Article

Life in the Fast Lane: Expediting Rate Cases While Preserving the Sound Economic Principles of the Surface Transportation Board's Rate Regulatory Regime

John M. Scheib and Aarthy S. Thamodaran*

ABSTRACT

The United States Surface Transportation Board ("STB" or "Board") has been investigating how to expedite certain proceedings that come before it. In particular, the Board has occasionally expressed concern that proceedings to evaluate the reasonableness of certain rates charged by railroads for the transportation of regulated shipments take too long to adjudicate. Recently, Congress enacted the Surface Transportation Board Reauthorization Act of 2015, which included a provision that required the STB 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."[1] Accordingly, the STB has sought public input regarding the tools used by courts to expedite legal proceedings in the hopes of identifying some tricks of the trade that might be applicable to these STB proceedings.

This Article explores some of the most fruitful tools used by courts to expedite litigation and their potential applicability to STB rate reason-

* Part I of this Article is a reprint of Part I of the Opening Comments filed on August 1, 2016 by Norfolk Southern Railway Company in *Expediting Rate Cases*, S.T.B. Ex Parte No. 733.

1. Pub. L. 114—110, §11(c), 129 Stat. 2228, 2234 (2015).

ableness proceedings. This Article concludes that there are several tools used by courts to expedite litigation that could be used to expedite rate reasonableness proceedings, but that their success ultimately turns on whether the STB is willing to be an active case manager. Being an active case manager presents political risks and scrutiny for the STB from which courts are immune.

I. Overview of STB Rate Reasonableness Proceedings

Before turning to a consideration of the tools that courts use to expedite litigation and their potential applicability to STB rate reasonableness proceedings, it is useful to begin with a simple review of those proceedings. Pursuant to the principles of the Rail Transportation Policy, the STB must "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."[2] Where a railroad is found to have market dominance,[3] the STB has exclusive jurisdiction to assess the reasonableness of the rate charged by the railroad to a captive shipper.[4]

The STB's general standards for assessing the reasonableness of rates are based on the principles of constrained market pricing ("CMP").[5]

2. 49 U.S.C. § 10101(1995) (noting also that "rail rates [should] provide revenues which exceed the amount necessary to maintain the rail system and to attract capital").

3. Market dominance is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a) (1995). *See also* § 10707(d)(1)(A) (noting that the railroad's revenues for a challenged rate must be at least 180% of its variable costs of providing the service).

4. *See* 49 U.S.C. § 10501(b) (1995).

5. *See Coal Rate Guidelines, Nationwide*, S.T.B. Ex Parte No. 347 (Sub-No. 1), 1 I.C.C.2d 520, 521 (S.T.B. served Aug. 8, 1985) ("*Guidelines*"). "The objectives of CMP can be simply stated. A captive shipper should not be required to pay more than is necessary for the carrier

CMP establishes four constraints on the rates that railroads may charge to captive shippers.[6] Most relevant for purposes of this Article, the stand-alone cost constraint ("SAC Test", and cases thereunder, "SAC Cases") "protects a captive shipper from bearing costs of inefficiencies or from cross-subsidizing other traffic by paying more than the revenue needed to replicate rail service to a select subset of the carrier's traffic base."[7] The SAC Test "does this by simulating the competitive rate that would exist in a 'contestable market.'"[8]

Specifically, the SAC Test requires the complainant to design a hypothetical, optimally efficient stand-alone railroad ("SARR") to provide the service at issue, free from any costs associated with inefficiencies or impermissible cross-subsidiaries, assuming no barriers to entry.[9] The challenged rate cannot be higher than what the SARR would need to charge to serve the complainant while fully covering all of its costs, including earning a reasonable return on investment.[10]

SAC Cases are complex litigation by their nature. As the STB and Congress have recognized, sound economic principles are and should re-

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involved to earn adequate revenues. Nor should it pay more than is necessary for efficient service. And a captive shipper should not bear the cost of any facilities or services from which it derives no benefit." *Major Issues in Rail Rate Cases*, S.T.B. Ex Parte No. 657 (Sub-No. 1), 2006 STB LEXIS 663, at *11 (S.T.B. served Oct. 30, 2006) ("*Major Issues*").

6. *See generally Guidelines*, *supra* note 5.

7. *See Major Issues*, *supra* note 5, at *5. CMP also identifies a revenue adequacy constraint, a management efficiency constraint, and a phasing constraint. *See id.*

8. *See Major Issues*, *supra* note 5, at *6. A contestable market is "one that is free from barriers to entry." *Id.*

9. *Rate Regulation Reforms*, S.T.B. Ex Parte No. 715, 2013 STB LEXIS 222, at *5 (S.T.B. served July 18, 2013). "To make a Full-SAC presentation, a shipper designs a SARR specifically tailored to serve an identified traffic group, using the optimum physical plant or rail system needed for that traffic. Using information on the types and amounts of traffic moving over the defendant railroad's system, the complainant selects a subset of that traffic (including its own traffic to which the challenged rate applies) that the SARR would serve. Based on the traffic group selected, the level of services provided, and the terrain to be traversed, a detailed operating plan must be developed for the SARR. Once an operating plan is developed that would accommodate the traffic group selected, the SARR's investment requirements and operating expense requirements must be estimated. The parties must provide appropriate documentation to support their estimates. The annual revenues required to recover the SARR's capital costs (and taxes) are combined with the annual operating costs to calculate the SARR's total annual revenue requirements. The revenue requirements of the SARR are then compared to the revenues that the defendant railroad is expected to earn from the traffic group. If the present value of the revenues that would be generated by the traffic group is less than the present value of the SARR's revenue requirements, then the complainant has failed to demonstrate that the challenged rate levels violate the SAC constraint. If, on the other hand, the present value of the revenues from the traffic group exceeds the present value of the revenue requirements of the SARR, then the Board disperses the overage among the traffic group, and prescribes the resulting rate and/or reparations for the issue traffic." *Id.*

10. *Id.*

main the foundation for any rate regulatory regime that is not arbitrary.[11] And, applying sound economic principles is necessarily complex. Any complex and significant litigation—whether in court or before the STB—requires substantial outlays of time, effort, and money. The time, effort, and money required to litigate a SAC Case before the STB are not appreciably different from that required to litigate a comparable case in court. As the STB noted in 2006, the SAC Test "has evolved into an intricate, expensive, and time-consuming process."[12] In response to claims by shippers that the SAC Test is prohibitively intricate, expensive, and time-consuming, and in response to the relatively few rate cases filed,[13] the STB has undertaken significant steps to streamline SAC Cases and rate cases more generally over the years.[14]

Although it is important to resist the urge to conflate the number of rate cases filed with the need for substantive regulatory reform,[15] oppor-

11. *See, e.g., Simplified Standards for Rail Rate Cases*, S.T.B. Ex Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, at *26 (S.T.B. served Sept. 5, 2007) ("*Simplified Standards*") ("The SAC test, which judges the reasonableness of a challenged rate by comparison to the rate that would prevail in a competitive market, rests on a sound economic foundation and has been affirmed by the courts. . . . Any simplified methodology for assessing the reasonableness of rail rates should be designed to achieve the same objective . . . ."); Section 15(a)(3), Surface Transportation Board Reauthorization Act of 2015, Public Law 114—110, 129 Stat. 2228 ("Act") (requiring the STB to report to certain congressional committees on rate case methodologies but specifying that the STB should "only include[ ] alternative methodologies, which exist or could be developed, that are consistent with sound economic principles").

12. *See Major Issues*, *supra* note 5, at *3.

13. *See Rail Rate Cases at the STB (1996 to Present)*, SURFACE TRANSP. BD., https://www.stb.dot.gov/stb/industry/Rate_Cases.htm (last visited Apr. 10, 2017).

14. In 2003, the STB adopted mandatory mediation to "encourage full or partial settlements" and certain technical conferences to "narrow the range of disputed issues." *See generally Procedures To Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology*, S.T.B. Ex Parte No. 638 (S.T.B. served Apr. 3, 2003) ("*Procedures To Expedite*"). In 2006, the STB prohibited movement-specific adjustments to the Uniform Rail Costing System and settled longstanding disputes about issues like revenue allocation methodologies and productivity adjustments. *See generally Major Issues*, *supra* note 5. In 2007, the STB overhauled its simplified rail rate guidelines to create a simplified stand-alone cost test ("SSAC Test," and cases thereunder, "SSAC Cases") and a three-benchmark test ("3-B Test," and cases thereunder, "3-B Cases") for smaller rate cases whose values do not justify filing a SAC Case. *See Simplified Standards*, *supra* note 11, at *26. In 2013, the STB greatly expanded access to these alternative, simplified rate case methodologies by removing the rate relief limit for SSAC Cases and quadrupling the rate relief limit for 3-B Cases. *See generally Rate Regulation Reforms*, S.T.B. Ex Parte No. 715 (S.T.B. served July 18, 2013). And, filing fees that once were nearly $180,000 for SAC Cases have been reduced to $350. *See Regulations Governing Fees for Services*, S.T.B. Ex Parte No. 542 (Sub-No. 18) (S.T.B. served July 7, 2011).

15. An optimally functioning regulatory environment *should* result in relatively few rate cases filed, as the Interstate Commerce Commission (the STB's predecessor agency) prophesized in 1985. *See Guidelines*, *supra* note 5, at 524 ("[A] benefit of these guidelines is to enable both the shipper and the railroad to estimate the maximum rate we would prescribe if the matter were brought to us for adjudication. We believe this will encourage contract solutions which (as shown below) may often be more efficient and more beneficial to both parties than a

tunities do exist to expedite rate cases based on a review of procedures used by courts to expedite litigation and a review of the parties' and STB's experiences in *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125.[16] However, in implementing any of these procedures to expedite SAC Cases, the STB should be extremely careful not to undermine the sound economic principles that underpin the STB's rate regulatory regime and, in particular, the SAC Test. As recently confirmed by the STB's independent consultant, "research has not pointed to a simpler methodology than the three [Constrained Market Pricing] methods[, including the SAC Test,] that assess rate reasonableness consistent with the statutory requirement to take into account carrier revenue adequacy and encourage achievement of the highest possible level of economic efficiency/economic welfare."[17]

With this background regarding the economics underlying the SAC Test and the concern (whether accurate or not) that SAC Cases take too long and need to be expedited, this Article turns to a review of the procedures that courts employ to expedite litigation and their potential applicability to STB rate reasonableness proceedings.

