

**Before the
Surface Transportation Board**

EX PARTE NO. 575 (Sub – No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

OPENING COMMENTS OF THE MARSHALL DURBIN COMPANIES

I.

Introduction

In response to the Board’s decision served in this proceeding on October 30, 2007 (“Decision”) the Marshall Durbin Companies (“MDC”) hereby submit the following comments on the rules the Board has proposed to govern the disclosure of contractual provisions included with the sale or lease of a railroad line that limit the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad, respectively. While MDC and other rail shippers have referred to such provisions as “paper barriers” the Board has elected in the Decision and the proposed rules to call such restrictions “interchange commitments.” In these comments MDC will focus on the Board’s proposed rules for the disclosure of pre-existing interchange commitments, focusing on MDC’s particular facts and circumstances, which (as of March, 2006) are discussed in comments MDC and others submitted in Ex Parte No. 575, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, (“Ex Parte 575 Comments”), and in comments MDC and others

submitted in Ex Parte No. 658, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, filed October 12, 2005 (“Ex Parte 658 Comments”). Copies of these prior filings are attached hereto for the Board’s convenience. A brief summary and update of those facts and circumstances is provided below.

II.

Summary of Relevant Facts

MDC is one of the largest privately owned poultry companies in the United States and a major regional business and employer in Mississippi and Alabama. Among its many facilities is a feed mill (“Mill”) in Waynesboro, Mississippi. The Mill was built in 1974 and is dependent on rail service for the majority of its inbound shipments of soybean meal and corn, which are currently about 2400 carloads per year. The Mill is located at the end of a 55-mile line of railroad originally constructed over 100 years ago that extends from Meridian, Mississippi to Waynesboro, Mississippi (the “Waynesboro Line”). See Ex Parte 658 Comments at 4-5. There are numerous other shippers along the line, some of which joined MDC in the Ex Parte 575 Comments and the Ex Parte 658 Comments. As explained in more detail in these prior comments, in 2000 the Waynesboro Line was sold by the Kansas City Southern Railway (“KCS”) to a short line railroad company called the Meridian Southern Railway using the Board’s “notice of exemption” procedures under 49 U.S.C. §§ 10901 and 10502 and 49 CFR Part 1180. See id. at 5-6. This sale occurred after seven years of KCS ownership of the track, during which operations and maintenance of the Waynesboro Line both gradually decreased, resulting in the track falling into general disrepair and it not being upgraded to accept heavier railcars or hazardous material. Id. at 4-5. MDC formally opposed the sale,

primarily on the grounds that KCS was selling a rail line badly in need of maintenance and upgrades to an entity that had no apparent ability to improve the *status quo* or stave off further deterioration of the track. However, the Board denied MDC's petition to revoke the exemption¹ as well as its request to obtain discovery of the underlying agreement, which MDC believed contained not only a paper barrier preventing the purchaser from interchanging traffic with any railroad other than KCS, but also a "steel barrier," meaning that KCS had retained ownership of a small segment of the physical track leading into the rail yard at Meridian. *Id.*, and Ex Parte 575 Comments at 2, 3-5. MDC and other shippers along the Waynesboro Line have previously stated their belief that the apparent "interchange commitments" imposed by KCS were a primary reason why, as of early 2006 (1) the overall poor state of the Waynesboro Line and rail service over it had not improved; (2) the Meridian Southern apparently still did not have the resources to adequately repair and rehabilitate the Waynesboro Line in order to improve or expand rail service beyond minimal levels; and (3) planned economic development along the Waynesboro Line had still not occurred. Ex Parte 575 Comments at 3-6. In MDC's view, the overall condition of the track and rail service provided over it did not improve in 2007, and the *status quo* concerning expansion of existing businesses or attracting new businesses to the Waynesboro area has not changed.

III.

Comments on Proposed Disclosure Rules

MDC and the other shippers along the Waynesboro Line continue to believe that its rehabilitation, repair, and safe and efficient operation are essential to their businesses

¹ STB Docket No. 33854, *Meridian Southern Railway, LLC – Acquisition and Operation – Line of Kansas City Southern Railway Company, Petition to Revoke Exemption* (served August 19, 2000).

and to the economic development of this region of Mississippi, which is one of the poorest in the United States. As such, MDC and the other Waynesboro Line shippers are continually assessing the options available to them to accomplish these goals. Therefore, MDC welcomes the Board's adoption of a policy of favoring the disclosure of interchange commitments contained in pre-existing sales or leases of railroad lines to short line railroads. MDC offers the following comments in regards to pre-existing transactions; in particular situations such as the Waynesboro Line sale, where interchange commitments were obviously imposed but the Board nevertheless approved the transaction without scrutinizing the terms of the agreement.

