BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. EP 733

EXPEDITING RATE CASES

Joint Comments of the American Chemistry Council The Fertilizer Institute and The National Industrial Transportation League

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Pursuant to the Notice of Proposed Rulemaking ("NPR") served by the Surface Transportation Board ("STB" or "Board") in the above-captioned docket on March 31, 2017, the American Chemistry Council ("ACC"), The Fertilizer Institute ("TFI"), and The National Industrial Transportation ("NITL"), hereby submit these opening comments on proposals for expediting rate cases. The Board initiated this proceeding pursuant to Section 11 of the STB Reauthorization Act of 2015 through issuance of an Advance Notice of Proposed Rulemaking ("ANPR") served on June 15, 2016. The ANPR solicited comments on multiple proposals for expediting rate cases, particularly stand-alone cost ("SAC") cases, developed from Board experience processing rate cases and from informal meetings with stakeholders. Based upon two rounds of public comments, the Board now has issued specific rulemaking proposals in this NPR.

I. Introduction.

ACC, TFI and NITL represent companies that tender traffic to railroads primarily in carload, as opposed to unit train, volumes. They strongly advocated for passage of the STB

Reauthorization Act, and Section 11 in particular, because the existing process for SAC cases is too long, expensive, and complex.

Overall, ACC, TFI and NITL either support or do not object to the proposals because they may incrementally improve the current process in SAC cases. The most useful proposals to actually expedite SAC cases are the Pre-Complaint Period (including shifting mediation into that period) and the appointment of a Board liaison to the parties. The other proposals mostly codify current standard voluntary practices or are vulnerable to loopholes that could defeat their objectives. In some instances, ACC, TFI and NITL suggest improvements to proposals that would be more impactful.

The Board's proposals will have only a marginal effect upon expediting SAC cases because they do not deal with the most significant causes of delay, of which the nature of the SAC standard itself is the single greatest source. That is why ACC, TFI and NITL strongly urge the Board to prioritize efforts to develop and implement alternatives to SAC that are not so inherently complex, costly and time-consuming. More specifically, ACC, TFI and NITL encourage the Board to give serious considerations to proposals in EP 722 (Sub 2), *Railroad Revenue Adequacy*, to develop a benchmarking methodology comparable to the concept suggested by the Transportation Research Board and discussed in the Comments of the Concerned Shipper Coalition, in which ACC, TFI and NITL participated.

ACC, TFI and NITL acknowledge the Board's statement that "these proposed rules are not intended to be a comprehensive response to the comments received in this docket, nor are they the final action the Board plans to take to improve the Board's rate review processes for all shippers." NPR at 2. ACC, TFI and NITL look forward to these future actions. In particular, ACC, TFI and NITL hope the Board will offer proposals to expedite, if not standardize, the

production of traffic data; to address the problems caused by the use proprietary software; and to prevent the evidentiary misalignment that has plagued all of the recent carload shipper SAC cases. The ANPR Comments of the Joint Carload Shippers offered several proposals for addressing these issues.

These comments follow the same categories as the ANPR.

II. Pre-Complaint Period

The Board has proposed to establish a 70-day pre-complaint period to provide parties with an opportunity to mediate their dispute and prepare for litigation. There are three specific elements to this pre-complaint period in the NPR. First, the complainant must file a pre-filing notice at least 70 days prior to filing a formal complaint challenging rates under the SAC methodology. This is slightly longer than the 60 days most parties supported in the ANPR. The notice must contain the challenged rate(s), origin/destination pair(s) and commodity(ies), and be accompanied by a motion for protective order. Second, the Board proposes that mandatory mediation, which presently begins upon filing a SAC complaint, will instead be conducted during the pre-complaint period. Finally, the Board proposes to appoint a Board liaison to the parties within 10 business days of receiving the pre-complaint notice to serve as a point of contact for questions and disputes the parties may have.

ACC, TFI and NITL support each of the foregoing elements of the Board's proposal. The pre-filing notice will allow the parties to begin, and perhaps complete, many functions that typically would occur only after filing a complaint. Indeed, a successful mediation would avoid the filing of a complaint at all. The idea of a liaison will improve communications between the parties and with the Board, potentially short-circuit many disagreements before they fester into full-blown motions to the Board, provide guidance on process, and keep the case moving

forward through status conferences. The pre-complaint period also should enable parties to make some discovery preparations that otherwise would not occur until a complaint has been filed. The Board should make some accommodation, however, for skipping or shortening the pre-complaint period when the statute of limitations otherwise would bar any portion of a complaint that is filed after the notice period expires.

III. Discovery

The Board has made two proposals with respect to discovery. ACC, TFI and NITL cautiously support these proposals but point out potential loopholes and improvements for the Board's careful consideration.

First, the NPR would require parties to serve initial discovery requests with their complaint and answer. ACC, TFI and NITL support this proposal because it ensures that discovery will begin promptly upon the initiation of a case. The overall impact on expediting rate cases nevertheless is likely to be insignificant because many parties already adhere to this standard. Furthermore, even a skeletal initial discovery request would seem to comply with this requirement, enabling parties to still serve their principal discovery requests at a later date. Absent some limitation upon subsequent discovery requests, this proposal could be "gamed" by parties to neutralize the benefits.

