

**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**

**OPENING COMMENTS
OF
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
WASHINGTON WHEAT COMMISSION
NATIONAL ASSOCIATION OF WHEAT GROWERS**

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Dated: March 8, 2006

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I. INTRODUCTION

The MONTANA WHEAT & BARLEY COMMITTEE, COLORADO WHEAT ADMINISTRATIVE COMMITTEE, IDAHO BARLEY COMMISSION, IDAHO WHEAT COMMISSION, NEBRASKA WHEAT BOARD, OKLAHOMA WHEAT COMMISSION, SOUTH DAKOTA WHEAT COMMISSION, TEXAS WHEAT PRODUCERS BOARD, WASHINGTON WHEAT COMMISSION AND NATIONAL ASSOCIATION OF WHEAT GROWERS (known as Wheat & Barley Commissions) welcomes the opportunity to file Opening Comments on Rail Access and Competition Issues as outlined in the February 1, 2006, Request for Comments. The Wheat & Barley Commissions support the renewed petition of the Western Coal Traffic League for initiation of a proceeding addressing rail access and competition issues. This is a focused effort by the Wheat & Barley Commissions in this proceeding because of the importance that federal regulatory oversight of railroads or lack of it, bears on the marketing and transportation of wheat and barley. Your Wheat & Barley Commissions have filed together and participated in various Ex Parte proceedings in the past and they welcome the opportunity to address the issues in this proceeding. The past, present and future of regulatory oversight affects the daily lives of this nation's wheat and barley producers.

Your Wheat & Barley Commissions respectfully request the STB revise its view of sales to shortlines by major railroads and utilize its authority to promote increased rail-to-rail competition in such sales.

II. IDENTITY AND INTEREST OF WHEAT & BARLEY COMMISSIONS

The Wheat & Barley Commissions represent wheat and barley producers in the major wheat and barley producing areas of the United States. They represent the majority of wheat and barley production. The Wheat & Barley Commissions are charged with representing the interests of wheat and barley producers in the marketing (which includes transportation) of their grains both domestically and internationally. A vast majority of the wheat and barley producers represented by the Wheat & Barley Commissions are captive to rail carriers for significant portions of their freight shipments. The Wheat & Barley Commissions also concur in the statement filed in this proceeding by the Alliance for Rail Competition. There will be many participants in this proceeding covering a whole host of issues and the Wheat & Barley Commissions would like to focus on a couple of issues for your consideration as opposed to filling the pages with a multitude of issues.

III. WHEAT & BARLEY PRODUCERS ARE THE ONES WHO BEAR THE FREIGHT CHARGES IN THE TRANSPORTATION OF GRAIN

For the layman, a simplistic discussion of how wheat is marketed will illustrate the product flow and the importance that transportation plays as a price determinant of agricultural commerce. Wheat is sold by growers through local country elevators or grain sub-terminals located in the various states and subsequently transferred to merchandisers and exporters. The wheat is delivered by a

farm producer to a local elevator. The producer is given the Grain Exchange price (basis), less rail transportation charges, less deduction for elevation and margin. For example, if the price of wheat at the market is \$4.00 and the transportation price is \$1.00 and elevation is \$.15, the farm producer would receive \$2.85 for his wheat. Thus, the farm producer bears the transportation costs of moving the wheat to market. The grain merchandiser pays the railroad, but the farm producer is the bearer of freight rates.

For the farm producer, the cost of transporting grain can represent as much as one third (1/3) the overall price received for the grain. The key to understanding the uniqueness of the farm producers plight is to understand: unlike virtually every other industry, the farm producers bear the freight charges and cannot pass them on to any other party in the distribution chain, and yet the farm producer does not physically pay the freight charges.

These facts do not make farm producers victims but it does accurately portray rail customers who, when captive, are truly and uniquely captive.

IV. MANY SHORTLINES THAT SERVE THE WHEAT AND BARLEY PRODUCERS WERE CREATED WITH 'PAPER BARRIER' RESTRICTIONS

In many areas of the wheat and barley production areas, one finds local shortlines providing a substantial portion or the bulk of the service. There are shortlines throughout the wheat and barley production areas in the United States in Texas, Oklahoma, Kansas, Colorado, South Dakota, North Dakota, Idaho, Montana, Oregon and Washington. Your Wheat & Barley Commissions have had many conversations with these shortlines over the years.

