



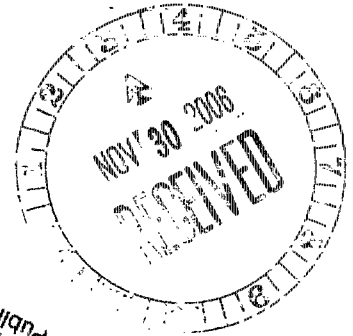
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November 30, 2006

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 Reply Comments of Canadian Pacific Railway Company. A diskette containing an electronic version of the Reply Comments is also enclosed.

Please acknowledge receipt of the enclosed Reply 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

TMH:aat
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: November 30, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**REPLY 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 Reply Comments regarding the Board’s proposal to adopt simplified standards for small and medium sized rail rate cases.

The Board’s stated purpose in initiating this proceeding is to simplify the ratemaking process to “provide captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable, while recognizing the need for railroads to earn a reasonable return on their investments so that they will have the resources to make the investment needed to continue to serve the transportation needs of their customers.” *NOPR Decision* at 3. The Board should consider changes to its ratemaking procedures to reduce to the extent possible the time and expense of pursuing rate relief for small and medium sized shippers. However, the Board must not, in the name of “simplicity,” abandon its well-established substantive rate reasonableness standards, including recognition of the need for railroads to engage in differential pricing.

In their initial comments, CPR and other railroad parties generally expressed support for the Board’s proposed “Simplified SAC” (“SSAC”) methodology. SSAC appears likely to reduce the cost of litigating medium sized rate proceedings without undermining the Board’s

Constrained Market Pricing (“CMP”) based rate reasonableness standards. CPR urged the Board to consider certain refinements to SSAC (such as permitting limited adjustments to URCS system-average variable costs) that would ensure “SAC-like” results without unduly complicating, or increasing the cost of, a SSAC case. CPR Comments at 8-15. In its initial comments, USDOT likewise urged the Board to adopt regulations for small and medium rate disputes that “produce results roughly similar to those expected from a full SAC presentation.” USDOT Comments at 2. In particular, USDOT stated that “the greater the amount in controversy, the greater should be the emphasis upon reaching a result similar to that produced” by SAC. *Id.*

The initial comments filed by shipper parties express an entirely different point of view. NITL asserts that the proposed simplified procedures “would be useless to virtually all shippers.” NITL Comments at 3. NITL dismisses SSAC as “extremely complex, uncertain and expensive,” and complains that the proposed 18-month procedural schedule for SSAC cases “cannot be considered an ‘expedited’ method.” *Id.* at 3, 6. Yet, NITL’s opening comments do not offer any concrete suggestions for improving the SSAC methodology. The Joint Shippers contend that SSAC “conflicts with CMP” because it does not permit shippers to present evidence regarding alleged inefficiencies in the defendant carrier’s operations or to hand-pick the SARR’s traffic group. *Jt. Shipper Comments* at 29, *V.S. Crowley* at 53-56. However, rather than suggesting modifications to SSAC to make it more “SAC-like,” the Joint Shippers urge the Board to discard SSAC altogether, and to apply instead a methodology (the “Three-Benchmark” (“3B”) methodology) that is utterly inconsistent with CMP principles in the vast majority of future rate disputes. The Agricultural Shippers go even further, urging the Board to withdraw SSAC and

apply the 3B methodology to rail rate disputes involving grain traffic regardless of the value of the case. NGFA *et al.* Comments at 15-18, 39-40; *see also* USDA Comments at 8-9.

The common denominator of the shipper parties' initial comments is their desire to see the Board replace CMP-based ratemaking standards with a methodology that effectively guarantees shippers more favorable results. The Agricultural Shippers candidly state that one of the "shortcomings" they perceive in the proposed rules is that the rules impose "limitations on relief and outcomes." NGFA *et al.* Comments at 16. NITL likewise complains that shippers may be reluctant to invoke rate procedures under which "the likely outcome is far from clear." NITL Comments at 2. These statements (and similar sentiments expressed by other shipper parties) reflect a fundamental misperception of the purpose of this proceeding.

