

**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
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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REPLY COMMENTS

The National Industrial Transportation League (“NITL”) hereby submits these Reply Comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking (“NPRM”) issued by the Surface Transportation Board (“Board” or “STB”) on November 1, 2012.¹ The NPRM contained a proposal for enhanced disclosure requirements applicable to rail line sale and lease transactions that would create a new paper barrier (a.k.a. “interchange commitment”).

I. SUMMARY OF NITL’S OPENING COMMENTS

In Opening Comments filed on December 18, 2012, NITL commended the Board for initiating this proceeding and, in general, strongly supported the Board’s proposals to require the disclosure of more information concerning the existence and impact of paper barriers. See NITL Opening at 2-4. NITL explained that paper barriers that limit the rail routings that may be offered by rail line purchasers or lessees, particularly for lengthy or indefinite periods of time, adversely impact the competitiveness and efficiency of the rail transportation market, and the

¹ The Board modified the procedural schedule in a decision issued on November 15, 2012 to extend the due date for opening and reply comments.

American economy as a whole. Id. at 3. Paper barriers may also conflict with the national Rail Transportation Policy of 49 USC § 10101. Id. at 2-3.

NITL stated that the Board should evaluate the structure and terms of proposed paper barriers to determine if they contravene the public interest (i.e, whether the paper barrier on balance would result in more harm to rail customers than benefits to the parties to the transaction), and if they are appropriate for expedited consideration and approval under the class exemption process. Id. at 2-3 and 5-7. NITL supported the enhanced disclosure requirements described in the NPRM but requested additional clarification regarding (1) access to the information filed under seal, and (2) the valuation figures asserted by railroads involved in a proposed transaction. Id. at 7-8. Finally, NITL requested that the Board adopt additional standards and protections to address the harmful effects of paper barriers that include more restrictive or anti-competitive characteristics, and to require public disclosure of all pre-existing paper barriers. Id. at 9-13.

Evaluation of the Opening Comments filed by other parties in this proceeding has not altered NITL's view, and NITL respectfully requests that the Board take the steps outlined in the NITL Opening Comments.

II. NITL STRONGLY VALUES THE KEY ROLE SERVED BY SHORTLINE RAILROADS IN THE NATIONAL RAIL SYSTEM

Shortline railroads serve a critical role in the national rail system and, indeed, the entire American economy. In a modern and diverse economy, reliable and efficient transportation services are crucial to ensuring that the goods and services needed by American citizens can be provided in a timely and cost-effective manner, and shortline railroads are an integral part of the transportation services used on a daily basis by thousands of businesses across the country. Moreover, cost-effective and dependable rail transportation is vitally important to American

companies that increasingly must compete in a global marketplace, and the shortline rail network in the United States is an important component of our national rail system. NITL highly values the existing partnerships between manufacturers, shippers, and receivers, on the one hand, and shortline railroads, on the other, and believes that adoption of the Board's proposals in this proceeding will not reduce the number of rail line sales and leases that will be pursued in the future, since those transactions will continue to be determined by the economics of the rail line at issue. NITL believes that shortlines will continue to prosper if the Board adopts its proposed paper barrier rules, as well as the suggested clarifications and additional standards proposed by NITL in its Opening Comments.

III. THE RAILROADS HAVE VASTLY OVERSTATED THE BURDEN AND COST OF COMPLIANCE WITH THE PROPOSED RULES

In the NPRM, the Board proposed to require eight additional disclosure items as part of any Notice of Exemption or Petition of Exemption that involves a rail line sale or lease. These items are:

1. A list of shippers that currently use or have used the line in question within the last two years;
2. The number of carloads those shippers specified in paragraph (1) originated or terminated (submitted under seal);
3. A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (1);
4. A list of third party railroads that could physically interchange with the line sought to be acquired or leased;
5. The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);
6. An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);
7. An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and
8. A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

NPRM at 5-6. In their Opening Comments, several of the railroad parties asserted that the Board has underestimated the burden and cost of compliance with the disclosure requirements proposed in the NPRM. See, e.g., Opening Comments of the Association of American Railroads (“AAR”) at 10-11; the American Short Line and Regional Railroad Association (“ASLRRA”) at 3, 12, 14, 17, and 18; and Union Pacific Railroad Company (“UP”) at 8-11. These concerns have been dramatically overstated, as described below.

