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August 1, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 733, *Expediting Rate Cases*

Dear Ms. Brown:

Pursuant to the Advance Notice of Proposed Rulemaking served in the above docketed proceeding on June 15, 2016, the Association of American Railroads respectfully submits the attached comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 733

EXPEDITING RATE CASES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Section 11(c) of the Surface Transportation Board Reauthorization Act of 2015¹ directed the Surface Transportation Board (“STB” or “Board”) 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.” Accordingly, on June 15, 2016, the Board issued an Advance Notice of Proposed Rulemaking (“ANPRM”) in this proceeding, seeking comments on procedures to expedite stand-alone cost (“SAC”) rate reasonableness cases before the Board, including procedures available to parties in federal court. The Association of American Railroads (“AAR”) submits these comments in response.

The freight railroad members of the AAR account for the vast majority of North American freight railroad traffic, mileage, employees, and revenue. As such, the AAR has a strong interest in ensuring that the Board’s rate reasonableness processes do not cause unnecessary delay and expense, while maintaining their foundation in sound economics consistent with the national Rail Transportation Policy.² And, the AAR has long supported

¹ P.L. 114-110 (2015).

² See 49 U.S.C. § 10101(1).

efforts by the Board to limit the cost and complexity of the SAC test as applied by the Board, while maintaining the economic principles underlying the test.³

Most rates are set in the market, and the Board has limited jurisdiction to hear rate complaints. The task of adjudicating those relatively few rates that come before the Board by estimating a competitive market outcome is complex. The constrained market pricing (“CMP”) principles adopted in *Coal Rate Guidelines*, which form the basis of the judicially-affirmed SAC test, reflect the economic structure of the railroad industry and an understanding of contestable markets.⁴ In particular, the SAC test mimics competition by establishing the maximum lawful rate at the level necessary to induce a competitor to enter the market, if there were no barriers to entry or exit. To do so, the SAC test estimates what it would cost for that hypothetical competitor to build, operate, and maintain an efficient railroad to serve a traffic group that includes the issue traffic. The SAC test has two purposes: (1) to illustrate whether there are inefficiencies in the service to the issue traffic; and (2) to illustrate if the issue traffic is cross-subsidizing parts of the rail network it does not use.

Because of the time and expense associated with this SAC analysis, the Board has established two simplified methodologies: (1) Simplified-SAC, which focuses only on the cross-subsidy analysis by making a variety of simplifying assumptions that rely on the defendant’s existing traffic and infrastructure; and (2) the Three-Benchmark test, which compares the challenged rate to an average of comparable traffic’s rates adjusted for revenue adequacy.⁵

³ See, e.g., AAR Comments, *Rate Guidelines – Non-Coal Proceedings*, EP 347 (Sub-No. 2) (filed Aug. 20, 1987).

⁴ *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520, 526 (1985).

⁵ Though this rate comparison lacks an economic basis, relief under the Three-Benchmark test is limited to \$4 million. *Rate Regulation Reforms*, EP 715 (STB served July 18, 2013).

The AAR supports efforts by the Board to eliminate unnecessary delay in SAC cases. In the comments below, the AAR notes that private sector solutions are preferable to litigation and regulation, and therefore supports proposals like a pre-filing requirement that facilitate negotiation and mediation. The AAR also supports certain procedural reforms, like the increased use of technical conferences and timely disposition of motions to dismiss that could expedite SAC litigation before the Board. The AAR strongly opposes any proposal for the Board to collect and store railroad data for use in potential rate cases. Finally, the AAR suggests that reforming the qualitative market dominance inquiry by abandoning the limit price rule would simplify the market dominance determination.

COMMENTS

I. Private Sector Solutions Are the Most Efficient Means to Resolve Rate Disputes, And the Board Should Expand Non-Binding Mediation in Rate Disputes

Section 10101(2) establishes the policy of the federal government to “minimize the need for Federal regulatory control over the rail transportation system” Railroads, like other businesses that operate in competitive markets, communicate with their customers and set prices based on market demand. Commercial negotiations between railroads and their customers will always be the most efficient way to resolve disputes that arise between them, including those regarding rates. The overwhelming majority of rates charged by railroads never come before the Board, because the parties have established mutually agreeable transportation contracts, the rates are not subject to regulation, or the commercial bargaining of the parties have resulted in an arrangement that is preferable to litigation. Occasionally, the commercial relationship between a railroad and a shipper breaks down and the shipper believes that it can obtain more favorable treatment by regulation than by commercial negotiation. But clearly, the most efficient and successful rate cases are the ones that never come to the Board.

