

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 715

RATE REGULATION REFORMS

BNSF RAILWAY COMPANY'S OPENING COMMENTS



BNSF Railway Company (“BNSF”) hereby submits its opening comments on the issues addressed in the Board’s July 25, 2012 Decision in *Rate Regulation Reforms*, Ex Parte No. 715 (“EP 715”).

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**I. Introduction**

BNSF appreciates the Board’s continued review of its rate reasonableness standards and supports the Board’s efforts to refine its rate reasonableness methodologies. When the ICC adopted Constrained Market Pricing (“CMP”) in *Coal Rate Guidelines*<sup>1</sup> as the guiding standard for railroad rate reasonableness determinations, the ICC recognized that the methodologies used to implement CMP would evolve as the agency gained experience. It is appropriate for the Board to undertake periodic reviews of the methodologies used to implement CMP to make sure that the Board’s rate reasonableness methodologies remain true to the economic principles underlying CMP.

Experience has shown that the proper implementation of CMP principles can in some cases require complex evidentiary records. To address concerns about the complexity of rate reasonableness analyses, the Board has adopted a three-tiered approach that involves trade-offs

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<sup>1</sup> *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985).

between the accuracy (and complexity) of the rate reasonableness analysis and the amount of relief available to a shipper. The preferred approach is the Full SAC test. A Full SAC analysis is the most accurate test of rate reasonableness and as a result there are no limits on the relief available to successful complainants. The second tier is a Simplified SAC methodology that uses shortcuts to approximate the results of a Full SAC case, but since the simplifying assumptions necessarily produce some inaccuracies, there is a limit on available relief. The Three-Benchmark test is the most simplified approach but also the least accurate approach. Relief under the Three Benchmark test is currently limited to just over \$1 million.

This proceeding offers the Board the opportunity to refine its three-tiered approach to rate reasonableness analyses. A critical part of that refinement should be the elimination of cross-over traffic altogether from Full SAC analyses. Full SAC cases have become dominated by issues arising from complainants' use of cross-over traffic. The Board's EP 715 Decision acknowledges the complications and distortions that can arise from the use of cross-over traffic in Full SAC analyses. Cross-over traffic was originally developed as a simplification tool at a time when complaining shippers had no alternative to the Full SAC test in a rate reasonableness challenge. Now that the Board has established a Simplified SAC methodology that is expressly intended to use simplifying assumptions, with corresponding limits on relief to compensate for inaccuracies that inevitably result from the use of simplifying assumptions, cross-over traffic should be limited to Simplified SAC cases. The Full SAC test should be used as originally conceived in *Coal Rate Guidelines* as a test involving a true stand-alone railroad without cross-over traffic.

BNSF supports as additional refinements to the existing three-tiered rate reasonableness approach the changes proposed by the Board to the revenue allocation methodology for cross-

over traffic and the treatment of road property costs in the Simplified SAC methodology. BNSF also would not be opposed to an increase in the relief limits available under the Simplified SAC and Three Benchmark tests as part of a package of refinements that includes the elimination of cross-over traffic from Full SAC analyses. For reasons explained below, BNSF does not believe that it would be appropriate under any circumstances to eliminate altogether the limit on relief in Simplified SAC cases. Finally, BNSF does not believe that a change in the interest rate used to calculate reparations would be justified. These issues are discussed further below.

## **II. Cross-Over Traffic Should Be Eliminated from Full-SAC Analyses.**

### **A. Cross-Over Traffic Was Intended to Simplify SAC Cases Without Creating Bias.**

The use of cross-over traffic in a stand-alone cost test was not contemplated in *Coal Rate Guidelines*. As the name implies, and as originally conceived, the *stand-alone* cost test was designed to compare the costs incurred to build and operate a *stand-alone railroad* that served the needs of an individual shipper or group of shippers with the revenues generated by the shipper or group of shippers at the existing rate levels charged by the defendant railroad. A stand-alone railroad that relies on only a portion of revenues earned by the defendant from the shippers served by the hypothetical railroad and that incurs only a portion of the costs to serve the stand-alone shipper group is not a true *stand-alone* railroad.

Several years after the SAC test was adopted, cross-over traffic was first used in a SAC analysis as a response to the unique circumstances of *Bituminous Coal—Hiawatha, Utah, to Moapa, Nevada*, 10 I.C.C. 2d 259 (1994) (“*Nevada Power*”). There, the Tenth Circuit had struck down the ICC’s initial rate reasonableness finding and maximum rate prescription for movements of coal from Utah to Nevada via Union Pacific Railroad Company (“UP”) and two other railroads. *See id.* at 260, 260 n.3, citing *Union Pac. R.R. v. United States*, 637 F.2d 764

(10th Cir. 1981). On remand, the ICC allowed the complainant to expand the traffic base of the SARR but, at UP's urging, placed limits on the size of the expanded SARR so that the SARR could not reach existing interchange points with carriers other than the incumbent railroads. *Id.* at 265 n.12. The complainant dealt with the imposed limit on the size of the SARR by using cross-over traffic in its SAC analysis. *Id.* In response to UP's subsequent arguments against the use of cross-over traffic, the ICC noted that UP, having argued to limit the size of the SARR, "[wa]s in a poor position to now complain about the inclusion of hypothetical interchange points that would have been avoided by the proposed 2,000-mile model." *Id.*

Complainants in subsequent SAC cases saw cross-over traffic as an opportunity to game the SAC analysis. Complainants' increasingly inventive uses of cross-over traffic forced the Board to examine the purpose for allowing shippers to use cross-over traffic in the SAC analysis. Complainants argued that cross-over traffic should be seen as a form of partial entry by a hypothetical railroad into the market to handle only a portion of the cross-over shipper's through movement. Under this theory of cross-over traffic, the SARR and the residual incumbent would bargain with each other upon the SARR's supposed entry into the market to determine how much of the through revenues on the movement each railroad would receive. The Board rejected this view of cross-over traffic. *See Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, slip op. at 14 (STB served Jan. 27, 2006) ("*Otter Tail*") (rejecting coal shipper's proposed market-based divisions).

The Board explained that cross-over traffic was not intended as a mechanism for modeling revenue divisions for fictitious interchanges between a hypothetical SARR and the residual incumbent. Instead, cross-over traffic was permitted only as a device to simplify the presentation of SAC evidence by "enabl[ing] the SAC analysis to take into account the

economies of scale, scope and density that the defendant carrier enjoys over the routes replicated” without having to undertake “a complete SAC analysis of the off-SARR network at tremendous expense to the complainant.” *Otter Tail*, slip op. at 11-12. In *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 32 (STB served Oct. 30, 2006) (“*Major Issues*”), the Board reiterated that the purpose of cross-over traffic was to simplify the presentation of SAC evidence.

In explaining the simplification rationale for cross-over traffic, the Board also made it clear that cross-over traffic should be a simplifying device that makes “the [SAC] analysis more manageable without introducing bias.” *Major Issues*, slip op. at 24. The Board further explained that “the goal in allocating revenue from cross-over traffic should be to ensure that a truncated SAC analysis using cross-over traffic will approximate the outcome of a full SAC analysis, which provides origin-to-destination service for the entire traffic group.” *Major Issues*, slip op. at 24.

**B. Experience Has Shown that Cross-Over Traffic in Full SAC Cases Does Not Simplify SAC Cases and Cannot Be Used Without Biasing Results.**

Notwithstanding the Board’s hope that cross-over traffic would simplify SAC analyses, cross-over traffic has in fact been the source of most of the complications that have characterized recent SAC cases. One source of complication has been the need to allocate through revenues between the on-SARR and off-SARR segments of a through movement. The parties to SAC cases have litigated extensively over the proper methodology for allocating revenue on cross-over traffic. In the eighteen years since *Nevada Power*, the Board has identified at least five different revenue-allocation methodologies for cross-over traffic. *See Nevada Power*, 10 I.C.C.2d at 268 (mileage prorate); *Wisc. Power & Light v. Union Pac. R.R. Co.*, 5 S.T.B. 955, 975 (2001) (modified mileage block prorate); *Duke Energy Corp. v. Norfolk S. Ry. Co.*,

7 S.T.B. 89, 110 (2003) (“*Duke Energy v. NS*”) (Modified Straight-Mileage Prorate); *Major Issues*, slip op. at 31 (Average Total Cost); *W. Fuels Ass’n, Inc. v. BNSF Ry. Co.*, STB Docket No. 42088, slip op. at 14 (STB served Sept. 10, 2007) (“*Western Fuels I*”) (adopting modified ATC).

