

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

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

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Dated: June 1, 2010

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Norfolk Southern Railway Company (“NS”) and CSX Transportation, Inc. (“CSXT”) submit these Reply Comments on the Notice of Proposed Rulemaking issued in this proceeding on April 2, 2010 (“NPRM”), which proposed to permit parties to Three Benchmark rate proceedings to select comparison group movements from four historical years of Waybill Sample data. NS’s and CSXT’s Opening Comments (hereafter “NS/CSXT Open. Comments”) demonstrated that the NPRM’s failure to provide any explanation of the rationale for the proposal is a plain, material violation of the Administrative Procedure Act (“APA”) that makes it impossible to comment meaningfully on the proposal. *See* NS/CSXT Open. Comments at 6-10. Moreover, NS and CSXT showed that the Board’s proposal would further reduce the reliability of Three Benchmark adjudications because – as the Board’s own studies show – over time rates and costs fluctuate significantly (and not in tandem). *See id.* at 10-18.

None of the Opening Comments filed by other parties changes the fact that the NPRM is both procedurally invalid and substantively unwise. Several commenters entirely ignore the significant APA problems with the NPRM, but the Board cannot brush aside its obligation to comply with the law. The D.C. Circuit has made clear that adequate notice in a

rulemaking is not optional. *See CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009). Other commenters ignore the significant inaccuracies that can arise from using outdated movements in a comparison group, and instead focus on concerns that, in a small category of cases, a single year's Waybill Sample might not contain sufficient data. But the Board has already taken measures that fully address that concern, and it therefore provides no justification for introducing significant further inaccuracies into the Three Benchmark approach. The American Chemistry Council and its co-commenters ("Joint Shippers") also claim that a four-year comparison group is necessary to "smooth out" fluctuations in rates or costs, and even that use of outdated comparison group data is consistent with precedent from ICC cases. *See Joint Shipper Comments* at 3-5. The Joint Shippers misunderstand the purpose of the R/VC_{COMP} benchmark – to ensure that today's customers pay comparable rates to those paid by today's comparable customers – and they mischaracterize the cases they cite. Indeed, the only applicable Board precedent from a *Simplified Guidelines* case shows that under that methodology the Board released only the most recent year's Waybill Sample for the selection of comparison group movements.

I. THE BOARD CANNOT IGNORE THE SERIOUS APA PROBLEMS CREATED BY ITS FAILURE TO EXPLAIN WHY ITS PROPOSAL IS NECESSARY

On Opening, NS and CSXT explained that the NPRM failed to satisfy fundamental APA requirements because the Board failed to explain why its proposal is necessary. *See NS/CSXT Open. Comments* at 6-8. Because of this deficient notice, parties have been left to speculate as to the Board's rationale for its proposal. The Board would violate the APA if it adopted a final rule predicated on this defective NPRM. *See Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1172 (D.C. Cir. 1997) (NPRM must include "'sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully'"); *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”). Other commenters ignore this fundamental deficiency, but ignoring the problem does not eliminate it. NS and CSXT will address the comments of other parties, but reiterate that this threshold flaw makes it impossible for parties to provide meaningful comments.

The Joint Shippers claim that they have somehow divined that the Board “clearly intended” in the final *Simplified Standards* rule¹ to adopt the rules proposed in the present NPRM, and they further speculate that the purpose of the NPRM is therefore to “address th[e] procedural deficiency” that caused the D.C. Circuit to vacate that aspect of *Simplified Standards*. Joint Shippers Open. Comments at 2-3. This argument is immaterial to the Board’s responsibilities under the APA. In the first place, the Joint Shippers are merely guessing what the Board intended in the final *Simplified Standards* rule because: (1) that rule was ambiguous at best with respect to whether parties would be allowed to select comparison movements from multiple years’ Waybill Samples; and (2) the Board certainly did not in the final *Simplified Standards* rule explain or provide a justification for why that change was necessary. See NS/CSXT Open. Comments at 2-3. In any event, what the Board may have tacitly “intended” in *Simplified Standards* is not relevant to whether it complied with the APA here. The Board cannot rely on a vacated portion of a final rule – which was vacated precisely because the Board failed to follow appropriate notice and comment procedures – to cure its APA violation here.

