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April 29, 2005

By UPS overnight mail
(Monday delivery)

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Ex Parte No. 575, *Review of Rail Access and Competitive Issues*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Support Of Renewed Petition For Rulemaking, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Albany & Eastern
Railroad Company

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BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF RAIL ACCESS AND
COMPETITIVE ISSUES

) EX PARTE
) NO. 575



**REPLY IN SUPPORT OF RENEWED
PETITION FOR RULEMAKING**

ALBANY & EASTERN RAILROAD COMPANY
1784 South Main Street
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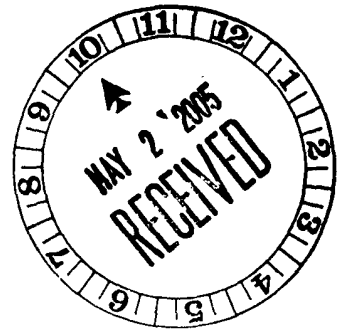
Attorney for Replicant

DATE FILED: May 2, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF RAIL ACCESS AND
COMPETITIVE ISSUES

) EX PARTE
) NO. 575



**REPLY IN SUPPORT OF RENEWED
PETITION FOR RULEMAKING**

Pursuant to 49 C.F.R. § 1110.5, ALBANY & EASTERN RAILROAD COMPANY (AERC) hereby replies to a “Renewed Petition of Western Coal Traffic League for Rulemaking to Eliminate Unreasonable Paper Barriers to Interchange” (Petition), filed by Western Coal Traffic League (WCTL) on March 21, 2005.

STATEMENT OF POSITION

AERC strongly supports WCTL’s petition for institution of a rulemaking proceeding on the subject of paper barriers to interchange. AERC seeks adoption of regulations that would enable the Board to effectively identify and proscribe paper barriers that unreasonably restrain rail competition.

IDENTITY OF AERC

AERC is a Class III rail carrier. AERC’s rail lines extend from connection with BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) at Albany, OR, to Foster, OR and Mill City, OR, via a junction at Lebanon, OR. AERC’s rail lines total approximately 66 miles.

As a result of experience, AERC is competent to testify to the need for a rulemaking to adopt regulations to enable the Board to identify and root out paper barriers that unreasonably

restrain competition. In November, 2002, AERC filed a request under the RIA for arbitration of BNSF's refusal to waive paper barriers in an AERC-BNSF Purchase Agreement that were alleged to unreasonably restrain AERC's ability to interchange specified traffic with UP at Albany, OR. *See Albany & E.R. Co. v. The Burlington N. & S.F. Ry. Co.*, STB Docket No. NOR-42076, complaint to commence arbitration filed Nov. 26, 2002. AERC's support of WCTL's Petition is primarily motivated by AERC's unsatisfactory experience in that arbitration.

ARGUMENT IN SUPPORT OF POSITION

During the course of that arbitration, it became apparent that if a Class I rail carrier opposes a request for waiver of a paper barrier under the RIA, the standards for determining the merit of such a request are such that it virtually impossible for such a request to be granted. Specifically, it is a principle of the RIA that a paper barrier should not be waived unless "the selling or leasing Large Railroad can not or will not participate in the New Traffic" (RIA, Section III, *Principles of Relationship, Paper Barriers*). It is a general premise of the paper barrier provisions of the RIA that a waiver request should be approved only if it "does not harm the Large Railroad" (RIA, Section IV, *Principles of Agreement, 3(a), Paper Barriers and New Routes, General Premise*). Under RIA Guidelines, a paper barrier is not to be waived unless the selling or leasing Large Railroad has been requested to establish a competitive package of rates, service and car supply in relation to proposed "new traffic", and such Large Railroad has failed to do so. (RIA, Exhibit C, *Guidelines for Paper Barriers and New Routes, Example 3, Paper Barriers*).

The upshot of the foregoing is that Class I rail carriers essentially have veto power over waiver of paper barriers under the RIA. A Class I rail carrier can turn back any attempt to obtain

relief from a paper barrier, no matter how much that barrier may unreasonably restrain rail competition, by claiming that it can or will participate in the new traffic, and/or that it would be harmed by a waiver, and/or that it can establish a competitive package for the new traffic. In AERC's view, the ability of Class I rail carriers to defeat all waiver requests is very much at odds with the provisions of the National Rail Policy in favor of rail competition. *See* 49 U.S.C. § 10101(1), (4), (5), (7) and (13). The Board should institute a rulemaking proceeding to ensure that paper barriers are tested on the basis of sound principles of transportation economics and competition, not on the basis of Class I rail carriers' desire to maintain control over the traffic at issue.

Faced with the futility of its position under RIA standards, AERC took a voluntary dismissal of its arbitration request before the record was completed. There have been no other requests for arbitration of refusal to waive a paper barrier in the 6½-year existence of the RIA. The absence of such activity is a strong indication that the standards for waiver of paper barriers are unreasonably skewed in favor of Class I rail carriers. It may be that Class I rail carriers have granted a number of such waiver requests without the need for arbitration under the RIA. However, that simply means that those Class I rail carriers were not interested in maintaining full control of the traffic involved in those requests. That certainly does not mean that fair standards for determining the reasonableness of paper barriers are not required where Class I rail carriers oppose their waiver.

The recent amendment of the RIA does not warrant holding the renewed Petition in abeyance, as was done when the RIA was first adopted. That amendment merely fine tunes the definition of "new traffic" under the paper barrier standards. In no way does it lessen the ability

of Class I rail carriers to exercise veto power over waiver of paper barriers. As such, the amendment does not lessen the need for a rulemaking to enable the Board to effectively identify and proscribe paper barriers that unreasonably restrain competition.

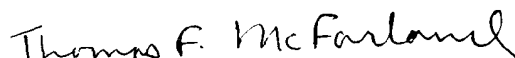
CONCLUSION AND REQUESTED RELIEF

As set forth above, the RIA does not effectively and fairly deal with paper barriers that unreasonably restrain rail competition. Regulations that do so are essential to further Congressional intent in favor of rail competition as reflected in multiple provisions of the National Rail Policy. For those reasons, and for the additional reasons set forth in WCTL's Petition, the Board should institute a rulemaking proceeding on the subject of paper barriers.

Respectfully submitted,

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DATE FILED: May 2, 2005

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2005, I served the foregoing document, Reply In Support Of Renewed Petition For Rulemaking, by first-class, U.S. mail, postage prepaid, on all known parties, i.e.:

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