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BEFORE THE
SURFACE TRANSPORTATION BOARD



**PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE
CONSIDERED UNDER THE
STAND-ALONE COST METHODOLOGY**

STB Ex Parte No. 638

**REPLY COMMENTS OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

Pursuant to the Board's September 4, 2002 Notice of Proposed Rulemaking, The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits these reply comments addressing the Board's proposal to adopt a mandatory mediation process, to establish a more restrictive discovery standard, and to expedite resolution of motions to compel in rate reasonableness cases involving the stand-alone cost test. BNSF submitted opening comments in this proceeding on October 11, 2002. In addition to the comments of BNSF, the Board received comments from the Association of American Railroads, in which BNSF joined, two government organizations, a transportation union, a private entity and several shipper organizations. BNSF addresses these reply comments primarily to the comments of the shipper organizations, which contained a number of proposals to which BNSF objects. BNSF is also joining in the reply comments filed today by the Association of American Railroads in this proceeding.

I. The Mediation Proposal

Most of the shipper organizations accept, with reluctance, the Board's mediation proposal. Some commenters are openly skeptical that mediation will resolve the rate disputes that lead to litigation.¹ However, the main objection expressed by the shipper organizations to the mediation proposal is that it could delay the initiation of shippers' rate challenges. This concern over delay is misplaced. At most, the Board's mediation proposal would result in a two month delay of litigation. Under the Board's proposal, the parties could extend the period of mediation beyond two months only with unanimous consent. Such a brief delay in the initiation of litigation is justified if there is a chance that mediation will bring about a private sector resolution of the parties' dispute that avoids the costly expenditure of time and resources associated with rate reasonableness litigation. The governing statute instructs the Board to "minimize the need for Federal regulatory control over the rail transportation system," 49 U.S.C. §10101(2), and the Board's proposal advances this goal by encouraging the parties to resolve their differences before proceeding with litigation. Moreover, since the complainant is able to recover damages for the two-year period preceding the litigation with interest, the complainant will not be injured at all by the brief delay.

By contrast, the proposals suggested by the commenting shipper organizations for addressing their concerns about delay would have a number of harmful effects. Edison Electric Institute ("EEI") and the Western Coal Traffic League ("WCTL") propose that delays be avoided by requiring carriers to quote a common carrier rate as much as five months before a rail transportation contract rate expires. However, such an attempt to jump-start the regulatory

¹ See, e.g., Opening Comments of Edison Electric Institute and Request for Oral Hearing at 3-4 (hereinafter "EEI Opening Comments").

process could actually interfere with the private resolution of rate disputes. The months leading up to the termination of a transportation contract are often when the most intense commercial negotiations take place. If private solutions are to be reached, the parties need to be given the opportunity during this time to resolve disputes on their own before having to participate in regulatory proceedings. Private negotiations would have less chance of success if shippers could force carriers to publish a common carrier rate months in advance of the termination of the contract. Shippers would have less incentive to bargain seriously and carriers would be distracted by the need to prepare for litigation. Therefore, the shippers' proposal would run contrary to the objective of the Board and the governing statute to encourage private sector solutions to rate reasonableness disputes.

Moreover, the Board does not have the authority to order carriers to establish common carrier rates in advance of any need by the shipper for transportation. EEI seems to acknowledge that its proposal would be inconsistent with the decision of the Court of Appeals for the D.C. Circuit in *Burlington Northern R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996) ("*BN v. STB*"), but it claims that the decision in that case was invalidated by the enactment of the ICC Termination Act.² EEI is wrong; *BN v. STB* remains good law. The D.C. Circuit issued its decision in *BN v. STB* after ICCTA was enacted, although the appeal was brought under the preexisting statute. Apparently anticipating that questions might be raised about the validity of its decision under the new statute, the D.C. Circuit specifically noted that the ICC would have had even less justification for requiring the publication of a common carrier rate in advance of the need for transportation under the ICCTA than it did under existing law. *BN v. STB*, 75 F.3d at 693 n. 7 (noting that "this change in the law suggests that any future action by the Board along the lines

² EEI Opening Comments at 4 n. 4.

of the Commission's action here would be on even weaker statutory ground than was the action taken here.") As the Board recently acknowledged, a shipper is entitled to publication of a common carrier rate only when it has an actual need for transportation.³ A shipper is not entitled to a common carrier rate for the purpose of manipulating the regulatory process.

