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May 27, 2011

## VIA ELECTRONIC FILING

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

Re: *Competition in the Railroad Industry*,  
STB Docket Ex Parte No. 705

Dear Ms. Brown:

In accordance with the Board's decisions served on January 11 and February 4, 2011, Four Rivers Transportation, Inc., hereby tenders its reply comments in the above-captioned proceeding.

If there are any questions concerning this filing, please contact me at the address and phone listed above or at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins

cc: J. Thomas Garrett

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET EX PARTE NO. 705**

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**COMPETITION IN THE RAILROAD INDUSTRY**

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**REPLY COMMENTS OF  
FOUR RIVERS TRANSPORTATION, INC.**

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**Dated: May 27, 2011**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET EX PARTE NO. 705**

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**COMPETITION IN THE RAILROAD INDUSTRY**

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**REPLY COMMENTS OF  
FOUR RIVERS TRANSPORTATION, INC.**

Pursuant to the Board’s notice served on January 11 and its supplemental decision served on February 4, 2011 (respectively, the “January 11 Notice” and the “February 4 Decision”), Four Rivers Transportation, Inc. (“Four Rivers”) hereby offers its reply comments in response to the opening comments filed in this proceeding. As is discussed below, a review of all of the initial comments tendered to the Board reflect two key points – (1) the majority of comments filed urged the Board not to change existing rail competition policies or precedent; and (2) those comments that did seek changes in Board policy and precedent appear to advocate for an industry-wide application of such new policies and precedent, despite the fact that the alleged “harm” for which the remedy is being proffered is almost exclusively caused by the conduct of only the very largest railroads. Accordingly, the record, as it stands at this stage of the proceeding, certainly reflects a majority view that the Board’s procedures and processes appear to be working and that no radical change is required. Even for those who advocate change, their arguments, directed as they are at the harms caused by the four largest railroads, do not provide a foundation for imposing “universal” change that would subject both large and smaller carriers to the same remedy.

**BACKGROUND**

In its opening comments, Four Rivers filed comments on behalf of the three rail carriers that it directly controls (hereinafter, the “Four Rivers Railroads”) – Paducah & Louisville Railway, Inc.

("P&L" – a Class II common carrier railroad that owns and operates approximately 262 miles of rail line, all of which is located within the Commonwealth of Kentucky); Evansville Western, Inc. ("EVWR" – a Class III common carrier railroad that operates approximately 124 miles of rail line in Illinois and Indiana); and Appalachian and Ohio Railway, Inc. ("A&O" – a Class III common carrier railroad that leases and operates over 158 miles of rail line, all of which is located within West Virginia). Four Rivers initial comments urged the Board to resist imprudent calls to change existing rail competition policy and discussed the harms that would result from imposing regulatory change that would treat all carriers the same. Four Rivers pointed out that any changes the Board might consider, aside from being utterly unwarranted, would do disproportionate harm to smaller railroads, concluding that, if the Board were to opt to explore competition policy changes, the agency must account for the vast differences between the largest Class I carriers and smaller railroads. In reviewing the initial comments, there is nothing in the record to contradict this view.

### REPLY COMMENTS

The record, as it stands, does not support the notion that the Board should change its regulatory policy, and it certainly doesn't justify applying any remedies to the shortline rail industry. To date, the Board has received some 194 opening comments in this proceeding. Of the 194 total, Four Rivers understands that 135 comments (or roughly 70% of all comments filed) urged the Board *not* to change its rail competition policies and precedent, and that 22 additional comments took no position either way. This leaves only 37 opening comments (or roughly 20% of all comments filed) advocating for some level or another of rail competition policy/precedent change.<sup>1</sup>

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<sup>1</sup> The commenter contingent that would have the Board take further action does not have a unified position. While some of the comments of this contingent – such as those filed by the Agricultural Retailers Association, Consumers United for Rail Equity, National Industrial Traffic League, Olin Corporation ("Olin"), and others – urge extensive change to the Board's bottleneck policies, terminal access, and reciprocal switching, other commenters are focused on "pet" issues. Of the latter group, for example, are – Mercury Group (which promotes a new fuel surcharge system); Senator John Thune (who expresses concern over the Berkshire Hathaway "acquisition premium")

Of the 37 comments arguing for change, 14 focus exclusively on alleged competitive misconduct of one or more of the four largest Class I railroads – BNSF Railway Company; CSX Transportation, Inc.; Norfolk Southern Railway Company; and Union Pacific Railroad Company (collectively, the “Big Four”) – and that 28 of this 37 focus specific attention upon Class I railroads. Only a few commenters – such as PPG Industries (“PPG”), Occidental Chemical (“OxyChem”), Olin, and Westlake Chemical Corporation (“Westlake”) – even refer to short line or regional railroads at all.<sup>2</sup> The comments are thus quite telling in that by far the majority of the opening comments oppose any change to the Board’s rail competition policies and none of them justify imposing a universal remedy against all railroads.

