BEFORE THE
SURFACE TRANSPORTATION BOARD

EXPEDITING RATE CASES	)))	Docket No. EP 733

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

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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 Reply Comments in accordance with the Surface Transportation Board's ("STB" or "Board") governing procedural schedule in this proceeding.

Coal Shippers/NARUC's reply responds to opening comments filed in this proceeding by the Association of American Railroads ("AAR"); CSX Transportation, Inc. ("CSXT"); Joint Carload Shippers ("Carload Shippers"); Norfolk Southern Railway Company ("NS"); Rail Customer Coalition ("RCC");[1] Samuel J. Nasca on behalf of

[1] RCC's Comments generally support the Comments filed by the Carload Shippers. *Id.* at 1.

SMART/Transportation Division – New York State Legislative Board ("SMART/TD-NY"); and Union Pacific Railroad Company ("UP").

SUMMARY

The Board's Advanced Notice of Proposed Rulemaking ("ANPR") discusses various ideas, some of which were suggested by Board stakeholders, on how to expedite its processing of maximum rate cases decided under the Stand-Alone Cost ("SAC") test. The Board asked for comments on these ideas, as well as any others interested parties might propose. These ideas included "standardizing" some forms of SAC evidence, procedures to expedite discovery, and approaches to expedite the Board's consideration of SAC evidence.

In their Comments, Coal Shippers/NARUC urged the Board not to propose new rules "standardizing" some forms of SAC proof because consideration of these proposals would exceed the procedural scope of this proceeding; the Board's specific standardization proposals violated key Full SAC principles; and any attempts to change substantive Full SAC standards in a rulemaking proceeding would ultimately result in delaying, not expediting, future cases.

Significantly, all commenting parties addressing the Board's standardization ideas agree that they should be discarded for the same reasons cited by Coal Shippers/NARUC. *See* NS Comments at 42 ("NS steadfastly opposes the Board's suggestion for standardization of evidence"); CSXT Comments at 29 ("The Board should not standardize SAC evidence"); Carload Shippers Comments at 18 ("the Board should

not attempt to standardize unit costs . . . unless it also reexamines truly complicated SAC analyses"). In light of the unanimous views of all stakeholders that addressed this issue, the Board should drop the pursuit of standardization.

The commenters expressed different views on many of the Board's ideas for expediting discovery and consideration of merits evidence in SAC cases. Not surprisingly, the railroad commenters steadfastly avoided the single biggest cause of discovery delays in SAC cases – the failure of carriers to produced Core SAC Data[2] – in a timely and readily useable format.

In their Comments, Coal Shippers/NARUC discussed a simple solution to this pressing problem, which Coal Shippers/NARUC continue to advocate in this reply filing: the Board should propose and adopt new rules requiring complainant shippers to file their discovery requests, including their Core SAC Data requests, when they file their complaints; the Board's staff would then convene a conference within 15 days to address the defendant carrier's production of Core SAC data and, following the conference, the Board would issue an order directing the carrier to produce the Core SAC data within 60 days from the date the complaint was filed, or such later date as the Board directs.

Coal Shippers/NARUC also recommend that the Board propose several other changes in its current rules that should expedite its consideration of rate cases, including: making mediation voluntary; requiring meet-and-confer sessions before parties file discovery motions; limiting the number of interrogatories and depositions that

[2] Core SAC Data refers to the principal categories of SAC data a complainant shipper needs to obtain in discovery to develop its Stand-Alone Railroad ("SARR"). *See* Coal Shippers/NARUC Comments, Attachment 1.

parties can tender, without leave of the Board; and limiting final briefs to issues identified by the Board.

On the other hand, Coal Shippers/NARUC recommend that the Board not to adopt several ideas discussed in the ANPR, or raised by other commenting parties, because they will not speed up rate cases or do not constitute the most effective means of doing so. These ideas include several discovery-related proposals, such as requiring standardized discovery questions, which Coal Shippers/NARUC believe will unduly complicate discovery, and will not be as effective as Coal Shippers/NARUC's proposals to speed-up production of Core SAC Data.

Coal Shippers/NARUC also urge the Board not to revive various practices suggested by some railroad commenters that history has shown to be expedition killers, such as bifurcating consideration of market dominance and rate reasonableness issues, and holding procedural schedules in abeyance, over the objections of complainant shippers, while the Board considers motions to compel.

REPLY COMMENTS

I. PARTIES AGREE THAT THE BOARD SHOULD NOT CONSIDER CHANGES IN SUBSTANTIVE SAC STANDARDS IN THIS PROCEEDING

The ANPR stated 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." ANPR at 5.

The Board went on to identify "various areas in a SAC case that may be well-suited to some form of standardization or simplification" and listed the following examples:

> - "the Board could estimate (G&A) [general and administrative costs] 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") (*id.* at 5);
>
> - "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") (*id.* at 6);
>
> - "[c]onstruction costs might be standardized using R-1 data or carriers' depreciation studies to develop the cost per track mile" ("Construction Cost Proposal") (*id.* at 6); 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"). *Id.* at 6.

The Board asked for comments on its four ideas, as well as any others that commenters may wish to submit.

In their Comments, Coal Shippers/NARUC urged the Board to discard its evidentiary standardization proposals because: (i) consideration of these proposals is beyond the procedural scope of this proceeding; (ii) the proposals are fundamentally at odds with SAC theory; (iii) additional changes in SAC substantive standards would unduly complicate future SAC cases; and (iv) changing SAC standards would hinder pre-

litigation settlements of SAC cases by making it more difficult for shippers and railroads to predict SAC case outcomes. *See* Coal Shippers/NARUC Comments at 52-58.

