

SURFACE TRANSPORTATION BOARD
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Docket No. EP 714
INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING
INTERCHANGE COMMITMENTS

REPLY COMMENTS OF
THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION

Michael Ogborn
Chairman
Keith T. Borman
Vice President & General Counsel
American Short Line and Regional Railroad Association
Suite 7020
50 F Street N.W.
Washington, D.C. 20001-1564
Telephone 202-628-4500
Fax: 202-628-6430
Email: kborman@aslrra.org

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The American Short Line and Regional Railroad Association ("ASLRRA") respectfully submits the following Reply Comments on the Surface Transportation Board's ("STB" or "Board") November 1, 2012, Notice of Proposed Rulemaking ("NPR").¹ After reviewing the Comments filed in this proceeding, it is apparent the NPR is a solution looking for a problem that does not exist. Moreover, imposing that solution will lead to a situation where many light density lines that could be saved through the transfer or continued operation by a short line through the renewal of a lease will instead be on inevitable path to a reduced level of service or abandonment. Neither the NPR nor the Comments filed in support of it show how the additional information would benefit shippers whose competitive situation will not change after a transaction with an interchange commitment. As stated by the ASLRRA in its opening Comments, no need has been shown why these proposed burdensome additional requirements need to be appended to rules that already provide any necessary notice to any interested party.

Background

The NPR would require railroads to develop and include additional information in notices of or petitions for exemption ("Exemption Proceedings") for transactions to acquire, lease or operate rail lines subject to interchange commitments. The NPR proposes significant revisions,

¹ In a decision served November 15, 2012, the STB granted in part ASLRRA's request to extend the comment and reply deadlines. The decision stated that comments would be due by December 18, 2012, and reply comments by January 17, 2013.

including eight new disclosure obligations, to the Board's rules at 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h) and 1180.4(g)(4) (the "Proposed Rules"). Nine parties filed Comments favoring the Proposed Rules² and, in addition to the ASLRRRA, ten parties filed Comments opposing them.³

As more fully discussed below, the ASLRRRA is opposed to any of the changes contained in the Proposed Rules. While all impose unneeded burdens on Class II's and III's, three of them also involve requests for information that either is not available or is impossible to provide. Those three are items (5), (6), and (7).⁴

In its opening Comments, the ASLRRRA declared its opposition the Proposed Rule on four main grounds as summarized below and more fully discussed in ASLRRRA's Comments filed December 18, 2012:

- ... The proposed rules are inconsistent with the historic premise for exemption proceedings. That historic premise is based on less regulation and more dependence on the marketplace and has worked to strengthen short lines and the railroad industry. The Proposed Rules would impose more regulation and regulatory burdens where none is needed, chill the transfer of light density lines from Class I carriers to Class II and III carriers, and expose more lines to abandonment and thus permanent loss of rail service. Interchange commitments have meant that many rail lines serving hundreds of shippers, receivers, and communities have been preserved and allowed short lines to flourish;

- ... The current rules are adequate to provide notice to the STB, shippers, and other parties and the adoption of the Proposed Rules is not needed and would not add anything to the process except delays and unintended consequences. Interested parties can presently see when a transaction involves an interchange commitment by virtue of the publication in the *Federal Register* and the STB website and parties have ample time within the 30 days from publication to determine whether to participate. For example, in each of the 10

² The parties filing in support were the National Industrial Traffic League ("NITL"), the National Grain and Feed Association ("NGFA"), the Chorine Institute, Union Electric Company, d/b/a Ameren Missouri ("Ameren"), the United States Department of Agriculture ("USDA"), Consumers United for Rail Equity ("CURE"), Alliance for Rail Competition, *et al* ("Alliance"), American Chemistry Council ("ACC"), the Arkansas Electric Cooperative Corporation ("AECC"), and the United Transportation Union – New York State Legislative Board ("UTU")(collectively, the "Proponents").

