

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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MARKET DOMINANCE STREAMLINED
APPROACH

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Docket No. EP 756

**COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

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Dated: November 12, 2019

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The Western Coal Traffic League (“WCTL”) submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) notice of proposed rulemaking served in this proceeding on September 12, 2019 (“NPRM”).

IDENTITY OF INTEREST AND SUMMARY

WCTL is a voluntary association whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities and a non-profit fuel supply cooperative.

WCTL was formed in 1977 and, since that time, has actively participated in all major proceedings before the Interstate Commerce Commission (“ICC”) and the STB involving the regulation of western coal transportation rates and service, including all of the major ICC and STB rulemaking proceedings involving rail market dominance issues. Many of WCTL’s member organizations have successfully litigated rate cases under the Board’s maximum rate standards, and its market dominance standards, applicable in large rate cases.

The Board appears to have proposed its new streamlined market dominance rules to permit the Board to promptly adjudicate small rate cases under its proposed Final Offer Rate Review (“FORR”) standards. *See Final Offer Rate Review*, Docket No. EP 755 (STB served Sept. 12, 2019) (“FORR NPRM”). Nevertheless, the Board’s NPRM proposes to permit complainant shippers in all rate cases (including large rate cases) to elect to utilize the proposed streamlined market dominance procedures.

WCTL appreciates that the Board’s proposal permits, but does not require, large rate case shippers to utilize the proposed streamlined market dominance procedures. WCTL suggests that large rate case shippers may be more likely to use the proposed streamlined procedures if (i) the Board eliminates its proposal to make the streamlined procedures not available in cases where the shipment distance is less than 500 miles and (ii) the Board eliminates its proposed requirement that complainant shippers in large rate cases provide detailed market dominance disclosures at the outset of their cases.

The Board has found the existence of market dominance in unit train rate cases where the shipment distances were far less than 500 miles, and to the best of WCTL’s knowledge, neither the Board, nor the ICC before it, ever found that truck transportation was a viable competitive alternative to transporting coal by unit train. WCTL recommends that the Board allow a unit train coal shipper to elect to utilize the proposed streamlined market dominance procedures without regard to the length of the shipper’s haul.

Similarly, there is no need to saddle large rate case shippers with a requirement to provide detailed disclosures concerning Phase III costs and “all

documents” relating to qualitative market dominance at the outset of a case. In large rate cases, the parties and the Board have addressed variable cost issues/disputes in post-complaint technical conferences. This process has worked reasonably well and does not need to be changed.

Nor should the Board saddle large rate case complainants with an obligation to provide “all documents” relating to market dominance with its complaint. In large rate cases, market dominance document production is best left as a two-way street, where both complainant shippers and defendant carriers can obtain whatever discovery is necessary, subject to Board supervision, to address market dominance issues. Indeed, in large rate cases, the complainant shipper may not be in a position to know whether it should utilize a streamlined market dominance approach until its market dominance discovery is completed.

I. **THE BOARD’S PROPOSED STREAMLINED MARKET DOMINANCE PROCEDURE**

The Board describes its proposed streamlined market dominance procedure as follows:

- **Election** – A complainant shipper may elect to use the Board’s proposed streamlined market dominance procedure (NPRM at 11), subject to the caveat that the Board is proposing in a companion proceeding (Docket No. EP 755) that the Board’s proposed “FORR procedure may only be used if the complainant also elects to

use the streamlined market dominance approach proposed in Docket No. EP 756.”¹ If a complainant shipper elects not to utilize the proposed streamlined procedures, it “would instead need to choose a non-streamlined market dominance presentation.” *Id.*

- **Complaint** – If the complainant shipper elects to use the Board’s streamlined market dominance procedures, its complaint must contain, at a minimum, the traffic and operating information set forth at 49 C.F.R. § 1111.2(a)(1)-(9); a narrative addressing whether there are any feasible transportation alternatives for the challenged rail transportation (*id.* § 1111.2(a)(10)); a statement addressing the consideration and rejection of arbitration (*id.* § 1111.2(a)(11)); and attach, or otherwise provide with its complaint, “all documents” relied upon in formulating its assessment of feasible transportation alternatives and in making its Uniform Rail Costing System (“URCS”) input calculations (*id.* § 1111.2(b)). *See* NPRM at 16.

