

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 733

EXPEDITING RATE CASES

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

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I. INTRODUCTION.

CSX Transportation, Inc. ("CSXT") appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking ("ANPRM") published in this proceeding on June 15, 2016. The ANPRM requests comment on several potential changes to the Board's rules for rate reasonableness cases that are intended to improve and expedite rate litigation. CSXT has carefully considered these potential changes in light of its experience as a litigant in several recent and pending rate cases. CSXT believes that some of the changes proposed in the ANPRM would improve the process, but that others would be counterproductive and could even undermine the economic validity of the Board's rate regulation.

CSXT believes that any changes the Board makes to the process should be consistent with three key principles: (1) the Board should not abandon sound economics or make any changes that would affect the substantive economic validity of the Stand Alone Cost ("SAC") test; (2) the Board should implement rules that

encourage negotiated resolutions; and (3) the Board should pursue reasonable regulatory changes that expedite both the discovery and evidentiary processes.

1. Principle 1: Any Regulatory Changes Must Be Consistent With Sound Economics.

First, any changes that the Board makes should be consistent with sound economic principles. The STB Reauthorization Act¹ creates a standard schedule for rate cases that significantly shortens both the parties' time to prepare evidence and the Board's time to consider the parties' evidence. But while Congress made clear that it wants rate cases to be resolved more expeditiously, it made no changes to the economically tested and judicially approved substantive standards for ratemaking.² And it certainly did not indicate that expediting rate cases should come at the expense of economic validity. That is particularly true for the SAC test, which is reserved for the highest-value cases that warrant the most precision and accuracy.

Indeed, SAC cases are typically among CSXT's highest-value commercial litigation matters. The outcome of these cases has an enormous potential impact on CSXT, both because of the potential for rate prescriptions and reparations in a particular case and because of the precedential impact that a decision could have on the overall pricing environment. It is essential that the Board get these high-stakes

¹ Pub. L. No. 114-110, 129 Stat. 2228 (2015).

² See, e.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), at 13 (STB served Sept. 5, 2007) ("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) ("CMP provides the only economically precise measure of rate reasonableness and therefore must be used wherever possible.").

cases right, and that it not be tempted to take shortcuts that are less accurate and that could have materially adverse impacts on stakeholders.

It should not be forgotten that shippers who want a simpler or less expensive alternative to SAC already have that option. The Board has invested much time and effort to develop the Simplified SAC (“SSAC”) and Three Benchmark methodologies.³ SSAC provides an alternative to SAC that is now available to all shippers.⁴ A shipper making a Simplified SAC presentation would avoid many of the most complicated issues raised in a SAC case; for example, a Simplified SAC complainant does not need to design an operating plan or to develop ground-up operating expenses like Maintenance of Way (“MOW”) or General & Administration (“G&A”). Moreover, the current \$4 million relief limit for Three Benchmark cases makes that simple, rough methodology available to provide complete recovery for a substantial majority of all traffic.⁵ While CSXT continues to have concerns about the wisdom of applying simplified methodologies to such a broad swath of traffic, the Board has certainly taken aggressive action to make rate relief remedies available to all. With these simple, expedited methodologies already available to shippers, the Board does not need to look for shortcuts in the method reserved for the most consequential and high-value cases.

³ See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 3 (STB served July 28, 2006) (describing the process for establishing simplified guidelines and commencing a new process for further changes).

⁴ See *Rate Regulation Reforms*, STB Ex Parte No. 715 (STB served July 18, 2013).

⁵ See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 37 (STB served July 26, 2006) (Board’s calculations showed that 66% of all traffic had maximum five-year value of less than \$3.5 million).

In this vein, CSXT urges the Board not to consider any evidentiary simplifications that would undermine the economic validity of the results in SAC cases. For example, some of the proposed “standardizations” to SAC evidence discussed in the ANPRM would almost certainly “favor one side or the other” by requiring use of standard values rather than real-world values. ANPRM at 5-6. The suggestion that accounting book values be used in place of actual road property investment values would be particularly damaging to the economic reliability of the SAC test.

While CSXT is not philosophically opposed to changes that would simplify the presentation of evidence, several of the proposals in the ANPRM would depart from SAC economic principles in ways that could bias the results and undermine their economic rationale. In SAC cases, shippers must be allowed to present evidence of proposed efficiencies, and railroads must be allowed to present evidence ensuring that any proposed efficiencies are consistent with the realities of real-world railroading.⁶ In short, the purpose of this proceeding should be to streamline and expedite SAC cases—not to make changes that alter the economic principles of SAC.

⁶ See, e.g., *Western Fuels Ass’n, Inc. and Basin Electric Power Cooperative v. BNSF Ry. Co.*, STB Docket No. 42088, at 15 (STB served Feb. 18, 2009) (“assumptions used in the SAC analysis . . . must be realistic, *i.e.*, consistent with the underlying realities of real-world railroading”); *Arizona Electric Power Cooperative, Inc. v. BNSF Ry. Co. and Union Pacific R.R. Co.*, STB Docket No. 42113, at 16 (STB served Nov. 22, 2011) (“The composition of the traffic group, as with all assumptions used in the SAC analysis, must be realistic, *i.e.*, consistent with the underlying realities of real-world railroading.”).

2. Principle 2: Negotiated Resolutions Are Preferable to Litigation.

The second principle that should govern any changes to rate reasonableness procedures is that negotiated resolutions are always better than rate litigation. Any changes the Board wishes to make should encourage the voluntary resolution of differences in a mutually beneficial manner. The Board's mediation processes have worked well in past SAC cases in which CSXT has been involved, and a significant number of cases have been resolved with the help of a Board-appointed mediator.

A potential danger of an expedited litigation process is that it will effectively shorten the time in which the parties can engage in meaningful mediation. With a shortened discovery and evidentiary schedule, parties will have no choice but to aggressively litigate cases almost from the moment that a complaint is filed. It is an arduous, months-long process for a railroad to identify the hundreds of kinds of responsive information requested in a SAC case; to organize and produce that information in a comprehensible way; and to answer follow-up questions and requests for further information. If discovery is to be completed within 150 days after a complaint is filed, there will be no time to lose. And there is a danger that parties will become so focused on their discovery obligations that the chance to meaningfully resolve cases through mediation is lost. One way to guard against this danger would be to require a prefiling notice and to have the Board appoint a mediator immediately after posting of the prefiling notice.

3. Principle 3: Procedural Changes to Accelerate Certain Discovery and Evidentiary Issues Would Expedite the Process.

A third general principle was aptly summarized by Thomas Jefferson: “Never put off to tomorrow what you can do today.”⁷ The best way to deal with the compressed STB Reauthorization Act timelines for presenting evidence and considering evidence is to not leave everything to the end and to require parties to address issues early in the process when that is possible. One way for the Board to do this is to require early filing of discovery requests to avoid the delays that occur when parties wait several weeks to begin discovery.

Another way to alleviate these pressures is for the Board to separate out issues and decisions that could be considered earlier in the process. Under the STB Reauthorization Act schedule, no evidence is presented for 210 days—nearly halfway through the overall procedural schedule.⁸ While that makes sense for SAC evidence that a complainant must develop through information obtained in discovery, a complainant’s market dominance case is based primarily on evidence in its possession at the time it files its case. This important but analytically distinct issue could be litigated earlier in cases without distracting from or delaying the preparation of SAC evidence. CSXT here presents a proposal to accelerate the consideration of market dominance evidence without impacting the deadlines for SAC evidence. Considering market dominance earlier (rather than “leaving [it]

⁷ Letter from Thomas Jefferson to Paul Clay (July 12, 1817), *available at* https://www.loc.gov/resource/mtj1.050_0013_0013/

⁸ See *Revised Procedural Schedule In Stand-Alone Cost Cases*, STB Ex Parte No. 732 (Mar. 7, 2016) (STB served March 9, 2016).

until tomorrow”) would make it easier for the parties and the Board to address SAC issues on an expedited schedule.