A. Several Proposed Disclosure Items Should Already Exist

1. Disclosure Items #1 and #2 Should be in the Seller/Lessor Railroad’s Records

The railroad acting as the putative seller or lessor of the rail line should have ready access to disclosure item #1 and item #2 from its own transportation, accounting, and other records. Assembling the necessary data should take a minimum of time. Indeed, the parties concerned about the asserted burden of compliance have not provided an estimate of compliance time. Some parties have, however, claimed that compliance would be made more difficult because the required information is in the possession of the seller/lessor railroad, not the railroad filing the Notice of Exemption or Petition for Exemption at the Board. See, e.g., AAR Opening at 11. However, this concern can be alleviated simply by having the seller/lessor railroad, rather than the purchaser/lessee railroad, file this information with the Board. Moreover, the information in item #2 should be filed as Highly Confidential, meaning that only external counsel and consultants of all other parties would have access to it. Designation of the information as Highly Confidential should alleviate any concern by shippers and the seller/lessor railroad about this information being shared with other shippers. See, e.g., UP Opening at 6-7; ASLRRA Opening at 19-20; Norfolk Southern Railway Company (“NS”) Opening at 8 (n. 5).

2. Disclosure Items #3 and #8 Involve Simple Procedural Steps

Disclosure item #3 simply requires notice (and certification that notice was given) to all shippers listed in disclosure item #1. Disclosure item #8 merely requires a change to the case caption on the transaction filings submitted to the Board. Compliance with these two items should be possible with a minimum of effort. The ASLRRRA complains that the notice requirements are more extensive than those required under other statutory provisions, but ASLRRRA does not really explain why the notice requirements should be the same or why providing the notice results in an undue burden. ASLRRRA Opening at 17. In any event, the proposed implementation of a paper barrier is a legitimate reason for the notice requirement in the NPRM.

3. Disclosure Item #4 Should be Readily Known

With disclosure item #4, the Board has proposed that the filing party list all other railroads that can physically interchange with the rail line to be purchased or leased. Preparing this list will not be difficult or time consuming, as the desired information should be already well-known to the party seeking to purchase or lease the rail line. Nonetheless, a few parties have objected to this disclosure, but their objections are without merit. ASLRRRA claims that affected shippers already know what railroads interchange with the rail line at issue (ASLRRRA Opening at 11 and 16), but, even if this is true (which NITL does not concede), ASLRRRA fails to recognize that the Board may be unaware of and interested in such information. In any event, it would be an easy task for the filing railroad to specify those railroads with which the subject rail line can physically interchange.

Additionally, UP contends that this requirement is inherently ambiguous and open to interpretation because the interchange facilities might only be suitable for certain kinds of traffic

(UP Opening at 7). To the extent that a railroad believes certain types of traffic cannot be interchanged or other limitations exist, then that assertion can be addressed in any contested proceeding that arises regarding the rail line. Finally, the Board can clarify in its final decision whether or not the proposal requires consideration of “build-out” options as alleged by ASLRRRA. See ASLRRRA Opening at 15-16.

B. The Remaining Disclosure Items Can Be Readily Developed from Information that Should Already Be Known By One of the Railroads Involved in the Transaction

1. The purchaser or lessee railroad should be able to comply with disclosure item #5

With disclosure item #5, the Board proposes that the purchaser or lessee railroad state, under seal, the percentage of its revenue projected to be derived from operations on the line with the interchange commitment. This information should already be known to the purchaser or lessee. In order to determine if operation of the subject rail line would be successful, the lessee or buying railroad has presumably already calculated figures that can be used to quickly develop item #5. Any entity engaging in a purchase or lease of a rail line would almost certainly have engaged in due diligence and already calculated the estimated traffic on the rail line.

2. The seller or lessor railroad should already have information required by disclosure items #6 and #7

The Board has proposed that the disclosure include two items related to the valuation of both the rail line and also the paper barrier restriction; both items would be submitted under seal. These two items have caused the greatest consternation among railroad parties. ASLRRRA contends that the requested information is not known to the purchaser/lessee railroad and, consequently, would be problematic to develop. ASLRRRA Opening at 14-15. Similarly, AAR asserts that the disclosure would require the seller/lessor to share commercially sensitive

information with the purchaser/lessee. AAR Opening at 8-9. These concerns can be simply and easily addressed: The Board can merely require the seller/lessor to file this information under seal, designated as Highly Confidential. The information would not need to be developed by the purchaser/lessee, nor would it need to be shared with the purchaser/lessee. The Board would only need to analyze the valuation figures if a paper barrier is challenged or determined by the Board to be problematic and the valuation of the line becomes an issue. AAR Opening at 9. See also NITL Opening at 8.

UP assumes that the valuation of the rail line would require use of the Uniform Rail Costing System (“URCS”), which the Board uses to calculate rail variable costs, and alleges that use of URCS in this manner would be extremely difficult. UP Opening at 10-11. However, UP’s assumption is not based on the Board’s Notice, since the agency did not state or even imply in the NPRM that the valuation disclosures must be based upon URCS. In order for any seller or lessor railroad to determine (1) that it wanted to sell or lease the rail line at issue, and (2) the specific dollar figure included in the proposed paper barrier, the seller/lessor would have already engaged in some internal calculations valuing the rail line and the proposed paper barrier provision. NITL believes it is safe to assume that Class I railroads, such as UP, do not haphazardly or randomly decide to sell or lease certain rail lines. Instead, such a decision is based on economic valuations showing that the line is no longer sufficiently profitable.

