BEFORE THE

SURFACE TRANSPORTATION BOARD

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Docket No. EP 733

EXPEDITING RATE CASES

Reply Comments of the Joint Carload Shippers

Pursuant to the Advance Notice of Proposed Rulemaking ("ANPR") served by the Surface Transportation Board ("STB" or "Board") in the above-captioned docket on June 15, 2016, the American Chemistry Council, the Dow Chemical Company, and M&G Polymers USA, LLC (collectively the "Joint Carload Shippers"), hereby submit these reply comments in response to the opening comments of various other parties submitted on August 1, 2016. These reply comments are supported by the attached joint reply verified statement of Thomas D. Crowley and Robert D. Mulholland, President and Vice President respectively, of L.E. Peabody and Associates, Inc. ("Crowley/Mulholland Reply R.V.S.").

I. Introduction.

Although there are several significant disagreements between railroad and shipper interests in the opening comments, there also are many areas of agreement. The major areas of disagreement to which the Joint Carload Shippers direct most of these reply comments pertain to the production of traffic data and/or collection of such data by the STB, the use of motions practice to address the problem of misaligned evidence, software that is not publically available, rebuttal page limits, and market dominance. In other areas, there is partial agreement that may lead to other concepts for expediting rate cases.

II. Pre-Filing Requirement

Nearly all of the comments on the STB's proposed pre-filing requirement ranged from neutral,[1] at worst, to supportive.[2] The Joint Carload Shippers continue to support the STB's proposal, but agree with an issue raised by Coal Shippers/NARUC. Specifically, a railroad must be required to provide a tariff rate, where none presently exist, before a shipper has a rate to actually challenge.[3] Any pre-filing requirement is rendered pointless if the railroad refuses to publish a tariff rate until an existing contract is on the verge of expiration. The Joint Carload Shippers also agree with Coal Shippers/NARUC's assertion that pre-filing only expedites a SAC case if carriers are expected to use this time to begin gathering SAC information to meet a required response deadline.[4]

There also appears to be general agreement upon the basic content of the pre-filing notice: the challenged rate, the issue commodity, the origin-destination pairs, and the methodology that will be used. NS has suggested adding to this list the SARR states. The Joint Carload Shippers concur to the extent that information would facilitate the more expedited production of traffic data. It is worth noting that there appears to be some disagreement between CSX and NS as to whether a pre-filing notice would facilitate railroad discovery responses.[5]

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[1] Comments of Norfolk Southern Railway Company ("NS") at 35-36; Joint Comments of The Western Coal Traffic League *et al.* ("Coal Shippers/NARUC") at 32-34.

[2] Comments of the Association of American Railroads ("AAR") at 6; Comments of CSX Transportation, Inc. ("CSX") at 7-11.

[3] Coal Shippers/NARUC at 32-33.

[4] Coal Shippers/NARUC at 34.

[5] *Compare* CSX at 7-8 *with* NS at 35-36.

III. Standardized Discovery Requests and/or Disclosures.

The comments varied along a spectrum as to how valuable standardized discovery requests and/or disclosure would be in expediting SAC cases. While rail carriers focused on market dominance discovery, shippers focused on SAC information. The general consensus was skeptical of standardized discovery requests, but there was support for, or at least openness to, some form of standardized initial disclosure requirement. The nature of those disclosures, however, was subject to significant disagreements.

Standardized Discovery Requests. The Joint Carload Shippers agree with Coal Shippers/NARUC that standardizing SAC questions is inappropriate because SAC questions must be able to evolve from case-to-case as new information and technologies become available.[6] The railroad commenters have expressed mixed sentiments.[7]

Standardized Production of Traffic Data. The Joint Carload Shippers also agree with Coal Shippers/NARUC that the real benefit to expediting SAC cases is not from the standardization of discovery requests, but in addressing delays by rail carriers in the production of what Coal Shippers/NARUC calls "Core SAC Data."[8] Initial disclosures are a means to address this concern by getting critical SAC information into the hands of complainants earlier. Coal Shippers/NARUC has proposed specific rules that the Joint Carload Shippers believe could provide a valuable framework for addressing this issue.

The Joint Carload Shippers believe that the fastest and most effective way to get traffic data into the hands of complainants, and thereby shave months off the current SAC process, is to

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[6] Coal Shippers/NARUC at 43.

[7] CSX at 23-24 (standardized discovery requests may not be workable); NS at 36 (strongly supporting the concept).

[8] Coal Shippers/NARUC at 44.

standardize data reporting and to require Class I carriers to submit their traffic data to the Board annually in the prescribed format. The rail industry universally opposes any proposal that the STB collect and maintain traffic data from each railroad in a standardized format that shippers could access upon filing a complaint.[9] As discussed in their opening comments, the Joint Carload Shippers believe these objections are exaggerated and misplaced.

The railroad commenters primarily object to this concept on burden grounds. But their data submissions can be built around the same information that the Board currently collects in the costed waybill sample with the incremental addition of other fields and tables needed for a SAC analysis. The railroads also protest any requirement that they submit data annually when several years often have elapsed between cases in which the same railroad is a defendant in a SAC case. But the very point of this rulemaking is to make SAC accessible to more shippers through an expedited process. The standardization of traffic data to make SAC both easier to use and available much earlier in the SAC process would do more than any other proposal to both expedite SAC cases and reduce their cost to complainants. By making SAC more accessible to shippers, there may be more frequent SAC cases to make use of that data. Finally, the incremental burden is outweighed by the significant reduction in the cost and duration of SAC cases.

