

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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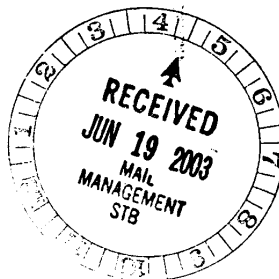
WRITER'S E-MAIL ADDRESS
phemmersbaugh@sidley.com

June 19, 2003

By Hand

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

208129



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 ten copies of the Joint Supplemental Reply Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company. Also enclosed, for the Board's convenience, is a computer disk containing an electronic copy of the document.

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.

Very truly yours,

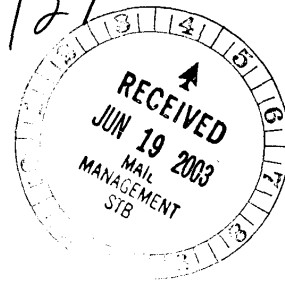
Paul A. Hemmersbaugh

Enclosures

208129

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 REPLY COMMENTS OF
CSX TRANSPORTATION, INC.
AND NORFOLK SOUTHERN RAILWAY COMPANY

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Peter J. Shudtz
CSX Corporation
Suite 560
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James A. Squires
George A. Aspatore
Counsel to Norfolk Southern Ry. Co.
Three Commercial Place
Norfolk, Virginia 23510-9241
(757) 629-2600

Paul R. Hitchcock
Counsel to CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

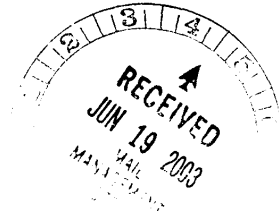
G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Of Counsel

Dated: June 19, 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 REPLY COMMENTS OF
CSX TRANSPORTATION, INC.
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Peter J. Shudtz
CSX Corporation
Suite 560
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James A. Squires
George A. Aspatore
Counsel to Norfolk Southern Ry Co.
Three Commercial Place
Norfolk, Virginia 23510-9241
(757) 629-2600

Paul R. Hitchcock
Counsel to CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Of Counsel

Dated: June 19, 2003

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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

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

INTRODUCTION AND SUMMARY

Norfolk Southern Railway Company (“NS”) and CSX Transportation, Inc. (“CSXT”) hereby submit their Joint Supplemental Reply Comments in response to the supplemental comments of other participants in this proceeding. *See* Decision, Ex Parte No. 638 (served April 3, 2003) (seeking additional comments concerning discovery procedures in Stand-Alone Cost (“SAC”) rate reasonableness proceedings). NS and CSXT (collectively referred to herein as the “Eastern Railroads”) again commend the Board on its efforts to streamline SAC proceedings, and to reduce the burden of discovery – several of the Board’s proposed rules revisions, including early involvement in discovery by Board staff, hold real promise of effecting significant improvements in the fairness and efficiency of SAC proceedings.

Regrettably, the joint supplemental comments of major shippers’ organizations seek to turn this proceeding on its head, treating the Board’s request for suggestions to streamline and improve discovery in SAC cases as an opportunity to

significantly expand, complicate, and exacerbate the burden of discovery on carriers, while simultaneously reducing the responsibility, time, and effort required of SAC complainants, and increasing the number and complexity of issues to be decided by the Board.¹ The Board's express purpose in initiating this proceeding was to develop rules and procedures "to further streamline the process for resolving rail rate challenges that are considered under . . . stand-alone cost methodology." April 3, 2003 Decision at 1. Far from seeking to streamline, rationalize, or reduce the burden of discovery, however, the shippers propose instead to *expand* discovery significantly, by requiring carriers to produce more information faster, in multiple forms, without even requiring complainants to propound case-specific, targeted discovery requests. At the same time, those same parties seek to maintain an entitlement to unlimited additional discovery. *See* Joint Shipper Comments at 8-18.

The Eastern Railroads have numerous objections to the shippers' proposals, but their four major objections are briefly summarized here and discussed in more detail below.

- *First*, shippers' proposal that defendant carriers automatically be required to produce, at the time they file their Answer, nearly all of the information shippers need to make SAC and variable cost presentations, is patently absurd. In 20 days, railroads would be required to produce the vast majority of information complainants need (as well as a significant volume of information they do not need) to present their market dominance, variable cost, and SAC evidence. Any reasonable person familiar with SAC discovery would agree that such a schedule would be entirely unworkable, and indeed well-nigh impossible to meet.

¹ These comments will refer to the three shipper trade associations that submitted joint supplemental comments collectively as the "shippers" or "shipper groups." *See* Joint Opening Comments of the Western Coal Traffic League, Edison Electric Institute, and the National Industrial Transportation League, STB Ex Parte No. 638 (Phase II) (June 9, 2003) (the "Joint Shipper Comments").

