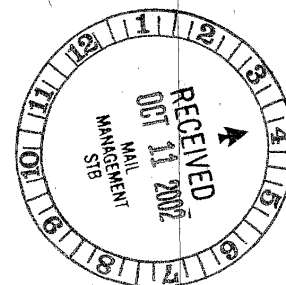


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 638

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

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COMMENTS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: October 11, 2002

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League" or "NITL"), by and through its attorneys, hereby submits its comments in STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered under the Stand-Alone Cost Methodology*, decision served September 4, 2002, modified September 12, 2002.

At the outset, NITL commends the Board for its recognition of existing problems in the resolution of rail rate challenges considered under the stand-alone cost ("SAC") methodology. NITL believes that the Board has proposed a number of workable modifications to its regulations that may ameliorate issues that cause or contribute to delayed resolution of SAC proceedings. First, NITL supports the Board's proposals for mandatory mediation of rail rate cases. The Board's proposal for mandatory mediation appears to provide flexible, expeditious, and cost-effective procedures for attempting to resolve abuses of rail market power before a formal complaint is filed.

Second, the League believes that the procedural changes proposed by the Board to resolve discovery disputes in SAC proceedings are very worthwhile, and should be adopted. The Board is clearly on the “right track” in proposing such procedural improvements as expedited replies to motions to compel; the use of informal conferences to resolve issues; and summary rulings by the Secretary with an appeal to the Board. Indeed, the League believes that the Board should also implement rules to require expedited filings of any appeals from a ruling by the Secretary and expedited decisions on any appeal to the Board.

On the other hand, the League does not believe that the Board should adopt its proposed modifications to the substantive standard governing discovery in SAC proceedings, by eschewing the “relevance” standard in favor of a new standard that would only permit a party to obtain discovery of information for which the party seeking discovery has a “clear, demonstrable need” in order to make its case and which is “not readily available” to it through means other than discovery. The League believes that the proposed standard does not recognize the varieties and subtleties of discovery necessary in SAC cases brought before the Board; will create substantial uncertainty and additional litigation as to the proper scope of discovery; and in fact is likely to lead to more, rather than fewer, discovery disputes, in direct contradiction to the goal of the Board to simplify and expedite rail rate proceedings.

Finally, as set forth in the League’s comments in Ex Parte 542 (Sub-No. 4), the League does not oppose the proposed “fee-shifting” arrangement with respect to motions to compel, under which a losing party would bear the responsibility for the filing fee. However, the League believes that the proposed fee-shifting arrangement is not likely to deter the filing of unwarranted discovery responses and/or motions to compel. Moreover, given the fact that a single motion to compel may encompass a variety of discovery issues, and that decisions on such motions will frequently be decided in favor of the complainant shipper on some issues and the defendant railroad on others, the Board should consider whether the proposed fee-shifting arrangement may prove to be more complex than it appears and more trouble than it is worth.

I. IDENTITY AND INTEREST OF THE LEAGUE

The National Industrial Transportation League is an association of companies that conduct industrial and/or commercial enterprises throughout the United States and internationally, and that are concerned with the transportation of goods in domestic and international commerce. The League has approximately 700 separate company members who are involved with all modes of transportation, including rail transportation. The League's members conduct industrial and commercial enterprises throughout the country and internationally and ship all types of goods. NITL members ship substantial volumes of freight via railroad and regularly employ the major Class I rail carriers. A significant number of League's members have an interest in rate relief made available by law, pursuant to 49 U.S.C. §§ 10701, 10704, and 10707. Accordingly, the League has a direct and immediate interest in this proceeding, which affects the regulatory procedures for bringing a statutory rate complaint under the SAC methodology.

II. NITL'S COMMENTS ON THE BOARD'S PROPOSALS

A. MANDATORY MEDIATION WOULD BE BENEFICIAL TO SAC PROCEEDINGS

As a general matter, the League supports innovative, private-sector resolutions to disputes between shippers and rail carriers. The League believes that the Board's proposal for mandatory mediation prior to the initiation of a rate challenge represents a useful and practical means for attempting to resolve a rate dispute with minimal regulatory intervention.

