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SERVICE DATE - MAY 4, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 575

REVIEW OF RAIL ACCESS AND COMPETITION ISSUES

Decided: May 4, 1998

BY THE BOARD:

This proceeding was initiated to examine issues of rail access and competition in today's railroad industry. During two days of informational hearings, and in numerous written statements, we heard the complaints of shippers dependent on rail service that, as a result of consolidation in the industry, their competitive options have been limited, and that available remedies are burdensome, costly, and unresponsive.

On April 17, 1998, we issued a decision addressing the concerns that had been raised. We found that, through administrative action, we could examine making it less costly and burdensome for aggrieved parties to obtain access to the regulatory system, and providing the opportunity for shippers with concerns about poor service to obtain service from an alternate carrier. Thus, we began one rulemaking proceeding, and intend to begin another shortly.¹ We decided that the most appropriate way to achieve more effective utilization of smaller railroads in addressing the concerns raised by the shippers would be through discussions within the railroad industry. Thus, we directed railroads to meet and discuss this issue among themselves, and to report back to the Board by May 11, 1998. Finally, we concluded that certain issues -- in particular, issues relating to railroad "revenue adequacy," the competitive access rules in general, and formalized railroad/shipper dialogue designed to help carriers find a more systematic way of addressing customer concerns -- would be better addressed at this time in a private-sector rather than governmental forum. Thus, as to revenue adequacy, we directed railroads to meet with shippers with a view toward selecting a panel of three disinterested experts to make recommendations as to an appropriate revenue adequacy standard, and to report back to the Board by May 15, 1998. As to competitive access, because we were convinced that railroads and shippers could, if they tried, find some common ground, we directed them to meet, negotiate, and report back to the Board by August 3, 1998. Finally, we directed railroads to report back to the Board by May 11, 1998, on their progress in establishing

¹ Our notice proposing removal of product and geographic competition as factors in market dominance proceedings was issued in Market Dominance Determinations — Product and Geographic Competition, STB Ex Parte No. 627 (STB served Apr. 29, 1998). We will soon issue a decision addressing service issues.

formalized dialogue with their shippers and their employees. We designated Administrative Law Judge Jacob Leventhal to supervise meetings as appropriate.²

On April 27, 1998, we received a letter from several shippers and shipper groups asking us to modify our April 17 order in two respects. Rather than seeking to characterize the letter, we quote its operative portions directly:

First, the Board should reverse the priorities of the revenue adequacy and competitive access issues. Competitive access is, by far, the most urgent matter to shippers. We also believe it will be difficult to reach agreement with the railroads on this issue, and therefore we first request that the order be modified to require the parties to report by May 29, rather than August 3, on whether significant progress is possible.

Second, revenue adequacy, while important, is less urgent. Moreover, we question the need for the elaborate and expensive processes set forth in the Board's order. However, we are certainly willing to discuss revenue adequacy issues with the railroads. Indeed, recent pronouncements by railroad executives suggest that progress on the subject may be possible. Accordingly, we also request that the procedures on revenue adequacy ordered by the Board be suspended until shippers and the railroads enter discussions on this issue, and report back to the Board on the progress of these discussions. The deadline for this report should be May 29, 1998.³

On April 30, 1998, the Association of American Railroads (AAR) responded to the shippers' letter. Noting that the only conference scheduled before Judge Leventhal between now and May 29 will be held on May 21, AAR points out that the schedule proposed by the shippers will allow little time for meaningful dialogue and consultation as to the competitive access issue. Although it says that it will participate in further negotiations on revenue adequacy, AAR also expresses its dismay that the shippers have apparently rejected the panel approach, which, as AAR describes it, "would replace advocacy and contentiousness with objective economic analysis."

DISCUSSION AND CONCLUSIONS

1. Prioritization of Issues. At the outset, we will respond to the request that we "reverse the priorities" of the initiatives we set in motion. Our April 17 order raised several issues, but it did not intend to, and indeed did not, prioritize among them. The fact that the date for the revenue adequacy report was set earlier than the date for the competitive access report did not reflect a higher priority

² Judge Leventhal held a preliminary conference on April 28, 1998.

