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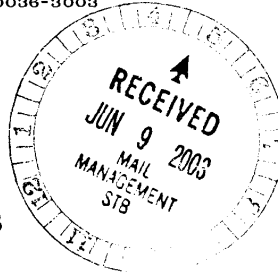
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June 9, 2003

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN 11 2003

Part of
Public Record

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 above-referenced proceeding please find an original and ten copies of the Joint Opening Comments of the Western Coal Traffic League, Edison Electric Institute and The National Industrial Transportation League. Also enclosed is a wordperfect disk containing an electronic copy of the submission.

An additional copy of the filing is enclosed. Please indicate receipt and filing by time-stamping the additional copy and returning it to the bearer of this letter.

Thank you.

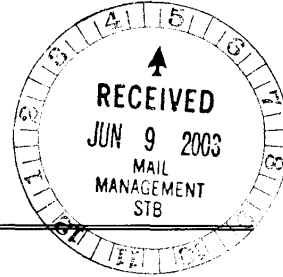
Sincerely,

Kelvin J. Dowd

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



PROCEDURES TO EXPEDITE RESOLUTION	)	
OF RAIL RATE CHALLENGES TO BE	)	
CONSIDERED UNDER THE STAND-ALONE	)	Ex Parte No. 638
COST METHODOLOGY	)	(Phase II)
	)	

**JOINT OPENING COMMENTS
OF
THE WESTERN COAL TRAFFIC LEAGUE
EDISON ELECTRIC INSTITUTE
AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The Western Coal Traffic League ("WCTL"), Edison Electric Institute ("EEI") and The National Industrial Transportation League ("NITL") jointly submit these Comments¹ in response to the Board's Decision served April 3, 2003 in the captioned proceeding. In the Decision, the Board adopted certain amendments to its procedural regulations governing the adjudication of rail rate disputes under the stand-alone cost (SAC) constraint of the Constrained Market Pricing (CMP) methodology adopted in *Coal Rate Guidelines -- Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom., Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3d Cir. 1987). Those amendments included the

¹For convenience, WCTL, EEI and NITL collectively are referred to herein as the "Shippers."

introduction of mandatory non-binding mediation as an initial step in the formal rate litigation process; the adoption of procedures to expedite the resolution of discovery disputes and to clarify evidentiary records in advance of Board deliberations; and changes in the rules governing the treatment of confidential information in public evidentiary filings. *See* Decision at 2-4, 6-9.

The Board's April 3, 2003 Decision also sought public comments on four (4) additional, potential changes in the Board's discovery procedures for cases brought under the SAC methodology. These are:

1. Whether the Board should prescribe a standard set of discovery elements that always should be produced as a matter of course by parties to SAC cases.
2. Whether the Board should place a limit on the number of discovery requests that may be propounded in addition to those covered by the standard set. *See* Decision at 5.
3. Whether there should be cut-off dates for the updating of discovery responses and a limit on the number of years for which data should be produced.
4. Whether new rules should be adopted to require one party to pay the cost of another party's discovery compliance, and if so, how any cost sharing should be determined. *Id.* at 6.

Each of these questions is addressed in these Comments.

I.

IDENTITY AND INTEREST

WCTL is a voluntary association of entities responsible for the purchase and transportation of coal mined from sources west of the Mississippi River. In the aggregate, WCTL members arrange and pay for the transportation of over 100 million tons of coal annually, nearly all of which moves by rail. WCTL has been an active participant before the Board and its predecessor in every proceeding of significance that has addressed the procedural or substantive rules applied to adjudicate complaints challenging the reasonableness of rates assessed on traffic subject to railroad market dominance. Several WCTL members are and have been complainants in cases brought under the *Coal Rate Guidelines*, almost all of which have involved disputes over discovery and resulting procedural delays.

EEI is the national association of investor-owned electric utilities. EEI likewise has participated in virtually every general interest proceeding before the Board in which the rules governing the resolution of disputes over the reasonableness of rail rates on coal have been an issue. Coal-fired power plants generate over fifty percent (50%) of the Nation's electricity, and EEI members ship by rail hundreds of millions of tons of coal annually to generate that electricity. EEI members also have been complainants in numerous coal rate reasonableness cases before the Board and its predecessor.

NITL is an association of companies that conduct industrial and/or commercial enterprises throughout the United States and internationally, and that are concerned with the transportation of goods in domestic and international commerce. NITL has approximately 600 separate member companies that are involved with all modes of transportation, including rail. NITL members ship hundreds of thousands of carloads of freight of all kinds by rail each year, and many NITL members have been litigants before the Board and/or have a direct interest in procedures related to securing relief from unreasonable rates on captive traffic.

