

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 733

EXPEDITING RATE CASES

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Pursuant to the Notice of Proposed Rulemaking (“NPRM”) served on March 31, 2017, by the Surface Transportation Board (“STB” or “Board”), the Association of American Railroads (“AAR”) submits these reply comments.

In its opening comments to the NPRM,¹ the AAR generally supported the NPRM proposals as consensus-based changes that will improve Board processes. The AAR noted that this proceeding was initiated pursuant to Congress’s direction to “initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases,”² and, as such, that the NPRM proposals were rightly focused on procedural improvements to the rate case process.³ The AAR Opening Comments also detailed

¹ The AAR also filed opening and reply comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM”) issued in this proceeding.

² Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 11(c), 129 Stat. 2228, 2234 (2015).

³ See Comments of the Association of American Railroads at 3-5, *Expediting Rate Cases*, Ex Parte No. 733 (filed May 15, 2017) (“AAR Opening Comments”).

some additional targeted process improvements that could help expedite cases but would not require rule changes.⁴

The AAR submits the following reply comments in response to comments filed by groups that advocate on behalf of some rail customers, specifically, comments filed by the National Grain and Feed Association (“NGFA”), joint comments filed by the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League (“Joint Carload Shippers”), and joint comments filed by 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 (“Coal Shippers”).

As explained below, the AAR concurs with the broad consensus expressed in this proceeding that greater staff involvement in all phases of rate complaints would expedite cases. The AAR also responds to some specific requests made in opening comments that are ill-considered and would not meet the Board’s stated goal of expediting rate cases. Finally, the AAR reiterates that, consistent with Congress’s direction⁵ and recent independent findings regarding the Board’s rate regulatory regime,⁶ the Board should not

⁴ *Id.* at 8-10.

⁵ See Surface Transportation Board Reauthorization Act of 2015, § 11(c) (STB directed to initiate proceeding to explore procedures to “expedite” litigation that could be applied to rate cases—not to consider changes to substantive rate case standards).

⁶ See, e.g., InterVISTAS, *An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification*, at 127-29 (Sept. 14, 2016) (“InterVISTAS Report”) (concluding that the STB’s existing rate regulatory regime is consistent with sound economic principles and provides multiple avenues for shippers to access the STB’s remedies).

expand the scope of this proceeding to consider substantive changes to a regulatory framework that “has stood the test of time.”⁷

I. Stakeholders Agree that Greater Board Staff Involvement Would Improve the Rate Case Process.

The AAR Opening Comments generally supported the NPRM proposals as procedural improvements largely reflecting stakeholder consensus. One area of particularly clear and broad-based consensus in the comments to both the ANPRM and NPRM in this proceeding is support for increased staff involvement in all phases of the rate case process. The AAR expressed support for the appointment of a staff liaison to each rate case and the Board’s stated intention to make greater use of technical conferences in order to promote evidentiary alignment and reduce issues in dispute.⁸ Similarly, in their opening comments, NGFA and the Coal Shippers expressly made the point that increased staff involvement in all phases of litigation would facilitate dispute resolution and expedite cases.⁹ Given the agreement of diverse stakeholders, the Board should increase staff involvement to achieve these positive aims.

At the same time, the Board should address an area of common concern—the lack of clarity about the staff liaison. Several commenters joined the AAR in seeking greater clarity for the role of the staff liaison. The AAR Opening Comments suggested that the Board state that the staff liaison and the Board appointed mediator will be two separate

⁷ *Id.* at 134.

⁸ AAR Opening Comments at 6.

⁹ *See, e.g.*, Opening Comments of NGFA at 6, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed May 15, 2017) (“NGFA Opening Comments”); Joint Comments of the Coal Shippers at 39, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed May 15, 2017) (“Coal Shipper Opening Comments”).

individuals. The AAR also suggested that the Board formally delegate authority to the staff liaison to conduct technical conferences and to rule on issues. Similarly, the Coal Shippers noted the potential for confusion and overlap between the role of mediator and liaison.¹⁰ The Board should address this confusion by adopting AAR's proposal to clarify that the mediator and staff liaison will be two different individuals. The mediator will perform the same role that past Board-appointed mediators have performed to encourage private-sector resolution in the mediation phase, while the staff liaison will act as a point of contact throughout the rate case to facilitate evidentiary alignment and resolve procedural disputes.

