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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**



REPLY COMMENTS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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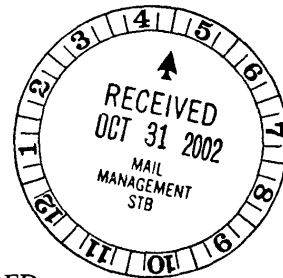
*The National Industrial
Transportation League*

Dated: October 31, 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 reply 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 ("NPRM").

NITL again 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 effective modifications to its regulations that may ameliorate problems that cause or contribute to delayed resolution of SAC proceedings. At the outset of these reply comments, NITL wishes to reiterate in summary form its opening comments on the Board's proposals:

- NITL supports the Board's proposal for mandatory mediation prior to the initiation of a rail rate case. NITL believes that mediation presents a flexible, expeditious, and cost-effective means for attempting to resolve abuses of rail market power with minimal resort to the regulatory process.

- NITL supports the procedural changes proposed by the Board to resolve motions to compel expeditiously. NITL believes that these measures, if enacted, would very likely eliminate the primary source of delay in SAC cases.
- NITL opposes changes in the substantive standard governing discovery in SAC proceedings. NITL fears that the proposed standard will create substantial uncertainty and engender additional litigation as to the proper scope of discovery, in direct contradiction of the Board's goal of simplifying and expediting rail rate proceedings.
- Finally, as set forth in the NITL's comments in Ex Parte 542 (Sub-No. 4), NITL 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. But, NITL urges the Board to carefully consider whether this proposal would unduly complicate and prolong the resolution of motions to compel.

I. NITL'S REPLY TO COMMENTS FILED BY OTHER PARTIES

A. MOST PARTIES SUPPORTED MANDATORY MEDIATION AS A BENEFICIAL ADDITION TO THE REGULATIONS GOVERNING SAC PROCEEDINGS

NITL believes that the clear majority of participants supported the Board's proposal to implement mandatory mediation prior to the initiation of a rail rate proceeding under the SAC procedures. Like NITL, these commenters recognized that mediation could provide a flexible, expeditious, and cost-effective means to resolve disputes arising from the abuse of rail market power with minimal regulatory oversight. In its reply comments, NITL wishes to address three issues with respect to mediation, which appeared frequently in the opening round of comments.

1. Timing Issues Raised by Mediation.

A number of parties expressed concern over the timing of mediation, specifically that sixty days of mediation would only further delay a shipper's opportunity to seek STB relief from an unreasonable rate. Some of these parties have suggested that the Board should allow mediation to begin prior to the termination of an existing rail transportation contract for the movement in question. The League concurs that mediation should not become an additional obstacle to relief and stated the same in its opening comments. Thus, the League supports proposals that would allow parties to initiate mediation prior to expiration of a rail transportation contract. However, NITL questions the utility of measures that would have mediation proceed simultaneously with a formal complaint proceeding. NITL believes that an ongoing rate case might poison the atmosphere of a contemporaneous mediation.

Another issue with respect to timing arose on the carrier side. AAR questioned whether under proposed 49 C.F.R. § 1109.4(b), the request for mediation could "fix the relevant limitations period for any relief for rates or charges already paid." AAR argued that this regulation would violate the existing statute of limitations for filing a rate complaint, as set forth in 49 U.S.C. § 11705. According to AAR, the statutory limitations period is "defined by reference to the filing of the complaint." NITL questions AAR's interpretation of 49 U.S.C. § 11705(c), which states plainly that the limitation period runs two years from the time "the claim accrues." In other words, a claimant has two years from the time the unreasonable rate became effective to file its complaint. NITL does not see how fixing the date from which relief will begin has anything to do with whether a complainant files within the statutory period. In fact, the regulation may run afoul of the statute if it truncates the complainant's ability to reach

backwards for relief, beyond the date of the request for mediation (although NITL did not read it as such.)

2. Maintaining the Confidentiality of Mediation.

The second issue that NITL wishes to address with respect to mediation is confidentiality. The League did not comment upon this, directly, in its opening submission. Simply stated, NITL fully supports the idea that mediation must be conducted under confidence so that information exchanged by the parties during the mediation cannot be used during a future rate proceeding, if such occurs.¹ NITL believes that regulations to assure confidentiality will facilitate free and open discussions before the mediator. Thus, NITL urges the Board to implement confidentiality measures because they are critical to the success of the program.

3. The Format of Mediation.

Certain commenters also expressed misgivings over the fact that mediation will generally follow a period of protracted, but unsuccessful negotiation over a new contract rate. Expressly or implicitly, these parties questioned what a mediator could accomplish that they could not. The League believes that this view misses the point. Mediators are engaged in adversarial settings precisely because the parties have reached an impasse. A mediator's purpose is to introduce an "outsider's" perspective and to break the deadlock with creative suggestions and solutions. NITL does not understand the Board's proposal to establish a "sixty-day SAC proceeding" and supports the Board's decision, in this regard, to leave mediation procedures to the mediator's discretion. Mediation should not function as a microcosm of, or a surrogate for, a formal rate-case.

¹ Of course, NITL believes that the same information would remain discoverable to the extent that it is kept by the parties in another form. A party could not shield otherwise discoverable information by introducing it during the course of a mediation. WCTL at 14.

