

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SEMINOLE ELECTRIC COOPERATIVE, INC.)	
)	
Complainant,)	
)	Docket No. NOR 42110
v.)	
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
)	

**DEFENDANT CSX TRANSPORTATION, INC.'S
OPPOSITION TO MOTION TO COMPEL**

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Dated: February 2, 2009

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**DEFENDANT CSX TRANSPORTATION, INC.’S
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Defendant CSX Transportation, Inc. (“CSXT”) hereby submits its opposition to Seminole Electric Cooperative, Inc.’s (“SECI”) First Motion to Compel Discovery (“Motion”) pursuant to the Board’s regulations at 49 C.F.R. § 1114.31.

INTRODUCTION

Complainant SECI seeks to compel CSXT to produce documents and information maintained by non-party CSX Intermodal (“Intermodal”), claiming that it is entitled to use this information to develop its Stand-Alone Railroad (“SARR”). *See* Complainant’s First Motion to Compel Discovery at 3-4, *Seminole Elect. Coop, Inc. v. CSX Transportation, Inc.*, STB Dkt No. 42110 (Jan. 23, 2009) (“Motion”). As CSXT demonstrates below, the information SECI seeks is not relevant to this rate case. CSXT has agreed to produce documents providing relevant information concerning the rail transportation services that CSXT provides to Intermodal. The documents and information that CSXT will produce to SECI will allow SECI to determine CSXT’s costs and revenues associated with intermodal traffic – which is precisely what SECI is entitled to, for purposes of designing a SARR that will stand in the shoes of CSXT.

As discussed in more detail below, CSXT has agreed to produce significant information responsive to SECI's Fourth Requests for Production of Documents, including information that appears to be covered by the literal terms of the Motion. CSXT emphasizes that it is not refusing to produce information in CSXT's possession on the ground that it relates to Intermodal or CSXT's relationship with Intermodal.¹

I. CSXT IS PRODUCING ALL THE INFORMATION NECESSARY TO DETERMINE ITS COSTS AND REVENUES ASSOCIATED WITH MOVING INTERMODAL'S TRAFFIC.

Contrary to SECI's suggestion, CSXT has produced, and will continue to produce, relevant documents and information in CSXT's possession that concern or pertain to third parties and CSXT's agreements and transactions with third parties, including Intermodal. *See, e.g.*, CSXT Response to SECI RFP 107; *cf.* Motion at 6 (noting that SECI has produced documents "related to non-parties unaffiliated with SECI"). SECI does *not* claim that it has produced documents that are maintained or possessed exclusively by third parties. Likewise, CSXT is

¹ SECI's reliance on cases where parties have produced "information related to non-parties and non-carriers" is a red herring. Motion at 6. CSXT has not refused to produce "information related to non-parties"—it is producing all information in CSXT's possession related to the transportation service CSXT provides to Intermodal and related to the transfer price payments through which CSXT is compensated for that service. SECI has not filed this motion to obtain CSXT information "related to" Intermodal – it has filed this motion to obtain information in the possession of Intermodal that is maintained by Intermodal. And, as SECI admits, it seeks this non-CSXT information in order to determine whether to incorporate non-CSXT revenues into its SARR. SECI has cited no authority holding that it can discover this irrelevant Intermodal information (because there is none). Indeed, only two of the decisions cited by SECI (Motion at 6) even involved motions to compel. *See Texas Municipal Power Agency v. Burlington No. & Santa Fe Ry. Co.*, STB Docket No. 42056 (Mar. 13, 2001); *FMC Wyoming Corp. v. Union Pacific R.R. Co.*, STB Docket No. 42022 (Feb. 4, 1998). One decision involved a discovery request for a joint facility agreement and is therefore entirely inapposite – in this case CSXT agreed to produce joint facilities agreements. *See Texas Municipal Power Agency* at 2. The other was an equally inapplicable decision related to discovery of expert witnesses. *See FMC Wyoming* at 4-6.

producing documents in its possession that are related to third parties, but it is not producing documents that are in the exclusive possession of third parties.

Accordingly, Defendant CSXT will produce information sufficient to allow SECI to determine CSXT's costs and revenues associated with intermodal traffic. CSXT will produce relevant agreements between CSXT and Intermodal regarding the calculation and payment of the fee for rail transportation service, and other fees. And, CSXT will produce documents showing the amount of those fees, and how they are calculated on a monthly basis. Using this information, SECI will be able to determine the revenue received by CSXT for moving Intermodal's rail traffic. Thus, CSXT is producing the relevant information that SECI needs in order to determine whether to include Intermodal's traffic in its SARR. *See* SECI Request for Production ("RFP") No. 107.

