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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

ENTERED
Office of Proceedings
August 8, 2023
Part of
Public Record

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
MOTION SEEKING LETTER ROGATORY**

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Dated: August 8, 2023

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SURFACE TRANSPORTATION BOARD

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NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

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**BNSF RAILWAY COMPANY'S
MOTION SEEKING LETTER ROGATORY**

INTRODUCTION

BNSF Railway Company (“BNSF”), pursuant to 49 U.S.C. § 1321 and 49 C.F.R. § 1113.2, respectfully requests that the Administrative Law Judge assigned to this proceeding issue the attached Letter Rogatory on behalf of BNSF to obtain documents and deposition testimony from the following foreign third party:

Westshore Terminals Ltd. (“Westshore”)
1 Roberts Bank
Delta, British Columbia V4M4G5
CANADA

The Letter Rogatory (Appendix A) seeks the assistance of the appropriate judicial authority in Canada to obtain documents and deposition testimony relevant to these proceedings. BNSF believes that Westshore Terminals Ltd. (“Westshore”), located in Roberts Bank, British Columbia, Canada, has evidence relevant to these proceedings. Central to NTEC’s damage claims are BNSF’s alleged “failures to transport export coal from NTEC’s Spring Creek Mine . . . to the Westshore

Terminal.” Compl. at 2, and that “NTEC has suffered substantial injury and damages as a direct and proximate result of BNSF’s failure.” *Id.* ¶ 52. To test NTEC’s claim, BNSF seeks to request documents and deposition testimony from Westshore regarding its procedures for prioritizing loading and unloading activities by customers at its facilities and the options available for coal shippers to store coal at those facilities. The information cannot be obtained through other means. Westshore has internal information and communications relevant to NTEC’s claims that NTEC would not have access to regarding Westshore’s practices for prioritizing as well as loading and unloading. BNSF respectfully requests that the Administrative Law Judge grant this motion so that BNSF may transmit the Letter Rogatory through the Canadian court system.

BNSF has attached to the Letter Rogatory requests for the production of documents, a set of deposition questions, the Protective Order in this matter, the Surface Transportation Board rules, and the Complaint.

In support of its Motion, BNSF states the following.

ARGUMENT

I. District courts have the authority to issue Letters Rogatory to the appropriate judicial authorities in Canada.

Canada is not a signatory to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Evidence Convention”). *See* U.S. State Dep’t, Canada Judicial Assistance Information (Nov. 19, 2018), <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Canada.html> (“State Dep’t Canada Fact Sheet”). Nor are Canadian

companies subject to the Surface Transportation Board's subpoena power. *See* 49 U.S.C. § 1321 ("The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States.").

U.S. parties may nonetheless "use letters rogatory to take evidence from a specific person within the foreign jurisdiction." *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 775 (S.D.N.Y. 2012) (citing *Black's Law Dictionary*). "A letter rogatory is the request by a domestic court to a foreign court to take evidence from a certain witness." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 n.1 (2004). U.S. law authorizes "tribunals" such as the Surface Transportation Board to issue letters rogatory, *see* 28 U.S.C. § 1781, and Canadian courts accept letters rogatory by such administrative agencies.¹ *See* Canada Evidence Act § 51(2) (authorizing processing of "letters rogatory from a court *or tribunal* outside Canada in which the civil, commercial or criminal matter is pending") (emphasis added). Accordingly, BNSF's requested Letter Rogatory is an appropriate tool for it to obtain evidence from Westshore, a Canadian company.

¹ BNSF is also seeking issuance of a Letter Rogatory to obtain evidence from JERA Trading Pte Ltd. ("JERA"), a Japanese company. Judicial authorities in Japan do not accept letters rogatory from U.S. administrative agencies. *See* U.S. State Dep't, Japan Judicial Assistance Information (Apr. 21, 2023), <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html>. Thus, an application to the United States District Court for the District of Columbia is necessary to request evidence from JERA. For this reason, BNSF has separated and distinguished the requests for Letters Rogatory.

