

20 CHAIRMAN NOBER:

21 We have with us Nicholas DiMichael, on

22 behalf of a very long list of groups, which are in

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1 the record and I need not repeat now. Mr.

2 DiMichael?

3 MR. DIMICHAEL: Chairman Nober, Vice  
4 Chairman Mulvey and Commissioner Buttrey, my name is  
5 Nicholas DiMichael, and I appear today on behalf of  
6 a large number of national organizations  
7 representing users of the rail transportation  
8 system.

9 These organizations represent an  
10 extremely broad spectrum, among them a variety of  
11 agricultural interests, including major national  
12 farm and agricultural organizations, and various  
13 state weed and barley interests. These also include  
14 chemical producers, industrial producers, fertilizer  
15 shippers and a number of others.

16 A number of these organizations have  
17 representatives in the hearing room. Though I've  
18 have been designated as spokesman of the group for  
19 this hearing, if the Board has any questions dealing  
20 with particular commodities, I'll be able to call  
21 upon these people for assistance.

22 I would also like to inform the Board

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1 that the National Petrochemical and Refiners  
2 Association has asked me to convey to the Board  
3 their desire to be added to the list of  
4 organizations sponsoring the joint written testimony  
5 that was submitted on July 16<sup>th</sup>. I'll be submitting  
6 a letter to that effect later today.

7 I'm very pleased to be able to appear  
8 before the Board. I'm particularly honored to be  
9 able to appear for the first time before Vice  
10 Chairman Mulvey and Commissioner Buttrey, and I also  
11 want to extend my sincere congratulations on your  
12 appointment.

13 I will tell you that the participation  
14 of these organizations represents and demonstrates  
15 the substantial interest of the community of rial  
16 users in this proceeding.

17 The fact that all of these organizations  
18 have joined in a single submission of written  
19 testimony testifies to the unity of the community of  
20 rail users that substantial changes need to be made  
21 to the Board's small rate case procedures.

22 It also testifies to the desire of these

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1 organizations to be as helpful as possible to the  
2 Board, in presenting a single set of  
3 recommendations. I would note that the joint  
4 written testimony submitted on July 16<sup>th</sup>  
5 incorporates and builds upon joint comments  
6 submitted last year by 17 of the organizations  
7 submitting the current joint written testimony to  
8 the Board.

9 There's no doubt that a change in the  
10 Board's rules for small rate cases is sorely needed.  
11 Under the Board's statute, all captive shippers, and  
12 as Chairman Nober mentioned before, these are  
13 shippers with -- who are market-dominant, and have  
14 rates in excess of 180 percent of these captive  
15 shippers, have a right to a reasonable rate.

16 As Chairman Nober testified to the  
17 Congress, the shippers who feel they have been  
18 charged an unreasonable rate have a right to have  
19 that complaint heard by the Board in a fair,  
20 impartial and economical manner. That is part of  
21 our, as Chairman Nober said, fundamental charge from  
22 the Congress.

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1                   We emphatically agree with you, Chairman  
2 Nober. The Board's processes and procedures must  
3 allow for the practical exercise of a captive  
4 shipper's right to have the Board decide a  
5 reasonable rate, not only for large coal shippers  
6 but also for other shippers with movements that are  
7 far smaller.

8                   It's been almost eight years since the  
9 Board, at the request of Congress, issued its small  
10 rate case guidelines, and since that time, not a  
11 single case has been filed. Though some would argue  
12 that this lack of use of the Board's small rate case  
13 procedures demonstrates there are no shippers out  
14 there who are unsatisfied, that is emphatically not  
15 the case.

16                   A 1999 GAO report found that of 700 rail  
17 shippers surveyed, a significant percentage reported  
18 paying rates that they regarded as excessive, but  
19 they felt that they had no regulatory recourse.  
20 Shippers in that survey cited the time, cost and  
21 complexity of rate cases, and the poor prospects for  
22 relief.

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1                   In fact, the Board's current small case  
2 rules unintentionally establish substantial barriers  
3 to bringing a small case. Instead of guarding  
4 against complexity, they invite it. Instead of  
5 speed, they really set few, if any, time limits on  
6 the litigation or on the decision.

7                   Potential complainants do not know  
8 whether small rate case procedures will be used,  
9 what evidence will be considered, how long the case  
10 will take, and therefore, and perhaps most  
11 critically, how much the case will cost.

12                   These interested parties emphatically  
13 agree that the uncertainty of small rate case  
14 procedures appear to be a major reason why no cases  
15 have been brought using the small case process.

16                   The goal should be to provide a  
17 balanced, simple, clear, quick and inexpensive  
18 process for deciding smaller rate cases. Complexity  
19 drives up the cost of any litigation, including  
20 litigation before the Board, and given the smaller  
21 amounts at stake by definition in a small rate case,  
22 complexity and cost will terminally chill the

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1 exercise of the statutory right to reasonable rates  
2 for many small rate disputes.

3 Parties also need the assurance of a  
4 system featuring relatively straightforward  
5 eligibility and substantive standards, so that they  
6 can predict, to some reasonable while necessarily  
7 imperfect degree, what cases qualify for small rate  
8 case procedures, and which rates are likely to be  
9 found unreasonable.

10 I would note very importantly at the  
11 outset, that the interested parties are not asking  
12 for a rote determination of reasonableness or for  
13 perfect certainty going in. We understand that any  
14 standards will have to be fleshed out in actual  
15 litigation.

16 However, the level and degree of  
17 uncertainty in the Board's current guidelines can  
18 and should be reduced, and later in my statement  
19 I'll address some of those specifics.

