

MR. DiMICHAEL: Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan, my name is Nicholas DiMichael. I appear here for the National Industrial Transportation League.

Before I start, I want to thank Commissioner Morgan for her long and dedicated service to the Board and to the participants in the transportation system. And, frankly, on a personal note, I have appeared before you probably more times than I can remember for the past nine years, but the law of life has changed. I don't know if that will happen again. But both the League and myself certainly wish you very well.

COMMISSIONER MORGAN: Thank you.

MR. DiMICHAEL: This proceeding involves procedures to expedite resolution of rail rate challenges to be considered under the Board's stand-alone cost methodology. At the outset, let me note that the very large majority of League members cannot practicably utilize the Board's standards and procedures for so-called major rate complaints under SAC.

As the Board well recognizes, complaints under these procedures take several years, and each complaint costs a minimum of about \$2 million to pursue, and the price goes up from there.

For League members who may be captive to a particular railroad, complaints would need to be resolved in a few months rather than years in order to be useful, since rail markets and shippers' commercial needs change rapidly.

Moreover, in the case of most League members, even so-called large rate -- even so-called large shippers, most origin-to-destination rail moves involve far fewer dollars than the movements involved in SAC cases, and the complaints would need to cost a small fraction of the cost of pursuing a SAC case in order to be accessible and practicable.

And, therefore, the League believes that the only -- that only the competitive market can offer the quick and cost effective price discipline that would be practicable for most League members who ship by rail. And it is for this reason that

the League has focused its energies on increasing competitive rail options and rail-to-rail competition.

However, the League is very interested in this proceeding for several reasons. First of all, of course, there are some League members who might, particularly if procedures are reformed, be able to directly utilize the Board's major rail rate procedures for some of their bulk shipments.

Second, procedures developed in this case may have application in other contexts in the future. The League understands, for example, that the Board may be considering a look in the future at so-called small rate complaint procedures -- procedures which have never been utilized by a single rail shipper even once, and the lessons learned in this case might be applied to needed reforms in that context.

In any event, the League very much commends the Board for its recognition of existing problems in the resolution of rail rate challenges considered under the stand-alone cost methodology.

The Board has proposed three types of reforms. The Board has suggested that there be mandatory mediation prior to the filing of a complaint. The Board has proposed a number of procedural changes to resolve discovery disputes in SAC proceedings. And the Board has proposed a modification to its substantive standard governing discovery in SAC cases.

The League believes the Board has proposed a number of workable procedural modifications to its regulations that may ameliorate problems that cause or contribute to the delayed resolution of SAC proceedings. However, the League strongly opposes the one change proposed by its -- by the Board in its substantive discovery standards. Let me deal with each of those categories in turn.

First, we support the mandatory mediation of rail rate cases. Mediation should not be looked upon as a panacea. And the Board's proposal, at least for SAC cases, appears to provide

for procedures that might help to resolve abuses of rail market power before a formal complaint is filed.

Because SAC cases take so long and cost so much money to pursue, the decision of a shipper to embark on a \$2 million plus several year litigation is taken very, very seriously, and very, very slowly. Usually, the decision to file a complaint under SAC procedures is preceded by many months of negotiations with the railroad over the rate.

Mediation would take place in this already preexisting time -- pre-complaint time period, and the League believes that it may be helpful in this pre-complaint time period for there to be outside assistance in resolving a dispute that is going to cost both parties much time and much money.

Again, I don't want to imply that mediation is going to work in every case. It may work, you know, very, very seldom. But we're not -- but it seems that there might be some use to have a third head in the game.

The League believes, however, that mediation should not become a cause for further delay. It should clearly be allowed to begin prior to the termination of an existing rail contract, and the mediator should be permitted to declare an impasse before the end of the 60-day period.

I was just in a mediation not involving, obviously, a Board case just several weeks ago, and the mediator met with both sides and came back into the room and said, "I can't do anything for you." And that is sometimes how it goes, and that's not bad either.

However, in this connection, I would note the suggestion of the Western Coal Traffic League that carriers should be required to respond promptly to shipper requests for new common carrier rates, and that carriers honor all requests made within five months of the start of common carrier shipment.

What we have here sometimes is that you don't even know the common carrier rate that you're going to be paying once the

complaint ends. And I think in that context it's going to be very, very difficult for a mediator to bring the sides together, if you don't even know what the rail rate is going to be, and the mediator will not be even able to say, "Well, that seems high," or "that seems fine."