The use of cross-over traffic has also led to numerous other complexities in SAC analyses. For example, complainants have tried to use cross-over traffic to create internal cross-subsidies that made reasonable rates appear to be unreasonably high. In *PPL Montana, LLC v. Burlington N. & Santa Fe Ry. Co.*, 6 S.T.B. 286, 293-99 (2002), the challenged rates did not even produce revenues sufficient to cover the cost of facilities used to provide the issue traffic service, but the complainant used cross-over traffic on high density Powder River Basin lines to create the appearance that the challenged rates exceeded maximum reasonable rates.

The availability of cross-over traffic also led complainants to assume implausible reroutings of traffic, as in the *TMPA* case where complainants assumed a rerouting of unit coal trains through the heavily congested Houston area. See *Tex. Muni. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, 6 S.T.B. 573, 596-98 (2003) (“*TMPA*”). In *Duke Energy v. NS*, 7 S.T.B. at 113-14, the complainant assumed rerouting that in some instances would have more than doubled the total hauls of the original movements.

In *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42113, (STB served Nov. 16, 2011) (“*AEPCO*”), *appeal docketed*, No. 12-1246 (D.C. Cir. June 8, 2012), a case involving interline issue traffic, complainant’s use of cross-over traffic to distort the rate reasonableness analysis reached new heights. In *AEPCO*, the complainant ignored the defendant railroads’ real world allocation of responsibility for handling the issue traffic as reflected in their designation of an interchange for the traffic. This allowed them to reroute the issue traffic over

lines that have never been used by defendants to provide the transportation service and which resulted in inefficient and circuitous routing of the issue traffic. The assumed rerouting of issue traffic allowed the complainant to use cross-over traffic on high density lines that had no relation to the issue traffic solely for the purpose of making the challenged rates look unreasonably high.<sup>2</sup>

Experience has shown that cross-over traffic cannot be used without introducing bias into the SAC analysis. In *Xcel*, the Board recognized that the use of cross-over traffic “introduces some imprecision” into the SAC analysis. The Board explained that the “imprecision” resulted from the fact that existing revenue allocation methodologies were supposed to allocate revenues based on the relative costs of the on-SARR and off-SARR segments of a movement, but those methodologies did not fully account for economies of density on high density rail lines. On high density lines, per unit costs are lower because fixed costs are spread over a larger traffic base. A revenue allocation methodology that failed to fully reflect economies of density would allocate too much revenue to a SARR that replicated high density lines (by assuming that the costs on those line segments are higher than they are) and too little to the residual incumbent’s lower density lines. See *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42057, slip op. 7 (STB served Jan. 19, 2005) (“*Xcel II*”).

In *Major Issues*, the Board addressed the concern over the bias created by the use of a revenue allocation methodology that failed to reflect economies of density by adopting the ATC methodology. ATC allocates revenues to each portion of a through movement—the on-SARR and off-SARR portions—based on the average total cost of each segment. The Board explained that the average total cost calculations would fully account for economies of density. *Major*

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<sup>2</sup> Defendants have appealed the Board’s decision to the United States Court of Appeals for the D.C. Circuit and the appeal is pending.

*Issues*, slip op. at 25-26. Therefore, the use of ATC would eliminate bias by allocating revenue based on an accurate assessment of relative on-SARR and off-SARR costs.

When it adopted ATC, the Board assumed that the allocation of revenues based on an accurate assessment of on-SARR and off-SARR costs would produce SAC results that approximated the results of a SAC analysis done without cross-over traffic. But the Board also recognized that it would not be possible to know with certainty whether such an approach would in fact eliminate bias without carrying out a SAC analysis without cross-over traffic, which would defeat the simplification objective. Moreover, the other sources of bias from rerouting and other manipulation of SARR configuration produced by the availability of cross-over traffic would remain.

In any event, in the first case to apply the new rules that the Board adopted in *Major Issues*, the Board abandoned the ATC methodology. The Board's stated concern with ATC was that it produced the "illogical and unintended result" that "for certain competitive traffic with low R/VC ratios, original ATC led to revenue allocations that did not cover BNSF's variable costs of handling the traffic over high-density segments." See *W. Fuels Ass'n, Inc. v. BNSF Ry. Co.*, STB Docket No. 42088, slip op. at 5-6 (STB served June 15, 2012) ("*Western Fuels III*"). To address this concern, the Board adopted a modified ATC methodology that gave more weight to variable costs in the revenue allocation and reduced the impact of economies of density on the revenue allocation. This change to the ATC methodology reintroduced the bias that ATC was intended to eliminate. While the Board is proposing a further change to the ATC methodology in this proceeding that will reduce this bias, the Board's decision to abandon its original ATC methodology means that some bias in favor of complainants who use cross-over traffic to replicate high-density portions of a defendant's rail network will be unavoidable.