¹ *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007). But see *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009) (reversing and vacating similar provision of rule for failure to provide adequate notice required by APA).

II. “SMOOTHING” HISTORICAL FLUCTUATIONS IN RATES AND COSTS IS INCONSISTENT WITH A PROPER COMPARISON TEST

NS and CSXT wholeheartedly agree with the U.S. Department of Agriculture’s comments that “[t]he development of a good comparison group is a crucial step in the three-benchmark rate” approach. *See* USDA Comments at 3. The Three Benchmark approach is an R/VC comparison approach whose validity depends on the use of comparison traffic that is truly comparable in relevant respects. In dynamic rail transportation markets, one of the most critical comparability factors is *temporal* comparability, because rates and costs vary from year to year.

NS and CSXT demonstrated that the concerns that many commenters expressed in *Simplified Standards* and in this proceeding about the “comparability” of a current movement to a Waybill Sample movement that is several years old are not merely theoretical. The Board’s own studies prove that rail transportation prices and costs change substantially over time. *See* NS/CSXT Open. Comments at 11-14.² Importantly, costs and rates do not change at a uniform pace or in the same proportions. *See id.* at 12-13 (citing Christiansen Report).³ As a result, there is a significant risk that using comparison movements with rates and costs that are not as nearly current as possible will produce an R/VC_{COMP} that does not reflect the R/VCs of current comparable traffic. This risk of material distortion already exists under the current rule of using the most recent Waybill Sample (which may be as much as two years old), but it becomes

² Even the Joint Shippers admit that there are “[c]hanges and fluctuations in market conditions over time.” Joint Shipper Comments at 6.

³ The well-supported analysis of the Christiansen Report, which was not available to the Board when it issued *Simplified Standards*, thus contradicts the Board’s suggestion that any change in rates would likely be “offset” by a corresponding change in costs. *Simplified Standards* at 85.

unacceptably high if the Board permits use of substantially older data.⁴ *See id.* at 13-14 (demonstrating dramatic changes in rates over three- and six-year periods).

The Joint Shippers' argument that using the most current available Waybill Sample data might "lock in" a rate at a high or low point (Joint Shipper Comments at 7) misapprehends the purpose of the comparison test: to ensure that today's customers pay comparable rates to those rates paid today by comparable customers. *See Simplified Standards* at 17 (Board selects comparison group "most similar in the aggregate to the challenged movement"); *id.* at 73 (comparison groups should be drawn "from other captive traffic with similar characteristics"). While the Board has more rigorous rate reasonableness methodologies for larger cases, the purpose of the Three Benchmark approach is to ensure that the R/VCs of the challenged movements are similar to R/VCs for other similarly situated traffic. Whether rates or R/VC ratios for similar traffic were higher or lower *at some prior time* is immaterial. Indeed, the less proximate in time the movement to the issue traffic, the less meaningful it is for purposes of rate comparison.

Therefore, the real risk is not of "locking in" a rate at a time when rates for comparable shipments are relatively higher or lower, but rather of "locking in" a rate at a historical level that does not reflect current market conditions. Comparisons based on outdated historical data simply are not meaningful comparisons. Such comparisons with historical data would lead to arbitrary Three Benchmark decisions that would violate the Board's obligations under 49 U.S.C. § 10704 to consider the reasonableness of the particular rate at issue. *See NS/CSXT Open. Comments* at 14-15.

⁴ Under the NPRM's proposal, if a Three Benchmark proceeding were filed today comparison group movements could be selected from as long ago as the 2004 Waybill Sample. *See NS/CSXT Open. Comments* at 6.

