

LAW OFFICES OF
LOUIS E. GITOMER

LOUIS E. GITOMER
LOU_GITOMER@VERIZON.NET

August 11, 2008

223213
223214
THE ADAMS BUILDING SUITE 301
600 BALTIMORE AVENUE
TOWSON MARYLAND 21204-4022
(202) 466-6532
FAX (410) 312 0885

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

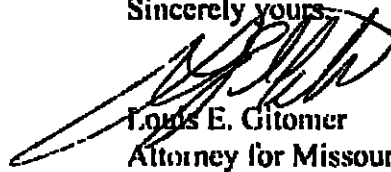
RE: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*
Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad Company, Inc. -Leave, Acquisition and Operation Exemption-Missouri Pacific Railroad Company and Burlington Northern Railroad Company*

Dear Acting Secretary Quinlan:

Enclosed for e-filing is the Response of the Missouri & Northern Arkansas Railroad Company, Inc. to the Opening Evidence and Argument of Entergy Arkansas, Inc. and Entergy Services, Inc.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for Missouri & Northern Arkansas
Railroad Company, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No 42104

ENTERGY ARKANSAS, INC AND ENTERGY SERVICES, INC
v
UNION PACIFIC RAILROAD COMPANY AND MISSOURI & NORTHERN ARKANSAS
RAILROAD COMPANY, INC

Finance Docket No 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC
-LEASE, ACQUISITION AND OPERATION EXEMPTION-
MISSOURI PACIFIC RAILROAD COMPANY AND
BURLINGTON NORTHERN RAILROAD COMPANY

RESPONSE OF MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC
TO OPENING EVIDENCE AND ARGUMENT OF ENTERGY ARKANSAS, INC AND
ENTERGY SERVICES, INC

Scott G Williams Esq
Senior Vice President & General Counsel
RailAmerica, Inc
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

Louis E Gitomer, Esq
Law Offices of Louis E Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for MISSOURI & NORTHERN
ARKANSAS RAILROAD COMPANY, INC

Dated August 11, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC
v
UNION PACIFIC RAILROAD COMPANY AND MISSOURI & NORTHERN ARKANSAS
RAILROAD COMPANY, INC

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC
-LEASE, ACQUISITION AND OPERATION EXEMPTION-
MISSOURI PACIFIC RAILROAD COMPANY AND
BURLINGTON NORTHERN RAILROAD COMPANY

RESPONSE OF MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC
TO OPENING EVIDENCE AND ARGUMENT OF ENTERGY ARKANSAS, INC. AND
ENTERGY SERVICES, INC

The Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA") is a Class III railroad that leases certain lines, described below, from the Union Pacific Railroad Company ("UP") pursuant to a Lease.¹ M&NA has abided by the provisions of the Lease since that time, and intends to abide by the provisions of the Lease as long as it remains in effect.

Entergy Arkansas, Inc. ("EAI") and Entergy Services, Inc. ("ESI"), jointly referred to as Entergy, seek to have the Surface Transportation Board (the "Board") either amend the Lease to

¹ M&NA entered a Lease Agreement dated as of December 11, 1992 (the "Original Lease") with the Missouri Pacific Railroad Company, predecessor in interest to the UP. Over the years, the Original Lease has been supplemented and modified. The Original Lease and all modifications and supplements will be referred to as the "Lease." A copy of the Lease is attached to the Opening as Counsel's Exhibits 1. M&NA will refer to Entergy's Counsel's Exhibits as "CE."

terminate the rental provisions in section 4, or to terminate the Lease and give Entergy veto power over a new lease.