A. Proposed 49 CFR § 1114.30(d)

MDC supports the Board's adoption of a policy that is more favorable toward disclosure of interchange commitments to affected parties rather than the current policy of resisting such disclosure because of a presumption of their propriety. As Commissioner Mulvey states in his Comment accompanying the Decision, the fact that only one party in the Ex Parte No. 575 proceeding had sufficient knowledge of its particular restriction to attempt to quantify the harm it claimed the restriction caused it demonstrates the need for more disclosure. Decision at 18 (Mulvey Comment). While the Board has stopped short of adopting a policy that interchange commitments are *per se* anticompetitive, MDC supports prompt disclosure of the terms of lease or sale agreements where interchange commitments were a condition of sale, so that such commitments can be closely scrutinized on a case-by-case basis to ensure that they are not anticompetitive or otherwise against public policy. As MDC experienced firsthand when it formally contested the original sale of the Waynesboro Line by KCS, unless the

actual terms of the transaction can be reviewed and analyzed affected shippers cannot properly ascertain the extent to which any terms of sale might harm them by going beyond acceptable conditions for selling branch lines to short line railroads to conditions that improperly restrict competition or the ability of the short line to maximize its use and development of the line it has acquired. Any confidentiality concerns by the parties to the transaction can be addressed through the use of an appropriate protective order, a requirement which the Board has included in the proposed rules. This being said, MDC suggests that the Board should more clearly enunciate its pro-disclosure policy in the decision adopting the final rules, and that the Board should consider liberalizing or eliminating altogether any showing of need to review the agreement terms beyond (1) the filing of a complaint or petition to reopen a prior proceeding or to revoke an exemption, in whole or in part (or any other appropriate formal action); and (2) a demonstration that the filing party is a shipper directly affected by the transaction and that to the best of the shipper's knowledge the transaction includes an interchange commitment or commitments.

MDC also supports the proposal for expedited review of motions for disclosure of relevant agreements containing the interchange commitments filed under proposed 49 CFR § 1114.30(d), and suggests further that the Board add a requirement to the final rules that the agreement (defined as including all amendments thereto) must be produced within 10 days after the Board's granting of the motion and approval of the requisite protective order. This will enable the party seeking review of the prior transaction in light of the interchange commitment to more quickly assess how the agreement and

commitments affect the party's filing and to make any necessary amendments thereto as early in the process as possible.

B. Factors for Determining Propriety of Existing Interchange Commitments

The Board does not articulate in the Decision the factors it will examine to determine whether an interchange commitment in a previously approved transaction is in the public interest and, if it is not, how the relationship between the seller and purchaser should be modified. MDC submits that in the case of a railroad branch line such as the Waynesboro Line, which at the time of its sale in 2000 was in dire need of capital investment and rehabilitation, the public interest determination should include an examination of the extent to which the terms and duration of the contractual restrictions have prevented the railroad line from being upgraded and adequately maintained, thereby perpetuating unsafe and unstable track conditions and minimal service levels, which in turn stifle economic growth. Such an examination might, for example, reveal in certain cases that the removal or modification of an interchange commitment and the establishment of the short line railroad as a stand-alone entity with access to multiple connecting carriers in joint line service could provide the short line and affected rail shippers with new alternatives and opportunities that provide the short line with additional revenues to make necessary investments in the track, thereby improving rail safety, the overall national rail infrastructure, and facilitating economic growth.

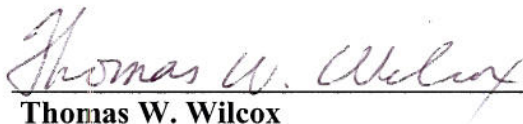
IV.

Conclusion

In conclusion, MDC supports the Board's adoption of a policy requiring railroads disclose to affected shippers existing lease or sale agreements containing "interchange

commitments.” In furtherance of this policy the Board should ensure that the final rules governing disclosure of such agreements either liberalize or eliminate altogether any showing of “need” on the part of a party seeking such disclosure. MDC also submits that existing lease or sale agreements containing an interchange commitment should be closely scrutinized by the Board when an appropriate proceeding is commenced for the purpose of determining whether the restrictive conditions on the sale or lease are in the public interest, and that this scrutiny should include an examination of whether the restrictive conditions have prevented the rail line at issue and the overall railroad service along the line from being improved subsequent to the transaction.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas W. Wilcox", is written over a horizontal line.