C. Cross-Over Traffic Should Be Limited to Simplified SAC Cases.

When the ICC adopted cross-over traffic as a simplification tool, the Full SAC approach was the only rate-reasonableness methodology available to shippers. Shippers seeking rate relief had no choice but to pursue a Full SAC case with all of the potential complexities of a Full SAC analysis. The ICC and later the Board allowed complainants to use cross-over traffic to simplify the presentation of evidence. But the simplification rationale for adopting cross-over traffic no longer justifies using cross-over traffic in Full SAC analyses. The Board has adopted a Simplified SAC analysis that is expressly intended to use simplifying assumptions to reduce the cost and burden of a Full SAC case. A simplifying assumption like cross-over traffic is appropriate for use in a Simplified SAC analysis, but it no longer has any place in the Full SAC analysis. A Full SAC analysis should be carried out as originally intended based on a true stand-alone railroad.

Experience has shown that Full SAC analyses can be carried out without the use of cross-over traffic. For example, the complainant in *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 638 (1996) (“*West Texas Utilities*”), obtained rate relief based on a SARR that did not include cross-over traffic. There, the SARR was 1,400 route miles, served 11 selected power plants, and interchanged traffic at existing interchange points. *See id.* at 657-60. The complainant in *Arizona Public Service Company v. Atchison, Topeka & Santa Fe Railway Company*, 2 S.T.B. 367 (1997) (“*APS*”), also obtained rate relief based on a SARR that did not include cross-over traffic. The SARR was 115 route miles, served two power plants, and interchanged at an existing interchange point. *See id.* at 381, 398.

The Board has justified the continued use of cross-over traffic in Full SAC analyses on grounds that eliminating cross-over traffic could result in stand-alone railroads that are relatively far-ranging in scope, requiring substantial road property and operating cost evidence. *See Pub.*

*Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 589, 601-03 (2004) (“*Xcel I*”). But large SARRs are not unprecedented in Full SAC cases, even when cross-over traffic is used. For example, the complainant in *E.I. du Pont de Nemours & Company v. Norfolk Southern Railway Company*, STB Docket No. NOR 42125, has modeled a SARR that is approximately 8,000 miles in length. Apr. 30, 2012 DuPont Op. Evid. at I-57, STB Docket NOR 42125 (“*DuPont*”).

Moreover, if the elimination of cross-over traffic results in an increase in the complexity of evidence required to carry out a Full SAC analysis, such an increase in complexity would be offset by a reduction in the complexity involved in dealing with the increasingly bizarre scenarios that complainants have presented through the use of cross-over traffic. For example, the complainant in *DuPont* has posited a stand-alone railroad that uses “leapfrog” cross-over traffic in which the SARR hands traffic back and forth to the incumbent multiple times. See Aug. 6, 2012 Norfolk Southern Mot. to Hold Case in Abeyance at 7, STB Docket No. NOR 42125 (discussing “leapfrog” traffic). Traffic patterns that have no basis in real world railroad practices often present special challenges to evaluate. Elimination of cross-over traffic from Full SAC analyses would simplify the presentation and analysis of SAC evidence by forcing complainants to posit more realistic SAC assumptions and SARR scenarios that are less likely to produce biased results.

**D. If Cross-Over Traffic Continues to Be Permitted in Full SAC Cases, the Board Should Limit Cross-Over Traffic to Trainload Traffic.**

If the Board does not eliminate cross-over traffic altogether from Full SAC analyses, the Board should limit its use to traffic that is handled by the incumbent in trainload service. In its July 25, 2012 Decision, the Board correctly noted the distortions that can be created by using non-trainload cross-over traffic in a Full SAC analysis. See July 25, 2012 Decision at 16. The

problem stems from complainants' assumption that the SARR handles the non-trainload traffic as hook-and-haul traffic. The SARR is assumed to receive an assembled train of carload traffic from the residual incumbent at a hypothetical interchange point and move the assembled train, usually without any intermediate activity, to another interchange with the residual incumbent where the train is delivered. The SARR does not incur the substantial costs associated with gathering the individual cars, switching the cars in yards, train assembly and disassembly, and delivery of the cars to their final destination, among other activities undertaken in the real world by the defendant. *See id.*

As a result, the SARR's costs for handling carload traffic are very similar to its costs for handling trainload traffic. But the methodologies used to allocate revenue on cross-over traffic to the SARR (ATC, or modified ATC) and to establish maximum reasonable rates (Maximum Markup Methodology or "MMM") assume that the SARR's costs for carload traffic are higher than its costs for trainload traffic. The difference between the costs incurred by the SARR for the carload traffic and the costs that are assumed in the revenue allocation and MMM calculations create a distortion in the SAC results that heavily favors complainants.

