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July 16, 2004

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423



RE: STB Ex Parte No. 646, *Rail Rate Challenges in Small Cases*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Joint Written Testimony of the Interested Parties in the above referenced proceeding. Also enclosed is a diskette containing the testimony in PDF format.

An extra copy of the Testimony is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nicholas J. DiMichael'.

Nicholas J. DiMichael
Representative of the Interested Parties

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 646

RAIL RATE CHALLENGES IN SMALL CASES



Joint Written Testimony of the

American Chemistry Council, American Farm Bureau Federation, American Soybean Association, Colorado Wheat Administrative Committee, The Fertilizer Institute, Idaho Barley Commission, Idaho Wheat Commission, Kansas Wheat Commission, Montana Wheat & Barley Committee, National Association of Wheat Growers, National Barley Growers Association, National Council of Farmer Cooperatives, National Farmers Union, National Grain and Feed Association, National Grain Sorghum Producers, The National Industrial Transportation League, North Dakota Grain Dealers Association, North Dakota Public Service Commission, the North Dakota Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Board, Washington Barley Commission, Washington Wheat Commission, Alliance for Rail Competition, Consumers United for Rail Equity

I. INTRODUCTION AND BACKGROUND

In accordance with the Notice of Public Hearing served June 29, 2004 in this proceeding, the above-listed parties ("Interested Parties") submit this Joint Written Testimony to be included in the record of the public hearing scheduled for July 21, 2004. That hearing is intended to provide a forum for the expression of views regarding rail rate challenges in small cases to be considered by the Board. The hearing is also intended to offer an opportunity to discuss proposals for handling small cases involving a challenge to the reasonableness of rates charged by a rail carrier and the discussion of views as to how "small rate cases" should be defined or identified. Notice of Public Hearing, p. 2. In its 1996 decision in Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings [1996 Decision]*, served December 27, 1996, the Board

set out “simplified evidentiary guidelines” to be used in proceedings to determine the reasonableness of challenged rail rates charged on captive traffic where the agency’s Constrained Market Pricing guidelines¹ cannot practicably be applied.

One year ago, on July 11, 2003, seventeen separate organizations,² each of which is also joining in this Joint Written Testimony, submitted Joint Comments in this proceeding (“2003 Joint Comments”), after Chairman Nober, at a hearing held in this case on April 22, 2003, asked shipper interests to identify common ground and, where possible, to present the Board with more specific proposals addressing their concerns.³ The 2003 Joint Comments were the product of intensive discussions and comprehensive agreement among the seventeen named shipper groups in response to Chairman Nober’s request.⁴

Observing that no case had ever been filed under the *1996 Decision* because of its many uncertainties, the 2003 Joint Comments set forth several fundamental principles that should

¹ See, Ex Parte 347 (Sub-No. 1), *Coal Rate Guidelines Nationwide*, 1 I.C.C.2d 520 (1985) [*Coal Rate Guidelines*]

² The American Chemistry Council; the Colorado Wheat Administrative Committee; The Fertilizer Institute; Idaho Barley Commission; the Idaho Wheat Commission; the Kansas Wheat Commission; the Montana Wheat & Barley Committee; the National Grain and Feed Association; the National Industrial Transportation League; the North Dakota Public Service Commission; the North Dakota Grain Dealers Association; the North Dakota Wheat Commission; the South Dakota Wheat Commission; the Washington Barley Commission, the Washington Wheat Commission; the Alliance for Rail Competition; and Consumers United For Rail Equity

³ The Board initiated this proceeding on March 26, 2003, in a notice soliciting the views of interested persons regarding all aspects of rail rate challenges in small cases. In response, various shipper, carrier, labor and government interests submitted written testimony on April 16, 2003, and presented oral testimony at a hearing held on April 22, 2003.

⁴ The 2003 Joint Comments supplemented the written testimony of individual parties submitted on April 16, 2003. The document was not intended to supplant the individual comments filed by the organizations named in the 2003 Joint Comments, and the 2003 Joint Comments specifically urged the Board to review the individual comments as well as the Joint Comments. 2003 Joint Comments, p. 2, fn 1.

guide the Board in revising its small rate case procedures. 2003 Joint Comments, pp. 3-5. The 2003 Joint Comments also proposed a “bright-line test” to determine the eligibility of a shipper to use the small case guidelines (2003 Joint Comments pp. 5-7), and requested the Board to clarify how it would determine the reasonableness of rates in small rate cases (2003 Joint Comments pp. 9-12). The 2003 Joint Comments lastly set forth detailed suggestions for simplifying and expediting procedures for small rate cases, with the goal of obtaining an initial decision from an Administrative Law Judge within at most five to six months from the date of the filing of the complaint, and a decision on appeal to the Board within at most nine months.

Finally, on August 21, 2003, the seventeen 2003 Joint Commenters sent a letter to the Chairman responding to a letter sent by counsel for the Association of American Railroads that discussed several of the proposals discussed in the 2003 Joint Comments.

Since the 2003 Joint Comments were submitted on July 11, 2003, additional parties⁵ have determined to participate in this proceeding along with the parties submitting the 2003 Joint Comments. These organizations represent an extremely broad spectrum of users of the nation’s rail system, including a variety of agricultural interests, chemical producers, industrial producers, fertilizer shippers, coal shippers, and others.

These Interested Parties here adopt and incorporate the 2003 Joint Comments, which are attached to this submittal in their entirety for the convenience of the Board. These Interested Parties also supplement those 2003 Joint Comments as set forth in this Joint Written Testimony.

⁵ The American Farm Bureau Federation; American Soybean Association; National Association of Wheat Growers; National Barley Growers Association; National Council of Farmer Cooperatives; National Farmers Union; National Grain Sorghum Producers; and the Texas Wheat Producers Board.

II. THE BOARD'S SMALL RATE CASE RULES MUST PROVIDE FOR A BALANCED, CLEAR, QUICK AND INEXPENSIVE PROCESS FOR ADJUDICATING SMALL RATE CASE DISPUTES

As discussed in more detail in the 2003 Joint Comments, the goal of the small rate case process must be to provide a balanced, simple, clear, quick, and inexpensive process for deciding such cases in accord with the intent of Congress that a “simplified and expedited” methodology be made available as an alternative to a “full stand-alone cost presentation” when such a process is “too costly, given the value of the case.” The rules, processes and standards that currently exist for small rate cases do not meet these goals, and these Interested Parties applaud the Board for initiating a process designed to lead to substantial changes.

Simplicity is crucial. Complexity and undue uncertainty drive up the cost of any litigation, including litigation before the Board, and given the smaller amounts at stake by definition in a “small rate case,” complexity and cost will terminally chill the exercise of the statutory right to reasonable rates for the very large majority of captive users of rail services. In this regard, the Board’s experience in Stand-Alone Cost cases is an object lesson in what should not happen in small rate case proceedings. Since the Interstate Commerce Commission decided the first Stand-Alone Cost case eighteen years ago,⁶ the complexity, size and cost of a SAC case before the agency has increased astronomically. But instead of guarding against complexity in small rate cases, the Board’s current small rate case rules invite complexity at the very outset: they define little, rule nothing out, and identify virtually no standards for decision.