II. THE BOARD SHOULD ADOPT A PREFILING REQUIREMENT FOR RATE CASES.

In the ANPRM, the Board requests comments on whether it should require complainants to file a notice of intent to initiate a rate case some time before filing a complaint.⁹ As the Board states in the ANPRM, the Board requires prefiling notices for applications to approve major and significant merger and consolidation transactions.¹⁰ Such applications initiate complex proceedings and must be resolved on a tight procedural schedule—just as rate cases must be after the STB Reauthorization Act.¹¹ CSXT supports the proposal for a prefiling notification, which would benefit the rate case process by allowing both more time for parties to prepare for discovery and more time for the parties to reach negotiated resolutions.

The first benefit of a prefiling notification is that it would allow the defendant railroad to begin preparing for discovery.¹² Under the STB Reauthorization Act, the 150-day discovery time period starts the day that a complaint is filed. But a

⁹ See ANPRM at 3.

¹⁰ See 49 C.F.R. § 1180.4(b).

¹¹ The ICC’s adoption of a prefiling notification requirement was motivated both by a belief that proceedings could “be expedited if all potential parties have advance warning and are able to define their positions and develop their evidence” and by recognition of “short time in which [the ICC] must decide” such applications. *Railroad Consolidation Procedures*, 366 I.C.C. 75, 81-82 (1982).

¹² The additional time would also be available to the complainant, of course. But because the complainant controls when a case is commenced, it already has more control over the early stages of a rate reasonableness case schedule and can begin discovery preparation prior to its actual filing of the complaint.

railroad cannot be ready to begin discovery on the day a complaint is filed without some prior notice that a complaint is forthcoming. Discovery in a SAC case reaches into every aspect of a railroad's operations and requires participation from virtually every department of the railroad. In past rate cases CSXT typically has needed to enlist scores of personnel from all parts of the organization to identify and assemble responsive data. For example, in the TPI rate case more than 90 internal CSXT personnel were involved in identifying data for CSXT's discovery responses.

Because personnel often change positions, it takes time and effort to identify the right personnel and to educate them on what will be required. And identification of the correct personnel must occur before any discussion of what responsive data is available and the best way to gather and produce it. In CSXT's experience, it can take several weeks to identify the right personnel for all the different types of documents and data that will be subject to discovery. A prefiling notification would allow a railroad to begin that process before a complaint is filed, and could make it less likely that discovery-related delays could require an extension of the procedural schedule.

Moreover, a prefiling notification should allow the parties to agree on a protective order that could be in place at the outset of the case, thus allowing for immediate discovery production and initial disclosures. In the *Consumers* case, for example, a protective order was not entered until almost two months after the

complaint was filed.¹³ The delay was similar in the *TPI* case.¹⁴ Prompt agreement to a protective order would allow earlier discovery production.

A second important reason to adopt a prefiling notification is that it will promote negotiated resolutions. CSXT has resolved several rate cases successfully with the help of the Board's mediation services. One potential drawback to compressing the overall procedural schedule is that as soon as a case is filed parties will need to aggressively pursue discovery issues and begin developing evidence. The important opportunity to resolve cases before intensive litigation commences could be lost. But a prefiling notification requirement would create space for Board-sponsored mediation or other negotiations to potentially resolve the dispute before the parties must dedicate themselves to litigating the case on an expedited schedule.

This is particularly so because it often takes some time to set up even the first joint mediation session (which typically occurs only after the mediator has coordinated separate meetings with each party). For example, in *Consumers* the first joint mediation session was held on February 20, 2015, 38 days after the

¹³ The parties filed a joint motion for a protective order a month after the complaint had been filed. See *Consumers v. CSXT*, STB Docket No. 42142, *Complaint* (filed Jan. 13, 2015); *Consumers v. CSXT*, STB Docket No. 42142, *Joint Motion for Protective Order* (filed Feb. 27, 2015). The Board granted the motion 19 days later. See *Consumers v. CSXT*, STB Docket No. 42142 (STB served March 18, 2015).

¹⁴ In *TPI*, the complaint was filed one month before the joint motion for protective order. See *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, *Complaint* (filed May 3, 2010); *TPI v. CSXT*, STB Docket No. 42121, *Joint Motion for Protective Order*, (filed June 3, 2010). The Board entered the protective order 20 days later. See *TPI v. CSXT*, STB Docket No. 42121 (STB served June 23, 2010).

complaint was filed. Providing breathing room for these discussions at the beginning of the schedule will increase the likelihood of more timely and mutually beneficial negotiated resolutions.

The ANPRM also requests comments on the length of a notification period, and suggests 30 or 60 days as possibilities.¹⁵ CSXT believes it would make sense to vary the length of the notification period by the complexity of the case. For a Three Benchmark case already operating under a streamlined procedural schedule, a 30-day prefiling notification would be sufficient. For more complex SSAC or SAC cases, a 60-day period would be more appropriate.

This proposal is analogous to the Board's prefiling notification requirements for transactions, which requires longer notice for a "major transaction" than a "significant transaction."¹⁶ The ICC made this distinction because "significant" transaction decisions are governed by a more limited set of criteria than those for "major" transaction decisions and Congress had expressed its intent that such cases be expedited.¹⁷ Here, Three Benchmark cases are governed by a more limited set of criteria than SSAC or SAC cases, and Congress has made clear that expedited methods should be made available.¹⁸ Providing 30 days advance notice for Three

¹⁵ See ANPRM at 3.

¹⁶ See 49 C.F.R. § 1180.4(b) ("significant transaction" requires a two to four month prefiling notice and a "major transaction" requires a three to six month prefiling notice).

¹⁷ See *Railroad Consolidation Procedures*, 366 I.C.C. at 82.

¹⁸ See 49 U.S.C. 10701(d)(3) (mandating that the Board establish a "simplified and expedited method for determining the reasonableness of challenged rail rates").

Benchmark cases and 60 days for more complicated SSAC and SAC cases is appropriate.

For the prefiling notification to be useful, the Board should require that it include certain categories of information, just as is the case for prefiling notifications for consolidation transactions.¹⁹ The Board should require parties to include (1) the rate that will be challenged; (2) the specific origin-destination pair(s) being challenged; and (3) the methodology that will be used (*i.e.*, SAC, SSAC, or Three Benchmark). Without such basic information, it will be difficult for the railroad to make appropriate use of the time allowed by a prefiling notice to prepare for discovery and for the parties to engage in discussions to attempt to reach a meaningful negotiated resolution.

III. THE BOARD SHOULD CONSIDER REQUIRING EARLY SUBMISSION OF MARKET DOMINANCE EVIDENCE.

The STB Reauthorization Act both challenges parties to present evidence on an expedited schedule and challenges the Board to decide cases on a compressed timeframe. The best way for the Board to accommodate these challenges is to reduce the number of issues that have to be litigated and decided on that schedule. While it may be difficult to separate out any SAC issues for separate determination, it would not be difficult for the Board to accelerate the consideration of market dominance, a jurisdictional prerequisite which is both analytically distinct from SAC and suitable for early resolution. To be clear, CSXT does not propose that the Board bifurcate rate cases or delay the schedule for preparation of SAC evidence in

¹⁹ See 49 C.F.R. § 1180.4(b)(4).

any way. Rather, CSXT proposes that market dominance evidence be submitted and considered earlier in the proceeding without adjusting the schedule for SAC evidence.

