

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 714

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**INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING
INTERCHANGE COMMITMENTS**

**OPENING COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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OPENING COMMENTS

The National Industrial Transportation League (“NITL”) hereby submits these Opening Comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking (“NPRM”) issued by the Surface Transportation Board (“Board” or “STB”) on November 1, 2012.¹ In the NPRM, the Board proposed to expand disclosure requirements related to transactions that would create new paper barriers. The League commends the Board for initiating this proceeding on the important subject of paper barriers. As described herein, the NITL strongly supports many of the rule changes proposed in the NPRM. However, while the League believes that the Board’s proposals are a good first step in making more accessible information regarding paper barriers, it also believes that the Board must expand its proposals to: (1) ensure that anti-competitive paper barriers that are prime facie unreasonable are not able to become effective in the first place; and (2) require public disclosure of all pre-existing paper barriers which currently are unknown both to the Board and the shipping public. Expanding the proposals in this respect would be consistent with the Board’s responsibilities to ensure that rail line sales or leases that establish paper barriers are consistent with the public interest.

¹ The Board modified the procedural schedule in a decision issued on November 15, 2012 to extend the due date for opening and reply comments.

I. IDENTITY AND INTEREST OF THE NITL.

The NITL is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The NITL was founded in 1907 and currently has over 500 company members. These members range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the NITL's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the NITL. Many members of the NITL are engaged in transportation of goods via rail subject to the jurisdiction of the Board and therefore have a strong interest in the subject of paper barriers.

II. NITL COMMENDS THE BOARD FOR TAKING A PRO-ACTIVE APPROACH TO INCREASING DISCLOSURE OF THE IMPACT OF PAPER BARRIERS.

In the NPRM, the Board has proposed to revise its regulations at 49 C.F.R. §§ 1121.3, 1150.33, 1150.43, and 1180.4 in order to broaden the disclosure requirements applicable to newly established paper barriers.² The NPRM reflects a pro-active approach by the Board to assess paper barriers and the potential competitive concerns raised by such arrangements.

The NITL applauds the Board's willingness to take a more active role in the evaluation of paper barriers, which approach is entirely consistent with the Board's statutory duties under the National Transportation Policy ("NTP"). Paper barriers tend to restrict, limit, or even bar the ability of a rail line purchaser or lessee to offer all possible rail routings to its shipper customers. For this reason, an individual paper barrier, depending on its specific provisions, can transgress several elements of the NTP, including:

² The Board used the term "interchange commitment" in its NPRM, but the NITL will continue to use the term "paper barrier" in order to encompass the wide range of possible restrictions that can exist.

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- (9) to encourage honest and efficient management of railroads; and
- (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

49 U.S.C. § 10101. Furthermore, greater scrutiny of paper barriers is appropriate to ensure that the exemption process of 49 U.S.C. § 10502, which is implicated in many rail line sales transactions, is reserved for those transactions that truly warrant exemption from regulation.

Paper barriers that restrict, limit, or bar certain rail routing options, can cause transportation inefficiencies and increased costs which inevitably affect shippers, communities, and the American economy at large. For U.S. businesses operating in a competitive national or global marketplace, such impacts are obviously harmful when compared to the companies' competitors who do not face such restrictions in their rail transportation options.

The Board is the gatekeeper for proposed rail line sales and leases that would create new paper barriers. See, e.g., 49 U.S.C. §§ 10901-10902. As such, the Board should use its statutory authority to ensure that newly proposed transactions do not create paper barriers that contravene the NTP or are inappropriate for class exemption. Furthermore, many paper barriers are as yet undisclosed because they predate the Board's initial disclosure requirements, which were created just four years ago. Disclosure of Rail Interchange Commitments, STB Ex Parte No. 575 (Sub-No. 1) (served May 29, 2008). While shippers have the right to challenge paper barriers, shippers obviously cannot challenge a paper barrier if the existence of that paper barrier is

unknown. For this reason, the NITL is also requesting that the Board require disclosure of all pre-existing paper barriers.

III. NITL SUPPORTS THE PROPOSED PAPER BARRIER DISCLOSURE REQUIREMENTS BUT SEEKS CLARIFICATION OF CERTAIN PROPOSALS.

Currently, the Board's rules require a minimum of disclosure from applicants filing a Notice of Exemption or Petition for Exemption for a rail line lease or sale where such lease or sale would impose a new paper barrier. Specifically, the current rules require that the applicant provide public notice of the existence of the proposed new paper barrier in the Notice of Exemption or Petition for Exemption, and also file the paper barrier agreement under seal with the Board. See, e.g., 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4). Additionally, the current rules provide a process by which a "shipper or other affected party" may be granted access to the paper barrier agreement. See id. The current rules only apply to newly-filed transactions after the 2008 effective date of the rules.

