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BEFORE THE  
SURFACE TRANSPORTATION BOARD



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Docket No. EP 715

RATE REGULATION REFORMS  
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REBUTTAL COMMENTS OF CSX TRANSPORTATION, INC.  
AND NORFOLK SOUTHERN RAILWAY COMPANY

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CSX Transportation, Inc ("CSXT") and Norfolk Southern Railway Company ("NS") (CSXT and NS collectively referred to hereinafter as "CSXT/NS") respectfully submit these joint Rebuttal Comments in the above-captioned proceeding. As in prior rounds of comments in this proceeding, CSXT/NS also join the rebuttal comments of the Association of American Railroads.

## I. INTRODUCTION

Based on two rounds of comments from parties to this rulemaking, it is clear that participating railroads and shippers do not agree on the rules, principles and policies at issue in the proceeding. The best, most objective way for the Surface Transportation Board ("Board") to evaluate competing proposals and arguments is to weigh them against the core standards that establish the Board's mission, responsibilities, and mandates. In their Reply comments, CSXT and NS offered a framework for evaluating comments in this proceeding. See CSXT/NS Reply Comments at 1-12. In particular, CSXT/NS suggested that the principles that should guide the Board's review and decisions are:

- (1) Fidelity to governing statutes and to their animating policies;
- (2) Consistency with sound railroad economics;
- (3) Recognition that rates subjectively deemed "high" by a shipper are not necessarily unreasonable; and
- (4) Rate regulations should encourage negotiation rather than litigation and additional regulation

CSXT/NS's comments have demonstrated that the Board must be tethered to core principles such as those set forth above, when evaluating comments and proposals in this proceeding. And, any rule changes the Board may adopt in this proceeding must be grounded in objective application of sound economics and policies established by Congress and the Board. As further demonstrated below, subjective and unsupported shipper assertions such as the claim that some rail rates are "too high," or that certain rate

challenge methodologies are not sufficiently “accessible,” are inconsistent with the fundamental principles that must guide the Board in discharging its rate regulation duties. Shipper commenters imply that they think that the only principle that the Board should adhere to is that any rules it adopts should maximize the likelihood that shippers who bring rate cases will win, and at minimal cost to the complaining shipper. *See e g*, CURE Reply Comments at 9 (“Obviously, shippers support rate-reasonableness standards that permit successful challenges.”).<sup>1</sup> But that alone is no principle at all because it ignores the Board’s governing statutes and responsibilities, not to mention well-established economic principles. The relevant test for evaluating relevant proposals is not whether a proposal makes it more or less likely that a particular party will prevail. Rather, the proper test for evaluating proposals is whether they advance governing policies and policy goals, and whether they improve the economic soundness, rigor and reliability of the Board’s rate reasonableness tests. When the Board’s proposals are viewed through the lenses of the statute, governing policy and sound economics, it is clear which proposals pass muster and which do not.

**II. CONSPICUOUSLY ABSENT FROM SHIPPER COMMENTS IS ANY SUBSTANTIVE DISCUSSION OF THE GOVERNING STATUTE, WHICH BOTH RESTRICTS THE BOARD’S AUTHORITY TO RAISE RELIEF LIMITS AND PROHIBITS ELIMINATING RATE RELIEF LIMITS ALTOGETHER.**

As CSXT/NS have consistently maintained, the Board’s lodestar must be the governing statute. *See, e g*, CSXT/NS Opening Comments at 2-5; CSXT/NS Reply

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<sup>1</sup> Contrary to CURE’s assertions, none of the Board’s proposals limits a shipper’s right or ability to file a case. CURE Reply Comments at 9, n.10. A shipper is always free to file a case. Instead, CURE and other shipper parties’ real concern is that economically-sound tests will demonstrate that rates that they deem “too high” are in fact reasonable.

Comments at 1-3. Indeed, the statute itself disposes of many of the parties' arguments and proposals. The statute prohibits the Board from eliminating the relief limits for simplified stand-alone cost ("SSAC") and Three-Benchmark cases because doing so would violate the statutory command that simplified rate reasonableness proceedings be available only "in those cases in which a full stand-alone cost presentation is too costly, given the value of the case " See 49 U.S.C. 10701(d)(3). The same statutory provision guides and restricts the Board in any effort to make SSAC and Three Benchmark applicable to more rail rates or more rate disputes. The statute requires that the use of any simplified approach be based upon and constrained by three factors: (1) the cost of presenting a SAC case; (2) the value of the case to which the simplified method would be applied; and (3) the relationship between factors (1) and (2). *Id.* Perhaps because the constraints imposed by the statute are so clear, some commenters have chosen to ignore the statute through two rounds of comments. See, e.g., Joint Chemical Companies ("JCC") Reply Comments at 7-9 (arguing for elimination of all limits on simplified methods, but failing to discuss the statutory language)