WCTL, EEI and NITL all participated in earlier phases of this proceeding, both through written comments and appearances at the hearing held on February 27, 2003.

II.

SUMMARY OF POSITIONS

WCTL, EEI and NITL support and endorse the Board's ongoing efforts to develop procedural reforms that will help to streamline and make more efficient the process of resolving rail rate disputes under the SAC methodology. From the standardization of evidentiary formats mandated in *Ex Parte No. 347 (Sub-No. 3)*² through the rules revisions promulgated in the April 3 Decision, the Board has taken steps

²*General Procedures for Presenting Evidence in Stand-Alone Coal Rate Cases*, Ex Parte No. 347 (Sub-No. 3) (STB served March 12, 2001).

that the Shippers believe will lead to more expeditious decisions, while still protecting the rights of shippers and carriers to take full advantage of the remedies and defenses offered under the governing statute and the *Coal Rate Guidelines*. Certain of the suggestions on which the Board has asked for further comment in the current phase of this proceeding may advance these goals still further.

The Shippers agree that standardized sets of discovery responses to be provided as a matter of course by both sides in a rail rate dispute are a positive innovation that should be pursued. The Shippers have developed and herein present the categories of data that complainants and defendants, respectively, should be required to produce, along with accompanying guidelines to ensure that the production is useful and complete, and that the parties' privilege claims and administrative due process rights are protected.

In light of the fact that recent reforms to the discovery process have yet to be fully implemented, however, the Shippers oppose the imposition of any general limits on the number of supplemental discovery requests. Particularly given the significant differences between the discovery processes in SAC cases and those characteristic of federal civil litigation, there is no sound basis at present to place general limits on the number of interrogatories or document requests that parties to SAC cases can propound. The Board has ample authority under current regulations to curb abuses, and can always revisit this issue in the future once experience is developed under the new discovery procedures recently adopted and the additional revisions discussed in these Comments.

The Shippers agree that it would be appropriate and procedurally beneficial to set limits on the time periods for which data in SAC cases needs to be produced, and cut-off dates for discovery requests and the updating of previous discovery responses. In Part III C, *infra*, the Shippers propose specific limits in these areas. As emphasized therein, however, a critical component of any rule setting temporal limits on discovery and data production must be a clear mandate that all limits will be enforced equally on all parties. It would be inequitable in the extreme for a party to enjoy the benefits of time limits on its obligation to produce relevant data to its opponent, and not be bound by those same limits in the presentation of evidence in support of its own case.

On the issue of “cost sharing,” the Shippers support a rule generally akin to the *status quo*: the party that controls the production of information or documents should be responsible for the costs associated with the production. Thus, for example, if a party offers the requesting party an opportunity to review files and select the documents or information it wishes to use, the requesting party should pay the cost of copying documents, conducting a special study, etc. If, on the other hand, the recipient of a discovery request insists on selecting and producing the responsive data itself, that party should bear the costs. A contrary rule would lead to abuse and subsidiary litigation, both of which run counter to the Board’s stated purposes in this proceeding.

III.

DISCUSSION

A. STANDARD DISCOVERY REQUESTS

The Shippers agree with the Board that the mandatory disclosure of certain standardized categories of data by complainants and defendants in SAC cases holds promise for expediting what all too often has been an unduly protracted discovery process. *See* Decision at 5. Expedition in and of itself should not be the Board's sole goal, however. Any new rules that are adopted in this area should be designed to ensure that the data to be produced as a matter of course is complete and provided in a usable form, and that all parties' administrative due process rights and legitimate claims of privilege are protected.

Exhibit Nos. 1 and 2 to these Comments set out the Shippers' proposed schedules of information and data respecting stand-alone and variable cost calculations, and jurisdictional determinations of qualitative market dominance, that the Shippers submit should be made available as a matter of course in any proceeding governed by the *Coal Rate Guidelines*.³ The Exhibits list categories of data, rather than specific documents or types of records, to ensure that the substance of a party's production responsibilities cannot be influenced or manipulated by changes in the format of its files

³Exhibit No. 1 describes the data that would be produced by a shipper-complainant. Exhibit No. 2 describes the data that would be produced by a rail carrier-defendant.

or the manner in which it otherwise retains information. The Shippers also have strived to make the lists as comprehensive as practicable,⁴ both in keeping with the Board's recent admonitions that complainants submit as complete and detailed a case for the relief requested as possible in the opening evidentiary round,⁵ and in the interest of minimizing the need for additional discovery requests tailored to relevant information not already produced. *See* Decision at 5.