There is a substantial minority of influential shippers and trade associations who do advocate for change. Four Rivers is not surprised that there is a contingent advocating for regulatory change. Shippers have been unhappy with government policies governing railroads for over a hundred and twenty five years. What troubles Four Rivers, however, is that many advocating for change point to alleged harms caused, not by smaller railroads, but rather by the four largest Class I carriers. They then propose a “one size fits all” series of remedies without recognizing the disproportionate impacts that the proposed remedies would have on smaller carriers. This contingent nowhere discusses, defends, or seems to consider or appreciate the potentially disastrous impact their proposed Board policy changes would have on smaller railroads, despite the Board’s

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for BNSF); North Carolina Department of Transportation (which complains about a lack of Class I cooperation in connection with rail transportation and rated to and from North Carolina ports); Roseburg Forest Products (who alleges collusion between Union Pacific and BNSF); and Wisconsin Central Group (whose focus is predominantly upon the conduct of Canadian National Railway following its acquisition of Wisconsin Central Railway).

<sup>2</sup> Olin and PPG comment about experiences with short line railroad transportation of chlorine, a highly toxic commodity bearing much higher transportation risks and costs. Olin’s and PPG’s respective short line-related comments deal with the rates and practices adopted by the shortline industry to deal with the transportation of highly hazardous commodities. OxyChem refers to specific short lines in connection with certain “paper barrier” issues and does not advocate wholesale regulatory change. Westlake’s discussion of smaller railroads is covered below.

specific invitation for such a discussion. Indeed, few, if any, of the 194 comments received direct any substantive attention to the issue of changing Board policies vis-à-vis smaller railroads.<sup>3</sup> In fact, short line and regional carriers barely register in the opening comments at all.<sup>4</sup>

A handful of those advocating change do suggest measures that might exclude smaller railroads from additional regulatory burden and economic harm,<sup>5</sup> but overall, the record makes clear that while most parties arguing for change depict only a small handful of the very largest rail carriers as the problem, these same shippers all too frequently seem to expect the Board to subject all railroads – both large and small – to expansive regulatory “solutions.” In so doing, such shippers are throwing out the baby with the bathwater.

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<sup>3</sup> Westlake makes an occasional, passing reference to smaller carriers in its opening comments, reporting favorably, for example, on the efforts of short line Wisconsin & Southern Railroad Co. (“WSOR”) to be an effective competitive alternative to Class I carrier Canadian Pacific at Janesville, WI, and remarking that it ships via both WSOR and Four Rivers’ subsidiary, P&L. See Westlake Opening Comments at 1-2, 16 n. 8. Westlake remarks at page 16 (footnote 8) of its opening comments that it “does not address Class II and Class III railroads” in the first section of its argument for more aggressive rail competition policy (which deals with the financial condition of the rail industry), but Four Rivers found no subsequent general or specific references to Class II or III railroads in the sections of its comments that followed.

<sup>4</sup> Admittedly, a few commenters raise the issue of “paper barriers” (interchange commitments) – an issue not specifically enumerated in the Board’s January 11 Notice as acknowledged by one commenter group (Agricultural Retailers Association, et al.). The peculiarities of the paper barrier issue, which has been the subject of a previous Board proceeding, can and should be addressed separately (if it needs to be revisited at all). In any event, the Board’s policies on this issue are already solid and there is no basis to depart from a case-by-case evaluation of so-called paper barrier problem.

<sup>5</sup> See, e.g., Comments of the “Interested Parties” at 67-68 (in which the Interested Parties recommend – *as an alternative* to aggressive changes in Board policy concerning, among other things, reciprocal switching, terminal access, and bottleneck rates – reopening past merger proceedings (in its context, presumably, those that involve existing Class I carriers) “for the limited purpose of supplementing those approvals with additional pro-competitive conditions”); and Comments of Western Coal Traffic League (“WCTL”) (which, aside from assailing current Board “paper barrier” policies, decries the harms that are alleged to have flowed from “massive consolidation” in the rail industry, resulting in a situation in which, according to WCTL, “UP and BNSF today operate as a protected duopoly”) (WCTL Comments at 18).

