

October 16, 2006

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

RE: STB Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*

Dear Secretary Williams:

This letter constitutes an appeal of the Decision of the Secretary in this case served September 25, 2006. In that decision, the Secretary denied a request for Board workpapers underlying the Board's July 28, 2006 Notice of Proposed Rulemaking ("NRPM") in this case, in which the Board is seeking public comments on a proposal to revise and clarify its standards and procedures for resolving "those cases in which a full stand-alone cost presentation is too costly, given the value of the case." The National Industrial Transportation League ("NITL") sought access to Board workpapers in a variety of areas.

It should be noted that the request sought all workpapers underlying the Board's July 28 NRPM in this case, including (but not limited to) a variety of named subjects. The Secretary's decision denied the request because it would allegedly reveal confidential, commercially-sensitive information. The Secretary also stated that the request would be denied because the material sought is not necessary to assess or fully comment on the merits of the methodological changes that the Board has proposed. Finally, the Secretary said that the proposal could "change in the light of the public comments received." Therefore, the Secretary said, even if there were a demonstrated need to test the accuracy of any of the calculations in the NRPM, "it would be premature at this time."

Respectfully, we believe that the decision of the Secretary is incorrect.

The workpaper request covered a wide variety of information, some of which covered the Confidential Waybill Sample used by the Board as a basis for and underlying the proposals in its decision and information submitted in prior cases to the Board, but some of which did not. The Secretary's decision denied access to any workpapers whatsoever, whether involving the Confidential Waybill Sample, other commercially sensitive information, or not.

The workpaper request was made in order to test and evaluate a wide variety of information and proposals in the NRPM, a short list of which includes the following:

- The need to verify the calculations of the figures presented by the STB in Table 2 in the NRMP, to verify the categorization of the figures in the various dispute categories, and to test the agency's proposed aggregation limits and their impact on potential disputes;
- The STB ties the cost of developing the Simplified SAC and the Three Benchmark analyses to eligibility requirements. The agency's assumptions concerning the time and cost of performing a

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Simplified SAC or Three Benchmark presentation is needed to evaluate the accuracy of these estimates; as well as the agency's assumptions of what drives the costs of Full-SAC cases, including hours and consultant billing rates;

- Whether or not the agency tested the results of its new proposals in past actual full SAC cases or assumed cases, and the results of those tests, as the agency did in evaluating the proposal of the Association of American Railroads in its 1996 decision in this proceeding. If the agency tested the results of its current proposals in past actual or assumed cases, the accuracy of those tests would depend upon the assumptions and data used. Whether the agency tested the results of its proposals, and the accuracy of any test, would be necessary to evaluate and hopefully improve the STB's proposal;
- The need to test the agency's proposed departures in its proposed Simplified SAC procedures, and the effect of those departures on the analyses otherwise developed under the Full-SAC procedures;
- The need to test the accuracy and assumptions under the revised RSAM and the R/VCtotal figures, which are the heart of the agency's proposed Three-Benchmark approach;
- The need to analyze the index used by the agency in its Road Property Investment (RPI) in Table A-1 to 2005 price levels, which directly impacts the results of those figures. In a Full-SAC analysis, parties generally use different indices for different road property accounts, whereas the agency in its proposal infers that it uses one index or all accounts.
- The agency seeks to replace actual case-specific statistics in a variety of areas in Full-SAC cases which averages and regression equations based on previous cases. There is a need to test the validity of the equations to determine if they produce statistically significant results.

The fact that some of the workpaper request would encompass confidential commercial information is not a reason for denial of the information in its entirety. Full-SAC cases, merger cases, and other cases all involve the release of extremely sensitive commercial information, which the agency routinely permits under protective orders. Indeed, the agency notes that the calculations in Appendix A of its proposal were drawn from the records in six prior full SAC rate cases – but in all of these cases, the Board permitted the release of confidential, extremely commercially sensitive information under protective orders. A rulemaking which will determine legal rights in cases that are at the heart of the agency's regulatory mission should receive no less favorable treatment. Additionally, unmasked Waybill Sample data is accessible by the carriers who supply that data to the Board. It is entirely unfair to deny information that is at the heart of the agency's proposal when some parties can but other parties cannot access the accuracy of, or the accuracy of the use of, the data that underlies the agency's proposal.

Moreover, some of the workpaper requests clearly encompass matters that do not involve the release of commercially-sensitive information. The Secretary's reason for denial of such non-confidential requests, namely, that the agency's proposal could change in light of the public comments, is tautological and

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nonsensical. After all, the issue before the agency now is whether the STB should change its proposal, and if so, how. Denying the workpaper request on the agency's proposal on the grounds that the agency might change its proposal in the future is contrary to the entire purpose of the rulemaking. Moreover, once the agency has decided the case, need for the workpaper request is passed, and the request would at that point presumably be denied as moot or untimely.

The Secretary's denial of the workpaper requests should be reversed.

Sincerely,



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