The rules proposed in the NPRM also would apply only on a going-forward basis, but they would significantly expand the information required to be disclosed. The Board proposes that the following information be included in a Notice of Exemption or Petition for Exemption that involves a rail line sale or lease and a proposed paper barrier:

- (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 (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 (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.

NPRM at 5-6. As shown above, items (2), (5), (6), and (7) would be submitted under seal. The NITL supports these new disclosure requirements, but seeks clarification as described below.

A. The new disclosure requirements are intended to facilitate evaluation of proposed paper barriers.

The Board states that the additional disclosures proposed in the NPRM “will aid the Board in its review of petitions for and notices of exemption.” NPRM at 6. The NITL strongly supports the Board’s goal of reviewing proposed paper barriers for possible “competitive issues” (NPRM at 6) and the resulting impact on the public interest. The publicly-available disclosures proposed in the NPRM would enable the Board, as well as interested shippers, communities, and others, to obtain certain additional information that would assist them in determining the effect of the proposed paper barrier.

The new disclosure requirements would also insure that affected shippers are notified of a proposed transaction that creates a paper barrier prior to the filing of a Notice of Exemption or Petition for Exemption. See NPRM at 5-6 (requiring the filing party to provide “certification” that it has notified shippers who have used the line in the past two years). This prior notice is critical to enabling affected shippers to participate in the relevant proceeding at the Board. Without affirmative prior notice from the filing party, affected shippers would be deemed to have “constructive notice” of the filing party’s proposed transaction simply due to the fact that the Notice of Exemption or Petition for Exemption was posted on the Board’s website and/or included in the Federal Register. For business executives engaged in the day-to-day operations

of their company, it is often impractical to search the Board's website and/or Federal Register every day to determine if a paper barrier has been proposed for a rail line serving the business facility. In short, the NITL strongly supports the actual prior notice requirement included in the NPRM.

B. The NITL supports greater Board scrutiny of proposed paper barriers.

The Board further stated that its goal underlying the proposed rules is to ensure 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." See NPRM at 6. The NITL strongly supports having the Board scrutinize more closely the potential competitive impact of each new paper barrier prior to its effectiveness rather than after a transaction has been approved, especially to the extent that the Board is willing and able to act on the information disclosed to protect the public interest.

Review of proposed paper barriers prior to their effectiveness is desirable because of the burden placed on parties seeking to revoke a previously-effective exemption. See, e.g., 49 C.F.R. § 1121.4(f) ("Petitions to revoke an exemption or the notice of exemption may be filed at any time. The person seeking revocation has the burden of showing that the revocation criteria of 49 U.S.C. 10502(d) have been met."). Moreover, it is much more difficult to unravel an approved and implemented business transaction than it is to prevent a potentially unreasonable, anti-competitive transaction from occurring in the first place.

The NITL understands that certain interchange commitments or similar contractual arrangements in a lease or sale might be defensible for a limited period of time if they facilitate preservation of marginally viable rail lines that would otherwise be abandoned. This facilitation can include a no cost sale or lease to the purchaser or lessee railroad, as well as the lower

operating costs of the purchaser/lessee railroad. See, e.g., Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Ex Parte No. 575, slip op. at 3-4 (served Oct. 30, 2007). Nevertheless, the NITL believes that permanent and/or severely restrictive paper barriers, as exemplified in the characteristics listed in Section IV.A, should be presumed unreasonable and contrary to the public interest due to their deleterious effects on routing options, economic efficiency, and the competitiveness of the American economy.

The Board recently stated that it “may reject a notice sua sponte, and could reject a notice of exemption without any opposition from shippers, government agencies, or environmental groups, so long as doing so would be in the public interest.” Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. 35559, slip op. at 6 (served May 14, 2012). The NITL urges the Board to use this authority to review paper barriers to ensure that the public interest is not harmed.

C. The NITL seeks clarification of certain disclosure requirements and requests the Board to require a disclosing party to verify and substantiate data provided in certain disclosures.

Although the League is strongly in favor of the proposed disclosure requirements, it believes that clarification of certain requirements is needed. In support of the NPRM, the Board stated that “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.” NPRM at 6. The NITL is unclear regarding the exact meaning of this statement, and requests clarification from the Board. Would “objecting to a petition for exemption” or “filing a petition to revoke” automatically entitle a party to access the disclosures filed under seal, without having to file a Motion for Access to Confidential Documents pursuant to 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h),

and 1180.4(g)(4)? What about a party objecting to a Notice of Exemption; would such a party also have “access to this relevant information up front”? Given the tight deadlines in exemption proceedings, the need for access to confidential information “up front” is particularly important.

