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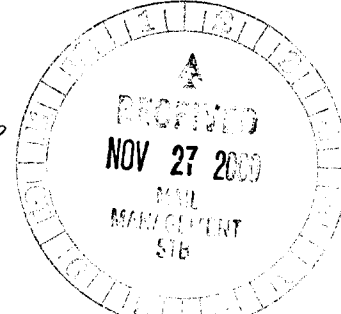
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November 27, 2000

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By Hand Delivery

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

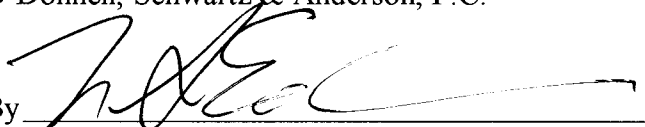
Re: Proposal to Require Consolidated Financial Reporting by  
Commonly Controlled Railroads - STB Ex Parte No. 634

Dear Mr. Williams:

Enclosed for filing in the referenced docket are the original and 10 hard copies of the Comments of the Transportation Trades Department, AFL-CIO, Rail Labor Division, as well as a copy of the comments in Word Perfect 9 format on a 3.5 inch IBM-compatible floppy diskette,

Very truly yours,

O'Donnell, Schwartz & Anderson, P.C.

By   
Richard S. Edelman

Enclosures

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

EX PARTE No. 634



PROPOSAL TO REQUIRE CONSOLIDATED FINANCIAL REPORTING  
BY COMMONLY CONTROLLED RAILROADS

**COMMENTS OF THE RAIL LABOR DIVISION  
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO**

Pursuant to the Board's decision served on September 25, 2000, the Rail Labor Division of the Transportation Trades Department AFL-CIO ("RLD") and its affiliated organizations<sup>1</sup> submit these comments in response to the Request for Comments on the Board's Proposal to Require Consolidated Financial Reporting by Commonly Controlled Railroads. The RLD agrees that the Board should adopt the proposal outlined in its September 25 Notice.

As the Board aptly noted, requiring commonly controlled railroads to consolidate their financial filing would bring simply bring Board practice into line with commonly accepted accounting principles. The Board's proposal would remedy a clear error in current Board rules (originally formulated by the Interstate Commerce Commission ("ICC")) which otherwise follow Generally Accepted Accounting Principles ("GAAP") derived in large part from Financial Accounting Standards Board ("FASB") standards. The Board plans to bring itself fully into accord with the FSAB standards by adopting its principles with the respect to financial reporting

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<sup>1</sup> American Train Dispatchers Department; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Service Employees International Union; Sheet Metal Workers International Association; Transportation • Communications International Union; Transport Workers Union of America

for commonly owned companies: FASB Statement No. 94. Moreover, adoption of the Board's proposal would bring the Board into line with widespread governmental practice with respect to financial reporting for commonly controlled entities. Indeed, the RLD submits that having recognized that the Board's current practice is not in accord with the accounting principles that the ICC said it had adopted, and having stated that it intends to remedy that situation, it would be arbitrary and capricious for the Board to decline to adopt the proposed rule set forth in the September 25, 2000 Notice.

The RLD further submits that there could not be any reasoned basis for the Board to retreat from its intention to adopt the FASB standard requiring consolidated reporting for commonly owned and controlled entities. As the Board observed, the FASB is the authoritative body on financial accounting standards and there is no reason whatsoever for the Board to depart from the FASB's well-recognized and widely applied principles. There is nothing about the railroad industry that even remotely suggests that there might be a rational basis for it to be treated in a manner at odds with other industries for the sole purpose of STB reporting and regulatory functions. Commonly controlled companies must file consolidated reports for Securities and Exchange Act and Internal Revenue Act purposes; there is no reason for them to be treated as separate for Interstate Commerce Act purposes.<sup>2</sup>

