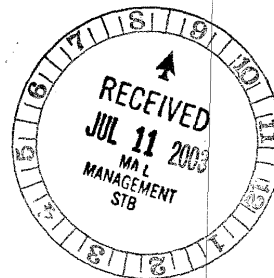


July 11, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Attn: STB Ex Parte No. 646
1925 K Street, N.W.
Washington, D.C. 20423-0001

208342



Re: STB Ex Parte Docket No. 646, Rail Rate Challenges in Small Cases

Dear Secretary Williams:

Enclosed are the original and ten copies of the Joint Comments of the American Chemistry Council and 16 other organizations. If you have any questions about these comments, please contact me at 703-741-5172.

Sincerely,

Thomas E. Schick

Thomas E. Schick
Distribution Counsel

cc: All parties of record

ENTERED
Office of Proceedings

JUL 11 2003

Part of
Public Record



Responsible Care®

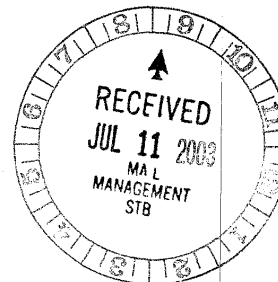
208342

BEFORE THE

SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
JUL 11 2003
Part of
Public Record

Ex Parte No. 646



RAIL RATE CHALLENGES IN SMALL CASES

Joint Comments of

**American Chemistry Council, Colorado Wheat Administrative Committee,
The Fertilizer Institute, Idaho Barley Commission, Idaho Wheat Commission,
Kansas Wheat Commission, Montana Wheat & Barley Committee,
National Grain and Feed Association, National Industrial Transportation League,
North Dakota Grain Dealers Association, North Dakota Public Service Commission, North
Dakota Wheat Commission, South Dakota Wheat Commission, Washington Barley
Commission, Washington Wheat Commission, Alliance for Rail Competition and
Consumers United for Rail Equity**

I. INTRODUCTION AND BACKGROUND

In accordance with the request of Chairman Nober at the April 22, 2003, hearing in this proceeding, 15 shipper organizations that previously participated in this proceeding have prepared a joint proposal and comments regarding rail rate challenges in small rate cases. Those organizations are the American Chemistry Council; The Fertilizer Institute; the National Grain and Feed Association; the National Industrial Transportation League; the North Dakota Public Service Commission, the North Dakota Grain Dealers Association, and the North Dakota Wheat Commission; the Colorado Wheat Administrative Committee, the Idaho Barley Commission, the

Idaho Wheat Commission, the Kansas Wheat Commission, the Montana Wheat & Barley Committee, the South Dakota Wheat Commission, the Washington Barley Commission, and the Washington Wheat Commission. In addition, the Alliance for Rail Competition and Consumers United for Rail Equity also support this submission, bringing to 17 the number of cooperating shipper organizations (collectively “Joint Commenters”).

The Board initiated this proceeding in a Notice and Amended Notice of Public Hearing, issued on March 26 and April 1, 2003. Specifically, the Board solicited the views of interested persons regarding all aspects of rail rate challenges in small cases, including proposals for handling such cases and how small rate cases should be defined. In response, various shipper, carrier, labor and government interests submitted written testimony on April 16, 2003, and presented oral testimony at a hearing held on April 22, 2003.

In their previous written and oral testimony, the Joint Commenters echoed several common themes. Uniformly, they advocated (a) the need for a bright-line standard to determine a shipper’s eligibility to use the simplified small case guidelines; (b) the need for greater predictability in the existing standards, or even a different standard, for determining rate reasonableness under the small case guidelines; and (c) the need for simplified and expeditious handling of small rate cases. Although they presented common themes, the Joint Commenters proposed a variety of different solutions. At the April 22nd hearing, Chairman Nober asked shipper interests to identify their common ground and, where possible, to present more specific proposals to address their concerns. The Joint Commenters submit these comments in response to Chairman Nober’s request.¹

The Joint Commenters note that they have not addressed the standards for determining market dominance, although some individual commenters have previously addressed this topic in this proceeding. The Joint Commenters recognize that further simplification of market

¹ These Comments supplement the written testimony of each individual party, submitted on April 16, 2003. Each party has presented testimony that is particularly pertinent to it, but which has not been addressed in these Joint Comments. Therefore, the Joint Commenters urge the Board to review these Joint Comments and the individual comments together. Moreover, these Joint Comments represent the positions that all of these groups could agree upon. Positions in the individual comments include suggestions that one, or sometime more, of the organizations signing this document could advance, but not all of them. This document, therefore, is not intended to supplant the individual comments filed by these organizations in this proceeding.

dominance determinations would assist shippers in smaller cases by reducing the total cost of bringing such cases, and would be pleased to submit suggestions for simplification if the Board would be willing to entertain them.

