

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

248921

ENTERED
Office of Proceedings
November 12, 2019
Part of
Public Record

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

MILLERCOORS COMMENTS

MillerCoors respectfully submits its comments in the above-captioned proceeding in accordance with the Notice of Proposed Rulemaking (“NPRM”) served on September 12, 2019. In the NPRM, the Surface Transportation Board (“STB” or “Board”) proposed a streamlined approach for pleading market dominance in rate reasonableness proceedings. The Board expects that this streamlined approach would reduce burdens on parties, expedite proceedings, and make the Board’s rate relief procedures more accessible, especially for complainants with smaller cases. MillerCoors commends the Board for taking this action to make rate cases more accessible to rail shippers but asks it to eliminate two of the prima facie factors -- “no practical build-out option” and “the complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period” -- in its streamlined approach because of their inherent complexity that could spoil the positive effects of this proposal.

IDENTITY AND INTEREST

MillerCoors is a wholly owned subsidiary and the United States business operation of its parent, Molson Coors Brewing Company. MillerCoors is the second largest beer brewer in the United States and its iconic beer brands include Coors Light, Miller Lite, Coors Banquet, the Blue

Moon Brewing Company brands, the Jacob Leinenkugel Brewing Company brands, Keystone, Icehouse, Mickey's, Miller 64, Miller Genuine Draft, Miller High Life, Milwaukee's Best, Hamm's, Olde English 800, and Steel Reserve. It also brews craft and import brands such as Hop Valley, Revolver, Saint Archer and Terrapin brands, as well as the Grolsch, Peroni Nastro Azzurro, and Pilsner Urquell brands.

1. **Beer's Three-Tier System**

In the United States, beer is sold through a three-tier system. Brewers (like MillerCoors) sell their products to independent distributors, who in turn sell the products to retailers – both on-premise (restaurants and bars) and off-premise (liquor stores or grocery stores). Retailers sell the products to consumers. This three-tier system is mandated by state and federal law, and with very limited exceptions, brewers can *only* sell to distributors and distributors can only sell to retailers.

Further, because MillerCoors generally cannot sell its products to retailers, its distributors are the face of the brewery in the marketplace and the brewer's sole route to market. Importantly, MillerCoors distributors have exclusive territories and, therefore, MillerCoors is completely dependent on *one* distributor to represent the assigned brands in that territory.

2. **MillerCoors Use of Rail**

MillerCoors operates seven major breweries, five craft breweries, two container operations, and a cidery in the United States. MillerCoors breweries depend on transportation for both receiving raw materials as well as for getting its products to distributors for sale to retailers. Rail transportation is an integral part of MillerCoors logistics plan, which it relies on to move items to thousands of destinations across the country. Because MillerCoors products are sold in every part of this country, rail is absolutely necessary for the company to move product as far as thousands of miles in some instances. By rail, MillerCoors generally receives agriculture products and ships out heavy finished beverage products.

MillerCoors is captive to single rail carriers at several of these plants and at numerous destinations. As a result, it does not have any bargaining leverage with its serving rail carrier in these situations regarding rates and service. One of our rail providers, Norfolk Southern Railway (“NS”), has recently taken advantage of its market power by imposing an embargo, refusing to provide service, and threatening rate increases if MillerCoors sought services from other providers. As a result, MillerCoors feels compelled to provide comments in this proceeding in the hope that the Board will take the actions necessary to restore some balance to its relationship with NS and, to some degree, the rest of the Class I railroads.

3. NS’s Unreasonable Behavior by Refusing to Provide Service.

In early 2018, NS imposed an embargo at its New York Suffern Yard and refused to deliver MillerCoors products to MillerCoors’ distributor, Manhattan Beer Distributors (“Manhattan”). As described above, Manhattan is MillerCoors sole and exclusive route to market to service the critical New York City market. As you would expect, the greater New York City market is one of the most important sales regions for MillerCoors’s success.

