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Office of Proceedings

June 19, 2003

via Hand Delivery

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

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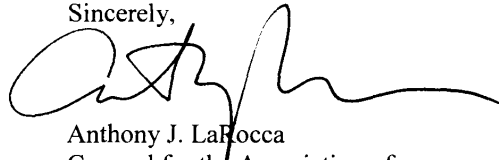
**Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered
Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the Reply Comments of the Association of American Railroads.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,



Anthony J. LaRocca
Counsel for the Association of
American Railroads

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 638

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

**REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

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Dated: June 19, 2003

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SURFACE TRANSPORTATION BOARD**

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The Association of American Railroads ("AAR") submits these reply comments on behalf of itself and its individual members in response to the Board's April 3, 2003 request for comments in this proceeding. AAR has previously submitted comments in this proceeding on October 11, 2002 and October 31, 2002 and participated in the Board's hearing held on February 27, 2003.

In a decision served on April 3, 2003, the Board sought comments from interested parties on certain proposals designed to streamline discovery in stand-alone cost ("SAC") cases. The request for comments was directed primarily to litigants in SAC cases and AAR therefore did not submit opening comments. The Board received comments from four railroads and a representative of a rail labor union, and in a joint filing, from three shipper groups, the Western Coal Traffic League, Edison Electric Institute and The National Industrial Transportation League (collectively "Shippers"). AAR is filing these reply comments to address proposals by the Shippers in their joint filing that are grossly overreaching and inconsistent with the Board's objective in this proceeding to streamline the litigation of SAC cases and reduce the burden of these cases on the litigants and the Board.

Several of the Shippers' proposals would expand and complicate the discovery process, contrary to the Board's stated intent to streamline discovery. While the Shippers present their comments as neutral and even-handed, they are in fact extremely biased in favor of complainants in SAC cases. The Shippers seem to believe they are entitled to virtually unlimited discovery without regard to the burdens on rail defendants or the intrusiveness of discovery on railroads' operations. The Shippers' comments also convey the false sense that railroad defendants are to blame for the burdens and expense of discovery in SAC cases. In fact, it is the overreaching by complainants, clearly on display in the Shippers' proposals here, that has made SAC discovery become a time-consuming and contentious process.

The Shippers' proposed "Guidelines" go far beyond the scope of the Board's request for comments on standardized discovery designed to streamline the discovery process. For example, the Shippers ask the Board to promulgate a blanket rule in SAC cases requiring a party to produce *all* data maintained by the party that are responsive to a particular topic or request. Shippers' Comments at 11. Such a rule, if adopted, would require defendants to conduct extraordinarily broad data searches in numerous areas of their company and in multiple databases. Moreover, it would be inconsistent with limits on discovery in SAC cases that have already been established. As recently as the April 3 Decision in this proceeding, the Board stated that the purpose of discovery is to provide a party with data that it needs to make its case. If a complainant needs a particular set of data and the defendant produces that data from a single database, there is no valid reason to require the defendant to search for and produce duplicate data sets from other databases. The Board has already rejected attempts by complainants in SAC cases to require production of multiple data sets from which to pick and choose in presenting

SAC evidence. See STB Docket No. 42057, *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 3 (served July 2, 2002).

The Shippers seek to overturn another longstanding discovery rule that limits discovery to the production of data maintained by a party in the ordinary course of business and in the format in which the data are maintained. The Shippers ask the Board to require the defendant in a rate case to conduct special data studies and to manipulate data in order to report data in a format chosen by a complainant or, alternatively, to give the complainant direct access to the defendant's databases. Shippers' Comments at 12. But the Board has already found that a defendant cannot be ordered to create evidence through special studies to assist the complainant in its challenge to the defendant's rates. See STB Docket No. 42054, *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 3 (served Nov. 9, 2000). And the Shippers are either naïve or seriously mistaken if they believe it would be practicable or appropriate for a shipper or shipper representative to have direct access to a defendant's sensitive databases to conduct their own special studies.

The Shippers also ask the Board to adopt a rule that would preclude a party from introducing or relying on any data in presenting SAC evidence that was responsive to a discovery request but not produced in discovery. Shippers' Comments at 13. Such a blanket preclusion rule would turn the discovery process on its head. It would no longer be sufficient for the producing party to identify data that satisfies a particular discovery request. The producing party would now have to identify during the discovery process all the data that it might need to present its defense to an evidentiary presentation it has not yet seen and determine whether the other party might construe particular discovery requests as extending to that data. Since many discovery requests are general in nature (*e.g.*, requests for data on cycle times), the range of

information that might arguably be covered by a particular request could be extremely broad. A defendant seeking to keep its defense options open would be required to produce massive amounts of data, even though much of that data could turn out to be redundant or irrelevant. Once again, the result would be an expansion of discovery, not a streamlined discovery process.

The Shippers' proposed "Guidelines" go beyond the scope of the Board's request for suggestions on streamlining discovery and should, accordingly, be rejected. But even on the issues that are the subject of the Board's April 3 request, the Shippers' proposals disregard entirely the objective of this proceeding, which is to make the discovery process more manageable. Exhibit 2 to the Shippers' Comments contains a broad list of proposed SAC discovery that encompasses virtually all areas that are covered by complainants' traditional discovery requests. Moreover, the Shippers propose that a defendant be required to respond to these broad "standard" discovery requests at the time they answer the complaint. Shippers' Comments at 9. In effect, a discovery process that under the Board's current discovery rules is expected to take at least 75 days would, under the Shippers' proposal, have to be conducted in 20 days. This proposal is patently unreasonable. Indeed, the Shippers themselves recognize that it would be impossible for a defendant to prepare a response within 20 days and suggest that the defendant should begin collecting discovery materials even before the complaint is filed. The Shippers cannot expect the Board to take this proposal seriously.

Finally, the Shippers propose that they be given the unlimited right to conduct additional discovery beyond the broad "standard" discovery described in Exhibit 2 to their comments. Shippers' Comments at 9-10 and n.6. This proposal would result in multiple rounds of discovery that would be extremely disruptive to a defendant's operations. Discovery in a SAC case does not generally involve the simple identification of relevant files that can be reviewed by an

attorney or paralegal and then produced. The data sought in SAC cases must usually be identified or collected by a defendant's employee who also has important business responsibilities to perform. It is critical to minimize the disruption to a defendant's business by limiting as much as possible the number of times that employees must be called upon to produce data. The Shippers' proposals utterly disregard the impact of SAC discovery on defendants.

The Shippers' proposals are so one-sided that they offer the Board little help in developing procedures for managing or expediting discovery. They also confirm the view of AAR's members that much of the burden associated with SAC discovery has been the product of gross overreaching by complainants and a lack of moderation in complainants' conduct of discovery. AAR supports the Board's goal of producing a more streamlined discovery process. That goal will not be achieved by adopting the Shippers' extreme proposals.

Respectfully submitted,

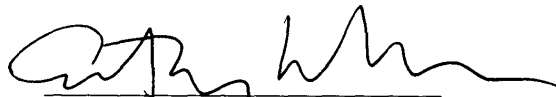
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Dated: June 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of June, 2003, I served a copy of the foregoing Reply

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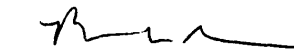
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