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SERVICE DATE – NOVEMBER 30, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 733

EXPEDITING RATE CASES

Decided: November 29, 2017

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: Pursuant to section 11 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), the Surface Transportation Board (Board) is modifying rules pertaining to its rate case procedures.

DATES: This rule is effective on December 30, 2017.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 733 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn, (202) 245-0283. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Section 11 of the STB Reauthorization Act, Pub. L. No. 114-110, 129 Stat. 2228 (2015), directs the Board to “initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.” In addition, section 11 requires the Board to comply with a new timeline in Stand-Alone Cost (SAC) cases.

In advance of initiating this proceeding, Board staff held informal meetings with stakeholders¹ to explore and discuss: (1) how procedures to expedite court litigation could be

¹ Board staff met with individuals either associated with and/or speaking on behalf of the following organizations: American Chemistry Council; Archer Daniels Midland Company; CSX Transportation, Inc.; Economists Incorporated; Dr. Gerald Faulhaber; FTI Consulting, Inc.; GKG Law, P.C.; Growth Energy; Highroad Consulting; L.E. Peabody; LaRoe, Winn, Moerman & Donovan; consultant Michael A. Nelson; Norfolk Southern Railway Company

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applied to rate cases and (2) additional ways to move SAC cases forward more expeditiously. The Board issued an Advance Notice of Proposed Rulemaking on June 15, 2016, seeking formal comment on specific ideas raised in the informal meetings as well as comments on any other relevant matters. Expediting Rate Cases (ANPRM), EP 733 (STB served June 15, 2016). The Board received eight opening comments and six reply comments on the ANPRM.

On March 31, 2017, the Board issued a Notice of Proposed Rulemaking, addressing the comments on the ANPRM and proposing specific amendments to its regulations. Expediting Rate Cases (NPRM), EP 733 (STB served Mar. 31, 2017). The Board received four opening comments and six reply comments on the NPRM.²

Below, the Board addresses the comments and suggestions submitted by parties in response to the NPRM and discusses clarifications and modifications being adopted in the final rule to help improve the rate review process.³ Appendix A contains the text of the final rule.

Pre-Complaint Period. In the NPRM, the Board proposed to create a pre-complaint period, which would begin when a SAC complainant files a pre-filing notice with the Board. Under the proposed rule, a complainant would file the pre-filing notice at least 70 days prior to filing its complaint. The proposed pre-filing notice would contain the rate and origin/destination pair(s) to be challenged, the commodities at issue, and a motion for protective order pursuant to

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(NSR); Olin Corporation; POET Ethanol Products; Sidley Austin LLP; Slover & Loftus LLP; Steptoe & Johnson LLP; The Chlorine Institute; The Fertilizer Institute; The National Industrial Transportation League; and Thompson Hine LLP. The Board notes that some participants expressed individual views, not on behalf of the organization(s) with which they are associated.

² Comments were received from the following organizations: the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League (ACC, TFI, and NITL); the Association of American Railroads (AAR); the National Grain and Feed Association (NGFA); Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board; Union Pacific Railroad Company (UP); and the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, National Rural Electric Cooperative Association, and Freight Rail Customer Alliance (collectively, Coal Shippers/NARUC).

³ The final rule adopted in this rulemaking pertains mostly to SAC cases—the Board’s methodology for large rate cases. However, some aspects of the final rule would also benefit cases filed under the Board’s other methodologies, Simplified-SAC and Three-Benchmark (collectively, simplified standards). See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007). In those instances, the rule will specify to which types of cases it applies.

the proposed, new 49 C.F.R. § 1104.14(c).⁴ The Board also proposed to revise its regulations to move mandatory mediation in SAC cases to the pre-complaint period.

Several stakeholders generally support the Board's proposed pre-complaint period, although some suggested modification to the proposed rule. ACC, TFI, and NITL state that the pre-filing notice would allow parties to begin many functions that would typically occur after a complaint is filed and note that engaging in mediation before the filing of a complaint could potentially avoid the filing of a complaint at all. (ACC, TFI, & NITL NPRM Comments 3.) They also suggest that the Board allow for skipping or shortening the pre-complaint period when the statute of limitations would otherwise bar any portion of a complaint that is filed after the notice period expires. (*Id.* at 4.) AAR also supports conducting mediation during the pre-complaint period, noting that a pre-filing notice would potentially foster private-sector resolution of the dispute by allowing Board-administered mediation to begin earlier. (AAR NPRM Comments 5-6.) AAR, however, urges the Board to clarify that protective orders filed with the pre-filing notice may continue to include provisions recognizing a party's right to review its own confidential or highly confidential material referenced in the other party's filings. (AAR NPRM Comments 7; *see also* Coal Shippers/NARUC NPRM Reply 4 (noting that they do not object to this request).) NGFA does not oppose the Board's proposal to provide for a pre-complaint period and pre-filing notice so parties can engage in mediation before filing a SAC complaint but recommends that the mediation period span no more than 45 days, subject to extensions by agreement of the parties. (NGFA NPRM Comments 4.)

Coal Shippers/NARUC urge the Board not to adopt the proposed pre-complaint period rules. (Coal Shippers/NARUC NPRM Comments 14.) According to Coal Shippers/NARUC, the pre-filing notice requirement would lengthen the rate case schedule. (*Id.* at 16.) They also argue that the pre-filing notice would not expedite discovery. (*Id.* at 23 (citing NSR ANPRM Comments 35 ("The railroad can only begin to gather the necessary documents and data once a shipper has . . . served its discovery requests, informing the railroad of the time frame for discovery materials and segments of the railroad for which discovery is sought"); AAR ANPRM Comments 6 (pre-filing notice "would not actually expedite the rate case itself once it is filed")); *see also* ACC, TFI, & NITL NPRM Reply 5.) According to Coal Shippers/NARUC, railroads would continue to "withhold" production of the most important information unless the Board establishes expedited post-complaint deadlines for discovery production. (Coal Shippers/NARUC NPRM Comments 24 (citing NSR ANPRM Comments 6).)

Coal Shippers/NARUC urge that, if the Board establishes a pre-filing notice requirement, it should also require railroads to provide common carrier rates and service terms to shippers upon request no later than 90 days prior to the anticipated start of the common carrier service. (Coal Shippers/NARUC NPRM Comments 29; *see also* ACC, TFI, & NITL NPRM Reply 5-6; NGFA NPRM Reply 3.) Coal Shippers/NARUC further argue that the pre-filing notice should be optional, (Coal Shippers/NARUC NPRM Reply 11), and should be filed at least 40 days prior

⁴ In the NPRM, the Board proposed standard identifying markers for the submission of confidential, highly confidential, and sensitive security information in rate cases at § 1104.14(c). This proposal is discussed in more detail, below.

to the proposed filing date of a complaint, (Coal Shippers/NARUC NPRM Comments 30; Coal Shippers/NARUC NPRM Reply 12; see also ACC, TFI, & NITL NPRM Reply 6; NGFA NPRM Reply 3).

Coal Shippers/NARUC also do not support moving mandatory mediation to the pre-complaint period. According to Coal Shippers/NARUC, by the time a case reaches the Board, it is unlikely that a mediated resolution can be obtained. (Coal Shippers/NARUC NPRM Comments 20.) Coal Shippers/NARUC further argue that mediation is more beneficial following a complaint because the complaint provides valuable information to both the defendant carrier and mediator. (Id. at 21.) Coal Shippers/NARUC argue that the Board could best deal with the burdens imposed by the Board's current mandatory mediation rules by changing those rules to make mediation voluntary, not mandatory, in SAC cases. (Id. at 22.) Coal Shippers/NARUC argue that, if the Board proceeds with the proposed pre-complaint period, the mediation period should be 40 days (beginning when the pre-filing notice is submitted), subject to extensions if requested by all parties. (Id. at 32-33; Coal Shippers/NARUC NPRM Reply 12; see also ACC, TFI, & NITL NPRM Reply 6; NGFA NPRM Reply 3.) Coal Shippers/NARUC also argue that the Board should reduce the time allotted (i) to assign mediators after the pre-filing notice is submitted from within 10 business days to within three business days, and (ii) for mediators to contact the parties from within five business days of assignment to within three business days. (Coal Shippers/NARUC NPRM Comments 32.)

NGFA suggests the Board shorten the mediation period, specifically to no more than 45 days, subject to extension by mutual agreement of the parties. (NGFA NPRM Comments 4; NGFA NPRM Reply 3; see also ACC, TFI, & NITL NPRM Reply 4.) According to NGFA, by the time any non-agricultural shipper files a SAC complaint, it already would have engaged in thorough discussions with the defendant railroad and formal action likely would be required to resolve their differences. (NGFA NPRM Comments 4; see also ACC, TFI, & NITL NPRM Reply 4.)

UP opposes Coal Shippers/NARUC's suggestion that the Board require a carrier to provide common carrier rates and service terms 90 days prior to the anticipated start of that service, arguing such a requirement would constitute a modification to the Board's rules governing the establishment of common carrier rates, which are neither the subject of this proceeding nor a logical outgrowth of the proposed rule. (UP NPRM Reply 6.) UP further argues that, even if such a rule were permissible, a carrier would retain its statutory right to increase the rate with 20-days' notice or reduce the rate with no notice. (Id. at 7 (citing 49 U.S.C. § 11101(c) & Burlington N. R.R. v. STB, 75 F.3d 685, 694 (D.C. Cir. 1996)).)

The Board continues to believe that establishing a pre-complaint period, during which parties would engage in mediation, would help rate cases proceed more efficiently. The pre-filing notice would put parties on notice as to what they likely will need to produce in discovery and enable parties to begin many activities that typically would occur only after a complaint is filed. In this respect, the pre-complaint period could shorten the rate case schedule by lessening the need for parties to request extensions of time once discovery begins. Establishing a pre-complaint period will also allow parties to engage in mediation before a complaint is filed, enabling parties to focus on mediation without the distractions of fully active

litigation.⁵ In addition, the Board continues to believe that the early submission of a motion for protective order will expedite discovery production and disclosures by allowing a protective order to be in place at the outset of a case.

Additionally, completing Board-sponsored mediation during the pre-complaint period could potentially prevent the filing of a complaint altogether. The Board prefers the resolution of disputes through mediation in lieu of formal Board proceedings whenever possible. See 49 C.F.R. § 1109.1. AAR noted, and the Board agrees, that pre-complaint mediation could foster such resolutions before a formal complaint is filed. Mediation is widely used by courts as a measure for expediting proceedings.⁶ The Board disagrees with NGFA and Coal Shippers/NARUC that, by the time a complaint is filed, formal action would be required to resolve the parties' differences. In fact, parties in several rate cases have successfully mediated resolutions to rate disputes, even following the filing of a formal complaint. See NRG Power Marketing LLC v. CSX Transp., Inc., NOR 42122, slip op. at 1 (STB served July 8, 2010); Williams Olefins, L.L.C. v. Grand Trunk Corp., NOR 42098 (STB served Feb. 15, 2007). See also E.I. Du Pont De Nemours & Co. v. CSX Transp., Inc., NOR 42112 (STB served May 11, 2009) (complaint challenging the reasonableness of rates dismissed following voluntary settlement). Resolving disputes in mediation would save parties considerable time and expense, and could better preserve their ongoing commercial relationship.

The Board also continues to believe that 70 days is the most appropriate length for the pre-complaint period because it would allow sufficient time for mediation to be completed before the filing of a formal complaint, thus freeing parties to focus on mediating a resolution before litigation begins. The Board is not persuaded by the arguments set forth by Coal Shippers/NARUC and NGFA in support of shorter pre-complaint and mediation periods. Coal Shippers/NARUC provide no support for their claim that 40 days is "more than enough time" for parties to reach a mediated solution.

For these reasons, the Board will adopt the proposal in the NPRM with two modifications. First, the Board will modify the rule proposed in the NPRM to adopt Coal Shippers/NARUC's suggestion that the assignment of the mediator(s) should occur in fewer than 10 business days after the shipper submits its pre-filing notice. The Board finds that five business days would be a reasonable amount of time for the Board to assign the mediator(s).⁷ The Board will also modify the introductory text of the proposed new section to clarify that the pre-filing notice is required only in SAC cases.

⁵ The Board intends for mediation to conclude before the filing of a complaint; however, consistent with current procedures, the rules would allow for an extension of time via Board order.

⁶ Under the Alternative Dispute Resolution Act of 1998 § 3, 28 U.S.C. § 651(b), "[e]ach United States district court shall authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions."

⁷ The Board, however, will maintain the current five business day deadline for mediator(s) to contact the parties to discuss ground rules and the time and location of any

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Second, in response to AAR's concern regarding a party's ability to view its own confidential information when such information is referenced in another party's filing, the Board clarifies that the rules adopted here would not affect the parties' ability to negotiate protective orders addressing that situation, as is routinely done now.

The Board declines to adopt Coal Shippers/NARUC's suggestion that the Board require railroads to provide common carrier rates to shippers upon request no later than 90 days prior to the start of that service. The Board agrees with UP that the dates associated with the establishment of common carrier rates are beyond the scope of this proceeding.

The Board also declines to adopt ACC, TFI, and NITL's suggestions that the Board allow the pre-complaint period to be skipped or shortened when the statute of limitations would otherwise bar any portion of a complaint. Adopting such an approach would effectively permit parties to ignore the pre-complaint period established in this final rule. Parties should take the applicable statute of limitations into account when preparing to file a rate case.

Discovery. The Board also sought comment on several ways the Board could change its discovery procedures to help improve the processing of rate cases.

a. Service of initial discovery requests and deadlines for production. In the NPRM, the Board proposed requiring parties in SAC proceedings to certify that they have served their initial discovery requests simultaneously with their complaint and answer. Several stakeholders generally support the Board's proposal. (See ACC, TFI, & NITL NPRM Comments 4; Coal Shippers/NARUC NPRM Comments 33-34; UP NPRM Reply 2.) Both Coal Shippers/NARUC and ACC, TFI, and NITL argue that the proposal would ensure discovery begins promptly. (See ACC, TFI, & NITL NPRM Comments 4; Coal Shippers/NARUC NPRM Comments 34.) However, ACC, TFI, and NITL suggest that the Board limit subsequent discovery requests because a party could "game[]" this requirement by submitting a skeletal initial discovery request with the intention of serving principal discovery requests at a later date. (ACC, TFI, & NITL NPRM Comment 4.) Coal Shippers/NARUC also argue that shippers should be permitted to include in their pre-filing notices discovery requests for "Core SAC Data," which Coal Shippers/NARUC describe as key categories of information shippers need to present a SAC case. (Coal Shippers/NARUC NPRM Comments 30 & Attachment 1.) According to Coal Shippers/NARUC, this requirement would allow carriers to begin collecting requested documents, expedite discovery, and eliminate the delay caused by "carrier foot-dragging." (Id. at 30-32; Coal Shippers/NARUC NPRM Reply 13-14.)

Additionally, both Coal Shippers/NARUC and ACC, TFI, and NITL suggest that the Board establish firm deadlines for defendant carriers to produce certain data. (ACC, TFI, & NITL NPRM Comments 4; Coal Shippers/NARUC NPRM Reply 15.) ACC, TFI, and NITL

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meeting. The Board believes that fewer than five days would not provide sufficient time for the mediator to establish ground rules for the mediation and contact the parties.

argue that defendant carriers should be required to produce traffic data within 90 days of the initial discovery request. (ACC, TFI, & NITL NPRM Comments 4-5.) Coal Shippers/NARUC argue that the defendant carrier(s) should be required to produce “Core SAC Data” no later than 70 days after receipt of the shipper’s initial discovery requests.⁸ (Coal Shippers/NARUC NPRM Comments 32.) NGFA supports Coal Shippers/NARUC’s proposal, arguing that establishing a date for production of such data after the commencement of a formal complaint proceeding seems logical and efficient. (NGFA NPRM Reply 3.)