As explained above, to establish the SARR's revenue on cross-over traffic, through revenue is allocated between the SARR and the residual incumbent based on the relative costs of the on-SARR and off-SARR portions of the movement. The costs for both on-SARR and off-SARR segments are based on the defendant's URCS costs. For non-trainload traffic, the defendant's URCS costs include the gathering, switching, assembly and delivery costs described above, which are spread across both the SARR and non-SARR segments. Thus, under a cost-based revenue allocation methodology, the SARR is allocated revenues to cover such costs, even though the complainant has posited a SARR that does not incur those costs. A revenue

allocation methodology that effectively compensates the SARR for costs it does not incur unfairly biases the SAC analysis in favor of the complainant.

A similar problem arises in the MMM calculation. The objective of MMM is to allocate responsibility for the SAC costs among the SARR's shippers, including the complainant. Under MMM, the responsibility for SAC costs is assumed to be proportional to each movement's variable costs. However, variable costs are calculated using the defendant's URCS costs. Since the defendant's URCS costs for cross-over carload traffic contain substantial costs that the SARR does not incur, MMM allocates proportionally more responsibility for SARR costs to carload traffic than is justified by the costs actually incurred by the SARR to handle that traffic. By assigning to carload traffic a disproportionately large share of responsibility for SARR costs, the responsibility for SARR costs that should be allocated to other traffic, including the complainant's traffic, is reduced. The result is a maximum reasonable rate under MMM for the complainant's traffic that is too low.<sup>3</sup>

If the Board does not eliminate all cross-over traffic from Full SAC analyses—which would address the distortion created by the use of carload traffic as cross-over traffic as well as other distortions in the SAC analysis created by cross-over traffic—the Board should disallow the use of non-trainload traffic in Full SAC analyses. It might be possible to correct some of the distortion arising from the use of carload traffic as cross-over traffic by adjusting the variable cost calculations used in the revenue allocation and MMM calculations. Defendants in *AEPCO* proposed such an approach. *See* Defs.' July 19, 2011 Resp. to AEPCO's Revised Variable Cost

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<sup>3</sup> As the Board correctly notes in the EP 715 Decision, these issues do not arise in the use of carload traffic as cross-over traffic in the Simplified SAC methodology since the defendant's URCS costs are used as the basis for determining the SARR's operating costs. *See* July 25, 2012 Decision at 17.

Calculations, STB Docket No. 42113. However, BNSF acknowledges that such an approach would likely lead to further disputes and complexities in cases where complainants use carload traffic as cross-over traffic. The simpler and most direct way of dealing with the distortions created by the use of carload traffic as cross-over traffic is to disallow the use of carload traffic as cross-over traffic in Full SAC analyses.<sup>4</sup>

### **III. BNSF Supports the Board's Proposed Modification to ATC**

In *Major Issues*, the Board explained that a proper revenue allocation methodology for cross-over traffic would be based on three premises. First, the purpose of cross-over traffic in SAC analyses was “to make the analysis more manageable without introducing bias.” *Major Issues*, slip op. at 24. Second, to achieve simplification without biasing the SAC results, revenue should be allocated based on the defendant carrier’s relative average total costs of providing service over the on-SARR and off-SARR segments of the through movement. *See id.* at 25. Third, a cost-based revenue allocation must reflect economies of density, and “any approach that seeks to account for economies of density must examine average total costs, rather than average variable costs.” *Id.* at 34.