II. Westshore possesses documents and information that are relevant to these proceedings.

Westshore possesses information critical to NTEC's allegations regarding BNSF's service. NTEC claims that it has suffered "substantial injury and damages as a direct and proximate result of BNSF's failure and refusal to comply with its obligations under 49 U.S.C. §§ 11101(a) and 11101(e) by providing NTEC with inadequate common carrier service." Compl. ¶ 52. NTEC further claims that BNSF has caused "NTEC to lose significant loadings at Spring Creek, to miss vessel loadings at Westshore, and to be unable to operate Spring Creek at levels sufficient to meet demand." *Id.* ¶ 53. The operations at Westshore were raised at the oral argument considering NTEC's emergency service request. *See* Hearing Tr. at 56, 230 (May 10, 2023). Also, at the oral argument, the Chairman stated that "everybody seems to agree that the rotation of these trains ultimately is determined by Westshore, and whether those are shipped there because Westshore handles the loading of the ships." Hearing Tr. 232:18-22. And NTEC's witness provided a verified statement asserting that "storage at Westshore is limited to a maximum of 180,000 tons. Thus, if BNSF bunches trains or there are long droughts with no trains, timely vessel loading becomes extremely difficult." NTEC Emergency Service Request, Babcock V.S. at 2.

BNSF must be able to test NTEC's claims of damages and causation of those damages with evidence regarding the operation of Westshore. Westshore thus possesses information relevant to this case, and witnesses from Westshore would be able to testify regarding how BNSF's service impacted NTEC's ability to load vessels with coal bound for Asia.

III. BNSF's requested Letters Rogatory comply with the required procedural safeguards.

The U.S. State Department provides guidelines for preparing Letters Rogatory and specific information about requesting judicial assistance from Canada. See U.S. State Dep't, Preparation of Letters Rogatory, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html>; State Dep't Canada Fact Sheet. BNSF's Letter Rogatory complies with the guidelines for seeking documents and testimony.

In addition, the Letter Rogatory aligns with the factors that Canadian courts analyze under the Canada Evidence Act and British Columbia Evidence Act to determine whether to compel discovery responses. These factors include:

(1) relevance; (2) whether the evidence is necessary for trial and will be adduced at trial if admissible; (3) whether the evidence is otherwise obtainable; (4) whether the order sought is contrary to public policy; (5) whether the documents sought are identified with reasonable specificity; and (6) whether the order sought is unduly burdensome having in mind what the relevant witnesses would be required to do and produce were the action to be tried locally.

EchoStar Satellite Corp. v. Quinn, 2007 BCSC 1225, ¶ 38 (B.C. 2007) (citing *Re Friction Division Prods. Inc. & E.I. Du Pont de Nemours & Co. Inc. (No. 2)*, 56 O.R. (2d) 722 at 732 (Ont. 1986)). The evidence is clearly relevant, as NTEC has placed BNSF's service of NTEC coal to Westshore at the center of this dispute. Accordingly, the evidence will play a key role in the Board proceedings. Third, BNSF has no means of obtaining the evidence from Westshore or any other party absent the Letter

Rogatory process. Next, there is no reason to believe that requesting the documents and testimony will violate Canadian public policy. The requests spell out the needed documents and information specifically, identifying the narrow categories of documents needed. Finally, the documents requested are typical business documents that Westshore presumably can produce without burden.

The existing Protective Order, which will be attached to the Letter Rogatory and apply to evidence from Westshore, should alleviate any confidentiality concerns.

CONCLUSION

BNSF respectfully requests that the Administrative Law Judge assigned to this proceeding grant the Motion and issue the attached Letter Rogatory, which BNSF will transmit to the appropriate Canadian judicial authorities.

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Tamara R. Middleton
Adam Weiskittel
Jill M. Rugema
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2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Respectfully submitted,

/s/ Anthony J. LaRocca
Anthony J. LaRocca
Timothy J. Strafford
Molly Bruder Fox
Onika K. Williams
Tara A. Woods
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: August 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding. I have also served the Administrative Law Judge assigned to this proceeding via electronic mail.

/s/ Tara A. Woods

Tara A. Woods

Attorney for BNSF Railway Company

August 8, 2023

APPENDIX A

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
(LETTER ROGATORY)

TO THE APPROPRIATE JUDICIAL AUTHORITY OF CANADA:

The undersigned United States Administrative Law Judge, on behalf of the United States Surface Transportation Board (the “Board”), presents its compliments to the Appropriate Judicial Authority of Canada, and requests international judicial assistance to obtain the production of documents and deposition testimony to be used in an administrative proceeding before this Board in the above-captioned matter.

The Board requests the assistance described herein in the interests of justice.

