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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

Decided: September 11, 2019

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) proposes a streamlined approach for pleading market dominance in rate reasonableness proceedings. The Board expects that this streamlined approach would reduce burdens on parties, expedite proceedings, and make the Board's rate relief procedures more accessible, especially for complainants with smaller cases.

DATES: Comments are due by November 12, 2019; replies are due by January 10, 2020.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 756, 395 E Street, S.W., Washington, DC 20423-0001. Comments and replies will be posted on the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245-0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: In January 2018, the Board established its Rate Reform Task Force (RRTF), with the objectives of developing recommendations to reform and streamline the Board's rate review processes for large cases, and determining how to best provide a rate review process for smaller cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (RRTF Report).[1] Among other recommendations, the RRTF Report included a proposal that the Board develop "a standard for pleading market dominance that will reduce the cost and time of bringing a rate case," stating that the market dominance inquiry for rate reasonableness cases was a "costly and time-consuming undertaking." RRTF Report 52-53. Moreover, the RRTF concluded that an effort to

[1] The RRTF Report was posted on the Board's website on April 29, 2019, and can be accessed at https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

streamline the market dominance inquiry was a necessary part of making rate relief available for smaller rate disputes. Id. at 52. Having considered the recommendations included in the RRTF Report, and the broader market dominance issues discussed below, the Board is proposing a streamlined market dominance approach that would be available to complainants for rate cases under all of the Board's rate review methodologies.

Background

Determining the reasonableness of challenged rail transportation rates is one of the Board's core functions. See 49 U.S.C. § 10101(6) (stating the rail transportation policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital"). In order to adjudicate the reasonableness of a rate, the Board must first find that the defendant rail carrier has market dominance over the transportation to which the rate applies. 49 U.S.C. §§ 10701(d)(1), 10707(b), (c). Market dominance is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a).

The Board's market dominance inquiry comprises two components: a quantitative threshold and a qualitative analysis. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of the variable costs[2] of providing the service. 49 U.S.C. § 10707(d)(l)(A). However, a finding by the Board that a movement's R/VC ratio is 180% or greater does not establish a presumption that the rail carrier providing the transportation has market dominance over the movement. 49 U.S.C. § 10707(d)(2)(A). Accordingly, if the quantitative 180% R/VC threshold is met, the Board moves to the second component, a qualitative analysis. In this analysis, the Board determines whether there are any feasible transportation alternatives sufficient to constrain the railroad's rates for the traffic to which the challenged rates apply (the issue traffic). See, e.g., M&G Polymers 2012, NOR 42123, slip op. at 2, 11-18; Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 287-98 (STB served Jan. 11, 2018).

The Board considers two types of competition in its qualitative market dominance analysis:[3]

- *Intramodal* (i.e., whether the complainant can use other railroads to transport the same commodity between the same points); and

[2] Variable costs are those railroad costs of providing service that vary with the level of output. See M&G Polymers USA, LLC v. CSX Transp., Inc. (M&G Polymers 2012), NOR 42123, slip op. at 2 n.4 (STB served Sept. 27, 2012). The comparison of revenues to variable costs, reflected as a percentage figure, is known as a revenue-to-variable cost (R/VC) ratio. Id.

[3] M&G Polymers 2012, NOR 42123, slip op. at 2.

- *Intermodal* (i.e., whether the complainant can use other transportation modes, such as trucks or barges, to transport the same commodity between the same points).

It is established Board precedent that the burden is on the complainant to demonstrate the lack of effective competition. See, e.g., Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc. (Total Petrochems. 2013), NOR 42121, slip op. at 28 (STB served May 31, 2013) (with Board Member Begeman dissenting on other matters) ("In the qualitative market dominance inquiry, the complainant bears the burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies."). The evidentiary process requires the complainant to prove a negative proposition on opening—that intermodal and intramodal competition are not effective constraints on rail rates. The Board then must determine what evidence is sufficient to make such a showing and how that evidence should be presented.[4]

The market dominance inquiry is a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants.[5] Given the hypothetical nature of some competitive options proposed by defendant railroads in past cases, complainants essentially have to predict what a defendant railroad might argue regarding potential, but unused, competitive options—all without knowing precisely what constitutes a prima facie showing of an absence of effective competition. In the most recent rate reasonableness case, Consumers Energy Co. v. CSX Transportation, Inc., Docket No. NOR 42142, the parties' market dominance presentations alone (throughout their filings) exceeded 200 pages of narrative discussion and included multiple expert reports. See also Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., Docket No. NOR 42121 (including over 340 pages of narrative discussion on market dominance). In two cases where the market dominance inquiry was bifurcated from the rate reasonableness inquiry, the market dominance procedural schedules alone were three months long. See M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 5 (STB served May 6, 2011); Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 7-8 (STB served Apr. 5, 2011).

[4] See, e.g., Pet. of the Ass'n of Am. R.Rs. to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Util. Generation Facilities, EP 717 (STB served Mar. 19, 2013); Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 442-46 (2001).