20 It's seminally crucial for small rate  
21 cases to be decided expeditiously. The economy is  
22 changing rapidly. The Board's procedures must

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1 reflect business needs, and procedures that result  
2 in decisions in years rather than a few months, will  
3 simply not be relevant to the business needs of  
4 transportation users.

5 Finally, and perhaps one of the most  
6 important matters, is that clarity, predictability  
7 and speed will enhance the potential of private  
8 settlements, since both parties will be able to make  
9 a more accurate assessment of their risks, and both  
10 parties will know that the risk will come to pass  
11 quickly.

12 In short, if the small rate case process  
13 becomes more effective, it is more likely that  
14 customers and suppliers will conduct balanced  
15 negotiations, leading to private resolutions rather  
16 than Board-ordered relief.

17 Let me talk a little bit about the  
18 specifics of our filing, and some of the specific  
19 recommendations. Let me first address what we have  
20 characterized as a bright line test for eligibility.

21 Under the statute, the Board is required  
22 "to establish a simplified and expedited method for

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1 determining the reasonableness of challenged rail  
2 rates, in those cases in which a full stand-alone  
3 cost presentation is too costly, given the value of  
4 the case."

5 The statute thus clearly links the use  
6 of the small rate case standard to the cost and  
7 value of the small rate case, compared to the cost  
8 of a stand-alone cost presentation.

9 This is crucial. In deciding who should  
10 qualify for small rate case procedures, the Board  
11 must take into account the current very high cost of  
12 a stand-alone cost presentation. The cost of a SAC  
13 case, we believe, is in the neighborhood of \$3  
14 million and probably going up.

15 There are only two buckets, I would tell  
16 you, in this matter. There is a SAC bucket, and  
17 there is a smaller rate case bucket. The fact that  
18 the SAC bucket costs so much and takes so long has  
19 got to be a direct driver to what you decide, as to  
20 who should be qualifying for small rate case  
21 procedures.

22 If the SAC bucket we could just wish

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1 were smaller, then perhaps that would have an effect  
2 upon the cases that qualify under the small rate  
3 case procedures. But it does not.

4 SAC is a long, expensive process, and  
5 therefore you have to take that directly into  
6 account in deciding what cases qualify under the  
7 small rate case procedures.

8 These interested parties believe that  
9 there should be a greatly simplified standard,  
10 bright line standard of eligibility, so that  
11 potential complainants will know what movements  
12 qualify for small rate case treatment, and what  
13 movements do not in at least a very large majority  
14 of potential cases.

15 Interested parties believe that the  
16 simplest and most objective way of determining the  
17 link between the cost and value of the small rate  
18 case, compared to other cost of a stand-alone cost  
19 presentation, would be to utilize the amount of the  
20 shipper's annual freight bill between an origin and  
21 destination pair, combined with certain reasonable  
22 judgments.

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1           As noted above, the interested parties,  
2 believe that a conservative estimate of the cost of  
3 a typical SAC case is \$3 million. A multiplier of  
4 three would reasonably compensate for litigation  
5 risk, and a potential 25 percent rate reduction over  
6 five years is a probably very generous estimate of  
7 potential recovery.

8           If you combine these four factors, it  
9 leads to a mathematical calculation that if the  
10 shipper's annual freight bill from the complained of  
11 rates would need to be at least \$7.2 million, to  
12 rationally justify a SAC case.

13           Therefore, any freight bill lower than  
14 that, between a single origin-destination pair,  
15 should qualify for small rate case treatment. If it  
16 can't economically be justified to bring a SAC case,  
17 then you have to be in the other bucket. You have  
18 to be in the small rate case bucket, and we think  
19 the rules should basically account for that.

20           We also believe that the Board's  
21 eligibility rules should provide at least for the  
22 possibility that in a particular case, a movement

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1 whose yearly freight bill does not meet that  
2 standard should at least be able to show that in a  
3 particular case it should be, that this should be  
4 adjudicated under the small rate case treatment.

5           There are going to be cases that are  
6 doubtful, that are close, that are at the line. In  
7 those cases, you shouldn't be automatically thrown  
8 over in to the SAC standard, but you should at least  
9 be given the opportunity to show that your case,  
10 given the specific factors, should qualify for small  
11 rate case treatment.

12           Finally, we strongly, strongly oppose  
13 the position of the AAR, that the Board should  
14 identify a subclass of cases brought by truly small  
15 shippers.

16           First, the AAR suggestion is contrary to  
17 the statute, which recognizes only two categories of  
18 complainants: those litigated under -- excuse me,  
19 two categories of complaints. Those litigated under  
20 the stand-alone cost standard, and those cases in  
21 which "a full stand-alone cost presentation is too  
22 costly, given the value of the case."

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1           There is no provision in the statute for  
2 special eligibility rules for the truly small  
3 shipper as a third category of complaint. The AAR's  
4 argument is inconsistent with the statute's focus on  
5 the value of the case, not the size of the shipper.

6           There is no support for the AAR's  
7 suggestion in a letter sent to the Board last year,  
8 that non-coal cases would be less costly than coal  
9 cases. We think in fact past history has shown that  
10 that is not true, and there is no reason to believe  
11 that a non-coal case would be any less costly, any  
12 less -- that a non-coal SAC case would be any less  
13 costly than a coal SAC case.

14           In sum, the Board should develop rules  
15 that attempt to fairly and reasonably identify the  
16 universe of possible cases that qualify for small  
17 rate case treatment, under the statutory value of  
18 the case standard, leaving a degree of flexibility  
19 to account for individual or unusual circumstances.