Coal Shippers/NARUC were not alone\. All other commenters addressing the Board's SAC evidentiary standardization proposals also urge the Board to drop them. *See* NS Comments at 42 ("NS steadfastly opposes the Board's suggestion for standardization of evidence"); CSXT Comments at 29 ("The Board should not standardize SAC evidence"); Carload Shippers Comments at 18 ("the Board should not attempt to standardize unit costs . . . unless it also reexamines truly complicated SAC analyses"). In their comments, these other parties also cited many of the same reasons Coal Shippers/NARUC relied upon in urging the Board to discard evidentiary "standardization."

A. Consideration of Substantive Changes to SAC is Outside the Scope of this Proceeding

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, as Coal Shippers/NARUC emphasized in their Comments, 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. *See id*. at 53-54.

Other commenters agree. *See* NS Comments at 43 (the Board's standardization "proposals are . . . beyond the scope of this proceeding, pursuant to Section 11(c) of the [STB Reauthorization] Act"). 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 in this proceeding 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. As Coal Shippers/NARUC pointed out in their opening Comments, in *Expedited Procedures II*,[3] 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."[4] NS makes the very same point in its comments. *See* NS Comments at 42 ("In 2003, the STB actually rejected proposals to standardize evidence because "'these proposals are beyond the procedural focus of this proceeding'").[5]

B. The Board's Ideas for Standardizing Substantive SAC Evidence Violate Fundamental Full SAC Principles

In their Comments, Coal Shippers/NARUC demonstrated that the Board's MOW, Construction Cost and Locomotive Acquisition Cost Proposals were fundamentally at odds with basic SAC precepts because the Board mistakenly sought to substitute the incumbent carrier's actual costs for those of the highly efficient SARR on these consequential items. Coal Shippers/NARUC Comments at 54-55. Coal

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[3] *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 (2003).

[4] *Id.*, 6 S.T.B. at 815.

[5] *Id.*, citing *Expedited Procedures II*, 6 S.T.B. at 815.

Shippers/NARUC requested the Board not to further pursue these proposals because they undermine fundamental SAC principles. *Id.*

All other commenters addressing this issue agree. *See* NS Comments at 43 ("Standardization does not comport with the sound economic principles of the SAC test"); CSXT Comments at 29 ("In SAC cases, complainants are permitted to develop uniquely optimized operations . . . . In these cases it may be difficult to develop 'simplifications' that do not interfere with either a shipper's right to propose efficiencies or a railroad's right to test a shipper's evidence"); Carload Shippers Comments at 17 (adoption of the Board's standardization ideas "has a potentially significant trade-off that could bake real-world inefficiencies into the operations of a theoretically more efficient SARR, thereby undermining a critical objective of the SAC analysis").[6]

Coal Shippers/NARUC also urged the Board drop its G&A standardization proposal because it is arbitrary and unfair to calculate G&A expenses based on percentages derived from prior cases or to arbitrarily select one side's G&A evidence on all G&A items. *See* Coal Shippers/NARUC Comments at 55. Once again, all other commenters addressing this issue agree. *See* CSXT Comments at 30 ("Using past SARRs as a proxy is a particularly poor option because SARRs have very different traffic groups and G&A needs); *id.* at 31-32 (Board should reject "'baseball-style'" style consideration of G&A evidence because "this approach would not substantially simplify

[6] *See also* Carload Shippers Comments, Verified Statement of Thomas D. Crowley and Robert D. Mulholland ("Crowley/Mulholland V.S.") at 19-20 (identifying additional defects in the Board's MOW, Construction Cost and Locomotive Acquisition Cost proposals); CSXT Comments at 32-34 (identifying additional defects in the Board's MOW and Construction Cost proposals).

the parties' presentations," "would not simplify the Board's analysis of the evidence," and would encourage "gamesmanship"); Carload Shippers, Crowley/Mulholland V.S. at 17 (developing standardized G&A costs based on past SARRs "would be difficult to develop and implement" because "G&A costs may be driven by factors other than traffic and revenue levels" including the geographic size of the SARR); *id*. at 18 (selection of one side's G&A evidence over another's can be arbitrary because, for example, "a party may develop an appropriately supported number of accountants for a SARR but overstate the number of policeman without support").

C. Changing Substantive SAC Standards Will Delay, Not Expedite, SAC Cases

In their Comments, Coal Shippers/NARUC also opposed any changes in substantive SAC standards because there simply is no need at this time for another long and costly proceeding to address how to calculate SAC costs and because any changes in how SAC calculations are made would lead to less certainty – not more – on how to calculate these costs in pre-litigation negotiations. *See id*. at 55-57.

Coal Shippers/NARUC note that no commenters have requested that the Board undertake a new rulemaking proceeding to address changes in how SAC costs are currently calculated.[7] Additionally, other commenters have confirmed that the Board's adoption of new substantive SAC standards can create substantial uncertainty on case outcomes until those rules are actually applied in SAC cases. *See, e.g.*, AAR Comments

[7] In their comments, Carload Shippers state that the Board "should evaluate" its decision adopting the Average Total Cost ("ATC") method for allocating revenues on cross-over traffic, but do not make a request for the Board to institute a new rulemaking proceeding to reconsider ATC.

at 5 ("Changes by the Board in SAC methodology have led to new issues being raised and further litigation, like when rulemaking in 2006 delayed several proceedings and resulted in extended litigation over certain issues like cross-over traffic revenue allocation").

II. THE BOARD SHOULD PROPOSE NEW RULES TO EXPEDITE DISCOVERY IN SAC CASES

While the commenting parties generally agreed that the Board should not advance further consideration of its standardized SAC evidence proposals, they did not reach a similar level of agreement concerning several of the other ideas addressed by the Board in the ANPR to expedite discovery. Coal Shippers/NARUC have reviewed the views expressed by other parties and respond to them below. Overall, Coal Shippers/NARUC believe that the expedition proposals they advanced in their Comments constitute the best approach to fairly expedite SAC case discovery.