The Shippers propose that complainants in rate cases be required to produce the data described in Exhibit No. 1 coincident with the filing of the complaint itself. At the same time, the complainant also would be obligated to serve on the defendant a written description of the potential geographic and temporal scope of the hypothetical stand-alone transportation system that the complainant intends to present in its opening evidence. Defendants would be required to produce the data described in Exhibit No. 2 (as guided by the complainant's written scope notice) coincident with the filing of the answer to the complaint. Additional discovery would be governed by the general rules, as previously modified in this proceeding.

The Shippers submit that the standard production scheme proposed herein is both workable and fair. Complainants control the initiation of a rate proceeding, and

⁴While comprehensive, the data lists in Exhibit No. 1 and 2 reflect information that is routinely and repeatedly requested and made available in major rail rate complaint proceedings.

⁵*See PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42054 at 7-9 (STB served March 24, 2003).

obviously take a number of preparatory steps in advance, including (presumably) undertaking some general analysis of the reasonableness of the challenged rate based on publicly available information. Since the complainant determines when the case will start, it is not unreasonable to require that it collect the data described in Exhibit No. 1 in the course of its pre-complaint preparation. Likewise, the complainant's preliminary rate analysis should enable it to identify the states (and to some extent the individual rail lines) through or over which the stand-alone transporter would operate and the timeline for its construction and commencement of operations.

Requiring defendant rail carriers to produce the data in Exhibit No. 2 with their answer also is reasonable, given the timing of the complainant's standard production. Adoption of the Shippers' proposed standard discovery lists (along with prior rate case experience) will put the railroads on notice as to what will be required generally, and the complainant's scope notice will narrow the data production range accordingly.⁶ Moreover, while the exact date that a complaint will be filed may not be known by the defendant, the fact that one is coming usually will be. It is generally acknowledged that rate complaints almost always follow extended periods of unsuccessful negotiation and, ultimately, a shipper's request for the establishment of a common carrier rate subject to the Board's jurisdiction. A rail carrier is likely to know for weeks or even months that

⁶ If, after receiving this data, a complainant shipper finds it necessary to modify the geographic scope of its stand-alone railroad, it could pursue necessary additional discovery through usual procedures during the discovery period.

prospects for rate litigation are high, and will have ample opportunity to prepare accordingly.

In addition to the standard data categories themselves and the production timing requirements described above, the Shippers submit that the Board should promulgate guidelines to govern production to better ensure that the data provided is useful and complete, and that the process itself is not manipulated for partisan gain.

First, the Board should require that if a party has more than one data base or other repository of responsive information, all must be produced. This rule is needed to help assure that each party has access to the same non-privileged information that might be relied upon by its opponent. This rule also will protect against improper manipulation of the process; *e.g.*, a railroad defendant with multiple data bases for the allocation of terminal expenses could not bias the cost determination by withholding one that reflects the efficiencies of unit train service vis-a-vis system average operations.

Second, the Board should require that all data be produced in a computer-readable format to the extent available, and that the data itself be accompanied by all codes, field definitions, record layouts, and other documentation needed to interpret and manipulate the data. A good deal of discovery-related delay in proceedings under the *Coal Rate Guidelines* results from voluminous “hard copy” production of information that must be re-loaded into a computer before it can be used, or from the production of computer data without the codes and other features needed to interpret it, thereby

necessitating further, follow-up discovery requests. The rule requested here would serve the twin goals of expedition and completeness of production.

Third, the Board should clarify that a party cannot withhold data based on a claim that a “special study” is required to produce it if all that must be done is combine information from different databases that routinely is combined in the ordinary course of business, or revise or modify computer program instructions to cause data to be reported in a particular format.⁷ In the current era of advanced information technology, the “special study” objection is abused if it allows a party to avoid producing relevant data that it easily can and often does generate for its own internal purposes, simply because it does not retain the data in that precise form in its permanent files. The Board should take the opportunity to prevent such abuse in the standardized discovery context.

Additionally, when a “special study” objection is legitimately raised, the Board should confirm that the requesting party will be entitled to access to the data or facilities that would be needed for the study, to conduct the study at its own expense.⁸

⁷Under STB discovery precedents, parties are generally required “to furnish information in their possession” but are not required “to prepare special studies.” *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42054 at 3 (STB served Nov. 9, 2000).

⁸*See, e.g., Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42056 at 5 (STB served Feb. 9, 2001) (special study objection overruled where shipper sought access to carrier facilities to collect, on its own locomotive fuel consumption data); *San Antonio, Texas v. Burlington Northern R.R.*, Docket No. 36180 at 5 (ICC served Dec. 5, 1986) (carriers’ special study objections overruled where shipper “merely requests access to the underlying data from which it will assume the task of preparing any special study”).

