

MR. MOATES: Thank you, Chairman Nober, Commissioner Morgan. I am not Pete Shudtz. I think that is apparent. I am Paul Moates of Sidley, Austin, Brown, and Wood.

We are counsel to CSX in this pending rate case here and counsel to Norfolk Southern, represented here today by my good friend Mr. Squires, who is in-house counsel for Norfolk Southern in Norfolk Southern's Eastern rate cases.

Mr. Shudtz was unavoidably detained in New York City. Believe me, he really did want to be here for lots of reasons. He regrets not making the hearing, which he and CSX view as very important.

He asked me to emphasize a few points that he had already prepared. I am going to do that. Then if I have a moment, I would like to make a few observations of my own on behalf of CSX which derive from my experience in these most recent Eastern cases that are before you.

Mr. Shudtz wants to emphasize that CSX's coal transportation business is a very, very important core element of the railroad. I think everyone knows that. In fact, CSX handles between 170 and 200 million tons of coal per year across the system, which accounts for about 25 percent of the system tonnage and about 24 percent of its system revenue. It's critically important. It gets a lot of attention, a lot of capital.

Over, well over, 90 percent of all of that coal traffic on CSX moves under private transportation contracts. That means he tells me that they have roughly 300 transportation contracts for coal in place at any given time, that about 75 to 100 of those turn over every year. In other words, they are renegotiated, 75 to 100 of them, every year.

As a general proposition, CSX emphasizes that its experience with Staggers Act contracting has been overwhelmingly positive, as I think it has been for all of the railroads here today.

The company strongly believes that the private

negotiation of rates and other commercial terms for coal transportation service is extremely preferable to having it brought to this Board. However, -- this is an important however -- CSX is very concerned that several of its larger coal customers have declined to enter into contracts of more than a year's duration -- this is a recent, fairly recent, development -- because they; that is, those utility customers, don't want to eliminate their ability to file a complaint case should they conclude the regulatory intervention may be more attractive than private negotiation of rates. For that reason, CSXT is acutely concerned about how the Board handles the cases pending before it as well as what it does to balance the burdens in SAC cases.

Now let me turn to some of these procedural issues. First of all, we have had to deal, CSX has had to deal, over the last year plus couple of months with its first coal rate case in quite a number of years. We are obviously not going to discuss the merits of it, but the experience itself procedurally informed some of the views that CSX has on the issues before you now.

First, CSX reiterates strongly its support for the proposal of non-binding mediation. We are certainly behind that as a necessary precursor to the filing of the complaint.

We also urge the Board to ensure as best it can the mediator selected for these matters have, at least as Mr. Sipe said, some knowledge of the act and some knowledge of ex parte 341, sub 1 at the CMP guidelines.

Again, it is unrealistic I think to believe that anyone would be an expert in the nuances of stand-alone costing, but at least some familiarity with what that principles are about. By the way, contrary to some suggestions from some of my esteemed colleagues on the other side of these cases here this morning, they are not about pinning down variable costs so that you can figure out exactly where the 180 percent variable cost threshold is. They shouldn't be about that.

Yes, I agree with Mr. McBride. SAC is supposed to be

the standard under CMP. It is the standard, as Chairman Nober noted, that all of the customers, all of the shippers in these cases have elected to invoke.

SAC, if you go back and look at 347 somewhat I committed to you, SAC said the ICC should approximate the results of Ramsey pricing. It should approximate the kind of outcomes you would get under a differential pricing regime.

It didn't say SAC was meant to tell you where 180 is. What it means is there should be outcomes, as Mr. Sipe suggested, in these cases, where you should find rates reasonable that are above, and I would submit well above, the 180 percent threshold because if some of those rates of the most demand inelastic customers of the railroads can't be at those higher levels, where are the railroads supposed to get the revenues that will move them towards revenue adequacy. They are not going to get it from the customers who have other kinds of options.

Second, CSX supports the Board's efforts to impose more restrictive standards on discovery in these cases. And I understand the concerns our opposing counsel have that somehow we tricky railroad lawyers will jump on some narrowing of the standard to say we don't have to produce what we used to produce.

