UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

PUBLIC HEARING

REVIEW OF RAIL ACCESS AND COMPETITION ISSUES -- RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE

EX PARTE 575

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THURSDAY, JULY 27, 2006

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The Public Hearing convened in Hearing Suite 760, 1925 K Street, N.W., Washington, D.C. 20423-0001, pursuant to notice at 10:00 a.m., Chairman Douglas Buttrey presiding.

SURFACE TRANSPORTATION MEMBERS PRESENT:

DOUGLAS BUTTREY Chairman
FRANCIS MULVEY Vice Chairman

PANELISTS:

PANEL I

DAVID LAFFERE	WESTERN COAL TRAFFIC LEAGUE
ANDREW B. KOLESAR III	WESTERN COAL TRAFFIC LEAGUE
MICHAEL E. GRISSO	ALLIANCE FOR RAIL COMPETITION
THOMAS E. SCHICK	AMERICAN Chemistry COUNCIL
MICHAEL F. McBRIDE	EDISON ELECTRIC INSTITUTE
ANDREW P. GOLDSTEIN	NATIONAL GRAIN AND FEED ASS'N

PANEL II

LOUIS P. WARCHOT	ASSOCIATION OF AMERICAN RAILROADS
KEITH T. BORMAN	AMERICAN SHORT LINE AND R.R.

	ASS'N
J. REILLY McCARREN	RAILROAD INDUSTRY WORKING GROUP
JOHN T. GRAY	UNION PACIFIC RAILROAD COMPANY
	PANEL III
SANDRA BROWN	AMEREN ENERGY FUELS AND SERVICES CO.
STEVE SHARP	ARKANSAS ELECTRIC COOPERATIVE CORP.
JEFF BAKER	DOW CHEMICAL CO.
MIKE MUNRO	DOW CHEMICAL CO.
JEFFREY G. HERNDON	ENTERGY SERVICES AND ENTERGY ARKANSAS, INC.
	PANEL IV
ROGER BELL	COLUMBUS & GREENVILLE R. COMPANY
CHARLES N. MARSHALL	GENESEE & WYOMING, INC., AND FARMRAIL SYSTEM, INC.
ROBERT DINGMAN	OIL CREEK & TITUSVILLE LINES, INC.
WAYNE A. MICHEL	READING BLUE MOUNTAIN & NORTHERN R. CO.
Ed McKechie	WATCO COMPANIES, INC.
LARRY PARSONS	WHEELING & LAKE ERIE RAILWAY COMPANY

I-N-D-E-X

P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRMAN BUTTREY: We've just gotten word from our security folks downstairs that there is a fairly considerable number of people who are still trying to get it, probably the people who haven't maybe been here in a while and are not familiar with our new security procedures.

So, we will hold off on starting the hearing until we are sure that all of those people have had an opportunity to get up here.

We are going to retire and make a dramatic entrance later.

(Laughter.)

Thank you.

VICE CHAIRMAN MULVEY: About five or ten minutes, right?

CHAIRMAN BUTTREY: Yes, about ten minutes or so.

(Whereupon, the above-entitled matter went off the record at 10:03 a.m. and went back on the record at 10:10 a.m.)

VICE CHAIRMAN MULVEY: Please be seated and come to order.

CHAIRMAN BUTTREY: Good morning.

Let’s call this hearing to order and welcome everyone here today for the Surface Transportation Boards Public Hearing on paper barriers, in the proceeding entitled STB Ex Parte Number 575.

I’m pleased that today’s hearing is being simultaneously video web cast and is available for viewing through the Board’s website.

I’d like to welcome all those who are tuned in and are watching over the Internet, in addition to those who are here in person.

Vice Chairman Mulvey and I are aware of concerns that have been raised about so-called paper barriers. The Western Coal Traffic League has filed a renewed petition requesting that the Board adopt rules to limit the extent to which agreements for the sale or lease of railroad lines, by larger railroads to existing or newly created short-line railroads may contain paper barriers that restrict the incentive or the ability of the purchaser or tenant to interchange traffic with connecting carriers that can compete with the seller or main line carrier.

The Board has received written comments from the interested parties in response to the petition and the Board is holding this public hearing to further explore this matter.

With that background, let's turn to today's hearing. We have a number of interested parties that will testify. Some of the questions that may be raised concern out statutory authority to address pre-existing paper barriers, the short and long term economic effects of paper barriers, the specific proposals for action from those opposed to paper barriers, and other matters discussed in our notice announcing the public hearing.

In particular, there is a threshold issue that we would like the parties to address. There has been discussion about anti-trust immunity attaching to these transactions resulting from Board approval. The vast majority of these transactions, however, appear to have been approved under 49 USC 10901, and more recently 49 USC 10902, enacted by ICCTA, or have been exempted from those provisions. But under our statute, federal anti-trust immunity is specifically conferred only on transactions approved under or exempted from the provisions of 49 USC 11321 through 11328, thus participants should address whether interchange restrictions created by short-line spinoffs, under Sections 10901 and 10902, are subject to federal anti-trust law and parties are able to pursue relief in Court under those laws.

The Board, of course, must maintain an open mind about all these issues until all the testimony, both oral and written, has been given full consideration.

I plan to proceed straight through the witness list today, in order, until all speakers have been heard. I do not anticipate, at this point, the need to provide a break for lunch.

I will now turn to Vice Chairman Mulvey for his opening statement.

Vice Chairman?

VICE CHAIRMAN MULVEY: I thank you

Chairman Buttrey.

Good morning, and let me add my welcome to our Panelists and those attending the hearing today, and those watching on the Internet.

The Board has been petitioned to address the concerns of various shippers and short-line railroads with regard to paper barriers. Some shippers have argued that paper barriers seemed primarily designed to limit competition and frustrate the promise of deregulation. Many railroads, on the other hand, claim that paper barriers are necessary, indeed vital, to make it possible for Class 1 railroads to sell or at least attract the short-lines.

I am most interested in hearing from the panelists about their experiences with paper barriers, the economic justifications for their existence, and any result in anti-competitive effects. I am particularly interested in views as to why paper barriers need to be perpetual in nature, rather than time-limited.

I believe this hearing is an important step in exploring the ways in which the Board can be helpful in this area, particularly in deciding whether or not to open a rulemaking on this subject.

Thank you, Chairman Buttrey.

CHAIRMAN BUTTREY: Thank you, sir.

We'll now call the first panel, identified as Panel I in the notice of the hearing. Speaking will be representatives of the Western Coal Traffic League, Alliance for Rail Competition, American Chemistry Council, Edison Electric Institute, and the National Grain and Feed Association.

Our process today will be that for each panel. We will first hear the testimony of all witnesses on the panel. I'd like to remind all witnesses that we have read the testimony that has been submitted; therefore, each witness should summarize their presentations and emphasize the main points they'd like to make, so as to stay within the time allotted.

Following the testimony, we will turn to questions with myself and Vice Chairman Mulvey alternating questions and generally limiting ourselves to five minutes a piece.

I would appreciate if each witness would identify himself or herself at the beginning of their testimony.

And let's begin now with the Western Coal Traffic League.

Thank you.

PANEL I

MR. LAFFERE: Good morning, Chairman Buttrey and Vice Chairman Mulvey.

My name is David Laffere; I'm the Manager of Fuels for Kansas City Power Light and the current President of the Western Coal Traffic League.

CHAIRMAN BUTTREY: Is your microphone on?

MR. LAFFERE: I think so.

WCTL is a voluntary association of shippers whose members annually purchase and transport in excess of 140 million tons of coal produced in the Western United States. And for most WCTL members, those tons were moved by mail.

It is WCTL's position that the continuing enforcement of unreasonable paper barriers is inconsistent with the National Rail Transportation

Policy. Through the preservation of monopoly control over a given destination, paper barriers prevent the shipping public from enjoying the benefits of competition between rail carriers.

WCTL, as you know, was the party that filed the petition in 1998 requesting that the Board limit the use of unreasonable paper barriers. And after more than six years experience under the Railroad Industrial Agreement, WCTL was the party that filed the renewed petition that the Board is considering today.

In its filing, WCTL has proposed regulations concerning unreasonable paper barriers that would create a rebut-able presumption that any paper barrier that has been effect for more than five years is unreasonable.

WCTL's proposed regulations also address the subject of structure of paper barriers, suggesting that paper barriers should be found to be unreasonable if it penalizes the purchaser for interchanging traffic with the carrier, other than the selling carrier, even if the level of traffic interchange with the selling carrier is not reduced.

Finally, WCTL has proposed that the Board consider whether the rental or sale price for a given line reflects the return of more than the railroads cost of capital on the fair market value of the properties that are sold or released.

I will not go into detail regarding the railroad industrial agreement this morning, but as we explained in our comments, that agreement is an inadequate solution to the paper barrier problem. The agreement was negotiated between two portions of the railroad industry. It lacks a meaningful definition of what an unreasonable paper barrier is, and it does not provide any direct opportunity for enforcement by shippers.

One of the most common points raised by the carriers in their comments in this proceeding is that paper barriers do not reduce the number of competitive services for a given shipper. WCTL submits that it -- there is more to this issue of unreasonable paper barriers than simply the numbering of service options. The nations railroad industry has undergone a remarkable consolidation under the last 15 years, with far fewer Class 1 railroads to complete with one another.

In addition, the recent widespread use of public pricing by the rail carriers on coal movements has transformed the manner in which we do business and has coincided with the rapid escalation of railroad prices.

As WCTL described in its 2005 renewed petition to eliminate paper barriers, this tremendous consolidation in the rail industry prompted the Board to announce a new policy in Ex Parte 582 that parties seeking approval or merger of two Class 1 railroads now must demonstrate that the proposed transaction would enhance competition.

WCTL submits that the same policy goal warrants inquiry of the Board into the nature of paper barriers. Where there has been an overall reduction in intra-modal competition, the Board should view limitations on the use of paper barriers as one way to restore some competitive balance to the industry.

Another point that the railroads have

stressed is that paper barriers can be necessary for financial reasons. WCTL does not dispute that point. We do disagree, and we believe that the Board should draw reasonable distinctions, between paper barriers that act as a legitimate vehicle for the financing of underfunded short-lines to acquire rail lines, and paper barriers that amount to permanent restraints on competition.

At some point in the life of a paper barrier, a Class 1 will have recovered the reasonable value of the line that it has sold or leased through the rates of its long-haul traffic. The continued enforcement of the interchange barrier beyond such reasonable point in time serves no public benefit. It simply allows the Class 1 carrier to extent its monopoly control over a destination in the perpetuity.

Under WCTL's proposal, if the carrier were able to demonstrate that some valid economic reason supported the continued existence of a paper barrier beyond a five year period, the Board could decline to find that the paper barrier is unreasonable. In the majority of instances involving paper barriers that have been enforced for periods of time longer than five years, we believe there is a presumption regarding the unreasonableness of continued paper barrier enforcement and that that's a valid assumption.

In conclusion, it's important to distinguish WCTL's opposition of unreasonable paper barriers from the railroads -- excuse me, paper barriers from what the railroads sometimes criticize as efforts to obtain widespread open access.

Paper barriers interchange only arise for an individual Class 1 carrier has made an affirmative decision that it can maximize its profits by selling or leasing specific portions of its system.

So it's the Class 1 carriers themselves, not the shippers, not the Board that make the decision to divest a portion of their system. It is entirely reasonable that in these instances that the Board should seek to enhance competition between the carriers.

Thank you.

MR. KOLESAR: Good morning, Chairman

Buttrey and Vice Chairman Mulvey.

My name is Andrew Kolesar. I'm an attorney with the Law Firm of Slover and Loftus and I'm here this morning on behalf of the Western Coal Traffic League.

The issue of unreasonable paper barriers has been a concern of WCTL for a number of years and we thank the Board for its willingness to consider this issue here today.

It's evident from the comments that have been filed in this proceeding that paper barriers are extremely common, although shippers typically don't have any information about the paper barrier restrictions that apply to their traffic. The rail groups that have participated in this case have suggested that there may be hundreds of paper barriers that may be in existence. It certainly appears to us that if the Board were to calculate the total number of short-line carriers that are subject to paper barrier restricts and the total volume of traffic that is subject to paper barrier restrictions, it would find that each of those totals are extremely large.

And speaking about those totals might be the best way for the Board to develop an understanding of the nature and scope of this problem. We would expect that the Board would be concerned if there were a Class 1 carrier that had agreed that it would not interchange any traffic with another rail line. The only difference in the current situation is that the railroad making the agreement that it will not interchange as a short-line carrier. It seems to us that the same policy reasons that would cause you to be concerned with the Class 1 agreement of that nature ought to apply with equal force in the short-line situation, particularly whereas here there is so much traffic and so many short-lines who are subject to these type of restrictions.

The Board's authority to address pre-existing paper barriers is based upon the Board's reopening and revocation powers. And those are drawn, of course, from Section 722 and Section 10502(D) of Title 49, and upon the Board's statutory authority to prohibit unreasonable practices under Section 10704(A)(1).

In their reply comments in this proceeding, the railroads have taken exception with each of these points, based largely on the argument that if the Board were to grant the relief that WCTL seeks, it would be engaged somehow in a form of retroactive rule making.

We think this argument confuses the nature of the relief that WCTL is seeking. In particular, if the Board were to grant the relief that WCTL has requested, it would only address the future enforcement of a pre-existing paper barriers, rather than to somehow undo the original transaction or to penalize the Class 1 carrier for its past actions, or to take away any of the revenues that it has received for those many years on its long haul traffic.

One of the underlying assumptions of the railroads' filings in this case is if the Board were to take any action with respect to paper barriers, it would be financially adverse for the Class 1 carriers and that they would lose their traffic or terminate their existing leases. And the railroads rely on this argument, of course, to support their view that you do not have the authority to address pre-existing paper barriers.

We don’t believe that the railroads’ assumption in this regard, or their related arguments regarding your authority are correct.

A finding that the continued enforcement of a paper barrier constitutes an unreasonable practice would not guarantee that the leasing or selling Class 1 carrier would lose its traffic, only that it would have to face competition. It may very well be the case that the leasing carrier that is no longer permitted to enforce this paper barrier has a routing advantage or has some other efficiency advantage over a rival Class 1 carrier that will ensure that it will keep all of its prior traffic and will do so at the rates that it charged in the past. If that type of advantage exists, then there will be no economic impact associated with the elimination of the paper barrier.

In addition, it is possible that if the Board were to look at a given paper barrier it might find that it is only unreasonable to the extent that the penalty provision exceeds some reasonable level. In any event, a Class 1 carrier that currently benefits from an unreasonable paper barrier would only lose its traffic where another Class 1 carrier is able to offer a lower rate for comparable service. And if that happens to be the case, then the Class 1 carrier’s real complaint is that the Board hasn’t been willing to shield it from competition where it otherwise couldn’t complete.

There is nothing in the Rail Transportation Policy, in our opinion, that requires this Board to protect rail carriers in that situation.

One of the other arguments raised by rail carriers in this case is that the railroad industry agreement is sufficient to protect the interest of shippers and that the small number of disputes under that agreement confirms that it is working properly. An agreement between the two groups of rail carriers that were responsible for the creation of paper barriers cannot be expected to constitute a legitimate surrogate for regulatory oversight. We certainly understand the railroads’ objection that shippers are not often allowed to participate in negotiations between carriers, but we think it is also the case that private agreements between carrier groups aren't often used as a basis from refraining from regulatory action.

Before I conclude, if I have a moment I wanted to address the question that you raised, Chairman Buttrey about anti-trust immunity. It's certainly correct, as you mentioned, that anti-trust immunity extends under the statute, transactions under 11323 and following. Whether paper barriers are something that shippers could challenge in court is certainly an interesting question, but I don't think that really, in any way, removes this agency's authority and obligation to ensure that they are protecting the public convenience and necessity in any situation in which a railroad is divesting itself of part of its system. Each of these transactions is one that comes before you where you have the authority to uphold the public interest, and you, therefore, have the obligation to make sure you are doing that. And if a paper barrier will limit that public interest, or interfere with that public interest, or has interfered with that public interest, then we think you have the authority and the obligation to take some action.

In conclusion, we appreciate the opportunity to present these comments here before you today and we request that you grant WCTL's renewed petition.

Thank you.

MR. GRISSO: Chairman Buttrey, Vice Chairman Mulvey, thank you for the opportunity to appear today.

My name is Mike Grisso. I'm the Executive Director of the Alliance for Rail Competition. The Alliance for Rail Competition was created in 1997 by a group of captive shippers who wanted to find solutions to the problems that came along with their captivity. ARC has, as its members, some of the largest electric utility, the largest chemical companies, manufacturers of finished goods, and a great number of agriculture commodity groups.

We feel that the diverse nature of our membership gives credence to our ideas and our drive for real marketplace in freight rail.

Whenever I speak, I always take care to state that I believe railroad executives to be good and honorable people, working hard to return equity to investors using every tool available to them. My members are simply weary of being one of those tools.

Mr. Chairman, I've been Executive Director of ARC for three years now. But this world of freight rail was new to me. For 24 years I've made my career on Capitol Hill. I do legislation and public policy. I wasn't a transportation expert, but I catch on fast. What I quickly learned is that this world is bizarre. When I try to explain the issues of captivity to uninitiated civilians, they find it hard to believe. I get wrinkled brows and invariably they say 'that just doesn't make sense'. Indeed, when public policy creates sides, which then wrestle so violently against each other, it is solid proof that dramatic change is needed.

The railroad/shipper relationship is poisoned right now. It is poisoned by policies and regulations which pit good people against each other, people who should be acting as partners, people who should each be cheering the progress and prosperity of the other. In this bizarre world we find ourselves in, market forces determine the size of the pie, but the shape of the pie is driven by public policy.

What we have right now is a disfigured confection that starves some while it engorges others. Shippers are starved for balance. And in the entire glossary so familiar to freight rail, bottlenecks, demurrage, stand alone costs, the one that makes least sense of all is what brings us here today, paper barriers. The notion that competition can't happen when there are true rail infrastructure alternatives is really just baffling.

Now, these barriers, some are legal provisions and sales contracts, and others are physical, like when the Class 1 railroad retains ownership rights on both sides of an interchange point. The former are called paper barriers. The latter are sometimes called steel barriers. But ARC will use the term paper barriers to refer to all of them.

The only remotely logical justification for barriers of this kind were arguments in old ICC decisions. But those decisions were issued at a time when the major railroads' financial health were uncertain. Today, major railroads are enjoying record revenues and profits.

Today, we call upon the Board to issue a Notice of Proposed Rule Making, calling for additional evidence on paper barriers. At a minimum, the Board should also announce its intention to prohibit such barriers in future agreements while encouraging continued sales of unused or underutilized line to short-line operators. In addition, the Board should propose new procedures for the termination of paper barriers, approved years ago, when Class 1 railroads financial strength was less apparent and when the industry was characterized by excess capacity.