20           Let me turn to the substantive standards  
21 that are set forth in the Board's 1996 decision. On  
22 this matter, we believe that the existing guidelines

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1 do not provide a clear standard that complainants  
2 know they must satisfy in order to obtain leave.

3 As I said before, we're not asking for a  
4 road or an absolute mathematical certainty going in,  
5 and we certainly recognize that whatever you  
6 standards you do will have to be fleshed out in  
7 actual litigation. But there are improvements that  
8 we think can be made.

9 Specifically, and these are set forth in  
10 more detail in the written comments, that we believe  
11 the Board can and should clarify what type of  
12 "individualized pricing considerations" that are  
13 mentioned in the Board's decision, might be relevant  
14 in a particular case.

15 The Board might clarify the types of  
16 efficiency considerations that might be significant  
17 in choosing the efficiency-adjusted RSAM or the non-  
18 efficiency adjusted RSAM.

19 We think that the Board might be able to  
20 clarify what should be considered similar traffic  
21 for purposes of the RVC benchmark. We think that  
22 the Board ought to think of weighing the three

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1 factors by preparing responses to at least several  
2 examples, applying various combinations of the three  
3 benchmarks.

4 These are not asking you to tell us with  
5 precision, but we are seeking additional clarity.

6 Concerning the RSAM benchmark which I  
7 just mentioned, the Board has stated that RSAM  
8 supplies a key component of the simplified rate  
9 reasonableness analysis because it accounts for a  
10 railroad's need to earn adequate revenues.

11 But it appears to us, and we've been  
12 frankly just investigating this, but it appears to  
13 us that the RSAM does not in fact measure a  
14 carrier's existing shortfall from revenue adequacy,  
15 and in fact it appears under the Board's procedures  
16 that a carrier's revenue might even exceed the level  
17 of revenue adequacy and the carrier may still have a  
18 very high RSAM.

19 What we would be seeking here is that  
20 the Board should, in any rulemaking that follows  
21 from this hearing, the Board should explain its  
22 methodology for calculating the RSAM, explain its

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1 rationale for calculating the methodology in that  
2 particular way, and then seek comments from the  
3 public on the appropriate way to compensate, excuse  
4 me, on the appropriate way to calculate the RSAM.

5 Finally, let me shift to the topic of  
6 procedures for small rate cases, and we've set forth  
7 these in fair detail in our written comments, but  
8 just simply to summarize here.

9 We believe that the Board should make  
10 very substantial changes in its procedures for  
11 litigating small cases, and adopt procedures to  
12 expedite those cases.

13 These new procedures should include the  
14 following: Active management of a small rate case  
15 by an administrative law judge, with high standards  
16 for interlocutory appeals.

17 We believe there can be standardized  
18 discovery, to expedite the initial processing of the  
19 case, with limited additional discovery in specified  
20 areas.

21 We think that there should be expedited  
22 determinations of small case eligibility by the ALJ,

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1 where the bright line standard perhaps is not met.

2 We think that there should be access to  
3 the confidential waybill sample upon certification  
4 by a potential complainant that information will be  
5 used to evaluate a possible small rate case  
6 complaint.

7 We think there should be expedited  
8 processing of motions to compel, and I think most  
9 importantly, expedited and clearly-established time  
10 frames for the submission of evidence, for the  
11 briefs filed at the same time as the submission of  
12 evidence, and a specified time frame for decision by  
13 the ALJ, within five to six months after the filing  
14 of a complaint, and expedited appeals to the full  
15 Board, with a specified time frame.

16 These are all, we think, practical,  
17 reasonable suggestions that the Board should closely  
18 investigate, to speed the processing of small rate  
19 cases.

20 In conclusion, we very much appreciate  
21 the opportunity to appear before the Board. We  
22 applaud the Board for initiating the process,

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1 designed to lead to substantial changes in its small  
2 rate case rules.

3 We respectfully request the Board to  
4 review the suggestions in our joint written  
5 testimony, and to take steps to adopt these  
6 suggestions as revisions to the Board's rules.

7 I've attempted to keep well within my 20  
8 minute time frame, because I do feel that there  
9 would be valuable time and purpose here spent in  
10 answering questions, and I'd be very pleased to do  
11 so.

12 CHAIRMAN NOBER: Thank you very much.  
13 Commissioner Buttrey, we'll start with you.

14 COMMISSIONER BUTTREY: In asking this  
15 question, I want to make sure that everyone  
16 understands I'm not questioning Mr. Parsons'  
17 previous witnesses' veracity at all. He said he  
18 didn't have any rate complaints, and if he says he  
19 didn't have any rate complaints, as far as I'm  
20 concerned he didn't.

21 But his company represents or operates  
22 in Ohio, West Virginia, Pennsylvania and Maryland,

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1 and presumably he made a valiant effort to get as  
2 many comments back as he could. And yet there were,  
3 I think he said, no rate complaints.

4 Do you think that has something to do  
5 with how good a job they're doing, or do you think  
6 it has to do with their geographic location? Do you  
7 think it has to do with their customers? Do you  
8 think it has to do with just the nature of the  
9 business that he has or, I mean, how do you explain  
10 that?

11 Some people say there's just a lot of  
12 rate problems out there. Some people say there are  
13 not so many, and if there were, they'd bring us that  
14 case. I mean, can you speak to that for me?

15 MR. DIMICHAEL: Let me try. I noted  
16 that Mr. Warchot commented that perhaps some of the  
17 large railroad marketing people didn't do quite as  
18 -- may not do quite as good a job as Mr. Parsons'  
19 people do.

20 I think it's fair to say, frankly, that  
21 small railroads provide very, very close and  
22 responsive service and information to their

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1 customers.

2 In my own experience, I do not hear very  
3 many complaints about service or rates from short  
4 line rail carriers, because there is a close  
5 business relationship between them.

6 I think that business relationship would  
7 go a long way in explaining Mr. Parsons' experience.

8 CHAIRMAN NOBER: Commissioner Mulvey.

9 VICE CHAIRMAN MULVEY: If the AAR is  
10 correct, revenues could fall by as much as \$3  
11 billion if the shippers' bright line test were  
12 adopted, and this could in lead to a considerable  
13 disinvestment in the infrastructure, or certainly  
14 reduce maintenance.

15 How do you respond to that potential  
16 problem? I'm always told that shippers, while rates  
17 are at issue, believe the quality of service and  
18 reliability of service are far, far, far more  
19 important.

20 If the railroads don't have sufficient  
21 revenues to invest in their infrastructure, then  
22 while you may get lower rates, service and

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1 reliability will decline. Isn't that, after all,  
2 really more important to your clients?

3 MR. DIMICHAEL: Let me respond by  
4 saying, first of all, I think, with all due respect  
5 to the AAR's numbers, I think they are wildly and  
6 incredibly and massively overstated, not to put too  
7 fine a point on that.

8 VICE CHAIRMAN MULVEY: Just tell us how  
9 you really feel on that.

10 (Laughter)

11 MR. DIMICHAEL: The Board before talked  
12 about, I think Commissioner Mulvey, you in fact  
13 talked about some of the flaws in those numbers.  
14 Certainly some of those numbers don't count for  
15 shippers who are not market-dominant.

16 That particular numbers assumes if every  
17 single shipper, every single small shipper is going  
18 to bring a rate case, and every single result of  
19 every single one of those rate cases is going to be  
20 proscription of a rate at 180 percent, the Board's  
21 factors, and this I think is the real answer, the  
22 Board's factors, we think, do consider the statutory

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1 requirements.

2 In fact, Mr. Warchot, in his testimony,  
3 indicated that the Board's factors do not  
4 necessarily result in an unlawful rate. What this  
5 Board has is a responsibility to all shippers, large  
6 shippers and small shippers, to adjudicate a rate  
7 consistent with the statutory standards. That's  
8 what Congress has said.

9 I think that that is the sum and  
10 substance of the answer. If the rates that are  
11 adjudicated by this Board, leaving everyone who has  
12 the right to a reasonable rate, to have access to  
13 that right, if it leaves them with rates that are  
14 consistent with the statutory standards, that is the  
15 end of the issue. That is all that you need to do,  
16 and that's all that the shipping community can and  
17 should be satisfied with.

18 VICE CHAIRMAN MULVEY: A simplified SAC  
19 test, then, should lead to rates that are generally  
20 above the 180 percent of variable cost, as they do  
21 in the coal rate cases, correct?

22 MR. DIMICHAEL: The coal rate cases,

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1 over time, some coal rate cases have resulted in the  
2 rates at the jurisdictional threshold. Some of the  
3 coal rate cases have resulted in rates far, far  
4 above the jurisdictional threshold.

5 The most recent *XL* decision, I think,  
6 resulted in a revenue to variable cost ratio of  
7 close to 300 percent.

8 VICE CHAIRMAN MULVEY: You mentioned the  
9 *Excel* case in your testimony. You said that it's  
10 led to greater cost and complexity in bringing rate  
11 cases. Could you explain that, why you think the  
12 *Excel* decision has caused the costs to rise?

13 MR. DIMICHAEL: I do not mean to say  
14 that it is only the *XL* decision, because certainly  
15 that is not my true --

16 VICE CHAIRMAN MULVEY: It's the only one  
17 I've been involved in, so I think that's --

18 MR. DIMICHAEL: It's the most recent one  
19 for sure. But I think what has happened in the  
20 process over the years, the stand-alone case  
21 standard was always expensive, and it was always  
22 long and always difficult.

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1 I think it has gotten more expensive,  
2 even lengthier and more difficult, as people have  
3 put in new evidence. Then the next case, the  
4 evidence goes even further. Then the next case, the  
5 evidence goes even further than that. The dynamic  
6 which occurs in a large rate case seems to lead to  
7 greater and greater complexity.

8 So, you know, definitely the *XL* case  
9 didn't represent some quantum leap or anything else.  
10 It was just the latest in a series of the SAC cases  
11 that led to the situation where we're in now, where  
12 to do a SAC case is a \$3 million plus, and three  
13 year plus, piece of work.

14 VICE CHAIRMAN MULVEY: Thank you.

15 CHAIRMAN NOBER: Mr. DiMichael, let me  
16 follow up on Vice Chairman Mulvey's question, which  
17 is -- and put a somewhat sharper point on it, if you  
18 will, which is many of the people you represent,  
19 members of almost all the groups, have been on the  
20 phone with me, requested customer forms from me,  
21 called, e-mailed, written and complained about  
22 service.

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1                   How would those same customers square  
2                   the fact that putting aside what number you would  
3                   put on it, small rate cases will have a negative  
4                   effect on railroad's revenue.

5                   How would they square the service  
6                   complaints and calls that I get on a daily basis  
7                   from the very people you're representing, with their  
8                   desire at the same time to see some cap on their  
9                   rates, or some limit to their rates, in which case  
10                  railroads would have less revenue and it would  
11                  exacerbate the very problems they're calling on the  
12                  other hand about?

13                  MR. DIMICHAEL: I think first of all  
14                  individual companies are very sensitive to the  
15                  railroad's needs for the revenues -- obviously  
16                  shippers are the railroad's best customers. Large  
17                  shippers are the railroad's best customers. Smaller  
18                  shippers are the railroad's best customers. They're  
19                  all the railroad's best customers.