Both AAR and UP dispute the claims that railroads delay discovery. (AAR NPRM Reply 5-6; UP NPRM Reply 2.) They also both claim that production of discovery material in SAC cases, especially production of traffic data, is a resource- and time-intensive task, requiring the development of information not maintained in the ordinary course of business. (AAR NPRM Reply 7-8; UP NPRM Reply 2-3, V.S. Sanford 1 & 3.) According to UP, carriers should not be expected to begin compiling discovery material during the mediation period for several reasons. First, according to UP, doing so would effectively transform the pre-filing notice into a complaint by immediately triggering discovery, yet ignoring the burdens involved in addressing disputes over the scope of discovery. Second, the proposal would cause a waste of resources if mediation succeeds. Third, parties may be able to resolve part of their dispute in mediation and narrow the scope of discovery. (UP NPRM Reply 5-6.)

Additionally, UP argues that the Board need not establish a firm discovery deadline because one already exists. (UP NPRM Reply 3 (“The rules establish a 150-day discovery period, followed by a 60-day period for preparing evidence.”).) According to UP, if the Board were to subdivide and micromanage the discovery period, the Board would generate more litigation by creating new types of disputes for the Board to resolve, imposing additional costs and delay. (*Id.*) UP also argues that shippers’ timelines are unrealistic and assume that a railroad should produce traffic data without questioning the scope of a shipper’s discovery requests. (UP NPRM Reply 3-4.) Additionally, UP notes that a defendant cannot begin producing traffic data until the geographical and temporal limits of a case are settled. (UP NPRM Reply 2, V.S. Sanford 1 & 3.) AAR likewise argues that an “arbitrary” deadline for the production of “Core SAC Data” is unwarranted and impracticable given shipper groups’ failure to provide any evidence in support of their “foot-dragging” claims and given the significant effort required of carriers to produce certain categories of “Core SAC Data.” (AAR NPRM Reply 5-8.)

The final rule will adopt the proposal as set forth in the NPRM. The Board continues to believe that beginning discovery earlier in the rate review process (i.e., serving discovery requests with the complaint and answer) will help expedite discovery. These changes will eliminate the current potential gap between the filing of a complaint and the beginning of discovery, thus expediting both discovery and the rate case in general.

⁸ Under Coal Shippers/NARUC’s proposal, the initial discovery requests would be filed (with the pre-filing notice) 40 days before the filing of the complaint, meaning the 70-day production deadline would fall 30 days after the filing of the formal complaint.

The Board declines to adopt Coal Shippers/NARUC’s recommendation that complainants be permitted to include discovery requests for “Core SAC Data” with their pre-filing notices. Because the scope of discovery could potentially evolve as parties proceed through mediation, the Board believes the appropriate time for parties to submit discovery requests is with the respective filings of the complaint and answer. Parties may resolve certain aspects of the dispute, such as the geographical and temporal limits for the case, and those agreements could significantly affect what data a party is required to produce and could render prior efforts to gather data superfluous.

Additionally, because the Board’s rules already provide a default procedural schedule for SAC cases that includes a 150-day deadline for the completion of discovery, the Board need not establish other interim discovery deadlines in this rulemaking. See 49 C.F.R. § 1111.8(a). The parties are free to—within the context of the Board’s default procedural schedule or an agreed-upon procedural schedule—negotiate interim discovery deadlines on a case-by-case basis.

Lastly, the Board declines to adopt the suggestion made by ACC, TFI, and NITL that the Board include a limit on subsequent discovery requests in the revised regulations. In accordance with 49 C.F.R. § 1103.27, the Board expects practitioners to exercise candor and fairness in dealing with other litigants. Attempts to “game” discovery requirements would contravene the canons of ethics governing practitioners before the Board. If a party believes subsequent discovery is overly broad or unduly burdensome, it may move to quash those requests. Additionally, the Board can, on its own initiative or at the request of a party, convene a staff conference to aid in resolving a discovery dispute.

b. Meet-and-confer requirement. The Board also proposed in the NPRM to amend its regulations to require a party filing a motion to compel in a SAC or simplified standards case to certify that it has in good faith conferred or attempted to confer with the party serving discovery to settle the dispute without Board intervention. This requirement is similar to Federal Rule of Civil Procedure 37.

Railroad and shipper interests generally support the Board’s proposed meet-and-confer requirement. (AAR NPRM Comments 6-7; ACC, TFI, & NITL NPRM Comments 5; Coal Shippers/NARUC NPRM Comments 35; NGFA NPRM Comments 5; UP NPRM Reply 2.) Coal Shippers/NARUC ask the Board to clarify whether the proposed meet-and-confer obligation applies to requests for document production.⁹ (Coal Shippers/NARUC NPRM Comments 36; Coal Shippers/NARUC NPRM Reply 16; see also NGFA NPRM Reply 4.)

⁹ Parties also raised the following arguments pertaining to regulations that apply to other Board proceedings besides rate cases.

- Coal Shippers/NARUC ask the Board to clarify whether the requirement in § 1114.31(a) that motions to compel be filed with the Board within 10 days after the failure to obtain a responsive answer applies to requests for document production. (Coal Shippers/NARUC NPRM Comments 36-37; Coal Shippers/NARUC NPRM Reply 3-4, 16; see also NGFA NPRM Reply 4.)

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The Board agrees with the majority of commenters that adding a meet-and-confer requirement modeled on Federal Rule of Civil Procedure 37 would encourage parties to resolve disputes without involving the Board, thus reducing the number of disputes that reach the Board, requiring fewer Board decisions, and avoiding potential delays in processing rate cases. As requested by Coal Shippers/NARUC, the Board will clarify in the final rule adopted here that the requirement that a party filing a motion to compel in a SAC or simplified standards case certify that it has in good faith conferred or attempted to confer with the party serving discovery to settle the dispute without Board intervention will apply to all motions to compel.

Evidentiary Submissions. The Board proposed several changes to its regulations governing the submission of evidence that were intended to improve and expedite the presentation of evidence in rate cases.

a. *Staggered filings and confidential designations.* In the NPRM, the Board proposed changing its regulations to stagger the submission of confidential and public filings. Under the proposed rule, parties would submit highly confidential versions of the filings according to the procedural schedule, followed by public versions of those filings within three business days after the filing of the highly confidential versions. Additionally, the Board proposed standard identifying markers for the submission of confidential, highly confidential, and sensitive security information in both SAC and simplified standards rate cases.¹⁰ Specifically, the Board proposed

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- AAR suggests the proposed meet-and-confer requirement should apply in all Board proceedings, not just rate cases. (AAR NPRM Comments 7 n.24; see also Coal Shippers/NARUC NPRM Reply 4, 17.)
- ACC, TFI, and NITL ask the Board to clarify whether parties may continue to mutually agree to toll the 10-day period for filing motions to compel while they engage in negotiations and suggest that 30 days is a more realistic time line for filing motions to compel in SAC cases. (ACC, TFI, & NITL NPRM Comments 5; see also Coal Shippers/NARUC NPRM Reply 17.)

In general, as noted in the ANPRM, the Board does not believe it is appropriate to make changes to regulations that would impact other proceedings in this rulemaking proceeding, which is specifically limited to procedures in rate cases.

With respect to the concern from ACC, TFI, and NITL regarding agreements tolling the 10-day period, the Board believes that 10 days is generally sufficient time to confer or attempt to confer with a party before filing a motion to compel under § 1114.31(a), and extending that period any further would unnecessarily delay discovery. If parties have conferred and are unable to reach a negotiated solution within 10 days, they may file a request for extension of time with the Board. Given the recent changes to the statutory deadlines for deciding rate cases, the Board finds it more appropriate to consider such requests in the context of the individual case than to incorporate a longer meet-and-confer deadline into the Board's regulations.

