

206385

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN

TELEPHONE:
(202) 347-7170

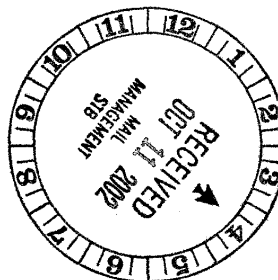
FAX:
(202) 347-3619

WRITER'S E-MAIL:
kjd@sloverandloftus.com

October 11, 2002

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001



Re: STB Ex Parte No. 638, Procedures To Expedite Resolution
Of Rail Rate Challenges To Be Considered Under The
Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and 10 copies of the Opening Comments Of The Western Coal Traffic League. Additionally, please find 3 WordPerfect Disketts, containing the filing in electronic form.

An extra copy of the Comments also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
an Attorney for
Western Coal Traffic League

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Office of Proceedings

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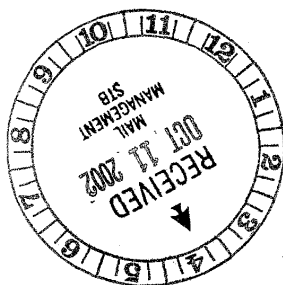
KJD:dmb
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

STB Ex Parte No. 638

OPENING COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE



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OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, D.C. 20036

**William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170**

Attorneys for the Western Coal Traffic League

Dated: October 11, 2002

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

The Western Coal Traffic League (“WCTL”) submits these Comments in response to the Board’s Decision served September 4, 2002 in the captioned proceeding. In the Decision, the Board proposed amendments to its regulations at 49 C.F.R. Parts 1109 and 1114 to effect three changes in the procedures governing the adjudication of rail rate disputes under the stand-alone cost (SAC) constraint of the Constrained Market Pricing (CMP) methodology that was first adopted in Coal Rate Guidelines – Nationwide, 1 I.C.C. 2d 520 (1985), aff’d. sub nom., Consolidated Rail Corporation v. United States, 812 F. 2d 1444 (3d Cir. 1987), and since has been applied and refined in a number of maximum reasonable rate proceedings initiated under 49 U.S.C. §§ 10701 and 10704. Almost all of these cases examined the reasonableness of rates established for the transportation of coal to electric utilities.

The changes proposed in the Decision are:

1. The introduction of a requirement that shippers intending to seek rate relief from the Board under the SAC test must participate in non-binding mediation with the prospective defendant(s) before filing a formal complaint under 49 U.S.C. § 11701.
2. The adoption of a new standard for the discovery of relevant information, documents, and data applicable only to parties to proceedings handled under the SAC test, which would allow discovery only where the proponent showed “a clear, demonstrable need for information” that was not “readily available to that party through other means.” See Decision at 4.
3. The adoption of a new procedure for the resolution of motions to compel discovery that would lead to summary rulings on such motions within ten (10) days after replies thereto were filed, and would allow Board staff to convene a conference of the parties to attempt to narrow the issues presented and gather further information to assist in their resolution. Id. at 5.

The text of the specific regulations being proposed are set forth in the Appendix to the Decision. If adopted, the mediation requirement would be codified at 49 C.F.R. Part 1109, et seq.

I.

IDENTITY AND INTEREST

WCTL is a voluntary association of entities responsible for the purchase and transportation of coal mined from sources west of the Mississippi River.¹ In the aggregate, WCTL members arrange and pay for the transportation of over 100 million tons of coal annually, nearly all of which moves by rail. WCTL has been an active participant before the Board and its predecessor in many proceedings related to matters of general transportation importance, and in every proceeding of significance that has addressed the procedural or substantive rules applied by the Board in adjudicating complaints challenging the reasonableness of rates assessed on traffic subject to railroad market dominance. In 1997, WCTL participated in Ex Parte No. 560,² the Board proceeding that led to adoption of the voluntary arbitration rules promulgated at 49 C.F.R. Part 1108. More recently, WCTL filed comments in Ex Parte No. 586, Arbitration -- Various Matters Relating To Its Use As An Effective Means Of Resolving Disputes That Are Subject To The Board's Jurisdiction.

