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ASSOCIATION OF
AMERICAN RAILROADS

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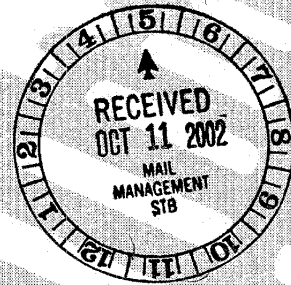
October 11, 2002

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

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Office of Proceedings

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Re: Ex Parte No. 638 - - Procedures To Expedite Resolution Of Rail Rate
Challenges To Be Considered Under The Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the proceeding captioned above, please find an original and ten copies of the Comments of the Association of American Railroads.

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

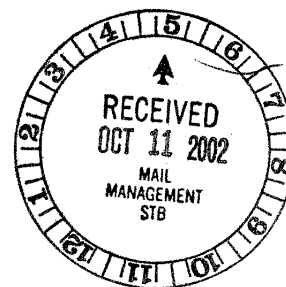
Sincerely,


Dennis J. Starks
Senior Commerce Counsel

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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

INITIAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: October 11, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO.638

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INITIAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") hereby submits these initial comments on behalf of itself and its individual members in response to the Board's Notice of Proposed Rulemaking, served September 4, 2002, (NPR). To further expedite the resolution of rate challenges, the Board proposes several changes. The Board solicits comments on (1) its proposal to require shippers seeking relief from a railroad in a large rate case to engage in non-binding mandatory mediation (NBMM) of a dispute with the railroad prior to filing a complaint; and (2) its proposal to amend its regulations at parts 49 C.F.R 1109 and 1114, to modify its discovery standards and how it handles discovery disputes in large rate cases considered under the Stand Alone Cost methodology (SAC).

Specifically, with respect to NBMM, the NPR stresses the Board's overall preference for a more efficient means of moving rate disputes toward quick resolution outside the adjudicatory process. The Board emphasizes its belief that private sector solutions are the most efficient way of resolving disputes. Accordingly, the Board seeks comments on its proposal to require that a shipper seeking relief from a railroad in a large rate case engage in NBMM to provide the opportunity for shippers and railroads to settle rate disputes, in whole or in part, in less time, with lower costs, and in a less confrontational environment.

With respect to its proposal to amend the discovery rules, the Board observes, without fixing blame, that the discovery practices of complaining shippers or defendant carriers, and sometimes both, may have contributed to delays in some recent rate proceedings. The Board proposes to amend its rules both to restrict the scope of discovery and to provide a quicker process for resolving any discovery disputes that arise.

COMMENTS

AAR supports the proposal to encourage the consensual, private resolution of rail/shipper rate disputes. Recognizing the value of negotiated resolutions, AAR's member railroads maintain an active dialogue with their customers on a range of commercial matters designed to prevent disputes from arising, and work to resolve them informally when they do. AAR's members have supported previous Board initiatives to enhance that dialogue and continue to pursue individual efforts to promote rail/shipper discussions¹. AAR also supports the Board's desire to restrict discovery in SAC proceedings in order to minimize the burden on the parties and to expedite the resolution of rate reasonableness disputes that cannot be resolved by private negotiations.

Accordingly, since the AAR and its members have a keen interest in resolving carrier-shipper disputes informally to the greatest extent possible, and to expedite the completion of necessary discovery in rate reasonableness proceedings, it offers the following comments and suggestions in response to the NPR.

I. Non-Binding Mandatory Mediation

¹For example, the AAR and its member railroads supported the Board's recent effort to develop a public record on the propriety of arbitration as an effective means of resolving disputes that are subject to the Board's jurisdiction. See AAR's Comments filed November 21, 2001, in Ex Parte No. 586, *Arbitration - Various Matters Relating To Its Use As An Effective Means Of Resolving Disputes That Are Subject To The Board's Jurisdiction*. In addition, AAR supported the adoption by the Board in Ex Parte No. 560 of the voluntary arbitration rules set forth at 49 CFR Part 1108 and the Board's implementation in Ex Parte No. 55 (Sub No. 83) of the voluntary alternative dispute resolution rules set forth at 49 CFR Part 1109.

As the AAR understands the NPR, the Board proposes that a shipper file a request for NBMM with the Board, indicating an intent to file a formal complaint, and specifying the relevant facts and nature of the issue to be mediated. Simultaneously, the shipper would have to serve a copy of its request for NBMM on the defendant railroad(s). Next, a mediator appointed by the Board would work with the parties under specific ground rules and time frames through settlement, if one is achieved. If no settlement is reached, or if a partial settlement is reached, then the shipper is permitted to proceed with its formal complaint with respect to unresolved issues.