Furthermore, NITL believes that the Board should clarify certain disclosures by requiring a verification and supporting data for the information submitted to the Board. Specifically, items (5), (6), and (7) on page 6 of the NPRM would require disclosure under seal of a projected revenue figure by the purchasing/leasing railroad; an estimated difference in the sale and lease price with and without the paper barrier; as well as an estimate of the discounted annual value of the paper barrier to the selling or leasing carrier. As the NPRM is currently drafted, there is no verification process in place for any of these figures submitted to the Board under seal. Without verification and/or substantiation of these figures, they may be of dubious value in any evaluation of a proposed or existing paper barrier. For example, a filing party that wanted to insulate its proposed paper barrier from challenge could simply assert that the price of the sale or lease without the paper barrier would be dramatically higher than with the paper barrier. See item (6) at NPRM p. 6. Similarly, the filing party could assert a very high value of the paper barrier to the incumbent (or Class I) railroad leasing or selling the line. See item (7) at NPRM p. 6.

Due to the lack of requirement for substantiation in the NPRM, the Board should require that the filing party has the burden of proof as to the disclosure data that it submits, and that the filing party should be required to provide verifiable data that supports the asserted figures. Even when verification data accompanies the figures asserted by the filing party, the NITL believes the Board should require that the figures provided by the filing party will be understood as assertions until proven by the filing party and affirmed by the Board in a contested proceeding.

IV. THE NPRM IS A GOOD FIRST STEP BUT NITL BELIEVES THAT ADDITIONAL REQUIREMENTS AND STANDARDS ARE NEEDED TO PROTECT THE PUBLIC INTEREST.

A. The Board should establish review standards to accompany the disclosure requirements proposed in the NPRM.

While the NITL believes that the disclosure requirements proposed in the NPRM represent a positive development in addressing the competitive concerns raised by paper barriers, further steps should be taken to ensure that paper barriers that are *prime facie* unreasonable are prevented from ever coming into effect. The NITL agrees that the primary focus of the Board's energies and resources should be focused toward future transactions including paper barriers. To this end, the Board should establish substantive standards for newly-proposed paper barriers to accompany the disclosures proposed in the NPRM.

In particular, the League believes that additional requirements should attach to a proposed transaction involving a paper barrier that meets any one of the following four characteristics:

- unlimited duration;
- an outright ban on interchange of rail service with an alternative railroad for an extended/unreasonable period of time;
- an unreasonable financial penalty for an extended/unreasonable period of time; or
- any other characteristic that would have a significant risk of anti-competitive effect.

Paper barriers with any one of these four characteristics would be especially anti-competitive and damaging to the provision of efficient and competitive rail transportation services. As such additional requirements should apply, as described below.

B. Additional standards are necessary to promote the National Transportation Policy and the public interest.

For a proposed transaction involving a paper barrier that meets any one of the four characteristics listed above in Section IV.A, the following additional requirements should apply:

1. The Notice of Exemption process should not be available for such proposed transactions, meaning that the filing party must file a full Application or use the Petition for Exemption process;
2. During the Application or Petition for Exemption process, there should be a rebuttable presumption that the paper barrier is contrary to the public interest; and
3. The Board should evaluate the impact of the proposed paper barrier on the public interest.

The substantive standards described above are necessary for the proper evaluation of newly-proposed paper barriers that appear unreasonable on their face. The 30-day time frame provided in the Notice of Exemption process simply does not allow sufficient time for an interested party to (1) determine if it is affected by the proposed transaction; (2) evaluate the proposed paper barrier and the disclosures of the filing party; (3) find transportation counsel; and (4) draft an appropriate pleading for filing at the Board.³ In fact, the window of possible action for an interested party is actually only 23 days, because petitions to stay the effectiveness of an exemption must be filed 7 days before the exemption becomes effective. See, e.g., 49 CFR § 1150.32(c).

Some parties may contend that mandatory use of the Petition for Exemption (or full Application) process is unnecessary because an interested party can always file a Petition to Revoke the exemption at any time. See, e.g., 49 CFR § 1121.4(f). However, the burden of proof is on a party seeking revocation of a previously-filed exemption. See id. It would be manifestly inequitable to require a party challenging a paper barrier to have the burden of proof simply because the party could not completely evaluate the proposed transaction and respond to the Board in a short 23-day window. Cf. Winamac Southern Railway Company – Trackage Rights Exemption – A&R Line, Inc., STB Docket No. 35208, slip op. at 3 (served Jan. 9, 2009) (the Notice of Exemption process does not enable the Board to “fully consider” an issue).

