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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

Joint Written Reply Comments

submitted by

American Chemistry Council, American Forest and Paper Association, American Soybean Association, Agricultural Retailers Association, Colorado Wheat Administrative Committee, Corn Refiners Association, The Fertilizer Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Institute of Scrap Recycling Industries, Iowa Soybean Association, Montana Wheat and Barley Committee, National Association of Wheat Growers, National Barley Growers Association, National Corn Growers Association, National Council of Farmers Cooperatives, National Farmers Union, National Grain and Feed Association, National Sorghum Producers, The National Industrial Transportation League, National Oilseed Processors Association, National Petrochemical & Refiners Association, Nebraska Wheat Board, North American Millers Association, North Dakota Grain Dealers Association, North Dakota Public Service Commission, North Dakota Wheat Commission, Oklahoma Wheat Commission, Paper and Forest Industry Transportation Committee, PPL EnergyPlus, LLC, South Dakota Wheat Commission, Texas Wheat Producers Board, USA Rice Federation, Washington Wheat Commission, Alliance for Rail Competition, Consumers United for Rail Equity

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Dated: November 30, 2006

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I. INTRODUCTION

On October 24, 2006, these Interested Parties submitted Joint Written Comments, explaining their position on the Board's decision served July 28, 2006 in this proceeding ("Decision"). In that Decision, the Board proposed major changes to the handling of cases challenging the reasonableness of rail rates that fall within the provisions of 49 U.S.C. 10701(d)(3), that is, cases in which a "full stand-alone presentation is too costly, given the value

of the case.” For such cases, Congress has ordered the Board to establish “a simplified and expedited method for determining the reasonableness of challenged rail rates. . . .” *Id.*

Although the Interested Parties were pleased that the Board initiated this proceeding, the October 24, 2006 Joint Written Comments of these Interested Parties (“Interested Parties’ Opening Comments”) indicated that the primary proposals in the Decision were not an adequate solution to the problems afflicting the current rules. Indeed, the Interested Parties’ Opening Comments indicated that adoption of the primary features of the Board’s proposal would make a currently poor situation even worse, and would effectively foreclose the great majority of small case rate challenges in the future, contrary to law.

Specifically, the Interested Parties indicated that the Board’s eligibility proposals as offered were unrealistic and inconsistent with the statute. Those Opening Comments also stated that the Board’s proposed Simplified-SAC procedures for “medium” size cases were unclear, unfair, unworkable and unlawful, and the agency’s cost and time assumptions for bringing a Simplified-SAC case were far understated. The Interested Parties’ Opening Comments also noted that the substance of the proposed Simplified-SAC procedure was arbitrarily skewed to result in rates significantly higher than would result from a Full-SAC case, in violation both of the statute and the principles set forth under the Board’s decision in *Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520 (1985) (“*Guidelines*”). Finally, although some parts of the Board’s revised Three-Benchmark procedures hold some promise, significant changes were needed.

The Interested Parties’ Opening Comments urged the Board to:

- 1) Withdraw its Simplified-SAC proposal for “medium” cases in its entirety.

- 2) Drastically revise upwards its eligibility thresholds for the Three-Benchmark Standard and the Full-SAC standard, and consider changing the standard for determining eligibility.
- 3) Eliminate the "aggregation" rule.
- 4) Utilize the revised Three-Benchmark factors to determine the basic level of rate reasonableness for small cases, but permit parties to supplement the Three-Benchmark factors with other relevant evidence, including evidence of inefficiencies required to be considered by the Board under the statutory Long-Cannon provision.
- 5) Eliminate the "confidence interval" requirement under the Three-Benchmark standard, or modify it significantly.
- 6) Revise the procedural requirements proposed for the Three-Benchmark standard to provide shippers with access to data needed for a proceeding before a complaint is filed, and adopt procedures that will permit the final resolution of a complaint within 180 days.

A number of parties filed comments in this proceeding supporting the criticisms of the Interested Parties and some of the Interested Parties submitted individual comments as well.¹ More importantly, even those parties who took a different approach identified many of the same problems outlined by the Interested Parties. Indeed, railroads made numerous suggestions that would exacerbate the problems identified by the Interested Parties. These Reply Comments, therefore, discuss additional reasons why the Board must drastically revise its proposal to withdraw consideration of its proposed Simplified Stand-Alone Cost methodology for so-called "medium" cases and make the other changes outlined by the October 24 Joint Written Comments of the Interested Parties.

¹ By participating in these Reply Comments, those of the Interested Parties who submitted their own Opening Comments are not relinquishing the positions taken in such Opening Comments.

II. RAIL CARRIERS' NEED FOR INCREASED REVENUE FOR INVESTMENTS CANNOT OVERRIDE THE STATUTORY REQUIREMENT THAT RATES ON CAPTIVE TRAFFIC MUST BE REASONABLE

The major railroad commenters and their trade organization, the Association of American Railroads ("AAR"), all advance the argument that the Board's policies toward rate reasonableness challenges must take into account the need for rail industry profits in order to make railroad investments in infrastructure possible. The railroads argue that, without additional revenues and profits, they will be unable to make investments in new facilities sufficient to meet projected increases in demand for transportation services in future years. For example, the AAR states, at page 5 of its statement: "[t]he achievement of sustained revenue adequacy will permit railroads to make the continuing investments in necessary infrastructure to serve the expanding traffic base and benefit the national economy as a whole." The railroads would therefore have the Board view as narrowly as possible the statutory requirement for a "simplified and expedited" process to bring rate complaints when a "full stand-alone presentation is too costly, given the value of the case."

The Interested Parties submitting these Joint Reply Comments are today's railroad shippers who share a desire for a healthy, responsive, and efficient railroad system in the United States. But the railroads' quest for revenue cannot override the statutory command that rates on captive shipments be "reasonable." The current emphasis on higher revenues for infrastructure funding brings to mind that, just a few short years ago, the railroad industry argued vigorously against widespread availability of simplified rate procedures on the grounds that such procedures would impede the railroads' alleged right to attain revenue adequacy.

Today, most railroads are approaching revenue adequacy even under the STB's openly conservative revenue adequacy test and one, Norfolk Southern, has already achieved that standard for two years running. The Board, and the ICC before it, has repeatedly ruled that the

railroads' need for adequate revenues cannot and does not justify rates at unreasonable levels.

Guidelines, at 536 ("a rate may be unreasonable even if the carrier is far short of revenue adequacy.".)² Moreover, the agency has held in *Guidelines* that, once revenue adequacy is achieved, further differential pricing must be constrained:

A railroad seeking to earn revenues that would provide it, over the long term, a return on investment above the cost of capital would have to demonstrate, with particularity: (1) a need for higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why captive shippers should supply them.

Guidelines at 536, n. 36. Given such precedent, there is no legal basis for the carriers' expressed need for infrastructure expansion to override the statutory command that rates be "reasonable."

BNSF argues that captive traffic is "the only traffic from which it is reasonable to expect that a railroad could obtain the higher level of contribution necessary to achieve revenue adequacy,"³ but this is clearly incorrect. Much of the railroad industry's current and improving financial strength is due to higher rates on traffic across the board. UP's Opening Comments at p. 9 confirm this, acknowledging that UP uses rate increases to manage demand. Moreover, BNSF's argument ignores the Long-Cannon provisions of 49 U.S.C. §10701(d)(2), under which the Board must consider the efforts of market-dominant railroads to maximize revenues from low-rated traffic, and whether railroad revenue needs are being fairly allocated among commodities. These inquiries have particular relevance in a capacity-constrained environment.