- *Second*, the shippers seek to expand and complicate discovery in a proceeding the Board convened for the express opposite purpose – to identify and implement practices and procedures to streamline discovery and to reduce its burdens.
- *Third*, the shipper groups effectively advocate the imposition (on all defendant carriers) of an inflexible, “one-size-fits-all” set of standard, uniform initial production obligations. This approach fails entirely to account for the myriad material differences in the nature, parameters, and complexity of rail service provided in different regions of the country, and to different shippers within a region, which make it essential that specific discovery requirements be tailored to the circumstances of particular cases.
- *Fourth*, shippers seek to shirk their basic responsibility to define and develop their own case, and to shift that responsibility to their adversary in SAC cases – defendant carriers – by imposing sweeping, automatic mandatory production obligations on the carriers. Shippers essentially seek to place the burden on defendants (at the outset of the case, and without even receiving discovery requests) to identify, gather, and produce all of the information complainants might conceivably need – or claim they need – to prepare complainants’ SAC and variable cost presentations.

Contrary to the shippers’ claims, the one-sided changes they seek are neither “fair” nor “workable”² – they would result in more burdensome and more costly discovery (the additional costs and burden of which would fall on defendant railroads), and additional discovery disputes, all without any significant offsetting benefits. These proposed expansions of carriers’ responsibilities in rate cases are not only inconsistent with the Board’s purpose in this rulemaking, they are contrary to well-established federal policies (dating at least to the Staggers Rail Act of 1980) of progressively reducing the regulatory burden on railroads; favoring private, negotiated resolution of disputes

² See Joint Shipper Comments at 9. The Eastern Railroads note that the shippers are represented in this proceeding by some of the same counsel that represents complainants in most SAC proceedings, including the counsel that represents Duke Energy and Carolina Power & Light in the three rate cases against CSXT and NS that are currently pending before the Board. Given those counsel’s frequent and ongoing firsthand experience with discovery in SAC proceedings, it is truly remarkable that they would suggest that essentially all SAC discovery could be completed within 20 days of the filing of the Complaint.

between railroads and shippers; and delivering fair, expeditious, and efficient resolution of disputes that cannot be resolved through private negotiations.

Moreover, the sweeping and inflexible automatic disclosure requirements shippers propose would relieve them of their basic responsibility to develop discovery requests specifying the information they require to develop their case, instead shifting the burden to defendant carriers both to identify the types of information complainants need to develop a particular case, and to develop, generate, and produce that case-specific information to the complainants.³ The shippers then seek to skew this unprecedented discovery regime even further, by asking the Board to bar carriers from using any information not produced in their mandatory initial production – in the event carriers (guided solely by the initial, bare-bones allegations of the complaint) guess wrong about any of the eventual details or parameters of complainants’ SAC presentation (which typically would not be disclosed until months after the carriers would be required to make their automatic production) at the outset of the case, they would be precluded from using additional evidence to respond to those unanticipated details, parameters, and assertions. This is not how the American adversarial process works – the party who initiates the case, and seeks relief from the party it has sued, must develop its own case; it may not

³ Consistent with this burden-shifting approach, the Joint Shipper Comments briefly suggest that the Board should reconsider its longstanding rule that parties are not required to conduct special studies to respond to discovery requests in maximum rate reasonableness cases. Joint Shipper Comments at 12. The special study rule is fair and reasonable, and applies equally to both sides in rate cases. There is no evidence that the protection of this rule has been significantly misused or is otherwise in need of revision, and shippers offer no new proposal for changing this well-established rule.

rely upon its adversary to supply the efforts, resources, and wits necessary to accomplish that task.⁴

Comments of Western Railroads

The opening comments of The Union Pacific Railroad (“UP”) and of The Burlington Northern Santa Fe Railway (“BNSF”) (collectively, “the Western Railroads”) concerning additional discovery issues appropriately reflect their particular circumstances and experience in SAC proceedings concerning coal transportation service in the Western United States. The Eastern Railroads agree with many of the comments and proposals submitted by the Western Railroads, and understand that other proposals may streamline or otherwise improve discovery in Western coal rate cases. Some of the proposals offered by BNSF and/or UP, however, would not be workable or efficient in Eastern rate cases, owing primarily to fundamental differences between coal transportation services in the East and in the West. For this reason, the Eastern Railroads urge the Board not to adopt a uniform, “one-size-fits-all” set of discovery procedures and requirements. Instead, the Board should allow and encourage the parties in specific cases to agree on practices and procedures that make the most sense for the specific circumstances obtaining in those individual proceedings. The Board’s new rules providing for early involvement of Board staff in the discovery process, and submission of discovery

⁴ It would be unwise and contrary to sound rulemaking practice and principles to adopt the sweeping expansion of discovery the shippers propose in their supplemental comments without substantial additional scrutiny and review, based on a fuller and more detailed record than is possible in this short (10-day) supplemental comment period. If the Board even considers such significant changes in the way discovery is conducted in SAC proceedings, the Eastern Railroads request that it establish a full, separate, and independent rulemaking proceeding to consider the very significant effects and ramifications of such proposed changes.

disputes to Board staff for expeditious resolution should facilitate the implementation of such a flexible, common sense approach.

