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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EXPEDITING RATE CASES)	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”) Advanced Notice of Proposed Rulemaking (“ANPR”) served in the above-captioned proceeding on June 15, 2016.

SUMMARY

In the ANPR, the Board asks for comments concerning ways to expedite its consideration of maximum rate cases decided under its Stand-Alone Cost (“SAC”) test. Coal Shippers/NARUC represent the interests of coal shippers and the consumers they serve and are uniquely well-qualified to address the issues raised in the ANPR because most SAC cases have been filed by coal shippers. Thus, Coal Shippers/NARUC Comments reflect that extensive experience.

The Board's predecessor, the Interstate Commerce Commission ("ICC" or "Commission") initially adopted the SAC test in 1985.¹ As all stakeholders acknowledge, this is a complex test that requires a complainant shipper to develop and defend a Stand-Alone Railroad ("SARR"). To do so, a shipper needs substantial discovery, and must present detailed, expert-laden evidence to the Board. Over the years, defendant carriers have utilized a host of devices to delay and drive up the cost and duration of SAC cases. In prior proceedings, the Board has effectively stopped some of the carriers' more egregious delaying tactics, for example, by eliminating the use of product and geographic competition in making market dominance determinations,² by not staying rate cases while carrier motions to dismiss are pending,³ and by adopting accelerated procedures to address motions to compel.⁴

While the Board has done much that is positive to move cases along, it has also done things that have the opposite effect – most notably its decision in 2006 to hold

¹ See *Coal Rate Guidelines, Nationwide* ("Coal Rate Guidelines" or "Guidelines"), 1 I.C.C.2d 520, 521 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987).

² See *Mkt. Dominance Determinations – Prod. & Geographic Competition* ("Prod. & Geographic Competition"), 3 S.T.B. 937, 950 (1998).

³ See *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings* ("Expedited Procedures"), 1 S.T.B. 754, 763-64 (1996)

⁴ See *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology* ("Expedited Procedures II"), 6 S.T.B. 805, 809-10 (2003).

SAC cases in abeyance while it developed new SAC rules,⁵ and then attempting to retroactively apply the new rules in the pending cases. That decision resulted in years of additional litigation for coal shippers.

The Board issued the ANPR in response to a provision in the STB Reauthorization Act of 2015 (“STB Reauthorization Act”)⁶ directing the Board to study how procedures used to expedite court cases may be applied to expedite STB maximum rate cases.⁷ The Board’s ANPR addresses this directive, as well as some related (and unrelated) issues.

One principal problem faced by coal shippers in STB rate cases – and one they have faced for years – involves discovery delays. Specifically, shippers need to obtain basic carrier records (*e.g.*, waybill data, train movement data, and car movement data) in order to develop their SARRs. Coal Shippers/NARUC refer to this material as “Core SAC Data.” Attachment 1 provides a general description of the categories of Core SAC Data.

Defendant carriers routinely delay the production of Core SAC Data until the very end of discovery and even then they may not provide it in a readily useable format. Because of these delays, shippers either must rush to try to put their SARRs

⁵ See *Major Issues in Rail Rate Cases*, EP 657 (Sub-No.1) (“*Major Issues*”), slip op. at 2 (STB served Feb. 27, 2006) (“*Major Issues Feb. 2006*”) and slip op. at 75-76 (STB served Oct. 30, 2006 (“*Major Issues Oct. 2006*”).

⁶ Pub. L. No. 114-110, 129 Stat. 2228 (2015).

⁷ STB Reauthorization Act, § 11(c).

together by the due date for submission of opening evidence or seek extensions which, if granted, ripple through the remainder of the schedule.

The Board can and should address carrier delaying tactics by adopting rules that require (i) the complainant shipper file its initial discovery requests on the same day it files its complaint – Day (“D”)-1; (ii) the Board’s staff to hold a technical conference on or before D-15 to address the production of Core SAC Data responsive to the shipper’s discovery requests; and (iii) the Board, following the completion of the technical conference, to issue an order directing the defendant carrier to produce fully responsive Core SAC Data by D-60 or such other date as the Board in its discretion may select.

The Board can also expedite or otherwise improve its consideration of coal rate cases by advancing several of the ideas set forth in its ANPR, including increased use of staff technical conferences at all stages of the SAC litigation process, requiring parties to confer before motions to compel are filed, limiting the number of interrogatories and depositions used in SAC cases, and sequencing the filing of highly confidential and public versions of evidence.

One thing the Board *must not* do is use this proceeding as a vehicle for making changes in how the Board calculates Full SAC.⁸ Specifically, the Board opines in the ANPR that its consideration of SAC evidence may be expedited if the Board

⁸ “Full SAC” refers to SAC cases litigated under the *Coal Rate Guidelines*, as opposed to the “Simplified SAC” procedures the Board first adopted in *Simplified Standards for Rail Rate Cases* (“*Simplified Standards*”), EP 646 (Sub-No. 1) (STB served Sept. 5, 2007).

develops “standardized” evidence for SAC calculations of such items as a SARR’s General & Administrative (“G&A”) costs, maintenance-of-way (“MOW”) costs, construction costs, and locomotive acquisition costs. ANPR at 5.

The Board’s “standardization” ideas are fatally flawed and should not be pursued because they mistakenly place claims of “expedition” ahead of fair case outcomes for complainant coal shippers, thus depriving coal shippers of their due process rights to a fair hearing. Three of the four standardization ideas put forward by the Board (MOW, construction costs and locomotive acquisition costs) violate fundamental SAC principles applicable in Full SAC cases by defaulting to the incumbent carrier’s costs, not the costs of the highly efficient SARR. And, the Board’s fourth proposal (G&A), appears to arbitrarily lock the complainant shipper into percentages derived from G&A calculations made in prior cases – cases the complaining shipper did not even participate in, much less have any control over how the G&A calculations were developed.

The Board should limit the scope of this proceeding to improving SAC procedural rules, and not use this proceeding as a subterfuge for making changes to substantive SAC rules under the guise of asserted expedition. Coal Shippers/NARUC have already expended substantial amounts of time, money and effort over the past decade in two major rulemaking proceedings where the Board adopted substantive changes to how it calculates SAC: *Major Issues* and *Rate Regulation Reforms*.⁹ The Board should give these changes a chance to work, rather than endlessly tinkering with SAC in a way that hurts coal shippers.

⁹ *Rate Regulation Reforms*, EP 715 (STB served July 18, 2013).

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 the ICC/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

The issues raised by the Board in its ANPR are best addressed in historical context.

A. Development of the *Coal Rate Guidelines* (1975-1985)

The issues in this case trace their historical roots to the OPEC Oil Embargo in the early 1970's.¹⁰ In response to that Embargo, Congress enacted laws encouraging or requiring electric utilities in the western United States to replace oil and gas with coal as a boiler fuel. Western utilities responded to these governmental directives by

¹⁰ See *Coal Rate Guidelines*, 1 I.C.C.2d at 522; *Coal Rate Guidelines*, Ex Parte No. 347 (Sub-No. 1), slip op. at 1-2 (ICC served Feb. 24, 1983) ("*Guidelines 1983*").

expending billions of dollars on new coal-fired generation, which started coming on-line in the mid-1970's.

The new coal boom was of substantial interest to western railroads. The railroads saw the boom as an opportunity to reap huge profits from utility coal shippers. Utility coal shippers fought back. The rail rates they paid ultimately were passed through to their utility customers, and the utilities had a fiduciary duty to protect the interests of their customers from carrier rate-gouging.

When negotiations failed, western utilities turned to the ICC as their last line of defense against monopoly carrier pricing of the new western coal traffic. The ICC then issued a series of decisions, in most cases granting relief using cost-based maximum rate standards.¹¹ The western railroads were unhappy with these results, and pressed the ICC to develop new maximum rate standards to apply in western coal rate cases.

The ICC responded by instituting a proceeding in 1978 docketed as Ex Parte No. 347, *Western Coal Investigation – Guidelines for Railroad Rate Structure*. In 1980, this proceeding was broadened to encompass coal movements throughout the country. *See* Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines – Nationwide*, 364 I.C.C. 360 (1980).

For the next five years, the ICC's extensive docket of maximum coal rate cases was largely placed on hold while the ICC attempted to develop new maximum rate

¹¹ *See Guidelines 1983*, slip op. at 2-5.

standards in *Coal Rate Guidelines*.¹² In August 1985, the ICC issued its final decision in *Coal Rate Guidelines*. In that decision, the ICC adopted four “constraints” on the pricing of market dominant coal traffic: stand-alone costs (“SAC”), revenue adequacy, management efficiency, and phasing.¹³

B. Initial Application of the *Guidelines* (1985-2006)

Following the ICC’s adoption of *Coal Rate Guidelines*, shippers with pending or new cases began to seek relief under the Board’s four rate constraints. It soon became apparent to shippers that three of the constraints – revenue adequacy, management efficiency, and phasing – simply did not work in practice. The revenue adequacy constraint was moot because no carriers were deemed by the ICC to be financially sound; the ICC rejected all shipper attempts to quantify relief under the management efficiency constraint; and phasing offered no meaningful rate reductions, just phasing-in of base rate increases.

That left SAC. Here coal shippers met with some success. In a series of decisions, several coal shippers obtained substantial rate reductions under the SAC test.¹⁴ However, obtaining such relief was not easy, as the defendant carriers’ strategy became

¹² See, e.g., *San Antonio, Tex. v. Burlington N. R.R., et al.* NOR 36180 *et al.* (“*San Antonio et al. 1985*”), 1985 ICC Lexis 168 (ICC dated Sept. 26, 1985) (reopening the record in 33 pending coal rate cases for further consideration under the *Coal Rate Guidelines* decision).

¹³ *Coal Rate Guidelines*, 1 I.C.C.2d at 521.

¹⁴ See, e.g. *Omaha Pub. Power Dist. v. Burlington N. R.R.*, 3 I.C.C.2d 123 (1986); *Ark. Power & Light Co. v. Burlington N. R.R.*, 3 I.C.C.2d 757 (1987); *W. Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff’d sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997).

clear – drive up case costs, and drag out case timelines – in order to discourage shippers from seeking SAC relief.

Initially, carriers focused on the market dominance test. That test, which was first adopted by Congress in the 4-R Act of 1976,¹⁵ retained as modified in the Staggers Rail Act of 1980¹⁶ and the ICC Termination Act of 1995,¹⁷ was intended to be employed by the ICC, and later the STB, as a simple threshold test to limit the agency's maximum rate jurisdiction to cases where shippers lacked effective competitive alternatives.¹⁸

While intended to be a simple threshold test, railroad defendants seized on the test, and attempted to turn the Board's threshold market dominance inquiry into a full-blown antitrust case-type market analysis, with accompanying reams of discovery, batteries of expert witnesses, convoluted theories concerning product and geographic competition, etc.¹⁹ The railroads' approach recognized that if they could not prevail on SAC in coal rate cases, they could prevail on jurisdiction – either by prevailing on the merits of their market dominance arguments, or by making the market dominance process

¹⁵ See Railroad Revitalization and Regulatory Reform Act of 1976 (“4-R Act”), Pub. L. No. 94-210, § 202, 90 Stat. 34-39 (Feb. 5, 1976).

¹⁶ See Staggers Rail Act of 1980, Pub. L. No. 96-448, § 202, 94 Stat. 1900-01 (Oct. 14, 1980)

¹⁷ See ICC Termination Act of 1995 (“ICC Termination Act”), Pub L. No. 104-88, § 2, 109 Stat. 815- 816 (codifying the test at 49 U.S.C. § 10707).

¹⁸ See *Prod & Geographic Competition*, 3 S.T.B. at 938.

¹⁹ See *id.*, 3 S.T.B. at 945-49.

so complex, complicated and expensive – even coal shippers with solid SAC cases would not pursue them.

To its credit, the ICC rejected the railroads’ convoluted market dominance arguments in all of the major coal rate cases. So did the STB, and, in 1998, the STB put a stop to the most egregious and costly railroad market dominance ploys when it banned consideration of product and geographic competition in the market dominance analysis.²⁰

The railroads’ market dominance tactics, along with other delaying tactics the railroads typically employed in rate cases – *e.g.*, filing motions to dismiss along with motions to hold cases in abeyance pending resolution of the dismissal motions, refusing to agree to procedural schedules, etc. – captured Congress’ attention as well. In the ICC Termination Act, Congress ordered the STB to decide large rate cases “within 9 months after the close of the administrative record”²¹ and directed the STB to develop “procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.”²²

The Board promptly responded to Congress’ directive to develop new procedures to expedite the handling of rate cases. In *Expedited Procedures*, the Board outlawed two of the railroads’ principal delaying tactics: motions to dismiss could no longer be used to delay the prosecution of rate cases,²³ and a default procedural schedule

²⁰ *Id.*, 3 S.T.B. at 950.

²¹ ICC Termination Act § 2, 109 Stat. 811 (codified at 49 U.S.C. § 10704(c)(1)).

²² *Id.* (codified at 49 U.S.C. § 10704(d)).

²³ *Expedited Procedures*, 1 S.T.B. at 763-64.

would apply automatically if the parties did not agree on a different one at the outset of a rate case.²⁴

The Board's actions in *Expedited Procedures* were very helpful to complainant coal shippers. But, the railroads came up with new tactics to complicate and delay the resolution of rate cases – obstructing discovery, developing massive amounts of SAC evidence and constantly rearguing SAC points they had lost in prior cases. Thus, while the old battles in the coal cases over market dominance, motions to dismiss etc. were no longer causing case delays and running up shipper's litigation costs, the field of battle had changed – and ground zero was now the development and presentation of the SAC evidence itself.

Following *Expedited Procedures*, several coal shippers obtained significant relief under the SAC standard,²⁵ but in each case the SAC discovery took longer and longer due to carrier delays in tendering Core SAC Data to shippers and case records became even larger because, under the Board's SAC rules, the shipper has the burden of proof and Board decisions made clear that if a complainant shipper did not respond in detail to each and every SAC argument raised by the defendant carrier – which sometimes numbered in the thousands – it would fail to meet its evidentiary burdens.²⁶

²⁴ *Id.*, 1 S.T.B. at 760.

²⁵ *See, e.g., Wis. Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001), *aff'd sub nom. Union Pac. R.R. v. STB*, 62 F. App'x 354 (D.C. Cir. 2003); *Pub. Serv. of Colo. v. Burlington N. and Santa Fe Ry. Co.*, 7 S.T.B. 589 (2004), *aff'd sub nom. BNSF Ry. v. STB*, 453 F.3d 473 (D.C. Cir. 2006) (“PSCo”).

²⁶ *See, e.g., PSCo*, 7 S.T.B. at 614, 644, 657, 662, 663, 686 and 689.

The STB recognized these problems and attempted to address some of them. Building on *Expedited Procedures*, the Board adopted a detailed outline in 2001 of how SAC evidence must be presented in rate cases.²⁷ In 2003, the Board adopted new rules that called for expedited consideration of motions to compel in SAC cases and increased use of staff conferences to address variable cost and SAC issues.²⁸

C. Continued Application of the *Guidelines* – 2006 to Date

In 2006, the Board instituted its *Major Issues* rulemaking proceeding to consider, and ultimately adopt, modifications to several SAC standards that it had previously developed in its case-by-case implementation of the *Coal Rate Guidelines*. These modifications included a new method to allocate revenues on cross-over traffic called Average Total Cost (“ATC”),²⁹ a new method to set rate relief when SARR revenues exceeded SAC called the Maximum Mark-up Methodology (“MMM”),³⁰ and it restricted the calculation of variable costs for purposes of determining the jurisdictional threshold to the URCS Phase III program’s nine inputs.³¹

The Board also decided to place pending cases in abeyance while it developed its new SAC standards and then to retroactively apply the new standards in the

²⁷ See *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441 (2001).

²⁸ See *Expedited Procedures II*, 6 S.T.B. at 808-13.

²⁹ See *Major Issues Oct. 2006*, slip op. at 31.

³⁰ *Id.*, slip op. at 14.

³¹ *Id.*, slip op. at 52.

pending cases.³² The Board's actions resulted in huge delays and complications in pending cases, with the *WFA Case*³³ being a primary example. WFA had filed a maximum rate case against BNSF in 2004 challenging BNSF's rates on its coal trains moving from the Wyoming PRB. The parties had completed all evidentiary filings and briefs by the end of 2005, but as a direct result of the Board's decisions to hold WFA's case in abeyance and then to retroactively apply its new rules in WFA's case, WFA had no choice but to go back to the drawing board and completely revamp its case, at substantial additional cost.³⁴

In 2009, the Board found that BNSF's rates on WFA's coal traffic exceeded a reasonable maximum by substantial margins,³⁵ but issues surrounding the Board's decision to retroactively apply the new SAC rules in 2009 led to a series of court appeals, remands, and further proceedings before the Board. The case eventually settled in 2015 – more than ten years after it had been filed.³⁶

Following its 2009 Decision in the *WFA Case*, the Board considered two other western coal rate cases (*AEPCO*³⁷ and *IPA*³⁸) and completed another rulemaking

³² *Id.*, slip op. at 75-76.

