BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. EP 733

EXPEDITING RATE CASES

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Joint Reply Comments of the American Chemistry Council The Fertilizer Institute and The National Industrial Transportation League

Pursuant to the Notice of Proposed Rulemaking ("NPR") served by the Surface Transportation Board ("STB" or "Board") in the above-captioned docket on March 31, 2017, the American Chemistry Council ("ACC"), The Fertilizer Institute ("TFI"), and The National Industrial Transportation ("NITL"), hereby submit these reply comments on proposals for expediting rate cases. ACC, TFI and NITL filed opening comments on May 15, along with the Association of American Railroads ("AAR"), the National Grain and Feed Association ("NGFA"), and "Coal Shippers/NARUC."[1] Although the commenters mostly supported the Board's proposals, there were varying degrees of enthusiasm and alternative suggestions. ACC, TFI and NITL reply to those other comments herein.

I. Introduction.

In their Opening Comments, ACC, TFI and NITL expressed support for, or no objection to, the Board's proposals, but observed that the proposals might improve the current rate case

[1] "Coal Shippers/NARUC" consists of the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Commissioners, the National Rural Electric Cooperative Association, and the Freight Rail Customer Alliance.

process only incrementally. They noted that many of the proposals mostly codified current voluntary practices and were vulnerable to loopholes. ACC, TFI and NITL also suggested improvements to make some of the proposals more impactful.

ACC, TFI and NITL strongly urged the Board to prioritize efforts to develop and implement alternatives to SAC that are not so inherently complex, costly and time-consuming.[2] NGFA expressed nearly identical concerns when it "remind[ed] the Board of [NGFA's] firm belief that the Board's current *substantive* rail-reasonableness standards still do not provide meaningful access to challenge unreasonable rates...."[3] ACC, TFI and NITL continue to believe that the best and most effective way to address this issue is for the Board to focus its efforts upon developing rate reasonableness standards based upon proposals in EP 722 (Sub No. 2), *Railroad Revenue Adequacy* ("EP722-2"), to develop a benchmarking methodology comparable to the concept suggested by the Transportation Research Board and discussed in the Comments of the Concerned Shipper Associations, in which ACC, TFI and NITL participated.

In contrast, the AAR argues, based upon the InterVistas study, that the substantive basis of the Board's rate reasonableness tests does not need an overhaul.[4] ACC, TFI and NITL, participating as members of the "Concerned Shipper Associations" in EP722-2, challenged that assertion through testimony from the original author of SAC, Gerald Faulhaber, who testified that the use of SAC in rail rate regulation is so far from the models in which it was originally developed as to be unrecognizable.[5] Moreover, until the InterVistas study has been subjected to

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[2] ACC et al. at 2.

[3] NGFA at 3 (italics in original).

[4] AAR at 4-5.

[5] *See* "Comments submitted by Concerned Shipper Associations," Ex Parte No. 722 (Sub No. 2), *Railroad Revenue Adequacy*, Ex. A (Verified Statement of Gerald R. Faulhaber) (filed Sept. 5, 2014), and "Reply Comments submitted by Concerned Shipper Associations," Ex Parte No.

public comment, the Board should not rely upon its conclusions. Two Board members also recently have expressed their belief that SAC is an inappropriate rate reasonableness standard for carload rates.[6] This last point is especially pertinent because, regardless of whether the current rate reasonableness tests need a substantive overhaul, the salient point is that they are not readily accessible to carload shippers and thus do not afford them effective regulatory protection against unreasonable rates. None of the proposals in this proceeding will alter that fact.

Within that context, ACC, TFI and NITL support the Board's efforts in this proceeding to expedite rate cases. There is much agreement among all the commenters on most of the proposals. ACC, TFI and NITL also support some of the alternative suggestions in the opening comments, but disagree with others. In the following sections, ACC, TFI and NITL describe their points of agreement and disagreement with the other opening comments.

II. Pre-Complaint Period

In their Opening Comments, ACC, TFI and NITL supported all three elements of the Board's proposed pre-complaint notice requirement: (1) a pre-filing notice at least 70 days prior to filing a formal complaint challenging rates under the SAC methodology; (2) mandatory mediation during the pre-complaint period; and (3) appointment of a Board liaison to the parties.[7] Their only suggested modification was to accommodate exceptions when the statute of

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722 (Sub No. 2), *Railroad Revenue Adequacy*, App. A (Verified Statement of Gerald R. Faulhaber) (filed Nov. 4, 2014).

[6] *See, e.g.*, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, slip op. at 47 (served Sept. 4, 2016) (Begeman, dissenting in part) (expressing concern whether carload rates can even be judged under SAC); *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, Docket No. NOR 42130, slip op. at 43 (served June 30, 2016) (Miller, concurring) ("The very fact that the SAC test was developed in a proceeding titled Coal Rate Guidelines demonstrates that the test was not intended for non-coal commodities.").

[7] ACC et al. at 3-5.

limitations otherwise would bar any portion of a complaint that is filed after the notice period expires.

