



ASSOCIATION OF
AMERICAN RAILROADS

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Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Docket No. EP 714, *Information Required in Notices and Petitions
Containing Interchange Commitments*

Dear Ms. Brown:

Pursuant to the Board's order served on November 1, 2012, please find attached the
Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
*Counsel for the Association
of American Railroads*

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS
CONTAINING INTERCHANGE COMMITMENTS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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On November 1, 2012, the Surface Transportation Board (“Board”) issued a notice of proposed rulemaking (“NPR”) that would require railroads to develop and include additional information in notices of or petitions for exemption to acquire and operate rail lines subject to interchange commitments. The Board defines interchange commitments as “contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.” NPR at 2 (citing *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, EP 575, slip op. at 1 (STB served Oct. 30, 2007)).

Specifically, the Board proposed 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 railroad affirmatively state in its filing when the underlying agreement does not contain an interchange commitment.¹ The Board further proposed to revise those rules to require that the following information be

¹ Board regulations already require carriers to disclose when the underlying agreement contains an interchange commitment. See *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No. 1)(STB served May 29, 2008). The AAR notes that, under the Board’s definition of interchange commitment, the presence or absence of an interchange commitment could be subject to dispute.

developed and included in notices of and petitions for exemption involving a transaction that contains 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 originated or terminated (submitted under seal); (3) a certification that the railroad has provided notice of the proposed transaction and interchange commitment to those shippers; (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 (submitted under seal); (6) an estimate of the difference between the sale or lease price with and without the interchange commitment (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 (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 Association of American Railroads ("AAR"), on behalf of its Class I, II, and III member freight railroads, hereby submits its comments in response to the November 1, 2012 NPR. The AAR is concerned that the NPR disregards the importance of interchange commitments in facilitating the transfer of marginal rail lines from large railroads to smaller railroads. Moreover, the AAR submits that the NPR is unnecessary and contrary to Congressional directives to encourage exemptions and to reduce regulatory barriers to entry. As shown below, the Board has underestimated the burden of its proposed rules and the potential chilling effect it will have on transactions. For these reasons, the proposed rules should be withdrawn.

Discussion

I. Interchange Commitments Have Played and Continue to Play an Important Role in Facilitating the Transfer of Marginal Rail Lines, Preventing Abandonments, and Maintaining Rail Service

Interchange commitments have been an important part of maintaining and expanding service over low density lines in the national rail system. As the NPR notes, the regulatory environment prior to the Staggers Rail Act of 1980 made it difficult for rail carriers to abandon, sell or lease rail lines, even where they could not be operated economically. NPR at 2. Reforms beginning in the Railroad Revitalization and Regulatory Reform Act of 1976 and continued in the Staggers Act encouraged exemptions from the agency's regulatory procedures to facilitate private market solutions that preserved rail service over low density lines and allowed Class I rail carriers to focus their limited capital on higher density lines. Interchange commitments evolved in this time frame as a market-based solution to facilitate the transfer of marginal lines to new and existing shortline carriers who had little capital to finance acquisitions or leases.

Interchange commitments created "win-win-win" scenarios where: (1) shortlines were able to acquire or lease a line that it could not otherwise afford and operate it at a profit; (2) shippers were able to receive continued (and frequently, improved and locally-focused) rail service on lines that would have otherwise been abandoned or gradually deteriorated; and (3) large railroads were able to rationalize their networks while preserving service to customers on the spun-off lines. In addition, the public has benefited by traffic moving in efficient, environmentally friendly rail service, rather than shifting to the highways.

Interchange commitments have played, and continue to play, a positive role in harnessing market forces to enhance the rail network, particularly to preserve low density lines often in rural areas. Interchange commitments reflect an element of the bargained-for compensation that a

willing buyer/lessee and willing seller/lessor have agreed to in the marketplace. When a Class I railroad leases or sells a line to a shortline with an interchange commitment at a lower price or no cash payment, it does so because it is assured that it will receive value by continuing to participate in the long-haul traffic on the line. The shortline buys the right to provide the local service over the line and to work with the Class I railroad to develop and provide origin-to-destination service and assumes the financial responsibility to maintain the track and facilities. Such a bargain presents no more competitive concerns than when a railroad elects to sell “bridge-only” or “overhead” trackage rights to another carrier for a lower price than it would sell trackage rights that also included local service rights. There is simply a sale of more limited rights between a willing buyer and willing seller.