³³ *Western Fuels Ass'n, Inc. and Basin Elec. Power Coop., Inc. v. BNSF Ry.*, NOR 42088 (filed Oct. 19, 2004) ("*WFA Case*"). One complainant was Western Fuels Association, Inc. ("WFA") and the defendant was BNSF Ry. ("BNSF").

³⁴ *See WFA Case*, slip op. at 3 (STB served Feb. 18, 2009).

³⁵ *See WFA Case* (STB served Feb. 18, 2009, June 5, 2009 and July 27, 2009).

³⁶ *See WFA Case* (STB served June 15, 2015).

³⁷ *Ariz. Elec. Power Coop. v. BNSF Ry.* ("*AEPCO*"), NOR 42113 (STB served Nov. 22, 2011), *aff'd sub nom. BNSF Ry. v. STB*, 748 F.3d 1295 (D.C. Cir. 2014).

proceeding addressing maximum rate regulation – *Rate Regulation Reforms*. The Board granted substantial rate relief to the complainant shipper in *AEPCO*, the *IPA* case eventually settled, and the Board adopted new SAC rules in *Rate Regulation Reforms*. A third coal rate case, *Consumers Power*,³⁹ remains pending.

Chemical shippers also became active SAC litigants. Starting in 2010, chemical shippers filed four SAC cases (“Chemical Cases”).⁴⁰ Unlike the western coal cases, the issue traffic in the Chemical Cases was predominately single-car traffic moving between many traffic origins and destinations, not unit train traffic moving predominately between single origin area/destination pairs. The Chemical Cases took years to litigate. In the end, chemical shippers lost two of these cases,⁴¹ a third was dismissed,⁴² and the fourth – *TPI* – awaits decision by the Board.

D. The STB Reauthorization Act of 2015

Last year, Congress passed the STB Reauthorization Act. As pertinent here the new law directed the STB to (i) maintain expeditious procedures in SAC cases; (ii)

³⁸ *Intermountain Power Agency v. Union Pac. Ry.*, NOR 42127 (filed Dec. 22, 2010) and *Intermountain Power Agency v. Union Pac. Ry.*, NOR 42136 (filed May 5, 2012) (collectively “*IPA*”)

³⁹ *Consumers Energy Co. v. CST Transp., Inc.*, NOR 42142 (filed Jan. 13, 2015).

⁴⁰ See *Total Petrochems. & Refining USA, Inc. v. CSX Transp. Inc.* (“*TPF*”), NOR 42121 (filed May 3, 2010); *M&G Polymers USA, LLC v. CSX Transp. Inc.* (“*M&G*”), NOR 42123 (filed June 18, 2010); *DuPont v. Norfolk S. Ry.* (“*DuPont*”), NOR 42125 (filed Dec. 7, 2010); and *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.* (“*Sunbelt*”), NOR 42130 (filed July 26, 2011) (collectively “Chemical Cases”).

⁴¹ See *DuPont* (STB served Mar. 24, 2014, Oct. 3, 2014 and Dec. 23, 2015); *Sunbelt* (STB served June 20, 2014 and June 30, 2016).

⁴² See *M&G* (STB served Dec. 27, 2012).

adhere to a prescribed procedural schedule in SAC cases, subject to extensions requested by a party or granted in the interest of due process; and (iii) institute a proceeding to assess whether procedures used to expedite resolution of court cases could also be used in SAC cases.

The first two directives are contained in Section 11(b) of the STB Reauthorization Act, which amends 49 U.S.C. § 10704(d) to read in pertinent part:

(d)(1) The Board shall maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in discovery and evidentiary phases of such proceedings . . . including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals.

(2)(A) Except as provided in subparagraph (B), in a stand-alone cost rate challenge, the Board shall comply with the following timeline:

(i) Discovery shall be completed not later than 150 days after the date on which the challenge is initiated.

(ii) The development of the evidentiary record shall be completed not later than 155 days after the date on which discovery is completed under clause (i).

(iii) The closing brief shall be submitted not later than 60 days after the date on which the development of the evidentiary record is completed under clause (ii).

(iv) A final Board decision shall be issued not later than 180 days after the date on which the evidentiary record is completed under clause (ii).

(B) The Board may extend a timeline under subparagraph (A) after a request from any party or in the interest of due process.

Id. The third is contained in Section 11(c):

(c) Procedures – Not later than 180 days after the date of the enactment of this Act, the Surface Transportation Board shall 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 in rate cases.

The STB Reauthorization Act also directed the STB to maintain standards to apply “in those cases in which a full stand-alone cost presentation is too costly, given the value of the case;”⁴³ to study, and report to Congress, whether alternatives to current maximum rate standards (including SAC) could and should be developed;⁴⁴ and to provide a report each quarter to Congress “that describes the [Board’s] progress toward addressing issues raised in each unfinished regulatory proceeding.”⁴⁵

E. EP 732 (March 2016)

In response to the STB Reauthorization Act, the Board amended its procedural rules governing SAC cases. *See Revised Procedural Schedule in Stand-Alone Cost Cases*, EP 732 (STB served Mar. 9, 2016) (“EP 732”). These changes included amending the procedural schedule set forth at 49 C.F.R. § 1111.8(a) which, as amended provides “[a]bsent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases:”

⁴³ *Id.* § 11(a) (codified at 49 U.S.C. § 10701(d)(3)).

⁴⁴ *Id.* § 15(a).

⁴⁵ *Id.* § 15(b).

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

Id., slip op. at 4-5 (amending 49 C.F.R. § 1111.8).

F. The Board's Stakeholder Meetings (April 2016)

Prior to issuing the ANPR, the Board met with interested stakeholders to obtain their views concerning how to expedite Board consideration of SAC cases and how best to implement the Congressional directive set forth in Section 11(c) of the STB Reauthorization Act that the Board consider procedures used by courts to expedite judicial proceedings. *See* ANPR at 2.

Coal Shippers/NARUC's' counsel met with Board staff to discuss these issues. As part of that discussion, Coal Shippers/NARUC's counsel referenced recent amendments made to the Federal Rules of Civil Procedure ("FRCP") to expedite court cases, including 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 management"

including participation in “face-to-face” meetings with counsel to discuss discovery issues.⁴⁶

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.

II. RESPONSE TO THE ANPR

In its ANPR, the Board states that “[b]ased on the Board’s experience in processing rate cases, as well as feedback received during the informal [stakeholder] meetings, the Board has generated a number of ideas to expedite rate cases.” *Id.* at 2. The Board says it now “seek[s] formal comment on procedures used to expedite court litigation that could be applied to rate cases” as well as “the ideas listed [in the APRM] to expedite” SAC cases. *Id.* at 2. The ideas listed include a “pre-filing requirement” and the use of “standardized [discovery] requests and/or disclosures.” *Id.* at 3.

⁴⁶ Hon. John G. Roberts, *2015 Year-End Report on the Federal Judiciary* (“*Chief Justice’s Report*”) at 7 (Dec. 31, 2015) (citing FRCP 16), available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

A. Preliminary Observations

1. What the ANPR Does Not Address

The Board's ANPR responds to a Congressional directive to consider ways to expedite rate cases. However, the ANPR does not address what – historically – has caused the longest case delays in coal rate cases: delays caused when cases are held in abeyance while new maximum rate standards are considered.

Between 1980 and 1985, the ICC's entire maximum rate case docket was effectively placed on hold pending the ICC's development of the *Coal Rate Guidelines*.⁴⁷ Five years is a long time, and reflects the complications that can arise when an agency decides to make major changes in consequential rules governing railroad rates. Congress has directed the Board to consider alternatives to SAC, and Coal Shippers hope that the Board will learn from history and not place any pending cases on hold pending consideration of SAC alternatives without the consent of the complainant shipper.

More recently, the Board decided to place its maximum rate case docket on hold pending its development of revisions to SAC in *Major Issues*.⁴⁸ The Board then decided to retroactively apply its new SAC rules.⁴⁹ This decision also caused major delays in pending cases, particularly the *WFA Case*, which ended up taking over 10 years from start to finish.⁵⁰ Coal Shippers/NARUC hope the Board will learn from this

⁴⁷ See *San Antonio et al. 1985*.

⁴⁸ See *Major Issues Feb. 2006*, slip op. at 2.

⁴⁹ See *Major Issues Oct. 2006*, slip op. at 75-76.

⁵⁰ See *WFA Case* (STB served June 15, 2015).

experience as well, should it decide to pursue any new SAC rulemaking proceedings. The lesson here is simple – the Board should not hold pending cases in abeyance while developing any new SAC rules without the complainant shipper’s consent.

Coal Shippers/NARUC further urge the Board to take the opportunity in this proceeding to announce a policy that it will not hold any case in abeyance pending the development of SAC alternatives, or changes in SAC rules, without the consent of the complainant shipper. This new policy would single-handedly remove what in fact has caused the longest delays in deciding coal rate cases – the ICC/Board’s hold-in-abeyance/retroactive application policies.

2. Fair Process

The APRM focuses on expediting procedures, and the Board’s proposals appear to be driven in part by the procedural schedule that Congress included in Section 11 of the STB Reauthorization Act, which, as slightly modified by the Board, calls for parties to conduct discovery and complete their evidentiary filings on a 335 day schedule⁵¹ – a little less than one year:

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

⁵¹ See EP 733, slip op. at 4-5.

However, Congress devised a default schedule that is aspirational in nature. SAC cases are very complicated, and even when shippers are doing their best to keep things moving along, strict enforcement of the dates set forth in the new schedule (*e.g.*, 35 days to submit rebuttal evidence), could deprive a shipper of its fundamental due process rights to have sufficient time to present its case to the Board.

Congress recognized this fact of life in SAC cases. Congress specifically provided in Section 11(b) of the STB Reauthorization Act that “[t]he Board may extend [any schedule due date] after a request from any party or in the interest of due process.” *Id.* Similarly, the principal STB Reauthorization Act Committee Report states that Section 11 “would provide an option for a Board-granted extension upon request or in the interest of due process.”⁵²

Congress clearly did not intend that its new schedule dates hurt shippers or in any way preclude them from having sufficient time to fairly present their cases to the Board. Simply stated, Congress did not intend that expedition trump fair process for shippers. Coal Shippers/NARUC urge the Board to emphasize in its subsequent notices and decisions in this docket that it will modify the schedule dates, upon a request from a shipper, when that request is predicated on the need for additional time to properly prepare and present its case to the Board. The same holds true for requests made by railroad parties and, for that matter, the Board.

⁵² See Report of Senate Committee on Commerce, Science and Transportation on S. 808, S. Rep. No. 114-52 at 12 (May 21, 2015).

If the Board believes that in any particular case it needs more than 180 days after rebuttal evidence is filed to issue a decision, Section 11 clearly entitles the Board to invoke the due process provision and provide itself with additional time to decide the case. Neither shippers nor railroads will realize the benefits of a fair process if the Board feels compelled to rush a decision out to meet a deadline. Rushed decisions frequently contain errors, and decisions full of errors deprive both railroads and shippers of the most basic of due process rights – a fair and reasoned decision from the Board.

Coal Shippers/NARUC are not proposing anything radical here. In 1996, the Board adopted a default procedural schedule in its SAC case rules.⁵³ That schedule, which remained in effect until the Board amended it earlier this year,⁵⁴ provided the following deadlines:

<u>Event</u>	<u>Day</u>
Complaint Filed; Discovery Begins	0
Party Conference By	7
Defendant's Answer	20
Discovery Completed	75
Complaint's Opening Evidence	120
Defendant's Reply Evidence	180
Complainant's Rebuttal Evidence	210

The old schedule is generally similar to the new schedule for the events covered by both, except the new schedule contains a significantly longer discovery period:

⁵³ See *Expedited Procedures*, 1 S.T.B. at 760.

⁵⁴ See 49 C.F.R. § 1111.8 (2015).

<u>Event</u>	<u>Day/Old</u>	<u>Day/New</u>
Complaint Filed; Discovery Begins	0	0
Party Conference By	7	7
Defendant's Answer	20	20
Discovery Completed	75	150
Complaint's Opening Evidence	120	210
Defendant's Reply Evidence	180	270
Complainant's Rebuttal Evidence	210	305

The old schedule was also aspirational in nature. As a practical matter, the schedule dates, including the elapsed times between the completion of discovery, and sequential time periods governing the filing of opening, reply and rebuttal evidence, simply proved to be not feasible.⁵⁵ The parties routinely agreed to modified schedules, as did the Board.

The STB Reauthorization Act codifies current STB practice. It includes, as did the STB's rules at the time, a default procedural schedule, while giving the parties, and the Board, the flexibility to modify the due dates, as necessary, to meet the specific facts and circumstances of each case.

The Board also appears to be concerned that Congress cut its time to decide SAC cases from "270 days to 150 days." ANPR at 2 n.2. As the Board explains it, "[t]he statute previously required the Board to issue a decision no later than 270 days after the close of the record, which the Board measured from the filing of closing briefs." *Id.* However, "[u]nder the STB Reauthorization Act, the Board is now required to issue a

⁵⁵ See, e.g., *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, NOR 42110, slip op. at 1 (STB served Dec. 11, 2008) ("The default procedural schedule set forth at 49 CFR 1111.8 for rail rate cases that our full [SAC] test has grown dated due to the increasing complexity of these cases . . .").

decision no later than 180 days after the close of the record, which by statute is now defined to exclude closing briefs.” *Id.* (citing 49 U.S.C. § 10704(d)(2)).

The Board should revisit this analysis. The Board’s premise is that 49 U.S.C. “previously” established a 270-day decision deadline. However, Congress in fact did not change this deadline, which continues to be set forth at 49 U.S.C. § 10704(c)(1). Congress did not amend or otherwise repeal the text of 49 U.S.C. § 10704(c)(1) in the STB Reauthorization Act. 49 U.S.C. § 10704(c)(1) provided before the STB Reauthorization Act was enacted, and continues to provide after that Act was enacted, that:

(c) In a proceeding to challenge the reasonableness of a rate, the Board shall make its determination as to the reasonableness of the challenged rate –

(1) within 9 months after the close of the administrative record if the determination is based on a stand-alone cost presentation; . . .

Id.

In the STB Reauthorization Act, Congress amended 49 U.S.C. § 10704(d) – not 49 U.S.C. § 10704(c) – and, as the Board correctly notes in the ANPR, 49 U.S.C. § 10704(c) provides a 180-day decision deadline, measured from the date rebuttal evidence is filed, subject to an important exception – the 180-day rule can be modified if necessary for due process purposes.

Thus, 49 U.S.C. § 10704(c) provides the STB has 270 days to decide the case from the close of the administrative record, which under the Board’s longstanding interpretation, is measured from the date final briefs are filed. However, 49 U.S.C. §

10704(d) provides the Board has 180 days to decide the case from the date rebuttal evidence is filed, subject to due process modification.

This appears to create a statutory conflict. For example, assume that the rebuttal evidence is filed on D+305 and the briefs are filed on D+335. Under the 49 U.S.C. § 10704(d) schedule, the STB must decide the case by D+485 – 180 days after rebuttal. However, under 49 U.S.C. § 10704(c), the STB must decide the case by D+605 – 270 days after briefs are filed. The STB’s interpretation appears to ignore the fact that § 10704(c) remains on the books.

Coal Shippers/NARUC suggest that the proper interpretation here is one that gives meaning to both 49 U.S.C. §§ 10704(c) and 10704(d). Specifically, it appears that Congress intended that the Board adhere to the faster § 10704(d) deadline unless due process required that the Board take more time. In that event, the Board could take more time up to the deadline set by § 10704(c).

Referring back to our example, the Board would decide the case by D+485 unless due process required the Board to take more time. In that case, the Board could take more time, after it issued an appropriate order, up to D+605 – an additional 120 days. This construction comports with governing principles of statutory construction,⁵⁶

⁵⁶ See *Int’l Joint Through Rates Involving Ocean Carriers – Revision of Tariff Filing Requirements* (49 CFR Part 1312), 1 I.C.C.2d 978, 981 (1985) (citing the “well settled principle of statutory construction that statutes should be construed to give effect to all of their terms”); *Railroad Transp. Contracts*, 367 I.C.C. 9, 18 (1982) (citing the “fundamental precept of statutory construction . . . that Congress does not use superfluous words”).

and is also consistent with Congressional intent that expedition not trump fair process in SAC cases.

3. Chemical Cases

As discussed in more detail below, the Board's new SAC proposals appear to have been heavily influenced by its recent experiences in the Chemical Cases. These were the first cases where shippers, and the Board, attempted to apply SAC in the context of single car traffic and multiple O/D pairs or "lanes" as they are referred to in the cases. This turned out to be a far more complex undertaking, both for the parties and the Board, than the undertaking required to litigate and decide unit train coal rate cases.

