

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 646 (Sub-No. 3)

**WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE
PROCEEDINGS**

**JOINT OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY AND
CSX TRANSPORTATION, INC.**

James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Co.

Peter J. Shultz
Paul R. Hitchcock
John P. Patelli
CSX Corporation
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

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

Dated: May 3, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 646 (Sub-No. 3)

**WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE
PROCEEDINGS**

**JOINT OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY AND
CSX TRANSPORTATION, INC.**

Norfolk Southern Railway Company (“NS”) and CSX Transportation, Inc. (“CSXT”) submit these Opening Comments on the Notice of Proposed Rulemaking issued in this proceeding on April 2, 2010 (“NPRM”). The NPRM seeks comments on two proposals related to procedures for “Three Benchmark” proceedings. The first would permit the selection of comparable movements not from the most recent Waybill Sample (as is the current law), but rather from four historical years of Waybill Sample data. *See* NPRM at 2. This proposal seeks to resurrect the “four-year data range” provision of the final rule in *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007) (“*Simplified Standards*”), which was vacated by the D.C. Circuit in *CSX Transportation, Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009). The second proposal in the NPRM is “to permit the parties to draw their proposed comparison groups in any combination they choose from the released Waybill Sample data.” NPRM at 2.

The Board’s proposal to revive the four-year data range rule is unsupported and misguided, and it should be abandoned. The Board has not provided any justification for expanding the universe of historical data from which parties may select comparison traffic from

one to four years of outdated Waybill Samples. Moreover, the Board's proposal would further reduce the accuracy of the already rough and imprecise Three Benchmark Approach, particularly in light of the Board's refusal to consider any adjustments to rates and costs for outdated movements.

I. BACKGROUND

A. **The *Simplified Standards* Proceeding.**

In *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (served July 26, 2006) ("*Simplified Standards* NPRM"), the Board proposed a Three Benchmark methodology for smaller rate reasonableness cases. Under the Three Benchmark method proposed in the *Simplified Standards* NPRM, a challenged rate would be compared to the rates of a comparison group drawn from "the most recent Waybill Sample." *Id.* at 32-33.

During the *Simplified Standards* rulemaking, NS, CSXT, and several other commenters expressed concern about the inherent "regulatory lag" created by using unadjusted data from the most recent year's Waybill Sample. *See* Opening Comments of Norfolk Southern Ry. Co. and CSX Transportation, Inc. at 24, STB Ex Parte No. 646 (Sub-No. 1) (filed Oct. 24, 2006).¹ Because Waybill Sample data is one-to-two years old by the time the Board generates a Waybill Sample, using even the most recent Waybill Sample means that the reasonableness of a current rate is judged by comparison to rates from one-to-two years earlier. NS and CSXT argued that use of such lagging, stale data was a serious flaw in the Three Benchmark proposal, particularly in a time of rapidly changing rates, and urged the STB to consider a mechanism to adjust outdated Waybill Sample rates and costs to current levels. *See id.* Neither NS nor CSXT

¹ *See also* BNSF Opening Comments at 40-41, STB Ex Parte No. 646 (Sub-No. 1) (filed Oct. 24, 2006); Opening Submission of Union Pacific Railroad Company at 58-59, STB Ex Parte No. 646 (Sub-No. 1) (filed Oct. 24, 2006).

nor any other commenter addressed the significantly greater inaccuracy and distortion that could result from using multiple years of Waybill Sample data, because neither the NPRM nor any commenter had made such a proposal, and there was no reason to believe that the Board was considering such a significant change to the Three Benchmark approach. *Cf. CSX Transp. v. STB*, 568 F.3d 1076, 1080 (D.C. Cir. 2009) (noting that “the Board nowhere disagrees[] that not one commenter indicated that it understood the proposal to mean that the Board might consider using more than one year’s worth of private data”).

The final *Simplified Standards* rule rejected commenters’ concerns about the inherent “regulatory lag” caused by using unadjusted Waybill Sample data. *Simplified Standards* at 84-85. The Board described the problem as “1 to 2 years of regulatory lag” and “an inevitable 1-year time lag” – indicating that the comparison group would be drawn from the most recent Waybill Sample. *Id.* However, a separate section of the final Rule stated that, because shippers needed the ability to “verify the Board’s RSAM and R/VC_{>180} calculations,” the Board would release waybill data “for the 4 years that correspond with the most recently published RSAM figures.” *Id.* at 79, 80. The Final Rule never clearly stated that the Board intended to permit parties to use this older Waybill Sample data not just to “verify” the RSAM calculation, but also as a source of comparison movements.² And the Board certainly did not give any justification for rejecting its own proposal that parties use only the most recent available Waybill Sample in favor of permitting the use of older Waybill Sample data.