Ironically, the only shipper to make a statutory argument on reply asserts that any proposal to lower the relief limit for the Three-Benchmark case would violate the statute.<sup>2</sup>

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<sup>2</sup> This argument itself is something of a straw man, as neither the Board nor any commenter appears to have intended to propose that the Board lower the existing limit on relief available under the Three Benchmark approach. Several parties assert that CSXT/NS advocated for a reduction in the relief limit in the Three-Benchmark cases. See JCC Reply Comments at 8-9, ARC Reply Comments at 4; CURE Reply Comments at 19-20. However, CSXT/NS did not, and do not, intend to advocate a reduction in the Three Benchmark relief limit at this time. Rather, CSXT/NS intended to make the point that there is no justification for an *increase* in the relief limit. In support of their opposition to an increase, CSXT/NS noted that in *Major Issues*, they had advocated a \$200,000 limit and asserted that, if anything, the current higher relief limit is generous

ARC argues that the Board cannot lower the relief limit because that would “ignore[] the statutory command that the Board adopt a ‘simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.’” ARC Reply Comments at 4. Of course, the very language ARC contends restricts the Board’s ability to lower the relief limit (which no one has proposed in this proceeding) also restricts the Board’s authority to increase the relief limit

Rather than address the express requirements of the statute, several shipper commenters attempt to side-step it. For example, CURE disregards the statutory requirement that simplified methods be available only when full SAC is too costly by making the irrelevant and unsupported claim that “Full-SAC normally results in the lowest possible reasonable rate.” CURE Reply Comments at 16, relying on non-sequitur and convoluted logic. Other shippers echo CURE’s irrelevant refrain. *See, e.g.* JCC Reply Comments at 8 (“Simplified-SAC and Three-Benchmark methodologies inevitably produce higher rate prescriptions than a Full-SAC case.”) But *results* generated by a particular test or in a particular case are irrelevant to the statutory language and mandate. The statute is clear—what matters under the statute is only whether “a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. 10701(d)(3).

Moreover, even if the results of a particular rate reasonableness test were relevant, there is no proof that Full-SAC consistently or always produces the lowest possible rate. Despite protestations that they have “shown” (CURE Reply Comments at 16 & 18) or

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given the lack of any economic foundation for that test. Thus, CSXT/NS are not proposing a reduction in the Three Benchmark relief limit in this proceeding.

“demonstrated” (JCC Reply Comments at 8-9) this to be true, shipper commenters have not shown or demonstrated anything. The only “evidence” they cite for this proposition is an unsupported assertion in a single page of a verified statement submitted by shipper witnesses. See JCC Reply Comments at 8-9 (relying on opening comments “supported” by V.S. T. Crowley and R. Mulholland at 58).

When the railroads sought the work performed by these witnesses to reach their conclusion, JCC belatedly produced a simplistic workpaper that fails to support their assertion.<sup>3</sup> First, the workpaper simply tabulates results of selected prior rate cases. This proves nothing. A meaningful analysis would have to compare the result generated for the same movement(s) for the same shipper under each of the three available methodologies (SAC, SSAC, and Three-Benchmark). Comparing the rate generated in a SAC coal rate case to a rate for chemicals generated in a Three-Benchmark case is meaningless. Second, it attempts to jigger the statutory floor for each Class I railroad in a Three-Benchmark rate case by adjusting the 180% statutory floor by the ratio of that carrier’s  $RSAM-R/VC > 180$ . This machination is also meaningless. And, even if this adjustment had any relevance or merit, JCC’s workpaper itself does not show that the “rate floor” for Three Benchmark cases is always higher than that for SAC. Taking the workpaper at face value, it shows that the “adjusted” floor for Three-Benchmark cases involving NS and for SAC and SSAC cases involving NS is the same 180%.<sup>4</sup>

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<sup>3</sup> When he produced this “workpaper,” JCC counsel did not represent that the witnesses relied on that workpaper at the time they issued their statement.

<sup>4</sup> See JCC WP “Comparison of Rate Floors Under Alternate Reasonableness Frameworks, Since Major Issues” at 2.

Finally, the shippers fall back to a “just trust us” argument. According to them, the Board should ignore its statutory duty to make simplified procedures available only “in those cases in which a full stand-alone cost presentation is too costly, given the value of the case” 49 U.S.C. 10701(d)(3). Instead, the Board should have faith that if there are no limits on relief, the shippers will not abuse the system because they can be trusted to use the cruder, less accurate and less economically sound tests “only if there is not a better alternative.”<sup>5</sup> CURE Reply Comments at 20. But the statute does not delegate to shippers the authority to determine when a full-stand alone cost presentation is too costly. That is the Board’s statutory duty.

