BEFORE THE

SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 646 (Sub-No.1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

REPLACEMENT COMMENTS OF THE

U.S. DEPARTMENT OF AGRICULTURE

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AUTHORITY AND INTEREST

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

BACKGROUND

The ability of shippers to appeal excessive rail rates is particularly important for agricultural producers because of the characteristics of the market in which they operate. Due to their numbers (many), size (small), and the nature of their products (homogeneous with many substitutes) individual agricultural producers of grain and oilseed crops are considered "price-takers." That is, they have little or no ability to influence the price they receive for their products, and therefore, are unable to pass increases in costs forward to buyers of their products. Instead, these individual agricultural producers tend to absorb any cost increases because of their lack of market power. Consequently, increases in transportation costs typically result in decreased producer incomes as individual producers absorb the increased transportation cost. In turn, lower producer incomes can adversely affect the ability of individual producers to borrow funds, potentially reducing economic prosperity in rural areas. Higher transportation costs may also hinder the competitive position of U.S. agricultural products in highly competitive export markets.

Recognizing that shippers need cost-effective appeals procedures and in response to a Congressional directive, the Board developed simplified rate appeal guidelines for small rail shippers in 1996. Since their adoption, however, the Simplified Guidelines have never been used to decide smaller rate cases. Thus, the Board held public hearings in April 2003 and July 2004 to examine why the guidelines had not been used and to explore possible improvements to the guidelines. In these hearings, the Board discovered that shippers perceived the Simplified Guidelines as being too vague and as requiring costly and prolonged litigation to establish an individual shipper's qualifications for using the guidelines in a rate case. As a result of the hearings and in response to the concerns presented by shippers and other interested parties, on July 28, 2006, the Board published the proposed Simplified Standards for Rail Rate Cases.

According to the proposed standards outlined in the Simplified Standards for Rail Rate Cases, rail rate cases brought forward by shippers would be classified as: 1) a large dispute wherein the maximum value of a particular case (MVC) exceeds $3.5 million and a Full Stand Alone Cost (SAC) analysis must be presented, 2) a medium-size dispute wherein the MVC is between $200,000 and $3.5 million and a Simplified-SAC analysis must be presented, or 3) a small dispute wherein the MVC is less than $200,000 and a "Three-Benchmark" analysis is presented.

MVC is defined in the proposed guidelines as "the maximum rate relief the shipper could attain over 5 years if the challenged rates were reduced to the jurisdictional floor (i.e., the level at which the revenue-to-variable cost ratio (R/VC) equals 180%)."

USDA COMMENTS

The Department of Agriculture (USDA) thanks the Board for its efforts and thoughtful analysis in the development of these proposed simplified standards. These proposed revisions are better defined and more transparent than the guidelines originally adopted in 1996.

USDA is concerned, however, that the proposed Simplified Standards for Rail Rate Appeals have several challenges that could limit shipper access to cost-effective procedures as envisioned by Congress, the *Staggers Act of 1980*, and the *Interstate Commerce Commission Termination Act of 1995*. It should be re-emphasized that shippers need appeals procedures that not only are well defined and transparent but are also cost-effective and timely. Access to cost-effective rate appeal procedures is only just. A rail rate appeal does not guarantee a favorable result to a shipper appealing rail rates; instead it ensures that a shipper has the opportunity to present its case.

USDA believes that the proposed eligibility criteria ceilings for medium-size and small rate appeals procedures in the Simplified Standards are set at levels much too low. As a result the expected costs of pursuing a rate appeal could often exceed the expected benefits, precluding shippers from challenging unreasonable rates. In addition, USDA is concerned that the proposed procedural schedules may be longer than necessary.

The Board appears to have conducted a thoughtful analysis in the development of the proposed simplified standards and procedures. However, if the Board adjusts the proposed standards and procedures to better fit shipping community needs, USDA believes these standards and procedures could be fair to both shippers and railroads.

Calculation of the Maximum Value of the Case

For the most part, USDA concurs with the Board's focus on the MVC of a rail rate appeal.[1] The primary issue is not how many cars are being shipped, the amount of freight revenue, or the size of the shipper. Instead, the crux of the issue has always been the benefits a shipper could reasonably expect from a rate appeal compared with the probable cost of appealing those rates. No reasonable shipper would spend more to appeal rail rates than the benefits expected.

The proposed calculation of the MVC, however, does not consider the probability of prevailing and greatly overstates the probable value of a rail rate reduction. In rail rate cases using the Full-SAC procedure, the probability of prevailing over the years has been approximately 50 percent and the rate reductions have usually been little more than 10 percent. The probability that an average shipper will be awarded a reduction in rail rates equivalent to a revenue-to-variable cost ratio of 180 is very remote. In reality, it is much more likely that most shippers will be able to obtain only 10-20 percent reductions in rail rates.