ICCTA requires the 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) (emphasis added). The legislative history of this provision makes clear that, in instructing the Board to promulgate simplified rate procedures, Congress did not intend that the Board adopt a substantive standard other than CMP for smaller rate disputes.¹ To the contrary, "any simplified methodology for assessing the reasonableness of rail rates should be designed to achieve the same objective [as the SAC test], albeit in a less precise manner." *NOPR Decision* at 10. In short, the Board's rate regulations should not guarantee a favorable result to every complaining

¹ See S. Rep. 104-176 (1995) at 7 ("The Committee intends the simplified methodology directed to the Board to complete would apply to cases in which the full stand-alone cost presentation, which encompasses elaborate evidentiary presentations, are impractical. The Committee seeks to assure that the rate complaint process is accommodating of small cases. However, the Committee does not intend to erode the Constrained Market Pricing principles adopted by the ICC for full stand-alone cost presentations.") (Emphasis added).

shipper. Rather, those regulations should provide procedures that reduce, to the extent feasible, the time and expense required to pursue a rate case in those instances in which the SAC methodology is not cost-effective. *See* USDA Comments at 4.

I. THE BOARD'S PROPOSED ELIGIBILITY CRITERIA ARE CLEAR, REASONABLE AND CONSISTENT WITH THE STATUTE.

Section 10701(d)(3) requires the Board to develop a simplified rate process for use in cases in which a full SAC analysis would be too costly “given the value of the case.” The Board proposes to base eligibility for simplified rate procedures on the Maximum Value of the Case (“MVC”). The MVC is the present value of the maximum rate relief that a shipper could attain over a five-year period, based upon the difference between the challenged rate and the 180% jurisdictional threshold. The MVC therefore reflects the maximum amount at stake in a particular rate proceeding. Basing eligibility on the MVC is consistent with the requirements of Section 10701(d)(3).

Moreover, an MVC-based standard provides a clear and simple method for determining eligibility for the SSAC and 3B methodologies. The MVC of a particular rate dispute can be determined based upon (1) the challenged rate, (2) the volume of traffic to which that rate would apply over a five-year period, and (3) what the rate for that traffic would be if prescribed at 180% of variable cost. Each of these elements can be readily identified by the parties, and the MVC calculation is relatively straightforward. Thus, the MVC standard provides an inexpensive and readily discernible method of stratifying rate complaints for purposes of determining the appropriate methodology for a particular case.

Nevertheless, shipper parties urge the Board to adopt a variety of alternative eligibility standards for simplified rate procedures. The Joint Shippers and Cargill suggest that eligibility should be based on the “shipper’s [annual] freight bill between a single origin-destination pair.”

Joint Shippers Comments at 5-6. *See* Cargill Comments at 8. This proposal is not consistent with the requirements of Section 10701(d)(3) because the total amount paid by a shipper for rail transportation has nothing to do with the potential “value” of a challenge to the rate applicable to that shipper’s traffic. As USDA observes, “[t]he primary issue is not how many cars are being shipped, the amount of freight revenue, or the size of the shipper” (USDA Comments at 5), but rather the value of the rate relief at stake in the litigation. An eligibility standard based upon the size of a shipper’s freight bill alone could make simplified procedures available to shippers of traffic characterized by high variable costs and a relatively low markup over 180%, while denying a simplified process to shippers whose traffic moves at a very high markup over (lower) variable costs. In any event, the Joint Shippers’ suggestion that eligibility be determined based upon the freight bill “between a single origin-destination pair” is unsuitable for any case involving movements between multiple origins or destinations.