The Board concluded that the ATC methodology satisfied these criteria for a successful revenue allocation methodology. However, as noted above, in the first case to apply the new revenue allocation methodology following *Major Issues*, the Board adopted a modified ATC

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<sup>4</sup> The Board proposed as an alternative to the elimination of carload traffic as cross-over traffic that a complainant be required to include an origin or termination of any traffic included as cross-over traffic. BNSF prefers a rule that would not allow complainants to use carload traffic as cross-over traffic under any circumstances as the simpler and more direct way of addressing the distortions created by the use of carload traffic as cross-over traffic. However, if the Board does not eliminate the use of carload traffic as cross-over traffic in all cases, the Board could at a minimum require that a complainant choose between the two alternatives proposed by the Board.

methodology that gave increased weight to variable costs. *See Western Fuels III*, slip op. at 6. The modified ATC approach reduced the impact of economies of density on the assessment of relative on-SARR and off-SARR costs and thereby undermined an important objective of ATC, which was to eliminate bias by fully accounting for economies of density. The Board explained that its modified version of ATC was necessary to address instances where original ATC would not allocate revenues to the SARR portion of a movement that were sufficient to cover the incumbent's URCS variable costs for that portion of the movement.

BNSF appealed the Board's adoption of a modified ATC methodology to the D.C. Circuit and the court remanded the Board's 2009 *Western Fuels* decision so that the Board could consider BNSF's contention that the modified ATC methodology gave too much weight to variable costs and thereby reintroduced the bias that ATC was intended to eliminate. *See BNSF Ry. Co. v. STB*, 604 F.3d 602, 613 (D.C. Cir. 2010), *rev'g W. Fuels Ass'n, Inc. v. BNSF Ry. Co.*, STB Docket No. 42088, slip op. at 2 (STB served Feb. 18, 2009) ("*Western Fuels II*"). On remand, BNSF showed that the double-counting of variable costs in the modified ATC methodology resulted in a large shift in revenues to the SARR that was far out of proportion to the problem that modified ATC was intended to solve. *See* Nov. 22, 2010 BNSF Comments at 11-16, STB Docket No. 42088. BNSF pointed out that the Board could address its concern over the small number of movements that received revenues under ATC that are less than the defendant's URCS variable costs by adjusting the revenues only on the affected movements rather than by giving undue weight to variable costs on all cross-over movements. *See id.* at 30-31.

The approach outlined by the Board in the July 25, 2012 Decision properly targets only the movements that give rise to the Board's concern about the level of revenues allocated to the

SARR on cross-over traffic. For all other movements, the Board's proposed approach continues to allocate revenues under the cost-based approach of the original ATC methodology that fully reflects economies of density. The Board's proposed approach, which is virtually identical to the approach that BNSF urged the Board to adopt on remand in the *Western Fuels* case, addresses the Board's concerns about original ATC while minimizing the distortion of SAC results that comes from failing to reflect economies of density.

**IV. BNSF Supports the Board's Proposal to Refine Simplified SAC Presentations, Although BNSF Believes that a Limit on Relief Needs to Be Retained.**

In the July 25, 2012 Decision, the Board proposes to refine the Simplified SAC analysis in two ways. First, the Board would require a full, de novo estimate of the road property costs of the SARR. *See* July 25, 2012 Decision at 14-15. Under the existing Simplified SAC methodology, the parties use the Board's road property cost determinations in prior Full SAC cases as the basis for estimating the SARR's road property costs. Second, in exchange for the improved accuracy of the Simplified SAC analysis resulting from the refinement of road property costs, the Board proposes to remove altogether the limit on relief in Simplified SAC cases. *See id.* at 13-14.

BNSF supports the Board's proposal to require a full assessment of road property costs for the SARR. A requirement that complainants estimate road property costs as required in a Full SAC case will improve the accuracy of the Simplified SAC results. A full assessment of road property costs will ensure that the SAC analysis is based on current cost information and on cost information that is relevant to the specific types of facilities used to provide the service at issue in the Simplified SAC case.

A requirement that complainants provide a full assessment of road property costs would also reduce the incentive for complainants to bring unmeritorious rate reasonableness claims.

Under the current Simplified SAC standards, the defendant railroad bears most of the cost and burden of gathering and presenting the Simplified SAC evidence. Given the low filing fees for bringing a Simplified SAC claim and the relative lack of litigation cost or burden for the complainant, there is a real risk that complainants will bring unmeritorious Simplified SAC claims, or threaten to bring such claims, simply to gain an unjustified advantage in commercial negotiations. If a complainant is required to undertake some of the litigation burdens in a Simplified SAC case by preparing road property evidence for the SARR, the accuracy of the Simplified SAC analysis will be improved and at the same time there will be less risk that a complainant will file unmeritorious claims.

