

LAW OFFICES OF  
PRESTON, THORGRIMSON, ELLIS & HOLMAN  
1735 NEW YORK AVENUE, N.W., SUITE 500  
WASHINGTON, D.C. 20006-5209  
(202) 626-1700

JAMES R. WEISS

TELEX 904059 WSH TELECOPY (202) 331-024

SEATTLE, WASHINGTON 98104-7011  
5400 COLUMBIA SEAFIRST CENTER  
701 FIFTH AVENUE  
(206) 623-7580  
TELEX 4740035 TELECOPY (206) 623-7022

ANCHORAGE, ALASKA 99501-1937  
420 L STREET, SUITE 404  
(907) 276-1969  
TELECOPY (907) 276-1365

SPOKANE, WASHINGTON 99210-0636  
1480 SEAFIRST FINANCIAL CENTER  
W. 601 RIVERSIDE AVENUE  
(509) 624-2100  
TELECOPY (509) 456-0146

PORTLAND, OREGON 97204-3635  
3200 U.S. BANCORP TOWER  
111 S.W. FIFTH AVENUE  
(503) 226-3200  
TELECOPY (503) 246-9055

July 24, 1989

The Honorable James Rill  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
Washington, D.C. 20530

Re: Business Review

Dear Mr. Rill:

This letter is to request on behalf of the Western Railroad Traffic Association ("WRTA"), Consolidated Rail Corporation ("Conrail") and CSX Corporation a business review letter, pursuant to 28 C.F.R. §50.6, stating the Department of Justice's enforcement intention with respect to a proposal for WRTA to expand its current services to include the collecting, coordination, listing, filing with the Interstate Commerce Commission ("ICC") (where appropriate), and dissemination to the public of certain changes in regulated and unregulated railroad rates.

WRTA is an unincorporated association, the membership of which consists of all of the major railroads operating in the western United States. Among its current functions, WRTA compiles tariffs of its member railroads that are applicable to regulated transportation, files these tariffs with the ICC and certain state regulatory agencies as required by law, and distributes the tariffs to shippers and other interested parties. WRTA provides these services under agreements approved by the ICC under 49 U.S.C. §10706(a) or otherwise authorized by the Interstate Commerce Act.

In 1983, WRTA, and in 1984, WRTA and Conrail sought and received from the Department favorable business reviews concerning certain joint rate adjustment activities. In the first letter, which was issued on October 28, 1983, the Department stated that it had no present intention to challenge a proposal to collect, list and disseminate to the public railroad rates on traffic that is exempt from ICC regulation and thus not subject to the Interstate Commerce Acts tariff filing requirements.

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In the second letter, which is dated May 24, 1984, the Department stated that it had no present intention of challenging another type of tariff and listing service. Under this service, which WRTA implemented shortly after the issuance of the Department's letter, WRTA collects, coordinates, lists and files in tariff form with the ICC, and disseminates to the public, changes in railroad rates by individual railroads in response to changes in the ICC's quarterly rail cost adjustment factor index ("RCAF"). For single-line rates, the service operates as a publication service. For joint-line rates, WRTA's tariff publishing officer ("TPO") collects proposed rate adjustments, matches them with the proposals of direct connectors and either publishes them if they match or by publication notifies the carriers that they do not match so that the direct connectors then can negotiate the new rates and divisions themselves.

WRTA's inflation adjustment tariff collection, publication and dissemination service has proven to be so successful and efficient that WRTA now proposes to expand the service to include all regulated and unregulated single-line and joint-line rates. The current procedure has significantly reduced the railroads' transaction costs for inflation cost recovery adjustments, and the savings would be much greater under the proposed procedure, which would enable efficient coordination of all types of rate adjustments.

As the I.C.C. has recently noted, the transaction costs incurred by individual railroads in making broad rate adjustments are "not ... insignificant, [and] are not readily recoverable by any avenue of which we are aware." Quarterly Rail Cost Adjustment Factor, Ex Parte No. 290 Sub-No. 5) (89-3), June 28, 1989, p.6. This is because rate adjustments generally involve multiple carriers and multiple discussions with each direct connector concerning each commodity. System-wide adjustments, involving literally thousands of rates and routes, are obviously even more time consuming and expensive. The costs, time and inflexibility that are the result of this process diminish railroads' ability to take competitive initiatives. Under the proposed service, the TPO will consolidate and coordinate rate adjustment communications, considerably reducing the participating railroads' transaction costs with no adverse competitive consequences.