Several WCTL members are and have been complainants in maximum reasonable rate proceedings brought under the Coal Rate Guidelines and evaluated under the SAC constraint. In virtually all such cases, discovery disputes of one sort or another have arisen, often

¹WCTL members include: Alliant Energy; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Central Louisiana Electric Company, Inc.; City of Austin, Texas; City Public Service Board of San Antonio; Kansas City Power & Light Company; Lower Colorado River Authority; Mid American Energy Company; Minnesota Power; Nebraska Public Power District; Northern States Power; Omaha Public Power District; Reliant Energy; Texas Municipal Power Agency; Western Resources, Inc.; and Wisconsin Public Service Corporation.

²Ex Parte No. 560, Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board.

necessitating the submission of motions to compel by both sides. Additionally, as entities that routinely enter into and administer commercial contracts in the ordinary course of their business, WCTL members have extensive experience with mediation and other forms of alternative dispute resolution. WCTL members have a direct interest in the matters that are the subject of the September 4 Decision, and in promoting the fair and expeditious resolution of rail rate disputes that are brought before the Board through the complaint process.

II.

SUMMARY OF POSITION

WCTL shares the concern expressed by the Board over the pace of proceedings under the Coal Rate Guidelines, and endorses the goal of rendering fair and complete decisions as expeditiously as practicable. However, expedition need not and should not be purchased at the price of an erosion of parties' due process rights, or a biasing of the rail rate regulatory process in favor of one constituency over another. Any procedural modifications that are adopted must be even-handed in their application and consequence, and strictly avoid the risk of inadvertently exacerbating the very problems they are intended to address. WCTL's positions with respect to the three proposals included in the Decision are informed by these criteria.

WCTL supports the concept of pre-complaint mediation, so long as the mediation is focused on an actual dispute that falls within the Board's jurisdiction, the process itself is relatively inexpensive and not unduly burdensome, and the exercise cannot be exploited as a vehicle for added delay. Consistent with these conditions, the Board should refine its mediation proposal to (1) clarify that a shipper will not be required to participate in mediation if the

defendant rail carrier refuses to establish a common carrier rate for the subject traffic promptly upon request by the shipper, made not more than five months before shipments under the rate are scheduled to begin; (2) confirm that the proceeding itself and all information exchanged between the parties shall be confidential, and may not be used against the producing party in any subsequent litigation; (3) clarify that no party may be required by a mediator to produce evidence or data supporting its position in a specific format; and (4) prescribe that the 60-day mediation period may only be extended by agreement of all parties, and may be shortened by the mediator if he or she finds that the parties are at impasse.

WCTL opposes any change in the standard for discovery set forth in 49 C.F.R. Part 1114.21 as unnecessary, potentially prejudicial, and counter-productive. The principal cause of discovery-related procedural delays revealed by the recent record -- the long periods of time that elapse between the filing of motions to compel and Board rulings -- will be remedied effectively by the Board's third proposal, which WCTL supports. A rule restricting discovery to information for which a party "has a clear, demonstrable need in order to make its case" will afford railroad defendants (who already have powerful incentives to try to limit the information and data available to complaining shippers) a new opportunity to obstruct access to relevant evidence, with the end result being more, not fewer, motions to compel. Such a rule also puts the cart before the horse, as frequent changes in the railroads' internal record-keeping systems can make it very difficult for a shipper to articulate specifically how otherwise relevant data will be used in its evidentiary presentation before it has seen and analyzed the data. In lieu of a change in the standard for discovery, WCTL urges the Board to modify its procedural rules to include staff participation in the initial conference of parties, to facilitate the development of discovery plans

with firm deadlines that will better ensure the actual completion of discovery within the 75-day period prescribed by 49 C.F.R. Part 1111.8.

Finally, WCTL endorses the Board's proposal concerning expedited rulings on discovery motions (Decision at 5), with certain modest but important clarifications. First, there must be a prohibition against ex parte communications between parties and staff, and a conference should be mandatory if requested by the movant. If a staff conference is convened, any requests for or offers of information not already on the record must be made in the presence of both parties, and any such information should be provided to Board staff and the opposing party within one business day after the conference, to allow the opposing party an opportunity to respond. Second, so that rulings might serve as precedential guides for future disputes and thereby reduce the number of motions and appeals to the Board, "summary rulings" issued by the staff should contain sufficient detail to allow discernment of the reason(s) why particular data, documents or interrogatory answers were or were not deemed properly discoverable. At a minimum, the ruling should include a synopsis of the substance of the request(s) at issue, and a cogent statement of the basis for its disposition.

