

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. EP 715**  
**RATE REGULATION REFORMS**

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**ENTERED**  
**Office of Proceedings**  
**October 23, 2012**  
**Part of**  
**Public Record**

**OPENING COMMENTS OF CSX TRANSPORTATION, INC.  
AND NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: October 23, 2012

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Pursuant to the Decision served by the Board in the above-captioned proceeding on July 25, 2012, CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NS”) hereby submit their joint opening comments in the above-captioned proceeding, STB Ex Parte 715, *Rate Regulation Reforms*. The Board has proposed significant amendments to its rules governing each of three rate case approaches, and NS and CSXT have significant concerns about those proposed amendments and their potential effects. Below, CSXT and NS (sometimes referred to collectively hereinafter as “CSXT/NS”) describe some of those concerns and their objections to and comments on the new rules proposed by the Board. CSXT/NS also join in the comments of the Association of American Railroads.

**I. THE BOARD SHOULD MAINTAIN THE LIMIT ON RELIEF FOR SIMPLIFIED STAND-ALONE COST CASES.**

The Board has proposed a profound change to the Simplified Stand-Alone Cost (“SSAC”) approach for medium-sized rate cases that it adopted in an extensive notice-and-comment rulemaking barely five years ago. See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision (served Sept. 5, 2007) (“*Simplified Standards*”). In particular, the primary change the Board has proposed—to eliminate the limit on relief in SSAC cases—is inconsistent with the governing statute and would give inappropriate and unfair

bargaining leverage to shippers, who could impose substantial discovery burdens on the railroads at little cost to themselves. The Board should maintain the cap on relief for SSAC cases to protect against such abuse.

**A. The Proposal to Remove the Relief Limit on SSAC Cases Would Violate the Governing Statute.**

The Board's mandate to develop and make available alternative rate reasonableness tests in addition to the Stand-Alone Cost test is set forth in the Interstate Commerce Commission Termination Act ("ICCTA"), in a provision codified at 49 U.S.C. § 10701(d)(3). As the Board has repeatedly recognized, Constrained Market Pricing and the SAC constraint are the gold standard for regulatory determination of the reasonableness of challenged rail rates, and the only economically precise and accurate measurement of maximum reasonable rates. *See, e.g., Simplified Standards*, Decision at 13 ("CMP, with its SAC constraint, is the most accurate procedure available for determining the reasonableness of rail rates when there is an absence of effective competition."); *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996) ("*Simplified Guidelines*") ("CMP provides the only economically precise measure of rate reasonableness and therefore must be used wherever possible."). Recognizing the superiority of the SAC test, Congress has endorsed the "full stand alone cost" test in the governing statute. 49 U.S.C. § 10701(d)(3). Congress also determined that in some limited instances a less economically-sound test may be appropriate. Accordingly, Congress directed the Board to

establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.

49 U.S.C. § 10701(d)(3). The statute makes clear that the application of any non-SAC simplified rate reasonableness test must be guided by three factors: (1) the cost of presenting a SAC case;

(2) the value of the case to which the simplified method would be applied; and (3) the relationship between factors (1) and (2). *See id.*

The Board's proposal to eliminate all limits on the relief available in SSAC would violate its statutory mandate. The express language of Section 10701(d)(3) requires that application of any method other than "full stand alone cost" must be limited. The statute requires the Board to consider both the value of the case *and* the cost of bringing a full SAC case in determining the types of rate cases to subject to simplified and less accurate approaches. By eliminating any limit on the far less reliable and less accurate SSAC approach, the Board's proposal fails to conduct the balancing required by the statute and to restrict the use of methods other than "full stand alone cost." In addition, the proposal would eliminate any role for the statutorily mandated factors: the value of the rate case, the cost of bringing that case under the SAC methodology, and the relationship between those two factors. *See* Section 10701(d)(3). Accordingly, the Board's proposal to eliminate any limit on recovery allowed under the "far simpler" approach would violate the statute.

The Board's proposal necessarily eliminates any consideration of the value of a case in determining whether a non-SAC approach is appropriate to evaluate the reasonableness of the rates challenged in that case. As the Court of Appeals for the D.C. Circuit has confirmed, the statute obliges the Board to limit simplified remedies to "low-value cases" where full SAC presentations are not practicable. *CSX Transp., Inc. v. STB*, 568 F.3d 236, 242 (D.C. Cir.), (§ 10701(d)(3) "clearly contemplates a method that may substitute for a full SAC proceeding in low-value cases"), *vacated on other grounds*, 584 F.3d 1076 (D.C. Cir. 2009). The Board's primary justification for eliminating any recovery limit is that it seeks to "encourage" the use of SSAC instead of "the more complex, costly, and time-consuming Full-SAC test," without regard

for the amount in dispute. *Rate Regulation Reforms*, STB Ex Parte No. 715 (Sub-No. 1), Notice of Proposed Rulemaking at 13 (July 25, 2012) (“NPRM”). This rationale reads out of the statute the requirement that the Board consider “the value of the case” in establishing a simplified rate reasonableness test. For this reason alone, the Board’s proposed lifting of the limit on relief in SSAC cases would violate Section 10701.

Similarly, the Board’s proposal fails to give meaningful consideration to the cost of bringing a SAC case. Under *Simplified Standards*, the Board’s estimate of the cost to a shipper of litigating a full SAC case is \$5 million. Assuming this is a reasonable estimate, allowing a complainant to seek, say \$20 million – or far more – under the less rigorous SSAC test would violate the statutory limitation of simplified methods to “*those cases* in which a full [SAC] presentation is too costly, given the value of the case.” See Section 10701(d)(3) (emphasis added). A case whose potential value to the complainant is several multiples of its cost could hardly be characterized as being “too costly” in relation to its value. More broadly, the Board’s sweeping proposal to eliminate any limit on SSAC relief means that it would allow a complainant to pursue infinite relief under that less accurate method *without any* comparison of the cost of litigating a case against the value of the case. Such a rule would vitiate the premise of Congress’s authorization of a simplified approach: that for some but by no means all cases, the cost of litigating the case under the most accurate and rigorous approach is not justified by the amount the litigant might expect to recover via a rate prescription and reparations. Not only would allowing unlimited infinite relief in SSAC cases be contrary to the statute’s restriction of lesser methods to a limited class of cases, but it would also ignore Congress’ expressed preference for use of the SAC test.