The Lease has governed the relation between UP and M&NA with respect to much of M&NA's operation. A change in one provision of the Lease will affect other provisions. As related to this proceeding, if M&NA were required to pay UP a market based rental under the Lease, then the revenue divisions that M&NA receives under Exhibit E to the Lease, as amended, would be required to substantially increase, perhaps resulting in an increase in the rates that shippers served by M&NA are required to pay. Instead of viewing the provisions of the Lease as interrelated, Entergy views the Lease as readily severable clauses, where one does not affect the other. Entergy selectively seeks termination or amendment of two sections the Lease (Section 4, Rents, and Section 15, Termination) that it believes create an unreasonable practice, without any regard for the effect on M&NA and the 126 employees of M&NA.² Mohl at 1

Nowhere in its pleading does Entergy evince any respect for M&NA's rights and obligations under the Lease, or for the sanctity of the Lease under which M&NA has been operating for over 15 years.³

M&NA is ready willing and able to provide to all of its shippers reasonable service upon reasonable demand, which includes payment of a reasonable rate to make M&NA whole and earn a return on its assets. M&NA is also willing to abide by the terms of the Lease, or to amend the Lease to pay UP a market based rent upon receipt of market based revenue.

² Opening, Verified Statement of Mr. Mohl at 1. M&NA will refer to the verified statements submitted by Entergy as VS followed by the name of the witness.

³ See the Verified Complaint or in the Alternative Petition to Revoke in Part filed on February 12, 2008 (the "Complaint") and the Opening Evidence and Argument filed on July 11, 2008 (the "Opening").

With the foregoing principles in mind, M&NA opposes any relief sought by Entergy that will result in the destruction of M&NA's franchise through the termination of the Lease without M&NA's consent.

BACKGROUND

M&NA and UP entered the Lease on December 11, 1992. Pursuant to the Lease, UP leases to M&NA the rail lines between (1) milepost 643.3, at Pleasant Hill, MO, and milepost 527.9, at Carthage, MO, (2) milepost 316.9, at Nevada, MO, and milepost 265.2, end of track at Clinton, MO, (3) milepost 317.2, at Carthage Sub Jct., MO, and milepost 337.4, at Ft. Scott, KS, (4) milepost 528.2, at Carthage, MO, and milepost 545.7, at Joplin, MO, (5) milepost 527.9, at Carthage, MO, and milepost 415.7, at Bergman, AR, (6) milepost 381.5, at Cotter and milepost 258.7, at Diaz Jct., AR, and (7) milepost 506.5, at Springfield, MO, and milepost 511.4, at Wallis, MO (the "Leased Lines")

M&NA purchased from UP the rail lines located between milepost 415.7, at Bergman, AR, and milepost 312.2, at Guion, AR (the "Purchased UP Line"). M&NA also obtained incidental trackage rights from UP (1) over UP's line between milepost 643.13, near Pleasant Hill, MO and milepost 276.80, at Neff Yard in Kansas City, MO, (2) over UP's line between milepost 259.05, near Diaz Jct., AR, and milepost 261.5, near Newport, AR; (3) over BNSF Railway Company's ("BNSF") line between milepost 512.02 and milepost 512.13 in Springfield, MO, and (4) over BNSF's line between chaining station 14187+07, near Aurora, MO, and

chaining station 10637+09+2354 feet, near Springfield, MO (the "Incidental Trackage Rights Lines")⁴

M&NA also acquired lines from BNSF's predecessor between (1) milepost 334.39, at Iron Gate Street in Joplin, MO, and milepost 330.2, end of track near Tamko, including the Tamko Lead, the West Joplin Industrial Trackage, all tracks formerly owned by BNSF in the KCS rail yard in Joplin and BNSF's Joplin Yard, and (3) milepost 309.9 and milepost 315.3 in Carthage, MO (the "Purchased BNSF Lines")⁵

The Leased Lines, Purchased UP Lines, Incidental Trackage Rights Lines, and Purchased BNSF Lines are collectively referred to as the "Line."

BNSF provides haulage service for the M&NA between Aurora and Springfield, MO. The Branson Scenic Railroad, Inc., and the White River Scenic Railroad operate passenger excursion trains over sections of the M&NA.

M&NA interchanges with UP at Kansas City, MO, and Newport, AR, BNSF at Lamar, Aurora, and Springfield, MO, and KCS at Joplin, MO. One of M&NA's largest and most valued customers is the Entergy plant at Independence, MO.