In those cases where a rate complaint is filed with the Board, no party—railroad or shipper—benefits from unnecessary delay and millions of dollars of litigation costs.⁶ The challenge for all stakeholders and the Board is that the rate disputes that do come before the Board can potentially have hundreds of millions of dollars in reparations and prescriptive relief at stake. Such high-stakes rate disputes will be hard fought by zealous advocates on both sides, just as comparable litigation is intensely contested in the federal courts.⁷ The similarities do not end there. Large, multi-million dollar, complex cases often take years to resolve in courts.⁸ And, litigation costs continue to rise across all large, high-stakes, and complex litigation, not just SAC cases.⁹

Adding to the challenge is the fact that the complex issues before the Board in SAC cases are not only linked to potential liability, *i.e.*, who wins and who loses the case, but also to the magnitude of relief potentially available to successful complainants. The Board's SAC methodology apportions relief based on the total calculation of costs associated with the traffic group considered. That is, the lower each cost category, the higher the potential relief that is available. Thus, complainants have every incentive to seek the absolute lowest stand-alone cost conceivable, leading to evidentiary disputes on a host of smaller issues. As long as complainants

⁶ See AAR Supplemental Comments, EP 665 (Sub-No. 1), at 12 (filed Aug. 25, 2015).

⁷ See Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation*, at 1 (2010).

⁸ See, *e.g.*, 2010 Civil Litigation Conference <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last accessed Aug. 1, 2016).

⁹ See *Litigation Cost Survey of Major Companies*, Statement submitted by Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, 2010 Conference on Civil Litigation Duke Law School (May 2010); *Litigation Costs in Civil Cases: Multivariate Analysis*, Report to the Judicial Conference Advisory Committee on Civil Rules (March 2010).

are free to posit whatever stand-alone railroad (“SARR”) will yield the lowest cost without limitation, there are likely to be serious evidentiary disputes in SAC cases.

Concerns regarding the time and expense associated with rail rate cases are not new. In 1987, the U.S. General Accounting Office observed:

Rate cases can be lengthy. Of the five cases we reviewed that are still pending, the average case length was about 7 years. Part of the length of these cases can be attributed to ICC’s effort to develop rate reasonableness guidelines. As ICC revised its interim guidelines, ongoing cases were often reopened, adding to their length. A second reason for long rate cases is that parties have frequently exercised their full rights under the Administrative Procedure Act (5 U.S.C. 651 et seq., 1982). We did not evaluate the merits of the process; however, we found that the efforts of the railroad and shipper to fully use their right to due process added to the time needed to decide a case.¹⁰

Over the years since then, similar forces have led to delay in some cases. While some SAC cases have been straightforward and resolved relatively quickly, other cases that presented novel issues have taken longer. Changes by the Board to the SAC methodology have led to new issues being raised and further litigation, like when rulemaking in 2006 delayed several proceedings and resulted in extended litigation over certain issues like cross-over traffic revenue allocation. Where rail rate disputes have substantial money at stake and where complex factual questions regarding rail infrastructure and operations must be resolved, litigation costs and processing times continue to be extensive as all parties to SAC cases avail themselves of their full due process rights.

To avoid this time and expense, and to capture the general efficiency of private sector solutions, the AAR has long seen the benefits of mandatory, non-binding mediation facilitated by

¹⁰ GAO, *Shipper Experiences and Current Issues in ICC Regulation of Rail Rates*, at 13 (Sept. 1987).

Board staff.¹¹ Since the Board adopted mandatory, non-binding mediation in 2003, 20 of the 37 filed rate reasonableness complaints have been settled voluntarily by the parties and 2 have been withdrawn.¹² The AAR supports efforts by the Board to expand non-binding mediation and make it more useful for the parties to rate cases.

To that end, the AAR supports the proposal in the ANPRM that the Board establish a pre-filing period ahead of the filing of a rate reasonableness complaint, and the AAR supports the Board's suggested period of 60 days.¹³ At minimum, a pre-filing notice should identify the origin/destination lanes that would be subject to the complaint and the commodities at issue. As the ANRPM observes, such a pre-filing period would allow for the Board to appoint a mediator and for the parties to engage in early stage voluntary mediation. Mediation at the outset of the process would allow the parties to avoid litigation altogether rather than the details of a stand-alone cost presentation. Although this proposal would move mediation forward in the procedural schedule, it would not actually expedite the rate case itself once it is filed. The AAR does not object to the Board utilizing non-binding mediation or other staff-led conferences focused on the actual SAC presentation later in the case, in addition to pre-filing mediation.