I. REQUEST

The Board requests that the Appropriate Judicial Authority of Canada facilitate the production of documents from the following corporate entity:

Westshore Terminals Ltd. (“Westshore”)
1 Roberts Bank
Delta, British Columbia V4M4G5
CANADA

Specifically, the Board requests that Westshore produce the documents and things set forth in **Attachment A** to this Request. The Board further requests that

the Appropriate Judicial Authority of Canada direct Westshore to provide testimony as to the topics and questions set forth in **Attachment B** to this Request. With respect to the methods and procedures to be followed in connection with the requested deposition, the Board respectfully requests that, to the extent possible under Canadian law and appropriate treaties:

a) Westshore be requested to designate one or more officers, directors, managing agents, or other person(s) who consent to testify on its behalf as to the topics set forth in **Attachment B**;

b) an appropriate judicial officer of Canada direct that the Westshore witness or witnesses be duly sworn-in in accordance with the applicable laws and procedures of Canada;

c) the examination be conducted orally;

d) the parties' legal representatives and a stenographer be permitted to be present during the examination; and

e) the stenographer be permitted to record verbatim the examination, and a full transcript of the examination be made at the time of the examination.

The documents and information requested may be of a confidential nature. As such, the documents may be designated under and treated pursuant to the Protective Order entered in this matter, which can be found in **Attachment C**.

Based on the representations made by Navajo Transitional Energy Company, LLC ("NTEC"), the undersigned believes that Westshore is in possession of

documents and has knowledge regarding material facts that are relevant for the proper defense of the above-referenced administrative proceeding.

II. FACTS

NTEC is an energy company owned by the Navajo Nation. Among other ventures, NTEC operates the Spring Creek Mine in Montana. BNSF is a rail transportation service provider that provides rail service shipping coal for NTEC from the Spring Creek Mine to domestic destinations as well as the Westshore Terminals (“Westshore”) in British Columbia, Canada. From Westshore, the NTEC coal is shipped to markets in Asia, including Japan and South Korea.

The Board is an independent agency that acts in a quasi-judicial function to adjudicate certain disputes among railroads and their customers. NTEC has alleged in a legal action with the Board that BNSF has breached its common carrier service obligations to NTEC. NTEC has sought, among other relief, an injunction mandating a certain level of rail service that BNSF must provide from Spring Creek Mine to Westshore. The Board instituted proceedings shortly after NTEC filed its Complaint on April 14, 2023. A decision by the Board is subject to review by a United States Court of Appeals. *See* 28 U.S.C. § 2342.

The Board seeks judicial assistance from the Appropriate Judicial Authority of Canada to evaluate certain NTEC allegations regarding BNSF’s alleged “failures to transport export coal from NTEC’s Spring Creek Mine . . . to the Westshore Terminal.” Compl. at 2, and that “NTEC has suffered substantial injury and damages as a direct and proximate result of BNSF’s failure.” Compl. ¶ 52. To assess NTEC’s

claim, BNSF seeks to request documents and deposition testimony from Westshore unavailable from other sources regarding its procedures for prioritizing loading and unloading activities by customers at its facilities and the options available for coal shippers to store coal at those facilities. The requested documents and information regarding dealings with NTEC are narrow and should not present an undue burden on Westshore.

The undersigned respectfully believes that the Letter Rogatory aligns with the factors that Canadian courts analyze under the Canada Evidence Act and British Columbia Evidence Act to determine whether to compel discovery responses. These factors include: “(1) relevance; (2) whether the evidence is necessary for trial and will be adduced at trial if admissible; (3) whether the evidence is otherwise obtainable; (4) whether the order sought is contrary to public policy; (5) whether the documents sought are identified with reasonable specificity; and (6) whether the order sought is unduly burdensome having in mind what the relevant witnesses would be required to do and produce were the action to be tried locally.” *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225, ¶ 38 (B.C. 2007) (citing *Re Friction Division Prods. Inc. & E.I. Du Pont de Nemours & Co. Inc. (No. 2)*, 56 O.R. (2d) 722 at 732 (Ont. 1986)). The evidence is relevant because NTEC’s allegations focus on BNSF’s service of NTEC coal to Westshore. Accordingly, the evidence could play a key role in the Board proceedings. Third, BNSF has no means of obtaining the evidence from Westshore or any other party absent the Letter Rogatory process. Next, there is no reason to believe that requesting the documents and testimony will violate Canadian public

policy. The requests identify the narrow categories of documents needed. Finally, the documents requested are typical business documents that Westshore presumably can produce without burden.