The League believes that that change would permit the parties to negotiate knowing what the common carrier rate might be, and would permit the mediator to mediate with the full knowledge of the rate that any complaint might challenge.

We certainly believe that all information exchanged in mediation should be kept strictly confidential, and we urge the Board in adopting any rule on mandatory mediation to carefully ensure confidentiality.

Finally, the Board should ensure that any proposed mediation procedures don't impose significant costs on the parties and should take steps to ensure that costs of any mediation are kept to a minimum. We have suggested only a short transportation and negotiation summary, in narrative form, be presented, and beyond that we don't think there should be any rules for the conduct of the mediation, that the procedures ought to be very flexible.

The parties should not be forced to present a costly or complex evidentiary showing, and mediation should be a low-cost method of bringing an experienced third perspective into a dispute. It should not be a forum for pre-litigating that dispute.

On the Board's proposed procedural reforms, we strongly support the Board's proposals on procedural reforms in discovery of SAC cases. In its comments, the League had indicated that motions to compel discovery have frequently remained pending at the Board for several months before decision, and the League believes that a good measure of the delay, and, therefore, the cost in SAC proceedings could be solved if the Board would adopt and extend its proposed procedural reforms for resolving

discovery disputes in SAC cases.

In our comments, we note that the time period that it took for deciding -- we noted the time period that it took for the Board to decide motions to compel in five pending rate cases, and in those cases it took an average of nearly five months for the Board to decide those motions to compel.

Thus, just the time for deciding a motion to compel has on average extended the evidentiary phase of a SAC proceeding from the seven months contemplated in the Board's procedural rules to over a year. And adding the nine months that the Board has to decide a SAC case extends, with just a single motion to compel, the time period for deciding a SAC case to nearly two years, and thus you can really see how these cases are going two years, three years, and more.

Thus, the League supports the Board proposal that a reply to a motion to compel be filed within 10 days rather than the usual 20 days. Expedited replies to motions to compel are common in rail merger cases and could be done in rail complaint cases.

Since motions to compel are virtually always preceded by lengthy negotiations between the counsel to the case, because after all a shipper complainant does not often want to suffer the delays caused by filing a motion to compel, there is virtually no danger of a surprise motion or anything of that sort.

Secondly, we very strongly support the proposed requirement that the Secretary issue a summary ruling 20 days after the motion is filed. We also strongly support the proposal that the Board's staff be permitted to convene an informal conference with the parties to discuss the dispute.

We believe that the parties' consultation with STB staff might facilitate a private resolution of the discovery dispute, and, at a minimum, will aid in the Secretary's consideration of the issues. We agree that the staff conference, in fact, be mandatory upon the request of any party.

Finally, we concur that the parties should have a right to file an appeal, that the appeal should be an expedited one, with a response due just 10 days after the filing, and we very strongly believe that the Board in one form or another should commit itself by rule to deciding the appeal within a set and very short period of time. Particularly if the staff is involved in a discovery conference, this should help the staff to assist the Board in resolving any appeal.

Finally, on the proposed revision of the discovery standard, the Board has proposed revising that standard by eschewing the relevant standard in favor of a new standard. We very strongly oppose that change, and we believe that it would set the Board on a process that would be very counterproductive actually to its stated goal of reducing the time period for processing SAC cases.

The Board needs to recognize that over the past several years, especially over the past two years, it has begun to develop a body of discovery precedent in SAC cases that can, for the first time, guide parties in their discovery disputes, particular discovery disputes decided and by particular decisions.

The past discovery disputes have been complex and, indeed, the complexity of disputes may have been one reason why the Board took so long to resolve them. But because of that precedent, future discovery disputes might be able to be resolved much more quickly as the parties, the staff, and the Board will be able to consult this past precedent in resolving any future disputes.

But this precedent will be swept away, as Mr. McBride mentioned, if the Board would adopt its proposed substantive change to the discovery precedent -- excuse me, would adopt its proposed substantive change to the discovery standard.

Even beyond the loss of a useful precedent, the League believes that the adoption of the Board's proposed more

restricted discovery standard would spawn more, not less, discovery disputes, because the heightened standard for obtaining discovery would invite objections, would encourage objections, which would then lead to more motions to compel.

Moreover, the Board has correctly recognized that shippers need more discovery in SAC cases than do defendants, and the Board's proposal would tend to cut against the party that needs discovery the most. That would be unfair.

