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March 28, 2006

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

MAR 28 2006

Part of
Public Record

Re: Ex Parte No. 575, Review of Rail Access and
Competition Issues – Renewed Petition of the
Western Coal Traffic League

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Reply Comments of the Western Coal Traffic League. We have also enclosed an electronic copy of this filing in WordPerfect format.

An additional paper copy of the Reply Comments also is enclosed. Kindly indicate receipt of the filing by time-stamping this extra copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

Andrew B. Kolesar III
An Attorney for the Western
Coal Traffic League

Enclosures

MAR 28 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Part of
Public Record



REVIEW OF RAIL ACCESS AND)	
COMPETITION ISSUES – RENEWED)	
PETITION OF THE WESTERN COAL)	Ex Parte No. 575
TRAFFIC LEAGUE)	

**REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

OF COUNSEL:

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Dated: March 28, 2006

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Traffic League

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REVIEW OF RAIL ACCESS AND)	
COMPETITION ISSUES – RENEWED)	Ex Parte No. 575
PETITION OF THE WESTERN COAL)	
TRAFFIC LEAGUE)	
)	

**REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

The Western Coal Traffic League (“WCTL”), by its undersigned attorneys, hereby files these reply comments in accordance with the schedule established by the Board in its decision served February 1, 2006.

In response to the Board’s February 1, 2006 decision, four parties filed comments that were opposed to the relief that WCTL sought in its 2005 Renewed Petition for Rulemaking. Those parties included the Association of American Railroads (“AAR”), the American Short Line and Regional Railroad Association (“ASLRRA”), the Rail Industry Working Group (“RIWG”), and Union Pacific Railroad Company (“UP”) (collectively, the “Opposing Parties”).¹ The Opposing Parties’ comments are more notable for what they omit, rather than for what they include, and offer little in the way of

¹ A fifth party, the United Transportation Union (“UTU”), filed a one-page statement expressing a desire to participate in the proceeding and cautioning the Board that “any revision of interchange and routing arrangements would likely have a very profound and extremely adverse effect upon certain railroad employees.”

a substantive response to the Board's six specific questions regarding paper barriers. Instead, the Opposing Parties' comments include numerous pleas to maintain the balance struck in the Railroad Industry Agreement ("RIA"), claims that any action by the Board on this matter would destroy the process through which class I railroads rationalize their systems, and misplaced arguments that WCTL seeks to introduce "artificial" or "unsustainable" competition.

None of these comments provides any basis to refrain from engaging in the rulemaking proceeding that WCTL seeks. Instead, a review of the comments of the Opposing Parties demonstrates that no party takes serious issue with the Board's statutory authority to address pre-existing paper barriers and that the scope of the paper barrier problem is extensive. The comments also confirm that an inconsistency exists between the Opposing Parties' dire warnings regarding abandonment and the value associated with the traffic that paper barriers are designed to protect. Finally, the comments also fail to provide any basis for finding that the RIA constitutes an effective means of addressing shipper concerns regarding paper barriers.

A. No Opposing Party Demonstrates that the Board Lacks Statutory Authority to Address Pre-Existing Paper Barriers

No party opposing the rulemaking that WCTL seeks regarding unreasonable paper barriers endeavors to demonstrate that the Board lacks statutory authority to address pre-existing paper barriers. In fact, only one of the opposing parties (i.e., the AAR) addresses the question of the Board's statutory authority to address pre-existing paper

barriers, and that reference is by its very terms, inconclusive. Specifically, the AAR states simply that: “it is uncertain, absent an express reservation of authority in its approval orders, whether the Board can reopen a consummated line sale or lease transaction and modify a material term of the underlying arms-length agreement.” AAR Comments at 12 (emphasis added). The AAR adds to its claim of uncertainty that “the Board itself has consistently recognized that retroactively adjusting the terms of consummated transactions can undermine broader notions of commercial certainty and fairness; and it has indicated that, in considering requests for post-transaction relief, it is guided by concerns that it not impose remedies which are disproportionate and inconsistent with those notions.” Id. (citing Union Pacific/Southern Pacific Merger (Houston/Gulf Coast Oversight), 3 S.T.B. 1030, 1032-33).

It is ironic that the AAR would rely upon language from the Board’s UP/SP Merger proceeding after previously insisting, in response to WCTL’s 2005 Renewed Petition, that Board principles developed in the context of Class I mergers have no applicability to the question of paper barriers. See Reply of the Association of American Railroads to Renewed Petition for Rulemaking, dated May 2, 2005, at 9-10 (“[T]he Board’s requirements cited by WCTL have application only to mergers of large Class I railroads.”). Notably, the principle cited by the AAR in its 2006 comments was expressly labeled by the Board as a “principle of transportation merger law.” 3 S.T.B. at 1032. Consequently, the AAR’s objection to the statutory authority of the Board should be

discounted on the basis of the AAR's own prior criticisms. In any event, even if one were to apply the principle quoted by the AAR to the instant matter, the relief that WCTL ultimately seeks is by no means "disproportionate," but instead, is narrowly focused upon preventing the continuation of a specific unreasonable practice (i.e., precluding the continued enforcement of an unreasonable paper barrier with respect to the traffic of an impacted shipper).

Beyond the AAR's claim of "uncertainty" regarding the Board's statutory authority, the only other Opposing Party to mention the inquiry is UP, but this reference consists merely of the statement that UP will not address the question. In particular, UP's comments consist of the statement of Warren C. Wilson, who indicates that he is not a lawyer, and therefore "cannot address whether the Board has the legal authority to alter interchange commitments in shortline transactions that were previously authorized and implemented." UP Comments at 5. UP's decision to refrain from submitting a legal response on this matter and leaving it to Mr. Wilson to acknowledge his inability to address the question suggests that UP had no legitimate basis on which to take issue with the Board's statutory authority. Finally, neither the RIWG nor the ASLRRA addresses this inquiry.

