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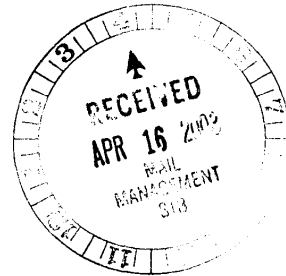
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April 16, 2003

Via Hand Delivery

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



ENTERED
Office of Proceedings

APR 16 2003

**Part of
Public Record**

Re: Ex Parte No. 646 - Rail Rate Challenges in Small Cases

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter, please find an original and ten copies of the Written Testimony of the Association of American Railroads.

Please date-stamp the extra copy provided for that purpose and return it to our messenger.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cynthia L. Quarterman".
Cynthia L. Quarterman

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

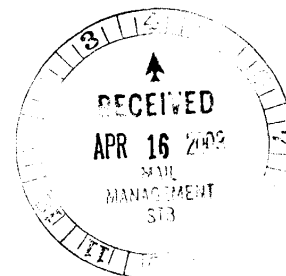
BRUSSELS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 646

RAIL RATE CHALLENGES IN SMALL CASES

**WRITTEN TESTIMONY OF THE
ASSOCIATION OF AMERICAN RAILROADS**



**ENTERED
Office of Proceedings**

APR 16 2003

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Public Record**

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Dated: April 16, 2003

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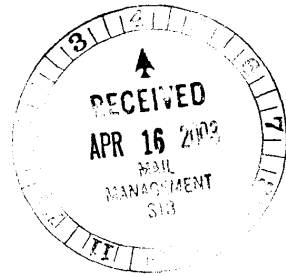
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 646

RAIL RATE CHALLENGES IN SMALL CASES

**WRITTEN TESTIMONY OF THE
ASSOCIATION OF AMERICAN RAILROADS**



This is the written testimony of the Association of American Railroads (“AAR”), submitted in response to the Board’s procedural orders served on March 26 and April 1, 2003 in the above-captioned proceeding. Since 1934, AAR has represented the interests of major freight railroads in North America. AAR has been involved in numerous proceedings before the Surface Transportation Board (“STB”) and its predecessor agency, the Interstate Commerce Commission (“ICC”), involving issues related to rate regulation. These include proceedings relating to the ICC’s adoption of market dominance standards,¹ the *Coal Rate Guidelines*,² the Uniform Railroad Costing System (“URCS”),³ small shipper rate guidelines,⁴ the review of

¹ *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981).

² *Coal Rate Guidelines, Nationwide*, Ex Parte No. 347 (Sub-No. 1), 1 I.C.C. 2d 520 (1985).

³ *Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes*, Ex Parte No. 431 (Sub-No. 1), 5 I.C.C.2d 894 (1989).

⁴ *Rate Guidelines - Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No. 2), 1 S.T.B. 1004 (1996).

access and competition issues,⁵ *Market Dominance Determinations--Product and Geographic Competition*,⁶ and matters related to the arbitration of rate disputes.⁷ Most recently, AAR participated actively in the Board's recently completed rulemaking proceeding, STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered under the Stand-Alone Cost Methodology*.

AAR is pleased to participate in the Board's initial public hearing in this matter, the purpose of which is to provide a forum for interested persons to present their views and proposals regarding rail rate challenges in small cases subject to the Board's jurisdiction. At this preliminary stage of the proceeding, AAR has one principal proposal to offer for the Board's consideration. AAR proposes that the Board adopt a program of mandatory, non-binding mediation for small case rate disputes. AAR's mediation proposal actually pre-dates the initiation of this proceeding. After the July 31, 2002 hearing before the Senate Commerce Committee's Surface Transportation Subcommittee on "Railroad Shipper Concerns" that Senator Breaux chaired, the AAR developed this approach. In December 2002, AAR informally presented its mediation proposal to the National Industrial Transportation League ("NITL"). The current hearing presents an appropriate forum for airing that proposal more broadly.

AAR believes that a program of mandatory, non-binding mediation can have a real impact on small case disputes over rates, allowing the majority of such disputes that may arise to

⁵ *Review of Rail Access and Competition Issues*, STB Ex Parte No. 575, 3 S.T.B. 96 (1998).

⁶ *Market Dominance Determinations--Product and Geographic Competition*, STB Ex Parte No. 627, 3 S.T.B. 937 (1998).

⁷ *Arbitration--Various Matters Relating to its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction*, STB Ex Parte No. 586 (served May 22, 2002).

be resolved through private sector negotiations. To the extent that formal proceedings before the agency may be required to resolve some such disputes, AAR takes no position at this time as to whether different rate reasonableness guidelines from those currently in place might be called for. Regardless of what guidelines are in place, the Board could consider expediting small rate case proceedings through such mechanisms as early discovery conferences and technical conferences.

