



U.S. Department of  
Transportation  
Office of the Secretary  
of Transportation

General Counsel

400 Seventh St., S.W.  
Washington, D.C. 20590

248718  
February 26, 2007

Vernon A. Williams, Secretary  
Surface Transportation Board  
Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Pursuant to the order of the Surface Transportation Board served January 22, 2007 in the above-referenced proceeding, enclosed herewith are the Supplemental Comments of the United States Department of Transportation.

Please contact me if there are any questions regarding this matter.

Respectfully submitted,

PAUL SAMUEL SMITH  
Senior Trial Attorney

Enclosure

cc: All Parties of Record

**Before the  
Surface Transportation Board  
Washington, D.C.**

\_\_\_\_\_  
Simplified Standards for Rail Rate Cases )  
\_\_\_\_\_ )

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

**Supplemental Comments of the  
United States Department of Transportation**

**Introduction**

The Surface Transportation Board (“STB” or “Board”) in this proceeding continues the difficult task of trying to ease access to regulatory relief for shippers who believe their rail rates are unreasonably high. After considering the prior submissions of parties, the Board recently asked for comments on certain refinements to its original proposals. Order served January 22, 2007 (“January Order”). These latest variations evidence the STB’s willingness to modify its initial views in order to ensure that the final rules better meet their intended purpose, and the United States Department of Transportation (“DOT” or “Department”) welcomes the opportunity to comment on these refinements.

As an initial matter, however, DOT must emphasize that the new proposals do not alter our support for two basic recommendations we advanced earlier in this proceeding. The first is for the Board to conduct public demonstrations of the proposals it is most seriously considering. Rebuttal Comments of DOT at 5-7. Showing how they would work in practice and how their results would compare to those of previously decided Stand-Alone Cost (“SAC”) cases would dispel uncertainties and illuminate potential

problems, thereby making it more likely that parties would actually avail themselves of the rules finally adopted.

The second continuing DOT recommendation is to ensure the ongoing accuracy of the Uniform Rail Costing System ("URCS"), *Id.* at 3-5, or possibly to explore alternative costing methodologies. To reduce the cost of adjudicating rate cases, the STB has proposed to simplify the regulatory process in various ways. To the extent simplification of that process entails increased reliance on broad industry costs, the accuracy and reliability of URCS -- the very repository of those costs -- becomes more important. The Department understands that a comprehensive update of URCS would be expensive, time-consuming, and perhaps contentious. In order to determine whether and to what extent such an undertaking would be necessary, DOT suggests the Board first conduct an exercise to determine the continuing validity, *vel non*, of the core industry cost relationships embodied in URCS.

URCS estimates the variable costs of performing various railroad services, such as intermodal transportation. See Review of the General Purpose Costing System, 2 S.T.B. 659, 660 (1997). Accurate estimates require not only current cost data, which Class I carriers report annually, but also an accurate picture of the relationships between those costs and the services to which they relate. For example, intermodal traffic entails the use of particular kinds of equipment and facilities that other traffic (such as unit coal trains) does not. Thus, the variable costs of one type of service will differ from those of another.

The Board could select a sampling of several of the underlying cost relationships embodied in URCS. For example, the STB could examine the allocation of switching

costs for a movement to determine if that has changed over the years. If the Board finds that the allocation of these costs applied to the different services is the same as estimated by URCS, then that would at least inspire confidence that URCS as presently constituted produces reasonable variable costs. However, if the results of this or other examples show that the URCS cost allocation is incorrect, the STB could consider changes to URCS or, alternatively, explore methodologies different from URCS for costing individual rail movements.