Fourth, the Board should adopt a rule that parties will be absolutely precluded from introducing or relying upon any evidence that is based on data responsive to one of the categories described in Exhibit Nos. 1 and 2, that was not produced during the discovery process.⁹ A principal benefit of a standard set of discovery responses is that it reduces the need for separate discovery requests directed at the same data. The benefit is undermined if parties cannot be assured that what is produced during the standard discovery phase constitutes *all* the data and information that is responsive to the listed categories and could be used to generate evidence in the case. Coupled with the rule requiring the production of all responsive data bases described above, the preclusion rule proposed here will help provide that assurance.

Fifth, the Board should clarify that all claims of attorney-client or attorney work product privilege are preserved with respect to data otherwise responsive to the standard discovery categories. Also, consistent with standard discovery procedures, the Board should adopt a rule specifying that a party withholding standard discovery data on grounds of privilege must prepare and serve an index showing: (1) the type of document(s) being withheld; (2) the date it was prepared; (3) the identity of the preparer; (4) the identity of all recipients; (5) the nature of the privilege being claimed; and (6) the basis for the claim being asserted.

⁹This includes data produced with the complaint and answer, as well as updated information produced under a party's continuing production obligations, as discussed in Part III.C., *infra*.

Sixth, and finally, the Shippers recognize that some of the documents subject to production in response to the Standard Discovery Requests contain confidentiality provisions that preclude their production without the Board first entering an order directing disclosure. Such documents typically include coal transportation agreements.

To address this confidentiality issue and the production delays it may cause, the Shippers request that the Board issue a general order directing parties in SAC cases to produce all relevant, responsive materials containing confidentiality provisions (including rail transportation contracts). The Board's order should further direct the parties to maintain the appropriate level of confidentiality for the produced documents in accordance with the protective orders governing the involved case. *Cf. Duke Energy Co. v. Norfolk Southern Ry. Co.*, Docket No. 42069 at 1-3 (STB served March 4, 2002) (directing disclosure of transportation contracts in a SAC case, subject to highly confidential provisions in the governing protective order).

B. ADDITIONAL DISCOVERY/QUESTION LIMITS

1. Additional Discovery

Shippers propose that complainant and defendants be permitted to supplement Standard Discovery Requests with case-specific requests. These requests

would be tailored to meet case-specific factual, legal or production issues that invariably arise in particular cases.

Even with a good set of Standard Discovery Requests it is important that both shippers and carriers have the flexibility to obtain documents and materials not encompassed with the Standard Discovery Requests. Without this flexibility, shippers and carriers would be denied the ability to obtain vital case-specific information.

2. Question Limits

Referencing the standard limit on the number of interrogatories that can be propounded in federal civil litigation absent leave of court,¹⁰ the Board seeks additional comments on whether and to what extent it should modify its own rules to limit the number of discovery requests that can be propounded without prior Board approval in cases brought under the SAC methodology. *See* Decision at 5-6. The Shippers respectfully submit that, even if the Board adopts a comprehensive requirement of standard data disclosure such as that proposed in Part A, it would be premature to consider new rules to limit supplemental discovery at this stage.

At the outset, it should be noted that while the federal rules governing civil litigation do prescribe a threshold limit on the number of interrogatories, that limit frequently is exceeded, particularly in complex cases. *See* Wright, Miller & Marcus, *Federal Practice and Procedure*, § 2168.1 (2d ed. 1994) (federal “courts readily grant

¹⁰*See* Federal Rules of Civil Procedure (“FRCP”), Rule 33(a).

leave [from numerical interrogatory limitations] in proper cases”); *Manual for Complex Litigation, Third*, §21.462 (1995)) (“In complex [federal] litigation, ... adhering to [numerical interrogatory limits] ... may be counterproductive”). Moreover, there is no corresponding limit on document production requests or requests for admissions, under the federal rules, and there are significant differences between the typical discovery profile of a federal civil action and that of a rail rate proceeding before the Board, all of which argues strongly against the adoption of any new limits on SAC discovery requests.

While interrogatories and document production requests are standard fare in federal civil litigation, another principal discovery tool is witness examination by deposition, which can be conducted without leave of court and may involve hundreds or even thousands of inquiries per witness propounded over several days. In this context, document production requests tend to be designed as precursors to depositions--in keeping with the live testimony focus of a civil trial--as opposed to discovery ends themselves. In a civil action involving issues as complex and economic stakes as high as those characteristic of rate disputes under the *Coal Rate Guidelines*, the deposition transcript record alone easily could run to tens of thousands of pages.

