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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING INTERCHANGE COMMITMENTS

Digest:[1] This decision adopts final rules that establish additional disclosure requirements for notices and petitions for exemption where the underlying lease or line sale includes an interchange commitment.

Decided: August 29, 2013

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: On November 1, 2012, the Board issued a Notice of Proposed Rulemaking (NPR) proposing rules that would establish additional disclosure requirements for notices and petitions for exemption where the underlying lease or line sale includes an interchange commitment. Information Required in Notices and Petitions Containing Interchange Commitments, EP 714 (STB served Nov. 1, 2012). Based on the comments received and further evaluation, the Board now adopts as final the proposed rules, with modifications that reduce the amount of information required to be submitted. The final rules are set forth in the Appendix.

DATES: *Effective date*: These rules will be effective on October 5, 2013.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Interchange commitments are "contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad."[2] Under the Board's existing rules, if a proposed acquisition of a rail line involves an interchange commitment, the party filing the notice or petition for exemption must inform the Board that such a provision exists and must file a confidential, complete version of the document containing that provision with the Board.[3]

In the NPR, the Board proposed to require that applicants provide additional information in notices and petitions for exemption, including information intended to assist the Board and interested parties in evaluating the significance and economic impact of the interchange commitment. The Board proposed that the applicant provide:

> (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[4] (submitted under seal);
> (6) an estimate of the difference between the sale or lease price with and without the interchange commitment[5] (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.[6]

Because the procedures for class exemptions contain very short deadlines, the Board also proposed to require disclosure of information about the transaction at the time of the notice itself, rather than during any subsequent requests to reject or revoke the exemption. The purpose of this rulemaking was to improve the ability of the Board and affected parties to determine at the outset whether a transaction that includes an interchange commitment is appropriate for the exemption process or raises competitive issues that require a more detailed examination. The

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[2] Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League, EP 575, slip op. at 1 (STB served Oct. 30, 2007). Interchange commitments are sometimes referred to as "paper barriers."

[3] See 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4).

[4] Hereinafter referred to as "the revenue requirement."

[5] Hereinafter referred to as "the discounted annual value requirement."

[6] See NPR, slip op. at 6.

Board stated that early disclosure would eliminate delays in the decision-making process for the types of transactions at issue caused by the need to obtain additional information.

The Board sought comments on the proposed regulations by December 3, 2012, and replies by January 2, 2013.[7] The Board received comments both supporting the proposed rules[8] and opposing them.[9]

THE FINAL RULES

Having carefully considered the parties' comments, the Board has decided to modify the disclosure requirements set forth in the NPR. It now adopts final rules requiring that the following information be included in notices and petitions for exemption involving an interchange commitment:

1. A list of shippers that currently use or have used the line in question within the last two years;
2. The aggregate number of carloads those shippers specified in paragraph (1) originated or terminated (confidential);
3. A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (1);

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[7] The Board has received comments and/or replies from the Rail Industry Working Group (RIWG); the Association of American Railroads (AAR); the American Short Line and Regional Railroad Association (ASLRRA); Norfolk Southern Railway Company (NSR); Union Pacific Railroad Company (UP); the United States Department of Agriculture (USDA); the Oregon Department of Transportation (ODOT); the Pennsylvania Department of Transportation (PennDOT); the National Grain and Feed Association (NGFA); Minn-Kota Ag Products (Minn-Kota); Sherwood Construction Co., Inc. (Sherwood); Harrison Gypsum, LLC (Harrison Gypsum); Milnor Grain Company (Milnor); Consumers United for Rail Equity (CURE); American Chemistry Council (ACC); The National Industrial Transportation League (NITL); Alliance for Rail Competition (ARC) (filed with Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Montana Farmers Union, Nebraska Wheat Board, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producer Board, Washington Grain Commission, National Association of Wheat Growers); Arkansas Electric Cooperative Corporation (AECC); The Chlorine Institute, Inc.; Union Electric d/b/a Ameren Missouri (Ameren Missouri); Arkansas Oklahoma Railroad (A-OK); Progressive Rail, Inc. (PGR); and United Transportation Union-New York Legislative Board (UTU-NY).

