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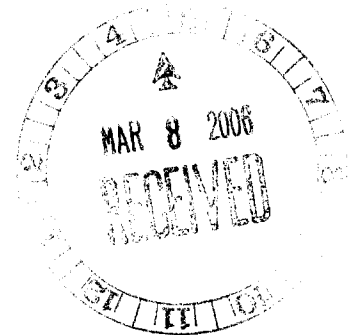
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March 8, 2006

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001



Re: Ex Parte No. 575, Review of Rail Access and
Competition Issues – Renewed Petition of the
Western Coal Traffic League

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Comments of the Western Coal Traffic League. We have also enclosed an electronic copy of this filing in WordPerfect format.

An additional paper copy of the Comments also is enclosed. Kindly indicate receipt of the filing by time-stamping this extra copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

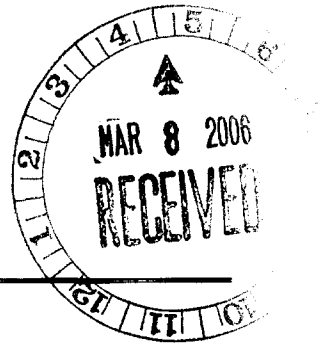
Sincerely,

A handwritten signature in black ink, appearing to read "Andrew B. Kolesar III".

Andrew B. Kolesar III
An Attorney for the Western
Coal Traffic League

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



REVIEW OF RAIL ACCESS AND
COMPETITION ISSUES – RENEWED
PETITION OF THE WESTERN COAL
TRAFFIC LEAGUE

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COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

OF COUNSEL:

SLOVER & LOFTUS
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Dated: March 8, 2006

By: William L. Slover
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Attorneys for the Western Coal
Traffic League

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REVIEW OF RAIL ACCESS AND	)	
COMPETITION ISSUES – RENEWED	)	
PETITION OF THE WESTERN COAL	)	
TRAFFIC LEAGUE	)	
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Ex Parte No. 575

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

The Western Coal Traffic League (“WCTL”),¹ by its undersigned attorneys, hereby files these Comments in response to the Board’s Decision served February 1, 2006 and in support of WCTL’s 1998 Petition for Rulemaking and its 2005 Renewed Petition for Rulemaking. These Comments also include the Statement of Professor Paul S. Dempsey (see Appendix B), who previously offered a statement in support of WCTL’s 1998 Petition. WCTL commends the Board for its decision to afford further consideration to the subject of paper barriers, and welcomes the opportunity to respond to the specific issues that the Board raised in its Decision.

SUMMARY

WCTL respectfully requests that the Board grant the relief that WCTL sought in its 2005 Renewed Petition; namely, the initiation of a rulemaking proceeding to consider the regulations proposed by WCTL to permit relief from unreasonable paper

¹ WCTL is an association of shippers and consumers of western coal, most of which is transported by rail. A list of current members is attached hereto as Appendix A.

barriers. As WCTL explains herein, the Board has sufficient statutory authority through its reopening and revocation powers (and its authority with regard to unreasonable practices) to preclude the continuing enforcement of unreasonable pre-existing paper barriers when challenged by an affected shipper or short line. WCTL also demonstrates in these Comments through the public statements of representatives of the short line industry that paper barriers are very common in transactions involving lines sales and leases, and that the nature of paper barriers has changed over time, having originated as a solution for lines facing potential abandonment, but now being used as a cost saving and/or profit-maximization device for Class I carriers for rail lines with abundant traffic.

Through the preservation of monopoly control over a given destination, paper barriers prevent the shipping public from enjoying the benefits of enhanced competition between rail carriers, and thus contradict the national rail transportation policy. The railroads' efforts to resolve the paper barrier issue through the "Railroad Industry Agreement" ("RIA") have been inadequate. The RIA does not adequately define an "unreasonable" paper barrier,² it applies only to "new" traffic, and it lacks any genuine means of enforcement. Although the rail industry has characterized the RIA as adequate to protect the interests of shippers with respect to paper barriers (to the extent that the rail

² WCTL respectfully submits that in any proceeding in which a shipper or short line carrier challenged the continuing enforcement of a paper barrier, the Board should determine that any paper barrier that has been in effect for more than five years should be presumed to be unreasonable.

industry acknowledges that shippers enjoy a right to such protection), experience has shown that short line rail carriers simply do not share the same interests as shippers.

IDENTITY AND INTEREST

WCTL is a voluntary association of enterprises whose members annually purchase and transport in excess of 140 million tons of coal mined in the western United States. Each WCTL member moves substantially all of its coal by rail. In certain instances, the single rail carrier that provides service to the electric generating facilities of a WCTL member is a short-line railroad that purchased or leased its lines from a Class I railroad and operates subject to a paper barrier precluding interchange with an alternative Class I railroad.

BACKGROUND

A. WCTL's 1998 Petition

On December 21, 1998, in the midst of a multi-faceted Board proceeding regarding rail access and competition issues, WCTL filed a "Petition for Further Rulemaking to Eliminate Unreasonable 'Paper Barriers' to Interchange" ("Petition"). Therein, WCTL argued that the RIA between the Association of American Railroads and the American Short Line and Regional Railroad Association ("ASLRRA") constituted a "good start" to resolving the paper barrier problem, but was insufficient in at least two major respects. Specifically, WCTL explained that the agreement does not define what constitutes an "unreasonable" paper barrier, and the agreement lacks any implementation

mechanism including any right of enforcement by affected shippers. WCTL's Petition included the expert testimony of Paul S. Dempsey, then a Professor of Law at the Denver University College of Law and Director of its Transportation Law Program. In addition, WCTL's Petition set forth proposed language for Board regulations concerning unreasonable paper barriers.

On January 11, 1999, the AAR filed in opposition to WCTL's Petition, arguing that the proposed rulemaking was "unwarranted and, indeed, would be counterproductive." Reply of Association of American Railroads to Petition for Further Rulemaking to Eliminate Unreasonable Paper Barriers to Interchange, filed January 11, 1999 ("AAR 1998 Reply"), at 1. The AAR added that the promulgation of a rule regarding paper barriers would discourage the resolution of disputes through private negotiation. According to the AAR:

. . . the negotiations that led to the Rail Industry Agreement were not easy ones, and the "paper barrier" issue was a particularly challenging one. In the end, all parties had to give more than they had wanted to give but an agreement on "paper barriers" was reached.

Id. at 5-6.

