

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EXPEDITING RATE CASES

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Docket No. EP 733

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

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

SUMMARY

Coal Shippers/NARUC represent coal shippers that have had extensive experience both in negotiating coal transportation contracts and, when negotiations fail, litigating maximum coal rate cases before the Board. Coal Shippers/NARUC applaud the Board for considering ways to expedite its consideration of coal rate cases and, in order to assist the Board in this effort, Coal Shippers/NARUC have actively participated in the earlier stages of this proceeding.

Coal Shippers/NARUC generally support many of the Board's proposed rules, including those calling for the early start of discovery, imposing meet and confer obligations before motions to compel are filed, staggering the filing of evidentiary submissions, the use of standard confidentiality designations, limiting the page length of final briefs, and increased staff involvement during all phases of the case.

However, Coal Shippers/NARUC urge the Board to reconsider its proposal to require a shipper to engage in a mandatory 70-day mediation before the shipper can file a complaint. The Board's proposal will not expedite the Board's consideration of rate cases; instead, it will simply add an additional 70 days to the Board's current case schedules, and is totally at odds with the Board's stated objectives in this proceeding – expediting its consideration of maximum rate cases.

The better approach, if mediation is to be mandated, is the one the Board currently has in place: mediation begins shortly after the shipper files its complaint and runs concurrently with the litigation. Under that approach, mediation does not slow down the case. This result is critically important to complainant shippers because history has shown that the vast majority of maximum rate cases do not result in Board-mediated settlements.

The reason why is well known. Coal shippers always engage in extensive contract negotiations with their carriers with the hope of negotiating contract rates. In most instances, the negotiations result in contracts. However, in some instances they do not, and shippers have been forced to implement to their remedy of last resort – filing a rate case at the STB. By the time cases are filed, the parties – who are sophisticated

commercial entities – have already engaged in extensive negotiations that have not produced a deal. Mediation – particularly mandated mediation – seldom works in situations like this, which explains why very few cases have been settled through Board-mandated mediation.

If the Board is committed to pre-complaint mediation, Coal Shippers/NARUC propose an alternative approach. Under this alternative, carriers would be required to provide common carrier rates to shippers no later than 90 days prior to the date common carrier service subject to those rates is expected to start. The shipper would then have 50 days to evaluate the rates and, if it decided to pursue a rate case, it would submit a pre-filing notice with the Board. This notice would trigger a 40 day pre-complaint mediation period.

At the end of the mediation period, the shipper could file its complaint with the Board and mediation would end, unless the parties agreed to continue to mediate. The shipper also would have the option to include in its pre-filing notice its requests for the key Stand-Alone Cost (“SAC”) data it needs to present its case – what Coal Shippers/NARUC refer to as “Core SAC Data.” If the shipper exercises this option, and the case does not settle during the mediation period, the defendant carrier would be required to produce the Core SAC Data no later than 30 days after the shipper files its complaint, unless the Board otherwise orders.

Coal Shippers/NARUC believe that this alternative approach is better than the one proposed by the Board because it addresses key issues such as when carriers must provide common carrier rates to shippers, allows shippers to identify with specificity

Core SAC Data at the first available opportunity in the case process, permits mandated mediation to proceed prior to the complaint being filed, and should help address one of the principal reasons why SAC cases experience delays – carrier failure to produce Core SAC Data in a timely manner.

Coal Shippers/NARUC also request that the Board clarify some aspects of its proposed new rules, *e.g.*, limiting “confidential” designations in pleadings to documents each side initially designates as confidential; confirming that Board-appointed liaisons are precluded from engaging in *ex parte* communications with the parties; and addressing the question of whether its new proposed meet and confer standards apply to motions to compel document production.

IDENTITY AND INTEREST

WCTL is a voluntary association whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. WCTL members collectively consume more than 150 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

APPA is the national service organization representing the interests of over 2,000 municipal and other state- and locally-owned electric utilities in 49 states (all but Hawaii). Collectively, public power utilities deliver electricity to one of every seven electric consumers (approximately 48 million people), serving some of the nation’s

largest cities, but also many of its smallest towns. Over 40% of the power generated by public power utilities is from coal.

EEI is the association of U.S. shareholder-owned electric utility companies. EEI's members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70% of the U.S. electric power industry. EEI's diverse membership includes utilities operating in all regions, including regions with Regional Transmission Organizations and Independent System Operators, and companies supplying electricity at wholesale in all regions.

NARUC is the national organization of State commissions responsible for economic and safety regulation of utilities. NARUC members in the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, as well as ensuring such services are provided at just and reasonable rates. NARUC is consistently recognized by Congress, the Courts, and a host of federal agencies (including the Federal Energy Regulatory Commission), as the proper entity to represent the collective interests of State utility commissions.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states or 13% of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11% of all electric energy sold in the United States. NRECA members generate approximately 50% of the electric energy they

sell and purchase the remaining 50% from non-NRECA members. The vast majority of NRECA members are not-for profit, consumer-owned cooperatives. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 841 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. An umbrella membership organization, FRCA members include large trade associations representing more than 3,500 manufacturing and agriculture companies, electric utilities, and their customers. Its membership base is expanding to include other industries and commodities.

Collectively, Coal Shippers/NARUC represent the interests of all major coal shippers in the United States. Coal Shippers/NARUC have actively participated in prior proceedings before the Board and its predecessor, the Interstate Commerce Commission ("ICC" or "Commission"), involving the standards and procedures that the ICC and the Board should apply to determine whether rates charged by railroads on market dominant traffic are reasonable.

As particularly pertinent here, most of the STB's large case maximum rate docket has consisted of cases involving the transportation of coal, and all of these cases

have involved shippers who are members of one or more of the trade associations that comprise the Coal Shippers:

<u>Shipper</u>	<u>Docket No.</u>
West Texas Utilities	41191
Arizona Pub. Service	41185
PEPCO	41989
PPL	41295
PSI Energy	42034
Minn. Power	42038
Wisconsin P&L	42051
PPL Montana	42054
Northern States Power	42059
Arizona Pub. Service	42077
TMPA	42056
Duke	42069
Duke	42070
Carolina Power	42072
Xcel	42057
AEPCO	42058
Otter Tail	42071
APS	42091
KCPL	42095
Western Fuels	42088
AEP Texas	41191(1)
OGE	42111
NRG	42122
Seminole	42110
AEPCO	42113(1)
SMEPA	42128
AEPCO	42113
IPA	42127
IPA	42136
Consumers Energy	42142

Coal Shippers/NARUC's Comments are guided and informed by the experience of these shippers in their cases before the Board and by the experiences of other utility coal shippers in rate cases heard by the ICC.

