BEFORE THE
SURFACE TRANSPORTATION BOARD

233234

ENTERED
Office of Proceedings
October 22, 2012
Part of
Public Record

Ex Parte No. 715

RATE REGULATION REFORMS

OPENING COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY

Glenn English
Chairman, Consumers United for Rail
Equity
4301 Wilson Boulevard
Arlington, VA 22203-5541
(703)907-5541

For Consumers United for Rail Equity

Of Counsel:

Robert G. Szabo, Executive Director
Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street, N.W., Suite 700
Washington, DC 20007-3877
(202)298-1800
rgs@vnf.com
mfm@vnf.com

October 22, 2012

Opening Comments of Consumers United for Rail Equity

Consumers United for Rail Equity ("CURE") hereby files its Opening Comments.

Summary of Position

CURE appreciates and supports the Board's initiative in addressing its current rate-reasonableness methodologies, the operation of which are crucial to rail customers without access to transportation competition. Regrettably, however, we cannot support most of the proposals in the Board's Decision served July 25, 2012 ("July 25th Decision").

Three-Benchmark Methodology

Specifically, the Board's proposal to increase the remedy cap on applications of the Board's "Three-Benchmark" rate-reasonableness methodology will not cure the flaws with that methodology that increasingly limit or eliminate its use.

As the Board knows, the highest prescribed rates under any of the Board's methodologies generally result from application of the "Three-Benchmark" guideline which compares the rate in question to other comparable rates on the same or similar commodities. Therefore, rail customers believe that there is no public policy reason to have a remedy cap in "Three-Benchmark" proceedings. Captive shippers will file under the rate-reasonableness methodology that best fits the circumstances of their shipments, offers them the lowest prescribed rate, and is appropriate to the amount of funds they can commit to the litigation. Thus, rail customers who file under the "Three-Benchmark" methodology undoubtedly do so mindful that they are likely to win, at most, the highest reasonable rate possible under any STB methodology, because the Three-Benchmark methodology is almost certainly the only methodology that is useful to them. Thus, a remedy cap only operates to deny certain rail customers access to any Board rate-reasonableness methodology.

Going forward, few captive shippers are likely to invoke the "Three-Benchmark" guideline. The major reason is that challenged rates are often high but in the range of other, comparable rates for the same or similar commodities, so the "Three-Benchmark" methodology likely will offer little if any relief from the challenged rate. The remedy cap of $1 million over 5 years has rendered the "Three-Benchmark" guideline of little practical value, given the necessary transaction costs and the relatively small amount of damages that would be possible annually under the cap. In light of the railroad requirement of chemical shippers challenging rates on certain "lanes" that the chemical company pay higher tariff rates than normal on all lanes during the rate challenge, the Three-Benchmark methodology is even less useful for chemical shippers – the only ones who have ever brought such a case. Raising the remedy cap to $2 million over 5 years will not avoid most of the problems discussed above, and therefore will not trigger many, and most likely any, more "Three-Benchmark" challenges.

Simplified-SAC Methodology

The Board has never decided a rate challenge under its "Simplified-SAC" ("SSAC") guideline. The Board, however, apparently believes that the elimination of a cap on the SSAC guideline – now $5 million in total relief over 5 years – will be a welcome change that will result in rate challenges under the SSAC methodology. We believe the removal of the damages cap could have that result, but not in light of another proposal contained in its Decision. The Board's proposal to require the complaining shipper to provide a full analysis of the replacement costs for Road Property Investment ("RPI"), rather than a more simplified analysis of replacement costs based on previously decided cases, as is now applicable, we believe wipes out the benefit of the removal of the cap on remedies.

We believe the Board's proposal on SSAC is contrary to Congressional intent as expressed in the ICC Termination Act of 1995 that the Board develop simplified methods for challenging rail rates when the use of Full-SAC is too costly, given the value of the case. By the time the shipper goes to the expense of satisfying the new RPI requirement for complete replacement-cost analysis, particularly in light of the other change the Board proposed with respect to the revenues for the so-called "cross-over traffic" that may be included in the "Stand-Alone Railroad" ("SARR"), a captive shipper is likely to conclude that it might as well use the Full-SAC methodology to attempt to obtain the lower replacement cost that is generally available using the Full-SAC methodology.

