

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

242038

ENTERED
Office of Proceedings
November 14, 2016
Part of
Public Record

Ex Parte No. 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE RELIEF

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

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November 14, 2016

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CSX Transportation, Inc. (“CSXT”) respectfully submits opening comments on the advance notice of proposed rulemaking (“ANPRM”) issued in the above-captioned proceeding on August 30, 2016. CSXT also joins in the comments of the Association of American Railroads (“AAR”) being filed today.

CSXT appreciates the Board’s solicitation of comments through the process of an ANPRM. CSXT has experience in rate reasonableness cases both under the Stand Alone Cost (“SAC”) methodology¹ and under the Three Benchmark approach.² These comments draw on that experience and on CSXT’s belief that the Board’s rate regulations need to be economically sound, fair to all parties, and consistent with the limits that Congress has placed on the Board’s jurisdiction. The

¹ See, e.g., *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070; *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110; *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (“*TPI*”); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123 (“*M&G*”); *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142 (“*Consumers*”).

² See, e.g., *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42100; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42101.

Board's decision to seek stakeholder input through an ANPRM provides a mechanism most likely to further those goals.

CSXT's individual comments address five issues of critical importance:

First, it is far from clear that the Board needs to develop a methodology that would be even more simplified than the “very rough and imprecise” Three Benchmark methodology.³

Second, the Board needs to ensure that any rate reasonableness methodology allows for a fair opportunity to present relevant evidence about market dominance—the statutory prerequisite for the Board's jurisdiction.

Third, the Board should not adopt any methodology that would add dissimilar or non-defendant traffic to a comparison group in the interest of increasing the sample size.

Fourth, the Board should adopt fair procedures for the presentation of evidence and should rethink any procedure that would bar defendants from addressing new or revised arguments that complainants raise for the first time at an evidentiary hearing.

Fifth, the Board should adhere to its judicially-approved policy of using award caps to encourage complainants to use more rigorous methodologies where appropriate.

³ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 73 (STB served Sept. 5, 2007) (“*Simplified Standards*”).

I. There Is No Need For Yet Another Rate Reasonableness Methodology.

At the outset, CSXT urges the Board to think carefully before instituting a rulemaking to develop yet another rate reasonableness methodology. The Board has one economically sound methodology: SAC.⁴ SAC has been approved by the courts as an economically sound way to implement the policies of the Interstate Commerce Act⁵ and reaffirmed by Congress as recently as last year's STB Reauthorization Act.⁶ The recently commissioned InterVISTAS Report confirms the economic soundness of this test, concluding that "the STB's Full-SAC method has stood the test of time as a maximum rate reasonableness methodology. . . ."⁷ The

⁴ See *Simplified Standards* at 13 ("CMP, with its SAC constraint, is the most accurate procedure available for determining the reasonableness of rail rates when there is an absence of effective competition."); *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996) ("CMP provides the only economically precise measure of rate reasonableness and therefore must be used whenever possible.").

⁵ See, e.g., *Consolidated Rail Corp. v. United States*, 812 F.2d 1444, 1449 (3d Cir. 1987) ("We hold that [SAC is] consistent with the 4R Act and the Staggers Act"); *Potomac Elec. Power Co. v. ICC*, 744 F.2d 185, 193 (D.C. Cir. 1984) ("Commission's use of stand-alone cost" is "appropriate. . . .").

⁶ Surface Transp. Bd. Reauthorization Act of 2015, Pub. L. 114-110, § 11, 129 Stat. 2228, 2233 (2015) (adopting schedules for SAC cases and providing that simplified methodologies should be used "in those cases in which a full stand-alone cost presentation is too costly, given the value of the case").

⁷ InterVISTAS, *An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, at 134 (Sept. 14, 2016) ("InterVISTAS Report").

Board has worked in multiple proceedings to refine and streamline the SAC test,⁸ and it is currently exploring ideas for expediting the application of the test.⁹

In keeping with Congress’s requirement in 49 U.S.C. § 10701(d)(3) that the Board “maintain . . . simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case,” the Board also has two alternative simplified methodologies—each of which has also been refined in multiple rulemakings.¹⁰ The simplest of these, the Three Benchmark methodology, has been recognized by the Board itself to be “crude” and “very rough and imprecise.”¹¹ And the costs of litigating a Three Benchmark case are not high—the Board itself has estimated the litigation costs to be approximately \$250,000.¹² This amount (which the Board concluded would be reduced as the test was refined)

⁸ See, e.g., *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657; *Rate Regulation Reforms*, STB Ex Parte No. 715.