I. RESPONSE TO SHIPPER COMMENTS AND PROPOSALS

As the Eastern Railroads stated in their opening comments, they believe that specific standard discovery requirements or automatic “initial disclosures” are generally not appropriate or workable in SAC cases. *See* Joint Supplemental Comments of CSXT and NS at 2-4. It is simply not practicable to develop a single set of “one-size-fits-all” specific discovery requests that would be appropriate for the myriad different and divergent circumstances and conditions presented by rail transportation services in very different geographic regions, provided by different railroads to customers with varying demands and requirements.

For example, coal service in the West is characterized by relatively few mine origins, which “flood load” full, intact trains using loop tracks; cycling unit train service in trains that bear a single train symbol for the entire trip from origin to destination; significant proportions of cars and equipment that are privately owned; and long hauls over relatively flat territory. Coal transportation in the East, on the other hand, is substantially different, involving numerous smaller and more geographically dispersed mine origins; loading and assembly of trains in multiple “cuts,” employing various different loading methods and procedures; loading a single train at several different mine origins; non-cycling trains consisting almost entirely of carrier-owned cars and locomotives; use of multiple trains to complete a single origin-to-destination movement, and multiple routes and/or train handling practices for a given movement; frequent

changes in sourcing of coal; an extensive web of branch lines serving many mine origins; and hauls over mountainous, rugged, and irregular terrain.

A. Initial Disclosure and Production Obligations of Complainants

The Eastern Railroads agree with the shippers that requiring a complainant to provide certain information at the time it files its complaint could expedite discovery, and in some cases narrow the areas of dispute between the parties. As the shippers note, because they control the timing of the filing of a complaint, they have ample opportunity to ensure that they collect all relevant information that the Board may require before they file a complaint and initiate a rate reasonableness proceeding.

If the Board adopts an automatic initial disclosure requirement for complainants, it should include, at a minimum, the categories of information described in the shippers' opening comments. See Joint Shipper Comments at 9, Exh. 1 (p. 27). As the shippers further acknowledge, a complainant should be required to submit, at the time the complaint is filed, a specific written description of the primary relevant parameters of its hypothetical stand-alone railroad ("SARR") it intends to posit, including its "geographical and temporal scope," the mine origins and destinations it would serve, the routes it would traverse, and the "timeline for its construction and commencement of operations." Id. at 9-10.⁵

Current discovery practices require defendant carriers to identify, develop, and produce large volumes of material that are irrelevant and/or not used by either party

⁵ Complainants should be allowed an opportunity (at or before the time they file their opening evidence) to refine the SARR configuration they initially specify when they file their complaint, to take into account material information they did not know and could

in evidentiary submissions to the Board. Indeed, in the Eastern Railroads' experience, the majority of information they produced in response to complainants' discovery requests in recent cases was not used by complainants in their evidentiary submissions, pleadings, or briefs. While some surplus production may be inevitable, requiring complainants to specify the parameters of the SARR when they file their complaint would be a meaningful step toward reducing the costly and time-consuming identification, review, and production of documents and information that are not needed for the proceeding.

B. Initial Disclosure Obligations for Defendants

The types and categories of information the shipper groups propose to require carriers to develop and produce automatically, without receiving any discovery requests, are so broad and sweeping that they encompass virtually all of the information that shippers typically request in order to develop and present a full SAC case (including stand-alone costs, market dominance, and variable costs). *See* Joint Shipper Comments, Exh. No. 2. The broad language of shippers' proposed initial disclosures attempts to collapse virtually all of their discovery into fourteen numbered paragraphs. This approach appears intended to elicit all information shippers might wish to review for their SAC case without the need for drafting specific discovery requests. The information covered by the broad language of the resulting paragraphs is so vast and inclusive, and so unspecific, that shippers could have achieved effectively the same result, with more economy of language, by simply proposing that defendant carriers be required automatically to produce all information, in whatever form, concerning: (1) any and all

not have known before receiving defendants' discovery production.

components of stand-alone costs; (2) any and all components of variable costs; and (3) qualitative and quantitative market dominance.

