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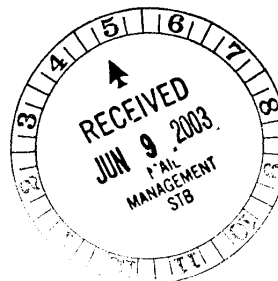
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June 9, 2003

By Courier

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



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 above-captioned proceeding are an original and twenty-five copies of the Joint Supplemental Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company. Also, for the Board's convenience, please find enclosed three computer diskettes containing this document in WordPerfect.

Please date-stamp the extra copy provided and return it with our messenger. If you have any questions or need further information, please contact me.

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Enclosures

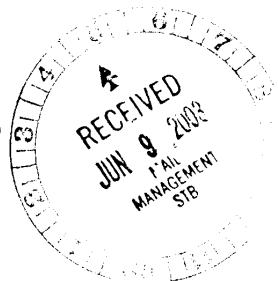
Very truly yours,

Paul A. Hemmersbaugh

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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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JOINT SUPPLEMENTAL COMMENTS OF
CSX TRANSPORTATION INC.
AND NORFOLK SOUTHERN RAILWAY COMPANY

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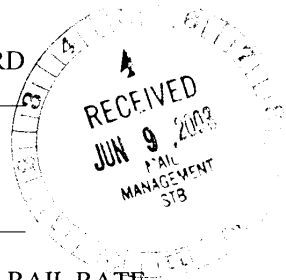
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Of Counsel

Dated: June 9, 2003

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

JOINT SUPPLEMENTAL COMMENTS OF
CSX TRANSPORTATION INC.
AND NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company ("NSR") and CSX Transportation, Inc. ("CSXT") hereby respond to the Board's April 3, 2002 Decision and request for additional comments in the above-referenced proceedings. NS and CSXT support the Board's efforts to further streamline the procedures for deciding rate cases under the stand-alone cost constraint ("SAC") of the Constrained Market Pricing ("CMP") Guidelines, and they believe in particular that implementation of the mandatory mediation process adopted in the April 3 Decision, as well as the involvement of Board staff in pre- and/or post-motion and technical conferences, are likely to have beneficial effects on the expeditious and fair handling of SAC cases.

NSR and CSXT also believe that there may be some additional benefits to be derived by the Board's specification of the types of discovery – both requests for production of documents and written interrogatories and/or requests for admissions – that will normally be deemed appropriate for SAC cases. However, NSR and CSXT are concerned that by indicating

the types of documents and information that will normally be appropriate for parties' use in developing cost evidence in SAC cases that the Board not indirectly convert an indication of general relevance into what could effectively become a mandatory record-keeping requirement. In particular, in both railroads' experience in the pending Eastern coal rate cases¹, complainants repeatedly sought production of maintenance records, computerized traffic files, and a number of other documents in forms or formats maintained by neither NSR nor CSXT in the normal course of business. Moreover, when NSR or CSXT explained that it did not maintain the records in the form sought by complainants (generally because such records or formats are of little utility in operating and maintaining the railroads and their business), the railroad was frequently met with motions to compel and/or claims in the Complainant's evidentiary filings that the defendant carriers had "refused" or "failed" to produce the information in the manner requested. There is no proper basis for converting the format for railroad information preferred by complainants' counsel and consultants into a substantive record-keeping requirement. So long as rail carriers maintain the records specified by the Board for official (i.e., non-rate case) reporting purposes, they should be permitted to measure their business activities, and compile and maintain their records in whatever manner they decide is best for their business purposes.

As for the specifics of "routine" discovery in SAC cases, NSR and CSXT caution the Board not to impose an inflexible, "one-size-fits-all" set of requirements on the parties. Although it will certainly be the case that the defendant railroad will have to produce some information about such subjects as its traffic records on the issue traffic, maintenance

¹ *Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069; *Duke Energy Corporation v. CSX Transportation, Inc.*, STB Docket No. 42070, and *Carolina Power & Light Company v. Norfolk Southern Railway Company*, STB Docket No. 42072.

information about the lines at issue, information about the investment in equipment used for the transportation of complainant's traffic, and so forth, it should not be required to do so until the complainant defines the parameters of its proposed stand-alone railroad ("SARR"). Requiring railroads to produce system-wide data for SARRs that ultimately involve only a portion – and often a fairly limited portion – of their networks is both inefficient and imposes unnecessary costs and burdens on defendants.² NSR and CSXT therefore suggest that the Board consider requiring complainants, at an early stage of SAC cases, to specify the lines and facilities that complainant contemplates including in its SARR, with the understanding that reasonable modifications of the SARR can be made once discovery has been completed (but before the initial SAC filings have been made).