### **Modified Proposals**

#### **A. Eligibility standards**

The STB now seeks comment on modifications to the agency's original eligibility standards for use of non-SAC methodologies. January Order at 1-2. As DOT understands the new proposal, the Board would set a different limit on the amount of rate relief available via each of the proposed alternatives to SAC (i.e., the Three Benchmark and Simplified-SAC approaches), and a complaining shipper would be free to select either alternative so long as any recovery was limited to the regulatory ceiling regardless of the actual value of the case.<sup>1</sup>

The Department supports this proposal. The initial reliance on the "maximum value" of a case to determine eligibility was inappropriate to the extent that amount could never be recovered by shippers as a practical matter; indeed, "maximum value" could be much higher than any real-world award. Allowing shippers to determine a realistic

---

<sup>1</sup> A shipper might decide to pursue a Three Benchmark route even in the case of a relatively high actual value if, for example, the expense of a Simplified-SAC approach and the risk of not prevailing made that option unpalatable.

“actual value” of their cases would encourage more reasoned decisions about pursuing rate relief.

It is of primary importance that the limit on relief to be set by the Board for each alternative to SAC also be realistic. The original limits were based upon the estimated costs of pursuing the next more expensive (and presumably more accurate) rate methodology.<sup>2</sup> The Board has asked for comment on these costs as well. January Order at 3. Although DOT has no basis upon which to offer its own estimates, if the envisioned limits continue to be based upon estimated adjudication costs, it is very important that the STB adopt realistic amounts or ranges in order to provide appropriate regulatory access.

B. The aggregation rule

The Board has asked for comment on whether to abandon its aggregation rule, which was proposed in order to prevent manipulation by shippers seeking less expensive (and presumably less accurate) regulatory methodologies. January Order at 3. DOT favors elimination of the aggregation rule, subject to revisiting if there is actual evidence of manipulation by shippers in order to qualify for less expensive and less accurate alternatives. It appears that the rule would force many shippers with multiple customer/consignee destinations to use the very expensive and time-consuming full SAC procedures if they contested shipments in more than one or two of their traffic lanes.

---

<sup>2/</sup> I.e., the projected \$3.5 million cost of a SAC case served as the ceiling for the “maximum value” of cases eligible for the Simplified-SAC methodology; the estimated \$200,000 cost of a Simplified-SAC case became the ceiling for use of the Three Benchmark approach.

That would lead to the same result this proceeding seeks to remedy: inaccessible regulatory relief.<sup>3</sup>

C. The three-tier approach

Some parties have questioned whether the STB's proposed two alternatives to the SAC methodology complies with Congress' directive to adopt "a simplified expedited method" for determining rate reasonableness, and the Board has requested comment on this issue. 49 U.S.C. 10701(d)(3); January Order at 4. The only literal command in this provision was for the Board to complete within a fixed time a then-pending proceeding begun by its predecessor agency, Ex Parte No. 347 (Sub-No. 2), and the STB did so. Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004, 1006 (1996). There is thus a significant threshold question about whether section 10701(d)(3) even applies here, at least in the very technical sense intimated by some parties.

As a substantive matter, it is clear that now, roughly ten years later, the Board is still trying to respond to the basic Congressional intent that "non-coal" shippers have access to regulatory relief in a fashion that does not entail "a full stand-alone cost presentation." The statutory language in this context does not limit the STB to a single non-SAC alternative or require the use of literally one methodology for use in every single case for which SAC is "too costly." The existence of tens of thousands of shippers of all sizes and distribution patterns, the universe of traffic types carried by rail, and the breadth of possible financial amounts in dispute, all strongly suggest that Congress would

---

<sup>3</sup> Indeed, the situation could well be worse. Even the stand-alone railroad ("SARR") that shippers must develop for SAC is relatively simple in the case of coal insofar as it usually embraces only one origin-destination pair. Shippers with many more customer destinations would have to construct a much more complicated (and expensive) SARR.

have been far more explicit in its language had it determined that “one size fits all” but for a handful of the largest shippers with stable distribution patterns. In short, the Department submits that in these circumstances either the Board has long since complied with section 10701(d)(3), or its current proposals are within the agency’s discretion to interpret and apply the statutory language within reasonable bounds.