Railroad commenters have reiterated a fact that the Board has long recognized: Full-SAC is the only economically-sound way to determine the reasonableness of rates.<sup>6</sup> CURE notes this: “AAR argues that Full-SAC is the most accurate way to determine the reasonableness of rates, and, therefore, apparently contends that it must be used.” CURE Reply Comments at 15. Tellingly, CURE does not dispute that SAC is the most accurate or most economically-sound way to determine the reasonableness of a rate test. And it does not dispute the fact that Three-Benchmark is a grossly simplified and inaccurate

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<sup>5</sup> Curiously, CURE does not define “better alternative.” In fact, its prior sentence could be read as an acknowledgement that the shipper always has a better alternative to the simplified methods because CURE claims the “Full-SAC methodology generally produces the lowest rates.” CURE Reply Comments at 19-20.

<sup>6</sup> See, e.g., *Burlington Northern Railroad Co. v ICC*, 985 F.2d 589, 596 (D.C. Cir. 1993) (“CMP, with its SAC constraint is the ‘preferred and most accurate procedure available for determining the reasonableness’ of rates in markets where the rail carrier enjoys market dominance”) (quoting ICC in *McCarty Farms v Burlington Northern*, 3 I.C.C. 2d 822 (1987)); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision at 13 (served Sept. 5, 2007) (“*Simplified Standards*”) (“CMP, with its SAC constraint is the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition”).

approach compared to the rigorous, economically-sound SAC test. Other shipper parties simply admit these facts. For example, Coal Shippers admit that “[s]implified-SAC is – by design – ‘less precise’ than Full-SAC ” Coal Shippers Reply Comments at 14; *see* APC Reply Comments at 4.

In sum, any proposal to eliminate relief limits for SSAC or Three-Benchmark cases would violate the statute. The Board has concluded that “an overly simplified approach should not be applied to a case when the amount in dispute justifies the use of a more robust and precise approach.” *Simplified Standards* at 27. And, after reviewing that Board decision, the D.C. Circuit affirmed that conclusion, finding that the statute “clearly contemplates a method that may substitute for a full SAC proceeding in *low-value cases*.” *CSX Transp. v. Surface Transp. Bd.*, 568 F.3d 236, 242 (D.C. Cir. 2009) (emphasis added), *vacated on other grounds*, 584 F.3d 1076

Separate and apart from the logical and theoretical flaws of shippers’ arguments, there is no evidence in the record to support raising the relief limit for SSAC or Three Benchmark. The Board has relied on litigation expenses to set the relief limits. The NPRM requested that the public provide “details” regarding litigation costs so that the Board could evaluate whether to adjust the limitation on Three Benchmark relief. *Rate Regulation Reforms, Notice of Proposed Rulemaking* (July 25, 2012) (“NPRM”) at 15. But no party provided any details or other evidence regarding litigation costs for Full-SAC, SSAC, or Three Benchmark cases. Nor did any party provide any evidence regarding how litigation expenses might change if the Board adopted any of its proposals. Without supporting evidence or other record addressing those litigation costs or potential changes in those costs if the Board were to adopt its proposals, the Board has no basis to

declare that the limits it adopted based upon the record compiled in *Simplified Standards* are "no longer operative." Given that there is no adequate supporting evidence or details in the record, there is no reasonable basis for changing the relief limits previously established by the Board, and changes to those limits would be arbitrary and capricious

**III. PROPOSALS TO ADDRESS CROSS-OVER TRAFFIC ARE AIMED AT ENSURING THE SAC TEST REMAINS ECONOMICALLY SOUND.**

A primary purpose that impelled the Board to initiate this rulemaking was to make sure that the economics and reliability of the SAC test are sound in light of the increasing and novel (and, in CSXT/NS's view, excessive) uses of cross-over traffic. Use of cross-over traffic has changed and grown substantially since its introduction nearly 20 years ago. Indeed, a case currently pending before the Board, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Co*, STB Docket No. 42130, has the second highest percentage of cross-over traffic in history according to chemical shipper witness Crowley. The Board is appropriately concerned that new and expanded use of cross-over traffic is distorting the Full-SAC analysis and could generate inaccurate results under the Board's method of allocating revenue from this traffic. As CSXT/NS previously stated, "if the Board were able to adjust its revenue allocation method to account for the unique attributes and characteristics of each particular SARR, the use of crossover traffic would not necessarily need to be limited in the manner that the Board has proposed, either by limiting the use of crossover traffic to (1) movements originating or terminating on the SARR or (2) trainload movements." CSXT/NS Opening Comments at 17-18. In all events, the Board should ban Leap-Frog cross-over traffic because of its unique infirmities and distortions. *See id.* at 18-19.