³ In a letter dated April 29, 1998, the National Industrial Transportation League supported the April 27 letter insofar as it sought a change in the procedures for addressing revenue adequacy.

for the revenue adequacy exercise, any more than the still earlier reporting date for the smaller railroad discussions could be said to reflect an even higher priority. The due date for the report on revenue adequacy exercise was set earlier than the due date for the competitive access report merely because it was, and still is, our view that it would be simpler for interested parties to meet and select three unbiased experts than it would be to address and seek to resolve issues such as competitive access. Although the shippers in their letter indicate that competitive access relief is more urgent than amendments to revenue adequacy, we did not establish a hierarchy of objectives, and we urge all parties to take all of the initiatives in our April 17 order seriously.

2. Revenue Adequacy. We also do not believe that our order set forth “elaborate and expensive processes” regarding revenue adequacy. At the hearings, shippers raised substantial concerns about the current revenue adequacy standards, while the railroads defended the need for a revenue adequacy standard that permits them to earn enough money to attract capital and to invest in needed facilities. Railroad and shipper representatives recommended referring the revenue adequacy question to one or more disinterested expert economists with no preconceived position on the issue,⁴ and so we directed railroads to meet with shippers with a view toward selecting a panel of three such experts to make recommendations as to an appropriate standard. Selection of a panel, as we envision it, should be a relatively straightforward exercise. The process from then on would not be an elaborate one, and it would not be particularly expensive overall if all of the parties agreed in advance to support the recommendations of the expert panel rather than to continue to pursue the revenue adequacy issue before the Board, the courts, and whatever other forums the railroad and shipping communities typically address.

Nevertheless, as both the shippers and AAR indicate that progress through means other than the 3-expert panel is possible in addressing the revenue adequacy issue, we will give the shippers more time so that they can pursue the issue directly with the railroads. If they cannot reach agreement, however, we urge the parties not to reject, as the shippers apparently have done, the notion that the issue be resolved by a neutral expert or panel of experts. Moreover, given that the next conference is not scheduled until May 21, 1998, we do not believe that a reporting date of May 29, 1998 will provide an adequate opportunity for meaningful progress. Therefore, although we certainly will not preclude any party that wishes to do so from filing an interim report on May 29, 1998, or on any other date it deems appropriate, we request a report on the revenue adequacy issue by August 3, 1998.

3. Competitive Access. The shippers ask to shorten the reporting time for the competitive access issue, apparently because of their concern that it will be difficult to reach agreement with the railroads on this issue. We do not understand the shippers’ logic.

⁴ Dr. Alfred E. Kahn, for example, testifying on behalf of the Alliance for Rail Competition (ARC), one of the signatories to the April 27 letter, urged the Board to consult with disinterested financial analysts that are not paid by either the railroads or the shippers as to an appropriate revenue adequacy standard.

At the hearings, shippers raised substantial concerns about the impediments that the existing regulations imposed on their ability to make a competitive access case, while the railroads expressed concern that opening up the competitive access rules could place them on a slippery slope toward total open access, which, in their view, would adversely affect them and the public. Because we were convinced that railroads and shippers could, if they tried, find some common ground on the issue of competitive access, in our May 17 order we directed them to meet, negotiate, and report back to the Board. We recognized that negotiations concerning competitive access might require substantial work, and that is why we did not request a report until August 3, 1998.

Shortening the reporting time to, in effect, permit one session before Judge Leventhal with a report due a week later would send a message that we see little prospect for accommodation on any aspect of the competitive access issue. If that were our view, however, we would not have directed the railroads to negotiate with the shippers in the first place. Notwithstanding the tenor of the shippers' letter, we continue to believe that some common ground can be reached if all parties can put aside their preconceived notions and enter negotiations with an open mind, committed to seeking some common ground rather than immediately assuming that governmental fiat is the only answer or that more litigious avenues must be pursued. Therefore, we continue to urge the parties to negotiate seriously to reach agreement on as many issues related to competitive access as possible. We request a report on August 3, 1998, although, again, we will not preclude any party that wishes to do so from filing an interim report on May 29, 1998, or on any other date it deems appropriate.

It is ordered:

1. The shippers' requests are governed by this decision.
2. The report on revenue adequacy is due on August 3, 1998, although any party that wishes to do so may file an interim report on May 29, 1998.
3. The report on competitive access is due on August 3, 1998, although any party that wishes to do so may file an interim report on May 29, 1998.
4. This decision is effective upon its service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary