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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 715

RATE REGULATION REFORMS

Digest:[1] Captive shippers have long stated that they cannot bring rate disputes to the Surface Transportation Board because of the prohibitive litigation costs and the tremendous complexity of rate cases. The agency responded in 1996 and 2007 by creating simplified procedures to reduce the time, complexity, and expense of rate cases. The goal was to make the agency more accessible to the average shipper. But in 2011 Board hearings, many stakeholders stated that these simplified alternatives were ineffective because of the limitations on relief that the Board placed on those simplified procedures.

Today, the Board proposes to modify its rules to remove the limitation on relief for one simplified approach, and to double the relief available under the other simplified approach. The Board also proposes to make some technical changes to the rate procedures, and to raise the interest rate that railroads must pay on reparations if they are found to have charged unreasonable rates. The overarching goal is to ensure that the Board's simplified and expedited tests for resolving rate disputes are more accessible to parties.

Decided: July 25, 2012

Where there is no competitive transportation market, Congress charged the Board with protecting the public from unreasonable pricing by freight railroads, while fostering a sound, safe, and efficient rail transportation system by allowing carriers to earn adequate revenues. Balancing these sometimes conflicting goals is no easy task. Over the past 30 years, we have worked to provide shippers a more accessible forum to bring rate disputes. For the most part, we have relied on a case-by-case evolution of our methodology, but occasionally have used rulemaking procedures to implement greater changes. The result is a comprehensive set of rules that provides a variety of constraints on railroad pricing.

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

At the heart of our rate rules lies the stand-alone cost (SAC) test. Under this test, also referred to as the Full-SAC test, the rate at issue cannot be higher than the rate a hypothetical efficient railroad would need to charge to serve the complaining shipper while fully covering all of its costs, including a reasonable return on investment. In other words, we judge the challenged rate against a simulated competitive rate a captive shipper would enjoy if a competitive transportation market existed.

While the SAC test is considered sound and has been affirmed repeatedly by the courts, it remains controversial among both shippers and railroads. Shippers view the test as too complex and too expensive. Some also object to the "hypothetical" nature of the inquiry, questioning why they must design an entirely hypothetical railroad to judge the reasonableness of a railroad's real world rates. Railroads, in turn, argue that the Board's attempt to reduce the complexity of the Full-SAC test with a device called "cross-over traffic" is distorting the test. The railroads also object to their rates being judged against hypothetical operations that, the railroads say, do not reflect the way railroads are run in the real world.

To provide rail customers with a lower cost, expedited alternative to the SAC test, Congress, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act), directed the Board to promulgate simplified evidentiary procedures for rate cases where the SAC test could not practicably be applied. In response, the agency created the Three-Benchmark test, a benchmark approach that compares the markup being paid by the challenged traffic to the average markup assessed on other comparable traffic. See Rate Guidelines—Non-Coal Proceedings (Simplified Guidelines), 1 S.T.B. 1004 (1996).[2] Later, in 2007, the Board adopted the Simplified-SAC test. See Simplified Standards for Rail Rate Cases (Simplified Standards), EP 646 (Sub-No. 1) (STB served Sept. 5, 2007).[3] The Simplified-SAC test, like the Full-SAC test, was designed to allow the Board to determine whether a railroad is abusing its market power to extract monopoly profits or to force a captive shipper to cross-subsidize parts of the defendant's existing rail network that the shipper does not use. The Simplified-SAC test, unlike the Full-SAC test, does not look to a hypothetical railroad to judge the reasonableness of the defendant railroad's rates, but rather to the actual operations and services provided.

In Simplified Standards, the Board also placed limits on relief for the Three-Benchmark and Simplified-SAC methodologies of $1 million and $5 million over a 5-year period, respectively. These limits provided the chief basis for a petition for reconsideration jointly filed by numerous shippers. The Board denied the petition in 2008. Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Mar. 19, 2008).

Last year, we held a public hearing to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where

[2] Pet. to reopen denied, 2 S.T.B. 619 (1997), appeal dismissed sub. nom. Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998).

[3] Aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir.), vacated in part on reh'g, 584 F.3d 1076 (D.C. Cir. 2009).

appropriate. See Competition in the R.R. Indus., EP 705 (STB served Jan. 11, 2011). During that proceeding, we heard concerns from stakeholders that the complexity, high litigation costs, and current limits on relief for simplified alternatives were dissuading parties from bringing rate disputes to this agency. We continue to explore whether there are policy changes the Board could adopt that would promote more rail-to-rail competition and thereby allow competition and the demand for services to establish reasonable rates for transportation by rail, and thus minimize the need for Federal regulatory control. See Pet. for Rulemaking to Adopt Revised Competitive Switching Rules, EP 711 (STB served July 25, 2012). Regardless of the outcome of that inquiry, however, we must continue to improve our rate review process to ensure that it is as fair and accessible as possible.

Accordingly, today we issue this Notice of Proposed Rulemaking to propose six changes to our rate reasonableness rules. The centerpiece is a proposal to remove the limitation on relief for cases brought under the Simplified-SAC alternative. Our goal is to encourage shippers to use a simplified alternative to a Full-SAC analysis that is economically sound, yet provides a less complicated and less expensive way to challenge freight rates by discarding the requirement that shippers design a hypothetical railroad to judge a railroad's real world rates. In addition, we wish to facilitate the ability of shippers to seek redress economically and efficiently in disputes in cases involving smaller but still significant amounts. We also propose five other changes: doubling the relief available under the Three Benchmark method; curtailing the use of cross-over traffic in Full-SAC cases; modifying the approach used to allocate revenue from cross-over traffic in Full-SAC and Simplified-SAC cases; improving the accuracy of the Road Property Investment (RPI) component of the Simplified-SAC test; and raising the interest rate that the railroads must pay to complainants for, inter alia, reparations when the railroad has collected unreasonable rates.

