

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE PROCEEDINGS

Joint Opening Comments

submitted by

American Chemistry Council, The Fertilizer Institute, National Grain and Feed Association, The National Industrial Transportation League, Consumers United for Rail Equity, American Forest and Paper Association, Glass Producers Transportation Council, Alliance for Rail Competition, and Montana Wheat and Barley Committee

In a Notice of Proposed Rulemaking served on April 2, 2010, in this docket (“Notice”), the Surface Transportation Board (“Board”) proposed to revise its Three-Benchmark rules for small rail rate cases by permitting parties to select comparable movements to the issue traffic from the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published Revenue Shortfall Allocation Method (“RSAM”) figures. The above-listed parties (“Interested Parties”) hereby submit these Opening Comments in support of the Board’s proposal.

I. Statement of Interest.

The Interested Parties are all associations which represent the interests of their members on transportation and other important issues. Each of the Interested Parties participated as part of a group of commenters in the proceedings that produced the Board’s decision in *Simplified*

Standards for Rail Rate Cases, STB Docket No. 646 (Sub-No. 1) (served Sept. 5, 2007)

(“*Simplified Standards*”), and as both appellants and intervenors in subsequent appeals, in which the decision was partially vacated. The issues raised in the Notice will have a substantial impact upon the ability of the Interested Parties’ members to access regulatory rate remedies through the Three-Benchmark approach for small rate cases.

II. Background.

The Notice, at page 2, contains two proposals, which the Board describes as follows:

For Three-Benchmark proceedings, the Board now proposes to release to the parties the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published RSAM figures. The Board also proposes to permit the parties to draw their proposed comparison groups in any combination they choose from the released Waybill Sample data.

These proposals essentially re-adopt rules that the Board first enacted in *Simplified Standards*, *aff’d sub nom. CSX Transp. Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009) (“*CSX I*”), and *vacated in part on reh’g, CSX Transp. Inc. v. STB*, 584 F.2d 1076 (D.C. Cir. 2009) (“*CSX II*”).

In *Simplified Standards*, slip op. at 18, the Board declared that comparable movements “must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case.” The Board also stated that, “once a shipper files a complaint under the Benchmark methodology, we will release the unmasked Waybill Sample for the defendant carrier...for the 4 years that correspond with the most recently published RSAM figures.” *Id.* at 80. In *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*, Docket Nos. 42099 *et al.*, slip op. at 2 (served Jan 15, 2008), the Board confirmed this fact, and further clarified that a party “is free to limit its own proposed comparison group to the most recent movements available and to argue that is a more appropriate group for the Board to select.” Thus, the Board clearly intended, in *Simplified Standards*, to adopt the very same rules that it has proposed in this Notice.

In *CSX II*, however, the D.C. Circuit vacated this aspect of *Simplified Standards*, because the Board had failed to provide adequate notice of the final rule regarding the available range of Waybill Sample data. 584 F.3d at 1083. Through the Notice, the Board now addresses this procedural deficiency, and proposes to re-adopt those rules in *Simplified Standards* that the Court vacated on procedural grounds.

III. Comments.

A. Board Precedent Provides Strong Justification For Drawing Comparable Traffic From Multiple Years of Waybill Data.

Since very early in the development of small rate case procedures, comparable traffic has been drawn from multiple years of waybill data. This indisputable fact was part of the small case rules adopted in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1 STB 1004 (1996) (“*Non-Coal Guidelines*”), and was carried forward to *Simplified Standards*.

The Interstate Commerce Commission (“ICC”) originally proposed the R/VC_{Comp} benchmark in a decision in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings* (served April 8, 1987) (“*April 1987 Decision*”). That decision did not address whether to use a single year or multiple years of Waybill Sample data. However, before the ICC issued its final decision in *Non-Coal Guidelines*, it had two opportunities to apply the R/VC_{Comp} benchmark in actual rate cases. In both cases, the Board selected comparable traffic from multiple years of Waybill Sample data.

The first decision was in *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C. 2d 262 (1988). Although in a prior decision in this same case, the ICC had made tentative findings based upon comparable traffic from only a single year of waybill data, the ICC reversed itself:

We agree that one year of data should not be used to establish a standard which will have application to movements of traffic for many years. The risk that data for any one year could be non-representative of the long-term trend outweighs any benefit, in

terms of simplicity in developing a rate reasonableness standard, to be derived from the use of a single year of data.

