CHAIRMAN NOBER: Thank you very much and I will just note that several folks have suggested returning to some thoughts from the negotiated rates days which I have to say is I consider something of an irony that anything about the negotiated rates situation anybody would view nostalgically.

Anyway, Commissioner Morgan?

COMMISSIONER MORGAN: Since I processed a lot of those cases, I agree.

(Laughter.)

Just a couple of questions. First of all, Mr. Sipe, the AAR has suggested an eligibility threshold which relates to the dollar amount at issue as I understand it. How did you come to that particular figure and that particular approach?

MR. SIPE: Well, this is an easy question for me because I came to it because this is the number that AAR included in its proposal to NITL which we conveyed to them last December. It was a starting party for discussions with NITL. That's the context in which it was intended and I believe it actually carried forward from a number we had espoused in the prior comments in 347 sub 2. But we didn't formulate the proposal for this proceeding.

COMMISSIONER MORGAN: Some would view that number as very low, that's why I was asking the question and it was, as I recall --

MR. SIPE: I sort of guessed that. I'm sure some would.

COMMISSIONER MORGAN: It was the suggestion that you all had made in the original proceedings, so the number does not reflect inflation or anything else clearly, given that.

MR. SIPE: It's probably higher than it would be if we had plotted the RCAF-A to it, but lower than if we had applied the RCAF-U. But what I would say and I don't mean to be facetious about this, but the number we came up with it in a context different from this proceeding before a rulemaking proceeding was adopted. And if the Board were to say we want to go in the direction of a clearly defined benchmark which is defined in terms of the value of what's at stake and put something out for comment, AAR would obviously assess that carefully and come in with a position in that proceeding.

COMMISSIONER MORGAN: Several of the witnesses have suggested certain process changes, discovery, deadlines, ALJs, and so forth.

Do you have any particular comments on any of those suggestions? Some of them, of course, reflect some of what we've pursued with respect to the larger cases.

MR. SIPE: I believe we said in AAR's written testimony that we would support expedited discovery, expedited procedures. I don't think there's any reason to have procedures that are any longer than necessary. All I would say in that regard is that whatever deadlines are adopted should be realistic, but we are comfortable with the idea of discovery reforms.

ALJs, I guess, I'm a little ambivalent on that issue. It's not something we have discussed at the AAR and I don't think I'm authorized to say there is an AAR position on ALJs. The concern, obviously, would be that ALJs don't expedite the process. Perhaps it represents and other step in the road and I'm not sure that's a good idea.

And it may be a little bit like mediators. If you get really good ALJs, it can facilitate the more expeditious resolution of the process, but if you get ones who are not all that great, then it doesn't help.

COMMISSIONER MORGAN: Mr. MacDougall, I take from your comments that one of your key concerns is about any processes that occur outside of a formal, open process?

MR. MacDOUGALL: Correct, particularly when they're the same people that are in on the merits are also the ones in on the -- trying to resolve some of the controversies.

I think the ALJ thing is a good idea. When we had it here, the ALJs' primary function as I saw it was to marshall the evidence and make a good report, at least give all the issues and everything and the Board could change the ALJ's ultimate conclusion. I don't see it's any -- the problem with the ALJ is the conflict with it's own staff. The ALJ people have a certain independence. They're apart from the process. They're usually older, more mature, have more experience. They're not just out of college, like your staff. So that's where the rivalry comes.

(Laughter.)

And new members --

COMMISSIONER MORGAN: Is our staff just out of college? I hadn't noticed.

(Laughter.)

MR. MacDOUGALL: And the Board Members tend to ask the ALJ's questions, even apart from their cases because they have a better background. And you've lost some good ALJs. Mr. Dolan that was here. He's now at the Federal Maritime Commission. He's doing the same type of work there. Great analyzing the evidence. Often the Board, the Commission there reverses him, you know. I think it speeds the process actually because they're experienced. They can really bat out a decision. Those are my thoughts.

COMMISSIONER MORGAN: Thank you, both.

CHAIRMAN NOBER: Well, thank you and I think I am almost 20 years out of college and I'm the seventeenth youngest person at the Board.

(Laughter.)

So if that's any help.

COMMISSIONER MORGAN: You did have to remind me.

(Laughter.)

CHAIRMAN NOBER: Not that I know that staff, but if I were to guess be that where it was.

Let me ask the both of you some more questions that I've asked everyone else which is we are struggling with what is the appropriate threshold for what constitutes a small case. The parties this morning have suggested that our current standards leave that question open and would leave that question subject to a great deal of uncertainty and perhaps litigation and cost which it may well be a legitimate concern.