CURRENT RATE REASONABLENESS STANDARDS

Statutory Framework

Where a railroad has market dominance—i.e., a shipper is captive to a single railroad—its transportation rates for common carrier service must be reasonable. 49 U.S.C. §§ 10701(d)(1), 10702. Market dominance is defined as an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies. 49 U.S.C. § 10707(a). The Board is precluded, however, from finding market dominance if the revenues produced by a challenged rate are less than 180% of the carrier's "variable costs" of providing the service. 49 U.S.C. § 10707(d)(1)(A). Variable costs vary with the level of traffic, and are developed in rates proceedings by using the Board's Uniform Rail Costing System (URCS). See Adoption of the Unif. R.R. Costing Sys. as a Gen. Purpose Costing Sys. for all Regulatory Costing Purposes, 5 I.C.C. 2d 894 (1989).

When a complaint is filed, the Board may investigate the reasonableness of the challenged rate, 49 U.S.C. §§ 10704(b), 11701(a), or dismiss the complaint if it does not state reasonable grounds for investigation and action, 49 U.S.C. § 11701(b). If the Board finds a challenged rate unreasonable, it will order the railroad to pay reparations to the complainant for past movements and may prescribe the maximum rate the carrier is permitted to charge.

49 U.S.C. §§ 10704(a)(1), 11704(b). However, the Board may not set the maximum reasonable rate below the level at which the carrier would recover 180% of its variable costs of providing the service. W. Tex. Util. Co. v. Burlington N. R.R., 1 S.T.B. 638, 677-78 (1996), aff'd sub nom., Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997).

In examining the reasonableness of a rate, the Board is guided by the rail transportation policy set forth at 49 U.S.C. § 10101. It must also give due consideration to the "Long-Cannon" factors contained in 49 U.S.C. § 10701(d)(2)(A)-(C).[4] And the Board must recognize that rail carriers should have an opportunity to earn "adequate revenues." 49 U.S.C. § 10701(d)(2). Adequate revenues are defined as those that are sufficient—under honest, economical, and efficient management—to cover operating expenses, support prudent capital outlays, repay a reasonable debt level, raise needed equity capital, and otherwise attract and retain capital in amounts adequate to provide a sound rail transportation system. 49 U.S.C. § 10704(a)(2).

As part of the ICC Termination Act, Congress added a new provision to the rail transportation policy calling for the "expeditious handling and resolution of all proceedings." 49 U.S.C. § 10101(15). Congress further instructed the Board to establish procedures for rail rate challenges in particular, including "appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S.C. § 10704(d). Moreover, 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).

Constrained Market Pricing Guidelines

The Board's general standards for judging the reasonableness of rail freight rates are set forth in Coal Rate Guidelines, Nationwide (Guidelines), 1 I.C.C. 2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). These guidelines adopt a set of pricing principles known as "constrained market pricing" (CMP). The objectives of CMP can be simply stated: a captive shipper should not be required to pay more than is necessary for the carrier involved to earn adequate revenues. Nor should it pay more than is necessary for efficient service. And a captive shipper should not bear the costs of any facilities or services from which it derives no benefit. Guidelines, 1 I.C.C. 2d at 523.

[4] The Long-Cannon factors were added to the Interstate Commerce Act in 1980 and direct the Board to give due consideration to (a) 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; (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and (c) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

CMP contains three main limits on the extent to which a railroad may charge differentially higher rates on captive traffic.[5] The revenue adequacy constraint is intended to ensure that a captive shipper will "not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs." Id. at 535-36. The management efficiency constraint is intended to protect captive shippers from paying for avoidable inefficiencies (whether short-run or long-run) that are shown to increase a railroad's revenue need to a point where the shipper's rate is affected. Id. at 537-42. The SAC constraint is intended to protect a captive shipper from bearing costs of inefficiencies or from cross-subsidizing other traffic by paying more than the revenue needed to replicate rail service to a select subset of the carrier's traffic base. See id. at 542-46.

SAC Constraint

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; the SAC analysis does this by simulating the competitive rate that would exist in a "contestable market." A contestable market is defined as one that is free from barriers to entry. See Guidelines, 1 I.C.C. 2d at 528 (citing William J. Baumol, John C. Panzar & Robert D. Willig, Contestable Markets and the Theory of Industry Structure (1982)). The economic theory of contestable markets does not depend on a large number of competing firms in the marketplace to ensure a competitive outcome. Guidelines, 1 I.C.C. 2d at 528. In a contestable market, even a monopolist must offer competitive rates or potentially lose its customers to a new entrant. Id. In other words, contestable markets have competitive characteristics that preclude monopoly pricing.

To simulate the competitive price that would result if the market for rail service were contestable, the costs and other limitations associated with entry barriers must be omitted from the SAC analysis. Id. at 529. This removes any advantages the existing railroad would have over a new entrant that create the existing railroad's monopoly power. A stand-alone railroad (SARR) is therefore hypothesized that could serve the traffic at issue if the rail industry were free of entry barriers. Under the SAC constraint, the rate at issue cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering all of its costs, including a reasonable return on investment. This analysis produces a simulated competitive rate against which the Board judges the challenged rate. Id. at 542.

To make a Full-SAC presentation, a shipper designs a SARR specifically tailored to serve an identified traffic group, using the optimum physical plant or rail system needed for that traffic. Using information on the types and amounts of traffic moving over the defendant

[5] A fourth constraint – phasing – is intended to limit the introduction of otherwise-permissible rate increases when necessary for the greater public good. Guidelines, 1 I.C.C. 2d at 546-47.

railroad's system, the complainant selects a subset of that traffic (including its own traffic to which the challenged rate applies) that the SARR would serve.

Based on the traffic group selected, the level of services provided, and the terrain to be traversed, a detailed operating plan must be developed for the SARR. Once an operating plan is developed that would accommodate the traffic group selected, the SARR's investment requirements and operating expense requirements must be estimated. The parties must provide appropriate documentation to support their estimates. The annual revenues required to recover the SARR's capital costs (and taxes) are combined with the annual operating costs to calculate the SARR's total annual revenue requirements.

The revenue requirements of the SARR are then compared to the revenues that the defendant railroad is expected to earn from the traffic group. If the present value of the revenues that would be generated by the traffic group is less than the present value of the SARR's revenue requirements, then the complainant has failed to demonstrate that the challenged rate levels violate the SAC constraint. If, on the other hand, the present value of the revenues from the traffic group exceeds the present value of the revenue requirements of the SARR, then the Board disperses the overage among the traffic group, and prescribes the resulting rate and/or reparations for the issue traffic.

Cross-Over Traffic

In recent SAC cases, complainants have relied extensively on the use of cross-over traffic to simplify their SAC presentations. Cross-over traffic refers to those movements included in the traffic group that would be routed over the SARR for only a part of their trip from origin to destination. In such circumstances, the SARR would not replicate all of the defendant railroad's service, but would instead interchange the traffic with the residual portion of that railroad's system. This modeling device, which was first accepted by the agency in 1994 in Bituminous Coal—Hiawatha, Utah, to Moapa, Nev., 10 I.C.C. 2d 259, 265-68 (1994), is now a well-established practice in SAC cases.[6] A continuing issue in SAC cases is how to allocate the total revenues the railroad earns from that cross-over traffic between the facilities replicated by the SARR and the residual network of the railroad needed to serve that traffic.

The goal in allocating revenue from cross-over traffic is to ensure that a truncated SAC analysis using cross-over traffic approximates the outcome of a Full-SAC analysis, which provides origin-to-destination service for the entire traffic group. A Full-SAC analysis compares the total SAC costs incurred to serve the selected traffic against the total revenues the carrier is expected to earn from that traffic group. A SAC presentation with cross-over traffic, however, calculates only part of the total SAC costs to serve the cross-over traffic. Thus, to distribute

[6] See, e.g., Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 11-13 (STB served Jan. 27, 2006), aff'd sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007); Duke Energy Corp. v. CSX Transp., Inc., 7 S.T.B. 402, 422-24 (2004); Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 6 S.T.B. 573, 605 (2003).

revenues equitably in relation to the cost incurred to generate those revenues, the portion of the revenue allocated to those facilities replicated by the SARR ideally equals the total revenue from that movement, multiplied by the share of total SAC costs represented by the cross-over segments of the movement (i.e., multiplied by the ratio of the truncated SAC costs for the cross-over traffic to the Full-SAC costs for the cross-over traffic).

The Board recognized, however, that it would face a dilemma if it were to attempt to allocate revenues based on the relationship between a truncated and Full-SAC analysis. The total SAC costs for a particular cross-over movement cannot be judged without a Full-SAC analysis, an undertaking that would defeat the simplifying purpose of using cross-over traffic in the first place. Even if the Board knew the total replacement costs of the off-SARR segments used by cross-over movements, it would have no method for allocating a share of those investment costs to only the cross-over movements. The off-SARR segments would have other traffic flowing over those lines that would be expected to contribute to the investment costs, but whose contribution would depend on the profitability of that traffic.

The Board attempted to address this dilemma by focusing on the average costs that the defendant railroad currently incurs to haul the traffic over the relevant segments. Duke Energy Corp. v. Norfolk S. Ry., 7 S.T.B. 89, 104-106 (2003). The objective was to select a revenue allocation methodology that reflects, to the extent practicable, the defendant's relative average costs of providing service over the two segments (the segment replicated by the SARR, and the residual facilities needed to serve the traffic, at times referred to as the off-SARR segment). See id.

In Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 31 (STB served Oct. 30, 2006), the Board adopted an "Average Total Cost" (ATC) approach to allocate revenues from cross-over traffic between the facilities replicated by the SARR and those of the incumbent carrier. Using the URCS variable and fixed costs for the carrier, and the density and miles of each segment, parties can calculate the railroad's average total cost per segment of a move. The revenues from each portion of the movement would then be allocated in proportion to the average total cost of the movement on- and off-SARR. See Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1) et al., slip op. at 19-20 (STB served Feb. 27, 2006).

In the first case to apply ATC, however, the Board concluded a modification was needed to address an unanticipated flaw. See W. Fuels Ass'n v. BNSF Ry. (Western Fuels), NOR 42088 (STB served Sept. 10, 2007). The Board noted that, in their submissions, the parties had applied ATC to the cross-over movements' total revenues. For a substantial number of these movements, the result of doing so was to drive below 100% the revenue-to-variable cost (R/VC) percentages—as measured by URCS—for the on-SARR portion.

This occurred because of two factors. First, the complainant had included considerable cross-over traffic in its traffic group with total revenue either below or barely above the variable costs of handling the traffic. Second, the off-SARR segments of these movements had lower traffic densities, and thus higher average total costs. By allocating revenues from these movements in proportion to average total costs, as required by ATC, a proportionally larger percentage of that revenue was allocated to the off-SARR segment. Id. at 14. The result was

that "the on-SARR revenue allocation for those movements would be insufficient to cover the variable costs (as calculated using URCS) of handling traffic for the highest-density portion of a movement." Id. This result, the Board said, was unintended and illogical because "[t]raffic must cover its variable costs before it can be expected to make any contribution to joint and common costs." Id.[7] The Board further explained that it had not contemplated this situation and that such a result (a revenue allocation below variable cost) "would plainly conflict with our express purpose to find a non-biased, cost-based method." Id.

To avoid allocating revenues at levels below URCS variable costs, the Board determined that it had to refine the ATC approach. Rather than applying ATC to total revenue, the Board concluded that it would apply ATC to total revenue contribution, i.e., revenue in excess of variable costs as calculated by URCS. Id. Under modified ATC, allocating revenue from cross-over traffic would involve a two-step process. First, sufficient revenue would be allocated to each segment to cover that segment's variable costs of providing service as measured by URCS. Second, remaining revenues, if any, would be allocated using the original ATC methodology.

Western Fuels was challenged in court, and the case was remanded to the Board to address whether modified ATC improperly double counts variable costs. BNSF Ry. v. STB, 604 F.3d 602, 613 (D.C. Cir. 2010). On remand, the Board, with Commissioner Begeman dissenting, explained the decision to use modified ATC. See W. Fuels Ass'n v. BNSF Ry. (Western Fuels Remand), NOR 42088 (STB served June 15, 2012). Based on its experience in that case, the Board concluded that there were two competing principles in play. First, the Board seeks a revenue allocation that takes into account the important role that economies of density should play in any cost-based revenue allocation approach. Second, it seeks a revenue allocation approach that does not create the implausible result of driving the revenue allocation below variable costs. The Board understood that modified ATC did not give the same weight to economies of density as did the original ATC approach. While it concluded that the modified approach was superior to original ATC, the Board also announced that it planned to begin a rulemaking to consider a methodology, similar to one suggested, but not advocated, by BNSF (on remand), for possible future cases.