AAR agrees with the Coal Shippers that the Board's ex parte rules on their face apply to all staff, including the staff liaison.¹¹ But the Coal Shippers go too far when they suggest that the ex parte rules require "all communications between the liaison and any of the parties to a case . . . [to] be joint ones."¹² On the contrary, the Board's ex parte rules only bar ex parte communications "concerning the merits of the proceeding" and do not prohibit ex parte communications on non-merits issues, such as discussions that a staff liaison might have with a party about process or scheduling.¹³ To effectively and efficiently manage rate cases, the staff liaison occasionally may need to communicate separately with parties on procedural issues, and such communications violate neither the letter of the ex parte rules nor the rules' purpose of safeguarding due process. The Coal Shippers' proposal to forbid any such communications could hamper a staff liaison's

¹⁰ Coal Shipper Opening Comments at 26.

¹¹ *Id.* at 27.

¹² *Id.*

¹³ *See* 49 C.F.R. § 1102.2(c).

ability to resolve issues quickly. In applying ex parte rules to the staff liaison, therefore, the Board should ensure that the staff liaison has the flexibility to drive rate cases forward expeditiously without eroding fundamental notions of fairness and due process.

II. The Board Should Not Adopt Proposals Advocated by Shipper Interests that Would Not Expedite Rate Cases.

A. The Board Should Not Create One-Size-Fits-All Discovery Rules on “Core SAC Data.”

Some shipper interest groups renew their request from the ANPRM phase of this proceeding that the Board require railroads to produce all “Core SAC Data” on an accelerated schedule.¹⁴ They suggest that “carrier foot-dragging in producing Core SAC Data” is a significant driver in the length of rate cases.¹⁵ The Board rightly refused to include such a proposal in the NPRM, and there is no justification for the Board to revisit that decision.

In the first place, neither now nor in the ANPRM phase of this proceeding did the shipper groups produce any evidence to support their claims of “foot-dragging.” Their

¹⁴ The Coal Shippers proposed a 60 day deadline in the ANPRM phase of this proceeding; they now propose 70 days. *See* Joint Comments of the Coal Shippers at 4, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 1, 2016) (“Coal Shipper ANPRM Opening Comments”); Coal Shipper Opening Comments at 32. Perhaps recognizing that this deadline could sometimes, or perhaps always, be impossible to reach, the Coal Shippers would allow for an extension by order of the Board. *See id.*; *see also* Joint Comments of the Joint Carload Shippers at 4-5, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed May 15, 2017) (“Joint Carload Shippers Opening Comments”) (supporting a requirement “that defendants produce traffic data within 90 days of the initial discovery requests” and claiming that “this is usually the last information that defendants produce”); Joint Comments of the Joint Carload Shippers at 7, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 1, 2016) (“Joint Carload Shipper ANPRM Opening Comments”) (claiming that traffic and revenue data “is among the last information produced by the railroad”).

¹⁵ Coal Shipper Opening Comments at 31; *see* Joint Carload Shippers Opening Comments at 4.

claim that railroads deliberately delay production of “Core SAC Data” until late in the discovery period is not accurate. Many of the items that the Coal Shippers identify as “Core SAC Data” are relatively accessible items that typically can be and are produced early in the discovery period. Examples of such accessible items include track charts, density data, valuation maps, and Wage Forms A & B. But other categories of so-called “Core SAC Data” require substantially more time and effort to compile and produce, generally making it impracticable for such data to be produced early in the discovery period.

In particular, traffic and event data generally takes more time to produce because it is highly labor- and time-intensive to compile and assemble into usable and accurate databases.¹⁶ As explained in the AAR reply comments filed in the ANPRM phase of this proceeding, railroads maintain traffic and revenue data in the ordinary course of business, not for SAC litigation.¹⁷

To respond to discovery requests from complainants, railroads must review and compile pieces of information drawn from a wide variety of internal sources.¹⁸ And

¹⁶ In addition, it often takes significant time for shippers themselves to clarify for the railroads the time period for which traffic data is sought and the particular information that is requested. *See, e.g.,* CSXT ANPRM Opening Comments at 22-25, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 1, 2016) (“CSXT ANPRM Opening Comments”) (describing instances where vague time frame definitions slowed down the discovery process and where particular traffic data requests varied from case to case).

