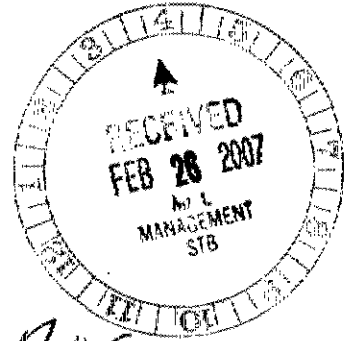


SK Snavely King Majoros O'Connor & Lee, Inc.
Economic and Management Consultants

February 26, 2007

By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Room 700
Washington DC 20423



RE: Ex Parte No. 646 (Sub-No. 1) – Simplified Standards for Rail Rate Cases
Additional Comments of Snavely King Majoros O'Connor & Lee, Inc.

Dear Secretary Williams,

Enclosed for filing please find the original and twenty copies of the Comments of Snavely King Majoros O'Connor & Lee, Inc. submitted in the above captioned proceeding.

We have enclosed an extra copy to be date-stamped and returned to our messenger.

Respectfully submitted,

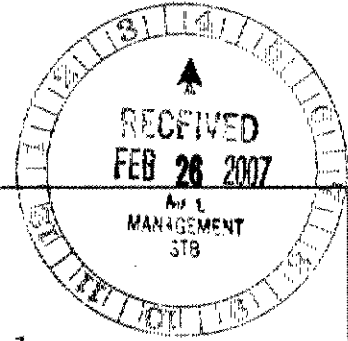
Kim N. Hillenbrand

ENTERED
Office of Proceedings

FEB 26 2007

Part of
Public Record

Economic and Management Consultants



Before the

Surface Transportation Board

Ex Parte No. 646 (Sub-No.1)

Simplified Standards for Rail Rate Cases

Summary Comments and Recommendations of

Snavelly King Majoros O'Connor & Lee, Inc.

Tom O'Connor
Kim Hillenbrand
Snavelly King Majoros O'Connor & Lee, Inc.
1111 14th Street NW
Suite 300
Washington DC 20005
(202) 371-9149

February 26, 2007

ENTERED
Office of Proceedings

FEB 26 2007

Part of
Public Record

I. Introduction

Snavelly King Majoros O'Connor & Lee, Inc. ("SK" or "Snavelly King") welcomes this opportunity to provide Summary Comments¹ on the Simplified Standards for Rail Rate Cases proposed by the Surface Transportation Board ("STB" or "Board") in decisions on July 26th, 2006 and on January 22, 2007 in Ex Parte 646 (Sub No. 1) Simplified Standards for Rail Rate Cases.

These Summary Comments, which Snavelly King has filed on its own behalf, reaffirm our prior testimony, particularly the testimony we offered at the January 31, 2007 STB Hearing Ex Parte 646 (Sub No. 1).

The testimony presented at the January 31, 2007 STB Hearing and in these summary comments reflects the fact that carefully addressing the key issues can assure the effectiveness of the Simplified Standards for Rail Rate Cases. Conversely, failure to address and resolve these key issues could render the Simplified Standards for Rail Rate Cases ineffective and irrelevant, perhaps ultimately leading to more sweeping alternative solutions.

II. Key elements of an effective Win-Win solution

The following chart, excerpted from our presentation at the January 31, 2007 STB Hearing, outlines the key elements of an effective Win-Win solution:

¹ Snavelly King has filed Opening, Reply and Rebuttal Comments on behalf of Snavelly King, as well as Rebuttal comments on behalf of Olin Chemical and Reply Comments on behalf of BASF. The Comments on behalf of Olin and on behalf of BASF both focused on a specific issue: Maximum Case Value

Economic and Management Consultants

**Key Elements of a Solution:
General Principles and Recommendations**

- ☐ Rely on market place dynamics by increasing opportunities for mediation
- ☐ Mediation options must be combined with litigation options which are reasonable and equitable
 - ☐ Implement the Staggers Rail Act Long-Cannon factors,
 - ☐ Include remedies for captive shipper issues
 - ☐ Ensure that carriers have the opportunity to earn revenues adequate to cover costs, allow replacement of needed assets, and provide a fair return.
- ☐ Learn from the past and resolve the limitations of existing methods. The effectiveness of mediation depends upon a fair and equitable litigation frame work for rate reasonableness review
- ☐ The recommendations will enhance attainment of all of these objectives.

Snavelly King Majoros O'Connor & Lee, Inc.

January 31, 2007 Ex Parte 548 (Sub-No. 1) Hearing Presentation

2

The effectiveness of the mediation option ultimately rests on availability of fair and equitable rate reasonableness standards for use in the litigation phase. For mediation to succeed, litigation should be equally appealing, or unappealing, to both parties. The most essential component of fair and equitable simplified rate reasonableness standards is to provide a means of addressing and resolving captive shipper issues.