II. FUNDAMENTAL PRINCIPLES

The overarching goal of the small rate case process must be to provide a simple, predictable and relatively inexpensive process for deciding such cases. The cost of the case must be commensurate with the stakes involved. No matter how big and well-capitalized a shipper might be, it will make no sense for that shipper to attempt to bring a rate case if the costs of doing so are not justified by the possible payoff in terms of lower rates. Most business would view the rate case itself as an activity that would have to generate a sufficient return to compensate for the time and expenditure of money, taking into account the likely rate reduction, the traffic volume that has or will move under the rate, the risk that the rate case will be unsuccessful, and the risk that the relevant market may shift before, or not long after, the case has been concluded.

It is no surprise that the great majority of all rate cases in recent years have involved large volume, multiyear movements of coal from fixed mine locations to fixed utility plants. Only in such cases is the volume of traffic and the potential payoff in terms of a rate reduction sufficient to justify the complex and expensive process of calculating the costs of a hypothetical stand-alone railroad, not to mention the high costs in lawyer and consultant fees and management attention to discovery on market dominance and stand alone cost issues. By contrast, movements of grain, forest products, chemicals, automobiles, and other products are too diffuse – the volume moving on any one route is insufficient to justify the costs of modeling a stand-alone cost network for that route.

In contrast, the incentives that railroads have to defend rate cases are different from a shipper's incentive to pursue rate relief. The risk (from the railroads' perspective) that one successful rate case will set a precedent for other challenges means that it may well be worthwhile for a railroad to spend more money defending a rate case than is actually at issue in that case alone. (The chance that one of the small number of remaining Class I railroads will be

a defendant in a subsequent rate case is far higher than the chance that a particular shipper bringing a successful rate case will be able to obtain further benefit from the precedent set by that case.) The incentive that railroads have to invest substantial resources in defending rate cases magnifies the costs faced by shippers, because it is usually to the advantage of the railroad to seek to increase the complexity of the cases, both to increase the number of issues on which the railroad may prevail, and to attempt to exhaust shipper resources and deter shippers from bringing future rate cases. This view of railroad behavior is not intended to portray railroads in an unfavorable light, but only to state realistically the very different economic incentives of a rational shipper and a rational railroad contemplating a rail rate case.² The incentives on the part of railroads to make rate cases complex underscores the necessity, in establishing protocols for small rate cases, of having simple rules that are not amenable to debates, permutations, exceptions, and contingencies.

The rules must be not only simple, but also clear, so as to enable the parties to make an educated projection of a case outcome. The reason is straightforward. A single shipper – one of the tens of thousands of shippers moving products by rail – is relatively unlikely to bring rate cases with sufficient frequency that it can “play the odds” and count on cases “paying off” only once in a while. Winning an occasional case is not good enough for the typical shipper, because that case will still be expensive to bring, even if the expense is greatly diminished as a result of this proceeding. Rather, if shippers are going to avail themselves of the rate complaint process, they need the assurance of a system featuring fairly objective and straightforward tests to determine market dominance and reasonableness. This does not mean that every rate will be subject to challenge – only that the standards and protocols will be sufficiently clear that shippers and carriers can predict with some degree of accuracy which rates are more likely to be found unreasonable. It is irrational to expect shippers to utilize a rate process that is likely to cost hundreds of thousands of dollars and engender serious carrier ill-will without some reasonable ability to project the outcome. Moreover, predictability will foster the voluntary resolution of disputes, since the predictability will be enhanced for both sides.

² As Chairman Nober testified on May 20, 2003 to the Railroad Subcommittee of the House Committee on Transportation and Infrastructure, railroads have been known to spend \$5 million on each rate case, while a shipper’s spending on the same case is more likely to be \$2-3 million. (See page 7 of Chairman Nober’s prepared testimony submitted to the Subcommittee.)