This "alternative ATC" methodology would have two steps. First, the Board would apply original ATC to all movements. Second, for those movements that received on-SARR revenue allocations below the defendant's URCS variable costs for the movement over the on-SARR segment, the Board would allocate additional revenues to that segment based on the relative on-SARR and off-SARR variable costs up to 100%.

[7] "Joint and common costs," sometimes referred to by the Board as "unattributable costs," are costs that cannot be assigned directly to specific movements by any conventional accounting methodology. See Guidelines, 1 I.C.C. 2d at 526. "Common costs" are costs shared by two or more services in variable proportion (e.g., terminal costs), while "joint costs" are costs shared by two or more services in fixed proportion (e.g., backhaul). Id. at 526 n.13.

Simplified Guidelines

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). To respond to this directive, the Board adopted the guidelines set forth in Simplified Guidelines. A decade passed, however, without any shipper bringing a case under those simplified guidelines. In Simplified Standards, the Board modified the test described in Simplified Guidelines and created an additional simplified alternative that a complainant could elect to use where a Full-SAC analysis was too costly, given the value of the case. These two alternatives, discussed in detail below, are referred to as (1) Simplified-SAC and (2) Three-Benchmark. Since Simplified Standards, only a few Three-Benchmark cases have been decided by the Board, while no complaint has been litigated to completion under the Simplified-SAC alternative.

1. Simplified-SAC

A. Objectives

The principal objective of the SAC approach is to restrain a railroad from exploiting market power over a captive shipper by charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper. A second objective of the SAC constraint is to detect and eliminate the costs of inefficiencies in a carrier's investments or operations.

It is the second objective that turns a Full-SAC presentation into an intricate, expensive undertaking. To replicate less than the existing rail infrastructure used to serve the captive shipper, the complainant must demonstrate that there would still be sufficient capacity to handle expected demand. This requires the complainant to first select an appropriate subset of the defendant railroad's traffic for the SARR to serve, then design an operating plan that shows how an efficient railroad would serve this traffic group, and determine the optimal network configuration. Complex computer programs are needed to model the hypothetical SARR and test the operating plan and configuration against the forecast demand of the traffic group. All these tasks are interrelated, such that changes to the traffic group may require reconfiguring the hypothetical network and revising the operating plan. The parties must then develop detailed evidence to calculate both the direct operating expenses (such as the costs of locomotives, crews, and railcars) and the indirect operating expenses (such as general and administrative, and maintenance-of-way). The time and expense associated with this inquiry dwarfs those needed to examine the replacement cost of the necessary rail infrastructure.

Accordingly, the inquiry under the Simplified-SAC method described below is limited to whether the captive shipper is forced to cross-subsidize other parts of the railroad's rail network or whether the defendant carrier is abusing its market power. Such an approach is a less thorough application of CMP in that it would not identify inefficiencies in the current rail operation. But it allows the Board to determine whether a captive shipper is forced to cross-subsidize parts of the defendant's existing rail network the captive shipper does not use. The Simplified-SAC method ensures that a railroad does not earn monopoly profits on its

investments. As railroads enjoy increasing market power with rising demand for their services, the SAC test (in either its full or simplified form) would provide a critical restraint on their pricing of captive traffic, without deterring railroads from making the investments in their rail networks that are needed to meet rising demand. Indeed, the Simplified-SAC method incorporates those new capital investments and ensures that the maximum lawful rate includes a reasonable return on the replacement cost of those investments.

B. Methodology

The Simplified-SAC method allows the Board to determine whether a captive shipper is forced to cross-subsidize parts of the defendant's existing rail network that the shipper does not use. To hold down the cost of a Simplified-SAC presentation, various simplifying assumptions and standardization measures were adopted.

- *Route*: The analysis examines the predominant route of the issue movements during the prior 12 months.

- *Configuration*: The facilities of the SARR consist of the existing facilities along the analyzed route (including all track, sidings, and yards). If a shipper presents compelling evidence that some facilities along the route have fallen into disuse by the railroad, and thus need not be replicated, those facilities are excluded from the Simplified-SAC analysis.

- *Test Year*: The Simplified-SAC analysis examines the reasonableness of the challenged rates based on a one-year analysis. The Test Year is the most recently completed four quarters preceding the filing of the complaint.

- *Traffic Group*: The traffic group consists of all movements that traveled over the selected route in the Test Year. No rerouting of traffic is permitted.

- *Cross-Over Traffic*: The revenue from cross-over traffic is apportioned between the on-SARR and off-SARR portions of the movement based on the revenue allocation methodology used in Full-SAC proceedings.

- *Road Property Investment*: The Board's findings in prior Full-SAC cases are used to simplify parts of the road property investment analysis.

- *Operating Expenses*: The total operating and equipment expenses of the SARR are estimated using URCS.

- *Discounted Cash Flow (DCF) Analysis*: The DCF analysis calculates the capital requirements of a SARR in the customary fashion, but then compares the revenues earned by the defendant railroad against the revenue requirements of the SARR only for the Test Year.

- *Internal Cross-Subsidy Inquiry*: The approach to identify an internal cross-subsidy set forth in PPL Montana, LLC v. Burlington Northern & Santa Fe Railway, 6 S.T.B.

286 (2003),[8] as refined in Otter Tail v. BNSF, is an affirmative defense, with the evidentiary burden of production and persuasion on the railroad.

- *Maximum Reasonable Rate*: The SAC costs (i.e., the revenue requirements of the SARR) are allocated amongst the traffic group based on the methodology used in Full-SAC cases.

- *Five-Year Rate Relief*: The maximum lawful rate is expressed as a ratio of revenue to variable costs (R/VC), with variable costs calculated using URCS without any movement-specific adjustments. This maximum R/VC ratio is then prescribed for a maximum five-year period.