There is a real need to gather information on this issue, in particular because so many, if not all of these agreements, are confidential in nature. It's therefore hard to judge the damage or the harm that's being done in the marketplace.

We understand that the ICC may have wanted to err on the side of promoting railroad revenue adequacy when it approved some of the earlier line sales of paper barriers, but times have changed. And too much rail to rail competition is not a problem today, assuming it ever was.

The Class 1's financial health today is excellent. Norfolk-Southern was found revenue adequate in 2004. And ARC's research indicate that even under STB standards, the combined revenue shortfalls of BN, UP, CSX in 2004 was around 4 billion. That figure will be smaller now in light of the record profits.

In addition, Congress may soon provide $25 billion in investment tax credits to the railroad industry to address infrastructure concerns we all have. Obviously, a $25 billion infusion of capital will more than offset the shortfall found by the Board in 2004, pushing the railroads far above revenue adequacy.

Concerns about revenue adequacy should therefore be tempered by recognition that too much differential pricing is going on. If the railroad can raise the capital they need in financial markets, like other businesses, they should no longer be protected from marketplace competition. Economic power is as likely to corrupt as any other kind, and the short-line railroads can help provide needed competition if allowed to do so.

If the Board looks beyond the short-term interest of railroads, it will face considerations like the following: Rail capacity is tight and the problem is exacerbated by congestion. Railroads are demarcating freight by declining to provide service or imposing high rates to discourage requests for service by disfavored customers. Railroads have shifted the burden of supplying most railcars to shippers and often auction car supply. Captive and non-captive rail shippers complain of poor rail service. Captive and non-captive rail shippers complain of excessive fuel surcharges and other charges, which this Board is gathering information on at this point.

It is only through an end to paper barriers that short-lines will have the ability and the resources to contribute to solving these problems. Improvements will come both because some of the burdens now bourne by Class 1's can be shifted to short-lines and because short-line competition will result in greater efficiency and better service by Class 1's themselves.

ARC recognizes that the lion’s share of the coal hauling in the United States is done by Class 1's. However, the railroad industry is a network industry. And improvements at one location over a one-line segment can permit efficiency gains elsewhere on the system, including lines hundreds of miles away. For this reason, ARC believes that the Board should not focus on isolated locations in this proceeding. Instead, it should explore whether the rail transportation system, as a whole, suffers from reduced capacity and efficiency when servicing competition from short-lines is circumscribed. In ARC’s view, the answer is clearly yes.

We believe this proceeding will produce more than enough evidence of a problem which requires corrective action for the Board to proceed to the next step and issue a Notice of Proposed Rule Making on paper barriers. It should also use its authority to conclude the avoidance of competition and capacity enhancement for short-lines through tactics such as discontinuance of service or planned obsolescence of track segments that short-lines could operate more efficiently.

The Board should also propose regulations phasing out paper barriers and previously approved line-sale agreements.

I want to take just a moment to remind us all of something that we all know, but I don’t hear it mentioned enough in this community. In the proceedings and the day-to-day business of this Board, we know that shippers and railroads are very active, with lawyers, economists, and experts all making their case. But there’s another group represented in this room everyday, the American taxpayers. They hold the trump card around here, not the railroads, not the shippers. So who represents the interests of the taxpayers? Of course you do, Mr. Chairman, and Vice Chairman Mulvey. I have come to know some things about each of you. I know that both of you are intelligent, hardworking, experienced professionals who could, at this moment, be doing something more lucrative than you are. But you've chosen to serve. I believe that taxpayers know that things aren't perfect, but I also think that they believe that in the long run the American system has failed. They believe that the economic engine that drives the country is sound. I don't think they think about it very much when they flip on a switch and the lights come on, when they go to the grocery and there's abundant food, or when shiny new cars beckon them from dealerships.

Whether they think about it or not, they have come to have a silent confidence in the fairness of America. They are so confident that the vast majority of Americans get out of the bed everyday and go to work without giving much thought to the STB. That's because they have you here, Mr. Chairman and Mr. Mulvey. So I want to express my gratitude for all who work at the STB, and to thank the Board members for taking up the mission of seeing that that silent confidence of the taxpayers is fulfilled.

Thank you.

MR. SCHICK: Good morning, Chairman Buttrey and Vice Chairman Mulvey.

I'm Tom Schick. I'm with the American Chemistry Council. Thank you for the opportunity to be here this morning. I'm from the American Chemistry Council, ACC. I'm pleased to be here to represent our members and to present views on paper barriers on short-line railroads.

ACC represents the leading companies that are engaged in the business of chemistry. Under our responsible care initiative, the 129 member companies of ACC have committed to implement a set of goals and guidelines that go above and beyond federal regulations in the safety, health, security, and the environment. ACC's members account for about 85 percent of the productive capacity of basic industrial chemicals in the United States. Each of the chemical shippers depend on the US railroad system for the safe, secure, and sufficient delivery of approximately 170 million tons of products that provide rail carriers with over $5 billion in annual revenue.

ACC believes that short-line paper barriers have long been recognized as constraints on competition in the rail industry. We request that the Board take immediate action to remedy the unreasonable and anti-competitive effects of paper barriers.

As you know, paper barriers are conditions attached when a Class 1 railroad transfer a portion of its track to a short-line operator. If a short-line is created from traffic connects, both from a former owner and another railroad, that traffic could be interchanged with either of those two line-haul carriers. This practice would not only allow the short-line to do business with both of the connecting Class 1 railroads, but would also provide shippers or consignees on those short-lines to have access to both line-haul carriers for service.

When track is transferred to short-line under conditions that impose paper barriers, competition is clearly constrained. Furthermore, the Board's approval of such transactions gives the government sanction to anti-competitive conduct. Now, ACC understands and appreciates the economic circumstances under which, over time, and with the Board's permission, Class 1 carriers engage in the rationalization of their rail systems and transfer lines through abandonment, lease, sale, et cetera.

But as the only agency which is charged with regulatory supervision of these transactions, the Board should not simply accept each paper barrier that is presented as a condition of sale. Your decision in this docket observe that the comments that were filed in response to the Federal Register Notice in February raise issues that merit consideration by a public hearing. We applaud you for taking this step in what has unfortunately become an overly drawn out review of paper barriers.

This is not a new issue certainly. Paper barriers were a subject of concern to shippers in this very docket, Ex Parte 575, eight years ago. At that time, the AAR and the American Short Line and Regional Railroad Association entered into the Railroad Industry Agreement. By its terms, however, that is a very limited agreement because it only applies to traffic that is deemed to be new to rail, new traffic to rail.

So the RIA, itself, perpetuates the captivity that exists when a short-line is spun off by a Class 1 railroad subject to paper barriers. In other words, the RIA does nothing to enhance competition, as previous speakers have noted, for shippers that are served by only one railroad.

Among ACC members, for instance, 63 percent of the rail served facilities that manufacture chemicals receive service from only a single railroad.

Your approval, the Board's past approvals or future approvals, or exemptions of paper barriers in individual transactions constitutes a failure to promote competition. This is clearly inconsistent with the statutory mandate to the Board. If you take a look at the Rail Transportation Policy in Section 10101, you will see that you are to allow to the maximum extent possible competition and the demand for services to establish reasonable rates for transportation by rail. You are to ensure the development and continuation of a sound rail transportation with effective competition among rail carriers. You are to ensure effective competition and coordination between rail carriers in other modes. You are to reduce regulatory barriers to entry into and exit from the industry. And you're to prohibit predatory pricing and practices to avoid undue concentration of market power and to prohibit unlawful discrimination.

So, it seems pretty clear, that the Board's continued regulatory approval or its approval of continuation of exemption of paper barriers is inconsistent with the competition that Congress has called for in the Rail Transportation Policy of this country.

We are also concerned that the Board, while aware of the paper barrier controversy for many years, has failed to take decisive action. Indeed it was December 21, 1998 when the Western Coal Traffic League filed a petition requesting a rule making to eliminate unreasonable paper barriers, not all paper barriers, unreasonable paper barriers. On the following year, the Board deferred action on that petition in order to gather more information about the effects of the Railroad Industry Agreement. So that would've been 1999.

Paper barriers have also been the subject of legislation that was introduced in both Houses of Congress for the past several years. Current bills addressed this issue, S919 in the Senate, Section 103; S2047, Section for that bill in the House. Both these bills would prevent the Board from approving or exempting paper barriers. In addition, both the bills would permit the parties to previous short line transactions and shippers to request that the Board review and potentially terminate paper barriers where they are found to be anti-competitive. The references in these provisions to anti-trust laws are significant. Each of them looks at the anti-trust laws as a model in that section, or a reference in that section.

Paper barriers are the very kinds of conditions which, if observed in other industries, would raise serious anti-trust concerns. As the agency whose regulatory authority provides the basis for what is less than complete application of the anti-trust laws in the railroad industry, you, therefore, have a special obligation to correct this problem.

So, we're here at hearing to gather views on paper barriers and ACC respectfully requests that the Board take either of the following two actions: If you believe that you have the statutory authority to prohibit paper barriers in future transactions and to review paper barriers that now exist, then we request that you promptly open a proceeding which will lead to a rule that will promote competition in this regard. On the other hand, if you and your advisors believe that you do not have the statutory authority, we would like you to join us in promptly recommend to Congress the enacting of very carefully tailored paper barrier legislation that would allow you to go ahead and do this.

In conclusion, we thank you for the opportunity to comment on the impact of paper barriers, on competition in the railroad industry. We think that after eight years it's time for the Board to take meaningful action and to eliminate unreasonable paper barriers.

Thank you.

MR. MCBRIDE: Good morning, Mr. Chairman, Mr. Vice Chairman, staff.

Mr. Chairman, my name is Michael F. McBride. I appear on behalf of Edison Electric Institute, the association of the nation's investor owned electric utilities.

Let me go straight to the question that you asked us to address this morning. If the STB were to take the position that paper barriers that had been exempted from regulation by this Board or otherwise approved by this Board, but that had not been approved under 49 USC 11321 to 28 were somehow subject to anti-trust regulation or litigation, I think you might be met or if a shipper took that position, the shipper might be met with the following argument from the railroad: Number one, that in addition to the statutory provisions you've cited, there are broad exemptions for railroads under the Sherman Act and the Clayton Act. Number two, in the Supreme Court's decision in 1922 in Keogh, Mr. Justice Holmes seemed to say that anything that the ICC regulated or could regulate that is subject to regulation is immune from anti-trust regulation. And number three, about two years ago I seem to recall in response to an inquiry from Congressman Sensenbrenner, the Chairman of the House Judiciary Committee, the Department of Justice weighed in on this subject and seemingly said, if I recall correctly, but subject to check the letter which I do not have here with me, that regulation by this Board might prevent the application of the anti-trust laws to matters that you have the authority to regulate.

I'm not saying that those arguments would prevail or that they are still correct. I'm simply suggesting to you that the matter may not be so simple as whether you have or have not approved the matter under 11321 to 328.

In any event, let me address some of the same topics the other speakers have here this morning and echo some of the points they made and make a few others.

Edison Electric Institute didn't participate in this proceeding until recently because members of EEI only recently brought to its attention through their comments in this proceeding the problems they were having with paper barriers at their facilities. So we are pleased to endorse the positions of Ameren and Kansas City Power & Light, and through it the Western Coal Traffic League and Entergy and endorse those comments as our own.

Let me just make a few brief points about why we have a concern here. Paper barriers, by definition, are anti-competitive. The railroads will say that they don't change the status quo in many cases, but that's not the answer to the question. Paper barriers exist to restrict competition with another railroad with whom that short line may connect.

And whatever the merits of approving paper barriers in the past, today we're in a different world. As Mr. Grisso has already alluded to, the railroads are far more financially healthy than they were. And as your recent letter to railroad CEO's indicated, Mr. Chairman, we are now living in a world of capacity constraints in the railroad industry. And it, therefore, may be very timely for this Board to take another look at whether public policy now suggests that paper barriers, which inhibit competition and frustrate the ability to use existing rail capacity are contrary to public policy.

We think, frankly, they are bad public policy and you should not approve paper barriers in the future. There are other contractual restrictions in this industry that similarly cause problems. As I eluded to in our written statement for EEI, you might look at the case of State of Minnesota by BN Railroad Company v. Big Stone Development Company. The citation is there, which prevented Ottertail Power Company from building out to reach a short line two miles from the power plant, and which inevitably led to the rate case that Ottertail Power Company had to bring to this Board.

Had it been able to build out, that rate case might never have been necessary, which is an illustration of the larger problem that we face. And that is, if the Board is not going to find paper barriers to be contrary to public policy, there is no substitute for your authority and your intercession to regulate the anti-competitive problems that inevitably result from such problems. It is one or the other. We would much prefer competition, but we'll take regulation in the alternative.

And so let me just conclude by saying that I think you have the authority to act and I think it's timely for you to act. The world has changed and your policies can change with it. You'll have the authority at any time to reopen a prior proceeding or to revoke an exemption. I would encourage you to do so. I would encourage you to institute a rule making. There is more than enough evidence of record in this proceeding to cause you to do that.

I'd be happy to answer your questions. Thank you.

MR. GOLDSTEIN: Good morning, Mr. Chairman and Mr. Vice Chairman.

I am Andy Goldstein. I'm appearing today on behalf of National Grain and Feed Association, which, as you may know, is the oldest and largest diversified AG business trade organization in the country, with members involved in grain merchandising, grain exporting, feed manufacturing, grain processing, and the production of ethanol and bio-diesels. And we appreciate your courtesy in providing an opportunity for us to offer our comments.

NGFA believes that conditions in the rail industry have evolved to the point where it is plainly appropriate that a rule making on paper barriers be instituted.

The Board, we know, understands what paper barriers entail. They are conditions placed on the sale or lease of Class 1 branches or other lines, prohibiting the free flow of traffic between that property and any connecting Class 1 railroad. These types of restrictions are far more harmful today than they were years ago when the paper barrier practice again.

Light density rural lines, disposed of by Class 1's, often generate both traffic by grain, grain products in less than train volumes. That's traffic increasingly given poor service or discouraged entirely by Class 1 railroads today.

Shippers on light density lines have a greater need today for routing alternatives than ever before in order to seek out routes where their traffic is welcome and given acceptable service.

Allowing shippers on paper barrier short lines to have access to competitive Class 1 service is consistent with the intent of Congress. Mr. Schick just recited to you the relevant portions of the Rail Transportation Policy and I won't repeat them.

The conclusion, of course, is that paper barriers simply preclude effective competitive choices by shippers and are, therefore, contrary to that policy.

I'd like to comment on the Board's question concerning whether or not it has the authority to terminate paper barriers. Applicable case law indicates firmly that a rule making declaring the prospective invalidity of paper barriers is not prohibited as a matter of law, even if doing so has an impact on existing agreements. The type of retroactive agency action that is prohibited is the type of action that actually alters the past legal consequences of prior actions.

For example, if the Board were to invalidate a paper barrier agreement as of the date it was entered into and expose the parties to retroactive third party liability, that action, most likely, would be a form of prohibited activity. But a rule that has been adopted by the Board for prospective application only, even if it undoes for the future, in part or in whole, a bargain made in the past, is a different animal all together, and has been allowed by the Courts as illustrated by the cases cited in our filed summary of argument.

The AAR, as Mr. Kolesar I think mentioned, takes the position that the Board can’t undo paper barrier bargains entered into in reliance on prior decisions approving paper barrier arrangements. Set forth as the strict rule of law, we believe that rule is without merit. Case law requires the Board to evaluate reliance arguments but not to accept them simply as presented.

The Board must weigh a party's reliance arguments against other considerations, such as whether the extent to which the public interest will be served by a change in policy and whether a new policy is consistent with the statutory scheme, which in this case it is in order to promote competition.

NGFA believes that a rule making should be instituted to establish procedures under which existing and proposed paper barrier arrangements can be reviewed under the appropriate balancing tests set forth in the court cases.

It is highly unlikely that there is a valid economic justification for a perpetual paper barrier restriction, and the rule making should serve to establish ground rules for examining paper barrier agreements to determine at what point they outlive their justification in any particular transactional setting.

And if I may, just let me comment also on your question. In addition to what Mr. McBride just said, which I'd join him, about it not being as simple as simply what happens to the Board's exemption process, there also, I think, has to be the question of who would be in a position to bring an anti-trust action. Anti-trust cases have very strict rules of standing and it doesn't necessarily follow that if anti-trust remedies were available they would be available to all shippers served by the railroads involved.

So, again, I would join Mr. McBride in saying it's not a simple question by any means.

Thank you.

CHAIRMAN BUTTREY: Well, thank you very much for all your statements, which I found very interesting. Obviously, this subject has created a lot of interest here at the Agency and we appreciate everyone coming forward today to express your views.

I'd like to just invite comments from anybody on this panel and ask the questions of others, as well, who will appear.

On this issue of restrictions on new customers, as opposed to existing customers who might be affected by a paper barrier, isn't something like that inherently discriminatory under the act?

MR. KOLESAR: Chairman Buttrey, I'm afraid I'm not following the question.

CHAIRMAN BUTTREY: My understanding is that there are paper barriers that exist that say you can serve new business but you can't serve old business, or something to that effect. I actually haven't read very many of these, these paper barrier contracts.

My understanding is, from being briefed on this, is that there are provisions in the paper barriers that make a distinction between new business and old business, if you will.

What are your thoughts on whether that is inherently discriminatory or not.

MR. KOLESAR: I'll try to push it a couple of different ways. One, the new traffic distinction that I'm most familiar with in this context has to do with the Railroad Industry Agreement and the fact that that agreement will only apply in situations where new traffic exists. That the incumbent Class 1 carrier either cannot or will not attempt to serve.

As to whether any provisions of the type that you're describing in paper barrier agreements may exist and whether those are discriminatory, I think it's inherently discriminatory that paper barriers exist in the first place. The whole idea is to discriminate, to allow the shippers to only have service by only one carrier. So, if those paper barriers exist, as you describe them, yes, but they are probably part of a much larger discrimination problem.

MR. MCBRIDE: Mr. Chairman, maybe I could add something to that. And that is that I think you are right that if two shippers are otherwise similarly situated and the only distinction between them is one was a customer at the time the paper barrier was entered into and the other comes along later that one would think on its face that that is the definition of discrimination.

The difficulty is, I would submit to you respectfully, that I think it has been at least 25 years since anyone even believed that they could make a case for discrimination before the ICC or the Board. I don't think you'll find a case since Staggers Act and maybe well before, in which the ICC or the Board found discrimination on any set of facts.

If your question suggests a revival of the old doctrine, I'm cheering you on. But I'm concerned that there's a body of case law here that might inhibit the application or the principle that you were just asking about.