A. The Board Should Propose Rules Requiring Carriers to Produce Core SAC Data in a Timely Manner

One of the principal reasons for delays in coal rate cases is the defendant rail carrier's tactic of not producing the most important information that shippers need to devise their SARRs – the Core SAC Data – until the very end of the discovery period, and even then, the Core SAC Data is usually incomplete or presented in a format that is very difficult for shippers to utilize. *See* Coal Shippers/NARUC Comments at 57-58.[8]

[8] *See also* SMART/TD-NY Comments at 5 ("Discovery is believed to be the principal cause of delay in rate cases.").

Coal Shippers/NARUC proposed the following approach to remedy this recurring problem in SAC cases:

> - D-1 – Shipper files its principal discovery requests on the same day it files its complaint.
>
> - D-15 – Board staff holds a technical conference by D-15 to address production of Core SAC Data responsive to the shipper's discovery requests. Following the technical conference, the Board issues an order directing the defendant carrier to produce the Core SAC Data by D-60 (or such other date as set by the Board).
>
> - D-20 – Defendant carrier files its principal discovery requests on the same day (or before) it files its answer.
>
> - D-40 – Defendant carrier may request a staff conference to address its discovery requests at any time on or after D-40. Following any such conference, the Board would have the discretion to, but not be required to, issue an order imposing specific production deadlines on the complainant shipper.

Coal Shippers/NARUC Comments at 45.

Coal Shippers/NARUC's suggested approach is designed to build upon the Board's current discovery procedures by requiring that each side's discovery begin as early as possible in the SAC case process; to get the Board's staff involved early in the process, with a particular focus by the staff, the parties and the Board on production of Core SAC data in a readily useable format as early as reasonably possible; and to recognize that defendants do not face the same discovery issues as complainants because they need far less discovery and do not submit any evidence until the reply phase of the case.

Coal Shippers/NARUC also share Carload Shipper's concerns about defendant carriers gaming the discovery process by producing traffic and revenue data only in flat files, not relational databases. *See* Coal Shippers/NARUC Comments at 44-45; Carload Shippers' Comments at 7-8; Carload Shippers Comments, Crowley/Mulholland V.S. at 4-6. Coal Shippers/NARUC agree with Carload Shippers that the optimal solution here "is to simply require railroads to provide the databases containing their traffic and revenue data in the same format used by railroads in the normal course of business, i.e., provide intact relational databases housing tables that are linked and keyed appropriately." *Id*. at 6.

Coal Shippers/NARUC recommend that these types of production issues be addressed and resolved in the initial staff discovery conference they are proposing, with carriers thereafter ordered to produce traffic and revenue data in a relational database format, unless a carrier demonstrates it is not possible to do so. As Carload Shippers point out, if the Board takes this approach, it should moot the need for the Board to order what Carload Shippers refer to as "the second best" option – "having the Board annually collect waybill and other traffic data customarily used in SAC cases," (*id*.), an option uniformly opposed by railroad commenters. *See* AAR Comments at 10-11; UP Comments at 4-5; CSXT Comments at 25-26; NS Comments at 37-38.

B. The Board Should Propose Rules Limiting the Number of Interrogatories and Depositions, But Not the Number of Document Production Requests

In their Comments, Coal Shippers/NARUC stated they would have no objection if the Board proposed new rules limiting the number of interrogatories and depositions taken in SAC cases, without leave of the Board, to 25 interrogatories and 2 depositions. *Id*. at 49. Coal Shippers/NARUC noted that the Federal Rules of Civil Procedure ("FRCP") places limits on interrogatories and depositions. Coal Shippers/NARUC Comments at 49. Coal Shippers also urged the Board not to place any limits on the number of document discovery requests. *Id*. The FRCP places no limits on the number of document discovery requests, and use of this discovery tool is critically important to shippers in developing and defending their SARRs. *Id*.

Carload Shippers agree with Coal Shippers/NARUC that no restrictions should be placed on the number of document production requests. *See* Carload Shippers Comments at 14 ("the FRCP does not contain a . . . restriction on the number of document production requests, which suggests that any limit adopted by the Board similarly should apply only to interrogatories").

UP proposes to limit the number of shipper discovery requests (but not the number of carrier discovery requests) "to 100 document requests, 10 interrogatories, and five requests for admissions related to stand-alone costs." UP Comments at 2. However, UP itself acknowledges that if its 100 document production request rule was applied in

the recent *IPA* case,[9] IPA could not have obtained the document discovery it needed. *Id*. at 2 (noting that IPA served 106 document production requests). The same result would have occurred in other recent cases, as well. *See* NS Comments at Exhibit B (complainant shipper in *DuPont*[10] tendered 154 document production requests in its first set of discovery requests).

Coal Shippers/NARUC continue to recommend that the reasonable approach here, and one that comports with the FRCP, is for the Board to propose rules limiting the number of interrogatories tendered and depositions taken in SAC cases but not to place any arbitrary limits on the number of document production requests.

C. The Board Should Propose Rules Requiring Meet and Confer Certifications Before Discovery Motions Are Filed

Coal Shippers/NARUC also support changing the Board's discovery rules to require that parties filing motions to compel certify that they have attempted to confer with opposing counsel. *See* Coal Shippers/NARUC Comments at 51-52. This procedure is typically followed in SAC cases and can lead in some instances to negotiated resolutions of discovery issues, thereby eliminating delays resulting from motions to compel.

All other commenters addressing this issue agree. *See* CSXT Comments at 28 ("The Board should require parties to meet and confer before filing motions to compel"); NS Comments at 41 ("NS supports the STB's proposal to require parties to

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[9] *Intermountain Power Agency v. Union Pac. R.R.* ("*IPA*"), NOR 42127.

[10] *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry* ("*DuPont*"), NOR 42125.

meet and confer regarding discovery issues prior to filing motions to compel"); Carload Shippers Comments at 16 ("Carload Shippers have no objections to a rule requiring parties, before filing a motion to compel or a motion to modify the procedural schedule, to certify that they have consulted the other party(ies)").

