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December 28, 2007

VIA UPS SECOND DAY AIR

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

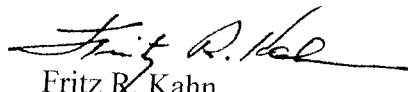
Dear Secretary Williams:

Enclosed for filing in STB Ex Parte No. 575 (Sub-No. 1), Disclosure of Rail Interchange Commitments, are the original and ten copies of the Comments of Transportation Arbitration and Mediation, P.L.L.C.

A diskette with the text of the Comments also is enclosed.

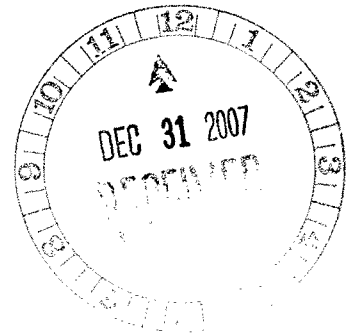
Additional copies of this letter and of the Comments are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the enclosed self addressed and stamped envelope.

Sincerely yours,


Fritz R. Kahn

enc.

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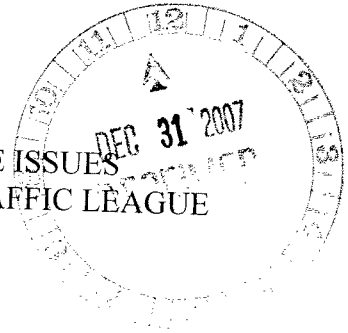


SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

ORIGINAL

STB Ex Parte No. 575

REVIEW OF RAIL ACCESS AND COMPETITIVE ISSUES
--RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE



STB Ex Parte No. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

COMMENTS
OF
TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.

ENTERED
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Public Record

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Attorney for

TRANSPORTATION ARBITRATION
AND MEDIATION, P.L.L.C.

Due and dated: January 2, 2008

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Ex Parte No. 575

REVIEW OF RAIL ACCESS AND COMPETITIVE ISSUES
--RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE

STB Ex Parte No. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

COMMENTS
OF
TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.

Pursuant to the Decision of the Board, served October 30, 2007, 72 Fed. Reg. 62200, November 2, 2007, Transportation Arbitration and Mediation, P.L.L.C. of Washington, D.C. ("TAM"), offers the following comments:

By its actions herein, the Board proposes to adopt regulations which are beyond its powers to promulgate. Clearly, the Board can exercise only such authority as has been delegated to it by the Congress. See, Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116, 134-35 (1990); Texas & Pacific Ry. Co. v. U.S., 290 U.S. 627, 640 (1933); United States v. Mo. Pac. R. Co., 278 U.S. 269, 277-78 (1929). Forgiving rail carriers their violations of the antitrust laws in the sales or leases of their railroad lines is not within the jurisdiction with which the Board has been vested by the Congress.

The statutory provisions relating to railroad acquisitions or mergers are otherwise.

49 U.S.C. 11321(a), in part, provides:

The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approval or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let the rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

Pursuant to the predecessor provision, the Interstate Commerce Commission approved Pennsylvania R. Co.--Merger--New York Central R. Co., 327 I.C.C. 475 (1966), aff'd sub nom, Penn Central Merger Cases, 389 U.S. 486 (1968), and Northern Pac.--Merger--Great Northern, 331 I.C.C. 896 (1968), aff'd sub nom, Northern Lines Merger Cases, 396 U.S. 491 (1970), over the strong objections of the Antitrust Division of the U. S. Department of Justice, which deemed the proposed transactions to be contrary to the antitrust laws.

No comparable statutory grant of authority allows the Board to approve the acquisition and operation of a rail line if the proposed transaction violates the antitrust laws. 49 U.S.C. 10901 and 10902 are totally devoid of any language suggesting that the proposals can go forward if the agreements between the conveying and procuring railroads were to contain terms offensive to the antitrust laws. Yet that has become commonplace in the railroad industry, and the proposed regulations which the Board has published for comments offer no promise that the practice will be prohibited.

Whether it be prettified with the euphemism, "interchange commitment," as the Board sought to do by its Decision, served October 30, 2007, or is referred to by its widely used industry term, "paper barrier," a provision in an agreement providing for the

sale or lease by a railroad of one of its lines conditioned so as to foreclose the purchasing or leasing railroad's interchange of traffic with a competing railroad is a tying arrangement, in violation of Section 1 of the Sherman Act.¹

The bellwether decision defining a tying arrangement is Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6 (1958), in which the Supreme Court explained:

[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from another any other supplier [footnote omitted].

