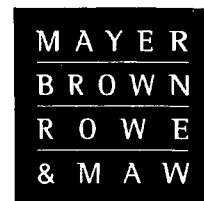


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July 13, 2006

**BY HAND-DELIVERY**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001

Mayer, Brown, Rowe & Maw LLP  
1909 K Street, N.W.  
Washington, D.C. 20006-1101

Main Tel (202) 263-3000  
Main Fax (202) 263-3300  
www.mayerbrownrowe.com

**Robert M. Jenkins III**  
Direct Tel (202) 263-3261  
Direct Fax (202) 263-5261  
rmjenkins@mayerbrownrowe.com

ENTERED  
Office of Proceedings

JUL 13 2006

Part of  
Public Record

Re: STB 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 above-captioned proceeding are an original and ten copies of "Summary of AAR Remarks for July 27, 2006 Hearing." Please date-stamp the enclosed extra copy and return it to our representative.

In the event that the Board forms panels of witnesses for the hearing, the AAR respectfully suggests that the Board consider including on the same panel the AAR and the American Short Line and Regional Railroad Association ("ASLRRA"). This would enable the Board to hear the views of the associations representing large and small railroads and to pose follow-up questions to each simultaneously or sequentially, which could be more informative and efficient for the Board.<sup>1</sup> I am authorized to state that the ASLRRA concurs in the suggestion that it appear on the same panel as the AAR.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures

<sup>1</sup> The AAR also notes that, in its notice of intent to participate, Union Pacific Railroad Company ("UP") requested that it be on the same panel as the AAR. The AAR supports UP's request.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB EX PARTE NO. 575**

**REVIEW OF RAIL ACCESS AND COMPETITION ISSUES—  
RENEWED PETITION OF WESTERN COAL TRAFFIC LEAGUE**

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**SUMMARY OF AAR REMARKS  
FOR JULY 27, 2006 HEARING**

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**Of Counsel:**

Richard E. Weicher  
Michael E. Roper  
Sarah W. Bailiff  
BNSF Railway Company

Theodore K. Kalick  
Canadian National Railway Company

Paul Guthrie  
Canadian Pacific Railway Limited

Peter J. Shudtz  
Paul R. Hitchcock  
CSX Transportation, Inc.

Robert B. Terry  
The Kansas City Southern Railway Company

George A. Aspatore  
Greg E. Summy  
Norfolk Southern Corporation

J. Michael Hemmer  
Louise A. Rinn  
Robert T. Opal  
Union Pacific Railroad Company

Louis P. Warchot  
Association of American Railroads  
50 F Street, NW  
Washington, DC 20001  
(202) 639-2502

Robert M. Jenkins III  
Adam C. Sloane  
Monica A. Aquino  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, NW  
Washington, DC 20006  
(202) 263-3000

Counsel for Association of  
American Railroads

Dated: July 13, 2006

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB EX PARTE NO. 575**

**REVIEW OF RAIL ACCESS AND COMPETITION ISSUES—  
RENEWED PETITION OF WESTERN COAL TRAFFIC LEAGUE**

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**SUMMARY OF AAR REMARKS  
FOR JULY 27, 2006 HEARING**

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- I. The Board Should Not Grant WCTL's Petition for a Rulemaking**
- II. Contractual Interchange Commitments Are In the Public Interest**
  - A. Interchange Commitments Have Made a Significant Contribution to the Development of the Shortline Industry and More Productive and Cost-Effective Rail Service in This Country**
    - Interchange commitments in shortline transactions evolved directly from the mandate of the Staggers Rail Act for more reliance on market-based solutions to improving efficiency on lower density rail lines.
    - Interchange commitments create "win-win-win" situations where the shortline railroad is able to acquire and operate a line that would otherwise be unaffordable and often not preserved, the Class I railroad is freed to better concentrate its service and investment on its main and other lines with a greater traffic base, and shippers obtain responsive service on a low density line which otherwise would not receive investment and service priority.
    - Interchange commitments have facilitated rail traffic growth by maintaining and enhancing the productivity of low density lines in the national rail system.

