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October 24, 2006

217915



The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

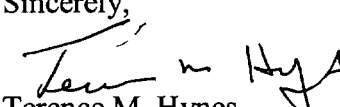
Re: Ex Parte No. 646 (Sub-No. 1) Simplified Standards for Rail Rate Cases

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and twenty copies of the Comments of Canadian Pacific Railway Company. A diskette containing an electronic version of the Comments is also enclosed.

Please acknowledge receipt of the enclosed Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

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Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

217915



STB Ex Parte No. 646 (Sub-No. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: October 24, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 646 (Sub-No. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to the Decision served in the above-captioned proceeding on July 28, 2006 (the “*NOPR Decision*”), Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company and Delaware and Hudson Railway Company, Inc. (collectively “CPR”) submit the following Comments regarding the Board’s proposal to adopt simplified methodologies and procedures for small and medium sized rail rate cases.

In the *NOPR Decision* (at 9), the Board declares that “CMP, with its SAC constraint, continues to be our preferred and the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition.” Yet the rules proposed in the *NOPR Decision* would apply one of two “simplified” rate methodologies, rather than the SAC test, to most rail rate disputes. By the Board’s own estimate, a simplified methodology would be available to shippers in cases involving approximately 67% of all non-exempt traffic that currently moves at an R/VC ratio above the 180% jurisdictional threshold. *NOPR Decision* at 37, Table 2. The proposed new “Simplified SAC” (“SSAC”) methodology would apply to approximately half of all such traffic. *Id.*

CPR does not oppose the objective of making expedited, less expensive rate procedures available to small and medium sized shippers. However, if the Board chooses to promulgate simplified rate regulations of such broad applicability, it must ensure that its efforts to “simplify”

the rate process do not produce results that depart substantially from those generated by a full SAC inquiry. The Board appears to acknowledge this requirement, stating that simplified rate procedures “should be designed to achieve the same objective” as SAC. *NOPR Decision* at 10. Certain of the Board’s proposals should help to reduce the cost of preparing evidence in rate proceedings without unduly compromising the accuracy of the Board’s rate reasonableness findings. However, other elements of the proposed methodologies could sacrifice accurate rate reasonableness determinations for the sake of simplicity. CPR urges the Board to adopt final rules that strike an appropriate balance between the goal of reducing the time and expense required to litigate rate cases and the statutory imperative that simplified rate procedures produce SAC-like results. Such a balance is particularly important for the large number of potential rate cases likely to be eligible for handling under the SSAC methodology.

I. ELIGIBILITY CRITERIA

A. Proposed Eligibility Thresholds

Under the regulations proposed in the *NOPR Decision*, the methodology applied by the Board in determining the reasonableness of a challenged rate would depend upon the “Maximum Value of the Case,” or MVC. The MVC is defined as “the maximum rate relief the shipper could attain over 5 years if the challenged rates were reduced to the jurisdictional floor (*i.e.*, the level at which the R/VC ratio equals 180%).” *NOPR Decision* at 33. The Board proposes to calculate the MVC of the case in the following manner: First, for each issue movement, the Board would determine the difference between the challenged rate and what that rate would be if it were set at 180% of variable cost. The difference would be multiplied by the annual volume of each issue movement. A discount factor equal to the most recent cost-of-capital figure for the rail industry would then be applied to obtain the net present value of the maximum relief available (or MVC) for each issue movement. Any case involving an MVC greater than \$3.5 million would continue

to be governed by the Board's existing CMP ratemaking standards, including the SAC test articulated in *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985) ("*Coal Rate Guidelines*"). In cases with an MVC between \$200,000 and \$3.5 million, the Board would apply the proposed new SSAC methodology. Cases involving an MVC of less than \$200,000 would be handled under a so-called "Three Benchmark Test." *NOPR Decision* at 33-37.

In promulgating its existing standards for small rate cases, the Board stated that "CMP provides the only economically precise measure of rate reasonableness and therefore must be used wherever possible." Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996) ("*Small Case Guidelines*"). Acknowledging that the methodology for small cases adopted in that decision would sacrifice precision for simplicity, the Board concluded that "the simplified procedures must be used as sparingly as possible, reserved for only those cases where CMP is not a realistic option." *Id.* (emphasis added). The Board's current proposals represent a departure from that policy insofar as the proposed eligibility criteria would make a "simplified" rate methodology available to the shippers of two-thirds of all rail traffic that moves at rates above the Board's jurisdictional threshold. See *NOPR Decision* at 37, Table 2.

CPR does not object to the Board's proposal to base eligibility for the SSAC and Three Benchmark methodologies on the MVC of a case. However, CPR is concerned that the eligibility thresholds proposed by the Board will dilute CMP-based ratemaking by extending simplified procedures to the majority of all future rate cases. Moreover, while the Board can, and should, pursue measures to simplify the procedures for small and medium cases, it must not alter the substantive standards for rate reasonableness in ways that depart from the fundamental

principles of CMP, including recognition of the continuing need for railroads to engage in differential pricing.

The Board should not make the results of the MVC calculation a “rebuttable presumption.” *NOPR Decision* at 33, 34. The grounds upon which a complainant might obtain an exception from the methodology prescribed by the MVC test are, at best, vague. In particular, it is not clear what evidence might be sufficient to demonstrate that the “likely actual (as opposed to maximum) value of the case” is less than the MVC calculated by the Board, or that a SAC analysis would be “unusually expensive” in a particular case. *NOPR Decision* at 34. However, making the results of the MVC calculation a mere “rebuttable presumption” clearly would invite shippers to seek to expand the use of simplified rate methodologies. The MVC test, as proposed, already makes such procedures available to most shippers. The Board should not further dilute the use of CMP-based rate methodologies by creating additional ways for complainants to avoid a full SAC inquiry (or review under SSAC standards designed to produce SAC-like results) where the MVC prescribes that those standards be applied.

B. The Proposed Simplified Rate Methodologies Cannot Be Applied In Cases Involving Cross-Border Traffic.

The simplified rate methodologies proposed in the *NOPR Decision* cannot be applied in cases involving movements between a point in the United States and a point in Canada (or Mexico). The mechanisms proposed by the Board to simplify the analysis in small and medium rate cases are not available for cross-border shipments.

Under the proposed SSAC methodology, the SARR’s operating and equipment expenses would be estimated by applying the defendant carrier’s system-average costs from the Board’s Uniform Rail Costing System (“URCS”) for the Test Year to the SARR’s traffic group. *NOPR Decision* at 13, App. B. URCS is based upon cost data reported in the R-1s of Class I carriers.

See Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes, 5 I.C.C. 2d 894 (1989). Consequently, URCS data are available only for rail operations in the United States – the Board does not prepare URCS costs for Canadian railroads such as CPR and CN. Nor do Canadian regulatory authorities publish cost data equivalent to URCS. Thus, URCS cannot be used as a simplifying tool to estimate the operating and equipment costs associated with the Canadian portion of cross-border through movements.

Applying the proposed Three-Benchmark methodology to cases involving cross-border issue traffic is even more problematic. Like the SSAC test, the Three-Benchmark methodology would rely upon URCS to develop variable costs for both the issue movements and traffic within the comparison group. Moreover, the proposed regulations contemplate that the revenue used to calculate R/VC ratios for both the issue traffic and the comparison group would be drawn from the Waybill Sample maintained by the Board pursuant to 49 C.F.R. § 1244. While the Waybill Sample contains revenues reported by U.S. railroads on cross-border traffic, it does not include revenue information for the portion of cross-border through movements that takes place in Canada (or Mexico). For example, on a southbound shipment from a CPR-served point in Canada to a UP-served destination in California, the Waybill Sample contains only the revenue earned by UP for that portion of the movement between the U.S./Canada border (at Kingsgate/Eastport, ID) and the destination. The same is true of cross-border through shipments handled by CPR in conjunction with its U.S. affiliates, Soo Line and D&H. Thus, the Waybill Sample cannot be used to simplify the process of developing the revenue and R/VC ratio information needed to apply the proposed Three-Benchmark test to cross-border shipments.