Even if the Board declines to collect standardized traffic data for SAC cases from railroads, there are other steps it can take to reduce the cost and duration of SAC cases through the earlier production of key information by rail carriers. The number one contributing factor to the cost and complexity of rate cases is the requirement for complainants to reconstruct a functional traffic and revenue database from the disparate parts provided by the railroads in

[9] AAR at 10-11; CSX at 25-26; NS at 37-38; Comments of Union Pacific Railroad Company ("UP") at 4-5.

discovery. Crowley/Mulholland R.V.S. at 2. As the Joint Carload Shippers discussed in their opening comments, simply requiring railroads to produce their traffic data in a database format that retains or restores the links between the various flat files produced, rather than requiring shippers to recreate those links, would be the next best thing to STB collection of this data.

Messrs. Crowley and Mulholland provide a more detailed response to the railroad commenters' objections to standardizing traffic and revenue data in their Reply Verified Statement. First, they reiterate their opening testimony that the most significant problem faced by complainants is the production of traffic and revenue data in terabytes of individual flat files, instead of the relational format in which railroads maintain the data in the ordinary course of business, which in turn requires complainants to first restore each table into a proper database file and then rebuild the relational database from scratch. Crowley/Mulholland R.V.S. at 2-3. The very nature of this task sometimes results in missed data links that may cause the complainant to make technically incorrect interpretations of the unlinked data tables, despite diligent and good faith efforts, which the railroads then attempt to exploit in their reply evidence. *Id.* at 7. Second, Messrs. Crowley and Mulholland point out that, while the railroad commenters object to the burden of producing standardized traffic data in an expedient manner for use in SAC cases, they have no such qualms about the burdens that they impose upon shippers to convert that data into a useable format. *Id.* at 4-6. Finally, the best and most expedient option they suggest is to require railroads to submit standardized traffic data to the Board in a functioning, linked database; but failing that, the Board at least should require that railroads produce their traffic and revenue data to shippers as intact relational databases housing tables that are linked and keyed appropriately. *Id.* at 3, 6-8.

Market Dominance Disclosures. Finally, CSX has suggested four areas for initial market dominance disclosures.[10] The Joint Carload Shippers agree with three of those categories, although they have proposed those categories cover three years as opposed to five years that CSX proposes. Three years seems reasonable, and it is consistent with the time period for most SAC discovery. The Joint Carload Shippers do not agree with CSX's fourth category, which would require a narrative statement of complainant's basis for asserting market dominance. This is not the type of information typical of initial disclosures; most likely because it is not appropriate to expect complainant to have developed its evidence to such an extent at the very beginning of its case. The Joint Carload Shippers are concerned that, despite complainants' good faith efforts to provide the narrative response that CSX proposes, defendants may try to limit the market dominance evidence to information contained in those narratives, thereby locking complainants into market dominance theories at the very start of the case. There is no good reason to require such narratives in the form of initial disclosures.

IV. Software Not Publically Available.

CSX and NS object to disclosing software they intend to use upon the close of discovery, because they claim that they cannot know whether they intend to use such software until they review the complainant's opening evidence.[11] But this objection misses the point. The subject of the ANPR is not any software, but software not publically available. It is unfair and prejudicial to complainants when the defendant uses software that was not available to them to develop opening evidence. As the Joint Carload Shippers explained in their opening comments,

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[10] CSX at 16.

[11] CSX at 26; NS at 38.

this was the issue that DuPont and SunBelt faced when NS opted to use MultiRail.[12] While the Joint Carload Shippers supported the Board's proposed software disclosure requirement, they noted that their concerns with the introduction of new software into a case on reply are much deeper than a disclosure requirement can resolve and that any use of such software inherently is inconsistent with this proceeding's objective of expediting SAC cases.

V. Evidentiary Submissions: Standardization.

There appears to be a consistent theme among shippers and railroads that standardization of SAC evidence is generally inappropriate and perhaps even inconsistent with the objectives of SAC.[13] Several commenters point out that the Board already has a rate case methodology, in Simplified-SAC, that attempts to standardize portions of the SAC evidence.

The Joint Carload Shippers agree that the Board should not conflate Full-SAC with Simplified-SAC. Once the Board begins to standardize SAC evidence, the distinction between the two methodologies will become increasingly fuzzy. To the extent commenters have identified potential areas for standardization, the Board should consider those only in the context of Simplified-SAC.

The Joint Carload Shippers, however, reiterate a point from their opening comments that the Board should provide 10 year rate prescriptions for Simplified-SAC, the same as it does for Full-SAC.[14] The original rationale for a shorter prescription period was to encourage the use of Full-SAC in appropriate cases. But there is ample incentive to use Full-SAC without reducing

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[12] By the time of *TPI*, CSX, perhaps realizing this concern, made arrangements with Oliver Wyman for TPI to acquire a license to use MultiRail. Again, however, TPI was given this opportunity to use this non-public software only because CSX arranged it, almost certainly because CSX knew, even before TPI submitted opening evidence, that it intended to use MultiRail in its reply evidence.

