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RECEIVED

November 17, 2000

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

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Office of the Secretary
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Dear Secretary Williams:

Enclosed for filing in STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, are the original and twenty-five copies of the Comments of Enterprise Products Operating L.P. (EPO-1).

Also enclosed is a 3.5 inch IBM-compatible diskette convertible into WordPerfect 9.0 format with the text of the Comments.

Additional copies of this letter and of the Comments are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

If you have any question concerning this filing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Service list
John E. Smith II, Esq.

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ORIGINAL

EPO-1

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
ENTERPRISE PRODUCTS OPERATING L.P.

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Due and dated: November 17, 200

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
ENTERPRISE PRODUCTS OPERATING L.P.

Enterprise Products Operating L.P. of Houston, Texas ("Enterprise"), pursuant to 5 U.S.C. 553(c) and 49 C.F.R. 1110.1, et seq., offers the following comments pertaining to the rules proposed for adoption by the Board's Notice of Proposed Rulemaking, served October 3, 2000:

Enterprise is one of the Nation's foremost midstream energy companies, providing processing, transportation and storage services to producers of natural gas, natural gas liquids and consumers of natural gas liquids purity products. Since its formation in 1968, Enterprise has built its reputation on its flexibility and reliability in providing cost effective, value-added services to its customers, which are major energy and petrochemical companies. Its annual revenues exceed $2 billion.

Enterprise's natural gas liquids processing (fractionation) plants receive their supplies of mixed natural gas liquids from domestic gathering pipelines that originate at natural gas

processing plants and by vessel from overseas sources. From the natural gas processing plants, mixed natural gas liquids are sent by pipelines to Enterprise's fractination plants, at which the streams of mixed natural gas liquids are separated into their purity components: ethane, propane, normal butane, isobutane and natural gasoline. Enterprise, also, produces polymer grade and commercial grade propylene at propylene fractionation plants that receive by rail a propane/propylene mix feedstock that is produced as a refinery byproduct and converted to polymer grade or commercial grade propylene in these plants.

Ethane is used in the production of petrochemical raw materials for plastics, refrigerants and solvents. Propane is used in the production of petrochemical raw materials for residential and commercial heating, industrial fuel and crop drying. Normal butane, isobutane and natural gasoline are used as petrochemical raw materials and motor gasoline additives. Polymer grade propylene is used in the manufacturing of plastics, foams and synthetic fibers, and commercial grade propylene is used as a feedstock for other petrochemical products.

While certain of Enterprise's natural gas liquids products customers receive the products of the fractionation process by pipeline, others are not served by pipelines and are dependant on railroad delivery. To serve its own and its customers' needs, Enterprise owns or leases more than 680 railroad tank cars. Some of Enterprise's plants are located at sites served by two railroads, as, for example, its facilities at Mont Belvieu,

Texas, and Breaux Bridge, Mississippi. Other of its facilities, however, are served by only one railroad, as for example, its fractionation plant at Norco, Louisiana, served by the Kansas City Southern, at Tebonne, Louisiana, served by the Illinois Central and at Petal, Mississippi, served by Norfolk Southern.

The markets for natural gas liquids purity products and supplies of propane/propylene mix are intensely competitive, and even a slight increase in Enterprises's transportation costs can result in the loss of sales or processing revenues.

The railroads on which Enterprise is dependant, as a practical matter, are able to set their rates for the rail transportation of the natural gas liquids purity products and propane/propylene mix wherever they will. The railroads know full well that in the twenty years since the enactment of the Staggers Rail Act of 1980 neither the Board nor the Interstate Commerce Commission before it ever has found the applicable rates for the rail transportation of natural gas liquids purity products or propane/propylene mix to be unreasonable. That places a shipper, such as Enterprise, in a perfectly untenable position, for the railroads are free to dictate the terms for their handling of these products on a take it or leave it basis. Enterprise is wholly without effective recourse in protecting itself from the railroads' pricing practices.

The only constraint upon the railroads' setting of rates on natural gas liquids purity products or propane/propylene mix has been competition; however, as the Board, as well as the ICC

before it, has approved one railroad merger or acquisition after another, competition in the industry has all but disappeared. While certain of Enterprise's plants, as already noted, may be served by two railroads, Enterprise in actuality is unable to chose between them if one of the two railroads is the only one that serves Enterprise's supplier or customer. The single-system railroad has a lock on the traffic, particularly as an aftermath of the Board's Bottleneck decision.[1] The situation, of course, is exacerbated at Enterprise's other plants served by a single railroad, for Enterprise has no alternative rail service at those sites and must pay whatever rates the railroad chooses to assess for its transportation Enterprise's natural gas liquids purity products and propane/propylene mix.

As late in the day as it in fact may be, the Board had an opportunity to preserve what little intramodal competition remains by promulgating meaningful rules in the instant proceeding; however, in fashioning the rules it proposes to adopt, the Board has squandered that opportunity. While the Board goes to great lengths to pay lip service to preserving and even enhancing competition in its approval of major railroad mergers and acquisitions, as, for example, in the language it employed in proposed §1180.1(c), the Board's proposed rules would establish no standards that the applicants would need to observe

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[1] No. 41242, Central Power & Light Co. v Southern Pac Transp. Co., decided April 30, 1997, aff'd, MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. den., 120 S. Ct. 372 (1999).

to safeguard the preservation of competition in gaining unconditional agency approval of their future filings.

The unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that the applications will be treated differently than they have in the past. This uncertainty renders it likely that shippers, such as enterprise, really won't know what the ground rules are until the next major railroad merger or acquisition proposal has been approved by the Board, and, of course, then it will be too late.

The treatment of gateways is illustrative. The ICC half a century ago recognized that keeping gateways open was the single most important means for maintaining intramodal competition when railroad mergers or acquisitions were authorized. In Detroit, T.& L. R. Co. Control, 275 I.C.C. 455, 492 (1950), the ICC approved the transaction on condition that the merged railroad "maintain and keep open all routes and channels of trade via existing junctions and gateways" between it and the railroads with which the merging railroads had connected. The DT&I condition served to keep the connecting railroads competitive, as the ICC subsequently acknowledged:

> A consolidated carrier was generally prohibited from maintaining rates on its new single-line routings resulting from the consolidation below the rates on any competing joint-line routes in which it participated. We feared that if a single-line rate was lowered without securing the concurrence of all connecting carriers in lowering the corresponding joint-line rates, the "commercial closing" of certain routes or gateways would occur and competition would

be reduced.[2]

The ICC routinely imposed the DT&I conditions for the next three decades, discontinuing the practice only in 1982. While withholding the DT&I condition might have been able to be rationalized in the fervor of deregulation spurred by the enactment of the Staggers Act, at a time when there continued to be at least 23 Class I railroads and when, as the Board concedes at page 9 of its NPR, the ICC and Board were "decidedly pro-merger," there no longer is any justification for not imposing the DT&I or similar conditions in any major railroad merger or acquisition hereafter approved by the Board. Indeed, the Canadian National Railway Company and The Burlington Northern and Santa Fe Railway Company voluntarily agreed that, if their common control relationship were approved by the Board, they would maintain open gateways. Nevertheless, the Board shied away from coming to grips with the need for keeping gateways open as a means of preserving intramodal competition, leaving it to the applicant railroads to address the issue. In proposed §1180.1(c)(2)(i), the Board conceded it would be satisfied if the applicants merely were to "explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways." It adds, "We . . . would specifically require applicants to present an effective plan to keep open major existing gateways." These generalizations are almost a

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[2] Traffic Protective Conditions, 366 I.C.C. 112, 113 (1982).

nullity; at best they are hortatory. It doesn't require a great deal of foresight or imagination on anyone's part to anticipate that resourceful railroad counsel in their applications will be able to offer all manner of reasons as to why the single-line rates of the merged railroad should not be equalized with the joint-line rates the merging or acquired railroads previously had maintained to with their connecting carriers, thereby effectively closing the gateways and foreclosing intramodal competition. The Board offers no clue as to what explanations or plans offered by the railroads it would accept or reject, leaving it wholly to the whim of the agency as to what, if anything, will need to be done to keep gateway open, even the ones the Board deems to be major ones.

