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ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 715
RATE REGULATION REFORMS

REPLY COMMENTS



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Introduction

Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these reply comments in response to Notice of Proposed Rulemaking (NPR) decided and served July 25, 2012. 77 Fed. Reg. 44571-72 (July 30, 2012).

I. CONCERNS OF RAIL CARRIER EMPLOYEES. Rail carrier employees have an interest in the establishment and maintenance of reasonable rates for rail transportation, in accordance with goals set forth in the rail transportation policy (RTP), 49 U.S.C. 10101(1), (6), even though other provisions of the RTP may not authorize relief for certain unreasonable rates.^{2/} Reasonable

^{1/} New York State Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} See: NPR, at 3. A finding of "market dominance" ordinarily is a predicate for jurisdiction to determine whether a rate is unlawful. A rate may be unreasonable, yet lawful, thus not in violation of the Act. The NPR may convey an invalid impression that the STB, on complaint, may investigate the reasonableness of a rate, NPR at 3, for unlike § 1(5) prior to the 4-R and Staggers Acts, at present there is no requirement that rates be just and reasonable.

rates also promote safety, operational efficiency, adequate revenues, sound economic conditions, honest and efficient management, with fair wages and safe and suitable working conditions. 49 U.S.C. 10101(3), (4), (5), (9), (10).

Various rail employee organizations have actively participated with shippers in some individual rail rate cases. Light-density line surcharges instigated shipper-employee activity involving rate increases deemed aimed not at revenue maximization, but for discontinuance of service.^{3/}

Rail employees have been involved in numerous rulemaking proceedings arising out of the former ICC and current STB changes in emphasis toward resolution of rate disputes by reference to theoretical cost allocation comparisons, and theoretical imputation of revenues comparisons; and contrary to the traditional best test of reasonableness for a particular rate primarily being rate comparisons. Shinn, Glenn L., Reasonable Freight Rates, 32 (Traffic Service Corp., 1952). These agency changes have been advanced somewhat by agency interpretations of statutory revisions made in recent legislation, such as the 4-R, Staggers, and ICCTA acts.^{4/}

^{3/} Some of these were: People of State of Ill. v. ICC, 660 F.2d 289 (7th Cir. 1981); Mississippi Public Service Commission v. ICC, 662 F.2d 314 (5th Cir. 1981); City of Cherokee v. ICC, 671 F.2d 1080 (8th Cir. 1982), cert. den. 459 U.S. 863; Illinois Commerce Com'n v. ICC, 789 F.2d 951 (D.C. Cir. 1986).

^{4/} We look primarily to agency Staff, rather than to the nation's legislators. This is particularly true for the many statutory changes brought about by ICCTA, in which the inability of Staff to resolve the "overcharge-undercharge" situation brought about termination of the ICC. There were no Congressional hearings on the substantive changes made to the ICC's dispute mechanism standards for the remaining railroad industry. The ICCTA provisions were worked out through informal conferences between unelected Congressional staff and agency staff, the latter perhaps concerned that loss of railroad dispute jurisdiction would follow the Congressional desire

(Continued.....)

Rail carrier employees have been active in rate rulemaking after creation of the STB at the end of 1995. See: Rate Guidelines-Non-Coal Proceedings, 1 S.T.B. 1004, 1014, 1020 n.48, 1034 n.88 (1996); Ex Parte No. 646, Rate Challenges in Small Cases;^{5/} Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases;^{6/} Ex Parte No. 638, Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology.^{7/} Ex Parte No. 657, Rail Rate Challenges Under the Stand-Alone Cost Methodology;^{8/} Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases.^{9/} UTU-NY is a participant in a pending proceeding mentioned in the NPR, Ex Parte No. 705, Competition in the Railroad Industry, and intends to participate in another also mentioned in the NPR, Ex Parte No. 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules.^{10/}

II. RELY TO INITIAL SUBMISSIONS. UTU-NY considers that although the many submissions may reflect the world of rate regulation, they fall short of reflecting the world of actual rate

to remove motor carrier jurisdiction. One historian found the former ICC to have been regulated by its staff, said to be "entrenched." Hoogenboom, Ari & Olive, A History of the ICC, a p.189 (W.W. Norton, 1976).

