



SIDLEY AUSTIN LLP
1501 K STREET, N.W
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

BEIJING
BRUSSELS
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LOS ANGELES
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SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C

ryoung@sidley.com
(202) 736-8164

FOUNDED 1866



April 23, 2009

By Courier

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 431 (Sub-No. 3), Review of the
Surface Transportation Board's General Costing System

ENTERED
Office of Proceedings
APR 23 2009
Part of
Public Record

Dear Secretary Quinlan:

Pursuant to the Notice of Public Hearing served April 6, 2009, in the above-referenced proceeding, please find enclosed for filing the original and ten (10) copies of the Comments of Norfolk Southern Railway Company.

If you have any questions, please contact the undersigned counsel.

Sincerely,

Richard E. Young

*Counsel for Norfolk Southern
Railway Company*

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 431 (Sub-No. 3)

**REVIEW OF THE SURFACE TRANSPORTATION
BOARD'S GENERAL COSTING SYSTEM**



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**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

James A. Hixon
George A. Aspatore
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

G. Paul Moates
Richard E. Young
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

**Attorneys for
Norfolk Southern Railway Company**

Dated: April 23, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 431 (Sub-No. 3)

**REVIEW OF THE SURFACE TRANSPORTATION
BOARD'S GENERAL COSTING SYSTEM**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company ("Norfolk Southern" or "NS") hereby submits these comments in response to the Notice of Public Hearing released by the Board on April 6, 2009, in the above-captioned proceeding ("Notice"). Norfolk Southern has no position on whether the Board should examine URCS because the time provided to examine the questions raised by the Board is insufficient. Norfolk Southern does not intend to testify at the public hearing that the Board will hold on April 30, 2009.

In its Notice, the Board stated that it was instituting this proceeding in order to conduct "a second, and more comprehensive, review of URCS to determine whether and to what extent modifications are needed to account for recent changes in Board procedures and to improve the system outputs." Notice at 2. The Board further stated that as part of that review, it would hold a hearing on April 30 "to receive public comment on how best to revise the existing URCS model." *Id.* In addition, the Board invited parties to submit written testimony or submissions by April 23, 2009. *Id.* at 1.

As the Notice states, the Board is under a statutory mandate to "periodically review its cost accounting rules and [to] make such changes in those rules as are required to achieve the

statutory purposes of” the rail provisions of the Interstate Commerce Commission Termination Act of 1996. *See* 49 U.S.C. § 11161; Notice at 2.¹ Norfolk Southern is certainly prepared to do what it can to assist the Board in that effort, to the extent that modifications in URCS are required.

At this stage, however, Norfolk Southern believes that it is premature for Norfolk Southern to address – or for the Board to determine -- whether the existing URCS model should be modified. Norfolk Southern has not yet determined whether any modifications to the model should be considered. Norfolk Southern’s position is that any improvement in accuracy that is likely to result from any modifications should be compared to the likely cost of developing and implementing such modifications.

Regrettably, the deadlines established by the Notice are simply too short to enable Norfolk Southern to conduct such an analysis or submit meaningful responses to the thirteen specific substantive issues specified in the Notice which the Board asks the parties to address. *See* Notice at 2-3.² Assessing each of these issues, and preparing a meaningful response, would require months of effort – not merely the two or three weeks allowed by the Notice. Similarly, additional time and resources would be required for Norfolk Southern to determine whether they have “suggestions on additional aspects or features of URCS the Board should revisit.” *Id.* at 3.

Because of the short deadlines established by the Notice, Norfolk Southern offers no substantive comments on the proposed modifications. Rather, Norfolk Southern’s comments are

¹ Although 49 U.S.C. § 11161 repeatedly refers to the Board’s cost accounting *rules*, the Notice is not styled as – and does not purport to be – a notice of proposed rulemaking issued pursuant to Section 553 of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b)-(d).

