CHAIRMAN NOBER:

We have with us Nicholas DiMichael, on behalf of a very long list of groups, which are in
the record and I need not repeat now. Mr. DiMichael?

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

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

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

I would also like to inform the Board
that the National Petrochemical and Refiners
Association has asked me to convey to the Board
their desire to be added to the list of
organizations sponsoring the joint written testimony
that was submitted on July 16\(^{th}\). I’ll be submitting
a letter to that effect later today.

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

I will tell you that the participation
of these organizations represents and demonstrates
the substantial interest of the community of rail
users in this proceeding.

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

It also testifies to the desire of these
organizations to be as helpful as possible to the
Board, in presenting a single set of
recommendations. I would note that the joint
written testimony submitted on July 16th
incorporates and builds upon joint comments
submitted last year by 17 of the organizations
submitting the current joint written testimony to
the Board.

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

As Chairman Nober testified to the
Congress, the shippers who feel they have been
charged an unreasonable rate have a right to have
that complaint heard by the Board in a fair,
impartial and economical manner. That is part of
our, as Chairman Nober said, fundamental charge from
the Congress.
We emphatically agree with you, Chairman Nober. The Board’s processes and procedures must allow for the practical exercise of a captive shipper’s right to have the Board decide a reasonable rate, not only for large coal shippers but also for other shippers with movements that are far smaller.

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

A 1999 GAO report found that of 700 rail shippers surveyed, a significant percentage reported paying rates that they regarded as excessive, but they felt that they had no regulatory recourse. Shippers in that survey cited the time, cost and complexity of rate cases, and the poor prospects for relief.
In fact, the Board’s current small case rules unintentionally establish substantial barriers to bringing a small case. Instead of guarding against complexity, they invite it. Instead of speed, they really set few, if any, time limits on the litigation or on the decision.

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

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

The goal should be to provide a balanced, simple, clear, quick and inexpensive process for deciding smaller rate cases. Complexity drives up the cost of any litigation, including litigation before the Board, and given the smaller amounts at stake by definition in a small rate case, complexity and cost will terminally chill the
exercise of the statutory right to reasonable rates
for many small rate disputes.

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

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

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

It’s seminally crucial for small rate
cases to be decided expeditiously. The economy is
changing rapidly. The Board’s procedures must
reflect business needs, and procedures that result in decisions in years rather than a few months, will simply not be relevant to the business needs of transportation users.

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

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

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

Under the statute, the Board is required “to establish a simplified and expedited method for
determining the reasonableness of challenged rail
rates, in those cases in which a full stand-alone
cost presentation is too costly, given the value of
the case.”

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

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

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

If the SAC bucket we could just wish
were smaller, then perhaps that would have an effect
upon the cases that qualify under the small rate
case procedures. But it does not.

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

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

Interested parties believe that the
simplest and most objective way of determining the
link between the cost and value of the small rate
case, compared to other cost of a stand-alone cost
presentation, would be to utilize the amount of the
shipper’s annual freight bill between an origin and
destination pair, combined with certain reasonable
judgments.
As noted above, the interested parties, believe that a conservative estimate of the cost of a typical SAC case is $3 million. A multiplier of three would reasonably compensate for litigation risk, and a potential 25 percent rate reduction over five years is a probably very generous estimate of potential recovery.

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

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

We also believe that the Board’s eligibility rules should provide at least for the possibility that in a particular case, a movement
whose yearly freight bill does not meet that standard should at least be able to show that in a particular case it should be, that this should be adjudicated under the small rate case treatment.

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

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

First, the AAR suggestion is contrary to the statute, which recognizes only two categories of complainants: those litigated under -- excuse me, two categories of complaints. Those litigated under the stand-alone cost standard, and those cases in which “a full stand-alone cost presentation is too costly, given the value of the case.”
There is no provision in the statute for special eligibility rules for the truly small shipper as a third category of complaint. The AAR’s argument is inconsistent with the statute’s focus on the value of the case, not the size of the shipper.

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

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

Let me turn to the substantive standards that are set forth in the Board’s 1996 decision. On this matter, we believe that the existing guidelines
do not provide a clear standard that complainants know they must satisfy in order to obtain leave.

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

Specifically, and these are set forth in more detail in the written comments, that we believe the Board can and should clarify what type of “individualized pricing considerations” that are mentioned in the Board’s decision, might be relevant in a particular case.

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

We think that the Board might be able to clarify what should be considered similar traffic for purposes of the RVC benchmark. We think that the Board ought to think of weighing the three
factors by preparing responses to at least several
eamples, applying various combinations of the three
benchmarks.

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

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

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

What we would be seeking here is that
the Board should, in any rulemaking that follows
from this hearing, the Board should explain its
methodology for calculating the RSAM, explain its
rationale for calculating the methodology in that particular way, and then seek comments from the public on the appropriate way to compensate, excuse me, on the appropriate way to calculate the RSAM.