We are advised by experts on both railroad economics and the application of the stand-alone cost methodology that the Full-SAC methodology generally produces a lower R/VC ratio for the challenged rate than does SSAC. Thus, if a captive shipper were now required to bear the additional expense and additional time associated with using the SSAC methodology, due to the changes proposed by the Board, we believe shippers are likely to be driven back to use of the Full-SAC methodology to produce the lowest possible rate. So, taken together, the Board's total proposed changes to the SSAC methodology may, instead of providing relief to shippers, make the SSAC methodology even less useful for most captive rail customers.

Full-SAC Methodology

CURE is surprised that, despite the already incredible complexity of Full-SAC proceedings, the Board seems now to be proposing a railroad-inspired suggestion that will complicate the application of the Full-SAC methodology going forward. We refer to the proposal in the July 25th Decision to substantially increase the traffic that must be included in the SARR in Full-SAC proceedings in order to derive the benefits to the SARR of that traffic, as well as to change the revenue calculation associated with "cross-over traffic." We understand from experts on this subject that the net effect of these changes would be that most captive shippers would be unable to obtain relief in Full-SAC proceedings. Thus, we fear that the proposals of the Board not only would not help captive rail customers, but may actually make it more difficult for rail customers to win the cases they have won in recent years through the application of the Board's current Full-SAC methodology.

When the SAC methodology was adopted in 1985, the ICC stated that the shipper could design the SARR as it saw fit (*see* July 25th Decision at 5-6, discussing prior ICC and STB decisions), provided only (say more recent cases) that it have an approved operating plan (*id.* at 6). Subsequently, the Board has imposed more and more constraints on the SARR, the net effect of which has been to make the SAC methodology less and less accessible to most captive rail shippers.

Indeed, we understand from experts that, if the proposed changes to the Full-SAC methodology had been applied to most recent STB rate decisions, relief would not have been available to the rail shippers who prevailed in those cases.[1] It is clear that Congress intended that shippers with meritorious rate challenges should prevail, but the decision of the Board seems designed to make such recoveries rare or non-existent.

For these reasons, and despite the fact that CURE supports the increase in, or elimination of, the remedy caps proposed in the Decision, CURE opposes the Board's proposed changes with regard to the shipments that must be included in the SARR and in the revenues to be assigned to the SARR. These changes would prevent most shippers from bringing rate challenges under <u>any</u> of the Board's rate-reasonableness guidelines, regardless of the applicable remedy caps. Congress could not have intended that the Board maintain a rate-reasonableness process that provides no realistic opportunity for success for most captive rail customers.

---

[1] Sept. 4, 2012 Reply of Intermountain Power Agency in NOR 42136, <u>Intermountain Power Agency v. Union Pacific Railroad Co.</u>, at 15-16 ("As a practical matter, if complaining shippers are denied reasonable access to revenues from cross-over traffic, the Board's already dauntingly complicated, drawn out, and expensive SAC methodology would become completely unworkable in all but a few very unusual situations."). This assertion carries more weight than might be the case for the typical litigant's argument, because the law firm filing that Reply has been involved in many of the recent STB rail rate challenges, and is intimately familiar with the sensitivity of the Board's Full-SAC methodology to changes of the sort proposed by the Board.

Interest Rate

Finally, the Board proposed that the interest rate imposed on the damages a railroad is required to pay a shipper in the event of a successful rate challenge should be changed. The current rate, which is based on the interest rates on Treasury bills (now 0.1%), obviously is too low. July 25th Decision at 18. While the Board's proposal to change to the Prime Rate (now 3.25%) is more reasonable than the present approach of using the T-Bill rate, the Board's rationale actually supports using the rate of return earned by the railroad during the time it held the shipper's money. The Board stated that the Prime Rate "is the interest rate that banks charge to their most creditworthy customers, and may serve as a more appropriate rate for calculating interest owed to shippers for rates found by the Board to be unreasonable." Rates actually charged for interest are more appropriate than the rate paid by the United States to borrow money (through T-Bills).