The AAR also supported all three elements of the pre-complaint notice requirement.[8] In addition, AAR suggested that the Board consider delegating authority to the liaison through modifications to 49 C.F.R. Part 1011. ACC, TFI and NITL are not prepared to endorse the AAR's proposal at this time. Nothing in the Notice suggests that the Board intends to delegate any decision-making authority to the liaison. If the Board wants to go down this path, it should provide details in a subsequent NPRM upon which the public can comment. Any such proposal should address the division of responsibility between the liaison and an Administrative Law Judge ("ALJ").

NGFA, while supporting a pre-filing period, asserted that 70 days is too long and instead advocated for no more than 45 days.[9] NGFA notes that most shippers and railroads already will have engaged in substantive negotiations prior to filing a complaint. As such, a shipper should not be compelled to wait any longer to pursue its complaint. If mediation nevertheless shows potential for resolving the dispute, which is likely to be apparent within no more than 45 days, NGFA notes that the parties can always request an extension. ACC, TFI and NITL find NGFA's reasoning to be sensible and could endorse this approach. NGFA also enthusiastically supported the proposed Board liaison.[10]

Coal Shippers/NARUC oppose any pre-filing notice period on similar grounds to NGFA, and also argue that this proposal extends, rather than expedites, rate case schedules by adding 70

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[8] AAR at 5-6.

[9] NGFA at 4-5.

[10] *Id.* at 6.

days.[11] They do, however, support the appointment of a Board liaison to the parties, but only upon filing of the complaint, not the pre-complaint notice.[12] Although ACC, TFI and NITL generally support the pre-filing notice period, Coal Shippers/NARUC raise several legitimate concerns that ACC, TFI and NITL share.

Of greatest concern to ACC, TFI and NITL is the Coal Shippers/NARUC concern that the notice period will not expedite discovery.[13] In their opening comments, ACC, TFI and NITL stressed that "the most significant impact that the Board can have upon the pace of rate cases through discovery is establishing a firm deadline for the defendant to produce the traffic data that is essential to the vast majority of the SAC evidence" and suggested a deadline of 90 days from filing of a complaint.[14] ACC, TFI and NITL agree with Coal Shippers/NARUC that, for the pre-complaint period to have any salutary effect on expediting rate cases, there must be firm discovery deadlines for traffic data. Thus, the support of ACC, TFI and NITL for a pre-complaint notice period is predicated upon that period being used to begin discovery much earlier.

If the Board proceeds to adopt the proposed pre-filing notice period, Coal Shippers/NARUC offer certain modifications which ACC, TFI and NITL support. First, Coal Shippers/NARUC ask the Board to clarify that, even though a contract may govern existing shipments, carriers must provide common carrier tariff rates that could be subject to challenge at least 90 days prior to the date the shipper could begin using common carrier service (*i.e.*, the

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[11] Coal Shippers/NARUC at 15-23.

[12] *Id.* at 26-28 ,39.

[13] *Id.* at 23-24.

[14] ACC et al. at 4-5.

contract expiration date).[15] This is a common sense request so that shippers can identify the challenged tariff rates in their pre-complaint notice after sufficient time to review and evaluate them.

Second, Coal Shippers/NARUC ask that the pre-complaint period last only 40 days, instead of 70, to provide sufficient time to review and evaluate common carrier rates.[16] They also correspondingly propose to reduce the mediation period to 40 days.[17] This is similar to NGFA's 45-day proposal. ACC, TFI and NITL believe this proposal is reasonable.

Third, Coal Shippers/NARUC renew their use of the term "Core SAC Data" from their ANPR comments, propose that shippers serve their discovery requests for such data with their pre-complaint notice, and ask the Board to require carriers to produce this information within 70 days.[18] Core SAC Data includes the traffic data that ACC, TFI and NITL have identified as so critical to SAC cases and the production of which is the single greatest cause of delay in SAC cases. Whether the Board adopts the Coal Shippers/NARUC proposed 70-day deadline or the ACC, TFI and NITL proposed 90-day deadline, the potential to expedite SAC cases is significant. Together, requiring shippers to serve discovery requests for Core SAC data with their pre-filing notice and adopting a firm deadline for rail carriers to produce that data will do more to expedite SAC cases than all the other proposals combined. Therefore, ACC, TFI and NITL strongly support this Coal Shippers/NARUC proposal.

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[15] Coal Shippers/NARUC at 28-29.

[16] *Id.* at 30.

[17] *Id.* at 32.

[18] *Id.* at 30-31.

III. Discovery

ACC, TFI and NITL have addressed their primary discovery concern in the preceding section, as that concern is closely integrated with their support for the pre-complaint notice period. As to the Board's other discovery proposals, there appears to be a general consensus among the opening round commenters in support of them. For example, the commenters all support the proposed "meet and confer" requirement prior to filing a motion to compel discovery. There is also general support for serving discovery requests with the complaint and answer, with the exception of requests for Core SAC Data which would be served with the pre-complaint notice.

