

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**M&G POLYMERS USA, LLC v. CSX TRANSPORTATION, INC.**

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**DOCKET NO. NOR 42123**

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**COMMENTS  
OF AMICUS CURIAE  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**Dated: November 28, 2012**

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In this case, the Board issued its decision on September 27, 2012, addressing CSX Transportation's ("CSX") market dominance over the movements challenged by M&G Polymers ("M&G"). The Board concluded that M&G had viable motor carrier alternatives for most of the challenged movements despite the complainant's arguments that customer preference, product integrity concerns, and infrastructure constraints rendered these alternatives infeasible. See *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123, at 12-13 (Sept. 27, 2012). Having found that the transportation alternatives were feasible, the Board manufactured a new test, which it called the "limit price" test, in order for the Board supposedly to gauge the effectiveness of the feasible alternatives in constraining the railroad's pricing.

The first step in the Board's proposed approach is to set a "limit price," which the Board defines as the highest price a railroad could theoretically charge a shipper "without causing a significant amount of the issue traffic on a particular rail movement to be diverted to any particular competitive alternative." *Id.* at 3-4. Next, the Board would calculate a "limit price RVC ratio," defined as the ratio of the limit price to the rail

carrier's "variable cost of providing the service at issue." *Id.* at 4. This limit price R/VC ratio then would be compared to the railroad's most recent Revenue Shortfall Allocation Method (RSAM) figure. If the limit price R/VC ratio exceeded the RSAM figure, the Board would preliminarily conclude that "the alternative cannot exert competitive pressure sufficient to effectively constrain the rate at issue." *Id.* If the limit price R/VC ratio is less than the current RSAM figure, the Board would preliminarily conclude that "the competitive alternative effectively constrains the rate at issue." *Id.* As a final step, this "preliminary" conclusion may be subject to change if the Board determines that there are "*certain intangible qualities*" that contribute to the effectiveness or lack of effectiveness of the limit price to constrain the railroad rate at issue. *Id.* (emphasis added). These intangible qualities are characterized as "certain unquantifiable benefits" or "certain unquantifiable costs." *Id.* at 14. The Board concluded that most of the transportation alternatives that were feasible failed the limit price test, and therefore that CSX was market dominant over those movements.

Norfolk Southern Railway ("NS") submits these comments as an amicus curiae pursuant to the Board's order of October 25, 2012. *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at n.10 (Oct. 25, 2012). First, adoption of the test in this case would not bind non-parties, including amici curiae such as NS, and would be subject to appeal by such non-parties if applied in a subsequent case to which they were a party. Second, adoption of the "limit price" test in this case would violate the Administrative Procedure Act. Third, it is clear that the "limit price" test as a presumption is unlawful, uneconomic, and bad policy.

**I. Adoption of the “Limit Price” Test in This Case Would Not Create a Binding Rule on Amici Curiae.**

Norfolk Southern submits these comments as an amicus curiae, as instructed by the Board. See *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at n.10 (Oct. 25, 2012). As an amicus, NS is not a party to this action. See *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”). As a result, NS has no right to bring an appeal or otherwise contest the Board’s ultimate decision in the current case. 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). Therefore, it is clear that even if the Board does apply a “limit price” test in *M&G*, regardless of its exact specifications, NS and other participants in subsequent adjudications will retain their right to challenge the Board’s application of its new precedent in those cases because: (1) NS is merely an amicus curiae; (2) NS has no right to appeal a decision in *M&G*; and (3) the Board’s decision to permit amici curiae does not change the *M&G* adjudication into a rulemaking. See *General American Transp. Corp. v. ICC*, 872 F.2d 1048, 1060 (D.C. Cir. 1989) (finding “no authority for [the] theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the

comments of those who have an interest in prospective application of the principle under study”). If the Board were to consider applying the “limit price” test in a case to which NS was a party, NS will litigate the legality of the test at that time. *Id.* (noting that adjudicatory rulings do not “harden into rules”).