[5] The Board's rate review methodologies generally have proven to be costly and time-consuming. Further, the Board has recognized that, for smaller disputes, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016). In a decision issued concurrently with this one, the Board is proposing an alternative rate review procedure for challenging the reasonableness of rates in smaller cases. See Final Offer Rate Review, EP 755 et al. (STB served September 12, 2019).

In smaller rate cases, the expense associated with the market dominance inquiry may be particularly out of balance with the remedy being sought. For some complainants whose case may involve a limited number of carloads per year, the expense of the market dominance inquiry could make even the Board's least costly rate methodology, currently the Three-Benchmark methodology, cost-prohibitive. See RRTF Report 44 (noting carload shipper concerns "that even a Three-Benchmark case under our current methodology (including, e.g., a required showing of market dominance) is still too expensive and time-consuming"). Public comments in other Board proceedings state that current options for challenging the reasonableness of rates do not meet their need for expeditious resolution at a reasonable cost. See, e.g., Alliance for Rail Competition Opening Comments 22, June 26, 2014, Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1) (stating that the Three-Benchmark test is too costly and complex in its current form); Western Coal Traffic League Opening Comments 74-76, Oct. 23, 2012, Rate Regulation Reforms, EP 715 (stating that the cost and complexity of Simplified-SAC discourage its use). The RRTF concluded that streamlining the market dominance inquiry is a necessity to making rate relief available for smaller rate disputes and that a streamlined inquiry, available to complainants for rate cases under all of the Board's methodologies, could reduce the cost and time required to bringing a rate case while preserving a railroad's right to rebut market dominance arguments. RRTF Report 52-54.

An overly complicated and costly market dominance inquiry can *itself* be a barrier to rate relief, even in cases where there is no effective competitive restraint on rail rates. A less complex market dominance inquiry that still provides ample opportunity for both parties to present evidence would help ensure both that the burden of the process will not dissuade complainants with meritorious cases from bringing those cases to the Board, and that rate cases are processed more expeditiously. The agency's predecessor, the Interstate Commerce Commission, noted the Congressional intent expressed in the market dominance statute and in the legislative history, stating that Congress "envisioned the market dominance determination simply as a practical threshold jurisdictional determination to be made without lengthy litigation or administrative delay." Westmoreland Coal Sales Co. v. Denver & Rio Grande W. R.R., 5 I.C.C.2d 751, 754 (1989) (discussing 49 U.S.C. § 10709, the predecessor of the current § 10707).

Having considered the RRTF's recommendation, the Board proposes a streamlined market dominance approach to further the rail transportation policy, which requires that the Board regulate in such a way to provide for the expeditious handling and resolution of all proceedings, 49 U.S.C. § 10101(15), foster sound economic conditions in transportation and ensure effective competition, § 10101(5), and maintain reasonable rates where there is an absence of effective competition, § 10101(6). The streamlined market dominance approach would expedite the handling of rate cases and make rate relief procedures more accessible to those complainants that find the current processes cost prohibitive. A streamlined approach to market dominance would also be consistent with the policy of allowing, to the maximum extent possible, competition and the demand for services to establish reasonable transportation rates,

§ 10101(1). Under the proposed streamlined approach described below, complainants would still be required to demonstrate, with sufficient evidence, the absence of effective competition.[6]

Streamlining the market dominance inquiry would also be consistent with clear Congressional directives not only in the rail transportation policy but also in the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Pub. L. No. 114-110, 129 Stat. 2228. Section 11 of the STB Reauthorization Act modified 49 U.S.C. § 10704(d) to require that the Board "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates."[7] Section 11 also shortened the time for deciding rate cases brought under the Stand-Alone Cost (SAC) methodology. In addition, appropriate Board-imposed measures to avoid delay in the discovery and evidentiary phases of rate proceedings, especially on a threshold issue like market dominance, fulfill those Congressional directives. See, e.g., 49 U.S.C. § 10704(d)(1).

It is well established that the Board has the authority to review and modify its rate reasonableness methodologies and processes—including its market dominance inquiry—to ensure that they remain accessible to the complainants that are entitled to use them.[8] For example, in Market Dominance Determinations—Product & Geographic Competition (Product & Geographic Competition 1998), 3 S.T.B. 937, 938 (1998), the Board examined whether product and geographic competition should be considered in market dominance inquiries. The Board concluded that "it appears that the burdens associated with litigating product and geographic competition issues may serve to deny captive shippers with valid claims access to the Board and thus their only avenue of rate relief."[9] In a subsequent decision, following remand from the U.S. Court of Appeals for the District of Columbia Circuit for consideration of the rail transportation policy, the Board reaffirmed its elimination of product and geographic competition from consideration, stating that "Congress has directed us to apply the market dominance provision in a practical manner." Product & Geographic Competition 2001, EP 627, slip op. at 2. The Board stated that "the complications and delays resulting from consideration of product and geographic competition are contrary to the Congressional directive that the

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[6] Because the market dominance inquiry is a threshold determination, even in cases where a complainant demonstrates the absence of effective competition, the Board, after considering evidence from the parties, may find a challenged rate to be reasonable.