Therefore, in recognition that the effective MVC is overstated, consideration should be given to adjusting the eligibility ceilings. If the eligibility ceilings are not adjusted to account for the likelihood of prevailing in a rate case and for the probable value of a rate reduction, then the proposed eligibility ceilings by their nature are set too

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[1]The exception is the use of a maximum MVC for medium-size cases under certain circumstances. Later in the document, an alternative option to an eligibility ceiling for medium-size cases is presented for use when extenuating circumstances exist.

low. Those shippers most in need of rail rate relief could be precluded from challenging unreasonable rates.

Proposed Eligibility Standards Set Too Low

USDA agrees with the Board's proposal to use the Producer Price Index to annually adjust the eligibility ceilings and that those ceilings should be a rebuttable presumption. However, USDA is concerned that the proposed eligibility ceilings for the two simplified appeals procedures (the Simplified-SAC and the "Three-Benchmark" methods) are set at levels that are much too low. Given the probability of prevailing in a rate case and the probable value of any rate reduction, the proposed eligibility ceilings would not be cost-effective for many shippers. In other words, based on the proposed guidelines, the actual value of a particular case may not cover the cost of pursuing a case.

For example, suppose a shipper's rail rates have a revenue-to-variable cost ratio (R/VC) of 300, and the shipper's cost to pursue a medium-size rate case is equivalent to the Board's estimate of $200,000. If this shipper were to obtain a 10 percent rate reduction, the value of the rate reduction would only be one-fourth of the MVC.[2] Moreover, with a probable success rate of 50 percent in a medium-size case, only one-eighth of the MVC is recovered.[3] Viewed differently, the MVC of a medium rate case would need to be at least eight times as high, or in this example at least $1.6 million, as

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[2] The MVC is the difference between the appealed rate and the regulatory threshold R/VC of 180. Assuming a tariff rate of $300, a 10 percent reduction would be $30 compared to a maximum possible rate reduction of $120 ($300 less $180). Thus, the value of a 10 percent rate reduction would only be one-fourth ($30/$120) of the MVC.

[3] With a probability of success of 50 percent, the one-fourth of the MVC ($30/$120) is further reduced by 50 percent (($30/$120) x 0.5) to one-eighth of the MVC.

the costs of pursuing an appeal in order for the shipper to expect to recover all anticipated case costs ($1.6 million x 0.5 x 0.25 = $200,000).

If the same shipper expects a rate reduction of about 20 percent, then the value of the rate reduction would only be one-half of the difference between the appealed rate and the MVC.[4] Again, given the Board's estimated costs of $200,000, the likelihood of prevailing in a medium-size rate case, and a possible 20 percent reduction in rates, the expected value of the case to the shipper would then need to be at least $800,000 [5] to cover expected costs.

The MVC needed to break even also increases as the R/VC increases. For instance, if R/VC is 400 and the shipper obtains a 10 percent rate reduction, the MVC would need to be approximately 11 times the cost of appealing the rail rate.[6]

Based upon these calculations, USDA believes that the eligibility standards are set too low. The eligibility ceilings should be set at a level where shippers have adequate access to rail rate appeals procedures.

<u>Proposed Standards Could Exclude Many Shippers from the Rate Appeals Process</u>

If the Board sets the eligibility standards too low, some shippers may be foreclosed from the ability to appeal rail rates. Some small shippers may be forced to use

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[4] Assuming a tariff rate of $300, a 20 percent reduction would be $60 compared to a maximum possible rate reduction of $120 ($300 less $180). Thus, the value of a 20 percent rate reduction would only be one-half ($60/$120) of the MVC.

[5] Assuming an expected cost of pursuing a medium-size rate appeal of $200,000, a shipper would need four times the expected cost of the case to cover costs ($800,000 x ½ x ½ = $200,000).

[6] Assuming a tariff rate of $400, a 10 percent reduction would be $40 compared to a maximum possible rate reduction of $220 ($400 less $180). Thus, a shipper would need 11 times the expected cost of the case to cover costs ($2,200,000 x 40/220 x ½ = $200,000).

the more costly Simplified-SAC procedure rather than the "Three-Benchmark" procedure for small rate disputes. Also, some medium-size agricultural shippers—who may be unable to justify the cost of the Full-SAC procedures—would be unable to use the Simplified-SAC procedure. In either case, a shipper would be precluded from appealing unreasonable rail rates.