Several shipper parties contend that eligibility for simplified rate methodologies should be based upon the “actual” value of a case to the shipper, taking into account both the likely level of any rate prescription and the “risk” associated with bringing a rate complaint. *See, e.g.*, NITL Comments at 8-12; Jt. Shipper Comments at 14; Dow Comments at 7-8. The fundamental problem with such an approach is that it would require the parties — and the Board — to speculate at the outset of a rate case about the likely outcome on the merits, and to “handicap” the shipper’s prospects for success. It is simply not possible to predict with any reasonable degree of certainty the actual amount of rate relief (if any) that a complaining shipper is likely to obtain until the parties have submitted all of their evidence and the Board has had an opportunity to analyze that evidence in light of the governing standards. Attempting to divine the likely

outcome of a rate proceeding would unduly complicate the “eligibility” phase of a SSAC or 3B case.

Moreover, the risk associated with a particular rate case is a function of the merits of the parties’ respective positions, not the dollar amount at issue. Thus, a risk-based standard is not consistent with the requirements of Section 10701(d)(3). Nor is it feasible for the Board to adopt any single “risk factor” in determining eligibility for simplified rate procedures, since the risk associated with the litigation is likely to differ from case to case. In any event, litigation risk is an element of any commercial dispute for both parties. It would not be appropriate for the Board to adopt an eligibility standard that alters the balance of litigation risk in favor of the complaining shipper.

Shipper parties claim that an MVC-based standard would incent railroads to “game” the eligibility process by raising tariff rates to levels sufficiently high to deny shippers access to the Board’s simplified rate procedures. *See* Jt. Shippers Comments at 18; Cargill Comments at 7; AECC Comments at 5-6. Such behavior is unlikely, for several reasons. CPR and other railroads set tariff rates based upon market conditions, not in anticipation of possible rate litigation. Publishing an artificially high tariff rate would only increase a carrier’s litigation risk — indeed, setting the rate at a level that the carrier knows is likely to be declared unreasonable makes little economic sense, as it would expose the carrier to the payment of reparations, including interest. Moreover, publishing such a rate for the sole purpose of imposing higher litigation costs on the shipper would result in a similar increase in the carrier’s own litigation costs (with a higher risk of losing the case).

USDA urges the Board to increase the MVC threshold for the 3B methodology from \$200,000 to \$1.6 million, and the threshold for use of SSAC from \$3.5 million to \$15 million.

USDA Comments at 11. Joint Shipper witness Fauth proposes that any case with an MVC of less than \$7.2 million be eligible for the 3B methodology. Jt. Shippers Comments, V.S. Fauth at 5. Other shipper parties likewise argue that the proposed MVCs should be increased substantially. The Board should reject those proposals.

The thresholds proposed by the Board make simplified procedures available in the majority of cases involving non-exempt traffic that moves at an R/VC ratio above 180%. *See NOPR Decision* at 37, Table 2. There is simply no justification for expanding the scope of the Board's simplified rate procedures even further. The shippers' complaint that "very few [cases] will qualify for the three benchmark approach" (Cargill Comments at 11) is unpersuasive. As the Board correctly concluded, the 3B methodology should be used "only as a last resort" because it does not incorporate a CMP-based approach to rate reasonableness. *NOPR Decision* at 11. The Board should not prescribe use of the 3B (or any "comparative ratemaking" approach) except in connection with very small rate disputes.

The Board should likewise reject the Agricultural Shippers' suggestion that traffic (such as grain) characterized by shipments between multiple origins and destinations should be "exempt" from CMP-based ratemaking methodologies. NGFA *et al.* Comments at 5-6, 15. *See also* USDA Comments at 8-9. Agricultural Shippers assert that such an exception should be granted because "grain facilities do not generate the tonnage necessary to meet the high traffic densities essential for a successful full SAC presentation" (NGFA *et al.* Comments at 15) and that shippers located on secondary lines are "at a disadvantage" under SAC-like rate methodologies (*id.* at 5) (emphasis added).² In essence, Agricultural Shippers argue that rail

