

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 714

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INFORMATION REQUIRED IN NOTICES AND PETITIONS  
CONTAINING INTERCHANGE COMMITMENTS

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REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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**REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY**

Pursuant to the Board's Notice of Proposed Rulemaking served November 1, 2012 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits these reply comments to address certain opening comments submitted on the Board's proposal to require additional disclosure of information when railroads utilize interchange commitments.<sup>1</sup>

The Board and its predecessor agency adopted class exemptions for acquisitions and operations by noncarriers and Class III carriers because these transactions would ensure the continuation of rail service on lines that may otherwise be abandoned and these smaller carriers would likely provide better, more cost-efficient service for shippers.<sup>2</sup> The Board and its predecessor agency also found that usually no loss of competition resulted in transactions under Sections 10901 and 10902 because one carrier merely supplanted another carrier.<sup>3</sup> In 2008, the

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<sup>1</sup> UP also supports the reply comments submitted by the Association of American Railroads.

<sup>2</sup> See *Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 817 (1985) ("*Section 10901 Class Exemption*"); *Class Exemption for Acquisition or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902*, 1 S.T.B. 95, 103 (1996) ("*Section 10902 Class Exemption*").

<sup>3</sup> See *Section 10901 Class Exemption* at 812, 817; *Section 10902 Class Exemption* at 103, 107.

Board adopted disclosure rules to facilitate its review of Section 10901 or 10902 transactions that utilize interchange commitments, and with one exception, the Board has since approved all interchange commitments under the class exemptions. (NPRM at 3-4.) Although the interchange commitments reviewed since 2008 have drawn little or no opposition, the NPRM proposes additional disclosure requirements for notices and petitions for exemption where the underlying lease or line sale contains an interchange commitment.

Eleven parties filed opening comments opposing the NPRM,<sup>4</sup> and seven parties filed comments generally supporting the NPRM.<sup>5</sup> The parties opposing the NPRM, which include smaller shippers, rail carriers, and state departments of transportation, have endorsed the benefits of short line operations of former Class I lines, explained why interchange commitments are

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<sup>4</sup> Comments of the Association of American Railroads; Comments of the American Short Line and Regional Railroad Association; Harrison Gypsum, LLC Comments (“Harrison Gypsum Comments”); Milnor Grain Company Comments (“Milnor Grain Comments”); Minn-Kota Ag Products Comments (“Minn-Kota Comments”); Comments of Norfolk Southern Railway Company; Verified Statement on Behalf of the Rail Industry Working Group; Sherwood Construction Co., Inc. Comments; Oregon Department of Transportation Comments; Pennsylvania Department of Transportation Comments; and Comments of Union Pacific Railroad Company.

<sup>5</sup> Comments of American Chemistry Council (“ACC Comments”); Opening Comments of Union Electric Company D/B/A Ameren Missouri (“Ameren Comments”); Opening Comments of Alliance for Rail Competition, et al. (“ARC Comments”); Comments of Consumers United for Rail Equity (“CURE Comments”); Opening Comments of the National Grain and Feed Association; Opening Comments of the National Industrial Transportation League (“NITL Comments”); and Comments of the U.S. Department of Agriculture (“USDA Comments”).

Three additional parties filed comments but did not state a position on the NPRM. Instead they either favored the Board curtailing short line spin-offs in some fashion or reopening three past mergers. *See* Comments of Arkansas Electric Cooperative Corporation (“AECC Comments”); Comments on Behalf of United Transportation Union-New York State Legislative Board; and Initial Comments of The Chlorine Institute, Inc. (stating that “the Board should [...] determine what actions it might take to require the major railroads to compete with one another [...]” such as “reopening the three mega mergers of the 1990s to impose additional competitive conditions.”).

sometimes necessary and do not reduce competition, and described how the additional burdens would have a chilling effect on future leases and line sales. The parties supporting the NPRM, on the other hand, either support the additional disclosure requirements in general terms only, call upon the Board to go far beyond the scope of the NPRM, or both.<sup>6</sup>

UP's reply comments will address (i) how some parties overlook the benefits and greatly exaggerate the risks of interchange commitments having anti-competitive effects, (ii) why establishing a burden of proof on certain disclosures is unnecessary, and (iii) why granting automatic access to confidential information submitted under seal is unjustified. Finally, we correct mischaracterizations regarding certain UP transactions.