A pre-filing notice would not affect the existing statute of limitations period applicable to rate reasonableness challenges. Section 11705(c) states that “[a] person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues.” The plain language of the statute refers to the filing of a complaint, not a pre-filing notice. The Board cannot adjust this statutory limitation by regulation. Similarly, the

¹¹ See, e.g., AAR Comments, EP 638, at 4 (filed Oct. 11, 2002); AAR Supplemental Comments, EP 665 (Sub-No. 1), at 4-5 (filed June 24, 2015).

¹² See https://www.stb.dot.gov/stb/industry/Rate_Cases.htm.

¹³ ANPRM at 3.

establishment of a pre-filing notice requirement would not affect the timing of when a railroad is required to quote a common carrier rate.¹⁴

II. Procedural Reforms Could Expedite Litigation Before the Board

Consistent with the Board's instructions from Congress, the ANPRM draws on a few procedural reforms used by the federal courts to expedite litigation, such as standardized discovery requests and limitations of discovery. The AAR believes that certain procedural reforms could expedite rate cases before the Board. In comments filed in EP 665 (Sub-No. 1), the AAR noted the recommendations of The Institute for the Advancement of the American Legal System at the University of Denver ("IAALS") to expedite the processing of civil litigation in the federal courts:

1. Setting firm dates early in the pretrial process for the close of discovery, the filing of dispositive motions, and trial, and maintaining those dates except in rare and truly unusual circumstances;
2. Ruling expeditiously on motions, even when the motions are denied;
3. Limiting the number of extensions sought by the parties during any phase of the case;
4. Working to foster a local legal culture that accepts efficient case processing as the norm, and enforcing that culture through active judicial case management; and
5. Tracking the status of cases and motions through internal statistical reporting, and disseminating the results internally and externally as appropriate.¹⁵

The AAR notes that the Board has begun implementing some aspects of these recommendations through internal changes and workflow process improvements.¹⁶ The AAR believes that the Board should continue to focus on improvements designed to implement the IAALS recommendations.

¹⁴ See *Burlington N.R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996).

¹⁵ See *Civil Case Processing in the Federal District Courts: A 21st Century Analysis*, The Institute for the Advancement of the American Legal System at the University of Denver (IAALS), at 9-10, available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke Materials/Library/IAALS, Civil Case Processing in the Federal District Courts.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS_Civil%20Case%20Processing%20in%20the%20Federal%20District%20Courts.pdf).

¹⁶ See ANPRM at 3 & n.6.

Most importantly, in order to exert active case management over a rate case, the Board should advance proposals designed to achieve an “early resolution of certain issues through interim rulings to narrow the scope of the case or to avoid evidentiary misalignment.”¹⁷ For example, the Board should increase its use of technical conferences. Technical conferences would aid the Board in identifying issues in controversy earlier in the process and providing feedback to the parties to minimize the time spent arguing about such issues.

A clear standard for granting a motion to dismiss and timely disposition of such motions would also serve these goals. When crafting such a standard, the Board should acknowledge that the principle causes of evidentiary misalignment are deficiencies in the complainant’s case-in-chief. There is no doubt that constructing a SAC presentation is a difficult endeavor, requiring substantial expertise. Yet the Board should ask itself whether it is the complexity of the analysis or the incentive for complainants to push the envelope to create the best result by unrealistically lowering costs in the SAC presentation that has led to defective operating plans being put into evidence. For example, the Board has seen a SARR that failed to develop the feeder network necessary to gather and serve a predominately Appalachian coal traffic group,¹⁸ a SARR that did not replicate the facilities necessary to serve the issue traffic, instead relying on trackage rights of one defendant over another as a stand-in for SAC,¹⁹ and a SARR that failed to include trains that delivered the issue traffic to destination.²⁰ The common thread for all of these deficient submissions were that they were designed to result in an extremely low cost structure for the

¹⁷ ANPRM at 6.

¹⁸ *Duke Energy Corp. v. CSX Transp., Inc.*, NOR 42070, slip op. at 24-28 (STB served Feb. 4, 2004).

¹⁹ *Arizona Elec. Power Coop., Inc. v. Burlington N. and Santa Fe Rwy. Co. et al.*, NOR 42058, slip op. at 9-15 (STB served Mar. 15, 2005).

