IS LESS EVER MORE? DOES THE DUE PROCESS CLAUSE EVER REQUIRE FEWER PROCEDURES?

David E. Benz *

ABSTRACT

The Due Process Clause of the U.S. Constitution provides procedural guarantees for litigants and others subject to state action. Traditionally, parties invoking the due process guarantee seek more process, but could the Due Process Clause ever require less process? To explore this issue, this Article provides an analysis of railroad rate regulation at the federal Surface Transportation Board (STB). Although federal law mandates "reasonable" rail rates for certain railroad customers, dramatic regulatory challenges are faced by railroad customers who deal in carload quantities and desire to obtain rates at a reasonable level, thereby implicating the Due Process Clause. Consequently, either Congress or the STB should replace the current rail rate reasonableness adjudication methodology.

TABLE OF CONTENTS

I. INTRODUCTION

Pursuant to the Due Process Clause of the U.S. Constitution, litigants are guaranteed a sufficient amount of "process" before their rights or property are taken away.[1] Traditionally, process is deemed a good thing, and unhappy litigants raising due process claims assert that they should have

* Counsel with the law firm Thompson Hine LLP in Washington, D.C. The views expressed herein are entirely those of the Author.

1. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

been given *more* process: an in-person hearing, perhaps, or a greater opportunity to present evidence. However, can the Constitution ever require *less* process? What if the process itself is the problem? What if the government has created, or permitted the creation of, a process that prevents or unduly impedes a party from asserting a right guaranteed to him or her by federal law? Can the protections of the Constitution be used to support an assertion that the applicable process should be shorter, simpler, and more efficient? Can the process created or utilized by a court or an adjudicatory body ever be so cumbersome, complex, and costly that it effectively denies a litigant of his or her right to "due" process?

This Article aims to explore the questions posed above through evaluation of one small class of disputes in the U.S. legal arena: railroad rate reasonableness cases at the federal Surface Transportation Board (STB).[2] This topic was selected for two main reasons. First, railroad rate cases involve a process effectively created and required by the STB, meaning that the STB is responsible for the process in the same way that a court or decisionmaker is responsible for its process (and required, under the Due Process Clause, to provide sufficient process to a litigant). Second, the Author is familiar with railroad rate cases.[3]

Due process is one of the foundational features of the U.S. legal system or, indeed, any justice system based on the rule of law. "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."[4] Laws affording rights to citizens are not of much value if the application of those laws does not follow constitutionally guaranteed

2. *See generally* 49 U.S.C.A. § 10701 (West 2016); 49 U.S.C. § 10702 (2012); 49 U.S.C.A. § 10704.

3. This Article includes discussion of or citation to various proceedings in which the Author, through Thompson Hine LLP, represented or assisted in representing the complainant party. The relevant proceedings are: NRG Power Mktg. LLC, No. NOR 42122; M&G Polymers USA, LLC, No. NOR 42123; Sunbelt Chlor Alkali P'ship, No. NOR 42130; E.I. DuPont de Nemours & Co., No. NOR 42125; Total Petrochemicals & Ref. USA, Inc., No. NOR 42121; and BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006) (intervention in appeal).

4. Richards v. Jefferson Cty., 517 U.S. 793, 797 n.4 (1996) (citations omitted); *see also* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 n.7 (1972) (citation omitted) ("Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing . . . ."); 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (2d ed. 2002) (referring to "[o]ur deep-rooted historic tradition that everyone should have his own day in court").

procedures.[5] The process utilized in applying the laws must be equitable; in short, government action implementing the laws of the land must occur in a fundamentally fair manner.[6]

Jurisprudence surrounding the Due Process Clause is almost exclusively based on criminal proceedings (where the State seeks the imposition of fines, incarceration, or capital punishment on the private citizen defendant)[7] or on "termination of benefit" cases (where a private party seeks more process before the State, as the acting party, terminates the private party's employment or government benefits).[8] Under these circumstances, it is understandable that the defendant or private party wants more process. The theory is that process acts as a safeguard against improper government action, and more process means better protection.[9] Moreover, the greater the process, the longer the delay until the day of reckoning arrives—meaning the day that, potentially, the defendant must report to prison or the private party faces unemployment or a cut in government benefits. In contrast, railroad rate cases involve two private litigants, albeit in a process that has been created, developed, and refined by the STB—a representative of the State.[10] This distinction is crucial to ascertaining the implications of the Due Process Clause on such railroad rate cases.

The main body of this Article is organized in six parts. Part II explains the statutory and legal background for the STB's regulation of certain rail transportation rates, with Part III further describing the "stand-alone cost" (SAC) methodology used for virtually all such railroad rate cases. The Due Process Clause applies to these railroad rate cases, as described in Part IV. The unique circumstances facing shippers of carload rail traffic are explained

5. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights . . . cannot be deprived except pursuant to constitutionally adequate procedures.").

6. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citation omitted)).

7. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (addressing procedural due process requirements for an inmate seeking to avoid being placed in a high security state prison).

8. *See, e.g.*, *Loudermill*, 470 U.S. at 546–47 (holding a "pretermination opportunity to respond" is required before a government employee can be dismissed).

9. *See infra* Part VI.

10. *E.g.*, BNSF Ry. v. STB, 453 F.3d 473 *passim* (D.C. Cir. 2006) (appeal of STB decision regarding challenge by Public Service Company of Colorado, d/b/a Xcel Energy, Inc., to the transportation rates of BNSF Railway Company).

in Part V. The main thesis of this Article—that the Due Process Clause requires the STB or Congress to devise an alternative to SAC for carload shippers—is set forth in Part VI. Finally, Part VII describes the current opportunities for change in the federal railroad regulatory regime.

II. THE STB'S REGULATION OF RAIL RATES

Federal law mandates that certain customers of freight railroads be charged no more than a "reasonable" rate by the freight railroad.[11] For the reasonableness standard to apply, the freight railroad must be "market dominant" for the customer's transportation service, meaning that there is no effective competition to the railroad's transportation for the customer.[12] Additionally, rail customers can only challenge rates for non-exempt commodities (i.e., products) and services.[13] This Article does not address issues of market dominance or exemptions but instead focuses on the rate evaluation process utilized by the STB when a railroad customer (known herein as a "shipper" because it ships products via the railroad) challenges a railroad's rate as being unreasonably high—thereby commencing a "rate case." Such challenges occur through administrative litigation under the exclusive jurisdiction of the federal STB,[14] with the shipper as the so-called "complainant" and the railroad as the defendant. In this administrative litigation, certain statutory principles[15] act as a general guide for how the STB must implement the rate reasonableness requirement, but the STB has wide discretion in this endeavor, and the courts grant considerable deference to the STB's determinations in rate cases.[16]

For most shippers, rail freight transportation predominantly occurs pursuant to contracts entered into with the relevant railroad(s).[17] However,

11. 49 U.S.C.A. § 10701(d) (West 2016); 49 U.S.C. § 10702 (2012).

12. 49 U.S.C.A. § 10701(d); 49 U.S.C. § 10707(a).

13. 49 U.S.C. § 10502 (requiring the STB to exempt persons, classes of persons, or specific transactions under certain circumstances); 49 C.F.R. §§ 1039.10–.22 (2015) (providing specific exemptions).

14. *Id.* § 10501(b); 49 U.S.C.A. § 10704.

15. *See, e.g.*, 49 U.S.C. § 10701(d)(2) (providing three considerations that the STB must use in determining whether a given rate is reasonable).

16. *See, e.g.*, BNSF Ry. v. STB, 526 F.3d 770, 774 (D.C. Cir. 2008) ("In the rate-making area, our review is particularly deferential . . . .").

17. *See* COMM. FOR A STUDY OF FREIGHT RAIL TRANSP. & REGULATION, TRANSP. RESEARCH BD., NAT'L ACADEMS. OF SCIS., ENG'G, & MED., SPECIAL REPORT 318, MODERNIZING FREIGHT RAIL REGULATION 68 (2015) [hereinafter MODERNIZING FREIGHT RAIL REGULATION], *available for download at* http://www.trb.org/

the STB only has jurisdiction over common carrier (i.e., tariff) rates, not contract rates.[18] In virtually all situations, the tariff rate is significantly higher than the corresponding contract rate offered by the railroad.[19] The amount by which the tariff exceeds the railroad's offer of a new contract rate (which the shipper rejected) is often referred to as the "tariff premium."[20]

If a contract exists between a railroad and a shipper, the railroad is not required to provide a tariff rate for the same transportation until just before the contract ends, meaning that a shipper cannot challenge a tariff rate for traffic that currently is subject to a contract rate.[21] Therefore, a rate case typically begins around the same time as the new tariff rate goes into effect. During the pendency of a rate challenge at the STB, the shipper must pay the tariff rate, including the inherent tariff premium, for all covered transportation.[22] It is not the intent of this Article to address the propriety of the tariff premium, but the concept of the tariff premium provides context and will be mentioned briefly herein.

The rate case process at the STB offers large, medium, and small case procedures. Large cases offer the greatest possible relief to the complainant but are more complex and require a greater commitment of resources (time, effort, and litigation expense) by the parties. In contrast, medium cases offer a moderate level of recovery but less complex procedures, with small cases being the simplest but also the least remunerative.[23] The vast majority of rate

Publications/Blurbs/172736.aspx (recognizing shippers' "general shift toward contracting over the past decade").

18. 49 U.S.C.A. § 10709 (exempting contractual agreements from STB's authority over rate regulation); *see id.* § 10501 (providing for general jurisdiction of STB).

19. *See, e.g.*, Duke Energy Corp., 7 S.T.B. 402, 435, *modified on reconsideration*, 7 S.T.B. 862 (2004).

20. *See, e.g.*, Olin Corporation, Comments on Railroad Revenue Adequacy; Petition to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital, at 5 (entered Sept. 5, 2014) [hereinafter Olin Corporation, Railroad Revenue Adequacy Comments], https://www.stb.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/e970c251487e3ec885257d4a00628a11/$FILE/236588.pdf.

21. *See* Burlington N. R.R. v. STB, 75 F.3d 685, 692 (D.C. Cir. 1996).

22. Olin Corporation, Railroad Revenue Adequacy Comments, *supra* note 20.

23. For background information, see Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007), https://www.stb.gov/Decisions/readingroom.nsf/UNID/CA4BB78C4CA56E5985257352006BC9DD/$file/38326.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd sub nom.* CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009). Concerns raised by the D.C. Circuit about this decision on appeal

cases have been of the large variety; indeed, there was no process for other cases until 1996, even though deregulation of rail rates had been largely accomplished by 1980 with the Staggers Rail Act, Public Law 96-448.[24] After the STB finally created a simplified or small rate case process, shippers still avoided it; the process "went unused for years."[25] Eventually, the STB revised its small rate case rules and created medium case rules too, and a few small cases were adjudicated.[26]

The limitations of the small ("Three-Benchmark") and medium ("Simplified SAC") case processes make them unpalatable for most large shippers: there is a relief cap of $4 million for small cases,[27] and the medium case process requires a shipper to accept the existing cost structure of the defendant railroad, thereby limiting the relief available.[28] Additionally, both small and medium case relief is only provided for 5 years, compared to 10 years under the large case method.[29] Finally, the STB has explicitly stated

were eventually addressed by the STB. *See* Waybill Data Released in Three-Benchmark Rail Rate Proceedings, No. 646 (Sub-No. 3), slip op. at 2–4 (served Mar. 8, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/8A55681 AC3A6AB11852579BF004D2B25/$file/41223.pdf.

24. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 49 U.S.C.); *see CSX Transp.*, 568 F.3d at 239 (discussing history, difficulty, and costs of large case procedures).

25. *CSX Transp.*, 568 F.3d at 239.

26. Simplified Standards for Rail Rate Cases, slip op. at 4 (served Sept. 5, 2007) (revising small case rules and creating medium case rules). One of the few small cases to reach decision was affirmed on appeal. Union Pac. R.R. v. STB, 628 F.3d 597, 599 (D.C. Cir. 2010).

27. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 2 (STB served Mar. 13, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/C945E11FDC839 C5A85257E06006D3D45/$file/44230.pdf.

28. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 9 (STB served July 18, 2013), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/60A2C167BAAB 1DB185257BAC005E6235/$file/42980.pdf ("[T]he inquiry under the Simplified-SAC method . . . is limited to whether the captive shipper is forced to cross-subsidize other parts of the railroad's rail network or whether the defendant carrier is abusing its market power. Such an approach . . . would not identify inefficiencies in the current rail operation."), *vacated in part sub nom.* CSX Transp., Inc. v. STB, 754 F.3d 1056 (D.C. Cir. 2014).

29. Rate Regulation Reforms, No. EP 715, slip op. at 12 (STB served July 25, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/417734B915195B4F85257A460 060B258/$file/42418.pdf (small and medium case method); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 61–66 (served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD3852572 17005C5064/$file/37406.pdf (to be published in the S.T.B. Reporter at a later date) (large

that a shipper concerned about numerous different rates is not permitted to bring several separate smaller rate cases when, in actuality, the shipper has a broader, "large" case dispute with the railroad.[30] Hence, the STB effectively requires use of the large case process whenever a shipper has a significant amount of traffic at issue.[31]

III. THE SAC TEST

For the entire history of railroad rate reasonableness at the STB, a large rate case has been synonymous with use of the "stand-alone cost" (SAC) test—one of the three main rate constraints created by the STB's predecessor, the Interstate Commerce Commission, as part of the Constrained Market Pricing (CMP) adopted in 1985.[32] SAC involves development by the complainant of a hypothetical railroad and determination of the transportation rates that this hypothetical railroad (called a "stand-alone railroad" (SARR)) would need to charge its customers.[33] The complainant must design the SARR from the ground up, including all of the capital and operating costs, as well as a reasonable rate of return.[34] Obviously, the SARR is not a real-world railroad but, instead, a "paper" railroad based on documents, spreadsheets, computer programs, and the testimony of dozens of expert witnesses.[35] After the SARR is developed by the complainant, the defendant provides a critique and generally creates a competing version of the SARR, usually with much

case method), *aff'd sub nom.* BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

30. Simplified Standards for Rail Rate Cases, slip op. at 32–33 (served Sept. 5, 2007) (referring to "improper attempts by a shipper to disaggregate a large claim into a number of small claims").