- **Opening Evidence** – The Board proposes that a complainant shipper can make a “prima facie showing” of market dominance under its proposed streamlined procedure by satisfying six factors set forth in its proposed new 49 C.F.R. § 1111.12(a):

§ 1111.12 Streamlined Market Dominance.

(a) A complainant may elect to pursue the streamlined market dominance approach to market dominance if the challenged movement satisfies the factors listed in paragraphs (a)(1) through (a)(6) of this section. The Board will find a complainant has made a prima facie showing on market dominance when it can demonstrate the following with regard to the traffic subject to the challenged rate:

(1) the movement has an R/VC ratio of 180% or greater;

¹ FORR NPRM at 9.

- (2) the movement would exceed 500 highway miles between origin and destination;
- (3) there is no intramodal competition from other railroads;
- (4) there is no barge competition;
- (5) the complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and
- (6) the complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

NPRM at 18. The Board also proposes that to meet its prima facie burden of proof, “[a] complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts,” and “[i]n demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.” *Id.* (quoting proposed new 49 C.F.R. § 1111.12(b)). It appears that the complainant shipper must make this showing as part of its opening evidence in both large and smaller rate cases. *See id.* at 17-18; FORR NPRM at 23.

- **Reply Evidence** – Under the Board’s proposal, “[c]arriers would be 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.” NPRM at 12. It appears that the defendant carrier must make this showing as part of its reply evidence in both large and smaller rate cases. *See id.* at 17-18; FORR NPRM at 23.

- **Rebuttal Evidence** – The Board’s proposal provides that “[a]s in a non-streamlined market dominance presentation, a complainant under this new approach would have the opportunity to respond to the railroad’s reply evidence in its rebuttal submission” in large rate cases, or in smaller rate cases brought under the Board’s current

simplified standards. *See* NPRM at 12. (The Board is proposing to eliminate rebuttal evidence in FORR cases. *Id.*).

- **ALJ Hearing** – The Board proposes that “an Administrative Law Judge (ALJ) . . . 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).” *Id.* According to the Board, “[t]he 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.” *Id.* Under this proposed procedure, it appears the ALJ would not issue substantive market dominance rulings, but instead, the Board would review “the transcript from the ALJ hearing” as part of its market dominance merits review. *Id.* The Board also proposes that if a complainant shipper elects to proceed with an ALJ hearing on market dominance in large rate cases, or rate cases adjudicated under its current simplified standards, “the complainant may elect whether to file rebuttal evidence on market dominance issues . . . or to rely on the ALJ hearing to rebut the defendant’s reply evidence.” *Id.*

- **Page Limits** – The Board proposes 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.” *Id.*

- **Final Merits Decision** – The Board proposes to issue its final merits decision on market dominance and rate reasonableness issues at the times called for under the Board’s current procedural schedules for large rate cases, small rate cases (under the Board’s current rules), and under its proposed schedule for FORR cases. *Id.* The Board notes that under its proposed streamlined approach, “[t]he burden for establishing market dominance remains on the complainant,” but “the proposed approach would allow a complainant that can demonstrate the factors to make a prima facie showing that it has met its burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies.” *Id.* at 11 (internal quotation marks and citation omitted).

- **Relitigation** – The Board proposes that “[i]f a complainant elects to use the streamlined market dominance approach and the Board finds that market dominance has not been shown, the complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances (or other factors under 49 U.S.C. § 1322(c)).” *Id.*

- **Rationale** – The Board states that it is proposing its streamlined market dominance procedure to reduce the time, cost and complexity of rate cases, which the Board states “is particularly important for smaller rate disputes:”

The Board concludes that the proposed approach would have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting railroads’ ability to mount a thorough defense. The Board finds that the availability of a streamlined market dominance approach would reduce unneeded burdens that could dissuade complainants from bringing cases. Moreover, reducing

the time and expense associated with litigating market dominance is particularly important for smaller rate disputes.

