

SK Snavely King Majoros O'Connor & Lee, Inc.
Economic and Management Consultants

July 16, 2004

211590

July 16, 2004

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: Ex Parte No. 646

Dear Secretary Williams:

Pursuant to the Notice served June 29, please find the original and ten copies of the testimony of Snavely King Majoros O'Connor & Lee, Inc. in the above-referenced proceeding.

Please date stamp and return the eleventh copy provided for that purpose.

The undersigned, who will appear on behalf of Snavely King at the public hearing on July 21, has requested and been assigned five minutes' time.

Sincerely,


Tom O'Connor
Vice President

ENTERED
Office of Proceedings

JUL 16 2004

Part of
Public Record

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

211590

SK Snavelly King Majoros O'Connor & Lee, Inc.
Economic and Management Consultants

July 16, 2004

1



**A "Win-Win" Action Plan
For Consideration by the
Surface Transportation Board**

In

STB Ex Parte No. 646

Rail Rate Challenges In Small Rate Cases

ENTERED
Office of Proceedings

JUL 16 2004

Part of
Public Record

Prepared and Submitted By

Tom O'Connor

Snavelly King Majoros O'Connor & Lee

1220 L St NW

Washington, DC

20005

July 16, 2004

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

A "Win-Win" Action Plan For Small Rate Cases

I. INTRODUCTION	3
II. OBJECTIVE	4
III. APPROACH	5
IV. BENEFITS OF THE SK ACTION PLAN	6
V. IMPLEMENTATION OF THE SK ACTION PLAN	7
VI. RECOMMENDATION	16
VII. VERIFICATION	17
VIII. CAPABILITIES AND EXPERIENCE OF TOM O'CONNOR	18

STB Ex Parte No. 646

A "Win-Win" Action Plan For Small Rate Cases

I. Introduction

My name is Tom O'Connor. I am Vice president of Snavelly King Majoros O'Connor & Lee, Inc. (Snavelly King or SK). Snavelly King is an economic and management consulting company focusing on transportation and utilities. Snavelly King has been in business for more than 34 years, serving transportation clients including railroads, shippers and government agencies, in the United States, Canada and Europe.

While we generally prefer negotiations as the more effective pathway to conflict resolution, we are also thoroughly experienced in litigation. Section VII of this statement contains a summary of my capabilities and experience.

One of the more important and durable lessons of our experience in negotiations is the importance of structuring the process to facilitate "win-win" outcomes. Unless both parties to a transaction perceive that the agreement is in their interest, its effectiveness is diminished, in some cases sharply diminished. Conversely, when the parties see that the agreement is designed to protect and advance their interests, the agreement is energized.

Using this "win-win" approach, resources that might have been applied to contentious struggle are re-directed to mutually beneficial outcomes. For example, we frequently find opportunities for increasing efficiency and thereby generating savings which can benefit both parties.

While we see private negotiations as the preferred approach, we also see a need for improving the structure of the rate reasonableness process for small rate cases. Adopting the proven strengths conveyed by a "win-win" approach is the essential design concept.

We believe that involvement of the Surface Transportation Board as a mediator is a significant step in the right direction. This will help establish processes that can transform conflict resolution into productive teamwork and convert friction into momentum.

In today's testimony we outline some specifics which implement the "win-win" concept to help both railroads and shippers achieve mutual objectives.

STB Ex Parte No. 646

II. Objective

The action plan approach designs and implements an effective "win-win" strategy to achieve more reasonable rail rates; a strategy both railroad and shipper can endorse, support and implement.

Snavelly King routinely recommends and follows "win-win" strategies in rail negotiations. We see continued reliance on private negotiations as the primary strategy and would turn to the STB to resolve impasses in such negotiations. At that point the Action Plan would be applied.

The objective is to develop an action plan based on a "win-win" approach that will result in more reasonable railroad rates, benefiting both railroads and shippers. Specifically we see the Action Plan addressing rail rates that generate Revenue Cost Ratios (RCR) which:

- Exceed 180% and
- Exceed the levels given by the metrics advanced by the ICC and STB in Ex Parte No. 347 (Sub-No.2) Rate Guidelines – Non Coal Proceedings.¹

Ultimately, resolving such situations benefits both shippers and railroads since such rates present adverse outcomes for all involved parties; the railroads, shippers and their mutual customers. We see three sets of issues:

1. Higher rail costs erode the rail shipper's profitability
2. Higher rail costs could lead to adverse outcomes for the shipper such as lost business in its product markets. In some cases the production shifts to overseas markets.
3. Lost business and overseas relocation of production capacity for such shippers can erode the rail traffic base and degrade long term rail profitability.

The action plan involves coordinated use of both the Surface Transportation Board (STB) approach in the coal rate guidelines, the non coal rate guidelines and techniques proven in negotiations. A key component of the Action Plan is STB assistance with fair and even-handed mediation of the rate discussions.

¹ In formulating the Action Plan we consider all three STB Revenue Shortfall Allocation Method (RSAM) Revenue Cost Ratios.

STB Ex Parte No. 646

Introducing STB assisted mediation in a "win-win" context will help move the discussions toward reasonable settlement.

