MR. MORENO: I will start off. Good morning, Chairman Nober, Commissioner Morgan. I'm speaking, first, on behalf of the Fertilizer Institute, which is a national trade association of the fertilizer industry. Many of its members use rail transportation and have a keen interest in the small case guidelines.

TFI is also represented here today by Patrick Harmon, who is the North American Transportation and Logistics Manager for Cargill Fertilizer, which is a member of TFI, and Mr. Harmon is seated to my right.

TFI commends the Board for holding this hearing on a significant obstacle that prevents TFI members from benefitting from the statutory rate protections for captive shippers. TFI hopes this hearing will promote a constructive debate towards making the small rate guidelines more accessible.

TFI urges that the Board look at, consider, three principles in this proceeding. The first principle is that cases should be adjudicated far faster than the current guidelines provide. The 45 days just to determine if a shipper qualifies for small case status, discovery at best then takes an additional month at least, and probably two to three times that amount. The evidentiary phase consumes three months of time, and then the Board has six months to decide. By the time you are through this process, you have consumed at least a year, probably a little more.

The characteristics of most fertilizer movements do not justify many rate challenges that take a year or more. Unlike coal shipments, fertilizer shipments are not repetitive, year-after-year, origin-destinations movements. Their markets are changing constantly. Therefore, their destinations are shifting constantly. Demand waxes and wanes with economic conditions. Often, by the time a rate case is resolved, the challenged rate may no longer even be in use.

The second principle is that the process should be simpler and less costly. There are extra costs that are involved just to prove that a shipper is eligible for a small rate case status. Furthermore, the rules are silent on most discovery and procedural matters, where many costs are very significant. There is a need to expedite the discovery process, and we urge that the Board adopt something similar to what it did in the Ex Parte 638 proceedings for expedited Motions to Compel.

The third principle is that the standards for determining a reasonable rate need to be more predictable. The current standards do not allow a shipper counsel to reasonably advise the shipper whether it will qualify for small case status. Neither can we reasonably advise a shipper as to the time and the expense of a small case rate challenge. The range of likely outcomes, given the three benchmarks as mere starting points, is also quite random and is very unpredictable.

Shippers must be able to make a reasonable assessment of the case outcome in order to effectively weigh the costs and benefits of bringing a small rate case. This uncertainty also hinders the ability to enter into effective private negotiations with the railroads even before deciding whether to bring a case.

The benchmarks in the guidelines also suggest that a rate prescription would be far higher than the standalone cost rate presentation would be, which limits the benefits of a potential rate prescription in a small rate case.

TFI recommends that the Board adopt a bright-line qualification test for small case status that would be based on tonnage. TFI would also like to see the Board reduce the discovery, processing, and decision timeframes. For example, we urge the Board to adopt a

timeframe of four months from complaint to decision.

To help meet this timeframe, we recommend standardized discovery requirements such as requiring a shipper to produce certain market dominance evidence at the time it filed its complaint and requiring the carrier to produce certain cost evidence within 10 days after the complaint is filed. Also, shippers should be permitted access to the confidential weigh bill sample before they file the complaint.

TFI also urges the Board to consider the use of Administrative Law Judges to further this process and expedite it. However, we believe that any appeal from an ALJ ought to be on a deferential basis rather than a de novo review by the Board. Otherwise, the ALJ process simply becomes an additional hurdle that shippers must overcome.

We would like to see simplified standards, giving more predictability to current standards. We would also like the Board to develop standards for addressing other types of rail charges, such as fuel surcharges and car storage charges, which currently do not have any procedures in place.

But, ultimately, TFI favors mandatory binding arbitration. This is the argument they favored in Ex Parte 586. This would shorten and simplify rate disputes, and we urge the Board, although there may be some statutory changes necessary to adopt arbitration, we urge the Board to be out in front and take the lead in adopting and urging the necessary changes.

TFI thanks the Board for this opportunity, and I will now move on and present the testimony of the National Industrial Transportation League.

The League represents a broad cross-section of the shipping community, including members of all shipper organizations testifying today. The League commends the Board for taking a fresh look at the small case guidelines.

The recent procedural changes that were adopted in the Ex Parte 638 proceeding are a very positive step, and the League hopes that this proceeding will result in even more substantial review of the small case guidelines.

The current guidelines do not provide non-coal shippers with practical access to statutory rate protections. Indeed, they actually discourage the pursuit of such relief.

The League perceives four major flaws in the guidelines. Qualifying for small case status is costly and vague. The adjudication process is too long. The standards themselves are vague, which renders it impossible for a shipper to make rational judgments regarding the merits of a case. And the combination of these three factors often permits the railroads to drive up the costs for shippers to the point where they outweigh the potential relief.

In its review of the small rate guidelines, the League encourages the Board to accommodate the transportation circumstances that are faced by non-coal shippers. Unlike coal shippers, non-coal shippers typically do not transport huge volumes of a single commodity over a single-origin-destination pair year after year, often for 20 years or more.

They may, however, transport large volumes of freight over a bottleneck origin-to-interchange segment, but once they reach the interchange, they are dispersed to a wide number of destinations.

The STB, however, has precluded shippers from challenging bottleneck rates, even though those bottleneck segments may constitute a sufficient volume of traffic for a non-coal shipper to justify the expense of a rate complaint. Instead, the shipper is required to bring multiple origin-to-destination complaints, often none of which individually is financially or economically justified, but the combined effect is very harmful to the shipper.