- Interchange commitments reflect the terms of payment on which a willing buyer and a willing seller agreed at the time of the sale. It is bad public policy for the government to: (i) interfere with the payment terms agreed to by the parties to such contracts; (ii) judge the fairness of the terms years after such terms were agreed to; and (iii) consider changing the terms in favor of only the buyers.

#### **B. Interchange Commitments Are Not “Anticompetitive”**

- Interchange commitments no more constitute an unreasonable “restraint of trade” than similar commitments in overhead trackage rights, haulage rights, switching agreements, or other cooperative ventures between railroads that commit them to a particular course of conduct or a particular transaction.
- Analogies to “non-compete” agreements and other such restrictions that are ancillary to the sale of a business are inapt. Interchange commitments are at the core of many shortline sale and lease transactions that establish a cooperative arrangement, *not* a competitive rivalry, between the shortline railroad and the large railroad.

### **III. There Are Legal and Practical Constraints on Board Action – in a Rulemaking Proceeding or Otherwise – Regarding Existing Interchange Commitments in Settled Transactions**

#### **A. It Would Be Clear Error in the Context of a Broad Rulemaking for the Board to “Reform” or Eliminate Paper Barriers in Existing Sale or Lease Transactions**

- The Courts have strongly disfavored retroactive rulemaking, particularly where the affected parties have reasonably relied on the prior policy of the agency.
- The ICC and the Board have long encouraged voluntary inter-carrier agreements and recognized the obvious unfairness of efforts by third parties to impose conditions on those transactions years after they were approved.

**B. Even Assuming the Board Had the Legal Authority, Retroactively Eliminating Interchange Commitments Would Create Intractable Practical and Commercial Problems**

- If interchange commitments were eliminated, the underlying transaction would need to be renegotiated to reflect the value of the consideration to the parties. Board oversight and intervention into such renegotiations would distort prior market and commercial expectations.
- A large railroad would need to be paid for the value of the line without the interchange commitment if the transaction were to remain in place. The Board, in each individual case, would need to address who should pay the compensation where the shortline was either unwilling or unable to afford the price, even where none of the parties to the transaction are seeking “relief.”
- If a large railroad did not receive appropriate compensation, it would likely have the right to seek to unwind the transaction under contract law generally, if not under the terms of the specific agreement itself. The Board would become embroiled in disputes about not only the railroads’ respective contractual rights but the rights of third parties who had relied on these settled transactions.
- In the event of a forced termination of an otherwise settled transaction, shippers who have come to rely on the productivity and service of the shortline would also be ill-served.

**IV. A Rulemaking to Restrict Interchange Commitments in Future Shortline Transactions is Not Justified by the Record in This Proceeding and Would Represent a Marked and Counterproductive Departure From the Board's Past Encouragement of Cooperative, Market-Based Transactions**

**A. Restricting Interchange Commitments Would Discourage Productive Shortline Transactions**

- Interchange commitments make it possible for shortline railroads to buy or lease lines at low cost (or no cost) in exchange for cooperating with the large carrier to handle and grow its long-haul business.
- The sale or lease transaction to the shortline benefits the shippers on the line by maintaining and often enhancing responsive rail service.
- If large railroads cannot receive fair consideration for the sale of a line, they are unlikely to enter into line sales transactions.

**B. Individual Proceedings Can and Should be Used to Assess Whether a Particular Interchange Commitment Has Created a Rate or Service Problem That Requires Regulatory Relief**

- An interchange commitment on a line does not alter a shipper's current right to seek regulatory relief for rate or service problems on the line.
- The Rail Industry Agreement between the AAR and the ASLRRRA also provides a private sector means of resolving issues between railroads relating to interchange commitments.

- The parties complaining about interchange commitments in this proceeding have identified no widespread problem that could justify a rulemaking proceeding to impose broad restrictions on the use of such provisions.