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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Ex Parte No. 646 (Sub-No. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

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REBUTTAL SUBMISSION OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company (“UP”) is filing this rebuttal to address the reply comments that have been submitted on the proposals for medium-size and small rate cases that the Surface Transportation Board (“Board”) set out in its Notice of Proposed Rulemaking in Ex Parte No. 646 (Sub-No. 1) (STB served July 28, 2006) (“*NPRM*”).

I. INTRODUCTION

UP strongly supports the Board’s effort to establish new simplified standards for medium-size and small rail rate cases (“small cases”). We have carefully considered the Board’s simplified stand-alone cost (“Simplified-SAC”) and Three-Benchmark (“Benchmark”) proposals and the opening and reply comments filed by other parties, and we continue to urge the Board to adopt Simplified-SAC, with the modifications we have proposed, and apply it to all small cases.

UP’s opening comments contained concrete proposals for improving Simplified-SAC and specific criticisms of the Benchmark method. In their reply comments, shippers largely fail to address the substance of our comments regarding the merits of the Board’s proposals and ways to further simplify and reduce the cost of small cases. Instead, they focus on justifying an increase in the size of cases that would be eligible for simplified treatment without engaging in any meaningful discussion of the standards that should be applied to those cases. They criticize

Simplified-SAC for not perfectly reproducing the results of a full SAC test, but they never address the fact that the Benchmark-like test that they propose would have little or no connection to any of the principles of Constrained Market Pricing (“CMP”). They offer no legitimate reason why the Board should not adopt Simplified-SAC, with the modifications we have proposed, and apply it to all small cases.

II. ANY SIMPLIFIED STANDARDS MUST REFLECT SOUND ECONOMIC PRINCIPLES.

In UP’s opening comments, we urged the Board to take care that any simplified standards it adopts in this proceeding allow railroads to earn revenues adequate “to ensure the development and continuation of a sound rail transportation system.” 49 U.S.C. § 10101(4). Our concern is particularly relevant in the current transportation environment, in which “[r]ail capacity is strained, demand for transportation service is forecast to increase, and railroads must make capital investments to meet that demand.” *NPRM* at 11.

The Joint Shippers¹ and AECC² mischaracterize our concern about the need to invest in new capacity as elevating a “quest for revenue” above the “statutory command that rates on captive shipments be ‘reasonable.’”³ We have not argued that the need to invest in new capacity justifies unreasonable rates. Rather, our concern is that the application of inappropriate simplified standards could require us to reduce our rates, and thus deprive us of needed revenue,

¹ Joint Written Reply Comments submitted by American Chemistry Council, et al. (“ACC Reply”).

² Reply Comments of Arkansas Electric Cooperative Corporation (“AECC Reply”).

³ ACC Reply at 5; *see also* AECC Reply at 2 (“[Railroad] comments essentially argue that the Board should not implement reforms that would constrain rail revenues to any significant degree, because the railroad industry is not yet revenue adequate but faces substantial investment requirements.”).

when a more appropriate test would show challenged rates to be reasonable.⁴ We therefore have argued that the Board should apply the full SAC test whenever possible and that any simplified test must make trade-offs between the cost of pursuing a small rate case and the accuracy of the applicable standards while remaining consistent with the principles of CMP, which “provides the only economically precise measure of rate reasonableness.”⁵ If the Board were to adopt rate standards that do not allow railroads to earn adequate revenues, it would violate the statutory directive to “make an adequate and continuing effort to assist [rail] carriers in attaining revenue levels” sufficient to “attract and retain capital in amounts adequate to provide a sound transportation system in the United States.” 49 U.S.C. § 10704(a)(2).

The Joint Shippers and AECC also mischaracterize our proposals for modifying the Board’s proposed standards in light of our concern about the need to invest in new capacity. They incorrectly claim that our proposals involve “future expansion of the general rail network” rather than capacity “required to serve [issue] traffic,” and thus “promote[] a cross-subsidy” and are “inconsistent with [CMP] and [SAC] principles.”⁶ In fact, our proposals would ensure that simplified standards take into account a defendant railroad’s need for additional investment *on*

⁴ The Board should reject AECC’s assertion that increases in price relative to variable costs when demand exceeds supply “reflect an undesirable increase in railroad market power.” AECC Reply at 4. Market power is the ability of an entity to exert influence over the quantity of goods or services sold or the price at which they are sold. *See* Paul A. Samuelson & William D. Nordhaus, *Economics* 184 (18th ed. 2005). Even in markets in which no one firm can influence quantity or price, price levels will rise if consumers demand more goods than firms can supply. *See id.* at 45, 155. Thus, an increase in price when demand exceeds supply does not indicate an increase in market power, contrary to AECC’s claims.

⁵ *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1021 (1996) (“*Simplified Guidelines*”).

⁶ ACC Reply at 6-7; AECC Reply at 2-3.

*the specific routes used by challenged movements.*⁷ They would therefore bring the proposed standards more closely in line with the approach that is used in full SAC cases, which requires a complainant to construct facilities sufficient to accommodate the projected growth of all traffic in the SARR traffic group during the SAC analysis period.⁸

The Joint Shippers say that “[e]nhanced railroad infrastructure is a desirable and necessary goal from the shippers’ perspective,” but they mistakenly argue that the Board should disregard that goal in regulating rates because it “is not in a position to guarantee that increased revenues will in fact wind up as increased investments.”⁹ The Joint Shippers’ argument overlooks the impact that Board adjudications of rate matters will have on railroad investment. Although the Board cannot require railroads to invest, it can adopt rules that promote investment by allowing market forces to function. When rates are allowed to respond to market forces,

⁷ With regard to Simplified-SAC, we proposed that the Board account for new capacity investment on the issue route during the analysis period. *See* Opening Submission of Union Pacific Railroad Company (“UP Op.”) at 19-22. With regard to the Benchmark test, we proposed that the Board consider whether movements operate over lines with similar capacity constraints when evaluating comparability. *See id.* at 65-66.

⁸ *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 63 (STB served Oct. 30, 2006) (“*Major Issues*”); *FMC Wyo. Corp. v. Union Pac. R.R.*, 4 S.T.B. 699, 789-90 (2000).