Moreover, in urging the Board to pursue policies in this proceeding designed to provide railroads with funds to expand their infrastructure to accommodate new traffic, the railroads are advocating a standard inconsistent with the Constrained Market Pricing and Stand-Alone-Cost

² See e.g., *Public Service of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, decision served January 19, 2005, slip op. at 6 ("the SAC test excludes revenue needs associated with other traffic and other parts of BNSF's system.")

³ BNSF Opening Comments, p. 41.

principles that they so strongly support. As described by the Board in its Decision, a “SAC analysis seeks to determine whether a complainant is bearing costs resulting from inefficiencies or costs associated with facilities or services *from which it derives no benefit.*” Decision, slip op. at 5 (emphasis added). Moreover, in describing Constrained Market Pricing, the Board stated that the “core analysis” under SAC principles would “address the replacement cost of the *existing facilities used to serve the captive shipper* and the return on investment a hypothetical [stand-alone railroad] would require to replicate *those facilities.*” *Ibid.*, slip op. at 12 (emphasis added).

Thus, in a complaint proceeding employing Full-SAC procedures, future *expansion* of the general rail network is legally irrelevant. The maximum rate that can be established in any such proceeding must, according to the Board’s own description of CMP, be limited to the replacement value of “existing facilities used to serve the captive shipper” and cannot be based on the *possible* addition of new facilities that are unrelated to the rail system identified as the stand-alone railroad.

Enhanced railroad infrastructure is a desirable and necessary goal from the shippers’ perspective. But the Board is not in a position to guarantee that increased revenues will in fact wind up as increased investments, and particularly cannot guarantee that increased revenues will wind up as increased investments that will directly or even indirectly benefit the shippers who are already paying differentially higher rates. Moreover, the railroads themselves are well-positioned to adjust their position as circumstances change. As a September 18, 2006 securities rating report by *Credit Suisse* on one carrier stated, rail carriers have a variety of options when it comes to capital spending. That report noted that a railroad can quickly “streamline its own

operations if need be,” and that “the quickest adjustment that can be made is in the area of capital spending for expansion.”

In summary, we urge the Board to reject railroad arguments that seek to translate the *possibility* of infrastructure enhancements into policies that influence *case-specific* outcomes. The Board must be mindful of its own pronouncements disfavoring consideration of assets other than those actually used for the transportation at issue and it should not allow challenges to a specific rate to be dictated by the possibility that railroads will invest their profits to some unknown degree and at some unknown location. A complaining shipper in a rate reasonableness challenge should not be required, under the rate-setting principles that the Board adopts, to have movement-specific rates determined by a claim that the revenues from those rates are required for other purposes.

III. THE RAILROADS’ ARGUMENTS IN SUPPORT OF THE BOARD’S ELIGIBILITY PROPOSALS ARE MISTAKEN

With one deviation, the railroads support the Board’s proposal to use a Maximum Value of the Case (“MVC”) methodology to establish two new categories of “simplified” rate cases in addition the existing SAC methodology. Union Pacific, apparently alone among the railroads, wants to eradicate any “distinction between medium-size and small rate cases” and relegate shippers who cannot use the Full-SAC methodology to only the medium-size, or Simplified-SAC, methodology.⁴

The carriers’ arguments in support of the Board’s eligibility proposals, including the deadly aggregation rules (which are glossed over by those railroads that even mention them at all), only serves to confirm the Interested Parties’ belief, expressed in our Opening Comments,

⁴ UP Opening Comments, p. 70.

that the proposed eligibility rules will greatly circumscribe the ability of shippers to maintain non-SAC rate litigation.⁵

The railroads offer no particularized support for their position that the proposed eligibility standards are reasonable. Union Pacific states that the Board's estimate of a \$3.5 million cost for a party to present evidence in a Full-SAC case is "consistent with our experience in SAC cases,"⁶ but the Board's estimate of costs is not for a railroad's presentation; it is the estimated cost of a *shipper* presentation, regarding which neither UP nor any other railroad is "experienced." And even \$3.5 million is too low as a shipper cost, as demonstrated in the Opening Comments of the Interested Parties. The Board must recognize that shippers, unlike railroads, need to go outside their own administrative structure for virtually all expertise necessary to consider, prepare, and present a rate complaint and are likely, at least in some areas, to incur higher litigation costs than railroads, who are in possession not only of expert staff but most of the essential case data.

Union Pacific's call for the Board to eliminate any distinction between Simplified-SAC and Three-Benchmark cases is misguided. As we understand UP's position, a shipper would have to bring a Simplified-SAC case (at a cost which UP mistakenly says will not exceed \$200,000) instead of a Three-Benchmark case even if the MVC of the Simplified-SAC case is less than \$200,000 and returns less in value than the cost to bring the case. Apparently, UP thinks such a result is permissible because the Simplified-SAC method qualifies as a "simplified" process and, having offered a "simplified" process, the Board is obligated to do no more. Union Pacific's position, however, turns the statute on its ear. Not only is the proposed

⁵ Interestingly, the NS/CSXT Comments indirectly support the Interested Parties' view that the Board's eligibility proposals will limit "simplified" relief to only very small movements. The two carriers note: "Given the proposed eligibility threshold for SSAC cases (an MVC of less than \$3.5 million), most SSAC cases are likely to involve relatively low-volume single-car or multiple-car shipments" NS/CSXT Opening Comments, p. 14, fn. 12.

⁶ UP Opening Comments, pp. 68-69.

Simplified-SAC process highly complicated and the antithesis of “simplified,” as explained in the Interested Parties’ Opening Comments, but its high cost of litigation defeats one of the core goals of Section 10701(d)(3), which is to make rate reasonableness relief more, and not less, widely available.

One possible reason why UP seeks to force all non-SAC cases into the Simplified-SAC mold exclusively is evident from other information presented by UP, including its suggestion that railroads be permitted to introduce evidence in Simplified-SAC proceedings aimed at charging higher rates over high density routes. Such adjustments are not possible under the Board’s proposed Three-Benchmark procedures and are not proposed by UP for that purpose. Union Pacific’s tactic is understandable, given UP’s evidence that it is extremely difficult to move traffic across UP’s network without running into a constrained capacity segment, as illustrated by Exhibit C to UP’s Opening Comments. That exhibit shows, for example, that it is not possible to ship over UP to the major eastern gateways of Chicago and St. Louis without extensive use of high density, capacity-constrained lines; that it is not possible to ship over UP to export positions on the Texas Gulf coast without encountering high-density, capacity-constrained areas; that it is not possible to make shipments to Mexico without utilizing similar segments; and that it is not possible to make shipments from many heavy grain producing states to the Pacific Northwest without passing through capacity-constrained terminal areas.

