

November 14, 2012

**Counsel's Report
WMC Transportation Committee
WMC Headquarters, Madison – November 15, 2012**

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MAP-21 and the Next Congress.

“Moving Ahead for Progress in the 21st Century” moved us ahead, but not much past this last election, and without much in the way of progress.

MAP-21 expires September 30, 2014. Of course, the incoming Congress could kick the can down the road past the mid-term elections. Lots of precedent for that. But, once past mid-term, the window for acting before things presidential ramp up seem to have become shorter and shorter. So, when? Solvency of the Highway Trust Fund will not wait for expiration of MAP-21.

Deja vu almost all over again. Rep. Shuster – not Bud, but Bill, son of Bud – seems likely to replace John Mica as chair of the House Transportation and Infrastructure Committee:

I want to look across the spectrum, look at tolling, look at the other various ways, public-private partnerships and, certainly, you have to look at the gas tax, the user fee, certainly, all those things have to be looked at. I believe there's going to be some large-scale negotiations taking place, not only in the lame duck but then into the next year, and they'll be dealing with some of these significant [issues], not just trust fund issues but tax reform, the fiscal cliff, what we're going to be doing with debt ceiling.

Transport Topics, 11/12/2012. Taking these issues up in the lame duck Congress seems unlikely, but

Will the Lame Duck Congress Pass Shortline Tax Credits?

Per Morgan Stanley's report “Post-Election Regulatory Landscape,” 11/12/2012:

It is difficult to put a probability on such an outcome, but a lame-duck Congress is generally a more favorable time for such tax credits to be reauthorized. Moreover, given the fiscal cliff, there may be a legislative vehicle for the tax credits as well.

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As background, the 45G tax credit is an income tax credit directed at US shortline railroads for track maintenance. The primary beneficiary of the tax credit in our universe is Genesee & Wyoming.

STB To Require Additional Information on Interchange Commitments.

The proposed rule was announced 11/1/2012 in Docket No. EP 714, *Information Required in Notices and Petitions Containing Interchange Commitments*.

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 tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.” Currently, 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.

The Board proposes to require that the filing party affirmatively disclose whether or not the underlying agreement contains an interchange commitment. The Board further proposes to revise those rules to require that the following information be included in notices and petitions for exemption involving an interchange agreement:

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

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

The Board's goal is to encourage transactions that are in the public interest, while ensuring that it has sufficient information about transactions to determine whether they are appropriate for the exemption process or, on the other hand, raise competitive issues that require a more detailed examination. The Board has already indicated that interchange commitments that last in perpetuity or completely eliminate the ability of the lessee/purchaser railroad to interchange with a third-party carrier raise significant concerns.

The proposal would, perhaps, have greater import, if STB required disclosure of all existing interchange commitments. It does not. Moreover, many shortlines have only one choice of interchange which would seem to render them captive regardless of a formal interchange commitment. STB's consideration of new access rules might have an impact in these situations depending on proximity to an alternative rail carrier.

Wisconsin Central Group, General Update.

Our contact committee is engaged in exchanges with CN regarding establishment of a "CN Advisory Board – Great Lakes Region". Our objective is to schedule an initial conference call in early December and an inaugural face-to-face session before the end of January, 2013.

On 10/15/2012, counsel and WMC liaison Jason Culotta met with representatives of the Mid-America Freight Coalition ("MAFC") and National Center for Freight & Infrastructure Research & Education ("CFIRE"). Our principal focus was the CN/WCGroup Log Project, specifically potential development of a "TIGER grant level" benefit-cost analysis to support funding for supply chain visibility for raw forest products from forest to mill. CFIRE, however, suggested the critical problem is demonstrating "feasibility," the essential foundation for the benefit-cost calculation to support funding. We believe previous log studies supported by CFIRE and our stakeholder outreach resources can be brought together to demonstrate "feasibility".

The CFIRE/MAFC discussion also touched on the Intermodal and Chicago Gateway Projects and NGVs for freight in the I-90/94 Chicago/Twin Cities corridor and related I-39/41/43 and U.S. 29 corridors in Wisconsin. Follow-up will include a closer look at domestic and export markets for wood fuel pellets.

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Wisconsin Central Group – Position On Shortline Options.

For nearly a decade, from CN control of WC in 2001 until mid-2011, our goal has been for CN to effect “Mr. Tellier's Plan” (see our website, “Our Goal, Mr. Tellier's Plan – Give Competition a Chance”) to preserve the “local characteristics,” and service as good as, or better than that, and ensure the competitiveness, previously provided by the Wisconsin Central System. Since mid-2011, feeling that CN was committed to compete for market share on all of its WC lines, we have worked in collaboration with CN on three specific, joint long term strategic projects – Logs, Chicago Gateway, and Intermodal (see website, “2012 Joint Projects Initiative”).

Our View Today: Depending on the scope, conditions and mutual undertakings, shortline operation or spin-off of one or another of the lighter density CN/WC lines may be an acceptable, practical and pragmatic means, of advancing WCGroup's purpose, objective and goal (see website), focused on the three “CN/WCGroup Joint Projects”.

Characteristics of Acceptable Shortline Operation of CN/WC Lines:

- Those served by a shortline operator will have the same, but “virtual,” single line service and pricing to/from CN single-line points and connections as those on CN/WC lines.
- Benefits of the Log, Chicago Gateway and Intermodal Projects shall be implemented in a manner that ensures that CN/WC lines operated by a CN shortline partner are on a par with CN/WC lines.
- A shortline operator of CN/WC lines, on its own or through conditions, mutual undertakings or commitments by CN, shall have power, rail car and private capital resources and capabilities, with respect to the CN/WC lines it operates, comparable to CN's or as necessary to fulfill conditions imposed in STB Docket 34000.
- CN and any shortline candidate to operate and/or own a CN/WC line shall inform and ensure meaningful consultation, well in advance of any application to STB, with WCGroup and other WC line stakeholders, as to the ways and means to ensure establishing and implementing the foregoing “characteristics”.

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Railroad Fuel Surcharge Antitrust Cases – Update.

In re Rail Freight Fuel Surcharge Antitrust Litigation is the main action against four Class Is. On Nov. 6, the D.C. Circuit Court of Appeals granted the railroads' request to modify the procedural schedule, which results in a one-month extension of the deadline to the summary judgment motions.

The new set of due dates in the District Court is: 1/12/2013, Defendants' rebuttal expert reports; 3/4/2013, Plaintiffs' rebuttal expert reports; 3/25/2013, all expert depositions completed; 5/9/2013, all challenges to experts or their opinions and summary judgment motions; 6/20/13, all opposition briefs to those challenges and to summary judgment motions; and 7/18/2013, all reply briefs in support of those challenges and summary judgment motions. **Absent summary judgment, the case could stretch into 2014 and, with appeals, into 2015."**

The D.C. Circuit is also in the process of simultaneously determining whether to take the Railroads' appeal of the class action status determination and whether or not to hear the appeal. The briefing schedule will conclude 11/28/2012.