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

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

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

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

We think that there should be expedited determinations of small case eligibility by the ALJ,
where the bright line standard perhaps is not met.

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

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

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

   In conclusion, we very much appreciate
the opportunity to appear before the Board. We
applaud the Board for initiating the process,
designed to lead to substantial changes in its small
rate case rules.

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

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

CHAIRMAN NOBER: Thank you very much.

Commissioner Buttrey, we’ll start with you.

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

But his company represents or operates
in Ohio, West Virginia, Pennsylvania and Maryland,
and presumably he made a valiant effort to get as many comments back as he could. And yet there were, I think he said, no rate complaints.

Do you think that has something to do with how good a job they’re doing, or do you think it has to do with their geographic location? Do you think it has to do with their customers? Do you think it has to do with just the nature of the business that he has or, I mean, how do you explain that?

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

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

I think it’s fair to say, frankly, that small railroads provide very, very close and responsive service and information to their
customers.

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

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

CHAIRMAN NOBER: Commissioner Mulvey.

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

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

If the railroads don’t have sufficient revenues to invest in their infrastructure, then while you may get lower rates, service and
reliability will decline. Isn’t that, after all, really more important to your clients?

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

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

(Laughter)

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

That particular numbers assumes if every single shipper, every single small shipper is going to bring a rate case, and every single result of every single one of those rate cases is going to be proscription of a rate at 180 percent, the Board’s factors, and this I think is the real answer, the Board’s factors, we think, do consider the statutory
requirements.

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

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

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

MR. DIMICHAEL: The coal rate cases,
over time, some coal rate cases have resulted in the rates at the jurisdictional threshold. Some of the coal rate cases have resulted in rates far, far above the jurisdictional threshold.

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

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

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

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

MR. DIMICHAEL: It’s the most recent one for sure. But I think what has happened in the process over the years, the stand-alone case standard was always expensive, and it was always long and always difficult.
I think it has gotten more expensive, even lengthier and more difficult, as people have put in new evidence. Then the next case, the evidence goes even further. Then the next case, the evidence goes even further than that. The dynamic which occurs in a large rate case seems to lead to greater and greater complexity.

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

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOBER: Mr. DiMichael, let me follow up on Vice Chairman Mulvey’s question, which is -- and put a somewhat sharper point on it, if you will, which is many of the people you represent, members of almost all the groups, have been on the phone with me, requested customer forms from me, called, e-mailed, written and complained about service.
How would those same customers square the fact that putting aside what number you would put on it, small rate cases will have a negative effect on railroad’s revenue.

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

MR. DIMICHAEL: I think first of all individual companies are very sensitive to the railroad’s needs for the revenues -- obviously shippers are the railroad’s best customers. Large shippers are the railroad’s best customers. Smaller shippers are the railroad’s best customers. They’re all the railroad’s best customers.

It seems to me that shippers are sensitive about the needs for railroads to have the revenue that they need. But I think shippers are
also sensitive that there are certain instances in which railroads are exercising a pricing power that in the individual instance is not fair.

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

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

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

    What at least to me we’re looking at are what are the reasons that it hasn’t been used, and
are there changes that could be made to the
procedures, that would help us get there?

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

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

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

CHAIRMAN NOBER: Correct. We have
procedures in place that are non-SAC procedures,
where the value of the case is too expensive. Then
if, as they say, for a certain subclass of shippers,
we should presume that they could use them.

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

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

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

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

    CHAIRMAN NOBER: And we have those.

    MR. DIMICHAEL: But it seems to me that
what you’ve got here is that you’ve got an
eligibility rules, or really a lack of eligibility
rules, that really chill shippers’ rights and
abilities to access, because they don’t know. It
seems to me --

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

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

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

And I guess my only point, I don’t want
anybody to infer that I’m for or against it, but is
that contrary to the statute, which is what you
asserted it was?

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

(Simultaneous discussion)

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

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

CHAIRMAN NOBER: And again, I just want to separate what’s policy, from what the statute would allow or not allow us to do. I’ll defer to my other commissioners and come back to this.

Commissioner Buttrey?

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

MR. DIMICHAEL: I’m up to him.

COMMISSIONER BUTTREY: I’m just curious
as to what you think about his chart in his
submission. I’m still watching him, so go right
ahead and answer.

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

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

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

What we’re saying is that the rules that
you should be developing to determine who fits into
what bucket or the other, should take reasonably
into account the fact that you’ve got this huge
cost, and only a few people that can go into this
bucket over here.

