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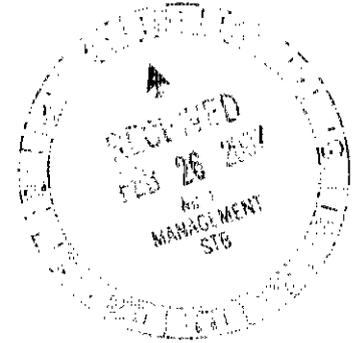
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February 26, 2007

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By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 646 (Sub-No. 1) Simplified Standards for Rail Rate Cases

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, are an original and ten copies of CSX Transportation, Inc.'s and Norfolk Southern Railway Company's Supplemental Comments in the above-captioned proceeding. A CD containing an electronic version of those comments is also enclosed.

Please acknowledge receipt of the enclosed CSXT/NS Supplemental Comments by date-stamping the enclosed extra copies and returning them via our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned counsel.

Sincerely,

G. Paul Moates
Paul A. Hemmersbaugh

*Counsel to CSX Transportation, Inc. and
Norfolk Southern Railway Company*

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**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

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



SIMPLIFIED STANDARDS FOR RAIL RATE CASES

**SUPPLEMENTAL COMMENTS OF
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NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated February 26, 2007

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INTRODUCTION

After the submission of three rounds of evidence, and shortly before the hearing regarding the proposed simplified standards, the Board issued a decision setting forth several new proposals, and seeking testimony on other issues raised by commenters. *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision (January 22, 2007) (“Supplemental Decision”). In general, CSXT/NS oppose the new proposals set forth in the Supplemental Decision, including the new “small claims” proposal and the elimination of the proposed aggregation rule. In these comments, CSXT/NS describe their positions on the new proposals and other issues highlighted in the Supplemental Decision.

CSXT/NS also comment on some of the issues discussed in the hearing the Board held in this matter on January 31, 2007. At the outset, CSXT/NS note that, while shippers urge the Board to adopt the Three Benchmark test – and thus abandon Constrained Market Pricing – for the great majority of traffic subject to rate regulation, no shipper testimony discussed the need for analytical rigor or accuracy in rate reasonableness adjudications. This conspicuous absence is further evidence that shippers are not interested in sound and accurate evaluation of challenged rates, but rather in a process that they can rely upon to generate quick and cheap rate reductions for most traffic within the Board’s jurisdiction. That is not the purpose of this proceeding, and CSXT/NS urge the Board to reject result-oriented proposals designed to generate procedures that are fast, simple, cheap, and wrong.

CSXT/NS commend the Board’s attention to the core principles they believe are essential to any sound and reasonable revision of rate reasonableness procedures. CSXT/NS described these key principles and their application in each of their three previous submissions. *See, e.g.,*

CSXT/NS Open. Comments at 1-2. The principles highlighted in these supplemental comments include:

- **The more revenue that is at stake in a case, the closer the results must be to those that would be generated by a full SAC analysis. And, the more overall revenue that is judged by non-SAC procedures, the more important it is that those procedures generate SAC-like results.** Therefore, the Board should not increase the eligibility ceilings, apply a risk premium, modify the aggregation rule, eliminate SSAC, or otherwise increase the number of movements and amount of rail revenue subject to evaluation under methods other than full SAC. Nor should the Board adopt the “small claims” approach it proposed in its January 22 decision. *See infra* at 3-13.
- **The Board should not expand eligibility for the methods proposed for smaller cases.** *See infra* at 3-13.
- **Mechanical rate reasonableness formulas cannot be accurate.** Therefore, CSXT/NS oppose the use of formulas as the sole determinant of the reasonableness of any rate. *See infra* at 4-5, 13-14, 20-25.
- **Rate regulation should not encourage litigation over negotiation.** The proposal that the Board apply a “risk factor” to increase eligibility ceilings would promote litigation over negotiation and market-based solutions, contrary to the Board’s statutory mandate. CSXT/NS’s mediation proposal would encourage early resolution of rate disputes through mediated negotiation, thereby minimizing litigation. *See infra* at 1-3, 9-11.
- **The Board should monitor the effects of any new procedures it adopts in this proceeding.** For example, the Board should adopt the proposed eligibility ceilings and schedules for SSAC and Three Benchmark cases. And, it should monitor those ceilings and schedules as they are applied, to ensure that they are appropriate and reasonable. *See infra* at 6-8, 14-15.

I. MEDIATION IS AN IMPORTANT COMPONENT OF ANY PROCESS THAT SEEKS TO SIMPLIFY AND EXPEDITE MEDIUM AND SMALL RATE CASES.

CSXT/NS strongly advocate the adoption of mandatory non-binding mediation as part of any new rules for small cases. They believe that mediation can and will resolve many disputes without further litigation.¹ Because of their strong support for mediation, CSXT/NS proposed

¹ As the witness for the National Grain and Feed Association testified at the hearing, the NGFA voluntary arbitration system has successfully resolved many railroad-shipper disputes efficiently and expeditiously, most without proceeding to an arbitration decision. *See* Hearing Transcript at 42-43 (Note: CSXT/NS obtained a transcript of the January 31 2007 hearing from the reporter.

that the Board adopt a mediation requirement in their opening comments and have emphasized the value and importance of mediation in each of their subsequent filings and in their hearing testimony.

As the Board knows, both of the cases filed under the *Simplified Guidelines* to date have been resolved through early mediation. Based on their experience in mediation in this and other contexts, CSXT/NS believe smaller rate cases are particularly well-suited to mediation. Where the parties reach a negotiated solution through mediation at the outset of a case, they avoid the majority of expenses they would incur in litigating under the SSAC or Three Benchmark approaches. Resolution through mediation thus represents a greater savings of time and cost than could be obtained through any methodological simplification or change proposed in this proceeding. Moreover, mediation that does not result in settlement will likely streamline the subsequent litigation by resolving questions and eliminating some disputes at the outset.

The mediation proposal is perhaps the most widely supported, and least controversial, proposal in this entire proceeding. Many parties have voiced their support for mediation, and no party has opposed it.² Because mandatory non-binding mediation holds promise for significant

Because the reporter has not yet issued the official version of that transcript, CSXT/NS have attached copies of the cited pages of the unofficial transcript as an exhibit to these comments). CSXT/NS agree that this experience demonstrates the value of dispute resolution negotiations mediated by a neutral non-party. There are two important differences between NGFA arbitration and CSXT/NS's mediation proposal for medium and small rate cases. First, NGFA arbitration does not address several contentious issues, including rate disputes. Second, CSXT/NS are proposing non-binding mediation, not binding final arbitration.

² At the hearing, a witness for the United Transportation Union expressed opposition to the proposal to make mediation compulsory, and to STB commissioners or staff serving as mediators. *See* Hrg. Tr. at 190-196. CSXT/NS believe that making mediation mandatory (rather than voluntary) will ensure universal participation and thereby increase the number of cases that are resolved – or narrowed – before the parties and the Board expend significant resources litigating a rate case. CSXT/NS's experience with Board mediation has been quite positive and productive, and they strongly support Board staff serving as mediators, so long as they do not

savings of time and money for parties, and because it has consensus support of most commenters, CSXT/NS urge the Board to adopt this proposal.

II. THE BOARD’S NEW PROPOSED “SMALL CLAIMS” APPROACH IS MATERIALLY INCOMPLETE, AND CSXT/NS OPPOSE IT.

A. The New “Small Claims” Proposal is Flawed and Incomplete.

CSXT/NS oppose the Board’s new proposal to create what it refers to as a “small claims” procedure. The proposal is incomplete because it lacks essential elements, and therefore is not susceptible to meaningful evaluation and comment. Moreover, to the extent CSXT/NS understand the incomplete outline of the proposal, they cannot support it.

The proposal is incomplete because, while it suggests establishing ceilings on the total relief available under the simplified methods, it does not specify the level of those limits. *See* Supplemental Decision at 2 (proposing “a limit on the total relief available under the Simplified-SAC and Three Benchmark approaches,” without stating what those limits would be). Specific proposed limits are an essential component of the proposal, and asking a party to comment on the proposal without that element is akin to asking a person to decide whether to accept a contract offer that is missing the price or other essential term. The omission of proposed dollar limits thus makes adequate evaluation of the proposal impossible. For this reason alone, CSXT/NS oppose the Board’s proposal.³

Moreover, to the extent that CSXT/NS understand the other general terms of the new proposal, they have strong reservations and concerns about potential uses and abuses of such the

take part in any subsequent evaluation or decision in a rate case in which he/she served as mediator (in the event mediation does not fully resolve the dispute). *See* Hrg. Tr. at 299-300.

³ In addition, the new proposal does not discuss how the Board would calculate rate prescriptions in cases in which a rate is found unreasonable. For example, the Board does not explain how – or even if – the proposed new approach would set a floor on rate prescriptions in Three Benchmark cases. Without this and other essential information, neither CSXT/NS nor any other commenter can make a meaningful evaluation of the proposal.

proposed approach. First, the proposal would allow any complainant, regardless of the size of its shipment, to elect any of the three methodologies. This would permit large volume shippers to eschew the full SAC test and pursue a case under SSAC or even the much less rigorous and less accurate Three Benchmark approach, in order to seek a speedy rate reduction. No reasonable construction of Section 10701(d)(3) suggests that Congress intended that the Board develop an expedited and simplified process for large shipments in which full stand-alone cost presentations were not too costly. Indeed, the statute itself presumes just the opposite – that simplified procedures would be confined to “those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3). As the Board has repeatedly affirmed, SAC remains the best and most appropriate approach method for evaluating rate reasonableness. *See, e.g.*, NPRM at 9.

Second, although it is not clear from the description of the proposal in the Supplemental Decision, it appears the “small claims” approach would allow shippers of large volumes to further evade SAC and obtain a five-year rate prescription through the expedient device of a Three Benchmark case. Thus, using a rough methodology that is unconnected to SAC or sound economics, such a shipper could lock in a rate for high-volume traffic – and eliminate a carrier’s rate flexibility on that traffic – for five full years. The potential revenue loss to the defendant carrier associated with such a prescription could – and in most instances would – far outweigh the dollar amount of the proposed ceiling on rate relief.

