BEFORE THE
SURFACE TRANSPORTATION BOARD

EXPEDITING RATE CASES	)	Docket No. EP 733

JOINT REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND FREIGHT RAIL CUSTOMER ALLIANCE

William L. Slover
John H. LeSeur
Kelvin J. Dowd
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 14, 2017

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

EXPEDITING RATE CASES	)	Docket No. EP 733

JOINT REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE,
AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND
FREIGHT RAIL CUSTOMER ALLIANCE

The Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners ("NARUC"), National Rural Electric Cooperative Association, and Freight Rail Customer Alliance (collectively "Coal Shippers/NARUC") submit these Reply Comments in response to the Surface Transportation Board's ("STB" or "Board") Notice of Proposed Rulemaking ("NPRM") served in the above-captioned proceeding on March 31, 2017.

Coal Shippers/NARUC have previously submitted opening and reply comments in response to the Advanced Notice of Proposed Rulemaking ("ANPRM") the

Board served in this proceeding on June 15, 2016[1] and filed opening comments in the NPRM phase of this proceeding on May 15, 2017.[2]

Coal Shippers/NARUC's Reply Comments address submissions made by the other parties in response to the ANPRM and the NPRM, including the Association of American Railroads ("AAR"),[3] the Joint Carload Shippers ("Carload Shippers"),[4] National Grain and Feed Association ("NGFA"),[5] Norfolk Southern Railway Company ("NS"),[6] CSX Transportation, Inc. ("CSXT"),[7] and the joint submission tendered by the

[1] *See* Joint Comments of The Western Coal Traffic League *et al*., EP 733 (Aug. 1, 2016) ("Coal Shippers/NARUC ANPRM Op. Comments"); Joint Reply Comments of The Western Coal Traffic League *et al*., EP 733 (Aug. 29, 2016).

[2] *See* Joint Comments of The Western Coal Traffic League *et al*., EP 733 (May 15, 2017) ("Coal Shippers/NARUC NPRM Op. Comments").

[3] *See* Comments of The Association of American Railroads, EP 733 (Aug. 1, 2016) ("AAR ANPRM Op. Comments"); Reply Comments of the Association of American Railroads, EP 733 (Aug. 29, 2016); Comments of the Association of American Railroads, EP 733 (May 15, 2017) ("AAR NPRM Op. Comments").

[4] *See* Comments of the Joint Carload Shippers, EP 733 (Aug 1, 2016) ("Carload Shippers ANPRM Op. Comments"); Reply Comments of the Joint Carload Shippers, EP 733 (Aug. 29, 2016) ("Carload Shippers ANPRM Reply Comments"). The Joint Carload Shippers were comprised of the American Chemistry Council, Dow Chemical Company, and M&G Polymers USA, LLC. *See* Carload Shippers ANRPM Op. Comments at 1.

[5] *See* Opening Comments of The National Grain and Feed Association, EP 733 (May 15, 2017) ("NGFA NPRM Op. Comments").

[6] *See* Comments of Norfolk Southern Railway Company, EP 733 (Aug. 1, 2016) ("NS ANPRM Op. Comments"); Reply Comments of the Norfolk Southern Railway Company, EP 733 (Aug. 29, 2016).

[7] *See* Opening Comments of CSX Transportation, Inc., EP 733 (Aug. 1, 2016) ("CSXT ANPRM Op. Comments"); Reply Comments of CSX Transportation, Inc., EP 733 (Aug. 29, 2016).

American Chemistry Council ("ACC"), the Fertilizer Institute ("TFI") and the National Industrial Transportation League ("NITL") (collectively "ACC/TFI/NITL").[8]

SUMMARY

The Board instituted this proceeding to address ways it could modify its current procedural rules to help expedite its disposition of large maximum rate cases. Coal Shippers/NARUC believe that several of the proposals set forth in the Board's NPRM should, if properly structured, achieve this objective, including the Board's proposals to begin discovery at the earliest opportunity, to encourage increased use of meet and confer sessions before parties file motions to compel, to require parties to uniformly identify confidential, highly confidential and sensitive security information ("SSI") in Board filings, to limit the length of final briefs, and to increase staff involvement at all stages of the maximum rate case process.