² The Board did not make clear that it interpreted the final *Simplified Standards* rule to authorize use of movements from four prior years of Waybill Samples for comparison group purposes until the first Three Benchmark adjudications. *See E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099 *et al.*, at 2 (served Jan. 15, 2008).

B. The D.C. Circuit’s Partial Vacation of *Simplified Standards*.

A number of railroads and shippers petitioned for review of the final *Simplified Standards* rule in the United States Court of Appeals for the D.C. Circuit. Among other things, NS, CSXT, and several other petitioners argued that the final rule’s expansion of the pool of Waybill Sample data available for comparison movements violated the notice-and-comment requirements of the Administrative Procedure Act (“APA”). The Board contended that the Court of Appeals should not consider this argument because it had not been raised in a petition for reconsideration of the final rule. The Court of Appeals initially accepted the Board’s claim that petitioners had waived their objections to the Board’s APA violation. *See CSX Transp. v. STB*, 568 F.3d 236, 246-47 (D.C. Cir. 2009).

After NS filed a petition for rehearing demonstrating that the panel’s acceptance of the Board’s waiver argument was contrary to D.C. Circuit precedent, the Court of Appeals reversed itself and held that NS’s objections to the Board’s APA violation had not been waived. *See CSX Transp. v. STB*, 568 F.3d 1076, 1079 (D.C. Cir. 2009). It went on to hold that the Board’s expansion of the pool of Waybill Sample data violated the APA. The Court found that “nothing in the NPRM . . . indicated that the Board might consider expanding the comparison group data from one to four years” and that the change was not a “logical outgrowth” of the *Simplified Standards* NPRM. *Id.* at 1082. The Court then considered the Board’s argument that its APA violation should be excused “because the change was neither prejudicial to the railroads nor important.” *Id.* The Court firmly rejected this argument, holding that the Board’s adoption of a four-year rule was “important and potentially prejudicial,” because of the possibility that outdated information could distort the Three Benchmark approach:

[B]ecause the Board needs one to two years to gather and release the data, expansion to four years’ worth of data means that the comparison groups could be drawn from movements that are up to six years old, and older

data increases the likelihood of distorted comparisons and results. We thus agree with the railroads that the change from one year to four years' worth of data was important and potentially prejudicial.

Id. at 1083 (internal citations and quotation marks omitted). In short, the Court of Appeals specifically rejected the Board's suggestion that its failure to provide notice was a simple technical error. Instead, the Court's decision reflects a judgment that the Board's failure was a material violation of federal administrative law and that adoption of the four-year rule was a significant alteration to the Three Benchmark approach that would increase the likelihood of distorted results. The Court therefore vacated the portion of the final rule that made four years of data available for selection of comparison movements. *See id.* at 1083.

C. The NPRM in This Proceeding.

On April 2, 2010, the Board served the NPRM in this proceeding proposing to reimpose the very four-year rule that the D.C. Circuit vacated. See NPRM at 2. The cursory two-and-a-half page NPRM did not include any explanation of the Board's rationale for proposing the change. The failure to provide any justification for the rule was particularly surprising in light of the D.C. Circuit's holding that such a change is "important and potentially prejudicial" and the Court's recognition that permitting comparison movements to be selected from outdated Waybill Sample data could lead to distorted results.

It was also surprising because the Board's proposed rule would effect a dramatic change in the Three Benchmark approach. For example, if a Three Benchmark proceeding were filed today, the Board would release to the parties the most recent Waybill Sample – the Waybill Sample for 2008 – for use in selecting comparison movements. Although there is some regulatory lag under current law, because the comparison movements would be drawn from the 2008 Waybill Sample the "lag" should not exceed two years. If the currently proposed rule were adopted, however, the Board would release the Waybill Samples "for the four years that

correspond with the most recently published RSAM figures.” Since the last RSAM was published for the four-year period 2004-2007,³ comparison groups could include movements from as long ago as 2004 (six years ago). The most current 2008 data would not be released – because the 2008 RSAM has yet to be published – thereby making the regulatory lag problem even worse. The Board’s proposed rule therefore actually aggravates the regulatory lag problem because it would not allow parties to select comparison movements from the most recent Waybill Sample, thereby forcing them to select “comparable” movements at least three years and as much as six years older than the challenged movement.