The STB's "stand-alone cost" ("SAC") test seeks to determine the lowest cost at which a hypothetical, efficient, "stand-alone railroad" ("SARR") could provide the transportation service needed by a complaining shipper. Under the SAC test, the complaining shipper designs a hypothetical railroad specifically tailored to serve its needs and the needs of other traffic it designates. The costs of building and operating such an efficient SARR are then compared to the revenues that such a system could expect to earn. If the involved shipper demonstrates that the SARR would earn more than necessary to cover all of its costs (including a reasonable return on investment), the shipper is entitled to rate relief.

For many shippers, the costs of developing and presenting a stand alone cost case are uneconomic given the small size of the traffic volume at issue. Nevertheless, the volumes are important to the shipper and ultimately to the railroad. The Action Plan addresses this situation to the benefit of railroad and shipper.

Regarding applicability of the non-coal rate guidelines, we note that large shippers often have lanes with low shipment volumes and high Revenue Cost Ratios. Such lanes should qualify for the small rate case guidelines.

While the rates on individual lanes can vary significantly, one of the more important determinants of the rate level is access to rail to rail competition. Where access to rail to rail competition is limited the rate levels tend to be higher. Where access to rail to rail competition is absent, the rate levels tend to be significantly higher. This pattern occurs for both large shippers and small shippers. Accordingly, the criteria for access to small rate case procedures should be size of the shipment, rather than size of the shipper.

III. Approach

The Action Plan relies in the first instance on private negotiations and would turn to the STB to resolve impasses in such negotiations. At that point, the Action Plan approach consists of the following steps:

1. Select specific rail lanes for which rail or other modal competition are not available or not economically or commercially practical. This is designed to meet the market dominance prerequisite for Surface Transportation Board (STB) regulatory rate relief.

STB Ex Parte No. 646

2. Demonstrate that the rail shipper is eligible to pursue Surface Transportation Board Maximum Rate Relief for the traffic at issue under the STB regulations.
3. Demonstrate, based on Revenue Cost Ratios (RCR), that the rail rates at issue would be found as excessive using the STB small case non-coal guidelines.
4. We recognize that the STB small shipper guidelines have never been applied; for a number of reasons. Therefore it is clear that more is needed.
5. We recommend a synthesized alternative: a solution based on STB small shipper guidelines and mediated by the STB.²

IV. Benefits of the SK Action Plan

☐ Benefits for The Rail Shipper

The rail shipper benefit by achieving rate relief on key lanes and resolving impasses with the railroads. The rail shipper also benefits by avoiding the cost and risk of a major rate case.

☐ Benefits for The Railroads

The railroads benefit by demonstrating that the small shipper guidelines mechanism they have been advocating for over a decade can actually work. This can also mute the demand for more stringent rail regulation. The railroads also benefit by resolving impasses with the involved shippers and avoiding the cost and risk of major rate cases.

☐ Benefits for The STB

The STB benefits by demonstrating that the small shipper guidelines they have been working on since the early 1990's can be designed to work effectively. However, the guidelines work only when combined with innovative mediation and arbitration techniques advocated by STB Chairman Roger Nober, and others.

² We note that the National Grain and Feed Association (NGFA) reported good success with a program using compulsory arbitration for a set of disputes including rate disputes between railroads and NGFA members. See for example NGFA testimony filed in this proceeding on April 16, 2003.

Similarly the AAR has endorsed mediation, although the AAR would make such mediation non-binding. See for example AAR testimony filed in this proceeding on April 16, 2003.

STB Ex Parte No. 646

V. Implementation of the SK Action Plan

SK can analyze rail logistics costs using SK's proprietary systems and methods. SK developed these in the course of analyzing rail transportation and logistics on behalf of hundreds of clients, including railroads, rail shippers and regulatory agencies. Our approach uses proven methods in logistics, systems analysis, negotiation strategy, and regulatory policy. Others have similar methods so the recommended approach is not confined to a particular provider. Each of the five steps, as defined by SK, is outlined below and then each step is discussed.

□ The Action Plan

- 1. Select specific rail lanes with Revenue Cost Ratios well above the regulatory threshold on lanes for which rail or other modal competition are not available or not economically or commercially practical. Meeting these two conditions satisfies the market dominance prerequisite for accessing Surface Transportation Board (STB) regulatory rate relief and indicates that regulatory rate relief may be appropriate.**
- 2. Demonstrate that small rail shipments are eligible to pursue Surface Transportation Board Maximum Rate Relief under the STB regulations in Ex Parte 347 Sub No. 1.**
- 3. Demonstrate that the small shipment rates at issue would be found as excessive in rate reasonableness analyses using the STB small shipper guidelines in Ex Parte 347, Sub No. 2.**
- 4. Many have observed that the STB small shipper guidelines have never been applied. This has occurred for a number of reasons. It is clear that more is needed**
- 5. SK recommends a synthesized alternative: a solution based on STB small shipper guidelines and mediated by the STB.**

□ Discussion of the Action plan

- 1. Select specific rail lanes with Revenue Cost Ratios well above the regulatory threshold on lanes for which rail or other modal competition are not available or not economically or commercially practical. Meeting these two conditions satisfies the market dominance prerequisite for accessing Surface Transportation Board (STB) regulatory rate relief and indicates that regulatory rate relief may be appropriate.**

STB Ex Parte No. 646

Based on extensive SK analyses of rail lanes over recent years, numerous rail lanes generate RCR's that exceed the regulatory threshold and meet the market dominance prerequisite. For example:

- SK, and other parties to this proceeding, have found numerous rail lanes with Revenue Cost Ratios (RCR) above the 180% regulatory threshold. Many are well in excess of 250% with some individual rail lanes ranging as high as 700% and more.
- SK analyses indicate that many of these lanes do not have access to effective competition and thus would meet the STB Market Dominance tests. More specifically, rail-to-rail competition is often not available and other modal competition is not operationally practical or economically feasible.
- Many such lanes carry relatively small amounts of traffic, making the cost of a Stand Alone Cost Case under Ex Parte No. 347 (Sub-No. 1) economically infeasible.

