



ASSOCIATION OF
AMERICAN RAILROADS

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Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Docket No. EP 714, *Information Required in Notices and Petitions
Containing Interchange Commitments*

Dear Ms. Brown:

Pursuant to the Board's order served on November 1, 2012, please find attached the
Reply Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
*Counsel for the Association
of American Railroads*

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS
CONTAINING INTERCHANGE COMMITMENTS

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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ASSOCIATION OF AMERICAN RAILROADS

On November 1, 2012, the Surface Transportation Board (“Board”) issued a notice of proposed rulemaking (“NPR”) that proposed imposing additional requirements on railroads seeking exemptions to acquire or operate rail lines. Specifically, the proposed rules would require railroads to develop and include additional information in notices of or petitions for exemption in transactions that contain interchange commitments, which the Board defines as “contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.” NPR at 2 (citing *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, EP 575, slip op. at 1 (STB served Oct. 30, 2007)).

The Association of American Railroads (“AAR”), filed comments on December 18, 2012, on behalf of its Class I, II, and III member freight railroads. In its opening comments, the AAR expressed concerns that the NPR disregards the importance of interchange commitments in facilitating the transfer of marginal rail lines from large railroads to smaller railroads. Moreover, the AAR explained that the NPR is unnecessary and contrary to Congressional directives to

encourage exemptions and to reduce regulatory barriers to entry into the rail industry. Also, the NPR underestimated the burden of its proposed rules and the potential chilling effect it will have on transactions. For these reasons, the AAR requested that the proposed rules be withdrawn.

Opening comments were filed by Norfolk Southern Railway Company, Union Pacific Railroad Company, Railroad Industry Working Group (“RIWG”), American Short Line and Regional Railroad Association (“ASLRRA”), U.S. Department of Agriculture (“USDA”), Pennsylvania Department of Transportation, Oregon Department of Transportation, National Industrial Transportation League (“NITL”), National Grain and Feed Association (“NGFA”), Consumers United for Rail Equity (“CURE”), American Chemistry Council, Chlorine Institute, Arkansas Electric Cooperative Corporation, Union Electric Company d/b/a Ameren Missouri (“Ameren”), Milnor Grain Company, Minn-Kota Ag Products, Sherwood Construction Co., Inc., Harrison Gypsum, LLC, and United Transportation Union- New York State Legislative Board (“UTU-NY”). Joint comments were filed by the Alliance for Rail Competition, Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Montana Farmer Union, Nebraska Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Board, and Washington Grain Commission (collectively, “ARC”).

Several comments filed by shippers located along lines spun-off to short line railroads recognize the benefits of continued rail service that transactions that contain interchange commitments can bring and therefore oppose the proposed rules.¹ Likewise, state departments of

¹ See, e.g., Milnor Grain Company Opening Comments; Minn-Kota Ag Products Opening Comments.

transportation participating in this proceeding recognized the benefits of transactions that keep rail lines active in the national freight system.²

In contrast, other comments filed by shippers and organizations that advocate on behalf of shippers that support the proposed rules suggest that the Board go substantially beyond the proposed rules to create regulatory burdens on transactions that contain interchange commitments, which would have the effect of limiting such transactions.³ The AAR herein responds to these comments.

As fully discussed below, opening comments filed in support of the proposed rules generally mischaracterize or misunderstand the statutory framework for both the approval of applications for transactions to acquire and operate rail lines, including transactions that contain interchange commitments, under 49 U.S.C. § 10901 and § 10902 and the class exemptions from those provisions, adopted pursuant to 49 U.S.C. § 10502. Contrary to assertions made in those comments, the provisions of the Rail Transportation Policy (“RTP”) at 49 U.S.C. § 10101 do not support the proposed rules.

I. The Proposed Rules and Proposals in the Opening Comments to Establish Procedural Burdens on Transactions With Interchange Commitments are Inconsistent with the Governing Statutory Framework

In its opening comments, the AAR described the unnecessary regulatory burdens that the proposed rules would cause if adopted and cautioned that the proposed rules would likely generate litigation over the newly required information.⁴ Those shippers in favor of the proposed rules generally seem to anticipate extensive litigation over the filed information and would essentially have the Board utilize the information to erect regulatory barriers to prevent the

² See, e.g., Pennsylvania Department of Transportation Opening Comments.

³ The AAR will not respond to broad requests, such as the suggestion by the Chlorine Institute that the Board reopen settled transactions from 20 years ago, that are clearly beyond the scope of this proceeding.