II. THERE IS NO JUSTIFICATION OR NEED FOR THE BOARD’S PROPOSAL.

The Board’s cursory NPRM treats the renewed expansion of the pool of comparison group data as if it were an inconsequential housekeeping proposal. The NPRM is devoid of any rationale for making a change that the D.C. Circuit found to be “important” and “potentially prejudicial” enough to justify vacatur of this portion of the rule. The NPRM therefore violates basic APA notice requirements. The Board’s failure to explain the reasons for its proposed actions has severely compromised NS’s and CSXT’s ability to comment meaningfully on the NPRM. Moreover, it is clear that there could be no justification for introducing further inaccuracies into the “rough and imprecise” Three Benchmark approach by permitting parties to select outdated comparison movements.

A. The NPRM’s Failure to Provide a Justification for the Proposed Rule Violates the APA.

In the first place, the perfunctory NPRM falls far short of what the APA requires. The premise of notice-and-comment rulemaking is that an agency cannot simply state what it

³ See *Simplified Standards for Rail Rate Cases – 2007 RSAM and RVC_{>180} Calculations*, Ex Parte No. 689 (served May 12, 2009).

plans to do – it must give notice of, and explain, why it plans to do it. An NPRM must include “sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Nat’l Elec. Mfrs. Ass’n v. EPA*, 99 F.3d 1170, 1172 (D.C. Cir. 1997) (quoting *Florida Power & Light v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)); *see HBO v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (agency “must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based”).⁴ The Board’s rules reflect this fundamental APA standard by requiring notices of proposed Board rulemakings to include “[a] discussion of why the rulemakings are needed and what they are intended to accomplish.” 49 C.F.R. § 1110.3(c)(2).

Here, the NPRM did not provide any reason whatsoever for expanding eligible comparison data to four historical years of waybill samples. After recounting the procedural history of the *Simplified Standards* proceeding, the NPRM simply stated without explanation that the Board “proposes” to release four years of waybill sample data. And an explanation for the Board’s proposed action cannot be inferred from the *Simplified Standard* rulemaking, for the Board did not provide any explanation for this change in that proceeding. As a result, NS and CSXT have no way of knowing what concerns this proposal is intended to address or the reasons the Board is making it. This plain violation of APA requirements (and the Board’s own rules) has left NS and CSXT to shoot in the dark in these comments. It is impossible for parties to comment effectively on a proposed rule when the agency has not explained why it is being proposed.

⁴ RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE*, § 7.2 (5th ed. 2010) (“When an agency proposes to adopt a substantive legislative rule. . . . the agency must provide notice of (1) what it proposes to do and (2) the bases for its proposed actions.”).

Moreover, the NPRM does not contain any citation to the legal authority under which the rule is proposed. The APA requires a reference to the legal authority under which a rule is proposed, *see* 5 U.S.C. § 553(b)(2); *Global Van Lines v. ICC*, 714 F.2d 1290 (5th Cir. 1983), as do the Board’s rules. *See* 49 C.F.R. § 1110.3(c)(7).

B. There is No Justification for the Rule.

As discussed above, the deficient NPRM has severely impaired NS’s and CSXT’s ability to comment on the proposed rule, leaving NS and CSXT to speculate as to the Board’s rationale for its proposal. But even speculation is unable to uncover any good reason for the proposed change.

First, it is conceivable that the Board’s proposal was generated by a general belief that parties need a larger pool of data from which to select comparison movements. But it is unlikely that is the reason. The Board has limited experience with the new Three Benchmark standards, having decided only four cases since the new standards went into effect. Moreover, none of those cases was decided using one year’s Waybill Sample data – the D.C. Circuit did not vacate the four-year rule until after the three *DuPont* cases were decided and evidence in *U.S. Magnesium, LLC v. Union Pacific Railroad Co.* had been submitted.⁵ The Board therefore has no experience deciding a case under the rule it now seeks to abandon.