Additionally, when a federal civil action involves expert witness testimony, the rules require that each expert prepare an advance report summarizing the substance of his or her expected testimony, and serve the report on the opposing party during discovery. See FRCP Rule 26(a)(2)(B). That party then is given an opportunity to depose

the expert(s), a process which, again, often involves the propounding of hundreds of inquiries and the assembly of thousands of pages of record transcripts. *Id.*, Rule 26(b)(4). In short, in complex litigation under the Federal Rules of Civil Procedure, interrogatories and document production requests comprise but a small part of the customary discovery plan.

In contrast, litigants in SAC cases before the Board depend almost *entirely* on interrogatories and document requests to assemble the data and information needed for a complete evidentiary presentation. While depositions are available under the Board's Rules of Practice,¹¹ they are rarely used in matters handled under modified procedures (as are SAC cases). Moreover, even though most of the evidence presented in a SAC proceeding is sponsored by expert witnesses, there are no provisions in the Board's rules for the exchange of expert reports during the discovery phase, or for the deposition of experts on the subjects of their expected testimony in advance of the formal submissions of evidence. Given the dissimilarities in their typical discovery profiles and the greater dependence on interrogatories and document requests characterizing proceedings under SAC, the fact that FRCP Rule 33(a) generally limits the number of interrogatories that may be propounded without court approval does not provide a sound basis to enact limits on the discovery requests that may be used under the *Coal Rate Guidelines*.

¹¹See 49 C.F.R. Part 1114.22-25.

The Board's current rules provide a mechanism for curtailing excessive or abusive discovery on a case-by-case basis, if it is shown to be appropriate under a particular set of circumstances. *See* 49 C.F.R. Part 1114.21(c). The new rules mandating staff-supervised discovery conferences and expedited rulings on motions to resolve discovery disputes¹² are in their infancy, and have yet to be applied in an actual case. The Shippers submit that when these conferences are held, the Board staff will learn what parties to rail rate cases know from experience: while a large number of inquiries often are propounded by complainants in an effort to identify the scope of relevant data in the defendant's possession, ensuing negotiations generally result in the defendant actually answering only a fraction of the questions. The Board is only now accepting comments on the question of standardized threshold discovery responses. *See* Part III.A. These recent and prospective changes in the discovery rules for SAC cases are likely to have a significant impact both on the number of non-standard discovery requests that will be propounded in future cases, and on the nature of disputes that arise out of them. The Shippers respectfully suggest that the Board defer any consideration of placing limits on the number of discovery requests until sufficient experience is gained under the rules already in force and on the drawing board to make a reasoned judgment whether and to what extent such limits are necessary.

¹²*See* Decision at 14-15.

C. TIME PERIODS

The Board's third request for further comments concerns the establishment of time limits for data production and discovery. Specifically, the Board raises the questions whether there should be limits on the number of years for which SAC data must be produced, and a cut-off date beyond which discovery responses would not have to be updated, and if so, how these limits and cut-off dates should be established. *See Decision at 6.*

1. Production Time Periods

For purposes of the present discussion, shippers will divide SAC document production into three categories: (i) base documents (*e.g.*, joint facility agreements, valuation records, *etc.*), (ii) data documents (*e.g.*, joint facility payment documents); and (iii) study documents (*e.g.*, a traffic studies, forecasts, *etc.*). Shippers submit the following proposals concerning the temporal scope of production of these documents:

- For documents responsive to shippers proposed Standard Discovery Requests (*see Exhibits 1 and 2*), the producing party would be required to produce with its complaint (in the case of shipper production) or with its answer (in the case of carrier production): (i) all currently effective base documents (regardless of when they were created) as of the date of shipper's complaint; (ii) all data documents generated in the last two (2) calendar years prior to the date that a complaint is filed, along with data documents generated in the then current calendar year through that date, subject to two

exceptions;¹³ and (iii) all study documents prepared in the last two (2) calendar years prior to the date that a complaint is filed, along with study documents prepared for the then current calendar year through that date. The standard production periods would apply to both variable cost and SAC documents in all cases.

- For documents produced in response to supplemental case-specific discovery requests, parties may request documents for request-specific time periods. For such requests, parties need flexibility to draft requests for time periods governing Standard Discovery Requests. As an example, in the *WPL* case, the Board criticized *WPL* for not utilizing 1995 data related to the CNW/WRPI/UP merger in making a movement-specific road property adjustment calculations.¹⁴ Accordingly, a shipper in a subsequent case seeking to make a similar movement-specific adjustment may need to obtain documents generated in a specific historic time period that could fall outside of the historical boundaries governing Standard Discovery Requests. Shippers need flexibility in crafting specific requests to obtain data for particular time periods. Carriers may need similar flexibility, as well.

¹³The exceptions are data concerning roadway maintenance expenses and equipment maintenance expenses, which URCS procedures require be collected over five (5) and three (3) year time frames, respectively. *See* Exhibit No. 2.