While the cited proposals are also generally supported by the other parties that submitted comments responsive to the NPRM, both Coal Shippers/NARUC, and other commenting parties, have sought clarification of, or have proposed some modifications to, some of these proposals:

- **Meet and Confer Requirement**. The Board proposes to amend 49 C.F.R. § 1114.31(a) to require that a party certify that it has conferred or attempted to confer with the opposing party prior to filing a motion to compel in a rate case. Coal Shippers/NARUC request that the Board address the question whether § 1114.31(a)

[8] *See* Joint Comments of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Traffic League, EP 733 (May 15, 2017) ("ACC/TFI/NITL NPRM Op. Comments").

applies to motions to compel document production. This is a fundamental threshold question since most discovery in large rate cases consists of document production. Regardless of how the Board resolves this question, Coal Shippers/NARUC support ACC/TFI/NITL's request that the Board clarify that parties can agree to "toll" the ten-day period for filing motions to compel under § 1114.31. Coal Shippers/NARUC also support the AAR's suggestion that the Board's proposed meet and confer requirement be expanded to include all Board proceedings subject to the § 1114.31 motion to compel standards.

- **Standard Designations**. Coal Shippers/NARUC support the Board's proposed rule calling for parties to use specified bracket designations to identify confidential, highly confidential and SSI material contained in their filings with the Board. Coal Shippers/NARUC have requested that the Board clarify that the "confidential" material referenced in the proposed rule does not cover "confidential" versions of filings that parties' counsel create for distribution to in-house personnel. Coal Shippers/NARUC also do not object to AAR's request that the Board clarify that the parties remain free to agree to terms in protective orders that address the mechanics of creating non-filed confidential versions of filed documents for distribution to parties' in-house personnel.

- **Final Briefs**. Coal Shippers/NARUC support the Board's proposal to limit final briefs to 30 pages. Coal Shippers/NARUC also have no objections to the suggestions made by other commenters to substitute a 13,000-word limit, to stagger the filing of carrier and shipper final briefs, or to allow the Board to determine on a case-by-

case basis the need for, and length of, final briefs (but in no event to exceed 30 pages). Coal Shippers/NARUC do object to AAR's proposal that, as Coal Shippers/NARUC understand it, if adopted, would allow defendant carriers to ignore limits on the length of final briefs to address what the carriers self-proclaim is "impermissible" rebuttal.

- **Increased Staff Involvement**. Coal Shippers/NARUC generally support the Board's proposals calling for increased staff involvement at all stages of the maximum rate case process, including the Board's proposal to appoint a staff liaison, so long as the Board clarifies that the staff liaison cannot engage in *ex parte* communications with the parties. Coal Shippers/NARUC oppose AAR's request that the Board amend its rules to allow a staff liaison to make binding rulings in technical conferences, subject to party appeals to the Board. Adoption of the AAR's proposal would delay, not expedite, STB consideration of rate cases, and would mistakenly turn informal technical conferences – which in Coal Shippers/NARUC's perspective have usually worked quite well – into formal adversarial proceedings.

While Coal Shippers/NARUC generally support many of the Board's proposals, they urge the Board to drop its proposal calling for a 70-day pre-complaint mediation period. Coal Shippers/NARUC oppose this proposal because it will slow-down, not speed-up, STB consideration of maximum rate cases. Coal Shippers/NARUC recognize that other commenters responding to the NPRM have not opposed this proposal, but note that many of these commenters have agreed with Coal Shippers/NARUC that the Board's proposal will not expedite the Board's consideration of maximum rate cases.

Coal Shippers/NARUC respectfully submit that the Board's stated goal of expedition is best achieved by not having a pre-complaint period, but instead, allowing cases to start in the same manner that they do today – upon the filing of the shipper's complaint. If the Board believes that mandatory mediation should continue – despite the obvious lack of success in most Board-supervised mediations – the Board can continue its current practice of requiring the parties to pursue mandatory mediation at the outset of the case, a practice that does not slow down the litigation schedule.

Alternatively, Coal Shippers/NARUC request that the Board modify its proposed pre-complaint period proposal in a manner that addresses concerns raised by Coal Shippers/NARUC and other commenters. Specifically, Coal Shippers/NARUC's alternative requires a carrier to provide its common carrier rates, upon a timely request by a shipper, at least than 90 days prior to the start of common carrier service under the rates; affords a shipper at least 50 days to evaluate those rates; permits shippers to make a pre-filing notice ("Pre-Filing Notice") no more than 40 days prior to the start of service, with mandated mediation to begin immediately; gives shippers the option of filing their principal Core Stand-Alone Cost ("SAC") Data discovery requests[9] along with their Pre-Filing Notices; allows shippers to file their complaint at the end of the 40-day mediation period (and permits the parties to jointly request extensions of the mediation period); and requires carriers to provide responsive Core SAC Data within 30 days after the shipper files its complaint (unless the Board sets a different date).