As MillerCoors understood the situation, NS was in a dispute with Manhattan over demurrage. As a result, it imposed an embargo on and was not delivering MillerCoors cars to Manhattan. MillerCoors, not Manhattan, was NS’s customer in this situation. MillerCoors advised NS that the cars NS was holding hostage contained a perishable product, beer. MillerCoors also advised NS that these cars had left its brewery before the rail carrier imposed its embargo on Manhattan. MillerCoors was given no warning of the embargo and was only told about the situation when its railcars filled with beer arrived at Suffern Yard outside of New York City (“NYC”). MillerCoors also explained to NS that Manhattan was the only beer distributor it could use for distribution purposes in NYC. MillerCoors needed to have NS deliver this product to Manhattan, so it could be on the shelves in NYC as quickly as possible. Otherwise, the product could spoil, and there would be no MillerCoors products in NYC. The bottom line was NS had no dispute with MillerCoors; the NS dispute was with Manhattan, and there was no rational reason for NS not to move the railcars.

But even after being advised of these unacceptable and financially damaging circumstances, NS employees refused to move these railcars to Manhattan. MillerCoors then made a plea to a higher-level executive at NS who heard about the situation and reasonably had the first set of cars delivered to Manhattan. However, NS inexplicably refused to move the second set of four cars filled with beer to Manhattan even though they were already in route before the embargo was set and contained perishable product, and even though Manhattan was the only distributor in NYC that could accept them. MillerCoors begged NS to move this set of cars to no avail. As a result, some of its product spoiled and some of it had to be transloaded to truck at a very expensive rate to get the beer to Manhattan. In sum, MillerCoors suffered over \$200,000 in direct losses and \$2 million in out-of-stock losses because of NS's unreasonable behavior.

MillerCoors was astounded by its treatment by NS. This treatment caused MillerCoors to focus more on its rail service in the interest of protecting itself from this type of unfair treatment. At the beginning of 2019, NS increased its rates with MillerCoors to the New York destinations by an average of 24% in what MillerCoors believes was retaliation for the demurrage issues between NS and Manhattan. In another example of unreasonable behavior by NS, MillerCoors has one brewery that is dual served and requested rates from both the NS and CSX to introduce market competition. NS was the incumbent carrier on the lane but responded with a much higher rate than the CSX. When told it was in jeopardy of losing the lane, instead of negotiating in good faith with MillerCoors, NS threatened to raise rates on captive lanes to other breweries by a comparative amount, \$1.85 million, if it was to lose this lane. Consequently, MillerCoors decided it could not sit idly by while this unreasonable behavior went unchecked.

As a result, MillerCoors has a very strong interest in seeing the market dominance process streamlined and in having an accessible rate case process as proposed in EP 755. MillerCoors commends the Board for taking an interest in promoting policies that remove barriers to accessing regulatory protection remedies and is extremely pleased that the Board has proposed this streamlined market dominance approach.

THE BOARD'S MARKET DOMINANCE PROPOSAL

The Board's market dominance inquiry is comprised of two components: a quantitative threshold and a qualitative analysis. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of the variable cost of providing the service. 49 U.S.C. § 10707(d)(1)(A). However, a finding by the Board that a movement's R/VC ratio is 180% or greater does not establish a presumption that the rail carrier providing the transportation has market dominance over the movement. 49 U.S.C. § 10707(d)(2)(A). Accordingly, if the quantitative 180% R/VC threshold is met, the Board moves to the second component, a qualitative analysis. In this analysis, the Board determines whether there are any feasible transportation alternatives sufficient to constrain the railroad's rates for the traffic to which the challenged rates apply. *See, e.g., M&G Polymers 2012*, NOR 42123, slip op. at 2, 11-18; *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 287-98 (STB served Jan. 11, 2018).