**I. The Board's Prior Findings That Interchange Commitments Are Not Inherently Anti-Competitive or Contrary to the Public Interest Remain Sound.**

Many parties supporting the proposed rules largely rely on general assertions that interchange commitments harm or eliminate competition,<sup>7</sup> but they fail to consider whether the competitive options *after* the transaction changed from the competitive options *before* the transaction. When the Board considered the lawfulness of interchange commitments previously,

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<sup>6</sup> UP will not respond to comments urging the Board to adopt rebuttable presumptions because such comments are outside the scope of this proceeding. (Ameren Comments at 6-7; NITL Comments at 9-10; USDA Comments at 2.) The Board requested comments on the NPRM's proposed disclosure requirements, not whether it should review its prior findings that rebuttable presumptions are unsuitable for determining whether a particular interchange commitment is unlawful. *See Review of Rail Access & Competition Issues – Renewed Petition of the Western Coal Traffic League*, Ex Parte No. 575, slip op. at 7-8, 12 (STB served Oct. 30, 2007).

<sup>7</sup> *See* ACC Comments at 1; Ameren Comments at 2-3; AECC Comments at 6-7; ARC Comments at 3; CURE Comments at 1; NITL Comments at 2-3; USDA Comments at 1.

Other parties make even broader claims that competition does not exist in the railroad industry due to individual railroad actions and past mergers. (ARC Comments at 2-3, 4-6; TCI Comments 1-2.) Railroads have filed substantial evidence showing that competition has not diminished since the Staggers Act of 1980 in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions and Competition in the Railroad Industry*, and the Board should address broad competition issues in those proceedings.

the Board concluded that all interchange commitments are not inherently anti-competitive because a shipper's competitive options before the interchange commitment may not be different than those options after the interchange commitment. *Review of Rail Access & Competition Issues – Renewed Petition of the Western Coal Traffic League*, Ex Parte No. 575, slip op. at 8-9 (STB served Oct. 30, 2007) (“*Renewed WCTL Petition*”). When properly viewed *ex ante* (i.e., before the sale or lease), the lessor or seller railroad had a right to favor its long haul or was required to establish a through route with another carrier to complete transportation. *Id.*<sup>8</sup> After the transaction, the competitive options have not changed: the short line railroad merely supplants the lessor or seller railroad. *Id.* at 9. Simply put, a particular interchange commitment may not reduce competitive options that existed before the sale or lease.<sup>9</sup>

U.S. Department of Agriculture (“USDA”) attempts to illustrate that interchange commitments are anti-competitive with a hypothetical example, but a hypothetical and oversimplified example does not prove that all interchange commitments are anti-competitive. The Board refused to adopt broad rules of general applicability precisely because the terms of interchange commitments vary and whether the terms of that particular interchange commitment are unduly restrictive or unwarranted under the circumstances is necessarily fact-specific. *Id.* at 7-8.

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<sup>8</sup> See also *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1063-64 (1996) clarified 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099 (8th Cir. 1999).

<sup>9</sup> Assuming *arguendo* that there may have been some unreasonable interchange commitments previously, the Board's heightened scrutiny of interchange commitments since 2008 means rail carriers are even more mindful of the terms that may be found unreasonable and take care to ensure the terms are reasonable, which is demonstrated by the fact that only one interchange commitment was rejected by the Board in the past four years. See NPRM at 4-5.

The Board has also noted that particular interchange commitments may in fact have pro-competitive effects. Leases and line sales containing interchange commitments “may [benefit] and [further] the public interest in a number of ways, including better service and/or better rates, and the creation or strengthening of short line railroads that have the potential to expand into other markets, and thereby ultimately add to competition.” *Id.* at 9. Indeed, the comments filed by smaller shippers reinforce the Board’s conclusion that even though a transaction includes an interchange commitment, shippers are receiving excellent service and are growing with the short line railroads. For example, Minn-Kota Ag Products explained that the short line railroad “has more flexible service and it is competitively priced” and “[t]he interchange commitment has not hindered [Minn-Kota’s] growth.” (Minn-Kota Comments at 1.) Similarly, Milnor Grain Company explains that the short line railroad invested in infrastructure to preserve and enhance rail service to its facility, which has allowed Milnor Grain to double its rail shipments. (Milnor Grain Comments at 1.)<sup>10</sup>

**II. Requests that Parties Filing Notices and Petitions for Exemption Should Support and Bear Burden of Proof on Certain Disclosures Are Unnecessary and Overreaching.**

Some parties urge the Board to require parties filing a notice of exemption to verify and bear the burden of proof for certain disclosures proposed in the NPRM. (Ameren Comments at 5-6; NITL Comments at 8.) These requests, however, are unnecessary and overreaching for three reasons.

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<sup>10</sup> See also Harrison Gypsum Comments (explaining that even with the interchange commitment, the short line railroad has a lower cost structure and provides more flexible service than the Class I railroad ever provided).