Second, perhaps the Board’s proposal was generated by other experience in one of the cases involving toxic by inhalation (“TIH”) chemicals traffic that it has decided since the new standards went into effect. It is also unlikely that is the reason because the Board has

⁵ U.S. Magnesium and Union Pacific elected to proceed on the evidence that had been submitted rather than develop and submit new evidence based on one year’s Waybill Sample. *See* Joint Letter Filing, *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket No. 42114 (filed Nov. 10, 2009) (“U.S. Magnesium, LLC and Union Pacific Railroad Company have conferred and agree to proceed based on the current record, in light of their desire to avoid additional costs, uncertainty and delay.”).

initiated a separate rulemaking to address that issue. For TIH traffic, the very limited experience to date suggests the available number of “comparable movements” in the most recent Waybill Sample arguably may be insufficient in some cases. But the Board has already taken action to address that concern through its proposal in Ex Parte No. 385 (Sub-No. 7) to expand waybill sample reporting of TIH movements. *See Waybill Data Reporting for Toxic Inhalation Hazards*, STB Ex Parte No. 385 (Sub-No. 7) (served Jan. 28, 2010). Specifically, the Board proposed to change the rules for waybill sample reporting to require railroads to include waybill information for all TIH movements. *Id.* at 4. The Board stated that its proposal was motivated in part by a conclusion that expanded TIH reporting “would be beneficial in Three Benchmark rail rate cases involving TIH traffic” because “[i]n those cases, the parties would have more data to draw upon when forming their comparison groups.” *Id.* at 2. Adoption of the Board’s proposal or the modification proposed by the Association of American Railroads⁶ would resolve any concern about sufficient TIH comparables for future Three Benchmark cases involving TIH traffic by ensuring that the most recent year’s Waybill Sample will contain adequate samples of TIH movements.

Moreover, there is little evidence that a similar paucity of data exists for movements of commodities likely to be jurisdictional to the Board or subject to challenge. In any event, the *Simplified Standards* rule itself provides a mechanism for Three Benchmark cases to proceed in the event that the Waybill Sample does not contain sufficient comparable movements. The Board explained that “if the Waybill Sample contains no useful comparison

⁶ The AAR’s comments, which were filed on behalf of NS, CSXT, and other member railroads, raised several security-related concerns with the Board’s proposal and suggested alternatives that would permit expanded access to TIH waybills in Three Benchmark proceedings while protecting highly sensitive security information. *See Comments of the Association of American Railroads*, STB Ex Parte No. 385 (Sub-No. 7) (filed Mar. 4, 2010).

traffic,” it would “entertain a reasonably tailored request for comparable movements from the defendant’s own traffic tapes.” *Simplified Standards* at 83.

In short, the Board has not identified any problem that the NPRM is intended to correct, and there does not appear to be any other, unarticulated justification for the change. The Board should abandon its proposed alteration of the Three Benchmark approach.

III. THE PROPOSED CHANGE WOULD FURTHER REDUCE THE RELIABILITY OF THE THREE BENCHMARK APPROACH AND RENDER RESULTING RATE REASONABLENESS DETERMINATIONS ARBITRARY.

Not only has the Board failed to provide any justification for the alteration proposed in the NPRM, such a change would in fact substantially compromise the accuracy of the Three Benchmark approach. The Three Benchmark approach is an admittedly “rough and imprecise” methodology that purports to measure the reasonableness of a rate by comparing it to rates for the comparison group. *Simplified Standards* at 73. If that approach is to have any meaning, the comparison group must be as comparable to the issue movement as possible. While several factors affect the comparability of a movement, one of the most important ones is temporal proximity. Both rates and costs change substantially over time – sometimes rising, sometimes falling; sometimes changing at the same pace, sometimes not. As a result, the greater the distance in time between the issue movement and a comparable movement, the greater the potential for distorted Three Benchmark results. The reality that historical rates are not comparable to current rates – and the Board’s refusal thus far to adopt a solution adequately addressing the problem of regulatory lag – makes it imperative that the Board only use the most recent Waybill Sample data for comparison group purposes.

A. Rates and Costs Change Substantially Over Time.

There is no question that rates and costs of rail transportation are dynamic and can change significantly over time. This fact has been repeatedly confirmed by multiple observers,

including (1) the Board-commissioned reports from Christiansen Associates⁷; (2) studies by the Government Accountability Office⁸; and (3) a recent report by the Board's own Section of Economics.⁹ These studies demonstrate that change is not uniform or predictable. They also show that rail rates not only fluctuate over time, but that they fluctuate from one year to the next. Following are a few key points that these studies establish about how rates and costs vary over time

Rates Sometimes Rise and Sometimes Fall. All of the studies agree that inflation-adjusted rates for rail transportation sometimes rise and sometimes fall. *See* 2006 GAO Report at 3, 11-12; 2007 GAO Report at 4; Christiansen Final Report at 2-2; OEEAA Report at 1-2. As the GAO has demonstrated:

From 1985 through 1987, rail rates dropped by 10 percent and then continued to decline, although not as steeply, through 1998. Rates increased in 1999, then dropped again in 2000. In 2001 and 2002 rates rose again. Rates were nearly flat in 2003 and 2004, finishing approximately 3 percent above rates in 2000, but were 20 percent below 1985 rates.