[7] Prior to the enactment of the STB Reauthorization Act, § 10704(d) began with a sentence stating that, "[w]ithin 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates."

[8] See, e.g., Rate Regulation Reforms, EP 715, slip op. at 1-2 (STB served Mar. 13, 2015); Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), 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).

[9] Product & Geographic Competition 1998, 3 S.T.B. at 949, remanded sub nom. Ass'n of Am. R.Rs. v. STB, 237 F.3d 676 (D.C. Cir. 2001), reaff'd on remand, 5 S.T.B. 492 (2001), corrected, EP 627 (STB served Apr. 6, 2001) (Product & Geographic Competition 2001), aff'd sub nom. Ass'n of Am. R.Rs. v. STB, 306 F.3d 1108 (D.C. Cir. 2002).

administrative market dominance procedures be easily administrable." Id. at 8 (citing Ass'n of Am. R.Rs., 237 F.3d at 680; Rail Revitalization & Regulatory Reform Act of 1976, Pub. L. No. 94-210 § 202(d), 90 Stat. 31). Most significantly, the Board found that elimination of product and geographic competition from consideration advanced the equally important goal of expediting rate cases. Id. (citing 49 U.S.C. § 10101(2), (15)).

In affirming the Board's 2001 decision, the D.C. Circuit noted that it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Rail Act of 1980, and that Congress had expressly required the Board to provide for the expeditious handling and resolution of all proceedings. Ass'n of Am. R.Rs., 306 F.3d at 1111. The court found that the Board's construction of the statute furthered its statutory mandate "to establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates, including 'appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.'" Id. (emphasis omitted) (citing 49 U.S.C. § 10704(d)(1)).

In a similar vein, the D.C. Circuit affirmed the Board's decision in Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 60 (STB served Oct. 30, 2006), to eliminate "movement-specific adjustments" to the uniform method for determining the variable costs in the quantitative market dominance inquiry. BNSF Ry. v. STB, 526 F.3d 770, 776-77 (D.C. Cir. 2008). Prior to the decision in Major Issues, parties to rate cases were permitted to make movement-specific adjustments to the Board's standard variable cost calculations generated by the Uniform Railroad Costing System (URCS). In Major Issues, the Board eliminated the use of those movement-specific adjustments in market dominance presentations, finding that they made proceedings "inordinately complex, time consuming, and expensive, and [did] not necessarily result in more reliable results." Major Issues, EP 657 (Sub-No. 1), slip op. at 60. In affirming the Board's decision, the D.C. Circuit found that the elimination of movement-specific adjustments "balances inherently incommensurable cost and benefits," and is a decision that "falls within the expertise of the agency." BNSF Ry., 526 F.3d at 776.

The expeditious treatment of market dominance issues is essential to the Board's ability to consider rate reasonableness cases where there is an absence of effective competition. In order to meet its statutory duty to ensure the expeditious handling of challenges to the reasonableness of railroad rates, it is important for the Board to consider ways to streamline the presentation of market dominance evidence, particularly in smaller cases where the cost of making a market dominance presentation can outweigh the value of the case.

Proposed Rule

To reduce the burden on the parties, the Board proposes to establish that a complainant has made a prima facie showing of market dominance when it can demonstrate the following:

- The movement has an R/VC ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- The complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and

- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

As discussed below, these proposed prima facie factors are relevant to the Board's consideration of the existence (or lack) of effective competition for a rail movement and would be sufficient to make a prima facie showing of market dominance. If a complainant could demonstrate each of the factors listed above, the Board would have significant evidence about the status of effective competition, without requiring a more complicated evidentiary showing by the complainant or the railroad. Complainants that cannot make a showing under the six factors—and therefore choose not to attempt a streamlined market dominance showing in the first place—would be required at the outset to establish market dominance in a non-streamlined market dominance presentation by introducing additional detailed evidence regarding effective competition. In either scenario, defendant railroads would continue to have the opportunity to rebut the complainant's evidence or argue against a finding of market dominance based on other factors.

Proposed Prima Facie Factors

R/VC of180% or Greater. As discussed earlier, this is a statutory requirement for quantitative market dominance and must be established, even under a streamlined approach. This is not often a contentious issue in rate cases and is often established by stipulation. The revenue figure is taken from the tariff rate plus applicable fuel surcharge and escalation clauses. The URCS Phase III movement costing program, which is available for download on the Board's website, calculates the variable costs of a particular movement based on user-supplied information. Calculating variable costs using the URCS Phase III program is a quick and simple process. In demonstrating the R/VC ratio, a complainant must show its quantitative calculations.

Movement Length Greater than 500 Highway Miles. The Board proposes a 500-highway-mile threshold as a factor to identify when trucking is not likely to provide effective competition. The Board has previously indicated that "[t]rucking becomes less viable when the length of haul exceeds 500 miles because any transport over that threshold, in many instances, could not be completed in one day." Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1), slip op. at 7 n.12 (STB served Mar. 23, 2016).[10] Given the reduced likelihood of effective truck competition for movements exceeding 500 highway miles, rail movements that meet this criterion are more likely to be served by market dominant carriers. If a complainant can establish this prima facie factor, it would assist the Board in making a market dominance determination more expeditiously.

