



Freight Rail Customer Alliance

November 12, 2019

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By Electronic Filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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Re: Docket No. EP 756, Market Dominance Streamlined Approach

Dear Ms. Brown:

The Freight Rail Customer Alliance (“FRCA”) submits the following comments in response to the Notice of Proposed Rulemaking (“Notice” or “Proposal”) that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on September 12, 2019.

FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. FRCA represents large trade associations that in turn represent more than 3,500 electric utility, agriculture, chemical and alternative fuel companies and their customers.

FRCA very much appreciates the intention of the Notice to make rate cases less burdensome, and to make rate relief more available, to captive shippers, especially those that may otherwise lack resources to obtain reasonable rates as required by 49 U.S.C. § 10702. In past rate cases, carriers have demonstrated the ability to make market dominance showings under 49 U.S.C. § 10707 prohibitively expensive for shippers, thereby deterring many shippers from seeking and obtaining the rate relief to which they are otherwise entitled by statute. Notice at 4.

The Notice seeks to address those problems by allowing a shipper to make a streamlined “prima facie” showing by addressing six factors: (a) the rate exceeds the jurisdictional threshold; (b) the movement exceeds 500 truck miles between origin and destination; (c) there is no intramodal competition; (d) there is no barge competition; (e) the complainant has shipped no more than 10% of its issue traffic by truck over the past five years; and (f) the complainant has no practical build-out alternative. *Id.* at 6-7. There is no stated page limit for the shipper on opening, but reply and rebuttal filings are limited to fifty pages, inclusive of exhibits and verified statements. Significantly, the complainant retains the ultimate burden of proof, and defendants are “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.” *Id.* at 12.



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FRCA does appreciate the benefit of being able to make a streamlined initial showing, as opposed to being required “to prove a negative proposition on opening.” *Id.* at 3. The specified factors are generally the types of matters to be considered in evaluating market dominance: the jurisdictional threshold and the lack of a viable rail, truck, or barge alternative, even with a buildout. These matters would be considered in any event.

However, there are only two specifics provided in the proposal, 500 miles and no more than 10% of the volume by truck. Both are too stringent. For example, coal is seldom, if ever, trucked more than 100 miles, and 50 miles is a generous threshold.¹ For distance for trucking, there should be some sort of sliding scale that takes into account at least the density of the product (weight divided by volume), other factors that limit its suitability for trucking, and overall volumes to formulate the appropriate mileage threshold. There should also be a different standard for short-haul rate cases because of the difficulties of transloading, *e.g.*, the distance should apply from origin to destination, and not to or from the interchange. For diversion to trucking, 20% is a more appropriate threshold. Furthermore, shipping more than 20% (or 10%) of the volume by truck should not be disqualifying for the streamlined approach if the railroad has effectively forced the shipper to ship by truck when a shipper can show that the diversions occurred because the railroad has provided inadequate service or imposed too high a rate. In addition, some dollar limit should be set on the cost of the build out alternative, at least relative to the annual transportation charges. These modifications are meant to be illustrative only, and not definitive, as other shipper parties will likely note the need for additional modifications.

FRCA’s more fundamental concern is that the streamlined showing does not restrict the scope of what the defendant can contest, nor does it otherwise address the burden of proof. While the defendant is limited to fifty pages on reply, so is the complainant on rebuttal. However, the complainant has the ultimate burden of proof, and there is a real risk that the defendant will raise a multitude of issues and posit hypothetical and theoretical questions in its fifty pages that will require more than fifty pages for the complainant to rebut. The railroad may not “prove” anything in its submission, but may present enough questions and complications that the shipper cannot sustain its burden of proof with only fifty pages.

Moreover, much may depend on how the new approach is applied in practice, meaning the first plaintiffs will thus face substantial uncertainty. That uncertainty will discourage complainants from proceeding under the streamlined approach, and the streamlined approach will never be meaningfully developed, much as has occurred (or rather, has not occurred) with the Board’s existing alternative to stand-alone costs. The minimum that is needed is that a shipper that fulfills the stated criteria will earn a

¹ *E.g.*, Coal: Research and Development to Support National Energy Policy (National Research Council of the National Academies 2007), at 84 (noting that typical one-way truck hauls of coal are less than 100 miles and average about 32 miles), available at <https://www.nap.edu/download/11977>.



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strong presumption that market dominance exists, and the railroad will be required to make a specific and supported showing to overcome that presumption. The burden of proof would not be shifted, but what is required to meet that burden would be clarified and defined.

FRCA does strongly disagree with one element of the Notice's proposal, the restriction on bringing a new rate case "involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances or other factor under 49 U.S.C. § 1322(c)." Notice at 11. By statute, rates for captive shippers are to be reasonable. 49 U.S.C. § 10702(1). Where a shipper proceeds in good faith under the streamlined approach, but the railroad is able to raise issues as to that showing, or other matters, then the shipper should not be punished, and the defendant's rates effectively immunized from review, because of a shipper's decision to proceed in accordance with the Board's rules. Rates that exceed a reasonable maximum are in violation of the legal requirement, and a proposal that is ostensibly intended to make relief more readily available should not have the opposite effect.

Respectfully submitted,

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About FRCA

An umbrella membership organization, the Freight Rail Customer Alliance (FRCA) includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. Through a growing coalition of industries and associations, the mission of FRCA is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices. www.railvoices.org