If UP’s proposal to make only Simplified-SAC relief available in non-SAC cases is coupled with its proposal to set higher maximum rates over heavy density, congested lines, and then the Board’s so-called internal cross-subsidy principles (defeating SAC and Simplified-SAC

rate relief over *low-density* lines) are also factored in, effective rate relief is hard to foresee under any circumstances.⁷

Union Pacific offers an additional draconian eligibility proposal, which is that the eligibility boundaries for “simplified” cases not be treated as presumptions, but instead as firm, immovable barriers. Union Pacific believes that the proposed eligibility standards make far too many “small shipments” candidates for “simplified” relief, pointing to Table 2 of the Decision.⁸

To begin with, the problem confronting the Board, captive shippers and railroads is clearly not that too many small rate cases are being filed. We would note that the AAR raised this same concern about a deluge of small rate cases in Ex Parte 347 (Sub-No. 2), and the Board rejected it. See, *Simplified Guidelines*, 1 S.T.B. at 1051-53. The Board should do the same here.⁹

In any event, Table 2 is not a reliable statement or measure of the number of “small shipments” that might be eligible for non-SAC relief under the proposed rules. When the underlying basis of Table 2, the 2004 confidential waybill sample, was examined by the Interested Parties’ two cost consultants, neither consultant could reconcile Table 2 with his own examination of the confidential waybill data. Additionally, Table 2 totally ignores the proposed aggregation rules, which have the effect of imposing a chokehold on the theoretical and practical

⁷ UP also attacks the Three Benchmark approach as a “comparative rates” test, but then inconsistently argues that the Simplified-SAC procedure should be subject to a “reality check” based on rate comparisons. In its Opening Comments, p. 47, UP argues that the Board cannot prescribe a rate lower than that being paid by a second shipper with competitive transportation alternatives. But this is not a valid defense in a SAC case, and cannot be one in the small-case context.

⁸ Union Pacific Opening Comments, pp. 68-69. Other railroads share that view.

⁹ The railroads also claim that many frivolous complaints would be filed. However, the high cost, uncertainty and risk of cases will remain a significant deterrent to the filing of cases. A generalized concern about frivolous cases, in the absence of any evidence whatsoever, should not be credited.

ability of any shipping facility to utilize either the Three-Benchmark or Simplified-SAC methodologies proposed by the Board.¹⁰

Unless the proposed eligibility rules are altered drastically to make them more realistic, then one of two things will occur: almost every non-SAC complaint case will begin with a pitched battle involving the shipper's effort to overcome the eligibility presumptions, or the large majority of shippers will be deprived of any effective rate remedy whatsoever. If the Board adopts UP's proposal to make the eligibility boundaries immovable, then the certain result will be a loss of access to rate relief in almost all instances where a Full-SAC case is "too costly."

IV. THE COMMENTS IN THIS PROCEEDING INDICATE THAT THE BOARD'S SIMPLIFIED SAC PROCEDURES ARE EXTREMELY EXPENSIVE AND COMPLEX. RAILROAD SUGGESTIONS FOR CHANGES IN SIMPLIFIED-SAC PROCEDURES WOULD EXACERBATE THE CURRENT PROBLEMS WITH THE BOARD'S PROPOSALS

A. Rail Carriers' Comments in this Proceeding Confirm the Complexity and Expense of the Board's Simplified-SAC Proposal

The Interested Parties' Opening Comments discussed in great detail the complexities, expense and uncertainties connected with the Board's Simplified-SAC proposal.¹¹ Although the comments that were submitted by a number of rail carriers were conditionally supportive of the Board's proposal, those comments also discussed the difficulties and cost of the proposed Simplified-SAC procedure. In key respects, then, the railroads' comments effectively *confirm* the criticisms of the Simplified-SAC procedure that were presented by the Interested Parties in their Opening Comments.

¹⁰ Opening Comments of Interested Parties at pp. 19-22; Statements of Thomas C. Crowley and Gerald W. Fauth, III attached thereto.

¹¹ The Department of Transportation voiced a similar concern, albeit in a far more abbreviated fashion, noting that the cost of a Simplified-SAC case "seems likely nonetheless to be substantial" and noting that, therefore, "the true accessibility of regulatory relief would remain" an open question. Initial Comments of the Department of Transportation, October 24, 2006, p. 8.

For example, BNSF's comments forthrightly noted the problems associated with the Simplified-SAC procedure:

[T]he railroad defendant [in a Simplified-SAC case] would be required to engage in *extensive data processing* to identify and present for complainants' use data on the traffic moving over the issue route, on-SARR and off-SARR miles, *the costs of every movement on the selected route*, and the revenue to be allocated between the SARR and the residual incumbent *on the significant quantities of cross-over traffic that will inevitably be included* in SSAC cases. *Detailed programming would be necessary to extract data concerning a vast number of individual movements, and the data must be carefully vetted to ensure accuracy. Both the data extraction and processing are time-intensive and costly.* Moreover, the Board's proposal for a one-year DCF and a five-year rate prescription *would require BNSF to update prior SSAC analyses each year over a five-year period.*

Opening Comments of BNSF Railway, October 24, 2006, p. 17 ("BNSF Opening Comments") [emphasis added].¹² BNSF correctly notes that in a Simplified-SAC case, "a large portion of the traffic using the SARR lines will be cross-over traffic," *id.* at 19, 20. The Interested Parties believe that the existence of large amounts of cross-over traffic on a Simplified-SAC Stand Alone Railroad ("SARR") will be an important factor that will complicate the discovery and analysis process.

The Comments of Norfolk Southern and CSX are to the same effect. NS and CSX indicated that they were "very concerned" about the proposed Simplified-SAC litigation process and requirements. The two carriers indicate that the proposed information required by the Board under its "Second Disclosure" would require "special studies" to generate the required information. The two railroads note:

¹² BNSF charges that shippers are responsible for the high cost of SAC litigation in recent cases, citing to *Otter Tail Power Company v. BNSF Railway Co.*, STB Docket No. 42071, arguing that the complainant in that case was the cause of "multiple additional filings." BNSF Opening Comments, p. 9. As the Board well knows, the charge is not true, and in fact that case is a perfect example of the complexities that are likely to affect Simplified-SAC cases: in the *Otter Tail* case, the complainant asked for one additional filing when the Board changed its standard on one key issue in a previous case; the defendant asked for one additional filing for the same reason when still another decision was issued by the Board during the pendency of the case; and the Board itself called for one additional filing for its own purposes.

CSXT and NS do not maintain data in the format(s) in which it is typically requested in rate cases, and they could not simply “push a button” to generate the specific data the Decision proposes be provided by carriers in their “second disclosure.” Rather, *generating much of the proposed information and data – to the extent that it could be done at all – would require special studies, and substantial carrier time and resources.*

Opening Comments of Norfolk Southern Railway Company and CXT Transportation, Inc. (“NS/CSXT Opening Comments”), dated October 24, 2006, p. 7 [emphasis added].

Canadian Pacific Railway (“CPR”) mirrors the BNSF, CSXT and NS sentiments. CPR notes that the proposal would require the carriers to identify “all traffic that moved over the selected route during the Test Year” and make total operating and equipment cost calculations for “each movement” in the Simplified-SAC traffic group. Comments of Canadian Pacific Railway Company (“CPR Comments”), October 24, 2006, p. 15. CPR indicates that:

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

Id. [emphasis added]. CPR notes that it would have to develop special studies to generate the information required by the Simplified-SAC procedure. *Id.*, p. 16.