[13] CSX at 29-33; NS at 42-44; Coal Shippers/NARUC at 52-58.

[14] Comments of Joint Carload Shippers at 3 (n. 4).

the prescription period, because Simplified-SAC is designed only to detect cross-subsidies, not to eliminate inefficiencies, with the consequence that Simplified-SAC already provides less rate relief potential than Full-SAC.[15] This by itself provides sufficient incentive to use Full-SAC in appropriate cases. Furthermore, the lower volumes and frequently changing customer base of carload shippers, as detailed in the Joint Carload Shipper opening comments, at 2-3, requires more time for them to recover the lower, yet still substantial, cost of a Simplified-SAC case. Therefore, instead of standardizing evidence in SAC cases, the Joint Carload Shippers ask the Board to increase the Simplified-SAC rate prescription period to 10 years.

VI. Evidentiary Submissions: Misaligned Evidence.

The opening comments varied widely on the use of motions practice to resolve the issue of misaligned evidence. To the extent they addressed this issue, the railroad commenters either supported the use of motions to dismiss or deemed them unnecessary in light of standards applied in recent SAC cases.[16] Coal Shippers/NARUC opposed any procedure that would hold cases in abeyance pending a motion to dismiss, without the complainant's consent.[17] The Joint Carload Shippers offered two options that fell between these positions.

While both the Joint Carload Shippers and railroad commenters suggested that motions to dismiss could be used to address evidentiary misalignment, they differed over the cause of such misalignment and the process for resolving the issue. The Joint Carload Shippers attribute the cause of misaligned evidence to railroads developing entirely new operating plans on reply, instead of making corrections to alleged flaws in the complainants' operating plans, even when

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[15] *See, e.g.*, Coal Shippers/NARUC at 54-55, *quoting Rate Regulations Reforms*, EP 715, slip op. at 14 (served July 18, 2013); CSX at 30, *citing Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 10 (served July 28, 2006).

[16] AAR at 8-9; CSX at 37-38; NS at 33-34, 45.

[17] Coal Shippers/NARUC at 58-59.

such corrections are possible. Their proposal, rather than permit defendants to file an entirely new plan as the Board has allowed in recent cases, is to require defendants to file a motion to dismiss if they cannot correct the alleged flaws; otherwise, defendants must adhere to the general rule that "a railroad's SAC evidence should be limited to addressing deficiencies in the complaining shipper's evidence. It is not sufficient for a railroad to show that another way of providing the stand-alone service would be superior, because the purpose of a SAC analysis is to identify the ***least*** cost at which the current level of service for each member of the traffic group could be provided." *See Gen. Procedures for Presenting Evid. in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (emphasis in original; footnote omitted).

Motions to dismiss could be used to determine whether the defendant can correct the alleged flaws in the complainant's evidence or truly has no other choice but to submit a brand new operating plan. In the latter situation, the Board would require the complainant to correct the deficiencies in its operating plan or have its case dismissed, instead of allowing the railroad to submit something completely different.

It is also worth noting that the portions of the Complainants' operating plans in *DuPont* and *SunBelt*[18] to which the railroads objected were all related to the Complainants' interpretation and use of the railroads' traffic data, which was provided in multiple disparate flat files from which the Complainants were required to build functioning, linked databases. Specifically, in all three cases, the central theme underpinning the railroads' allegations of inadequate operating plans was that the Complainants erred in their development and use of the provided traffic data. This underscores the need for the traffic data to be provided in a linked, functioning database.

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[18] Docket No. NOR 42125, *E.I. du Pont de Nemours & Company v. Norfolk Southern Ry. Co.* ("*DuPont*"); Docket No. NOR 42130, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.* ("*SunBelt*").

The railroads similarly advocate the use of motions to dismiss as a remedy for perceived deficiencies in the complainants' case-in-chief. But in their minds, the proper remedy is out-right dismissal of the complaint, regardless of whether the railroad could in fact correct the alleged deficiency without submitting a brand new operating plan.[19]

The Board rejected the railroad position over a decade ago in *Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry.* ("*PSCo/Xcel II*"), STB Docket No. 42057, slip op. at 3-5 (served Jan. 19, 2005):

> Our predecessor, the Interstate Commerce Commission (ICC), was expected to be "directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It [was] not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected." Thus, the ICC was not the prisoner of the party's submissions, but rather had the duty to "weigh alternatives and make its choice according to its judgment of how best to achieve and advance the goals of the National Transportation Policy." In other words, the ICC was not expected to blandly call balls and strikes; rather "the right of the public must receive active and affirmative protection at the hands of the Commission."
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> In SAC cases, the railroad has the advantage of having much greater knowledge and experience in how to construct and operate a railroad. Moreover, as a potential repeat participant in SAC cases, the defendant carrier may have an incentive to contest every detail of a SAC presentation. Our expertise and our interest in the SAC test serving its intended purpose can level the playing field somewhat, but we must ensure that an adequate record is developed upon which we can make an informed decision. Were we to entertain only those rate complaints where the railroad could not poke holes in the operating plan devised by the shipper for its SARR, almost every rate challenge considered by this agency since the adoption of the SAC test would have had to have been dismissed.