⁹ See *Expediting Rate Cases*, STB Ex Parte No. 733.

¹⁰ *Simplified Standards* (creating Simplified SAC and substantially modifying prior simplified guideline to create Three Benchmark); *Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method*, STB Ex Parte No. 646 (Sub-No. 2) (STB served Nov. 21, 2008) (revising Revenue Shortfall Allocation Method (“RSAM”) formula); *Rate Regulation Reforms*, STB Ex Parte No. 715 (STB served July 18, 2013) (raising the limitations on awards, changing the interest rate on reparations, and making technical changes to procedures for the presentation of evidence).

¹¹ *Simplified Standards* at 73.

¹² *Id.* at 31.

compares quite favorably to the litigation costs of almost any sort of commercial litigation.¹³

It is not at all clear that there is a regulatory need for a methodology that would be even cruder and less precise than Three Benchmark. Indeed, adopting such a methodology would directly contradict the Board-commissioned InterVISTAS Report, which concluded that the Board should not further simplify its rate reasonableness methodology.¹⁴ CSXT urges the Board to follow this advice and discontinue a proceeding that would add an even more economically deficient price control methodology to the Board's existing healthy suite of three procedures.

II. Any Alternative Methodology Must Allow For Meaningful Consideration of Market Dominance.

If the Board nonetheless proceeds with developing a new methodology, it must ensure that methodology complies with Congress's command that the Board only regulate rates where there is a lack of effective competition. The law is clear that the Board may not intervene in the transportation marketplace unless a

¹³ A litigant to one of the first Three Benchmark cases has indicated that its litigation costs were less than \$500,000. *See Rate Regulation Reforms*, STB Ex Parte No. 715, *Comments of U.S. Magnesium*, Kaplan Verified Statement, at 4 (filed Oct. 23, 2012). While this estimate was not supported by any accounting that would explain the divergence between the asserted cost and the Board's *Simplified Standards* findings, in any event this asserted cost for one of the first cases under a new methodology also favorably compares to the costs of most commercial litigation.

¹⁴ InterVISTAS Report at xvii ("Team believes that simplification of either the Three-Benchmark or Simplified-SAC tests risks moving the approaches further away from the bedrock CMP principles, undermine the reliability of the tests, and would not necessarily incentivize shippers to use those tests.").

shipper proves that it lacks an effective alternative to rail service.¹⁵ That law is an absolute limit regulating the agency’s jurisdiction, and it is not different for “small” or even “very small” shippers. The statute simply provides that the Board has no jurisdiction over shipments subject to effective competition. Indeed, it is often easier for low-volume shipments to be transported through alternatives like trucking or rail-truck transloading than it is for high-volume shipments.¹⁶

The ANPRM rightly recognizes the statutory requirement that the Board may only regulate when it has found a lack of effective competition. But certain aspects of the proposed methodology could adversely affect the Board’s ability to comply with that jurisdictional command.

First, the ANPRM suggests that the Board could use a preliminary screen to “identify those movements for which truck transportation alternatives are unlikely and the rates are significant outliers.” ANPRM at 15. CSXT does not object to the general concept of a preliminary screen, but the Board should be careful not to assume that such a screen is a replacement for a meaningful consideration of market dominance. The Board suggests that 500 highway miles is an effective cutoff because movements under that distance are more likely to be subject to truck

¹⁵ See, e.g., *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1506 (D.C. Cir. 1988) (Congressional policy is to “preclude the Commission from scrutinizing rates where ‘effective competition’ exists”); *Potomac Elec. Power Co. v. Consolidated Rail Corp.*, 367 I.C.C. 532, 536 (1983) (Congress intended to “allow the forces of the marketplace to regulate railroad rates whenever possible. . . .”)(citation omitted).