While this gives the Board maximum flexibility and discretion, it makes it impossible for potential complainants to know whether small rate case procedures will be used; what evidence

⁶ *Omaha Public Power District v. Burlington Northern, Inc.*, 3 I.C.C.2d 123 (1986).

will be considered; how long the case will take; and what the case will cost. These problems, formidable in the best of cases, become insurmountable when combined with defendants' litigation incentives to make small rate cases long, complex and expensive in order to discourage future complaints. The issue was summed up by Chairman Nober in recent Congressional testimony: the uncertainty of the small rate case procedures "appears to be a major reason why no cases have been brought using the small-case process."⁷

Clarity is similarly important. If parties are going to avail themselves of the rate complaint process, they need the assurance of a system featuring relatively straightforward eligibility and substantive standards, so that they can predict to some reasonable degree what cases qualify for small rate case procedures and which rates are likely to be found unreasonable. This does not mean that the outcome of small rate case litigation must be perfectly and entirely predictable. It does mean that the eligibility for small rate cases should be clearer and that processes for determining eligibility should be defined. It also means that the substantive inquiry should be sufficiently transparent to allow exercise of reasonable, though necessarily imperfect, judgment.

Most importantly, clarity and predictability will enhance the potential of private settlements, since both parties will be able to make more accurate assessment of their risks. Where there is good reason to conclude that rates are reasonable, neither side has an incentive to litigate. Where rates appear unreasonable, regulatory uncertainty should not protect the status quo. And where cases fall between these points, clarity promotes negotiated solutions. In short,

⁷ Testimony of Roger Nober, Chairman of the Surface Transportation Board, House Committee Transportation and Infrastructure Subcommittee on Railroads, Hearing on the Status of Railroad Economic Regulation, March 31, 2004, p. 9.

if the small rate case process becomes clearer, it is even more likely that customers and suppliers will conduct balanced negotiations leading to private resolutions rather than Board-ordered relief.

Finally, it is most important for the Board's rules on small rate cases to establish a process under which a complainant can be assured of expeditious action. Unlike coal movements that generally continue for years and even decades, small rate cases are likely to involve movements that may last for only a few years. The need to spend two years litigating rates for a movement that may last only three to five years would discourage most if not all potential complainants. Moreover, increased litigation time usually means increased litigation cost.

The Board's current small rate case standards do not appropriately balance the rights of shippers and carriers. The complexity, uncertainty and cost that are inherent in the current small case procedures and standards, combined with the astronomical cost, time and uncertainty of a Stand-Alone Cost case, make it virtually impossible for any captive shippers, other than the largest coal shippers, to exercise their right to a reasonable rate under the ICC Termination Act. As Chairman Nober testified before Subcommittee on Railroads of the House Committee on Transportation and Infrastructure on May 20, 2003, "shippers who feel they have been charged an unreasonable rate have a right to have that complaint heard by the Board in a fair, impartial, expeditious and economical manner. That is part of our fundamental charge from the Congress. *That is not the case now*, and our agency can and will offer some solutions to that problem." Nober Testimony, May 20, 2003, p. 9 [emphasis added].⁸

⁸ Chairman Nober's statement echoes an earlier conclusion by the General Accounting Office, which, in 1999, found that, of 700 rail shippers surveyed, 75% reported paying rates that they

III. THE BOARD SHOULD ADOPT A “BRIGHT-LINE” TEST TO DETERMINE A SHIPPER’S ELIGIBILITY TO USE THE SMALL CASE GUIDELINES, WHICH SHOULD BE BASED UPON THE COMPLAINANT’S ANNUAL FREIGHT BILL FOR TRANSPORTING A COMMODITY BETWEEN AN ORIGIN-DESTINATION PAIR

Under the statute, the Board is required “to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3).

The agency’s current rules provide no guidance to potential complainants as to how the Board will decide whether a shipper will qualify for small rate case procedures or not. 2003 Joint Comments, p. 6. The 2003 Joint Commenters strongly believed that there must be a less onerous and greatly simplified bright-line standard of eligibility, and strongly urged the Board to adopt a bright-line small case eligibility standard utilizing the shipper’s annual rail freight bill between each origin-destination pair. The Board was correct in concluding that eligibility for the simplified standard must turn on the dimensions of the “case” and not the size of the shipper bringing the case, in order to accurately reflect the Congressional intent behind the “small rate case” provisions.⁹

The 2003 Joint Comments argued that where a dispute involved an annual freight bill of \$4.8 million per commodity for a single origin-destination pair, a full stand-alone cost complaint would clearly be “too costly, given the value of the case.” Such cases would therefore plainly

regarded as excessive, but felt that they had no regulatory recourse. Shippers cited the time, cost, and complexity of rate cases, poor prospects for relief, and concerns about retaliation. See, Report GAO/RCED-99-46, Railroad Regulation: Current Issues Associated with the Rate Relief Process, February 26, 1999.

⁹ See, Ex Parte No. 646, Notice of March 27, 2003, focusing the proceeding on small rate “cases” as opposed to “small shippers.”

qualify for the small case procedures. The calculation of this bright line was directly linked to the cost of bringing a full stand-alone case and reasonable assumptions as to the value of a potential complainant's case.

Specifically, the 2003 Joint Comments began with a conservative estimate of the cost of a typical SAC rate case of \$2 million, and then made three additional very conservative assumptions, namely a multiplier of three to compensate for litigation risk; a potential 25% rate reduction; and a five-year recovery period. Combining these four factors led to a mathematical calculation that the shipper's annual freight bill from the complained-of rates would need to be at least \$4.8 million to justify a SAC case, and therefore any freight bill lower than that between a single origin-destination pair should automatically qualify for small rate case treatment.¹⁰ See 2003 Joint Comments, pp. 6-7.

The Interested Parties endorse the methodology set out in the 2003 Joint Comments, but wish to supplement that analysis with a few additional points.

First, in the year since the 2003 Joint Comments were filed, it has become very clear that the complexity and cost of bringing a SAC case has increased. The 2003 Joint Comments indicated that the cost of a typical large rate case for a complainant was \$2 to \$3 million for legal fees, consultants and other expenses.¹¹ The calculation of the \$4.8 million eligibility figure was predicated on a cost for a SAC case at \$2 million, the low end of this range. However, more

¹⁰ \$2 million cost of a SAC case times a litigation risk factor of 3 = \$6 million. \$6 million divided by 5 year recovery period = \$1.2 million per year. \$1.2 million divided by 25% potential rate reduction = \$4.8 million annual freight bill.

¹¹ As Chairman Nober testified on May 20, 2003 to the Railroad Subcommittee of the House Committee on Transportation and Infrastructure, railroads have been known to spend \$5 million on each rate case, while a shipper's spending on the same case is more likely to be only \$2-3 million. (Nober Testimony, p. 7)

recent experience with SAC cases indicates that \$2 million is no longer even close to the actual amount for bringing a SAC case, which now exceeds \$3 million, and is heading upward.

