

ENTERED
Office of Proceedings
January 10, 2020
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 756

MARKET DOMINANCE STREAMLINED APPROACH

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) respectfully submits these reply comments pursuant to the Notice of Proposed Rulemaking (“NPRM”) issued in this proceeding on September 12, 2019.

In opening comments filed on November 12, 2019, AAR supported the Board’s goal to reasonably streamline procedures associated with the submission of evidence related to market dominance in appropriate cases. To this end, AAR offered several specific suggestions to improve the NPRM proposal. AAR suggested that: (1) the streamlined market dominance procedures should be available only for cases in which a full stand-alone cost presentation is too costly, given the value of the case; (2) the Board should consider a distance longer than 500 highway miles as a threshold, as rail and trucks are competitive for longer distances; (3) the Board should make a *prima facie* finding of market dominance only if, in addition to the other factors, there is no pipeline competition; (4) the complainant should be required to disclose to the defendant and submit to the Board all studies of competitive alternatives that it has undertaken; (5) railroads should have an equal right to request an administrative law judge hearing; (6) the page limitation should be 50 pages of narrative,

excluding exhibits, and increase by 10 pages per additional lane of traffic included in the complaint (up to 100 pages of narrative); (7) the Board should add a modest element of indirect competition by precluding use of these streamlined procedures where the complainant ships less than a specified percentage of the product to the destinations (or from the origins) at issue; (8) the Board should not undermine the coherence of the *prima facie* factors by applying its recent interpretation of the *DMIR* case to the streamlined approach;¹ and (9) the Board should take this opportunity to formally abandon the Limit Price Test in any future rate reasonableness proceeding.

Several AAR member railroads also filed comments offering improvements to the NPRM proposal. For example, Union Pacific Railroad provided practical improvements to the proposed streamlined approach such as trying to clarify the documents that complainants should disclose with their complaints.² BNSF Railway set forth principles that should guide the Board and cautioned that “any streamlined approach must avoid improper regulatory interference in well-functioning transportation markets through overly simplistic assumptions and procedures.”³ Specifically, BNSF noted that “there are extensive multi-modal movements that involve rail-truck, rail-barge or rail-pipeline combinations, where the rates charged by the rail carrier for the rail portion of the movement are heavily constrained by competition for the entire multi-modal movement” and noted that “[t]he growth of transload

¹ See *E.I. du Pont de Nemours & Co. v. Norfolk S. Rwy.*, NOR 42125, slip op. at 10 (STB served on Mar. 14, 2014) (citing *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway*, 4 S.T.B. 64 (1999), and *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway*, 4 S.T.B. 288 (1999)).

² See UP Comments at 7-8

³ BNSF Comments at 2.

operations provides another example of the difficulty in assessing competitive constraints by looking only at the rail portion of a movement.”⁴

Comments submitted by academics also supported the AAR position in this proceeding. The members of an ad-hoc committee of the Transportation Research Board that authored a 2015 report reiterated their view that the Board should not exclude the consideration of product and geographic competition in the market dominance inquiry. The authors noted that “excluding potentially relevant evidence always puts fairness and accuracy at risk.”⁵ The authors also noted that “[a]bsence of product and geographic competition” could be incorporated as an additional element in the list of factors that would make a *prima facie* showing of market dominance.”⁶

Comments submitted by organizations representing shippers were generally supportive of the NPRM, but sought to substantially expand or modify the proposal. For example, the large shipper trade associations (“Coalition Associations”) proposed an entirely new market dominance approach applicable to all rate cases, rather than offering suggestions to improve the Board’s proposal. The Coalition Associations proposed an “a la carte” approach to market dominance whereby complainants could satisfy some, but not all, of the proposed factors. The Coalition Associations’ new approach would also have the Board change the *prima facie* factors and use a bifurcated market dominance process that would be

⁴ BNSF Comments at 4.

⁵ TRB Comments at unnumbered 3-4.

⁶ *Id.*

available to all complainants in all cases with page limits on opening, reply and rebuttal evidence.⁷

As explained below, the Board should resist shipper requests to broaden this proceeding and reject calls to make substantive changes to the market dominance standard. The Board should also reject efforts by shippers to water down the proposed thresholds that could establish a *prima facie* showing of a lack of effective truck competition.

