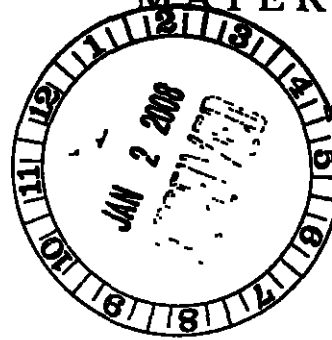


MAYER • BROWN



Mayer Brown LLP
1909 K Street, N W
Washington, D C 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrown.com

Robert M. Jenkins III
Direct Tel (202) 263-3261
Direct Fax (202) 263-5261
rmjenkins@mayerbrown.com

January 2, 2008

02/1/56

Vernon A Williams
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re Ex Parte 575 (Sub-No 1)—Comments of
the Association of American Railroads

Dear Secretary Williams

Enclosed for filing in the above-captioned proceeding are an original and ten copies of
"Comments of the Association of American Railroads " Please date-stamp the enclosed extra
copy and return it to our representative Thank you

Sincerely yours,

Robert M Jenkins III

ENTERED
Office of Procurement

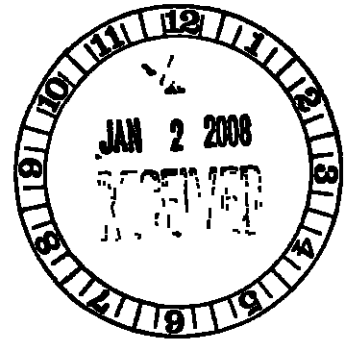
RMJ/bs

JAN 02 2008

Enclosures

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



EX PARTE NO. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Of Counsel

**Richard E. Weicher
Jill K. Mulligan
BNSF Railway Company**

**Theodore K. Kalick
Canadian National Railway Company**

**Paul A. Guthrie
Canadian Pacific Railway Limited**

**Peter J. Shultz
Paul R. Hitchcock
CSX Transportation, Inc**

**David C. Reeves
The Kansas City Southern Railway Company**

**James A. Hixon
George A. Aspatore
Norfolk Southern Corporation**

**J. Michael Hemmer
Louise A. Rinn
Robert T. Opal
Union Pacific Railroad Company**

**Robert M. Jenkins III
Adam C. Sloane
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000**

**Louis P. Warchol
Association of American Railroads
50 F Street, NW
Washington, DC 20001
(202) 639-2502**

**Counsel for Association of
American Railroads**

Dated January 2, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") hereby submits these comments in response to the Notice of Proposed Rulemaking published in the Federal Register, 72 Fed. Reg. 62200 (Nov. 2, 2007), and the Decision served October 30, 2007, in Ex Parte No. 575, *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, and Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments* ("October 30 Decision"). The AAR's members include all of the Class I railroads and many of the smaller railroads that have entered into line sale or lease transactions which include interchange commitments.

The AAR filed comments in response to the Board's previous requests for comments in Ex Parte No. 575, and the AAR has carefully reviewed the Board's October 30 Decision. The AAR endorses many of the Board's conclusions in that decision, especially the Board's conclusion that a rule of general applicability curbing or eliminating interchange commitments—such as the rule sought by the Western Coal Traffic League ("WCTL") and some other commenters in the proceeding—would be unsupportable, unnecessary, and unwise. *See id.* at 8-14. The AAR does not disagree with the Board's determination that it can consider the propriety of future individual interchange commitments on a case-by-case basis, and the AAR does not

oppose amending the Board's rules to require confidential disclosure of individual interchange commitments for good cause

However, the AAR wishes to stress that interchange commitments are often core elements in shortline sale or lease transactions. The Board must neither discourage new shortline transactions nor prejudice existing shortline arrangements by permitting parties to use disclosure requirements to engage in fishing expeditions or by applying different legal standards than it has consistently applied in the past to judge the propriety of individual interchange commitments.

In the October 30 Decision, the Board set forth a proposed rubric for obtaining discovery of existing interchange commitments in proceedings challenging such commitments. Two points with regard to this proposed procedure require clarification.

First, in its proposed amendment to 49 C.F.R. § 1114.30, the Board omitted a provision that it included in its proposed amendments to Sections 1121.3, 1150.33, 1150.43, and 1180.4. Specifically, in the latter proposed amendments, the Board included a requirement that motions for disclosure of an interchange commitment set forth "an explanation of the party's need for the information." The omission of such a provision in the proposed amendment to Section 1114.30, which relates to discovery procedures for challenges to existing interchange commitments, could cause confusion and wrongly imply that discovery of an *existing* interchange commitment does not require a showing of need or good cause. Surely, the Board did not intend to make it *easier* for a shipper that is seeking to upset a settled transaction to obtain discovery of a consummated agreement than it would be for a shipper seeking disclosure of a proposed commitment in a not-yet-consummated transaction. Indeed, before being entitled to any discovery at all, a party seeking to challenge an existing interchange commitment should be required, at a minimum, to

present a showing of need for the agreement containing the existing interchange commitment that includes a colorable claim to the relief the party seeks