If Congress intended to authorize the Board to allow *all* cases to proceed under a simpler, less accurate methodology, it would not have limited its directive to “those cases that are too costly” to litigate under SAC. Rather it would have simply directed the Board to establish a simpler and less costly test than the SAC methodology for all rate challenges. The Board’s proposal would either treat the factors and comparison mandated by the statute as mere surplusage or read them out of the statute entirely. The Board – charged with implementing statutes as enacted by Congress – may do neither. Because the proposal to eliminate the limit on SSAC recovery would violate the express terms of the statute, the Board may not lawfully adopt it.

**B. Without A Limit on SSAC Recovery, Shippers Would Have Substantial Incentive to File SSAC Cases and Force the Carrier to Expend Money and Resources to Develop a Case for Complaining Shippers.**

If the Board eliminates the limit on relief in SSAC cases without shifting any burden to shippers to develop their own SSAC evidence, it will foster use of the SSAC process by shippers as leverage in rate negotiations and will provide shippers with a carrier-financed-and-developed view of their potential for recovery in a rate case, which under the Board’s proposal would be limitless. In Ex Parte No. 646, carriers expressed concern that, given the disproportionate burden of discovery and “Second Disclosure” on carriers in SSAC cases, shippers might bring unmeritorious cases as a low-cost way to gain unfair leverage in rate negotiations or engage in a “fishing expedition” at the carrier’s cost. *See, e.g.*, Ex Parte No. 646, CSXT/NS Opening Comments at 5-8; *id.*, BNSF Opening Comments at 17-18; *id.*, UP Opening Comments at 45; *id.*, AAR Opening Comments at 9. Carriers proposed several different safeguards to discourage potential abuses of the SSAC process. *See id.*

In its final rules, the Board “agree[d] with the railroads that there needs to be a safeguard that prevents shippers from bringing frivolous cases or using the threat of frivolous cases as

leverage,” but rejected carriers’ proposed safeguards. *Simplified Standards*, Decision at 68. Instead, the Board imposed a filing fee of \$10,600 as a “deterrent to a shipper bring[ing] a Simplified-SAC case simply to engage in a fishing expedition or to use as leverage in rate negotiations.” *Id.* at 70 (further noting that \$150 filing fee would provide “virtually no deterrent” to shipper abuse of SSAC process). Congress subsequently lowered the filing fee to \$350 (just \$200 more than the fee rejected in *Simplified Standards*), effectively eliminating the Board’s intended deterrent to shipper abuse of SSAC. *See Consolidated Appropriations Act of 2008*, Pub. L. No. 110-161, Division K, Sec. 194; *Regulations Governing Fee for Services*, Docket No. EP 542 (Sub-No. 18), Decision at 2 (Feb. 14, 2011); 49 C.F.R. § 1002.2(f). Regardless, given the enormous costs to the railroad from the SSAC Second Disclosure, raising the filing fee alone would be an insufficient remedy to protect against shipper abuse if the Board were to eliminate the cap on relief.

The potential for misuse of the SSAC process is real under current rules and that potential for abuse would be greatly magnified if the Board were to eliminate the recovery limit on cases brought under the SSAC approach. The SSAC approach in its current form places nearly all of the burden of discovery and development of the complainant’s case on the defendant carrier. Along with its complaint and token filing fee, a SSAC complainant is only required to make an “initial disclosure,” consisting of its preliminary estimate of the URCS variable costs for movements whose rates it challenges and a “narrative addressing whether there is any feasible transportation alternative for the challenged movements” and any supporting documents. *See Simplified Standards* at 25. Following the complainant’s low-cost initial disclosure, the defendant is required to bear nearly all of the burden of discovery, production, and even development of the core of complainant’s case.

Twenty days after the complaint is filed, the defendant is required to file an answer and its estimate of the URCS variable costs associated with movements under the challenged rates and supporting information. *See Simplified Standards* at 25. Following the filing of the complaint and overlapping with the carrier's preparation of its answer and initial disclosure, the parties are required to engage in Board-sponsored mediation. If mediation does not resolve the case, discovery begins at the end of the 20-day mediation period. *See id.*

Next the railroad is required to identify, gather, and produce the voluminous and extensive information that complainants seek in rate reasonableness challenges. As the Board knows from its experience in Full-SAC cases, the discovery burden imposed on defendant carriers in rate cases is heavy. Such discovery requires carriers to divert substantial time, resources, and funds from their productive business activity to generating and producing the extensive information complainants seek in rate cases. Although the scope of discovery in Full-SAC cases has expanded beyond what is truly relevant and necessary, CSXT/NS recognize that defendants are expected to provide relevant discovery in the context of litigation. However, the burdens imposed on the railroads in SSAC cases go beyond the already excessive burdens of normal rate case discovery and shift the standard allocation of litigation burdens by forcing the defendant railroad to expend substantial additional time, effort, and resources to develop the *complainant's* case.

Imposing this burden on the railroads is contrary to the bedrock principle of American law that the party seeking relief bears the burden of proving it is entitled to that relief. *See Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure

of proof or persuasion.”) (citing *McCormick on Evidence* § 337)<sup>1</sup>; see C. Mueller & L. Kirkpatrick *Evidence* § 3.1 at 103 (3d ed. 2003) (noting broad acceptance of this approach). This assignment of the burden of proof to the party seeking relief applies equally in federal agency administrative proceedings and adjudications<sup>2</sup>, including proceedings governed by the Administrative Procedure Act. See 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof”).<sup>3</sup>

The Board’s prior assertion that “the discovery procedures [for SSAC cases] are not significantly different from the discovery procedures in Full-SAC cases” is incorrect. *Simplified Standards* at 68. Rather, SSAC imposes unprecedented burdens on carriers that go substantially beyond the burdens in Full-SAC cases. Before discovery even closes, the defendant carrier is required to develop and to present to the complainant, pre-assembled, the essential components of complainant’s opening evidence. See *Simplified Standards* at 25-26 (describing required components of carrier’s “Second Disclosure”). In the evidentiary package that the Board refers to as the Second Disclosure, the *carrier* must develop, document, and provide full support for most of the key evidence and calculations required for *complainant’s evidence*, including:

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<sup>1</sup> As the Court noted, exceptions to this rule generally involve shifting of burdens to defendants, including burden of proving affirmative defenses or exemptions after a plaintiff has met its burden of proving necessary elements of a *prima facie* claim. See *id.* at 58. Even in exceptional situations in which the defendant has the burden of proof, that burden is nearly always to prove that complainant is not entitled to relief. SSAC requires the defendant to do something more extraordinary – to develop evidence necessary to meet *complainant’s* burden of demonstrating it is entitled to relief.

<sup>2</sup> See, e.g., *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 547 (1985); *Californians for Renewable Energy v. Nat’l Grid*, 139 FERC ¶ 61,117 at 11 (2012) (“All complainants bear the burden of proof.”); *Gilmore v. Sw. Bell Mobile, LLC.*, 20 FCC Rcd. 15079, 15084 (FCC 2005) (“[T]he complainant bears the burden of proof in a complaint proceeding.”).

<sup>3</sup> Because Section 10701(d)(3) does not “otherwise provide” an alternative allocation of the burden of proof, the APA requires the Board to assign the burden of proof to the complainant.

- Identification of all traffic moving over routes replicated by the SARR;
- Full traffic volume and revenue data for just the identified traffic, “aggregated by origin-destination pair and shipper;”
- Calculation of operating and equipment costs for each of the movements “so the complainant can readily estimate the total operating and equipment costs of the SARR;”
- Calculation of revenue allocations for cross-over traffic, which will likely constitute nearly all of the non-issue traffic; and
- Calculation of trackage rights payments associated with the SARR route.

*Simplified Standards*, 25-26. The foregoing constitute the major components of a SSAC presentation. Requiring the defendant to develop and present such evidence is a significant departure from the practice in SAC cases -- and nearly all other American litigation. In all other litigation, the defendant is required only to produce relevant information, usually in the form in which it is maintained in the ordinary course of business. It is then the complainant’s responsibility to review, synthesize, and develop that information into an evidentiary presentation designed to meet its burden of proof. In SSAC cases, however, the Board has transferred to the *defendant* the burden of developing, supporting, and presenting most of the complainant’s case.

The Board’s proposal to abolish the limit on relief in SSAC cases would eliminate the only meaningful check on shippers’ ability to abuse this process, essentially providing them with the potential for limitless relief for the trivial price of \$350 and the cost of the initial disclosure. There are two principal reasons why this change would create potential for shipper abuse: (1) shippers could impose or threaten to impose this expense on the railroad as an unfair and distorting negotiating tactic; and (2) shippers could use SSAC as a low-cost mechanism to evaluate their potential success in a rate case.

First, as CSXT, NS and other commenters warned in the *Simplified Standards* proceeding, an approach that allows a shipper to force a carrier to expend substantial resources on discovery and then to develop the primary building blocks of a shipper's rate case at very little risk to the shipper creates the potential for significant abuse as a way to gain unfair leverage in rate negotiations regardless of the merits of a case challenging the reasonableness of the rate. Eliminating the limit on SSAC recovery would exacerbate this potential for abuse.

For example, in an attempt to obtain a better deal than it could through marketplace negotiations, a shipper could threaten to file a SSAC case and force the carrier to undertake expensive discovery and development of the Second Disclosure, and to incur substantial attorney and consultant fees. Because CSXT and NS have not litigated a SSAC case, they cannot provide a precise estimate of the cost, but it is clear that the vast majority of work and costs associated with a SSAC case would be borne by the railroads. The complaining shipper, on the other hand, would incur only the \$350 filing fee and the relatively low costs of its First Disclosure (which it could develop at its leisure before filing a complaint), and perhaps some modest consultant and attorney costs. Following the defendant carrier's Second Disclosure, the complainant could review the evidence and decide whether to dismiss the case or incur costs necessary to pursue a rate case to decision.

A carrier faced with the expensive prospect of SSAC discovery and Second Disclosure might well conclude it is better off making additional concessions in rate negotiations – even where the threatened unreasonable rate claim lacks merit -- than diverting resources and personnel to a SSAC case. Such regulatory intervention and distortion of market negotiations would directly contravene the policies and goals of ICCTA, and national rail transportation policy dating to at least the Staggers Act. *See, e.g.*, 49 U.S.C. § 10101 (“[I]t is the policy of the

United States Government (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required”).

Filed SSAC cases might be just the tip of the iceberg, as shippers who successfully apply this regulatory leverage to obtain rate concessions would not file a case. Thus, it would be difficult for the Board to gauge whether or to what extent shippers would use the threat of a SSAC case as leverage in rail transportation contract negotiations.

Second, shippers could use a SSAC case to get a very low cost look at their likelihood of success in a rate case. Maintaining a SSAC case through the Second Disclosure would allow a shipper to obtain detailed information regarding the specific costs, revenues, and SARR at issue, which it could use to evaluate whether to continue to pursue a rate case. Based on that detailed information, the complainant could decide whether to dismiss the case and walk away; continue to pursue a SSAC case; or amend its complaint and pursue a SAC or Three Benchmark case. Because *Simplified Standards* allows a party to invoke a different rate reasonableness test at any time until opening evidence is filed, a party could use SSAC as a low-cost way to evaluate whether to pursue a rate reasonableness case, using substantial relevant and specific information it would not be able to obtain outside of the context of a rate case.

