

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 646 (SUB-NO. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

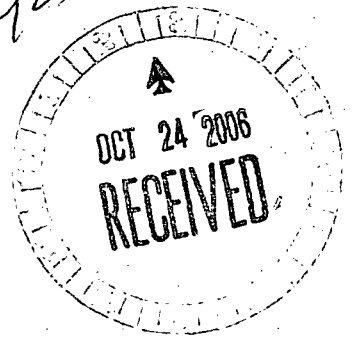
Opening Comments of
National Grain and Feed Association, National Oilseed Processors Association,
Corn Refiners Association, North American Millers Association, National
Association of Wheat Growers, American Farm Bureau Federation,
American Soybean Association, National Corn Growers Association,
National Farmers Union, USA Rice Federation, National Sorghum Producers,
National Barley Growers, Pacific Egg and Poultry Association, National Council of
Farmer Cooperatives, Renewable Fuels Association, Agricultural Retailers Association,
Agribusiness Association of Iowa, California Grain and Feed Association, Grain and
Feed Association of Illinois, Indiana Grain and Feed Association, Iowa Soybean Associa-
tion, Kansas Grain and Feed Association, Michigan Agribusiness Association, Michigan
Bean Shippers, Minnesota Grain and Feed Association, Missouri Ag Industries Council,
Nebraska Grain and Feed Association, North Dakota Grain Dealers Association,
Oklahoma Grain and Feed Association, Ohio Agribusiness Association,
Texas Grain and Feed Association, Wisconsin Agri-Service Association,
Colorado Wheat Administrative Committee, Idaho Wheat Commission,
Idaho Barley Commission, Montana Wheat and Barley Commission,
Oklahoma Wheat Commission, South Dakota Wheat Commission,
Texas Wheat Producers Board, Washington Wheat Commission

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037
(202) 775-5560

Attorney for
National Grain and Feed Association, et al.

Date: October 24, 2006

217923



ENTERED
Office of Public Hearing
Public Record

TABLE OF CONTENTS

		<u>Page</u>
I.	<u>INTRODUCTION</u>	2
II.	<u>USE OF RAIL TRANSPORTATION BY THE AGRICULTURAL COMMUNITY</u>	4
A.	<u>U.S. Agriculture Consists of Many Points of Production Delivering Raw and Processed Products to Many Points of Consumption</u>	4
B.	<u>The Vast Majority of Rail-Served Facilities in Agriculture are Served by a Single Railroad</u>	5
C.	<u>Agriculture Has a High Dependence on Branch And Light Density Lines</u>	5
D.	<u>Elevator to Elevator Transshipment Does Not Provide a Realistic Competitive Alternative</u>	6
E.	<u>Location of Agricultural Facilities Contributes to the Captivity Problem in the Agricultural Sector</u>	6
F.	<u>Who Pays the Rail Freight Bill for U.S. Agriculture?</u>	8
III.	<u>SHIPPING AND RECEIVING CHARACTERISTICS OF GRAIN FACILITIES</u>	9
IV.	<u>ARGUMENT</u>	13
A.	<u>Preface</u>	13
B.	<u>Shortcomings of the Proposed Rules</u>	16
C.	<u>The Proposed Eligibility Standards Are Legally Deficient Because They Will Place Both Forms of "Simplified" Rate Relief Beyond the Reach of Most Agricultural Shipments</u>	19
i.	<u>Table 2 is Unreliable</u>	25

	<u>Page</u>
ii. <u>The Use of Presumptions Does Not Excuse the Rules' Shortcomings</u>	26
iii. <u>There Is No Excuse for the Aggregation Rules</u>	27
D. <u>The Proposed Rules Are Not Expedited</u>	28
E. <u>The Proposed Rules Also Have the Practical Effect of Discouraging Use of the Simplified Procedures Intended by Congress Because They Do Not Pass a Cost-Benefit Analysis</u>	28
i. <u>3-B Example: 3-B Method of Rate Challenge Unlikely to be Useful for Agriculture</u>	29
ii. <u>SSAC Example: SSAC Case Unlikely to be Useful for Agricultural Shippers</u>	31
iii. <u>The "Simplified Procedures Proposed Do Not Provide Cost-Effective Relief</u>	34
V. <u>BRIEF COMMENTS ON SUBSTANTIVE FAILINGS OF THE PROPOSED RULES</u>	37
VI. <u>CONCLUSION</u>	39

Appendix A

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 646 (SUB-NO. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

Opening Comments of
National Grain and Feed Association, National Oilseed Processors Association,
Corn Refiners Association, North American Millers Association, National
Association of Wheat Growers, American Farm Bureau Federation,
American Soybean Association, National Corn Growers Association,
National Farmers Union, USA Rice Federation, National Sorghum Producers,
National Barley Growers, Pacific Egg and Poultry Association, National Council of
Farmer Cooperatives, Renewable Fuels Association, Agricultural Retailers Association,
Agribusiness Association of Iowa, California Grain and Feed Association, Grain and
Feed Association of Illinois, Indiana Grain and Feed Association, Iowa Soybean Associa-
tion, Kansas Grain and Feed Association, Michigan Agribusiness Association, Michigan
Bean Shippers, Minnesota Grain and Feed Association, Missouri Ag Industries Council,
Nebraska Grain and Feed Association, North Dakota Grain Dealers Association,
Oklahoma Grain and Feed Association, Ohio Agribusiness Association,
Texas Grain and Feed Association, Wisconsin Agri-Service Association,
Colorado Wheat Administrative Committee, Idaho Wheat Commission,
Idaho Barley Commission, Montana Wheat and Barley Commission,
Oklahoma Wheat Commission, South Dakota Wheat Commission,
Texas Wheat Producers Board, Washington Wheat Commission

I. INTRODUCTION

These Opening Comments are submitted on behalf National Grain and Feed As-
sociation and 39 other organizations representing various facets of the agricultural pro-
duction and processing community ("Agricultural Commenters"), as described more fully
in Appendix A.¹

¹ Some of the organizations participating in these Opening Comments also are participants in Joint
Written Comments being submitted on behalf of a diverse groups of organizations (American Chemistry

The Opening Comments are intended to assess the rules proposed by the Board in its Decision of July 28, 2006 in this proceeding (“Decision”) as those rules are viewed by the Agricultural Commenters. Rail service has always been essential to the marketing and successful production of agricultural commodities and products. Rail rates directly impact the entire grain industry² and are of increasing concern especially because of double-digit rate increases that have been experienced recently. Increased rail rates have their impact on all segments of the agricultural community, from farmer to grain elevator to grain processor and to the purchasers of their products.

The Agricultural Commenters recognize that economically healthy freight railroads are in the interest of all who require their services. But the need for railroads to earn adequate revenues should not be viewed in a vacuum or elevated above the right of shippers to effective regulatory relief when charged unreasonably high rates.

The Board has proposed that its rules be amended to now provide three methods for challenging rail rates: retention of the existing method for complaints using stand-alone costing (“SAC”); a less than full-SAC method (“SSAC”) with many, but not all, of the complexities and costs of a SAC case; and a three-benchmark method (“3-B”) for use in a limited number of instances, as explained below in more detail. Although the Board is to be commended for examining the issue of rate relief for smaller shipments, the Agricultural Commenters are greatly disappointed that the proposed rules do not appear to offer the “simplified and expedited” procedures commanded by Congress and do not provide realistic access to a process to challenge unreasonably high rail rates for shippers

Council, et al.) that represent shippers of a wide range of commodities. This pleading is intended to stress issues deemed of special significance to the Agricultural Commenters.

² Unless otherwise indicated in context, the terms “grain” and “grain industry” when used herein refer to unprocessed grains as well as grain products.

such as those in the agricultural community, unable to employ the SAC methodologies designed by the Board for rate complaints by coal and similar high volume shippers.

II. USE OF RAIL TRANSPORTATION BY THE AGRICULTURAL COMMUNITY

Virtually all agricultural commodities (other than cotton) are delivered by the farmer to the first point of sale by truck. While country elevators that act as seasonal storage points and shippers of crops to domestic and export markets tend to be the most common first point of sale, farmers also deliver grain directly to feed manufacturers, live-stock feeding operations, grain and oilseed processors and other grain and oilseed users.