³ The additional parties filing in opposition were the Association of American Railroads ("AAR"), the Rail Industry Working Group ("RIWG"), Harrison Gypsum, LLC ("Harrison"), Sherwood Construction Co., Inc. ("Sherwood"), Minn-Kota Ag Products ("Minn-Kota"), Milnor Grain Company ("Milnor"), the Oregon Department of Transportation Rail Division ("ODOT"), Pennsylvania Department of Transportation ("PennDOT"), Norfolk Southern Railway Company ("NS"), and the Union Pacific Railroad Company ("UP").

⁴ NPR at 5-6.

cases cited by the STB in the NPR, all the parties who decided to participate obviously had sufficient time to make the decision and then file. The information sought will not provide any party with any additional meaningful information on which to determine whether to participate in the proceeding;

- ... Processes already exist to deal with interchange commitments that do constitute an anti-competitive situation or where new business opportunities present themselves. First, any interested party can today seek to stop the exemption process by filing in opposition, undo it through a petition to revoke or through a petition seeking a through route pursuant to 49 U.S.C. § 10903. If a new business opportunity arises subsequent to a line transfer with an interchange commitment attached to it, the short line transferee can seek a waiver of the interline commitment through the Rail Industry Agreement ("RIA") procedures.
- ... The burdens of the Proposed Rules are vastly underestimated by the STB. They are ambiguous, require information that would either be difficult to document, information that is non-existent or unavailable to the short line applicant or that would produce nothing of value to allow a party to determine whether the proposed transaction would have adverse competitive effects. Moreover, the resources needed to provide the information requested in items (5), (6) and (7) are substantial and the time to produce it (assuming it could be) would be considerable.

Reply Comments

The Proponents Ignore the Benefits of Interchange Commitments

Perhaps the most glaring omission in the Proponents' Comments concerns the almost complete lack of acknowledgement of the fact that interchange commitments have saved many lines that otherwise would have been abandoned or left to increasingly worse service. Only two Proponents (NITL and Ameren) mention this fact but essentially say that interchange commitments should be allowed only in limited circumstances and then only for a short period of time.

The reality is that the use of interchange commitments in many leases and sales allowed the Class I sellers or lessors to rationalize their networks and concentrate on using capital on main lines while still preserving service to light density, often rural lines. They also allowed the shippers to continue to receive rail service on a locally focused and improved basis and for short lines to grow and prosper. It would be profoundly counterproductive to risk chilling this positive result by instituting burdensome regulations requiring additional disclosures that sellers/lessors and buyers/lessees probably cannot produce, and which, even if they could, would not result in any meaningful analysis of transactions or address whether the proposed transaction is consistent with the National Transportation Policy ("NTP").

The Information Produced Pursuant to the Proposed Rules Serves No Valid Purpose

In general, the Proponents all take the position that disclosure of more information of any kind is better – the theory of more is better – without specifying how that information would in any way aid a potentially interested party in determining whether to participate or for the STB to make a finding that the transaction is not in the public interest. Nor do any of the Proponents address the fact that the Proposed Rules are inconsistent with the premise for exemption proceedings contained both in the statutes and STB regulations and policies. Additionally, while a couple of the Proponents recognize that interchange barriers have saved lines (and will continue to) that would otherwise been candidates for abandonment or reduced service, those same Proponents would risk abandonment or reduced service by prohibiting or severely limiting interchange commitments.⁵

Summary of Proponents' Arguments

Proponents raise a number of points but rely on the following major arguments in support of the Proposed Rules: (1) that the Proposed Rules will provide interested parties more information and more time to determine whether to participate in a proceeding; (2) that while the Proposed Rules are a good start, they do not go far enough – the STB ought to outright prohibit interchange commitments prospectively and revisit existing ones and revise them or require that they be rescinded⁶; (3) that there may "certain" interchange commitments that are defensible for a while if designed to save a line that would otherwise be abandoned; (4) that interchange commitments tend to restrict, limit or bar the ability of purchasers or lessees to offer all possible rail routings and thus transgress several goals of the NTP; (5) that the information required in items 6 and 7 of the Proposed Rules are of critical importance to shippers since many defenders of interchange commitments state that without the barrier, the sale or lease price would have been much higher; (6) that the filing party needs to verify the valuation figures and/or supply supporting data; and (7) that the STB should deny a transaction or require a contested proceeding if the transaction has a paper barrier of unlimited duration, has a ban on interchanges with an alternative railroad for an extended or unreasonable period of time, has an unreasonable financial

⁵ The Comments filed by Harrison, Sherwood, Minn-Kota, and Milnor confirm that the existence of an interchange commitment resulted in the continued existence of the line serving them, that their businesses were saved, and that in the end, the transaction produced better rail service. ODOT and PennDOT also commented that the existence of interchange commitments meant the preservation of lines that would have otherwise been permanently lost.