Coal Shippers also have no objections if the Board expands the coverage of its meet and confer certification standard to other forms of discovery and procedural motions.

D. Discovery Ideas the Board Should Not Pursue

Coal Shippers/NARUC recommend that the Board discard the following ideas: (1) requiring the use of standardized discovery requests; (2) requiring the use of standardized discovery disclosures; (3) establishing new "pre-filing" rules; (4) adopting standardized definitions of discovery terms; (5) changing current Board rules governing the use of admissions (if the Board adheres to the construction of those rules set forth in the ANPR); and (6) changing the legal standards governing resolution of motions to compel.

1. Standardized Discovery Requests

In their Comments, Coal Shippers/NARUC opposed the prescription of standardized discovery requests. As Coal Shippers/NARUC explained, SAC discovery requests 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. Coal Shippers/NARUC Comments at 43. Use of standardized requests will stop this evolution in its tracks. *Id*. In addition, Coal Shippers/NARUC

demonstrated that use of standardized requests will not permit case-specific modifications that shippers need to make. *Id*.

Other commenters agree. *See* CSXT Comments at 24 ("CSXT notes . . . that it may be impractical to standardize discovery requests by rule . . . . [because] discovery requests evolve over time"); Carload Shippers at 6-7 ("Carload Shippers do not believe there is much merit to standardized discovery requests . . . . [because] many SAC cases will have elements that are not subject to standardization"); Carload Shippers, Crowley/Mulholland V.S. at 3 ("If the Board were to limit discovery to a group of pre-determined requests, these requests could become obsolete as new arguments and presentations are made in future cases, and as railroads develop new models to capture and store information in the normal course of business.").

Coal Shippers/NARUC also emphasized in their Comments that any use of standardized requests will introduce a whole new level of complication in SAC cases that will result in case delay, not case expedition. *Id*. at 44. 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 requests, can the receiving party object to the requests as outside the scope of permitted discovery, etc.? Other commenting parties made the same point. *See* Carload Shippers, Crowley/Mulholland V.S. at 3 ("arguments regarding changes to standard requests and/or whether new requests should be added could bog down the process and make it less efficient that it is at present").

The only party that says it strongly supports standardized requests is NS. *See* NS Comments at 36. However, it appears to Coal Shippers/NARUC that what NS is really advocating is that parties' discovery requests be filed early in the SAC case process and that these requests focus on the key "categories of information:"

> NS strongly supports the concept of standardizing initial discovery requests for both the complainant and the defendant, and further supports the concept of requiring these initial discovery requests to be served concurrently with the complaint or answer, as applicable. NS generally agrees with the categories of information related to the creation of the SARR and market dominance, as outlined by the STB in the ANPRM.

NS Comments at 36 (footnotes omitted).

Coal Shippers/NARUC's proposed discovery procedures encompass much of what NS is suggesting here – shippers and carriers would tender their discovery requests early on in the process, and both sets of requests would focus on key case issues. If NS is in fact suggesting that the actual discovery questions be prescribed, Coal Shippers/NARUC do not believe that this is a sound policy choice for the reasons set forth above.

2. Standardized Disclosures

In their Comments, Coal Shippers/NARUC did not advocate the use of standardized disclosures. *See id*. at 44. Instead, Coal Shippers/NARUC's proposal to expedite discovery establishes a process where both shippers and carriers can obtain discovery – particularly shipper discovery of the specific Core SAC Data requested by the complainant shipper – in a timely manner. The key here, as Coal Shippers/NARUC explained, is for shippers to obtain case-specific Core SAC Data in a timely manner,

consistent with the needs of each individual case, through prompt carrier responses to specific discovery requests filed by the shipper early-on in the SAC case process.

Predictably, carrier parties do not address the most pressing discovery problem faced by coal shippers – delays in getting Core SAC Data, nor do they present any proposals addressing standardized disclosures by carriers. Instead, the two carriers addressing this issue propose requiring standardized disclosure requirements only on the complainant shipper. *See* NS Comments at 37 ("NS supports an attempt to require initial market dominance disclosures from the complainant, but NS believes that any attempt to require initial disclosures from the defendant is unworkable"); CSXT Comments at 15-16 (proposing that the parties provide "initial disclosures of information that is most relevant to market dominance").

NS and CSXT's standardized disclosure proposals would not simplify discovery in SAC cases, they would unnecessarily complicate them. It appears that under both proposals, the initial market dominance disclosures would be followed by additional market dominance discovery. *See, e.g.*, CXST Comments at 15 ("Parties would be free to use regular discovery requests to ask for information outside of the initial disclosures, such as information from a broader time period when appropriate"); NS Comments at 36 (referencing carrier "discovery requests" directed to "market dominance" issues).

The practical effect of the carrier's proposals would be to unfairly double complainant shippers' current market dominance discovery obligations – the complainant shipper would need to prepare and submit initial market dominance disclosures (which is

not required today) and then have to respond to market dominance discovery requests (which is required today).

In addition, as Coal Shippers/NARUC emphasized in their Comments, there is no need to front-load Board discovery procedures with accelerated market dominance discovery because carriers do not submit market dominance evidence until the reply phase of the case.[11] This stands in stark contrast to shippers, who must present their entire SAC and market dominance cases on opening.

Finally, as the Board has long-recognized, carrier needs for market dominance discovery pale in comparison with shipper needs for SAC discovery:

> 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.

Expedited Procedures II, slip op. at 4 (STB served Sept. 4, 2002).

Carload Shippers assert that they oppose the use of standardized discovery requests, but support the use of standardized discovery disclosures:

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[11] *See* Coal Shippers/NARUC Comments at 47. Coal Shippers/NARUC address CSXT's proposal to bifurcate the presentation of market dominance and SAC evidence below.

> While we support standardized disclosures, the Joint Carload Shippers do not believe there is much merit to standardized discovery requests. . . . The time savings is not in the standardization of discovery requests, but in requiring automatic and earlier production of responsive information. Also, many SAC cases will have elements that are not subject to standardization which will still require some adherence to the regular discovery process.

Carload Shippers Comments at 6-7. Coal Shippers/NARUC agree with Carload Shippers that complainant shippers need to obtain early production of responsive information – particularly Core SAC Data – but believe the most efficient way to do so is through improvements to the current discovery process, including deadlines for production of case-specific Core SAC data in a readily useable format, not one that attempts to mix some form of automatic disclosures – the specific contours of which are likely to shift from case-to-case – with "the regular discovery process." Carload Shippers Comments at 7.

4. Pre-Filing Notice Requirements

In the ANPR, the Board asked for comments on whether it should consider proposing a rule that would require complainant shippers to tender a "pre-filing notice" at a specified time period before filing its complaint. The Board stated that the pre-filing date might be used to trigger the Board's mandatory mediation process and might give rail carriers the chance to start collecting discovery information. ANPR at 3.

In their Comments, Coal Shippers/NARUC opposed the imposition of a pre-filing requirement in coal rate cases, because adding a pre-filing requirement would increase, not decrease, the amount of time it takes to litigate a SAC case. Coal Shippers

Comments at 33. Coal Shippers/NARUC also observed that simply adding a pre-filing requirement will not advance the discovery process. *Id*. at 33-34. The better approach, in Coal Shippers/NARUC's view, is to start discovery immediately after a complaint is filed, with early involvement by the Board's staff, and the setting of specific deadlines for production of Core SAC Data.

NS agrees with Coal Shippers/NARUC that imposition of a pre-filing requirement will not result in case expedition. *See* NS Comments at 35-36 ("a pre-filing requirement does nothing to expedite SAC cases" because "[a] pre-filing requirement simply adds time to SAC Cases 'off the books' by creating a new procedural phase before the rate case formally starts").

Other commenters support a pre-filing requirement. *See* CSXT Comments at 7; AAR Comments at 6; Carload Shippers Comments at 4. These commenters claim that a pre-filing requirement would be useful because it would allow mediation to begin immediately and allow carriers to begin to collect discovery data. Coal Shippers/NARUC respectfully disagree.

Under the Board's current rules, mediation goes on simultaneously with discovery. Starting mediation early – before discovery begins – adds to the case processing timeline; it does not expedite that timeline. Also, mediation – while well intentioned – has not proven to be of any practical value in any SAC cases involving coal traffic. *See* Coal Shippers/NARUC Comments at 39-41.

Putting carriers "on notice" that a SAC case may be coming also does nothing to advance the SAC process, unless the putative defendant carrier actually starts

to begin to collect Core SAC data and even then the carrier may be shooting in the dark without knowing exactly what requests the shipper will be tendering in discovery. The more logical approach here is the one proposed by Coal Shippers/NARUC, which calls for discovery to start immediately after a case is filed, and calls for the Board to set binding deadlines for carriers to tender case-specific Core SAC data, with oversight by the Board's staff .

While Coal Shippers/NARUC do not advocate the use of a pre-filing notice, if the Board is going to propose pre-filing notice rules, the rules need to be both logical and effective. Both objectives can be satisfied if the rules require that the shipper's pre-filing notice include the shipper's case-specific requests for Core SAC Data and further establish a deadline for the defendant carrier to produce the Core SAC Data. *See* Coal Shippers/NARUC Comments at 38-39. Also, if a pre-filing notice is used, and forced mediation is retained, the Board could amend its rules to start the mediation process at the same time the pre-filing notice is tendered.

4. Adopting Standardized Definitions of Discovery Terms

In the ANPR, 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. *See* Coal Shippers/NARUC Comments at 50-51.

Taking the Board's example of what the phrase "to the present" means, in 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 the 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 post-conference discovery order.

Several commenters support the Board's proposal to adopt standardized discovery cut-off dates. *See* UP Comments at 4; NS Comments at 41; CSXT Comments at 23. However, each of these commenters proposes a different cut-off date. *See* UP Comments at 4 (cut-off date should be the "end of the last calendar quarter before [the] complaint [is] filed"); NS Comments at 41 (cut-off date should be "the date of the filing of the complaint"); CSXT Comments at 23 (cut-off date should be " through the end-month immediately preceding the date of the complaint").

The fact that different railroads prefer different cut-off dates proves Coal Shippers/NARUC's point – there is no "one-size-fits-all" definition of the proper discovery cut-off date. The best approach here is to leave definitions of cut-off dates, and

other discovery terms, to the parties' discretion, subject to early Board intervention as necessary during Coal Shippers/NARUC's proposed discovery/technical conference.

NS also notes that in two recent cases it agreed to a cut-off date, based on the circumstances of those cases, that was different than the standard cut-off date it is proposing here. *See* NS Comments at 40-41 (noting the cut-off date in *DuPont*[12] and *Sunbelt*[13] was "the end of the quarter in which the complaint was filed"). NS's experience is yet another example of why the Board should not set a rule governing discovery cut-off dates since the dates can change based on the facts of each particular case.

5. Changing Current Rules Governing Admissions

The Board's current procedural rules permit parties to use requests for admissions,[14] 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.

In their comments, Carload Shippers assert that in the recent Chemical Cases,[15] complainant shippers have tendered requests asking defendant carriers to admit

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[12] *DuPont* (filed Dec. 7, 2010).

[13] *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry*., NOR 42130 (filed July 26, 2011) ("*Sunbelt*").

[14] *See* 49 C.F.R. § 1114.27.

[15] *Total Petrochems. & Refining USA, Inc. v. CSX Transp. Inc.*, NOR 42121 (filed May 3, 2010); *M&G Polymers USA, LLC v. CSX Transp. Inc*., NOR 42123 (filed June 18, 2010); *DuPont;* and *Sunbelt* (collectively "Chemical Cases").

they will not contest market dominance on some or all of the moves at issue; the defendant carriers object to responding; but later, after complainant shippers have spent substantial time and effort to develop market dominance evidence, the carriers concede the issue. *See* Carload Shippers' Comments at 14-16.

Carload Shippers assert that carriers engaging in this activity should be sanctioned if the carriers did not reasonably believe, at the time they made their objections, that they might prevail on market dominance issues. *Id*. at 16. Carload Shippers then request that the Board amend its current discovery rules to "clarify" that this carrier practice is subject to sanctions. *Id*.

Coal Shippers/NARUC also do not believe that it is necessary for the Board to change its current discovery rules to address the Carload Shippers concerns if the Board adheres to the interpretation of these rules set forth in the ANPR that bad faith responses to requests for admissions are subject to regulatory penalties:

> To encourage thorough and honest consideration of requests [for admissions], if a party denies a request for admission with no basis for doing so, that party would pay for the litigation at issue. See 49 C.F.R. § 1114.27 (providing for requests for admission); 49 C.F.R. § 1114.31) (providing for "the reasonable expenses incurred in making that proof").

ANPR at 5.

6. Changing Standards Governing Motions to Compel

NS requests that the Board change its current standards governing motions to compel to make it more difficult for complainant shippers to obtain needed SAC discovery from defendant carriers. *See* NS Comments at 30. Specifically, NS asks the

Board to "codify" proposals the Board made in *Expedited Procedures II* that, if adopted, would have required a shipper seeking to compel discovery to show "(1) that it needs the information to make its case, (2) that the information cannot be readily obtained through other means, and (3) that the request is not unduly burdensome." *Id*., 6 S.T.B. at 808.

The Board correctly decided in *Expedited Procedures II* not to adopt these proposals. *Id.*, 6 S.T.B at 809. The Board observed there that "shippers need substantial discovery to put together a SAC presentation" and that "both shipper and carrier interests viewed our proposals as more far-reaching and restrictive than we had intended." *Id*. For these reasons, the Board concluded "it is neither necessary nor appropriate to modify our rules." *Id*. Instead, the Board held "[o]ur case precedent should continue to serve as a guide to parties regarding the proper parameters of discovery in SAC cases." *Id*.

It would be a major step backward for the Board to resurrect, as NS requests, standards the Board properly rejected in 2003, and Coal Shippers/NARUC urge the Board not to consider NS's proposal.

III. OTHER ISSUES

A. Mediation Should Be Voluntary

In their Comments, Coal Shippers/NARUC recommended that the Board eliminate mandatory mediation in SAC cases, and replace it with voluntary mediation, because mandatory mediation has not worked in SAC cases, and drives up the shipper's case costs. Mediation works best when both sides agree to it, and that is the Board's standard practice in all cases except SAC cases. *See* Coal Shippers/NARUC Comments at 39-41.

AAR urges the Board to "expand" mandatory mediation, noting that "[s]ince the Board adopted mandatory, non-binding mediation in 2003, 20 of the 37 filed rate reasonableness complaints have been settled voluntarily by the parties." AAR Comments at 6 (footnote omitted) (citing the STB's webpage listing of rate case dispositions). In fact, the figures cited by the AAR confirm that the Board should eliminate mandatory mediation.

It appears from Coal Shippers/NARUC's review of the Board disposition webpage cited by AAR, only one SAC case, and one non-SAC case, may have settled as a result of mandatory mediation.[16] The vast majority of the case settlements cited by AAR (17 in total) appear to have been the result of non-mediated voluntary party discussions;[17] and one, a non-SAC case, settled as a result of voluntary mediation.[18] The record is clear – mandatory mediation has not worked in SAC cases, and should be discontinued.

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[16] *See E.I DuPont de Nemours & Co. v. CSX Transp., Inc.*, NOR 42112 (STB Decisions served April 19, 2009 and May 11, 2009) (SAC case settled after a "mediation" between the parties); *Williams Olefins, L.L.C. v. Grand Trunk Corp.*, NOR 42098 (STB served Feb. 15, 2007) (non-SAC case appears to have been settled as a result of mediation under the Board's mandatory mediation procedures).

[17] *See, e.g., W. Fuels Ass'n v. BNSF Ry.* ("*WFA*")., NOR 42088 (STB served June 15, 2015 (non-mediated settlement); *IPA* (STB served Oct. 8, 2014) (non-mediated settlement); *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, NOR 42110 (STB served Sept. 27, 2010) (non-mediated settlement).

[18] *See BP Amoco Chem. Co. v. Norfolk S. Ry.*, NOR 42093 (STB served June 28, 2005).

B. Rejected Delaying Tactics Should Not Be Revived

1. Suspension of Procedural Schedules

In the ANPR, 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 suggested 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*. In the interim, the case would be held in abeyance.

As stated in their Comments, Coal Shippers/NARUC oppose any new Board procedures that reinject the policy of automatically holding coal rate cases in abeyance while the Board considers motions to dismiss. *Id*. at 58-59. 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 maximum coal rate cases. The Board finally did so in 1996[19] and since that time, motions to dismiss have not slowed down the Board's resolution of coal rate cases.

Carload Shippers propose to require a defendant carrier "who genuinely believes that it cannot 'correct' the complainants operating plan, to file a motion to dismiss." Carload Shippers Comments at 21. Following the filing of that motion, Carload Shippers propose that the procedural schedule "be held in abeyance" while the

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

Board decides the motion. *Id*. Alternatively, the Carload Shippers propose that the procedural schedule only be held in abeyance if the Board grants the motion, "in which case, the complainant would receive 45 days to resubmit its opening evidence to correct the identified flaws." *Id*. at 22.

Carload Shippers themselves identify the problem with their initial proposal – carriers could unilaterally drag cases out simply by filing motions to dismiss. *Id*. at 22 That is completely at odds with the goal of expediting rate cases. Carload Shippers' alternative approach attempts to address this problem, but even under the alternative procedure, cases would likely be delayed and complicated by the Board's consideration of a motion to dismiss following the presentation of opening evidence.

Under governing Board precedent established in *Duke/NS*, "[i]f a shipper's evidence is so flawed as to preclude the development of appropriate reply evidence to address the flaws, the railroad should file a separate motion bringing the problem to the Board's attention."[20] In addition, since 1996, the filing of such a motion itself does not result in a case being held in abeyance.

To address the concerns raised by Carload Shippers, the Board should apply the Duke/NS "file a motion" standard in cases where a rail carrier believes that a shipper's operating plan is so flawed that it cannot be accepted (with changes) in the carrier's reply filing and, in addition, the Board could carve-out an exception to the no-hold-in-abeyance rule in cases where the shipper asks the Board to hold its case in abeyance pending the Board's resolution of the carrier's motion. If the shipper makes

[20] *Duke Energy Corp. v. Norfolk S. Ry*, 7 S.T.B. 89, 101 n.20 (2003) ("*Duke/NS*").

such a request, the Board would hold the procedural schedule in abeyance pending its disposition of the carrier's motion.

2. Bifurcating Schedules

For many years, defendant carriers attempted to complicate and delay SAC cases by proposing various schemes to bifurcate the Board's consideration of market dominance and rate reasonableness issues.[21] The Board put those schemes to bed when it adopted rules in 1996 that called for simultaneous development and presentation of market dominance and rate reasonableness evidence.

The Board reaffirmed its now long-standing no-bifurcation policy[22] earlier this year when it modified some of its procedural rules to address the STB Reauthorization Act.[23] Under the Board's prescribed procedural schedule in SAC cases, discovery on market dominance and SAC goes on simultaneously; the complainant files its opening evidence on both market dominance and SAC; the defendant replies on both issues; and the complaint files rebuttal on both.[24]

CSXT asks the Board to re-introduce the long-discredited bifurcation approach. Specifically, CSXT proposes a bifurcated approach where the parties submit

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[21] *See generally C.F. Indus., Inc. v. Koch Pipeline, L.P.*, 2 S.T.B. 257, 263-64 (1997) ("Our experience in the rail area has shown that bifurcation of the market power and rate reasonableness phases can unnecessarily prolong a proceeding.").

[22] An exception exists if the parties agree to bifurcation, a result that occurred in two of the Chemical Cases.

[23] *See Revised Procedural Schedule in Stand-Alone Cost Cases*, EP 732 (STB served Mar. 9, 2016).

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

three rounds of market dominance evidence; the Board decides the market dominance issues 30 days after that evidence is submitted; and, if the shipper prevails, the parties submit three more rounds of evidence on stand-alone cost issues, followed by a final Board decision on SAC. *See* CSXT Comments at 19.

CSXT argues that "accelerated market dominance consideration would not delay rate reasonableness cases," (*id*.), but that is most unlikely since CSXT is proposing six evidentiary rounds, not three; proposing that shippers prepare opening and rebuttal market dominance evidentiary presentations at the same time the shipper is conducting extensive SAC discovery and developing its SARR; and proposing a very narrow window for shippers to conduct market dominance discovery. CSXT's proposal also places extraordinary time pressures on the Board, and its staff, to decide market dominance issues in a 30-day window. The most likely outcome here is that bifurcated schedules will not hold, and cases will be delayed, as they inevitably were in the past, under prior bifurcation schemes.

CSXT also argues that bifurcation is a wise policy choice because "[i]f the Board finds there is no market dominance, the parties will be spared the expense of preparing and submitting SAC evidence." *Id*. at 20. This argument is a red-herring. Most of the STB's SAC rate case docket has consisted of coal rate cases, and in not one of these cases has the Board found an absence of market dominance.

C. Efforts to Stymie Fair Rebuttal Should Be Rejected

1. No Page Limits Should Be Placed on Rebuttal Evidence

In the ANPR, the Board suggested that cases could be expedited if the Board placed page limits on rebuttal evidence tied to the length of the shippers' opening evidence. *See id.* at 6 ("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 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. *See* Coal Shippers/NARUC Comments at 59-60. 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 the 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 due process to place page limits on rebuttal filings in the manner set forth in the Board's ANPR. *Id.*

To its credit, NS agrees that there should be no page limits on rebuttal. *See* NS Comments at 47 ("NS generally does not support the imposition of page limits on rebuttal evidence, as it is difficult to anticipate the number and complexity of issues appropriate for rebuttal in any particular SAC case").

Carload Shippers also agree that it would be inappropriate for the Board to place page limits on the length of a shipper's rebuttal evidence that is tied to the length of

the shipper's opening evidence. *See* Carload Shippers Comments at 23 (it is "illogical" to tie the length of rebuttal to the length of opening because "[r]ebuttal evidence responds to the defendant's reply evidence, not to opening evidence"); Carload Shippers Comments, Crowley/Mulholland V.S. at 22 ("The reason for lengthy Rebuttal filings . . . results from the tactical approaches recently employed by railroads in which the railroads disclose new information and raise new arguments and theories in Reply to which the complainant must respond in Rebuttal.").

CSXT argues that the Board should limit a shipper's rebuttal to no more than half the length of the shipper's opening evidence. CSXT Comments at 36. CSXT claims that such page limitations are supported by court practices which limit the length of reply briefs, referencing "[f]or example, the Federal Rules of Appellate Procedure [which] require reply briefs to be half the length of opening briefs, 15 pages for reply briefs compared to 30 pages for principal briefs." *Id*. (citing Fed. R. App. P. 32(a)(7)(A)).

CSXT's argument is flawed. The court rules it cites involve rules governing briefs, not rules governing the submission of evidence. Neither the Federal Rules of Civil Procedure, nor the Federal Rules of Appellate Procedure, place any page limits on evidentiary filings. Thus, federal court practice supports placing no page limits on shipper rebuttal filings in SAC cases. In addition, CSXT ignores the fact that federal briefing rules place page limits on all briefs – opening, response, and reply briefs. *See, e.g.*, Fed. R. App. P. 32(a)(7)(A) (limiting the appellee's response brief to 30 pages).