The Joint Commenters are concerned that the railroad industry has made it very clear that it will litigate vigorously through the federal courts the first successful small rate case. Indeed, the railroad industry litigated the lawfulness of the small rate case guidelines when they were published in 1996. The courts found this litigation to be premature, indicating that the issues raised by the railroad industry should be litigated when a shipper was granted relief under these new guidelines.

Chairman Nober acknowledged this problem when he testified before the Railroad Subcommittee of the House Committee on Transportation and Infrastructure on May 20, 2003. This threatened litigation adds another cost factor that must be considered by any shipper considering a rate case either under the current small rate case guidelines or any improved guidelines that the Board may adopt. While the Board may have limited ability to avoid this litigation, this very real threat is and will remain a major disincentive to shippers bringing small rate cases, regardless of the improvements the Board makes to the small rate case process and, potentially, the benchmarks of rate reasonableness in small rate cases.

The proposals below are divided into three subparts: (1) the test for determining eligibility for the small rate case procedures, (2) the test for reasonableness, and (3) general procedural matters and protocols designed to limit the cost and complexity of small rate cases.

III. THE BOARD SHOULD ADOPT A “BRIGHT-LINE” TEST TO DETERMINE THE ELIGIBILITY OF A SHIPPER TO USE THE SMALL CASE GUIDELINES

A. The Most Appropriate Test is Based on the Shipper’s Annual Freight Bill for the Commodity Between Each Origin-Destination Pair.

The Board has asked explicitly for comments and proposals regarding how small rate cases should be defined or identified. The statute requires that CMP procedures be used unless they are “too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3). Currently, the Board requires a shipper, in its complaint, “to present sufficient information to show that CMP is not available.” *Non-Coal Rate Guidelines*, 1 S.T.B. at 1050. A complaint must contain a minimum

of nine separate items, each with subparts, to satisfy this requirement. The most problematic of these items is a showing of the feasibility and anticipated cost of preparing a SAC presentation. This leaves shippers in the anomalous position of having to undertake some form of estimated SAC analysis in order to establish that they should not be required to make a full-blown SAC presentation, and with no indication from the Board as to how it will adjudicate whether a shipper will qualify for small rate case procedures or not. These Joint Commenters strongly believe that there must be a less onerous and greatly simplified bright-line standard of eligibility.

The only sensible way to calculate the ceiling for small case status is to make it proportionate to the cost of bringing a rate case. Attempting to pick out a dollar number (or number of tons, or cars) as being “small” is an arbitrary and meaningless exercise if divorced from a consideration of the stakes needed to justify bringing a SAC rate case. This approach is fully consistent with the statutory maxim that the non-coal rate guidelines are to be used in those cases in which a full SAC presentation is “too costly, given the value of the case,” and it recognizes that the ultimate purpose of this proceeding is to create a simplified procedure that will make it feasible for non-coal shippers to actually pursue rate relief.

The cost of a typical large rate case today is at least \$2 million for legal fees, consultants and other expenses.³ Based on evidence submitted in Ex Parte No. 347 (Sub-No. 2), 1 S.T.B. at 1049, a shipper needs a multiplier of at least three as a necessary margin between the expected costs and expected recovery in a rate case in order to justify the risk. Therefore, the potential return to the shipper for investing \$2 million in a SAC case must be at least \$6 million in rate relief. Assuming the shipper believes that its rail rates are 25% too high (which probably is a conservatively high assumption) and that the period of potential relief is five years (which, in many cases will be as few as 1-3 years),⁴ given the changing nature of the shipper’s origin-destination pairs, the shipper’s annual freight bill between each origin-destination pair would

³ See note 2, supra. These Joint Commenters strongly agree with Chairman Nober that a shipper’s expenditure for a large rate case proceeding is at least \$2 million. Chairman Nober has indicated that a rail carrier’s cost is substantially greater.