## **II. Adoption of the “Limit Price” Test in This Case Would Violate the Administrative Procedure Act**

The new “limit price” test would be a sharp break from the Board’s existing and longstanding rules on qualitative market dominance, which were adopted through notice-and-comment rulemaking by the Interstate Commerce Commission (“ICC”) in *Market Dominance Determinations*, 365 I.C.C. 118 (1981) (hereinafter “*Market Dominance Determinations*”). The Board would violate the Administrative Procedure Act (“APA”) by attempting to amend through this adjudication rules that were adopted by the agency (and amended by the agency) in notice-and-comment rulemakings. See, e.g., 5 USC § 553(b) (requiring notice of proposed rulemaking to be published in the Federal Register).

In 1976, the ICC first adopted market dominance “rules, setting out the factual situations that would trigger a rebuttable presumption of market dominance.” *Market Dominance Determinations—Product and Geographic Competition*, STB Ex Parte No. 627 (STB served Dec. 21, 1998). In adopting a set of rebuttable presumptions, the ICC specifically said it was attempting to devise rules that were “practical and capable of prompt administrative application.” *Id.* at 2-3.

During the next iteration of rulemaking regarding market dominance, the ICC specifically terminated the use of rebuttable presumptions for the purposes of qualitative

market dominance analysis, stating, “[w]e have decided to discontinue the use of rebuttable presumptions as a tool to develop this qualitative evidence.” *Market Dominance Determinations* at 119; *id.* at 120 (“Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures.”). Indeed, not only did the ICC reject reliance on rebuttable presumptions generally, it also specifically rejected rebuttable presumptions based upon revenue to variable cost ratios (“R/VC”) concluding, “[t]here are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.” *Id.* at 122. The ICC instead adopted legislative rules governing submissions and individualized consideration of evidence of qualitative market dominance. *Id.* at 132-34.

The Board may not now reverse those legislative rules in an individual adjudication.<sup>1</sup> Indeed, the Board acknowledged the need for a notice-and-comment rulemaking to amend the qualitative market dominance rules established in *Market Dominance Determinations* by conducting even further rulemaking to amend the agency’s rules on consideration of product and geographic competition, as opposed to altering those rules through adjudication. See *Market Dominance Determinations*—

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<sup>1</sup> The fact that the Board labels the rule change announced in the Decision a “refinement” of its procedures does not change the fact that it is truly a reversal in policy. See *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123, at 21 (Sept. 27, 2012).

*Product and Geographic Competition*, STB Ex Parte No. 627 (STB served Dec. 21, 1998). The Board's consistent use of rulemakings to set the rules regarding market dominance presentations in rate case has created settled expectations.

Given this history, adoption of the new "limit price" test in this case would be an impermissible amendment of the market dominance rules that were adopted through notice-and-comment rulemaking and specifically rejected rebuttable presumptions and tests based on RVC ratios. See *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C.Cir.1993) ("[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first," subject to notice and comment requirements); *Broadgate Inc. v. U.S. Citizenship and Immigration Services*, 730 F.Supp.2d 240, 244 (D.D.C. 2010) (An "agency's intent to exercise legislative power may be shown where the second rule effectively amends the previously adopted legislative rule, either by repudiating it or by virtue of the two rules' irreconcilability."). Although an agency has discretion in the first instance to determine whether to adopt a binding rule through a rulemaking or to establish precedent in an adjudication, the agency's initial decision has consequences. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974). A properly adopted rule becomes binding and must be changed through notice-and-comment rulemaking.<sup>2</sup> See *General*

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<sup>2</sup> On the other hand, agency use of adjudications to resolve issues provides the agency more flexibility to resolve novel questions that have not been address 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.*, 872 F.2d at 1060. But the agency chose to adopt and amend its rules regarding market dominance through notice-and-comment rulemaking and not through adjudications. See *Market Dominance*