Because a SSAC complainant would have very little at risk and much potential gain, shippers might file and maintain SSAC cases – at least through discovery – that they would not pursue if they had something more at stake. This is the very definition of a “moral hazard.” Presently, the primary safeguard against that hazard is the limitation on the amount that may be recovered in SSAC cases. If complainants are able to recover unlimited amounts under the less

rigorous and less costly SSAC approach, it would almost never be in a shipper's economic interest to file a SAC case – at least initially.<sup>4</sup>

For all the foregoing reasons CSXT/NS oppose the Board's proposal to eliminate limits on recovery in SSAC cases. Further, CSXT/NS request that the Board remove the burden on the railroads to build the complainant's case, which violates the APA and bedrock principles of American law. Instead, the Board should limit the railroads' responsibilities to the already onerous task of rate case discovery. Although the Board should adopt both of CSXT/NS's positions independently, the cap on relief currently provides the only deterrent against the filing of abusive cases by shippers, and in all events the Board should not eliminate the cap without protecting railroads from the extensive burdens of meritless SSAC cases.

**C. The Board Should Abandon Its Proposal to Eliminate a Rate Cap on SSAC and Remove the Burden on Defendants to Build Complainant's SSAC Case.**

The Board should maintain its existing "limits to relief" approach, which limits recovery available under SSAC to the estimated cost of bringing a full SAC case. This approach strikes a reasonable balance between the amount at stake in a case and the rigor and cost of the applicable rate reasonableness test, as required by 49 U.S.C. § 10701(d)(3), while affording the railroads some protection from potential abuse by shippers. Moreover, the Board should conform SSAC to standard American litigation rules and practice by placing the burden on the complainant to develop its own case based upon discovery produced by the railroad, rather than allowing the

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<sup>4</sup> Even in cases in which a shipper thinks from the outset that it may have a stronger case under the SAC methodology than the SSAC approach, it would likely be worth its while to file a SSAC case in order to obtain the benefits of the carrier developing much of the evidence it needs *and* substantial further insight to the merits of its case. If, after analyzing the Second Disclosure, the complainant continued to believe it had better prospects under the SAC methodology, it could amend its complaint at that point and proceed with a SAC case. On the other hand, if the complainant's post-Second Disclosure evaluation suggests SSAC is more advantageous to it, the complainant would have the option to continue its case under SSAC.

complainant to force the railroad to incur the costs of the onerous Second Disclosure, with little cost to the complainant. Stated simply, the Board should eliminate the Second Disclosure, and require a SSAC complainant to develop and present a full case-in-chief to meet its burden of proof in its opening evidence.

CSXT/NS are not aware of evidence that would justify an increase in the eligibility limit for SSAC cases.<sup>5</sup> But if the Board is concerned that the cost of bringing a more rigorous and accurate SAC case is significantly higher than it found in *Simplified Standards*, it should commence a separate proceeding to receive and review evidence of the cost to a complainant of litigating a SAC case. *See Simplified Standards* at 32 (providing for parties to petition the Board to adjust limit on relief and submit detailed litigation cost estimates). Absent such a proceeding and the presentation of reliable supporting evidence, any change in the SSAC recovery limit would be unsupported and arbitrary. If the Board determines through such a proceeding that the existing estimate of that cost is inaccurate, it may wish to consider adjusting the limit on SSAC recovery to reflect a revised estimate of the complainant's cost of litigating a SAC case. However, any increase in the amount a complainant may recover using the SSAC approach must be accompanied by: (i) elimination of the Second Disclosure; and (ii) a requirement that complainants present the same type of road property investment evidence required in SAC cases.

## **II. THE BOARD SHOULD ADOPT THE PROPOSED REVISION OF THE SSAC PROCESS TO INCLUDE THE PRESENTATION OF FULL CASE-SPECIFIC ROAD PROPERTY INVESTMENT EVIDENCE.**

The Board has proposed to require the parties to a SSAC case to present the same specific and detailed road property investment ("RPI") evidence required in a full SAC case, in order to

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<sup>5</sup> The Board previously provided for adjustments of the SSAC limits to account for inflation, so a further proceeding probably would not be necessary to make such indexed adjustments. *See Simplified Standards* at 28, n.36 (providing for indexing eligibility limits using the Producer Price Index).

improve the accuracy of the SSAC analysis. See NPRM at 13-15. CSXT/NS support this proposed adjustment of the SSAC methodology and the resulting improvement in the rigor and precision of the SSAC test that change should accomplish. They support this refinement of the SSAC approach as necessary and appropriate regardless of whether the Board raises the amount of the limit on recovery under the SSAC approach. The rough proxy RPI estimate approach adopted in *Simplified Standards* is inherently imprecise and may significantly skew the SSAC analysis, as replacement costs for the facilities required to serve the issue traffic are likely to be different from the rolling average RPI costs from prior SAC cases.

This change will also avoid the imprecision that can arise from basing SSAC analyses on findings in SAC cases that involve a different region of the country. As the Board has determined in its experience in SAC cases, and acknowledged in its decisions in those cases, the East is not the West with respect to RPI. For example, prior rate cases have demonstrated that average real estate costs are higher in the East because of higher land values and the fact that more railroad lines and facilities are in higher valued areas (including more high-value urban areas). Prior cases have demonstrated that a number of categories of construction costs are higher on average in the East because more railroad lines and facilities are built in areas of difficult topography. The table below compares the cost of certain RPI categories from the Board decisions in an Eastern rate case, *Duke Energy v. Norfolk Southern*, to a Western rate case, *Otter Tail Power v. BNSF*, both of which had a base year of 2002.