2. Three-Benchmark

For some shippers who have small disputes with a carrier, the Board believed that the Simplified-SAC method would be too expensive, given the small value of their cases. The Board reasoned that these shippers must also have an avenue to pursue relief. Accordingly, the Board retained the Three-Benchmark method for those shippers, with refinements to lessen the uncertainties of the existing method.

Under the Three-Benchmark method, the reasonableness of a challenged rate is determined by examining the challenged rate in relation to three benchmark figures, each of which is expressed as an R/VC ratio. The first benchmark, the Revenue Shortfall Allocation Method (RSAM), measures the average markup over variable cost that the defendant railroad would need to charge all of its "potentially captive" traffic (traffic priced above the 180% R/VC level) in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2). The second benchmark, the $R/VC_{>180}$ benchmark, measures the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic. The third benchmark, the R/VC_{COMP} benchmark, is used to compare the markup being paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic.

Once the Board has selected the appropriate comparison group for the R/VC_{COMP} benchmark, each movement in the comparison group will be adjusted by the ratio of RSAM ÷ $R/VC_{>180}$. The Board will then calculate the mean and standard deviation of the resulting R/VC ratios (weighted in accordance with the proper sampling factors). If the challenged rate is above a reasonable confidence interval around the estimate of the mean for the adjusted comparison group, it is presumed unreasonable and, absent any "other relevant factors," the maximum lawful rate will be prescribed at that boundary level. See Simplified Standards, slip op. at 21-22.

[8] Aff'd sub nom. PPL Mont., LLC v. STB, 437 F.3d 1240 (D.C. Cir. 2006).

3. Limits on Relief

The maximum potential rate relief available to a complainant that elects to use the Simplified-SAC method is limited to $5 million per case over a five-year period, and for a complainant that elects to use the Three-Benchmark method, relief is limited to $1 million per case over the same period.[9] The relief refers to the sum of the differences between the challenged rates and the maximum reasonable rates, whether in the form of reparations, a rate prescription, or a combination of the two. Any rate prescription automatically terminates once the complainant has exhausted the relief available. Thus, the actual length of the prescription may be less than five years if the available relief is used up in a shorter time. The complainant is barred from bringing another complaint against the same rate for the remainder of the five-year period.

Once a rate prescription expires, the carrier's rate-making freedom is restored with a regulatory safe harbor at the challenged rate for the remainder of the five-year period, with appropriate adjustments for inflation using the rail cost adjustment factor, adjusted for inflation and productivity (RCAF-A). See R.R. Cost Recovery Procedures-Productivity Adjustment, 5 I.C.C. 2d 434 (1989), aff'd sub nom. Edison Elec. Inst. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992). If, however, a carrier establishes a new common carrier rate once the rate prescription expires, and the new rate exceeds the inflation-adjusted challenged rate, the shipper may bring a new complaint against the newly established common carrier rate.

Interest Rate on Overcharges

Under 49 U.S.C. § 10701(c), a rail carrier may establish any common carrier rate it chooses and has the freedom to increase its rates without precondition, except for the notice requirement of 49 U.S.C. § 11101(c). A shipper may seek a Board determination of the reasonableness of the rates, "but it may not withhold payment of a legally established rate." See AEP Texas N. Co. v. Burlington N. & Santa Fe Ry., NOR 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004). Instead, if the Board determines that the rates are unreasonable it can order the railroad to reimburse the complaining shipper, with interest. Id. The level of interest is currently set at the T-Bill rate. 49 C.F.R. § 1141.1(a).

BOARD PROPOSALS

Our proposals are presented in four parts. **Section I** sets out proposed refinements to the Simplified-SAC test, where we propose to remove the limit on relief and increase the precision of the calculation of RPI. **Section II** sets forth our proposal to raise the limit on relief for a case brought under the Three-Benchmark test from $1 million to $2 million. **Section III** sets forth

[9] Currently, the Board annually adjusts the $5 million and $1 million thresholds using the Producer Price Index (PPI), which measures the average change over time in the selling prices received by domestic producers for their output. Simplified Standards, slip op. at 28 n.36. These indexed thresholds are now $5,590,000 and $1,118,000, respectively.

our proposal to limit the use of cross-over traffic in the Full-SAC test and to modify the revenue allocation methodology. **Section IV** sets out a proposal to change the interest rate carriers must pay shippers when the rate charged has been found unlawfully high, from the current T-bill rate to the U.S. Prime Rate, as published in *The Wall Street Journal.*

I. Simplified-SAC

As mentioned earlier, the Board has created a simplified version of the SAC constraint for litigants who cannot justify the expense of the more detailed Full-SAC analysis. This constraint has numerous positive features. Unlike the Full-SAC analysis, it does not require shippers to design hypothetical railroads. Rather, the Simplified-SAC approach focuses on the operations of the actual defendant railroad to determine if the railroad is exploiting its market power to charge monopoly pricing. Because the approach does not require the complainant to design a hypothetical railroad from scratch, it is a far simpler and less costly approach. And unlike the Three-Benchmark analysis, the Simplified-SAC approach uses replacement cost to determine the maximum lawful rates a carrier may charge. We are offering proposals to encourage its use over the more complex, costly, and time-consuming Full-SAC test. Specifically, we propose to remove the $5 million monetary limitation on relief for cases pursued under the Simplified-SAC constraint.

Our rationale for this proposal rests on the key similarity between the Full-SAC constraint and the Simplified-SAC constraint. As noted above, the principal objective of the Full-SAC constraint is to restrain a railroad from exploiting market power over a captive shipper by charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper. A second objective of the Full-SAC constraint is to detect and eliminate the costs of inefficiencies in a carrier's investments or operations.

Like the Full-SAC approach, the inquiry under the Simplified-SAC method is also designed to prevent the railroad from abusing its market power by charging unreasonably high rates. The Simplified-SAC test can provide a critical restraint on the railroad's pricing of captive traffic by allowing the Board to determine whether a captive shipper is being forced to cross-subsidize parts of the defendant's existing rail network the shipper does not use. In other words, the Simplified-SAC constraint ensures that a railroad does not earn monopoly profits on its investments.