Third, if the Board were to combine the new proposal with elimination of its proposed aggregation rule (*see* Supplemental Decision at 2-3), the rough Three Benchmark approach could

displace SAC as the method for virtually all cases, potentially including large coal rate cases.⁴ Depending on how the Board applied its residual aggregation power, the result could be that most rail rates under the Board's jurisdiction would be evaluated and prescribed under a rough, inaccurate, non-CMP process. The Three Benchmark approach is inconsistent with differential pricing. If the Board were to accept the shippers' suggestions concerning eligibility, it would be abandoning longstanding precedent and support for differential pricing, at least for all traffic other than the largest coal movements.

In sum, it appears that the Board's proposal would undermine CMP and SAC and their underlying policies – the foundation of the Board's system of rate regulation – by allowing even the very largest shippers to use the crude Three Benchmark approach as an expedient rate relief device, without regard for the value of the case. That would be directly contrary to Congress' intent in directing the Board to establish simplified procedures for small cases. *See* 49 U.S.C. §10701(d)(3); *See* S. Rep. 104-176 at 7 (1995) (“[T]he committee does not intend to erode the constrained market pricing principles adopted by the ICC for full stand-alone cost presentations”).

⁴ The Board suggests that it would retain discretion to address instances in which it found a party was using Three Benchmark to manipulate the process, but it does not indicate what might constitute manipulation of the new proposed process. For example, would a large volume shipper bringing Three Benchmark cases seriatim for numerous different origins (e.g. numerous coal mines in the same region) be regarded as manipulation or as permissible elections of methodology in each of those cases? And even if a railroad could convince the Board that a large volume shipper was manipulating the rate procedures, what relief would the Board be able to grant? Would it reopen the prior cases found to be part of the “gaming” of the procedures? Would it rescind any relief order in such prior cases? The Board's suggestions raises many more issues than it resolves.

III. THE BOARD SHOULD RETAIN ITS PROPOSED AGGREGATION RULE AND LITIGATION COST ESTIMATES.

A. The Aggregation Rule is Appropriate Because It Would Confine Small Case Procedures to Small Cases.

The Board's proposed aggregation presumption is a necessary and appropriate safeguard to prevent manipulation of the proposed three-tiered system. CSXT/NS have consistently supported the use of an aggregation presumption rather than a rigid rule. *See, e.g.*, CSXT/NS Rebuttal Comments at 15. Use of such a presumption would allow the Board to exercise its judgment to avoid unfair results in particular circumstances, while maintaining a reasonable check against inappropriate manipulation.⁵

Shipper objections to such an aggregation rule are, at bottom, objections to the requirement that larger cases remain subject to SAC (or SSAC). The purpose of this proceeding is to develop simplified procedures for lower value cases, not to facilitate the application of such procedures to higher value cases. The aggregation presumption, properly applied, will work to ensure that less accurate and less rigorous small case procedures are used only in small cases. *See id.* at 13-15.

⁵ In the recently completed Ex Parte 657 proceeding, shippers insisted that a new rate prescription methodology was necessary in order to prevent carrier manipulation of the Board's rate reduction methodology, although there was no evidence that such manipulation had occurred in more than two decades of experience with the *Coal Rate Guidelines*. The Board responded to the shippers' concern by issuing a new rate reduction methodology (one that CSXT/NS believe is inconsistent with CMP, differential pricing principles, and the law). Here, in stark contrast, shippers assert that, even though they could benefit from disaggregation of claims, there is little likelihood shippers would do so, and therefore the aggregation rule is unnecessary. CSXT/NS's position remains that the Board should adopt the aggregation rule as a rebuttable presumption. This would discourage inappropriate disaggregation of claims, while allowing shippers to demonstrate that aggregation is not appropriate in particular circumstances.

B. The Board's Litigation Cost Estimates are Reasonable and Consistent with the Evidence in the Record.

The Board's proposed eligibility ceiling for SSAC cases is consistent with evidence in the record regarding the cost of a SAC case, and the Board should not increase that ceiling. As the Board has suggested, the changes to SAC proceedings it recently adopted may reduce complainants' cost of litigating a SAC case. *See, e.g.*, Supplemental Decision at 3. Because the realization of such savings, let alone their magnitude, cannot be reliably determined without actual experience under new SAC rules, CSXT/NS do not advocate a reduction of the SAC/SSAC eligibility threshold at this time.⁶

The proposed SSAC eligibility ceiling is based upon evidence submitted by shippers regarding the cost of a SAC proceeding. *See* NPRM at 36 (joint shipper testimony estimated that "the cost to bring a Full-SAC case 'now exceeds \$ 3 million'"). Based upon the testimony of their cost consultant, the joint shipper comments now advocate a SAC cost estimate of \$4.5 million. *See* Joint Shipper Rebuttal Comments at 8-9. The only evidence in the record regarding a complainant's actual cost of litigating a SAC case is Otter Tail Power's cost of \$4.5 million to litigate its recent SAC case with BNSF. *See* Hrg. Transcript at 58, Ex Parte 646 Public Hearing (Jan. 31, 2007) (testimony on behalf of Joint Shippers group). As a witness for a party to the case testified, the *Otter Tail* case was more complex and burdensome than the average SAC case, because it involved four different stand-alone cost presentations, filed in succession.⁷ The

⁶ Throughout this proceeding, CSXT/NS have emphasized that it is important that the Board monitor the implementation and results of its new approaches and rules in order to determine if adjustments to those rules are necessary or appropriate. Here, if experience shows that complainants' SAC case costs are materially different from the Board's estimate of \$3.5 million, the Board could consider revising the MVC eligibility ceiling for the SSAC procedure.

⁷ *See* Hrg. Tr. at 216-18 (BNSF witness testimony); *id.* at 217 ("[I]n Otter Tail, it would be fair to characterize that as four stand-alone cases.").

complainant's costs in *Otter Tail* thus likely overstate the average costs of a SAC case under the rules that existed before the Board's recent decision simplifying SAC procedures.

Moreover, the new SAC rules the Board adopted late last year appear likely to reduce SAC costs significantly. *See* Decision Ex Parte 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (Oct. 30, 2006). As the Board noted in that Decision, a central aim of those new rules is to simplify SAC cases, including the jurisdictional inquiry and rate analysis. *See id.* at 3. Even assuming *arguendo* that *Otter Tail* was not an above-average case in terms of complexity and cost, the SAC changes adopted in Ex Parte 657 would reduce the complainant's cost to below the \$3.5 million SSAC ceiling the Board has proposed in this proceeding. *See, e.g., id.* at 59 (estimating, based on shipper testimony, that elimination of movement-specific adjustments to URCS costs would reduce the costs of a SAC proceeding by one-third, or more than \$1 million).

The Board's estimate of a complainant's costs of a SSAC proceeding appears reasonable, particularly if it eliminates costly and time-consuming route selection litigation by requiring the stand-alone railroad to follow the issue traffic's predominant route of movement. Because no SSAC case has ever been litigated, it is difficult to estimate a complainant's cost with precision or certainty. The Board's estimate is based upon expert testimony in a prior proceeding, appropriately updated and extrapolated to account for relevant changes and differences, based upon the Board's experience and judgment.⁸ *See* NPRM at 36. The Board should adopt its

⁸ Joint shipper witness Fauth purports to estimate the cost of litigating a SSAC case. *See* V. S. Fauth at 13-14. It is not clear, however, that Mr. Fauth's experience qualifies him to testify as an expert on this point, or provides any basis to assume his estimates are credible. Mr. Fauth's "Statement of Qualifications" lists no specific SAC case in which he served as a consultant. While he obviously has experience and expertise in other areas and contexts, he does not appear to have the experience necessary to opine on the cost to a complainant of a SAC proceeding, let alone a simplified SAC case. Moreover, the comments of Union Pacific Railroad further demonstrate that Mr. Fauth's estimates are not credible. *See* U. P. Reply Comments at 27-34.

proposed \$200,000 SSAC/Three Benchmark eligibility threshold as the best available projection of the cost of a SSAC proceeding. As with other elements of its proposal, the Board should monitor the cost of SSAC proceedings and make appropriate adjustments to the threshold in light of the experience of the Board and parties.

C. Complainants' Litigation Risk Should Not be Considered in Setting Eligibility Thresholds.

The eligibility thresholds for Three Benchmark and SSAC cases should reflect the Board's best estimate, based upon the evidence in the record, of the cost to a complainant to litigate a rate case under SAC and SSAC. *See* 49 U.S.C. § 10701(d)(3) (directing the Board to develop simplified procedures for those cases in which a full SAC proceeding "is too costly, given the value of the case."). The risk that a complainant will not prevail in a particular rate case depends on the strength of its case, and has nothing to do with the relation between a complainant's cost of maintaining a rate case and the monetary value it could potentially recover in a specific case. While rational parties certainly consider the strength of their case and the risk of loss in determining whether to bring a case, that litigation risk should have no role in setting eligibility limits.

Commenters who advocate the use of a risk premium to inflate eligibility limits proceed from the erroneous premise that the purpose of this proceeding is to provide greater incentives for shippers to file rate cases, and to facilitate more rate litigation.⁹ The proper purpose of this proceeding is narrower and more objective: to develop procedures to ensure that shippers of smaller volumes have reasonable access to the Board's procedures and are not precluded from seeking rate relief because the cost of a challenge exceeds the amount a shipper could recover if

⁹ There is no evidence in this record that rail rates are presently "too high," that shippers are filing "too few" rate cases, or that a greater volume of rate cases is necessary or desirable.

it prevailed. Stated differently, the Board's goal should be to remove structural barriers – to the extent they exist – to the filing of cases challenging rates for smaller shipments within the Board's jurisdiction, while minimizing any departure from established substantive standards for evaluating rate reasonableness. The use of an arbitrary risk multiplier to increase the proposed litigation-cost-based eligibility limits would not provide access to any shipper who would not otherwise have access. Rather it merely would allow a greater number of shippers to bring cases under a less rigorous and less costly methodology, and thereby encourage more rate litigation.