⁷ *See* LAURITS R. CHRISTIANSEN ASSOCIATES, INC., AN UPDATE TO THE STUDY OF COMPETITION IN THE U.S. FREIGHT RAILROAD INDUSTRY (Jan. 2010) (“Christiansen Final Report”).

⁸ *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FREIGHT RAILROADS: UPDATED INFORMATION ON RATES AND OTHER INDUSTRY TRENDS, GAO 07-291R, at 3-4 (Aug. 2007), available at <http://www.gao.gov/new.items/d07291r.pdf> (“GAO 2007 Report”); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION AND CAPACITY SHOULD BE ADDRESSED, GAO 07-94, at 9, 11-12 (Oct. 2006), available at <http://www.gao.gov/new.items/d0794.pdf> (“GAO 2006 Report”).

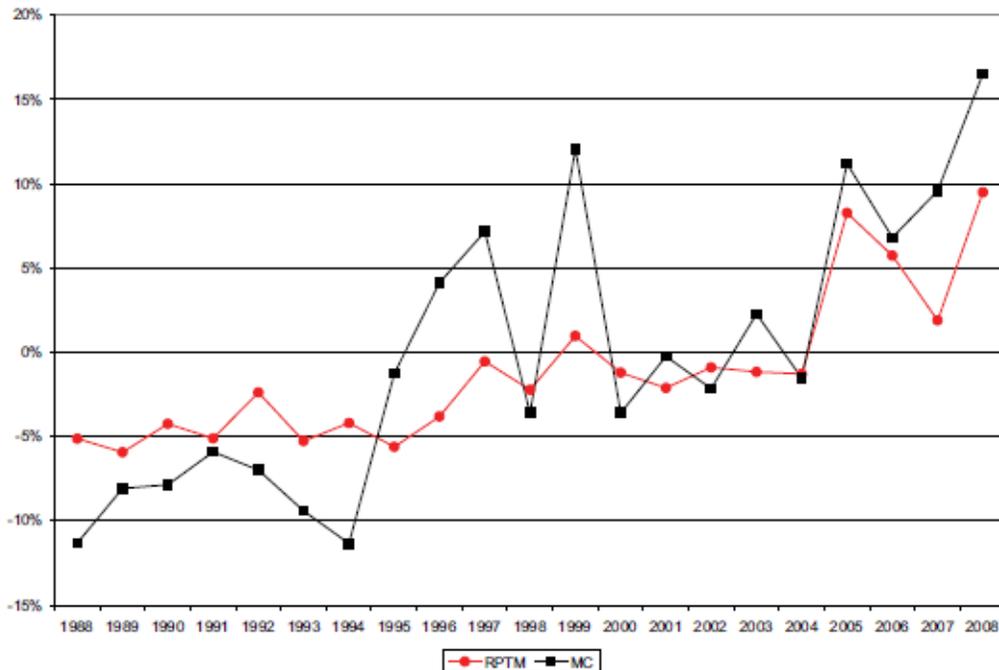
⁹ *See* SURFACE TRANSPORTATION BOARD, OFFICE OF ECONOMICS, ENVIRONMENTAL ANALYSIS AND ADMINISTRATION, SECTION OF ECONOMICS, STUDY OF RAILROAD RATES: 1985-2007, at 1-2 (Jan. 2009), available at <http://www.stb.dot.gov/industry/1985-2007RailroadRateStudy.pdf> (“OEEAA Report”).

2006 GAO Report at 11. The Christiansen Report documented similar up-and-down movement in rates from 2004 through the present, finding that rates rose from 2004 through 2008 and fell in 2009. *See* Christiansen Final Report at i, 2-5.

Rates For Different Commodities Change Differently. The GAO found that rates for different commodities “have not declined uniformly,” and that some rates increased while others decreased. 2006 GAO Report at 13. For example, the GAO found that in 2005 rates for fiberboard and paperboard increased 12 percent, while rates for motor vehicles only increased 2 percent. 2007 GAO Report at 4, 5; *see also* 2006 GAO Report at 9 (“[F]rom 1985 through 2004, coal rates declined 35 percent while grain rates increased 9 percent.”); Christiansen Final Report at i (“percentage increases in revenue per ton-mile have not been uniform across commodities”).