AECC appears to suggest that the Board should distinguish between rates that would be reasonable for existing business and rates that would be reasonable for new business that requires carriers to make incremental investment in capacity. *See* AECC Reply at 3 (“If the defendant carrier foresees incremental capacity associated with non-issue traffic, it should ensure that such traffic is fully paying its own way.”). However, existing customers benefit when railroads invest in new capacity, particular when investments improve service on capacity-constrained routes. In addition, existing customers have been responsible for much of the “new” business that railroads are being asked to accommodate as they have expanded their businesses. Finally, even if it were possible to distinguish clearly between existing and new business, and even if it were practical to apply different standards in those two situations, such an approach would be inconsistent with the fundamental concept that rates should reflect market forces of supply and demand. In other words, existing shippers are not entitled to rates below the rates that new shippers would pay.

⁹ ACC Reply at 7.

higher prices will signal a demand for additional investment and provide railroads with the revenue needed to fund that investment. Conversely, if regulation prevents rail carriers from charging lawful, market-based rates for traffic, carriers will be deprived of the revenues they would need to invest in additional capacity to serve that traffic and will be encouraged to allocate their limited capital dollars to other investments. Thus, the standards the Board adopts in this proceeding clearly will have a significant impact on railroad investment in new capacity.

UP shares the Joint Shippers' view that enhanced railroad infrastructure is necessary and desirable, which is why we have urged the Board not to adopt standards that would interfere with the operation of market forces and with rate levels that result from the interaction of supply and demand.¹⁰ The Board is required to regulate rates in the absence of effective competition and where rates are unreasonable, but its regulations must be based on meaningful, market-based standards that allow railroads to earn revenues adequate to provide a safe, efficient, and sound rail transportation system. *See* 49 U.S.C. §§ 10101(1)-(4), (6), 10704(a)(2).

III. THE BOARD SHOULD NOT EXPAND ELIGIBILITY FOR SIMPLIFIED STANDARDS AND SHOULD APPLY SIMPLIFIED-SAC TO ALL SMALL CASES.

In UP's opening comments, we generally agreed with the Board's approach to determining eligibility for simplified standards, including the proposed Maximum Value of the Case ("MVC") approach and aggregation rule. We also agreed that the threshold between full SAC and Simplified-SAC cases should be set no higher than \$3.5 million. However, we urged

¹⁰ AECC misses the point entirely when it argues that the Board should not "permit[] railroads to rely on price escalation rather than capacity investment to accommodate increasing demand." AECC Reply at 5. The fact is that railroads cannot afford to build new capacity to accommodate increasing demand unless they are allowed to charge shippers rates that reflect that demand.

the Board to establish a firm threshold in order to eliminate costly and time-consuming disputes about eligibility. We also urged the Board to apply Simplified-SAC in all cases in which the use of simplified standards is deemed appropriate because (i) the costs to a shipper of a Benchmark case would be similar to the costs of a Simplified-SAC case, and (ii) the Benchmark method does not provide a principled basis for testing the reasonableness of a challenged rate.¹¹

In their reply comments, the Joint Shippers continue to criticize the Board's proposed eligibility criteria, and they attack our additional proposals, but their criticisms and attacks lack merit. As in their opening comments, the Joint Shippers focus their efforts on expanding the size of cases that would qualify for an unprincipled, unpredictable, benchmark-based test rather than offering constructive proposals that would make it less costly for shippers with small cases to obtain access to the Board.¹²

A. The Board Should Set The Threshold Between A Full SAC Presentation And Simplified-SAC No Higher Than \$3.5 Million.

The Joint Shippers incorrectly assert that the Board has no evidence that shipper costs for full SAC cases are approximately \$3.5 million.¹³ They also criticize UP for endorsing the \$3.5 million threshold based on its experience in SAC cases, arguing that railroad costs are irrelevant.¹⁴ In fact, the Board's \$3.5 million estimate was based in large part on testimony from the same shippers that now claim costs will be much higher – testimony that the Joint Shippers

¹¹ See UP Op. at 68-70.

¹² AECC merely summarizes the arguments it made in its opening comments for allowing shippers in all cases the option of using Simplified-SAC rather than the full SAC test. See AECC Reply at 5-7; Opening Comments of Arkansas Electric Cooperative Corporation ("AECC Op.") at 3-7. We addressed those arguments in our reply comments. See Reply Submission of Union Pacific Railroad Company ("UP Reply") at 62-63.

¹³ See ACC Reply at 9.

¹⁴ See *id.*

attached to their opening comments in this proceeding. *See NPRM* at 36.¹⁵ Moreover, UP's argument focused on shipper costs, not railroad costs. We said that the threshold should be no higher than \$3.5 million, a figure consistent with our experience in full SAC cases, because "the cost to complainants is likely to be significantly lower than the cost to defendants," who would bear "the bulk of discovery costs in a SAC case."¹⁶

Significantly, shippers never advance any concrete proposals of their own for broader eligibility standards, and they never address the Board's and our concern that expanding eligibility any further would have a negative impact on the ability of railroads to earn adequate revenues.¹⁷ Nor do they address the argument that a broader application of a Benchmark-like test would undermine that test's one tenuous link to CMP principles because fewer of the rates for potentially comparable movements would be constrained by some form of the SAC test.¹⁸

B. The Board Should Apply Simplified-SAC In All Cases In Which A Full SAC Presentation Would Be Too Costly Given The Value Of The Case.

UP's argument for applying Simplified-SAC in all cases in which a full SAC presentation would be too costly is based on three propositions that shippers have not refuted: (i) Simplified-SAC is based on sound economic principles; (ii) the Benchmark method is not based on sound economic principles; and (iii) the costs to shippers would be similar under both methods.

¹⁵ *See also* Joint Written Comments submitted by American Chemistry Council, et al. ("ACC Op."), App. C at 9 (Joint Written Testimony of the American Chemistry Council, et al., submitted July 16, 2004, claiming that the cost to bring a full SAC case "now exceeds \$3 million, and is heading upward").

¹⁶ UP Op. at 69. We also observed that the costs of full SAC cases would likely decrease in the future as a result of the Board's decision in *Major Issues*. *See id.* at 69 & n.76.

¹⁷ *See id.* (citing *Simplified Guidelines*, 1 S.T.B. at 1008-09).

¹⁸ *See* UP Reply at 65-66.