III. THERE IS NO EVIDENCE SHOWING THAT THE MOST RECENT WAYBILL SAMPLE CONTAINS INSUFFICIENT DATA, AND THE BOARD HAS BETTER ALTERNATIVES IN THE EVENT THE WAYBILL SAMPLE IS INSUFFICIENT IN A PARTICULAR CASE.

Several parties claim that, in some instances, one year's Waybill Sample might not include sufficient potential comparison movements for a meaningful comparison group.⁵ See Joint Shipper Comments at 6-7; USDA Comments at 4. As NS and CSXT showed in their Opening Comments, however, the potential for an insufficient number of comparison movements is exaggerated, and the Board has more effective alternatives available in the event such a challenge should arise. See NS/CSXT Open. Comments at 8-10. Accordingly, NS/CSXT do not think that concern is what underlies the NPRM.

The most important answer to these commenters' concern is one that the Board itself stated in *Simplified Standards*. If a Three Benchmark case arises in which the Waybill Sample contains insufficient comparison traffic, the Board has adopted a mechanism to solve that data problem. *Simplified Standards* at 83. Namely, in such a situation it will "entertain a reasonably tailored request for comparable movements from the defendant's own traffic tapes." *Id.* The current rule therefore provides a solution to this claimed data sufficiency problem. It thus seems unlikely this rationale motivated the Board because there is no need for the Board to permit manifestly outdated data to be used *in all cases* when it already has a procedure to address data sufficiency problems if they arise in particular cases.⁶

⁵ The Board's failure to provide the APA-required explanation of its rationale for the NPRM necessarily means that commenters are speculating as to the Board's reasons for its proposal.

⁶ While the current rule is superior to the rule now proposed by the Board, as addressed in the NS/CSXT Opening Comments at 16 and in the AAR's opening comments at footnote 5, NS and CSXT continue to propose that better alternatives are readily available, such as requiring the railroad to produce all of its waybill data during the most current period for the specific commodity (or specific class of commodities) at issue in the Three Benchmark case.

USDA expresses concern that, in some cases, a single Waybill Sample may not include enough movements of anhydrous ammonia for an anhydrous ammonia comparison group. *See* USDA Comments at 4. The Joint Shippers similarly point to the Board's recent decision in *U.S. Magnesium LLC v. Union Pacific Railroad Co.* to argue that there might be an insufficient number of chlorine movements in the most current Waybill Sample.⁷ *See* Joint Shipper Comments at 6-7. However, the Board's proposal in *Waybill Data Reporting for Toxic Inhalation Hazards*, Ex Parte No. 385 (Sub-No. 7), to expand Class I carriers' waybill reporting to 100% of all TIH movements completely eliminates these potential data insufficiencies. *See* NS/CSXT Comments at 9. Whether the Board adopts its own proposal or one of the alternatives suggested by AAR, its final decision in that proceeding should alleviate any concern that, in some instances, the most recent Waybill Sample may not include a sufficient number of comparable TIH movements.

The Joint Shippers also point to the *Dupont/CSXT* nitrobenzene case as one where the potential comparison movements were allegedly insufficient. *See* Joint Shipper Comments at 7. But the evidence filed in that case provides no basis for the use of additional outdated waybill data from prior years. Indeed, while the Board's final decision accepted DuPont's smaller final comparison group, CSXT's public filings contained significantly more potential comparison movements. *See, e.g.,* CSXT Open Evidence at 19, *Dupont v. CSXT*, Docket No. 42101 (CSXT's opening comparable group had 132 movements). CSXT's separate Reply Comments address the specifics of that case in more detail. *See* CSXT Reply Comments (June 1, 2010).

⁷ Contrary to the Joint Shippers' suggestion, the Board's central concern in *U.S. Magnesium* was not the number of movements included in the parties' sample, but rather the lack of comparability of the movements the parties chose to include. *See U.S. Magnesium LLC v. Union Pacific Railroad Co.*, Docket No. 42114, slip op at 6-12 (Jan. 28, 2010).