¹⁰ Protective orders in SAC cases generally distinguish between “confidential,” “highly confidential,” and “sensitive security information.”

that all confidential information be contained in single braces, i.e., {X}, all highly confidential information be contained in double braces, i.e., {{Y}}, and all sensitive security information be contained in triple braces, i.e., {{{Z}}}.

AAR and NGFA support the proposal to establish a standard convention for identifying confidential, highly confidential, and sensitive security information. (See AAR NPRM Comments 7; NGFA NPRM Comments 5.) AAR, Coal Shippers/NARUC, and NGFA also support the Board's proposal to stagger the submission of public and highly confidential versions of filings.¹¹ (See AAR NPRM Comments 7; Coal Shippers/NARUC NPRM Comments 38; NGFA NPRM Comments 5.)

ACC, TFI, and NITL do not object to this proposal but question whether it is feasible in practice. (ACC, TFI, & NITL NPRM Comments 6.) Specifically, ACC, TFI, and NITL state that, if confidentiality designations are not made until after the highly confidential version has been filed, confidential versions would no longer identify confidential text; as such, parties will have to cross-reference the confidential versions with the redacted public versions to identify confidential text, a process they claim is cumbersome and creates risk of inadvertent disclosures of confidential information. (ACC, TFI, & NITL NPRM Comments 6; ACC, TFI, & NITL NPRM Reply 8.) Coal Shippers/NARUC, however, believe the Board's proposal would be feasible in practice and note that ACC, TFI, and NITL's feasibility concern appears to be premised on a scenario where the Board's proposal is interpreted as not requiring parties to make all bracket designations (i.e., highly confidential, confidential, and sensitive security information) when they make their initial filings with the Board containing this information. Coal Shippers/NARUC ask the Board to clarify its intent given ACC, TFI, and NITL's concern. (Coal Shippers/NARUC NPRM Reply 19-20.)

The Board finds that the standard designations for confidential information will help eliminate any confusion caused by parties using different methods of identification and, accordingly, this proposal will be adopted in the final rules. The Board also continues to believe that the proposal to stagger the filing of confidential and public filings will be beneficial and, therefore, will adopt this proposal as well. However, the Board will provide clarification in response to ACC, TFI, and NITL's concern regarding the feasibility of staggering the filings.

¹¹ Coal Shippers/NARUC qualify their support, noting that they do not object to the Board's proposal, provided that the Board limits the universe of "confidential information" so that it does not include highly confidential information that is reclassified as confidential to permit a party to see its own highly confidential information (e.g., where a shipper files a pleading with the Board that contains information that the railroad has designated as highly confidential, and the shipper's counsel agrees to reclassify the information as confidential vis-à-vis the railroad so that the railroad's counsel can disclose the information (which came from the railroad in the first instance) to the railroad's in-house personnel). (Coal Shippers/NARUC NPRM Comments 25-26, 38; Coal Shippers/NARUC NPRM Reply 4, 18.) As the Board noted in the section related to the pre-complaint period, discussed above, the rules adopted here would not affect parties' ability to negotiate protective orders covering such circumstances, as is currently done.

Under the NPRM, a party would submit, by the deadline set forth in the procedural schedule, the non-public (e.g., confidential, highly confidential) version(s) of its filing *with* the appropriate confidentiality designations around any confidential, highly confidential, and sensitive security information.¹² In this fashion, a party's non-public version(s) will clearly designate what information is confidential, highly confidential, and sensitive security information. The non-public version(s) would not be posted to the Board's website. The party would then have an additional three days to redact the confidential, highly confidential, and sensitive security information from the document(s) it filed with the Board and submit a public version of the filing to the Board. Thus, all confidentiality designations would be included in the initial version(s) of the filing submitted to the Board by the procedural deadline, indicating which information is non-public and the degree of confidentiality assigned. Accordingly, parties would not need to cross-reference the non-public version(s) with the redacted public version(s) to identify confidential text, as ACC, TFI, and NITL suggest. Rather, the purpose of this requirement is to provide parties a reasonable amount of time to ensure confidentiality redactions are properly made after submitting the non-public version(s) of each filing without delaying the case. To codify this clarification in the final rule, the Board will replace the phrase "highly confidential versions of filings" with "non-public (e.g., confidential, highly confidential) versions of filings."

b. Limits on final briefs. In the NPRM, the Board proposed limiting the length of final briefs in SAC and Simplified-SAC cases to 30 pages, inclusive of exhibits.¹³ Coal Shippers/NARUC and NGFA generally support limits on the length of final briefs. (See ACC, TFI, & NITL NPRM Comments 7; Coal Shippers/NARUC NPRM Comments 38; NGFA NPRM Comments 5; Coal Shippers/NARUC NPRM Reply 21.) AAR also supports limiting final briefs but suggests that the Board set a limit of 30 pages or 13,000 words, consistent with the Federal Rules of Appellate Procedure, to avoid gamesmanship regarding type fonts and margins. (AAR NPRM Comments 8.) Neither ACC, TFI, and NITL nor Coal Shippers/NARUC object to such a word limit, although Coal Shippers/NARUC note that the Board's rules already contain standards governing document formatting and font sizes. (ACC, TFI, & NITL NPRM Reply 8; Coal Shippers/NARUC NPRM Reply 4-5, 21-22.)

ACC, TFI, and NITL also suggest that the Board stagger the submission of final briefs so a complainant would file its final brief two weeks after the defendant files its final brief. (ACC, TFI, & NITL NPRM Comments 7.) According to ACC, TFI, and NITL, staggering briefs would ensure that complainants, who have the burden of proof, can respond to the defendant's final brief rather than simply reiterate their rebuttal. (Id.; see also Coal Shippers/NARUC NPRM

¹² In the Board's experience, parties to rate cases typically do not submit confidential versions of their filings in addition to the highly confidential and public versions. To the extent that only highly confidential and public versions are filed, parties should continue to identify all confidential, highly confidential, and sensitive security information in the "highly confidential" filing, properly identifying each type of information according to the convention described in this final rule.

¹³ Final briefs are not permitted under the procedural schedule in Three-Benchmark cases. See 49 C.F.R. § 1111.9(a)(2).

Reply 4-5, 21; NGFA NPRM Reply 4.) UP urges the Board to reject ACC, TFI, and NITL's proposal because final briefs are not evidence. (UP NPRM Reply 8 (citing NPRM, EP 733, slip op. at 9).) Similarly, AAR argues that a complainant that has not included improper new arguments or new evidence in its rebuttal evidence should have little need to "react" to a defendant's brief. (AAR NPRM Reply 8-10.) AAR also argues that staggering final briefs would make it harder for the Board to process cases expeditiously since the Board's deadline for deciding a case now runs from the filing of rebuttal evidence—not the filing of final briefs. (AAR NPRM Reply 8-10.)

AAR also asks the Board to reiterate its commitment to policing improper rebuttal evidence, strictly enforcing those rules, and either relieving defendants from the brief limit when responding to improper rebuttal evidence or giving defendants an opportunity to file a separate document (not subject to the brief length limit) that responds to improper rebuttal evidence. (AAR NPRM Comments 8.) ACC, TFI, and NITL object to AAR's proposal, arguing that it would give railroads the right to decide unilaterally when there has been an improper rebuttal and relieve themselves of brief limits. ACC, TFI, and NITL further state that the Board already has procedures for dealing with improper rebuttal evidence through motions to strike. (ACC, TFI, & NITL NPRM Reply 8.) Coal Shippers/NARUC also object to AAR's proposal, arguing that it would create a loophole that would defeat the purpose of the proposed rule and deprive shippers of procedural due process because shippers would not have an opportunity to respond to the carrier's claims of improper rebuttal. (Coal Shippers/NARUC NPRM Reply 5, 22.)

Lastly, NGFA recommends that the Board tailor final briefs to "specific issues of concern to the Board" by determining whether final briefs are needed on a case-by-case basis and imposing even shorter page limits where the issues do not justify 30 pages. (NGFA NPRM Comments 5-6.) Both Coal Shippers/NARUC and ACC, TFI, and NITL state that they do not object to the Board determining on a case-by-case basis the need for, and length of, final briefs. (ACC, TFI, & NITL NPRM Reply 9; Coal Shippers/NARUC NPRM Reply 4-5, 21.)