^{5/} Statements filed Apr. 16, 2003 and July 16, 2004; hearings held April 22, 2003 & July 21, 2004.

^{6/} Statement filed November 30, 2006, and February 26, 2007; hearing held January 31, 2007.

^{7/} Statement filed February 19, 2003.

^{8/} Statement filed April 20, 2005.

^{9/} Statement filed May 31, 2006.

^{10/} See: NPR at 3.

making. The experience of railroad employees suggests that rail shippers are primarily concerned with rate relationships; that is, shipper concern is primarily directed to the rail or other modal rates their competitors or other entities are paying or absorbing. Of course, many shippers seek competitive advantage in dealing with common markets, communities, ports, and suppliers.^{11/} It appears that the various shipper interests in this proceeding argue for rate adjustments solely upon the reasonableness per se theory of ratemaking, rather than judging the reasonableness of a rate taken as part of a rate structure. Yet the importance of rate relationships is critical--such is the real game being played.

Class Rate Investigation, 1939, 262 I.C.C. 447, 620 (1945):

"In fact, rate relations are more important to the manufacturer and shipper than the level of rates."

A. Differential Pricing. UTU-NY agrees with the need for differential pricing, expressed by AAR, and implicit in the individual rail carrier submissions. Differential pricing expands the flow of commerce, and the development of multi-source production and marketing, with lower commodity prices than otherwise would be experienced. The working of differential pricing suggests that some rail charges must exceed so-called "full costs" whether denominated "Full SAC" or otherwise.

B. Rate Reasonableness Standards. Although the NPR recogniz-

^{11/} Rail employee representatives have discussions with shippers, state agencies, community officials, and others, where the subject of freight rates arises as a topic, and also in the course of discussions involving federal and state proceedings, including line abandonments, line transfers, maintenance standards, grade crossings, and other common concerns. Of course, freight rates receive attention in railroad labor-management discussions.

es that determinations of rate reasonableness involve much more than cost of service, such as the goals set forth in the rail transportation policy and Long-Cannon factors, among other elements, NPR at 4, most of the contentions advanced by the shipper interests and other parties, and indeed the NPR itself, are directed to cost analysis.

UTU-NY will not here address initial comments involving "Full-SAC," "Simplified SAC," or "Interest Rates," inasmuch as these subjects generally involve large shippers or large traffic volumes, and where many commercial entities utilizing such procedures are perceived capable of providing a considerable degree of self-protection.^{12/} However, UTU-NY hopes the STB will retain a viable "Three-Benchmark"(3B) process suitable for application by smaller shipper entities.

The comments of some parties suggest that 3B is worthless inasmuch as many challenged rates involve R/VC ratios which are fairly comparable to the comparison rate group. For example, CURE, 14-16; ARC, 11-12; NGFA, 11; USDA, 3-4. However, it appears the challengers complaining about comparable R/VC ratios are really seeking to secure a preference over their competitors; in short, the challengers wish to get a jump over other rail shippers which, in essence, is the "individual rate" reasonableness per se theory so roundly rejected. Shinn, supra, at 31:

It is sometimes said that certain rates are, or are not, "reasonable per se" or "reasonable in and of themselves." Concerning the use of the phrase last quoted, in an early case decided in the year 1888 and cited with approval in a case decided the

^{12/} Moreover, many of the complainants have greater assets than their carriers.

following year, The Commission said:

The Commission is of the opinion that the phrase `rates reasonable in and of themselves,' *** is very likely to be misleading. It is a phrase which seems to imply that the particular rates may be considered by themselves as if they were and could be affected by no others: *** But his is not the theory of the Act *** that the reasonableness of rates can thus be separately and independently determined..

It would seem that the criticism of unfairness in the 3B process solely by reference to comparable R/VC ratios is without merit. Rail employees in other proceedings have been critical of rate measurement by ton-mile earnings, having in the past preferred the Bureau of Labor Statistics (BLS) rail rate data, and UTU-NY does not endorse the STB's present calculation of rail rates.

UTU-NY does not support an increase in the 3B relief maximum of \$1.2 million for small shippers, as such might unduly encourage utilization by larger shippers or greater values.

Respectfully submitted,



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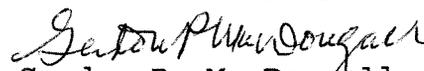
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I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC



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