Such lanes should be eligible for regulatory rate relief under STB Ex Parte No. 646 Rail Rate Challenges in Small Cases.

In summary, SK has found numerous instances in which rail shippers are paying rates, which SK analyses indicate are:

- Producing RCR's greater than the regulatory threshold
- Producing RCR's greater than those on comparable traffic
- Producing RCR's greater than required by the STB Revenue Shortfall Allocation Method (RSAM) benchmarks

2. Demonstrate that small rail shipments are eligible to pursue Surface Transportation Board Maximum Rate Relief under the STB regulations in Ex Parte 347 Sub No. 1.

Having established eligibility for regulatory relief, the strategy is to move first to the STB small shipper guidelines and then to STB-assisted mediation of those guidelines.

STB Ex Parte No. 646

Under the Interstate Commerce Act, as revised by the ICCTA, the ICC and its successor agency the STB were charged with protecting individual captive shippers from unreasonably high and unfair rate levels.³

The Staggers Rail Act sought to improve the financial health of the rail industry and provide protections for shippers without access to rail-to-rail competition. Efforts to accomplish the first objective, improving the rail industry's financial health have largely been successful. Efforts to accomplish the second objective, providing protections for shippers without access to rail-to-rail competition, have been less successful.

The protections for shippers without access to rail to rail competition were implemented in part by directing the STB to consider three so-called Long-Cannon factors⁴, set forth in 49 U.S.C. 10701(d) (2). These factors are:

- ❑ **Long-Cannon- 1**; the amount of traffic transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic
- ❑ **Long-Cannon- 2** the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and
- ❑ **Long-Cannon- 3** the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

As noted above, the STB is also directed to ensure that carriers have the opportunity to earn revenues that are adequate to cover costs, allow replacement of needed assets, and provide a fair return on investment.

Under the Ramsey pricing principles adopted by the ICC and STB, railroads can price traffic in inverse proportion to demand elasticity, up to the point at which a reasonable, adequate profit level is attained. In other words, a railroad can price its traffic differentially so as to recover a greater percentage of its unattributable costs from the traffic with greater dependency on its service.

If there is a challenge to the reasonableness of a rail rate charged for captive traffic, the STB's task is to determine whether the degree of differential pricing--

³ This section draws on excerpts from a series of STB decisions in Ex Parte 347 (Sub No.2) ranging from 1995 through 2004.

⁴ The Long-Cannon Factors were named for the two Senators who introduced the amendment that added these provisions to the Staggers Rail Act of 1980 (Staggers Act), which deregulated the rail industry.

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

i.e., the amount by which the revenues derived from the traffic at issue exceed the long-run marginal cost (LRMC) of handling that traffic--is reasonable. This determination should be carried out in light of the three Long-Cannon factors.

In carrying out this regulatory task the STB recognizes that LRMC, attributable costs and elasticities of demand are economic concepts and are typically not precisely measurable. Moreover, fairness tends to be a subjective guideline. The STB challenge is to reflect these economic and equitable principles, in a practical, readily administered test.

The Coal Rate Guidelines, adopted in 1985, provided the regulatory framework, known as Constrained Market Pricing (CMP), now used for analyzing rail rate challenges in major rail rate cases.

The Non-Coal Rate Guidelines embodied in the Revenue Shortfall Allocation Method, with the essential inclusion of STB assisted mediation, can similarly meet the challenge of analyzing rail rates in small rail rate cases.

CMP has been approved by the courts and applied in a number of cases, most often using a stand-alone cost (SAC) analysis. However, the STB recognized that a SAC analysis or other CMP presentation could be quite expensive and thus not feasible where the amount of money at issue does not justify the expense.

Accordingly, the ICC initiated a proceeding to determine rate reasonableness guidelines for small shippers in 1986. This was intended to determine maximum rail rates where CMP (particularly SAC) is too costly or traffic too infrequent and dispersed for a Stand Alone Cost analysis.

The STB recognized that a simpler method would necessarily be cruder than the CMP applied in major rate cases. Accuracy is sacrificed for simplicity. This trade-off is necessary to ensure that shippers are not foreclosed from exercising the statutory right to challenge the reasonableness of rates charged on its captive traffic.

Under STB regulations (49 U.S.C. 10707(d) (1)), the reasonableness of a rate cannot be challenged if any of the following conditions hold:

- ❑ The revenues generated by that rate are less than 180% of the variable costs associated with handling the traffic involved.
- ❑ In addition, under 49 U.S.C. 10709(c), the reasonableness of a contract rate cannot be challenged.

