

incorporation-by-reference effective February 4, 1992 (57 FR 4162). We reserve the amendment of 40 CFR part 272, subpart KK for the codification of Ohio's program changes until a later date.

#### K. Statutory and Executive Order Reviews

This rule only authorizes hazardous waste requirements pursuant to RCRA 3006 and imposes no requirements other than those imposed by state law (see **SUPPLEMENTARY INFORMATION**, Section A. Why are revisions to state programs necessary?). Therefore, this rule complies with applicable executive orders and statutory provisions as follows:

##### 1. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

The Office of Management and Budget has exempted this rule from its review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821 January 21, 2011).

##### 2. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

##### 3. Regulatory Flexibility Act

This rule authorizes state requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those required by state law. Accordingly, I certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

##### 4. Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

##### 5. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to this rule because it will not have federalism implications (*i.e.*, substantial direct effects on the States, on the relationship between the national government and the states, or on the distribution of

power and responsibilities among the various levels of government).

##### 6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000) does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects on one or more Indian tribes, or on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.)

##### 7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866 and because the EPA does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

##### 8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action as defined in Executive Order 12866.

##### 9. National Technology Transfer Advancement Act

EPA approves state programs as long as they meet criteria required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a state program, to require the use of any particular voluntary consensus standard in place of another standard that meets requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply to this rule.

##### 10. Executive Order 12988

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

##### 11. Executive Order 12630: Evaluation of Risk and Avoidance of Unanticipated Takings

EPA has complied with Executive Order 12630 (53 FR 8859, March 18, 1988) by examining the takings

implications of the rule in accordance with the Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings issued under the executive order.

##### 12. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Because this rule authorizes pre-existing State rules and imposes no additional requirements beyond those imposed by State law and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994).

##### 13. Congressional Review Act

EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until sixty (60) days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final authorization will be effective March 19, 2012.

#### List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: February 29, 2012.

**Susan Hedman,**  
Regional Administrator, Region 5.

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#### DEPARTMENT OF TRANSPORTATION

##### Surface Transportation Board

##### 49 CFR Part 1244

[Docket No. EP 646 (Sub-No 3)]

##### Waybill Data Released in Three-Benchmark Rail Rate Proceedings

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Final rule.

**SUMMARY:** When a shipper files a formal complaint that a railroad's rate is too high, the Surface Transportation Board (Board) must determine whether the challenged rate is reasonable. To present its case using the Board's procedures for small cases, the complaining shipper needs to obtain from the Board confidential information that the Board collects regarding the rates that the defendant railroad charges other shippers for similar shipments.

Pursuant to the notice of proposed rulemaking published in the **Federal Register** on October 27, 2010, the Board is formalizing its rules with respect to the Three-Benchmark methodology for adjudicating simplified rate case complaints, making the most recent four years of this confidential information available to parties and permitting the parties to use any combination of the four years of confidential information when presenting their cases.

**DATES:** Effective March 12, 2012.

**FOR FURTHER INFORMATION CONTACT:** Scott Zimmerman at (202) 245-0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Board is formalizing its rules with respect to the Three-Benchmark methodology used to adjudicate simplified rate case complaints. Under the rule we are adopting here, the Board will release to the parties in Three-Benchmark proceedings the unmasked Carload Waybill Sample data (Waybill Sample data)<sup>1</sup> of the defendant carrier for the four years that correspond with the most recently published Revenue Shortfall Allocation Method (RSAM) figures. The parties may then form their traffic comparison groups by choosing the movements from the released four-year Waybill Sample data that they believe are the most comparable to the issue movements.

<sup>1</sup> The Carload Waybill Sample is a sample of carload waybills for shipments by all rail carriers that terminate at least 4,500 carloads or 5% of the carloads in any one state. The Waybill Sample identifies originating and terminating freight stations, the names of all railroads participating in the movement, the point of all railroad interchanges, the number of cars, the car types, the weight in tons, the commodity type, and the freight revenues. The names of the shipper and consignee are not included in the data set. Other data in the sample, however, may permit the identification of a shipper and consignee. Therefore, railroads may encrypt, or "mask," revenue information associated with contract shipments to safeguard the confidentiality of the contract rates, as required by 49 U.S.C. 11904.