In rate challenges, the Defendant railroad has the Complainant shipper's money and has earned a return on that money during the pendency of the rate challenge. The Board calculates what it says is the rate of return of that railroad during the applicable time period, so the rate is readily available. So, rather than the Prime Rate, which is itself an improvement over the current applicable rate, we believe the most appropriate measure of the proper interest rate is the actual rate of return the Defendant railroad earned on the money it owes the Complainant shipper. That rate is the actual measure of what the railroad earned on the shipper's money that the Board has now found that the railroad held improperly. Allowing a railroad to profit from money it extracts improperly from a captive rail customer does not provide the necessary incentives for the railroad to charge the shipper a reasonable rate *ab initio*. The rates of return of the railroads as calculated by the Board, even though normally lower than CURE believes the real-world evidence shows them to be, demonstrate that the major freight railroads all earn far more than the 3.25% Prime Rate.

The Board's recent Railroad Revenue Adequacy -2011 Determination (in Ex Parte No. 552 (Sub-No. 16) (served October 16, 2012) that Norfolk Southern Railway ("NS"), Union Pacific Railroad ("UP"), and possibly BNSF Railway ("BNSF") are revenue-adequate under its own standard[2] means it is time – indeed, past time – that the Board propose a methodology for determining maximum reasonable rates for captive traffic being carried on a revenue-adequate railroad. In Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987), the Board's predecessor, the ICC, stated that such a methodology – which obviously must be lower than "stand-alone costs" ("SAC") because SAC is the highest possible rate a monopolist can be allowed to charge – would be

[2] CSX Transportation (which was found revenue-inadequate in 2011 by only 0.03 percentage points, with a return on investment of 11.54%, as compared to the STB-determined industry cost of capital of 11.57%, Railroad Revenue Adequacy-2011 Determination, slip op. at 1, citing Railroad Cost of Capital – 2011, Ex Parte No. 558 (Sub-No. 15) (served Sept. 13, 2012), would also have been revenue-adequate in 2011 if the Board's cost-of-capital determination were done in accordance with the type of methodology used by other regulatory agencies. Moreover, if BNSF's much-reduced cost of capital (since its acquisition by Berkshire Hathaway) were taken into account in calculating the industry's cost of capital, CSX would be revenue-adequate even using the STB's cost-of-capital determination.

promulgated for application when railroads achieved revenue adequacy. CURE has maintained consistently that the Board's revenue-adequacy methodology imposes far too high a bar for a railroad to achieve revenue adequacy, and that the Class I railroads have been revenue-adequate for years, using conventional measures of assessment (such as market-to-book ratios). NS and UP now have exceeded even the Board's too-high revenue-adequacy bar, BNSF is revenue-adequate because its capital needs are now covered by Berkshire Hathaway and it no longer raises capital through stock sales or borrowings from the capital markets, and CSX is on the very brink of revenue adequacy even with the application of a cost-of-capital standard that rail customers believe to be unreasonably high. We believe, the Board now needs to propose a rate-reasonableness standard for revenue-adequate railroads. We believe the most efficient path forward would be to expand this proceeding to receive public comment on such a new standard.

<u>Interest of CURE and Its Members</u>

CURE is an incorporated, non-profit advocacy group with the single purpose of seeking rail policy favorable to rail-dependent shippers, many of which are referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual rail-dependent rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of governmental institutions whose members work to protect consumers.

The issues that are the subject of this proceeding are of interest to all of CURE's members, either because many of them have filed complaints challenging rail rates for being in excess of a reasonable maximum, or because others may consider doing so in the future. The Board's rules applicable to such challenges are often determinative in whether CURE's members challenge the rail rates quoted to them or agree to rates after negotiation with the railroads. The accessibility of the Board's rate-reasonableness process and the perceived chance the rail customer has to prevail at the Board often are the only bargaining leverage that a captive rail customer has in a rate negotiation with its rail carrier.

I.