CSXT, of course, offers no corresponding proposal to limit the length of carrier reply evidentiary filings in SAC cases.

2. No Changes Are Needed to Board Rules Governing the Scope Of Permissible Rebuttal

The Board states in the ANPR 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*. Since those rules already exist, and are well-known, Coal Shippers/NARUC see no need to further address them in this proceeding. *See* Coal Shippers Comments at 59.

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.[25] Carriers file these motions in a transparent attempt to shore-up their reply evidence. *Id*.

All commenters appear to agree with Coal Shippers/NARUC that no changes are needed to the Board's current standards governing the scope of permissible rebuttal, but both NS and CSXT argue that the Board should "enforce" those rules. *See* NS Comments at 46 (Board should "'more strictly enforce'" rules against improper rebuttal); CSXT Comments at 34 (the "Board should enforce strict limits on rebuttal" under current standards).

The Board is adequately equipped to enforce its current standards concerning the permissible scope of rebuttal and Coal Shippers/NARUC encourage the

[25] *See, e.g.*, *WFA*, slip op. at 5-6 (STB served Sept. 10, 2007) (rejecting BNSF's motion to strike portions of the complainant shippers' rebuttal evidence).

Board to continue to deny carrier motions to strike a shipper's rebuttal evidence that are in fact poorly disguised attempts by carriers to impermissibly plug holes in their reply evidence.

D. The Board Should Address The Multi-Rail Software Problem

In the ANPR, the Board asked for comments on two issues involving non-public software: "requiring the disclosure by each party of any such software it intends to use in its evidentiary submissions by, for example, the close of discovery," (*id.* at 4) and whether "the Board should restrict a party's ability to use such software in its rate presentation unless it provides a temporary license to the opposing party." *Id*. at 6.

The two software issues relate to carrier defendants use of a program called Multi-Rail in the Chemical Cases to develop their reply SARR operating plan and costs. As Carload Shippers explain in detail in their comments, Multi-Rail is a proprietary program developed by a railroad consulting firm – Oliver Wyman – that could only have been obtained by the complainants in these cases in a "fully-functional" format if "complainants paid "a sizeable licensing fee . . . that would be valid for only for each case." Carload Shippers Comments at 12.

Coal Shippers/NARUC recommend that the Board not permit parties to submit evidence in rail rate cases using prohibitively expensive propriety software. Alternatively, if the Board does permit a railroad to submit evidence using expensive software such as Multi-Rail, the Board should require the railroad to first enter into arrangements with the software's owner that permits the shipper access to the same fully-

functional versions of the software the railroad is using in the case – under appropriate licensing arrangements and at no cost to the shipper.

Coal Shippers/NARUC also suggest that the potential use of Multi-Rail, or any other similar form of expensive, proprietary software, be discussed at the initial discovery staff conference Coal Shippers/NARUC are proposing, and that the Board address the use, or potential use, of any such software, and the licensing/payment arrangements for such use, in the post-conference discovery order called for under Coal Shippers/NARUC's proposed discovery procedures.

E. Briefs Should Be Tailored to Meet the Board's Needs

In the ANPR, the Board asked for comments on its proposal to limit final briefs to topics of specific concern to the Board. *Id*. at 6. Coal Shippers/NARUC support this approach, as do Carload Shippers. *See* Coal Shippers Comments at 60-61; Carload Shippers' Comments at 25.

Briefs are for the Board's benefit, and it makes sense that those briefs focus on issues identified by the Board. The only other commenter to address this issue, NS, disagrees. It believes briefs should be used to highlight issues the parties, not the Board, "believe are important." NS Comments at 47. By the time a case is briefed, the parties will already have had the opportunity in their prior submissions to highlight issues they "believe are important." *Id*. Limiting briefs to issues the Board requests is the more efficient approach.

F. Highly Confidential/Public Filing Dates Should Be Staggered

Under current Board rules, parties must simultaneously file public and highly confidential versions of their pleadings and evidence. The Board asked for comments on whether these rules should be changed to permit the sequential filing of highly confidential versions of pleadings and evidence, followed by the later filing of public versions, of the pleadings and evidence. ANPR at 2. Coal Shippers/NARUC supported this proposal in their Comments. *See id*. at 61-62. All other parties addressing this proposal also supported it. *See* NS Comments at 48; CSXT Comments at 39.

CSXT requests that parties prepare copies of "confidential" versions of their filings and submit copies of those filings to opposing counsel on the same date that the highly confidential versions of the filings are made by the Board. CSXT Comments at 39. Confidential versions of pleadings are not filed with the Board, and the timing of the production of these versions has, in Coal Shippers/NARUC's experience, been governed by agreements between the parties. There is no need for Board intervention in matters that have been, and should continue to be, subject to agreements between the parties.

Coal Shippers/NARUC continue to suggest that public versions of highly confidential filings be submitted to the Board no later than three (3) business days after the highly confidential filing is submitted. *See* Coal Shippers/NARUC Comments at 61.

G. Interactions with Board Staff Should Be Encouraged

In the ANPR, the Board observes that "numerous stakeholders expressed that increased interaction with Board staff during the all stages of a SAC case would be

beneficial." *Id*. at 7. The Board suggests several ways that staff involvement could be increased, including holding more staff technical conferences, and authorizing staff to submit written questions to the parties at all stages of a case.

Coal Shippers/NARUC agree that increased staff involvement should help expedite rate cases, and note that their proposed discovery procedures incorporate active staff involvement in the discovery process. All other commenters addressing this issue agree that increased staff involvement in SAC cases is a good idea. *See* AAR Comments at 8; CXST Comments at 40-41; NS Comments at 12; Carload Shippers Comments at 26-28.

CONCLUSION

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

Respectfully submitted,

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