

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

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INFORMATION REQUIRED IN NOTICES AND PETITIONS
CONTAINING INTERCHANGE COMMITMENTS

REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY

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INTRODUCTION

Norfolk Southern Railway Company (“NS”) submits these Reply Comments to respond to initial comments filed in this proceeding. Although advocates for the proposed rules are quick to support the notion that more disclosure leads to better analysis, they do not articulate clearly how the additional disclosures would be helpful to a shipper’s decision to challenge a particular interchange commitment. On the other hand, comments filed by individual shippers, support the notion that interchange commitments that preserve rail service, such as NS’s lease credit arrangements, are beneficial to shippers. In addition to raising concerns about the practical implementation of the proposed rules, the initial comments demonstrate that the additional disclosure is not necessary for the Board’s performance of its duties. If anything, the comments filed suggest that the current disclosure requirements strike the proper balance between railroads’ ability to rationalize their networks and individual shippers’ desire to maintain rail service.

1. *Existing disclosure requirements are sufficient.*

Twenty-one parties filed opening comments in response to the Board's notice of proposed rulemaking issued on November 1, 2012, in Ex Parte 714 in which the Board seeks comment on its proposed rules requiring additional information related to interchange commitments. Of these, four individual shippers and two state departments of transportation filed comments imploring the Board not to make the process so burdensome that the short line option was no longer viable for Class I railroads.¹ And, although many parties generally took the position that more disclosure was better, no party in favor of the Board's proposed rules explained fully how the information proposed to be collected would be helpful to the Board or other interested parties.² Indeed, under the current disclosure requirements, in addition to the description of the provision included in the notice or petition by the filing party, the Board and interested parties already have access to the actual interchange commitment provision in the context of the entire lease or sale agreement.

2. *The proposed rules would be difficult to implement.*

From the railroads' perspective, practical implementation of the proposed rules would be difficult. Short lines stated that they did not have the relevant information to provide certain of the proposed disclosure items, noting that Class I railroads would be required to provide much of

¹ See Harrison Gypsum, LLC Opening Comments, Milnor Grain Company Opening Comments, Minn-Kota Ag Products Opening Comments, Sherwood Construction Co., Inc. Opening Comments, Oregon Department of Transportation Opening Comments, and Pennsylvania Department of Transportation Opening Comments.

² Union Electric Company d/b/a Ameren Missouri ("UEC") argues that valuation figure are of potential relevance in an interchange commitment case because many railroads have defended such provisions by arguing that the sale or lease price of a segment would have been much higher without the provision. See UEC Opening Comments at 5. However, the parties' commercial evaluation of the line is not relevant to the analysis of whether a transaction is anticompetitive where a transaction does not affect the shipper's competitive options in the first place.

the information – to the extent that it even existed – to the short line.³ Essentially, this would require one party to a transaction to disclose, through the other party, information that it used to negotiate a transaction price with that party. Additional requirements proposed by advocates of the proposed rules would further compound this awkward result by requiring the filing party to bear the burden of proof to verify the disclosed information.⁴ Rather than creating a process that allows parties to challenge an interchange commitment in an efficient and timely manner, the proposed rules and the proposed additions to those rules would create a lengthy, complicated process far beyond that contemplated by the class exemption that covers these types of transactions. Additionally, NITL proposed that the Board adopt substantive standards for newly-proposed interchange commitments to accompany the proposed disclosure rules.⁵ This is especially overreaching given the individual shippers’ stated preference for the preservation of rail service.

3. *NS lease credits are not interchange commitments and preserving service on marginal lines benefits shippers.*

Even advocates of the proposed rules acknowledge that certain interchange commitments or similar contractual arrangements may be beneficial if they facilitate preservation of marginally viable rail lines that would otherwise be abandoned.⁶ They acknowledge further that all of the leases with lease credit arrangements have been approved by the Board.⁷ To that end, NS’s lease

³ See The American Short Line and Regional Railroad Association Opening Comments at 18-20.

⁴ See UEC Opening Comments at 6, The National Industrial Transportation League (“NITL”) Opening Comments at 8.

⁵ NITL proposes that additional requirements should attach to a transaction if the interchange commitment is of unlimited duration, is an outright ban of interchange of rail service with an alternative railroad, results in an unreasonable financial penalty for an extended period of time, or has any other characteristic that would have a significant risk of anti-competitive effect. See NITL Opening Comments at 9-12.

⁶ See NITL Opening Comments at 6.

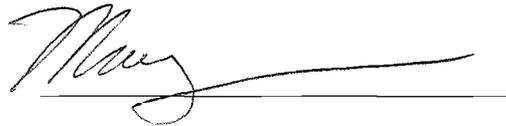
⁷ See Arkansas Electric Cooperative Corporation Opening Comments at 5.

credit arrangements benefit smaller rail carriers by allowing them to retain cash if cars are interchanged with NS. *See* *Kirchner V.S.* at 1-2. The aggregate amount of the credit is limited annually based on the number of cars historically interchanged with NS. *See id.* These arrangements do not prohibit interchange with other carriers and have been included where the short line has no other carrier connections, *e.g.*, *Midwest Rail d/b/a Toledo, Lake Erie and W. Ry – Lease & Operation Exemption – Norfolk S. Ry.*, FD 35634 (STB served June 29, 2012) (Mulvey, commenting), or where the nature of the traffic is such that the leasing carrier does not control routing decisions, *e.g.*, *Adrian & Blissfield R.R. – Continuance in Control Exemption – Jackson & Lansing R.R.*, FD 35410 (STB served Oct. 6, 2010) (Mulvey, dissenting). As such, these arrangements are not provisions put in place to protect the lessor’s traffic from diversion. Rather, they are a commercial term of the lease included at the request of the acquiring short line primarily for the benefit of that short line, which ultimately preserves rail service on these marginal lines for the benefit of shippers located on those lines.

CONCLUSION

Initial comments filed suggest that the proposed rule is not necessary for the proper performance of the functions of the Board. Parties generally supporting the proposed rules did not articulate how the information sought to be collected would benefit their analysis of whether to challenge a particular interchange commitment. In fact, several parties raised issues about the practical implementation of the proposed rules. Most individual shippers filing initial comments cited the importance of preserving rail service on marginal lines. In the interest of balancing the interests of all parties, the Board should not adopt its proposed rules. Further, the Board should conclude that NS's lease credit arrangements, which support the preservation of rail service on marginal lines, are not interchange commitments.

Respectfully submitted,



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