IV. THERE IS NO APPLICABLE PRECEDENT FOR THE SELECTION OF THREE BENCHMARK COMPARISON MOVEMENTS FROM FOUR OR MORE YEARS.

Contrary to Joint Shippers' contention, historical agency decisions in small rate cases pre-dating *Simplified Standards* provide no basis to conclude that the Board's proposal to use four years of antiquated data is a return to the prior practice of the ICC and the STB. *See* Joint Shipper Comments at 3-5. Indeed, the limited available evidence supports the opposite conclusion, that the agency intended to use only the single most recent year's Waybill Sample to draw comparison movements for small rate cases.

Joint Shippers rely on attenuated reasoning to contend that the proposed expansion of the Waybill Sample from the most recent year to four historical years change proposed is not really a change, but instead a continuation of consistent practice dating back 25 years: First, they claim the ICC established a practice of using multiple historical years of historical data in *McCarty Farms* and *Southwest Railroad Car Parts*. *See id.* at 3-5. Second, they hypothesize that the STB tacitly adopted that purported ICC practice when it adopted *Simplified Guidelines* in 1996. *See id.* Third, they speculate that more than a decade later, the STB – again acting silently – implicitly imported from *Simplified Guidelines* the (hypothetical) practice of using four years of historical data for its new Three Benchmark approach adopted in *Simplified Standards*. *See id.* at 2, 8. As demonstrated below, this logical house of cards collapses under scrutiny.

A. The Two Pre-*Simplified Guidelines* Decisions the Shippers Rely Upon Applied Different Methodologies and Are Not Good Law Because They Were Reversed and Abandoned by the ICC.

The two isolated 1980s cases relied upon by Joint Shippers -- which involved an R/VC comparison approach rejected by the D.C. Circuit – were both decided before the ICC adopted its small rate case methodology in *Simplified Guidelines*, were reversed and have no

precedential value for the Three Benchmark approach. The first case cited by the Joint Shippers, *McCarty Farms*, was an intermediate ICC decision that was reversed by the D.C. Circuit. *See Burlington Northern RR v. ICC*, 985 F.2d 589 (D.C. Cir. 1993). The Circuit reversed the ICC because the comparison methodology the agency had used was arbitrary and “lack[ed] any visible intellectual coherence.” *Id.* Thus, the *McCarty Farms* decision relied upon by Joint Shippers provides no foundation for a valid or viable rate case methodology. On remand, rather than attempting to fix the ICC’s fatally flawed methodology on remand, the case proceeded under the SAC methodology. *See McCarty Farms, v. Burlington Northern*, 4 I.C.C.2d 262 (1988); *id.*, 2 *S.T.B.* 460, 465-66 (recounting long history of case).

Moreover, *McCarty Farms* was unique, and bears little resemblance to modern Three Benchmark cases. The case was a class action brought on behalf of approximately 10,000 shippers, seeking retrospective reparations for “an extremely large number of movements spanning ten years.” *McCarty Farms*, 4 I.C.C.2d 262, 282. The multiple years of Waybill Samples the ICC used in the reversed *McCarty Farms* decision were for the same years for which the shipper plaintiffs sought reparations. *See id.* at 263-64, 277-78, 281-82.

The ICC *abandoned* the other intermediate decision that Shippers rely upon, *Southwest Railroad Car Parts*. That ICC case was so seriously flawed (both complainant and defendant challenged the R/VC comparison test used by the ICC and the selection and validity of the comparison group) that the ICC declined to defend it in court, instead abandoning the decision and reopening the proceeding. *Southwest R.R. Car Parts v. Missouri Pacific R.R. Co.*, ICC No. 40073, Decision at 3 (Dec. 31, 1996). On reopening, the STB applied the then-new *Simplified Guidelines* approach to effectively reverse the decision cited by Shippers, preliminarily finding that the challenged rates were not unreasonable. *Id.* at 9. The Board

subsequently dismissed the case. *See Southwest R.R. Car Parts v. Missouri Pacific R.R. Co.*, STB No. 40073 Decision (April 9, 1998). Because the ICC abandoned the intermediate decision Shippers rely upon, and there was no final decision on the merits of the case, the abandoned decision has no precedential value.