Coal Shippers/NARUC ask the Board to clarify the scope of the 10-day rule for filing motions to compel in 49 C.F.R. § 1114.31(a).[19] The confusion Coal Shippers/NARUC reference is broader than just that rule. It stems from the arcane and archaic nature of rules that were first adopted by the ICC and modeled after the Federal Rules of Civil Procedure existing at that time. The Federal Rules, however, have been updated and modernized many times since then while the Board's discovery rules have remained stagnant. Moreover, the nature of discovery and adjudicatory proceedings at the Board has changed significantly. Therefore, ACC, TFI and NITL believe that the Board should conduct a more comprehensive review and update of its discovery rules to fulfill its mandate in Section 11 of the STB Reauthorization Act "to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases."

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[19] Coal Shippers/NARUC at 35-38.

IV. Evidentiary Submissions

The Board sought comment on three proposals governing evidentiary submissions that received either qualified or enthusiastic support from all commenters.

While all commenters generally supported allowing parties to submit public versions of their evidence three days after submitting confidential versions, no one identified the potential drawback that ACC, TFI and NITL observed. Specifically, if confidentiality designations are not made until after the highly confidential version has been filed, the highly confidential versions no longer will identify confidential text.[20] That drawback may cause more problems than the extra three days are worth. ACC, TFI and NITL will be interested to learn how other commenters view this drawback in their reply comments.

All commenters supported the proposal to formalize the *de facto* use of single and double brackets to delineate confidential and highly confidential text and to employ triple brackets to delineate Sensitive Security Information.

All commenters supported limits upon the lengths of final briefs. AAR suggested a word limit rather than a page limit, which is acceptable to ACC, TFI and NITL.[21] AAR, however, also asks the Board to relieve defendants from brief limits when responding to improper rebuttal evidence.[22] That is not appropriate. Essentially, AAR is asking the Board to grant railroads the right unilaterally to decide what is improper rebuttal and hence relieve themselves of brief limits. The Board already has procedures for dealing with improper rebuttal evidence through motions to strike and there has been no suggestion that this process does not work.

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[20] ACC et al. at 6-7.

[21] AAR at 8.

[22] *Id.*

NGFA expressed the same concerns as ACC, TFI and NITL that briefs are not necessary in all cases, should be tailored to specific issues when desirable, and not be allowed to undermine the complainant's right to have the last word.[23] ACC, TFI and NITL support NGFA's modification of proposed § 1111.9(2) to clarify that the Board will authorize briefs on a case-by-case basis.

V. AAR Process Improvement Proposals

AAR proposes additional process improvements that it claims do not require rule changes and would expedite SAC cases.[24] First, AAR commends to the Board the recommendations of The Institute for the Advancement of the American Legal System at the University of Denver for expediting civil litigation in federal courts, the essence of which is a commitment to establish and enforce a timeline of actions. ACC, TFI and NITL agree that those recommendations could serve the Board's objectives well.

For the purpose of expediting SAC cases, there are two types of deadlines that would have the most impact. First, there is a strong need to enforce deadlines for completing discovery. Extensions of time should be granted only in extraordinary circumstances and for the shortest possible time. A party always can come up with plausible reasons why it needs more time, but knowing there is a strict deadline with consequences will motivate a party to devote the time and resources needed to complete discovery by the deadline instead of taking for granted the ability to obtain an extension. The onus initially should be upon the party subject to the deadline to take reasonable measures needed to comply with it, and if more time is needed, to make a convincing showing of such need.

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[23] *Compare* NGFA at 5-6 *with* ACC et al. at 7.

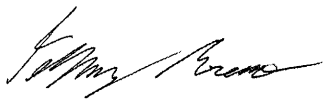
[24] AAR at 8-10.

Second, the parties should be able to count on timely action by the Board in response to motions. Parties can be reluctant even to bring certain issues to the Board that could be more efficiently addressed earlier in the case because of the potential to delay a case while the Board takes many months—sometimes more than a year—to decide the motion. In recent years, the Board has attempted to address this issue by delegating more authority to staff and appointing ALJs from the Federal Energy Regulatory Commission ("FERC"). Although this has improved the speed of decision-making, it also has had unintended consequences. It injects an added layer of decision-making because all staff and ALJ decisions are subject to Board review, which can prolong rather than expedite a case. The Board, therefore, should apply a deferential standard of review so that only the most meritorious appeals to the Board occur and it should decide such appeals expeditiously. At the same time, however, FERC ALJs do not possess the substantive background to effectively determine the relevance of many types of discovery requests in Board proceedings, which can cause them to grant more discovery than otherwise may be appropriate, thereby prolonging a case unnecessarily and making it more expensive. Ideally, this concern could be addressed if the Board had its own ALJ who possesses a background in STB precedent.

VI. Conclusion

There is general consensus supporting most of the Board's proposals. However, there are key differences as to some elements and suggested modifications to which the Board should give serious consideration. ACC, TFI and NITL again urge the Board to prioritize its efforts to develop alternatives to SAC, such as the rate benchmarking approach based upon econometric modeling, and go beyond the measures in the NPR to address the discovery issues that will have the most impact upon expediting SAC cases.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2017, I served a copy of the foregoing upon all parties of record via U.S. first-class mail, postage prepaid.

Jeffrey O. Moreno