*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 longstanding adjudicatory precedent, which can be altered or amended in an subsequent adjudication). 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). Accordingly, any application of the Board’s new “limit price” market dominance rule would be invalid absent notice-and-comment rulemaking in compliance with the APA.<sup>3</sup>

### III. The “Limit Price” Test Is Neither Lawful Nor Reasonable

The “limit price” is unlawful because, at the end of the day, all it does is presume market dominance based on the level of R/VC ratios in violation of Section 10707(d)(2) of Title 49. Further, the Board provides no rational explanation for reincarnating a test

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*Determinations*, 365 I.C.C. 118 (1981); *Market Dominance Determinations—Product and Geographic Competition*, STB Ex Parte No. 627 (STB served Dec. 21, 1998).

<sup>3</sup> In this proceeding, however, no notice was filed in the Federal Register, and the Board’s decision to allow parties to comment as *amicus curiae* does not satisfy the requirements of the APA. *General American Transp. Corp. v. ICC*, 872 F.2d 1048, (D.C. Cir. 1989) (finding “no authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study”). Therefore, application of the “limit price” test in this or other adjudications exceeds the Board’s authority.

based on R/VC ratios that was long-ago rejected or for relying on RSAM, which tells us nothing about the competition in the marketplace for a specific movement. Despite lots of jargon and precise-looking mathematical formulas, there is also no economic basis for the test, which fails to take into account the individual market factors that the Board's predecessor has found must be considered to determine the effectiveness of otherwise feasible transportation alternatives. See, e.g., *Market Dominance Determinations*, at 133. Indeed, the fallacy of the limit price test is revealed by the absurd results it generates. Accordingly, the Board should abandon the "limit price" test.

First, the "limit price" approach suggested by the Board in this case is not a lawful means to determine whether competition is effective. The limit price approach directly contradicts the statute's language and is at odds with Congress's expressed opposition to the use of rebuttable presumptions based on variable costs for qualitative market dominance purposes. Section 10707(d)(2) explicitly prohibits the Board from establishing a presumption that a "rail carrier has or does not have market dominance over such transportation" because the rate yields a revenue-to-variable cost ratio "equal to or greater than 180 percent." The RSAM for each Class I railroad is above 180%. One reason the statute prohibits presumptions like the one the Board seeks to adopt here is that those presumptions do not have any relation to the actual competition in the transportation marketplace for specific movements of specific commodities.

Although the Board attempts to dodge the statutory limitation by comparing its manufactured R/VC ratio for the transportation alternative to the defendant railroad's RSAM, this is just gimmickry. Although the "limit-price" test uses the rate levels charged by the competitor rather than the railroad's rate as the starting point for calculating the

RVC of the limit price for the transportation alternative, in a competitive marketplace one would expect in many cases that the carrier's rate and the competitor's rate would be roughly comparable (on a quality-adjusted basis).<sup>4</sup> For example, in *E.I. DuPont v. Norfolk Southern Railway Company*, STB Docket No. NOR 42125, Norfolk Southern will provide extensive evidence that there are feasible transportation alternatives for 96 of the challenged lanes. In addition, NS will show that these alternatives are effective, including showing that in most of these lanes the rail rate and the truck rates are within ten percent or less of one another. NS demonstrates this largely by using the actual contracts DuPont has entered into with the transportation alternative and other evidence mandated by the rules regarding market dominance that the agency adopted in prior notice-and-comment rulemaking.<sup>5</sup> Because the rate levels of actual competitors will

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<sup>4</sup> How much adjustment must be taken into account depends on the specific movement at issue and accounting for various factors such as the needs of the customer and the nature of the commodity. But both the rail rate and the rate of the transportation alternative will be set with these factors in mind, so those two rates remain linked in a competitive market.