[9] *See* Coal Shippers/NARUC's NPRM Op. Comments at Attachment 1 (identifying Core SAC Data).

REPLY COMMENTS

A. The Board's Proposed Pre-Complaint Period Will Delay, Not Expedite, the Board's Administration of Maximum Rate Cases

The Board's rules currently provide that "[a]bsent a specific order by the Board,"[10] the following procedural schedule will apply in SAC cases:[11]

Event	**Day**
Complaint Filed; Discovery Begins	0
Party Conference	7 (or before)
Defendant's Answer	20
Discovery Completed	150
Complainant's Opening Evidence	210
Defendant's Reply Evidence	270
Complainant's Rebuttal Evidence	305
Final Briefs	335
Final Decision	485 (or before)

In its NPRM, the Board proposed to modify the schedule by adding a 70-day pre-complaint period:

[10] *Revised Procedural Schedule in Stand-Alone Cost Cases*, EP 732, slip op. at 4 (STB served March 9, 2016) (amending 49 C.F.R. § 1111.8(a)).

[11] *Id*., slip op. at 4-5.

Event	**Day**
Pre-Filing Notice Filed	0[12]
Staff Liaison & Mediator(s) Assigned	10[13]
Mediator(s) Initiate Mediation	15[14]
Mediation Period Ends	70[15]
Shipper Can File Complaint	70 (or later)[16]

The obvious effect of the Board's proposal to *add* 70 days to the procedural schedule is to lengthen, not shorten, the time it takes the parties to mediate/litigate a case at the STB.

Nevertheless, the Board maintains that the proposal should help expedite cases in two ways – first by "provid[ing] the railroad with time to start preparing for litigation, including gathering documents and data necessary for the discovery phase, which in turn could benefit both parties by accelerating the discovery process"[17] and second by giving the parties "time to focus on resolutions before litigation begins"[18] which could "result in a settlement in a rate case."[19]

Respectfully, Coal Shippers/NARUC do not share the Board's view that the Board's proposed Pre-Filing Notice will "accelerat[e] the discovery process" because the

---

[12] *Id.*, slip op. at 17.

[13] *Id.*, slip op. at 16-17. The mediator is assigned 10 business days following the date the Pre-Filing Notice is filed with the Board. The liaison is assigned 10 calendar days following the filing of the Pre-Filing notice.

[14] *Id.*, slip op. at 16. The proposed rule specifically sets this date as "[w]ithin 5 business days of the assignment to mediate." *Id.*

[15] *See* 49 C.F.R. § 1109.4(e) ("[t]he mediation will be completed within 60 days of the appointment of the mediator(s)").

[16] NPRM, slip op. at 17.

[17] NPRM, slip op. at 3.

[18] *Id.*, slip op. at 4.

[19] *Id.*, slip op. at 5.

Pre-Filing Notice does not specifically identify the shipper's discovery requests and, even if it did, discovery would not be accelerated unless the proposal also included Board-ordered production deadlines. *See*, *e.g.*, Coal Shippers/NARUC NPRM Op. Comments at 23-24.

Most other commenters agree that the Pre-Filing Notice in its current form will not result in accelerated post-complaint discovery:

> - "The Joint Carload Shippers . . . agree with Coal Shippers/NARUC's assertion that pre-filing only expedites a SAC case if carriers are expected to use this time to begin gathering SAC information to meet a required response deadline."[20] In addition, "[a]ny pre-filing requirement is rendered pointless if the railroad refuses to publish a tariff rate until an existing contract is on the verge of expiration."[21]
>
> - "NS respectfully submits that [a Pre-Filing Requirement] likely would not do much to expedite rate cases. . . . The railroad can only begin to gather the necessary [SAC] documents and data once the shipper has filed its case . . . and served its discovery requests, informing the railroad of the time frame for discovery materials and the segments of the railroad for which discovery is sought."[22]
>
> - "Although this proposal would move mediation forward in the procedural schedule, [AAR believes] it would not actually expedite the rate case itself once it is filed."[23]

---

[20] Carload Shippers' ANPRM Reply Comments at 2.

[21] *Id*.

[22] NS ANPRM Op. Comments at 35.