First, current regulations provide that when an attorney signs and files a pleading, document, or paper with the Board, the attorney believes there is good ground for the document. 49 C.F.R. § 1104.4(a). Furthermore, if a party files false or misleading information in the verified notice of exemption, the exemption is void *ab initio*. 49 C.F.R. §§ 1150.32(c), 1150.42(c). Since the current regulations provide adequate protection against the filing of unsubstantiated, false, or misleading information, additional verifications are unnecessary.

Second, Ameren and NITL fail to recognize that price and other financial terms that parties negotiate are commercial judgments. The commercial terms that two parties negotiate between themselves do not need to be proven because there is no right or wrong way for those parties to ascertain the value of a transaction to their respective businesses. Indeed, parties often reach an agreement where the seller would have accepted less and the buyer would have paid more because they value the asset differently.

Third, by arguing that parties filing notices of exemption should bear a burden of proof on certain disclosures in the NPRM, Ameren and NITL are essentially arguing for the Board to treat a notice of exemption as an application that will be contested. In other words, Ameren and NITL are essentially arguing to revoke the class exemptions under Sections 10901 and 10902 when the underlying transaction contains an interchange commitment. However, neither party has shown that such revocation is necessary to carry out the transportation policy of 49 U.S.C. § 10101. 49 U.S.C. § 10502(d), 49 C.F.R. § 1121.4(f).<sup>11</sup>

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<sup>11</sup> And, of course, such a revocation is beyond the scope of this proceeding.

### **III. Granting Automatic Access to Confidential Information Without a Protective Order is Unjustified and Would Further Deter Transactions.**

NITL points out an ambiguity in the NPRM regarding whether “parties objecting to a petition for exemption or those filing a petition to revoke an exemption will have access to [the proposed information submitted under seal] up front,” (NPRM at 6) without following the existing procedures for obtaining confidential interchange commitment documents. (NITL Comments at 7-8.) Under the existing regulations, objecting parties may access confidential interchange commitment documents by filing a Motion for Access to Confidential Documents (“Motion for Access”), showing a need for the information, and submitting an appropriate protective order and confidentiality undertakings. *See* 49 C.F.R. §§ 1121.3(d)(2), 1150.33(h)(2), 1150.43(h)(2), and 1180.4(g)(4)(ii). NITL seems to suggest that objecting parties should have “up front” access to confidential information submitted under seal without filing a Motion for Access, showing a need for the information, or submitting an appropriate protective order. (NITL Comments at 8.)

However, treating the NPRM’s proposed confidential information differently from the confidential interchange commitment document is not justified and would further deter lease and line sale transactions. The Board previously explained that commercially sensitive information – such as the precise terms of the interchange commitment documents – is typically disseminated through the Board’s protective order process. *Disclosure of Rail Interchange Commitments*, at 3. The NPRM is similarly proposing disclosures that are as commercially sensitive as the precise terms of the interchange commitment documents, such as shipper carload information, revenue projections, and other financial estimates, and the information submitted under seal should be

protected under the same procedures.<sup>12</sup> NITL's only justification for anyone who objects to have "up front" access to the proposed confidential information is that the exemption proceedings have short deadlines (NITL Comments at 8), but the same short deadlines have not affected those parties from gaining access to the confidential interchange commitment documents under the existing procedures.<sup>13</sup> Furthermore, Class I and short line railroads would be further deterred from negotiating leases and line sales if their confidential commercial information is automatically disseminated to anyone who objects without those parties showing a need for the information and being required to keep that information confidential.

#### **IV. Certain Parties Mischaracterize UP's Transactions with Short Line Railroads.**

Arkansas Electric Cooperative Corporation ("AECC") makes numerous allegations about the notices or petitions for exemption that the Board has reviewed since May 2008 including one notice that involves a UP lease. In regards to UP's transaction with Progressive Rail,<sup>14</sup> AECC's claim that the interchange commitment appeared for the first time in the lease renewal is incorrect. (AECC Comments at 6.) The prior UP-Progressive Rail lease did have an interchange commitment. Furthermore, to the extent that AECC calls into question the need for an interchange commitment if the short line railroad does not physically connect to another Class I railroad, AECC ignores the possibility of a connection being restored. The leased line in the Progressive Rail transaction formerly connected with Canadian National Railway Company, and

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<sup>12</sup> See also UP Comments at 7, 11 (explaining that the NPRM proposes the disclosure of customer information that rail carriers must not disclose under 49 U.S.C. § 11904 without appropriate protections).