Commissioner Morgan posed the question what do you think an appropriate standard would be and I guess you replied in your testimony $300,000 is the right -- is the AAR position at the moment. Is that correct?

MR. SIPE: $300,000 is the number that was contained in AAR's proposal to NITL. We haven't gone back and reassessed that number since this proceeding was instituted. That's something we obviously would take a look at down the road, but I am in favor of the bright line concept. I think that it's understandable that all parties to one of these cases would want to have more certainty as to where, at least a majority of the disputes would fall.

We can all imagine that there might be disputes that don't fit the common mold where you might need to go beyond a bright line standard. But it could work with the majority of disputes.

MR. MacDOUGALL: I think we have to know why people haven't brought complaints, to find out what the threshold might be satisfactory to that. It might be a chicken or

the egg question. And I'll refer you to the testimony of James Hagan who was the AAR witness at the hearings on this 347 sub 2 back in March of 1994. He was asked that question and there are problems. What is the -- how do you define a small shipper? And I think you should first find out why complaints aren't being filed period. Maybe the threshold amount is a factor. Maybe it is not a factor.

CHAIRMAN NOBER: The statute talks about coming up with expedited procedures for shippers for whom full stand-alone cost presentations is not, is too expensive or not cost effective. I have to read the exact words.

And we've had a lot of testimony both at this hearing and a prior hearing that the cost of those can run $1.5 million to $2 million for a shipper and Mr. Sipe, many of your witnesses at our last hearings said that on their -- that a railroad might spend $5 to $10 million on a SAC case. That was what our testimony -- that's what we got in our record in the last hearing.

So some of the witnesses this morning have suggested well, let's take a look at the $2 million number as one possibility because that's the ballpark of what they think a SAC case would cost.

What do you think of that?

MR. SIPE: I think that we can't on the basis of what we've heard so far in this proceeding look at a specific number and say that's what it would cost to do a SAC case. The reality is in the coal cases, they have become very expensive because there's so much at stake. And because a very small difference in the amount of the outcome can be worth so much. I mean the difference between a rate prescribed, just to pick an arbitrary number, 200 percent of variable cost and 210 percent of variable cost can represent millions of dollars. And so the parties are going to put resources into even subsidiary issues in those big coal cases.

I think you can do a stand-alone cost presentation for a lot less than the parties are spending on the coal cases because their effort is going to be somewhat commensurate with what's at stake. They're not going to spend more than what's at stake. But I would acknowledge that SAC cases are expensive. I just don't know how expensive they are for a dispute other than a coal rate dispute.

MR. MacDOUGALL: I would say here that one of the problems even with a rate comparison, the simplified thing is you have a state here which is the market dominance statute. There's the threshold and that's going to exist because the law says it exists, irrespective of whether you're going to use simple rate comparisons which makes it more easy for traffic people. So there's going to be a cost just on that market dominance which is you can't get away with it. You can't get away and avoid it. It's there, 10707.

CHAIRMAN NOBER: I mean clearly we would have to make a finding that variable cost was -- the rate was above 180 percent of variable cost, for example, right? That's statutory prescription.

If you all, as I suggested to all the other witnesses, do have any better ideas as to what the threshold ought to be, please submit them to us. We would encourage you to do so in advance of anything the Board might put out.

Now secondly, the area I'd like to just touch on a little bit is about the test for rate reasonableness in a small case and you've all, you've both heard a great deal of discussion and comment about that test and concerns about its application. So that the AAR has gone so far as to challenge it in Court.

Now help us understand what you think the right test ought to be. On the one hand, the AAR has challenged the current standard in Court. In your testimony, you indicate

that we ought not to change it, even though you've challenged it. But that if we do change it, we should only change it to a standard that would be legal under the Interstate Commerce Act which, of course, we would agree with.

Do you have any suggestions on what that might be? You basically put -- I mean your suggestions, if we follow them to their logical conclusion put the Board in a very difficult spot which is maintain a test that you don't think is legal, but if you change it, only change it to one that is legal. But what might that be? What should we do with that -- with your different points?

MR. SIPE: There are a lot of questions wrapped up in that and I'll try to respond to them.

First of all, AAR's position regarding the legality of the existing standard is really defined by the law, by what the Court of Appeals said. It's not defined by what we believed when we brought the challenge back in 1996, I guess it was. What the Court said is we can't determine the lawfulness of this standard based on the record of the rulemaking proceeding. We've got to decide the lawfulness of the standard as applied.