Category	Duke v. NS	Otter Tail v. BNSF
Real Estate Cost Per Route Mile	\$95,303	\$34,768
Tunnels Cost Per Mile	\$374,080	\$0
Bridges and Culverts Cost Per Mile	\$634,719	\$133,033
ALL RPI	\$3.593 Billion	\$2.517 Billion

As the foregoing table illustrates, construction costs are different in the East and in the West, and RPI costs in the East are often higher than in the West.<sup>6</sup>

Requiring full current RPI evidence in SSAC cases will also avoid the distortion created by the fact that it has been nearly a decade since a full SAC case involving an Eastern railroad has been decided, which means that railroad construction costs for Eastern cases are outdated. *See Duke Energy Corp. v. CSX Transp., Inc.* 7 S.T.B. 402 (2004). A SSAC case based on such antiquated data – even if indexed – would not accurately reflect the cost to build today. Rolling averages drawn from a diverse variety of SAC cases -- decided at different times and involving much different terrain, traffic mixes, land values, service requirements, and other SARR parameters – are inherently imprecise proxies for actual replacement costs of the specific facilities and assets required in the unique circumstances of a particular case. Accurate, case-specific calculations of all facility replacement costs are absolutely essential to a test whose objective the Board describes as “to restrain a railroad from . . . charging [a shipper] more than it needs to earn a *reasonable return on the replacement cost of the infrastructure used to serve that shipper.*” *See* NPRM at 9 (emphasis added). Without accurate determination of the replacement cost of the specific infrastructure used to serve the shipper, it is impossible to conduct with any accuracy the analysis necessary to accomplish the core objective of the SSAC test. Use of actual case-specific evidence for all RPI categories should significantly improve the accuracy of

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<sup>6</sup> In *Simplified Standards*, the Board properly refused to simplify the RPI analysis for tunnels, instead requiring parties to submit evidence on replacement costs. *Simplified Standards*, Decision at 42. And, the Board allowed for some use of case-specific grading and earthwork quantities. *Id.* at 39-40. Moreover, the Board agreed with shippers that the differences between eastern and western bridge costs are “fairly significant,” and therefore, the Board “modified the procedures for calculating bridge costs to better account for the differences between eastern and western costs.” *Simplified Standards*, Decision at 62. Nevertheless, the Table illustrates that it is not only the per mile costs of tunnels, earthwork, bridges and culverts that differ significantly between the East and the West, but rather that other costs per route mile, such as real estate and the total RPI investment, also are considerably different.

infrastructure replacement cost determinations, and thereby generate a corresponding improvement in the precision of SSAC analysis and results.

As the Board notes, replacement of the imprecise rolling average approach with case-specific, accurate RPI evidence will increase SSAC case costs somewhat, and may require procedural schedule adjustments. *See* NPRM at 14. However, as the Board goes on to conclude, even with the additional cost of this substantial improvement in the precision of the SSAC approach, rate cases brought under that approach “will remain far less expensive to litigate than a Full-SAC case.” The improvement in the accuracy of the methodology would be well worth the accompanying incremental increase in SSAC case discovery and evidence costs.<sup>7</sup>

Importantly, if the Board adopts any significant increase in the limits on recovery in SSAC cases, CSXT/NS believe it must also adopt the proposed case-specific full RPI evidence requirement. The “RPI simplification” used under the existing SSAC approach is an inherently inaccurate and simplistic general estimate that in many cases would distort a key element of the analysis and generate inaccurate and unreliable maximum reasonable rate findings. Such inaccuracy may be a tolerable cost of simplicity for cases at which up to \$5 million over five years is at stake, but is unacceptable and should not be allowed in any case seeking recovery of higher amounts. Thus, elimination of the “RPI simplification” is an essential pre-condition to any increase in the limit on recovery in cases brought under the SSAC approach.

### **III. CROSSOVER TRAFFIC IN SAC CASES.**

The Board has proposed two limitations on crossover traffic to address potential distortions to SAC analysis that arise from difficulties in allocating revenue generated by

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<sup>7</sup> Additional discovery production by defendants would represent one of the largest additional costs, and that cost is borne entirely by defendant carriers. CSXT/NS believe imposition of this additional cost on defendants in SSAC cases would be worth the resulting improvement of the accuracy of SSAC case results.

crossover traffic, particularly in the context of SARRs that involve carload networks. NPRM at 16-18. The Board has also proposed a change to its revenue allocation methodology to address a perceived problem that arises when revenue allocated to an on-SARR (or off-SARR) segment falls below the defendant's URCS variable costs. *Id.*<sup>8</sup> With respect to cross-over revenue allocation approach, CSXT/NS believe that either original ATC or the alternative approach the Board has proposed in this proceeding would produce a better, more accurate revenue allocation than the *ad hoc* ATC variant the Board applied in *Western Fuels*, but even those methods would produce imperfect and inaccurate crossover traffic revenue allocations. .<sup>9</sup>

As the Board has recognized, the distortions arising from the use of crossover traffic do not necessarily stem from the reasonable use of crossover traffic *per se*, but more prominently from difficulties in revenue allocation. *Id.* at 16 (“The inclusion of large amounts of carload and multi-carload cross-over traffic has revealed a significant and growing concern. There is a disconnect between the hypothetical cost of providing service to these movements over the segments replicated by the SARR and the revenue allocated to those facilities.”). Thus, if the

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<sup>8</sup> CSXT/NS do not agree with the Board that an on-SARR revenue allocation that generates an R/VC of less than 100 percent is either implausible or irrational. *First*, if a complainant selects low R/VC movements for its SARR traffic group, a SARR revenue allocation at or below 100 percent is an entirely plausible result of appropriate allocation of the relatively low revenues generated by such movements. Traffic selection is entirely within the control of the complainant, who can avoid selecting any cross-over traffic generating an R/VC of less than 100 percent if it wishes to do so. *Second*, the concern expressed by the Board arises in part because the Board compares apples to oranges. It compares the SARR's revenue to the incumbent's URCS system average variable costs. The proper analysis would use the SARR's revenues and the SARR's variable costs to account for the SARR being the least cost, efficient railroad compared to the incumbent. Thus, CSXT and NS do not agree with the Board that a proper revenue allocation method must generate R/VC > 100% for every SARR segment.

