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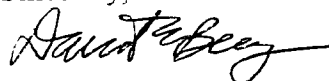
October 12, 2005

*Via electronic filing*The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001**Re: The 25th Anniversary of the Staggers Rail Act of 1980: A Review and
Look Ahead, Ex Parte No. 658**

Dear Secretary Williams:

Please accept for filing in the above docket the Written Statement of the Marshall Durbin Companies, Wayne County Economic Development District, and Odom Industries, Inc. We are electronically filing the Written Statement on behalf of these three parties. If there are any questions concerning this matter, please contact the undersigned at 202.274.2809.

Sincerely,

Thomas W. Wilcox
David E. Benz

Enclosure

Before the
Surface Transportation Board

EX PARTE NO. 658

THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:
A REVIEW AND LOOK AHEAD

Comments of the Marshall Durbin Companies, Odom Industries, Inc., and Wayne
County Economic Development District

I.
Introduction

The Marshall Durbin Companies and Odom Industries, Inc. (hereinafter referred to as the "Waynesboro Line Shippers") and the Wayne County Economic Development District ("WCEDD") hereby file this Statement outlining certain concerns about rules and policies adopted by the Interstate Commerce Commission and Surface Transportation Board implementing various provisions of the Staggers Rail Act of 1980 ("Staggers Act"). In particular, the Waynesboro Line Shippers believe that Board rules and policies governing Class I railroads' sales of branch lines to short line railroads, when such sales are made using the Board's "exemption authority" which entails virtually no scrutiny of the ability of the acquiring party to adequately maintain and provide service over the acquired line, has been stifled economic growth in eastern Mississippi and, they suspect, other rural areas of the country as well. In addition, both WCEDD and the Waynesboro Line Shippers believe that the Board's extremely strict standards for correcting service problems and addressing anti-competitive conditions (such as paper or steel barriers)

have also been detrimental to the local economy and, again, to the economy in other rural areas.

II.

Identification and Interest of Waynesboro Line Shippers and WCEDD

The Waynesboro Line Shippers and WCEDD are three of several rail-served entities located along an approximately 55-mile section of track running from Meridian, Mississippi to Waynesboro, Mississippi (the "Waynesboro Line"). The line is located in one of the poorest areas of Mississippi and the United States, and therefore sustaining existing industry and attracting additional industrial development along the line is critical for the local communities and the region as a whole. The Waynesboro Line Shippers own and operate industries that employ a large part of the local population. Each of their facilities require, or would greatly benefit from, dependable rail service to operate efficiently and at a cost low enough to enable the facilities to expand. In the case of WCEDD, the availability of reliable rail service over the line is also essential to attracting new businesses to locate in Waynesboro.

A. The Marshall Durbin Companies

The Marshall Durbin Companies is one of the largest private poultry companies in the United States and a major regional business and employer in Mississippi and Alabama. Marshall Durbin owns and operates hatcheries, feed mills, and processing plants in those states. Among its many facilities, Marshall Durbin operates a feed mill ("Mill") in Waynesboro which presently employs 22 people, and a processing and rendering facility in Hattiesburg, Mississippi that employs approximately 800. The Waynesboro Mill was built in 1974 and has always depended on rail service for the

majority of its inbound shipments of soybean meal and corn, which total about 2300 carloads per year. After processing at the Mill, the resulting feed is transported by truck to numerous farms in the Waynesboro area that have contracted to raise chickens for Marshall Durbin. In addition to the 22 employees at the Mill, there are 172 Marshall Durbin employees at the Waynesboro complex along with approximately 189 local farmers who directly rely on Marshall Durbin for part or all of their livelihood.

B. Odom Industries, Inc.

Odom Industries, Inc. is an Alabama-based industrial and chemical manufacturing company with a facility located along the southern end of the Waynesboro Line. The Waynesboro facility employs 75 people and primarily engages in the contract manufacture of chemical products for large agricultural and industrial companies. The facility's products include herbicides, pesticides, and chemical additives for various industrial and consumer products. While connected to the Waynesboro Line, Odom is presently unable to ship its products by rail due to the fact the current state of the line prevents the movement of hazardous material for safety reasons.