M&NA operates as a unified system. M&NA owns about 108 miles of railroad, leases about 380 miles of railroad from UP and operates over about 70 miles of trackage rights with separate segments owned by UP and BNSF. If M&NA's right to lease the 380 miles and operate

⁴ See, *Missouri & Northern Arkansas Railroad Company, Inc. - Lease, Acquisition and Operation Exemption - Missouri Pacific Railroad Company and Burlington Northern Railroad Company*, ICC Finance Docket No. 32187 (ICC served December 22, 1992).

⁵ See, *Missouri & Northern Arkansas Railroad Company, Inc. - Acquisition and Operation Exemption - The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33637 (STB served September 29, 1998). It must be noted that Entergy's map of M&NA does not reflect the ownership of the rail lines purchased from BNSF in the Joplin and Carthage, MO area.

over 30 miles of trackage rights from UP were terminated for any purpose, M&NA would cease being a viable railroad. The two segments owned by M&NA would become disconnected islands and M&NA would lose the majority of its traffic. Loss of the lease and trackage rights franchise from the UP would require M&NA to review all options as to the future of its remaining lines. M&NA has operated for over 15 years and believes that it provides a valuable service to its customers and its railroad landlords.

ARGUMENT

Entergy contends that since M&NA commenced service under the Lease, three times there has been a disruption of UP service to Entergy's Independence Plant that has resulted in an unquantified harm to Entergy and that Entergy might not have been harmed if M&NA had been able to interchange coal traffic with a railroad other than UP. Entergy contends that it was an unreasonable practice for M&NA to be prevented from interchanging traffic with a railroad other than UP because of the rental provisions in section 4 of the Lease. The potential need for future emergency alternate rail service is the basis for the relief sought by Entergy.

Entergy contends that the rental provisions of the Lease, under which UP forgives a percentage of the rent based on the percentage of traffic interchanged between UP and M&NA (the "Interchange Commitment"), are an unreasonable practice, are cause for the revocation of the exemption granted by the Interstate Commerce Commission (the "ICC"), and amount to a pooling arrangement that has not been approved by the ICC or the Board. Entergy contends that the law governing whether the Interchange Commitment is improper is whether UP has earned a revenue stream in excess of what it would have earned if the transaction had not taken place. All of Entergy's assumptions are wrong or have not been proven. Entergy does not support its

request that the Board to rewrite portions of the Lease or allow the Lease to be terminated and grant Entergy an unfettered veto power over a new lease

Entergy also ignores Section 22 of the Lease, which mandates the revenue divisions that M&NA receives from UP. M&NA does not have independent rate making authority under the Lease, except on local traffic, other traffic described in Section 4.02 of the Lease, and five percent of traffic that could be interchanged with UP. However, if M&NA were required to quote rates in connection with railroads other than UP, M&NA would have an obligation to set its rate at a maximum competitive level, and not at the levels mandated by the Lease⁶, in order to be able to pay the new rental for the Leased Lines and earn a reasonable return.

I. Entergy has not shown that transportation alternatives are unavailable.

M&NA takes no position on the severity or cause of the service disruptions that Entergy claims to have occurred. However, there is reason to question the severity of the disruptions based on Entergy's lack of action during the latest period. Entergy failed to follow through on its request for alternate rate quotes. In addition, the Board has indicated that there are other options available to Entergy.

Entergy claims that during 2005-2006 it sought to obtain alternate service to Independence (Opening, Argument of Counsel at 28, referred to hereafter as "CA"). In response to several verbal inquiries requesting rates, M&NA sent Entergy a letter on June 2, 2006, pursuant to 49 C.F.R. §1300.3, asking Entergy to provide additional information so that M&NA could establish a rate. (Opening, VS Gray, Exhibit DBG-6). Entergy did not provide M&NA with the requested information necessary for M&NA to prepare and quote a rate to Entergy.

⁶ The revenue generated under the Lease is one reason M&NA is losing money.

Entergy states that M&NA did not quote a rate to Entergy because UP did not respond to a request from M&NA for a waiver of the Interchange Commitment. However, the letter referred to by Entergy (CE 17) actually states that M&NA “cannot quote a rate to” Entergy “without first receiving the specific operational information that was requested.” M&NA also advised Entergy that it “will exercise its rate and route discretion and will quote a rate as part of a joint line rate ..” Regardless of whether UP granted the waiver, M&NA was prepared to quote rates to Entergy. Entergy did not comply with the Board’s rules as far as providing information about the transportation it was seeking, and therefore, M&NA could not quote a rate.

Entergy did not take all steps necessary to obtain alternative rail service during the 2005-2006 period. This is an instance where Entergy’s actions, and not those related to the Lease, prevented Entergy from obtaining a rate quote from M&NA.

There are less intrusive and permanent options than those sought by Entergy available to a shipper that believes it is being harmed by service disruptions on a railroad. The Board has stated that “Shippers who believe that a rail carrier is not providing adequate service due to the condition of its lines or certain other service problems have recourse before the Board, including, among other things, the emergency and alternative service rules, the feeder line provisions, and enforcement of the statutory common carrier obligation.”⁷ If any service disruptions arise on UP or M&NA in the future that affect Entergy’s Independence Plant, Entergy can avail itself of the options propounded by the Board, instead of the amendment of the Lease that it seeks without negotiations between the parties to the Lease.

⁷ *Review of Rail Access and Competition Issues—Renewed Petition of The Western Coal Traffic League*, STB Ex Parte No. 575 (STB served October 30, 2007) (the “*Ex Parte 575 Decision*”) at 11.

II. Entergy has not addressed the legal standards developed by the Board.

Entergy relies on one paragraph in the *Ex Parte 575 Decision*, at 10-11, for the proposition that if the revenue stream created under the Lease is in excess of what the lessor would have earned if the transaction had not taken place, then the Interchange Commitment is the cause of that excessive revenue stream, and the continuation of the Interchange Commitment is an unreasonable practice

The language cited by Entergy is not a general overriding legal standard, but instead the Board's response to an argument that any interchange commitment with a duration of five years or longer is likely to overcompensate the seller or lessor

Entergy also contends that the UP lease to M&NA should be subject to a "higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity" *Id* at 15 Entergy contends that there is a total ban on interchange and that the Lease continues in perpetuity

First, there is not a total ban on interchange The rent that M&NA pays to UP does not increase until more than five percent of the traffic is interchanged Even in that instance, there is not a ban on interchange, only an increase in rent In addition, M&NA and UP can enter an amendment to any provision in the Lease, including the Section 4, Rent Indeed, the requirements of this provision have been modified in the past in specific circumstances Therefore, contrary to Entergy's argument, the Lease does not create a total ban on interchange

Entergy argues that the Interchange Commitment continues in perpetuity because it extends "for the full term of the lease, which may be 80 years" (CA at 18) Black's Law Dictionary defines perpetuity as "the state of continuing forever" Neither the Lease nor the

Interchange Commitment continues forever. The Lease can be terminated by UP or M&NA if the rental provision is changed. Lease section 15.01(f), CE 1 at 36. Pursuant to Section 23.08 of the Lease, the Interchange Commitment has been waived in the past (See Exhibit 1 for one example of a waiver of the Interchange Commitment), and M&NA is confident that the Interchange Commitment can and will be waived in the future.

Entergy also argues that because the Interchange Commitment runs for the length of the Lease that the Interchange Commitment continues in “perpetuity.” As has been shown, the Interchange Commitment has been waived in the past and M&NA expects it to be waived in the future. Therefore the Interchange Commitment has not continued without change for the duration of the Lease. Entergy’s argument is not consistent with the facts of the ongoing relation between M&NA and UP. In addition, following Entergy’s logic would lead to the conclusion that every Interchange Commitment in every Lease is in perpetuity unless it terminates prior to the end of the lease. M&NA urges the Board not to adopt such an unreasonable definition of perpetuity. Indeed, Entergy’s interpretation would require a higher level of scrutiny for every lease, even one of one year in duration, which the Board clearly did not intend through the use of the term “perpetuity.”