Rail Transportation Prices and Costs Do Not Change At the Same Rate. Significantly, rates and costs do not move in parallel. While the Board has opined that rising rail rates in recent years can be explained in large part by rising cost inputs, that does not mean that cost increases are accompanied by equivalent or proportional increases in rail rates. To the contrary, the Christiansen Report found that “[r]ailroad industry marginal cost has been increasing at a faster average annual rate than railroad revenue per ton-mile.” Christiansen Final Report at i. The Christiansen Report went on to observe that “revenue per ton-mile and marginal cost tend to move together, but not in proportion or consistently.” *Id.* at 4-2 (emphasis added). Figure 4-2 from the Christiansen Report, which is reproduced below, starkly demonstrates that rates and costs do not increase and decrease uniformly.

FIGURE 4-2
PERCENT CHANGES FOR INDUSTRY AVERAGE ANNUAL REVENUE PER TON-MILE AND
MARGINAL COST



Christiansen Final Report at 4-3. The conclusion of a Board-commissioned report that rates and costs do not increase and decrease proportionately means that the Board cannot assume that the R/VC ratio for a historical movement will be comparable to that for a current movement.¹⁰

Rates Can Change Substantially Over Three-to-Six Years. While studies have shown that rates can rise or fall substantially in just one year, over longer periods changes can be far more dramatic. According to the recent OEEAA study, between 1985 and 1991 carriers’ real revenue per ton-mile fell 33%. See OEEAA Report at 2 (showing rail rate index drop from 100 to 77.0 between 1985 and 1991). Conversely, between 2004 and 2007 real revenue per ton-mile rose by over 15%. See *id.* (showing rail rate index increase from 56.8 to 65.5 between 2004 and

¹⁰ The Board’s unsupported suggestion in the final *Simplified Standards* rule that changes to rates over time would be “largely offset” by corresponding changes in costs is disproven by the Christiansen Report. See *Simplified Standards* at 85.

2007). Because the Board's proposed rule would permit selection of "comparable" movements from as long as six years prior to the issue movement, the Board should take note of the dramatic changes that can occur over a six-year period.

The evidence of substantial dramatic changes in rates and costs over time is not surprising. This is exactly what one would expect in a competitive marketplace. Factors like tightening capacity, new regulations and requirements, and changing market dynamics substantially affect rates and costs over time. As a result it is impossible to say that a historical rate – particularly an unadjusted rate that is five or six years old – is truly "comparable" to a current challenged rate. The Board's proposal to permit use of older rate data is therefore inconsistent with the very purpose of the Three Benchmark approach, which is to compare a movement's R/VC to those of other movements as a measure of reasonableness.

B. The Board Has An Obligation to Use the Most Current Data.

In light of the overwhelming evidence that rates and costs for historical movements are not comparable to current rates and costs of a challenged movement, adoption of the Board's proposal would violate the Board's statutory obligations and would be arbitrary and capricious. The Board may not choose to use older, outdated Waybill Sample data (and certainly not without adjusting it to reflect that carrier's pricing as of the date of a shipper's complaint) instead of the most current data available.

The Board has a statutory obligation to consider the reasonableness of "the rate established by [a] carrier." 49 U.S.C. § 10701(d)(1). Congress's instruction that the Board consider reasonableness of "the" particular rate at issue – not a carrier's rates in general – requires that any rate reasonableness methodology used by the Board consider the circumstances relevant to that particular rate, including when the rate was set and the characteristics of the movement at issue. For a rate comparison methodology like the Three Benchmark approach to

have any validity, the statute requires at a minimum that the comparison group movements be similar to the movement at issue. Put differently, if the Board were asked to consider the reasonableness of a rate set in 2010, an analysis of whether the rate was “comparable” to unadjusted rates from 2008, 2007, 2006 or 2005 would not provide a meaningful basis to evaluate the reasonableness of the 2010 rate. Rather, such an analysis is by definition a consideration of whether the 2010 rate would have been reasonable in 2008, 2007, 2006, or 2005.¹¹ Logically, the Board cannot use outdated rates and costs in the Three Benchmark approach without any mechanism to bring them to levels that reflect the pricing as of the date of the complaint, particularly when there are superior alternatives, including continuing the existing rule of using the most current Waybill Sample.¹²

In addition to violating the Board’s statutory obligation under 49 U.S.C. § 10701(d)(1), the proposed rule would be arbitrary and capricious. The validity of a rate comparison method depends upon the use of relevant, meaningful comparators. The use of movements that are as much as six years old – without adjustment of their rates to current levels – would make those movements not “comparable” and dramatically undermine the already limited validity and value of the Three Benchmark approach.