MR. GOLDSTEIN: And if I may add a comment --

CHAIRMAN BUTTREY: Well, if I was starting a business near a rail line somewhere and-- I was the person who couldn't get service because of a restriction like that, I think it would concern me greatly. I mean the whole theory of entrepreneurship is that you start a business and you get service. And to have someone getting service on the line and you not being able to get service from the line, that would concern me, if I were starting a business. I'm not starting a business, by the way. I might start one later, but not now.

MR. MCBRIDE: Let me just add and then let Mr. Goldstein answer. But Big Stone Development

Company was trying to start a business, if you will, in the case in which it sought to build out to the short line to be served at Big Stone. And I don't think it matters if it's new or old. The power plant was there and they weren't permitted to do business with that short line.

So I think the problem is the same whether it's for the existing customer or the new customer. And that's why I agree with you that it's discriminatory. But I think we'd have some heavy lifting to do to get rid of all those old precedents to be able to make that case.

MR. GOLDSTEIN: And the agricultural industry, Mr. Chairman, we have a tremendous problem in just getting any new business into the railroad system. And we're finding it more and more difficult, so the problems that we have are really involved in existing business perhaps more seriously than new business which comes in on very defined terms these days.

MR. SCHICK: Mr. Chairman, I would address your question or your concern about discrimination very similarly to the way Andy just did, which is I think a shipper is entitled service whether the shipper is starting a new business or whether the shipper has an existing business. And if that shipper is held captive or doesn't have the alternative of going and having short-line carry the traffic to the other Class 1, while we're all in favor of new business and entrepreneurship, I think we're also in favor of supporting the businesses in the industries, and the jobs, and the exports that we have in this country. I think this distinction does not, doesn't really answer the question if you only focus on new business.

In fact, as I mentioned in my prepared comments, that's at the heart of the Railroad Industry Agreement, this idea of traffic that's new to the railroad. And that's is up for shifting between the one Class 1 and the other. And again, that's a problem because it doesn't address the real fundamental problem, which is the lack of competition for the shipper who is captive on that short-line and would like to have access to both Class 1 carriers rather than the one.

VICE CHAIRMAN MULVEY: Thank you. I always come to these hearings with a lot of prepared questions and then I hear the testimony, and I come up with different questions.

On this issue of the Railroad Industry Agreement and new business, it's been charged that there were different expectations about how this would play out, and that in fact the agreement has not allowed short-lines to come in and capture new business because of the way it's been defined. Do you have any specific examples from your industries where what was thought to be new business could not be handled by the short-line with another Class 1 because the Railroad Industry Agreement said that new business also came under the paper barrier?

MR. SCHICK: Number one, Vice Chairman Mulvey, I don't have any examples. Number two, I'll come back to my prior comment to the Chairman, which is I don't believe that distinction is a valid distinction that somehow competition should only be available to new business or to incremental traffic.

And therefore, I haven't been spending the last eight years looking for examples where something did or didn't work under that new business distinction in the RIA.

VICE CHAIRMAN MULVEY: Well, I guess my question was whether or not the RIA was working at all or whether or not it was itself just a piece of paper and not an effective way of overcoming some of the paper barriers or some of the traffic.

MR. SCHICK: Are you suggesting it's a paper barrier itself?

(Laughter.)

MR. SCHICK: I couldn't resist.

VICE CHAIRMAN MULVEY: You claim that the Railroad Industry Agreement, Mr. Kolesar, that it does not define what an unreasonable paper barrier actually is, and it lacks any mechanism by which shippers can participate in that agreement.

What changes to the RIA would you suggest or how would you propose that shippers be part of the process?

MR. KOLESAR: That's a good question.

VICE CHAIRMAN MULVEY: Thank you.

MR. KOLESAR: That is a question I was asking myself. There is a great deal that would need to be done to the RIA to turn it into something that would constitute a proper solution to this problem, we believe. I guess the short and somewhat flip answer is to amend the thing so that the replacement is the proposed regulations that we put in place and grant our right to shippers to come in and come to the Board and announce that anytime that those regulations aren't complied with, we've got evidence of an unreasonable practice.

Short of that, you really have a situation where the Class 1's have the short-lines in a situation where the short-lines really don't want to do anything to interfere with the Class 1 carriers, and the Class 1's have unfettered discretion to decide whether or not they'll want to keep traffic. It really hardly seems to be a solution for a Class 1 carrier to say there's only a problem if we say there's a problem. And if we want to keep the traffic, then we're entitled to.

You know, that really is a long, far cry from where we think it needs to be to constitute a solution.

VICE CHAIRMAN MULVEY: The issue came up about the applicability of the anti-trust laws. It's been suggested that the Courts might say that, no, it's STB's jurisdiction and therefore, the entire anti-trust laws won't apply here. But, this is a very, very controversial issue and for us to act on paper barriers would mean we would be going back on the implications of the approved -- the previously approved spin-offs of the short-lines,-- which had those paper barrier clauses in them. So, it would be going against our own precedent. And someone argued that doing so would also interfere with contracts between private parties.

And so, it would strike me that if it went to the Courts and if the Courts began to uphold your view that these things were a violation of the Clayton Act, then the Board would have more evidence in which to make a decision as to what to do with paper barriers; isn't that true?

MR. KOLESAR: Well, let me try to answer what was one of the assumptions in the middle of your question, I think, the idea that this might interfere with private agreements.

These are not simply private arrangements. They are by definition public because the railroads involved necessarily under statute have to come to you for approval. And your authority and jurisdictions over those transactions removes them from simply being private agreements. So, in that sense, I don't think that you can say that interference there is any problem.

Also, whether it might improve your comfort level in addressing paper barriers, if a Court told you that they couldn't do anything about it, well I suppose you could, but that certainly puts the burden on a shipper to have to go out and file an anti-trust case when we believe this Agency has the authority and the obligation to act in the first instance.

MR. MCBRIDE: Mr. Vice Chairman, the constitutional prohibition here in the contract only applies to the states and not the federal government, so it’s not a limitation on this Board’s authority. And on any event, I would submit to you further one of the reasons Mr. Goldstein gave to you about the difficulty of finding someone who has standing to challenge one of these paper barriers. It might be difficult to bring such a case. It would be met with the arguments that I suggested would be made in response to such a case under the Clayton or Sherman Act. And I think in the end you’re in a greater position to develop the evidence than a Court would, or a court by court, case by case.

But, what you could do, I think, perhaps, is following up on Congressman Sensenbrenner’s letters, ask the Justice Department for its views on whether shippers have standing to challenge paper barriers, number one. And number two, whether the anti-trust exemption is as limited to as 11322 to 11328, or whether it’s broader than that.

And I think it would be very instructive to get the Justice Department’s views on those questions.

VICE CHAIRMAN MULVEY: Thank you. I think we'll look into that.

CHAIRMAN BUTTREY: We are concerned, however, about the length of time that it would take to get such an answer.

VICE CHAIRMAN MULVEY: Yes, that's also a factor.

Mr. Grisso, one of your suggestions is the Board issue an NPR calling for more evidence on paper barriers.

What specific types of evidence would you have the Board request from the carriers, the short-lines, and the shippers?

MR. GRISSO: One of the problems that we have in developing the rational arguments to come to you with is the fact that so many of these agreements are confidential, and you are the only ones who really have access to them. And at the opening of the proceeding, and I'm well aware that this has been going on for some time now, but times -- time has passed and times have changed during the time that this proceeding has been opened, so we believe that it is relevant to gather new information and to use the power of the Board to gather specifics on those contracts, knowing full-well that some of those would have to be held in executive, you know, confidence. But we just believe that this Board has the power that no one else has, as Mr. McBride says, to take a good look at this and see what those conditions are at this point.

MR. KOLESAR: If I may, I'm not certain that that may be more of a burden now than is really necessary, given the fact that the Board certainly does have in its possession a number of these paper barrier agreements already. And we know we've seen your dissent, Vice Chairman Mulvey, in the past, with respect to paper barriers because you've seen them. They're in your hands, so I'm not certain if it's really required to go out and start a lengthy proceeding to try to collect them again.

CHAIRMAN BUTTREY: So is it the collective judgement of this panel that the jurisdiction to determine whether a contract is either granted exemption from the anti-trust laws with the Board or not is exclusive jurisdiction of the federal courts? Or is it exclusive jurisdiction or at least initial, initially the jurisdiction of the Surface Transportation Board? The question of whether the provisions of the Act extend the anti-trust immunity to a particular contract or not. Isn't that a subject that's exclusive to the jurisdiction of the federal courts, like a declaratory order proceeding or something of that nature?

MR. KOLESAR: You clearly have the authority and the jurisdiction under 10901 and 10902 to look at the transactions that come before you and ensure that they're consistent with the public interest. I think that's all the jurisdiction that you need to address this situation.

MR. MCBRIDE: Mr. Chairman, I think there is a two part answer to your question.

First of all, I think it's clear that this Board had the authority in the first place to determine whether to approve paper barriers, and it did so through a class exemption in general. It has the authority to revoke that, in whole or in part, it has the authority to look at each of these agreements before they are approved. It certainly has the authority to distinguish between agreements that it may conclude are anti-competitive and others, for some reason, may not be, for example.

So, you plainly have authority with respect to the approval or the disapproval of the agreements, in general or specifically.

If your question, however, now I'm going to the second part of my answer to your question. If your question is who has the authority to determine the full extent of anti-trust exemption that may apply, given this Board's regulation or authority, that may indeed ultimately be a question for the federal courts to answer. I think you can weigh in on the question whether your views were given any deference by the courts is a difficult question, perhaps, I'm not sure if I know the answer to that. But I do think they'd probably give your views at least respect, if not deference, because to some extent you do regulate, and by doing so, oust the anti-trust regulators of authority, at least to some extent. And so there’s a line to be drawn there between what you do and what they do.

And yes, ultimately I think the Courts will have to answer this question and that’s why I suggested you get the views of the Justice Department about this, but I don’t think you’re completely incapable of addressing this question.

CHAIRMAN BUTTREY: I don’t mean to put words in your mouth, Mr. Goldstein, but you seem to be saying that a shipper might have standing to attack a paper barrier contract between a short-line and a Class 1 railroad. Is that what I heard you say, is that what you said? And how would the other panel members feel about that?

MR. GOLDSTEIN: No, I think what I was contenting on, Mr. Chairman, was your question about what the consequences, or at least your question, as I understood it and may have misunderstood it what the consequences would be if the anti-trust laws were applicable. And in that context I was suggesting that that might not be a simple solution from a shippers’ point-of-view because there are standing questions about the ability of the shipper to bring a complaint alleging that the short-line railroad that serves the shipper and connects with a large railroad is being denied access to the rail system. And that was all I was talking about.

CHAIRMAN BUTTREY: That's what I thought you were talking about, and I was wondering how the other members of the panel might comment about whether there would be standing or not?

MR. KOLESAR: There is a question. There is a case referred to Illinois Brick, in which the issue is whether the indirect beneficiary or user, if you will, is entitled to bring an action to challenge, or whether it is only the would-be competitor or frustrated competitor who can bring the action to challenge. And there are restrictions on indirect visitors being able to bring anti-trust actions.

CHAIRMAN BUTTREY: I guess that depends on what your definition of independent is?

MR. SCHICK: In effect, a downstream.

CHAIRMAN BUTTREY: Right.

MR. KOLESAR: Beyond that initial

transaction. I think that's where the Illinois Brick case falls out. But I think we're in danger here of sending ourselves down another eight years of legal analysis and wondering, and referrals to the Justice Department, when it's probably time to get moving on this as of many other matters that the Board could address.

CHAIRMAN BUTTREY: There's been some discussion about sunseting existing --paper barrier prvisions. What's the view of the panel on that?

MR. KOLESAR: Well, we think that there should be an engagement of sunset provision, but what we had contemplated in our filing was that an individual would have the opportunity to come before the Board and seek a declaration the continued enforcement of an individual paper barrier constitutes an unreasonable practice.

We envisioned that one of those thresholds to be used in that determination is whether the paper barrier has been in existence for more than five years.

Set that up as a rebuttable presumption.

If the rail carrier can come before the Board and demonstrate that the continued enforcement of the paper barrier beyond its five years, beyond ten years, beyond twenty years is not unreasonable, then arguably the Board could allow that paper barrier to continue for some reason.

If that meant that that individual paper barrier were to continue for some years past the time in which you engaged in that individual proceeding, then I suppose that's one possible outcome. But I think that would depend upon the proof brought before the Board by the rail carrier, with respect to one of those older paper barriers.

CHAIRMAN BUTTREY: So you're talking about creating a new cause of action, if you will, for that type of proceeding?

MR. KOLESAR: It's an unreasonable practice and all that we would need is a regulation that the Board proposes that says when we evaluate a claim of unreasonable practice related to paper barriers these are the things that we're look at, and these are our presumptions.

VICE CHAIRMAN MULVEY: Well, this would be on a case-by-case basis then.

MR. KOLESAR: Correct.

VICE CHAIRMAN MULVEY: Theoretically, we could have hundreds of these cases being brought, if indeed there are hundreds of paper barriers out there affecting maybe thousands of shippers. So, it would -- how would we go about calculating whether or not the paper barrier was unreasonable or not? How would we calculate whether or not the railroad recaptured the value of its paper barrier? What would be some of the elements or factors that we would need to consider?

MR. KOLESAR: I presume that you would take evidence regarding the size of the line that was subject to the lease or the sale, the volume of traffic, the rates that the Class 1 carrier has been able to charge over the years since its paper barrier went into effect since then, since the paper barrier was put into effect, the residual value of the line, what it might have caused to lease the line in the absence of any paper barrier restriction. Compare those two, see where the numbers come out.

And again, I know I mentioned it in my prepared comments, but I think it bears emphasis again, the elimination of a paper barrier will not necessarily mean that the incumbent Class 1 carrier is going to lose its traffic. It is not a taking in that sense that all of that traffic is being taken away by the Agency. They may need to reduce their rates by a penny a ton. They may need to reduce their rates by more than that. And it may turn out that they can't reduce their rates enough to beat the competition because Class 1 carrier B really can get in there and serve that traffic in a more efficient and more cost-effective way. And is that really what needs to be protected? Do we need to protect monopoly rates on long haul rail transportation.

We think the answer is no.

VICE CHAIRMAN MULVEY: One of the witnesses estimates the cost of the paper barrier to his firm, $3.25 a ton, something like that. There's precious little on the record about what these paper barriers actually are costing. We hardly even know how many there are and what the impacts are. So, it's not clear whether we're dealing with a big problem or a small problem.

There's also some suggestion that paper barriers when they were first permitted, were permitted at a different time, when railroads were revenue inadequate, or more so than they are today. And perhaps, the times they are a changing, and there's a new world out there and that railroads don't need the same kinds of protections from the competition that they did, say when paper barriers were first instituted.

Do you want to comment on that?

MR. KOLESAR: We certainly agree with that. In fact, it's something that appears in our 2005 renewed petition that the railroad world has changed, and changed even between 1998 and 2005, as reflected by the Board's changed regulations regarding enhanced competition with respect to Class 1 mergers.

The world does change. The railroad industry does change. And it's not unheard of for this Agency to change its policy on certain matters in response to those changes. We could go through a list of issues in stand alone rate cases where one item has been ICC and STB policy for a long period of time, in terms of how you present your evidence and the how the world will rule on those issues, suddenly becomes the opposite policy. And that type of thing does happen.

VICE CHAIRMAN MULVEY: But isn't that a little bit different because now we're talking about the applicability and the validity of whether or not this is an unfair or unreasonable practice. And we're saying that our declaration as to whether it's unreasonable should be a function of the economic environment the industry faces itself. Is that the principle that we can say, well, we thought it was reasonable when the industry was revenue inadequate, but now that the revenue -- is more revenue adequate, it's now unreasonable. Is that something that we could defend?

MR. KOLESAR: I think it is defensible, yes.

MR. GRISSO: And we would absolutely agree with that. It's been our policy at ARC and it's part of -- a provision is drafted, it is drafted with the respect to current agreements so they would phase out. But in terms of precedent, I'm the only non-lawyer around on this panel, I think. So, I can only just quote poets and encourage the Board to do as Goethe say, be bold and angels will come to your aid.

MR. MCBRIDE: And Mr. Vice Chairman, I would submit to you that there's no question that if the circumstances of change that the Board can change a policy and that that would likely be given great deference by the Court and would likely be upheld. The Board has a pretty good track record when it announces policies of being upheld in Court so long as it has any authority whatsoever under the Act.

In any event, I want to just observe also that I can't think of another industry in which a participate can sell an asset and then restrict the parties with whom the person who buys the asset can do business. And so I would submit to you the answer to your question is that after a reasonable notice period you should declare that the pre-existing paper barriers no longer can be used in an anti-competitive fashion. You should rely not only on the fact that the railroads are more financially healthy than they were, but also on the fact that we need all the rail capacity we can get in this country and make the most efficient and effective use of it. And to inhibit the use of existing capacity because of some circumstances that may have been in effect 20 years ago when there was excess capacity in the industry and there is no longer, I think would be to tie yourself to the past. And no court requires a regulatory agency to tie its policies to the past.

VICE CHAIRMAN MULVEY: In testimony you state the STB is mindful of current capacity constraints, and we certainly are. And you urge us to take actions to try and limit such capacity constraints and improve capacity in the railroad industry. But how would acting on paper barriers improve capacity in the railroad industry? How would you get more capacity? It would strike me that it would probably put more stress on capacity.

MR. MCBRIDE: The classic hypothetical paper barrier that we're talking about here is a short-line that can connect to two Class 1's.

VICE CHAIRMAN MULVEY: Yes.

MR. MCBRIDE: But which through contractual constrictions, penalty provisions or otherwise, is effectively required to give most or all of its business to the first railroad. If the first railroad takes you through Chicago and the second railroad doesn’t, then I would submit to you that it’s a given that by allowing that business to go to the second railroad and bypassing Chicago you’re most likely going to improve the fluidity and therefore the capacity of the nation’s rail network.

We’re -- and we can talk about examples like this all day long so I won’t try to come up with other hypotheticals, but I simply make the point to you that there are obvious choke points in the rail system of the United States. And there are enumerable examples, I think, of putting in additional capacity or making effective use of existing capacity has improved fluidity. You see the Class 1's reactivating lines themselves that they previously took out of service for the same purposes.

And so I think all over this country you can see ways in which this country would improve if we didn't have these artificial choke points as the problem.

VICE CHAIRMAN MULVEY: I was just thinking that lowering or reducing paper barriers or eliminating them might lead to somewhat lower rates. That's the expectation. Lower rates, of course, might mean more rail traffic and more pressure on the existing capacity.

MR. SCHICK: One of the things we don't know is if there are two Class 1 carriers that could carry the traffic for the bulk of the distance, we don't know which one is more efficient. That's what the market is supposed to find out. And what we're doing, and I think this might be what Mike was suggesting, is that we're freezing and saying it's all got to go on railroad A. Now railroad A may be going through Chicago or not. But the market is to allow whichever of those two railroads, even if it goes through Chicago the one that has the most efficient route, or over time, things change, to get the traffic or offer better service package. Rate or no rate difference, but to offer a better service package and to do it.