III. Mediation: a market place solution that is effective in a regulatory setting

Expanding access to mediation is the best way to bring the collaboration and creativity of the market to small and medium shipment rate reasonableness cases. The need for Simplified Standards for Rail Rate Cases has been evident for years to shippers, railroads and other interested parties, including Congress.

Economic and Management Consultants

The development of a method for determining the reasonableness of small shipment rates responded to a directive from Congress in 1995.² As the Board noted in its July 26, 2006 decision, at that time only one shipper had filed a case under Simplified Guidelines. The parties settled the dispute, with the assistance of Board mediation, before presenting any evidence. (See *BP Amoco Chem. Co. v. Norfolk S. Ry.* STB Docket No. 42093 served June 28, 2005)³. More recently, a second shipper filed a case under Simplified Guidelines. On November 22, 2006 Williams Olefins, LLC filed a Rate Complaint and Request for Mediation.⁴ On January 31, 2007, this second case filed under Simplified Guidelines also was successfully resolved through STB facilitated mediation.

Given the proven effectiveness of mediation we recommend:

- Extending the mediation period to 30 days,
- Broadening the access to mediation and
- Making voluntary mediation mandatory as the initial step in resolving small and medium rate reasonableness cases.

Board action and initiatives in this proceeding contain many commendable initiatives which are steps in the right direction towards meeting the longstanding 1995 Congressional directive. The Board is

² In 1995, Congress directed the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). In 1996, the Board adopted the guidelines set forth in Rate Guidelines - Non-Coal Proceedings, 1 S.T.B. 1004 (1996) (Simplified Guidelines).

³ Snavelly King participated in the first case, *BP Amoco Chem. Co. v. Norfolk S. Ry.* STB Docket No. 42093, as an expert witness on behalf of BP Amoco.

⁴ Snavelly King also participated in the second case, *Williams Olefins L.L.C. v. Grand Trunk Corporation* STB Docket No. 42098, on behalf of Williams Olefins.

Economic and Management Consultants

seeking to meet statutory goals of providing captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable, while recognizing the need for railroads to earn a reasonable return on their investments.

In the context of unparalleled levels of strong financial performance by the railroads, the time has clearly come for increased attention to the Board's statutory goal of providing captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable. Mediation is the preferred option. In chart 2 we demonstrate that revenue adequacy objectives would not be hindered by meaningful and effective methods of resolving small shipment rate reasonableness cases.

As the following example illustrates, the potential revenue reduction would be far less than one tenth of 1 percent of rail revenue. Offsetting any potential revenue reduction we see strong and ongoing potential for gain. One source of gain is broader access to the creative and collaborative market solutions provided by mediation.

Economic and Management Consultants

Specific Recommendations

- ❑ Rely on market place dynamics. Increase the use of mediation and combine mediation options with litigation options which are reasonable and equitable

Maximum value of the case (MVC) and Eligibility

- ❑ Merge the small shipment and medium shipment eligibility thresholds and allow the shipper to select the basis under which to bring the case.
 - ❑ As the STB suggested, if litigation were required the shipper could revise the basis under which the case would be litigated after mediation
- ❑ As an example \$500,000 per year is a minimum realistic threshold for small shipment rate cases. This value would equate to about \$2.5 million using a five year time period.
 - ❑ 100 such cases would have no discernible effect on revenue adequacy, as the graph shows
- ❑ In computing eligibility and MVC use a rate proposed by the shipper between the existing rate and a rate generating RVC 180%

Estimated Revenue Impact of Recommended Small Shipment Rate Approach Applied to 100 Cases

Source: STB Waybill Sample 2002-2005

Snavely King Majeros O'Connor & Lee, Inc. January 31, 2007 Ex Parte 646 (Sub-No. 1) Hearing Presentation 3

As noted above, we recommend making mediation the first recourse option for both small and medium shipment rate reasonableness cases. Some of the reasons are outlined in the following chart.

Economic and Management Consultants

Specific Recommendations

- ❑ Rely on market place dynamics by increasing use of mediation and combining mediation options with litigation options which are reasonable and equitable

Simplified-SAC Proposal

- ❑ The limits on maximum value of the case for small and medium cases should be combined into a single threshold and increased.
- ❑ Snavely King recommends that the proposed eligibility criteria should enable access to both medium and small shipment rate cases. The proposed maximum value of the case is much too low for both medium and small shipment rate cases.
- ❑ Neither SAC nor medium-sized simplified SAC as proposed is feasible for a rail distribution pattern of few origins to numerous and widely distributed destinations.
- ❑ A SSAC internal segment cross-subsidy prohibition is ill-advised and impracticable. In effect, this would preclude most access to medium sized shipment SSAC rate reasonableness review
- ❑ A predictable path of development of the medium sized SSAC converges on SAC. This points to increasingly complex SSAC procedures applicable to a small and diminishing base of users

Snavely King Majoros O'Connor & Lee, Inc.