20                  It seems to me that shippers are  
21                  sensitive about the needs for railroads to have the  
22                  revenue that they need. But I think shippers are

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1 also sensitive that there are certain instances in  
2 which railroads are exercising a pricing power that  
3 in the individual instance is not fair.

4 I think that is part of the balance that  
5 the Board draws, and that individual shippers draw,  
6 when they're dealing with their own carriers. If  
7 the railroads make in the business discussions a  
8 case for, a reasonable case for the rates that  
9 they're charging, my experience is shippers listen  
10 to that in a case.

11 CHAIRMAN NOBER: Well, I mean, this is a  
12 point I made with the railroad panel before, which  
13 is -- I mean, the question as to what rates are  
14 regulated is not at issue here. I mean, that's  
15 settled; it's in the statute. It's not being  
16 changed here.

17 In fact, we have complied with the  
18 Congress' mandate, to say that there would be  
19 simplified procedures for cases in which a SAC is  
20 too expensive. That's in place too.

21 What at least to me we're looking at are  
22 what are the reasons that it hasn't been used, and

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1 are there changes that could be made to the  
2 procedures, that would help us get there?

3 I asked last year if there should be a  
4 new standard, and nobody has suggested that there  
5 ought to be. In fact, you're not even suggesting  
6 that there ought to be more clarity and we'll come  
7 to that in a minute.

8 So to sort of come back to the carriers'  
9 point, that if we're looking at just procedurally  
10 what types of shippers ought to have an easier,  
11 there ought to be some procedural changes for, why  
12 shouldn't we take into account the size of the  
13 shipper? Why is that not relevant? Why is that  
14 contrary -- how is that at all contrary to the  
15 statute?

16 MR. DIMICHAEL: Well, let me maybe talk  
17 about that in two or three different slices. First  
18 of all, I think the statute clearly talks about the  
19 value of the case, not the size of the shippers. We  
20 were focusing on that.

21 CHAIRMAN NOBER: Correct. We have  
22 procedures in place that are non-SAC procedures,

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1 where the value of the case is too expensive. Then  
2 if, as they say, for a certain subclass of shippers,  
3 we should presume that they could use them.

4 How is that contrary to the statute?  
5 You asserted it was?

6 MR. DIMICHAEL: Well, because -- well,  
7 the size of the shipper, it seems to me, is not a  
8 factor for you to be considering. The size of the  
9 case is the factor for you to be considering.

10 CHAIRMAN NOBER: But the ultimate  
11 question is who gets to use the tripartite measure,  
12 if you will, right? Their proposal wouldn't alter  
13 who gets to use it; it would just presume some  
14 people automatically get to, and others would have  
15 to prove it, right?

16 MR. DIMICHAEL: The problem with that is  
17 that the Board's statute also says there should be a  
18 simplified and expedited procedure.

19 CHAIRMAN NOBER: And we have those.

20 MR. DIMICHAEL: But it seems to me that  
21 what you've got here is that you've got an  
22 eligibility rules, or really a lack of eligibility

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1 rules, that really chill shippers' rights and  
2 abilities to access, because they don't know. It  
3 seems to me --

4 CHAIRMAN NOBER: Well, that may be bad  
5 policy, but is that -- I mean, you may argue that's  
6 bad policy, but is it contrary to the statute, which  
7 you asserted it was?

8 MR. DIMICHAEL: It seems to me that the  
9 size of the shipper aspect is contrary to the  
10 statute, because you're looking at the value or you  
11 should be looking at the value.

12 CHAIRMAN NOBER: Well, we wouldn't be  
13 changing the standard by which any shipper, other  
14 than a SAC case, would be evaluated. What they're  
15 proposing, and if we were to adopt this, would be  
16 saying that there are some shippers for whom we can  
17 give extra simplified and extra expedited  
18 procedures, and we'd still have simplified and  
19 expedited procedures for everybody else.

20 And I guess my only point, I don't want  
21 anybody to infer that I'm for or against it, but is  
22 that contrary to the statute, which is what you

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1       asserted it was?

2                   MR. DIMICHAEL: Well, it seems to me the  
3 focus --

4                   (Simultaneous discussion)

5                   MR. DIMICHAEL: I see where we're going  
6 here. But if you want to rest the issue on a policy  
7 one, it seems to me that policy is also embedded in  
8 the statute for expedited and some simplified.

9                   I think to have a bright line test, then  
10 it meets that statutory policy.

11                   CHAIRMAN NOBER: And again, I just want  
12 to separate what's policy, from what the statute  
13 would allow or not allow us to do. I'll defer to my  
14 other commissioners and come back to this.  
15 Commissioner Buttrey?

16                   COMMISSIONER BUTTREY: Mr. DiMichael, I  
17 have a question for you. Now before I ask the  
18 question, I will keep an eye on Mr. Rockey. He's  
19 sitting right behind you there, so I just wanted you  
20 to get the geographic scope here.

21                   MR. DIMICHAEL: I'm up to him.

22                   COMMISSIONER BUTTREY: I'm just curious

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1 as to what you think about his chart in his  
2 submission. I'm still watching him, so go right  
3 ahead and answer.

4 MR. DIMICHAEL: Let me answer this this  
5 way. Chairman Nober, not too many months ago,  
6 indicated that there was about 75 shippers in the  
7 country who can practically access the stand-alone  
8 cost procedures. That means, for these 75 shippers,  
9 there's probably a few hundred movements.

10 But what Mr. Rockey's data shows is  
11 there are 20,000 plus movements. If you only have a  
12 few hundred -- as I mentioned before, there's only  
13 two buckets here. There's only a SAC -- there's a  
14 SAC bucket, and there's a non-SAC bucket.