**Background**

In *Simplified Standards for Rail Rate Cases (Simplified Standards)*, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc. v. STB (CSXT I)*, 568 F.3d 236 (DC Cir. 2009), *vacated in part on reh'g, CSX Transp., Inc. v. STB (CSXT II)*, 584 F.3d 1076 (DC Cir. 2009), the Board modified its simplified rail rate guidelines, creating a Simplified Stand-Alone Cost approach for medium-size rail rate disputes and revising its Three-Benchmark approach for smaller rail rate disputes.

The Three-Benchmark method, originally promulgated in 1996,<sup>2</sup> compares a challenged rate of the "issue traffic" (the traffic at issue in the case), measured as the ratio of the traffic's revenues to variable costs (R/VC ratio), to the R/VC ratios of a comparison group of traffic (R/VC<sub>COMP</sub>) drawn from the Waybill Sample data of the defendant carrier.<sup>3</sup> Under the Three-Benchmark method as revised in *Simplified Standards*, each party creates and proffers to the Board a proposed comparison group (R/VC<sub>COMP</sub>), and the Board selects the one that it concludes is most similar in the aggregate to the issue movements. The Board then applies a "revenue adequacy adjustment" (the ratio of RSAM + R/VC<sub>>180</sub>) to each movement in the comparison group and calculates the mean and standard deviation of the resulting R/VC ratios. If the challenged rate exceeds a reasonable confidence interval around the estimated mean, it will be presumed unreasonable, and, absent any "other relevant factors," the maximum lawful rate will be prescribed at that boundary level.

The rule proposed in *Simplified Standards* would have required parties to draw their traffic comparison groups from the most recently available one year of Waybill Sample data derived from the defendant carrier's shipments of non-issue traffic. *Simplified Standards*, slip op. at 32-33 (STB

<sup>2</sup> *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) (*Simplified Guidelines*).

<sup>3</sup> In addition to the R/VC<sub>COMP</sub> benchmark, the two other benchmarks in the Three-Benchmark methodology are RSAM and R/VC<sub>>180</sub>. The RSAM benchmark measures the average markup that the rail carrier would need to charge all of its "potentially captive" traffic to earn adequate revenues, as measured by the Board under 49 U.S.C. 10704(a)(2). The R/VC<sub>>180</sub> benchmark measures the average markup over variable costs currently earned by the defendant carrier on its potentially captive traffic. "Potentially captive" traffic is all traffic priced at or above the 180% R/VC level, which is the statutory floor for regulatory rail rate intervention. See *Simplified Standards for Rail Rate Cases-2009 RSAM and R/VC<sub>>180</sub> Calculations*, EP 689 (Sub-No. 2), slip op. at 1 (STB served July 14, 2011) (*2009 RSAM and R/VC<sub>>180</sub> Calculations*). See also 49 U.S.C. 10707(d).

served July 28, 2006) (Notice of Proposed Rulemaking). The final rule, however, allowed parties to form comparison groups using Waybill Sample data from the four years that correspond with the most recently published RSAM figures. *Simplified Standards*, slip op. at 80.

On judicial review, the court concluded that the Board had failed to provide adequate notice of the final rule regarding the available date range of Waybill Sample data. Accordingly, the court vacated that portion of *Simplified Standards*. *CSX II*, 584 F.3d at 1078. As a result, there is currently a gap in the Board's rules; *i.e.*, there is no defined period for which unmasked Waybill Sample data is to be released in a Three-Benchmark proceeding.<sup>4</sup>

On April 2, 2010, the Board issued a notice of proposed rulemaking for a rule that would provide to the parties in Three-Benchmark proceedings the unmasked Waybill Sample data of the defendant carrier for the four years that correspond with the most recently published RSAM figures. The parties would then draw their comparison groups in any combination they choose from the released Waybill Sample data. The Board received comments on this proposal from shippers, rail carriers, the U.S. Department of Agriculture, and other interested organizations.<sup>5</sup> AAR, CP and NSR/CSXT expressed concern that the Board did not provide the rationales and regulatory objectives behind the proposed rules. In response, on October 22, 2010, the Board published a revised notice, which proposed rules identical to those proposed on April 2, 2010, and