Id. at 12. *See also id.* at 6 (“[I]t is important for the Board to consider ways to streamline the presentation of market dominance evidence, particularly in smaller cases where the cost of making a market dominance presentation can outweigh the value of the case.”); *id.* at 4 (“In smaller rate cases, the expense associated with the market dominance inquiry may be particularly out of balance with the remedy being sought.”); *id.* (“The [Rate Review Task Force] concluded that streamlining the market dominance inquiry is a necessity to making rate relief available for smaller rate disputes . . .”).

II.

WCTL GENERALLY SUPPORTS THE BOARD’S PROPOSAL BUT SUGGESTS SOME CHANGES TO ADDRESS LARGE RATE CASE CONCERNS

The Board’s proposal appears to be principally directed at developing an expedited market dominance review procedure for application with the Board’s proposed FORR standards. However, the Board’s proposal also allows complainant shippers to use the proposed expedited market dominance procedures in large rate cases at their election, but does not require complainant shippers to do so. Thus, the Board is simply providing large shippers with a new market dominance proof option. WCTL appreciates the Board’s offer. WCTL does, however, propose two changes to the Board’s proposal that may increase the likelihood that a large shipper would opt to use this approach.

A. Eliminate the Movement Length Factor for Unit Coal Train Shipments

The Board “proposes a 500-highway-mile threshold as a factor to identify when trucking is not likely to provide effective competition.” *Id.* at 7. The Board,

however, candidly acknowledges that “the 500-highway-mile threshold may be underinclusive for certain commodities that are more difficult to move by truck (e.g., particularly heavy commodities).” *Id.* at 8. “Accordingly, the Board specifically seeks comment on whether, and if so how, the mileage threshold could be varied by commodity group(s).” *Id.*

WCTL recommends that the Board eliminate any “highway-mile threshold” factor for unit coal train transportation. Most of the Board’s (and the ICC’s) maximum rate cases have involved unit coal train transportation. WCTL is not aware of a single case where the Board (or the ICC) has found that this transportation was subject to any effective competition from truck transportation. These cases have included unit train coal moves with loaded train miles far less than 500 highway miles.²

The reasons why truck transportation is not a viable transportation alternative for unit train coal shippers – for even very short distances – are illustrated in the Board’s 1996 decision in *West Texas Utilities Co. [“WTU”] v. Burlington Northern R.R. [“BN”]*, 1 S.T.B. 638 (1996). In that case, WTU challenged BN’s rail rates on its unit train coal shipments from Wyoming to its Oklaunion, TX electric generating station. BN was the only rail carrier serving Oklaunion, but BN argued that WTU had an effective transportation alternative – WTU could obtain coal deliveries from Wyoming

² See e.g., *W. Fuels Ass’n v. BNSF Ry.*, Docket No. 42088, slip op. at 7 (STB served Sept. 10, 2007) (approximately 200 loaded miles); *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, slip op. at 3, 282 (STB served Jan. 11, 2018) (approximately 170 loaded miles); *Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, Docket No. 42038, slip op. at 2 n.7 (STB served Mar. 6, 2000) (“*MP v. DMIR*”) (approximately 30 loaded miles).

by another set of competitive rail carriers to Wichita Falls, TX, and then truck the coal from Wichita Falls to Oklaunion – a distance of approximately 35 miles. *Id.* at 650. The Board summarily rejected BN’s argument:

BN argues that trucking can provide an alternative . . . [from] Wichita Falls. We do not consider trucking to be a feasible option. As WTU has explained, transporting all of its coal from Wichita Falls to Oklaunion in 35-ton trucks would require just under 200 truck shipments each day of the year. Moreover, environmental concerns, noise, community opposition, increased inefficiencies associated with loading and unloading, etc., make this option infeasible for any of its coal movements.

Id. at 652. *Accord MP v. DMIR*, slip op. at 2 n.7 (finding no “effective . . . intermodal competitive alternatives for transporting large volumes of coal” over approximately 30 loaded rail miles); *Metro. Edison Co. v. Conrail*, 5 I.C.C.2d 385, 413 (1989) (“It is simply impractical to move [large] volume[s] of coal by truck.”); *Wis. Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955, 963 (2001) (substituting trucking for unit train coal transportation is “impractical . . . because of the high cost and significant community impact”).