Indeed, NS and CSX indicate that the proposed schedule adopted by the Board – 30 days to provide the requested information – “would simply not be sufficient time for either CSXT or NS to develop the required data and information. . . .” and in fact would be “nearly impossible.” NS/CSXT Opening Comments, p. 10. CPR likewise requires more than 30 days to develop the requested information. CPR Opening Comments, p. 16. BNSF has similar problems regarding the 30-day time period proposed by the Board, which would “be difficult to meet without extraordinary and costly efforts,” and which

could not be started until the route of movement identified. BNSF Opening Comments, p. 35.

First, each of these requests by the railroads for more time strongly suggests that the already-far-too-lengthy-procedural schedule proposed for Simplified-SAC cases is understated and will be prone to expansion on a case-by-case basis, as has uniformly occurred in Full-SAC cases. Moreover, the carriers' comments also indicate that the \$200,000 total cost estimate by the Board for a Simplified-SAC case is far off the mark. If, for example, CSXT and NS are correct that 90 days would be necessary to develop the data required for the Second Disclosure, and if it is assumed that two people at a cost per person of \$100 per hour,¹³ working full time five days per week would be necessary to develop the data, then the cost of generating just this one part of the information needed for calculating the investment and operating cost of the SARR in a Simplified-SAC case would likely total over \$100,000. In reality, given the complexities of the Board's proposal, we believe that four or five people will have to be used to develop the required data, at a cost that would already exceed the Board's \$200,000 estimate for the entire case. And, of course, the final Simplified-SAC procedures will require far more time and expense than simply the identifying the traffic and cost calculations that would be part of the Second Disclosure.

It is no answer to say that because the railroads will be required to assume some data production burdens under the Board's rules, the cost of generating the data is "free" to the complaining shipper. It will not be possible – indeed, it would be malpractice – for shipper counsel and consultants to simply accept whatever numbers come out of the

¹³ A \$100 per hour cost is conservative. In developing his cost for work for a Simplified-SAC case, witness Fauth, who developed the least expensive estimate of the cost of a Simplified-SAC procedure, used an hourly cost of \$175 per hour. See, Joint Written Comments of Interested Parties, Fauth V.S., Appendix GWF-2.

railroad calculations without thoroughly checking the data and the procedures used to develop it. This will require at least partial replication of the railroads' efforts. If (as the railroads likely correctly claim) the data will have to be generated using special studies that would not even have the reliability of records produced in the ordinary course of business, the need for additional scrutiny will be compounded. If there are any omissions or errors in what are likely to be large numbers of calculations, then the cost of such corrections will also have to be borne by the shipper. Then, the shipper will have to "marry" this Second Disclosure data to the other requirements of the "Simplified"-SAC process. Moreover, unlike carrier defendants who have in-house personnel to generate and review the data (though it is extremely likely that even carrier defendants will need to utilize cost consultants such as Mr. Klick, who submitted a Verified Statement on behalf of BNSF in this proceeding), shipper complainants will need to employ outside cost consultants for every step in the process.

The railroads propose to "correct" the alleged discovery imbalance by mandating a "loser pays" rule for discovery. But the Board's Simplified-SAC proposal *inherently* requires large amounts of data from the rail carriers, who are solely in possession of that data. A "loser pays" rule is impossible to monitor and almost impossible to apply. For example, if the shipper is seeking a \$2000 per car rate reduction, and achieves a \$200 per car reduction, does that shipper pay nine-tenths of the discovery cost? What if the railroad developing the data makes a mistake, and the shipper must re-do some or all of the data? Or what if there is a disagreement between the shipper and the carrier as to what the Second Disclosure procedures require, either generally, or in a specific case? Who "pays" in that instance? Most importantly, a "loser pays" rule does not "solve" the

cost problem, but simply exacerbates the serious eligibility issues identified by the Interested Parties in their Joint Written Comments, since the risk of bringing a case will be substantially increased by the possibility that the complaining shipper will have to bear some unknown discovery burden that the complainant cannot even control.

The Board should not accept the railroads' claim that they may be victimized by frivolous rate complaints. Railroads are not victims of high rates; shippers are. Any railroad that publishes a rate well in excess of 180 percent of variable cost is fully aware that it is subject to a rate challenge, and must be willing to bear its statutory responsibility for defending the rate as "reasonable" in any resulting rate challenge.

B. Rail Carriers' Suggestions for Changes to the Board's Proposed Simplified-SAC Procedures Underline the Failure of the Board to Test Its Proposal, and Would Exacerbate the Problems With the Board's Procedures

The NS/CSXT Opening Comments crisply note that "[t]here is no benefit to a [rate] review that is fast, cheap, and wrong." NS/CSXT Opening Comments, p. 3. As a general proposition, these Interested Parties agree, and have noted in their Opening Comments that the Board's Simplified-SAC proposal makes numerous "simplifying" assumptions and procedures almost all of which raise the level of the rate produced by the Simplified-SAC procedures compared to a Full-SAC analysis.¹⁴ As DOT points out (Comments at 2), small and non-coal rate cases brought by shippers unable to afford a Full-SAC challenge should not produce less

¹⁴ For example, the railroads' arguments against the Board's proposal to permit, in extremely limited circumstances, a route of movement other than the existing route of movement is flatly inconsistent with CMP/SAC principles set forth by the agency in *Guidelines*. The arguments are especially puzzling in view of the fact that CSXT and NS *concede* that the railroads themselves re-route traffic in order "to improve service to customers." NS/CSXT Opening Comments, p. 13. Presumably, a carrier's effort to "improve service" is an important aspect of trying to increase efficiencies – the very purpose of permitting a SARR to re-route traffic in the first place. The carriers argue that permitting the re-routing of traffic would encourage "gaming." See, e.g., NS/CSXT Opening Comments, p. 14. But carriers have re-routed substantial amounts of traffic in recent years to increase traffic densities (which may reduce costs) and increase efficiencies. It is not "gaming" to permit a SARR to achieve the same type of efficiencies that real carriers engage in on a daily basis.

rate relief. These Interested Parties agree. In short, the Interested Parties believe that the Board's Simplified-SAC procedures are *not* fast, they are *not* cheap, *and* they *are* wrong.

In their comments, many of the railroads also take issue with the Board's proposed procedures, and suggest substantial alterations in the process. This extensive critique by the carriers underlines two points.

First, as the Interested Parties pointed out in their Opening Comments, the Board has apparently failed to test its proposal against both the results of past SAC cases (to determine if the answer produced by the proposed "simplified" procedure bears any relationship to the answer produced by a Full-SAC analysis) or against a real-life small-case example (to determine how "expedited" and "simplified" the proposed procedures really are). The railroad critiques underline the Board's failure to test the process. There is simply no basis for the Board to determine whether the railroads' proposed changes to the process will result in a more accurate Simplified-SAC analysis, or (as is much more likely) whether the proposed changes will increase the rate produced by the Simplified-SAC analysis to a point even further from the level that would be produced by a Full-SAC. Moreover, there is no basis for the Board to measure how much the railroads' proposed changes will increase the cost and complexity of the proposed Simplified-SAC process, because the Board apparently has no knowledge – other than mere guesswork based upon a fifteen-year-old "estimate" provided by the AAR – of how much time and expense its current proposal would require to litigate.

Although it is not clear how much additional time and expense the railroads' proposed changes to the Simplified-SAC would require, it is very clear that the railroads' suggestions for "improving" Simplified-SAC procedures would add substantial time, cost and complexity to the process – thus exacerbating the already-complicated and expensive Simplified-SAC proposal.

