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*ADMITTED IN NY

July 13, 2006

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

By Hand Delivery



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

Dear Secretary Williams:

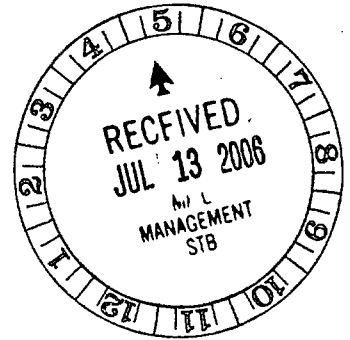
Enclosed for filing are an original and 10 copies of Summary of July 27, 2006
Oral Presentation that I will be making on behalf of National Grain and Feed Association.

Sincerely,

Andrew P. Goldstein

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 575

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

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SUMMARY OF JULY 27, 2006 ORAL PRESENTATION ON BEHALF OF
NATIONAL GRAIN AND FEED ASSOCIATION

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National Grain and Feed Association

Dated: July 13, 2006

1. My name is Andrew P. Goldstein. I am a member of the law firm of McCarthy, Sweeney & Harkaway, P.C. I am appearing on behalf of National Grain and Feed Association ("NGFA"). NGFA is comprised of some 900 companies in the United States, Canada and Mexico involved in all aspects of grain merchandising, processing, storage, transportation, feed manufacturing, integrated livestock operations, exporting, and importing grain and grain products. NGFA members include many small country elevators, as well as the largest firms in the industry, most with access to only a single rail carrier at each of their rail-served facilities.

2. The Board's decision of February 1, 2006 in this proceeding poses a single question: should a rule-making be instituted to reconsider the Board's permissive policies toward so-called paper barriers (i.e., restrictions imposed by Class I railroads on sales or leases of their lines to short line railroads, barring or penalizing the interchange of traffic by the short line acquirer with any Class I railroad other than the transferor). NGFA's answer is "yes."

3. NGFA is of the view that, although revenue streams flowing from paper barriers may in some circumstances be a legitimate commercial consideration in Class I line sales or rentals, the right to impose them free from Board scrutiny should be reconsidered in a rulemaking, as should the ability of carriers to retain paper barriers in perpetuity.

4. The principal argument of the railroad industry in favor of paper barriers, as expressed in the Comments and Reply Comments of the Association of American Railroads ("AAR"), is that they actually foster competition by retaining for continued rail service light-density lines that otherwise would be abandoned with a resulting loss of

traffic to motor carriers. To the contrary, NGFA believes that, where the "salvation" of a light-density line truly is at stake, the Board's abandonment process offers a far superior pro-competitive alternative than does an unscrutinized transaction resulting in paper barrier restrictions. Abandonments approved by the Board are subject to the provisions of 49 U.S.C. § 10904, requiring the abandoning carrier to entertain offers of financial assistance for continued operation of the line, including purchase proposals at net liquidation value. Rail lines that change hands pursuant to these provisions are not encumbered by paper barriers, and traffic originating and terminating on those lines can enjoy any available interchange. If a light-density line of a Class I railroad truly is an abandonment candidate, and service to and from that light-density line is worth preserving, continued rail service can be provided on the light-density line without anticompetitive restrictions under the abandonment process.

5. Permitting shippers to pursue alternative routings is far more important today than it was in years past, primarily due to the occurrence and reoccurrence of congestion on various segments of the rail network. Paper barriers deprive shippers not only of competitive routing options, but also of access to improved service. Those alternatives are more necessary than ever because many carriers currently are "demarketing" traffic they regard as below optimal desirability.

6. The Board's decision of June 2, 2006 in this proceeding discloses the Board's interest in reviewing certain discreet aspects of paper barrier policy, and NGFA would like to address certain of those issues.

7. **The Board's Statutory Authority to Address Pre-Existing Paper Barriers.** Contrary to AAR's claim (AAR Reply Comments at 26) that any current Board

rule curtailing a pre-existing paper barrier would be "invalid" retroactive rulemaking, it is permissible for prospective rulemaking to have a reasonable retroactive impact. "That rules of general application, though prospective in form, may ascribe consequences to events which occurred prior to their issuance does not, on that basis alone, invalidate them. [Citations omitted.] Where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable." *General Telephone Company v. United States*, 449 F.2d 846 (5th Cir. 1971). As the Supreme Court held in *SEC v. Chenery Corporation*, 332 U.S. 194, 203 (1947): "That ... action might have a retroactive effect was not necessarily fatal to its validity.... The fact that the Commission's order might retroactively prevent [a company] from securing the profits and controls which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint."