A number of features of the Board's proposal for mandatory mediation make the measure attractive:

- The Board indicates that it expects to use Administrative Law Judges ("ALJs") from the Federal Energy Regulatory Commission ("FERC"), as it has in the past, to conduct the mediation. See Decision page 3, footnote 7. The League supports such use of FERC ALJs. By selecting such ALJs to serve as mediators and by

providing that compensation for each mediator will be handled by the Board, the Board would ensure that mediation will be impartial.

- By selecting FERC ALJs who are generally familiar the rail and utility industries and conversant with complex economic issues arising in rate matters, the Board would ensure that mediation will be handled competently. Knowledgeable mediators will be able to identify key issues and to work effectively to resolve them.
- By setting internal time frames and by mandating completion of the mediation within 60 days, the Board would ensure that mediation will progress expeditiously. This aspect of the proposed rule will encourage parties genuinely interested in reaching a resolution to participate actively in the proceeding and, at the same time, prevent misuse of the proceeding for the sake of stalling or harassment.
- By leaving mediation procedures to the discretion of the mediator, after consultation with the parties, the Board provides that the mediation would be informal and flexible. This aspect of the proposal is particularly important since the informality of the mediation process is intended to contribute to its effectiveness by removing the parties from the adversarial setting that by its nature defines rail rate proceedings.
- By eschewing formal procedures, the Board would ensure that mediation will not impose significant additional costs upon the parties. The Board should take steps to insure that the costs of any mediation are kept to a minimum.
- Finally, the Board has properly recognized that mediation may be constructive even if it does not resolve all facets of a dispute. The League expects that some

ultimately unsuccessful mediations will produce agreements on a subset of issues that, through the filing of stipulations or otherwise, would narrow the scope of such disputes and perhaps expedite resolutions before the Board.

Although the League perceives many advantages to the Board's proposal for mandatory mediation, it also believes that certain aspects of the proposal warrant more attention.

First, in order to provide informed and effective counseling, the mediator will need certain basic information from the parties about the movement at issue and the source of the dispute. Given that SAC rate complaints often follow protracted negotiations, it may be advantageous also to have each party provide a "transportation and negotiation summary" in narrative form. This would assist the mediator in understanding the parties' perspectives on the negotiation and in recognizing points of consensus and contention. With this information, the mediator could more readily formulate ideas for bringing the parties together.

Second, in the event that mediation stalls before the end of the 60 day period, the mediator should have the ability to declare an impasse that would allow the shipper to bring its complaint to the Board. After a single session with the parties, the mediator might be able to come to the conclusion that the parties are unlikely to settle the issue voluntarily, particularly if they have already engaged in long negotiations before the matter came to the mediator. The power to declare a mediation at an impasse would discourage abuse of the mediation process and prevent a fruitless mediation from becoming an additional obstacle to timely relief.

B. THE BOARD SHOULD ADOPT ITS PROPOSED PROCEDURAL REFORMS FOR PROMPT RESOLUTION OF MOTIONS TO COMPEL IN SAC PROCEEDINGS, AND SHOULD EXTEND SUCH REFORMS TO APPEALS OF INITIAL DECISIONS ON DISCOVERY MOTIONS

In its goal to expedite the processing of SAC cases, the League believes that the Board has properly focused its attention on faster resolution of motions to compel that are filed in SAC proceedings. In recent cases, motions to compel have frequently remained pending for several

months before decision.¹ Indeed, the Board itself notes in its decision that motions to compel “have in the past taken several months to resolve.” Decision, p. 5. Typically, because the information sought is crucial to the movant’s case, particularly on the shipper’s side where the railroad is the sole source of critical data, the time that it has taken to decide such motions brings proceeding to a stand-still and adds significantly to the length of the proceedings. Thus, the League believes that the Board is correct in revising its procedures for handling such motions, and the League supports the Board’s proposal for expedited review via an initial decision by the Secretary. Indeed, the League believes that the Board should go further, and bind itself to an expedited review of any appeal from the Secretary’s decision.