Many of these shortlines were created prior to the early 1990's. Later, in the mid-1990's, the four major Class I's combined which led to radical and substantial changes in railroad infrastructure that altered their Railroad systems and traffic flows. The BN combined with the Santa Fe forming the BNSF. The UP merged with the SP. CSX and NS carved up Conrail.

V. AFTER THE LARGE WESTERN MERGERS IN THE WEST IN THE 1990'S CHANGES IN TRAFFIC PATTERNS ALTERED MANY SHORTLINE 'TRADITIONAL TRAFFIC'

The combination of the BN and Santa Fe and subsequently the UP and the SP set up entirely new single line routes in the Western half of the United States. Each of the Class I's now had new (non-traditional) routings that were available to the railroad and in many cases, the shortlines (still saddled with paper barriers) suddenly found themselves in a situation where they lost substantial traditional traffic due to Class I rerouting.

Definitions utilized in this Opening Statement:

1. Traditional Traffic – the traffic that exists when the shortlines are formed and upon which the new shortline carriers rely upon for shortline economics
2. Large Railroad – the Class I railroad which sells one of its lines to a shortline
3. Paper Barriers – contractual provisions implemented by the Large Railroad on the newly established shortline to control the short lines' pricing, traffic mix and use of the acquired track

Large Railroad Decides to Re-route Some of the Traditional Traffic From Several Shortlines After the Western Mergers

In several cases in the Southern and Northern plains, the Large Railroad no longer needed to route via a shortlines – and the shortlines with paper barriers were left with a reduced, and in some cases, substantially reduced traffic base. Yet, even though the Class I Large Railroad continued to hold 'paper barriers' over the shortlines (thereby restricting their ability to replace lost traffic), the shortlines could not do anything to re-attract the traditional traffic base.

The Large Class I's responded to the shortlines with classic indifference – opting to utilize the Large Railroad single line routing rather than route from, through or over the shortline as it had traditionally.

Major oil companies, for example, after the BN & SF merger, were shut off from traditional routing over shortlines on their traditional shipments and were forced by BNSF to re-route over BNSF newly established longer haul (BNSF only) routes. UP likewise, developed routings that maximized their new UP-SP system, as opposed to routings that involved their shortlines and other Class I joint routes. Both BNSF and UP sought to discourage movement of traditional routes involving the shortlines, and countered the tendency of continued shipments on the traditional routes by establishing increased transit times (through scheduling changes) and even higher tariff rates on the traditional routes. Of course, the shortlines are both powerless to do anything about the re-routings and reticent to talk about it with the STB because the Class I Large Railroad continues to exert monopoly control over the rest of the shipments on and over the shortline.

While the STB, may consider this a normal practice after a major merger, the shortlines involved were powerless to recoup their lost revenues. The inevitable results of the intentional re-routing away from shortlines is loss of the shortlines.

The problem here is simple. When the shortlines are created they are created with a historic traffic base – the traditional base. This is in large part the basis for future economic life by the shortline. The Class I Large Railroad which creates the shortline uses the traditional base as the foundation for justifying creation of paper barriers.

The shortlines are, in most cases, saddled with paper barriers which keep them from developing new traffic or expanding their traditional traffic. Yet, the Class I's through operational changes are reaping the STB granted 'new' rights,

efficiencies, increased revenues and increased captivity of many shippers, but the STB has not developed a methodology to provide protections for the shortlines, nor has the STB provided an avenue for shortlines to petition for retroactive protective conditions that should be due them. Be mindful that in many cases, the shortlines were not able to 'read' the Large Railroad's mind and conclude that after a merger or other changed circumstance, the shortline might be 'shorthauled' or stripped of traditional traffic.

If this country is going to keep a viable shortline system, the STB must address the situation that when some of the traditional traffic goes away on the shortline, that shortline must be allowed to make up some of the traffic base without penalty. They need to be able to chart their own destiny. Shortlines, due to changes in traffic patterns outside their control, whether the erosion is due to merger or not, should be allowed by the STB, to develop new business without penalty (paper barrier) to offset losses due to Large Class I activity.