In that case, the Court considered the legality of the Northern Pacific Railroad Company's sale or lease of parcels of its land-grant holdings subject to preferential routing clauses which compelled the purchasers or lessees to ship over its lines all goods produced on the sold or leased premises, provided the Northern Pacific's rates were no higher and its service no worse than those of competing carriers, namely, the Great Northern Railway or the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Court, id., noted:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. * * * Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts and tying arrangements [citations omitted].

The Supreme Court, id., continued:

"[T]ying agreements serve hardly any purpose beyond the suppression of competition." Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirement has a better

¹ Fritz R. Kahn, "Tied Railroad Routings," vol. 64, Journal of Transportation Law, Logistics and Policy, no. 2, Winter 1997.

product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected [footnote and citations omitted].

The Supreme Court, 356 U.S. at 8, concluded::

So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition. While this may have been exceedingly beneficial to its business, it is the very type of thing the Sherman Act condemns.

In reaching its conclusion, the Supreme Court cited its earlier decision in International Salt Co. v. U.S., 332 U.S.392 (1947), in which the salt company leased its patented machines to canners and manufacturers on condition that the salt or salt tablets used in the machines be purchased from the salt company. In upholding the lower court's summary judgment, the Supreme Court, 332 U.S. at 396, declared, "Not only is price-fixing unreasonable *"per se"* but also it is unreasonable *"per se"* to foreclose competitors from any substantial market [citations omitted]."

As the Supreme Court noted in its decision in Illinois Tool Works v. Independent Ink, 126 S. Ct. 1281, 1286 (2006), "[T]his Court's strong disapproval of tying arrangements has substantially diminished." Indeed, the Supreme Court, 126 S. Ct. at 1287, went so far as to say that "tying arrangements may well be procompetitive." The Supreme Court used the case to reexamine the presumption of *per se* illegality of a tying arrangement involving a patented product, and it held that the mere existence of a patent does not in an of itself establish the requisite market power rendering a tying arrangement a *per se* violation of section 1 of the Sherman Act. The Supreme Court, 126 S. Ct. at

1293, concluded "that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."

In Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007), the Supreme Court said, "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1 [of the Sherman Act]." Nevertheless, the Supreme Court continued, 127 S. Ct. at 2713:

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*."

* * *

To justify a *per se* prohibition a restraint must have "manifest anticompetitive" effects and "lack . . . any redeeming virtue" [citations omitted].

The tying arrangements in railroad sales or lease agreements meet the Supreme Court's test for a *per se* violation of Section 1 of the Sherman Act. Such tying arrangements have only one purpose, and that is to permit the selling or leasing Class I rail carrier to prohibit the acquiring short line railroad to route traffic to a competing Class I rail carrier. The arrangements are devoid of any redeeming virtue, except, of course, to allow the selling or leasing Class I railroad to exploit its dominant position and retain the freight revenues on the interlined shipments.

That a Class I rail carrier selling or leasing a marginally profitable railroad line to a short line railroad has sufficient market power in the tying product, the sale or lease of the line, to enable it to restrain trade in the market for the tied product, the routing of shipments by the short line railroad to a connecting carrier, would seem to be self evident. No other railroad can sell or lease the line in question. It is the selling or leasing Class I railroad's line alone to sell or lease. That railroad has a monopoly hold on that particular piece of property. The selling or leasing railroad, accordingly, can insert in the

sale or lease agreement whatever restrictions it chooses to impose on the acquiring short line railroad in its routing of interlined shipments.

The party proposing to purchase or lease the Class I railroad's line has no choice. It either buys or rents the property upon the terms set by the selling or leasing Class I railroad or it foregoes acquiring the property. Almost invariably the sale or lease agreements include tying arrangements, prohibiting the acquiring short line railroad from interchanging traffic with any Class I rail carrier with which it connects other than the one from which obtained the property.

The Board, in its Decision of October 30, 2007, at page 4, acknowledged:

Many of the line spin-off transactions that created or built up these new short line railroads contained contractual provisions that limited the incentive or ability of the short line railroad to interchange traffic with other connecting carriers that could compete with the seller or lessor carrier for the long-haul portion of the movement. These interchange commitments took varying forms, including credits for cars interchanged with the seller or lessor carrier, a penalty for traffic interchanged with another railroad, or a total ban on interchange with any carrier other than the seller or lessor carrier.