Similarly, railroads do not agree upon the provisions of paper barriers (e.g., the per car dollar premium to interchange with another railroad) in a random manner. The valuation figures used by the seller/lessor railroad in making its decisions to sell or lease the rail line, and to include the specific proposed paper barrier provision, can be relied upon to develop the information for disclosure items #6 and #7. This information can be submitted by the

seller/lessor railroad, and designated as Highly Confidential, so that it would not be available to internal employees of either the purchaser/lessee or any shipper.

C. The Cost of Compliance with the Disclosure Requirements Should be Minimal

A number of commenting parties have asserted that the Board has severely understated the cost of compliance with the proposal in the NPRM. See, e.g., UP Opening at 11; AAR Opening at 8; ASLRRRA at 18-20. However, these parties have tended to interpret the NPRM proposal in the most complex manner possible. See Sections III.A. and III.B. above. Clarification by the Board in its final decision should alleviate a great deal of the cost concerns.

No commenting party has specified a dollar figure for the cost of compliance. With a reasonable interpretation of the NPRM proposal, as clarified by the Board, the cost of compliance would be minimal and would be dwarfed by railroads' normal operating and investment expenses. As NITL showed above in Sections III.A. and III.B., all of the disclosure items can be based upon information that should already be in the possession of either the seller/lessor or the purchaser/lessee. Of course, some limited effort in time and cost would likely be required, but compliance with the reasonable disclosure and regulatory requirements of the Board is justified in order to address the policy issues raised by paper barriers. Furthermore, the minimal cost is justified because the proposals should help avoid establishment of anti-competitive paper barriers and the litigation costs that would arise when those paper barriers are challenged.

D. Confidentiality Issues Can be Easily Addressed

Several parties have expressed concerns about various confidentiality issues, including that the seller/lessor would not want to allow the purchaser/lessee to have access to its internal valuation information (see UP Opening at 6-7; NS Opening at 8 (n. 5); ASLRRRA Opening at 19-

20) and that shippers would not want other shippers to have access to their annual car volumes (see AAR Opening at 8-9). These concerns can be simply alleviated. For those disclosure items (such as item #6 and item #7) that would be in the possession of the seller/lessor railroad, the Board can simply allow the seller/lessor railroad to file this information. Consequently, the information would not be shared with the purchaser/lessee. Information can be designated as Highly Confidential whenever appropriate, thus ensuring that only outside counsel and consultants could see the information. This would alleviate the concern that (1) one shipper would not have access to another shipper's traffic information, and (2) the shortline would have access to the Class I railroad's valuation data.

IV. THE RAILROADS HAVE EXAGGERATED THE CONSEQUENCES THEY CLAIM WILL RESULT FROM ADOPTION OF THE PROPOSED RULES

Many commenting parties warned of a "chilling effect" on rail line sales and leases, or an increase in rail line abandonments, due to the cost and burden of compliance with the proposals described in the NPRM. See, e.g., AAR Opening at 3 and 8; ASLRRRA Opening at 3, 7, and 20; UP Opening at 2; Oregon Department of Transportation ("ODOT") Opening at 1; Pennsylvania Department of Transportation ("PDOT") Opening at 1. However, the likelihood of a "chilling effect" or increased abandonment is minimal because the cost and burden of compliance would itself be minimal, and has been greatly exaggerated by several commenting parties. See Section III above.

The claims of a chilling effect or increased abandonments fail to recognize that the market will still dictate whether investment should be made or continued in certain rail lines. As the Board certainly knows, the rail industry has been a favorite of Wall Street for many years. Where rail service is needed, and the economics are workable, the proposals in the NPRM will not discourage parties to develop defensible and lawful sale and lease agreements. While some

paper barriers may facilitate such sale or lease transactions when a shortline lacks sufficient capital, the proposals will help to ensure that the structure and terms of such paper barriers do not “cross-the-line” and result in long-term competitive disadvantages to the parties and communities receiving the rail service. Further, as a last resort, the Offer of Financial Assistance process is available, if a viable rail line is the subject of an abandonment filing. See 49 USC § 10904.

Even if there is some “chilling effect” on the margins, this effect is a necessary consequence of the Board’s statutory duty to protect the public interest. Congress specified that the Board would have regulatory control over rail line sales and leases for the express purpose of ensuring that the proposed transactions are not “inconsistent with the public convenience and necessity.” 49 USC §§ 10901(c) and 10902(c). In fulfilling this statutory duty, the Board must necessarily evaluate whether a proposed paper barrier harms the public interest. The Board cannot ignore this Congressional directive.