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prescribed rate."). When rate regulations are certain, railroads are able to conform their pricing decisions thereto; and, shippers also understand their regulatory options, with the advice of outside counsel and consultants, and negotiate accordingly. *See, e.g.*, *Petition of Norfolk Southern Ry. Co. and CSX Transp. Inc. to Institute a Rulemaking Proceeding to Exempt Railroads from Filing Agricultural Transp. Contract Summaries*, S.T.B. Ex Parte No. 725, 2014 STB LEXIS 195, at *5 (S.T.B. served Aug. 11, 2014) (V.C. Miller, concurring) ("My view is that when shippers have more information they can make better decisions and, as a consequence, fewer disputes will arise."). Under such conditions, rate cases arise only in those limited instances where shippers take a calculated risk to push the regulatory envelope.

16. To date, the authors respectfully submit that *DuPont* is the largest and most complex SAC Case litigated to completion at the STB by any number of measures. *See, e.g.*, *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, S.T.B. Docket No. NOR 42125, 2015 STB LEXIS 424, at *13, n9 (S.T.B. served Dec. 23, 2015) ("*DuPont Merits*") ("In cases where the SARR moves many commodities in carloads from many origins to many destinations—and especially a case like this one where the SARR replicates much of a Class I railroad's network—or where the parties find less common ground on the thousands of inputs to a full SAC analysis, the case greatly increases in size and complexity. . . . The magnitude of the alleged overcharge on the collective traffic group in this case—approximately $20.1 billion according to DuPont's opening evidence—further illustrates the complexity.") (internal citations omitted).

17. *An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, Inter*VISTAS* Consulting Inc. 130 (Sept. 14, 2016). *See also id.* at 44 (noting that the "complexity of [the SAC Test] is a necessary exercise for those who want to estimate an economically efficient rate for the traffic in a network industry"); *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, S.T.B. Docket No. NOR 42121, 2016 STB LEXIS 271, at *100 (S.T.B. served Sept. 14, 2016) (Begeman, dissenting in part) (acknowledging "economists' views that [the SAC Test] is the 'gold standard'").

II. An Analysis of the Applicability to Rate Cases of Procedures Used by Courts to Expedite Litigation

Courts use a number of effective procedures to expedite litigation. Such procedures fall into six general categories: (A) triaging cases; (B) leveraging case management conferences; (C) scheduling deadlines early; (D) enforcing scheduled deadlines; (E) streamlining discovery; and (F) streamlining motions practice. The specific procedures for each of these categories, as well as their applicability to rate cases, are discussed in turn below. The sum of these procedures reveals that active case management *by the court*[18] is essential to expedite litigation.

The STB could adopt a number of these procedures effectively used by courts to expedite litigation, but the critical question is whether the STB is willing to be an active case manager. Absent the will of the regulator to actively manage the case process, efforts to expedite cases will fail notwithstanding the procedures adopted in name only.

A. Triaging Cases

Triaging[19] has been at the heart of efforts by courts over recent decades to expedite litigation.[20] Recognizing that not all cases are created equal, triaging allocates cases upon filing to different processing tracks.[21]

At a minimum, there typically is an expedited track for routine cases requiring minimal court oversight, a standard track for disputed cases requiring average court oversight, and a complex track for multifaceted, highly contested cases requiring extensive court oversight.[22] However, "[t]here is no magic number; the number [of tracks] should reflect realis-

18. Active case management is the "management of the continuum of processes and resources necessary to move a case from filing to disposition. . . . It is concerned with active attention by the court to the progress of each case once it has been filed with the court." *Defeating Delay: Developing and Implementing a Court Delay Reduction Program*, American Bar Ass'n 24 (1986), https://www.americanbar.org/content/dam/aba/publications/judicial_division/lc_defeating_delay_1986.authcheckdam.pdf.

19. Triaging also is known as differentiated case management or mandatory pathway assignment. *See, e.g.*, *Resolution*, American Bar Ass'n 3-4 (Feb. 6, 2017), https://www.americanbar.org/content/. . ./2017_hod_midyear_102.authcheckdam.docx.

20. *See, e.g.*, Bureau of Justice Assistance, Differentiated Case Management – Implementation Manual 5 (June 1993), http://babel.hathitrust.org/cgi/pt?id=mdp.39015040995618;view=1up;seq=3.

21. *See, e.g.*, *Recommendations To Reduce Cost and Delay in the Delivery of Civil Justice* ("Recommendations"), Civil Justice Improvements Comm. 7-8 (Feb. 1, 2016), http://nacmconference.org/wp-content/uploads/2014/01/CJI-Recs-6-0-1-2-1-16.pdf; Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, National Center for State Courts 146 (2011), http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends/Author%20PDFs/Clarke%20and%20Flango.ashx.

22. *E.g.*, *Recommendations*, *supra* note 21, at 7-15; Clarke & Flango, *supra* note 21, at 146.

tic distinctions in case-processing requirements."[23]

Cases are allocated upon filing to the appropriate track based on particular characteristics intended to reveal the types of judicial tasks that will need to be performed in the case,[24] such as: (1) amount in controversy; (2) complexity of factual and legal issues; (3) expected scope of discovery; (4) anticipated pretrial motions; (5) degree of inter-party conflict; and (6) likely time between the filing date and trial date.[25] Allocation is dynamic; and, a case may switch tracks as it progresses.[26]

Based on its track, distinct procedural rules are applied and proportionate judicial resources are devoted to a case, "lead[ing] to efficiencies in time."[27] Major case events, like pretrial conferences and additional discovery, are only scheduled for cases in those tracks where such events are necessary. "Only events that contribute to the case disposition process are scheduled, and each scheduled event is designed to promote case disposition."[28] Thus, triaging ensures that procedural rules and judicial resources are effectively deployed to expedite cases.[29]

Empirical evidence confirms that triaging successfully expedites litigation, although such benefits tend to be concentrated in cases in the expedited and standard tracks.[30] Cases in the complex track generally are not expedited as a result of triaging for the very reason that they are inherently complex. Nonetheless, triaging benefits the court's overall docket. As one example, in the 17 years following its adoption of the Birmingham Differential Case Management Plan, the Circuit Court for the Tenth Judicial Circuit of Alabama, Civil Division experienced a nearly 40% reduction in the average number of days from filing to disposition of a case—from 678.48 days to 423.08 days.[31]

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23. IMPLEMENTATION MANUAL, *supra* note 20, at 21. *See also* James Cabral et al., *Using Technology To Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 296 (Fall 2012) (outlining tracks for cases amenable to alternative dispute resolution and for cases likely to require ongoing decision-making and compliance activity, among others).

24. *E.g.*, Cabral, *supra* note 23, at 296.

25. *See, e.g.*, *Recommendations*, *supra* note 21, at 7-15; JUDICIAL CONFERENCE OF THE U. S., CIVIL LITIGATION MANUAL, SECOND EDITION 9-10 (2010), http://www2.fjc.gov/sites/default/files/2012/CivLit2D.pdf.

26. *E.g.*, Cabral, *supra* note 23, at 296.

27. *E.g.*, *Recommendations*, *supra* note 21, at 7. *See also* Rick Dabbs, *Differentiated Case Management*, MONTGOMERY CTY. CIRCUIT COURT, http://www.montgomerycountymd.gov/circuitcourt/attorneys/dcm.html (describing that triaging assures "timely provision of resources for the expeditious processing and resolution of cases on each track").

28. *Differentiated Case Fact Sheet*, BUREAU OF JUSTICE ASSISTANCE (Nov. 1995), https://www.ncjrs.gov/txtfiles/dcm.txt.

29. *See, e.g.*, Clarke & Flango, *supra* note 21, at 147.

30. *See, e.g.*, Practical Aspects of Civil DCM 6-7, Presentation, 2010 NACM Annual Conference (Aug. 20, 2010), https://nacmnet.org/sites/default/files/conferences/PastConferences/PastConferences/2010Annual/Civil%20DCM.pdf.

31. *Birmingham Differential Case Management Plan*, BIRMINGHAM BAR ASS'N 2 (Sept.

The STB already employs triaging to some degree. But, the STB can do more—both within SAC Cases specifically and across the entire STB docket generally.

With respect to SAC Cases specifically, there are four critical components of evidence: (1) traffic group; (2) traffic volumes (including peak week calculations); (3) operating plan; and (4) configuration of the SARR. These four components are interrelated: traffic volumes depend, in part, on the traffic group; the operating plan depends on the traffic group and volumes; and the SARR's configuration depends on the operating plan.[32] The remaining evidence in SAC Cases builds upon these four components. Accordingly, promoting evidentiary alignment from the start between the complainant and the defendant on these four critical components would expedite SAC Cases. For one thing, the STB would be faced with less competing evidence. And, once the four critical components are settled, the rest of the SAC Case flows relatively smoothly. Thus, the STB should triage its handling of SAC Cases by devoting more resources to achieve early resolution of the four critical evidentiary components.

With respect to the entire STB docket, it currently encompasses proceedings ranging from simple petitions for declaratory order to complex SAC Cases. These various proceedings are handled under different rules[33] and by different staff. For example, in November 2011, the STB implemented a "grant stamp procedure" for certain "uncontested, routine procedural matters" delegated to the Director of the Office of Proceedings ("Director") in order to "streamline" STB processes.[34] As another example, many minor proceedings are handled pursuant to notices of exemption.[35] Exemptions are a valuable tool for triaging, and the STB should continue to expand the use of exemptions pursuant to its

2008), http://c.ymcdn.com/sites/birminghambar.org/resource/resmgr/Miscellaneous/Differential_Case_Management.pdf.

32. *See, e.g.*, *DuPont Merits*, *supra* note 16 (noting "How a SARR would operate influences both its configuration and annual operating expenses.").

33. For example, in many proceedings, responsive pleadings must be filed within 20 days and no replies to replies are permitted. *See* 49 C.F.R. § 1104.13 (1982). However, SAC Cases operate under entirely different pleading schedules. *See* 49 C.F.R. § 1111.8 (1996). And, SSAC Cases and 3-B Cases have their own distinct pleading schedules. *See* 49 C.F.R. § 1111.9 (1996). *See also Rate Regulation Reforms*, S.T.B. Ex Parte No. 715 (S.T.B. served July 18, 2013).

34. *Policy Statement on Grant Stamp Procedure in Routine Director Orders*, S.T.B. Ex Parte No. 709 (S.T.B. served Nov. 14, 2011) ("*Grant Stamp Policy*") (noting that use of a grant stamp would "eliminate the time it takes to draft a decision and would allow for quicker responses to stakeholders" and "will allow for more efficient use of Board resources").