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[19] AAR at 8; NS at 33.

> The public interest would not be served by dismissing rate complaints solely because of correctable defects in the shipper's presentation with respect to how a hypothetical railroad would operate.[footnotes and citations omitted]

There is substantial risk of prejudice to complainants in the railroad position advocating outright dismissal of a complaint. The Board's recent decisions in *SunBelt* and *DuPont* illustrate this risk. In those decisions, the Board allowed the defendants to submit entirely new operating plans, rather than correct the alleged flaw in the complainants' plans, on grounds that the complainants had not provided for classification and blocking at all, and thus there was nothing for defendants to correct.[20] The railroad commenters consider this to be a failure of the complainants' case-in-chief that merits outright dismissal.[21] But no complainant or defendant in any of the prior SAC cases involving carload traffic had developed detailed classification and blocking plans; instead, they presented the same type of evidence as DuPont and SunBelt. Crowley/Mulholland Opening V.S. at 23. Based upon this precedent, DuPont and SunBelt had no reason to anticipate claims that the lack of a classification and blocking plan was a fatal deficiency. Rather, it was a novel argument that NS exploited to justify an evidentiary misalignment.

The Joint Carload Shippers urge the Board to use motions to dismiss to distinguish between truly uncorrectable operating plan deficiencies from those that are correctable, requiring the complainant to address the former situation and the defendant to address the latter. But in neither circumstance would the Board permit the submission of misaligned evidence that

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[20] *See* Docket No. NOR 42125, *E.I. du Pont de Nemours & Company v. Norfolk Southern Ry. Co*, slip op. at 41 (served March 24, 2014) ("*DuPont*"); Docket No. NOR 42130, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, slip op. at 13 (served June 20, 2014) ("*SunBelt*").

[21] CSX at 37-38; NS at 33-34.

undermines the Board's role as defender of the public interest, as described in *PSCo/Xcel II* quoted above.

VII. Evidentiary Submissions: Other Ideas.

Rebuttal Page Limits. The Joint Carload Shippers adhere to their opening position that page limits on rebuttal are inappropriate for the reasons presented in their opening comments. Their arguments are consistent with the position of Coal Shippers/NARUC.[22] NS also opposes rebuttal page limits.[23]

CSX is the only commenter to argue for rebuttal page limits. Specifically, CSX advocates that rebuttal narratives be limited to no more than half the length of opening, which it claims is "in line with the practice in federal courts...."[24] But the cited practice comes from the Federal Rules of Appellate Procedure, without acknowledgement that appellate proceedings, which limit argument to a previously developed record, are very different from evidentiary proceedings, which actually develop the record. In addition, the federal rules cited by CSX place page limits on all parties' filings at all phases of the case, not just rebuttal. Any standard that permits railroads to submit unlimited reply evidence, while restricting the complainants' right of rebuttal would be a fundamental violation of due process.[25]

Final Briefs. The commenters found several areas of common ground on the role of final briefs. For example, the Joint Carload Shippers, Coal Shippers/NARUC, and NS all suggested

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[22] Coal Shippers/NARUC at 59-60.

[23] NS at 47.

[24] CSX at 36-37.

[25] *Mkt. St. R. Co. v. R.R. Comm'n of Cal.* 324 U.S. 548, 562 (1945) ("Due process...requires that commissions proceed upon matter in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal."). *See also, Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977).

limiting briefs to specific issues of concern to the Board.[26] The other railroad parties did not address this subject.

Public Evidence Filings. In general, all of the commenters supported some form of delayed filing for public versions of SAC evidence.

VIII. Interaction with Board Staff.

There appears to be universal agreement among commenters that greater interaction with Board staff at all stages of the SAC process would be a positive development.[27] Despite this general agreement, the parties had distinctly different ideas as to where responsibility lies for delays in recent SAC cases. Most notably, NS made a case study out of the *DuPont* case, attributing the delays in that case entirely to the complainant and the Board.[28] The complete facts of that case, however, tend to reinforce the points made by both Coal Shippers/NARUC and the Joint Carload Shippers that rail carriers, even when they have an extended period of time to prepare traffic data, produce such data at the very end of the discovery process and it often is incomplete and/or erroneous. Resolving that issue must be a Board priority if it is to expedite SAC cases.

First, NS attributes many of the procedural delays to the fact that DuPont shared counsel with the complainants in *TPI* and *M&G*,[29] and the consequent need to stagger filings across three contemporaneous proceedings. [30] While that that observation is accurate, NS omits the fact that it also shared counsel with the defendants in those other proceedings. Indeed, both parties shared

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[26] Coal Shippers/NARUC at 60-61; NS at 47

[27] AAR at 7; CSX at 40-41; NS at 11-14, 42; Coal Shippers/NARUC at 62.

[28] NS at 14-17, 22.

[29] Docket NOR 42121, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.* ("*TPI*"); Docket NOR 42123, *M&G Polymers USA, LLC v. CSX Transp., Inc.* ("*M&G*").

[30] NS at 17.

not only counsel across all these cases, but also consultants, which is where the real bandwidth limitations arose. The procedural schedule extensions negotiated between the parties were designed to avoid scheduling conflicts in all parties' evidentiary submissions.