If the Board really were desirous of preserving, much less enhancing, competition it would adopt a rule that in effect would provide:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to maintain and keep open all routes and channels of trade via existing junctions and gateways unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

The Board in its Advance Notice of Proposed Rulemaking, served March 31, 2000, gave shippers, such as Enterprise, hope that the Board might actually avail itself of the opportunity of

revising its major railroad merger rules to redress some of the wrongs shippers, particularly captive shippers, believe they heretofore have suffered, such as "requiring merger applicants to provide switching, at an agreed upon fee, to all exclusively served shippers located within or adjacent to terminal areas", "requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment", and "requiring merger applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment." None of these competition enhancing provisions, however, found its way into the proposed rules promulgated by the Board. Only bottleneck pricing was even mentioned, and, as it did with respect to maintaining gateways, the Board, in proposed §1180.1(c)(2)(i), left it to the applicants to explain how they anticipate affording affected shippers "the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement." The Board adds, "[W]e believe that it is appropriate to protect the ability of shippers to use a transportation contract obtained to a junction point to obtain a challengeable rate quote for transportation service provided beyond the junction point." These abstractions do nothing for shippers, for they already are free try to negotiate rate agreements for the competitive portion

of a through route; however, because of the ability if the bottleneck railroad to retaliate against the competing railroad in a situation in which their roles are reversed, such contracts are hard, if not impossible, to come by. Again, the Board leaves it up in the air as to what explanation offered by the applicants it will find to be acceptable or unacceptable and what, if anything, it will expect the merged railroad to do to so that shippers are assured of their ability to secure contracts for the competitive portion of a through route. It might have been better in the interest of enhancing or just preserving competition if the Board had promulgated a rule at in effect read:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to offer, upon request of a shipper, a contract for the competitive portion of an existing or potentially available through route whenever the merged or controlled and controlling railroads have a bottleneck segment unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

The Board's NPR, as already noted, is silent with respect to the ability of a shipper served by a merged or controlled and controlling railroad to have access to a second carrier within essentially the same switching district or terminal area. Such

terminal access, however, is essential if rail-to-rail competition is to be enhanced, as the Board insist is one of its goals in revising its major railroad merger rules. The Board well might have promulgated a proposed rule to read:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

Indeed, the Board doesn't even go so far as to propose adopting a rule that essentially codifies what has become the practice in recent major merger or acquisition proceedings,[3] namely, that any shipper which as a result of the merger or acquisition suffers a loss of actual or potential competitive railroad service shall be protected by the imposition of a

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[3] See, Finance Docket No. 32760, Union Pacific Corporation, et al.--Control and Merger--Southern Pacific Rail Corporation, et al., served August 12, 1996, aff'd, Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999; Finance Docket No. 32549, Burlington Northern, Inc., et al.--Control and Merger--Santa Fe Pacific Corporation, et al., served August 23, 1995, aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir 1997).

condition affording trackage or haulage rights to another railroad to serve the affected shipper. Thus, a further rule to be adopted by the Board should read:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as a result of the proposed merger or acquisition unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

Enterprise, moreover, would have hoped that in view of the widespread publicity in the trade press given to the substantial rate increases which have been announced by the Norfolk Southern Railway Company and CSX Transportation, Inc., since their division of the lines of the Consolidated Rail Corporation , the Board would have been persuaded not to permit the acquisition premium paid to effect a major railroad merger or acquisition to become a part of the merged or controlled and controlling railroads' rate bases.[4] In effect, shippers, such as Enterprise,

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[4] See, STB Finance Docket No. 33388, CSX Corporation, et al. --Control and Operating Leases/Agreements--Conrail Inc., et al., served July 23, 1998, rev. pend. No. 98-4285, Erie-Niagara Rail Steering Comm. v. S.T.B. (2d Cir.).

served by NS at Petal, Mississippi, are bearing the cost of the railroads' irrational exuberance in bidding up the price of Conrail, for the railroads believe themselves entitled to earn a reasonable return on the inflated values assigned the merged or acquired properties. The Board's proposed rules, however, are silent in this regard, as well. Enterprise believes an appropriate rule to be adopted by the Board well might provide:

> "Any merger or acquisition shall be conditioned so as to disallow the acquisition premium paid to effect the proposed transaction to be included in the merged or controlled and controlling railroads' rate bases unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

In sum, Enterprise believes that the proposed rules for major railroad consolidations are far too vaguely worded, do little to correct the decidedly pro-merger bent of the Board and offer shippers, such as Enterprise, little in the way of reliable safeguards to preserve, much less enhance, railroad competition.

Respectfully submitted,

ENTERPRISE PRODUCTS OPERATING L.P.

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Due and dated: November 17, 2000

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing Comments upon counsel for each of the parties by mailing them copies thereof, with first-class postage prepaid.

Dated at Washington, DC, this 17th day of November 2000.

Fritz R. Kahn