Accordingly, the Board’s concern over perceived competition issues, which seem to form the basis of the Board’s proposed requirements in this proceeding, is unfounded. Rather than raising competitive concerns, as suggested by the NPR,² transactions that contain interchange commitment do not diminish competition. The shippers on the line do not lose any competitive options after the transaction is consummated. They were served by one rail carrier before and by one rail carrier after the transaction. Thus, the suggestion that transactions that contain interchange commitments lessen competition is unsupported. Indeed, the class exemption under which most of the transactions involving interchange commitments have been approved is based on the conclusion that transactions that do not diminish competition should be exempted. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 817 (1985) (*Class Exemption*), review denied sub nom., *Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). The ICC held that “these transactions will not result in an abuse of market power,” because “[p]roposals under this class exemption generally will maintain the

² See, e.g., NPR at 6.

status quo and will not change the competitive situation.” *Id.* As such, transactions that contain interchange commitments are fully consistent with the class exemptions from the prior approval requirements of 49 U.S.C. §10901 and §10902.

II. The Development and Disclosure of Additional Information is Neither Necessary For the Proper Performance of the Functions of the Board nor Consistent with 49 U.S.C. § 10502

Based on the NPR, it does not appear that the information to be collected would aid parties in any meaningful way in evaluating individual transactions and the proposed blanket heightened disclosure requirement for all transactions that contain interchange commitments is not warranted. Further, the proposed rules are unnecessary because there are existing private sector and regulatory processes in place to any address issues with interchange commitments as they arise on a case-by-case basis.

The NPR does not explain how the proposed rules would meet the Board’s stated goal “to ensure that both the agency and other interested parties have sufficient information to judge whether the exemption process is appropriate for a transaction.”³ NPR at 5. The Board appears to be concerned that the procedures established in *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No. 1)(STB served May 29, 2008) could result in delay if additional information is not disclosed early in the exemption process. *See id.* at 5 (stating “because the notice of exemption process involves very short deadlines, the Board propose to require disclosure of information about the transaction at the time of the notice itself, rather than during any subsequent request to reject or revoke the exemption.”). The NPR does not explain, however, how the disclosed information would be evaluated or how it would be useful in determining if

³ Such a case-by-case evaluation of what transactions qualify for an exemption is the antithesis of a class exemption that “is designed to meet the need for expeditious handling of a large number of requests that are rarely opposed.” *Class Exemption*, at 811.

the exemption process is appropriate for a transaction. Nor does the NPR explain how potentially affected shippers would gain timely access to the additional information filed with the Board. It is also not clear how the information relates to the standard to revoke the class exemption under 49 U.S.C. § 10502(d) – whether regulation is necessary to carry out the transportation policy contained in 49 U.S.C. § 10101.

Rather than forcing railroads to disclose additional information of questionable utility up front in all transactions, the Board should continue to rely on the existing private sector and regulatory mechanisms to address issues with transactions containing interchange commitments on a case-by-case basis as they arise. In 1998, Class I and smaller railroads subscribed to a private-sector framework, known as the Rail Industry Agreement (“RIA”), to resolve inter-railroad disputes regarding the interpretation and use of interchange commitments. In 2004, the Rail Industry Working Group (“RIWG”) was formed with members from both Class I and smaller railroads to provide a forum for the discussion between larger and smaller railroads. The RIWG’s role was expressly incorporated into the RIA by an Amendment executed by the AAR and the American Shortline and Regional Railroad Association (“ASLRRA”). The RIWG, has in part, established a process under the RIA whereby a shortline railroad can request a waiver to a previously agreed to interchange commitment.⁴

Moreover, the Board’s existing processes enable all affected parties to be on notice of interchange commitments and gain access to the relevant agreements. The added disclosure requirements for public notice of proposed new interchange commitments adopted in 2008 allow shippers or other affected parties to obtain confidential, commercially sensitive contract information to evaluate the transaction when those parties deem it in their interest to do so. *See*

⁴ The AAR and the ASLRRA have also established a confidential non-binding mediation process available for disputes between parties involving interchange commitments. To date, there have been six instances where parties have voluntarily used this process.

Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1)(STB served May 29, 2008). Such procedures are consistent with Congressional directive to “minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required,” 49 U.S.C. § 10101(2), and “to reduce regulatory barriers to entry into and exit from the industry.” 49 U.S.C. § 10101(7). As the Board has noted, “Congress directed the [Board] to pursue exemptions aggressively, and to correct any problems arising as a result through its revocation authority.” *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (STB served Oct. 21, 2010)(citing H.R. Rep. No. 96-1430, at 105(1980)). Contrary to these principles, the new rules proposed in the NPR would require railroads to develop information solely for regulatory purposes to guard against speculative and unsupported anticompetitive concerns before affected parties can evaluate the transaction.

There is also no basis for the Board to conclude that there is a need for additional disclosure rules. As the Board notes in the NPR, there have been 10 notices or petitions for exemption involving interchange commitments filed at the Board since that decision, NPR at 4, and that the Board and interested parties have availed themselves of the information disclosed as required by those rules. *Id.* at 5. Notably, in the ten cited proceedings⁵ filed under the current disclosure regulations, no shipper opposed the transaction as anticompetitive, unsuitable for the exemption process, or not otherwise in the public interest.⁶ Instead, the only such challenges to transactions under the new rules have come from labor organizations. *See Adrian & Blissfield R.R.—Continuance in Control Exemption—Jackson & Lansing R.R.*, FD 35410 *et al.*(STB

⁵ See NPR at 4 & n. 17.

⁶ The only filing by a shipper in these proceedings was in support of the transaction. See letter of Padnos Iron & Metal Company in FD 35410 *et al.* (filed Feb. 10, 2011).

served Sept. 27, 2011)(Mulvey, dissenting).⁷ And though the Board notes that it rejected a notice of exemption in *Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry.*, FD 35370 (STB served Apr. 23, 2010)(Mulvey, commenting), it did so for reasons unrelated to the interchange commitment.

III. The NPR Does Not Adequately Consider the Possible Chilling Effects the Proposed Rules May Have on Transactions and Other Potential Consequences Such as Termination of Lessor Abandonment of Light Density Lines

Rather than meeting the Board’s second stated goal of encouraging transactions that are in the public interest, NPR at 5, the proposed rules would instead create the environment for a chilling effect on sale/lease transactions involving marginal rail lines. At a minimum, by requiring alternative valuations and multiple transaction structures, the proposed rules would make shortline spin-off transactions more expensive and less economically feasible. By suggesting heightened regulatory scrutiny for transactions, without defining how the disclosed information will be used in Board decision making, the proposed rules also add regulatory uncertainty to every transaction that contains an interchange commitment. This makes the future of such transactions more problematic.

More fundamentally, the proposed rules would place the filing carrier in an untenable position. The railroad filing a notice of exemption or petition for exemption would not likely know “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.” The NPR seems to mischaracterize the role interchange commitments

⁷ Contrary to any misimpression created by footnote 20 of the NPR, there were challenges to a single transaction in three interrelated dockets that were decided by the Board on September 27, 2011, rather than three separate transactions. See NPR at 5 & n.20.

generally play in these transactions. The interchange commitment is not a peripheral term of a contract that is ancillary to the sale or lease of the line. Often, it is the core element without which the transaction will not take place. Rather than a sale/lease of the line at higher price, the alternative to a transaction with an interchange transaction can be no transaction at all.⁸ The result would then be that the line would not be spun off or the lease would not be renewed (with any attendant disruptions of transferring operation of the line back to the Class I). Moreover, even if that information could be developed, it would require the seller/lessor railroad to share commercially sensitive information with the purchaser/lessee or require the purchaser/lessee to speculate on the valuation. The difficulties associated with such a task would discourage transactions.