C. Wayne County Economic Development District

WCEDD was created in 1988 for the purpose of involving itself in industrial, economic and technological development for industrial sites and parks, providing support for existing, expanding or new businesses, and assisting in assuring and preparing an adequate and effective work force and support programs to accomplish these ends. WCEDD owns a 244-acre site at the end of the Waynesboro Line that is home to seven existing businesses. Of these businesses four rely on rail service, and two, including Odom Industries would use rail service if the line and rail service were improved.

WCEDD is actively involved in attempting to attract new businesses to construct facilities along the Waynesboro Line.

III.

History of the rail line

What is now known as the Waynesboro Line was once part of a through-route of the Gulf, Mobile & Ohio Railroad that extended north from Mobile, Alabama to Waynesboro and then to connection with other railroads in Meridian, Mississippi. Presently the Kansas City Southern Railroad ("KCS"), Norfolk Southern Railway, and the Meridian & Bigbee Railroad operate trains into and out of the Meridian Yard. The Waynesboro Spur extends south from the Meridian Yard through a generally flat and rural area in eastern Mississippi, roughly following the Chickasawhay River and its tributaries. Parts of the line were built as early as 1847, and some sections of today's track are 90-pound rail over 100 years old. In 1991, the southern two-thirds of the line were abandoned by Southrail Corporation leaving only the 55-mile Meridian to Waynesboro segment. The Kansas City Southern Railway purchased the Waynesboro Spur in 1993 from MidSouth Corporation, the parent company of Southrail Corporation.

During the seven years of KCS ownership, the condition of the Waynesboro Line gradually deteriorated as KCS increasingly concentrated on its mainline, long haul operations. What had been daily rail service was reduced to service two to three times per week. Moreover, as KCS and the other Class 1 railroads increasingly utilized larger 286,000 lb rail cars in their interstate operations, the inability of the Waynesboro Line to accept such railcars became a significant operational problem. As discussed further

below, the continued inability to ship the larger railcars over the Waynesboro line is a significant impediment to further economic development at this location.

Rather than make the investments necessary to enable the Waynesboro Line to handle larger rail cars and operate at faster speeds, KCS decided in early 2000 to sell most of its interest in the Waynesboro Line. To do so, KCS used the Board's seven-day "notice of exemption" procedures under 49 U.S.C. 10901 and 10502 and 49 CFR Part 1180. These fast track procedures were developed by the Board under the Staggers Act to enable Class I railroads to shed unwanted branch lines with little or no regulatory scrutiny. Under the procedures, the sale of the Waynesboro Line was deemed to meet all statutory standards and became effective seven days after the notice of exemption was filed. The Marshall Durbin Companies seriously questioned whether the new owner, the Meridian Southern Railway, was financially capable and otherwise desirous of maintaining and performing necessary upgrades of the Waynesboro line, and otherwise supplying adequate rail service, in both the short and long terms. After unsuccessfully attempting to obtain information from Meridian Southern regarding its plans for the line and its ability to follow through on those plans, Marshall Durbin asked the Board to more closely scrutinize this transaction. The Board's rules required this request to be in the form of a petition to revoke the exemption authority for the transaction, which Marshall Durbin filed on April 14, 2000. See generally STB Docket No. 33854, Meridian Southern Railway LLC – Acquisition and Operation – Line of Kansas City Southern Railway Company. Marshall Durbin also asked that the Board permit it to obtain discovery of information pertaining to Marshall Durbin's concerns. In a decision served

August 29, 2000, the Board refused to more closely examine the transaction and denied Marshall Durbin's Petition to Revoke the Exemption.

In addition to using the Board's notice of exemption procedures, KCS apparently availed itself of another policy of the Board; it conditioned its sale of the Waynesboro Line on the inclusion so-called "paper" and "steel" barriers that prevented the purchaser of the line from interchanging with any rail carrier other than KCS. The Waynesboro Line Shippers and WCEDD understand these mechanisms have been defined as ensuring 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. Ostensibly, these restrictions are included in the transaction in exchange for a reduced acquisition price. While one of the original reasons for allowing such provisions was to facilitate acquisitions by small or undercapitalized shortlines (*i.e.*, it is better to sell the line at a reduced price if the only other option is abandonment), such provisions can also be barriers to competition. While the details of the sale to the Meridian Southern are confidential, it is apparent that KCS, rather than sell all of its interest in the Waynesboro Line from KCS's yard track and interchange points in Meridian, retained ownership of approximately the first mile of track extending from the yard, thereby creating a "steel barrier" to the Meridian Southern interchanging with other railroads in Meridian.¹ Moreover, the existence of a "paper barrier" is evident from the fact that KCS retained the rate setting authority for service over the line and indeed the track still appears on KCS's system maps and grain tariffs as being part of the KCS system. Accordingly, shippers along the line must obtain rates from KCS, who handles the billing for service