CSXT is not withholding any information responsive to RFP No. 105. The traffic files that CSXT has already produced identify certain shipment and event information for the trailers and containers that CSXT moves for Intermodal. In addition, these traffic files also include some data on flatcars used to move intermodal traffic. Additional responsive information, to the extent it exists, would be maintained in Intermodal's own databases, which are separately maintained.

RFP 106 again asks for links to data that, if it exists, would be in the exclusive possession of Intermodal. In addition, even if Intermodal collects and records the data sought in RFP 105, there is no "link" between CSXT "waybill/car movement/train movement records" and Intermodal data sought by RFP 105. To create, develop, and implement such links would be an enormously time- and resource-consuming task, and the Board has long held that parties to rate cases are not required to undertake such special studies.

In response to RFP 108, CSXT intends to produce reasonably available information concerning assets owned or leased by CSXT (including any assets that CSXT may have leased to Intermodal). CSXT will also produce relevant and responsive documents in CSXT's possession that pertain to Intermodal. CSXT does not intend to ask Intermodal to search for and produce information pertaining to assets owned or leased by Intermodal (except for assets owned by CSXT and leased by Intermodal), because Intermodal is not a party to this case, and it is not a rail carrier. In response to RFP 109, CSXT has already advised SECI that CSXT will produce a copy of the operating agreement that SECI has requested. There is thus no dispute about RFP 109.

RFPs 110-113 seek information exclusively pertaining to Intermodal's assets, equipment, facilities, employees, and purchases from other third parties. Here again, CSXT does not record or maintain such information or data, and Intermodal is not a party to this case.

II. INTERMODAL AND CSXT ARE TWO SEPARATE CORPORATIONS, AND INTERMODAL IS NOT A PARTY TO THIS CASE.

As CSXT has explained to SECI, Intermodal and CSXT are separate corporations. CSXT is incorporated in the State of Virginia, provides rail transportation services, and is a rail carrier regulated by the Board. Intermodal is incorporated in the State of Delaware, and is neither a rail carrier nor regulated by the Board. Intermodal has more than 1000 employees, a separate payroll from CSXT, and is headquartered in a separate office building. It provides intermodal transportation services using its fleets of trucks and containers and a network of intermodal terminals. Intermodal does significant business with major Class I rail carriers, including CSXT. Intermodal and CSXT are legally and financially separate, and the financial results of Intermodal are reported separately from the financial results of CSXT.

As part of the services it provides to its customers, Intermodal purchases rail transportation services for its trailers and containers. CSXT provides rail transportation services to Intermodal in accordance with a Transportation Services Agreement. The Agreement obligates CSXT to move Intermodal's traffic over CSXT's rail system in exchange for a "Rail Transportation Fee," which is based on, and intended to approximate, the full attributable costs of those movements. CSXT bills Intermodal the Rail Transportation Fee prescribed by the Agreement on a monthly basis, and Intermodal pays those amounts. The Rail Transportation Fee that Intermodal pays to CSXT under the Agreement constitutes CSXT's revenue for rail transportation services it provides to Intermodal.² The net revenue to Intermodal is the difference between the revenue it collects from its customers, and the cost of providing the service, including the Rail Transportation Fee.

The revenue that CSXT reports to the Board in its Form R-1 for moving Intermodal's traffic is the amount that Intermodal pays to CSXT for that service. The Board is aware of how CSXT calculates and reports those intermodal revenues.³ There is no reason that non-party Intermodal should be required to search for and produce cost and revenue information in order to allow Complainant to determine whether to hypothesize that its SARR would collect non-CSXT

² In addition to the Rail Transportation Fee, Intermodal also pays other miscellaneous fees to CSXT to cover the costs of services CSXT provides to Intermodal, including lease payments for rental property and administrative services payments. CSXT will produce governing agreements and billing information that show the amounts of these fees and other revenue CSXT obtains from Intermodal in exchange for the services it provides to Intermodal.

