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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**OPPOSITION OF THE ASSOCIATION OF AMERICAN RAILROADS
TO PETITIONS FOR RECONSIDERATION**

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PREFACE AND SUMMARY OF ARGUMENT

On October 12, 2007, a group of parties representing shipper interests (identifying themselves as "Interested Parties") filed a petition to reconsider various aspects of the Board's decision served in this proceeding on September 5, 2007 ("Decision"). A second petition for reconsideration was filed on that same date by Arkansas Electric Cooperative Corporation. The petitioners do not demonstrate either that the Board's decision is materially affected by new evidence or changed circumstances or that the Board committed material error. See 49 C.F.R. § 1115.3(b). Instead, they rehash arguments that the Board has already addressed and rejected. On behalf of its member railroads who have participated in this proceeding, the Association of American Railroads ("AAR") urges the Board to deny the petitions for reconsideration.¹

The Interested Parties' objections to the Decision are without merit. Specifically:

¹ AAR and several of its members have sought (or may seek) review of the Decision in the Court of Appeals. This Opposition to the petitions for reconsideration should not be taken as evidence of lessened concerns with various aspects of the underlying Decision on the part of AAR and its members.

- **Higher Relief Limits.** The increased limits on relief adopted by the Board for both Three Benchmark and Simplified SAC cases already provide a more than adequate cushion between litigation cost and potential relief. The Interested Parties' "risk factor" calculations do not provide meaningful information about risk levels and do not support higher limits. Particularly given the admittedly crude nature of the Three Benchmark test, it would be a serious mistake for the Board to further expand relief limits.
- **Pre-Complaint Access to Confidential Waybill Data.** As the Board concluded, shippers have no valid need for pre-complaint access to confidential waybill data. The Interested Parties' arguments to the contrary reflect a desire to enhance the negotiating position of shippers, but the Board has concluded that such use of confidential waybill data is not permissible.
- **Confidence Interval.** The Board has already rejected the argument raised by the Interested Parties and there is no need for the Board to substitute their judgment for its own. In addition, it would be inappropriate to view the confidence interval issue in isolation from the entire Three Benchmark approach.
- **RSAM.** The Board's decision to use only the unadjusted RSAM is rational and well-supported. Long Cannon does not require use of the adjusted RSAM as the adjusted RSAM does not meaningfully account for traffic that does not contribute to going concern value.
- **Simplified SAC.** The Interested Parties want both full conformance with SAC principles and simplification. Simplification requires rational departures from Full SAC proceedings, so it is not possible to have both. The development of a simplified rate standard requires the Board to balance competing objectives of accuracy and simplification, and the Interested Parties have not shown that the Board struck the wrong balance.
- **Oral Argument.** The Board does not typically permit oral argument at the petition for reconsideration stage and there is no reason for it to do so in this case.

In addition, Arkansas Electric Cooperative's argument for higher relief limits based on a consideration of the litigation expenses incurred by both defendants and shippers is not supported by the statute that provided for simplified rate standards and should be rejected.

ARGUMENT

I. The Interested Parties' Attempt to Increase Limits for Relief Must Be Rejected

The Interested Parties devote the bulk of their petition to arguing that the Board did not do enough to give shippers access to simplified standards when it increased five fold (from \$200,000 to \$1,000,000) the relief available under the Three Benchmark maximum reasonable rate methodology, increased by more than 40% the relief available under Simplified SAC (from \$3.5 million to \$5 million), provided shippers the choice of methodology to be applied regardless of the volume of traffic at issue or the size and resources of the shipper, and eliminated the proposed aggregation rule. The Interested Parties argue that the Board should further expand relief caps to \$3 million for Three Benchmark cases and \$10 million for Simplified SAC cases. The transparent goal of their argument, as it has been throughout this proceeding, is to subject as large a share of rail traffic as possible to rate regulation under the crudest and least accurate methodology (Three Benchmark) and to make the bulk of the remaining eligible (i.e., potentially market dominant) traffic subject to the Simplified SAC approach. Allowing any rail shipper to pursue \$3 million in rate relief under the Three Benchmark methodology, regardless of the amount of freight shipped under the challenged rate, would not constitute a rational trade off between simplification and accuracy. Nor does it make sense to permit shippers to pursue relief under the Simplified SAC standard where the cost of a Full SAC presentation would clearly be justified.