⁶ As NS points out in its Comments, the overly broad definition of interchange commitments would bring under the Proposed Rules transactions that in reality are incentives and not penalties. *See*, NS Comments at pp. 7-9.

penalty for an extended or unreasonable period of time or "any other characteristic that would have a significant risk of anti-competitive effect."

Current Rules Provide Sufficient Notice to the Public

While the Proposed Rules would produce reams of information, not one of the Proponents shows how that additional information will facilitate a review or otherwise produce any of the results they state its provision will. Moreover, the Proponents fail to show how the existing rules inhibit an interested party from participating in a transaction if it so desires. The current rules require the buyer or lessee to describe the interchange commitment and file the transaction agreement with the STB under seal so that any interested party can gain access to it.⁷ The notice of the transaction is also published in the *Federal Register* as well as on the STB website. These regulatory requirements currently provide sufficient notice to any party that wants to participate and investigate the proposed interchange commitment.

In fact, notwithstanding information already required by the regulations, not one shipper has objected to a transaction with an interchange commitment since the rules were instituted in 2008. As noted by the shippers who filed in opposition to the NPR, they actually support the interchange commitments.

Requirements 5-7 of the NPR Would Not Assist Shippers or Other Interested Parties

Regarding items 5-7 of the NPR requiring the filing party to "...provide the percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment, an estimate of the difference between the sale or lease price with and without the interchange commitment or an estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line..." none of the Proponents say how these requirements would assist in any way in making a determination whether to participate in a transaction or whether the transaction is in the public interest.

These three requirements in particular have nothing to do with a decision by a shipper to participate. Rather, it is the transportation needs of the shipper not the economic value of the transaction privately negotiated between the Class I and the short line that will drive the shipper's decision. This disclosed information also will not aid the STB in determining if the exemption

⁷ *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No.1)(STB served May 29, 2008).

process is appropriate for a transaction or how it relates to the standard to revoke a class exemption.

Problems Producing Information

Just as importantly, the NPR and the Proponents ignore the problems inherent in even trying to produce the information requested, particularly respecting items 6 and 7. These items require the short line to estimate "...the discounted annual value of the interchange commitment to the Class I..." and "...the difference between the sale price with and without the interchange commitment." A short line would not be able to reasonably estimate either one of these items and would need to rely on the ability and the willingness of the Class I to produce the information. As has been pointed out by the AAR, UP, and NS, the preparation of any such information is not done in the ordinary course of business by Class I railroads, would be burdensome if not impossible to calculate, and would only be prepared for a regulatory purpose. In any event, it would not result in producing information of any utility to the evaluation of the interchange commitment.

Even if a Class I could produce the required information, to do so would be a substantial burden on it. For example, UP points out that since it does not calculate these items in the ordinary course of business, it would have to either use URCS or a rather complicated internal calculation solely for this regulatory purpose.⁸ URCS does not, however, "...lend itself to calculating total variable costs for an aggregation of unique movements of traffic [.]" that would be required for the calculations.⁹

The STB Understated the Burden on Small Businesses

Overall, the STB has seriously underestimated the amount of time and effort it would take to produce the items listed in the NPR. In its Comments, the ASLRRRA showed that the use of the SBA definition of small businesses was inappropriate and that the burden on short lines would be substantially more if the Proposed Rules were adopted.¹⁰ Moreover, the Board's determination that only four transactions per year would be subject to the Proposed Rules for all rail carriers disregards the fact that in upcoming years there will be an increased number of leases with interchange commitments coming up for renewal. UP estimated that it alone could

⁸ UP Comments, pp. 10-11. Short lines have also expressed discontent with the use of URCS for a number of reasons, including that URCS does not include Class II and III inputs. *See, e.g.*, Railroad-Shipper Transportation Advisory Council, Position Paper on the Uniform Rail Costing System, November 22, 2011.