¹ The notice of exemption filed by the Meridian Southern Railway stated that it was purchasing the KCS track from Milepost 134.2 southward, but the Waynesboro Line begins at Milepost 135.2.

provided by the Meridian Southern along the line. Under this arrangement, which along with the Board's exemption procedures has been an accepted practice under the Staggers Act, other rail carriers that could interchange with the Meridian Southern in Meridian Yard for deliveries to shippers along the Waynesboro Line are prevented from doing so.

IV.

The Current State of the Waynesboro Line

It has been nearly six years since the sale of the Waynesboro Line by KCS. As noted below, the Waynesboro Line Shippers and WCEDD have been proactive in trying to assist the Meridian Southern in improving the overall condition of the track and the rail service provided over it. However, despite such efforts, the state of the Waynesboro Line since it was shed by KCS can be summarized as follows:

1. Due to its poor condition, the great majority of the Waynesboro Line is classified by the Federal Railroad Administration ("FRA") as excepted track, meaning train speeds are limited to 10 mph. Moreover, Odom Industries cannot ship its products by rail because safety concerns prevent the shipment of hazardous material over the line.

2. There have been at least 10 derailments, with some resulting in significant loss of inbound commodities.

3. In June and July 2002, the Federal Railroad Administration ("FRA") ordered the Meridian Southern to make certain bridge repairs. These repairs caused service disruptions and forced Marshall Durbin to truck soybean meal to the Waynesboro Mill.

4. In March 2004, the Army Corps of Engineers criticized the Meridian Southern for not having a long term maintenance plan in place for the railroad.² Furthermore, many of the trestles and bridges on the line were found to be in questionable condition, and the Corps recommended an analysis by a structural engineer.³

5. In April 2004, the FRA ordered Meridian Southern to remove two of its three locomotives from operation for repairs, creating service disruptions that were not rectified until the following month.

6. In February 2005, one of the three locomotives used by the Meridian Southern at that time was totaled when it derailed and wrecked due to a culvert washout. This halted rail service to Marshall Durbin's Waynesboro Mill for nearly two weeks.

7. As stated previously, the Waynesboro Line is limited to handling railcars weighing up to 263,000 pounds. This limitation significantly hinders the business operations of the Waynesboro Line Shippers, and significantly handicaps the ability of WCEDD to attract new business. From Marshall Durbin's perspective, since KCS and other carriers that connect with the KCS routinely use cars of weighing up to 286,000 pounds to haul grain, and many sellers of grain do not have origin weights, loading cars to 263,000 pounds becomes a guessing game. Because overloading of grain railcars leads to offloading costs and overload penalties, grain sellers are reluctant to sell to Marshall Durbin's Waynesboro facility. Both the weight restriction and the congestion in Meridian Yard are contributing factors preventing Marshall Durbin from expanding its

² To quote the Corps directly: "Lack of maintenance is a major contributing factor in many of the problems the team observed. Cost of repairs now needed to address these problems could have been avoided through proper maintenance. A maintenance plan should be developed for the railway." Memorandum for Record, Reconnaissance of Meridian Southern Railroad to observe rail problems between Waynesboro and Meridian, MS, at page 2 (May 2004).

³ The Corps of Engineers Report was part of the larger effort by Marshall Durbin, WCEDD, and other entities in 2004 and 2005 to try and obtain state and federal funding to upgrade the Waynesboro Line, whether independent of the Meridian Southern or by direct funding grants to the railroad.

track to receive 50, 75, or 100 car trains at a lower cost than the rates KCS charges for the single cars and 25-car trains currently received at the Mill.