STB Ex Parte No. 646

- Similarly, rates for traffic or services that are exempted from regulation pursuant to 49 U.S.C. 10502 or its predecessor (former 49 U.S.C. 10505) are free from challenge.
- The qualitative market dominance limitation of 49 U.S.C. 10707(a)-(b) rules out traffic with access to effective transportation competition.
- Finally the grandfather provision of section 229 of the Staggers Act, which conferred regulatory immunity upon the rate levels that were in place at that time and not successfully challenged by a certain date

In our practice we have encountered many lanes that can meet all of these tests. The need for an effective method for small rate cases is significant in scope.

3. Demonstrate that the small shipment rates at issue would be found as excessive in rate reasonableness analyses using the STB small shipper guidelines in Ex Parte 347, Sub No. 2.

As noted above, the STB Constrained Market Pricing (CMP) rail rate guidelines were developed in the mid 1980's for use in coal rate cases in ICC proceeding Ex Parte No. 347 (Sub-No. 1).⁵ Subsequently, on December 27, 1996, in Ex Parte No. 347 (Sub-No. 2) Rate Guidelines -- Non-Coal Proceedings, the Board adopted simplified evidentiary guidelines. These were designed to be used in proceedings to determine the reasonableness of challenged rail rates charged on captive traffic where the Constrained Market Pricing guidelines used in major maximum rate cases cannot practicably be applied.

As of 1996 these simplified guidelines used three revenue-to-variable cost (R/VC) benchmark figures as starting points for a case-by-case reasonableness analysis.

- The RSAM benchmark reflects the defendant carrier's particular revenue needs (by examining the average markup that the carrier might charge its potentially captive traffic to meet those needs).
- The R/VC _{COMP} benchmark reflects demand-based differential pricing principles (by measuring the markups applied to similar traffic).

⁵ Coal Rate Guidelines--Nationwide, 1 I.C.C.2d 520 (1985)

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

- The R/VC^{>180} benchmark tests whether the traffic at issue bears a disproportionate share of the carrier's revenues (by examining the markups applied by the carrier to its other potentially captive traffic).

Our approach uses each of these STB R/VC to determine whether rail shippers on small volume lanes would qualify for and should receive rate relief on their rail freight. We have found numerous instances in which these criteria would be satisfied.

□ **The RSAM benchmark**

The Revenue Shortfall Allocation Method (RSAM) benchmark measures the uniform markup above variable cost that would be needed from every shipper of potentially captive traffic (the >180 traffic group) in order for the carrier to recover all of its URCS fixed costs. RSAM supplies a key component of a simplified rate reasonableness analysis, because it accounts for a railroad's need to earn adequate revenues, as required by 49 U.S.C. 10704(a) (2).

RSAM calculates the average markup over variable cost that would be needed from all relatively demand-inelastic traffic (traffic moving at RCR percentages in excess of 180) for the carrier to recover its total costs including a reasonable profit component, as measured by the cost of capital for the railroad industry.

In an effort to avoid cross-subsidization among traffic, RSAM as originally proposed would exclude the revenue shortfall resulting from pricing any traffic below the variable costs of serving that traffic.

The STB concluded that adjusting RSAM to exclude the full shortfall from all traffic moving at rates generating an RCR below 100 would understate the revenue requirements that should be borne by captive shippers. The STB was also concerned that failing to include any efficiency adjustment at all would overstate the revenue requirements that should be borne by captive shippers.

Accordingly the STB now publishes a range of RSAM parameters that take into account the need to adjust RSAM for traffic failing to cover its fair share of costs.

SK analyses indicate that many small shipment size rail lanes greatly exceed the RSAM Mark-up percentages reported by the STB in its most recent decision on Rate Guidelines- Non -Coal Proceedings.

STB Ex Parte No. 646

□ The R/V_C COMP benchmark

Revenue-to-variable cost comparison R/V_C COMP looks at the markup or RCR (percentage) collected on traffic with demand characteristics comparable to those of the issue traffic (i.e., movements of a similar commodity under similar circumstances) to estimate the appropriate amount of differential pricing for the traffic at issue.

In attempting to use this measure, however, the ICC learned that it can be difficult, with some types of small or isolated shipments, to obtain a sufficient data base of similar traffic to use for comparison. Moreover, a reviewing court overturned the ICC's use of the R/V_C COMP test in the only case in which the ICC relied upon it solely.

The SK Action Plan can solve both problems encountered by the STB in prior applications of R/V_C COMP. Based on the extensive work already done by SK on rail lane analyses, it is clear that many rail lanes with small volumes bear a far greater than proportional share of the burden than other lanes moving comparable traffic over comparable distances. Moreover, we need not rely on this R/V_C COMP test alone. We can supplement it with other data, including the two other STB R/V_C tests.

□ The R/V_{C>180} benchmark

The R/V_{C>180} benchmark measures the average markup actually charged by the carrier on its high-rated traffic (traffic moving at RCR percentages above 180). This metric is relatively straightforward. One can observe whether the RCR on the traffic at issue is higher than or lower than the average markup actually charged by the railroad.

In many instances SK has found lanes moving small volumes with RCR's well above the R/V_{C>180} benchmark. Generally such lanes also have restricted access or no access to rail to rail competition.