For example, if a shipper has a potential rate case with an MVC of \$100,000, but estimates that a Three Benchmark case will cost it \$100,000 to litigate, it likely will not bring the case. If the Board applied a risk multiplier of 3 to increase the Three Benchmark ceiling to \$600,000, that shipper would face the same cost-benefit analysis: should it spend \$100,000 in order to seek the same amount in rate relief?¹⁰ The inflated eligibility ceiling would provide no benefit to the small shipper, and would be irrelevant to its litigation decision. Instead, the higher eligibility threshold would allow certain midsized shipments to qualify for the less accurate and less rigorous small case (Three Benchmark) methodology, without regard for whether the cost of a SSAC or SAC case would exceed the value of the case. While such an approach might increase rate litigation and drive down rail rates, it would not benefit the truly small shipper.

Even if use of a risk multiplier to determine eligibility ceilings were appropriate – and it is not – it would be impossible for the Board to estimate risk in a particular case without

¹⁰ CSXT/NS recognize that, for shippers whose rates generate an MVC marginally greater than the eligibility threshold, the strict application of a bright-line limit might cause some anomalous results (e.g., a case with an MVC of \$201,000 would be considered under SSAC, whereas a case with an MVC of \$199,000 would be eligible for the Three Benchmark method). If the Board uses the eligibility limits as rebuttable presumptions, which CSXT/NS advocate, it could mitigate such potential unfairness.

engaging in prohibited prejudgment of the merits of the case. Using a single static risk premium to cover all potential cases, the alternative some shippers apparently advocate, would be arbitrary.¹¹ Litigation risk depends on the merits of each individual case, and cannot be distilled to a single number that would represent adequately the disparate risks of challenges to all rates and traffic within the Board's jurisdiction. Moreover, the value of a particular rate case to a shipper may well include more than a reduction in the rate for the challenged movement. Most customers have multiple moves, and therefore challenging a rate to establish a principle may be worth considerably more than the dollars at stake in the particular movement.

Risk is inherent in all litigation. Any person or entity contemplating litigation must consider risks in deciding whether to litigate or settle a dispute. Carriers must also consider risk in deciding whether to resolve a rate dispute through negotiation or settlement or to defend a rate case. Mutual litigation risk serves a valuable function by encouraging settlements and negotiations over litigation. Using a risk multiplier to effectively reduce shippers' risks and thereby insulate them from the risk and cost-benefit analysis faced by every other potential litigant is neither sound policy nor consistent with the Board's statutory responsibilities.

In the end, application of a risk multiplier would have one indisputable result – it would increase the amount of traffic subject to less accurate and less rigorous analysis. It would also make rate litigation cheaper – and therefore more attractive – for a large number of shippers. Most shipper commenters seek to magnify this effect by advocating the complete elimination of SSAC. Taken together, the elimination of SSAC and the application of the requested risk

¹¹ Although some shippers have asserted that a risk multiplier of 2 is somehow “too small,” but a multiplier of 3 may be appropriate, they have articulated no logical, consistent, and principled basis for the calculation of a single risk factor that could apply to all shipments within the Board's jurisdiction. *See, e.g.*, Hrg. Tr. at 71 (shipper witness asserts that “a risk factor of two” is somehow “not sufficient” because only two of the last seven SAC cases resulted in rate relief and because “the uncertainties” of small cases appear “greater”).

premium would make the overwhelming majority of jurisdictional rail rates subject to evaluation and prescription under the rough and inaccurate Three Benchmark proposal. While this prospect might be attractive to shippers (in the short term), it would be unsound policy and unlawful.

D. A Railroad's Cost to Defend a Rate Case Should Not be Considered in Setting Eligibility Thresholds.

The Board also asked whether, if it were to adopt what it calls its “small claims” proposal, it should set relief limits at twice the estimated cost to a complainant of litigating a case under the next higher tier (*i.e.*, the limit for Three Benchmark cases would be twice a complainant’s cost of litigating SSAC and the limit for SSAC cases would be twice the cost of litigating a full SAC case). *See* Supplemental Decision at 3. For several independent reasons, CSXT/NS oppose this proposal. First, because CSXT/NS oppose the Board’s new “small claims” proposal in the first instance, they necessarily oppose this proposal, which is predicated on the adoption of the “small claims” proposal.

Second, a defendant’s cost of litigating a rate case is legally irrelevant to the question of limits on eligibility or rate relief in smaller rate cases. The Board’s statutory mandate focuses on the cost to a potential *complainant* of bringing a rate case, and the effect of that cost on a shipper’s access to a rate reasonableness determination by the Board. *See* 49 U.S.C. 10701(d)(3). A carrier’s litigation costs are not relevant to the statutory goal of providing shippers within the Board’s jurisdiction reasonable access to procedures to challenge the reasonableness of their rail rates.¹² Nothing in the statute or the legislative history of Section 10701(d)(3) suggests that the Board should consider a defendant carrier’s litigation costs in

¹² CSXT/NS do believe the litigation cost and burden to carriers should be a consideration in establishing carriers’ discovery and production burdens. *See, e.g.*, CSXT/NS Open Comments at 5-8, 10 (discussing the undue burden that the SSAC “second disclosure” proposal would place on defendant carriers). However, the Board should not consider defendants’ litigation costs in establishing eligibility thresholds.

setting eligibility or relief limits. Moreover, no carrier has suggested in this proceeding or – to CSXT/NS’s knowledge – in any other STB proceeding, that the costs of defending a rate case be considered in setting such limits.¹³ It is neither lawful nor appropriate to use a defendant carrier’s potential litigation costs as a basis for setting eligibility thresholds or limits on rate relief.

Third, there is no basis to assume a defendant carrier’s litigation costs would be the same as a complainant’s costs. It would be arbitrary and capricious to set limits on rate relief or eligibility by simply doubling estimates of a complainant’s litigation costs.

IV. THE PROPOSED THREE-TIERED APPROACH IS GENERALLY APPROPRIATE.

A. The Board’s Proposal to Establish a Three-Tiered System is Consistent with the Board’s Statutory Mandate.

The Board’s proposal to establish a three-tiered system for rate reasonableness analysis is fully consistent with its statutory mandate to establish simplified procedures for “determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. 10701(d)(3). The statute does not require the Board to establish alternative procedures that are wholly different from SAC or CMP, or divorced from their economic principles. *See* CSXT/NS Rebuttal Comments at 1-2, 9-10; *cf.* Joint Shipper Rebuttal Comments at 3-4. To the contrary, by directing the establishment of a simplified method for those cases in which a full SAC analysis is too costly, the statute

¹³ It appears that only one commenter in this proceeding suggested that a defendant carrier’s litigation costs might be considered in determining the eligibility limit for SSAC cases. *See* AECC Rebuttal Comments at 3-8. Significantly, AECC does not contend that consideration of a defendant’s litigation costs is required, or even suggested, by Section 10701(d)(3). Moreover, even the isolated AECC proposal concerned the determination of the SSAC *eligibility* threshold, not the use of defendants’ litigation costs to set limits on rate *relief* in SSAC and Three Benchmark cases. *See id.* Thus, the proposal upon which the Board seeks comment would create a new and different approach that neither AECC nor any other commenter advocated in the three rounds of comments filed to date.

strongly implies that a simplified method using a less-than-full SAC analysis would be appropriate. In any event, the statute provides no basis whatsoever for the assertion that the simplified method must be a “wholly different alternative to SAC.” The Board’s general approach of developing a simplified SAC methodology for medium and smaller cases and a third-tier of non-SAC-based analysis as a last resort alternative for the very smallest cases is fully consistent with the language and intent of the statute.¹⁴

B. The Board’s Proposed Schedules are Generally Consistent With the Length and Schedule of Other Complex Litigation.

At the hearing, some commenters asserted that the proposed schedules for SSAC and Three Benchmark proceedings are too long. CSXT/NS disagree. The overall schedules appear tight, but achievable.¹⁵ Indeed, the proposed schedules would consume less time than most comparable commercial litigation, to which carriers and most of their customers are accustomed. Very few court cases proceed from complaint to full submission for a decision on the merits in one year. *See* NPRM at 16-17 (proposing completion of all discovery, evidentiary submissions, and final briefing in less than a year after the complaint is filed, and a decision six months thereafter). And no case of any complexity is completed and fully submitted for decision within

¹⁴ The Joint Shippers misread the Board’s statement in its *Simplified Guidelines* decision as requiring the use of a non-CMP methodology for smaller cases. *See* Joint Shipper Rebuttal Comments at 4-5. What the Board posited was that, if it determined that, for some small cases, CMP could not be simplified while retaining its effectiveness, then the Board could consider non-CMP procedures. *See Simplified Guidelines*, 1 STB 1004, 1021. This is exactly what the Board has sought to do with its three-tier proposal – to provide for evaluation of rates under the more rigorous simplified SAC where it is feasible, and to provide an alternative non-SAC methodology for cases that are so small that even SSAC is not feasible.

¹⁵ CSXT/NS reiterate that they believe the Board has allotted insufficient time for the “second disclosure” phase of a SSAC proceeding; the very short time provided for that phase would place a heavy and undue burden on defendant rail carriers, and carriers may be unable to meet that schedule. If the Board eliminates the route selection process as CSXT/NS have suggested, it could use the time saved to provide adequate time to conduct the “second disclosure” phase without lengthening the overall schedule.

6 months of filing a complaint. *See id.* at 29-30 (proposing 180 day schedule from complaint to final submission for Three Benchmark cases).

Because no cases have been litigated under the proposed new approaches, it is impossible to determine with any certainty or precision whether the suggested schedules are appropriate.¹⁶ Such uncertainty is inherent in new proposals, and is the reason CSXT/NS have consistently urged the Board to monitor the implementation of any new methodologies it may adopt. Based upon its experience with actual adjudications, the Board can make adjustments – including schedule adjustments – that it finds necessary and appropriate.