Thomas W. Wilcox

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January 2, 2008

ATTACHMENT

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 575

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

**COMMENTS OF THE MARSHALL DURBIN COMPANIES,
ODOM INDUSTRIES, INC., SOUTHEAST READY MIX, INC.
AND WAYNE COUNTY ECONOMIC DEVELOPMENT DISTRICT**

The Marshall Durbin Companies, Odom Industries, Inc., Southeast Ready Mix, Inc., and the Wayne County Economic Development District (“WCEDD”) (hereinafter collectively referred to as the “Waynesboro Line Shippers”) hereby submit these comments in response to the invitation of the Surface Transportation Board (“Board”) in the decision served February 1, 2006 in the above-captioned docket (“Decision”). In the Decision, the Board invited all interested parties to comment on certain issues related to the referenced renewed petition, which asks the Board to commence a rulemaking to address contractual provisions (so-called “paper barriers”) inserted in some rail line sale or lease agreements that limit the ability of the acquiring shortline railroad to interchange traffic with railroads other than the railroad conveying the line. As part of the request for comments, the Board asked parties to “(b) identify and describe existing paper barriers . . . , (c) identify and quantify any problems experienced by shippers as a result of paper barriers, [and] (d) address the short term and long term economic impacts of paper barriers.” Decision at 4.

The Marshall Durbin Companies, Odom Industries, Inc., and WCEDD recently addressed these three points in comments filed October 12, 2005 in Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead (“Ex Parte No. 658 Comments”). In the Ex Parte No. 658 Comments, a copy of which is attached hereto for inclusion in the record of this proceeding, these three parties described the existence and impact of a paper barrier (as well as a physical or “steel” barrier) that was imposed by the Kansas City Southern Railway (“KCS”) as part of its contract for sale to the Meridian Southern Railway (“Meridian Southern”) of most of KCS’s 55-mile line of rail extending south from Meridian, Mississippi to Waynesboro, Mississippi (the “Waynesboro Line”). These shippers also encouraged the Board to commence a rulemaking on paper barriers. Ex Parte No. 658 Comments at 14.

General descriptions of the Marshall Durbin Companies, Odom Industries, Inc., and WCEDD is set forth in the Ex Parte No. 658 Comments at 2-3. Southeast Ready Mix, Inc., another shipper along the Waynesboro Line, has joined Marshall Durbin Companies, Odom Industries, and WCEDD in these comments, as it has also been adversely affected by the paper barrier imposed in this particular circumstance. Southeast Ready Mix, Inc. is a concrete producer and aggregate company that sells concrete and aggregates to businesses and local governments in this area of Mississippi. Until 2003 Southeast Ready Mix shipped approximately 100 railcars of aggregates per year to its facility on the Waynesboro Line. It presently ships aggregates by truck due in large part to the inability to feasibly ship aggregate by rail from aggregate sources served by railroads other than the KCS.

As the Ex Parte No. 658 Comments describe, the Waynesboro Line is located in one of the poorest areas of Mississippi and the United States, and therefore sustaining existing industry and attracting additional industrial development along the Waynesboro Line is critical for the local communities and the region as a whole. Id. at 2. Moreover, the Comments explain that the Waynesboro Line Shippers and the other businesses along the line own and operate industries that employ a large part of the local population. Id. Each of their facilities require, or would greatly benefit from, dependable rail service to operate efficiently and at a cost low enough to enable existing facilities to expand. From the perspective of the WCEDD, the availability of reliable rail service over the Waynesboro Line is also essential to attracting new businesses to locate at its industrial park in Waynesboro. Id.

While the terms of the sale of the Waynesboro Line are confidential, the existence of a paper barrier is plainly evident from the fact that KCS retained the rate setting authority for KCS/ Meridian Southern movements over the Line and indeed the track still appears on KCS's system maps and grain tariffs as being part of the KCS system. Id. at 6. Accordingly, businesses along the Waynesboro Line obtain rates from KCS, who submits the invoices for such transportation and, presumably pays Meridian Southern an agreed-upon fee or division.

In addition, as stated above, KCS did not convey all of the Waynesboro Line to the Meridian Southern back to the point in the Meridian yard where it could directly interchange with other railroads, such as the Norfolk Southern Railway ("NS"). See, Id. Under this arrangement, NS and other rail carriers that could directly interchange with the Meridian Southern at the Meridian Yard for deliveries to shippers along the Waynesboro

Line are physically prevented from doing so without first interchanging with KCS.¹ The combination of the paper and steel barriers imposed on the sale to the Meridian Southern means, for all practical purposes, that the Waynesboro Line Shippers are only able to interchange traffic to and from the KCS from the Meridian Southern.

The problems experienced by the Waynesboro Line Shippers and the other rail shippers located along the line due to this particular paper barrier are not insignificant. With their options limited, the shippers along the Waynesboro Line are unable to seek competitive rail rates and KCS controls their ability to receive goods from and ship finished products to locations that are not served by KCS. *Id.* at 6-7. The Waynesboro Line Shippers also believe that the terms of the Meridian Southern's purchase from KCS and the inability of the Meridian Southern to directly interchange with other railroads at Meridian, Mississippi has contributed to the inability of Meridian Southern to earn sufficient income to adequately repair and rehabilitate the Waynesboro Line, which was in poor physical condition when it was acquired. Most notably, a multi-million dollar upgrade of the track is needed to enable it to handle 286,000-pound railcars.