COMMENTS

I. BACKGROUND

Section 11(c) of the STB Reauthorization Act (“Reauthorization Act” or “Act”)¹ directed the STB 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.” *Id.* The Act also retained the directive that the Board “maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.”²

A. The Staff Meetings

In response to these directives, the Board’s staff conducted a series of informal meetings with stakeholders in April 2016 to discuss “(1) how procedures to expedite court litigation could be applied to rate cases, and (2) additional ways to move SAC cases forward more expeditiously.”³

Counsel for Coal Shippers/NARUC participated in one of these informal meetings. In this meeting, Coal Shippers/NARUC’s counsel referenced recent amendments made to the Federal Rules of Civil Procedure (“FRCP”) to expedite court cases, including ones calling for more active participation by judges at all pre-trial portions of the case. As Chief Justice Roberts recently reported, “[t]he amended rules . . . emphasize the crucial role of federal judges in engaging in early and effective case

¹ Pub. L. No. 114-110, 129 Stat. 2228 (Dec. 18, 2015).

² 49 U.S.C. § 10704(d)(1).

³ NPRM, slip op. at 2.

management” including participation in “face-to-face” meetings with counsel to discuss discovery issues.⁴

Coal Shippers/NARUC’s counsel informed the Board staff that, in their opinion, more active participation of STB staff at the early stages of SAC case discovery could go a long way toward addressing the principal cause of delays in SAC coal rate cases – the failure of defendant railroads to timely respond to shippers’ requests for critical data and supporting information needed to develop their SAC evidence. Coal Shippers’ counsel also emphasized that the Board should take no actions in the interest of expedition that would adversely affect a shipper’s right to fairly present its case to the Board.

B. The Advanced Notice of Proposed Rulemaking

Following the stakeholder meetings, the Board served an advance notice of proposed rulemaking in this proceeding on June 15, 2016 (“ANPRM”). The Board stated that “[b]ased on [its] experience in processing rate cases, as well as the feedback received during the informal meetings, the Board has generated a number of ideas to expedite rate cases.”⁵ The Board discussed these ideas in the ANPRM, and asked for public comment on them.⁶ The Board also sought public comment on any other “relevant matters.”⁷

⁴ Hon. John G. Roberts, *2015 Year-End Report on the Federal Judiciary* at 7 (Dec. 31, 2015) (citing FRCP 16), available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

⁵ ANPRM, slip op. at 2.

⁶ *Id.* at 2-3.

⁷ *Id.* at 3.

Coal Shippers/NARUC reviewed the Board's ideas with three policy objectives in mind: would the ideas, if adopted, expedite the Board's consideration of rate cases; would the ideas, if adopted, adversely impact a shipper's ability to present the merits of its case; and would the ideas, if adopted, otherwise assist the parties in effectively presenting their cases to the Board.

Coal Shippers/NARUC filed joint opening and reply comments in response to the ANPRM.⁸ In these filings, Coal Shippers/NARUC supported several of the ideas contained in the ANPRM:

- Coal Shippers/NARUC supported the idea of requiring a complainant shipper to serve its initial discovery requests on the same date that it files its complaint because the idea, if adopted, should help expedite case discovery;
- Coal Shippers/NARUC supported the idea of requiring a defendant carrier to serve its initial discovery requests on the same date it that files its answer because the idea, if adopted, should help expedite case discovery;
- Coal Shippers/NARUC supported the idea of requiring a party to engage in a meet and confer session with the other party prior to filing a motion to compel because the idea, if adopted, could help minimize discovery disputes and, as a result, expedite case discovery;
- Coal Shippers/NARUC supported the idea of limiting the number of interrogatories that a party could tender without leave of the Board because the idea, if adopted, should reduce unnecessary discovery and, as a result, expedite case discovery;

⁸ See Joint Comments of the Western Coal Traffic League, *et al.*, EP 733 (Aug. 1, 2016) ("Coal Shippers/NARUC ANPRM Op. Comments") and Joint Comments of the Western Coal Traffic League, *et al.*, EP 733 (Aug. 29, 2016) ("Coal Shippers/NARUC ANPRM Reply Comments") (collectively "Comments").

- Coal Shippers/NARUC supported limiting case briefs to issues the Board directed the parties to address because the idea, if adopted, should assist the Board's case administration by focusing briefs on issues of most concern to the Board;

- Coal Shippers/NARUC supported staggering the due dates for the filing of public and highly confidential versions of party filings with the Board because the idea, if adopted, would make it easier for the parties to meet case deadlines; and

- Coal Shippers/NARUC supported increasing involvement of Board staff during the discovery and evidentiary phases of a case because the idea, if properly adopted and implemented, should speed-up the administrative process for both the Board and the parties.

Coal Shippers/NARUC opposed several of the other ideas contained the ANPRM, including the following:

- Coal Shippers/NARUC opposed the Board's idea to adopt specified forms of "standardized" SAC evidence because, among other things, development of this "standardized evidence" would slow-down, not speed-up, SAC cases and would most likely unfairly hinder a shipper's ability to present its case on the merits;

- Coal Shippers/NARUC opposed the Board's idea to establish a pre-filing notice, and a pre-filing mediation period, because the idea, if adopted, would slow-down, not speed-up, the Board's administration of SAC cases; and

- Coal Shippers/NARUC opposed the Board's idea of developing "standardized" discovery requests and "standardized" discovery disclosures because the idea, if adopted, would slow-down, not speed-up, the Board's administration of SAC cases.

Coal Shippers/NARUC also offered some alternative ideas for the Board to consider, including the following:

- Requiring the parties to participate in a staff conference within 15 days after the shipper files its complaint to address and set a timetable for the defendant carrier's submission of the most important SAC data, which Coal/Shippers/NARUC called "Core SAC Data." Coal Shippers/NARUC explained that the single biggest source of delay in SAC cases has been carrier foot-dragging in producing Core SAC Data, and this new requirement, if adopted, would more than anything else help expedite discovery and SAC case processing.

- As an alternative to its preferred approach, Coal Shippers/NARUC proposed that if the Board did adopt a pre-filing notice, the notice be required to contain the complainant shipper's Core SAC Data requests, and the defendant carrier be required to provide the responsive Core SAC Data by a fixed deadline.