If the Simplified-SAC analysis of a particular case detects a problem, we see no reason to curtail the relief that is available to the shipper to correct that problem. There is no basis to permit the railroads to earn monopoly profits simply because, unlike the Full-SAC model, the Simplified-SAC model does not detect the inefficiencies in rail operations that may further raise rates. This proposal is linked, however, to the change described below to also remove the simplification to the RPI component of the Simplified-SAC test. If there is no limitation on relief under Simplified-SAC, we believe the approach must calculate the replacement cost of the facilities used to serve the captive shipper with as much precision as a Full-SAC presentation.

We recognize that our decision here is a departure from the Board's prior rationale for imposing relief limits on the Simplified-SAC methodology. In Simplified Standards, slip op. at

28, the Board stated 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. Instead, the complainant must 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." The Board used this rationale to apply limits on the relief available under both the Simplified-SAC approach and the Three-Benchmark approach. We continue to believe that the Three-Benchmark approach should be reserved for small disputes where the litigant cannot justify the expense of a SAC analysis (either in Full or Simplified form). But if we improve the precision of the RPI components of the Simplified-SAC test, as discussed below, we cannot see any justification for continuing to curtail the relief where the analysis has detected that a carrier is abusing its market power and is earning more than a reasonable return on the replacement costs of the facilities being used to serve the captive shippers. In other words, regardless of the amount in dispute, the Full-SAC and Simplified-SAC approaches both appear to be an appropriate method to judge the reasonableness of the challenged rates, and there is no apparent reason to force the shipper to use the more expensive Full-SAC approach over the Simplified-SAC approach in cases where the shipper seeks more than $5 million in relief.

There still are reasons why a complainant may prefer to use the Full-SAC procedures instead of pursuing relief under a Simplified-SAC approach if unlimited relief is available. In a Full-SAC case, the challenged rates are judged based on the simulated competitive price that would exist in a contestable marketplace where there were no barriers to entry and the pricing of the defendant was constrained by the threat of a new entry by a hypothetical SARR. This simulated competitive price protects the complainant from paying for the costs of inefficiencies in a carrier's investments or operations. Therefore, if the complainant believes that there are enough inefficiencies in the defendant's rail operations to justify the added expense and complexity of a Full-SAC presentation, it may pursue relief using this hypothetical SARR analysis. By removing the limitation on relief for Simplified-SAC, we are not seeking to discourage complainants from using the Full-SAC approach if that is their litigation preference. Rather, we are proposing to make a simplified alternative more accessible to a shipper who believes it is being charged unreasonable rates, yet does not choose to go through the complex process of designing a hypothetical railroad to prove its case. Moreover, lifting the limitation on relief under the Simplified-SAC approach should address the concerns raised by many of our stakeholders that the Full-SAC is too complex, too expensive, and too impractical for most shippers.

The current Simplified-SAC test simplifies the RPI component by relying on findings from prior Full-SAC cases. Simplified Standards, slip op. at 15. We also seek public input on whether, if we remove the limitation on relief as discussed above, we should remove the RPI simplification. Complainants would be required to submit detailed expert testimony on the replacement costs of the facilities used to serve the complainant.

Our rationale is that we cannot retain the RPI simplification if we are going to remove the rate-relief cap under this approach. We understand that removing this simplification feature of the approach will raise costs and may require extending the procedural schedule. We propose to consider extensions of the procedural schedule on a case-by-case basis. As for costs, we believe

that a Simplified-SAC case, even without the RPI simplification, will remain far less expensive to litigate than a Full-SAC case. Nevertheless, because there will be some increased cost, we also propose to raise the monetary limit on relief for a Three-Benchmark case to allow all rate complainants who cannot justify using the Simplified-SAC approach to have a cost-effective option for rate relief.

II. Three-Benchmark

Currently, parties seeking relief under the Three-Benchmark test are limited to $1 million in relief over a five-year period (with the monetary limit indexed for inflation). The Board selected the $1 million cap on relief because, at the time, it was the best evidence of record for the cost of litigating a Simplified-SAC case. Because we anticipate that litigation costs for Simplified-SAC would rise under the proposal noted above, the limitation on relief under the Three-Benchmark case should also be similarly raised. See Simplified Standards, slip op. at 28, 31 (basing the limit on relief for Three-Benchmark cases on the best available estimate of the litigation cost to pursue relief under the Simplified-SAC method).

By way of background, in Simplified Standards, we estimated that it costs about $5 million to bring a Full-SAC case. Simplified Standards, slip op. at 30-31. We added that, while "difficult to discern" precisely, the cost to litigate a Simplified-SAC case with the RPI simplification should be "dramatically less than the cost of presenting a Full-SAC case." Id. at 31. Based on the record before it, the Board estimated the cost to litigate such a Simplified-SAC case at $1 million, and therefore adopted that as the limitation on relief for Three-Benchmark cases.

Today, two considerations lead us to propose a $2 million limitation on relief for Three-Benchmark cases. On the one hand, as we acknowledged when first proposing Simplified-SAC, developing RPI evidence is "expensive." Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 39 (STB served July 28, 2006). This suggests that a substantial increase above the current $1.2 million (in current dollars) limit is warranted. On the other hand, we have acknowledged that the main driver of litigation costs in Full-SAC cases is the search for inefficiencies in the defendant's investments or operations, Simplified Standards, slip op. at 13, a process that involves modeling a hypothetical railroad from scratch. Because a Simplified-SAC case does not involve this expensive search for inefficiencies, the cost to bring a Simplified-SAC case, even without the RPI simplification, should be significantly less than 50% of the cost to bring a Full-SAC case (i.e., less than $2.75 million in current dollars). We note, however, that those who litigate rate cases before the Board are in the best position to provide details regarding litigation costs. We thus seek public input on whether it would be reasonable to raise the limitation on relief in Three Benchmark cases to $2 million in 2012 dollars (with the monetary limit indexed for inflation thereafter).

