

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 646 (Sub-No. 1)

RAIL RATE CHALLENGES IN SMALL CASES

Comments

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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These Comments are submitted by The National Industrial Transportation League ("League") in response to the July 28, 2006 decision ("Decision") of the Surface Transportation Board. The Decision proposed substantial changes in the guidelines for handling cases challenging the reasonableness of rail rates where a "full stand-alone cost presentation is too costly, given the value of the case." The Board's proposal was composed of three major parts:

- a) Creation of a "simplified" Stand-Alone Cost (Simplified-SAC) procedure to use in "medium size rate disputes" for which a full Stand-Alone Cost (Full-SAC) presentation would be too costly, given the value of the case;
- b) Revision of the "Three Benchmark" method presented in *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) (*Simplified Guidelines*), for "small rate disputes" for which even a Simplified-SAC presentation would be too costly, given the value of the case; and,
- c) Establishment of "eligibility presumptions" based on the "maximum value of the case" (MVC) to distinguish between large, medium-size, and small rate disputes.

The League is an association of companies interested in transportation. Many of its members ship goods via rail. As the Board is well aware, most non-coal shippers do not transport sufficiently large quantities of goods in consistent volumes between the same two

points for a long period of time in order to justify bringing a Full-SAC case before the Board. Furthermore, because of the uncertainties in the *Simplified Guidelines* issued by the Board in 1996, shippers have been reluctant to enter into costly litigation when a shipper's eligibility for simplified and expedited procedures is completely unknown and when the likely outcome is far from clear. Thus, rail shippers without effective transportation competition, including a number of the members of the League, currently have no effective way of exercising their right under the law to a reasonable rail rate and for satisfying their commercial need for a simple and expedited method for resolving rail rate disputes. Reduced competition, resulting from rail mergers and capacity constraints in all modes of transportation, combined with extremely high barriers to entry in the rail industry, places increased emphasis on the need for an effective and cost-efficient means of resolving rail rate disputes.

But the issues in this case are not just about legal rights and the resolution of commercial disputes. This case is also important for an effective and efficient national transportation system for the future. As the League has testified before both Congress and the Board, the United States is currently experiencing a growing transportation capacity shortage across modes. Because it is highly unlikely that sufficient highway capacity can be constructed to meet the nation's transportation needs, the share of goods transported by the nation's rail carriers must grow compared to other modes. The alternative is increasing highway congestion and the gradual migration of the nation's industrial capacity to areas of the world whose transportation systems are not capacity-constrained.

But unless rail shippers believe that they can fairly, quickly and at a reasonable cost resolve rate disputes with market-dominant carriers, they will be increasingly unwilling to put their confidence in rail transportation. The League has actively participated in this proceeding

for several years in hope that the Board would quickly comply with Congress's directive to establish "a simplified and expedited method for determining the reasonableness of challenged rail rates. . . ." In 2004, the League joined with a large number of "Interested Parties" to present to the Board a united position on steps that the Board should have taken to improve its approach in administering its small rate case guideless. Similarly, today the League joins with these same and additional Interested Parties in submitting detailed comments and expert analysis of the Board's proposals set forth in its Decision. However, the League also desires to submit supplemental comments to emphasize its deep individual concern about the direction that the Board has taken in its Decision.

The League strongly believes that the Board's Decision does not establish a fair, simple, inexpensive, and expedited means of resolving rail rate disputes. As proposed, the procedures outlined by the Board in its Decision would be useless to virtually all shippers. As a procedural matter, the Board's eligibility presumptions for both the Simplified-SAC and the Three-Benchmark procedure are set so unreasonably low as to effectively eliminate any chance that a smaller rate case will be brought before the Board. Under the Board's proposal, most rail rate disputes would fall into the impossibly expensive, lengthy and complex Full-SAC procedure. As a substantive matter, the Board has proposed to adopt a "Simplified-SAC" procedure that is extremely complex, uncertain and expensive and that cannot be considered "expeditious" in any realistic commercial or legal sense.

While the League is pleased the Board has initiated this proceeding, adoption of the Board's current proposals, without radical and fundamental change, would in fact undermine one of the prime rationales for the Board's very existence: to be a place where users of rail services can obtain fair and expeditious resolution of challenges to unreasonably high rail rates.

