BEFORE THE

SURFACE TRANSPORTATION BOARD

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

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE PROCEEDINGS

Supplemental Joint Reply Comments

228537

submitted by

American Chemistry Council, The Fertilizer Institute, National Grain and Feed Association, The National Industrial Transportation League

In a Notice of Proposed Rulemaking served on October 22, 2010, in this docket ("Notice"), the Surface Transportation Board ("Board") republished its April 2, 2010, proposal to amend its rules with respect to the Three-Benchmark methodology used to adjudicate simplified rate case complaints. The Board proposed to permit parties to select comparable movements to the issue traffic from the unmasked Waybill Sample data of the defendant carrier for the four years that correspond with the most recently published Revenue Shortfall Allocation Method ("RSAM") figures. On November 23, 2010, the above-listed parties ("Interested Parties") submitted Supplemental Joint Opening Comments that incorporated by reference their initial Joint Opening and Reply Comments (filed May 3 and June 1, 2010) to the April 2nd Notice. The Association of American Railroads ("AAR"), Canadian Pacific Railway Company ("CP"), and Norfolk Southern Railway Company jointly with CSX Transportation, Inc. ("NS/CSXT"), also filed supplemental opening comments (collectively "Railroad Parties"). The Railroad Parties' Supplemental Opening Comments largely repeat and repackage their initial opening and reply comments. The Interested Parties hereby reply to those comments.

I. THE RAILROAD PARTIES' FUNDAMENTAL ARGUMENT AGAINST FOUR YEARS OF WAYBILL DATA IS BASED UPON A FALSE PREMISE.

The Railroad Parties' fundamental argument against the use of four years of waybill data is based upon the false premise that the objective of the R/VC_{Comp} benchmark is to reflect "current" market conditions.[1] Neither the Board nor the Interstate Commerce Commission ("ICC") has ever made such a statement and the Railroad Parties do not cite to any precedent. Instead, they attempt to derive this conclusion from more general statements made by the Board and in the statute.[2] This attempted derivation, however, ignores explicit precedent to the contrary.

As the Interested Parties presented in their original May 3rd Opening Comments, at 3-6, the ICC's objective, when it first decided to calculate the R/VC_{Comp} benchmark based upon multiple years of waybill data, was to address the possibility that data from any one year could be "non-representative," to "balance out cyclical fluctuations and provide a better estimate of maximum reasonableness from a long run perspective," and to "smooth out cyclical fluctuations" and "aberrations."[3] Because rate prescriptions in a Three-Benchmark proceeding are for five years, the Board has taken a longer run perspective than just "current" market conditions.

Although the Board has stated that its rationale for using four years of waybill data for the R/VC_{Comp} benchmark is consistent with its practice for calculating the RSAM and $R/VC_{>180}$ benchmarks, the fact of the matter is that the decision to use multiple years of waybill data for the R/VC_{Comp} benchmark pre-dated the same decision for the RSAM and $R/VC_{>180}$ benchmarks.

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[1] AAR Comments at 6; NS/CSXT Comments at 6-7, 10-11; CP Comments at 4.

[2] For example, NS/CSXT somehow stretch the phrase in 49 U.S.C. 10701(d)(1), which states that "the rate established by [a] carrier" must be reasonable, to an undocumented, contrived Congressional intent that the R/VC_{Comp} benchmark reflect the same market conditions as the challenged rate (i.e., current rates). NS/CSXT Comments at 7.

[3] *McCarty Farms v Burlington Northern Inc.*, 4 I.C.C. 2d 262, 277 (1988); *South-West R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 ICC LEXIS 370, *14 (Dec. 1, 1988).

When the ICC first formally proposed the Three Benchmark approach in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1995 ICC LEXIS 301 (Nov. 22, 1995) ("*Non-Coal NPRM*"), it added the RSAM and $R/VC_{>180}$ benchmarks in response to criticisms of using the R/VC_{Comp} benchmark alone. Consistent with its decisions in *McCarty Farms* and *South-West Car Parts* to draw comparable traffic for the R/VC_{Comp} benchmark from multiple years of waybill data, the ICC also proposed to use a multi-year average of the RSAM and $R/VC_{>180}$ benchmarks in order "to smooth out any aberrations." *Id.* at *28-29, *34-35. In its October 22nd Notice in this proceeding, the Board echoed its original rationale for using four years of waybill data "to 'smooth out annual variations and minimize the impact of any year that may have been aberrational for that carrier.'" Notice at 3, *quoting Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004, 1032-33 (1996). Thus, it is the RSAM and $R/VC_{>180}$ benchmarks that followed the logic of the R/VC_{Comp} benchmark, not the other way around.