¹⁴*See Wisconsin Power and Light Co. v. Union Pacific R.R. ("WPL")*, Docket No. 42051 at 16 (STB served May 14, 2002).

2. Production Cut-Off Dates

The Shippers refer to “cut-off” dates as relating to production of any form of document (including data documents) that is created after a certain date. The Shippers propose that both complainants and defendants not be required to produce any documents created within ninety (90) days prior to the scheduled filing date for complainant’s opening evidence. The proposed cut-off date would apply to documents responsive to both Standard Discovery Requests and additional discovery requests. Any extension of the filing date would trigger a commensurate extension of the discovery cut-off date.

The Shippers also propose that neither side shall be permitted to propound new discovery requests after the 90-day cut-off,¹⁵ and that neither side shall be permitted to introduce any evidence (other than publicly-available information) based on documents created by a party after the cut-off date.

Finally, the Shippers propose that both complainants and defendants in SAC cases be required to update their production to include all responsive documents generated through the cut-off date, unless the parties otherwise agree.

3. Enforcement

Establishing reasonable production time periods and cut-off dates can help bring order and consistency to an evidentiary proceeding without compromising the accuracy or integrity of the agency’s final decision. The Shippers submit, however, that

¹⁵The cut-off rule would not apply to the completion of production of data or documents requested prior to the cut-off date.

in setting time limits, a key consideration is ensuring that both sides to the dispute are bound by the same limits. For example, it would be prejudicial and fundamentally unfair to provide that a railroad defendant need not produce data generated after a certain date to the complainant, while nevertheless allowing that defendant to use that later data in its own case. Accordingly, shippers ask the Board to rule that any introduced evidence that (i) is based on data generated outside the production/cut-off time frames and (ii) was not produced to the other party on a timely basis during discovery, will be stricken summarily upon motion by the aggrieved party.

Shippers submit that the time frames proposed here are adequate to allow parties a full opportunity to develop a complete evidentiary record without imposing undue or unusual discovery burdens on their counterparts. Moreover, by making the same rules applicable to both complainants and defendants, the Board would promote procedural fairness, which as noted must be a central concern in any formulation of deadlines for, or temporal limitations on, the production of data in proceedings such as rail rate litigation, where one party is disproportionately dependent on the other for access to relevant information.

D. COST SHARING

The final issue raised by the Board for further comment concerns whether and to what extent the Board can or should require parties to SAC cases to share the cost

of discovery compliance as a general matter. *See* Decision at 6. Under current standard practice, which is common both to civil litigation and administrative proceedings, in most instances the responding party bears the cost of compliance with its counterpart's discovery requests. *See, e.g., Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954). The exceptions are circumstances in which one party participates in a special study at the request and expense of the other,¹⁶ or a responding party makes its files available for copying at the discretion and expense of the discovering party. The Shippers submit that it is appropriate to require the party that controls the production of documents and information to pay the cost of that production. Any "cost sharing" rule that runs counter to this principle would be unsound as a matter of policy, and counter-productive to the Board's desire to streamline the discovery process.

If railroad defendants responded to complainants' requests for production of documents by agreeing to open their files for inspection and copying, as often is done in civil litigation, it would be proper and within the Board's authority¹⁷ to require the requesting party to absorb the cost of copying the documents that it selects. In the vast majority of instances, however, railroads do not permit shippers or their representatives to

¹⁶*Texas Municipal Power Agency v. Burlington Northern and Santa Fe Railway Company*, Docket No. 42056 at sheets 5-8 (STB served Feb. 9, 2001).

¹⁷*See* 49 C.F.R. Part 1114.21(c)(3). *See generally, Manual for Complex Litigation, Third*, §21.433.

examine files and business records.¹⁸ Instead, the railroad selects, copies and transmits the documents that *it* believes are responsive. For several reasons, a requirement that the requester bear all or part of the cost of that production would be improper and ill-advised.

First, a rule that gave one party control over the selection and production of responsive data and documents *and* allowed that party to pass along the cost of production would create an enormous opportunity and incentive for abuse. Complainant shippers in particular would face the risk of even greater increases in litigation costs, as they are billed for the reproduction of voluminous documents that they neither need nor selected. The cost of litigating a SAC case already gives railroads considerable leverage in their dealings with their captive customers; an “I pick, you pay” rule would only exacerbate the burden.

Second, any rule requiring one party to pay expenses incurred by its opponent when the payor did not control the process would be an invitation for sidebar litigation over the reasonableness and necessity of claimed costs incurred, the equity of cost-sharing formulas, and myriad other audit-type issues. This entirely predictable consequence runs counter to the Board’s stated (and laudable) goal in this proceeding of simplifying and expediting the discovery process.