In the recent cases brought against the Eastern Railroads by Duke Energy, each of CSXT and NS produced tens of thousands of pages of documents, and tens of millions of electronic records, in response to Duke's more than five hundred discovery requests in each case.⁶ Under the shippers' proposal, carriers would be required to produce automatically, at the very beginning of the case, virtually all of that information

Remarkably, the shipper groups' proposal then goes even further, seeking to substantially expand the scope of discovery and the accompanying burden on rail carriers by requiring them to produce multiple potential sources of the same data (e.g., traffic data), even if one source is clearly more accurate, comprehensive, or appropriate, or if additional sources are redundant or duplicative of information already produced. This is a recipe for a substantial increase in "follow-up" discovery from complainants seeking to have the Railroads reconcile differences contained in multiple data sources, increased discovery disputes, and likely would require Railroads to spend substantial effort – in their Reply and Rebuttal filings – demonstrating why one source relied upon by a complainant is inferior to another source of the same information. This is the antithesis of efficiency, and would place a substantial additional burden on the Board to determine which party has relied upon the most reliable source of data in each such circumstance.

⁶ See Reply Evidence and Argument of Norfolk Southern, Appendix A, STB Doc. No. 42069 (Sept. 27, 2002); Reply Evidence and Argument of CSX Transportation, Inc., Appendix A, STB Doc. No. 42070 (Sept. 20, 2002).

While production of the voluminous information shippers in the form shippers typically request is already an excessively burdensome and costly task, producing all of that data and more in the 20 days provided to file an Answer (or in any similarly short period) would be, for all practical purposes, impossible. It takes a substantial period of time (generally more than 20 days) for carriers simply to locate appropriate sources of the voluminous, disparate data and information within the railroad organization, and then to instruct and supervise far-flung railroad personnel (virtually none of whom had any experience responding to discovery requests) how to gather, develop, and produce information in the forms requested by Complainants. Moreover, because modern Class I railroads like NS and CSXT are the product of numerous combinations and consolidations, they frequently have a number of geographically dispersed sites and sources of information. For example, in order to identify and develop data for each of the two rate cases currently pending against it, NS was required to search numerous sources in Norfolk, Roanoke, Atlanta, Bluefield (West Virginia), several operating terminals and yards, and to visit every one of the 40-plus mine origins served by complainants' SARRs.

1. Stand-Alone Cost Information

Like BNSF, the Eastern Railroads believe that the unique attributes and requirements of each shipper and rail service provided to that shipper make it impossible to specify uniform automatic initial disclosure requirements for stand-alone cost information, and for most information concerning the variable costs of service in a specific geographic region and between specific sets of mine origins and destinations. Moreover, each railroad maintains its data differently, as necessary to meet its particular

real-world operating and business requirements. Even without considering other factors, differences in data needs and practices of major carriers and their numerous different customers alone result in so many permutations of evidence needs and demands that meaningful and specific uniform disclosure requirements would be unworkable.

NS' recent experience with two simultaneously pending rate cases showed that there were relatively few economies or savings in terms of discovery production in two rate cases. Even though Complainants were both electric power producers with coal-fired power plants located in the Carolinas, and were represented by the same counsel and consultants in the two SAC proceedings, discovery requests in the two cases sought information for different states, lines, routes, origins, and subdivisions. As a result, much of the information that was produced in response to the Duke discovery requests had to be revised to remove information not requested by CP&L and then supplemented with information for new states and lines not involved in the Duke/NS proceeding. Similarly, many of Complainants' discovery requests sought route-specific information for which there was only moderate overlap between Duke Energy and Carolina Power & Light.

Another factor complicating and slowing production of discovery documents by carriers is that complainants generally request that data be organized in ways, forms, and formats that are different from those in which they are maintained by the railroads. In many instances, the Eastern Railroads have no need for records and data organized in the form and format sought by complainants. Producing much of the data and information in the form, or as close as feasible to the form, sought by complainants (including voluminous data concerning traffic, crew wages, equipment ownership and costs, and maintenance of way) requires substantial matching, synthesizing, and

computer processing of multiple electronic databases and other data sources, followed by significant checks and adjustments to ensure that the results are as accurate as possible.

Generation of traffic and movement data alone is a very time-and-resource-intensive process for defendant carriers. In the Eastern Railroads' experience, this process takes so much time and effort in SAC cases primarily because of the special studies required to develop state-specific, sub-division-specific, or route-specific information requested by complainants (neither railroad maintains its cost or investment data by route, state, or other subdivisions specified by complainants), and the need to cull and synthesize data and information from multiple data sources. In the recent rate cases brought by Duke Energy against both NS and CSXT, for example, it took each carrier approximately six weeks of intensive, diligent computer and data-processing work (diverting several employees and substantial resources from the business of the railroads) to generate and produce the specially tailored traffic tapes and car movement records that Duke requested, which are of no utility to the railroads in their normal course of business.