On the basis of recent data, railroads carry about one-third of all commercial (off-farm) movements of whole grains and oilseeds. Barges account for roughly 20% of all grains and oilseed movements (mostly moving into export markets) and trucks account for the remainder of the commercial transportation market. While rail's modal share has declined over the last twenty-five years (in 1980 rail modal share was about 50% of total commercial movements), the rail-served markets today are generally for long-haul movements that have few if any competitive alternatives to rail.

A. U.S. Agriculture Consists of Many Points of Production Delivering Raw and Processed Products to Many Points of Consumption

Agricultural production, storage, shipping and processing locations form a network for delivery of grains, oilseeds and processed products from many points of origination to many destinations for further processing or consumption, with points of production and consumption frequently separated by distances of 500 to 1500 miles. This is the long-distance marketplace for agricultural commodities, for which there is no good substitute for reasonably reliable and competitively priced rail service. Yet, for many of these shipping and receiving points, volumes handled between any single origin-

destination pair are small in comparison to other rail-served industries with more concentrated volumes. While railroads are providing rate and other incentives for the agricultural marketplace to consolidate, there are practical reasons why agriculture will likely remain more decentralized than virtually all other rail-served industries, in particular on the production and grain origination side of the business.

B. The Vast Majority of Rail-Served Facilities in Agriculture
Are Served by a Single Railroad

With few exceptions, country elevator locations that still have rail service have access to only one carrier. While some of the large processing plants constructed recently have been built with a purpose of being able to obtain service from dual carriers, a majority of processors also are limited to a single railroad for receipt of whole grains and oilseeds and shipment of product. The same situation applies to other domestic receiving points for grain products. The important point is that, regardless of the size of the facility, for long-haul movements there generally is a dearth of competition available to the shipper or receiver, and if the carrier fails to offer reasonable pricing, an absence of rate relief will result in exorbitant costs paid by shippers and farmers or the serving railroad may in fact shut off the business it no longer wants by its refusal to provide reasonable economic access to available markets, using rate increases as a way to avoid meeting its common carrier service obligation.

C. Agriculture Has a High Dependence on Branch and
Light Density Lines

Agricultural shippers have always been dependent on branch or secondary line service because those so often are the types of lines serving rural areas. As discussed be-

low, this characteristic of rail service to the agricultural community places agricultural facilities at a disadvantage under recent Board decisions if rail rate relief is necessary.

D. Elevator to Elevator Transshipment Does Not Provide
a Realistic Competitive Alternative

Obtaining reasonable regulatory relief on rates is extremely important for agriculture in particular, because despite frequent arguments to the contrary, elevator-to-elevator truck transshipments of grain to reach competitively-priced service normally is not a viable economic alternative. For example, if two elevators are located within 100 miles of each other on different railroads, and one carrier is quoting competitive market rates in an effort to attract business, and the other carrier maintains substantially higher rates, the cost of loading out of one elevator, and trucking to the other elevator for shipment is virtually always prohibitive because of: 1) labor costs, 2) the cost of grain elevation at the shipping point, 3) cost of grain handling and receipt at the destination elevator, and 4) the truck transportation between the two facilities. Such costs could easily be in the range of 20-30 cents per bushel or more (representing as much as 10% of the total value of the commodity), meaning that the uncompetitive carrier would need to have rates far in excess of the competition to lose grain volume, on the basis of "uncompetitive" rates.

E. Location of Agricultural Facilities Contributes to the Captivity
Problem in the Agricultural Sector

Country elevators and other first points of sale for producers are necessarily tied to the areas of grain and oilseed production in the U.S. To the extent such facilities confront uneconomic rates, moving the farm or the plant is not an option. But shifting locations, even for larger processing plants in response to inadequate service or uncompetitive rail rates, is generally not a realistic proposition either. For instance, in the case of

soybean processing plants, generally those facilities have been located in areas of high crop production, with farmer and elevator truck deliveries being an important part of incoming volume, but usually require rail-received soybeans to fully employ the plant's capacity. On the other hand, customers of soybean processing plants tend to be located away from production points in markets such as feeding areas (high plains area for cattle feeding, and East and Western U.S. for poultry, hog and dairy operations) or near population centers where soybean oil is typically delivered, in all cases requiring heavy reliance on rail service. Feeding operations in many cases also have been located near population centers for efficient movement of meat and poultry in refrigerated units to major consumption points.

This system of delivery for grains, oilseeds, soy products and meat/poultry is unlikely to change in a systematic way because of the overall economics of the business and the pragmatic management of businesses at or near full capacity. What is more likely is that individual soy processing plants will remain at the mercy of a single carrier to maintain economic access into this system of food processing and delivery to consumers. While the wet corn milling industry (producing corn syrups and sweeteners) and the flour milling industry have plants that are located near both grain production points as well as locations near population centers (receiving grain by rail and often trucking or railing product to points of consumption or further processing), the fundamental economics of those businesses precludes any realistic possibility that a plant or mill could operate efficiently without reliance on rail service or relocate itself to obtain competitive and reliable rail service.

F. Who Pays the Rail Freight Bill for U.S. Agriculture?

U.S. farm commodities, because they are often produced in relatively low-populated rural areas, must utilize transportation services to reach points of consumption and further processing. Because crop prices at point of production are generally set by subtracting from destination value the costs of transportation from origin (plus the origin elevator's markup), a very high proportion of the costs of transporting unprocessed field grains ultimately is paid by the U.S. farmer in the form of the cash prices that are offered in local markets, although elevators often are forced to absorb rail rate increases when rates are raised after grain is bought from the producer. The fact that many final or near-final delivery points for commodities have alternative supply sources means that higher freight rates must be absorbed mostly by the origin as such costs cannot be successfully passed forward through the marketing chain. Over time, elevators handling and storing grain, and processors that are refining raw agricultural products for utilization in food production activities, must make a margin that pays for services rendered and provides an adequate incentive for re-investment to at least maintain plant and equipment. Beyond those marketing and processing margins, the transportation freight bill, whether rail, truck or barge, becomes part of the price mechanism that competitively bids for producer grains at origin. One consequence of these conditions is that railroad rate increases often have the effect of transferring wealth from farmer to railroad. To the extent the marketplace fails to provide for reasonably competitive rates from agricultural origins to destinations, the sub-sector within U.S. agriculture that is subject to the most economic cost from excessive charges is U.S. production agriculture.

III. SHIPPING AND RECEIVING CHARACTERISTICS OF GRAIN FACILITIES

It is highly relevant to this proceeding and the specific rules proposed by the Board to understand the nature of shipments from and to typical grain facilities. In a word, they are extremely diversified shipping patterns, with incoming shipments to a receiving facility that originate in small volumes from an array of origins and outbound shipments, especially of processed products, reaching an even greater multitude of destinations in relatively small quantities.

In the tables that immediately follow, we present actual shipping volumes from several actual agricultural facilities. As demonstrated by the examples, shipping facilities have numerous separate rates that are potentially challengeable under either a 3-B or a SSAC complaint. However, these shipping volumes for each commodity from or to specified points can be highly variable absolutely and across years. This variability is caused by changes in cropping patterns, shifts in livestock production, weather patterns that create "good weather" surpluses or "poor weather" deficits for a region for any given year, and fluctuations in market demand for a particular commodity. If an agricultural shipper found a particular commodity being shipped between two points that for a given year appeared to fit within the narrow range of an optimal challenge under the proposed 3-B Method, there is substantial uncertainty whether a similar shipment volume would be forthcoming in future years. Thus, the shipper or receiver that might bring a rate case based upon historical shipments, even if successful, might find that the market would not support such movements in the future, and winning the case may offer little monetary value that could be realized if rate litigation is protracted beyond a point of market utility and not genuinely "expedited."