□ The Combined R/V_C or RCR Benchmarks

Taken together the three RCR benchmarks substantially meet the requirements of the Long-Cannon Factors and Constrained Market Pricing. In combination, these measures provide a solid base on which to determine whether a given rate or set of rates exceeds a reasonable level.

The STB has observed, and we agree, that the combined benchmarks include all of the factors that must be looked at in a rate reasonableness analysis:

STB Ex Parte No. 646

- ❑ The RSAM measure addresses revenue adequacy and managerial efficiency (at least as reflected in the Long-Cannon-1 and Long-Cannon-2 tests),
- ❑ The R/VC_{COMP} measure addresses demand-based differential pricing, (as reflected in Long-Cannon-2 tests) and
- ❑ The R/VC_{>180} measure addresses basic principles of fairness (as reflected in the Long-Cannon-3 test),

Accordingly, the three r/vc or RCR benchmarks in combination provide a solid base for conducting the rate reasonableness analysis.

4. Many have observed that the STB small shipper guidelines have never been applied. This has occurred for a number of reasons. It is clear that more is needed

Despite the apparent strengths of the three RCR benchmarks when used in combination, the record is clear that no shipper has stepped forward to use the Non-Coal Rate Guidelines. While motivations and reasons may vary, the persistence of this situation over a period of years strongly suggests that improvement is needed to make this procedure effective.

5. SK recommends a synthesized alternative: a solution based on STB small shipper guidelines and mediated by the STB.

In recognition of the need to improve the Simplified Small Shipper Rate Guidelines to make them effective and available, we recommend supplementing the existing guidelines with mediation and arbitration procedures. The recent mediation facilitated by the STB shows that the STB is capable of, and committed to, using this technique.

SK has participated successfully in both mediation and arbitration. The widespread use of mediation and arbitration techniques indicates their effectiveness.

Mediation provides numerous benefits. Some of the benefits associated with mediation can be summarized as follows:⁶

- ❑ **Mediation works.** It is an effective means of dispute resolution for disputes not requiring judicial or third party determination. It provides a

⁶ Source: Based in part on "Why Mediation?" By Lawrence Huerta; Nov. Dec 1998 issue of Right of Way

STB Ex Parte No. 646

forum and an atmosphere in which parties gain understanding, become understood, and work together to explore options for resolution. By resolving disputes in mediation, parties determine for themselves what is important and, ultimately the outcome of the situation.

- ❑ **Recognition of the other Parties Positions and Underlying Interests:** In the mediation forum, parties gain understanding of the other parties' point of view, and an enhanced opportunity to be heard and understood themselves.
- ❑ **Speed:** In resolving or narrowing disputes through mediation, parties avoid the delay of litigation.
- ❑ **Economical:** In resolving or narrowing areas of disputes through mediation parties save an enormous amount of time, energy, and expense associated with protracted conflict and litigation.
- ❑ **Confidentiality:** While lawsuits are generally matters of public record, what transpires at a mediation can be kept confidential by agreement. Whether a mediation occurs before or after filing of a lawsuit, any form of communication generated at a mediation can be treated as inadmissible evidence.
- ❑ **Quality Of Settlement:** Parties entering into voluntary agreements through mediation are often more likely to adhere to and fulfill commitments made in such agreements than if the decision is judicially imposed.
- ❑ **Reality Check:** In a private caucus, mediation can afford the opportunity to communicate important "reality check" information that may be easier for a client to accept from a neutral.
- ❑ **Win-Win:** Most importantly, through mediation, parties avoid both the "win-lose" and "lose-lose", outcomes associated with litigation. Many parties who "win" in protracted litigation often find the overall time, energy, and monetary commitment associated with litigation comes at an enormous cost and loss. Those who lose in litigation fare even worse. Mediation can prevent such mutual losses and enable the parties to move forward to mutual wins.

These are just some of the reasons to mediate disputes. Mediation works not only because it focuses on the parties' own interests and agendas, but also

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

because it provides the opportunity for parties to move beyond disputes to chart a better solution.

VI. Recommendation

Snavelly King recommends and follows "win-win" strategies in rail negotiations. We recommend continued reliance on private negotiations, turning to the STB to resolve impasses in such negotiations. At that point the Action Plan would be applied.

Using a "win-win" approach, resources that might have been applied to contentious struggle are re-directed to mutually beneficial outcomes. For example, we frequently find opportunities for increased efficiency, thereby generating savings which can benefit both parties.

The action plan approach builds on an effective "win-win" strategy to achieve more reasonable rail rates; a strategy both railroad and shipper can endorse, support and implement.

We see a need for improving the structure of the rate reasonableness process for small rate cases by adopting this "win-win" approach. We believe that involvement of the Surface Transportation Board as a mediator is a significant step in the right direction. This will help establish processes that can transform conflict resolution into productive teamwork and convert friction into momentum.

SK recommends a program of rail shippers and railroads working together to develop more reasonable rail rates based on the STB Non-Coal Guidelines combined with STB-facilitated mediation; such as outlined in this Action Plan. This approach combines the decades of ICC and STB rail rate reasonableness analyses with the proven strengths of "win-win" negotiation and mediation in resolving fact finding and other issues.

In today's testimony we have outlined some specifics which implement the "win-win" concept to help both railroads and shippers achieve mutual objectives. SK has successfully used the techniques recommended in this plan.