When a Large Railroad shifts traditional shortline traffic away from a shortline whether by carrier or shipper desires, the price determination that the original paper barrier was calculated upon is clearly outdated and worth less. Thus, the 'paper barrier' which was constructed allegedly in consideration of the 'reduced' price taken for the shortline, is worth less. The STB should recognize this fact and Large Carrier should, upon petition to the STB by the affected shortline or any shipper who has had traffic re-routed over the Large Railroad off a shortline, grant elimination of the paper barrier (which is creating a burden on interstate commerce) on all future shortline movements.

For example, in any future rail merger, the STB should consider that the participating Class I's should remove all barriers to interstate commerce by canceling all shortline pricing restrictions on all shortlines attached to their system and shortlines should be given the right to market all of their traffic without restrictions that have heretofore previously imposed such as paper barriers. The lifting of all previously imposed paper barriers will become one of the prices the merg-

ing railroads will have to incur in order to attain their merger goals and will serve to increase competition.

Additionally, in order to ensure shortline viability, the shortlines should be granted trackage or haulage rights to the next junction with a major Class I carrier. Such a grant will ensure the full participation of attached shortlines in competitive railroading in the U.S.

VI. LARGE RAILROADS HAVE THWARTED ECONOMIC DEVELOPMENT ON SHORTLINES AND THEN PROVIDED INCENTIVES FOR SHIPPERS TO LOCATE ON THEIR MAINLINE OR BRANCHLINES

There are several examples in the Western U.S. throughout the wheat and barley growing areas where the Class I Large Railroads have not allowed or discouraged economic development (grain and/or fertilizer terminals) locating on shortlines. When the new facilities are then built on the Large Railroad, they effectively draw traditional traffic off the adjacent shortline. In a few cases, the Large Railroad has provided economic incentives to rail shippers to locate on the Large Railroad and thus forestalling the shipper locating on the shortline.

The new facilities (grain and fertilizer) effectively minimize the ability of the shortline to compete or remain competitive. In other cases that your Wheat and Barley Commissions have witnessed, the Large Carriers would not allow the shortlines to build new facilities on their lines, because under the 'paper barriers' the Large Railroad would state that it wanted the business and therefore the shortline would not be allowed to participate, thereby, once again, creating a burden on interstate commerce and, in some cases clearly, the monopoly power possessed by the Large Railroad is being utilized to abuse the shortline.

The AAR/ASLRA Shortline agreement is short on horsepower that will assist shortlines in remaining competitive with Large Railroads. It does not deal with traditional traffic loss nor does it deal with the punitive effects of the paper barriers. Self-regulation is not the answer to fairness and competitiveness.

1. The agreement suggests that a Shortline should be able to develop without paper barriers – new traffic with another carrier. In theory, this sounds reasonable but in reality, the dominant carrier will always be able to claim that it can, in some way, participate in the New traffic via another, albeit, sometimes a more circuitous route. While this Large Railroad route may prove to be circuitous, the AAR/ASLRA agreement allows the large dominant railroad (and they have and do) to claim that it is ‘competitive’ under its own internal economics. This Board should not be fooled by this “New Traffic” plank. The agreement should state that any New Traffic a shortline can develop with another carrier cannot be interfered with by the dominant carrier – otherwise, this Board is sanctioning the continuation of monopoly interference in interstate commerce by the dominate and controlling Large Railroad carrier.
2. The agreement also does not protect the shortline from traffic shifts by the dominant carrier of ‘base’ traffic. If the dominant carrier decides that it can develop another route for some of the base traffic, the shortline must have a method of recouping such actions. Developing new traffic, not subject to dominant railroad interference, is key to economic survival of the shortline system in this country. Protection by the STB is fully within it purview of the U.S. transportation policy.
3. If the STB will take the position that any new traffic is exempt from paper barriers it will then be delivering on both its focus on increasing rail competition and one of its stated goals in the recently published rail consolidation rules. Further it will comport with “Title 49, Subtitle IV, Part A, Chapter 101: Section 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;
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;