The manner of barring the short line railroad from interchanging traffic with a connecting Class I railroad other than the selling or leasing Class I railroad is immaterial. Adding additional amounts to the agreed upon purchase price or lease payments for each car interchanged with another railroad or reducing the purchase price or lease payments in consideration for the short line railroad's agreeing not to interchange its traffic with another railroad are as illegal as an outright prohibition on interchanging with a connecting carrier would be. See, United Shoe Mach. Co. v. United States, 258 U.S. 451, 457 (1922). The transparent purpose of the Class I railroads' tying arrangements is to curtail competition, to retain for themselves traffic which the short line railroads might be able to interchange with another Class I railroad at more favorable divisions or other

terms or which the short line railroads' shippers may believe can be handled more profitably or efficiently by another Class I railroad with which the short line railroads connect.

The Board in its Decision of October 30, 2007, at page 9, notes that, prior to its sale or lease of the marginal rail line, the Class I railroad could hold on to the traffic for the long haul and was not required to enter into a through route with a competing Class I rail carrier. Thus, the Board rationalizes that disallowing the tying arrangement in the sale or lease agreement with the short line railroad would not "restore a competitive option lost to a sale or lease with an interchange commitment, but rather create a new competitive option that did not exist prior to the sale or lease."

The flaw in the Board's argument is that the purchasing or leasing short line railroad is not the same as the Class I railroad which sold or leased the marginally profitable line to the short line railroad. The selling or leasing Class I railroad relinquished its right to retain the traffic for the long haul when it sold or leased a segment of its line to the short line railroad. In other words, the Class I railroad may not exercise the power it has in selling or leasing a marginally profitable line, the tying product, to restrict the routing options of the short line railroad, the tied product. The tying arrangements are in the sale or lease agreements for the sole purpose of eliminating another Class I railroad from competing with the selling or leasing Class I railroad for the traffic moving beyond the short line railroad. The tying arrangements serve the classic purpose of eliminating competition.

The Board, at page 10 of its Decision, further argues that, in lieu of asking for a higher sales price or rental fee of a potential purchasing or leasing short line railroad, the

Class I railroad's insertion of the tying arrangement in the sale or lease agreement merely safeguards that it will retain "the net present value of the stream of revenue contribution from the traffic it would be foregoing" if it were to sell or lease the marginally profitable railroad line free of the prohibition disallowing the purchaser or lessee short line railroad to interchange traffic with another Class I rail carrier. In short, the selling or leasing Class I railroad is unwilling or unable to compete with another Class I railroad for the traffic interchanged by the short line railroad whether by offering better service, lower rates or a combination of both. Again, the tying arrangements fulfill the classic purpose of eliminating competition.

The Board, at page 7 of its Decision, contends that the tying arrangements "have facilitated the creation and growth of short line railroads, which in turn has benefited the public by lowering transportation costs, improving service, and in some cases preserving rail transportation to localities and communities that might otherwise have seen service over their lighter-density line deteriorate or be lost altogether." The Board conveniently overlooks the fact that the real beneficiaries of the sales and leases of their marginally profitable lines have been the Class I railroads themselves. The very reason that the Class I railroads have sold or leased those properties is that, in their view, they have failed to contribute adequate revenues to warrant their retention, and yet the rail lines have continued to handle sufficient traffic that their abandonment would have been opposed by the shippers and likely denied by the Board. The tying arrangements and the additional revenues they yield the selling or leasing Class I railroads are not unlike windfall profits they derive from the sales or leases of the marginally profitable lines. The volumes of traffic which the selling or leasing Class I railroads thereby transfer to

the short line railroads subject to the restrictions that there be no interchange with another Class I rail carrier are by no means insignificant or insubstantial.

Finally, the Board, at page 11 of its Decision, takes comfort in asserting that the "short line railroads, in negotiating arms-length and voluntary contracts, are [able] to protect their financial interests or properly assess the value of an asset that they are considering for purchase". Undoubtedly, the short line railroads would not enter into the purchase or lease agreements with the Class I railroads if they did not think that they could make a go of it. The Board, however, surely cannot doubt that the short line railroads and their shippers would much prefer if they were not constrained by the tying arrangements that Class I railroads invariably insert in the purchase and lease agreements.