STB Ex Parte No. 646

SK Snavely King Majoros O'Connor & Lee, Inc.
Economic and Management Consultants

July 16, 2004

VII. VERIFICATION

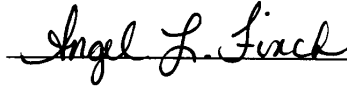
I, Tom O'Connor, declare under penalty of perjury that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement.

Executed on July 16, 2004.



Tom O'Connor

Subscribed and sworn to before me this 16th day of July, 2004 in the District of Columbia.



Notary Public

My Commission expires: March 14, 2006

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmolto1@aol.com

VIII. Capabilities and Experience of Tom O'Connor

This Appendix sketches some of the highlights of Tom O'Connor's background and experience, focusing on the following areas:

- Negotiations
- Litigation,
- Arbitration and Mediation
- Operations analysis
- Network planning and design
- Analysis of complex operations including mergers

The presentation of capabilities is developed in two parts:

- Attachment I, which includes Tom O'Connor's resume, covers the broader range of assignments.
- Attachment II sketches Tom O'Connor's litigation experience, including a brief summary of the cases in which he has testified. Attachment II also summarizes some of the projects he has led.

STB Ex Parte No. 646

Attachment I

Experience

Snavelly King Majoros O'Connor & Lee, Inc., Washington, DC

- **Vice President (1988-Present)**

Mr. O'Connor has more than twenty-five years experience in business and economic analysis. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor has authored a series of guidelines on transportation negotiations and contracting and has conducted transportation negotiations and contracting seminars for a wide range of clients. Mr. O'Connor has also designed and helped lead transportation contract negotiations resulting in tens of millions in gains for both parties.

Mr. O'Connor has also appeared as an expert witness in successful transportation rate litigation, achieving millions of dollars in savings for the client.

He has also created and managed numerous computerized transportation management and regulatory systems to address complex problems and is a widely recognized expert on costing and economics.

He has conducted extensive analyses of truck transportation as well as analyses of tug and barge operations, both inland and off shore, for private sector clients.

Mr. O'Connor has conducted analyses for the Government of Canada used to shape policy for freight transportation and studies for the U.S. Government used to shape Freight and Passenger Transport Policy.

For the Government of Bulgaria, in the Balkans, he developed the Master Plan for Management Information Systems, including telecom and computer facilities designed to operate, measure, manage and monitor both rail freight and rail passenger operations of the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

trust issues and transportation economics and costing. Mr. O'Connor has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Mr. O'Connor has also conducted management audits, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of claims asserted by major railroads.

His experience in telecoms spans the period since 1995. During this period, on a succession of government and commercial projects, Mr. O'Connor directed and participated in the review, design and operation of telecoms systems.

He also designed and developed the business and operations plan for an Eastern European telecoms startup company, BDZCOM. Mr. O'Connor designed and presented the plan and conducted liaison with international commercial, banking and government interests in the United States and Europe.

DNS Associates Inc., Washington, DC

- **Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies.

He designed and implemented mainframe and microcomputerized systems for analyzing rail, truck load, LTL and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies.

He provided expert testimony on coal rates, computerized data bases and cost systems and rail cost issues before the Interstate Commerce Commission.

Association of American Railroads, Washington, DC

- **Assistant Vice President, Economics (1979 - 1982)**

Managing a large staff of professionals, Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the

STB Ex Parte No. 646

Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant rail industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted rail industry seminars on URCS and related economic issues.

Mr. O'Connor testified on behalf of the rail industry before the Interstate Commerce Commission on the design and application of this pathbreaking URCS rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system adopted by virtually all major US railroads.

Consolidated Rail Corporation, PA

- **Assistant Director, Cost & Economics (1977 - 1979)**

Managing a staff of about 30 professionals, Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry.

He also finalized the design, installed and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions, including service design, equipment acquisition, strategic initiatives, line abandonments and service discontinuance.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the North East corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage and turn around this multi-billion dollar corporation.

R.L. Banks & Associates Inc., Washington, DC

- **Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation-related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

STB Ex Parte No. 646

U.S. Railway Association, Washington, DC

- **Manager, Local Rail Service Planning (1974 - 1976)**

In a project of unprecedented scope and historic implications, Mr. O'Connor developed, computerized, and implemented the light density lines cost analysis system, which defined Conrail. This system was used to reach line service decisions for thousands of miles of track, including service throughout the Midwest-Northeast Region.

He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. Mr. O'Connor was an expert witness on behalf of USRA presenting and defending the USRA costing system.

