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March 21, 2005

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423

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MAR 21 2005
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Re: STB Ex Parte No. 575, Review of Rail Excess and Competition Issues

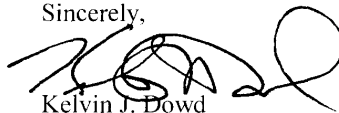
Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Renewed Petition of the Western Coal Traffic League for Rulemaking to Eliminate Unreasonable "Paper Barriers" to Interchange, along with a computer disk which contains the filing.

An additional copy of the Petition also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

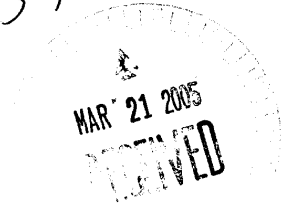
Sincerely,



Kelvin J. Dowd
An Attorney for
The Western Coal Traffic League

cc: Parties of Record

213590



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 575

**REVIEW OF RAIL ACCESS
AND COMPETITION ISSUES**

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**RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE
FOR RULEMAKING TO ELIMINATE
UNREASONABLE "PAPER BARRIERS" TO INTERCHANGE**

Of Counsel:

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Dated: March 21, 2005

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**Attorneys for The Western Coal
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 575

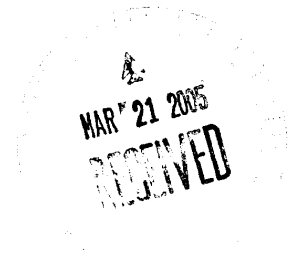
**REVIEW OF RAIL ACCESS
AND COMPETITION ISSUES**

**RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE
FOR RULEMAKING TO ELIMINATE
UNREASONABLE "PAPER BARRIERS" TO INTERCHANGE**

The Western Coal Traffic League ("WCTL")¹, by its undersigned attorneys, hereby renews its request under 5 U.S.C. § 553(e) and 49 C.F.R. § 1110.2(b) that the Surface Transportation Board ("STB" or "Board") initiate a rulemaking to identify and proscribe unreasonable "paper barriers" to interchange in the railroad industry. A copy of WCTL's December 21, 1998 Petition requesting such relief, which was supported by the testimony of Professor Paul S. Dempsey, a noted expert in transportation law and policy, is appended for convenient reference as Attachment 2.

It has now been six years since the Board ordered WCTL's 1998 Petition held in abeyance, pending further experience under the then just-negotiated "Railroad Industry Agreement" ("RIA") between the Association of American Railroads ("AAR") and the

¹ WCTL is an association of shippers and consumers of western coal, most of which is transported by rail. A list of current members is appended as Attachment 1.



American Short Line and Regional Railroad Association (“ASLRRA”).² During the intervening years, pre-existing paper barriers have continued to restrain competition for substantial volumes of traffic originating or terminating on small railroads, and Class I carriers have continued to create new paper barriers as they have spun off more of their marginal rail lines to smaller, typically non-union, carriers. While recent amendments to the RIA apparently have resolved certain procedural imperfections in the prior agreement that were troubling the short lines, there has been nothing done to address the RIA’s twin failings that were the primary focus of WCTL’s 1998 Petition: the agreement’s exclusion of any remedies for the pernicious effect of unreasonable paper barriers on *pre-existing* traffic, and its denial of any remedy for adversely affected *shippers*, whose interests do not necessarily coincide with those of the short lines serving them.

WCTL respectfully submits that now is the time for the Board to act on WCTL’s 1998 Petition, and to open a proceeding to establish clear guidelines for evaluating the reasonableness of existing and prospective paper barriers to interchange, which guidelines then could be invoked on a case-by-case basis by adversely affected shippers. The 1998 Petition included WCTL’s suggested draft of such guidelines,³ which WCTL again commends to the Board’s favorable consideration. In the requested rulemaking, other parties also would be free to propose, and the Board would be free to consider, alternative

² As discussed *infra*, the RIA seemed to offer limited private remedies for some paper barriers when they would interfere with the development of “new traffic.”

³ See Attachment 2, Appendix B.

approaches to accomplishing these objectives.⁴ Given the lack of any private sector progress toward the dismantling of unreasonable and anti-competitive paper barriers over the past six years, however, there is no legitimate justification for further delay.⁵

BACKGROUND

A. 1980-1998: Emergence of the Paper Barrier Problem

Paper barriers to interchange – that is, provisions in rail line lease agreements between large railroads and short line carriers that restrict or discourage the acquiring short line’s interchange of traffic with competitors of the lessor⁶—appear to have begun as mechanisms to facilitate the financing of rail line acquisitions by small, under-capitalized short line entrepreneurs. Under such arrangements, rather than insisting on fixed rentals for lines conveyed to cash-strapped short lines, Class I carriers would accept the profits that

⁴ Neither the AAR nor the ASLRRA, which replied in opposition to the 1998 Petition, addressed the merits of WCTL’s proposal, nor did they suggest alternative approaches. Instead, they argued that the RIA should be given time to work, and that initiation of a rulemaking proceeding to augment the railroads’ negotiated compromise at that point could chill future efforts to forge private sector solutions to regulatory problems. In its March 2, 1999 order holding the 1998 Petition in abeyance, the Board adopted the same reasoning and likewise did not address the merits of WCTL’s proposal.

⁵ WCTL and its interest in the paper barrier problem were described in the 1998 Petition. See Attachment 2, at 1-2.

⁶ Conceptually, paper barriers also could be included in agreements for the outright sale of rail lines. However, in practice they typically have appeared in leases, perhaps because the periodic rental payment mechanism that is central to a lease arrangement creates a ready framework for the crafting of a paper barrier.

would be earned on traffic interchanged with the short line in lieu of part or all of the rental that otherwise would have been demanded. A common mechanism for accomplishing this is a periodic rental coupled with a per-car credit for traffic interchanged with the lessor that offsets the rental obligation. Such arrangements could make economic sense for a Class I if, without them, prospective short line bidders could not afford to pay for a light density line and the Class I's next best alternative to a short line conveyance would be outright abandonment, with a resultant loss of all traffic and related revenue from the line.

During the 1980's, the Class I railroads' plant rationalization programs (*i.e.*, their programs for the systematic pruning of unneeded or underperforming assets, including light density lines) gained speed, encouraged and facilitated by a relaxation of regulatory scrutiny. Among the more significant steps in this direction was the Interstate Commerce Commission's establishment of expedited, self-executing "Class Exemptions" covering short line acquisitions that otherwise would have required case-by-case prior approvals under 49 U.S.C. § 10901, and various railroad control transactions otherwise subject to scrutiny under what is now 49 U.S.C. § 11323 *et. seq.* As the process advanced and transactions multiplied, it became apparent that the credit-for-traffic-interchanged mechanisms used to finance short line acquisitions also could serve as highly effective barriers to any competition that the Class I otherwise might face following the spin-off, for traffic originating or terminating on the short line. For example, by doubling or tripling the rent and making a corresponding upward adjustment to the per-car credit, the effective cost

to the short line lessee of interchanging traffic with another carrier would be multiplied, while the overall net economics of the transaction would remain the same so long as all interline traffic continued to go to the lessor. If the effective cost was raised high enough and the traffic diversion threshold trigger was set low enough, any interchange with the lessor's competitor would be completely foreclosed. Other leases achieved the same objective by tying lease credits to percentages of traffic interchanged with the lessor, rather than to absolute car counts. Still others adopted a more direct approach, and imposed penalty rentals for any traffic interchanged with a competitor, regardless of how much traffic was still going to the lessor.⁷

As both the duration of these arrangements and the gap between the economic consequences of prohibited interchanges and any reasonable assessment of the value of the subject property grew, it became increasingly clear that mechanisms which initially might have been justified as alternative financing schemes in fact had evolved into naked restraints on competition.

Because the economic terms of short line leases typically have been treated as confidential (for transactions processed under the Board's Class Exemption procedures, the

⁷ Examples of such paper barrier variants may be found in the lease excerpts reproduced in Attachment 3. While most rail line lease agreements have been treated as confidential and never made public, several leases entered into in the 1990's were included in filings with the Securities and Exchange Commission, and as such are available for scrutiny. The leases from which the attached excerpts were drawn were obtained from such filings.

leases themselves often are never filed), affected shippers on the lines in question usually would be unaware that the transaction entailed the imposition of a paper barrier until they tried to route their traffic over the lessor's competitor, rather than the lessor. At that point, the short line would be forced either to refuse to establish a through route with the competitor, or to set a local rate for traffic routed via the competitor that was high enough to cover the cost of the paper barrier penalty that the short line would incur. In all too many – if not most – cases, the penalties were high enough that either response by the short line effectively would prevent the shipper from using the competitor.

B. 1998-1999: Ex Parte No. 575 and the Railroad Industry Agreement

Despite the secrecy shrouding most paper barrier transactions, many shippers became painfully aware of their effects, and some complained to the STB or its predecessor about them⁸. At the same time, many short lines – though they had accepted such provisions (however begrudgingly) when they signed their leases – had begun complaining that the Class I carriers' strict enforcement of the provisions was frequently hampering their efforts to develop new traffic and/or prevent the loss of existing traffic to other modes. In its April 17, 1998 order in this docket, the Board acknowledged such complaints, but deferred

⁸ See e.g., F.D. No. 31360, *South Carolina Central Railroad Company, Inc. – Purchase and Lease – CSX Transportation Inc. Lines in Georgia and Alabama*, Decision served May 4, 1989. See also Docket No. 41528, *Kansas City Power & Light Co. v. Missouri Pacific Railroad Company, et. al*, Complaint filed December 29, 1994 at 10.

consideration of the issues they raised pending private negotiations between the AAR and the ASLRRA over various issues, including paper barriers.

On September 10, 1998, the AAR and ASLRRA announced that they had reached agreement on a comprehensive charter to govern their future relationships, which they called the "Railroad Industry Agreement." Shortly thereafter, they submitted the rate-related aspects of the RIA to the STB for approval, which promptly was granted. The parties did not seek or obtain STB approval for the non-rate provisions of the RIA, including the paper barrier provisions.

The RIA's treatment of paper barriers begins with a broad statement of the "public policy principles" that should apply to such contract terms:

Only legitimate "paper barriers" should be enforceable. Paper barriers are restrictions on interchange imposed by contract at the time of the creation of the Short Line. Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. Such barriers should not restrict the Short Line's ability to develop New Traffic with another carrier if the selling or leasing Large Railroad cannot or will not participate in the New Traffic. Excessive per car charges or other penalties imposed if a car is interchanged to another Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

RIA at 3 (emphasis added).

As Professor Dempsey observed in his testimony accompanying WCTL's 1998 Petition (Attachment 2, V.S. Dempsey at 7-9), on its face the quoted principle is one with which most shippers presumably would agree. In particular, the RIA's definition of

“legitimate” paper barriers as those that merely provide “fair payment” to the lessor for the value of the leased line, and its admonition that paper barriers exceeding such levels should not be permitted, are principles that are consistent with the positions taken by WCTL in its Petition. However, both the AAR and the ASLRRRA have interpreted their agreement as limited to “new traffic” which the Class I railroad is unable or declines to serve,⁹ thereby leaving all shippers whose traffic is not deemed “new,” and/or is desired by the Class I, at the mercy of whatever restrictive paper barriers the short lines serving them may have accepted in order to acquire the lines at issue, regardless of how excessive the barriers to interchange might be, and regardless of their duration. Furthermore, the RIA limits enforcement of its paper barrier provisions to negotiations and/or private arbitration between the involved carriers. Affected shippers, who constitute the real parties in interest when it comes to restrictions on their competitive transportation options, are denied any right to challenge the paper barriers.

WCTL’s 1998 Petition addressed the twin shortcomings of the RIA’s paper barrier provisions summarized above, and proposed appropriate remedies. In particular, the Petition included suggested language for an added section in 49 C.F.R. Part 1180 that would

⁹ The railroads’ reading of the RIA paper barrier principle is at odds with the literal language of the provision. The fourth sentence, the only one that mentions “new traffic,” appears on its face to add a further requirement that paper barriers must meet in order to pass muster as legitimate, over and above the “fair payment” standard expressed in the previous sentence. The sentence does not appear on its face to define the universe of traffic to which the paper barrier limitations apply.

implement the general principles articulated in the RIA, and establish a set of rebuttable presumptions to facilitate the determination of whether a particular paper barrier is excessive and therefore unreasonably anticompetitive. Pre-existing traffic, as well as new traffic, would be entitled to the protection of the presumptions.¹⁰ And by creating an STB forum for resolving disputes over paper barriers, WCTL's proposal would enable aggrieved shippers as well as short lines to challenge particular paper barriers as unreasonable under the governing standards.

In their replies, neither the AAR nor the ASLRRRA addressed the merits of WCTL's proposed rules. Instead, each asked that the Petition be denied as premature, arguing that the just-completed RIA should be given a chance to work before the STB considered making changes to it, and that intervention at that time would chill future efforts to negotiate private sector solutions. The AAR also argued that shippers did not need separate standing to challenge paper barriers because their interests were fully represented by the short lines serving them, and that any STB effort to regulate the terms of short line transactions would discourage such transactions, contrary to Congress' intent.¹¹

¹⁰ As explained at length in the 1998 Petition, and for the reasons articulated in the accompanying testimony of Professor Dempsey, WCTL does not dispute that paper barriers properly may be found to be reasonable and lawful when their anticompetitive effects are modest and short-lived, and the public benefits they offer (*e.g.*, financing a meritorious short line acquisition) outweigh such temporary anticompetitive effects. WCTL submits that just as under the antitrust laws, what is required is a *balancing* of benefits against burdens.

¹¹ See Reply of AAR, January 11, 1999 at 5-8.

On March 2, 1999, the STB served an order in response to the 1998 Petition. Therein, the Board largely accepted the AAR/ASLRRRA “prematurity” arguments, and on that basis ruled that the 1998 Petition should be held in abeyance pending further experience under the RIA. The STB explained:

... [W]e are not prepared to act in a way that would quickly overturn a privately negotiated settlement, completed at our direction. Such precipitous action on our part would unduly chill the process of privately negotiated settlements that we have stated we prefer, by pursuing regulation of uncertain consequences. We believe that a more responsible approach would be to develop a better record with the benefit of experience under the RIA before we act on WCTL’s petition. It may be that no regulations will ultimately be necessary; it may be that the private parties will work out some but not all of the issues that concern WCTL; or it may be that the issues that will arise will be different from those that WCTL now envisions. In any case, it appears to us that the petition is premature and that the appropriate course of action is to hold the petition for rulemaking in abeyance, and to revisit the matter later based on the experience under the RIA.

Ex Parte No. 575, Decision served March 2, 1999, at 3.

C. 1999-present: Life Under the RIA

In the six years that have passed since the Board ordered WCTL’s 1998 Petition held in abeyance, there have been significant changes in the Board’s policies regarding competition in the railroad industry, even as the parties were gaining experience under the RIA.

On the policy side, perhaps the most notable development was the Board's in-depth re-evaluation of its merger guidelines and policies in 2000-2001. That re-evaluation culminated in revised rules and policies that, in the Board's words, placed "...greater emphasis ... on *enhancing* competition" rather than simply protecting whatever competition already existed.¹² Under rules currently codified at 49 C.F.R. Part 1180.1, proponents of major rail consolidations now are required to specifically explain how conditions would result in new or more effective competition, not simply maintain an equivalent to the pre-merger *status quo*. 49 C.F.R. Part 1180.1(c)(iv).

Over the same time frame, however, Class I railroads continued to spin off their remaining marginal operations to short line railroads, and in the process more new paper barriers were created.¹³ The process shows no signs of abating. Moreover, although the AAR and ASLRRRA recently were able to agree on amendments to the RIA that addressed

¹² Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, Decision served June 11, 2001, at 9.

¹³ While the number of such new paper barriers is difficult to estimate (since most short line spin-offs are handled under expedited exemption procedures that do not require submission of the governing lease or sale agreement), in one transaction the parties opted to seek and obtain formal approval under 49 U.S.C. §§ 11323 *et seq.* and 49 C.F.R. Part 1180.2 *et seq.*, rather than invoking the Class Exemption available under 49 C.F.R. Part 1150.41 *et seq.* In the ensuing STB proceeding, the existence of a paper barrier was revealed, and its legality became a focus of questioning during oral argument. See Finance Docket No. 34495, *Buckingham Branch Railroad Company—Lease—CSX Transportation, Inc.*, Decision served November 5, 2004, at 6-7. Interestingly, during the oral argument the carriers did not suggest that the paper barrier was lawful simply because it did not reduce competition *ex ante* (there having been none). Rather, they contended that the paper barrier was reasonable because it would not have a significant effect on the short line's ability to interchange traffic profitably with carriers other than the lessor (CSXT).

certain concerns that the short lines had regarding the effectiveness of the RIA paper barrier relief mechanisms, those amendments did nothing to redress *shipper* concerns regarding the lack of any relief from the anticompetitive effects of excessive paper barriers. Even so, the conflict between the artificial restrictions on competition that flow directly from paper barriers, and sound transportation policy has been acknowledged:

Paper barriers are clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. As such, these restrictions effectively tie the shortline to a single Class I carrier, thereby restricting the flow of interstate commerce and reducing the potential public benefits of the lease transaction.

Buckingham Branch Railroad, supra, at 9 (Vice-Chairman Mulvey, dissenting).

To summarize, after six years of experience under the RIA, the problems that precipitated the filing of WCTL's 1998 Petition have persisted and grown, and remain incapable of resolution within the framework of that agreement. Meanwhile, in light of the elevated importance that the Board's decision in *Ex Parte No. 582 (Sub-No. 1)* gave to the enhancement of intramodal competition, a continued tolerance of anticompetitive paper barriers is even more out of step with public policy now than it was back in 1999. WCTL submits that the time has come for the Board to address and resolve the paper barrier issues that WCTL raised in its 1998 Petition.

DISCUSSION

A. Unreasonable Paper Barriers Must be Subject to Challenge by Adversely Affected Shippers, and Not Simply by Short Lines.

The 1998 Petition and accompanying testimony of Professor Dempsey explained at some length why paper barriers that discourage or prevent a short line from interchanging traffic with its landlord's competitors should be unenforceable unless it is shown that a particular paper barrier (1) generates public benefits outweighing its anticompetitive effects, and (2) is as narrowly drawn as possible. The Petition also explained why the Board should promulgate specific rules, including rebuttable presumptions, to facilitate interested parties' evaluation of existing and proposed paper barriers.

See Attachment 2, at 11-16. WCTL's arguments remain valid, and have not yet been challenged by any party. WCTL incorporates them herein by reference, rather than repeat them.¹⁴ However, one point does merit further discussion here; namely, the need for affected shippers, and not simply short lines, to have a forum for seeking relief from unreasonable paper barriers.

⁴ While WCTL's Petition advanced a set of substantive rules to govern the evaluation of pre-existing and new paper interchange barriers, WCTL did not undertake to craft all the additional procedural steps that might be needed to give effect to the substantive standards, such as how and under what circumstances the Board should require the public disclosure of paper barriers included in new transactions brought before the agency for approval or exemption. Such matters also would be appropriate for consideration in the rulemaking proceeding that WCTL requests be initiated.

As noted *supra*, in opposing the 1998 Petition the AAR argued that there was no need to allow shippers to challenge paper barriers independently, because the short lines serving them could be counted on to represent the shippers' interests. Whatever the merits of that argument possibly might be as it applies to *new* traffic,¹⁵ however, it is utterly false with respect to *pre-existing* traffic. While the shipper of existing traffic always will have a direct interest in obtaining access to competition from a second Class I carrier, the short line handling such traffic for its lessor very often would not be expected to have any real incentive to advocate the shipper's case, since it will earn its switching revenues regardless of which Class I receives the traffic at the interchange. For example, while the ASLRRRA has bargained to perfect its right to obtain paper barrier relief for new traffic, it has never sought to expand the RIA mechanisms to allow paper barrier relief for pre-existing traffic.

Because only the Board can provide adversely affected shippers with a forum in which to press their objections to the effect of unreasonable paper barriers on pre-existing traffic, it is imperative that the Board allow such challenges by promulgating rules along the lines WCTL has proposed. See Attachment 2, Appendix B.

¹⁵ There are a number of reasons why even as to new traffic or new restrictions, an affected shipper should have rights independent of the short line's. For example, if the short line in question is one of many subsidiaries of a larger concern pursuing multiple transactions with the same Class I carrier, there may be an understandable reluctance on its parent's part to press a case for rejection of a paper barrier as vigorously as would a particular shipper faced with direct and measurable harm from the foreclosure of competitive transportation alternatives.