The Interested Parties' arguments are based on a mischaracterization of the Board's approach to the issue of litigation risk. The Board was cognizant that concerns about the inherent uncertainties of litigation might discourage shippers from bringing meritorious rate cases unless "the potential relief exceeds the expected cost of obtaining the remedy by a sufficient margin to make it worthwhile to pursue the complaint." Decision at 32. Contrary to

the Interested Parties' suggestion, however, the Board did not address the issue by guaranteeing shippers a specific minimum ratio between the potential value of a case and litigation costs (what the Interested Parties call a "risk factor") Instead, the Board addressed litigation risk by adopting a "limits to relief approach" it established relief limits for each simplified methodology such that there would be an "ample cushion between the cost to bring the case and the potential relief available," and it allowed shippers the choice to use either simplified methodology, subject to those limits *Id* The Board thus avoided the controversial issues of determining the potential value of a specific case and the litigation risk associated with the case and instead left it to the complaining shipper to make those determinations for itself

The Interested Parties incorrectly assert that shippers with claims in the \$1.75 million to \$4 million range are faced with a "Hobson's choice" because they will have to choose between pursuing a Three Benchmark case and limiting their potential relief to \$750,000 or spending \$1 million to pursue a Simplified SAC case if they want a chance to obtain greater relief A "Hobson's choice" is a situation that involves no real choice The Board's approach gives these shippers a meaningful choice between two alternatives – (1) pursuit of a low-cost methodology with relief capped at \$1 million, or (2) pursuit of a higher-cost methodology and potential relief capped at \$5 million. A shipper that is not confident in its case or that believes that the potential amount of relief is below \$1.75 million will be more likely to choose the Three Benchmark methodology A shipper that is confident in its case or that believes that the potential amount of relief is above \$1.75 million will be more likely to choose the Simplified SAC methodology A shipper that is somewhere in the middle with respect to either factor will have a more difficult choice to make, but the Board reasonably left it to each claimant "to evaluate its own claim,

decide for itself the expected value of the case, and balance the value against the litigation costs and the potential relief it may receive ” *Id* at 28.

At the end of the day, the false precision of the Interested Parties’ discussion of litigation risk transmutes into a naked grab for higher limits of relief. Thus, the Interested Parties assert that “the Board’s decision to set relief caps at the \$1 million and \$5 million levels is *particularly* arbitrary and capricious because the problem can be fixed (now that the Board has wisely adopted a “limit to relief” approach), by increasing the relief caps for Three-Benchmark and SSAC cases to level substantially *less* than those urged by the Interested Parties at the NPR stage.” Interested Parties’ Petition at 9 (emphasis in original). The Interested Parties have lost sight of the fact that the Board’s objective in this proceeding was to make rate relief available to shippers who could not otherwise afford to pursue it, while at the same time encouraging use of more accurate rate standards where greater litigation expense is justified. Thus, the Board made clear that “by placing limits on the relief available, we encourage shippers with larger disputes to pursue relief under the more appropriate methodology without the Board itself trying to determine the likely value of a case ” Decision at 28. The Interested Parties seek to subvert this objective by urging the Board to allow shippers with larger disputes to pursue relief under inappropriate methodologies. The Board must reject these efforts to expand the prescribed limits of relief.