Further, both of the decisions cited by Shippers pre-dated the adoption of *Simplified Guidelines* (which first adopted the precursor to *Simplified Standards*' Three Benchmark approach) at the end of 1996, which the Board adopted largely in response to the inadequacy of the R/VC comparison approach demonstrated in *McCarty Farms* and *Southwest RR Car Parts*. *See Non-Coal Guidelines*, 1 S.T.B. 1004, 1011 (1996) ("*Simplified Guidelines*"). Because the cited decisions pre-date the creation of the Three Benchmark methodology, even if they were good law, they could hardly serve as precedent for application of that methodology.

B. The Only Applicable Precedent Under *Simplified Guidelines* Authorized the Release of Only The Single Most Recent Year's Waybill Sample.

There is no evidence to suggest that the Board intended to – or ever lawfully did – release four years of Waybill Samples for parties' use to select comparison movements or to calculate the R/VC_{COMP} benchmark prior to *Simplified Standards*.⁸ There is nothing in *Simplified Guidelines* or in the *Simplified Standards* rulemaking indicating that the Board intended to implement R/VC_{COMP} using four years of antiquated data rather than the most recently available data. .

First, neither the NPRM nor the final rule in *Simplified Guidelines* mentions the notion of using multiple years' Waybill Samples to select comparable movements.

⁸ The D.C. Circuit decision in *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009), makes clear that the Board erred when it released four years of Waybill Samples in the first cases brought under *Simplified Standards*.

Second, the single available decision addressing the release of a Waybill Sample in an adjudication under *Simplified Guidelines* supports the conclusion that the intent of those guidelines and of the Board was to release only one year's Waybill Sample. In *B.P. Amoco Chemical v. Norfolk Southern*, the Board decided to release the single most recent year's Waybill Sample for the parties' use in selecting comparison movements. See *B.P. Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42093, Letter Ruling from STB OEEAA Director L. Gardner (June 8, 2005). Complainant B.P. Amoco's appeal of the ruling did not challenge the Board's limitation of the Waybill Sample to the single most recent year or suggest that parties were entitled to access to similar data from prior years' Waybill Samples. See *id.* B.P. Amoco Chemical Company Appeal to Chairman of Decision Denying, in Part, Access to Costed Waybill Sample (June 14, 2005), STB Docket No. 42093.⁹ This further shows that, at the time *Simplified Guidelines* was in effect, the Board, the complainant shipper, and the defendant carrier in an actual rate case were in accord that release of one year's data was consistent with the requirements of the *Guidelines*. Thus the available precedent establishes that, contrary to Joint Shippers' supposition, parties to a small rate case under *Simplified Standards* were given access to the single most recent year's Waybill Sample data only.

In sum, the Joint Shippers' speculative and attenuated theory -- that the proposed release of four years of Waybill Samples is simply a continuation of a practice dating back to the ICC -- collapses of its own weight. Each of the three premises necessary to support their speculative argument is erroneous. First, both of the interim ICC decisions they rely upon were vacated on appeal and have no precedential value. Second, there is no evidence that the ICC or the Board intended to resurrect its data release and use approach from those two failed

⁹ The parties voluntarily resolved and dismissed the case before the Board ruled on the appeal.

experiments (the reversed and abandoned *McCarty Farms* and *Southwest R.R. Car Parts* decisions) in *Simplified Guidelines*. Third, in the sole actual case addressing the issue under *Simplified Guidelines*, the Board made clear its understanding of the rule when it released only the most recent year's Waybill Sample.