B. Arguments Previously Advanced in Defense of Paper Barriers Cannot Justify Continuing to Deny Shippers Relief.

While Class I railroads have defended their use of paper barriers to restrain competition in a variety of ways over the years, two arguments deserve brief mention at this juncture because they appear to have held some sway with the Board at various points. They are: (1) the “no harm, no foul” defense (the Class I carrier had monopoly control over the traffic of shippers on the line being leased prior to the transaction, so a paper barrier that preserves that monopoly cannot further diminish competition); and (2) the “don’t interfere with private sector solutions” defense. We address each in turn.

1. **“No Harm, No Foul.”** As Professor Dempsey explained (Attachment 2, V.S. Dempsey at 12-13), this argument runs counter both to principles of the Rail Transportation Policy, and to established rules applied by the antitrust courts. More specifically, he explained that restraints of trade that are allowed when confined to the components of a single enterprise (*e.g.*, price-fixing agreements among corporate affiliates, or agreements among such affiliates not to compete against one another), become unlawful if continued following a corporate spin-off of one or more of the conspirators. *See also, Blackburn v. Sweeney* 53 F. 3d 825 (7th Cir. 1995). Implicit in this rule is the recognition that antitrust law and policy are intended to promote and encourage the *growth* of competition, not simply retard its erosion. By the same token, the STB’s charge under the Rail Transportation Policy is to encourage the enhancement of healthy intramodal competition,

a point which the Board clearly recognizes in its revised merger policies (49 C.F.R. § 1180.1). Accordingly, the fact that a Class I operating its own light density line can limit competing carriers' access to its shippers' traffic does not mean that it is proper policy to endorse a continuation of that restriction after the light density line is transferred to another, independent carrier. To the contrary, such post-conveyance restraints (*i.e.*, paper barriers) must be subject to evaluation under the same balancing approach that the Board would apply in judging any other inter-carrier agreements to restrict competition.

2. "Don't Interfere with Private Sector Solutions." In opposing WCTL's 1998 Petition, both the AAR and the ASLRRA stressed that in keeping with the Board's preference for private sector solutions to complex industry problems, they had worked to reach agreement on the RIA, and that if the Board immediately modified or augmented the agreement it would discourage parties from making similar efforts in the future.¹⁶ While the Board's order holding the 1998 Petition in abeyance gave weight to this argument, it is fundamentally flawed in at least two respects.

First, as explained above, the RIA is the product of negotiations that intentionally excluded an entire class of interested parties; *i.e.*, the shippers affected by paper barriers. The result was an incomplete agreement that addressed the negotiating parties' interests and concerns, but ignored the interests and concerns of the principal victims of paper barriers insofar as they did not coincide with those of either negotiating party. To treat

¹⁶ See Reply of ASLRRA, January 11, 1999 at 1.

this as a “private sector solution” entitled to deference on issues of interest primarily to the excluded shippers would be akin to treating a market division agreement between competitors as sacrosanct despite protests from the conspirators’ customers.

The second flaw in the private sector solution defense is the one noted by Vice-Chairman Mulvey in his dissent in *Buckingham Branch*: the Board has a statutory responsibility to enforce the law for the benefit of the public interest, and must “interfere with contracts between private individuals ... when contractual provisions run counter to public policy and the public interest as a whole.” *Id.* at 9. An agreement that unreasonably restrains competition must be rejected by the Board, regardless of whether the particular litigants appearing before it support the restraint.

CONCLUSION

For the reasons set forth above and in WCTL’s 1998 Petition, WCTL respectfully requests that the Board initiate a rulemaking proceeding to consider amending its policies and procedures for evaluating paper barriers to interchange, and that after due consideration of the comments it receives, adopt revised rules substantially consistent with those set forth in the 1998 Petition (Attachment 2, Appendix B) in order to provide adversely affected shippers with a meaningful and effective remedy for unreasonable and anticompetitive paper barriers.¹⁷

¹⁷ There is no question that the Board retains the power to grant meaningful relief
(continued...)

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

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Dated: March 21, 2005

By: William L. Slover

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¹⁷(...continued)

from unreasonable paper barriers, including not only those proposed after the new rules become effective, but also those contained in lease agreements that are already in effect. Most short line transactions have been processed by means of Class Exemptions, to which the immunities conferred on transactions approved under 49 U.S.C. §§ 11323 *et seq.* did not attach. *Railway Labor Executives Ass'n v. U.S.*, 987 F. 2d 806, 813 (D.C. Cir. 1993). Moreover, the Board retains authority under 49 U.S.C. §§ 722 and 10502 (d) to reopen or conditionally revoke an approval or exemption previously granted, in order to address and remove an unreasonable paper barrier.

ATTACHMENT 1

ATTACHMENT 1

**MEMBERS OF THE
WESTERN COAL TRAFFIC LEAGUE**

Alliant Energy
Ameren Energy Fuels and Services
Arizona Electric Power Cooperative, Inc.
Arizona Public Service
Associated Electric Cooperative, Inc.
Cleco Corporation
City of Austin, Texas
City Public Service Board of San Antonio
Kansas City Power & Light Company
Lower Colorado River Authority
MidAmerican Energy Company
Minnesota Power
Nebraska Public Power District
Omaha Public Power District
Texas Genco, LP
Texas Municipal Power Agency
Westar Energy
Western Farmers Electric Cooperative
Western Fuels Association, Inc.
Wisconsin Public Service Corporation
Xcel Energy

ATTACHMENT 2

BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of:

REVIEW OF RAIL ACCESS
AND COMPETITION ISSUES

)
)
) Ex Parte No. 575
)
)

PETITION FOR FURTHER RULEMAKING
TO ELIMINATE UNREASONABLE "PAPER BARRIERS"
TO INTERCHANGE

The WESTERN COAL TRAFFIC LEAGUE ("WCTL"), by its undersigned attorneys, hereby respectfully petitions the Surface Transportation Board ("STB" or "Board"), pursuant to 5 U.S.C. § 553(e) and 49 C.F.R. § 1110.2(b), to initiate a rulemaking proceeding to consider the proscription of unreasonable "paper barriers" to the free interchange of traffic between and among all connecting common carriers by railroad. Suggested language for the regulations WCTL proposes is attached hereto as Appendix B.

This Petition consists of Argument of Counsel, supported by the expert testimony of Paul S. Dempsey, Professor of Law at the Denver University College of Law and Director of its Transportation Law Program.

IDENTITY AND INTEREST

The Western Coal Traffic League is a voluntary association of enterprises whose members annually purchase and transport

in excess of 95 million tons of coal mined in the western United States. WCTL members are listed in Appendix A. Each WCTL member moves substantially all of its coal by rail.

WCTL members have a keen interest in the Board's treatment of paper barriers to interchange because, while many of their electric generating facilities are served by a single railroad, that railroad in some instances is a short line railroad that purchased or leased its lines from a Class I railroad. If the terms of the agreements by which such short lines obtain their tracks are allowed to contain excessive paper barriers to interchange, the WCTL members served by such short lines will lose the opportunity they would otherwise have had after the sale to obtain alternative coal transportation service from a second connecting Class I carrier.

SUMMARY

Public policy, as articulated in both the Rail Transportation Policy and the antitrust laws, mandates the pro-active promotion of competition within the railroad industry, and not simply the minimization of harm to whatever competition presently survives. While this does not mean that the Surface Transportation Board must promote competition to the exclusion of all other transportation policy goals, it does mean that competition cannot take a back seat to those other goals, but rather must be given great weight in the Board's balancing of competing interests.

These basic principles are directly applicable to so-called "paper barriers to interchange," by which we mean terms in rail line sales and lease agreements that penalize the buyer for interchanging traffic with competitors of the seller, or in some other fashion discourage or prevent such free interchanges. As Professor Dempsey notes, such paper barriers are by definition anti-competitive, but properly circumscribed they can serve useful purposes in terms of assisting a small carrier with limited resources to finance its acquisition of a rail line. Accordingly, in evaluating paper barriers, the Board should perform the same balancing that it does in merger cases, measuring the public benefits that the paper barriers allegedly serve against the magnitude of their anti-competitive impact.

The railroad industry seems to agree that only "legitimate" paper barriers should be enforceable, but their recently-approved agreement to that effect does not obviate the need for an STB forum for application of those principles where the railroads' private agreement leaves off. WCTL therefore proposes that the Board institute a "child" rulemaking under this docket, as it has done for other issues, to consider and promulgate specific policies that it will apply in evaluating paper barriers properly brought before it for review.

Procedurally, WCTL requests that the Board issue a Notice of Proposed Rulemaking, proposing rules along the lines of the draft attached hereto, and providing for the filing of opening and reply comments thereon by all interested parties.

WCTL further requests that following due consideration, the Board issue final rules substantially in accordance with Appendix B.

BACKGROUND

Proceedings in this docket have revealed a substantial reservoir of shipper dissatisfaction with the policies of the Board and its predecessor, the Interstate Commerce Commission, regarding the preservation and enhancement of competition in the railroad industry. As the Board acknowledged in its April 17, 1998 order, shippers generally perceive the Board's and ICC's policies as doing little to retard the inexorable reduction of competition that results from an industry hell-bent on consolidation, coupled with a regulatory scheme that seemingly abets such consolidations as the panacea for perceived railroad operating inefficiencies and inadequate revenues.

The Board's response was to initiate "child" rulemaking proceedings on certain discrete sub-issues, while postponing consideration of other issues pending efforts by the involved parties to negotiate mutually-acceptable resolutions.

One of the issues deferred pending private negotiations was the concern expressed by short-line railroads and shippers they serve about the "obstacles -- including 'paper barriers' ... that prevent [short-lines] from obtaining or fully using connections with competing carriers." This issue was committed to negotiations between the Association of American Railroads ("AAR"), representing the Class I carriers, and the American

Short Line and Regional Railroad Association ("ASLRRA"), representing the smaller carriers. Conspicuous by their absence from those negotiations, however, were representatives of the shippers whose facilities were served by short-line railroads subject to paper barrier constraints, and whose traffic would therefore be directly affected by the ultimate decision on paper barriers.¹

On September 10, 1998, the AAR and ASLRRA proudly announced that they had reached agreement on a number of issues, including the paper barrier issue. They jointly petitioned the STB to approve their agreement insofar as it dealt with rate-related issues; interim approval was granted on September 21, with final approval on December 11.² The paper barrier provisions of the agreement were not among those for which STB approval was sought.

As Professor Dempsey explains in his verified statement submitted herewith, the AAR-ASLRRA Agreement constitutes a good beginning on a proper resolution of the issues raised by paper barriers to interchange. However it is at best an incomplete solution to those issues; apparently even ASLRRA recognizes this, judging from its September 25 petition seeking further Board

¹Representatives of WCTL informally asked to participate in the negotiations, but were advised that the AAR vetoed their involvement.

²Docket No. S5R 100, *Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706* (unprinted decisions served September 21 and December 11, 1998).

action to address procedures for overcoming paper barriers during service emergencies.

In an order served October 15, the Board invited comments on the ASLRRA petition to be filed in Ex Parte No. 628, *Expedited Relief for Service Inadequacies*, one of the child rulemakings initiated pursuant to the April 17 order in this "umbrella" docket. WCTL responded by urging that the Board broaden its inquiry to consider other issues raised by paper barriers, in addition to the emergency situations addressed by the ASLRRA petition (and the original proposed rules in Ex Parte No. 628). On October 22 the Board denied WCTL's request, concluding that the relief proposed by ASLRRA, when limited to service emergencies, was closely analogous to the similarly-limited relief being considered for shippers in Ex Parte No. 628, and that accordingly the ASLRRA Petition could best be considered in the latter proceeding. The Board pointedly expressed no view on the broader issues, however, leaving them for separate consideration consistent with its April 17 order in Ex Parte No. 575.

It is in response to that ruling that WCTL submits this Petition for Further Rulemaking, requesting Board consideration of the broader issues left out of Ex Parte No. 628.

DISCUSSION

1. Preface -- the Need to Promote Competition.

It is undisputed that our nation's public policy strongly favors competition, in the railroad industry as else-

where. This is manifest in the antitrust laws, which the courts and the Board have long recognized provide important "guidance" for the Board's "public interest" determinations;³ it is driven home by the heavy emphasis placed on the promotion of competition in the Rail Transportation Policy ("RTP") enacted by Congress, 49 U.S.C. § 10101. As Professor Dempsey notes, no less than four of the fifteen enumerated policy goals of the RTP specifically deal with the promotion of competition, both intermodal and intra-modal, and still others, by encouraging deregulation, implicitly or explicitly assume the presence of competition to obviate the need for strict regulatory control. Indeed, if a single constant theme can be distilled from the course of legislative and administrative policy pronouncements over the last two decades, it is this persistent preference for competition, rather than regulation, as the best disciplinarian of the rail transportation market, and of the players in that market.

There is another lesson, however, to be learned from the last twenty years of deregulation: if competition is to step in and truly replace regulation, it must be actively and substantively promoted. It is not enough to pay lip service to competition, especially in an industry experiencing rapid consolidation

³See, e.g., *McLean Trucking Company v. United States*, 321 U.S. 67, 87-88 (1944); Finance Docket No. 33388 et al., *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corporation* (Decision No. 89, served July 23, 1998), at 50.

and increasing concentration. It is not enough merely to retard the loss of existing competition in railroad mergers and other transactions; that is the prescription for a steadily shrinking competitive universe. If competition is to perform its legislatively-prescribed role, the Board -- and all parties with an interest in the health of the railroad system, including rail-dependent shippers such as WCTL's members -- must vigilantly promote the growth of competition at every opportunity, wherever that can be done without undue harm to the Board's other statutory policy goals.

WCTL submits that the issues surrounding paper barriers to interchange present an opportunity for the Board to do precisely that.

2. Unreasonable Paper Barriers to Interchange Must Be Subject to Challenge.

As Professor Dempsey observes, paper barriers to interchange are by definition anticompetitive. However, he adds, it does not follow that all must be prohibited. Rather, because such clauses can also serve beneficial functions -- in particular, as financing tools for short-line purchasers -- the Board must decide their acceptability on a case-by-case basis. This is exactly the sort of balancing test that the Board applies today in the context of railroad consolidations, as articulated in 49 C.F.R. § 1180.1(c).⁴

⁴Section 1180.1(c) reads as follows:

(continued...)

⁴(...continued)

(c) *Public interest considerations.* In determining whether a transaction is in the public interest, the Board performs a balancing test. It weighs the potential benefits to applicants and the public against the potential harm to the public. The Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public.

(1) *Potential benefits.* Both the consolidated carrier and the public can benefit from a consolidation if the result is a financially sound competitor better able to provide adequate service on demand. This beneficial result can occur if the consolidated carrier is able to realize operating efficiencies and increased marketing opportunities. Since consolidations can lead to a reduction in redundant facilities and thereby to an increase in traffic density on underused lines, operating efficiencies may be realized. Furthermore, consolidations are the only feasible way for rail carriers to enter many new markets other than by contractual arrangement, such as for joint use of rail facilities or runthrough trains. In some markets where there is sufficient existing rail capacity the construction of new rail line is prohibitively expensive and does not represent a feasible means of entry into the market.

(2) *Potential harm.* There are two potential results from consolidations which would ill serve the public—reduction of competition and harm to essential services. In analyzing these impacts, we must consider, but are not limited by, the policies embodied in antitrust laws.

(i) *Reduction of competition.* If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest. The Board recognizes that rail carriers face not only intramodal competition, but also intermodal competition from motor and water carriers. The Board's competitive analysis depends on the relevant market(s). In some markets the Board's focus will be on the preservation of effective intermodal competition, while in other markets (such as longhaul movements of bulk commodities) effective intramodal competition may also be important.

(continued...)

The potential -- or rather, clear and present -- harm that a paper barrier to interchange will cause, is obvious: depending on its magnitude relative to the revenues to be earned on affected traffic, it will either discourage or completely prevent the interchange of traffic with competitors of the carrier that sold or leased its track to the short-line.

The potential legitimate benefits of such an arrangement are less obvious, but nonetheless real: prospective purchasers of marginal short lines who cannot afford to pay a fair price or rental for a line in cash nonetheless may be able to pay indirectly, by tendering enough profitable traffic to the seller/lessor -- traffic which would not move by rail if the line were simply abandoned -- to yield an equivalent amount of profit to that carrier. At least in the case of lines that are likely to be marginal at best even in the hands of a "lean and mean" short line operator, this may be the only way of finding someone willing to step in and preserve service on the line.

⁴(...continued)

(ii) *Harm to essential service.* Consolidations often result in shifts of market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable impacts, the Board's concern is the preservation of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

It is these costs and possible benefits that the Board must balance when evaluating transactions that include paper barriers to interchange. But, as in the case of merger benefits and burdens, the Board first should make sure that the paper barrier it is reviewing is structured to minimize its adverse impact on competition -- that it is the least restrictive alternative for accomplishing its intended public benefit. A needlessly restrictive barrier should be recast to minimize its adverse impact; only then, if its benefits outweigh its harm, should the paper barrier be approved.

3. Board Action is Required to Complement the AAR-ASLRRRA Agreement.

As the Board is aware, the two main railroad trade associations -- the AAR (for the Class I railroads) and the ASLRRRA (for the Class II and III railroads) -- already have agreed with one another that only "legitimate" paper barriers to interchange should be enforceable, and that even those should give way when necessary to permit new traffic to move. They have also agreed that "excessive per-car charges" on traffic interchanged to another Class I carrier "are unreasonable and should not be permitted." Railroad Industry Agreement (Exhibit 1 to September 10, 1998 Petition initiating Docket S5R 100), at page 3. (A copy of that Agreement is included as Attachment B to Professor Dempsey's testimony.)

The AAR-ASLRRRA Agreement on paper barriers is a good beginning, and a testament to the Board's often-expressed prefer-

ence for "private sector solutions." Further Board action is necessary, however, to build on that beginning and achieve a complete resolution of the paper barrier problem for all parties.

Board action to supplement the AAR-ASLRRA Agreement is necessary for two reasons: first, to flesh out the details left out of that Agreement's cursory treatment of paper barriers, and second, to give all affected parties, including the shippers whose traffic is at issue, a voice in the process.

As Professor Dempsey observes, the AAR-ASLRRA Agreement does not really define what is, or is not, an unreasonable paper barrier. In particular,

- the AAR-ASLRRA Agreement does not articulate how a reasonable "sale or rental value" (against which the level of per-car charges would be measured) should be determined;
- the Agreement does not distinguish between credits for traffic tendered to the seller/lessor (which can be proper if the level of the per-car rents and credits is reasonable in relationship to the value of the properties) and penalties for traffic tendered to another carrier (which should be presumed unreasonable);⁵ and

⁵Paper barriers tied to percentages of traffic rather than car counts may in some circumstances be functionally equivalent to penalties and in such circumstances, should be deemed to be presumptively unreasonable.

-- the Agreement does not take the duration of the paper barrier into account (a perpetual paper barrier, like a perpetual restraint on alienation, should never be permitted; in general, the shorter a paper barrier's duration, the less objectionable it is likely to be from a competitive standpoint).

WCTL respectfully submits that the Board should fill in these gaps through more comprehensive rules along the lines WCTL is proposing.

The second deficiency in the AAR-ASLRRA Agreement's treatment of paper barriers to interchange is that, as Professor Dempsey puts it,

[the Agreement] provides no mechanism for implementation of that agreement, even by the parties thereto (the only enforcement provisions regarding paper barriers relate to their application to new traffic, and in that instance it appears that even legitimate paper barriers are to be "waived," see Exhibit C, Example 3 of the AAR-ASLRRA Agreement) -- and it provides no right of enforcement at all for affected shippers.

(VS Dempsey at 9.) The latter point is particularly significant from the standpoint of WCTL members, of course, since it is their traffic that is potentially subject to the very restrictions at issue. The problem, in a nutshell, is that the Agreement calls for arbitration of disputes under the Board's new dispute resolution procedures (Ex Parte No. 560), which do not provide for participation by third parties. To redress this problem, the Board at a minimum must adopt the AAR-ASLRRA Agreement's prohibi-

tion of unreasonable paper barriers -- with the additional details proposed by WCTL -- as its own, so that the Board's complaint and other remedial procedures will be available to aggrieved shippers.

4. The Rebuttable Presumptions Proposed by WCTL Would Both Facilitate the Board's Evaluation of Paper Barriers, and Provide "Safe Harbor" Guidance for Parties Negotiating Line Sales or Leases.

The rules proposed by WCTL, in Appendix B, begin with a forthright statement of Board policy that sale or lease agreement terms which unreasonably restrict the buyer/lessor's freedom to interchange traffic with carriers other than the seller/lessor of the line, are "disfavored" and normally will be disapproved, and that the enforcement of such terms is presumptively an unreasonable practice. The Board could stop there, and leave the task of defining just how restrictive a paper barrier can be without risking disapproval for case-by-case adjudication.