- Limiting mediation in SAC cases to those cases where both sides agree to it, as opposed to the current procedure where mediation is mandatory.

- Clarifying whether the requirement in 49 C.F.R. § 1114.31(a) directing that motions to compel be filed within 10 days applied to motions to compel document production.

C. The Notice of Proposed Rulemaking

In the NPRM, the Board states that "[b]ased on the comments [made in response to the ANPRM], the Board is now proposing specific changes intended to help improve the rate review process and expedite rate cases."⁹ The specific changes the Board is proposing in SAC cases are:

- Requiring a complainant shipper to tender a pre-filing notice at least 70 days prior to filing its complaint;

⁹ NPRM, slip op. at 2 (footnote omitted).

- Requiring a complainant shipper to file a motion for protective order with its pre-filing notice;
- Appointing a Board-staff “liaison” within 10 days after the shipper submits its pre-filing notice;
- Requiring the parties to engage in mandatory mediation following the shipper’s submission of its pre-filing notice;
- Requiring a shipper to tender its initial discovery requests with its complaint and requiring a defendant carrier to tender its initial discovery requests with its answer;
- Imposing a meet and confer requirement before a party can file a motion to compel;
- Establishing a uniform protective order protocol for designating material in party filings as confidential, highly confidential, or security sensitive;
- Permitting parties to file public versions of highly confidential filings three days after the due date for the filing of the highly confidential filing;
- Limiting final briefs to 30 pages; and
- Increasing Board staff involvement in the case processes.

The Board states in the NPRM that it “seeks comments . . . on these proposed rules” and “encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule.”¹⁰ The Board also says that it “will consider all recommended proposals in an effort to establish the most useful changes to improve and expedite the rate review process.”¹¹

¹⁰ NPRM, slip op. at 13.

¹¹ *Id.*, slip op. at 13.

II. RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING

A. The Board Should Not Adopt its Proposed Pre-Complaint Period Rules

Coal Shippers/NARUC urge the Board not to adopt its proposed rules establishing procedures to apply before a shipper files its complaint.

1. The Proposed Pre-Complaint Period Rules: 70 Day Pre-Complaint Notice; Motion for Protective Order; Mandatory Mediation; and Liaison Appointment

The Board's "proposed rules include changes creating and detailing a pre-complaint period in SAC cases intended to provide parties with an opportunity to mediate the dispute and prepare for litigation."¹² The Board's pre-complaint period proposals contain four component parts:

First, the Board proposes to add a new notice provision ("Pre-Filing Notice") that states "[a]t least 70 days prior to the proposed filing of a complaint challenging the reasonableness of a rail rate to be examined under the constrained market pricing, [the] complainant shall file a notice with the Board" which shall "(i) [i]dentify the rate to be challenged; (ii) [i]dentify the origin/destination pair(s) to be challenged; [and] (iii) [i]dentify the affected commodities."¹³

Second, the Board proposes that "[i]n stand-alone cases, the motion for protective order [under 49 C.F.R. § 1104.14(c)] shall be filed together with the [Pre-

¹² *Id.*, slip op. at 10.

¹³ *Id.*, slip op. at 17.

Filing Notice].”¹⁴ The Board also proposes that any such protective order contain a prescribed format for designating confidential, highly confidential and sensitive security information.

Third, the Board proposes that “[a] shipper seeking rate relief . . . in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon submitting [the Pre-Filing Notice]” in accordance with the otherwise applicable procedures currently codified at 49 C.F.R. § 1109.4.¹⁵

Fourth, the Board proposes that “[w]ithin 10 days of the filing of the [Pre-Filing Notice], the Board shall appoint a liaison to the parties.”¹⁶ The Board states that the intended function of the liaison is “to improve communication between the parties and the Board by providing parties with a point of contact to whom they can address questions or disputes.”¹⁷ The Board also proposes that “[t]he liaison would not be recused from handling substantive elements of the case.”¹⁸

2. The Pre-Filing Notice Requirement Will Delay, Not Expedite, the Board’s Administration of Maximum Rate Cases

In § 11(b) of the Reauthorization Act, Congress prescribed a *pro forma* procedural schedule to apply in SAC cases, subject to Board-granted extensions “after a request from any party or in the interest of due process.” *Id.* Following the enactment of

¹⁴ *Id.*, slip op. at 16.

¹⁵ *Id.*, slip op. at 16.

¹⁶ *Id.*, slip op. at 17.

¹⁷ *Id.*, slip op. at 11.

¹⁸ *Id.*, slip op. at 10.

the Reauthorization Act, the Board amended its procedural rules to adopt a procedural schedule that conforms to the § 11(b) directives.¹⁹ Specifically, amended 49 C.F.R. § 1111.8(a) provides that “[a]bsent a specific order by the Board,”²⁰ the following procedural schedule will apply in SAC cases:²¹

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

Under the current schedule, the first formal action the shipper takes at the Board is the filing of its complaint on Day 0. That filing triggers the remaining dates on the *pro forma* 485-day schedule. Under the Board’s proposed Pre-Filing Notice rule, the first formal action the shipper will take at the Board is the filing of its Pre-Filing Notice no earlier than 70 days before it files its complaint.

The obvious effect of the Board’s Pre-Filing Notice rule is to add at least 70 days to the procedural schedule, with the result that a *pro forma* 485-day schedule becomes at least a 555-day schedule ($485 + 70 = 555$) for all practical purposes, save one

¹⁹ See *Revised Procedural Schedule in Stand-Alone Cases*, EP 732 (STB served March 9, 2016).

²⁰ *Id.*, slip op. at 4.

²¹ *Id.*, slip op. at 4-5.

– the 70 day Pre-Filing Notice time period is not counted in determining the Board’s compliance with the § 11(b) deadlines.

In their ANPRM Comments, Coal Shippers/NARUC urged the Board not to adopt a pre-filing requirement because its adoption would slow-down, not speed-up, the Board’s processing of rate cases. See Coal Shippers/NARUC ANPRM Reply Comments at 20 (“adding a pre-filing requirement would increase, not decrease, the amount of time it takes to litigate a SAC case”).