[10] See also Rail Gen. Exemption Auth.—Exemption of Grease or Inedible Tallow, 10 I.C.C.2d 453, 461 (1994) (finding that movements over 500 miles "were thus less likely to be the subject of direct truck competition"). Additionally, the Board sought comment on using 500 highway miles between origin and destination as a preliminary screen as part of a potential rate review methodology. Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1) et al., slip op. at 16 (STB served Aug. 31, 2016) (responsive comments docketed in Docket No. EP 665 (Sub-No. 2)).

The Board recognizes that the 500-highway-mile threshold may be underinclusive for certain commodities that are more difficult to move by truck (e.g., particularly heavy commodities). Further, the Board has received public comment that "trucking generally becomes cost-competitive to rail only for agricultural movements of 200 miles or less." National Grain & Feed Assoc. Opening Comments 11, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2). Accordingly, the Board specifically seeks comment on whether, and if so how, the mileage threshold could be varied by commodity group(s). The Board invites public commenters to include detailed quantitative and qualitative information in support of any alternative mileage threshold.

The Board also recognizes that movements in excess of the proposed 500-highway-mile threshold could still have effective competitive transportation alternatives. See CSX Transportation, Inc. Opening Comments 7, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2) (noting instances where the Board has found market dominance for movements over 500 miles). Under the Board's proposal, a defendant railroad would have the opportunity in its reply evidence to argue that despite the 500-highway-mile threshold, the carrier is not market dominant for the movement.

Absence of Intramodal Competition. Because the Board must consider whether other railroads provide effective competition regarding a challenged rate, the absence of intramodal competition is an important factor that could streamline the Board's analysis. While the existence of intramodal competition is not often litigated, there are exceptions. See, e.g., Total Petrochems. 2013, NOR 42121, slip op. at 50-51 (addressing railroad's arguments that shipper had a direct rail option for one of the lanes at issue). If a complainant can demonstrate the complete absence of such competition, it would assist the Board in making a market dominance determination more expeditiously. The Board expects that, in most cases, the complainant would demonstrate the absence of intramodal competition by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to another railroad. Practical physical access encompasses feasible shipping alternatives on another railroad, including switching arrangements, where "an alternative is possible from a practical standpoint given real-world constraints." Total Petrochems. 2013, NOR 42121, slip op. at 4 n.9.

Absence of Barge Competition. The existence of barge competition, like truck competition, can be an issue in cases where a complainant's or receiver's facility is located on a navigable waterway. See, e.g., Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 287 (STB served Jan. 11, 2018). Accordingly, if a complainant can demonstrate the absence of such competition (e.g., because the complainant or receiver, or both, is landlocked), it would assist the Board in making a determination more expeditiously as to whether barge competition constrains market power. The Board expects that, in most cases, the complainant would demonstrate the absence of barge competition by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to barge competition.

No More Than 10% of Recent Movements by Truck. Board precedent makes clear that traffic that regularly and routinely moves by truck or truck-rail transloading is less likely to be served by a market dominant rail carrier. See, e.g., E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (E.I. DuPont), NOR 42125, slip op. at 307-08 (STB served Mar. 24, 2014), corrected and

updated (STB served Oct. 3, 2014); M&G Polymers 2012, NOR 42123, slip op. at 48. However, market dominance can still be found in cases where truck competition exists if the truck competition is found not to be a constraint on the defendant railroad's rates. See, e.g., Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 9 (STB served Dec. 19, 2013) ("But the fact that some [truck] competition exists, or that the price of the alternative happens to be similar to the challenged rate, does not in itself demonstrate that such competition is effectively constraining a carrier's pricing—i.e., whether the competitive alternative is sufficient to deter the carrier from charging monopoly prices for the transportation at issue."). Cases that require a review of the comparative pricing between truck and rail raise many complicated issues that do not appear to be suitable for a streamlined market dominance approach. But most cases that raise no such issues, because truck competition is simply not a factor providing effective competition, would benefit from a streamlined approach, and it would assist the Board in making a market dominance determination more expeditiously.