The *Coal Rate Guidelines* were directed at setting maximum rates on unit train coal traffic, not single car chemical shipments moving over multiple traffic lanes. Coal Shippers/NARUC are concerned that the Board is now attempting to develop SAC procedures and standards that address issues and problems that are unique to the Chemical Cases. This appears to be putting the cart before the horse.

The STB's website lists 41 large rate case dispositions. The listed cases include 33 unit train coal cases and 8 non-unit coal train cases. The unit train coal cases have constituted over 80% of the Board's maximum rate case docket. Given this fact, the Board should not fashion rules that address issues that have arisen only in small fraction of its maximum rate case docket.

The Board should also reconsider its one-size-fits-all approach to SAC procedural rules, recognizing that the procedures that work in unit train coal rate cases may not work as well in single car/multiple lane chemical cases. Both coal shippers and

chemical shippers, as well as the Board, may be much better off if the Board adopted a special set of SAC rules that apply in single car/multiple lane SAC cases.

4. What the Board Has Already Done

Congress has directed the Board 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.”⁵⁷ The STB is not working off a blank slate here because the STB already has adopted many procedures that have helped expedite rate cases, and in some instances has rules in place that eliminate corresponding sources of delay in court cases. Examples include:

- Courts endeavor to resolve discovery disputes promptly.⁵⁸ In 2003, the STB adopted procedural rules that call for expedited consideration of motions to compel in rate cases.⁵⁹
- Courts may speed cases along by not staying case processing while a motion to dismiss is pending. In 1996, the STB adopted procedural rules that allow rate cases to move forward pending the Board’s consideration of the motion.⁶⁰
- Many courts now speed up bench trials by requiring that opening evidence be presented in written affidavits, not oral testimony.⁶¹ The STB follows the same practice in rate cases, but goes one step further by requiring all

⁵⁷ STB Reauthorization Act, § 11(c).

⁵⁸ See FRCP 16.

⁵⁹ See *Expedited Procedures II*, 6 S.T.B. at 809-10.

⁶⁰ See *Expedited Procedures*, 1 S.T.B. at 763-64.

⁶¹ See, e.g., U.S. Dist. Ct. Dist. Of Mass., Order Regulating Non-Jury Civil Trial at 5 (“Except as otherwise provided . . . all direct examination of witnesses at trial will be presented by affidavit.”) available at <http://mad.uscourts.gov/boston/pdf/WoodlockNonJuryTrial.pdf>.

merits evidence be presented in writing.⁶² In addition, courts do still continue to permit cross-examination in bench trials, but, again the STB has gone one step further by seldom (if ever) authorizing oral cross-examination in rate cases.

- One of the reasons for pre-trial delays in court cases is depositions of fact witnesses, and the requirement that experts file pre-trial reports, followed by depositions.⁶³ While depositions are permitted in STB rate cases, they are seldom used, and expert reports are not contemplated as the Board has required participants to follow the Board's standard narrative outline.

- The new amended FRCP call for increased participation by judges in pre-trial proceedings in order to help speed those proceedings along.⁶⁴ The STB already has in place a regulatory equivalent, with rules authorizing staff involvement in the discovery/evidentiary process⁶⁵ (though as discussed in more detail below, Coal Shippers/NARUC believe that expedition can be achieved by better use of existing processes).

B. Pre-Filing Requirement

The first idea the Board references in the ANPR is a “pre-filing requirement.” *Id.* at 3. As described by the Board, the pre-filing would consist of a filing made by a shipper prior to filing its complaint. This filing would then trigger a “pre-complaint’ period, during which the railroad would have time to start preparing for litigation, including gathering documents and data necessary for the discovery stage.” *Id.* The Board states that such a pre-filing requirement “could benefit both parties by accelerating the discovery process.” *Id.* The Board also notes that its merger rules

⁶² See 49 C.F.R. § 1111.8

⁶³ See FRCP 26, 30.

⁶⁴ See FRCP 16; *Chief Justice's Report* at 7.

⁶⁵ See 49 C.F.R. § 1111.8(b).

contain a pre-filing notification requirement. *Id.* at 3 n.5. Finally, the Board observes that “[i]f a pre-filing notice were adopted, the Board could also use this pre-complaint period to provide the parties the opportunity to engage in early-stage mediation, and appoint a mediator upon receipt of the pre-filing notice.” *Id.* at 3.

The Board specifically asks for comments “on the merits of adopting a pre-filing requirement in SAC cases, and if a pre-filing notice were adopted, the information that should be contained in the notice and the appropriate time period for filing the notice (*e.g.*, 30 or 60 days prior to the filing of a complaint)” and “on the idea of offering or requiring mediation during a pre-complaint period, or any other period during the rate case.” *Id.*

1. Merits

The prefiling proposal should be viewed through the prism of what typically occurs pre-complaint. Generally speaking, a coal shipper will be moving its traffic under a contract. Well before the contract term expires, the shipper will start engaging the carrier (or carriers, if the movement is a multi-carrier haul) in negotiations over a new contract. If those negotiations are not successful, a captive coal shipper may start taking a hard look at its STB options.

That look can be quite complicated because, under current law as construed by the Board, a carrier does not have to offer common carrier tariff rates until shortly before its contract with the shipper expires.⁶⁶ In any event, with or without the tariff rate,

⁶⁶ *See Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1079 (1996) (“the Board is without authority to adjudicate a rate case involving a common carrier rate

the shipper can undertake a study to estimate what the maximum STB rates should be on its captive traffic. Frequently, shippers will then endeavor to negotiate contract rates based on their expected STB outcomes.

If the STB outcomes-based negotiation fails, the shipper then may decide to file a case, though, if the defendant railroad withholds its tariff rate offerings, the shipper will not be able to make any final decisions until it sees what that rate will be. If the defendant railroad plays hardball, the shipper may not obtain the tariff rate offering until a month or so before its contract expires. At that point, the shipper will decide whether to seek STB relief.

Against this typical backdrop, it is hard to see how adding a pre-filing requirement in and of itself will result in expediting coal rate cases. Shippers will not want to make any STB filings – and may not legally be able to – until they first have a tariff rate in hand to challenge, and at that point, most coal shippers, if they have decided to file a case, are ready to do so immediately. Adding a pre-filing requirement under these typical circumstances will simply delay things, as a shipper must wait whatever the pre-filing time period is before it can file its complaint.

The Board opines that a pre-filing notice might expedite discovery because the carrier would be on notice before a case is filed that the case is coming. ANPR at 3. However, as discussed above, a coal shipper seldom files a case without first engaging in months (or sometimes years) of negotiations with its carrier(s), and, as a practical matter,

that might be used on the expiration of a contract until at or near the time at which the contract expires”).

carriers will know well in advance of the filing of a coal rate case whether such a case is coming. In addition, in negotiations where a potential SAC case is in play, prudent carriers will have already run their SAC estimates. Thus, carriers can easily start gathering necessary SAC information well in advance of any case filing, if they choose to do so, without any pre-filing requirement.

The only potential benefit of a pre-filing requirement is one that includes a response deadline. For example, if the Board adopts a rule requiring a shipper to make a pre-filing 30 days before its complaint is filed, the rule should contain a corresponding provision directing defendant carrier(s) to produce specified SAC information to the shipper no later than 30 days after the complaint is filed. Such a procedure could expedite discovery, but the key is including a specific response deadline.

As discussed below, Coal Shippers/NARUC believe that it would be more expeditious to include deadlines of this sort in the post-complaint discovery process, without the need for any pre-filing notice, but if the Board does decide to pursue a pre-filing requirement, it must have some teeth to be of any use – with the teeth coming in the form of compliance deadlines.

Also, the Board may want to consider a procedure where the pre-filing requirement is at the complainant shipper's option, and, if the shipper so elects, the respondent carrier is required to provide specified information at a specified date after the complaint is filed. While Coal Shippers/NARUC doubt that this procedure would be used in coal cases – assuming compliance deadlines are included in the post-filing

discovery process – it would give complainant shippers the option to use this approach if they believe it will help speed things along in a particular case.

2. Analogy to Merger Cases

The Board notes in the ANPR that it does have pre-filing requirements in merger cases. *See* 49 C.F.R. § 1180.4(b). Pursuant to these rules, carriers proposing major or significant mergers or acquisitions must make filings within specified time periods prior to filing an application. These filings must contain the following information:⁶⁷

- A description of the transaction;
- The year to be used for the acquisition impact analysis;
- The approximate filing date of the application;
- Whether the transaction is significant or major;
- A proposed procedural schedule;
- A proposed draft protective order; and
- A statement of waybill availability (in major transactions).

Within 30 days after its receipt of this pre-filing material, the Board is required to publish a notice in the Federal Register containing the following information:⁶⁸

- A brief description of the transaction;
- The year to be used for the impact analysis;

⁶⁷ *See* 49 C.F.R. §§ 1180.4(b)(1), 1180.4(b)(4).

⁶⁸ *See* 49 C.F.R. § 1180.4(b)(2)

- The approximate filing date of the application;
- The Board's determination whether the transaction is major, significant, or minor; and
- A statement of any additional information which must be filed with the application in order for the application to be considered complete.

The Board's pre-filing rules in merger cases serve several different objectives – giving the public notice of the transaction; letting the Board know how the applicants-in-waiting have characterized the transaction (significant or major) so the Board can make a quick determination whether it agrees; allowing the applicants-in-waiting to propose procedural schedules; and allowing interested parties prompt access to waybill data.

In a rate case, there is no need for advance public notice because the public does not have the right to participate; there is no need for any Board rulings on how the case should be classified; and the Board has a prescribed procedural schedule in place (which can be modified later by agreement of the parties). The only real parallel is the shipper's need for prompt access in a rate case to the internal carrier records it needs to present its case. Here, the Board's pre-filing merger rules are instructive.

The Board's pre-filing merger rules provide that in their pre-filing materials in major transactions, "Applicants must indicate, as soon as practicable after issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request." 49 C.F.R. §

1180.4(b)(4)(iii). The Board adopted this rule because “[e]arly access to this critical data would aid interested parties in the preparation of their own submission.”⁶⁹

Shippers too need prompt access to key carrier data in order to develop their SAC evidence. Significantly, the pre-filing requirements in the merger cases have teeth – they require carriers to promptly provide traffic tape data after the pre-filing notice is submitted to the Board, and a protective order is in place. Thus, if the Board were to adopt any pre-filing requirements, the merger rules support inclusion of corresponding response deadlines.

However, given the complexities of SAC cases, Coal Shippers/NARUC do not believe that the Board could craft a rule akin to its pre-filing merger rules that specifically identifies what SAC data a shipper needs to develop its SARR. Certainly the categories of data that are needed is well known (*e.g.*, the Core SAC Data categories listed in Attachment 1). But, a rule listing general categories of Core SAC Data is not enough. A shipper needs to obtain case-specific Core SAC Data. Under current practice, the complainant shipper tenders detailed discovery requests to obtain case-specific Core SAC data and other data, and the defendant carrier provides responsive information from its records.

The problem for shippers – and the reason for discovery delays – is not due to the overall form of the process (*i.e.*, a shipper’s tendering questions and carriers providing responsive data), but the fact that carriers’ delay providing responsive information – particularly the key Core SAC Data – until the end of the discovery period.

⁶⁹ *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 591 (2001).

Even then, the key Core SAC Data the carriers provide may be incomplete data or its provided in a way that causes additional delays, such as by providing waybill, train and car movement records that are not electronically linked together, even though they are linked within the carrier's system.

As discussed in more detail below, Coal Shippers/NARUC believe that discovery delays are best addressed not by adopting a new set of pre-filing rules akin to those that now apply in merger cases, but by improving the efficiency of the current discovery process.

3. Contents of Pre-Filing Notice Contents; Due Dates; Required Response Information

If the Board decides to propose a pre-filing notice, which Coal Shippers/NARUC do not advocate for the reasons set forth above, Coal Shippers/NARUC suggest the Board consider the following approach for application in coal rate cases:

- **Notice Contents.** The notice should (i) identify the issue traffic origin/destination pairs; (ii) identify the states that the complainant shipper expects its SARR may traverse; (iii) set forth case-specific questions to obtain responsive Core SAC Data in the manner requested; and (vi) set forth any other information the complainant shipper deems pertinent. The new notice rules would also define Core SAC Data to include the categories of data set forth in Attachment 1, unless otherwise ordered by the Board.

- **Notice Filing Due Date/Carrier Response Filing Due Date.** The pre-filing notice filing date should be filed no later than thirty (30) days prior to the date

the complaint is filed. The carrier's response filing date should be no later than sixty (60) days after the complainant shipper's pre-filing notice is submitted to the Board. This sixty (60) day window should give the carrier sufficient time to gather responsive information.

- **Required Response Data.** The carrier should be required to provide the requested case-specific Core SAC Data in its response. In effect, the pre-notice procedure sets up a bifurcated discovery process – the information that the shipper needs to properly design its SARR – the Core SAC Data – is provided first, in response to the pre-filing notice, while the additional information the complainant shipper needs to present its SAC evidence is provided later in response to additional discovery tendered by the complainant shipper during the case discovery period.

4. Mediation

In 2003, the Board adopted rules requiring shippers seeking SAC relief to engage in non-binding mediation immediately after filing their complaints. These rules are codified at 49 C.F.R. § 1109.4 and specifically provide:

- Within 10 business days after a complaint is filed, the Board will assign a mediator; within 5 business days after the mediator is selected, he or she will contact the parties to discuss the mediation process; and, at the mediator's request, at least one principal for each party with authority to bind that party must be present at each mediation session.

- The mediator will work with the parties to try to broker a negotiated settlement of some or all of the issues in the case. The mediation process itself is confidential and information exchanged cannot be used in the subsequent proceedings.

- The mediation must be completed within 60 days of the appointment of the mediator, unless the parties agree otherwise agree. In addition, mediation may be re-engaged later if all parties agree.

- Unless the Board orders otherwise, the onset of the mediation will not affect, or stay, the otherwise applicable procedural schedule in the case.

Well-intentioned, mandatory non-binding mediation has not worked in practice. Indeed, since 2003, mandatory mediation has produced no case settlements (in whole or in part). Coal Shippers/NARUC believe that no coal rate cases have settled as a result of the Board's mediation process because coal shippers and railroads usually engage in extensive discussions and negotiations before a shipper files its case with the Board and, given this history, mediation adds little to a pre-filing negotiation process between sophisticated parties that has already occurred.

While mandatory mediation has not worked in practice, it has driven up the costs associated with pursuing STB relief because, in addition to pursuing that relief, the complainant shipper incurs additional costs preparing for, and engaging in, the mediation. Against this backdrop, the Board should consider changes to its current rules to eliminate mandatory mediation of SAC disputes, while leaving the option open for the parties to jointly agree upon, and request, mediation at any time during the SAC case process.

Mediation works best when both sides agree to it as opposed to when mediation is forced upon the parties. The *BP Amoco Case*⁷⁰ provides a good example. In that case, the complainant shipper sought relief under the Board's Three Benchmark ("3-

⁷⁰ *BP Amoco Chem. Co. v. Norfolk S. Ry.*, NOR 42093 (filed May 23, 2005) ("*BP Amoco Case*").

B”) test. Mediation is not mandatory in 3-B cases, but the parties agreed to engage in non-binding mediation at the outset of the case, and the mediation produced a negotiated settlement.⁷¹

In the ANPR, the Board asks for comments on whether the Board’s current mediation process should start at the time a pre-filing notice is submitted to the Board. If the Board is going to adopt a pre-filing notice, and if it decides to retain its current mediation rules, Coal Shippers/NARUC see no reason not to start the mediation process when the pre-filing notice is submitted. However, it is not clear to Coal Shippers/NARUC how this procedure will expedite rate case decisions since, under the Board’s current procedural rules, institution of mandatory mediation does not stay the governing procedural schedule.⁷²

C. Discovery: Standardized Requests and/or Disclosures

In the ANPR, the Board observes that “[i]n order to expedite litigation, some federal courts have focused on streamlining discovery by, among other things, requiring early disclosures,” citing Fed. R. Civ. P. 26(a). *Id.* at 3. The Board goes on to state that during the stakeholder meetings, several participants informed the Board that “over the years, the initial discovery requests relating to both the SAC and market dominance portions of SAC cases have become relatively consistent, and that formalizing such requests could be helpful.” *Id.*

⁷¹ *See id.* (STB served June 28, 2005).

⁷² *See* 49 C.F.R. § 1109.4(f).

The Board provides an example in the ANPR of how the standardized process might work: upon the filing of its complaint, the complainant would be required to “(a) serve a standard set of discovery requests on the defendant railroad covering data pertinent to creation of the [SARR], or (b) serve a standard set of disclosures pertinent to market dominance.” *Id.* The defendant carrier would then file, along with its answer, “(a) . . . a standard set of discovery requests on the complainant pertinent to market dominance, or (b) serve a standard set of disclosures pertinent to creating the SARR.” *Id.* at 4.