Such a result is important here because the Board, in this proceeding, did not fully address the legal and practical consequences of reviewing or reopening past transactions. The AAR urges careful consideration of such consequences in any individual proceedings that may be brought to review consummated transactions. The Board has repeatedly recognized that the interests of fairness, repose, reliance, and settled expectations must be given substantial weight in deciding whether to reopen past approved transactions. *See, e.g.*, STB Docket No. AB-33 (Sub-No. 132X), *Union Pac. R.R. Co.—Abandonment Exemption—In Rio Grande & Mineral Counties, Co.*, slip op. at 3 (served May 3, 2005), *Indiana Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Co. Line Between Rochester & Argos, IN, and—Exemption from 49 U.S.C. 10761, 10762, and 11144*, slip op. at 4-5 (served Jan. 30, 1998), *Gulford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, 5 I.C.C.2d 202, 206 (1988). Even under a case-by-case approach to challenges to existing interchange commitments, neither the petitioner seeking the modification or elimination of an interchange commitment nor the Board is writing on a clean slate. The parties to the original transaction relied not only on the ICC's or Board's approval of that transaction, but also on the ICC's or Board's consistently-stated position that interchange commitments are usually not anticompetitive. An appropriate respect for this precedent, as well as the parties' reliance on it, necessitates a strong presumption that existing interchange commitments are valid and legitimate.¹

¹ These standards are already embodied in the Board's standards for reopening an exemption. As the Board has previously held, the grounds upon which an exemption may be revoked are quite limited. Thus, in STB Docket No. AB-565 (Sub-No. 14X), *New York Cent. Lines, LLC—Abandonment Exemption—In Montgomery & Schenectady Counties, NY*, slip op. at (Footnote con'd)

Moreover, as the Board recognized in its October 30 Decision (slip op at 12), there would be serious practical issues associated with determining a remedy years after a transaction was consummated. In any individual case, if interchange commitments were to be eliminated or modified, the underlying transaction either (1) would need to be renegotiated to reflect the value of the consideration to the parties, and who should pay the compensation where the shortline was either unwilling or unable to pay the price, or (2) deals would have to be unwound. As the AAR showed in its comments, the elimination of existing interchange commitments would require compensation, which would raise a host of problems, including how to determine the value of the property taken by the elimination of the interchange commitment and who should pay compensation for the taking. See AAR's Reply Comments at 34-39. The Board would become embroiled in disputes about not only the railroads' respective contractual rights but the rights of third parties who had relied on those settled transactions as well.

Accordingly, the Board should revise its proposed amendment to 49 C.F.R. § 1114.30 to include the same requirement for a showing of need that appears in the other proposed amendments.

Second, the proposed amendments direct parties seeking disclosure of consummated or proposed agreements containing interchange commitments to submit a "draft protective order" and undertaking. See October 30 Decision, slip op at 20-22. The discussion of the protective

3 (served Jan. 22, 2004), the Board explained that, when a petition is filed under 49 U.S.C. 10502(d) to revoke an exemption that has become effective, "a revocation request is treated as a petition to reopen and revoke and, under 49 C.F.R. § 1115.3(b), the petitioner must specify whether revocation is supported by material error, new evidence, or substantially changed circumstances. The petitioner has the burden of proof and must articulate reasonable, specific concerns to satisfy the revocation criteria."

order provisions, however, states that the "shipper may file a motion seeking prompt access to the documents containing the interchange commitment, together with a *signed* protective order " *Id* at 16 (emphasis added) We assume that the use of the word "signed" in the discussion was inadvertent, and we request that the Board clarify that it meant to state that shippers would submit *draft* protective orders

Respectfully submitted,

Of Counsel

Richard E. Weicher
Jill K. Mulligan
BNSF Railway Company

Theodore K. Kalick
Canadian National Railway Company

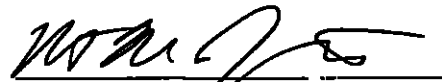
Paul A. Guthrie
Canadian Pacific Railway Limited

Peter J. Shudtz
Paul R. Hitchcock
CSX Transportation, Inc

David C. Reeves
The Kansas City Southern Railway Company

James A. Hixon
George A. Aspatore
Norfolk Southern Corporation

J. Michael Hemmer
Louise A. Rinn
Robert T. Opal
Union Pacific Railroad Company



Robert M. Jenkins III
Adam C. Sloane
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Louis P. Warchol
Association of American Railroads
50 F Street, NW
Washington, DC 20001
(202) 639-2502

Counsel for Association of
American Railroads

Dated January 2, 2008