⁴ Shipper testimony in Ex Parte No. 347 (Sub-No. 2), at note 125, was 3-5 years.

have to be at least \$4.8 million to justify a SAC case.⁵ Thus, these Joint Commenters believe that the lowest appropriate ceiling for a non-SAC case – a case brought under the small case guidelines developed in this proceeding – should be a \$4.8 million annual freight bill from a single origin-destination pair.⁶

The Board should adopt a bright-line small case eligibility standard that follows this methodology, and establish a small case eligibility standard allowing use of the small case standards for cases involving no more than a \$4.8 million annual freight bill from a single origin-destination pair. A separate dollar ceiling should be applicable to the rate for each commodity between each origin-destination pair. If the shipper's annual freight bill falls below this level, its complaint should automatically be entitled to small case treatment.⁷

B. The Board Has Properly Focused the Eligibility Issue on “Small Cases,” Rather than “Small Shippers.”

The Joint Commenters strongly believe that the Board's March 27 Notice appropriately emphasizes small rate “cases,” as opposed to small rate “shippers.” This stands in contrast to Ex Parte No. 586, *Arbitration-Various Matters Relating to Its Use As An Effective Means of Resolving Disputes*, served September 20, 2001, slip op. at 4, where the Board seemed to focus on small shippers, which elicited a storm of objections from many shipper interests in their comments. These Joint Commenters believe that a focus on small “shippers” rather than small

⁵ \$6 million divided by 5 years = \$1.2 million per year. \$1.2 million divided by 25% = \$4.8 million annual freight bill.

⁶ If one assumed, perhaps more realistically, that there would be a 10% rate reduction over 3 years, an annual freight bill of \$20 million would be the ceiling.

⁷ These Joint Commenters believe that a \$4.8 million annual origin-destination freight bill is a conservative measure of a proper bright-line eligibility standard. However, the Board could choose to modify such a bright-line test by permitting a carrier to show that, in light of long term contracts, the traffic will move under the challenged rate for more than five years, and that the case will actually put at issue rate reductions and reparations totaling more than \$6 million (discounted to present value). This is similar to the approach advocated by the National Grain and Feed Association that, if a carrier believes that a complaint should be adjudicated under CMP principles, then the burden of so proving should be placed on the defendant carrier, with an extremely abbreviated time period for a Board decision on the matter. The Joint Commenters propose that if the Board were to adopt such a procedure, it should utilize the same \$2 million cost to the shipper of bringing the SAC case and also require that the shipper furnish its traffic and other relevant data for use by the railroad in its challenge. See NGFA's April 16, 2003 comments in this docket, at p. 8.

“cases” would be inconsistent with the statute, which directs the Board to make available procedures other than CMP when a full SAC presentation would be “too costly, given the value of the case.” 49 U.S.C. §10701(d)(3). Moreover, if the Board restricts access to small case procedures to only small shippers, it will leave the vast majority of shippers with no possibility for rate relief at all.

Most non-coal shippers, regardless of size, are unable to benefit from the Coal Rate Guidelines because a SAC presentation simply is too costly, given the value of the case. Unlike unit-train coal shippers, who transport tremendous volumes of a single commodity from only one, or just a few, origins to a single destination, often for twenty years or more, non-coal shippers typically transport their commodities to many destinations (sometimes hundreds) that frequently change every few years. Thus, even a large shipper who tenders thousands of carloads annually will have few, if any, origin-destination pairs that are of sufficient magnitude to make a SAC presentation economically feasible, given the value of the case.

This untenable situation is due, in large part, to the Board’s “Bottleneck Decisions.”⁸ Although large non-coal shippers may tender over a thousand carloads annually to many destinations, frequently all of that traffic must move over a single route to a bottleneck point, from which the carloads are dispersed over many different routes and rail carriers to their final destinations. The consolidated traffic volumes over just this “bottleneck segment” are much more likely to have a value that would justify the cost of a SAC presentation. However, in the “Bottleneck Decisions,” the Board precluded shippers from challenging just the bottleneck portion of a rail rate, and instead required them to challenge the entire rate from origin to destination, except in the rare case in which the Board’s “contract exception” applies. Instead of presenting a single SAC case from the origin to the bottleneck point, the Board has thus required the shipper to present separate SAC cases for each origin-destination pair, none of which individually is of sufficient value to justify the expense of a SAC analysis.⁹ Thus, the

⁸ STB Docket No. 41242, *Central Power & Light Co v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059 (1996), reconsideration granted in part 2 S.T.B. 235 (1997), aff’d, *MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

⁹ Another significant factor that makes it difficult for non-coal shippers to challenge the reasonableness of rail rates is that the Board’s predecessor, the Interstate Commerce Commission, allowed the carriers to

“Bottleneck Decisions” are in part responsible for the situation where large shippers require small rate case protection.