The Board will adopt the proposed 30-page limit, inclusive of exhibits, on the length of final briefs in SAC and Simplified-SAC cases. The Board believes the page limit will encourage parties to focus their briefs on the most important issues. As the Board noted in the NPRM, it has on occasion, in individual cases, imposed page limits on final briefs. See, e.g., Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 3, 2016); Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 4 (STB served Sept. 26, 2013). Based on the Board's prior experience in those cases, it believes 30 pages provides space sufficient for the parties to articulate their final concerns, but limited enough to prevent improper surrebuttal. The Board is not persuaded that a 13,000-word limit on final briefs, as proposed by AAR, is necessary to prevent gamesmanship regarding type fonts and margins. The Board's regulations already provide guidelines concerning document formatting and font sizes. See 49 C.F.R. § 1104.2 ("white paper not larger than 8½ by 11 inches," "double-spaced (except for footnotes and long quotations which may be single-spaced)," "using type not smaller than 12 point").

The Board also declines to adopt ACC, TFI, and NITL's suggestion that the Board stagger the submission of final briefs. First, staggering final briefs would shorten the time

between when final briefs are filed and when the Board must render a decision. Second, because parties are not permitted to raise new evidence or arguments in final briefs, a complainant need not respond to a defendant's final brief. Rather, final briefs are intended as a concise summary of the parties' positions to help focus the Board's analysis of the evidence and arguments and facilitate a more efficient resolution of outstanding issues. Nor will the Board adopt AAR's proposal to relieve defendants from the page limit to respond to improper rebuttal evidence or give defendants an opportunity to file a separate document when responding to improper rebuttal evidence. The Board agrees with ACC, TFI, and NITL that the Board's existing procedures for dealing with improper rebuttal evidence are sufficient.¹⁴

As the Board noted in the NPRM, while the Board believes designating topics for final briefs could be beneficial, doing so would require an additional Board decision following the close of evidence. The Board remains concerned that this additional step would curtail the already shortened period available to the Board for issuing a decision on the merits in SAC cases. The case-by-case approach regarding the necessity of and length for briefs proposed by NGFA would similarly require an additional decision by the Board. As is already the case, if, following receipt of final briefs, the Board believes it requires additional information to reach its decision, the Board may request supplemental information from the parties.

Interaction with Board Staff. In the NPRM, the Board proposed increasing staff involvement at all stages of a rate case, both through technical conferences/written questions and a Board-appointed liaison to the parties. This change was intended to reduce the number of disputes between the parties that can delay the resolution of cases. The Board proposed appointing a liaison to the parties within 10 business days of the submission of the pre-filing notice in SAC cases, and within 10 business days of the filing of the complaint in Simplified-SAC and Three-Benchmark cases. The liaison would not be recused from handling substantive elements of the case. In addition, the Board proposed greater use of written questions from staff and technical conferences with the parties at every stage of the case. When a technical conference is requested by a party or parties or convened by the Board, the Board would provide advance notice of the topics to be discussed to promote an efficient and productive conference.

ACC, TFI, and NITL support the Board's proposal, stating that a liaison will improve communications between the parties and with the Board, potentially resolve disagreements, provide guidance on process, and keep the case moving forward through status conferences. (ACC, TFI, & NITL NPRM Comments 3-4.) NGFA also supports this proposal, noting that the proposed staff involvement contemplated by the NPRM, including the establishment of ground rules, issue-specific Board expectations, and a point of contact for questions about the process, could prove to be extremely useful to grain and other agricultural shippers in the event such a case is filed. (NGFA NPRM Comments 6.)

Coal Shippers/NARUC also generally support the Board's proposal for increased staff involvement in rate cases, but suggest two modifications. (See Coal Shippers/NARUC NPRM

¹⁴ In the event of improper rebuttal evidence, a party may file a motion to strike or a request to file supplemental information to respond to the improper rebuttal evidence.

Comments 39.) First, Coal Shippers/NARUC argue that the Board should appoint the liaison after the shipper files its complaint. (Coal Shippers/NARUC NPRM Reply 23.) According to Coal Shippers/NARUC, there is no need for the Board to appoint a staff liaison during the mediation period, and the appointment itself could cause confusion because the Board's rules call for the mediator to supervise the parties' mediation, not the liaison. (Coal Shippers/NARUC NPRM Comments 26.) NGFA, however, disagrees, arguing that appointment of a liaison should be made during the pre-filing phase to assist those parties that may be new to or unfamiliar with the rate-complaint process. (NGFA NPRM Reply 4-5.)

Second, Coal Shippers/NARUC request the Board clarify that the parties and the liaison must abide by the Board's rules governing ex parte communications. (Coal Shippers/NARUC NPRM Comments 27.) Specifically, Coal Shippers/NARUC argue: (1) the liaison should be free to engage in joint communications with counsel for the parties as is done in technical conferences; (2) while it may not be necessary for the liaison to convene joint meetings at all times, all communications between the liaison and any of the parties to a case (e.g., letters, emails, and phone discussions) should be joint ones (e.g., conference calls where both parties participate, written communications copied to all parties, etc.); and (3) unless the parties otherwise agree, the parties should not be permitted to address the merits of the case (or case evidence) with the liaison and the liaison should not be permitted to address the merits of the case (or case evidence) with the parties. (Id. at 27-28; Coal Shippers/NARUC NPRM Reply 23.)

UP argues that the ex parte restrictions proposed by Coal Shippers/NARUC are vague, would have a chilling effect on communications, and would undermine the usefulness of the staff liaison. (UP NPRM Reply 7.) Moreover, UP argues, the Board's ex parte regulations should address any concern shippers have. (Id.) Likewise, AAR argues that the Board's ex parte regulations do not require that "all communications" be joint ones because the ex parte regulations bar only communications "concerning the merits of the proceeding." (AAR NPRM Reply 4.) AAR states that to effectively and efficiently manage rate cases, the staff liaison occasionally may need to communicate separately with parties on procedural issues, and such communications violate neither the ex parte rules nor the rules' purpose of safeguarding due process. (Id.)

AAR supports increased use of written questions and technical conferences and the appointment a staff liaison to a rate case; however, AAR asks the Board to clarify that the staff liaison and the appointed mediator would be two separate individuals. (AAR NPRM Comments 6; AAR NPRM Reply 3-4.) AAR further suggests the Board modify its regulations to delegate to the liaison the authority to convene a technical conference and to rule on issues raised in such conferences. (AAR NPRM Comments 6.) According to AAR, this modification would enable the liaison to facilitate negotiation among the parties while still providing a clear path for Board oversight, as the liaison's rulings would be subject to the appellate standards for interlocutory appeals under 49 C.F.R. § 1115.9(b). (Id.) ACC, TFI, and NITL do not endorse AAR's suggestion, arguing that if the Board were to adopt such a change, it should provide details in a subsequent rulemaking for public comment and any such proposal should address the division of responsibility between the liaison and administrative law judges. (ACC, TFI, & NITL NPRM Reply 4.) Coal Shippers/NARUC likewise object to AAR's proposal, arguing that it would delay Board consideration of rate cases and turn informal technical conferences into

formal adversarial proceedings. (Coal Shippers/NARUC NPRM Reply 5, 25.) Coal Shippers/NARUC also note that AAR’s proposal is at odds with the role the Board envisioned the liaison would perform. (*Id.* at 25 (citing NPRM, EP 733, slip op. at 9 (the function of the liaison is “to answer questions about the process and to intervene informally (e.g., hold status conferences) if it would help discovery or other matters move more smoothly”).))