WCTL's positions as summarized above are explained in detail in the next Part.

III.

DISCUSSION

A. **SUBJECT TO CERTAIN MODIFICATIONS, WCTL SUPPORTS THE BOARD'S MEDIATION PROPOSAL**

In its Decision, the Board expresses optimism that pre-complaint mediation could help facilitate the settlement of rate disputes before formal proceedings begin. Decision at 3. Moreover, “[e]ven if the parties were unable to fully resolve the dispute..., they might be able to narrow the issues in dispute, and reach stipulations that they would incorporate into any subsequent adjudication before the Board.” *Id.* On the basis of these aspirations, the Board proposes to mandate a 60-day non-binding mediation period as a prerequisite to the filing of an actual rate complaint.

WCTL members have serious doubts about the prospect that Board-ordered mediation will lead to settlements of coal rate disputes that otherwise would not have been reached through private negotiation. The experiences of WCTL members that have been parties to complaint proceedings under the Coal Rate Guidelines are that coal shippers and their serving carriers usually negotiate for months trying to reach agreement on rates and service terms in a private, contractual context, before the Board’s jurisdiction is invoked. It is only after those efforts are exhausted and the parties are at impasse that the shipper undertakes the monumental burden and extraordinary cost associated with prosecuting a case under the SAC constraint. *See, e.g.,* Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Railway Company. Expensive, protracted rate litigation is never a shipper’s preferred course of

action. Occasional railroad rhetoric notwithstanding, rate cases represent the failure of extensive negotiations, not a tactic in the negotiation process.

While WCTL is skeptical that adding another 60 days (albeit under ALJ auspices) to what already will have been a months-long process might lead to more outright settlements of rate disputes, it nonetheless supports the mediation proposal as a promising catalyst for stipulations that might reduce the number of issues that must be litigated. On matters such as the presence of railroad market dominance or other discrete issues, structured mediation might lead parties to acknowledge sufficient similarities in their respective positions to allow them to reach agreement and remove the issues from contention. Based on these prospects, WCTL is prepared to support the Board's mediation proposal in principle. In three specific respects, however, WCTL submits that the proposal must be modified to ensure that it serves the purposes espoused by the Board in its Decision, and does not itself become a vehicle for procedural abuse and delay.

**1. Mediation Must Focus on a Dispute
Subject to The Board's Jurisdiction**

The Board's proposal specifies that a shipper's request for mediation "would engage Board processes and serve to fix the relevant limitations period for any relief...." Decision at 3. Clearly, the proposal assumes that the subject of the mediation will be a dispute that falls within the Board's statutory jurisdiction; that is, a dispute over the reasonableness of a common carrier rate.

Where the movement in contention between the parties is a new common carrier movement or an established move that has been taking place under a tariff or other public pricing

document, the Board's jurisdiction already will be established at the time the shipper determines that it has no recourse but to invoke the agency's authority to set a maximum rate. Under these circumstances, the new mediation requirement will add a fixed, 60-day period to the standard 16-month timetable that otherwise would apply to adjudication of the shipper's complaint, and particularly if the modification described in A.3, infra, is adopted, the shipper can be assured that its access to the Board will not be delayed further absent its consent.

A very different situation could arise, however, in the case of shippers who previously moved their coal under contract, and were compelled to resort to the Board following unsuccessful efforts to negotiate new or extended contracts with their serving carriers. See, e.g., Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Company; West Texas Utilities Company v. Burlington Northern Railroad Company, 1 S.T.B. 678 (1996), aff'd. sub nom., Burlington Northern Railroad Company v. Surface Transportation Board, 114 F.3d 206 (D.C. Cir. 1997). It is well-established that the Board has no jurisdiction over matters and disputes that arise under contracts,³ and the Board properly has deferred to private negotiations over contract rates and service terms. Cf. F.D. No. 33467, FMC Wyoming Corporation v. Union Pacific Railroad Company, Decision served December 16, 1997. When contract negotiations fail, however, the shipper first must secure a common carrier rate before approaching the Board for prescriptive relief, a process which itself often is very contentious. See, e.g., Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Decision served August 20, 2002.