I think there's a lot of uncertainty and I understand that everyone is troubled by things like clauses that are perpetual. That's a really long time. But there's also concern about is this a big problem or not and I think that's what you were trying to get at with the last question. You know, are there hundreds of cases out there or are there only six. I would submit, since we don't really have a record on that, and maybe the rule making would help to build that record, but there's hundreds of cases, then there's a lot of problem that has to be fixed. And if there's only six, then it won't be a big burden on you guys to fix six. So, I think we should get on with it.

MR. MCBRIDE: And I think that the history of regulation by this body in the last ten years and by the ICC before it since Staggers is that you almost never get hundreds of cases in any subject. What happens is that the parties go out and work out commercial solutions once you make clear what your policies are.

CHAIRMAN BUTTREY: Thank you very much.

MR. MCBRIDE: Thanks.

CHAIRMAN BUTTREY: We'll call the second panel now, Panel 2 in the notice: the Association of American Railroads, the American Short Line Regional Railroad Association, Railroad Industry Working Group, and Union Pacific Railroad Company.

PANEL II

CHAIRMAN BUTTREY: Again, we're going to hold all of our questions until everyone has had a chance to speak.

We were delayed a little bit this morning. I apologize a for the delay. Because of security concerns -- not security concerns, but security procedures, I would like to remind everybody that everybody in this town has gotten a lot more concerned about security, so when you're in the building you need to be sure to display your badge. I don't mean to pick on you, Mr. Grisso, if you're still in the audience, but I never did see your badge. I'm not sure where you are right now, but I assume you have your -- okay, good.

So, we're looking out for that sort of thing and otherwise you might be summarily escorted out of the building, which might be an inconvenience. But anyway, we're really exercised about that these days, so I just point that out.

You may proceed, sir.

MR. WARCHOT: Good morning, Chairman Buttrey, Vice Chairman Mulvey. On behalf of members of the Association of American Railroads, we appreciate the opportunity to appear before you today to discuss the significance of interchange commitments or so called paper barriers and line sale and lease transactions.

As the AAR has expressed in its written submissions in this proceeding, we believe the record shows that paper barriers, which should more accurately be called interchange commitments, are valuable private sector contractual tools that the railroads have made to maintain and grow rail business and improve the efficiency of rail service to customers.

Moreover, there is no basis from either a legal or factual standpoint -- moreover -- moreover, there is no basis from either a legal or factual standpoint for the Board to grant Western Coal Traffic Leagues petition for a rule making that would restrict the rail industry's ability to freely negotiate such contractual terms and thereby deprive the railroads of means to promote rail service.

In that regard, viewing these interchange commitments and the context of contractual obligation reminds one that such commitments are not unique and are not made in a vacuum. Comparable provisions that accomplish much of the same results are customarily found in myriad overhead trackage rights, haulage rights, switching agreements, and other cooperative ventures between railroads. And these interchange commitments are not the same in their scope or application, no one size fits all model. They are given in exchange for other considerations.

The structure of interchange commitments were in a reflective of factors such as the values of the line, the initial purchase price or lease payment, the expected future revenues, traffic, and costs on the line, and the ongoing cooperative relationship that the agreement establishes between the railroads.

In the time I have remaining, I would like to offer four observations on the written record in this proceeding. A record, again, which we believe provides no justification, no legal or factual basis, for the Board to institute a rule-making proceeding to restrict the use of these interchange commitments.

First, the record is un-refuted that these kind of contractual interchange commitments have contributed significantly to the short-line industry and to the productivity and cost-effectiveness of both short haul and long haul rail transportation in this country. Neither the ICC nor the STB has ever found in any individual case that an interchange commitment was itself anti-competitive or it had resulted in anti-competitive conduct. And, in fact, there are ICC and Board cases cited in the record which state exactly otherwise.

The bottom line is that interchange

commitments create win/win/win situations, where the short-line railroad is able to acquire and operate a line that would otherwise be unaffordable. The Class 1 railroad is free to better concentrate its service and investment on its main and other lines with a great traffic base, while retaining the revenues from the line haul operations off of that line. And shippers obtain responsive service on a lower density line, which otherwise would not receive investment and service priority.

Despite the assertions by the Western Coal Traffic League and other parties of so called problems with these interchange commitments, there is nothing here that would require a rule-making proceeding. The record does not support such claims. While arguments have been made that these interchange commitments needs to be eliminated to address rate and service problems, the fact is that if a shipper has a rate or service problem it can seek redress from the Board in the same manner as any other shipper located on any other rail line.

An interchange commitment on a line does not restrict a shipper’s right or place it at any less advantageous position than any other shipper on lines not subject to interchange commitments.

As such, these interchange commitments have not resulted in the loss of any shipper rights, or remedies, or rail options.

And in connection with a comment, Chairman Buttrey, that you made concerning new traffic on a rail line, that new entrant on a rail line where there might be an interchange commitment receives the same service that it would have received if the interchange commitment -- if the transaction providing for the lease of sale hadn’t occurred. There is no loss of service to a shipper locating on such a line as a result of any interchange commitment.

When it comes down to the so called problem that WCTL and its supporters seek to address by the elimination of interchange commitments, that problem is the absence of intra-modal competition, the absence of intra-modal competitive alternatives, even though such intra-modal competition was not present prior to the transaction creating the commitment.

WCTL and its supporters are seeking to introduce intra-modal competition artificially by regulatory fiat, both in this instance and as was mentioned in the prior panel and other regulatory and legislative venues as well.

Interchange commitments -- secondly, interchange commitments do not constitute a restraint of trade, nor are they otherwise anti-competitive.

In answering your question, there clearly is statutory immunity under Section 11323. And as the first panel indicated, it is not clear the extent to which there would be anti-trust immunity or protections provided under applications under 10901 and 10902 in view of the regulatory jurisdiction and the scope of that jurisdiction that the Board currently has over transactions.

But nonetheless, whether or not there is such jurisdiction or not, the interchange commitments again do not constitute an unreasonable restraint of trade. They are not anti-competitive. There is nothing anti-competitive about an interchange commitment that maintains the status quo and has been recognized in ICC and Board decisions. And that is all these provisions do.

Transactions with these commitments are no more an unreasonable restraint of trade than a railroad electing to enter into haulage, overhead trackage rights, agreements that lower prices, than if arrangements were made to include and serve local shippers on the line as well.

Such interchange commitments are a sale of limited rights between a willing buyer and a willing seller. The so called restraint here is no different than a restraint to which a shipper would be subject to if only the Class 1 that was owning the line elected not to enter into the transaction at all.

Third, there are significant legal and practical constraints to a Board action through a rule making proceeding or otherwise regarding existing interchange commitments and already consummated transactions. These are not peripheral to the transactions. These are not add-ons. These interchange commitments are core to the transaction, and the elimination of the essential terms would have retroactive effect. They would retroactively abrogate the rights that were vested with the approval of the Board and they cannot be eliminated through effectively a retroactive rule making. These types of rule makings have been invalidated by the Courts.

Now, comments were made that these only have future application, yet a retroactive rule making includes rule makings that have provisions that impose new duties with respect to transactions already completed. And in this case, there would be new duties and new liabilities upon the railroad even prospectively. And those would be the loss of a line or the use of a line without the adequate compensation that had been negotiated and previously approved by the Board.

But even assuming that the Board had the legal authority to make retroactive rules, the ICC and the Board have recognized the unfairness of imposing conditions on transactions years after they were otherwise approved. Moreover, if a contractual interchange commitment was a core component of the transaction and it was restricted or eliminated by regulation, there would be the host of practical and commercial problems that Vice Chairman Mulvey indicated and that would need to be resolved in subsequent individual proceedings that WCTL even conceded would be necessary. In each individual case, the underlying transaction would need to be reassessed, perhaps renegotiated to reflect the value of the consideration to the parties. The case would be further complicated by having to determine who should pay the compensation, especially when the short line was unable or unwilling to do so.

And further, if the selling or leasing railroad did not receive appropriate compensation, it would likely have the right to unwind the compensation. The Board would become embroiled in disputes about not only the railroad's respective rights and obligation, but rights and obligations of third parties who may have relied upon the transaction as well.

Nothing would be accomplished except for increased costs for both long haul and short haul rail service and diminished productivity, all in the attempt or the name of trying to solve a non-existent rate or service problem. A non-existent problem because any rate or service problem could already be handled by the Board under its existing procedures and rules that apply to any other shipper whether or not a line with subject to an interchange commitment.

What this does again is only attempt to force intra-modal competition by regulatory fiat.

Lastly, a rule making proceeding would restrict the use of interchange commitments, and a rule making proceeding that would restrict the use of interchange commitments either retroactively or prospectively would represent a marked and counter-productive departure from the Boards past encouragement of such cooperative market-based transactions.

Both large and small railroads have said in this proceeding that without the opportunity to use interchange commitments the short-line railroad could not afford to purchase or lease the line. The large railroad would be unlikely to lease or sell it if it did not receive fair consideration. Shippers would not get the benefit of the hands on, low cost service that short line railroads provide. And we do not believe that there is anything in the 25 year history of the short line sale/lease transaction since passage of the Staggers Act that would justify such a result.

Thank you. I would be happy to answer questions.

CHAIRMAN BUTTREY: Thank you. Mr. Gray?

MR. GRAY: Chairman Buttrey, Vice Chairman Mulvey, I’m John Gray. I’m appearing on behalf of Union Pacific Railroad. I’m the Executive Director of the Interline Group at Union Pacific, which among other responsibility has our relationship with short line and regional railroads.

Because we have --

CHAIRMAN BUTTREY: Please adjust your microphone so you can speak directly in because people in the back I don’t think can hear you.

MR. GRAY: Okay.

Because we have already submitted written testimony in this, I will keep the remarks brief, but I would like to emphasize four points that I think are important in respect to the transactions that we have undertaken and how we look at the transactions for the short -- creation of short lines.

First, we think that the short lines that have been created through this mechanism are in public interest, and that the interchange commitments that go along with the creation of the short lines are an integral part of the transaction. We think that the short lines benefit all parties involved in one form or another, the Class 1, the short line obviously, and the customers that are served by the short line. They also, has as been noted earlier, they also benefit the rail network as a whole. They benefit the Class 1 particularly by allowing it to concentrate spending on those lines which are most able to utiliz4e the capital that we create, in short or long distance heavy density lines.

We think that the spin offs of two short lines create railroads that bring management closer to the business needs of specific customers. We feel that short lines focus more closely than we can, as a large railroad, on local issues, on local concerns involved in maintaining and improving service to existing customers, and promoting the growth of rail business on low density lines.

They also have the flexibility, the flexibility that we do not in creating lower cost, high service structure that can attract more business from overcrowded highways, hopefully.

We believe that they've been successful in doing this and that we've seen the organic growth of our manifest business -- growth of our manifest business on short lines to change upwardly at a level considerably higher than that that we see from the rest of the Union Pacific.

In short, the short lines are an important mechanism for growth in our industry. The spin offs allow us to continue to efficiently provide full service to all customers located on low density lines. An area that we could see with the capital allocation process that over time could otherwise degenerate. It allows us to focus more of our resources on the core portions of our network, which benefits all of our customers in that network.

In our experience, the most effective approach for achieving these objectives for these spin offs is to lease the lines to the short line for little or no rent, usually for no rent. And that is most of the transactions that we have are on that basis. Because the short lines do not pay any rent -- they pay nothing for the use of the property, they can focus their resources, the capital that they have, their people, on maintaining and improving existing property and services and growing their business. It's not the only approach to creating a short line. We've used others, as have our predecessors, but these other approaches have to fit specific conditions. The transactions that include interchange commitments share a key feature. They allow the short line to reduce or eliminate the out of pocket payments that they otherwise would have to make for that line.

In our experience, most if not all spin offs that include interchange commitments would not have occurred without them. Simply, the cash simply was not available to do that for the short line. In these transactions, our compensation comes not from the up front payments, but charges from the revenue that we continue to earn on existing traffic and any growth of traffic that we may experience from the short line. Any revenue that we earn from the new business that the short lines develop.

If short lines cannot commit to any change in traffic with UP, UP would have to set a lease or sale price high enough to account for the loss of, or potential loss of revenue and not just the loss of revenue, but the loss of margin form those transactions if the traffic were interchanged with other railroads.

Most short lines would or could not pay those prices so the spin offs would not have occurred.

The second point that I would like to make is that interchange commitments do not reduce shipper's competitive options. Union Pacific uses the interchange commitments only in transactions where customers have always had to route their traffic over UP. Our interchange commitments do not reduce these routing options. In fact, our spin offs general increase the routing options because the interchange commitments typically do not involve 100 percent of the short line traffic. There are provisions which do allow them increase -- to interchange more traffic with other railroads that might have been the case where UP is still operating the line.

Indeed where our customers on short lines have had access to other railroads, either directly or through some type of reciprocal switch arrangement prior to the spin off, we assure that this access continues. Even in cases where UP has had, in some cases, to pay additional charges to the short line even to assure that access. And in some cases, we have had to go in and subsidize the continued access for shippers to other carriers after the short line takes over.

Moreover, as I've said, most spin offs would not have occurred without the interchange commitments. In other words, the alternative was not a short line service without an interchange commitment. The alternative was, and will in the future, will be continued service by our company, in which case the customers would not obtain many of the benefits that the short lines bring to the table and might well have faced a decline in the service, or in extreme cases even abandonment of the service.

CHAIRMAN BUTTREY: Excuse me, Mr. Gray, you've exceeded your time. I'm sorry. We can maybe pick up with the question portion later on. We need to be concerned about our time commitments so that we don't inconvenience other people in the audience.

MR. GRAY: Okay.

CHAIRMAN BUTTREY: We need to go to the next witness.

MR. BORMAN: Good morning.

CHAIRMAN BUTTREY: Good morning.

MR. BORMAN: My name is Keith Borman. I am the Vice President of the General Council of the American Short Line and Regional Rail Association. I appreciate the opportunity to be able to testify on behalf of the Association today.

Frankly, there is no single unified view about contractual interchange restrictions among the 425 member railroads of the ASLRRA. Our railroads are diverse in size, geographic location, and commercial position. And so it shouldn't be surprising that each member's opinion is formed by all those factors and more.

A small number of our member railroads have expressed unhappiness with how paper barriers have affected their operations. However, we believe that the large majority of our member railroads who operate under contracts that contain interchange restrictions are satisfied, and not dissatisfied with their effect on their operations.

You will hear later directly from some short line railroads in this proceedings. Some are ASLRRA members and some are not. They will explain for themselves their views.

My purpose is to make some observations about the impact of this issue on the short line and regional rail line industry as a whole.

First, the ASLRRA strongly believes that the Railroad Industry Agreement to which it is a party has been and remains an effective private sector vehicle in which to address issues about contractual interchange restrictions on an ongoing basis. Under it, the Railway Industry Working Group, which is represented today by Reilly McCarren, to my left, its Co-Chairman, and himself a short line operator, has proven to be a useful mechanism to deal with complaints and requests for waivers from paper barriers. The vast majority, by the way, of which have been granted over the years.

Indeed, while we have no data to cite, the effectiveness of the Railway Industry Agreement, at least for the large majority of railroads who have subscribed to it, is surely one reason that so few short lines have expressed concerns about interchange restrictions.

As a private sector solution, the Railway Industry Agreement is an illustration of the efficiency and economic revitalization, which deregulation of the railroad industry has produced. Deregulation made today short line and regional railroad industry possible.

The shipping public is best served when the hundreds of members of our industry each are able to assess all the factors of their particular markets, and based on that knowledge, to freely negotiate operating contracts which take into account all those individual circumstances.

So it is that ASLRRA views with great doubt calls for substituting regulatory solutions for the thousands of daily decisions of the marketplace reflected in bilateral contracts. In fact, ASLRRA believes that the mere discussion of potential regulatory intervention to forbid or limit interchange restrictions in private, bi-lateral contracts between railroads has already had a chilling effect on the transfer of otherwise good candidate railroads from Class 1 railroads to short lines.

Based on what we know about the economics of short line stops, we believe that if regulatory restrictions are adopted, which would constrain the ability of the Class 1 railroads to transfer something less of full operational control of their formal lines, the creation of the new short lines from formal Class 1 lines will come to a virtual halt.

In sum, ASLRRA believes that substituting a regulatory framework for the action of the marketplace will be a huge step backwards towards re-regulation of the railroad industry. It would certainly cause severe and disruptive short-term consequences and would set the industry on a course with unforeseeable long-term consequences, threatening the rail renaissance of the 21st century, especially for the short line segment of the industry.

Thank you.

CHAIRMAN BUTTREY: Thank you.

MR. MCCARREN: Chairman Buttrey, Vice Chairman Mulvey, my name is Reilly McCarren. I'm the Co-Chair of the Rail Industry Working Group. That group was established in 2000 and is comprised of representatives of all seven Class 1 railroads, as well as seven Class 2 and Class 3 representatives, the Council of ASLRRA and the AAR, as well as staff advisors and experts, as required. We meet quarterly and we hold conference calls in the intervening months. We are a successor to the Senior Management Commitment and specified in the original Rail Industry Agreement. And we administer that authority to interpret and amend the Rail Industry Agreement as required.

We are a very active group. Not only do we meet on a regular basis, we frequently hold presentations of the Short Line Association Regional and Annual Meetings to assure that our members of the Short Lines Association are fully aware of the how the Rail Industry Agreement works.

Our activity with respect to the Rail Industry Agreement has been most notable in the area of paper barriers, but we have also ventured into other areas such as car supply, interchange service, and equipment visibility.

The Rail Industry Agreement itself was originally adopted in 1998 to attempt to bring some definition to the terms of trade between large and small railroads. It deals with a number of issues that, at the time and presently, pose some concern as impediments to growth of short line traffic. And notably, paper barriers, but also terminal assets, reciprocal switching pricing discrimination, car supply, and interchange service are areas covered by the Rail Industry Agreement.

With respect to paper barriers, the principles that the agreement applies are that only legitimate barriers should be enforceable. That barriers should not restrict the short lines ability to develop new traffic. And that is not only with respect to rates, which was much the focus of the previous panel, but also with respect to service and equipment.

The agreement was redrafted in 2004 to better define new traffic so that short lines might be better able to avail themselves of the relief afforded by the agreement. We also have a provision where if individual cases should not be agreed between the respected railroads are mediated between the Association, the AAR and the ASLRRA. While, issues of principle and interpretation are handled by the Rail Industry Working Agreement. Should neither of those avenues provide resolution, arbitration by the Board is available to an unhappy short line party.

In terms of relief requests, since January 2002 there have been 90 request, formal requests, for relief under the Rail Industry Agreement. Sixty-seven of those have been granted and one is still pending. Roughly two thirds of those requests are paper barriers. Others involve different forms of access, trackage rights, and whatnot under the Rail Industry Agreement.