³ SECI misunderstands the nature of the reporting adjustment CSXT made in 2002. *See* Motion at 6. Prior to 2002, CSXT had been recording the Intermodal transfer fee payment as a "reimbursement of CSX Transportation's operating expenses" (*i.e.*, a reduction of operating expenses), in accordance with GAAP. Because the Board's Uniform System of Accounts treats such payments differently, the Board asked CSXT to adjust the way it reported those payments on its Form R-1. CSXT agreed to make this adjustment, and Intermodal's payments to CSXT are now recorded as CSXT revenue, rather than an expense offset. *See* STB Asst. Chief Paul Aguiar Letter to CSXT Asst. Controller Darrell Mitchell (July 29, 2002).

revenues. As demonstrated below, the Board's cases make clear that the SARR steps into the shoes of the incumbent, and complainants may not assume the SARR would be able to take advantage of revenues earned by non-parties.

III. ARGUMENT

As demonstrated below, SECI has failed to carry its burden in this motion for several reasons. *First*, the documents and information whose production SECI seeks to compel is simply not relevant to matters at issue in this case. *Second*, the Motion seeks discovery from a non-party under discovery rules that are limited to parties. *Third*, even if the information SECI seeks were relevant and in the possession of CSXT, the only way it could be developed and provided would be through a burdensome special study. This is not the proper forum for changing the Board's sound, longstanding rules concerning special studies, and SECI's vague and indefinite arguments are insufficient to warrant serious consideration in any event.

Movant's Burden of Proof in a Motion to Compel Discovery

SECI bears the burden of proving that the Board should compel CSXT to produce the requested documents. *Allen v. Howmedica Leibinger, GmhH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999). In considering motions to compel discovery, the Board has said that it "will balance the burden and potential disruption that [the proponent's] proposal would impose on [the other party] with [the proponent's] need for the information and the possibility of obtaining it through other means." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42056, 2001 WL 112303, at *3 (Feb. 9, 2001); *see also Can. Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, STB Fin. Docket 35081, 2008 WL 820744, at *6 (March 27, 2008) ("The scope of the request would clearly constitute a burden We must balance that burden against the facts that the information is not relevant to the particular foreclosure theories advanced.").

Moreover, “[o]nce an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action.” *Allen v. Howmedica Leibinger, GmhH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999). A party seeking to compel discovery must “show clearly that the information sought is relevant and would lead to admissible evidence.” *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006); *Alexander v. FBI*, 186 F.R.D. 154, 159 (D.D.C. 1999) (“[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant.”). In considering a motion to compel, the Board has recognized that information is relevant for discovery purposes only when the specific information sought is necessary for the Board’s determination in the litigation. *Canadian Nat’l Ry. Co. & Grand Trunk Corp. Control—EJ&E West Co.*, STB Fin. Docket. No. 35087 (Feb. 22, 2008); *Salt Lake City Corp.—Adverse Abandonment—In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No 183), 2002 WL 27988, at *1 (Jan. 11, 2002).

A. Information Regarding Intermodal’s Revenues and Costs Is Irrelevant.

Intermodal receives the full revenue paid by its customers for intermodal services, including the rail service that Intermodal purchases from CSXT. As SECI asserts, Intermodal pays CSXT a contractual fee for the rail transportation services CSXT provides to Intermodal (as well as other miscellaneous fees, as noted above). Contrary to SECI’s assertions, however, Intermodal’s revenues and costs are irrelevant to the determination of stand-alone costs in this case.

SECI contends that (1) it appears that the Rail Transportation Fee paid to CSXT covers only CSXT’s actual operating costs; (2) the remaining revenue earned by Intermodal “would include the full profit or margin on the overall intermodal move (including the rail portion)”; and (3) therefore data regarding CSX Corporation’s assessment of the profitability of the intermodal

traffic “is relevant to the question of the degree to which the revenues that would be available to a SARR if it replicated the CSXT/CSXI service would exceed the total costs attributable to that service.” Motion at 11. Without that data, SECI claims, it will be unable to assess “the full measure of revenue associated with the inclusion of CSXT’s intermodal traffic in its SARR configuration.” *Id.* at 8.⁴

SECI’s arguments are without merit. Although the Board’s rules generally provide for liberal discovery, discovery must be “directed toward a relevant issue,” and is not permitted “when it is clear that the information [the complainant is] seeking is not relevant.” *E.g., Duke Energy Corp. v. Norfolk Southern Ry. Co.*, Docket Nos. 42069, *et al.*, Decision served July 26, 2002, 2002 WL 1730020 (S.T.B.), at *3; *Sierra Pacific Power Co. v. Union Pacific R.R. Co.*, Docket No. 42012, Decision served April 15, 1998, 1998 WL 177704, at *2.⁵ Here, it is clear that Intermodal’s revenues and costs are not relevant.