²⁰ *E.I. DuPont de Nemours & Co. v. Norfolk S. Rwy. Co.*, NOR 42125, slip op. at 37 (STB served Oct. 3, 2014) (“*DuPont*”).

SARR, bearing no relation to reality. Accordingly, the Board should clarify that a motion to dismiss will be granted when the complainant submits a defective operating plan or otherwise fails to present a complete case-in-chief on opening.²¹

To facilitate consideration of the sufficiency of complainants' opening evidence, the Board should create a deadline 45 days after the filing of the complainant's opening evidence for the filing of a motion to dismiss. The Board should rule on such motions substantially before the defendant is required to file its reply evidence. Under such a procedure, complainants would have more incentive to ensure that the opening submissions were complete. If there were more of a potential for dismissal, complainants would be less likely to wait until rebuttal to file probative evidence. In this way, the Board could also focus on the enforcement of the standards on the proper scope of rebuttal as set forth in *Duke Energy Corp. v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 100 (2003).

The ANPRM proposes the assignment of attorneys' fees or extension of rate prescriptions could be imposed to discourage frivolous motions to dismiss. The AAR believes that such sanctions are inappropriate, as the Board cites no instances of frivolous motions to dismiss being filed in SAC cases and no statutory authority to make such orders. Moreover, rate prescriptions are set at a level determined by the SAC analysis over a specific number of years; extension of prescriptions as a punitive measure could sever the relief from the economic foundations of the test.

²¹ Though the ANPRM contemplates dismissing cases without prejudice, failure on the part of the complainant to submit critical elements of its case-in-chief should foreclose its ability to bring another case "challenging the same rates as to past movements, [without demonstrating] the existence of material error, new evidence or substantially changed circumstances." *Intermountain Power Agency v. Union Pacific R.R. Co.*, NOR 42127, slip op. at 5 (STB served Nov. 21, 2012)(citing *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 37 (STB served Feb. 27, 2006).

III. The Board Should Not Warehouse Extensive Data For Potential Use in Rate Cases

The AAR strongly opposes the proposal in the ANPRM that “the Board could collect data that could be used in rate cases . . . [to] be made available to complainants upon the filing of a complaint and a protective order being entered.”²² The Board is right to be “concerned . . . about how to standardize the data and the burdens collection of the data could impose.”²³ Because the Board could not know whether a rate complaint would be filed against a railroad, and what traffic and line segments would be at issue, the Board would have to collect and maintain a huge trove of data for the entire railroad.²⁴ Such an undertaking also would impose substantial burdens on all railroads to routinely collect, prepare, refine, and report this huge trove of data, most of which would never be put to any practical use. This is directly contrary to the Paperwork Reduction Act, as such a collection is not necessary for the proper performance of the Board’s statutory responsibilities and it does not minimize the federal collection burden.²⁵ It would also run directly counter to the rail transportation policy of “minimizing the burden on rail carriers of developing and maintaining the capability of providing” information in regulatory proceedings.²⁶ It also would be contrary to the statute’s mandate that the Board’s accounting rules to be “[c]ost effective and compatible with and not duplicative of the managerial and responsibility accounting requirements” of rail carriers.²⁷

²² ANPRM at 4.

²³ *Id.*

²⁴ Individual railroad filings in this proceeding will detail the amount of data produced in the course of a SAC case.

²⁵ 44 U.S.C. §§ 3508, 3504.

²⁶ 49 U.S.C. § 10101(13).

²⁷ 49 U.S.C. § 11164.

The proposal also ignores the Obama Administration’s call that each agency should “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.”²⁸ The costs of this warehousing proposal for the Board and the railroads significantly outweigh the benefits, if any. The data which would be collected, reviewed, and maintained by the Board has a limited shelf-life. Given that a railroad can go years (or decades) without a rate complaint being filed against it, the data may never be taken off the shelf. The Board would need to carefully protect this data while it sits on the shelf, as data used in rate cases contain highly confidential shipper information and, in the case of toxic-by-inhalation hazards, sensitive security information. The Board should carefully consider how it would safeguard such confidential and sensitive information and whether such warehoused data would be subject to Freedom of Information Act requests. In the event a complaint was filed and such data were eventually to be used in a case, the Board would need to have retained staff with the expertise and ability to pull the relevant data and provide it in a useable format to complainants. In the end, the data would not be sufficient to shape the complainant’s full SAC presentation and the complainant would still have to engage in the normal discovery process. As such, this proposal would not measurably help complainants or expedite rate cases.