These problems cannot be solved by truncating the Board's rate reasonableness analysis to consider only the United States segment of a cross-border movement. It is well-established that a shipper may only challenge the reasonableness of a rate "as a whole." *See, e.g., Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 475 (1935) ("The shipper's only interest is that the charge shall be reasonable as a whole."); *Louisville & No. R.R. Co. v. Sloss-Sheffield Co.*, 269 U.S. 217, 234 (1925) (same). A shipper must show the unlawfulness of the entire through rate because one factor of a through rate might be unreasonably high but might be offset by a lower factor of a connecting line. *See, e.g., Docket No. 41687, Grain Land Coop v. Canadian Pacific Ltd.*, (served Dec. 6, 1999) at 5. The fact that a portion of a challenged through movement takes place in Canada (or Mexico) does not alter this rule — the Board has long held that it has jurisdiction to determine the reasonableness of a joint international through rate. *See Canada Packers, Ltd. v. Atchison, Topeka and Santa Fe Ry. Co.*, 385 U.S. 182, 183-84 (1966).

Nor can the Board properly "simplify" its analysis by attributing the URCS costs of the U.S. carrier participating in a cross-border through shipment to the foreign segment of the movement. Each carrier's URCS system-average costs reflect that carrier's unique experience, based upon its traffic mix, the terrain over which it operates, the terms of its labor agreements and a variety of other factors. Applying the URCS system-average costs of a U.S. railroad to the foreign segment of a cross-border movement would produce inaccurate variable costs, because CPR (and other foreign railroads) operate over different terrain, with a different mix of traffic and under different labor arrangements than their U.S. counterparts.

In light of these limitations on the ability of parties (and the Board) to apply the proposed simplified rate methodologies to cross-border movements, any final regulations adopted by the Board should provide that the SSAC and Three-Benchmark tests will not be used where the issue

traffic moves between a point in the United States and a point in Canada or Mexico. Rather, the Board should continue to apply the SAC methodology in rate proceedings involving cross-border issue traffic.

II. PROPOSED “SIMPLIFIED SAC” METHODOLOGY FOR MEDIUM RAIL RATE DISPUTES

The proposed SSAC methodology represents an effort by the Board to reduce the burden and expense of litigating a full SAC proceeding in medium sized rate disputes, while maintaining a substantive methodology that “more closely tracks CMP then (sic) the Three-Benchmark approach.” *NOPR Decision* at 11. SSAC would do away with competing evidentiary presentations on a number of issues that typically are hotly contested in a SAC case, including the SARR’s physical configuration, the unit costs associated with constructing it, and the SARR’s operating plan. SSAC would replace detailed case-specific evidence regarding these issues with system-average operating costs based on URCS, estimated construction unit costs based upon findings in prior SAC cases, and other simplifying assumptions.

Certain of the Board’s proposals (e.g., requiring that the SARR incorporate all existing facilities along the selected route and using average unit costs from prior SAC proceedings in determining road property investment) are likely to reduce the time and expense required to prepare evidence in rate proceedings without unduly compromising the accuracy of the Board’s rate reasonableness findings. However, the proposals to permit a complainant to base its SARR on a route over which the issue traffic does not move, and to prohibit all movement-specific adjustments to URCS system-average costs, represent a substantial departure from CMP principles and should not be adopted.

A. SARR Route and Configuration

Under the proposed SSAC methodology, a complaining shipper would have the right to “identify its preferred route” for the SARR. *NOPR Decision* at 12. The route selected by the complainant “need not be the route actually used by the railroad for the traffic at issue,” subject only to a requirement that the shipper show that the alternate route “has sufficient existing capacity to handle the additional traffic.” *Id.* The SARR would be required to incorporate all of the existing facilities along the selected route, and its traffic group would consist of the issue traffic and all other traffic that moved over the selected route during the Test Year. *Id.* at 12-13.

The Board should not permit a complainant to select for its SARR a route other than the route over which the issue traffic actually moves. Evaluating the reasonableness of a challenged rate based upon revenue and expense data attributable to rail facilities that are not used to provide service to the complaining shipper would be inconsistent with the fundamental purpose of a SAC analysis. “The principal objective of the SAC constraint is to restrain a railroad from . . . charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper.” *NOPR Decision* at 10 (emphasis added). A SSAC analysis based upon the physical configuration, traffic mix and operating costs of a route that is not used to handle the complainant’s traffic in the real world would shed little (if any) light on whether the defendant is earning an excessive return on the “infrastructure used to serve that shipper.”

Giving complainant the right to base its SARR on any route of its choosing would create obvious opportunities for “gaming.” A complainant might attempt to truncate the SARR’s road property investment costs by selecting a single-track route without CTC, even where the defendant railroad provides service via a double-tracked, CTC-equipped line with higher speed limits in order to meet the complainant’s real world service requirements. (The Board’s proposal

to do away with operating plans in SSAC cases would facilitate such a strategy by eliminating the need for a complainant to take account of the service requirements of the SARR's traffic.) Likewise, a complainant might select an alternate route with greater traffic density or a higher rated traffic base than the line over which its traffic actually moves for the sole purpose of inflating the SARR's revenues. The Board should not countenance (much less promote) such "gaming."¹

In any event, allowing complainants to select alternate routes would complicate, rather than simplify, SSAC cases by creating the potential for disputes concerning the appropriate route for the SARR. The *NOPR Decision*, which provides a 90-day period for the submission of evidence (and a Board staff decision) on the issue of route selection, appears to acknowledge that such disputes are likely. The proposed route selection rule undermines the Board's fundamental objective of reducing the time and expense required to litigate a SSAC case.

In order to assure that the SSAC analysis accurately measures whether a challenged rate is higher than necessary to afford the defendant carrier a reasonable return on the "infrastructure used to serve that shipper" (*NOPR Decision* at 10), the Board should require that the SARR's configuration be based on the route over which the complainant's traffic actually moved during the Test Year. Where the issue traffic actually moved via more than one route during the Test Year, the SARR's configuration should be based upon the predominant route of movement

¹ The requirement that complainant demonstrate that an alternate route "has sufficient existing capacity" to handle the issue traffic (*NOPR Decision* at 12) would do little to discourage such "gaming." Based upon the proposed eligibility threshold for the SSAC methodology, most SSAC cases are likely to involve single-car or multiple-car, rather than trainload, movements. It is not likely that such traffic would necessitate additional daily train movements. Rather, in order to make the proposed capacity showing, the complainant would need only demonstrate that existing trains could accommodate a few additional cars.

during that year. The complainant should not be permitted to base its SARR on a route over which its traffic does not move in the real world.

B. SARR Traffic Group

Under the proposed SSAC rules, the SARR's traffic group would consist of "all movements that traveled over the selected route in the Test Year." *NOPR Decision* at 13. Furthermore, "no rerouting of non-issue traffic would be permitted." *Id.* CPR supports these proposals, which will eliminate the "cherry-picking" of high revenue, low cost traffic that has become commonplace in SAC cases. The proposed rules governing the SARR's traffic group will also eliminate the substantial time and expense that parties (and the Board) incur in litigating issues relating to the complainant's traffic selection. A SSAC analysis based upon the traffic that actually moves over the route replicated by the SARR (and only that traffic) will produce a more accurate determination as to whether the defendant carrier is earning an appropriate return on the replacement cost of the infrastructure used to serve the complaining shipper. *NOPR Decision* at 10.

C. Road Property Investment

One of the most complex issues in SAC cases is the calculation of road property investment (RPI). In the typical SAC case, the parties submit massive volumes of expert testimony and data relating to the cost of acquiring land, preparing roadbed, laying track and constructing other facilities that comprise the SARR's physical plant. The Board correctly observes that these issues contribute substantially to the cost and complexity of SAC cases. *NOPR Decision* at 39.

The Board proposes to streamline the RPI issue in medium sized rate cases by substituting average unit costs for case-specific unit cost evidence. Specifically, rather than having the parties present expert evidence regarding the unit costs associated with various

elements of SARR construction, the Board would develop “rolling averages” of those unit costs based upon its findings in the five most recent SAC proceedings. *Id.* at 40-48. The rolling average unit costs would be indexed for inflation. *Id.* at 40. The “units” to which these average costs are applied would be developed in essentially the same fashion as they are in SAC proceedings.

The Board’s proposal for simplifying the calculation of RPI appears to offer the opportunity to reduce the scope and cost of a SSAC case. However, because there has not been any SAC case involving a Canadian railroad, the “rolling averages” contemplated by the Board would not reflect any differences in the cost of constructing railroad lines in Canada and the United States. As the Board itself observes (*NOPR Decision* at 39), regional differences in geography and configuration can have a significant impact on RPI costs. Therefore, if the Board makes the SSAC methodology applicable to cross-border movements (and, for the reasons discussed above, it should not), the Board must provide an opportunity for Canadian carriers to introduce evidence relating to actual construction unit costs in Canada, at least until such time as the “rolling averages” contemplated by the proposed regulations include one or more SAC cases in which the cost of constructing rail lines in Canada has been considered.

D. SARR Operating Expenses

The proposed SSAC methodology would use URCS-generated cost information for two purposes. At the outset of a SSAC proceeding, URCS costs would be used to develop R/VC ratios for the issue movements in order to determine whether a challenged rate exceeds the 180% jurisdictional threshold. *NOPR Decision* at 14-16. In addition, the SARR’s operating and equipment expenses would be estimated by applying the defendant carrier’s URCS system-average costs for the Test Year to the SARR’s traffic group. *NOPR Decision* at 13, App. B. This would eliminate the need for the parties to present detailed operating plans and movement-

specific operating statistics. Thus, in SSAC cases, URCS-based costs would be used not only to determine whether the Board had jurisdiction over the challenged rates, but also as a critical substantive input in the Board's rate reasonableness determination.

The Board proposes to use only "unadjusted" URCS costs in performing these URCS-based analyses in SSAC cases.² According to the Board, its experience in SAC cases has led it to conclude that consideration of movement-specific adjustments to URCS costs is "enormously complex and time-consuming." *NOPR Decision* at 15. By contrast, the Board suggests that "calculating variable costs based solely on URCS [would be] a quick and administratively simple process." *Id.* Therefore, the Board has indicated that "even if we should decide to continue to permit some movement-specific adjustments in large rail rate disputes, we propose to disallow such adjustments in medium-size rail rate disputes given the need for a less expensive, simplified process for those cases." *NOPR Decision* at 16.

CPR opposes the Board's proposal to prohibit all movement-specific adjustments to URCS costs in SSAC proceedings. For the reasons set forth in its comments in *Ex Parte No. 657*, CPR believes that banning all movement-specific adjustments to URCS would substantially and adversely affect the accuracy of the Board's rate reasonableness analyses. *See Ex Parte No. 657*, CPR Comments at 5-9; Reply Comments at 5-9. Because movement-specific

² The Board has likewise proposed to prohibit all movement-specific adjustments to URCS costs in SAC cases. *See Ex Parte No. 657, Major Issues in Rail Rate Cases* ("Ex Parte No. 657"). But that proposal was not supported by any carrier or shipper party. *See, e.g.*, AECC Comments at 20 (prohibition of all movement-specific adjustments "would produce an unacceptable loss of accuracy" (emphasis added); Coal Shippers' Comments at 89-91 (movement-specific data are essential to produce reliable variable cost calculations); South Carolina ORS Comments at 7 (STB should permit cost evidence "based upon more accurate cost determinations than a system average") (emphasis added); CSXT/NS Comments at 11 (refusal to consider adjustments "could significantly affect the accuracy, integrity, and reliability of SAC analyses and results.") (emphasis added).

data produce more precise variable cost evidence, the Board has (until now) permitted – indeed, it has encouraged – parties to present movement-specific costs in SAC cases.³ The Board’s proposal to rely exclusively on “unadjusted” URCS in calculating the SARR’s operating and equipment costs represents a substantive (rather than procedural) change to the Board’s rate reasonableness methodology, because it would fundamentally alter the way in which variable costs are measured in SSAC cases.

The danger that a failure to consider movement-specific adjustments will produce inaccurate results is even greater under the proposed SSAC methodology than it is in SAC cases. In SSAC cases, URCS-generated costs would be used not only to make an initial jurisdictional determination for the issue movements, but also to calculate operating and equipment expenses for the SARR’s entire traffic group. Exclusive reliance upon unadjusted URCS costs for that purpose could seriously distort the SARR’s operating and equipment expenses and result in inaccurate SSAC results.

Certain types of traffic have special handling requirements or are subject to regulations that add substantially to the cost of transporting those shipments.⁴ For example, railroads incur additional handling, customs and security costs in connection with hazardous commodity

³ See, e.g., Docket No. 42072, *Carolina Power & Light Co. v. Norfolk Southern Railway Co.* (served Dec. 23, 2003) at 114 (movement-specific adjustments allowed “[b]ecause a carrier’s system-wide average costs are not necessarily representative of the costs of providing a particular service”); Docket No. 42057, *Public Service Co. of Colo. d/b/a XCel Energy v. BNSF Ry. Co.* (served June 7, 2004) at 77; Docket No. 42056, *Texas Municipal Power Agency v. BNSF Ry. Co.*, (served Sept. 24, 2004) at 10-11 (movement-specific adjustments “would better reflect the variable costs of serving the particular traffic at issue than the URCS system-average figure”).

⁴ The Board has held that special handling requirements are properly included in determining variable costs in rate proceedings. See, e.g., Docket No. 42072, *CP&L v. Norfolk Southern*, (Decision served December 23, 2003) at 130 (costs of constructing, operating, and maintaining conveyor belt system to move coal from mine to loadout were properly included in variable costs).

movements and virtually all cross-border shipments. “Unadjusted” system-average URCS costs do not account for these unique expenses, which can be substantial in relation to the overall cost of handling a particular shipment. Failing to take such costs into account would undermine the accuracy of the Board’s variable cost calculations and resulting R/VC ratios for such shipments.

In order to avoid such an unfair (and unlawful) result, the Board’s SSAC regulations should permit evidence relating to unique costs that may not be captured by URCS, where such adjustments could materially affect the outcome of a particular proceeding. Such accuracy can be achieved without substantially reducing the benefits of simplified SSAC procedures. The parties would, in the first instance, decide whether to present movement-specific cost evidence based upon their assessment as to whether such evidence could materially affect the Board’s variable cost calculations. Unless movement-specific costs not captured by URCS were sufficient to alter the outcome in a particular case, it is not likely that the parties would choose to incur the time and expense of preparing such evidence. Even in those cases where movement-specific evidence was submitted, the proposed SSAC methodology would eliminate the time, expense and discovery burdens associated with the detailed operating plans and operating statistics that are required in SAC cases.

Moreover, the Board can reduce the cost of litigating potential disputes relating to movement-specific adjustments to URCS costs by providing guidance regarding the types of adjustments that it will permit in SSAC cases. In *Ex Parte No. 657*, CPR and other railroad and shipper parties suggested a number of categories of movement-specific adjustments that ought to be allowed. At a minimum, the Board should permit movement-specific adjustments for fuel, equipment ownership, crew wages, switching or handling requirements, car mileage allowances,

payments to other transportation providers (*e.g.*, haulage fees or similar payments to short lines) and the cost of complying with special handling, customs and security regulations.

These modifications to the Board's proposed procedure for estimating operating expenses in SSAC cases would promote the objective of reducing the cost of medium sized rate cases without unnecessarily curtailing the ability of parties to present movement-specific cost evidence that could materially affect the outcome in a particular case. If the Board adopts its proposal to use URCS-based variable costs in SSAC proceedings, it should also adopt the modifications proposed by CPR.

E. Discovery

The Board proposes to "streamline" the discovery process in SSAC proceedings by prescribing certain "standardized discovery" in all cases. *NOPR Decision* at 19. The Board's proposal would impose a substantial (and highly disproportionate) burden on railroad defendants. In particular, the railroad's "Second Disclosure" would require the defendant, within 30 days after the SARR route was determined, to provide to the complainant (1) an identification of all traffic that moved over the selected route during the Test Year; (2) detailed data for all identified traffic, in electronic format; (3) total operating and equipment cost calculations for each movement, based upon the defendant's system-average URCS costs; (4) revenue allocation for the on-SARR portion of each crossover movement; and (5) all workpapers supporting the railroad's calculations. *NOPR Decision* at 19-20.

In effect, the "Second Disclosure" requirement would obligate the carrier, at its expense, to perform most of the data analysis and cost calculations required to support the complainant's case. In a typical SAC case, the defendant railroad produces a traffic tape and various cost data to the complainant. It is then the complainant's responsibility to select the SARR's traffic and calculate the costs of handling that traffic. The Board's proposal would shift the burden (and

expense) of developing such evidence entirely to the carrier. This could encourage shippers to file rate complaints in order to gain leverage in rate negotiations with carriers, because filing a complaint would impose substantial costs on the carrier while costing the shipper relatively little. Such a result would be flatly inconsistent with the Board's stated preference for negotiated solutions to carrier-shipper disputes.

Moreover, it is not clear whether railroads' IT systems can readily generate the information that would be required in the "Second Disclosure." For example, single-car shipments that move infrequently may be added to whatever train is available at the time of shipment, and therefore may move via more than one route over a carrier's system. CPR does not, in the normal course of business, maintain automated data regarding the internal routing of every shipment. Defendant railroads should be given more than 30 days to generate the required information.

It is likely that defendant carriers would be compelled to devote considerable time and resources to develop the data contemplated by the "Second Disclosure." Requiring railroads to conduct special studies in support of the complainant's case is both fundamentally unfair and contrary to longstanding STB/ICC precedent. The Board (and the ICC before it) have consistently refused to compel parties to engage in special studies to generate information or data that are not kept in the normal course of business. *See, e.g.,* Docket No. 42054, *PPL Montana v. BNSF*, (Decision served Nov. 9, 2000) at 3 (in SAC cases, discovery rules "require parties to furnish information in their possession, not to prepare special studies"); Docket No. 37038, *Nevada Power*, (Decision served Oct. 24, 1984) at 8-9.

Any final regulations promulgated by the Board should correct the inherent unfairness of the proposed discovery rules, either by reducing the obligation of the carrier to develop traffic

and cost data for the complaining shipper's benefit, or by requiring complainant to pay for costs incurred by the railroad in compiling such information if the challenged rates are found to be reasonable. The Board should also clarify that carriers are not required to perform special studies to generate information to support a complainant's case.

III. PROPOSED METHODOLOGY FOR SMALL RAIL RATE DISPUTES

The Three-Benchmark methodology set forth in the *NOPR Decision* would significantly alter the substantive standard for determining the reasonableness of a challenged rate in small cases. Specifically, the Board proposes a major change in the manner in which RSAM would be calculated. The existing RSAM calculation measures the average markup above variable cost that a carrier would need to charge every shipper of potentially captive traffic (i.e., traffic with an R/VC ratio above 180%) in order to become revenue adequate. *See NOPR Decision* at 22. Under the Board's proposal, the RSAM calculation would be modified to distribute the carrier's revenue shortfall over its entire traffic base, not just those movements with an R/VC ratio greater than 180%. *Id.* at 23. According to the Board:

“While one could argue that only rates for such potentially captive traffic could be increased to achieve revenue adequacy, the current rate practices of the railroads suggest otherwise, as they have raised rates on competitive traffic as demand for rail transportation has increased.” *NOPR Decision* at 24.

The Board's rationale for proposing this major change in the RSAM calculation is both factually and legally incorrect. As an initial matter, the Board's suggestion that railroads have the ability to collect the same average markup over variable cost on “competitive” traffic as they do on “captive” traffic is simply wrong. Notwithstanding the recent increase in demand for rail service, railroads continue to face intense competition from other railroads and other modes of transportation for a large portion of their traffic. The *NOPR Decision* itself acknowledges that “competition controls the rates for most of a railroad's traffic.” *NOPR Decision* at 12. Thus, any

suggestion that railroads can achieve revenue adequacy by imposing significant rate increases on competitive traffic is illogical.

Moreover, the Board's proposal to incorporate into its small case rate methodology an assumption that the markup over variable cost required for a railroad to achieve revenue adequacy should be distributed among both captive and competitive movements is inconsistent with the principles of differential pricing that underly the Board's CMP approach to rate regulation. As the Board observed in *Small Case Guidelines*, "[b]ecause railroads serve a mix of competitive and captive traffic, a carrier cannot recover an equal or pro rata portion of those unattributable costs from all traffic." *Small Case Guidelines*, 1 S.T.B. at 1007 (emphasis added). Given that reality, Ramsey pricing principles dictate that "a railroad should price its traffic differentially so as to recover a greater percentage of its unattributable costs from the traffic with a greater dependency on its service." *Id.*

The methodology for small rate cases proposed in the *NOPR Decision* represents a major departure from these principles. The proposed modification to the RSAM calculation would do nothing to simplify the process of litigating small rate cases, but rather would serve only to change the substantive standard by which the reasonableness of rail rates is determined in those proceedings. CPR urges the Board to retain its existing RSAM formula in small cases. For the reasons discussed above, the Board should also permit the parties to a small rate case to introduce evidence relating to movement-specific adjustments to URCS-based variable costs where such adjustments could materially affect the outcome of the proceeding.

IV. EXEMPT TRAFFIC

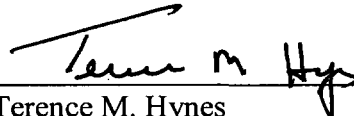
The Board's discussion of the procedures applicable to SSAC proceedings indicates that:

"If the traffic at issue is part of a class of traffic that has been exempted from Board regulation pursuant to 49 U.S.C. 10502(a), the complainant would need to include with its complaint a

separate request for a partial revocation of the pertinent class exemption for the traffic at issue.” *NOPR Decision* at 17.

This statement appears to suggest that the Board is prepared to revoke in part a commodity class exemption any time a complainant can demonstrate that its rate is unreasonable under one of the proposed “simplified” methodologies. However, Section 10502(d) authorizes the Board to revoke an exemption only if it finds that “application in whole or in part of a provision of [Title 49] to the person, class or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). The Board should not entertain a rate complaint on an exempt commodity unless – and until – the complaining shipper has made the requisite showing under Section 10502(d). Accordingly, the Board should require a shipper of exempt traffic to file its petition for partial revocation, and decide the merits of that petition, before imposing upon a railroad the burden and expense of defending a SSAC case.

Respectfully submitted,



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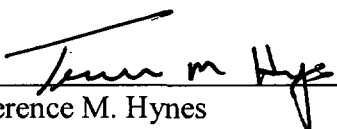
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Dated: October 24, 2006

CERTIFICATE OF SERVICE

I hereby certify this 24th day of October 2006 that I have served all parties of record in this proceeding by first class mail, postage prepaid.



Terence M. Hynes