However, far more of these paper barriers waivers are handled informally between short lines and Class 1s. The RIA essentially provides the backdrop, if you will, of what those terms of trade are, substituting, if you would, for case law in this area.

In short, the RIA has been an effective mechanism to ensure that these contractual obligations between Class 1s and short lines, such as the paper barriers, don't inhibit the rail system from handling traffic that it should be able to handle. This is especially true with respect to new traffic opportunities, which refer not simply to new shippers, but to new traffic from existing shippers.

We are an active industry body. We interpret the RIA and we intend to continue doing so and adapting it to an evolving rail industry.

Thank you.

CHAIRMAN BUTTREY: Thank you. I thank all of you again. Listening to this testimony, I'm thinking of a lot of interesting questions to ask.

VICE CHAIRMAN MULVEY: Yes, that's the thing because you have all these written down and you think of more to ask.

CHAIRMAN BUTTREY: Since I get to go first, if I were a short line railroad and had an agreement with a Class 1 railroad and one morning I got up and said I don't like being bound by these restrictions and so I'm just going to ignore them in the future -- so I proceed to do that, is it true that the result of that decision would be that when I'm asking for access to the track or when I deliver that traffic to the mainline that I don't get access because of dispatching requirements or some other restriction? What enforcement procedure would be in effect under those circumstances? I bet that's never happened, but if it did happen?

MR. GRAY: I was going to say, Chairman Buttrey, for us we have not had that experience where a railroad with a commitment has refused to honor that commitment. Quite frankly, a lot of the process in this is basically you're dealing with honorable people so you don't have those issues. The fact is that operationally we do not have a lot of recourse. We are still obligated to do interchange with that railroad, in any case, to take care of that interchange appropriately, regardless of what other disputes there might be. The resolution for something like that unfortunately would have to be through legal processes, not through operational processes. The fact is that whether we like what the short line may be doing -- or like what the short line is doing on something or not, we would have to resolve it not through operational issues that hurt both ourselves, our customer, and the short line, but through the legal process.

CHAIRMAN BUTTREY: So the avenue of approach, the initial avenue of approach would be through your organization that you said that there's a lot of cases that's still pending that haven't been resolved, which might fall under that category I just mentioned. Is that correct or not correct?

MR. MCCARREN: Well, we only have one case currently pending. We had 67 that had been resolved favorably to the short line. There were 22 that were not resolved favorably to the short line of the 90.

CHAIRMAN BUTTREY: Which means that the short line was relieved of whatever it was that they were asking for relief on, correct?

MR. MCCARREN: If it was resolved favorably, yes. They received the relief they were asking.

CHAIRMAN BUTTREY: okay.

MR. MCCARREN: In the 22 cases they did not receive the relief that they were seeking under the agreement.

CHAIRMAN BUTTREY: Right.

MR. MCCARREN: In some cases, in many cases, because there was a disagreement as to whether or not traffic was truly there, I would say that if it is a gray area with respect to whether or not traffic is prohibited by the contractual terms in the overall tapestry of the Rail Industry Agreement, then we would see it before our group. If it’s a peculiar issue of contract or if it is simply a, you know, we're going to do what we want, come and get us, then that would be resolved by the two companies. I'd say that in my past experience at Wisconsin Central, we did have circumstances where we had contractual issues with a Class 1 carrier over exactly what the meaning of those restrictions in the contract were. They were always negotiated out. Traffic was never, you know, traffic stopped moving and customers were never directly affected.

CHAIRMAN BUTTREY: And the traffic was switched as if nothing ever happened?

MR. MCCARREN: Exactly.

CHAIRMAN BUTTREY: Okay. But the recourse for your organization is only for railroads?

MR. MCCARREN: That is correct.

CHAIRMAN BUTTREY: A shipper would not be able to come to you and say I can't get Railroad XYZ to do whatever it is I want them to do.

MR. MCCARREN: That is correct. Their railroad would have to advance that cause on their behalf. The Rail Industry Agreement is an agreement between railroads.

CHAIRMAN BUTTREY: Right. Thank you.

VICE CHAIRMAN MULVEY: Thank you. The anti-trust law identifies all primary indicia of reasonableness of a restrictive covenant, interchange agreement, whatever you want to call it. And those four are: one, the restraint is ancillary to the main purpose of a lawful contract. Two, the restraint is neither imposed by a party with monopolistic power or forced as a monopoly. Three, the restraint is partial in nature and reasonably limited in time and scope. And four, the restraint is not greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interest of the public. You'd have all four of these to be reasonable.

In your opinion, do paper barriers pass this test and why?

MR. WARCHOT: The transaction that the parties enter into is not a transaction where the interchange commitment is ancillary to the transaction itself. In this case, this is not a transaction --

VICE CHAIRMAN MULVEY: Excuse me, you said that the transaction would not occur if it was not for the agreement?

MR. WARCHOT: The transaction would not occur, yes.

VICE CHAIRMAN MULVEY: Okay.

MR. WARCHOT: The interchange commitment is integral to the transaction.

VICE CHAIRMAN MULVEY: Okay. So it's not ancillary then?

MR. WARCHOT: We would not say it's ancillary because this is an agreement not among parties where one of the parties may ultimately end up being in competition; here, this is between two parties which are entering into a cooperative venture, an arrangement, a long-term joint venture, however you want to characterize legally. The cooperative arrangement between the parties to jointly serve the customer, the same as a joint venture, there wouldn't necessarily be any limitations on the time of a joint venture arrangement. It would be as long as the parties so desired. So the comparison of non-compete agreements or the application of non-compete agreements is really inept in this circumstance.

VICE CHAIRMAN MULVEY: Anyone else want to -- well, in your testimony, written comments, and just now, you claim that the analogies to non-compete agreements and other anti-trust restrictions are inapt and that interchange commitments establish "a cooperative arrangement not a competitive rivalry between the buyer and the seller," yet isn't it true that with paper barriers there's an advantage of competitive routing often by the buyer and another Class 1 railroad? And isn't that the competition that paper barriers will end up stifling?

MR. WARCHOT: No, we would submit that the transaction itself creates the cooperative arrangement. That cooperative arrangement is for the through service from the short line through the line haul transportation. Each transaction and each interchange commitment is somewhat different. As we indicated, no one size fits all. These arrangements depend on the transaction and could include different types of arrangements, such as support arrangements, where the Class 1s provides marketing services, provides cars. Some do, some don't. There could be different amounts of payment that would be made or foregone if there were these types of arrangements.

These are cooperative arrangements. The relationship is between the two parties for the provision of the through service. It is not at the downstream point.

CHAIRMAN BUTTREY: I think I heard you say that these agreements between short lines and Class 1s, even if they were approved under 10901 or 10902 somehow have some type of umbrella protection under the other provisions of the Act for anti-trust immunity. How do you get there?

MR. WARCHOT: Well, I think as Mr. Gray and other members of the previous panel indicated, I think there is some question as to the extent to which any anti-trust protections are afforded as a result of the overall jurisdictional -- or the overall jurisdiction of the STB with respect to the transaction under concepts of primary jurisdiction or applied immunity. There's also the question of standing that was referenced. So it's an open question as to the extent to which there may be some anti-trust protections that are afforded, even though there is no specific statutory immunity.

But let me add also to that point as well that even though there may not be the application of the anti-trust laws because of some protections that might exist, we believe that these are not -- these interchange commitments are not unreasonable restraint of trade that would be in violation of the anti-trust laws. Any contract contains some sort of restraint of trade. Contracts such as overhead trackage rights agreements, haulage agreements contain restraints of trade in terms of limiting what one party will do in a transaction in consideration for that limitation.

What the courts and what the law prohibits are unreasonable restraints of trade. And we would submit that there are three tests to determine whether they are unreasonable in any context. One is whether or not there is any lessening of efficiency if the transaction creates inefficiencies. Here we would submit that the transaction itself enhances efficiency by providing better service and perhaps preserving service on a line where it otherwise may not be available.

Secondly, is there any anti-competitive effect from the transaction. And I think we've shown, and I don't think anybody has disagreed, with the fact that this does protect the status quo competitively. The customer on the line has no less competitive options, from a rail standpoint, than it did prior to the transaction. It has no less rights or remedies before the Board than it had prior to the transaction.

And third, does any party to the transaction have greater market power as a result of the transaction than it did before. And here the Class 1 railroad has no greater market power with respect to the ability to route traffic over its lines than it did prior to the transaction. We believe that the interchange commitments in these contexts meet all three tests and would not be found to be unreasonable restraint of trade under the anti-trust laws.

CHAIRMAN BUTTREY: The testimony that was given by some of the witnesses that were on before you

-- I'm not exactly sure whether you were in the room or not and heard those, would seem to suggest that the opposite is true, that there are a fair amount of cases out there, actual cases out there, where these conditions, or provisions, or agreements do impede the ability for shippers to elect to use some other carrier or be switched to a different carrier or something like that. And that's a different question really from whether they're anti-competitive or not. It's a question of whether it grants them an option, if you will, for service into their location.

MR. WARCHOT: Yes, but again I would submit that that shipper is in no worse position after that transaction with the interchange commitment than it was before. It didn't have that option before; it doesn't have it after.

VICE CHAIRMAN MULVEY: But it does create a barrier to entry, to the extent you consider that market, you are, with that contract, erecting a barrier to entry. And, in fact, one of the indicia that I mentioned before was that the restraint was partial in nature and reasonable and limited in time and scope. Now, these go on in perpetuity and one of the criticisms of paper barriers is not that they are not useful for facilitating transactions, but that they go on forever. Do you want to comment on that?

MR. WARCHOT: Well, the -- first of all, the fact that they go on forever or go on for longer periods of time could be consistent with, or is consistent with the relationship, conductive relationship that is created between the Class 1 and short line in the transaction.

Also, that the length of time reflects, as I mentioned before, the consideration and the assumptions that go in to the transaction on behalf of each party. When the Class 1 goes into a transaction, there are a number of different considerations that it has to be involved with. One, of course is the value of the line, how it would determine the value of the line. One would be what the expected revenues would be on the line. One would be what type of service it intends to provide, the amount of traffic it expects, the time it expects that traffic to flow. You can't say in any one particular instance that a length of time is unreasonable, too long, or too short.

VICE CHAIRMAN MULVEY: Well, but infinite is a little different from a fixed amount of time. Every transaction has a value to the Class 1 and the short line, correct? There's a monetary value that you could attach to it. And you could recapture that value over some defined time arising rather than an agreement that would stay in place in perpetuity. It could be five years. It could be ten years. It could be a trade-off between the amount of discount you want to give the short line in taking over the traffic and how much they would have to pay for it. So, if you accepted a smaller amount and say okay, but for five years you're going to have to give us this traffic and you can't get to the line with anyone else, that would compensate you for the discount, would it not?

MR. WARCHOT: Well --

VICE CHAIRMAN MULVEY: And still give the shipper the eventual opportunity to use another carrier.

MR. WARCHOT: Well, at the outset, I want to go back to the question of who it is that is being affected by this. The shipper, again, is at no worse position before the transaction -- or after the transaction as he was before the transaction. The question here is what is fair, what is unfair, as between the parties involved, between the two carriers. And as we've seen with very few exceptions, the carriers are not complaining about the terms of the transaction.

VICE CHAIRMAN MULVEY: At least not publicly.

MR. WARCHOT: Well, because again, it is a win/win situation for them. So these again were entered into on an arms length basis with assumptions and terms that made sense and that were a value to the parties involved. Again, without any reason from an anti-competitive standpoint, from a misrepresentation standpoint and the like, to change those terms there is no basis for making that change.

VICE CHAIRMAN MULVEY: When you say no change in a competitive environment, however, you're talking about the current, the present. When a barrier to entry is something that precludes future competition, it precludes future entry, and one of the charges that the Chairman and I have is to protect the public interest. And the public interest is not only today, but it's also in the future. What are we going to do, to enter, and compete? The whole presumption of deregulation was to promote competition and let them walk at the side. When you have these restrictive covenants, don't you in fact frustrate the market solution?

MR. WARCHOT: When you say firms coming in to compete, if you're talking about shippers --

VICE CHAIRMAN MULVEY: No, firms coming in to compete -- the short line railroad competing against other --

MR. WARCHOT: Well, they're the short line railroad again. These are all arms length negotiations. The short line doesn't have to enter into the transaction, and in many cases there aren't paper barriers, as Mr. Gray had indicated in transactions. So, again, these vary depending upon the circumstances, the consideration, the expectations of the parties. Some may have interchange commitments, some may not.

MR. MCCARREN: Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: Yes.

MR. MCCARREN: Can I provide a different view on the future for you?

CHAIRMAN BUTTREY: Please do.

MR. MCCARREN: I think there's another angle to this, which is that the spin offs of these lines to short lines are very, very important of preserving the competitiveness of our merchandise carload network. And I think with the panel previous, which very heavily represented utility coal interests, large chemical companies, these sorts of facilities are very much in the minority in the short line world. Generally, those facilities are on lines that are retained by Class 1s, but there are some in the short line world. But the people who are shipping boxcars of brown paper and gondolas of scrap, that is the business that is most at risk in the rail network. And that is where short lines have been most effective at retaining that business, increasing the railroads participation in that business.

And to give a real world example of this, one of the -- we recently at the Arkansas & Missouri, where I’m the principle owner, jointly with the Missouri and Northern Arkansas, which is one of the railroads at issue here in paper barriers with respect to utility coal plan -- we jointly received a marketing award for a new movement we developed of construction safety from Van Buren, Arkansas to Branson, Missouri. Now, the Missouri Northern Arkansas had to get a paper barrier waiver from the UP to handle that traffic, which they did. However, I think I could say categorically that if that line was still owned by the Union Pacific, their economics would’ve prohibited them from handling that traffic in an economic fashion. And had -- now, that line has been in short line hands for a long time, now about 15 years give or take, but I dare say that had the Union Pacific known ahead of time that they would potentially bring their arch-rival into a service position at two utility coal plants that are also located on that line, they never would’ve leased it into the short line world. And therefore, the beneficial effects, not just on our traffic, but on many other shipper, merchandise traffic shippers, people shipping frozen foods and coiled wire rod, and logs, and things like that, those beneficial effects would never have taken place.

So, I think a very real public policy question here is that if these sorts of contractual restrictions are not permitted in the future, and devolution of lines into -- the gathering lines into the short line world comes to a halt, as a couple of our other witnesses have suggested, then a very positive evolution of the rail system as a whole will be halted.

MR. GRAY: I --

CHAIRMAN BUTTREY: Yes, I'm sorry. Go ahead.

MR. GRAY: Yes, to continue on answering your question, your part of your question and Mr. Mulvey's question on some of the time frame of the interchange commitments. To my knowledge, Union Pacific doesn't have any interchange commitments that are perpetual. They are consistent with the term of the lease of the line. In some cases, we found that the lease of the line has to be at least 20 years to provide the short line enough time to make investments in the line and recover those investments, that you can’t do it for anything less than that. However, at the end of that lease period, that interchange commitment is like all other terms of the lease are renegotiable and include the opportunity, if the interchange commitment is not there, to begin charging rental for the line. Certainly we would not lease it for free if the interchange commitment is not in place. So, there is always that flexibility downstream that we can -- the interchange commitment can disappear at the end of the term of the lease.

But as Mr. Reilly said, there are consequences one way or another, economic consequences which have to be accounted for as part of the termination of the interchange commitment.

Potentially it could be renewed at a zero cost lease, or it could be put into some form of which we would charge for the lease, or the line could be sold. Now, I want to emphasize that where we have sold lines and occasionally we do have a line sale,, if that line sale is for what we perceive to be the going concern value of the line, then there are no interchange commitments involved with that line. Rarely do we find a short line that believes that the line that it would be buying is worth the economic value to pay the full cost of that line, then inevitably there is greater value, there is greater ability to ensure that the line continues in operation if we have it at a low cost sale, or a no sale, or a lease at no cost with the interchange commitment in place.

VICE CHAIRMAN MULVEY: Do you have any data on how many of these agreements have paper barriers that were renegotiated, or liberalized, or bought out? That's a question for all of you.

MR. MCCARREN: We have -- I have no information on the industry. I can tell you for UP what we have. We have, depending on how you define the interchange commitment, it can be between 25 and 29 that we have in place with various railroads. All of them are spin offs from Union Pacific. There is no such thing as an interchange commitment with a railroad that is not a spin off from us.

And as far as renegotiation, there have been very -- I don't believe there have been any that we have renegotiated to date, simply because we'll start seeing the first of the lease turnovers that took place in the late 80s start coming up within the next couple years.

VICE CHAIRMAN MULVEY: Well, there'll be requests for waivers from the RIA.

MR. MCCARREN: In terms of requests for waivers?

VICE CHAIRMAN MULVEY: Yes.

MR. MCCARREN: Well, in that --

VICE CHAIRMAN MULVEY: Yes.

MR. MCCARREN: -- I believe we've had about 50 waivers. Of those, I believe we've granted all but three or four.

VICE CHAIRMAN MULVEY: There were 50 waivers of paper barriers?

MR. MCCARREN: Of paper barriers.

VICE CHAIRMAN MULVEY: Because you said

those 67 waivers were granted. Now, that's different from the ones -- in other words, some parties had waivers they negotiated directly and the other ones went to you and of the 90 requests for waivers of paper barrier restrictions and other things, 67 were granted.

MR. MCCARREN: That's correct. And we consider those to be the formal requests made pursuant to the agreement. There are others that are handled informally.

VICE CHAIRMAN MULVEY: I'm sorry. Just statistics wise, of the 67 waivers, what percentage of those were for paper barriers? You said about two thirds?

MR. MCCARREN: Of the total 90, about two thirds were paper barriers. I don't have the percentage from the 67 because --

VICE CHAIRMAN MULVEY: Theoretically then it could be 50/50 then because if 20 were rejected they were all paper barriers then, you would have about 50/50?

MR. MCCARREN: Yes, I would say that I have been Co-Chairman of the Committee since late 2002, so most of this period. And I would say that in general the paper barrier statistics mirror the total during that time frame. So, I would expect you could simply take a pro rata.

In the first couple of years of data keeping, it simply wasn't broken down by type of relief requested.

CHAIRMAN BUTTREY: There was some testimony earlier I think, that there are paper barriers out there that prevent build outs. Are you aware of whether that's the case with your company or not?

MR. GRAY: Well, we don't have any paper barriers in place that specifically address build outs. However, the situation -- you would have a situation where if a carrier is contractually committed for interchange to us, if someone built out to that carrier or that carrier built out to another location, then those commitments would apply on any new traffic that was developed as a result of that build out. Now, I’m not sure of the exact facts that were mentioned earlier in the Minnesota case. I don’t believe that was related to any of our short line spin off carriers.

CHAIRMAN BUTTREY: Car surcharges things like that might be applied to that build out traffic?