Until the Board finds it appropriate to revisit the “Bottleneck Decisions,”¹⁰ it must accept the fact that the vast majority of non-coal rate cases will involve individual, dispersed movements whose values do not justify the expense of a CMP presentation, and therefore, must be decided pursuant to the small case guidelines.

VI. THE BOARD SHOULD CLARIFY HOW IT WILL DETERMINE THE REASONABLENESS OF RATES IN SMALL RATE CASES.

The non-coal rate guidelines do not provide a clear standard that complainants know they must satisfy in order to obtain relief. Rather, the Board has adopted three benchmarks as a “starting point,” without any guidance as to how those benchmarks will be applied, and with the expectation that complainants will augment these benchmarks with additional, vaguely identified, evidence. Ex Parte No. 347 (Sub-No. 2) at 1045. The Joint Commenters seek clarification from the Board as to how it will apply these benchmarks as a standard of reasonableness in small rate cases, and how various types of additional evidence may alter the benchmark results.

publish point-to-point rates rather “scale” rates. Thus there is often not enough traffic at stake to warrant a complaint on a point-to-point basis.

¹⁰ Although the Board concluded, in the “Bottleneck Decisions,” that the Interstate Commerce Act mandated this result, that was not the basis upon which the Court of Appeals affirmed the Decisions. Thus, the Board is free to reopen and reconsider its holding. If it did so, a greater number of rate challenges could be decided under CMP principles, as opposed to the non-CMP small case guidelines. In Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996), the Board stated:

We recognize that CMP provides the only economically precise measure of rate reasonableness and therefore must be used whenever possible. We are persuaded, however, that other procedures can, and indeed must, be made available for those cases in which CMP simply cannot be used – because the traffic is so infrequent or widely dispersed that it is not susceptible to a SAC presentation or because the case is so small in value that the substantial expense of a CMP presentation...cannot be justified. [emphasis added]

The “Bottleneck Decisions” have thus greatly expanded the number of situations in which the CMP cannot be used. By reconsidering the “Bottleneck Decisions,” the Board could reverse that trend, if the Board desires to expand the universe of cases in which CMP could be used.

In most judicial and regulatory matters, complainants have a clear standard or rule of law that they know must be satisfied. Although the parties may dispute whether the complainant has satisfied that standard with its evidence, the standard itself seldom is in doubt. Even with respect to the SAC standard, while a complainant and defendant may disagree strongly as to whether the complainant has met the standard in a particular case, there is at least relatively little doubt as to what the standard is. The non-coal rate guidelines do not, however, set a specific standard, which prevents shippers and carriers from assessing the risks of litigation based on the evidence likely to be submitted. Because there is no indication of how the three “benchmarks” and other unspecified evidence will be balanced to determine a maximum reasonable rate, shippers face the prospect of filing a complaint under the simplified rules without guidance in estimating the outcome of the case or for any particular method of balancing the benchmarks. This increases a shipper’s risk, uncertainty and expense, and discourages private settlements, since neither party has the ability to estimate the probable outcome of a small rate complaint.

The Joint Commenters recognize that all litigation comes with certain inherent risks and uncertainties, and therefore, they do not seek absolute certainty from the Board. Rather, they are looking for an increased level of guidance so that they can better evaluate their evidence against a known standard in order to determine both the risks and potential rewards of filing a rate case. Thus, they need to know – at least better than they do now -- how the Board will apply the three benchmarks to determine a reasonable rate and how other types of evidence may alter the results of the benchmark analysis.

The three benchmark indicators identified by the Board are (1) the RSAM, which examines the average markup that the carrier needs to charge its captive traffic to meet its revenue needs; (2) the R/VC[Comp], which measures the markups applied to similar traffic in order to reflect demand-based differential pricing; and (3) the R/VC[>180], which examines the markups applied by the carrier to its other captive traffic to test whether the issue traffic bears a disproportionate share of the carrier’s revenues. According to the Board, these three benchmarks “in combination supply the necessary springboard for a closer scrutiny of the more individualized pricing considerations that may apply to the particular traffic at issue.” *Id.* at 1020. At least one of these benchmarks requires further clarification, not to mention the added uncertainty surrounding the application of “individualized pricing considerations.”