³See F.D. No. 33582, Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company, Decision served October 27, 1998 at 3; Docket No. 41510, H.B. Fuller Company v. Southern Pacific Transportation Company, Decision served August 27, 1997 at 2-3.

It is not uncommon for post-contract common carrier rates to be significantly -- if not punitively -- higher than those under the expiring contract, at least until the Board orders them reduced under 49 U.S.C. §10704. See, e.g., Duke Energy Corp., supra. The availability of reparations notwithstanding, shippers in these circumstances have a legitimate interest in minimizing the amount of time that they must be subject to these often exorbitant increases, by having the formal complaint proceeding commence prior to or commensurate with the start of common carrier shipments.⁴ If that proceeding cannot begin until 60 days after a request for mediation that itself cannot be made until a rate subject to the Board's jurisdiction is established, a significant and plainly unfair risk arises that a railroad defendant could force the shipper to absorb a greater financial penalty for contemplating a rate action by resisting the shipper's request for a common carrier rate until the last possible moment. Such a scenario also would undermine the mediation process, as the shipper would have an economic incentive to look for an early impasse rather than negotiate for the full 60-day period.

To address this risk, WCTL proposes that the Board modify its mediation rule to provide that a shipper intending to challenge a new (i.e., previously unused or not established) common carrier rate will not be required to request or participate in mediation if its serving carrier failed or refused to promptly honor a request for the establishment of such a rate. WCTL recognizes that there must be an outside limit on the timing of such a request,⁵ and proposes that

⁴See generally, Docket No. 41191, West Texas Utilities Company v. Burlington Northern Railroad Company, Decision served October 14, 1994 at 6.

⁵See Burlington Northern Railroad Company v. Surface Transportation Board, 75 F.3d 685 (D.C. Cir. 1996)(finding that the Board lacked authority to compel the establishment of a common carrier rate over a year in advance of the anticipated start of shipments).

the Board set it at not more than five (5) months prior to the date that common carrier shipments are expected to begin. The Board has acknowledged that a shipper is entitled to a rate reasonably in advance of the start of shipments. See FMC Wyoming, supra at 3, n.7. A five (5) month limit would allow the shipper and carrier an opportunity to negotiate privately over the rate before the shipper formally filed a notice of intent to challenge it, which should facilitate some agreements that could obviate the need for resort to the Board altogether. It also would allow time for the mediation itself, so that a formal complaint (if any) could be filed at approximately the same time that common carrier service begins. WCTL's proposal is consistent with the spirit of the September 4 Decision, and would not prejudice the legitimate rights of either carriers or shippers.⁶ It should be made a part of any final pre-complaint mediation rule.

**2. The Mediation Process Must Be Inexpensive
And Not Unduly Burdensome**

As the Board observed in its Decision, the principal attraction of mediation is that it can serve as "a more efficient means of moving a rate dispute toward quick resolution at an early stage...." Decision at 2. As a practical matter, however, because mediation is non-binding and depends for its success on agreement between antagonists, an atmosphere conducive to frank and open exchange is essential. WCTL believes that such an atmosphere must be characterized by assurances of confidentiality, and flexible and inexpensive procedures. These elements are reflected briefly in the Board's proposal. See Decision at 3. If the Board ultimately decides to adopt the mediation requirement, each should be further clarified and reinforced.

⁶The request still would have to conform with the Board's regulations governing the establishment of common carrier rates. See 49 C.F.R. Part 1300.

First, the Board should adopt a general rule that all information exchanged by the parties during the course of mediation that is not already publicly available will be considered confidential, and may not be disclosed or used for any purpose other than the mediation itself. A necessary corollary of this rule is that neither party should be permitted to raise or comment on the other party's conduct during mediation in subsequent evidentiary presentations. If the parties subsequently end up in litigation before the Board, information that is otherwise relevant and discoverable would not be protected from discovery simply because it was used by a party in mediation. However, the fact that certain information or documents are exchanged during mediation would not, in and of itself, make such information or documents relevant for purposes of litigation discovery.