Second, the first extension to the *DuPont* procedural schedule was necessitated by NS's objections to producing traffic data that NS considered to be Security Sensitive Information ("SSI"). This issue was not resolved until after the 6-month window for discovery in the original procedural schedule had closed. Once this issue was resolved, DuPont requested a second extension because NS did not produce all of the core information that DuPont needed to perform its SAC analysis for another month, and even that data was incomplete and deficient in multiple respects that required a total of four months to cure.[31] Furthermore, the NS objections to SSI data caused the very convergence of the *DuPont* procedural schedule with the *TPI* and *M&G* cases, thereby necessitating the procedural accommodations described in the preceding paragraph.

In summary, the procedural delays in the *DuPont* case, contrary to NS claims, were not entirely or even primarily attributable either to DuPont or the Board's excessive willingness to grant extensions. The early extensions were required to afford DuPont proper "due process" in the face of an extended delay in NS production of useable traffic data. This accounted for half of the 301 days of delay that NS has identified in that case.[32] Ultimately, the *DuPont* case is a better example of delays caused by incomplete and tardy production of essential traffic data by

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[31] *See* "Motion to Modify Procedural Schedule," Docket No. 42125, *E.I. du Pont de Nemours and Company v. Norfolk Southern Ry. Co.*, at 2-7 (filed Dec. 12, 2011) (describing DuPont's 4-month ordeal to obtain complete traffic data from NS's first production attempt 2 months after the close of discovery, until the data was complete and useable by DuPont).

[32] NS at 22.

rail carriers and the need to address that problem to have the greatest impact upon expediting SAC cases.

IX. Market Dominance Issues

Several railroad parties presented comments on market dominance that extended beyond the scope of the ANPR. Specifically, AAR argues against the Limit Price Methodology ("LPM") employed in recent SAC cases and CSX proposes an expedited market dominance process that would occur on a separate track from SAC.[33] The Joint Carload Shippers address both of those comments in this section.

A. Limit Price Methodology.

The Board should reject AAR's invitation to revisit LPM in this proceeding. AAR is simply wrong when it asserts that LPM complicates the market dominance inquiry. LPM is not difficult to implement; nor does it substantially increase the time and effort of the parties. As a threshold matter, the Board has not mandated LPM, but has used it only in the absence of a better means offered by the parties in recent cases to ascertain whether a feasible alternative transportation mode is an effective competitive constraint upon the defendant's pricing.[34] Because LPM only applies when feasible alternative transportation modes exist, the parties still will present traditional feasibility evidence, and if the alternative mode is not feasible, the Board never even would have occasion to use LPM. On the other hand, if an alternative mode is feasible, LPM is a means to reach a preliminary conclusion that the parties can attempt to refute with traditional market dominance evidence. The LPM calculation itself relies upon the pricing of the lowest cost feasible transportation alternative, which is part of the traditional market

[33] AAR at 11-13; CSX at 11-20.

[34] *DuPont*, slip op. at 19 (served March 24, 2024) (LPM is "not a binding rule" and "the agency would be open to other ways to address the competitiveness of suggested transportation alternatives.").

dominance evidence that both parties typically already submit. The additional time and expense required to make the limit price calculation is negligible. LPM is a particularly useful tool to expedite market dominance determinations in carload cases which typically have scores of origin-destination pairs. AAR's claim that eliminating the LPM analysis would expedite the market dominance determination has no basis in reality.

B. Expedited Market Dominance Determination.

CSX has suggested a process for the early submission of market dominance evidence on a separate track from SAC that would produce a market dominance determination, if not a fully-supported decision, prior to the submission of opening SAC evidence. Although the Joint Carload Shippers gave serious consideration to this proposal, ultimately they concluded that it is not feasible within the time constraints of the statutory procedural schedule and that it does not offer most the benefits CSX claims.

The Joint Carload Shippers believe that CSX's proposal for an accelerated market dominance determination is overly-compressed for a multi-lane case, which will be more typical for carload shippers who must aggregate lanes, and often commodities, to create the volume needed to economically justify the cost of a SAC case. While CSX compares its proposed schedule to those in the bifurcated *TPI* and *M&G* cases, complainants were only able to meet those aggressive schedules for the following reasons:

- In *TPI*, the complainant had substantially completed its opening evidence when the Board issued its bifurcation decision less than a month before combined SAC and market dominance evidence was to have been filed under the prior procedural schedule.
- In *M&G*, the substantial overlap of issues with *TPI*, because both cases concerned the transportation of polymers, created efficiencies that would not ordinarily exist.

- In both cases, once the Board bifurcated the procedural schedule, complainants no longer had to devote resources to their SAC evidence, which allowed them to divert additional resources to market dominance that will not be an option under CSX's proposal where complainants must still devote resources to SAC evidence and on an even more compressed schedule than either TPI or M&G faced.

CSX's proposed schedule also compresses 30 days for rebuttal evidence in *TPI* and *M&G* into just 15 days, which is impossibly brief. Furthermore, those cases, which primarily or exclusively involved polymers, were relatively easy when contrasted with *DuPont*, which had 26 different commodities.[35]

CSX also compares its proposed schedule to that in Three-Benchmark cases, because both provide 90 days for filing opening market dominance evidence.[36] But Three-Benchmark cases do not encompass anywhere near the number of lanes and commodities of a carload SAC case. Although CSX suggests the Board could extend the schedule for complex cases, complexity will be the rule, not the exception, for carload SAC cases.[37] The Board should not adopt generally-applicable rules predicated upon exception cases.