C. The SSAC Approach Would Simplify Medium-Sized Rate Cases and Reduce Their Cost to Litigants.

At the hearing and in their comments, some parties have suggested that the Board's SSAC proposal would not actually simplify rate reasonableness proceedings. This claim is groundless and illogical. Parties may legitimately disagree as to whether certain of the Board's proposed rule changes are, on balance, appropriate – CSXT/NS do not support some of the Board's proposals – but there can be no real debate that proceedings under the proposed SSAC approach would be more simple than SAC proceedings. The Board's SSAC proposal would effectively eliminate many of the most complex, costly, and time-consuming elements of a SAC case, including SARR traffic selection; network design and configuration; the development of an operating plan and expenses; and demand forecasts and projections. *See NPRM* at 10-14. At the same time, the SSAC proposal would significantly simplify other major SAC components, including road property investment and the jurisdictional inquiry, thereby dramatically reducing the time and cost of the proceeding. *See id.* at 12-16, Appendix A.

¹⁶ Early mediation, as CSXT/NS have proposed, would likely reduce the number and complexity of issues in a case and focus the parties on the core of the dispute. This, in turn, would reduce the time necessary to litigate the case to final resolution.

In response to shippers' claims that SSAC would not significantly reduce costs or complexity, Commissioner Mulvey cited a few of the major simplifications in the Board's SSAC proposal that would substantially reduce costs, including:

- Use of unadjusted URCS system average costs to determine jurisdictional threshold;
- Elimination of disputes regarding SARR configuration;
- Elimination of re-routing of traffic;
- Elimination of most disputes regarding traffic volume and revenues;
- Use of URCS to establish operating expenses, using actual traffic, thereby eliminating need for modeling a hypothetical railroad operating plan and expenses;
- Use of rolling average road property investment costs from prior SAC cases; and
- Use of one-year discounted cash flow analysis.

Hrg. Tr. at 100-101. In sum, there is no real question that SSAC would represent a very substantial simplification of SAC, and contrary assertions are without merit.

D. The Board Should Reduce the Time and Expense of SSAC Cases by Requiring That the SARR Follow the Issue Traffic's Predominant Route.

The Board should reduce the cost and complexity of its proposal by eliminating the route selection process in SSAC cases. As CSXT/NS explained in their prior comments, such a simplification would significantly reduce the cost and complexity of such proceedings without compromising the accuracy of SSAC analysis and results. *See, e.g.*, CSXT/NS Rebuttal Comments at 17-19. Requiring the stand-alone railroad in SSAC cases to use the issue traffic's predominant route would advance the single most important goal of the SAC constraint – to restrain a railroad with market power from charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper and to ensure it is not required to cross-subsidize parts of the railroad's network from which it derives no benefit –

while simultaneously avoiding cross-subsidization of the issue traffic by other customers whose traffic uses a route not generally used by the issue traffic. *See* NPRM at 5, 10; CSXT/NS Rebuttal Comments at 17-18. At the same time, eliminating the unnecessary and potentially distorting route selection process would substantially reduce the cost and complexity of SSAC proceedings. *See* NPRM at 10-11.

The suggestion by a few commenters that confining SSAC analysis to the predominant actual route of movement could cause carriers to use inefficient routes is baseless.¹⁷ Carriers do not make routing decisions and other business judgments based upon perceived litigation advantage in potential future rate cases (which may or may not materialize in any given instance). Rather, they make such decisions based upon sound business and commercial considerations. *In making those decisions, rail carriers have every incentive to use the most efficient routing, in order to minimize costs and maximize the productive use of their assets, and thereby maximize profits.*¹⁸ There is no evidence that rail carriers currently route traffic in an inefficient manner in order to take advantage of the existing rate regulation system, and there is no reason to believe that use of the predominant route of the issue traffic in SSAC cases would cause carriers to change the way they route their traffic.

The benefits of eliminating the route selection process would be significant. The parties would avoid the cost of developing and filing three rounds of evidence, and the 90 days the Board proposes to devote to that process could instead be used to establish a more realistic

¹⁷ The primary shipper groups' comments contain no significant discussion of this routing question. *See, e.g.,* Joint Shipper Rebuttal Comments; NITL Open. Comments; NG&FA Open. Comments.

¹⁸ As the Board has explained, SSAC eliminates certain efficiency analyses as a necessary element of simplification. *See* NPRM at 10-11. If a shipper thinks it has a better chance of prevailing using an alternative route, it has the option of bringing a case under the full SAC test.

schedule for the proposed “second disclosure,” without lengthening the overall schedule. *See* NPRM at 16.¹⁹ Thus, such a change would make the SSAC analysis simpler, less costly, and less time-consuming. The Board should adopt the suggestion of CSXT/NS and other commenters that the SSAC stand-alone railroad be required to follow the issue traffic’s predominant route.

E. The Proposed Rules May Not Provide Some Small *Shippers* Significantly Better Access to Rate Reasonableness Challenges.

This proceeding has addressed rate challenges for smaller shipments, without regard to the size or resources of the shipper. While the final rules the Board adopts will likely increase the access of shippers to simplified rate reasonableness proceedings for their small and medium-sized shipments, they do not focus on the needs of small shippers with limited resources. As Vice-Chairman Buttrey suggested in the hearing, the near-exclusive focus on the size of the shipment rather than the size and resources of the shipper may not be consistent with an underlying purpose of Section 10701(d)(3) – to mitigate the effect of disparate resources of potential plaintiffs and defendants on the ability of low-resource (i.e. small) shippers to seek and obtain rate relief where such relief is warranted. *See* Hrg. Tr. at 345-50.

Most of the shippers and members of shipper organizations participating in this proceeding have more than ample resources to pursue a full SAC case. Indeed, the vast majority of CSXT/NS’s rail revenues are generated by services to shippers who have more-than-adequate resources to litigate a rate case. Many of those shippers have resources that dwarf those of the Class I railroads. Because there is no real question that those large shippers have the

¹⁹ CSXT/NS have urged the Board to provide additional time for the burdensome “second disclosure” phase of the proposed SSAC schedule. *See* CSXT/NS Open. Comments at 5-8, 10. They have suggested that the time saved by elimination of the route selection process could be devoted instead to the second disclosure phase. *See e.g.* CSXT/NS Rebuttal Comments at 21-22. Regardless of whether the route selection process is eliminated, CSXT/NS believe it is essential that additional time be allotted for the second disclosure.

wherewithal to bring and maintain a rate case, their ability to access the Board's processes is not at issue in this proceeding. *See, e.g.* Hrg. Tr. at 345 (Vice-Chairman Buttrey) ("Nobody is going to contest the fact that the BPs of the world, the Dow Chemicals of the world, or the Shells, the Amocos, and the Exxons and the ADMs and the Cargills and those guys all have the resources to fight these battles.").²⁰ Rather, what large shippers seek in this proceeding is simply a faster, less expensive way to seek rate reductions. Unfortunately, the Board's proposed rules appear likely to allow them to accomplish that goal.

Some small shippers, on the other hand, may find it more difficult to seek rate relief because of their limited resources. A small shipper that has a potentially meritorious claim that it was being charged an unreasonably high rate might be unable to obtain rate relief because it could not afford to pursue a rate case under the current system. Mediation should help, but there may be occasions when it does not solve the problem for a small shipper.

If the Board believes it should do more for small shippers with limited resources, it should not try to do so using rules of general applicability for all shippers. Rather, it could consider developing a different approach that would afford truly small shippers more effective

²⁰ Moreover, large shippers who make some small shipments have plenty of leverage and negotiating strength to protect their interests and ensure they are not charged excessive rates for their small shipments. For them, a rate case is simply one weapon in the arsenal available to maximize their overall benefit from the rail transportation services they consume. *See* Hrg. Tr. at 267 -270 (exchange between Chairman Nottingham and UP witness Rinn, revolving around the Chairman's question: "[A]re you suggesting, then, that it might be . . . sort of a reasonable business tactic [for a large shipper] to actually roll the dice and pursue a rate claim with the full knowledge that even success might only bring a break-even on costs or even a loss in costs because you may have . . . possibly 10, 20 other transactions pending or that it may give you leverage as a business in other ways?"). CSXT/NS's answer to the Chairman's question would be yes, that is an accurate summary of our experience.

access to expeditious and inexpensive rate reasonableness determinations.²¹ CSXT/NS do not concede that a rulemaking proceeding to consider such an approach is necessary, but they mention the possibility because of some commenters' suggestions in this proceeding that some small shippers lack the resources to engage in rate litigation.

V. THE THREE-BENCHMARK APPROACH IS A PERMISSIBLE METHODOLOGY OF LAST RESORT FOR SMALL CASES, SO LONG AS THE BOARD'S PROPOSAL IS MODIFIED AND LIMITED AS CSXT/NS HAVE REQUESTED IN THEIR COMMENTS.

CSXT/NS reiterate that their support for a Three Benchmark approach is dependent upon two conditions: (1) The Board maintains the presumptive eligibility threshold it proposed in the NPRM (maximum rate relief attainable over five years ("MVC") less than \$200,000) and the proposed aggregation presumption²²; and (2) The Board does not determine rate reasonableness based upon a formula, but rather considers the result of the proposed formula along with all other relevant evidence to determine the maximum reasonable rate. *See, e.g.*, CSXT/NS Rebuttal Comments at 28-33. Like virtually every other business, rail carriers set their prices based on numerous different factors – that process cannot be captured or meaningfully evaluated by a rigid one-size-fits-all formula. No shipper sets the prices it charges to its customers by a formula,

²¹ There is evidence in the legislative history that Congress was as concerned about small *shippers* as about small shipments. For example, Senator Pressler, a sponsor of ICCTA, explained the provision as follows: "[W]e have attempted to address a few very critical shipper concerns in those areas in which the ICC's current administrative procedures do not enable a shipper to even bring a legitimate grievance and receive an effective remedy. For example, S. 1396 would instruct the new Board to complete the ICC's pending noncoal rate guidelines proceeding so that *smaller shippers* have a practical procedure available in which to bring a rate case." Floor Statement by Senator Pressler, 141 Cong. Rec. S17579 (Nov. 28, 1995) (emphasis added); *see* Senate Report 104-176, at 7 (1995) (The Committee is concerned that non-coal shippers, particularly grain shippers and *smaller volume* bulk *shippers*, have been deterred from utilizing the rate reasonableness provisions in the ICA in part because of the complex nature of the full standalone cost presentation adopted by the ICC and the resulting expenses associated with pursuing that test) (emphasis added).