<sup>5</sup> *Market Dominance Determinations*, at 133. In that decision, the ICC established the currently applicable rules for market dominance evidence:

"b. Motor carriage. -- Unlike rail or water alternatives, the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted. Therefore, the feasibility of using motor carriage as an alternative to rail may be viewed as depending exclusively on the nature of the product and the needs of the shipper or receiver. Effective competition from motor carriage may be deduced from the following types of evidence:

- (1) the amount of the product in question that is transported by motor carrier where rail alternatives are available;
- (2) the amount of the product that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail;
- (3) the amount of the product that is transported using motor carrier by shippers with similar needs (distributional, inventory, et cetera) as the shipper protesting the rate;
- (4) physical characteristics of the product in question that may preclude transportation by motor carrier; and

approach one another, the level of the rail rate is essentially what determines whether a rate passes or fails the “limit price” test. In the end, the test involves little more than comparing the rail rate (or a rate close to the rail rate) to the RSAM and judging whether that rate exceeds RSAM.

Whether the rail rate is high should not be a factor in a market dominance determination. Indeed, it is a consideration that is prohibited by the statute. 49 U.S.C. § 10707(d)(2). The Board is not permitted to judge market dominance by asking whether rate levels appear to be reasonable. The Board’s “limit price” test, by contrast, presupposes that *even a rate produced by competition between a railroad and trucking companies* might nonetheless be “too high” for the competition to be deemed “effective” simply because the rail rate is too high relative to the railroad’s RSAM. This throws out the market dominance threshold test altogether in favor of a test that is premised on an unlawful measure of whether a rate appears reasonable.<sup>6</sup>

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(5) the transportation costs of the rail and motor carrier alternatives.

Other types of evidence on the feasibility or nonfeasibility of motor carriage as an alternative to rail will also be considered.”

<sup>6</sup> It is beyond dispute that the R/VC ratio of a challenged rate is not determinative of whether a rate is reasonable. Whether a challenged rate is reasonable is determined by faithful, consistent application of the stand-alone cost test (or SSAC or Three-Benchmark test, as applicable), and nothing more. Some shippers seem to want to assume or imply that the R/VC ratio yielded from a particular rate for a particular shipment indicates something about the reasonableness of the rate. See, e.g., Opening Comments of Alliance for Rail Competition, et al., *Rate Regulation Reforms*, Ex Parte 715, at 7 (assuming rates in SAC cases should be reduced to 180%). The Board knows well that such assertions are simply wrong and contrary to 49 U.S.C. § 10707(d)(2)(b). Moreover, just as the Board has found that “a rate may be unreasonable even if the carrier is far short of revenue adequacy,” (*id.* at 16 (quoting *Rate Guidelines – Non-Coal Proceedings*, 1 STB 1004, 1017 (1996)), the converse is also true – a high rate may be reasonable even if the carrier is far in excess of RSAM or any other R/VC measure.

Second, the Board cannot offer a rational explanation for reversing a prior decision of its predecessor or for using RSAM in a market dominance inquiry. Given the failings of the “limit price” test described in this filing, it is unsurprising that the Board has provided no rationale for it. If the Board intends its RSAM benchmark to reflect what real competition in the marketplace would yield for a particular movement at issue in a rate case, it is entirely arbitrary and unsupported. The Board merely *asserts* that a rate producing an R/VC ratio above RSAM “is a useful indicator that competitive transportation alternatives – whether intermodal or intramodal – do not exist and are not effectively constraining the rate.” Likewise, it merely states as an article of faith that a limit price above RSAM “provides an objective indication of monopoly pricing.” The Board’s only discussion of these issues is at pages 15-17, and is purely conclusory. The Board has not and cannot provide a rational, sound, economic explanation for these bare assertions.