The paper barrier in place on the Waynesboro Line has had short-term and long-term impacts on the City of Waynesboro and the surrounding region. As explained in the Ex Parte No. 658 Comments, WCEDD believes that 50-100 jobs would be created just from existing industry if the track were upgraded to handle 286,000-pound railcars.

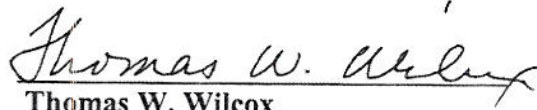
¹ Subsequent to the filing of the Ex Parte No. 658 Comments, the Meridian Southern published "Freight Tariff" MDS 8000-A," effective November 17, 2005, which includes local rates from "Meridian, MS." However, due to the fact that KCS did not convey all of the Waynesboro Line back to the point of interchange with NS and other carriers in the Meridian Yard, such carriers are physically prevented from interchanging directly with the Meridian Southern and becoming part of a joint line movement without first interchanging with KCS. This obviously enables KCS to add rates and charges that make such a movement economically, if not operationally, infeasible.

Odom Industries would like to use the Waynesboro Line for shipment of the herbicides, pesticides, and chemical additives that it manufactures in Waynesboro, but it is unable to do so until the track is reliable and safe enough for shipments of hazardous materials. In addition, expansion of Marshall Durbin Companies' Waynesboro Mill is being prevented by the current state of the Line, which cannot handle larger trains and 286,000-pound railcars. These shippers and Southeast Ready Mix, Inc. would also like the option of directly exploring service opportunities with NS and other railroads in combination with the Meridian Southern. Having more rail options and an upgraded track would also significantly increase the attractiveness of the area to potential new industries, which WCEDD believes are presently balking at locating along the Waynesboro Line due to the limited rail service options and the poor physical condition of the track.

In short, the Waynesboro Line Shippers believe that the continued presence of the restrictive conditions imposed on the sale of the Waynesboro Line by KCS to the

Meridian Southern has and will continue to harm existing businesses, industrial development, and the surrounding community in general.

Respectfully submitted,

A handwritten signature in cursive script that reads "Thomas W. Wilcox".

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March 8, 2006

ATTACHMENT TO COMMENTS

ATTACHMENT TO COMMENTS
OF
MARSHALL DURBIN COMPANIES,
ODOM INDUSTRIES, INC.,
AND
WAYNE COUNTY ECONOMIC DEVELOPMENT DISTRICT

**Before the
Surface Transportation Board**

EX PARTE NO. 658

**THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:
A REVIEW AND LOOK AHEAD**

**Comments of the Marshall Durbin Companies, Odom Industries, Inc., and Wayne
County Economic Development District**

**I.
Introduction**

The Marshall Durbin Companies and Odom Industries, Inc. (hereinafter referred to as the "Waynesboro Line Shippers") and the Wayne County Economic Development District ("WCEDD") hereby file this Statement outlining certain concerns about rules and policies adopted by the Interstate Commerce Commission and Surface Transportation Board implementing various provisions of the Staggers Rail Act of 1980 ("Staggers Act"). In particular, the Waynesboro Line Shippers believe that Board rules and policies governing Class I railroads' sales of branch lines to short line railroads, when such sales are made using the Board's "exemption authority" which entails virtually no scrutiny of the ability of the acquiring party to adequately maintain and provide service over the acquired line, has been stifled economic growth in eastern Mississippi and, they suspect, other rural areas of the country as well. In addition, both WCEDD and the Waynesboro Line Shippers believe that the Board's extremely strict standards for correcting service problems and addressing anti-competitive conditions (such as paper or steel barriers)

have also been detrimental to the local economy and, again, to the economy in other rural areas.

II.

Identification and Interest of Waynesboro Line Shippers and WCEDD

The Waynesboro Line Shippers and WCEDD are three of several rail-served entities located along an approximately 55-mile section of track running from Meridian, Mississippi to Waynesboro, Mississippi (the "Waynesboro Line"). The line is located in one of the poorest areas of Mississippi and the United States, and therefore sustaining existing industry and attracting additional industrial development along the line is critical for the local communities and the region as a whole. The Waynesboro Line Shippers own and operate industries that employ a large part of the local population. Each of their facilities require, or would greatly benefit from, dependable rail service to operate efficiently and at a cost low enough to enable the facilities to expand. In the case of WCEDD, the availability of reliable rail service over the line is also essential to attracting new businesses to locate in Waynesboro.