Eliminating the mileage threshold is also not unfair to defendant rail carriers in unit coal train rate cases. The defendant carriers can still present evidence to demonstrate that trucking provides effective competition (though, as noted, to the best of WCTL’s knowledge, no such evidence has ever been found credible by the Board or the ICC in unit coal train rate cases). In addition, the Board’s “No More Than 10% of Recent Movements by Truck” factor (NPRM at 8) would serve as an additional backstop that would continue to apply in unit coal train rate cases.

B. Eliminate the New Initial Disclosures Requirements in Large Rate Cases

The Board proposes to amend 49 C.F.R. § 1111.2 to require large rate case complainant shippers who want to use the simplified market dominance approach to (i) submit Phase III inputs; (ii) submit all documents relied upon to develop the Phase III inputs; and (iii) provide “all documents relied upon in formulating its assessment of a feasible transportation alternative.” *Id.* at 16.³

WCTL submits that issues involving Phase III inputs are best addressed – and resolved (if possible) – in large rate case technical conferences.⁴ WCTL doubts that the large rate case process will be expedited by providing Phase III inputs with the shipper’s complaint, particularly when there is no corresponding obligation on the defendant carrier to identify any disputed inputs in the carrier’s answer.⁵

³ The Board initially promulgated the § 1111.2 disclosure requirements for application only in small rate cases. *See Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1), slip op. at 25 (STB served Sept. 5, 2007) (“*Simplified Standards*”), *aff’d sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh’g*, 584 F.3d 1076 (D.C. Cir. 2009). The Board adopted this new disclosure requirement to facilitate its new rules, also adopted in *Simplified Standards*, limiting defendant carrier discovery (including market dominance discovery) in Three-Benchmark Cases (*id.* at 26); requiring defendant carriers in simplified cases to disclose their Phase III calculations and inputs along with their answers (*id.* at 25); and requiring defendant carriers in Simplified-SAC cases to make a second set of disclosures containing detailed SAC information (*id.* at 25-26). There is no corresponding limit on carrier discovery in large rate cases, nor do any of the carrier disclosure requirements apply in large rate cases.

⁴ *See Expediting Rate Cases*, Docket No. EP 733, slip op. at 13-15 (STB served Nov. 30, 2017) (discussing the benefits of technical conferences in large rate cases).

⁵ *See* 49 C.F.R. § 1111.5(b) (requiring defendant carriers in “simplified standards” cases to “provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program”).

Similarly, it is a huge undertaking for a shipper to perform the modelling necessary to determine whether to file a large rate case. All of this modelling needs to be done before a complaint is filed and, under the Board's recently adopted large rate case procedural rules, complainants in large rate cases are now required to engage in mandatory Board-sponsored mediation during the seventy-day period immediately prior to filing a complaint,⁶ and to file initial discovery requests along with the complaint.⁷

Adding a new requirement that a large rate case complainant shipper must produce "all documents" it "relied upon" concerning transportation alternatives will add a substantial new burden – a shipper must look for and identify all such documents relating to market dominance before it files its complaint. This requirement will likely serve as a strong disincentive for large rate case shippers to use the Board's proposed streamlined market dominance procedures.

Not only is this proposed new disclosure obligation burdensome given the many other issues a complainant shipper in a large rate case must deal with prior to filing a complaint, it is unnecessary because a defendant carrier in a large rate case can obtain all relevant non-privileged documents concerning market dominance as part of the large rate case discovery process.⁸ Moreover, as a practical matter, it will add a new area for disputes because it is most unlikely that defendant carriers in large rate cases will agree

⁶ *See id.* §§ 1111.1, 1109.4.

⁷ *See id.* § 1111.2(f).

⁸ *See id.* § 1114.21 *et seq.*

with a complainant shipper's assessment that it has provided "all documents" it has relied upon and may seek substantial market dominance discovery anyway.

Finally, a complainant shipper in a large rate case may not be in a position to make a decision on whether to pursue the submission of market dominance evidence under the Board's proposed streamlined procedures until it completes its market dominance discovery from the defendant carrier.

CONCLUSION

WCTL respectfully requests that the Board take actions in this proceeding consistent with the views expressed by WCTL in these Comments.

Respectfully submitted,

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