Prior to the Lease, UP provided single-line service to Entergy’s Independence plant over a variety of routes. Entergy fails to address the actual service that it received prior to the Lease and why it should expect different competitive options under the Lease. However, the Board was prescient in its analysis in *Ex Parte 575 Decision*, at 8-10. Essentially, the Board concluded that if a shipper was receiving service from a single railroad and did not have competitive options prior to the transaction, the shipper should not expect the Board to improve the shipper’s

competitive options after the transaction. Entergy is seeking exactly such relief, but has not explained why it is entitled to unique treatment. Entergy's complaints concern service over UP, not over M&NA. If UP had not leased the Line, the same service issues would have arisen. However, Entergy would not have had the Lease as a tool to try to use to leverage additional competitive options. Entergy has not shown that UP is rendering inadequate service, merely that it was one of many shippers affected during three service disruptions. Entergy does not address the criteria established in the *Ex Parte No. 575 Decision* concerning the establishment of a new competitive option, and should not be entitled to relief because it did not address or meet the criteria adopted by the Board.

III. The Board should not revoke the exemption in part.

The Board has stated that

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. We may exercise that revocation authority to protect the integrity of our processes. *Minnesota Comm. Ry., Inc.—Trackage Exempt—BN RR Co.*, 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary. *I&M Rail Link LLC—Acquisitions and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 33326 *et al.* (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998).⁸

Entergy does not raise an issue concerning the integrity of the Board's process.

Therefore, Entergy is not entitled to partial revocation of the exemption on that basis.

⁸ *Progressive Rail Inc. - Continuance in Control Exemption- Montgomery Short Line LLC*, STB Finance Docket No. 35092 and *Montgomery Short Line LLC—Lease and Operation Exemption—Union Pacific Railroad Company*, STB Finance Docket No. 35093 (STB served February 13, 2008) at 2.

Entergy must therefore demonstrate that there are “reasonable, specific concerns” that require the Board to partially revoke the exemption. Entergy has not met its burden.

Entergy claims that the rail transportation policy (the “RTP”) of 49 U.S.C. §10101(4) requires the Board to promote “effective competition among rail carriers.” CA at 53. However, Entergy provides no support for that bald statement.

Entergy next claims that the RTP would be fostered because Entergy would not have to build a new connection to the BNSF.⁹ The proposed new line construction is a creation of Entergy. Based on the argument that the RTP would be fostered by Entergy not having to build the new line, Entergy is arguing that its own construction is contrary to the RTP and therefore the construction request must be denied by the Board. Hence, if the construction is denied, there is no basis for partially revoking the M&NA lease exemption. If the new construction would foster the RTP, then Entergy is wrong in arguing that partial revocation is required by the RTP to prevent the construction. The fallacy of Entergy’s argument is that it is based upon the construction straw man that Entergy itself created.

Entergy has not demonstrated that partial revocation of the lease exemption is required to foster the RTP or to protect shippers from the abuse of market power. M&NA urges the Board to deny Entergy’s request to partially revoke the lease exemption in order to strike Section 4 of the Lease.

IV. The Lease is not a pooling agreement.

⁹ See, Finance Docket No. 35122, *Entergy Arkansas, Inc. and Entergy Services, Inc. –Petition for Exemption–Construction and Operation of a Line of Railroad in Independence, Jackson and Lawrence Counties, Arkansas*, filed February 22, 2008.

Entergy contends that the Lease is a pooling agreement that was not approved by either the ICC or the Board. First, the Lease is not a pooling agreement because a pooling agreement is an agreement between rail carriers to pool traffic or service.¹⁰ At the time UP and M&NA entered the Lease, M&NA was not a carrier. Therefore, there was no agreement between rail carriers.