A. The Marshall Durbin Companies

The Marshall Durbin Companies is one of the largest private poultry companies in the United States and a major regional business and employer in Mississippi and Alabama. Marshall Durbin owns and operates hatcheries, feed mills, and processing plants in those states. Among its many facilities, Marshall Durbin operates a feed mill ("Mill") in Waynesboro which presently employs 22 people, and a processing and rendering facility in Hattiesburg, Mississippi that employs approximately 800. The Waynesboro Mill was built in 1974 and has always depended on rail service for the

majority of its inbound shipments of soybean meal and corn, which total about 2300 carloads per year. After processing at the Mill, the resulting feed is transported by truck to numerous farms in the Waynesboro area that have contracted to raise chickens for Marshall Durbin. In addition to the 22 employees at the Mill, there are 172 Marshall Durbin employees at the Waynesboro complex along with approximately 189 local farmers who directly rely on Marshall Durbin for part or all of their livelihood.

B. Odom Industries, Inc.

Odom Industries, Inc. is an Alabama-based industrial and chemical manufacturing company with a facility located along the southern end of the Waynesboro Line. The Waynesboro facility employs 75 people and primarily engages in the contract manufacture of chemical products for large agricultural and industrial companies. The facility's products include herbicides, pesticides, and chemical additives for various industrial and consumer products. While connected to the Waynesboro Line, Odom is presently unable to ship its products by rail due to the fact the current state of the line prevents the movement of hazardous material for safety reasons.

C. Wayne County Economic Development District

WCEDD was created in 1988 for the purpose of involving itself in industrial, economic and technological development for industrial sites and parks, providing support for existing, expanding or new businesses, and assisting in assuring and preparing an adequate and effective work force and support programs to accomplish these ends. WCEDD owns a 244-acre site at the end of the Waynesboro Line that is home to seven existing businesses. Of these businesses four rely on rail service, and two, including Odom Industries would use rail service if the line and rail service were improved.

WCEDD is actively involved in attempting to attract new businesses to construct facilities along the Waynesboro Line.

III.

History of the rail line

What is now known as the Waynesboro Line was once part of a through-route of the Gulf, Mobile & Ohio Railroad that extended north from Mobile, Alabama to Waynesboro and then to connection with other railroads in Meridian, Mississippi. Presently the Kansas City Southern Railroad ("KCS"), Norfolk Southern Railway, and the Meridian & Bigbee Railroad operate trains into and out of the Meridian Yard. The Waynesboro Spur extends south from the Meridian Yard through a generally flat and rural area in eastern Mississippi, roughly following the Chickasawhay River and its tributaries. Parts of the line were built as early as 1847, and some sections of today's track are 90-pound rail over 100 years old. In 1991, the southern two-thirds of the line were abandoned by Southrail Corporation leaving only the 55-mile Meridian to Waynesboro segment. The Kansas City Southern Railway purchased the Waynesboro Spur in 1993 from MidSouth Corporation, the parent company of Southrail Corporation.

During the seven years of KCS ownership, the condition of the Waynesboro Line gradually deteriorated as KCS increasingly concentrated on its mainline, long haul operations. What had been daily rail service was reduced to service two to three times per week. Moreover, as KCS and the other Class 1 railroads increasingly utilized larger 286,000 lb rail cars in their interstate operations, the inability of the Waynesboro Line to accept such railcars became a significant operational problem. As discussed further

below, the continued inability to ship the larger railcars over the Waynesboro line is a significant impediment to further economic development at this location.

Rather than make the investments necessary to enable the Waynesboro Line to handle larger rail cars and operate at faster speeds, KCS decided in early 2000 to sell most of its interest in the Waynesboro Line. To do so, KCS used the Board's seven-day "notice of exemption" procedures under 49 U.S.C. 10901 and 10502 and 49 CFR Part 1180. These fast track procedures were developed by the Board under the Staggers Act to enable Class I railroads to shed unwanted branch lines with little or no regulatory scrutiny. Under the procedures, the sale of the Waynesboro Line was deemed to meet all statutory standards and became effective seven days after the notice of exemption was filed. The Marshall Durbin Companies seriously questioned whether the new owner, the Meridian Southern Railway, was financially capable and otherwise desirous of maintaining and performing necessary upgrades of the Waynesboro line, and otherwise supplying adequate rail service, in both the short and long terms. After unsuccessfully attempting to obtain information from Meridian Southern regarding its plans for the line and its ability to follow through on those plans, Marshall Durbin asked the Board to more closely scrutinize this transaction. The Board's rules required this request to be in the form of a petition to revoke the exemption authority for the transaction, which Marshall Durbin filed on April 14, 2000. See generally STB Docket No. 33854, Meridian Southern Railway LLC -- Acquisition and Operation -- Line of Kansas City Southern Railway Company. Marshall Durbin also asked that the Board permit it to obtain discovery of information pertaining to Marshall Durbin's concerns. In a decision served

August 29, 2000, the Board refused to more closely examine the transaction and denied Marshall Durbin's Petition to Revoke the Exemption.