WCTL submits, however, that railroads and shippers alike will be better off, and the Board's enforcement burden materially reduced, if the Board goes on to delineate what factors will trigger closer scrutiny and likely disapproval. A good mechanism for accomplishing this is a set of rebuttable presumptions, along the lines WCTL has proposed in the second part of its proposed rule. We therefore urge the Board to consider the use of such presumptions.

The rebuttable presumptions WCTL has included in its draft rule flow directly from the relevant reasonableness factors

discussed in the preceding section of this Petition. Thus, we propose a rebuttable presumption that paper barriers lasting more than five years are unreasonable (to the extent of the excess), to encourage parties to limit such restraints of trade to a reasonable transition period. We propose a rebuttable presumption that paper barriers penalizing a short-line for traffic interchanged with another connecting carrier, rather than simply rewarding it for traffic interchanged with the seller/lessor, are unreasonable, because such terms discourage interchange with the seller/lessor's competitor even if the traffic in question cannot be handled by the seller/lessor, and to that extent they cannot be defended as financing tools. And we propose a rebuttable presumption that reasonable per-car charges or credits cannot be based on a "value" for the sold or leased line that exceeds a cost-of-capital return on the line's fair market value, computed without consideration of the seller/lessor's "off-line" revenues on traffic from the line being sold or leased. This presumption is intended to prevent selling/leasing carriers from setting per-car charges and credits so high that shippers are effectively paying the seller/lessor the same amount whether or not it handles their traffic -- thereby preventing competitors from underbidding the seller/lessor regardless of how low they set their own rates.

Because the proposed presumptions are rebuttable, they would not prevent carriers from tailoring their line sales and lease agreements to their individual circumstances and needs.

For example, a low per-car rent credit that lasts, say, ten years and gives the lessor a slight cost advantage over other connecting carriers, but does not significantly reduce the volume of traffic interchanged with those carriers, may be defended successfully despite the rebuttable presumption that barriers lasting more than five years are invalid.

5. Proposed Comment Procedures.

WCTL urges the Board promptly to issue a Notice of Proposed Rulemaking, soliciting comments on the proposed rules set out in Appendix B to this Petition. Furthermore, because such a notice is likely to elicit a large number of comments from shippers and carriers alike, WCTL submits that the Board's deliberations will be advanced if the Board's Notice also provides for publication of a service list and the filing of reply comments.

CONCLUSION

For the reasons set forth above and in the Verified Statement of Professor Paul S. Dempsey filed herewith, WCTL respectfully urges the Board to publish a Notice of Proposed Rulemaking, soliciting opening and reply comments on the enclosed draft rules; and that following consideration of such comments as

it may receive, that the Board duly issue final rules substantially along the lines of WCTL's proposal.

Respectfully submitted,

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Dated: December 21, 1998

APPENDIX A

APPENDIX A

WESTERN COAL TRAFFIC LEAGUE MEMBERS

Arizona Electric Power Cooperative, Inc.

Central Louisiana Electric Company, Inc.

Central and South West Services, Inc.

City of Austin, Texas

City Public Service Board of San Antonio

Colorado Springs Utilities

Houston Industries, Inc.

Kansas City Power & Light Company

Lower Colorado River Authority

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Western Resources, Inc.

Wisconsin Public Service Corporation

PROPOSED RULE

PROPOSED RULES

A new section 1180.x is added to Title 49, Code of Federal Regulations, to read as follows:

1180.x. Unreasonable Restrictions on Interchange.

(a) *Policy.* It is the policy of the Board to encourage and promote the growth of healthy competition among rail carriers and between rail carriers and other modes of transportation. To that end, in determining whether an agreement for the sale or lease of a rail line by a railroad to a non-carrier or smaller railroad is in the public interest, and in determining whether regulation is necessary in the case of a notice or petition seeking exemption for such an agreement, the Board will look with disfavor upon terms in such agreements which unreasonably impair or penalize the short line's freedom to interchange traffic with carriers, other than the seller, with which the short line can physically connect ("paper barriers"). Approval of a line sale or lease subject to such provisions is presumptively contrary to the public interest, and insistence upon or enforcement of such a contract provision by a selling or leasing railroad is presumptively an unreasonable practice.

(b) *Presumptions.* Paper barriers to interchange are inherently anti-competitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit. There is a rebuttable presumption that a paper barrier is unreasonable insofar as it

- (i) lasts longer than five (5) years from the date of the agreement containing the paper barrier, or
- (ii) includes any financial penalty on the purchaser that is triggered by the interchange of traffic with a carrier other than the selling carrier, even when traffic interchanged with the

selling carrier is not thereby reduced,
or

- (iii) includes credits for traffic interchanged with the selling carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. For purposes of this section, "fair market value" shall be computed without considering the revenues earned by the selling carrier for handling traffic originating or terminating on those properties over other parts of its system.

Paper barriers which are not presumptively unreasonable under the preceding paragraphs of Section 1180.x(b) are rebuttably presumed to be reasonable and lawful.

If, after the line sale is consummated, the purchaser will be able physically to interchange only with the selling carrier, terms which otherwise would be deemed unreasonable paper barriers shall be rebuttably presumed reasonable.

DEMPSEY

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 575

REVIEW OF RAIL ACCESS
AND COMPETITION ISSUES

VERIFIED STATEMENT OF
PAUL S. DEMPSEY

My name is Paul Stephen Dempsey. I am Professor of Law and Director of the Transportation Law Program at the University of Denver, where I also serve as Faculty Editor of the *Transportation Law Journal*. I have delivered expert testimony before several Public Utilities Commissions in both the United States and Canada, and I have testified before the transportation committees of the United States Congress, the Canadian Senate, and various state legislatures. I have also written numerous law review articles, and nine books, on transportation issues. A more complete statement of my qualifications is attached as Attachment A.

I have been asked by counsel for the Western Coal Traffic League to identify and analyze the legal and public policy issues raised by so-called "paper barriers" to interchange -- contractual provisions sometimes insisted upon by large railroads when they sell

or lease branch lines to smaller railroads, that discourage or even effectively preclude the buyer from interchanging certain desirable traffic with the seller's competitors.

This testimony presents the results of that analysis. As explained below, I conclude that while all paper barriers by definition restrain competition to some extent -- in the language of the antitrust laws they are "contracts ... in restraint of trade" -- not all paper barriers should be condemned: properly circumscribed paper barriers can serve legitimate public policy objectives in some circumstances. In particular, limited-duration payments or credits keyed to the amount of traffic interchanged with the seller can function as an installment purchase mechanism for a line. Nevertheless, the Surface Transportation Board should carefully scrutinize such clauses in line sale or lease agreements, and should approve them only upon a showing that they are no more restrictive than absolutely necessary to accomplish such a legitimate purpose.

In the concluding portion of my testimony, I apply these principles to a real-world example of a paper barrier to interchange.

The Statutory Framework

In evaluating paper barriers to interchange, I begin, as the STB must, with our nation's Rail Transportation Policy ("RTP"), as enacted by Congress and codified at

49 U.S.C. § 10101.¹ That policy manifests a strong Congressional preference for the

¹Sec. 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government -

- (1) *to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;*
- (2) *to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;*
- (3) *to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;*
- (4) *to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;*
- (5) *to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;*
- (6) *to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;*
- (7) *to reduce regulatory barriers to entry into and exit from the industry;*
- (8) *to operate transportation facilities and equipment without detriment to the public health and safety;*
- (9) *to encourage honest and efficient management of railroads;*
- (10) *to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;*
- (11) *to encourage fair wages and safe and suitable working conditions in the railroad industry;*
- (12) *to prohibit predatory pricing and practices, to avoid undue*
(continued...)

0 vigorous promotion, and not simply the preservation, of competition among the nation's railroads. No less than four of the fifteen specific policies enumerated in 49 U.S.C. § 10101 focus directly on promoting competition (Paragraphs (1), (4), (5), and (12)), and still others (*e.g.*, Paragraph (2)) encourage minimization of the need for regulation, which in the case of rate regulation presupposes the presence of effective competition (49 U.S.C. §§ 10701, 10707).

Further support for the importance of both preserving and promoting competition within the railroad industry may be found in the antitrust laws, which as the Board has acknowledged provide important "guidance" regarding the "public interest" that the Board must consider in its decisionmaking. I shall come back to the nature and content of that guidance at various points in my testimony.

On the other hand, while encouragement of intra- and intermodal competition is certainly a dominant theme of the RTP, it is not the only policy goal in the RTP. Rather, the RTP also encourages support of other objectives that could in some circum-

¹(...continued)

concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

(Emphasis supplied.)

stances be thought to conflict with the single-minded promotion of competition. I understand, for example, that the goal of achieving "adequate revenues" for the railroad industry (§ 10101(3)) has been cited to support restraints on competition in other contexts, for example in the "Bottleneck" cases.² Closer to the current inquiry, § 10101(2)'s support for reduced regulatory intervention and § 10101(7)'s encouragement of free entry and exit have been cited to justify relaxed scrutiny of the contract terms governing line sales, especially line sales to short lines. One need not agree with those lines of argument to recognize that the RTP includes objectives other than maximization of competition.

It is axiomatic that every statute should be construed and applied, if at all possible, in a manner that gives meaning and effect to all of its provisions. Thus the STB cannot singlemindedly promote intramodal rail competition while ignoring the importance of the RTP's revenue adequacy and deregulation objectives; but neither can the STB ignore its duty to promote intramodal competition simply because introducing more competition might necessitate tighter regulatory scrutiny of some transactions, and dampen railroad revenue gains in certain circumstances. Clearly, a balanced approach is required.

²Docket No. 41242, *Central Power & Light Company v. Southern Pacific Transportation Company* and companion cases (decision served December 31, 1996), *pet. for review pending sub nom. MidAmerican Energy Company et al. v. Surface Transportation Board*, Nos. 97-1081 *et al.* (8th Cir. argued November 18, 1997). The railroad parties in that case argued revenue adequacy; in its decision the Board disclaimed reliance on such arguments and instead based its decision on its interpretation of the law.

Adoption of a balanced approach to the promotion of competition is also supported by the antitrust laws, as construed by the courts over the years. This is perhaps most vividly illustrated by the very existence of the "reasonableness" rule: although § 1 of the *Sherman Act*, 15 U.S.C. § 1, unequivocally proscribes "every contract ... in restraint of trade" (emphasis added), the Supreme Court long ago made it clear that with the exception of a few types of restraints such as price-fixing that are deemed *per se* violations, only unreasonable restraints of trade are outlawed. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

I submit that the Board should apply a similar "reasonableness" standard to restraints of trade in the railroad industry -- including paper barriers to interchange. When called upon to approve a transaction that includes the creation or maintenance of a paper barrier, or when otherwise called upon to examine such a restraint of trade for consistency with the public interest and Rail Transportation Policy, the Board should approve the paper barrier only if it determines that it is reasonable. In order to make such an ultimate determination, the Board must be able to conclude from the evidence that, to borrow from its Merger Policy (49 C.F.R. § 1180.1), (a) the restraint on competition is no more restrictive than necessary in order to achieve benefits that are in the public interest, and (b) that those public benefits outweigh the harm to current or prospective competition that the paper barrier will cause.

**Application of Rail Transportation Policy
to Paper Barriers**

A decision to apply a reasonableness standard to paper barriers to interchange does not end the analysis, of course. Questions will remain regarding how the test will be applied in practice. Under what circumstances might paper barriers to interchange be found reasonable? What public benefits can they serve? In order for railroads and shippers alike to have a clear understanding as to what will or will not pass muster, the Board must flesh out its reasonableness standard, either through case-by-case decision-making or through a more detailed exposition in its rulemaking pronouncement or policy statement.

The Board's task in this regard has been eased by the railroad industry itself, which recently proposed a good rule of thumb for answering these questions. In the AAR-ASLRRRA Agreement recently approved by the STB in Docket No. S5R 100, *Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706* (unprinted decisions served September 21 and December 11, 1998), the two main railroad associations declared that:

Only legitimate "paper barriers" should be enforceable.
Paper barriers are restrictions on interchange imposed by contract at the time of the creation of the Short Line. Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. ... Excessive per car charges or

other penalties imposed if a car is interchanged to another Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

(Railroad Industry Agreement (Exhibit 1 to September 10, 1998 Petition initiating Docket S5R 100), at page 3, emphasis added.) A copy of the AAR-ASLRRA Agreement is appended hereto as Attachment B for convenient reference.

In theory there could be other legitimate functions served by paper barriers to interchange, but I suspect that the railroads have identified the only one the Board is likely to encounter in practice. And I would have to agree with them that a paper barrier consisting of a reasonable rental or purchase price installment, coupled with a reasonable per-car credit for traffic interchanged to the seller (as distinct from a penalty for traffic interchanged to another carrier), should ordinarily be approved as reasonable -- provided it is structured in a manner that minimizes its adverse impact on the other connecting carrier's ability to compete.

At this point a reader might be wondering, if the AAR and ASLRRA have done such a good job of identifying and condemning unreasonable paper barriers to interchange, why is any further action by this Board required? Why not simply congratulate the railroads on their ability to craft a private-sector solution, and leave it at that?

There are two basic answers to these questions. The first is that, while the AAR-ASLRRA Agreement states that only "legitimate" paper barriers should be enforceable, and that excessive per car charges should be deemed unreasonable, it provides no mechanism for implementation of that agreement, even by the parties thereto (the only enforcement provisions regarding paper barriers relate to their application to new traffic, and in that instance it appears that even legitimate paper barriers are to be "waived," *see* Exhibit C, Example 3 of the AAR-ASLRRA Agreement) -- and it provides no right of enforcement at all for affected shippers. I believe that the STB should adopt a prohibition of unreasonable paper barriers as its own policy, if only to provide non-railroad parties harmed by such paper barriers with a venue for redressing their grievances, as to any traffic -- old or new.

The second reason for the STB to take action in this area is that the railroads' statement of policy, while right as far as it goes, does not fully identify all of the essential characteristics of a reasonable restraint on competition. In particular, it does not specify how the "sale or rental value" used to evaluate the level of per-car charges is to be determined, it does not distinguish between credits for cars interchanged to the seller (which can be reasonable) and penalties for cars interchanged to a competitor (which should be presumptively unreasonable), and perhaps most significantly, it does not provide for consideration of a paper barrier's duration in determining reasonableness.

It is important that the "value" of sold or leased railroad properties that a seller may recover through paper barrier devices be strictly limited to the fair market value of the properties sold or leased, excluding any extra off-line revenue-generating value to the seller. This is not to say that a selling carrier would not include such value in its calculus when deciding whether or not to sell, or that the total sales price cannot include such value. But off-line revenue-generation values should be recoverable only through up-front payments. Allowing such values to be factored into installment payments or rentals, which would then be recovered through paper barrier penalties if the short line interchanges traffic with another carrier, would effectively tie all existing and projected traffic to the selling carrier, making the paper barrier absolute, since affected shippers would effectively be paying the same monopoly rents to the selling carrier whether or not it handled their traffic.

It is also important to distinguish between credits for traffic tendered to the selling carrier, and penalties for traffic tendered to another carrier. A seller has a legitimate interest in being paid, either up front or through profits generated by traffic received from the short line; but to the extent it is paid in the latter fashion, its profits do not decrease simply because traffic is also interchanged to another carrier, so long as the volume of traffic it receives remains constant. Accordingly, while a per-car credit for traffic tendered to the selling carrier can be reasonable, a per-car or other penalty for traffic tendered to someone else is unlikely to be reasonable.

Finally, the duration of a paper barrier is an important factor in determining its reasonableness. It is one thing for a seller to restrict the competitive options available to the buyer for a limited transition period, and quite another for such restrictions to constrain competition in perpetuity or for a protracted period. The approach taken under the antitrust laws is instructive in this context; a good example is the treatment accorded non-competition clauses in agreements for the sale of a business, which are approved only if they are reasonably limited both in geographic scope and in duration to the minimum necessary to accomplish a proper purpose (allowing the purchaser a chance to develop a relationship with the business' customers). *See, e.g., Lektro-Vend Corp. v. Vendo Co.*, 403 F. Supp. 527, 532 (N.D.Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds*, 433 U.S. 623 (1977). The important thing to remember is that the Rail Transportation Policy supports the growth of intramodal competition, and not simply static preservation of whatever competition there is now. When a rail line (or any other business segment) is sold, public policy may tolerate arrangements that postpone the buyer's ability to compete freely as an independent entity, but it cannot tolerate restrictions that prevent such independence indefinitely.

The Arguments for Doing Nothing

If past is prologue, the Class I railroads will raise a plethora of objections to any Board proposal to take action to limit unreasonable paper barriers. I submit that the Board should examine arguments for the *status quo* with a healthy dose of skepticism.

The Class I's may be expected to argue, for example, that paper barriers associated with line sales by definition do not harm competition because they merely preserve the competitive situation that existed before the line sale (*i.e.*, affected shippers were captive to the selling carrier before the sale, and the paper barriers merely perpetuate that captivity after the sale). While this may be true, however, it ignores the fact that as I discussed earlier, both the RTP and the antitrust laws call for the promotion of competition, and not simply the static preservation of whatever competition presently exists. Any seller of a business segment (a "spin-off") could make the same argument to support any and all post-sale restrictions on the buyer, up to and including price-fixing; after all, the seller was free to fix prices for its entire business before the spin-off, so what's the harm if it continues to do so afterward? But such an argument would be subjected to the

strictest antitrust scrutiny and skepticism,³ and I submit that the STB should not give it any greater dignity within its purview.⁴

Equally specious is the argument that turning a blind eye to unreasonable paper barriers is necessary to encourage and facilitate free entry into and exit from the railroad industry. In the first place, when a large railroad sells or leases part of its system to a short line on terms that allow the seller to retain full control over the business on the line in question, it is not really "exiting" from the business, it is merely subcontracting a portion of the operation. An explicit prohibition of unreasonable paper barriers would encourage true exit and entry transactions -- rather than such "neither fish nor fowl" deals -- where a transfer to a short line is truly justified from an economic standpoint (that is,

³See, *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), in which an agreement among former law firm partners not to compete against one another by means of advertising in one another's territories, was struck down as a *per se* violation of the *Sherman Act* -- even though the partners had been free to abstain from competing against one another while they were part of the same firm.

⁴It should be noted that paper barriers designed to prevent a short line from doing business with the seller's competitors are structurally similar to covenants not to compete -- except that they are intended to benefit the seller rather than the buyer of the railroad business. In the antitrust context, covenants precluding the buyer of a business operation from competing against the seller's other business operations are viewed with particular skepticism, because the considerations that justify short-duration, limited-scope covenants against competition to protect the buyer are utterly lacking when the beneficiary is the seller. See Philip E. Areeda, *Antitrust Law* § 703b, n.8 (1991) (where a relevant geographic market is intensely zoned so that only two sites permit a particular activity, a party unlawfully monopolizes if it owns both sites but then sells one of the sites with a covenant that prohibits the activity); *Flatley v. Forbes*, 483 So. 2d 483 (Fla. Ct. App. 1986) (seller cannot seek, nor does it need, a covenant that prohibits the buyer from competing with the seller).

where the large carrier is losing money on the line in question and the sale or lease is an alternative to the abandonment which would otherwise occur). And if there are any deals that would not go through at all but for an unreasonable paper barrier -- that is, proposed short line transactions involving profitable lines that the seller would keep rather than abandon if precluded from retaining control of the traffic on the line after the sale -- then I submit that this is a "price" worth paying. Certainly, no rail service is lost in the process, and the large railroad's decision to keep on operating the lines is still a voluntary business decision.

More fundamentally, it is difficult to envision how a prohibition of unreasonable paper barriers to interchange would discourage any line sales or leases. Recall that what would be prohibited is not the seller's recovery of the off-line revenue generating value of the lines it is selling, but simply its recovery of that value by one particular means: imposition of an unreasonable paper barrier on the purchaser. Recovery through an up-front payment -- or through installment payments not tied to traffic interchange -- could be employed without adversely restraining competition.