[23] AAR ANPRM Op. Comments at 6. The only other commenter to address the issue – CSXT – took the position that the Pre-Filing requirement "would *allow* the defendant railroad to begin preparing for discovery" but did state that the carrier actually would begin preparing for discovery. *See* CSXT ANPRM Op. Comments at 7 (emphasis added and footnote omitted).

Coal Shippers/NARUC also do not share the Board's view that conducting mandated mediation prior to filing a complaint, as opposed to conducting the mandated mediation immediately after the complaint is filed, will result in more mediated case settlements.

Coal shippers file rate cases only as a matter of last resort, after months or years of failed contract negotiations with their carriers. These types of cases are not good candidates for mediation because the parties – who are sophisticated commercial actors – have tried and failed to reach agreement, which is the reason why mandated mediation in coal rate cases has not been successful in most cases.

The Board, and some non-coal shipper parties, maintain that a pre-filing mediation period will increase the parties' odds of reaching a negotiated solution because the parties will be able to focus on mediation exclusively without the distractions of litigation. These assertions do not square with the commercial reality of coal rate case negotiations and litigations.

Coal rate cases typically involve disputes where the difference between the challenged tariff rate payments, and the maximum rate prescriptions sought by shippers, involves tens or hundreds of millions of dollars over the 10-year prescription period. In addition, the costs of litigating a case are high, sometimes exceeding $10 million on the shipper side alone.

Given these financial realities, both sides have very strong incentives to reach an agreement to avoid litigation – if one can be reached – and the reason why cases do not settle is because the parties simply cannot reach a deal. It has nothing to do with

the asserted distractions of litigation. No party involved in large coal rate case is going to be distracted by litigation if an acceptable deal can be negotiated at any time during the case process.

It may be that shippers of commodities other than coal have not engaged in the same level of pre-filing negotiations as coal shippers and, for those shippers, a pre-filing mediation period would be helpful. Coal Shippers/NARUC have no objections to the Board adopting rules giving such shippers the option of submitting a Pre-Filing Notice, and engaging in a mandatory pre-filing mandatory mediation, but there is no reason to adopt a one-size-fits-all rule requiring all shippers to engage in a costly, time-consuming process that increases, not decreases, the length of time it takes to pursue maximum rate relief at the STB.

B. If There Is to Be a Pre-Complaint Period, The Board Should Modify Its Proposal In the Manner Suggested By Coal Shippers/ NARUC In Their Opening Comments

Coal Shippers/NARUC provided an alternative pre-complaint period proposal for the Board's consideration if the Board decides to retain a pre-complaint period:[24]

Event	**Day**
Rate Provided	0
Pre-Filing Notice	50 (or later)[25]
Mediators Assigned	53

[24] *See* Coal Shippers/NARUC NPRM Op. Comments at 28-33.

[25] If the Pre-Filing Notice is filed after Day 50, for example at Day 60, the subsequent dates would be moved back accordingly, *e.g.*, the mediators would be assigned at Day 63, *etc*.

Mediator(s) Initiate Mediation	56
Mediation Period Ends	90 (unless extended)
Shipper Can File Complaint	90 (or later)
Core SAC Data Production	120

Coal Shippers/NARUC's alternative proposal addresses, and responds to, several contentions raised by commenters in this proceeding.

First, Coal Shippers/NARUC's alternative starts with the requirement that carriers provide shippers with their common carrier rate and service terms on Day 0. Day 0 can be no later than 90 days before common carrier service starts under the challenged rates. This requirement addresses concerns shared by the Carload Shippers that "[a]ny pre-filing requirement is rendered pointless if the railroad refuses to publish a tariff rate until an existing contract is on the verge of expiration."[26]

Second, Coal Shippers/NARUC's alternative proposal gives shippers at least 50 days to study the proposed rates under the Board's jurisdictional threshold and SAC tests before making a decision to submit a Pre-Filing Notice to the Board. The shipper's filing of the Pre-Filing Notice starts the clock running on a 40-day mediation period, subject to extension upon mutual agreement of the parties, and a corresponding Board order. The shipper would also be free to file its complaint at any time following the expiration of the initial 40-day mediation period.

The 40-day mediation period addresses NGFA's concern that "the 70 days proposed by the Board for such a mediation is too long"[27] and is line with NGFA's

[26] Carload Shippers ANPRM Reply Comments at 2.

[27] NGFA NPRM Op. Comments at 4.