III. Full-SAC

The Full-SAC test has been the most heavily utilized method for challenging the reasonableness of rail rates. One reason that it is used more often is that a complainant is

permitted great flexibility in the design of its hypothetical SARR to detect inefficiencies in rail operations and the infrastructure. The approach is complicated, however. As such, since 1994 the Board has permitted complainants to use cross-over traffic, which enables these Full-SAC cases to focus on the facilities and services that are used by the complainant shipper and prevents Full-SAC cases from becoming unmanageable. See Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry., 7 S.T.B. 589, 600-03 (2004). In 2004, the agency concluded that "[w]ithout cross-over traffic, captive shippers might be deprived of a practicable means by which to present their rate complaints to the agency." Id. at 603. At the time, the Board acknowledged that, as with any simplifying assumption, "the inclusion of cross-over traffic necessarily introduces some degree of imprecision into the SAC analysis." Id. But the agency concluded that "the value of this modeling device—both in keeping the analysis focused on the facilities and services used by the complainant shipper, and in streamlining and simplifying already complicated undertakings—outweighs the concerns raised by [the defendant railroad]." Id. Complainants first began by utilizing the device by including cross-over traffic that was predominantly trainload service. More recently, however, complainants have begun to include in the SAC analysis a significant amount of carload and multi-carload cross-over traffic.[10]

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. When the proposed SARR includes cross-over traffic of carload and multi-carload traffic, it generally would handle the traffic for only a few hundred miles *after* the traffic would be combined into a single train. As such, the "cost" to the SARR of handling this traffic would be very low. In recent cases, litigants have proposed SARRs that would simply hook up locomotives to the train, would haul it a few hundred miles without breaking the train apart, and then would deliver the train back to the residual defendant. All of the costs of handling that kind of traffic (meaning the costs of originating, terminating, and gathering the single cars into a single train heading in the same direction) would be borne by the residual railroad. However, when it comes time to allocate revenue to the facilities replicated by the SARR, URCS treats those movements as single-car or multi-car movements, rather than the more efficient, lower cost trainload movements that they would be. As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted.

Without a means of correcting or minimizing the bias that is created by the disconnect between the revenue allocation and the costs of providing service, we need to address the use of cross-over traffic in Full-SAC cases. Accordingly, we propose and invite public comment on the following two options for Full-SAC cases: (1) restricting the use of cross-over traffic to

[10] See, e.g., Ariz. Elec. Power Coop., Inc. v. BNSF Ry., NOR 42113, slip op. at 35 (STB served Nov. 22, 2011) (noting concern that "while a majority of AEPCO's traffic group moves in trainload service, most of the variable costs calculated for that group were costed assuming it moved in carload and multi-car service"), appeals docketed sub nom. Ariz. Elec. Power Coop., Inc. v. STB, No. 12-1045 (D.C. Cir. Jan. 23, 2012); BNSF Ry. v. STB, No. 12-1042 (D.C. Cir. Jan. 23, 2012); Union Pac. R.R. v. STB, No. 12-1046 (D.C. Cir. Jan. 23, 2012).

movements for which the SARR would either originate or terminate the rail portion of the movement, or (2) restricting the use of cross-over traffic to movements where the entire service provided by the defendant railroad in the real world is in trainload service.

The first limitation would require the SARR to replicate more of the services being provided by the defendant railroad. If the SARR would either originate or terminate the traffic, then there may be less of a disconnect between the hypothetical cost to provide service over the segments replicated by the SARR and the revenue allocated to those facilities from cross-over traffic. Alternatively, the second limitation would limit the use of cross-over traffic to trainload movements, where the cost of providing service over any particular segment of the movement may be sufficiently homogenous that there would be less of a disconnect between the hypothetical costs of providing service in the SAC analysis and the actual costs of providing service used to allocate revenue to those segments. Parties are encouraged to comment on which alternative is superior, or to offer alternative solutions to the handling of cross-over traffic of carload and multi-carload traffic in Full-SAC cases.[11]

Similar limitations on the use of cross-over traffic in Simplified-SAC cases do not appear necessary. In those cases, the hypothetical SARR is replicating the existing facilities and existing operations of the defendant railroad. Because URCS is used in those cases to estimate both the operating costs of the SARR and of the incumbent railroad, there does not appear to be the same kind of disconnect between the operating costs of providing service and the revenue allocation. In other words, if URCS is significantly overestimating (or underestimating) the costs of operating over a particular segment, it will correspondingly overestimate (or underestimate) the revenue that should be allocated to that particular segment. However, parties in Full-SAC cases may not use URCS to estimate the operating costs of the hypothetical SARR because the SARR is not replicating the existing facilities and existing operations of the defendant railroad, as is the case in the Simplified-SAC proceeding. Instead, the complainants develop the operating costs of the SARR based on the particular services offered to the selected traffic group, but then use URCS operating costs for purposes of the revenue allocation, which creates the disconnect between the hypothetical operating costs of the SARR and the revenue allocation.

The Board also proposes to modify the ATC method used to allocate revenue from cross-over traffic. The revised ATC methodology would have two steps. First, using the URCS variable and fixed costs for the carrier, and the density and miles of each segment, parties would calculate the railroad's average total cost per segment of a move. The total revenues from each portion of the movement would then be allocated in proportion to the average total cost of the movement on- and off-SARR. This first step would thus follow the original ATC proposal adopted in Major Issues. A second step would then be performed to ensure that the revenue allocated to both the facilities replicated by the SARR and those of the residual defendant

[11] We do not propose to apply any new limitation retroactively to existing rate prescriptions that were premised on the use of cross-over traffic or to any pending rate dispute that was filed with the agency before this decision was served. We do not believe it would be fair to those complainants, who relied on our prior precedent in litigating those cases.

carriers would not be driven below the defendant's URCS variable costs for the movement over those segments. If the revenue allocation to the on-SARR (or off-SARR) segment would result in revenues falling below URCS variable costs for that segment, the revenue allocation to the on-SARR (or off-SARR) segment would then be raised to equal 100% of the defendant's URCS variable costs of providing service over that segment. If the total revenue from the cross-over movement were below our measure of total variable cost for the entire movement, revenue would be allocated between the two segments to maintain the existing total R/VC ratio on both segments.