² Agricultural Shippers' statement that grain facilities do not generate traffic volumes sufficient for a successful SAC presentation ignores the fact that, in most SAC cases, the "issue" traffic

rates on grain traffic should not be governed by SAC (or SSAC) simply because it may be difficult for them to “win” a case under those methodologies. There is no principled basis for judging the reasonableness of grain rates under different substantive standards than those applicable to other commodities, nor does ICCTA authorize such preferential treatment of grain shippers. Moreover, Agricultural Shippers’ proposal is inconsistent with Section 10701(d)(3), which commands that eligibility for simplified ratemaking procedures be determined on the basis of the “value of the case,” not the transportation characteristics of the issue traffic.

II. THE BOARD SHOULD NOT ABANDON THE PROPOSED SSAC METHODOLOGY.

The shipper parties express universal “disappointment” with the Board’s effort to craft a “simplified” SAC methodology. NITL complains that SSAC is “extremely complex, uncertain and expensive” and “cannot be considered ‘expeditious’ in any realistic commercial or legal sense.” NITL Comments at 3. However, rather than proposing improvements to SSAC, NITL urges the Board to “withdraw its Simplified-SAC proposal in its entirety.” *Id.* at 6. The Joint Shippers likewise call upon the Board to abandon SSAC and to “drastically revise upwards its eligibility thresholds for the Three-Benchmark Standard and the Full-SAC standard.” Jt. Shippers Comments at 5. Cargill takes the position that a three-tiered rate methodology is “unnecessary and unjustified” and that the SSAC methodology “should be abandoned altogether.” Cargill Comments at 4.

These comments typify the decidedly non-constructive response of shipper interests to the Board’s SSAC proposal. Indeed, it does not appear that shippers are truly interested in a less

represents only a small fraction of the SARR’s total traffic group (which consists mostly of other traffic selected by the complainant). Under the proposed SSAC methodology, the overall traffic density of the SARR would reflect the defendant carrier’s actual experience.

costly, more expedited CMP-based rate process. Rather, they would prefer that the Board abandon CMP for all but the very largest rate disputes, and determine the reasonableness of most rail rates under a crude comparison-based methodology (3B) that is not consistent with CMP principles. Conversely, USDOT has preliminarily concluded that “Simplified-SAC appears a reasonable, economically acceptable method of ascertaining the reasonableness of rail rates at a lower cost.” USDOT Comments at 8. The Board should pursue ways to reduce the time and expense of litigating rate cases without jettisoning the fundamental principles that have guided the Board’s rate jurisprudence for more than two decades.

The shippers’ initial comments criticize the proposed SSAC methodology on a variety of grounds. Chevron Phillips Chemical Company maintains that “SSAC appears to be anything but simple, timely and inexpensive.” Chevron Phillips Comments at 5. NITL likewise asserts that SSAC is “far too complex [and] costly.” NITL Comments at 6. But neither offers any suggestion for expediting, or reducing the cost of, SSAC proceedings, nor do they acknowledge the significant degree to which the Board’s proposals would reduce the costs associated with a full-SAC presentation. The Joint Shippers (ironically) complain that the Board’s decision to eliminate consideration of alleged inefficiencies in the defendant carrier’s operations under SSAC renders that methodology inconsistent with CMP principles. *Jt. Shippers Comments, V. S. Crowley* at 52. But the Joint Shippers likewise offer no concrete suggestions for streamlining the SAC methodology in ways that would (according to them) be more consistent with CMP.

In the *NOPR Decision* (at 10-11), the Board correctly observed that the time and expense required to prepare evidence relating to inefficiencies “dwarfs” the cost of litigating other issues in most SAC cases. By eliminating traffic selection issues, detailed operating plans and the

calculation of specific SARR operating expenses, the SSAC methodology would greatly reduce the cost of litigating a rate case. While these changes may also result in “a less precise application of CMP” in SSAC cases (*NOPR Decision* at 11), the Board concluded that the need to make the rate process more affordable to shippers justifies some loss of precision. The decision to simplify SSAC by eliminating the “carrier inefficiencies” issue is logical given the absence of substantial excess rail capacity in today’s high-demand environment. The Board’s choice is also supported by the fact that complainants’ attempts to demonstrate carrier inefficiencies have not had a material impact on the outcome of most recent SAC cases, such as *Duke/NS*, *Duke/CSX*, *CP&L*, *PPL* and *Otter Tail*. In any event, the proposed rules do allow for adjustments to the defendant carrier’s physical plant where the complainant can show that particular facilities have fallen into disuse. *NOPR Decision* at 12. If a complainant believes that issues relating to the efficiency of the defendant’s operations will be decisive in a particular case, it can invoke the SAC methodology.

Shipper parties complain that the proposed 18-month procedural schedule for SSAC cases is not sufficiently “expedited.” NITL Comments at 6; Cargill Comments at 4; Chevron Phillips Comments at 5. NITL asserts that “[a]ny rate dispute that takes more than about six months to resolve will simply be useless to a vast majority of shippers.” NITL Comments at 6. The shippers’ insistence upon a rate process that can be completed in six months or less is utterly unreasonable. A “medium” rate case is, by definition, a commercial dispute that can involve several million dollars. Such a case may also have precedential significance for rates on movements other than the “issue” traffic. As the commenting shippers (many of which are large, highly sophisticated business entities) are fully aware, commercial disputes of similar magnitude

are rarely litigated in the courts in less time than that contemplated by the Board's SSAC procedures.

In its initial comments, CPR suggested that the Board require the complainant to build its SARR along the predominant route over which the issue traffic actually moves, rather than allowing complainant to choose its "preferred route." CPR Comments at 8-10. This would eliminate the need for the parties to prepare evidence on route selection, or for the Board to decide that issue. Based upon the procedural schedule set forth in the *NOPR Decision*, this should, in turn, enable the Board to reduce the time required for a SSAC case by at least 60 days. The Board should consider CPR's proposal, as well as any other constructive suggestion for reducing the time required to complete SSAC proceedings. However, NITL's suggestion that the Board decide all rate cases within six months is simply unrealistic.

Several shippers also contend that the SSAC methodology is unduly expensive and time consuming to the extent that it would require the parties to cooperate to "true up" the Board's Test Year rate prescription on an annual basis. *See, e.g.,* Chevron Phillips Comments at 5-6; NITL Comments at 7. The Board can mitigate the impact of this requirement by providing that any Test Year rate prescription would remain in effect throughout the five-year relief period, unless either party requests that it be adjusted to reflect changes in traffic volume, revenues and URCS costs. This would allow the parties to avoid the time and expense of adjusting the rate prescription where the likely magnitude of the adjustment does not justify the cost of the "true up" exercise.

CPR and other carrier parties urged the Board to allow parties to a SSAC case to present evidence relating to movement-specific adjustments to URCS system-average variable costs, where such evidence could materially affect the Board's rate reasonableness determination. In

its recent decision in *Ex Parte No. 657*, the Board announced that it will prohibit all movement-specific adjustments to URCS in calculating variable costs in SAC cases, notwithstanding the almost universal opposition to that proposal among both carriers and shippers.³ CPR believes that the Board's decision in *Ex Parte No. 657* was in error. However, whether or not the Board permits movement-specific adjustments in SAC proceedings, it should allow the parties to present evidence concerning a limited number of such adjustments in SSAC cases.