Responding to WCTL's suggestion that a Board-issued rule was needed to "flesh out the details" in the RIA, the AAR insisted that "what the Agreement contemplates is that the parties will flesh out the details of their general agreement in the context of negotiations involving specific factual situations." Id. at 6. Based upon this

underlying premise, the AAR requested that, “at a minimum, the Board should give the parties to the Rail Industry Agreement the opportunity they thought they had created when they entered into the Agreement – the opportunity to work cooperatively to implement the general principles through fact-specific negotiations in the future.” Id. The AAR added that “[a]ny rule issued by the Board containing presumptions regarding the validity of specific sorts of contractual provisions” would inhibit the creation of short line railroads. Id. at 7.

The AAR also claimed that the RIA did not ignore the interests of shippers. However, a careful reading of the AAR’s filing confirms that it simply (and wrongly) equated the interests of shippers with those of the rail carriers:

It is wrong to suggest that the Agreement ignores the interests of shippers. A fundamental purpose of the agreement, addressed in the “paper barrier” section, is “to increase rail freight business” and business will not increase unless shippers receive new or better service. More important, a shortline railroad will not have the incentive to resort to the dispute resolution mechanism of the Rail Industry Agreement unless there is specific traffic of one or more shippers that it hopes to handle or route in a different fashion.

Id. at 8. Providing further insight into the AAR’s view of the actual rights of shippers, the AAR went on to argue that shippers should not be entitled to any relief from paper barriers unless that outcome is favorable for all involved rail carriers:

[I]t is not realistic to suppose that a shipper could or should be able to pursue relief under the Rail Industry Agreement solely in its own name without the support of the railroad that seeks to serve it. If an arrangement proposed by a shipper to a

shortline is commercially attractive to the shortline, then the shortline will have the incentive to pursue that arrangement in the shortline and shipper's joint interest. If the shipper has not been able to persuade the shortline that a commercial arrangement is in the shortline's interest, it makes no sense for the shipper to press the shortline's case.

There is every reason to believe that the interests of shippers will be vigorously promoted under the Rail Industry Agreement by railroads who wish to serve them.

Id. (emphasis added).

The ASLRRA also filed a reply in opposition to WCTL's Petition on January 11, 1999, but the contrast between the two railroad organizations' filings was striking. Unlike the extensive argument submitted by the AAR praising the accomplishments of the RIA and insisting that it would protect the interests of shippers (to the extent the rail carriers themselves deem those interests as meriting protection), the ASLRRA filed a one-page reply evidencing only tepid support for the AAR. In fact, the first substantive point made by the ASLRRA actually noted a limitation in the scope of the RIA:

The provisions of the Railroad Industry Agreement which pertain to "paper barriers" apply only to traffic new to rail, not all traffic. Therefore, the Railroad Industry Agreement deals with only part, not all, of the "paper barrier" issue. It is a start, and a good one. It represents a privately-negotiated approach to resolving this issue, and should be given a chance to work before any further regulatory approaches are considered by the Board. ASLRRA is also concerned that a regulatory approach could have a chilling effect on future line sales.

ASLRRA therefore fully supports AAR's position that it would be inappropriate to initiate a rulemaking proceeding addressed to paper barriers at this time.

Id. at 1 (emphasis in original). Reading these two filings together, it is manifestly evident that the great champions of the shipper community touted by the AAR (i.e., the short lines), were less than enthusiastic about their rights under the RIA.

In any event, faced with a situation in which both the large and small carriers requested additional time to evaluate the effectiveness of the RIA in dealing with the problem of unreasonable paper barriers, the Board concluded that it should defer any action on WCTL's Petition:

We will not act on the petition at this time, but rather will hold it in abeyance. WCTL's proposal would affect the process through which hundreds of light density lines used to originate or terminate traffic for many rail-dependent shippers have been spun off by the larger railroads to short-line and regional carriers. This process can maintain and even improve upon the service provided to many shippers located along those light density lines. The RIA, which is still in its infancy, is intended to further promote those objectives.

. . . [W]e are not prepared to act in a way that would quickly overturn a privately negotiated settlement, completed at our direction. Such precipitous action on our part would unduly chill the process of privately negotiated settlements that we have stated we prefer, by pursuing regulation of uncertain consequences. We believe that a more reasonable approach would be to develop a better record with the benefit of experience under the RIA before we act on WCTL's petition. It may be that no regulations will ultimately be necessary; it may be that the private parties will work out some but not all of the issues that concern WCTL; or it may be that the issues that will arise will be different from those

that WCTL now envisions. In any case, it appears to us that the petition is premature and that the appropriate course of action is to hold the petition for rulemaking in abeyance, and to revisit the matter later based on the experience under the RIA.

Ex Parte No. 575, Review of Rail Access and Competition Issues (Decision served March 2, 1999), at 3.

B. WCTL's 2005 Renewed Petition

On March 21, 2005, after a period of more than six years of experience under the RIA, WCTL filed a Renewed Petition for Rulemaking to Eliminate Unreasonable "Paper Barriers" to Interchange ("Renewed Petition"). Therein, WCTL explained that during the time period since the Board's 1999 Decision, "pre-existing paper barriers have continued to restrain competition for substantial volumes of traffic originating or terminating on small railroads, and Class I carriers have continued to create new paper barriers as they have spun off more of their marginal rail lines to smaller, typically non-union, carriers." Id. at 4. On the basis of those ongoing problems, WCTL suggested that the time had come for the Board to address and resolve the paper barrier issues that WCTL raised in its 1998 Petition. Id. at 14.

The principal points raised by WCTL in support of that request were: first, that paper barriers must be subject to challenge by adversely affected shippers, rather than merely by short line carriers; second, that the AAR's "no harm, no foul" argument runs counter to the Rail Transportation Policy; and third, that the Board need not defer to an

incomplete, private sector “solution” that was the product of negotiations that intentionally excluded an entire class of interested parties. Id. at 15-19.

A number of parties filed replies to WCTL’s Renewed Petition. Parties filing replies in support of WCTL included the Albany & Eastern Railroad Company (“AERC”), the Arkansas Electric Cooperative Corporation (“AECC”), and Entergy Arkansas, Inc. (“Entergy”). Parties filing replies in opposition to WCTL included the Railroad Industry Working Group (“RIWG”), the ASLRRA, and the AAR. Both Union Pacific Railroad Company and BNSF Railway Company filed responses to certain of the replies.

C. The Board’s 2006 Request for Comments

On February 1, 2006, the Board issued a Decision requesting comments regarding WCTL’s Renewed Petition. Therein, the Board identified six subjects that it wished commenting parties to address:

We are especially interested in comments that: (a) discuss our statutory authority to address pre-existing paper barriers; (b) identify and describe existing paper barriers so that we can determine the extent of the problem alleged by WCTL; (c) identify and quantify any problems experienced by shippers as a result of paper barriers; (d) address the short and long term economic impacts of paper barriers; (e) address the effectiveness of the existing AAR/ASLRRA agreement on paper barriers; and (f) include information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc.

Decision served Feb. 1, 2006, at 4.

COMMENTS

WCTL commends the Board for its decision to solicit additional Comments regarding WCTL's Renewed Petition. This inquiry constitutes the next logical step in the Board's ongoing, multi-year effort to ensure that the current treatment of paper barriers to interchange is consistent with the Rail Transportation Policy outlined in Title 49. In 1998, the Board encouraged parties to reach negotiated solutions to concerns that had been raised regarding railroad access and competition. When those efforts led to the RIA, the Board deferred any regulatory action in response to railroad claims that experience with this private-sector approach was needed first. Now, with the benefit of more than six years of experience, it is proper to consider the railroads' prior claims in support of the RIA and to evaluate whether the interests of the shipping community have been protected adequately.

WCTL respectfully submits that the time for regulatory intervention through a rulemaking proceeding has arrived. The rail carriers' predictions regarding the efficacy of the RIA have been proven to be unfounded. To the contrary, the RIA simply has preserved the ability of Class I carriers to exercise unchecked power to compel and perpetuate paper barriers.

A. Statutory Authority to Address Pre-Existing Paper Barriers

In its 2006 Decision, the Board inquired as to its statutory authority to address "pre-existing" paper barriers. Decision at 4. Stated differently, the Board seeks

comments regarding line sales or leases that already have received Board (or Commission) approval under 49 U.S.C. §§ 10901 or 10902 or were subject to exemptions.³

As WCTL noted in its Renewed Petition (at 19-20 n.17), the authority to address pre-existing paper barriers lies in the Board's revocation and reopening procedures. In particular, the Board possesses statutory authority to change its actions under 49 U.S.C. § 722, and statutory authority to revoke exemptions under 49 U.S.C. § 10502(d). As discussed infra, the Board also possesses the authority under 49 U.S.C. § 10704(a)(1) to prescribe reasonable practices of rail carriers, such as the continuing enforcement of an unreasonable paper barrier with respect a given shipper's traffic.

As an initial matter, under Section 722, the Board has broad latitude to change, suspend, or set aside any prior action on notice:

§ 722. Board action

...

(b) Terminating and changing actions.—An action of the Board remains in effect under its own terms or until superseded. The Board may change, suspend, or set aside any such action on notice. Notice may be given in a manner

³ Under 49 U.S.C. § 10901, a person may provide transportation over, or by means of, an extended or additional railroad line, only if the Board issues a certificate authorizing such activity. Similarly, under 49 U.S.C. § 10902, a Class II or Class III rail carrier providing transportation subject to the jurisdiction of the Board may acquire or operate an extended or additional rail line only if authorized by the Board.

determined by the Board. A court of competent jurisdiction may suspend or set aside any such action.

(c) Reconsidering actions.—The Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(1) reopen a proceeding;

(2) grant rehearing, reargument, or reconsideration of an action of the Board; or

(3) change an action of the Board.

An interested party may petition to reopen and reconsider an action of the Board under this subsection under regulations of the Board.

49 U.S.C. § 722(b)-(c).⁴ A shipper that seeks relief from the continuing enforcement of a paper barrier that restricts the interchange of traffic by a short line whose line acquisition was approved through the Board's application procedures could file a petition to reopen, in part, the acquisition proceeding to demonstrate that the continuing enforcement of the paper barrier constitutes an unreasonable practice. Such a demonstration could be made on the basis of a rebuttal presumption adopted by the Board regarding the duration of a paper barrier. Notably, Section 722(b) allows the Board to reopen a decision such as the approval of an application under 49 U.S.C. §§ 10901 or 10902 at any time.

⁴ See former 49 U.S.C. § 10324(b) ("An action of the Commission remains in effect under its own terms or until superseded. The Commission may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Commission.").

Section 10502, in turn, relates directly to the subject of revocation, and provides that “[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). By definition, revocation proceedings always operate with respect to pre-existing exemption authority, and thus, it is evident that the statutory grant of exemption authority itself contemplates that the Board will have the authority to address problems that it identifies with consummated transactions. Moreover, while section 10502(d) requires the Board to complete a proceeding begun as a result of a request under subsection (d) within nine months, there is no limitation under the statute regarding the filing of a petition to revoke.

If a shipper seeks relief from the continuing enforcement of a pre-existing paper barrier where the paper barrier arose as a result of an exemption proceeding, the shipper can file a petition to revoke the exemption to the limited extent that it permits the continuing enforcement of the subject paper barrier to prevent the interchange of the petitioning shipper’s traffic. As in the case of a petition to reopen regarding an unreasonable paper barrier, the shipper could demonstrate that the continuing enforcement of the paper barrier constitutes an unreasonable practice because of the paper barrier’s duration. If the shipper demonstrated that the paper barrier fell within the category of presumptively unreasonable restrictions, and if the carriers failed to rebut that

presumption, the Board could impose a condition upon the exemption to prevent the continuing enforcement of the paper barrier with respect to the petitioning shipper's traffic.

In addition, the Board has the statutory authority to prescribe practices to be followed by carriers upon determining, after hearing, that a given practice is unreasonable. See 49 U.S.C. § 10704(a)(1). There is nothing in the language of this statute that would preclude the Board from prescribing practices to be followed with respect to pre-existing paper barriers. In furtherance of that effort, the Board could adopt regulations setting forth guidelines for the evaluation of the reasonableness of paper barriers (e.g., a rebuttal presumption regarding excessive duration). Shippers impacted by an unreasonable paper barrier could invoke those guidelines in a filing before the Board complaining that the continuing enforcement of the paper barrier (with respect to the shipper's traffic) constitutes an unreasonable practice.

B. Identify and Describe Existing Paper Barriers

As an organization of coal shippers, WCTL typically is not granted access to agreements between short-line and Class I carriers. As such, WCTL is limited in its ability to present a comprehensive list of paper barriers to the Board. Nevertheless, instances do arise in which WCTL or its members become aware of the public filing of an agreement between two rail carriers that contains a paper barrier.

WCTL included copies of an agreement that included a paper barrier in its 1998 and 2005 filings. In particular, WCTL described the paper barrier that appeared in the "Coos Bay" Agreement governing Southern Pacific Transportation Company's sale of three rail lines to the Central Oregon & Pacific Railroad ("COPR"). This agreement had been included in a Securities Exchange Commission filing made by COPR's parent company, RailTex, Inc. In its 1998 statement, WCTL's witness Dempsey described the paper barrier in the Coos Bay Agreement as follows:

Section 3 of the Coos Bay Agreement, entitled "Purchase Price," begins with a statement that the agreed purchase price was based on the parties' "assumption" that all traffic originating or terminating on the lines being sold would continue to move via SP after the sale. It then defines the purchase price as \$16,975,000, plus additional per-car amounts to be paid if the buyer ever interchanges cars to another railroad without SP's approval. Those additional charges range from \$2700 to \$5000 depending on car type, and are subject to annual escalation. The penalties are to remain in force for 100 years.