Second, the Board should clarify that parties to the mediation shall retain complete flexibility with respect to the manner in which they present and/or support their respective positions. The mediator should not be empowered to require parties to submit particular evidence or information, or to present it in any particular format; e.g., the format required by the Board for stand-alone cost presentations in major cases under the Coal Rate Guidelines. Properly designed, the mediation procedure must be inexpensive and conducive to an open exchange between erstwhile adversaries. It should not afford any party the opportunity to force another to offer a preview of the case that it would present should formal proceedings before the Board be initiated, or to absorb the burden of complex and costly evidentiary showings.

**3. The 60-Day Mediation Period Should Only Be
Extended With the Consent of All Parties**

In the Decision, the Board proposes a 60-day standard timeline for the conduct of mediation. However, the Board goes on to suggest that “a request for an extension could be filed by the mediator, after consultation with the parties,... and could be considered by the Board.”

Decision at 3-4. As discussed supra, WCTL does not oppose a 60-day pre-complaint mediation period, subject to certain conditions. However, the final version of proposed new 49 C.F.R. Part 1109.4(f) should provide that this period can only be extended by agreement of all parties.

For coal shippers and other parties to have full faith in the mediation process, it must be clear that their opponent(s) cannot exploit the process as a vehicle for delay. If parties approaching the end of the 60-day period in fact are making progress toward a negotiated resolution of some or all of the issues in dispute between them, both should and in all likelihood would readily agree to extend the period as necessary to attempt a successful closure. An objection to an extension, however, would reflect the objecting party’s conclusion that the mediation had not been successful (or had succeeded only to the extent of agreements already reached), and that formal recourse to the Board was now necessary. If in such a circumstance a mediator nonetheless was empowered to request--or the Board disposed to grant--an extension of the mediation period, the objecting party would be forced against its will to “participate” in further negotiations that it already had determined would be useless. The only consequence of such a result would be delay in the initiation of the rate proceeding which that party viewed as its only recourse.

As the Board is aware and has acknowledged, captive coal shippers seeking agency redress for what they consider to be unreasonably high rail rates are seriously concerned about various tactics employed by railroad defendants to drag out proceedings and delay the final adjudication of their complaints. See Decision at 2, n. 3. In adopting a mediation rule intended to facilitate the resolution of disputes before Board intervention is invoked, care should be taken to ensure that it cannot be misused to cause unwarranted delay in the start of formal proceedings, once it is clear that such a pre-emptive resolution will not occur. A stipulation that the 60-day mediation period only can be extended with the agreement of all parties will accomplish this.

WCTL also respectfully submits that a mediator should be empowered to terminate the process before the 60-day period has run, if he or she concludes that the parties have reached impasse. Again, the Board's stated purpose in adopting mediation as a prerequisite to proceeding with a formal complaint is to "allow shippers and railroads to settle rate disputes--in whole or in part--in a more flexible, less costly, less time-consuming, and less confrontational environment." Decision at 2-3. No doubt there will be cases where this laudable purpose in fact will be served. At the same time, however, there also will be instances in which it will be clear early on that the gaps between the antagonists' positions are simply too wide to bridge in mediator-supervised negotiations.⁷ In such a case, forcing the shipper to wait the full 60 days before filing its complaint would serve no useful purpose and would lead to meaningless delay. Consistent with

⁷As noted supra, the filing of a rail coal rate complaint normally is preceded by months of unsuccessful negotiation between shipper and carrier(s). While WCTL does not object to a requirement that mediation be invoke as a precursor to the filing of a formal complaint, if it is readily apparent that the parties already have exhausted all meaningful avenues for settlement, there is no point in requiring them and the mediator to waste another two months before the shipper can move to the inevitable last resort.

the Board's commitment to expedition, under those circumstances the mediator should be authorized to declare impasse and terminate the process.

**B. THE BOARD'S PROPOSED CHANGE IN THE
DISCOVERY STANDARD FOR SAC CASES
IS UNNECESSARY AND COUNTER-
PRODUCTIVE, AND SHOULD NOT BE ADOPTED**

Premised on its concern that discovery not be "used for the sake of delay or harassment" or become "unduly burdensome and overwhelming the process,"⁸ the Board proposes to adopt a new, stricter standard for discovery that would apply only in major cases brought under CMP. In lieu of the standard set out in 49 CFR Part 1114.21,⁹ which entitles a party to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding," the Board proposes that "the party seeking discovery would have to have a clear, demonstrable need for the information in order to make its case, and the information would have to be such that it would not be readily available to the party through other means." Decision at 4.