In addition to using the Board's notice of exemption procedures, KCS apparently availed itself of another policy of the Board; it conditioned its sale of the Waynesboro Line on the inclusion so-called "paper" and "steel" barriers that prevented the purchaser of the line from interchanging with any rail carrier other than KCS. The Waynesboro Line Shippers and WCEDD understand these mechanisms have been defined as ensuring that the traffic originated or terminated by shortline carriers on the segments sold or leased continues to flow over the lines of the seller to the maximum extent possible. Ostensibly, these restrictions are included in the transaction in exchange for a reduced acquisition price. While one of the original reasons for allowing such provisions was to facilitate acquisitions by small or undercapitalized shortlines (*i.e.*, it is better to sell the line at a reduced price if the only other option is abandonment), such provisions can also be barriers to competition. While the details of the sale to the Meridian Southern are confidential, it is apparent that KCS, rather than sell all of its interest in the Waynesboro Line from KCS's yard track and interchange points in Meridian, retained ownership of approximately the first mile of track extending from the yard, thereby creating a "steel barrier" to the Meridian Southern interchanging with other railroads in Meridian.¹ Moreover, the existence of a "paper barrier" is evident from the fact that KCS retained the rate setting authority for service over the line and indeed the track still appears on KCS's system maps and grain tariffs as being part of the KCS system. Accordingly, shippers along the line must obtain rates from KCS, who handles the billing for service

¹ The notice of exemption filed by the Meridian Southern Railway stated that it was purchasing the KCS track from Milepost 134.2 southward, but the Waynesboro Line begins at Milepost 135.2.

provided by the Meridian Southern along the line. Under this arrangement, which along with the Board's exemption procedures has been an accepted practice under the Staggers Act, other rail carriers that could interchange with the Meridian Southern in Meridian Yard for deliveries to shippers along the Waynesboro Line are prevented from doing so.

IV.

The Current State of the Waynesboro Line

It has been nearly six years since the sale of the Waynesboro Line by KCS. As noted below, the Waynesboro Line Shippers and WCEDD have been proactive in trying to assist the Meridian Southern in improving the overall condition of the track and the rail service provided over it. However, despite such efforts, the state of the Waynesboro Line since it was shed by KCS can be summarized as follows:

1. Due to its poor condition, the great majority of the Waynesboro Line is classified by the Federal Railroad Administration ("FRA") as excepted track, meaning train speeds are limited to 10 mph. Moreover, Odom Industries cannot ship its products by rail because safety concerns prevent the shipment of hazardous material over the line.
2. There have been at least 10 derailments, with some resulting in significant loss of inbound commodities.
3. In June and July 2002, the Federal Railroad Administration ("FRA") ordered the Meridian Southern to make certain bridge repairs. These repairs caused service disruptions and forced Marshall Durbin to truck soybean meal to the Waynesboro Mill.

4. In March 2004, the Army Corps of Engineers criticized the Meridian Southern for not having a long term maintenance plan in place for the railroad.² Furthermore, many of the trestles and bridges on the line were found to be in questionable condition, and the Corps recommended an analysis by a structural engineer.³

5. In April 2004, the FRA ordered Meridian Southern to remove two of its three locomotives from operation for repairs, creating service disruptions that were not rectified until the following month.

6. In February 2005, one of the three locomotives used by the Meridian Southern at that time was totaled when it derailed and wrecked due to a culvert washout. This halted rail service to Marshall Durbin's Waynesboro Mill for nearly two weeks.

7. As stated previously, the Waynesboro Line is limited to handling railcars weighing up to 263,000 pounds. This limitation significantly hinders the business operations of the Waynesboro Line Shippers, and significantly handicaps the ability of WCEDD to attract new business. From Marshall Durbin's perspective, since KCS and other carriers that connect with the KCS routinely use cars of weighing up to 286,000 pounds to haul grain, and many sellers of grain do not have origin weights, loading cars to 263,000 pounds becomes a guessing game. Because overloading of grain railcars leads to offloading costs and overload penalties, grain sellers are reluctant to sell to Marshall Durbin's Waynesboro facility. Both the weight restriction and the congestion in Meridian Yard are contributing factors preventing Marshall Durbin from expanding its

² To quote the Corps directly: "Lack of maintenance is a major contributing factor in many of the problems the team observed. Cost of repairs now needed to address these problems could have been avoided through proper maintenance. A maintenance plan should be developed for the railway." Memorandum for Record, Reconnaissance of Meridian Southern Railroad to observe rail problems between Waynesboro and Meridian, MS, at page 2 (May 2004).