As to what rate disputes could be eligible for “small case” disposition, AAR urges the Board to adopt a clear threshold based on the amount in dispute to define the upper limit of those matters that could receive small case treatment. AAR proposes that the Board determine that a dispute be eligible for small case treatment if the amount in controversy is limited to \$300,000 (inclusive of both reparations and the present value of any future rate prescription).

I. AAR’S PROPOSAL FOR MANDATORY, NON-BINDING MEDIATION FOR SMALL CASE RATE DISPUTES

AAR believes that there are very few situations in which market dominant rail carriers are charging unreasonably high rates. Pervasive competition, especially from trucks, limits disagreements over rates. Where disputes do arise and the amount in dispute does not justify resolution under the Board’s Constrained Market Pricing guidelines, private sector negotiated resolution of the rate dispute should be encouraged. Railroads and their customers should continue to maintain an active dialogue regarding their commercial dealings to address issues before they rise to the level of a dispute calling for third-party resolution. When such disputes do arise, they should be resolved to the fullest extent possible in an informal context.

A. The Rationale for Mandatory, Non-Binding Mediation

AAR sees mandatory, non-binding mediation of small case rate disputes as a logical extension of attempts to resolve commercial issues informally through discussions between the parties. It views mandatory, non-binding mediation as a process whereby a neutral will assist carriers and customers in reaching their own settlement, but not have the authority to make a settlement binding or to offer a recommended solution, unless the parties agree to request such a recommendation from the mediator.

Voluntary resolution of rate disputes is clearly preferable to regulatory litigation for two principal reasons: (1) voluntary dispute resolution is less likely to disrupt the parties' ongoing commercial relationship; and (2) the costs in time and money of voluntary dispute resolution are less than the costs of formal regulatory litigation. Regarding the first point, AAR contemplates that the parties themselves (*i.e.*, the business people involved in the commercial relationship) will be directly engaged in negotiating a resolution with the assistance of an objective mediator, rather than relying primarily on their legal representatives. Through mediation, parties can increase the likelihood of maintaining their business relationships, which might be adversely affected as a result of positions taken in formal litigation. Creative solutions or accommodations to special aspects of the business relationship can readily be incorporated into a settlement that is reached with the assistance of a mediator.

Regarding the second point, mediation can be scheduled at an early stage before parties have become "locked in" to their positions, which increases the likelihood of an expeditious

resolution.⁸ Where disputes are settled as a result of mediation, parties will be able to save money by avoiding the costs of formal litigation.⁹

The Board, of course, is well aware of the benefits of voluntary dispute resolution, including non-binding mediation. The Board's recent adoption of rules requiring mandatory, non-binding mediation in rate challenges brought under the Constrained Market Pricing Guidelines is another step in a series of actions taken by the Board to promote informal dispute resolution.¹⁰ AAR supported the Board's proposal for mandatory, non-binding mediation in Ex Parte No. 638. It believes that non-binding mediation is even more likely to produce negotiated settlements where smaller rate disputes are at issue. The principal reason for this is that with smaller amounts at stake, the parties will have a greater incentive to resolve disputes informally and avoid the costs of formal litigation.

B. The Elements of Mandatory, Non-Binding Mediation

AAR's proposal for mandatory, non-binding mediation would be simple to implement and would be subject to relatively few formal constraints. One unavoidable constraint, given the statutory scheme, is that mandatory mediation should be available only in those situations where it can be shown that there is an absence of effective competition for the common carrier transportation at issue. However, as with the new Ex Parte No. 638 rules, the mediation would take place in advance of a formal Board determination of market dominance.

⁸ Other agencies have adopted early intervention requiring negotiation prior to rate adjudications. For example, the Federal Energy Regulatory Commission refers all oil pipeline protested rate filings to a settlement judge for recommended resolution. *See* 18 C.F.R. § 384.5 (2003); *see also* § 385.603(d).

⁹ A matter as simple as scheduling mediation at a mutually convenient location can save travel time and money.

¹⁰ STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered under the Stand-Alone Cost Methodology* (served Apr. 3, 2003).

Mediation Procedures. The parties to the mediation should be free to design a mediation process that will provide the best opportunity for a successful outcome given the particular facts and issues underlying the dispute. If the parties are unable to agree on a process, they should adhere as closely as practicable to the practices and procedures for commercial mediation set out in the American Arbitration Association's Commercial Mediation Rules ("CMR"). The CMR contain recommended practices ranging from who initiates the process to the appointment and qualifications of the mediator.