⁹ UP Comments, p. 10.

¹⁰ *See*, ASLRRRA Comments, footnote 8, p. 8.

be dealing with as many as eight per year in the upcoming years. The witness for UP stated preparing items 5 and 6 would be a substantial undertaking taking days and not hours to do the required calculations.¹¹ Other stated requirements could be equally time consuming, as detailed in the ASLRRRA Comments. Accordingly, the conclusion reached by the STB that the Proposed Rules would not have an adverse effect or impose undue burdens on the small businesses that constitute short lines is not supported by the facts.

USDA Comments

The USDA Comments are at once interesting and confusing. On the one hand, USDA recognizes the value of interchange commitments in saving lines serving rural areas but, on the other, it declares that all interchange commitments should be banned and even goes so far as to say the STB should address existing ones thus potentially interfering with existing contracts and taking property without due process. USDA shows its fundamental misunderstanding of interchange commitments and what they have meant and will continue to mean to the railroad industry.

Simply stated, the existence of an interchange commitment does not change the competitive situation. Prior to the transfer of a line, the shipper was served by one carrier and after the transfer, it is still served by that same railroad plus a locally focused, profit driven small business that preserves service, provides jobs, and contributes to the local economy. None of that would have occurred but for the interchange commitment.

USDA also says "[i]t is reasonable to assume there will not likely be a large number of paper barriers in the future due to the extent of trackage already controlled by short lines, which has been stable since the 1990's and because Class I's have begun reacquiring light density lines."¹² While it seems to acknowledge in one part of its Comments the value of these contractual obligations in saving light density lines¹³ it essentially says the time has passed for them as there will not be any significant number of line spin-offs by the Class I's going forward.

The facts belie the assertion that interchange commitments are no longer necessary. The Class I's have continued to spin off lines to short line operators. Moreover, there have been a number of sales or leases from one short line carrier to another, and as discussed above, there are

¹¹ Verified Statement of Michael N. Drechlicharz, p. 1.

¹² USDA Comments, p. 1.

¹³ The states that commented also noted the value that interchange commitments have had in preserving rail service in their states. See ODOT Comments and PennDOT Comments.

a great number of leases with interchange commitments in them that come up for renewal in the next five years as well. Assuming that the Proposed Rules apply in all these circumstances, how in the world would the filing parties ever obtain or calculate the information required?

Finally, the assertion that there are not likely to be future line sales is pure conjecture and does not comport with the history of the line sale phenomenon. In 1980 no one predicted the absolute explosion in line sales. That explosion occurred for reasons of economics. The Class I's had excess capacity and local entrepreneurs discovered ways to turn money losing or marginal lines into profitable lines. To suggest that the economics of the Class I railroad will forever remain unchanged is not reasonable. Today the Class I's operate approximately 162,000 miles of track of which only approximately only 65,750 miles is characterized by the AAR as "high density" track. The economics of those non-high density miles of track could very well change in the future in a way that once again presented railroads the choice of abandonment versus sale.

USDA then concludes by saying quixotically that "[i]n extreme cases, the nullification of previous sale or lease agreements could terminate the short line's right to operate on the line, which would cause economic harm to shippers but the STB should be able to strike a balance between railroads and shippers that preserves market incentives for all involved."¹⁴ It is quite amazing that an agency of the U.S. government could even suggest that another agency would have the right to interfere with pre-existing contracts or that it could nullify them out of hand. Such action would dispossess short lines of the business for which they have paid, invested in and grown and would likely be not only impractical, but unconstitutional. There would be no way under this scenario that the STB could "strike a balance."

The Proposed Rules Are Ambiguous and Flawed

Many parts of the Proposed Rules are ambiguous and flawed. NS has raised questions about how parties will even determine what constitutes an "interchange commitment."¹⁵ The ASLRRRA pointed out that in many instances the NPR requires the filing of information that either does not exist or is unavailable or is not required to determine the potential competitive effects of an interchange commitment.