The Joint Shippers argue that broad application of Simplified-SAC would result in some situations in which the cost to bring a case might be higher than the anticipated value of the case.¹⁹ But such situations will arise no matter what test the Board adopts.²⁰ Moreover, as we discussed in our opening and reply comments, Simplified-SAC would be much less costly for shippers than shippers claim, and similar to their costs under the Benchmark method, because railroads would bear most of the costs.²¹ But even if Simplified-SAC would be as costly as shippers claim, the costs would be outweighed by the fact that Simplified-SAC is based on sound economic principles while the Benchmark method is not.²² The Board cannot satisfy its obligation to adopt a “simplified” process by adopting a test that does not employ a meaningful standard for “determining the reasonableness of challenged rail rates.” 49 U.S.C. § 10701(d)(3).²³

The Joint Shippers suggest that UP’s proposal to apply Simplified-SAC in all small cases may be motivated by a desire to apply “adjustments” that would allow us to charge “higher rates over high-density routes.”²⁴ They further state that our “tactic is understandable”

¹⁹ See ACC Reply at 9-10.

²⁰ Indeed, shippers’ opening comments contained many examples in which the likely value of a case would be less than the \$100,000 to \$400,000 that their consultants claim it would cost to conduct a Benchmark test. See, e.g., Comments of Cargill Incorporated at 12; Comments of Chevron Phillips Chemical Company at 13; Comments of The Dow Chemical Company at 14. But this has not stopped shippers from proposing to make the Benchmark test even more costly for shippers by introducing additional factors into the analysis. See UP Reply at 66-67.

²¹ See UP Op. at 49-51; UP Reply at 27-37.

²² See *Burlington N.R.R. v. ICC*, 985 F.2d 589, 599 (D.C. Cir. 1993).

²³ See also *Burlington N.R.R. v. ICC*, 985 F.2d at 598 (rejecting a benchmark-based maximum rate standard because “[t]he principle for limiting . . . rates has no evident connection to any of the goals that the Commission said CMP/SAC was designed – indeed, well designed – to achieve”).

²⁴ ACC Reply at 10.

given that “it is extremely difficult to move traffic across UP’s network without running into a capacity constrained segment.”²⁵ Although constrained capacity is a valid factor to consider in evaluating the reasonableness of rates, we have not proposed the type of adjustments the Joint Shippers describe. To the contrary, we observed that Simplified-SAC assumes that all traffic will incur system-average operating costs and thus would *not* allow railroads to show that they “incur higher costs when they operate over capacity-constrained lines.”²⁶

In any event, the Joint Shippers have no need to speculate about UP’s motive for supporting Simplified-SAC rather than the Benchmark method. Our motive is straightforward: we believe that the use of the unpredictable, unprincipled Benchmark method would create an even greater risk of depriving us of revenue we need to invest in the new capacity that shippers are now demanding.

C. The Board Should Establish Firm Eligibility Thresholds For Simplified Standards.

The Joint Shippers mischaracterize UP’s proposal that the Board establish strict eligibility thresholds as “draconian” and incorrectly claim that the proposed eligibility criteria would place a “chokehold” on shippers’ ability to invoke simplified standards.²⁷ Our proposal is a legitimate effort to eliminate the time and cost that would otherwise be involved in eligibility disputes, which are of even greater concern now that shippers have threatened to begin each case

²⁵ *Id.*

²⁶ UP Op. at 21. The Joint Shippers may be referring to our proposal that the Board account for new investments on the issue route during the prescription period, but our point there was simply to ensure that railroads are at least compensated for their actual investments on the issue route, which is a necessary complement to the Board’s plan to incorporate changes in traffic volumes, revenues, and operating costs during the prescription period. *See NPRM* at 14.

²⁷ ACC Reply at 11.

“with a pitched battle involving . . . eligibility.”²⁸ In fact, the Joint Shippers themselves have previously urged the Board to adopt “a ‘bright-line test’ to determine the eligibility of a shipper to use the small case guidelines.”²⁹ Moreover, we have refuted shipper claims that few cases would be eligible for simplified treatment under the Board’s criteria.³⁰ We even proposed an alternative approach to MVC calculations to address shipper complaints that the Board’s approach would unduly limit access to simplified standards by understating the likely actual value of cases.³¹

Despite their various complaints, the Joint Shippers fail to suggest any concrete alternatives to the Board’s proposals. Instead, they repeat earlier assertions that “the proposed eligibility rules [must be] altered drastically to make them more realistic” and threaten to begin each case “with a pitched battle involving . . . eligibility.”³² Particularly given these shipper threats and their failure to suggest workable alternatives, the Board should not be dissuaded from adopting its proposed eligibility criteria, modified in accordance with our comments.

²⁸ *Id.* at 12.

²⁹ ACC Op., App. C at 3 (Joint Written Testimony of the American Chemistry Council, et al., submitted July 16, 2004); *see also* Joint Comments of American Chemistry Council, et al. at 13, *Rail Rate Challenges In Small Cases*, STB Ex Parte No. 646 (July 11, 2003) (“A bright-line eligibility test . . . will significantly streamline small rate cases.”).

³⁰ *See* UP Reply at 52-53.

³¹ *See id.* at 58.

³² ACC Reply at 12.

IV. THE BOARD SHOULD ADOPT SIMPLIFIED-SAC WITH THE MODIFICATIONS SUGGESTED BY UP.

In UP's opening comments, we supported Simplified-SAC and suggested several modifications to the Board's approach that would increase the accuracy and reduce the time and cost of Simplified-SAC cases.³³

The Joint Shippers continue to claim in their reply comments that Simplified-SAC would be too costly, too time-consuming, and inconsistent with CMP. However, just as in their opening comments, they complain about costs that would in fact be borne by railroads rather than shippers, ignore the need to make reasonable trade-offs between cost and accuracy, and offer no suggestions of their own for improving the Board's proposal.

Unlike the Joint Shippers, AECC supports Simplified-SAC.³⁴ Although AECC does not dispute the benefits of most of our proposed modifications, it does take issue with our proposal to further simplify proceedings by requiring SARRs to replicate the primary route used by the challenged movement because it is concerned that railroads may elect to use inefficient routes.³⁵ As we discuss below, AECC's concern is unwarranted.

A. The Board Should Reject Claims That Simplified-SAC Would Be Too Costly For Shippers.

The Joint Shippers rely on comments by railroads (other than UP) to support their erroneous claim that Simplified-SAC proceedings would be time-consuming and expensive for shippers.³⁶ Those railroads correctly observed that Simplified-SAC would require railroads to

³³ See UP Op. at 13-46.