To reduce the burden on the parties, the Board proposed a standard that a complainant has made a prima facie showing of market dominance when it can demonstrate the following:

- The movement has an R/VC ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- The complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and
- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

The Board stated that these proposed prima facie factors are relevant to the Board's consideration of the existence (or lack) of effective competition for a rail movement and would be sufficient to make a prima facie showing of market dominance. If a complainant could demonstrate each of the factors listed above, the Board explained that it would have significant evidence about the status of effective competition, without requiring a more complicated

evidentiary showing by the complainant or the railroad. Complainants that cannot make a showing under the six factors—and therefore choose not to attempt a streamlined market dominance showing in the first place—would be required at the outset to establish market dominance in a non-streamlined market dominance presentation by introducing additional detailed evidence regarding effective competition. In either scenario, the Board noted that defendant railroads would continue to have the opportunity to rebut the complainant’s evidence or argue against a finding of market dominance based on other factors.

With respect to procedure, the Board proposed a 50-page limit, inclusive of exhibits and verified statements, on each of the parties’ reply and rebuttal submissions on market dominance in proceedings where the complainant uses the streamlined approach. “The Board believes the page limit will encourage parties to focus their [arguments] on the most important issues.” *Expediting Rate Cases*, EP 733, slip op. at 12 (STB served Nov. 30, 2017).

To help facilitate building the record under the streamlined approach, the Board also proposed a new delegation of authority under 49 C.F.R. § 1011.6 to an Administrative Law Judge (“ALJ”) to hold an on-the-record telephonic market dominance evidentiary hearing, at the complainant’s option, within seven days after the due date of complainant’s rebuttal (or in the case of a matter brought under the Final Offer Rate Review procedure within seven days after the due date of the parties’ reply). The ALJ’s role would be to allow the parties to clarify their market dominance positions under oath, and to build upon issues presented by the parties through critical and exacting questioning. Given this hearing, the complainant may elect whether to file rebuttal evidence on market dominance issues (in cases that provide for rebuttal, i.e. cases not brought under the Final Offer Rate Review procedure) or to rely on the ALJ hearing to rebut the defendant’s reply evidence. Within four days of the evidentiary hearing, a transcript of the hearing would be entered into the docket. The Board would take the entire record into consideration, including the transcript from the ALJ hearing, when reaching its final conclusion on market dominance. The Board’s determinations would occur in accordance with the deadlines set out in 49 C.F.R. § 1111.9 and 1111.10, and, if adopted, the new deadlines proposed in *Final Offer Rate Review*, Docket No. EP 755 et al.

The Board concluded that the proposed approach would have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting the railroads' ability to set forth a thorough defense. The Board found that the availability of a streamlined market dominance approach would reduce unneeded burdens that could dissuade complainants from bringing cases. Moreover, it stated that reducing the time and expense associated with litigating market dominance is particularly important for smaller rate disputes. The Board asserted this proposal would achieve the statutory requirement to ensure the expeditious handling of challenges to the reasonableness of railroad rates, 49 U.S.C. § 10704(d)(1), and further the rail transportation policies of providing for the expeditious handling and resolution of all proceedings, § 10101(15), fostering sound economic conditions in transportation and ensuring effective competition, § 10101(5), and maintaining reasonable rates where there is an absence of effective competition, § 10101(6).

MARKET DOMINANCE HISTORY SUPPORTS THIS SIMPLIFIED APPROACH

In 1976, the Interstate Commerce Commission ("ICC"), the predecessor to the STB, adopted its market dominance rules, setting out the factual situations that would trigger a rebuttable presumption of market dominance. *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 875 (1976). In developing the rebuttable presumption test, the ICC explained that the R.R. Revitalization & Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, granted the agency broad discretion to devise rules to implement the market dominance concept, and that any rules needed to be practical and capable of prompt administrative application. *Id.* at 886. Accordingly, the ICC declined to consider the effects of product and geographic competition on a railroad's ability to set its rates, out of concern that the introduction of such considerations would require extensive fact-finding and produce lengthy antitrust-type litigation. *Id.* at 905-06, 942-43.