Table 1-A

Example Shipping Facility

Commodity	Number of Destina- tions Shipped to From this Origin	Estimated Average Annual Carloads per Destination	Number of Rates or Rte Groups per Des- tination
Commodity 1	2	380	2
Commodity 2	7	1225	8
Commodity 3	4	612	6
Commodity 4	9	1636	8

Table 1-B

Example Shipping Facility

Commodity	Number of Destina- tions Shipped To/From This Origin	Estimated Average Annual Carloads Per Destination	Number of Rates or Rate Groups Per Destination
Commodity 1	37	65	4
Commodity 2	100	60	4
Commodity 3	63	12	4

Table 1-C

Example Shipping Facility

Commodity	Number of Destinations Shipped To/From This Origin	Estimated Average Annual Carloads Per Destination	Number of Rates or Rate Groups Per Destination
Commodity 1	42	2 to 1157 Av = 118	1 or 2

Table 1-D

Example Shipping Facility

Commodity	Number of Destinations Shipped To/From This Destination	Estimate Average Annual Carloads Per Destination	Number of Rates or Rate Groups Per Destination
Commodity 1	49	1-1301	1
Commodity 2	159	1-1436	1-4

Not only does a typical grain origin ship to numerous destinations, but the shipments it makes are not susceptible of aggregation into a full SAC case. A facility shipping wheat ships east and west to export positions and domestic mills in different size units depending on destination and carrier rate structure. Few of these shipments could realistically be combined into a single case, yet the proposed rules assume they would or must be. The same is true of virtually all agricultural commodities and products, which, for the most part, are shipped from the middle region of the United States to destinations east, west, and south. While it might be possible to aggregate into a single SAC com-

plaint shipments to two or three destinations that might be on exactly the same lines of railroad in close proximity of each other, the economics of SAC cases disallow widespread aggregation of origin-destination pairs. Thus, a full SAC presentation is almost certain to be "too costly, given the value of the case" for virtually any of the typical origin-destination volumes shipped from an agricultural facility.

Tables 1-A through 1-D reflect data provided by members of one or more Agricultural Commenters and are offered as typical of outbound grain industry shipments. Inbound shipments would have similar characteristics. By way of explanation, the column entitled "Number of Rates or Rate Groups per Destination" refers to the fact that it is commonplace for carriers to offer a variety of different rates, not all of which necessarily would be included in the same, if any, maximum rate complaint. For example, between any given origin-destination pair, there may be rates applicable to single cars, multiple-car units (e.g., 26 cars), and unit trains of 75 to 110 cars, rates for large and small cars, as well as rates applicable in private equipment or railroad cars. The result is hundreds of separate potential small rate complaints from any given point.

By showing traffic volumes per destination, Tables 1-A through 1-D actually portray a simpler array of rate case possibilities than actually may exist. Further, we call attention to the fact that there generally are several commodities shipped from the origin to a given destination and each may be subject to the last column depicting rate groups per origin. As a result, each origin-destination pair lends itself to the possibility of one or more rate complaints involving volumes smaller than those shown for each destination.

IV. ARGUMENT

A. Preface

The Board postures its Decision as one that “should help provide shippers meaningful access to regulatory relief” from excessively high rail rates. Decision, slip op. at 37. Far from providing “meaningful access to regulatory relief,” at least for shippers of relatively small volumes of freight moving from or to widely dispersed origins or destinations as is the case with most agricultural shipments, the Decision actually deprives shippers of meaningful access to regulatory relief and places them in a worse position than at present, if that is even imaginable.

It has been 26 years since enactment of the Staggers Act which, although designed to give railroads more rate-setting freedom than previously, nevertheless prohibited unreasonably high rail rates. During the first 16 of those years, the Interstate Commerce Commission (“ICC”), the Board’s predecessor, failed to establish a regulatory framework to govern challenges of rail rate levels except for challenges involving high density shipments between repetitive origins and destinations, such as coal shipments between coal mines and electric generating facilities. See *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2nd 520 (1985) (“*Guidelines*”), aff’d sub. nom., *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987). The principle adopted for “coal rate” challenges was Constrained Market Pricing (“CMP”). SAC, a highly complex and costly analysis requiring the complaining shipper to construct and demonstrate on paper a hypothetical rail competitor for the traffic at issue, was the methodology offered to implement CMP.

Its patience apparently exhausted with the ICC's inability to devise guidelines for rate complaints involving smaller shipments, Congress in 1995 directed the newly-created Board 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 Board was instructed to do so by completing the then-pending proceeding in Ex Parte No. 347 (Sub-No. 2) within one year. Consequently, on December 27, 1996, the Board adopted allegedly "simplified and expedited" guidelines in *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) (*Simplified Guidelines*). See *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("ICCTA"). The same legislation added a provision to the rail transportation policy directing the Board to provide "expeditious handling and resolution of all proceedings" before it, 49 U.S.C. 10101(15), and to provide for expeditious handling of rail rate challenges in particular, 49 U.S.C. 10704(d).

As the Decision acknowledges, in the more than 10 years since adoption of the *Simplified Guidelines*, no case challenging the reasonableness of a railroad's rates has been decided under those provisions. Shippers were leery about using the procedures in *Simplified Guidelines* not merely because they lacked a reasonable degree of outcome predictability, as the Board acknowledges, but, to the extent foreseeable from the rules themselves, appeared destined to produce a higher maximum permissible rate than would result from application of the SAC procedures adopted in *Coal Rate Guidelines*, creating the impression that small volume shippers could expect an inferior level of rate relief to larger volume shippers.

Although the Decision claims that the proposed “simplified” standards are designed to overcome the perceived *Simplified Guidelines* shortcomings, that claim appears to be unrealistic, particularly insofar as agricultural shipments are concerned.

As indicated above, the grain industry – shippers and receivers of whole grains as well as dry and liquid grain products – is characterized by diverse traffic patterns that are the antithesis of the high density, single origin/destination movement pattern for which the SAC rate-setting methodology was designed in *Guidelines*. With shipments between single origin/destination pairs normally fewer than 500 cars per year, seldom exceeding 1,000 cars per year, and virtually never exceeding 5,000 cars annually, grain facilities simply do not generate the tonnage necessary to meet the high traffic densities essential for a successful full SAC presentation, or necessary to justify a multi-million dollar investment in a full SAC rate complaint. Further, many grain facilities are located on low density rural branch lines or secondary lines and are likely to fail the Board’s internal cross-subsidy tests, placing SAC relief beyond their reach.³

Contrasted with the infeasibility of rate relief under the SAC guidelines for virtually any and all grain shipments is the growing need for such relief brought about by sharp hikes in railroad grain rates, particularly recently. Grain industry shippers report a frequent and increasing number of double digit rate increases during the past two years. A recent government study shows that there have been railroad rate reductions for coal, miscellaneous mixed shipments, and motor vehicles since 1985, compared with *increased*

³ See *PPL Montana, LLC v. Burlington N. & S. F. Ry.*, STB Docket No. 42054 (August 20, 2002), *aff’d*, sub. nom. *PPL Montana, LLC v. STB*, 437 F.3rd 1240 (D.C. Cir. 2006); *Otter Tail Power Co. v. BNSF Ry.*, STB Docket No. 42058 (January 27, 2006).

grain rates.⁴ The greatest increases in the percentage of rail tonnage traveling at rates over 300 percent of revenue/variable costs are occurring in rural areas typified by a high incidence of grain originations.⁵

Grain shippers have been among the most vocal in bringing to the Board's attention the absence of effective remedies for rates perceived by them as unreasonably high. It is extremely disappointing that the proposed rules fail to bring about the Congressionally mandated "simplified and expeditious" access to relief from unreasonably high rail rates that was contemplated by Congress for shipments such as those generated by the grain industry, where a "full stand-alone cost presentation" is inevitably "too costly."

B. Shortcomings of the Proposed Rules

The shortcomings of the proposed rules fall mainly into two categories: (1) legal and practical limitations on eligibility, and (2) limitations on relief and outcomes. This argument will focus mainly on eligibility limitations as relevant to the grain industry to demonstrate that, as proposed by the Board, the eligibility rules fail to provide access for that industry to a "simplified" alternative to a full SAC presentation, as required by the ICCTA. NGFA and other parties to this pleading are participants in Joint Written Comments, to which are appended the comments of Thomas D. Crowley of L. E. Peabody & Associates ("Crowley Comments") and the comments of G. W. Fauth, III of G. W. Fauth & Associates ("Fauth Comments"). The Joint Written Comments address eligibility issues and also illuminate a number of reasons why the measure of substantive relief possi-

⁴ Freight Railroads, United States Government Accountability Office, Report No. GAO-07-94 (October 2006), Figure 4.