Full Stand-Alone Cost Rate Appeals Are Not Suitable For Agricultural Shippers

The Full-SAC procedure involves the creation of a hypothetical railroad to haul the product on which the rate is being contested. The process can be cumbersome, expensive, and time consuming. A rail customer filing a rate complaint at the Board can expect to spend over $3 million and wait several years for a final decision, according to grain shipper associations. Consequently, the Full-SAC procedure has been most successful when used by energy companies to appeal rates on large-quantity coal movements between one origin and one destination.

The Full-SAC procedure is not considered feasible for rate appeals by agricultural shippers because, in contrast with coal movements, agricultural production is geographically dispersed. That is to say, agricultural firms typically ship much smaller quantities (compared to coal shippers) of varied crops to many destinations. Rate appeals using Full-SAC procedures become extremely complex and expensive as multiple hypothetical origin-destination pairs and commodities are added to the rate appeal. Consequently, a lower eligibility ceiling for medium-size rate appeals could preclude many agricultural shippers from appealing unreasonable rail rates due to a lack of a cost-effective rate appeals procedure.

Another possible option to an eligibility ceiling for medium-size rate cases is for the Board to allow medium-size rate appeals based upon the shipper demonstrating that the appealed rates involve numerous origins, destinations, and commodities. In such cases, the rebuttable presumption would be that a Full-SAC rate appeal is infeasible, and an upper limit on the MVC of a medium-size rate appeal becomes unnecessary. Thus, the use of the Simplified-SAC procedure is acceptable.

Using Waybill Sample Data To Demonstrate The Restrictiveness Of Proposed Standards

USDA believes that the eligibility criteria ceilings of the maximum value of the case (MVC) being \$200,000 for the small rate case and \$3.5 million for the medium-size case are set too low. Based on reviews of Waybill Sample data, these eligibility ceilings for small cases and medium-size cases could be limited to as few as 14 and 250 railcars per year, respectively. For a medium-sized shipper that usually ships 54 to 110 cars per shipment, this could represent less than three separate shipments per year for five years.

Tables 1 and 2 (appendix) show how current eligibility standards relate to shippers of farm products in 2004. Shippers of farm products eligible for the small shipper and mid-size shipper categories could be few in number relative to the total population of farm product shippers. Furthermore, under the proposed eligibility standards, those who are paying the highest rail rates in the United States would be most likely to be excluded from cost-effective rate appeal procedures.

Shipping Point Location Codes (SPLCs) shipping fewer than 12 carloads of farm products during 2004 (based on unexpanded totals from the STB Waybill Sample) comprise less than 1 percent of the total farm product carloads during 2004 and include 36 percent of the shipping locations (Table 1). These numbers are based on a sample, however, and do not account for all shipments made at these particular shipper locations. Therefore, table 2 shows the expanded[7] number of cars shipped which contain farm products by SPLC.

In table 2, locations shipping fewer than 54 carloads of farm products during 2004 comprise less than 1 percent of all 2004 farm product carloads and less than 12 percent of the shipping locations.[8] In an extreme case, such as a small shipper of 14 carloads per year, this means the true percentage of carloads and shipping locations is likely somewhere between the percentage shown in Table 1 (0.74 percent) and the percentage shown in Table 2 (0.56 percent).

When considering the criteria for mid-size rate appeals, SPLCs shipping fewer than 299 carloads of farm products during 2004 (unexpanded) comprise less than 20 percent of the total farm product carloads during 2004 and include more than 81 percent of the shipping locations (Table 1). In table 2, note that those locations shipping fewer than 299 carloads of farm products during 2004 comprise a little more than 7 percent of

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[7] Because the Waybill data is a sample, an expansion factor is used to estimate the true population of rail shipments.

[8] There is no smaller category due to expansion factors as high as 40 for single-car shipments.

all 2004 farm product carloads and less than 49 percent of the shipping locations. Again, the true percentage of carloads and shipping locations for a shipper in the 250 carload per year category is likely somewhere between the percentage shown in Table 1 (20 percent) and the percentage shown in Table 2 (7 percent).

This review based on Waybill Sample data suggests that the current proposed eligibility limits for small- and medium-size rate cases are likely insufficient. In an extreme case of 14 carloads per year, a relatively small number of shippers may have access to a cost-effective rail rate appeal process.

USDA RECOMMENDATIONS

In light of the comments and analysis presented above, USDA puts forth the following recommendations. Implementation of these recommendations represents a further step toward making the appeals process for shippers more transparent, cost-effective, and timely.