2. Variable Cost Information

Similarly, because of the multiple, fundamental differences between the train service at issue in different cases, it is difficult to specify in advance a uniform set of variable cost data that would be relevant, necessary, and readily producible at the outset of any given case. Coal service in the East involves numerous, geographically dispersed mines, trains assembled in different lengths, sometimes at multiple locations, and with different locomotive consists for different mines runs, and multiple different train symbols for any given route between mine origin and destination.⁷ These multiple

⁷ Thus, with a very few exceptions, it would not be possible for the Eastern Railroads to

variables make it difficult to readily identify specific assets and personnel associated with a particular service, which is essential to the calculation of their costs.

This is another way in which substantial differences between the East and the West make uniform mandatory disclosure requirements unworkable. For example, BNSF proposes that defendants might be required to include in their initial disclosure information identifying each locomotive and railcar used in serving the issue traffic, and to provide lease and ownership costs and information concerning each. See BNSF Comments Exhibit A. In Western coal service, it may be relatively simple to identify a limited set of cars (which in most instances are privately owned by the shipper) and locomotives employed in service to a given mine origin and destination, because of the cycling unit-train nature of such service. For CSXT and NS, however, locomotives and cars move in and out of different areas frequently, any given movement may involve several different train numbers and identifiers, and the universe of cars and locomotives in service to any given customer encompasses virtually their entire coal car and locomotive fleets.

Further complicating the difficulty of identifying specific equipment that serves a specific customer is that coal customers in the East source their coal from numerous different mines, and change their mine origins frequently, in some instances resulting in 60 to 90 origin-destination pairs for a single customer in a single year. Given these and other variables inherent in Eastern coal transportation service, identifying and

produce in an initial disclosure the types of information suggested in the comments of Western railroads. *See, e.g.*, Comments of BNSF (June 9, 1993), Exh. A, p. 14 (it would be impracticable for Eastern Railroads to produce items 1, 2, and 4-6 as part of an initial disclosure).

gathering data on “each” or “every” car, locomotive, trainman, and engineman that were used in a given subset of an Eastern carrier’s traffic (e.g. the issue traffic) is a very time- and-resource-consuming task.⁸

The Eastern Railroads suggest that, rather than impose specific, one-size-fits-all initial disclosure requirements, the Board should indicate its preference for expeditious voluntary disclosure of relevant data and information by both parties. NS and CSXT further suggest that the Board direct the parties to attempt, at their mandatory initial conference (*see* 49 CFR § 1111.10), to identify and agree upon categories of relevant data and information that the parties could readily produce without undue cost or burden. This would allow the parties to tailor their initial disclosures to the specific circumstances and requirements of each case. If the parties are unable to agree regarding such initial disclosures at their initial conference, they could present their positions to Board staff at the conference established by the Board’s new pre-motion rules, and the Board Secretary could issue a decision shortly thereafter. See April 3 Decision at 4-5.

⁸ In part because of the complexity and variability of coal service in Central Appalachia, neither NS nor CSXT actually maintains records that allow ready identification of the various assets, equipment, and personnel used to serve a specific customer in a specific period of time. Gathering and developing such information for rate cases consumes substantial carrier resources. Indeed, in the pending proceedings brought by Duke Energy against NS and against CSXT, the only way the carriers were able to identify these attributes with any precision was to send operations personnel out into the field to make and record their actual observations of issue traffic and of traffic along the routes of the hypothetical SARRs. This process alone – which was but one of the steps necessary to develop route-specific stand-alone cost and variable cost information – took several weeks. Here again, the nature of Eastern coal service makes the task of gathering such information more complex, costly, and time consuming than gathering information for the cycling, intact unit train service characteristic of the West. In the East, it would be virtually impossible to gather such information in the 20 days between the filing of the Complaint and the filing of the Answer.

In sum, the radical discovery changes embodied in the shippers' proposals would put the burden entirely on the railroads to: (i) anticipate the parameters of the complainants' SARR (which, under current practice, complainants do not disclose until they file their opening evidence); (ii) identify (without even the guidance of discovery requests) all types of information the complainants might conceivably require to develop their SAC evidence and presentation; and (iii) generate, duplicate, and produce all such information in every form and format in which it exists, regardless of redundancy, or suitability of additional sources or formats, all within 20 days.⁹ Whatever else it does, this proposal emphatically does not seek to streamline discovery. Rather, it seeks to expand discovery significantly, and to further shift the burden-of discovery from complainants to defendant carriers, neither of which would be appropriate or consistent with the Board's objectives in this proceeding.