Accordingly, the Board proposes that a showing that truck movements for the issue traffic are minimal would establish this factor. See, e.g., E.I. DuPont, NOR 42125, slip op. at 323 n.1709 (noting that "there are a variety of reasons unrelated to transportation economics that [a shipper] might use certain alternatives (e.g., to serve customers without rail access, to accommodate low volume purchasers, or to expedite emergency shipments)"). As might be expected in a case-by-case fact-specific inquiry, the agency has accepted varying percentages of truck movements as proof of effective competition. Compare Amstar Corp. v. Atchison, Topeka & Santa Fe Ry., NOR 37478, slip op. at 7 (ICC served Dec. 8, 1987) (finding that effective competition existed even where complainants had shipped 98.5% of the issue movements by rail), with McCarty Farms v. Burlington N. Inc., 3 I.C.C.2d 822, 829-33 (1987) (finding no effective competition existed despite a trucking alternative accounting for 20%-25% of the movements). Given today's transportation market, including the state of truck competition, and the Board's experience with market dominance determinations in recent rate cases, the Board proposes that a complainant that shows that it has used trucking for 10% or fewer of its movements subject to the rate at issue over a five-year period will have made a prima facie showing for this factor concerning the absence of effective truck competition. Although the agency has found an absence of market dominance in cases where less than 10% of the issue traffic has moved by truck, the Board proposes that a 10% level is an appropriate threshold for a complainant to demonstrate that its truck options are ineffective, based on its limited use of the option over a historical period. Unlike complainants that regularly move large volumes of traffic by truck, complainants that move less than 10% of their traffic by truck, despite rates with high R/VC ratios and the absence of intramodal and barge competition, are reasonably likely to have persuasive arguments for why trucking does not provide effective competition, including customer contracts, product characteristics, and price of the trucking alternative. See, e.g., M&G Polymers 2012, NOR 42123, slip op. at 19-21, 24-34 (addressing, among other things, customer requirements and product integrity issues in the context of a market dominance analysis). Such a showing would assist the Board in making a market dominance determination more expeditiously.

The Board recognizes that it has found market dominance in cases where complainants utilize trucks for more than 10% of their movements. Accordingly, the Board specifically seeks comment on whether, and if so, how the truck movement percentage threshold should be implemented. The Board invites public commenters to include detailed quantitative and

qualitative information in support of any alternative truck movement percentage threshold. As with the 500-highway-mile threshold, and all the other factors as well, a defendant railroad would have the opportunity in its reply evidence to argue that despite the 10% threshold, the carrier is not market dominant for the movement. The Board proposes that five years[11] is an appropriate lookback period for truck movement data because it is recent enough to reflect a complainant's current business operations and long enough to capture a snapshot of its historical use of trucks.

No Practical Build-out Option. The term "build-out" has been used by the agency to refer to possible competitive alternatives that could be accessed if the complainant makes certain infrastructure investments. The Board proposes that one factor of a prima facie showing of market dominance under the streamlined approach would be that a complainant demonstrate, by a short plain statement in a verified statement from an appropriate official or other means, that it has no practical build-out option due to physical, regulatory, financial, or other issues (or combination of issues).[12] The streamlined market dominance option would not be available when build-out alternatives are practical, although such a complainant could still attempt to show in a non-streamlined market dominance presentation that the build-out does not provide effective competition. In cases where there is no practical build-out option, it would assist the Board in making a market dominance determination more expeditiously.

Railroad arguments that potential build-outs are available—although not typically found by the Board to be practical alternatives[13]—can significantly complicate market dominance presentations. A complainant may not have information to address build-out options unless it has studied those options. But a defendant railroad might be able to identify hypothetical potential competitive options for the complainant's traffic. This possibility likely leaves some complainants unsure as to how much information to affirmatively include in their opening presentation about potential competitive options that a railroad *might* identify. Such uncertainty could significantly increase litigation costs and dissuade complainants from bringing cases to the Board.

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[11] Complainants with new traffic that does not go back a full five years would be permitted to submit the available months or years of data for the movement.

[12] Physical issues include geographic constraints, such as the inability to obtain a right-of-way to the connecting carrier. Regulatory issues include legal barriers, such as prohibitive environmental permitting processes. Financial issues include a determination that the expense of the build-out would not be cost effective in light of the potential transportation rate savings.

[13] See, e.g., Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 295-96 (STB served Jan. 11, 2018) (finding an alternative which would require building additional rail infrastructure to be not feasible); Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 6 S.T.B. 573, 584 (2003) (finding that constructing a 13.5-mile spur track to reach a competing railroad that would cost at least $49 million was not feasible); W. Tex. Utils. Co. v. Burlington N. R.R., 1 S.T.B. 638, 651 (1996), aff'd sub nom. Burlington N. R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997) (finding two potential rail line build-out alternatives costing $62 million and $79 million to not be realistic).

Therefore, the Board proposes a factor that would limit the evidentiary burden and simplify the requirement for complainants while also ensuring that the Board obtains information about build-out alternatives that may be relevant to the competitive landscape. To demonstrate this factor of a market dominance prima facie showing, a complainant would need to submit a short plain statement in a verified statement by an appropriate official, or otherwise demonstrate, that it has no practical build-out alternative. For example, the complainant must state whether the impracticality is due to physical, regulatory, financial, or other issues (or combination of issues). If that showing cannot be made, the complainant would be required at the outset to address in some detail in its opening, through the non-streamlined market dominance presentation, why any potential build-out(s) would not provide effective competition.