The Interested Parties understand that the Board has a difficult time balancing the need for predictability in SAC cases with the need to be responsive to the evidence submitted by the parties. Yet, the Board must understand the “downstream” consequences of its own actions on both SAC cases and on the “value of the case” standard for determining eligibility for small rate cases. For example, in the recent *Xcel Energy* case (STB Docket No. 42057, *Public Service Company of Colorado D/B/A/ Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, decision served June 7, 2004), the Board made a number of changes to its rulings in prior cases. The nature of SAC cases and the Board’s rulings tend to lead to greater cost and complexity. But as the cost of bringing a SAC case rises, any threshold for determining eligibility for small rate case procedures must also rise, given the statutory “value of the case” standard.

Using a multiplier of three as a necessary margin between the expected costs and expected recovery in a rate case in order to justify the risk; an assumption that the relief sought is a 25% rate reduction; and that the period of potential relief is five years,¹² the shipper’s annual freight bill between each origin-destination pair would now have to be at least \$7.2 million to justify a SAC case, simply using the SAC cost of \$3 million rather than a SAC cost of \$2

¹² Unlike coal movements, which may extend for many years under long-term coal supply contracts, non-coal movements are rarely governed by long-term supply arrangements. Markets change frequently. These Interested Parties believe that a five year assumption is reasonable, and indeed generous, inasmuch as shipping patterns may change in less than five years. It should be noted that the Board itself has implicitly recognized that that non-coal movements are typically of much shorter duration than coal movements, since the Board’s rules provide that a small rate case shipper must specify “the duration of any rate prescription” sought. 49 C.F.R. §1111.1(a)(8).

million.¹³ Thus, these Interested Parties believe that a \$7.2 million annual freight bill from a single origin-destination pair should be the eligibility threshold for small case status, under which a shipper is automatically entitled to utilize the small case procedures to challenge the rate.¹⁴

Second, these Interested Parties believe that the Board's eligibility rules should provide for the possibility that, in a particular case, a movement whose yearly freight bill is larger than that set forth above might still qualify for small case treatment. Thus, although a movement with a freight bill below \$7.2 million should automatically qualify for small case treatment, a movement above that level might also qualify, but only after a specific showing of eligibility by the shipper. The \$7.2 million threshold was predicated, for example, on an assumed potential rate relief of 25% -- a very high figure. However, a particular complainant might allege, at the outset in its complaint, that it is seeking a 15% rate reduction, or a rate reduction for fewer than five years. In that case, the "value of the [complainant's] case" is even lower than the figure used to calculate the threshold, and the complainant should be given the opportunity to show that it should be able to qualify for small case treatment even if its freight bill for the movement is somewhat in excess of the threshold. In other words, where a case does not qualify for small rate case procedures under the bright-line test, the Board should not, at this early stage, assume that SAC litigation is feasible.

¹³ \$3 million for the cost of a SAC case, times a multiplier of 3 to represent the risk premium = \$9 million; \$9 million divided by a 5 year recovery period = \$1.8 million per year. \$1.8 million divided by 25% = \$7.2 million annual freight bill.

¹⁴ See, 49 C.F.R. §1111.1(8). As noted, the \$7.2 million threshold assumes that the shipper desires and the Board will prescribe a rate under the small case guidelines for five years. In the event that the shipper would seek a rate prescription for a longer period of time, the shipper would still be bound by the \$7.2 million threshold, and would have to show that the total relief sought would be less than the \$7.2 million amount over the longer time period.

Finally, these Interested Parties strongly oppose the position of the AAR that the Board should identify a “sub-class of cases brought by truly small shippers.” See Letter from the Association of American Railroads, August 4, 2003. The AAR’s letter takes issue with the premise that SAC cases typically cost \$2 million. However, there is no support for the AAR’s suggestion that non-coal cases under CMP would be less costly than coal cases. Experience and logic show otherwise. There have been two non-coal cases litigated under the SAC standard, and both at least equaled or exceeded the cost of coal cases.¹⁵ Non-coal shippers typically transport multiple commodities to many destinations that change every few years, if not more frequently. Thus, a non-coal SAC is likely to involve a larger stand-alone system, to more destinations, with more complex rail operations. This suggests that non-coal SAC case costs would at least be equal to, but certainly not lower than, coal rate cases.

The AAR’s suggestion is contrary to the statute, which recognizes only two categories of complaints: those litigated under the Stand-Alone Cost standard, and “those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. §10701(d)(3). There is no provision in the statute for special eligibility rules for the “truly small shipper” as a third category of complainant. The AAR’s argument in favor of rules applicable to the “truly small shipper” is inconsistent with the statute’s focus on the “value of the case,” not the size of the shipper. In sum, the Board should develop rules that attempt to fairly and reasonably identify the universe of possible cases which qualify for small rate case treatment under the statutory

¹⁵ The *McCarty Farms* case took seventeen years to resolve and the State of Montana and various farm producers spent \$3.2 million in costs, excluding attorney’s fees (the case was taken on contingency). The *FMC Wyoming* case involved all of the same procedures, issues, and evidence that is submitted in coal rate cases.

“value of the case” standard, leaving a degree of flexibility to account for individual or unusual circumstances.

IV. THE BOARD SHOULD CLARIFY HOW IT WILL DETERMINE THE REASONABLENESS OF RATES IN SMALL RATE CASES.

In the 2003 Joint Comments, the commenters indicated that the existing small rate case guidelines do not provide a clear standard that complainants know they must satisfy in order to obtain relief. The Joint Commenters noted that the Board adopted three benchmarks only as a “starting point,” without any guidance as to how those benchmarks will be applied, and with the expectation that complainants will augment these benchmarks with additional, vaguely identified, evidence. *1996 Decision*, at 1045. The Joint Commenters sought clarification from the Board as to how it will apply these benchmarks as a standard of reasonableness in small rate cases, and how various types of additional evidence might alter the benchmark results.

Specifically, the 2003 Joint Comments asked the Board to:

- Clarify what type of “individualized pricing considerations” might be relevant in a particular case (2003 Joint Comments, p. 10)
- Clarify the types of efficiency considerations that might be significant in resolving the issue of whether or not to use the efficiency –adjusted RSAM (2003 Joint Comments, p. 11);
- Clarify the application of the R/VC>180 benchmark when the complainant’s R/VC ratio is less than the average published by the Board (2003 Joint Comments, p. 11)
- Grant complainants’ access to the confidential waybill sample for purposes of evaluating a potential rate complaint (2003 Joint Comments, p. 11)
- Clarify what should be considered “similar” traffic for purposes of the R/VC[Comp] benchmark (2003 Joint Comments, p. 11)
- Clarify how the Board is thinking of weighing the three factors by preparing responses to eight hypothetical examples applying various combinations to the three benchmarks (2003 Joint Comments, p. 12)

The Interested Parties in this respect adopt the 2003 Joint Comments in their entirety, and urge the Board to implement the suggestions therein.

In this regard, the Board has sought suggestions on substantively revising the small case standards, and has indicated that no party has yet come forward with any such revisions.¹⁶ However, the Interested Parties are painfully aware that it took the ICC and the Board ten years – from 1986 to 1996 -- and a Congressional directive to the agency in the 1995 ICC Termination Act (49 U.S.C. 10709(d)(3)), to come up with the benchmark approach set forth in the *1996 Decision*. Before embarking on a wholesale new path, the Interested Parties believe that the sounder approach would be for the Board to better define what the 1996 standards mean and how they will be applied, as requested in the 2003 Joint Comments.

