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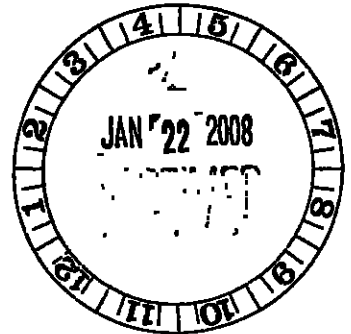
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22/328

January 22, 2008

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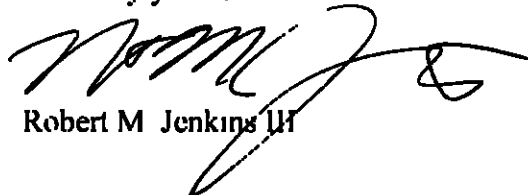
Re Ex Parte 575 (Sub-No. 1)—Comments of
the Association of American Railroads



Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the "Reply Comments of the Association of American Railroads." I also am enclosing a CD-ROM containing the document. Please date-stamp the enclosed extra copy and return it to our representative. Thank you.

Sincerely yours,



Robert M. Jenkins III

RMJ/bs

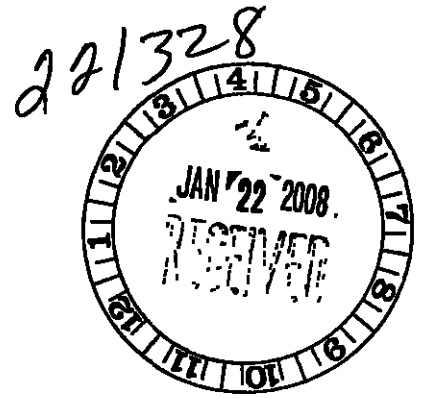
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



EX PARTE NO. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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EX PARTE NO. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") submits these reply comments pursuant to the Notice of Proposed Rulemaking published in the Federal Register, 72 Fed Reg 62200 (Nov. 2, 2007), and the Decision served October 30, 2007, in Ex Parte No 575, *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, and Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments* ("October 30 Decision"). Many of the other parties' comments are directed at issues that the STB already decided in Ex Parte No. 575, rather than the disclosure issues presented in Ex Parte No 575 (Sub-No. 1). Nevertheless, the AAR will briefly address some of those comments.

We first address comments relating to the degree of scrutiny that the Board should apply to interchange commitments and whether a party seeking disclosure of an interchange commitment should be required to make a showing of need. We then address the antitrust issues raised by two of the commenters.

I. COMMENTS RELATING TO REVIEW AND DISCLOSURE OF INTERCHANGE COMMITMENTS

A. Mandated Sunsetting, Presumptions Against Interchange Commitments, And Higher Scrutiny of Interchange Commitments

Ameren Energy Fuels and Service Company ("Ameren") states that it is "disappointed" "with the Board's reluctance to impose a sunset provision or rebuttable presumption for the

harmful interchange commitments that were first formally challenged over nine years ago.”

Ameren Comments at 4. Thus, “Ameren implores the Board to not back down on its commitment to review the potential harm of such agreements with a higher level of scrutiny and be willing to strike down either existing agreements when challenged by a shipper or prohibit proposed future agreements via the new rules in the NPR ” *Id.* at 4-5

The Board already has rejected proposals along similar lines. *See, e g* , October 30 Decision, slip op. at 7 (adopting case-by-case approach to evaluation of interchange commitments and stating that “[g]enerally, interchange commitments 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 light-density line deteriorate or be lost altogether”), *id.* at 8 (“[N]o single rule of general applicability seems appropriate [for the evaluation of interchange commitments], and we will not attempt to establish such a rule ”); *id.* at 14 (similar) Neither Ameren nor any other commenter has presented any new arguments or evidence supporting a mandatory sunset provision, a presumption against interchange commitments, or a higher level of scrutiny of such commitments ¹

¹ Ameren continues to complain about the 1999 line sale by Union Pacific Railroad Company (“UP”) to Missouri Central Railroad Company (“MCRR”), suggesting that the terms of the sale eliminated a competitive option for Ameren’s Labadie, Missouri, generating plant (Ameren Comments at 3-4). This is simply not true and is fully addressed in UP’s March 28, 2006 Reply Comments (Reply Statement of Warren C. Wilson at 7-10). Briefly, Ameren was entitled to competitive service to its Labadie plant as a 2-1 location in the UP-SP merger UP offered to give BNSF access to Labadie over the SP trackage that later was sold to MCRR, but both BNSF and Ameren declined this option Instead, Ameren’s competitive options were preserved initially by a proportional rate agreement and later by an agreement to give BNSF trackage rights over a different and superior UP routing As such, the MCRR sale had no effect on Ameren’s competitive options