VII. MANY SHORTLINES ARE BEING PRECLUDED FROM PARTICIPATION IN NEW RAIL SERVICE FACILITIES BECAUSE THE LARGE RAILROAD SIMPLE WON'T ALLOW ECONOMIC DEVELOPMENT ON THE SHORTLINE

The Wheat and Barley Commissions can point to multiple examples where a shortline and grain merchandisers had desires and plans to expand/modernize facilities located on a shortline and the Large Railroad simply wouldn't allow construction on the shortline or worse, the Large Railroad chose a path to assist in the economic development project provided the new/modernized facility was located on the Large Railroad. To the grain merchandiser it does not make sense to oppose the Large Railroad especially when there is economic incentives being provided to not locate on the shortline. However, this also constitutes an inter-

ference with interstate commerce and potentially does violence to the internal economics of the shortline by the Large Railroad, and should not be allowed by the STB.

In conversations with many shortlines, Wheat & Barley Commissions have found that the shortlines after repeated turndowns by the Large Railroad of waiver requests (from paper barriers), chose not to continue to bring them up to the Large Railroad for review. Why? The shortlines tell us they are faced with three issues: 1. in many cases they must rely on Large Railroad for car supply and 2. many rely on Large Railroad for accessorial services, and 3. repeated turndowns become a precedent for all future requests – namely automatic turn-down.

VIII. ARGUMENT

A. MANY WHEAT & BARLEY PRODUCERS HAVE HAD FIRST HAND EXPERIENCE WITH SHORTLINES AND THE LIMITATIONS TO INTERSTATE COMMERCE IMPOSED BY PAPER BARRIERS

The wheat and barley producers are finding that their shortlines, many of which were created by sell offs by the Class I railroads, are hurting. Why? With each successive merger creating ever greater concentration of rail economic power, there is ever greater level of disconnect between railroad marketers and the rail customer. In many cases, the Class I's are not providing sufficient division of revenue or payments to shortlines to allow for both economic return and rehabilitation of rail plant.

One does not find the same heavy handed conduct by shortlines in dealing with their rail customers. The shortlines are in business to serve and en-

hance their customer's business base as opposed to the general tenor of the Class I case who, of late, view a rail customer for what it monetarily can provide to the Class I or what margin that customers business can produce.

Paper Barriers by their definition and how they are utilized by the Class I railroads, adversely affects interstate commerce. The STB utilizes this same concept of 'adversely affecting interstate commerce' as the justifying circumstance for approving Class I rail abandonments.

B. THE JUSTIFICATION GIVEN BY LARGE RAILROAD OF SETTING UP
'PAPER BARRIERS' HAS CIRCULAR LOGIC THAT MASKS FOR MONOPOLY
CONTROL

The justification by Class I's for placing Paper Barriers on a shortline is that the line in question is being sold or transferred to the shortline for 'less than full market value'. However, the real reason a Class I is transferring a line to a shortline is that the Class I can realize more net revenue by the transfer. It may be because of a reduction of expenses, lower labor costs, alleviate abandonment costs, etc. but no Class I ever gives one of their lines to a shortline if it expects to get less revenue than if the Class I retained ownership. Thus the argument that 'Paper Barriers' are necessary to make the carrier whole for selling the line for 'less than full value' doesn't hold water. Paper barriers are simply a way for a Class I to ensure that it can continue to exert monopoly control over lines it does not own. The issue here that this Board must conclude is that monopoly control by a Class I over shortlines does not foster increased competition and hinders

the development of those carriers (shortlines) that continue to make strides in serving their rail customers.

It is acknowledged by the Wheat & Barley Commissions that Class I's continue to provide the bulk of the 'hook and haul' business but that shortlines by their nature provide better overall 'pick up and delivery' service to their rail customers than traditional Class I's.

It is in the best interests of the rail industry and the public at large to have a proactive policy to encourage the development of safe, efficient, viable and innovative shortlines in the U.S.

C. STAGGERS RAIL ACT AS PASSED BY CONGRESS IN 1980 SOUGHT A BALANCING OF CARRIER AND SHIPPER INTERESTS

It is the view of the Wheat & Barley Commissions that when the Staggers Rail Act was passed, Congress was seeking two major outcomes – 1.) by focusing on deregulation, the charge was to produce a stronger rail industry that was, at that time, plagued with multiple bankruptcies, and 2.) by protection of the captive rail customers from potential abuse that might occur due to decreased regulatory oversight and the inevitable consolidations that would occur in the future. The Staggers Rail Act was an act that espouses a balancing of shipper and carriers interests.