¹⁷ *See* Reply Comments of the Association of American Railroads, Fisher V.S. at 5, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 29, 2016) (“AAR ANPRM Reply Comments”); *see also* NS Opening Comments at 26, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 1, 2016) (“NS ANPRM Opening Comments”) (“For defendants in SAC cases, pulling traffic tapes and other traffic data in response to discovery requests has one of the longest lead times.”).

¹⁸ *See* AAR ANPRM Reply Comments, Fisher V.S. at 6.

railroads have to invest significant resources to cull the relevant data from their databases and produce them over to complainants.¹⁹ The task is only complicated more by the fact that traffic data requests can vary from case to case. As stated in Union Pacific's Opening Comments to the ANPRM,

. . . compiling the relevant information into a useable format requires substantial efforts on the part of railroad employees, consultants, or both who are familiar with the data. To produce the extensive data typically requested in a SAC case, data must be extracted from several different databases and linked together using procedures that are not performed in the ordinary course of business. Because the data are not compiled or produced in the ordinary course of business, substantial quality control efforts are required to ensure that the production is correct and complete. Even so, there are many follow-up questions about the data after its production.²⁰

As one example of the significant investment of time, labor and resources necessary for railroads to produce critical categories of Core SAC Data, consider the *DuPont v. Norfolk Southern* rate case. In that case, DuPont "posed over 900 discovery requests (including subparts), in response to which NS personnel are spending thousands of person -hours to identify and produce responsive material."²¹ NS ultimately produced

¹⁹ See *id.* at 5-7.

²⁰ Comments of Union Pacific Railroad Company at 5, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 1, 2016); see also Reply Comments of Norfolk Southern Railway Company at 24-25, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 29, 2016) ("NS ANPRM Reply Comments") (describing "significant time, effort, and inter-departmental coordination required to produce this complex and massive data"); Reply Comments of CSX Transportation, Inc. at 17, *Expediting Rate Cases*, STB Ex Parte No. 733 (filed Aug. 29, 2016) ("CSXT ANPRM Reply Comments") (describing "intensive, time consuming process" required to produce traffic data).

²¹ Norfolk Southern Ry. Co.'s Reply in Opposition to Motion to Compel of E.I. DuPont de Nemours & Co., at 2, *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. NOR 42125 (filed Apr. 25, 2011).

approximately 51,000 pages and 36,197.50 gigabytes of relevant materials.²² Shippers may not understand the immense burdens of production imposed on the railroads, because of their own relatively lower production burdens. For example, in contrast, DuPont produced approximately 6,000 pages and 16.1 gigabytes of relevant materials, which amounts to only about 12% and 0.044 %, respectively, of the pages and gigabytes NS produced.²³

In sum, imposing an arbitrary deadline for the production of Core SAC Data is unwarranted and impracticable.

B. The Board Should Not Stagger Briefs.

In an effort to seek advantage for their members rather than expedite cases, the NGFA and Joint Carload Shippers repeat their rejected suggestion that the Board should stagger final briefs so that shippers get the last word.²⁴ According to the Joint Carload Shippers, briefs should be designed to “afford complainants an opportunity to react to defendant’s critique of the rebuttal evidence.”²⁵ The Board refused to adopt a similar suggestion by shipper groups in the ANPRM phase, instead reasoning that imposing a length limitation on final briefs would be a “better approach.”²⁶ The Board should not revisit that conclusion, for two reasons.

First, staggering final briefs would contradict the basic purpose of this proceeding by making it harder for the Board to process cases expeditiously. The Board’s time to

²² NS ANPRM Opening Comments at 27.

²³ *Id.* at 27-28 & n.93.

²⁴ Joint Carload Shippers Opening Comments at 7.

²⁵ *Id.*

²⁶ NPRM at 9.

decide a case now runs from the filing of rebuttal evidence—not the filing of final briefs.²⁷ Accordingly, the proposal for staggering briefs would cut by 15 days the already-short time that the Board has to consider the full record. Under the Joint Carload Shippers proposal, the Board would only have 135 days after the filing of the complainant’s brief until the statutory deadline for issuing a decision.²⁸

Second, the only purpose of a proposal to stagger briefs is to encourage the improper gamesmanship often employed by complainants. The rules require a complainant to present its entire case on opening. This requirement expedites the proceeding by placing complete information in the record to which the railroad can respond. The railroad then files evidence on reply, and the complainant can respond to the railroad’s arguments on rebuttal. Under the Board’s rules, a complainant generally is prohibited from introducing new evidence on rebuttal.²⁹ If this process is followed by the parties and enforced by the Board, the closing briefs are not responding to any evidence. Rather, briefs are “a summary of key issues” that are more comprehensively discussed in other prior filings.³⁰ Accordingly, a complainant that has not included improper new

²⁷ See 49 U.S.C. § 10704(d)(2)(A)(iv).