The United States Department of Agriculture (“USDA”) nevertheless suggests that the Board reopen and examine *all* existing interchange commitments “for propriety and conformance with the law,” regardless of whether a challenge has been made to an individual interchange commitment. USDA Comments at 1-2. The USDA fails to provide any support for such a sweeping retroactive regulatory review—which rests on a presumption against interchange commitments that the Board has specifically rejected. Far from a negative presumption, a strong presumption in *favor* of the continuance of existing interchange commitments is compelled by policies supporting the protection of settled expectations and vested property rights. The interests of administrative finality and repose, the principle that retroactive agency action is highly disfavored, the requirement of just compensation for takings, and the practical problems posed by the unwinding of short line transactions or the elimination of interchange commitments in such transactions all militate heavily against reopening settled transactions. See October 30 Decision, slip op. at 12 (discussing practical problems involved in eliminating existing interchange commitments); STB Docket No. AB-33 (Sub-No. 132X), *Union Pac R R Co—Abandonment Exemption—In Rio Grande & Mineral Counties, CO* (served May 3, 2005), slip op. at 3 (noting “concerns for administrative finality, repose, and detrimental reliance strongly counsel against reopening”); STB Finance Docket No. 32162, *Indiana Hi-Rail Corp—Lease & Operation Exemption—Norfolk & W R Co Line Between Rochester & Argos, IN, and—Exemption from 49 U.S.C. 10761, 10762, and 11144* (served Jan. 30, 1998), slip op. at 4-5 (same); *Guilford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, 51 C.C.2d 202, 206 (1988) (noting “unfairness that would result from imposing a condition of which the consolidating carriers had no advance knowledge at the time of consummation”); Reply Comments of the Association of American Railroads in STB Ex Parte No. 575 (filed March 28,

2006) (hereinafter “AAR March 28, 2006 Reply Comments”) at 6-7, 26-27, 34-39 (discussing compensation and restructuring issues that would arise if existing interchange commitments were eliminated)

Marshall Durbin Companies (“MDC”) proposes that, in evaluating existing interchange commitments, the Board should consider whether they impede improvements of track conditions and service levels that were unsatisfactory at the time of the initial transaction. MDC Comments at 6. MDC states that this would facilitate the provision of “new alternatives and opportunities” for the short line and the shippers. *Id.* Aside from the retroactivity and unwinding problems this would create—which MDC nowhere addresses—MDC’s standard effectively calls for the Board to upset settled transactions in order to create competitive options. As the Board recognized in the October 30 Decision, however, the Board’s regulatory province has never been to revise or revoke short line transactions that are otherwise beneficial in order to create competition. *See* October 30 Decision at 9 & n.24. So long as a short line transaction does not diminish competition, there is no basis for the Board to interfere with the parties’ voluntary transaction agreement. *See* AAR March 28, 2006 Reply Comments at 4-6, 9-14.

Finally, Arkansas Electric Cooperative Corporation (“AECC”) invites the Board generally to consider that the improving financial state of the rail industry might warrant a less “protectionist” regulatory position than it has taken in the past. AECC Comments at 2. But there is not, and never has been, anything “protectionist” about the Board’s position regarding short line transaction agreements containing interchange commitments. As the Board noted in its October 30 Decision, interchange commitments have played an important role in the rebirth of the short line industry in the wake of the Staggers Act, which has contributed both to improving the financial health of all railroads and to the reduction of rail rates to shippers. October 30

Decision at 2-4. Far from protectionist, the Board's readiness to approve voluntary transactions that allowed short lines to flourish was part and parcel of its deregulatory mandate under the Staggers Act. *Id.* at 2. Both sound policy and sound law support the Board's long-standing position, which has demonstrably benefited railroads and shippers alike

B. Mandated Disclosure Of All Interchange Commitments That Directly Affect Shippers' Ability To Interchange With Other Railroads And The Elimination Of The Requirement Of A Showing Of Need For Disclosure

USDA urges that the terms of all interchange commitments "that directly affect shippers' ability to interchange with other railroads be publicly available." USDA Comments at 3. The basis for this proposal is not clear. USDA appears to believe that it may help correct shippers' erroneous impressions that interchange commitments are anti-competitive. If shippers knew about the terms of interchange commitments, USDA suggests, the "majority may have agreed with the terms of reasonably constructed interchange commitments rather than lose rail service entirely." *Id.*; *see also id.* at 4 ("USDA has heard from agricultural shippers that they are concerned that sale and lease contracts of rail lines containing existing interchange commitments may contain unreasonable restraints of trade. *USDA believes that this perception is born from a lack of shipper knowledge of the terms of the barriers and a lack of cost-effective shipper recourse* ") (emphasis added).