WCTL submits that a discriminatory change in the discovery standard -- the burden of which overwhelmingly would fall on shippers¹⁰-- is not necessary to ameliorate perceived problems of harassment or delay. The Board's third proposal regarding summary rulings on

⁸Decision at 4.

⁹This was the discovery rule in effect at the time of adoption of the Coal Rate Guidelines, wherein the Board's predecessor noted that "[w]e recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them." 1 I.C.C. 2d at 548.

¹⁰As the Board recognizes, railroad defendants in coal rate litigation in most cases have little legitimate need for discovery. See Decision at 4.

motions to compel, which WCTL fully supports and is discussed infra, will be far more effective in that regard. Furthermore, there is a very real risk that adoption of a more restrictive standard will be counter-productive, as it would lead to more -- not fewer -- discovery disputes and motions to compel. WCTL therefore urges the Board not to adopt the proposed new 49 C.F.R. Part 1114.21(b).

Over the past several years, the matters at issue in contended motions to compel discovery in coal rate cases¹¹ have tended to fall into two distinct categories. The first concerns data and documents -- such as computerized traffic tapes and roadway investment and maintenance records -- that the Board and its predecessor repeatedly have ruled are properly subject to discovery. See, e.g., Arizona Electric, supra, Decision served September 11, 2002 at 5-6; Docket No. 42059, Northern States Power Company Minnesota d/b/a Xcel Energy v. Union Pacific Railroad Company, Decision served May 24, 2002 at 4-5. In these cases, discovery disputes spring from the railroads' refusal to accept and abide by prior agency precedents, not over-reaching on the part of complaining coal shippers. If a problem exists here from a litigation management perspective, the needed cure is a clear affirmation by the Board that it will adhere to its prior rulings and precedents and expects parties to do the same, not a change in the standard for discovery.

The second category encompasses data requests and carrier responses that arise more specifically from the peculiar facts and circumstances of a particular rail rate dispute. Here, the Board is called upon to referee a contest between a shipper's claims of relevance and need and

¹¹As noted infra, shipper requests for orders compelling the production of confidential coal transportation contracts often are not seriously resisted by railroad defendants.

a carrier's objection based on burden or overbreadth. In balancing these interests and ruling on motions to compel under the existing standard, however, the Board has considered the same principles of demonstrated need and availability that it now proposes to write into a new, more restrictive rule. Thus, the Board has held that "[e]ven under our liberal discovery rules, a party seeking discovery must demonstrate the need for the material it seeks." Arizona Electric, supra, Decision served December 31, 2001 at 7; Texas Municipal Power Agency, supra, Decision served February 9, 2001 at 8.¹² Indeed, the principle that considerations of need and alternative availability would temper claims under the general relevance standard was recognized in the original Coal Rate Guidelines decision:

[A] shipper seeking discovery must state with particularity the nature and substance of the charges it seeks to prove, as well as the basis for its belief in those charges. In other words, it must demonstrate a real practical need for...and reflect the least intrusive means of obtaining the information.

1 I.C.C. 2d at 548. A new regulatory standard is not needed to allow the Board to continue to apply criteria that it has been applying in practice for nearly twenty (20) years.¹³

Not only is a new, more restrictive discovery standard unnecessary, it is potentially counter-productive. It is an obvious fact of rail rate litigation life that carrier defendants stand to benefit from limiting the nature and scope of their internal records that must be produced to

¹²See also, Docket No. 42072, Carolina Power Light Co. v. Norfolk Southern Railway Co., Decision served August 26, 2002 at 3-4 ("It is unnecessary to require one party to provide information to which the other party already has access.")

¹³As noted supra, a more restrictive discovery rule is not needed to reduce motions-related delay. The Board's proposal for expedited rulings on such motions will accomplish that goal.

complainant shippers. If the Board adopts its proposed new standard, railroads most certainly will seize upon it as a new weapon in their defense of unreasonable captive coal rates, and objections based on a “failure to show a clear, demonstrable need for the information” will become routine. Given that such a charge could be made based on nothing more than a railroad’s subjective reading of a shipper’s discovery request,¹⁴ the result is likely to be a proliferation of motions to compel, not a reduction in their number or frequency.

