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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: June 1, 2010

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Canadian Pacific Railway Company ("CPR") submits these Reply Comments regarding the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, which proposes to abandon the current rule that parties to Three Benchmark proceedings select comparison movements from the most recent Waybill Sample and instead require comparison movements to be selected from the four years of Waybill Samples corresponding to the most recently published RSAM. As CPR demonstrated in its Opening Comments, the NPRM suffers from three substantial flaws: (1) it violates the Administrative Procedure Act ("APA") because it does not contain any discussion of the Board's rationale for proposing the changed rule; (2) it would severely impair the accuracy of the Three Benchmark methodology by permitting rate comparisons based upon long-outdated movements; and (3) there does not appear to be any legitimate justification for the rule. Several other commenters echoed CPR's concerns about the NPRM. *See* Opening Comments of Norfolk Southern Railway Co. and CSX Transportation, Inc.; Opening Comments of Association of American Railroads.

Other parties supported the Board's proposal. *See* Opening Comments of American Chemistry Council *et al.* ("Interested Parties"); Opening Comments of U.S. Department of

Agriculture (“USDA”). But neither the Interested Parties nor USDA rebutted the serious flaws in the NPRM articulated in CPR’s comments.

The NPRM is plainly insufficient under the APA because the Board failed to articulate a rationale for the substantial change it proposes to the Three Benchmark approach. It is not enough for an agency to give notice of *what* it plans to do; it must also give notice of *why* it plans to do it. Agencies must provide “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); *see* CPR Opening Comments at 3-4. The Interested Parties and USDA simply ignore the Board’s failure to provide any rationale for the proposed rule, and instead hypothesize reasons why they think it should be adopted. But the APA requires that the Board itself provide a rationale in the NPRM in order “to permit interested parties to comment meaningfully.” *Nat’l Elec. Mfrs. Ass’n*, 99 F.3d at 1172. It has not done so here, and the NPRM is invalid.

Interested Parties and the USDA similarly ignore the significant inaccuracies that would result from using rates as much as six years old to assess the reasonableness of current rates. USDA is quite correct that “[t]he development of a good comparison group is a crucial step in the three benchmark [approach].” USDA Opening Comments at 3. But a “good comparison group” by definition must consist of movements that are as close in time to the challenged movement as possible, because rates and costs change substantially over time. As CPR showed on Opening, the Board’s own studies prove both that rates and costs fluctuate substantially over time and that rates and costs do not necessarily rise and fall in tandem or proportionally. *See* CPR Opening Comments at 4-6; *see also* NS/CSXT Opening Comments at 10-14. As a result, the older the data used for a Three Benchmark comparison group, the less “comparable” that data is to current traffic.

Interested Parties and the USDA ignore the real and documented problems from using untimely data, and focus instead on alleged problems with the sufficiency of data in any one year's Waybill Sample.¹ But that is a problem that the Board has already addressed. USDA argues that a single year's Waybill Sample may not include sufficient movements of anhydrous ammonia for a comparison group in a Three Benchmark case involving that commodity. See USDA Opening Comments at 4. But the Board has already proposed a remedy for that problem in *Waybill Data Reporting for Toxic Inhalation Hazards*, STB Ex Parte No. 385 (Sub-No. 7) (served Jan. 28, 2010). The Board's proposal in Ex Parte No. 385 (Sub-No. 7) would require Class I railroads to include all their TIH movements in their waybill reports. Whether the Board adopts that proposal or one of the alternatives proposed by AAR, that proceeding will address concerns about having enough anhydrous ammonia traffic in a single year's Waybill Sample for use in a Three Benchmark case. See CPR Opening Comments at 9.

USDA also expresses concern that the waybill sample might not have sufficient movements to provide an adequate comparison group for other agricultural products. USDA Comments at 4. However, the Board anticipated in the *Simplified Standards* rule that in some cases the Waybill Sample might not have sufficient data, and the Board provided an avenue for Three Benchmark cases to proceed in those situations. In the event that "the Waybill Sample contains no useful comparison traffic," the Board stated that it would "entertain a reasonably tailored request for comparable movements from the defendant's own traffic tapes." *Simplified Standards* at 83. This process is a satisfactory solution for the occasional case where the most recent Waybill Sample does not include sufficient comparison data for a challenged movement

¹ Interested Parties also claim that over twenty years ago two ICC cases used multiple Waybill Samples in a comparison group. See Interested Parties Comments at 3-5. These ICC decisions have no relevance here. Each of those decisions was reversed, and the Board had long abandoned them at the time it proposed in the *Simplified Standards* NPRM to only use the most recent waybill sample.

that is particularly unique. The Board should not adopt a rule of general applicability permitting outdated data to be used in every case because of the possibility that in some case the Waybill Sample alone might not contain an ideally robust set of potential comparison movements. Instead, the Board should follow the case-by-case approach set forth in *Simplified Standards* to address any data sufficiency problems (if they ever arise).

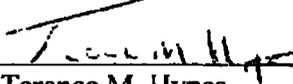
In short, the question before the Board is whether to adopt a proposal that would substantially impair the reliability of the Three Benchmark methodology in order to "solve" the supposed potential problem of having insufficient data in a particular proceeding. The Board has taken appropriate steps to address that problem, and it provides no justification for permitting the use of outdated Waybill Sample data and further undermining the accuracy of the Three Benchmark approach.

CONCLUSION

For the reasons stated in these Reply Comments and in CPR's Opening Comments, the Board's proposal to revive the "four-year Waybill Sample" provision of *Simplified Standards* that the D.C. Circuit struck down should not be adopted.

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Respectfully submitted.

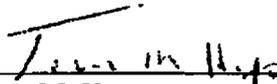

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Dated: June 1, 2010

CERTIFICATE OF SERVICE

I hereby certify this 1st of June 2010 that I have served all parties of record in this proceeding by first class mail, postage prepaid.



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