The Eastern Railroads remain optimistic that the Board's new rules (particularly provisions for expeditious informal resolution of discovery disputes) will improve the efficiency of SAC discovery. Both CSXT and NS remain ready and willing

⁹ Although the shipper groups' comments are not entirely clear on this point, it appears that they may be proposing a discovery regime under which carriers would be precluded from using in their own evidentiary presentations any information they did not produce in their initial disclosures, if that information arguably falls within the broad scope of the 14 automatic initial discovery categories shippers have proposed. *See* Joint Shipper Comments at 13. The result of such a draconian rule would be to force carriers to engage in costly and inefficient over-production of documents and information in their "initial disclosure" production, as a defense against the possibility of being precluded from using information they later determine is relevant, in light of the final configuration, operating plan, and other parameters of complainants' ultimate SAC presentation, or unanticipated claims or arguments made in complainants' evidentiary submissions. Such defensive overproduction would impose significant additional costs on defendant carriers without conferring any commensurate benefit on complainants or enhancing their ability to develop their case.

to cooperate with complainants in the future to make SAC discovery in specific cases more rational and productive, and to eliminate unnecessary discovery burdens.

C. Timing of Any Initial Disclosures

Under the present system, discovery in SAC cases imposes a severe and disproportionate burden on defendant carriers, requiring them to devote large amounts of time and resources to developing and producing information demanded by complainants in discovery. Requiring those carriers to gather and produce the vast majority of that information *automatically* at the *very outset* of the case – as the shipper groups propose – would severely magnify and intensify the burden and cost of that discovery. To make matters worse, the shipper groups are not even willing to consider limits on additional discovery in exchange for the onerous new automatic disclosure burden they seek to impose on carriers, contending that, even after the onerous mandatory disclosure obligations they propose, their right to seek additional discovery should remain unlimited. *See* Joint Shipper Comments at 14-18.

Shippers claim that their proposed schedule would effectively give defendant carriers more than 20 days to gather the huge volume of “initial disclosure” documents and information, because carriers usually “know” a complaint will be filed well in advance. This claim is incorrect, and inconsistent with both general STB policy (favoring contracts and private resolution of rate disputes) and the railroads’ experience. As a matter of fact, carriers generally do not know with any certainty whether or when a particular shipper will file a rate complaint.¹⁰ This is due in part to the fact that,

¹⁰ Norfolk Southern’s recent experience in contract negotiations with Duke Energy illustrates this point. In 1999, negotiations between Duke and NS were contentious and

consistent with the Board's frequently expressed preference for contracts instead of rate litigation, NS and CSXT always conduct negotiations with the good faith objective of agreeing on a contract. During negotiations, the carriers' responsible personnel focus their efforts and resources on the negotiations – they do not simultaneously begin to gather and compile documents and information they think they may need to produce in the event negotiations are unsuccessful and their customer decides to initiate rate litigation.

Moreover, the specter of the shipper filing of a rate reasonableness case is always present in rate negotiations, and is an important source of leverage for shippers in those negotiations – leverage that a shipper is very reluctant to relinquish or diminish by revealing its intentions. It would be wasteful and inefficient for a carrier to begin to gather materials to satisfy an undefined possible future disclosure obligation based on a threat that a shipper may file a rate case, and before it even knows if a complaint actually will be filed. Further, until a rate complaint is filed, the defendant carrier does not know even the basic allegations of the complaint, let alone the specific O-D pairs, routes, or traffic the complainant may choose to include.

During the 20-day initial disclosure period proposed by the shippers, defendants would still be required to investigate the allegations of the Complaint, retain counsel and consultants, develop and file their Answer, conduct initial discovery conferences, and engage in mediation aimed at resolving the dispute. In the Eastern

seemingly unproductive. Nonetheless, the parties eventually agreed to a contract. Two years later, the parties engaged in similarly contentious and unproductive negotiations, but in that case, Duke ultimately decided to file a rate reasonableness complaint during the Christmas holidays near the end of 2001.

Railroads' experience, however, 20 days is barely enough time to investigate the allegations of the complaint and file a responsive Answer.

Heedless of this reality, the shippers propose that railroads be required to gather, generate, and produce, in 20 days or less, most of the information that it typically takes the railroads 90-120 days of diligent and resource-intensive work to develop.¹¹ In addition to the tremendous logistical difficulties of producing such a huge volume of complete and accurate information at such a breakneck pace, the Herculean effort required to attempt to meet that deadline would divert substantial resources from productive tasks necessary to the daily operations of the railroads. At the same time, the required effort would distract the carriers' attention and effort from the mediation process, thereby reducing the likelihood of success in that process. Thus, apart from the merits of imposing any specific substantive "initial disclosure" obligation on carriers, *see supra* at 6-15, the proposal that such production be required at the same time as the Answer is entirely unrealistic, and unworkable.¹²

¹¹ Shippers also propose a uniform 90-days-before-opening-evidence-is-filed discovery "cutoff." *See* Joint Shipper Comments at 21. While the Eastern Railroads do not object to the establishment of case-specific discovery period limits and deadlines, once again they emphasize that they do not believe it is useful or appropriate to establish uniform "one-size-fits-all" discovery limits. Instead, the parties should negotiate case-appropriate limits and deadlines, and present them to the Board for its approval. In addition, any discovery limit should preserve the parties' right to propound limited follow-up discovery requests concerning new claims or information the opposing party presents in a pleading, evidentiary filing, or motion.