<sup>4</sup> Prior agency precedent is not definitive. The 1996 *Simplified Guidelines* decision did not discuss how many years of Waybill Sample data the Board would release to the parties. The Interstate Commerce Commission's decision in *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C.2d 262 (1988), relied on by shippers, was reversed on appeal in *Burlington Northern Railroad v. ICC*, 985 F.2d 589 (DC Cir. 1993), and the letter issued June 8, 2005 in *B.P. Amoco Chemical Co. v. Norfolk Southern Railway*, NOR 42093, cited in NSR's and CSXT's June 1, 2010 reply comments (at 11), was an unpublished letter ruling by Board staff; hence, neither is precedential.

<sup>5</sup> Initial and Reply comments on the April 2, 2010 notice of proposed rulemaking were filed jointly by American Chemistry Council, Fertilizer Institute, National Grain And Feed Association, The National Industrial Transportation League, Consumers United for Rail Equity, American Forest and Paper Association, Glass Producers Transportation Council, Alliance for Rail Competition and Montana Wheat and Barley Commission (collectively Shippers); jointly by Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT) (collectively, NS/CSXT); and by Canadian Pacific Railway Company (CP), Association of American Railroads (AAR), and U.S. Department of Agriculture (USDA). CSXT also filed separate reply comments. We cite to these comments as "Initial" or "Reply."

included an expanded explanation of the rationales and regulatory objectives behind the proposed rules. Following publication, the Board received additional comments from rail carriers, shippers, and other interested organizations.<sup>6</sup> Although the final rules adopted in this decision are identical to those published in the two previous notices, the Board responds in further detail to the comments received in response to the April 2, 2010 and October 22, 2010 notices.

AAR and the commenting rail carriers object to permitting shippers to draw their comparison group from the four most recently available years of Waybill Sample data, because of what they characterize as “regulatory lag.”<sup>7</sup> They argue that even the most recent one year of Waybill Sample data is unlikely to reflect current market conditions because the data may be up to two years old by the time the Board publishes the Waybill Sample. They contend that the proposed rule increases the likelihood of distorted comparison groups and results by permitting parties to use six-year old data.<sup>8</sup> AAR further contends that the Board can address any issues of data insufficiency in individual cases from the one-year data release by requiring the carrier to provide its traffic tapes for all movements of the commodity at issue for the current period.<sup>9</sup>

Shippers, on the other hand, generally support adoption of the four-year Waybill Sample data rule. They argue that using multiple years of Waybill Sample data will smooth out the effects of short term variations in prices and costs that make up the data. They also claim that it is necessary to permit the use of four years of Waybill Sample data because a single year’s traffic may not contain sufficient data from which to derive meaningful or representative comparison groups. Shippers maintain that the Board should require, rather than merely permit, parties to incorporate data from each year of the current four-year Waybill Sample data in developing their R/VC<sub>COMP</sub> comparison groups, because the two

<sup>6</sup> Supplemental initial or reply comments on the October 22, 2010 notice were filed by American Chemistry Council, Fertilizer Institute, National Grain And Feed Association, and National Industrial Transportation League jointly, and by AAR, CP, and NSR/CSXT. We cite to these as “Supp.” or “Suppl. Reply.”

<sup>7</sup> E.g., AAR Supp. at 6-9; CP Initial at 4-9 and Supp. at 2-5; NSR/CSXT Initial at 7-18 and Supp. at 9-12. CP and NSR/CSXT mistakenly assumed in their initial comments that the release of one year of Waybill Sample data was “the existing rule.” See *supra* note 5.

<sup>8</sup> E.g., AAR Initial at 4.