35. *See, e.g.*, 49 C.F.R. § 1152.50 (1996) (exempting abandonments and discontinuances from the application requirements of 49 U.S.C. § 10903 under certain circumstances).

statutory mandate.[36] Expanding the use of exemptions would most effectively deploy limited STB resources by allowing the STB to concentrate on inherently complex proceedings like SAC Cases.

To sum, the STB should employ a greater degree of triaging in order to expedite SAC Cases as well as other proceedings on its docket.

B. Leveraging Case Management Conferences

Case management conferences can be expressly designed to expedite cases. For example, the Superior Court of California explains that such conferences "are used by the court to expedite the movement of most civil cases through to an early resolution or trial."[37]

At the case management conference, the judge and the parties can discuss pleadings and amendments, discovery, financial resources, cost-shifting provisions, dispositive motions, and the importance of cooperation, to name a few major topics.[38] As described by the Committee on Court Administration and Case Management of the Judicial Conference of the United States:

> One of the most important tasks in the initial case management conference is early identification of the issues in controversy (in both claims and defenses) and of possible areas for stipulations. . . . Issue narrowing is aimed at refining the controversy and pruning away extraneous issues. This effort will provide [the court] and the parties with an assessment of the resources that this case warrants, the likelihood of successful dispositive motions, and the issues to focus on at trial or in settlement.[39]

The STB similarly should leverage technical conferences to narrow the issues in controversy. Technical conferences could be held prior to the complainant's filing of its opening evidence and periodically thereafter during the course of the SAC Case. The ultimate goal would be clarity. With clear guidance from the STB on relevant issues, the parties could reevaluate their positions and recalibrate their strategies. This clarity would expedite SAC Cases by minimizing the competing evidence faced by the STB and even promoting settlement or withdrawal.

For example in *DuPont*, earlier resolution of several major issues[40]

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36. *See* 49 U.S.C. § 10502 (1995) ("[T]he Board, *to the maximum extent* consistent with this part, shall exempt a person, class of persons, or a transaction or service . . . .") (emphasis added).

37. *Case Management Conference Policies*, Superior Court of Cal., Yolo Cty., http://www.yolo.courts.ca.gov/divisions/civil/case-management-conference-policies (last visited Apr. 10, 2017).

38. *E.g.*, Inst. for Advancement of Am. Legal Sys., Reforming Our Civil Justice System 8-9 (Apr. 2015), http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf.

39. Judicial Conference of the U.S., Civil Litigation Manual 21 (2001), https://public.resource.org/scribd/8763686.pdf.

40. First, the parties disagreed on whether leap-frog traffic was permissible. *See E.I. Du-*

via such intermediate technical conferences would have streamlined the proceeding. To consider just one such issue, E. I. DuPont de Nemours & Company's ("DuPont") opening evidence included revenues from certain non-rail subsidiaries of Norfolk Southern Railway Company ("NS")—Triple Crown Services ("TCS") and Thoroughbred Direct Intermodal Services ("TDIS")—without accounting for any of the costs to build TCS's and TDIS's infrastructure. This opening evidence understandably confused NS: NS wondered whether DuPont had erred by including this revenue or erred by excluding these costs. At an intermediate technical conference, NS could have confirmed what DuPont intended to include and exclude; and, DuPont and NS could have resolved with the STB what should have been included and excluded. Armed with this clarity, NS and DuPont could have reevaluated their positions regarding TCS and TDIS, resulting in considerably less arguments back and forth requiring STB adjudication.

Technical conferences already are a proven method to expedite SAC Cases. *Procedures To Expedite* authorized STB staff to convene a technical conference with the parties to SAC Cases to address 20 operating characteristics common to all variable cost computations:

> Agreement on these matters would expedite rate cases by narrowing the range of issues that the parties litigate and the Board needs to adjudicate. In past and pending SAC cases, seemingly obvious facts such as the number of miles that the complainant's traffic moves have frequently been in dispute. The parties agree that informal consultation with our staff could help to nar-

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Pont de Nemours & Co. v. Norfolk Southern Ry. Co., S.T.B. Docket No. NOR 42125, 2014 STB LEXIS 71, at *448-49 (S.T.B. served Mar. 21, 2014) ("The parties have agreed on the composition of the DRR's traffic group, with one exception, the inclusion of leapfrog, cross-over traffic (traffic that would move over multiple, physically discreet segments of the DRR, requiring multiple interchanges with the residual incumbent)."). Second, the parties disagreed on whether the SARR could earn revenues from certain NS subsidiaries without incurring the associated costs. *See id.* at 54 ("Further, as NS asserts, DuPont overstated SARR revenues in its opening by including revenues earned by TCS/TDIS without providing adequate evidence that the necessary infrastructure, operations, or corresponding expenses have been accounted for to provide such services. On rebuttal, DuPont still fails to include the necessary facilities, operations, capital investments, and expenses necessary to generate the TCS/TDIS revenue it seeks to include, and merely subtracts some TCS/TDIS operations costs from the intermodal revenues. DuPont has failed to show that the DRR is entitled to more than the rail line haul revenues."). Third, the parties disagreed on whether the SARR could use tracks and facilities of third-party carriers in whom NS had varying ownership stakes. *See id.* at 48 ("DuPont did not account for the construction costs proportional to NS's ownership interests in the BRC and the TRRA, even though these partially owned facilities are owned by the railroad. The DRR must replicate and account for those costs. . . . At the same time, the Board will not require DuPont to account for the construction costs of the SAA and the IHB because these partially owned facilities are subsidiaries of NSC and not of NS. In this instance, the Board notes that NSC elected to set up its ownership interests in SAA and IHB as separate legal entities from its railroad subsidiary, and NS has failed to present a valid argument for ignoring this structure.").

row the range of disputed issues.[41]

In the first technical conference in a major rate case, involving Otter Tail Power Company and BNSF Railway, the parties "resolved every one of the 200 issues on the conference table."[42] In the words of then-STB Chairman Roger Nober, "[t]he issues [the parties] have resolved between themselves, with expert assistance from board staff, will save them time and money in this litigation. Otter Tail and BNSF have set a high bar for parties in future rate cases to come together to resolve issues during technical conferences."[43]

To sum, the STB should expand its use of intermediate technical conferences to narrow the issues in controversy which otherwise could contribute to unwarranted delay of SAC Cases.

C. Scheduling Deadlines Early

Early scheduling of procedural deadlines allows courts to gain active control of a case from the outset. And, early scheduling, as directed by the court, helps ensure that the parties will resolve the case in a timely manner.[44] As noted in the Federal Rules of Civil Procedure ("FRCP"):

> [W]hen a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of . . . more efficiently and with less cost and delay than when the parties are left to their own devices.[45]

The California Rules of Court similarly emphasize that "[t]o enable the just and efficient resolution of cases, *the court*, not the lawyers or litigants, should control the pace of litigation."[46] Absent early scheduling by the

41. S.T.B. Ex Parte No. 638 (S.T.B. served Apr. 3, 2003); *see also* John M. Scheib, *Alternative Dispute Resolution at the Surface Transportation Board*, 71 J. Transp. Law, Logistics & Pol'y 1 (Fall 2003).

42. *Surface Transportation Board Announces Success of 1st Technical Conference in a Major Rail-Rate Case*, News Release No. 03-31, Surface Transp. Bd. (July 16, 2003), https://www.stb.dot.gov/newsrels.nsf/71c35e25bd34f1f68525653300425877/d0dbbd6be40ee3f785256d65006c323d?OpenDocument.

43. *Id.*

44. *E.g.*, Civil Litigation Manual, Second Edition, *supra* note 25, at 13. *See also* Mattia Landoni, *Justice Delayed . . . an Overview of the Options To Speed Up Federal Justice*, 18 J. Pub. & Int'l Aff. 127, 143 (Spring 2007), https://www.princeton.edu/jpia/past-issues-1/2007/6.pdf (noting that early scheduling offers the greatest promise for expediting litigation).

45. Fed. R. Civ. P. 16, Advisory Committee Note, amend. (1983) (citing Steven Flanders, Fed. Judicial Ctr., Case Management and Court Management in United States District Courts 17 (1977)). *See also* Inst. for Advancement of Am. Legal Sys., Working Smarter Not Harder: How Excellent Judges Manage Cases 16 (Jan. 2014), http://amjudges.org/conferences/2015Annual/Materials/Kourlis-Kauffman-Working-Smarter-Not-Harder.pdf (stating that "the best case management technique is 'a firm trial date and a ready judge'").

46. Cal. R. Ct. Standard 2.1 (emphasis added).

court, a case "may drop from sight."[47]

Early scheduling typically begins with a case management conference, as discussed above, where the judge can "shape the pretrial process proportionally to the needs of the case."[48] Based on the discussion with the parties at this conference, the judge schedules a trial date and all pretrial events, such as deadlines for pleadings, discovery, and motions, by working backwards from that trial date.[49] This scheduling order "controls the course" of the case.[50]

Empirical evidence confirms that early scheduling successfully expedites litigation, "with no detectable cost to the quality of dispute resolution."[51] And the earlier the scheduling, the better: a 2009 study of nearly 8,000 federal civil cases found a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between filing a case and setting a trial date.[52] Similarly, Judge Prince of the Fourth Judicial District of Colorado reports that early scheduling resulted in a 20-30% reduction in his caseload as well as 90% and 70% reductions in the time spent on dispositive motions and discovery, respectively.[53]

As a broader example, consider the Eastern District of Virginia ("EDVA"), which consistently outpaces the national average in trial times and disposition times for civil cases, rightfully earning the title of the "rocket docket."[54] The EDVA's speed is directly tied to its rules and practices: (1) "not later than ninety (90) days from first appearance or one hundred and twenty (120) days after service of the complaint, the Court shall enter an order fixing the cut-off dates for the respective parties to complete the processes of discovery, the date for a final pretrial conference and, whenever practicable, the trial date;" and (2) courts tend to issue initial scheduling orders shortly after a case is filed, generally setting the trial date a few months after the filing date.[55]

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47. CIVIL LITIGATION MANUAL, SECOND EDITION, *supra* note 25, at 13.

48. REFORMING OUR CIVIL JUSTICE, *supra* note 38, at 8.

49. *E.g.*, *Recommendations*, *supra* note 21, at 11. *See also* FED. R. CIV. P. 16; Michael E. Tigar, *Pretrial Case Management under the Amended Rules*, 14 REV. LITIG. 137, 150-52 (1994).