The Board is on very dangerous ground in tampering with a standard that on substantive grounds has worked well. At the very least, the Board should see if the proposed procedural reforms solve the problem, as the League believes that they will, before it undertakes a highly uncertain course to sweep away its increasingly well-developed precedent on discovery in SAC cases.

Finally, I would note that in written submissions to the Board on February 21, the Association of American Railroads and several railroads have made several suggestions for other changes to the Board's rule. I would note that the Board cannot, as Mr. Dowd said before, as a matter of law under the APA adopt any of these suggestions as rules in this case. But I do want to provide at least an informal -- an initial reply to at least some of those suggestions at that time.

First, on initial disclosures, the AAR suggested that a complainant should be required to provide certain initial disclosures, including a prima facie showing of market dominance, URCS-based variable cost calculation, and documentation that fully discloses future coal sourcing and transportation plans.

The League believes that a requirement for a prima facie showing of market dominance will simply lead to more motions, this time in the form of motions to dismiss, which will simply lead to further delay. Market dominance and these other matters are highly factor of an inquiry -- which is not readily resolvable unless there is full factual development.

The AAR's suggestion about initial disclosures of facts

such as variable costs before the complainant has had an opportunity to examine those costs through discovery would be unfair, and any requirement for initial disclosure of facts from the shipper would need to be balanced by initial disclosure of facts from the defendant carriers, such as traffic tapes, etcetera.

Certainly, if you're going to require initial disclosures, as in the Federal Rules, both sides have to be subject to that.

On the issue of standard period for discovery requests, the AAR and the UP have suggested a standard period for discovery requests, namely one year of the most recent data for variable costs and two years of data relating to the railroad's operating plan for the SAC evidence.

There would appear to be very serious problems with that approach. The periods chosen would include an anomalous period, such as when the UP experienced its meltdown in the late 1990s. The League believes that the parties and the Board need to have more flexibility than such a rigid rule would imply.

On variable costs, we very strongly oppose the AAR's suggestion that the Board eschew movement-specific variable costs or system average variable costs. The variable cost calculation is a crucial one in the stand-alone cost case, because in many cases the SAC calculation is below the jurisdictional threshold, which is based on variable costs.

Thus, the maximum rate is set in many cases on the calculation of variable costs. Thus, it is very important for the Board to get the variable cost calculation right rather than use averages which are just that -- averages, and don't reflect the efficiencies that may be present in a particular movement.

Regarding the issue of technical conferences, the AAR suggests that once parties have made their presentations the Board staff might convene a technical conference. We believe that this suggestion may have merit, just as long as the

technical conference includes experts and attorneys from both sides.

Finally, on the treatment of confidential information -- well, I shouldn't say finally. I do have one more point to make after that.

(Laughter.)

Treatment of confidential information -- much of the filings has been confidential. We agree that there is, frankly, more need for public versions of this, of the filings. But we agree also with Mr. Dowd that the problem here has been that the railroad defendant has chosen to stamp virtually every piece of paper they give the shipper with a highly confidential designation. So it's virtually impossible for the shipper to make a public filing.

We think that instead of, or in addition to, guidelines for expedited distribution of redacted versions and public versions, which will just add to the cost, the Board might consider guidelines for the use of the highly confidential designation in the first place to restrict it to matters which are really highly confidential.

If the defendant carrier continues to make all of the information highly confidential, it's going to be very difficult to provide public versions of the evidence.

Finally -- this is finally --

(Laughter.)

-- on the limitation of the number of discovery requests, the UP has suggested that the Board adopt a limit on the number of discovery requests. While facially appealing, the Board needs to understand how these discovery requests have evolved over the decade and a half that SAC cases have been litigated.

In general, discovery requests propounded in cases have been made much more specific over the years over the cases as they have gone forward, as the complainants have gotten more

experience with how rail carriers keep their own records. The trend has been to make very detailed discovery requests, so that what is being requested is clear.

A limitation on the number of discovery requests would be a step backward, since complainants would simply couch their discovery requests much more broadly. Thus, instead of a number of detailed specifications of about -- of, for example, exactly what crew wage data is really wanted, limitations on the number of discovery requests would simply lead to such requests as, "Please provide all data of wages paid to all personnel involved in the movement of all trains used in the movement of coal from origin X to destination Y."

And that would simply lead to uncertainty as to exactly what's meant by that, potential overbreadth objections, more discussion between the parties, more motions to compel. In short, this is an area in which the law of unintended consequences might apply with a vengeance.

We very much appreciate the opportunity to present our views, and I would be very happy to answer any of your questions.