Similarly, NSR and CSXT caution the Board not to adopt any single set of discovery criteria for what complainants should produce to railroads in SAC cases. Although documents relating to competitive alternatives to the defendant's rail service will always be relevant (and complainants should therefore be in a position to produce them promptly upon filing a new case), railroads should be allowed to tailor their discovery requests based on the particular circumstances of individual cases. The reality is that with the elimination of product and geographic competition as permissible subjects of market dominance evidence, the burden of discovery on complainants in SAC cases has been significantly reduced in any event – in fact, the burden of discovery in these cases falls disproportionately heavily on the railroads.

Limiting the number of interrogatories and document production requests to a

² In this regard, the Board should reaffirm its sound and longstanding rule that parties are not required to conduct "special studies" in response to discovery requests. Although there may be circumstances in which the parties may agree to conduct such studies, that should be left to private negotiation and not be a burden imposed by the Board.

reasonable number – perhaps in the range of 25-35 such requests – has merit, especially if the Board makes it clear that requests with multiple subparts (which have become the norm in complainants’ discovery in SAC cases) will not be tolerated as a subterfuge. Especially if the Board indicates the broad types of discovery materials that railroads will likely have to produce in SAC cases (again, without converting such guidelines into hard and fast discovery and record-keeping rules), the parties should be able to focus their “customized” discovery on information or issues that are truly relevant to the issues in a particular case.

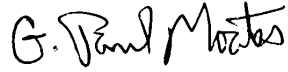
As to the time when production of discovery responses should be required, NSR and CSXT urge the Board not to require unfair and unrealistic deadlines. Bearing in mind that railroads often do not know for several days after a Complaint has been filed against them of its existence, and then must make decisions about the retention of counsel and consultants, it would be absolutely unworkable to require that they produce substantive discovery materials at the time of filing an Answer. (See April 3 Decision at 5.) Reasonable time periods must be allowed within which railroad defendants can analyze the Complaint, determine which of the carrier’s lines and facilities are likely to be involved in the SAC presentations, and then compile, index and produce the substantial computer and other documentary materials that are necessary for a SAC case.³

Finally, NSR and CSXT strongly support the idea of cost-sharing for the

³ Developing and generating traffic and car movement data for SAC proceedings is a very time-consuming and costly endeavor for defendant railroads. The time and resources required to develop such data are multiplied when the railroads are required to produce data for multiple years. To minimize the cost and burden of producing such data, NSR and CSXT suggest that the parties be required to agree on a single year (likely the “base year” for the complainant’s SAC presentation) for which the defendant railroad will be required to produce traffic data. After the railroad has produced traffic data for the specified year, it should not be required to produce such data for other years, absent exceptional circumstances.

production of information in SAC cases. The Board's broad authority to manage and control discovery to ensure fair, just, and efficient resolution of maximum rate reasonableness proceedings should reasonably be understood to encompass the power to require that parties share the burdens of discovery, including its costs. The reality is that since it is the railroads that are required to produce the preponderance of data and information in these cases, often including the generation of detailed computerized traffic files that take significant amounts of programming and computer time to produce, they have borne far and away the largest burden of discovery responses in the SAC area. The Board should specify that the parties in SAC cases are to share all costs of complying with discovery equally, and that invoices reflecting such costs (including the costs of internal computer programming and processing) be produced in timely fashion. In the event that the parties disagree about the nature or appropriateness of any particular costs billed by one to the other, the Board should be prepared to resolve those disagreements in the same manner as any other discovery disputes.

Respectfully submitted,



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Dated: June 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of June, 2003, I served the foregoing
“ Joint Supplemental Comments of CSX Transportation Inc. and Norfolk Southern Railway
Company” by causing one copy thereof to be delivered by messenger unless otherwise indicated
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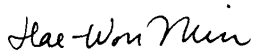
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