This is an insufficient basis for the compelled disclosure of competitively-sensitive essential terms of transactions. The vast majority of short line transactions containing interchange commitments have never been the subject of competitive concern, and assuaging unjustified and unsupported concerns is hardly a valid reason for the Board to require railroads to reveal their confidential business arrangements

Ameren and MDC call for the establishment of a presumption in favor of the disclosure of interchange commitments and the elimination of any requirement that a shipper establish a

need for such disclosure. *See* Amercen Comments at 6 n 6, MDC Comments at 5. There is no basis for mandating the disclosure of competitively-sensitive essential terms of proposed transactions in the absence of a showing of need. These proposals to eliminate the showing of need are predicated upon the assumption that interchange commitments are disfavored and that there should be a presumption against them. As noted above, however, the commenters have provided no grounds for questioning the Board's considered rejection of such a position. Thus, there is no basis for a departure from the requirement that a party seeking disclosure of confidential terms of a transaction must show a need for access to those terms. Any other position would invite fishing expeditions.² Moreover, with regard to existing interchange commitments in consummated transactions, fairness and policies favoring efficient and economic administration dictate that a party seeking to upset a settled transaction should be required to include in its demonstration of need "a colorable claim to the relief the party seeks." *See* AAR Comments in Ex Parte No. 575 (Sub-No. 1), at 3-4 (filed Jan. 2, 2008).

² Amercen seeks to justify its request for the elimination of the requirement for a showing of need for the disclosure of interchange commitments by arguing that "[t]he documents will be subject to a protective order and confidentiality undertaking(s) which will presumably be similar to those used in other proceedings so the protective order will sufficiently protect the parties without placing an additional burden upon the shipper or interested party." Amercen Comments at 6 n 6. But the existence of a protective order and confidentiality undertakings does not cure the problem of unjustified fishing expeditions and crippling delay resulting from extended regulatory proceedings. *See* Comment of the American Short Line and Regional Railroad Association at 8-9 (filed December 31, 2007).

II. COMMENTS RELATING TO ANTITRUST PRINCIPLES

A. Allegation That Interchange Commitments Are *Per Se* Illegal Tying Arrangements

Transportation Arbitration and Mediation, P.L.L.C. ("TAM") argues that interchange commitments involve "tying" of products and that they are *per se* illegal under Section 1 of the Sherman Act.³ This contention is baseless.

First, there is no "tying" of one product to another in interchange commitments. AAR addressed this issue in its March 28, 2006 Reply Comments in Ex Parte No. 575, stating,

When a Class I railroad leases or sells track to a shortline with a paper barrier, it typically does so at a lower price because it is assured that it will continue to participate in the long-haul traffic on the line. Usually, it is clear that the shortline is not paying the going concern value of the line as part of the Class I railroad's long-haul system. Rather, the shortline buys the right to provide local service over the line and to work with the Class I railroad to develop and provide long-haul traffic. The Class I railroad does not "tie" one product to another

This is no more a "restraint of trade" than a railroad electing to sell "bridge-only" or "overhead" trackage rights to another railroad at a lower price than it would sell local trackage rights that permitted the tenant to serve shippers on the line. Nothing requires the landlord to sell "all-inclusive" trackage rights, and nothing requires the tenant either to buy "all-inclusive" trackage rights or none at all. There is no "restraint." There is only a sale of limited rights between a willing buyer and a willing seller.

AAR March 28, 2006 Reply Comments at 15. Thus, short line transactions do not involve the sale of two distinct products, but rather sales of limited rights in a line commensurate with the lower price of the line. Because there are neither two distinct products nor a requirement that

³ TAM also argues that the Board lacks authority to approve interchange commitments that constitute *per se* violations of the antitrust laws. TAM Comments at 10-11. TAM's assertions in this regard are moot, because its assertions about *per se* violations of the antitrust laws are flatly wrong.

one product be purchased in order to acquire another, an analysis of interchange commitments as “tying” arrangements is inapposite. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 462 (to “defeat a motion for summary judgment on their claim of a tying arrangements, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that [the defendant] has tied the sale of the two products”) (emphasis added). TAM utterly ignores AAR’s argument on this fundamental point.