V. THE BOARD SHOULD REVISE ITS METHODOLOGY FOR CALCULATING THE REVENUE SHORTFALL ALLOCATION METHOD (RSAM)

Among the three benchmarks developed by the agency to assess the reasonableness of a rate under the simplified procedures is the Revenue Shortfall Allocation Method, or RSAM. The Board has stated in its *1996 Decision* that the RSAM benchmark measures the uniform markup above variable cost that would be needed from every shipper of potentially captive traffic (i.e., the >180 traffic group) in order for the carrier to recover all of its fixed costs. *1996 Decision*, 1 S.T.B. at 1027. The Board noted in its *1996 Decision* that RSAM supplies a “key component” of a simplified rate reasonableness analysis “because it accounts for a railroad’s need to earn adequate revenues, as required by 49 U.S.C. 10704(a)(2).”

¹⁶ Testimony of Roger Nober, Chairman, Surface Transportation Board, before the House Committee Transportation and Infrastructure, Subcommittee on Railroads, March 31, 2004, p. 11.

Assuming that Board's small rate case standards should include a factor assessing a railroad's "shortfall" from revenue adequacy, it appears that the methodology by which the Board calculates the RSAM is flawed. Indeed, it appears that the RSAM, as calculated by the Board, does not in fact measure the carrier's existing "shortfall" from revenue adequacy. In fact, under the Board's existing methodology, a carrier's revenue might equal or exceed the level for "adequacy" found by the Board in its yearly determinations of revenue adequacy, and yet the RSAM could still show the existence of a substantial "shortfall."

The reason for this anomaly appears to lie in the technicalities of the RSAM calculation, technicalities that are not apparent from the Board's *1996 Decision*. A short summary of our understanding of the RSAM calculation is in order:

Step 1: The Board first calculates a carrier's total variable cost from the Waybill File, and the carrier's total freight revenues from the Waybill File and the R-1.

Step 2: The Board inflates to carrier's total variable cost by a "markup" in order to develop the carrier's Fully Allocated Costs.

Step 3: The Board subtracts from the Fully Allocated Cost figure the carrier's total variable cost (obtained in Step 1) and any non-line haul revenues (such as switching, demurrage, and joint facility revenues), to obtain a figure for the carrier's "Unattributable Costs."

Step 4: The Board subtracts the variable costs of the non-competitive (i.e., traffic with a revenue to variable cost ratio of less than 180%) from the revenue of the non-competitive traffic, to obtain the "revenue contribution" of the non-competitive traffic.

Step 5: The Board then subtracts the revenue contribution of the non-competitive traffic from the "Unattributable Costs" developed in Step 3, to obtain "residual" unattributable costs.

Step 6: The Board calculates the RSAM by dividing the residual unattributable costs by the variable cost of the captive (i.e., greater than 180% r/vc ratio) traffic.

A quick review of these steps reveals that the revenue being obtained from captive traffic never figures in to the calculation of a revenue "shortfall." Particularly in view of the Board's ruling

that the RSAM is intended to account “for a railroad’s need to earn adequate revenues,” the implications of this methodology are anomalous:

1) Because revenue from existing captive traffic never figures in to the calculation of the RSAM under the Board’s current methodology, a carrier can be revenue adequate, or even have revenues that exceed revenue adequacy, and still have a high “revenue shortfall” denoted by a very high RSAM, as long as a significant portion of its revenues is obtained from the carrier’s captive shippers.

2) A carrier that over time increases revenues from its captive traffic and decreases revenues from its non-captive traffic will have a higher and higher “shortfall” and thus a higher and higher RSAM. Under the Board’s existing small case guidelines, all other things being equal, a higher RSAM will apparently permit a carrier to increase revenues on its captive traffic still further, since the RSAM is one of three factors that the Board will consult in determining the reasonableness of a captive shipper’s rail rate.¹⁷

3) Two carriers can have precisely the same total revenue and precisely the same relationship to revenue adequacy, yet one carrier’s RSAM can be very different from the other, if one carrier is obtaining a larger proportion of its revenue from captive traffic, compared to the other carrier that is maximizing revenues from its non-captive traffic. Oddly enough, the carrier with the higher RSAM will be the carrier obtaining a greater proportion of its revenue from

¹⁷ The Board’s methodology in calculating the RSAM appears to create a perverse incentive for carriers not to maximize revenues from traffic that contributes only marginally to fixed costs, and instead to maximize revenues from captive traffic. Such an incentive could be argued to be at odds with the statutory command in 49 U.S.C. §10701(d)(2)(B), which requires the agency, in determining rate reasonableness, to give consideration to the amount of traffic which contributes only marginally to fixed costs and the extent to which rates on such traffic can be changed to maximize the revenues from such traffic.

captive traffic – thus permitting that carrier to obtain even more revenue from captive traffic, since that carrier's RSAM will be higher than the RSAM of the carrier maximizing revenues from all of its traffic.

The Interested Parties submit that the Board should, in any rulemaking, seek comments from the public on the appropriate way to calculate the RSAM. The Interested Parties submit that the methodology for calculating the RSAM utilized by the Board appears to incorrectly increase the level of the RSAM, create inappropriate incentives for rail carriers, and establish unlawful considerations for the Board in determining whether a particular rate is reasonable.

VI. THE BOARD SHOULD DEVELOP NEW PROCEDURES FOR SMALL RATE CASES.

The 2003 Joint Comments set forth a detailed discussion of procedures that the Board should adopt to expedite small rate cases. These suggestions included:

- Active management of a small rate case by an Administrative Law Judge, with high standards for interlocutory appeals;
- Standardized discovery to expedite the initial processing of a case, and limited additional discovery in specified areas;
- Expedited determinations of small case eligibility by the ALJ;
- Access to the confidential waybill sample upon certification by a potential complainant that information will be used to evaluate a possible small rate case complaint;
- Expedited processing of motions to compel;
- Expedited time frames for the submission of evidence, with briefs filed at the same time as the evidence
- A specified time for decision by the ALJ, within 5 to 6 months after the filing of the complaint;
- Expedited appeals to the full Board, with a specified time frame for decision.

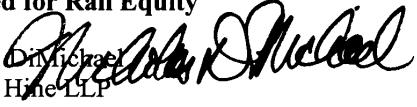
These Interested Parties adopt in their entirety the suggestions on these matters set forth in the 2003 Joint Comments, and urge the Board to implement them in refining its small rate case guidelines.

VII. CONCLUSION

The undersigned organizations respectfully request the Board to review the suggestions in these Comments and to take steps to adopt these suggestions as revisions to the Board's rules.