"recommend[ation] that the Board's rules should provide for a mediation period of no more than 45 days, while also providing the option for an extension by mutual agreement of the parties if circumstances warrant."[28]

Third, Coal Shippers/NARUC's proposed pre-complaint period rules would give the complainant shipper the option of serving its Core SAC Data requests. Inclusion of these requests responds to concerns raised by NS that a carrier cannot begin collecting discovery data in a SAC case until the complainant shipper "inform[s] the railroad of the time frame for discovery materials and the segments of the railroad for which discovery is sought."[29]

Fourth, Coal Shippers/NARUC's proposed pre-complaint period rules establish a deadline for carriers to produce Core SAC Data in cases where a shipper's Pre-Filing Notice contains the shipper's Core SAC Data requests. That deadline is set at 70 days after the Shipper files its Pre-Filing Notice, unless the Board otherwise directs. This deadline addresses the principal reason for discovery delays in SAC cases – the failure of defendant carriers to produce Core SAC Data in a timely manner.[30] And, as the

---

[28] *Id*.

[29] NS ANPRM Op. Comments at 35.

[30] *See, e.g.*, Coal Shippers/NARUC ANPRM Op. Comments at 21 ("the principal cause of delays in SAC coal rate cases [is] the failure of defendant railroads to timely respond to shippers' requests for critical data and supporting information needed to develop their SAC evidence"); Carload Shippers ANPRM Op. Comments at 7 ("Although traffic and revenue data forms the foundation for every aspect of the SAC analysis, it typically is among the last information produced by the railroad and it nearly always contains gaps and/or unexplained elements that require a time-consuming exchange of correspondence before the information is complete and fully usable. The additional time needed to review, process and understand this data is the single most

Carload Shippers have emphasized, "pre-filing only expedites a SAC case if carriers are expected to use this time to begin gathering SAC information to meet a required response deadline."[31]

C. Discovery Should Begin At the Earliest Opportunity

Coal Shippers/NARUC agree with the Board's proposal that discovery should start at the earliest opportunity in case.[32] Other commenters agree as well.[33] The only issue is when the earliest opportunity arises.

If the Board drops its pre-complaint period proposals, the first opportunity comes at the times the Board has proposed: a complainant shipper serves its initial discovery requests when it files its complaint and a defendant carrier serves its initial discovery requests when it files its answer.[34] However, if the Board decides to retain a pre-complaint period, the first opportunity for shippers comes earlier – when the shipper files its Pre-Filing Notice – and, as discussed above, Coal Shippers/NARUC recommend that the Board allow shippers to tender their Core SAC Data Requests at the time they file their Pre-Filing Notice.

---

common reason why complainants request extensions to the procedural schedule for submitting opening evidence."); ACC/TFI/NITL NPRM Op. Comments at 4 ("ACC, TFI and NITL also stress 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.").

[31] Carload Shippers ANPRM Reply Comments at 2.

[32] *See* NPRM, slip op. at 6 ("beginning discovery as soon as possible will help expedite SAC Cases"); Coal Shippers/NARUC NPRM Op. Comments at 33-34.

[33] *See* ACC/TFI/NITL NPRM Op. Comments at 4; AAR NPRM Op. Comments at 6.

[34] *See* NPRM, slip op. at 6.

In addition, as also discussed above, discovery expedition will not be advanced unless the Board's rules also establish deadlines for carrier discovery responses. Coal Shippers/NARUC's alternative pre-complaint procedures require carriers to provide requested Core SAC Data within 70 days after it is requested, unless the Board otherwise directs. ACC/TFI/NITL propose that the Board adopt rules requiring carriers to respond to a shipper's initial discovery requests seeking traffic data "within 90 days."[35]

While Coal Shippers/NARUC believe that 70 days is a sufficient time period to provide responsive Core SAC Data in a coal rate case, Coal Shippers/NARUC would also support a 90-day deadline that applies across-the-board in all maximum rate cases, with the timeline for applying the deadline starting when the shipper first tenders its discovery requests for Core SAC Data.

D. The Board Should Clarify the Scope of the Parties' Meet and Confer Obligations

Coal Shippers/NARUC, and other commenters, support the Board's proposal to amend 49 C.F.R. § 1114.31(a) by adding a requirement that a party filing a motion to compel in a SAC or simplified procedures case "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention."[36]

[35] ACC/TFI/NITL NPRM Op. Comments at 4-5.