III. EVIDENCE

The documents requested to be produced are identified in **Attachment A**. The deposition questions to which Westshore's testimony is requested are set forth in **Attachment B**. And the Board-entered Protective Order is contained in **Attachment C**. Finally, the Board's regulations that govern the proceedings (49 C.F.R. Parts 1112-13) are reproduced in **Attachment D**.

IV. URGENCY

A response is requested as soon as practicable. Expedient treatment of this request will allow the parties and the witnesses to arrange a mutually agreeable date for testimony and avoid disruption of the witnesses' business or personal plans.

V. OFFER OF RECIPROCAL ASSISTANCE

The Board is willing to provide similar assistance to the Appropriate Judicial Authority of Canada.

VI. REIMBURSEMENT FOR COSTS

BNSF's counsel is willing to reimburse the Appropriate Judicial Authority of Canada for costs and expenses incurred in executing this Letter Rogatory. BNSF's counsel may be contacted at the following address:

Timothy J. Strafford
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW

Washington, DC 20036
Telephone: (202) 429-3000
Email: tstrafford@steptoe.com

Signed by:

The Honorable Thomas McCarthy
Administrative Law Judge

Signed in _____, this _____ day of _____, 20_____

ATTACHMENT A

DOCUMENTS REQUESTED

DEFINITIONS

1. “Westshore” shall mean the Westshore Terminals Ltd. facility located in British Columbia, Canada.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants,

attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if

ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the

communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Westshore, its successors, agents, members, and employees.

18. The term “2022 Strike” shall mean the labor stoppage at Westshore led by International Longshore and Warehouse Union Local 502 in September and October of 2022.

INSTRUCTIONS

1. In responding to the following document requests, furnish all available documents in Westshore’s possession, custody, or control.

2. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

3. If you contend that a particular document or category of documents contains trade secret or other confidential research, development, or commercial

information, please mark the document or documents as such, as required by the Protective Order attached to this Letter Rogatory as Attachment C.

4. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

5. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

6. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

7. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

8. If any information called for by one of these document requests is

withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

9. Where an identified document is in a language other than English, state whether an English translation of such document exists. If a document is in a language other than English and an English translation exists, identify and provide both documents.

10. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

11. Unless otherwise provided, the relevant time period for these requests is January 1, 2019, to present.

DOCUMENT REQUESTS

1. Documents related to Westshore's capacity to receive coal deliveries for NTEC and timing of deliveries for NTEC.

2. Documents related to Westshore's capacity to receive coal deliveries and timing for deliveries of BNSF transported coal.

3. Documents sufficient to show the number of train loads of coal allocated to NTEC in relation to other shippers or receivers of coal.

4. Documents sufficient to show forecasts for vessels to be loaded in 2023.

5. Documents sufficient to show which coal shippers store coal at Westshore, the cost of that storage, and the volume of storage available to each shipper.

6. Documents sufficient to show the impact the 2022 Strike had on the volume of shipments loaded and unloaded in 2022 at Westshore.

ATTACHMENT B

DEPOSITION TOPICS AND WRITTEN QUESTIONS

DEFINITIONS AND INSTRUCTIONS

1. The definitions and instructions in Attachment A are incorporated by reference.

TOPICS AND QUESTIONS

1. Describe the process by which Westshore allocates loading and unloading capacity to coal shippers.
2. Describe the storage options Westshore offers to coal shippers.
3. Identify any options NTEC has had or currently has to store coal at Westshore for loading onto vessels bound for Asian markets.
4. Describe how Westshore decides the prioritization of vessels for loading.
5. Describe how Westshore decides the prioritization of trains for unloading.
6. Describe how the 2022 Strike impacted the volume of shipments loaded and unloaded at Westshore in 2022.

ATTACHMENT C

Pt. 1112

(2) The movement would exceed 500 highway miles between origin and destination;

(3) There is no intramodal competition from other railroads;

(4) There is no barge competition;

(5) There is no pipeline competition;

(6) The complainant has used truck for 10% or less of its volume (by tonnage) subject to the rate at issue over a five-year period; and

(7) The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

(b) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. An appropriate official is any individual who has either direct or supervisory responsibility for, or otherwise has knowledge or understanding of, the complainant's transportation needs and options. The official(s) should provide his or her title and a short description of his or her duties in the verified statement. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under §1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it

49 CFR Ch. X (10–1–22 Edition)

elects an evidentiary hearing of lieu of the submission of a written rebuttal on market dominance issues.

