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October 31, 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 Reply Opening Comments Of The Western Coal Traffic League.  
Additionally, please find 3 WordPerfect Diskettes, 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

KJD:dmb  
Enclosure

ENTERED  
Office of Proceedings

NOV 10 2002

**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**

**REPLY COMMENTS OF THE  
WESTERN COAL TRAFFIC LEAGUE**

**Entered Proceedings  
NOV 1 2002**

**OF COUNSEL:**

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**Part of  
Public Record**

**Dated: October 31, 2002**

**Attorneys for the  
Western Coal Traffic League**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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

**STB Ex Parte No. 638**

**REPLY COMMENTS OF THE  
WESTERN COAL TRAFFIC LEAGUE**

The Western Coal Traffic League ("WCTL") submits these Reply Comments in accordance with the Board's Decision served September 4, 2002 in the captioned proceeding. WCTL filed its Opening Comments in this proceeding on October 11, 2002 ("Comments").

**SUMMARY OF POSITION**

Some eleven parties filed comments in response to the Board's proposal. The majority of the responding parties agree with WCTL that the mediation proposal, albeit with some modifications, should be implemented, and that the expedited procedures for resolving motions to compel discovery will benefit all parties in maximum rail rate cases. The most controversial and contentious of the Board's proposals concerns the adoption of new, more restrictive discovery standards for application in stand-alone cost

cases. WCTL continues to oppose the new standards as unnecessary and counter-productive.



## DISCUSSION

### A. AAR'S MODIFICATION OF THE PROPOSED MEDIATION RULE SHOULD NOT BE ADOPTED

The Association of American Railroads ("AAR") supports the mediation procedures but argues that the rule should be modified to provide that the statute of limitations applicable to challenges against unreasonable rates will continue to run until the mediation<sup>1</sup> is complete and a formal rate complaint is filed.

The AAR argues that the Board's proposal purports to override the language of 49 U.S.C. § 11705(c), which requires that a complaint be filed with the Board within two years after the date on which the claim at issue accrues. WCTL disagrees; the Board possesses the discretion and regulatory flexibility to establish by rule what constitutes a "complaint" for purposes of the statute. Even if AAR's point is conceded, however, its proposed "solution" is prejudicial and should not be adopted.

The Board's mediation proposal allows for the possibility that the 60-day mediation period could be extended. WCTL and other commenters have urged that extensions be strictly limited to instances where all parties agree. Whichever rule ultimately is adopted, however, shippers will have little incentive to support extended mediation if it comes at the price of curtailing the scope of available relief through the continued running of a statute of limitations. If the Board is persuaded that only a formal

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<sup>1</sup> In its Decision, the Board proposed mandatory, non-binding mediation prior to the filing of a rate reasonableness complaint. Under the proposed rule, the two-year statute of limitations would end upon the filing of a Request for Mediation. See Decision at 7.

complaint as described in the current Rules of Practice will toll the statute, the proper response is to have the mediation period begin after the complaint is filed. The Board then also should consider allowing discovery to proceed during the mediation period. By adopting these changes, the Board will prevent any prejudicial harm to shippers if mediation is extended beyond the 60-day period.

**B. BNSF'S OPENING COMMENTS SHOW THAT THE PROPOSED DISCOVERY STANDARDS WOULD BE BE BOTH COUNTER-PRODUCTIVE AND UNNECESSARY**

In its Opening Comments, WCTL expressed concern that the number of motions to compel actually would increase as a result of the new restrictive discovery standards, because railroad defendants may use these new standards as new justifications for withholding relevant discovery.<sup>2</sup> See Comments at 19. The Burlington Northern and Santa Fe Railway Company's ("BNSF") Comments on this topic demonstrate that WCTL's expressed concerns about access to relevant and justifiable discovery materials are well-founded.