The following is only a partial listing of the changes to the Simplified-SAC process that the railroads have proposed so far in this proceeding:

- The Board should permit carriers to utilize movement-specific adjustments to URCS costs in Simplified-SAC proceedings, especially for fuel, equipment ownership, crew wages, switching or handling requirements, car mileage allowances, payments, and customs and security costs of certain shipments. CPR Opening Comments, pp. 12-15. See also, BNSF Opening Comments, p. 28 (adjustments to URCS should be permitted for “unique circumstances,” for example, to account for different hedging effects in the cost of fuel).
- The Board should permit parties in Simplified-SAC cases to account for differences in terrain and topography in calculating Road Property Investment (“RPI”) costs. NS/CSXT Opening Comments, p. 11. The Board should also “make appropriate adjustments in specific cases for other material differences from RPI in the preceding five SAC cases” *Id.*
- The Board should permit adjustment in URCS costs to recognize special handling or other services. NS/CSXT Opening Comments, p. 17 (“the Board should not sacrifice accuracy on the altar of expediency” in such cases).
- The Board should permit carriers to add new facilities to the current configuration in a Simplified-SAC case if additional facilities are needed or planned to handle expected traffic. Opening Submission of Union Pacific Railroad Company (“UP Opening Comments”), October 24, 2006, pp. 19-20. See also, BNSF Opening Comments, p. 31 (the Board should allow railroad defendants to modify RPI costs to account for “any increases in capacity on the SARR route that have occurred since the original Simplified-SAC calculations were made.”)
- The Board should permit “flexibility” in assessing RPI costs in Simplified-SAC cases to account for differences between the SARRs posited in prior Full-SAC cases and the SARRs likely to be posited in Simplified-SAC cases, to account for traffic mixes that are allegedly different from coal cases. This would include such a wide variety of RPIs as the cost of intermodal terminals, autoramps, large bridges, fencing, security, lighting, and urban land values. BNSF Opening Comments, pp. 22 – 25. See also, UP Opening Comments, pp. 24-27 (land values from prior SAC cases should be adjusted for land values on the Gulf Coast, from Houston to the eastern gateways, and for traffic originating or terminating on the West Coast).
- The Board should permit adjustments to unit costs in Simplified-SAC cases to account for allegedly different traffic densities in Simplified-SAC cases compared to prior SAC cases. BNSF Opening Comments, p. 25.
- The Board should permit adjustments for the differences in state statutory tax rates. BNSF Opening Comments, p. 31.

- The Board should permit carriers to specifically calculate operating costs for hazmat movements, and for the costs of using actual trackage rights payments. UP Opening Comments, pp. 28-30.

Adoption by the Board of any of the above wish-list of modifications, alterations, refinements, etc., would simply pile additional cost and complexity onto an already-impossible process.

Indeed, the quagmire into which the Board has stepped as a result of its "Simplified-SAC" proposal is illustrated perfectly by the following "standards" proposed by the UP in its Opening Comments to govern exceptions to the Board's proposed Simplified-SAC procedures:

1. The Board should permit parties to "submit evidence that would produce *more accurate results* than the rolling average [of RPI costs]" where "actual costs *differ enough* from the rolling average costs to make the additional expenses *worthwhile*." UP Opening Comments, p. 27 [emphasis added]
2. The Board should permit route-specific RPI evidence "when *the added precision outweighs the costs* of developing more accurate evidence." UP Opening Comments, pp. 26-27 [emphasis added].
3. The Board should, as a "reality check," permit evidence "that the application of Simplified-SAC in a particular case has produced a result that is *plainly flawed or illogical . . .*" since "if the results [of a Simplified-SAC analysis] are *obviously wrong*, the Board would have no rational basis for prescribing a maximum rate based on the flawed result." *Id.* at 46-47 [emphasis added].

Given the flaws and uncertainties of the Board's proposal and the utter lack of any Board analysis of the ease or accuracy of the proposed Simplified-SAC procedure in the record in this case, the Board can neither accept such vague standards without utterly destroying the alleged "simplicity" upon which its Simplified-SAC proposal is built, nor completely reject all exceptions to its Simplified-SAC procedures without acting arbitrarily and capriciously. Even if

the Board's Simplified-SAC standards were perfectly clear (which they are not), the fact of the matter is that, unless the Board flatly and thus arbitrarily forbids any adjustments whatsoever to its proposed Simplified-SAC procedures regardless of the facts of a particular case, it will be impossible for the Board to prevent parties from submitting evidence and arguing that the "simplified" procedure results in an answer that is contrary to Constrained Market Pricing and SAC theory. Once one party proposed an adjustment, the other party will have to respond. And in that case, how "simple" will the Board's "Simplified"-SAC procedures actually be?

The Board cannot escape this deepening quagmire by stepping further into it. The Board should withdraw its Simplified-SAC procedure, as the Interested Parties requested in their Opening Comments.

V. THE RAILROADS' CRITICISMS OF THE BOARD'S REVISED THREE-BENCHMARK PROCEDURES ARE MISPLACED

Several railroads suggested in their opening comments that significant revisions be made to the Three-Benchmark methodology, notably in the areas of selecting a comparison traffic group.¹⁵ Among the changes advanced by the carriers are exclusion of non-defendant traffic from the comparison group and an opportunity for the defendant to demand a highly particularized showing of similarities in demand elasticity between the issue traffic and any comparison traffic. Use of a confidence interval is also criticized by the railroads as being inadequate to protect against a "ratchet-down" effect from use of the comparability calculation as proposed by the Board.¹⁶

¹⁵ E.g., BNSF Opening Comments, p. 37; UP Opening Comments, p. 58.

¹⁶ The AAR attacks the Board's use of the revised RSAM benchmark because it allegedly "destroys the logic" of the original calculation. But the Board is correct in revising the RSAM benchmark. As many of these same Interested Parties pointed out in comments filed with the Board in July 2004 (attached as Appendix C to the Interested Parties' Opening Comments in this proceeding), the original RSAM benchmark was clearly flawed in that it might show a "shortfall" from revenue adequacy *even when the Board had determined the carrier to be revenue*

A. Confidence Intervals.

We will address the latter claim first. As noted in the statement of Thomas D. Crowley, attached to the Opening Comments of the Interested Parties, the proposed use of a confidence interval is seriously flawed and should be scrapped entirely or revised substantially in methodology. If the use of the confidence interval is retained with the changes proposed by the Interested Parties (or even if no changes are made to the process of selecting the sample size, as they must be in order to produce an accurate and reliable confidence interval), the confidence interval cannot possibly produce a ratchet-down effect. The confidence interval in all cases assures that the final comparable rate is above the average of all comparable rates. As a result, the more that comparable railroad rates increase over time, the more it is assured that any comparability factor will have a "ratchet-up" effect on rates, or just the opposite of the effect claimed by the railroads.