As CPR's initial comments demonstrate, failure to consider movement-specific adjustments would have an even greater adverse impact on the accuracy of the Board's rate reasonableness determinations under the SSAC methodology than it would in SAC cases. Under the SSAC methodology, URCS-based costs are 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. Thus, URCS costs are a critical substantive input in the Board's rate reasonableness determination in SSAC cases. 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 Board should permit parties to a SSAC case to present evidence relating to unique costs (such as payments to third parties and handling costs associated with hazardous commodities) that may not be captured by URCS. The Board can minimize the cost of litigating issues relating to movement-specific adjustments to URCS costs by providing guidance regarding the types of adjustments that it will permit in SSAC cases.

³ See *Ex Parte No. 657, Major Issues In Rail Rate Cases*, Decision served October 30, 2006 at 47-61.

Finally, in their initial comments, CPR and other railroads demonstrated that the Board's proposed discovery procedures for SSAC cases — particularly the defendant's proposed "Second Disclosure" — would impose a highly disproportionate burden on railroad defendants. CPR Comments at 15-16. USDOT likewise expressed concern with "the apparent disparity in the information burden borne by the railroads in this category of cases." USDOT Comments at 8. USDOT agreed with CPR that the discovery obligations placed on defendant carriers "may become leverage or a bargaining tool in rate negotiations." *Id.* Moreover, the Joint Shippers state that requiring a defendant carrier to perform most of the data analysis and cost calculations on the complainant's behalf "will not reduce the shipper's cost, because the shipper will still need to verify the railroad's data." Jt. Shippers Comments at 25 (emphasis added). Accordingly, there would appear to be no sound reason for imposing such a burden on defendant carriers. The Board should modify its proposed discovery rules for SSAC cases to eliminate the obligation of the defendant carrier to develop traffic and cost data required to support the complainant's case.

III. IF THE BOARD ADOPTS THE MODIFIED THREE-BENCHMARK METHODOLOGY, IT SHOULD APPLY THAT METHODOLOGY ONLY TO THE SMALLEST RATE DISPUTES.

The modified 3B methodology for small rate cases proposed in the *NOPR Decision* represents a major substantive departure from CMP-based ratemaking. The premise underlying the 3B test — *i.e.*, that a rate should not exceed by a significant amount the mean R/VC for a "comparison group" of similar movements — is fundamentally at odds with the concept of differential pricing. The Board's proposed modification of the RSAM calculation — which would distribute a carrier's revenue shortfall over its entire traffic base rather than those movements with an R/VC ratio greater than 180% — is likewise inconsistent with differential pricing and the Board's prior pronouncements. *See* CPR Comments at 17-18. In short, the proposed 3B methodology is not a "simplification" of the existing CMP-based ratemaking

process; rather, it embodies a new substantive standard that sharply conflicts with the Board's well-established approach to determining rate reasonableness.

Discarding SSAC in favor of the 3B methodology for all non-SAC proceedings (as many shippers propose) would severely impair the ability of carriers to engage in differential pricing. Such a result would threaten the railroads' efforts to respond to the growing demand for rail service by increasing rail capacity. USDOT correctly observes that:

“repeated use of this [3-B] procedure could tend to lower the mean and reduce all rates to that level. Such an outcome would clearly have a detrimental effect on railroad incentives to make capital investments and improve service.”

USDOT Comments at 6.

Widespread application of the 3B methodology would violate the fundamental tenets of railroad rate regulation articulated, and repeatedly confirmed, by the ICC/STB and the courts over the last two decades. It would also threaten to reverse the significant progress that railroads have made toward achieving the statutory goal of sustained revenue adequacy. For these reasons, CPR does not support use of the 3B methodology except in those few instances in which the value of a rate case cannot justify even a streamlined SSAC inquiry. Indeed, if the Board is inclined to agree with shipper parties who argue that a three-tiered STB rate process is unjustified, it should eliminate the 3B methodology rather than the SSAC test.