Id. at 277. For the purpose of prescribing future rates, the ICC declared:

We believe that the best approach to establishing a standard that can be used to determine the reasonableness of rates for any year, including periods when data are not available, is to use an average of several years' of data. Evaluation of R/VC ratios over several years tends to balance out cyclical fluctuations and provide a better estimate of maximum reasonableness from a long run perspective.

Id. The ICC used an R/VC_{Comp} figure derived from waybill data from 1979 to 1985. *Id.* at 277-78.

Later that same year, the ICC reached the same conclusion in *South-West R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 ICC LEXIS 370 (Dec. 1, 1988). Quoting from its March 16, 1988 decision in that same case, the ICC described its selection of comparable traffic as follows:

[W]e use the railroad waybill samples on file with the Commission as our data source. We used the years 1981 to 1985. 1985 is the most recent year available, and we combined 5 years' of data in order to smooth out cyclical fluctuations.

Id. at *14.

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. Rather than describe the application of the R/VC_{Comp} benchmark in detail, the ICC merely referred back to both its *April 1987 Decision* and the *McCarty Farms* decision. *Id.* at *30 and note 32. 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.

The final rules adopted by the Board in *Non-Coal Guidelines* did not alter any of these earlier decisions to use a multiple year average for the R/VC_{Comp} benchmark.¹ In fact, the Board expanded its justification for multiple years of Waybill data to its newly adopted RSAM and $R/VC_{>180}$ benchmarks by declaring its intent to use a four year average to calculate those benchmarks. 1 STB at 1032-33, 1039-40. Indeed, it would be arbitrary and inconsistent to apply an "expansion ratio" (the factor resulting from dividing the RSAM by the $R/VC_{>180}$) based upon four years of Waybill data to a comparable group taken from just a single year of data, because the rationale for using a four year average for the RSAM and $R/VC_{>180}$ benchmarks was identical to the rationale for using a multi-year average of comparable traffic. A similar four year average for the R/VC_{Comp} is necessary in order to ensure an apples-to-apples application of all three benchmarks.

The underlying principles expressed by the Board in this precedent — to use multiple years of data for the RSAM, the $R/VC_{>180}$ and the R/VC_{Comp} figures in order to prevent 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" — remain just as valid today as they were then. The use of a single year of Waybill data could have the effect of "locking in" rates at their very peak or valley. Because any rate prescription will be for a 5 year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the

¹ Although the *McCarty Farms* and *South-West Car Parts* decisions were reversed, it was on grounds different from the number of years of Waybill Sample data used. The ICC itself reversed *South-West Car Parts* in response to both party's challenge to selection of the comparable group from dissimilar commodities, not the dates of the Waybill Samples. An appeals court remanded *McCarty Farms* because the R/VC_{Comp} benchmark was considered insufficient *by itself* to determine rate reasonableness, since it did not account for the defendant carrier's revenue needs. As a result of the *McCarty Farms* remand, the ICC abandoned R/VC_{Comp} as the *sole* determinant of reasonableness, but proposed to continue using it in combination with RSAM and $R/VC_{>180}$ in the *Non-Coal NPRM*, at *11, *23-24. Despite the court remand in *McCarty Farms*, it is significant that the ICC cited to that decision as the example of how to apply the R/VC_{Comp} benchmark as part of the newly-proposed three benchmark approach. *Id.* at *30-31, n. 32. Thus, *McCarty Farms* clearly remained a viable precedent for that purpose both then and now.

business cycle. Changes and fluctuations in market conditions over time are precisely why a multi-year average of comparable rates is necessary to make the best determination of a maximum reasonable rate over the long run. Therefore, it is both proper and necessary for the Board to permit the parties to select comparable movements to the issue traffic from the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published RSAM figures.

B. Four Years Of Waybill Data Is Needed For A Meaningful Three-Benchmark Approach.

As a practical matter, the Board should permit parties to select their comparison groups from four years of Waybill Sample data in order to ensure that the Three-Benchmark standard works as intended. The Waybill Sample is only a 1% sampling by carriers of their waybill data. Consequently, by definition, the Waybill Sample only captures a small portion of the movements that actually occur on a carrier over a one-year period. When the parties attempt to reduce that sample further by a variety of comparability factors, such as distance, commodity, car type, and traffic density, it can become difficult to identify more than a few comparable movements. In some cases, the number of comparable movements might shrink to a level where the statistical significance of the sampling is questionable. Four years of Waybill data mitigates this risk.