The primary beneficiary from using the most recent available data is not railroads or shippers; it is the validity and accuracy of the Three Benchmark approach. Because rates go

¹¹ Even the current Three Benchmark approach suffers from the same statutory deficiency, because it compares the issue movement to movements from one-to-two years earlier. In an individual case, it may be error for the agency not to update the historic rates in the comparable group to account for the regulatory lag that results in the agency not evaluating “the rate” at issue.

¹² By urging the Board to abandon its current proposal and continue the comparatively better approach of selecting comparison groups from the most recent year’s Waybill Sample, NS and CSXT expressly reserve their ability to argue in a specific case that the Board should rely on data that reflects the market and pricing at the time of the complaint.

up and down, and because rates and costs do not rise and fall proportionately, the effect of using current data will differ from case to case. Sometimes the railroad will “benefit” from using more current data and sometimes the complainant will “benefit.” What is important is that the data underlying the Board’s decisions be as accurate as possible. To do so, it must reject the unsupported and unjustified proposed rule and use a methodology that reflects the pricing at the time of the complaint, whether that means using the most recent waybill sample, updating rates in the waybill sample, or using the defendant railroad’s actual current traffic data for the commodity at issue.

C. The Board’s Refusal To Adjust Historical Rates in Three Benchmark Proceedings Makes the Proposed Rule Particularly Unreasonable.

The Board’s proposal to start allowing use of outdated movements for comparison purposes is particularly troubling because the Board has previously made clear that it will not adjust historical rates and costs in Three Benchmark cases. In the final *Simplified Standards* rule, the Board rejected the request of NS, CSXT, and other commenters that the Board adjust historical revenues and costs to current levels. *Simplified Standards* at 84-85. The Board conceded that “relying on the Waybill Sample introduces some regulatory lag into the analysis,” and suggested that parties to individual Three Benchmark proceedings could introduce evidence of market changes as “other relevant evidence.” *Id.* at 85. But in practice the Board’s limitations on “other relevant evidence” make it all but impossible for a party to demonstrate rate inflation (or deflation) over time.

Specifically, in the recent *DuPont v. CSXT* cases, the defendant presented “other relevant evidence” that rates for the comparison group movements had increased over time. *See, e.g., E.I. DuPont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42100, slip op. at 15-

16 (served June 27, 2008).¹³ While the Board did not question that the rates and costs had risen over time, it nevertheless refused to make any adjustments. The Board first hypothesized that “the effects of price shifts on revenues should be largely offset by inflationary increases in costs” – a claim that the Board itself disproved when it noted that “CSXT’s proposed adjustments would have the effect of raising the R/VC ratios in the comparison groups.” *Id.* at 16. The Board went on to reject CSXT’s adjustments because CSXT did not make corresponding modifications to the RSAM and R/VC_{>180} benchmarks. *Id.* at 16. That standard makes it impossible for a litigant to ever present sufficient evidence to adjust historical revenues and costs to current levels. Fine-tuning the RSAM and R/VC_{>180} benchmarks to account for regulatory lag would require granular adjustments to thousands of individual movements. It is entirely impractical for litigants to a simplified proceeding to conduct such an exacting exercise. Even setting aside the sheer effort necessary for such a modification, the unavailability of data and other limitations make it virtually impossible for litigants to make sufficient adjustments to the rates and costs that underlie all these benchmarks.

To be clear, NS and CSXT are not arguing that the Board is correct to insist upon such exacting evidence of changes to historical rates, particularly in a proceeding designed to be simplified and that is admittedly “rough and imprecise” in most other respects. *Simplified Standards* at 73. The point is rather that there is no way under current Board precedent and standards for a party to present evidence that historical rates and costs should be adjusted to reflect current levels. If the Board were to adopt the proposal in the NPRM, it would be essential that it also adopt a rational and reliable method of adjusting historical rates to current levels. If,

¹³ The cited discussion from the Board’s decision in the *DuPont* case addressing chlorine shipments is nearly identical to the discussions in the *DuPont* case addressing nitrobenzene shipments (Docket No. 42101) and the case addressing shipments of plastics and plasticizers (Docket No. 42099).

however, the Board continues to refuse to give parties a reasonable opportunity to demonstrate changes to historical rates, it would be arbitrary and capricious for the Board to alter the existing Three Benchmark approach to permit parties to base comparison groups on even more outdated data.¹⁴

IV. THE BOARD’S PROPOSAL TO ALLOW PARTIES TO CHOOSE COMPARISON GROUPS DOES NOT CHANGE CURRENT LAW AND DOES NOT MITIGATE THE HARM OF RELEASING OUTDATED WAYBILL SAMPLES.