Mechanics

Many of the facts to support these proposed prima facie factors are available to complainants at the pleading stage. Accordingly, the Board expects that complainants would be able to plead these factors in most cases and potentially negotiate stipulations with defendant carriers that would avoid costly discovery. Further, as discussed above, with respect to some of the factors, a verified statement from an appropriate official(s) with knowledge of the facts would be sufficient to meet the complainant's prima facie showing. By establishing the list of factors set out above, the Board would find by rule that a complainant that meets each of the required factors will have made a prima facie showing of market dominance. If a complainant determines that it is not able to demonstrate one of the required factors, it would not choose this streamlined approach at the beginning of the case, but would instead need to choose a non-streamlined market dominance presentation with additional detailed information about its transportation options. If a complainant elects to use the streamlined market dominance approach and the Board finds that market dominance has not been shown, the complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances (or other factors under 49 U.S.C. § 1322(c)). For purposes of this streamlined approach, the disclosures required under 49 C.F.R. § 1111.2(a) and (b)[14] would apply to a complainant electing to use this streamlined approach.

The Board's proposed streamlined market dominance approach would not result in a shifting of the burden for market dominance. The burden for establishing market dominance remains on the complainant, as it does with other issues in rate reasonableness cases. But the proposed approach would allow a complainant that can demonstrate the factors to make a prima facie showing that it has met its "burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies." Total Petrochems. 2013, NOR 42121, slip op. at 28.

[14] Under the Board's existing regulations, § 1111.2(a) requires that, with any rate complaint submitted under simplified standards, a complainant must submit, inter alia, the URCS Phase III inputs. Likewise, § 1111.2(b) requires such a complainant to "provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program."

As stated above, this streamlined approach would not deprive railroads of their opportunity to defend themselves by rebutting a complainant's prima facie showing. Carriers would be permitted to refute any of the prima facie factors of the complainant's case, or otherwise show that effective competition exists for the traffic at issue. As in a non-streamlined market dominance presentation, a complainant under this new approach would have the opportunity to respond to the railroad's reply evidence in its rebuttal submission (or in the case of a matter brought under the Final Offer Rate Review procedure in the optional hearing described below). The new approach described in this decision should help narrow the focus of arguments on reply and rebuttal. Accordingly, the Board would impose a 50-page limit, inclusive of exhibits and verified statements, on each of the parties' reply and rebuttal submissions on market dominance in proceedings where the complainant uses the streamlined approach.[15] "The Board believes the page limit will encourage parties to focus their [arguments] on the most important issues." Expediting Rate Cases, EP 733, slip op. at 12 (STB served Nov. 30, 2017).

To help facilitate building the record on market dominance under the streamlined approach, the Board proposes a new delegation of authority under 49 C.F.R. § 1011.6 to an Administrative Law Judge (ALJ) to hold an on-the-record telephonic market dominance evidentiary hearing, at the complainant's option, within seven days after the due date of complainant's rebuttal (or in the case of a matter brought under the Final Offer Rate Review procedure within seven days after the due date of the parties' reply). The ALJ's role would be to allow the parties to clarify their market dominance positions under oath, and to build upon issues presented by the parties through critical and exacting questioning. Given this hearing, the complainant may elect whether to file rebuttal evidence on market dominance issues (in cases that provide for rebuttal, i.e. cases not brought under the Final Offer Rate Review procedure) or to rely on the ALJ hearing to rebut the defendant's reply evidence. Within four days of the evidentiary hearing, a transcript of the hearing would be entered into the docket. The Board would take the entire record into consideration, including the transcript from the ALJ hearing, when reaching its final conclusion on market dominance. The Board's determinations would occur in accordance with the deadlines set out in 49 C.F.R. § 1111.9 and 1111.10, and, if adopted, the new deadlines proposed in Final Offer Rate Review, Docket No. EP 755 et al.

The Board concludes that the proposed approach would have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting railroads' ability to mount a thorough defense. The Board finds that the availability of a streamlined market dominance approach would reduce unneeded burdens that could dissuade complainants from bringing cases. Moreover, reducing the time and expense associated with litigating market dominance is particularly important for smaller rate disputes. The proposed rule would also help the Board achieve the statutory requirement to ensure the expeditious

[15] The Board has found that a 50-page limit is an appropriate threshold to provide the parties with an adequate opportunity to address complex issues in rate cases, including petitions for reconsideration and briefs. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125, slip op. at 2 (STB served June 11, 2014); Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry., NOR 42130, slip op. at 2 (STB served July 25, 2014).

handling of challenges to the reasonableness of railroad rates, 49 U.S.C. § 10704(d)(1), and further the rail transportation policies of providing for the expeditious handling and resolution of all proceedings, § 10101(15), fostering sound economic conditions in transportation and ensuring effective competition, § 10101(5), and maintaining reasonable rates where there is an absence of effective competition, § 10101(6). Accordingly, the Board invites comment on the proposed streamlined market dominance approach.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

