

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB EX PARTE NO. 575  
REVIEW OF RAIL ACCESS AND COMPETITION ISSUES –  
RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE

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COMMENTS OF THE  
U.S. DEPARTMENT OF AGRICULTURE

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Washington, D.C. 20250

Date: January 2, 2008

## ***AUTHORITY AND INTEREST***

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Board proceedings involving rates, charges, tariffs, practices, and services.

Agricultural producers benefit from a competitive transportation environment because the price they receive for their commodities is net of transportation costs, and the transportation cost of agricultural products can be more than one-half of the landed cost. Our interest lies in preserving an efficient and competitive transportation sector that effectively serves U.S. agriculture.

## ***USDA CONCERNS WITH THE BOARD'S DECISION***

USDA thanks the Board for its decision regarding the use of contractual interchange commitments.<sup>1</sup> In this decision, the Board decided to increase its scrutiny of new interchange commitments, but examine existing interchange commitments on a case-by-case basis only upon a shipper bringing a regulatory challenge.

The proposed rule is a good first step toward alleviating overly restrictive terms in new interchange commitments, but falls short of expectations because of the cost burden it places on shippers who may want to challenge existing interchange commitments.

USDA urges the Board to review all existing contractual interchange commitments—

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<sup>1</sup> Contractual interchange commitments are included in contracts for the sale or lease of a rail line. The terms of such commitments can restrict the ability of the purchaser or tenant to interchange traffic with competitors of the seller or landlord railroad.

without requiring a shipper challenge—in order to promote competition, efficient movement of rail traffic, and discourage unnecessary charges and penalties that may restrain trade.

USDA is concerned that the Board's decision regarding existing interchange commitments may prevent rail-to-rail competition from developing, rather than encouraging competition. It appears the decision may protect overly restrictive interchange commitments by requiring shippers to challenge interchange commitments at considerable expense, including lawyer and consultant fees, rather than the Board reviewing such agreements first.

The Rail Transportation Policy<sup>2</sup> requires the Board to ensure effective competition between rail carriers and with other modes. Thus, USDA urges the Board to require rail carriers to file with the Board all existing interchange commitments, and that the Board will then review these commitments for propriety and conformance with the law. After review, USDA recommends that the Board modify terms in existing interchange commitments if appropriate and if it can be done without voiding the entire agreement. An alternative would be to give the railroads involved the option of nullifying any of the more restrictive terms of the interchange commitments that may be contained in such agreements.

USDA agrees with the Board that, in some cases, it might better serve the public interest to allow more restrictive terms in interchange commitments than are normally ideal rather than risk losing rail service on those lines. In addition, USDA recognizes the value of a contract in perpetuity for those commitments involving lease transactions and

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<sup>2</sup> ICC Termination Act of 1995, §10101.

realizes that seeking to modify terms will not be easy or without controversy.

The social and economic benefits arising from the rail network, as a whole, can be reduced by overly restrictive interchange commitments because rail carriers not only compete with, but complement, one another. Restrictions on interchange, which may be in the private interest of two railroads, may not be in the interest of the network as a whole.

In addition, past interchange commitments were reached without the input of affected shippers or disclosing the presence of interchange commitments to shippers (or the Board) before gaining Board approval of the transaction. Shippers have a vital interest in these interchange commitments and had they been involved in the process, the majority may have agreed with the terms of reasonably constructed interchange commitments rather than lose rail service entirely.

USDA recommends that those terms in interchange commitments that directly affect shippers' ability to interchange with other railroads be publicly available. Past non-disclosure of interchange commitments has reinforced the impression that these commitments may prevent rail-to-rail competition and that the type and size of the penalties for interchanging with a third carrier may restrain trade rather than reimbursing the selling/leasing carrier for the fair value of the line. Good public policy would seem to dictate that only those terms that directly affect shippers' ability to interchange with other railroads be publicly available.

USDA is also concerned that the Board has described the nature of these interchange commitments as "vertical"—between two companies that do not compete with each other, but rather provide services at different points in a distribution chain—

rather than “horizontal”—between two competitors (Decision at page 10). As both carriers involved in an interchange commitment provide rail haulage of freight, they are not in different stages of production but produce the same service, even if the service is provided over different line segments. Thus, USDA is concerned that the courts may view some of the more restrictive interchange commitments as possibly preventing potential competition. Such an outcome could be unpredictable and rail service could be disrupted.

Limited exceptions to antitrust law have been allowed by the courts in the past, but require the barriers to be reasonable, as limited as possible, and that the public benefits must outweigh the anti-competitive effects. USDA has heard from agricultural shippers that they are concerned that sale and lease contracts of rail lines containing existing interchange commitments may contain unreasonable restraints to trade. USDA believes that this perception is born from a lack of shipper knowledge of the terms of the barriers and a lack of cost-effective shipper recourse. This perception also arises from unreasonably long terms for some interchange commitments and line values that may be set too high.

Interchange commitments that limit the ability to interchange traffic with other railroads restrict the access of shippers and producers to all available markets. Limited market access interferes with the ability of agricultural producers and shippers to obtain the best price for their products and increases their transportation costs. This may result in reduced producer income and negatively impact the economic well being of nearby communities. Restrictions to market access can also result in inefficient transportation of agricultural products.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bruce I. Knight", written over a light gray rectangular background.

Bruce I. Knight

Under Secretary

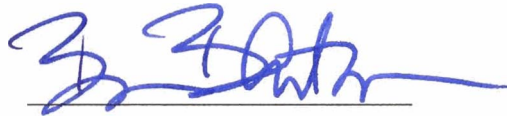
Marketing and Regulatory Programs

U.S. Department of Agriculture

Washington, D.C. 20250

CERTIFICATE OF SERVICE

I, Bruce Blanton, certify that on this 27th day of December, 2007, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Ex Parte No. 575.



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