THE EVIDENCE IS OVERWHELMING THAT THE LACK OF RAIL-T0-RAIL COMPETITION IN THE NATIONAL RAIL SYSTEM IS HARMING THE U.S. ECONOMY.

A. A Comprehensive Record of Lack of Rail-to-Rail Competition Is Before the Board in Ex Parte No. 705.

In Section V of the Initial Comments of the Interested Parties filed on April 12, 2011 in Ex Parte No. 705, Competition in the Railroad Industry, CURE and the other Interested Parties submitted substantial, hard evidence that the absence of rail-to-rail competition in our national freight rail system is harmful to the U.S. economy. In Section III of the Reply Comments of the Interested Parties filed May 27, 2011 therein, CURE and the other Interested Parties provided a summary of additional such evidence from shippers, shipper organizations, and governmental entities.

The voluminous comments, testimony, and other evidence submitted by shippers in Ex Parte No. 705 demonstrate overwhelmingly that the lack of rail-to-rail competition in the national rail system is harming the U.S. economy.[3] Moreover, the record in Ex Parte No. 705 contains specific examples from rail customers indicating that the major freight railroads often refuse to compete even where competition is physically possible.

The refusal to compete by our nation's freight railroads appears to be consistent with the evidence in the pending railroad fuel surcharge antitrust litigation. From the public record, it appears that the four largest Class I railroads in the nation first adopted fuel surcharge programs identical to or nearly identical to the fuel surcharge programs of their chief competitors, then almost universally refused to negotiate rail transportation contracts without fuel surcharges or with different fuel surcharges than those the railroads demanded as the price of entering into such a contract.

---

[3] CURE notes that the Board's propensity to commence a general policy proceeding (such as Ex Parte No. 705), and then, if it intends to take any action, to open a new proceeding, only prolongs the process, causing shippers and the public to become dispirited, and it compels parties who went to great lengths to prepare comments, arguments, or testimony in the prior proceeding to consider incorporating those submissions into the record of the new proceeding. It is not clear why the Board feels the need to do this; for example, the proposals herein could have been made in Ex Parte No. 705. (If the Board's response is that Ex Parte No. 705 was not initiated to allow that, that begs the question – why initiate proceedings in a manner that requires more proceedings if there is anything to come of the first proceeding?) In any event, the Board should issue a decision disposing of all issues raised in Ex Parte No. 705 that were not either proposed as issues in this proceeding or in Ex Parte No. 711. For example, parties raised concerns in Ex Parte No. 705 about the lack of "bottleneck rates," about the Board's "revenue adequacy" standards, and about "paper barriers," and, thus far, there has been no disposition of any of those issues.

B. Most Rail Shippers Are Captive to One Railroad.

As a result of the lack of rail-to-rail competition generally, many rail shippers throughout the United States are captive, meaning that they must use a railroad and have access to only one railroad. CURE recently commissioned "captivity maps" produced by Escalation Consultants that show that approximately 78 percent of the "rail stations" in the continental United States are served by only one major railroad. Given other factors, such as control of short-line and regional railroads by the major railroads, the inability of some railroads to reach an individual plant even if they reach a "rail station," and the lack of competition from origin to destination by two railroads even if both railroads serve a particular "rail station," the number of rail stations effectively served by only one major railroad is likely to be much higher than 78 percent.

Today, the seven remaining major freight railroads in our nation are fundamentally healthy as the quarterly analysis of railroad financial health by the Wall Street investment houses clearly indicates. The details are laid out by the Interested Parties in their Initial and Reply Comments in Ex Parte No. 705, referred to above and which are incorporated by reference herein. The financial health of no major freight railroad seems to have declined since these comments were filed in 2011.