¹⁸One exception is a request for vintage railroad valuation maps. In these instances, carriers often do make the maps available for inspection and copying, and complainants select and copy the maps at their own expense.

Finally, absent a showing that discovery requests in SAC cases routinely seek irrelevant information, there is no sound policy basis to consider a change in current practice. To be sure, complainants in SAC proceedings request extensive and detailed internal railroad data. However, the nature of the CMP methodology and the *Coal Rate Guidelines* as applied make such requests inevitable, and the Board's predecessor long ago recognized that shippers would need significant discovery in order to make a complete SAC presentation. *Id.*, 1 I.C.C.2d at 548. Thus, a rule that would require one party to reimburse the other for the cost of discovery would disproportionately and unfairly call on the one party – the complainant – that requires the information to make its case under the CMP procedures.

The Shippers submit that cost sharing should be limited to circumstances in which the requesting party controls the selection and production of responsive data, or directs a special study using the producing party's facilities and resources. In all other instances – including in particular the standard data production discussed in Part A – the *status quo* should be maintained and costs of compliance left with the producing party.

IV.

CONCLUSION

WCTL, EEI and NITL encourage the Board to continue its efforts to streamline and rationalize the process by which major rail rate disputes are resolved by

adopting the recommendations described in these Joint Comments, including the standardized discovery lists set out in Exhibit Nos. 1 and 2, and the time limitations outlined in Part III.C. However, for the reasons explained in Parts III.B. and D., the Board should decline at this time to enact any general limits on the number of discovery requests, or rules to require requesting parties to pay the producing party's cost of discovery compliance, absent agreement or special circumstances.

Respectfully submitted,

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Dated: June 9, 2003

**STANDARD DISCOVERY REQUESTS
BY COMPLAINANTS IN SAC CASES**

1. **Transportation Alternatives – Studies** --The Complainant must provide copies of all studies or reports that address the feasibility of transporting the traffic subject to the complaint between the origin(s) and destination via a mode or carrier other than the Defendant.
2. **Transportation Alternatives – Correspondence** -- The Complainant must provide copies of all correspondence between it and carriers other than the Defendant(s) concerning the transportation of the traffic subject to the complaint between the origin(s) and destination via a mode or carrier other than Defendant.
3. **Traffic Forecasts** -- The Complainant must provide all forecasts of future volumes of the traffic subject to the Complaint that are expected to be transported to the destination, together with an identification of the origin(s) expected to be used.
4. **Commodity Forecasts** -- The Complainant must provide all forecasts of future volumes of the commodity comprising the traffic subject to the Complaint that are expected to be transported to its other facilities using the route of the Complainant's proposed stand-alone railroad in whole or in part, together with an identification of the origin(s) expected to be used and the destination(s) to which the commodity is expected to be transported.
5. **Cost Projections** -- The Complainant must provide all estimates and/or forecasts of the cost of transporting the traffic subject to the Complaint between the origin(s) and destination(s), for each time period available.
6. **Commodity Supply Agreements** -- The Complainant must provide copies of all contracts (including amendments and supplements), quotations or other documents that memorialize the terms on which the traffic subject to the Complaint that is transported between the origin(s) and destination(s) is purchased by or for the Complainant.

**STANDARD DISCOVERY REQUESTS
BY RAILROADS IN SAC CASES**

A. VARIABLE COSTS

1. **Road Property Investment Costs** -- For each line segment which the issue traffic traverses (or as close thereto as geographically possible), the railroad must provide detailed valuation records for the most recent calendar year. For each valuation section, the data produced must include the geographic limits, and an identification of all track-miles included in the valuation section separated between main line, sidings and yards. For each valuation section, the railroad also must provide, by property account, the gross investment, accumulated depreciation expenses, the annual depreciation expenses, and the gross ton-miles generated over the valuation section. Finally, using the same records, the railroad must provide the same information described above for its entire system for the same calendar year, as well as a tie of these monies and statistics to its Annual Report Form R-1.
2. **Roadway Maintenance Expenses** -- For each line segment which the issue traffic traverses (or as close thereto as geographically possible), the railroad must provide detailed roadway maintenance expenses by expense account for the most recent five (5) calendar years, together with a tie or "cross-walk" between the maintenance monies provided for each line segment and the maintenance monies included in the Annual Report Form R-1. For each line segment, the geographic limits must be identified, including an identification of all track-miles separated between main line, sidings and yards. For each line segment (or as close thereto as geographically possible), the railroad must provide the gross ton-miles generated over that line segment.
3. **Equipment Capital Costs** -- For each locomotive and railcar ("assets") used to handle the issue traffic (or the pool of locomotives and railcars from which the locomotives and railcars are drawn), the railroad must provide the specific financial arrangements used to acquire each asset. The railroad must provide the payment details supporting each acquisition, a physical

description of each asset, the miles each asset traveled, and the hours each asset was utilized in the issue service.