[8] See generally ARC Comment; Ameren Missouri Comment; NITL Comment; USDA Comment; NGFA Comment; CURE Comment; ACC Comment.

[9] See generally UP Comment; ASLRRA Comment; NSR Comment; AAR Comment; RIWG Comment; Minn-Kota Comment; PennDOT Comment; Harrison Gypsum Comment; Sherwood Comment; Milnor Comment; ODOT Comment; PGR Reply; A-OK Reply.

4. A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

5. An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

6. A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

The Board is not including in the final rules the proposed revenue requirement or the discounted annual value requirement.

We discuss below the issues raised in the comments received on the proposed rules and our revisions made in response to the comments. The attached Appendix contains the final rules in full.

A. Burdens Associated with Filing and Purported Chilling Effect

Several commenters suggest that the Board underestimated the burdens associated with compiling the new information required by the proposed rules.[10] For instance, AAR states that the discounted annual value requirement would require information that is likely not in the control of the filing party and would be difficult to obtain.[11] AAR also suggests that the filing party would be required to speculate as to the difference in the lease or sale price to the incumbent carrier with and without the interchange commitment.[12]

ASLRRA argues that the Board overestimates the ability of shortlines to obtain and provide the information required, and understates the time and expense that would be necessary to prepare the information.[13] ASLRRA maintains that it is unlikely that a shortline will be capable of developing the key inputs of the Class I that would be critical to valuation such as the valuation period estimates, the terminal value assumptions, growth rates in traffic, marginal costs of incremental traffic, track maintenance expenses, and system impacts.[14]

Several commenters also suggest that the proposed rules would have a chilling effect on lease and sale transactions involving interchange commitments, because either the Board will begin rejecting such transactions or rail carriers will not negotiate such agreements because of the additional burdens.[15] This chilling effect, according to AAR, would be, in part, due to the

[10] See, e.g., AAR Comment 10-11; UP Comment 8-9; ASLRRA Comment 18-20.

[11] AAR Comment 10-11.

[12] Id. at 11.

[13] ASLRRA Comment 18.

[14] Id. at 14; UP Comment 9.

[15] UP Comment 3; AAR Comment 2, 8; ASLRRA Comment 9.

cost associated with gathering estimates of the difference between the sale or lease price with and without the interchange commitments and the discounted annual value requirement.[16]

We find persuasive the argument that some of the data proposed to be collected may not have been easily quantifiable by the filing party and, thus, could have been difficult to assemble. We also recognize the concern that shortlines would have to rely upon the incumbent carrier to provide the discounted annual value requirement. In response to these concerns, we are not including the discounted annual value requirement or the revenue requirement disclosures in the final rules. We are, however, retaining the requirement that the filing party provide a confidential estimate of the difference between the sale or lease price with and without the interchange commitment. We believe the relevance of this information for a party that may seek to vacate or challenge the interchange commitment outweighs any burden to the filer. We also believe this information would prove useful to the Board in making its case-by-case review of transactions that contain interchange commitments.[17]

Where there has been a negotiation over the price and other price-related terms of an interchange commitment, there is no basis for a filing party to claim that providing a confidential estimate of the difference between the sale or lease price with and without the interchange commitment is unduly burdensome or difficult to obtain. Indeed, in several recent notices of exemption, the agreement itself refers to a process whereby the lease initially was negotiated without an interchange commitment and then subsequently revised to include such a provision at the leasing railroad's request.[18] We recognize, however, that the difference between the sale or lease price with and without the interchange commitment may not always be discussed in negotiations between the incumbent carrier and the purchaser/lessee. Therefore, if the applicant does not have an estimate of the difference in price as a result of contract negotiations, it can request that information in writing from the incumbent carrier and submit the incumbent carrier's response with its initial notice or petition before the Board. Accordingly, the filing party would

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[16] AAR Comment 8.

[17] Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League, EP 575, slip op. at 14 (STB served Oct. 30, 2007) (deciding that the Board would consider the propriety of interchange commitments on a case-by-case basis).