That is not what is going on here. What is going on, in large measure, is what Mr. Weicher just talked about. I would submit for your consideration the ways of trying to share the costs, the very significant costs, that the railroads are forced to shoulder in responding to these discovery requests, Mr. Weicher gave you some examples from one of his cases.

In CSX's recent case, it would serve as 584 separate interrogatories of document requests. Now, that does count multiple subparts. Some of those subparts go on for pages. They delved, those requests delved, into virtually every aspect of the railroad's operations, its traffic information, its IT capabilities, its G&A and overhead costs, marketing plans and so forth.

Unlike our Western friends, the Eastern railroads had not until this last year had any rate cases for a long time. So this was not something they had sitting on the shelf, nor did they have, as Mr. Sipe said, a lot of experienced people who had done this before. Those people are all gone. So this was a tremendous burden.

The railroad's IT department, in particular, had to produce several years of traffic and revenue data for its entire system. They had to create computer programs. They dedicated a mainframe computer for an entire week running 24 hours a day just to sort and produce the information that was requested. That was the key thing. It didn't just hand them some pre-run tapes off the shelf. You have got to program these tapes to develop the data the way that the complainant wants it and the way that, frankly, both parties need it for the case.

For the purposes of this hearing today, Mr. Shutz conducted a survey internally. He tells me that he is determined that CSX spend approximately 3,000 staff hours just to comply with the utilities' discovery requests, 3,000 hours. That does not count the time and expense of people like me and the outside consultants, whom they have to pay as well.

Obviously, these are valuable and scarce resources that are deflected from the very important business of running the railroad. We, therefore, ask the Board's assistance in helping rein in this discovery juggernaut.

I am constrained to say -- and I saw this in all three of these cases -- there is a significant part of the difficulty associated with complying with all of these discovery requests. There has been the information is sought by the lawyers and the consultants for the utilities in the manner that they wanted for litigation purposes.

Well, unfortunately, that isn't the basis on which the railroads maintain data and records. Mr. Weicher made reference to this. Railroads constantly change the way they maintain their

records, the way they do their business, trying always to be more efficient and to modernize and to keep track with ongoing developments. They don't maintain their records in order to make bringing rate cases against them easy.

We respectfully submit that means that the realities of how a railroad like CSX runs its business need to be factored in to the data and information-gathering efforts of parties seeking discovery against it.

I can't help but observe that Mr. Dowd's claim that requests have been honed -- he used that term several times. What that means to me is that those requests have been honed by the shippers, lawyers, and consultants to the way they decide they want the data produced. It is not honed or tailored to reflect the realities of how CSX and the other railroads often maintain that data.

Lastly, -- I won't dwell on this because I have a feeling you will have a question or two, but we did, CSX and my friend Mr. Squires or NS, made quite a point in our prepared comments about this highly confidential designation concern.

I am sure there is some confusion here because it has been said and said accurately that the railroads put the highly confidential designation on a lot of their data. We do for a couple of reasons.

One Mr. Sipe said, the statute requires, 11904, you have got to protect traffic data. There are penalties for failing to do that. Of course, there are procedures that we use, protective orders, for seeing that that is done.

There is other competitively sensitive information, not just for the shippers but, frankly, for the competing railroads that there is concern. Norfolk Southern may not want CSX, or vice versa, to know what it is paying for, particularly the elements of traffic structures. It may not want to share what it is paying for fuel, that kind of thing. So that should be designated as confidential or highly confidential.

Indeed, the shippers dutifully observe that when they file their evidence. The way they do it is they put a big seal -- you have seen this; you read these cases -- on the front of every cover of every volume, contains sensitive, confidential, and highly confidential information filed under seal. Bingo. What is it that sets it in highly confidential?

Yes, it is in there, but they don't tell us that. We have to go back. And sometimes it takes weeks to go back because everybody is busy to go back and say, "Where is it? What is the stuff? Is it your information? You know, did the utilities put some highly confidential information here?" Ninety-nine percent of the time the answer is no or they used one or two little pieces of utility information. And it's easy to redact that.

Mr. Squires, Mr. Shudtz, Mr. Weicher, Mr. Hemmer, and their staffs don't get to see this evidence. So guess what happens? The outside lawyers and the outside consultants have this world of their own where they move forward with generating the evidence. The clients have to run and catch up.

Thank you.