This alternative method might better address two competing principles in the selection of a cross-over traffic methodology. First, as discussed earlier, we seek a revenue allocation that takes into account the important role that economies of density should play in any cost-based revenue allocation approach. Second, we seek a revenue allocation approach that does not create the implausible result of driving the revenue allocation on any segment below variable costs. While our current modified ATC approach also accommodates those two principles, this alternative approach, brought to our attention in Western Fuels Remand, avoids driving the revenue allocation below variable costs while giving more weight to the important role that economies of density should play in any cost-based revenue allocation approach.[12] We therefore seek public comment on whether we should adopt this modification to ATC for use in all future SAC and Simplified-SAC proceedings and whether it provides a more suitable methodology that would better accommodate the two competing principles than the current ATC approach. Parties may also propose alternative approaches that would better accommodate these two competing principles than the current modified ATC approach or the alternative described above.

IV. Interest Rate on Rate Overcharges

When the Board determines that a railroad has charged rates that are unreasonable, it may establish a rate prescription, as well as direct the railroad to reimburse the complaining shipper, with interest. Currently, the level of interest is set at the T-Bill rate. 49 C.F.R. § 1141.1(a).

It is our responsibility to establish an interest rate that encourages compliance with our rules and correlates to market interest rates over a comparable time frame. We are concerned that the T-Bill rate (currently at 0.10%) may be insufficient. Therefore, we propose to change the interest rate to the U.S. Prime Rate, as published in *The Wall Street Journal*. The U.S. Prime rate (currently at 3.25%) is the interest rate that the banks charge to their most creditworthy customers, and may serve as a more appropriate rate for calculating interest owed to shippers for rates found by the Board to be unreasonable.

[12] This proposal is similar, but not identical, to that proposed by BNSF in Western Fuels Remand. This proposal examines the revenue allocation to the on-SARR and off-SARR segments, whereas BNSF's proposal examined only the on-SARR segment.

CONCLUSION

We believe that the proposals contained here should further promote the rail transportation policy to protect captive shippers from unreasonable rates, 49 U.S.C. § 10101, without precluding rail carriers from earning revenues that are adequate under honest, economical, and efficient management, 49 U.S.C. § 10704(a)(2). We also believe that several of these changes would enable the agency to better follow the directive from Congress to "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 U.S.C. § 10101(15); see also 49 U.S.C. § 10704(d) (requiring the agency to establish "procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates"). We therefore invite public comment on each of these proposals.

Changes to the Code of Federal Regulations needed to implement this proposal are set forth in **Appendix A** and will be published in the Federal Register.

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or certify that the proposed rule would not have a "significant economic impact on a substantial number of small entities," 5 U.S.C. § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. United Dist. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

This proposal would not have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act. [13] The proposal imposes no additional record keeping by small railroads or any reporting of additional information. Nor do these proposed rules circumscribe or mandate any conduct by small railroads that is not already required by statute: the establishment of reasonable transportation rates. Small railroads have always been subject to rate reasonableness complaints and their associated litigation costs. And they have been subject to the simplified rate procedures since 1996, when the simplified procedures were first created. Finally, as the Board has previously concluded, the majority of

[13] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business. See 13 C.F.R. § 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a short line railroad is considered small if its number of employees is 500 or less. Id. (industry subsector 482).

railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act. See Simplified Standards, slip op. at 33-34. In the 32 years since the passage of the Staggers Act—when Congress limited the Board's rate reasonableness jurisdiction where a carrier has market dominance over the transportation at issue—virtually all rate challenges have involved large Class I carriers. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This proposal would also not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. All parties wishing to participate in this proceeding should file a notice with the Board by August 24, 2012.

2. Submissions addressing the proposals discussed herein are due by October 23, 2012. Reply submissions are due by December 7, 2012. Rebuttal submissions are due by January 7, 2013.

3. An original and 20 copies of each submission should be filed with the Board and one copy sent to each party who has filed a notice of intent to participate.

4. Notice of this decision will be published in the Federal Register.

5. A copy of this decision is being provided to the Chief Counsel for Advocacy, Small Business Administration.

6. This decision is effective on July 25, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

APPENDIX A – CHANGES TO CODE OF FEDERAL REGULATIONS

For the reasons set forth in the decision, the Surface Transportation Board proposes to replace part 1141 of title 49, chapter X, of the Code of Federal Regulations in its entirety with the following regulation:

49 C.F.R. PART 1141—PROCEDURES TO CALCULATE INTEREST RATES

Authority: 49 U.S.C. 721.

§ 1141.1 Procedures to calculate interest rates.

(a) For purposes of complying with a Board decision in an investigation or complaint proceeding, interest rates to be computed shall be the most recent U.S. Prime Rate as published by The Wall Street Journal. The rate levels will be determined as follows:

(1) For investigation proceedings, the interest rate shall be the U.S. Prime Rate as published by The Wall Street Journal in effect on the date the statement is filed accounting for all amounts received under the new rates.

(2) For complaint proceedings, the interest rate shall be the U.S. Prime Rate as published by The Wall Street Journal in effect on the day when the unlawful charge is paid. The interest rate in complaint proceedings shall be updated whenever The Wall Street Journal publishes a change to its reported U.S. Prime Rate. Updating will continue until the required reparation payments are made.

(b) For investigation proceedings, the reparations period shall begin on the date the investigation is started. For complaint proceedings, the reparations period shall begin on the date the unlawful charge is paid.

(c) For both investigation and complaint proceedings, the annual percentage rate shall be the same as the annual nominal (or stated) rate. Thus, the nominal rate must be factored exponentially to the power representing the portion of the year covered by the interest rate. A simple multiplication of the nominal rate by the portion of the year covered by the interest rate would not be appropriate because it would result in an effective rate in excess of the nominal rate. Under this “exponential” approach, the total cumulative reparations payment (including interest) is calculated by multiplying the interest factor for each period by the principal amount for that period plus any accumulated interest from previous periods. The “interest factor” for each period is 1.0 plus the interest rate for that period to the power representing the portion of the year covered by the interest rate.