

CHAIRMAN NOBER: Well, thank you very much.
Commissioner Burkes.

COMMISSIONER MORGAN: I just have one question. You talked about mediation and making sure that mediation moves the case along and doesn't add additional time to the process. Obviously our proposal talks about doing mediation before we get into the formal handling of the rate case.

We have had some discussion on the record about possibly doing mediation during the course of the pendency of the rate case. Do you have a view on that, particularly in the context of, again, trying not to add time to the whole process?

MR. SMITH: Right. One of the parties raised I think it was Section 11-705, which sets statute of limitations for bringing actions by parties aggrieved in rate cases, and it sets a two year period. And the Board's proposed rule on this point had indicated that that would be -- the filing of the arbitration notice would, in fact, have or could have some jurisdictional implication.

And it had been our thought that the Board either by modifying perhaps the black letter of the proposal or just explaining in the preamble to the final decision that would not and should not be the case; that perhaps the beginning of an action could be initiated with simple a placeholder kind of a filing so that time doesn't run.

And, in fact, since your proposal calls for this whole process to go no more than 60 days from start to finish, and it could be less, depending upon how things are going or not going in the mediation process, that as a practical matter we should not think in most occasions that that short period of time would pose a real problem with the statute of limitations period.

CHAIRMAN NOBER: Let me ask. I mean, given the nature of these disputes, what leads you to believe that mediation would be successful?

I mean, someone commented that it would just, you know,

further string out the time and the parties are at loggerheads at that point already and they've been negotiating for months. What makes you think that it would help bring about a solution in any individual case?

MR. SMITH: I don't think it could hurt, and I think that just as in litigation where very many courts have a mediation process and they select certain cases for the adversaries to try and resolve their dispute for various reasons that the court has, that can be helpful much in the same way that the judicial staff conferences have been helpful.

Now, obviously mediators are not part of the court's staff. They don't have that kind of input to the decision making, but they are experienced in facilitating disputes. They can usually by meeting separately with the parties try, and I think that's the benefit of mediation. You can advance or try to probe the flexibility without exposing each party to the other to some possible flexibility, some willingness to move that is very, very difficult to do face to face between two adversaries.

CHAIRMAN NOBER: Would the department have any suggestions on who should serve as mediators or how they should be chosen? Again, a point of dispute between the parties on this.

MR. SMITH: Right. We don't. I think that at least at the outset parties will try to use existing Board precedent on rate case matters as kind of worst case scenario and use that as the bottom line going into any negotiations or mediation, figuring they can do no worse than that.

So in that sense, I'm not sure whether it matters to what extent the mediator is steeped in rail rate law or not. There's something to be said on both of those occasions, and we haven't taken a position on which type of background would be the better for the purposes. It's something to explore.

CHAIRMAN NOBER: Okay. thank you very much.

COMMISSIONER MORGAN: Can I just follow up on that, Mr.

Chairman?

CHAIRMAN NOBER: Sure.

COMMISSIONER MORGAN: So just to -- what I hear you saying is that mediation is a useful tool for moving things to resolution.

MR. SMITH: It certainly can be.

COMMISSIONER MORGAN: It can be, and also I heard you also talk about the use of staff conferences, informal staff involvement to move discovery items.

MR. SMITH: We're very, very much in favor of that, and I think it's when the staff wants to hold a conference it should be an offer that the parties can't refuse. They should be going into that, again, with the expedited time frame.

And when and if there are appeals from that summary staff decision that you've mentioned in your proposals, I think that it's just as important that the Board address those in the same expeditious fashion as the staff has.

CHAIRMAN NOBER: Let me ask. The DOT inherited several adjudicatory functions from the Civil Aeronautics Board, which I know are performed by one of the Assistant Secretaries. In those adjudications, do you have any parallel procedures that you use in the ones that you undergo?

For example, you know, international aviation routes, mergers, co-chairing, things like that that you would do similar adjudications for?

MR. SMITH: Well, in the route cases, there certainly have been full fledged adjudications where the ALJs used. Those aren't particularly appropriate for mediation generally because there's just one route to be given out to one party usually, and so there's going to be a winner and a loser.

In terms of the other kinds of adjudications that we have, the vast majority of those don't rise to the level of hearing or are settled beforehand by our equivalent to the enforcement offices.

In the other kinds of cases, for example, in code sharing, although I'm not personally involved in those kinds of quasi-mergers, although I'm not personally involved in those kinds of proceedings and so I couldn't tell you whether they engage in any kind of mediation. I do know some people who are. I can't ever recall them complaining about discovery.

CHAIRMAN NOBER: I think they are probably different.

MR. SMITH: All right.

VICE CHAIRMAN BURKES: I have a question.

CHAIRMAN NOBER: Sure.

VICE CHAIRMAN BURKES: Paul, do you have any concern about there being a lack of sufficient data to both parties during the mediation process, or one party having ample data and the other side not having the data?

MR. SMITH: Well, I have to say that we don't know enough. That's the Transportation Department pre se, and I personally do get involved generally with the Board proceedings, don't get personally involved.

It could be that one of the parties, I think, has proposed that each side if they have any presentations or documentation to deliver, do so to each other and to the mediator beforehand. That might take care of that problem if it is a problem.

Otherwise, of course, as Chairman Nober has said, the parties are almost certainly negotiating before this mediation would take place, and there must have been some if not exchange of documents, then some communication about the positions of the parties so that we're not coming stone cold into -- they would need to be stone cold in the mediation anyway.

If there is a desire to provide the mediator with additional information, I'm not sure whether it should be mandatory that that information go automatically to the other side. We don't have a position on that, and the reason I'm kind of speculating here is that for the same reason that a mediator

meeting along with each party can sometimes facilitate movement toward a common ground by dint of that private meeting or series of private meetings. It might be that that same kind of exclusive use of information would be helpful. I just don't know that part of the question.

CHAIRMAN NOBER: Okay. Well, I have none either. Well, thank you very much for coming. We appreciate the views of the department and Secretary Mineta. Please give everyone my best.

MR. SMITH: I sure will. Thank you.

CHAIRMAN NOBER: Okay. Well, why don't we move to our next panel, which is the shipper panel. From the Western Coal Traffic League, we have Mark Schwirtz and Kelvin Dowd. Will you both be at the dias?

From the Edison Electric Institute Mike McBride, and from the National Industrial Transportation League, Nicholas DiMichael.

Please come on up. And for lack of a better order, we'll take the one that's on the paper. Mark Schwirtz with the Western Coal Traffic League.

You've been given a generous time allotment. Don't feel you need to use every minute of it.