Now, it does not take a mind-reader to see that the \$16,975,000 payable at closing was the true purchase price, and was all that SP really intended to charge for the lines it was selling. The per-car penalty charges were not intended as additional revenue sources themselves; rather, if they worked as planned, they would never be assessed because the COPR would never interchange cars to anyone else over SP's objections.

Statement of Professor Paul S. Dempsey at 18.

Professor Dempsey explained that the Coos Bay Agreement is a "classic example of an unreasonable paper barrier" because it imposes "a penalty on cars

interchanged to competitors rather than a credit for cars interchanged to the seller. Id. at 18-19. Professor Dempsey noted that “if COPR interchanges 10,000 cars to SP and none to anyone else, SP is satisfied with the \$17 million it received for the line, but if COPR interchanges 15,000 cars to SP and 1000 to a competitor, suddenly the ‘purchase price’ shoots up by at least \$2.7 million.” Id. at 19. In addition, Professor Dempsey noted that the 100-year duration of the paper barrier also was unreasonable. Id.

Other paper barriers have been identified by parties filing pleadings in this case. For example, AECC and Entergy identified the UP paper barrier restriction imposed upon the Missouri and Northern Arkansas Railroad Company, Inc. See Comments of Arkansas Electric Cooperative Corporation and Entergy Arkansas, Inc. in Support of WCTL’s Renewed Petition, dated May 2, 2005, at 3-6. This paper barrier limits service to one of WCTL’s members, as well (Kansas City Power & Light Company), and was included in Attachment 3 to WCTL’s 2005 Renewed Petition.

In addition, the Board has commented upon the existence of paper barriers in certain of its decisions relating to line sales. In two recent cases, the Board approved line sale transactions, but noted the existence of new paper barriers. See Finance Docket No. 34738, Paducah & Louisville Ry. – Acquisition – CSX Transp., Inc. (Decision served Nov. 18, 2005), at 6-7 (Commissioner Mulvey, dissenting); Finance Docket No. 34495, Buckingham Branch R.R. – Lease – CSX Transp., Inc. (Decision served Nov. 5, 2004), at 13 (Vice Chairman Mulvey, dissenting). WCTL commented upon the Buckingham

Branch case in its 2005 Renewed Petition. See Renewed Petition at 13 n.13; see also id. at 8 n.8 (identifying prior cases in which shippers have complained to the agency about the existence of paper barriers, i.e., Finance Docket No. 31360, South Carolina Central R.R. – Purchase and Lease – CSX Transp., Inc. Lines in Georgia and Alabama (Decision served May 4, 1999) and Docket No. 41528, Kansas City Power & Light Co. v. Missouri Pacific R.R., et al. (Complaint filed December 29, 1994), at 10).

There is other recent, anecdotal evidence that confirms the widespread use of paper barriers. Specifically, in its Reply to WCTL's 2005 Renewed Petition, the ASLRRA noted that it "represents approximately 425 class II and class III railroads, most of whom are affected in a variety of ways by paper barriers." See Reply of the American Short Line and Regional Railroad Association to Renewed Petition dated May 2, 2005, at 1 (emphasis added). The ASLRRA further explained in its Reply that "in assessing the broad experience of its members ASLRRA concludes that without the boundaries and predictability that paper barriers create for divesting class I carriers, a large number of its members would never have been created in the first place." Id. at 2 (emphasis added).

Similarly, during the Board's October 19, 2005 hearing regarding the twenty-fifth anniversary of the Staggers Rail Act of 1980, representatives of the short line industry commented upon the significant increase in the number of short line carriers and the prevalence of paper barriers in their agreements with Class I carriers. In that regard, Mr. Charles Swinburn of RailAmerica, Inc. noted that "[s]ince 1980, the number of short

line and regional railroads has more than doubled from less than 250 to 550.” Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead, Transcript of Hearing dated October 19, 2005, Testimony of Charles Swinburn, RailAmerica, Inc., at 327.

During the same 2005 hearing regarding experience under the Staggers Act, Mr. J. Reilly McCarren, speaking on behalf of the Rail Industry Working Group, explained that there has been a fundamental change in the nature of paper barriers during the past twenty years, moving from simply being used as a solution for branch lines facing potential abandonment to being employed in a far broader context in the process of helping Class I carriers to maximize their contribution from captive traffic:

[T]he nature of paper barriers has changed over the roughly 20 years since the modern short line era began. Originally, short line sales were predominantly lines that were abandonment candidates and would otherwise have been bike trails had not short lines come along to take them over.

Over time, substantially larger branch line opportunities have become available to short line companies, and the issues for the Class Is have been less ones of outright abandonment than return on invested capital and ability to reinvest in the fringes of their network.

However, many of these lines still have profitable traffic for their Class I owners and without some sort of paper barrier or access restriction, many of those lines would not, could not be sold due to revenue or contribution risk and, thus, the lines would remain in a sort of limbo, unable to warrant reinvestment, unable to warrant marketing effort but, yet, too valuable to exit the Class I fold.

Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead, Transcript of Hearing dated October 19, 2005, Testimony of J. Reilly McCarren, Rail Industry Working Group, at 334-35 (emphasis added).⁵

The foregoing comments indicate that the use of paper barriers is widespread, and that in the numerous instances in which short line carriers have been created (or expanded), there may be few – if any – instances in which a paper barrier does not exist. Furthermore, the comments of the short line industry suggest that the use of paper barriers is no longer limited to situations in which nearly idle branch lines are preserved from abandonment, but instead, includes an increasing range of instances in which the maximization of Class I railroad revenue and contribution over significant lengths of rail line is sought to be achieved without any consideration for the impact on captive shippers. It is this broader use of paper barriers – which can involve large volumes of traffic (e.g., unit train coal traffic to Entergy Arkansas, Inc. and Kansas City Power & Light under the 1992 UP/MNA paper barrier) – that presents the greatest cause for concern to shippers. The use of paper barriers in such contexts allows a Class I rail carrier with control over one or more high-volume destinations to reduce its operating costs without any risk to its control over the shippers' traffic and the associated revenue stream.

⁵ It stands to reason, of course, that if a Class I carrier seeks to impose a paper barrier limitation on the transfer of its line, it must anticipate that there remains at least some profit to be derived from the traffic on the line.