Other ANPRM commenters agreed. For example, Norfolk Southern Railway Company (“NS”) correctly observed that “a pre-filing requirement does nothing to expedite SAC Cases” because “[a] pre-filing requirement simply adds time to SAC Cases ‘off the books’ by creating a new procedural phase before the rate case formally starts.”²² Similarly, the Association of American Railroads (“AAR”) informed the Board that the Pre-Filing Notice period “would not actually expedite the rate case itself once it is filed.”²³

The delays the Board is proposing also contravene Congressional intent. Had Congress wanted the Board to adopt a pre-filing period, it could have included a pre-filing requirement in its *pro forma* procedural schedule set forth in § 11(b) of the STB Reauthorization Act. Of course, Congress did not, nor should the Board. Congress did

²² ANPRM, Comments of Norfolk Southern Ry. Co. at 35-36 (Aug. 1, 2016) (“NS ANPRM Comments”).

²³ ANPRM, Comments of the Association of American Railroads at 6 (Aug 1, 2016) (“AAR ANPRM Comments”).

however recognize that the statutory procedural schedule dates, which start when the shipper files its complaint, may need to be extended.

To that end, § 11(b) provides that the Board may extend any of the *pro forma* procedural deadlines, following the filing of the shipper’s complaint, “after a request from the parties or in the interest of due process.” *Id.* To the extent the Board is pursuing its pre-complaint procedures in order to “buy time,” Coal Shippers/NARUC suggest that the better approach is not to hard-wire 70 additional “off the books” days to the procedural schedule.

Instead, the Board should start cases when Congress intended them to start – when a shipper files its complaint – and utilize the authority Congress has expressly accorded it in § 11(b) to extend schedules in individual cases, as needed, if requested to do so by a party or if due process so requires. That way the Board will not automatically – and contrary to Congressional intent – hard-wire case delays through its new Pre-Filing Notice requirement.

3. The Board’s Rationales for the Pre-Complaint Period Do Not Support Slowing Rate Cases Down

The Board opines that the pre-complaint period requirement is beneficial “given the potential benefit of mediation in SAC cases,”²⁴ because the parties will be able to “engage in mediation without the burden of simultaneous litigation and discovery,”²⁵

²⁴ NPRM, slip op. at 5.

²⁵ *Id.*

and “because the pre-filing notice would put the parties on notice as to what they will likely need to produce in discovery.”²⁶

a. The Asserted “Benefits of Mediation” Can Be Realized Without Slowing Cases Down

The Board’s current rules currently call for mandatory non-binding mediation of SAC cases.²⁷ As presently constituted, the Board’s rules require that the Board appoint a mediator shortly after the shipper files its complaint.²⁸ The mediation period lasts for 60 days from the date the mediator is appointed, unless the parties agree to extend the mediation period.²⁹ The Board’s rules also provide that during the mediation period, the shipper’s case will go forward, unless the Board orders otherwise.³⁰

The Board adopted these rules in 2003.³¹ Since that time, the Board has supervised nine mandatory mediations in coal rate cases.³² The Board reports that of

²⁶ *Id.*, slip op. at 4.

²⁷ See 49 C.F.R. § 1109.4(a).

²⁸ See 49 C.F.R. § 1109.4(b) (STB to appoint mediator “[w]ithin 10 business days after the shipper files its formal complaint” and “within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting”).

²⁹ See 49 C.F.R. § 1109.4(e).

³⁰ See 49 C.F.R. § 1109.4(f).

³¹ See *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, 6 S.T.B. 805, 806-808, 818-819 (2003) (“*Expedited Procedures II*”).

³² See STB Docket Nos. 41191(Sub-No. 1), 42088, 42095, 42110, 42113, 42122, 42127, 42128 and 42142.

these nine mandatory mediations, only one case resulted in a mediated settlement.³³ This result is not surprising. Coal shippers and coal carriers are sophisticated parties, and coal shippers in particular view STB litigation as a remedy of last resort. Their overwhelming preference is to negotiate, not litigate, maximum rates.

Generally speaking, most negotiations between coal shippers and coal carriers do result in negotiated contracts, and the shipper does not institute STB litigation. In the unusual circumstance where a coal shipper does institute a case it is usually only after months, if not years, of negotiations have not produced an outcome that the shipper believes is reasonable under the Board's maximum rate constraints.

While the Board's staff, and its mediators, have attempted to assist parties in negotiating solutions, by the time a case reaches the Board it is almost always beyond the point where a mediated resolution can be obtained. This is particularly true in SAC cases where the complexity of the standard, and the proof required, make it hard for mediators to meaningfully evaluate the strengths and weaknesses of each side's case.

Coal shippers have spent considerable time and effort in failed mandatory mediations. The one positive for shippers has been that mediation has not slowed down the Board's processing of their maximum rate cases. The Board can certainly retain the asserted "benefits" of mandatory mediation by retaining its current approach – mandatory mediation after a complaint is filed – without delaying cases for 70 days or more as the Board proposes to do with its Pre-Filing Notice rule.

³³ See NPRM, slip op. at 5. The same holds true in SAC cases involving non-coal traffic. It appears that mandatory mediation has produced a mediated settlement in only one of these cases – Docket No 42112.

There are also many benefits associated with beginning mediation after a complaint is filed in addition to avoiding case delays. The parties usually are involved in intense negotiations in the 70-day period prior to filing a complaint. The purpose of these negotiations is to avoid the need to come to the Board at all. Injecting the Board into these negotiations will in most cases be counterproductive since it means the shipper has decided to start the formal litigation process at the STB.

In addition, the complaint itself provides valuable information to the defendant carrier as well as to the mediator, *e.g.*, it sets forth the shipper's market dominance allegations, it identifies what maximum rate standards the shipper plans to invoke, *e.g.*, stand-alone, revenue adequacy, *etc.*, and it helps frame the issues for the mediation. *See Expedited Procedures II*, 6 S.T.B. at 807 ("the shipper will have formulated its initial position by filing its complaint, giving the parties and the mediator basic information on which to conduct the mediation").

b. Bifurcating Mediation and Litigation Will Increase Case Burdens

The Board opines that bifurcating mediation and litigation will assist the parties because bifurcation eliminates the "burden of simultaneous litigation and discovery"³⁴ which takes place under the Board's current mandatory mediation rules. Coal Shippers/NARUC submit that the Board's proposed bifurcated approach will result in added burdens and costs to complainant shippers, it will not reduce them.

³⁴ NPRM, slip op. at 9.

Litigation costs in STB rate cases have a substantial time component. Simply stated, the longer the case takes, the more it usually costs. The Board's bifurcated approach adds 70 days to the STB maximum rate case process. That additional 70 days will most likely result in cases costing shippers more, not less, and increasing, not decreasing, case burdens.