One of the most glaring examples of ambiguity concerns the requirement that the filer submit the estimate of a discounted annual value with no direction of how this would be done,

¹⁴ USDA Comments, p. 4.

¹⁵ NS contends that its lease-credit arrangement should not be considered an interchange commitment. NS Comments, pp.7-8.

what it would contain, and who would have the resources to produce it. UP, NS, and the AAR all provided additional examples of ambiguities in the rule such as: the uncertainty about how information filed under seal will be kept confidential; how the parties should report carload information; what is meant by the phrase "could physically interchange"; and that the definition of interchange commitment used by the STB was overly broad.

Additionally, several commenters have raised questions how the Board would evaluate or use the information to be provided.¹⁶ Proponents of the NPR seems to assume that the Board will review the additional information, and at least in some instances unilaterally determine that the interchange commitment is or is not appropriate. The NPR gives no indication, however, that the Proposed Rules designed to be anything other than information or notice requirements and gives no indication about how the information might be evaluated. In the past the Board has not been willing to establish any sort of presumption that interchange commitments are improper (see *Review of Rail Access & Competition Issues – Renewed Petition of the Western Coal Traffic League*, Ex Parte 575 (STB served October 30, 2007), and the Board has not rejected any of the notices in the proceedings cited in the NPR as a result of the provisions of the disclosed interchange commitments. Requiring additional information without any indication of how it will be used, and not knowing whether the exemption will be permitted to take effect in the usual course, will make it difficult for short lines and Class I's to negotiate transactions and this uncertainty may well have a chilling effect on any future transactions that include interchange commitments.¹⁷

The RIA Provides Relief Where Appropriate

The RIA provides a method by which small railroads can avoid the restrictions of interchange commitments where new railroad business on the line is at stake. As indicated in the Verified Statement of Reilly McCarren, Co-Chair of the Railroad Industry Working Group ("RIWG"), over the years dozens and dozens of requests to waive an interchange commitment have been submitted, and the overwhelming majority has been granted, year in and year out. As shown in the table in Mr. McCarren's Verified Statement, the volume of successful interchange commitment waivers shows that under the RIA any perceived concern that existing interchange commitments will restrict the development of new business is incorrect.

¹⁶ AAR Comments, pp. 5, 8; NS Comments, pp. 8-9.

¹⁷ AAR Comments, p. 8; UP Comments, pp. 3-4.

Conclusion

The Proposed Rules are not just a modest expansion of its original interchange commitment disclosure requirements. Maybe this is what some of the Proponents of the Proposed Rules want, but the likely consequence is that the unintended consequences of these allegedly "small" disclosure rule changes will mean the salutary practice of spinning off light density lines by Class I carriers to Class II and III carriers will stop. Further, many light density lines whose service was preserved under leases that are coming up for renewal will be returned to Class I carriers, which are unlikely to remain as committed to their continued operation as the short lines have been. The communities and shippers served on those lines will either lose rail service or suffer a reduced level of service.

The NPR purports to address a problem that needs addressing but the truth is there is no problem with interchange commitments in a line spin-off transaction. These commitments have allowed the preservation of lines, improved service, and have not adversely affected competition.

Nothing contained in the Proponents' Comments shows how the Proposed Rules will enhance the shippers' knowledge about any purported anti-competitive effects of a proposed transaction that contains an interchange commitment. The Proponents simply reiterate that they feel interchange commitments are anti-competitive without any facts to back that assertion. They oppose these commitments in a kneejerk manner without considering the ultimate adverse effects of the Proposed Rules – no more spin-offs and loss of rail service.

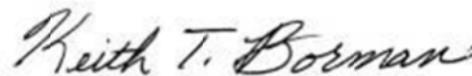
The Proposed Rules would require the expenditure of untold days of work and money to prepare the required information, would delay or frustrate transactions that are in the public interest, would produce data that are not useful in any context, and would add more burdens on small business with no concurrent benefit to those small businesses or the public. The NPR should be withdrawn.

Respectfully submitted,

American Short Line and Regional Railroad Association by



Michael J. Ogborn
Chairman



Keith T. Borman
Vice President & General Counsel