This proposal would not have a significant economic impact upon a substantial number of small entities, within the meaning of the RFA.[16] The proposal imposes no additional record-keeping by small railroads or any reporting of additional information. Nor do these proposed rules circumscribe or mandate any conduct by small railroads that is not already required by statute: the establishment of reasonable transportation rates when a carrier is found to be market dominant. Small railroads have always been subject to rate reasonableness complaints and their associated litigation costs, including addressing whether they have market dominance over traffic. Finally, as the Board has previously concluded, the majority of railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act. Simplified Standards, EP 646 (Sub-No. 1), slip op. at 33-34. Furthermore, since the inception of the Board in 1996, only three of the 51 cases filed challenging the reasonableness of

[16] For the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars or $39,194,876 or less when adjusted for inflation using 2018 data. Class II rail carriers have annual operating revenues of less than $250 million or $489,935,956 when adjusted for inflation using 2018 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 C.F.R. § 1201.1-1; Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served June 14, 2019).

freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimates that there are approximately 656 Class III rail carriers. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), and Appendix B, the Board seeks comments about the impact of the revisions in the proposed rule to the currently approved collection of Complaints (OMB Control No. 2140-0029) regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The proposed simplified market dominance approach is intended to provide a less burdensome alternative to a non-streamlined market dominance presentation and is estimated, on balance, to result in five additional complaints filed each year. Filing a complaint has been estimated to require an annual hour burden of 469 hours and an annual "non-hour burden" cost of $1,462. See Supporting Statement for Modification & OMB Approval Under the Paperwork Reduction Act & 5 C.F.R. pt. 1320, OMB Control No. 2140-0029 (Jan. 2018), available at https://www.reginfo.gov/public/do/DownloadDocument?objectID=78860402. For the reasons discussed above, filing a complaint with the streamlined market dominance approach is likely to require less time and expenditure than other complaints. Accordingly, the Board estimates that this new proposed method would entail an annual hour burden of 250 hours per complaint and an annual "non-hour burden" cost of $780 per complaint. These additional complaints are estimated to add a total annual hour burden of 1,250 hours and $3,900 of total annual "non-hour burden" cost under the PRA. The Board welcomes comment on the estimates of actual time and costs of complaints, as detailed below in Appendix B. Other information pertinent to complaints, including the simplified market dominance presentations, is also included in Appendix B. The proposed rule will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of Subjects

49 C.F.R. Part 1011

Administrative practice and procedure; Authority delegations (government agencies); Organization and functions (government agencies).

49 C.F.R. Part 1111

Administrative practice and procedure; Investigations.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.

2. Comments regarding the proposed rules are due by November 12, 2019. Replies are due by January 10, 2020.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Appendix A
Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1011 and 1111 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

2. Amend § 1011.6 by adding a new paragraph (i) to read as follows:

§ 1011.6 Delegations of authority by the Chairman.

* * * * *

(i) In matters involving the streamlined market dominance approach, authority to hold a telephonic evidentiary hearing on market dominance issues is delegated to administrative law judges, as described in § 1111.12(e) of this chapter.

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 is revised to read as follows:

Authority: 49 U.S.C. 10701, 10702, 10704, 10707, 11701, and 1321.

4. Amend § 1111.2 by revising the last sentence of the introductory text in paragraph (a) and (b) to read as follows:

§ 1111.2 Content of formal complaints; joinder.

(a) *General.* * * * If the complainant seeks to use the simplified standards or the streamlined market dominance approach, it should support this request by submitting, at a minimum, the following information:

* * * * *

(b) *Disclosure required with complaints in simplified standards cases and in cases using the streamlined market dominance approach*. The complainant must provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.

* * * * *

5. Amend § 1111.9 by revising paragraph (a) to read as follows:

§ 1111.9 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

(1) Day 0 - Complaint filed, discovery period begins.

(2) Day 7 or before - Conference of the parties convened pursuant to § 1111.11(b).

(3) Day 20 - Defendant's answer to complaint due.

(4) Day 150 - Discovery completed.

(5) Day 210 - Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues.

(6) Day 270 - Defendant files reply evidence to complainant's opening evidence.

(7) Day 305 - Complainant files rebuttal evidence to defendant's reply evidence.

(8) Day 312 – In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence on market dominance issues is due.

(9) Day 335 - Complainant and defendant file final briefs.

(10) Day 485 or before - The Board issues its decision.

* * * * *

6. Amend § 1111.10 by revising paragraph (a) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

(1)(i) In cases relying upon the Simplified-SAC methodology:

(A) Day 0 - Complaint filed (including complainant's disclosure).

(B) Day 10 - Mediation begins.

(C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).

(D) Day 30 - Mediation ends; discovery begins.

(E) Day 140 - Defendant's second disclosure.

(F) Day 150 - Discovery closes.

(G) Day 220 - Opening evidence.

(H) Day 280 - Reply evidence.

(I) Day 310 - Rebuttal evidence.

(J) Day 317 - In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence is due.

(K) Day 320 - Technical conference (market dominance and merits, except for cases using the streamlined market dominance approach, in which the technical conference will be limited to merits issues).

(L) Day 330 - Final briefs.

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(2)(i) In cases relying upon the Three-Benchmark methodology:

(A) Day 0 - Complaint filed (including complainant's disclosure).

