

ASSOCIATION OF
AMERICAN RAILROADS

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June 1, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 646 (Sub-No.3), Waybill Data Released in Three-Benchmark Rail Rate Proceedings

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served April 2, 2010, attached please find the Reply Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Attorney for the Association of
American Railroads

Attachment

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 THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: June 1, 2010

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 THE
ASSOCIATION OF AMERICAN RAILROADS

In response to the Board's April 2, 2010 Notice of Proposed Rulemaking ("NPR") in the above proceeding, opening comments were filed by the Association of American Railroads ("AAR"); Norfolk Southern Railway Company and CSX Transportation, Inc. ("Joint NS/CSX Opening Comments"); the Canadian Pacific Railway Company ("CP"); the U.S. Department of Agriculture ("USDA"); and jointly by several shipper and shipper organizations ("Joint Opening Comments").¹ The AAR, in its reply comments, concurs in the comments of NS/CSX and CP, and responds to various contentions made in the USDA and Joint Opening Comments filings.

In summary, the AAR urges the Board to fully explain its rationales and regulatory objectives regarding the proposed rules because those rationales and objectives were nowhere stated in the NPR. In engaging in a *bona fide* reevaluation of its prior rules as required under the Court's ruling and the Administrative Procedure Act ("APA"), the

¹ The "Joint Opening Comments" were filed on behalf of the 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 Council, Alliance for Rail Competition, and Montana Wheat and Barley Committee.

AAR also urges Board to consider whether there are better and more efficacious means than the current NPR proposals for the Board to achieve its regulatory purposes and objectives as ultimately defined.

Discussion

1. The Parties' Comments Confirm the Insufficiency of the NPR under the APA

The comments submitted by the parties in response to the NPR demonstrate the NPR's deficiency under the APA in failing to provide the Board's rationale for the proposed rules, to state the objectives to be achieved under the proposed rules and to evaluate and to discuss whether there are better alternatives to the proposed rules in meeting whatever may be the Board's intended objectives. The AAR and the railroad commentators made this point directly in their initial comments opposing the Board's NPR proposals. The NPR's deficiency under the APA is also readily gleaned from the submissions of the other commentators who filed in support of their respective guesses as to the Board's purpose. AAR will respond to some of the comments filed, but cannot be sure that any party has articulated the STB's objectives in issuing the NPR.

(a) The Commenters Fail to Cite to Any Specific Rationale or Objective Stated by the Board in the NPR

The Joint Opening Comments specifically state that the NPR simply re-adopts the rules vacated by the D.C. Circuit on APA lack of notice grounds and that the sole purpose of the NPR is to address this procedural deficiency. Joint Opening Comments at 2-3. The Joint Opening Comments, however, do not cite to any specific rationale or objective

proffered by the Board itself in the NPR for the proposed rules and essentially treat the NPR as a mere “housekeeping” matter.

The comments of USDA similarly fail to reference any specific rationale or objective for the proposed rules proffered by the Board in the NPR. Instead, USDA’s comments are necessarily based solely on USDA’s conjecture as to the Board’s NPR objectives and its further conjecture (in the absence of any Board discussion) that the NPR proposals are the only way (or the best way) to achieve these objectives. See AAR discussion *infra* at 11-14.

As noted in the AAR and railroad initial comments, however, the APA requires an agency to do far more in the NPR than simply provide a statement of the rules proposed to be adopted. The NPR 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) (internal quotation marks and citation omitted). See NS/CSX Joint Comments at 7. This the Board has failed to do.