Respectfully submitted,

**American Chemistry Council
American Farm Bureau Federation
American Soybean Association
Colorado Wheat Administrative Committee
The Fertilizer Institute
Idaho Barley Commission
Idaho Wheat Commission
Kansas Wheat Commission
Montana Wheat & Barley Committee
National Association of Wheat Growers,
National Barley Growers Association
National Council of Farmer Cooperatives
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National Grain and Feed Association
National Grain Sorghum Producers
The National Industrial Transportation League
North Dakota Grain Dealers Association
North Dakota Public Service Commission
North Dakota Wheat Commission
South Dakota Wheat Commission
Texas Wheat Producers Board
Washington Barley Commission
Washington Wheat Commission
Alliance for Rail Competition
Consumers United for Rail Equity**

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Representative of the Interested Parties

Dated: July 16, 2004

ATTACHMENT

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 646

RAIL RATE CHALLENGES IN SMALL CASES

Joint Comments of

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National Grain and Feed Association, National Industrial Transportation League,
North Dakota Grain Dealers Association, North Dakota Public Service Commission, North
Dakota Wheat Commission, South Dakota Wheat Commission, Washington Barley
Commission, Washington Wheat Commission, Alliance for Rail Competition and
Consumers United for Rail Equity**

I. INTRODUCTION AND BACKGROUND

In accordance with the request of Chairman Nober at the April 22, 2003, hearing in this proceeding, 15 shipper organizations that previously participated in this proceeding have prepared a joint proposal and comments regarding rail rate challenges in small rate cases. Those organizations are the American Chemistry Council; The Fertilizer Institute; the National Grain and Feed Association; the National Industrial Transportation League; the North Dakota Public Service Commission, the North Dakota Grain Dealers Association, and the North Dakota Wheat Commission; the Colorado Wheat Administrative Committee, the Idaho Barley Commission, the

Idaho Wheat Commission, the Kansas Wheat Commission, the Montana Wheat & Barley Committee, the South Dakota Wheat Commission, the Washington Barley Commission, and the Washington Wheat Commission. In addition, the Alliance for Rail Competition and Consumers United for Rail Equity also support this submission, bringing to 17 the number of cooperating shipper organizations (collectively “Joint Commenters”).

The Board initiated this proceeding in a Notice and Amended Notice of Public Hearing, issued on March 26 and April 1, 2003. Specifically, the Board solicited the views of interested persons regarding all aspects of rail rate challenges in small cases, including proposals for handling such cases and how small rate cases should be defined. In response, various shipper, carrier, labor and government interests submitted written testimony on April 16, 2003, and presented oral testimony at a hearing held on April 22, 2003.

In their previous written and oral testimony, the Joint Commenters echoed several common themes. Uniformly, they advocated (a) the need for a bright-line standard to determine a shipper’s eligibility to use the simplified small case guidelines; (b) the need for greater predictability in the existing standards, or even a different standard, for determining rate reasonableness under the small case guidelines; and (c) the need for simplified and expeditious handling of small rate cases. Although they presented common themes, the Joint Commenters proposed a variety of different solutions. At the April 22nd hearing, Chairman Nober asked shipper interests to identify their common ground and, where possible, to present more specific proposals to address their concerns. The Joint Commenters submit these comments in response to Chairman Nober’s request.¹

The Joint Commenters note that they have not addressed the standards for determining market dominance, although some individual commenters have previously addressed this topic in this proceeding. The Joint Commenters recognize that further simplification of market

¹ These Comments supplement the written testimony of each individual party, submitted on April 16, 2003. Each party has presented testimony that is particularly pertinent to it, but which has not been addressed in these Joint Comments. Therefore, the Joint Commenters urge the Board to review these Joint Comments and the individual comments together. Moreover, these Joint Comments represent the positions that all of these groups could agree upon. Positions in the individual comments include suggestions that one, or sometime more, of the organizations signing this document could advance, but not all of them. This document, therefore, is not intended to supplant the individual comments filed by these organizations in this proceeding.

dominance determinations would assist shippers in smaller cases by reducing the total cost of bringing such cases, and would be pleased to submit suggestions for simplification if the Board would be willing to entertain them.

II. FUNDAMENTAL PRINCIPLES

The overarching goal of the small rate case process must be to provide a simple, predictable and relatively inexpensive process for deciding such cases. The cost of the case must be commensurate with the stakes involved. No matter how big and well-capitalized a shipper might be, it will make no sense for that shipper to attempt to bring a rate case if the costs of doing so are not justified by the possible payoff in terms of lower rates. Most business would view the rate case itself as an activity that would have to generate a sufficient return to compensate for the time and expenditure of money, taking into account the likely rate reduction, the traffic volume that has or will move under the rate, the risk that the rate case will be unsuccessful, and the risk that the relevant market may shift before, or not long after, the case has been concluded.

It is no surprise that the great majority of all rate cases in recent years have involved large volume, multiyear movements of coal from fixed mine locations to fixed utility plants. Only in such cases is the volume of traffic and the potential payoff in terms of a rate reduction sufficient to justify the complex and expensive process of calculating the costs of a hypothetical stand-alone railroad, not to mention the high costs in lawyer and consultant fees and management attention to discovery on market dominance and stand alone cost issues. By contrast, movements of grain, forest products, chemicals, automobiles, and other products are too diffuse – the volume moving on any one route is insufficient to justify the costs of modeling a stand-alone cost network for that route.

In contrast, the incentives that railroads have to defend rate cases are different from a shipper's incentive to pursue rate relief. The risk (from the railroads' perspective) that one successful rate case will set a precedent for other challenges means that it may well be worthwhile for a railroad to spend more money defending a rate case than is actually at issue in that case alone. (The chance that one of the small number of remaining Class I railroads will be

a defendant in a subsequent rate case is far higher than the chance that a particular shipper bringing a successful rate case will be able to obtain further benefit from the precedent set by that case.) The incentive that railroads have to invest substantial resources in defending rate cases magnifies the costs faced by shippers, because it is usually to the advantage of the railroad to seek to increase the complexity of the cases, both to increase the number of issues on which the railroad may prevail, and to attempt to exhaust shipper resources and deter shippers from bringing future rate cases. This view of railroad behavior is not intended to portray railroads in an unfavorable light, but only to state realistically the very different economic incentives of a rational shipper and a rational railroad contemplating a rail rate case.² The incentives on the part of railroads to make rate cases complex underscores the necessity, in establishing protocols for small rate cases, of having simple rules that are not amenable to debates, permutations, exceptions, and contingencies.

The rules must be not only simple, but also clear, so as to enable the parties to make an educated projection of a case outcome. The reason is straightforward. A single shipper – one of the tens of thousands of shippers moving products by rail – is relatively unlikely to bring rate cases with sufficient frequency that it can “play the odds” and count on cases “paying off” only once in a while. Winning an occasional case is not good enough for the typical shipper, because that case will still be expensive to bring, even if the expense is greatly diminished as a result of this proceeding. Rather, if shippers are going to avail themselves of the rate complaint process, they need the assurance of a system featuring fairly objective and straightforward tests to determine market dominance and reasonableness. This does not mean that every rate will be subject to challenge – only that the standards and protocols will be sufficiently clear that shippers and carriers can predict with some degree of accuracy which rates are more likely to be found unreasonable. It is irrational to expect shippers to utilize a rate process that is likely to cost hundreds of thousands of dollars and engender serious carrier ill-will without some reasonable ability to project the outcome. Moreover, predictability will foster the voluntary resolution of disputes, since the predictability will be enhanced for both sides.