²² *See* NPRM at 33-34.

there is no reason rail carriers should be expected to do so. There is no evidence in the record that rates can be set accurately using a formula. No shipper – not even one that sells a patented product – has suggested that it sets its prices using a formula. When the NITL witness advocated “rate standards [that] would permit shippers and carriers to predict a narrow range of probable outcomes of a case,” he was seeking something that no NITL member would accept for its business. *See* Hrg. Tr. at 29 (NITL testimony).

CSXT/NS also urge the Board to consider other modifications proposed in their prior comments, but emphasize that they cannot support a Three Benchmark approach that does not satisfy the two conditions summarized above. Below, CSXT/NS discuss the other issues raised in the Supplemental Decision concerning the Three Benchmark approach.

A. Ratcheting

As CSXT/NS explained, the Board’s proposed formulaic approach would drive rates in the same comparison group down toward a declining mean. *See* CSXT/NS Rebuttal Comments at 32-33; V.S. Paul Lowengrub (Jan. 11, 2007). This is the same type of fundamental flaw the D.C. Circuit criticized in *Burlington Northern Railway Co. v. I.C.C.*, 985 F.2d 589, 597 (D.C. Cir. 1993). The way to fix this fundamental, fatal flaw in the Board’s proposal is to eliminate the use of a determinative formula, and instead use the benchmarks as non-determinative factors to be considered along with other relevant evidence to evaluate the reasonableness of a challenged rate. *See, e.g.*, CSXT/NS at 2-3, 6, 28-33.²³ If the Board retains the determinative formula proposed in the NPRM, it likely would not withstand judicial review.

²³ At the hearing, a shipper witness suggested that the ratcheting effect might be mitigated by the introduction of different movements to the comparison group in successive cases. Additional traffic could have such a partial mitigating effect only if the additional movement(s) had a higher rate than the challenged rate. Because the highest rates for comparable traffic are those most likely to be challenged, however, it is unlikely that many rates higher than the challenged rate (for comparable traffic) would exist. Any new rate established by a carrier that is above rates

The Board's question about whether it may use the Three Benchmark approach as proposed if it has "exhausted all reasonable means of simplifying a SAC presentation," rests on an erroneous premise. *See* Supplemental Decision at 5.²⁴ The Board has not approached exhaustion of all reasonable possibilities for simplifying SAC. In fact, CSXT/NS have proposed a number of changes to the Board's Three Benchmark proposal that would make it more accurate, less arbitrary, and more consistent with the law, sound economics and rail transportation policy. *See, e.g.*, CSXT/NS Open. Comments at 15-24; CSXT/NS Reply Comments at 26-32; CSXT/NS Rebuttal Comments at 27-47. Moreover, the generally solid SSAC framework the Board has proposed in this proceeding makes clear it has not exhausted all reasonable means of simplifying SAC. At this juncture, it would be neither appropriate nor lawful for the Board to adopt the Three Benchmark approach as proposed based upon the assertion that it had exhausted all reasonable means of simplifying a SAC presentation.

B. There Is No Good Reason To Disclose Highly Confidential Unmasked Waybill Sample Data To Shippers Prior To The Filing Of A Complaint.

The Board should not give shippers pre-complaint access to the Costed Waybill Sample with unmasked revenues. Rates are some of the most highly confidential and sensitive information maintained by railroads and their customers. For good reason, the Board has never

previously held "unreasonable" (i.e. above average for the comparison group) could be reduced promptly in a quick and inexpensive Three Benchmark case. Regardless, the overall effect is undeniable – for a given population of comparable movements, repeated application of the Board's formulas to prescribe rates for higher rated traffic (the rates most likely to be challenged) will ultimately drive rates toward the mean, while the mean itself simultaneously declines. *See generally* V.S. Lowengrub, filed with CSXT/NS' Joint Rebuttal Comments. The use of a confidence interval does not eliminate this downward ratcheting effect. *See id.*

²⁴ The Board seeks comments on the Three Benchmark proposal, as modified in the "Notice." Supplemental Decision at 5. CSXT/NS assume the Board is referring to the Three Benchmark proposal set forth in the July 2006 NPRM. As previously discussed, the possible further changes mentioned in the January 2007 Supplemental Decision are too indefinite and incomplete to allow meaningful evaluation or comment.

disclosed unmasked revenue information to anyone outside the Board, including carriers.

Widespread disclosure of such highly confidential information could have significant negative effects on competition and ultimately on prices paid by consumers of goods transported by rail.

Shippers do not need access to such information in order to assess their rates and decide whether to bring a challenge. They have access to the URCS cost data and revenues for all common carrier tariffs, which is all they need to determine if the R/VC ratios generated by their rates are in line with those charged for comparable movements. Shippers and their consultants could, however, use pre-complaint disclosure of confidential waybill sample revenue information to engage in fishing expeditions aimed at identifying rates they think they could reduce quickly and cheaply through a Three Benchmark challenge. This is not a proper purpose, and it is certainly not sufficient to overcome the Board's longstanding rule against disclosure of unmasked revenues to anyone outside the Board.

C. The Board Should Not Change its RSAM Calculation.

CSXT/NS do not favor the Board's proposed change to the RSAM calculation. See NPRM at 23-25. They believe the Board should continue to publish the current RSAM – and consider it with other relevant evidence in Three Benchmark cases – regardless of whether it also decides to publish the new RSAM proposed in this proceeding. The existing RSAM properly focuses on demand-inelastic, “potentially captive” traffic, upon which carriers must rely to earn adequate revenues. Broadening the RSAM analysis to include movements that generate R/VC ratios below 180% is unsound, because it erroneously assumes carriers have the same ability to obtain higher rates for competitive traffic that they have for traffic over which they have market dominance. This notion is at odds with demand-based differential pricing theory, CMP, and basic principles of economics that form the foundation of modern rail rate regulation.

Congress mandated that carriers be allowed to earn adequate revenues, and set the floor on the Board's rate reasonableness jurisdiction at R/VC of 180% because it determined that traffic generating lower R/VCs is competitive. Because carriers lack market power over such traffic, they cannot raise rates substantially on such traffic without losing it to competitors. Therefore, as the Board recognized when it established the existing RSAM, carriers must rely on traffic with R/VC greater than 180% to make up revenue shortfalls and make progress toward long-term revenue adequacy. Congress has not changed the jurisdictional threshold, and there has been no demonstration that carriers now have significant market power over traffic with R/VC ratios below 180%. Accordingly, the Board should not reverse its existing policy by assuming carriers can recover their revenue shortfall from traffic with R/VC less than 180%. The existing RSAM calculation is a more appropriate and useful benchmark for evaluating rate reasonableness in small rate cases.

The Board need not be concerned about the ability of parties to verify the RSAM and R/VC_{>180}. See Supplemental Decision at 5; NPRM at 23, n. 41. Neither the STB nor any other government agency is required to make all aspects of all of its regulatory calculations available for independent "verification" by regulated parties. Given the many calculations and determinations modern regulatory agencies must make, such a burdensome requirement would be impractical and would unduly impede and delay agency decisionmaking.

What the agency is required to do is to explain how it intends to make such calculations, and what data it will use to make them. Once the agency has disclosed its methods and process, it must be presumed to have implemented that process, including any necessary calculations, correctly. Therefore, an agency ordinarily is not required to provide all of the data and calculations it used to implement its methods in a specific instance. See, e.g., *BSNF Railway Co.*

v. *STB*, 453 F.3d 473, 486 (D.C. Cir. 2006). In the rare case in which an affected entity can demonstrate it has good reason to believe the STB's RSAM calculation is incorrect in a specific instance, it should be allowed to petition the STB to review its calculations to confirm they were done correctly. *See id.* The STB could then review its calculations and, if it finds an error, correct it and issue revised RSAM (or other) benchmarks.²⁵

D. Non-Defendant Traffic Should not be Eligible for Inclusion in a Comparison Group.

The Board should not allow traffic on other rail carriers to be included in a comparison group with a defendant carrier's traffic. Different carriers have different cost and rate structures; different traffic mixes; different infrastructure, equipment and assets; traverse different terrain; operate in different markets; and have different revenue needs, business plans and priorities. Almost by definition, movements on different carriers are not "comparable" in the ways that are necessary to make meaningful rate comparisons.

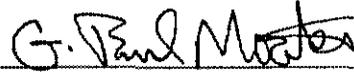
Moreover, each railroad makes its own pricing decisions based on its individual assessment of the market and other relevant factors. Each carrier is responsible for establishing and defending its own rates, and should not be required to answer for its competitors' actions and decisions. And no rail carrier should have the reasonableness of its rates evaluated based upon rates independently established by other carriers.²⁶ Therefore, it is not fair, appropriate, or

²⁵ Only in a truly extraordinary case in which the Board verifies its calculations and an affected party presents compelling evidence that the calculation nonetheless remains materially erroneous should the Board even consider a request for confidential information necessary for that party to conduct its own independent calculations.

²⁶ Using non-defendant carrier traffic in Three Benchmark cases would also present practical problems. Because the parties to a case do not know some of the relevant characteristics of the non-defendant carrier's traffic, or other information relevant to assessment of comparability, extensive discovery from non-party carriers would be necessary to allow a meaningful evaluation of whether selected movements are comparable to the issue traffic. Not only would this impose a significant burden on non-parties, but it would likely add costs and delay to a proceeding that is

necessary to include non-defendant traffic in a Three Benchmark comparison group. The Board should make such traffic ineligible for comparison groups.