Second, in reviewing this specific transaction, the ICC concluded that the "acquisition of a line of railroad and incidental trackage rights by a noncarrier, as here, is governed by section 10901."¹¹

Finally, in the context of the sale or lease to a short line, the Board has stated that they involve "agreements between two companies that do not compete with each other."¹² In order for pooling to be involved, the railroads must be competitors. The Board has concluded that the parties to the creation of short lines are not competitors, and therefore the Lease does not involve pooling since UP and M&NA do not compete.

V. Entergy does not justify the relief it seeks.

Because this proceeding is a matter of first impression, Entergy urges the Board to take an expansive view of its powers and impose broad relief. Entergy asks the Board to rewrite the Lease to eliminate the rent provision of Section 4. Entergy also asks the Board to grant it the right to veto any new sale or lease of the Leased Lines in the event the Lease from UP to M&NA is terminated. M&NA contends that if the Board determines that some level of relief is

¹⁰ 49 U.S.C. §11322(a). At the time of the Lease, 49 U.S.C. §11342 applied the same standards to pooling.

¹¹ *Missouri & Northern Arkansas Railroad Company, Inc. - Lease, Acquisition and Operation Exemption Missouri Pacific Railroad Company and Burlington Northern Railroad Company*, ICC Finance Docket No. 32187 (ICC served May 4, 1993) at 2.

¹² *Ex Parte No. 575 Decision* at 10.

warranted that the Board set forth the principles that it believes should govern the compensation to be paid from M&NA to UP under the Lease and then order UP and M&NA to negotiate under those principles, with the Board reserving the authority to approve any agreement. If the parties cannot agree on the new terms, M&NA contends that the Board should require UP and M&NA to seek arbitration under the provisions of the Lease in accord with the principles espoused by the Board.

A. The Board should act with restraint.

Entergy is correct that this proceeding is a matter of first impression. However, Entergy is wrong that the Board should be expansive in any relief it grants. In cases of first impression, the Board acts with restraint and looks to the specific statute and regulations in formulating a remedy.¹³

Similar action would be appropriate in this proceeding. Entergy has asked the Board to rewrite the Lease by deleting certain provisions without regard to the overall impact on the agreement or the parties. M&NA consummated the Lease and has operated under the terms of the Lease for over 15 years in reliance on those terms. Railroads that have consummated transactions pursuant to authority from the Board should be able to rely on the terms of the underlying agreements.¹⁴ If the Board is going to modify 15-year old contracts between parties,

¹³ See, *Arkansas Midland Railroad Company, Inc. –Petition for Declaratory Order–Caddo Valley Railroad Company*, STB Finance Docket No. 34865 (STB served May 2, 2007), *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42056 (STB served September 27, 2004), *Wisconsin Central Ltd.-Acquisition Exem - Union Pac. RR*, 2 S.T.B. 218 (1997).

¹⁴ See the concurring opinion of Justice Brennan in *B. & O. R. Co. v. United States*, 386 U.S. 372 (1967).

M&NA contends that the Board must have substantial justification for taking such unusual action

If the Board determines that there is a problem with Section 4 of the Lease, M&NA contends that instead of the Board rewriting the contract, a better solution would be for the Board to set forth clear principles governing rental provisions, but leave it to the parties to negotiate the specifics in the Lease. The parties could address the Board's principles in a number of ways, but would arrive at a solution that best fit their needs. If the parties could not agree, then they could submit the dispute to arbitration as provided under section 21 of the Lease. Once the revised provision was agreed upon or arbitrated, it could be presented to the Board for approval, with input from any affected parties.

B. The shipper veto of short line transactions should be rejected.

Entergy presents a joint verified statement by Professor Kwoka and Dr. Warren-Boulton that presents a scheme that they call the Shipper Right of Approval (the "SRA"). Not only are there myriad unproven and unjustified assumptions underlying the SRA, but the SRA is actually a shipper right to veto any short line transaction, contrary to the statute and the Board's rules. The Kwoka/Warren-Boulton VS places no limits on the reasons that a shipper would have for vetoing the creation of a new short line. Hence, the shipper could veto the transaction unless the railroads agreed to provisions more favorable to that shipper than any others, including its competitors on the same Line.