The AAR has been a strong proponent of less costly and informal processes, such as non-binding mandatory mediation to settle rate disputes, and it agrees in concept with the Board's instant proposal to require parties to attempt mediation before embarking on any formal rate complaint involving SAC. Accordingly, the AAR agrees that the time has come to prescribe such a process by regulation, and offers the following:

First. Proposed rule 1109.4 (b) indicates that a request of NBMM would serve to "fix the limitations period for any relief for rates or charges already paid, just as would the filing of a formal complaint." AAR does not believe that the Board has the statutory authority to modify the existing limitations period applicable to rate reasonableness challenges. The governing statute at 49 U.S.C. §11705(c), states that "A person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues." The limitations period is thus defined by reference to the filing of a complaint. The AAR does not believe that a notice requesting mediation under the Board's proposed rules can satisfy this statutory requirement. The Board cannot, by regulation, override the plain language of the statute. Thus, the proposed regulation should firmly state that *a notice of NBMM shall not stop the relevant statute of limitations period from running.*

As a practical matter, the most recent generation of rate complaints have been filed immediately before or after an existing contract expires and the common carrier rate becomes effective. Since the parties should be able to determine whether mediation is likely to be fruitful long before the two year limitations period established by 49 U.S.C. 11705 (C), this should not be a problem.

Second. The AAR agrees that new proposed rule 1109(f) should provide that the mediation process shall be private and confidential. That ensures that the mediating parties can communicate freely, enhancing the likelihood that mediation will be productive. However, 1109(e) states that the precise procedure is within the mediator's discretion. To avoid any possible conflict between the two provisions, the AAR recommends the following additions to the proposed new rule: (1) the parties, including the mediator, shall not disclose to any third party, including the Board, what transpired or the nature of the information exchanged during mediation; (2) a mediator shall be precluded from participating in any subsequent adjudications before the Board that might follow in the event that mediation does not resolve all of the dispute; and (3) the entire mediation process in any given case, shall be subject to a protective order to be prepared by the parties for **adoption by the Board**.

Third. The AAR notes that the proposed regulation does not set forth criteria for selecting a mediator. In the AAR's view, a requirement that a mediator be neutral, yet have knowledge and experience resolving rail rate matters or experience mediating commercial disputes, enhances the probability of successful mediation. Thus, the AAR proposes that the following be added to proposed rule 1109.4(b): (1) a mediator cannot be an employee of the Board; (2) the parties should have the option of agreeing in advance on a mediator; and (3) a mediator should have knowledge of relevant regulatory standards, i.e., knowledge of substantive

rate reasonableness standards that draw their essence from ICCTA, including the standard of a railroad's statutory right as well as need to earn adequate revenues; or be experienced in mediating commercial disputes.

Fourth. The AAR agrees that the precise procedure for resolving an individual rate dispute through the mediation process should be left up to the mediator. Nevertheless, the AAR recommends that proposed rule 1109.4(e) should be modified, by adding that the mediator should make every effort to design a process that avoids imposing significant resource burdens on either party.

II. More Restrictive Discovery Standards

The AAR supports the Board's desire to streamline and simplify the rate complaint process. The AAR agrees that a variety of factors can contribute to the time it takes to complete rates cases, given their complexity. To that end, the AAR understands the Board's concern that ill-conceived discovery requests may needlessly delay resolution of such cases and burden the parties.

Accordingly, the AAR agrees that more restrictive discovery standards would ensure discovery could not be used to harass or burden parties. In addition, by focusing on information truly needed, such standards would expedite rate cases, reduce or narrow discovery disputes and prevent excessive costs to the parties. The AAR offers the following comments and suggestions:

First. The Board states that a more restrictive standard is appropriate. The AAR would agree with the Board, provided more restrictive standards are applied to complainants and defendants evenly. The AAR submits that certain discovery requests are appropriate as to each party. Nevertheless, the expense of excessive discovery requests, often affects both sides, i.e., the railroads in searching for, developing and producing data, and the shippers in paying consultants to manipulate the data. A restrictive discovery standard, evenly applied, should help

alleviate both concerns.

Second. The time frame for discovery should be limited so that extra years of data do not have to be either searched for or objected to.

CONCLUSION

The AAR urges the Board to modify its proposal in a manner consistent with the views expressed above.

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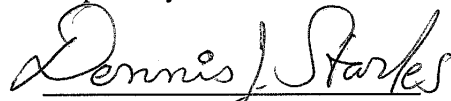
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Dated: October 11, 2002

Respectfully submitted



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