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<sup>2</sup> Moreover, under other federal statutes, corporate form is not allowed to control decisions and regulation under Federal law. *Anderson v. Abbott*, 321 U.S. 349, 363 (1943); *Bangor Punta Operations v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974). See e.g. *Electirc Bond & Share Co. v. Securities and Exchange Comm.*, 303 U.S. 419, 440 (1938)—holding companies which controlled public utilities subject to Public Utilities Holding Co. Act (15 U.S.C. §79); *Bowater Steamship. Co. v. Patterson*, 303 F. 2d 369, 372 (2d Cir. 1962)—Norris LaGuardia Act (29 U.S.C. §101) ban on anti-strike injunction applies to picketing at affiliate of struck corporation; *North American Telecommunications Ass'n. v. FCC*, 772 F. 2d 1282, 1293 (7<sup>th</sup> Cir. 1985)—“FCC can pierce corporate veil in order to prevent frustration of its

Accounting Research Bulletin No. 51 ("ARB No. 51"), the original FASB publication regarding consolidated financial reporting issued in 1959, permitted non-consolidated reports for "nonhomogeneous" corporate families. In FASB No. 94, the Board noted the increasing use of "nonhomogeneity" as a basis for corporations to evade the consolidated reporting requirements of ARB No. 51. *FASB No. 94 at ¶6*. Accordingly, the Board expressly eliminated the "nonhomogeneous" exception from ARB No. 51 and limited the exceptions to consolidated reporting to situations where: (1) control is temporary; or (2) does not rest with the majority owner. *Id.* at ¶13. Here, the STB proposes consolidated reporting "of all railroad and railroad-related activities on a consolidated basis for all regulatory purposes." Notice at 3. The RLD submits that even under ARB No. 51, the STB and the ICC before it, should have required consolidated reporting. The FASB No. 94 statement only reinforces the need for the STB to "get in step" with GAAP and the other reporting requirements of the federal government.

The RLD disagrees with the STB's proposed rule to the extent that it would exclude earnings from activities outside the United States. In doing so, the Board would not be exercising jurisdiction over activities outside the United States, it would merely be considering the true size of the carriers involved for all purposes for which the STB has viewed the size of carriers as

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regulatory tasks"; *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965)—NLRB had jurisdiction over dispute involving small corporation because of relationship with parent and affiliates. *See also Baker v. Stuart Broadcasting*, 560 F. 2d 389, 392 (8<sup>th</sup> Cir. 1977)(Equal Employment Opportunity Act); *Marshall v. Arlene Knitwear, Inc.* 454 F. Supp. 715, 719 (E.D. N.Y. 1978)(Age Discrimination in Employment Act); *General Telephone Co. v. United States*, 449 F. 2d 846 (5<sup>th</sup> Cir. 1971)(Federal Communications Act); *Kavanaugh v. Ford Motor Co.*, 353 F. 2d 710, 716(Automobile Dealers Franchise Act); *Ohio Tank Car Co. v. Keith Ry. Equipment Co.*, 148 F. 2d 4, 7-8 (7<sup>th</sup> Cir. 1945)(Elkins Act); *Corn Products Refining Co. v. Benson*, 232 F. 2d 554, 564 (2d Cir, 1956) (Commodity Exchanges Act); and *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F. 2d 983, 985 (9<sup>th</sup> Cir. 1971)(Packers and Stockyards Act).

significant. Recognition of the true size of a carrier or related group of carriers would only affect STB classification and consideration of activities and reports of those carriers and families of carriers when one or more of them is subject to STB jurisdiction. Indeed, the Board would not be treating affiliates of foreign carriers properly if it ignored the cross-border relationships. The Board can not reasonably consider the full impact of an action involving a U.S. affiliate of a foreign carrier, or obtain adequate information from a report by that carrier if it ignores the foreign parent or affiliate, particularly when the affiliates connect and are operated in a joint or coordinated manner. This linkage between “foreign” and “domestic” operations was vividly revealed in the ongoing proceeding before the Board regarding the continued financial viability of Greyhound as a result of economic reverses suffered by its Canadian parent, Laidlaw Transit. *See, Laidlaw Inc. & Laidlaw Transit Acquisition Corp.–Merger–Greyhound Lines, Inc.*, STB Docket No. MC-F-20940, served August 18, 2000.