[36] NPRM, slip op. at 20.

None of the commenters addressed the issue previously raised by Coal Shippers/NARUC: whether the Board's proposed addition of a meet and confer requirement in 49 C.F.R. § 1114.31(a) gets the job done. As Coal Shippers/NARUC have discussed in their prior comments, the express terms of 49 C.F.R. § 1114.31(a) only apply to motions to compel adequate responses to interrogatories and deposition questions.[37]

Discovery in SAC cases principally takes the form of requests for document production and disputes have arisen in SAC cases as to whether the standards set forth in 49 C.F.R. § 1114.31(a) apply to motions to compel document production. If the Board concludes they do not, its proposed meet and confer requirement will not achieve its intended objective.

ACC/TFI/NITL assume that the provisions in 49 C.F.R. § 1114.31(a) apply to SAC document production requests and, based on this assumption, ask the Board to clarify that parties in SAC cases may agree to "toll" the timing requirements set forth in 49 C.F.R. § 1114.31(a).[38] Specifically, 49 C.F.R. § 1114.31(a) requires that a party file a motion to compel "within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after the expiration of the period allowed for submission of interrogatories." *Id.*

ACC/TFI/NITL state that "[g]iven the volume of discovery required in SAC cases, the process of reviewing, analyzing and negotiating the scope of production

[37] *See, e.g.*, Coal Shippers/NARUC NPRM Op. Comments at 35.

[38] *See* ACC/TFI/NITL NPRM Op. Comments at 5.

for hundreds of discovery requests at a time can rarely be completed in 10 days." [39] Therefore, ACC/TFI/NITL assert that "[i]f the parties are not permitted to toll this 10-day rule, they will have little choice but to file broad scope motions to compel to protect their interests, even though on-going negotiations likely would moot most if not all of their motions."[40]

Coal Shippers/NARUC agree with ACC/TFI/NITL that the Board should permit the parties in a SAC case to agree to toll the 10-day rule set forth in 49 C.F.R. § 1114.31(a) as applied to interrogatory and deposition answers, as well as to document production requests, if the Board concludes that § 1114.31(a) applies to document production requests, or amends § 1114.31(a) to cover document production requests.

AAR proposes that the Board modify its proposed amendment to § 1114.31(a) to provide that the meet and confer standards apply to all types of cases, not just rate reasonableness cases.[41] Coal Shippers/NARUC have no objections to AAR's proposal.

E. Standard Designations, As Clarified, Will Assist the Parties

The Board proposed that the protective order forms that the parties request the Board to enter in rate cases "shall specify that evidentiary submissions will designate confidential material within single braces (i.e., {X}), highly confidential information

[39] *Id.*

[40] *Id.*

[41] AAR NPRM Op. Comments at 7 n.24.

within double braces (i.e., {{Y}}), and sensitive security information within triple braces (i.e., {{{Z}}}).”[42]

Coal Shippers/NARUC support this proposal, subject to the Board’s clarification that the term “confidential material” excludes material that one party has designated as “highly confidential” for purposes of its production to the other party, *i.e.*, it cannot be seen by the other party’s in-house personnel, but, is not highly confidential vis-à-vis the producing party – *i.e.*, it can be seen by the producing party’s in-house personnel.[43]

AAR “urges that the Board make it clear that proposed protective orders should continue to include provisions that recognize parties have the right to review confidential or their own highly confidential material without prior permission from the party who has included or referenced it in its filings,”[44] citing as a representative example, the following protective order provision:

> Each party has the right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing the permission of the producing party. If a party (the “filing party”) files and serves the other party (the “reviewing party”) a pleading or evidence containing the “HIGHLY

[42] NPRM, slip op. at 16.

[43] *See, e.g., W. Fuels Ass’n v. Burlington N. & Santa Fe Ry.*, NOR 42088, slip op. at 7, § 11 (STB served Nov. 10, 2004) (adopting a protective order providing a party with the option of preparing a “confidential” version of filings it makes with the Board from which the filing party’s, but not the non-filing party’s, “‘HIGHLY CONFIDENTIAL’ material has been redacted”).