Also, simultaneous mediation/discovery is not unduly burdensome under the Board's current rules. These rules generally call for mediation to be completed within approximately 75 calendar days after the shipper files its complaint and, during this 75-day period, the litigation proceeds. This is typically not an intensely active time period for the parties' counsel and their consultants, particularly when compared to the later stages of the case schedule – *e.g.*, the subsequent time periods when parties are evaluating the discovery materials produced, filing motions to compel, preparing case evidence, *etc.* And, as the Board previously (and correctly) observed, “[b]ecause at least some of those people representing the parties in mediation should be different from those conducting the litigation, any additional burden imposed by contemporaneous processes should be minimal.”³⁵

Coal Shippers/NARUC believe that the Board could best deal with the burdens imposed by the Board's current mandatory mediation rules by changing those rules to make mediation voluntary, not mandatory, in large rate cases.³⁶ Mediation works

³⁵ *Expedited Procedures II*, 6 S.T.B. at 807 (footnote omitted).

³⁶ See Coal Shippers/NARUC ANPRM Op. Comments at 39-41; Coal Shippers/NARUC ANPRM Reply Comments at 26-27.

best if both sides agree to it, not where it is forced upon parties by regulators, and where it stands little chance of success. If the Board is serious about easing complainant shippers' costs and burdens in rate cases, it should reconsider Coal Shippers/NARUC's proposal to eliminate mandatory mediation, and replace it with voluntary mediation that both sides agree to following the filing of the shipper's complaint.

c. Discovery Will Not Be Expedited

The Board asserts that the Pre-Filing Notice would put the parties on notice of what they will need to produce in discovery, thus “help[ing] the case proceed more efficiently and quickly once the complaint is filed.”³⁷ There are two problems with the Board's assessment.

First, the railroads do not agree that a pre-filing requirement will result in expedited cases. *See, e.g.*, NS ANPRM Comments at 35 (“A pre-filing requirement would not have the STB's intended effect of allowing the railroad to ‘start preparing for litigation, including gathering documents and data necessary for the discovery stage’ The railroad can only begin to gather the necessary documents and data once a shipper has . . . served its discovery requests, informing the railroad of the time frame for discovery materials and segments of the railroad for which discovery is sought”); AAR ANPRM Comments at 6 (pre-filing notice “would not actually expedite the rate case itself once it is filed”).

Second, even if the Pre-Filing Notice, as proposed by the Board, could expedite post-complaint discovery, it will not have that salutary effect in the absence of

³⁷ NPRM, slip op. at 4.

Board rules setting expedited post-complaint deadlines for carriers to produce requested discovery information. In the absence of such deadlines, defendant carriers will revert to their normal procedure in large rate cases – withholding production of the most important information a shipper needs to develop its case until the very end of the discovery period set in the procedural schedule.

4. Protective Orders Should Be Sought After a Complaint is Filed and the Protective Order Proposal Clarified

The Board’s current procedural rules permit a shipper to file a motion for a protective order at any time after a complaint is filed. Typically, counsel for a complainant shipper will present a form of protective order to the defendant carrier’s counsel shortly after the shipper’s complaint is filed. This form is usually one that the parties’ counsel have used in prior cases, and which the STB has approved.

The parties almost always quickly come to an agreement on the terms of a protective order; the shipper files it with the Board; and the Board approves it. This process has worked well and, in Coal Shippers/NARUC’s experience, has not been the cause of any discovery delays in coal rate cases. The Board appears to want to change this process so that the protective order covers the parties’ pre-filing mediation. There is no need to do so, since the Board already has rules governing the confidentiality of mediation.³⁸

In addition, as a practical matter, the shipper will need to start discussions with its carrier prior to filing the Pre-Filing Notice if it plans to file an unopposed

³⁸ See 49 C.F.R. § 1109.4(d) (“the entire mediation process shall be private and confidential”).

protective order motion. That means that the shipper's STB counsel will need to start discussions with the railroad's STB counsel regarding a protective order prior to filing the 70-day notice. These discussions themselves can have a chilling effect on commercial negotiations where parties are attempting to settle the case without having to start formally lawyering things up with protective order discussions.

The Board has also proposed that the protective order forms that the parties request the Board to enter "shall specify that evidentiary submissions will designate confidential material within single braces (i.e., {X}), highly confidential information within double braces (i.e., {{Y}}), and security sensitive information within triple braces (i.e., {{{Z}}})."³⁹

Coal Shippers/NARUC have no objections to this proposal, subject to the Board's clarification of the intended scope of term "confidential material." Under the Board's standard form protective orders, "confidential material" usually refers to material that a party has designated as containing non-public information that can be seen by the other party's in-house employees and counsel.⁴⁰ However, some protective orders also refer to a second form of "confidential material" – material that one party has designated as "highly confidential" for purposes of its production to the other party, *i.e.*, it cannot be

³⁹ NPRM, slip op. at 16.

⁴⁰ *See, e.g., W. Fuels Ass'n v. Burlington N. & Santa Fe Ry.*, slip op. at 4, § 1(b) (STB served Nov. 10, 2004) (adopting a protective order stating that "confidential" information may "be disclosed only to employees, counsel, or agents of the party requesting such material").

seen by the other party's in-house personnel, but, it is not highly confidential vis-à-vis the producing party – *i.e.*, it can be seen by the producing party's in-house personnel.⁴¹

Coal Shippers/NARUC request that the Board clarify that the “confidential material” referred to in its proposed rule is material produced by a party that is initially designated by that party as confidential for purposes of its disclosure to the other party, not highly confidential material that a party reclassifies as confidential for disclosure to itself. This latter form of reclassification typically occurs in cases where a shipper files a pleading with the Board that contains information that the railroad has designated as highly confidential, and the shipper's counsel agrees to reclassify the information as confidential vis-à-vis the railroad so railroad counsel can disclose the information (which came from the railroad in the first instance) to the railroad's in-house personnel.

5. Liaisons Should Be Appointed After a Complaint is Filed and the Function of the Liaison Clarified

The Board proposes to appoint a staff “liaison” within 10 days after a shipper submits its Pre-Filing Notice.⁴² There is no need for the Board to appoint a staff liaison during the mediation period and the appointment itself could cause confusion because the Board's rules call for the mediator to supervise the parties' mediation, not the new liaison.

⁴¹ See, *e.g.*, *id.*, slip op. at 7, § 11 (adopting a protective order providing a party with the option of preparing a “confidential” version of filings it makes with the Board from which the filing party's, but not the non-filing party's, “highly confidential material has been redacted”).