C. There Is Far Less Rail-to-Rail Competition Today Than In 1980, or Even the 1990s, as a Result of Mergers and Acquisitions Approved by the Board and Subsequent Apparent Class I Railroad Determinations to Avoid Competing with Each Other In Most Instances

The very large mergers – UP-C&NW, BN-ATSF, UP-SP – as well as the Conrail acquisition by CSX and Norfolk Southern, all of which were approved by the ICC and the STB in the 1990s – greatly reduced rail-to-rail competition in large areas of the United States.[4] This point should be obvious, but given the Board's past assertions in those proceedings that a loss of competition would not occur as a result of the consolidations, and the assertion of these same claims by the railroads in their Initial Comments in this proceeding, the evidence filed by many shippers and parties supportive of the shippers in this proceeding demonstrates beyond dispute that loss of rail-to-rail competition has occurred as a result of Board approved railroad consolidations.

There are far-fewer Class I railroads in the United States today than there were in 1980. In most regions, there are no more than two major railroads, but typically shippers in the region have access to only one of the two major railroads. Some regions are served by a single major rail carrier. Restrictions on competitive-access remedies (reciprocal switching, terminal access rights, and "bottleneck" rates) further reduce the number of rail-dependent shippers with access to railroad competition.

Of course, a shipper that is unable to obtain rail-to-rail competition for its entire movement also normally cannot obtain a "bottleneck" rate, as a result of the Board's 1996-97 "bottleneck" rate decisions, to preserve rail-to-rail competition from the origin or destination to the point of interchange. This is despite the belief of the STB, when the "contract exception" to the "bottleneck rate" decisions was created, that railroads would compete by offering contracts

---

[4] April 12, 2011 Joint Comments of "Interested Parties" (Alliance for Rail Competition, *et al.*, including CURE) in Ex Parte No. 705 at 6-16; *see also* April 12, 2011 Initial Comments of the United States Department of Transportation and United States Department of Justice at 3-5, in Ex Parte No. 705.

for the "non-bottleneck" segment. As a number of shipper filings in this proceeding demonstrate, there have been very few, if any, such contract offerings. In other words, even where railroads physically can compete for each other's business, they rarely do so.

For some shippers who have benefited from rail-to-rail competition in the past, that competition has disappeared. Our members report that, starting in about 2003 or 2004, the major railroads shifted their focus from gaining additional market share to maximizing their revenue from existing traffic. Thus, the non-incumbent carrier often offers only an obviously uncompetitive rate, no rate at all or otherwise evinces no interest in obtaining the transportation, often while doing just enough to avoid a challenge that it is not discharging its "common carrier" obligation. Indeed, shippers who previously constructed "build-outs" to obtain access to a second major railroad often find themselves potentially worse off than if they had not built out. Often, the railroad they built out to will not compete for their business. Meanwhile, the very fact of the expensive "build-out" could prevent the shipper from being able to show that it is subject to railroad market dominance under the Board's current policies. Thus, the rail customer has the worst of all worlds: no competition for its transportation business and no ability to challenge its rate at the Board. As a result of this phenomenon, petitions to the Board for "build-outs" have dropped precipitously since 2003.

So, our national rail system today is, essentially, an oligopoly in the East and an oligopoly in the West, with large areas of the country served by only a single major railroad. It is not possible to allow "competition, not regulation," to govern the rail industry to the "maximum extent possible," as Congress directed in the Staggers Rail Act of 1980, if there are no competitors for most rail-dependent traffic. Yet, this is the status of the nation's freight rail system after the mergers and acquisitions approved by the ICC and the STB over the last thirty years.

II.

THE BOARD SHOULD BE COMMENDED FOR PROPOSING TO INCREASE THE REMEDY CAP IN "THREE-BENCHMARK" PROCEEDINGS AND TO ELIMINATE THE REMEDY CAPS IN SSAC PROCEEDINGS, BUT THOSE PROPOSALS WILL DO LITTLE OR NO GOOD FOR RAIL CUSTOMERS BECAUSE THE BOARD'S OTHER PROPOSED CHANGES WILL MAKE IT UNLIKELY THAT EITHER OF THOSE METHODOLOGIES WILL BE USED – AND COULD MAKE IT ACTUALLY HARDER FOR RAIL CUSTOMERS TO PREVAIL UNDER A FULL–SAC PROCEEDING.