(3) The Board will provide an unofficial copy of the hearing transcript no later than 5 days after the conclusion of the hearing. The Board will provide the official hearing transcript shortly thereafter. The hearing transcript will be part of the docket in the proceeding.

[85 FR 47697, Aug. 6, 2020]

**PART 1112—MODIFIED
PROCEDURES**

Sec.

1112.1 When modified procedure is used.

1112.2 Decisions directing modified procedure.

1112.3 Default for failure to comply with schedule; effect of default.

1112.4 Petitions to intervene.

1112.5 Joint pleadings.

1112.6 Verified statements; contents.

1112.7 Records in other Board proceedings.

1112.8 Verification.

1112.9 Sample verification for statement of fact under modified procedure.

1112.10 Requests for oral hearings and cross examination.

1112.11 Authority of officers.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

§ 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the

Surface Transportation Board

§ 1112.10

proceeding. In this part, a statement responding to an opening statement is referred to as a “reply”, and a statement responding to a reply is referred to as a “rebuttal”. Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

§ 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

(b) The petition to intervene shall set out:

(1) The petitioner’s interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner’s request, if any, for relief.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.5 Joint pleadings.

Parties with common interests are encouraged to prepare joint pleadings whenever possible.

§ 1112.6 Verified statements; contents.

A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts. Parties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents’ statements unless those allegations are specifically challenged. Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.

§ 1112.7 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy should be presented for the record.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.8 Verification.

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

§ 1112.9 Sample verification for statement of fact under modified procedure.

State of _____,
County of _____,
SS: _____

_____ being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Signed _____.
Subscribed and sworn to before me this ____ day of _____.
Notary Public of _____.
My Commission expires _____.

§ 1112.10 Requests for oral hearings and cross examination.

(a) *Requests.* Requests for oral hearings in matters originally assigned for handling under modified procedure must include the reasons why the matter cannot be properly resolved under modified procedure. Requests for cross examination of witnesses must include the name of the witness and the subject matter of the desired cross examination.

§ 1112.11

(b) *Disposition*. Unless material facts are in dispute, oral hearings will not be held. If held, oral hearings will normally be confined to material issues upon which the parties disagree. The decision setting a matter for oral hearing will define the scope of the hearing.

[61 FR 52712, Oct. 8, 1996]

§ 1112.11 Authority of officers.

Except to the extent that they apply only to the conduct of a public hearing, the officer assigned to handle a proceeding under the modified procedure shall have the same authority as officers assigned to conduct oral hearings as described in § 1113.3(a) and (b).

PART 1113—ORAL HEARING

Sec.

- 1113.1 Scheduling hearings; continued hearings.
- 1113.2 Subpoenas.
- 1113.3 Authority of officers.
- 1113.4 Prehearing conferences.
- 1113.5 Stipulations.
- 1113.6 Appearances; withdrawal or absence from hearing.
- 1113.7 Intervention; petitions.
- 1113.8 Witness examination; order of procedure.
- 1113.9 Prepared statements.
- 1113.10 Records in other Board proceedings.
- 1113.11 Abstracts of documents.
- 1113.12 Exhibits.
- 1113.13 Filing evidence subsequent to hearing.
- 1113.14 Objections to rulings.
- 1113.15 Interlocutory appeals.
- 1113.16 Oral argument before the hearing officer.
- 1113.17 Transcript of record.
- 1113.18 Briefs.
- 1113.19 Pleadings: part of the record.
- 1113.20–1113.30 [Reserved]

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49559, Nov. 1, 1982, unless otherwise noted.

§ 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice*. In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted on the Board's Web site, will be served upon the parties and such other persons as may be entitled to receive notice under the Act, and will be avail-

49 CFR Ch. X (10–1–22 Edition)

able for inspection at the Board's office.

(b) *Requests for changes in assignment*. Requests for postponements of date of hearing will be granted only in exceptional circumstances.

(c) *Continuances*. (1) A continuance may be granted at the discretion of the presiding officer.

(2) If the presiding officer announces the time and place of a continued hearing on the record, no further notice need be given.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.2 Subpoenas.

(a) *Issuance*. A subpoena may be issued upon the direction of the Board on its own motion or upon request. A subpoena may be issued by the Board or by the officer presiding at a hearing and must be signed by the Director of the Office of Proceedings or a member of the Board.

