

Court Upholds Surface Transportation Board Decision to Exclude Consideration of Product & Geographic Competition in Market Dominance Determinations

Surface Transportation Board (Board) Chairman Linda J. Morgan announced that the United States Court of Appeals for the District of Columbia Circuit has today upheld the Board's decision reaffirming an earlier decision not to consider product and geographic competition in the Board's market dominance analysis in railroad rate complaint proceedings.

Under the law, the Board may not review the reasonableness of a challenged rail rate unless it first finds that the railroad has "market dominance." Market dominance refers to an absence of effective competition from other railroads or modes of transportation for the transportation to which a rate applies. Before 1999, the Board's procedures permitted railroads to avoid regulatory review of the reasonableness of a rate by showing effective competition from other railroads (intramodal competition) or from other modes of transportation (intermodal transportation); or by showing that a shipper could avoid using the defendant railroad by shipping or receiving a substitute product (product competition), or by obtaining its product from a different source or shipping it to a different destination (geographic competition). In decisions issued in late 1998 and early 1999, however, the Board decided to exclude product and geographic competition as factors in its market dominance analysis, finding that the applicable law did not require consideration of those factors; that consideration of those factors unduly burdened shippers attempting to bring rate cases; and that excluding those factors would not have any substantial effect on the rates that the railroads could charge in the marketplace (see Surface Transportation Board "News" release No. 99-32, issued July 2, 1999, and No. 98-82, issued December 21, 1998).

The railroad industry sought judicial review of the Board's decisions, and in *Association of Am. Railroads v. STB*, 237 F.3d 676 (D.C. Cir. 2001), the court remanded the matter for further consideration. The court rejected the railroads' claim that the statute expressly requires the agency to consider product and geographic competition. It found, however, that the Board had not adequately explained how its decision had taken into account the statutory policy directive "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." On remand, after addressing the various competing policy goals of the statute, the Board concluded that "the scale tilts heavily in favor of excluding product and geographic competition from consideration in rail rate cases." (See Surface Transportation Board "News" release No. 01-15 issued April 3, 2001.)

In today's decision, the court found that the Board had appropriately addressed the statutory language. The court also noted that the Board's action advanced the statutory directives to move rate cases forward expeditiously, to formulate "appropriate measures for avoiding delay in the discovery and evidentiary phases" of rate cases, and to "allow shippers that lack competitive alternatives practical access to the rate complaint process." Accordingly, the court concluded that the Board's "attempt to strike a balance between the various statutory objectives [was] reasonable," and the court denied the railroads' petition for judicial review.

The court's decision was issued today in *Association of American Railroads v. Surface Transportation Board*, No. 01-1213 (D.C. Cir. October 8, 2002), and is available on the court's web site at <http://www.cadc.uscourts.gov>.

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