[18] See, e.g., Lease Agreement, Ann Arbor R.R.—Lease Exemption—Norfolk S. Ry., Docket No. FD 35729 (filed June 26, 2013) (Ann Arbor Railroad, Inc. designated this information as "highly confidential." Although the general practice is to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board has determined that referencing this particular clause is necessary to explain our decision and does not jeopardize the confidentiality of the rest of the Lease Agreement.); Verified Notice of Exemption, Midwest Rail d/b/a Toledo, Lake Erie and W. Ry —Lease & Operation Exemption—Norfolk S. Ry., Docket No. FD 35634 (filed June 15, 2012); Verified Notice of Exemption, E. Penn R.R.—Lease & Operation Exemption—Norfolk S. Ry., Docket No. FD 35533 (filed July 1, 2011).

not be required to spend a great deal of additional time making calculations to meet this requirement.

We do not believe that the additional disclosures established by the final rule would discourage parties from entering into efficiency-enhancing transactions. As stated in the NPR, the Board will continue to review transactions involving interchange commitments on a case by case basis.[19]

B. Confidentiality

UP asserts that the proposed rules are ambiguous about the manner in which the information filed under seal will be kept confidential.[20] It is our intention to treat the new information that is confidential in the same manner in which the agreements have thus far been treated under the current rules, i.e., it will be kept confidential without need for the filing of an accompanying motion for a protective order. Additional language has been added to the final rules to clarify this procedure.

C. Comments Outside the Scope of this Rulemaking

Several commenters raise issues that are either outside the scope of this rulemaking or that were clearly addressed in EP 575. For instance, many commenters argue that interchange commitments are generally anticompetitive[21] and urge the Board to adopt stricter rules that regulate the content of the interchange commitment itself.[22] Several commenters would require the Board to develop a specific policy toward interchange commitments,[23] or would require the Board to review all pre-existing interchange commitments.[24] CURE maintains that an outright ban on interchange commitments would be appropriate.[25]

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[19] Id.

[20] UP Comment 5, 11.

[21] See generally USDA Comment; NFGA Comment; CURE Comment.

[22] Ameren Missouri Comment 7 (all interchange commitments should contain a "reasonable sunset provision"); AECC Comment 9-10 (the Board should adopt a policy to disapprove or limit interchange commitments under certain specific circumstances).

[23] AECC Comment 3.

[24] USDA Comment 1 (the Board should retroactively review all existing interchange commitments for any anti-competitive provisions); NITL Comment 1, 9-10 (proposing additional reporting requirements including requiring public disclosure of all pre-existing interchange commitments); see also ARC Comment 3 (stating that the proposed rules are "a necessary (though not sufficient) response to the problem of interchange commitments that are unreasonable and anticompetitive).

[25] CURE Comment 1 ("[A]ll 'paper barriers' [are] restraints on competition that should be per se illegal.").

We will not address comments that advocate for banning or regulating the content of interchange commitments themselves as they are outside of the scope of the proposed rules.[26] The purpose of this rulemaking is for the Board to obtain information to assist it in performing individualized, case-by-case evaluations of notices and petitions to exempt transactions that include interchange commitments.[27] The scope of this rulemaking did not include consideration of rules of general applicability to determine the legality of interchange commitments. The Board will continue to perform a case-by-case, fact-specific review of these transactions, in which we will weigh the benefits of a particular interchange commitment against its potential for harm.[28]

D. Other Points of Clarification

UP raised a concern regarding the requirement that the filing party provide the number of carloads that affected shippers originated or terminated. Specifically, UP questioned whether the Board was looking for an aggregate number or sought the carloads broken down by shipper.[29] We clarify that the Board is seeking the number of carloads in the aggregate.

UP and ASLRRA assert that the term "could physically interchange" is vague and does not address situations involving current or potential track construction or trackage rights.[30] We clarify that the rules intend the term to cover the ability to physically interchange based on traffic conditions at the time the notice or petition is filed before the Board. The filing party may provide additional information about operational limitations or other restrictions that could reduce or eliminate the competitive significance of the ability to physically interchange traffic at the point.