(b) *Requests*. (1) A request for a subpoena to compel the appearance of a person at a hearing to give oral testimony, but not to produce documents, may be made either by letter (only the original need be filed with the Board) or orally upon the record at the hearing. A showing of general relevance and reasonable scope of the evidence sought to be introduced through the subpoenaed person may be required.

(2) A request for a subpoena to compel a witness to produce documentary evidence should be made in writing by petition. The petition should specify with particularity the books, papers, or documents desired and facts expected to be proved, and should show the general relevance and reasonable scope of the evidence sought. The officer presiding at a hearing may grant a request for such a subpoena made orally upon the record.

(c) *Service*. The original subpoena should be exhibited to the person served, should be read to him if he is unable to read, and a copy should be delivered to him by the officer or person making service.

(d) *Return*. If service of subpoena is made by a United States marshal or his deputy, service should be evidenced by his return of the subpoena. If made by

Surface Transportation Board

§ 1113.3

any other person, such person shall make an affidavit stating the date, time and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure should be stated on the original subpoena. The written acceptance of service of a subpoena by the person subpoenaed will be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, should be returned forthwith to the Chief, Section of Administration, Office of Proceedings, unless otherwise directed.

(e) *Witness fees.* A witness who is summoned and responds to the summons is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose insistence the testimony is taken at the time the subpoena is served, except that when the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009; 81 FR 8854, Feb. 23, 2016]

§ 1113.3 Authority of officers.

(a) *General.* (1) The presiding officer has the authority to regulate the procedure in the hearing before him, and has authority to take all measures necessary or proper for the efficient performance of the duties assigned him. These include authority: (i) To hold hearings; (ii) to administer oaths and affirmations; (iii) to grant intervention; (iv) to accept any pleading; (v) to establish special rules of procedure appropriate to the effective handling of the particular proceeding; (vi) to examine witnesses; (vii) to issue subpoenas at the hearing; (viii) to dispose of requests for discovery; (ix) to hold conferences for the settlement and simplification of issues; (x) to rule on motions and dispose of procedural requests; (xi) to make initial decisions; (xii) to exclude any person from the hearing for contemptuous conduct; and (xiii) to take any other action authorized by this part, by the Administra-

tive Procedure Act, or by the Interstate Commerce Act and related acts.

(2) The presiding officer has the authority: (i) To terminate examination or cross-examination of repetitious or cumulative nature; (ii) to limit direct examination to material matters; (iii) to limit cross-examination to disputed material facts; (iv) to require that principal examination or cross-examination be conducted by one or more counsel representing similar interests in proceedings where several parties are involved; (v) to set reasonable schedules for the presentation of witnesses; (vi) and to set reasonable time limits for the examination or cross-examination of witnesses. In order to enforce this paragraph, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness.

(b) *Motions to dismiss; amendments.* (1) The presiding officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding.

(2) The presiding officer may grant leave to amend any application or complaint.

(c) *Preparation of the decision by the prevailing party.* Any proceeding in which an oral hearing is held and in which the officer is able to announce his decision either:

(1) On the record after the close of the taking of testimony and the hearing of arguments by the officer, or

(2) By appropriate notification to the parties after the close of the hearing, may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(d) *Recording; media coverage.* The presiding officer shall have authority to permit or to refuse to permit the recording of the hearing by means of live or delayed television or radio broadcast, or the use of a tape recorder or

§ 1113.4

other electronic or photographic equipment by any person other than the official reporter.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.4 Prehearing conferences.

(a) *Purposes.* Upon written notice by the Board in any proceeding, or upon written or oral instruction of an officer, parties or their representatives may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

- (1) The simplification of issues;
- (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;
- (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to avoid the unnecessary introduction of proof;
- (4) The procedure at the hearing;
- (5) The limitation of the number of witnesses;
- (6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and
- (7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding. Parties may request a prehearing conference.

(b) *Facts disclosed privileged.* Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, will not be used against participating parties either before the Board or elsewhere unless fully corroborated by other evidence.

(c) *Recordation and decision.* Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and defining the issues, will be recorded in an appropriate decision unless the parties enter into a written

49 CFR Ch. X (10–1–22 Edition)

stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the decision; subsequent proceedings.* If a decision is entered, the parties may, within 20 days of the date of service, or within such lesser time as is set by the officer, present objections on the grounds that the decision does not fully or correctly embody the agreements reached at the conference. Thereafter the terms of the written stipulation or statement of the officer, as the case may be, will determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.5 Stipulations.