The RSAM actually is a range. The lower end of the range reflects an efficiency adjustment that excludes all shipments with R/VC ratios of less than 1.0. In theory, that would be the lowest rate achievable. Because the railroads, however, have argued that this efficiency adjustment is inappropriate, the Board has retained the unadjusted RSAM as the upper end of the range, and simply asserted that parties “should address any specific efficiency considerations that apply to the particular carrier defendant(s) that would serve to narrow that range.” *Id.* at 1030. No one knows how this issue ultimately will be resolved and what types of efficiency considerations will be significant. Furthermore, if the other benchmarks support a prescribed rate below the low end of the RSAM range, it is unclear which benchmark would control. The Board should clarify these matters.

The R/VC[>180] benchmark measures the extent to which the carrier is marking up its >180 traffic on average, to ensure that the complainant’s traffic is not bearing a disproportionate share of the carrier’s revenue requirements vis-à-vis other demand inelastic shippers. If the complainant’s R/VC ratio is less than the R/VC[>180] average, however, it is unclear whether that automatically would preclude rate relief for the complainant.

The R/VC[Comp] benchmark attempts to reflect demand-based differential pricing principles by measuring the markup taken on >180 traffic that involves similar commodities moving under similar transportation conditions. This is the only one of the three benchmarks that cannot be calculated from publicly available data, and therefore, requires discovery. This prevents a shipper from making an informed assessment of its litigation risks and rewards based upon the three benchmark analyses prior to filing a complaint. The Board could take a step toward alleviating this particular uncertainty by granting a shipper access to the confidential waybill sample, upon certification from the shipper that it seeks the sample to evaluate a potential rate complaint. In addition, the Board should offer guidance in the instant proceeding concerning what should be considered “similar” traffic for purposes of the R/VC[Comp] standard.

In order to ameliorate some of these uncertainties, the Joint Commenters also suggest that the Board should explain more precisely how it will weigh these factors. One way that this could be done is to prepare a decision in response to a series of hypothetical small rate cases. Ideally,

the Board would prepare responses to eight hypothetical examples applying various combinations of the three benchmarks. For the RSAM, the Board would look at both the efficiency adjusted and unadjusted numbers, referred to as “High” and “Low” in the chart below. For the R/VC[Comp], the Board would consider scenarios with rates above and below the average R/VC[Comp]. For the R/VC[>180], the Board would consider situations where the challenged rates were above and below the R/VC[>180]. The eight hypotheticals would address the following combinations of the benchmarks:

RSAM	R/VC[Comp]	R/VC[>180]
High	Above	Above
High	Above	Below
High	Below	Above
High	Below	Below
Low	Above	Above
Low	Above	Below
Low	Below	Above
Low	Below	Below

The objective of these hypotheticals would be to obtain some guidance from the Board as to how it would balance the three benchmarks to arrive at a maximum reasonable rate. In addition, the Joint Commenters ask the Board to discuss, in these hypotheticals, how other factors might alter the benchmark results. The Joint Commenters are emphatically not suggesting that the Board open a new rulemaking or solicit new comments. Rather, the Boards should analyze the hypotheticals based upon its interpretation (as clarified) of its existing non-coal standards, and based upon waybill sample data and other information in its possession.

VI. THE BOARD MUST ADOPT SIMPLIFIED AND EXPEDITED PROCEDURES FOR SMALL RATE CASES.

A major disincentive to use of the Non-Coal Rate Guidelines by shippers is the lengthy and uncertain amount of time required to prosecute a small rate case. Before the merits of the case even can be addressed, the parties must spend 50 days in just determining whether a case qualifies for “small case” treatment. That is followed by cost discovery and review of the Board’s Waybill Sample. Discovery, at best, requires a minimum of twenty days, assuming that the rail carrier is prompt and responsive, and there are no disputes. Discovery disputes can add months to process through motions to compel that require a month to brief and then must await a Board decision. Only then do the parties submit opening, reply and rebuttal evidence, for which the rules currently provide no defined procedural schedule. Even assuming a very brief period for filing evidence (e.g., 30 days for opening evidence, 30 for reply, and 15 for rebuttal), the entire process, without discovery disputes, will consume a minimum of six months. This also assumes no post-evidence briefs. After all that is completed, the Board has six months to render a decision. Thus, under the present standards, a year is the best-case scenario, with the much more likely scenario being 18-24 months.