Thirdly, encouragement of what I referred to above as "subcontracting" transactions is not called for by the RTP policy favoring railroad efficiency. To be sure, even rail lines that are profitable when operated by a Class I carrier, can often be operated more cheaply by a Class III short line. However, the primary source of such savings is in labor costs: the overwhelming majority of short lines are non-union, and even those that

are organized typically have lower wage rates and more flexible work rules than the Class I's do. Where a line would be abandoned but for its sale to a short line, the selling carrier's employees are not hurt by the substitution of non-union jobs because they could not have kept the work, anyway, and in any event the transaction serves the public welfare by preserving rail service for affected shippers and communities. But where the Class I carrier would keep the line in operation if it were precluded from selling it with strings attached, the primary "efficiency" gain is an income transfer from that carrier's employees to its shareholders. While this is probably not reason in and of itself to block such a transaction, it is certainly not a result encouraged by the RTP, which directs the STB to "encourage fair wages and safe and suitable working conditions in the railroad industry." Thus, such an income transfer cannot properly be used to justify an unreasonable paper barrier or other restraint on competition.⁵

**A Practical Approach to the Prevention of
Unreasonable Paper Barriers to Interchange**

Hand in hand with a decision to prohibit unreasonable paper barriers to interchange, must come a practical plan for implementing that prohibition. My suggestion in this regard is that the Board adopt, as a rule, an affirmative policy statement that defines

⁵See Paul Dempsey and William Mahoney, "The US Short Line Railroad Phenomenon: the Other Side of the Tracks," 21 *Trans.L.J.* 383 (1994).

unreasonable paper barriers to interchange; declares them against the public interest; and declares that it is an unreasonable practice for railroads to include such provisions in their agreements with other carriers or prospective carriers. Such a policy statement, without more, would provide a regulatory and statutory basis for aggrieved parties to use in challenging such clauses, whether as protestants (in the case of new line sales and leases brought before the Board for authorization), or as complainants (in the case of paper barriers in existing line sales and lease agreements).

To facilitate resolution of such challenges -- and to provide a clearer indication to railroads and shippers alike of what kind of paper barrier is, or is not, likely to pass muster -- I would further recommend that the Board consider the establishment of rebuttable presumptions tied to the more salient features that typically determine reasonableness. For example, the Board might declare that a paper barrier enduring more than 5 years would be rebuttably presumed unreasonable to the extent of the excess. Similarly, a paper barrier provision penalizing the short line for traffic interchanged with another carrier, rather than simply rewarding it for traffic interchanged with the seller, would be presumed unreasonable. And finally, a paper barrier provision entailing rental or installment purchase payments that exceed a cost of capital return on the fair market value of the properties sold or leased (computed without regard to their off-line revenue generating value), would be rebuttably presumed unreasonable -- again, to the extent of

the excess. Conversely, paper barriers not triggering any of those presumptions would be rebuttably presumed reasonable.

If a proposed line sale or lease is before the Board for approval or exemption when a challenge is made to a paper barrier in the sale or lease agreement, and the Board finds the challenged paper barrier unreasonable, it should condition its approval of the transaction on the parties' modification of the paper barrier to make it lawful. Similarly, if a paper barrier contained in the sales or lease agreement for an already-consummated short line transaction is challenged by complaint, and is shown to be unreasonable, the Board can presumably reopen its prior action approving or exempting the short line transaction, and add such a condition to its prior order. (Alternatively, the Board in that situation might want to give the selling carrier the option of simply waiving the paper barrier as to the complaining shipper's traffic.)

The proposed rule that counsel for WCTL have attached to their Petition as Appendix B is consistent with the preceding discussion.

Case Study--the Sale of SP's Coos Bay Branch

A real-world example of an unreasonable paper barrier to interchange may help to put things in perspective. In 1994, Southern Pacific Transportation Company ("SP") sold three of its lines to a subsidiary of Railtex, Inc. named the Central Oregon &

Pacific Railroad ("COPR"). Those lines were the Siskiyou Line, the Coos Bay Branch, and the White City Branch.

Because Railtex appended a copy of the Sale Agreement for those lines to a filing at the Securities and Exchange Commission, that agreement is in the public domain. I have appended pertinent pages from the agreement, which I shall refer to as the "Coos Bay Agreement," to this testimony as Attachment C.

Section 3 of the Coos Bay Agreement, entitled "Purchase Price," begins with a statement that the agreed purchase price was based on the parties' "assumption" that all traffic originating or terminating on the lines being sold would continue to move via SP after the sale. It then defines the purchase price as \$16,975,000, plus additional per-car amounts to be paid if the buyer ever interchanges cars to another railroad without SP's approval. Those additional charges range from \$2700 to \$5000 depending on car type, and are subject to annual escalation. The penalties are to remain in force for 100 years.

Now, it does not take a mind-reader to see that the \$16,975,000 payable at closing was the true purchase price, and was all that SP really intended to charge for the lines it was selling. The per-car penalty charges were not intended as additional revenue sources themselves; rather, if they worked as planned, they would never be assessed because the COPR would never interchange cars to anyone else over SP's objections.

This is a classic example of an unreasonable paper barrier clause. It is, first of all, a penalty on cars interchanged to competitors rather than a credit for cars

interchanged to the seller (if COPR interchanges 10,000 cars to SP and none to anyone else, SP is satisfied with the \$17 million it received for the line, but if COPR interchanges 15,000 cars to SP and 1000 to a competitor, suddenly the "purchase price" shoots up by at least \$2.7 million). As such, it should be deemed unreasonable, without more. The 100-year duration of this paper barrier to interchange is also well beyond the pale, and even if the per-car charges were scaled back to a more moderate level and converted into credits against a (perhaps higher) initial purchase price, SP should not be allowed to tie up the traffic for such a long period after the sale. WCTL's proposed rule uses a five-year cap on paper barrier duration as a rule of thumb, and I commend that to the Board's attention.

All in all, the Coos Bay Agreement's paper barrier to interchange is a good example of a circumstance warranting the imposition of limits on such anticompetitive devices, both on the basis of the principles I have outlined, and those set forth in the AAR-ASLRRA agreement itself.

Conclusion

Since enactment of the *4-R Act*⁶ and the *Staggers Act*⁷, enhanced competition has been a major objective of rail regulatory reform. Indeed, enhancing competition is the common thread that runs throughout much of the legislation Congress has enacted to address market issues, including the *Sherman Act*, the *Clayton Act*,⁸ the *Robinson-Patman Act*,⁹ and the *Federal Trade Commission Act*,¹⁰ as well as the transportation deregulation statutes. These legislative pronouncements flow from Article I § 8 of the U.S. Constitution which vests in Congress the power to assure that commerce flows freely between the states. Efforts to suppress competition are antithetical to that great body of law.

Competition can stimulate improvements in rail service and efficiency, and lower the overall costs of production, thereby fueling the economic engine of commerce, directly and indirectly enhancing the consumer interest. Monopolization can have the opposite effect, for it results in a wealth transfer from consumers to producers, and results in little incentive for better service or enhanced efficiency. For this reason, competition

⁶*Railroad Revitalization and Regulatory Reform Act of 1976*, Pub.L. 94-210, 90 Stat. 31 (1976).

⁷*Staggers Rail Act of 1980*, Pub.L. 96-448, 94 Stat. 1895 (1980).

⁸15 U.S.C. §§ 12-27, 44.

⁹15 U.S.C. § 13.

¹⁰15 U.S.C. §§ 41-57a.

has been emphasized and reemphasized by Congress as an important public policy objective of rail regulation.

In spinning off spurs and branch lines to short-line railroads, the Class I carriers have sometimes attempted to engage in conduct designed to suppress competition. The most notorious of these blatantly anticompetitive efforts are the contractual provisions, frequently insisted upon by the selling carriers, which impose substantial economic penalties upon purchasers who subsequently begin handling traffic with the seller's competitor. These "paper barriers" to the free flow of commerce are potentially as anticompetitive as agreements between the buyers and sellers of properties to engage in price fixing. Just as price fixing agreements between buyers and sellers would not be tolerated under the law, neither should anticompetitive agreements which assure the monopolization of connecting service.

Such anticompetitive agreements, designed to deter if not prohibit a short-line railroad from interchanging traffic with the seller's competitors, serve neither the efficiency nor the public interest goals of the *ICC Termination Act*¹¹ or its predecessors. They assure only that the short-line purchaser will handle only the selling carrier's traffic to the exclusion of its competitors' traffic, even where the competitor's price and/or service offerings are superior, and even where the shipper would prefer to have a

¹¹*ICC Termination Act of 1995*, Pub.L. 104-88, 109 Stat. 803 (1995).

competitive alternative. Such efforts to suppress competition and monopolize markets are instead hostile to a long line of statutory and case law, and should be condemned by the Surface Transportation Board as unreasonable and unlawful.

In an environment where major rail mergers have reduced competitive alternatives for many shippers, and allegedly caused service deterioration in major regions of the nation, the STB should be more vigilant than ever in assuring that anticompetitive agreements are not allowed to create or perpetuate additional barriers to competition. Enhanced competition can eradicate monopolistic exploitation so as to fulfill the goals of regulatory reform, improve service, and reduce costs, and in the long term, reduce the need for governmental oversight.

Verification

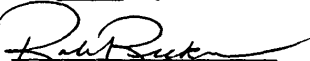
City and County of Denver) ss:
STATE OF COLORADO)

PAUL STEPHEN DEMPSEY, being duly sworn, deposes and says that he has read the foregoing Verified Statement, knows the contents thereof, and that the same are true as stated.



Paul Stephen Dempsey

Subscribed and sworn to before me
this 18th day of December, 1998.



Notary Public in and for
the State of Colorado.

My commission expires 12/20/99

ATTACHMENT A

Paul Stephen Dempsey

Page 1

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Date of Birth: August 27, 1950
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PROFESSIONAL EMPLOYMENT

1979 - present	Professor of Law (with tenure) [Assistant, Associate Professor, 1979-85], Director of the Transportation Law Program, and Faculty Editor, <i>Transportation Law Journal</i> , University of Denver College of Law, Denver, Colorado.
1986 - present	Host, "Your Right To Say It," KWGN-TV, Channel 2, Sunday Morning Public Affairs Program.
1994 - present	Vice Chairman & Director, Frontier Airlines, Inc. (Vice Chairman 1996- present).
1995 - present	Editorial Board of Contributors, <i>Denver Business Journal</i> .
1992 - 1993	Hughes Research Professor of Law, University of Denver College of Law (first person to be so designated, 1985-86; redesignated, 1989-91).
1989 - 1990	Distinguished Visiting Professor of Law, DePaul University, Chicago, Illinois (first person to be so designated).
1981 - 1982	Legal Advisor to the Chairman, Interstate Commerce Commission, Washington, D.C.
1977 - 1979	Attorney-Advisor, Office of General Counsel; and Bureau of Pricing and Domestic Aviation, Civil Aeronautics Board, Washington, D.C.
1975 - 1977	Attorney-Advisor, Office of Proceedings, Interstate Commerce Interstate Commerce Commission, Washington, D.C.

COLLEGE & UNIVERSITY DEGREES

- o DOCTOR OF CIVIL LAWS (D.C.L.) (cum laude), Institute of Air & Space Law, McGill University, Montreal PQ, Canada (1986).
- o MASTER OF LAWS (LL.M.) in International Law (summa cum laude), National Law Center, George Washington University, Washington, D.C. (1978); "A" average; Staff: Journal of International Law & Economics.
- o JURIS DOCTOR (J.D.) School of Law, University of Georgia, Athens, Georgia (1975); Chief Justice, Main Court of the Student Judiciary; Editorial Board, Georgia Journal of International & Comparative Law.
- o BACHELOR OF ARTS in Journalism (A.B.J.), School of Journalism, University of Georgia, Athens, Georgia (1972); minor: political science.

ADDITIONAL EDUCATION

- o George Mason University Law and Economics Institute for Law Professors, Dartmouth College, Hanover, N.H. (1987).
- o Georgetown University Law Center, Washington, D.C. (1976); "A" average.
- o Sessions on Public and Private International Law, The Hague Academy of International Law, the Hague, The Netherlands (1974).
- o Seminar on the European Economic Community, Institut d'etudes Europeenes, Universite Libre de Bruxelles, Brussels, Belgium (1974).

AWARDS, GRANTS AND FELLOWSHIPS

- Inducted into the Colorado Aviation Hall of Fame (1995).
- Canadian Institutional Research Grant (1989-90).
- Economic Policy Institute Grant on Airline Deregulation (1989-90).
- Hughes Foundation Research Grant in International Dispute Resolution at the U.N. International Civil Aviation Organization, Montreal, Canada (1987-88)
- Fulbright Fellowship, Western European Regional Research Program (1986-87).
- University of Denver Burlington Northern Foundation Award for Outstanding Scholarship (1987).
- Rocky Mountain Mineral Law Institute Research Grant in Oil and Gas Law (1987).
- Transportation Lawyers Association Distinguished Service Award (1986).
- Certified Claims Professional Accreditation Council Award for Outstanding Service (1983).
- Hughes Foundation Research Grant in International Maritime Law (1982).

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**SPEECHES, PAPERS AND TESTIMONY DELIVERED BEFORE SEMINARS,
CONFERENCES, REGULATORY AGENCIES AND LEGISLATIVE COMMITTEES**

1997 International Conference On Air and Space Policy, Law and Industry for the 21st Century, Seoul, Korea; Airports Council International World Economic Specialty Conference, Denver, Colorado; American Association of Airport Executives, St. Louis, Missouri; Columbine Kiwanis Club, Littleton, Colorado.

1996 International Aviation Conference, McGill University Institute of Air & Space Law, Montreal, Canada; Annual Meeting of the Southwestern American Association of Airport Executives, Monterey, California; OECD Conference on Sustainable Transportation, Vancouver, British Columbia; Fifth Annual Phoenix International Aviation Symposium, Phoenix, Arizona; Lakewood Kiwanis Club, Lakewood, Colorado.

1995 Transportation Law Institute, San Francisco, California; Colorado Motor Carrier Association, Colorado Springs, Colorado; Mile-High Rotary Club, Denver; The Colorado Motor Carriers Association, Denver; The Transportation Lawyers Association Annual Meeting, San Diego; National Confectioners' Logistics Council Annual Meeting, Orlando; The Colorado Public Utilities Commission, Denver; The Kansas Public Utilities Commission, Topeka

1994 Japan Aeronautics Association, Tokyo, Japan; Conference on Asia-Pacific Airports '94, Singapore; Commencement Address, Embry Riddle Aeronautical University, U.S. Air Force Academy, Colorado Springs, Colorado; Kanto-Gakuin University, Japan; Transportation Lawyers Association 57th Annual Joint Conference with the Canadian Transport Lawyers Association, Kiawah Island, South Carolina; Air Line Pilots Association Leadership Conference, Reston, Virginia; American Airlines, Dallas, Texas; Aspen Salon, Aspen, Colorado.

1993 Conference on Airline Growth & Survival in the 1990s, Hong Kong; Conference on Multilateral Aviation in the 1990s, Singapore; Conference on Airport Development & Expansion, Hong Kong; House Judiciary Subcommittee on Economic and Commercial Law, Washington, D.C.; National Commission to Ensure a Strong Competitive Airline Industry, Washington, D.C.; American Bar Ass'n Forum on Air & Space Law, Annual Forum on Aviation Law, Orlando, Florida; 19th Annual Conference of the Transportation Claims & Prevention

Council, Orlando, Florida; 16th Annual Conference of Regulatory Attorneys, Whitefish, Montana; Transportation Committee of the Colorado Senate, Denver, Colorado; 56th Annual Conference of the Transportation Lawyers Ass'n, Santa Fe, New Mexico; Air Line Pilots Ass'n Executive Council, Washington, D.C.; IBM Travel School, Dallas, Texas; International Ass'n of Machinists Lodge 141, Las Vegas, Nevada; United Airlines Union Coalition Labor Summit, Chicago, Illinois; Society of American Business Editors & Writers, Denver, Colorado; Rocky Mountain Business Travel Association, Denver, Colorado; 35th Annual Meeting of the Transportation Research Forum, New York, N.Y.; The Heritage Club, Denver, Colorado; International Conference & Exposition on Aviation & Airport Infrastructure, Denver, Colorado; Annual Meeting of the Colorado Motor Carriers Association, Beaver Creek, Colorado; Aviation Division of the Canadian Union of Public Employees, Toronto, Canada; Canadian Motor Coach Ass'n, Toronto, Canada.

1992 Embry-Riddle International Symposium on Aviation Law/Insurance, Brussels, Belgium; Canadian Senate, Committee on Transportation and Communication, Ottawa, Canada; 18th Annual Conference of the Transportation Claims and Prevention Council, Las Vegas, Nevada; Colorado General Assembly Seminar, Denver, Colorado; Air Line Pilots Association Executive Council, Reston, Virginia; Air Line Pilots Association Denver Council, Denver, Colorado; Denver Mile High Rotary Club, Denver, Colorado; Cherry Creek Kiwanis Club, Denver, Colorado; Second Annual Conference on Airlines, Airports and Aviation, Washington, D.C.; 51st Annual Western Conference of Public Service Commissioners, Coeur d'Alene, Idaho; Transportation Trades Department, Washington, D.C.; Seventeenth Annual National Transportation Week, Boise, Idaho; Embry Riddle University, Las Vegas, Nevada; Oregon Trucking Associations Annual Meeting, Gleneden Beach, Oregon.

1991 Aviation Subcommittee of U.S. House of Representatives Public Works Committee, Washington, D.C.; Seminar on Strategic Options for Transport Development, Depts of Transport and Aviation, and University of Papua New Guinea, Port Moresby, Papua New Guinea; 40th Anniversary Colloquium of the Institute of Air & Space Law, McGill University, Montreal, Canada; Colorado House & Senate Joint Transportation Committee, Denver, Colorado; Atlas 24th Annual Conference on Moving America Forward, Chicago, Illinois; Ohio Public Utilities Commission, Columbus, Ohio; National Defense Transportation Ass'n, Lowery AFB, Colorado; Colorado Transfer & Warehouseman's Ass'n, Denver, Colorado; University of Colorado College of Business Administration, Boulder, Colorado; Regular Common Carriers Conference Board of Governors, Washington, D.C.; Colorado Motor Carriers Ass'n 52nd Annual Convention, Beaver Creek, Colorado; Transportation Trades Dep't Executive Committee, Miami, Florida; Conference on Airlines & the Future of Aviation, Denver, Colorado; Air Line Pilots Assn Executive Committee, Washington, D.C.; Colorado Public Utilities Commission, Denver, Colorado; Pueblo Kiwanis Club, Pueblo, Colorado; Colorado Democratic Party Leadership Conference, Denver, Colorado; National Conference of State Transportation Specialists, 33rd Annual Meeting, Detroit, Michigan; ALPA Leadership Conference, Washington, D.C..

1990 National Press Club, Washington, D.C.; Transportation Law Institute, San Francisco, California; 32nd Annual Transportation Research Forum, Long Beach, California; Section on Canadian-American Cooperation, and Section on Aviation & Space Law, Ass'n of American Law Schools, San Francisco, California; DU Mile High Alumni, Denver, Colorado; El Paso

County Bar Ass'n, Colorado Springs, Colorado; Weber Aircraft Aviation Conference, Los Angeles, California; University of North Dakota Center for Aerospace Sciences, Grand Forks, North Dakota; Ass'n of Professional Flight Attendants Executive Committee, Dallas, Texas; Transportation Trades Department First Annual Conference, Washington, DC.

1989 Michigan House of Representatives Transportation Committee, Lansing, Michigan; California Public Utilities Commission, San Francisco, California; Section on Graduate Programs, Ass'n of American Law Schools Annual Meeting, New Orleans, Louisiana; Pennsylvania Public Utilities Commission, Harrisburg, Pennsylvania; Western Social Sciences Ass'n Annual Meeting, Albuquerque, New Mexico; Southeastern Ass'n of Regulatory Utility Commissioners, Williamsburg, Virginia; Northern Illinois University School of Law, DeKalb, Illinois; Burlington Northern General Chairman's Ass'n Annual Meeting, Denver, Colorado; Michigan Bar Ass'n, Lansing, Michigan; University of North Dakota Center for Aerospace Sciences, Grand Forks, North Dakota; DePaul University College of Law Alumni, Chicago, Illinois; Chancellor's Breakfast, University of Denver, Denver, Colorado; Canadian Transport Lawyers Ass'n Annual Meeting, Toronto, Canada.

1988 Air & Space Law Section, Ass'n of American Law Schools Annual Meeting, Miami, Florida; US West Academic Seminar, Keystone, Colorado; National Conference of State Transportation Specialists, 30th Annual Meeting, St. Louis, Missouri; Transportation Lawyers Association 51st Annual Meeting, Ft. Lauderdale, Florida; Second International Education Conference, American Society of Transportation and Logistics and Delta Nu Alpha Transportation Fraternity, St. Louis, Missouri; Duclos-Gordon Seminar in Transportation Regulation, Syracuse University, Syracuse, New York; NARUC Biennial Regulatory Information Conference, Columbus, Ohio; California Public Utilities Commission, San Francisco, California; British Columbia Motor Carrier Commission, Vancouver, British Columbia.