¹⁶ See, e.g., *FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 715 (2000) (finding truck alternative infeasible when volumes would require “40,000 to 50,000 truck shipments per year”); *W. Tex. Utils. v. Burlington N. R.R.*, 1 S.T.B. 638, 652 (1996) (concluding that trucking alternative was not feasible in part because it would have required an additional 200 truck shipments per day).

competition. *See id.* at 16. But trucking is often an effective competitor for movements above that distance.¹⁷ Moreover, many movements have effective rail-truck transload competition, involving a short truck movement to a transload facility and a longer haul on another railroad.¹⁸ The effectiveness of that competition is not influenced by the highway miles between origin and destination. The Board therefore cannot assume that the lanes remaining after the preliminary screen is applied are in any way less likely to be constrained by effective competition.

Second, the ANPRM's proposed discovery limitations would hobble the defendant's ability to make a meaningful case on market dominance. Specifically, the ANPRM suggests that a shipper could provide an initial disclosure in the form of a verified statement about (1) whether the issue traffic moved by alternative transportation and (2) whether the shipper had inquired with alternative transportation providers about the issue traffic. ANPRM at 17-18. Other than that disclosure, the ANPRM suggests that discovery might be limited or eliminated altogether. *Id.* at 18. Such a framework is misguided, because in many cases it would not allow for meaningful evidence on market dominance.

¹⁷ *See, e.g., M&G*, STB Docket No. 42123, at 48 (STB served Sept. 27, 2012) (finding CSXT not market dominant for Apply Grove-Waynesville lane, a 572 mile movement, because of a direct truck alternative).

¹⁸ *See, e.g., M&G*, STB Docket No. 42123, at 56 (finding CSXT not market dominant for Altamira-Clifton Forge movement, a 1,335 mile lane, because of transloading alternative); *TPI*, STB Docket No. 42121, at 90 (STB served May 31, 2013) (finding CSXT not market dominant for New Orleans-Green Spring movement, a 1,390 mile lane, because of transloading alternative).

CSXT supports the concept of initial market dominance disclosures, as it proposed in its Ex Parte 733 comments. CSXT proposed initial disclosures that would expedite market dominance discovery by requiring shippers to provide four categories of information at the time of their complaint: (1) a narrative statement explaining why the complainant believes that intermodal and intramodal competitive alternatives are not effective; (2) information on any use of transportation alternatives for the issue shipment during the previous five years; (3) information on any studies or consideration of transportation alternatives during the previous five years; and (4) any transportation contracts that could have been used for the issue traffic.¹⁹ Railroads would similarly have to disclose any information they had relating to transportation alternatives. The initial disclosures CSXT proposed in Ex Parte 733 were designed to jumpstart market dominance discovery by requiring disclosure of core information early in the process, without limiting either party's ability to seek discovery of relevant information not subject to initial disclosure.

The ANPRM's proposed initial shipper disclosure would not reach much of the most relevant information about competitive options, however. The proposal would not require any statements about a shipper's internal assessments of the effectiveness of competitive alternatives—even though internal studies not prepared for use in litigation are often highly relevant evidence. The proposal also would not require disclosure of trucking and transportation contracts or pricing offers that

¹⁹ *Expediting Rate Cases*, STB Ex Parte No. 733, *Opening Comments*, at 15-17 (filed Aug. 1, 2015).

could be used for the issue traffic—even though the rates in a shipper’s existing contracts or pricing proposals are a reliable way to calculate the actual cost of alternative transportation.²⁰

Most troubling is the suggestion that discovery might be eliminated and that the initial disclosure might be the only information a complainant is required to produce on market dominance. The ANPRM’s proposed initial disclosure only requires production of information about alternative transportation for “the issue traffic.” ANPRM at 17. What about evidence that the shipper used trucks to transport the same commodity from the same origin to a different destination at a similar distance? Under the ANPRM’s proposal, that information would not have to be disclosed, and railroads would not be allowed to learn it in discovery. The Board has rightly found in past cases that evidence that a shipper extensively uses trucks to transport a commodity is important evidence of the feasibility of trucking.²¹ Reasonable discovery has to be allowed to determine whether a shipper is already using workable alternatives for similar movements—even if it is not using those alternatives for the issue movement.

²⁰ For example, rates from contracts that the complainant produced in discovery were used for market dominance calculations by both parties in cases such as *TPI*, *M&G*, and *Consumers*.