NSR argues that its lease credits–which "provide an incentive to the shortline to interchange traffic with NSR up to a point"–are not interchange commitments because they do not prohibit a shortline's ability to interchange with other carriers.[31] The Board has defined an interchange commitment as a "provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the

[26] The Board likewise declines to address the comment from UTU-NY as it is beyond the scope of this rulemaking. See UTU-NY Comment 5 ("UTU-NY is concerned that the statutory provisions of 49 U.S.C. [§] 10902[] not be a wide-open substitute for transactions more appropriately instituted under the multiple-carrier provisions of 49 U.S.C. [§§] 11323-25.").

[27] NPR, slip op. at 5.

[28] Id. at 8.

[29] UP Comment 6.

[30] Id. at 7-8; ASLRRA Comment 15-16.

[31] NSR Comment 7-9.

purchase price or rental, positive economic inducement, or other means."[32] Moreover, in the NPR, the Board recognized that lease credits are a type of interchange commitment.[33] Accordingly, the Board declines to adopt NSR's interpretation and clarifies that we consider the agreements described by NSR to be interchange commitments.

RIWG and ASLRRA assert that the Rail Industry Agreement (RIA) provides an adequate remedy to resolving issues involving interchange commitments and that, therefore, this rulemaking is unnecessary.[34] The Board recognizes and appreciates the value of the RIA and the process it provides for shortlines to seek a waiver from certain interchange commitment restrictions. However, the existence of the private RIA in no way limits the Board's ability to obtain the additional information it is seeking in this rulemaking to carry out its regulatory responsibilities. In any event, the RIA only provides an avenue for purchasing or leasing railroads to seek a waiver, and does not provide the same opportunity to other interested parties, such as shippers or communities affected by the transaction.

PAPERWORK REDUCTION AND REGULATORY FLEXIBILITY

In the NPR, published in the Federal Register at 77 Fed. Reg. 66,165 on November 2, 2012, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.11, regarding: (1) whether the collection of information as modified in the proposed rule, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. We received comments regarding the Board's burden estimates and have addressed them herein.[35]

The proposed rule modifications were submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11. No substantive comments were received from OMB. Unless renewed, OMB approval for this collection expires August 31, 2014. The OMB control number is 2140-0016. The display of a currently valid OMB control number for this collection is required by law. Under the PRA and 5 C.F.R. § 1320.11, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

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[32] See, e.g., 49 C.F.R. § 1121.3(d)(1).

[33] NPR, slip op. at 2 ("Interchange commitments took varying forms, including lease payment credits for cars interchanged with the seller or lessor carrier").

[34] RIWG Comment 3-4; ASLRRA Comment 13-14.

[35] See supra pp. 6-9; infra p. 14-15.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. Under § 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a "significant impact on a substantial number of small entities." In accordance with § 605(b), we certify that the final rules will not have a significant economic impact on a substantial number of small entities.[36] The basis for this determination is as follows.

The regulations adopted here will affect all railroads filing notices and petitions for exemption for sales and leases that contain interchange commitments. The filing railroad (or respondent) is typically a small rail carrier. Between May 2008, when the Board began requiring the disclosure of interchange commitments in notices and petitions for exemption, and the date of this decision, a total of 12 notices or petitions for exemption for leases that contain interchange commitments were filed that would have been affected by these regulations, or 2.4 petitions per year. Nevertheless, in an abundance of caution, the Board estimates that a total of four small rail carriers, out of a total of approximately 560 small Class II and III rail carriers, will file such notices or petitions per year, and thus will be affected by these additional reporting requirements. We further estimate that the additional time required by each rail carrier respondent to comply with these additional reporting requirements is no more than eight hours. Most of the information sought by the Board under these final rules is information that the filing railroad would likely already have as a result of due diligence it completed in the course of its contract negotiations. With respect to the requirement that the filer provide an estimate of the difference in the sale or lease price of the transaction with and without the interchange commitment, the Board seeks a good faith estimate to fulfill this requirement. If the filing railroad does not have an estimate of the difference in price as a result of contract negotiations, it can request that information in writing from the incumbent carrier and submit to the Board the incumbent carrier's response with its initial notice or petition. Therefore, the Board certifies under 5 U.S.C. § 605(b) that these rules will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The rules set forth in the Appendix are adopted as final rules.