A. "Three-Benchmark" Proceedings.

The Board proposed to increase the remedy cap from $1 million over 5 years to $2 million over 5 years for rate challenges under the "Three-Benchmark" guideline (July 25th Decision at 15), but that proposal is not likely to be useful to many, or even any, shippers. Why? Because, under the "Three-Benchmark" guideline, a captive shipper is eligible for rate relief, no matter how high the Revenue/Variable Cost ("R/VC") ratio applicable to the rate, only if the R/VC ratio for the challenged rate exceeds the average level of the "comparable rate" group adopted by the Board for comparison.

CURE commends the Board for proposing to increase the remedy cap in "Three-Benchmark" rate proceedings and to eliminate the remedy cap in "SSAC" rate proceedings. However, CURE urges the Board to eliminate the remedy cap completely on both types of simplified rate methodologies. The Board need not fear that shippers will use the "Three-Benchmark" methodology instead of the more precise Full-SAC or SSAC methodologies, and derive a lower rate by doing so. Rather, the highest reasonable rates typically result from use of the "Three-Benchmark" methodology, because the essence of the methodology is to compare the challenged rate to other (and therefore also likely captive) shipments of the same commodity.[5] For example, chlorine rates tend to be relatively high, on an R/VC ratio basis of comparison, and all the rates on chlorine have increased substantially in recent years. Shippers who have considered filing such a "Three-Benchmark" challenge on chlorine rates report that their rate case preparation indicates that relief is not available under that methodology any longer, in all or nearly all instances, due to the almost uniform rate increases on virtually all chlorine movements.

The Board's rationale for increasing the remedy cap in "Three-Benchmark" proceedings was that "the Board estimated the cost to litigate such a SSAC case at $1 million, and therefore adopted that as the limitation on relief for Three-Benchmark cases." July 25th Decision at 15. The Board is now proposing a change in the methodology for SSAC cases to require complete evidence of "Road Property Investment," which will increase the cost of litigating a SSAC case. Therefore, the Board considers it appropriate to raise the remedy cap to $2 million.

CURE agrees that increasing the remedy cap to $2 million is preferable to a remedy cap of $1 million, but neither is "reasonable." July 25th Decision at 15.

---

[5] See, e.g., US Magnesium v. Union Pacific Railroad, NOR 42114 (served Jan. 28, 2010), slip op. at 2 (setting maximum reasonable rates at 346-356 percent of variable costs); compare the Board's most recent Full-SAC proceedings, setting the maximum reasonable rate at 180-240 percent of variable costs.

The reason is that the remedy cap on the "Three-Benchmark" approach is almost irrelevant, in that the railroads seem largely to have "gamed the system" by setting most rates on specific commodities at or about the same R/VC ratio. Under the "Three-Benchmark" guideline, if most of the comparable traffic has roughly equal R/VC ratios, the challenged rate will be in the same range as the comparable traffic, and no relief will be available.

Moreover, if the railroad involved is considered "revenue-inadequate," as is the CSX and, perhaps, the BNSF under the Board's revenue adequacy determinations for 2011, the R/VC level of the comparable traffic group is *increased* by a factor proportional to the amount of the alleged revenue inadequacy, which only makes it more unlikely that any relief is available against the CSX and, perhaps, the BNSF under such a comparable-rates methodology.

In CURE's view, the "Three-Benchmark" methodology is largely useless to captive rail customers given the railroads' "gaming" of the system to deny relief through a comparison to comparable rates. Removing the remedy cap on this methodology altogether might marginally increase the usefulness of this methodology, but does not make up for the current flaws in the comparable rate methodology.

B. <u>SSAC Proceedings.</u>

With respect to SSAC rate challenges, the Board's proposals, taken together, transform the SSAC methodology into a less rail customer-friendly version of the current Full-SAC methodology. While the removal of remedy caps is positive, this positive proposed change does not outweigh the damage done to the methodology by the proposed changes to the costs considered in developing the SARR and the proposed more limited availability of revenues from cross-over traffic. These changes mean that the SSAC methodology simply will not work for most rate challengers, who will be forced to opt for Full-SAC cases. July 25th Decision at 13. Thus, if the Board adopts its proposals set forth in its July 25th Decision, there will be available to rail customers only a mostly disfavored Three-Benchmark methodology and the Full-SAC methodology.