<sup>9</sup> AAR Initial at 6 n.5.

other benchmarks (RSAM and R/VC<sub>>180</sub>) are calculated using Waybill Sample data for the same four-year period.<sup>10</sup>

### Discussion and Conclusions

Parties in a Three-Benchmark rate case may submit a comparison group from the four-year Waybill Sample data we provide them at the beginning of the case. This rule simply defines the range of data that will be available to the parties; it does not dictate how the data will be used. We are not imposing a rule that forces the parties to submit a comparison group that includes movements from each year of the four-year period, or just from the first year, or the last year, or any particular combination of years. Parties may construct their comparison groups from any combination of movements drawn from the four-year Waybill Sample data. We will continue to use the final offer selection process to select the best comparison group on a case-by-case basis.

We have three reasons for adopting this rule. First, this rule provides the parties the flexibility needed to tailor their comparison groups as they see fit. In some cases, a shipper might believe it needs to use more than one year of data to demonstrate that rates for the issue traffic were unreasonably high. Thus, a party may, for example, select its comparison group from data across all four years and argue that a group selected from all four years is the most comparable to the movements at issue. On the other hand, a party may select its comparison group from a single year’s data and argue, based on that case’s facts, that the best comparison group is one drawn from only that year. The Board remains the ultimate arbiter in each case of which litigant’s comparison group it will use to judge the challenged rate.

Second, permitting the parties to draw a comparison group from the four-year Waybill Sample data should provide enough observations to draw a valid inference about the maximum lawful rate. One year of data may in some cases be insufficient to provide a meaningful benchmark for comparison purposes. The Board was particularly concerned in *Simplified Standards* with having sufficient movements of certain hazardous cargoes (known as toxic inhalation hazards or “TIH”) for parties to develop appropriate comparison groups, but our concern about data sufficiency is broader than that. As USDA noted in its comments (at 3), for example, because production of some specialty crops may vary significantly

from year to year, shippers of such crops must have the flexibility to draw upon data generated during multiple year periods.

The rail carriers argue that, instead of permitting the use of four years of Waybill Sample data, we should instead require the carrier to make available its most recent traffic data. Using the most recent traffic data would, according to the carriers, meet the Board’s desire for both flexibility in the selection of the comparison group and enough observations to make an informed decision.

We disagree. Based on our experience in Stand-Alone Cost (SAC) cases and in processing the annual Waybill Sample data, we have already concluded that using the prepared Waybill Sample data is one of the linchpins to the simplified rate review process. The release of four years of Waybill Sample data to the parties minimizes the possibility that additional traffic data will be needed for the parties to develop their comparison groups.<sup>11</sup> Moreover, the costs and delays associated with the collection, preparation, production, verification, and use of the carrier’s most recent traffic data run contrary to Congress’s directive and the Board’s objective of devising simplified procedures for use in small rate cases. Because relief in Three-Benchmark cases is limited, the costs associated with extensive discovery could significantly offset, or even eliminate, any rate reduction benefits from such cases and deter shippers from seeking relief. For example, relying only on data provided by the carrier presents the problem that, unlike the Waybill Sample data, the traffic data provided by the carriers would not include the variable cost data necessary to determine R/VC ratios.<sup>12</sup> Adopting the carriers’ proposal would substantially increase the cost of bringing a Three Benchmark case and impede shippers’ ability to seek relief for smaller disputes.

Third, making four years of data available is fully consistent with the

<sup>11</sup> The Board noted in *Simplified Standards*: “This Three-Benchmark approach rests on the selection of a useable comparison group. If a particular movement is so unique that there are insufficient comparable movements in the Waybill Sample, we will entertain a reasonably tailored request for comparable movements from the defendant’s own traffic tapes. Such motions will be decided on a case-by-case basis, but are not encouraged, as they will expand the cost and time of pursuing relief under this simplified approach.” Slip op. at 83.

<sup>12</sup> As part of the preparation of the Waybill Sample data for each calendar year, the Board calculates the variable costs for each movement in the sample using its Uniform Rail Costing System program and the carriers’ R-1 annual financial reports.