On judicial review, the United States Court of Appeals for the District of Columbia Circuit upheld the ICC's general approach but remanded the case for the limited purpose of clarifying one of the presumptions. *Atchison T. & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C. Cir. 1978). In response to arguments that it was error for the ICC not to consider product and geographic

competition, the court found "sufficient basis in the statutory language and purpose to merit our deferral to the [ICC's] view." *Id.* at 634. The court recognized that consideration of product and geographic competition could embroil the agency in highly complex evidentiary proceedings, thereby delaying the market dominance determination. *Id.*

Then, Congress enacted the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980), to further reform railroad regulation. In the Staggers Act, Congress added a new provision exempting from regulation rail rates yielding revenue/variable cost ratios below certain levels, but otherwise left it to the agency's discretion how to administer the market dominance test. See 49 U.S.C. § 10707(d)(2).

Following enactment of the Staggers Act, in 1981, the ICC replaced its original presumptive scheme for making market dominance determinations with guidelines that explicitly provided for evidence on intramodal, intermodal, product and geographic competition. *Market Dominance Determinations*, 365 I.C.C. 118 (1981). This decision to consider product and geographic competition was judicially challenged. On *en banc* review, the full court concluded that the statute did not preclude consideration of evidence on product and geographic competition. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1983).

Under *Market Dominance Determinations*, the complainant had the burden of establishing that intramodal and intermodal competition did not effectively constrain rail rates, as well as the burden of demonstrating that any product and geographic competition that has been identified by the railroad would not effectively limit the defendant carrier's rates. 365 I.C.C. 118. However, shippers encountered difficulty trying to prove a negative proposition -- that product or geographic competition identified by a railroad was not an effective constraint on rail rates. To address this problem, the ICC in 1985 modified the market dominance procedures to make them more practical, by shifting the burden of establishing the effectiveness of product and geographic competition to the railroads. *Product and Geographic Competition*, 2 I.C.C.2d 1 (1985). The agency hoped that this reallocation of the burden of proof would "reduce discovery disputes and expedite the market dominance phase of maximum rate reasonableness proceedings." *Id.* at 15.

In applying its revised market dominance guidelines, the ICC found that product or geographic competition provided effective competition for certain traffic in several cases. *E.g.*, *Consolidated Papers, Inc. v. Chicago & N.W. Transp. Co.*, 7 I.C.C.2d 330 (1991); *Coal Trading Corp. v. Baltimore & O.R.R.*, 6 I.C.C.2d 361 (1990); *Westmoreland Coal Sales Co. v. Denver & Rio Grande W.R.R.*, 5 I.C.C.2d 751 (1989). However, in each case, it took years to collect the evidence and make that determination.

In the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress retained both the market dominance requirement and broad agency discretion to revise the market dominance guidelines as appropriate. See H.R. Conf. Rep. No. 422, 104 Cong., 1st Sess. 173 (1995) *reprinted in* 1995 U.S.C.C.A.N. 858 ("Although the conference provision does not disturb the existing statutory standard or the current agency regulations implementing the market-dominance standard, the Conference recognizes that the agency has broad discretion to consider additional factors such as the availability of other forms of transportation and other economic alternatives, and to revise and supplement its existing standards and regulations as appropriate.") Congress also stressed the need to expedite cases. It added a new provision to the national rail transportation policy calling for the "expeditious handling and resolution of all proceedings." 49 U.S.C. § 10101(15). It further instructed the Board to establish "procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S.C. 10704(d). Congress also placed time limits on deliberations in rate reasonableness cases. 49 U.S.C. 10704(c).

In response to the statutory directive to find ways to expedite rail rate cases, the STB imposed new documentation and processing requirements on parties, altered the evidentiary and discovery procedures, and eliminated layers of administrative review. *Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings* ("Expedited Procedures"), Ex Parte No. 527 (STB served Oct. 1, 1996 and Nov. 15, 1996), *aff'd sub nom. United Transp. Union-III. Legis. Bd. v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998).