² As Chairman Nober testified on May 20, 2003 to the Railroad Subcommittee of the House Committee on Transportation and Infrastructure, railroads have been known to spend \$5 million on each rate case, while a shipper’s spending on the same case is more likely to be \$2-3 million. (See page 7 of Chairman Nober’s prepared testimony submitted to the Subcommittee.)

The Joint Commenters are concerned that the railroad industry has made it very clear that it will litigate vigorously through the federal courts the first successful small rate case. Indeed, the railroad industry litigated the lawfulness of the small rate case guidelines when they were published in 1996. The courts found this litigation to be premature, indicating that the issues raised by the railroad industry should be litigated when a shipper was granted relief under these new guidelines.

Chairman Nober acknowledged this problem when he testified before the Railroad Subcommittee of the House Committee on Transportation and Infrastructure on May 20, 2003. This threatened litigation adds another cost factor that must be considered by any shipper considering a rate case either under the current small rate case guidelines or any improved guidelines that the Board may adopt. While the Board may have limited ability to avoid this litigation, this very real threat is and will remain a major disincentive to shippers bringing small rate cases, regardless of the improvements the Board makes to the small rate case process and, potentially, the benchmarks of rate reasonableness in small rate cases.

The proposals below are divided into three subparts: (1) the test for determining eligibility for the small rate case procedures, (2) the test for reasonableness, and (3) general procedural matters and protocols designed to limit the cost and complexity of small rate cases.

III. THE BOARD SHOULD ADOPT A “BRIGHT-LINE” TEST TO DETERMINE THE ELIGIBILITY OF A SHIPPER TO USE THE SMALL CASE GUIDELINES

A. The Most Appropriate Test is Based on the Shipper’s Annual Freight Bill for the Commodity Between Each Origin-Destination Pair.

The Board has asked explicitly for comments and proposals regarding how small rate cases should be defined or identified. The statute requires that CMP procedures be used unless they are “too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3). Currently, the Board requires a shipper, in its complaint, “to present sufficient information to show that CMP is not available.” *Non-Coal Rate Guidelines*, 1 S.T.B. at 1050. A complaint must contain a minimum

of nine separate items, each with subparts, to satisfy this requirement. The most problematic of these items is a showing of the feasibility and anticipated cost of preparing a SAC presentation. This leaves shippers in the anomalous position of having to undertake some form of estimated SAC analysis in order to establish that they should not be required to make a full-blown SAC presentation, and with no indication from the Board as to how it will adjudicate whether a shipper will qualify for small rate case procedures or not. These Joint Commenters strongly believe that there must be a less onerous and greatly simplified bright-line standard of eligibility.

The only sensible way to calculate the ceiling for small case status is to make it proportionate to the cost of bringing a rate case. Attempting to pick out a dollar number (or number of tons, or cars) as being “small” is an arbitrary and meaningless exercise if divorced from a consideration of the stakes needed to justify bringing a SAC rate case. This approach is fully consistent with the statutory maxim that the non-coal rate guidelines are to be used in those cases in which a full SAC presentation is “too costly, given the value of the case,” and it recognizes that the ultimate purpose of this proceeding is to create a simplified procedure that will make it feasible for non-coal shippers to actually pursue rate relief.

The cost of a typical large rate case today is at least \$2 million for legal fees, consultants and other expenses.³ Based on evidence submitted in Ex Parte No. 347 (Sub-No. 2), 1 S.T.B. at 1049, a shipper needs a multiplier of at least three as a necessary margin between the expected costs and expected recovery in a rate case in order to justify the risk. Therefore, the potential return to the shipper for investing \$2 million in a SAC case must be at least \$6 million in rate relief. Assuming the shipper believes that its rail rates are 25% too high (which probably is a conservatively high assumption) and that the period of potential relief is five years (which, in many cases will be as few as 1-3 years),⁴ given the changing nature of the shipper’s origin-destination pairs, the shipper’s annual freight bill between each origin-destination pair would

³ See note 2, *supra*. These Joint Commenters strongly agree with Chairman Nober that a shipper’s expenditure for a large rate case proceeding is at least \$2 million. Chairman Nober has indicated that a rail carrier’s cost is substantially greater.

⁴ Shipper testimony in Ex Parte No. 347 (Sub-No. 2), at note 125, was 3-5 years.

have to be at least \$4.8 million to justify a SAC case.⁵ Thus, these Joint Commenters believe that the lowest appropriate ceiling for a non-SAC case – a case brought under the small case guidelines developed in this proceeding – should be a \$4.8 million annual freight bill from a single origin-destination pair.⁶

The Board should adopt a bright-line small case eligibility standard that follows this methodology, and establish a small case eligibility standard allowing use of the small case standards for cases involving no more than a \$4.8 million annual freight bill from a single origin-destination pair. A separate dollar ceiling should be applicable to the rate for each commodity between each origin-destination pair. If the shipper's annual freight bill falls below this level, its complaint should automatically be entitled to small case treatment.⁷

B. The Board Has Properly Focused the Eligibility Issue on “Small Cases,” Rather than “Small Shippers.”

The Joint Commenters strongly believe that the Board's March 27 Notice appropriately emphasizes small rate “cases,” as opposed to small rate “shippers.” This stands in contrast to Ex Parte No. 586, *Arbitration-Various Matters Relating to Its Use As An Effective Means of Resolving Disputes*, served September 20, 2001, slip op. at 4, where the Board seemed to focus on small shippers, which elicited a storm of objections from many shipper interests in their comments. These Joint Commenters believe that a focus on small “shippers” rather than small

⁵ \$6 million divided by 5 years = \$1.2 million per year. \$1.2 million divided by 25% = \$4.8 million annual freight bill.

⁶ If one assumed, perhaps more realistically, that there would be a 10% rate reduction over 3 years, an annual freight bill of \$20 million would be the ceiling.

⁷ These Joint Commenters believe that a \$4.8 million annual origin-destination freight bill is a conservative measure of a proper bright-line eligibility standard. However, the Board could choose to modify such a bright-line test by permitting a carrier to show that, in light of long term contracts, the traffic will move under the challenged rate for more than five years, and that the case will actually put at issue rate reductions and reparations totaling more than \$6 million (discounted to present value). This is similar to the approach advocated by the National Grain and Feed Association that, if a carrier believes that a complaint should be adjudicated under CMP principles, then the burden of so proving should be placed on the defendant carrier, with an extremely abbreviated time period for a Board decision on the matter. The Joint Commenters propose that if the Board were to adopt such a procedure, it should utilize the same \$2 million cost to the shipper of bringing the SAC case and also require that the shipper furnish its traffic and other relevant data for use by the railroad in its challenge. See NGFA's April 16, 2003 comments in this docket, at p. 8.

“cases” would be inconsistent with the statute, which directs the Board to make available procedures other than CMP when a full SAC presentation would be “too costly, given the value of the case.” 49 U.S.C. §10701(d)(3). Moreover, if the Board restricts access to small case procedures to only small shippers, it will leave the vast majority of shippers with no possibility for rate relief at all.

Most non-coal shippers, regardless of size, are unable to benefit from the Coal Rate Guidelines because a SAC presentation simply is too costly, given the value of the case. Unlike unit-train coal shippers, who transport tremendous volumes of a single commodity from only one, or just a few, origins to a single destination, often for twenty years or more, non-coal shippers typically transport their commodities to many destinations (sometimes hundreds) that frequently change every few years. Thus, even a large shipper who tenders thousands of carloads annually will have few, if any, origin-destination pairs that are of sufficient magnitude to make a SAC presentation economically feasible, given the value of the case.

This untenable situation is due, in large part, to the Board’s “Bottleneck Decisions.”⁸ Although large non-coal shippers may tender over a thousand carloads annually to many destinations, frequently all of that traffic must move over a single route to a bottleneck point, from which the carloads are dispersed over many different routes and rail carriers to their final destinations. The consolidated traffic volumes over just this “bottleneck segment” are much more likely to have a value that would justify the cost of a SAC presentation. However, in the “Bottleneck Decisions,” the Board precluded shippers from challenging just the bottleneck portion of a rail rate, and instead required them to challenge the entire rate from origin to destination, except in the rare case in which the Board’s “contract exception” applies. Instead of presenting a single SAC case from the origin to the bottleneck point, the Board has thus required the shipper to present separate SAC cases for each origin-destination pair, none of which individually is of sufficient value to justify the expense of a SAC analysis.⁹ Thus, the

⁸ STB Docket No. 41242, *Central Power & Light Co v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059 (1996), reconsideration granted in part 2 S.T.B. 235 (1997), aff’d, *MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

⁹ Another significant factor that makes it difficult for non-coal shippers to challenge the reasonableness of rail rates is that the Board’s predecessor, the Interstate Commerce Commission, allowed the carriers to

“Bottleneck Decisions” are in part responsible for the situation where large shippers require small rate case protection.

Until the Board finds it appropriate to revisit the “Bottleneck Decisions,”¹⁰ it must accept the fact that the vast majority of non-coal rate cases will involve individual, dispersed movements whose values do not justify the expense of a CMP presentation, and therefore, must be decided pursuant to the small case guidelines.

VI. THE BOARD SHOULD CLARIFY HOW IT WILL DETERMINE THE REASONABLENESS OF RATES IN SMALL RATE CASES.

The non-coal rate guidelines do not provide a clear standard that complainants know they must satisfy in order to obtain relief. Rather, the Board has adopted three benchmarks as a “starting point,” without any guidance as to how those benchmarks will be applied, and with the expectation that complainants will augment these benchmarks with additional, vaguely identified, evidence. Ex Parte No. 347 (Sub-No. 2) at 1045. The Joint Commenters seek clarification from the Board as to how it will apply these benchmarks as a standard of reasonableness in small rate cases, and how various types of additional evidence may alter the benchmark results.

publish point-to-point rates rather “scale” rates. Thus there is often not enough traffic at stake to warrant a complaint on a point-to-point basis.

¹⁰ Although the Board concluded, in the “Bottleneck Decisions,” that the Interstate Commerce Act mandated this result, that was not the basis upon which the Court of Appeals affirmed the Decisions. Thus, the Board is free to reopen and reconsider its holding. If it did so, a greater number of rate challenges could be decided under CMP principles, as opposed to the non-CMP small case guidelines. In Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996), the Board stated:

We recognize that CMP provides the only economically precise measure of rate reasonableness and therefore must be used whenever possible. We are persuaded, however, that other procedures can, and indeed must, be made available for those cases in which CMP simply cannot be used – because the traffic is so infrequent or widely dispersed that it is not susceptible to a SAC presentation or because the case is so small in value that the substantial expense of a CMP presentation...cannot be justified. [emphasis added]

The “Bottleneck Decisions” have thus greatly expanded the number of situations in which the CMP cannot be used. By reconsidering the “Bottleneck Decisions,” the Board could reverse that trend, if the Board desires to expand the universe of cases in which CMP could be used.

In most judicial and regulatory matters, complainants have a clear standard or rule of law that they know must be satisfied. Although the parties may dispute whether the complainant has satisfied that standard with its evidence, the standard itself seldom is in doubt. Even with respect to the SAC standard, while a complainant and defendant may disagree strongly as to whether the complainant has met the standard in a particular case, there is at least relatively little doubt as to what the standard is. The non-coal rate guidelines do not, however, set a specific standard, which prevents shippers and carriers from assessing the risks of litigation based on the evidence likely to be submitted. Because there is no indication of how the three “benchmarks” and other unspecified evidence will be balanced to determine a maximum reasonable rate, shippers face the prospect of filing a complaint under the simplified rules without guidance in estimating the outcome of the case or for any particular method of balancing the benchmarks. This increases a shipper’s risk, uncertainty and expense, and discourages private settlements, since neither party has the ability to estimate the probable outcome of a small rate complaint.

The Joint Commenters recognize that all litigation comes with certain inherent risks and uncertainties, and therefore, they do not seek absolute certainty from the Board. Rather, they are looking for an increased level of guidance so that they can better evaluate their evidence against a known standard in order to determine both the risks and potential rewards of filing a rate case. Thus, they need to know – at least better than they do now -- how the Board will apply the three benchmarks to determine a reasonable rate and how other types of evidence may alter the results of the benchmark analysis.

The three benchmark indicators identified by the Board are (1) the RSAM, which examines the average markup that the carrier needs to charge its captive traffic to meet its revenue needs; (2) the R/VC[Comp], which measures the markups applied to similar traffic in order to reflect demand-based differential pricing; and (3) the R/VC[>180], which examines the markups applied by the carrier to its other captive traffic to test whether the issue traffic bears a disproportionate share of the carrier’s revenues. According to the Board, these three benchmarks “in combination supply the necessary springboard for a closer scrutiny of the more individualized pricing considerations that may apply to the particular traffic at issue.” Id. at 1020. At least one of these benchmarks requires further clarification, not to mention the added uncertainty surrounding the application of “individualized pricing considerations.”

The RSAM actually is a range. The lower end of the range reflects an efficiency adjustment that excludes all shipments with R/VC ratios of less than 1.0. In theory, that would be the lowest rate achievable. Because the railroads, however, have argued that this efficiency adjustment is inappropriate, the Board has retained the unadjusted RSAM as the upper end of the range, and simply asserted that parties “should address any specific efficiency considerations that apply to the particular carrier defendant(s) that would serve to narrow that range.” *Id.* at 1030. No one knows how this issue ultimately will be resolved and what types of efficiency considerations will be significant. Furthermore, if the other benchmarks support a prescribed rate below the low end of the RSAM range, it is unclear which benchmark would control. The Board should clarify these matters.

The R/VC[>180] benchmark measures the extent to which the carrier is marking up its >180 traffic on average, to ensure that the complainant’s traffic is not bearing a disproportionate share of the carrier’s revenue requirements vis-à-vis other demand inelastic shippers. If the complainant’s R/VC ratio is less than the R/VC[>180] average, however, it is unclear whether that automatically would preclude rate relief for the complainant.

The R/VC[Comp] benchmark attempts to reflect demand-based differential pricing principles by measuring the markup taken on >180 traffic that involves similar commodities moving under similar transportation conditions. This is the only one of the three benchmarks that cannot be calculated from publicly available data, and therefore, requires discovery. This prevents a shipper from making an informed assessment of its litigation risks and rewards based upon the three benchmark analyses prior to filing a complaint. The Board could take a step toward alleviating this particular uncertainty by granting a shipper access to the confidential waybill sample, upon certification from the shipper that it seeks the sample to evaluate a potential rate complaint. In addition, the Board should offer guidance in the instant proceeding concerning what should be considered “similar” traffic for purposes of the R/VC[Comp] standard.

In order to ameliorate some of these uncertainties, the Joint Commenters also suggest that the Board should explain more precisely how it will weigh these factors. One way that this could be done is to prepare a decision in response to a series of hypothetical small rate cases. Ideally,

the Board would prepare responses to eight hypothetical examples applying various combinations of the three benchmarks. For the RSAM, the Board would look at both the efficiency adjusted and unadjusted numbers, referred to as “High” and “Low” in the chart below. For the R/VC[Comp], the Board would consider scenarios with rates above and below the average R/VC[Comp]. For the R/VC[>180], the Board would consider situations where the challenged rates were above and below the R/VC[>180]. The eight hypotheticals would address the following combinations of the benchmarks:

RSAM	R/VC[Comp]	R/VC[>180]
High	Above	Above
High	Above	Below
High	Below	Above
High	Below	Below
Low	Above	Above
Low	Above	Below
Low	Below	Above
Low	Below	Below

The objective of these hypotheticals would be to obtain some guidance from the Board as to how it would balance the three benchmarks to arrive at a maximum reasonable rate. In addition, the Joint Commenters ask the Board to discuss, in these hypotheticals, how other factors might alter the benchmark results. The Joint Commenters are emphatically not suggesting that the Board open a new rulemaking or solicit new comments. Rather, the Boards should analyze the hypotheticals based upon its interpretation (as clarified) of its existing non-coal standards, and based upon waybill sample data and other information in its possession.

**VI. THE BOARD MUST ADOPT SIMPLIFIED AND EXPEDITED PROCEDURES
FOR SMALL RATE CASES.**

A major disincentive to use of the Non-Coal Rate Guidelines by shippers is the lengthy and uncertain amount of time required to prosecute a small rate case. Before the merits of the case even can be addressed, the parties must spend 50 days in just determining whether a case qualifies for “small case” treatment. That is followed by cost discovery and review of the Board’s Waybill Sample. Discovery, at best, requires a minimum of twenty days, assuming that the rail carrier is prompt and responsive, and there are no disputes. Discovery disputes can add months to process through motions to compel that require a month to brief and then must await a Board decision. Only then do the parties submit opening, reply and rebuttal evidence, for which the rules currently provide no defined procedural schedule. Even assuming a very brief period for filing evidence (e.g., 30 days for opening evidence, 30 for reply, and 15 for rebuttal), the entire process, without discovery disputes, will consume a minimum of six months. This also assumes no post-evidence briefs. After all that is completed, the Board has six months to render a decision. Thus, under the present standards, a year is the best-case scenario, with the much more likely scenario being 18-24 months.

Small rate cases should include expedited time frames, active management by Administrative Law Judges (ALJs), limited appeal rights, and standardized discovery with a very limited ability to go beyond standard discovery lists. The total process should take no longer than 9 months.

ALJs are an important component of this plan. They can alleviate the burden upon Board staff, act as case managers, and resolve disputes quickly. In order for ALJs to be effective, however, every decision they make must not be subject to *de novo* review by the Board. There should be interlocutory appeals of discovery decisions only in rare circumstances and only under expedited time frames for decision by the full Board, with no suspension of the procedural schedule. Moreover, a final ALJ decision should be overturned only upon a showing that it is clearly contrary to law or the Board’s small case guidelines.

A bright-line eligibility test, like the one proposed in Part III.A., *supra*, will significantly streamline small rate cases. A shipper should submit evidence that it qualifies for small case

treatment under the bright-line test when it files its complaint [Day 0]. The carrier should respond to the complaint within 20 days and contemporaneously submit any evidence contesting the shipper's eligibility for small case treatment [Day 20]. Such evidence should be limited to the bright-line factors. The ALJ, in turn, should determine the shipper's eligibility within ten days [Day 30].

The Board should adopt standard discovery requests for each party, just as it is considering in Ex Parte No. 638. For example, the shipper would serve responses to standard market dominance requests with its complaint [Day 0] and the carrier would provide standard cost information with its answer, 20 days later [Day 20]. Additional discovery should be restricted to the specifics of the issue transportation and should be served within 40 days of the complaint [Day 40]. Responses would be due within 20 days [Day 60]. In addition, the shipper should be granted access to the confidential waybill sample prior to filing its complaint, upon certifying that the request is for a complaint under 49 U.S.C. § 10701.

If a discovery dispute does arise, the movant should file a motion to compel no later than 65 days after the filing of the complaint [Day 65], which would be 5 days after the last possible day for serving discovery responses [Day 60]. A reply would be due 5 days later [Day 70]. The ALJ would issue a decision in another 5 days [Day 75]. If the ALJ grants the motion to compel, the requested information then must be produced within 5 days [Day 80]. Thus, even with discovery disputes, the process to this point would consume no more than 80 days.

If there are no discovery disputes, opening evidence would be due within 30 days after the close of discovery [Day 90]. If there is a dispute, opening evidence would be due either 30 days after the ALJ's decision denying a motion to compel [Day 105], or 30 days after production in accordance with an ALJ decision granting a motion to compel [Day 110]. Just as the parties do in coal rate cases, they would file market dominance and rate reasonableness evidence contemporaneously. Reply evidence would be due 30 days after the submission of opening evidence, and rebuttal evidence would be due 15 days after that. The parties would submit legal arguments at the same time they submit their evidence, which eliminates the need for a separate round of post-evidence briefs. Thus, the evidentiary record would close anytime between Day 135 and Day 155.

The ALJ should render a decision within 30 days after the close of evidence. That would complete the entire process within 165 to 185 days, or 5 to 6 months, even in the worst-case scenario. An appeal to the Board would have to be filed within 20 days of the ALJ's decision, and a reply would be due 20 days later. The Board then should issue a final decision within 30 days. Thus, even with an appeal, the entire process would conclude within 9 months.

VII. CONCLUSION

The undersigned organizations respectfully request the Board to review the suggestions in these Comments and to take steps to adopt these suggestions as revisions to the Board's rules.

Respectfully submitted,
American Chemistry Council
Colorado Wheat Administrative Committee
The Fertilizer Institute
Idaho Barley Commission
Idaho Wheat Commission
Kansas Wheat Commission
Montana Wheat & Barley Committee
National Grain and Feed Association
National Industrial Transportation League
North Dakota Grain Dealers Association
North Dakota Public Service Commission
North Dakota Wheat Commission
South Dakota Wheat Commission
Washington Barley Commission
Washington Wheat Commission
Alliance for Rail Competition
Consumers United for Rail Equity

Dated: July 11, 2003