Small rate cases should include expedited time frames, active management by Administrative Law Judges (ALJs), limited appeal rights, and standardized discovery with a very limited ability to go beyond standard discovery lists. The total process should take no longer than 9 months.

ALJs are an important component of this plan. They can alleviate the burden upon Board staff, act as case managers, and resolve disputes quickly. In order for ALJs to be effective, however, every decision they make must not be subject to *de novo* review by the Board. There should be interlocutory appeals of discovery decisions only in rare circumstances and only under expedited time frames for decision by the full Board, with no suspension of the procedural schedule. Moreover, a final ALJ decision should be overturned only upon a showing that it is clearly contrary to law or the Board’s small case guidelines.

A bright-line eligibility test, like the one proposed in Part III.A., supra, will significantly streamline small rate cases. A shipper should submit evidence that it qualifies for small case

treatment under the bright-line test when it files its complaint [Day 0]. The carrier should respond to the complaint within 20 days and contemporaneously submit any evidence contesting the shipper's eligibility for small case treatment [Day 20]. Such evidence should be limited to the bright-line factors. The ALJ, in turn, should determine the shipper's eligibility within ten days [Day 30].

The Board should adopt standard discovery requests for each party, just as it is considering in Ex Parte No. 638. For example, the shipper would serve responses to standard market dominance requests with its complaint [Day 0] and the carrier would provide standard cost information with its answer, 20 days later [Day 20]. Additional discovery should be restricted to the specifics of the issue transportation and should be served within 40 days of the complaint [Day 40]. Responses would be due within 20 days [Day 60]. In addition, the shipper should be granted access to the confidential waybill sample prior to filing its complaint, upon certifying that the request is for a complaint under 49 U.S.C. § 10701.

If a discovery dispute does arise, the movant should file a motion to compel no later than 65 days after the filing of the complaint [Day 65], which would be 5 days after the last possible day for serving discovery responses [Day 60]. A reply would be due 5 days later [Day 70]. The ALJ would issue a decision in another 5 days [Day 75]. If the ALJ grants the motion to compel, the requested information then must be produced within 5 days [Day 80]. Thus, even with discovery disputes, the process to this point would consume no more than 80 days.

If there are no discovery disputes, opening evidence would be due within 30 days after the close of discovery [Day 90]. If there is a dispute, opening evidence would be due either 30 days after the ALJ's decision denying a motion to compel [Day 105], or 30 days after production in accordance with an ALJ decision granting a motion to compel [Day 110]. Just as the parties do in coal rate cases, they would file market dominance and rate reasonableness evidence contemporaneously. Reply evidence would be due 30 days after the submission of opening evidence, and rebuttal evidence would be due 15 days after that. The parties would submit legal arguments at the same time they submit their evidence, which eliminates the need for a separate round of post-evidence briefs. Thus, the evidentiary record would close anytime between Day 135 and Day 155.

The ALJ should render a decision within 30 days after the close of evidence. That would complete the entire process within 165 to 185 days, or 5 to 6 months, even in the worst-case scenario. An appeal to the Board would have to be filed within 20 days of the ALJ's decision, and a reply would be due 20 days later. The Board then should issue a final decision within 30 days. Thus, even with an appeal, the entire process would conclude within 9 months.

VII. CONCLUSION

The undersigned organizations respectfully request the Board to review the suggestions in these Comments and to take steps to adopt these suggestions as revisions to the Board's rules.

Respectfully submitted,

American Chemistry Council

Colorado Wheat Administrative Committee

The Fertilizer Institute

Idaho Barley Commission

Idaho Wheat Commission

Kansas Wheat Commission

Montana Wheat & Barley Committee

National Grain and Feed Association

National Industrial Transportation League

North Dakota Grain Dealers Association

North Dakota Public Service Commission

North Dakota Wheat Commission

South Dakota Wheat Commission

Washington Barley Commission

Washington Wheat Commission

Alliance for Rail Competition

Consumers United for Rail Equity

Dated: July 11, 2003