C. Identify and Quantify Any Problems Experienced by Shippers as a Result of Paper Barriers

The problems experienced by shippers as a result of paper barriers involve the artificial preservation of monopoly control over what should be a neutral destination. Stated simply, these problems are identical to the goals sought to be achieved by Class I carriers in insisting upon paper barriers; i.e., the continuation of a rail monopoly on traffic moving to a given destination, notwithstanding the former destination monopolist's decision to transfer operations over the line to a third party. This artificial preservation eliminates the possibility that the shipper would receive the benefit of any upstream competition between line-haul carriers.

As WCTL explained in its 2005 Renewed Petition, in the 2000-2001 time frame, the Board adopted new policies seeking not only to preserve competition, but actually to enhance competition in transactions involving the merger of Class I carriers. See WCTL Renewed Petition at 13 (citing Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures (Decision served June 11, 2001), at 9). Under these new rules, codified at 49 C.F.R. § 1180.1(c)(iv), proponents of major rail consolidation are required to explain how conditions would result in new or more effective competition, not simply maintain an equivalent to the pre-merger status quo. Contrary to the AAR's argument raised in its Reply to the 2005 Renewed Petition (see AAR Reply at 9-10), the Board's revised policy regarding major rail consolidations need not be read in an entirely narrow manner with no implications whatsoever for paper barriers. To the contrary, the

combined effect of the numerous rail line “spin off” transactions occurring in recent years constitutes a significant shift in the manner in which rail service is provided in the United States, and certainly rivals the overall impact of a major railroad consolidation. Given the significant scope of paper barrier transactions, there is every reason to find that the Board’s new competition-enhancing policy should inform the Board’s view of paper barrier transactions, as well.

In this context, it is also worthwhile to consider the railroads’ frequent argument that paper barriers allow Class I carriers to avoid the abandonment of unprofitable rail lines, and thus preserve rail service for shippers on the lines. See, e.g., AAR Reply to WCTL’s Renewed Petition at 8 (“Shippers are afforded continued, and usually enhanced, rail service where that service was otherwise in danger of elimination.”); id. at 9 (if the Board were to grant WCTL’s requests, “an increasing portion of the rail network would likely be lost rather than transferred to short line carriers for continued operation”). Ignoring, for the sake of argument, the fact that railroads now impose paper barriers in transactions involving lines that have little or no possibility of abandonment (discussed in greater detail, supra), it is by no means the case that certain shippers necessarily would be better off with a line sale or lease accompanied by a paper barrier than with an abandonment.

If a Class I carrier were able to demonstrate – as is often claimed – that its cost structure prevents it from continuing to serve traffic on a given line in a profitable

manner and therefore proposes abandonment, the line would be a candidate for the Offer of Financial Assistance ("OFA") procedures under 49 U.S.C. § 10904. Assuming that a short line carrier could operate the abandoned line in a more cost-effective manner than the Class I, there is every reason to expect that a short line carrier would be able to secure sufficient financing to purchase the line for its net liquidation value. Any dispute between the Class I and the short line carrier regarding the proper level of the OFA payment would be subject to resolution by the Board. If a short line carrier then acquired a line proposed for abandonment through the OFA process, the carrier would be free from any interchange restrictions and intramodal rail competition would be enhanced, to the likely benefit of both the short line carrier and the shipping public. The railroads' frequent threat that any modification to the RIA would lead to the elimination of lines from the rail network clearly is overstated.

D. The Short and Long Term Economic Impacts of Paper Barriers

In response to the Board's inquiry regarding the short and long term economic impact of paper barriers, WCTL submits the accompanying statement of Professor Paul S. Dempsey. In his statement, Professor Dempsey explains that as a matter of economic policy, a clear distinction can be drawn between legitimate paper barriers of a short duration, and unreasonable paper barriers of an extended or unlimited duration.

As indicated in WCTL's 1998 Petition, and on the basis of Professor Dempsey's statement, WCTL respectfully submits that in considering any effort (by a shipper or short line carrier) to challenge the enforcement of an unreasonable paper barrier, the Board can implement a rebuttable presumption that any paper barrier that has remained in effect for more than five years has succeeded in compensating the Class I carrier for the discount that it provided to the short line carrier and has begun to operate solely to generate increased profits for the Class I carrier.

E. The Effectiveness of the Existing AAR/ASLRRA Agreement

Any assessment of the effectiveness of the existing agreement between the AAR and the ASLRRA must begin with a clarification of the goal of the agreement. To that end, if the goal of the RIA was to allow the Class I carriers to preserve their control over short line railroads and to dissuade the STB from intervening to address the paper barrier problem, then the RIA was tremendously "effective." For example, in its Reply to WCTL's Renewed Petition, the RIWG commented that the RIA had achieved its purpose of maximizing rail traffic while "protecting" shippers in situations in which a Class I carrier was not interested in providing service:

[T]he RIA had established principles to guide rail carrier activities with the objective of ensuring that rail shippers had continued opportunities to ship new traffic by rail (e.g., where the Class I railroad with the paper barrier was unable or unwilling to handle such traffic). The RIA, in essence, provided that a paper barrier would be waived if such action were necessary to accomplish that objective.

RIWG Reply to WCTL's Renewed Petition at 3. Limited to this narrow scope of analysis, one could reasonably conclude that the RIA has been entirely "successful" in preventing the Class I carriers from having to make any concessions to short lines regarding paper barriers.

If, on the other hand, the purpose of Board's inquiry regarding the "effectiveness" of the RIA is to determine whether the RIA has provided any means through which the interests of the shipping public are protected, then the RIA has been counterproductive. There is ample support for WCTL's argument (raised in both its 1998 and 2005 Petitions) that the short line industry represents an inadequate surrogate for the interests of shippers, and that as a result, the RIA cannot be regarded as a legitimate "private sector" solution to the paper barrier problem.⁶ To the contrary, without a genuine right of enforcement by shippers, the RIA amounts only to the formalization of one industry segment's ability to impose its will on a second industry segment in order to ensure the dominant Class I carriers' continuing control over captive markets.

While Class I carriers may be pleased with the RIA, various comments made by short line carriers indicate that the short line carriers' enthusiasm is far more

⁶ As noted by the ASLRRRA in its Reply to WCTL's 1998 Petition, the RIA also is inadequate because it applies only to "new" traffic. ASLRRRA Reply to WCTL Petition, dated January 11, 1999, at 1 ("The provisions of the Railroad Industry Agreement which pertain to 'paper barriers' apply only to traffic new to rail, not all traffic. Therefore, the Railroad Industry Agreement deals with only part, not all, of the 'paper barrier' issue.") (emphasis in original).

tempered, and may be a product of the short lines' dependence on the Class I railroads for their very existence. In most if not all cases, the short lines have no real option – and thus no real incentive to complain – when a Class I carrier insists that the carriers' lease or purchase agreement include a paper barrier. See, e.g., Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures (Decision served June 11, 2001), at 27 (“The ASLRRRA claims that the RIA is not working as effectively as the small railroads had hoped. . . . [T]he jury is still out on RIA’s success.”).