The League hopes that the Board will carefully consider these comments, the comments of the Interested Parties, and the comments of other stakeholders, and will fundamentally modify its proposal to ensure that small rate case guidelines are in fact "simplified and expedited," as well as clear and cost-effective.

I. SHIPPERS NEED EFFECTIVE PROCEDURES TO CHALLENGE RAIL RATES

Shippers need an effective, simple and expeditious method for resolving smaller rate disputes. Congress has recognized that need and has instructed 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.

The Board should recognize that the existence of a simple and expeditious method for resolving smaller rate disputes will not result in a tidal wave of litigation. Shippers are in the business of growing, manufacturing, selling and distributing goods – they are not in the business of bringing litigation before federal agencies and the courts. Indeed, the very existence of a meaningful method to resolve rate disputes would be a vital tool to help both shippers and carriers *avoid* those very disputes. Meaningful rail rate standards, if applied consistently, would permit shippers and carriers to predict a narrow range of probable outcomes from a rate case. This in turn would provide incentives for both parties to reach a negotiated commercial agreement based upon that range, anticipated litigation costs to challenge a rate, and various risk factors. Conversely, the lack of a meaningful method for resolving rail rate disputes does not eliminate those disputes: it merely submerges them, channels them into unproductive commercial relationships and into increasingly urgent calls for significant legislative change.

The Board's current standards and procedures for challenging rail rates have been ineffective. The Board's preferred regulatory standard, a Full-SAC analysis, is much too complex, time consuming, and costly for use in any but a very small minority of cases.¹ The Board stated in its Decision that the cost of bringing a full SAC case is now more than \$3.5 million. A Full-SAC case will take three to four years. Unlike major coal shippers, most shippers do not have long term, high volume moves between just two locations. Rather, most shippers have lower volume moves to and from numerous locations. Furthermore, many of these moves are of a shorter duration, frequently less than 5 years, and often as little as one year. The result is that the total amount in dispute for most individual moves is far less than the cost of bringing a Full-SAC case, and the time required for bringing a Full-SAC case renders the procedure useless for virtually all shippers.

The Board's current *Simplified Guidelines* for small rate cases provide no relief. The current guidelines are unclear and eligibility under the *Simplified Guidelines* is uncertain. Due to the high level of uncertainty, determining the costs of litigation has been difficult and estimating the level of risk has been impossible. The result is that in the ten years since the Board issued the *Simplified Guidelines*, only a single case has been brought under those guidelines, and that case was settled within a month of its filing.

The League has long urged the Board to provide more guidance and better procedures for shippers interested in challenging rail rates in cases that cannot justify the time and expense of a Full-SAC proceeding. In its Decision, the Board agreed that revisions to the *Simplified Guidelines* are necessary. Unfortunately, the Board's unrealistically low eligibility requirements effectively eliminate any likelihood that a small rate case will ever be brought, and the Board's

¹ Indeed, members of the Board have recognized this: former Chairman Nober indicated several years ago that the large rate case SAC standard could be used by only about 75 shippers nationwide.

proposed Simplified-SAC addition to the *Simplified Guidelines* vastly and unlawfully complicate the method by which shippers can bring a challenge, even if they could qualify for the procedure.

II. THE BOARD'S SIMPLIFIED-SAC PROPOSAL COMPLETELY FAILS TO PROVIDE A SIMPLIFIED AND EXPEDITED METHOD FOR DETERMINING THE REASONABLENESS OF RAIL RATES

The Board's proposed "Simplified-SAC" methodology for "medium-sized" cases does not provide any meaningful or effective regulatory constraint. The proposed Simplified-SAC procedure is far too complex, costly, uncertain and time-consuming. Moreover, the procedure will unfairly and unlawfully produce rates that are higher than the rates produced by the Full-SAC procedure. In sum, the Simplified-SAC procedure proposed by the Board, rather than providing a meaningful and effective standard, creates a standard that is unclear, unfair, unworkable, and inconsistent with the statute. The Board should withdraw its Simplified-SAC proposal in its entirety.

