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SURFACE TRANSPORTATION BOARD

EX PARTE NO. 634
CONSOLIDATED RAIL REPORTING

COMMENTS OF OMNITRAX, INC.

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Surface Transportation Board
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CONSOLIDATED RAILROAD REPORTING

OmniTRAX, Inc. ("OmniTRAX"), pursuant to the decision of the Surface Transportation Board ("STB" or "Board") served September 25, 2000, offers the following comments in STB Ex Parte No. 634, Consolidated Railroad Reporting. OmniTRAX opposes the intention by the STB of FASB No. 94 to require the reporting of all railroad and railroad-related activities on a consolidated basis for all regulatory purposes.

OmniTRAX is a non-common carrier holding company in control of nine Class III railroad companies in the United States.¹ These holdings consist of the following railroads:

1. Central Kansas Railway, L.L.C. ("CKR") of Wichita, Kansas operates over lines in the State of Kansas acquired from the Atchison, Topeka and Santa Fe Railroad Company ("ATSF").
2. Chicago Rail Link, L.L.C. ("CRL") of Chicago, Illinois operates over lines in the State of Illinois acquired from the Chicago, West Pullman and Southern Railroad and the Rock Island & Pacific Railroad Company.
3. Georgia Woodlands Railroad, L.L.C. ("GWRC") of Washington, Georgia that operates over a line acquired from CSX Transportation, Inc. ("CSX").
4. Great Western Railway of Colorado, L.L.C. ("GWRCO") operates over lines in the State of Colorado acquired from The Great Western Railway Company and Burlington Northern and Santa Fe Railroad Company ("BNSF").
5. Great Western Railway of Iowa ("GWRIA") operates over lines in the State of Iowa acquired from the Iowa Southern Railway.
6. Manufacturers' Junction Railway ("MJ") operates over lines in the State of Illinois acquired from its previous industrial owner.
7. Newburgh & South Shore Railroad, L.L.C. ("NSR") operates in the State of Ohio on lines that it or its predecessors owned from the outset of operations.
8. Northern Ohio & Western Railway, L.L.C. ("NOW") operates in the State of Ohio on lines owned by the Sandusky, Seneca, and Tiffin Port Authority.
9. Panhandle Northern Railroad, L.L.C. ("PNR") operates in the State of Texas on lines acquired from ATSF.

¹ Common control of the railroads was approved in OmniTRAX, Inc.—Control Exemption—Northern Ohio & Western Railway, L.L.C., STB Finance Docket No. 33598 (STB served June 5, 1998).

Each of these railroads is separately managed, geographically separated, and transports widely varying commodities as well as providing different types of services for their customers. The operations of these nine railroad companies are not integrated. Each has its own president and staff and each is a separate profit center. None of the lines of these railroads connect with the lines of any of its affiliated railroads and no traffic is interchanged between them.

The short line railroads operated by OmniTRAX consist either of lines that were scheduled or destined to be abandoned by the Class I carrier or involved carriers that were already in bankruptcy and were destined to the scrap heap of history. OmniTRAX, like hundreds of other short line operators, stepped up and purchased these lines in order to preserve rail service, especially to rural areas of the United States.

The efforts of short line operators to purchase the lines the Class I carriers deemed marginal would not have been successful save two very important factors. The first factor is the Staggers Rail Act that set the stage for transfers of lines from the Class I carriers. The second was the decision of the Interstate Commerce Commission to exempt transactions involving transfers from Class I carriers to Class III carriers. Class Exemption – Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd., Illinois Commerce Com'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).

OmniTRAX was one of many companies that were formed as a non-carrier holding company to take advantage of this exemption. It did this by forming non-carrier subsidiaries that in turn would purchase or lease the lines from the Class I carriers.

Congress has also stated that there is and should be a bright line distinction between Class I carriers and Class III carriers to allow transfers of lines from the former to the latter with the most limited amount of agency oversight practicable. See, ICC Termination Act of 1995. The clear intent of that statute was to allow the expeditious handling transactions between large and small railroads and to avoid the imposition of additional and potentially fatal costs (such as labor protection) on the start up operations of the small railroad purchaser.