31. *See id.*

32. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 521, 542–46 (1985), *aff'd sub nom.* Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). The other two constraints are management efficiency and revenue adequacy. *See id.* at 534–42. There is also a fourth constraint—phasing—but it only applies after a challenged rate has been found reasonable. *See id*. at 546–47.

33. PPL Mont., LLC v. STB, 437 F.3d 1240, 1242 (D.C. Cir. 2006).

34. *See Major Issues in Rail Rate Cases*, slip op. at 8 (served Oct. 30, 2006).

35. *See* Rate Regulation Reforms, No. EP 715, slip op. at 9 (STB served July 25, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/417734B915195B4F85257A460060B258/$file/42418.pdf (stating that a full-SAC presentation is "an intricate, expensive undertaking" that requires "[c]omplex computer programs," numerous "interrelated" tasks, and "detailed evidence"); General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441 *passim* (2001).

higher costs.[36] The STB makes the final determination regarding the proper configuration of the SARR, and then the challenged tariff rates are compared to the rates that would need to be charged by the SARR.[37]

Instead of SAC, a shipper could theoretically bring a large case based on one of the other CMP constraints—the management efficiency constraint or, depending on the defendant railroad, perhaps the revenue adequacy constraint[38]—but several hurdles have prevented such cases. The STB has not created any process or given any details for either type of case, and it is unknown what showing would need to be made by the shipper.[39] A revenue adequacy case would presumably require the defendant railroad to be "revenue adequate" pursuant to the STB's annual economic assessment or some other metric,[40] but railroads have long claimed they are not earning sufficient revenue, and certain STB statistics have found many railroads to be revenue inadequate, especially prior to 2011.[41]

36. *See, e.g.*, BNSF Ry. v. STB, 453 F.3d 473, 477 (D.C. Cir. 2006).

37. *See, e.g., id.* at 1242–43; *Major Issues in Rail Rate Cases*, slip op. at 8 (served Oct. 30, 2006).

38. *See* Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 534, 548 (1985) (describing the management efficiency and revenue adequacy constraints and stating "the various constraints contained in CMP may be used individually or in combination"), *aff'd sub nom.* Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

39. *See* Notice of Acceptance of Comments in Railroad Revenue Adequacy, No. EP 722, official release at 4 (STB served Apr. 2, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/F808D9F1F151F6EC85257CAE005ABDA2/$file/43506.pdf ("The [STB] has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rail rate cases. Nearly all large rate reasonableness cases to date have relied upon the stand-alone cost constraint.").

40. *See Coal Rate Guidelines*, 1 I.C.C.2d at 534–35 ("Our revenue adequacy standard represents a reasonable level of profitability for a *healthy* carrier." (emphasis added)).

41. The STB annually reports railroad revenue adequacy in Ex Parte No. 552. The most recent decision is Railroad Revenue Adequacy—2015 Determination, No. EP 552 (Sub-No. 20) (STB served Sept. 8, 2016), https://www.stb.gov/decisions/readingroom.nsf/UNID/1A5249A29E39865285258027006AA17B/$file/45419.pdf ("[A] railroad is considered revenue adequate . . . if it achieves a rate of return on net investment (ROI) equal to at least the current cost of capital for the railroad industry."). It must be noted that the STB has said that a railroad's revenue adequacy status under Ex Parte No. 552 is not necessarily determinative regarding whether a revenue adequacy rate case can be sustained. *See, e.g.*, Consumers Energy Co., No. NOR 42142, slip op. at 2 (STB served June 15, 2015), https://www.stb.gov/decisions/readingroom.nsf/UNID/2CB28D26D02A9A5285257E62006C0763/$file/44521.pdf ("[A]lthough the annual determinations suggest that CSXT is revenue inadequate, Consumers has stated a claim under the constraint and may present

Congress and the STB have long steered shippers toward SAC for large rate cases. Indeed, both entities have frequently used the terms *large rate case* and *SAC* interchangeably, with much less attention paid to the other two constraints: management efficiency and revenue adequacy. When the STB was created, Congress directed the new agency to devise a simplified rate reasonableness methodology for "those cases in which a full stand-alone cost presentation is too costly."[42] The statutory time limits for the STB to issue decisions in rate cases apply to SAC cases (nine months after the close of the record) and simplified method cases (six months after the close of the record), but the statute is silent as to management efficiency and revenue adequacy cases.[43] In late 2015, Congress added new statutory language that again referred to SAC cases with no mention of other possible large cases.[44] Over the years, the STB has repeatedly made statements such as "CMP, with its SAC constraint, is the most accurate procedure available for determining the reasonableness of rail rates"[45] and "[a]t the heart of our rate rules lies the stand-alone cost (SAC) test,"[46] thus contributing even more to an atmosphere in which SAC is portrayed as, and assumed to be, the only kind of large rate case possible. Given this set of circumstances, shippers with large rate disputes have often felt there is little feasible alternative to the SAC process.

other competent and probative evidence . . . ."). Again, however, there is no guidance from the STB regarding what a revenue adequacy case should look like.

42. 49 U.S.C.A. § 10701(d)(3) (West 2016).

43. 49 U.S.C. § 10704(c) (2012). Simplified method cases under § 10701(d)(3) are commonly understood to be the "small" and "medium" cases. *See* Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 4 (served Sept. 5, 2007), https://www.stb.gov/decisions/readingroom.nsf/UNID/CA4BB78C4CA56E5985257352006BC9DD/$file/38326.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd sub nom.* CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009).

44. *See* Surface Transportation Board (STB) Reauthorization Act of 2015, Pub. L. No. 114-110, § 11(b), 129 Stat. 2228, 2233 (amending 49 U.S.C. § 10704(d)). It is unclear how the new language added in 49 U.S.C. § 10704(d)(2)(A)(iv) (stating that final STB decisions in SAC cases are due 180 days after the date on which the evidentiary record is completed) relates to existing language in 49 U.S.C. § 10704(c)(1) (stating that final STB decisions are due nine months after close of the administrative record in SAC cases).

45. *Simplified Standards for Rail Rate Cases*, slip op. at 13 (served Sept. 5, 2007).

46. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 2 (STB served July 25, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/417734B915195B4F85257A460060B258/$file/42418.pdf.

Of course, SAC is well-known as a complicated, costly, and time-consuming endeavor.[47] Even the STB admits this fact.[48] Further, the rules are constantly changing due to new precedent, rulemaking proceedings, and related STB decisions. The complexity and cost of SAC directly correlate with the size and complexity of the SARR developed by the complainant.[49] Even though SAC is always complex and expensive, designing a SARR based on unit trains—large trains comprised entirely of rail cars transporting the same product from one origin to one destination as a single "unit"—is significantly simpler than designing a SARR based on carload traffic—where the individual rail cars in each train all originate at, and are destined to, different locations.[50] Consequently, coal shippers with simple transportation patterns, involving movement of unit trains from a single origin or a small number of origins to a single destination, have been virtually the only users of SAC.[51] In fact, large electric utilities, which utilize unit trains to ship coal, have brought nearly all successful SAC cases.[52] From the

47. CSX Transp., Inc. v. STB, 754 F.3d 1056, 1060 (D.C. Cir. 2014) ("SAC tests are complicated and costly . . . ."); *CSX Transp.*, 568 F.3d at 239 ("Due largely to the difficulty of modeling an efficient stand-alone railroad, however, this process is both expensive and time-consuming . . . .").

48. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 13–14 (STB served July 18, 2013), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/60A2C167BAAB1DB185257BAC005E6235/$file/42980.pdf (referring to SAC as "complex, costly, and time-consuming"), *vacated in part sub nom. CSX Transp., Inc.*, 754 F.3d 1056 (D.C. Cir. 2014); *Rate Regulation Reforms*, slip op. at 9 (STB served July 25, 2012) (stating that a full-SAC presentation is "an intricate, expensive undertaking" that requires "[c]omplex computer programs," numerous "interrelated" tasks, and "detailed evidence"); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD385257217005C5064/$file/37406.pdf (to be published in the S.T.B. Reporter at a later date) ("[T]he complexity of the approach and the cost of seeking relief have seriously escalated . . . ."), *aff'd sub nom*. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

49. *See, e.g.*, E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 6 (STB served Dec. 23, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf (discussing the complexity of a carload SAC case because of the many origins and destinations).

50. *Id*.

51. *See, e.g.*, *CSX Transp.*, 568 F.3d at 239 ("In fact, coal companies are virtually the only shippers who deliver sufficiently large loads along fixed routes to justify using full SAC procedures." (citation omitted)); Total Petrochemicals & Ref. USA, Inc., No. NOR 42121, slip op. at 46 (STB served Sept. 14, 2016) (Miller, Vice Chairman, commenting); *id*., slip op. at 47 (Begeman, Comm'r, dissenting in part).

52. For an example of a case on appeal, see BNSF Ry. v. STB, 748 F.3d 1295, 1297–99 (D.C. Cir. 2014).

simple name of the decision adopting SAC—the Coal Rate Guidelines—it is apparent that SAC was created only or primarily for coal shippers.[53]

The complexity of SAC cases arises from many different factors, at least two of which affect both carload shippers and unit train shippers, and would presumably affect management efficiency and revenue adequacy cases also. The first factor is the "repeat player" problem.[54] Defendant railroads are frequently repeat players in rate cases and, consequently, tend to shape the rate case process through a long-term view in each individual case.[55] Collectively, the railroads also have a shared, uniform goal: to make the rate case process as onerous as possible so it is not a viable option for shippers. In contrast, complainants—the shippers—generally are not repeat players and, even if they are, such repetition is much less frequent than that experienced by the major railroads.[56] Shippers also tend to be concerned only about the ultimate result in their individual cases.[57] They are indifferent to both the long-term evolution of the rate case law and the precedential value of their individual cases.[58]

Legal commentators have long recognized that repeat players have the incentive to litigate individual cases with an eye to the future.[59] Repeat players are interested in changing the governing law in order to make victory in future cases more likely,[60] and they are also interested in "send[ing] a signal" to other potential litigants.[61] As repeat players, railroads have a

53. *See* Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), *aff'd sub nom.* Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

54. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (describing "repeat players" as those "who are engaged in many similar litigations over time").

55. Of the 36 SAC cases litigated since 1996, only two have featured a defendant other than the four major U.S. railroads (BNSF Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., and Norfolk Southern Railway Company) or their predecessors. *See Summary of Results of Freight Rail Rate Challenges at the Surface Transportation Board*, STB (Sept. 15, 2016), http://www.stb.dot.gov/stb/industry/Rate_Cases.htm.

56. *See id.*

57. *See* Galanter, *supra* note 54, at 100 (stating occasional recourse parties "have little interest in that element of the outcome which might influence the disposition of the decision-maker next time around").

58. *See id.*

59. *See, e.g.*, *id.* at 97–101.

60. *Id.* at 100–01, 110.

61. David C. Croson & Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 HARV. NEGOT. L. REV. 65, 78 n.38 (1996); *cf.* Russell v.

significant incentive to make the process much more complex, time-consuming, and expensive not only for the case in front of them, but also for all future cases, potential and actual. Therefore, the defendant railroad will spend an inordinate amount of effort in one case for the sake of all future possible cases.[62]

Any one rate case decision requires hundreds or thousands of interim decisions by the STB on subsidiary issues related to the development of the hypothetical SARR.[63] The issues include everything conceivably related to creation of a railroad, including: real estate (e.g., appraisals of land needed to build the SARR); construction details (e.g., Would batteries for the railroad signal system be sufficient as a backup for the railroad track switches in the event of a power outage, or would generators be required?); construction materials (e.g., How much ballast would be needed for SARR construction, where could it be obtained, and how much would it cost to transport it from the quarry to the rail line?); construction methods (e.g., What methods would be used for, and what costs would apply to, stabilizing embankments created during construction of the SARR?); personnel (e.g., What salary would be paid by the SARR to administrative assistants?); support operations (e.g., How much ongoing track maintenance would the SARR perform?); operating plans (e.g., actions of each train on each day of a theoretical "peak week"); future traffic projections (e.g., amount of intermodal traffic years into the future); and present value economic modeling (e.g., discounted cash flow analysis).[64]

Each case has hundreds or thousands of such interim decisions, and the

Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995) (citation omitted) (stating that "employers have incentives to invest heavily in the defense of [employment discrimination cases] in order to deter the bringing of them").

62. The defendant railroad in a rate case, like defendants in virtually all types of civil litigation, wants the adjudication process to be as complex, time-consuming, and expensive as possible. In contrast, the party challenging the defendant's rail rate wants the process to be as expeditious as possible.

63. *See, e.g.*, Ariz. Elec. Power Coop., No. NOR 42113, slip op. *passim* (STB served Nov. 22, 2011), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/B4B6654E5F913BC68525794F00735FB5/$file/41181.pdf (illustrating the numerous subsidiary contentions of the parties in the SAC analysis), *aff'd sub nom.* BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014).

64. *See* Russell Pittman, *Against the Stand-Alone-Cost Test in U.S. Freight Rail Regulation*, 38 J. REG. ECON. 313, 314–16 (2010); *e.g.*, FMC Wyo. Corp., 4 S.T.B. 699, 724–41 (2000) (discussing SARR issues for a "hypothetical stand-alone railroad called the Overland Railroad (ORR), which [was intended to] replicate approximately 3,000 miles of the [Union Pacific] rail system").

STB's ultimate decision on rate reasonableness often results in both the complainant shipper and the defendant railroad succeeding on hundreds of issues, regardless of the ultimate result in the case.[65] In their defense of individual cases, defendant railroads generally seek to add new steps, new requirements, and new computer modeling programs to the SAC process.[66] Every STB rate case decision has precedential force and effectively dictates to future complainants the showing that must be made for a successful case.[67] In fact, the STB has cautioned parties not to relitigate issues that have been settled in prior decisions.[68]

Consequently, even if the railroad "loses" the overall case—meaning the challenged rates were found unreasonable—it is likely the railroad industry has successfully convinced the STB to add not just one but dozens of new steps to the SAC case process. From the shippers' point of view, SAC is a classic situation in which the defendants can lose every battle but still ultimately win the war. In other words, every rate that is challenged could be found unreasonably high by the STB, but, in the process, the SAC methodology could be made so complex and costly that shippers cease bringing new cases.

In one recent example, the STB created a new requirement for "model[ing] the impact of program maintenance on the operation of the SARR," even though "the agency ha[d] never required a party to model program maintenance" previously.[69] This new modeling requirement was

65. *See, e.g.*, E.I. DuPont de Nemours & Co., No. NOR 42125 (STB served Mar. 24, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/569665745 80BB51385257CA5006D2E05/$file/43717.pdf (335-page decision in carload SAC rate case); *see also* Pittman, *supra* note 64, at 315–16 ("Evidence with this degree of complexity inevitably invites further regulatory dispute and litigation over a seemingly endless list of details regarding the configuration, costs, and revenues of the hypothetical SARR.").

66. Pittman, *supra* note 64, at 314.

67. Sunbelt Chlor Alkali P'ship, No. NOR 42130, slip op. at 13 (STB served June 30, 2016), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/4421878150E5C0B685257FE10077C3A8/$file/45039.pdf ("In instances where a complainant's evidence follows agency precedent regarding a particular methodology, it is the defendant 'who carr[ies] the burden to justify a departure from that methodology.'" (alteration in original) (citation omitted)).

68. General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001) (citation omitted) ("[T]he parties to SAC cases are cautioned not to attempt to relitigate issues that have been resolved in prior cases. Unless new evidence or different arguments are presented, we will adhere to precedent established in prior cases.").

69. Ariz. Elec. Power Coop., No. NOR 42113, slip op. at 28–29 (STB served Nov.

added in a case in which the challenged rates were found unreasonably high.[70] Crucially, this new requirement has force as precedent and incrementally increases the complexity, time, and cost for all future cases. This dynamic is repeated in every case, meaning that the overall rate case process is dramatically more complex than it was 20 or even 10 years ago and that it will continue becoming more complex. There is also a compounding effect to these new steps and layers because the complainant must ensure that the ramifications of each new step are appropriately reflected in all previously accepted steps.

At the same time that the complexity has been increasing, the relief available to successful SAC complainants has been dramatically curtailed. After 2006, successful complainants, who had previously been awarded 20 years of rate relief, were limited to just 10 years.[71]

The second factor contributing to the complexity of STB rate cases for both carload shippers and unit train shippers is the tariff premium problem. As mentioned in Part II, most rail transportation occurs via contracted rates, but the STB only has jurisdiction over tariff rates.[72] Consequently, a shipper contemplating a rate reasonableness case must request a tariff rate before a complaint can be filed; this tariff rate is nearly always noticeably higher than the contract rate offered by the railroad, a difference called the "tariff premium."[73] During the entire length of an STB rate case, the complainant shipper must pay the tariff premium—an amount that could add up to several tens of millions of dollars by the end of the case. If the STB finds the challenged tariff rates unreasonably high, then the shipper is awarded reparations for the amount by which the challenged rates exceed the "reasonable rates" determined by the STB, with interest at the U.S. prime rate.[74] This level of reparations may or may not cover the entire amount of

22, 2011), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/B4B6654E5F913BC68525794F00735FB5/$file/41181.pdf, *aff'd sub nom.* BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014).

70. *Id.* at 38.

71. Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 64–66 (served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD385257217005C5064/$file/37406.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd sub nom*. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

72. 49 U.S.C.A. § 10709 (West 2016).

73. *See* Olin Corporation, Railroad Revenue Adequacy Comments, *supra* note 20.

74. 49 U.S.C. § 11704 (2012) (rights and remedies); 49 C.F.R. § 1141.1 (2015) (interest rates), *stylistic revision*, Revision to the Surface Transportation Board's CFR Chapter Heading Pursuant to the Surface Transportation Board Reauthorization Act of

the tariff premium paid by the shipper during the case; for any amount not covered, the tariff premium is lost.

If the challenged tariff rate is found reasonable, then the entire tariff premium is irretrievably lost. Given that the tariff premium can easily be in the tens of millions of dollars, it is not difficult to envision the consternation and hand-wringing that occurs before a shipper decides to bring a rate reasonableness case to the STB. The shipper must effectively gamble with an "ante" of $30 million, $40 million, or more, and this ante will be lost forever to the extent that the reasonable rate level is found to exceed the last contract offer of the railroad. The railroad is not forced to make any similar ante; if the challenged tariff rates are found unreasonably high, the railroad simply pays the required reparations, effectively repaying some or all of the tariff premium, as if the railroad had received a multi-year, low-interest loan.[75] On the other hand, if the challenged rates are found reasonable, the railroad keeps the tariff premium ante.[76]

The risks facing a shipper contemplating a rate challenge are weighty.[77] If the case fails, the shipper immediately experiences several deleterious effects. First, the shipper has irretrievably lost the tariff premium paid during the case. Second, the challenged rates have been established as reasonable under governing law, meaning the shipper will experience much higher operating costs for the foreseeable future and a significant loss in negotiating

2015, 81 Fed. Reg. 33416 (May 26, 2016) (to be codified at 49 C.F.R. subtitle B, ch. X); *see also* CSX Transp., Inc. v. STB, 754 F.3d 1056, 1059 (D.C. 2014) ("If the [STB] finds a railroad's rate unreasonable, it may prescribe a maximum lawful rate and order the railroad to pay reparations." (citation omitted)).

75. It is theoretically possible that an STB-prescribed rate would be below the railroad's last contract offer, meaning that the railroad must repay more than the entire amount of the tariff premium, but this possibility seems unlikely or, at the very least, extremely rare. As mentioned earlier, in any single case where the challenged rates are found unreasonably high, the STB invariably adds new SARR requirements or follows the defendant railroad's evidence on numerous subsidiary issues, thus pushing up the ultimately prescribed rates. *See supra* notes 54–62 and accompanying text.

76. Given the wide range of results possible, a more technically accurate statement would be: the railroad keeps the tariff premium except to the extent the challenged rates exceed the reasonable rates prescribed by the STB. Thus, if the challenged rates are found unreasonably high but the STB-prescribed rates are still above the railroad's last contract offer, then the railroad keeps a portion of the tariff premium.

77. In fact, STB Commissioner Ann Begeman recently admitted that she has "yet to hear from even one shipper who believes the SAC methodology is a reasonable way to judge rail rates." Total Petrochemicals & Ref. USA, Inc., No. NOR 42121, slip op. at 47 (STB served Sept. 14, 2016) (Begeman, Comm'r, dissenting in part).

leverage. Third, the shipper would likely need to show changed circumstances, new evidence, or material error before being permitted to commence another challenge to the same rail transportation rate in the next 10 years.[78]

IV. THE DUE PROCESS CLAUSE APPLIES TO STB RAIL RATE CASES

Shippers served by market dominant railroads are entitled to a reasonable rate under federal law[79] and have a protected property interest in that right; the protection exists even if the right is only considered to be the cause of action by which a shipper can challenge a railroad's tariff rate as unreasonably high at the STB. "Property extends to every species of right. . . . [A]nd includes choses in action."[80] As stated by the Supreme Court, "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."[81] Clearly, the Due Process Clause applies to STB rate reasonableness cases.

Over 100 years ago, the Supreme Court stated that a rail rate determination could be set aside if the hearing was not adequate or fair.[82] This view has been repeated in subsequent cases as well, such as a federal district court determination that a rail rate reasonableness cause of action "constitutes property within the meaning of the Fifth Amendment to the United States Constitution of which the plaintiff cannot be deprived without being given notice and a reasonable opportunity to be heard."[83]

Both before an STB rate case complaint is filed and also during the litigation of any such STB rate case, it remains unknown whether the railroad rates challenged by the shipper are unreasonably high. This

78. *See* Intermountain Power Agency, No. NOR 42127, slip op. at 3 n.11, 4 (STB served Nov. 2, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/74609ABF3017AFA585257AAA004DCE43/$file/42519.pdf.

79. *See* 49 U.S.C. § 10701(d)(1).

80. 63C AM. JUR. 2d *Property* § 4 (2009).

81. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (footnote omitted); *see also* Richards v. Jefferson Cty., 517 U.S. 793, 804 (1996) (citations omitted) ("To conclude that the suit may nevertheless be barred . . . would thus be to deprive petitioners of their 'chose in action,' which we have held to be a protected property interest in its own right." (citations omitted)).

82. Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 91–92 (1913).

83. Keystone Steel & Wire Co. v. United States, 117 F. Supp. 330, 333 (S.D. Ill. 1953).

uncertainty is immaterial for constitutional purposes. The Supreme Court has expressly found that a petitioner has a due process right to a hearing on eligibility for statutorily defined welfare benefits, even if the petitioner has not yet shown that he or she qualifies under the statute.[84] The situation facing the STB in a rail rate case is no different; the complainant shipper in such a case, like the petitioners in welfare benefits cases, claims entitlement to a specific statutory benefit.[85] In the shipper's case, the "benefit" is a lawful, reasonable rail transportation rate as defined in 49 U.S.C. §§ 10701, 10702, and 10704.[86] Regardless of whether the shipper is in fact entitled to the benefit, the shipper is guaranteed that there will be a fair and adequate hearing on the claim of entitlement.[87] This is the essence of due process, and it forms a cornerstone of the U.S. legal system.

From a policy perspective, the Due Process Clause should also apply to rail rate cases because of the increasing importance of administrative agencies such as the STB. More and more each day, we live in an administrative world where state and federal agencies are the main source of law and governance.[88] Given the increasing complexity and specialization in modern life, where the role of government mirrors and increases commensurate with such complexity and specialization, administrative agencies necessarily affect innumerable aspects of peoples' lives through not just regulations but also licensing, permitting, enforcement actions, policy statements, and administrative litigation.[89]

Indeed, most Americans' experience of government occurs primarily

84. Goldberg v. Kelly, 397 U.S. 254, 264–66 (1970); *see also* Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (4–3 decision) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.").

85. *Compare Goldberg*, 397 U.S. at 255–57 (challenging procedures for termination of welfare benefits), *with Keystone Steel & Wire Co.*, 117 F. Supp. at 331 (challenging unreasonable rates).

86. *See* 49 U.S.C.A. § 10701 (West 2016); 49 U.S.C. § 10702 (2012); 49 U.S.C.A. § 10704.

87. *See Keystone Steel & Wire Co.*, 117 F. Supp. at 333–34 (holding shipper was "entitled to a hearing before the Interstate Commerce Commission on the merits of its claim for reparations").

88. *See, e.g.*, WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 10–11 (2010).

89. *See, e.g.*, *id.* ("[I]n the modern administrative state, commissions and bureaus promulgate most legally binding rules. The framework for understanding most national lawmaking and much national adjudication in this country is no longer Article I, Section 7, of the Constitution, but is instead the Administrative Procedure Act of 1946 . . . .").

on the administrative level, with agencies such as the Internal Revenue Service, the Department of Veterans Affairs, the Social Security Administration, and the Department of Motor Vehicles.[90] Other agencies also have major impacts on everyday life, such as when the Environmental Protection Agency (EPA) adopts new emissions rules for electric utilities, causing a switch to natural gas,[91] or when the National Highway Traffic Safety Administration (NHTSA) requires changes in automobile design,[92] though ordinary citizens may not interact directly with either the EPA or the NHTSA.

Given administrative agencies' far-reaching and increasing impacts, the agencies themselves must take great care to ensure that their actions comply with constitutional standards such as due process.[93] As stated by one administrative law scholar:

> Administrative agencies today are responsible for much of the federal government's decisionmaking. Excluding such primary decisionmakers from a judicially enforceable obligation to include significant constitutional concerns in their deliberations is at odds with the structural imperatives of our constitutional system. Agencies are not only well positioned to enforce constitutional norms effectively, but they are also better able than courts to determine how to incorporate constitutional concerns into a given regulatory scheme with the least disruption. In addition, it is far easier for agencies to respond to judicial decisions remanding administrative actions for failure to take account of constitutional concerns than for Congress to respond to judicial invalidation of measures on constitutional grounds or judicial narrowing of statutes through the application of constitutional canons.[94]

90. *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1898 (2013) [hereinafter Metzger, *Administrative Constitutionalism*].

91. *See, e.g.*, AIR ECONS. GRP., U.S. EPA, PUB. NO. EPA-452/R-14-002, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED CARBON POLLUTION GUIDELINES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS, at ES-24 (2014), https://www.epa.gov/sites/production/files/2014-06/documents/20140602ria-clean-power-plan.pdf.

92. *See, e.g.*, Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1180–81 (9th Cir. 2008); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 332 (D.C. Cir. 1968).

93. Metzger, *Administrative Constitutionalism*, *supra* note 90 ("[M]ost governing occurs at the administrative level and thus that is where constitutional issues often arise.").

94. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 485–86 (2010) [hereinafter Metzger, *Ordinary*

With the recent growth in what has been called "administrative constitutionalism," many scholars are calling for an increased recognition of the important role played by administrative agencies in implementing constitutional norms and requirements in day-to-day governance.[95] If the agencies do not actively incorporate constitutional concerns in their regulations, processes, and decisionmaking, then due process, equal protection, and the other guarantees of the Constitution begin to acquire an ephemeral quality. If agencies do most of the governing but fail to incorporate constitutional protections in their governance, then the Constitution becomes a theoretical construct only, not a true guarantee on which citizens can rely, and the framework for U.S. constitutional democracy is fundamentally changed.

Therefore, the STB, like all administrative agencies, needs to ensure that its actions, including rail rate cases, comport with constitutional principles. The STB should not wait until it is forced by judicial review to include consideration of due process principles in the rate case process. The STB itself is the proper vehicle for investing its rate reasonableness structure with due process principles. At least one scholar has asserted that administrative agencies are ideally suited for incorporating constitutional concerns into their decisions, and the STB should be no different in this regard.[96] The STB can introduce constitutional concerns into the public discussion and the rulemaking process that attends STB rate case structure changes, the STB has the knowledge and expertise to balance the technical aspects of ratemaking with due process requirements, and the STB can be more experimental in its decisionmaking. Indeed, the STB may have more flexibility than it thinks. Trial-like proceedings are not required by the adjudicatory provisions of the Administrative Procedure Act,[97] suggesting

Administrative Law].

95. *See, e.g.*, Metzger, *Administrative Constitutionalism*, *supra* note 90, at 1901 ("Given the dominance of the modern administrative state, a full picture of contemporary constitutionalism in the United States must include administrative constitutionalism—the constitutional understandings and interpretations developed by agencies as well as those that structure the administrative state itself.").

96. Professor Gillian Metzger has stated that agencies can introduce constitutional concerns into a public debate, are skilled at balancing various factors in their decisionmaking, and can experiment with different approaches to incorporating constitutional principles. *See id.* at 1906, 1922–23, 1928 (stating agencies may experiment, "balanc[e] constitutional and policy concerns," and engage in public debate).

97. William S. Jordan, III, Chevron *and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 273 (2009) ("Although APA formal adjudications tended to harden into trial-like proceedings, [5 U.S.C.] §§ 554, 556, and 557 have never

that rail rate cases could take any number of different forms.

The STB's obligation to imbue its processes and decisions with constitutional principles also stems from the great deference it enjoys. The STB is afforded not just normal deference under the familiar *Chevron* doctrine,[98] but also enhanced deference due to the highly technical aspects of ratemaking.[99] However, it remains an open question whether or not any deference must be given to an STB decision evaluating the impact of the Due Process Clause on the STB's own procedures.[100]

Constitutional concerns can result in agency action being found unlawful upon judicial review.[101] This view of unlawfulness is different from the traditional "arbitrary and capricious" standard, because the Supreme Court recently found, in a 5–4 decision, that constitutional issues are not encompassed within the concept of "arbitrary and capricious."[102] Some commentators disagree with the Court's explicit segregation of administrative law from constitutional law.[103]

The Supreme Court has previously indicated that due process concerns, in the administrative agency arena, are heightened when an agency action is narrow and affects one entity or just a small group.[104] The Court cited its prior decisions in contrasting individualized adjudications with broadly applicable rulemaking proceedings, stating, "While the line dividing

required trials.").

98. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

99. BNSF Ry. v. STB, 526 F.3d 770, 774 (D.C. Cir. 2008) ("In the rate-making area, our review is particularly deferential . . . ."); *see also* Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997) (quotation and citations omitted) ("Because Congress has expressly delegated to the [STB] responsibility for determining whether a railroad has market dominance and, if so, whether its rate is reasonable, the [STB] is at the zenith of its powers when it exercises that authority and therefore [is] entitled to particular deference." (citations and quotations omitted)).

100. *See, e.g.*, Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1892–93 (2016).

101. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009).

102. *Id.*

103. *E.g.*, Metzger, *Ordinary Administrative Law*, *supra* note 90, at 484 ("[A] fair amount of ordinary administrative law qualifies as constitutional common law. Its doctrines and requirements are constitutionally informed but rarely constitutionally mandated, with Congress and agencies enjoying broad power to alter specific administrative mechanisms notwithstanding their constitutional aspect.").

104. *See* United States v. Fla. E. Coast Ry., 410 U.S. 224, 244–45 (1973).

them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."[105] An STB rail rate case is just such an individual adjudication in which only two entities are involved (the complainant shipper and the defendant railroad);[106] thus, due process concerns are heightened.

When one takes a step back and critically considers the profound role played by agencies such as the STB, the necessity for constitutional principles to be considered in agency decisions and processes is and should be apparent. Professor Gillian Metzger puts the point bluntly:

> As those primarily responsible for setting governmental policy, agencies should have an obligation to take constitutional norms and requirements seriously in their decision[-]making. Such an obligation can be inferred simply from the structure of our constitutional order, under which the Constitution governs all exercises of governmental authority and all government officials have an independent duty to support it.[107]

In order to uphold the rule of law and the legitimacy of its processes, the STB should likewise consider constitutional requirements in rail rate cases and all relevant agency functions.

V. INTRODUCTION TO CARLOAD SHIPMENTS

The cost, delay, and complexity of the SAC method are dramatically enhanced for carload shippers. In the context of this Article, "carload" describes a shipper that needs rail transportation for single rail cars. Such shippers typically utilize, on a regular or semi-regular basis, dozens or hundreds of different yet repeated carload movements between various

105. *Id.* at 245; *see also* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542–48 (1978) (stating that additional procedures would generally not be required in rulemaking proceedings).

106. *See supra* Part I.

107. Metzger, *Ordinary Administrative Law*, *supra* note 94, at 522 (citations omitted); *see also* Metzger, *Administrative Constitutionalism*, *supra* note 90, at 1925 ("[I]n an administrative world administrative agencies must become a locus for independent constitutional enforcement to do justice to the principle of constitutionally constrained government.").

origins and destinations.[108] For example, a carload shipper may have a manufacturing facility in Milwaukee, yet 100 different customers in multiple states throughout the United States. Any individual customer, say, one in New Orleans, may receive single car shipments from the Milwaukee facility many times throughout the calendar year. Thus, the same Milwaukee-to-New Orleans transportation occurs repeatedly on an ongoing basis. Each individual origin–destination pair, such as Milwaukee-to-New Orleans, is sometimes called a "lane" or an "O–D pair."[109] Most carload shippers operate in competitive industries; therefore, the New Orleans customer might one day decide to buy its products from a competitor of the shipper. Consequently, the Milwaukee–New Orleans lane might suddenly disappear from the shipper's transportation needs; of course, the shipper could add new customers (in Kansas City, Seattle, or elsewhere) at the same time and could later win back the New Orleans business due to lower pricing or better service or any of the myriad of possible factors that affect any commercial transaction.

Freight railroads transport individual carload shipments in mixed trains containing a wide assortment of car types and products; such transportation involves the complex routing of several trains, the switching of individual cars into and out of those trains, and constant car location monitoring in order to ensure that a single car can be transported from the origin to the destination in the most efficient manner possible by sharing railroad resources with other cars being transported between different points.[110]

108. *See, e.g.*, E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 14 (STB served Mar. 24, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/56966574580BB51385257CA5006D2E05/$file/43717.pdf (explaining complexity of rail operations serving carload shipper).

109. *See, e.g.*, M&G Polymers USA, LLC, No. NOR 42123, slip op. at 5–6 (STB served Sept. 27, 2012) (using the term "lane" synonymously with origin–destination pair); *id*. at 20 n.50.

110. *See* Edward Lin & Clark Cheng, *YardSim: A Rail Yard Simulation Framework and Its Implementation in a Major Railroad in the U.S.*, *in* PROCEEDINGS OF THE 2009 WINTER SIMULATION CONFERENCE 2532, 2532–33 (M.D. Rossetti et al. eds., 2009), http://www.informs-sim.org/wsc09papers/244.pdf. *See generally E.I. DuPont de Nemours & Co.*, slip op. at 36–43 (STB served Mar. 24, 2014) (discussing efficiency and planning problems associated with SARR transportation modeling); Jeremiah R. Dirnberger & Christopher P.L. Barkan, *Lean Railroading for Improving Railroad Classification Terminal Performance: Bottleneck Management Methods*, 1995 TRANSP. RES. REC. 52 (2007) (discussing concerns regarding railroad terminal performance as it relates to the system efficiency as a whole).

Clearly, carload shipments are dramatically different from "unit train" shipments, which involve movement of an entire train of the same product from a single origin to a single destination.[111] For unit trains, there is no car switching, no delay time in intermediate rail yards, and no transferring of a single car among several different trains to get it to the destination.[112] Transportation for unit train shippers often consists of repeating the same origin-to-destination movement for years at a time.[113] This is in stark contrast to the transportation of carload shippers, which involves dozens or hundreds of frequently changing O–D pairs.[114] As previously mentioned in Part III, the vast majority of SAC cases have been based on unit train operations.

Compared to unit train shippers, carload shippers experience unique problems in attempting to make use of the STB rate case process. Perhaps the most pervasive and intractable problem consists of what can be referred to as "business planning losses." A carload shipper may have hundreds of different customers and potential customers (i.e., destinations) across the country, not to mention multiple origins from which it ships products to those destinations, and there may be hundreds of unique O–D pairs (or lanes) at issue. Obviously, each individual lane has its own specific characteristics, including: the shipper's customer, the volume of traffic, the specific product(s) shipped, the strength of the commercial relationship between the shipper and customer, and the extent to which the customer may use other suppliers (competitors of the shipper) for the products desired.

All other things being equal, the railroad that serves the route between the origin and destination may be indifferent as to whether the shipper loses the customer to a competitor supplier. As just one example, consider a Milwaukee-based shipper (Shipper A) selling a product to a customer (Customer C) in New Orleans and transporting the product via Railroad X. If Shipper A loses the business to a competitor (Shipper B) based in San Antonio such that the O–D pair is now San Antonio to New Orleans, then delivery may still occur via Railroad X to Customer C in New Orleans. Thus, Railroad X is indifferent as to whether Shipper A or Shipper B wins the

111. Potomac Elec. Power Co. v. United States, 584 F.2d 1058, 1067 n.7 (D.C. Cir. 1978) ("Unit-train service is a system in which cars and locomotives are joined for an uninterrupted, round trip, shuttle-type service, and is regarded as an efficient method of transporting coal in large volumes." (citation omitted)).

112. *See id.*

113. *See* Investigation of Railroad Freight Rate Structure Coal, 345 I.C.C. 71, 114 (1974).

114. *See* Dirnberger & Barkan, *supra* note 110, at 52.

business of Customer C.

Of course, "all other things" are rarely equal. Considerations that could affect this hypothetical include:

- Length of railroad haul. Railroad X may prefer the Milwaukee–New Orleans route because it is longer than a route from San Antonio. A longer route would presumably enable Railroad X to earn more revenue. Therefore, Railroad X may take steps (such as setting rates or service provisions) to encourage use of the Milwaukee–New Orleans option.
- Existence of railroad competition. If Railroad X is the only transportation provider for the San Antonio–New Orleans route, but the Milwaukee–New Orleans route has other potential railroad providers, then Railroad X may take steps to encourage the use of the San Antonio–New Orleans route.
- Railroad congestion. If Railroad X, or any other railroad that might provide the rail service, is overwhelmed with requests for transportation, then it may not be interested in bidding a low price to win the business.
- New competitor trying to break into the business. If Shipper B, the competitor, (based in San Antonio) is a new entity trying to break into the business, it may offer unusually low prices to Customer C (based in New Orleans) in order to try to win the business currently held by Shipper A.
- Underutilized facility. If Shipper B has an underutilized facility in San Antonio that, for various commercial reasons, it is trying to keep operational, then Shipper B may offer unusually low prices to Customer C.
- Maintenance shutdown. If Shipper B is planning a temporary partial facility shutdown in San Antonio for maintenance reasons, then Shipper B may not be interested in obtaining Customer C's new business until the maintenance is complete.

This list includes just a few of the innumerable different factors and considerations possible in the extremely complex, fluid, and multi-layered business environment faced by carload shippers. Such shippers must correctly analyze commercial considerations to effectively win sufficient business at a remunerative price and constantly be aware of changes in the marketplace. Any one O–D pair has a wide variety of applicable factors,

some of which are constantly changing and evolving, and these factors form the backdrop for the business planning losses faced by carload shippers in SAC cases.

This fluid and complex business environment emphasizes the need for carload shippers to know their costs of operation so that they can know what product price they should charge to existing customers for their products and how much they can offer to potential new customers interested in buying the products. The transportation rate applicable to each O–D pair is one element of a carload shipper's cost of operation.

During the pendency of a rate case, the shipper does not know what prices to charge customers for its products or what prices to offer potential customers, due to uncertainty about the true transportation rate applicable to such product sales.[115] The shipper could base its prices on transportation rates in its old contract, on the tariff rates at issue in the rate case, or on what rates it thinks the STB will prescribe at the end of its rate case. This sort of prediction effort is a virtually impossible task, however, to the great detriment of the shipper. After the STB's decision appears, the shipper will inevitably find that it charged far too low in some lanes and offered prices that were far too high in others, with the result that the shipper lost money in some lanes where it had business and missed moneymaking opportunities in other lanes where it should have had business.[116] The longer the rate case lasts, the more pronounced these effects, which constitute the aforementioned business planning losses.[117]

As a simplistic visual example, business planning losses can be

115. *Cf.* Burlington N. R.R. v. STB, 75 F.3d 685, 694 (D.C. Cir. 1996) ("[U]ncertainty associated with an extended rate investigation would play havoc with the utility's ability . . . to set rates for its electric consumers." (citation omitted)).