In most respects, the new service will parallel the existing procedures. Under its proposed expanded service, the WRTA will continue to act as a clearing house for the compilation of rate adjustment instructions from any railroad that wishes to use its

service. It will accept any proposed rate changes, on a scheduled or unscheduled basis, and either publish them on the requested date if they are single-line rates, or communicate them to direct connectors of the proponent carrier. WRTA will then accumulate the connectors' responses to the offer, determine whether there is concurrence to the adjustment and, if so, the terms agreed upon. Finally, WRTA will inform the participants in the rate who could themselves effectuate the adjustment or, in the alternative, could instruct WRTA to publish the changes.

More specifically, any carrier desiring to have WRTA publish an adjustment to its single-line or its joint-line rates would independently instruct the TPO as to the percentage or specified amount of an adjustment it wishes to have applied to the identified rate(s) and which specific rules, conditions or exceptions, if any, it desires to apply for its account (i.e., the effective date of the proposed adjustment, routing application, etc.). Subject to the TPO's ability to prepare and publish the new rates, the TPO would publish requested adjustments to single-line rates on the notice directed by the carrier or, if no notice is specified, at the earliest convenience of the TPO.

For joint-line rate adjustments, WRTA would forward a rate adjustment request to all direct connectors as soon as feasible after the TPO receives it, (collecting and sorting changes involving the same carrier), and would, as under WRTA's current service, specify a date on or before which the connectors must return a Rate Adjustment Instruction Form with its response.<sup>1</sup> A carrier's instructions on its joint-line rates would be treated as offers to concur with matching offers independently submitted by its direct connectors. A carrier could also submit instructions concerning joint-line rate adjustments on behalf of another carrier under a power-of-attorney, but the power would be limited to routes in which the instructing carrier is a direct connector with the carrier for which the power is held. Since a carrier may lawfully agree on joint-line rates with its direct connectors at any time, instructions to the TPO could reflect prior concurrences with a carrier's direct connectors.

The TPO would match the carriers' submissions, advise participating carriers of the matches, and ask whether those carriers wish to effectuate the changes themselves or have the

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<sup>1</sup> A copy of the proposed Rate Adjustment Instruction Form is attached to this letter, and constitutes an integral part of this request for a business review.

TPO do so. In either event, rate adjustments would be published for those joint-line movements for which directly connecting carriers submitted matching rate adjustments. Carriers would have the option of making an offer of concurrence "up to" or "down to" a certain amount. The TPO would not publish a rate adjustment for joint-line movements for which the participating carriers' rate adjustments did not match. Carrier instructions submitted to the TPO pursuant to a power-of-attorney would be handled in the same manner as under WRTA's current RCAF service. A concurring carrier may unilaterally modify its instructions and, in such event, the TPO would again match, compile, advise, and seek instruction on whether to publish any rate adjustment for which matches existed.

As in the case of single-line rate adjustments and requested joint-line adjustments under WRTA's current RCAF service, the TPO would keep all notices containing instructions on joint-line rates confidential until all the participating carriers are advised and publishing instructions are issued. Under the proposed service, each rail carrier would retain all of the rights and obligations it now has to adjust its rates independently. Thus, each carrier will retain the unqualified right to alter its single-line rate adjustments at any time. On its joint-line rate adjustments, each carrier would retain the right to alter its specified notice of concurrence prior to the effective date of the applicable publication. Each carrier would also retain the unrestricted right to take independent action subsequent to the effective date of the publication, but only with the required concurrence, as to any route affected by the resulting publications.

The proposed service would not require any interaction among competing carriers. A carrier would not be able to use the proposed WRTA service to gain any knowledge of contemplated rate adjustments by other carriers before such rate adjustments are published with the ICC or before they become known to the public generally.<sup>2</sup> Each participating carrier would be charged a non-discriminatory fee for WRTA's service, and that service would be available to all carriers. A carrier would be able to cancel its participation in the proposed WRTA service at any time.

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<sup>2</sup> Of course, it is possible that one carrier's offer to its direct connectors could generate similar offers by one or more of those connecting railroads to their connectors. Given the confidentiality provisions of the proposal, the resulting rate adjustments obviously would be the result of price leadership, not collective activity.

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In our view, the above proposal does not raise significant antitrust concerns. It increases the efficiency of the railroad ratemaking process without in any way undermining the railroads' ratemaking independence. Moreover, like the prior proposals, the proposed procedure will enhance competition between the railroads by providing shippers with a ready source of information about railroad rates, which facilitates "comparison shopping." Nonetheless, because the new procedure involves ratemaking coordination on behalf of companies that are competitors as well as joint-line partners, out of an abundance of caution, we request a business review letter confirming that the proposed expansion of WRTA's existing rate service will not be the subject of enforcement action by the Antitrust Division.

We appreciate your prompt attention to this request. We are prepared to supplement this description if you have any questions concerning the proposal.

Sincerely yours,



James R. Weiss  
Counsel for the Applicants

cc: Mark Schechter  
Donna Kooperstein