<sup>9</sup> CSXT/NS believe that the *ad hoc* variant of ATC applied in the individual *Western Fuels* adjudication was adopted in violation of the Administrative Procedures Act. *See e.g., Marseilles Land and Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003); *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that “adopt[s] a new position inconsistent with . . . existing regulations” must follow APA notice and comment procedures).

Board were able to adjust its revenue allocation method to account for the unique attributes and characteristics of each particular SARR, the use of crossover traffic would not necessarily need to be limited in the manner that the Board has proposed, either by limiting the use of crossover traffic to (1) movements originating or terminating on the SARR or (2) trainload movements. In particular, to address the distortions about which the Board is concerned would require movement-specific adjustments to URCS. *See* NPRM at 16. Contrary to the Board's suggestion, such adjustments are possible, although they would require that the parties submit additional evidence and argument. If, however, the Board is unwilling or unable to perform the needed adjustments to URCS to address cross-over traffic revenue allocation distortions, it would be justified in adopting one or both of the limits on crossover traffic that it has proposed. *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937 (1998) (deciding to eliminate consideration of evidence of product and geographic competition that is admittedly relevant to the market dominance inquiry, because its consideration was found unduly burdensome to the parties and the Board).

Regardless of whether it adopts the proposed limits, the Board should prohibit use of internal "Leapfrog" cross-over traffic, first presented in the Complainant's opening evidence in *DuPont v. NS*, STB Docket No. 42125. . In the *DuPont v. Norfolk Southern Railway* rate case, DuPont proposes to expand the construct of cross-over traffic dramatically to allow the DRR to interchange traffic to the residual NS multiple times, forcing NS to move the traffic on as many as four separate, discrete segments, notably including segments within the geographic footprint of the SARR. The parties refer to these movements as "leapfrog" trains, because the SARR effectively seeks to leap over difficult or costly segments in the interior of the SARR network. Leapfrog traffic is a steep, slippery slope because taken to its logical conclusion, a complainant

could propose that the incumbent receive trains at the beginning of tunnels, bridges, or other expensive infrastructure and hand it back at the end of the tunnel or bridge. In such instances, it would be very difficult, if not impossible, for the Board to adjust its revenue allocation method to account for such gamesmanship without adding unreasonable and unnecessary complexity.

To preclude such abuses, the Board should disallow internal cross-over traffic (*i.e.*, movements within the SARR footprint that use the residual incumbent as a bridge carrier between two SARR segments), and make it clear that complainants may not use multiple on-SARR cross-over segments for a single movement.

Finally, regardless of whether the Board adopts one or both of its proposed limitations on crossover traffic to address distortions associated with carload SARRs, the Board must require that every SAC complainant present and fully support a feasible operating plan, accounting for all the costs necessary to serve the needs of all selected traffic, including cross-over traffic. Particularly when a SARR traffic group includes large volumes of carload and multi-carload traffic, accurate determination of SARR operating costs requires a complex and detailed operating plan involving, among other things, numerous car handlings, complex yard and switching operations, and local service for SARR origins, destinations, and interchange points. Heavy use of crossover traffic further complicates the operating plan needed to serve the selected traffic group. Thus, if crossover traffic is to be allowed, it is essential that the Board rigorously enforce the complainant's obligation to develop and present in its case-in-chief a full, detailed, specific, and feasible operating plan and associated operating parameters and costs that would meet the service needs and requirements of the selected SARR traffic (including cross-over traffic) without shortcuts or simplifications.

The defendant railroad should not be required to produce in its reply evidence the first operating plan that accounts for the movement of each car from each specific origin through a network, including the classification process in yards, and to each specific destination.

Unfortunately, this is precisely what the defendant carriers have been required to do in the most recent SAC cases in which NS and CSXT have been parties. The Board should make it very clear that failure to present a sufficient *prima facie* operating plan on opening will result in dismissal of the entire case.

#### **IV. THE BOARD SHOULD NOT RAISE THE RELIEF CAP FOR THE THREE BENCHMARK APPROACH.**

The Board should not adopt its proposal to increase the \$1.1 million relief cap for the Three Benchmark approach, because this “very rough and imprecise” methodology should be limited to the very smallest rate disputes. *Simplified Standards* at 73. The Board has repeatedly acknowledged the “crude,”<sup>10</sup> “rough,”<sup>11</sup> and “imperfect”<sup>12</sup> nature of the Three Benchmark approach, but has found that the approach is necessary to ensure that “shippers with small disputes [have] some practical means of challenging the reasonableness of their rail rates.” *Simplified Standards* NPRM at 28. The current \$1.1 million limit on recovery more than satisfies the goal of creating a last-resort simple methodology for shippers with the smallest rate disputes, while encouraging shippers with higher-value disputes to use a more rigorous methodology. But the Board’s proposal to double the relief cap would allow the crude Three

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<sup>10</sup> *Simplified Standards* at 73.

<sup>11</sup> *Id.*

<sup>12</sup> *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Notice of Proposed Rulemaking at 28 (July 26, 2006) (“*Simplified Standards* NPRM”).

Benchmark comparison approach to be used in many higher-value cases where a more rigorous SAC or Simplified SAC approach can and should be used.

**A. The Interstate Commerce Act Requires Simplified Methodologies To Be Limited To Low-Value Cases.**

The Board’s statutory obligation to develop simplified rate methodologies is not an obligation to make simple methodologies available to all shippers. On the contrary, Congress made clear that simplified methodologies were intended for shippers with rate disputes too small for a full SAC presentation. 49 U.S.C. § 10701(d)(3) requires the Board to establish a “simplified and expedited method for determining the reasonableness of challenged rail rates *in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.*” 49 U.S.C. § 10701(d)(3) (emphasis added). Under the statute, therefore, the Board is obliged to limit simplified remedies to “low-value cases” where full SAC presentations are not practicable. *CSX Transp., Inc. v. STB*, 568 F.3d 236, 242 (D.C. Cir.), (§ 10701(d)(3) “clearly contemplates a method that may substitute for a full SAC proceeding in low-value cases”), *vacated on other grounds*, 584 F.3d 1076 (D.C. Cir. 2009).

