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SERVICE DATE - APRIL 29, 1998

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

[STB Ex Parte No. 627]

Market Dominance Determinations--Product and Geographic Competition

AGENCY: Surface Transportation Board

ACTION: Notice of Proposal to Eliminate Product and Geographic Competition From Consideration in Market Dominance Determinations.

SUMMARY: Pursuant to its decision in Review of Rail Access and Competition Issues,

STB Ex Parte No. 575 (STB served Apr. 17, 1998), the Board is instituting a proceeding to consider removing product and geographic competition as factors in market dominance determinations in railroad rate proceedings. The Board requests that persons intending to participate in this proceeding notify the agency of that intent. A separate service list will be issued based on the notices of intent to participate that the Board receives.

DATES: Notices of intent to participate in this proceeding are due May 12, 1998.

Comments on this proposal are due May 29, 1998. Replies are due June 29, 1998.

ADDRESSES: An original plus 12 copies of all comments and replies, referring to STB Ex Parte No. 627, must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Ex Parte No. 627, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

Copies of the written comments will be available from the Board's contractor, D.C. News and Data, Inc., located in Room 210 in the Board's building. D.C. News can be

reached at (202) 289-4357. The comments will also be available for viewing and self copying in the Board's Microfilm Unit, Room 755.

In addition to an original and 12 copies of all paper documents filed with the Board, the parties shall submit their pleadings, including any graphics, on a 3.5-inch diskette formatted for WordPerfect 7.0 (or in a format readily convertible into WordPerfect 7.0). All textual material, including cover letters, certificates of service, appendices and exhibits, shall be included in a single file on the diskette. The diskettes shall be clearly labeled with the filer's name, the docket number of this proceeding, STB Ex Parte No. 627, and the name of the electronic format used on the diskette for files other than those formatted in WordPerfect 7.0. All pleadings submitted on diskettes will be posted on the Board's website (www.stb.dot.gov). The electronic submission requirements set forth in this notice supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in the Board's regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).¹

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600.

[TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: In STB Ex Parte No. 575, the Board conducted two days of informational hearings, on April 2 and 3, 1998, to examine issues of rail access and competition in today's railroad industry, and the statutory remedies and agency

^{1/} A copy of each diskette submitted to the Board should be provided to any other party upon request.

regulations and procedures that relate to those matters. As a result of those hearings, we announced, *inter alia*, that we would commence a proceeding to consider eliminating the product and geographic competition factors of our market dominance guidelines in cases challenging the reasonableness of rail rates.²

Under 49 U.S.C. 10707, the Board can entertain a challenge to the reasonableness of a rail rate only if we first find that the rail carrier has market dominance over the traffic to which the rate applies, that is, that there is no effective competition for that traffic. In making that determination, we now consider four forms of competition that may effectively constrain the carrier's pricing: *intramodal competition* (whether the shipper could obtain the transportation service that it needs from other railroads); *intermodal competition* (whether the shipper could obtain service by another transportation mode); *product competition* (whether the shipper can use a suitable substitute product that can be acquired without relying on the services of the same carrier); and *geographic competition* (whether the shipper can obtain the product it needs from a different source and/or by shipping its goods to a different destination using another carrier). Shippers have the burden of showing that there is no effective intramodal and intermodal competition; carriers have the burden of identifying any product and geographic competition and showing its effectiveness.

At the Ex Parte 575 hearings, shippers complained about the difficulties associated with seeking rate relief from the Board today, particularly the complexity and burden of litigating issues of product and geographic competition, issues that they charge have transformed the threshold market dominance phase of a rail rate complaint into a full-blown

^{2/} The current market dominance guidelines are set forth in Product and Geographic Competition, 2 I.C.C.2d 1, 20-22 (1985) (Market Dominance III).

antitrust-style case of its own. Shippers regard product and geographic competition issues as major, undue litigation obstacles that discourage captive shippers from even seeking regulatory relief from unreasonably high rates in both large and small rates cases.

Accordingly, consistent with our determination in Ex Parte 575 to reexamine certain aspects of our current regulatory regime in the context of today's more consolidated rail industry — particularly those that concern the availability of regulatory relief — we are instituting this proceeding to consider eliminating product and geographic competition from our market dominance analysis.

We note that our predecessor, the Interstate Commerce Commission (ICC), initially concluded that consideration of product and geographic competition issues would complicate rate proceedings unduly. Special Procedures for Making Findings of Market Dominance, 353 I.C.C. 875, 905-06, modified, 355 I.C.C. 12 (1976) (Market Dominance I), aff'd in relevant part sub nom. Atchison, T. & S.F. Ry. v. ICC, 580 F.2d 623 (D.C. Cir. 1978). The ICC subsequently reversed course and decided that consideration of these issues would be manageable. Market Dominance Determinations, 365 I.C.C. 118, 127-31 (1981) (Market Dominance II), aff'd sub nom. Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 953 (1984). Later, recognizing that it is inherently “much more difficult” for shippers to prove the ineffectiveness of these factors than of intramodal and intermodal competition, the ICC placed upon the railroads the burden of both identifying any product and geographic competition and demonstrating the effectiveness of such competition in individual cases. Market Dominance III, 2 I.C.C.2d at 15.

The comments presented in the Ex Parte 575 hearings suggest, however, that, even without bearing the burden of proof on these issues, shippers find that the product and geographic competition inquiry remains an imposing burden upon their ability to prosecute rail rate complaints. Aggressive use of the discovery process may be partly responsible for the heavy burdens associated with the inquiry into product and geographic competition, and we have recently taken action to prevent a rail carrier from effectively shifting those burdens onto a complaining shipper through unsupported and/or overreaching discovery demands. FMC Wyoming Corp. et al. v. Union Pac. R.R., STB Docket No. 42022 (STB served Apr. 17, 1998). However, curbing individual instances of discovery abuses may not be sufficient to address the shippers' concerns. Therefore, we are instituting this proceeding to obtain public comment on whether we should eliminate product and geographic competition from consideration altogether.

Any person that wishes to participate as a party of record in this matter must notify us of this intent by May 12, 1998. In order to be designated a party of record, a person must satisfy the filing requirements outlined in the ADDRESSES section. We will then compile and issue a service list. Copies of comments and replies must be served on all persons designated on the list as a party of record. Comments on the proposal are due May 29, 1998; replies are due June 29, 1998.

A copy of this decision is being served on all persons on the service list in Ex Parte No. 575. This decision will serve as notice that persons who were parties of record in the Ex Parte 575 proceeding will not be placed on the service list in the Ex Parte 627 proceeding unless they notify us of their intent to participate therein.

The Board preliminarily certifies that the proposal to eliminate product and geographic competition from its market dominance analysis, if adopted, would not have a significant effect on a substantial number of small entities. While the proposal, if adopted, may ease the burdens on those prosecuting rate complaints, we do not expect it to affect a substantial number of small entities. The Board, however, seeks comments on whether there would be effects on small entities that should be considered.

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

Decided: April 28, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Secretary