[44] AAR NPRM Op. Comments at 25

> CONFIDENTIAL" material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of "HIGHLY CONFIDENTIAL" information of the filing party contained in the pleading that must be redacted from the "HIGHLY CONFIDENTIAL" version prior to review by the In-House Personnel of the reviewing party.[45]

As pertinent here, the protective order establishes the following procedure to apply where outside counsel for party "A" files a pleading with the Board containing "highly confidential" information and serves a copy of the filing on outside counsel for adverse Party "B:"

> - Outside counsel for filing party A prepares a list of information in the filing that Party A has designated as "highly confidential" and therefore cannot be seen by in-house personnel for party B. Outside counsel for party A provides this list to outside counsel for party B.
>
> - Outside counsel for party B creates a copy of Party A's filing that redacts the "highly confidential" information shown on Party A's list. Outside counsel for Party B then provides this redacted copy to Party B's in-house personnel.

Coal Shippers/NARUC have no objection to the Board confirming that parties remain free to negotiate protective order provisions of this type. These provisions allow the parties to work out arrangements between themselves governing the preparation of redacted copies of STB filings that can be seen by the parties' in-house personnel.

ACC/TFI/NITL question whether the Board's redaction proposal is "feasible in practice."[46] Coal Shippers/NARUC believe that the Board's proposal, as

---

[45] *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42127, slip op. at 5, ¶ 10 (STB served Jan. 27, 2011), cited in AAR NPRM Op. Comments at 7 n.25.

[46] ACC/TFI/NITL NPRM Op. Comments at 6.

they understand it, should be "feasible in practice." Coal Shippers/NARUC understand the proposed rule as requiring that parties making filings containing highly confidential, confidential, and SSI information designate this information in their non-public filings in manner the Board has proposed.

Parties then have three business days to create and file a "public version" of their filings – *i.e.*, filings where the highly confidential, confidential and SSI information is redacted. Parties also remain free, as they are today, to negotiate protective order procedures to apply to create redacted copies that in-house personnel can see – which in effect are hybrid versions of the two filings the parties make with the Board.

ACC/TFI/NITL's feasibility concerns appear to be premised on a scenario where the Board's proposal is interpreted as not requiring parties to make all bracket designations (*i.e.*, highly confidential, confidential and SSI) when they make their initial filings with the Board containing this information.[47] Coal Shippers/NARUC do not interpret the Board's proposal this way, but given ACC/TFI/NITL's concerns, the Board should clarify its intent here.

Coal Shippers/NARUC view the benefit of the Board's rule as easing parties' day-of-filing production burdens by not requiring parties to physically produce and file public versions of their filings. It will not, as Coal Shippers/NARUC understand it, give parties additional time to designate non-public information in their filings with the Board.

[47] *Id.*

F. Limitations on Final Brief Lengths Are Reasonable

Coal Shippers/NARUC support the Board's proposal to limit final briefs to 30 pages, inclusive of exhibits. ACC/TFI/NITL also support the 30-page limit, but suggest that the Board consider "staggering the submission of final briefs so that complainants file their briefs two weeks after the defendants."[48] Coal Shippers/NARUC support the staggered briefing proposal because it allows shippers, who generally have the burden of proof in SAC cases, to respond to arguments raised by railroads in their briefs.

NGFA suggests that the Board modify its final briefing rule by adopting a rule providing that the Board will determine on a case-by-case basis whether final briefs are needed, and if the Board determines final briefs are needed, the Board will set a final brief page length of up to 30 pages on a case-by-case basis.[49] Coal Shippers/NARUC support this alternative as well, which could be tailored to permit staggered briefing along the lines suggested by ACC/TFI/NITL.

AAR suggests an alternative limit of 13,000 words "to avoid gamesmanship regarding font sizes and margins."[50] Coal Shippers/NARUC do not

[48] ACC/TFI/NITL NPRM Op. Comments at 7.

[49] NGFA NPRM Op. Comments at 6.

[50] AAR NPRM Op. Comments at 8.

object to a 13,000-word limit, but note that the Board's rules already contain standards governing document formatting and font sizes.[51]

AAR also proposes that the Board "relieve defendants from the brief limit when responding to improper rebuttal evidence or give defendants an opportunity to file a separate document (not subject to the brief length limit) that responds to improper rebuttal evidence."[52] Coal Shippers/NARUC urge the Board not to adopt this AAR proposal. If adopted, the AAR's proposal would open up a huge loop-hole in the Board's proposed final brief rule, a loop-hole that would defeat the purpose of the rule – limiting the length of final briefs – and one that would deprive shippers of procedural due process.