A. **The Board's Simplified-SAC Proposal Is Much Too Time Consuming and Costly**

As proposed, a Simplified-SAC proceeding would take no less than 18 months for a decision even under the schedule proposed by the Board. This is simply far too long for non-coal cases and cannot be considered to be an "expedited" method. Moreover, given the complexities and uncertainties of the procedure, it is extremely likely that Simplified-SAC cases would take far longer than the 18 months posited by the Board.

Most non-coal shippers must contend with shifting shipping patterns, changes in customers and customer demands, and changes in shipping volumes. As such, the process for challenging a rate must be much shorter than 18 months. Any rate dispute process that takes more than about six months to resolve will simply be useless to a vast majority of shippers.

The Board estimates that the cost of a Simplified-SAC will be about \$200,000. Decision, p. 36. As set forth in the comments of the Interested Parties to which the League also subscribes, this estimate is impossibly low. Even accounting for simplifications that the Board has proposed, the Simplified-SAC procedure still requires extremely complex and expensive cost and revenue determinations. For example, a Simplified-SAC proceeding would still involve the time-consuming identification of the SARR assets, such as land, track, and bridges. Indeed, a Simplified-SAC procedure used by a non-coal shipper would in some respects be even more complex than the stand-alone cost systems devoted primarily to coal transportation that have been developed in Full-SAC cases. These would include, for example, highly complex calculations of the revenues and costs for many different kinds of cross-over traffic and the cost of calculating investment needed in highly complex, urban parts of a carrier's system. The Board's Simplified-SAC proposal ignores the significant cost of updating the Simplified-SAC annually (a cost not a part of Full-SAC cases), which is likely to result in an annual relitigation of some aspects of the dispute throughout the 5-year rate prescription period. Indeed, simply working through the many uncertainties in the Simplified-SAC procedure will result in extensive litigation, which will substantially increase the overall cost of litigation. The effect of the uncertainties alone will terminally chill challenges.

B. The Board's Proposed Simplified-SAC Procedure Is Unfairly and Unlawfully Skewed Toward a Higher Maximum Rate

The League recognizes that the Board can, at least to some extent, "trade" accuracy for simplicity. However, in order to do so, the Board must be able to show that the results of its simplifications are still fair, in other words, that it has made rational, fair, and non-arbitrary trade-offs between simplicity and accuracy. The Board has not done so, because it has failed to test its Simplified-SAC procedure, or if it has done so, it has not revealed the procedures or the

results of such tests. Without such testing, it is simply impossible for the Board to know whether its proposed procedure will in fact result in rates that bear any relationship whatsoever to the results that would accrue from a Full-SAC analysis. Moreover, by failing to rigorously test its proposed procedures in a real-life environment, the Board cannot determine whether its procedures are in any way practical. Therefore, the Board cannot show that its proposed Simplified-SAC procedures meet the statutory test of a “simplified and expedited” methodology for determining the reasonableness of rates in cases where a Full-SAC procedure is impractical given the value of the case.

The Board’s procedure for a Simplified-SAC analysis in fact suggests that the result of the procedure would be significantly higher than the result of a Full-SAC analysis. For example, the Simplified-SAC methodology as proposed would remove any consideration of SARR efficiencies by mandating the use of existing infrastructure along the route of movement, by including all existing traffic in the SARR traffic group, and by using the incumbent railroad’s system average operating costs. The Board proclaims that the inclusion of SARR efficiencies are not necessary because “railroads are not burdened by substantial excess capacity; rather, the rail industry now faces the opposite situation.” Decision, p. 11. The Board does not, however, explain how alleged capacity constraints ensure efficiency in the sense that the concept is used in *Guidelines*.

III. THE BOARD’S ELIGIBILITY PROPOSALS ARE UTTERLY UNREALISTIC AND EFFECTIVELY ELIMINATE MOST SHIPPERS FROM QUALIFYING FOR SMALLER RATE CASE PROCEDURES

The League agrees that rebuttable eligibility standards for small rate case proceedings are appropriate to provide some degree of predictability. The League believes very strongly, however, that the eligibility standards proposed for “small,” “medium” and “large” cases are

utterly unrealistic. No shipper will qualify for a “small” rate case. Very few shippers will even qualify for “medium” case status, because the Board vastly underestimates the cost of a Simplified-SAC case; because the Board essentially ignores the actual value of the case; and because the Board fails to account for any “risk factor” in the litigation. Moreover, even if those factors themselves do not eliminate relief, the Board’s “aggregation” rule will do so. While it appears that, under the Board’s proposal, shippers have a “right” to bring a case other than a Full-SAC complaint, that right is merely an illusion, since the eligibility rules will place most shippers in the “large case” category.