The Board also provides a representative list of potential standardized response items relating to the creation of the SARR. This listing generally identifies the Core SAC Data set forth in Attachment 1. The Board also provides a list of standardized market dominance response items: “forecasts of issue traffic, [and] alternative transportation options.” *Id.*

The Board asks for comments on “the advisability of adopting standardized discovery requests” (*id.*) as well as related issues including whether, as an alternative to standardized requests, the Board could collect a set of specified SAC data from railroads and make that data available to shippers after they file their complaints and whether the Board should require early disclosure by each party of non-publicly available software “it intends to use in its evidentiary submissions by, for example, the close of discovery.” *Id.*

Finally, the Board states it would be beneficial for parties to provide it with copies of SAC case discovery requests because the Board usually does not have the

opportunity to review non-contested SAC discovery questions and access to these questions would provide it with “guidance on common discovery topics.” *Id.*

1. Standardized Requests

The SAC test was adopted in 1985. In each SAC case after 1985, the parties have tendered discovery requests. Generally speaking, the requests used in the cases have evolved over time based on experience and the needs of the case at hand.

On the experience front, shipper counsel and consultants learn over time what questions work and do not work for each defendant carrier in terms of obtaining necessary information and in terms of asking the right questions. For example, a shipper may ask a question about crew wages, but learn in subsequent carrier merits filings that, at least in the carrier’s view, the question did not cover a crew wage issue, leaving the carrier free (in its view) to rely on documents not produced in discovery. In the next case involving the same railroad, shipper counsel will most likely modify its crew wage questions to fill the alleged gap in its prior questions.

In light of these practical realities, Coal Shippers/NARUC do not believe pursuit of “standardized” SAC questions is a wise policy choice. SAC discovery questions have evolved over time, and should continue to do so to meet shippers’ discovery needs and to address technological changes in how carriers collect, store and maintain data. Use of standardized questions will stop this evolution in its tracks. In addition, use of standardized questions will not permit case-specific modifications that shippers need to make.

Perhaps most importantly, any use of standardized questions will introduce a whole new level of complication in SAC cases. For example, can parties supplement standardized requests with other requests? If so when and how? If supplemental requests are permitted, but touch on the same topics as those covered by the standardized questions, can the receiving party object to the questions as outside the scope of permitted discovery, etc.? This is a road the Board need not, and should not, go down.

2. Standardized Disclosures

While coal shippers need flexibility to tender case-specific discovery requests, the specific categories of information shippers need – the Core SAC Data – generally remain the same case-to-case, though the exact set of responsive information can change over time based on case-specific needs and changes in how the carriers maintain and update their internal data bases.

For these reasons, Coal Shippers/NARUC do not advocate that the Board attempt to promulgate standardized disclosure rules. Instead, Coal Shippers/NARUC suggest that the Board can best expedite discovery in coal rate cases by focusing on the real problem here – carrier delays in providing responses to shippers’ requests for Core SAC Data.

As discussed above, one major reason for delays in SAC cases is that defendant carriers withhold access to much of the Core SAC Data until the very end of the discovery period. And, even after the data is produced, it can be incomplete or produced in a way that makes it very time consuming for shippers to utilize. These delaying tactics typically leave the complainant shipper with no choice but to seek

additional time to present its opening evidence. That problem – which is a longstanding one in coal rate case litigation – can and should be addressed in this proceeding. Coal Shippers/NARUC suggest that the Board resolve this problem by promulgating new rules along the following lines.

First, the new rules would require the complainant shipper to file its initial discovery requests along with its complaint on D-1. Typically, a shipper's initial requests are comprehensive and are the shipper's principal discovery vehicle. Shippers would still be free, as they are today, to seek additional discovery in the form of follow-up questions, or to address any new topics that might arise during the discovery process, but the new rule would require complainant shippers to start discovery promptly on day D-1.

Second, the new rules would require the Board's staff to hold a technical discovery conference with the parties no later than fifteen days after the initial discovery is filed (by D-15). The purpose of this conference would be for the complainant shipper to identify those questions seeking Core SAC Data, for the parties to discuss questions concerning responsive production of Core SAC Data, such as the format the databases are kept in, how the information can be produced in a readily useable fashion, the amount of time the carrier needs to gather the Core SAC Data, *etc.*

Third, the new rules would require that, following the conference, the Board issue an order directing the defendant carrier to respond to the complainant shipper's specific requests seeking Core SAC data no later than 60 days after the initial discovery requests were filed (D-60), unless the Board in its discretion sets a different

date. The Board's order would address any other related issues raised at the conference (e.g., the format of data base production).

Coal Shippers/NARUC believe that having a firm deadline for carrier submission of Core SAC Data, along with early Board staff involvement in the discovery process, would help facilitate and expedite discovery in SAC cases. This procedure is also consistent with the recent amendments to the FRCP. These new procedures call for early involvement by judges to move discovery along. That is exactly what Coal Shippers/NARUC propose here.

Coal Shippers/NARUC also believe that their suggested approach properly addresses the various factors at play here. It permits shippers to ask case-specific questions; it permits the parties and the Board to focus on the most important production first – the Core SAC data; it gives the parties and the Board the opportunity to work through production issues in the informal technical conference setting; and it sets specific compliance deadlines.

Coal Shippers/NARUC's proposal is not a radical one. In prior cases, shippers have tendered their principal discovery requests early in the case process. The new proposal simply requires that this discovery start on Day 1. Under current practice, shippers and railroad counsel typically meet on one or more occasions to discuss the shipper's discovery requests. This meet-and-confer process usually narrows disputes, but in the end the carrier has absolute control over production timing and format. Coal Shippers/NARUC's proposal expedites the already existing meet-and-confer process, includes the Board's staff in this process and sets specific production deadlines.

Coal Shippers/NARUC suggest a different approach for carrier discovery. As the Board has repeatedly held, shippers need far more discovery of carriers in SAC cases than carriers need of shippers.⁷³ In addition, carriers are not permitted to present their market dominance evidence until the reply stage of the case so they do not face the same time constraints as shippers.⁷⁴

Consistent with these differences, Coal Shippers/NARUC suggest the Board adopt rules requiring carriers to file their discovery requests no later than 20 days after the shipper's complaint is filed (D-20). The new rules would then permit the carrier to request a staff conference to address its discovery requests at any time after 40 days have elapsed since the complaint was filed (D+40). Following that conference, the Board would have the discretion to, but not be required to, issue an order imposing specific production deadlines on the complainant shipper.

⁷³ See, e.g., *Expedited Procedures II*, EP 638, slip op. at 4 (STB served Sept. 4, 2002) (“We understand that in SAC cases a shipper typically needs a certain amount of discovery if (as is usually the case) its SAC presentation would be based on replicating the lines of defendant carrier and carrying other traffic handled by the defendant As a general rule, we see less need for extensive discovery by a railroad. Railroads should already be cognizant of any inter-or intramodal transportation alternatives available for the traffic at issue, and they are generally quite capable of assessing and critiquing the shipper's SAC presentation using their own experts' or other publicly available information. Thus, we look skeptically at railroad attempts to obtain extensive discovery in these [SAC] cases.”)

⁷⁴ See EP 732, slip op. at 2 (“in line with practice before the Board in recent SAC cases, only the complainant will file opening and rebuttal evidence, and only the defendant will file reply evidence”).

3. Required Data Collection & Software Disclosure

The Board notes that some stakeholders suggested that the Board collect standardized SAC data and that this data could be made available to shippers after they filed their complaint and entered into a suitable protective order. ANPR at 3. Coal Shippers/NARUC do not have a data collection proposal to submit to the Board at this time, but will review and comment on any data collection proposals that other commenters may suggest.

The Board also referenced adopting new procedures to address the use of non-public software in rate cases. *Id.* That issue appears to be directed at the railroad defendants' use of a program called Multi-Rail in the Chemical Cases. Coal Shippers/NARUC will review the submissions made by shippers that have been directly impacted by Multi-Rail before addressing this issue.

4. Sample Discovery Requests

As requested by the Board, Coal Shippers/NARUC are providing the Board with a copy of a set of discovery questions tendered by a coal shipper in a SAC case. These requests are set forth in Attachment 2.

D. Discovery: Other Ideas

In the ANPR, the Board seeks comments on “other ideas” regarding discovery including: (1) limiting the number of discovery requests; (2) requiring more requests for admissions; (3) defining by rule discovery terms such as “to the present;” and (4) requiring parties to confer before filing motions to compel.

1. Limiting the Number of Discovery Requests

The FRCP place limits on the number of interrogatories.⁷⁵ Interrogatories are not widely used today in coal rate cases, and Coal Shippers/NARUC have no objection if the Board wants to place reasonable limits on the number of interrogatories that can be tendered without leave of the Board. The FRCP limits parties to 25 interrogatories subject to stated exceptions. The Board could place the same limit on the use of interrogatories in coal rate cases.

The FRCP place no limits on the number of document production requests, and neither should the Board. In coal rate cases, shippers face substantial discovery needs,⁷⁶ and obtain most of this discovery by tendering document discovery requests. Coal Shippers/NARUC oppose any limits on the number of such requests, as such artificial limitations will hinder a shipper's ability to develop and support its SARR.

The FRCP also place limits on the number of depositions that may be taken.⁷⁷ Depositions are also rarely used in STB rate cases, and Coal Shippers/NARUC have no objection if the Board decides to specifically limit depositions to a stated number per side – *e.g.*, two – without leave of the Board.

If the Board adopts limits on the number of depositions and interrogatories, but places no limits on the number of document discovery requests, it will have in place

⁷⁵ See FRCP 33(a) (no more than 25 interrogatories may be served absent agreement of the parties or leave of the court).

⁷⁶ See, *e.g.*, *Coal Rate Guidelines*, 1 I.C.C.2d at 548 (“shippers may require substantial discovery to litigate a [SAC] case”)

⁷⁷ See FRCP 30(a)(2)(A) (i) (establishing a 10 deposition limit, subject to stated exceptions).

“number caps” on discovery requests that are substantially stricter than those set forth in the FRCP.

2. Admissions

The Board’s ANPR states that “[s]takeholders . . . indicated that the Board could either encourage or require more requests for admissions (particularly with respect to the issue of market dominance) to narrow the scope of contested issues and to avoid unnecessary presentation of evidence.” *Id.* at 5.

The Board’s current procedural rules permit parties to use requests for admissions,⁷⁸ but to the best of Coal Shippers/NARUC’s knowledge, this discovery device has not been used much in recent years in coal rate cases, and, where it has been used, has not proven to be any more or less contentious than any other form of discovery device. Coal Shippers/NARUC do, however, note requests for admission have proven useful for market dominance purposes in certain coal rate cases.

The admission issue may be one that has arisen in the Chemical Cases. Coal Shippers/NARUC will wait to review the submissions of other parties in this case before addressing it.

3. Definitions

The Board asks whether it should adopt standardized definitions for terms used in discovery such as production of documents “to the present.” ANPR at 5. Coal Shippers/NARUC do not believe this is a sound or necessary use of the Board’s time and resources. Taking the Board’s example of what the phrase “to the present” means, in

⁷⁸ See 49 C.F.R. § 1114.27.

western coal transportation cases, the parties have typically agreed that “to the present” includes a time-period up to a stated discovery cut-off date. However, in some instances, the cut-off date may vary by discovery category. Simply stated, there is no “one-size-fits-all” definition that what the “cut off” date should be in each case, and whether multiple cut-off dates are needed.

The same holds true with regard to other common definitional issues. Different carriers use different definitions, and nomenclature, for their discovery materials, and a one-size-fits-all approach would be more complicated than helpful here. Coal Shippers/NARUC believe that better approach, which ties into their discussion of discovery issues above, is for the parties to discuss any issues about definitions in an early discovery conference with Board staff, where those issues can be ironed out, and addressed as necessary, in the Board’s pre-conference discovery order.

4. Certifications

The Board asks for comments on whether its procedural rules should be amended to require that a party filing a motion to compel first certify that it has first conferred with the opposing party. ANPR at 5. Coal Shippers/NARUC have no objection to a “confer first” rule, and, as a practical matter, that usually occurs in most coal rate case discovery disputes.

However, Coal Shippers/NARUC suggest that any such “confer first” rule also address the continuing confusion caused by the Board’s procedural rule calling for the filing of motions to compel in certain instances no later than 10 days after an insufficient response is received. *See* 49 C.F.R. § 1114.31(a). Coal Shippers/NARUC

suggest that the Board confirm that the 10-day rule does not apply to requests for document production and that the 10-day rule be changed to 14 days for other covered discovery to allow a moving party sufficient time to adhere to any new “confer first” rule.

E. Evidentiary Submissions: Standardization

The ANPR states that some “stakeholders indicated that standardization of certain evidence could not only reduce the number of litigated issues, thereby expediting the case, but would also allow parties before a rate case has even started to more accurately assess their respective positions and the potential outcome of the case.” *Id.* at 5.

The Board goes on to list “various areas in a SAC case that may be well-suited to some form of standardization or simplification” and lists the following examples:

- “the Board could estimate general and administrative (G&A) as a percentage of the SARR’s total revenue or based on the SARR’s traffic levels or the Board could adopt one party’s entire G&A evidence over the other” (“G&A Proposal”);
- “the parties could develop MOW [maintenance-of-way] expenses by developing a general unit cost by dividing MOW operating costs by the Trailing Gross Ton Miles found in the R-1 multiplied by the General Overhead Ratio found in the Board’s Uniform Rail Costing System” (“MOW Proposal”);
- “[c]onstruction costs might be standardized using R-1 data or carriers’ depreciation studies to develop the cost per track mile” (“Construction Cost Proposal”); and
- “the Board could develop standardized locomotive acquisition costs using data from the R-1 reports (Schedule

710S) and the carriers' periodic depreciation studies" ("Locomotive Acquisition Cost Proposal").

The Board asks for comments on its four proposals as well as any others that commenters may wish to submit. Coal Shippers urge the Board not to consider evidence standardization for the following reasons.

1. Proceeding Scope

In the STB Reauthorization Act, Congress directed the Board to "assess procedures that are available to parties in litigation before courts to expedite such litigation." *Id.* § 11(c). Courts do not utilize "standardized" evidence, and the Board's proposals concerning the use of "standardized" evidence fall outside the scope of topics Congress expressly asked the Board to address in this proceeding.

The focus of this proceeding should be on what Congress directed the STB to study – procedural rules. Had Congress been interested in the STB's development of new SAC evidentiary rules it certainly could have directed the Board to consider them, but it did not. Consideration of changes to SAC evidentiary standards in cases involving SAC procedural rules is also contrary to prior Board precedent.

In an earlier proceeding, the Board considered ways to modify its procedural rules to expedite its consideration of SAC cases. During that proceeding, the Board considered and rejected proposals "to standardize in certain respects the evidence to be submitted in rate cases" because "these proposals are beyond the procedural focus of this proceeding."⁷⁹

⁷⁹ See *Expedited Procedures II*, 6 S.T.B. at 815.

The same holds true here. The focus of the Board’s attention is – and should be – on development of procedural rules to move SAC cases along, not to develop new SAC standards under the guise of expedition.

2. Merits

The complainant shipper’s goal in a Full SAC case is to design a SARR that is more efficient than the incumbent carrier. As the Board has repeatedly emphasized in case after case, “[t]he incumbent railroad’s own practices are not dispositive, and a complainant can seek efficiencies to reduce the costs of its SARR, including efficiencies that depart from the incumbent’s practices.”⁸⁰

The Board’s MOW, Construction Cost, and Locomotive Acquisition Cost Proposals completely undermine the objectives of a Full SAC analysis. Each of these three proposals focuses exclusively on the “the incumbent railroad’s own practices” and costs, and, as a result, deprive the complainant shipper of the opportunity to “seek efficiencies to reduce the costs of its SARR, including efficiencies that depart from the incumbent’s practices” and costs.⁸¹

The Board already has in place Simplified SAC procedures that focus on the incumbent carrier’s practices and costs. However, as the Board has explained, use of the Simplified Standards comes with a trade-off – higher SAC answers. *See Rate Regulation Reforms*, slip op. at at 14 ([“U]nlike the Full-SAC methodology, the Simplified-SAC methodology is not designed to detect inefficiencies in rail operations

⁸⁰ *Sunbelt*, slip op. at 46 (STB served June 20, 2014).

⁸¹ *Id.*

that may further raise rates. In effect, a shipper utilizing the Simplified-SAC methodology foregoes some potential for relief in exchange for a simplified process.”).

The Board’s MOW, Construction Cost, and Locomotive Acquisition Cost Proposals have no place in a Full SAC analysis. Nor should shippers be forced to give up better answers (and a fair result) in a Full SAC case simply because use of a “standardized” procedure makes case processing faster. That is simply not fair to complainant shippers, and not what Congress intended when it directed the Board to examine its SAC procedural rules.