⁴ SECI’s motion should be denied for the independent reason that it seeks prohibited discovery of CSX’s internal profitability assessments. It is well-established that the Board does not allow discovery of a carrier’s sensitive internal management costing systems, or data or information concerning a carrier’s internal profitability assessments. *See, e.g., Entergy Arkansas and Entergy Services, Inc. v. Union Pacific Railroad Company*, STB Dkt. No. 42104, Decision at 4, n. 5 (May 7, 2008) (collecting cases). Here, SECI seeks non-party “CSX Corporation’s internal assessment of the profitability” of intermodal traffic, a category of information Board has held is not relevant to a SAC analysis, and therefore is not subject to discovery in a SAC case. *See id.*; *see also Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), Decision at 57 (Oct. 30, 2006); *Kansas City Power & Light Company v. Union Pacific Railroad Co.*, STB Dkt. No. 42095, Decision at 2 (Feb. 15, 2006).

⁵ SECI asserts that “relevance is established if the information in question might affect the outcome of a proceeding,” citing *Waterloo Railway Company – Adverse Abandonment – Lines of Bagor and Aroostook Railroad Company and Van Buren Bridge Company In Aroostook County, Maine*, Docket Nos. AB-124 (Sub-No. 2) *et al.*, Decision served Nov. 14, 2003 (“*Waterloo Railway*”). *See* Motion at 11. SECI’s reliance on *Waterloo Railway*, however, is misplaced, because the Board *also* stated in *Waterloo Railway* that “discovery ... may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Waterloo Railway*, slip op. at 2 (footnote omitted). In fact, in *Waterloo* the Board denied a motion to compel responses to certain document requests because “the vast majority of information” that was sought in the requests “does not appear to be relevant to the issues in these proceedings,”

As an intermodal service company, Intermodal is not a rail carrier and not subject to the Board's jurisdiction. SECI cites no authority to support its position that information regarding the revenues and costs of a non-regulated intermodal company can properly be considered in calculating the stand-alone costs of railroad transportation that *is* subject to the Board's jurisdiction.

The fundamental limitation that Seminole fails to acknowledge is that, in a SAC analysis, the SARR must step into the shoes of the incumbent rail carrier. That means that the SARR incurs the same costs, and earns the same revenues, as those incurred and earned by the incumbent in moving the SARR traffic. CSXT earns a cost-based fee for the rail transportation service it provides to Intermodal. In this respect, Intermodal is just like any other third party for purposes of a SAC analysis – the SARR is entitled to the same revenues to which the defendant rail carrier is entitled under its arrangement with the third party, nothing more and nothing less. Where, for example, CSXT has a haulage rights agreement with another rail carrier, the SARR would be entitled to the haulage rights fee and revenue that CSXT would collect from that carrier, but not any additional profit or net revenue the other carrier earns from its customers on that traffic, or even on the segment for which CSXT provides haulage.

The Board has consistently held that a stand-alone cost analysis may not include costs that the incumbent carrier does not actually incur,⁶ or revenues that the incumbent does not

and compelling responses to those requests “would force the parties to search extensively for much information that has little or no relevance to those proceedings.” *Id.* Thus, the requests were “simply too burdensome.” *Id.* Precisely the same situation exists here. In light of its irrelevance, information regarding Intermodal's costs, revenues, and margins would not “affect the outcome” of this proceeding. Thus, even if Intermodal were a party, compelling it to produce the information SECI seeks it would be an unreasonable and unduly burdensome requirement.

⁶ See, e.g., *Burlington Northern R.R. Co. v. STB*, 114 F.3d 206, 214 (D.C. Cir. 1997) (affirming Board's definition of “barriers to entry” as costs that a new entrant would incur that were not incurred by the incumbent, and Board's decision to exclude certain costs from SARR's costs

actually receive. See *Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42058, Decision served August 20, 2002, 2002, at 6 (“*AEPCO I*”).