In its decision, the Board indicates that the Three-Benchmark, “small” case process is intended to be used “only as a last resort.” Decision, p. 11. This is a considerable understatement. The fact of the matter is that no shipper, except those with the tiniest of movements, will qualify for a Three-Benchmark, “small” case. This can be easily seen with some extremely simple math. Assume a rate per carload of \$6,000 per car, and a variable cost per car of \$1,900, which results in a revenue to variable cost ratio of 316 percent. Assume shipments from a single location to a single destination of just two carloads a month. As small as this movement is, it would still not qualify for small case treatment, as follows:

Rate per carload	\$6,000
Cost per carload	\$1,900
Jurisdictional threshold	\$3,420
Annual carloads	24
Time in years	5
Unadjusted MVC	\$309,600
MVC (applying discount factor of 1.242)	\$249,275
Qualifies for “small case”?	NO

Under the Board’s proposed eligibility standards, even this tiny movement would not qualify for a “small” case (indeed, it is about 25% higher than the presumptive eligibility level), but would be presumptively required to litigate under the “medium” case standard.

The same is true under the “medium” case thresholds. At relatively low levels of traffic even between a single origin and destination, even under the Board’s completely unrealistic cost assumptions for litigating a “Simplified SAC” case, a shipper will be thrown into the “large case” category. This can be seen by adjusting the annual carloads in the example above, to assume a shipment of just one car per day:

Rate per carload	\$6,000
Cost per carload	\$1,900
Jurisdictional threshold	\$3,420
Annual carloads	365
Time in years	5
Unadjusted MVC	\$4,708,500
MVC (applying discount factor of 1.242)	\$3,791,063
Qualifies for “medium case”?	NO

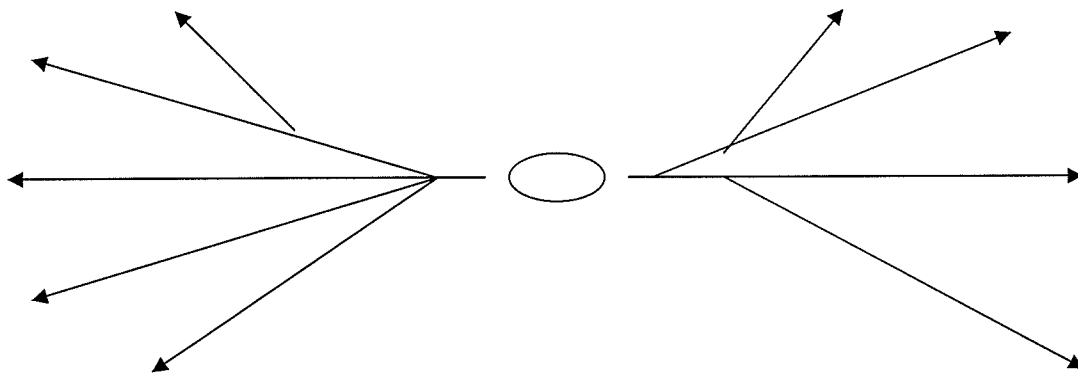
Thus, even a movement of just one car a day would bring the shipper-complaint into the “large case” category, where, the Board itself concedes, the cost of litigating the case would be over \$3.5 million and take three to four years to complete. The eligibility standards that the Board has selected are, even on the Board’s own far-understated assumptions, completely unrealistic.

But the situation is made much, much worse, because the Board ignores numerous factors that will essentially eliminate any chance for relief even from shippers who do formally fall into the “medium” case category. As noted in the Comments of the Interested Parties and in the expert evidence attached, the Board’s estimate of \$200,000 to litigate a “medium” Simplified-SAC case is far too low. Moreover, the Board ignores the fact that the actual recovery of a shipper will in all likelihood be far above the jurisdictional threshold of 180%, and therefore the actual value will be far less than the maximum value. And, the Board has ignored the fact that a shipper will never bring a case if it is simply going to recover its litigation costs. Thus, the Board must calculate a risk factor in its development of eligibility thresholds. Finally, the Board needs to carefully re-evaluate whether the MVC concept is useful as an eligibility standard, since

it can be readily manipulated by a potential defendant carrier simply by increasing the challenged rate.