The League believes that the Board’s proposal should break the procedural log-jam caused by the filing of a motion to compel. The League supports the proposed requirement that a reply to a motion to compel be filed within 10 days, rather than the usual 20 days. A motion to compel is by its nature preceded by the refusal of one party to provide information. Moreover, typically before filing a motion to compel, the parties have engaged in substantial discussions about that party’s refusal to provide information. Thus, it is unlikely that a motion to compel will “surprise” a party and necessitate more than 10 days of response time.

The League also strongly supports the proposed requirement that the Secretary issue a summary ruling twenty days after the motion is filed. NITL also believes that the Board’s staff should be permitted to convene an informal conference with the parties to discuss the dispute, to

¹ See, e.g., STB Docket No. 42069, *Duke Energy Corporation v. Norfolk Southern Railway Company*, decision served July 26, 2002 (deciding motion to compel filed March 15, 2002); STB Docket No. 42057, *Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, decision served September 25, 2002 (deciding motion to compel filed March 15, 2002); STB Docket No. 42059, *Northern States Power Co. Minnesota v. Union Pac. R.R.*, decision served May 24, 2002 (deciding motion to compel filed November 9, 2001); STB Docket NO. 42058, *Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co., et al*, served September 11, 2002 (deciding motion to compel filed April 9, 2002); STB Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, decision served February 9, 2001 (deciding motion to compel filed December 1, 2000);

attempt to narrow the issues, and to gather any further information needed to render a decision. The League believes that the parties' informal consultation with STB staff might facilitate a private resolution of the matter and, at minimum, will aid in the Secretary's consideration of the issues.

NITL also concurs with the provision that would preserve a party's right to file an appeal to the entire Board. However, in keeping with the stated intent to expedite the process, NITL believes that the Board should require an appeal to be filed within ten days of the Secretary's summary ruling. A response to the appeal would be due ten days later. The Board, then, should commit itself to ruling on the appeal within fifteen days thereafter. Given that the Board's staff will have examined the issues pursuant to Secretary's decision and, perhaps, received an oral presentation of the parties' positions through informal consultation, the League believes that the Board should be able to resolve the appeal promptly. This would be especially true where the appellant merely repeats arguments made in the initial stage. See also, footnote 3 to these Comments infra.

C. THE BOARD SHOULD NOT ADOPT A MORE RESTRICTIVE DISCOVERY STANDARD

The League commends the Board for recognizing that discovery in SAC cases inordinately generates disputes and causes delay. As noted above, NITL believes that some discovery reform is necessary in order to bring these cases under control. However, NITL believes that the Board is not correct in faulting the "relevance" standard for discovery problems and delays. NITL does not agree that this allegedly "liberal" standard has been "counterproductive to [the Board's] prompt resolution of rail rate proceedings." Also, the League has particular concerns about the import and meaning of the Board's resolution to "sharply restrict the scope of discovery in SAC rate cases" and its newly-proposed standard for discovery.

NITL believes that the problem does not lie with the relevance standard. As noted above, discovery has delayed SAC proceedings often because the Board has taken several months to decide motions to compel. The League does not believe that there is a correlation between the Board's delayed resolutions of motions to compel and the relevance standard. Substantively, there does not appear to be such a connection. The Board has never suggested that it has had difficulty in interpreting and applying the standard or that delayed decisions are attributable to such substantive difficulties. Indeed, the Board notes that it uses the same standard in other proceedings, apparently without difficulty. Thus, NITL believes it unlikely that the relevance standard, on a substantive level, is culpable for discovery-related problems in SAC cases.

In the alternative, discarding the relevance standard might be justified on procedural grounds if the Board could show a nexus between the standard and its decision-making. By citing "delay," "harassment," and "undue burden," the Board's proposal posits some procedural link. The Board appears to argue that the "liberal" relevance standard simply allows parties to file too many discovery requests, which lead to too many motions to compel. If the volume of discovery requests has in fact translated into more motions to compel, the Board might be on solid ground in arguing that there is some procedural connection between the discovery standard and the delay. But it does not appear that the Board has experienced a large number of motions to compel. From a review of the cases, it appears that each side in recent rate cases has generally filed no more than a single motion to compel. See footnote 1 herein. Moreover, in deciding those motions to compel, the Board has never in fact identified any requests as "dilatory" or "harassing" or "unduly burdensome," even though parties may have even asked for sanctions.²

² For example, in its decision on a motion to compel in STB Docket No. 42057, *Public Service Company of Colorado D/B/A Xcel Energy*, served September 25, 2002, the complainant asked for sanctions because the defendant railroad allegedly breached its agreement during discovery. The Board denied the request.