Despite the STB's best efforts and these expedited procedures, rail rate cases continued to take unreasonably long periods to litigate. See *West Texas Util. Co. v. Burlington N. R.R.*, No. 41191 (May 3, 1996)(it took nearly two years to build the evidentiary record); *Arizona Pub. Serv. Co. v. Atchison, T.&S.F.R.R.*, No. 41185 (July 29, 1997)(it took over two years to develop the evidentiary record). The product and geographic competition issues contributed significantly to the length and complexity of both of those cases. And in the first rate case filed after the *Expedited Procedures* rules were put into place, disputes over product and geographic competition extended the discovery period far beyond the 75-day period contemplated in *Expedited Procedures*. See *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, NOR 42022 (STB served Mar. 11, 1999).

As a result of this constant delay, in *Market Dominance Determinations—Product & Geographic Competition (Product & Geographic Competition 1998)*, 3 S.T.B. 937, 938 (1998), the Board examined whether product and geographic competition should be considered in market dominance inquiries and eliminated them as factors. The Board concluded that “it appears that the burdens associated with litigating product and geographic competition issues may serve to deny captive shippers with valid claims access to the Board and thus their only avenue of rate relief.” *Id.* at 949. In a subsequent decision, following remand from the U.S. Court of Appeals for the District of Columbia Circuit for consideration of the rail transportation policy, the Board reaffirmed its elimination of product and geographic competition from consideration, stating that “Congress has directed us to apply the market dominance provision in a practical manner.” *Product & Geographic Competition 2001*, EP 627, slip op. at 2 (STB served Apr. 6, 2001). The Board stated that “the complications and delays resulting from consideration of product and geographic competition are contrary to the Congressional directive that the administrative market dominance procedures be easily administrable.” *Id.* at 8 (citing *Ass’n of Am. R.Rs. v. STB*, 237 F.3d 676, 680 (D.C. Cir. 2001); Rail Revitalization & Regulatory Reform Act of 1976, Pub. L. No. 94-210 § 202(d), 90 Stat. 31 (1976)). Most significantly, the Board found that elimination of product and geographic competition from consideration advanced the equally important goal of expediting rate cases. *Id.* (citing 49 U.S.C. § 10101(2), (15)).

In affirming the Board's 2001 decision, the D.C. Circuit noted that it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Rail Act of 1980, and that Congress had expressly required the Board to provide for the expeditious handling and resolution of all proceedings. *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2003). The court found that the Board's construction of the statute furthered its statutory mandate "to establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates, including 'appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.'" *Id.* (emphasis omitted) (citing 49 U.S.C. § 10704(d)(1)).

Similarly, the D.C. Circuit affirmed the Board's decision in *Major Issues in Rail Rate Cases* ("*Major Issues*"), EP 657 (Sub-No. 1), slip op. at 60 (STB served Oct. 30, 2006), to eliminate "movement-specific adjustments" to the uniform method for determining the variable costs in the quantitative market dominance inquiry. *BNSF Ry. v. STB*, 526 F.3d 770, 776-77 (D.C. Cir. 2008). Prior to the decision in *Major Issues*, parties to rate cases were permitted to make movement-specific adjustments to the Board's standard variable cost calculations generated by the Uniform Railroad Costing System. In *Major Issues*, the Board eliminated the use of those movement-specific adjustments in market dominance presentations, finding that they made proceedings "inordinately complex, time consuming, and expensive, and [did] not necessarily result in more reliable results." *Major Issues*, EP 657 (Sub-No. 1), slip op. at 60. In affirming the Board's decision, the D.C. Circuit found that the elimination of movement-specific adjustments "balances inherently incommensurable cost and benefits," and is a decision that "falls within the expertise of the agency." *BNSF Ry.*, 526 F.3d at 776.

As is evident from this market dominance history, Congress, the courts, the ICC, and the STB have all have found the market dominance test to be a process that requires expeditious handling with minimal administrative burden to provide shippers access to the rate case process. The ICC and STB have been engaged in an ongoing battle in an attempt to keep the market dominance process from becoming so complex that it begins to deter and even preclude persons from bringing legitimate rate cases. The STB now is at another turning point

where the market dominance process has become so burdensome to shippers that access to rate cases has clearly been hindered and often precluded in direct conflict with Congressional intent. The Board wisely has sought out how to stop the market dominance process from deterring rate complaints as it has done in the past with product and geographic competition.