Notwithstanding their clear preference for the 3B methodology, shipper parties propose a number of significant changes to the rules governing 3B cases:

Several shipper parties argue that the Board should make the STB Carload Waybill Sample with “unmasked” revenues available to any potential complainant, even prior to the filing of a rate complaint. *See* Jt. Shippers Comments at 34-36; NITL Comments at 12; NGFA *et al.* Comments at 37. According to the shippers, denying them access to unmasked revenue data

is “unfair” because it affords the defendant carrier an advantage in selecting movements for a “comparison group.” *Id.* This concern is misplaced, for several reasons.

First, masking factors are applied only to traffic that moves under a transportation contract. *See NOPR Decision* at 32. Contract rates are, by definition, not “comparable” to common carrier rates. Rather, contract rates are the product of negotiation between a carrier and shipper, and typically reflect a variety of commercial factors — such as volume commitments, “bundling” of traffic originating at both competitive and exclusively-served origins, and agreements regarding ancillary facilities and services — that do not apply to shipments tendered under a tariff. Contract shipments may also exhibit very different demand characteristics than tariff movements of the same commodity. For these reasons, the Board should not permit contract shipments to be used as “comparable” movements under the 3B methodology. Because contract shipments are not properly included in a “comparison group,” a complainant has no need for unmasked contract rate information for purposes of selecting its proposed comparable movements.

Second, even if shipments moving under a transportation contract could properly be considered in a 3B analysis, a complainant would not need unmasked revenue information to select an appropriate comparison group. The only purpose for which a complainant might use unmasked revenue data in selecting its comparison group would be to identify movements with R/VC’s that (the shipper believed) might support a more favorable result in the case. But the Board has made it clear that “[t]he comparability of a movement should depend on the characteristics of the movement, not the level of the rate for that movement.” *NOPR Decision* at 33. The masked Waybill Sample data provide all of the information that a complainant may properly rely upon in choosing movements comparable to the issue traffic.

Third, the “baseball” style method that the Board proposes to use to determine the comparison group in 3B cases offsets any advantage that a defendant carrier might otherwise have in knowing the “unmasked” revenue for its contract shipments. A carrier that selects comparable movements on the basis of favorable R/VC ratios, rather than relevant transportation characteristics, runs the risk that its entire comparison group will be rejected.

Fourth, to the extent that traffic handled by a railroad other than the defendant carrier might be comparable to the issue traffic, the defendant has no advantage over the complaining shipper, as neither party would have access to unmasked revenue information for such shipments.

The Board has consistently refused to make unmasked Waybill Sample data available to shippers — or to carriers — in connection with STB proceedings. To the contrary, “[the Board’s] long standing policy is that the unmasked revenues and the specific masking factors are highly confidential, for internal Board use only, and not to be released to waybill users.”⁴ “These masking factors have never been made publicly available, not even under a protective order; they have been held in the strictest confidence, and, at any time, have been known only by a few members of the Board’s staff.” *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Company – Control and Operating Leases - Conrail, Inc. and Consolidated Rail Corporation* (Decision No. 42, served October 3, 1997) at 7, n.24. There is no justification (or need) for the Board to depart from its longstanding policy regarding access to unmasked Waybill Sample data in 3B proceedings.

⁴ See Letter dated February 4, 2005 from M. Redisch (Acting Director) to C. M. Loftus (emphasis added). See also *Waybill Request WB972*, Letter dated June 8, 2005 from L. Gardner (Director) to P. Hemmersbaugh at 1 (granting access to “only masked revenues, in conformance with standard procedures in STB waybill releases”).

Finally, shipper parties propose that the scope of the evidence permitted in 3B cases be expanded in ways that would substantially complicate, and increase the time and expense required to litigate, such cases. The Joint Shippers propose that the 3B methodology be applied only to determine “the basic level of rate reasonableness” and that the Board “permit parties to supplement the [3B] factors with other relevant evidence, including evidence of inefficiencies required to be considered by the Board under the statutory Long-Cannon provision.” Jt. Shippers Comments at 6 (emphasis added). NITL makes a similar proposal, arguing that allowing shippers to present supplemental evidence is “necessary as a matter of fairness, because situations are different, and shippers should have the possibility of showing that the Board should evaluate its case differently, or should consider additional factors in determining a maximum reasonable rate.” NITL Comments at 13.