Apart from the procedure contemplated by the prehearing provisions, the parties may, by stipulation in writing filed with the Board at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. The parties should agree to facts in this manner whenever practicable.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.6 Appearances; withdrawal or absence from hearing.

(a) *Who may appear.* Any individual may appear for himself. Any member of a partnership which is a party to any proceeding may appear for such partnerships upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Withdrawal or absence from hearing.* A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully be absent therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person who has entered an appearance withdraws from the hearing in a manner other than that specified, the Board or the

Surface Transportation Board

§ 1113.9

Officer may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or if the withdrawal is without the permission of the presiding officer, disciplining of the practitioner concerned.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.7 Intervention; petitions.

(a) *How requested.* Intervention will normally be granted only upon petition. In exceptional circumstances, where the issues would not be broadened or the proceeding delayed, an officer may, at his or her discretion, allow intervention upon motion made orally at the hearing.

(b) *Content generally.* A petition for leave to intervene must set forth the grounds for the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought. If the proceeding is by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(c) *When filed.* A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(d) *Broadening issues; filing.* If the petition seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in time to permit service upon and answer by the parties in advance of the hearing.

(e) *Copies; service; replies.* When a petition for leave to intervene is tendered at the hearing, sufficient copies of the petition must be provided for distribution to the parties represented at the hearing. When a petition for leave to intervene is not tendered at the hearing, the petition should be submitted

to the Board together with a certificate that service has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service of the petition to intervene. At the discretion of the Board, leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(f) *Disposition.* Leave to intervene will be granted only when the petitioner addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner becomes an intervenor and a party to the proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.8 Witness examination; order of procedure.

Witnesses will be orally examined under oath before the officer unless the facts are presented to the Board in the manner provided under modified procedure. In formal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. In the event of further hearings granted on petition, the petitioners requesting further hearing shall open and close the proceeding. Instances exist in which parties other than the respondent may open and close in investigations where the burden of proof is not upon the respondent. Intervenor shall follow the party on whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.9 Prepared statements.

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of opinion prepared by the witness, or written answers to interrogatories of counsel. A prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement does not include argument. Before any such

§ 1113.10

statement is read or admitted in evidence, the witness shall deliver to the officer, the reporter, and to opposing counsel, as may be directed by the officer, a copy of such statement or of such interrogatories and the written answers thereto. The admissibility of the evidence contained in such statement will be subject to the same rules as if such testimony was produced orally, including the right of cross-examination of the witness. The officer may require that the witness testify orally if, in the officer's opinion, the memory or demeanor of the witness may be of importance.

§ 1113.10 Records in other Board proceedings.

A portion of the record before the Board in another proceeding may be offered in evidence at an oral hearing. A party making such an offer must provide, as an exhibit, a certified copy of the material sought to be introduced. A hearing officer may waive the requirement that a copy be provided, subject to such conditions as he or she may impose to assure that a copy will be available later, if needed, at no expense to the Board and to assure that the interests of other parties are not prejudiced. An offer of evidence under this section will be subject to objection by other parties.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.11 Abstracts of documents.

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive all the documents in evidence and instead admit only a limited number of representative documents. He may instruct, if the proffer be for the purpose of proving damages, that introduction be deferred until there is opportunity to comply with § 1133.2. If the proffer be for another purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and

49 CFR Ch. X (10–1–22 Edition)

thereupon offer such abstract in evidence in exhibit form.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.12 Exhibits.

(a) *Copies.* Unless the officer otherwise directs, the original and 10 copies of each exhibit of a documentary character should be furnished for the use of the Board. The original will be delivered to the reporter, and the copy to the officer. If the hearing is before a board, a copy of the exhibit should be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies should be furnished to counsel in attendance at the hearing.

(b) *Interchange prior to hearing.* Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Board or presiding officer may so direct.

(c) *When excluded how treated.* When exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn, it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.13 Filing evidence subsequent to hearing.

Except as provided in this section or as expressly may be permitted in a particular instance, the Board will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that

Surface Transportation Board

§ 1113.18

a party furnish additional documentary evidence that supplements the existing record, within a stated period of time. Documentary evidence to be furnished in this way will be given an exhibit number at the time of filing and the parties advised accordingly.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.14 Objections to rulings.

It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds for that objection. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in an appeal or reply to an appeal, if filed, or in a separate petition dealing only with that objection.

§ 1113.15 Interlocutory appeals.

