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The Honorable Roger Nober, Chairman
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

RE: STB Ex Parte No. 646, *Rail Rate Challenges in Small Cases*

Dear Chairman Nober:

This letter is submitted on behalf of the seventeen shipper interests that submitted Joint Comments to the Board on July 11, 2003 in this proceeding ("Joint Commenters").¹ On August 4, 2003, Samuel M. Sipe submitted a letter on behalf of the Association of American Railroads ("AAR") that takes issue with the Joint Commenters' proposal to determine the eligibility of a rate complaint for small case treatment and makes a much more stringent alternative proposal. This letter responds to the AAR's comments.

In their July 11th Comments, the Joint Commenters proposed that the Board establish a bright-line eligibility standard for "small rate cases" based on no more than a \$4.8 million annual freight bill from a single origin-destination pair. The premise for this threshold is that a typical SAC case costs a complainant approximately \$2 million and the expected recovery requires a multiplier of at least three in order to justify the litigation risks. The Joint Commenters then conservatively assumed a 25% rate reduction and at least a five year recovery period to calculate the \$4.8 million maximum eligibility amount.

The AAR accuses the Joint Commenters of "overreaching in the extreme" and of "hijacking" the interests of small shippers. But, the Joint Commenters simply have developed a small case eligibility standard that adheres to the statutory maxim that non-coal rate guidelines be used "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) [emphasis added]. In proposing a \$4.8 million threshold, the Joint Commenters have taken a very conservative approach. Under a more realistic scenario of only a 10% rate reduction and a three year recovery period, the threshold would be \$20 million.

¹ The Joint Commenters are the American Chemistry Council, Colorado Wheat Administrative Committee, The Fertilizer Institute, Idaho Barley Commission, Idaho Wheat Commission, Kansas Wheat Commission, Montana Wheat & Barley Committee, National Grain and Feed Association, National Industrial Transportation League, North Dakota Grain Dealers Association, North Dakota Public Service Commission, North Dakota Wheat Commission, South Dakota Wheat Commission, Washington Barley Commission, Washington Wheat Commission, Alliance for Rail Competition and Consumers United for Rail Equity.

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AAR takes issue with the Joint Commenters' premise that SAC cases typically cost \$2 million. Although AAR implicitly concedes that \$2 million is a fair approximation of the cost to litigate coal rate disputes, it contends that all cases decided under the SAC standard would not be as costly. There have been only two non-coal rate cases under the SAC standard. The McCarty Farms case is infamous because it took seventeen years to resolve and has become an example of the need for non-coal rate reforms. The State of Montana and various farm producers spent \$3.2 million in costs, excluding attorney's fees (the case was taken on contingency). More recently, the Board decided FMC Wyoming, a case that involved all of the same procedures, issues, and evidence that is submitted in coal rate cases. Indeed, the printed decision in FMC was nearly 200 pages long.

Based on the facts presented in these actual non-coal SAC cases, rather than the AAR's speculation, there is no support for the AAR's suggestion that non-coal cases under CMP would be less costly than coal cases. In fact, such a conclusion defies logic. Unlike coal shippers who transport large volumes of one commodity between a single origin-destination pair for twenty years or more, the vast majority of non-coal shippers transport multiple commodities to many destinations that frequently change every few years. These different transportation characteristics of non-coal traffic dramatically complicate the development of a stand-alone railroad. A non-coal SAC is likely to involve a larger stand-alone system, to more destinations, with more complex rail operations. This suggests that non-coal rate SAC case costs would at least be equal to, but certainly not lower than, coal rate cases.

AAR urges the Board "to identify a sub-class of cases brought by truly small shippers...[that] would be carved out from the larger set of cases potentially eligible by statute to be decided under rate standards other than CMP." [emphasis added] This is a rare admission by the AAR that the statute does provide for a larger set of cases to be decided under the non-coal rate guidelines than just "small shipper" cases. AAR's desire, however, to restrict the non-coal guidelines to "truly small shippers" is contrary to the statute. By its own terms, the AAR's approach would leave the vast majority of small rate case shippers with no effective remedy at all for unreasonably high rail rates -- neither able to afford a SAC proceeding given the value of the case, nor able to qualify for non-coal rate procedures.²

² AAR asserts that the Joint Commenters' proposal would encompass a substantial majority of non-coal traffic. The Joint Commenters point out that the difficulty of applying SAC procedures is due in part to the practical effect of the Board's "Bottleneck Decisions." It would be doubly incongruous for the Board to deny shippers bottleneck relief and then to use the impact of that denial also to refuse shippers relief under the non-coal rate guidelines, essentially depriving them of any remedy whatsoever.

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The Board appropriately has focused this proceeding on “small rate cases,” as opposed to “small shippers.” Since “small rate cases” are “those cases in which a full stand-alone cost presentation is too costly, given the value of the case,” the Joint Commenters’ proposal best identifies those cases that should qualify for a simplified and expedited determination of rate reasonableness pursuant to the non-coal rate guidelines.³

Sincerely,



Nicholas J. DiMichael
Jeffrey O. Moreno

cc: Parties of Record

³ It may be, as AAR suggests, that the Board can adopt modified small case rules, including the case size threshold, only after further notice and comment. As the Joint Commenters stated, however, the Board does not need to employ rulemaking to clarify its existing standards under various hypothetical circumstances.