An accelerated determination of market dominance will have multiple benefits for the Board, complainants, and defendants.

First, an accelerated determination of market dominance will remove one significant contested issue from the compressed timeline for presentation and consideration of SAC evidence. In cases where market dominance is contested, it can take up a significant proportion of the parties' evidence and the Board's analysis of such evidence, particularly in cases involving multiple traffic lanes. In *DuPont* the parties devoted 809 narrative pages to market dominance, and 59 pages of the Board's 335-page decision was dedicated to market dominance issues. Separating these issues from the schedules for presenting SAC evidence would increase the ability of shippers and railroads alike to meet the evidentiary deadlines for SAC evidence.

Second, in a multi-lane case, a Board determination that it lacks jurisdiction over some lanes but not others could affect the SARR configuration proposed by parties in the SAC evidence. As the Board recognized in *TPI*, the parallel presentation of market dominance evidence and SAC evidence in a multi-lane case creates a risk that the SARR network may not be designed to optimally serve the

lanes over which the Board has jurisdiction.²⁰ If the Board finds a lack of market dominance in case lanes that substantially affects the optimal SARR configuration, a complainant might seek to redesign its SARR. Such an outcome would both cause delays and result in a significant waste of time and resources. This is not a speculative possibility. While the Board's decisions to dismiss lanes for lack of market dominance in recent multi-lane cases have not substantially affected the potential SARR configuration (because other issue traffic moved over the same routes), there is no guarantee that this would occur in future cases.

Third, accelerated determination of market dominance will avoid unnecessary SAC evidence in any case where the complainant does not meet the threshold requirement of market dominance.²¹ This is an important benefit that can be achieved without bifurcating or delaying the overall proceeding.

Fourth, accelerated determination of market dominance provides a further opportunity for meaningful settlement discussions by allowing early determination of an important issue that often affects the parties' valuation of a case.

Conversely, accelerated determination of market dominance would not have any negative consequences for the parties or the Board. Neither shippers nor

²⁰ See *id.* at 7 (“Moreover, if the Board allowed stand-alone cost evidence to be filed now and later found some number of lanes of traffic to be outside our jurisdiction, the result could be an evidentiary record inconsistent with the assumptions underlying the complainant’s selection of a traffic group and the facilities necessary to serve that group. That could warrant supplemental rounds of evidence that would ultimately drag out resolution of this case.”).

²¹ Cf. *TPI v. CSXT*, STB Docket No. 42121, at 4 (STB served April 5, 2011) (“The advantage of a sequential process was that parties were spared the time and expense of filing rate reasonableness evidence where the carrier was not found market dominant.”).

railroads would be presenting different evidence than they submit under the current framework. The only difference would be the timing of the presentation. And the schedule CSXT proposes for market dominance evidence is realistic and mirrors the schedules the Board had adopted in bifurcated proceedings. Market dominance evidence is uniquely suited to early presentation. While most of the issues in SAC evidence depend on information in the railroad's possession that the complainant must obtain through discovery and then analyze, market dominance evidence is developed largely through information within the complainant's control that it can begin to gather and prepare to produce before filing a complaint or even a prefiling notification.

The proposal below is designed to capture all the benefits of early determination of this jurisdictional issue without prejudicing any party. The three key features are (1) an accelerated market dominance discovery schedule with initial disclosures of the most relevant information; (2) an accelerated evidentiary schedule with timelines modeled on those from past cases with standalone market dominance evidence; and (3) a summary Board notification of its conclusions on market dominance to be issued before opening SAC evidence is due (which would be followed by a decision explaining the Board's reasoning). Each aspect is detailed below.

Proposed Accelerated Market Dominance Procedural Schedule

Prefiling Notification	Day -60
Complaint and Complainant's Initial Disclosures	Day 0
Defendant's Initial Disclosures	Day 30
Market Dominance Discovery Closes	Day 60
Market Dominance Opening Evidence	Day 90
Market Dominance Reply Evidence	Day 120
Market Dominance Rebuttal Evidence	Day 135
Summary Notification of Market Dominance Decision	Day 180

A. Accelerated Market Dominance Discovery Period.

CSXT's proposal envisions an abbreviated market dominance discovery period that would feature initial disclosures of information that is most relevant to market dominance.²² Initial disclosures regarding qualitative market dominance issues would facilitate an accelerated process by requiring early disclosure of information that is relevant and eventually produced in discovery in virtually every case. The goal of the initial disclosures is not to require parties to produce new information, but rather to require the early disclosure of information that would be produced later in the case's discovery phase. Parties would be free to use regular discovery requests to ask for information outside of the initial disclosures, such as information from a broader time period when appropriate.

²² Initial disclosures are used in federal court litigation as a way to jumpstart the discovery process by requiring production of certain critical information without awaiting a discovery request. See Fed. R. Civ. Proc. 26(a)(1).

Complainant disclosures would be produced at the time a complaint is filed and would include four categories of information²³:

- (1) A narrative statement of the complainant's basis for asserting market dominance and why complainant believes that intermodal and intramodal competitive alternatives are not effective²⁴;
- (2) Information on any use of a transportation alternative for the issue shipment during the five year period prior to the filing of the complaint, including the date; price; volume shipped; and provider used²⁵;
- (3) Information on any studies of transportation alternatives for the issue shipment during the previous five years;²⁶ and
- (4) Any transportation contracts that could have been used for the issue traffic during the five year period prior to the filing of the complaint.²⁷

Defendant railroads would also have required initial disclosures which would be due 30 days after service of a complaint. Specifically, railroads would need to disclose information on any studies of transportation alternatives for the issue

²³ CSXT has included references to its discovery requests in *Consumers* to illustrate that this initial disclosure information is typically produced in discovery. These requests are part of the record in *Consumers*. See *Consumers v. CSXT*, STB Docket No. 42142, *Motion to Compel*, Exhibit 1 (filed April 2, 2015) ("CSXT Discovery Requests in Consumers").

²⁴ See *id.* at 13 (Interrogatories Nos. 7 and 8).

²⁵ See *id.* at 13-14 (Interrogatories Nos. 10 through 13); *id.* at 16 (Interrogatory No. 20); *id.* at 21 (Requests for Production Nos. 4 and 5).

²⁶ See *id.* at 13; (Interrogatory No. 10); *id.* at 15 (Interrogatories Nos. 15 through 19); *id.* at 20-22 (Requests for Production Nos. 3, 8 through 10).

²⁷ See *id.* at 16 (Interrogatory No. 22); *id.* at 21-22 (Request for Production No. 6); *id.* at 23 (Requests for Production Nos. 12-13).

shipment(s) during the previous five years. This type of information is typically requested by shippers in discovery.²⁸

B. Accelerated Market Dominance Evidence.

Market dominance opening evidence would be due on Day 90 in this proposal, just as it is in Three Benchmark cases.²⁹ Reply evidence would be due 30 days later, and rebuttal 15 days after that. This schedule is similar to the market dominance evidentiary schedules in the *TPI* and *M&G* cases, where parties had thirty days to file opening and reply evidence.³⁰ If the Board is confronted with an unusually complex case, it can extend the procedural schedule at the request of the parties or “in the interest of due process.”³¹ If the Board adjusts the SAC

²⁸ For example, in *Consumers* the complainant requested that CSXT “produce any studies, analyses and other documents in CSXT’s possession from January 1, 2002 to the present regarding the transportation of coal to Destination from Origin (a) by such rail carrier(s) other than CSXT; and (b) by any mode of transportation other than rail.” *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142, *Consumers Energy Company’s First Motion to Compel*, Appendix 1 at 16 (“Consumers Discovery Requests”) (Request for Production No. 2) (filed March 16, 2015). See also *TPI v. CSXT*, STB Docket No. 42121, *Second Motion to Compel*, Ex. 1 at 29 (“TPI’s Discovery Requests”) (Request for Production No. 3) (filed Nov. 16, 2010).

