

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF RAIL ACCESS AND) EX PARTE
COMPETITIVE ISSUES) NO. 575

COMMENTS IN SUPPORT OF RENEWED
PETITION FOR RULEMAKING

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Pursuant to the Board's Request for Comments served February 1, 2006, ALBANY & EASTERN RAILROAD COMPANY (AERC) hereby comments in support of 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.

OVERVIEW

It is futile for small railroads to attempt to obtain waivers of paper barriers in arbitration under the Railroad Industry Agreement (RIA). Class I rail carriers have virtual veto power over any such relief because a paper barrier cannot be waived under the RIA unless "the selling or leasing Large Railroad can not or will not participate in the New Traffic." The test is not only the practicality of the Large Railroad's participation in the traffic, but also its desire to so participate. Thus, the Large Railroad effectively controls all traffic by means of restricted interchange, without regard to whether competition is unreasonably restrained as a result.

The ability of Large Railroads to squelch all relief from paper barriers without regard to their effect on competition is squarely at odds with the provisions of the National Railroad Policy that strongly favor rail competition, i.e., 49 U.S.C. §§ 10101(1), (4), (5), (7) and (13).

The Board should institute a rulemaking to ensure that paper barriers are tested on the basis of sound principles of transportation economics and rail competition, not on the basis of RIA standards that permit Large Railroads to control interchange.

The Board has authority to institute the requested rulemaking in order to further the statutory right of shippers to route their traffic, as provided in 49 U.S.C. § 10747(a)(1). The Board also has authority to grant relief as to existing paper barriers by virtue of its continuing authority and conditioning power in proceedings by which Class III railroads purchased or leased rail lines from Large Railroads, i.e., 49 U.S.C. §§ 10901(a)(4) and (c); and 49 U.S.C. §§ 10902(a), (c).

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 a rail carrier's refusal to waive a paper barrier in a purchase agreement that unreasonably restrained AERC's ability to interchange specified traffic with another rail carrier. *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. The arbitration was withdrawn when it became apparent that relief is not available under the RIA for unreasonable paper barriers.

COMMENTS IN SUPPORT OF RULEMAKING

AERC addresses the subject matter as to which the Board expressed a special interest in receiving comments (Request for Comments at 3).

1. The Board's Statutory Authority To Address Pre-existing Paper Barriers

The Board has authority to proscribe unreasonable paper barriers under 49 U.S.C. § 10747(a)(1) in furtherance of a shipper's right to route its traffic. That statute, read in the light of strong expressions in favor of rail competition in the National Rail Policy (49 U.S.C. §§ 10101[1], [3], [4], [7], [13]), clearly authorizes the Board to adopt rules that would require cancellation or waiver of paper barriers that unreasonably restrain competition.

The Board also has authority to address pre-existing paper barriers under 49 U.S.C. § 10901(a)(4) or 49 U.S.C. § 10902(a) by virtue of its continuing authority over the terms and conditions by which rail lines are acquired by noncarriers and carriers, respectively. The Board has the authority under those statutes to condition continued authorization of such acquisitions on the requirement that objectionable paper barriers be eliminated or modified.

2. Identity and Description Of Paper Barrier

There is a confidentiality provision in the Sale Agreement by which AERC acquired its rail lines from the predecessor BNSF Railway Company (BNSF) that precludes AERC from disclosing the contents of that Agreement. Accordingly, AERC is contractually precluded from describing the terms of the paper barrier in that Agreement. Without violating confidentiality,

AERC can say that there is a provision in that Agreement that effectively precludes AERC from interchanging traffic with any rail carrier other than BNSF.

3. Problems Experienced As A Result Of Paper Barriers

The same constraint described above precludes a detailed description of the effect of the paper barrier on AERC. AERC is free to state as a general matter that the paper barrier in its Sale Agreement in many cases has prevented AERC from being able to provide the best possible rail service to its shippers. That inability has resulted in AERC transporting less traffic than it could have transported if it had been able to provide superior rail service.

4. Short And Long Term Impacts Of Paper Barriers

Unreasonable paper barriers restrain competition and prevent shippers from receiving the most efficient and economical rail service available.

5. Ineffectiveness Of The Rail Industry Agreement

A rulemaking to deal with unreasonable paper barriers is required because those anticompetitive interchange restrictions significantly harm Class III rail carriers and the shippers that they serve, and because the RIA is entirely ineffective as a means of relief for unreasonable paper barriers.

Class I rail carriers are able to veto any relief under the RIA for unreasonable paper barriers. 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). 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.” (*Id.*, Section IV). 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.

Thus, a Class I rail carrier can turn back any attempt to obtain relief from a paper barrier, no matter how much the restricted interchange may unreasonably restrain competition, merely by asserting that it can or will participate in the new traffic, and/or that it would be harmed by the waiver, and/or that it can establish a competitive package of rates, service and car supply for the new traffic. The ability of Class I rail carriers to defeat all paper barrier waiver requests is very much at odds with provisions of the National Rail Policy in favor of rail competition, i.e., 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 the ability of Class I rail carriers to maintain control over the traffic at issue.

Other rail carriers in addition to AERC apparently have seen the futility of seeking a waiver of an unreasonable paper barrier under the RIA. There have been no other requests for arbitration of refusal to waive a paper barrier in the 8-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.

6. **Recent Version Of The RIA**

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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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2006, I served the foregoing document, Comments In Support Of Renewed Petition For Rulemaking, by overnight mail, on all known parties, i.e.:

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