The Board is confronted squarely with the same cross-over traffic issues in the pending rate cases of *E I DuPont de Nemours and Company v. Norfolk Southern Railway Co.*, Docket No. 42125, and *SunBelt Chlor Alkali v. Norfolk Southern Ry.*, STB Docket No. 42130.<sup>7</sup> Regardless of whether the specific rules adopted in this rulemaking process are applied to currently pending cases or whether the Board examines the issue in the context of those individual cases, it must resolve question of proper limits on cross-over traffic. Indeed, the Board has expressly advised the parties in *DuPont* and in *SunBelt* that it will address cross-over traffic limits and revenue allocation issues presented there

The parties should have been, and continue to be, on notice that use and application of cross-over traffic, as well as ATC revenue allocation methodologies, are potential issues in these individual cases, and that parties are entitled to raise and respond to substantive arguments regarding those methodologies within those proceedings. *See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry.*, NOR 42113 (STB served June 27, 2011) (stating that the Board has concerns with the way cross-over traffic has been costed, and directing the parties to submit new evidence and arguments for how to rectify the identified issue). The Board will address any arguments related to cross-over traffic and cost allocation raised in the pending adjudications, even as it completes its consideration of those issues more broadly in *Rate Regulation Reforms*.

*DuPont v NS*, STB Docket No. 42125, *SunBelt v NS*, STB Doc No. 42130, (Nov. 29, 2012) Decision at 5 (emphasis added) Accordingly, it is clear that in cases in which

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<sup>7</sup> Historically, the Board has addressed specific facts presented in each case with respect to the permissible use of and limits on cross-over traffic. Because, to date, the Board has not adopted any rules regarding cross-over traffic, the agency has more flexibility to resolve in an adjudication novel questions that have not been addressed through notice-and-comment rulemaking. *SEC v Chenery Corp.*, 332 U.S. 194 (1947) (“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved *despite the absence of a relevant general rule*” (emphasis added)) Simply put, the choice to pursue precedent through adjudication means that the decisions “do not harden into ‘rules’” and can be altered or reversed in subsequent adjudications. *General American Transp Corp. v. ICC*, 872 F.2d 1048, 1060 (D.C. Cir 1989). As the Board has recognized, it must address, head-on, the cross-over traffic issues presented in pending individual cases. *See, e.g., DuPont v. NS*, STB Docket No. 42125, *SunBelt v NS*, STB Doc. No. 42130, (Nov. 29, 2012) Decision at 5.

cross-over traffic issues are presented, the Board has undertaken to address them in the context in which they arise, either by applying rules it adopts in this proceeding or by addressing the problems separately in the context of the individual adjudications

**A. Cross-Over Traffic, As Employed in Recent Cases, Distorts SAC Results.**

The Board is correct that carload and multi-carload cross-over traffic is different from trainload traffic and can distort SAC results under the Board's revenue allocation methodology. In the real world, to move carload traffic a railroad must (1) pick up the cars at each specific origin; (2) sort the cars in a local serving yard into blocks and build a train; (3) move that train through the system to a classification yard where the cars are resorted and blocked, (4) often move them through the system to other yards for further classification; (5) move a block, including the car to a local serving yard; and (6) finally deliver the specific car to its specific destination.<sup>8</sup> The simple credit for the originating or terminating railroad does not account for all of the work that must take place before or after the car moves over the SARR. When a SARR inserts itself in the middle of a movement, and handles carload traffic in an overhead fashion, it performs little-to-none of that costly, essential work.

Complainants often assume the residual incumbent would do all that work, and treat the portion of such a cross-over movement that is on the SARR as a "hook-and-haul" intact trainload shipment. The defendant's URCS costs include all the work described above that is necessary for movement from origin to destination, including the costly gathering, switching, assembly and other tasks performed only by the residual

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<sup>8</sup> See Exhibit 1, *Carload Operations Overview Video* (DVD)

incumbent. For revenue allocation purposes, however, certain costs are spread across both the SARR and the non-SARR segments, resulting in the assignment of revenues to the SARR based upon costs that the SARR would not incur. *See BNSF Opening Comments* at 3. As the Board has recognized, this results in an over-allocation of cross-over revenues to the SARR. Even JCC confirms this point, in part, when it admits that “the cost associated with inter- and intra-train switching, which does not occur at the origin or termination points, is allocated on a per-mile basis.” *See JCC Reply Comments* at 4. This is precisely the disconnect that should concern the Board. As the Board succinctly stated: “when it comes time to allocate revenue to the facilities replicated by the SARR, URCS treats those movements as single-car or multi-car movements, rather than the more efficient, lower cost trainload movements that they would be. As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted.” *Rate Regulation Reforms* at 16.