116. Conceivably, there could also be a few lanes where the shipper earned unexpectedly high revenue because it charged the customer a price that reflected a prediction of the reasonable rail rate that was too high. The lanes falling into this category are likely to be very few in number because any unusually high prices charged to a shipper's customer would result in the customer seeking alternative suppliers or curtailing production.

117. Admittedly, business planning losses are not the only effects felt by carload shippers. Most such shippers operate in competitive industries and, as such, it is the marketplace that ultimately determines the prices for their products. These competitive industries generally have thin profit margins however, meaning that the applicable railroad transportation rate could be the difference between a profit and a loss. Knowing the applicable transportation rate is also crucial so that the carload shipper knows where to invest its finite capital and marketing efforts because other opportunities may be more profitable or, at least, have more predictable costs.

represented in the following two charts. The first chart reveals two lanes (Lanes A and B) where the shipper is challenging the transportation rates charged by the defendant railroad (Row 2). During the multi-year proceeding at the STB, the shipper's supply contracts with the customers in Lanes A and B expire, and the shipper must decide upon new product prices to offer to these customers. The applicable transportation rate is one of the component parts of the product price charged by the shipper, so the shipper must make its best guess to predict the result of the STB rate case (Row 3). Of course, the actual result in the rate case is almost certainly different from the shipper's prediction. For this hypothetical, the actual result is shown in Row 4.

Row	Issue	Lane A	Lane B
1	Transport Rate in Old Contract	$3,300	$2,000
2	Challenged Tariff Rate	$4,800	$3,100
3	Prediction of Rate Case Result (i.e., transport rate inherent in price offered to customer)	$4,100	$2,500
4	Actual STB Rate Case Result	$3,600	$2,900

After the shipper issued its bids to the customers in Lanes A and B, one possible result is that the shipper lost the business in Lane A but won the business in Lane B (see Row 5 below). After the bids were made and the new product supply contract signed in Lane B, the STB rate case could continue for many more years, with a final result that impacts the shipper in the following way:

Row	Issue	Lane A	Lane B
3	Prediction of Rate Case Result (i.e., transport rate inherent in price offered to customer)	$4,100	$2,500
4	Actual STB Rate Case Result	$3,600	$2,900
5	Was Bid Successful?	No	Yes
6	Transport Rate Shipper Needed to Beat the Winning Bid	$3,700	N/A (shipper had the winning bid)
7	Highest Transport Rate at Which Shipper Could Break Even on Sale to Customer at Product Price Used in Bid	$4,300	$2,700
8	Should Shipper Have Won Customer's Business?	Yes	No
9	Ultimate Commercial Result for Shipper After STB's Rate Case Decision is Released	Bid should have been lower. Shipper could and should have won customer's business and successfully provided the product.	Bid should have been higher. Shipper lost money on the business and should not have had the business at this price.

Even though the shipper "won" a rate reduction in Lanes A and B, the shipper actually suffered significant business planning losses in both lanes, as shown in Row 9. The transport rate prescribed by the STB in Lane A was lower than the shipper expected (compare Rows 3 and 4), and the shipper could have bid less for the customer's business, won the business, and successfully provided the product (see Row 6). In contrast, the transport rate prescribed by the STB in Lane B was higher than the shipper expected

(compare Rows 3 and 4), and the shipper should have bid more for the business; at the actual transport rate, the shipper lost money on the business (compare Rows 4 and 7).

The tables shown above are admittedly simplistic, but they provide a good example of how business planning losses occur during a rate case and show that the longer a rate case lasts, the greater the business planning losses incurred. Of course, the defendant railroad is also in the dark about the true amount of the reasonable rate during the case, but the railroad is necessarily market dominant for the lanes at issue.[118] Therefore, the railroad is not competing with another railroad in rate-setting for the lanes.[119] There is no danger of failed bids that should have succeeded or successful bids that should have failed.

The business planning losses are all the more injurious when one considers the length of time required for a rail rate case at the STB. Cases tend to last at least two and a half years and often extend for four, five, six, or more years.[120] As mentioned in Parts II and III, success in a SAC rate case

118. *See* 49 U.S.C. § 10701(d)(1) (2012); *see also id.* § 10707(a) (defining "market dominance" as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies").

119. *Id.* § 10707(a).

120. Determining the actual length of past STB rate cases is a somewhat complex task because of the appeals, reopenings, and technical adjustments that commonly occur in most cases. The five most recent SAC cases that included an STB merits decision on rate reasonableness generally lasted between three and six years, with one outlier. *See* Total Petrochemicals & Ref. USA, Inc., No. NOR 42121 (STB served Sept. 14, 2016), https://www.stb.gov/decisions/readingroom.nsf/UNID/468428972FC59B2C852577E500640068/$file/41260.pdf (complaint filed May 3, 2010; merits decision Sept. 14, 2016); Sunbelt Chlor Alkali P'ship, No. NOR 42130 (STB served June 30, 2016), https://www.stb.gov/decisions/readingroom.nsf/b227c2e1eecbe157852572f700012fc5/4421878150e5c0b685257fe10077c3a8?OpenDocument (complaint filed July 26, 2011; merits decision June 20, 2014; reconsideration decision June 30, 2016; case now on appeal at the 11th Circuit in No. 16-15701); E.I. DuPont de Nemours & Co., No. NOR 42125 (STB served Dec. 23, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf (complaint filed Oct. 7, 2010; merits decision Mar. 24, 2014; reconsideration decision Dec. 23, 2015); W. Fuels Ass'n, No. NOR 42088 (STB served June 15, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/0D2321116C6045B485257A1D006C33F8/$file/42453.pdf (complaint filed Oct. 19, 2004; case eventually settled June 15, 2015, after several merits decisions); Ariz. Elec. Power Coop., Inc., No. NOR 42113 (STB served Nov. 22, 2011), https://www.stb.gov/decisions/readingroom.nsf/WebDecisionID/41181?OpenDocument (complaint filed Dec. 30, 2008; initial merits decision Nov. 22, 2011, with later proceedings also occurring).The outlier case involved a complaint by a Wyoming-based

leads to STB-prescribed rail rates for up to 10 years.[121] Most shippers file their rate complaints around the same time as the challenged tariff rates go into effect.[122] Thus, the 10-year period starts around the same time as the

electric utility against BNSF Railway Company in Western Fuels Association, No. NOR 42088 (complaint filed Oct. 19, 2004). An initial decision was served September 10, 2007, finding the challenged rates reasonable, but the STB gave the complainant the opportunity to submit revised evidence because the rules changed midway through the case. W. Fuels Ass'n, No. 42088 (STB served Feb. 18, 2009), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/3FE4193782B6435085257561006F3148/$file/39709.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd in part sub nom.* BNSF Ry. v. STB, 604 F.3d 602 (D.C. Cir. 2010), *original reasoning reaff'd sub nom.* W. Fuels Ass'n, No. NOR 42088 (STB served June 15, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/0D2321116C6045B485257A1D006C33F8/$file/42453.pdf, *vacated sub nom.* BNSF Ry. v. STB, 741 F.3d 163 (D.C. Cir. 2014). The complainant accepted this offer and submitted revised evidence, and the STB found the challenged rates unreasonable on February 18, 2009. BNSF Ry. v. STB, 604 F.3d 602, 607, 608 (D.C. Cir. 2010) (citing W. Fuels Ass'n, No. 42088, slip op. at 20 (STB served Sept. 10, 2007), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/0F22D00F7D7A4B48852573520051B4D1/$file/38254.pdf (to be published in the S.T.B. Reporter at a later date) (Initial Decision), *clarified on reh'g*, (STB served Mar. 12, 2008), https://www.stb.gov/decisions/ReadingRoo;m.nsf/UNID/AFDA3F4642A64EBE8525740A00724CDA/$file/38872.pdf *modified*, (STB served Aug. 4, 2008), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/E240B80CB80543BD8525749B0051A0E6/$file/39262.pdf). BNSF appealed this decision, and the D.C. Circuit affirmed the vast majority of the STB's decision but remanded to the STB for consideration of one issue. *Id.* at 613. On remand, the STB explained its reasoning and did not change the substance of its earlier decision, prompting another BNSF appeal. BNSF Ry. Co. v. STB, 741 F.3d 163, 165–66 (D.C. Cir. 2014). The D.C. Circuit remanded again for further STB explanation of its reasoning, given ongoing changes in the rate case process. *Id.* at 168. Eventually, the complainant and the defendant reached a settlement of their dispute and asked the STB to dismiss the proceeding. The STB granted the motion to dismiss in a decision served June 15, 2015. W. Fuels Ass'n, No. NOR 42088, slip op. at 1 (STB served June 15, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/03B5BAAD6215784E85257E65004A7468/$file/44510.pdf. This case is a somewhat extreme example, but the initial rate reasonableness review customarily takes several years at the STB, even before court appeals occur.

121. Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 64–66 (served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD385257217005C5064/$file/37406.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd sub nom.* BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

122. In fact, shippers are prohibited from filing complaints significantly in advance of this date. *See* Burlington N. R.R. v. STB, 75 F.3d 685, 688, 693–96 (D.C. Cir. 1996) (filing of complaint more than a year before expiration of contract; granting petition for review because premature filing violated statutory scheme).

case commences.[123] If a carload case lasts four years at the STB and the shipper wins a 10-year rate prescription, then 40 percent of the transportation rate benefit inherent in the victory is counterbalanced by business planning losses for those four years. For a case that lasts five or six years, the results are even worse.

Due to the complexity of the rate case process, especially for carload shippers, a complainant shipper's business planning could be thwarted for a majority of the 10-year prescription period. At the end of the 10 years, the railroad is given complete rate-setting freedom again, where the shipper's only recourse, yet again, is to the STB in a rate case. If a new case is brought, the same problems arise: pronounced business planning losses. Despite being guaranteed "reasonable rates" by federal law,[124] carload shippers could easily suffer business planning losses for 40 percent, 50 percent, or more of the time. Many, if not most, carload shippers operate in a competitive global marketplace with fierce price competition. If business planning losses are incurred for a majority of the time on an ongoing basis, it is difficult to see how such shippers could afford to remain in business, thus rendering illusory the right to a reasonable rate.

As mentioned in Part II, the vast majority of railroad rate cases have been brought by electric utility coal shippers.[125] Business planning losses have not been as much of a concern for these coal shippers for a wide variety of reasons, including the expense of alternative fuels for much of the past 30 years, the utilities' need to have dependable base-load generation, and the fact that most electric utility shippers that have brought SAC cases have electric rates and costs approved by state regulators, which are passed through to electricity users.[126] Due partially to coal shippers' comparative

123. If the shipper wins a rate reduction, then, after the STB's decision, the defendant railroad pays the shipper "reparations" to the extent the shipper's past transportation rate payments covered by the complaint exceeded the STB-prescribed rate. *Major Issues in Rail Rate Cases*, slip op. at 6 (served Oct. 30, 2006) ("If, after a full hearing, the [STB] finds the challenged rate unreasonable, it will order the railroad to pay reparations to the complainant for past movements . . . ." (citations omitted)).

124. *See, e.g.*, 49 U.S.C.A. § 10701(a), (d) (West 2016); 49 U.S.C. § 10702.

125. *E.g.*, BNSF Ry. v. STB, 748 F.3d 1295, 1297–99 (D.C. Cir. 2014); Burlington N. R.R. v. STB, 114 F.3d 206, 209 (D.C. Cir. 1997).

126. *See, e.g.*, Petition for Injunctive Relief at 14–15, NRG Power Mktg. LLC, No. NOR 42122 (filed May 25, 2010) ("Unlike all prior coal rate complainants, which involved rate-based power plants, Huntley and Dunkirk are merchant power plants and, thus, do not have a guaranteed market for their power, do not have captive retail or wholesale customers, and cannot make use of automatic fuel cost pass-through."). The

lack of concern regarding business planning losses, the SAC process has been allowed to become extremely time-consuming, complex, and unwieldy over the past 30 years.

VI. DOES THE DUE PROCESS CLAUSE REQUIRE CHANGES IN OR REPLACEMENT OF SAC?

Since the seminal case of *Mathews v. Eldridge*,[127] courts have used a three-part balancing test to determine if the process afforded to a litigant meets the due process standard of the Constitution.[128] Pursuant to this test, courts consider the following factors:

1. the private interest that will be affected by the official action;

2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

3. the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[129]

Most procedural due process claims in civil litigation focus on the sufficiency of a specific hearing before or after a specific payment or benefit, such as continued employment or a disability payment, is terminated.[130] Thus, the disputes tend to be between the government and a private party regarding a benefit or right of the private party that the government seeks to take away.[131] Nonetheless, due process concerns are occasionally raised in situations akin to a rail rate case—meaning civil litigation between two

proceeding in Docket No. NOR 42122 settled before the STB issued any substantive rulings. *See* NRG Power Mktg. LLC, No. NOR 42122 (STB served July 8, 2010), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/FFA4F3984CAE76E08525775A0042EA3C/$file/40927.pdf.

127. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (applying the Due Process Clause of Fifth Amendment to Social Security Administration decision regarding benefits).

128. *E.g.*, Turner v. Rogers, 564 U.S. 431, 444–45 (2011) (considering "an indigent's right to paid counsel" at a civil contempt proceeding).

129. *Mathews*, 424 U.S. at 334–35 (citation omitted).

130. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546–47 (1985) (holding a "pretermination opportunity to respond" is required before a government employee can be dismissed).