50. CIVIL LITIGATION MANUAL, SECOND EDITION, *supra* note 25, at 6-8, 14.

51. *E.g.*, Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873, 892 (1981).

52. REFORMING OUR CIVIL JUSTICE SYSTEM, *supra* note 38, at 10.

53. WORKING SMARTER NOT HARDER, *supra* note 45, at 7.

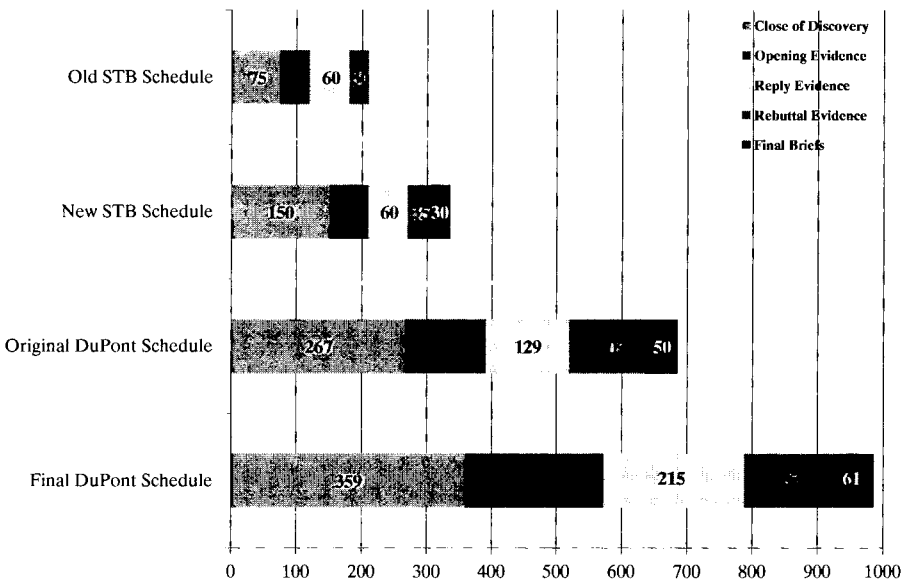
54. *See, e.g.*, Robert M. Tata & Wendy C. McGraw, *What Litigators Must Know About Va.'s 'Rocket Docket'*, LAW360 1 (Mar. 19, 2013), www.law360.com/articles/423669.

55. Loren Kieve, *Eastern District of Virginia Pretrial Procedures* (Mar. 2010), http://www.uscourts.gov/sites/default/files/loren_kieve_eastern_district_of_va_pretrial_procedures.pdf. *See also* Local Civil Rule 16, *Pretrial Conference*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

The STB typically establishes procedural schedules for SAC Cases relatively early, but there is always room for improvement. For example in *DuPont*, the STB adopted a procedural schedule approximately one month after DuPont submitted its motion for a procedural schedule but over four months after DuPont filed its initial complaint.

It is useful to expand further on the *DuPont* schedule. Chart 1 below compares the original *DuPont* schedule adopted by the STB on February 24, 2011 ("Original DuPont Schedule"), the final *DuPont* schedule adopted by the STB on March 8, 2013 ("Final DuPont Schedule"), and the schedule for SAC Cases set forth in 49 C.F.R. § 1111.8, both prior to its amendment by the Act ("Old STB Schedule") and after ("New STB Schedule"). [56] The Original DuPont Schedule was approximately three times as long as the Old STB Schedule and twice as long as the New STB Schedule.

CHART 1: COMPARISON OF *DUPONT* SCHEDULES TO STB SCHEDULES
(in days from DuPont's filing of its Complaint)

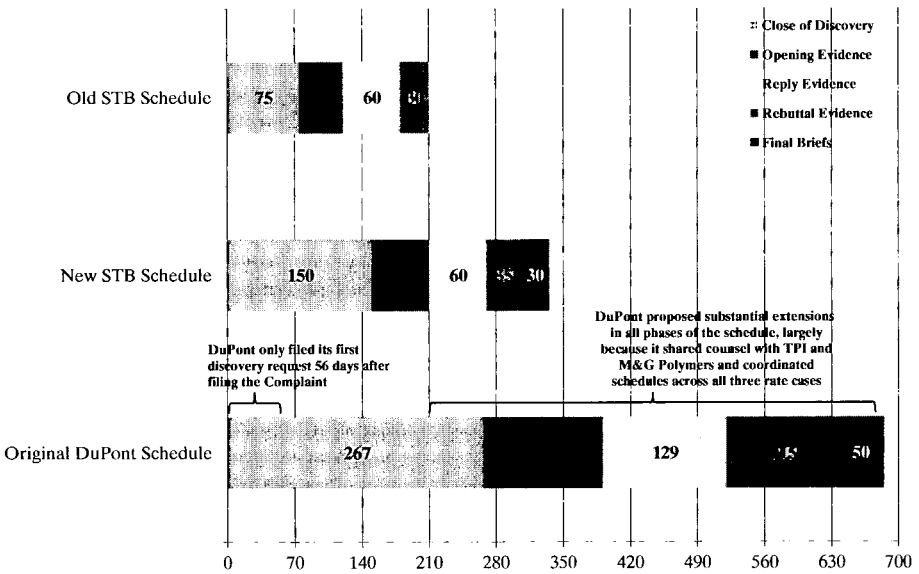


So even though the STB established the Original DuPont Schedule relatively early, that schedule itself was doomed from the start. As shown in Chart 2 below, DuPont had proposed substantial extensions in all phases of the schedule, largely because it shared counsel with the com-

56. The charts provided herein address only certain procedural phases of SAC Cases: (a) close of discovery; (b) filing of opening evidence; (c) filing of reply evidence; (d) filing of rebuttal evidence; and (e) submission of final briefs—the five phases most within the parties' control.

plainants in *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. NOR 42121 and *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, and needed to stagger filings across these three contemporaneous SAC Cases.[57] And, the STB adopted DuPont's proposed procedural schedule in its entirety.

CHART 2: EXTENSION OF *DUPONT* SCHEDULES FROM STB SCHEDULES
(in days from DuPont's filing of its Complaint)



Although the Director should continue to use the "grant stamp" to approve a request for a procedural schedule, this stamp should not be affixed on any request that grossly violates the New STB Schedule simply because that request is not opposed by the other party. 49 C.F.R. § 1111.10(b) should be amended to reflect that the STB ultimately retains control over the procedural schedules of rate cases—not just over "unresolved disputes."

To sum, soon after the filing of a rate case complaint, the STB should adopt a procedural schedule consistent with 49 C.F.R. § 1111.8 or § 1111.9, as applicable.

57. *See Motion for Procedural Schedule*, S.T.B. Docket No. NOR 42125 (filed Jan. 10, 2011) ("All three Complainants are represented by the same counsel and consultants . . . . Therefore, careful coordination of procedural schedules is especially important to the fair and efficient prosecution of these cases."). NS did not join in DuPont's motion for a procedural schedule.

D. Enforcing Deadlines

It is not enough simply to schedule procedural deadlines.[58] Procedural deadlines must be enforced:

> Consistent application and enforcement of rules and procedures creates a culture and practice in which meaningful events occur as scheduled, and preparation and compliance are promoted. Policies of no continuances, extensions, or adjournments absent extraordinary circumstances create this culture. That culture moves a case toward timely and cost-effective resolution.[59]

The importance of this culture in expediting litigation cannot be overstated. "[Q]uantitative and qualitative data . . . strongly suggest[ ] that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys."[60] Court practices of liberally accepting untimely filings and granting continuances and extensions generally are regarded as the greatest evils in creating a culture of delay.[61] For example, one survey of Colorado district courts finds that "[i]ncreasing the number of extension motions granted [ ] decreases the probability of earlier resolution by 16%."[62] Thus, failure to enforce deadlines fuels a cycle of delay.

Empirical evidence confirms that enforcing deadlines, *notwithstanding any agreement of the parties to delay*, successfully expedites litigation. For example, the EDVA's speed in trial times and disposition times for civil cases is directly correlated with its governing rules, which "disfavor" continuances and extensions.[63] Under Local Civil Rule 7(G) for the EDVA, continuances "shall not be granted by the mere agreement of counsel. No continuance will be granted other than for good cause and

58. *See* Tigar, *supra* note 49, at 152 (noting that wise case management "also keeps pressure on the parties to complete discovery, to file dispositive motions, to structure the case for trial, and to explore settlement").

59. *Civil Caseflow Management Guidelines*, Inst. for Advancement of Am. Legal System 10 (2009), http://iaals.du.edu/sites/default/files/documents/publications/civil_caseflow_management_guidelines2009.pdf. *See also* David C. Steelman, et al., Caseflow Management: The Heart of Court Management in the New Millennium 6 (National Center for State Courts, 2000) ("If case participants doubt that trials or hearings will be held at or near the scheduled time and date, they will not be prepared.").

60. Steelman, *supra* note 59, at xv.

61. *See, e.g.*, Hon. William F. Dressel, *Time to Redefine: Court Organization and Effective Caseflow Management*, National Judicial College 13 (2010), http://www.judges.org/wp-content/uploads/Time-to-Redefine.pdf.

62. Corina D. Gerety & Logan Cornett, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*, Institute for the Advancement of the American Legal System 29 (Oct. 2014), http://iaals.du.edu/sites/default/files/documents/publications/momentum_for_change_capp_final_report.pdf.

63. *See, e.g.*, Tata & McGraw, *supra* note 54, at 3.

upon such terms as the Court may impose;"[64] and under Local Civil Rule 16, "[m]ere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance."[65] In harmony with such rules, studies find that attorneys in the EDVA file only 6 motions to extend discovery for every 100 cases, as compared to the national average of nearly 25 motions.[66]

As another example, under special rules adopted by five Colorado district courts in 2012 pursuant to the Colorado Civil Access Pilot Project ("CAPP Rules"), continuances and extensions are "strongly disfavored" and are denied absent "extraordinary circumstances" even if the motion for a continuance or extension is stipulated.[67] These CAPP Rules were expressly designed to "counteract the tendency for extensions and continuances to become par-for-the course."[68] And, they worked. These CAPP Rules yielded a 40% decrease in filed motions for an extension and an 11% decrease in granted motions for an extension.[69]

1. Sanctions

Sanctions, and even the threat of sanctions, generally are regarded as the most effective tools in enforcing deadlines. Failure to sanction creates a "restraint vacuum in which economic and competitive pressures often lead litigators and parties to violate clear duties or, at least, to test the outer limits of the elasticity of the rules or of the system for enforcing them."[70] As such, it is "critical" that consequences exist for such violations or abuses.[71] Sanctions not only punish the specific violation or abuse at hand but also have a beneficial deterrent effect, creating a feedback loop that minimizes violations and abuses—and thus expedites litigation—over time.