**B. Shipper Comments Ignore the Real Cross-over Traffic Revenue Allocation Issues.**

CURE and Coal Shippers claim that it is not necessary for the Board to address the potential distortions caused by cross-over traffic by requiring either a larger SARR or by limiting the traffic because the SARR would not need to be large or limited in the real world. *CURE Reply Comments* at 7; *Coal Shippers Reply Comments* at 6. Regardless of the accuracy of that premise, the shippers’ conclusion misses the point. The problem is the lack of a sound, reliable, and accurate method to allocate revenues between the SARR and the residual incumbent, particularly for the carload and multi-carload cross-over traffic that complainants have employed more and more extensively in recent cases.

In this proceeding, CSXT/NS have maintained that “a proper cost-based cross-over revenue allocation methodology would use the SARR’s variable costs rather than the carrier’s system average URCS costs” could be an alternative solution to the Board’s proposal to restrict the use of cross-over traffic CSXT/NS Reply Comments at 21. Accordingly, comments by JCC that “[n]either the Board nor any railroad has alleged that the [ATC] formula fails to [equitably allocate revenue]” are simply wrong. JCC Reply Comments at 2. It is implicit in CSXT/NS’s position that none of the forms of ATC (Original, Modified, or the proposal here) discussed to date adequately allocate revenue for cross-over traffic—particularly for carload and multi-carload traffic.<sup>9</sup> It is similarly inherent in Union Pacific’s advocacy of Efficient Component Pricing. See UP Comments at 12-13. Finally, in the Reply Comments, in which JCC makes its erroneous assertion, JCC quotes from BNSF’s comments making the very point that JCC says no railroad made. See JCC Reply Comments at 3 (quoting BNSF Opening Comments at 11).

**C. Absent a New Rule Adopted in a Rulemaking, the Lawful Revenue Allocation Method is Original ATC.**

The Board adopted Original ATC by notice-and-comment rulemaking and established the use of Original ATC as a rule for all cases. Then, in *Western Fuels*, the Board *sua sponte* sought to modify the ATC rule to address a perceived problem, not raised by any party to the case. CSXT/NS were not parties to *Western Fuels*, so they have not had an adequate opportunity to be heard regarding the modified approach the

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<sup>9</sup> Original ATC is the best and most accurate of the three ATC approaches, and the Board’s proposed approach is superior to the “modified ATC” alleged in *Western Fuels*, but none of the methods is satisfactory for carload traffic.

Board applied in *Western Fuels*.<sup>10</sup> In any event, the Board may not adopt a new revenue allocation rule in an individual adjudication to replace the ATC methodology adopted in a notice-and-comment rulemaking pursuant to the Administrative Procedure Act (“APA”). Under the APA, a properly adopted legislative rule may be changed only through notice-and-comment rulemaking.<sup>11</sup> See, e.g., *General American Transp Corp. v ICC*, 872 F.2d 1048, 1060 (D.C. Cir. 1989) (distinguishing rules, “which cannot be altered or reversed except by rulemaking,” from adjudicatory precedent, which may be altered or amended in an subsequent adjudication). In this proceeding, the Board has proposed to change the ATC legislative rule through notice-and-comment rulemaking

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<sup>10</sup> Even filing an amicus brief in that case as CURE suggests non-party railroads should have done (CURE Reply Comments at 12) is a red herring as an amicus cannot be bound by a decision in a litigation. See, e.g., *Clark v Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953) (“An *amicus curiae* is not a party to the action. . . .”); Black’s Law Dictionary 83 (7th ed. 1999) (defining an *amicus curiae* as “[a] person who is not a party to a lawsuit”). Nor can an amicus appeal the decision. See 28 U.S.C. § 2344 (only permitting “[a]ny party aggrieved by the final order” to seek judicial review) (emphasis added), *Erie-Niagara Rail Steering Comm. v Surface Transp. Bd.*, 167 F.3d 111, 113 (2d Cir. 1999) (“To the extent that non-parties were once permitted to appeal ICC decisions, that avenue was closed by the clear language of the Hobbs Act when it became applicable to the ICC in 1975.”) See generally *Moten v. Bricklayers, Masons and Plasterers Int’l Union of Am.*, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam) (holding an amicus may not appeal from a judgment).

<sup>11</sup> And the agency may not avoid its obligations under the APA by *de facto* amending a rule in an adjudication. *Marseilles Land and Water Co. v FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (holding that “an administrative agency may not slip by the notice-and-comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication”); see *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that “adopt[s] a new position inconsistent with existing regulations” must follow APA notice-and-comment procedures).

Unless and until the Board adopts a new rule in the manner required by the APA, however, the only lawful revenue allocation methodology remains Original ATC.<sup>12</sup>

**D. Leap-Frog Traffic.**

“Leap-Frog” internal cross-over traffic should be prohibited regardless of what the Board does with respect to its two proposals to limit cross-over traffic. The Board specifically asked parties “to offer alternative solutions to the handling of cross-over traffic.” NPRM at 17. One of the solutions CSXT/NS offered in response is to proscribe the use of the “Leap Frog” cross-over device, as exemplified in DuPont’s SAC presentation in *DuPont v. NS*, STB Docket No. 42125. Thus, CURE’s assertion that CSXT/NS’s proposal to address cross-over traffic is an impermissible attempted re-litigate is meritless. See CURE Reply Comments at 12.