(B) Day 10 - Mediation begins. (STB production of unmasked Waybill Sample.)

(C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).

(D) Day 30 - Mediation ends; discovery begins.

(E) Day 60 - Discovery closes.

(F) Day 90 - Complainant's opening (initial tender of comparison group and opening evidence on market dominance). Defendant's opening (initial tender of comparison group).

(G) Day 95 - Technical conference on comparison group.

(H) Day 120 - Parties' final tenders on comparison group. Defendant's reply on market dominance.

(I) Day 150 - Parties' replies to final tenders. Complainant's rebuttal on market dominance.

(J) Day 157 - In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence is due.

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

* * * * *

7. Add a section § 1111.12 to read as follows:

§ 1111.12 Streamlined Market Dominance.

(a) A complainant may elect to pursue the streamlined market dominance approach to market dominance if the challenged movement satisfies the factors listed in paragraphs (a)(1) through (a)(6) of this section. The Board will find a complainant has made a prima facie showing on market dominance when it can demonstrate the following with regard to the traffic subject to the challenged rate:

(1) the movement has an R/VC ratio of 180% or greater;

(2) the movement would exceed 500 highway miles between origin and destination;

(3) there is no intramodal competition from other railroads;

(4) there is no barge competition;

(5) the complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and

(6) the complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

(b) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

(c) When a complainant elects to utilize the streamlined market dominance approach, it must provide the initial disclosures found in § 1111.2 (a) and (b) of this chapter, regardless of the rate reasonableness methodology selected (including stand-alone cost cases).

(d) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues (in cases that provide for rebuttal, i.e. cases not brought under the Final Offer Rate Review procedure). Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(e) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant within 7 days after the complainant's rebuttal evidence is due. In Final Offer Rate Review matters, the hearing will be held within 7 days after the parties' replies are due. The Board will arrange to receive the hearing transcript within 4 days of when the evidentiary hearing is held. The oral hearing transcript will be part of the docket in the proceeding. Market dominance determinations will be made by the Board.

Appendix B
Information Collection Under the Paperwork Reduction Act

Title: Complaints under 49 C.F.R. part 1111

OMB Control Number: 2140-0029

STB Form Number: None

Type of Review: Revision of a currently approved collection

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. §§ 3501-3521, the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Complaints under 49 C.F.R. part 1111, OMB Control No. 2140-0029, as further described below. The requested revision to the currently approved collection is necessitated by this Notice of Proposed Rulemaking (NPRM), which is expected to increase the number of complaints filed with the Board because of the addition of the proposed streamlined market dominance approach. All other information collected by the Board in the currently approved collection is without change from its approval.

Respondents: Affected shippers, railroads, and communities that seek redress for alleged violations related to unreasonable rates, unreasonable practices, service issues, and other statutory claims.

Number of Respondents: Nine

Frequency: On occasion. In recent years, respondents have filed approximately four complaints per year with the Board. In Final Offer Rate Review, EP 755 et al. (STB served September 12, 2019), the Board simultaneously issued a separate NPRM that also impacts the Board's existing collection of complaints. In that decision, the Board estimates that the proposed alternative (Final Offer Rate Review) complaint would result in the collection of approximately four additional complaints annually. The modification of the Board's existing collection for those additional complaints is noticed in Docket No. EP 755 et al. and incorporated in the burdens below. In this NPRM, based on the addition of the simplified market dominance approach, the Board anticipates that approximately five additional complaints would be filed annually, including those from Docket No. EP 755 et al. Combining the existing complaints and the additional complaints resulting from the proposed rules in Docket No. EP 755 et al. and this NPRM, the estimated number of complaints filed annually is approximately nine.

Total Burden Hours (annually including all respondents): 3,126 (sum of (i) estimated hours per complaint (469) x total number of estimated, existing complaints (4), and (ii) estimated hours per additional complaints (250) x total number of those complaints (5)).

Total "Non-Hour Burden" Cost (such as start-up costs and mailing costs): $9,748 (sum of (i) estimated non-hour burden cost per complaint ($1,462) x total number of estimated, existing complaints (4), and (ii) estimated non-hour burden cost per additional complaint ($780) x total number of those complaints (5)).

Needs and Uses: Under the Board's regulations, persons may file complaints before the Board pursuant to 49 C.F.R. part 1111 seeking redress for alleged violations of provisions of the Interstate Commerce Act, Public Law 104-88, 109 Stat. 803 (1995). In the last few years, the most significant complaints filed at the Board allege that railroads are charging unreasonable rates or that they are engaging in unreasonable practices. See, e.g., 49 U.S.C. §§ 10701, 10704, and 11701. As described in more detail above in the NPRM, the Board is proposing new rules that would allow complainants in these rate cases to use a new simplified market dominance approach to make a prima facie showing before the Board. As a result of the reduction in burden from this new simplified approach, it is expected that additional complaints would be filed. The collection by the Board of these complaints, and the agency's action in conducting proceedings and ruling on the complaints, enables the Board to meet its statutory duties.