15 If only 75 shippers and a couple, 300  
16 movements fit into the SAC bucket, it necessarily  
17 means -- and the reason for that is the huge cost of  
18 a SAC case -- it means the other bucket that you  
19 have, the only other bucket that you have, all other  
20 cases need to fit into that other bucket.

21 What we're saying is that the rules that  
22 you should be developing to determine who fits into

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1 what bucket or the other, should take reasonably  
2 into account the fact that you've got this huge  
3 cost, and only a few people that can go into this  
4 bucket over here.

5 Therefore, those rules can and should  
6 permit a lot of people to go in this bucket here,  
7 because they can't fit in this bucket here because  
8 of the huge cost.

9 COMMISSIONER BUTTREY: So you would --  
10 and on another matter here, you do not foresee a  
11 situation where the Board would come up with a  
12 standard where an extremely large company with great  
13 resources would be precluded from bringing a small  
14 rate case?

15 MR. DIMICHAEL: A large company with a  
16 specific small movement, I mean, a large company  
17 with a specific small movement that is captive,  
18 ought to be able to bring a small rate case. I  
19 think that that is what the statute contemplates.

20 It is not -- your ability to bring a  
21 case should not swing on the size of the shipper,  
22 but should be determined by the size of the

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1 movement.

2 A small movement, even if it's a large  
3 shipper, as long as that movement is captive, and as  
4 long as the shipper believes that that movement is  
5 being charged an unreasonable rate, that shipper  
6 should have access to the small rate case rules,  
7 because it's a small movement. It's a small case.

8 The money that it would get from even  
9 winning that case would not justify the \$3 million  
10 it would have to spend for a SAC case.

11 VICE CHAIRMAN MULVEY: It's seems that  
12 we're getting to three buckets now. We have the  
13 large cases, the coal cases; we have the large  
14 companies, who are small shippers; and then we have,  
15 as Mr. Hamberger identifies, the truly small  
16 shippers.

17 One of the concerns that I have with all  
18 of this is that, as I mentioned on my opening  
19 remarks, that we have to be consistent with what the  
20 court's guidelines have been for how we can act and  
21 that we cannot act in an arbitrary and capricious  
22 manner.

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1           So solving all of these myriad of needs  
2           and different circumstances may prove to be beyond  
3           our capabilities. But we're all committed here to  
4           trying our best to do it.

5           I was reading with interest your  
6           discussion of the RSAM, and you discussed the  
7           revenue adequacy measure. Do you think the STB's  
8           approach to measuring revenue adequacy is accurate?

9           Do you have some alternative approach,  
10          or is there another way that we should be looking at  
11          railroad revenue, to see whether they're making the  
12          income necessary to meet their investment needs?

13          MR. DIMICHAEL: I think that the issue  
14          of how you measure railroad revenue adequacy is  
15          frankly beyond the scope of this proceeding here.

16          VICE CHAIRMAN MULVEY: It is. But you  
17          raised the issue in the RSAM discussion, so I --

18          MR. DIMICHAEL: I would be pleased to  
19          talk about the RSAM. I think that I frankly don't  
20          have the brief to tell you what the various  
21          positions would be on the methodology for  
22          calculating railroad revenue and adequacy.

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1 I have personal opinions on that, which  
2 I'd be glad to share.

3 VICE CHAIRMAN MULVEY: Let me turn to  
4 another issue that came up this morning, and that is  
5 the discussion of non-binding mediation. The AAR  
6 has suggested that there's some real merit to doing  
7 that, but I've heard from shippers that there's been  
8 meetings of chief executives.

9 While the meetings had the potential of  
10 being useful, eventually they did not bear fruit.  
11 Do you want to comment on whether or not there's  
12 some potential for non-binding mediation?

13 MR. DIMICHAEL: Let me talk a little bit  
14 to that. First of all, at least it's my experience  
15 here that when there's a dispute in terms of rates,  
16 there is frankly no lack of discussion. There's no  
17 lack of talk between the shipper and the railroad.  
18 This is an important thing for both, and there is no  
19 lack of discussion.

20 I think there is a grave concern that if  
21 you have a requirement for non-binding mediation,  
22 it's going to simply add to a cost of a small case,

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1 and cost factors in the small case are going to be  
2 very, very important because the case is small.

3 The other matter on this is that I  
4 frankly don't see at this point what the -- it seem  
5 to me that at this point a mediation requirement is  
6 at least premature. What a mediator would do is  
7 attempt to get the parties together in light of a  
8 standard that is known to all the parties.

9 At this point, it seems to me that there  
10 is sufficient uncertainty, great uncertainty, about  
11 the standard that the Board has in mind, that I'm  
12 not quite sure what the mediator would ever do.

13 The shipper wants Rate X and the carrier  
14 wants Rate Y. But what's the missing piece here is  
15 what is, in a sense, likely to come out of a Board-  
16 determined rate, and are the shippers, is the  
17 shipper and the carrier accurately evaluating that.  
18 If they're not, it seems to me at that point the  
19 mediator can say "Well, you need to look at this,  
20 you need to think about that."

21 But I just don't see that as a useful  
22 function at this point. And as I said, I am very

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1 concerned that I think it would be a huge concern  
2 about the cost of a mediation.

3 If you're looking at large cases and  
4 looking at a SAC case, the cost of a mediator there  
5 is obviously just minuscule in relationship to the  
6 case, and perhaps you then say "Look, we want to be  
7 absolutely sure for this huge case."

8 We've gone down every road and we've  
9 taken every last thing we can. But I'm not sure  
10 that's appropriate for small cases.

