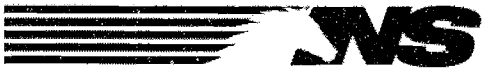

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

Writer's Direct Dial Number

December 18, 2012

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Information Required in Notices and Petitions Containing Interchange Commitments*, STB Docket No. EP 714

Dear Ms. Brown:

In accordance with the procedures set forth in the Board's November 1, 2012, decision in the above-referenced proceeding, enclosed are the Comments of Norfolk Southern Railway Company. If there are any questions concerning this filing, please contact me by telephone at (757) 533-4939 or by e-mail at Maqui.Parkerson@nscorp.com.

Sincerely,

Maquiling B. Parkerson

Enclosure

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING INTERCHANGE COMMITMENTS

COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

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December 18, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS
CONTAINING INTERCHANGE COMMITMENTS

COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

INTRODUCTION

Norfolk Southern Railway Company ("NS") is a Class I railroad operating in the eastern United States. NS operates approximately 20,000 route miles in 22 states and the District of Columbia. NS currently has leases in place with over 40 shortlines covering approximately 2,000 track miles.

In addition to endorsing the comments filed in the current proceeding by the Association of American Railroads, NS submits these comments in response to the Board's notice of proposed rulemaking ("NPR") issued on November 1, 2012, in Ex Parte 714 in which the Board seeks comment on its proposed rules requiring additional information related to interchange commitments. In support of its comments regarding the discussion of lease credits, NS is submitting a verified statement from Marc C. Kirchner, NS's Director Strategic Planning ("Kirchner V.S."). The Board posits that the additional information proposed to be collected about interchange commitments will provide interested parties with sufficient information early in the exemption process that will allow those parties to judge whether the exemption process is appropriate for the particular transaction. NPR at 5. NS contends that the current disclosure

rules on interchange commitments provide sufficient notice to all interested parties to enable them to determine whether to challenge the use of the exemption process in a particular transaction. However well-intentioned the proposed additional disclosures are, the proposed rules appear to be an overly engineered solution that addresses something that does not appear to be problematic.

The collection of the information suggested by the proposed rule is not necessary for the proper performance of the functions of the Board. Rather than minimizing regulatory control over the rail transportation system, the NPR seems to be an unnecessary measure to provide information for the benefit of shippers whose competitive situation will not change as a result of the proposed sale or lease transactions between the affected Class I rail carrier and its shortline partners. Further, certain of the proposed items to be disclosed serve little informational purpose other than to expose commercial aspects of the negotiations between the shortline and its connecting carrier or to expose a shipper's commercially sensitive information to its competitors. In the context of the NS's lease credit arrangements, which constitute the bulk of the interchange commitments referenced by the Board, the proposed additional disclosures make even less sense. The Board's proposed rules do not support rail transportation policy in that they needlessly increase regulation of rail transportation and improperly seek to change the competitive landscape after a sale or lease transaction between a Class I and a shortline. For the foregoing reasons, the rules proposed by the Board should not be adopted.

ARGUMENT

1. The current rules provide adequate notice and disclosure to interested parties to determine whether to challenge an exemption.

The current disclosure requirements relating to interchange commitments are sufficient to allow the Board and interested parties to determine whether a particular interchange commitment

has the potential to be problematic. The disclosure rules adopted in *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No.1) (STB served May 29, 2008) (the "May 2008 decision") require a lessee or acquiring shortline to describe the interchange commitment and file the lease agreement under seal so that interested parties can gain access to the provisions. Once the notice information is published in the Federal Register, the shipping public is aware of the provision.

Despite this public having this information, not one shipper has objected to a transaction involving an interchange commitment in any of the proceedings cited by the Board. The availability of the information combined with the lack of any shipper participation related to interchange commitments in these proceedings suggests that the current required disclosures are sufficient or that shippers are just not interested in challenging interchange commitments at the time of filing. Either way, there does not appear to be much external demand for additional information about interchange commitments. Collecting additional commercial information early on in the exemption process that provides insight to the economic value of the interchange commitment to the shortline and lessor carrier will not drive a shipper's decision to challenge the validity or application of a particular interchange commitment; that particular shipper's transportation needs drive this decision.[1]

2. Additional disclosure requirements do not alter how the transactions would be analyzed.

The Board's desire to address what it fears could be anticompetitive results flowing from sale and lease transactions involving interchange commitments is misplaced and inappropriate.