⁴² NPRM, slip op. at 17.

Coal Shippers/NARUC have no objection to the Board's appointment of a liaison after a shipper's complaint is filed, to act as a general point of contact between the parties and the Board, provided that the Board clarifies that the parties and the liaison must abide by the Board's rules governing *ex parte* communications.⁴³ Those rules generally preclude *ex parte* communications between the parties and the Board's staff during the pendency of an administrative adjudication.⁴⁴

While the Board's liaison should not be permitted to engage in *ex parte* communications, he or she should be free to engage in non-*ex parte* communications with counsel for the parties in the same manner that Board staff communicates with counsel for the parties in Board technical conferences. At these conferences, counsel for both sides (and any other persons selected by the parties' counsel) attend a joint meeting and issues are addressed with both sides, and the Board's staff, present.

It may not be necessary for the liaison to convene joint meetings at all times, but all communications between the liaison and any of the parties to a case (*e.g.*, letters, emails, and phone discussions) should be joint ones (*e.g.*, conference calls where both parties participate, written communications copied to all parties, *etc.*). Also, unless the parties otherwise agree, the parties should not be permitted to address the merits of

⁴³ See 49 C.F.R. § 1019.3 ("employees of the Board must conform to the standards adopted by the Board in 49 CFR 1102.2); 49 C.F.R. § 1102.2 (setting forth the Board's general rules prohibiting *ex parte* communications); 49 C.F.R. § 1103.14 (prohibiting *ex parte* communications by STB practitioners).

⁴⁴ See 49 C.F.R. § 1102.2(c)(1) (precluding parties from "engag[ing] in any *ex parte* communication concerning the merits of [an on-the-record] proceeding with . . . any employee of the Board").

the case (or case evidence) with the liaison and the liaison should not be permitted to address the merits of the case (or case evidence) with the parties.

Coal Shippers/NARUC also have no objection to the Board's proposal that the liaison "would not be recused from handling substantive elements of the case,"⁴⁵ provided that the liaison works as an impartial point of contact between the parties and scrupulously adheres to the Board's *ex parte* communications prohibitions in the manner set forth above. This result is consistent with the Board's use of staff in technical conferences. Board staff members participating in technical conferences are not precluded from handling substantive matters in the case.

**B. If the Board Adopts Pre-Complaint Period Rules,
Which It Should Not, the Board's Proposed Rules
Should Be Modified**

Coal Shippers/NARUC urge the Board to reconsider its Pre-Complaint Period Rules and to not adopt them. However, if the Board does decide to proceed with a Pre-Filing Notice, Coal Shippers propose that the Board modify its proposed rules in the manner set forth below.

**1. Carriers Must Provide Common Carrier Rates to
Shippers No Later Than 90 Days Prior to the Start of
Common Carrier Service Subject to Those Rates**

The Board's proposed Pre-Filing Notice rules require that the notice identify the challenged common carrier rates. However, the NPRM does not address the important issue of when the carrier is required to provide these common carrier rates. This issue needs to be addressed.

⁴⁵ NPRM, slip op. at 10.

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.⁴⁶

However, the Board has taken the position that in cases where a shipper has a contract with a carrier, and the shipper requests that the carrier provide it with common carrier rates to apply after its contract expires, the carrier is not required to provide the shipper with responsive common carrier rates and service terms for the traffic subject to the contract until "near the time at which the contract expires."⁴⁷

If the Board is going to pursue a Pre-Filing Notice requirement, it also should promulgate a bright-line rule that defines when a carrier must provide a shipper with a common carrier rate. Coal Shippers/NARUC suggest that the bright-line rule be 90 days – *i.e.*, upon receipt of a timely request by a shipper for a carrier's common carrier rates and service terms, the carrier is required to provide responsive common carrier rates and service terms no later than 90 days prior to the anticipated start of the common carrier service subject to the shipper's request.⁴⁸

⁴⁶ See 49 U.S.C. § 11101(b) (placing no temporal limitation on when a shipper can "request[] the carrier's rates and other service terms"); 49 U.S.C. § 1300.3 (placing no temporal limitations on when a shipper can request a carrier to provide it with a "new rate").

⁴⁷ See *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1079 (1996) (citing *Burlington N. R.R. v. STB*, 75 F.3d 685, 692-96 (D.C. Cir. 1996)).

⁴⁸ For such a request to be timely, it would need to be presented to the carrier at least 10 business days prior to the 90th day before the anticipated starting date for common carrier service. See 49 C.F.R. § 1300.3 (carrier responses to a shipper's request for common carrier rates must be made "no later than 10 business days from receipt of the request").

2. The Pre-Filing Notice Should Be Filed at Least 40 Days Prior to the Complaint

Following its receipt of the common carrier rate, a shipper needs to evaluate that rate for quantitative market dominance purposes (*i.e.*, does the rate have a rate-to-variable cost ratio over 180%) and for stand-alone cost purposes (*e.g.*, how does the rate impact SAC revenue calculations and SAC Maximum Markup Methodology calculations). Coal Shippers/NARUC believe, that at a minimum, 50 days is needed by shippers to make these calculations, and then to make a determination whether to tender a Pre-Filing Notice.

If the 90-day/50-day time line is accepted, Coal Shippers/NARUC propose that the Board permit the Pre-Filing Notice be filed at least 40 days prior to the proposed filing date of the shipper's complaint. The Pre-Filing Notice would contain the same shipment-related information as that set forth in the Board's proposed rules, as supplemented in the manner proposed by Coal Shippers/NARUC.⁴⁹

3. The Pre-Filing Notice Can Contain the Shipper's Requests for Core Stand-Alone Cost Data

Coal Shippers/NARUC propose that the Board permit a shipper to include in its Pre-Filing Notice its discovery requests for the key categories of information that a shipper needs to present a SAC Case – the “Core SAC Data.”⁵⁰ The specific categories

⁴⁹ Shippers should not be required to include a motion to compel in their Pre-Filing Notice for the reasons discussed above. In addition, as discussed above, Coal Shippers/NARUC recommend that the liaison be appointed after the shipper files its complaint, not before.

⁵⁰ See Coal Shippers/NARUC ANPRM Op. Comments at 3, 45-46.

of Core SAC Data are identified in Attachment 1. Permitting a shipper to include these requests serves several purposes.

First, it responds to concerns raised by carriers that they cannot begin to collect SAC discovery data until they know exactly what data shippers are seeking. The shipper's identification of requested Core SAC Data will provide the carriers this specific identification of the requested data, including the geographic scope of SAC discovery and the requested time periods for SAC discovery.

