



ASSOCIATION OF
AMERICAN RAILROADS

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206533

October 31, 2002

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

ENTERED
Office of Proceedings
2002
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Filing Record

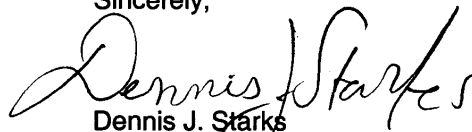
Re: Ex Parte No. 638 - - Procedures To Expedite Resolution Of Rail Rate
Challenges To Be Considered Under The Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the proceeding captioned above, please find an original and ten copies of the Reply Comments of the Association of American Railroads.

Please date-stamp the extra copy provided for that purpose and return it via our messenger.

Sincerely,


Dennis J. Starks
Senior Commerce Counsel



206533

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 OF THE
ASSOCIATION OF AMERICAN RAILROADS



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Office of Proceedings

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Dated: October 31, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE
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REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") submits these comments on behalf of itself and its individual members in reply to the comments submitted by other parties in this proceeding.

AAR continues to support the Board's proposals. Numerous federal district courts, as well as United States Courts of Appeals, including the D.C. Circuit, maintain mediation programs¹. Mediation is consistent with the Alternative Dispute Resolution Act, and with the approaches of other agencies, including DOT and FERC². It is a relatively simple and low cost means of allowing each party to assess the merits of its own case and that of the opposing party, while offering enhanced opportunities -- under the guidance of an experienced mediator -- for creative settlement of disputes. Most important, mediation would not sacrifice statutory standards, precedents or the vital role of the STB.

Some commenters fear that the process may delay the resolution of a rate dispute. And

¹ See D.D.C. Local Civil Rule 84; and April 4, 1998 Order of the U.S. Court of Appeals for the District of Columbia Circuit establishing and Appellate Mediation Program. See e.g., Federal Judicial Center and CPR Institute for Dispute Resolution, *ADR Settlement in the Federal District Courts* (1996) at 4.

² See ADR Act of 1998, 28 U.S.C. 651, et seq. See also, <http://www.dot.gov/adr/>, and <http://www.ferc.gov/legal/drs/drs.htm>.

others express skepticism that mediation would succeed where the parties were unable to negotiate an agreement³. The AAR submits that there is much to like about mediation that should make the effort worth while. The participation of the mediator, a disinterested third party with a fresh perspective, makes a qualitative difference. The mediator can aid a previously entrenched party see the merit in the other party's position and the weakness in its own. The mediator, by listening dispassionately, can see common points of interest and can suggest ways to build on them to a mutually beneficial bargain.

As to the Board's proposal to modify the discovery standard, all shippers were opposed to this aspect of the Board's proposal, contending essentially that the suggested new standard would lead to more, not less discovery disputes. The AAR believes it is appropriate to limit the parties in stand-alone cost cases to discovery of information for which there is a "clear and demonstrable need." This proposal would streamline and simplify the litigation of SAC cases and would reduce or eliminate disputes that result from overly broad and burdensome discovery requests.

In sum, many commenters embrace some, but not all, of the Board's proposals. To address their concerns over mediation and modification of the discovery standard, the commenting shipper organizations suggest specific changes to the Board's proposals. The AAR will address these points in further detail below, and respond as well to some of the specific arguments raised by these commenters.

³See the comments of the Edison Electric Institute (EEI), Western Coal Traffic League (WCTL), National Coal Transportation Association (NCTA), and the North Dakota Grain Dealers Association and North Dakota Public Service Commission (NDPCA-NDGA), and of the National Industrial Transportation League (NITL) (We note that while NITL shared the other commenters views regarding reform of the discovery standard, it strongly supports the Board's suggested mediation program. See NITL Comment at 4-6)

I. Mandatory Mediation Should Not Be Used To Alter The Basic Statutory Scheme Established To Address Rate Complaints.

Many commenters express doubt about the benefits of mediation. Essentially, EEI, WCTL, NDPSC/NDGDA, NCTA and others contend that mediation may further delay Board rate relief. To avoid the postulated delay, EEI and WCTL suggest that the Board's proposal should be modified to require a railroad to quote a common carrier rate five months before such a rate becomes effective.

Specifically, EEI contends that the Board's proposal should provide that a shipper should be able to invoke mediation up to five months before its existing rail transportation contract terminates, and that a shipper should not be compelled to continue mediation after the 60-day period proposed in the rule. EEI further asks the Board to allow simultaneous prosecution of a rate complaint and mediation⁴. For its part, WCTL suggests that a shipper intending to challenge a new common carrier rate should not be required to request or participate in mediation if its serving carrier fails or refuses to promptly honor a request for the establishment of such a rate. It proposes that the limit should be no more than five months prior to the date that common carrier shipments are expected to begin⁵.

The AAR submits that this rulemaking is directed only at procedural changes for complaints pursuant to 49 U.S.C 10704. These proposals to require railroads to establish common carrier rates five months before any shipments under the rate takes place attempt to expand rail carrier substantive legal obligations under 49 U.S.C. 11101, and to erode the limits on the Board's jurisdiction under 10709. In *Burlington N.R.R. v. STB*, 75 F.3d 685 (D.C. Cir.

⁴EEI Comment at 3-4.

⁵ WCTL Comment at 12-13. WCTL defines a new common carrier rate as including both "previously unused or not established" rates (*id* at 13). WCTL does not explain how a rail carrier could fail to establish an unused rate, which is presumably already in existence. The only logical conclusion is that this proposal is limited to common carrier rates that do not exist.

1996), the court held that the Board could not require a carrier to establish a common carrier rate when that rate could not possibly be applied to traffic still governed by a rail contract that had not yet expired. Recently, the Board echoed the D.C. Circuit's ruling in *Burlington* when determining that a carrier is not required to maintain rates when there is no present intention to ship. See *Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company*, STB Finance Docket No. 34041 (September 11, 2002 at 8). Here, EEI and WCTL attempt to accomplish indirectly what the rulings of the court and Board in both *Burlington* and *AEPCO* forbade, directly.

If the shipping community's real concern about the value of mediation is that it may delay the litigation process even where there is no prospect of a private settlement, then the AAR suggests that the Board can remedy that concern by clarifying in its proposal that the mediator has the authority to declare an impasse, anytime after mediation has begun, when the mediator believes that further discussions would be fruitless. Such clarification should allay any concerns the shippers may have about unnecessary delay produced by the mediation process. With this clarification, shippers should not seriously doubt that the process might be worth the effort. And the AAR would strongly urge the Board to proceed with this proposal.

II. The Board Should Go Forward With Its Proposals To Restrict Discovery And Expedite Resolution of Discovery Disputes.

The AAR believes that the Board should proceed with its proposal to modify the current discovery standard, by restricting discovery to situations where a party can show a "clear and demonstrable need for information" that is not "readily available through other means." As asserted in our initial comments, we understand the Board's concern that ill-conceived discovery requests may needlessly delay resolution of rate cases and burden the parties. A more restrictive discovery standard would ensure that discovery could not be used to harass or burden parties in

these proceedings.

The commenting shippers, however, oppose the proposal on the ground that application of the proposed new standard could lead to more, not fewer, motions to compel. But, in taking such a position, the shippers lose sight of the Board's objective in this proceeding, namely to move SAC rate cases to resolution more expeditiously. To do so, the Board has proposed a package of procedural changes, including mediation in advance of filing a rate complaint, narrowing the scope of discovery and facilitating Board resolution of motions to compel. With their challenge to the Board's discovery proposal, the commenting shippers are seeking to take the heart out of the Board's package. The other refinements to existing procedures would make little difference without the change that the Board is proposing in the discovery standard itself.

The Board's revised standard is designed to make discovery in rate cases less time consuming and burdensome. No one seriously disputes that this is a worthwhile objective. It is certainly logical to expect that a narrower discovery standard should result in more focused discovery and fewer disputes.

The commenting shippers appear to believe that it is desirable to curtail even further the scope of discovery available to defendant railroads in rate cases while allowing complainants to continue to pursue unfettered discovery. If the Board is serious about expediting rate cases, and AAR believes that it is, it should implement the new discovery standard that it proposed and level the playing field.⁶

⁶ EEI request oral argument, because the "proposals are of great importance to the shipping community and, for the same reasons, to the railroads", and "concern matters about which counsel with experience in such disputes could greatly assist the Board". EEI Comment at 11-12. EEI fails to demonstrate that the issues in this proceeding cannot be resolved through written submissions. However, if the Board deems oral argument necessary in these proceedings, then the AAR will participate.

CONCLUSION

The AAR urges the Board to modify its proposal in a manner consistent with the views expressed in these comments and in its initial comments.

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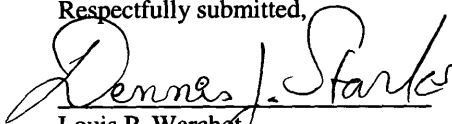
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Dated: October 31, 2002

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