As to WCEDD, it believes that 50-100 jobs would be created just from existing industry if the track was upgraded to handle 286,000 lb railcars. Such an upgrade would also significantly increase the attractiveness of the area to potential new industries who are presently balking at locating along the Waynesboro Line due to the poor physical condition of the track and its inability to handle the larger railcars. To this end WCEDD has worked with state officials, including the governor of Mississippi, to try and develop a program which would combine funds from the local, state, and federal governments along with funds from the Meridian Southern in order to help the Meridian Southern finance such an upgrade. Marshall Durbin has supported this effort but maintains that more proactive involvement by the STB at the time of the sale could have avoided the present efforts by Marshall Durbin, WCEDD, and others to try and locate funding for maintenance and track upgrades that the current operator apparently is unable to supply.

8. The question of rail service comes up more often than not when the WCEDD is attempting to attract new industry to the area.

9. In addition to the outbound products produced by Odom Industries, inbound grain and other materials that would have normally been shipped by rail have been shipped by truck, at a much higher cost to individual Waynesboro Line Shippers. Marshall Durbin has thus far been able to limit these truck deliveries to emergency situations, but the cost premium that must be paid is not insignificant.

V.

The Board's Current Rules and Policies Make it Virtually Impossible to Change the Status Quo

To summarize the preceding section, nearly six years after the sale of the Waynesboro Line to the present operator, the rail service over and maintenance of the line are at bare minimum levels. The Waynesboro Line Shippers, in particular Marshall Durbin, believe that this is due in large part to the Meridian Southern having insufficient financial resources when it acquired the line. The extent to which Meridian Southern is hampered by operational and economic restrictions included in its transaction with KCS is not known since such details are confidential. Whatever the reasons, the harsh reality for shippers along the line and the community as a whole is that the condition of Waynesboro Line has deteriorated since the sale of the line by KCS, and rail service, while it is being provided, has not improved. This state of affairs has hindered the viability and growth opportunities for existing industries that are or could be rail served, and has significantly retarded the efforts of WCEDD to attract new industry and economic growth in a rural area that could sorely use it.

The main point of this Statement is that under the Board's implementation of the Staggers Rail Act of 1980, to the extent it applies to sales of branch lines by Class I railroads, the minimum levels of service and maintenance currently being provided are enough to enable the current operator to remain in place and the status quo to continue. The applicable rules that lead to this conclusion are summarized below:

First, under the "notice of exemption" procedures, purchasing entities are not required in their initial filing to make any demonstration that they have the financial wherewithal and expertise to adequately replace the service provided by the Class I carrier selling the track, let alone improve the status quo. The Board's rules simply presume this to be the case. As Marshall Durbin experienced firsthand, rail shippers

seeking to have the Board more closely scrutinize a particular transaction at the time of the sale face a very high burden to overcome that presumption. Indeed, in the entire 25-year history of the Staggers Act, in which literally hundreds of branch lines have been sold to short line railroads by Class 1 carriers, the ICC and Board together have granted exactly two petitions to revoke the exemption authority for a branch line sale by a Class I railroad.⁴ In those two cases there was strong evidence that the short line was found to have engaged in some sort of nefarious activity that led to the conclusion that it had no intention of operating the track at all or was acquiring it for some purpose other than conducting rail operations.

Second, once the exemption authority becomes effective, the Board's rules and decisions establish that all the railroad must do to remain in place is offer the absolute minimum level of rail service, even if it is consistently bad rail service. This is plain from the Board's decisions rejecting petitions to revoke exemptions, but also in the Board's regulations and decisions implementing 49 U.S.C. 11123. A review of these decisions reveal that the only instances where the Board has taken action in cases involving complaints about the service being provided by a short line operator over a branch line, the operator had to effectively stop providing rail service altogether for a considerable length of time in order for the shippers along the line to obtain any relief, which even then is temporary.

⁴ *The Land Conservancy of Seattle and King County - Acquisition and Operation Exemption - The Burlington Northern and Santa Fe Railway Company*, Docket No. 33389, 2 STB 673 (1997) (revocation because rail line was acquired solely for purpose of abandonment); *San Bernardino Associated Governments - Acquisition Exemption - Southern Pacific Transportation Company*, Docket No. 32449, 1994 MCC Lexis 51 (served June 30, 1994) (ICC grants petition to revoke filed by entity that originally sought the acquisition exemption).