⁵ *Ibid*, Figure 18. See, also, STB Ex Parte No. 665, *Rail Transportation of Grain* (Notice of October 11, 2006) ("one category of rates examined by GAO – grain rates – diverged from the industry trends [of declining rail rates]. According to the GAO report, the amount of grain traffic with comparatively high markups over variable costs increased notably between 1985 and 2004").

ble under the proposed rules in non-SAC cases is impermissibly. The reasons this pleading focuses principally on eligibility issues are to avoid unnecessary duplication of the relief discussion in the Joint Written Comments and, more to the point, because it is highly unlikely that the eligibility standards proposed by the Board will allow grain industry members to pursue many, if any, complaints for rate relief.

One preliminary observation, however, is relevant to both the eligibility and outcome issues. The Decision adopts as perhaps its central premise the assumption that the “simplified” relief mandated by Section 10701(d)(3) must be a permutation of “CMP, with its SAC constraints,” to reflect the Board’s “preferred and the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition.” Decision, slip op. at 9. However, the ICCTA does not require the use of CMP or SAC in the first instance and does not require that “simplified” procedures be cast only in the image of SAC principles. CMP and SAC are devices chosen by the ICC to implement its maximum rate jurisdiction in proceedings involving high volume shipments (e.g., coal) between a repetitive origin and destination, and not for traffic which has “starburst” characteristics. When an attempt was made to apply CMP and SAC principles to widely diversified grain shipments, the effort failed for lack of traffic density adequate to support a sufficiently efficient hypothetical competitor.⁶ CMP and its SAC component have been recognized judicially as the Board’s *permissible* choice of a rate reasonableness test in the circumstances of specific rate complaints.⁷ But it is an

⁶ *McCarty Farms, Inc. v. Burlington Northern Inc.*, 2 S.T.B. 460 (1997); 3 S.T.B. 102 (1998).

⁷ *Burlington Northern v. ICC*, 985 F.2d 589 (D.C. Cir. 1993).

open question whether SAC is an appropriate merits consideration in any form under the “simplified” procedures required by the ICCTA.⁸

It has been widely estimated that meaningful rate relief under the SAC guidelines now is realistically available to fewer than 50 shippers in the entire United States, largely as a result of Board decisions over the past two or so years that have, as a practical matter, nullified access to effective rate relief using SAC standards from or to branch line points, points on or reached via light density lines, or arguably points on mainlines in the east.⁹ The grain industry parties to this pleading are constrained to ask why it is that a methodology for contesting rail rates that is potentially effective for only a handful of the nation’s rail shippers should be held out by the Board as the model to guide maximum rate remedies available to the thousands of other shippers who are entitled to pursue rate relief under standards other than a full SAC presentation, particularly when there no longer is widespread surplus rail capacity and the statute permits the Board to devise *any* “simplified methodology” for use when full SAC is not appropriate.

In its Decision, the Board lectures that “we must remain mindful that ‘the best should not be the enemy of the good’ and that we should not allow the ‘infeasible perfect to oust the feasible good.’” Slip op. at 28. It seems, however, that the Board is practicing precisely what it admonishes others not to practice; namely, offering to the vast majority of “captive” rail shippers a minimally attainable remedy due, we believe, to the Board’s apparent failure to make a “good” remedy available where the “best” remedy is unsuit-

⁸ *Association of American Railroads v. STB*, 146 F.3d 942, 947 (D.C. Cir., 1998) (“the Board’s explanation that railroads may not convert small rate cases into SAC cases when the shipper has demonstrated the infeasibility of the SAC persuades us the issue is not yet fit for review.”)

⁹ See *PPL Montana, LLC and Otter Tail Power, supra*; and *Duke Energy Corp. v. CSX Transportation, Inc.*, STB No. 42070 (Feb. 4, 2004). Effective rate relief under the full SAC constraint would appear to be available only between origins and destinations that are both on very high density routes and where the hypothetical SAC railroad could be constructed relatively inexpensively, as over terrain in the west.

able. As we have endeavored to explain, full SAC presentations are the “infeasible perfect” for the vast majority of grain shipments. Small volume shipments deserve a “feasibl[y] good” method of rate relief that the proposed rules fail to provide.

C. The Proposed Eligibility Standards Are Legally Deficient Because They
Will Place Both Forms of “Simplified” Rate Relief Beyond
the Reach of Most Agricultural Shipments

The Decision establishes three categories under which requests for maximum rate relief can fall: a full SAC presentation (arising under *Guidelines*), a simplified SAC presentation (SSAC) and a presentation involving the use of three sets of “benchmark” data (the 3-B test). The three categories are to be separated by presumptive maximum value of case (“MVC”) calculations:

MVC, as understood by the Agricultural Commenters, is essentially the present day value of the maximum possible rate reduction achievable in the case, based on the assumption that the assailed rates would in all cases be reduced to 180 percent of variable costs and that rate relief would be available for a total of five years. Where the MVC of a complaint would be greater than \$3.5 million dollars, the shipper would have no alternative but to employ a full SAC presentation because the Board has concluded that a full SAC case can be maintained by a shipper for that amount. If the MVC is between \$200,000 and \$3.5 million, the shipper would have the option of using full SAC or SSAC because the Board has concluded that an SSAC case can be brought for less than \$200,000. And, if the MVC is below \$200,000, the shipper can use the 3-B procedures.

The Joint Written Comments set out a number of reasons why the eligibility boundaries are highly unrealistic, including (1) a full SAC case involving anything more than a minimal traffic movement cannot in the usual situation be maintained for just \$3.5

million, (2) \$200,000 is a gross understatement of the cost of maintaining a SSAC case, and (3) there is virtually a zero possibility that any shipper will succeed in bringing about a reduction of rates to 180 percent of variable cost in any type of rate proceeding.¹⁰ The Board's unrealistic eligibility premises have the effect of narrowing and in many cases eliminating the availability of remedies other than full SAC for reasons explained later, including the fact that shippers will not regard the MVC boundaries as reliable prognosticators of actual outcomes.

Even accepting, *arguendo*, the Decision's MVC premises, the Decision fails to provide meaningful access to regulatory relief where a full SAC presentation is too costly. To assess the full impact of the proposed rules requires not just an analysis of the MVC, but how it is to be applied under the Board's proposals. A "case" for MVC purposes is defined in the Decision as one having a maximum life of five years, including the maximum two-year period of reparations if reparations are sought. Therefore, the maximum annual relief available from a successful SSAC complaint is \$700,000, and the maximum annual relief available from a 3-B case is \$40,000.

There are numerous ways to illustrate the constraints these limits place on access to "simplified" relief for those shipments entitled to such relief under the statute. One is to assess the proposed rules on a practical cost-benefit basis, as we do shortly. Another is just to look at how quickly eligibility access to rate relief is exhausted statistically by the rules themselves. The following table shows by way of example the maximum number of carloads per year for which SSAC and 3-B relief would be available from or to a sin-

¹⁰ Indeed, it is a statistical impossibility for 3-B case to produce an outcome equal to 180 percent of variable costs unless the R/VC comp. component of the methodology (against which the other two components are multiplied), is itself a rate equal to 180 percent of variable cost at the highest possible confidence level. See Decision, slip op. at 25-27.

gle facility under the Board's MVC eligibility standards, assuming various levels of per car rate reductions.

TABLE 2

Exhaustion of MVC Limits

	<u>Cars Per Year</u>
SSAC Reduction \$500/car	1,400
SSAC Reduction \$1,000/car	700
SSAC Reduction \$1,500/car	475
3-B Reduction \$500/car	80
3-B Reduction \$1,000/car	40
3-B Reduction \$1,500/car	27

As Table 2 demonstrates, if the MVC method of assessing the value of a rate complaint yields a rate reduction of \$500 per car, the shipper's annual eligibility for SSAC relief will be exhausted after 1,400 cars are shipped. But if the case yields a rate reduction of \$1,000 per car, only 700 cars per year will exhaust the shipper's access to the SAC methodology, and if relief amounts to \$1,500 per car, fewer than 475 cars yearly will be the limit. Even more drastic is the scenario under the 3-B standard, where eligibility for relief will be exhausted with a \$500 rate reduction for 80 cars, by 40 carloads if the rate reduction is \$1,000 per car, and by 27 carloads if the reduction is \$1,500 per car.