³⁴ See AECC Reply at 5-8.

³⁵ See *id.* at 7-8.

³⁶ See ACC Reply at 12-17.

produce a significant amount of data to shippers as part of discovery.³⁷ As we explained in our reply comments, however, these discovery burdens would not make proceedings expensive for *shippers*. Shippers would not incur substantial costs to review the data produced by railroads, which would consist of mechanical calculations of cross-over revenues and operating costs, and if necessary, they could ask the Board to convene technical conferences as a low-cost method of addressing any perceived disparities in the data.

We and other railroads have urged the Board to take steps to prevent shippers from imposing discovery costs on railroads in order to create leverage to bargain for below-market rates, but all of the railroads supported the adoption of Simplified-SAC.³⁸ None of the railroad comments support the argument that Simplified-SAC would be too costly for shippers.

B. The Board Should Reject Claims That Simplified-SAC Is Inconsistent With CMP Principles And Cannot Be Improved.

The Joint Shippers incorrectly portray railroad suggestions for improving Simplified-SAC as demonstrating that Simplified-SAC is inconsistent with CMP principles and

³⁷ UP does not share the concerns expressed by several other railroads about the ability to produce data regarding traffic moving over the route used by the challenged movement, but we recognize that different railroads have different information systems and therefore different data retrieval capabilities.

³⁸ UP urged the Board to help prevent shippers from taking advantage of their ability to impose significant discovery costs on railroads by (i) requiring parties to engage in mediation at an early stage of the proceedings; (ii) addressing petitions for partial revocation of exemptions before requiring railroads to produce extensive discovery; and (iii) ensuring that the full SAC test, with its more equal sharing of burdens, continues to be the preferred procedure for rate reasonableness determinations. *See* UP Op. at 3-4.

We also endorsed AAR's proposal that the Board implement a "loser pays" rule with respect to discovery costs. *See* UP Op. at 45; Opening Comments of the Association of American Railroads ("AAR Op.") at 9. The Joint Shippers oppose this proposal. *See* ACC Reply at 16-17. However, AECC suggests that the Board "should implement methods that would equalize (or equitably distribute) the reasonable and actual costs of the analysis and litigation required to establish the prescribed rates." AECC Reply at 9.

that any attempts to improve it would create a “quagmire.”³⁹ They falsely suggest that the Board must choose between (i) substantially complicating the Simplified-SAC approach by entertaining any and all arguments parties might make in each case about adjustments that would more accurately replicate the results that would be obtained using a full SAC test, and (ii) rejecting Simplified-SAC as inconsistent with CMP.⁴⁰ As a legal matter, the Board need not make such an all-or-nothing choice: any simplified method will necessarily be “less precise” than CMP and the SAC test. *NPRM* at 10.⁴¹ The Board must “make reasonable trade-offs between the quality and cost of possible regulatory approaches.”⁴² Moreover, as we discuss next, the Joint Shippers’ assertions are factually incorrect: Simplified-SAC is consistent with CMP principles, and the improvements suggested by the railroads would not substantially increase the time, cost, or complexity of a Simplified-SAC analysis.

The Joint Shippers are incorrect when they claim that railroad suggestions for improving Simplified-SAC show that the Board’s proposal is inconsistent with CMP principles. As we discussed extensively in our reply comments, Simplified-SAC strikes nearly the correct balance between accuracy and simplicity while adhering to the principles of CMP.⁴³ Railroads have suggested ways for the Board to improve the balance, but none has asserted that the basic approach is inconsistent with CMP principles.

³⁹ See ACC Reply at 17-21.

⁴⁰ See *id.* at 20-21.

⁴¹ The Joint Shippers ignore the inconsistency of criticizing Simplified-SAC as untested and unlikely to produce precisely the same result as the full SAC test while advocating a benchmark-based approach much further removed from any connection to CMP principles. See UP Reply at 39-42.

⁴² *Burlington N.R.R. v. ICC*, 985 F.2d at 597.

⁴³ See UP Reply at 12-25.

The Joint Shippers are also incorrect when they claim that railroad suggestions for improving Simplified-SAC “would add substantial time, cost and complexity to the process.”⁴⁴ Railroads have not proposed extensive changes to Simplified-SAC. We simply have asked the Board not to foreclose parties from offering evidence to avoid significant inaccuracies in specific cases, particularly with respect to road property investment and operating costs.⁴⁵ In fact, our approach would help achieve an even better balance between cost and accuracy because the parties would police themselves and submit evidence only when results would be meaningfully different.⁴⁶

Despite their general statements of opposition to Simplified-SAC, the Joint Shippers never object to the specifics of our proposals for improving the Board’s approach (with one exception, which they relegate to a footnote and which we discuss below). To the contrary, they recognize that the use of rolling average investment costs may merit additional scrutiny in particular cases.⁴⁷ They also recognize that movements of hazardous materials are subject to extensive regulation and involve special costs.⁴⁸

⁴⁴ ACC Reply at 18.

⁴⁵ *See, e.g.*, UP Op. at 24-30; Opening Comments of BNSF Railway Company (“BNSF Op.”) at 22-28. UP also proposed to save time and reduce costs by eliminating one entire round of evidentiary filings. *See* UP Op. at 43-44. Shippers have never addressed this proposal.

⁴⁶ The Joint Shippers claim that UP has proposed unworkable standards for deciding when parties would be allowed to submit additional evidence. *See* ACC Reply at 20. In fact, we did not propose to limit parties’ opportunity to submit additional evidence. Instead, we argued that parties would police themselves as long as the Board required them to meet a high standard of proof before it would depart from the results produced by its proposed rolling average cost approach. *See* UP Op. at 27-28.

⁴⁷ *See* ACC Op., Crowley VS at 57-60.

⁴⁸ *See* ACC Op., Fauth VS at 53; ACC Reply at 30.

