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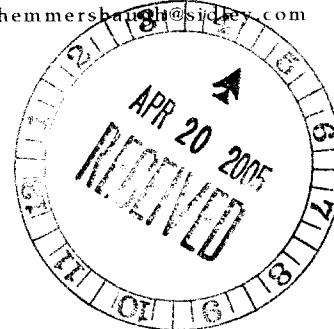
BY HAND

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

ENTERED
Office of Proceedings

APR 26 2005

Part of
Public Record



Re: *Ex Parte No. 657 – Written Testimony of CSX Transportation, Inc. and Norfolk Southern Railway Company.*

Dear Secretary Williams:

Enclosed for filing on behalf of Norfolk Southern Railway Company ("NS") and CSX Transportation Inc. ("CSXT") in the above-referenced proceeding are the original and 10 copies of CSXT's and NS' written testimony. Also enclosed is a computer diskette containing an electronic copy of that testimony. Please acknowledge receipt of these submissions for filing by date-stamping the enclosed duplicate paper copies and returning them with our messenger. If you have any questions concerning this filing, please contact the undersigned.

Thank you for your attention to this matter.

Sincerely

G. Paul Moates

Paul A. Hemmersbaugh

Enclosures

cc: Parties of Record (by mail)

Certificate of Service

I hereby certify that, on this 20th day of April 2005, I caused copies of the foregoing Written Testimony of CSX Transportation Inc., and Norfolk Southern Railway Company to be served, via First Class U.S. Mail or more expeditious method of delivery, upon:

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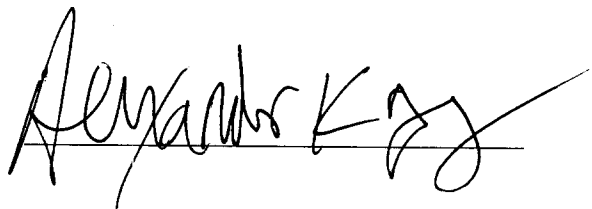
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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB EX PARTE NO. 657

**RAIL RATE CHALLENGES UNDER THE STAND-ALONE
COST METHODOLOGY**

**WRITTEN TESTIMONY OF CSX TRANSPORTATION, INC.
AND NORFOLK SOUTHERN RAILWAY COMPANY**

My name is Paul Moates, and I am appearing in this proceeding on behalf of CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS"). We thank the Board for this opportunity to address you for the purpose of commenting on several aspects of the stand-alone cost ("SAC") test as administered by the Board in maximum reasonable rate cases. As you know, my Firm and I are counsel for CSXT and NS in three pending Eastern coal rate cases in which the SAC test was invoked by Complainants, and consistent with the Board's guidelines for this hearing, I will not comment on any specific aspect of those cases. However, my views of the manner in which the Board is administering the SAC test have necessarily been colored by my experience in those cases, and I believe that the experience will helpfully inform my comments here this morning.

Overall, the Constrained Market Pricing framework adopted by the ICC in 1985 in the Coal Rate Guidelines is working adequately and properly. Both analytically and practically, it remains the best, most sound system for evaluating the reasonableness of common carrier rates for rail transportation under the current statutory framework. While NS and CSXT have several significant concerns about the implementation of certain aspects of the Guidelines in rate

reasonableness proceedings, they believe that, by making some corrections and adjustments, the Board can ensure that the judicially sanctioned Guidelines continue to provide the best available method for determining maximum rate reasonableness challenges.

I. THE BOARD SHOULD MORE RIGOROUSLY ENFORCE THE PARTIES' OBLIGATIONS TO SATISFY THEIR BURDENS OF PROOF, AND TO SUBMIT THEIR FULL CASE-IN-CHIEF IN THEIR OPENING EVIDENCE.

A. Complainants Should Be Required to Plead all Constraints Under Which they Wish to Seek Relief in Their Complaints, and to Present Evidence Sufficient to Support Their Case Under Each Constraint They Invoke.

Both fairness and efficiency require that, as in other litigation, a Complainant be required to state in its Complaint at the outset of the case, the bases under which it will seek relief. In maximum rate reasonableness cases before the Board, that means that a Complainant should be required to plead all CMP constraints under which it seeks relief, as well as the facts it contends entitle it to such relief. Failure to invoke a constraint in the Complaint (or in an Amended Complaint filed prior to the filing of opening evidence) should bar the Complainant from raising or relying upon that constraint later in the case. This basic requirement should be rigorously enforced, and the Board should not excuse non-compliance except upon the most extraordinary showing of cause and prejudice by the Complainant.