4. **Equipment Maintenance** -- For each locomotive and railcar used to handle the issue traffic (or the pool of locomotives and railcars from which the locomotives and railcars are drawn), the railroad must provide detailed maintenance expenses by equipment type for the most recent three (3) calendar years, together with a tie or "cross-walk" between the maintenance monies provided for each locomotive and railcar and the maintenance monies included in the Annual Report Form R-1. For each locomotive and railcar, the railroad must provide the miles traveled for the most recent three (3) calendar years.
5. **Crew Wages** -- For each train and engine crew and yard crew (if applicable) handling the issue traffic between the origin and destination of each movement, the railroad must provide all payments that it made to that crew including straight time, overtime and constructive allowances. The railroad also must identify and describe all activities that the train and engine crew (and/or yard crew) performed during each tour of duty where the issue traffic was handled. The railroad must provide the same information for any third parties with which it contracted to handle the issue traffic.
6. **Locomotive Fuel** -- For each locomotive used to handle the issue traffic (or the pool of locomotives from which the locomotives are drawn), the railroad must provide the gallons of fuel consumed in handling the issue traffic between origin and destination, the miles each locomotive moved when consuming the fuel, the cost of fuel, and a tie or "cross-walk" between the fuel monies provided for each locomotive and the fuel monies included in the Annual Report Form R-1.

B. STAND-ALONE COSTS

1. **Traffic Data** -- For each state and/or group of specific rail lines identified in the Complainant's scope notice, the railroad must provide specific information for each movement of traffic handled by the railroad as an originating, terminating, overhead or single-line carrier. The specific information must identify and include all the information contained on the waybill or freight bill that governs each movement of traffic. In addition, the specific information must include all the operating characteristics of the train(s) that handle each movement of traffic.
2. **Revenue Data** -- For each movement of traffic identified in the "Traffic Data", the railroad must provide the revenues it receives plus any refunds or rebates associated with the traffic. The railroad also must provide all revenue division data for the traffic commodity groups identified in the "Traffic Data".
3. **Forecasts** -- For each movement identified in the "Traffic Data", the railroad must provide all forecasts of projected changes in revenues and traffic levels for each time period available. The railroad also must provide all forecasts of revenues and traffic levels for traffic that it plans to move in each state and/or each group of rail lines identified in the Complainant's scope notice that did not appear in the "Traffic Data". The railroad must provide all forecasts of changes in its costs for each time period available.
4. **Transportation Contracts/Tariffs** -- For each movement identified in the "Traffic Data", the railroad must provide all transportation contracts (including amendments and supplements) and all tariffs or common carrier rate authorities that govern each movement.
5. **Joint Facility Agreements** -- For each state and/or group of rail lines identified in the Complainant's scope notice, the railroad must provide all joint facility agreements (including amendments and supplements) to which it is a party. For each joint facility agreement, the railroad must provide all payments received and the associated service units and all payments made and the associated service units.
6. **Investment In Roadway Properties** -- Each item that makes up the construction of a line of railroad from grading to rail (including bridges) must be identified by the railroad. For each item identified, the railroad must provide and document the size of each item and the cost to acquire, transport and install each item. For the associated roadway facilities not

identified from grading to rail, the railroad must identify and document each facility (e.g. signal system, microwave, buildings, etc.), the size of each facility and the cost to acquire or construct each facility.

7. **Land** -- For each state and/or group of rail lines identified in the Complainant's scope notice, the railroad must provide land valuation maps for its rail lines, including all deeds or other instruments of grant or conveyance, all land grants, all easements and all donated rights-of-way. The railroad also must provide all documents related to land sales and appraisals for each state.
8. **Rail Operating Information** -- The railroad must identify each category of employee that it employs. For each category of employee, the railroad must provide the range in base salaries, the range in fringe benefits paid, the range in overtime paid and the range in bonuses paid. The railroad also must provide locomotive leases and maintenance contracts and railcar leases and maintenance contracts for the locomotives and railcars used to transport traffic identified in the "Traffic Data". If this information is not maintained by individual locomotive or railcar, the railroad must provide the information for all locomotives and railcars of the type or model used to transport traffic identified in the "Traffic Data".

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Joint Opening
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prepaid. Dated this 9th Day of June, 2003 at Washington, D.C.:

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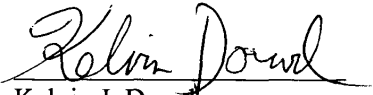
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