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[1] The *Entergy* case demonstrates that shippers are acutely aware of what transportation options are available and are not shy about seeking meaningful competitive options, interchange commitments notwithstanding. *Entergy Arkansas, Inc. & Entergy Services, Inc. ("Entergy") v. Union Pacific R.R. Co., Missouri & Northern Arkansas R.R. Co., Inc., & BNSF Rwy. Co.; M&NA R.R. Co., Inc. – Lease, Acquisition and Operation Exemption – Missouri Pacific R.R. Co, and Burlington Northern R.R. Co.*, FD NOR 42104, 32187 (STB served Mar. 15, 2011).

In the context of the exemption process, the analysis would be whether regulation of a particular shortline sale or lease transaction is necessary to support the rail transportation policy set forth in 49 U.S.C. §10101 or whether the transaction is of limited scope such that additional regulation by the Board is not required. With respect to the aspects of the rail transportation policy which deal with competition, the additional information is not useful because interchange commitments do not change the competitive options available to shippers before or after these types of transactions.

If the leasing carrier is the only carrier with which the shortline connects, then the existence of an interchange commitment such as a lease credit arrangement has no effect on a shipper's competitive options. Prior to the lease, the shipper had single carrier service. After the lease, the shipper still has single carrier service, but often with local service more closely attuned to the individual customer's specific needs provided by the leasing shortline. Even in the case of an interchange commitment that prohibits interchange with any other connecting carriers (which NS's lease credit arrangements do not do), the shipper's transportation options are the same pre- or post-lease. In either case, the shipper is in the position of having single carrier service.

The reasons given to support the Board's revised merger rules, which require applicants to demonstrate how their proposed transaction will enhance competition, are simply not applicable in the case of smaller sale or lease transactions between larger carriers and Class II or Class III carriers. The revised merger rules reflect the Board's concern that future mergers or acquisitions involving more than one Class I carrier could lead to serious service disruptions during their implementation. Accordingly, to offset such impacts, the Board adopted a policy encouraging Class I carriers proposing such a major merger or acquisition to include proactive measures that promote competition.

In contrast, when a short line acquires or leases a line previously operated by a large carrier, the expectation is that service will improve even without additional pro-competitive measures, because the short line will be able to devote more attention to the needs of the shippers on the line. Rather than file comments in opposition to these types of transactions, shippers have tended to support them in anticipation of improved service.[2] Further, when a shipper wants to pursue a routing that might be affected by an interchange commitment, that shipper has more specifically tailored ways to address its needs, e.g., filing a petition to establish a through route under 49 U.S.C. §10705 or working with the shortline to negotiate a solution pursuant to the Rail Industry Agreement.

3. Objections raised by "interested parties" based on interchange commitments have been unrelated to competitive concerns.

The currently required disclosures are adequate enough to allow third parties to raise objections, but so far these objections have been meritless. The Board noted that "interested parties" – labor unions in all cases – filed objections to transactions based in part on the existence of an interchange commitment in four of the ten proceedings that it has considered to date.[3] In the M&NJ proceeding, representatives from the United Transportation Union ("UTU") asserted that the interchange commitment itself was an anticompetitive feature which implicated the violation of certain aspects of the rail transportation policy. *See* Petition to Revoke or Reject in FD 35412 (filed on September 27, 2010). In the related JAIL transactions, representatives of

[2] *See* letter of Padnos Iron & Metal Company in FD 35410 et al. (filed Feb. 10, 2011). *See also* letter of Harrison Gypsum, LLC in EP 714 (filed Dec. 17, 2012).

[3] Labor unions filed petitions to revoke in the following cases: *Adrian & Blissfield R.R. – Continuance in Control Exemption – Jackson & Lansing R.R. ("JAIL")*, FD 35410 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Jackson & Lansing R.R. – Lease & Operation Exemption – Norfolk S. Rwy.*, FD 35411 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Jackson & Lansing R.R. – Trackage Rights Exemption – Norfolk S. Ry.*, FD 35418 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Middletown & N.J. R.R.("M&NJ") – Lease & Operation Exemption – Norfolk S. Ry.*, FD 35412 (STB served Sept. 23, 2011) (Mulvey, commenting). The first three cases listed relate to the same primary transaction.