The Board’s G&A proposal is also fatally flawed. The Board does not explain how it would develop standardized “percentages,” but suggest that such percentages might be drawn from the results of “prior rate cases.” ANPR at 5. It is unfair to saddle shippers with the results of prior cases in which the shipper did not participate. Moreover if the Board attempts to draw percentages “based on actual carrier data,” its proposal suffers from the same flaw as its other Proposals – it mistakenly focuses on the incumbent’s practices and costs, not those of an efficient SARR.⁸²

3. Complications

The Board notes in its ANPR that some stakeholders cautioned against the use of standardized evidence “because standardization has the potential to favor one side or the other.” *Id.* at 5. That is clearly correct, but the problem goes beyond that. As

⁸² The Board’s alternative proposal – pick either the shipper or carrier’s G&A expenses – is also arbitrary, since G&A expenses have component parts and unless all of the component parts submitted by one party are superior to those submitted by the other (an unlikely result), the choice of one over the other cannot reflect a reasoned decision.

discussed above, the Board's "standardization" ideas are antithetical to the principles governing development of Full SAC evidence and "standardization" proposals that impact SAC answers should not be considered in a proceeding addressing SAC procedural rules.

The proper forum to address substantive changes to SAC rules is in a SAC rulemaking proceeding devoted to merits issues. However, Coal Shippers/NARUC urge the Board not to institute any such proceeding at this time. SAC rulemaking proceedings on merits issues are complicated, expensive and one-step removed from pursuing an actual case before the Board.

The ICC developed the *Coal Rate Guidelines* in 1985 and it was over 20 years before a new rulemaking proceeding was instituted in 2006 to address, and subsequently adopt, new SAC rules. Then, just a few years later, the Board instituted another major SAC rulemaking case and adopted some additional new SAC rules in 2013. Thus, in the last ten years, the Board has already instituted two long, and costly, SAC rulemaking proceedings. There is no need for a third one to address how to make Full SAC calculations.

4. Assessment of Outcomes

The Board states that its standardization proposals "would also allow parties before a rate case has even started to more accurately assess their respective positions and the potential outcome of the case." *Id.* at 5. Coal Shippers/NARUC respectfully disagree.

Any change in the Board's standards for developing SAC evidence will cause uncertainty because it is a change in how the parties and the Board have developed and presented SAC evidence. This is particularly true when the change comes in a rulemaking proceeding. In that instance, the change itself has not been implemented in the actual context of developing SAC evidence.

The Board need look no further than its 2006 decision in *Major Issues* for a representative example. In that proceeding, the Board adopted several new SAC rules. Following that the issuance of that decision, parties in pending cases, and the Board, endeavored to make SAC quantifications using the new rules. Needless to say, shippers and railroads had different views on how to do this, and those different views produced different SAC answers.⁸³ The Board itself took several years to sort this all out.⁸⁴

More importantly, coal shippers and carriers can and do make reasonably accurate assessments of their positions, and likely case outcomes, using the SAC rules and precedents in place today. That is the principal reason why the number of coal rate cases filed at the Board has decreased in recent years.

Fewer cases fulfills one of the principal objectives the ICC emphasized when it initially adopted the *Coal Rate Guidelines* in 1985 – establishing a set of guidelines that would assist coal shippers and coal railroads in negotiating, rather than

⁸³ See, e.g., *WFA Case*, slip op. at 4-8 (discussing the parties' different interpretations of how ATC and MMM should be applied).

⁸⁴ See *Rate Regulation Reforms*, slip op. at 28-34 (discussing continued modifications to its ATC methodology).

litigating, coal rate disputes.⁸⁵ Changing the SAC rules in the name of “standardization” will not assist coal shippers in predicting case outcomes, it will have the exact opposite effect.

F. Evidentiary Submissions: Other Ideas

The Board asks for party comments on several “other ideas” including proposals to address mismatched evidence; the scope and length of rebuttal filings and briefs; licensing proprietary software; and the timing of the filing of public versions of the parties’ evidence.

1. Mismatched Evidence

The Board states that some stakeholders expressed concerns about “evidentiary misalignment[s],” citing as an example mismatched operating plans submitted by shippers and defendant carriers. ANPR at 6. The Board suggests that one way to avoid this issue might be for the Board to permit a defendant carrier to file a motion to dismiss if the carrier concludes the shipper’s operating plan could not be corrected, rather than submitting a reply based on a different operating plan. *Id.*

Coal Shippers/NARUC oppose of any new Board procedures that reinjects the policy of holding coal rate cases in abeyance while the Board considers motions to dismiss. Coal Shippers/NARUC spent years urging the ICC, and later the Board, to adopt schedules that precluded the use of motions to dismiss to stop the processing of

⁸⁵ *Coal Rate Guidelines*, 1 I.C.C.2d at 524.

maximum coal rate cases. The Board finally did so in 1996⁸⁶ and since that time, motions to dismiss have not slowed down the Board's resolution of coal rate cases.

If the Board disagrees, Coal Shippers/NARUC suggest that the Board consider an approach where the filing of a motion to dismiss to address operating plan issues or other issues will result in a case being held in abeyance only if the complainant shipper first agrees to having its case placed on hold while the Board considers the motion.

2. Scope of Rebuttal Filings/Briefs

The Board states that some stakeholders expressed concerns regarding the "scope of rebuttal filings." ANPR at 6. The Board notes that it has already developed evidentiary rules governing the scope of rebuttal (*id.*), and since those rules already exist, and are well-known, Coal Shippers/NARUC see no need to further address them in this proceeding. Moreover, the principal problem coal shippers have faced under these standards is not the proper scope of rebuttal but improper motions to strike filed by defendant carriers after complainant shippers have presented proper rebuttal.⁸⁷ Carriers file these motions in a transparent attempt to shore-up their reply evidence.

The Board also addresses "scope" issues in the context of the page length of rebuttal filings, stating "the Board could consider putting a page length on rebuttal evidence (e.g., cannot be longer than opening, or must be no more than half the length of

⁸⁶ See *Expedited Procedures*, 1 S.T.B. at 763-64.

⁸⁷ See, e.g., *WFA Case*, slip op. at 5-6 (STB served Sept. 10, 2007) (rejecting BNSF's motion to strike portions of WFA's rebuttal evidence).

opening.).” ANPR at 6. The Board’s page-length proposals ignore two practical realities that coal shippers face.

First, carriers typically tender massive reply filings that are substantially longer than the complainant shipper’s opening filings. Second, the Board imposes, and vigorously enforces, proof rules that require a shipper on rebuttal to respond in detail to each and every argument, and piece of evidence, tendered by a carrier in its reply filing, or risk losing the issue on grounds that it was ignored by the shipper. Carriers raise hundreds, if not thousands, of issues in their SAC reply filings – and it would violate a shipper’s right to fair process to place page limits on rebuttal filings in the manner set forth in the Board’s ANPR.

The Board also states that some stakeholders expressed concerns that “final briefs are often more akin to surrebuttal than a summary of key issues.” ANPR at 6. The Board suggests that one way to address this problem might be for it to “limit final briefs to certain subjects on which the Board would like further argument rather than allowing generalized argument.” *Id.*

Coal Shippers/NARUC agree that carriers sometimes use briefs to tender improper surrebuttal. The Board’s current procedures provide shippers with remedies here – *e.g.*, motions to strike. Limiting briefs to certain subjects might solve the surrebuttal issue in some cases, if the subjects of interest do not themselves lead to surrebuttal-type responses in briefs. Putting that issue to one-side, Coal Shippers/NARUC believe, as a general proposition, that limiting briefs to specific issues of concern to the Board is a good way to make the briefs more useful to the Board, and

perhaps reduce the costs that the parties otherwise would incur in presenting a brief that addresses a much wider swath of case issues.

3. Temporary Licenses

The Board notes in the ANPR that “some stakeholders suggested that the Board should restrict a party’s ability to use software [that is not available to the general public] in its rate presentation unless it provides a temporary license to the opposing party.” *Id.* at 6. This suggestion appears to be tied to the Multi-Rail issues that have arisen in the Chemical Cases. Coal Shippers/NARUC will review comments submitted by others before addressing the temporary license issue.

4. Public Versions

Under current STB practice, both highly confidential, and public, versions of case evidence are filed simultaneously. The Board asks for comments on whether these filing dates should be staggered, with the highly confidential version filed on the schedule due date, and the public version filed a few days later. ANPR at 7.

Coal Shippers/NARUC support staggered filing dates. Preparing public versions of highly confidential filings takes substantial time and effort. Providing parties a few additional days (*e.g.*, three business days) to submit a public version of their filing would ease the time crunch on the parties while not in any way limiting the public’s ability to review public versions of the filings. Also, as a practical matter, it should make no difference to the general public whether it can see a case filing on the same date a highly confidential version is submitted to the Board. If in some case it might affect a

response deadline by a non-party, the Board can clarify that response deadlines for the non-party run from the date of filing of the public version.

G. Interaction with Board Staff

The Board observes that “numerous stakeholders expressed that increased interaction with Board staff during the all stages of a SAC case would be beneficial. ANPR at 7. The Board goes on to suggest several ways that staff involvement could be increased, including holding technical conferences at various stages of the case, including at the beginning of the case to address discovery and other issues, and later during and/or after the submission of evidence in order to clarify the record. *Id.* The Board also suggests clarification could come in the form of written questions from the Board’s staff to the parties. *Id.*

Coal Shippers/NARUC agree that increased staff involvement, as outlined by the Board in the ANPR, would be very useful to the parties, and should help advance the submission, and decision, of rate cases in an expeditious manner. As discussed above, Coal Shippers/NARUC believe it is critically important that the Board staff be engaged early-on in the discovery process and that the Board set specific deadlines in each case for shippers to receive Core SAC Data.

CONCLUSION

Coal Shippers/NARUC urge the Board to consider changes to its SAC procedural rules that comport with its Comments.

Respectfully submitted,

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Slover & Loftus LLP

1224 Seventeenth Street, N.W.

Washington, D.C. 20036

Dated: August 1, 2016

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.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER)	
COOPERATIVE, INC.)	
)	
Complainant,)	
)	
v.)	Docket No. 42113
)	
BNSF RAILWAY COMPANY)	
)	
and)	
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendants.)	

**COMPLAINANT’S FIRST REQUESTS
FOR ADMISSIONS, INTERROGATORIES,
AND REQUESTS FOR PRODUCTION OF
DOCUMENTS TO DEFENDANTS**

Complainant Arizona Electric Power Cooperative, Inc. (“AEPCO”), pursuant to 49 C.F.R. Part 1114.30, hereby submits its First Requests for Admissions, Interrogatories, and Requests for Production of Documents to Defendants BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”).

Responses to AEPCO’s Requests for Admissions, answers to Interrogatories, and copies of documents responsive to AEPCO’s Requests for Production should be delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth

Street, N.W., Washington, D.C. 20036, within thirty (30) days from the date hereof, unless otherwise agreed by the parties. AEPCO is prepared to cooperate with Defendants to facilitate the expeditious production of documents with the minimum practical burden.

I. DEFINITIONS

The following defined terms are used herein:

1. “AEPCO route(s)” means the railroad line segments over which BNSF and UP move or could reasonably move loaded and empty coal trains between Origins and Destination.
2. “AEPCO train(s)” or “AEPCO service” means the trains containing loaded or empty coal cars moving to and from Cochise, AZ over the AEPCO route(s).
3. “BNSF” means BNSF Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessor, parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.
4. “Challenged Rate(s)” means the rate(s) for common carrier rail transportation service that are the subject of AEPCO’s Amended Verified Complaint in this proceeding, including any such rate(s) that may be established after the date hereof.
5. “Coal train” means any train that transports primarily loaded or empty coal cars, including a mine gathering or distribution run, a train carrying coal cars for more than one customer, a train carrying coal cars from more than one origin to a

single or more than one destination, and a unit train in which all cars in the train move between a single origin and a single destination on one bill of lading or other shipping document.

6. “Defendants” means BNSF as defined in this section and UP as defined in this section.

7. “Destination” means AEPCO’s Apache Generating Station located at Cochise, Arizona.

8. “Distributed power” means a train configuration in which one or more locomotives are positioned at the front of the train and one or more locomotives are positioned at an intermediate point in the train and/or at the rear of the train, with the intermediate or rear locomotives remotely controlled from the lead locomotive on the train.

9. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or mechanical means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, electronic mail, phone logs, contracts, drafts, workpapers, computer print-outs, computer tapes, telecopies, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in BNSF’s or UP’s current or prior possession, custody

or control. A draft or non-identical copy is a separate document within the meaning of this term.

10. “Identify,” when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and/or recipient(s).

11. “Identify,” when referring to information, means to list or produce documents containing the specified information.

12. “Interchange” means Deming, New Mexico or any other point at which BNSF and UP interchange AEPCO trains moving between Origins and Destination.

13. “Origins” means the mines and transshipment point identified in Paragraph 10 of AEPCO’s Amended Verified Complaint.

14. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

15. “Possession, custody, or control” refers to and includes documents actually within the possession, custody or control of BNSF and/or UP or any other person acting for or in concert with BNSF and/or UP; and refers to and includes documents prepared by, obtained, or placed in the possession, custody, or control of any such person within the scope of his or her duties or relationship to BNSF and/or UP; and further refers to and includes documents having been placed in the temporary possession, custody, or

control of any third party by any of the foregoing or BNSF and/or UP. Documents are deemed to be in the possession, custody, or control of BNSF and/or UP if BNSF and/or UP have the right to secure the document, or a copy thereof, from another person or entity, whether public or private, having such actual physical possession, custody, or control thereof.

16. “Price” or “prices” mean the price per ton or other unit of measure, and whether it is f.o.b. or f.a.s. a railroad car, vessel, destination, port or other conveyance.

17. “Related,” “related to,” and “relating to” mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

18. “SARR States” means the States of Arizona, California, Colorado, New Mexico, Nebraska, Oklahoma, South Dakota, Texas and Wyoming.

19. “And,” “or,” and/or “each” shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request. All use of the masculine gender shall be deemed to include the feminine.

II. INSTRUCTIONS

BNSF and UP are requested to conform to the following instructions in responding to these Requests and Interrogatories.

1. Each paragraph shall operate and be construed independently.

Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

2. Where these discovery requests seek data in a computer-readable format:

- a. For each computer file supplied provide:
 - i. The name and description of the source database or other file from which the records in the computer file were selected;
 - ii. A description of how the records in the file produced were selected; and
 - iii. Each computer program (in native software and text file) and intermediate file used in deriving the files produced.
- b. For each field in each computer database file provide:
 - i. The name of the field;
 - ii. The starting and ending positions of the field;
 - iii. A detailed definition of the field;
 - iv. A detailed description of the data in the field, including an explanation of what they are used for;
 - v. The type of data in the field, i.e., whether numeric, character, alphanumeric, number of digits, number of significant digits, whether signed or unsigned (i.e., negatives allowed);

- vi. If the values in a field are terms or abbreviations, a list of all terms or abbreviations used with detailed definitions of each;
- vii. An indication of whether the data in the field are packed or compressed; and
- viii. If the data in the field are packed or compressed, the type of packing or compression:
 - (1) Zoned with low-order sign;
 - (2) Binary with LSB first;
 - (3) Binary with MSB first;
 - (4) Packed with high-order sign;
 - (5) Packed with low-order sign;
 - (6) Packed with no sign; and
 - (7) Other (specify and provide detailed instructions for unpacking).

3. If an answer or the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (e.g., letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

4. If the answer to any Interrogatory or the production of any responsive document is withheld on claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

5. Defendants are requested to supplement their production in the manner provided in 49 C.F.R. § 1114.29.

6. All documents should be produced or made available for inspection in the form in which they are retained by BNSF and/or UP in their usual course of business (e.g., if the documents are in a file, the file containing the documents should be produced), unless otherwise agreed by AEPCO and BNSF and/or UP. All files containing responsive documents should be identified by the file name and number.

7. Please organize or number the documents produced in such a manner that AEPCO may readily determine which documents are being produced in response to each specific Request for Production. If no document is produced in response to any specific Request, please so indicate in the response.

8. AEPCO reserves the right to file supplemental or follow-up Interrogatories, Requests for Production, and other discovery, as necessary or appropriate.

III. REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1

Admit that the Challenged Rates exceed 180 percent of the variable costs of providing the transportation to which the Challenged Rates apply.

REQUEST FOR ADMISSION NO. 2

Admit that Defendants face no effective intramodal competition for the transportation of coal from Origins to Destination.

REQUEST FOR ADMISSION NO. 3

Admit that Defendants face no effective intermodal competition for the transportation of coal from Origins to Destination.

IV. INTERROGATORIES

INTERROGATORY NO. 1

If your response to Request for Admission No. 1 was anything other than an unqualified admission, please explain in detail the legal basis for your response, provide the revenue-variable cost percentages that Defendants claims the Challenged Rates produce, and identify all documents that support your response.

INTERROGATORY NO. 2

If your response to Request for Admission No. 2 was anything other than an unqualified admission, please describe the effective intramodal competition that Defendants claims exists for the transportation to which the Challenged Rates apply, the annual volume of coal subject to such competition, and why such competition is effective.