⁴ AAR Opening Comments at 5-8.

approval of transactions with interchange commitments.⁵ Some commenters would even interject the Board as an arbiter of what constitutes “reasonable” or “fair” compensation for a line sale or lease.⁶ Such comments, however, either misunderstand or mischaracterize the statutory and regulatory framework surrounding the Board’s approval of transactions that qualify for exemptions from 49 U.S.C. § 10901 and § 10902 under 49 U.S.C. § 10502.⁷

The standards for approving transactions under sections 10901 and 10902 are premised on the conclusion by Congress that rail line sales and leases are generally in the public interest. Those sections instruct the Board to approve line sale and lease transactions unless it is shown that a transaction is not consistent with the public convenience and necessity.⁸ Indeed, in enacting Section 10902 governing short line purchases by Class II and Class III rail carriers, Congress expressly intended to facilitate the transfer of lines to short line carriers. The legislative history states,

This new provision . . . should promote clearer and more expeditious handling of the affected transactions and avoid imposing additional and sometimes *potentially fatal costs* on start-up operations of often can keep rail lines in service, even if not viable as part of a larger carrier’s system.⁹

In addition to the Congressional policy in favor of approving line sales and leases, 49 U.S.C. § 10502 (a) instructs the Board to exempt transactions from regulatory requirements

⁵ See, e.g., NITL Opening Comments at 6; Ameren Opening comments at 2.

⁶ See, e.g., USDA Opening Comments at 3-4.

⁷ Moreover, such comments go well beyond the scope of the NPR and fail to observe the NPR’s stated goal to ensure “sufficient information to judge whether the *exemption process* is appropriate for a transaction.” NPR at 5 (emphasis added). What is at issue in this proceeding is the Board’s proposal to require railroads to develop and submit additional information in exemption proceedings where the underlying transaction contains an interchange commitment.

⁸ See, e.g., *Class Exemption for Acquisition of Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902*, 1 S.T.B. 95, 100 (1996) (“Congress thereby deems these transactions to be consistent with the public convenience and necessity unless shown to be otherwise.”)

⁹ H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179-80 (1995) (emphasis added).

when the application in whole or in part of a provision of Subtitle IV of Title 49, U.S.C.: (1) is not necessary to carry out the Rail Transportation Policy of Section 10101; and (2) either (a) the transaction or service is of limited scope; or (b) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. Congress intended that the agency would use this broad deregulatory authority to expedite and facilitate regulatory review.

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.¹⁰

Indeed, under governing statutory criteria, the Board is *required* to exempt a person, class of persons, or a transaction or service whenever the Board finds that the statutory criteria are met. As the D.C. Circuit has confirmed, where the STB finds the conditions of its exemption mandate are satisfied, “it has no choice but to grant an exemption.”¹¹

Taken together, the stated Congressional policies in favor of exemptions and approval of rail line sales and leases led the Board to adopt expedited processes for certain transactions. In adopting the class exemption from the prior approval requirements of Section 10902, the Board noted that Congress made clear its intent that its broad exemption authority should be used to

¹⁰ H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). Congress reaffirmed this policy in the Conference Report accompanying the ICCTA, which reenacted the existing exemption provisions as section 10502. H.R. Conf. Rep. No. 422, 104th Cong. 1st Sess. 168-69 (1995).

¹¹ *Coal Exporters Ass’n of US v. United States*, 745 F.2d 76, 82 (D.C. Cir. 1984).

free transactions and service from the administrative and financial costs associated with continued regulation wherever possible.¹² The Board expressly noted that,

The acquisition or operation of rail lines by Class III carriers under the exemption will be limited in scope. Major changes in rail operations or competitive relationships between railroads are not likely to occur because, under the exemption, the purchasing carrier's operation will merely supplant the selling carrier's operation. Moreover, purchases by Class III railroads typically do not have the impact of acquisitions by larger Class I or II carriers.¹³

As detailed in the AAR opening comments, aspects of the proposed rules,¹⁴ such as an estimate of the difference between the sale/lease price with and without the interchange commitment or estimates of the value of the discounted annual value of the interchange agreement, do not appear consistent with the expedited nature of exempt transactions.¹⁵ Comments filed by shippers in favor of the proposed rules would substantially increase the regulatory process beyond what is contemplated by the exemption process. Such comments anticipate litigation over the valuation of the interchange commitment,¹⁶ burden shifting,¹⁷ and the establishment of rebuttable presumptions against approval of the transaction.¹⁸ Such extensive litigation is utterly inconsistent with the exemption process and a collateral attack on

¹² *Class Exemption for Acquisition of Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902*, 1 S.T.B. 95, 102 (1996).