B. Comparable Traffic Groups.

The carriers hope to significantly expand the concept of comparable demand elasticities set forth in the *Simplified Standards* by making provision in the rules for the introduction of endless factors to be considered in selecting a comparable traffic group. No doubt hoping to overwhelm shippers in small rate cases with sophisticated elasticity arguments (a foretaste of the tactics that are likely to drive the cost of "small cases" far higher than the Board's implicit estimate), the carriers ask the Board to encourage the introduction of any and all evidence and manner of argument addressing the demand characteristics of the issue traffic and the traffic in the suggested comparability group.

adequate, since the RSAM calculation does not take into account any revenue being obtained from captive traffic in figuring the alleged revenue "shortfall." See Interested Parties' Opening Comments, Appendix C, pp. 13-16.

In the first place, there is absolutely no evidence that, just because traffic moves on a carrier different from that of the defendant, its elasticity of demand is different. Moreover, selection of a comparable traffic group as proposed by the Board already places the complaining shipper at a disadvantage compared to the defendant railroad, and that disadvantage should not be exacerbated by acceptance of the carriers' requests to build additional complexities and imbalances into the system. The rules as proposed by the Board require the complaining shipper in a Three-Benchmark case to enter the process of selecting a comparable traffic group with similar demand elasticities without access to the true characteristics of the universe of relevant traffic. The Board is refusing to make unmasked waybill data available to the complaining shipper, even though the Board intends to utilize unmasked waybill data in making its final selection of the appropriate comparison group after the parties have exhausted the "final offer" selection process.¹⁷ Only to the extent that a comparable traffic group might be drawn from carriers other than the defendant would the complaining shipper and the defendant railroad be on equal footing with respect to available data, because the defendant railroad presumably has no greater access to the unmasked traffic information of other railroads than would the complaining shipper. If, as UP proposes, the comparison traffic group is confined to only the defendant's traffic, then even the small area in which the parties are on a level playing field in selection of comparable traffic groups would be removed.

The carriers' plea for the introduction of unlimited considerations to determine comparable traffic groups in the name of "accuracy" goes much further than necessary to make

¹⁷ UP's criticisms of the Three-Benchmark process in fact confirm the inadvisability of the Board's procedures with respect to making available comparable traffic information until the end of the process. See, UP Opening Comments, p. 51. As correctly noted by UP, the Board's proposed procedures with respect to the Confidential Waybill Sample will make it impossible for a shipper to accurately gauge the possible outcome of its case until after the case is filed, and would not reveal unmasked revenues until the end of the proceeding, thus discouraging early settlement of the dispute before a case is filed, and even after a case is filed.

the Three-Benchmark process truly simplified. The attainment of ultimate precision in selecting a comparable group is both impracticable and inconsistent with the Congressional mandate for a "simplified" process. Moreover, if a comparable traffic group is to be comparable in every minute detail, as the railroads seek an opportunity to prove, then it is unlikely that there will be any comparable traffic unless it consists of the same railroad's movements of the same commodity from a neighboring origin facility to the same destination, especially since the "comparative" group will be drawn from the comparatively small Waybill Sample rather than a carrier's full traffic tapes. The result will be that a complaining shipper's rate will be determined by the rate charged its adjacent competitor, and nothing more. Since the complaining shipper cannot seek to reduce a competitor's rate, unless both shippers act at the same time, neither shipper can get relief.

The Board should make it clear that it intends to take a practical approach in identification of comparable traffic groups and that it will not demand satisfaction of every conceivable indicator of comparability before a suitably comparable traffic group is selected. To do otherwise would make an already-complex process even more complex.

C. Application of Benchmark Criteria

As noted below, more than one railroad suggests that, at the conclusion of any type of simplified proceeding, a final rate not be prescribed before the Board considers extrinsic reasons for increasing the rates resulting from the applicable process, whether it be Simplified-SAC or Three-Benchmark. The Interested Parties oppose retention of the Simplified-SAC process, even without a provision for railroads to argue, based on extrinsic evidence, that rates exceeding Simplified-SAC levels should be permitted.

The Interested Parties have no blanket objection to the introduction of non-formulaic considerations in the prescriptions of a maximum rate under the Three-Benchmark approach, provided that the railroads do not abuse that process to deprive the Three-Benchmark approach of the fundamental simplicity it is intended to foster. For instance, if Union Pacific wants to argue that the outcome of a Three-Benchmark analysis applying the benchmark standards alone should be adjusted for considerations such as the use of high-density lines, it might be inappropriate to exclude such a presentation entirely.¹⁸

By the same token, however, shippers must retain an equal right to press for downward modifications to the formulaic outcome. For example, there is no reason why a complaining shipper should not be able to present evidence and argument to the effect that benchmark inputs and results fail to take into account the costs imposed on a shipper by erratic, unpredictable service and detract from the value of the rates the shipper must pay. In fact, as pointed out in the Interested Parties' Opening Comments, the Long-Cannon factors mandate a consideration of railroad inefficiency. The Interested Parties do suggest, nevertheless, that the Board consider imposing a pagination limitation on the extent to which a party can offer post-formulaic adjustments in order to ensure that the process does not get out of hand.

VI. THE BOARD IS CORRECT IN PROPOSING USE OF UNADJUSTED URCS COSTS

Virtually all of the railroads submitting opening comments, including AAR, ostensibly support a less complex and simpler maximum rate process using unadjusted URCS costs in non-SAC cases, yet most of the railroads quickly abandon their support for simplification in favor of a litany of proposed exceptions to the use of unadjusted URCS data. Some of the adjustments

¹⁸ The Interested Parties do not aver or concede that the statutory directive to make available a "simplified" methodology where a full SAC presentation is too costly *requires* the Board to open the flood gates once a conclusion has been reached based on the benchmark criteria. The Congressional directive to establish a simplified methodology as an alternative in certain circumstances to a Full-SAC presentation may well empower the Board to be totally innovative in the replacement of Full-SAC with an alternative, simplified procedure.

proposed are for use in making the jurisdictional threshold determination, while others are proposed for use in the Simplified-SAC merits process and in calculating the Three-Benchmark rate. A summary of the proposed URCS changes follows:

A. Jurisdictional Threshold Changes.

1. Payments to third parties or shippers. These adjustments would include railroad switching charges paid to short lines or others; allowances paid to shippers for performing certain industry switching.¹⁹

2. Movement-specific adjustments. These proposed adjustments include substitution for system-average inputs of the actual number of locomotives used; empty miles; tare weight; trackage rights payments; payments to other railroads or private car suppliers for car costs; costs attributable to hazardous materials shipments; costs attributable to high/wide traffic.²⁰

B. Other URCS Adjustments.

Most railroads propose URCS adjustments for use in Simplified-SAC cases and some propose them for use in Three Benchmark cases to adjust the final revenue-to-variable cost ratio used to calculate a permissible maximum rate. Most of these adjustments are similar to those proposed by some railroads for use in making jurisdictional threshold determinations.²¹

If all or even some of the railroads' proposed URCS adjustments, whether for jurisdictional threshold determination purposes or otherwise, are accepted, the Board might as

¹⁹ E.g., UP Opening Comments, p. 34-35; BNSF Opening Comments, p. 11.

²⁰ E.g., UP Opening Comments, pp. 36-43. Norfolk Southern and CSX state that they have no objection to the use of unadjusted URCS cost for the jurisdictional determination, provided the Board requires mediation early in the complaint process and allows adjustments to URCS costs before prescribing a rate. NS/CSXT Opening Comments, p. 16. Presumably, if the Board fails to make these two adjustments, NS and CSX would join other carriers in seeking liberal use of adjusted URCS costs for jurisdictional threshold purposes.