The relief caps adopted in *Simplified Standards* implement this statutory command by providing that the recovery under simplified rate complaint mechanisms be limited to, at most, the litigation cost of using the next more exacting rate complaint mechanism. *See Simplified Standards* at 32. The Board correctly held that “[a]n overly simplified approach should not be applied to a case when the amount in dispute justifies the use of a more robust and precise approach,” *Id.* at 27, and that relief caps were essential to encourage complainants to select more

precise rate reasonableness methodologies where the value of the case warranted more precision. *Id.*<sup>13</sup>

The D.C. Circuit’s affirmance of the Board’s decision to impose relief caps similarly recognized that the statute requires the Board to limit the application of simplified methods to the smallest rate disputes. *See CSX Transp., Inc. v. STB*, 568 F.3d at 240-44. The Court of Appeals found that the purpose of the relief caps was “[t]o channel larger cases to the more accurate methods,” and held that this purpose was consistent with the purpose of § 10701(d)(3)). *Id.* at 240, 242. The Court of Appeals went on to hold the particular relief cap levels established by the Board to be “amply justif[ied].” *Id.* at 244.

**B. The Board Should Not Increase the Number of Cases Subject to the Inaccurate and Flawed Three Benchmark Approach.**

The Three Benchmark approach is marked by serious flaws and imprecision, and the Board should not expand its application any further. The Board has recognized that the Three Benchmark approach is “crude,” “very rough and imprecise,” and that the approach is the result of a decision to sacrifice precision for simplicity. *See, e.g., Simplified Standards* at 73, 74 (“precision must be sacrificed for simplicity”). And the D.C. Circuit has similarly questioned the accuracy of the approach, observing that “there is good reason to believe that judgments rendered pursuant to the Three Benchmark framework more often than not will be the antithesis of mathematical certainty.” *Union Pac. R.R. v. STB*, 628 F.3d 597, 607 (D.C. Cir. 2010). The

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<sup>13</sup> The Board recognized that a shipper whose potential recovery was close to one of the relief caps might have to choose between using a simpler method with limited potential recovery or a more precise method with higher potential recovery. *See Simplified Standards* at 29 (“There may be instances where a complainant will be faced with a difficult choice between forgoing some of the potential value of a dispute or pursuing greater relief despite increased costs. But we conclude that it is appropriate to encourage litigants facing this choice to use the rate reasonableness approach that is best suited for the magnitude of the dispute.”). Nothing has changed to warrant reconsideration of that conclusion.

only justification for maintaining this deeply flawed approach is to provide a “small claims” option for the very smallest cases, and the Board should not amend its rules to apply it to cases with values over \$1 million.<sup>14</sup>

The Three Benchmark Approach is marked by multiple serious flaws. First, the Three Benchmark assumption that an adjusted R/VC ratio derived from a group of comparable movements establishes a maximum reasonable rate has no sound economic basis. At its core, the Three Benchmark approach is a rate comparison formula,<sup>15</sup> and unlike SAC or even Simplified SAC it has no grounding in constrained market pricing or any other economic theory.

Second, the Three Benchmark approach suffers from the same methodological flaws as previous rate comparison formulas that have been rejected by the D.C. Circuit. *See Burlington N. R.R. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993) (rejecting rate comparison approach because repeated application of approach could ratchet rates down to jurisdictional threshold). Indeed, the Board has admitted that the Three Benchmark approach has the same fundamental theoretical flaw that concerned the *Burlington Northern* court, but argued that any concern about ratcheting down rates was alleviated by the Three Benchmark relief cap. *See Simplified Standards* at 73-74 (“the potential for ratcheting will be severely constrained by the limit on the relief available under this approach”). Raising the relief limits would eviscerate this rationale, and give rise to the downward rate “ratcheting” problem identified in *Burlington Northern*.

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<sup>14</sup> Indeed, NS and CSXT conditioned their acceptance of the Three Benchmark approach on the Board’s confining it to the very smallest cases. *See, e.g.*, STB Ex Parte No. 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases*, CSXT/NS Supplemental Comments at 21 (Feb. 26, 2007) (supporting a \$200,000 limit on relief).

<sup>15</sup> *See Simplified Standards* at 73 (admitting that Three Benchmark is a “basic comparison approach”).

Third, the Three Benchmark approach contains inherent “regulatory lag” created by the comparison of current R/VC ratios with R/VC ratios from older Waybill Sample movements. *See Simplified Standards* at 85 (acknowledging that “relying on the Waybill Sample introduces some regulatory lag into the analysis”).

Fourth, the Board’s significant limits on the consideration of “other relevant evidence” narrowly circumscribes parties’ ability to rebut the R/VC presumption. *Simplified Standards* at 22. For example, the Board prohibits “other relevant evidence” that the URCS variable costs for a challenged movement do not encompass all the movement’s costs (even for toxic-by-inhalation (“TIH”) shipments with substantial insurance, risk premium, and handling costs not fully reflected in URCS).<sup>16</sup> *Id.* at 84. And the Board also refuses to consider any “other relevant evidence” whose impact on the R/VC presumption cannot be precisely quantified. *See Id.* at 22.

In light of the significant shortcomings of an approach that the Board admits is “very rough and imprecise” and that the D.C. Circuit describes as “the antithesis of mathematical certainty,” CSXT/NS submit that even the current \$1.1 million relief cap is too high. This crude approach is only tolerable for the smallest cases, and a relief cap similar to the \$200,000 relief cap proposed in the initial *Simplified Standards* NPRM would be more appropriate. And raising the relief cap for this crude methodology is wholly unwarranted.

Under current law the relief caps established by the Board provide for Three Benchmark recoveries up to \$1.1 million.<sup>17</sup> This cap is far above the appropriate threshold for a truly small rate dispute. In fact, the current cap reflects a substantial increase over the original proposal in

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<sup>16</sup> Two of the four Three Benchmark cases that the Board has decided involved TIH commodities.