1987 American Bar Ass'n, Section on Administrative Law, Long Boat Key, Florida; National Ass'n of Regulatory Utility Commissioners 99th Annual Convention and Regulatory Symposium, New Orleans, Louisiana; Duclos-Gordon Seminar in Transportation Regulation, Syracuse University School of Management, Syracuse, New York; College of Business, Boise State University, Boise, Idaho; First International Education Conference, American Society of Transportation and Logistics and Delta Nu Alpha Transportation Fraternity, San Jose, California; Western Conference of Public Service Commissioners, Durango, Colorado; Senate and House Committees, Legislature of the State of Texas, Austin, Texas; North Dakota State University, Fargo, North Dakota; University of Colorado, Boulder, Colorado; Delta Nu Alpha Transportation Fraternity, Denver, Colorado; Rocky Mountain Chapter of the Transportation Practitioners Associations, Denver, Colorado; Colorado Bar Ass'n 89th Annual Convention, Colorado Springs, Colorado.

1986 Canadian Transport Lawyers Ass'n, Annual Meeting, Vancouver, British Columbia; Mid-Continent Assn. of American Law Schools, Annual Meeting, Keystone, Colorado; American Society of Transportation & Logistics, Chicago, Illinois; Colorado Senate Transportation Committee, Denver, Colorado; Intermountain Chapter of the Association of Transportation Practitioners, Salt Lake City, Utah; Delta Nu Alpha Transportation Fraternity, 46th Annual

International Education Conference, Orlando, Florida; Annual Transportation Conference of the Fertilizer Institute, San Antonio, Texas.

1985 Delta Nu Alpha Transportation Fraternity, 45th Annual International Education Conference, San Antonio, Texas; Colorado Senate Transportation Committee, Denver, Colorado; Rocky Mountain Chapter of Delta Nu Alpha, Denver, Colorado.

1984 Transportation Practitioners Ass'n, 7th Western Transp. Seminar, San Francisco, California; National Retail Merchants Ass'n., 63rd Annual Traffic Conference, Denver, Colorado; Transportation Lawyers Assn, Annual Conference, Williamsburg, Virginia; Colorado Finance Council, Denver, Colorado; Iowa Public Utilities Commission, Des Moines, Iowa; University of North Dakota School of Law, Grand Forks, North Dakota.

1983 Shippers National Freight Claims Council, 9th Annual Meeting, Orlando, Florida; Forward America, Organizational Meeting, Little Rock, Arkansas; National Conference of State Transportation Specialists, 25th Annual Meeting, Reno, Nevada; American Trucking Ass'n's, Interstate Carriers Conf. Annual Meeting, Durango, Colorado; Iowa Trucking Ass'n, Annual Meeting, Cedar Rapids, Iowa.

1982 Colorado Finance Council, Denver, Colorado; Rocky Mountain Chapter of Transportation Practitioners Ass'n, Denver, Colorado; American University Washington College of Law, Washington, D.C.

1981 Chicago Traffic Club, Chicago, Illinois; National Council on Physical Distribution Management, Houston, Texas; Motor Carrier Lawyers Assn., Annual Meeting, Kona, Hawaii.

1980 Transportation Law Institute, Keystone, Colorado; Ohio Northern University School of Law, Ada, Ohio.

1979 ICC Practitioners Assn., Denver, Colorado; Delta Nu Alpha, Denver, Colorado.

1978 Vanderbilt University School of Law, Nashville, Tennessee.

1977 Economic Development Council of the New Orleans Area, New Orleans, Louisiana.

OTHER ACTIVITIES

- o President and co-founder, Americans for Sound Aviation Policy (1993-present).
- o Chairman, Section on Air & Space Law, Association of American Law Schools (1989-1990).
- o Vice Chairman, Transportation Committee of the Administrative Law Section of the American Bar Association (1988-92).
- o Chairman of the Board of Governors of the Certified Claims Professional Accreditation Council, Inc. (1981-83) and co-founder of that organization; member of the Board of Governors (1981-93).
- o Project Co-Director, International Conference and Exposition on Aviation & Airport Infrastructure (Denver, Colorado, December 5-9, 1993).
- o Project Director, Conference on Airlines, Airports & Aviation (co-sponsored by Smithsonian Air & Space Museum, Washington, D.C., May 28-29, 1992).
- o Project Director, Conference on Airlines and the Future of Aviation (Denver, Colorado April 12-13, 1991).
- o Member, Commercial Board of Arbitrators, American Arbitration Association (1987-present).
- o Member of the Colorado Department of Transportation Committee on Tolls, Tunnels and Public Highway Authorities (1991).
- o President and Member of the Board of Directors, Citizens for Responsible Transportation, Inc. (1984-1986).
- o Member of the Board of Advisors, International Aerospace Institute (1982-1986).
- o Member of the Governor's Special Committee on Colorado Public Utility Commission Appointments (1988-1989).
- o Member of the Mayor's Selection Committee for a New Denver Stapleton International Airport Director (1992).
- o Consultant to the Colorado Faculty/State Oil Shale Review Program, Center for Environmental Sciences, University of Colorado at Denver (1979-1981).
- o Judge for the Jessup International Moot Court Competition, final rounds, at the Annual Meeting of the American Society of International Law in Washington, D.C. (1980).
- o Current or former member of the American Bar Association, the American Society of International Law, Transportation Lawyers Association, Transportation Practitioners Association, Transportation Research Forum, Delta Nu Alpha Transportation Fraternity, Western Social Science Association, Canadian Transport Lawyers Association, Federal Bar Association, Colorado Bar Association, Denver Bar Association, and Order of St. Ives.
- o Appeared on the following broadcast networks: ABC Radio, ABC Evening News with Peter Jennings, ABC World Business Report, Australian Broadcasting Company, Biznet, Business Radio Network, California Public Radio, Canadian Broadcasting Corp., C-SPAN, CBS Radio, CBS This Morning, CNBC, Cable News Network, CNN Crossfire, Financial News Network Market Wrap, MacNeal-Lehrer News Hour, National Public Radio, NBC Today, NBC Mutual Radio, Newstalk Radio Network, Newsweek On Air, Pacific Public Radio, PBS, PBS Nightly Business Report, Radio New Zealand, Transportation Digest, The Travel Channel, Unistar Radio Network, Voice of America, and Wisconsin Public Radio.
- o Quoted by the following news wire services: Associated Press, Knight-Ridder, Los Angeles Times, Newhouse Newspapers, Reuters, and United Press International.
- o Quoted by the following periodicals: Air Line Pilot, Aircraft & Aerospace (Australia), Airline Business (London), Airport, American Lawyer, Arizona Republic, Atlanta Journal-Constitution,

Atlanta Constitution, Aviation Daily, Aviation Week & Space Technology, Baltimore Sun, Berlin Ske-Tidend (Copenhagen, Denmark), Bond Buyer, Boston Globe, Bronx Riverdale Press, Business Today (India), Business Travel News, Business Week, Chicago Sun Times, Christian Science Monitor, Commercial Aviation News, Corporate Crime Reporter, Crains Detroit Business, Dallas Morning News, Denver Business Magazine, Denver Post, Detroit News, Financial Post (Canada), Florida Times Union, Fresno Bee, Frequent Flyer Magazine, Grand Forks Herald, Houston Chronicle, Journal of Commerce, Kansas City Star, Kiwanis Magazine, Los Angeles Times, Minneapolis Star Tribune, National Business Review (New Zealand), New York Times, New York Times Sunday Magazine, New York Newsday, Newsweek, OAG Frequent Flyer, Omaha World Herald, Parade, Pet Business Journal, Philadelphia Inquirer, Pittsburgh Press, Rocky Mountain News, Saf (Sweden), St. Louis Post-Dispatch, St. Paul Pioneer Press, San Diego Union, Seattle Times, Sydney Sun Herald (Australia), Time, The Times (London), Times Picayune (New Orleans), Toledo Blade, Toronto Star and Tribune, Tour and Travel News, USA Today, Wall Street Journal, Washington Post, Washington Post National Weekly Edition, and Washington Times.

o Interviewed on the following television stations: KCNC-TV (Denver), KMGH-TV (Denver), KPIX-TV (San Francisco), KRMA-TV (Denver), KSTP-TV (Minneapolis/St. Paul), KUSA-TV (Denver), KWGN-TV (Denver), KTVB-TV (Boise), Channel 9 (Australia), and Channel 10 (Australia).

o Interviewed on the following radio stations: Radio 2BL (Sydney, Australia), Radio 2SER (Sydney, Australia), KBCO-AM & FM (Denver), KBEN-AM (Los Angeles), KBOL-FM (Boulder), KBX-AM (Denver), KCFR-FM (Denver), KHOW-AM (Denver), KLZ-AM (Denver), KDEN-AM (Denver), KNUS-AM (Denver), KOA-AM (Denver), KYGO-AM (Denver), WAMU-FM (Washington, DC), WEEI-AM (Boston), WILL-AM, FM (Chicago), WNTR-AM (Washington, DC), WNWS-AM (Miami), WOAI-AM (San Antonio), KFYI-AM (Phoenix), KBCW-FM (Salt Lake City), KING-AM (Seattle), KIRO-AM (Seattle), KMOX-AM (St. Louis), and WXYT-AM (Detroit).

o Courses taught: Administrative Law, Aviation Law, Constitutional Law, Decision Process (Legal Method), International Business Transactions, International Economic Law, International Transportation Law, Regulated Industries, Torts, Transportation Law.

o Additional Teaching Interests: Antitrust.

o Biography published in Who's Who in American Law; Who's Who in the West; Who's Who in Colorado; Who's Who in U.S. Executives; Directory of Distinguished Americans; Directory of American Scholars; Community Leaders of America; Personalities of America; Dictionary of International Biography; The International Who's Who of Intellectuals; the International Directory of Distinguished Leadership; The International Who's Who of Contemporary Achievement; Men of Achievement; Five Thousand Personalities of the World; International Register of Profiles; Personalities of the Americas.

o References and writing samples are available upon request.

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1 May 97

ATTACHMENT B

RAILROAD INDUSTRY AGREEMENT

I. BACKGROUND

On April 2 and 3, 1998, the Surface Transportation Board ("STB") conducted two days of informational hearings to examine issues of rail access and competition in today's railroad industry.

In Ex Parte No. 575, the STB described the areas of concern expressed by the Short Line Railroads:

"Paper Barriers"—Contractual obligations incurred when Short Line carriers acquired lines from larger, connecting carriers;

Inadequate car supply; and

Lack of alternative routings.

The STB noted that private-sector negotiations were already underway and urged the parties to resolve these issues expeditiously.

In order to promote a stronger rail industry, this Railroad Industry Agreement ("Agreement") is entered into by the Association of American Railroads ("AAR") on behalf of participating Large Railroads (Class I carriers as defined by the regulations of the STB who subscribe to this Agreement) and by the American Short Line and Regional Railroad Association ("ASLRRA") on behalf of participating Small Railroads (Class II and III rail carriers as defined by the regulations of the STB who subscribe to this Agreement).

II. DEFINITIONS AND OTHER NOTES

For purposes of this Agreement and accompanying attachments, the following apply:

"Access" means interchange, intermediate switching, or haulage (or trackage rights at grantor's option);

No new Access to industries, shippers or receivers not now served is granted or created; all Access is Railroad to Railroad;

Carrier providing interchange, switching, haulage, trackage rights, or other service will be entitled to fair compensation for use of its facilities and/or services;

"New Traffic" means traffic that (1) is not now moving by rail (except for reasons of seasonality or unusual disruptions of shipping patterns outside the control of the Large Railroad, such as plant shutdowns) and (2) does not unreasonably negatively impact the Large Railroad.

"Congestion Problem" means that Access to or through a terminal, or to or via a track segment, need not be granted because incremental traffic caused by the New Traffic cannot be handled without causing unreasonable interference with the owner's operations. If the interference can be reasonably remedied by additional facilities and/or services, the carrier seeking Access is entitled to such facilities and/or services, provided it pays fair compensation;

"Short Line" ("SL") is a Class III railroad;

"Small Railroad" ("SRR") is a Class II or III railroad;

"Large Railroad" ("LRR") is a Class I railroad;

"Non-Short Line" ("Non-SL") is a Class I or II railroad.

"Railroad" ("RR") is a Class I, II or III railroad.

III. PRINCIPLES OF RELATIONSHIP

The parties agree that this Agreement shall be guided by the following public policy principles:

General

Laws and regulations must be consistent with the fundamentals of rail economics.

That was the genius of Staggers reforms such as permitting differential pricing, authorizing contracts and allowing most rates to be set by the market led to a rail renaissance.

Private sector solutions are best. Railroads and shippers are better served with market based solutions. Parties should turn to government only when the market cannot operate effectively and then only when private negotiations fail.

U.S. freight railroads are the most efficient in the world and wholesale changes in how they are regulated should not be made in the absence of compelling evidence of significant problems. American railroads form the world's most efficient rail system and contribute to the international growth and competitiveness of U.S. industry. It is not sound public policy to mandate major changes unless there are serious problems and proven alternatives.

Large and Small Railroads are integral to the provision of rail service in the U.S.

The business common to each is a collective effort for the benefit of both Large and Small Railroads and the railroad shipping public, made possible by the unique contributions of each.

Small Railroads deserve fair and workable solutions. When a Small Railroad has a legitimate grievance, the available remedy should be as fair, quick and inexpensive as possible, particularly for minor disputes. Arbitration should be available to settle most matters.

Paper Barriers

Only legitimate "paper barriers" should be enforceable. Paper barriers are restrictions on interchange imposed by contract at the time of the creation of the Short Line. Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. Such barriers should not restrict the Short Line's ability to develop New Traffic with another carrier if the selling or leasing Large Railroad can not or will not participate in the New Traffic. Excessive per car charges or other penalties imposed if a car is interchanged to another Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

Routing Alternatives and Access

Rail networks should be operated to maximize the efficiency of the network for ALL its users. A law or regulation that requires a Railroad to put the needs of the few ahead of the overall needs of the network is not sound public policy. Both Large and Small Railroads are dependent on interchanges and manifest train schedules.

A Large Railroad seller/lessor should not be able to block a Short Line's reasonable attempts to gain New Traffic that the Large Railroad cannot handle or for which it cannot offer a competitive package. The Short Line's attempt to gain New Traffic is not reasonable, however, if (1) the incremental traffic caused by the new business cannot be handled without causing unreasonable interference with the Large Railroad's operations; or (2) the Large Railroad is not adequately compensated for use of its tracks, yards and other facilities necessary to accommodate the traffic between the Short Line and another Railroad; or (3) the traffic of the Large Railroad is negatively impacted by such action.

Rail revenues, service and routing choices are intertwined. Railroads are networks that require huge amounts of capital investment in order to function most efficiently. A law or regulation that reduces a Railroad's ability to invest in infrastructure is not sound public policy.

Car Supply

Car supply is a problem of mutual concern to Small and Large Railroads. The answer should not lie in government regulation, but in private industry negotiation.

IV. PRINCIPLES OF AGREEMENT

1. **Car Supply Policy** (applies to all participating Class I, II and III Railroads)

A joint committee of senior representatives of Large and Small Railroads will meet to explore opportunities where they can work together to meet customers' car supply needs for existing and new business. In general, this committee will examine a long list of potential cooperative policies and innovative programs that will enhance car supply within the bounds of sound business principles and appropriate return on investment. A detailed protocol for car supply is attached as Exhibit A.

2. **Cooperative Service Actions** (applies to all participating Class I, II and III Railroads)

Large and Small Railroads agree to develop and implement Interchange Service Agreements ("ISA's") with each other to include standards for service and measurements to be used to manage improvement. Regular meetings between Large and Small Railroad corporate and operating personnel will be scheduled to resolve issues and improve service to customers. A more detailed protocol governing service is attached as Exhibit B.

3. **Paper Barriers and New Routes** (applies to participating Class I and III Railroads)

a) **General Premise:** *If the requested Access or routing helps the connecting Short Line and does not harm the Large Railroad, then the request should be approved as it will improve shipper rail service while strengthening the rail industry.*

b) **Paper Barriers and New Routes:** The Large and Short Line Railroads agree to work cooperatively to increase rail freight business. Joint initiatives designed to increase Short Line freight business under certain circumstances include, but are not limited to, waiver of contractual interchange restrictions and Large Railroad haulage of Short Line traffic. See Exhibit C (Examples 1-7).

In other cases, Large and Short Line Railroads may voluntarily agree at any time to renegotiate the terms of sale agreements including, but not limited to, terms relating to limitations on interchange (legitimate paper barriers). The renegotiations of limitations on interchange shall include consideration of additional compensation due to the Large carrier reflecting changes to the economic and market assumptions made by the Large and Short Line carriers at the time of original sale based upon the limitations on interchange at the time of such sale as well as all other relevant factors.

4. **Switching, Heavy Axle Loads, and Certain Rate Policies** (applies to all participating Class I, II and III Railroads)

a) **Switch Charges:**

i) **General Premise:** *The Large and Small Railroads agree that, subject to (iii) and (iv) below, existing (or future) intermediate and reciprocal switching charges*

between Large and Small carriers shall be comparable to existing (or future) charges between Large Railroads in similar circumstances and conditions.

ii) Any intermediate (switching between carriers) or reciprocal (switching between customer and carrier) switch charges existing between Large and Small Railroads on or after the effective date of this agreement shall be comparable to existing charges between Large Railroads in similar circumstances and conditions. See Exhibit D (Examples 8 – 12).

iii) This provision will not grant reciprocal switch Access for any carrier to any industry for which Access is not otherwise provided.

iv) This provision shall not apply with respect to any switch charges that are the subject of any administrative or judicial proceeding as of the date of this Agreement.

b) **Heavy Axle Loads:** With the growth of heavy axle load rolling stock (286,000 lbs. or greater), the Large Railroads agree to proportionately increase the Small Railroad share of the increase, if any, in overall revenue for handling heavy axle loads to reflect tonnage in situations where traffic is priced on a per-car basis for the Small Railroad.**

c) Certain Rates Policies:

i) **General Premise:** *The Large and Small Railroads commit to provide market-based competitive pricing for their customers, regardless of whether located on a Class I or connecting Small Railroad, that is non-discriminatory under similar circumstances and conditions.*

ii) Recognizing that the establishment of rate and service levels are matters of individual rather than collective consideration, assessment of market conditions upon which joint line price levels are based will reflect consideration of capital and/or operating savings for the Large Railroads resulting from services provided by the Small Railroads in the route. See Exhibit E for the sole application of this subsection(c).

V. APPLICATION

All sections of this Agreement apply to Large Railroads (Class I) and Short Line Railroads (Class III) that indicate their participation by individual subscription to this Agreement. All sections of this Agreement except Section (IV)(3)—“Paper Barriers and New Routes” apply to Class II Railroads that indicate their participation by individual

** Subsection IV(4)(b), Heavy Axle Loads, shall not apply to Montana Rail Link, Inc.; provided that this carve-out is without prejudice to the rights of Burlington Northern Santa Fe or Montana Rail Link, Inc. under their existing agreement.

subscription to this Agreement. All items provided for in this Agreement shall be binding upon all participating Railroads. Any relief available to any party under this Agreement shall be prospective only. To the extent that relief is granted by an arbitrator pursuant to the terms of this Agreement, such relief shall be limited solely to the period commencing on or, at the arbitrator's discretion, after the date that the subject arbitration proceeding was initiated.

VI. ARBITRATION

The participating Large and Small Railroads agree that if they have a dispute arising under Sections (IV)(3)—"Paper Barriers and New Routes" or Section (IV)(4) —"Switching, Heavy Axle Loads, and Certain Rate Policies" of this Agreement that cannot be resolved through discussion and negotiation between the parties involved, the parties will submit any unresolved issues to arbitration under the auspices of the STB (Ex Parte No. 560). Such arbitration will be based on the policies and principles of those sections of this Agreement, and to the extent applicable, the associated examples and exhibits, and will be binding on the parties.

VII. SENIOR POLICY COMMITTEE

A joint "Senior Policy Committee" shall be created to provide oversight, review, and, if applicable, non-binding recommendations on all matters relating to the relationship between Large Railroads and Small Railroads created by this Agreement and on all policy aspects and issues relating to the application and effects of this Agreement. This Senior Policy Committee shall be comprised of six members consisting of the Chief Executive Officers of the AAR, the ASLRRRA, two Large Railroads (to be designated by the Large Railroads) and two Small Railroads (to be designated by the Small Railroads). It shall meet semi-annually and, in addition, at any time upon the request of any member of the Committee or upon notification from a participant of its intent to withdraw from this Agreement. The Senior Policy Committee shall not have authority to set rates or charges or reach any agreement respecting rate-related matters.

VIII. AMENDMENT AND TERM

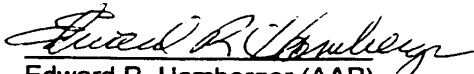
(a) The parties to this Agreement recognize that changes may occur which require modification of the terms of the Agreement. In the event of such changes, the parties agree that they will negotiate in good faith to modify appropriately the Agreement.