In *AEPCO I*, for example, the Board held that the complainant could not include, in the traffic group of the “sub-SARR” used to test the challenged single-line rates of Union Pacific (“UP”), traffic that was not carried by UP, because such an approach would overstate the revenues that UP received from the movements at issue. As the Board explained:

It would be equally inappropriate for a complainant to include non-UP traffic in the traffic group of any part of a SARR aimed at testing UP’s single-line rates for the Colorado coal traffic. UP’s single-line rates should not be judged as if UP has the benefit of revenues from traffic in which it does not participate. Just as our SAC analyses do not include types of costs not incurred by the defendant carrier, they should not include revenues not received by the defendant carrier.

AEPCO invokes the economic theory of contestable markets, in which the SAC constraint is rooted, to argue that there should not be any traffic restrictions or limitations on efficient alternatives to existing systems in a SAC analysis. But our SAC constraint is meant to serve as a practical tool, not a mere exercise in market theory divorced from its purpose of judging the reasonableness of the defendant carrier’s pricing. When the purpose of the SAC exercise is taken into consideration, it becomes clear that a defendant carrier’s ability to recover reasonable costs and earn adequate revenues should not be limited by the inclusion in our

because there was no evidence that Burlington Northern had incurred them); *Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42058, Decision served Nov. 19, 2003, at 6 (“*AEPCO II*”) (“Incorporating into a SAC analysis cost-sharing or cost-saving arrangements with third parties is fully consistent with the SAC principle that a SARR should not incur costs that the defendant carrier does not or need not incur”); *Wisconsin Power & Light Co. v. Union Pacific R.R. Co.*, Docket No. 42051, Decision served Sept. 13, 2001, at 85 (“it is well-settled that the cost of land is excluded from our SAC analysis as a barrier-to-entry cost where the defendant carrier did not incur that cost”); *McCarty Farms, Inc. v. Burlington Northern*, 2 S.T.B. 460, 504 (1997) (“we assign a zero cost to property acquired by the incumbent by easement where the incumbent railroad has not shown that any cost was incurred for procuring or maintaining the easement”); *Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 386 (1997) (“a SAC computation should exclude any sunk costs that were not incurred by the incumbent”).

rate reasonableness analysis of another carrier's traffic and revenues that do not or could not reasonably be expected to pay for the defendant carrier's costs. Guidelines, 1 I.C.C.2d at 534. In short, there are limits to the creativity with which a complainant such as AEPCO may develop its SARR.

Id. at 6-7 (emphasis added; footnotes omitted). In other words, for purposes of calculating the revenues to be received by the SARR, the SARR must “step into the shoes” of the incumbent carrier, and can earn no more than the revenues that the incumbent actually collects.

Similarly, in *AEPCO I* the Board ruled that a SARR may replicate existing cost-sharing arrangements with other carriers, “but may not hypothesize non-existent revenue or cost-sharing arrangements.” *Id.* at 7. For that reason, the Board held that in designing a SARR, the complainant could assume certain existing trackage rights agreements made by UP (including the trackage rights fees paid under those agreements) as long as “the terms of those arrangements (including operational provisions and terms of compensation) are *the same as those applicable to the defendant carriers.*”⁷

This principle – that the SARR may not hypothesize that it would earn more revenues than the incumbent railroad actually receives – has been applied to various other sources of an incumbent railroad's revenues. For example, to the extent that shippers with transportation contracts are included in the traffic base for the SARR, the revenues received by the SARR must

⁷*AEPCO I* at 7 (emphasis added); see also *Arizona Electric Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42053, Decision served March 15, 2005, 2005 WL 638319 (S.T.B.), at *4 (“*AEPCO III*”), *aff'd sub nom. Arizona Electric Power Cooperative, Inc. v. STB*, 454 F.3d 359, 364-366 (D.C. Cir. 2006). The Board reiterated this principle in *AEP Texas North Co. v. BNSF Ry. Co.*, Docket No. 41191 (Sub-No. 1), Decision served Sept. 10, 2007, 2007 WL 2680223 (S.T.B.) (“*AEP Texas*”), where it approved the inclusion of a trackage rights agreement in the stand-alone analysis. There, UP transported coal to one of the complainant's plants, but part of UP's movement was over one of the lines of BNSF (the defendant). The Board held that “Because the [SARR] would replicate the BNSF line segments that UP uses for the ... traffic, it may also replicate the trackage rights arrangement that applies to those line segments. Accordingly, *AEP Texas* properly presumed that the [SARR] would receive the same trackage right fees that BNSF receives for UP's use of those line segments.” *Id.* at *28 (emphasis added).

match those received by the incumbent during the contract term. *See, e.g., West Texas Utilities Co. v. Burlington Northern R.R. Co.*, 1 S.T.B. 638, 657 (1996) (“*West Texas I*”), *petition for review denied sub nom. Burlington Northern R.R. Co. v. STB, supra* (“The SAC analysis assumes that [the SARR] would replace BN, that is, step into the shoes of BN under the existing transportation contracts”).⁸ Similarly, the revenue divisions for inter-line movements used by the SARR must be the same as those for the incumbent railroad on the same lines. *AEP Texas*, 2007 WL 2680223, at *30 (“The parties agree that the [SARR] would receive the same revenue division from inter-line movements as BNSF does”).