the UTU and the Brotherhood of Locomotive Engineers and Trainmen asserted that the interchange commitment involved was an "indicia of 'control'" on the part of NS over the line of railroad that it was leasing to JAIL. *See* Petition to Revoke Exemptions filed in FD Nos., 35410, 35411 and 35418 (filed on October 20, 2010). Additionally, the unions asserted that the fact that the shortline requested a lease credit provided evidence that the shortline might not have the financial wherewithal to safely operate the line of railroad that it was leasing. *Id.* at 4-5. In the case of both the M&NJ and JAIL transactions, the Board carefully considered the unions' arguments and determined based on the existing required disclosures that none of the arguments made had any merit. The proposed additional disclosure items would not affect the merits of these objections or the Board's ultimate determination in those cases. In fact, they could have the unintended result of inviting baseless, irrelevant objections by parties with concerns that are wholly unrelated to the competitive effects of the transaction being considered.

4. The lease credits that the Board mentions are not interchange commitments in any event.

Seven of the ten proceedings cited by the Board in the NPR involved leases between various shortlines and NS.[4] The aspect of the lease described in those transactions consists of a lease credit arrangement between NS and the particular shortline. Although NS concedes that these lease credit arrangements provide an incentive to the shortline to interchange traffic with NS up to a point, they are not meant to prohibit in any way a shortline's ability to interchange traffic with other connecting carriers. *See* Kirchner V.S. at 1.

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[4] *Midwest Rail d/b/a Toledo, Lake Erie and W. Ry. – Lease & Operation Exemption – Norfolk S.Ry.*, FD 35634 (STB served June 29, 2012) (Mulvey, commenting); *Middletown & N.J. R.R. – Lease & Operation Exemption – Norfolk S.Ry.*, FD 34512 (STB served Sept. 23, 2011) (Mulvey, dissenting); *E. Penn R.R. – Lease & Operation Exemption – Norfolk S. Ry.*, FD 35533 (STB served July 15, 2011) (Mulvey, dissenting); *C&NC R.R. – Lease Renewal Exemption – Norfolk S. Ry.*, FD 35529 (STB served July 1, 2011) (Mulvey, dissenting); *Adrian & Blissfield R.R. – Continuance in Control Exemption – Jackson & Lansing R.R.*, FD 35410 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R. – Lease & Operation Exemption – Norfolk S. Ry.*, FD 35411 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R. – Trackage Rights Exemption – Norfolk S.Ry.*, FD 35418 (STB served Oct. 6, 2010 (Mulvey, dissenting).

The lease credits are not interchange commitments, but out of an abundance of caution, NS's shortline partners have included a discussion of the lease credit arrangements in response to the current interchange commitment disclosure requirement. However, NS considers these arrangements to be financing arrangements that enable a smaller shortline to acquire a line and use capital to reinvest in the line, rather than a restriction on interchange with other carriers. *Id.* at 2. Indeed, these leases give the shortline the right to pay the full market rent for the lease and interchange all cars with another carrier. *Id.* at 1. In addition, the lease credits are only available on a level of traffic that has historically moved on the line. Id. Thus, any "growth" traffic is not even covered by the lease credits.

Viewed from this perspective, the proposed additional disclosure items seem to be completely irrelevant to the analysis of whether a particular lease credit arrangement is consistent with the public interest. As required by the current disclosure rules adopted in the Board's May 2008 decision, NS's shortline partner files a copy of the lease with the Board as part of the exemption process. That lease contains the terms of the particular lease credit arrangement and the Board – and other interested parties, provided they comply with the applicable procedures – can calculate the potential total amount of the lease credit to be earned and can verify that the particular agreement does not prohibit interchange with a connecting carrier. Additional information about the number of shippers on the line or the volumes originated and received by each shipper might help the Board and interested parties validate NS's estimate of what fair market rental value is for the line, but it will have little value for signaling nefarious competitive intent.[5] Similarly, information with respect to the commercial

[5] In fact, requiring the disclosure of volume information by shipper could allow a shipper's competitors to learn sensitive commercial information that a shipper might not want revealed. Also, NS would expect that the Board would provide protection from any contractual violations of confidentiality provisions that are typically included in

value of the lease credit arrangement to both the shortline and NS is not useful for the Board's stated reason for requiring it, unless the Board intends to extend its jurisdiction to the validation of the commercial rental value agreed upon by the leasing carrier and the lessee shortline. That NS has agreed to include provisions for lease credits in situations where the leasing shortline has no other connecting carrier option further supports the notion that these lease credit arrangements are not motivated by anticompetitive intent. Rather than being superfluous to its agreements, these pro-shipper provisions allow shortlines to improve the condition of the lines and offer better service to the shippers located on the line.