<sup>17</sup> The original *Simplified Standards* cap for Three Benchmark cases was \$1 million; the current indexed cap is \$1.118 million. *See Rate Regulation Reforms*, STB Ex Parte No. 715, Notice of Proposed Rulemaking at 12 n.9 (July 25, 2012).

the *Simplified Standards* NPRM. Initially, the Board proposed that the maximum value of Three Benchmark cases be capped at \$200,000. *See Simplified Standards* NPRM at 36. The Board’s decision to adopt a fivefold increase in that cap in the final rule was a substantial accommodation to shipper groups seeking expanded Three Benchmark applicability. Indeed, as a result of the Board’s decision to raise the Three Benchmark relief cap, 45% of regulated traffic in the Board’s rate reasonableness jurisdiction qualifies for Three Benchmark treatment. *See Simplified Standards* at 35. Raising the eligibility limit any further would mean that more than half of all regulated traffic would be subject to a methodology that the Board itself has characterized as “crude” and “imprecise.” Such an increase would transform the crude Three Benchmark approach – which is entirely untethered to CMP, differential pricing, or sound railroad economics – from a “small claims” model for the very smallest cases into the rule for the majority of rate cases. Taking that step despite the acknowledged shortcomings of the Three Benchmark approach would be a significant and arbitrary departure from settled rate reasonableness rules.

**C. Changing The SSAC Methodology Is No Reason to Increase the Three Benchmark Relief Cap.**

The Board’s sole justification for proposing to raise the Three Benchmark relief cap is that its proposed alterations to Simplified SAC rules may increase the costs of litigating a case under that approach. In the first place, it is not clear that the Board’s proposal would increase SSAC litigation costs by as much as the Board proposes to increase the Three Benchmark relief limit. Indeed, the current Simplified SAC rules already contemplate that parties will devote significant time to Road Property Investment. While the Board has adopted many simplifying assumptions and shortcuts, complainants are still required to develop the necessary quantities of materials needed for many categories of road property investment, and to develop costs for

items like ballast, subballast, and tunnels. *See Simplified Standards* at 38-48. Indeed, the single largest line item in the litigation estimate cost that the Board used to develop its Simplified SAC litigation cost estimate was to “Develop Road Property Investment for identified SARR” – which was estimated as a task requiring up to 600 hours of consultant time. *See Simplified Standards, American Chemistry Council et al. Opening Comments, V.S. Fauth Ex. GWF-2* at 3, (filed Oct. 24, 2006). While the cost of developing full Road Property Investment evidence would likely increase this cost estimate, the Board has no evidence of the resulting total costs to complainants. Accordingly, the proposed increase to the Three Benchmark relief limit is completely arbitrary and lacks any rational basis.

More fundamentally, the fact that the \$1.1 million Three Benchmark relief cap would differ from the cost of litigating a SSAC case does not present a new or meaningful concern. Shippers whose potential recovery falls near the level of a relief cap will have difficult decisions wherever the relief cap lines are drawn. As the Board has previously explained, the “small claims” model by its nature involves drawing boundaries between methodologies, which leaves shippers with claims valued at an amount close to the cap with a “difficult choice”:

The fact that some shippers may face a difficult choice of which method to use would be true at any level at which the limits might be set. Any shipper that believes its case falls near the upper end of the relief available under a particular method would face this choice. Ultimately, we do not think it is improper for there to be some trade-off involved in using a simpler, faster, and less costly method that is inherently less precise.

*Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision at 8 (served Mar. 19, 2008). It is certainly true that a shipper that believes its potential recovery in a case is \$1.5 million might choose to pursue a less-costly Three Benchmark case with a \$1.1 million relief cap than to pursue a Simplified SAC case. But raising the relief cap to \$2 million does not eliminate that problem – it simply means that the difficult decision would now be faced

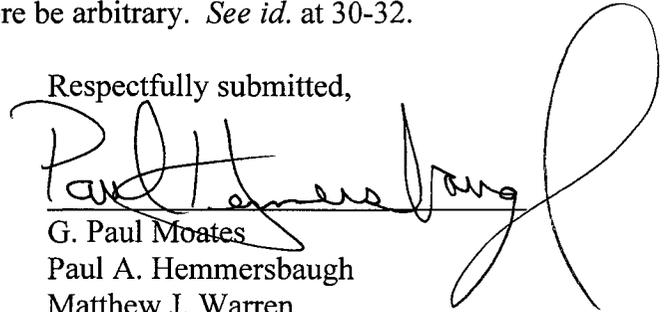
by shippers who believe their potential recovery is slightly over the \$2 million threshold. As the Board has made clear, the existence of a “trade-off” between the simplicity and lower litigation costs of a simplified method and the greater potential recovery from a more accurate method is inherent to the “small claims” model.

In short, the possibility that Simplified SAC reforms may marginally increase the litigation costs of that methodology is no reason to further expand the scope of a crude rate comparison approach that the Board admits is “very rough and imprecise.” Forty-five percent of all regulated traffic may use the Three Benchmark approach under the current rules (*Simplified Standards* at 35), and the Board should not raise relief limits to allow shippers to recover as much as \$2 million without using a more precise approach.

In the event that the Board does decide to continue to consider an increase in the limit on relief, it should follow the procedure it established in *Simplified Standards* and commence a proceeding to gather evidence to determine a reasonable estimate of that cost. *See Simplified Standards* at 32. Presently, the Board has no evidence to justify the increase. To impose such an increase without gathering and analyzing evidence of the cost of a SSAC case and other relevant

data would violate the Board's admonition that changes to the relief limits be based on a full record of evidence, and any such increase would therefore be arbitrary. *See id.* at 30-32.

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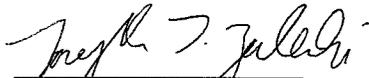
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Dated: October 23, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October 2012, I served a copy of the foregoing Opening Comments Of Norfolk Southern Railway Company and CSX Transportation, Inc. by first class mail, postage prepaid, on all parties of record.

  
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Joseph Zaleski