(b) The Joint Opening Comments Hypothesize Rationales and Objectives for the NPR That Are in Conflict with the NPR Itself

The Joint Opening Comments demonstrate the deficiency of the Board’s NPR in stating or discussing the Board’s rationales and objectives in this proceeding by hypothesizing rationales and objectives for the NPR that are at odds with the NPR itself. The Joint Opening Comments suggested that the Board’s rationales and objectives in the NPR in providing for use of four years of Waybill Sample data (predicated on purported “precedent” antedating adoption of the final *Simplified Standards* rules) is to provide for a “multiple-year average” of R/VC COMP data to (1) ensure an “apples-to-apples”

application of the “expansion ratio” (i.e., the factor resulting from dividing the RSAM by the R/VC > 180, which ratios are based on four year averages) and (2) to smooth out cyclical fluctuations in the R/VC COMP data to avoid “the effect of locking in rates at the peak or trough of a business cycle.” Joint Opening Comments at 4-5. These purported rationales and objectives were nowhere even hinted at in the NPR or the Board’s *Simplified Standards* rulemaking—neither by the Board nor by any party.²

Indeed, the Joint Opening Comments’ proposed rationales are in fact in conflict with the NPR itself, in which “[t]he Board proposes to permit the parties to draw their proposed comparison groups *in any combination they choose* from the released Waybill Sample data.” NPR at 2. The NPR does not propose a *multi-year average* of any sort regarding the selection of comparables traffic and the Joint Opening Comments’ arguments to use this as a rationale for the NPR are baseless. (The lack of merit of the Joint Opening Comments’ contention that the R/VC COMP ratio must be based on a “multi-year average” of comparison group data is discussed *infra*.)

Under APA notice and comment requirements, the Board’s rationales and objectives in this proceeding should not be the subject of surmise and conjecture by the parties as to the Board’s thinking (including with respect to whether the Board has properly taken into account and evaluated other readily available options that may better serve its intended rationales and objectives).

² See *CSX Transp. II* at 1080 (noting that in the *Simplified Standards* rulemaking “the Board nowhere disagree[s] 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”).

2. The Joint Opening Comments' Contention That a "Multiple-Year Average" of Comparables Group Data is Required in Three Benchmark Proceedings Is Inconsistent with the Three Benchmark Test

The Joint Opening Comments' contention that the parties must draw comparable traffic from multiple years of waybill data and that the Board must then average the results in calculating the R/VC_{COMP} benchmark has no basis in the Three Benchmark test and is in fact in conflict with it.

First, as noted supra, the NPR does not propose a requirement for a "multi-year average" in the selection of comparison groups, but instead specifically allows the parties to use the proposed four years of available Waybill Sample data "in any configuration they see fit to form their comparison groups." NPR at 1, 2. Moreover, as the Joint Opening Comments acknowledge, the Board, in applying the Three Benchmark test, specifically allows the parties to select the comparison group from the most recent movements available. See Joint Opening Comments at 8; see *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) ("CSXT 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"). The Joint Opening Comments' assertions thus have no basis in the NPR in this proceeding nor in the Three Benchmark test adopted in *Simplified Procedures* as applied by the Board.

The Joint Opening Comments essentially rely on two I.C.C. decisions that long antedate *Simplified Standards* as support for their claim that the *Simplified Standards* rules require a "multi-year average" of comparison group data. Both the cited decisions, however, were the subject of judicial remand, were not the basis for any case decided

under the Board's Three Benchmark methodology and have been otherwise overruled by the Board as they pertain to the Three Benchmark methodology.³

The Joint Opening Comments further contend (in purported explanation of the Board's NPR) that 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 "a

³ The Joint Opening Comments' contention that the Board's *Simplified Standards* rules require a "multi-year average" of comparison group data rests on two cases that do not provide any stated basis for a purported rule that the Board expressly rejected in applying *Simplified Standards*. The Joint Opening Comments note that a multi-year average of comparison group data was used by the I.C.C. in two rate cases arising under simplified procedures previously proposed by the Board in *Rate Guidelines—Non-Coal Proceedings*, Ex Parte No. 347 (Sub-No. 2) (ICC served April 8, 1987). (*McCarty Farms v. Burlington Northern, Inc.*, 4 I.C.C. 2d 262 (1988) ("*McCarty Farms*") and *South-West R. R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 WL 225131 (I.C.C. December 1, 1988) ("*Southwest Car Parts*"). Both of these cases long antedate *Simplified Standards* and, to the extent that they relate to the R/V COMP benchmark under the Three Benchmark test, have been effectively overruled by the Board.