Respectfully Submitted,



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DCI 916572v.3

intended to be expedited and simplified. Moreover, if the Board were to make the Waybill Sample with unmasked revenues available to parties to a rate case, inclusion of non-defendant carriers' traffic would mean that defendant carriers would be provided access to highly confidential and competitively sensitive information regarding their competitors' prices, which could raise other concerns.

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

PUBLIC HEARING

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

EX PARTE 646 (SUB-NO. 1)

+ + + + +

WEDNESDAY, JANUARY 31, 2007

+ + + + +

The Public Hearing convened in Hearing Suite 760, 1925 K Street, N.W., Washington, D.C. 20423-0001, pursuant to notice at 9:00 a.m., Chairman Charles Nottingham, presiding.

SURFACE TRANSPORTATION MEMBERS PRESENT:

CHARLES NOTTINGHAM Chairman
DOUGLAS BUTTREY Vice Chairman
FRANCIS MULVEY Commissioner

PANEL I: GOVERNMENT

PAUL S. SMITH UNITED STATES DEPARTMENT OF TRANSPORTATION

PANEL II: SHIPPERS/TRADE ASSOCIATIONS

NICHOLAS J. DIMICHAEL INTEREST PARTIES (JOINT SHIPPER GROUP)
ANDREW P. GOLDSTEIN INTEREST PARTIES (JOINT SHIPPER GROUP)
THOMAS D. CROWLEY INTEREST PARTIES (JOINT SHIPPER GROUP)
GERALD W. FAUTH III INTEREST PARTIES (JOINT SHIPPER GROUP)

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PANEL II: SHIPPERS/TRADE ASSOCIATIONS (cont.)

DAN MACK	NATIONAL Grain and Feed ASSOCIATION
DOUG KRATZBERG	NATIONAL INDUSTRIAL TRAFFIC LEAGUE
CURT WARFEL	NATIONAL INDUSTRIAL TRAFFIC LEAGUE

PANEL III: SHIPPERS/TRADE ASSOCIATIONS

JEFFREY O. MORENO	DOW CHEMICAL COMPANY
STEVE SHARP	ARKANSAS ELECTRIC COOPERATIVE CORPORATION
MICHAEL W. SNOVITCH	ALLIANCE FOR RAIL COMPETITION
TOM O'CONNOR	SNAVELY KING MAJOROS O'CONNOR & LEE

PANEL IV: LABOR

GORDON P. MACDOUGAL	UNITED TRANSPORTATION UNION- GENERAL COMMITTEE OF ADJUSTMENT
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PANEL V: RAILROADS

SAMUEL M. SIPE, JR.	ASSOCIATION OF AMERICAN RAILROADS
RICHARD E. WEICHER	BNSF RAILWAY COMPANY
LOUISE A. RINN	UNION PACIFIC RAILROAD COMPANY

PANEL VI: RAILROADS

THEODORE K. KALICK	CANADIAN NATIONAL RAILWAY COMPANY
TERENCE M. HYNES	CANADIAN PACIFIC RAILWAY COMPANY
G. PAUL MOATES	CSX TRANSPORTATION, INC. NORFOLK SOUTHERN RAILWAY COMPANY
WILLIAM A. MULLINS	KANSAS CITY SOUTHERN RAILWAY COMPANY

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Adjourn

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1 uncertainty regarding how much time a case will
2 require, the longer a case proceeds, the higher the
3 cost, the uncertainty of a possible court appeal of
4 an STB decision, the probability of winning which is
5 likely no more than 50 percent and lastly, if the
6 case is successful, the likely amount of potential
7 rate concessions which, in all likelihood, is a mere
8 fraction of the theoretical maximum case value. For
9 all these reasons, we anticipate that under any
10 reasonable eligibility standard, the use of small
11 rate guidelines would be limited.

12 Since 1998, NGFA also has experienced an
13 administrating and arbitration system for railroad
14 and rail customer disputes which may offer some
15 insights on what might be expected if the STB lowers
16 the bar on small rail rate cases. The NGFA rail
17 arbitration system provides for dispute resolution
18 on a wide range of issues. All Class 1 carriers and
19 several regional and short line carriers remain a
20 part of the system through a voluntary commitment to
21 abide by compulsory arbitration. This rail
22 arbitration system establishes a much lower bar to

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1 dispute resolution than what is being proposed by
2 the STB under even the least costly 3B approach.
3 And yet in its eight years of existence, the NGFA's
4 rail arbitration process has generated only six
5 completed and published cases.

6 This low number is not an indicator that
7 the private rail arbitration system has not been
8 useful or successful. To the contrary, I believe
9 that most rail shippers and railroads alike would
10 agree that the system has been extremely successful
11 as a business tool to encourage private negotiation
12 of disputes. Because the system exists, it permits
13 either the carrier or the rail customer to easily
14 and inexpensively initiate an arbitration proceeding
15 which often leads to more serious negotiations in an
16 expedited fashion. When both sides have an
17 incentive to negotiate, litigation can often be
18 avoided, and that is exactly what has happened with
19 the NGFA arbitration.

20 But the business incentive to negotiate
21 must exist, and if it doesn't naturally result from
22 a competitive marketplace, it must come from another

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1 whether it has over estimated the cost of a full-SAC
2 case. We think the Board, in fact, has under
3 estimated the cost of a full-SAC case. The most
4 recent SAC decision entered by the Board was in the
5 Otter Tail Power case, and in view of the importance
6 of this issue, I've been authorized by Otter Tail
7 Power Company to tell the Board that the cost to
8 Otter Tail of the recent proceedings before the
9 Board was \$4.5 million or \$1 million more than the
10 cost assumed by the Board in its July decision in
11 this proceeding. The Otter Tail proceeding was not
12 unusual. Although there were three supplementary
13 filings in that case, they dealt with narrow issues
14 and were not extensive. The record in that case is
15 probably something like about here (indicating) and
16 the supplementary filings are actually right here
17 (indicating). You can probably barely see them over
18 the lip. I would note that the Board has recently
19 suggested that Otter Tail, in fact, should have
20 filed more expert evidence on one issue in the case.

21 The cost of SAC cases has risen
22 astronomically over the past five years and really

1 parties in a land of uncertainty.

2 Moreover, we think that it's clear that
3 a risk factor of two is not sufficient to achieve
4 the quote "sufficient margin" close quote that the
5 Board discussed in 1996. Of the last seven SAC
6 decisions, two have resulted in some relief for the
7 shipper, and the lack of a small case precedent
8 itself argues for a substantial risk factor, because
9 the uncertainties of the small cases at this point
10 appear much greater than the uncertainties even of
11 large cases. Clearly, large cases have certain
12 risks, and small cases at this point, given the
13 uncertainties, have even more.

14 Finally, we want to discuss the maximum
15 value of the case concept. As the MVC concept was
16 stated in the July proposal, it did not take into
17 account the fact that both the simplified SAC
18 procedure and the three benchmark procedure would
19 not produce rates anywhere near the 180 percent
20 revenue to variable cost level. The Interested
21 Parties have partially adopted a railroad suggested
22 that as long as the Board has developed reasonable

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1 we try to make things simpler, we seem to make them
2 more complicated and more expensive. Every time we
3 try to make them cheaper -- I'm sad to hear that you
4 all think that the changes that were proposed in the
5 Ex Parte 657, the large SAC cases, has not lowered
6 the cost.

7 But on the -- some of the issues in the
8 full-SAC case that will be reduced or eliminated
9 using a simplified-SAC methodology, I had the staff
10 prepare a list of all the things that would no
11 longer need to be done or the cost of which would be
12 very, very much reduced, and they do seem to be
13 substantial. There's no -- the jurisdictional
14 threshold, for example; simply we use an unadjusted
15 URCS. The SAR configuration of who can track miles
16 -- we're now going to use the predominant route or
17 traffic, so you don't need to specify a route or
18 figure out what route you might want to take. The
19 traffic volumes and revenues are defined by actual
20 traffic for the most part or, in some cases, like
21 the rerouted traffic would no longer be an issue,
22 we're using actual miles.

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1 Operating expenses would all be based.
2 upon modified URCS operating expenses using actual
3 traffic. You wouldn't need to postulate a
4 hypothetical railroad, for example, and all those
5 operating expenses would no longer be remodeled.

6 Unrolled property investment using
7 rolling averages from prior cases, again, would
8 simply and, I would think, reduce the costs. In
9 fact, the only one that has no change in that
10 category seems to be tunnels, and tunnels tend not
11 to be typical, especially in western cases.

12 Discount to cash flow analysis -- again,
13 reduced to a one-year DCF, no debates over
14 refinancing debt under the new proposals, etcetera,
15 all of these would seem to substantially reduce the
16 case, the cost of bringing these cases. Anyone want
17 to respond to that?

18 MR. CROWLEY: I agree that those things
19 will reduce the cost if you're starting at the right
20 point. I think we heard this morning what it cost
21 to litigate the Otter Tail case and I was part of
22 that case. And what I'm telling you is that the

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1 General Committee of Adjustment who has requested
2 three minutes, and we welcome you, Mr. MacDougal.
3 Welcome, Mr. MacDougal. Please proceed.

4 MR. MacDOUGAL: Why thank you. I'm here
5 in one issue. It's the issue of the compulsory
6 mediation non-binding before a member of this board,
7 an employee of this board, in secret session. And
8 member employees generally go along with the labor
9 management. We have in all these rate cases with
10 very few exceptions. But the employees are against
11 secrecy. They want a transparent Agency, and they
12 want, if there's going to be mediation, an
13 independent mediator.

14 And we've made this -- Mr. Fistio has in
15 four recent filings -- actually, not recent, in the
16 last six years, Ex Parte 586, Ex Parte 638, Ex Parte
17 646 and Ex Parte 657, the idea of a big railroad and
18 a big shipper, even though the big shipper has small
19 shipments, and STB staff member getting together
20 behind closed doors and deciding the welfare of
21 rates in the country and things like that is just --
22 we're just against that.