<sup>10</sup> Shippers Initial at 8-9.

basic idea behind the Three-Benchmark approach. As the Board stated in *Simplified Standards* (at 73), in the absence of any other suitable method, a comparison approach can be instructive as to the reasonable level of contribution to fixed costs (the R/VC ratio) for a particular captive movement when a second, cost-based approach is also employed to constrain rail rates. The Three-Benchmark methodology embodies this approach: it is a comparison-based methodology that applies a cost-based adjustment—the ratio of RSAM + R/VC<sub>>180</sub>—to the comparison groups. The Three-Benchmark method begins with the assumption that, in setting rail rates for captive traffic, “the carrier will not exceed substantially the level permitted by the SAC constraint.” *Id.* An adjustment to the R/VC levels of captive traffic is needed, however, because the rates may be priced below the SAC constraint due to market forces. *Id.* Applying the RSAM + R/VC<sub>>180</sub> adjustment factor to the R/VC ratios of the comparison group adjusts those ratios to those that would be needed for the carrier to achieve revenue adequacy.<sup>13</sup> Assuming that the comparison group has been drawn properly from other captive traffic with similar characteristics—and the final offer procedures were adopted to create incentives for both parties to submit a reasonable comparison group—we concluded that “these adjusted R/VC ratios would fairly reflect the maximum lawful rates the carrier could charge those potentially captive movements.” *Id.* Accordingly, the selection of the best comparison group “will be governed by which group the Board concludes provides the best evidence as to the reasonable level of contribution to joint and common costs for the issue movement.” *Id.* at 18.

The rail carriers argue against using four years of Waybill Sample data because, they claim, (1) The data will be too stale, (2) the R/VC<sub>COMP</sub> benchmark should have no relationship to the time period used to calculate the other two benchmarks, and (3) in calculating the R/VC<sub>COMP</sub> benchmark, there is no need to smooth out business variations in the pricing of similar traffic. The carriers also claim the proposal is flawed because rates and costs in the industry and for specific commodities change over time. These objections are best summarized by NSR and CSXT, both of which declare that “the goal of the R/

<sup>13</sup> Likewise, the RSAM + R/VC<sub>>180</sub> adjustment would reduce R/VC ratios of the comparison group where the carrier is earning greater than adequate revenues from its captive traffic.

VC<sub>COMP</sub> is not to smooth out annual variations; it is to reflect as accurately as possible current market conditions in which the carrier establishes the challenged rate.” NSR/CSXT Supp. at 6–7.

The carriers’ arguments are not persuasive. The fundamental purpose of the Three-Benchmark approach is not to reflect a snapshot of current market conditions; it is to use the three benchmarks to decide the reasonable maximum contribution to joint and common costs for the issue movement where no cost-based approach is feasible. The R/VC<sub>COMP</sub> benchmark is used to approximate the maximum reasonable rate that a rail carrier could charge under the SAC constraint. The Three-Benchmark method compares the R/VC ratios (*i.e.*, percentage markups over variable cost) of particular current movements against the R/VC ratios of comparable movements selected from any mix of movements within the four years of Waybill Sample data.<sup>14</sup> One weakness in employing this benchmark to protect shippers from unreasonable rates is that the constraint may not always approximate the maximum reasonable rate under the SAC constraint, particularly over relatively short observational periods.<sup>15</sup> By giving parties the opportunity to select their comparison groups from as much or as little data as they choose from within multiple years of Waybill Sample data, the Board can have greater confidence that the adjusted R/VC ratios of the comparison group (R/VC<sub>COMP</sub>) selected through the final offer process will approximate the maximum reasonable level permitted by the more precise SAC constraint.<sup>16</sup>

<sup>14</sup> The carriers’ evidence regarding changes over time in rates and costs within the industry generally, and for specific commodities, does not support their position on the issue of data availability, because the Three-Benchmark method does not compare current rates against older rates or current costs against historical costs, but rather R/VC ratios. The carriers have provided no reason to believe that comparisons of a carrier’s R/VC ratios for similar traffic over different time periods are *prima facie* misleading or otherwise invalid. Indeed, the comments submitted by the rail carriers contain virtually no discussion of R/VC ratios themselves and are devoid of any evidence that comparisons of R/VC ratios of similar traffic for different years would skew the results of the final offer process.

<sup>15</sup> See *Simplified Standards* at 76 (observing that R/VC ratios in the upper end of the comparison group “might overstate a reasonable rate, as those rates might themselves be unlawfully high”).