²⁹ See 49 C.F.R. § 1111.9(a)(2).

³⁰ See *TPI v. CSXT*, STB Docket No. 42121 (STB served April 5, 2011); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123 (STB served May 6, 2011). Complainants in *TPI* and *M&G* had 30 days to submit Rebuttal, but 15 days is more appropriate given rebuttal’s limited scope. Indeed, in both *TPI* and *M&G*, the Board eventually struck several pieces of improper rebuttal evidence. See *TPI v. CSXT*, STB Docket No. 42121, at 7-15 (STB served May 31, 2013); *M&G v. CSX Transp., Inc.*, STB Docket No. 42123, at 7-11 (STB served Sept. 27, 2012). Parties should be less likely to embellish rebuttal filings with improper evidence with an expedited schedule.

³¹ STB Reauthorization Act, Sec. 11(b)(2)(B), *codified at* 49 U.S.C. § 10704(d)(2)(B).

procedural schedule, it could also provide additional time for the accelerated market dominance portion.

C. Summary Notification of Board's Decision.

After the complainant submits its rebuttal market dominance evidence, the Board would have 45 days to consider the evidence and notify the parties of its findings on market dominance. While the Board could provide a full explanation of the grounds of its decision at that time if it wished, it would also be sufficient for the Board to provide a simple notification of its conclusion and note that the full decision with the rationale will be forthcoming.³² That will allow the Board to resolve market dominance for jurisdictional purposes, but still give it time to address some of the details necessary for a full decision. The Board took a similar approach in *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties*, STB Fin. Docket No. 35724, at 2 (STB served Apr. 18, 2013), where it issued a preliminary decision denying a motion to dismiss and stating its intent to consider the merits of a petition for exemption and explained the rationale for that action in a later decision.³³

³² Neither the summary notification or subsequent explanation of grounds for the market dominance decision could be appealed before the Board reached a final decision on rate reasonableness. See *CSX Transp. v. Surface Transp. Bd.*, 774 F.3d 25 (D.C. Cir. 2014).

³³ Another example is in the *DuPont* case, when the Board served a decision on March 14, 2014 but did not issue the supporting appendices until ten days later. See *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125 (STB served March 14, 2014); *DuPont v. NS*, STB Docket No. 42125 (STB served March 24, 2014).

D. Accelerated Market Dominance Consideration Would Not Delay Rate Reasonableness Cases.

The proposed accelerated schedule would not delay the SAC portion of the case or the overall length of the case. To illustrate this point, below CSXT provides a complete procedural schedule that includes its market dominance proposal and otherwise maintains the schedule set forth in *Revised Procedural Schedule in Stand-Alone Cost Cases*, STB Docket No. Ex Parte 732.

Complete Procedural Schedule With Accelerated Market Dominance

Prefiling Notification	Day -60
Complaint and Complainant's Initial Disclosures	Day 0
Conference of the Parties	Day 7 (or before)
Defendant's Answer	Day 20
Defendant's Initial Disclosures	Day 30
Market Dominance Discovery Closes	Day 60
Market Dominance Opening Evidence	Day 90
Market Dominance Reply Evidence	Day 120
Market Dominance Rebuttal Evidence	Day 135
SAC Discovery Completed	Day 150
Summary Notification of Market Dominance Decision	Day 180
SAC Opening Evidence	Day 210
SAC Reply Evidence	Day 270
SAC Rebuttal Evidence	Day 305
SAC Final Briefs	Day 335
Final Decision	Day 485

Accelerated market dominance would be an improvement over the current framework in every scenario. If the Board finds there is no market dominance, the parties will be spared the expense of preparing and submitting SAC evidence. If market dominance is found for all lanes at issue, then the parties' evidence can focus exclusively on SAC issues and the Board can focus its resources on those matters. If market dominance is found for some lanes but not others, the complainant can optimize its proposed SARR to account for the lanes that remain in the case. And the advantages offered by these scenarios can all be gained within the Board's current statutorily mandated procedural schedule. CSXT urges the Board to carefully consider accelerating market dominance as a strategy for improving and expediting rate cases.

IV. SOME CHANGES TO DISCOVERY PROCEDURES MAY HELP TO EXPEDITE AND RESOLVE SAC CASES.

The Board has requested comment on several potential reforms to the discovery process. SAC discovery will always be complex and burdensome, just as discovery in any major commercial litigation is complex and burdensome. That said, there are changes the Board can make to expedite and improve the process, including expediting the service of discovery requests, standardizing the time frame of discovery, and requiring parties to confer before bringing discovery disputes to the Board. CSXT generally believes that the details of discovery are best left to the parties, and that the Board should not try to either dictate the terms of discovery requests or gather data itself for use in discovery.

A. The Board Should Require Early Filing of Initial Discovery Requests.

The discovery process in rate cases would be expedited by requiring that initial discovery requests be served as early as possible. Initial discovery requests often are filed several weeks after a complaint is filed, which delays a defendant's ability to begin work on its responses.³⁴ To expedite the process, a complainant's initial discovery requests should be submitted with the complaint and a railroad's initial discovery requests should be submitted with the answer. To ensure that parties do not submit incomplete placeholder requests followed by significant and complex subsequent requests, the Board should make clear that certain categories of discovery must be requested as part of the initial request, such as the "standard initial information" identified by the Board in the ANPRM.³⁵

B. The Board Should Require Early Submission of a Protective Order.

To expedite discovery production, a protective order must be in place as soon as possible so that parties may begin producing information expeditiously. Party discussions about the terms of a protective order should begin as soon as a prefiling

³⁴ For example, in the *Consumers* case, the first discovery requests were not made by the complainant until 22 days after the filing of the complaint. *See Consumers v. CSXT*, STB Docket No. 42142, *Complaint* (filed Jan. 13, 2015) *cf. Consumers v. CSXT*, STB Docket No. 42142, *Complainant's First Motion to Compel Discovery*, at 2 ("On February 4, 2015, Consumers served CSXT with its First Requests for Admission Interrogatories, and Requests for Production of Documents ('First Requests')") (filed Mach 16, 2015).

³⁵ *See* ANPRM at 4 ("Based on the informal discussions with stakeholders, the standard initial information related to creation of the SARR might include: waybill data; train and carload data; timetables; track charts; authorizations for expenditure; grade, curve, and profile data; Wage Forms A & B; Geographic Information System data; forecasts; and contracts.").

notice is in place. The parties also could be required to submit an agreed upon protective order before the complaint is filed so that an order can be entered by the Board before any discovery production or initial disclosures would be due. This proposal is consistent with the Board's approach to protective orders in transactions, where it requires submission of a draft protective order with the prefiling notification.³⁶

C. The Board Should Standardize the Time Scope of Discovery Requests.

The Board asks whether it should define the term "to the present" or otherwise standardize the timeframe for discovery responses.³⁷ This proposal has merit, because the vagueness of discovery requests for information "to the present" and similar terms such as "through the present" has been an issue in discovery in several recent rate cases in which CSXT has been involved,³⁸ and it even led to a discovery motion in *Consumers*.³⁹

"The present" is not a workable time scope for discovery, because "the present" is constantly moving. And disputes about what "the present" means or

³⁶ See 49 C.F.R § 1180.4(b)(4)(ii).