Pursuant to 49 U.S.C. §10901, the Board must grant a request to create a new short line, unless it is found to be inconsistent with the public convenience and necessity. There is no legal or factual basis equating the whims of a single shipper to the public convenience and necessity,

and Entergy certainly has not met the burden. The Kwoka/Warren-Boulton VS claims that a shipper like Entergy would be willing to pay the most for the line and should therefore have a right of veto. However, if Entergy were willing to pay the most for the Leased Lines, why wasn't Entergy at least one of the bidders, if not the winning bidder when UP offered the Lines for sale and lease in 1992?

The ICC found that the creation of short line railroads was so beneficial that it adopted an exemption to expedite the process and substantially reduce the regulatory costs.¹⁵ It was concluded that "the exemption of these transactions will foster the rail transportation policy of 49 U.S.C. 10101a by minimizing the need for Federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail management."¹⁶ Through the years the ICC and the Board have amended the rules governing the filing of the Notice of Exemption for the creation of new short line railroads. But nowhere in the rules at 49 C.F.R. §1150.31, *et seq.* is there a requirement that the largest shipper on the line must approve the transaction before Board approves the transaction. But Entergy proposes such a rule here, without benefit of a notice and comment rulemaking.

It is difficult enough for the two parties to the creation of a new short line to negotiate an agreement. Entergy wants to add a third party to the process, who will have the power to veto the transactions unless it is satisfied. Will the cost of such satisfaction be special rate relief,

¹⁵ *Class Exemption-Acq. & Oper. of R. Lines under 49 U.S.C. 10901*, 11 C.C.2d 810, 811 (1985)

¹⁶ *Id.* at 817

special service, freedom from demurrage, or some other issue? Negotiations could be interminable. Under Entergy's proposal, there is no limit as to the grounds that the designated shipper could use to veto the creation of a short line.

The mischief that could arise from such a rule is nearly boundless. Even if it were appropriate for shippers to have the right to veto the creation of a short line, why is the largest captive shipper on the line delegated that power? Doesn't that give the captive shipper the power to require the railroad's to structure the transaction to favor that shipper over all other shippers, including its competitors? Doesn't Entergy's proposal improperly delegate the Board's authority to approve transactions to a shipper that can act in an arbitrary manner? What happens if there is more than one shipper on the line and they disagree? Or in a more troubling situation, what if the shipper delegated to approve the transaction creates a subsidiary to acquire the line, but only on terms that disadvantage its competitor who is located on the line or even on a different line? Isn't it the function of the Board to review these issues, and hasn't the Board elected to review them after the fact and take corrective action because of the overwhelming benefit from the creation of short lines?

The relief proposed by Entergy through the Kwoka/Warren-Boulton VS is based on unproven assumptions, is contrary to the statute and regulations governing the creation of short line railroads, has not been tested through the notice and comment of rulemaking, and creates a setting with the potential for substantial abuse. There are no rules or limitations governing the shipper under the process proposed by Entergy.

Congress and the Board have created a process for the creation of short lines where there are rules, where every potentially affected party has an opportunity to present its objections, and

where an impartial body, the Board, weighs the merits of all claims. This process has worked well since 1985, and Entergy provides no concrete basis for changing the process.

M&NA strongly urges the Board to deny the creation of the SRA, which in reality is the ability of the largest shipper on the line to veto a transaction creating a short line for any reason.

CONCLUSION

M&NA most strongly urges the Board not to terminate the Lease without the consent of M&NA because of the immense harm that would befall M&NA.

M&NA urges the Board to conclude that Entergy has not proven that (1) the enforcement of the Lease creates an unreasonable practice, (2) revocation of the lease transaction is required by the RTP, (3) the Lease constitutes a pooling and/or traffic division agreement for which authorization was not properly obtained and condition any approval of that agreement under 49 U.S.C. § 11322, (4) broad relief is warranted, and (5) the SRA is a valid means of relief. M&NA prays that the Board dismiss the complaint and discontinue this proceeding.