It appears under AAR's proposal that a defendant carrier could evade the 30-page (or 13,000-word) limit simply by declaring that its "final" brief is responding to improper rebuttal evidence, and then submitting a final "brief" substantially in excess of the 30-page or 13,000-word limit. Even more troubling, if the Board does not adopt ACC/TFI/NITL's sequencing proposal, the AAR's proposal would deny a complainant shipper of procedural due process by not affording the shipper any opportunity to respond to the carrier's "improper rebuttal claims" – claims that are frequently impermissible attempts by carriers to shore-up their reply evidence.[53]

---

[51] *See* 49 C.F.R. § 1104.2 (filings with Board must be on "white paper not larger than 8 ½ by 11 inches" and "[t]ext must be double-spaced (except for footnotes and long quotations which may be single-spaced), using type not smaller than 12 point").

[52] AAR NPRM Op. Comments at 8.

[53] *See* Coal Shippers/NARUC ANPRM Op. Comments at 59.

Nor is there any need for the Board to give carriers "the opportunity to file a separate document" at the time briefs are filed. Under the Board's rules, carriers may file a motion to strike any portion of a shipper's rebuttal evidence they claim is "improper" within 20 days after the shipper's rebuttal evidence is filed,[54] and shippers are afforded the right to respond to the carrier's claims.[55] This established procedure protects the procedural due process rights of both carriers and shippers.

G. Properly Structured Increased Staff Involvement Should Be Beneficial

Coal Shippers/NARUC support the Board's proposal to appoint a liaison to serve as the principal "point of contact" between the parties and the Board's staff,[56] provided that the Board clarify that the liaison must strictly adhere to the Board's rules precluding *ex parte* communications in pending administrative adjudications.[57] Coal Shippers/NARUC believe the appropriate time for the Board to appoint a liaison is after the shipper files its complaint.[58]

Coal Shippers/NARUC also support the Board's proposals to "make greater use of written questions from staff and technical conferences with the parties at every stage of the case"[59] and "to provide advance notice of the topics to be discussed" at

---

[54] *See Consumers Energy Co. v. CSX Transp., Inc*., NOR 42142, slip op. at 2 (STB served Dec. 9, 2016) (citing 49 C.F.R. § 1104.13(a)).

[55] *Id*.

[56] NPRM, slip op. at 11.

[57] Coal Shippers/NARUC NPRM Op. Comments at 26-28, 39.

[58] *Id*. at 26-27, 39.

[59] NPRM, slip op. at 10.

technical conferences.[60] These technical conferences, if properly administered, should, among other things, assist shippers in obtaining needed SAC discovery from carriers in a readily usable, timely manner.[61]

Other commenters generally support the Board's proposals to appoint a liaison and to increase the use of staff conferences.[62] AAR suggests that the Board also consider amending its proposed rules to provide that "the staff liaison in a rate case has the authority to convene a technical conference and to rule on the issues raised in such conferences."[63] AAR further suggests that the liaison's decisions be subject to Board review pursuant to "the appellate standards for interlocutory appeals under 49 C.F.R. § 1115.9(b)."[64]

Coal Shippers/NARUC oppose the AAR's suggested changes. If adopted, they will lead to slower, not faster, administration of SAC cases by substituting a two-step decision-making process – an initial decision by the liaison followed by a final decision by the Board – for what is usually a one-step process – decisions in the first instance by the Board.

In addition, Coal Shippers/NARUC believe that the Board's current use of technical conferences has worked well. These conferences allow the Board's staff and

---

[60] *Id*.

[61] *See* Coal Shippers/NARUC NPRM Op. Comments at 39.

[62] *See* AAR NPRM Op. Comments at 6; ACC/TFI/NITL NPRM Op. Comments at 3-4; NGFA NPRM Op. Comments at 6.

[63] AAR NPRM Op. Comments at 6

[64] *Id*.

the parties to work informally to address and resolve pending matters. This informal process will be less effective if it changes, as the AAR proposes, into an adversarial proceeding that produces binding staff decisions.

Finally, the AAR's proposal is at odds with the role the Board envisioned the liaison to perform. *See* NRPM at 9 (function of the liaison is "to answer questions about the process and to intervene informally (e.g., hold status conferences) if it would help discovery or other matters move more smoothly").

CONCLUSION

Coal Shippers/NARUC request that the Board adopt final rules in this proceeding that are consistent with their Comments and Reply Comments.

Respectfully submitted,

By: /s/ John H. LeSeur
William L. Slover
John H. LeSeur
Kelvin J. Dowd
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 14, 2017