D. Routing of issue traffic

The Board seeks comment on a railroad suggestion to further simplify Simplified-SAC by accepting the “predominant route actually used” for the movement(s) in issue. January Order at 4. DOT supports a presumption that such routes should be used in Simplified-SAC cases. Not only would this reduce costs, but consistent use of a route by a railroad should normally tend to reflect its most efficient or optimal route. Shippers, however, should be free to offer rebuttal evidence of demonstrably more efficient alternative routes. For example, if railroads are using circuitous routes for less time-sensitive traffic because of capacity limitations on more direct routes, the shipper should be free to attempt to demonstrate that these actual routings unfairly raise the cost of the shipment, thereby lowering the R/VC ratio. The shipper should be entitled to use the most efficient route, if it can be demonstrated that a route not used is indeed more efficient.

E. Non-defendant traffic

Parties using the Three Benchmark option to resolve their rate dispute must each select a “comparison group” of traffic. In response to railroad industry comments, the

STB has asked whether that traffic should only come from movements carried by the defendant railroad in each case. January Order at 5. The Department does not favor limiting the source of "comparison groups" in these cases to defendant railroads only.

The purpose of this exercise is to identify a sample of shipments with similar characteristics. Shippers may well need to draw shipments from several railroads in order to obtain a sample of sufficient size to be valid. Moreover, if comparison groups are limited to rates for shipments over only the defendant railroad, that railroad could impose uniformly high tariffs on all "comparable" shipments, thereby denying the shipper meaningful relief. On the other hand, the Board should be aware that other carriers may have very high rates but low R/VC ratios if the other railroads are less efficient. Penalizing a railroad for being more efficient is certainly not in the public interest.<sup>4</sup> This is an instance in which experience with actual cases should determine whether there is reason to revisit the issue.

The Department does, however, consider that comparison groups should not be drawn from traffic moving pursuant to contracts, where the rate is confidential. The array of terms and the interrelationship of services, rates, and other conditions may well render contract traffic qualitatively dissimilar to non-contract traffic for comparison purposes.

#### F. Mediation

Finally, the STB has requested comment on whether it should mandate a 20-day non-binding mediation period at the commencement of every case. January Order at 5.

---

<sup>4</sup>/ The selection of a comparison group is another area in which a public demonstration of hypothetical Three Benchmark cases would assist shippers and carriers to better understand the application and implications of the proposals.

This proposal garnered widespread support across both railroads and shippers. DOT once again wishes to express its own strong support for such a requirement. The cost in time would be very small, and the parties could potentially gain a greater understanding of the factors behind the rate and each other's positions. This could in turn lead to greater flexibility even in the event no settlement was reached.<sup>5</sup> The Board should adopt this very worthwhile proposal.

### **Conclusion**

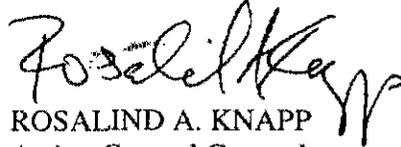
Whether the variable cost relationships generated by URCS remain valid continues to be an issue that should be examined. The application of Simplified-SAC and Three Benchmark methodologies should be demonstrated and their results compared to SAC outcomes. Progress on both these points would serve the basic purpose of this proceeding to make regulatory relief more truly accessible. To that end the Department encourages the Board to continue to refine its efforts to develop alternatives to SAC for determining the reasonableness of rail rates. DOT favors the recently proposed changes

---

<sup>5/</sup> It would also be appropriate to extend the 20-day period if both parties to a case agree.

to the eligibility rules, the elimination of the aggregation rule, the selection of comparison traffic from non-defendant railroads, a presumption in favor of the predominant routes actually used by rail carriers, and a mandatory mediation period.

Respectfully submitted,

  
ROSALIND A. KNAPP  
Acting General Counsel

February 26, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I have caused a copy of the Supplemental Comments of the United States Department of Transportation in Ex Parte No. 646 (Sub-No. 1) to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.

A handwritten signature in cursive script that reads "Paul Samuel Smith".

Paul Samuel Smith

February 26, 2007