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SERVICE DATE - MARCH 2, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 575

REVIEW OF RAIL ACCESS AND COMPETITION ISSUES

Decided: February 26, 1999

In a petition filed on December 21, 1998, the Western Coal Traffic League (WCTL) asks that we initiate "further rulemaking" to eliminate unreasonable "paper barriers." Responses in opposition to the petition were filed on January 11, 1999, by the American Short Line and Regional Railroad Association (ASLRRA) and the Association of American Railroads (AAR). We will defer action on the petition pending our review of experience under the Rail Industry Agreement (RIA) recently entered into by AAR and ASLRRA.

BACKGROUND

Paper barriers are contractual provisions limiting the opportunities for a small railroad to interchange traffic. Historically, they have been imposed in connection with the purchase by a small carrier of a short segment of a larger carrier's track. In exchange for a lower purchase price and/or more favorable financing terms, the smaller carrier would typically agree to incur substantial penalties if it did not interchange all, or substantial portions of, its traffic with the selling larger carrier. Recently, in connection with this proceeding and in other contexts, some parties have complained that paper barriers inhibit the ability of smaller carriers to expand the competitive options available to shippers.

In a decision served April 17, 1998, in this proceeding, we asked representatives of the railroad industry and the shipping community to meet privately to attempt to address many of the issues that had been raised concerning rail access and competition. Consistent with our request, AAR and ASLRRA (collectively, the large and small railroads) conducted intense negotiations, and on September 10, 1998, they entered into the RIA, a comprehensive agreement intended to provide a framework for improving the ability of smaller (Class II or III) railroads and Class I railroads to work together to fulfill their shared goal of serving the shipping public in the most efficient and effective possible manner. The RIA addressed a variety of subjects, including rate-related provisions consisting of a series of bilateral commitments with respect to switch charges and interline rates; and non-rate provisions aimed at better meeting the car supply needs of customers served by short-line and regional railroads, improving the quality of interline service provided jointly by smaller railroads and Class I carriers, and giving Class III carriers access to new routes and haulage arrangements in certain circumstances in order to develop new business. The non-rate provisions of the agreement do not entirely eliminate paper barriers, but they clearly do reduce the impact of paper barriers in certain respects.

In Association of American Railroads and American Short Line and Regional Railroad Association—Agreement—Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Dec. 11, 1998), we approved the rate-related provisions of the agreement.¹ We were not asked to rule on, and did not rule on, the non-rate provisions, including the provisions addressing paper barriers.

THE PETITION

Promptly after AAR and ASLRRA entered into the RIA, WCTL asked that we intervene, by promulgating agency rules with respect to the paper barriers issue, on the ground that the RIA did not go far enough in limiting the effects of paper barriers. In the context of this and another proceeding (STB Ex Parte No. 628), WCTL sought reconsideration of our decision in Expedited Relief For Service Inadequacies, STB Ex Parte No. 628 (STB served Oct. 15, 1998), asking for the opportunity to address “the merits of an approach to interchange barriers that takes account of unjustified, adverse impacts on shippers and short-lines beyond pure service obstacles.” In a decision served on October 22, 1998, in the Ex Parte No. 628 proceeding, we denied WCTL’s request, which went beyond the scope of that proceeding, although we expressed no position one way or the other as to the industry-wide issues that the request raised. WCTL subsequently filed the instant petition in this proceeding.

In its petition, WCTL expresses the view that we have done “little to retard the inexorable reduction of competition that results from an industry hell-bent on consolidation, coupled with a regulatory scheme that seemingly abets such consolidations as the panacea for perceived railroad operating inefficiencies and inadequate revenues.” It argues that public policy requires that we undertake a “pro-active promotion of competition within the railroad industry, and not simply the minimization of harm to whatever competition presently survives.” Thus, notwithstanding the differences between mergers, which can reduce the number of competitors, and line sales, which do not, it asks us to initiate a further rulemaking to adopt specific policies that will be applied when line sale-related paper barriers are brought before us for review. According to WCTL, paper barriers are “by definition anti-competitive” and, thus, the rules that it suggests that we adopt are designed to ensure that paper barriers are approved only to the extent necessary to achieve a public benefit, and then only if they are no broader or more restrictive than necessary to achieve that benefit. The suggested rules establish rebuttable presumptions that paper barriers are unreasonable whenever they last longer than 5 years; when they limit interchange even if interchange would not reduce traffic to the selling carrier; and when they provide benefits to the selling carrier that WCTL deems excessive.

AAR and ASLRRA responded in opposition to WCTL’s petition. The large and small railroads state that the RIA already provides a comprehensive set of general principles that will limit

¹ Notice of the agreement was served on September 22, 1998, and published in the Federal Register on September 25, 1998 (63 FR 51,398).

new paper barriers to those that are legitimate by disallowing inappropriate restrictions on the short line's ability to develop new traffic; by disallowing excessive per car charges and other penalties; and by providing for arbitration in the event of disputes. The large and small railroads argue that the RIA should be given a chance to work before the Government imposes "an unnecessary layer of regulation on top of the parties' private agreement, regulation that would effectively second guess the agreement negotiated by the private railroad parties." They take the view that the "details" that WCTL would address by rule can better be fleshed out in the context of negotiations involving specific factual situations (in which the interests of shippers looking for additional transportation options would be consistent with the interests of smaller railroads looking for additional traffic). The large and small railroads express concern that imposing new rules at this time could have a chilling effect on future industry negotiations in general and on future short-line sales in particular.

DISCUSSION AND CONCLUSIONS

We will not act on the petition at this time, but rather will hold it in abeyance. WCTL's proposal would affect the process through which hundreds of light density lines used to originate or terminate traffic for many rail-dependent shippers have been spun off by the larger railroads to short-line and regional carriers. This process can maintain and even improve upon the service provided to many shippers located along those light density lines. The RIA, which is still in its infancy, is intended to further promote those objectives.

The RIA did not fully address the concerns of short-line carriers about the role that they could play during periods of poor service. However, in response to a formal filing by ASLRRA, which all parties to the RIA were aware would be made, our decision in Ex Parte No. 628 essentially gave short-line railroads the same ability as shippers to invoke relief. Thus, under the Ex Parte No. 628 procedures, shippers or smaller railroads may seek access to additional railroads during periods of poor service.

Beyond this, however, we are not prepared to act in a way that would quickly overturn a privately negotiated settlement, completed at our direction. Such precipitous action on our part would unduly chill the process of privately negotiated settlements that we have stated we prefer, by pursuing regulation of uncertain consequences. We believe that a more responsible approach would be to develop a better record with the benefit of experience under the RIA before we act on WCTL's petition. It may be that no regulations will ultimately be necessary; it may be that the private parties will work out some but not all of the issues that concern WCTL; or it may be that the issues that will arise will be different from those that WCTL now envisions. In any case, it appears to us that the petition is premature and that the appropriate course of action is to hold the petition for rulemaking in abeyance, and to revisit the matter later based on the experience under the RIA.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for rulemaking is held in abeyance.
2. This decision is effective on service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.
Commissioner Burkes did not participate in the disposition of this matter.

Vernon A. Williams
Secretary