The Joint Shippers and AECC both object to railroad proposals to prohibit the re-routing of issue traffic,⁴⁹ but they never address arguments that disputes over re-routing would unnecessarily increase the time, cost, and complexity of Simplified-SAC cases.⁵⁰ Moreover, the Joint Shippers' argument for permitting SARRs to re-route traffic – that “carriers have re-routed substantial amounts of traffic in recent years to increase traffic densities . . . and increase efficiencies”⁵¹ – in fact supports our position that railroads make rational routing decisions and that re-routing efforts by shippers in rate cases would likely reflect gaming rather than sound railroad practice.⁵² The Joint Shippers' argument also undermines AECC's misguided claim that railroads have incentives to route traffic inefficiently.⁵³

The Joint Shippers have not offered any suggestions of their own for improving Simplified-SAC. They are thus in a poor position to criticize the balance between cost and accuracy struck by the Board and railroad proposals for improving that balance.

⁴⁹ See ACC Reply at 17 n.14; AECC Reply at 7-8.

⁵⁰ See, e.g., UP Op. at 14-19; BNSF Op. at 18-19.

⁵¹ ACC Reply at 17 n.14.

⁵² See UP Op. at 18 (“Railroads’ incentives are to minimize operating costs and maximize existing capacity.”).

⁵³ See AECC Reply at 7-8. AECC also argues that a shipper should be allowed to re-route the challenged movement even in situations in which the defendant has made an efficient routing decision based on overall network considerations, if the shipper can show that the challenged movement could in theory traverse a lower-cost route. See *id.* at 8. This is precisely the sort of situation that we discussed in our opening comments to illustrate the complications that would ensue if shippers were allowed to re-route traffic without considering the broader impacts on investment and operating costs. See UP Op. at 15-17. Our proposal to prohibit shippers from re-routing the challenged movement was specifically designed to eliminate the need to address such complicated issues in simplified proceedings.

V. THE BOARD SHOULD NOT ADOPT THE BENCHMARK METHOD.

Shippers have not attempted to refute UP's criticisms of the Benchmark method. They have no response to our argument that the Benchmark method violates fundamental principles of rate regulation and would produce inaccurate and unpredictable results.⁵⁴ They do not dispute that it "provides no economic principle, no theoretically definable test" against which a rate "can in principle be objectively assessed."⁵⁵ They do not dispute our argument that the use of a "revenue-need adjustment factor" would not remedy the fundamental problems inherent in a test based on revenue-to-variable cost ("r/vc") benchmarks.⁵⁶ They do not dispute our argument that the costs to a shipper of using the Benchmark method would be similar to the costs of a Simplified-SAC case.⁵⁷

Rather than offer a principled defense of the Benchmark method or their own Benchmark-like proposal, the Joint Shippers use their reply to continue to complain about the details of the Board's proposal. For example, in their opening comments, they argued that there was no statistical basis for the Board's proposal to construct a confidence interval around the

⁵⁴ See UP Op. at 52-54.

The Joint Shippers incorrectly claim that UP is being inconsistent when we attack the Benchmark method but suggest the use of rate comparisons as a "reality check" on the results produced by Simplified-SAC. See ACC Reply at 11 n.7. Simplified-SAC will necessarily be less accurate than a full SAC test, and rate comparisons can reveal the existence of flaws in an application of Simplified-SAC that could not reasonably be ignored – e.g., they might show that a prescribed rate would be lower than the rates charged to shippers with competitive alternatives. Using rate comparisons to help identify potential flaws in Simplified-SAC is very different from using r/vc comparisons as a simplified standard in their own right: we know enough to question a result that says that a shipper without competitive options should be paying less than a shipper with competitive options, but we cannot say how much more such a shipper should be paying based on nothing more than r/vc levels for supposedly comparable traffic.

⁵⁵ *Burlington N.R.R. v. ICC*, 985 F.2d at 598 (internal quotation omitted).

⁵⁶ See UP Op. at 54-57.

⁵⁷ See *id.* at 49-51.

estimate of the mean r/vc for the comparison group.⁵⁸ In their reply comments, under the guise of responding to railroad comments, they make the new argument that the use of a confidence interval “will have a ‘ratchet-up’ effect on rates.”⁵⁹ In fact, application of the Benchmark method will produce a ratchet-down effect when it reduces a challenged rate, because the first reduction will in turn reduce the mean r/vc of the comparison group in all later cases in which the comparison group includes the first movement, a pattern that will continue as shippers bring new cases.⁶⁰

The Joint Shippers also continue to complain that the Board’s proposal to unmask waybill data only after choosing the final comparison group would prevent them from selecting comparable traffic based on “the true characteristics of the universe of relevant traffic.”⁶¹ But

⁵⁸ See ACC Op., Crowley VS at 48-49. BNSF responded to the Joint Shippers’ criticism in its reply. See Reply Comments of BNSF Railway Company (“BNSF Reply”) at 37. UP did not address their criticism because we anticipated and addressed the issue in our opening comments. See UP Op. at 57.

⁵⁹ ACC Reply at 22. The Joint Shippers claim that they are replying to railroad arguments that the use of a confidence interval would “produce a ratchet-down effect.” *Id.* UP was the only railroad that addressed the confidence interval proposal on opening, and we argued only that the use of a confidence interval would not address the fundamental problem with the Benchmark method: that the mean r/vc ratio of the comparison group provides no objective basis for determining whether the rate for the challenged movement is unreasonably high. See UP Op. at 57. We did, however, argue that *other* aspects of the Benchmark approach – specifically, its reliance on average rates as the basis for a regulatory ceiling – would tend to produce a ratchet-down effect. See *id.* at 66-67.

⁶⁰ Use of a confidence interval would slow the ratchet-down effect because the challenged rate would not be reduced all the way to the average, and it would preclude rates from ratcheting all the way to the jurisdictional threshold – for revenue inadequate carriers – but the Benchmark approach would still have the impermissible effect of reducing rates merely through iterative applications. See UP Op. at 66-67.

Moreover, the Joint Shippers do not dispute that the Board’s proposed revenue adequacy adjustment would *accelerate* the ratchet-down effect for any carrier that has an R/VC_{total} greater than its RSAM by creating a situation in which every shipper would be entitled to a rate that is below average. See *id.* at 67 n.70.

⁶¹ ACC Reply at 23.

they still have no answer to the Board's point that the "comparability of a movement should depend on the characteristics of the movement, not the level of the rate for that movement."