DISCUSSION

I. The Board Must Reject Shipper Calls to Change to the Substantive Market Dominance Standard.

AAR's opening comments continued to support Board efforts to streamline the procedures for rate reasonableness cases, while ensuring economically valid outcomes.⁸ The Board correctly noted in the NPRM that it has the authority to streamline market dominance procedures in appropriate circumstances as long as it maintains fidelity to the Rail Transportation Policy of 49 U.S.C. § 10101 and the statutory standards of 49 U.S.C. § 10707. But shippers' calls for the STB to use revenue-to-variable cost ratios as a bright line market dominance standard run afoul of the RTP and violate the statute.⁹ For example, AFPM's suggests that a 280% R/VC should result in "market dominance [being] declared automatically" by rule and, separately, USDA requests a market dominance threshold of 200%. Congress has expressly prohibited the Board from presuming that the rail carrier

⁷ ACC *et al.* Comments at 6-7.

⁸ See, e.g., AAR Comments, EP 733, *Expediting Rail Rate Cases* (filed Aug. 1, 2016).

⁹ See AFPM Comments at 5; USDA Comments at 11.

possesses market dominance merely based on an R/VC ratio that is greater than or equal to 180%.¹⁰ Therefore, these requests should be rejected outright.

More generally, the theory of competition that emerges from the shipper comments is a flawed “heads-I-win, tails-you-lose” proposition in favor of complainants. Where shippers have the ability to ship by both truck and rail, and railroads offer a quality service product at a favorable price, freight moves by rail. Yet shipper organizations would have the Board rule that where the shippers elect to use truck, this is evidence of market dominance.¹¹ The comments submitted by USDA illustrate the flaw in this thinking. USDA sees the functioning of a competitive market as evidence of market dominance. USDA claims “whether and how much a shipper uses truck service is, in part, affected by the railroad’s position. If the railroad has market dominance and is exhibiting market power, such behavior could push a shipper to use more and more truck transportation.”¹² USDA admits that “shippers may switch to trucks temporarily to access alternative markets (often with a much lower offer price) within shorter distances”.¹³ Similarly, FRCA says that “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.”¹⁴

¹⁰ 49 U.S.C. § 10707(d)(2)(A).

¹¹ *See, e.g.*, NGFA at 4.

¹² USDA Comments at 9.

¹³ *Id.*

¹⁴ FRCA Comments at 2.

Organizations representing industries whose freight transportation is characterized by pervasive competition and is therefore exempt from regulation also echo this flawed logic.

ISRI points to a subjective survey of its members and the shipping preferences of two companies as evidence that trucks do not inflict competitive pressure on railroads for movements below 250 miles.¹⁵ Portland Cement Association simply cites to the Board's NPRM in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served Mar. 23, 2016) for the unsupported statement "cement shipments now range between 250 to 300 miles, yet truck transportation is not an economical mode of transport beyond 100 to 125 miles."

But the Board has made clear that market dominance must mean something more than traffic simply moving by rail. "For an alternative mode to provide effective competition, it need not necessarily be 'capable of handling substantially all or even a majority of the subject traffic.'"¹⁶ The Board instead "seek[s] to determine ... whether the alternative mode places 'considerable competitive pressures' on the defendant railroad."¹⁷ Effective competition can exist where an alternative transportation option accounts for half or less than half of the total volume.¹⁸

The Board should heed its precedent and the original logic of its NPRM. The NPRM correctly looked at the whole picture of direct competitive alternatives (absent indirect

¹⁵ ISRI Comments at 5.

¹⁶ *DuPont v. CSXT*, STB Docket No. 42100, slip op. at 4 (citing *Amstar Corp. v. Great Alabama S. R.R.*, I.C.C. Docket No. 382398 (served Nov. 10, 1987)); see also *Aluminum Ass'n v. ACY R. Co.*, 367 I.C.C. 475, 484 (1983) ("[w]e reiterate that not all aluminum has to move by truck for motor carriage to exert competitive pressure on the railroads.").

¹⁷ *Id.*

¹⁸ See *Consolidated Papers*, 7 I.C.C.2d at 337-38 (trucks provided effective intermodal competition where 55% of issue traffic moved via truck).

competition, which the Board categorically refuses to consider) and would require a showing of each of several factors to qualify for streamlined procedures. Certainly, no single factor could serve as an indicator of the presence or absence of effective competition. If all of the proposed factors can be shown, market dominance is likely, and complainants should be able to elect to use the streamlined procedure.

Finally, USDA's claim that "false positives are better than false negatives" gets the Board's statutory paradigm exactly backwards.¹⁹ Congress has granted the Board authority to review the reasonableness of rail rates only if "the Board determines under section 10707 . . . that a rail carrier has market dominance".²⁰ Section 10707 spells out the requirements that the Board must follow in making that determination. Congress did not instruct the Board to take a broad view of market dominance because a "market dominance is always followed up by a rate reasonableness test."²¹ Instead, Congress limited the agency's authority to instances where there was a lack of effective competition "in hopes of removing most rates from rate regulation."²² USDA would have the Board assert regulatory authority over functioning competitive markets because, in its view, where "there is effective competition, the railroad's rate is less likely to be unreasonable in the subsequent rate analysis."²³ In creating the Board as a small regulatory agency with limited resources, Congress clearly did not intend that the

¹⁹ USDA Comments at 8.