The farm producers continued to be concerned that rail shippers (the parties bearing the freight rates) today are facing the effects of increasing railroad monopoly and market power coupled with ineffective rail regulation and a system that allows only baseball and the railroads anti-trust protection.

The most pressing question and the heart of this Ex Parte exploration is what is best to address the public interest. After all, protecting the public interest is clearly what Congress desires when it makes changes to the regulatory scheme. In our mind, every rail customer - the public, needs a competitive rail transportation system including shortline treatment that provides fairly priced, safe and reliable service which will lead to stable long-term viability. From the captive rail customer's eyes today, the railroad industry is a rail system fraught with a series of continuing service problems that go on year after year; customer suffering, and rate gouging.

D. RELIEF FROM PAPER BARRIERS IS NECESSARY TO FACILITATE RAIL-TO-RAIL COMPETITION

There are two items that need addressing by the STB in these matters: 1. unreasonable paper barriers and 2. opening up rate quotes over segments to allow shortlines access to more than one Large Railroad.

Removal of paper barriers does not necessarily lead to competition. STB action reducing paper barriers to increase competition for Large Railroads is needed and warranted. The reductions are warranted because the Large Railroads are taking away traditional traffic from the shortlines and importantly, the

original justification for initiation of the paper barriers is faulty – no Large Railroad gives a line to a shortline expecting to get less net revenue in return.

The Board therefore needs to analyze alternatives to business as usual.

E. THE BOARD HAS THE AUTHORITY TO ADDRESS UNREASONABLE PAPER BARRIERS

The STB has the authority to address unreasonable paper barriers.

- Future Line Sales: the STB can disapprove an anticompetitive paper barriers 49 U.S.C Sections 11321-11328 and 10902
 - o A lessening of competition or creation of a monopoly are grounds for disapproval
- Pre-existing paper barriers: the STB can reopen market dominance findings and rate prescription due to changed circumstances – when the Large Carrier has taken away or caused to take away Traditional traffic – there is changed circumstances – which causes enhanced monopoly power.
 - o The current capacity shortage may also provide grounds for re-opening past transactions, 49 U.S.C. § 11327.
 - o The public interest requirement should more important here than the interest of the Large Railroad when considering the national rail transportation system and the part a viable shortline system plays in that.
 - o The balancing of shipper interests is called for in the Staggers Rail Act.

F. THE AAR/ASLRA AGREEMENT DOES NOT LESSEN THE NEED FOR A RULEMAKING

The current agreement does not adequately address shippers' concerns about paper barriers. The Wheat & Barley Commissions have shown multiple examples of the problems that are faced by rail customers and shortlines

throughout the plains. The Agreement focuses on what it calls new traffic but only for new traffic the Large Railroad doesn't want. Yet, the Large Railroad can, without oversight, run off virtually all traditional traffic leaving the shortline without recourse. The Large Railroads can insulate themselves from competition from shortlines. When the Large Railroad can control the service levels, the car supply, the rates, the investment in and around the shortlines, and the division of car payments – the Large Railroad simply capture the captivity from its ownership and transfer it to the shortline with no resulting competition or competitive forces. This self-serving agreement does nothing to alleviate shortlines captivity problems but serves to allow the Large Railroads a process to hide behind to mask their dominance over the shortlines.

The Board may want to consider adverse abandonments plus other new conditions which will serve to limit abilities of Large Railroads to control track they do not intend to use.

IX. CONCLUSION

The Wheat & Barley Commissions believe it is time for new approaches to be explored by this Board. It is time that this Board explores new approaches to a railroad system that is down to four dominant carriers controlling over 90% of the traffic and revenues. We come to a time when public policy must be reexamined. Thus, the Wheat & Barley Commissions respectfully request that the Board

institute a rulemaking proceeding to address the adverse effects on the public interest caused by paper barriers.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Terry C. Whiteside", is written over a light gray rectangular background.

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Dated: March 8, 2006