Eliminating a simplified methodology for applying the stand-alone cost analysis to a rate is directly counter to the directive of Congress to the Board as the Board referenced in its July 25th decision:

> "To provide rail customers with a lower cost, expedited alternative to the SAC test, Congress, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act), directed the Board to promulgate simplified evidentiary procedures for rate cases where the SAC test could not practicably be applied. In response, the agency created the "Three-Benchmark test,... Later, in 2007, the Board adopted the Simplified-SAC test. See Simplified Standards for Rail Rate Cases (Simplified Standards), EP 646 (Sub-No. 1)(STB served Sept. 5, 2007)...."

This result cannot be what Congress intended in requiring the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone presentation is too costly, given the value of the case." July 25th Decision at 4, citing 49 U.S.C. § 10701(d)(3).

III.

THE BOARD'S MAXIMUM REASONABLE RATE METHODOLOGIES DO NOT WORK FOR MOST CAPTIVE SHIPPERS.

Today, rail-dependent shippers do not have access to the railroad competition that was promised in the Staggers Rail Act of 1980. Indeed, at almost 80 percent of the rail stations in the continental United States there is a single major railroad available to provide transportation service. Thus, if a large percentage of rail-dependent shippers are to have any protection from freight railroad monopoly power, the Board's maximum rate standards must be accessible, administratively workable, economical, and efficient, so as to provide the opportunity for timely relief to complaining shippers where appropriate. Indeed, even the existence of such a set of rate standards would assist in protecting rail customers from monopoly rates when the rail-dependent shipper can credibly use the threat of successful litigation under the Board's suite of rate standards.

Unfortunately, recent actions by the Board have made rate challenges to the Board more difficult. The reasons: (a) the Board has bifurcated the market-dominance phase from the rate-reasonableness phase in rate challenges involving chemical companies, even though it is overwhelmingly likely that market dominance will be found in these pending cases [6]; (b) *proposed* changes

[6] The Board acknowledges that Congress enacted provisions in the ICC Termination Act calling for "expeditious handling and resolution of all proceedings," 49 U.S.C. § 10101(15), and that the Board should establish procedures for rail rate challenges in particular, including "appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S. § 10704(d). CURE believes that the Board's recent determinations to

in rules have been seized upon by railroad Defendants to postpone the rate challenges that are now pending; and (c) when new rate challenge rules have been adopted, the Board has then required shippers to re-file their evidence to conform to the new rules, further delaying the resolution of these challenges, despite clear Congressional intent that the challenges be decided as expeditiously as possible. The increasing barriers to rate challenges are all the more important because, since the demise of "investigation and suspension" proceedings in the ICC Termination Act of 1995 (although at the same time the Board was given the power to suspend a rate increase, but has never used that power), the railroads can charge a shipper with multiple movements not only the unreasonable rate being challenged, but also tariff rates on all other movements during the pendency of the rate challenge rather than the contract rates that would otherwise apply to the non-challenged rates.

The Board should not adopt its proposals to (a) require a full replacement-cost analysis for Road Property Investment in SSAC proceedings, (b) increase the amount of traffic that the SARR must include (or limit cross-over traffic to unit

---

bifurcate the market dominance and rate-reasonableness phases, and to delay in commencing discovery in the rate-reasonableness phase until the market dominance phase is decided, are both at odds with Congressional intent. Further, CURE believes that some of the Board's proposals herein, which would add to the cost and complexity of SAC proceedings, are also at odds with these clear Congressional commands. Also, the statute supposedly requires the Board to complete a rate-reasonableness determination within three years (although the Court of Appeals has not held that missing the three-year date for a decision requires the Board to deny relief to the Complainant shipper if the decision is not made within three years), so the Board should not bifurcate, unless the Complainant so requests, and it should allow the parties to use the time while matters are under consideration by the Board to conduct discovery on any remaining matters, unless the Complainant shipper's case is utterly lacking in merit.

trains), and (c) decrease the amount of revenues associated with so-called "cross-over" traffic. These proposed changes will make SAC proceedings more costly and more complicated and will either arbitrarily reduce the cross-over traffic that the SARR may carry or prevent the shipper from designing the SARR best-suited to its case, all actions that are directly contrary to the intent of Congress in directing that simplified rate challenge methodologies be developed by the Board. The Board should be looking for ways to expedite rate challenges and make them less costly rather than make the proposals that it has made in this Decision.