²¹ See *M&G*, STB Docket No. 42123, at 26 (STB served Sept. 27, 2012) (“For purposes of determining whether a direct truck option is generally feasible, the fact that significant volumes of PET shipped from M&G to its customers via truck is particularly relevant.”); *TPI*, STB Docket No. 42121, at 41 (STB served May 31, 2013) (“For purposes of determining whether a direct truck or transload option is practically feasible, the fact that significant volumes of the issue commodities shipped from TPI to its customers via truck is particularly relevant.”).

Without the ability to obtain basic market dominance discovery from a complainant, a railroad's ability to present meaningful market dominance evidence would be extremely hampered. A railroad would have no way of knowing what a shipper's internal assessments of transportation alternatives revealed, would have no way of knowing whether a shipper used transportation alternatives for similar movements, and would have no way of evaluating a shipper's actual costs for using an alternative through the shipper's own contracts. The ANPRM's statement that a railroad could present independently-developed evidence does not solve the problem, which is that the basic facts most relevant to a shipper's transportation alternatives are in the shipper's possession. Defendants will be irreparably hamstrung from presenting effective evidence on market dominance if they are prevented from obtaining relevant information that is inherently within complainants' control.

The Board should not heed any claims that market dominance is too complicated to warrant full consideration in a small case. The reason that market dominance was such a complex undertaking in cases like *M&G*, *TPI*, and *DuPont* was that each of those cases involved scores of different lanes that each had unique individual characteristics and circumstances. While the overall scope of market dominance evidence in those cases was significant, the evidence presented on each individual lane was more limited.²² The *CSX/DuPont* Three Benchmark cases are

²² For example, in *TPI* both parties presented evidence on market dominance that typically used a page or two to summarize factors affecting market dominance on

a good example of how market dominance can be considered quickly and efficiently in a simplified case on an expedited schedule. Several of the lanes in those cases presented significant market dominance issues because of existing truck and barge alternatives.²³ But all of those issues were presented and decided on the standard expedited schedule.

When considering “shortcuts” to the market dominance test, the Board should keep in mind the significant simplifications that it has already made to its assessment of effective competition. The Board has chosen to reject movement-specific adjustments to URCS variable costs when determining quantitative market dominance because of concerns about the effort required to do so.²⁴ For similar reasons, the Board already has unwisely chosen to not consider evidence of product and geographic competition—even though there is no question that such competition actually constrains rates and despite the railroad industry petitioning two times for a reconsideration.²⁵ For rates involving a segment of a joint

each individual lane. The evidence was voluminous only because so many lanes were at issue.

²³ See, e.g., *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099, at 5 (STB served June 30, 2008) (evaluating effectiveness of truck competition); *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No.42100, at 5 (STB served June 30, 2008) (evaluating effectiveness of barge competition).

²⁴ See *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 60 (STB served Oct. 30, 2006) (“Based on our experience in rate cases, and the evidence in this proceeding, we are persuaded that the use of movement specific-adjustments is inordinately complex, time consuming, and expensive, and does not necessarily result in more reliable results than using the URCS system averages.”).

²⁵ See *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937 (1998); *Market Dominance Determinations—Product and Geographic*

movement, the Board has unwisely expanded the definition of geographic competition to reach whole-route alternatives traveling from the ultimate origin to the ultimate destination (despite clear evidence of the economic relevance of competition from whole-route alternatives and agency precedent to the contrary).²⁶ And it has unwisely and unlawfully adopted a limit price test that replaces an actual consideration of the effectiveness of competition with an arbitrary mechanism that has no bearing on the actual effectiveness of competition.²⁷

In short, the Board has already extensively limited the evidence that it will assess to consider its foundational statutory jurisdictional requirement. CSXT respectfully submits that these limitations have gone much too far and are inconsistent with Congress's basic command that the Board not regulate any rate

Competition, 4 S.T.B. 269 (1999) (rejecting AAR and UP petitions for reconsideration); *Petition of the Ass'n of American Railroads To Institute A Rulemaking Proceeding To Reintroduce Indirect Competition As A Factor Considered In Market Dominance Determinations For Coal Transported To Utility Generation Facilities*, STB Ex Parte No. 717 (STB served March 19, 2013).

