

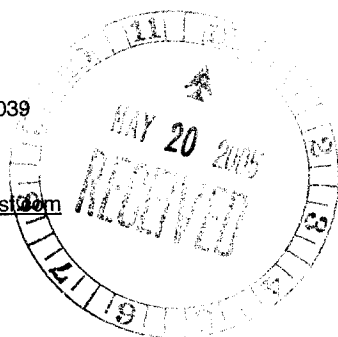


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VIA OVERNIGHT MAIL

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Office of Proceedings
May 19, 2005

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Public Record

The Honorable Vernon A. Williams
Secretary Surface Transportation Board
1925 K Street, N.W.
Washington DC 20423-001

Re: Ex Parte 575 – In the Matter of Rail Access and Competition Issues

Dear Secretary Williams:

BNSF Railway Company (“BNSF”) has subscribed to the Reply submitted by the Association of American Railroads to Western Coal Traffic League’s Renewed Petition for Rulemaking concerning “paper barriers.” Since the Albany & Eastern Railroad Company (“AERC”) submitted a reply dated May 2, 2005, making various allegations concerning AERC’s Rail Industry Agreement (“RIA”) dispute with BNSF, assertions which were not addressed in WCTL’s petition and to which BNSF was not afforded an opportunity to respond, BNSF herewith requests leave to reply to ensure the Board has a more complete record.¹

AERC devoted most of its attention to the arbitration between AERC and BNSF which was ultimately voluntarily dismissed by AERC for want of evidence to sustain its position. AERC claims that the structure of the RIA grants a Class I essentially unfettered “veto power” over waivers of application of so-called paper barriers under the RIA. That mischaracterizes the structure of the RIA and incorrectly implies such was the case in the AERC dispute which was, for a brief time, subject to arbitration.

BNSF’s “veto” authority, such as it is, is constrained by the boundaries of the RIA. AERC’s protestations to the contrary, BNSF cannot effectively deny a waiver if it meets the criteria set out in the RIA. In the particular dispute involving AERC, AERC simply could not demonstrate the issue traffic was, in fact, “new traffic” under any reasonable definition, and BNSF was obviously (as manifested by AERC’s voluntary withdrawal from arbitration) within its rights to decline the waiver. Exercising a legitimate contract right is not tantamount to an arbitrary exercise of veto power as suggested by AERC. Moreover, if BNSF had “arbitrary” veto

¹ Although it is acknowledged that the Board’s regulations under 49 CFR 1104.13(c) do not permit replies to replies, the Board construes its rules liberally under 49 CFR 1100.3 to allow such replies where they will contribute to a complete record without prejudicing any party or delaying the proceeding. See Keokuk Junction Ry – Feeder Line Acquisition – Line of Toledo, Peoria and Western Ry Between La Harpe and Hollis, IL, STB Docket No. 34335, served Feb. 7, 2005; CSX Transp., Inc. – Abandonment Exemption – In Shelby County, TN, STB Docket No. AB-55 (Sub-No. 590X), served Dec. 12, 2001. We submit those criteria are met under these circumstances. Further, although we submit no rulemaking should be instituted, we would expect to provide a more fulsome filing if a rulemaking were instituted.

power, it would never make sense for BNSF to grant ANY waivers, and that is not borne out by the facts. Although requests for waivers from BNSF have been relatively few in number (eight since inception of the RIA), their very existence and the fact that BNSF has granted waivers on half of those requests, belies the allegation that BNSF's "veto power" is unconstrained.

AERC's attempt to re-write its agreement with BNSF and acquire access to traffic for which it did not pay a full franchise value under its arrangements with BNSF was appropriately unrewarded. AERC's 1998 sale agreement with BNSF, freely signed without duress, allowed AERC to acquire at a relatively nominal cost its line between Lebanon and Foster, Oregon. AERC acknowledged at the time that it was not paying the full franchise value. Embedded in that agreement – one which most likely could not have occurred in the absence of a so-called "paper barrier" – was the concept that compensation for the partial divestiture of BNSF's franchise assets would flow from maintaining revenues tributary to BNSF's franchise. A transaction involving nominal consideration simply cannot be justified if inevitable diversion of traffic previously tributary to BNSF's franchise would result.²

AERC's efforts were only "futile" as alleged because AERC failed to have sufficient factual support to sustain its waiver claim, not because all waivers can be denied at the whim of the Class I, as AERC would suggest. Now AERC seeks another bite at its unfinished apple. We would submit that regulatory intervention to undermine the fundamental underpinnings of private contractual arrangements, such as the transaction between BNSF and AERC, as well as the RIA which has worked well for the industry, shortlines, shippers, and Class I's alike is unwarranted and ill-advised.

Sincerely,



Sarah W. Bailiff

Cc: All Parties of Record

² We would submit that AERC proposes to "fix" a situation that is far from problematic. It was recently reported that short line traffic volume increased 11.5 percent in the first quarter over last year. The large gain in short line traffic notably exceeded gains in Class I volumes for the same period. See "Short Line Volume Increases," *Traffic World* at 26, May 16, 2005. Growth of new shortlines and growth in shortline volumes have flourished in an environment with a host of shortline transactions similar in nature to AERC's – where nominal consideration is paid up-front and the potential for divestiture of the franchise value without adequate consideration is mitigated by so-called "paper barriers". Unwinding that mechanism – one which is working well -- will undeniably result in stifling the growth of new short lines, contrary to sound public policy.