³ Likewise, the 30-day period is insufficient for the Board to properly evaluate a proposed paper barrier.

By definition, a paper barrier contravenes numerous elements of the NTP. See 49 U.S.C. §§ 10101(1), (4), (5), (6), (9), and (12). This concern is even more pronounced for a paper barrier that has one of the four characteristics listed above in Section IV.A. Therefore, a transaction that would impose a new paper barrier with any one of these characteristics should be considered “non-routine” and inappropriate for the Notice of Exemption process. See, e.g., Winamac, slip op. at 2.

Barring use of the Notice of Exemption process is warranted for another reason. The Board typically allows the Director of the Office of Proceedings to determine if the Notice of Exemption process is appropriate for a proposed transaction. 49 C.F.R. § 1011.7(a)(2)(x)(A). The Director’s decision on this issue generally depends entirely on whether other parties have filed protests to the proposed transaction. See, e.g. Saratoga, slip op. at 5. (“The Board’s class exemption procedures are not intended for use in matters that attract substantial controversy and local interest.”). As noted above, however, it is unreasonable to expect interested parties to be able to develop and file opposition to a proposed transaction in the 23-day period required under the Notice of Exemption process. Moreover, such parties could not meaningfully comment on the proposed transaction without having access to the specific terms of the proposed paper barrier – but these terms are filed under seal at the Board. Therefore, when a proposed paper barrier has one of the four characteristics listed in Section IV.A, the Notice of Exemption process should be unavailable.

At a minimum, use of the Petition for Exemption process would also appropriately put the burden of proof on the filing party and enable the Board to make a comprehensive review of the impacts of the proposed paper barrier on the NTP and the public interest. The NITL is not asserting that every paper barrier is anti-competitive, however, the NITL does believe that

increased scrutiny of those paper barriers that contain one of the four characteristics listed in Section IV.A is necessary and should be required before they are allowed to take effect.

C. The Board should require public disclosure of all existing paper barriers.

Shippers have the right to challenge existing paper barriers at the Board. See, e.g., Review of Rail Access, slip op. at 15 (“shippers may, on a case-by-case basis, attempt to show that a particular interchange commitment is causing, or would cause, a violation of the Interstate Commerce Act”). The Board has the authority to void a contractual paper barrier. See, e.g., Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42104, slip op. at 7 (served June 26, 2009) (“UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute.”); Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 3-4 (served Jan. 7, 2000) (“contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy”).

Nevertheless, the ability of shippers and other interested parties to challenge existing paper barriers is, in many cases, foreclosed by the simple fact that pre-2008 paper barriers remain undisclosed. It is impossible to know how many shippers and communities are affected by paper barriers because the simple existence of the paper barriers remains hidden. See, e.g., statements of Commissioner Francis P. Mulvey, public hearing in Competition in the Railroad Industry, STB Ex Parte No. 705 (June 22, 2011), Tr. at p. 435 (“I know in the past we’ve asked about how many there were out there, and we were told nobody knew”) and Tr. at p. 436 (“we’ve been told that nobody knew how many paper barriers were out there, and how extensive

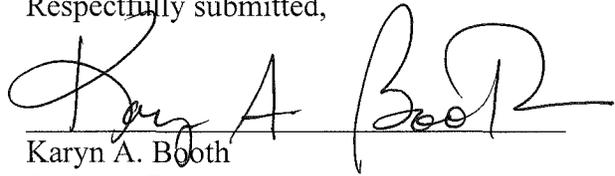
they were”). Although the Board allows shippers to challenge paper barriers, no challenge is possible if the shipper does not even know that a paper barrier exists.

The NITL is not in favor of a wholesale unraveling of settled, past commercial transactions but believes that the Board should simply require public disclosure of existing paper barriers. The NITL does not seek disclosure of the terms of existing paper barriers, but believes that a simple disclosure of the existence of paper barriers would benefit the public interest. Not only does a shipper need to know that a paper barrier exists before a challenge is possible, but knowledge of the mere existence of a paper barrier is relevant in other ways, too. For example, when a business is considering buying a rail-served facility, due diligence requires proper valuation of that facility. The existence or not of a paper barrier would certainly affect the valuation process, but ignorance as to pre-2008 paper barriers means that businesses are unable to engage in a proper valuation, thus leading to economically inefficient outcomes. Proper valuation is not possible without disclosure of all existing paper barriers.

V. CONCLUSION.

The NITL thanks the Board for the opportunity to provide these Opening Comments. The NITL respectfully requests that the Board (1) adopt the proposed rules, with the clarifications described herein, and (2) consider the additional disclosure and procedural requirements proposed by the NITL.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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