Eligibility Criteria

- The eligibility ceiling for small cases should be increased to an MVC of $1.6 million. For medium-size cases, the MVC should range from $1.6 million to $15 million. Large cases should have an MVC greater than $15M.
- EXCEPTION - The Board should allow a medium-size rate appeal, regardless of the MVC, if the shipper demonstrates that the rates appealed involve numerous origins, destinations, and commodities. In such cases, the rebuttable presumption

would be that a Full-SAC rate appeal would not be feasible, and a Simplified-SAC procedure can be used.

Procedural Schedule

- At a minimum, the small case procedural schedule should be reduced by 40 days. These days could possibly be taken out of the time allotted for the Board Decision on Eligibility, Discovery, Railroad's Final Tender, and Complainant Rebuttal.
- The Board should consider similar reductions in the medium-size case procedural schedule if the case does not involve complex changes to the railroad parameters.

CONCLUSION

The Department of Agriculture (USDA) thanks the Board for its efforts and thoughtful analysis in the development of these proposed simplified standards. These proposed revisions are better defined and more transparent than the guidelines originally adopted in 1996.

USDA hopes that its comments prove useful to the Board as it continues to assess the effectiveness of the proposed standards. USDA appreciates the opportunity to participate in this important process and offers its assistance to the Board if additional information is needed regarding our submitted comments.

Respectively submitted,

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APPENDIX

Table 1: Range of 2004 Carloads Shipped Per Year for U.S. Farm Products by Originating SPLC

Carloads Shipped	Num.	CARLOADS			TONS			REVENUE		
Per Year	SPLCs[1]	Cars	Percent	Cumulative %	Tons	Percent	Cumulative %	Dollars	Percent	Cumulative %
1-5	473	1,135	0.27%	0.27%	97,414	0.22%	0.22%	3,071,700	0.33%	0.33%
6-12	235	1,992	0.47%	0.74%	179,008	0.41%	0.64%	4,090,042	0.44%	0.77%
13-27	233	4,591	1.08%	1.82%	436,968	1.01%	1.65%	8,910,957	0.95%	1.72%
28-54	179	7,355	1.74%	3.56%	704,518	1.63%	3.27%	13,710,587	1.47%	3.19%
55-75	87	5,765	1.36%	4.92%	536,847	1.24%	4.51%	10,572,315	1.13%	4.32%
76-99	80	6,914	1.63%	6.55%	679,026	1.57%	6.08%	14,206,529	1.52%	5.84%
100-199	185	26,431	6.24%	12.79%	2,610,008	6.02%	12.10%	53,798,976	5.75%	11.59%
200-299	119	28,447	6.72%	19.51%	2,858,801	6.60%	18.70%	56,342,644	6.03%	17.61%
300-399	69	23,725	5.60%	25.11%	2,360,006	5.45%	24.15%	49,855,720	5.33%	22.95%
400-499	46	20,797	4.91%	30.02%	2,094,419	4.83%	28.98%	41,430,183	4.43%	27.38%
500-599	48	26,285	6.21%	36.22%	2,661,357	6.14%	35.13%	61,614,029	6.59%	33.97%
600-699	24	15,817	3.73%	39.96%	1,614,395	3.73%	38.85%	36,206,890	3.87%	37.84%
700-799	26	19,309	4.56%	44.51%	1,989,129	4.59%	43.44%	43,256,558	4.63%	42.46%
800-899	16	13,557	3.20%	47.71%	1,397,857	3.23%	46.67%	31,567,462	3.38%	45.84%
900-999	13	12,321	2.91%	50.62%	1,301,114	3.00%	49.67%	31,198,121	3.34%	49.18%
1000-1099	16	16,795	3.96%	54.59%	1,739,726	4.02%	53.69%	32,479,123	3.47%	52.65%
1100-1199	15	17,474	4.13%	58.71%	1,839,439	4.25%	57.93%	47,459,108	5.08%	57.72%
1200-1299	9	11,193	2.64%	61.36%	1,160,170	2.68%	60.61%	21,657,763	2.32%	60.04%
1300-1399	15	20,078	4.74%	66.10%	2,149,144	4.96%	65.57%	53,359,405	5.71%	65.75%
1400-1499	10	14,557	3.44%	69.53%	1,510,689	3.49%	69.06%	28,632,542	3.06%	68.81%
1500-1599	4	6,182	1.46%	70.99%	657,263	1.52%	70.58%	18,660,976	2.00%	70.81%
1600-1699	6	9,786	2.31%	73.30%	1,030,988	2.38%	72.95%	24,241,649	2.59%	73.40%
1700-1799	5	8,694	2.05%	75.35%	901,741	2.08%	75.04%	20,774,601	2.22%	75.62%
1800-1899	3	5,525	1.30%	76.66%	590,421	1.36%	76.40%	13,867,662	1.48%	77.10%
1900-1999	3	5,808	1.37%	78.03%	588,504	1.36%	77.76%	13,451,790	1.44%	78.54%
2000-4999	29	81,949	19.35%	97.38%	8,579,505	19.80%	97.56%	178,592,420	19.10%	97.64%
5000 & up	1	11,117	2.62%	100.00%	1,057,403	2.44%	100.00%	22,065,891	2.36%	100.00%
TOTAL	1949	423,599	100.00%		43,325,860	98.35%		935,075,643	100.00%	

[1] The number of Shipping Point Locations included in this category of carloads shipped per year.