CSX identifies four supposed benefits of its proposal. But those benefits are overstated and based upon flawed premises. First, CSX claims its proposal will remove one significant contested issue from the compressed timeline for presentation and consideration of SAC. While

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[35] Three lawyers spent an entire week in Wilmington, DE meeting with many different personnel from various DuPont businesses to gather market dominance facts on the 26 issue commodities. Those meetings occurred only after weeks of reviewing DuPont documents and data, and several teleconferences were required in follow-up to those meetings. All of this had to occur before drafting the equivalent of 26 different market dominance evidentiary submissions.

[36] CSX at 17.

[37] Of the four recent carload cases, only *SunBelt* involved just one issue movement, whereas *M&G*, *TPI*, and *DuPont* involved anywhere from 70 to 138 lanes and as many as 26 commodities.

CSX's proposal certainly means the parties won't have to submit SAC and market dominance together during the reply and rebuttal rounds, it does not remove market dominance from the overall compressed timeline for a SAC case. Rather, it forces the complainant to do more in the period for conducting discovery and preparing opening SAC evidence, by dealing with all aspects of market dominance simultaneously. In other words, CSX's proposal works almost entirely to the benefit of the defendant on reply, but only at the expense of the complainant on opening.

Second, CSX claims that, in a multi-lane case, a mixed result market dominance decision could affect the SARR configuration in the SAC evidence. As noted above, however, a multi-lane case is particularly ill-suited to CSX's accelerated schedule. Moreover, the 30 day period in CSX's proposed schedule between a market dominance determination and SAC opening evidence is nowhere near sufficient to redesign the SARR. Furthermore, the complainant has an interest in retaining even the non-market dominant lanes in the SARR so that it does not need to resubmit SAC evidence if it is successful on a petition for reconsideration, or appeal, of the Board's market dominance decision.[38] Thus, this alleged benefit rings hollow.

Third, CSX claims that its proposal would avoid unnecessary SAC evidence in cases where the complainant fails to prove market dominance, without bifurcating or delaying the overall proceeding.[39] To some extent, this always has been true in SAC cases. Ironically, however, it is less likely to be true in multi-lane carload cases because some portion of complainant's case is likely to remain after a market dominance determination. Furthermore, the impracticality of this touted schedule already has been addressed above. Whatever this benefit

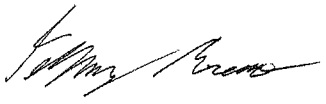
[38] Under CSX's proposal, there would be no petition for reconsideration or appeal of a market dominance decision until the Board reached a final decision on rate reasonableness. CSX at 18 (n. 32).

[39] CSX at 13.

may be, it does not accrue significantly to the complainant who will be well into development of its opening SAC evidence by the time the Board issues its market dominance determination.

Finally, CSX claims that accelerated market dominance determinations provide an opportunity for meaningful settlement discussions. While this may be true, it is insufficient to overcome the overall impracticality of the proposal.

Respectfully submitted.



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Dated: August 29, 2016

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Docket No. EP 733	)	**Expediting Rate Cases**

Reply
Verified Statement

Of

Thomas D. Crowley
President

And

Robert D. Mulholland
Vice President

L. E. Peabody & Associates, Inc.
On Behalf Of

The American Chemistry Council,
the Dow Chemical Company,
and M&G Polymers USA, LLC
(collectively the "Joint Carload Shippers")

Due Date: August 29, 2016

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I. INTRODUCTION

We are Thomas D. Crowley and Robert D. Mulholland, economists and President and a Vice President, respectively, of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. We are the same Thomas D. Crowley and Robert D. Mulholland that submitted an Opening Verified Statement ("VS") in this Proceeding on August 1, 2016. Our Opening Verified Statement addressed the Surface Transportation Board's ("STB" or "Board") proposal to modify its rules related to rate case procedures, specifically to expediting rate cases.

We have been requested by Counsel for The American Chemistry Council, the Dow Chemical Company, and M&G Polymers USA, LLC (collectively the "Joint Carload Shippers") to address the railroads' Opening comments dated August 1, 2016.

The results of our review are summarized in the remainder of this Reply VS.

II. DISCOVERY: STANDARDIZED REQUESTS AND/OR DISCLOSURES

In our Opening Verified Statement, we demonstrated that attempts to standardize a set of discovery requests could result in the production of insufficient and/or archaic materials. However, there are opportunities for significant efficiency improvements related to implementing standardized production *parameters* for certain critical discovery materials.

In their Opening comments, Coal Shippers/NARUC similarly articulated their belief that discovery delays are best addressed not by adopting a new set of pre-filing rules akin to those that now apply in merger cases, but by improving the efficiency of the current discovery process.[1]

A. TRAFFIC AND REVENUE DATA

The number one contributing factor to the cost and complexity of rate cases is the requirement for complainants to reconstruct a functional traffic and revenue database from the disparate parts provided by the railroads in discovery. Complainants must complete this critical process in short order, and any anomalies not accounted for in the database compilation process have the potential to undermine the development of complete evidence.