INTERROGATORY NO. 3

If your response to Request for Admission No. 3 was anything other than an unqualified admission, please describe the effective intermodal competition that Defendants claims exists for the transportation to which the Challenged Rates apply, the volume of coal subject to such competition, and why you think such competition is effective.

INTERROGATORY NO. 4

Please provide a complete description of the movement of AEPCO trains by Defendants from Origins to Destination and from Destination to Origins, including but not limited to a description of all transportation-related activities (including transloading or transshipping activities) at Origins, at Destination, and at all intermediate stations or other points between Origins and Destination.

INTERROGATORY NO. 5

Please provide the maximum permissible gross weight on rail (“GWR”) per railcar for each BNSF and/or UP line segment in the SARR States.

INTERROGATORY NO. 6

Please identify any computer programs or models that are or within the past three years have been used by BNSF and/or UP to simulate a locomotive’s and/or a train’s performance while moving over a particular route.

INTERROGATORY NO. 7

Please identify any computer programs or models that are or within the past three years have been used by BNSF and/or UP to (a) download locomotive event recorder data from locomotives along any line segment in the SARR States, and/or (b) process locomotive event recorder data for purposes of determining locomotive throttle position and/or fuel consumption.

INTERROGATORY NO. 8

Please identify, by name, title and address, the person(s) who prepared each answer to these Interrogatories and each response to the foregoing Requests for Admissions, and who reviewed and selected the documents to be produced in response to each of the following Requests for Production.

INTERROGATORY NO. 9

Please describe BNSF's and UP's plans for complying with the provisions of the Rail Safety and Improvement Act of 2008 (Pub. Law No. 110-432) related to the implementation of positive train control (Section 104) and hours-of-service reform (Section 108).

V. DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

Please produce all documents related to the establishment of the Challenged Rates, including but not limited to all documents used and/or relied upon in determining the formula for calculating the rates.

Request for Production No. 2

Please produce all studies and analyses conducted by or for UP and/or BNSF or from January 1, 2003 to date related to (a) the profitability of UP or BNSF's coal traffic; and (b) the profitability of coal transportation service provided by Defendants for the account of AEPCO.

Request for Production No. 3

Please produce documents or data, in a computer-readable format to the extent available, which provide the following information for each AEPCO train movement from Origins to Destination and from Destination to Origins for each crew district in the SARR States:

- a. Each crew district identified by "from" and "to" stations;
- b. The route miles in each such crew district; and
- c. The number of locomotive units per train in the loaded direction by train type (i.e., coal, general freight, intermodal, automotive, etc.), and the extent to which the locomotive units are in a distributed power configuration.

Request for Production No. 4 (BNSF Only)

Please produce all agreements, and all supplements or amendments thereto, between BNSF and Southwestern Railroad Company, Inc. (“SWRR”) which relate to the operation of trains in either direction over the lines between Rincon and Deming, NM.

Request for Production No. 5 (BNSF Only)

Please produce documents sufficient to show all compensation (whether in the form of payments or credits) paid by BNSF to SWRR for the transportation of trains and/or trainsets of coal cars on a per car or per train (as the case may be) basis as well as on annual basis for each of the three years ending December 31, 2008.

Request for Production No. 6 (BNSF Only)

Please produce all documents related to BNSF’s consideration of the abandonment of the Belen to Deming, NM line segment or any portion thereof, including the Rincon to Deming, NM line segment. If BNSF has not considered abandoning any such segment(s), please so indicate in response to this Request.

Request for Production No. 7

Please produce any studies, analyses and other documents in BNSF’s and/or UP’s possession from January 1, 2003 to present analyzing or related to the transportation of coal to Destination from Origins (a) by a rail carrier(s) other than BNSF and/or UP, and (b) by any mode of transportation other than rail. If no such documents exist, please confirm same in the response to this Request.

Request for Production No. 8

Please provide the following density information for UP's and BNSF's entire systems for each year or partial year 2006 to the present in a machine readable database or electronic spreadsheet, including all field descriptions, data definitions and data dictionaries required to utilize the data. The density database or spreadsheet should include, at a minimum, the following data:

- a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
- b. Station name at the beginning of a unique density segment and at the end of a unique density segment;
- c. Beginning and ending milepost for each unique density segment;
- d. Rail mileage for each unique density segment;
- e. (i) Total density (both directions including empty and loaded trains by segment expressed in net ton-miles, or in the alternative, (ii) total density (both directions including empty and loaded trains) by segment expressed in gross ton-miles plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment; and
- f. Density information (i) for segments that BNSF and/or UP utilizes via trackage rights (or other joint facility or joint use arrangements) on another railroad, and (ii) for segments where another railroad(s) operates by trackage rights (or other joint facility or joint use arrangements) over BNSF or UP segments.

Request for Production No. 9

For each BNSF and/or UP line segment and for any other railroad's line segments which UP and/or BNSF utilize via trackage rights agreements, please produce documents, in a computer-readable format to the extent available, which contain

operating statistics and density data (including but not limited to train miles, train hours, locomotive unit miles, loaded car-miles, empty car-miles, net ton-miles, gross ton-miles (both including and excluding locomotives), number of trains, etc.) for all traffic for each year or partial year 2006 to the present.

Request for Production No. 10

Please produce the data bases and computer programs (with all documentation related to these data bases and computer programs), in a computer-readable format, that include the information listed below for each movement handled by BNSF and/or UP as originating, terminating, overhead or single-line carrier that traveled in any of the SARR States for each year or partial year 2006 to the present:

- a. Commodity (seven-digit Standard Transportation Commodity Code “STCC”);
- b. Origin city and state;
- c. Destination city and state;
- d. For shipments that originated on BNSF’s or UP’s system(s), the date and time the shipment was originated;
- e. For shipments BNSF or UP received in interchange, the on junction location and station number;
- f. For shipments BNSF or UP received in interchange, the road received from;
- g. For shipments BNSF or UP received in interchange, the date and time the shipment was interchanged;
- h. For shipments given in interchange, off junction location and station number;
- i. For shipments given in interchange, the road given to;

- j. For shipments given in interchange, the date and time the shipment was interchanged;
- k. For shipments terminated on BNSF's and/or UP's system(s), the date and time the shipment was terminated;
- l. Origin Freight Station Accounting Code ("FSAC");
- m. Destination FSAC;
- n. Origin Standard Point Location Code ("SPLC");
- o. Destination SPLC;
- p. Number of cars;
- q. Tons (Net);
- r. Tare weight;
- s. Total freight revenues from Origin to Destination, including any adjustments thereto;
- t. BNSF's and/or UP's share or division of the total freight revenues, including any adjustments thereto;
- u. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and BNSF's and/or UP's division thereof provided in response to Subparts (s) and (t) above;
- v. The contract, agreement, tariff, or other pricing authority that the shipment is billed under;
- w. Waybill number and date;
- x. TOFC/COFC plan;
- y. Car/trailer/container initial for each car/trailer/container used to move the shipment;

- z. Car/trailer/container number for each car/trailer/container used to move the shipment;
- aa. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- bb. The train identification number of all trains used to move the shipment;
- cc. The number of locomotives, by train identification, by segment, used to move the shipment;
- dd. The total horsepower, by train identification, by line segment, used to move the shipment;
- ee. Total loaded movement miles;
- ff. Total loaded miles on BNSF's and/or UP's system(s);
- gg. AAR car-type code; and
- hh. Provider of car (BNSF and/or UP-owned, BNSF and/or UP-leased, shipper or foreign road).

Request for Production No. 11

Please produce documents, in a computer readable format to the extent available, which contain information tracking and describing car, locomotive and train movements from origin to destination for each car, locomotive and train moving on BNSF and/or UP lines to, from or through the SARR States for each year or partial year 2006 to the present.

Request for Production No. 12

Please provide copies of train dispatcher sheets (and the data recorded in such sheets in a computer readable format, to the extent available), or other documents (*e.g.*, conductor wheel reports) that record train movement data in a computer readable

format to the extent available, from origin to destination for all BNSF and/or UP car and train movements and yard and hub operations to, from or through the SARR States for each year or partial year 2006 to the present.

Request for Production No. 13

Please provide all documents, including programs, decoders, and instructions, necessary to link the data produced in response to Request for Production No. 10, Request for Production No. 11, and Request for Production No. 12.

Request for Production No. 14

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs, common carrier pricing authorities or other documents containing common carrier rate and service terms, entered into, agreed to or established or provided by BNSF and/or UP which govern(ed) shipments handled by BNSF and/or UP as originating, terminating, overhead or single-line carrier to, from or through any of the SARR States in any of the years 2006 to the present.

Request for Production No. 15

Please produce all documents related to forecasts or projections prepared by or for BNSF and/or UP from 2006 through the present, or in BNSF or UP's possession, of future traffic volumes and/or revenues for (a) coal and (b) other freight traffic (including any breakdowns of any such forecasts or projections whether by commodity classification, geographic region, line segment, or any other category) moving over any portion of the BNSF and/or UP system(s) located in any of the SARR States. Documents

responsive to this request include, but are not limited to, traffic projections prepared in connection with engineering studies or authorization for expenditures or marketing studies or operating expense budgets or capital budgets or mergers with or acquisitions of other carriers.

Request for Production No. 16 (BNSF Only)

Please produce all documents related to forecasts or projections prepared by or for BNSF from 2004 through the present, or in BNSF's possession of future traffic volumes and/or revenues for rail traffic originating and/or terminating on BNSF's rail line between North Tipple, NM to Defiance, NM, excluding rail traffic to and from the McKinley Mine.

Request for Production No. 17 (UP Only)

Please produce the traffic forecasts supporting the comment made by UP Spokeswoman Zoe Richmond in the May 31, 2008 issue of the Arizona Daily Star that the number of trains per day along the UP's Sunset Route will nearly double by 2016.

Request for Production No. 18

Please produce any studies or analyses (including any documents, computer models and inputs to run the model, supporting databases and manuals used in any such study or analysis) of transit and/or cycle times for any BNSF and/or UP train movements originating, terminating or passing through any of the SARR States for each year or partial year from 2006 to the present. Included in this Request are documents containing the following information for each movement, in a computerized format to the extent available.

- a. Waybill number and date;
- b. Car/trailer initial and number;
- c. Origin location, *i.e.*, city, state, FSAC and SPLC;
- d. Destination location, *i.e.*, city, state, FSAC and SPLC;
- e. Transit time from origin to destination and (if applicable) return from destination to origin;
- f. Location (*i.e.*, city, state, FSAC and SPLC) where shipment enters the states identified above;
- g. Location (*i.e.*, city, state, FSAC and SPLC) where shipment departs from or terminates in the states identified above; and
- h. Cycle time while movement is within the states identified above.

Request for Production No. 19

Please provide documents, in a computer-readable format to the extent available, sufficient to show the projected and actual transit and/or cycle times, and the standard or expected or contractual transit and/or cycle time for each BNSF and/or UP movement originating, terminating or passing through any of the SARR States for each year or partial year 2006 to the present.

Request for Production No. 20

Please produce documents which contain the computer model, supporting databases and supporting manuals that are used by BNSF and/or UP to calculate the expected transit and/or cycle time for a movement, including all necessary inputs required to run the model for each movement originating, terminating, or passing through any of the SARR States for each year or partial year 2007 to the present.

Request for Production No. 21

Please produce current operating timetables (including special instructions and/or operating rule books), station lists, station books, track charts and “condensed profiles” (including schematics which provide the number, length, and ownership status (*i.e.*, whether railroad-owned or privately-owned) of the tracks at the Origins and all destinations), which are applicable to BNSF and UP lines in the SARR States. Please provide the requested documents in machine-readable format to the extent available (including all necessary documentation). If current versions of any of the requested documents are not available, please produce the most recent versions that are available.

Request for Production No. 22

To the extent not included in the track charts or condensed profiles produced in response to Request for Production No. 21, please produce documents, in a computer-readable format to the extent available, that show the following for all BNSF and UP line segments in the SARR States:

- a. The gradient or grade profile for each line segment;
- b. The elevation and elevation changes (in feet above sea level) for each line segment; and
- c. The locations of all curves on each line segment and all information maintained by BNSF or UP pertaining to such curves, including but not limited to the beginning milepost, ending milepost, and degree of curvature.

Request for Production No. 23

Please produce documents which contain the following information for all coal mines that BNSF and/or UP served or from which BNSF or UP transported coal as an originating, intermediate or terminating carrier that moved in one or more of the SARR States for each year or partial year 2006 to the present:

- a. Geographic location, *i.e.*, city, county and state;
- b. Railroad location, *i.e.*, railroad station name and milepost;
- c. Railroad mine identification number corresponding to the identification numbers contained in Defendants' computerized traffic data, *e.g.*, SPLC, FSAC or any other numbering system BNSF or UP uses;
- d. Annual tonnages that BNSF or UP transported from that mine;
- e. Track capacity in feet at each location;
- f. The track configuration at each mine, with both the track that BNSF or UP or another rail carrier owns (or jointly owns) and the mine-owned track clearly identified;
- g. Annual weeks of mine operation;
- h. Average tons per car loaded; and
- i. Loading capacity (tons per hour).

Request for Production No. 24

Please produce all studies and analyses conducted by or for BNSF and/or UP related to implementation of and/or compliance with the provisions of the Rail Safety and Improvement Act of 2008 described in Interrogatory No. 9 above.

Request for Production No. 25

Please produce documents which provide the following information for all of BNSF's and/or UP's helper services operated in the SARR States, separately for each helper service location, for each year or partial year 2007 to the present:

- a. "From" and "To" stations and mileposts where trains are actually helped;
- b. Number and type of locomotives (model and horsepower) involved per help;
- c. Round-trip mileage each locomotive travels per help;
- d. Number of total trains helped per crew assignment;
- e. Minimum train size/weight requiring helper service; and
- f. Crew size per crew assignment.

Request for Production No. 26

Please produce documents which contain the following information for BNSF and UP for each year or partial year 2007 to present:

- a. The location(s) where car inspectors inspect trains in the SARR States;
- b. A description of the procedures followed by the car inspectors in preparing for and inspecting the trains;
- c. The total number of car inspections per tour of duty (by day of the week) and the total number of trains inspected per tour of duty (by day of the week), separated between coal trains and other than coal trains, for each location identified in response to (a) above;
- d. The number of car inspectors inspecting each train at each location identified in response to (a) above and the time spent by each inspector during each inspection;

- e. The daily or hourly rates of pay, including all additives, for the inspectors identified in response to (d) above;
- f. The number of trains each car inspector identified in response to (a) above inspects during his tour of duty;
- g. The other duties performed by the car inspectors identified in response to (d) above while on duty and not inspecting trains;
- h. The percentage of time the car inspectors identified in response to (d) above spend inspecting trains versus other assignments during their tour of duty;
- i. The materials and supplies used by the car inspectors at each of the locations identified in response to (a) above;
- j. The purchase price of each item identified in response to (i) above; and
- k. The total number of trains and cars inspected at each location identified in response to (a) above.

Request for Production No. 27

Please produce any studies or analyses conducted by BNSF and/or UP during the past three (3) years which model and evaluate rail operations over all or any part of the BNSF and/or UP rail system(s) using the Rail Traffic Controller (“RTC”) computer model. In addition to the results of such studies or analyses, please produce documents sufficient to show the following information for each study or analysis:

- a. The version of the RTC model utilized in each study or analysis;
- b. All electronic files input into the RTC model, including track input files, train input files, Form A and Form B files (or similar files showing track, operating or other outages or failures that affected train operations); and
- c. All electronic files generated as output from the RTC model.

Request for Production No. 28

Please produce the train list(s) and train profile(s) showing the scheduled horsepower per ton (“HPT”) for (a) all BNSF and/or UP trains operating to and from Origins, and (b) all other trains operating to, from or within the SARR States. If the train list(s) or train profile(s) are not available, please provide other documents sufficient to show the scheduled HPT for the trains identified in (a) and (b) above.

Request for Production No. 29

Please produce copies of the following documents:

- a. Documents which identify the locomotive tonnage ratings (*e.g.* horsepower per trailing ton) by line segment for BNSF’s and/or UP’s lines in the SARR States; and
- b. Tractive effort tables or other documents sufficient to show the tractive effort produced by the locomotives used to transport trains through all or any portion of the SARR States.

Request for Production No. 30

Please produce documents which describe and explain how BNSF and UP assign locomotives to each train on BNSF’s and/or UP’s system(s). If BNSF or UP uses a computer readable model for this purpose, please produce the model and all supporting data bases and operating manuals.

Request for Production No. 31

Please produce any locomotive and/or railcar spare margin study performed by BNSF and/or UP from January 1, 2003 to date that includes (in whole or in part) locomotives used (a) in coal service and/or (b) in other service to, from or through the

SARR States. In addition, please produce the underlying databases that were used to perform these studies.

Request for Production No. 32

Please produce any computer programs or models BNSF and/or UP uses or has used since January 1, 2003 to determine the number and types of railcars required to move its normally expected coal traffic volumes and the incremental or above-normal coal volumes moving in peak periods.