This problem is far more than theoretical. It can and does occur even when the parties use four years of data.

In *US Magnesium LLC v. Union Pac. R.R. Co.*, Docket No. 42114, slip op. at 9, n. 12 (served Jan. 28, 2010), the Board acknowledged that the failure of either party in that case to submit a comparison group more similar to the traffic at issue was likely “due to limitations in the number of comparable movements in the Waybill Sample.” In *Waybill Data Reporting for Toxic Inhalation Hazards*, Ex Parte No. 358 (Sub-No. 7), slip op. at 2 (served Jan. 28, 2010), the

Board noted that, when parties have more data to draw upon, they “could construct comparison groups that would be more comparable to the issue traffic.” (footnote citing to *US Magnesium* omitted). The difficulties noted by the Board in developing an appropriate TIH comparison group in *US Magnesium* occurred despite the use of four years of Waybill data.² A shorter sampling period would increase the potential for this problem to occur and exacerbate the problem where it already exists.

This problem is not unique to TIH shipments. In *E.I. du Pont de Nemours and Company v. CSX Transp. Inc.*, Docket No. 42101, slip op. at 13 (served June 30, 2008), the comparison group for a Nitrobenzene shipment was comprised of only 23 movements drawn from four years of Waybill data. If the parties had been restricted to only a single year, the inability to draw any conclusions from a smaller sampling would have required an expansion of the ranges for other comparison factors, including consideration of less comparable commodities.

Four years of Waybill data are necessary to ensure that the Three-Benchmark approach works properly for as many shippers as possible. As illustrated by actual experience in the few Three-Benchmark cases that have been decided, even four years is not a guarantee of success, while one year would be a recipe for certain failure. When Congress directed the Board “to establish a simplified and expedited method 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), it surely did not intend for the Board to adopt a standard that is workable for only shippers of certain commodities that appear in abundance in a single year of the Waybill Sample.

² In a dissent in *US Magnesium*, slip op. at 23, Commissioner Nottingham notes that UP’s comparison group, which the Board rejected, consisted of just 24 chlorine movements. That number also would have been much smaller if UP had been limited to only one year of Waybill data, instead of four years.

C. The Board Should Require Parties To Defend Their Selection of Comparison Movements From Less Than Four Years of Waybill Data.

The Board should clarify that its proposal to permit the parties to draw their comparison groups in any combination they choose from the Waybill Sample data does not absolve a party from justifying its decision to use only a temporal subset of Waybill traffic.

The rule proposed here would be permissive, not mandatory; *i.e.*, it would provide a rate complainant and the defendant railroad (possibly small entities) the option of using more data, but the proposed rule would not force them to use all of that data.

Notice at 3. As proposed, this rule could be interpreted to permit the selection of comparable movements from any temporal subset of Waybill data without any justification. In other words, a party would not have to support or defend its temporal selection factor. The Interested Parties urge the Board to require any party that opts to restrict its comparison group to a temporal subset of that data to carry the burden of proving that its subset is more appropriate.

For the reasons stated in Part III.A., *supra*, the Board's original decision in *Simplified Standards* to draw the comparison groups from four years of Waybill Sample data has strong support in agency precedent. Moreover, the agency's decision to use multi-year averages for the RSAM and R/VC_{>180} benchmarks was closely aligned with, and based upon the same rationale for, using multiple years of Waybill data for the R/VC_{Comp} benchmark. It would be arbitrary for the Board to sever that link by permitting a party to use a temporal subset of the Waybill Sample data for the R/VC_{Comp} benchmark, while continuing to require four year averages for the RSAM and R/VC_{>180} benchmarks, without justifying this departure.

This would be consistent with, and reaffirm, the Board's statement in *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*, Docket Nos. 42099 *et al.*, slip op. at 2 (served Jan 15, 2008), that a party "is free to limit its own proposed comparison group to the most recent movements available and to argue that is a more appropriate group for the Board to

select.” (underline added) The key point is that a party which applies a temporal factor in the selection of its comparable group from four years of Waybill Sample data must carry the burden of proving the appropriateness of its limitation. The Interested Parties ask the Board to clarify this point in its final rule.

Respectfully submitted,



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