(b) The initial term of this Agreement shall be for a period of five years from the date hereof. The provisions of Section IV(4), including Exhibits D and E, shall not become effective until the Board has entered an order approving those provisions pursuant to 49 U.S.C. § 10706. After the initial term, this Agreement shall remain in effect for additional

successive one-year terms; provided, however, that during any such additional term, any party to this Agreement may withdraw from participation in this Agreement, only if such party has first (i) presented the reason(s) for such withdrawal to the Senior Policy Committee and (ii) provided 90 days written notice to the AAR and the ASLRRRA.

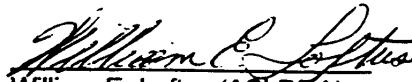
The parties agree to the policies, principles and procedures stated herein and to advise the Surface Transportation Board of this Railroad Industry Agreement. Individual Large and Small Railroads will indicate their acceptance of this Agreement by executing a separate document indicating their agreement to subscribe to and be bound by the terms and conditions of this Agreement.

For the Large Railroads:


Edward R. Hamberger (AAR)

Date: 9/14/98

For the Small Railroads:


William E. Loftus (ASLRRRA)

Date: 9/10/98

LIST OF EXHIBITS

- Exhibit A: *Car Supply Protocol* (applies to all participating Class I, II, and III Railroads)
- Exhibit B: *Service Policy Protocol* (applies to all participating Class I, II and III Railroads)
- Exhibit C: *Guidelines for Paper Barriers and New Routes* (applies to all participating Class I and III Railroads)
- Exhibit D: *Guidelines for Intermediate and Reciprocal Switching* (applies to all participating Class I, II and III Railroads)
- Exhibit E: *Guidelines for Certain Rate Policies* (applies to all participating Class I, II and III Railroads)

DEFINITIONS AND OTHER NOTES

"Access" means interchange, intermediate switching, or haulage (or trackage rights at grantor's option);

No new Access to industries, shippers or receivers not now served is granted or created; all Access is Railroad to Railroad;

Carrier providing interchange, switching, haulage, trackage rights, or other service will be entitled to fair compensation for use of its facilities and/or services;

"New Traffic" means traffic that (1) is not now moving by rail (except for reasons of seasonality or unusual disruptions of shipping patterns outside the control of the Large Railroad, such as plant shutdowns) and (2) does not unreasonably negatively impact the Large Railroad.

"Congestion Problem" means that Access to or through a terminal, or to or via a track segment, need not be granted because incremental traffic caused by the New Traffic cannot be handled without causing unreasonable interference with the owner's operations. If the interference can be reasonably remedied by additional facilities and/or services, the carrier seeking Access is entitled to such facilities and/or services, provided it pays fair compensation;

"Short Line" ("SL") is a Class III railroad;

"Small Railroad" ("SRR") is a Class II or III railroad;

"Large Railroad" ("LRR") is a Class I railroad;

"Non-Short Line" ("Non-SL") is a Class I or II railroad; and

"Railroad" ("RR") is a Class I, II or III railroad.

CAR SUPPLY

(Applies to participating Class I, II and III Railroads)

Large and Small Railroads will explore opportunities where they can work together, consistent with the antitrust laws, to meet customers' car supply needs for existing and new business.

A joint committee of senior representatives of Large and Small carriers will identify car types for which existing fleets (Railroad, shipper, etc.) are projected to be inadequate for current and future demand. Further, the joint committee will examine the ability of Small Railroads to provide freight cars for their customers for the purpose of developing cooperative policies and programs to enhance the ability of the Small Railroads to have the use of more new and used freight cars. Return on investment will be a consideration.

The joint committee will report its recommendations quarterly to the appropriate representatives of the Large and Small Railroads.

Policies and programs to be considered to determine if they are feasible and mutually beneficial include, but are not limited to:

- TTX ownership and operation of general service cars

- Regional pools for specific car types operated by interested Railroads

- Joint ownership of equipment by Large and Small carriers

- Underwriting of Small Railroad ownership by a larger carrier

- Continued review of rate arrangements

- Refurbishment of older cars

- Improvement of transit and turnaround times

- Opportunity for Small Railroads to buy surplus cars from Large Railroads on a mutually beneficial basis

- Longer term bilateral agreements to facilitate equipment financing

- Private agreement to establish car hire rates

SERVICE POLICY

(Applies to participating Class I, II and III Railroads)

Most Small Railroads are dependent upon and serve merchandise traffic that moves in non-unit manifest or local trains. Therefore, frequency and reliability of both interchange and manifest train schedules are of critical importance to the ability of Small Railroads, as well as Large Railroads, to serve their customers and to grow traffic and revenue.

To maintain a higher level of service, Large and Small Railroads agree to establish procedures for Small Railroad corporate and/or operating personnel and Large Railroad senior corporate and/or operating officers (all of whom having authority within their respective companies to effect a resolution of service issues) to meet on a regular basis in order to review, among other items, train service and interchange priorities.

Each Large Railroad and each Small Railroad connecting with a Large Railroad will develop and implement Interchange Service Agreements ('ISA's') with each other. These ISA's will include agreement on terms and standards to govern service and common procedures to measure interchange performance, manifest and/or local train performance, and car cycle time for the purpose of providing Small Railroad customers with the equivalent level of service provided to similarly situated Large Railroad customers taking into account factors such as volumes, commodities transported and locations.

Exhibit C

**GUIDELINES FOR
PAPER BARRIERS AND NEW ROUTES**

(Examples 1 – 7)

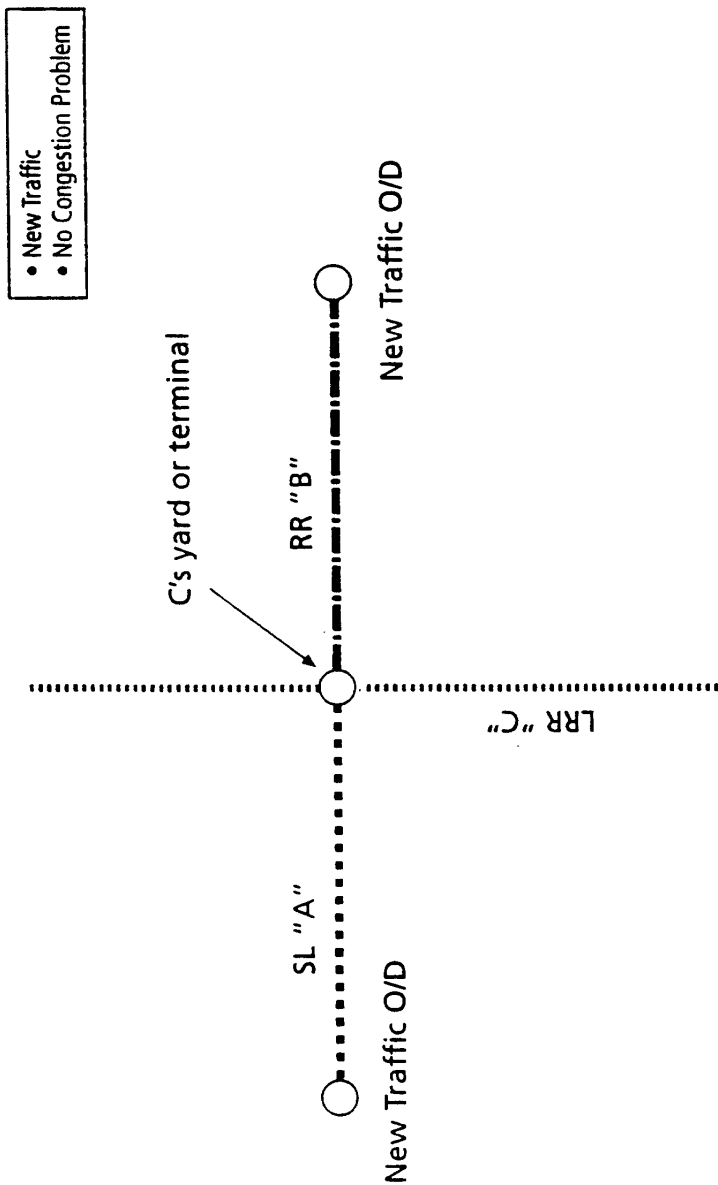
(Applies to participating Class I and III Railroads)

Example 1

Paper Barriers

Short Line "A" (SL "A") and Railroad "B" (RR "B") both connect with Large Railroad "C" (LLR "C") either in a common yard or terminal area. There is an opportunity for New Traffic that would originate on "A" and terminate on "B", or vice versa. There is no Congestion Problem. "C" must grant Access by either allowing "A" and "B" to connect directly or by handling the traffic between "A" and "B" within the yard or terminal.

If existing movements between "A" and "B" are provided for by a reasonable intermediate switch charge published by "C", "A" and "B" are already deemed to have Access.

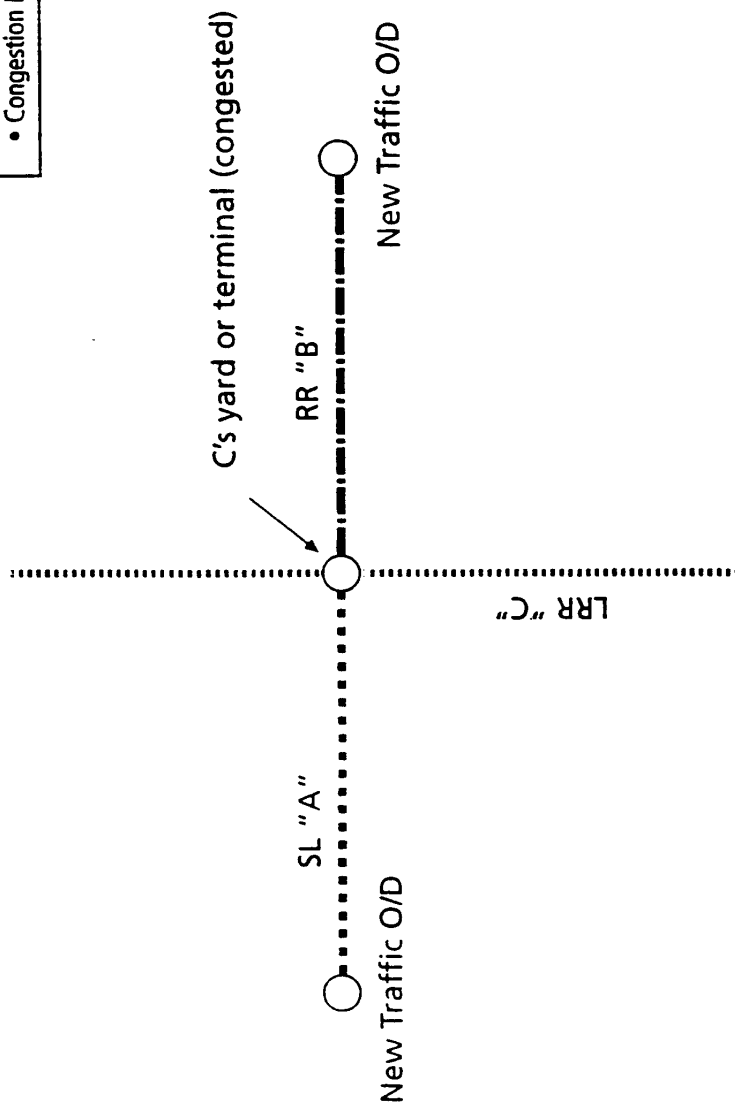


Example 2

Paper Barriers

Same facts as Example 1, except there is a Congestion Problem. Large Railroad "C" may deny Access.

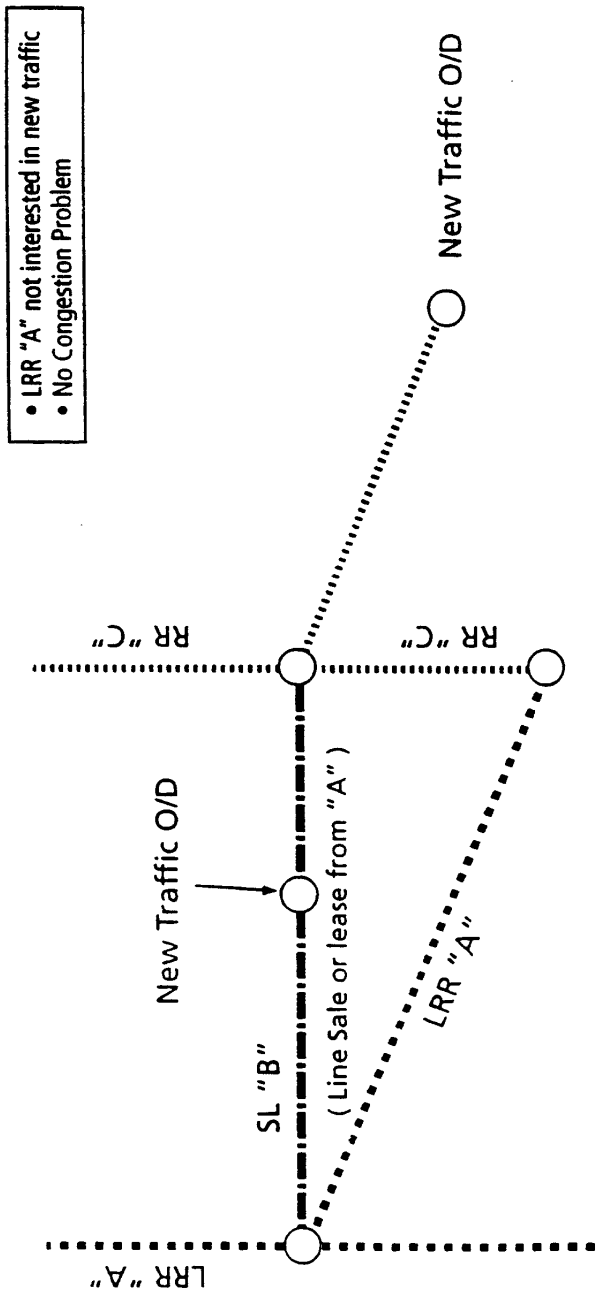
- New Traffic
- Congestion Problem



Example 3

Paper Barriers

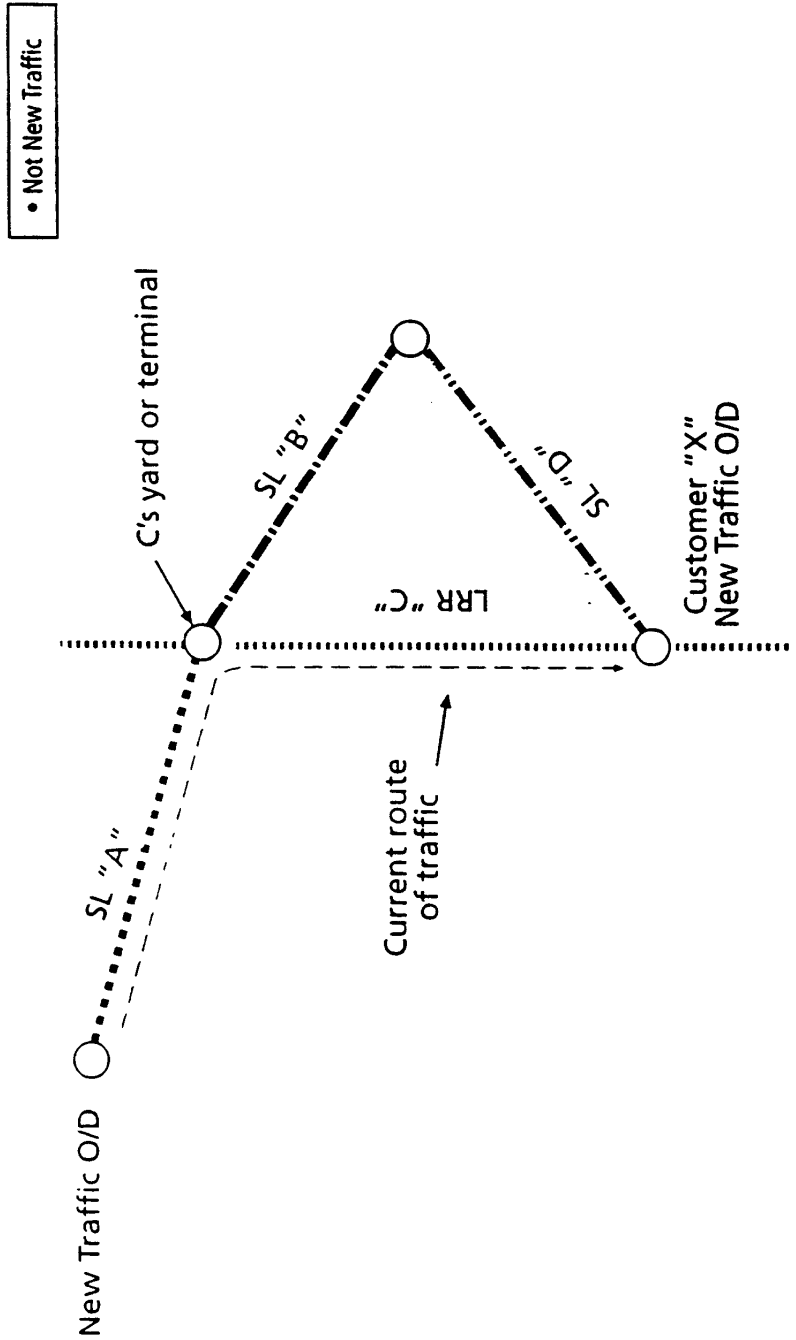
A legitimate paper barrier [see Section (III)(6)] resulting from a line sale or lease by Large Railroad "A" to Short Line "B" which restricts "B" from interchanging with Railroad "C" will be suspended to allow "B" to interchange New Traffic with "C" without penalty if, after request by "B", "A" does not establish a competitive package (rates, service and car supply) and "C" does.



Example 4

Paper Barriers

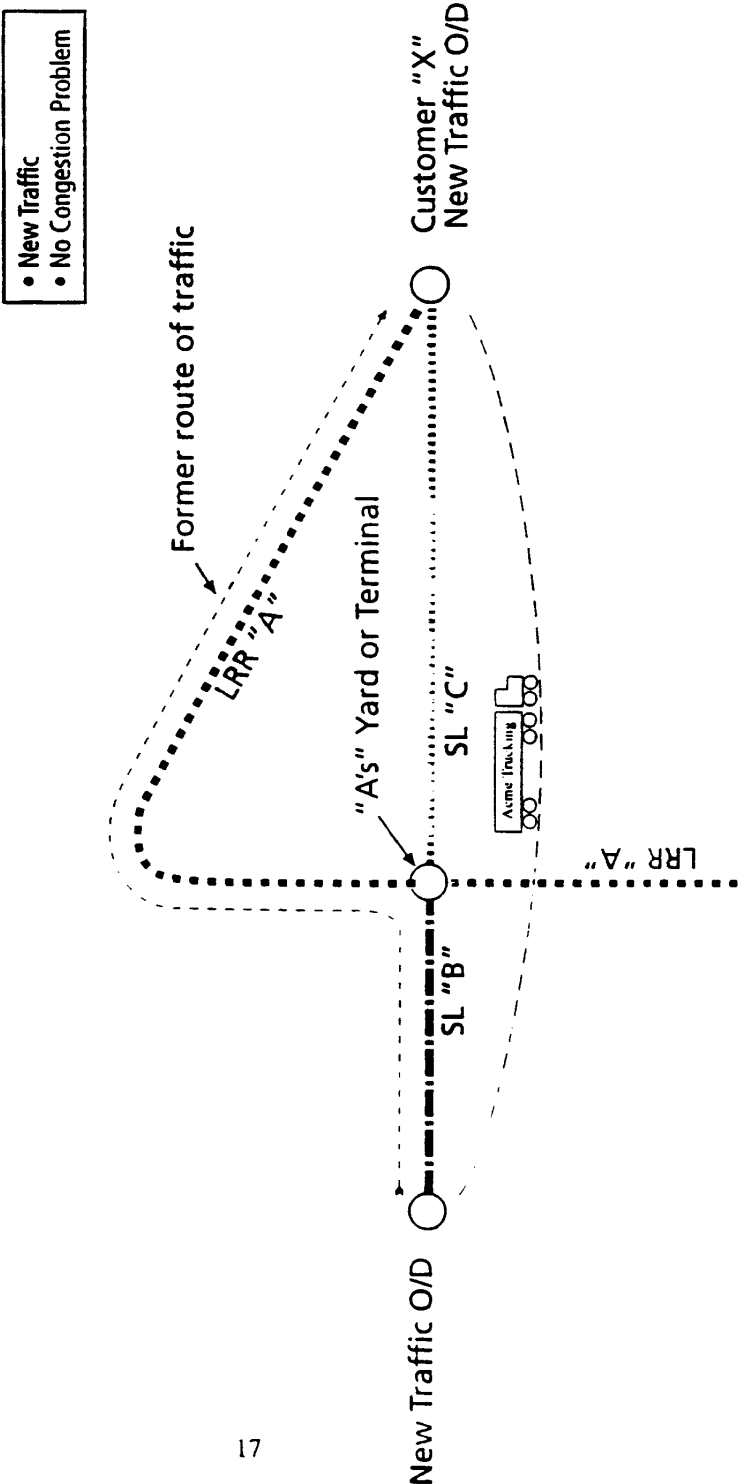
Short Line "A" can physically connect with Short Line "B" via Large Railroad "C's" yard or terminal but a paper barrier restricts "A" from interchanging with "B". "B" connects with Short Line "D" and "D" serves Customer "X" also directly served by "C". "A" and "D" wish to develop business with Customer "X" that is not New Traffic. "C" may deny Access.