Regardless which benchmark came first, the Board is correct in stating that the underlying rationale for using multiple years of waybill data to calculate each benchmark is the same. The Railroad Parties, however, incorrectly contend that, unlike the RSAM and $R/VC_{>180}$ benchmarks, there is no need to "smooth out" annual variations for the R/VC_{Comp} benchmark.[4] Just as the Board uses a four-year average of the RSAM and $R/VC_{>180}$ benchmarks in order to smooth out annual fluctuations and aberrations in their measure of a railroad's financial health, there are similar risks that "current" railroad pricing also is aberrational and should be smoothed out. Moreover, a railroad's revenue needs as reflected in the RSAM and $R/VC_{>180}$ benchmarks should be based upon the same four years of data as the R/VC_{Comp} benchmark, because the revenue included in the first two benchmarks is influenced by the same rates that are included in

[4] AAR Comments at 5; NS/CSXT Comments at 5-7; CP Comments at 6-7.

the latter benchmark. If a railroad is charging higher rates currently, a comparison group that reflects only current rate levels is not likely to require the same multiplier adjustment (which is the ratio of the RSAM and $R/VC_{>180}$ benchmarks) as a comparison group that reflects four years. In their June 1 Reply Comments at 8-11, the Interested Parties have described in greater detail the potential distortion caused by this mismatch of using one year of waybill data for the R/VC_{Comp} benchmark and four years for the RSAM and $R/VC_{>180}$ benchmarks.

The Railroad Parties, however, have raised one point that does concern the Interested Parties, and for which they have sought clarification in their prior comments. Because the Board has proposed to allow the parties to a Three-Benchmark case to select comparable movements from less than all four years of the waybill sample, the R/VC_{Comp} benchmark is not an average across all four years like the other two benchmarks.[5] In the Interested Parties' May 3rd Opening Comments, at 8-9, they urged the Board to clarify that Parties must defend their selection of comparison movements from less than four years of waybill data as an appropriate limitation, thereby making the use of all four years the default unless otherwise justified. Alternatively, the Board should abandon its proposal to allow the parties to select from less than all four years of the waybill sample. Instead, all traffic across all four years of the waybill sample that satisfy the various objective selection criteria applied by a party (e.g., distance, weight, commodity) must be included in the R/VC_{Comp} benchmark.

Finally, the Railroad Parties' contention that rail rates and costs fluctuate over time and not always in tandem actually supports the use of four years of waybill data rather than just the single most recent year.[6] Four years of data will smooth out these fluctuations just as the Board intends. Otherwise, the Board would risk freezing the current rate-cost relationship in a

[5] NS/CSXT Comments at 11-12; CP Comments at 6, 8.

[6] NS/CSXT Comments at 10, 13-15; CP Comments at 3-4.

prescribed rate that can last for up to five years. A rate prescription based upon four years of waybill data is more likely to track the rate-cost relationship on average over those five years than a prescription that locks in that relationship at a current peak or a trough in the business cycle.[7]

The fixation of the Railroad Parties with using only "current" rate comparisons improperly elevates temporal considerations above all other comparable factors. But as noted above, the Board long ago rejected an exclusive focus upon current market conditions in favor of a multi-year analysis. In the Notice, the Board has properly and rationally justified the choice of four years as the relevant temporal period for determining the R/VC_{Comp} benchmark.

II. THE NEED FOR LARGER COMPARISON GROUPS DOES NOT, BY ITSELF, JUSTIFY USING FOUR YEARS OF WAYBILL DATA.

The Interested Parties partially agree with the Railroad Parties' contention that the Board cannot justify its adoption of four years of waybill data on the grounds that one year may not produce a sufficiently large group of comparison movements.[8] While the Interested Parties agree with the Board that the availability of four years of waybill data would mitigate the issue of insufficient comparison movements, this cannot by itself support the Board's proposal, without

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[7] At page 14, note 5 of their comments, NS/CSXT claim that, because rates and costs fluctuate over time and not always in tandem, the Board's reliance upon R/VC ratios, rather than rates, to protect against "regulatory lag" is misplaced. *See also* CP Comments at 3-4. If the rate/cost relationship truly was constant, they argue that there is no basis for the Board even to conclude that waybill data over four years is too old to be reliable. But this ignores distinctions between long and short term fluctuations. If short term fluctuations are minor, and significant shifts occur mostly over longer periods, four years may in fact be a reasonable cut-off. However, even if significant shifts can occur within a single year, the need to smooth out such fluctuations, when prescribing a rate for five years, is at its greatest. Either way, the Board's proposal is sound.

[8] AAR Comments at 8; NS/CSXT Comments at 23; CP Comments at 8-10.

first considering alternative ways to address the issue of sufficient movements. Nevertheless, the Board has provided ample support for its proposal in its other rationale.

Respectfully submitted,

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Dated: December 27, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2010, I caused copies of the Supplemental Joint Reply Comments of the American Chemistry Council, The Fertilizer Institute, National Grain and Feed Association, and The National Industrial Transportation League, to be served by first-class mail on all Parties of Record in STB Ex Parte 646 (Sub-No. 3).

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