IV.

THE BOARD SHOULD PROPOSE IN THIS PROCEEDING A NEW RATE REASONABLENESS STANDARD FOR REVENUE-ADEQUATE RAILROADS.

Finally, the Board's recent determination (in Ex Parte No. 558 (Sub-No. 16) (served October 16, 2012) that NS, UP, and possibly BNSF are revenue-adequate under its own standard means it is time – indeed, past time – that the Board propose a methodology for determining maximum reasonable rates for captive traffic being carried on a revenue-adequate railroad. In <u>Coal Rate Guidelines, Nationwide</u>, 1 I.C.C.2d 520 (1985), <u>aff'd sub nom. Consolidated Rail Corp. v. United States</u>, 812 F.2d 1444 (3rd Cir. 1987), the Board's predecessor, the ICC, promised such a methodology – which obviously must be lower than "stand-alone costs" ("SAC") because SAC is the highest possible rate a monopolist can be allowed to charge -- when railroads achieved revenue adequacy. CURE has maintained consistently that the Board's revenue-adequacy methodology imposes far too high a bar for a railroad to achieve revenue adequacy, and that the Class I railroads have been revenue-adequate for years, using conventional methodologies (such as market-to-book ratios). But now that the Board agrees that NS and UP have exceeded even its too-high revenue-adequacy bar, may end up agreeing as to BNSF when the Berkshire Hathaway-paid acquisition premium issue is decided, and (had its cost-of-capital determination also not been too high), would have found CSX to be revenue-adequate in 2011 as well, the Board needs to propose a standard so that it can receive public comments and adopt it forthwith. This proceeding is the most appropriate proceeding in which to do so.

Conclusion

For the foregoing reasons, the Board should eliminate altogether the caps on remedies in "Three-Benchmark" and SSAC proceedings. In the alternative, the Board should eliminate the remedy cap in SSAC proceedings and should at least adopt its proposed increase from $1 million over 5 years to $ 2 million over five years as the remedy cap for the "Three-Benchmark" rate challenges.

The Board should use the return the Defendant railroad(s) earn on rail customer funds that it holds improperly during the pendency of a rate challenge, rather than the Prime Rate, as the measure of interest to be paid as part of the damages the railroad defendant must pay in a successful rate challenge. In the alternative, the Board should at least adopt its proposal to change the measure of interest to be paid from the T-Bill rate to the Prime Rate. The Board should not adopt its proposals to (a) require a full replacement-cost analysis for Road

Property Investment in SSAC proceedings, (b) increase the amount of traffic that the SARR must include (or limit cross-over traffic to unit trains), and (c) decrease the amount of revenues associated with so-called "cross-over" traffic. These proposed changes will make SAC proceedings more costly and more complicated, either will reduce, arbitrarily, the cross-over traffic that the SARR may carry or prevent the shipper from designing the SARR best-suited to its case, and are at odds with the Congressional directive to the Board in 1995. Rather than adopt these proposals, the Board should look for ways to expedite rate challenge proceedings and make them less costly.

Respectfully submitted,

Glenn English
Chairman, Consumers United for Rail Equity
4301 Wilson Boulevard
Arlington, VA 22203-5541
(703)907-5541
For Consumers United for Rail Equity

Of Counsel:
Robert G. Szabo, Executive Director
Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street, N.W., Suite 700
Washington, DC 20007-3877
(202)298-1800
rgs@vnf.com
mfm@vnf.com

Certificate of Service

I hereby certify that I have served, this 22nd day of October, 2012, a copy of the foregoing Opening Comments of CURE on each person on the service list.

Michael F. McBride