Second, it advances the Board's stated objective of using the Pre-Filing Notice as a means of expediting discovery once a case is filed. *See* NPRM at 4 (the pre-filing notice should "put the parties on notice as to what they likely will need to produce in discovery"). Including the Core SAC requests will put railroad defendants on notice, with sufficient specificity, of the principal SAC information the shipper is seeking.

Third, the principal reason why SAC cases are delayed in the discovery phase of the case is carrier foot-dragging in producing Core SAC Data.⁵¹ The first step to address this problem, in the context of a Pre-Filing Notice requirement, is for the shipper to include its requests for this data in its first filing with the Board – the Pre-Filing Notice. The second step is for the Board to establish a deadline for the carrier to provide the requested Core SAC Data.

⁵¹ *See id.*, at 3-4, 14.

4. The Board Should Establish a Deadline for Carriers to Produce Core Stand-Alone Cost Data

The best way for the Board to expedite discovery in SAC Cases is to adopt a rule that requires carriers to produce requested Core SAC Data within a specified number of days following its receipt of the shipper's request for that Data. Coal Shippers/NARUC propose that the Board adopt a rule requiring carriers to produce Core SAC Data no later than 70 days after receipt of the shipper's request for that Data, unless the Board otherwise orders.

As applied in the present context, if the shipper includes its request for Core SAC Data in its Pre-Filing Notice, the carrier's deadline to respond would be 70 days later, during the litigation phase of the case. The 70-day period would strike an appropriate balance. If the case settles during the mediation period (discussed below), the carrier will not need to engage in any production. However, if the case does not settle, the carrier will be required to produce Core SAC Data at the end of the 70-day period, unless the Board orders otherwise.

5. The Mediation Period Should Be 40 Days

Coal Shippers/NARUC propose that the Board follow its current rules governing mandatory mediations, except as follows:

- The STB will assign one or more mediators to the case within 3 business days after the shipper submits its Pre-Filing Notice;
- The mediator(s) will contact the parties within 3 business days of their assignment to discuss ground rules and the time and location of any meeting; and

- The mediation shall be completed within 40 days of the filing of the Pre-Filing Notice, subject to extension(s) if requested by all interested parties and approved by the Board.

Forty days is more than enough time for the parties to reach a mediated resolution (if one is to be had) or to agree to extend the mediation period, particularly since the parties will have already engaged in months of intense negotiations prior to the shipper's submission of its Pre-Filing Notice.

If the shipper and carrier do not reach a mediated resolution during the 40-day mediation period, the shipper would be free to file its complaint with the Board. This date also would in many instances coincide with the effective date of the carrier's common carrier rates.

C. The Board Should Adopt Its Proposed Discovery Rules

1. Discovery Should Start Immediately Upon the Filing of Complaints and Answers

The Board proposes to (i) "require a complainant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its complaint;" (ii) "require a defendant in a SAC proceeding to certify it has served its initial discovery requests simultaneously with its answer;" (iii) "require the complainant to certify that it has served on the defendant any initial discovery requests affected by the amended or supplemented complaint, if any;" and (iv) require "a defendant responding to an amended or supplemental complaint . . . to certify that it has served on the complainant any discovery requests affected by the amended or supplemental complaint, if any."⁵²

⁵² NPRM, slip op. at 11-12.

Coal Shippers/NARUC support the Board's proposals because they will require the parties to promptly begin discovery. However, neither these proposals, nor any of the others put forward by the Board in the NPRM, directly address the principal cause of discovery delay in SAC cases – defendant carriers' failure to produce Core SAC Data in a timely manner.

If the Board adopts Coal Shippers/NARUC's proposed alternative Pre-Filing Notice procedures, the Board's rules will address this issue head-on by establishing deadlines for carriers to produce Core SAC Data. In addition, if Coal Shippers/NARUC's proposal is accepted, the proposed certification rules would need to be modified along the following lines – the shipper certifies that it has served its initial discovery requests simultaneously with its complaint and/or in its Pre-Filing Notice.

2. Parties Should Attempt to Confer Prior to Filing Motions to Compel

The Board proposes to amend 49 C.F.R. § 1114.31(a) by adding the underscored "meet and confer" certification requirement:

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. In stand-alone cost and simplified standards cases, such motion to compel an answer must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it

without Board intervention. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

Coal Shippers/NARUC support the Board's proposed meet and confer certification requirement. In most instances, the parties' counsel already meet and confer (or attempt to do so) before filing motions to compel, so the proposal codifies current practice. In any event, Coal Shippers/NARUC agree with the Board that meet and confer sessions can "reduce the number of disputes that reach the Board and thus expedite rate cases."⁵³

3. The Board Should Clarify the Scope of the 10-Day Rule in 49 C.F.R. § 1114.31(a)

49 C.F.R. § 1114.31(a) applies when a party gives an incomplete answer to a deposition question tendered under 49 C.F.R. § 1114.24(a), or to an interrogatory tendered under 49 C.F.R. § 1114.26(a), and requires that a motion to compel be filed "with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after the expiration of the period allowed for submission of answers to interrogatories." *Id.*

The Board's proposed amendment adds a meet and confer certification requirement prior to a party's filing of a motion to compel directed at an incomplete deposition answer or an incomplete interrogatory response, but does not address the

⁵³ NPRM, slip op. at 7.

issue Coal Shippers/NARUC raised in their ANPRM Comments – whether the ten-day rule in 49 C.F.R. § 1114.31(a), as well as the proposed new meet and confer obligation, applies in cases where a party receives incomplete responses to document production requests tendered under 49 C.F.R. § 1114.30.⁵⁴

The issue whether the ten-day rule in 49 C.F.R. § 1114.31(a) applies to motions to compel document production requests has caused considerable confusion in maximum rate cases. The Board decided not to address this issue in the NPRM because Coal Shippers/NARUC did not “cite any examples” illustrating the confusion.⁵⁵ Examples abound. Two are provided here.

In the *TPI* Case,⁵⁶ TPI filed a motion to compel to obtain material responsive to several of its requests for document production.⁵⁷ The defendant carrier, CSX Transportation, Inc. (“CSXT”), argued that TPI’s motion was not timely under the 10-day rule set forth in 49 C.F.R. § 1114.31(a), as extended to a later date by an asserted agreement between the parties.⁵⁸ TPI disagreed,⁵⁹ but later withdrew its motion after the parties negotiated a settlement of the discovery dispute.⁶⁰

⁵⁴ See Coal Shippers/NARUC ANPRM Op. Comments at 51-52.

