



**AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION**

The Voice of America's Independent Railroads

205963



July 31, 2002

Surface Transportation Board
Office of the Secretary
1925 K Street, NW, Suite 100
Washington, DC 20423

**RE: Ex Parte No. 589 Calculation of Variable Costs in Rate Complaint Proceedings
Involving Non-Class I Railroads**

Dir Sir:

Attached for filing with the Surface Transportation Board are the original and ten paper copies of the Reply Comments of the American Short Line and Regional Railroad Association being submitted in the above-captioned proceeding.

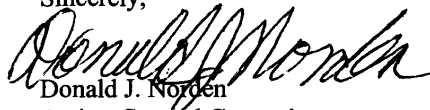
Please contact the undersigned should any questions arise regarding this matter.

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Sincerely,


Donald J. Norden
Acting General Counsel

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July 30, 2002



Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW, Suite 100
Washington, DC 20423-0001

**RE: Ex Parte No. 589 Calculation of Variable Cost in Rate Complaint Proceedings
Involving Non-Class I Railroads**

Dear Mr. Williams:

The American Short Line and Regional Railroad Association (ASLRRA) hereby submits its reply comments in regard to the above pending proceeding.

ASLRRA is a non-profit trade association representing the interests of over 400 Class II and Class III short line and regional railroads in legislative and regulatory matters. Short line and regional railroads are an essential and growing component of the railroad industry. Today, they operate and maintain 29 percent of the American railroad industry's route mileage, and account for 9 percent of the rail industry's freight revenue and 11 percent of railroad employment.

Despite the growing importance of this segment of the rail industry, when divided among hundreds of small railroads, each company's share of the railroad network becomes very small. Class II and Class III railroads are predominately small businesses unable to comply with additional regulatory or reporting requirements without a significant impact on operations and the viability of their business.

ASLRRA replies in agreement to the comments of other parties encouraging the Board to calculate non-Class I variable costs in future rail rate cases using the Uniform Railroad Costing System (URCS) average regional costs as opposed to requiring non-Class I

railroads to adopt reporting practices currently required of Class I carriers only. Comments in support of the URCS average regional cost methodology were filed by the Association of American Railroads (AAR), the Duluth Missabe and Iron Range Railway Company (DM&IR) and Bessemer & Lake Erie Railroad Company (B&LE), RailAmerica, Inc., Transtar, Inc. and the US Department of Transportation.

DM&IR and B&LE Recommendations for Rate Case Threshold

DM&IR is not a member of ASLRRRA, but its sister railroad, B&LE is a member. DM&IR, is the only non-Class I railroad to recently experience a rate case under the specter of directed compliance with Class I reporting methods. As such, its advice should be carefully weighed as this process continues. In encouraging the Board to require a threshold for initiating a proceeding against a Non-Class I carrier, DM&IR states, "Without such a proffer, rate proceedings could impose prohibitive ... costs on non-Class I carriers, even if the Board adopts the use of regional URCS costs... If shippers are allowed to pursue discovery regarding specific costs before demonstrating that the rate is of questionable legality, they could impose enormous discovery burdens... [and] ... could force the non-Class Is to make concessions in rate negotiations." Comments of DM&IR and B&LE, Ex Parte No. 589, July 1, 2002, 5-7.

After reaffirming the use of URCS average regional cost data, the Board should weigh the advice of DM&IR and B&LE carefully in order to ensure that those cases with merit remain the focus of the Board. This would minimize the ability of a challenging party to use the threat of a rate case, especially when unjustified, in order to create negotiating leverage, thereby distorting the market. Thoughtful consideration by the Board prior to intervention in a rate case would protect the undisputed right of parties to challenge illegal rates before the Board, while at the same time protecting the marketplace from undue distortions.

Transtar Comments Encourage “Identifiable, Cheap and Expeditious” Adjustments

In its institution of this proceeding, the Board welcomed “suggestions on how the URCS costs of such carriers can practically be adjusted to better reflect the operations of non-Class I railroads.” STB Decision, Ex Parte No. 589, April 30, 2002, 7.