The Board also seeks comments on a second “proposal” to allow parties “to draw their proposed comparison groups in any combination they choose from the released Waybill Sample data.” NPRM at 2. Existing rules and regulations already authorize parties to choose movements for their comparison group from any movements in the released Waybill Sample data. It is possible, therefore, that the Board intends this less as an independent proposal than as a purported mitigating factor to offset the distorting effect of introducing outdated movements into the Three Benchmark analysis – a possibility as to which NS and CSXT can only guess in light of the Board’s failure to explain the reasoning behind its proposal. *See supra* at 5-10. But the fact that parties have the discretion to fashion comparison groups as they choose provides no support for the Board’s proposal to expand the pool of available Waybill Sample data to include outdated Waybill Samples.

Far from mitigating the harm from the Board’s proposal, the Board’s reiteration of parties’ option to confine their comparison group to the most recent Waybill Sample creates a significant dilemma for Three Benchmark litigants. One option is to submit a comparable group

¹⁴ NS and CSXT note that the D.C. Circuit has reserved the question of whether the Board lawfully could predicate a rate reasonableness decision on four years of Waybill Sample data without any mechanism to adjust prices to current levels. *See CSX Transp. v. STB*, 568 F.3d 1076, 1083 (D.C. Cir. 2009) (vacating portion of prior opinion addressing regulatory lag).

from the most recent year of data (which although outdated is most relevant to a current rate) and risk the Board rejecting its comparable group on any number of grounds – including on the ground that it contains an insufficient number of movements. The other option is to select a comparable group drawn from multiple years of Waybill Sample – a group that will likely include more movements for potential inclusion (although much of it will contain outdated data that bears no relationship to rates today). Parties must consider numerous comparability factors in proposing a comparison group, and the Board can reject a proffered comparison group for any one of those factors, even if it results in the use of more outdated information. And of course it is by no means certain that the Board would select a comparison group with more recent data over one with outdated data.

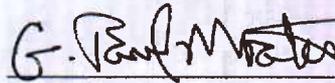
Weighing into a litigant’s decision will be the fact that the Board’s rules make it exceedingly difficult to demonstrate that older movements are not comparable. In particular, the Board has forbidden parties to Three Benchmark proceedings from presenting any evidence in support of a comparison group other than “information already in the Waybill Sample, or other publicly available information.” *Simplified Standards* at 84; *E.I. DuPont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099 *et al.*, slip op. at 2-4 (served Jan. 31, 2008) (reaffirming *Simplified Standards* restriction on evidence, with limited exception for traffic density maps). As a result, under the Board’s rules a litigant is prohibited from using nonpublic data to demonstrate that the rates or costs for a particular movement changed over time. Because of these evidentiary restrictions, a litigant may be unable to introduce evidence to *prove* that particular movements (and their corresponding rates and costs) are outdated – and hence not “comparable” – even though they are.

Reminding litigants that they have the right to choose more recent comparable movements is therefore an utterly inadequate remedy to the problem that would be created by the Board's proposal. The government and STB's own studies (discussed *supra*) demonstrate that rates and costs fluctuate considerably over time, and thus that more recent movements generally will be more comparable to a current movement. But the Board's regulations make it all but impossible to prove that a particular comparison group should be rejected because it contains historical movements in an environment in which costs and revenues have significantly changed. Moreover, it is not appropriate for the Board to alter the Three Benchmark approach to knowingly include outdated and distorting data, and then put the burden on litigants to winnow it out. The Board has an independent responsibility to ensure that the Three Benchmark approach and the data used for that approach is as accurate as possible, and that means that it should not expand the pool of potential comparable movements to permit inclusion of outdated movements.

V. CONCLUSION

The Board should not adopt the NPRM's proposed modification to the Three Benchmark approach.

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Co.

Peter J. Shutz
Paul R. Hitchcock
John P. Patelli
CSX Corporation
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

Dated: May 3, 2010

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