11 CHAIRMAN NOBER: Mr. DiMichael, let me  
12 turn back to this, which party would be able to get  
13 sort of a presumption to be able to use the  
14 procedures, because at some point that seems to be  
15 the core of what's being discussed here.

16 I mean, in the last hearing we talked a  
17 lot about what the standard ought to be, but now  
18 there seems to be that concurrence to the existing  
19 standard is okay, provided there was some guidance,  
20 and as I said, I'll come back to that.

21 So coming back to the size of the  
22 shipper, there seems to be two questions here, and

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1 staff will roll their eyes at hearing this because I  
2 say it all the time, but there's a difference  
3 between what we can do and what we should do.

4 So let's go back to what we can do,  
5 because you asserted that we could not make  
6 distinction between the size of the shipper,  
7 consistent with the statute. I was trying to press,  
8 is that really true? Can we make a distinction?

9 Now whether or not we should is another  
10 question. But can we, and would you concede that  
11 provided the standard stayed the same, there are two  
12 buckets, and therefore we could make a distinction,  
13 that it would be legal to do that under the statute?

14 MR. DIMICHAEL: It would be -- it's  
15 clearly legal to make a distinction between the SAC  
16 bucket and the non-SAC bucket.

17 CHAIRMAN NOBER: And to say within the  
18 non-SAC bucket, the standard stays the same. That's  
19 your proposal, and let's just say that it wasn't  
20 changed. Then to distinguish between the size of  
21 the shippers that would be presumed to be able to be  
22 a small case, versus those that would have to

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1 litigate it. That's the question. Would that be  
2 legal to do?

3 MR. DIMICHAEL: I respectfully believe,  
4 Chairman Nober, that there would be legal questions  
5 about that.

6 CHAIRMAN NOBER: Why?

7 MR. DIMICHAEL: Because it seems to me  
8 that the focus should be, that the statutory focus  
9 is the size of the case, and to make a distinction  
10 between the size of the shipper and not the size of  
11 the case is, I think that there is --

12 CHAIRMAN NOBER: But there isn't a  
13 distinction in the standard. In that situation,  
14 what we'd be saying is there are some shippers that  
15 would be presumed to be eligible, because of the  
16 size of that entity, and some that would have to  
17 prove that they were.

18 How is that contrary to the Board  
19 creating a SAC bucket and a non-SAC bucket, which is  
20 what the statute said to do? I'm going to press you  
21 on that, because I know what the answer I think is.

22 MR. DIMICHAEL: I think the Board can

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1 certainly make reasonable presumptions as to who  
2 should fit into the non-SAC bucket as a matter of  
3 presumption, and who should fit into the non-SAC  
4 bucket as a matter of proof.

5 CHAIRMAN NOBER: Now thanks. Next, the  
6 next question, which is some non-coal shippers have  
7 brought SAC cases. The grain shippers brought one  
8 in the *McCarty Farms* case; aggregate shippers  
9 brought on in *FMC*.

10 Now under the statute, they didn't win,  
11 but grain shippers and aggregate shippers don't have  
12 cases, have cases that the value of the case exceeds  
13 the cost of the SAC presentation, right?

14 MR. DIMICHAEL: Yes.

15 CHAIRMAN NOBER: So how should we deal  
16 with them? There is a long list of grain interests  
17 that want to be part of the simplified procedure,  
18 but under the statute, and again if we focus on the  
19 statute, would they qualify for simplified  
20 procedures? They brought that case, because we have  
21 prima facie evidence.

22 MR. DIMICHAEL: Okay. If we look at

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1 both of those cases, in *McCarty Farms*, the SAC case  
2 that was brought was basically a state line rate  
3 case. The case by its nature encompassed a huge  
4 amount of origins, a huge amount of destinations, a  
5 huge amount of money was at stake in that case.

6 Clearly that case, it seems to me that  
7 case did justify, and of course set it down and the  
8 court found it justified, a SAC presentation.

9 So it doesn't turn on the identity of  
10 the shipper; it turns on what they're complaining  
11 about and the scope of what they're complaining  
12 about.

13 Exactly the same thing was true in the  
14 *FMC* case. That case involved, out of the Green  
15 River in Wyoming, a number of movements , large  
16 movements going from several origins to a bunch of  
17 destinations, and that case involved a large amount  
18 of money. So again, that case didn't turn on the  
19 identity of who the shipper was or the size of the  
20 shipper. It turned on the total value of the case.

21 CHAIRMAN NOBER: But the statute doesn't  
22 give us a lot of guidance on that subject, right?

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1 If grain movements have been able to bring SAC cases  
2 or aggregate movements have been able to bring SAC  
3 cases, I'm not sure what your answer is as to  
4 whether or not they would qualify under the  
5 statutory provision which is governing us.

6 MR. DIMICHAEL: Some cases would, some  
7 grain cases would and some grain cases would not.  
8 Some aggregate cases would and some aggregate cases  
9 would not. It would depend the size of the movement  
10 being challenged in the complaint.

11 CHAIRMAN NOBER: Thank you.  
12 Commissioner Mulvey?

13 VICE CHAIRMAN MULVEY: To what extent  
14 are the small rate cases are problems because, he  
15 was talking about the aggregate cases and the grain  
16 cases, the nature of these movements. The nature of  
17 these shipments are very, very different from coal  
18 which are from large coal mines and to a utility.

19 In fact, the eastern cases are different  
20 from the western cases, and we are coming up with  
21 somewhat different outcomes and somewhat different  
22 predictability as to what the outcomes are going to

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1 be, depending on if they're western on eastern  
2 cases.