NPRM at 33.⁶²

Although UP opposes the Benchmark proposal and any formulaic, benchmark-based approach to testing the reasonableness of rates, we have tried to contribute to the dialogue in this proceeding by highlighting several issues that the Board would have to address in order to perform valid r/vc comparisons. The Joint Shippers do not dispute most of the points that we raised. They do not dispute that the Board would have to address situations in which the current rates charged for movements in the comparison group are not reflected in the Waybill Sample.⁶³ They also do not dispute the principle that parties should be allowed to offer non-public information to address whether or not movements are comparable,⁶⁴ though they ask the Board "to take a practical approach in identification of comparable traffic groups."⁶⁵

In fact, there appears to be no substantive difference between our argument that the Board would have to consider all relevant evidence that parties might offer when assessing whether movements are actually comparable and the Joint Shippers' view that the Board should allow "the introduction of non-formulaic considerations in the prescription of a maximum rate under the [Benchmark] approach."⁶⁶ The difference appears to be a practical one: we offered

⁶² See also UP Reply at 46-48 (explaining why shippers have no valid need for early access to unmasked revenue data); BNSF Reply at 35-36 (same); Reply Comments of Canadian Pacific Railway Company at 15-16 (same); Reply Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company at 28-30 (same).

⁶³ See UP Op. at 58-59.

⁶⁴ See *id.* at 61-65.

⁶⁵ ACC Reply at 24.

⁶⁶ *Id.* at 25.

(continued...)

suggestions within the framework of the Board's effort to develop a formulaic approach, while the Joint Shippers advocate "post-formulaic adjustments."⁶⁷ Thus, for example, we argued that the Board should consider evidence regarding capacity-constrained lines in selecting comparable traffic,⁶⁸ while the Joint Shippers say that evidence regarding the effects of capacity constraints on rates could be presented as part of an argument "that the outcome of a [Benchmark] analysis applying the benchmark standards alone should be adjusted."⁶⁹

Of course, even if we agreed with the Joint Shippers on the best way to perform r/vc comparisons, it would not change the fact that we fundamentally disagree with the concept of basing rate reasonableness determinations on those comparisons.

VI. THE BOARD SHOULD USE UNADJUSTED URCS WITH A FEW LIMITED EXCEPTIONS.

UP largely agrees with the Joint Shippers that the Board should simplify variable cost calculations and operating cost calculations in small rate cases by using unadjusted URCS system-average costs. In the few areas in which we disagree, it is because the Joint Shippers either understate the impact of failing to make adjustments or overstate the costs of making adjustments, and thus they advocate an outcome that would not reflect a reasonable balance between cost and accuracy.

The Joint Shippers disagree with our proposal to exclude non-defendant traffic from the comparison group, but they fail to consider the implications of their position. They say that "there is absolutely no evidence that, just because traffic moves on a carrier different from the defendant, its elasticity of demand is different." *Id.* at 23. However, the Board has recognized that carrier-specific factors *might* make comparisons inappropriate, so it must either allow parties to address those factors on a case-by-case basis or exclude non-defendant traffic altogether. *See* UP Op. at 60 (citing *Simplified Guidelines*, 1 S.T.B. at 1033-34, 1036). Our view is that it would make more sense in the context of a simplified approach to exclude non-defendant traffic. The Joint Shippers never address this choice.

⁶⁷ ACC Reply at 25.

⁶⁸ *See* UP Op. at 65-66.

⁶⁹ ACC Reply at 25.

A. The Board Should Allow Defendants To Account For Above-Average Operating Costs Associated With Movements Of Hazardous Materials In Simplified-SAC Cases.

One area of disagreement involves Simplified-SAC cases challenging rates for movements of hazardous materials.⁷⁰ Under the Board's proposal, SARR operating costs would be calculated based on the defendant's unadjusted URCS costs. The Board's proposal is, for the most part, a reasonable shortcut. However, as UP and other carriers have explained, movements of hazardous materials impose costs on railroads that greatly exceed system-average costs due to the safety precautions that railroads must take and the risks they face.⁷¹ We have explained that these costs will likely continue to rise as a consequence of additional federal and state regulation. We therefore urged the Board to recognize an exception to the use of system-average URCS costs in cases involving movements of hazardous materials.⁷² In fact, since we filed our reply comments, the Transportation Security Administration has proposed new security requirements, including costly tracking and chain-of-custody rules, for hazardous materials transported in commerce by rail.⁷³ In addition, the Pipeline and Hazardous Materials Safety Administration has

⁷⁰ No party has objected to UP's only other proposal regarding adjustments to URCS-based operating costs in Simplified-SAC cases – that the Board should not foreclose the possibility of using actual trackage rights payments when they would have a significant impact on the result – *i.e.*, when a SARR would use the incumbent's trackage rights for a substantial portion of the route. *See* UP Op. at 30.

⁷¹ The Joint Shippers incorrectly suggest that the only special costs at issue are those associated with the risk of incidents. *See* ACC Reply at 30. We are also concerned about above-system-average operating costs that arise from special handling requirements that currently apply to movements of hazardous materials and that might be applied under proposed regulations. *See* UP Op. at 28-29, 42-43.

⁷² *See* UP Op. at 28-29; Opening Comments of Canadian Pacific Railway Company at 13-14.

⁷³ *See* Rail Transportation Security, 71 Fed. Reg. 76,852 (proposed Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 1520 & 1580).

proposed new rules that would require rail carriers to compile data on specified shipments of hazardous material and make routing decisions based on safety and security assessments.⁷⁴

The Joint Shippers do not dispute that railroads incur above-average operating costs when handling hazardous materials, but they claim that opening the door to adjustments “will lead to serious disputes in each case.”⁷⁵ They are wrong for several reasons. *First*, we do not ask the Board to permit adjustments in every case, only cases in which the challenged rate is for the transportation of hazardous materials. *Second*, we do not ask the Board to permit adjustments to costs for all movements in the SARR traffic group, only movements of hazardous materials. *Third*, the burden of proof would be on the defendant, and thus railroads would seek to depart from system-average costs only when the impact on the case would be significant (*i.e.*, when the SARR traffic group would include a substantial amount of hazardous materials) and only when they could present evidence sufficient to meet their burden of proof (*i.e.*, evidence that would be required in a case under the full SAC test), thus ensuring an appropriate trade-off between cost and accuracy in each case.⁷⁶

The Board should also consider that it would be unfair and unreasonable for regulators to impose higher operating costs on railroads for movements of hazardous materials,

⁷⁴ See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834 (proposed Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 172 & 174).

⁷⁵ ACC Reply at 31.