¹³ *Id.*

¹⁴ The AAR does not oppose all of the proposed rule changes. For example, the AAR does not oppose disclosure of shippers who have used the line in the last two years, certification of notice to those shippers, or a change in the Board's case caption so as to denote a proceeding that involves an interchange commitment.

¹⁵ AAR Opening Comments at 5. According to materials available on the Board's website, "the simplest, fastest, and easiest way to start or expand a small railroad is to acquire an existing line from a large carrier." *So You Want To Start a Small Railroad*, Surface Transportation Board Small Railroad Application Procedures (March, 1997) at 3.

¹⁶ *See, e.g.*, Ameren Opening comments at 6.

¹⁷ *See, e.g.*, NITL at 8. Ameren Opening comments at 6

¹⁸ *See, e.g.*, Ameren Opening Comments at 6-7.

the Board's decision that allowed the use of the exemption process for transactions that include interchange commitments.

In contrast to the proposed rules, Congress intended that the Board should use its exemption authority to facilitate the approval of most transactions and, and rely on the adversarial process of revocation to address any areas of concern.¹⁹ The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted.²⁰

Indeed, the class exemption for certain transactions under 49 U.S.C. § 10901 explicitly addressed the appropriateness of relying on revocation in the line sale/lease context.

In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be "lost" in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.²¹

¹⁹ See *Ass'n of Am. Railroads-Petition to Exempt Indus. Dev. Activities from 49 U.S.C. §§ 10761(a)(1), 11902-03, & 11904(a)*, 8 I.C.C.2d 365, 377 (1992) ("The legislative history of the Staggers Act reveals a Congressional intention to have the Commission be liberal in granting exemptions and to correct problems with particular exemptions after the problems actually arise"); *Santa Fe S. Pac. Corp.—Control—S. Pac. Trans. Co.*, 2 I.C.C.2d 709, 741 (1986) ("Exemption analysis takes a broad brush approach to analysis of the competitive environment as a whole and looks to the remedy of partial revocation to address specific competitive situations should that become necessary."); *Brae Corp. v. US*, 740 F.2d 1023, 1043 (D.C. Cir. 1984) ("Congress itself envisioned after the fact review to correct isolated market abuses that may follow the lifting of protective regulations under section 10505(a)").

²⁰ *Minnesota Commercial Ry., Inc.—Trackage Rights Exemption-Burlington N. R.R. Co.*, 8 I.C.C. 2d 31, 35-38 (1991); *City of Ottumwa v. STB*, 153 F.3d 879, 883-884 (8th Cir. 1998) ("[T]o obtain revocation of an exemption, the burden of proof was on [the complainant] to show that regulation was required to carry out [rail transportation policy]").

²¹ *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985), review denied sub nom., *Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

Thus, rather than requiring railroads to develop and submit information in every case, the Board should continue its practice of relying on the adversarial process in cases that generate actual controversy. Neither the NPR, nor any of the opening comments effectively establishes why this process is insufficient for transactions that contain interchange commitments.

II. Rail Transportation Policy Does Not Support the Proposed Rules.

The AAR Opening Comments detailed the positive role that interchange commitments have played, and continue to play, in maintaining rail service on and preventing abandonment of light density rail lines.²² Contrary to claims by some shippers, interchange commitments are not inherently anti-competitive,²³ but rather constitute bargained for compensation between a willing buyer and a willing seller in an arms-length transaction that preserves the competitive *status quo*.

Shipper comments supporting the proposed rules make generalized appeals to the benefits of competition and the RTP, but upon closer inspection, those benefits would not be enhanced by the proposed rules. The Board has counseled parties in the past that the appropriate analysis is considering the state of competition *ex ante*, before the transaction, rather than focusing on, as shipper supporters of increased regulation of line sale and lease transactions do, potential interchange options *ex post*.²⁴ The Board noted that agreements that contain interchange commitments may “further the public interest in a number of ways, including better service and/or better rates, and the creation or strengthening of short line railroads that have the potential to expand into other markets, and thereby ultimately add to competition.”²⁵

²² AAR Opening Comments at 3-5.

²³ See, e.g., CURE Opening Comments at 5.

²⁴ *Review of Rail Access and Competition issues-Renewed Petition of the Western Coal Traffic League*, EP 575 (Sub-No. 1) *et al.* (STB served Oct. 30, 2007).

²⁵ *Id.* at 9.