For the reasons summarized above, the Board should not change the discovery standard for SAC cases currently set out in 49 C.F.R. Part 1114.21. Indeed, it should re-affirm its intention to apply it properly, particularly to excessive railroad demands for information that they can easily obtain independent of discovery. See Duke Energy Corp., supra, Decision served July 26, 2002 at 8.

Instead of a prejudicial modification of the substantive standard for discovery, WCTL recommends that the Board adopt a procedural reform that would reduce the number of discovery disputes and associated delays without jeopardizing any party’s ability to properly present its case. Specifically, the rule mandating a conference of parties (49 C.F.R. Part 1111.10) should be amended to include STB staff participation in the conference, for the purpose of facilitating development of a discovery plan with firm deadlines that provide for the actual completion of discovery within the 75-day period set by 49 C.F.R. Part 1111.8.

In a typical proceeding brought under CMP and the Coal Rate Guidelines, the complainant serves its discovery requests contemporaneous with or immediately following service

¹⁴Before-the-fact explanations of just how particular data will be used in a complainant’s evidentiary submissions are not only unprecedented, they well may be impossible in some cases, due to ongoing changes in rail carriers’ internal accounting and recordkeeping practices.

of the complaint itself. The requests (usually interrogatories and document production requests) generally seek answers and responsive documents in thirty (30) days, which is reasonable given the 75-day discovery period that is supposed to apply to stand-alone cost cases. All too often, however, the railroad defendant(s) only provide answers and objections within the timeframe set by the requests; actual production of documents, data, and other relevant and responsive materials frequently does not occur until the end of the discovery period, on or near the 75th day after service of the complaint. If, as usually is the case, the defendant's production is incomplete, the complainant faces a Hobson's choice of either proceeding on schedule without discovery to which it clearly is entitled, or suffering delay through motions practice or the suspension of the case schedule pending completion of discovery.¹⁵

WCTL submits that this very real and very soluble problem -- which leads directly to the types of delays that are of concern to the Board and Congress -- should be addressed by a requirement that parties include a member of the STB staff in their initial conference. The staff member's role would be to facilitate development of a discovery plan that would require the production of requested documents and data on a timetable that left room for the filing and disposition of any necessary motions to compel prior to the close of the 75-day discovery period.¹⁶ This reform, which affects only procedure and would be even-handed in application, not only would ameliorate a leading cause of scheduling delays in cases brought under CMP, but should

¹⁵See, e.g., Docket No. 42057, Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co., Decision served October 9, 2002.

¹⁶This rule would work in tandem with the Board's proposal (discussed infra) to resolve such motions by summary rulings within ten (10) days after replies are filed, a proposal which WCTL supports.

reduce the number of discovery motions before the Board by encouraging the identification of potential disputes before they mature.

C. WITH MINOR MODIFICATIONS TO PROTECT DUE PROCESS RIGHTS AND REDUCE THE NUMBER OF DISPUTES, THE BOARD'S PROPOSED PROCEDURES FOR MOTIONS TO COMPEL SHOULD BE ADOPTED

As the Board acknowledged in its Decision (at 4) and as history has shown, the relative complexity of major rail coal rate litigation and the often enormous economic value at stake in such cases make disputes over discovery inevitable. Similarly, even where (as often occurs) coal shipper complainants and railroad defendants attempt in good faith to resolve discovery issues through negotiation, or at least narrow the scope of their dispute, resort to the Board for a final decision through a motion to compel is and will remain a regular occurrence.

To be sure, if every railroad defendant responded fully and on a timely basis to all discovery requests without objection, motions practice before the Board would be reduced dramatically. Such a conversion, however, is not realistic. Likewise, as discussed supra, WCTL submits that in terms of reducing discovery-related delays in proceedings under the Coal Rate Guidelines, an effort to reduce the number of motions that come before the Board by changing the rules and standards for discovery will undermine litigants' legitimate rights to meaningful discovery, and most likely still fail in its intended purpose. WCTL believes that the key to mitigating discovery-related procedural delays is effectively managing the time that elapses between the filing of a motion and a ruling on that motion. The Board's third proposal as set out in the September 4 Decision speaks directly to this solution.