II. The Board Should Not Grant Pre-Complaint Access to Confidential Waybill Data

The Board has already squarely addressed the Interested Parties’ contention that pre-complaint access to confidential waybill data is necessary for a shipper to evaluate its complaint. The Board’s reasons for denying such access, set out in *Rate Guidelines – Non-Coal Proceedings*, 1 S T B 1004, 1054-55 (1996), and adverted to in the Board’s decision in this proceeding remain fully valid. As the Board recognizes, confidential waybill sample data is not

needed to develop the information that must be included in a rate complaint. Moreover, pre-complaint sifting of the confidential waybill data by counsel and consultants for potential litigants “would be an inappropriate use of the Waybill Sample for a non-regulatory purpose if we were to foster its use in rate negotiations between shippers and carriers.” *Id*

The Board’s decision here preserves the status quo regarding access to confidential waybill data. For example, it is consistent with the Board’s recent denial of a request for pre-complaint access to confidential waybill data. In 2006, when North Dakota grain shippers sought similar access to confidential waybill data, Chairman Nottingham, affirming the denial of access, relied on the Board’s prior ruling in *Rate Guidelines – Non-Coal Proceedings*. “To be sure, potential complainants could benefit from having advance access to waybill data. But the *Small Rate Case Guidelines* decision balanced such interests against the harms that could flow from pre-complaint disclosure of waybill data and found that the harms of such advance disclosure outweighed the benefits.”²

The claim that denial of pre-complaint access to confidential waybill data eliminates “a shipper’s ability to perform any kind of pre-complaint merits assessment,” Interested Parties’ Petition at 12, is a significant exaggeration. A shipper’s belief that its rate is unreasonably high is almost certainly informed by market intelligence, including a perception of how its rates compare to those of other shippers on the defendant carrier. The Board’s decision not to include rates for non-defendant railroads in comparison groups does not change the calculus. Simply put, the Board’s decision concerning third party-traffic in no way influences the amount of information that a potential complainant has concerning rates charged by the defendant railroad.

² October 20, 2006 Letter from Charles D. Nottingham to Nicholas J. DiMichael and Andrew P. Goldstein re: Waybill Request 456-1.

The Interested Parties argue that lack of pre-complaint access to confidential waybill data will encourage litigation and discourage shippers from entering into contracts. Clearly shippers do not need access to this data to enable them to negotiate contracts. Shippers negotiate contracts now without this data, which suggests both that they have sufficient market data to foster contractual negotiations and that they have enough market information to evaluate whether to bring a complaint.

There are two troubling implications arising from the argument that post-complaint access to waybill data will promote litigation and discourage contracting. First, the Interested Parties appear to be suggesting that shippers will file complaints *for the purpose of* gaining access to confidential waybill data, and that shippers may defer entering into contracts until after they file a complaint because the confidential data will help them “evaluate their negotiating position.” Interested Parties’ Petition at 12. The suggestion is that shippers can be expected to use the litigation process to gain access to data that they would not otherwise have for negotiation purposes. The Board should reiterate that any release of waybill data for contract negotiations is an “inappropriate use . . . for a non-regulatory purpose.” Removing the requirement for filing a complaint before gaining access to confidential waybill data, as the Interested Shippers advocate, would reduce the barriers to misuse of confidential waybill data.

Second, the Interested Parties appear to take the view that the proper course for a shipper is to first see what can be gained from government intervention in the rate setting process and only then look to what can be accomplished through negotiation in the marketplace. This view reverses the congressional policies reflected in the Staggers Act and ICCTA, which favor market mechanisms and discourage regulatory solutions, except as a last resort.

Finally, pre-complainant access to confidential waybill data should be denied to avoid creating unnecessary opportunities for litigation shopping. Access to confidential waybill data can encourage fishing expeditions on the part of those with incentives to promote litigation. The very practice of entering into protective orders is an acknowledgement of the potential for harm associated with granting access to confidential information. While it may be reasonable to incur this risk for purposes of a case that the shipper has decided to pursue, there is no corresponding need to put this information in the hands of shipper advisors before a decision to litigate has been made.