IV. Meaningful Qualitative Market Dominance Standards Would Eliminate or Limit Inappropriate Rate Cases where Effective Competition is Present

The Board’s authority to judge the reasonableness of a rate in the first place is constrained by statute to those instances where the Board determines that the rail carrier has

²⁸ See Memorandum for the Heads of Executive Departments and Agencies, Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs (March 20, 2012).

market dominance over the issue traffic under section 10707. Properly applied, the 10707 market dominance screen would place most rates beyond review by the Board.²⁹

Under this statutory structure, the agency's traditional market dominance inquiry had both a quantitative and qualitative prong.³⁰ First, the Board looked to see if the challenged rates generate revenues that exceed the traffic's variable cost by 180% or more, using the unadjusted system average variable costs established by URCS.³¹ Second, the Board determined "whether there are any feasible transportation alternatives that could be used for the issue traffic. . . . Even where an alternative mode or modes of transportation exists, a complainant can establish market dominance by demonstrating that the alternate modes of transportation are not effectively constraining the carrier's ability to increase the rates of the issue traffic."³²

The Board's traditional market dominance inquiry has been unnecessarily complicated by the limit price rule. In two recent cases, the Board applied a limit price rule on top of the feasible transportation alternative test for qualitative market dominance.³³ The Board has done so in spite of opposition from both railroads and shippers.³⁴ Parties must now present evidence on the traditional feasible alternative test in addition to running the calculations for the limit price

²⁹ See H.R. Report No. 96-1035, Rail Act of 1980 at 38 ("In the 4R Act, Congress instituted the so-called "market dominance test" in hopes of removing most rates from rate regulation.").

³⁰ *Market Dominance Determinations*, 365 I.C.C. 118 (1981).

³¹ See *Major Issues in Rail Rates*, EP 657 (Sub-No. 1) (STB served Oct. 30, 2006).

³² *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, NOR 42100, slip op. at 2-3 (STB served June 30, 2008).

³³ The Board has only compounded the substantive uncertainty regarding market dominance with additional uncertainty as to how the limit price rule will be applied in the future. In *TPI*, the Board stated that "[i]n future cases, parties may advocate alternative benchmarks or methods for determining whether a particular feasible transportation alternatives provides effective competition."³³

³⁴ *DuPont*, slip op. at 67 (Begeman, concurring)("The comments received were overwhelmingly critical from shippers, carriers, and economists.").

rule.³⁵ Eliminating the limit price analysis would expedite the market dominance determination by obviating unnecessary evidence and argument. Accordingly, the AAR respectfully submits that the Board should state unambiguously that it will not apply the limit price rule in future cases for several reasons, both procedural and substantive.

The AAR has set forth in detail the deficiencies of the limit price rule in comments filed in other proceedings.³⁶ To recount these flaws here in brief, the Board violated the Administrative Procedure Act (“APA”) by replacing the qualitative market dominance approach adopted through notice-and-comment rulemaking with the limit price rule adopted in an adjudicatory proceeding.³⁷ And due to the substantive economic flaws in the limit price rule, as discussed below, it is not the product of reasoned decision making.³⁸

As a substantive matter, the limit price rule rests on a number of faulty assumptions that are not supported by law or sound economics. In short, the application of revenue to variable cost ratios (“R/VC”) and the Revenue Shortfall Allocation Method (“RSAM”) at the core of the rule does not reveal anything about the existence and extent of feasible transportation alternatives for the movement of a specific commodity in a specific lane. Under section 10707(d)(2), R/VC ratios cannot shoulder the weight placed on them by the Board in the limit price test. And, the use of RSAM as a measure of market dominance has no rational basis.

³⁵ See, e.g., Consumers Opening Evidence, NOR 42142 (filed Nov. 2, 2015).

³⁶ AAR Comments, NOR 42123 (filed Nov. 28, 2012); AAR Amicus Comments, NOR 42121 (filed July 24, 2013).

³⁷ See, e.g., *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2004).

³⁸ See, e.g., *Burlington N. R.R. v. ICC*, 985 F.2d 589 (D.C. Cir. 1993).

Conclusion

Based on the foregoing, the Board should takes steps to eliminate unnecessary delay in SAC cases. Specifically, the Board should put forth proposals that would facilitate private sector negotiation, such as a pre-filing period and enhanced mediation. The Board should increase its use of technical conferences and increase the timely disposition of motions to dismiss. The Board should not impose any reporting requirement on railroads to provide data for use in rate cases. Finally, the Board should simplify the market dominance determination inquiry by abandoning the limit price rule.

Respectfully submitted,



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