WCTL supports the expedited motions resolution procedure described at pages 4-5 of the Decision. Successful establishment of a system where rulings are issued within ten (10) days of the reply pleading not only will reduce procedural delay, but also can offer a pattern of consistent precedent that should help guide litigants in the formulation of discovery requests and responses. In adopting the proposed procedures, however, the Board should make several modifications to better ensure the protection of parties' due process rights, and further advance the goal of eventually reducing the number of discovery disputes that must be brought before the Board.

First, a staff conference should be held automatically if requested by the proponent of a motion to compel. Particularly where there is doubt on the part of the movant concerning the precise form in which sought-for data is kept by the opposing party, a conference should be an available option to aid in clarifying just what records or information would be sufficient to meet the movant's legitimate discovery needs.

Second, the Board should make clear that if its staff convenes a conference and decides to "gather any further information" related to a pending motion, all requests for or offers of such information must be made in the presence of all parties, and any information or data provided by a party to the staff also must be provided contemporaneously to the other parties. Such a rule is needed in order to prevent any improper ex parte communications (whether intentional or inadvertent), and to ensure that all parties have access to and a reasonable opportunity to address all information submitted and considered in support of or in opposition to a motion to compel. Additionally, since the Board's proposed procedures contemplate a staff ruling within five (5) business days of a conference, any additional information requested or offered

should be submitted and served within one (1) day after the conference, so that the other party(is) can have a fair opportunity to review and, if necessary, respond to the new material.

WCTL's third proposed modification concerns the "summary rulings" that would be issued by Board staff. With due respect for the time constraints that would influence such rulings, the larger cause of fewer future discovery motions and Board appeals would be served if the rulings included sufficiently detailed explanations to allow parties to discern the reasons why particular information, documents, data, interrogatory answers, etc. were or were not ordered produced. Over time, a series of consistent rulings can give parties precedential guidance as to how particular disputes are likely to be resolved, which in turn should reduce the number of disputes that are formally presented to the Board. For this deterrent to be effective, however, the rulings must contain enough explanation to allow a reader to apply them in the future to different fact patterns.

A separate class of disputes that would not require this treatment are those related to the production of transportation and other admittedly relevant contracts that contain confidentiality clauses limiting their disclosure. In these cases, motions to compel are not occasioned by railroad opposition to production so much as by the need for a Board order to permit production under the terms of the contract. Indeed, the railroads themselves often do not even resist such a motion to compel on the merits. See, e.g., Arizona Electric, supra, Decision served August 20, 2002.

WCTL recommends that in the case of an unopposed motion for production of a contract that is subject to a confidentiality clause, a summary ruling granting the relief can and should be issued without a staff conference. Moreover, if the railroad itself does not oppose the

motion, it should not be made responsible for the filing fee as the "losing party." See Decision at

5. As an alternative, WCTL proposes that the Board modify its standard protective order form and accompanying ruling to include an order directing the production of all contracts that would be discoverable without formal Board action, but for the requirements of confidentiality or disclosure clauses in the contracts themselves. Such an innovation would eliminate the need for motions to compel entirely, saving time and resources for the Board, its staff and litigating parties.

Finally, the new regulation should provide that a summary ruling that is not specifically reversed by the Board within thirty (30) days automatically becomes a final order of the Board without further administrative action. If summary rulings are routinely appealed and the Board is required to issue formal decisions in response to each one, the expedition that the process is intended to promote will be compromised. With a finality rule such as that proposed by WCTL, an appeal that the Board finds unpersuasive effectively can be disposed of without a further expenditure of agency time and resources. Likewise, over time parties would be encouraged to be more selective in taking appeals from staff rulings, challenging only those that raise bona fide issues of material factual or legal error.

IV.

CONCLUSION

For all the reasons explained in these Comments, WCTL supports the Board's September 4 proposals to adopt mandatory, non-binding mediation of coal rate disputes and certain procedural reforms in connection with the consideration of motions to compel discovery, subject to the conditions, clarifications and modifications discussed herein. The proposed change

in the governing standard for discovery in SAC cases under the Coal Rate Guidelines (Decision at 4), however, is unnecessary, would be prejudicial and counter-productive, and should not be adopted.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

By: William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd 
Christopher A. Mills
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, D.C. 20036

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Attorneys & Practitioners