³⁷ See ANPRM at 5.

³⁸ TPI Discovery Requests at 31 (Request for Production No. 9 requesting all documents "through the present" objected to as vague, ambiguous, overbroad, and unduly burdensome); *Consumers* Discovery Requests at 16 (Request for Production No. 2 requesting all documents "to the present" objected to as "not limited to a reasonable period of time.").

³⁹ *Consumers v. CSXT*, STB Docket No. 42142, *Complainant's First Motion to Compel Discovery*, at 5 (filed March 16, 2015); *Consumers v. CSXT*, STB Docket No. 42142, *CSXT's Reply to Complainant's First Motion to Compel*, at 5-7 (filed March 26, 2015).

what should be the appropriate time scope of discovery slow down the discovery process. This is particularly true for traffic and event data, which takes significant time to finalize. SAC discovery reaches data that typically has to be retrieved from various sources and assembled for production, and data cannot be pulled until there is agreement on the time frame for discovery. In order to expedite discovery, it would be appropriate for the Board to require that discovery requests be limited to a specific and reasonable time frame. If discovery is to be completed by Day 150, a discovery cut-off must be set for a date certain that is early in the discovery period.

CSXT proposes that the default rule be that discovery covers data generated through the month-end immediately preceding the date of the complaint. Because most information is tracked on a monthly basis, it is more workable to have a cutoff at a month-end than at a date in the middle of a month. Using a discovery cutoff that is relatively early in the life of a case will allow the parties time to process and produce the information and respond to any follow-up questions before the close of discovery.

D. Standardized Discovery Requests May Not Be Workable.

The Board describes several stakeholder suggestions to standardize discovery requests.⁴⁰ Specifically, the ANPRM summarizes suggestions it received related to standardizing discovery requests, initial disclosures, and limiting discovery requests.⁴¹ CSXT understands the appeal of these proposals and will review the comments of the other parties on these issues with interest. CSXT does not take a

⁴⁰ See ANPRM at 3.

⁴¹ See ANPRM at 3-4.

position on discovery standardization at this time, except for its above-described proposal for initial market dominance disclosures.

CSXT notes, however, that it may be impractical to standardize discovery requests by rule. The Board is correct that discovery requests are “relatively consistent” from case to case.⁴² But while several categories of information are requested in virtually every SAC case, discovery requests evolve over time. For example, in the *Seminole* case, the complainant did not request any information about Positive Train Control (“PTC”). But in the *Consumers* case, the complainant made four PTC-related requests.⁴³ Parties and the Board cannot anticipate what future industry developments will require a significant change in discovery requests.

Even for standard discovery categories such as traffic and revenue data, shippers in different cases often request different details. For example, in the *Consumers* case, the complainant asked for several fields of data not requested in the *TPI* case.⁴⁴ These variances suggest that it might be difficult to establish a

⁴² ANPRM at 3.

⁴³ See *Consumers Discovery Requests* at 62 (Requests for Production Nos. 71 and 72); *id.* at 89 (Request for Production No. 114); *id.* at 98 (Request for Production No. 133).

⁴⁴ Specifically, *Consumers* asked for information on the Freight Station Accounting Code and milepost where shipments were received or given in interchange; the intermodal service plan code and intermodal line of business code for each intermodal shipment; the length, width and height for each car/container/trailer used to move a shipment; and the number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other shipment). Compare *Consumers Discovery Requests* at 19-21 (Request for Production No. 8) with *TPI Discovery Requests* at 37-39 (Request for Production No. 20).

standard set of Board-approved requests, even in a core area like traffic and revenue data.

E. The Board Should Not Itself Gather Traffic and Event Data.

The Board should not attempt to itself collect traffic data that could be used in rate cases, as some parties apparently have suggested.⁴⁵ Such a proposal would have significant burdens and little benefit.

First and foremost, the complexity and volume of the traffic and event data that are produced in rate cases would make it unduly burdensome for railroads to continually produce such data to the Board. Traffic and event data is not available to the railroads at the press of a button. It takes substantial work from both in-house staff and outside consultants to assemble data that respond fully to complainants' broad requests and are usable for the demands of SAC evidence. The proposal would force every Class I carrier to be perpetually engaged in SAC discovery production, regardless of whether any SAC cases were pending against the carrier.

Moreover, it is unclear how the Board would process and handle the continuous volume of data it would need to receive and maintain. For example, in the *TPI* case, CSXT produced five years of traffic and event data that totaled approximately 74.5 gigabytes. At a minimum, the Board would need to process and maintain that amount of data on a rolling basis for each of the Class I carriers for an extended period of years. It would require a significant investment in servers or

⁴⁵ See ANPRM at 4.

another storage approach that is thus far unexplained. Furthermore, because the Board—like the railroads—would not necessarily be able to simply push a button to produce the information, this approach would likely not even expedite production of traffic and event data.

Finally, any data collection by the Board of course would have to specify the particular data fields to be collected. But complainants often ask for different details in their traffic requests (as explained above). Furthermore, railroads have different internal systems that may capture different types of information. It is not clear that there is any reasonable way to standardize data collection to account for complainants' different demands and railroads' different systems.

F. The Board Should Not Require Software Disclosures Before Parties Know What They Might Need to Use.

A stakeholder recommended to the Board that parties disclose, by the conclusion of discovery, any software they plan to use.⁴⁶ The problem with the proposal is that a defendant has no way of knowing what software it might use in preparing its reply evidence until after a complainant's opening evidence has been submitted and analyzed. For example, in *TPI*, CSXT did not know it would need to use the MultiRail program until it reviewed TPI's deficient opening car classification plan and recognized its significant flaws.⁴⁷ A premature disclosure requirement could foreclose a defendant railroad's ability to present the best reply evidence possible in order for the Board to decide the case.

⁴⁶ See ANPRM at 4.

⁴⁷ See *TPI v. CSXT*, STB Docket No. 42121, *CSXT Reply Evidence*, at III-C-59 (filed July 21, 2014).

G. Complainants and Defendants Already Make Use of Requests for Admission and No Regulatory Changes are Needed.

The Board asks whether it should encourage or require requests for admission.⁴⁸ Requests for admission are already provided for by the Board's rules⁴⁹ and used by complainants⁵⁰ and defendants.⁵¹ Furthermore, the Board's rules already require that denial of a request "should fairly meet the substance of the requested admission" and be made in "good faith."⁵² Indeed, the language of the Board's rule closely tracks the federal Rules of Civil Procedure.⁵³

The stakeholder suggestion that requests for admission are being improperly denied is not consistent with CSXT's experience. In past cases CSXT has been served with general requests for admission about whether it faces effective competition.⁵⁴ These requests are typically made by the complainant before CSXT has received any productions of discovery on market dominance and often before the complainant has even explained its basis for claiming market dominance. There is nothing improper about denying such general requests, particularly when discovery often reveals the existence of potential competitive alternatives.

⁴⁸ See ANPRM at 5.

⁴⁹ See 49 C.F.R. § 1114.27.

⁵⁰ See, e.g., Consumers Discovery Requests at 7-8 (Complainant's two Requests for Admission and defendant replies).

⁵¹ See, e.g., CSXT Discovery Requests in Consumers at 6-7 (Defendant's six Requests for Admission).

⁵² 49 C.F.R. § 1114.27.

⁵³ See Fed. R. of Civ. Proc. 36.