Source: STB Waybill Sample, 2004

Table 2: Range of 2004 Carloads Shipped Per Year for US Farm Products by Originating SPLC (Expanded)

Carloads Shipped	Num.	CARLOADS			TONS			REVENUE		
Per Year	SPLCs[1]	Cars	Percent	Cumulative %	Tons	Percent	Cumulative %	Dollars	Percent	Cumulative %
28-54	230	9,236	0.56%	0.56%	766,648	0.48%	0.48%	24,770,944	0.72%	0.72%
55-75	61	4,002	0.24%	0.80%	388,576	0.24%	0.72%	7,906,782	0.23%	0.94%
76-99	138	11,376	0.69%	1.49%	969,956	0.61%	1.33%	28,649,688	0.83%	1.77%
100-199	288	40,812	2.46%	3.95%	3,786,799	2.37%	3.70%	91,037,520	2.63%	4.40%
200-299	236	56,230	3.39%	7.34%	5,215,938	3.27%	6.97%	112,058,935	3.23%	7.63%
300-399	141	47,978	2.90%	10.24%	4,494,138	2.81%	9.79%	106,977,647	3.09%	10.72%
400-499	91	40,175	2.42%	12.66%	3,817,683	2.39%	12.18%	82,041,853	2.37%	13.09%
500-599	76	41,366	2.50%	15.16%	3,991,912	2.50%	14.68%	81,116,319	2.34%	15.43%
600-699	70	45,034	2.72%	17.87%	4,305,681	2.70%	17.37%	108,134,284	3.12%	18.55%
700-799	73	54,122	3.27%	21.14%	5,219,755	3.27%	20.64%	108,052,336	3.12%	21.67%
800-899	50	42,172	2.54%	23.68%	4,042,050	2.53%	23.17%	99,455,045	2.87%	24.54%
900-999	49	45,898	2.77%	26.45%	4,299,624	2.69%	25.87%	82,353,081	2.38%	26.92%
1000-1099	40	41,778	2.52%	28.97%	4,212,975	2.64%	28.51%	83,881,997	2.42%	29.34%
1100-1199	25	28,785	1.74%	30.71%	2,836,982	1.78%	30.28%	54,616,660	1.58%	30.92%
1200-1299	20	24,931	1.50%	32.22%	2,433,012	1.52%	31.81%	46,692,134	1.35%	32.27%
1300-1399	27	36,215	2.19%	34.40%	3,632,150	2.28%	34.08%	80,811,879	2.33%	34.60%
1400-1499	24	34,707	2.09%	36.50%	3,358,292	2.10%	36.19%	73,969,384	2.14%	36.73%
1500-1599	23	35,449	2.14%	38.63%	3,305,750	2.07%	38.26%	63,158,545	1.82%	38.56%
1600-1699	23	37,833	2.28%	40.92%	3,651,887	2.29%	40.54%	77,438,615	2.24%	40.79%
1700-1799	15	26,338	1.59%	42.51%	2,697,699	1.69%	42.23%	60,366,084	1.74%	42.53%
1800-1899	19	35,120	2.12%	44.63%	3,404,584	2.13%	44.37%	77,535,480	2.24%	44.77%
1900-1999	13	25,154	1.52%	46.14%	2,533,792	1.59%	45.95%	61,548,763	1.78%	46.55%
2000-4999	180	552,295	33.33%	79.47%	55,486,892	34.75%	80.71%	1,240,577,926	35.81%	82.36%
5000 & up	37	340,242	20.53%	100.00%	30,799,185	19.29%	100.00%	611,056,643	17.64%	100.00%
TOTAL	1949	1,657,248	100.00%		159,651,960	100.00%		3,464,208,544	100.00%	

[1] The number of Shipping Point Locations included in this category of carloads shipped per year.
Source: STB Waybill Sample, 2004

CERTIFICATE OF SERVICE

I, Demaris A. Wilson, certify that on this 7th day of November, 2006, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Ex Parte No. 646.

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