Interstate Commerce Commission,

- **Economist, Washington, DC (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

□ Education

- University of Massachusetts, Amherst, B.A. Economics
- University of Wisconsin, Graduate Course Work, Economics
- University of Delaware, Graduate Course Work, Business Management
- The American University, Graduate Course Work, Computer Science

□ Professional Organizations

- Transportation Research Board
 - Past Chairman of the Transportation Regulation Committee
- Transportation Research Forum
 - Past President of the Cost Analysis Chapter
- National Defense Transportation Association
 - Past Member of Board of Directors, National Capital Chapter

STB Ex Parte No. 646

☐ **Academic honors**

- Phi Kappa Phi academic honors society
- Phi Beta Kappa academic honors society

☐ **Military**

- U.S. Army; Sergeant, Combat Engineers

☐ **Security Clearance**

- Secret

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com

Attachment II

Tom O'Connor is Vice-President of Snavelly King Majoros O'Connor & Lee (Snavelly King), an economic and management consulting company. He has been engaged in the business of economic analysis for more than twenty-five years, beginning in 1973 as an economist with the Interstate Commerce Commission (now the Surface Transportation Board) and later in economic consulting and management positions of increasing responsibility with

- ☐ United States Railway Association, as Manager of Local Rail Service Planning
- ☐ Conrail, as Assistant Director of Cost and Economics
- ☐ Association of American Railroads As Assistant Vice President – Economics
- ☐ DNS, Associates as Vice President
- ☐ Snavelly King Majoros O'Connor & Lee, (Snavelly King), as Vice President.

Mr. O'Connor was Vice President and principal at DNS Associates and has been Vice President and principal of Snavelly King since joining the firm in 1988.

He has provided testimony in a number of proceedings before courts and regulatory commissions in the United States and Canada including:

- Interstate Commerce Commission,
- Surface Transportation Board,
- United States Railway Association,
- Regulatory Commissions in New York, and Pennsylvania,
- State Court in Montana,
- State Court in Virginia
- Arbitration Panel in New York
- Mediation Panel in Massachusetts
- Canadian Crown Commission.
- US District Court for Eastern District of Virginia,
- US District Court for Arizona

Tom O'Connor's practice centers on transportation with specific focus on litigation, negotiations and infrastructure issues including rationalization and redesign of the railroad infrastructure in the US as well as rebuilding of the railway infrastructure in Eastern Europe.

Mr. O'Connor's work in Eastern Europe focused on both transportation and telecommunications.

STB Ex Parte No. 646

Tom O'Connor Testimony in Federal Regulatory Cases

- ❑ **The comparative merits of the Interstate Commerce Commission's Uniform Rail Costing System (URCS) and Cost Center Accounting** submitted to the ICC on behalf of the US Railroad industry in February 1980 in Docket No. 37203.
- ❑ **The economics and computer technology of the Light Density Line Methodology used to define Conrail**, submitted to USRA before a special hearing in 1980.
- ❑ **Computerized transportation database design and use.** Verified statement was submitted to ICC on behalf of the US Railroad industry in Nov 1980 in Ex Parte No. 385.
- ❑ **The comparative merits of two regulatory rail-costing systems**, URCS and Rail Form A, submitted to the ICC on behalf of the US Railroad industry in March 1981, in Ex Parte 399.
- ❑ **Testimony on the Preliminary 1979 Rail Cost Study as released by the ICC, calling for adopting and improving URCS.** This was submitted to the ICC on behalf of the US Railroad industry in Docket No. 37203 in February 1982.
- ❑ **Rail costing using Rail Form a costs applied to service units generated by a computerized rail network model.** This verified statement was submitted to the ICC on behalf of a shipper located in Nevada in July 1985 in ICC Docket Nos. 37809 and 37815S.
- ❑ **Rail costing, also using Rail Form A costs applied to service units generated by computerized network model.** This verified statement was submitted to ICC on behalf of a shipper located in Nevada in November, 1986 in Docket No. 37809, 37815S.
- ❑ **Stand Alone Rail Costing, for use in rate reasonableness, using service units developed with a series of computerized network model.** This verified statement was submitted to the ICC on behalf of the Association of American Railroads in September, 1988 in Docket No. 38239S
- ❑ **Rail merger conditions, developed using rail costs and a computerized network model.** This verified statement was submitted to the ICC in March 1994 in Finance Docket No. 21215 (Sub. No. 5)

STB Ex Parte No. 646

- ❑ **The effects of computerized methods on rail operations and costs.** This verified statement was submitted to the ICC on behalf of Coletto Creek Utility in July 1994 in Docket No. 41242.
- ❑ **The cost of rail coal transportation using URCS costs and A Stand Alone Network.** This verified statement was submitted to the ICC on behalf of West Texas Utilities in April 1995 in Docket No. 41191.
- ❑ **Further testimony on the cost of rail coal transportation using URCS costs and a Stand Alone Network.** This verified statement was submitted to the ICC on behalf of West Texas Utilities in July 1995 in Docket No. 41191.
- ❑ **Oral Argument on the effects of the BN-SF merger on rail costs and service presented before the full Commission** in August, 1995 on behalf of Universal Forest Products in Finance Docket No. 32549.
- ❑ **The effects of the UP-SP merger on costs, infrastructure and operations.** Verified statement was submitted to ICC on Behalf of Kansas City Southern Railroad in March 1996 in Finance Docket No. 32760.
- ❑ **Competitive truck transportation market.** Joint Verified Statement with James Wells was submitted to Surface Transportation Board (STB) on behalf of TJ MAXX on June 22, 1998 in Docket No. 41192
- ❑ **The investment plans of UP-SP to remedy effects of the UP-SP merger.** Verified statement was submitted to STB on Behalf of Kansas City Southern Railroad in June, 1998 in Finance Docket No. 32760 UP-SP Merger Oversight Proceeding
- ❑ **The Arkansas and Missouri Railroad Request For Discontinuance Waiver** Filed on Behalf of Kansas City Southern Railroad. Verified statement was submitted to Surface Transportation Board (STB) in November 1998 in Finance Docket No. 32670.
- ❑ **Further testimony on the competitive truck transportation market.** Joint Verified Statement with James Wells was submitted to Surface Transportation Board (STB) on behalf of TJMAXX in January, 1999 in Docket No. 41192