Moreover, the limit price test simply reincarnates a long-ago rejected test that relied on a comparison of the rail rate to some multiplier of the variable cost of the move without explaining why the ICC’s rejection of that test was wrong. In 1981, the ICC considered establishing a rebuttable presumption that “market dominance will arise where the rate in issue exceeds the variable cost of providing the service by 60 percent or more.” *Market Dominance Determinations*, at 122. But the ICC rejected the notion that cost ratios (if they could be properly calculated) demonstrated anything about market dominance:

But we question whether, even if calculated on the basis of accurate cost information, they reliably indicate the presence or absence of market dominance. Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually

move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.

*Id.* The fallacy of using R/V/C ratios in market dominance determinations was recently confirmed by the Board's independent economists:

The weak relationships between R/V/C ratios and market structure factors illustrated in Table ES-4 imply that correctly assessing the presence of market-dominant behavior requires direct assessment of relevant market structure factors. Thus, regulatory reforms that would establish R/V/C tests as the sole quantitative indicator of a railroad's market dominance are not appropriate.

Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition—Revised Final Report* at ES-14 (Nov. 2009). The Board has provided no reasonable or economically-sound reason for contradicting its predecessor's prior findings.

Similarly, there is no plausible explanation for using RSAM in a market dominance inquiry. "RSAM measures the average markup over variable cost that the defendant railroad would need to charge all of its "potentially captive" traffic (traffic priced above the 180% R/V/C level) in order for the railroad to earn adequate revenues." *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (Mar. 19, 2008). RSAM therefore is a general measure that is exclusively about the railroad as a whole. It is not a measure of whether the railroad faces actual competition for a particular shipment or how robust that competition is. The information contained in RSAM is unrelated to any specific market and therefore it has no bearing as to whether a rail price in a specific market is effectively constrained by competition. *Market*

*Dominance Determinations*, at 122 (“There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will . . . be misleading. . .”). Moreover, the focus on the price of alternatives to the rail transportation at issue on the one hand and RSAM on the other means that the analysis the Board is undertaking is completely untethered to the actions of the shipper and the railroad in the real world marketplace and is therefore “misleading.” This failing alone dooms the “limit price” test.

Third, the “limit price” test lacks any economic foundation because (1) it does not look at the specific transportation market for the movements at issue; and (2) the test produces absurd and arbitrary results.

The “limit price” test fails to examine the specific transportation market at issue. For example, the transportation of a large bulk commodity is different from the transportation of small volume moves of plastic pellets. Accordingly, the prices that two competitors will charge in each situation are different. The factors that determine how each competitor would price are not considered in the “limit price” test. That test does not look at factors such as the customer’s demand, the service characteristics and difference in service that each competitor can provide, and constraints each competitor must take into account when pricing such as driver shortages or other capacity constraints. *Market Dominance Determinations*, at 120 (“[T]he factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures.”). Instead, the only market information used in the proposed limit pricing test is the price limit for the transportation alternative. That calculation itself is flawed and meaningless because it

is not the competitor's true R/VC ratio because the test uses the defendant railroad's variable costs rather than the competitor's. Thus, it is not clear what this price limit could accurately measure because it has apples in the numerator and oranges in the denominator.<sup>7</sup> Nevertheless, even if the price limit for the transportation alternative had meaning, it is still not used to examine the level of competition for the movement at issue because the test never compares the transportation alternative's pricing of the specific movement to the railroad's pricing of the same movement. Instead, the Board relies on a measure that has no relation to the transportation market for the specific movement – RSAM, which is calculated for the railroad as a whole.

The Board offers no evidence or analysis as to why rates above RSAM could not result where there is actual and robust market competition. In fact, one might expect this in market circumstances where, among other things:

- many variable costs are not well captured by a railroads' URCS-based costs;
- providers face significant fixed costs and uncertainties about how those costs will be recovered;
- providers face high opportunity costs arising from constrained capacity and other factors; and
- the opportunity to switch modes is available and feasible but there are some costs associated with switching from one transportation provider to another in the short term -- even though the availability of alternative transport options may provide real discipline whenever supply chain options are up for reevaluation.