Some parties lump CSXT/NS’s concern about Leap-frog traffic into the general discussion about the Board’s proposals and the rationale that supports the Board’s proposals. See, e.g., JCC Reply Comments at 5. This amalgamation confuses distinct issues. Leap-frog traffic should be prohibited due to its own distinct infirmities and distortions.

Leap-Frog traffic is an attempt to excuse the SARR from incurring the costs to build and operate costly segments of the defendant railroad’s system, while simultaneously eroding the Board’s re-route test. For example, in *DuPont*, the Complainant used the Leap Frog internal cross-over traffic device to avoid building all of

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<sup>12</sup> In initiating a rulemaking to again address cross-over traffic revenue allocation, the Board clearly and officially has requested further input and comment concerning this rule and topic. Characterizations of responsive comments as re-litigating the issue that arose in *Western Fuels* are simply erroneous. (See, e.g., CURE Reply Comments at 1)

the very expensive NS tunnels on the Heartland Corridor route, and to avoid subjecting premium intermodal traffic to the Board's re-route test. The alternative route DuPont used for other SARR traffic is substantially longer (indeed NS made a very substantial investment in the Heartland Corridor project in order to shorten the route both in terms of miles and time). See NS Reply Evidence, *DuPont v NS*, STB Docket No. 42125 at III-A-53 to III-A-59 (filed November 30, 2012). To preclude such abuses and the slippery slope that would be created if such a tactic were allowed, the Board should disallow internal cross-over traffic (*i.e.*, movements within the SARR footprint that use the residual incumbent as a bridge carrier between two SARR segments), and make it clear that complainants may not use multiple on-SARR cross-over segments for a single movement.

#### **IV. SSAC**

As discussed above, the record in this proceeding provides no basis for changing—much less eliminating—the limit on relief on relief available in SSAC cases. But if the Board nonetheless decides to alter the relief limit, it must also make the SSAC test more rigorous and economically sound by requiring full and complete Road Property Investment (“RPI”) evidence. This issue is a particular concern to CSXT/NS as railroads operating in the East, because SAC cases have shown that they generally have higher road property investment costs than those in the West. In addition, CSXT/NS continue to have very strong concerns about the Board's proposal to eliminate caps on relief in SSAC cases without eliminating the so-called “Second Disclosure” requirement. This unbalanced proposal would exacerbate the SSAC burden-shifting problem and expand opportunities and incentives for unfair abuse of the regulatory process.

**A. Any Increase in SSAC Limits Must Be Accompanied By A Requirement that Complainants Develop and Present Full Road Property Investment Evidence**

Based on its experience in SAC cases, the Board has determined and acknowledged that the East is not the West with respect to Road Property Investment ("RPI"). For example, prior rate cases have demonstrated that average real estate costs are higher in the East because of higher land values and the fact that more railroad lines and facilities are in higher valued areas (including more high-value urban areas). Prior cases have demonstrated that several categories of construction costs are higher on average in the East because more railroad lines and facilities are built in areas of rugged and difficult topography. As CSXT/NS demonstrated, construction challenges and costs are different in the East and in the West, and RPI costs in the East are generally higher. See CSXT/NS Opening Comments at 14 Requiring full RPI evidence in SSAC cases would avoid the distortion that would result from using western RPI costs as a proxy (or as part of an average used as a proxy) applied in an eastern SSAC case. In addition, using full current RPI costs would avoid the distortion created by time lags – for example, it has been nearly a decade since the Board has issued a decision on the merits in a full SAC case involving an Eastern railroad. See *Duke Energy Corp. v. CSX Transp., Inc.* 7 S T B. 402 (2004). This means that Full SAC-based railroad construction costs for Eastern rail carriers are outdated.

Attempts by shipper commenters to undermine the Board's full RPI proposal and downplay its significance fall flat. For CSXT and NS, the assertion that "[t]he average RPI cost per track mile has varied less than 10% in the last five western Full-SAC cases" (*Simplified Standards*, Appendix A, p. 38, quoted in JCC, V.S of Crowley/Mulholland at

55), is meaningless. *See, e.g.* CSXT/NS Open. at 14 (comparing substantially different RPI findings in Eastern and Western rate case decisions using the same base year).