In their Reply to WCTL’s Renewed Petition, the ASLRRRA noted that “fundamentally short lines accept contractual restrictions on existing class I business because there is no other realistic way to incent the divesting carrier to sell or lease them a line in a structure that is economically viable for the acquiring line.” See ASLRRRA 2005 Reply at 3. Similarly, in his remarks during the Ex Parte No. 658 hearing, Mr. Charles Marshall of Genessee & Wyoming, Inc. referred to short line railroads as being the “ultimate captive shipper,” devoid of any leverage in their negotiations with Class I carriers regarding paper barriers:

I am here really in the context of being the ultimate captive shipper. Short lines, if you think about it, can’t make their product somewhere else or use another mode of transportation. If we’re going to succeed, the Class I railroads have to succeed and then we have to live with them as partners. And so that’s the way we try to think of our business and that’s the way we think of the Staggers Act.

Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead, Transcript of Hearing dated October 19, 2005, Testimony of Charles

Marshall, Genessee & Wyoming, Inc., at 337. In his remarks, Mr. Marshall added that:

Anything that takes money away from the Class I, and thereby makes our business less competitive and shifts that money to us, is not in the long run good. That might surprise you, but unless our joint product with the Class I succeeds competitively, we're going to fail. So we don't want artificially to take money from the Class Is and transfer them (sic) to the short lines or the shippers, because it will make the product less competitive and that is not good.

Id. at 339.

Notably, during the Ex Parte No. 658 hearing Commissioner Mulvey expressed some measure of disagreement with this view of the relationship between Class I and short line carriers, and suggested that the legitimate policy goal of employing short line railroads to increase the efficiency of rail service could be met even if the fundamental relationship between Class I and short line carriers were modified to enhance the independence of the short lines:

I want to address this question of paper barriers, because it is one that is of particular interest to me. I did not accept the analogy about the buyer and the supplier, simply because most buyers will have an option to go to another supplier. As one of you pointed out, you are the ultimate captive shippers. You really don't have any other options to go to another supplier. Therefore, you must negotiate with the railroads.

And secondly, most suppliers and buyers do not enter into contracts that go on in perpetuity. There is some limit as

to how long those contracts go on and, at some point, when the parties feel that the value has gone out of that contract, they can go elsewhere and contract anew. That is not the case with paper barriers, which do go on in perpetuity.

I find the perspective interesting that you are better off or you're happy with requirements that restrict your ability to negotiate. In general, the more negotiation positions you're able to take, the better your hand in negotiations, the better off you are in achieving what you want. This is interesting in the sense that because you have these paper barriers, you really have no credible threat to the Class I railroads and you are pretty much price takers and service takers.

. . . Unless paper barriers go on in perpetuity I am not opposed to the notion of paper barriers, per se. I think sometimes they are a legitimate part of a sale or lease, but when they go on forever and ever and cannot be sunsetted, then I think there is a problem and you don't have the ability for the short line to eventually bring competition to the Class I railroads in those markets.

Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead, Transcript of Hearing dated October 19, 2005, at 352-54 (emphasis added).

Commissioner Mulvey further commented as follows:

We agree that there should be more short lines and that short line[s] should prosper. I would disagree or I would question the notion of the Class I railroads creating the short lines, and it strikes me that the short lines should be firms that are independently created and come to operate these lines, as opposed to being the children and the controlled children at that of the Class I.

So that is my concern, not that the short lines don't grow and prosper, but rather that they be truly independent entities at some point.

Id. at 355 (emphasis added).

WCTL wholeheartedly agrees with these comments and respectfully submits that they should inform the policy of the Board in developing regulations to constrain the anticompetitive effects of unreasonable paper barriers. As WCTL acknowledged in its prior filings in this case, in limited contexts and over limited periods of time, paper barriers can have a salutary impact on the rail industry (chiefly in terms of the financing of acquisitions) without adversely impacting shippers. Where Class I carriers attempt to transform such reasonable restrictions into absolute prohibitions on competition with unlimited duration, then the propriety of such a restriction vanishes. Finally, WCTL reiterates that it is imperative that the Board allow shippers to invoke a remedy regarding paper barriers, rather than relying upon the short line carriers, who themselves are “captive” to the Class I railroads.

F. Any Information About the RIA

The Board’s final request for information regarding paper barriers seeks “information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc.” February 1, 2006 Decision at 4. Although reports from various railroad sources indicate that the railroads have amended the RIA to clarify the definition of “new traffic,” the carriers apparently have not released their amendment to the public. In this regard, however, Mr. J. Reilly McCarren of the Rail

Industry Working Group explained the nature of the amendment to the RIA during his remarks at the Ex Parte No. 658 Hearing:

. . . [T]he RIA evolved. As any time when there is a significant change in the terms of trade affecting a broad swath of an industry, there is a break-in period. And after a few years, we determined that some of the language was ambiguous. Some of the original intent may not have fit changing circumstances. In any event, the railroad industry had transitioned in those ensuing five years.

Consequently, after a long process of examination and negotiation, the rail industry has updated the Rail Industry Agreement. We have improved the definition of new business, established some bright lines and new clarity. We continue to focus on maximizing short line traffic potential without cannibalizing existing rail system traffic.

Id. at 333. Anecdotal evidence indicates that the “improved” definition of “new business” actually has restricted further the circumstances under which the RIA would sanction removal of a paper barrier. If that is borne out in this proceeding, the case for reform is stronger still.

CONCLUSION

For the foregoing reasons, and as previously explained by WCTL in its 1998 Petition and its 2005 Renewed Petition, WCTL respectfully requests that the Board initiate a rulemaking proceeding to consider the regulations that WCTL has submitted to the Board. These regulations would, inter alia, introduce the notion of a limited life to paper barriers and would allow affected rail shippers to seek relief from paper barriers. Without such modifications, the current treatment of paper barrier merely serves to

protect Class I carriers in their efforts to artificially maintain monopoly control over their customers.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

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Dated: March 8, 2006

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MidAmerican Energy Company
Minnesota Power
Nebraska Public Power District
Omaha Public Power District
Texas Genco, LP
Texas Municipal Power Agency
Western Farmers Electric Cooperative
Western Fuels Association, Inc.
Wisconsin Public Service Corporation
Xcel Energy

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 575

REVIEW OF RAIL ACCESS
AND COMPETITION ISSUES –
RENEWED PETITION OF THE
WESTERN COAL TRAFFIC LEAGUE

**VERIFIED STATEMENT OF
PAUL S. DEMPSEY**

My name is Paul Stephen Dempsey. I am the Tomlinson Professor of Global Governance in Air and Space Law and Director of the Institute of Air and Space Law at McGill University, in Montreal, Canada. From 1979 through 2002, I held the endowed chair as Professor of Transportation Law and Director of the Transportation Law Program at the University of Denver. Prior to that time, I served as an attorney with the Civil Aeronautics Board and the Interstate Commerce Commission ("ICC"), and from 1981-1982, I served as Legal Advisor to Chairman Taylor of the ICC. In addition, I have delivered expert testimony before several Public Utilities Commissions in both the United States and Canada, and have testified before the transportation committees of the United States Congress, the Canadian Senate, and various state legislatures.