Rulings of the presiding officer may be appealed prior to service of the initial decision only if:

- (a) The ruling denies or terminates any person's participation,
- (b) The ruling grants a request for the inspection of documents not ordinarily available for public inspection,
- (c) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or
- (d) The presiding officer finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

§ 1113.16 Oral argument before the hearing officer.

At the discretion of the hearing officer and upon reasonable notice to the parties, oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Board for consideration in deciding the case. The making

of such argument will not preclude oral argument before the Board.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.17 Transcript of record.

(a) *Filing.* After the close of the hearing, the complete transcript of the testimony taken and the exhibits shall be part of the record in the proceeding.

(b) *Corrections.* A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Board. A copy of the letter (original only need be filed with the Board) requesting the suggested corrections should be served upon all parties of record and with 2 copies to the official reporter.

(c) *Objections to corrections.* Parties disagreeing with corrections suggested pursuant to paragraph (b) of this section should file written objections in the same manner as suggested corrections are to be filed. Objections to suggested corrections should be filed not later than 15 days after the filing with the Board of suggested corrections. If no objections are timely filed, the Office of Proceedings shall make the suggested corrections to the transcript. If objections are timely filed, the officer who presided at the hearing shall determine the merits of the suggested correction and enter an appropriate decision in the proceeding.

(d) *No free copies.* The Board will not furnish free copies of the transcript to any party to any proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.18 Briefs.

(a) *When filed.* In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, that fact will be stated by the officer on the record. The officer shall fix the time for filing briefs. Simultaneous filing will normally be required, and reply briefs will not normally be permitted.

(b) *Evidence abstract.* A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the

§ 1113.19

pages of the record, if written, or exhibit where the evidence appears. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief.

(c) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Board to make.

(d) *Exhibit reproduction.* Exhibits should not be reproduced in the brief, but may be shown, within reasonable limits, in an appendix to the brief. Analysis of such exhibits should be included in the brief where pertinent.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.19 Pleadings: part of the record.

Matters of fact that are verified and filed prior to oral hearing and that are not specifically denied constitute evidence and are part of the record. A witness, who would present such evidence, must be made available for cross-examination if a request is reasonably made. This rule does not apply to protests against tariffs or schedules.

[47 FR 49559, Nov. 1, 1982, as amended at 64 FR 53268, Oct. 1, 1999]

§§ 1113.20–1113.30 [Reserved]

PART 1114—EVIDENCE; DISCOVERY

Subpart A—General Rules of Evidence

Sec.

- 1114.1 Admissibility.
- 1114.2 Official records.
- 1114.3 Admissibility of business records.
- 1114.4 Documents in Board's files.
- 1114.5 Records in other Board proceedings.
- 1114.6 Official notice of corroborative material.
- 1114.7 Exhibits.

Subpart B—Discovery

- 1114.21 Applicability; general provisions.
- 1114.22 Deposition.
- 1114.23 Depositions; location, officer, time, fees, absence, disqualification.
- 1114.24 Depositions; procedures.
- 1114.25 Effect of errors and irregularities in depositions.

49 CFR Ch. X (10–1–22 Edition)

- 1114.26 Written interrogatories to parties.
- 1114.27 Request for admission.
- 1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.
- 1114.29 Supplementation of responses.
- 1114.30 Production of documents and records and entry upon land for inspection and other purposes.
- 1114.31 Failure to respond to discovery.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49562, Nov. 1, 1982, unless otherwise noted.

Subpart A—General Rules of Evidence

§ 1114.1 Admissibility.

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.2 Official records.

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by a deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record

ATTACHMENT D

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

- (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
- (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of the preparation and presentation of evidence and argument in STB Docket No. NOR 42179, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Docket No. NOR 42179 and/or with any related proceedings, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
- (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10.
- (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper and/or private railcar owner car costs or pricing data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom and/or from any related proceedings, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the

attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL,” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party documents, including rail transportation and other contracts, or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

10. Each party has a 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 prior permission from the producing party. If a party (the "filing party") files and serves upon another party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). In lieu of preparing a "CONFIDENTIAL" version, the filing party may (simultaneously with the party's submission to the Board of its "HIGHLY CONFIDENTIAL" version) make available to outside counsel for

any other party a list of all “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the “HIGHLY CONFIDENTIAL” version before permitting any clients to review the submission.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on July_, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket NOR 42179 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order. I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Dated: _____

UNDERTAKING HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on July __, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Dated: _____