As we stated in Opening, although the traffic and revenue data requested by complainant shippers has not changed significantly over the last several cases, the format in which it has been provided has varied significantly from case to case, but with a common theme. In all recent stand-alone cost ("SAC") rate cases, the railroads have produced traffic data in a series of tables

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[1] The Western Coal Traffic League ("WCTL"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), National Association of Regulatory Utility Commissioners ("NARUC"), National Rural Electric Cooperative Association ("NRECA"), and Freight Rail Customer Alliance ("FRCA") (collectively "Coal Shippers/NARUC") Opening Comments, at 38.

(flat files) that have been disassembled from their original relational format (within a working database) as maintained by the railroads in the normal course of business. The railroads' production of terabytes of individual flat files requires the complainant to first restore each table into a proper database file and then subsequently rebuild the relational database from scratch. The design of these relational databases is something to which each railroad has devoted years of fine-tuning and perfecting. Yet, a complainant is expected to undertake this database building process *during the opening phase of each rate case before any evidence can be developed.* Given that the provided flat files already exist within a relational database where all fields and tables are linked and keyed appropriately, this data should be provided in an "intact" and "relational" database format.[2]

By far, the best option for expediting rate cases is to simply require the railroads to provide the databases containing their traffic and revenue data in the same format used by the railroads in the normal course of business, i.e., provide intact relational databases housing tables that are linked and keyed appropriately.[3] If the traffic and revenue data were provided in complete functioning databases (limited to the specific records and fields required), and linked in the manner required to correlate data contained in the various tables, and supplemented with complete decoders, complainants could reliably develop SAC evidence within the procedural schedule.

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[2] As we noted in our Opening VS, it is not clear what combination of hardware and software each railroad uses to manage its databases. However, it has been established that some of the railroads' databases currently exist in Client Server (PC) format that is easily deliverable. To the extent that any railroad databases require conversion from mainframe or older PC formatting, the Board should hold a technical conference to establish the best practices for converting mainframe databases to Client Server databases for use in rate cases.

[3] Confidential data which are irrelevant to the case can be removed by deleting select fields and/or records of data from the extant tables, and perhaps removing some non-essential tables from the database.

B. THE RAILROADS' REACTION TO THE BOARD'S PROPOSAL

One option suggested by the Board in its Advance Notice of Proposed Rulemaking ("ANPR") as a means to standardize data in rate cases involves having the Board annually collect waybill and other traffic data customarily used in SAC cases. Under this scenario, the STB would provide the standardized information to the complainant upon the filing of a complaint and the signing of protective orders. In their Opening comments, the railroads all strenuously objected to the concept of the STB collecting and storing annual traffic data for use in rate cases.

CSX Transportation Inc. ("CSXT") stated:

> The Board should not attempt to itself collect traffic data that could be used in rate cases, as some parties apparently have suggested. Such a proposal would have significant burdens and little benefit.[4]
>
> First and foremost, the complexity and volume of the traffic and event data that are produced in rate cases would make it unduly burdensome for railroads to continually produce such data to the Board. Traffic and event data is not available to the railroads at the press of a button."[5]
>
> At a minimum, the Board would need to process and maintain that amount of data on a rolling basis for each of the Class I carriers for an extended period of years. It would require a significant investment in servers or another storage approach that is thus far unexplained.[6]
>
> It is not clear that there is any reasonable way to standardize data collection to account for complainants' different demands and railroads' different systems.[7]

Norfolk Southern Railway Company ("NS") articulated similar objections, citing problems standardizing the data and the burden such collection would impose as significant

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[4] CSXT Opening Comments at p.25.
[5] *Id.*
[6] *Id.* pp. 25-26.
[7] *Id.* p. 26.

deterrents to pursuing the Board's proposal. NS stated, that because the STB would not know which parts of the defendant's rail network the potential SARR might traverse, the STB would have to collect data regarding the defendant's entire rail network. NS concludes that requiring railroads to submit such data for the STB library "would raise serious concerns under the Paperwork Reduction Act, Public Law 96 -511, 94 Stat. 2812, creating immense administrative burdens and enormous collection costs on the railroads."[8]

NS further states that collecting and storing railroad traffic and revenue databases in the STB library "would have little to no countervailing benefit."[9]

> Consider the fact that NS did not have to litigate a SAC Case to completion for ten years from 2004 to 2014. It is ludicrous, and a sheer waste of both the STB's and the railroads' limited resources, to ask the railroads to provide, and have the STB maintain, complex documents and massive data on an ongoing basis.[10]

Union Pacific Railroad Company ("UP") also expressed opposition to the STB collecting and storing railroad traffic and revenue data.

> The burden on the Board and the railroads of requiring each Class I railroad to produce system-wide data every year is dramatically disproportionate to the need for the data.[11]
>
> Compiling the relevant information into a useable format requires substantial efforts on the part of railroad employees, consultants, or both who are familiar with the data.[12]

The railroads uniformly latched onto the Board's stated concern regarding the potential burden associated with ongoing annual data collection activities. The railroads' objections to collecting and submitting traffic and revenue databases to the STB on an annual basis have an

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[8] NS Opening Comments at p. 37.
[9] *Id.* p. 38.
[10] *Id.*
[11] UP Opening Comments at p. 4.
[12] *Id.* p. 5.

obvious common theme: such data collection would be a "massive" undertaking that would require "substantial efforts" and would be "unduly burdensome" for the railroads.[13]

C. RESPONSE TO RAILROAD COMMENTS

The railroads' acknowledgement of the burden associated with the preparation of functioning databases for use in rate cases highlights the need for a meaningful change in the way traffic and revenue data are produced in discovery, because the same burdens the railroads claim they face are exponentially greater for shippers.