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

**B. The Board Should Not Increase the Relief Limits or SSAC Cases Unless It Restores Standard Procedures for Presentation of Evidence.**

In response to CSXT/NS’s expressed concerns about defendants’ burdens under SSAC procedures, no commenter has disputed that a rate case complainant—as the party seeking relief—has the burden of proving that a challenged rate is unreasonable. *See, e.g., Duke Energy Corp v Norfolk Southern Ry Co*, 7 S.T.B. 89, 100 (2003) (“*Duke/NS*”) (“[T]he party with the burden of proof—i.e., the shipper on SAC issues—must present its full case-in-chief in its opening evidence.”), *Coal Rate Guidelines*, 1 I.C.C.2d at 547; 49 U.S.C. § 10701, 5 U.S.C. § 556(d), *Minnesota Power Inc. v. DM&IR*, STB Doc. No. 42038 (March 3, 2000) (“a complainant bears the burden of proof”). Nor has any party offered an adequate or meaningful response to CSXT/NS’s showing that the Board’s proposal to eliminate relief caps for SSAC cases could effectively further

shift the real burden of proof from shippers to railroads in most rate cases brought before the Board.

Instead, shipper commenters claim that the disclosures required by the Board in SSAC cases require only the production of "documents or information." See CURE Reply Comments at 16-17. But the "Second Disclosure" requirements demand far more from the railroads than the simple production of material in the form maintained in the ordinary course of business, in accordance with ordinary discovery rules. Rather, the SSAC "Second Disclosure" requirement imposes an unprecedented burden on railroad defendants to develop and organize evidence for complainants and to provide them with nearly all of the major components of such cases with virtually no corresponding burden to be borne by the shippers. CSXT/NS Opening Comments at 5-12. In essence, the Second Disclosure requires a defendant to develop and support shipper's case for it, and then present that case to the shipper for use in its case-in-chief. Such a process is unfair and contrary to the near-universal allocation of evidentiary burdens, both in Board cases and in American litigation generally.

Moreover, as CSXT/NS have previously demonstrated, when combined with the "Second Disclosure" requirement, the Board's proposal to eliminate limits on SSAC relief would (1) inject regulatory leverage into private rate negotiations, (2) provide shippers with an incentive to file SSAC cases in order to get a virtually no-cost preview of their likelihood of prevailing in such a case; (3) open all rate disputes to this sort of unfair negotiating leverage, asymmetric burdens, and free peck at a rate analysis; (4) require railroads to develop and present the shipper's case for it; and (5) violate the

Board's oft-repeated policy and goal of encouraging the private resolution of rate disputes

**V. THERE IS NO BASIS FOR THE BOARD TO CHANGE ITS RULES GOVERNING INTEREST ON REPARATIONS.**

The Board's proposal to change its longstanding benchmark interest rate is based on nothing more than an unexplained and unsupported "concern[ ] that the T-Bill rate . . . may be insufficient" *Rate Regulation Reforms*, NPRM at 18. As AAR explained in its opening comments, the ICC originally adopted a specific interest rate benchmark at the direction of Congress.<sup>13</sup> In 1993, the ICC conducted a rulemaking to consider whether a different interest measure might be appropriate. Based on a full record, the ICC concluded that the 90-day T-Bill rate remained the most appropriate measure for interest on reparations. *See Procedures to Calculate Interest Rates*, 9 I.C.C.2d 528, 534 (1993); AAR Opening Comments at 23-26. Beyond a conclusory "concern" that the current level of the variable interest rate "may be insufficient," the Board offered no justification, evidence, or rationale to support its proposal to abandon its longstanding interest benchmark, which makes meaningful comment difficult. The agency has maintained the same interest benchmark through a variety of markets and economic conditions for 35 years. Throughout that time, widely varying economic conditions have caused the level of that benchmark rate to vary substantially (at one time exceeding 14%), and the agency has steadfastly adhered to the same benchmark because it understands that benchmark is

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<sup>13</sup> *See generally*, STB Ex Parte No. 715 Comments of the Association of American Railroads at 23-26 (Oct. 23, 2012). AAR is participating in this proceeding on behalf of its members, including CSXT and NS. The two carriers incorporate to these comments, as set forth in their entirety herein, the AAR opening comments in this proceeding, including comments on the Board's proposal regarding interest on reparations

a market-based interest rate that reflects current economic conditions. The Board did not change its interest benchmark when the market rate was relatively high, and there is no reason to change the benchmark during a period of relatively low interest rates.

Importantly, no commenter has offered a sound, well-reasoned argument for changing the Board's benchmark interest rate. Not surprisingly, shippers generally support the adoption of a new benchmark that they believe will result in higher interest on rate case reparations. But none of them has offered any argument or support for the prime rate benchmark proposed by the Board. Nor has any commenter provided a meaningful or principled basis for abandoning the longstanding, market-driven interest rate that has served the agency and its interest rate goals (*e.g.*, using a rate of interest that applies to risk-free investments) well through a variety of markets and economic conditions.