In its Opening Comments, BNSF approvingly asserts that discovery of road property investment and other relevant data recently ordered produced in pending rate proceedings would be "highly unlikely" under the new standards, because (in BNSF's view) the information was unreliable and not necessary for the complainant's case. Opening Comments of BNSF at 5. See Docket No. 42058, Arizona Electric Power

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<sup>2</sup> The AAR and the DOT both support the proposed discovery standards, but fail to offer any discussion of the merits of the proposal. See Initial Comments of AAR at 6; see also Comments of DOT at 4. For the reasons discussed by WCTL on Opening and further discussed herein, the proposed discovery standards are unnecessary and counter-productive, and should not be implemented. See Comments at 17 - 22.

Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Co., Decision served September 11, 2002 at 6; Docket No. 42059, Northern States Power Company Minnesota d/b/a Xcel Energy v. Union Pacific Railroad Co., Decision served May, 24, 2002 at 6. See also Docket No. 42057, Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co., Decision Served September 25, 2002 at 2 - 3. These statements readily demonstrate that BNSF intends to resist many of what the Board already has found to be proper and relevant discovery requests by arguing that the complainant does not have a "clear demonstrable need" for the evidence, or that the requested information is available through other means.

In its Comments, WCTL demonstrated that the Board effectively has been using the heightened criteria in evaluating motions to compel discovery under the current, relevance-based standard. While BNSF suggests that such heightened scrutiny has only been applied in cases where the railroads sought discovery, there is no merit to this argument. For example, in AEPCO, the Board denied the complainant's motion to compel and held that "[e]ven under our liberal discovery rules, a party seeking discovery must demonstrate the need for the material it seeks").<sup>3</sup> Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Co., Decision served December 31, 2001 at 7. The Board already holds shippers and carriers to the same standards which both WCTL and BNSF agree are "similar to the standards that the Board is now proposing for all discovery." Opening Comments of BNSF at 6.

The standards currently imposed on shippers and carriers under the existing relevancy test require an examination of the need for the material and the availability of

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<sup>3</sup> Accord, Docket No. 42056, Texas Municipal Power Agency v. BNSF, Decision served February 9, 2001 at 8 (examining the need and accessibility of the information before granting the shippers motion to compel).

the material outside discovery. Explicit promulgation of new, more restrictive standards is unnecessary, and as BNSF's own Comments show, prone to abuse. The Board should decline to adopt the proposed new discovery test.

**C. THE BOARD'S PROPOSED PROCEDURES FOR  
MOTIONS TO COMPEL SHOULD BE ADOPTED**

In its Comments, BNSF supports the proposal for staff conferences on motions to compel discovery, but objects to the reduced time period for replies to motions to compel. The Board should adopt its proposal (with the modifications previously offered by WCTL) with the 10-day reply period intact. Obviously, parties on both sides of an issue would benefit from having more time to prepare and plead their case. If the goal of expediting the resolution of discovery disputes is to be achieved, however, all parties must share the burden. The ten day period for replies is fair, as motions to compel generally are brought only after lengthy discussions between the parties and do not come as a surprise to the opposing party. See Comments of NITL at 7. WCTL continues to favor the expedited discovery procedures, with the modifications presented in its Opening Comments.

**CONCLUSION**

For the reasons stated above and in its Opening Comments, WCTL supports the proposed mandatory, non-binding mediation of coal rate disputes, as long as the statute of limitations does not continue to run during the mediation period. WCTL does not support the proposed change in discovery standards because such changes are unnecessary and counter-productive in light of the Board's goal of expedited discovery and the clear record of recent decisions in pending coal rate cases. Finally, WCTL favors

the Board's proposed expedited discovery procedures, including the abbreviated reply period for motions to compel.

Respectfully submitted,

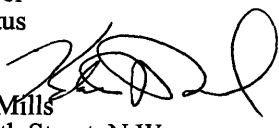
THE WESTERN COAL TRAFFIC LEAGUE

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Dated: October 31, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served this 31st day of October, 2002 by first-class mail, postage prepaid upon all parties of record to this case.

  
Kelvin J. Dowd