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1 If a carrier and a shipper want to have
2 somebody in outside world mediate a dispute, they
3 should not bring it here to staff. They can take it
4 somewhere else if it's voluntary. But the proposal
5 for a compulsory mediation -- if fact, we say -- I
6 say it's -- wasn't properly before the Board right
7 now. It was not part of your initial notice back in
8 July. It came up on January 22nd in a vague form
9 and I don't think -- I think you have to put out for
10 a new notice if you're really going to adopt a
11 compulsory non-binding mediation before this --
12 before an employee of this Board.

13 The AAR in their comments support it,
14 the Union-Pacific and jointly the Norfolk Southern
15 and CSXT. You have not heard from, not in their
16 comments -- it didn't go along with these three
17 carriers, three Class 1, so far anyway -- did not
18 hear from BNSF, Kansas City Southern, Canadian
19 Pacific or Canadian National.

20 A little short history. You once had
21 mediation. You had John Thune mediate. He was then
22 with the Arent Fox government relations -- section

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1 of government relations with the Arent Fox law firm.
2 That was in 2003. It was a BSNF rate case. You
3 also had the next year Clyde Hart who was the vice
4 president, government relations, of the American Bus
5 Association as a mediator in another BSNF rate
6 cases.

7 The idea of having it compulsory is just
8 -- just contrary to what the employees would want.
9 We want an open society. If there's going to be --
10 it has to be transparent. Also, there's the
11 independence thing. You had Congressman Thune and
12 Clyde Hart were independent. If you have compulsory
13 mediation at the FERC, there's an independent
14 settlement judge, ALJ, assigned to it. It's an ALJ
15 independent. If you do it at the Federal
16 Communications Commission, you have a person who's
17 also an ALJ, a settlement judge.

18 The idea of putting -- requiring
19 mediation in secret before an employee of this
20 agency just goes too far. You're going to have a
21 great opportunity for scandal. And your employees
22 are not angels. We had a problem in 1970 where the

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1 Congress, the Staggers committee, had hearings --
2 there's two volumes of it -- going into employee
3 conduct in passenger train discontinuance cases.
4 You had the shutdown of the ICC which was voted on
5 by the Congress in 1994 because irregularities of
6 the -- of under charge, over charges could not be
7 resolved. And you just -- to throw this to a staff
8 situation, make it compulsory, you would just think
9 won't work. that's all we have to say.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 MacDougal. Appreciate your testimony. Let me just
12 think through it for a second if you could. I'll
13 ask a question or two. Would you agree that -- what
14 I hear you saying is that the UTU supports
15 outsourcing in this case. Are you generally
16 supportive of outsourcing across the Board.

17 MR. MacDOUGAL: Well, if people want to
18 get together to try and solve their disputes, you're
19 a carrier and a railroad, nobody can stop them and
20 they should. They can arbitrate or they can
21 mediate, call somebody else. That's not what --
22 they can do what Mr. O'Connor wants, have it a

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1 voluntary situation. But you're proposing to have
2 it compulsory and before a staff member of this
3 board in secret. That's what you're proposing, and
4 it ain't going to work. I don't think it's going to
5 work.

6 And other agencies put in safeguards you
7 can rely on your staff. But they're not angels, and
8 we've had problems in the years. Those of us that
9 have practiced here know that staff, particularly a
10 lot of them relatively inexperienced in rate making,
11 and to give them that authority and put pressure on
12 parties, and it affects employees because indirectly
13 we are affected by what you do. We just think it
14 isn't the American way to go.

15 CHAIRMAN NOTTINGHAM: Would you expect
16 the overall cost of mediation under your proposal to
17 be higher than they are under the way the Board
18 currently handles mediation or --

19 MR. MacDOUGAL: Well, I'm not -- I'm
20 just saying if they -- I'm not -- I'm saying they
21 should not be required. There should not be any
22 binding mediation period whether it's before this

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1 Board or otherwise. But parties are free, of
2 course, to seek arbitration or mediation outside
3 this Board as a voluntary decision on their part. I
4 would not make it a requirement for small rate
5 cases. In fact, we've opposed it even in large
6 cases. That's the citations I give to Mr.
7 Fitzgerald's testimony since 2001.

8 CHAIRMAN NOTTINGHAM: But wouldn't you
9 agree generally it would be a fair assumption that
10 it would be more expensive to require folks to hire
11 private sector independent mediators? And it may be
12 well worth the expense given your beliefs but I just
13 --

14 MR. MacDOUGAL: Well, the question is
15 hire. I don't think you should hire anybody. It
16 should not require anybody to be hired. It
17 certainly should not be someone that's employed by
18 this Board.

19 CHAIRMAN NOTTINGHAM: So there are --
20 I'm just not aware -- there are people out there who
21 do this kind of work pro bono?

22 MR. MacDOUGAL: Oh, yes. There's all

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1 kinds of people. There's all kinds of retired rate
2 sharks and people that'll do things like that.

3 Sure.

4 CHAIRMAN NOTTINGHAM: Can we get them to
5 handle SAC cases as well pro bono?

6 MR. MacDOUGAL: You can --

7 CHAIRMAN NOTTINGHAM: That would solve -

8 -

9 MR. MacDOUGAL: -- in fact, you ---

10 CHAIRMAN NOTTINGHAM: -- a lot of our
11 problems we heard today.

12 MR. MacDOUGAL: You have a list for
13 arbitration of a number of people, about 20 or even
14 more experienced practitioners who have signified
15 that they would like to be designated as available
16 to resolve disputes. That's your private
17 arbitration list.

18 CHAIRMAN NOTTINGHAM: Vice Chairman
19 Buttrey, any questions? Commissioner Mulvey?

20 COMMISSIONER MULVEY: I have a few. Of
21 course, our current mediation is it's compulsory,
22 but it's non-binding and we're not proposing binding

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1 risk factor has anything to do with this. This is
2 supposed to be a gaming exercise or something that
3 drives to a point of an economic indifference.

4 If there is a problem, the shipper
5 should perceive they have a problem. And we should
6 be looking at the shipper's alleged or perceived
7 access issue, not some other construct. And it
8 should be the complainant's costs that are relevant,
9 not the railroad's.

10 I think it falls to BNSF to address the
11 Otter Tail issue that was raised this morning and
12 has been debated. I have tremendous respect for
13 complainant's counsel in that case. They are
14 experienced and fine counsel.

15 I think in this case, there is a great
16 deal of hyperbole to suggest that that was a simple
17 case. It didn't seem simple to us. We spent a lot
18 more than the \$3.5 million threshold on that case,
19 but there's nothing typical of that case. Not only
20 is it pre-six the new rules, and we'll come back to
21 that because we think they should simplify SAC cases
22 and make them less costly.

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1 But in Otter Tail, it would be fair to
2 characterize that as four stand-alone cases. They
3 started in June of '03 with the first filing of the
4 stand-alone railroad. And recall that the choice of
5 the stand-alone railroad in the initiative -- I'm
6 sorry to digress into this, but it's been raised.
7 There's a lot of talk. I'll make this as brief as I
8 can, but it's very relevant if we're going to talk
9 about the comparison of the stand-alone costs.

10 First they filed the stand-alone
11 railroad. Within a month or two, they did an
12 extensive errata, which was basically a whole new
13 stand-alone railroad or a rework one. We, of
14 course, have to reply to these or figure out how to
15 adapt to them at great cost to outside consultants
16 and fine lawyers.

17 Then January of '04 they filed another
18 stand-alone railroad with a new operating plan based
19 on a revised traffic route. And then in April of
20 '04, give or take, they filed another stand-alone
21 railroad based on the operating model they adopted
22 after the repudiation of the so-called strong model,

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1 which the Board and the staff will recall is another
2 whole sideshow fight over what kind of model should
3 drive all the operating revenue and expense
4 assumptions in the stand-alone railroad, a lot of
5 time, a lot of money, and a lot of efforts.

6 If you take their 4.5 million figure,
7 which they probably got a lot of good value from
8 complainants' counsel and lawyers in that case for
9 that, they could have done one round for probably a
10 million and a half. But, be that as it may, it's
11 the shippers' cost of what they choose to do.

12 From BNSF's standpoint, we have to
13 vigorously defend these cases. In the particular
14 circumstance of the last few years or the period of
15 this case, we have the privilege to be before the
16 Board on multiple cases and the honor of defending
17 them. We have to look at the broad concepts. And
18 when we're spending a lot of money in one case on
19 string model development defense against some model
20 or something, we're thinking of the big picture.

21 We do think the new guidelines, we shall
22 see, have simplifications in various operating

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1 subject of the likely outcome of the case, which is
2 not something the Board probably should be doing.

3 MS. RINN: I would also offer -- and,
4 again, I believe that this was an observation made
5 by one of the shipper witnesses this morning -- that
6 when you're dealing with a larger customer who may
7 have a lot of movements to individual
8 origin/destination pairs but who in the aggregate
9 has a substantial amount of business and, in fact,
10 we have more than one plant.

11 The rate case may be the issue that they
12 could bring before you or that they're addressing in
13 this proceeding, but ordinarily -- and this has been
14 UP's experience -- there are usually other issues
15 bundled up in that commercial relationship in the
16 difference between the railroad and its customer and
17 that if they decide to use the leverage of a rate
18 case, they have also factored in if it sets an
19 unfortunate precedent for other people, who can then
20 come on, we face that risk in terms of that rate
21 case or that we might want to avoid the hassle, that
22 risk of precedent, in order to give them concessions

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1 regarding equipment or contract concessions that we
2 have been unwilling to make.

3 It's more difficult for me to go into
4 more detail than that without breaking some
5 confines, but often, often, again, -- and I'm
6 talking about the folks who are not running a small
7 grain elevator or a small business. I'm talking
8 about some very sophisticated corporations, who have
9 a lot of stuff going on in the transportation world.

