35717 SERVICE DATE – FEBRUARY 1, 2006
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 575

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

AGENCY: Surface Transportation Board.

ACTION: Request for comments.

SUMMARY: The Surface Transportation Board is requesting comments on the renewed petition of the Western Coal Traffic League (WCTL) for a rulemaking to address agreements to sell or lease a rail line that restrict the ability of the purchaser or tenant to interchange traffic with competitors of the seller or landlord railroad.

DATES: Opening comments may be filed by any interested member of the public by March 8, 2006. Reply comments may be filed by March 28, 2006.

ADDRESSES: Any filing submitted in this proceeding must refer to STB Ex Parte No. 575 and may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing must comply with the instructions found on the Board's "www.stb.dot.gov" website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format must submit an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. Because all comments will be posted to the Board's website, persons filing them with the Board need not serve them on other participants but must furnish a hard copy on request to any participant.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1609. [Federal Information Relay Service for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION:

Since enactment of the Staggers Rail Act of 1980, larger railroads have sold or leased many rail lines to small, newly created short line railroads. Some of the lease or sale agreements have had "paper barrier" provisions that limit the incentive or ability of the short line railroad to interchange traffic with connecting carriers that could compete with the lessor or vendor. Such paper barriers may result from credits for cars

interchanged with the lessor or vendor, or they may involve a penalty for traffic interchanged with a competitor of the lessor or vendor, or a total ban on such interchange.

Concerns about such paper barriers were raised in STB Ex Parte No. 575, Review of Rail Access and Competition Issues, an ongoing umbrella proceeding to examine various issues concerning competition between railroads.[1] In response, on September 10, 1998, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) executed a broad "Railroad Industry Agreement" ("RIA" or "agreement") that addressed paper barriers as well as various other issues.[2]

The provisions of the RIA specifically pertaining to paper barriers establish a few general principles,[3] applicable only to new traffic (traffic that did not exist when a line

---

[1] In STB Ex Parte No. 575, the Board initiated a broad review of several railroad access and competition issues. Review of Rail Access and Competition Issues, 3 S.T.B. 92 (1998).

[2] The broader RIA was evaluated by the Board in STB Docket No. S5R 100. In that proceeding, the Board requested comments on, and granted interim approval for, the rate-related provisions of the broader agreement for which the parties requested approval. Assn. of American Railroads et al. – Agreement – 49 U.S.C. 10706, 3 S.T.B. 673 (1998). The Board subsequently granted final approval of these rate-related provisions. Assn. of American Railroads et al. – Agreement – 49 U.S.C. 10706, 3 S.T.B. 910 (1998). The Board made no findings as to the paper barrier and other non-rate provisions because approval for them was not sought. The original 1998 version of the RIA is included in Attachment 2 of the renewed petition of WCTL, filed on March 21, 2005, that is the subject of this notice. The agreement has been amended at least once: see the comments of the Rail Industry Working Group filed May 2, 2005.

[3] See, e.g., the following provisions:

Paper Barriers

Only legitimate paper barriers should be enforceable. Paper barriers are restrictions on interchange imposed by contract at the time of creation of the Short Line. Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. Such barriers should not restrict the Short Line's ability to develop New Traffic with another carrier if the selling or leasing Large Railroad can not or will not participate in the New Traffic. Excessive per car charges or other penalties imposed if a car is interchanged to another

(continued . . .)

was spun off), and illustrate their application by presenting the outcome (access/no access) under hypothetical situations with diagrams illustrating the relationships between the parties. The paper barrier provisions do not grant enforcement rights to shippers. Rather, the RIA provides for non-binding arbitration under Board auspices and creates a Rail Industry Working Group (RIWG) that can issue interpretations and provide a forum for discussion.

By petition filed on December 21, 1998, in STB Ex Parte No. 575, WCTL asked the Board to initiate a separate rulemaking to consider eliminating unreasonable paper barriers. WCTL argued that the agreement negotiated between AAR and ASLRRA did not adequately deal with the barriers. WCTL proposed rules that would restrict paper barriers. By decision served on March 2, 1999, the Board deferred action on WCTL's petition in order to gain experience under the AAR/ASLRRA agreement with respect to paper barriers.

By petition filed on March 21, 2005, WCTL renewed its 1998 request for rulemaking on the paper barrier issue. WCTL asserts that, since 1999, there have been significant changes in the Board's policies regarding competition, citing in particular the Board's revised merger guidelines for Class I railroads.[4] WCTL argues that, given the benefit of experience, unreasonable paper barriers should be subject to challenge by shippers as well as short lines and that any restrictions on these provisions should cover pre-existing traffic as well as new traffic. WCTL proposes specific rules that would establish a rebuttable presumption that a paper barrier is unreasonable and contrary to the public interest if the paper barrier (1) lasts longer than 5 years, (2) includes any financial penalty for interchanging traffic with another carrier, or (3) includes a credit for interchanging traffic with the seller or landlord railroad against a rental or sale price that

---

(. . . continued)

Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

3. Paper Barriers and New Routes (applies to participating Class I and III Railroads)

a) General Premise: If the requested Access or routing helps the connecting Short Line and does not harm the Large railroad, then the request should be approved as it will improve shipper rail service while strengthening the rail industry.

[4] See Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001). WCTL argues that these procedures require that the Board be proactive in taking steps to promote competition.

reflects a return on the "fair market value" of the properties sold or leased that is greater than the railroad industry's cost of capital.

Replies in support of WCTL's petition were filed on April 29, 2005, by Entergy Services, Inc. (Entergy); and on May 2, 2005, by Albany & Eastern Railroad Company (AERC) and jointly by Arkansas Electric Cooperative Corporation and Entergy Arkansas, Inc. (Arkansas Electric/Entergy).

Replies in opposition to WCTL's petition were filed on May 2, 2005, by: ASLRRA; AAR; and RIWG. On May 5, 2005, the Union Pacific Railroad Company filed a statement rebutting statements in the replies of Arkansas Electric/Entergy and Entergy, to which Entergy responded on May 17, 2005. BNSF Railway Company responded to the AERC filing on May 20, 2005.

We are especially interested in comments that: (a) discuss our statutory authority to address pre-existing paper barriers; (b) identify and describe existing paper barriers so that we can determine the extent of the problem alleged by WCTL; (c) identify and quantify any problems experienced by shippers as a result of paper barriers; (d) address the short and long term economic impacts of paper barriers; (e) address the effectiveness of the existing AAR/ASLRRA agreement on paper barriers; and (f) include information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc.

Board filings, decisions, and notices are available on its website at www.stb.dot.gov.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: January 30, 2006

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary