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Federal Identification Number 52-1793723



October 24, 2006

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BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, N.W.
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Comments of Canadian National Railway Company.

Also enclosed is a diskette containing the text of this filing in Microsoft Word format.

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Office of Proceedings

OCT 24 2006

Part of
Public Record

Enclosures

Very truly yours,

Paul A. Cunningham

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**COMMENTS OF
CANADIAN NATIONAL RAILWAY COMPANY**

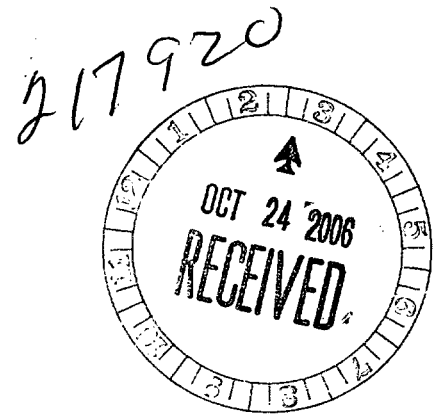
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October 24, 2006



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**COMMENTS OF
CANADIAN NATIONAL RAILWAY COMPANY**

Canadian National Railway Company ("CN") respectfully submits these comments in response to the notice of proposed rulemaking served by the Board on July 28, 2006, in the above-captioned matter.¹ CN generally supports the Board's efforts to develop simplified and expedited means by which the reasonableness of rail rates may be challenged in medium and small cases. CN wishes at this time to comment on two particular issues, while reserving its right to comment on other specific issues in later rounds of comments. First, CN wishes to bring to the Board's attention and ask the Board to take into account the fact that there are special data issues concerning the possible application of the proposed rules to U.S.-Canada through rates. Second, with regard to certain types of traffic that may have a much higher than average cost profile, for example, hazardous materials and other high-risk chemical traffic, CN believes the Board should not preclude the use of movement-specific adjustments to URCS system-average costs.

¹ CN also joins in the comments filed on behalf of the railroad industry by the Association of American Railroads.

A. Data Issues Regarding Traffic in Canada

As the courts, the ICC, and the Board have recognized, the reasonableness of domestic or international through rates is determined with respect to the entire charge for the overall movement.² Thus, if a through rate for a U.S.-Canada transborder movement is challenged, the rate reasonableness determination is based on the charge for the entire movement, including the portion of the through movement in Canada.³

There are differences, however, in the cost and revenue data that are available for domestic U.S. and U.S.-Canada transborder through movements. Although the Board's proposed rules for both small and medium-size cases would require the use of Uniform Rail Costing System ("URCS") data, neither the Board nor the Canadian rail carriers collect or maintain such data for the portions of rail movements in Canada.⁴ In addition, available Carload Waybill Sample ("Waybill Sample") data for U.S.-Canada through

² See *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1072 (1996), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999), *cert. denied*, 528 U.S. 950 (1999).

³ See, e.g., *Great N. Ry. v. Sullivan*, 294 U.S. 458, 475 (1935) ("The shipper's only interest is that the charge shall be reasonable as a whole."); *Can. Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182, 183-84 (1966).

⁴ Among other things, the proposed rules call for the use of URCS cost information to calculate the Maximum Value of a Case in order to determine eligibility for use of either the Three Benchmark methodology (for small cases) or SSAC (for medium cases), to determine under both methodologies whether the rates for challenged service exceeds the jurisdictional threshold of 180% of the variable costs of providing that service, to develop operating and equipment expenses for the SARR, and to prescribe future rates as part of the SSAC methodology. In addition, the proposed Three Benchmark methodology relies on waybill information, which would not be fully available for movements in Canada, to identify and determine the R/VC for a comparable group of traffic.

movements may not be adequate to support application of the proposed rules for small cases.⁵

The Board to date has not been called upon to address these differences in available data. It did not separately address issues relating to challenges to transborder through rates in the Coal Rate Guidelines, Nationwide,⁶ and it has not had to determine the reasonableness of any transborder rates since that time. Nor did the Board separately address this issue in the rules it has proposed in this proceeding.

If, however, there were ever occasion for the Board to apply its standards proposed in this proceeding to transborder U.S.-Canada through rates, then the difference in the availability of data could present significant issues. CN does not believe it is necessary for the Board to undertake now to consider alternative data sources or changes in its proposed procedures or rate standards to account for these differences in available data. Instead, if the Board adopts new rules for small or medium-size rate reasonableness cases, and those rules call for the use of URCS costs or Waybill Sample information (or both), then CN asks that the Board recognize in its decision that some changes in the application of its rules could be required for through rates for transborder U.S.-Canada movements, and that it provide for the necessary substantive and procedural flexibility to address those data issues if and when there is a challenge to a transborder U.S.-Canada through rate.

⁵ The proposed Three Benchmark methodology relies on waybill information to identify and determine the R/VC for a comparable group of traffic.

⁶ 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

B. Movement-Specific Adjustments to URCS System Average Costs

Although CN appreciates the Board's desire to simplify rate reasonableness determinations for medium and small shippers, it believes that the proposed prohibition on the use of movement-specific adjustments to URCS system-average costs goes too far. In some circumstances, the actual costs for movements could so greatly exceed URCS system-average costs that the accuracy and integrity of the Board's rate determination would be significantly undermined unless there were sufficient flexibility retained to account for differences in costs. Moreover, in many instances, the relevant actual costs would be readily ascertainable, so that use of more accurate information would not be complex or time-consuming.

The Board in prior proceedings has recognized the importance and practicality of permitting critical movement-specific adjustments to URCS system average costs. *See also Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1037 n.104 (1996) (discussing use of movement-specific cost adjustments). Given the added reliance on URCS costing under the simplified standards proposed in this proceeding, it would be critically important under the proposed rules that movement-specific adjustments to URCS system-average costs be permitted for movements where a substantial variation is likely between URCS average cost and the actual cost of the issue movement. Failure to account for such difference would threaten to depress prices artificially for entire classes of traffic, resulting in a significant and unjustified impairment of the railroads' efforts to achieve revenue adequacy.

The prohibition on movement-specific adjustment to URCS could be particularly significant with regard to movements of certain chemicals. Actual costs substantially

greater than URCS system-average costs are common for such movements, largely due to the additional costs and risks associated with the transportation of hazardous materials and especially toxic inhalation hazards such as chlorine gas and anhydrous ammonia. Examples of such costs include STB-prescribed mileage payments for the use of highly specialized, privately supplied tank cars that move this traffic, added insurance premiums, added safety and training costs, and costs due to speed restrictions imposed for hazmat traffic.

Rather than adopt a blanket prohibition against all movement-specific adjustments to system-average URCS costs, CN urges the Board to adopt a middle ground in its final rules that at least permits the use of critical adjustments with respect to classes of traffic with demonstrably higher-than-average costs. Should the Board reject this proposal, CN would urge the Board to commence a rulemaking to consider changes to URCS costing to incorporate additional movement-specific inputs to account for the added costs for movements of hazardous materials and other high-cost chemical traffic.⁷ Pending completion of such a rulemaking, CN asks that the Board not apply its new simplified rate standards to traffic that tends to have much higher actual costs than those reflected by URCS system-average costs unless appropriate adjustments are permitted to those costs in individual rate proceedings.

⁷ See *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 27 (STB served Feb. 27, 2006) (suggesting, as an alternative to movement-specific adjustments in individual rate reasonableness proceedings, that parties request a separate rulemaking to seek changes to URCS to better reflect the costs of individual movements).

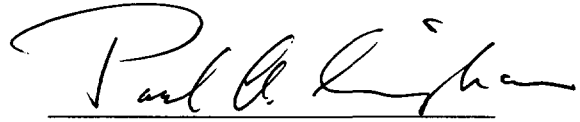
CONCLUSION

CN generally supports the Board's efforts to create alternative rate standards for small and medium-size cases where application of a full stand-alone cost analysis would be too costly, but it wishes to raise two points at this time.

First, if the Board adopts rules that require the use of URCS costing or Waybill Sample information to review rate reasonableness complaints in small and medium-size cases, CN asks the Board to recognize that should a case arise that would apply those rules to through rates for transborder U.S.-Canada movements, it may be necessary for the Board to consider procedural or substantive modifications to its rules.

Second, CN asks that the Board not adopt a blanket prohibition against the use of movement specific cost adjustments to URCS system-average costs. At least for classes of traffic such as certain chemicals, where much higher actual costs may not be captured by URCS system-average costs, some provision should be made either for movement-specific adjustments or for changes to URCS itself to recognize and account for the very real added costs for such traffic.

Respectfully submitted,



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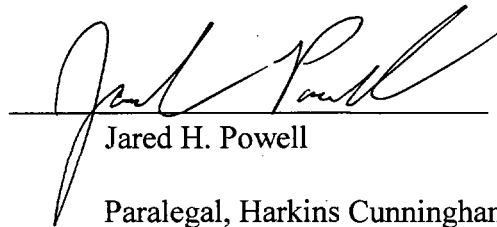
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Counsel for Canadian National Railway Company

October 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of October, 2006, served the foregoing
Comments of Canadian National Railway Company on all parties of record in this
proceeding by first-class mail or a more expeditious method of delivery.



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Paralegal, Harkins Cunningham LLP