Under the assumptions outlined above, most grain facilities would exhaust their access to 3-B relief by filing a complaint covering just a small part of their traffic and would have no legal or practical way of obtaining redress for the remainder.

These data are even more daunting when another of the proposed eligibility rules is factored in. The Decision asserts that it is necessary to employ a mechanism to prevent shippers from failing to aggregate in a single complaint all of their requests for rate relief

that might have been brought against the same railroad. The Decision proposes to adopt as a deterrent against such practices a rule barring the shipper from seeking recovery of more than the MVC limit against the same defendant from a single origin or to a single destination, for two years following the filing of a complaint. For example, if a complaint is successfully prosecuted under the 3-B standard and results in a rate reduction totaling \$100,000, the shipper facility filing that complaint would be barred from recovering more than the balance of the \$200,000 MVC amount for a two-year period if the same railroad would be a defendant in the original and any subsequent cases. Because no complaint is likely to be brought where more than one railroad serves a facility, successive complaints inevitably will involve the same defendant so that the aggregation rule is likely to apply in most potential complaint situations.

A single shipper facility therefore may not recover more than the MVC divided by five insofar as any origin-destination movement is concerned, but also must as a practical matter aggregate relief under the applicable MVC boundary of either \$200,000 or \$3.5 million for all shipments from a single origin (or to a single destination facility) in the two years following the filing of a rate complaint under SSAC or 3-B guidelines.

The effect of these policies will be to drastically and unlawfully limit the availability of "simplified" rate relief for virtually all grain facilities. As shown above, a typical grain facility ships to a multitude of destinations, although not always shipping the same commodity or using but a single rate or rate structure. Yet all these shipments would have to be aggregated for purposes of meeting the proposed eligibility rules since they involve a single origin and a single defendant.¹¹ Where a facility will exhaust its

¹¹ The proposed rules do not expressly address the situation where a multiplicity of complaints would be required to be brought against a common defendant because it is the only carrier serving the facil-

MVC, if not in total then under the two-year aggregation rule with, for example, rate relief for just 100 cars, the aggregation rule will bar that facility from seeking relief as to the remainder of its shipments.

This result is not consistent with the statute and is unlawful. Under the ICCTA, if a railroad has market dominance over a shipment, then the shipment must qualify to seek rate relief under either the full SAC or the “simplified” alternative. The proposed rules create a category of shipments that can do neither because, on the one hand, a full SAC case is clearly “too costly” on a value basis, yet relief would be exhausted and unavailable under the SSAC and 3-B tests.

The proposed eligibility and aggregation rules violate the statute in other ways. The proposed rules fail to make a “simplified” methodology available where “a full stand-alone presentation is too costly, given the value of the case.” The measure of that standard intended by the statute is a comparison of “a simplified” presentation with “a full” SAC presentation. If a shipper were to elect to challenge a railroad rate for the movement of corn from point A to point B and the defendant railroad also had rates for the movement of soybeans and wheat from point A to point B, the statute requires the Board to determine whether it would be “too costly, given the value of the case” *actually brought* for the shipper to utilize a full SAC presentation (i.e., for the corn rates only). But the Board has, by applying aggregation requirements, instead chosen to require the shipper to evaluate the hypothetical corn rate complaint in terms of other complaints that the shipper might not choose to bring or which might entail different full SAC outcomes

ity, but where various other carriers participate in some of the movements to some destinations. As written, the proposed rules appear to require aggregation whenever there is a single defendant, regardless of whether other defendants may participate in some challenged movements. Because of carrier pricing policies, in most instances where a facility is served by a single railroad the majority of traffic to or from that facility will in any event be single-line to that railroad.

if brought. The Board's approach is an improper failure to compare "a" singular simplified case with "a" singular full SAC case.

Likewise, and again contrary to the statute, the 3-B eligibility test does not measure the proposed 3-B case against "a full" SAC case, but instead against an SSAC case. The 3-B methodology is available where the value of the 3-B case is less than the \$200,000 MVC threshold, which is the floor for an SSAC case and not, as the statute commands, the cost/value line for a "full" SAC case.

Under the Board's approach, a potential 3-B case could have an MVC of \$200,001, and thus be ineligible for the 3-B procedures. Yet, even accepting, for the sake of argument, the Board's proposed eligibility boundaries, it would be futile to bring that case under the SSAC procedures because the case would yield literally nothing in net rate relief at an SSAC cost of just \$200,000. The shipper would thus end up with no effective remedy. If, as we believe has been demonstrated clearly in the Joint Written Comments and in the Crowley Comments and Fauth Comments, the Board's eligibility boundaries are grossly understated, even a wider swath of potential 3-B cases would be futile to bring.

The only acceptable statutory measure of "simplified" procedure eligibility is the cost of bringing a "full" SAC case for the traffic at issue, and it is improper for the Board to disfavor any "simplified" process where a *full* SAC presentation is "too costly given the value of the case." By imposing a middle level of allegedly "simplified" relief, the Board is making it overly difficult, and in many cases impossible, to meet that test.

i. Table 2 is Unreliable.

The Decision itself offers no reliable basis on which to conclude that the proposed rules will in fact make “simplified” rate relief accessible to the great majority of shippers that cannot use full SAC to resolve rate issues. Table 2 of the Decision, entitled “Eligibility Estimate,” is offered by the Board to suggest, apparently, that significant percentages of regulated traffic would be eligible for rate relief under the SSAC or 3-B approaches. For example, Table 2 suggests that 63 percent of farm product shipments with rates greater than 180 percent of variable costs would qualify for rate relief under SSAC standards and 22 percent under 3-B standards.

But Table 2 is highly suspect for at least two reasons. The first is that it appears to rest on a questionable use of traffic data. One cost consultant attempted to replicate the Board’s disclosed procedures in developing Table 2 from the waybill sample and came up with irreconcilable numbers. See Crowley Comments. Another consultant concluded that the Board had omitted significant traffic volumes. See Fauth Comments.

Perhaps more significantly, Table 2 is based on the Board’s assumption that each regulated shipment between an origin-destination pair is independent of other shipments from the same origin or to the same destination, and ignores the Board’s aggregation rules, which actually will bar complaints for many specific movements and significantly reduce the extent to which “simplified” remedies are available. Table 2 utterly fails to support the conclusion that the proposed “simplified” remedies will provide access to rate relief for smaller shipments.

Apparently, not even the Board truly expects the 3-B methodology to be widely available to shippers. In its explanation of how the 3-B methodology would be applied,

and possibly in anticipation of railroad claims that 3-B cases will too easily lead to rate relief, the Board comments that “importantly, only a small percentage of a carrier’s traffic would likely be eligible to use the Three-Benchmark approach under our proposed eligibility criteria.” Decision, slip op. at 28. It is difficult to see how shippers can have any serious expectation of access to effective rate relief when the Board is busy assuring railroads that the eligibility standards have been designed to confine the most simplified approach – 3-B cases – to “only a small percentage of a carrier’s traffic.” That, the Agricultural Commenters respectfully submit, is not the correct interpretation of the statute, which requires “simplified” relief to be made available in any case where full SAC is too costly, even if that means widespread eligibility for “simplified” procedures.

ii. The Use of Presumptions Does Not Excuse the Rules’ Shortcomings.

The Agricultural Commenters are fully aware that the eligibility standards in the Decision have been postured as presumptions only, and that an effort can be made to overcome the presumptive boundaries in a specific case. In this instance, however, use of the specific “presumptive” limitations proposed would be a disservice to shippers and inimical to the statutory goal of devising a “simplified” methodology. Because the 3-B eligibility limits are so completely unrealistic, attempting to overcome them will become the rule rather than the exception for grain and other shippers of small origin-destination volumes, adding complexity and cost to each case, not to mention additional uncertainty about whether the case can be maintained in the first instance under the “simplified” procedure that the shipper otherwise would select.