²⁶ *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 26 (STB served March 24, 2014) (“*DuPont*”) (“The DMIR decisions correctly held that whole-route alternatives fall outside the agency’s traditional definition of direct competition as set forth in various prior Board decisions.”) *cf.* *DuPont*, STB Docket No. 42125, *NS Reply Evidence*, at II-B-61 (filed Nov. 30, 2012) (“As NS expert transportation economist Mark Burton explains, the interest of purchaser of transportation services is in obtaining economical and efficient transportation to move product from the origin to the destination”); *Dayton Power Light Co v. Louisville Nashville R.R Co.*, 1 I.C.C.2d 375 380 (1985) (direct whole-route competitive alternatives analogous to whole-route truck competition are intermodal competition, not geographic competition).

²⁷ *See, e.g., TPI*, STB Docket No. 42121, at 4 (describing adoption of the “Limit Price test”) *cf.* *Consumers*, STB Docket No. 42142, *CSXT Reply Evidence*, at II-B-55-76 (explaining why the limit price test is unlawful and irrational) (filed March 7, 2016); *M&G*, STB Docket No. 42123, *CSX Transp., Inc.'s Comments on the Proposed “Limit Price” Approach to Determining Qualitative Market Dominance*, at 21-29 (filed Nov. 28, 2012).

subject to meaningful competition. Certainly there is no basis for the Board to further constrain its ability to satisfy this jurisdictional requirement by adopting discovery and evidentiary rules that prevent the submission of relevant evidence about the effectiveness of competition.

III. The Board Should Not Unduly Distort Its Rate Analysis Out Of Concerns Over Sample Size.

Several proposals in the ANPRM suggest potential changes to address the Board's concern that it have an adequate sample size for a comparison group. While CSXT understands the Board's concern about sample sizes, the Board should not go down a path that would add dissimilar movements to the comparison group simply in the interest of an increased sample size.

First, the Board's suggestion that it would begin a comparison group at the five-digit STCC level and progressively widen the group until it reaches twenty observations begins with a fundamental flaw and proceeds to aggravate it in the name of "sample size." Any default comparison group must be made up of commodities with the same seven-digit STCC as the issue commodity. Different commodities often have different transportation characteristics. Far more importantly, they have different market characteristics. Broader five-digit STCC groupings may (or may not) include commodities that have similar transportation characteristics, but the five-digit grouping often will include commodities at the seven-digit level that have very different market characteristics. For example, STCC code 20419 for flour or grain mill products groups a variety of grain products ranging from wheat meal (2041960) to pearled barley (2041918) to bakers' or

brewers' grits (2041922) to sorghum grain meal (2041958). Including different seven-digit STCC commodities in the comparison group could thus result in judging a challenged rate against rates for different commodities that face very different competitive conditions. And if the Board were to go above the five-digit STCC level, comparisons could be made to movements of commodities with even more markedly different characteristics.

At the same time, even at the five-digit STCC level the limited number of observations available in the Waybill Sample may create an unacceptably low number of movements for a comparison group. To address such a situation, the Board should allow a defendant the option to submit complete traffic files to the Board for the commodity at issue so that it can increase the sample size. This option would obviate any need to include less comparable traffic in the group simply to increase the sample size. Any burden would fall on the railroad—not the complaining shipper.

Second, the Board requested comment on whether comparison groups should be limited to defendant traffic as they are in Three Benchmark cases or whether non-defendant traffic should be included in the comparison group. *See* ANPRM at 14-15. CSXT believes it is essential for the Board to continue to limit comparison groups to the defendant's own traffic. Rate comparisons are always unreliable. That is why Three Benchmark should be limited to the smallest of cases. But rate comparisons between railroads with completely different cost structures would introduce whole new levels of unreliability and complexity that are unacceptable

and counterproductive to the stated goal of creating a simpler rate reasonableness methodology.