131. *See, e.g.*, *id.*

private parties. For example, the Supreme Court recently relied on due process to require recusal of a judge in a civil lawsuit between two private parties.[132] The Supreme Court has also relied on due process to evaluate the amount of discretion afforded to juries in setting punitive damage awards in civil litigation.[133]

As should be apparent from the descriptions in Parts III and V above, there are a multitude of serious obstacles facing any carload shipper seeking to enforce the "reasonable rate" guarantee under federal law. Some of these obstacles are inherent in any STB rate reasonableness case, some are peculiar to the SAC methodology, and others apply exclusively to carload shippers.[134] The combination of these numerous obstacles is particularly onerous for carload shippers, thereby raising grave questions about whether the constitutional due process requirement is satisfied when such carload shippers seek to make use of the STB rate case process.[135] While any one obstacle, standing alone, may not raise a due process violation, the cumulative and compounding effect of all obstacles on carload shippers is severe.

This would not be the first time that due process is implicated based on cumulative effect.[136] Courts are very familiar with the possibility that a series of discrete factors and events in a litigation, when taken together, can be a violation of the Due Process Clause.[137] In the criminal context, the Supreme Court has found that "the cumulative effect of the potentially damaging circumstances of [a] case [can] violate[ ] the due process guarantee of fundamental fairness."[138] The cumulative effect doctrine is not without its critics, but it has been frequently applied in criminal proceedings and its underpinnings form the basis of certain well-known due process decisions in civil proceedings.[139] As stated in one recent article: "[P]rocedural due process cases necessarily involve both a deprivation of a constitutionally

132. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886–87 (2009).

133. Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 18–19 (1991).

134. *See supra* Parts II–III, V.

135. *See supra* Parts IV–V.

136. *See* Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978).

137. *See* KERRY ABRAMS & BRANDON L. GARRETT, CUMULATIVE CONSTITUTIONAL RIGHTS 6–13 (Pub. Law & Legal Theory Research Paper ser. 2015-42, 2015), http://ssrn.com/abstract=2642640 (compiling cases and discussing the cumulative theory of constitutional harm), to be published 97 B.U. L. REV. (forthcoming 2017).

138. *Taylor*, 436 U.S. at 487 n.15.

139. *See* ABRAMS & GARRETT, *supra* note 137, at 9–10.

cognizable underlying life, liberty or property interest, and in addition, a consideration of the totality of the procedures used in connection with the deprivation."[140] Through the creation, development, and continuation of an overly complex SAC methodology—to the exclusion of all other possible methodologies—the STB has arguably violated the Constitution in its construction of the statute that gives shippers the federal right to a "reasonable" rail rate.[141] If the obstacles facing carload shippers are so pronounced that potential complainants are deterred from even bringing rate cases, then constitutional concerns are implicated because due process involves more than just the specific procedure utilized; it includes the simple right of civil litigants to access the courts.[142]

One may be tempted to assert that all litigation is expensive and time-consuming, especially litigation between business entities when large sums of money are at stake, and that, consequently, there is no reason for SAC rate cases to be any different. Indeed, for over 100 years, commentators have bemoaned the cost and length of court proceedings in the United States.[143] Under the well-known "American rule," each litigant in an STB or court proceeding generally bears its own costs.[144] While, as a general matter, it is

140. *Id.* at 13.

141. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." (citation omitted)).

142. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 431, 436–37 (1982) (finding due process includes "the right to use . . . adjudicatory procedures" pursuant to state employment practices law); *cf.* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding absent plaintiff member of class action is entitled to due process protections for its claim).

143. *See, e.g.*, Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) ("The common perception that the litigation process is marred by undue delays and costs is correct."); Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673, 673 (2013) (quoting Rule 1 of the Federal Rules of Civil Procedure and then stating that "any objective evaluation of current federal civil process will inevitably lead to the conclusion that the process is functioning inadequately in its purpose of discharging justice speedily and inexpensively"); Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Read Before the American Bar Association (Aug. 29, 1906), *in* 40 AM. L. REV. 729, 729 (1906) ("Dissatisfaction with the administration of justice is as old as law.").

144. Caddo Antoine & Little Mo. R.R.—Feeder Line Acquisition—Ark. Midland R.R. Line Between Gurdon and Birds Mill, 4 S.T.B. 610, 631 (2000) (awarding attorney fees is "contrary to agency practice"), *aff'd in part and rev'd in part*, GS Roofing Prods. Co. v. STB, 262 F.3d 767 (8th Cir. 2001) (upholding the STB's declination of attorney

undeniable that litigation is expensive, this viewpoint ignores several peculiar aspects of the SAC rate case process, namely: (1) the STB itself controls and mandates the SAC case structure, requirements, and details in a way that exceeds and is qualitatively different from normal court litigation, where the plaintiff has comparatively more freedom to develop its case; (2) there is a significant repeat player problem with the same four defendants in virtually all SAC rate cases;[145] and (3) the process has been developed for, and evolved based on, almost exclusively simple coal unit train transportation, not carload, cases.[146] Moreover, there has been a noticeable increase in SAC cost, complexity, and length despite repeated simplification efforts by the STB.[147]

Due to their particular traffic patterns, with dozens or hundreds of different O–D pairs scattered throughout the country, carload shippers face a uniquely uphill battle due to the sheer difficulty of developing a SARR to cover the rates that they want to challenge.[148] Compared to the expected

fees). Courts follow the same American Rule. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

145. *See supra* Part III.

146. *See supra* notes 52–53 and accompanying text.

147. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 13–14 (STB served July 18, 2013), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/60A2C167BAAB1DB185257BAC005E6235/$file/42980.pdf, *vacated in part sub nom.* CSX Transp., Inc. v. STB, 754 F.3d 1056 (D.C. Cir. 2014); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD385257217005C5064/$file/37406.pdf, *aff'd sub nom.* BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008); General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441 *passim* (2001).

148. Railroads usually require each shipper to enter into a single overall contract to cover all traffic; consequently, a shipper is generally paying all tariff rates or all contract rates. *See, e.g.*, Rail Transportation Contracts Under 49 U.S.C. § 10709, 74 Fed. Reg. 416, 418 (Jan. 6, 2009) (citations omitted), *vacated*, STB Ex Parte No. 676 (served Jan. 22, 2010), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/2F95DC7702595EB5852576B30054D843/$file/40013.pdf. To avoid what are customarily high tariff rates, a shipper has strong incentives to challenge as many rates as possible at one time. As explained in Part II, the STB also encourages rates to be challenged en masse. *See, e.g.*, Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 32–33 (served Sept. 5, 2007), https://www.stb.gov/decisions/readingroom.nsf/UNID/325990E4484E2E108257EED004C3821/$file/44760.pdf (to be published in the S.T.B. Reporter at a later date) (referring to "improper attempts by a shipper to disaggregate a large claim into a number of small claims"), *aff'd sub nom.* CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009).

relief, SAC is too costly to apply to a small number of carload traffic O–D pairs, which means that carload shipper complainants must consolidate dozens of O–D pairs into a single SAC case. Of course, it is this very expansion and consolidation that creates super-sized SARRs that are dramatically more complex than unit train SARRs.[149] In effect, a carload shipper's rate case can require replication of almost the entire rail network of the defendant railroad.[150] The STB has agreed that such a task would be daunting at best; in a unit train coal case from over 10 years ago, the STB remarked on the difficulties that would be faced if the complainant's SARR (named WCC) were forced to become significantly larger:

> While the WCC is a relatively small and straight-forward SARR, the parties had to produce, and the [STB] analyze, dozens of volumes of evidence on the costs associated with acquiring the land, designing, building, and operating this short SARR (approximately 400 route-miles). It is difficult to imagine the amount of materials that would have to be produced and analyzed to put together the evidence needed to design a railroad 10 times larger. The number of disputed issues would also escalate, and the operating plans and computer simulation models would become so complicated as to risk being intractable.[151]

The STB's above-quoted concern regarding the likely "intractab[ility]" of a 4,000-mile SARR based on simple coal *unit* trains in 2004 is quite ironic given that the STB recently decided a rate case with an 8,000-mile *carload* SARR but made no effort to simplify the SAC process.[152]

SAC modeling is inordinately complex for carload operations because of the need to develop a hypothetical SARR using computer programs,

149. *See supra* Part V.

150. *E.g.*, E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 1–2 (STB served Dec. 23, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf.

151. Pub. Serv. Co. of Colo., 7 S.T.B. 589, 602–03 (2004), *modified in part*, No. 42057, slip op. at 1 (STB served Jan. 19, 2005), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/06ED174365F0D8E285256F8E005E0DFA/$file/35137.pdf (to be published in the S.T.B. Reporter at a later date) (modifying "rate prescription and reparations award"), *aff'd sub nom.* BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006).

152. *See* E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 14–16 (STB served Mar. 24, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/56966574580BB51385257CA5006D2E05/$file/43717.pdf (refusing to prescribe rates after the complainant—relying on 8,000-mile SARR—had not demonstrated rates were unreasonable). Reconsideration was denied in a decision served December 23, 2015. *E.I. DuPont de Nemours & Co.*, (STB served Dec. 23, 2015).

spreadsheets, and voluminous data from the defendant railroad in order to transport the traffic selected by the complainant while, at the same time, showing that the SARR's operations are more efficient and less costly than those of the defendant railroad.[153] Effectively, a carload-based SARR must model the exact movements of thousands of individual rail cars and locomotives as they make their way across the railroad tracks included in the SARR system.[154] For any one rail car, this typically begins with a step such as picking up the car at the origin by a local train that operates in a relatively small area.[155] The local train drops off the car, and other cars, at a nearby rail yard, where the car is moved to a temporary holding track.[156] Relatively soon thereafter, the car is brought off the holding track by a yard locomotive that is busy assembling numerous cars in a long-distance train.[157] Eventually, the long-distance train departs the yard under the power of the appropriate locomotive(s).[158] It will likely travel hundreds of miles to a different rail yard where, again, the rail cars are separated and moved to temporary holding tracks.[159] The car may wait a day or so on this holding track before it is gathered by a yard locomotive that is assembling cars and creating new long-distance trains.[160] As part of this second long-distance train, the car is taken hundreds of miles to a new rail yard where, again, it is placed on a temporary holding track.[161] Finally, a local locomotive removes the car from the holding track and delivers it to the destination.[162]

If the above narrative is multiplied by thousands of individual rail cars, all moving between different O–D pairs, even a casual observer begins to get a sense of the complexity inherent in modeling a carload-based SARR. As

153. *See, e.g.*, *E.I. DuPont de Nemours & Co.*, slip op. at 31–33 (STB served Mar. 24, 2014).

154. *See, e.g.*, *id.* at 37–39 ("DuPont's plan does not account sufficiently for the fundamentals of carload transportation and the need to move individual shipments to their specific locations.").

155. *See, e.g.*, Burlington N., Inc. v. Dep't of Pub. Serv., 240 N.W.2d 554, 555–56 (Minn. 1976) (en banc) (per curiam) (stating the parties' stipulated facts concerning the typical operation of a local train).

156. *See, e.g.*, *id.*; *see also* Lin & Cheng, *supra* note 110, at 2532–34, and other sources cited in note 109.

157. *See* sources cited *supra* note 156.

158. *See* sources cited *supra* note 156.

159. *See* sources cited *supra* note 156.

160. *See* sources cited *supra* note 156.

161. *See* sources cited *supra* note 156.

162. *See* sources cited *supra* note 156.

should be obvious, the modeling of a unit-train-based SARR, where the complainant need only worry about the movements of entire trains (with no local trains, no intermediate yards, no holding tracks, and no disassembly and assembly of various trains) is dramatically simpler.[163] The complexity of carload SARR operations encompasses thousands of subsidiary decisions in the process—thereby creating endless opportunities for the defendant railroad to criticize the SARR and, crucially, the STB to find fault with the SARR.[164] The inordinate complexity involved in modeling a carload-based SARR raises serious questions regarding whether a "sufficiently reliable" result is obtained at the end of the case.[165]

Litigation costs and delays are higher in carload cases because of this complexity. Therefore, carload shippers are faced with longer SAC cases than unit train shippers, again raising constitutional concerns.[166] Arguably, requiring use of an overly complex and expensive procedure to vindicate one's statutory rights does not meet the due process standard of a hearing "in a meaningful manner."[167] The simple fact that SAC has existed and been used for many years does not insulate it from attack on constitutional grounds.[168]

Constitutional jurisprudence reveals that the traditional three-factor due process test under *Mathews* could be applied to rail rate cases.[169] These

163. *Cf.* Potomac Elec. Power Co. v. United States, 584 F.2d 1058, 1067 n.7 (D.C. Cir. 1978) ("Unit-train service is a system in which cars and locomotives are joined for an uninterrupted, round trip, shuttle-type service, and is regarded as an efficient method of transporting coal in large volumes." (citation omitted)).

164. *See, e.g.*, E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 17 (STB served Dec. 23, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf.

165. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978) (citations omitted) (recognizing that the extent of due process concerns depends upon whether the existing procedures are "sufficiently reliable to minimize the risk of erroneous determination").

166. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985) (rejecting claim that nine-month process was too long, but noting that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation").

167. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).

168. *See* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 17–18 (1991) (addressing the constitutionality of the common law method for punitive damages, despite being practiced for 200 years before the Fourteenth Amendment was enacted).

169. *See Mathews*, 424 U.S. at 334–35.

three factors create a "framework" by which courts "evaluate the sufficiency of particular procedures."[170] The timing and details required for a particular hearing depend on "appropriate accommodation of the competing interests involved."[171] Consideration must be given to the importance of the private interest, the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the government interests involved.[172] These factors suggest that current obstacles faced by carload shippers implicate due process concerns. Carload shippers have a federal right to a reasonable rail rate,[173] and the transportation rates that they incur are key factors in their ability to compete in the marketplace and remain viable business entities.[174] Such shippers are faced with at least 10 years of unregulated transportation rates if the STB's rate case process is not available to them.[175] Given the complexity of the current SAC process, especially for carload shippers, the risk of governmental error in setting the level of a reasonable rate seems quite high.[176] Finally, the government's interest in a lengthy, complicated, and expensive rate case process for carload shippers is negligible; in fact, the government presumably prefers a shorter, less complex, and less costly procedure.[177] In the lexicon of *Mathews*, "substitute procedural safeguards"[178]—meaning a simpler rate case methodology—would have significant value for carload shippers.

170. Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (addressing procedural due process requirements for an inmate seeking to avoid being placed in a high security state prison).

171. Goss v. Lopez, 419 U.S. 565, 579 (1975) (citations omitted).

172. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (citations omitted); *Mathews*, 424 U.S. at 334–35.

173. *See supra* Part II.

174. *See supra* Part V.

175. *See* Intermountain Power Agency, No. NOR 42127, slip op. at 3 n.11, 4 (STB served Nov. 2, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/74609ABF3017AFA585257AAA004DCE43/$file/42519.pdf.

176. *See supra* Parts III, V.

177. As mentioned earlier, most procedural due process cases are between a private party (the entity seeking more process before a benefit or right is removed) and the government (the entity responsible for the process). *E.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); *see supra* Parts I, VI. In this scenario, an expansion of the process is always a burden on the government. However, in a case between two private parties, it may be more appropriate to think of the third *Mathews* factor as the interest of the opponent on the other side of the lawsuit. It is the opponent whose rights will be most affected by granting more process.

178. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The unique and pronounced problems faced by carload shippers, especially when compared to unit train shippers, deserve greater evaluation. Even if no changes are made to unit train cases, it may be that special procedures are warranted in carload cases in order to reduce their complexity to a level comparable to that of a unit train case. If the STB does not proactively create an alternate rate reasonableness process for carload shippers (whether under SAC, the management efficiency constraint, or otherwise), then a carload shipper may be required by Supreme Court precedent to go through the entire existing SAC process, with all its attendant costs, complexities, and time investment, before bringing a due-process-based claim regarding the excesses of the process.[179]

An important distinction must be made. The issue raised in this Article is not just that litigation is expensive and time-consuming; many commentators have bemoaned this fact for decades with nary a mention of the Due Process Clause.[180] Indeed, no plausible due process claim naturally arises from such a fact. The key distinction with railroad rate reasonableness cases is that the government (here, the STB) has largely created the intricacies and complexities that are inherent in the process that must be utilized to adjudicate a rate claim, and crucially, this process seems particularly geared toward unit train shippers with virtually insurmountable barriers and excessive extra costs for carload shippers.[181] These unique circumstances should be carefully considered in a comprehensive due process evaluation.[182]

Independent observers agree that something is amiss in the STB's rate case methodology. The Transportation Research Board recently found that the STB's rate reasonableness standards are "slow, costly, and inappropriate for many shippers' circumstances . . . [and] [t]hey prevent shippers from having equal and effective access to the law's maximum rate protections."[183]

179. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199–200 (1985) (finding the due process claim to be premature because no "final decision" had been made "as to how the regulations w[ould] be applied to respondent's property").

180. *See supra* note 143 and accompanying text.

181. *See supra* Parts III, V.

182. *See* Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944) (citations omitted) ("What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case.").

183. MODERNIZING FREIGHT RAIL REGULATION, *supra* note 17, at 6–7. The

Other third parties have recommended that the standards be replaced.[184] Just as a decisionmaker is responsible under the Due Process Clause for providing too little process to a litigant, so too, this Article contends, should a decisionmaker be responsible when too much process is foisted onto a litigant seeking to enforce a statutory right.

An indication that the STB's rate reasonableness standards are in need of comprehensive overhaul could also be found in the fact that major U.S. railroads—the defendants in STB rate cases—are utterly sanguine about, and satisfied with, such standards.[185] In other words, if one side is extremely supportive of an adjudication method, but the other side is extremely unhappy with it, then this set of circumstances is likely a signal that the method itself is imbalanced and inequitable. A truly neutral method should provoke a roughly similar mixture of complex feelings on both sides.

A "too much process" litigant could easily assert that, under *Mathews*, there is a "risk of an erroneous deprivation" due to the complexity, inscrutability, and inherent delays in the applicable procedures.[186] The litigant could assert that simpler, substitute procedures would be preferable, and such substitute procedures would have the added benefit of fewer "fiscal and administrative burdens" for the government.[187] Of course, some difficulty inevitably exists in using traditional due process precedent, such as *Mathews*, to assert that too much process exists. Virtually all precedent is based on a litigant's desire for *more* process and an assumption that more

Transportation Research Board is one of the seven divisions of the National Research Council, which itself is the principal operating agency of the National Academy of Sciences and the National Academy of Engineering. *The Transportation Research Board*, NAT'L ACADEMS. SCI., ENG'G, & MED., http://www.trb.org/AboutTRB/AboutTRB.aspx (last visited Sept. 28, 2016).

184. Pittman, *supra* note 64, at 312.

185. *See, e.g.*, CSX Transportation, Inc., Supplemental Comments on STB Ex Parte No. 705, Competition in the Railroad Industry, at 10 (July 25, 2011), https://www.stb.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/f2ad2134bbc0c0b3852578d90059712a/$FILE/230692.PDF ("The [STB]'s rate reasonableness processes are robust, cost-effective, and efficient, and provide the appropriate remedy for any shipper who thinks its rates are unreasonably high."); Norfolk Southern Railway Company, Supplemental Comments on STB Ex Parte No. 705, Competition in the Railroad Industry, at 16 (July 25, 2011), https://www.stb.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/8b794f0245e0c5ed852578d90059bc68/$FILE/230691.PDF (asserting that the STB's rate reasonableness standards are "entirely adequate" to address shippers' concerns about high rates).

186. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

187. *See id.*

process is better, but the bounds of the Due Process Clause seem large enough to encompass a claim that too much process has been created.[188] "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[189] The exact parameters of due process may be difficult to define but arise from the concept of "fundamental fairness" based on an assessment of the "several interests that are at stake."[190]

As previously mentioned, due process jurisprudence has been developed almost exclusively on the basis of cases where the government actor seeks to impose a penalty on, or terminate employment or benefits of, a private party.[191] Consequently, the due process concerns arise only on one side of the dispute. With STB rail rate cases, there are private parties on both sides, meaning that the STB or a reviewing court must consider the competing due process rights of the complainant shipper and the defendant railroad.[192] In other words, further balancing of competing interests will likely be needed. Although this Article focuses on the due process rights of the complainant shippers, such rights are equally held by defendant railroads.[193] As described throughout this Article, the due process rights of carload shippers are most at risk from the current rate reasonableness regime. Remedial action by the STB or Congress is warranted; if such action is not taken, a legal challenge in court may be the only option for carload shippers. Throughout any revamping or reviewing of the STB's rate reasonableness methodology, the due process rights of defendant railroads must be preserved and protected, but right now, the most serious problem is carload shippers' access to the reasonable rates ostensibly guaranteed under federal law.[194]

The STB appears at least somewhat aware of the problem and has stated that it is trying to make its rate case process more accessible to parties other than unit train coal shippers,[195] but the hurdles faced by carload

188. *See supra* Part VI.

189. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

190. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981).

191. *See supra* notes 131–32 and accompanying text.

192. *See supra* Parts III, IV.

193. *See* discussion *supra* note 177.

194. Any overhaul of the STB's rate reasonableness process would also need to ensure that accurate rate case results are obtained.

195. M&G Polymers USA, LLC, No. NOR 42123, slip op. at 2 (STB served Sept. 27, 2012), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/64E3F8C385BA40A585257A8600483883/$file/41926.pdf ("For several years now . . . the [STB] has been striving

shippers in using the SAC process indicate that accessibility remains elusive. Furthermore, the accessibility steps taken by the STB in *M&G Polymers USA, LLC* only concerned the market dominance (i.e., jurisdictional) phase of the case, not the evaluation of the rates themselves.[196] As described in this Article, there are serious problems with the prevailing SAC rate reasonableness methodology as applied to carload shippers,[197] and the STB should seriously consider the manner in which SAC is applied to carload shippers. Indeed, as described herein, due process concerns require the STB to develop an alternative rate reasonableness method for carload shippers if SAC cannot be appropriately revised.

As a replacement for SAC, the STB could develop the revenue adequacy method or the management efficiency method.[198] The STB has recently requested comment regarding the form that a revenue adequacy rate case should take.[199] There has been no similar request for a management efficiency case. In any event, carload shippers are entitled to a viable methodology for their complaints. Indeed, they definitively need a workable rate reasonableness methodology other than revenue adequacy to cover those situations where the defendant railroad is not revenue adequate,[200] so significant revisions to SAC or an alternative to SAC could still be necessitated by due process concerns.

VII. FORCES OF CHANGE ARE ON THE HORIZON

Is there any chance that the STB will fundamentally reconceive SAC

to make its rate review process more broadly available to shippers other than large utilities.").

196. *Id.* at 1 ("[I]n response to an unopposed motion, [the STB] bifurcated [the] proceeding into separate market dominance and rate reasonableness phases . . . and held the rate reasonableness phase . . . in abeyance pending review of the parties' market dominance evidence." (citation omitted)).

197. *See supra* Part V.

198. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 547–48 (1985) ("[T]he various constraints contained in CMP may be used individually . . . ."), *aff'd sub nom.* Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987); *see also id.* at 534 n.35 (discussing the two CMP approaches and how each approach may affect "the rate to an individual shipper").

199. Notice of Acceptance of Comments in Railroad Revenue Adequacy, *supra* note 39.

200. *Coal Rate Guidelines*, 1 I.C.C.2d at 536 ("[A] rate may be unreasonable even if the carrier is far short of revenue adequacy."); s*ee also* BNSF Ry. v. STB, 453 F.3d 473, 480–81 (D.C. Cir. 2006).

or develop an alternative to SAC, especially for carload shippers? History indicates that skepticism would be a wise response to such a question. The STB has repeatedly tried to simplify the rate reasonableness process over the past 15 years, but there has been no noticeable reduction in cost, complexity, or length.[201] It could be asserted that the STB's prior simplification efforts were like rearranging the deck chairs on the Titanic—the STB expended considerable effort to fix and tweak SAC when, in reality, the SAC methodology itself might be the problem, especially for carload shippers.

Despite the justified skepticism about a possible revamping of the STB's rate reasonableness process, certain forces of change appear to be increasing at the STB. On December 18, 2015, President Barack Obama signed the Surface Transportation Board Reauthorization Act of 2015 (Act).[202] Among other things, the Act increases the size of the STB from three members to five[203] and, crucially, allows STB members to talk privately amongst themselves without implicating the Sunshine Act requirement that public observation be available.[204] At a minimum then, the STB will have fresh perspectives from two new faces, and the members will now be able to talk amongst themselves, thereby potentially fostering commiserating about problems and brainstorming about potential solutions in a manner that could move the STB forward.[205]

201. *See, e.g.*, Rate Regulation Reforms, No. EP 715, slip op. at 1 (STB served July 18, 2013), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/60A2C167BAAB1DB185257BAC005E6235/$file/42980.pdf, *vacated in part sub nom.* CSX Transp., Inc. v. STB, 754 F.3d 1056 (D.C. Cir. 2014); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (STB served Oct. 30, 2006), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/5C7E822CBDC68AD385257217005C5064/$file/37406.pdf (to be published in the S.T.B. Reporter at a later date), *aff'd sub nom.* BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008); General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 441–42 (2001).

202. STB Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2227 (to be codified in scattered sections of 49 U.S.C.) (beginning as Senate Bill 808, 114th Cong. (as introduced in Senate, Mar. 19, 2015)).

203. *Id.* § 4(a), 129 Stat. at 2229 (to be codified at 49 U.S.C. § 1301(b)).

204. *Id.* § 5, 129 Stat. 2230–31 (to be codified at 49 U.S.C. § 1303); *see also id.* § 3, 129 Stat. at 2228–29 (establishing the STB as an "independent establishment of the United States Government" and redesignating and striking preexisting statutory provisions).

205. As of the date this Article was written, the two new STB members have not yet been appointed, let alone confirmed by the Senate. The switch to Republican control of the White House in early 2017 means that the composition of the STB will shift from a Democratic 2-to-1 majority to a Republican 3-to-2 majority once the two new members

The Act also requires the STB to "initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases."[206] To fulfill this obligation, the STB issued an Advance Notice of Proposed Rulemaking (ANPRM) on June 15, 2016, instituting a rulemaking proceeding to evaluate whether revisions can be made to the current rate case procedures.[207] The specific revisions described in the ANPRM would represent minor tweaks to the rate case process; they consist of steps such as: (1) a pre-filing requirement to enable the defendant to begin gathering materials and to enable the parties to participate in STB-sponsored mediation, (2) standardization of discovery requests or even mandatory disclosures to expedite discovery, and (3) standardization of railroad unit costs used in development of the SARR or similar evidentiary shortcuts.[208] As should be obvious, the possible revisions enumerated in the ANPRM do not represent the dramatic transformation of the rate case process that is sorely needed. It remains to be seen if a fundamental rethinking of rate reasonableness will be seriously considered in this proceeding or at any time in the near future.

Pursuant to the Act, the STB is required to submit a report to Congress regarding "whether current large rate case methodologies are sufficient, not unduly complex, and cost effective" not later than one year after its enactment.[209] The report must also address whether "alternative methodologies" exist or "could be developed, to streamline, expedite, and address the complexity of large rate cases."[210] In an effort to implement these requirements, the STB held informal meetings in April 2016 with various stakeholders to "explore and discuss ideas to expedite rate reasonableness cases."[211] In a possible nod to carload shippers, the Act also requires the Comptroller General to submit a report to Congress regarding "rail

are confirmed.