MR. GRAY: Well, if nothing changes from the perspective of the small railroad, the short line that has the commitment. If someone builds out to them, they are still obligated for the business that comes from that build out. They would still be obligated to interchange that with Union Pacific under their agreements with us.

CHAIRMAN BUTTREY: Okay. Were any of those waivers that you spoke of, waivers from any kind of build out restrictions?

MR. MCCARREN: Not to my knowledge, no. They were for business on the line as it existed.

CHAIRMAN BUTTREY: Okay. Do you have anymore questions?

VICE CHAIRMAN MULVEY: I do, but I think we should move on. Thank you.

CHAIRMAN BUTTREY: Thank you very much.

PANEL III:

CHAIRMAN BUTTREY: This is the third panel, Ameren Energy Fuels and Services Company, Arkansas Electric Cooperative Corporation, Dow Chemical Company, and Entergy Services and Entergy Arkansas, Incorporated.

And I would ask the speakers, if you would, to identify yourself before you start speaking.

We'll start over here on my left.

MR. SHARP: Thank you, Chairman Buttrey, Vice Chairman Mulvey. I'm Steve Sharp. I'm the Fuels Manager for Arkansas Electric Cooperative Corporation. AECC is a membership based generation and transmission based cooperative that provides wholesale power to more than 400,000 of our customer members scattered over pretty much the entire state of Arkansas.

In order to satisfy this obligation, we've made agreements with other utilities to provide generation and transmission resources. Our largest generation resource that we have purchased on this co-owner title base are the While Bluff and Independence

Coal Fire Plants that are in Arkansas. Each of those plants burns approximately six million tons of powdery coal each year.

AECC has a 35 percent ownership interest in those two particular plants. Entergy is the majority owners of those plants and also operates the plants.

Our interest in the paper barrier situation stems primarily from our ownership in the Independence Power Plant in Arkansas. This plant is located near Newark Arkansas, on the line of the Missouri North Arkansas River Company, or as we refer to it as the MNA, which is now a subsidiary of RailAmerica, formerly known as RailTex. MNA operates on this line by virtue of a pair of agreements dated December 11, 1992, between MNA and Missouri Pacific, which at the time was a subsidiary of Union Pacific, or UP. UP had acquired the Missouri Pacific in 1992. These agreements provide for the lease and purchase of track in Missouri, Arkansas, and Kansas. The MNA can physically interchange traffic not only with UP but they could physically interchange traffic with

Burlington Northern Santa Fe at several locations, Fort Scott, Kansas, Lamar, Carthage, Springfield in Missouri. And also they could physically interchange with the Kansas City Southern Railroad.

However, just because they can physically interchange with these railroads doesn't mean that they are able to do so. These agreements that exist between the MNA and UP contain what we've been calling paper barriers that preclude the MNA from participating and preventing AECC, Entergy, and other co-owners of the Independence Plant from enjoying competitive rail service to the plant.

The AECC certainly welcomes the Board's review of this issue and we support the Western Coal Traffic Leagues' efforts related to paper barriers. We have experienced the adverse consequences of paper barriers and we believe it is important for the Board to give careful consideration to the need for limitations on or the elimination of this practice of paper barriers.

We believe that the paper barrier issue is integrally related to the loss of transportation options that we've experienced at the Independence Plant. And I guess this is one of the -- maybe we're encountered in a somewhat unique situation because these agreements are in a public domain in this case. So, unlike a lot of these situations, which are not, we are able to talk about some of the details.

First of all, these paper barriers effectively prevent the MNA from delivering any BRB coal that's originated by the Burlington Northern Santa Fe. We've found this to be especially important to us during time periods when the Union Pacific has had service problems and has not been able to deliver to us the amount of coal that we have under contract with them for delivery. Since MNA lease there have been three different episodes where Union Pacific has been unable to make the timely deliveries to the Independence Plant that we need. And in each of those situations, we've had to put burn restrictions on the plant and the cost to AECC has been tremendous. And in fact, we're still in the throes of the third episode. We're still not out of the woods on this last episode. We're still having difficulty getting coal we need to the Independence Plant.

In the past, had this same line segment still been owned by the North Missouri Pacific, excuse me, they would have been able and presumably able to handle the Burlington Northern Sante Fe originated BRB coal that is needed to keep this plant in full operation.

Secondly, the MNA as the arrangement has it now, does not provide a limitation on the destination, around it if you will, for the BRB movements of coal to Independence that formerly would've been provided by the possibility of an efficient interchange between Burlington and Union Pacific, via Hoxie, Arkansas.

This, there again, this possibility does not exist with the MNA. Not withstanding that Burlington to the Independence Plant via this Hoxie Interchange would be shorter than the route normally utilized by Union Pacific for the BRB coal moving to this plant.

Also, the paper barriers restrict or eliminate the MNA's ability to provide non-BRB coal from numerous points that would or could've been online origins for the Missouri Pacific, including some lines in Illinois, Kansas, Missouri, Texas, and Indiana. Similarly, the MNA is generally not able to receive non-BRB coals in interline movements that the Missouri Pacific could've handled from Kansas City Southern, Illinois Central, and part of the other line, and even some of the other railroads.

In the case of KCS, this results from the paper barriers. And related to some of the other carriers, the MNA does not have the physical ability to interchange directly with them.

UP is arguing that these competitive options were lost prior to the creation of the MNA and thus were not caused by the paper barriers. Even if UP is correct in this point, AECC does not believe that the Board should view that as a satisfactory closure to the issue. AECC has been unable to locate any Board, ICC, or other authoritative decision that approved these losses of transportation that the Independence Plant is experiencing.

The AECC has carefully reviewed the ICC

decision that approved the UP merger, calling aside the situation for remedial conditions were imposed. The ICC's approval was premised on a belief that, and I quote, the proposed transaction present no other significant competitive problems in any transportation markets, including coal transportation markets. If a carrier's post-merger ability to transport traffic results from an exercise of market power, rather than improved service, the ICC specifically recognized in the UP/MP/WP decision that the possibility that this may result in inefficiency, the inability to achieve monopoly profits, reduce competition, and harm to essential services. The ICC did consider the public interest aspects of potential diversions to UP of origin, BRB traffic terminated by the Missouri Pacific. Although BN may lose some or all of the traffic it now handles in joint-line service with Missouri Pacific, this is not a public interest concern. And again, this is a quote from ICC, unless the traffic diversion would have a detrimental impact on the users of the transportation services.

In reviewing UP's filings, we don't see

any evidence to refute the proposition that the MNA no longer alters transportation or options that would've been altered by independence Missouri Pacific. Moreover, AECC and Entergy have certainly demonstrated the detrimental impacts resulting from a loss of these options. The question that remains unanswered is how could these effects have occurred without ICC or Board approval. Testimony from ICC on page 658, which was the Staggers Act review last year highlighted how methodological refinements doing away with rail mergers created better recognition of several types of competitive problems, including gateway closures, source competition, and some so-called crossover effects and interactions among different transactions.

This testimony also explained how some site problems inadvertently may have been overlooked in some of the earlier merger cases. We see each of these issues at the Independence Plant, closure of the Hoxie Gateway, restricted ability to source substitute coal, and crossover effects between the UP/MP/WP merger, and the BRB joint line cases.

Even if the problems we now have at the

Independence Plant weren't created by the paper barriers, they are reinforced and maintained by these barriers, which limit the ability extensively of independent railroads to provide service under statutory obligations.

Certainly one way of approaching this from our standpoint would be to pursue the reopening of the WP/UP/MP merger case to try to permanently restore the lost competition. We believe the Board has the authority to do that and certainly could; however, we hope that the Board herein gives consideration to the fact that we have lived under these competitive restraints imposed by paper barriers for 14 years, and we would certainly endorse any action the Board might take regarding paper barriers that would restore us to at least the portion of rail options we believe we should've had all along.

Thank you.

CHAIRMAN BUTTREY: Thank you, sir.

MS. BROWN: Good afternoon, Chairman Buttrey and Vice Chairman Mulvey. My name is Sandy Brown. I am an attorney with the firm Troutman

Sanders. I am here today representing Ameren Energy Fuels and Services Company, which I will refer to as Ameren.

On behalf of Ameren, I would like to thank the Board for taking comments and holding a hearing on paper barriers. In response to the Board's February 1, 2006 decision, Ameren filed comments on this docket on March 8, 2006. Ameren is testifying today in response to the Board's June 2 decision to conduct a public hearing on paper barriers.

I had intended to provide some background on Ameren and describe the paper barriers impacting Ameren's Labadie Plant, but in the interest of time, I will skip that portion and refer the Board and others to Ameren's written comments.

However, I do think it's important to note that the paper barrier impacting the Labadie Plant, excuse me, is the perfect example of an unreasonable paper barrier. It contains an outright and permanent restriction against coal traffic being moved to Lavity, which is contained in a line sale agreement that was designed to sell off a parallel line that was headed for abandonment. In other words, the selling railroad had no use for the line, so the paper barrier was only imposed to protect monopolistic access to the plant.

I will provide -- I will next focus on the Board's clear authority to regulate paper barriers and provide suggestions to address the anti-competitive nature of paper barriers. The Board has and should exercise authority over anti-competitive behavior engaged in by railroads, particularly over the formation of unreasonable paper barriers. This authority is based upon and supported by one, the Board's inherent statutory authority. Two, the Board's authority to assure railroads fulfill their common carrier obligation. Three, regulatory powers afforded federal agencies by Congress in analogous situations. And four, as addressed in recent Board decisions.

The Board has exclusive jurisdiction over rail transportation over 49 USC 10501. Paper barriers are usually established in transactions that are "approved" pursuant to the Board's exemption authority under Section 10502. The Board has continual jurisdiction under the statute to revoke an exemption "to the extent necessary to carry out the Rail Transportation Policy or the RTP". The use of the exemption process to implement transactions with paper barriers gives the Board authority to review, at any time, the past, present, and future transactions with an eye to carrying out the RTP and eliminating unreasonable paper barriers.

The primary reason that certain paper barriers are unreasonable and conflict with the RTP is that they are specifically designed to prohibit or stifle competition. It is undisputed that our national public policy strongly favors competition in rail industry and elsewhere. This is captured in the heavy emphasis placed on competition in the RTP and enacted by Congress in 49 USC Section 10101. Indeed, one third of the points that Congress has mandated and codified in the RTP specifically charged the STB to promote and protect rail competition. The Board has recognized its authority to promote competition in rail construction cases and the revised rules for rail mergers. And this concept should be applied in line sales or other transactions that are currently used to create paper barriers.

As the Board is probably aware, Ameren has been active in trying to improve rail service and rates at its plants by creating competitive transportation alternatives by methods such as rail construction. The Board encouraged to invest in rail construction to promote competition. Ameren has shown that it is willing to do its part in investing in and expanding competition at its complaints. Thus, Ameren is asking for a level playing field so that the promotion of competition is applied at all transactions throughout the Board.

The Board should also look at what a paper barrier restriction interfere with and therefore violate the common carrier obligation of railroads. If a rail line transaction includes a provision that prohibits the purchasing railroad from providing a service to shipper or shippers along its line, then the paper barrier should be deemed an unreasonable contract restriction to requiring railroads common carrier obligation. As in other instances, the Board should not approve agreements that require a railroad to contract away its common carrier obligations. The Boards mandate to promote competition under the RTP is similar to the authority over competition problems exercised by other agencies.

In general, Congress has charged agencies with promoting competition and giving them the means to carry out that mandate. The STB should exercise its authority over competition issues within its jurisdiction, such as line and lease -- line sales and lease transactions and follow the general policy that competition is not only desirable, it is imperative in the rail industry.

It is instructive to look at the approach taken under the anti-trust laws for evaluating whether a competition restriction condition, similar to a paper barrier, is a reasonable or unreasonable constraint on competition. Federal anti-trust laws will permit, for example, covenants not to compete, so long as they are limited in geographic scope and time. The anti-trust case law approach is an effective method to ensure each transaction receives the proper scrutiny and thereby prevent the parties ability to privately contract the forbidden restrictions on competition.

Similarly, the RTP waives in favor of agreements that do not interfere with competition. Unreasonable paper barriers designed to permanently deter or prohibit a short line railroad from interchanging traffic with the seller's competitors or from carrying certain traffic on its line serve neither the efficiency nor the public interest goals of the RTP and the Board's governing statutes.

In sum, comparable competition analysis is performed by other agencies regarding the potentially anti-competitive agreements would be rightfully exercised by the Board in evaluating paper barrier effects. The Board's ongoing authority under the exemption authority in Section 10502 should rightfully be exercised to ensure that competition is fostered by allowing -- by evaluating the impact on competition that could result from allowing the paper barrier terms from remaining in the agreement. The Board can and should exercise its authority to protect and promote competition.

The anti-competitive nature of paper barriers has been recognized by one Board member in recent decisions. As Commissioner Mulvey noted, as Vice Chairman Mulvey noted that paper barriers have little or no competitive value in rail line agreements. These concerns, as well as the appropriateness of time limitation for any restriction were reflected in other decisions that addressed paper barriers. These statements appropriately reflect the Board's duty to promote the public interest which is governed by the RTP. Ameren concurs that the Board has a duty to evaluate paper barriers in transactions with an eye towards opening up, not shutting down, rail carrier competition to shippers.

Ameren respectfully submits that the Board can and should use its authority to review alleged anti-competitive effects of paper barriers. If needed, Ameren encourages the Board to initiate a rule-making to establish guidelines for challenging paper barriers.

Some suggested remedies or guidelines to consider for addressing the anti-competitive aspects are as follows: first, the Board should establish a presumption for a sunset provision for all current paper barriers, limited their life to no more than five years, unless the railroad that created the paper barrier shows that a longer unlimited restriction is reasonable.

Second, the Board should develop guidelines to conduct a case-by-case review of current paper barriers for determining whether a paper barrier should be revoked or dissolved before the sunset period.

Finally, the Board should establish policies to ensure that reasonable paper barriers -- unreasonable paper barriers are not permitted in future rail line sales or leases.

I would like to take a few moments to address some of the questions raised, including anti-trust immunity and retroactivity. First, whether or not these transactions enjoy anti-trust immunity should not be used to cloud the importance of the issue. The Board has authority to take action on paper barriers and it should do so.

Second, I am not aware of any rule, as defined by the Administrative Procedure Act that authorizes paper barriers. Thus, retroactive rule making arguments do not apply. Even assuming that those rules did apply, the Board can take reasonable retroactive action. Implementation of the relief requested in this proceeding would not propose damages for past action, and seeks only relief with respect to future rights of the parties, in other words would be reasonable.

Thank you for allowing Ameren to share its views today. And I am happy to answer any questions.

CHAIRMAN BUTTREY: Thank you very much.

MR. BAKER: My name is -- good afternoon, my name is Jeff Baker and I have Global Purchasing responsibility for Dow Chemical Rail Assets and Freight. My purpose today is to provide you insight into Dow Chemical's paper barrier situation and related commercial issues pertaining to Dow's facility in Ludington, Michigan.

To my right is Mike Munro. He’s a member of Dow’s legal department and he will address legal issues as it relates to paper barriers. Dow is a diversified chemical company that offers a broad range of chemicals, plastics, agricultural products to customers in more than 175 countries. Dow has approximately $20 billion in annual sales in North America. And we initiate, in North America, 130,000 rail shipments each year using a fleet of 20,000 rail cars.

Dow’s sole manufacturing facility for calcium chloride is located in Ludington, Michigan and it is served by a short line railroad called the Marquette Railroad. Calcium chloride is sold globally as deicing chemicals for walkways, oil and drilling fluids, and in dust control. These markets are extremely price competitive with numerous product substitutes. Rail freight reflects 30 to 50 percent of the total delivered calcium chloride product cost and is a major factor in determining a products global competitiveness.

The Marquette Railroad purchased an

estimated 100 miles of rail line from Dow's Ludington Facility to just north of Grand Rapids, Michigan from the CSXT Railroad. Dow asked to be considered as a purchaser of this rail line, the line running from Ludington to north of Grand Rapids; however, CSXT would not allow Dow to participate in this bidding process. Marquette has indicated to Dow that a paper barrier and a steel barrier was imposed by CSXT as a part of this sale agreement. Dow, by our estimate, that the CSXT paper barrier more than doubles the Marquette portion of the railway from our Ludington Facilities if Dow traffic wanted to connect to the NS in Grand Rapids. So we have the ability to connect from Ludington into the NS in Grand Rapids.

In addition, CSXT created a steel barrier which prevents Marquette from making a direct interchange with the NS or Norfolk Southern, without first connecting to the CSXT line. This steel barrier allows CSXT to add additional rates along with paper barrier costs, you know, the paper barrier costs, to prevent a cost effective connection to the NS.

The CSXT paper barrier and the steel

barriers make it anti-competitive for Marquette to connect to the Norfolk Southern in Grand Rapids. CSXT has used this lack of competition to increase their rates, and I'll stress significantly increase our rates, which has been compounded through unjustified and unreasonable fuel surcharges.

There is no economic justification to support the significant CSXT rate increases, other than the absence of effective rail competition. You know, we actually believe CSXT has improved the cost position by selling the Ludington line to Marquette Railroad. And Dow wants viable railroads. What does not want is to be subject to a monopoly situation, you know, created through artificial means such as paper and steel barriers to limit effective rail competition.

And I'll stress, we've worked, you know, we have attempted to work with the CSXT management to help them understand that we compete in a global calcium chloride market with primary competition from Europe and China. You know, imports are a significant threat to our calcium chloride franchise, and no one, neither Dow nor CSXT, benefits if Dow loses market share.

Since 2000, calcium chloride imports from China have grown from 0 to 34 percent of the total U.S. calcium chloride import market. Ten percent of Dow's calcium chloride volume is exported from the United States through rail shipments to the Gulf ports. We compete globally with the Chinese and European producers who have substantial and growing excess capacity for calcium chloride. Dow has specifically asked CSXT for competitive rates to the Gulf with no success. You know, the lack of effective rail competition has further impacted our ability to compete in this global marketplace.

Twenty percent of Dow's calcium chloride shipments from Ludington terminate at NS destinations. We already -- with already constrained rail capacity, it makes no sense to allow anti-competitive barriers to add a third carrier to the route, in this case, CSXT, which only serves to further increase cost, time, and potential accident risk.

Dow has evaluated the Railroad Industry

Agreement, referred to the RIA, relating to paper barriers with legal counsel, and found that the impact and the flexibility of the RIA to be difficult to interpret. The scope of the RIA seems to be limited to new business, with a requirement to demonstrate how new routes will not harm the incumbent Class 1 railroad. Dow does not consider the current RIA to be an effective tool in addressing the need for an anti-rail competition.

I will now turn it over to my right for the second part of Dow's testimony to Mike Munro. He's Dow's corporate supply chain international trade counsel.