Third, the Board has consistently permitted, as a matter of policy, Class I railroads to impose paper and steel barriers on branch line sales, even though the Board readily admits that such conditions restrict competition by perpetuating the monopoly of the Class I railroad over the line and excluding service by any other rail carrier. Shippers or other parties who seek to have such barriers removed again face an almost insurmountable burden to demonstrate that such provisions are contrary to the National Rail Transportation Policy. The majority of the Board has to date shown great reluctance to find such mechanisms improper.⁵

VI.

Conclusions and Recommendations

While the Staggers Act may have been a success in freeing the nation's major railroads to become more financially stable and operate more like regular businesses, the Waynesboro Line Shippers' experience over the past six years has revealed that the Board's implementation of the Act has created certain rules and policies that are not necessarily in the public interest. The Waynesboro Line Shippers and WCEDD ask the Board to consider the following recommendations, which urge the Board to change its "hands off" policies regarding branch line sales and subsequent operations, to more a proactive policy that actively promotes bettering the status quo to foster economic development and improving the overall rail system:

Recommendation 1:

⁵ See STB Finance Docket No. 34495, Buckingham Branch Railroad Co. – Lease – CSX Transportation, Inc., (served November 5, 2004); and STB Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc., (served August 23, 2005). Commissioner Mulvey dissented in each of these decisions on the "paper barrier" issue.

The Board should be more proactive prior to the sale of a branch line by a Class I railroad to a short line railroad by taking a less restrictive view of 49 U.S.C. 11123. More specifically, as a Class I railroad chooses to focus more on its mainline operations to the detriment of a particular branch line, the Board should be more willing to allow other railroads to provide service over the line via interchange or trackage rights. Taking such action early in the process may help prevent the physical state of the line from deteriorating to the point that the cost of rehabilitating the track after the line is eventually sold becomes significant.

Recommendation 2:

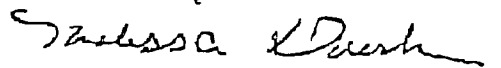
The Board should more closely scrutinize the financial viability and operational capability of potential short line purchasers of branch lines from Class I railroads at the time of the sale by requiring the purchaser to demonstrate in its initial filing that it has sufficient resources to not only pick up where the Class I railroad left off, but to improve the status quo. In cases such as the Waynesboro Line, where the Class I railroad has chosen to not invest in upgrading the track and to focus on its mainline operations, the Board should require the purchaser to demonstrate that it has or in the process of acquiring the financial wherewithal to do what the Class I has chosen not to do: make investments in the track and related equipment required to maintain existing rail service and expand opportunities to rail-served businesses. Similarly, the Board should make it easier to replace short line purchasers of branch lines if after a reasonable period of time (one or two years), the state of the rail line and the level of service over it has deteriorated, or if the new operator cannot demonstrate it has actively sought to improve the line and encourage economic development along it. Permitting a short line to remain

because it is merely providing minimum service levels and maintenance should no longer be the standard.

Recommendation 3:

The Board should revisit its routine acceptance of "paper" and "steel" barriers in branch line transactions. While the underlying reasons for initially allowing such restrictions under the Staggers Act may have had some benefit to Class I railroads and undercapitalized short line railroads, these restrictions are undeniably anti-competitive. Their widespread use in the railroad industry today requires the Board to more closely examine the extent to which foreclosing competition and rail transportation alternatives hinder the efforts of industry and industrial development entities to expand economic development in rural areas. The Waynesboro Line Shippers and WCEDD note that a Petition for Rulemaking to Eliminate Unreasonable "Paper Barriers" to Interchange has been filed in STB Docket Ex Parte No. 575, Review of Rail Access and Competition Issues. This petition has been pending before the Board since March 21, 2005. The Waynesboro Line Shippers and WCEDD encourage the Board to commence this rulemaking and eventually adopt standards for determining when "paper" and "steel" barriers are contrary to the National Transportation Policy by being unduly anti-competitive.

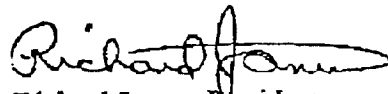
Respectfully submitted,



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