The Board’s ability to use presumptions is not unlimited. *Holland Livestock Ranch v. United States*, 655 F.2d 1002 (9th Cir. 1981). In this instance, the Board’s pre-

sumptive eligibility standards are so far from the mark that they cannot be said to represent a rational link between the actual cost of a proceeding before the Board and the presumptive cost attached to that proceeding by the Board. Where the Board presumes that a full SAC case can be maintained for \$3.5 million, the actual cost will be in excess of \$4 million. And, where the Board presumes that a SSAC case with an MVC of up to \$3.5 million can be maintained for only \$200,000, the actual litigation cost of such a case will be between \$1.5 and \$3 million. A 3-B case will cost at least as much to bring as a shipper can hope to recover. See Joint Written Comments.¹² If there are going to be presumptions, they must be more realistic.

iii. There Is No Excuse for the Aggregation Rules

The Board may believe that the aggregation rules are not as likely to pose an obstacle to the use of "simplified" procedures as we suggest because not all rates from or to a grain facility will necessarily be high enough to allow a rate challenge to be maintained. However, that is an insufficient answer if it is advanced. First, there is a large volume of traffic with rates in excess of the jurisdictional threshold. Second, a shipper should not have to undertake a revenue to variable cost analysis of all of its traffic in order to determine whether it can safely seek relief with respect to some of its traffic. Moreover, grain rates are rising more quickly than rates for other types of traffic, so that there is an increasing likelihood that a broader range of grain rates will be at levels justifying requests for regulatory relief. Further, if a shipper succeeds in obtaining a regulatory cap on some of its rates from a particular facility but is barred from seeking relief as to other rates

¹² The Board's expectation that an SSAC case can be maintained for no more than \$200,000 is based in part on the outdated and irrelevant estimates furnished previously by a railroad industry employee and outside expert, neither of whom had any disclosed experience in bringing rate case litigation against railroads.

from the same facility, the serving carrier will be in a position to raise rates on traffic immune from further complaints in order to recoup revenue suppressed by a successful rate complaint.

D. The Proposed Procedures Are Not Expedited

Another failing of the proposed rules for agricultural shippers is that they are not sufficiently expedited to keep pace with the needs of the grain industry for prompt rate relief, and in that respect fail the statutory mandate for “expedition” as well. Grain markets involve constantly changing transportation patterns for reasons described above. Reparations are not likely to have a great deal of meaning because agricultural shippers who have been at a rate disadvantage will be unlikely to have shipped at rates causing ongoing losses pending the outcome of multi-year litigation. Prospective relief may be helpful, but shipping volumes will not always be constant for a sufficiently long period to justify a large expenditure in a rate case. These considerations militate against use of the SSAC procedures with their 18-month timetable.

The 3-B timetable of nine months more closely approaches responsiveness to the needs of grain shippers for timely resolution of rate disputes but, as already discussed at length, the Board apparently does not intend for there to be widespread 3-B relief.

E. The Proposed Rules Also Have the Practical Effect of Discouraging Use of the Simplified Procedures Intended by Congress Because They Do Not Pass a Cost-Benefit Analysis

Another way to assess the propriety of the proposed rules is to look at how the MVC limits will be perceived from a cost-benefit viewpoint by a typical shipper forced to consider a rate complaint. Two examples of a cost-benefit analysis are provided below to demonstrate why the proposed rules are unlikely to be perceived as providing any realis-

tic rate relief for agricultural shippers and processors. One example is for “3-B” cases, and the second example provides a similar analysis for a SSAC case.

i. 3-B Example: 3-B Method of Rate Challenge Unlikely to be Useful for Agriculture

In evaluating the utility of the 3-B Method, an almost endless array of examples could be “tested” by a shipper to determine when and if this method might provide relief. The variables that enter into such decision making include: (1) cost to bring a case; (2) reasonably expected rate relief (in contrast to the MVC); (3) level of the rate to be challenged; (4) level of rate compared to 180% of variable cost; and (5) volume of traffic applicable to the rate. Rather than at this point offering endless combinations of these variables, we propose here to demonstrate that, even under the most optimal circumstances and most optimistic outlook for possible rate relief by the shipper, the 3-B Method will at the very best be viewed as accessible by a very narrow slice of the small shipment marketplace, if any at all.

Assumptions of the analysis:

(a) point to point rate to be challenged: \$4,000 per car (equal to 360% of variable cost)

(b) 180% of variable cost: \$2,000

(c) cost to bring a case: \$75,000

(d) probability of winning: 50% (based upon long-term record of shippers in SAC cases, even though more recent SAC cases had more negative results and there is no basis to assume even a 50% success rate for 3-B cases)

(e) Expected value of case: \$1,500 or \$1,000 rate reduction/car (2 alternatives)

(f) Maximum no. of cars per year: 20 (\$2,000 X 20 cars X 5 years)= \$200,000

This set of assumptions is believed to represent an “optimal” setting for a potential 3-B rate challenge because of the following: (1) it is unlikely, given the uncertain nature of the 3-B outcome (as explained in the Crowley and Fauth Comments) that any rate at or below 300% variable cost would likely be challenged because refunds or reductions may not be sizeable if markups are lower than 300%; (2) costs to bring the hypothetical case here are within or below the costs estimated to obtain mainly a technical cost analysis; (3) actual case costs are likely to be much higher, as shown in the Crowley and Fauth Comments so that this cost number is believed to be a highly conservative number; (4) expected value of the case (if the rail customer “wins”) is set at \$1,500 per car, which would effectively reduce the rate to 225% of variable cost (representing a 75% reduction in the spread between the rate and 180% of variable cost), or, alternatively, a \$1,000 reduction in the rate which would effectively reduce the rate to 270% of variable cost.

Presented in Table 3 below are the expected values of payoffs from litigating a 3-B rate case under the highly optimal assumptions outlined above. Even with an expected payoff of \$1,500 per car, a 3-B case does not become a realistic business consideration until annual cars shipped between two points reaches 14 cars per year, and given the \$200,000 MVC cap over 5 years, the number of cars shipped annually cannot exceed 20 cars. Thus, if the 3-B Method provides any rate relief at all for small volumes of shipments between two points, it likely does so for only a very narrow band of volume below the capped 5-year MVC value of \$200,000.

Table 3

**Benefit Cost Analysis for Shippers
Bringing a "3-B Method" Rate Case Before the STB**

Shipment Volume (Cars Per Year)	3	5	10	15	20
Expected Value of Payoff (\$1,500/car; 50% win probability)	-\$63,750	-\$56,250	-\$37,500	-\$18,750	\$0
Expected Value of Payoff (\$1,000/car; 50% win probability)	-\$67,500	-\$62,500	-\$50,000	-\$37,500	-\$25,000

It is unlikely that this "optimal" circumstance in which the 3-B Method might be used would ever in fact arise, or arise predictably, for small agriculture shipment volumes moving between two points.

ii. SSAC Example: SSAC Case Unlikely to be Useful for Agricultural Shippers

With an SSAC case, the stakes for the shipper are even higher than with a 3-B case. Cost experts (Crowley Comments and Fauth Comments) consulted by a group of shipper organizations estimate that the cost to bring a SSAC case is likely closer to \$2 million than to the \$200,000 estimated by the Board. Given the cap on the maximum value of a case, the SSAC process offers rate relief of no more than \$700,000 in a given year for a given destination or origin.

In this analysis of the potential benefits and costs of bringing an SSAC case that might be undertaken by a prospective complainant, we illustrate a similar approach to the methodology used to consider the practical value of bringing a case under the 3-B Method shown in the previous section. The only changes in the assumptions are: (1) the higher cost to bring a case, which we view solely for the sake of illustration as between \$500,000 and \$1,000,000 (which is much less than what our cost experts believe is achievable); and (2) the maximum number of cars to which the rate relief would apply, which in this case is 350 cars (\$2,000 per car difference between the rate and 180% of variable cost, divided into the \$700,000 annual cap on rate relief from or to each point).

Assumptions of the analysis:

(a) point to point rate to be challenged: \$4,000 per car (equal to 360% of var. cost)

(b) 180% of variable cost: \$2,000

(c) cost to bring a case: \$500,000 or \$1,000,000

(d) probability of winning: 50% (see 3-B example for explanation)

(e) expected value of case: \$1,500 or \$1,000 rate reduction per car

(f) maximum no. of cars per year: 350 (\$2,000 X 350 cars X 5 years) =

\$3,500,000

Table 4

Benefit-Cost Analysis for Shippers
Bringing a SSAC-method Rate Case before STB

Shipment Volume (Cars per Year)	50	100	150	200	250	300	350
Expected Value of Payoff Cost of Case: \$500,000 (\$1,500/car; 50% win probability)	-\$312,500	-\$125,000	\$62,500	\$250,000	\$437,500	\$625,000	\$812,500
Expected Value of Payoff Cost of Case: \$500,000 (\$1,000/car; 50% win probability)	-\$375,000	-\$250,000	-\$125,000	\$0	\$125,000	\$250,000	\$375,000
Expected Value of Payoff Cost of Case: \$1,000,000 (\$1,500/car; 50% win probability)	-\$812,500	-\$625,000	-\$437,500	-\$250,000	-\$62,500	\$125,000	\$312,500
Expected Value of Payoff Cost of Case: \$1,000,000 (\$1,000/car; 50% win probability)	-\$875,000	-\$750,000	-\$625,000	-\$500,000	-\$375,000	-\$250,000	-\$125,000
Expected Value of Payoff Cost of Case: \$750,000 (\$1,250/car; 50% win probability)	-\$593,750	-\$437,500	-\$281,250	-\$125,000	\$31,250	\$187,500	\$343,750

The various scenarios, based upon the assumptions indicated are listed in the first four rows of the table. Only in the case of the most optimal set of circumstances, which arguably is the most unrealistic scenario (\$500,000 to bring the case and a 75% reduction between the rate and 180% of variable cost, or \$1,500 in savings) would the majority of shipments potentially eligible for SSAC case relief be potentially attractive. In every other situation (rows 2-4 of the table) the outlook for net benefits of bringing a case is negative for the majority of movement volumes. Because of the wide range of potential outcomes for the variable assumptions, a 5th row was added to this table reflecting the simple average of cost to bring a case (\$750,000) and assumed value per car rate for a win (\$1,250). That analysis suggests that the vast majority of circumstances for annual shipments between 20 and 350 cars would not be attractive for a SSAC case proceeding,

and the rail customer would need to be shipping in the vicinity of 250 cars to even begin to seriously consider a rate challenge through the SSAC process.

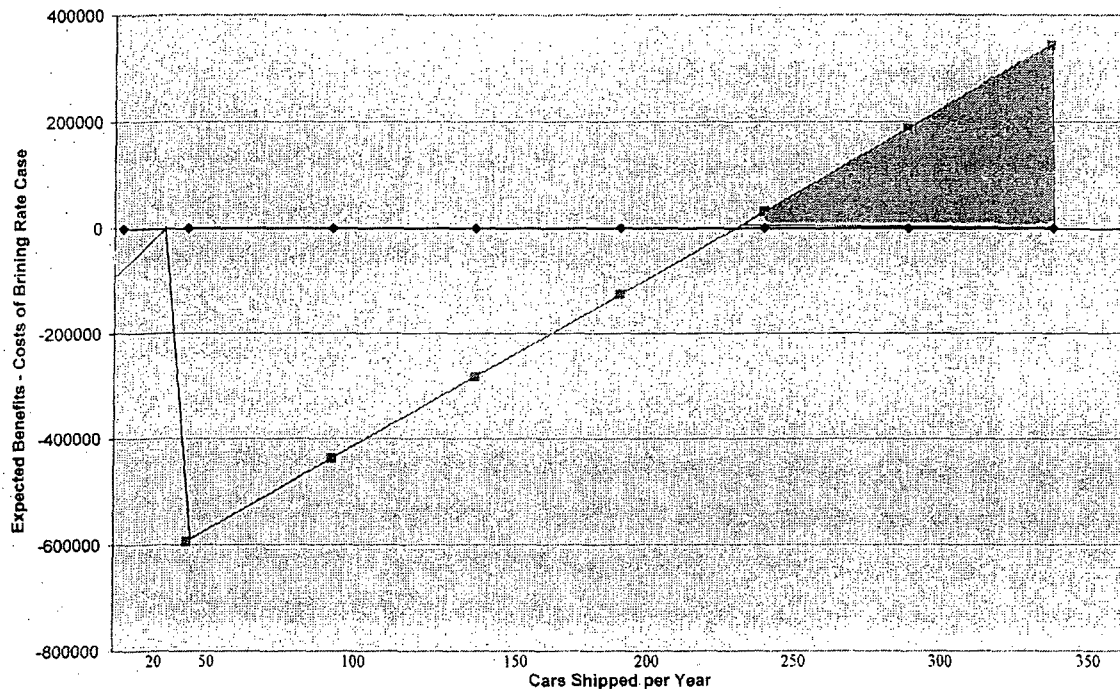
iii. The “Simplified Procedures Proposed Do Not Provide Cost-Effective Relief

The bottom line of this analysis is that the 3-B Method and SSAC approach for bringing small rate complaints, as proposed by the Board, are unlikely to be effective in providing shippers or receivers rate relief. At best, there are huge gaps in even theoretical rate relief coverage, even under optimal circumstances. Analysis of various situations, even under “optimal” conditions for bringing a case, suggest that approximately two-thirds of the range of shipment volumes likely to qualify for either of the two approaches would not be cost effective. The figure below reflects the general pattern of annual shipment rates and expected returns. Under different sets of assumptions, the horizontal axis (number of cars shipped) might well be elongated to 500 to 600 cars annually (this would reflect a lower average tariff and variable cost respectively). However, the conclusions would not likely change. Varying the assumptions underlying this analysis across a realistic range, it is much easier to conceive of situations where more than two-thirds of shipping situations would not technically qualify for relief (assuming the shipper is not willing to invest more than can be justified in potential returns) than it is to construct scenarios where more shipments would be viewed as attractive candidates for 3-B or SSAC proceedings.

Figure 1 below depicts the “theoretically possible” ranges over which small rate challenges might be considered. The shaded portions of the table represent potential net positive benefits. The areas below the horizontal line portray expected losses to a rail

customer, even in situations where the shipper would “win” the case and have a rate successfully reduced.

Figure 1



Obviously, there are a vast number of situations for shippers that would have no potential for even theoretical rate relief. But even for those shippers who have annual volumes that might potentially look attractive for a rate case, there are reasons to believe that such shippers might still be reluctant to bring a case:

(1) Would a good businessman really invest \$500,000 in litigation to buy the chance of a net gain of \$250,000; or spend \$750,000 when the outcome might result in zero gain or a net gain of \$340,000 with equal probability? Given the additional time necessary to be invested by employees of a shipping or receiving company in such litigation, in addition to paying legal counsel and consultants the \$500,000 or \$750,000 in fees,

is the potential payoff worth the true total costs in resources to the company? In most cases, the clear answer is "no." The proposed rules are utterly unrealistic to the extent they fail to recognize the need for a "risk premium." Shippers cannot be expected to invest dollars in a complaint to recover a payoff merely equal to their case investment.

(2) *Because agricultural shipping volumes between two identifiable points will vary substantially over time as weather patterns and markets force shifts in the economics of grain and product movements, the value of possible rate cases are very uncertain to agricultural shippers over time.* If a SSAC takes 18 months to decide (or longer for the "simplified" cases take longer than scheduled as inevitably occurs in full SAC cases) the shipper has no assurance, even if it wins, that the originally estimated value of the case can be realized. That will only happen if the rail volume of the specific commodity between the two specific points challenged in the case remains constant or increases over the life of the case.

(3) Finally, rail customers, in evaluating whether to initiate litigation proceedings against a carrier, must take into consideration overall business relations. Litigation can sour business relationships for the movement in question, or for other movements where the customer and the carrier are conducting business. This is a significant issue as individual shippers depend on carriers to reach markets, and do not want to endanger the economics of the facility in question or other of the company's facilities served by the carrier where the outcome of litigation is not swift and relatively foreseeable.

V. BRIEF COMMENTS ON SUBSTANTIVE FAILINGS OF THE PROPOSED RULES

Most of this pleading has been devoted to criticism of the proposed eligibility standards while relying primarily on the Joint Written Comments to discuss substantive deficiencies in the proposed rules. There is, however, one substantive issue that the Agricultural Commenters feel a need to emphasize.

The proposed rules are presented as a trade-off of perfection (full SAC) for simplicity. In each instance, where simplicity is substituted for the Board's vision of perfection, the result appears to be an increase in the level of the maximum lawful rate that will result from the complaint.¹³ In effect, what the Board is doing equates a "simplified" procedure with higher rates in virtually all instances, when there is no hint in the statute that Congress intended by regulatory design for small volume shipments to pay higher maximum rates under "simplified" procedures than high volume shipments pay under full SAC.

For example, in the name of simplicity, a modified form of "final offer arbitration" is to be used in the 3-B process for the selection of comparable traffic groups, with the complainant having no access to unmasked revenues from the waybill sample while the defendant railroad obviously knows its own unmasked revenues, which are likewise available to the Board. The result of this simplification is to give the defendant an advantage in the procedure for selecting a comparable traffic group, in all likelihood resulting in a rate preferential to the defendant. See Crowley Comments and Fauth Comments.

¹³ Conversely, the Board is retaining the carrier-friendly internal cross-subsidy analysis as an affirmative defense in SSAC cases even though it would be considerably simpler, less expensive, and more expeditious to dispense with that controversial process.

Another example is in the Board's elimination of efficiency considerations from the SSAC process. Here, the prospect for a higher maximum rate than would result from inclusion of efficiency considerations is virtually indisputable. *Ibid.*

As correctly observed in the Joint Written Comments (see, e.g., Fauth Comments), it appears entirely feasible for the Board to test its new methodologies to determine probable or comparable outcomes, as the Board did in *Simplified Guidelines*. Indeed, it is extremely difficult to imagine that the Board issued its proposed substantive standards for "simplified" cases of the SSAC and 3-B varieties without having endeavored to inform itself of what it was proposing to the public.¹⁴

The Agricultural Commenters regard the absence of disclosed testing outcomes as a significant shortcoming of the Decision, especially in light of the fact that the Decision relies so heavily on trade-offs in the name of simplification. The Board may well have the ability to make reasonable trade-offs between perfect procedures and less costly ones, but it must weigh the simplifications adopted against reality. If the shortcuts adopted are likely to consistently produce more favorable outcomes for railroad defendants than for shipper complainants, they may not be permissible shortcuts at all, but loaded dice instead. The validity of the trade-offs may depend in substantial part on the quantum of the outcome costs to the complaining shipper and outcome benefit to the defendant railroad, *Burlington Northern v. ICC*, *supra*, 985 F.2d at 597, but those outcomes have not been disclosed by the Board. It is not necessary for the Board to force the burden of testing the proposed rules on shippers when the Board has the demonstrated ability to do so itself.

¹⁴ Access to the Board's workpapers underlying the Decision to determine how the Board had assessed the proposed rules were rebuffed by the Board.

VI. CONCLUSION

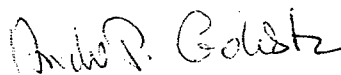
Although it is plain that rate reasonableness complaint reform is urgently needed for small shipments, the proposed rules do not fit the bill. The statute, as the Board observes, requires a "simplified and expedited" process is to be made available for those small shipments where a full SAC presentation is too costly, given the value of the case, and without regard to the size of the shipper bringing the complaint. In fact, the Board correctly rejects the railroad industry's urgings that "simplified" procedures be available only to small *shippers*. Decision, slip op. at 8.

Unfortunately it appears, however, that the proposed rules will have a result opposite to that intended by the statute. Eligibility for relief under the 3-B test will be available to such a small segment of the total traffic originating from a typical grain facility as to make that form of relief virtually non-existent to all but a shipper of miniscule traffic volumes that probably would not bother to file a rate complaint in the first instance. The Board's approach seems to make simplified rate relief available only for "truly small *shippers*," turning the statute on its ear and in effect adopting the test proposed by the railroad industry, even though the Decision asserts it is the wrong test. *Ibid*.

The proposed SSAC procedures appear to stand between full SAC and 3-B procedures as a barrier to effective relief for small shipments. SSAC may be simpler than full SAC (as might the construction of a nuclear reactor), but that does not make it a "simplified" process in statutory contemplation. As explained in the Joint Written Comments, SSAC is in fact a highly complex procedure. The 3-B process, if modified to eliminate inequities in determination of the comparable traffic group, has promise to represent the type of simplified methodology envisaged by Congress. The SSAC methodology, on the

other hand, does not. The Agricultural Commenters believe that the SSAC rules should be withdrawn.

Respectfully submitted,

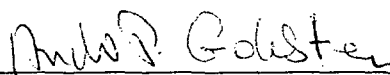


Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037
(202) 775-5560

Attorney for
National Grain and Feed Association, et al.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of October, 2006, served a copy of the foregoing pleading on all parties of record, by first class mail, postage prepaid.



Andrew P. Goldstein

Appendix A

DESCRIPTION OF CERTAIN NATIONAL ORGANIZATIONS PARTICIPATING IN THESE OPENING COMMENTS:

National Grain and Feed Association (NGFA) is a national trade organization comprised of 900 member companies involved in country elevator operations, animal feed production, export grain operations, livestock feeding integrators, grain processing and grain and feed merchandising. NGFA members, in particular the country elevator segment of the membership, comprises the principal point of sale for most producers of grains and oilseeds in the U.S. As such, country elevators must necessarily be located in proximity to the points of production of grains and oilseeds, and do not realistically have any opportunity to relocate the business in situations where there is an absence of competition for transportation services.

The National Oilseed Processors Association ("NOPA") is a trade organization of companies engaged in the processing of soybeans, sunflowers, canola and other oilseeds within the United States and the marketing of soybean products domestically and throughout the world. Its members operate processing facilities in the United States and account for the majority of all soybeans crushed in the United States.

Members of NOPA produce a variety of products for a variety of uses at a wide variety of consumption points. Vegetable oil produced by the industry is used in a variety of industrial and retail products including soap, paint, salad oil and cooking oils. Vegetable oils are also used in the bio-diesel industry to manufacture high-grade diesel fuel. The other principal product of oilseed processing is high protein meal used as an animal feed ingredient for beef, pork, poultry and turkey production.

Soybean crushing and processing is a complex undertaking requiring substantial acreage, equipment that is expensive to acquire, construct, and maintain, and reliable transportation. Operators of these facilities attempt to keep them operating continuously because of the very sizeable costs, in the vicinity of \$50,000 to \$100,000, incurred to shut down and restart such a facility.

Corn Refiners Association (CRA) is the national trade association representing companies that produce sweeteners, starches, feeds, oil, ethanol and bioproducts from our country's most abundant agricultural resource using the corn wet milling process. The CRA member companies operate a total of 24 plants in the United States.

North American Millers' Association (NAMA) is the national trade organization representing the wheat, corn, oat and rye milling industry. NAMA's 48 member companies operate 170 mills in 38 states and Canada. Their aggregate production of more than 160 million pounds per day is approximately 95 percent of the total industry capacity.

The National Corn Growers Association (NCGA) is a grower-led organization that represents the interests of more than 32,000 dues-paying corn growers from 48 states and works on behalf of 46 affiliated state organizations and more than 300,000 farmers who contribute to corn check off programs in 21 states. Working together, NCGA and its members create new opportunities and markets for corn growers.

American Farm Bureau (AFBF) is an independent, non-governmental voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being of farmers and ranchers. AFBF is the nation's largest general farm organization,

representing farm and ranch families in all 50 states and Puerto Rico. Farm Bureau members produce virtually every commodity grown or raised commercially in the United States. AFBF is a farm advocacy organization that regularly represents its members' interests before Congress, federal regulatory agencies, and the Courts.

U.S. corn growers make a significant and important contribution to our nation's economy. Over the last five years, the nation's corn crop has averaged 10.3 billion bushels resulting in an annual average farm gate value of almost \$22 billion. The relatively stable production over the past ten years, made possible by innovation in production practices and technological advances, has helped to ensure ample supplies of corn for livestock, an expanding ethanol industry, new biobased products and a host of other uses in the corn industry. Key to our continued success is reliable, cost-effective and efficient transportation.

USA Rice Federation is the national advocate for all segments of the rice industry, conducting activities to influence government programs, developing and initiating programs to increase worldwide demand for U.S. rice, and providing other services to increase profitability for all industry segments. Through the USA Rice Federation, the U.S. rice industry has a unifying forum that equips the industry with a strong voice and works to ensure rice's voice is heard when and where it counts. Charter Members of the Federation are the USA Rice Producers' Group, the USA Rice Millers' Association, the USA Rice Council, and the USA Rice Merchants' Association.