²⁰ 49 U.S.C. § 10701(d)(1).

²¹ USDA Comments at 8.

²² See H. Rept. No. 96-1035, Rail Act of 1980 at 38.

²³ USDA Comments at 8.

parties and the Board waste resources to go through a rate review process where effective competition is present.²⁴

II. The Record Does Not Support a Mileage Threshold Less than 500 Highway Miles.

The AAR opening comments noted that the proposed 500-highway-miles threshold is a conservative estimate for use in these streamlined market dominance procedures. No mileage threshold could itself ever identify a demarcation line whereby trucks do or do not provide effective competition to rail in every circumstance. Even so, it is not unreasonable to use a properly calibrated mileage threshold, along with other factors, as the test for complainants' access to streamlined procedures.²⁵

Two railroads supported AAR's position that a threshold of 500 highway miles is conservative with specific data points. BNSF Railway saw "strong truck competition for movements that significantly exceed 500 miles, which is consistent with reported statistics. As reported by the U.S. Department of Transportation ("USDOT") in its Transportation Statistics Annual Report for 2018: "Trucks carry the largest share of goods shipped in the United States - 62.7 percent of the tonnage and 61.9 percent of the value-and remain the primary mode for shipments moved less than 750 miles. Rail moves the most commodities by tonnage and ton-miles from 750 to 2,000 miles."²⁶

²⁴ Moreover, while USDA's assertion may be generally true where the Board conducts a robust stand-alone cost analysis, it becomes less true as the Board strays from economically sound methods of determining rate reasonableness and the truth of the assertion cannot be tested against the completely standard-less Final Offer Rate Review proposal.

²⁵ AAR Comments at 9.

²⁶ BNSF Comments at 13 (citing U.S. Department of Transportation, Bureau of Transportation Statistics, Transportation Statistics Annual Report 2018 (Washington, DC: 2018) <https://doi.org/10.21949/1502596>).

Canadian National Railway submitted data showing that “trucks have the lion’s share of tons of traffic that moves less than 500 miles. However, it also shows that using 500 miles as the cutoff is too conservative. Truck and rail have equal market shares for tons moved between 500 and 750 miles, a feature that is consistent in every year between 2007 and 2012. In 2012, 39% of tons shipped between 500 to 749 miles were by truck and 43% of such tonnage was shipped by rail. In 2007, 38% of tons shipped between 500 and 749 miles were by truck and 42% of such tonnage was shipped by rail. In other words, at this mileage band, the data in the Commodity Flow Survey demonstrate that rail and truck compete on equal terms.”²⁷

Shipper groups would like to see the mileage threshold reduced in an effort to weaken the market dominance standard. ACC would have the Board halve the 500-mile threshold to 250 miles because “if the driver uses the complainant’s equipment, the roundtrip distance must include the drive to the driver’s duty reporting location after returning the equipment at the origin.”²⁸ ACC provides no evidence on how many of its members own truck fleets, how often its members truck their products, how often trucks return to origin empty rather than taking a new load elsewhere, or why an empty move affects the competitive pressures on railroads.

Other shipper organization efforts to lower the threshold for their members fare no better. AFPM seeks a 250-mile threshold but provides no support for that number. WCTL asks the Board simply to eliminate the mileage requirement altogether for unit-coal shipments

²⁷ CN Comments at 4-5.

²⁸ ACC Comments at 12.

and the proposed initial disclosures for large rate cases.²⁹ WCTL succeeds only in demonstrating that market dominance is not a significant issue causing delay or complexity in most coal rate cases. In much the same way, Olin explains that its chlorine subsidiary, SunBelt Chlor Alkali Partnership, made an extensive showing of market dominance and prevailed.³⁰ In sum, the record established in this proceeding supports the use of a threshold of at least 500 highway miles as one of the factors that needs to be demonstrated in a streamlined market dominance process.

CONCLUSION

Based on the foregoing and the AAR Opening Comments, the Board should progress its proposal to establish a streamlined market dominance procedure that complies with the Board's governing statute and ensures defendants' due process rights.

Respectfully submitted,



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January 10, 2020

²⁹ WCTL Comments at 2-3.

³⁰ Olin Comments at 4-5 (“On Reply, the defendant carrier responded to SunBelt’s mountain of evidence establishing market dominance in one sentence: “NS does not dispute that the Board has jurisdiction to consider the reasonableness of the challenged rate under 49 U.S.C. 10701(d)(1) and 10707.”).