MILLERCOORS CHANGES TO THE PROPOSED RULES

The fix the Board has proposed here is the streamlined market dominance test set forth in the NPRM discussed above. The Board should be commended for bringing forth this solution to a long existing problem. As the Board discussed, the market dominance inquiry presently is a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants.

Given the hypothetical nature of some competitive options proposed by defendant railroads in past rate cases, complainants now essentially have to predict what a defendant railroad might argue regarding potential, but unused, competitive options—all without knowing precisely what constitutes a prima facie showing of an absence of effective competition. In the most recent rate reasonableness case, *Consumers Energy Co. v. CSX Transportation, Inc.*, Docket No. NOR 42142, the parties' market dominance presentations alone (throughout their filings) exceeded 200 pages of narrative discussion and included multiple expert reports because of a hypothetical build-out issue. *See also Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121 (including over 340 pages of narrative discussion on market dominance). In two cases where the market dominance inquiry was bifurcated from the rate reasonableness inquiry, the market dominance procedural schedules alone were three months long. *See M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 5 (STB served May 6, 2011); *Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 7-8 (STB served Apr. 5, 2011).

Consequently, MillerCoors suggests further streamlining the market dominance process to fulfill the intent of Congress by making it more expeditious and less likely to be abused through inherently complex and nebulous argument. MillerCoors asks the Board to remove the last two factors of the prima facie test: "the complainant has used truck for 10% or fewer of its

movements subject to the rate at issue over a five-year period” and “no practical build-out option”.

As noted above, these hypothetical build-outs proposed by railroads in their market dominance arguments in the past have become overly burdensome to shippers who bring rate cases. These build-out hypothetical arguments have been used by railroads in several recent proceedings and have been extremely difficult to resolve. *See, e.g., Consumers*, NOR 42142, slip op. at 295-96 (STB served Jan. 11, 2018) (finding an alternative which would require building additional rail infrastructure to be not feasible); *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 584 (2003) (finding that constructing a 13.5-mile spur track to reach a competing railroad that would cost at least \$49 million was not feasible); *W. Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 651 (1996), *aff'd sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997) (finding two potential rail line build-out alternatives costing \$62 million and \$79 million to not be realistic); *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, NOR 42110 (STB served May 19, 2010)(oral argument notice regarding build-out hypothetical by CSX).

These hypothetical build-out arguments have become the new product and geographic competition arguments of our time. They have created a blockade to many shippers’ ability to bring a rate case because the cost of litigating this type of issue in addition to the stand alone cost test has become insurmountable and makes very little business sense to shippers when reviewing ways to lower unreasonable rail rates. The Board has an opportunity here to remove this factor from its prima facie case test and follow its precedent of not allowing overly complex issues to destroy the market dominance test.

Similarly, the factor of whether a complainant has used truck on the challenged route less than 10% of the time over a five-year period could be extremely complex. A shipper’s reasons for using truck has so many variables that an analysis of this issue could again bog down the market dominance process. The Board already has included a factor regarding truck with its 500-mile limit. The Board should not overly complicate the process by adding an additional truck factor that could upset this streamlined approach.

THE RAIL TRANSPORTATION POLICY SUPPORTS MILLERCOORS SUGGESTED CHANGES

A prima facie test as amended by MillerCoors without the build-out and 10% truck factors would be more in line with the Rail Transportation Policy (“RTP”) which the Board must take into consideration when making its decisions. The RTP set forth in 49 U.S.C. § 10101 contains 15 separate and sometimes conflicting policy goals that together establish the framework for regulatory oversight of the rail industry. *Coal Exporters Ass’n v. United States*, 745 F.2d 76, 98 (D.C. Cir. 1984). No special significance attaches to the order in which these various policy goals are set out in the statute, and no single element of the RTP takes precedence to the exclusion of the others. *Intramodal Rail Competition – Proportional Rates*, EP No. 445 (Sub-No. 2) (ICC served Apr. 17, 1990). See *Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983), *vacated and remanded*, *Coal Exporters*, 745 F.2d at 98 (RTP in section 1 “must be read in conformity with the other provisions and policies of the Act”).

