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Sent: Wednesday, April 16, 2008 1:34 PM
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Subject: STB Small Rate Case Decision - court appeal

To all:

As you know, the Board has rejected the Interested Parties petition for reconsideration, and we have been considering next steps. The only option remaining is to appeal the Board's decision to the courts.

Procedural Status

The AAR and most of the railroads have individually filed Petitions for Review with the U.S. Court of Appeals for the District of Columbia Circuit, but the railroads and the STB have requested that the case be held in abeyance pending the Board's decision on the Interested Parties Petition for Reconsideration. Since the Petition for Reconsideration has been decided, the railroads' court case can go forward.

This, then, raises the issue as to whether an appeal should be filed by the shipper parties. Andy Goldstein and I have conferred, and we recommend that an appeal be filed, for substantive, strategic, and tactical reasons.

A short petition for review would need to be filed by May 17 in order to preserve our right of appeal.

Potential Issues for Appeal

Substantively, two issues stand out. First, the Board's adoption of Simplified SAC is still very troubling, and we believe that there are legal arguments that have merit. Second, the Board's refusal to increase the eligibility limits, especially for Three-Benchmark cases, limits the usefulness of the Three-Benchmark procedure, and the Board's reasoning in the decision is internally inconsistent.

Strategically, we know at least some of you would be concerned if shippers would be perceived as not to at least have tried all other avenues before seeking legislation.

Finally, tactically, it may be useful before the Court of Appeals if the STB's decision were not perceived as "one-sided" in favor of the shippers, and the filing of a shippers' appeal to "counter" the railroads' appeal would be useful from that point of view as well.

Funding

Given the complexity of the case, and the existence of cross-appeals by the carriers, Andy and I believe that the legal fees to pursue an appeal would be significant, in the neighborhood of \$125,000 to \$150,000. During the case, the League has assumed much of my fees and NGFA has assumed much of Andy's fees, and we expect that our clients would continue to support this effort. The Interested Parties group, during the STB proceeding, essentially paid for the consultants.

It would neither be fair nor reasonable to expect that the two organizations support more than their fair share of legal fees for any appeal to the courts, though both of us believe that they would be willing to continue to contribute to such an effort. Andy and I would need significant support from the group to recommend to our clients that they contribute to a court appeal.

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Therefore, we would ask each member of the Interested Parties group: (1) to state whether their organization would want to be part of any appeal of the STB's Small Rate Case decision to the courts; and, (2) to state the amount of money that the group would be willing to contribute to such an effort.

Given the timetable, we would need a firm answer to those questions no later than COB Monday May 12.

In order to answer any questions that you may have, we would like to schedule a conference call on either May 5th or May 6th. Please let me know if you are not available on these days. We will schedule a call to accommodate as many people as possible.

Nick DiMichael
Andy Goldstein