The Board will adopt the proposal in the NPRM. The Board continues to believe that increased communication between the parties and the Board will increase the efficiency of processing rate cases. The Board also believes that the appropriate time to appoint the liaison is following the submission of the shipper’s pre-filing notice. As the Board noted in the NPRM, the goal of the liaison is to increase staff involvement at *all stages* of a rate cases, which would begin with the newly created pre-complaint period. The Board does not agree with Coal Shippers/NARUC that the appointment of a liaison would cause confusion with the mediator. The liaison and mediator will be clearly identified and distinct individuals, and the liaison will not participate in the mediation.¹⁵

However, the Board will clarify that the liaison would be required to comply with the Board’s ex parte regulations. See 49 C.F.R. § 1102.2; see also Ex Parte Commc’ns in Informal Rulemaking Proceedings, EP 739 (STB served Sept. 28, 2017) (proposing modifications to the Board’s ex parte regulations in informal rulemaking proceedings). The Board is committed to ensuring that rate case proceedings, including the new liaison role, are conducted in a transparent and fair manner. Coal Shippers/NARUC have not provided any reason to believe that the Board’s regulations would be ineffective; therefore, the Board finds no reason to expand its ex parte restrictions in rate case proceedings as suggested by Coal Shippers/NARUC.

Additionally, AAR’s suggestion that the Board delegate to the liaison the authority to rule on issues exceeds the intended scope of the liaison’s role. As noted in the NPRM, the liaison is intended to “answer questions about the process and to intervene informally (e.g., hold status conferences) if it would help discovery or other matters move more smoothly.” NPRM, EP 733, slip op. at 9. The liaison’s role would be to work with parties to help primarily with procedural issues that arise through the processing of a rate case.¹⁶

Additional Comments. In addition to commenting on these specific proposals, some parties have also raised more general comments on how the Board could expedite rate cases. AAR notes certain internal reforms that could aid the Board in expediting rate case litigation without the need for changes to the Board’s rules. (AAR NPRM Comments 10.) Specifically, AAR cites to five recommendations of the Institute for the Advancement of the American Legal System at the University of Denver: (1) setting firm dates early in the pretrial process for the

¹⁵ Because the liaison would not participate in the mediation, the liaison would not be recused from handling substantive elements of the case.

¹⁶ The Board also notes that its regulations already include mechanisms to expedite resolution of some issues. See, e.g., 49 C.F.R. § 1011.6(c)(3) (delegating to the Director of the Board’s Office of Proceedings, among other things, the authority to dispose of routine procedural matters in proceedings assigned for handling under modified procedure).

close of discovery, the filing of dispositive motions, and trial, and maintaining those dates except in rare and truly unusual circumstances; (2) ruling expeditiously on motions, even when the motions are denied; (3) limiting the number of extensions sought by the parties during any phase of the case; (4) working to foster a local legal culture that accepts efficient case processing as the norm, and enforcing that culture through active judicial case management; and (5) tracking the status of cases and motions through internal statistical reporting, and disseminating the results internally and externally as appropriate. (AAR NPRM Comments 8, 8 n.28. (citing Civil Case Processing in the Federal District Courts, Inst. for the Advancement of the Am. Legal Sys. 9-10 (2009),

http://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf.) ACC, TFI, and NITL similarly argue that the Board should enforce deadlines for completing discovery and grant extensions of time only in extraordinary circumstances and for the shortest possible time. (ACC, TFI, & NITL NPRM Reply 9.) The Board appreciates that the parties offered these additional recommendations. The Board is committed to processing rate cases as expeditiously as possible, and agrees that it is important to timely rule on motions and grant extensions of time judiciously.

The Final Rule

The final rule adopted by the Board here contains changes to the Board's regulations at 49 C.F.R. parts 1104, 1109, 1111, 1114, and 1130, which are set out in Appendix A. The final rule would amend the existing procedures for filing and litigating a rate case, as directed by section 11 of the STB Reauthorization Act. While the rules adopted here are largely in response to section 11 of the STB Reauthorization Act, the Board intends to continue to review its rate regulations so that it may propose additional improvements to its rate review process in a subsequent rulemaking proceeding.

Pre-Complaint Period. The final rule includes changes creating and detailing a pre-complaint period in SAC cases, which is intended to provide parties an opportunity to mediate the dispute free from the distraction of litigation and take steps in preparation for litigation before the filing of the complaint.

1. Pre-filing Notice. The Board creates a pre-complaint period in a new 49 C.F.R. § 1111.1 by requiring a SAC complainant to submit a pre-filing notice at least 70 days prior to filing its complaint.¹⁷ The pre-filing notice shall contain the rate and origin/destination pair(s) to be challenged, the commodities at issue, and a motion for protective order pursuant to newly created 49 C.F.R. § 1104.14(c).
2. Mandatory Mediation. The Board revises 49 C.F.R. § 1109.4 to move mandatory mediation in SAC cases to the pre-complaint period. This change to the regulations would not impose new requirements but would require mediation to take place earlier to allow parties to focus on the mediation process without the distractions of fully

¹⁷ To accommodate the new § 1111.1, the existing §§ 1111.1-.10 will be redesignated as §§ 1111.2-.11.

active litigation. The Board intends for mediation to be complete prior to the filing of the complaint; however, consistent with current procedures, the rules will allow for an extension of time via Board order. Additionally, the Board revises its regulations to provide that it will assign one or more mediators to a case within 5 business days after the shipper submits its pre-filing notice (rather than the 10-business day period currently in place).

3. Appointment of a Board Liaison to the Parties. The Board will require the appointment of a liaison to the parties within 10 business days of the complainant's submission of the pre-filing notice in SAC cases pursuant to new 49 C.F.R. § 1111.1(b) and in cases using simplified standards pursuant to newly redesignated 49 C.F.R. § 1111.10(a).

Discovery. The final rule also includes changes to the Board's discovery regulations intended to streamline discovery in rate cases.

1. Initial Discovery Requests. The Board will add 49 C.F.R. § 1111.2(f) and amend 49 C.F.R. § 1114.21(d) & (f) to require a complainant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its complaint. The Board also will add 49 C.F.R. § 1111.5(f) and amend 49 C.F.R. § 1114.21(d) & (f) to require a defendant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its answer. To address the filing of an amended or supplemental complaint, the Board will amend the newly redesignated 49 C.F.R. § 1111.3(b) to require the complainant to certify that it has served on the defendant any new or modified discovery requests affected by the amended or supplemental complaint, if any. The Board will adopt a corresponding requirement at 49 C.F.R. § 1111.5(f), in which a defendant responding to an amended or supplemental complaint must certify that it has served on the complainant any new or modified discovery requests affected by the amended or supplemental complaint, if any.
2. Meet-and-Confer Requirement. The Board will amend 49 C.F.R. § 1114.31(a)(2) to require that all motions to compel in SAC cases and cases filed under simplified standards include a certification that the party filing the motion has in good faith conferred or attempted to confer with the party failing to answer discovery to settle the dispute over those terms without Board intervention.

Evidentiary Submissions. The final rule includes changes to the Board's regulations governing the submission of evidence intended to improve and expedite the presentation of evidence in rate cases.

1. Stagger the Submission of Public and Highly Confidential Versions of Filings. In both SAC and simplified standards cases, the Board will allow parties to submit non-public (e.g., confidential, highly confidential) versions of the filings according to the procedural schedule in a particular case, and submit public versions of those filings within three business days after the filing of the non-public versions.

2. Standard Convention for Identifying Confidential, Highly Confidential, and Sensitive Security Information. The Board will revise 49 C.F.R. § 1104.14 to create standard identifying markers set forth in protective orders for the submission of confidential, highly confidential, and sensitive security information in rate cases. The standard identifying markers are as follows: all confidential information will be contained in single braces, i.e., {X}, all highly confidential information will be contained in double braces, i.e., {{Y}}, and all sensitive security information will be contained in triple braces, i.e., {{{Z}}}.
3. Limits on Final Briefs. The Board will limit the length of final briefs to 30 pages, inclusive of exhibits, in SAC and Simplified-SAC cases.