EEI also proposes that delay can be avoided by allowing the mediation to take place after a complaint has been filed and therefore while the litigation is in progress.⁴ However, once a rate reasonableness case is started, defendants are under tremendous pressure to prepare discovery responses and to organize their defense against the complainant's claims. It would interfere with the defendant's litigation efforts to require simultaneous mediation and litigation. As a result, EEI's proposal would likely render the mediation an unproductive formality, which may not be far from EEI's goal given its position that it "does not believe that mediation, compulsory or otherwise, will settle rail rate disputes. . . ." ⁵

EEI suggests that delays can be avoided by giving the parties to a mediation the ability to declare an impasse and terminate the mediation before 60 days have expired.⁶ But granting either party the unilateral right to opt out of mediation at any time would diminish the likelihood that the parties will take mediation seriously and that the effort will be successful. A shipper, anxious to go forward with litigation, could preempt the mediation at the outset merely by

³ *Arizona Electric Power Cooperative v. BNSF*, STB Docket No. 42058 slip op. at 8 (Sept. 11, 2002) (hereinafter "*AEPCO*").

⁴ EEI Opening Comments at 4-5.

⁵ EEI Opening Comments at 2.

⁶ EEI Opening Comments at 6.

declaring an early impasse. This proposal would therefore frustrate the Board's objective to encourage private sector resolutions of rail rate cases.

The Board's proposal already has the flexibility to deal with situations where the parties' positions have become intractable. The Board's proposal states that the mediation will take place "within 60 days," which appears to allow for the possibility that the mediator could declare an end to the mediation if it has become clear before 60 days have passed that the parties are unlikely to reach a voluntary settlement. BNSF would not oppose a clarification to the Board's proposal that specifically provided that the mediator could terminate the mediation under those circumstances. No further measures are needed to ensure that the mediation takes place expeditiously.

II. The Proposed Discovery Standard

The commenting shipper organizations are uniformly opposed to the Board's proposal to adopt a more restrictive discovery standard. While they agree that defendants' discovery should be restricted and acknowledge that the Board's current approach already limits defendants' discovery, they oppose any similar restriction on a complainant's discovery and assert that complainants should be allowed to seek information in discovery so long as the information is relevant to the issues in a rate reasonableness proceeding.⁷ Even putting aside the unfairness of shippers' one-sided discovery proposal, the shippers offer no justification for broad discovery under a "relevance" standard. Since the issues that arise in stand-alone cost cases are well known by shippers' counsel and consultants, shipper-initiated discovery can and should be

⁷ See, e.g., EEI Opening Comments at 10-11. As BNSF explained in its initial comments, there are several areas in which a defendant in a SAC proceeding may require discovery from a complainant and the Board's rules should make it clear that it does not intend to prohibit that discovery.

focused on the specific information that is needed to present SAC evidence. There is no reason to permit broad discovery under a "merely relevant" standard that imposes substantial burdens on defendants and prolongs rate litigation.

Lacking a principled justification for retaining a broad discovery standard for shipper-initiated discovery, the shippers argue that the Board should abandon its proposed change in the discovery standard because such a change may lead to more discovery disputes.⁸ But even if it were the case that adoption of the new standard could initially produce disputes while the parties attempt to understand how the new discovery standard will be implemented by the Board, that would not be a rational basis for declining to adopt a standard that is otherwise justified. Any increase in litigation at the outset would be compensated by a decline in litigation after the scope of the new standard became clear.

In fact, there is no reason to expect an increase in discovery litigation under the proposed standard. The most likely effect of the new standard is that complainants will focus their discovery requests on the information they need rather than on the broad universe of potentially relevant information, as is now the case. As BNSF noted in its opening comments, complainants typically make hundreds of discovery requests and many of those requests extend far beyond the scope of information needed to present SAC evidence. The Board's proposed discovery standard should have the effect of forcing complainants to refine and focus broad discovery requests. By narrowing the field of potential discovery, the Board's standard should actually have the effect of reducing discovery disputes brought about by overly broad discovery requests. Moreover, the Board's proposed standard will likely reduce discovery litigation by

⁸ See, e.g., Opening Comments of the Western Coal Traffic League at 19-20 (hereinafter "WCTL Opening Comments").

narrowing the grounds on which a party can seek orders to compel discovery and the grounds for opposing discovery requests. Under the new standard, motions to compel should be filed only where the moving party has a real need for the information at issue. The Board will no longer have to address motions to compel premised only on the relevance of the information sought.

