

BEFORE THE
SURFACE TRANSPORTATION BOARD

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INFORMATION REQUIRED IN NOTICES AND PETITIONS FOR EXEMPTION
CONTAINING INTERCHANGE COMMITMENTS

COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY

Glenn English
Chairman, Consumers United for Rail
Equity
4301 Wilson Boulevard
Arlington, VA 22203-5541
(703)907-5541

For Consumers United for Rail Equity

Of Counsel:

Robert G. Szabo, Executive Director
Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street, N.W., Suite 700
Washington, DC 20007-3877
(202)298-1800
rgs@vnf.com
mfm@vnf.com

December 18, 2012

Opening Comments of Consumers United for Rail Equity

Consumers United for Rail Equity (“CURE”) hereby files its Opening Comments.

Summary of Position

CURE supports the Board’s proposal to require greater disclosure of information concerning “paper barriers” (or “interchange commitments,” as the Board refers to them). CURE urges the Board to clarify that it means public disclosure, not just disclosure to the Board, of the information the Board proposes to require be disclosed.

Going forward, CURE opposes all “paper barriers” as restraints on competition that should be per se illegal. CURE also supports phasing out all existing “paper barriers” that have existed longer than ten years. However, until now, a majority of the Board has not agreed with CURE, instead reviewing “paper barriers” on a case-by-case basis.

Recognizing that the Board apparently intends, at least at the present time, to continue case-by-case review of “paper barriers,” the Board’s proposed additional disclosures are demonstrably in the public interest and should be adopted. Rail customers need to know about the existence and terms of “interchange commitments” both for transportation planning purposes and so that rail customers will have the opportunity to challenge such commitments.

Interest of CURE and Its Members

CURE is an incorporated, non-profit advocacy group with the single purpose of seeking rail policy favorable to rail-dependent shippers, many of which are referred to as captive rail customers or captive shippers. CURE is

sustained financially by the annual dues and contributions of its members, who are individual rail-dependent rail customers and their trade associations.

Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of governmental institutions whose members work to protect consumers.

The issues that are the subject of this proceeding are of interest to all of CURE's members, either because many of them are subject to a lack of competition due to "paper barriers" or because they recognize that they could be subject to such restrictions in the future. The Board's case-by-case process for such challenges is difficult for shippers to invoke. Despite the fact that "paper barriers" have been an issue for well over a decade, the Board has not made clear the elements that are necessary for a successful challenge. Additional public disclosure of the specific shippers affected by a "paper barrier," the terms applicable to such a "paper barrier," and the other information the Board is proposing to require to be contained in a Notice of Exemption or Petition for Exemption will assist affected parties in determining whether to mount a challenge to a "paper barrier." Thus, CURE supports the Board's proposals. If these proposals are adopted, shippers will be aware of future "interchange commitments", will have the information to assess whether the commitments are anti-competitive and will be able to challenge the proposed "interchange commitments" before they become effective.

Factual Background and Related Matters

The Board recounted the history of the “paper barrier” issue in its November 1, 2012 Notice of Proposed Rulemaking (“November 1, 2012 Notice”). CURE has long urged the Board to disapprove all “paper barriers” prospectively and has urged that existing “paper barriers” in place more than ten years be terminated. However, a majority of the Board has rejected that position consistently in favor of case-by-case determinations.

The STB issued the proposed rule to establish additional disclosure requirements for notices and petitions for exemption where the underlying lease or line sale includes an interchange commitment. The Board stated that it “proposes to revise its rules at 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4) to require that the filing party affirmatively disclose whether or not the underlying agreement contains an interchange commitment”.

The Board further proposes to revise those rules to require that the following information be included in notices and petitions for exemption involving an interchange agreement:

- “(1) a list of shippers that currently use or have used the line in question within the last two years;
- “(2) the number of carloads those shippers specified in paragraph (1) originated or terminated (to be submitted under seal);
- “(3) a certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (1);
- “(4) a list of third party railroads that could physically interchange with the line sought to be acquired or leased;

- “(5) the percentage of the purchasing/leasing railroad’s revenue projected to be derived from operations on the line with the interchange commitment (to be submitted under seal);
- “(6) an estimate of the difference between the sale or lease price with and without the interchange commitment (to be submitted under seal);
- “(7) an estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (to be submitted under seal); and
- “(8) a change in the case caption so that the existence of an interchange commitment is apparent from the case title.”

The Board went on to state that its

“goal is to encourage transactions that are in the public interest, while ensuring that it has sufficient information about transactions to determine whether they are appropriate for the exemption process or, on the other hand, raise competitive issues that require a more detailed examination. The Board has already indicated that interchange commitments that last in perpetuity or completely eliminate the ability of the lessee/purchaser railroad to interchange with a third-party carrier raise significant concerns. Long-term interchange commitments, often embodied in lengthy, renewable leases, also have the potential to control the competitive environment—thus affecting rates and service—for years to come. To this end, the Board believes that it will benefit the parties to the transaction, shippers, and the public for the Board to be provided with the above-outlined information simultaneously with the filing of a notice or petition for exemption. This additional information will aid the Board in its review of petitions for and notices of exemption and allow the Board to evaluate contracts involving interchange commitments without the delay involved with seeking additional information. Furthermore, parties objecting to a petition for exemption or those filing a petition to revoke an exemption will have access to this relevant information up front, thus minimizing the length of time spent on the process of filing and deciding a petition to revoke.”

The Board’s proposal, while not adopting CURE’s position, at least would permit those who may consider challenging “paper barriers” to have the information necessary for such a challenge.

Argument

THE BOARD'S PROPOSED ADDITIONAL DISCLOSURE REQUIREMENTS SHOULD BE ADOPTED.

The Board's proposed rule would assist the public significantly in attempting to determine, based on available information, what the effect would be of permitting or approving a "paper barrier" to become effective before the effective date rather than long after, as has been the case. For that simple reason alone, CURE applauds the proposed rule and urges that it be adopted.¹ CURE agrees that the Board has a duty to determine whether transactions within its jurisdiction are in the public interest. To that end, the Board must have sufficient information to make the public-interest determination. We cannot improve on the Board's stated rationale for additional disclosure requirements:

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As stated supra, CURE continues to believe that all prospective "paper barriers" should be prohibited as per se anti-competitive, because, as the Board put it so well, "Long-term interchange commitments, often embodied in lengthy, renewable leases, also have the potential to control the competitive

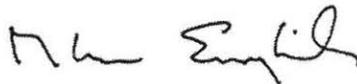
¹ CURE takes this position, notwithstanding its long-standing position that "paper barriers" do not serve the public interest.

environment—thus affecting rates and service—for years to come.” CURE also believes that existing “paper barriers” that have been in place more than ten years should be terminated. Until such actions are taken or proposed, however, the Board’s additional disclosure requirements would be an improvement that would better inform affected parties about “interchange commitments”, thus making it more likely that adversely affected parties could seek Board involvement before, rather than after, such restrictions on competition become effective.

Conclusion

For the foregoing reasons, the Board should adopt its proposed disclosure requirements and clarify that the disclosure is required to be public except with respect to that information identified as being submitted under seal.

Respectfully submitted,



Glenn English
Chairman, Consumers United for Rail
Equity
4301 Wilson Boulevard
Arlington, VA 22203-5541
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