The Board explained in *Simplified Standards* why non-defendant traffic should not be included in comparison groups:

We will exclude non-defendant traffic from the comparison group because R/VC ratios of one carrier cannot fairly be compared with the R/VC ratios charged by another railroad. The reasonable level of contribution to joint and common costs (reflected by the R/VC ratio) is first and foremost a function of the amount of joint and common costs that need to be recovered. This will vary between carriers, creating inevitable and proper differences in R/VC ratios.²⁸

The Board moreover recognized that a defendant's revenue needs and mix of traffic may vary from those of other railroads, making it inappropriate to use other railroads' R/VC ratios to assess whether the R/VC ratio for the challenged defendant traffic is unreasonable.²⁹ These recognitions in *Simplified Standards* remain true today, and the Board should not include nondefendant traffic that "cannot fairly be compared with" the issue traffic.³⁰

Other practical reasons counsel against including non-defendant traffic. As the Board recognized, including nondefendant traffic "likely would necessitate third party discovery" into potential differences in cost structures. ANPRM at 15. Other discovery might be necessary on the revenue side. A defendant will have no way of knowing whether rates that another railroad provided to other customers were

²⁸ *Simplified Standards* at 82.

²⁹ *Id.* at 82-83.

³⁰ *Id.* at 82.

affected by particular arrangements with that customer such as volume commitments, backhaul availability, or bundling agreements including other shipments. Such discovery will be burdensome and time-consuming, and the Board is right to think that it would increase the cost and time required to litigate cases. Moreover, analyzing potential differences in cost structures and developing ways to incorporate those differences into the comparison group analysis would lead to complex evidentiary disputes that would further increase litigation time and cost.³¹ The Board should not adopt a proposal that would reduce the accuracy and increase the complexity of simplified rate reasonableness determinations.

There are even more fundamental problems with the idea of comparing one railroad's prices to another's. No economic (or other) principle supports the proposition that CSXT's prices should be controlled by the government based upon prices offered, set, or negotiated by another Eastern Railroad. Furthermore, by no legal principle can it be said that CSXT's prices are unreasonably high because some non-union railroad in the same geographic region charges less. "Simplicity" and "expediting" are fine goals, but they must not be allowed to morph into arbitrariness.

IV. Any New Simplified Methodology Must Be Procedurally Fair To Both Parties.

The Board also must ensure that any new methodology is procedurally fair to shippers and railroads. One proposal that is particularly troubling is the suggestion

³¹ Using non-defendant traffic without accounting for cost structure differences would lead to arbitrary results and is not a reasonable option.

that the Board might allow complainants to respond to railroad replies in “evidentiary hearing[s]” rather than providing for rebuttal filings and final briefs. ANPRM at 20. Such a process would raise serious fairness issues, because it would allow a complainant to spring new or revised arguments on the railroad at a hearing with no prior notice. Due process requires more than the opportunity to “participate” in a hearing in which the railroad first hears about the complainant’s rebuttal. It requires some meaningful ability for a railroad to address any new or revised rebuttal arguments.

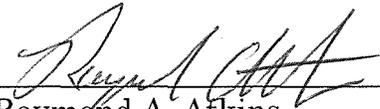
It is also not clear that such a system would result in any cost savings. Preparing for an evidentiary hearing does not require significantly less time than preparing a written submission. Indeed, the inherent uncertainty about what issues may come up at a hearing and what questions may be raised by Board staff will often mean that parties must spend much more time to prepare for and attend a hearing than they would to draft a written submission. Moreover, an “evidentiary hearing” system is likely to result in many requests for supplemental briefing on new issues and questions that arose at the hearing. In short, this proposal is not likely to make the process simpler or fairer or to reduce litigation expenses.

V. Any New Simplified Methodology Only Should Be Used For “Very Small Disputes.”

If the Board is to adopt a new methodology that is even less fair and accurate than the “rough” and “imprecise” Three Benchmark methodology (and it should not), then it is incumbent on the Board to limit the scope of that methodology to the very smallest of disputes. Both the Board and federal courts have recognized the

critical importance of using award caps to encourage shippers to use more rigorous methodologies.³² The larger the amount of money that the government can transfer from one company to another, the more important it becomes to ensure that a fair and accurate standard applies.

Respectfully submitted,



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³² See *Simplified Standards* at 27 (“[A]n 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.”); *CSX Transp., Inc. v. STB*, 568 F.3d 236, 240, 242, 244 (D.C. Cir. 2009) (purpose of award caps is “[t]o channel larger cases to the more accurate methods,” and this purpose accords with the statute).