<sup>13</sup> See *Middletown & N.J.R.R. – Lease & Operation Exemption – Norfolk S. Ry.*, FD 35412 (STB served Sept. 16, 2010) (Director of Proceedings granting a Motion for Access).

<sup>14</sup> *Progressive Rail, Incorporated – Lease & Operation Exemption – Rail Line of Union Pacific Railroad Company*, FD 35617 (STB served May 4, 2012).

although that connection does not currently exist, restoring that connection in the future is possible.

AECC also points to the UP lease with Missouri & Northern Arkansas Railroad (“MNA”) as an example of an interchange commitment that prevented a power plant partially owned by AECC from “obtaining competitive rail service” and as an example of how the Board has effectively foreclosed shippers’ ability to obtain relief from an interchange commitment. (AECC Comments at 6-8.) Yet being given three opportunities, AECC has failed to demonstrate that the interchange commitment in the UP-MNA lease foreclosed a better or more efficient route to the power plant, resulted in an abuse of market power, or otherwise violated the Interstate Commerce Act.<sup>15</sup> The UP-MNA lease has been fully litigated, and the lease and interchange commitment have not been shown to be anti-competitive. Additionally, just because AECC failed to satisfy the Board’s competitive access remedies based on the circumstances of the UP-MNA lease does not mean that the Board’s competitive access remedies could not provide relief for other shippers faced with different circumstances.

Ameren cites its complaint against UP as a challenge to a “paper barrier affect[ing] rail service” at Ameren’s Labadie facility.<sup>16</sup> (Ameren Comments at 1-2.) However, UP’s line sale and trackage rights agreements at issue in *Ameren v. UP* do not contain interchange commitments. In the agreements at issue in *Ameren v. UP*, UP conveyed limited rights to

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<sup>15</sup> *Entergy Ark., Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42104 (STB served June 26, 2009); *Entergy Ark., Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42104 (STB served Mar. 15, 2011); *Entergy Ark., Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42104 (STB served Nov. 26, 2012).

<sup>16</sup> See *Union Elec. Co. d/b/a Ameren Mo. v. Union Pac. R.R. Co.*, Docket No. NOR 42126 (“*Ameren v. UP*”).

Missouri Central Railroad Company (“MCRR”) and such conveyance does not fall within the Board’s definition of interchange commitments.<sup>17</sup> Furthermore, the agreements did not reduce rail competition at Ameren’s Labadie facility. The line that UP conveyed to MCRR was an unused UP route to Labadie. Before the agreements, Ameren had direct access to UP at Labadie, and access to BNSF Railway Company (“BNSF”) and other railroads that interchanged with UP at St. Louis and Kansas City through an arrangement between UP and Ameren designed to ensure on-going competition after the UP/SP merger. After the agreements, the facility continued to have the same competitive opportunities (and, in 2000, Ameren convinced the Board to provide it with direct access to BNSF at Labadie).<sup>18</sup> The Labadie facility did not lose any rail competition as a result of UP’s agreements with MCRR. Ameren also claims that UP did not discount the sale price to MCRR to reflect MCRR’s restricted access (Ameren Comments at 5), but as UP explained in its reply evidence, the quit claim deed filed in connection with the line sale specifies that the sale included a restriction on service to Labadie and that the restriction was reflected in a reduced sale price.<sup>19</sup>

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<sup>17</sup> In the NPRM, the Board defined interchange commitments as “contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.” NPRM at 2. UP is not limiting or restricting MCRR’s ability to interchange traffic originating or terminating at Labadie with another carrier because MCRR cannot access Labadie to originate or terminate traffic.

<sup>18</sup> See *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, Finance Docket No. 32760 (STB served June 1, 2000).

<sup>19</sup> Union Pacific’s Reply Evidence and Argument, Docket No. NOR 42126, at 6 (filed June 17, 2011).

**V. Conclusion**

The majority of parties who filed opening comments oppose the NPRM because interchange commitments have benefited the transportation industry as a whole and because imposing additional burdens on transactions utilizing interchange commitments would have a chilling effect on future leases and line sales. The parties supporting the NPRM have not demonstrated why the additional disclosure requirements are necessary, but rather urge the Board to adopt proposals far outside the scope of the NPRM. UP continues to believe that the Board should not adopt the additional disclosure requirements proposed in the NPRM. However, if the Board is not persuaded by the opposition to the NPRM and nonetheless believes some additional disclosures are warranted, UP would not object to notifying the shippers who have used the line in question within the last two years and changing the case caption so that the existence of an interchange commitment is apparent. UP respectfully urges the Board to reject the remaining proposed disclosure requirements.

Respectfully submitted,



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