The Board should not permit such open-ended evidentiary presentations in 3B cases. Giving a shipper carte blanche to introduce whatever evidence it might conceive to show that its “situation” is “different” would defeat the very purpose of the 3B methodology — *i.e.*, to provide a simple and less expensive rate process for small rate disputes.⁵ The Joint Shippers’ desire to introduce the “inefficiencies” issue in 3B cases is inconsistent with the Board’s proposal to eliminate that issue in cases under the SSAC methodology. In any event, consideration of such issues would appear to be superfluous under a methodology (3B) that focuses essentially on “rate comparisons” rather than CMP principles. By contrast, CPR’s proposal that the Board permit the parties to introduce limited evidence relating to movement-specific adjustments to URCS-based

⁵ NITL’s comments appear to suggest that only shippers should be afforded the right to present such supplemental evidence. However, if the Board were to adopt NITL’s proposal (and it should not), fundamental fairness would require that both parties have an opportunity to submit evidence addressing supplemental factors.

variable costs would improve the accuracy of the R/VC ratios upon which the 3B methodology is based, without unduly increasing the cost or complexity of 3B cases.

IV. THE BOARD SHOULD NOT ENTERTAIN RATE CHALLENGES ON EXEMPT COMMODITY MOVEMENTS UNLESS THE COMPLAINANT SATISFIES THE STANDARD FOR REVOCATION OF THE APPLICABLE EXEMPTION.

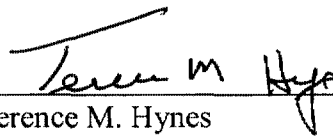
Not surprisingly, the Joint Shippers endorse the Board's proposal to proceed with a rate complaint involving exempt traffic prior to deciding the merits of the petition for partial revocation of the applicable exemption. Jt. Shipper Comments at 38-39. The rationale for permitting rate complaints on exempt traffic proffered by the Joint Shippers is nonsensical:

As rail capacity has tightened and the availability of transportation by other modes has declined because of tightening capacity in those modes as well, shippers of exempt commodities are increasingly finding themselves without effective transportation options. In such cases, resort to the Board's processes is becoming increasingly necessary."

Jt. Shippers Comments at 38 (emphasis added). In other words, Joint Shippers believe that the Board should revoke its longstanding commodity class exemptions, and regulate rail rates on exempt traffic, simply because increased demand has led to tighter capacity and higher prices for service by both railroads and other modes of transportation. However, rate increases by railroads (or by other modes) in response to strong demand are fully consistent with the manner in which a competitive marketplace is supposed to work. The mere fact that rail rates for certain exempt commodities have risen in the current capacity constrained environment provides no basis upon which the Board could properly conclude that re-regulation of those commodities is necessary to prevent an abuse of market power or otherwise to promote the goals of the National Transportation Policy ("NTP"). See 49 U.S.C. § 10502(d). To the contrary, the NTP expressly commands the Board "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates." 49 U.S.C. § 10101(1).

The Board should not entertain a rate complaint with respect to an exempt commodity movement unless — and until — the complaining shipper has satisfied the standards for revocation of the applicable exemption under Section 10502(d). The Board should require the shipper to file a petition for partial revocation, and decide the merits of that petition, before imposing upon a railroad the burden and expense of defending a rate case (whether under the SAC, SSAC or 3B methodology).

Respectfully submitted,



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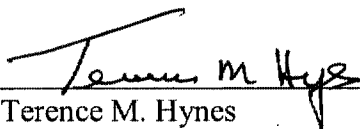
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Dated: November 30, 2006

CERTIFICATE OF SERVICE

hereby certify this 30th day of November 2006 that I have served all parties of record in this proceeding by first class mail, postage prepaid.


Terence M. Hynes