³ The Corps of Engineers Report was part of the larger effort by Marshall Durbin, WCEDD, and other entities in 2004 and 2005 to try and obtain state and federal funding to upgrade the Waynesboro Line, whether independent of the Meridian Southern or by direct funding grants to the railroad.

track to receive 50, 75, or 100 car trains at a lower cost than the rates KCS charges for the single cars and 25-car trains currently received at the Mill.

As to WCEDD, it believes that 50-100 jobs would be created just from existing industry if the track was upgraded to handle 286,000 lb railcars. Such an upgrade would also significantly increase the attractiveness of the area to potential new industries who are presently balking at locating along the Waynesboro Line due to the poor physical condition of the track and its inability to handle the larger railcars. To this end WCEDD has worked with state officials, including the governor of Mississippi, to try and develop a program which would combine funds from the local, state, and federal governments along with funds from the Meridian Southern in order to help the Meridian Southern finance such an upgrade. Marshall Durbin has supported this effort but maintains that more proactive involvement by the STB at the time of the sale could have avoided the present efforts by Marshall Durbin, WCEDD, and others to try and locate funding for maintenance and track upgrades that the current operator apparently is unable to supply.

8. The question of rail service comes up more often than not when the WCEDD is attempting to attract new industry to the area.

9. In addition to the outbound products produced by Odom Industries, inbound grain and other materials that would have normally been shipped by rail have been shipped by truck, at a much higher cost to individual Waynesboro Line Shippers. Marshall Durbin has thus far been able to limit these truck deliveries to emergency situations, but the cost premium that must be paid is not insignificant.

V.

The Board's Current Rules and Policies Make it Virtually Impossible to Change the Status Quo

To summarize the preceding section, nearly six years after the sale of the Waynesboro Line to the present operator, the rail service over and maintenance of the line are at bare minimum levels. The Waynesboro Line Shippers, in particular Marshall Durbin, believe that this is due in large part to the Meridian Southern having insufficient financial resources when it acquired the line. The extent to which Meridian Southern is hampered by operational and economic restrictions included in its transaction with KCS is not known since such details are confidential. Whatever the reasons, the harsh reality for shippers along the line and the community as a whole is that the condition of Waynesboro Line has deteriorated since the sale of the line by KCS, and rail service, while it is being provided, has not improved. This state of affairs has hindered the viability and growth opportunities for existing industries that are or could be rail served, and has significantly retarded the efforts of WCEDD to attract new industry and economic growth in a rural area that could sorely use it.

The main point of this Statement is that under the Board's implementation of the Staggers Rail Act of 1980, to the extent it applies to sales of branch lines by Class I railroads, the minimum levels of service and maintenance currently being provided are enough to enable the current operator to remain in place and the status quo to continue. The applicable rules that lead to this conclusion are summarized below:

First, under the "notice of exemption" procedures, purchasing entities are not required in their initial filing to make any demonstration that they have the financial wherewithal and expertise to adequately replace the service provided by the Class I carrier selling the track, let alone improve the status quo. The Board's rules simply presume this to be the case. As Marshall Durbin experienced firsthand, rail shippers

seeking to have the Board more closely scrutinize a particular transaction at the time of the sale face a very high burden to overcome that presumption. Indeed, in the entire 25-year history of the Staggers Act, in which literally hundreds of branch lines have been sold to short line railroads by Class 1 carriers, the ICC and Board together have granted exactly two petitions to revoke the exemption authority for a branch line sale by a Class I railroad.⁴ In those two cases there was strong evidence that the short line was found to have engaged in some sort of nefarious activity that led to the conclusion that it had no intention of operating the track at all or was acquiring it for some purpose other than conducting rail operations.

Second, once the exemption authority becomes effective, the Board's rules and decisions establish that all the railroad must do to remain in place is offer the absolute minimum level of rail service, even if it is consistently bad rail service. This is plain from the Board's decisions rejecting petitions to revoke exemptions, but also in the Board's regulations and decisions implementing 49 U.S.C. 11123. A review of these decisions reveal that the only instances where the Board has taken action in cases involving complaints about the service being provided by a short line operator over a branch line, the operator had to effectively stop providing rail service altogether for a considerable length of time in order for the shippers along the line to obtain any relief, which even then is temporary.

⁴ *The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Railway Company*, Docket No. 33389, 2 STB 673 (1997) (revocation because rail line was acquired solely for purpose of abandonment); *San Bernardino Associated Governments – Acquisition Exemption – Southern Pacific Transportation Company*, Docket No. 32449, 1994 MCC Lexis 51 (served June 30, 1994) (ICC grants petition to revoke filed by entity that originally sought the acquisition exemption).