CSXT has agreed to produce its agreement with Intermodal that provides how the transfer fee is calculated, and the revenues CSXT receives for the rail transportation service it provides to Intermodal. CSXT is also willing to produce documents showing the amounts of the actual transfer payments it has received for relevant periods. That information is sufficient for Seminole to determine CSXT’s revenues from traffic it carries for Intermodal, which is all that is relevant to the SARR analysis.

⁸*See also, e.g., West Texas Utilities Co. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 41191, Decision served Sept. 10, 2007, 2007 WL 2590261 (S.T.B.), at *5 & n.14 (citing quoted principle from *West Texas I* in reopening proceeding to allow complainant to add traffic to the SARR’s traffic group that had not been foreseen at time of original decision); *AEP Texas*, 2007 WL 2680223 at *30 (approving parties’ calculation of revenues, for future traffic moving under contract, by using escalation factor provided in the relevant contracts); *Otter Tail Power Co. v. BNSF Railway Co.*, Finance Docket No. 42071, Decision served Jan. 27, 2006, 2006 WL 275904 (S.T.B.), at *18 (“for projecting future tonnage and revenues for the [SARR’s] traffic group, our analysis relies on *existing contracts* (where applicable), actual data for 2002, BNSF’s internal coal tonnage forecasts for 2003, and the coal tonnage and revenue projections for the PRB region obtained from the U.S. Department of Energy’s Energy Information Administration (EIA) for 2003-21”) (emphasis added). *Cf. Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520, 544 (1985), *aff’d sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) (stating that, although revenue contribution of traffic may be adjusted if it is shown that rates are not at the Ramsey optimal level, “[i]n making such adjustments, ... we will recognize that contracts may result in a greater revenue contribution to the system than Ramsey optimal prices”).

In short, in determining the SARR's revenues, the only relevant evidence or consideration is the amount that CSXT, the incumbent railroad, actually collects for the rail transportation services that it provides. To consider the additional revenues collected and retained by Intermodal would attribute more revenue to CSXT than the rail carrier actually collects – a practice that the Board has clearly and unequivocally prohibited in a SAC analysis. Consequently, Intermodal's revenues, costs, and "margins" are irrelevant, and SECI's attempt to obtain such information should be rejected.

B. The Board Should Decline SECI's Invitation To Drastically Overhaul The Availability Of The Special Study Objection.

SECI's Motion asserts that its "Fourth Requests seek only data and documents as retained by CSXT in the regular course of business." Mot. at 9 (emphasis added). That is exactly what CSXT has told SECI it will produce. *See supra*. Given that the parties are apparently in agreement, SECI's objection to parties' right to refuse to conduct special studies is neither implicated nor presented here, and the Board need not consider it. Indeed, because this situation does not present a concrete context in which to consider or apply the prohibition against special studies, it would not be wise for the Board to accept SECI's invitation to consider new discovery limitations or precedents here. However, should the Board consider SECI's unnecessary and unwarranted request for a re-definition of what constitutes a special study, CSXT briefly addresses that unripe argument.

SECI's request that the Board "clarify" what is meant by a special study is an attempt to reopen the request by coal shippers, including SECI, to "revisit Board policy regarding 'special studies'" in the recent *Major Issues in Rail Rate Cases* rulemaking. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 57 (Oct. 30, 2006). This is merely a further "attempt to relitigate issues that have been resolved in prior cases" and in a recent

comprehensive rulemaking. *See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte 347 (Sub-No. 3) (served March 12, 2001). In that rulemaking, the Board reiterated that “requiring railroads to generate or assemble more data for the sake of litigation goes against the Congressional directive to minimize the need for Federal regulation.” *Major Issues*, at 57.