¹² If the Board nonetheless decides to impose any initial disclosure obligation on carriers, CSXT and NS urge that any such obligation be confined to variable cost data that is readily available to the defendant carrier, and that the time for the first such initial production be at least 20 days after the conclusion of mediation efforts. Consistent with the basic structure and nature of the adversarial process, the Board should in all events retain the standard litigation requirement that complainants must propound specific,

D. The Board Should Not Require that Responsive Information Be Produced in Multiple Forms.

The Eastern Railroads agree with Union Pacific that a responding party should be deemed to have satisfied its discovery response obligation when it produces information “sufficient to show” or sufficient to respond to, the type of information sought in the subject discovery request. *See* UP Initial Comments at 8 (June 9, 2003).¹³ The Board should reject, as unduly burdensome and contrary to established Board precedent, the shippers’ request that carriers be required to produce multiple cumulative or redundant forms or sources of information that is responsive to a discovery request, or alternative sources of information that are not as well-suited to respond to the discovery request as the source already produced. *See* Joint Shipper Comments at 11.

Here again, the shippers’ proposal would expand, rather than streamline, current discovery obligations. Based on the Eastern Railroads’ experience, production of information from multiple sources not only imposes unnecessary additional burdens on the carriers, but also leads to confusion, disputes, and potential misuse through mixing of information from sources designed for different, and incompatible, purposes.¹⁴ Each

tailored discovery requests in order to obtain most information (including all information concerning the components of a stand-alone cost presentation) that is relevant to the specific circumstances of a given case.

¹³ Thus, for example, when complainants seek information concerning wages of crews working on specific trains or routes, the Eastern Railroads produce their final electronic payroll and wage reports for those employees. They do not produce the numerous inputs to the payroll system that support those reports (e.g. time slips, constructive allowance claims, wage and overtime pay adjustment claims and resolutions, etc.) or other documents that report the same aggregate information (e.g. federal IRS W-2 forms), because the electronic payroll records are sufficient to show the crew wages sought by complainants.

¹⁴ NS and CSXT do not object to producing documents in electronic format, to the extent

party should be required to produce only such information as is necessary and sufficient to respond to its adversary's request. If the requesting party believes the information produced does not respond adequately to its request, it should be allowed additional discovery only upon a strong, particularized showing of specific need for, and relevance of, additional information.

E. General Order Requiring Production of Third-Party Confidential Information.

The shipper groups also propose that the Board issue a blanket order requiring railroads to produce all relevant, responsive information, including documents subject to a confidentiality agreement with a third-party. Joint Shipper Comments at 14. The Eastern Railroads oppose such a blanket general order because it might have unintended consequences for materials other than those targeted by the shippers' comments, *i.e.*, coal transportation contracts. The Eastern Railroads would not oppose a narrower general order directing parties to produce (i) coal transportation contracts, and (ii) coal supply contracts entered by complainants, which contain confidentiality or non-disclosure provisions, so long as other parties to the contracts are given adequate advance notice, and opportunity to object or otherwise be heard concerning the production of such contracts. To avoid unnecessary disclosure of confidential information, the Eastern

the carriers maintain the documents in an electronic format, and those documents are readily produced in that format with undue burden. Indeed, both NS and CSXT generally follow this practice already. The carriers oppose the creation of a new obligation to produce in electronic format (e.g. through a scanning process) documents that they do not maintain in electronic format. The Eastern Railroads further note that, due to the time-consuming processes necessary to extract data from larger databases, and to convert that information into formats that can be used by complainants' counsel and consultants, in some limited instances it may be more expeditious and efficient to produce paper "hard copies" than to produce electronic copies.

Railroads request that any such order be confined to carriers' coal transportation contracts and complainants' coal supply contracts, and that parties be required to seek leave from the Board before obtaining production of any other documents or materials subject to confidentiality or non-disclosure agreements with non-parties.

II. COMPLAINANTS SHOULD BE REQUIRED TO SHARE COSTS OF DISCOVERY

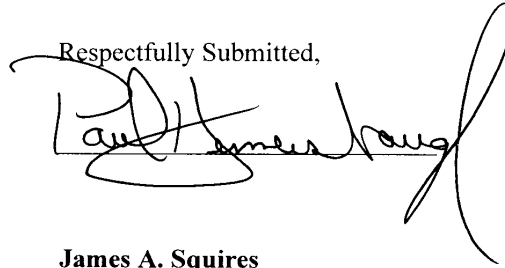
The burden of discovery in SAC maximum rate reasonableness proceedings falls disproportionately on defendant carriers (the disparity in the parties' relative discovery burdens has widened since the Board decided not to consider product and geographic competition evidence). As the ICC and the Board have recognized, some disparity in the burden of production is inevitable because the railroads possess a disproportionate share of the information necessary to develop a SAC presentation. There is no compelling reason, however, to force defendant railroads to bear the entire cost of gathering, developing, and producing information used by complainants to develop their case. A more equitable approach, which would have the added benefit of reducing complainants' incentive to seek more information than they need, would be to require the parties each to bear 50% of the readily quantifiable costs of document and information production (e.g., document reproduction costs and computer usage and processing costs).¹⁵ See April 3 Decision at 4 ("Our intent . . . is to continue the approach we have been pursuing on a case-by-case basis to prevent discovery from becoming unduly burdensome and overwhelming the process.")