WCTL submits that the only reasonable conclusion to draw from this combination of equivocation and silence is that the Opposing Parties recognize that the Board possesses sufficient statutory authority to address pre-existing paper barriers.

B. The Comments of the Opposing Parties Confirm the Broad Scope of the Paper Barrier Problem

In its February 1, 2006 Decision, the Board requested that parties identify and describe existing paper barriers “so that we can determine the extent of the problem alleged by WCTL.” Decision at 4. Although rail carriers are the parties with the ability to provide the most complete response to the Board’s inquiry, the AAR was generally reluctant to provide specific information to the Board regarding the nature of paper barriers:

Most short line transaction arrangements are covered by confidentiality agreements, and the AAR’s members are reluctant to discuss their terms with other railroads in the context of industry comments. The arrangements are negotiated one deal at a time, and no industry-wide general statement can be made. Furthermore, the AAR’s members strongly prefer not to disclose their arrangements or negotiating positions to potential buyers or in a public forum which includes competitors. The Board has in its possession many of these commitments in confidential filings that have been made over the years in the actual proceedings under protective orders, and may review those confidential contractual “paper barriers.”

AAR Comments at 13 (emphasis added).

Nevertheless, when read as a whole, the comments of the Opposing Parties confirm that the existence of paper barriers is widespread. See, e.g., ASLRRRA Comments at 1 (“ASLRRRA represents approximately 425 class II and class III railroads, most of whom are affected in a variety of ways by paper barriers.”); UP Comments at 5 (“[I]n most of our shortline leases, the shortline pays nothing to use our assets if it interchanges

most of the traffic generated by the leased lines to UP.”) (emphasis in original); id. at 10 (listing shortlines subject to UP paper barriers); AAR Comments at 13 (referring to “hundreds” of transactions). As such, it is evident from the comments submitted in response to the February 1, 2006 Decision that the paper barrier problem is extremely broad in scope.

C. The Incongruity in the Opposing Parties’ “Abandonment” Warning

In its comments, WCTL explained that an incongruity exists in the various arguments raised by parties seeking to support the status quo with respect to paper barriers. Specifically, WCTL suggested that Class I carriers that are sufficiently concerned with the loss of profits associated with a rail line to warrant the imposition of a paper barrier would not be likely to abandon that line (and with it, the associated profits) if a short line carrier were not willing to acquire the line. See WCTL Comments at 19 & n.5 (“It stands to reason, of course, that if a Class I carrier seeks to impose a paper barrier limitation on the transfer of its line, it must anticipate that there remains at least some profit to be derived from the traffic on the line.”).

The comments of the Opposing Parties once again reflect this dichotomy in railroad reasoning; i.e., that on the one hand, the lines in question are so financially precarious that any temporal limitation on the use of a paper barrier would result in widespread rail line abandonment, and on the other hand, that the lines are so valuable that the divesting carriers’ profit streams must be protected in perpetuity. In support of

the first view, the AAR comments that if the Board were to grant the relief sought by WCTL, “[i]t would become more difficult to keep marginal rail lines in operation . . . [A]n increasing portion of the rail network would likely be lost rather than transferred to short line carriers for continued operations and that would not serve the public interest.” AAR Comments at 7.

Quite to the contrary, UP’s Mr. Wilson suggests that the preservation of the profit streams from branch lines is so important that if the Board were to grant the relief sought by WCTL, UP would decline to lease valuable portions of its system, instead limiting its leases to lines without meaningful traffic:

I can guarantee that, were the Board to start voiding interchange commitments in consummated shortline deals, we would terminate most of our existing shortline leases as quickly as possible. I can also guarantee that we would do very few shortline deals in the future. They would essentially be limited to transactions where the shortline was willing and able to compensate us up front for the net present value of the traffic that would be put at risk, or transactions where there was no traffic at risk.

Id. at 7.

Consistent with WCTL’s statements in its own comments, WCTL anticipates that UP’s statements in this regard are more likely to be accurate than those of the AAR. Paper barriers exist because Class I carriers view their branch lines as valuable, not as worthless. The motivation of a Class I carrier for entering into a lease transaction with a short line carrier is to derive an entirely private benefit; namely, a reduction of the

costs of operating a branch line coupled with the preservation of the profit stream associated with all of the traffic on that line. It is entirely reasonable for the Board to place temporal (or other) limitations on the ability of Class I carriers to generate and/or preserve this exclusively private benefit.

D. The RIA is an Inadequate Constraint on Railroad Practices

Nothing in the comments of the Opposing Parties alters the fact that the RIA is an inadequate means of protecting captive shippers from the impact of unreasonable paper barriers. Although the comments reveal that the RIA has been amended and that interpretations have been provided regarding the first element of the definition of “new traffic,” those modifications do not address the fundamental flaws in the RIA that WCTL has identified. Most notably, the RIA continues to lack any means of enforcement by shippers, instead leaving the rail carriers themselves with the authority to determine whether they have acted unreasonably.

The frequently repeated fact that there have been relatively few disputes between large and small carriers under the RIA (see, e.g., RIWG Comments at 4) provides little basis for finding that the RIA is an effective solution to the paper barrier problem. To the contrary, this forced harmony between large and small carriers merely confirms WCTL’s argument that short line carriers cannot be relied upon as effective surrogates for the interests of the shipping community.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its prior pleadings in this proceeding, WCTL respectfully requests that the Board institute a rulemaking proceeding to allow relief from the continuing enforcement of unreasonable paper barriers.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

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