V. THERE IS NO REASON FOR R/VC_{COMP} TO USE THE SAME DATE RANGE AS OTHER BENCHMARKS.

The Joint Shippers also claim that it would be “arbitrary and inconsistent” for the Board to continue the current rule of using one year's Waybill Sample because the other two benchmarks in the Three Benchmark analysis are four-year averages. Joint Shipper Comments at 5. If the Joint Shippers' guess that this purported inconsistency motivated the Board to issue this NPRM were correct, that concern is misplaced. The Board is charged both with evaluating the reasonableness of rates for traffic within its jurisdiction and with ensuring that rail carriers earn adequate revenues. *See* 49 U.S.C. § 10101(3), (6); § 10704(a)(2). The Three Benchmark approach was designed to account for these dual goals. There is no inconsistency here because the R/VC_{COMP} benchmark and the RSAM and R/VC_{>180} benchmarks measure different things. Accordingly, the different purposes of R/VC_{COMP} on the one hand, and RSAM and R/VC_{>180} on the other, support using different time frames for these benchmarks.

On the one hand, the RSAM and R/VC_{>180} benchmarks account for the statutory mandate to “allow[] rail carriers to earn adequate revenues” 49 U.S.C. § 10101(3); *see Simplified Standards* at 19 (“The RSAM benchmark is intended to measure the average markup above variable cost that a carrier would need to charge to meet its own revenue needs.”); *Simplified Guidelines*, 1 S.T.B. at 1027 (“RSAM supplies a key component of a simplified rate reasonableness analysis, because it accounts for a railroad's need to earn adequate revenues, as required by 49 U.S.C. 10704(a)(2).”). The Board has reasonably chosen to calculate RSAM and

R/VC_{>180} using a four-year average, for this approach ensures that the Board considers the railroad's revenue needs over more than a single year, but substantially less than the long-term. In the real world, annual fluctuations in railroads' operating results are less important to determining its revenue needs than operating results over time. *Cf. Simplified Guidelines*, 1 S.T.B. at 1032-33 (using 4-year RSAM average would "minimize the impact of any year that may have been aberrational for that carrier").

On the other hand, the purpose of the R/VC_{COMP} benchmark is to examine whether a current rate challenged today is reasonable in comparison to other current rates for similar movements. Adding outdated data to that analysis does not "smooth out" anything – it just adds less-comparable data to the analysis and further distorts the analysis and results. The Joint Shippers' newfound claim that four years' worth of Waybill Sample movements is necessary "to ensure an apples-to-apples comparison of all three benchmarks" thus founders because the benchmarks are very different, and hence not all "apples." *See* Joint Shipper Comments at 5.

Furthermore, the Joint Shippers' hypothesized rationale for the NPRM – that the R/VC_{COMP} benchmark should have the same time frame as RSAM and R/VC_{>180} – is at odds with the Board's other proposal in the NPRM to allow parties to select a comparison group that includes traffic from fewer than the four years (or in unequal amounts from each year of the four years). If Joint Shippers were right that R/VC_{COMP} must be temporally "apples to apples" with RSAM and R/VC_{>180}, then parties would be required to select comparison groups that equally draw from all four years of the released Waybill Sample. Such an absurd restriction plainly would not "permit parties to draw their proposed comparison groups in any combination they choose from the released Waybill Sample data." NPRM at 2.

VI. THE BOARD'S PROPOSAL SHOULD BE REJECTED BECAUSE THERE IS NO EFFECTIVE REMEDY TO THE PROVEN PROBLEMS ARISING FROM THE USE OF OUTDATED WAYBILL SAMPLE DATA.