Furthermore, the Board's "aggregation" rule unlawfully transforms a "Small Case" category into a "Small Shipper" category. The Board's proposed rule would aggregate all claims brought within a 2-year period that involve the same defendant railroad and the same captive origin or destination. Thus, if a shipper files a complaint against a railroad challenging the movement from its captive plant to Destination 1, and then within two years the same shipper files a second complaint against the same defendant, challenging a movement from the same captive plant to Destination 2, the MVC of the two complaints would be combined to determine the MVC of the second complaint.

But most non-coal shippers have movements from a plant to many different locations throughout the country, like this:



Movements going in one direction from the plant often share few, if any facilities with movements going in the opposite direction, and often share few facilities with movements initially going in the same direction. Thus, under the Simplified-SAC procedure, the evidence for each of these movements will be very different. Yet, the Board's "aggregation rule" treats

them as if the evidence in one case could have been used in the other case, and the cases therefore should have been combined.

The statute gives the shipper the right to choose the “case” that he will bring. The shipper should have the right to choose to bring two cases for two separate lane moves, or a single case for challenges to rates of multiple lanes. The aggregation rule should be eliminated.

IV. THE BOARD SHOULD REVISE ITS THREE-BENCHMARK PROPOSAL

While the Board’s revised “Three-Benchmark” proposal holds some promise, the Board needs to substantially revise some of the procedures surrounding it. In particular, it is both unfair and counterproductive for the Board to restrict information regarding the masked Waybill Sample from the shipper’s outside counsel and consultants. It is unfair because the defendant carrier has access to its own masking factors, and it is very possible that the entire comparison group will be chosen from the defendant carrier’s traffic. Thus, the carrier will have knowledge of a key aspect to the litigation that will be denied in its entirety to the shipper. It is also counterproductive for the Board to restrict this information, since the shipper will be unable to evaluate the strength of its case, and will not be able to rationally evaluate whether to negotiate, litigate, or once in litigation, to settle. The Board should permit access to the Confidential Waybill Sample without masked revenues before a complaint is filed, at least to outside counsel and consultants who certify that the information is to be used to evaluate a rate challenge and who agree to be bound by strict confidentiality provisions.

The Board should reduce the time for processing its Three-Benchmark case – 9 months is too long. As noted above, an eligibility standard that would permit most non-coal movements to qualify without a detailed factual examination of eligibility would enable the Board to eliminate 50 days from the proposed schedule that is now devoted to an analysis of eligibility.

Finally, the Board needs to permit at least some evidence to be filed beyond the rate comparison evidence noted in the Board Decision for the Three-Benchmark proposal. This is necessary under the statute, to permit the Board to consider the Long-Cannon factors. It is also necessary as a matter of fairness, because situations are different, and shippers should have the possibility of showing that the Board should evaluate its case differently, or should consider additional factors in determining a maximum reasonable rate. Such a rule would also strengthen the Board's decision if it had to defend its proposal before the courts, since the courts have long indicated that the Board can and should consider a variety of factors in ratemaking.

V. CONCLUSION

While the League welcomes change to the small rate case methodology, the League is severely disappointed by proposed revisions. Congress has instructed the Board to ensure all captive shippers have access to "a simplified and expedited method for determining the reasonableness of challenged rail rates. . . ." The Board's proposal not only fails to provide that access, but in fact drastically limits a shipper's access to a small rate case proceeding while also making the process complex, uncertain, expensive, and time consuming. The League urges the Board to reconsider its entire Decision as set forth in these Comments and in the Joint Written Comments of the Interested Parties.

Respectfully submitted,

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By Its Attorneys

A handwritten signature in black ink, appearing to read "Nicholas J. DiMichael". The signature is stylized with a large, looped "N" and "J".

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Dated: October 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of October, 2006, served a copy of the foregoing Comments on all parties of record, by first-class mail, postage prepaid.

A handwritten signature in black ink, appearing to read 'Aimee DePew', written over a horizontal line.

Aimee DePew