2. Notice of this decision will be published in the Federal Register. The final rules will be effective on October 5, 2013.

[36] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business. See 13 C.F.R. § 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a short line railroad is considered small if its number of employees is 500 or less. Id. (industry subsector 482).

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented with a separate expression.

VICE CHAIRMAN BEGEMAN, dissenting:

I did not object to the Board's Notice of Proposed Rulemaking when it was issued last November, because I believed the Board could benefit from hearing the views of interested parties on whether changes were needed to improve the Board's existing rules on interchange commitments. Unfortunately, the record fails to convince me that these new requirements offer meaningful improvements over the Board's existing rules, nor, importantly, that the usefulness of the additional information outweighs the extra reporting burdens being imposed on small businesses here. This is especially true since it remains unclear how the Board will even use the additional information, if at all. Therefore, I dissent from the Board's decision.

Appendix

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1121, 1150, and 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1121 – RAIL EXEMPTION PROCEDURES

1. The authority citation for part 1121 continues to read as follows:

Authority: 49 U.S.C. §§ 10502 and 10704.

2. Amend § 1121.3 by revising paragraphs (d) introductory text, (d)(1), and (d)(1)(ii), and by adding paragraphs (d)(1)(iii) through (viii) to read as follows:

§ 1121.3 Content.

* * * * *

(d) *Interchange Commitments*.

(1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). If such a provision exists, the following additional information must be provided (the information in paragraphs (ii), (iv), (vii) of this subsection may be filed with the Board under 49 C.F.R. § 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 C.F.R. § 1104.14(b)):

(i) * * * * *

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The aggregate number of carloads those shippers specified in paragraph (iii) originated or terminated (confidential);

(v) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (iii);

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(viii) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

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PART 1150 – CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

3. The authority citation for part 1150 continues to read as follows:

Authority: 49 U.S.C. §§ 721(a), 10502, 10901, and 10902.

4. Amend § 1150.33 by revising paragraphs (h) introductory text, (h)(1), and (h)(1)(ii), and by adding paragraphs (h)(1)(iii) through (viii) to read as follows:

§ 1150.33 Information to be contained in notice—transactions that involve creation of Class III carriers.

(h) *Interchange Commitments*.

(1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). If such a provision exists, the following additional information must be provided (the information in paragraphs (ii), (iv), (vii) of this subsection may be filed with the Board under 49 C.F.R. § 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 C.F.R. § 1104.14(b)):

(i) * * * * *

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The aggregate number of carloads those shippers specified in paragraph (iii) originated or terminated (confidential);

(v) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (iii);

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(viii) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

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5. Amend § 1150.43 by revising paragraphs (h) introductory text, (h)(1), and (h)(1)(ii), and by adding paragraphs (h)(1)(iii) through (viii) to read as follows:

§ 1150.43 Information to be contained in notice for small line acquisitions.

(h) *Interchange Commitments*.

(1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase

price or rental, positive economic inducement, or other means ("interchange commitment"). If such a provision exists, the following additional information must be provided (the information in paragraphs (ii), (iv), (vii) of this subsection may be filed with the Board under 49 C.F.R. § 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 C.F.R. § 1104.14(b)):

(i) * * * * *

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The aggregate number of carloads those shippers specified in paragraph (iii) originated or terminated (confidential);

(v) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (iii);

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(viii) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

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PART 1180 – RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

6. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. §§ 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

7. Amend § 1180.4 by revising paragraphs (g)(4) introductory text, (g)(4)(i), and (g)(4)(i)(B), and by adding paragraphs (g)(4)(i)(C) through (H) to read as follows:

§ 1180.4 Procedures.

(g) * * *

(4) *Transactions imposing interchange commitments*.

(i) If a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"), the following additional information must be provided (the information in paragraphs (B), (D), (G) of this subsection may be filed with the Board under 49 C.F.R. § 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 C.F.R. § 1104.14(b)):

(A) * * * * *

(B) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(C) A list of shippers that currently use or have used the line in question within the last two years;

(D) The aggregate number of carloads those shippers specified in paragraph (C) originated or terminated (confidential);

(E) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (C);

(F) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(G) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(H) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

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