10 A rate case is just one card in a deck
11 of cards that they're playing in order to maximize
12 their overall benefits and that that is hard to
13 quantify. And, in fact, you may not see it, but
14 that is also part of the risk-benefit equation by
15 those shippers in deciding to file a rate case.

16 COMMISSIONER MULVEY: Thank you.

17 CHAIRMAN NOTTINGHAM: Ms. Rinn, just to
18 pick up on that, are you suggesting, then, that it
19 might be reasonable or sort of a reasonable business
20 tactic if one were in your job but for a very large
21 shipper, perhaps a shipper that is much larger even
22 than your current employer, to actually roll the

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1 dice and pursue a rate claim with the full knowledge
2 that even success might only bring a break-even on
3 costs or even a loss in costs because you may have,
4 as you just suggested, possibly 10, 20 other
5 transactions pending or that it may give you
6 leverage as a business in other ways?

7 MS. RINN: I'm going to have to think
8 carefully how I can give you a truthful answer that
9 does not betray things I promised in writing I am
10 not going to betray. But this is going to be based
11 on actual experience.

12 I have been privy to a situation where
13 rate cases have been threatened, rate cases have
14 been brought, where the level of the rate was an
15 issue of dispute between my client and our customer,
16 but it was only one, and that the shipper, partly
17 because they judge the odds of significant relief,
18 were good enough that they were willing to go
19 forward with it but that if you compared it to an
20 overall package looking at a variety of issues where
21 we believed we were offering them more value than
22 they could get in the rate case, they turned us

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1 down. And this has happened more than once.

2 Now, I will say I think that the Board's
3 decision in 657 and where you apparently are headed
4 in this proceeding that says you're going to be
5 using unadjusted URCS costs to establish the
6 jurisdictional threshold reduces that possibility
7 because I think it provides up-front information for
8 both the carrier and the shipper that's more
9 objective about what the maximum value of the case
10 was and that previously there may have been -- it
11 was a difference in perception because I was coming
12 up with where I thought the Board -- you know, the
13 maximum relief was going to be and the shipper was
14 asking us to give them value that exceeded the
15 maximum relief and that the shipper was getting
16 different information about what the maximum relief
17 was going to be.

18 And they, of course, did not believe me
19 who they were not paying. They believe the people
20 they were paying. And I can understand that. I
21 think I am hopeful that being more focused on
22 straightforward URCS, that might reduce some of that

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1 senior lawyers are here: From CSX, Mr. Peter
2 Schudtz and Mr. Paul Hitchcock; and for Norfolk
3 Southern, Mr. George Aspatore and Mr. John Scheib.

4 I want to start by responding to
5 something that wasn't in my prepared remarks. And
6 everybody has studiously avoided it this afternoon,
7 but I can't, not with the I thought, frankly,
8 inappropriate to some extent remarks made by Mr.
9 MacDougal before the break.

10 I say this in the perspective of someone
11 who has practiced before this agency since 1976 and
12 your predecessor and as someone -- Mr. O'Connor
13 forgot me -- who was a participant in the mediation
14 in the BP Amoco case. I did represent Norfolk
15 Southern in that case.

16 You may rest assured, as I'm sure you
17 know, that your staff is honest, it's truthful, it's
18 hard-working, and it possesses integrity. And we
19 all know that the reference that Mr. MacDougal made
20 to a very unfortunate event that occurred in the
21 1970s is in my view nothing more than the historical
22 footnote interest and has nothing to do with the way

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1 you conduct business today.

2 My view, which is shared I know by the
3 Norfolk Southern attorneys and business people who
4 participated in the BP Amoco mediation, was the
5 mediation was very effective and it was, frankly,
6 successful in very large part because of the
7 participation of your expert staff, who knew the
8 issues, who understood the regulatory concepts, had
9 more than passing familiarity, a lot more, with the
10 stand-alone costs and with the 347(ii) benchmarks,
11 which is what that case was initially, of course,
12 brought under. And they were extremely helpful at
13 getting both sides to stand back and, you know, take
14 another hard look at the positions that brought them
15 there:

16 We are not only endorsers of mediation,
17 not trying to steal the AAR's thunder, but I would
18 point you to the CSX-Norfolk Southern opening
19 comments, where we were one of the proponents from
20 the very beginning in this proceeding of mediation.

21 I also was struck by Ms. Rinn's comment
22 during her presentation that if there were some

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1 permission.

2 It's a serious question, serious
3 question.

4 VICE CHAIRMAN BUTTREY: Well, it seems
5 to me that if it's not clear what something means on
6 its face, then you go and look and see what the
7 Congress might have thought that they said. And
8 sometimes that's even hard to do, even if you can
9 get the transcript of the debate on the floor.

10 It seems to me that one of the bedrock
11 issues here is the relative resources that are
12 available to the plaintiff and the defendant in
13 these proceedings. And it might be that we have
14 just missed the point, point being it's about
15 resources. It's about who has power, who has market
16 power, who has financial power, who has resources to
17 procedure these cases.

18 Nobody is going to contest the fact that
19 the BPs of the world, the Dow Chemicals of the world
20 or the Shells, the Amocos, and the Exxons and the
21 ADMs and the Cargills and those guys all have the
22 resources to fight these battles.

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1 The point has been raised here today --
2 Ms. Rinn raised it herself -- that these customers,
3 big shippers have a lot of power. And it could be
4 that they might use a rate proceeding as leverage to
5 get things that they want in the contract that they
6 are not otherwise getting.

7 So it really troubles me, it sort of
8 troubles me in the back of my mind that we may be
9 missing the point here. The point may be that the
10 Congress meant that we're talking about small
11 shippers and not small shipments, although all we've
12 heard about is small shipments.

13 Now, I would just like to hear what the
14 panel or you or anyone else has to say about that
15 issue. You said just a minute ago that it wasn't
16 outside the realm of possibility that you would have
17 filed a motion to dismiss if it hadn't been settled.

18 Well, now, that's true in a lot of
19 litigation. I've been involved in a few lawsuits
20 back when I was much younger where you were hoping
21 you could settle this case because you didn't have
22 any hopes at all you could possibly win it. And a

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1 lot of them get settled. A lot of lawsuits get
2 settled. And this one got settled.

3 So it seems to me that you might have
4 had in the back of your mind that very thing,
5 although you can't say it. I know you can't say it.

6 MR. MOATES: I can tell you it wasn't in
7 the back of my mind.

8 VICE CHAIRMAN BUTTREY: It wasn't in the
9 back of your mind. Okay. Good. Good. So I'm not
10 completely --

11 (Laughter.)

12 MR. MOATES: There might even have been
13 a draft motion.

14 VICE CHAIRMAN BUTTREY: The only salmon
15 swimming upstream here.

16 MR. MOATES: No, sir. As I said before,
17 I think if we look back in the history of this
18 proceeding and the fairly recent history, for that
19 matter, AAR and the railroads argued pretty ardently
20 that these standards ought to address the small
21 shipper problem.

22 We thought the political concern was

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1 focused. We were told pretty expressly by the
2 agency not to change that paradigm and to focus on
3 small shipments. So we know that literally the
4 language of the statute talks about the cases where
5 shipments that cannot support the cost of a full
6 stand-alone presentation will be dealt with. And
7 the statute uses the word "shipment."

8 So we have stopped carrying that caudal,
9 but I would be pleased to paint it up again because
10 I do believe that you just said is absolutely
11 correct.

12 And, again, this is not meant to be
13 pejorative. In fact, my law firm represents a lot
14 of these fine chemical companies you just mentioned
15 in other contexts, but the Exxon Mobils and the BP
16 Amocos and the folks seen here, Dow Chemical, you
17 know, in the Williams Company, which is I think the
18 case it was going to maybe settle today through
19 mediation, these are sophisticated large companies
20 with operations in lots of areas. And they do
21 indeed have lots of leverage.

22 I do understand and respect where they

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1 come and say, you know, negotiation or otherwise,
2 "Well, we're just focused on this commodity, this
3 facility. It only moves out five cars every three
4 days. So it's a small shipment." I understand
5 that.

6 That doesn't mean that when they come to
7 talk to us about that five cars moving every few
8 days, as Ms. Rinn said, there isn't a whole lot more
9 going on in that room.

10 VICE CHAIRMAN BUTTREY: Well, I don't
11 think we would be sitting here today at all, none of
12 us would be sitting here today, the Board wouldn't
13 exist probably if it wasn't for the fact that the
14 Congress was very concerned about what is going to
15 happen to people who don't have resources to deal
16 with the captive shipper situation and the railroad
17 situation after the ICC goes away. If that weren't
18 the case, we wouldn't be sitting here today, none of
19 us.

20 And it just occurs to me that we may
21 have indeed missed the point that what we really
22 ought to be talking about is small shippers and not

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1 small shipments:

2 That's all I have to say.

3 CHAIRMAN NOTTINGHAM: Thank you, Mr.
4 Moates, for letting the Vice Chairman sleep better
5 tonight after all these many months.

6 Commissioner Mulvey?

7 COMMISSIONER MULVEY: Well, of course,
8 the decisions will be in the margin. And you look
9 at marginal costs and marginal revenues and the cost
10 to the shipper looked at the cost, as you pointed
11 out, the cost of the case relative to the value of
12 the court case. And whether there were other things
13 going on behind the scenes is hard to predict.

14 But I do think that you ultimately have
15 it right. It does have to be shipped. And whether
16 or not that is what the Congress intended or not I
17 don't know, but that seems to be where we are going.
18 And I guess bringing that caudal up again probably
19 is not going to get us very far.

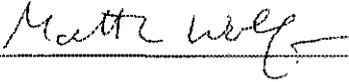
20 You mentioned the fact that we tried to
21 streamline things in the 657 ex parte decision.
22 And, of course, that wasn't exactly widely received

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2006, I caused a copy of the foregoing Supplemental Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company to be served on all parties of record in this proceeding by first class mail, postage prepaid or more expeditious method of delivery.



Matthew Wolfe