The Board's decisions to date, and certainly Commissioner Mulvey's dissents and comments, indicate that the Board considers NS's lease credit arrangements to be interchange commitments. NS suggests that they are not for the reasons described and further asserts that the additional proposed disclosure items are not necessary or particularly instructive in the context of NS's lease credit arrangement because such arrangements are not interchange commitments. As such, NS proposes that the Board determine that lease credit arrangements that limit the aggregate amount of the credit that can be earned to the fair market rental value of the leased line are not interchange commitments. Alternatively, the Board should except the application of the proposed additional disclosure items to such arrangements.

CONCLUSION

The current disclosure requirements relating to interchange commitments are sufficient to inform the Board and interested parties about the existence of a particular interchange commitment. To the extent that shippers want to object to a particular interchange commitment, they will do so based on the fact that one exists, not because of the value of that particular

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its transportation contracts with its shippers as well any liability under 49 U.S.C. §11904, which prohibits disclosure by a rail carrier of a customer's commercial information.

contractual provision to either the shortline or the leasing carrier. Under the current disclosure requirements, the only objections raised have come from labor unions and those objections have been meritless. Further, the Board has not rejected any of the relevant transactions considered since its May 2008 decision for reasons relating to the actual interchange commitments described. Finally, the Board should determine that the types of lease credit arrangements NS has put in place with certain of its shortlines are not interchange commitments or, in the alternative, that the proposed additional disclosure rules not apply to such arrangements.

Respectfully submitted,

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GREG E. SUMMY
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Norfolk, VA 23510
(757) 629-2657

Counsel for Norfolk Southern Railway Company

December 18, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING INTERCHANGE COMMITMENTS

VERIFIED STATEMENT OF MARCELLUS C. KIRCHNER

My name is Marcellus C. Kirchner. I am employed by Norfolk Southern Corporation (NS) in the capacity of Director Strategic Planning. My office is in Norfolk, Virginia. I have been employed by NS or an NS subsidiary since 1978 and have occupied my present position since January 1993. I previously occupied the positions of Director Human Resources and Director Labor Relations. I have a Bachelor of Arts degree, *cum laude*, from Duke University and a Master of Business Administration degree from Cornell University. Since 2004, the responsibilities of my present position have included oversight of Norfolk Southern Railway's line rationalization efforts.

When negotiating leases with potential operators of its light-density rail lines, Norfolk Southern expects to collect a rent that represents the fair market value of the line. NS typically calculates the fair market rental value for a line that it plans to lease and offers that rental amount to the shortline. In certain cases, a shortline requests an arrangement that will enable it to earn a credit towards its cash rental obligation for each car that it interchanges with NS. NS's general approach is to allow a shortline to reduce its lease payment to a nominal amount if it chooses to

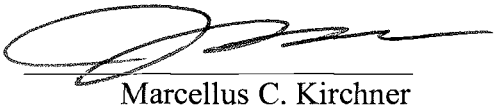
interchange with NS the same number of cars that NS historically handled on the line. NS considers a shortline's request for lease credits whether or not the line to be leased connects with another carrier. NS certainly does not seek to restrict interchange with connecting carriers if that opportunity exists. In the context of NS's lease credit arrangements, the proposed additional disclosure items do not make much sense because the value of the lease credits arrangement to both the shortline and to NS approximates the fair market rental value of the leased line.

Generally, lease credits are requested by smaller or independently run Class III carriers, not by our larger shortline partners which usually choose to pay full market rent. NS views lease credit arrangements as a useful financing tool that helps smaller shortlines more easily face the financial burdens associated with operating a line. Rather than paying full market rent, NS hopes that the lessee instead will use the cash to meet its maintenance obligations for the line or perhaps improve the condition of the line which will result in improved service to customers on the line. Many of our smaller shortlines would face significant financial difficulty in operating the line without the ability to earn lease credits. As a result, a customer could experience deterioration in service, which would defeat the purpose of shortlining the asset.

Verification

I, Marcellus C. Kirchner, verify under penalty of perjury that I am Director Strategic Planning of Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on December 17, 2012



Marcellus C. Kirchner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Comments of Norfolk Southern Railway Company upon all parties of record by U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Maquiling B. Parkerson

Counsel for Norfolk Southern Railway Company

December 18, 2012