ACC, TFI and NITL also stress that the most significant impact that the Board can have upon the pace of rate cases through discovery is establishing a firm deadline for the defendant to produce the traffic data that is essential to the vast majority of the SAC evidence. This is usually the last information that defendants produce, which impacts how soon complainants can be ready to present their opening evidence. A requirement that defendants produce traffic data within 90

days of the initial discovery requests could shave as much as 90 days from the current typical SAC timeline.

Second, the Board proposes to require parties to certify that it has attempted to meet and confer with the opposing party before filing a motion to compel discovery. ACC, TFI and NITL support that proposal, although they believe that this already is occurring in most circumstances.

In proposing the "meet and confer" requirement, the Board also responded to a request to extend the 10-day period for filing motions to compel, at 49 C.F.R. 1114.31(a), to 14 days to accommodate this requirement. While ACC, TFI and NITL are not questioning that determination, they ask the Board to clarify that its discussion in the NPR does not preclude a common practice by which the parties mutually agree to toll this 10-day period while they engage in negotiations. Given the volume of discovery required in SAC cases, the process of reviewing, analyzing and negotiating the scope of production for hundreds of discovery requests at a time rarely can be completed in 10 days. If the parties are not permitted to toll this 10-day rule, they will have little choice but to file broad scope motions to compel to protect their interests, even though on-going negotiations likely would moot most if not all of their motions.

For example, it is common for a party to assert numerous objections to a discovery request, but then state that "notwithstanding" or "subject to" those objections, that party will produce something. Often it is only after subsequent correspondence and meetings that the requesting party obtains a clear understanding of what the other party intends to produce and then can evaluate the sufficiency of that response.

Alternatively, ACC, TFI and NITL suggest that a more realistic time line for filing motions to compel in SAC cases is 30 days. This extended period has the advantage of establishing a reasonable time for negotiating discovery differences before filing motions to

compel so that the parties have less need to toll the current unrealistic deadline. Although this is longer than the current rule, it reduces the need for tolling agreements, and with it the potential for open-ended tolling arrangements.

IV. Evidentiary Submissions

The NPR contains three proposed rules governing evidentiary submissions. ACC, TFI and NITL are either neutral or support these proposals.

First, the Board would allow parties to file public versions of their evidence three business days after their highly confidential filings, instead of the existing simultaneous filing requirement. ACC, TFI and NITL do not object to this proposal, but upon some reflection, they question whether this is feasible in practice. Under the current system, the parties denote confidential and highly confidential text in single and double brackets, respectively in both the unredacted highly confidential and redacted public versions. Thus, when reading the highly confidential versions of evidence, both the Board and the parties know which text is confidential. If under the proposed rule those confidentiality designations are not made until after the highly confidential version has been filed, the highly confidential versions no longer will identify confidential text. Instead, when reading the evidence, the Board and the parties will have to cross-reference the redacted public versions to identify confidential text. That process is cumbersome and itself creates a new risk for inadvertent disclosures of confidential information.

If the Board intends that the parties still identify confidential text in the highly confidential versions, then the time savings from deferred public filings is primarily the additional day required to redact the confidential text and produce the requisite copies. This need for additional time to create public versions is much less than it once was. It has always been the case that confidential text is identified and appropriately marked during the drafting

process and/or the final review and editing process. The most time-consuming element of creating public versions was the redacting process itself. Technology has made the process of redaction much more expedient than the days when it took a roomful of lawyers and paralegals using redacting tape to create public versions manually.

Second, the NPR proposes to formalize the *de facto* use of single and double brackets to delineate confidential and highly confidential text. The NPR also would add triple brackets to delineate Sensitive Security Information. ACC, TFI and NITL support these proposals.

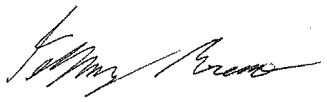
Third, the NPR proposes to impose a 30-page limit on final briefs. ACC, TFI and NITL support this proposal, but they also ask the Board to consider staggering the submission of final briefs so that complainants file their briefs two weeks after the defendants. Under the current sequence of filings, complainants' briefs are little more than an abridged repetition of their rebuttal legal argument because nothing occurs between rebuttal evidence and briefing. Defendants, on the other hand, use their briefs to respond to the rebuttal evidence, thereby giving them the last word in the case. The simultaneous filing of briefs does not afford complainants an opportunity to react to defendants' critique of the rebuttal evidence even though complainants have the burden of proof. A staggered briefing schedule would redress both the redundancy of the complainants' briefs and the unfairness to complainants in allowing defendants the last word on the evidence.

V. Conclusion

While ACC, TFI and NITL generally support the NPR proposals, they reiterate their desire that the Board prioritize its efforts to develop alternatives to SAC, such as the rate benchmarking approach based upon econometric modeling. They also ask the Board to go

beyond the measures in the NPR to address the issues that will have the most impact upon reducing and controlling the complexity, time, and cost of SAC cases.

Respectfully submitted.



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Dated: May 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2017, I served a copy of the foregoing upon all parties of record via U.S. first-class mail, postage prepaid.

Jeffrey O. Moreno