In 1998, I submitted a verified statement in support of the Western Coal Traffic League's ("WCTL") Petition for Further Rulemaking to Eliminate Unreasonable

“Paper Barriers” to Interchange. A complete statement of my qualifications is attached hereto as Exhibit 1.

I have been asked by counsel for WCTL to comment upon an issue raised by the Surface Transportation Board (“STB”) in its February 1, 2006 decision in this proceeding; namely, the short and long term economic impacts of paper barriers. In my opinion, a significant distinction can be drawn between paper barriers of relatively short duration, and paper barriers of unlimited duration. There are entirely valid economic and policy grounds for using this distinction to guide the STB’s analysis of the proper scope of a reasonable paper barrier.

1998 Statement

In my 1998 statement, I explained that the statutory framework for evaluating paper barriers strongly supports the promotion – and not simply the preservation – of competition among the nation’s railroads. I also argued that the Railroad Industry Agreement (“RIA”) between Class I and short line carriers provided an incomplete solution to the problem of paper barriers. Significantly, I observed that the duration of a paper barrier is an important factor in determining its reasonableness.

Response to the Board’s 2006 Inquiry

In its February 1, 2006 Decision, the Board requested that parties address, inter alia, the “short and long term economic impacts of paper barriers.” The most significant economic impact of paper barrier is the artificial preservation of monopoly

control over a captive shipper. The Class I carrier elects to pursue this type of arrangement because it believes that it will reduce its costs of operation and/or increase its revenues for a given portion of its system. Absent such a belief, the Class I carrier would not agree to the line sale or lease.

The sale or lease transaction also benefits the short line rail carrier which – having considered carefully the impact of the paper barrier on its operations – nevertheless believes that it can earn a profit on the line. The parties who bear the consequences of the decision to create a paper barrier are the railroads' customers (and potentially rail labor).

As I indicated in my 1998 statement, the short-term effect of a paper barrier can be supported logically as a reasonable protection for the Class I carrier that is transferring or leasing its property at some measure of a "discount" to be offset by continuing profits. Id. at 11 ("It is one thing for a seller to restrict the competitive options available to the buyer for a limited transition period, and quite another for such restrictions to constrain competition in perpetuity or for a protracted period."). Effectively, it is the shipper that is called upon to pay the difference to the Class I carrier between: (a) whatever price the Class I would have charged in the context of an unfettered sale of its line (i.e., the lump sum value of the line); and (b) whatever sale price the Class I was able to obtain in a transaction that was subject to a paper barrier restriction (i.e., the actual payment). Once this difference has been paid by the shipper

through ongoing rate payments for long-haul rail service, the long-term effect of the paper barrier is simply to enhance the profits of the Class I carrier.

Consistent with my prior statement supporting a temporal limitation on paper barriers, I believe that the Board can implement a rebuttable presumption that any paper barrier that remains in effect for more than five years has succeeded in compensating the Class I carrier for the discount that it provided to the short line carrier and has begun to operate solely to generate increased profits for the Class I carrier. To the extent that the Class I carrier can demonstrate that the parties to the paper barrier arrived at the financial terms assuming a longer "pay back" period, then this presumption could be overcome. For example, a Class I carrier may be able to demonstrate that given the low levels of anticipated traffic on the line and the inability of the short line carrier to secure adequate financing for a larger initial payment, the two rail carriers agreed to develop a purchase price assuming a ten-year payback period.

Notably, this type of analysis closely parallels the approach frequently undertaken to evaluate the reasonableness of a liquidated damages payment. Courts will uphold a liquidated damages amounts set forth in a contract if the proponent of that payment can demonstrate that the parties arrived at the amount through an analysis of the actual harm that would be associated with a breach of the contract. See, e.g., Restatement (Second) of Contracts § 356 ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the

anticipated or actual loss. A term fixing unreasonably large liquidated damages in unenforceable on grounds of public policy as a penalty.”); Joseph M. Perillo, Corbin on Contracts § 58.1 (“In order to qualify as a liquidated damages clause: first, the parties must intend to provide for damages rather than for a penalty; second, the injury caused by the breach must be uncertain or difficult to quantify; third, the sum stipulated must be a reasonable pre-estimate of the probable loss.”). If, however, it appears that the parties simply selected a substantial payment amount in order to operate as a penalty, then courts will refuse to enforce the liquidated damages provision.

Another analogy that may be helpful in allowing the Board to develop a comprehensive policy regarding unreasonable paper barriers is the antitrust doctrine regarding non-competition clauses in agreements for the sale of a business. As I explained in my 1998 statement, courts will approve such clauses only if they are reasonably limited both in geographic scope and in duration to the minimum necessary to accomplish a proper purpose (allowing the purchaser a chance to develop a relationship with the business’ customers). See 1998 Statement at 11 (citing Lektro-Vend Corp. v. Vendo Co., 43 F. Supp. 527, 532 (N.D. Ill. 1975), aff’d, 545 F.2d 1050 (7th Cir. 1976), rev’d on other grounds, 433 U.S. 623 (1977)). In this regard, I noted that “[w]hen a rail line (or any other business segment) is sold, public policy may tolerate arrangements that postpone the buyer’s ability to compete freely as an independent entity, but it cannot tolerate restrictions that prevent such independence indefinitely.” Id.

One leading antitrust treatise similarly explains that in evaluating an exclusive dealing or tying arrangement, the critical inquiry is the impact of the restriction on consumers. In particular, the anticompetitive nature of a competition restriction arises from the extent to which the restriction limits the effective choices of consumers. Paper barriers, of course, completely limit the ability of the consumer to choose between transportation service providers:

[T]he question of impact on competition is addressed not by considering whether the arrangement is exclusive dealing or tying, but rather by considering the extent to which customer choice is restrained. Restrictions imposed on customers often produce greater competitive harm than restrictions imposed on intermediaries, for restrictions of the latter permit customers to continue to make substitutes. . . .