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64. Local Civil Rule 7(G), *Pleadings—Motions—Continuances—Orders*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

65. Local Civil Rule 16, *Pretrial Conference*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

66. Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule* 1 THE FEDERAL COURTS L. REV. 1, 4, 17 (2009), http://iaals.du.edu/sites/default/files/documents/publications/managing_toward_the_goals_of_rule_1_2009.pdf.

67. Gerety & Cornett, *supra* note 62, at 27.

68. *Id.*

69. *Id.* at 28-29.

70. Brazil, *supra* note 51, at 922.

71. *E.g.*, *Reforming Our Civil Justice System*, *supra* note 38, at 20-21. *See also* WORKING SMARTER NOT HARDER, *supra* note 45, at 29 (describing an example from the Superior Court of California where Judge Karnow explicitly threatened to sanction frivolous filings in order to defend procedural deadlines against delay, by "set[ting] out an order listing those that appeared frivolous and why, and invit[ing] parties either to withdraw any and all motions they wished or file an answer within 10 days. Before this safe-harbor period ended, the lawyers had withdrawn all the motions.").

Data confirms that courts utilizing strong case management techniques, like sanctions, benefit from an average disposition time for cases that is approximately half of the average disposition time in courts that fail to employ such techniques.[72] For example, the EDVA's "rocket docket" culture is reinforced by sanctions: when "justified," courts in the EDVA do not hesitate to sanction parties for violating deadlines with untimely filings or other procedurally barred behavior.[73]

Further, the overwhelming majority of both judges and lawyers acknowledge the value of sanctions. Approximately 80% of judges from five representative federal district courts believe that sanctions have a positive impact on civil litigation;[74] and, approximately 90% of lawyers want courts to sanction procedural violations or abuses.[75]

The STB does not truly allow parties in rate cases to move for sanctions to enforce procedural deadlines. Although the STB has suggested that it is guided by the principles of Rule 11 of the FRCP,[76] the STB has never imposed sanctions in rate cases to punish and deter needless delay. Admittedly, the STB may not have the inherent power of courts; and therefore, its ability to sanction,[77] as well as the types of sanctions it may impose, may be limited.[78] But regardless of the legally permissible scope of the STB's authority to sanction, the STB has not employed it to enforce deadlines and expedite rate cases.

The "restraint vacuum" created by the STB's failure to sanction is

72. Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 12 (Oct. 1984).

73. Tata & McGraw, *supra* note 54, at 4.

74. Margaret L. Sanner and & Tobias, *Happy (?) Birthday Rule 11*, 37 LOY. L.A. L. REV. 573, 581 (Winter 2004).

75. Brazil, *supra* note 51, at 884.

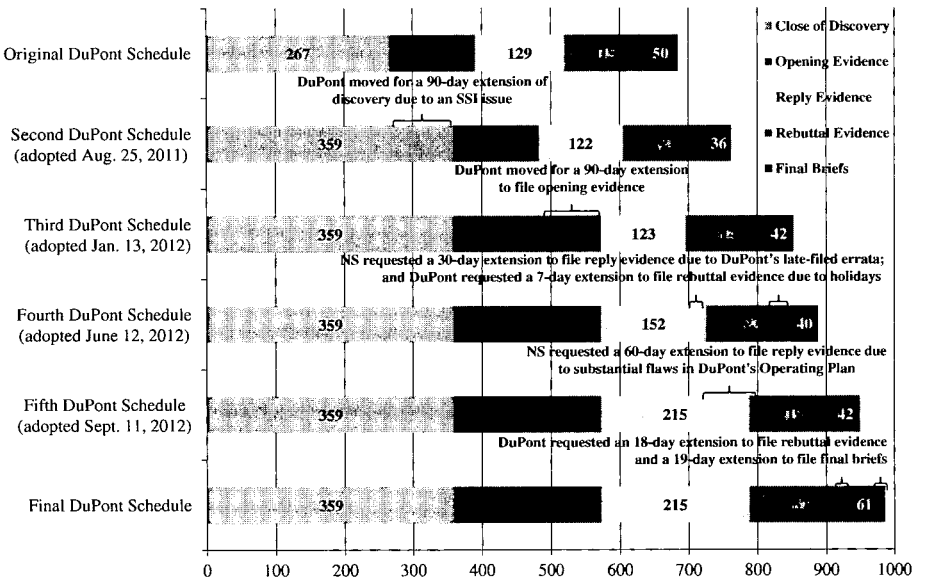
76. *See, e.g., SF&L Ry., Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Ry. Corp. Between La Harpe and Peoria, IL*, S.T.B. Finance Docket No. 33995; *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry., Inc.*, S.T.B. Finance Docket No. 33996 (S.T.B. served Mar. 15, 2002) ("Courts have upheld the authority of agencies to enact disciplinary rules for professionals who practice before them, despite a lack of express statutory authority, as necessary to protect the integrity of the agencies' processes. Therefore, under appropriate circumstances, the Board may impose sanctions to enforce its orders and ensure an efficient process for those under its jurisdiction.") (citation omitted).

77. Courts impose a variety of sanctions ranging from shifting attorneys' fees, to monetary fines, to restrictions on claims or evidence, to dismissal of the case. In one case, the EDVA concluded that the plaintiff had "abandoned" the litigation and dismissed his complaint because the plaintiff had a long history of causing delays and consistently had refused to take initiative in the litigation. Potter v. SunTrust Bank, 2015 U.S. Dist. LEXIS 115877 (E.D.V.A. Aug. 31, 2015).

78. *See, e.g.*, Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co., FD No. 28583 (Sub-No. 25), 1990 ICC LEXIS 20, at *13-15 (ICC served Jan. 18, 1990) (noting that any exceptions to the American Rule, generally requiring each party to bear its own attorneys' fees, for bad faith or willful disobedience "are unquestionably assertions of inherent power in the courts" as opposed to the agency).

exacerbated by the STB's willingness to grant extensions. Chart 3 below depicts the effects of the STB's willingness to grant extensions in *DuPont*. The Original DuPont Schedule was modified five times: DuPont requested five extensions to conduct discovery and to file evidence and final briefs; and NS requested two extensions to respond to DuPont's late-filed errata and flawed Operating Plan.[79] All such requests for extensions were granted for the entire length of time requested. In total, these extensions accounted for an additional 301 days of delay.

CHART 3: EXTENSION OF *DUPONT* ORIGINAL SCHEDULE
(in days from DuPont's filing of its Complaint)



To sum, the STB should enforce procedural schedules for rate cases, to the maximum reasonable extent, both by imposing sanctions for violations thereof and by granting extensions only where necessitated upon a showing of good cause. As in the EDVA, mere failure to proceed with the normal processes of discovery should not constitute good cause. Al-

79. *See, e.g.*, E.I. DuPont de Nemours & Co. v. Norfolk Southern Ry. Co., S.T.B. Docket No. NOR 42125 (filed Jan. 10, 2011). It is important not to lose sight of why and when an extension might be necessary. As in *DuPont*, many complainants have left defendants with no choice but to seek an extension in some instances. In *DuPont*, NS was forced to seek two extensions because DuPont untimely filed errata and because DuPont's Operating Plan was so flawed. As discussed *infra* in Part I.F, NS would have filed a motion to strike and a motion to dismiss, respectively, in response to DuPont's late-filed errata and flawed Operating Plan, had it been confident that the STB would have granted these motions promptly. But absent any such confidence, NS sought the necessary time to respond.

though the Director should continue to use the "grant stamp" to approve a request for an extension, this stamp should not be affixed on any motion simply because the motion is not opposed by the other party.

E. Streamlining Discovery

Recognizing that discovery often is the key culprit behind delays in litigation, many courts have attempted to control the discovery process:

> Judges can contribute significantly to reducing the frequency and intensity of discovery disputes (and thus to increasing the overall efficiency of the system) if, in the earliest stages of an action, they set appropriate expectations . . . .[80]

In the simplest version, courts use the case management conference and scheduling order, discussed above in Parts II.B and II.C, to manage the scope and timing of the discovery process. The U.S. Chamber Institute for Legal Reform hails "case management orders that set clear guidelines for discovery early in the life of the case" as the best weapon against discovery abuses.[81] At the case management conference, the judge and the parties can "advance problem-solve" discovery issues as practicable: "judges can, with the parties' help, identify the areas where discovery should *begin*, focusing discovery on the core issues and targeting the best sources. In many cases, the parties will find that is all they need."[82] And, as discussed above in Part II.D.1, sanctions can be imposed, as necessary and appropriate, to punish and deter any violations of the scheduling order or other discovery abuses.[83] Even this simple form of active judicial control significantly expedites the discovery process, as quantified by Judge Prince.[84]

In more advanced versions, courts use various techniques to tailor the scope and timing of the discovery process to the particular case. Such techniques include presumptive limits, proportionality standards, and enhanced initial disclosure requirements:

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80. Brazil, *supra* note 51, at 901-02.

81. John H. Beisner, *"The Centre Cannot Hold"—The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. Chamber Inst. for Legal Reform (July 2010), http://www.uscourts.gov/sites/default/files/john_beisner_the_centre_cannot_hold_0.pdf.

82. Working Smarter Not Harder, *supra* note 45, at 13.

83. *See* Rule 21(d) – Discovery Abuse; Sanction, Rules of the Superior Court of the State of New Hampshire (The New Hampshire Superior Court is authorized to impose a variety of sanctions to punish and deter discovery abuses). *See also, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure ("PAD") Pilot Rules*, Nat'l Ctr. for St. Cts. (Aug. 19, 2013), https://www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx.

84. *See supra* note 53, at 29.

- *Presumptive Limits*[85] are codified, as a default matter, under the FRCP: a party must obtain leave of court or a stipulation from the opposing party to: (1) conduct more than 10 depositions;[86] and (2) serve more than 25 interrogatories.[87] Such limits "aim . . . not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device." [88] Some courts also have created limits on discovery for different tiers of cases based on the amount in controversy.[89]
- *Proportionality Standards* acknowledge that discovery is "merely a means to an end. Discovery should promote the just, speedy, and inexpensive determination of actions and should be conducted in the most efficient, non-redundant, and cost-effective method available."[90] As such, the party requesting discovery must demonstrate that its request satisfies a proportionality standard in addition to the traditional relevancy standard.[91]
- *Enhanced Initial Disclosure Requirements* strive to "identify and narrow the disputed issues at the earliest stages of litigation and thereby focus discovery."[92] For example under Rule 26 of the FRCP, a party serves,

85. *See, e.g.*, Marc Therrien, *Talkin' 'Bout a Revolution?: Utah Overhauls Its Rules of Civil Discovery*, Note, 2011 UTAH L. REV. 669, 674 (2011).