⁵⁴ See, e.g., Consumers Discovery Requests at 7-8 (Requests for Admission Nos. 1 and 2).

H. The Board Should Require Parties to Meet and Confer Before Filing Motions to Compel.

The Board asks whether parties filing a motion to compel should be required to certify that they have attempted to confer with the opposing party.⁵⁵ CSXT strongly supports such a meet and confer requirement, which would require parties to attempt to resolve disputes prior to bringing them to the attention of the Board, a sensible practice that has not always been followed in rate cases. For example, in the *Consumers* case, the Complainant filed a motion to compel without first conferring with CSXT.⁵⁶ The Board issued a decision and observed “that many of the issues raised in Consumers’ motion to compel discovery can either be narrowed or resolved between the parties.”⁵⁷ The Board directed the parties to meet and confer.⁵⁸ The parties subsequently did so and resolved the disputes with no need for further Board involvement.⁵⁹

In the same case, the complainant filed a Petition for Technical Conference because it claimed CSXT violated the Board’s decision adopting procedures for the

⁵⁵ See ANPRM at 5.

⁵⁶ See *Consumers v. CSXT*, STB Docket No. 42142, *Complainant’s First Motion to Compel* (filed March 16, 2015).

⁵⁷ See *Consumers v. CSXT*, STB Docket No. 42142, at 1 (STB served April 3, 2015).

⁵⁸ *Id.*

⁵⁹ *Consumers v. CSXT*, STB Docket No. 42142, at 1 (STB served April 27, 2015) (“[T]he parties filed a joint status report informing the Board that the parties reached agreements to resolve each of the issues and that, as a result, Consumers was withdrawing its motion.”).

submission for evidence in the case.⁶⁰ CSXT noted in reply that Consumers had not brought the issues of concern to CSXT's attention prior to filing its petition.⁶¹ The Board again "strongly encourag[ed] parties to meet and confer on issues such as this prior to petitioning the Board for relief."⁶² CSXT agrees with the Board that parties should confer whenever possible prior to filing motions and supports a rule to require parties to certify that they have attempted to meet and confer before filing motions to compel.

V. THE BOARD SHOULD NOT STANDARDIZE SAC EVIDENCE BECAUSE THAT WOULD UNDERMINE THE ECONOMIC BASIS OF THE RESULTS.

CSXT has serious reservations about the proposal to standardize evidence in SAC cases.⁶³ Standardization and formulaic approaches may be unavoidable for simplified methodologies, but SAC is reserved for the highest-value cases where accuracy is most important. In SAC cases, complainants are permitted to develop uniquely optimized operations—as long as such operations are consistent with real-world railroading.⁶⁴ In these cases it may be difficult to develop "simplifications" that do not interfere with either a shipper's right to propose efficiencies or a

⁶⁰ See *Consumers v. CSXT*, STB Docket No. 42142, *Petition for Technical Conference* (filed March 14, 2016).

⁶¹ See *Consumers v. CSXT*, STB Docket No. 42142, *CSX Transportation, Inc.'s Reply to Complainant's Petition for Technical Conference*, at 3, n.2 (filed March 21, 2016).

⁶² *Consumers v. CSXT*, STB Docket No. 42142, at 2 (STB served April 6, 2016).

⁶³ See ANPRM at 5.

⁶⁴ See *Western Fuels Ass'n, Inc. and Basin Electric Power Cooperative v. BNSF Ry. Co.*, STB Docket No. 42088, at 15 (STB served Feb. 18, 2009) ("assumptions used in the SAC analysis...must be realistic, *i.e.*, consistent with the underlying realities of real-world railroading.").

railroad's right to test a shipper's evidence against the realities of real-world railroading.

SAC cases are complex in large part because they involve a shipper's effort to "detect and eliminate the costs of inefficiencies in a carrier's investments or operations."⁶⁵ If a shipper simply wishes to detect cross-subsidies, it can do so with the already streamlined SSAC approach that simplifies the calculation of operating expenses by using URCS.⁶⁶ But if it wants to argue that it has found railroad inefficiencies that a SARR could eliminate, evidence about that claim is not subject to easy simplification.

The Board outlines potential standardizations in a few general sentences, and it is not possible for CSXT to comment fully without more specific detail. But CSXT offers the following initial reactions and concerns to the Board's simplification proposals.

G&A. The Board suggests that it could estimate G&A expenses as a percentage of overall revenue or on the basis of the SARR's traffic levels.⁶⁷ Such an approach has significant problems. Determining the appropriate percentage is not straightforward. Using past SARRs as a proxy is a particularly poor option because SARRs have very different traffic groups and G&A needs. For example, in the *AEP Texas* case, the Board decision included G&A expenses that were 1.75% of

⁶⁵ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 10 (STB served July 28, 2006).

⁶⁶ *See Rate Regulation Reforms*, STB Docket No. Ex Parte No. 715, at 10 (STB served July 25, 2012).

⁶⁷ *See ANPRM* at 5.

revenue.⁶⁸ By comparison, in the *SunBelt* decision, G&A expenses amounted to 5.2% of revenue.⁶⁹ Neither of these figures is the dispositive “right” G&A percentage for all SAC cases—the SARR in each case was different, and a coal-only SARR has very different G&A requirements than a carload SARR. It is difficult to see how a standardized approach could achieve accurate results that would preserve both a shipper’s right to propose SARR efficiencies and a railroad’s right to ensure that any efficiencies are consistent with real world railroading.

Moreover, if the Board were to proceed with such an approach to G&A evidence (and it should not), it would need to be applicable to all cases. An approach that allows a shipper to choose between a percentage approach and a traditional approach would be one-sided and could bias the results.

The proposal that the Board simply choose to adopt one party’s entire G&A evidence over the other’s should not be adopted for several reasons.⁷⁰ First, this approach would not substantially simplify the parties’ presentations, because the parties would still need to submit complete evidence with costs built from the ground up. Furthermore, it would not simplify the Board’s analysis of the evidence, as the Board would need to consider all the evidence before making an up-or-down judgment. Finally, such a “baseball-arbitration” scheme of picking one party’s

⁶⁸ See *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) at 112, Table E-3 (STB served Sept. 7, 2007) (first year revenue of \$711 million); *id.* at 40, Table C-1 (G&A expenses of \$12.5 million).

⁶⁹ See *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 181, Table C-2 (STB served June 20, 2014) (first year revenue of \$362.4 million); *id.* at 34, Table A-1 (G&A expenses of \$18.9 million).

⁷⁰ See ANPRM at 6.

evidence works best when parties submit their proposals simultaneously, as in a Three Benchmark case. A process in which shippers have the last word could encourage gamesmanship.

Maintenance of Way. The Board similarly suggests that it could develop a general unit cost for MOW expenses from the R-1.⁷¹ But any costs based on the R-1 will necessarily be system-wide costs that might not reflect the SARR's particular maintenance needs. For example, a small SARR could easily be located on lines with below-average or above-average maintenance costs.

Construction Costs. Finally, the Board suggests that construction costs could be estimated to develop a cost per track mile.⁷² But average costs for a real-world Class I system will rarely be applicable to a SARR. A SARR typically replicates only a small fraction of the incumbent's network. For example, the SARR proposed in the *Consumers* case was approximately 235 route miles compared to the 21,000 route miles of the real-world CSXT, amounting to barely one percent.⁷³ Using an average simply does not work for most SARRs. How does the SARR relate to the "average"? Will the SARR traverse more mountainous terrain than the average or less? Will the SARR move through more urban territory than the average or less? Will it have more bridges? More tunnels? Or fewer? The point is

⁷¹ See ANPRM at 6.