If smaller carriers like the Four Rivers Railroads had abused market power, and truly were culprits in the establishment and perpetuation of an allegedly insufficiently competitive rail transportation marketplace, then Four Rivers would have expected to have seen evidence supporting such a proposition, but, as noted, there is scant evidence in the opening comments that smaller regional and shortline carriers are causing the problem.<sup>6</sup> This fact implicitly supports Four River's contention that if there is any rail competition "problem" (and the comments filed in this proceeding reflect that such an assertion is unproven), then carriers such as the Four Rivers Railroads are not part of that supposed problem and thus any proposed "solutions" should not be imposed against them.

Four Rivers perceives from the comments, particularly those of the Interested Parties and WCTL, that industry-wide application of any new rules, precedent or policies is not what most shipper interests are arguing for, expect or want. Many of the shipper interests arguing for Board policy changes may yet acknowledge this point, and on reply may clarify that they did not and do not intend to have the Board subject smaller carriers to the so-called "competition-enhancing" policy changes they advocate. But if they do not, the Board cannot and should not overlook the major distinctions between the largest carriers and the balance of the rail industry. In fact, the Board, and ICCTA itself, recognize that the same procedures and rules should not apply to both Class I carriers and Class II and Class III carriers.<sup>7</sup> As Four Rivers and others, including the

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<sup>6</sup> Likewise, there is no indication that smaller Class I's, such as KCS and CP, are also the culprits of alleged competitive harm. The record seems to indicate that these carriers have similar experiences to the shortline and regional railroads and would likewise suffer disproportionate harm if the Board were to apply the proposed policy changes to all railroads regardless of size and scope.

<sup>7</sup> For example, with respect to railroad merger and control proceedings, there are numerous statutory and regulatory distinctions between transactions involving Class I carriers and those not involving a Class I. Likewise, Class II's and III's are treated differently with respect to line sales and acquisitions and the level of labor protection imposed in such transactions. The same can be said with respect to certain rate complaint processes, see, e.g., Simplified Standards For Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007); See generally, Review of

American Shortline and Regional Railroads Association (“ASLRRA”), noted, even if change were needed, which it was not, that did not mean that such change should be applied to all carriers. Four Rivers and ASLRRA explained in their opening comments that failing to recognize the differences between carriers and applying any new policy changes to all railroads, regardless of size, scope, and market power, would be unwarranted, unfair, and potentially disastrous to the ability of smaller railroads to survive.

### CONCLUSION

The opening comments filed in this proceeding make the case overwhelmingly that the Board should not depart from its existing rail competition policies and precedent. The vast majority of the comments filed underscored the substantial and lasting harms the rail industry and, in turn, shippers would suffer as a result of unwise changes to Board regulatory policies. Railroads, railroad customers, and key elected officials alike spoke out in large numbers against making any substantive changes to existing, carefully-crafted rail competition policies. The record in this proceeding to date thus demonstrates that the Board should not tinker with its rail competition policies or precedent.

Nonetheless, even if the Board were to continue to explore possible adjustments to its rail competition policies, the opening comments clearly do not support the application of any such policy changes to smaller railroads. To the extent that a certain contingent of shipper interests (by far the minority of commenters in this proceeding) has urged change, they have made no case whatsoever for universal policy changes.

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Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575, STB Ex Parte No. 575 (Sub-No. 1) (STB served October 30, 2007) (discussing at great length the distinctions between larger and smaller railroads, and the public benefits delivered by smaller carriers); and Tom Murray, “A Different Way to Run a Railroad: Regional Versus Network Carriers,” *J. of Transp. Law, Logistics and Policy* (Vol. 71, No. 3, Spring 2004).

A relatively few of the commenters, such as the Interested Parties, have been responsible enough to acknowledge (albeit implicitly) the distinct roles that larger and smaller carriers play in the transportation marketplace, and Four Rivers appreciates that acknowledgement. But, the shipper interests need to make it clear that they are not seeking to adopt universal changes that would be disastrous for the smaller railroads. If they won't make that distinction, then the Board should do so on its own. There is simply no basis in the existing record to subject smaller carriers such, as the Four Rivers Railroads, to the universal changes advocated by some in the shipper community.

Perhaps the reply comments will reflect a more careful and nuanced understanding of the role of smaller carriers in this discussion, which, if so, could lead to a far more constructive and helpful dialogue. But if not, then the Four Rivers Railroads, like others railroads, will remain absolutely critical of the notion that all carriers, regardless of their market power or role in the marketplace, should be subjected to the same proposed remedies. Four Rivers looks forward to reviewing the other reply comments filed in this proceeding to see if the discussion has evolved as it hopes it will.

Respectfully submitted,



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Dated: May 27, 2011

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