86. FED. R. CIV. P. 30(a)(2)(A)(1).

87. FED. R. CIV. P. 33(a)(1). *See also* FED. R. CIV. P. 26(b)(2)(C) (permitting courts to "limit the frequency or extent of discovery" if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (3) the proposed discovery is outside the permissible scope of relevance).

88. FED. R. CIV. P. 33, Advisory Committee Note, amend. (1983). *See also* Carol Rice Andrews, *Thinking About Civil Discovery in Alabama: Using the Federal Rules of Civil Procedure as a Thinking Tool*, 60 ALA. L. REV. 683, 688-89 (2009) (noting that presumptive limits are "positive devices for both the requesting and responding parties" and a "legitimate means to control and focus discovery" by forcing lawyers to strategically plan and judicially use their allotted depositions and interrogatories).

89. *See Limits on Standard Discovery,* URCP 26(c)(5), https://www.utcourts.gov/howto/courtprocess/disclosure-discovery.html#limits (last visited Apr. 10, 2017).

90. *Civil Caseflow Management Guidelines*, *supra* note 59, at 7.

91. *See* Therrien, *supra* note 85, at 677-78 (describing the proportionality standard in Utah district courts: (a) discovery must be reasonable, considering the needs of the case, damages, complexity, parties' resources, importance of the issues, and importance of discovery in resolving the issues; (b) likely benefits of discovery must outweigh its burden or expense; (c) discovery must be consistent with the overall case management and further a just, speedy, and inexpensive resolution; (d) discovery must not be unreasonably cumulative or duplicative; (e) discovery must not be capable of being achieved from another source that is more convenient, less burdensome, or less expensive; and (f) the party seeking discovery must have had no prior chance to obtain the information).

92. *See, e.g.*, Gerety & Cornett, *supra* note 62, at 31. *See also Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts*, NATIONAL CENTER FOR STATE COURTS iv, 13-22 (Apr. 2015), *available at* www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx (noting that enhanced initial disclosure requirements "provid[e] litigants with sufficient information about the merits of the case to engage in more productive settlement negotiations").

> "without awaiting a discovery request," shortly after the initial case management conference: (a) the names of individuals likely to have discoverable information used to support its claims or defenses; (b) a copy of all written records used to support its claims or defenses; (c) a computation of each category of damages as well as supporting materials; and (d) any relevant insurance agreement.[93]

Empirical evidence confirms that such advanced techniques successfully expedite the discovery process and litigation overall. Studies have found that imposing presumptive limits on discovery reduces the time spent thereon.[94] For example in Utah district courts, a two-track discovery system—with enhanced initial disclosure requirements, presumptive limits for additional "standard" discovery, and proportionality standards for additional "extraordinary" discovery—resulted in faster case disposition times.[95] As another example, under the CAPP Rules introduced above in Part I.D, enhanced initial disclosure requirements dramatically reduced the need for additional discovery: the amount of discovery in 81% of cases was less than that authorized in the scheduling order.

At a basic level, the STB should streamline the discovery process by leveraging intermediate technical conferences to narrow the issues in controversy, as discussed above in Part I.B, and by adopting and enforcing deadlines for discovery consistent with its governing regulations, as discussed above in Parts I.C and I.D. This is consistent with the STB's promise in 2003 to prevent discovery abuses by "increas[ing] Board participation at the early stages of discovery, which we will do."[96]

At a more advanced level, the STB should experiment with enhanced initial discovery requirements as well as presumptive limits and proportionality standards.

With respect to initial discovery requirements, *DuPont* provides a roadmap for how the STB could further streamline the discovery process in SAC Cases. As noted in Chart 2 above, DuPont served its first discovery request on NS 56 days after filing its complaint. This was not a novel discovery request. In fact, the first set of discovery requests in SAC Cases has been largely identical for years. The STB could easily require complainants in SAC Cases to serve initial discovery requests related to the creation of the SARR concurrently with the filing of their complaint. However, the complainants' initial discovery request should be enhanced. For defendants in SAC Cases, pulling traffic tapes and other traffic data in response to discovery requests has one of the longest lead times. In

93. FED. R. CIV. P. Rule 26(a)(1).

94. *E.g.*, James S. Kakalik, *Analyzing Discovery Management Policies: RAND Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 JUDGES J. 22, 27 (1998).

95. *Utah: Impact*, *supra* note 92, at iv, 13-22.

96. *See Procedures To Expedite*, *supra* note 14, at 809.

order to expedite SAC Cases, complainants' initial discovery requests should include the detailed information necessary for defendants to start accumulating such traffic data (including the exact date ranges for such data).

Similarly, the STB could require defendants in SAC Cases to serve initial discovery requests related to market dominance concurrently with the filing of their answer. Typically, defendants know, immediately upon receipt of the complaint, which basic discovery questions related to market dominance to ask the complainants; for, the defendants already have some familiarity with the complainant-shipper, its traffic, and its competitive alternatives from conducting marketing and commercial negotiations and transactions in the ordinary course of business.

The STB also could require initial disclosures related to market dominance from the complainant. The STB actually sought comment on the concept of initial disclosures in 2003.[97] As noted above, the complainant likely would have basic information related to market dominance readily available from conducting commercial negotiations and transactions in the ordinary course of business. And, in the unlikely event the complainant has not previously examined its competitive alternatives, the complainant would have essentially unlimited time to prepare and gather the necessary documents and data related to market dominance prior to filing its complaint.

The same is not true for the defendant. The fundamental building blocks for any SARR are well-known, thus permitting initial discovery *requests from the complainant* related to the creation of the SARR. However, the railroad cannot initiate the search for responsive material without the critical pieces of information in the discovery requests, such as what segments and which traffic are involved, thus preventing initial standard *disclosures*. Moreover, the defendant's responsive documents and data cannot be collected in the mere 20 days between the filing of the complaint (and service of the initial discovery requests, if adopted) and the due date for the answer. For one thing, the defendant's responsive materials are complex and massive. For example in *DuPont*, NS produced approximately 51,000 pages and 36,197.50 gigabytes of relevant materials. Further, preparing and gathering such materials involves the coordination and efforts of numerous individuals across various corporate departments, which distracts significant time from the business of running a railroad.[98] Thus, it would be impracticable to require initial

97. *See Procedures To Expedite, supra* note 14, at 811 (noting that "[c]ommentators should address this proposal both as if it were to be adopted alone and as if it were to be adopted in conjunction with a list of standard information and documents that the parties to a SAC case would be required to produce as initial disclosures").

98. Complainants do not suffer a proportionate distraction from their business operations,

disclosures related to the creation of the SARR from the defendant.

On this point, it is instructive to contrast the automatic disclosures under Rule 26 of the FRCP. The automatic disclosures required under the FRCP are relatively simplistic—relating to the sources of relevant information and discrete information within the party's possession used to support *its* claims or defenses.[99] Because the party is in control of its claims or defenses, it also is in control of these initial disclosures. The same is not true with respect to any initial disclosures by the railroad related to the creation of the SARR. The complainant decides which lanes, traffic groups, and routes are included in its SARR, and that information is not available on the face of the complaint. As such, the defendant essentially is producing information relevant to the complainant's claims—claims that are not within its control.

With respect to presumptive limits and proportionality standards, the STB actually sought comment on a similar concept in 2003, noting that limited discovery "is the procedure that applies to complex commercial litigation conducted in the federal courts."[100] As under the FRCP, the STB should prescribe that document requests should not be unreasonably cumulative, duplicative, burdensome, or expensive and should establish presumptive limits for interrogatories and depositions. The STB could even experiment with different presumptive limits for different types of rate cases based on complexity, *i.e.*, the presumptive limits for interrogatories and depositions for a SAC Case involving a unit train SARR would be lower than those for a SAC Case involving a carload network SARR. And, the STB could look to the FRCP[101] and prior rate cases[102] for guidance in crafting presumptive limits. In the context of SAC Cases, only additional discovery requests, beyond the initial requests discussed above, should be subject to presumptive limits, as is consistent with the

because they do not produce nearly the same volume of discovery and because they tend to rely on outside lawyers and consultants for most purposes of their cases. For example, in *DuPont Merits*, *supra* note 16, DuPont produced approximately 6,000 pages and 16.1 gigabytes of relevant materials, which amounts to only about 12% and 0.044%, respectively, of the pages and gigabytes NS produced.

99. *See supra* note 93.

100. *See Procedures To Expedite*, *supra* note 14, at 810.

101. *See, e.g.*, FED. R. CIV. P. 30(a)(2)(A)(1); FED. R. CIV. P. 33(a)(1); FED. R. CIV. P. 26(b)(2)(C).

102. In *DuPont Merits*, for example, DuPont served 28 interrogatories and 171 document requests; and, NS served 52 interrogatories and 25 document requests. These tallies are based on the itemized numbered requests and do not account for various sub-requests therein. But on April 25, 2011, NS noted that, "DuPont has now posed over 900 discovery requests (including subparts), in response to which NS personnel are spending thousands of person-hours to identify and produce responsive material." *Norfolk Southern Ry. Co.'s Reply in Opposition to Motion to Compel of E.I. DuPont de Nemours & Co.*, S.T.B. Docket No. NOR 42125 (filed Apr. 25, 2011). Requests for depositions have not been used in recent SAC Cases.

practice of courts.[103]

The presumptive limits could be lifted upon a showing of good cause. Consistent with the expeditious approach of the Utah district courts, any additional discovery requests beyond the presumptive limits should be subject to a proportionality standard. The STB should affirmatively determine that any such additional discovery is proportionate to the needs of the case, considering the value and complexity of the case as well as the likely benefits of the additional discovery weighed against its burden, time, and expense.[104] This is a logical extension of the STB's existing precedent requiring a party moving to compel discovery to "demonstrate a real, practical need for the information" requested[105] and denying discovery "if it would be unduly burdensome in relation to the likely value of the information sought."[106]

Relatedly, it also may be worth codifying "rulings addressing discovery disputes in individual SAC cases," as proposed by the STB in 2003.[107] The STB should codify that "a party seeking to compel discovery must show that: (1) it needs the information to make its case; (2) the information cannot be readily obtained through other means; and (3) the request is not unduly burdensome."[108] Such rules would serve the STB's purpose, as stated in 2003, of preventing discovery "from being used for delay and harassment, and from becoming unduly burdensome and overwhelming the process" without compromising access to necessary information.[109]

To sum, the STB should streamline discovery in rate cases by more actively controlling the process and by experimenting with advanced techniques like presumptive limits and proportionality standards. In SAC Cases, the STB should require complainants and defendants to file initial discovery requests concurrently with the filing of their complaint and answer, respectively, and should require only complainants to serve initial market dominance disclosures concurrently with the filing of their complaint.