¹⁵ Cases involving more than two adverse parties might require different cost-sharing formulas. A 50-50 split would work for the two-party cases that constitute the majority of SAC cases filed in the last 10-15 years.

The Eastern Railroads also believe that the costs of reviewing and producing certain voluminous, but only marginally relevant, documents and information, should be borne primarily by complainants. Examples of such documents include non-coal transportation contracts in coal rate cases; joint facilities agreements; mine agreements; employee safety rules and regulations; locomotive "run-through" agreements; locomotive and freight car leases and payment data; construction standards, plans and specifications; railroad contractor and vendor invoices; maintenance of way and related cost information; train dispatcher records; car inspector reports; valuation maps; and real estate deed information. The Eastern Railroads propose that, to the extent complainants seek such information, they be required to go to the sites where such records are maintained, select the documents and records they desire, and pay the railroads' costs of production of copies of the selected documents.¹⁶

¹⁶ If a complainant truly desires to expedite discovery, it could agree to forgo production of documents that experience has shown complainants do not use. Alternatively, complainant could visit the sites where some of these documents are maintained shortly after initiating the case, and select whatever documents it wishes to be produced. Once again, the timing and other particulars of such early production are best resolved by the parties in a case-by-case basis, rather than in an inflexible specific regulatory provision.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul A. Hemmersbaugh", with a large, stylized flourish extending from the end of the signature.

Peter J. Shudtz
CSX Corporation
Suite 560
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James A. Squires
George A. Aspatore
Counsel to Norfolk Southern Ry Co.
Three Commercial Place
Norfolk, Virginia 23510-9241
(757) 629-2600

Paul R. Hitchcock
Counsel to CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Of Counsel

June 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of June, 2003, I served the foregoing
“Joint Supplemental Reply Comments of CSX Transportation Inc. and Norfolk Southern
Railway Company” by causing one copy thereof to be delivered by express overnight courier, or
a more expeditious method, to:

Samuel M. Sipe Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Steptoe and Johnson
1338 Connecticut Avenue NW
Washington, DC 20036

Louis P. Warchot
Dennis J. Starks
Association of American Railroads
50 F Street NW
Washington, DC 20001

Gordon MacDougall, Esq.
1025 Connecticut Avenue NW
Washington, DC 20036

Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae LLP
1875 Connecticut Avenue NW
Suite 1200
Washington, DC 20009

Steven D. Strege
Executive Vice President
North Dakota Grain Dealers Association
118 Broadway
606 Black Building
Fargo, ND 58102

Paul Guthrie
Canadian Pacific Railway
401 9th Avenue, SW
Calgary, Alberta T2P 4Z4
Canada

William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street NW
Washington, DC 20036

Nicholas J. DiMichael
Michael H. Higgins
Thompson Hine LLP
1920 N Street NW
Suite 800
Washington, DC 20036

Paul S. Smith
Senior Trial Attorney
Office of the General Counsel
U.S. Department of Transportation
400 Seventh Street SW
Washington, DC 20590

Thomas C. Canter
Executive Director
The National Coal Transportation Association
4 Meadow Lark Lane
Suite 100
Littleton, CO 80127-5718

William J. Wochner
Kansas City Southern Railway Company
427 West 12th Street
Kansas City, MO 64105

Richard E. Weicher
Michael E. Roper, Esq.
The Burlington Northern and Santa Fe Railway
Company
3017 Lou Menk Drive
Fort Worth, TX 76131

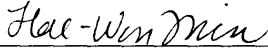
Ray Hickman
Options Net
10435 S. Sandusky Avenue
Tulsa, Oklahoma 74137

J. Michael Hemmer
Louise A. Rinn
1416 Dodge Street, Room 830
Omaha, NE 68179

Patricia E. Cooper, Esq.
Arizona Electric Power Cooperative, Inc.
1000 S. Highway 80
Benson, AZ 85602

Jon H. Mielke
Executive Secretary
Public Service Commission
State of North Dakota
600 E. Boulevard Avenue
Department 408
Bismarck, ND 58505-0480

George Koeck
Otter Tail Corporation
3203 32nd Avenue, S.W.
Suite 110
Fargo, ND 58103



Hae-Won Min