⁵⁵ NPRM at 7 n.6.

⁵⁶ *Total Petrochemicals USA, Inc. [“TPI”] v. CSXT Transp., Inc.*, No. 42121 (“*TPI*”).

⁵⁷ *TPI*, Second Motion to Compel Discovery at 22 (Nov. 17, 2010) (moving the Board to compel CSXT to respond to eleven separately numbered requests for production).

⁵⁸ *TPI*, CSXT’s Reply In Opposition to Second Motion to Compel of [TPI] at 5-8 (Nov. 24, 2010) (“[t]he Board should deny the Second Motion . . . [because, among other

CSXT switched gears in *Consumers*.⁶¹ In that case, CXST filed a motion to compel document production and took the position “that 49 C.F.R. § 1114.31(a)’s requirement to file a motion to compel within ten days does not apply to requests for production and only applies to interrogatories in the narrow circumstance when a party ‘fails to answer or gives evasive or incomplete answers to written interrogatories.’”⁶² Consumers did not contest the timeliness of CSXT’s motion.

While Coal Shippers/NARUC support a meet and confer requirement before a party files a motion to compel document production, the Board’s proposed amendment to 49 C.F.R. § 1114.31(a) may not accomplish that objective because the express terms of § 1114.31(a) do not encompass motions to compel document production and parties have argued in SAC cases that § 1114.31(a) does not apply to motions to compel document production.

If the Board interprets § 1114.31(a) as applying to motions to compel document production, it can issue the appropriate clarification in this proceeding. If the Board determines that § 1114.31(a) does not apply to motions to compel document

reasons] TPI [did] not bring its motion within the ten-day period mandated by 49 C.F.R. § 1114.31”).

⁵⁹ *TPI*, Letter from TPI Counsel to STB at 3 (Nov. 29, 2010) (acknowledging application of the 10-day rule but arguing that “TPI . . . obtained CSXT’s wavier of the 10-day deadline,” with no new deadline set).

⁶⁰ *TPI*, Motion to Withdraw Second Motion to Compel (Dec. 7, 2010).

⁶¹ *Consumers Energy Co.* [“Consumers”] v. *CSX Transp., Inc.*, NOR 42142 (“*Consumers*”).

⁶² *Consumers*, CSXT Motion to Compel (April 2, 2015), Exhibit 4 at 1 n.1.

production, it can take whatever action it sees fit – *e.g.*, amending § 1114.31(a) to expressly include motions to compel document production.

D. The Board Should Adopt Its Proposed Evidentiary Submission Rules

1. Staggering Evidentiary Submissions Will Assist Parties

The Board proposes to permit parties in rate cases to file highly confidential versions of their filings with the Board on the due dates set forth in governing procedural schedules, and then file public versions of the filings three business days later.⁶³ Coal Shippers/NARUC support the Board’s proposal.

2. Standard Designations, as Clarified, Will Assist Parties

As discussed above, Coal Shippers/NARUC support the Board’s proposed standard convention identifying confidential, highly confidential, and sensitive security information, provided that the Board limits the universe of “confidential information” so that it does not include highly confidential information that is reclassified as confidential to permit a party to see its own highly confidential information.

3. A 30-Page Limit on Final Briefs Is Reasonable

The Board proposes to adopt a rule “to limit the length of final briefs to 30 pages, inclusive of exhibits.”⁶⁴ This is a reasonable proposal and Coal Shippers/NARUC support its adoption.

⁶³ NPRM, slip op. at 8, 18.

⁶⁴ NPRM, slip op. at 12.

E. Coal Shippers/NARUC Support Increased Staff Involvement

The Board states that it is “convinced that increased staff involvement at all stages of a rate case . . . would reduce the number of disputes between the parties and thus expedite the rate case process.”⁶⁵ Coal Shippers/NARUC agree with the Board’s assessment.

As discussed above, Coal Shippers/NARUC support the Board’s proposal to appoint a liaison to serve as the principal “point of contact” between the parties and the Board’s staff,⁶⁶ provided that the liaison strictly adheres to the Board’s rules precluding *ex parte* communications in pending administrative adjudications. Also, as discussed above, Coal Shippers/NARUC believe the appropriate time for the Board to appoint a liaison is after the shipper files its complaint.

Coal Shippers/NARUC also support the Board’s proposals to “make greater use of written questions from staff and technical conferences with the parties at every stage of the case” and “to provide advance notice of the topics to be discussed” at technical conferences.⁶⁷ These technical conferences, if properly administered, should, among other things, assist shippers in obtaining needed SAC discovery from carriers in a readily usable, timely manner.

⁶⁵ *Id.*, slip op. at 10.

⁶⁶ *Id.*, slip op. at 11.

⁶⁷ *Id.*, slip op. at 10.

CONCLUSION

Coal Shippers/NARUC request that the Board adopt final rules in this proceeding consistent with its Comments.

Respectfully submitted,

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Dated: May 15, 2017

Their Attorneys

CORE STAND-ALONE COST DATA

1. Waybill, Train and Car Movement data (including details required to use such data and all databases linked together in a functional manner).
2. Database lists and descriptions for the Waybill, Train Movement, Car Movement, and ancillary databases to ensure that all databases are functional and all fields and data entries are defined.
3. Track Charts and timetables for the requested states or system-wide if no specific states are specified.
4. System-wide net density and gross density data by density segment.
5. Geographic Information System (“GIS”) data for the requested states or system-wide if not specific states are specified.
6. Wage Forms A & B.
7. List of transportation contracts applicable to traffic moving through the requested states.
8. List of common carrier pricing authorities or pricing tariffs applicable to traffic moving through the requested states.
9. List of current leases for locomotives and railcars, including details of the locomotive and car types covered by such leases and the lease term.
10. List of contracts for third-party services, including, but not limited to, contracts for maintenance-of-way services (*e.g.*, ultrasonic rail testing), electronic data interchange (*e.g.*, RMI and Railinc services), and employee training and recruitment service.
11. Lists of Authorization for Expenditures (“AFE”) or equivalent lists for projects exceeding \$2,000,000 on a system-wide basis.
12. Trackage rights agreements in the requested states and the most current two years of payments under those agreements.
13. Valuation maps, easements and land deeds covering the requested states.
14. Current, normal course of business traffic and revenue forecasts by commodity, business unit and/or system-wide.