MR. MUNRO: Thank you, John. To Dow the legal and conceptual argument is simple. Paper barriers are specifically intended to prohibit or stifle competition without any reasonable time limitation. That should just not be allowed.

Only in rare cases when there are highly compelling arguments is anti-competitive behavior allowed under our laws. And that anti-competitive behavior is typically limited in time and scope. In addition, we believe the railroads must always bear the burden of proof why a particular constraint of trade is necessary.

We've seen arguments to suggest that paper barriers should be allowed because shippers such as Dow are no worse off than if the railroad would have decided not to sell to a third party. From a legal sense, this logic is flawed.

The railroads are making the decision to bring in a third party and we assume this decision is based upon numerous factors, including strategic direction, not to keep lower volume lines, higher operating cost to short-runs, and cost of maintaining track, a whole host of non-monetary reasons.

The bottom line is that the railroad determines to bring in a third party. And under our laws with that determination comes an obligation not to engage in anti-competitive behavior with that third party.

This Board has stated objectives of encouraging competition. This is one area in which that can be accomplished. The Board, of course, can and should consider long standing juris prudence on allowable short-term restraints such as time limited non-competition agreements. What should the Board do in this instance? As referenced earlier, we believe the Board has clear jurisdiction and could issue rule making. The Board can determine in what circumstances anti-competitive behavior should be allowed and the scope and time frame of those agreements.

In addition, as the Board does in rate cases, financial formulas could be developed to ensure that railroads are fairly compensated for their rail lines. In determining fair compensation, however, numerous factors must be taken into consideration, including estimated cost savings and other factors that the railroads would likely use in their own determination whether or not to sell a short line. As any prudent business would, the railroads certainly document why they are considering a vesture. Those documents should be made available to the Board. As stated, the railroads should bear the burden to demonstrate why their anti-competitive restraint of trade agreements are necessary.

We believe the elimination or restriction of paper barriers is a real step forward in bringing railroads in line with basic legal principles which govern the vast majority of our U.S. economy. We understand that historically railroads have had difficulty in becoming economically viable, but expect everyone in here would agree that today railroads are much more profitable than they were just a few years ago. Things have changed.

Dow has a great respect for the railroads. We value our relationship with our key carriers, such as Union Pacific. In all our customer and supplier relationships, we fully comply with the law and abide by high ethical standards. What we are supporting here is in line with those principles. We trust that the Board will carefully examine the facts, the issues, the principles of law, and we hope will make the determination that paper barriers, as currently used, should be restricted or eliminated all together through rule making or otherwise.

Thank you again for your time.

MR. HERNDON: May it please the Board --

CHAIRMAN BUTTREY: Is your microphone on please?

MR. HERNDON: May it please the Board, my name is Jeff Herndon. I am Manager of the Coal Supply for Entergy Services, Inc, a subsidiary of Entergy Corporation. Entergy is a co-owner and the operator of Independence Station, which my colleague down at the end of the table has indicated is in the northeast corner of Arkansas, located on MNA Missouri Northern Arkansas sublease -- or lease.

The original coal that was delivered to the Independence Station was delivered under a tariff movement with the BN originating the coal, interchanging at Kansas City with the Missouri Pacific Railroad, and delivering along this very line to the Independence Plant. It wasn’t until the merger of the Union Pacific Railroad and the Missouri Pacific Railroad and western properties did UP take over the deliveries of coal to Independence Station. A number of years after this merger, the UP elected to lease this line that the station is on and place a number of paper barriers the affect our ability to operate the plant.

Even though the Missouri Pacific -- the Missouri Northern Arkansas Railroad has direct interconnect with the BN and NS and the Kansas City Railroads, the Missouri Northern Arkansas Railroad is prevented from making deliveries from coal originated from these carriers without incurring some very unhealthy economic disincentives. These disincentives appear in the form of paper barriers in the lease agreement between the Missouri Northern Arkansas and the Union Pacific Railroad. This lease is a public document. It is being submitted. It is part of my written testimony and it is on the Board's website for review.

The first of the paper barriers that are found in this lease can be found in Section 4.03, wherein the annual lease payment of $90 million is reduced inversely with the percent of car loadings interchanged with the UP. For example, at 95 percent car loadings of the UP in any one total year there is no payment for rent. However, if one car load more than five percent is interchanged with any railroad other than the UP, then there is incurring a $10 million lease payment. This $10 million lease payment will be added for each 10 percent drop in the car loading percentages from 95 percent until you get down to a four percent total traffic interchange, wherein the lease payment would be the entire $90 million cost. These values are in 1992 dollars. There are escalating values to these dollars, so the values certainly today are a lot bigger than what I'm discussing.

In UP's own testimony they suggested that a short line lease or purchase of a line such the size of the Missouri Northern Arkansas should generate five percent or 5,000 cars that could be interchanged without causing any kind of economic incentive. If you apply the five percent ratio to it, then that would indicate that that results in 100,000 car loadings per year that is suggested by the Union Pacific that is the size of the business that the Missouri Northern Arkansas Railroad is doing.

If you look at Independence's business by itself, we would represent more than 50 percent of the car loadings that is being shared to the Missouri -- to the Union Pacific Railroad. And in fact, if you take one train a week of delivery against the 7 and a half a week delivery of coal that is needed at the Independence's Plant to operate, it would nearly consume all available car loading free interchange that the Missouri Northern Arkansas would have.

You think that would be effective barrier to keep competition from happening and prevent the short line railroad from doing other service, but the UP apparently didn't think so and they applied another paper barrier to this thing, against a single customer of the line. That's found in Section 3.04 of the lease where the UP can, by giving a seven day notice, retain or get back the deliveries of the Independence Station. And once they take back the delivery, then the Independence Station would be a close industry to the Union Pacific, and the Missouri Northern Arkansas could not deliver any traffic to it, even though it resides on their own line.

This provision only perpetuates the captive shipper constraints imposed by paper barriers.

As we heard today, UP wants to make the argument that once captured always captured. I'm not a lawyer, but it is my understanding that when other industries sell off other assets, there cannot be any unreasonable constraint placed on those assets to be used by the purchasing party. Why should the railroad be any different?

I would submit even that limiting access to generate facilities that have alternate rail deliveries is against the interest of national security during times when we have rail disruption abilities and cannot get coal there. Twice, we've had paper barriers specifically prevent ISIS from getting coal to the plant that was kept from being happened by these paper barriers. The first time happened in 1997 during the Union Pacific and ST merger meltdown when the UP prevented BN from servicing the plant to help out deliveries. The second is still ongoing. It's from a 2005 track problem that happened in the Powder River Basin, and that prevented us from getting alternative coal being delivered to Independence Station through KCS originations.

Paper barriers have the potential to be a serious threat to the reliability of the electric grid in Arkansas and elsewhere that they exist when they prevent Entergy and other utilities from being able to deliver a service, fueled during service disruptions on the railroads.

We must not lose track of the fact that they also have an economic impact as a result of being in place. The use of paper barriers allows the railroads, the Class 1 railroads to maintain control over deliveries and thereby enabling higher charges for services rendered. However, at the present time Entergy is less concerned with the economic impact as opposed to reliability issues because we do, in fact, have a long-term contract that has several years left to go. But when this contract does expire, it does place the customers of Independence at exposures that it cannot receive the benefit of competitive total services from ISIS because of these paper barriers would be in place.

And in fact, these barriers do present a problem for future circumstances that might arise later on. For example, the Dakota, Minnesota and Eastern Railroad could have interconnections with the Kansas City Southern Railroad and deliver coal to the Independence Power Plant that would be prevented if these paper barriers are still in place.

I appreciate the Board taking the time to take up these paper barrier issues in these proceedings, and I urge the Board to take the next step and institute a full-fledged rule making procedure to consider the standards and procedures for review and evaluation of paper barriers in interchange.

Thank you.

CHAIRMAN BUTTREY: Thank you very much. Thank you for comments from all the witnesses on this panel. It seems to be the suggestion in general, of this panel anyway, that should the Board decide to get involved in this in a more strident way that there is sort of a mixture of approaches. That is some issues could be handled on the blanket basis and then maybe some issues could be handled on a case-by-case basis.

Does anybody have any comments on that?

MR. BAKER: I'll take a stab at it first. I think I would want to say -- I would say that I think the Board ought to take a reasonable approach to looking at paper barriers, whatever the method is. And if case-by-case is applicable to certain ones and a blanket to others, then that is certainly a good step forward.

MR. MUNRO: Dow would support the general threshold of some reasonable time period. As Jeff mentioned, you know, we do not have a problem with the railroads making a profit and doing well. We want them to do that. So a blanket, you know, threshold period of time would be adequate for us. And then a closer review of future paper barriers would, you know, be something that we would hope for.

CHAIRMAN BUTTREY: There seems to be a fair amount of anecdotal, what could be viewed as anecdotal information that's been taken here in testimony today. Some would say basically the issue isn't an anecdotal issue, that there are some peculiar situations out there that have evolved over the years that may not be quite to some people's liking but a lot of the paper barriers that are out there really don’t have any significant harmful effects and the Board should basically leave those in place. The information that we’ve gotten, especially from Ameren Energy this morning sounds like one of those cases where there is some pretty serious issues on an anecdotal basis anyway.

MS. BROWN: Well then, and I didn’t go into this and I can go into this more, but the paper barrier that impacts Ameren is actually a short line railroad now owned by Ameren. But the line was a parallel line that Union Pacific had two lines as a result of the UP/SP merger that came from Kansas City to Saint Louis. The line that was sold off, the second line, the Union Pacific doesn’t need and didn’t need to serve the plant. So that seems to me that that’s the perfect example of a paper barrier where the line is sold and the existing carrier, the Union Pacific, doesn’t need the line to serve the plant and the paper barrier put in place seems to be solely to keep that, without even getting into some of the history as to the dates. When the line was sold it wasn't clear whether or not Ameren was going to maintain its two to one status. Ameren had to file a petition for clarification in order to receive that after the line was already sold off.

So, it seems to be even a clearer case where the paper barrier was put in to try to protect whatever monopolistic access might have been there.

CHAIRMAN BUTTREY: Mr. Vice Chairman?

VICE CHAIRMAN MULVEY: On this question of the other -- where you had a case where you ran short of coal, stock piles of coal, you were unable to get deliveries by another carrier because of the paper barrier and there was sort of an emergency, wouldn't the Board's emergency service authority be appropriate to make sure that the coal is delivered and wouldn't that override a paper barrier if the Board was to issue an order in that kind of a case?

MR. HERNDON: I'm not fully familiar with the absolute requirements of the emergency procedures. I do not believe that without having some reasonable term of service it's going to be very difficult to get another carrier to provide coal into a location that they were not currently serving and didn't have the facilities set up to do so. So, I'd have to refer to my lawyers to respond to that question in more detail than that.

VICE CHAIRMAN MULVEY: Ms. Brown, you suggest that we should censure paper barriers after the duration of about five years. And how did you arrive at that five year time period? And what about future paper barriers? Would you have us limit them to no more than five years or prohibit them outright?

MS. BROWN: Well, the five year provision looking at other examples that have been out there, five years seem to be reasonable. And so that's how the five years was selected. As far as outright prohibiting them in the future, I think there should be a presumption that they are not permitted unless you can show that there is a reasonableness attached to the paper barrier with maybe a limited time or scope, but that the presumption should be that paper barriers should not be permitted in the future.

VICE CHAIRMAN MULVEY: Mr. Sharp, in your written comments you claim that the premium you paid for moving coal to the Independence Plant because of a paper barrier has increased by at least $3.25 a ton. How did you calculate that figure? What were the factors that went into that calculation? And how do you know that these factors are attributed to the paper barrier and not to the captivity of the Independence Plant?

MR. SHARP: You were referring to me?

VICE CHAIRMAN MULVEY: Yes, I'm sorry.

MR. SHARP: That -- those numbers were developed through -- by a consultant to us.

VICE CHAIRMAN MULVEY: Is that study available?

MR. SHARP: Yes, we can provide that.

VICE CHAIRMAN MULVEY: We'd like to see that.

MR. SHARP: Okay.

VICE CHAIRMAN MULVEY: Because as I said earlier, there's a real lack of hard evidence as to what these paper barriers actually affect. As the Chairman just mentioned, maybe some of these don't have much of an effect, especially in today's environment, but when we have hard evidence as to what the impacts are that helps us in our deliberations.

MR. SHARP: We'll have them provided.

VICE CHAIRMAN MULVEY: All right. To Dow Chemical, how close is the MNA connection to the short line that's around you?

MR. BAKER: Less than a half of a mile.

VICE CHAIRMAN MULVEY: Okay. So less than 18 miles then?

MR. BAKER: Yes.

VICE CHAIRMAN MULVEY: See, if you were a little up the border, you would be in the 18 mile territory where in Canada would require a line and reciprocal switching, correct?

MR. BAKER: Correct. Yes, we have plants in Canada and understand the reciprocal switch and we find that to be very favorable.

VICE CHAIRMAN MULVEY: Are you able to do a comparison between your rates in Canada and your rates down here and phase out the paper barrier effect?

MR. BAKER: Well, first of all the paper

barrier is basically confidentially between the short line and the Class 1 railroad. But based on our estimate of captivity, that's how we've drawn our conclusion. We've had captive plans where we've basically built into those facility and we've found that we pay premiums somewhere between 20 and 25 percent.

VICE CHAIRMAN MULVEY: What are you considering?

MR. BAKER: A captivity premium, but on top of that captivity premium is a paper barrier that we estimate doubles the rate of the short line running down from Ludington down into Grand Rapids. So you have this paper barrier impact on top of that. And also, to be clear, the short line cannot connect to BNS without going through another steel barrier. So there's another cost there that's been imposed because it's not direct connection from short line to Grand Rapids.

CHAIRMAN BUTTREY: Maybe you should get the chemical business included in the Canadian Grain Board's regulation. That might help.

I couldn't resist. I'm sorry.

VICE CHAIRMAN MULVEY: In the Railroad Industry Agreement, how would you envision shippers participating in the RIA?

MS. BROWN: I guess Ameren could participate through its Missouri Central Railroad subsidiary in the Railroad Industry Agreement, but Ameren is an existing shipper on the line, so there's no relief to even get under the Railroad Industry Agreement with respect to the paper barrier at the Lavity Plant. I don't envision that the Railroad Industry group would be the answer to this issue. Having an agreement that's developed between the parties who make these agreements, I don't view that as the answer. I would want the Board to take the issue and make its rulings.

VICE CHAIRMAN MULVEY: So you don't think that you could help liberalize some of these agreements by participating in the group, or that would not be an option for recrafting say a new Railroad Industry Agreement that was somewhat more liberal and permitted more ways out of these paper barriers?

MS. BROWN: I haven't seen the evidence of that to date and again, I would respectfully request that the Board take that action. This issue has gone on for a very long time. And I think that a decision and a result does need to be undertaken sooner rather than later.

VICE CHAIRMAN MULVEY: Just one more observation. You mentioned about not being able to serve Ameren through the shortline's connection with KCS because of a paper barrier, I just sort of wonder if that's a problem in operations, or does the shorline have a lot of paper barriers that it would have to get over in order to be a competitor. It's an interesting observation. I hadn't heard of that before.

MR. HERNDON: Yes, I can't make a comment on how many others they may have that might prevent them from service.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN BUTTREY: Thank you very much.

PANEL IV:

CHAIRMAN BUTTREY: We have a fourth panel. Columbus & Greenville Railroad Company, Genesee & Wyoming, Oil Creek and Titusville Lines, Watco, and Wheeling and Lake Erie.

Does everybody have a name plate?

MR. BELL: My name is Roger Bell.

CHAIRMAN BUTTREY: Your badge is missing.

MR. BELL: Yes, it's gone all together.

CHAIRMAN BUTTREY: How did you get in here?

(Laughter.)

MR. BELL: I'm not sure, but I'm here.

CHAIRMAN BUTTREY: Mr. Marshall's name badge is missing.

Oh, there it is. Okay. It's supposed to be visible, Mr. Marshall. You might want to put it on the outside of your jacket.

We're going to get real ticky about this. We already are real ticky about it. Ticky, not sticky. Anyway, thank you very much for coming and we're looking forward to your testimony.

Thank you, Mr. Bell?

MR. BELL: Thank you, Chairman Buttrey and Vice Chairman Mulvey. I wanted to thank you for the opportunity to the Board regarding the issue of paper barriers on small railroads. I serve as President of CAGY Industries, and the three short line railroads that we own and operate in the states of Mississippi, Alabama, and Georgia. We have about 35 employees and we operate in total about 150 miles of railroad.

We have both ISS and handling line carrier agreements. We have direct connections with four Class 1s and we've been operating short line railroads for more than 30 years. Based on these experiences, I would be opposed to the adoption of rules placing new restrictions and requirements on the lease or sale of future short line rail operations regarding the issue of paper barriers.

The short line industry has experienced phenomenal growth and the development of new operations across the country during the past 20 years. This expansion has been a positive alternative to the abandonment of many of these properties. Preservation of rail service has served most aspects of our industry well, including the shipping community, much of which is located in rural areas across the nation, off the interstate system and it desperately needs to retain multiple modes of transportation to remain competitive, reliable employers, and productive corporate cities to these local communities.

The percentage of growth and cargo traffic on short line railroads has outpaced the percentage of total carload growth in the industry for the past several years, so I believe we're doing a number of things right. There have been abandonments and some operations have failed, but overall thousands of mile of traffic have been saved. Hundreds of businesses with thousands of employees retain quality rail services, and tens of millions of dollars has been invested in equipment and infrastructure in the short line community.

Many of these properties were not candidates for operation in the traditional sense due to low traffic levels that could not generate revenue sufficient to sustain reasonable operations required to find true value. As alternative to abandonment, many short lines were created through these cell agreements that allowed the Class 1 an opportunity for a better return on those assets while providing the short line the time needed to develop new traffic. These unique agreements kept thousands of miles of rail line, thus avoiding abandonment and liquidation.

Additionally, rail jobs were preserved and short line operators were afforded an opportunity to dedicate scarce resources toward improvement of operations offering better service to customers and increased maintenance of track and infrastructure, assuring safer and dependable operations, and an opportunity to develop traffic.

The short line industry’s record indicates significant levels of success in these categories. Restrictions or requirements imposed on the parties of these transactions would likely have impeded or possibly have eliminated many of those operations before they started. While the past several years have produced historic results with the development of new short line operations, there’s no perfect system and there have been some problems, but our industry has worked together to address them.

Class 1s and the short line industry established the Railway Working Industry Group as a vehicle to address specific issues related to paper barriers as they arise, which has worked well. Short lines and the Class 1s communicate better now than ever before. Class 1s host their own annual short line conference with hundreds of short line participants, and most have conference groups that meet on a regular basis, to identify issues, communicate with their short lines, to inform and share new programs, operating plans, and technological advancements.