In other words, the League sees no link between the relevance standard and the Board's delay or difficulty in processing SAC cases.³

Moreover, the League believes that the Board is on dangerous ground in proposing a brand new discovery standard, on both procedural and substantive grounds. The "restrictive" alternative proposed by the Board would require two new showings: (1) "a clear, demonstrable need for the information in order to make a case" and (2) that "the information would have to be such that it would not be readily available to that party through other means." As a matter of procedure, NITL believes that in practice this standard will result in many more rather than fewer discovery disputes, because the heightened standard invites objections. As a matter of litigation strategy, it would be far more advantageous for a party to object to a request, rather than to respond, because the objection would force the proponent to justify its request in terms of the heightened standard through a motion to compel. Given the stringent requirements of the new standard, the proponent's chances of success are certainly less than they are now.⁴ The new standard thus would create a broader foundation for objections, thus multiplying the number of objections and exacerbating the burden placed on the Board in determining whether requests are legitimate.

³ In STB Ex Parte No. 542 (Sub-No. 4), *Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2002 New Fees* (served August 29, 2002), the Board calculates its fully distributed cost of deciding motions to compel in SAC cases as \$2,300, on the basis of time and motion studies. While the number of hours that the Board spends in processing such motions was not specifically stated in that item (See Appendix B, Fee Item (64)(i), Decision p. 29), if one examines the Fee Items where hours are given, it would appear that the Board is valuing staff time for other Fee Items at levels ranging from about \$92 per hour to about \$140 per hour at the fully distributed cost level. Valuing the Board's services for processing motions to compel at \$100 an hour, a conservative figure, the Board staff would spend 23 total hours, or about one-half of one week, considering such motions. This information also suggests that the Board could easily process appeals of such motions within 15 days of the filing of a reply, as the League has suggested infra.

⁴ The elements of the standard proposed by the Board closely resemble the standard contained in the Federal Rules for obtaining discovery of trial preparation materials. This federal standard allows discovery "only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." See FRCP 26(b)(3). The Board does not explain whether the similarity is intentional or whether it intends to apply precedent developed in the federal courts.

Moreover, as a substantive matter, the League seriously questions whether the Board will be well-served in discarding the familiar and well-litigated "relevance" grounds for discovery. Parties to Board proceedings will not know what the new standard means, and many years may be necessary to put "meat" on the general "bones" proposed by the Board. That very uncertainty will create litigation, as parties attempt to explore the meaning and boundaries of the new standard. The League believes that it would be a far better approach for the Board to first see whether the procedural fixes proposed by the Board in the form of expedited decision-making have the desired effect, rather than casting litigants loose from familiar Board and court precedent. If the procedural fixes proposed by the Board do not work to expedite SAC cases, then the Board might consider changes to the substantive standards for discovery.

Additionally, the League seriously questions whether the proposed standard reflects the reality of discovery in SAC proceedings. To its credit, the Board recognizes that shippers need greater amounts of discovery than rail carriers to support their presentations. This is consistent with past statements by both the Board and its predecessor, the Interstate Commerce Commission.⁵ NITL believes that the new standard contradicts this substantive precedent required by Constrained Market Pricing and SAC by removing one of the bases for the discovery that the Board has found necessary for shippers.

