MR. SIPE: Thank you, Chairman Nober, Commissioner Morgan. I'm happy to be here this morning on behalf of the Association of American Railroads. We, the Association has been involved in these vexing issues for quite a while, having gone through the 347 sub 2 rulemaking proceeding and they are vexing issues. It would be nice if we could bring back Louis Brandeis to help resolve, but we're not going to be able to do that.

I want to take just a few minutes this morning to highlight some of the points made in AAR's written testimony and place those points in the context of the testimony the other parties submitted and what we've heard this morning.

As you know, AAR is advocating that the Board adopt mandatory nonbinding medication as a mechanism to encourage private resolution of small rate case disputes. AAR's mediation proposal addresses at least three of the concerns that have been expressed regarding the existing guidelines and procedures in small rate case disputes.

First, mediation is a less adversarial way of trying to resolve a dispute than litigation. The on-going business relationship is less likely to be disrupted. In fact, mediation contemplates bringing the business people together under the auspices of a neutral third party objective observer.

Second, mediation is less expensive than litigation. And third, presenting a rate dispute in mediation can be considerably less complex than bringing such a dispute before the Board. And I think modeling a downsized mediation process on a mediation process the Board recently adopted in Ex Parte 638 could allow for a very quickly paced initial effort at resolving a dispute.

Now we're not saying that mediation is going to resolve all the disputes that might come before, might be brought to the Agency's attention. But I think it's frankly more likely that mediation will be successful in the small shipper context than in the large shipper context because frankly, there's less at stake. The railroad's don't want to expend valuable resources on small shipper litigation any more than the shippers do. If there's a legitimate controversy and some rational basis for compromise, the railroads want to reach that resolve and if they can do it through mediation without committing resources, that's the best way to try to approach these matters, at least in the first instance.

Now I will acknowledge that mediation is not necessarily going to resolve uncertainty. That's one of the concerns we've heard the shipper interests speak, the uncertainty of the rate dispute process. And I think the reason for that, as Chairman Nober alluded to earlier, is that litigation in controversies are inherently uncertainty. If everybody knew the outcome in advance, there wouldn't be a dispute because you'd reach the settlement without expending the resources. But we don't.

What mediation does do regarding uncertainty is that it addresses it by putting boundaries around uncertainty. Mediation can help the parties quantify what's at risk in an uncertain situation and it precisely is designed to help them put an end to the risk by reaching a compromised solution.

Now you never hear people coming out of mediation saying "I won." Successful mediation always involves both parties coming out saying "I didn't get everything I wanted, but I had to give a little bit, but now I've got certainty. The risk is over."

We think that's a likely outcome, if mediation of small rate disputes is proposed.

Also, mediation will not address the concern that I've heard that the existing guidelines don't offer the promise that shippers will achieve a certain result. We think this concern about the result that might be achieved using the current guidelines is misplaced. The

fact that a standard does not guarantee a particular level of relief does not make that standard a bad standard. Mediation can, however, help a shipper determine whether its claim for relief is realistic by allowing a neutral third party observer to assess that claim.

Now regarding the elements of mediation that the AAR has proposed, I just want to mention a couple of features. First of all, we have proposed nonbinding mediation and I recognize that other parties have talked about the desirability of binding arbitration, but we've all been through that in the Ex Parte 586 proceeding and as Commissioner Morgan mentioned, there was no consensus on binding arbitration.

I would point out that the parties to a dispute can always agree to binding arbitration. They can agree at any point. A matter can be submitted to nonbinding mediation and one outcome of that is that the parties could agree to arbitrate the dispute.

What AAR opposed in 586 is the notion of compulsory arbitration because that's not the voluntary workings of a private process.

The other point I would mention regarding the elements of our proposal is the standard for mediation. Obviously, a mediator is not applying the law the same way an Administrative Law Judge or the Board is, but we believe a mediator should at least be cognizant of the statutory standards and that a mediation standard should, as we say, draw its essence from the ICCTA which for us means a recognition of the need for differential pricing in the railroad industry and a recognition of the statutory objective that railroads be given an opportunity to earn adequate revenues.

Let me turn briefly to the standards that would apply in the absence of mediation, if mediation is not successful and I recognize that if it's adopted, it won't be successful in all instances.

There are really two issues here. The first one is defining eligibility for small rate case treatment. AAR believes that the statute tells the Board which direction you need to go in terms of how you craft the definition and that is a definition in terms of the value of what's in dispute in the case. That's the statutory standard. And we think that has to be used.

We also would be comfortable with the Board adopting a bright line test as at least a presumption for defining eligibility for small rate case treatment, if that bright line case is defined in terms of the value of what's at stake in the case.

The idea that I heard expressed earlier this morning by Mr. Keith about having a rebuttable presumption that the shipper is entitled to small rate case treatment if that's what the shipper elects, is not a good idea in AAR's view. And the reason for that is that these standards that the Board adopted in 347 sub 2 and presumably whatever comes out of this proceeding, are recognized as a second best standard. It's a substitute. It's not full CMP. Full CMP is the best and most reliable standard the Board has. And if you're going to have some kind of fall back which may not achieve the same precise results as CMP, the burden has to be on the party that wants to use those standards to prove that they should be applied in any individual case.

Regarding the standards themselves, AAR, as we mentioned in our comments, did challenge the 347 sub 2 standards when they were promulgated. We took that case up to the D.C. Circuit. The Court ruled that that challenge was not ripe for review and what that means is that any future challenge to those standards, if there was one from the rail industry, would be brought by an individual defendant in an individual case.

We don't think that there is evidence, hard evidence of a widespread need for new standards. We've heard in this proceeding a reference to one specific shipper that wanted to be able to bring a rate case and felt that it wasn't feasible to do so and a reference to a second

unidentified shipper. There probably are some others out there. I'm not saying that there are none, but I don't think we know that there are large numbers of shippers with small rate case disputes who have refrained from bringing them. You don't have that record before you.

I do believe that Mr. Smith's suggestion that the Board try to quantify the amount of traffic that might be at issue in these proceedings is a worthwhile endeavor, not necessarily the main focus of what the Board should be looking at, but just so that we can all get a handle on what's really at stake in these cases.

And with that, I will pass the baton to Mr. MacDougall and be happy to answer any questions you may have later.