8. AAR relies (*ibid*) on *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) for the proposition that a rulemaking with any retroactive implications is invalid. AAR, however, misapplies *Bowen* to the suggestions of some parties that paper barriers previously imposed in approved transactions can at a later date be modified or dissolved prospectively. An agency rule may be invalid retroactively if it imposes or alters prior legal consequences, but not merely if it has ongoing impacts. This distinction was highlighted by Justice Scalia in his concurring opinion in *Bowen*:

The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable, whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the *past* legal consequences of past actions. Rather, it is what has been characterized as 'secondary' ret-

roactivity [citation omitted]. A rule with exclusively future effect ... can unquestionably *affect* past transactions ... but it does not for that reason cease to be a rule....

Bowen, 488 U.S. at 219-220 (emphasis in text).

9. NGFA members and other shippers are not seeking to hold railroads monetarily liable under previously approved paper barrier conditions. NGFA advocates that the Board adopt rules requiring an evaluation of prior paper barrier conditions pursuant to established considerations such as those set forth in *Retail, Wholesale & Dept. Store Owner Union, AFL-CIO v. The Nat. Labor Relations Bd.*, 466 F.2d 380, 390 (D.C. Cir. 1972). In any such evaluation, the Board can take into consideration a number of relevant factors, including the railroad industry's "reliance" claims, even though such claims would alone not be controlling even if supported factually. See *United States v. E.I. du Pont Nemours*, 353 U.S. 586 (1956) (holding that vertical acquisitions can violate Section 7 of the Clayton Act, despite nearly 40 years of acquiescence in such acquisitions by the Federal Trade Commission).

10. **Identifying and Describing Existing Paper Barriers and Quantifying Problems Experienced by Shippers as a Result of Paper Barriers.** This information cannot be supplied by NGFA. As noted by AAR in its Comments (p. 13), most paper barrier transactions are subject to confidentiality agreements because the participating railroads prefer not to disclose the terms, or even the existence, of those agreements to the public. Thus, only railroad parties to paper barrier agreements can describe those agreements with specificity. In instances where short lines have replaced Class I railroads as operators of a branch line, a shipper seeking service to or from the line over a specific route may be told that the route is unavailable due to a paper barrier restriction,

but the shipper has no means to ascertain that fact for itself. Nor can the shipper ascertain the precise terms of any paper barrier agreement, such as whether occupancy is forfeit by the short line if traffic is routed improperly or is subject to penalty payments if routed improperly.

11. **Short and Long Term Economic Impacts of Paper Barriers.** NGFA does not believe that the economic impacts of paper barriers can fully be assessed in a vacuum. The railroad industry asserts that paper barriers are justified economically because they allow light-density lines to be sold for lower prices or with lower upfront costs than the owning carrier would seek in an unrestricted sale or lease. Whether or not that claim is valid depends on the specific economics of each transaction. Presumably, in setting a price for a branch line, the owning Class I railroad assesses the value of traffic that it expects to retain for some discernable period of time. As AAR states, some short lines have been willing to pay the "additional compensation ... reflecting the economic and marketing assumptions upon which the paper barrier provision" is based. AAR Comments at 7. It should be possible in each instance of a line sale to identify the assumptions used by the Class I railroad in setting a "lower" price based on traffic retention conditions and to calculate the period of time during which those conditions must remain in effect in order to recoup the true value of any traffic that otherwise might be lost to the seller. From the shipper's point of view, the value of competitive rail service may be somewhat speculative, but shippers in the past have asserted that competitive rail service has provided rate reductions approaching 30 percent.

12. **Railroad Industry Agreement.** The Board seeks information regarding the effectiveness of the Railroad Industry Agreement ("RIA") pursuant to which Class I rail-

roads and short lines have agreed to relax paper barriers for new traffic, to consider revisions of paper barriers where mutually acceptable to buyer and to seller, and to utilize arbitration to resolve disputes. Plainly, these are matters to which shippers are not privy. NGFA does not believe that the RIA is a substitute for the exercise of oversight by the Board.

Thank you for your consideration.

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