3 Is it maybe that we need to look at the  
4 whole way we approach the stand-alone cost test, and  
5 that maybe a lot of refinements are needed if we're  
6 going to be able to handle a broader variety of  
7 situations?

8 MR. DIMICHAEL: Again, I think that,  
9 probably going beyond the scope here, but let me see  
10 if I can take a whack at that. It seems to me that  
11 the SAC cases have gotten much more complex, much  
12 more expensive, and perhaps there needs to be some  
13 thinking about how to confine those.

14 I think the Board has been attempting to  
15 bring a measure of consistency to the decisions, and  
16 I think that's a very good thing. I think the more  
17 that those cases, that those decisions are resolved  
18 in a consistent rule, people are going to be able to  
19 know what they're litigating, the cases will be  
20 easier, quicker.

21 I think the very nature of SAC cases, to  
22 get to your question about, you know, the

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1 differences between the coal SAC cases and others,  
2 in a sense I think that coal SAC cases frankly tend  
3 to be the easier SAC cases to do, because it does  
4 mean the constructive of the hypothetical SAC  
5 railroad between a few or one or a few origins, to  
6 one or a few destinations.

7 That's why really I said before that if  
8 we would get into a situation where non-coal  
9 shippers would get into SAC cases, I think those  
10 cases would be at least as expensive, probably more  
11 expensive, because you have this, you know, huge  
12 spread of potential SAC movements.

13 Which makes it then even more critical  
14 for the Board's rule for small cases, to encompass  
15 as many potential shippers as possible, because I  
16 think a SAC case is going to be less available to  
17 those people than a non-SAC case.

18 VICE CHAIRMAN MULVEY: Okay. A last  
19 question. Do you believe the small rate cases could  
20 be processed much more quickly than the large coal  
21 rate cases? Could it be done in four months, six to  
22 eight months?

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1 MR. DIMICHAEL: Yes.

2 VICE CHAIRMAN MULVEY: That's an easy  
3 answer. Thank you.

4 CHAIRMAN NOBER: Okay. I have one last  
5 question and I'll come back to the same basic topic.  
6 But now product and geographic competition, when it  
7 was used in SAC cases, was an element of market  
8 dominance, and you had to prove that, you know, a  
9 utility couldn't wield power or move production to  
10 another facility. We've eliminated the use of that  
11 several years ago.

12 But some of the factors that that looked  
13 at, which is what is -- I think was trying to get at  
14 what is the sort of larger market relationship  
15 between the shipper and the carrier.

16 Would those be relevant in looking at a  
17 very narrow question, which is what, you know,  
18 should a shipper be entitled to be presumed to not  
19 be able to afford a SAC case, or ought to be able,  
20 or have to prove it?

21 Because in my travels and, you know,  
22 many of the folks that you're representing, the

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1 market relationship between themselves and their  
2 carriers is very complex. I've heard that time and  
3 time again.

4 How would we take that into account in  
5 looking at this question of who should be entitled,  
6 who should be presumed to use small cases, and is  
7 that fair to do?

8 MR. DIMICHAEL: Okay. Number one, I  
9 don't think you need to take into account. I think  
10 one of the reasons, one of the main reasons -- well,  
11 let me talk to two things.

12 First of all, it is very possible, it  
13 happens in my experience all the time, that even  
14 though a shipper might have options at Point X, Y  
15 and Z, but don't have options at Point A, B and C,  
16 it may be very difficult for that shipper to  
17 leverage his options, his competitive options at the  
18 competitive points into acceptable rates at the non-  
19 competitive points.

20 It's at least as likely, in my view,  
21 more likely in fact, that the opposite occurs, that  
22 because a railroad may have market dominance at non-

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1 competitive points that would give him an advantage  
2 in the competitive situation.

3 But it seems to me that the more  
4 critical point here is that if the carrier -- excuse  
5 me, if the shipper actually has options and has a  
6 larger commercial relationship with a shipper --  
7 excuse me.

8 If the shipper has options in his larger  
9 commercial relationship with the carrier, what the  
10 shipper is going to do is to use those options. You  
11 are never going to see a small rate case brought in  
12 that situation. There would be no reason for the  
13 small rate case to be brought.

14 It would be the same as a man who would  
15 have a, you know, healthy set of teeth who needs a  
16 cleaning, goes to the dentist and says I want all my  
17 teeth with, you know, to drill them all. I mean,  
18 you just wouldn't do that, and that's not going to  
19 actually happen.

20 So if there is an acceptable result that  
21 pertains from this larger commercial relationship,  
22 that's going to solve the problem. You as a

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1 commission, excuse me, you as the Board are never  
2 going to see that case.

3 CHAIRMAN NOBER: One final question on  
4 mediation, because we do require that at the  
5 beginning of large rate cases. In my experience,  
6 facilitated discussions can have a benefit in  
7 shipper-carrier relations. I've been asked to do a  
8 number of them, and it seems to have a benefit. But  
9 you are suggesting that it wouldn't.

10 MR. DIMICHAEL: No, I was not  
11 necessarily suggesting that it wouldn't. I was  
12 suggesting two things. Number one, I think  
13 discussions do occur, and the second thing is I  
14 think that if the parties feel that that should  
15 occur, and then they will do that. I think those  
16 kind of mediated things happen in commercial  
17 relationships all the time.

18 What I'm saying is the Board shouldn't  
19 be requiring that as a cost going in to this  
20 particular case.

21 CHAIRMAN NOBER: Okay. That's it, Vice  
22 Chairman Mulvey, Mr. Buttrey? Well, with that, I

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1 think we've kept you long enough.

2 MR. DIMICHAEL: Thank you very much.

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