⁷² See ANPRM at 6.

⁷³ *Consumers v. CSXT*, STB Docket No. 42142, at III-B-10, Table III-B-2 (filed Nov. 2, 2015).

that a SARR's particular construction costs are very likely to be different from system-wide costs.

Such variations are apparent in past SAC cases. In *Duke/CSXT*, the SARR traversed mountainous territory.⁷⁴ By comparison, the SARR in *Western Fuels* did not need to cross any mountain ranges.⁷⁵ It would not make sense to simply take a railroad's total R-1 construction cost, divide it by mileage, and apply that per mile cost to SARRs that may have very different topographies concentrated in high or low cost areas that do not reflect the average cost.

Another concern with the proposal to simplify construction costs is that using the accounting book values from R-1s or depreciation studies, rather than actual replacement costs, would break with SAC economic theory. The economic necessity of using replacement costs has long been recognized by the Board and its predecessor,⁷⁶ and leading economists have repeatedly testified to the Board that

⁷⁴ See, e.g., *Duke Energy Corp. v. CSX Transp.*, 7 S.T.B. 402, 470 (2004) (including additional casualty costs for mountainous territory) ("*Duke/CSXT*").

⁷⁵ See *Western Fuels Ass'n Inc. v BNSF Ry. Co.*, STB Docket No. 42088 (STB served Feb. 18, 2009).

⁷⁶ See, e.g., *DuPont v. NS*, STB Docket No. 42125, at 48 (STB served March 24, 2014) ("DuPont's argument that the costs should be based on the cost of acquisition as opposed to replacement costs is inconsistent with Board SAC precedent. In SAC cases, RPI costs are developed by replacement costs, and not the cost the incumbent railroad paid for the line when it was acquired."); *Rate Guidelines – Non-Coal Proceedings*, 1987 LEXIS 390, at * 8 (March 23, 1987) ("One of the major reasons for developing CMP was to provide railroads the opportunity to earn adequate revenues and replace assets expended in the provision of rail service at a current cost level. In describing the SAC test of maximum reasonableness in our Guidelines decision, we therefore emphasized that current replacement costs were to be used in the calculation of any proposed SAC test.").

replacement costs are the appropriate measure of rate reasonableness.⁷⁷ The Board should not break with that established precedent in the name of “efficiency.”

VI. CSXT SUPPORTS CURRENT BOARD PRACTICE AND PRECEDENT FOR THE OTHER IDEAS PUT FORTH FOR EVIDENTIARY SUBMISSIONS.

The Board requests comments on several other ideas for evidentiary submissions.⁷⁸ In most cases, the Board’s existing practices do not need to be changed. CSXT addresses each issue below.

A. The Board Should Enforce Its Rules for Rebuttal and Limit the Length of Rebuttal.

CSXT agrees with the Board that voluminous and improper rebuttal impairs the Board’s ability to decide cases efficiently.⁷⁹ CSXT agrees that the Board should enforce the strict limits on rebuttal specified in *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 100 (2003) (“*Duke/NS*”).

Even though the Board has plainly stated the standard in *Duke/NS* and other decisions, complainants continue to push the envelope on the proper scope of

⁷⁷ See, e.g., *Railroad Revenue Adequacy & Petition of Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Capital*, STB Ex Parte Nos. 722 and 664 (Sub-No. 2), *Public Hearing Transcript*, at 41-42 (July 22, 2015) (Testimony of Dr. Hennigan, former head of the ICC’s Office of Economics, explaining why replacement cost is appropriate for rate reasonableness proceedings).

⁷⁸ See ANPRM at 6-7.

⁷⁹ See *id.* at 6; *Xcel v. BNSF Ry. Co.*, STB Docket No. 42057, at 2 (STB served April 4, 2003) (Board “increasingly troubled by the submission” of improper rebuttal evidence which includes the filing of “incomplete or erroneous evidence on opening” and then addressing those deficiencies in rebuttal, “to which the defendant has no opportunity to respond.”).

rebuttal evidence. Recently, a complainant filed a reply to a motion to strike in which it asserted that a party is free to make new arguments on rebuttal because the rebuttal rules supposedly only bar new “evidence.”⁸⁰ It also claimed that it was free to submit public information on rebuttal that was not referenced in its opening because “[p]ublic documents are not new evidence.”⁸¹ Such an interpretation is plainly wrong, but it illustrates the need for an unambiguous holding from the Board that such improper rebuttal will not be considered.

In addition to clarifying the scope of rebuttal evidence, CSXT believes the Board should cabin rebuttal evidence by restricting the length of the rebuttal filing. Currently rebuttal submissions often dwarf opening evidence. For example, in the *M&G* case, the opening market dominance evidence was 129 pages compared to 276 pages on rebuttal.⁸² In the *SunBelt* case, the opening narrative was 147 pages of SAC evidence compared to 419 pages on reply.⁸³ The recurring problem is that complainants use a sentence or two on opening to say what they are doing on an

⁸⁰ *Consumers v. CSXT*, STB Docket No. 42142, *Complainant’s Reply to Motion to Strike*, at 3 (filed June 14, 2016).

⁸¹ *Id.* at 3, 20.

⁸² See *M&G v. CSXT*, STB Docket No. 42123, *Opening Market Dominance Evidence of M&G Polymers USA, LLC* (filed June 6, 2011) *cf.* *M&G v. CSXT*, STB Docket No. 42123, *Rebuttal Market Dominance Evidence of M&G Polymers USA, LLC* (filed Aug. 5, 2011).

⁸³ See *SunBelt v. NS*, STB Docket No. 42130, *Opening Evidence and Argument of SunBelt Chlor Alkali Partnership* (filed Aug. 1, 2012) *cf.* *SunBelt v. NS*, STB Docket No. 42130, *Rebuttal Evidence and Argument of SunBelt Chlor Alkali Partnership* (filed June 3, 2013).

issue, and then wait until rebuttal to unveil pages of rationales for that position.⁸⁴ These upside-down presentations deprive the Board of a record in which each party has responded to each other's best evidence and arguments, and they make it harder for the Board to evaluate disputed issues fairly and quickly.

CSXT proposes that rebuttal narratives be limited to no more than half the length of opening evidence, following a suggestion offered by the Board.⁸⁵ This approach is in line with the practice in federal courts, which Congress has specifically directed the Board to consider.⁸⁶ For example, the Federal Rules of Appellate Procedure require reply briefs to be half the length of opening briefs, 15 pages for reply briefs compared to 30 pages for principal briefs.⁸⁷ The United States

⁸⁴ For example, in the *TPI* case, the complainant on opening made a short reference to the possibility of product integrity concerns if transloading was employed. See *TPI v. CSXT*, STB Docket No. 42121, *TPI Opening*, at II-B-24 (filed May 5, 2011). But on rebuttal, TPI spent several pages discussing product integrity concerns and relied on the opinion of a new witness to support them, including extensively citing the opinion of that new witness in the lane summaries in which it discussed market dominance issues for each lane of issue traffic. See *TPI v. CSXT*, STB Docket No. 42121, *TPI Rebuttal*, at II-B-21 to II-B-25 (filed Sept. 29, 2011). The Board appropriately struck these arguments from the evidence. See *TPI v. CSXT*, STB Docket No. 42121, at 12-13 (STB served May 31, 2013) ("Applying our evidentiary standards, we find that TPI's evidence and argument on product integrity was not permissible rebuttal to the feasibility of the alternatives proposed in CSXT's reply evidence.").

⁸⁵ See ANPRM at 6.