The railroads' objections underscore the plight that shippers face in every SAC case. The railroads claim it would be too burdensome for them—as developers and keepers of the data—to produce the data in an expedient manner for use in future rate cases. Ironically, this is the very burden that is imposed on shippers every time a shipper brings a case before the Board. Moreover, shippers have far less familiarity with the data than the railroads who compile and maintain it on a regular basis. In fact, shippers are expected to accomplish the task of recreating a linked database, from data that is not theirs to start with, in a timely and cost effective manner as part of their development of opening evidence. This routinely leads to two very problematic outcomes.

First, when shippers encounter problems conducting this task, they are forced to request extensions of time to develop Opening evidence. The situation can be compared to ordering a bicycle and receiving it in three shipments of disassembled parts with incomplete assembly

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[13] NS and UP also objected to an annual filing because the collection would include system wide data whereas SAC cases are more limited in geographic scope. (See: NS Opening comments at p. 37 and UP Opening comments at p. 5.) The railroads fail to acknowledge that system wide car event data is commonly required even for relatively small SARR systems because the entire end-to-end route of movement must be evaluated to develop revenue divisions on cross-over traffic under the Board's Average Total Cost ("ATC") methodology.

instructions. If a crucial part is found to be missing after the bicycle is 90 percent assembled, more time would be needed to obtain the missing part. In SAC cases, such requests for more time are sometimes met with resistance from the railroads, and extending the procedural schedule is generally not a desirable outcome for shippers, as they incur greater litigation costs and are forced to wait longer for resolution of their complaint.

Second, despite their best efforts, the very nature of the task of trying to reconstruct a functioning linked database from the disparate parts provided sometimes results in data links being missed, which can manifest in several different ways. For example, in the database reconstructed by the complainant, selected carloads included in the traffic group may not be linked to trains on which they move in the same manner as they are in the railroads' internal databases. This may cause the complainant to make technically incorrect interpretations of the unlinked data tables despite its best good faith efforts. Returning to the bicycle analogy, this is comparable to receiving parts that are close, but not exactly correct. The assembled bicycle might appear to work properly, but fail a month later. The bicycle is fixable, but without complete assembly instructions, it would take time to diagnose and correct the error.

This type of problem seldom becomes evident in a SAC case until pointed out by the railroad, which is more familiar with the data. The railroads are very quick to exploit this sort of technical imperfection as the foundation of Reply arguments designed to sink the complainant's case, at which point the shipper's ability to reply on rebuttal is limited.

The best solution to this problem is for the railroads to give the data to the Board in a functioning, linked database, with standardized data. Failing that, the obvious compromise should be that railroads provide their traffic and revenue data directly to shippers in every rate case in a functioning, linked database. The Board should reject any claim that even this is too

big of a request on the part of the shippers, and that it is the equivalent of requiring the railroads to perform a special study. The railroads possess far greater knowledge of, and familiarity with, the data in question. Any burden this may impose on the railroads is exponentially less than the burden imposed on complainants to perform the same task. Under the current rules, complainants are heavily burdened with developing a relational database and all required links before developing evidence in every rate case.

Furthermore, the railroads practice of providing isolated flat files imposes a burden on the railroads themselves, as they (or their consultants and legal counsel) must expend significant resources responding to weeks (and often months) of follow-up questions, including time spent developing supplemental productions to fill in the inevitable gaps. Providing the existing links would reduce, if not eliminate, this effort on the part of the railroads responding to follow-up requests from complainants. In addition, requiring the railroads to provide the traffic and revenue data in a functioning, linked database would dramatically reduce the likelihood that shippers would need to request extensions to file opening evidence.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Sworn to and subscribed
before me this 29th day of August, 2016

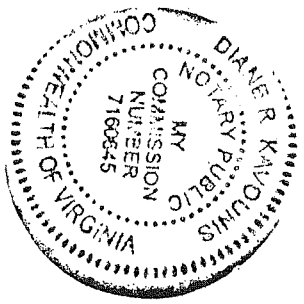
Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2016
Registration Number: 7160645

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, ROBERT D. MULHOLLAND, verify under penalty of perjury that I have read the foregoing Verified Statement of Robert D. Mulholland, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Robert D. Mulholland

Sworn to and subscribed
before me this 29th day of August, 2016

Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2016
Registration Number: 7160645

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Comments of the Joint Carload Shippers" has been served this 29th day of August 2016, via first class mail upon the following:

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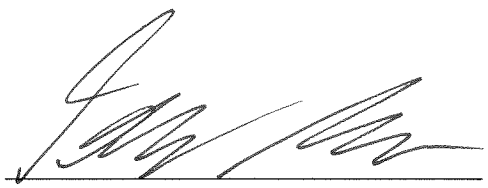

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