In *McCarty Farms*, the I.C.C. applied its rudimentary R/VC COMP test proposed in 1987 to determine the reasonableness of numerous challenged movements of agricultural commodities. Because the *McCarty Farms* rate dispute spanned a period of ten years, the I.C.C. used several years of Waybill Sample data (1979-1985) to calculate the average R/VC ratios of the purported comparable group traffic (which the I.C.C. itself selected) so as to "balance out cyclical fluctuations and provide a better estimate of maximum reasonableness from a long-term prospective." *McCarty Farms*, 4 I.C.C. 2d at 277-78. The I.C.C.'s comparable rates methodology used in *McCarty Farms* was overturned by the D.C. Circuit on appeal as lacking "any glimmer of supporting principle or intellectual coherence." *Burlington N. R. Co. v. I.C.C.*, 985 F.2d 589, 597 (D.C. Cir. 1993) ("*Burlington Northern*"). (On remand, the I.C.C., decided the case under its Constrained Market Pricing/SAC test and found that the carrier's rates were not shown to be unreasonable.)

South West Car Parts is even less helpful. In *South West Car Parts*, the I.C.C. initially decided the proceeding by selecting a commodity group (iron and steel scrap) with purportedly the same demand characteristics as the issue traffic (empty retired rail cars moving on their own wheels) and combining five year of waybill data to "assur[e] homogeneity of other transportation characteristics." *Id.* at 1988 WL 225131 *6 (I.C.C. December 1, 1988). After the D.C. Circuit's decision in *Burlington Northern*, the case was voluntarily remanded to the I.C.C. and was initially evaluated under the Board's early Three Benchmark test adopted in 1996. The R/VC COMP benchmark, however, was not even employed by the Board because the parties themselves agreed that even use of five years of Waybill Sample data was insufficient to produce useful comparable traffic. *South West Car Parts*, Docket No. 40073, 1998 WL 67414 (served Feb. 11, 1998). (The case was ultimately settled.)

It is ultimately telling as to the status of the above-cited "precedents" that under the Three Benchmark test adopted by the Board in Ex Parte No. 347(Sub-No.2), *Rate Guidelines—Non-Coal Proceedings*, 1 STB 1004 (1996), the Board prescribed no requirement that a "multiple-year average" be used for calculating the R/VC COMP benchmark. Nor did the Board's final rules adopted in *Simplified Standards* prescribe such a requirement.

similar four year average for the R/VC COMP is necessary to ensure an apples-to-apples application of all three benchmarks.” Joint Opening Comments at 5.

The Joint Opening Comments characterization of making the RSAM and R/VC>180 on the one hand and the R/VC COMP on the other hand into an “apples-to-apples” comparison is wrong because their purposes are different. RSAM and R/VC>180 serve as overall indicators of railroad health and pricing in the short term. In order to comply with the STB mandate to allow “rail carriers to earn adequate revenues” (49 U.S.C. 10101(3)), those measures look at a short history to smooth fluctuations from one year to the next.

The R/VC COMP benchmark, however, unlike the other two benchmarks in the Board’s admittedly “rough and imprecise” methodology⁴, is intended to reflect the specific demand and other relevant operational and market characteristics *of the challenged movement itself* using the comparison group of contemporary traffic as a proxy. As expressly recognized by the Board, the most accurate comparison group for the issue traffic that could be selected for the R/VC COMP benchmark would be the same commodity, moving the same distances, in the same equipment and *under the same or similar market conditions*. See *Simplified Standards* at 18 (“The Board will...select the comparison group that it concludes is most similar in the aggregate to the issue movements”).⁵

⁴ See *Simplified Standards* at 73. The Board also references its “revenue adequacy adjustment” as “admittedly a crude adjustment.” *Id.*

⁵ See *Simplified Standards* at 84-85 (noting that changes in market conditions are relevant factors in selection of comparison groups); see also *Simplified Standards* at 74 (generally noting with respect to the selection of comparison groups that if two movements in a comparison group “were identical in all respects... they should have the same lawful maximum rate”)