The Board's proposed rules would require the disclosure of tying arrangements in future acquisition proceedings and, upon request, their production to affected shippers, subject to normal protective orders. The Board, at page 15 of its Decision, said that it will look at the tying arrangement in a sales or lease agreement between a Class I railroad and a short line railroad and determine whether it "would cause a violation of the Interstate Commerce Act or that it is, or would be, contrary to a particular statutory provision under which approval was or is being sought."

Tying arrangements, however, do not violate the Interstate Commerce Act or any of its provisions; they violate Section 1 of the Sherman Act. The Board undoubtedly will counter that 49 U.S.C. 10501 renders its regulation of rail transportation to be exclusive and preempts the remedies provided under Federal or State law. The Board, however, has recognized that 49 U.S.C. 10501 does not supersede other Federal laws, such as the Clean Air Act and the Clear Water Act, see, STB Finance Docket No. 34797, New

England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--in Wilmington and Woburn, MA, served July 10, 2007; STB Finance Docket No. 34914, Desertxpress Enterprises, L.L.C.--Petition for Declaratory Order, served June 27, 2007, the Federal Safety Act and the Hazardous Materials Transportation Act, see, STB Finance Docket No. 34914, Desertxpress Enterprises, L.L.C.--Petition for Declaratory Order, supra; STB Finance Docket No. 34662, CSX Transportation, Inc.--Petition for Declaratory Order, served March 14, 2005, or the Jones Act, see, STB Finance Docket No. 35039, Horizon Lines, LLC--Petition for Declaratory Order, served December 19, 2007. So, too, 49 U.S.C. 10501 does not preempt the provisions of the Sherman Act as it applies to railroads.

With limited exceptions not pertinent to this rulemaking proceeding, railroads are subject to the Sherman Act. In re Lower Lake Erie Iron Ore Antitrust Lit, 998 F.2d 1144 (3rd Cir. 1933); Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990); United States v. Bessemer and Lake Erie R. Co., 717 F.2d 953 (D.C. Cir. 1983); Atchison, Topeka and Santa Fe Railway Co. v. Aircoach Transport Ass'n, 253 F.2d 877 (D.C. Cir. 1958), cert. den., 361 U.S. 930 (1960).

The Board has neither the background and experience nor the authority to determine whether a tying arrangement in a railroad's sales or lease agreement violates section 1 of the Sherman Act. The Board itself only recently recognized its lack of power in this regard. In STB Ex Parte No. 656, Motor Carrier Bureaus -- Periodic Review Proceeding, served October 25, 2007, the Board noted:

[T]he Board has not been delegated the authority to directly enforce the Sherman Act. Rather, the authority to interpret the Sherman Act primarily resides in [the Antitrust Division of the United States Department of Justice] and the federal courts.

The Board cited McLean Trucking Co. v. U.S., 321 U.S. 67, 79 (1944), affirming an ICC approved merger of carriers, in which the Supreme Court held:

To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems.

Accord, United States v. Baltimore and O. R.R., 538 F. Supp. 200, 209 (D.C. D.C. 1982); Transkentucky Transp. v. L. & N. R. C., 581 F. Supp. 759, 767 (E. D. Ky. 1983).

The proposed regulations, purporting to pass on the validity of tying arrangements in rail line sale or lease agreements between Class I railroads and short line railroads, encroaches upon the authority of the Antitrust Division of the U.S. Department of Justice and the federal courts, which are vested with the authority to determine whether section 1 of the Sherman Act will have been violated by the provisions in question. The Board should recognize that it is proposing to act without the requisite expertise or statutory authority to pass on a line sale or lease agreement's validity under the antitrust laws.

WHEREFORE, the Board should vacate the proposed regulations and discontinue the proceeding.

Respectfully submitted,

TRANSPORTATION ARBITRATION AND
MEDIATION, P.L.L.C.

By its attorney,

A handwritten signature in black ink, appearing to read "Fritz R. Kahn", written over the printed name.

Fritz R. Kahn
Fritz R. Kahn, P.C.
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Due and dated January 2, 2008

CERTIFICATE OF SERVICE

I certify that I this day have mailed a copy of the foregoing Comments to the following:

Office of Information and Regulatory Affairs
Office of Management and Budget
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Washington, DC 20503
Attention: Desk Officer for STB

Director of Operations
Antitrust Division
U. S. Department of Justice
601 D Street, NW (Room 1013)
Washington, DC 20530

Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW (Room 303)
Washington, DC 20580

Dated at Washington, DC, this 2nd day of January 2008.


Fritz R. Kahn