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103. *See generally* discussion *supra* note 95.

104. *See generally discussion supra* note 91.

105. *E.g.*, *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, S.T.B. Docket No. NOR 42121, at 2 (S.T.B. served Nov. 24, 2010). *See also CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*, S.T.B. Docket No. NOR 42084 (S.T.B. served Nov. 23, 2004) (noting that a party's "right to discovery . . . has limits").

106. *E.g.*, *Waterloo Ry. Co. – Adverse Aban. – Lines of Bangor & Aroostook R.R. Co.*, S.T.B. Docket No. AB-124 (Sub-No. 2) (S.T.B. served Nov. 14, 2003).

107. *See Procedures To Expedite*, *supra* note 14, at 808.

108. *See id.*

109. *See id.*

F. Streamlining Motions Practice

A targeted effort to streamline motions practice prevents cases from stalling in particular phases of litigation due to a "nebulous 'pending motion.'"[110] Courts use various techniques to streamline motions practice such as deadlines, "motions days," and limits on written motions:

- *Deadlines.* Many courts simply require prompt rulings on motions.[111]
- *Motions Days.* On these set dates, parties are afforded an oral hearing for all pending motions.[112] The difference in ruling times "is really quite startling—from about twenty-seven days in a court using motions days and favoring oral hearings, to over ninety days in a court using ad hoc scheduling and written opinions," according to a survey of federal district courts.[113] Courts with motions days tend to issue more rulings from the bench[114] and are less likely to grant extensions for submissions of briefs.[115]
- *Limits on Written Motions.* Limits "improve the chances for meaningful conferral and resolution of some if not most of the disputes early on" between the parties,[116] reducing the number and complexity of disputes that require judicial resolution. Experience suggests that any remaining disputes are "mostly capable of resolution during a hearing lasting from five to thirty minutes."[117] Even if additional written briefing is required or useful, it tends to be "focused (and non-combative)" with "intelligent page limits" and a "short time frame."[118] Most importantly, a judge who takes months to rule on extensive written briefs "is no more likely to

110. Becky Bye, *Implementing "Time-Denied" Pre-Trial Motions in Civil Cases*, 39 Colo. Lawyer 62 (Feb. 2010).

111. Colo. R. Civ. P. 121 § 1-15.

112. *E.g.*, Edward J. Devitt, *Effective Judicial Management of Motion Practice*, Judicial Panel on Multidistrict Litigation (1981), https://casetext.com/case/effective-judicial-management-of-motion-practice. For example, the Circuit Court of Alexandria in EDVA has Civil Motions Days on the second and fourth Wednesdays of each month, except May, with corresponding deadlines to file motions and responses and a 30-minute limit for hearings on motions per case. *Circuit Court Local Procedures – Civil*, City of Alexandria, Virginia, https://www.alexandriava.gov/circuitcourt/info/default.aspx?id=214 (requiring orders reflecting the court's rulings to be presented promptly).

113. Devitt, *supra* note 112.

114. *Id.*

115. *See id.* In contrast, "written submissions courts tend to overlook whatever time limits their local rules may set" and "experience delays in the receipt of opposition briefs which, on average, were submitted two to three weeks after the established deadline." *Id.* Written submissions courts rely on written requests for motions followed by reply briefs followed by the judge's determination of whether to hold an oral hearing. *Id.*

116. Richard P. Holme et al., *"No Written Discovery Motions" Technique Reduces Delays, Costs, and Judges' Workload*, 42 The Colorado Lawyer 65, 66 (Mar. 2013). *See also* Hon. James G. Carr, *From the Bench: Fixing Discovery: The Judge's Job*, 38 Litig. J. 4, 7-8 (Summer/Fall 2012) (noting that the need for judges to resolve disputes is "generally infrequent").

117. Holme, *supra* note 116, at 67.

118. *Id.*

make the 'correct' decision."[119]

Streamlining motions practice does not translate to limiting or prohibiting motions to strike/dismiss. In fact, such motions should be encouraged. Motions to strike/dismiss function as procedural devices that filter out frivolous and unmeritorious claims or cases, thus expediting litigation.[120] As Thomas Main describes, the "judiciary's aversion to delay, combined with substantial increases in the civil caseload, led to the activation of motions to dismiss and motions for summary judgment . . . that, in turn, led to the termination of cases at earlier stages of litigation."[121] Absent such motions, cases may "languish" on the court docket for no reason.[122]

Data reveals that the majority of motions to strike/dismiss are legitimate filters that do not threaten the administration of justice or fairness to the parties. For example, a 2007 survey of approximately 7,700 cases in federal district courts found that less than 30% of all motions to strike/dismiss were denied.[123] Similarly, Kent Sinclair and Patrick Hanes find no literature suggesting that "specious" motions are a prevalent problem.[124]

Accordingly, in light of data that unmeritorious claims and cases comprise a substantial portion of court dockets, many academic commentators urge courts to take the following actions: (1) configure case management systems that quickly identify such unmeritorious claims and cases; and (2) either (a) order the relevant party to move to strike such claims or dismiss such cases or (b) strike such claims or dismiss such cases on the court's own motion.[125]

The STB currently does not leverage motions to strike/dismiss as courts do to expedite litigation. First, the STB should clarify that a motion to strike is the appropriate remedy for late-filed evidence and for evidence inconsistent with Board precedent on a minor issue. A minor issue does not affect other issues and evidentiary submissions—such as the locomotive peaking factor. Second, the STB should clarify that a motion to dismiss is the appropriate remedy for fundamentally flawed evi-

119. *Id.* at 68.

120. Jack B. Weinstein, *The Role of Judges in a Government Of, By, And For the People*, 63 THE RECORD 326, 394 (2008).

121. Thomas O. Main, *How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1628 (Summer 2015).

122. *Id.*

123. INST. FOR ADVANCEMENT OF AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 6 (2009), http://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf

124. Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633 (Summer 1995).

125. *E.g.*, *Recommendations*, *supra* note 21, at 24-26.

dence and for evidence inconsistent with Board precedent on a major issue. A major issue does affect other issues and evidentiary submissions—such as the costs borne by the SARR.

It currently is difficult for parties to rate cases to place much faith in filing motions to strike/dismiss primarily because the STB does not rule on such motions in a timely fashion. For example in *AEP Texas North Co. v. BNSF Ry. Co.*, BNSF filed a motion to strike certain of AEP's evidence in September 2004. However, the STB did not rule on that motion until it issued its final decision—three years later in September 2007.[126] Effectively, BNSF's motion to strike was prevented from serving as a valuable procedural tool to expedite litigation because of the STB's delay in ruling on such motion. Similarly in *DuPont*, when the fundamental flaws in DuPont's Operating Plan became apparent,[127] NS chose not to file a motion to dismiss, as it would have done in court, for two key reasons: (1) NS did not believe the STB would treat its motion as an appropriate case management tool; and (2) NS did not believe the STB would rule on its motion in a timely manner (*i.e.*, sufficiently before NS had to file its reply evidence).[128] In hindsight, at least one STB member has publicly acknowledged the value that a motion to dismiss would have offered in such circumstances.[129]

The STB could create an expedited motions practice, perhaps limited to discrete issues that lend themselves to quick and clear answers, to demonstrate that it will rule on motions in a timely fashion. First, a party could file a motion with the STB. Second, both parties could brief the STB on the issue subject to an abbreviated timeline and/or page limits.

126. *AEP Texas North Co. v. BNSF Ry. Co.*, S.T.B. Docket No. NOR 41191 (Sub-No. 1) (S.T.B. served Sept. 10, 2007).

127. *DuPont Merits*, *supra* note 16, at 41 ("DuPont is correct that, in most circumstances, the Board would require the defendant in a SAC case to make any necessary corrections to the complainant's opening evidence rather than submitting something entirely new on reply, to avoid having operating plans so different as to impede comparison. *See, e.g.*, Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001) (explaining that "a railroad's SAC evidence should be limited to addressing deficiencies in the complaining shipper's evidence"). Here, however, DuPont's operating plan on opening included no blocking and classification at intermediate yards. Thus, on this issue, there was nothing for NS to correct on reply. To provide this essential part of the operating plan for a predominantly carload system, NS needed to supply its own analysis.").

128. *DuPont Merits*, *supra* note 16, at 33-34 (when NS previously had filed a motion to strike DuPont's late-filed errata in July 2013, as an unauthorized new evidentiary filing in violation of STB rules, the STB only ruled on this motion and agreed with NS in March 2014—nearly one year later.).

129. *E. I. DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.*, S.T.B. Docket No. NOR 42125, at 20 (S.T.B. served Dec. 23, 2015) (V.C. Begeman, dissenting) ("In hindsight, as soon as the Board realized how problematic the [complainant's operating plan] evidence was, we should have seriously considered either *dismissing the case* or directing the parties to submit supplemental evidence.") (emphasis added).

Third, the STB could hold a dedicated motions day and issue either an oral decision on such day or a written decision shortly thereafter. Regardless of the medium, the STB's decision would be brief.[130] The STB would simply rule with the complainant or the defendant, either in whole or in part, or rule that the issue is not appropriate for intermediate ruling, thus giving the parties a quick answer on the motion.

To sum, the STB should leverage motions to strike/dismiss as procedural devices to filter out late-filed and fundamentally flawed evidence as well as unmeritorious claims or cases. The STB could create an expedited motions practice to ensure that it rules on such motions in a timely fashion, thus giving the parties the confidence to utilize such motions to strike/dismiss.