However, BNSF does not believe that the Board's proposed change in the way road property costs are determined would justify removing the limits on relief for Simplified SAC cases. While the Board's road property cost proposal, if implemented, would improve the accuracy of a Simplified SAC analysis, the approach is still based on simplifying assumptions that will not produce results that are fully consistent with CMP principles or with the results of a Full SAC test. Since the results of a simplified analysis will inevitably be less accurate or reliable than the results of a properly conducted Full SAC analysis, there should be a limit on the relief available under the Simplified SAC approach. In addition, the Board has never handled a Simplified SAC case to its conclusion. Given the lack of experience in applying the Simplified SAC approach, it would not be appropriate to eliminate the limit on relief under the Simplified SAC approach.

**V. BNSF Would Not Oppose a Modest Increase in Relief Available under the Simplified SAC and Three Benchmark Tests as Part of a Refinement of the Three-Tiered Approach that Includes Elimination of Cross-Over Traffic from Full SAC Analyses.**

For the reasons set out above, BNSF believes that the elimination of cross-over traffic from Full SAC analyses would improve the Board's three-tiered rate reasonableness approach by ensuring that the first and most important tier of that approach—Full SAC—is carried out as originally contemplated in *Coal Rate Guidelines*. Simplifying assumptions like cross-over traffic that are designed to reduce the complexity of Full SAC analyses would be limited to Simplified SAC analyses where there would also be a limit on relief to compensate for the reduced accuracy of the analysis.

As part of this refinement of the three-tiered approach and the other proposed methodological changes in the revenue allocation methodology for cross-over traffic and the calculation of road property costs in the Simplified SAC analysis, BNSF would not oppose a modest increase in the limit of relief available in the Simplified SAC methodology and the Three Benchmark approach. The package of refinements that BNSF proposes would improve the accuracy of Full SAC calculations (by eliminating cross-over traffic) and Simplified SAC calculations (by modifying the ATC calculations and increasing the accuracy of road property calculations). The modest increase in costs to pursue relief that could result from these refinements would justify a modest increase in the relief limits in Simplified SAC and Three Benchmark cases, such as a doubling of the limit in both cases.

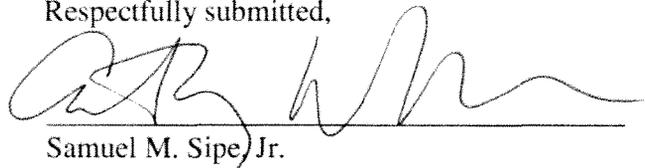
**VI. BNSF Does Not Support the Proposed Change to the Interest Rate Used to Determine Reparations.**

The Board's proposal to raise the interest rate on reparations appears to be driven by little more than a desire to increase the applicable interest rate. BNSF does not support such a result-oriented change in the Board's rules governing reparations. The current approach was developed through regulatory proceedings that addressed relevant economic principles and weighed conflicting considerations. The Board has not identified any flaw in the economic principles underlying the current interest rate rule or any economic principles that would justify a change in the existing approach. It would not be appropriate to abandon a long-standing approach simply because the Board prefers a higher interest rate.

It would be particularly inappropriate for the Board to increase the interest rate in light of the length of time that it takes to resolve rate reasonableness complaints. The Board has taken the position that the statutory three-year limit on the length of STB proceedings set out in 49 U.S.C. §11701(c) does not apply to rate reasonableness cases. *See BNSF Ry. Co. v. STB*, 453 F.3d 473, 478 (D.C. Cir. 2006) (summarizing Board's position). As a result, a number of rate reasonableness cases have taken over three years to resolve, in some cases with substantial reparations owing at the end of the proceeding. *See, e.g., Western Fuels II*, slip op. at 2 (2009 decision awarding reparations dating back to fourth quarter of 2004, when complaint was filed), *rev'd*, *BNSF Ry. Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010). An increase in the interest rate applicable to reparations awards would only exacerbate the adverse impact to railroads from such extended rate reasonableness proceedings.

Richard E. Weicher  
Jill K. Mulligan  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131  
(817) 352-2353

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S M Sipe Jr", is written over a horizontal line.

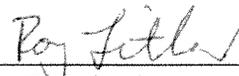
Samuel M. Sipe Jr.  
Anthony J. LaRocca  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036  
(202) 429-6486

*Attorneys for BNSF Railway Company*

October 23, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October, 2012, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon each party who has filed a notice of intent to participate.



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Roy E. Litland