Such filings could also provide an avenue for opponents to a transaction – for reasons other than competitive concerns – to seize upon the valuation of the interchange commitment as an object to challenge and generate litigation. The Board would then be placed in the position of judging whether the railroad has submitted the “right” estimates of alternative pricing mechanisms. The Board itself has recognized that market participants, not regulatory agencies, are in the best position to establish how the compensation for a transaction is structured. *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, EP 575, slip op. at 11 (STB served Oct. 30, 2007)(“As regulators, the Board must be very wary of the temptation to override the determination of reasonable compensation as negotiated by informed private parties.”). Such controversies are beyond the scope of determining

⁸ The AAR notes that different railroads approach pricing in transactions differently and individual railroads may approach each transaction differently based on the line in question and its negotiating partner. Indeed, the complex dynamism of market-based transactions counsel against the sort of blanket requirements proposed in the NPR.

whether transactions are appropriate for the exemption process and increased litigation on such matters would not further the Board's stated goal of "encouraging transactions that are in the public interest."

IV. The NPR Underestimates the Burden on Parties to Comply with the Proposed Rule Changes

Contrary to the conclusions in the NPR, the proposed rules would place significant burdens on railroads as they evaluate potential transactions that may be subject to Board licensing. The Board has estimated, without explanation, that a total of four parties will be affected by the proposed additional reporting requirements and that the additional time required by those parties will be no more than eight hours each. NPR at 7. Presumably those numbers reflect the Board's guess at the number of transactions with interchange commitments that will seek regulatory approval in a given year and the amount of time necessary to prepare regulatory filings. But that estimate is unrealistic because it does not take into account all of the efforts necessary to compile or develop the information, and that the filing small railroad⁹ would need to obtain information from the seller/lessor railroad and/or establish information that does not currently exist in order to evaluate how to structure potential transactions and comply with the proposed rule.

The Paperwork Reduction Act requires the Board to consider burdens beyond simply drafting the regulatory submissions to the agency. Under 5 C.F.R. § 1320.3(b), burden means,

the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency, including: (i) Reviewing instructions; (ii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and

⁹ Though the proposed rules would require the submission of "an estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line," NPR at 6, the Board's processes do not contemplate regulatory filings from that party. For this reason, the AAR's analysis of the burden of the proposed rules focuses on the burden to the filing purchaser/lessee railroad.

verifying information; (iii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information; (iv) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information; (v) Adjusting the existing ways to comply with any previously applicable instructions and requirements; (vi) Training personnel to be able to respond to a collection of information; (vii) Searching data sources; (viii) Completing and reviewing the collection of information; and (ix) Transmitting, or otherwise disclosing the information.

As such, the Board's estimate that each respondent would expend 8 hours each to comply with the proposed rules understates the efforts that would be needed to gather, develop, and review the information before submission to the agency.

The burdens associated with the proposed rules are also understated because the NPR would require the acquiring/lessee railroad to obtain commercially sensitive information regarding both valuation of the line and the shippers on the line from the selling/lessor railroad for submission to the Board for approval of new transactions. Some or all of the shipper information required by the NPR would be in the possession of the seller/lessor railroad. While such information is relevant to, and part of, negotiations regarding the line, compiling it in a form suitable submission to the Board will require coordination and additional efforts.¹⁰ Moreover, as explained above, the proposed rules would require the filing railroad to obtain information on valuation from the seller/lessor railroad that likely does not currently exist. If any party has that information, it would be the selling/lessor carrier that would have considered the possible price of the line without an interchange commitment. Further, such requirements would call on the filing carrier to engage in speculation for solely regulatory purposes. This runs directly counter to the market-based regulation embodied in the Staggers and ICC Termination Acts.

¹⁰ The submission of commercially sensitive information under seal further complicates the exemption process, as well. In order to evaluate a transaction, shippers may be required to retain outside counsel and experts to avoid disclosure of such information among competitors.

Conclusion

The AAR submits that the proposed rules are unnecessary and would have generally negative consequences for railroads, railroad customers, and the general public. The proposed rules would have a chilling effect on large railroad sale/lease transactions with small railroads and create the potential for leases not being renewed and increased line abandonments. As such, the AAR respectfully asks the Board to not adopt the proposed rules and discontinue this proceeding.

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