As CSXT/NS demonstrated in their comments, there is no rational basis for the Board to adopt the so-called "prime rate" of interest. *See CSXT/NS Reply Comments at 32-35.* Contrary to the Board's assumption, the prime rate is not the rate that banks charge to their most creditworthy customers, nor is there any evidence in the record that the prime rate is a market-based rate. *See id.* at 33-34. Indeed, by definition, the prime rate could never go below 3 percent, regardless of market conditions or the level of other interest rates. *See id.* Finally, there is no evidence to support the notion that an arbitrarily higher interest rate on reparations would somehow increase "compliance with [Board] rules." Ex Parte 715 NPRM at 18. As CSXT/NS previously explained, carriers have more than ample reason and incentive to comply with Board rules, and changing the

interest rate benchmark would not affect their efforts to comply with governing rules.

*See id*

In sum, the Board has offered no rational basis or evidence to support its proposed change to the interest benchmark, and commenters have offered neither evidence nor principled argument to support such a change. The alternative benchmark the Board has proposed is arbitrary and without any basis or support in the record. Changing the interest rate on reparations to the “prime rate” would be arbitrary, capricious and without support in the record. The Board should retain its longstanding, sound market-based interest rate benchmark for reparations and reject the proposal to change that benchmark.

**VI. EXTRANEOUS PROPOSALS ARE NOT PROPER SUBJECTS OF THIS RULEMAKING.**

Ironically, some of the same shippers who claim that railroads seek to introduce issues allegedly outside the scope of the NPRM, themselves devote substantial comments raising and discussing issues that are not even remotely implicated by the NPRM.

*Compare* CURE Reply Comments at 10 (contending that western railroads should not be permitted to argue for the elimination of cross-over traffic as a solution to problems the Board identified in the NPRM) *with* CURE Reply Comments at 1-4 (raising and discussing revenue adequacy constraint). In fact, CURE spends its first four pages discussing the “revenue adequacy” constraint, which is utterly separate and distinct from the SAC, SSAC, and Three-Benchmark tests that are the focus of the NPRM and properly at issue in this proceeding. CURE Reply Comments at 1-4, *see also* ARC Reply Comments at 6-8, *cf.* NPRM, *Rate Regulation Reforms* (no discussion of revenue adequacy policies or test, let alone any proposal)

In addition to the irrelevance of revenue adequacy to the issues in this rulemaking, as laid out by the NPRM, CURE's revenue adequacy arguments are premised on clearly erroneous and unsupported assertions. For example, CURE's primary argument is that the Board should act because "the Surface Transportation Board Authorization Act of 2009, contained a provision directing the Board to begin developing its 'revenue adequacy' constraint." CURE Reply Comments at 3. Remarkably, CURE neglects to mention that neither the full Senate nor the House of Representatives either considered or voted on the legislation -- much less approved it. Instead the bill died without any consideration by the full Senate, and received no consideration whatsoever by the House.

Far from showing that Congress intended to direct the Board to develop a revenue adequacy test, Congress's failure to even bring the bill up for a vote in that Congress or at anytime since, the legislative history suggests that Congress is disinclined to issue such direction or to impose *any* additional rate regulation. The Board should ignore such extraneous and unfounded claims and focus on the proposals and issues properly within

the scope of this rulemaking.

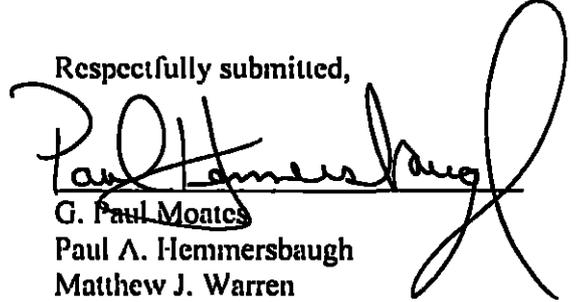
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**Dated: January 7, 2013**

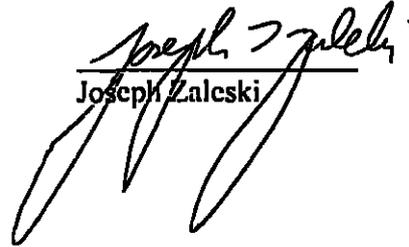
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of January 2013, I served a copy of the foregoing Rebuttal Comments of Norfolk Southern Railway Company and CSX Transportation, Inc. by first class mail, postage prepaid, on all parties of record.

  
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Joseph Zaleski

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# EXHIBIT 1

**Surface Transportation Board  
Ex Parte 715  
Rate Regulation Reforms**

**Rebuttal Comments of CSX Transportation, Inc.  
and Norfolk Southern Railway Company  
January 7, 2013**

**Exhibit 1 - Video**