206. *Id.* § 11(c), 129 Stat. at 2234 (to be codified at 49 U.S.C. § 10704).

207. Expediting Rate Cases, 81 Fed. Reg. 40,250, 40,250 (June 21, 2016) (to be codified at 49 C.F.R. subtitle B, ch. X).

208. *Id*. at 40,250–52.

209. STB Reauthorization Act of 2015 § 15(a), 129 Stat. at 2238 (to be codified at U.S.C § 11708).

210. *Id.*

211. *STB Reauthorization Act Implementation Continues: STB to Hold Informal Meetings for Streamlining and Expediting Rail Rate Cases*, STB (Mar. 15, 2016), https://www.stb.gov/newsrels.nsf/13c1d2f25165911f8525687a00678fa7/7d5e8ee0b64b081885257f77004e6d5d?OpenDocument.

transportation contract proposals containing multiple origin-to-destination movements."[212]

As should be clear, the Act does not mandate any game-changing action by the STB. Evaluated in isolation, the Act could easily be considered, and probably should be considered, as simply additional tweaking of SAC—moving a few more chairs on the Titanic. Nonetheless, recent STB decisions reveal mounting frustration within the agency regarding SAC. During 2014 and 2015, the STB issued a series of revealing decisions in one of the few carload SAC cases to be brought before the agency.[213] By the time the reconsideration decision was issued in late 2015, the case had been pending at the agency for over five years.[214] In the initial decision in March 2014, the STB found that the complainant shipper had failed to show that the challenged rates were unreasonable.[215] This case involved 138 lanes, 100 separate rates, 26 different commodities, and a 335-page STB decision.[216] A primary reason for the failure of complainant's evidence was the issue of "missing trains" in the operating plan designed for the SARR by the complainant.[217] To a large extent, the missing trains issue was a product of the fact that the complainant's case centered on carload traffic, and the actual operations of carload railroads are extremely complex, such that a single car may be a part of several trains and spend significant time in various rail yards between its origin and its destination.[218] The complainant had argued that there were not actually any trains missing, that it was following STB precedent in development of its SARR operating plan and use of the defendant's real-world train operations, and that it relied on traffic data

212. STB Reauthorization Act of 2015 § 14(a), 129 Stat. at 2238 (to be codified at 49 U.S.C. § 11708).

213. *See generally* E.I. DuPont de Nemours & Co., No. NOR 42125 (STB served Dec. 23, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf; E.I. DuPont de Nemours & Co., No. NOR 42125 (STB served Oct. 3, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CA77FEF9C33D8C6385257D66004D99FF/$file/44043.pdf; E.I. DuPont de Nemours & Co., No. NOR 42125 (STB served Mar. 24, 2014), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/56966574580BB51385257CA5006D2E05/$file/43717.pdf.

214. *E.I. DuPont de Nemours & Co.*, slip op. at 1 (STB served Dec. 23, 2015).

215. *E.I. DuPont de Nemours & Co.*, slip op. at 16 (STB served Mar. 24, 2014).

216. *Id.* at 14.

217. *Id.* at 37–39.

218. *See supra* Part V.

produced in discovery that did not reflect the missing trains.[219] The STB saw things differently, determining that the complainant should have "account[ed] sufficiently for the fundamentals of carload transportation."[220] Regardless of the reason, the complainant lost its carload case, with the clear message from the STB being that carload SAC cases must be modeled down to the individual movements of each car at all times, regardless of the defendant's real-world operations.[221] Such a modeling operation would be incredibly complex, again raising questions about whether SAC relief is feasible for most carload shippers.[222]

The inequities facing carload shippers were not lost on one of the three STB members. Vice Chairman Ann Begeman dissented from the STB's reconsideration decision in the 138-lane carload case—a decision in which the STB effectively affirmed its earlier determination that the challenged rates were reasonable.[223] Begeman found the case to be unusual due to its emphasis on carload traffic—thereby deviating from the vast majority of SAC precedent—and therefore, the STB "should have provided guidance to the parties on how to present evidence."[224] She further stated, "It remains to be seen whether carload traffic rates can be fairly judged under the SAC process."[225]

219. *E.I. DuPont de Nemours & Co.*, slip op. at 38–39 (STB served Mar. 24, 2014).

220. *Id.* at 39.

221. *See id.* at 39, 55.

222. Of course, modeling of train operations is just one part of what makes a SAC case so complex and expensive. As mentioned above in Part III, each SAC decision includes hundreds or thousands of subsidiary decisions comprising the ultimate result, and these subsidiary decisions are further compounded by the inherent complexity of a carload case, with its many variables and moving parts. Indeed, one recent carload complainant lost its case due to the cumulative effect of these innumerable subsidiary decisions even though the complainant had its SARR operating plan accepted by the STB. *See* Total Petrochemicals & Ref. USA, Inc., No. NOR 42121, slip op. at 15, 21 (STB served Sept. 14, 2016), https://www.stb.gov/decisions/readingroom.nsf/UNID/468428972FC59B2C852577E500640068/$file/41260.pdf. One reason for the result was that the STB inserted numerous aspects of the defendant's evidence into the complainant's SARR operating plan, which was already incredibly intricate due to the inherent complexity of modeling carload operations. *Id*. at 20–39.

223. E.I. DuPont de Nemours & Co., No. NOR 42125, slip op. at 19 (STB served Dec. 23, 2015) (Begeman, Vice Chairman, dissenting), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/CCCD4F06200CF24D85257F240051A2C7/$file/44700.pdf.

224. *Id.*

225. *Id.* at 20.

Commissioner Deb Miller concurred in that reconsideration decision but clarified she was not "fully satisfied with the SAC methodology."[226] She reiterated this sentiment in two decisions toward the end of 2016, when she was the STB Vice Chairman. In late August 2016, she stated that the STB "still needs to consider alternatives to the SAC test."[227] Just two weeks later, in a decision wherein the STB rejected a carload shipper's rate reasonableness challenge to certain railroad rates, she expanded upon her earlier concerns by recognizing that the rate reasonableness standards were originally developed for coal unit train transportation "and not the more complicated logistics of carload shipping."[228] In that same decision, then-Commissioner Begeman repeated the concern she had raised a year earlier, admitting again that "[i]t remains to be seen…if any carload traffic shipper" could show that challenged rates are unreasonable "using the SAC methodology."[229] In other words, decisions in late 2016 revealed a remarkable situation in which two of the three STB decisionmakers openly admitted having grave doubts about the adjudication process they utilize, implement, and administer.

The STB is also in the midst of considering the issue of railroad revenue adequacy.[230] It is true that the revenue adequacy status of a railroad does not dictate whether or not a challenged railroad rate is unreasonable in violation of 49 U.S.C. §§ 10701, 10702, and 10704.[231] However, the STB has specifically

226. *Id.* at 18 (Miller, Comm'r, concurring).

227. *See* Rail Transportation of Grain, Rate Regulation Review, No. EP 665 (Sub-No. 1), and Expanding Access to Rate Relief, No. EP 665 (Sub-No. 2) slip op. at 24 (STB served Aug. 31, 2016), https://www.stb.gov/decisions/readingroom.nsf/UNID/2E759A7B8B7E996F85258020004DF485/$file/44836(2).pdf (Miller, Vice Chairman, commenting).

228. *See* Total Petrochemicals & Ref. USA, Inc., No. NOR 42121, slip op. at 46 (STB served Sept. 14, 2016) https://www.stb.gov/decisions/readingroom.nsf/UNID/468428972FC59B2C852577E500640068/$file/41260.pdf (Miller, Vice Chairman, commenting).

229. *Id*. at 47 (Begeman, Comm'r, dissenting in part).

230. *See* Railroad Revenue Adequacy—2015 Determination, No. EP 552 (Sub-No. 20) (STB served Sept. 8, 2016), https://www.stb.gov/decisions/readingroom.nsf/UNID/1A5249A29E39865285258027006AA17B/$file/45419.pdf; Railroad Revenue Adequacy—2014 Determination, No. EP 552 (Sub-No.19) (STB served Sept. 8, 2015), https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/84F5C1A935F5ECDE85257EB60045C253/$file/44702.pdf.

231. *See, e.g.*, Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 536 (1985) ("[A] rate may be unreasonable even if the carrier is far short of revenue adequacy."), *aff'd sub nom.* Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987); s*ee also* BNSF Ry. v. STB, 453 F.3d 473, 480 (D.C. Cir. 2006) ("Regardless whether BNSF as a system

sought comments in this proceeding regarding how a rate reasonableness case based on revenue adequacy, as opposed to SAC, would be structured and configured.[232]

There are many reasons to have a "wait and see" attitude about the STB's commitment to fundamental rate regulation change. Seeking public input is very different from actually implementing transformative change to the rate reasonableness standards. Furthermore, the STB has a history of viewing its regulatory role as largely reactionary. The STB responds to complaints and proposals and arguments, but the STB rarely seizes the initiative. Regarding revenue adequacy, the STB commented that it "has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rail rate cases."[233] SAC itself has been formed in this reactionary, ad hoc manner over the years, but it is not difficult to envision the reluctance of carload shippers to invoke a nonexistent revenue adequacy process, given that such shippers would face a tariff premium and business planning losses in bringing such a case, not to mention repeat players as defendants.

There is also the very real possibility that the STB will become focused on the minutiae of rate reasonableness and forgo the fundamental change that is needed. For example, the STB recently released a report regarding ways to improve rate case processing, which may be necessary but represents merely tweaking the existing method of handling cases instead of engaging in wholesale transformation.[234] As a second example, the STB has joined the ongoing revenue adequacy proceeding with a separate consideration of how the railroad industry cost of equity should be calculated, asserting that "administrative convenience" is fostered by addressing both proceedings in the same decision.[235] The cost of equity issue, while important, is nonetheless a distraction if the entire rate process—based as it is on SAC—needs

is revenue-adequate, system-wide revenue inadequacy is not a basis upon which a carrier may defend an unreasonable rate over a segment of its system." (citation omitted)).

232. Notice of Acceptance of Comments in Railroad Revenue Adequacy, *supra* note 39 ("This proceeding is intended as a public forum to discuss the [STB]'s methodology in fulfilling its statutory mandate to determine railroad revenue adequacy, as well as the revenue adequacy component of the [STB]'s standard for judging the reasonableness of rail freight rates, with a view to what, if any, changes the [STB] can and should consider.").

233. *Id.*

234. STB, CONFIDENTIAL REPORT (June 8, 2015), https://www.stb.gov/stb/docs/IndependentStudy/Final/STB%20Confidential%20Report.pdf.

235. *Id.* at 1 n.1.

revamping because it fails to ensure due process protections for carload shippers.

The inertia and slow pace of change at the STB could also be a problem. In September 2014, the STB awarded a contract to InterVISTAS Consulting LLC "to conduct an independent analysis that evaluates potential alternative rate regulation approaches, with the goal of reducing the time, cost and complexity."[236] The report was expected to be made public in late 2015, but the report was not released until September 14, 2016. The findings in the report reveal that some experts hold a markedly different view from that recently expressed by Vice Chairman Miller and Commissioner Begeman; the report authors concluded that SAC "has stood the test of time as a maximum rate reasonableness methodology and is a justifiable complaint choice in some cases."[237] As alternatives to SAC, the authors recommended continued use of the Simplified SAC and Three-Benchmark cases,[238] which have already been shown to be inappropriate for carload shippers with many transportation rates at issue.[239] In short, the authors supported maintenance of the status quo.

Despite all the changes and potential changes at the STB, there have been only a few isolated statements about the deep-seated problems faced by carload shippers in the prevailing SAC process. This Article has sought to explain these problems, assert that significant STB action reforming the process for carload rate cases is required by constitutional due process principles, and show that any STB action affecting carload rate cases should be transformative in nature rather than consist of minor revisions at the margins of the current process.

In sum, while certain forces of change do seem to be coalescing, the current regime has its adherents and it will take a concerted effort by the STB or Congress to seize the moment and enact the transformation that is necessary. Otherwise, the only avenue for a revamped rate reasonableness

236. *Surface Transportation Board Awards Contract for Study of Railroad Rate Regulation Alternatives*, STB (Sept. 19, 2014), https://www.stb.gov/newsrels.nsf/cee25ffbd056e9d1852565330043f0d6/dc15d930b5e775e485257d580053a4c9?OpenDocument.

237. INTERVISTAS CONSULTING INC., PROJECT NO. FY14-STB-157, SURFACE TRANSPORTATION BOARD: AN EXAMINATION OF THE STB'S APPROACH TO FREIGHT RAIL RATE REGULATION AND OPTIONS FOR SIMPLIFICATION 134 (2016), https://www.stb.gov/stb/docs/IndependentStudy/Final/STB%20Rate%20Regulation%20Final%20Report.pdf.

238. *Id.*; *see supra* note 27 and accompanying text.

239. *See supra* Part II.

process may be a due process challenge brought by a shipper or, more specifically, a carload shipper.

VIII. CONCLUSION

The STB has never explained why carload shippers should face considerably more difficulty in having the reasonableness of their rail rates evaluated. There is no law or regulation stating that unit train shippers have a greater right or entitlement to lawful rail rates; there is no court decision finding that Congress intended to hamstring carload shippers' attempts to enforce their statutory rights. None of these things exist, yet this is precisely the current state of affairs in the federal regulation of rail rates. It is plainly inequitable and clearly implicates constitutional concerns about not just due process but also, potentially, equal protection. Rumblings of possible change are felt underfoot, and it is conceivable that the STB, Congress, the courts, or all three will finally act to correct the inequity faced by carload shippers. A viable alternative to SAC would be a welcome first step, but the key point stressed in this Article is that making no change is not an option given that the current state of affairs may well represent a violation of the Due Process Clause.