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

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

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

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

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

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

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

One of the concerns that I have with all of this is that, as I mentioned on my opening remarks, that we have to be consistent with what the court’s guidelines have been for how we can act and that we cannot act in an arbitrary and capricious manner.
So solving all of these myriad of needs and different circumstances may prove to be beyond our capabilities. But we’re all committed here to trying our best to do it.

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

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

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

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

MR. DIMICHAEL: I would be pleased to talk about the RSAM. I think that I frankly don’t have the brief to tell you what the various positions would be on the methodology for calculating railroad revenue and adequacy.
I have personal opinions on that, which
I’d be glad to share.

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

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

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

I think there is a grave concern that if
you have a requirement for non-binding mediation,
it’s going to simply add to a cost of a small case,
and cost factors in the small case are going to be very, very important because the case is small.

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

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

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

But I just don’t see that as a useful function at this point. And as I said, I am very
concerned that I think it would be a huge concern about the cost of a mediation.

If you’re looking at large cases and looking at a SAC case, the cost of a mediator there is obviously just minuscule in relationship to the case, and perhaps you then say “Look, we want to be absolutely sure for this huge case.”

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

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

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

So coming back to the size of the shipper, there seems to be two questions here, and
staff will roll their eyes at hearing this because I say it all the time, but there’s a difference between what we can do and what we should do.

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

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

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

CHAIRMAN NOBER: And to say within the non-SAC bucket, the standard stays the same. That’s your proposal, and let’s just say that it wasn’t changed. Then to distinguish between the size of the shippers that would be presumed to be able to be a small case, versus those that would have to
litigate it. That’s the question. Would that be legal to do?

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

CHAIRMAN NOBER: Why?

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

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

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

MR. DIMICHAEL: I think the Board can
certainly make reasonable presumptions as to who
should fit into the non-SAC bucket as a matter of
presumption, and who should fit into the non-SAC
bucket as a matter of proof.

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

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

MR. DIMICHAEL: Yes.

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

MR. DIMICHAEL: Okay. If we look at
both of those cases, in McCarty Farms, the SAC case that was brought was basically a state line rate case. The case by its nature encompassed a huge amount of origins, a huge amount of destinations, a huge amount of money was at stake in that case.

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

So it doesn’t turn on the identity of the shipper; it turns on what they’re complaining about and the scope of what they’re complaining about.

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

CHAIRMAN NOBER: But the statute doesn’t give us a lot of guidance on that subject, right?
If grain movements have been able to bring SAC cases or aggregate movements have been able to bring SAC cases, I’m not sure what your answer is as to whether or not they would qualify under the statutory provision which is governing us.

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

CHAIRMAN NOBER: Thank you.

Commissioner Mulvey?

VICE CHAIRMAN MULVEY: To what extent are the small rate cases are problems because, he was talking about the aggregate cases and the grain cases, the nature of these movements. The nature of these shipments are very, very different from coal which are from large coal mines and to a utility. In fact, the eastern cases are different from the western cases, and we are coming up with somewhat different outcomes and somewhat different predictability as to what the outcomes are going to
be, depending on if they’re western or eastern cases.

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

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

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

I think the very nature of SAC cases, to get to your question about, you know, the
differences between the coal SAC cases and others,
in a sense I think that coal SAC cases frankly tend
to be the easier SAC cases to do, because it does
mean the constructive of the hypothetical SAC
railroad between a few or one or a few origins, to
one or a few destinations.

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

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

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

VICE CHAIRMAN MULVEY: That’s an easy answer. Thank you.

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

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

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

Because in my travels and, you know, many of the folks that you’re representing, the
market relationship between themselves and their
 carriers is very complex. I’ve heard that time and
time again.

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

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

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

It’s at least as likely, in my view,
more likely in fact, that the opposite occurs, that
because a railroad may have market dominance at non-
competitive points that would give him an advantage
in the competitive situation.

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

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

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

So if there is an acceptable result that
pertains from this larger commercial relationship,
that’s going to solve the problem. You as a
commission, excuse me, you as the Board are never

going to see that case.

CHAIRMAN NOBER: One final question on

mediation, because we do require that at the

beginning of large rate cases. In my experience,

facilitated discussions can have a benefit in

shipper-carrier relations. I’ve been asked to do a

number of them, and it seems to have a benefit. But

you are suggesting that it wouldn’t.

MR. DIMICHAEL: No, I was not

necessarily suggesting that it wouldn’t. I was

suggesting two things. Number one, I think

discussions do occur, and the second thing is I

think that if the parties feel that that should

occur, and then they will do that. I think those

kind of mediated things happen in commercial

relationships all the time.

What I’m saying is the Board shouldn’t

be requiring that as a cost going in to this

particular case.

CHAIRMAN NOBER: Okay. That’s it, Vice

Chairman Mulvey, Mr. Buttrey? Well, with that, I
think we’ve kept you long enough.

MR. DIMICHAEL: Thank you very much.