The R/VC COMP benchmark accordingly is not measured, and would not be served, by a requirement that a “multi-year average” of comparison group traffic be used as a proxy for determining the reasonableness of the defendant carrier’s current rate under challenge since, by definition, a “multi-year average” is highly unlikely to be reflective of either current operational or market conditions. Use of a multi-year average would virtually guarantee that the comparison group traffic selected would not reflect current market conditions nor serve as a useful indicia of the extent of demand-based differential pricing for the issue traffic that would be reasonable under current market conditions. Since rail operating patterns must be continually adjusted to meet market changes it is also most unlikely that a movement based on past patterns and reflecting their costs will be comparable to a movement today. Such a “multi-year average” requirement for calculating the R/VC COMP would make the Board’s Three Benchmark methodology an even “rougher and imprecise” test of rate reasonableness than it already is and serve to undermine the theoretical underpinnings of the benchmark as explained by the Board in its *Simplified Standards* rulemaking.⁶

⁶ For the same reasons, the Joint Opening Comments’ contention that a “multi-year average” must be used for the R/VC COMP benchmark “to smooth out peaks and troughs in the business cycle” (Joint Opening Comments at 4-5) is baseless. The Board’s Three Benchmark procedure is predicated on the parties’ selection of comparison groups that reflect as nearly as possible the characteristics of the challenged issue traffic so that the R/VC ratios of the comparison group can be used as a proxy for the reasonableness of the issue traffic. *Simplified Standards* at 17. Because the issue traffic is a current rate predicated on current operational patterns and market conditions, a “multi-year average,” by definition, is highly unlikely to be reflective of either current operational or market conditions pertaining to the issue traffic. The Joint Opening Comments reflect the commentators’ preference, not the stated purpose of the proposal. As noted supra, the Board has expressly rejected the contention that a “multi-year average” is a requirement of the R/VC COMP benchmark for any purpose. See *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).

3. The Joint Opening Comments' Contention That Parties Must Justify Using Only a "Temporal Subset" of the Four-Year Waybill Sample Data is Without Foundation

The Joint Opening Comments' contention⁷ that the parties must justify using less than the four years of Waybill Sample data proposed to be made available for use in selecting comparison groups under the NPR is essentially predicated on the general contention that the Three Benchmark test requires that comparison groups be based on a "multi-year average." This contention is without foundation for the reasons explained above and therefore warrants no further discussion.

As emphatically demonstrated in the initial comments of NS/CSX in this proceeding, market demand and pricing conditions for rail transportation do not remain static but change from year-to-year and even day-to-day.⁸ As a general proposition, if the Three Benchmark test were to be solely limited to Waybill Sample data collected under current procedures, the most current Waybill Sample data available (which is one-to-two years old) would be far more likely than three-to-six year old Waybill Sample data to reflect current market conditions and should be preferred by the Board over older data because it is far more likely to produce more meaningful maximum rate reasonableness determinations reflecting current market conditions. Similarly, should the Board reject use of the most current Waybill Sample data and instead decide to rely on three-to-six year old Waybill Sample data as proposed in the NPR (which the AAR strongly opposes in light of the far better alternatives available), use of the most recent Waybill Sample data (rather than data reaching back as far as six years) should be strongly favored by the Board as producing a more meaningful approximation of current market conditions and

⁷ Joint Opening Comments at 5-6.

⁸ See Joint NS/CSX initial comments at 10-18.

maximum rate reasonableness determinations results where other comparability factors are of equal value.⁹ And if a shipper were to rely in whole or in part on antiquated Waybill Sample data in selecting its comparison group, it should have a heavy burden in justifying the probative value of such a choice because, as the D.C. Circuit found, it would “increas[e] the likelihood of distorted comparisons and results.” See *CSX Transp. II*, 584 F. 3d at 1083 (internal quotation marks and citation omitted).

4. Depending on the Board’s Objectives, Better Alternatives May Exist.

The AAR remains blindfolded as to the reasons for the NPR and whether it will achieve the Board’s unstated purpose. Nevertheless, based on the disparate comments submitted it is abundantly clear that better alternatives exist for achieving some of the rationales for the rule provided by the commentators.