ASLRRRA, in its original comments stated, “ASLRRRA believes the better way to frame the issue is if there is a demonstrable need for such adjustments.” Comments of ASLRRRA, Ex Parte No. 589, July 1, 2002, 2. If adjustments are deemed necessary after careful consideration of the potential costs to both sides of such adjustments, then the Board should heed the advice of Transtar, Inc., the parent company of DM&IR at the time of the Minnesota Power proceeding.

In its comments, Transtar stated, “we believe that the methodology for adjusting [URCS regional data] to more closely approximate the operations of Non-Class I rail carriers becomes more problematic ... [A]djustment of such data... requires some sort of identifiable mechanism that can be employed cheaply and expeditiously.” Comments of Transtar, Inc., Ex Parte No. 589, July 1, 2002, 5.

ASLRRRA agrees that any mechanism, if such an adjustment mechanism is deemed necessary, must maintain the goal of protecting small railroads from a crushing data collection burden, while at the same time preserving the statutory rights of challenging parties to utilize the Board review process. Any such mechanism should be “identifiable”, and capable of being “employed cheaply and expeditiously”. The ground rules for such adjustments must strive to not only prevent burdensome reporting before a rate case, but also prevent “gaming of the system” and disproportionate litigation costs after a case has begun. The ground rules must be clear, or some cases may become so costly that they threaten the survival of a non-Class I carrier, or indirectly threaten it by distorting the market and negotiation process in favor of the challenging party.

WCTL Alternative

The Western Coal Traffic League (“WCTL”) has submitted an alternate proposal for variable cost calculation, suggesting that the Board “require a shipper to set forth in its complaint ... whether the shipper will present its cost evidence using regional costs (adjusted only by carrier-specific traffic and operating data) or whether it will present carrier-specific unit costs... [I]f a shipper states it will present carrier-specific unit costs, the Board should issue ... an order similar to the order accompanying the Minnesota Power Decision.” Comments of Western Coal Traffic League, Ex Parte No. 589, July 1, 2002, 7.

Such an alternative would create a bifurcated analysis process that would tilt the scales disproportionately in favor of challenging parties. Under this approach it would not be possible, prior to the commencement of a rate case, for a challenging party or the railroad to determine the legality of a specific rate on its face. Non-Class I railroads would ultimately face the burdensome cost of developing railroad specific costs at the sole discretion of the challenging party. Such an alternative would turn the statutory shield of the Board into a sword with which to threaten non-Class I carriers. Likewise, in some cases, the reality of non-Class I variable costs may cut both ways, making regional URCS data more beneficial to a challenging party. In that case the proposed alternative would allow the challenging party to “game the system” to their strategic advantage. Such ambiguities could encourage a proliferation of rate cases against non-Class I carriers that have heretofore been an extremely rare occurrence.

The Board should reject the WCTL alternative and adopt a uniform standard using Class I URCS average regional cost data in determining the relationship between rates and variable costs.

Conclusion

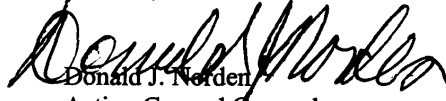
In conclusion, the Board should give careful consideration to those comments filed in support of using Class I URCS average regional costs in rate cases involving Class II and

III railroads. ASLRRA agrees that the use of regional average URCS data is a better option for all parties involved. It will provide an accessible standard by which the legality of a rate may be judged by challenging parties and non-Class I railroads alike. Such a standard will minimize delay and eliminate the burden of obtaining specific railroad cost data at a level comparable to that required of Class I railroads. While this solution may not be perfect, the Board and its predecessor agency have stated repeatedly their intention to not allow "the infeasible perfect to oust the feasible good." Decision at 6, citing Pennsylvania v. ICC, 535 F.2d 91, 96 (D.C. Cir.), cert. denied, 429 U.S. 834 (1976).

In meeting this stated goal of preserving the "feasible good" it is important that the Board reject ambiguous and lopsided standards such as those advocated by WCTL.

ASLRRA believes the Board should also give careful consideration to the recommendations of DM&IR, B&LE and Transtar, Inc. These parties have first-hand knowledge of the advantages and disadvantages of the proposed methodology. Their recommendations summarized above could help avoid costly discovery and litigation expenses and market distortions in future rate cases before the Board.

Sincerely,



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