<sup>16</sup> The shippers argue that we mandate that comparison groups be drawn from the same time period as the two other benchmarks. Parties are free to argue that the time period from which data may be drawn to determine the R/VC<sub>COMP</sub> benchmark should be consistent with the time period used to determine the R/VC<sub>>180</sub> and R/VC<sub>COMP</sub> benchmarks because the three benchmarks are interrelated. See

Moreover, we use the parties’ comparison group to prescribe the maximum lawful rate not just at the moment a carrier’s rates are challenged, but for a five year period. The maximum lawful rate for a movement (*i.e.*, the maximum reasonable contribution to joint and common costs expressed as an R/VC ratio) may change from year to year, as it is a function of the amount of joint and common costs that need to be recovered, as well as the level and the mix of traffic, and the revenue generated by that traffic. See *Simplified Standards* at 82. For example, a carrier with little revenue from competitive traffic in a given year will need to recover a larger share of joint and common costs from its potentially captive traffic, *id.*, while in a boom year when the carrier enjoys stronger revenues from competitive traffic, a carrier would need to recover less from its potentially captive traffic. It is therefore reasonable to permit parties broad latitude to draw information about the R/VC levels charged to comparable traffic from any or all of the most recent four years of Waybill Sample data for all three benchmarks. Again, the parties may argue that the circumstances of a particular case caution against drawing information from a four-year time period, or that a comparison group drawn from, say, only one or two years of Waybill Sample data is superior to one drawn from four years of data because of other characteristics of the selected movements,<sup>17</sup> or that, due to the inevitable regulatory lag, a further adjustment to all three benchmarks is needed (so-called “other relevant factors”).<sup>18</sup> We reiterate that the

*Simplified Standards* at 85. On the other hand, a party may believe that, for other reasons, a comparison group drawn from only one or two years of Waybill Sample data is superior to one drawn from four years of data in a given case. Allowing, but not requiring, comparison groups to be drawn from four years of Waybill Sample data is consistent with the Board’s goal of making available to the parties a sufficiently robust yet easily (and equally) accessible data set from which the parties are given the maximum flexibility to draw as they see fit to shape their comparison groups.

<sup>17</sup> The rail carriers argue, nonetheless, that they will be prejudiced by this four-year rule because the Board has not stated that the age of the movements in a comparison group will be a factor in deciding which comparison group is most similar to the issue traffic. This argument is erroneous. The Board has stated previously that the list of comparability factors in *Simplified Standards* is not exclusive and that a rail carrier is free to limit its proposed comparison group to the most recent movements available in the Waybill Sample data and to argue that its group is more appropriate for the Board to select. *E.I. Du Pont De Nemours & Co. v. CSXT Transp. Inc. (DuPont)*, NOR 42099, slip op. at 2 n.4 (STB served Jan. 15, 2008).

<sup>18</sup> Citing our rejection of a rail carrier’s proposed adjustment for other relevant factors in *DuPont*, slip

Board remains the ultimate arbiter of which litigant's comparison group it will use to assess the challenged rate(s), and the Board will consider the extent to which a party's comparison group is most similar in the aggregate to the issue traffic on a case-by-case basis. The final offer process gives both parties the opportunity to convince the Board that its comparison group is most similar to the issue traffic.

In addition, complainants should have access to multiple years of data so that they can make year-to-year comparisons of rate changes to identify potentially unreasonable carrier pricing behavior. Although the R/VC ratios of the issue traffic might well be similar to the R/VC ratios of comparable movements in the current year, they might be dramatically higher than the R/VC ratios of comparable shipments from prior years. We see no reason why a complainant should be deprived at the outset of the case of readily available Waybill Sample data needed to make that case.<sup>19</sup>

Finally, NSR and CSXT argue that 49 U.S.C. 10701(d)(1) compels us to use the most current data when evaluating the reasonableness of rates. They maintain that the statute "requires at a minimum that the comparison group movements reflect the same market conditions that exist when the railroad established the challenged rate." NSR/CSXT Supp. at 7. Put differently, they argue that when asked to judge the reasonableness of a rate set in 2010, we cannot perform an analysis of whether the rate was comparable to rates from 2005–2008. *Id.*