There is no need for further clarification of what constitutes a “special study”; the Board’s recent decisions are perfectly clear. “A party can not be required to prepare new documents solely for their production.” *Canadian Nat’l Ry. Co.—Control—EJ&E W. Co.*, STB Fin. Docket No. 35087, 2008 WL 4180309 (served Sept. 11, 2008). A party must conduct a reasonable search for records within its possession, custody, or control, which, at minimum, “should include files that are located on its premises, files that are kept electronically, and the off-site storage or archived files of those individual employees or departments likely to have responsive information.” *Entergy Ark., Inc. v. Un. Pac. R.R. Co.*, STB Docket No. 42104, slip op. at 5-6 (served May 19, 2008). A party “does not have to conduct special studies or attempt to recreate information that was not kept in the ordinary course of business.” *Id.* at 6.

SECI claims that a special study should be distinguished from discovery requests that ask “for defined categories of information from a larger database, or an explanation or illustration of the manner in which a railroad’s different databases may be searched or linked.” Mot. at 10. A distinction must be made between using existing reports and simple searching of stand-alone databases and designing new searches across multiple databases to create custom reports. The latter essentially requires the creation of a new software application. SECI exhibits a lack of understanding of the difficulties in creating new computerized data reports when it suggests that it is a trivial matter to create custom reports across standalone database systems. Because of the

great expense in designing, creating, and maintaining business applications, companies only implement new and separate database systems when there is a failing in the old system(s), or some problem the old system(s) cannot solve. Different database systems necessarily contain different data and creating a link requires a testing and reconciliation process to ensure correct and complete data. CSXT would agree that a party is required to provide “a data search or report that does not exist ‘on the shelf,’ but readily could be provided if requested to railroad management.” *See* Mot. at 10. However, SECI cannot point to any case where CSXT has invoked the special study objection to refuse to provide a data search or report that could be readily provided to CSXT management.

* * * * *

In sum, SECI has failed to carry its burden of proving that the information it seeks is relevant. Because CSXT has agreed to provide information sufficient to allow SECI to include the rail portion of Intermodal traffic in its SARR, SECI is not prejudiced by the application of the Board’s established rules and limitations on discovery.

CONCLUSION

For all of the foregoing reasons, the Board should deny SECI's Motion to Compel.

Respectfully submitted,

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Dated: February 2, 2009

EXHIBIT

**SURFACE TRANSPORTATION BOARD
OFFICE OF ECONOMICS, ENVIRONMENTAL ANALYSIS, AND
ADMINISTRATION**

SECTION OF ECONOMICS

July 29, 2002

Mr. Darrell W. Mitchell
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Jacksonville, FL 32202

Dear Mr. Mitchell:

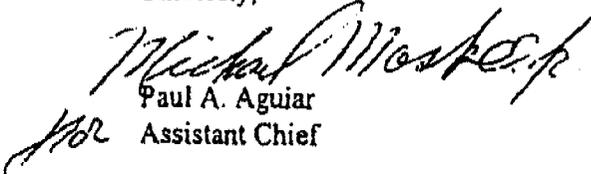
This is a follow-up to our recent telephone discussions concerning your railroad's handling of intermodal (TOFC/COFC) traffic for CSX Intermodal (CSXI). While we understand that you have been in compliance with GAAP, we advised that current accounting and reporting of these transactions by CSXT is not in technical compliance with our Uniform System of Accounts (USOA). This letter is to clarify our discussions and confirm those modifications in your reporting that will ensure future compliance with the USOA.

As provided in USOA Instruction 1-2 Classification of Accounts (a), accounts are prescribed to cover the cost of property used in transportation operations and operations incidental thereto and for revenues, expenses, taxes, rents, and other items of income for such operations. Further, the text of Account 101- Freight (j) provides that revenue earned in performing TOFC/COFC transportation service shall be recorded in this account. The costs incurred in providing these services shall be recorded in the appropriate operating expense accounts, and relevant operating statistical data (service units) compiled and reported in the R-1 as well.

Please modify your accounting and reporting of transportation services performed for CSXI prospectively, commencing with current year reporting.

Should you have any questions, please contact me at 202-565-1527.

Sincerely,


Paul A. Aguiar
Assistant Chief

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2009, I caused a copy of the foregoing Defendant CSX Transportation, Inc.'s Opposition to Motion to Compel to be served on the following:

Kelvin J Dowd
Christopher A Mills
Slover & Loftus
1224 Seventeenth Street NW
Washington, DC 20036-3003

Richard M. Bryan