²⁸ See *Revised Procedural Schedule in Stand Alone Cost Cases*, Ex Parte 732 (Mar. 9, 2016) (providing that Board would issue final decision 150 days after final briefs are filed).

²⁹ See *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 101 (2003) (“[T]he shipper must plan to submit its best, least-cost, fully supported case on opening. It may not hold back to see the railroad’s reply evidence before finalizing or supporting its own case[.]”); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (“Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.”).

³⁰ See *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42142, at 7 (served Dec. 9, 2016).

arguments or new evidence in its rebuttal evidence should have little need to “react” to a defendant’s brief.

Staggering briefs thus cuts against the Board’s goal of expediting rate cases, because it only creates an incentive for complainants to improperly present new evidence in their rebuttal filings, which will necessitate further filings (such as more motions to strike such evidence in order to enforce the Board’s rules). It is true that in many cases complainants’ use of improper new arguments on rebuttal has forced defendants to address such new evidence for the first time in their final briefs in order to preserve the integrity of the STB’s decision-making process. But this is not cause to reward such improper use of rebuttal by giving complainants another round of briefing. Rather, it is further evidence of the essential role that enforcing the rules against improper rebuttal evidence must play in any serious effort to expedite rate case litigation. As such, the Board should not alter its rules to stagger briefs; and, the AAR again emphasizes that the Board must honor its commitment to policing improper rebuttal evidence.

III. The Board Should Not Expand the Scope of this Proceeding

Shipper comments acknowledge that this proceeding is rightly focused on procedural improvements to the rate case process. For example, the Joint Carload Shippers specifically acknowledge that changes to the rate case standards are beyond the scope of this proceeding.³¹ Nevertheless, the shipper comments persist in making appeals to the Board to change its substantive rate case standards in ways that lack economic foundation and would artificially lower rates. The Joint Carload Shippers “reiterate their desire that the Board prioritize its efforts to develop alternatives to SAC, such as the rate

³¹ Joint Carload Shippers Opening Comments at 2.

benchmarking approach based upon econometric modeling.”³² And NGFA attempts to revive the Ag Commodity Maximum Rate Methodology that the Board did not accept as part of a proposal in EP 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*.³³

It is clear that such proposals are beyond the scope of this proceeding, as prescribed by Congress, and are not a logical outgrowth of a proceeding focused on procedural improvements. Moreover as explained in the AAR Opening Comments, the substantive basis of the Board’s tests does not need overhaul.³⁴ The Board’s independent consultant, InterVISTAS, recently confirmed the validity of the SAC test and that shippers have sufficient simplified options to bring smaller rate disputes to the Board.³⁵ The InterVISTAS Report concluded that the Three Benchmark test in particular is a cost-effective means for shippers with small claims to challenge the reasonableness of their rates.³⁶

The Coal Shippers attempt to camouflage a separate substantive change in the law in the guise of a procedural change. The Coal Shippers claim that the “law places no temporal limitation on when a shipper can request that a rail carrier provide it with the carrier’s common carrier rate and service terms.”³⁷ While carefully worded so as to be technically true—the law places no limits on the ability of a shipper to ask for a rate—the

³² *Id.* at 7.

³³ NGFA Opening Comments at 2.

³⁴ AAR Opening Comments at 4-5.

³⁵ InterVISTAS Report at 127-28.

³⁶ *Id.* at 128-29.

³⁷ Coal Shippers Opening Comments at 29.

law does place limits on when such a request is reasonable and therefore would obligate a rail carrier to respond.³⁸ This proceeding is not the proper forum to consider the substantive law of what constitutes a reasonable request for rates and service and when a response to such a request should be issued.

In sum, the STB should abide by the clear congressional directives and conclusions of the InterVISTAS Report, and this proceeding should only address procedural improvements to the rate case process.

Conclusion

Based on the foregoing, the Board should adopt the NPRM proposals modified consistent with the AAR opening comments and this reply filing.

Respectfully submitted,



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³⁸ *Burlington N. R.R. v. Surface Transp. Bd.*, 75 F.3d 685 (D.C. Cir. 1996).