Third, the Board has consistently permitted, as a matter of policy, Class I railroads to impose paper and steel barriers on branch line sales, even though the Board readily admits that such conditions restrict competition by perpetuating the monopoly of the Class I railroad over the line and excluding service by any other rail carrier. Shippers or other parties who seek to have such barriers removed again face an almost insurmountable burden to demonstrate that such provisions are contrary to the National Rail Transportation Policy. The majority of the Board has to date shown great reluctance to find such mechanisms improper.⁵

VI.

Conclusions and Recommendations

While the Staggers Act may have been a success in freeing the nation's major railroads to become more financially stable and operate more like regular businesses, the Waynesboro Line Shippers' experience over the past six years has revealed that the Board's implementation of the Act has created certain rules and policies that are not necessarily in the public interest. The Waynesboro Line Shippers and WCEDD ask the Board to consider the following recommendations, which urge the Board to change its "hands off" policies regarding branch line sales and subsequent operations, to more a proactive policy that actively promotes bettering the status quo to foster economic development and improving the overall rail system:

Recommendation 1:

⁵ See STB Finance Docket No. 34495, Buckingham Branch Railroad Co. – Lease – CSX Transportation, Inc., (served November 5, 2004); and STB Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc., (served August 23, 2005). Commissioner Mulvey dissented in each of these decisions on the "paper barrier" issue.

The Board should be more proactive prior to the sale of a branch line by a Class I railroad to a short line railroad by taking a less restrictive view of 49 U.S.C. 11123. More specifically, as a Class I railroad chooses to focus more on its mainline operations to the detriment of a particular branch line, the Board should be more willing to allow other railroads to provide service over the line via interchange or trackage rights. Taking such action early in the process may help prevent the physical state of the line from deteriorating to the point that the cost of rehabilitating the track after the line is eventually sold becomes significant.

Recommendation 2:

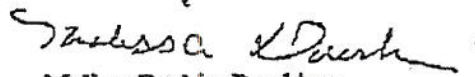
The Board should more closely scrutinize the financial viability and operational capability of potential short line purchasers of branch lines from Class I railroads at the time of the sale by requiring the purchaser to demonstrate in its initial filing that it has sufficient resources to not only pick up where the Class I railroad left off, but to improve the status quo. In cases such as the Waynesboro Line, where the Class I railroad has chosen to not invest in upgrading the track and to focus on its mainline operations, the Board should require the purchaser to demonstrate that it has or in the process of acquiring the financial wherewithal to do what the Class I has chosen not to do: make investments in the track and related equipment required to maintain existing rail service and expand opportunities to rail-served businesses. Similarly, the Board should make it easier to replace short line purchasers of branch lines if after a reasonable period of time (one or two years), the state of the rail line and the level of service over it has deteriorated, or if the new operator cannot demonstrate it has actively sought to improve the line and encourage economic development along it. Permitting a short line to remain

because it is merely providing minimum service levels and maintenance should no longer be the standard.

Recommendation 3:

The Board should revisit its routine acceptance of “paper” and “steel” barriers in branch line transactions. While the underlying reasons for initially allowing such restrictions under the Staggers Act may have had some benefit to Class I railroads and undercapitalized short line railroads, these restrictions are undeniably anti-competitive. Their widespread use in the railroad industry today requires the Board to more closely examine the extent to which foreclosing competition and rail transportation alternatives hinder the efforts of industry and industrial development entities to expand economic development in rural areas. The Waynesboro Line Shippers and WCEDD note that a Petition for Rulemaking to Eliminate Unreasonable “Paper Barriers” to Interchange has been filed in STB Docket Ex Parte No. 575, Review of Rail Access and Competition Issues. This petition has been pending before the Board since March 21, 2005. The Waynesboro Line Shippers and WCEDD encourage the Board to commence this rulemaking and eventually adopt standards for determining when “paper” and “steel” barriers are contrary to the National Transportation Policy by being unduly anti-competitive.

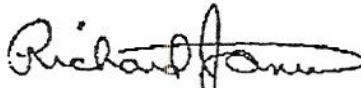
Respectfully submitted,



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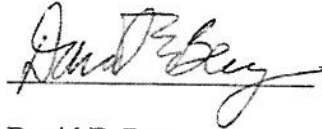


Richard James, President
Odom Industries, Inc.
800 Odom Industries Road
Waynesboro, MS 39367

October 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2005, I have served a true and accurate copy of the Comments of the Marshall Durbin Companies, Odom Industries, Inc., and Wayne County Economic Development District by U.S. mail, postage prepaid, to all parties listed on the service list for this docket.

A handwritten signature in black ink, appearing to read "David E. Benz", written over a horizontal line.

David E. Benz