And so that's -- AAR accepts the finding of the Court, just as the Board accepts that it is somewhat constrained by past Court decisions involving rate comparisons, let's say.

We're not necessarily advocating that you maintain the existing standard. What we said in our testimony is we haven't seen a convincing basis for saying it should be replaced with something else. This something else we have advocated in the past was a simplified SAC which the Board rejected, in part, because under the model we developed the Board concluded it produced ridiculous results in certain cases.

If somebody wants to come back and propose a fine-tuned, simplified SAC, I'm sure we'd be interested in taking a look at that, given where we've been historically.

CHAIRMAN NOBER: Does the AAR feel that a simplified SAC is a better test than the one the Board adopted?

MR. SIPE: It did in 347 sub 2. We haven't talked about it anew and I really am not in a position to commit the organization.

CHAIRMAN NOBER: That's fair, but I would encourage you all to consider that question and get back to the Board as I've asked everyone else to, if you think that there is a better standard or one that the Board ought to adopt in lieu of the one that's currently in place to submit that to us.

I've asked all the witnesses to do that and would make the same request of you, if that's --

MR. SIPE: Fair enough. We'll certainly look at that.

CHAIRMAN NOBER: As for mediation, the parties this morning expressed a great deal of doubt about mediation being helpful which -- do you have any comment on that?

MR. SIPE: I have several comments on that. There was skepticism expressed about mediation in the context of 638 and I think the Board was realistic and the parties were realistic in Ex Parte 638 about the value of mandatory, but nonbinding mediation and that was the Board didn't see it as a panacea, but thought it could help in some cases.

As I said earlier this morning, it's not a panacea for small rate case disputes. But I think it would help in a larger number of cases, precisely because people, neither side wants to commit large resources to resolving small disputes. So I think it's of some value and I think when the shippers suggest that they'd prefer to go straight to the Board for relief rather than pursuing mediation, what they're really saying is if we know we could get a certain result from

the Board, that's what we want. We want rate relief. But that's not what the statute says. The statute doesn't say that every shipper who's unhappy about his rate that happens to be above 180 is entitled to rate relief. That's why the cases are uncertain.

CHAIRMAN NOBER: The statute says the rates have to be reasonable.

MR. SIPE: That's correct. And it says there's no presumption that a rate above 180 is unreasonable which surely means that Congress contemplated that rates above 180 could be reasonable.

CHAIRMAN NOBER: Commissioner Morgan, do you have any questions?

CHAIRMAN NOBER: No, I'm listening and taking notes.

CHAIRMAN NOBER: I have no further questions.

Mr. MacDougall, do you have anything to do?

MR. MacDOUGALL: Our position on compulsory mediation, I want to make that clear. I just would emphasize that you adopted your compulsory mediation along with technical conferences and discovery conferences and circumstantially increasing the role of the staff in that the real import of the -- in my judgment is to involve the staff more directly in the informal process.

CHAIRMAN NOBER: I would like to say that I appreciated your comments before about the public nature of our organization and the openness. Those are ones that I very much agree with and have taken a lot of steps to ensure are the case. So I appreciate your thoughts in that regard and appreciate you presenting the views of employees, and Mr. Sipe, I appreciate having you back again this morning or now this afternoon.

Commissioner Morgan, if you have nothing else for the good of the order?

COMMISSIONER MORGAN: Just a few comments to close out.

CHAIRMAN NOBER: Please.

COMMISSIONER MORGAN: First of all, I appreciate all the input we've had today. I think we've had an important discussion concerning eligibility issues, valuable suggestions on streamlining the process, reflecting what we've already done in the larger case arena. I think we've had some good dialogue on the existing guidelines and I'm sure they'll be further suggestions as the Chairman has asked for.

I think overall it's been a good contribution to the Agency's continuing focus on improving its processes as appropriate and from wherever I will be, I look forward to future installments in this matter.

CHAIRMAN NOBER: Well, thank you very much, Commissioner Morgan, and if you are not here when we issue our next, when we take our next step on this, you'll certainly be missed.

Again, I'd like to thank all the witnesses for their time and patience and thoughtfulness on answering all the questions today. They really were intended to help us and help me understand what the proposals are and help us make a better proposal which I hope to do in the not too distant future. So we appreciate your all taking the time to give us thoughtful, concerned answers and you know, take the time to come here and present us with information on this important topic.

So with that, thank you all again for coming and the Board stands adjourned.