Second, TAM fundamentally misstates antitrust law in arguing that a *per se* rule applies to interchange commitments. Even assuming they were tying arrangements, that would not make them *per se* illegal. *See, e.g., Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1287 (2006) (discussing, with approval, case law rejecting application of *per se* treatment to tying arrangements, and concluding that “tying arrangements may well be procompetitive”). Most recently, the Supreme Court has reaffirmed that the “rule of reason” is the “accepted standard for testing whether a practice restrains trade in violation of [Section 1 of the Sherman Act].” *Leegin Creative Leather Prod. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007). Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Id.* (internal quotations marks omitted). “To justify a *per se* prohibition”—that is, a prohibition that treats “categories of restraints as necessarily illegal”—“a restraint must have ‘manifestly anticompetitive’ effects, and ‘lack . . . any redeeming virtue.’” *Id.* at 2713 (citations omitted, quoting *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977)).

The Board in the October 30 Decision specifically found that interchange commitments involved in short line transactions are not generally anticompetitive at all, much less “‘manifestly anticompetitive’” (*Leegin Creative Leather Prod.*, 127 S. Ct. at 2713). *See* October 30 Decision

at 8-9. Furthermore, their business virtues are plainly illustrated by the post-Staggers rebirth of the short line railroad industry that they helped promote. *Id.* at 2-5. The Board specifically considered antitrust learning on vertical restraints and the rule of reason in its Decision (slip op. at 10 and n. 25), and the Board concluded that none of the broad-brush attacks on interchange commitments provided a basis for a presumption against such restrictions in the rail industry. *Id.* at 10-14. TAM's repeated *ipse dixit* claims that interchange commitments serve the purpose of "eliminating competition" do nothing to refute the Board's careful analysis. TAM Comments at 7-8.⁴

B. Analysis Of Interchange Commitments As Vertical, Rather Than Horizontal, Arrangements

USDA states that it is "concerned" that the Board has described interchange commitments as "vertical" arrangements. USDA Comments at 3. According to USDA, they are "horizontal" agreements because they are "between two competitors" who are "not in different stages of production, but produce the same service, even if the service is provided over different line segments." *Id.* at 4.

This argument misconstrues the nature of the transactions that contain interchange commitments. As the Board explained in its October 30, 2007 Decision, interchange commitments are agreements between two companies that "do not compete with each other, but rather provide services at different points in a distribution chain" (October 30 Decision, slip op. at 10). As such, they are classic "vertical" agreements between end-to-end connecting carriers.

⁴ There is also no merit to TAM's suggestion that interchange commitments are somehow exploitive of short line railroads. TAM Comments at 9. The American Short Line and Regional Railroad Association's ("ASLRRA") defense of the use of interchange commitments in this and other proceedings is evidence enough that the Board's conclusion that short line railroads have benefited from such commitments was and is correct. See ASLRRA Comments in Ex Parte No 575 (dated March 7, 2006), at 3-4.

The fact that the short line and Class I railroads provide the same general type of service—freight transportation by rail—does not make an agreement between them a “horizontal” agreement, because, as the Board noted, they supply the service “at different points in a distribution chain.” *Id.* Moreover, the services that they provide are, in fact, not identical and, therefore, the Class I is not competing with the short line. The short line picks up from and delivers to shippers on the line (and provides local service on the line). The long-haul carrier and the short line work together to provide the line-haul business as a single, integrated service. They are not, and do not intend to be, in competition with each other. *See* AAR’s March 28, 2006 Reply Comments at 3, 18-19 (discussing cooperative joint venture agreements).

Thus, the Board has correctly analyzed the nature of interchange commitments, and there is no basis for concluding that they represent “horizontal” arrangements that unreasonably restrain competition.

CONCLUSION

For the foregoing reasons, the commenters have failed to provide any grounds for a blanket rule subjecting interchange commitments to sunset provisions, adverse presumptions, or heightened scrutiny. By the same token, there is no basis for the Board to apply a special standard to its review of interchange commitments based on track or service conditions, for the Board to examine all interchange commitments without requiring shippers to bring complaints, or for the Board to mandate the disclosure of all interchange commitments or, indeed, the disclosure of particular commitments in the absence of a showing of need. Finally, there is no basis for the argument that interchange commitments are *per se* violations of the Sherman Act or for the argument that they constitute “horizontal” agreements between competitors.

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