The RLD contends that the Board’s adoption of FASB Statement No. 94 standards is long overdue. For many years, Rail Labor argued that commonly owned carriers and corporate families of carriers and carrier related enterprises should be recognized as single entities for purposes of ICC/STB reporting and regulation. Rail Labor noted that treating commonly controlled rail and rail related corporations as single entities was fully consistent with the real world relationships among those corporations and consistent with the way they were treated by other federal bodies. While many commonly controlled railroads and their affiliates may be nominally separate corporations, they are in reality structurally and operationally integrated . Oftentimes such commonly controlled corporations share common officers and directors and upper and middle level executives work for more than one affiliate and move among affiliates.

Many commonly controlled railroads consolidate their purchasing and leasing of goods and services and use the same contractors. There are commonly controlled clusters of railroads and rail service corporations where multiple railroad corporations utilize the service of affiliated companies that perform administrative and personnel work, maintenance of way work, signal work and maintenance of equipment work. And train operations of connecting rail affiliates are typically co-ordinated for obvious reasons.

Furthermore, in some cases after representations of corporate independence were made to the ICC, the corporations involved later claimed functional unity when it suited their purposes to gain advantage under the law. For example, after declaring to the ICC that the Fox River Valley Railroad would be entirely independent of its connecting affiliate the Green Bay & Western Railroad ( *FRVR Corp.—Acquisition and Operation Exemption—Chicago & North western Transp. Co.*, ICC F.D. No. 31205 (served February 28, 1989), the president of the parent corporation of the two carriers testified in a Wisconsin state court case that the FRVR was acquired to enhance business opportunities for GBW and for their operations to be coordinated for their mutual benefit.

Similarly, the parent of the Wisconsin Central Ltd. (“WCL”) argued to the ICC that its Fox Valley & Western Ry. (“FVW”) subsidiary would be completely independent of WCL ( *Fox Valley & Western Ltd. —Exemption Acquisition and Operation—*, 9 ICC 2d 209 (1992)). However, shortly after the ICC approved the transaction, WCL and FVW argued to the National Mediation Board that “comprise[d] a single transportation system for representation purposes because train operations, management and marketing are integrated and WCL and FV&W ‘have a common human resources function’”. *Fox Valley & Western R.R.*, 21 N.M.B. 319,320 (1994).

The RLD also notes that the ostensibly separate but related Gateway Western Ry. Co. and Gateway Eastern Ry. Co. were effectively treated as a single entity referred to as “Gateway” in *Kansas City Southern Industries, Inc. et al.—Control--Gateway Western Ry. Co. and Gateway Eastern Ry. Co.*, STB F.D. No. 33311 (served May 1, 1997), and that Gateway Western and Gateway Eastern were referred to as “the Gateway system” in *Kansas City Southern Ry. Co.—Trackage Rights Exemption--Gateway Western Ry. Co. and Gateway Eastern Ry. Co.*, STB F.D. No. 33780 (served September 15, 1999). And in *CSX Corp. et al, Norfolk Southern Corp. et al—Control and Operating Leases/Agreements-Conrail Inc.*, STB F.D. No. 33388 (served September 17, 1997), the commonly controlled Buffalo & Pittsburgh R.R., Inc. and Allegheny & Eastern R.R., Inc. jointly filed a request for B&Ps inclusion in the CSX/NS-Conrail transaction and referred to contingency plan for B&P to grant trackage rights to A&E for it to connect with a third affiliate, Pittsburgh & Shawmut R.R. “[i]n order to replace the family connection when BPRR is included in the primary transaction”.

The RLD therefore submits that requiring consolidated reporting by commonly controlled carriers and their railroad-related affiliates for STB purposes is not only consistent with controlling accounting standards, it is also consistent with the real organizational and operation relationships among families of railroads.

## CONCLUSION

Since there is no rational basis for the Board to refrain from adopting the FASB No. 94 principles for commonly controlled carriers and their rail related affiliates for STB reporting purposes, the RLD urges the Board to adopt those principles and require commonly controlled railroads to consolidate their financial filings.

Respectfully submitted,

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Transportation Trades Department, AFL-CIO

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