Example 5

Paper Barriers

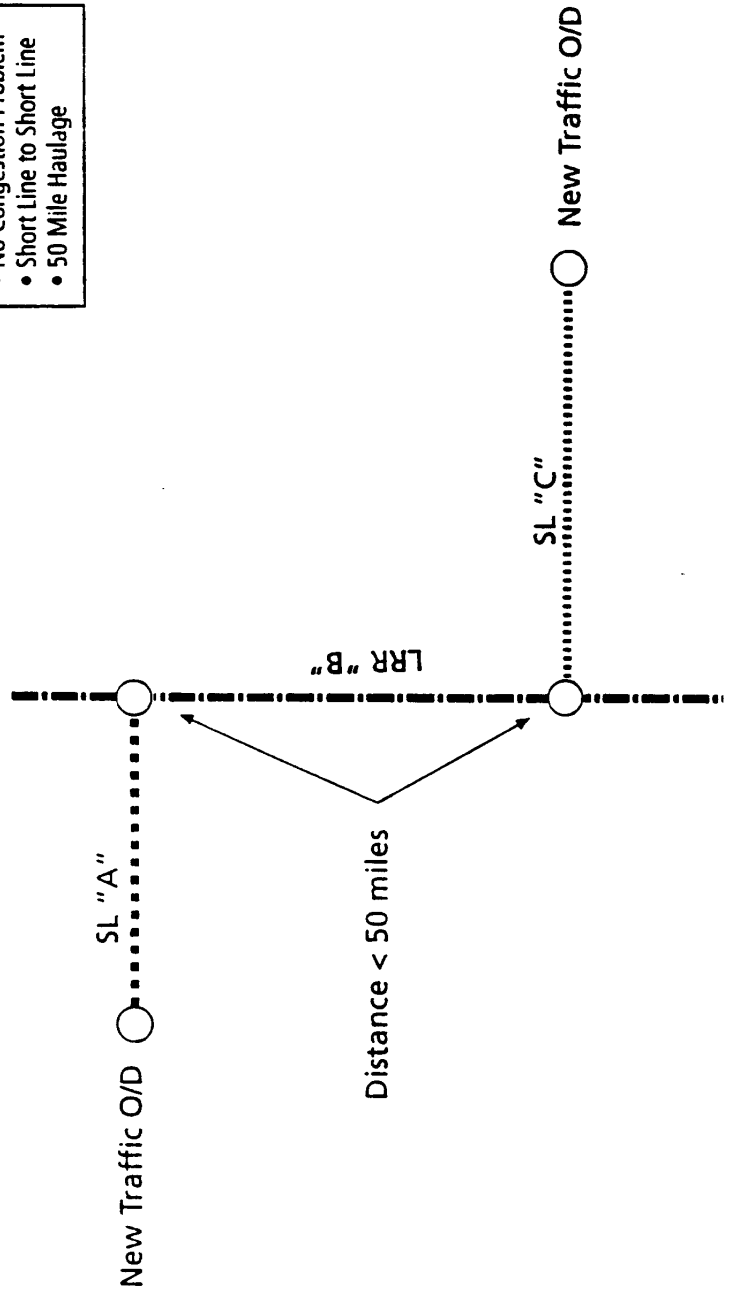
Large Railroad "A"/Short Line "B" traffic for Customer "X" has been lost to truck. "B" and "C" had no role in causing the truck diversion to happen. "A" must grant Access to "B" and Short Line "C" through "A's" terminal or yard to redirect traffic to rail from truck (New Traffic). There is no Congestion Problem.



New Routes

Large Railroad "B" must grant Access via haulage (or trackage rights at "B's" option) for New Traffic originating on Short Line "A" and terminating on Short Line "C", or vice versa, for distances up to fifty (50) miles along "B's" line of railroad connecting "A" and "C" as long as there is not a Congestion Problem. "B" is not obligated to provide equipment. Haulage (or trackage rights at "B's" option) may be for longer distance by mutual agreement. If "B" does provide equipment, "B" is entitled to participate as a line-haul carrier in the rate if it so chooses.

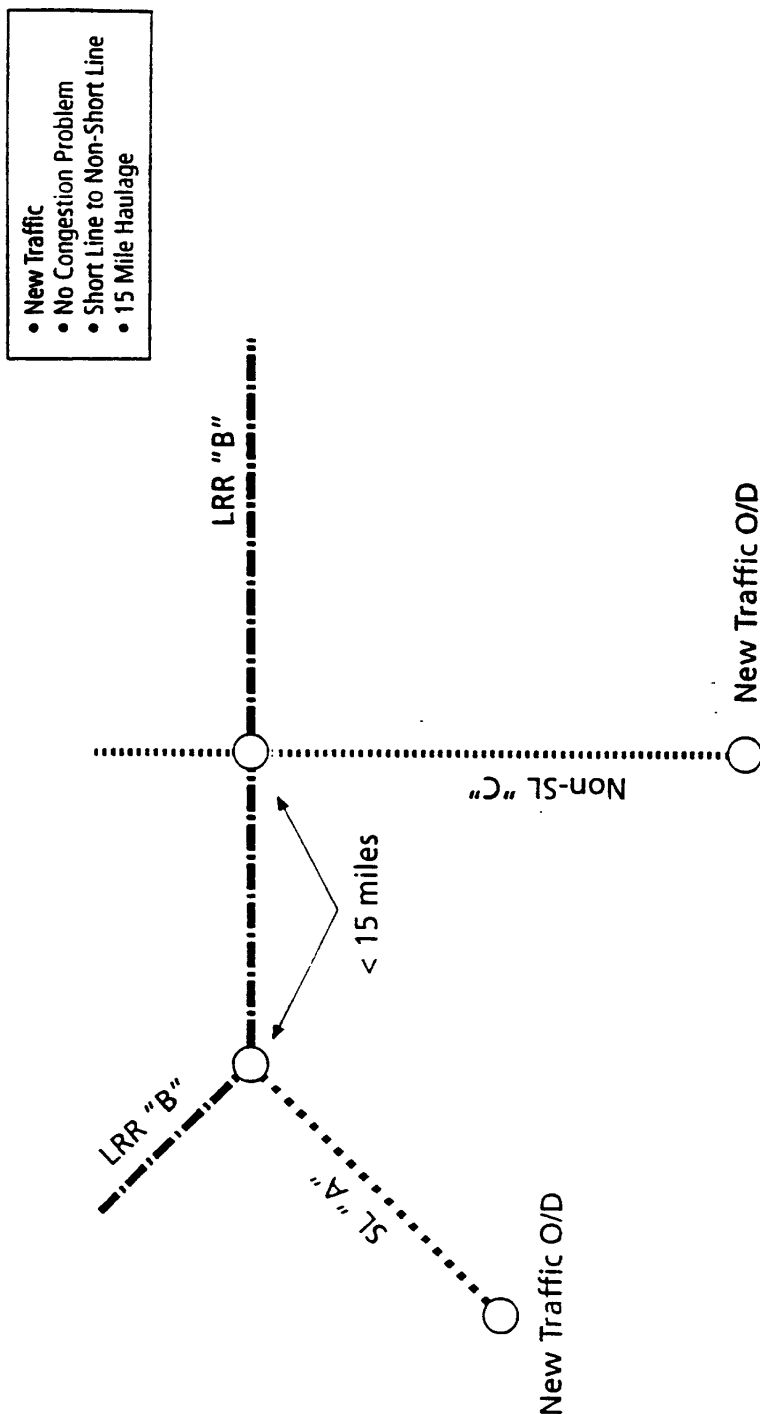
- New Traffic
- No Congestion Problem
- Short Line to Short Line
- 50 Mile Haulage



Example 7

New Routes

Large Railroad "B" must grant Access via haulage (or trackage rights at "B's" option) between Short Line "A" and Non-Short Line "C" to move New Traffic handled by "B" for distances up to fifteen (15) miles along "B's" line of railroad connecting "A" and "C" as long as there is not a Congestion Problem. "B" is not obligated to provide equipment. Haulage (or trackage rights at "B's" option) may be for longer distance by mutual agreement.



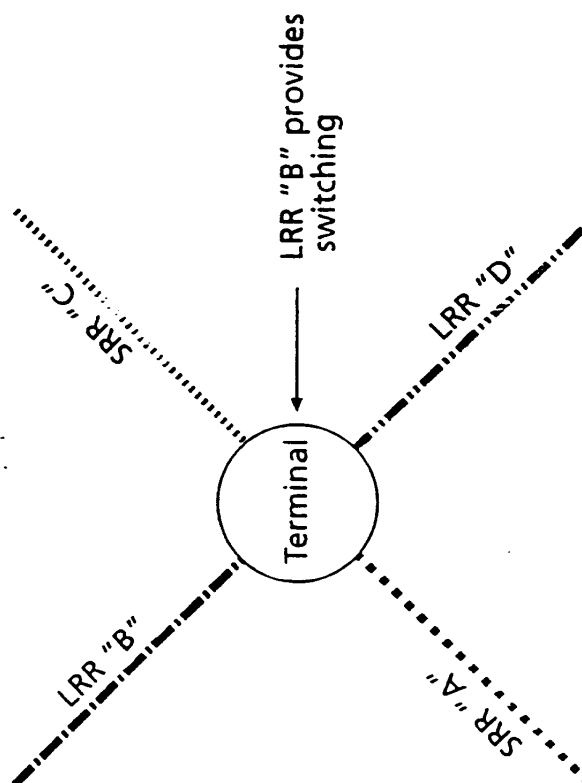
**GUIDELINES FOR
INTERMEDIATE AND RECIPROCAL SWITCHING**

(Examples 8 – 12)

(Applies to participating Class I, II and III Railroads)

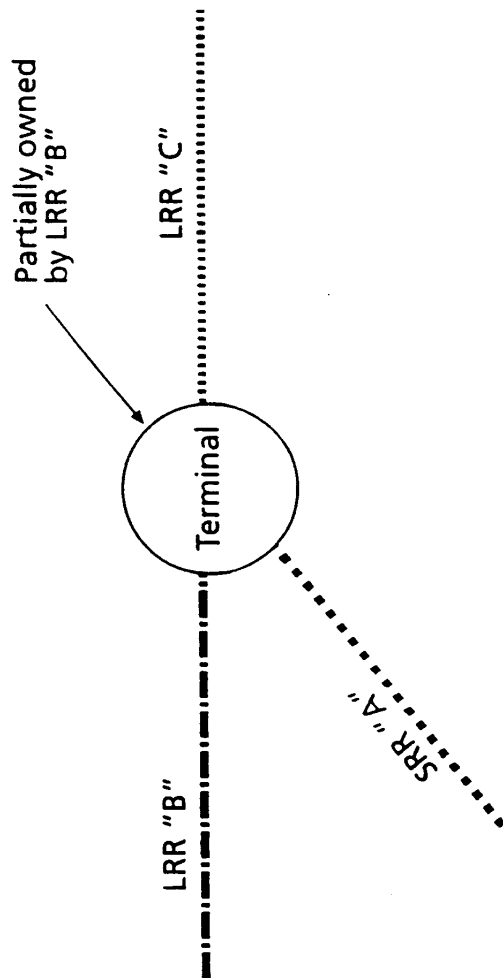
Intermediate Switching Charges

Small Railroad "A" serves a terminal where Large Railroad "B" currently provides intermediate terminal switching between a number of carriers including Small Railroad "C". Small Railroad "C" serves the same terminal as does another Large Railroad. Assuming the operating conditions are similar, "A" and "C" should pay the same or similar charges as the other Large Railroad for receipt of similar services.



Intermediate Switching Charges

Small Railroad "A" serves a terminal, as do Large Railroad "B" and Large Railroad "C". "B" owns a share of the terminal switching company and "A" and "C" own no share of the terminal switching company. "A" and "C" may pay a higher per car intermediate switch charge than "B", reflecting its ownership interest. Assuming the operating conditions are similar, "A" and "C" should pay the same or similar charges for receipt of similar services.



Example 10

Reciprocal Switching Charges

Large Railroads "A" and "B" and Small Railroad "C" serve a terminal. No other Large Railroads serve the terminal. "A" and "B" charge each other \$400 per loaded car for reciprocal switching within the terminal. "A" charges "C" \$500 per loaded car, and "B" charges "C" \$600 or more per loaded car. "A" and "B" must each charge "C" \$400 per loaded car, assuming similar circumstances and conditions.

Example 11

Reciprocal Switching Charges

Large Railroads "A" and "B" and Small Railroad "C" serve a terminal. No other Large Railroads serve the terminal. "A" and "B" have a system-wide reciprocal switching arrangement with each other that provides for a per-car charge less than or equal to \$250 per loaded car. The charge (assessed by "A" and/or "B" to "C") for switching in this particular terminal exceeds \$250 per loaded car. If 115% of the actual cost of performing the reciprocal switch service is greater than \$250, "A" and "B" shall each charge "C" no more than said 115% of actual cost. If 115% of actual cost is less than or equal to \$250, "A" and "B" shall not charge "C" more than \$250 per loaded car. Nothing in this example prohibits a lower switch charge to "C" if such is mutually agreed to by "A" and/or "B" and "C."

Example 12

Reciprocal Switching Charges

In terminals containing multiple Railroads (greater than three), the carrier, on which the particular customer to be Accessed by reciprocal switch is located, must not charge a Small Railroad a charge that is higher than the highest charge to a Large Railroad or \$250 per loaded car, whichever is greater. (The involved Large Railroads may be parties to one or more system-wide reciprocal switching agreements providing charges to each involved carrier of less than or equal to \$250 per loaded car.)

Note: Nothing in the provisions of Examples 10, 11 and 12 will grant reciprocal switch access for any carrier to any industry for which Access is not otherwise provided.

GUIDELINES FOR CERTAIN RATE POLICIES

(Applies to participating Class I, II and III Railroads)

In the event that a Small Railroad has only one Class I connection or a Large Railroad has rate making authority on behalf of a Small Railroad, and the Small Railroad is trying to generate New Traffic or is threatened with the loss of existing traffic, and the Small Railroad believes that the Large Railroad is not adequately reflecting the Large Railroad costs or relevant market conditions in a rate charged to a shipper of a comparable commodity located on the Large Railroad in close proximity to a similar shipper located on the Small Railroad (similar circumstances and conditions), then the Small Railroad can request the Large Railroad, within ninety (90) days, to examine its costs and relevant market conditions and meet to discuss the matter. For purposes of this Agreement, a haulage agreement between a Large Railroad and a Small Railroad does not give the Large Railroad rate making authority on behalf of the Small Railroad.

The Large Railroad shall study its costs and the relevant market conditions, on an annual actual total cost basis, from the area requested by the Small Railroad to the first crew change location common for the similar Small Railroad and Large Railroad shipments in question. This study shall include all costs relevant to this segment of the Large Railroad (including any savings attributable to the then present Small Railroad operations as well as including any applicable handling charges paid by the Large Railroad to the Small railroad as part of the costs incurred by the Large Railroad) and shall consider the volume and seasonality of the traffic in question and capability of the Large Railroad, due to economies of scale, to reallocate assets and personnel during periods of slow demand.

After the requested cost study has been completed, the Railroads shall meet to discuss the results. Terms of confidential transportation contracts to which both Railroads are not a party will not be revealed. Acting on the results of the study, the Large Railroad may choose to adjust one or more rates and/or charges or may elect to retain the status quo.

The Small Railroad, if not satisfied with the result, may invoke arbitration under Section VI of this Agreement. Both parties and the arbitrator will treat all cost information involved in the arbitration as confidential. Particular rates charged to individual shippers or receivers in transportation contracts shall not be considered in arbitration under the terms of this Agreement. The arbitrator's decision can only deal with the rate complained of, that is, the joint Large Railroad/Small Railroad rate.

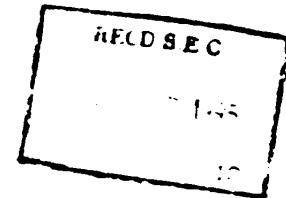
If the arbitrator determines that the rate charged by the Large Railroad to the Small Railroad shipper improperly favors the shipper on the Large Railroad, then the arbitrator may order a reduction of the rate, but only to the extent needed to eliminate such favoritism. The rights provided in this Exhibit E reflect unique circumstances and create no rights for any third parties.

ATTACHMENT C

Registration No. 33-88782

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Amendment No. 2
To
FORM S-1
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933



RailTex, Inc.

(Exact name of Registrant as specified in its charter)

Texas
(State or other jurisdiction of incorporation or organization)

4911
(Primary Standard Industrial Classification Code Number)

75-1948121
(U.S. Employer Identification No.)

4940 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7680

(Address, including zip code and telephone number, including area code of Registrant's principal executive office)

Bruce M. Flehr
Chairman of the Board and President
RailTex, Inc.

4940 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7680

(Name, address, including zip code and telephone number, including area code, of agent for service)

EXHIBITS

SALE AGREEMENT
SISKIYOU LINE, COOS BAY BRANCH
AND WHITE CITY BRANCH

By and Between

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Delaware corporation ("Seller")
and CENTRAL OREGON & PACIFIC RAILROAD, INC.,
a Delaware corporation ("Purchaser")

Dated

November 31, 1994

SALE AGREEMENT - SISKIYOU LINE,
COOS BAY BRANCH AND WHITE CITY BRANCH

THIS SALE AGREEMENT, together with all the exhibits referenced herein (the "Contract") is made and entered as of November 11, 1994, by and between SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("Seller") and CENTRAL OREGON & PACIFIC RAILROAD, INC., a Delaware corporation ("Purchaser"), upon the following terms and conditions:

1. Sale and Purchase. Seller agrees to sell and quitclaim, and Purchaser agrees to purchase and take, the Property and the common carrier obligations pertaining thereto, upon the terms and conditions contained in this Contract. Seller also agrees to sell, and Purchaser agrees to purchase and take, the water cars listed on Schedule 1 attached hereto and made a part hereof, or cars equivalent thereto (the "Water Cars").

2. Property.

2.1 As used in this Contract, the term "Property" includes that certain real property described and/or depicted on Exhibit A attached hereto and made a part hereof, together with all of the interests described within this Section 2 as being included in the Property, but excludes the parcels described and/or depicted in Exhibit A-1 attached hereto and made a part hereof, and all other interests and rights described within this Section 2 as being excluded or reserved from the Property. Upon completion of the Legal Description (as defined in Section 13 below), the Legal Description shall become the description of the real property comprising the Property for all purposes of this Contract. The Property does not include, and Seller shall reserve to Seller and Seller's successors and assigns in the deed quitclaiming the Property to Purchaser, to the extent of Seller's interests therein: (i) all water rights, (ii) all timber rights and (iii) all oil, gas, sulfur, iron ore, coal, lignite, uranium, limestone, building stone, caliche, gravel, sand and other minerals (whether or not of like kind or character) in and under the Property (the "Mineral Reservation"). Seller, however, shall waive the right to use or damage the surface of the Property in connection with its Mineral Reservation, and shall exercise its Mineral Reservation in a manner that does not interfere with the rail operations of Purchaser and in accordance with all reasonable operating rules of Purchaser.

The Property also does not include, and Seller shall reserve in the deed quitclaiming the Property, all of the reservations described in Section 2.5 below (collectively, together with the water rights, the timber rights and the Mineral Reservation, such rights and such reservations shall hereinafter be referred to as the "Retained Rights").

2.2 Seller hereby expressly agrees to indemnify Purchaser and hold Purchaser harmless from and against any and all costs, expenses (including, without limitation, reasonable attorneys' fees, disbursements and costs), damages, losses, claims, liabilities, liens, encumbrances and charges arising out of the acts or omissions of Seller in connection with the exploitation of the Mineral Reservation, including, without limitations, personal injury, death and property damage. Seller agrees that as a condition to any conveyance or assignment of the Mineral Reservation, its successors or assignees shall be required to give the Purchaser and its successors and assigns the same indemnification set forth in this Section 2.2.