If a Complainant invokes more than one CMP constraint, it should be required to submit its entire affirmative case on each constraint in its Opening evidence. Thus, for example, if a Complainant wishes to invoke both the SAC constraint and the Phasing constraint, it should be required to put in its full case on both constraints in its opening evidence, and not be allowed to defer development and submission of phasing evidence to some later time.

B. More Rigorous Enforcement of Burdens of Proof is Important to the Fair and Efficient Administration of Rate Reasonableness Cases.

In all civil litigation, a party must satisfy its burden of proof or have its case dismissed for failure of proof. In rail rate cases, however, the Board has sometimes excused such failures of proof by Complainants, by defaulting to the proof submitted by the railroad, by allowing the Complainant to shore up its case and attempt to supply missing elements of its burden on rebuttal, or, occasionally, by directing the parties to file supplemental evidence addressing the issue(s) on which Complainants have failed to carry their burden.

The Board should not allow Complainants such second and third bites at the apple with respect to basic elements of their *prima facie* case. If a Complainant fails to make out a *prima facie* case, the Board should grant a motion to dismiss if it determines that the Complainant has in fact failed to carry its burden. Requiring the railroads to supply alternative evidence that can be used to fill the gaps in Complainants' case is unfair and imposes undue costs on the railroads, and is fundamentally inconsistent with the adversarial process at the foundation of litigation.

Both parties are sophisticated and represented by able counsel and consultants, and both have substantial financial interests at stake in rate cases. Virtually all shippers who bring rate cases are represented by one of a small group of experienced outside counsel and consultants, all of whom have many years of experience in maximum rate reasonableness cases before the ICC and the Board. Because the vast majority of SAC evidence and presentations pertain to the design, construction, operation, costs, and revenues of a Stand-Alone Railroad, the knowledge, experience, and sophistication of complainants' counsel and consultants regarding these matters means that even shippers who have no prior experience with rail rate cases are ensured of able, experienced and knowledgeable representation before the Board. Particularly now that the Board has eliminated product and geographic competition evidence from coal rate cases, the

individual characteristics and attributes of the complaining shipper are essentially immaterial. Given the sophistication of the parties and their representatives, there is simply no reason to excuse failures of proof or to impose the cost of fixing those failures on the opposing party.

C. More Rigorous Enforcement of the Board's Rule that a Party Must Submit its Full Case-in-Chief on Opening Would Make Proceedings More Fair and Less Confusing.

A closely related point is the need for the Board to enforce more rigorously and more consistently its procedural rule requiring that a party that has the burden of proof on an issue submit its full evidence and argument regarding that item in its opening evidence. Complainants have sometimes been allowed to submit an inadequate or incomplete presentation on opening, and then to "fix" those deficiencies (generally identified by Defendants' reply evidence) in their rebuttal. This is not fair and often results in new theories or arguments presented on rebuttal that Defendants have no opportunity to address. A further result is that the Board is faced with a confusing situation in which arguments or theories offered by one party are not even addressed by the other party (requiring the Board to compare apples and oranges in its decision-making process).

The Board's procedural rules for SAC cases, in place for more than four years, clearly give all parties more than adequate notice that they must present their full case-in-chief on opening. See "General Procedures for Presenting Evidence in Stand-Alone Cost Rates Cases," *Ex Parte No. 347 (Sub-No. 3)*, Decision, Slip Op. at 5 (served March 12, 2005). If, despite that notice, a party fails to do so, the Board should refuse to countenance such non-compliance and enforce its rule.

II. TRAFFIC AND REVENUES FOR SAC PRESENTATIONS

A. Actual, Real-World Traffic and Revenue Data Should be Used Instead of Forecasts or Projections in all Instances in Which Such Actual Data is Available.

Use of forecasts or projections instead of actual data, particularly in the early years of the DCF period, can significantly distort overall traffic and revenue projections. Accordingly, whenever and wherever possible, the Board should base its decision on actual, real-world traffic and revenue data. In addition, Complainants should not be allowed to assume future increases in demand for coal transportation except where they are able to present strong evidence supporting the likelihood of such additional demand (e.g., assumption of additional coal-fired generating capacity coming online in the future should be allowed only based upon real world, time-definite announcements of planned capacity increases at destinations served by the SARR).

B. Projections of Future Traffic Volumes and Rates (for periods for which actual data is not available) Should be Derived from the Same Source.

Because the demand for coal transportation services is dependent upon, and inextricably linked to, the price for those services, projections of future coal traffic volumes should be based upon the same source as projections of future rates for coal traffic. Complainants have sometimes asked the Board to use volume projections from one source, and rate projections from another, mismatched source, which undermines the accuracy and integrity of the resulting overall revenue projections. At least in the recent Eastern cases, the Board has correctly rejected this approach and used traffic volume and rate projections from the same source, a practice that it should continue to follow.

C. Crossover Traffic.

Because Complainants are now designing their SARRs to include predominately crossover traffic, the correct application of SAC principles, requirements, and limitations is

essential to ensuring sound analysis and results. NS and CSXT are concerned that Complainants' use of crossover traffic has become so extensive that it departs from sound principles of SAC and economic theory. For example, current methods of allocating revenues between the SARR and the residual incumbent are not satisfactory. Parties have proposed different revenue division methods, but the Board has not adopted them. It is essential that the SARR be required to account fully for the attributable costs to the residual incumbent of carrying crossover traffic, and to demonstrate that the residual incumbent's portion of the crossover movement would be economically viable.

As the Board recognized in PPL Montana and subsequent cases, it is impermissible to require the residual incumbent to cross-subsidize the operation of the SARR. If the residual incumbent receives insufficient revenue, it would cease to haul that traffic, which in turn would make it impossible for the SARR to transport traffic on its (more lucrative) segment. Therefore, at a minimum, the Complainant should be required to show, for every crossover traffic movement, that the revenues allocated to the residual incumbent would be sufficient to cover all of the variable costs, and some reasonable portion of the fixed costs, of carrying that traffic.

III. SARR CONFIGURATION AND OPERATING PLAN

As the Board has recognized, it is essential that the Complainant show that the way it proposes to serve the selected traffic is consistent with the customers' needs and wishes, and is feasible given the physical limitations at origins and destinations, and the configuration of the SARR. This is an indispensable element of the Complainant's burden of proof. If the Complainant does not satisfy this burden, it cannot establish a *prima facie* case. As emphasized above (at I.B, C), Complainants also should not be allowed to make significant, material changes

to their SAC evidence and presentation in their Rebuttal submission in an effort to shore up deficient opening evidence that fails to establish a *prima facie* case.

While Complainants are entitled to assume the least-cost most efficient mode of operating, their assumptions – about both the SARR and the residual incumbent – must be feasible and consistent with real world limitations and requirements. The Board should continue to police this requirement by carefully evaluating operating costs and underlying assumptions to ensure that Complainants' cost assumptions are supported and would actually be achievable in the real world.

IV. ROAD PROPERTY INVESTMENT

As with operating costs, it is important that the Board carefully scrutinize Complainants' cost assumptions to ensure that they are feasible and adequately supported. It is Complainants' burden to show that the cost assumptions they have made would be feasible. It is not Defendants' burden to show those cost assumptions are not feasible or that they could not be realized using the equipment or engineering techniques upon which Complainant's evidence is based. Once again, it is important that the Board enforce rigorously its rule against new evidence or arguments on Rebuttal.

V. RATE PRESCRIPTION METHODOLOGY

This is a matter to which Complainants have devoted much time and attention in recent cases. While it may be theoretically possible in some contexts for a railroad to set rates so high that the percentage reduction methodology does not adequately reduce the rates, there is no evidence that this has happened in any case to date. To the extent that "gaming" of the rate prescription methodology may be possible, to date the concern has been entirely theoretical.

Adoption of a different rate prescription methodology is a complex and difficult matter that necessarily involves an inquiry into how and to what extent the Complainant's selection of traffic for its SARR should affect the rate prescription process. To date, proposals for new or different methods offered in individual cases have been inadequate, unfair and/or unworkable. For example, the alternative rate prescription methods shippers have offered in recent years have either disregarded railroads' statutory right to set rates as they determine appropriate in the first instance, or have failed adequately to account for complainants' traffic selection (including the increasing dominance of crossover traffic), or both. Unless and until the Board determines that a railroad's common carrier rates have been set at a level that is so high that it distorts the operation and application of the percentage reduction method, there is no reason for the Board to consider departure from this tried-and-true method.