⁷⁶ The Joint Shippers also criticize carriers for not offering concrete proposals for making movement-specific adjustments to system-average costs for movements of hazardous materials. See ACC Reply at 31 n.24. However, we could not offer firm proposals because the legal and regulatory environment that railroads face is in a state of flux, and the impacts on railroad operations and costs cannot yet be determined. The present state of uncertainty is one of the main reasons why the Board should leave room for future efforts to adjust system-average costs, not a reason to close the door on such efforts.

on the one hand, while precluding railroads from charging rates sufficient to recover those costs, on the other. It would be particularly unfair and unreasonable because railroads cannot avoid those costs, as they have a common carrier duty to handle hazardous materials.⁷⁷

B. The Board Should Allow Limited Adjustments To URCS Costs For Jurisdictional Threshold Calculations.

A second area of disagreement involves the use of unadjusted URCS to calculate jurisdictional thresholds. In our opening comments, we also urged the Board to recognize a few important exceptions to the use of unadjusted URCS. The Joint Shippers' primary response to our proposals is that there would be a slippery slope – “[o]nce the adjustment process starts, it will be endless.”⁷⁸ However, the Board can and should allow some exceptions while imposing strict limits on the types of adjustments it will permit.

First, the Board should adhere to precedent by including in jurisdictional threshold calculations the cost of railroad payments to third parties and shippers that are not captured as costs by URCS, such as payments for loading services, plant switching, and completing hauls.⁷⁹ The Joint Shippers incorrectly claim that “such costs are included in the URCS data and in an URCS-based variable cost analysis on a system-average basis.”⁸⁰ As we explained in our opening comments and as the Board has also recognized, the Board’s current accounting rules in fact exclude these costs from URCS costs.⁸¹

⁷⁷ See *Classification Ratings of Chemicals, Conrail, April 30, 1986*, 3 I.C.C.2d 331 (1986).

⁷⁸ ACC Reply at 27.

⁷⁹ See UP Op. at 34-36.

⁸⁰ ACC Reply at 30.

⁸¹ See UP Op. at 34-35 & n.38; *Major Issues*, slip op. at 57 (“Carriers note that these costs are not reflected as expenses in Schedule 410, and thus are not captured as costs by URCS.”).

The Joint Shippers also claim that adhering to precedent would complicate rate cases because the Board could not include the costs of carrier payments to shippers without also leaving room to address potential shipper claims that the payments to shippers “are insufficient to cover the costs of the service provided” and that “the shipper [should be] entitled to some form of an offset [on its rates].”⁸² However, most cases that raise these payment issues involve payments to third parties, not payments to shippers, and the Joint Shippers have no argument at all for excluding payments to third parties from jurisdictional threshold calculations. Moreover, with respect to payments to shippers, the Joint Shippers’ professed concern is in fact a red herring. Even if payments were insufficient to cover the costs of the services provided and the difference was not offset by lower rates, that situation would not be redressed by excluding the payments from jurisdictional threshold calculations in a rate case. In fact, in the context of a rate case, a shipper would be better off if the carrier were paying less than the full costs: the higher the carrier’s payment, the higher its variable costs will be, and the higher its variable costs are, the higher it may set rates while remaining below the jurisdictional threshold. Furthermore, the scenario that the Joint Shippers hypothesize is not plausible: a shipper would have no reason to provide a service for a railroad unless the carrier was paying the actual cost of the service or providing the shipper with an appropriate offset to its rates. Ultimately, no matter how a shipper is actually compensated, jurisdictional threshold calculations must account for the costs of providing service so that prescribed rates do not fall below the statutory minimum.

The Board should also consider the consequences of deciding that railroads can no longer treat their payments to third parties and shippers as a cost: carriers will have stronger

⁸² ACC Reply at 30.

incentives to perform services themselves and recover the costs through higher rates, even if it would be more efficient to pay others to perform the services.

Shippers have offered no argument or evidence to undermine the fact that including payments to third parties and shippers in jurisdictional threshold calculations is a simple, low-cost, and well-established practice that can dramatically improve the accuracy of those calculations.⁸³

Second, the Board should adhere to its precedent by using actual car rental costs because the inclusion or exclusion of actual car rental costs can have a dramatic effect on variable cost calculations.⁸⁴ The Joint Shippers argue that such a rule would be subject to manipulation and could lead to protracted disputes because a railroad may choose to use a shipper's cars but fail to make payments adequate to cover the shipper's ownership expenses.⁸⁵

⁸³ See, e.g., *FMC*, 4 S.T.B. at 775, Table A-13 (showing third-party switching allowances accounting for up to 20% of total variable cost per carload); *Carolina Power & Light Co. v. Norfolk S. Ry.*, STB Docket No. 42072, slip op. at 136, Table E-11 (STB served Dec. 23, 2003) (showing third-party loading charges accounting for up to 25% of total variable cost per carload).

Shippers incorrectly claim that the cases railroads cite to support the use of movement-specific adjustments “are decisions that are antecedents of the Interstate Commerce Commission Termination Act and its mandate for ‘simplified’ procedures.” ACC Reply at 32. The Board has consistently made movement-specific adjustments to URCS costs in its post-ICCTA cases, including the two cases cited in this footnote.

⁸⁴ See UP Op. at 39-40. The Joint Shippers argue that disputes might arise because carriers may attempt to claim that they make “constructive” payments for shipper-owned equipment that take the form of reduced rates for movements in shipper-owned equipment. See ACC Reply at 29. However, we are unaware of any rate case in which the carrier actually pursued such an approach, and in any event, our proposal involves only documented car rental costs.

⁸⁵ See ACC Reply at 28-29. The Joint Shippers incorrectly suggest that railroads are not entitled to compensation for providing service in cars they do not own because “one goal of the proposed rules . . . is to provide the defendant railroad with ‘a reasonable return on the replacement value of those facilities’ used to serve the complaining shipper.” *Id.* at 29 (quoting *NPRM* at 12). The Joint Shippers’ argument misses the point. A railroad must be allowed to recover its operating costs, which would include car hire payments to shippers, and URCS costs for shipments in private equipment do not include any additional costs for return on investment or depreciation associated with those cars.