III. There Is No Basis for Discarding the Proposed Use of a Confidence Interval Around the Mean of Comparison Group Rates

Regarding the use of a confidence interval as an element in identifying the comparison group rate under the Three Benchmark approach, the Interested Parties simply reiterate an argument made previously and rejected by the Board in its decision. They challenge the Board's proposed use of a reasonable confidence interval around the estimate of the mean for the adjusted comparison group on the grounds that the use of a confidence interval is only appropriate if the sample to which it is applied was drawn randomly, which is not the case with the comparison group. The Board addressed this contention in its prior response to this argument, stating that while "the selection process introduces some non-randomness to the observed comparison movements[,] there is uncertainty as to the true mean of a comparison group when the movements are drawn from a random sample." Decision at n. 30, pp. 21-22. Thus, the Board concluded that the randomness of the waybill sample itself warranted the use of a confidence interval. Moreover, the Board reasoned that "we should only presume that a rate is unlawful (or vice versa) if it falls outside a reasonable confidence interval around the mean. . ."

Id The shippers provide no good reason why their judgment on this issue, which is unsupported by any evidence or authority, should be substituted for the Board's

In addition, the Board's proposed use of a confidence interval is but one of several features of the Three Benchmark approach adopted by the Board in its attempt to make the "admittedly imperfect comparison approach" minimally acceptable. Decision at 72. To single out the confidence interval as arbitrary and capricious brings to the forefront the broader question of whether the Board can legitimately use averages to determine maximum reasonable rates. See *Burlington Northern Railroad Co v ICC*, 985 F.2d 589 (D.C. Cir. 1993) (reversing prior attempt to set maximum rates at average level for purported comparison group). The Board should not revisit the issue of the confidence interval unless it is prepared to revisit the entire rate comparison rationale underlying the Three Benchmark approach.

IV. The Version of the RSAM Adopted by the Board Is Not Contrary to the Requirements of the Statute

The Interested Parties argue that the Board's elimination of the RSAM with an efficiency adjustment is inconsistent with the Long Cannon requirement to consider "the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic." 49 U.S.C. § 10701(d)(2)(A). The Interested Parties are simply wrong that movements generating R/VC ratios less than 100 percent do not contribute to going concern value. In the capacity constrained environment that has prevailed in the recent past, railroads have every incentive to maximize revenue contribution. Movements that generate revenues less than 100 percent of URCS variable costs may nonetheless exceed directly variable costs and thereby contribute to going concern value. And in some cases where costs must be incurred regardless of how much revenue is generated, such as with the repositioning of empty equipment, it is preferable to realize a modest revenue contribution rather than no revenue at all.

There is, therefore, no reason to believe that an efficiency adjustment to RSAM would be appropriate

Moreover, the Board clearly articulated its reasons for determining that an efficiency adjusted RSAM is no longer necessary or appropriate in its notice served in this proceeding on July 28, 2006 ("NOPR"). The Board concluded that its 1996 analysis of the industry, which was a basis for publication of the efficiency adjusted RSAM, was outdated because "[t]here is no longer significant excess capacity in the rail industry." NOPR at 21. This mitigated the Board's prior concern that a "managerial efficiency" adjustment was needed to reflect the existence of assets that were not used or useful. *Id.* Finally, the Board concluded that the revenue shortfall attributable to traffic moving at less than 100 percent of variable cost, the shortfall that the adjusted RSAM excludes, was simply not a reasonable approximation of inefficiencies on a carrier's system. *Id.* at 22. The Board relied on the same reasoning when it announced that it would use only the unadjusted RSAM in *BP Amoco Chemical Company v. Norfolk Southern Railway Company*, STB Docket No. 42093, slip op. at 10-11 (served June 6, 2005). The Board's reasons for rejecting the efficiency adjusted RSAM were sound and it should not reverse its prior rulings on this issue.

V. The Interested Parties' Have Not Shown that Simplified SAC Is Invalid

The Board has already addressed the Interested Parties' complaints about Simplified SAC and found them to be without merit. Decision at 52-54. There is no basis for a reconsideration of the Board's decision.

The Interested Parties' dual arguments that Simplified SAC is not a simplified rate standard and that it does not adhere to SAC principles are at odds with one another. The Interested Parties simultaneously object to any departure from Full SAC principles and to what they perceive as insufficient simplification in the SSAC methodology. They cannot have it both

ways. The reason that Simplified SAC does not allow the complaining shipper to reconfigure the defendant's existing system or to select a subset of the defendants' traffic is to make Simplified SAC less complex vis-à-vis Full SAC cases. As a matter of logic, the Board cannot make Simplified SAC both simpler and more like Full SAC. The Board has presumably tried to strike what it believes is an appropriate balance between these competing considerations.