Technical Modifications. The Board adopts two technical modifications to the existing regulations. Specifically, the Board will amend the newly redesignated 49 C.F.R. § 1111.11(b) (requiring parties to meet at the beginning of the case to discuss procedural matters) to clarify that its requirements also apply to SAC cases. The Board also will amend 49 C.F.R. § 1130.1 to include the correct reference to the newly redesignated 49 C.F.R. § 1111.2(a).

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its final rule, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board certified under 5 U.S.C. § 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.¹⁸ The Board explained that the proposed changes to its regulations would not mandate or circumscribe the conduct of small entities. Rather, the changes proposed would

¹⁸ Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a "small business" as only those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$35,809,698 or less when adjusted for inflation using 2016 data. Class II rail carriers have annual operating revenues of less than \$250 million in 1991 dollars or less than \$447,621,226 when adjusted for inflation using 2016 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1.

be largely procedural or would codify existing practice, and would not have a significant economic impact on small entities. Additionally, the Board noted that, since the inception of the Board in 1996, only three of the 51 filed cases challenging the reasonableness of freight rail rates involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimated that there are approximately 656 Class III rail carriers. Therefore, the Board certified under 5 U.S.C. § 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The final rule adopted here revises the rules proposed in the NPRM; however, the same basis for the Board's certification of the proposed rule applies to the final rule. The final rule will not create a significant impact on a substantial number of small entities, as the regulations do not mandate or circumscribe the conduct of small entities. Thus, the Board again certifies under 5 U.S.C. § 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act. In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) through May 31, 2020, under OMB Control No. 2140-0029. In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3) regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11.

List of Subjects

49 C.F.R. Part 1104

Administrative practice and procedure.

49 C.F.R. Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, Railroads.

49 C.F.R. Part 1111

Administrative practice and procedure, Investigations.

49 C.F.R. Part 1114

Administrative practice and procedure.

49 C.F.R. Part 1130

Administrative practice and procedure.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the Federal Register.
2. This decision is effective December 30, 2017.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Board Members Begeman and Miller.

Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, parts 1104, 1109, 1111, 1114, and 1130 of the Code of Federal Regulations as follows:

PART 1104—FILING WITH THE BOARD-COPIES-VERIFICATION-SERVICE- PLEADINGS, GENERALLY

1. The authority citation for part 1104 is revised to read as follows: 5 U.S.C. §§ 553 and 559; 18 U.S.C. § 1621; and 49 U.S.C. § 1321.
2. In § 1104.14, add paragraph (c) to read as follows:

§ 1104.14 Protective orders to maintain confidentiality.

(c) *Requests for protective orders in stand-alone cost and simplified standards cases.* A motion for protective order in stand-alone cost and simplified standards cases shall specify that evidentiary submissions will designate confidential material within single braces (i.e., {X}), highly confidential material within double braces (i.e., {{Y}}), and sensitive security information within triple braces (i.e., {{{Z}}}). In stand-alone cost cases, the motion for protective order shall be filed together with the notice pursuant to 49 C.F.R. § 1111.1.

PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

3. The authority citation for part 1109 is revised to read as follows: 49 U.S.C. § 1321(a) and 5 U.S.C. § 571 *et seq.*
4. In § 1109.4, revise paragraphs (a), (b), and (g) to read as follows:

§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

(a) *Mandatory use of mediation.* A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon submitting a pre-filing notice under 49 C.F.R. part 1111.

(b) *Assignment of mediators.* Within 5 business days after the shipper submits its pre-filing notice, the Board will assign one or more mediators to the case. Within 5 business days of the assignment to mediate, the mediator(s) shall contact the parties to discuss ground rules and the time and location of any meeting.

(g) *Procedural schedule.* Absent a specific order from the Board granting an extension, the mediation will not affect the procedural schedule in stand-alone cost rate cases set forth at 49 C.F.R. § 1111.9(a).

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

5. The authority citation for part 1111 continues to read as follows: 49 U.S.C. §§ 10704, 11701, and 1321.

6. Part 1111 is revised to read as follows:

§ 1111.1 Pre-filing procedures in stand-alone cost cases.

(a) *General.* At least 70 days prior to the proposed filing of a complaint challenging the reasonableness of a rail rate based on stand-alone cost, complainant shall file a notice with the Board. The notice shall:

- (i) Identify the rate to be challenged;
- (ii) Identify the origin/destination pair(s) to be challenged;
- (iii) Identify the affected commodities; and
- (iv) Include a motion for protective order as set forth at 49 C.F.R. § 1104.14(c).

(b) *Liaison.* Within 10 days of the filing of the pre-filing notice, the Board shall appoint a liaison to the parties.

§ 1111.2 Content of formal complaints; joinder.

(a) *General.* A formal complaint must contain the correct, unabbreviated names and addresses of each complainant and defendant. It should set forth briefly and in plain language the facts upon which it is based. It should include specific reference to pertinent statutory provisions and Board regulations, and should advise the Board and the defendant fully in what respects these provisions or regulations have been violated. The complaint should contain a detailed statement of the relief requested. Relief in the alternative or of several different types may be demanded, but the issues raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed. In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether, in its view, the reasonableness of the rate should be examined using constrained market pricing or using the simplified standards adopted pursuant to 49 U.S.C. § 10701(d)(3). If the complainant seeks to use the simplified standards, it should support this request by submitting, at a minimum, the following information:

- (1) The carrier or region identifier.
- (2) The type of shipment (local, received-terminated, etc.).
- (3) The one-way distance of the shipment.
- (4) The type of car (by URCS code).
- (5) The number of cars.
- (6) The car ownership (private or railroad).
- (7) The commodity type (STCC code).
- (8) The weight of the shipment (in tons per car).
- (9) The type of movement (individual, multi-car, or unit train).
- (10) A narrative addressing whether there is any feasible transportation alternative for the challenged movements.

(11) For matters for which voluntary, binding arbitration is available pursuant to 49 CFR part 1108, the complaint shall state that arbitration was considered, but rejected, as a means of resolving the dispute.

(b) *Disclosure with simplified standards complaint.* The complainant must provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.

(c) *Multiple causes of action.* Two or more grounds of complaint concerning the same principle, subject, or statement of facts may be included in one complaint, but should be stated and numbered separately.

(d) *Joinder.* Two or more complainants may join in one complaint against one or more defendants if their respective causes of action concern substantially the same alleged violations and like facts.

(e) *Request for access to waybill data.* Parties needing access to the Waybill Sample to prepare their case should follow the procedures set forth at 49 CFR § 1244.9.

(f) *Discovery in stand-alone cost cases.* Upon filing its complaint, the complainant shall certify that it has served its initial discovery requests on the defendant.

§ 1111.3 Amended and supplemental complaints.

(a) *Generally.* An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants. The time limits for responding to an amended or supplemental complaint are computed pursuant to §§ 1111.5 and 1111.6 of this part, as if the amended or supplemental complaint was an original complaint.

(b) *Stand-alone cost.* If a complainant tenders an amended or supplemental complaint in a stand-alone cost case, the complainant shall certify that it has served on the defendant those initial discovery requests affected by the amended or supplemental complaint, if any.

(c) *Simplified standards.* A complaint filed under the simplified standards may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or Full-SAC. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required.

§ 1111.4 Service.

A complainant is responsible for serving formal complaints, amended or supplemental complaints, and cross complaints on the defendant(s). Service shall be made by sending a copy of such complaint to the chief legal officer of each defendant by either confirmed facsimile and first-class mail or express overnight courier. The cover page of each such facsimile and the front of each such first-class mail or overnight express courier envelope shall include the following legend: "Service of STB Complaint". Service of the complaint shall be deemed completed on the date on which the complaint is served by confirmed facsimile or, if service is made by express overnight courier, on the date such complaint is actually received by the defendant. When the complaint involves more than one defendant, service of the complaint shall be deemed completed on the date on which all defendants have been served. An original and ten copies of the complaint should be filed with the Board together with an acknowledgment of service by the persons served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. If complainant cannot serve the complaint, an original of each complaint accompanied by a sufficient number of copies to enable the Board to serve one upon each defendant and to retain 10 copies in addition to the original should be filed with the Board.