The Joint Shippers' professed concern that carrier payments are not adequate to cover shipper ownership expenses would not be redressed by using system-average payments rather than actual payments. Moreover, as we discussed above with regard to carrier payments for other services that shippers perform, in the context of a rate case, a shipper would actually be better off if the carrier were paying less than the full amount needed to cover the shipper's ownership expense because it would result in a lower jurisdictional threshold. Furthermore, as is the case with carrier payments for other services, the scenario that the Joint Shippers hypothesize is not plausible. Railroads cannot dictate car rental payment terms. If the shipper is dissatisfied with the compensation that the railroad offers, it can require the carrier to use its own cars.⁸⁶ Finally, as is the case with carrier payments for other services, Board precedent in this area is well established, and both railroads and shippers have structured their commercial relationships accordingly.⁸⁷ It would be unreasonable for the Board to change its rules in ways that disrupt parties' established expectations and affect substantive liability determinations in rate cases.

Third, the Board should allow parties to make more accurate variable cost calculations for movements of hazardous materials and high/wide traffic.⁸⁸ The Joint Shippers do not dispute our evidence that railroads may be significantly under-compensated for movements of hazardous materials and high/wide traffic unless the Board remains open to adjustments to system-average URCS. Moreover, as discussed above with respect to operating

⁸⁶ See 49 U.S.C. § 11121. In addition, as the Joint Shippers recognize, railroad payments for use of privately owned tank cars are governed by an agency-approved agreement. See ACC Reply at 29; see also *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), *supplemented*, 7 I.C.C.2d 645 (1991).

⁸⁷ See, e.g., *FMC*, 4 S.T.B. at 760 & n.111.

⁸⁸ See UP Op. at 41-43.

costs, parties would pursue adjustments to URCS only when the improvement in accuracy outweighs the costs involved.

The Joint Shippers argue that the Board should not worry about high/wide traffic because it generally moves under contract.⁸⁹ But the Board cannot avoid the issue because shippers can be expected to demand common carrier rates if they can take advantage of the Board's jurisdiction to obtain better results than they could obtain under contracts.

Finally, the Board should allow parties to substitute three actual operating statistics in place of calculated or system-average inputs: (i) number of locomotives, (ii) empty miles, and (iii) tare weight of cars.⁹⁰ Our proposal would have no effect on the Board's use of unadjusted URCS system-average costs. Rather, our proposal would ensure that those costs are applied to the actual operating characteristics of the challenged movement. Moreover, the Board's Phase III model readily allows users to substitute these actual operating characteristics to obtain more accurate cost results. In many cases, the difference will not be significant, and parties likely will not bother with any adjustments. But in some cases, the differences will be substantial – for example, UP coal movements originating in the Colorado mountains require about twice as many locomotives than our system-average unit trains, while certain movements originating in the Powder River Basin require fewer locomotives for substantial portions of their routes. In both cases, it would be unreasonable to prohibit parties from costing the actual movement characteristics.

The Joint Shippers object to our proposal, but they never even try to explain how the use of these few additional actual operating characteristics would complicate jurisdictional

⁸⁹ See ACC Reply at 30.

⁹⁰ See UP Op. at 36-39.

threshold calculations more than they would improve the accuracy of such calculations. They suggest that railroads have only proposed to use data that would benefit them, but the use of actual operating characteristics would not systematically benefit either railroads or shippers. Instead, it would produce more accurate calculations for everyone at little additional cost.

VII. THE BOARD SHOULD REQUIRE NON-BINDING MEDIATION IN SMALL RATE CASES.

In our opening comments, we endorsed AAR's proposal that the Board provide for mandatory, non-binding mediation in small rate cases.⁹¹ The Joint Shippers' response was less than enthusiastic. They say that they "do not oppose mandatory mediation," as long as "it takes place after the parties have been given equal access to all information relevant to conduct an informed and meaningful mediation process."⁹² If they mean to say that mediation should not take place until the end of discovery, we strongly disagree. The primary benefit of mediation is that it provides parties with an opportunity to resolve their dispute before expending substantial resources on a case. If mediation would not take place until the case is well underway, then that important benefit would be lost. We continue to support mandatory, non-binding mediation in small cases and urge the Board to provide for mediation before the beginning of discovery.

VIII. THE BOARD SHOULD ADDRESS PETITIONS FOR PARTIAL REVOCATION OF CLASS EXEMPTIONS BEFORE REQUIRING RAILROADS TO PROVIDE RATE CASE DISCOVERY.

In UP's opening comments, we argued that the Board should address shipper petitions for partial revocation of class exemptions before requiring railroad defendants to make the special disclosures required by the Board's proposed simplified standards.⁹³ We argued that the Board should follow the approach it used in *Sierra Pacific Power v. Union Pacific Railroad*,

⁹¹ See *id.* at 73-74; AAR Op. at 6-7.

⁹² ACC Reply at 32.

⁹³ See UP Op. at 71-73.

where it bifurcated the market dominance and rate reasonableness phases of the case because it had “considerable doubts” about the complainants’ ability to demonstrate market dominance.⁹⁴

We argued that the Board should have similar doubts when a party seeks partial revocation of an exemption.⁹⁵ The Joint Shippers argue that past class exemption decisions are not entitled to much respect, particularly when individual shippers petition for partial revocations.⁹⁶ Their position, however, is contrary to Board precedent and without merit.⁹⁷ We continue to urge the Board to adopt UP’s proposed approach.

IX. CONCLUSION

We continue to urge the Board to adopt Simplified-SAC, with the modifications we have suggested, as the one and only simplified method for determining rate reasonableness for cases in which a full SAC presentation would be too costly given the value of the case.

⁹⁴ STB Docket No. 42012, slip op. at 5 (STB served Jan. 26, 1998).

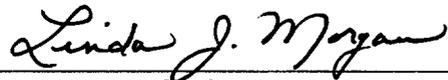
⁹⁵ See UP Op. at 72.

⁹⁶ See ACC Reply at 33-34.

⁹⁷ See UP Op. at 73 (citing *Rail Exemption Misc. Agric. Commodities*, 8 I.C.C.2d 674 (1992), *aff’d in relevant part sub nom. Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993)).

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January 11, 2007

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 11th day of January, 2007, I caused a copy of the Rebuttal Submission of Union Pacific Railroad Company to be served by first-class mail or a more expeditious method of delivery upon all persons who have filed a notice of intent to participate in STB Ex Parte No. 646 (Sub-No. 1).



Michael L. Rosenthal