As discussed above and in NS's and CSXT's Opening Comments, using stale Waybill Sample data from as much as 6 years before the challenged rate(s) would add significant arbitrariness to the Three Benchmark Approach. The Joint Shippers ignore this problem and the fact that there is effectively no remedy for it. Indeed, the Joint Shippers take the remarkable position that parties should be required to select movements from all four years of the Waybill Sample unless they prove that using more recent data is more appropriate. *See* Joint Shipper Comments at 8. Such proof is nearly impossible to present under the current procedural rules for Three Benchmark cases.

NS's and CSXT's Opening Comments explained how the procedural rules for Three Benchmark cases effectively preclude parties from presenting evidence of changes in rates and costs over time. *See* NS/CSXT Comments at 18-20. At the comparison group stage, the Board has precluded parties from using any evidence regarding the merits of the parties' proffered comparison groups 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). But by definition the old Waybill Sample will not have information on current rates in it. And it would be the very rare case that the current rates for traffic included in the comparable groups are publicly available – especially since the Board permits movements covered by confidential contracts to be included in the comparison group. Under these restrictive evidentiary rules, parties generally have no ability – at the critical stage of the case in which the Three Benchmarks and presumptive maximum reasonable rate are established – to prove a fact that is universally

recognized and is supported by the Board's own studies: rates and costs change significantly over time.

This practical inability to prove the superiority of more recent comparison movements within the strictures of a Three Benchmark proceeding strongly weighs against adoption of the NPRM. It also demonstrates the absurdity of the Joint Shippers' request that the Board require such proof before permitting a litigant to select comparison movements from the most recent Waybill Sample. In practice, the Joint Shippers' demand would effectively require many litigants to submit outdated comparison groups for want of admissible publicly available evidence that the specific older Waybill Sample movements at issue do not reflect the current market.

At the "other relevant factors" stage, the die is already cast. The theoretical opportunity to alter the presumptive maximum reasonable rate with evidence of changes over time is illusory. NS and CSXT demonstrated that, in practice, the Board's requirement that such "other relevant evidence" precisely quantify parallel modifications to RSAM and R/VC_{>180} make it all but impossible for a party to demonstrate rate inflation (or deflation) over time. *See* NS/CSXT Open. Comments at 16-18. Indeed, even attempting to make the thousands of calculations necessary to make such a showing could be prohibitively expensive in the context of a Three Benchmark proceeding.

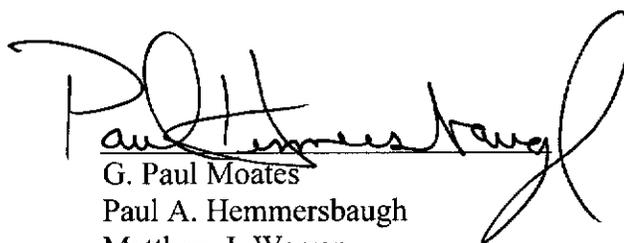
The Board should not adopt the proposals in the NPRM for the many reasons detailed in these Reply Comments and in NS's and CSXT's Opening Comments. But if the Board nevertheless chooses to expand the temporal period from which comparison movements may be drawn, at a minimum it must adopt a reliable method to adjust historical movements' rates to current market levels. Altering the existing Three Benchmark approach to permit parties

to base comparison groups on even more outdated data without providing them with a reasonable opportunity to demonstrate changes to historical rates would be arbitrary and capricious.

VII. CONCLUSION

For the foregoing reasons and those in NS's and CSXT's Opening Comments, the Board should not adopt the NPRM's proposed change to the Three Benchmark approach.

Respectfully submitted,



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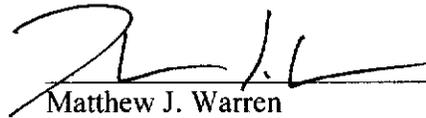
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Dated: June 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2010, I caused copies of the Reply Comments of Norfolk Southern Railway Company and CSX Transportation, Inc. to be served by first-class mail or more expeditious means on all Parties of Record in STB Ex Parte 646 (Sub-No. 3).



Matthew J. Warren