Moreover, shipper comments in support of the proposed rules take an overly narrow view of competition. In nearly all markets for transportation services, rail-to-rail competition is only one part of the competitive landscape. While railroads compete vigorously with each other for traffic,²⁶ they also face competition from other modes of transportation.²⁷ Based upon service reliability and flexibility considerations, trucks often provide shippers with viable competitive options even when rail rates may be lower.²⁸ For example, railroads and trucks compete vigorously for intermodal traffic.²⁹ The availability and desirability of truck transportation in certain circumstances also enhances rail-to-rail competition in the form of transloading.³⁰ The Board has recognized that railroads compete with barges for some movements,³¹ while ships on

²⁶ See generally AAR Comments at 18-24, EP 705 (filed April 11, 2011).

²⁷ See, e.g., *Surface Freight Transportation, A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments that are not Passed on to Consumers*, GAO Report to the Subcommittee on Select Revenue Measures, Committee on Ways and Means, House of Representatives, at 5 (“... modes may be substitutable for certain types of trips and will compete directly for shipments or for segments of shipments based on price and performance. For example, long-haul trucking and rail shipments may be substitutable, or short sea shipping legs can be a substitute for rail or truck shipments along coastal routes.”).

²⁸ See, e.g., Brian A. Weatherford, et al., *The State of U.S. Railroads: A Review of Capacity and Performance Data*, RAND Supply Chain Policy Center, 59 (2008) (“Despite the direct cost advantage of long-haul rail over long-haul truck, it is clear from the prevalence of national trucking firms that many companies find trucking to be more competitive or reliable.”); USDA *Study of Rural Transportation Issues*, Chapter 6, Rail Competition and Its Importance to Agriculture (2010) at 192 (“although rail shipments of grains and oilseeds have increased at an average of 1.1 percent over the last fifteen years, truck shipments have increased by 4.4 percent. In other words, rail’s market share has been steadily decreasing. Farmers have other options, and they appear to be taking advantage of them.”).

²⁹ Christensen Assoc., Revised Final Report at 15-1 (Nov. 2009) (“For shorter hauls, all-truck movements tend to have cost advantages over intermodal movements, despite relatively high per-mile costs for trucks, as all-truck movements avoid “drayage” costs associated with hauling the container or trailer to and from railroad terminals, as well as the costs of loading and unloading the railroad flat cars. For longer hauls, truck shipments may have more desirable service qualities despite higher costs, although railroads have developed and expanded higher-speed and scheduled services in competition with trucking.”).

³⁰ See AAR Opening Comments at 15-16, EP 704 (filed Jan. 31, 2011).

³¹ *E.I. DuPont de Nemours and Co. v. CSX Transportation, Inc.*, NOR 42100 (STB served June 30, 2008).

intracoastal waterways likewise play an important role in the transportation of many commodities, including chemicals.³²

As detailed in the AAR petition for rulemaking in EP 717, transportation of coal to electric utilities demonstrates that railroads face indirect product and geographic competition in some instances, as well.³³ Some shippers and receivers can substitute products as market prices change and shippers of all commodities with multiple plants and facilities from which to supply their customers can take advantage of the geographical location of those facilities to increase their transportation options.

The RTP recognizes that competition for transportation services is extensive and multimodal³⁴ and calls on the Board “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”,³⁵ and rather than calling on the Board to intervene to force carrier actions or block market transactions. Further, the RTP instructs the Board to “minimize the need for Federal regulatory control over the rail transportation system . . .”³⁶ and “reduce regulatory barriers to entry into” the rail industry.³⁷ As such, the Board’s current regulatory regime, encouraging transactions consistent with Congressional intent, is fully supported by provisions of the RTP.

³² See AAR Opening Comments, EP 575 (filed March 26, 1998).

³³ See AAR Petition for Rulemaking, EP 717 (filed Nov. 19, 2012).

³⁴ 49 U.S.C. § 10101(4).

³⁵ 49 U.S.C. § 10101(1).

³⁶ 49 U.S.C. § 10101(2).

³⁷ 49 U.S.C. § 10101(7).

Conclusion

Nothing in the comments filed in this proceeding undermines the AAR's position in its opening comments: the proposed rules are unnecessary and would have generally negative consequences for railroads, railroad customers, and the general public. The opening comments demonstrate that the proposed rules would increase litigation and have a chilling effect on large railroad sale/lease transactions with small railroads and create the potential for leases not being renewed and increased line abandonments. As such, the AAR respectfully asks the Board to not adopt the proposed rules and discontinue this proceeding.

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