Request for Production No. 33

Please identify all origins where BNSF and/or UP pays or since January 1, 2006 has paid an outside contractor or third party to load coal trains, and with respect to each such origin, please produce the following:

- a. Copies of all third party loading crew contracts/agreements, including negotiated rates and associated rate escalation clauses and operating provisions, as well as a description of the service performed by the contractor; and
- b. All records in BNSF's and/or UP's or its loading contractor's possession relating to the contractor's handling of the trains, including but not limited to the time when each train was in the possession or under the control of the loading contractor.

Request for Production No. 34

Please produce documents, in a computer-readable format to the extent available, which describe (a) how BNSF and UP determine the dispatch priority given to each train type (*e.g.*, doublestack, priority intermodal, through, general freight, coal, *etc.*); and (b) BNSF's and/or UP's methodology for scheduling all trains by train type.

Request for Production No. 35

Please produce all documents related to unplanned track-related and operating-related incidents or outages that affected BNSF and/or UP train operations in 2007 and to date in 2008 in the SARR States. If the information requested would require a special study, please produce random failure, outage or incident reports or similar documents, as kept in the ordinary course of business by BNSF and/or UP, from which the requested data could be extracted.

Request for Production No. 36

Please produce any studies performed by or for you from January 1, 2003 to the present related to the increase in locomotives and/or railcars required to handle shipments during seasonal peak traffic periods for (a) BNSF and/or UP's coal traffic, and (b) all BNSF and/or UP traffic. In addition, please provide the underlying databases that were used to perform each study.

Request for Production No. 37

Please produce documents for each year or partial year 2007 to the present which list by initial and unit number: (a) locomotives used in the AEPCO service between Origins and Destination and in any other coal service between Origins and any destination; and (b) if such locomotives were drawn from a pool(s), all the locomotives in the pool(s) from which the locomotives used in the AEPCO or other coal service are drawn.

Request for Production No. 38

Please produce documents, in a computer-readable format to the extent available, which provide the following information for each of the locomotives contained in each of the listings produced in response to Request for Production No. 37:

- a. The locomotive initial and number;
- b. The manufacturer, if purchased;
- c. The lessor, if leased or rented;
- d. Model or type (*e.g.*, SD-40-2);
- e. Horsepower;
- f. Capacity of its fuel tanks (gallons);
- g. Weight;
- h. Date of purchase or lease;
- i. Date first placed into service;
- j. The original cost plus the cost of any additions and betterments;
- k. Financing vehicle (*e.g.*, equipment trust);
- l. Debt rate as a percent;
- m. Financing terms (in years);
- n. Annual depreciation;
- o. Annual depreciation as a percent;
- p. Current salvage value as a percent;
- q. Accrued depreciation;

- r. If leased, the type of lease (i.e., capital, operating, “power by the hour”, etc.);
- s. If a capital lease, the capitalized value of the lease by locomotive or group of locomotives (if a group of locomotives, the number of locomotives (by initial and number) and aggregate dollars);
- t. If an operating lease, the quarterly, semi-annual, etc., lease payment by locomotive or group of locomotives covering the term of the lease (if a group of locomotives, the number of locomotives (by initial and number) and aggregate dollars);
- u. If leased or rented under a short-term or “power by the hour” agreement, the minimum annual fixed payment and the use payment (e.g., per kilowatt/hour, per diesel unit mile, etc.) per locomotive, the average annual payment per locomotive, and the annual locomotive unit-miles for each such locomotive, stated separately for coal service and other service; and
- v. The diesel unit-miles traveled each year or partial year from 2005 to the present:
 - i. In coal service; and
 - ii. In all types of service.

Request for Production No. 39

Please produce all lease or rental agreements, including all supplements and copies of all billings, applicable to each leased or rented locomotive identified in response to Request for Production No. 37 and Request for Production No. 38.

Request for Production No. 40

Please produce all locomotive maintenance and repair records and/or reports and related documents for each year or partial year 2006 to the present, which provide BNSF and/or UP locomotive maintenance, repair and overhaul expenses by locomotive or locomotive type or series (or by other basis in which records are kept) and

the total locomotive unit-miles corresponding to these maintenance, repair and overhaul expenses for the locomotives identified in response to Request for Production No. 37. To the extent that these records and/or reports do not include all locomotive repair, maintenance and overhaul amounts reported in R-1 Schedule 410, please identify those expenses that are not included.

Request for Production No. 41

Please produce all locomotive maintenance agreements, including all supplements, attachments, exhibits and schedules, with outside contractors and provide, for each year or partial year 2006 to the present for all locomotives in BNSF's and/or UP's fleet under such maintenance agreements, (a) the amount paid for each locomotive or by locomotive type in total and broken down by each service performed under the agreement and (b) the number of locomotive unit miles corresponding to the amounts listed above.

Request for Production No. 42

Please produce documents sufficient to show the following information for BNSF and UP for the most recent 12 calendar months:

- a. The location(s) where locomotives are fueled in the SARR States;
- b. The actual amount of fuel used by the locomotives identified in response to Request for Production No. 37, by individual locomotive;
- c. The total number of diesel unit miles generated by the locomotives for which fuel consumption data was provided in response to (b) above during the same time period used in response to (b) above;

- d. The method by which BNSF and/or UP accounts for or records fuel usage for locomotives;
- e. Computer-readable versions (both compiled and non-compiled), including all supporting databases and necessary documentation, of any and all computer programs in BNSF's and/or UP's possession used to estimate the fuel usage of locomotives; and
- f. The same information for all road locomotives on the BNSF and/or UP systems in the same format as that given in the responses to (b), (c), and (e) above.

Request for Production No. 43

Please produce all studies, analyses and related documents (including summaries, computer programs and all supporting databases and data), in a computer-readable format to the extent available, pertaining to the fuel consumption or the measurement of the fuel consumption by BNSF's or UP's trains (or the locomotives used on BNSF's or UP's trains) moving through any portion of the SARR States during the period from January 1, 2006 to the present.

Request for Production No. 44

For each year or partial year 2007 to the present, please produce documents which contain the following information, in a computer-readable format to the extent available, for each of the end-of-train telemetry devices ("EOTD") used on any BNSF and/or UP trains that traverse any portion of the SARR States:

- a. The date of purchase;
- b. The original cost and the cost of any additions and betterments;
- c. The debt rate as a percent;
- d. The financing terms (in years);

- e. The annual depreciation;
- f. The annual depreciation rate as a percent;
- g. The salvage value as a percent; and
- h. The accumulated depreciation.

Request for Production No. 45

Please produce documents for each year or partial year 2003 to the present which contain the following, in a computer readable format, for each freight car purchased or leased by BNSF or UP (including freight cars currently on order and privately-owned freight cars leased by BNSF or UP that maintain the private owner's car initial and number) that has been or could be used to transport coal:

- a. Initial and number;
- b. Manufacturer;
- c. Lessor, if leased;
- d. AAR car type;
- e. Tare weight;
- f. Purchase or order date, if purchased;
- g. Lease or order date, if leased;
- h. Total purchase price, if purchased;
- i. If leased, the type of lease (e.g., capital, operating, etc.) and term;
- j. If leased, the amount and frequency of lease payments;
- k. If purchased, the AFE applicable to each purchased freight car; and

1. If leased, the lease agreement including all supplements, amendments, exhibits and applicable schedules.

Request for Production No. 46

Please produce all railcar repair and maintenance records, reports, databases and related documents which include or record rail car repair and maintenance expenses for each year or partial year 2006 to the present, including but not limited to all input data to schedules 415 and 755 of BNSF's and UP's R-1, and the total rail car-miles corresponding to these repair and maintenance expenses, in a computer readable format to the extent possible, for all freight cars in BNSF's and UP's systems. To the extent that these records, reports and databases do not include all car repair and maintenance amounts reported in R-1 Schedule 410, please identify the expenses that are excluded.

Request for Production No. 47

Under *Alternative Methods of Accounting for Railroad Track Structures*, 367 I.C.C. 157, 180 (1983), BNSF and UP are required to submit a standard "unit of property" that distinguishes between when a certain cost should be expensed or capitalized. Please produce BNSF's and UP's most recent, STB approved property units and the supporting information and data for those units.

Request for Production No. 48

Please produce all documents that relate to the development of the methodology for the calculation and imposition of the "fuel surcharges" described in BNSF's Rules Book 6100-series Item 3381 and in UP Circular 6602 Series, Item 695 and UP Circular 6603 Series, Item 694, including but not limited to:

- a. Documents related to the selection of the Retail On-Highway Diesel Fuel average price as the benchmark for the calculation of the surcharges;
- b. Documents related to the determination of how to (i) base and (ii) calculate the surcharges based upon the length of a linehaul movement; and
- c. All analyses, studies or other documents which address the relationship, if any, between the application of the surcharges to any specific coal movement(s) and changes in the actual cost to BNSF and/or UP of the fuel consumed by the locomotives used in that (those) movement(s).

Request for Production No. 49

Please identify all locations in the SARR States where BNSF and/or UP or a third party contractor acting for or on behalf of BNSF or UP performs fueling of locomotives, and produce documents sufficient to show the following information with respect to locomotive fueling at each location:

- a. The source(s) of the fuel, including the name and location of the vendor(s) who provide the fuel to BNSF or UP and the refinery(ies) or other location from which the fuel is obtained;
- b. The method and cost of transporting and dispensing the fuel from the refinery(ies) or other locations from which the fuel is obtained to the location where the fueling of locomotives is performed;
- c. The method by which fuel is dispensed into locomotives, *i.e.* from fixed fueling facilities or by direct-to-locomotive (tanker truck) service; and
- d. A description of all facilities and equipment (including but not limited to fuel storage tanks) at each location where BNSF or UP has fixed fueling facilities; and
- e. The cost per gallon paid (including any applicable taxes) on a weekly basis in 2008.

Request for Production No. 50

Please produce copies of all contracts/agreements with third parties related to the performance of locomotive fueling functions for all road locomotives that are used on any portion of the BNSF and/or UP system(s) located in the SARR States.

Request for Production No. 51

Please produce a copy of BNSF's and UP's rules and instructions pertaining to train handling, including but not limited to measures for conserving fuel.

Request for Production No. 52

Please produce documents, in a computer readable format to the extent available, which show locomotive utilization and locomotive performance (*e.g.*, locomotive unit-miles, locomotive hours running, locomotive hours switching, locomotive hours out-of-service for repairs and locomotive hours stored useable) for each locomotive that BNSF and UP owned or leased for each year or partial year 2006 to the present and that BNSF and UP used in providing transportation service in the SARR States.

Request for Production No. 53

For each year or partial year 2006 to the present, please produce documents which contain the following information (in a computer-readable format, if available) with respect to each shipper-owned and shipper-leased railcar and each intermodal and automotive railcar provided by a third party moving over any part of the BNSF and/or UP system(s) located in the SARR States:

- a. Identification number of the car;

- b. The type of the car;
- c. The length and tare weight of the car (for intermodal and automotive cars only);
- d. The cost to BNSF or UP for use of the car;
- e. The terms of any mileage allowance agreement covering the car;
- f. Whether the car is subject to a zero-based mileage agreement;
- g. Whether the car hire paid on the car is subject to refund of the payments under certain contractual conditions; and
- h. The year of manufacture of the car.

Request for Production No. 54

Please produce all railcar maintenance agreements with outside contractors, including all supplements, attachments, exhibits and schedules, in effect during all or any portion of each year or partial year 2006 to the present, for all the cars on BNSF's and/or UP's systems, and documents providing (a) the amount paid for each car or by car or by car type total and broken down by each service performed under the agreement, and (b) the number of car-miles corresponding to the amounts referenced above.

Request for Production No. 55

Please produce copies of all contracts/agreements with third parties (including but not limited to shippers or receivers) in effect during all or any portion of the period from January 1, 2006 to the present related to the performance of car inspection functions with respect to (a) BNSF and UP coal trains and (b) other BNSF and UP trains traversing all or a portion of the SARR States.

Request for Production No. 56

Please produce the following for all joint facility or joint use agreements (including but not limited to trackage rights agreements, joint or common ownership agreements and lease agreements) between BNSF and UP or between BNSF or UP and another rail carrier or other entity applicable to any of the railroad lines and/or facilities in the SARR States and that were in effect during all or any portion of the period from January 1, 2006 to the present:

- a. Copies of all agreements (including amendments and supplements);
- b. Copies of all bills from 2006 to the present (including all supporting documents and data);
- c. The BNSF and/or UP density (in gross or net ton-miles) over the joint facility for each year 2006 to the present; and
- d. The density (in gross or net ton-miles) of all other rail carriers or other entities over the joint facility for each year 2006 to the present.

Request for Production No. 57

For each year or partial year 2006 to the present, please produce BNSF's and UP's detailed annual and quarterly Wage Forms A and B that support the summary Wage Forms A and B provided to the STB.

Request for Production No. 58

Please provide documents showing the amounts paid by BNSF and UP for training employees, including but not limited to training employees hired for the following positions, in each of the year 2006 to the present:

- a. Experienced locomotive engineers;
- b. Experienced locomotive conductors;

- c. Locomotive conductors training to become engineers;
- d. Novice conductors;
- e. Train dispatchers;
- f. Information technology programmers;
- g. Supervisors of maintenance operations;
- h. Maintenance crew members; and
- i. Equipment inspectors.

The training information requested includes, but is not limited to, wages paid during classroom training, wages paid during field or on the job training, fringe benefits paid during classroom training, fringe benefits paid during field or on the job training, costs for classroom training, costs for on the job training or field training, expenses for room and board during classroom training and during field training, the number of weeks of classroom training required for each type of employee, and the number of weeks of on the job or field training required for each type of employee.

Request for Production No. 59

Please produce documents showing the amount(s) paid by BNSF and/or UP to a recruitment firm or firms for executive search services in each year or partial year 2006 to the present. The documents should include the amount paid by individual, the position of the individual hired and the basis for the recruitment firm's fee schedule. As used in this Request, the term "executive" means those employees so defined or grouped in BNSF's and/or UP's Wage Forms A and B.

Request for Production No. 60

Please produce documents sufficient to show the applicable wage rates for BNSF's and/or UP's maintenance of way employees by job classification for each year or partial year 2006 to the present.

Request for Production No. 61

Please provide documents sufficient to show the maintenance-of-way districts and/or crews employed by each of the Defendants to maintain the (a) track, (b) signals and communications facilities, and (c) bridges and other facilities in the SARR States, the number of BNSF and UP employees by job classification presently assigned to each maintenance-of-way district or crew on both a permanent and a seasonal basis, and any changes in the maintenance districts, crews, and number and classification of employees that have occurred since January 1, 2003.

Request for Production No. 62

Please produce documents sufficient to show the maintenance-of-way equipment owned or leased by BNSF and/or UP whose value per unit exceeded \$500 when acquired, and how such equipment is assigned to the respective maintenance-of-way districts identified in response to Request for Production No. 61 of AEPCO's First Requests. In addition, please provide documents sufficient to show the unit costs for such equipment, if purchased, or the annual lease cost if leased, and the annual cost of ownership including information on maintenance and fueling costs during each year or partial year 2006 to the present.

Request for Production No. 63

For maintenance of way and/or construction on BNSF and/or UP lines in the SARR States performed by contractors for the period from 2005 to the present, please produce copies of all bills for services, documents which contain a description of the line location of the contract repairs and/or construction, and the details of the work

performed, including labor and materials. If BNSF and/or UP do not maintain copies of any of these documents, produce whatever documents BNSF and/or UP do maintain or have available to it describing the costs incurred by BNSF and/or UP and the details of the work performed, in a computer readable form if applicable (including all necessary documentation).

Request for Production No. 64

Please produce documents for each year or partial year from 2006 to the present sufficient to show (a) the frequency of ultrasonic rail testing and track geometry testing and (b) the costs per mile, or other applicable unit of measure, incurred by BNSF and/or UP for ultrasonic rail testing and track geometry testing for each BNSF and/or UP line segment in the SARR States.

Request for Production No. 65

Please produce documents for each year or partial year 2006 to the present which provide BNSF's and UP's loss and damage costs and annual tonnage separately for all commodities BNSF and UP carry on a system-wide basis.

Request for Production No. 66

Please produce documents showing the ad valorem taxes that BNSF and/or UP paid for each year or partial year 2005 to the present to each of the SARR States, together with documents showing the total route-miles and total track-miles BNSF and/or UP owned or owns in the SARR States for each year 2005 to the present.

Request for Production No. 67

Please produce all documents relating to any contribution by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) to construction, upgrading, maintenance and/or operating expenses on any of BNSF's and/or UP's lines located in the SARR States.

Request for Production No. 68

Please produce copies of the most current land valuation maps for BNSF and/or UP rail lines located in the SARR States, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

Request for Production No. 69

Please produce documents identifying all donated rights of way and/or land grants (including easements) obtained by BNSF and/or UP or BNSF's and/or UP's predecessors in connection with the construction of any rail lines or facilities located in the SARR States.