In administering the statute, the STB must weigh and balance the various RTP elements. *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 115 (D.C. Cir. 1987). In doing so, the STB is “guided by the canon of statutory interpretation that all statutory provisions should be given effect and that no provision should be interpreted in a way that reads other provisions out of the statute... To the extent that there is tension among different policy goals, we must balance the competing interests in a way that gives effect to each policy.” *Market Dominance 2001*, EP 627, slip op. at 7.

First, excluding the buildout and 10% truck factors from consideration in the market dominance analysis is not inconsistent with 49 U.S.C. § 10101(1) (“RTP-1”). The policy of RTP-1 is “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” Indeed, limiting the STB’s market dominance analysis in this way should have little, if any, effect on the RTP-1 policy of allowing the marketplace to establish rates. That is because a competitive rate is unlikely to be challenged and, even if challenged, is unlikely to be disturbed. See *Coal Exporters*, 745 F.2d at 98 (the policy “of establishing reasonable rates ‘to the maximum extent possible’ through

reliance on competition and the demand for services' ... must be read in conformity with the other provisions and policies of the Act.”)

Experience has shown that consideration of hypothetical build-outs has a demonstrable negative effect on relevant RTP goals. *See, e.g., Ass’n of Amer. R.Rs.*, 237 F.3d at 680. The complications and delays resulting from consideration of build-outs are contrary to the Congressional directive that the administrative market dominance procedures be easily administrable (4R Act §202(d)) so that the processing of rate cases can be expedited in accordance with the policy of 49 U.S.C. 10101(2) (RTP-2) and 49 U.S.C. 10101(15) (RTP-15) to resolve disputes expeditiously. *See also* 49 U.S.C. 10704(c), (d); *Ass’n of Am. Railroads*, 237 F.3d at 680 (discussing the same issue with respect to product and geographic competition). Similarly, consideration of the 10% truck factor would also have a negative effect on these RTP goals by making the process more difficult to administer than it needs to be to effectively determine market dominance.

Moreover, the policy of 49 U.S.C. 10101(6) (RTP-6) provides that rates be limited to reasonable levels in the absence of competition. Shippers must have practical, not merely nominal, access to the rate review process to give real meaning to that policy. Similarly, with respect to buildouts and the 10% truck factor, procedures that thwart a shipper’s ability to pursue a valid complaint are clearly inconsistent with RTP-6.

The Board also asserted in the NPRM that this proposal would further the rail transportation policy of fostering sound economic conditions in transportation and ensuring effective competition. 49 U.S.C. § 10101(5). These changes suggested by MillerCoors would only enhance this policy.

Accordingly, considering all of the relevant policy goals of the statute, the scale tilts heavily in favor of excluding build-outs and the 10% truck factors from consideration in this streamlined market dominance process. Because exclusion of these factors should have little effect on a railroad’s ability to set rates in a competitive environment (the goal of the RTP-1) but should significantly advance the equally important goals of expediting cases (the goal of

RTP-2 and RTP-15), fostering sound economic conditions in transportation and ensuring effective competition (the goal of RTP-5), and ensuring reasonable rates in instances where effective competition is absent (the goal of RTP-6), the most appropriate administrative course of action is to eliminate these two factors.

CONCLUSION

MillerCoors thanks the Board for this opportunity to address its proposed streamlined market dominance process and for its earnest efforts to remedy the broken, existing process. MillerCoors only urges the Board to take a couple more steps by eliminating the build-out and 10% truck factors to ensure that this proposed process also is not abused through overly elaborate arguments that would burden this preliminary test in the rate case process. This initial step by the Board is a good one and only should be slightly changed to ensure the process is expeditious and straightforward as Congress intended.

Respectfully submitted,

Daniel R. Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue
Suite 7000
Washington, DC 20006
(703) 863-9670

Counsel for MillerCoors

November 12, 2019