III. The Hard Question – Is the STB Willing To Actively Manage SAC Cases?

Plainly, there are court procedures that could be employed by the STB to help expedite, to some degree, SAC Cases. Of course, as discussed above, SAC Cases are complex litigation by their nature, which is a result of the sound economic principles that must remain a foundation for the STB's rate regulatory regime, as directed by Congress. So in a certain respect, SAC Cases can never work like small claims or simple commercial litigation, which are the cases in court most ripe for expedition. Rather, SAC Cases are much more analogous to complex commercial litigation, such as antitrust or securities cases, that can last years because of the complexity of the subject matter. Nevertheless, the STB should enhance the utility of its rate regulatory regime—for shippers and carriers, alike—by adopting procedures that could operate to expedite rate cases.

However, in order for these procedures to successfully expedite rate cases, the STB must assume the role of an active case manager. The key question is whether the STB is willing to assume this role.

There is one critical distinction between the STB and courts which calls into question whether the STB can and will assume the role of an active case manager—exposure to political pressures. Federal courts are insulated from political pressures by Constitutional design.[131] Although the federal court system receives funding from Congress, federal judges are appointed essentially for life.[132] Life tenure is generally regarded as the best way to ensure judicial independence: "[i]t shields judges from the

130. If necessary, the STB could always provide a more fulsome explanation of its ruling in the final decision on the merits.

131. *See* U.S. Const. art. III.

132. *Id.* (stating that federal judges "shall hold their Offices during good Behavior").

political pressure that comes with periodic accountability to an electorate."[133] Judges are free to issue decisions on the merits consistent with the rule of law and their judicial discretion, without factoring in political pressures. Judges also are free to institute controls on their docket, without factoring in political pressures.

In contrast, the STB is a political creature by Congressional design. Yes, the STB is an "independent" federal agency.[134] But, it reports to and is subject to oversight by Congress in many ways. STB Members must be confirmed by the Senate, and if they seek reappointment, must be later reconfirmed after serving for some period of time on the STB.[135] The Congressional committees of jurisdiction periodically hold hearings on the STB's regulatory actions, at which individual Members of Congress question the STB's processes and decisions.[136] The STB's budget is determined by Congress. Members of Congress testify in writing or in person at STB hearings. And Congress changes the laws regarding the STB in response to its perception of how the STB is working.[137] Thus, the STB is subject to political pressures. Such political pressures necessarily constrain, whether directly and indirectly, how the STB makes decisions and controls its docket.

Consider the very mandate for the STB to assess the procedures used by courts to manage litigation—it came directly from Congress.[138] On the one hand, this mandate could suggest that Congress wants the STB to assume the role of an active case manager in order to expedite rate reasonableness proceedings. However, this conclusion is called into question by the origins of the mandate. Shippers had long complained that the SAC Test is too time-consuming and expensive; and, many provisions of the STB Reauthorization Act are a direct response to these shippers' complaints.[139] Thus, how shippers perceive the STB is a critical

133. Edward Lazarus, *Life Tenure for Federal Judges: Should It Be Abolished?*, FINDLAW (Dec. 9, 2004), http://supreme.findlaw.com/legal-commentary/life-tenure-for-federal-judges-should-it-be-abolished.html.

134. *E.g.*, *About STB > Overview*, SURFACE TRANSP. BD., https://www.stb.gov/stb/about/overview.html (last visited Apr. 10, 2017).

135. 49 U.S.C. 701(b) (1995).

136. *See, e.g.*, *Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015: Hearing Before the Subcomm. on Commerce, Science & Transportation*, 114th Cong. (2016).

137. *See* statement of Senator John Thune regarding his bill to change the procedures at the STB, which was enacted into law as the Surface Transportation Reauthorization Act of 2015. Press Release, Senator John Thune, Senate Passes Bipartisan Surface Transportation Board Reforms (June 19, 2015), https://www.thune.senate.gov/public/index.cfm/2015/6/senate-passes-bipartisan-surface-transportation-board-reforms.

138. *See supra* note 1.

139. *See, e.g.*, *What They're Saying About Bipartisan Surface Transportation Board Reforms*, THUNE, https://www.thune.senate.gov/public/_cache/files/1cd83fd4-bb7a-4337-8914-3c74fd5218

component of how Congress views the STB.

As a necessary corollary, the STB needs to be perceived, by Congress, as being fair to shippers. Accordingly, the STB could interpret Congress' directive to expedite rate reasonableness proceedings only as a directive to expedite such proceedings only where shippers benefit.[140] This could prevent the STB from actively managing rate reasonableness proceedings in ways that disadvantage shippers, for example, by denying requests for continuances from shippers or by asking for supplemental information when the shipper's evidence is unsatisfactory.

This corollary is a real, if not unfair, pressure on the STB. In some instances it would appear that shippers only want cases expedited when the STB's rulings favor them. For a real-world example, consider the recent SAC Case involving Sunbelt and Norfolk Southern. Throughout the evidentiary phase of the case, Sunbelt contended that the STB should adopt its evidence regarding the operating plan – including the design of a major yard – as submitted by Sunbelt. After Norfolk Southern pointed out that the Sunbelt design could not handle the traffic Sunbelt sought to operate through the yard, it submitted its own design of the yard, which included a hump yard rather. In its final evidence submitted in response to Norfolk Southern's criticism and in its closing brief, Sunbelt continued to urge the Board to simply adopt its evidence. The Board ultimately adopted Norfolk Southern's evidence as the best evidence of record. In a petition for reconsideration, Sunbelt for the first time suggested that if the STB was not going to adopt its evidence, then the STB should have somehow incorporated the hump yard proposed by Norfolk Southern into the remnants of Sunbelt's operating plan, which was designed without a hump yard. When the STB denied reconsideration on this point, Sunbelt appealed to the United States Court of Appeals for the Eleventh

db/24BB2A4F37B4242E9C61DFA0B8FF7B77.what-they-re-saying.pdf ("[T]he time and expense necessary to bring even a small case before the Board . . . highlight the need for a more independent STB.") (quoting Daren Coppock, President & CEO of the Agriculture Retailers Association); *id.* ("Often coal shipments are not priced competitively in certain areas of the country, and the process to seek relief has become a time-consuming and costly exercise that can take several years and cost millions of dollars, ultimately hurting customers. This important legislation makes modest and commonsense improvements to make the STB more effective and efficient in resolving these issues, and will have a positive benefit for shippers and electricity customers.") (quoting Tom Kuhn, President of the Edison Electric Institute); *id.* ("The bill would help ensure that pulse shippers receive fair treatment from the railroads by implementing efficient rate review mechanisms . . . .") (quoting USA Dry Pea & Lentil Council).

140. *See, e.g.*, *Norfolk Southern Railway Company's Motion for Modification of Procedural Schedule*, S.T.B. Docket No. NOR 42121, at 2, 10 (filed Aug. 17, 2012) (noting that "[w]hen the Board granted DuPont a *second* 90-day extension, it declined to provide the same schedule extension for NS at that time" and arguing that "[i]f the Board is to hold each party to a similar evidentiary standard, it cannot approve a procedural schedule giving one party far more time to prepare evidence than the other") (emphasis in original).

Circuit. Rather than noting that the Board has managed the proceeding to expedite it as much as possible by having the parties adhere to the normal and ordinary process of presenting evidence, Sunbelt told the court that it believed that the STB had erred by not requiring the parties to submit even more evidence when the STB realized that NS had presented the best evidence of record. "To the extent the Board was unsure whether the hump yard could be incorporated into Sunbelt's plan, it should have requested supplemental evidence to resolve the issue."[141] The irony that Sunbelt, on appeal, seeks an unusual procedure that flies in the face of active case management aimed at expediting rate cases is the fact that Sunbelt's parent company, Olin, is a member of one of the very organizations that have lobbied or testified to Congress, the STB, or both that SAC cases take too long.[142]

Thus, the challenging question for the STB is whether it has the stomach to be an active case manager in SAC cases with a goal of expediting them. Congress may want rate reasonableness proceedings to move more swiftly. But how will Congress react if the STB expedites cases but shippers cannot keep up with swifter procedural schedules? If justice is swift, but the shipper loses – as was the case in Sunbelt[143] — is it really expedited cases that the shippers seek? Or do they just seek a process that guarantees them a win fast? Considerations like these put the STB in a difficult situation to determine to what extent to apply to SAC Cases the tools available to courts to expedite litigation.

IV. Conclusion

The STB could borrow from the judicial playbook, adopting procedures used by courts to expedite litigation in order to expedite rate reasonableness proceedings. This would further the STB's statutory mandates to "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part"[144] and

141. Initial Form Reply Brief for the Petitioner at 17, Sunbelt Chlor Alkali Partnership v. Surface Transp. Bd., No. 16-15701 (11th Cir. Apr. 3, 2017).

142. Olin is a member of the American Chemistry Council. *See,* Am. Chem. Council, https://www.americanchemistry.com/Membership/MemberCompanies/ (last visited Apr. 10, 2017). *See* examples of ACC's testimony on SAC cases, https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/ACC-and-CI-Call-on-STB-to-Fix-Process-for-Reviewing-Freight-Rail-Rates.html. Specifically, ACC's President testified in support of the STB Reauthorization Act of 2015, stating that "[t]he STB should implement a more efficient, workable method to review and determine the reasonableness of freight rail rates for captive shippers . . .," https://www.americanchemistry.com/Policy/Rail-Transportation/ACC-Testimony-to-the-House-Transportation-Infrastructure-Committee-Regarding-Freight-Rail-Issues.PDF.

143. As of this writing, the Sunbelt case remains on appeal in the United States Court of Appeals for the Eleventh Circuit and the STB decision in favor of Norfolk Southern stands.

144. 49 U.S.C. § 10101(15) (1995).

to establish "procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates."[145]

Of course, the STB must not expedite rate cases at the risk of eroding the sound economic principles underlying its rate regulatory regime. As Congress and the STB have directed, sound economic principles must remain the foundation for any rate regulatory regime that is not arbitrary.[146] Thus, the STB should focus on the *procedural* aspects, rather than the substantive elements, of rate reasonableness proceedings. For example, a court would not seek to expedite an antitrust case by eliminating the presentation of evidence regarding market share. Similarly, the STB should not seek to expedite a SAC Case by eroding the sound economic principles of the SAC Test.

Even focusing on purely procedural aspects of rate reasonableness proceedings, there are opportunities for the STB. But, there is one key to the success of these opportunities—the STB must become a more active case manager. The STB's decision to become a more active case manager, particularly where it could be viewed as disadvantaging shippers, would create political risks. Thus, it is hard to predict to what extent the STB could actually act like a court and use proven court procedures to expedite rate reasonableness proceedings.

145. 49 U.S.C. § 10704(d) (1995).

146. *See, e.g., Simplified Standards, supra* note 11, at *26.