Request for Production No. 70

Please produce all documents related to any sale, appraisal, abandonment or acquisition of land (improved and unimproved) that BNSF and/or UP completed in the SARR States, including but not limited to documents showing the location of the parcel, size of the parcel, the valuation of the parcel by BNSF and/or UP, the sale or acquisition price, a description of any improvements to the parcel, the date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

Request for Production No. 71

Please produce documents sufficient to show the following with respect to grading construction activities undertaken or proposed at any time, or currently ongoing, on any portion of BNSF's and/or UP's system(s) located in SARR States, including the line of rail known as the Defiance Spur (Defiance to North Tipple, NM):

- a. Number of cubic yards of excavation of:
 - i. Common earth;
 - ii. Loose rock; and
 - iii. Solid rock;
- b. Number of cubic yards of borrow of:
 - i. Common earth;
 - ii. Loose rock; and
 - iii. Solid rock;
- c. Grading construction data for each construction specification measured by BNSF and/or UP including without limitation, roadbed width, side slope ratio, track center distance, presence of access roads, impact of grading activities on right-of-way width, use of geotextiles, use of water, soil stabilization, and width and depth of side ditches;
- d. Number of route miles, separated between single track main, double track main, triple track main, etc., corresponding to the cubic yard information described in paragraphs (i) through (iii) of Subparts (a) and (b) of this Request;
- e. Number of track-miles corresponding to the cubic yards in paragraphs (i) through (iii) of Subparts (a) and (b) of this Request;
- f. All of the different types of equipment (and the associated tasks) used to:
 - i. Excavate common earth;
 - ii. Excavate loose rock;
 - iii. Excavate solid rock; and

- iv. Obtain borrow material;
- g. Linear feet of pipe installed for lateral drainage;
- h. Number of cubic yards of rip-rap placed for the protection of the roadway;
- i. Location, type and quantity of retaining walls;
- j. Construction method, including but not limited to the number of cubic yards of masonry or other similar material used for retaining walls;
- k. Number of acres cleared;
- l. Number of acres grubbed; and
- m. Number of acres seeded.

Request for Production No. 72

To the extent BNSF and/or UP incurred any of the following expenses during the years 2006 to the present, please produce documents sufficient to show the costs BNSF and/or UP incurred during each year for the following:

- a. BNSF's and/or UP's cost per cubic yard of excavation for:
 - i. Common earth;
 - ii. Loose rock; and
 - iii. Solid rock;
- b. BNSF's and/or UP's cost per cubic yard of borrow for:
 - i. Common earth;
 - ii. Loose rock; and,
 - i Solid rock;
- c. BNSF's and/or UP's cost per cubic yard of rip-rap (installed), separated between material and labor;

- d. BNSF's and/or UP's unit cost for each material used for retaining walls, separated between material and labor;
- e. BNSF's and/or UP's gross cost per acre for clearing timber;
- f. Any adjustments to BNSF's and/or UP's cost per acre for clearing timber or for clearing by burning;
- g. BNSF's and/or UP's cost per acre for grubbing;
- h. BNSF's and/or UP's cost per acre for seeding;
- i. BNSF's and/or UP's cost per acre for weed spray (including necessary chemicals);
- j. BNSF's and/or UP's cost per hour or per mile for brush cutting; and
- k. BNSF's and/or UP's cost per square yard for geotextile fabric.

Request for Production No. 73

Please produce documents sufficient to show culvert/drainage pipe locations (*i.e.*, railroad milepost), size (diameter), length, height of cover, number of tracks crossed, type, and cost of material and installation for each, for BNSF's and/or UP's lines located in the SARR States.

Request for Production No. 74

Please produce documents sufficient to show the following for construction projects that BNSF and/or UP has undertaken since January 1, 2005:

- a. Standard construction project specifications, including but not limited to: track structures and designs; bridges; culverts; yard and roadway buildings; fueling facilities; maintenance facilities and waste water treatment facilities;
- b. Standard estimating procedures for track construction projects; and
- c. Standard estimating procedures for non-track construction projects.

Request for Production No. 75

Please produce all of BNSF's and/or UP's price list books governing prices for construction and maintenance materials (including but not limited to weights of rail from 115 to 141 pounds per yard, turnouts, ties, fasteners, lubricators, plant and field welds, fencing, roadway signs, track geometry cars, hot bearing and dragging equipment detectors, and related tools), or other documents utilized by BNSF's and/or UP's engineering personnel for estimating costs of maintenance and construction projects for each year or partial year 2005 to the present. To the extent that the charges for transportation and delivery of materials are not included in the prices shown, please produce documents sufficient to show such charges for all materials.

Request for Production No. 76

Please produce documents sufficient to show the following information with respect to ballast or sub-ballast used on BNSF's and/or UP's system(s) for each year or partial year 2005 to the present:

- a. The average cost per cubic yard for ballast, by type;
- b. The average cost per cubic yard for the transportation and handling of ballast;
- c. The average length of haul represented by the value(s) in (b) above;
- d. The average cost per cubic yard for sub-ballast, by type;
- e. The average cost per cubic yard for transportation and handling of sub-ballast;
- f. The average length of haul represented by the value(s) in Subpart (e) above;

- g. The names and locations of all quarries supplying such ballast or sub-ballast; and
- h. The unit prices from all quarries listed in response to Subpart (g).

Request for Production No. 77

Please produce documents sufficient to show the tunnels or former tunnels that have been constructed or removed (by daylighting or other means) by BNSF and/or UP, including tunnels constructed or removed, detailing location (line segment and milepost), length, number of tracks in the tunnel, method and time period of construction, and the cost per linear foot to construct or remove the tunnel, for any tunnels located on BNSF's and/or UP's system(s) in the SARR States. If no cost data is available for any such tunnels, please produce documents sufficient to show the cost per linear foot of any tunnel construction or removal performed anywhere on BNSF's and/or UP's system(s) since January 1, 2003.

Request for Production No. 78

Please produce bridge lists or other documents detailing location, a description of what is being crossed (*e.g.*, river, interstate highway, navigable waterway *etc.*), type, length, number of tracks and height for all bridges located on BNSF's and/or UP's system(s) in the SARR States.

Request for Production No. 79

For each of the types of bridges identified in the documents produced in response to Request for Production No. 78, please produce documents sufficient to show the standard design for the bridge type and the unit costs (*e.g.*, cost per foot or other

appropriate measure), for single track open deck and ballast deck construction and double track open deck and ballast deck construction, from January 1, 2003 to the present.

Request for Production No. 80

Please produce documents sufficient to show the following information related to the construction or replacement, in part or in whole, of each bridge on BNSF's and/or UP's system(s) in the SARR States from January 1, 2003 to the present:

- a. The location of the bridge, by line segment and milepost;
- b. An itemized listing of the bridge components being constructed or replaced (including quantities);
- c. The estimated cost, by component, for each of the components (identified in response to Subpart (b) above) being constructed or replaced; and
- d. The actual cost, by component, for each of the components (identified in response to Subpart (b) above) being constructed or replaced.

Request for Production No. 81

Please produce documents listing the items, the cost of each item and the quantity of each item installed on BNSF's and/or UP's system(s) related to the construction and (during each year or partial year 2005 to the present) operation of the centralized traffic control signal system(s) or any other traffic control system in use on the BNSF and/or UP system(s). Please indicate whether the costs include additional services such as installation, design planning, electrical drops for utilities, and/or transportation.

Request for Production No. 82

For each year or partial year 2005 to the present, please produce documents containing the following information with regard to BNSF's and/or UP's hot bearing and dragging/failed equipment detectors ("FED"):

- a. The criteria for determining the appropriate spacing of the devices along BNSF's and/or UP's main lines; and
- b. The location of FEDs for the portion of BNSF's and UP's systems in the SARR States.

Request for Production No. 83

Please produce documents containing the following information for each BNSF and/or UP communications site (defined as a location with a microwave tower, a land mobile radio ("LMR") tower, a tower used for both purposes, or a location where communications equipment (microwave or LMR) is located that does not include a tower) located in the SARR States:

- a. The number of microwave towers, LMR towers, combined towers, or other communications equipment location (shown separately for each category);
- b. The latitude and longitude coordinates of each tower or other communications equipment location;
- c. The height of each tower in (i) feet above the ground and (ii) feet above sea level;
- d. The number of microwave antennae on each tower and the status of each antenna (*i.e.*, whether it is operational);
- e. The number of LMR antennae on each tower and the status of each antenna (*i.e.*, whether it is operational);

- f. The latitude and longitude coordinates of other communications sites that can link via microwave or radio from this site or a topological map of the communication system; and
- g. The acres of land owned or leased by BNSF and/or UP for these sites and the cost of purchase or lease.

Request for Production No. 84

Please produce documents sufficient to show:

- a. BNSF's and/or UP's specifications for the construction of communications sites (as defined in Request for Production No. 83 above);
- b. The total number of BNSF and/or UP route miles in the SARR States that are covered by microwave communications;
- c. The total number of BNSF and/or UP route miles in the SARR States that are not covered by microwave communications;
- d. The cost, manufacturer and model number of each item and the quantities used for the construction and operation of the microwave radio and/or land mobile radio communications system(s) on the BNSF and/or UP system(s) during each of the years 2005 to the present; and
- e. The annual spot maintenance costs incurred by BNSF and/or UP for the microwave and/or land mobile radio tower communications system(s) per tower and by device type, in the SARR States, as well as the overall spot maintenance costs systemwide.

Request for Production No. 85

Please produce documents sufficient to describe the specifications, functions, operation and costs, during each year or partial year 2005 to the present, of any communications system equipment other than microwave towers used to transmit data from devices such as mobile two-way radios, portable (hand-held) two-way radios, FEDs, AEI scanners and EOTDs across all or any part of the BNSF and/or UP system(s).

Request for Production No. 86

Please produce documents sufficient to show:

- a. The locations and quantities of fiber optic cabling installed on BNSF and/or UP rights-of-way in the SARR States;
- b. The bandwidth capacity of the fiber optic cabling identified in Subpart (a);
- c. The entity that owns and operates the fiber optic cabling identified in Subpart (a);
- d. The costs to BNSF and/or UP, if any, for installing the fiber optic cable identified in Subpart (a);
- e. Whether BNSF and/or UP is permitted to use the fiber optic cable identified in Subpart (a);
- f. The amount, if any, BNSF and/or UP pays the carriers for use of the fiber optic cable identified in Subpart (e); and
- g. The revenues or other payments BNSF and/or UP receive from the carriers for the use of the railroad's right-of-way.

Request for Production No. 87

If BNSF and/or UP utilizes the fiber optic cable(s) identified in response to

Request for Production No. 86, please provide documents sufficient to show:

- a. The total number of BNSF and/or UP route miles in the SARR States that are covered by fiber optic backbone communications;
- b. The cost, manufacturer and model number of each item and the quantities used for the construction and operation of the fiber optic communications system on the BNSF and/or UP system(s) during each of the years 2005 to the present; and
- c. The annual spot maintenance costs incurred by BNSF and/or UP for the fiber optic communications system and by device type, in the SARR States, as well as the overall spot maintenance costs systemwide.

Request for Production No. 88

Please produce documents sufficient to show the location, size (including square footage, number and lengths of tracks, capacity, etc.), components (such as equipment and machinery), and original cost of each facility located on any portion of BNSF's and/or UP's system(s) in the SARR States that falls within each of the following categories of facilities:

- a. Roadway maintenance facilities;
- b. Locomotive maintenance facilities;
- c. Locomotive servicing facilities (including fueling facilities);
- d. Administrative facilities;
- e. Rail yards;
- f. Dispatch centers;
- g. Freight car repair and maintenance facilities;
- h. Scales;
- i. Wastewater treatment plants;
- j. Landslide/rockslide detection/protection devices or facilities;
- k. Snowshed facilities; and
- l. Train, yard and engineman facilities.

Request for Production No. 89

For each year or partial year 2005 to the present, please produce documents which contain the following information with regard to BNSF and/or UP highway and railroad at-grade crossings:

- a. The various sizes, compositions and costs per linear foot (installed) of a one-lane private road crossing over a single line of track;
- b. The various sizes, compositions and costs per linear foot (installed) of a two-lane public highway crossing over a single line of track;
- c. The various sizes, compositions and costs per linear foot (installed) of a four-lane public highway crossing over a single line of track;
- d. The installed cost of signs for a private road crossing (if necessary);
- e. The installed cost of signs for a public highway crossing;
- f. The installed cost of each of the different types of protective devices identified in the response to Subpart (g) below;
- g. A list identifying each component required for an automatic type interlocking (assuming a diamond crossing);
- h. The cost of each of the components identified in response to Subpart (g) above and the cost of installation for each year or partial year 2005 to the present;
- I. The costs for a 16-foot and 24-foot cattle guard and the cost of installation for each year or partial year 2005 to the present; and
- j. Any additional costs incurred.

Request for Production No. 90

Please produce documents in a computer readable format, if available, containing the following information for each BNSF and/or UP at-grade and grade-

separated highway crossing on the portion of the BNSF and/or UP system(s) in the SARR States:

- a. Geographic location, *i.e.*, city, county and state;
- b. Rail location, *i.e.*, railroad, line name and milepost;
- c. Width;
- d. Length;
- e. Type of construction;
- f. Number of tracks;
- g. Type of protective devices;
- h. Date of initial installation at the location;
- I. Total cost of the initial installation and the amount borne by BNSF and/or UP, if any; and
- j. Identification of the party responsible for ongoing maintenance of any such structures.

Request for Production No. 91

Please produce documents sufficient to show the location, linear feet, and type of fencing (*e.g.*, snow fence) for all fencing currently in place on the portion of the BNSF and/or UP system(s) in the SARR States.

Request for Production No. 92

Please produce all documents relating to any contribution by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) to the construction or maintenance of at-grade or grade separated crossings located in the SARR States.

Request for Production No. 93

Please produce documents sufficient to show the following for each construction and rehabilitation project which exceeded \$500,000 in cost and was completed by BNSF and/or UP, or an outside contractor acting on BNSF's and/or UP's behalf, since January 1, 2005:

- a. The date the project was started;
- b. The date the project was completed;
- c. A complete copy of the Authorization For Expenditure ("AFE") and description of all columns and data contained with the AFEs;
- d. A complete copy of the Roadway Completion Report or any successor document; and
- e. All invoices underlying each AFE and/or Roadway Completion Report.

Request for Production No. 94

Please produce documents, including but not limited to AFE, construction plans, engineering estimates, bid tabs, contractor invoices, and construction specifications for the any projects that a carrier other than BNSF and/or UP has undertaken in the SARR States for which BNSF and/or UP paid for some or all of the project.

Request for Production No. 95

For the CTC or other traffic control system, signal devices, powered grade crossing protective/warning devices, and/or other powered devices such as switches on any portion of the BNSF and or/UP system located in the SARR States, please produce documents sufficient to show the source of electricity powering each device, and whether

BNSF and/or UP paid for the connection to the source of electricity. In addition, please produce documents sufficient to show BNSF's and/or UP's costs for an electrical drop to any powered on-track or trackside device in each SARR State during the period from January 1, 2006 to the present.

Request for Production No. 96 (UP Only)

Please produce all documents related the development, construction and operation of a new yard facility at Santa Teresa, NM, including, but not limited to, potential operational and/or physical changes in or to UP's El Paso Yard.

Request for Production No. 97

Please produce all studies or analysis conducted by or for UP and/or BNSF from January 1, 2006 to date related to the STB's annual revenue adequacy determination, including, but not limited to, any studies or analysis considering whether BNSF and/or UP will be considered revenue adequate for 2008 or otherwise earn a return that covers its cost of capital.

Request for Production No. 98

Please produce all inflation and/or rail cost adjustment estimates or calculations in BNSF's and/or UP's possession or that BNSF or UP prepared or caused to be prepared or purchased for each year or partial year 2006 to the present, including, but not limited to, any estimates relating to:

- a. The cost of acquiring equity;
- b. The cost of acquiring debt;

- c. General expenses, including, but not limited to, asset, equipment, materials and supplies, fuel and labor expense;
- d. Railroad productivity, including but not limited to commodity-specific productivity, asset productivity and expense productivity;
- e. Gross Domestic Product/Implicit Price Deflator;
- f. Producer Price Index - All Commodities; and
- g. The U.S. Department of Energy's U.S. average price of Retail On-Highway Diesel Fuel.

Request for Production No. 99 (BNSF Only)

Please produce all studies or analysis conducted by BNSF from January 1, 2004 to date related to the closing of the McKinley Mine, including, but not limited to, any studies or analysis developing the costs to abandon and salvage BNSF's rail line from North Tipple, NM to Defiance, NM.

Request for Production No. 100 (BNSF Only)

Please produce all studies or analysis conducted by BNSF from January 1, 2004 to date related to industrial development on property owned or accessible to BNSF's rail line between North Tipple, NM and Defiance, NM.

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