⁸⁶ See STB Reauthorization Act, Sec. 11(c) ("Not later than 180 days after the date of the enactment of this Act, the Surface Transportation Board shall initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.").

⁸⁷ See Fed. R. App. P. 32(a)(7)(A). The Supreme Court rules are even stricter. For example, Reply Briefs in Opposition to a Petition for a Writ of Certiorari are limited

District Court for the District of Columbia limits reply memoranda to 25 pages, just slightly more than half of the 45 pages allowed for memoranda of points and authorities in support of motions.⁸⁸ To make such a page limitation effective, the Board should continue to enforce its rule that evidence and arguments must be presented in the narrative and not moved to exhibits or workpapers.⁸⁹

B. The Board’s Existing Precedent for Motions to Dismiss and Operating Plans Can Easily Be Applied in Future Cases.

The Board describes a stakeholder suggestion that if a railroad believes a complainant’s operating plan cannot be corrected, the railroad would be required to file a motion to dismiss rather than submit its own operating plan.⁹⁰ But the Board has explained its position on this issue in recent cases and has adopted a standard that it can easily apply and follow in the future. In *SunBelt*, the Board explained that a defendant must typically make corrections to a complainant’s operating plan rather than submitting something entirely new. But in the case of *SunBelt*, the complainant had neglected to include blocking and classification analysis, a “major design flaw” that the defendant railroad had to rectify on reply with its own

to 3,000 words, one third the length of Briefs in Opposition. See Rules of the Supreme Court of the United States, Rule 33.

⁸⁸ See Rules of the United States District Court for the District of Columbia, Local Rule 7(e).

⁸⁹ See, e.g., *Consumers v. CSXT*, STB Docket No. 42142, at 3 (STB served July 15, 2015) (“No narrative information/argument should be included in the exhibits or the workpapers”).

⁹⁰ See ANPRM at 6.

analysis. In those circumstances, the Board said it would accept a competing operating plan.⁹¹

There is no reason for the Board to depart from that approach, which it recently affirmed on reconsideration in *SunBelt*.⁹² Not allowing an alternative operating plan in those limited circumstances would have the effect of impeding, rather than expediting, a rate case, for it would require the Board to hold the case in abeyance, decide the motion to dismiss, and potentially require the submission of new opening evidence. This is the opposite of what the STB Reauthorization Act was intended to accomplish.

C. No New Rules Are Necessary for Software Licenses.

The Board requests comment on a stakeholder suggestion that it should prevent the use of software in a rate case unless a temporary license is given to the opposing party.⁹³ But parties use all types of software today with no controversy and without any provision for the exchange of licenses. For example, Rail Traffic Controller is used by complainants in virtually every SAC case, but there is no expectation that a complainant will provide a railroad a license for this program (or vice versa). Indeed, parties occasionally do provide temporary software licenses.

⁹¹ See *SunBelt v. NS*, STB Docket No. 42130, at 13 (STB served June 20, 2014). See also *SunBelt v. NS*, STB Docket No. 42130, at 8 (STB served June 30, 2016) (rejecting reconsideration of that finding); *DuPont v. NS*, STB Docket No. 42125, at 41-42 (STB served March 24, 2014) (same).

⁹² See *SunBelt v. NS*, STB Docket No. 42130, at 8 (STB June 30, 2016).

⁹³ See ANPRM at 6.

CSXT provided a temporary MultiRail license in the *TPI* litigation,⁹⁴ and filings with the Board show that NS did the same in the *DuPont* and *SunBelt* cases with the MultiRail program.⁹⁵ There is no need for a new rule on this point.

D. CSXT Does Not Oppose Delaying Filing of Public Evidence, So Long As Parties Promptly Designate Material for View By In-House Personnel.

Some stakeholders also suggested staggering the submission of public and highly confidential versions of the parties' pleadings.⁹⁶ CSXT has no objection to parties submitting public versions of the evidence at a later date than the Highly Confidential versions, but it is imperative that a party identify the information in filings that can be shared with in-house personnel simultaneously with its Highly Confidential submission. In-house counsel and personnel at both shippers and railroads play critical roles in the litigation effort, and their ability to review the evidence should not be delayed because some parties want more time to file public evidence.

The need for simultaneous identification is particularly crucial because of the expedited timeline required by the STB Reauthorization Act and the Board's revised procedural schedule. Under the new procedural schedule, rebuttal evidence

⁹⁴ See *TPI v. CSXT*, STB Docket No. 42121, *Rebuttal Evidence of Total Petrochemicals & Refining USA, Inc.*, at III-C-35 (filed Nov. 5, 2014).

⁹⁵ See, *DuPont v. NS*, STB Docket No. 42125, *NS Reply Evidence*, at III-C-158, n.245; *SunBelt v. NS*, STB Docket No. 42130, *Reply Evidence* at III-C-122, n.192 (filed Jan. 7, 2013).

⁹⁶ See ANPRM at 7.

is due just 35 days after reply evidence is submitted⁹⁷ and final briefs are due just 30 days after the rebuttal evidence is submitted.⁹⁸ Any delay in providing evidence to parties' in-house experts and personnel may require extending the case's procedural schedule.

CSXT also recommends that the Board create a standard rule for identifying highly confidential and confidential materials. CSXT and many other parties have used the convention of double braces for highly confidential material (*i.e.*, “{{highly confidential material here}}”) and single braces for confidential material (*i.e.*, “{confidential material here}”). Some parties have designated material in a more haphazard way, however, which makes it difficult to identify materials that can be shared with in-house personnel. Board standardization of such designations would improve the process.

VII. CSXT ALWAYS WELCOMES THE OPPORTUNITY TO MEET WITH THE BOARD'S STAFF AND THE OPPOSING PARTIES.

The Board also states that it is considering more extensive use of written questions from staff or technical conferences to clarify the record.⁹⁹ CSXT strongly supports such steps if the Board believes they would be helpful to its efforts to resolve these cases. The Board also proposes assigning a staff member to act as a liaison to the parties and who would be available to informally assist in procedural

⁹⁷ See *Revised Procedural Scheduled in Stand-Alone Cases*, STB Ex Parte No. 732, at 4 (STB served March 9, 2016).

⁹⁸ See STB Reauthorization Act, Sec. 11(b)(2)(A).

⁹⁹ See ANPRM at 7.

matters like discovery.¹⁰⁰ CSXT supports the idea. Such a liaison could create an avenue to resolve disputes short of formal motions to compel. Indeed, there is a history of Board involvement helping to resolve such issues.¹⁰¹

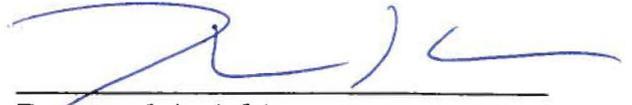
* * *

In conclusion, CSXT appreciates the opportunity to participate in this proceeding and encourages the Board to keep the three principles outlined in these comments in mind when considering any changes to rate case procedures. The Board should not make any change that is inconsistent with sound economic principles. It should be cognizant of the need to encourage negotiated resolutions of rate disputes, and should make changes consistent with that imperative. And it should expedite SAC cases by resolving important issues like market dominance sooner rather than later.

¹⁰⁰ *See id.*

¹⁰¹ *See, e.g., Consumers v. CSXT*, STB Docket No. 42142, at 1 (STB served April 27, 2015) (“On April 21, 2015, Board staff held a conference with the parties to discuss CSXT’s motion to compel. CSXT has now filed a motion to withdraw its motion to compel, stating that, *as a result of the conference*, the parties have reached an agreement that resolves the discovery disputes.”) (emphasis added).

Respectfully submitted,



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