If the exclusive arrangement is anticompetitive at all, it is because the arrangement forecloses rivals from adequate sales outlets. Thus, the condition that makes tying or exclusive dealing anticompetitive in the first place is that customers lack sufficient options to purchase their [product] elsewhere. . . .

To the extent exclusive dealing limits the ability of an entire firm to sell the products of a rival, it often has more anticompetitive potential than tying, which often requires use of the tied product only with specific tying machines.[] In all cases, competitive injury is best measured by examining the degree to which the restraint limits the effective choices of consumers.

Herbert Hovenkamp, Antitrust Law, Vol. XI (Second Edition 2005), at ch. 18, ¶ 1800.

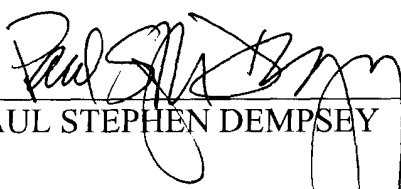
Once again, paper barriers between Class I and short line carriers are particularly

problematic over the long-term because they completely restrict the consumer's ability to obtain service from a rival long-haul carrier.

VERIFICATION

I, PAUL STEPHEN DEMPSEY, declare under penalty of perjury under the laws of the United States that the foregoing Statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on March 1, 2006



PAUL STEPHEN DEMPSEY

Exhibit 1

Paul Stephen Dempsey

Tomlinson Professor of Global Governance in Air & Space Law

Director, Institute of Air & Space Law

McGill University

3661 Peel Street

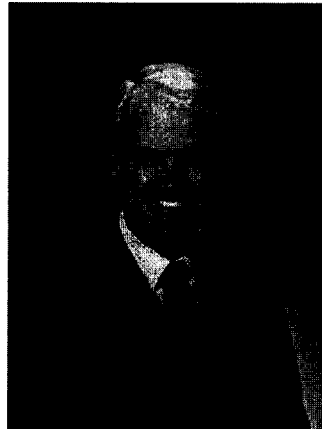
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Paul Stephen Dempsey is Tomlinson Professor of Global Governance in Air & Space Law and Director of the Institute of Air & Space Law at McGill University, in Montreal, Canada. From 1979-2002, he held the chair as Professor of Transportation Law and Director of the Transportation Law Program at the University of Denver. He was also Director of the National Center for Intermodal Transportation. From 1975-79, he served as an attorney with the Civil Aeronautics Board and the Interstate Commerce Commission in Washington, D.C., and in 1981-82 he was Legal Advisor to the Chairman of the I.C.C.

Professor Dempsey has written more than seventy law review and academic journal articles, scores of newspaper and news magazine editorials, and several books:

- International Air Carrier Liability: The Montreal Convention of 1999 (CRASL 2005)
- International Aviation Policy for Canada (editor) (CRASL 2005)
- Aviation and the Law (Coast Aire 4th ed. 2005).
- Air Transportation: Foundations for the 21st Century (Coast Aire 2nd ed. 2005).
- Air Commerce & the Law (Coast Aire 2004).
- European Aviation Law (Kluwer Law International 2004).
- Space Law (four volumes, Oceana 2004-06).

- Transit Law (Transportation Research Board 2004)
- Metropolitan Planning Organizations: An Assessment of the Transportation Planning Process (NCIT 2000).
- Airport Planning & Development: A Global Survey (McGraw Hill 1999).
- Airline Management: Strategies for the 21st Century (Coast Aire 1997).
- Denver International Airport: Lessons Learned (McGraw-Hill 1997).
- Aviation Law & Regulation (two volumes, Butterworth 1993).
- Airline Deregulation & Laissez-Faire Mythology (Quorum Books 1992).
- Flying Blind: The Failure of Airline Deregulation (Economic Policy Institute, 1990).
- The Social & Economic Consequences of Deregulation (Quorum Books 1989).
- Law & Foreign Policy in International Aviation (Transnational 1987).
- Law & Economic Regulation in Transportation (Quorum Books 1986).

Dr. Dempsey holds the following degrees: Bachelor of Arts (1972), Juris Doctor (1975), University of Georgia; Master of Laws (1978), George Washington University; Doctor of Civil Laws (1986), McGill University. He is admitted to practice law in Colorado, Georgia and the District of Columbia. Professor Dempsey was a Fulbright Scholar, was awarded the Transportation Lawyers Association Distinguished Service Award, and was designated the University of Denver's Outstanding Scholar. He was the first individual designated the University of Denver's Hughes Research Professor and DePaul University's Distinguished Visiting Professor of Law. The Colorado transportation community named him "Educator of the Year", and inducted him into the Colorado Aerospace Hall of Fame. From 1979-2002, he was faculty editor of the *Transportation Law Journal*. He also served on the Editorial Boards of the *Denver Business Journal*, and *The Aviation Quarterly* (Lloyds, London), and currently serves on the Editorial Board of the *German Journal of Air & Space Law*, and Editor-in-Chief of the *Annals of Air & Space Law*.

From 1986 to 1998, he was host of KWGN-TV's weekly talk show, "Your Right to Say It." Professor Dempsey has appeared on the ABC Evening News with Peter Jennings, the MacNeil-Lehrer News Hour, ABC World Business Report, NBC Today, ABC Good Morning America, CNN Crossfire, National Public Radio, CBS Radio, NBC Mutual Radio, and other news broadcasting networks in the United States and abroad. His editorials have been published numerous newspapers and news magazines, including *Newsweek*, the *New York Times*, and the *Wall Street Journal*.

Dr. Dempsey is also Vice Chairman & Director of Frontier Airlines, Inc., and has served with that airline since its birth in 1994. He is Director of the Jordan Centre for Aviation Security and Safety at Queen Noor Civil

Aviation Technical College in Amman, Jordan, and advisor to the National University of Singapore. He was a founder and first Chairman of the Board of Governors of the Certified Claims Professional Accreditation Council, Inc., and President and Director of the Genesee Foundation, Inc. He has also served as a consultant to U.S. and foreign airlines, railroads, motor carriers, bus companies, transportation labor organizations and industry associations, government agencies, and telecommunications companies.

Dr. Dempsey has delivered expert witness testimony and studies before the Public Utility Commissions of the states of California, Colorado, Kansas, Iowa, Ohio, Pennsylvania, and Washington, the Province of British Columbia, and the courts of Missouri and Nevada. He has testified before the transportation committees of the U.S. Senate, the U.S. House of Representatives, the Canadian Senate, and the state legislatures of Colorado, Michigan and Texas. He has lectured in Austria, Belgium, Canada, Chile, China, Colombia, Germany, Hong Kong, Italy, Japan, Jordan, the Netherlands, Papua New Guinea, Singapore, South Korea, the United Arab Emirates, the United Kingdom, and the United States.