Non-coal shipper demand for transportation to specific destinations changes

frequently. A non-coal shipper does not have, therefore, 20 years to recoup its litigation cost from a single-origin-destination pairing rate prescription. A small rate case may, in fact, last longer than the movement at issue.

A non-coal shipper's exposure to the high cost of a rate challenge is compounded by the prohibition on filing the complaint before a current contract ends. When a contract ends and there is no agreement on a new contract between the shipper and the railroad, the railroad frequently increases its rate immediately and the shipper must pay that rate throughout the duration of the rate case.

This tariff rate is often higher than the railroad's most recent contract offer to the shipper. Thus, even with the possibility of reparations, the shipper must pay these rates for a substantial and uncertain period of time.

If the shipper loses the case, it receives no reparations and it has paid a premium over the last contract rate it might have been able to get from the railroad for the entire duration of the case. Thus, the lengthier the case, the more costly it is to the shipper to litigate.

The cumulative impact of this lengthy and uncertain process is that the shipper cannot rationally calculate its cost exposure from a rate case. This uncertainty begins with a vague and expensive process of qualifying for small case treatment, especially the showing that CMP is unavailable, which requires that the shipper submit nine separate items in its complaint. The most problematic of these items is the estimate of the feasibility and cost of a SAC presentation, which, ironically, requires the shipper to hire a SAC expert to do that analysis.

Most shippers recognize that a SAC presentation for a single-origin-destination pair typically costs around $2 million. If the STB would also recognize this fact, this requirement of showing that CMP -- that the unfeasibility and cost of a SAC presentation would not be so onerous.

The League also is concerned that very few shippers may actually qualify for small case treatment under the current guidelines. When it adopted the current guidelines, the Board rejected an origin-destination tonnage test. The Board also rejected a test proposed by DOT of $1 million in annual freight bills, less than $1 million in annual freight bills.

But if the typical cost of a rate case is $2 million, a SAC presentation is economically feasible only when annual freight bills are several times that $2 million. Thus, it appears that shippers with rail bills perhaps greater than $1 million but less than perhaps $6 million fall into a gap, a gap which the Board should close.

The uncertainty of this qualification process discourages complaints because the shipper does not know what type of case to prepare and evaluate. Money spent on a small case analysis is wasted if the shipper does not qualify for small case status.

Yet, the current standards are too vague to give the shipper any predictability as to how the Board would rule. The shipper is then left to decide whether to spend additional money on a SAC presentation or to drop the case altogether.

The uncertainty of the current guidelines is aggravated by the adjudication process that takes too long. In total, it takes at least a year, if not more.

Also, the three benchmark standards that the Board has adopted are vague, and this vagueness discourages complaints. Although the Board adopted three standards, it did not provide any definitive guidance as to how those standards would be applied or how they would be weighed. In fact, the Board described the standards as mere starting points, leaving open the possibility there are other standards that would be considered that have yet to be identified.

One of these three benchmarks, the revenue of variable cost comparison, cannot

even be evaluated by a potential complainant prior to filing the small rate case because the shipper is denied access to the weigh bill sample until after the complaint is filed.

The other two standards, which can be based on publicly-available information, appear likely to yield a rate that is far above what a SAC rate would be. These standards make it nearly impossible for a shipper to weigh the costs and risks of the rate case against the likelihood of success.

The League agrees with TFI recommendations for a bright-line test for origin-destination pair based on tonnages to determine qualification for small case treatment. The League also supports a four-month processing time with standardized discovery, pre-complaint access to the weigh bill sample, expedited Motions to Compel, and the use of ALJs with a high standard of review.

The League also urges the Board to provide better guidance as to how the benchmarks will be applied, if the Board chooses to retain the current benchmarks, or the League would like to see the Board consider adoption of a new standard, perhaps a direct rate comparison similar to the types of direct rate comparisons that have been used in motor carrier cases in the nineties.

The League also is an avid supporter of mandatory expedited arbitration and urges the Board to take the lead in advocating any necessary legislative change to bring about such arbitration. The League also has suggested that the Board explore the conceptual base in model standalone cost.

Whether it will work or not we are uncertain, but we think that at least there has been over a decade, nearly two decades, of experience in standalone cost cases, which may allow for the Board to develop some standards that might be used in a model, something that may not have been available when the Board originally considered these guidelines. We recognize this may not work for all commodities and all routes, but we think it is a concept that ought to be explored at this point.

Although the League commends the Board's efforts to review the small case guidelines, it believes that pro-competitive solutions would be even far better and lasting than simply fixing the procedural and substantive rules for small rate cases. The League, therefore, would like to see the Board fix the terminal access rules by eliminating the requirement of anticompetitive action and giving consideration to the Canadian system of intraterminal switching.

The League also urges the Board to re-examine the bottleneck decisions. Most monopoly pricing occurs over the bottleneck segment, and all origin traffic from a small shipper moves over the bottleneck, making such relief for just that segment more meaningful and more cost-effective for shippers. This also would allow competition to set the rates for non-bottleneck segments.

The League thanks the Board for the opportunity to present its testimony in this case and looks forward to participating in future stages of this proceeding and taking your questions at the conclusion of this panel.

CHAIRMAN NOBER: Thank you very much.