STB Ex Parte No. 646

- **Rail Merger Guidelines to develop new and improved merger analysis processes.** Verified statements were submitted to Surface Transportation Board (STB) on behalf of OxyChem, Oxy Vinyls, BASF and Williams Energy Services in May 2000 in Ex Parte 582.
- **Reply Testimony on Rail Merger Guidelines to develop new and improved merger analysis processes.** Reply Verified statements were submitted to Surface Transportation Board (STB) on behalf of OxyChem, Oxy Vinyls, BASF and Williams Energy Services in June 2000 in Ex Parte 582.
- **Testimony on Rail Costs and Rates.** Verified statement was submitted to Surface Transportation Board (STB) on behalf of Peabody Energy Company June 2003 in Docket 42077.

Tom O'Connor -- State, Regional and Canadian Testimony

- **Expert testimony centering on transportation rates and costs and the implications for antitrust matters.** This testimony involved research and development of computerized cost and rate analyses for rail and truck service to Arizona and surrounding areas. The evidence is focuses on resolving antitrust allegations regarding certain construction materials. This evidence was developed and submitted on behalf of Solcon in May, 2003 with oral testimony slated to be presented in 2003 and 2004. The case is under adjudication as Case No. CIV 01 01269 PHX ROS, United States District Court for the District of Arizona
- **Expert testimony centering on commuter railroad operations and costs.** This testimony involved design and development of computerized costing models of commuter rail operations. The evidence was central to arbitration to resolve subsidy disputes between New York and Connecticut. This evidence was developed and submitted on behalf of Metro North Commuter Railroad in August 1996 with oral testimony presented in February 1997. The case was decided successfully in favor of the client.
- **Expert testimony centering on the effects of a series of explosions on transportation operations and costs.** This was submitted on behalf of Washington construction Company in a damages case filed by Burlington Northern Railroad in state court in Montana, First Judicial District Court, and

STB Ex Parte No. 646

Cause Number ADV 91-1885. The case went to a jury trial and was decided successfully in favor of the client in September 1993.

- **Expert testimony centering on computerized network models.** This was submitted in an antitrust case filed on behalf of Geoplex in U.S. District Court for the Eastern District of Virginia, Geoplex Corporation v. CACI, Inc. Civil Action No. 89-610-A. This evidence was developed and submitted in November 1989.
- **Expert testimony centering on transportation operations and costs.** This was submitted on behalf of the Canadian provinces of Alberta, Manitoba and Saskatchewan before a Canadian Crown Commission in a series of hearings held in Winnipeg, Manitoba and Regina, Saskatchewan in 1976. This led to an historic change in Canadian transportation regulation.
- In addition to these cases Mr. O'Connor has also submitted testimony on rail costs and operations before State regulatory commissions in Indiana, Pennsylvania and New York.

Throughout more than two decades of providing consulting services in transportation, and telecommunications, Tom O'Connor has developed and defended practical operations, market and economic analyses. The projects he has directed include: developing economic analyses; analyzing mergers, acquisitions, and start-up companies, and in providing strategic planning services to commercial, institutional and government clients. In hundreds of projects, these analyses have significantly influenced decision making in both the private and public sectors

Tom O'Connor has conducted many studies for government and commercial clients involving developing, gathering and analyzing market and pricing data. Mr. O'Connor's recent assignments have involved:

- Rail Transportation
- Truck Transportation
- Water Transportation
- Merger analyses of railroads
- Merger analyses of manufacturing companies
- Business planning for companies in emerging economies
- Transportation contract negotiations
- Transportation rate litigation
- Analysis of the allocation of rail passenger costs and revenues
- Comparative analyses of alternative product sourcing

STB Ex Parte No. 646

- Cost analysis of transportation rates
- Evaluation of transportation operations in Eastern Europe
- Evaluation of telecoms installations in Eastern Europe
- Pricing analyses for commercial telecoms technologies and services in emerging economies

Since 1995 Mr. O'Connor has conducted organizational and commercial studies relating to major European telecommunications projects.

Tom O'Connor recently completed a project for the Bulgarian State Railways (BDZ). The project involved an in-depth study of current rail operations in Eastern Europe and long range planning for the transition from a controlled economy to a market economy. The project included identifying the specifications for upgrading the rail-related telecommunications and management information systems. BDZ was the client in this project.

In a related multi-year project Mr. O'Connor designed an international telecoms company to provide service in Europe. He developed the blue print for this telecoms company, BDZCOM, and presented the business plan to banking, and commercial and government agencies in the United States and Europe.

Tom O'Connor has held key management positions in government, private industry and trade association. He has direct experience planning deregulation and assisting companies adjust to decreased regulation, proliferation of competition and rapid changes in technology for producing and delivering services.

STB Ex Parte No. 646

1220 L St NW Washington, DC, 20005
202 371-9149 ■ Fax 202 842-4966 ■ email skmoltom1@aol.com