For example, the USDA supports the NPR because it opines that the Board’s proposal to allow the parties to use up to four years of Waybill Sample data from which the parties can select comparison groups is necessary to give shippers more flexibility in selecting comparison groups where one year of Waybill Sample data would be insufficient. USDA comments at 3.¹⁰ USDA notes that this flexibility is especially important for producers of specialty crops where production amounts can vary greatly

⁹ To use an analogy employed by the Board in *Simplified Standards* pertaining to its decision to use the mean R/VC ratio of the selected comparison group as evidence of the maximum lawful rate of the issue traffic, “[i]f the inquiry were to determine the market value of a particular home... [the Board] would naturally look to the average of ... comparable sales as the best evidence of the market value of the home in question.” *Simplified Standards* Slip op. at 75. Similarly, in evaluating the maximum reasonableness of the issue traffic (which is based on current market conditions), there is no basis for the Board to use three-to-six year old “comparable sales” data, as currently proposed in the NPR, when far more current and meaningful “comparable sales data” is available from the defendant carrier’s current traffic tapes or even from the latest Waybill Sample data available.

¹⁰ USDA specifically acknowledges that “many products shipped by rail may need only one year of Waybill Sample data to develop a good comparison group.” *Id.* at 3.

year to year. *Id.* The USDA also points to its Waybill Sample analysis of anhydrous ammonia (STCC 2819815) from 2003-2008 where it “found an inadequate number of comparable shipments originating on some Class I railroads in a single year from which to build good comparison groups....” *Id.* at 4.

The AAR does not disagree that one year of Waybill Sample data (under the current Waybill Sample collection process) may indeed be insufficient for selection of useful comparison groups for some specific commodity movements such as anhydrous ammonia as cited by USDA. The AAR also does not disagree that four years of Waybill Sample data would provide a larger number of total commodity movements than one year of Waybill Sample data. This, however, only perfunctorily addresses the hypothetical “insufficient data” problem.

To make a rational rulemaking decision, the Board must also evaluate whether allowing use of four years of Waybill Sample data would by itself be sufficient or *even useful* for the selection of meaningful comparison groups by the parties in Three Benchmark proceedings (assuming that this is the Board’s objective) or whether there exist other alternatives that may better serve this objective and provide the parties more meaningful and useful information from which to select the most accurate comparison groups.

What USDA’s comments ultimately reveal is that *the Board has neither provided nor discussed in the NPR other Board- recognized options to address the data insufficiency problem: options that can better serve to provide shippers and carriers the ability to select meaningful comparison groups from more accurate, current data and that would satisfy USDA’s legitimate concerns.* Nowhere in the NPR does the Board

inform the parties nor discuss that in its recent rulemaking decision in Ex Parte No. 385 (Sub-No. 7), *Waybill Data Reporting for Toxic Inhalation Hazards* (served January 28, 2010), it has proposed requiring the use of a 100% “Waybill Sample” for TIH commodity movements (commencing with the January 2011 Waybill Sample) to address the data insufficiency issue regarding anhydrous ammonia (and other TIH movements) *that even use of a four year Waybill Sample under current procedures has not been able to properly resolve.*¹¹ The use of 100% Waybill Sample data as proposed by the Board in Ex Parte No. 385 (Sub-No. 7) would directly solve USDA’s issue with respect to anhydrous ammonia (and other TIH movements) and could be readily adopted for other specific agricultural commodity movements of concern to USDA as well.

The NPR also totally failed to note or discuss a second available Board-recognized option that would resolve USDA’s “insufficient data” concerns for the selection of meaningful comparison groups. In its final *Simplified Standards* rules,¹² the Board noted that it could on a case-by-case basis “entertain a reasonably tailored request for comparable movements from the defendant railroad’s own traffic tapes” where there is insufficient data in the Waybill Sample to allow a party to choose a meaningful comparison group. *Simplified Standards*, Slip Op. at 83. This option, supported by the AAR,¹³ would also resolve USDA’s concerns pertaining to the availability of a sufficient

¹¹ See *US Magnesium L.L.C. v. Union Pacific Railroad Company*, STB Docket No. 42114 (served Jan. 28, 2010) (“*US Magnesium*”), appeal docketed, No. 10-1019, *Union Pacific Railroad Company v. Surface Transportation Board* (D.C. Cir. Feb. 2, 2010).