This statutory argument is unpersuasive for a number of reasons.

op. at 17–18 (STB served June 30, 2008), some rail carrier commenters maintain that the Board has foreclosed such adjustments. The carriers are mistaken. While the Board did not accept the carrier's adjustment factor in that case, it rejected the proposal because the adjustment was incomplete. The carriers also argue that the proposed rule's prohibition on the use of non-public information from their files—particularly evidence of changes in costs or market conditions—hampers their ability to show that a shipper's comparison group consisting of older movements is not comparable to the issue traffic and effectively precludes them from proving changed conditions as an "other relevant factor." To the contrary, however, evidence outside the four years of Waybill Sample data provided under this rule may be used to attempt to demonstrate "other relevant factors." *See Simplified Standards*, slip op. at 77–78.

<sup>19</sup> Releasing the Waybill Sample for the four years that correspond with the most recently published RSAM (as opposed to five years or three years of data) is reasonable because (1) complainants must have access to that data anyway to verify the Board's calculation of the RSAM and R/VC<sub>>180</sub> benchmarks; and (2) it provides the complainant the ability to use the same four-year time period to estimate all three benchmarks used in this analysis. No party has demonstrated that the release of more Waybill Sample data is appropriate.

First, the statute contains no such directive. Second, when judging the reasonableness of a particular rate, we routinely look to information beyond the year when the rate was established. For example, our SAC test does not judge the reasonableness of the challenged rate by looking only at a snapshot of the current financial circumstances. Rather, the SAC test requires a 10-year analysis that is structured to reflect the variations in the business cycle. *See Major Issues In Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 61 (STB served Oct. 30, 1996). Some of the variables it takes into account are the annual tonnage fluctuation, change in tax laws, equity investor expectations, and inflation in the prices of the assets utilized by the industry. *Coal Trading Corp. v. B&O R.R.*, 6 I.C.C.2d 361, 411 (1990). Third, in their example above, the Three-Benchmark approach would not compare the rate set in 2010 against the rates from 2005–2008; it would judge the reasonableness of the challenged rate by comparing the R/VC ratio (the level of contribution to joint and common cost) against the adjusted R/VC ratios of comparable traffic from 2005–2008. Finally, in a rate case, we are not asked to determine the maximum lawful rate on the day the tariff was issued, but for a multi-year prescriptive period.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board will adopt the rule as set forth in this decision.
2. This decision is effective on the day of service.
3. This decision will be published in the **Federal Register**.

Decided: March 8, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

**Jeffrey Herzog,**

*Clearance Clerk.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 110211137–2141–02]

RIN 0648–BA87

### Fisheries Off West Coast States; Highly Migratory Species Fisheries; Swordfish Retention Limits

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule under the Magnuson–Stevens Fishery Conservation and Management Act (MSA) to modify retention limits for swordfish harvested in the U.S. West Coast-based deep-set tuna longline (DSLL) fishery. The DSLL fishery is managed under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). The final rule implements the Pacific Fishery Management Council's (Council) recommendation to modify HMS FMP regulations governing the possession and landing limits of swordfish captured in the DSLL fishery as follows: if a vessel without an observer onboard uses any J-hooks (tuna hooks), the trip limit is 10 swordfish; if a vessel without an observer onboard uses only circle hooks, the trip limit is 25 swordfish; if the vessel carries a NMFS-approved observer during the entire fishing trip, there is no limit on swordfish retained.

**DATES:** This final rule is effective April 18, 2012.

#### FOR FURTHER INFORMATION CONTACT:

Craig Heberer, Sustainable Fisheries Division, NMFS, 760–431–9440, ext. 303.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

This final rule is also accessible at (<http://swr.nmfs.noaa.gov/>). An electronic copy of the current HMS FMP and accompanying appendices are available on the Pacific Fishery Management Council's Web site at <http://www.pcouncil.org/hms/hmsfmp.html>.

The HMS FMP was developed by the Council in response to the need to coordinate state, Federal, and international management of HMS stocks. The management unit in the FMP consists of highly migratory species (tunas, billfish, and sharks) that