B. MOST PARTIES FAVOR THE BOARD'S PROPOSED PROCEDURAL REFORMS FOR PROMPT RESOLUTION OF MOTIONS TO COMPEL IN SAC PROCEEDINGS, INCLUDING THE APPELLATE PROCESS

The League believes that most parties concurred with the Board's proposal to expedite decision-making on motions to compel. Like NITL, these parties identified outstanding motions to compel as the single greatest factor contributing to the delay of rail rate cases brought under the SAC procedures.² NITL wishes to respond directly to two issues with respect the procedural changes proposed by the Board for expedited rulings on motions to compel.

First, many parties, like NITL, reacted favorably to the availability of conferences with STB staff as part of the process for resolving motions to compel.³ In fact, certain commenters urged the Board to make staff conferences mandatory, for the purposes of discouraging filing of frivolous papers, facilitating the STB staff's understanding of the issues, or reaching a settlement on the scope of contested discovery. In light of the opening comments, the League believes that it would be proper for the Board to modify its proposal to make a staff conference mandatory upon the request of a party.

The second issue that NITL wishes to comment upon, directly, is the "appellate stage" of the expedited process for resolving motions to compel, which received a fair amount of attention in opening comments. Like NITL, many parties expressed the concern that the lack of a time constraint on the Board's ruling on an appeal from a decision of the Secretary could undercut the entire purpose of the new measures.⁴ NITL believes that the Board must impose a deadline upon itself to prevent appeals from languishing in the same manner as do motion to compel, now. NITL originally proposed a ten day period for parties to file an appeal and ten days for a reply.

² NCTA at 3; WCTL at 22-23; EEI at 9.

³ BNSF at 8; WCTL at 23; NCTA at 4.

⁴ WCTL at 25; NCTA at 5.

The Board would be required to issue a ruling within fifteen days. Other commenters proposed that the Secretary's ruling should become a final decision if it is not acted upon within a set period of time after the filing of an appeal. Given the concern that the appellate process has raised and the obvious need for a firm deadline to preserve the Board's overall objective in making procedural modifications, NITL strongly urges the Board to implement a mechanism that will make appeals subject to a finite temporal limitation.

C. MOST PARTIES RECOGNIZE THAT A MORE RESTRICTIVE DISCOVERY STANDARD WOULD BE COUNTERPRODUCTIVE TO THE BOARD'S STATED OBJECTIVE OF FACILITATING TIMELY RESOLUTION OF SAC CASES.

The League again commends the Board for recognizing that discovery in SAC cases inordinately generates disputes and causes delay. NITL firmly 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 disagrees that this allegedly "liberal" standard has been counterproductive to prompt resolution of rail rate proceedings. Thus, the League reiterates its serious concerns about the import 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 most commenters perceived similar problems in the Board's proposal to adopt new substantive standards for discovery in SAC cases and that the Board should abandon its proposal in light of broad and convincing opposition.⁵ Indeed, there were a number of strong arguments against the new standard. First, many parties, like NITL, expressed the belief that the new standard would prompt more rather than fewer motions to compel, as litigants seek to flesh out the new standard or, unfortunately, to use it as an avenue for dilatory litigation tactics. Second, many parties, like the League, expressed the belief that the new standard might preclude necessary and legitimate discovery and improperly compromise a litigant's effort to

⁵ EEI 9-11; WCTL 17-20, NCTA 6.

present effective evidence during SAC proceedings. The League is particularly concerned that the application of the new standard might result in the Board's abandonment of its existing precedent, which ultimately has served parties well in obtaining information, despite considerable procedural delays. Third, many parties, like NITL, expressed the belief that the existing relevance standard and precedent developed thereunder have properly framed discovery in SAC cases and that delays have arisen not because of substantive defects but rather procedural issues in the decision-making process—namely, the inordinate amount of time for obtaining a Board ruling. NITL agrees with other commenters that the Board should not adopt a new standard, but rather apply the existing one promptly.⁶

Comments filed by BNSF, in particular, demonstrate the pitfalls associated with the Board's proposal to adopt a more restrictive discovery standard. BNSF exhorts the Board to disavow, expressly, discovery decisions in certain recent SAC cases and to state generally that existing precedent would not be binding under the new standard. In the short term, this would clearly benefit BNSF because it would immediately rid BNSF of its obligation under existing precedent to respond to certain commonly-posed discovery requests, improving its position in future rate cases by denying complainants the use of crucial information. In the long term, a much greater detriment runs to the Board and all parties to future rate cases because each and every previously resolved dispute will require renewed attention under the new standard. Discovery disputes in ensuing cases will be legion, as shippers and carriers fight over what passes muster under the new standard. The situation will be all the worse without existing precedent as a guide, as BNSF suggests. Thus, NITL strongly urges the Board to withdraw its proposal to adopt a new discovery standard. At the very least, NITL urges the Board to make clear that any new discovery standard does not foreclose information on movement-specific or more accurate costs simply because generalized "system average" information might be available.

⁶ EEI at 9; WCTL at 20; NCTA at 6.

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

Finally, the League reiterates that it 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.

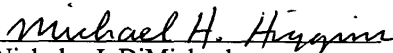
III. CONCLUSION

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 its opening comments and its reply comments, NITL is receptive to the Board's proposals for mandatory mediation and expedited resolution of motions to compel. Along with the majority of other parties, however, the League ardently objects to the Board's proposal for changing its substantive standard for discovery in Stand Alone Cost cases.

Respectfully submitted,

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October 31, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 31st day of October, 2002, a copy of the foregoing Reply Comments of the National Industrial Transportation League by first-class mail on the persons listed below:

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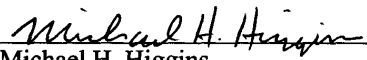
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