For example, in past SAC cases the Board has recognized that it is appropriate for a shipper to seek discovery of line-specific valuation data that enables it to make appropriate

⁵ In *Coal Rate Guidelines*, 5 I.C.C. 2d 520, 548 (1985), the ICC stated "We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them."

adjustments to a rail carrier's system average road property investment and depreciation costs.⁶ By allowing discovery only where "there is a clear, demonstrable need for the information in order to make a case" and where "the information . . . would not be readily available to that party through other means," the Board's proposed framework casts doubt upon the continuing validity of this precedent. Clearly, the complaining shipper could "make a case" using system average numbers contained in the carrier's Annual Report Form R-1 that would be "readily available through other means." Thus, under the new standard the railroad could argue, contrary to existing precedent, that the complaining shipper's discovery of line-specific data is improper. But the unavailability of such data would have profound consequences upon the outcome of SAC cases. Complainants would be forced to rely upon system average costs, which may seriously overstate variable costs for the movement at issue. The Board has recognized that such an overstatement "would result in an understatement of the revenue-to-variable cost ratio of the transportation at issue, which could in turn affect whether [it has] authority under 49 U.S.C. 10707(d)(1) to review the rates or the extent to which [it can] afford relief if the rates are found to be unreasonable."⁷ If the Board eventually decides that it should adopt the new standard, at the very least the Board should make clear that its new standard does not foreclose discovery and use of movement specific data.

Finally, nothing in the existing "relevance" standard prevents the Board from rejecting a discovery request as unduly burdensome, overbroad, oppressive or dilatory. Given the Board's

⁶ See STB Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co.*, slip op. at 2 (served Sept. 25, 2002); STB Docket No. 42058, *Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company*, slip op. at 7 (served Sept. 11, 2002); *Iowa Pub. Serv. Co. v. Burlington Northern R.R. Co.*, No. 37029, 1985 ICC Lexis 542, at *8-9 (served March 11, 1985). See also *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry. Co.*, STB Docket No. 42038, 2000 STB Lexis 126, at *6 (served Mar. 6, 2000); *West Texas Utils. v. Burlington Northern R.R.*, 1 S.T.B. 638, 717 (1996); *Arizona Pub. Serv. Co. & PacifiCorp v. The Atchison, Topeka and Santa Fe Ry. Co.*, STB Docket No. 41185, 1997 STB Lexis 169 (served July 29, 1997).

⁷ STB Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, 2001 STB Lexis 125, at *10, note 10 (served Feb. 9, 2001).

familiarity with discovery in SAC proceedings and the types of data that are important to evidentiary submissions, the League believes that it should have little trouble separating the "wheat from the chaff" while using the current standard.

D. THE BOARD SHOULD CLOSELY CONSIDER WHETHER ITS PROPOSED "FEE SHIFTING" ARRANGEMENT WILL BE WORKABLE

In its decision Ex Parte 542 (Sub-No. 4), the Board proposes a fee of \$2,300 for the filing of a motion to compel, and a "fee-shifting" arrangement whereby the party moving to compel discovery, if it is successful, would be reimbursed for its filing fee by the party against which discovery is sought. The Board suggests that the establishment of a fee for a motion to compel discovery could discourage parties from working out discovery issues amicably, as one party might conclude that it might avoid complying with discovery if its opponent was unwilling to pay the filing fee. Thus, the Board has arrived at the "fee-shifting" approach to ameliorate that effect.

The League does not oppose the proposed "fee-shifting" arrangement with respect to motions to compel, but believes that the Board is setting up a procedure that will not achieve the proposed goal (at least in SAC cases) and may be more trouble than it is worth. Particularly in SAC cases, where the stakes are often high, the fee-shifting arrangement is not likely to deter the filing of unwarranted discovery responses and/or motions to compel. Moreover, an examination of recent decisions in SAC cases indicates that a single motion to compel frequently encompasses a variety of discovery issues, and that decisions on such motions will frequently be decided in favor of the complainant shipper on some issues, and the defendant railroad on others. The Board's proposed arrangement will require the Board not only to decide the substantive

issues in such cases, but also decide how to "split" the fee, thus complicating and perhaps delaying the decision itself.

III. CONCLUSION

In conclusion, the League commends the Board for proposing workable modifications to its regulations that may ameliorate issues that cause, or contribute to delayed resolution of SAC proceedings. Subject to the foregoing comments, NITL is receptive to the Board's proposals for mandatory mediation and expedited resolution of motions to compel. The League objects, however, to the Board's proposal for changing its substantive standard for discovery in Stand Alone Cost cases.

Respectfully submitted,

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