§ 1111.5 Answers and cross complaints.

(a) *Generally.* An answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under the simplified standards, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with simplified standards answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service.* An answer must be filed within 20 days after the service of the complaint or within such additional time as the Board may provide. The original and 10 copies of an answer must be filed with the Board. The defendant must serve copies of the answer upon the complainant and any other defendants.

(d) *Cross complaints.* A cross complaint alleging violations by other parties to the proceeding or seeking relief against them may be filed with the answer. An answer to a cross complaint shall be filed within 20 days after the service date of the cross complaint. The party shall serve copies of an answer to a cross complaint upon the other parties.

(e) *Failure to answer complaint.* Averments in a complaint are admitted when not denied in an answer to the complaint.

(f) *Discovery in stand-alone cost cases.* Upon filing its answer, the defendant shall certify that it has served its initial discovery requests on the complainant. If the complainant tenders an amended or supplemental complaint to which the defendant must reply, upon filing the answer to the amended or supplemental complaint, the defendant shall certify that it has served on the complainant those initial discovery requests affected by the amended or supplemental complaint, if any.

§ 1111.6 Motions to dismiss or to make more definite.

An answer to a complaint or cross complaint may be accompanied by a motion to dismiss the complaint or cross complaint or a motion to make the complaint or cross complaint more definite. A motion to dismiss can be filed at anytime during a proceeding. A complainant or cross complainant may, within 10 days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

§ 1111.7 Satisfaction of complaint.

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the complainant must be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

§ 1111.8 Investigations on the Board's own motion.

(a) *Service of decision.* A decision instituting an investigation on the Board's own motion will be served by the Board upon respondents.

(b) *Default.* If within the time period stated in the decision instituting an investigation, a respondent fails to comply with any requirement specified in the decision, the respondent will be deemed in default and to have waived any further proceedings, and the investigation may be decided forthwith.

§ 1111.9 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

Day 0—Complaint filed, discovery period begins.

Day 7 or before—Conference of the parties convened pursuant to § 1111.11(b).

Day 20—Defendant's answer to complaint due.

Day 150—Discovery completed.

Day 210—Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues.

Day 270—Defendant files reply evidence to complainant's opening evidence.

Day 305—Complainant files rebuttal evidence to defendant's reply evidence.

Day 335—Complainant and defendant file final briefs.

Day 485 or before—The Board issues its decision.

(b) *Staggered filings; final briefs.* (1) The parties may submit non-public (e.g., confidential, highly confidential) versions of filings on the dates identified in the procedural schedule, and submit public versions of those filings within three business days thereafter.

(2) Final briefs are limited to 30 pages, inclusive of exhibits.

(c) *Conferences with parties.* (1) The Board will convene a technical conference of the parties with Board staff prior to the filing of any evidence in a stand-alone cost rate case, for the purpose of reaching agreement on the operating characteristics that are used in the variable cost calculations for the movements at issue. The parties should jointly propose a schedule for this technical conference.

(2) In addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served but before any motions to compel may be filed, to discuss discovery matters in stand-alone cost rate cases. The parties should jointly propose a schedule for this discovery conference.

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

(1) In cases relying upon the Simplified-SAC methodology:

Day 0—Complaint filed (including complainant's disclosure).

Day 10—Mediation begins.

Day 20—Defendant's answer to complaint (including defendant's initial disclosure).

Day 30—Mediation ends; discovery begins.

Day 140—Defendant's second disclosure.

Day 150—Discovery closes.

- Day 220—Opening evidence.
- Day 280—Reply evidence.
- Day 310—Rebuttal evidence.
- Day 320—Technical conference (market dominance and merits).
- Day 330—Final briefs.

In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(2) In cases relying upon the Three-Benchmark methodology:

- Day 0—Complaint filed (including complainant’s disclosure).
- Day 10—Mediation begins. (STB production of unmasked Waybill Sample.)
- Day 20—Defendant’s answer to complaint (including defendant’s initial disclosure).
- Day 30—Mediation ends; discovery begins.
- Day 60—Discovery closes.
- Day 90—Complainant’s opening (initial tender of comparison group and opening evidence on market dominance). Defendant’s opening (initial tender of comparison group).
- Day 95—Technical conference on comparison group.
- Day 120—Parties’ final tenders on comparison group. Defendant’s reply on market dominance.
- Day 150—Parties’ replies to final tenders. Complainant’s rebuttal on market dominance.

In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(b) *Staggered filings; final briefs.* (1) The parties may submit non-public (e.g., confidential, highly confidential) versions of filings on the dates identified in the procedural schedule, and submit public versions of those filings within three business days thereafter.

(2) In cases relying upon the Simplified-SAC methodology, final briefs are limited to 30 pages, inclusive of exhibits.

(c) *Defendant’s second disclosure.* In cases using the Simplified-SAC methodology, the defendant must make the following disclosures to the complainant by Day 170 of the procedural schedule.

(1) Identification of all traffic that moved over the routes replicated by the SARR in the Test Year.

(2) Information about those movements, in electronic format, aggregated by origin-destination pair and shipper, showing the origin, destination, volume, and total revenues from each movement.

(3) Total operating and equipment cost calculations for each of those movements, provided in electronic format.

(4) Revenue allocation for the on-SARR portion of each cross-over movement in the traffic group provided in electronic format.

(5) Total trackage rights payments paid or received during the Test Year associated with the route replicated by the SARR.

(6) All workpapers and documentation necessary to support the calculations.

(d) *Conferences with parties.* The Board may convene a conference of the parties with Board staff to facilitate voluntary resolution of discovery disputes and to address technical issues that may arise.

(e) *Complaint filed with a petition to revoke a class exemption.* If a complaint is filed simultaneously with a petition to revoke a class exemption, the Board will take no action on the

complaint and the procedural schedule will be held in abeyance automatically until the petition to revoke is adjudicated.

§ 1111.11 Meeting to discuss procedural matters.

(a) *Generally.* In all complaint proceedings, other than those challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone, discovery and procedural matters within 12 days after an answer to a complaint is filed. Within 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case.

(b) *Stand-alone cost or simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, and 7 days after the mediation period ends in simplified standards cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

PART 1114—EVIDENCE; DISCOVERY

7. The authority citation for part 1114 is revised to read as follows: 5 U.S.C. § 559; 49 U.S.C. § 1321.

8. Amend § 1114.21 as follows:

- a. Revise paragraph (d).
- b. Revise the first sentence of paragraph (f).

The revisions read as follows:

§ 1114.21 Applicability; general provisions.

(d) *Sequence and timing of discovery.* Unless the Board upon motion, and subject to the requirements at 49 C.F.R. §§ 1111.2(f) and 1111.5(f) in stand-alone cost cases, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery.

(f) *Service of discovery materials.* Unless otherwise ordered by the Board, and subject to the requirements at 49 C.F.R. §§ 1111.2(f) and 1111.5(f) in stand-alone cost cases, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, shall be served on other counsel and parties, but shall not be filed with the Board. ***

9. In § 1114.31(a), revise paragraph (a)(2) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) ***

(2) *Motions to compel in stand-alone cost and simplified standards rate cases.*

(i) Motions to compel in stand-alone cost and simplified standards rate cases must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention.

(ii) In a rate case to be considered under the stand-alone cost or simplified standards methodologies, a reply to a motion to compel must be filed with the Board within 10 days of when the motion to compel is filed.

PART 1130—INFORMAL COMPLAINTS

10. The authority citation for Part 1130 is revised to read as follows: 49 U.S.C. §§ 1321, 13301(f), 14709.

11. In § 1130.1, revise paragraph (a) to read as follows:

§ 1130.1 When no damages sought.

(a) *Form and content; copies.* Informal complaint may be by letter or other writing and will be serially numbered and filed. The complaint must contain the essential elements of a formal complaint as specified at 49 C.F.R. § 1111.2 and may embrace supporting papers. The original and one copy must be filed with the Board.