2.3 The Property also includes:

(i) the grant of an easement for railroad purposes in Ashland, Oregon in the form of Exhibit B attached hereto and made a part hereof;

(ii) the grant of rights subordinate to Seller's interests in the microwave facilities listed in Exhibit C attached hereto and made a part hereof, such grants to be in the form of Exhibits D and R attached hereto and made a part hereof;

(iii) the assignment of certain Tax Benefit Transfer Agreements ("TBT Agreements") that pertain to the Property; and

(iv) the assignment of all of Seller's interests in the leases and agreements affecting the real property described in Exhibit A, excluding those pertaining to the Retained Rights. The Property does not include any improvements owned by tenants or by any party other than Seller or Seller's affiliates.

2.4 The Property also includes all rails, ties, fastenings, switches and frogs complete, bumpers, and other track materials, signals and installed communications equipment, railroad crossing signs and appurtenances located upon the Property (the "Railroad Facilities"). The Property

also includes all of Seller's right, title and interest in and to all improvements located thereon other than Railroad Facilities, including, but not limited to, depots, buildings, railroad structures, culverts, grading, embankments, dikes, pavements, ballast and other drainage facilities and similar structures (the "Railroad Structures") and all of Seller's right, title and interest in or to all leases or other agreements affecting rail use of the Property (the "Incidental Interests").

2.5 The deed quitclaiming the Property shall also reserve to Seller and its successors and assigns certain easements in the forms contained in Exhibit D attached hereto and made a part hereof.

3. Purchase Price.

3.1 (a) The purchase price for the Property (the "Purchase Price") is based upon the assumptions of both Seller and Purchaser that, from and after the Closing Date, revenue freight cars originating or terminating on the Property and/or the Leased Premises (as defined in Exhibit F) (i) shall be interchanged directly or indirectly (including without limitation pursuant to switching operations) solely with Seller or such carriers as may be authorized in writing from time to time by Seller, and (ii) shall be routed in line haul service such that those cars that are interchanged with Seller (x) are routed solely over Seller's lines if such cars are moving to or from destination or origin points served by Seller except as otherwise provided in Seller's rail transportation contracts or tariffs, or (y) are routed via Seller's long haul route if such cars are moving to or from points not served by Seller. Based upon these assumptions and the other terms and conditions of this Contract, Seller and Purchaser have agreed that the Purchase Price for both the Property and the Water Cars shall be the sum equal to the total of:

(i) \$16,975,000.00 (the "Closing Portion"), and

(ii) the amounts described below as the "Additional Portion" of the Purchase Price.

Purchaser shall also deposit \$1,000,000 (the "Escrow Amount") in a labor protection escrow account (the "Escrow Fund") to be held in accordance with the terms of the escrow instructions attached hereto as Exhibit E and made a part hereof.

(b) In the event that the routing and interchange of freight rail cars do not occur in the manner currently contemplated by the parties (as described in Subsection 3.1(a) above), then both Purchaser and Seller agree that Seller shall be entitled to receive additional consideration for the sale of the Property, and Purchaser hereby agrees to pay to Seller as the "Additional Portion" of the Purchase Price the following amounts:

(i) for each revenue freight car, trailer, container, intermodal car or other type of equipment used in revenue intermodal service (each, a "revenue freight car") interchanged by Purchaser (A) with a carrier other than Seller (or such other carriers as may be authorized in writing from time to time by Seller), or (B) (x) that is not routed solely over Seller's lines if such revenue freight car is moving to or from destination or origin points served by Seller except as otherwise provided in Seller's rail transportation contracts or tariffs, or (y) that is not routed via Seller's long haul route if such revenue freight car is moving to or from points not served by Seller, an amount equal to \$2,700 per car (for each revenue freight car other than center beam flat revenue freight cars) and \$5,000.00 per car for center beam flat revenue freight cars, for all such cars so interchanged or routed. Notwithstanding the foregoing, in the event that Purchaser pays an Additional Portion for any trailer, container or other type of equipment that was transported by a rail car, Purchaser shall not also pay an Additional Portion for the rail car itself.

Notwithstanding any other provision of this Contract, such payments shall be made by Purchaser within 30 days after any such interchange is effected, and all such payments shall be accompanied by a listing of any revenue freight cars interchanged, the dates thereof and such other information regarding each such car as Seller may require. The Additional Portion of the Purchase Price shall be subject to annual increase or decrease on each July 1, commencing July 1, 1995, based on the relationship of the Association of American Railroads (or successor organization) Indices of Railroad Material Prices and Wage Rates for Railroads of Class I, Western District (material prices, wage rates and supplements combined, excluding fuel). Statistics for the year 1993 shall be used as the base year statistics, and the change effective July 1, 1995 shall be based on the relationship between 1994 statistics and 1993 statistics. Subsequent changes also shall be made on the basis of subsequent year to year changes in these statistics, pursuant to the Trackage Rights Agreement between Seller and Purchaser, dated of even date herewith. The right of Seller to collect the Additional Portion of the

Purchase Price shall not extend past December 31, 2093. To the extent that Purchaser pays to Seller either (i) an Additional Portion of the Purchase Price, (ii) an Interchange Charge as defined in the Trackage Rights Agreement (defined in Section 11.1 below), or (iii) any Additional Rents as defined in the Lease Agreement (defined in Section 11.1 below), Seller may elect whether to treat such payment as either an Additional Portion of the Purchase Price, an Interchange Charge or as Additional Rents, but Purchaser shall not owe duplicate (or triplicate) payments to Seller.

(b) The Purchase Price shall be paid to Seller by wire transfer of funds to Seller, in accordance with Seller's written instructions, at the Closing and the Escrow Amount shall be deposited at the Closing with an escrow agent selected by the parties.

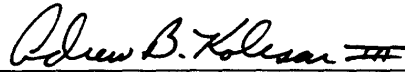
(c) This Section 3.1 shall survive the Closing.

3.2 The parties shall provide the escrow agent with instructions that allow Seller to withdraw from the Escrow Fund money to be spent on labor protection payments arising from the transactions contemplated by this Contract, including but not limited to: (i) those based upon agreements that Seller has executed with its unions; (ii) those arising from Seller's employees using the Region/System Boards (including all costs associated therewith); (iii) any guarantee payments; (iv) ICC-imposed protective conditions; and (v) any other type of payments (collectively, the "Protective Payments"). Seller's withdrawals shall be limited to one-half of its Protection Payments, so that Seller and Purchaser (through the Escrow Fund) shall each bear one-half of all such costs up to an aggregate amount of \$2,000,000. The escrow instructions are set forth in Exhibit E attached hereto and made a part hereof.

4. Title. Seller shall quitclaim all of Seller's right, title and interest in the Property by quitclaim deed (the "Deed") in the form attached hereto as Exhibit D. Notwithstanding anything contained in this Contract or the Deed that could be construed to the contrary, the transfer of title contemplated in this Contract shall be without warranty of any kind, whether oral or written, express or implied, whether existing by common law or by statute or any other manner, and Purchaser's title shall be subject to: (i) all existing leases, licenses, permits, easements and agreements affecting the Property; (ii) the Retained Rights; (iii) any liens or encumbrances arising out of any activity of Purchaser or its agents with respect to the Property; (iv) any matters

Certificate of Service

I hereby certify that I have this 21st day of December, 1998, caused copies of the foregoing "Petition for Further Rulemaking to Eliminate Unreasonable 'Paper Barriers' to Inter-change" to be served by hand upon counsel for the Association of American Railroads and counsel for the American Short Line and Regional Railroads Association, and upon all other parties of record in this docket by first class mail, postage prepaid.



Andrew B. Kolesar III

ATTACHMENT 3

As filed with the Securities and Exchange Commission on November 19, 1993

BEST AVAILABLE COPY

Registration No. 33-68938

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549



93 26 0145

POST-EFFECTIVE AMENDMENT NO. 1

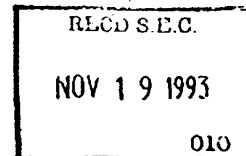
TO

FORM S-1

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933



RailTex, Inc.

(Exact name of Registrant as specified in its charter)

Texas
(State or other jurisdiction of
incorporation or organization)

4011
(Primary Standard Industrial
Classification Code Number)

74-1948121
(I.R.S. Employer
Identification No.)

4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Address, including zip code and telephone number, including area code of Registrant's principal executive offices)

Bruce M. Flohr
Chairman of the Board and President
RailTex, Inc.

4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Name, address, including zip code and telephone number, including area code, of agent for service)

Copies to:

John D. Flach, Esq.
Matthews & Branscomb
A Professional Corporation
106 S. St. Mary's, Suite 800
San Antonio, Texas 78205
(210) 226-4211

Joel S. Klaperman, Esq.
Shearman & Sterling
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Approximate date of commencement of proposed sale of securities to public: As soon as practicable after this Registration Statement becomes effective.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box. ☐

This Post-Effective Amendment No. 1 to the Registration Statement shall become effective on such date as the Commission, acting pursuant to Section 8(c), may determine.

Total of sequentially numbered pages 1166
Exhibit Index on sequential page number 87

1 ✓

whether or not pursuant to necessary and proper regulatory authority as required by Section 3.02 of this Section III, Lessee will promptly relinquish to Lessor possession of the Leased Premises and this Lease Agreement will terminate as provided by Section XV of this Lease; PROVIDED, HOWEVER, any discontinuance of service or abandonment of any portion(s) of the Leased Premises which are inconsequential to rail freight service over the Leased Premises generally will be permitted and will not result in a termination of this Lease or require relinquishment of possession of the Leased Premises by Lessee.

SECTION 3.04 -- Lessor may acquire the right to operate over the Leased Premises between milepost 259.05 at Diaz Junction and milepost 270.00 near Independence to serve AP&L and, if this right is exercised, Lessee shall no longer have the right to serve AP&L, and AP&L shall become a closed industry served only by Lessor. This right shall be acquired effective seven days after Lessee's receipt of Lessor's written notice to Lessee that Lessor desires to begin operation over such trackage.

SECTION IV RENT

SECTION 4.01 -- In consideration of this Lease, and subject to the terms and provisions set forth herein, Lessee agrees to pay Lessor rent for the Leased Premises in the amount of Ninety Million Dollars (\$90,000,000) per year payable annually in advance on the 1st day of March; PROVIDED, HOWEVER, that subject to the provisions of Section 4.02 hereof, for each lease year that 95% or more of all traffic originating or terminating on the Leased Premises is interchanged with Union Pacific Railroad Company or Missouri

Pacific Railroad Company and any affiliated company, their successors and assigns, Lessor agrees that it will waive or partially waive the rent for that particular year in accordance with the schedule set forth in Section 4.03. The 95% level must be achieved separately and simultaneously on the Pleasant Hill-Bergman (including connecting branches) and Guion-Diaz Junction segments.

SECTION 4.02 -- The following traffic shall not be counted in calculating either total traffic or the percentage of traffic in Section 4.03: (a) Industries open to reciprocal switching at Ft. Scott, KS; Lamar, MO; Joplin, MO; Carthage, MO; Aurora, MO; and Springfield, MO as shown in Exhibit C, and (b) traffic that is local to Lessee, i.e., traffic which both originates and terminates at stations on the Leased Premises or at the stations served by Lessee pursuant to the Line Sale Contract between Lessor and Lessee which is being executed by the parties concurrently with this Agreement, and not involving line haul movement by any railroad other than Lessee. Lessor will consider further exceptions to this section on a case by case basis.

SECTION 4.03 -- Upon request of Lessor, on or before the 1st day of February of each year following the commencement of this Lease, Lessee shall submit a report, signed by an officer of Lessee, certifying the amount and type of traffic originating or terminating on the Leased Premises during the prior calendar year, the railroads (if any) with which all or portions of such traffic were interchanged, the volume of traffic interchanged with each such railroad, and the total amount of rent due and payable for the previous calendar year. The rent due from Lessee for the Year shall be determined by reference to the percentage of the total

traffic (as described in Section 4.01, subject to the provisions of Section 4.02) that was interchanged with Lessor, subject to the terms of Section 4.04, in accordance with the following schedule:

<u>PERCENTAGE OF THE TOTAL TRAFFIC THAT WAS INTER- CHANGED WITH LESSOR</u>	<u>RENT DUE LESSOR</u>
100 - 95%	\$ -0-
94 - 85%	\$10,000,000
84 - 75%	\$20,000,000
74 - 65%	\$20,000,000
64 - 55%	\$30,000,000
54 - 45%	\$40,000,000
44 - 35%	\$50,000,000
34 - 25%	\$60,000,000
24 - 15%	\$70,000,000
14 - 5%	\$80,000,000
0 - 4%	\$90,000,000

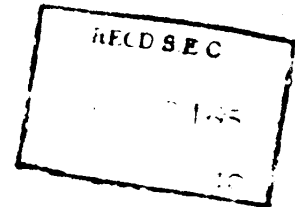
Lessee shall pay to Lessor all rent determined to be payable pursuant to this Section 4.03 on or before March 1st for each calendar year following the commencement of this Lease.

SECTION 4.04 -- Rent shall be adjusted each year to reflect changes in the Producer Price Index - Finished Goods (the "Index") and the amount due each year shall be determined as follows:

The Index for the month of December 1992 shall be deemed to be the base index ("Base Index"). Rent shall be adjusted annually as of each December thereafter by multiplying the rent shown in Section 4.03 by a fraction, the denominator of which is the Base Index and the numerator is the Index for the month of December in each year. The term "Producers Price Index" shall mean the Producer Price Index - Finished Goods (Reference Base 1982 = 100), published by the United States Department of Labor, Bureau of Labor Statistics, or, if the Producer Price Index ceases to be published, such comparable index or measure of change in the

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Assessment No. 2
To
FORM S-1
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933



RailTex, Inc.

(Exact name of Registrant as specified in its Charter)

Texas
(State or other jurisdiction of
incorporation or organization)

4011
(Primary Standard Industrial
Classification Code Number)

75-1948121
(I.L.S. Employer
Identification No.)

4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Address, including zip code and telephone number, including area code of Registrant's principal executive officers)

Bruce M. Flehr
Chairman of the Board and President
RailTex, Inc.
4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Name, address, including zip code and telephone number, including area code, of agent for service)

EXHIBITS

SALE AGREEMENT
SISKIYOU LINE, COOS BAY BRANCH
AND WHITE CITY BRANCH

By and Between

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Delaware corporation ("Seller")
and CENTRAL OREGON & PACIFIC RAILROAD, INC.,
a Delaware corporation ("Purchaser")

Dated

November 31, 1994

SALE AGREEMENT - SISKIYOU LINE,
COOS BAY BRANCH AND WHITE CITY BRANCH

THIS SALE AGREEMENT, together with all the exhibits referenced herein (the "Contract") is made and entered as of November 11, 1994, by and between SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("Seller") and CENTRAL OREGON & PACIFIC RAILROAD, INC., a Delaware corporation ("Purchaser"), upon the following terms and conditions:

1. Sale and Purchase. Seller agrees to sell and quitclaim, and Purchaser agrees to purchase and take, the Property and the common carrier obligations pertaining thereto, upon the terms and conditions contained in this Contract. Seller also agrees to sell, and Purchaser agrees to purchase and take, the water cars listed on Schedule 1 attached hereto and made a part hereof, or cars equivalent thereto (the "Water Cars").

2. Property.

2.1 As used in this Contract, the term "Property" includes that certain real property described and/or depicted on Exhibit A attached hereto and made a part hereof, together with all of the interests described within this Section 2 as being included in the Property, but excludes the parcels described and/or depicted in Exhibit A-1 attached hereto and made a part hereof, and all other interests and rights described within this Section 2 as being excluded or reserved from the Property. Upon completion of the Legal Description (as defined in Section 13 below), the Legal Description shall become the description of the real property comprising the Property for all purposes of this Contract. The Property does not include, and Seller shall reserve to Seller and Seller's successors and assigns in the deed quitclaiming the Property to Purchaser, to the extent of Seller's interests therein: (i) all water rights, (ii) all timber rights and (iii) all oil, gas, sulfur, iron ore, coal, lignite, uranium, limestone, building stone, caliche, gravel, sand and other minerals (whether or not of like kind or character) in and under the Property (the "Mineral Reservation"). Seller, however, shall waive the right to use or damage the surface of the Property in connection with its Mineral Reservation, and shall exercise its Mineral Reservation in a manner that does not interfere with the rail operations of Purchaser and in accordance with all reasonable operating rules of Purchaser.

The Property also does not include, and Seller shall reserve in the deed quitclaiming the Property, all of the reservations described in Section 2.5 below (collectively, together with the water rights, the timber rights and the Mineral Reservation, such rights and such reservations shall hereinafter be referred to as the "Retained Rights").

2.2 Seller hereby expressly agrees to indemnify Purchaser and hold Purchaser harmless from and against any and all costs, expenses (including, without limitation, reasonable attorneys' fees, disbursements and costs), damages, losses, claims, liabilities, liens, encumbrances and charges arising out of the acts or omissions of Seller in connection with the exploitation of the Mineral Reservation, including, without limitations, personal injury, death and property damage. Seller agrees that as a condition to any conveyance or assignment of the Mineral Reservation, its successors or assignees shall be required to give the Purchaser and its successors and assigns the same indemnification set forth in this Section 2.2.

2.3 The Property also includes:

(i) the grant of an easement for railroad purposes in Ashland, Oregon in the form of Exhibit B attached hereto and made a part hereof;

(ii) the grant of rights subordinate to Seller's interests in the microwave facilities listed in Exhibit C attached hereto and made a part hereof, such grants to be in the form of Exhibits D and R attached hereto and made a part hereof;

(iii) the assignment of certain Tax Benefit Transfer Agreements ("TBT Agreements") that pertain to the Property; and

(iv) the assignment of all of Seller's interests in the leases and agreements affecting the real property described in Exhibit A, excluding those pertaining to the Retained Rights. The Property does not include any improvements owned by tenants or by any party other than Seller or Seller's affiliates.

2.4 The Property also includes all rails, ties, fastenings, switches and frogs complete, bumpers, and other track materials, signals and installed communications equipment, railroad crossing signs and appurtenances located upon the Property (the "Railroad Facilities"). The Property

also includes all of Seller's right, title and interest in and to all improvements located thereon other than Railroad Facilities, including, but not limited to, depots, buildings, railroad structures, culverts, grading, embankments, dikes, pavements, ballast and other drainage facilities and similar structures (the "Railroad Structures") and all of Seller's right, title and interest in or to all leases or other agreements affecting rail use of the Property (the "Incidental Interests").

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3.1 (a) The purchase price for the Property (the "Purchase Price") is based upon the assumptions of both Seller and Purchaser that, from and after the Closing Date, revenue freight cars originating or terminating on the Property and/or the Leased Premises (as defined in Exhibit F) (i) shall be interchanged directly or indirectly (including without limitation pursuant to switching operations) solely with Seller or such carriers as may be authorized in writing from time to time by Seller, and (ii) shall be routed in line haul service such that those cars that are interchanged with Seller (x) are routed solely over Seller's lines if such cars are moving to or from destination or origin points served by Seller except as otherwise provided in Seller's rail transportation contracts or tariffs, or (y) are routed via Seller's long haul route if such cars are moving to or from points not served by Seller. Based upon these assumptions and the other terms and conditions of this Contract, Seller and Purchaser have agreed that the Purchase Price for both the Property and the Water Cars shall be the sum equal to the total of:

(i) \$16,975,000.00 (the "Closing Portion"), and

(ii) the amounts described below as the "Additional Portion" of the Purchase Price.

Purchaser shall also deposit \$1,000,000 (the "Escrow Amount") in a labor protection escrow account (the "Escrow Fund") to be held in accordance with the terms of the escrow instructions attached hereto as Exhibit E and made a part hereof.

(b) In the event that the routing and interchange of freight rail cars do not occur in the manner currently contemplated by the parties (as described in Subsection 3.1(a) above), then both Purchaser and Seller agree that Seller shall be entitled to receive additional consideration for the sale of the Property, and Purchaser hereby agrees to pay to Seller as the "Additional Portion" of the Purchase Price the following amounts:

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(b) The Purchase Price shall be paid to Seller by wire transfer of funds to Seller, in accordance with Seller's written instructions, at the Closing and the Escrow Amount shall be deposited at the Closing with an escrow agent selected by the parties.

(c) This Section 3.1 shall survive the Closing.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2005, I caused copies of the foregoing Renewed Petition to be served by hand upon counsel for the Association of American Railroads and the American Short Line and Regional Railroad Association, and upon all other parties of record in this proceeding by first class United States mail, postage prepaid.


Kelvin J. Dowd