In the event that the Board concludes that there is a problem with the rental provisions of Section 4 of the Lease, M&NA respectfully requests the Board to (1) set forth the principles that it believes constitute a reasonable rental, (2) direct UP and M&NA to renegotiate the Lease in line with those principles, and addressing revenue divisions along with rent, (3) direct the parties to proceed to arbitration under the Lease if they cannot agree on the provisions of the new lease, and (4) direct the parties to present the revised lease to the Board for approval, either on the Board's own analysis or after a proceeding, at the Board's discretion

Respectfully submitted,



Scott G. Williams Esq
Senior Vice President & General Counsel
RailAmerica, Inc
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

Louis E. Gitomer, Esq
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for MISSOURI & NORTHERN
ARKANSAS RAILROAD COMPANY, INC

Dated August 11, 2008

EXHIBIT 1

MNA- AM - 95% Waiver for
movement of Sand - Expires 12/31/05

Franger, Sandy K. (Boca)

From: RDBILBAY@up.com
Sent: Tuesday, February 17, 2004 3 25 PM
To: Franger, Sandy K (Boca)
Cc: Horton, Anita (MNA), Wilson Warren (WCWILSON@UP.COM), RJGARTNE@up.com, GLJOHNSO@up.com
Subject: Re MNA Waiver Request for Movement from A&M

Sandy

Please accept this as Union Pacific concurrence to waive the 95% Rental clause of Section IV RENT to Lease Agreement dated December 11, 1992. This waiver applies only on STCC 14-4, Construction Sand, from Arkhola Sand at Van Buren, AR, to Arkhola Sand at Branson, MO, via a route of AM-MNA. MNA will still be obligated to pay rental per the Lease Agreement should they exceed the threshold on all traffic less the volume created by this waiver.

This concurrence will expire December 31, 2005 unless otherwise agreed to in writing by the Union Pacific.

Raymond D Bilbay
402 271-5832
FAX 402 233-2489

"Franger, Sandy K (Boca)"	To.	"Bilbay Ray
(RDBILBAY@UP.COM)" <RDBILBAY@UP.COM>		
<Sandy.Franger@RailAmerica.com>	cc	"Wilson Warren
(WCWILSON@UP.COM)"		
(MNA)"		<WCWILSON@UP.COM>, "Horton, Anita
		<Anita.Horton@RailAmerica.com>
	02/17/04 08:11 AM	Subject: MNA Waiver Request for
Movement from A&M		

Ray ? discussed this briefly with Warren this morning. Would like to discuss with you as soon as possible to obtain a waiver on the 95%. If necessary, we can set up a concall between you, Anita and me to discuss.

Here are a few bullet points:

- Sand currently moves into Branson via truck today.
- Joint effort is between MNA, AM and Arkhola Sand in Van Buren, AR.

BNSF has agreed to a per car fee to bridge the traffic from Monett to Aurora in order for us to keep the transportation cost within competitive rates.

AM is supplying the cars and paying for the facility at Branson. They are paying for the track repair and unloading pit.

Volume is approx. 1,000 cars per year.

The key drivers to make this work is the ability to get the sand delivered to Branson at a competitive rate and AM paying for the

facility AM is supplying the cars to the MNA for this move. If AM is out of the deal, then we have no one to pay for the facility. Arkhola has already made sales contacts with the customers in Branson to use their sand once the facility is set up

IMAGED:

BY AND DATE : MARY BRAMEL 07/12/07
Also in Folder 45

INDEXED:

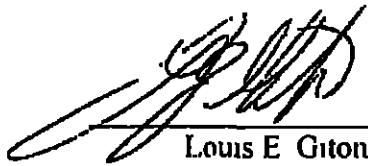
BY AND DATE - SAME

QUALITY CONTROL:

BY AND DATE - SAME

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for Entergy Arkansas, Inc., Entergy Services, Inc., Union Pacific Railroad Company, BNSF Railway Company, and Arkansas electric Cooperative Corporation electronically and by first class mail postage prepaid



Louis E. Gitomer
August 11, 2008