Selection and Qualification of Mediators. Because unresolved mediated disputes might proceed to the STB for formal resolution, mediators should not be employees of the Board. A mediator should be experienced in mediating commercial disputes and should have no personal or financial interest in the outcome of any dispute that he/she mediates. The parties should have the option of agreeing in advance on a mediator, as opposed to accepting in the first instance a mediator proposed by a third party.

Mediation Standard. While there is no standard for decision making in mediation, the mediator's advice to the parties as to the reasonableness of a rate should be based upon considerations of reasonableness that draw their essence from ICCTA, including recognition of the precepts of differential pricing and of a rail carrier's statutory right, as well as a need, to earn adequate revenues.

Mediation to Be Confidential and Non-Precedential. The entire mediation process should be private and confidential. The outcome of mediation should have no precedential effect in any subsequent proceedings. Consistent with the foregoing, neither the parties nor the mediator should disclose to any third party, including the Board, what transpired during the mediation, including the nature of the information exchanged. However, the mediator should

submit a brief statement to the Board on the results of the mediation in a standardized format. AAR views this requirement of confidentiality as critical to ensuring that the mediating parties communicate freely in an effort to reach a negotiated settlement.

II. SMALL RATE CHALLENGES BROUGHT BEFORE THE BOARD

If the Board adopts AAR's proposal for mandatory, non-binding mediation of small case rate disputes, there should be few such matters that require formal resolution by the Board. However the possibility exists that such disputes will be brought before the Board following unsuccessful mediation.

In 1996 the Board adopted guidelines that were intended to provide "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).¹¹ The fact that no cases have been brought under the *Non-Coal Guidelines* is apparently one reason why the Board has decided to initiate the current proceeding.

As the Board knows, AAR challenged the legal sufficiency of the *Non-Coal Guidelines* when they were adopted in 1996 and that challenge was dismissed as unripe. Putting that legal challenge aside, AAR is unaware of reasons for proposing alternative standards for rail rate challenges in small cases at this time. AAR has no basis for saying that the absence of small rate cases means that the *Non-Coal Guidelines* are or are not "workable" in their current form. The lack of small rate case litigation must be attributable, at least in part, to the fact that the vast majority of rail traffic is competitive and that much of it moves under negotiated rates. The universe of truly captive small shippers with rates that are excessive cannot be large.

¹¹ *Rate Guidelines -- Non-Coal Proceedings*, 1 S.T.B. 1004 (1996), *petition for review dismissed as unripe sub nom. Association of American Railroads v. STB*, 143 F.3d 942 (D.C. Cir. 1998).

In AAR's view, the Board should not consider adopting any alternative to the *Non-Coal Guidelines* unless and until two conditions are met. First, the Board would have to determine that there is a substantial need for Board resolution of small rate case disputes. Such a determination should be based on a specific showing of particular disputes that could and should be resolved by the Board and not on unsubstantiated, anecdotal representations. Second, the Board should not pursue alternative guidelines unless it has reason to believe that it could fashion new guidelines that comply with the principles of maximum rate regulation embodied in ICCTA, including the principles that maximum rate guidelines permit differential pricing and recognize the goal of railroad revenue adequacy.

Whatever guidelines are in place, the Board could take steps to make small rate case proceedings as efficient and inexpensive as possible. Such steps might include versions of proposals recently adopted in Ex Parte No. 638 for discovery conferences before Board staff members and technical conferences. The specifics of such procedures would have to be tailored to fit the small case framework.

III. IDENTIFICATION OF DISPUTES ELIGIBLE FOR SMALL CASE TREATMENT

The Board's original Notice of Public Hearing in this matter indicated that the Board is "interested in participants' views on how small rate cases should be defined or identified." Slip op. at 1. Congress has identified this category of disputes as "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). This suggests that the Board should identify the relevant category of cases by reference to the amount in dispute. As previously noted, AAR's mediation proposal to NITL was that a dispute be eligible for small case treatment if the amount in controversy is limited to \$300,000 (inclusive of both reparations and the present value of any future rate prescription).

Respectfully submitted,

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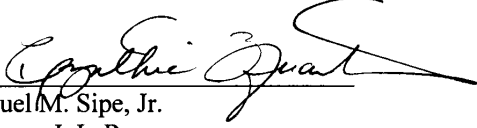
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Dated: April 16, 2003


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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2003, I served a courtesy copy of the
Written Testimony of The Association of American Railroads by hand delivery or overnight mail
to the following parties that filed a Notice of Intent to Participate in this proceeding:

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