One of the commenting shipper organizations requests clarification of the new standard in the event it is adopted by the Board.⁹ Specifically, the National Industrial Transportation League ("NIT League") requests that the Board make it clear that its new discovery standard is not intended to preclude discovery of movement-specific data merely on grounds that such data is not needed because the complainant can base variable cost calculations on system-average data that are publicly available. BNSF agrees that such a broad, a priori restriction on discovery of movement-specific data would not be appropriate. But NIT League misconstrues the grounds on which BNSF has opposed some requests for movement-specific data in the past. In the *AEPCO* case, for example, BNSF opposed discovery of certain road property investment records because those records were incomplete, inconsistent with URCS costing methodology and therefore unable to be used in presenting reliable movement-specific cost estimates. Discovery of such data would needlessly complicate both discovery and the presentation of evidence.

Finally, some commenting shippers propose changes to the Board's existing discovery procedures that go far beyond the scope of the rules proposed in this proceeding. For example, WCTL suggests that the Board participate in the initial discovery conference with the parties and impose strict production deadlines on carriers. But one of the key objectives of the Board's proposed rules is to have discovery take place with as little Board intervention as possible;

⁹ See Comments submitted by The National Industrial Transportation League at 12 (hereinafter "NIT League Opening Comments").

Board staff would become involved only where there was a dispute that could not be resolved between the parties. WCTL's proposal is squarely contrary to that objective. In any event, it would be inappropriate for the Board to consider WCTL's proposal since it is beyond the scope of the rule changes that are the subject the Board's Notice of Proposed Rulemaking. Similarly, EEI proposes that the Board change the standards under which sanctions can be assessed in discovery disputes. EEI proposes that sanctions would be appropriate in any case where a party loses a motion to compel. Its theory, apparently, is that the losing party will have violated a Board order, namely the general requirement that parties follow prescribed discovery standards. However, existing case law and the Board's regulations require the violation of a specific order in a specific dispute as a condition to the imposition of sanctions, and it would be inappropriate even to consider changes to that standard in this proceeding.¹⁰

III. Motions To Compel

BNSF stated in its initial comments that it supports the Board's proposal for informal conferences with Board staff for the purpose of assisting the Board in resolving the issues raised in motions to compel. BNSF believes that informal conferences will facilitate the prompt resolution of discovery disputes by allowing the Board to gain a quick understanding of the issues.¹¹ The commenting shippers also support the Board's proposal. Some commenting shippers urge the Board to make the staff conferences mandatory either in all cases or where

¹⁰ See, e.g., *Public Service Company of Colorado d/b/a Xcel Energy v. BNSF*, STB Docket No. 42057, slip op. at 3 (Sept. 25, 2002).

¹¹ Given this objective, there is no reason to have a FERC ALJ involved in the staff conferences as EEI proposes. See EEI Opening Comments at 8-9.

requested by the moving party.¹² These suggestions miss the point of the Board's proposal, which is to assist *the Board* in addressing motions to compel without adding burdens or procedures that might prolong discovery litigation. To advance this objective, the Board should leave it to the discretion of the Board staff to convene an informal conference when the Board deems such a conference necessary.¹³

The commenting shippers also support the Board's proposal to limit the time for a party to reply to a motion to compel to 10 days. As BNSF explained in its initial comments, such a restriction on the time to reply to motions to compel will not significantly expedite the resolution of those motions, but it will affect the ability of the responding party to present facts and arguments relevant to the dispute. BNSF opposes this aspect of the Board's proposal because it could undermine the Board's objective of making it easier for the Board staff to resolve motions to compel, which often deal with substantive issues relevant to the SAC test.

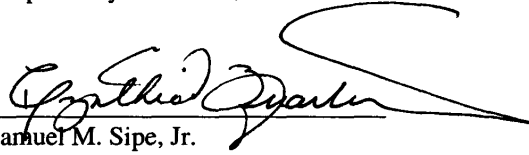
Finally, some commenting shippers request modifications to the existing appellate rules to deal with appeals from staff decisions on motions to compel.¹⁴ BNSF believes that the Board's existing appellate rules adequately address the procedures that would apply to appeals from staff decisions. No changes in those rules are necessary or warranted.

¹² EEI Opening Comments at 8; WCTL Opening Comments at 23; Opening Comments Submitted by The Membership of the National Coal Transportation Association at 4 (hereinafter "NCTA Opening Comments").

¹³ WCTL's proposal that any information requested by the Board staff in an informal conference be submitted within one day of the request is patently unreasonable. In any event, there is no reason to micromanage the procedures to be applied in the informal conferences.

¹⁴ NCTA Opening Comments at 4-5; NIT League Opening Comments at 8; and WCTL Opening Comments at 25.

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CERTIFICATE OF SERVICE

I hereby certify that this 31st day of October 2002, I served a copy of the Reply
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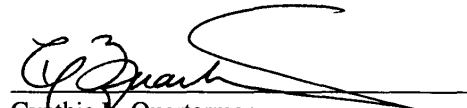
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