Paper barrier issues should be addressed in the private sector, and where possible resolved on a case-by-case basis. The key component to successful negotiations and addressing issues in our agreements is the relationship between the short line operator and his or her Class 1 partner. For short lines, these relationships are essential to our everyday operations and our customers depend on it.

Thank you.

CHAIRMAN BUTTREY: Thank you. Mr. Parsons?

MR. PARSONS: Thank you. Mr. Chairman, Vice Chairman, staff, it is my pleasure to be here today. And I will not regress to my statement which you have, but you can read it. It's one page. And everything I do is short.

CHAIRMAN BUTTREY: We appreciate that.

MR. PARSONS: Okay. I'm sure you do. The issue is simple, we operate about 850 miles of short line railroads. We have no restrictions, but we believe whatever the arrangements are and deals are done should prevail. So if the economics dictate a restriction, it should stay in place.

Thank you.

CHAIRMAN BUTTREY: Good morning.

MR. MCKEHNIE: Good morning. My name is Ed McKechie.

CHAIRMAN BUTTREY: Afternoon, I guess it is now.

MR. MCKEHNIE: We're moving right along,

aren't we?

My name is Ed McKechie. I'm the Chief Commercial Officer for Watco Companies. I'm also in the Working Group, and we've got a quick PowerPoint presentation to walk through that's also been handed out to you so we can just -- I'll go through it for you.

This technology is going to slow us down here. Just a second. Mr. Chairman, I believe you've got a copy of it. Sort of the first line shows our vast network. We've got about 3,000 miles of track. Here is our network. We've got about 3,000 miles of track. We connect with five of the seven North America Class 1 railroads. Here we show all of our interchanges, so if you have questions about those, we can go through there.

Four quick points is that paper barriers are a key element of short line outsourcing. As we work to consider these, we have to understand what the limitations are of the Class 1 to out source something. So when we approach a Class 1 about making or creating a short line railroad or they approach us, we understand that that is a key portion of protecting their franchise. We believe the STB should consider the requiring of reporting paper barriers and the initial exemption notice that creates a new rail carrier or allows additional track to be required.

Paper barriers are a key element of the short line outsourcing, and a couple points on that. That it lowers the cost of the acquisition. In many cases, it avoids the full going cost concern of the transaction. So in essence, we look at a transaction here recently that would be about $20 million in revenue, and the cost to get it up and going will be about $17 to $18 million at least. Additional cost of purchasing a railroad in addition to that would make that railroad unable to be outsourced and lead to potential abandonments. It doesn't have the lower cost barriers for entry. And one of the things you ought to consider about this, when we started this there were plenty of excess locomotives in the market 20 years ago and you could pick up a locomotive for $50 or $100,000. You could pull it right off the side and put it in service. Today you're going to pay $450 to $500,000 for a locomotive and that's after three months of shop work. It avoids potential abandonments because, you know, it is greater than the growing concern value.

Paper barriers and one of the things we want you to think about is the creation of networks that allow for additional capacity. Paper barriers allow larger regional networks to be created. This allows short haul traffic to be develop, additional value for customers, additional values for communities, and it grows the short line industry, which we think is a good thing. Just an example here of something to walk through to think through this. I deal with this everyday out there, you know, with networks, so I have a sample network here. This is something that a Class 1 might want to out source. And they would put paper barriers in place to say, to help control the traffic that goes off to protect that out source. And this would be something that would be in the neighborhood of $20 million network, maybe a couple hundred miles. So if you didn't out source this with paper barriers to be able to protect this franchise, you go through a series of abandonments that would lead you to a conclusion that would not be in the public interest. So, after the first abandonment, you would still have some interchange there on the left side of the network. You would have a small short line or a small island operation out there that would not be connected to the rest of the network. Later on you would abandon the second part of the network so that you would again have customers cut off from the rest of it. And finally go through and abandon significant other portions of the line, cutting up and chopping up the network.

And while this is a hypothetical, it's based on facts of what we have experienced and also that we have case studied that we are working on as a potential outsourcing.

And so what we would argue is that preserving that regional network is more public value to more customers than removing a paper barrier for a select few customers. And that in the Board decision, it needs to take into consideration the value for all customers versus a few.

So, this example shows a smaller network that is reduced over time and without any real opportunities. Because in reality what folks would say is you can just do an OFA and preserve those chunks of track, but if there are no customers on that track, you can't make an OFA to preserve that. And it may take 20 -- what I just showed here on the board could be over a 10 or 15 year period of time and you can't spend those types of dollars on a track the same day you'll be able to put together a network.

Most importantly, it no longer a value for short haul value. You look at our interstate highway system, along that short haul -- slower than short haul, and that's where railroads off real opportunity.

So finally, we suggest that the STB require reporting paper barriers and the initial exemption notice. This would be information that would be gathered to understand the value of the entire transaction. I think it warrants further study and a specific STB hearing is warranted for this concept.

In summary, the government should help the market work. Paper barriers are an important part of our industry. They are evolving with the help of the Rail Industry Working Group. It’s not perfect, but it’s better every time we meet. And I think most importantly, as you’ve heard from all the arguments today, good and accurate information is probably the most important thing that would help serve the Board so that you had exactly, shown exactly what this paper barrier was and what it was doing with each transaction.

Thank you, Mr. Chairman, Vice Chairman.

CHAIRMAN BUTTREY: Mr. Marshall, are you next?

MR. MARSHALL: Thank you, Mr. Chairman, Mr. Vice Chairman. Genesee & Wyoming and Farmrail together operate about 3,000 route miles of short lines across the country. Some of those railroads are subject to paper barriers and some are not.

I would like to talk just a little bit about the bigger picture here. I looked at the traffic that is subject to paper barriers on our system, and it seems to be made up mostly of merchandise traffic, paper, lumber, metals, things that are shipped by groups that haven't been represented at this hearing here today. I tried to consider what sort of characteristics this traffic had, and you'll see that it moves generally one car at a time, and when it gets out on the main line it moves in mixed freight trains. The surprising thing about this merchandise traffic or loose car traffic is that it is, first of all, highly truck competitive, but also highly competitive against unit trains for track space on the main line railroads. In other words, those of us that are in the loose car business, small shippers and small railroads, are being nibbled at one side by the trucks and on the other side by the unit train shippers who are trying to get that precious and scarce track space on the mainline railroads. The problem we face as merchandise shippers is that if we don't become competitive for that mainline track space, we will rightfully be squeezed out, because a rational big railroad goes after the traffic which is most profitable.

So, regulation of paper barriers, as I see it, would hurt in three ways. It would hurt small shippers and railroads first by tending to lower prices on this competitive merchandise business that is already struggling to be able to renew the assets that are used to support it. Second, it would cause the large railroads to be very cautious and reluctant about creating new short lines. And short lines are, I believe, the key to the future of merchandise traffic because we provide the efficiency and the customer friendly service that is important for merchandise shippers. I would like to think we do it better than the big railroads do it.

But finally, and most immediately, and this is the thing that we are concerned about is that if short line traffic, merchandise traffic is made less attractive the big railroads, if their margins go down because there is more competition, the winner for that scarce track space is going to be unit trains. You'll see more coal trains and fewer boxcars on the track space that is there. And that will happen very quickly. You hear about railroads de-marketing this or that. That's one symptom of this competition for main line track space.

So, I think all of us in this business together can make the merchandise business a better product for the railroads and a better product for our shippers if we work together on it. But regulation of the sort that has been proposed in this proceeding could inhibit that cooperation, could inhibit the profitability that is needed for investment, and could stop in its tracks the efforts to maintain the merchandise business. So, I'm hoping that you will not start a rule making or go down that road.

Thanks.

CHAIRMAN BUTTREY: Thank you.

MR. DINGMAN: Mr. Chairman Buttrey, Mr. Vice Chairman Mulvey, I'm Robert Dingman, President of the Oil Creek and Titusville Lines. We appreciate this opportunity to appear before the Board and to address the rail access and competition issues, which are the subject of this ex parte 575 proceeding, and commonly referred to as paper barriers.

First, we agree that paper barrier is a legitimate tool. It is a legitimate result of a bargaining process entered into between a selling or leasing carrier and a purchasing or tenant carrier when the selling or leasing carrier chooses to remove itself from the direct operation of a line segment or any portion of its service territory. If the selling or leasing carrier retains a franchise in the territory served by the line, and if it retains an investment in assets formerly used to provide the direct service, the paper barrier is no more than a form of deferred compensation in a structured transaction. The removal or modification of the paper barrier which is used to finance the transaction by parties other than the parties to the bargaining process would constitute confiscation of property without just compensation. As you can see by the first paragraph, Dingman is in line with the rest of his friends and associations and the rail line industry.

However, I think to widen the discussion today is an important thing and I'm glad Charlie has brought it up, because the original conveyance of a franchise to serve a territory for the public convenience and necessity carried with it the obligation to serve the public by creating value through time and place utility for the goods carried. The STB is clearly the agency charged with the obligation to provide regulatory oversight on behalf of the public to assure that the objectives and benefits of the franchise approve to all parties, but especially to the public. And in this regard, I have to believe that regulation is required when an industry is a public utility. We can deregulate certain aspects, and I have written since the Smathers Act in support of deregulation. But there comes a time when a public utility owes an obligation in the franchise.

The public has voiced its continued support for a national rail system that is healthy, efficient, and serves all the lanes of commerce in an equitable, and I emphasize all the lanes of commerce. Generally, the public through the STB has continued the franchise rights while permitting the seller or leasing carrier and the purchasing or tenant carrier to arrive at a service configuration which reduces costs to the divesting carrier, that's why they did it. We believe that the shipping public has been reasonably well served by the neursal [phonetic] process and other post Staggers Act legislation, which required the opportunity to continue low density rail lines in service rather than to complete an abandonment process because the infrastructure was to be preserved.

This legislation required the divesting carriers to make reasoned efforts to secure transactions which permitted a purchaser or a lessee to obtain certification from the STB and to obtain connection interchange and service from the divesting carrier. The purchaser or the lessee should not be required to purchase or lease a divested property with no guarantees of service quality, that's timeliness. And no right to participate in the marketing of the service, principally rate making. The public has frequently expressed its support by investing in the purchasing, rehabilitation, or operation of the required property. In other words, the public has spoken loudly in what its interest is.

The oversight of the STB should be no less than a learned review of the transaction between the parties to insist that reasonable standards of service and equity of rate making are contained within the transaction and enforced over the life of the transaction.

I'll abbreviate. Standards of service are part of the means and methods by which railroad companies create the time utility which is demanded by the shipping public. Service that is so deficient that it dries up or discourages traffic is tantamount to de facto abandonment and public policy says no. Premium pricing, which may be justified by improved system metrics is designed to improve yield and finance additional mainline capacity, but premium pricing is inappropriate to the customers served by lanes where deficient service is the only service offered to the connecting carriers.

In summary, an active effort by the STB is required to develop the performance standards which all parties must adhere to for the benefit of the public interest. The economic circumstances of the small carriers and the regions they serve are disproportionate when compared to the vast resources of the Class 1s. Only the STB can effectively address these issues and embody the objectives of the Interstate Commerce clause of the United States Constitution.

Thank you.

CHAIRMAN BUTTREY: Thank you, sir. Mention has been made of the Board considering reporting requirements of when these transactions come before the Board. I was curious by reporting requirements are you just talking about notice or are you talking about full public disclosure here?

MR. MCKEHNIE: We're open to whatever you think meets your needs. I think information as to the process that these would be thought through as to what exactly is it that ought to be out there and discussed and that it's more factual. And in talking through that, you'd be comfortable with those concepts. But I think ultimately we're better off discussing facts and everybody saying I want paper barriers but I've never seen one, but I know it's there, I know it's bad. I don't think that's helpful for anybody.

So if we all knew what we were talking about, we'd probably get to a conclusion faster.

CHAIRMAN BUTTREY: I was just curious, Mr. Parsons, how is it that you were able to escape the paper barriers in your transactions?

MR. PARSONS: Good luck.

CHAIRMAN BUTTREY: Good luck?

(Laughter.)

CHAIRMAN BUTTREY: So it wasn't negotiating expertise or clairvoyance, or anything like that?

MR. PARSONS: No. No.

CHAIRMAN BUTTREY: Okay. That's the only question I had.

VICE CHAIRMAN MULVEY: Thank you. Okay. First, I want to say that I've been a long-time supporter of the short line industry. And as many of you know, I worked very hard to get the financing for the rehabilitation of the short lines when I was on the Hill. So I continue to be a strong supporter of the short lines and we want to see them prosper.

But I do have some problems with the issue today. Paper barriers represent really a restriction on your business activities, I mean the things you can do. I can't think of any other -- any times when having less scope of authority, having less opportunities, and having restrictions placed on you, make you better off.

Wouldn't you all agree, say other things being equal, that you'd be better off without the paper barriers, assuming that you would've been created, better off without them than with them?

MR. MARSHALL: Maybe in the short-term. It's hard to go to the locally owned Burger King and buy a Big Mac. In the long-term we need the Class 1 railroads to maintain a system of merchandise trains, classification yards, local service to get to and from the interchange points, and in addition their own pick up and delivery service for the non-short line merchandise customers. I see paper barriers, as unattractive as they may be in the short term, as maintaining the kind of margins for the large carriers that are needed to keep this very extensive service in place which supports all of us.

VICE CHAIRMAN MULVEY: Are you especially concerned about the paper barriers if they were taken away, could it jeopardize some of the traffic, the merchandise traffic that the short lines carry, but what about the common-carrier obligation that all short line railroads -- all railroads have to carry traffic, even less than unit train traffic? Because the common-carrier obligation here -- the railroads, you were saying the railroads could legitimately de-market all this traffic, absent paper barriers?

MR. MARSHALL: Most of the traffic is highly truck competitive and by raising the prices, even though still below the regulate-able level, the railroads could inhibit the movement of this traffic by rail. And I think quickly the merchandise traffic would dry up.

It has happened in other countries and it could happen here. And we'd see an all-unit training system develop.

VICE CHAIRMAN MULVEY: Someone mentioned paper barriers as a solution for the capacity problem, that it helped to create more capacity. But Mr. McBride just spoke here earlier saying that eliminating paper barriers would reduce capacity, I guess is this the part we're to approach to deal with the railroad capacity problem, either repealing or continuing paper barriers? I mean I'm not really sure of the capacity impact here.

MR. MCKEHNIE: Mr. Vice Chairman, I think the creation of regional networks that have a focus on that short haul move, that Class 1s are capital restrained participating in, is better left in the hand of the short line; we have different access to capital. Many of the ways a lot of this is capacity restrained is stricken by capital -- our ability to go out and get capital put in within a protected regional network that we have a lower cost of entry of getting into.

That's to say is the Board should be encouraging the outsourcing of secondary and tertiary remains of short lines to be putting additional capacity into service. And one of the ways to do that is to make sure that the paper barrier is in place, that the Class 1 knows that it's not going to have to take this back in some short notice, and that the Board, not only through this but in other ways ought to be encouraging this outsourcing of lines that are way under capacity right now that, if were put in the hands of a short line, could add one, two, or three trains a day.

VICE CHAIRMAN MULVEY: Does this chart up here before us show you what happened as the rail network began to slowly atrophy and finally disappear serving some shippers --

MR. MCKEHNIE: No.

VICE CHAIRMAN MULVEY: But isn't there some holes in the logic here that paper barriers--without them--that these lines would then be created? If the line has enough value for the shipper or shortline to want to retain it, it's marginal and the railroad wants to get out of it, why wouldn't someone put out an OFA? And you'd have an Offer of Financial Assistance, you would have another railroad come in that would not be circumscribed by the paper barrier. What prevents that?

MR. MCKEHNIE: Because the part of the line that would be abandoned wouldn't have any track traffic, and so it would probably be more of a two year exemption. So, it chops it up from the rest of the network.

VICE CHAIRMAN MULVEY: But I was thinking if we're creating paper barriers there already is traffic there and you're trying to preserve that traffic as a Class 1 railroad and preserve those revenues. So there is traffic on that, so if I find that traffic marginal and I want to focus my resources elsewhere and I want to get out from under this kind of traffic, which is still generating revenues, why do I need to create a short line then a paper barrier when I could just as well sell it as an OFA, in terms of the public's interest on this?

MR. MCKEHNIE: I'm not in a position -- I don't know why they don't -- I don't know why that doesn't happen. I just know it doesn't happen that way and we ought to, you know, understand what our paths to success and the paper barrier and creation of a regional network is a path to success, or just looking at having them out there and picking up the scrap value of the steel has not led to creation of these regional networks.

VICE CHAIRMAN MULVEY: I'm not suggesting that's what would happen, that it would in fact create these other ones, if paper barriers were somehow prohibited.

MR. PARSONS: Well, the paper barrier I think creates the economic incentive to do it. Without the paper barrier it's not going to happen.

VICE CHAIRMAN MULVEY: And then the Class 1 railroad would continue to operate the lines?

MR. PARSONS: No, it would probably abandon?

VICE CHAIRMAN MULVEY: Well then an OFA might come out?

MR. PARSONS: What?

VICE CHAIRMAN MULVEY: An OFA might be offered.

MR. PARSONS: It might.

MR. MARSHALL: The difficulty there is that the Class 1 would probably have to raise the prices to dry up the line before disposing of it. To dispose of it with low prices to a third party without commercial restraints would likely be the lowest economic return. And once this process started happening, the Class 1s would quickly lose their enthusiasm completely for the loose car traffic and we'd get to the situation of the sort that Genesee & Wyoming has seen in Australia where there is no loose car traffic, where everything moves in unit trains.

VICE CHAIRMAN MULVEY: My follow-up question is what about the suggestion that while paper barriers therefore might be needed in order to get short lines created, they're not needed in perpetuity, that they should be at some point terminated when the Class 1 gets the value -- the difference in the value from having it and not having it in the transaction?

MR. PARSONS: Well that assumes that the evaluation is somehow not understood. And I think it is. That's why you have the paper barrier.

VICE CHAIRMAN MULVEY: Well, then let's say that the value of it is infinite then.

MR. PARSONS: Yes. Yes.

MR. MCKEHNIE: Well, look at the 100 plus year history of the railroad industry. Traffic moves to and from different lines. So in 1920 there was a set of lines that had 20 trains a day on it, triple track. Right now, you've got more tumbleweeds on that line than you do trains. Another line that was completely empty 80 years ago is now completely full. And so you have to look at this on the very long-term nature of it and say that just because traffic is down there now, it may make sense to short line that for 20 years to preserve that part of the national network, and then in 20 years maybe the Class 1 takes back, but both parties have been treated fairly and understand, you know, the implications there.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN BUTTREY: Thank you very much for your testimony. This concludes the hearing and the matter is before the Board. Thank you.

(Whereupon, the Surface Transportation Board Public Hearing, Ex Parte 575, Review of Rail Access and Competition Issues - Renewed Petition of the Western Coal Traffic League, was adjourned at 1:45

p.m.)