January 31, 2007 Ex Parte 848 (Sub-No. 1) Hearing Presentation

4

IV. Other Key Issues

On the following chart we offer our analysis and recommendations on other key issues on which the Board requested comments. As the chart indicates, we agree with the STB suggestion that aggregation be eliminated and addressed downstream if it emerges as an issue in need of attention. We see ratcheting similarly, unlikely to occur but easily amenable to remediation if it materializes as an issue. We recommend controlled access to the unmasked waybill sample under stringent confidentiality conditions. We see all of the traffic as relevant and advisable to include in the small and medium shipment case rate reasonableness process.

Economic and Management Consultants

Other Issues

- ❑ **Aggregation**
 - ❑ Snavelly King recommends that the Board eliminate its aggregation proposal
 - ↳ Downstream, if aggregation appears to be an issue, the Board and the parties could address it on a case by case basis
- ❑ **Routing of Issue Traffic**
 - ❑ We recommend routing alternatives be permitted. The introduction of routing alternatives is a minor issue in comparison to the complexity of the proposed SSAC
- ❑ **Ratcheting**
 - ❑ Snavelly King sees ratcheting as a minor issue given the few and disparate cases
- ❑ **Access to the Unmasked Waybill Sample**
 - ❑ Representatives of both the shippers and the railroads should have access to the unmasked waybill sample under Board approved confidentiality agreements
- ❑ **RSAM**
 - ❑ The advantages of STB's proposed RSAM is the transparency of the process and the inclusion of all railroad traffic
 - ❑ If the Board chooses to keep the current method of calculating the RSAM, railroad and shippers representatives would need access to the unmasked waybill sample to verify the calculations and the RSAM benchmark should include all rail traffic regardless of RVC
- ❑ **Non-Defendant Traffic**
 - ❑ The relevant traffic includes all the traffic regardless of involved railroad. To restrict the relevant traffic to the defendant railroad creates arbitrary and unsupported segmentations of the data

Snavelly King Majoros O'Connor & Lee, Inc. January 31, 2007 Ex Parte 545 (Sub-No. 1) Hearing Presentation 6

Finally we reiterate our strong support for facilitating and expanding the use of mediation. We have seen the effectiveness of mediation and arbitration both in our work at the STB and in other venues.

As the following chart illustrates mediation brings the power of creative market based problem solving to the regulatory arena. Mediation is clearly the best means of bringing market capabilities into the small shipment sector. We note again that the effectiveness of mediation depends on a fair and equitable litigation framework for both shippers and railroads to gain access to rate reasonableness review.

Economic and Management Consultants

Mediation	
❑ SK has participated successfully in both mediation and arbitration. The widespread use of mediation reflects these additional benefits: ❑ Mediation provides an economical alternative to litigation: In resolving or narrowing areas of dispute through mediation parties save time, energy, and expense associated with litigation. ❑ Mediation provides Confidentiality: 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 is normally inadmissible. ❑ Mediation provides a Reality Check: In a private caucus, mediation can provide the opportunity to communicate important "reality check" information. ❑ Mediation provides Win-Win options: 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. Those who lose in litigation fare even worse. Mediation enables the parties to move forward from disputes efficiently and effectively. ❑ We see in Mediation virtually no downside. Mediation works because it focuses on the parties' own interests and agendas, and because it provides the opportunity for parties to move beyond disputes to chart a better solution.	Snavelly King Majoros O'Connor & Lee, Inc. January 31, 2007 Ex Parte 646 (Sub-No.1) Hearing Presentation 8

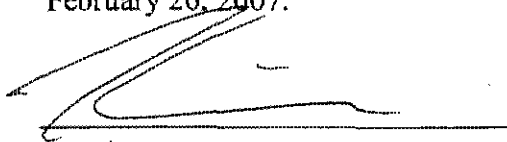
V. Summary

- ❑ SK recommends rail rate reasonableness review based on the STB Three Benchmark Guidelines combined with STB facilitated mediation; such as outlined in our comments.
- ❑ SK recommends relying primarily on mediation and commercial negotiations. This reliance on mediation can be effective only with access to a fair and equitable litigation framework for rate reasonableness review.
- ❑ A fair and equitable litigation framework for rate reasonableness review will allow shippers and railroads to reach market based agreements
- ❑ SK has successfully used the techniques recommended in this report.

Certificate of Service

I certify that this filing was served this day on all parties of record by first class US Mail or more expeditious method of delivery.

February 26, 2007.

A handwritten signature in black ink, appearing to read 'Kim Hillenbrand', written over a horizontal line.

Kim Hillenbrand