See *id.* These market factors are simply not captured in a test that relies on price ratios (either of the railroad or properly calculated for the competitive alternative). As the ICC warned, “[t]here are any number of reasons why a high price/cost ratio may not be

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<sup>7</sup> The Board provides no rational explanation for what the price limit for the transportation alternative could possibly mean given this flaw.

indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.” *Id.* at 122.

Moreover, the Board's approach of presuming market dominance whenever a "limit price RVC" is higher than the carrier's RSAM and ignoring the actual competition and market factors that drive that competition for the transportation of the specific movement leads to absurd and arbitrary results. Even in instances in which the price of the transportation alternative is in fact *significantly lower* than the carrier's own price, the Board's test could lead to a presumption of market dominance. For example, if a rate for a particular shipment from a chemical plant served by a rail carrier generates an RVC ratio of 600%, the Board's test would find that the carrier is presumptively "market dominant" *even if a truck alternative existed that was moving some of those same shipments at a rate 35% cheaper than the rail rate*. Such a result is entirely driven by a relatively high limit price RVC ratio in comparison to the RSAM rather than the market. A similarly absurd result can occur for a high-priced commodity where the customer has the option of two rail carriers. Even in the instance of a *dual-served* chemical plant, if the RVC ratios were higher on both carriers than the corresponding RSAM figures, then the Board's test would lead to *both* carriers being presumptively "market dominant." Obviously, a test that yields such illogical results is not an accurate gauge of effective competition. In fact, there could be a situation in which trucks, barges, and rails all actively compete for a movement but at prices higher than RSAM (perhaps because of capacity constraints at the point and time of the price bids), still leaving the railroad market dominant.

These absurdities were a major concern to the ICC when it rejected a test very similar to the “limit price” test. “Since the simplicity of the cost test requires that a standard costing methodology be used, there is no way of avoiding the distorting inaccuracies of such a test. Many rates falling above a designated revenue-to-variable cost ratio would, on the basis of more accurate cost estimates, in fact be below it.” *Id.* The ICC determined that such a test was so inaccurate that it could not even be used as a rebuttable presumption of market dominance – regardless of what additional evidence it permitted parties to provide in the market dominance inquiry. *Id.* at 120-121. The Board offers no explanation for why the same results are no longer the significant concern they have always been.

Fourth, the Board’s assertions that its RSAM-based test is a mere “refinement” of its approach to qualitative market dominance, and would establish only a “preliminary” conclusion of market dominance, cannot save the test. In fact, the test appears quite rigid. The other factors the Board says it will consider appear limited to factors that would properly be regarded as quality-based adjustments to the relative prices of the competing alternatives, and not evidence going to the heart of the question whether the competitive alternative has in fact provided market discipline. Indeed, the public version of the Appendix to the September 27 Decision seems to confirm that the presumption is nearly iron-clad – regardless of the “intangible qualities.” It appears no “intangible qualities” could overcome a discrepancy between the limit price and RSAM of any size.

#### IV. CONCLUSION

In sum, the proposed test is unlawful under the express terms of the Board's statute, irrational, and economically unsound. Its creation of a presumption based on R/VC ratios violates the statute that makes clear the level of the rate has no bearing on market dominance. Moreover, the test simply ignores the actual market for transportation and produces bizarre results. Accordingly, there can be no rational explanation that overcomes the findings of the ICC more than 30 years ago. Namely, "[t]here are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced." 364 I.C.C. at 122.

Respectfully Submitted,



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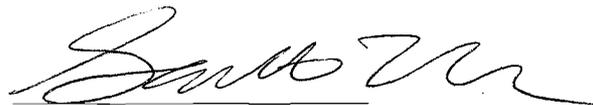
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**Dated: November 28, 2012**

**Certificate of Service**

I hereby certify that I have served all parties of record in this proceeding with Norfolk Southern's Motion to Participate and Comments by United States mail.



Garrett Urban

Norfolk Southern Railway Co.

Date: 11/28/2012