Although extensive, the simplifications adopted by the Board are not enough for the Interested Parties, who claim that Simplified SAC is not "simplified and expedited" as those terms are used in the statute. But there is no statutory benchmark, other than Full SAC, that the Interested Parties can point to for purposes of assessing whether Simplified SAC is sufficiently "simplified and expedited." The statute left this question to the Board's judgment. Particularly where the Board has established the Three Benchmark approach as a more simplified and expedited alternative rate standard, albeit a cruder one, the shippers have no principled basis for saying that the Board struck the wrong balance with Simplified SAC.

VI. Oral Argument Would Not Be Instructive at this Juncture of the Proceeding

The Board has obtained an extraordinary amount of input from the parties over the course of this proceeding, including a public hearing that predated the issuance of the NOPR, four rounds of written comments since October 2006, and an extended oral argument session in January 2007. The Interested Parties' petition does not raise new issues that would warrant the unusual step of conducting oral argument at the petition for reconsideration stage. There is no reason for the Board to depart from its normal practice of not holding oral argument at the petition for reconsideration stage of a proceeding.

VII. Arkansas Electric Cooperative's Argument for Higher Liability Limits is Deficient

The petition for reconsideration filed by Arkansas Electric Cooperative Corporation ("AECC") reiterates its position that the Board must set limits on relief in Simplified SAC cases

that are at least equal to the *combined* litigation costs of the complainant and the defendant railroad. The Board has correctly concluded that the cost borne by the railroad is not a relevant consideration in setting caps on relief. As AAR noted in its supplemental comments,³ the statute directs the Board to develop “a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3). The point of the statutory directive was to provide shippers with lower value cases an effective vehicle for seeking rate relief. Consistent with this purpose, the statute clearly contemplates balancing the value of a case from the shipper’s perspective against the shipper’s cost to bring the case. As the Board recognized, “a simplified presentation would not be cost-effective unless the potential relief exceeds the expected cost of obtaining the remedy by a sufficient margin to make it worthwhile to pursue the complaint.” Decision at 32. The Board addressed this problem by ensuring that there was an “ample cushion between the cost to bring the case and the potential relief available.” *Id.* Litigation costs borne by the defendant railroad are simply not pertinent to the inquiry.

VIII. Conclusion

For the foregoing reasons, the Board should deny the petitions for reconsideration.

³ Supplemental Comments of the Association of American Railroads, at 6 (filed Feb. 26, 2007).

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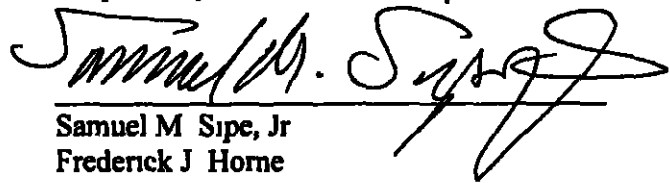
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Respectfully submitted



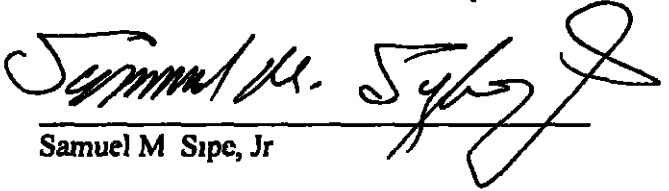
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CERTIFICATE OF SERVICE

I, Samuel M Sipe, Jr , hereby certify that on this 1st day of November, 2007, I caused a copy of the *Opposition of the Association of American Railroads to Petitions for Reconsideration* to be served by first-class mail or a more expeditious method of delivery upon all persons identified on the Board's service list for STB Ex Parte No 646 (Sub-No. 1).



Samuel M Sipe, Jr