²¹ E.g., NS/CSXT Opening Comments, p. 21.

well abandon the goal of using unadjusted URCS as a compromise to achieve simplification of non-SAC rate complaints. As explained below, what the railroads are proposing in the way of “modest” URCS adjustments are in many cases highly complicated issues. If accepted, they would ruin the trade-off proposed by the Board by compelling shippers to seek offsetting adjustments advantageous to their case and by engaging in protracted litigation over the adjustments proposed by the railroads.

The Interested Parties hope to refrain from countering the railroads’ destructive proposals, plainly intended to tilt the balance of revenue/variable cost determinations in the carriers’ favor, by offering our own counter-theories of URCS adjustments deemed beneficial to a shipper’s case. See, for example, *BP Amoco Chemical Company v. Norfolk Southern Railway*, Docket 42093 (June 6, 2005), citing *Burlington Northern R.R. v. ICC*, 895 F.2d 589, 601 (D.C. Cir. 1993): “Thus, if the adjustments were made on both sides, it might well be pointless; if on only one side, it would create phony discrepancies.” While those findings were aimed at adjustments to URCS variable costs for comparison traffic purposes in a case that arose under the Board’s existing “three-benchmark” rules, they are equally applicable to the concept of URCS adjustments in general. Once the adjustment process starts, it will be endless.

The Interested Parties view the Board’s proposed use of unadjusted URCS data as a mixed blessing, ultimately acceptable as a reasonable compromise to achieve simplified procedures consonant with the Board’s statutory mandate. There are in fact many cases where shippers would benefit from movement-specific URCS adjustments, and the Interested Parties have been willing to forego pursuit of those adjustments if the use of URCS data is to be totally adjustment-neutral. For example, railroads may “marry” large multi-car units into a 100-car or larger train to achieve the economies attendant to full-size unit trains, but only the higher URCS

system-average variable costs for the smaller units are used in a Phase III variable cost exercise where the issue traffic is tendered in smaller units.

Similarly, railroads sometimes require or convince shippers to perform pre-classification of cars on shipper tracks without a specific or full allowance payment, claiming that a "reduced" rate is being given in return. However, the amount of any rate reduction generally is not evident from the tariff itself and may not in fact equal the shipper's costs of furnishing the requested service, providing a valid basis for the shipper to seek an offsetting adjustment. Where a railroad's rates apply in private equipment but the shipper receives no compensation for furnishing that equipment, the carrier has no variable car ownership expense, but system average car ownership costs are nevertheless charged against the equipment by URCS. As the Board notes, there are almost endless examples of URCS adjustments that could be proposed by the parties in any case. If the process begins with railroad-preferred adjustments, it cannot end there.

Beyond that, many of the adjustments proposed by the railroads are highly contentious or outright inappropriate. Take, for instance, freight car rental payments, proposed as URCS adjustments by UP whether the cars are privately owned or owned by another railroad. All forms of car rental and ownership costs already are included in the system-average URCS data, which is all that is required for these particular inputs to be included in a variable cost calculation. See, *FMC Wyo. Corp. v. Union Pacific RR*, 4 S.T.B. 699, 760 (2000).

Adjustments to system-average car ownership costs are not necessary and, in fact, would lead to protracted disputes. By way of example, use of specific payments to private car owners in lieu of system average costs introduces the question of whether those payments are adequate to cover the shipper's car ownership expense and, if not, whether the uncompensated portion of a shipper's car supply costs are non-deductible costs or are entitled to recognition as a credit

against the freight rate. In many instances, "payments" to private car owners are difficult to determine on a per trip basis because the so-called payments are not really payments at all, and instead may take the form of an allegedly reduced rate that the carrier will take the liberty of translating constructively into a "payment." In reality, except in those rare instances when a mileage allowance actually is paid to tank car owners pursuant to a rate prescribed in Ex Parte No. 328, it is probable that each railroad's claim of "actual" car ownership costs for the use of private cars would be contentious either because the payment is computed constructively or, if actually made as a result of a unilateral judgment of the carrier, represents an understatement of the value of the car and would lead to an effort by the shipper to offset the per-trip market value of the equipment against the rate being challenged.²² Use of system average costs will avoid these types of disputes.

Carrier efforts to include third party equipment costs at their highest movement-specific level in lieu of system average costs are objectionable for another reason. As the Board notes in *Simplified Standards*, slip op. at 12, one goal of the proposed rules, at least in Simplified-SAC proceedings, is to provide the defendant railroad with a "reasonable return on the replacement value of those facilities" used to serve the complaining shipper. Private cars supplied by shippers simply are not assets owned or replaced by the railroads. Not a single tank car is supplied by a railroad for the transportation of shipper traffic. Over 60 percent of all covered hopper cars are privately supplied, largely because they are specialized types of equipment that carriers elect not to furnish. If private tank car suppliers receive compensation for furnishing their cars, it frequently is on an imputed basis that cannot readily be converted to a per-

²² Shippers furnishing covered hopper cars, such as those used for grain, plastics, and chemical service, do not receive a prescribed mileage allowance and instead are entitled to receive market-based compensation, *LO Shippers Action Committee v. Aberdeen & Rockfish Railway*, 4 I.C.C.2d 1 (1987), *aff'd.*, *LO Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

movement variable cost and cannot be tied at all to replacement of the equipment by the carrier. The same can almost uniformly be said of covered hopper car compensation.

The use of unadjusted URCS costs for equipment costs eliminates several potential mine fields of controversy and is consistent with the statutory goal of obtaining a simplified process for "small" rate cases.

Movement-specific adjustments for payments by defendant railroads to other carriers or to shippers for switching service likewise should be avoided. All such costs are included in the URCS data and in an URCS-based variable cost analysis on a system-average basis. In those cases where payments are made to shippers, departure from the use of system-average data would raise issues similar to those discussed above with respect to private car payments; namely, whether the shipper is entitled to some form of an offset because the payments received from the carrier are insufficient to cover the costs of the service provided.

Several railroads suggest that movement-specific adjustments be made for unique services such as circus trains, high/wide shipments, or hazardous materials shipments.²³ Circus trains, high/wide, and similar unique shipments uniformly move under specially negotiated circumstances resulting in bilateral agreements. If disputes arise regarding this type of traffic they will almost certainly involve contract disputes not subject to the Board's rate reasonableness jurisdiction.

Hazardous materials shipments pose another problem: the extreme complexities of measuring the "special costs" the carriers seek to impute to the shipments because of their varying degrees of risk. To treat all hazardous materials shipments as having the same movement-specific costs arising from the same degree of risk would be inconsistent with the carriers' claim that hazardous materials shipments must be segregated from all other types of

²³ E.g., UP Opening Comments, p. 41; CSXT/NS Opening Comments, p. 18.

railroad traffic. Toxic inhalation hazard materials, for example, would be seen to pose a higher level of risk than would most other hazardous materials. If movement-specific adjustments for this type of traffic are to be allowed, they would have to involve clearly differentiated levels of risk that will be extremely hard to quantify and will lead to serious disputes in each case.²⁴

Another category of movement-specific adjustments proposed is for fuel costs, locomotive costs, crew wages, and other similar expenses. In effect, these proposals would completely undo the concept of using system-average URCS costs to achieve a simplified process. Would actual fuel costs be before or after hedging? Should hedging successes or failures be taken into account? If crew wages are inflated due to carrier operating inefficiencies, should adjustments be made?