Moreover, the railroads conveniently ignore the obvious benefits of the proposals, including that the use of prior notice and disclosure of paper barriers is more efficient, and ultimately less costly, than the alternative of after-the-fact litigation. Also, the enhanced transparency of the proposed disclosure requirements are likely to assist the Board in achieving its public policy objectives by discouraging the establishment of the most egregiously anti-competitive paper barriers. This, in turn, would have the added benefit of reducing the need for costly litigation at the Board to challenge paper barriers that may be contrary to the public interest. Hence, the shining of a bright light on the terms and impact of paper barriers *before* they are implemented may actually discourage the establishment of the most unreasonable paper barriers. This, in turn, would help preserve the resources of the Board needed to evaluate the

paper barrier, as well as potential litigation costs—all desirable results for the rail transportation system and the nation as a whole.

V. PAPER BARRIERS CAN BE HARMFUL TO SHIPPERS AND COMMUNITIES

Some parties have claimed that shippers are not harmed by paper barriers. See, e.g., AAR Opening at 4; ASLRRA Opening at 22. This claim is based on the view that a rail line purchaser or lessee is simply replacing the seller/lessor and, consequently, the number of railroads serving the shipper has not been reduced by the paper barrier. This reasoning ignores several key points. First, the structure and terms of paper barriers may vary widely, and it appears that some paper barriers do, in fact, reduce the number of railroads that can serve a shipper. See, e.g., complaint of Union Electric Company d/b/a Ameren Missouri at para. 32, p. 12 (filed Nov. 22, 2010) in STB Docket No. 42126. Second, when a paper barrier reduces the ability of a shortline railroad to equally offer the full number of potential routings to a shipper, then rail service and rates are negatively impacted by the lack of competitive routing options that would otherwise be available. Furthermore, paper barriers that continue in perpetuity seem inherently unreasonable and harmful, since, at some point, the selling railroad is reimbursed far in excess of the economic value of the line.

It is possible that there are some situations in which a paper barrier is reasonable, or, at least, not necessarily unlawful. However, the Board has a duty to evaluate the public interest of transactions that include paper barriers, including whether such transactions are appropriate for a class exemption. Paper barriers do not have infinite value and should not be permitted to permanently or severely restrict otherwise available transportation options. The disclosure proposal in the NPRM will appropriately assist the Board in its duty to evaluate the public interest.

VI. THE RIA WAIVER PROCESS IS NOT A PANACEA

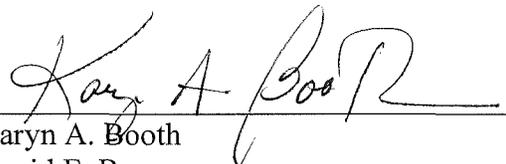
A number of commenting parties have asserted that the Railroad Industry Agreement (“RIA”) provides ample opportunity to address the competitive concerns inherent in paper barriers. See, e.g., AAR Opening at 6; ASLRRRA Opening at 3 and 13; Rail Industry Working Group Opening at 2-4. The RIA is an agreement among most of the nation’s railroads, and it governs a variety of inter-railroad relations. See Association of American Railroads and American Short Line and Regional Railroad Association – Agreement – Application Under 49 U.S.C. 10706, STB Docket No. S5R 100, slip op. at 1-2 (served Sept. 22, 1998). The primary benefit alleged to exist under the RIA is that it includes a waiver process that may allow for avoidance of a paper barrier. However, a close review of the waiver provision reveals that it is grossly inadequate to address the concerns over paper barriers. First, the RIA only provides the waiver right to the railroad that has purchased or leased the rail line. See RIA § III. See also “Request Under Railroad Industry Agreement” form.² For commercial reasons, the shortline purchaser may be unwilling to apply for the waiver since it may be viewed unfavorably by the Class I carrier who is the beneficiary of the paper barrier, and upon whom the shortline depends to interchange traffic. Thus, the lack of access to the waiver process by shippers, communities, or other affected parties renders the RIA grossly insufficient to meaningfully address the competitive concerns raised by paper barriers. Second, the RIA waiver process only applies to new traffic (see RIA § III) and, therefore, it does not apply to existing traffic that is negatively impacted by a paper barrier.

² This form is available at http://www.aslrra.org/images/news_file/RIA_Waiver_Request_Form.pdf.

VII. CONCLUSION

NITL thanks the Board for the opportunity to submit these Reply Comments. As described herein and in NITL's Opening Comments, the Board should adopt the proposals in the NPRM with additional clarifications and standards proposed by NITL.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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