² Norfolk Southern recognizes that the Notice provides that, as a follow-up to the April 30th hearing, the Board “will accept comments for 30 days responsive to the hearing.” Notice at 3. Given the complexity of the issues, however, 30 days is also insufficient for the preparation of a meaningful response to matters raised at the hearing.

limited to only these three general overarching concepts that would affect any review of URCS: (1) no cost system is perfect; (2) the specifically identifiable potential benefits must outweigh the costs and burdens of the inquiry and the implementation of any changes ; and (3) the Board should consider carefully the possible effects that the modifications would have on proceedings which are currently pending before the Board. Each of these points is discussed below.

First, although the Board is required by statute to ensure that the rules governing URCS are “the most efficient and least burdensome means by which the required information may be developed for regulatory purposes” (49 U.S.C. § 11161), the Board should recognize that no cost accounting model is, or ever will be, perfect -- and, therefore, that there is seldom (if ever) a single “correct” answer to a particular costing issue. Furthermore, the fact that certain aspects of URCS were developed some time ago does not mean that they are inferior to changes or substitutes that are subsequently proposed.

Second, any proposed changes to the URCS model must be examined from a cost-benefit standpoint, *i.e.*, whether the purported improvement in accuracy which the changes are expected to achieve are outweighed by the costs to the parties of determining and implementing the changes. The Board has recognized these principles in its previous decisions. For example, in its first review of URCS, the Board stated:

In considering costing modifications, we cannot demand perfection. Rather, we base our decision on whether a proposed change represents an improvement over current costing procedures, and whether such a change can be implemented at a reasonable cost and without undue burden on the railroad industry, the shipping public or the agency.

Review of the General Purpose Costing System, 2 S.T.B. 659, 660 (1997).

The same principles should govern here. It is unclear to Norfolk Southern at this time whether a costly inquiry into URCS would result in a cost system that produces any materially more accurate or different results than the current system.

Third, it is essential that the Board, in considering any proposed modifications to URCS, determine whether, and to what extent, such modifications should be applied to pending proceedings. As the Notice states, the Board uses URCS to determine a rail carrier's variable costs "in a variety of regulatory proceedings." Notice at 1.³ These proceedings include, of course, proceedings where rail carrier rates are challenged as exceeding a maximum reasonable level.⁴

As the Board is aware, a number of maximum rate reasonableness proceedings are currently pending. In some of those proceedings, the parties are still in the process of conducting discovery and/or preparing opening testimony.⁵ Applying any modifications of URCS to those proceedings could seriously disrupt the preparation of cost evidence by the parties therein.

³ Indeed, the Board's predecessor, the Interstate Commerce Commission, stated that the URCS model is the agency's "general purpose costing system for all regulatory costing purposes." *Adoption of the Uniform Railroad Costing System As a General Purpose Costing System For All Regulatory Costing Purposes*, 5 I.C.C. 2d 894, 899 (1989).

⁴ See, e.g., 49 U.S.C. § 10707(b)-(d) (authorizing the Board to find a challenged rate to be unreasonably high if it first finds that the revenue-variable cost percentage equals or exceeds 180 percent, with the variable costs to be calculated using the URCS methodology).

⁵ See, e.g., Docket No. 42110, *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, Decision served Dec. 10, 2008, at 3 (establishing procedural schedule calling for filing of complainant's opening evidence by June 1, 2009, and of defendant's reply evidence by August 31, 2009); Docket No. 42113, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co. and Union Pacific R.R. Co.*, Decision served Feb. 3, 2009, at 2-3 (establishing procedural schedule calling for filing of complainant's opening evidence on August 27, 2009, and of defendants' reply evidence on November 25, 2009).

Respectfully submitted,

G. Paul Moates (By Ry)

G. Paul Moates
Richard E. Young
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

James A. Hixon
George A. Aspertore
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

Attorneys for
Norfolk Southern Railway Company

Dated: April 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2009, I caused a copy of the foregoing Comments of Norfolk Southern Railway Company to be served to all parties listed on the official service list in this proceeding by first class mail, postage prepaid.


Richard M. Bryan