Finally, it is urged by some carriers that movement-specific adjustments to URCS costs be allowed at the conclusion of a proceeding to adjust the revenue/variable cost ratios used for rate prescription purposes.²⁵ The argument advanced is that a failure to make such an adjustment may result in the prescription of a rate below 180% of true variable costs, which would be "unlawful." The converse of that argument, however, is that it would be equally "unlawful" for the Board to prescribe a maximum rate that is *above* a reasonable level. Accordingly, a reexamination of system-average URCS costs at the rate prescription phase of a proceeding would have to entail a thorough re-analysis from the perspective of both shipper and carrier, nullifying the statutory goal of rate proceeding simplification. The Board should draw a distinction between URCS adjustments, which should be proscribed, and consideration of non-URCS related factors in addition to Three-Benchmark statistical outcomes, which should be considered within reasonable limits.

²⁴ No carrier has a concrete proposal for making movement-specific adjustments to system average costs for the movement of hazardous materials. See UP Opening Comments, p. 44.

²⁵ E.g., CSXT/NS Opening Comments, p. 20.

While many of the railroads give lip service to the principle of small rate case simplification, their proposals for URCS adjustments contradict that statutory goal. The cases cited by the carriers in support of certain movement-specific adjustments²⁶ are decisions that are antecedents of the Interstate Commerce Commission Termination Act and its mandate for "simplified" procedures, and arose in the context of the full-blown, Full-SAC procedures that Congress seeks to avoid in smaller cases. The Board's ICCTA mandate authorizes the Board to make reasonable trade-offs to achieve simplification. The Board should continue to pursue the goal of simplification by adhering to the use of system-average URCS costs.

VII. THE RAILROAD'S SUGGESTION FOR MANDATORY MEDIATION HOLDS PROMISE, AS LONG AS CERTAIN CONDITIONS ARE MET

Mandatory mediation has been proposed by several railroads for use in both Simplified-SAC and Three-Benchmark proceedings. The Interested Parties do not oppose mandatory mediation, provided that it takes place after the parties have been given equal access to all information relevant to conduct an informed and meaningful mediation process, and as long as there are strict and abbreviated time periods for conducting mediation. The twenty-day limit suggested by the AAR may be appropriate.

VIII. THE RAILROADS' CRITICISMS OF THE BOARD'S PROPOSAL TO HANDLE CHALLENGES TO RATES FOR EXEMPT COMMODITIES ARE WITHOUT MERIT

Railroad commenters in this proceeding advance a number of arguments against the Board's proposal that a complainant shipping commodities falling within a class of exempt traffic would need to include with its complaint a separate request for a partial revocation of the pertinent class exemption, with evidence to be submitted under the schedule proposed by the Board while the Board considered that request. Decision, p. 17, 30.

²⁶ UP Opening Comments, p. 35; BNSF Opening Comments, p. 11.

Some railroad commenters argue that the Board should not “water down” its standards or make them a “backdoor” for “reregulation.” See, AAR Opening Comments, p. 13; UP Opening Comments, p. 72. Others argue that the Board should rule on the exemption revocation request before proceeding with the complaint. AAR Opening Comments, p. 14; UP Opening Comments, p. 45, 70; BNSF Opening Comments, p. 13; NS/CSXT Opening Comments, p. 15. Still other railroads argue that the Board should make a “searching inquiry” before revoking an exemption, AAR Opening Comments, p. 13-14; that the Board must “revisit” its prior findings granting the exemption or show that the prior findings were “clearly wrong,” BNSF Opening Comments, p. 16, UP Opening Comments, p. 73. Finally some railroads argue that the shipper should not simply be required to show market dominance or that the rate exceeds the reasonableness standards, BNSF Opening Comments, p. 14, CPR Opening Comments, p. 19. These arguments either misapprehend what the Board has proposed or misunderstand the statutory standard for revoking an exemption in the context of an individual case (as distinct from revocation for a class of shippers).

In its Decision, the Board has simply proposed a procedural device, requiring a shipper of an exempt commodity to submit a request for revocation with its complaint, and has indicated that the request would be processed while the complaint was considered. The Board did not propose to “water down” the statutory standards, or create any “back door.”

On the other hand, the Board should not be tempted in this proceeding to erect any barriers to revocation that are not in the statute. An individual shipper complainant should not have to show, for example, that the Board’s prior determination was “clearly wrong”; that a “searching inquiry” is needed to revoke an exemption; or that the Board must “revisit” its prior findings. The fact of the matter is that, for many exemptions, there was no “searching inquiry”

in the first place, but simply a cursory examination of general statistical evidence, often now more than twenty years old. But more importantly, when an *individual* shipper complainant makes a request for revocation of the exemption *as to it*, the Board is in a fundamentally different position than the agency was when it first issued the exemption *for the class*. When it issued the exemption as to a class, the Board was examining the market *as a whole* for that class of shipper, *without* reference to individual facts and circumstances.

An individual complainant is *not* limited to arguing that the facts concerning the market *as a whole* have changed and that the agency therefore needs to “revisit” its prior findings, or that the Board’s initial examination was “clearly wrong.” An individual complainant should be able to show, in addition, that the exemption should be revoked *as to it*, because *its facts* indicate that application of the statute *as to it* is “necessary to carry out the transportation policy of section 10101 . . .” 49 U.S.C. 10502(d). The statute clearly gives the Board the power to *maintain* an exemption for a *class* of shippers, while *revoking* the exemption “to the extent it specifies,” as to a “person” within that class. 49 U.S.C. 10502(d).

Finally, the Board’s procedural determination to consider a revocation request at the same time that it considers the complaint is appropriate. Even if it could be argued that the standard for a finding of market dominance (an “absence of effective competition”, 49 U.S.C. 10707(a)) is not perfectly coincident with the standard for revocation (regulation is “necessary to carry out the transportation policy of section 10101”), the market dominance and revocation standards are clearly very closely related, at the very least because one of the rail transportation policies tracks *word for word* the market dominance standard (see, 49 U.S.C. 10101(6), “to maintain reasonable rates where there is an absence of effective competition . . .”).

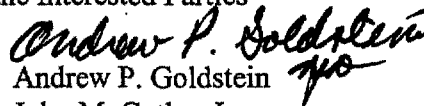
Especially given this close relationship, there is no need for the Board, in its proposed small case guidelines, to decide *a priori* that all cases involving an exempt commodity must be bifurcated, or that the request for revocation of an exemption for an individual shipper should always be ruled on before the case proceeds under the schedule adopted by the Board. The Board has the discretion to balance the statutory requirement for a "simplified and expedited" determination of rate reasonableness in small cases against the procedures that it must use to revoke an exemption in the case of an individual shipper. Its procedural proposal for handling complaints about rates applicable to an exempt commodity, and revocation of the exemption as applied to an individual shipper of that commodity, appropriately strikes that balance.

Respectfully Submitted,

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Dated: November 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of November, 2006, served a copy of the foregoing Reply Comments on all parties of record, by first-class mail, postage prepaid.

A handwritten signature in black ink, appearing to read 'Aimee DePew', written over a horizontal line.

Aimee DePew