base, rate of return and cost of capital calculations.
Mayer Brown is a leading global law firm serving many of the world’s largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX
and Hang Seng Index companies and more than half of the world’s largest investment banks. We provide legal services in areas such as Supreme Court and
appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and
insolvency; and environmental.

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