¹² See *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (“*Simplified Standards*”), *aff’d sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009) (“*CSX Transp. I*”), *vacated in part on reh’g, CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1083 (D.C. Cir. 2009) (“*CSX Transp. II*”).

¹³ As noted in its initial comments, the AAR responded to the Board’s proposal in Ex Parte No. 385 (Sub-No. 7) for use of expanded TIH waybill data by proposing that, consistent with the need for strict

data base from which to select accurate comparable movements. And it would do so far better than the use of four years' worth of stale Waybill Sample data reaching back three to six years and likely requiring the inclusion of commodity movements that differ significantly from the challenged commodity movements at issue.

Notwithstanding the Board's endorsement of alternative approaches to address insufficient data issues in Three Benchmark proceedings, the Board did not discuss these alternatives in the NPR, even though they were (1) rooted in the Board's own final rules in *Simplified Standards* and proposals made in the Ex Parte No. 385 (Sub-No. 7) rulemaking proceeding addressing the use of Waybill Sample data in Three Benchmark proceedings and (2) were unopposed in the Ex Parte No. 385 (Sub-No. 7) rulemaking.¹⁴

confidentiality protections for sensitive security information pertaining to TIH movements, a far better solution (and comparable to the Board's case-by-case suggestion in *Simplified Standards*) would be for a railroad defendant in a Three Benchmark proceeding to simply make available for use by the parties all of its TIH waybills for the most current period. The AAR also noted that, in fact, no shipper or other party opposed the AAR's case-by-case proposal for use of the railroad defendant's traffic tapes (or the Board's expanded Waybill Sample proposal). See May 3, 2010 AAR Comments at 5-6.

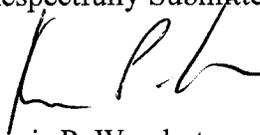
¹⁴ The Board also ignored another option that would improve the usefulness of Waybill Sample data that the parties could use for selection of comparison groups ---continuation of the current pre-existing Three Benchmark test requirement that comparison groups be selected from the latest Waybill Sample data. See NS/CSX Comments at 5-6. Thus, for a Three Benchmark case filed today, the latest Waybill Sample data (currently from the 2008 Waybill Sample) would be used instead of Waybill Sample data from 2004-2007 as proposed in the NPR. This option would provide more current and accurate data from which a comparables group may be selected and would reduce the 3-6 year regulatory lag now incorporated in the proposed rules to from 1-to-2 years. See also NS/CSX Comments at 16-18 (discussing use of an indexing approach to resolve the regulatory lag issue).

Moreover, the Board's initial NPR in *Simplified Standards* specifically proposed the use of the latest available Waybill Sample data for selection of comparison groups and the Board at a minimum has an obligation under the APA to at least address it in the NPR initiating this proceeding and to provide a rational basis for rejecting it. See *Simplified Standards*, at 33 (served July 28, 2006) (NPR). The Board has done neither. (Further, the Board's Three Benchmark rules also allow the parties to use *any publicly available data* in selecting comparison groups. See *Simplified Standards*, Slip Op. at 83; see also *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 should at a minimum provide the parties with access to the latest Waybill Sample data available and allow its use in Three Benchmark proceedings to supplement other data made available for use.)

Conclusion

The Board should not adopt the NPR proposals. The AAR would urge the Board to draw on a clean slate in this proceeding and to fully explain its rationale and regulatory objectives regarding the proposed rules. In engaging in a *bona fide* reevaluation of its prior rules as required under the Court's ruling and the APA, the Board must at a minimum also take into account the other clearly available, and potentially far more efficacious, options recognized by the Board for the parties to obtain current, useful waybill data for selecting comparison groups in Three Benchmark proceedings (which the AAR can only assume is the primary objective underlying the NPR).

Respectfully Submitted,



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