The change the STB has proposed in Ex Parte 634 could not only render the exemption process virtually meaningless for companies such as OmniTRAX but also could thwart the intent of Congress as set forth above. The simple fact is that this proposal will cause OmniTRAX to report all railroad and railroad related activities on a consolidated basis. According to the STB, this consolidated reporting could "...change the 'classification' status of some railroads (footnote omitted)."

Assuming for the sake of argument that requiring this consolidated reporting could cause such a reclassification, the result of such a requirement would be that the reported revenues of the OmniTRAX entities would be over the lower dollar amount established for Class II carriers. If this in turn meant that OmniTRAX would be reclassified as a Class II carrier. The same may be true for a number of other entities in the same situation

as OmniTRAX. This reclassification could in turn lead to a number of unintended consequences.

The first of these unintended consequences would be that entities such as OmniTRAX would, when seeking to have an affiliated non-carrier company purchase a line from a Class I, be faced with the imposition of labor protection of an employee's earnings during the preceding 12 months before an application to acquire the line. In addition, the proposed sale would have to be delayed 60 days while notice of the sale is given to the involved unions and the seller's employees. The effect of these two items could well be that an entity like OmniTRAX would determine not to proceed with a purchase because of the cost involved in providing for labor protection. Just as important, a 60 day waiting period could also have a chilling effect on any line sales.

The second unintended consequence is that one type of short line (one that is part of a group of short line carriers owned by a holding company) would be placed in an unfair position vis-à-vis another type of short line (an individual carrier unaffiliated with any other carrier). The former would be able to purchase a line from a Class I carrier without any imposition of labor protection or of a waiting period while the latter would be faced with both of those. This has the result of putting the individual carrier in an unfair competitive position.

The third unintended consequence is that more Class I trackage could be abandoned as the market for sale or lease of these lines could dry up as a result of the reclassification of a number of carriers that are currently Class III carriers to the Class II category. Both the seller and the buyer could easily determine that the costs and time involved would make the sale of the line uneconomic and both would pass on the opportunity. The only realistic course left open to the Class I in that situation would be to proceed with an abandonment application. This would have an adverse effect on the shippers and receivers on those lines.

The Notice does not provide any cogent reasons for making this change. The STB has adopted its own accounting rules in which it has accepted some and rejected some of the generally accepted accounting principles ("GAAP"). It has the discretion to determine not to use certain of the GAAP standards and has correctly decided to do that regarding Class III carriers, *i.e.*, not requiring them to report according to FASB No. 94. It now proposes to change its own accounting rule for no discernible reason. The only result from this proposed change would be to cause hardships for holding companies like OmniTRAX, increase the cost of purchasing lines from Class I carriers, and causing all of the unintended consequences discussed previously in these Comments.

OmniTRAX is opposed to the proposed change contained in Ex Parte No. 634. If, however, the Board determines that there is some reason to impose consolidated reporting for all majority owned subsidiaries unless the control is temporary or does not rest with the majority owner, then OmniTRAX submits that rule should not be imposed on holding companies where its subsidiaries or affiliates consist of railroads that do not connect. The OmniTRAX railroads do not physically connect, each is operated as a

separate corporate entity with its own management, and each serve entirely separate shippers and receivers. Under no stretch of the imagination does the operation of these railroads constitute "a major rail system." In fact, they do not constitute a system under any definition of that word. The mere fact that a number of Class III carriers are under common control is not a sufficient reason to require consolidated reporting absent any other facts. The only immediate effect this proposed rule would have on OmniTRAX would be to increase its costs tremendously for no apparent reason.

OmniTRAX urges the Board to reject this proposal and discontinue Ex Parte No. 364.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Michael J. Ogborn", written over the printed name.

Michael J. Ogborn
Managing Director