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November 12, 2019

VIA ELECTRONIC FILING

The Honorable Ann D. Begeman, Chairman
The Honorable Patrick J. Fuchs, Vice Chairman
The Honorable Martin Oberman, Commissioner
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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Office of Proceedings
November 12, 2019
Part of
Public Record

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

Dear Board Members:

Enclosed please find Opening Comments of BNSF Railway Company to the Board's Notice of Proposed Rulemaking decided on September 11, 2019 in the above-referenced docket.

Very truly yours,

A handwritten signature in blue ink, appearing to read "J.K.M.", is written over a printed name.

Jill Mulligan

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

OPENING COMMENTS OF BNSF RAILWAY COMPANY

1. Introduction and Summary

BNSF Railway Company (“BNSF”) submits these opening comments in response to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB”) in this proceeding on September 12, 2019 (the “NPRM”).

One of the STB’s most important regulatory responsibilities is to resolve claims that a railroad has abused its market power and is charging unreasonable rates. It is essential that the STB’s rate regulation be consistent with the Congressional requirement, embodied in the Rail Transportation Policy, “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation.” 49 U.S.C. §10101(1). Central to that responsibility is the STB’s need to determine whether a railroad has market dominance over the movement at issue, defined as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. § 10707(a).

BNSF shares the STB’s concern regarding the complexity of rate reasonableness proceedings, including the procedures and standards for determining whether rail carriers have market dominance. And BNSF appreciates the STB’s desire to simplify or streamline elements of such proceedings, including the assessment of market dominance. But because of the

importance of the market dominance inquiry to the STB's scheme of regulating rail rates, any simplification of the STB's procedures for determining market dominance must ensure an economically valid outcome and must account for the pervasive competition that exists in rail markets and the importance of avoiding regulatory intervention where competition exists.

Accordingly, BNSF is not opposed to the STB's efforts to revise its rules regarding rate reasonableness proceedings to allow a complainant to elect to pursue a "streamlined market dominance approach." However, any streamlined approach must avoid improper regulatory interference in well-functioning transportation markets through overly simplistic assumptions and procedures. Moreover, in light of the inherent complexity of rail markets, a streamlined and simplified market dominance approach must be limited to small cases and small shippers to avoid inappropriate interference in rail markets that could have extensive impacts both in transportation markets and in the markets in which BNSF's customers participate. BNSF addresses in these comments the considerations that should guide the STB's efforts to streamline or simplify market dominance determination procedures and offers specific suggestions on how the STB can avoid unintended interference in well-functioning markets.

2. Considerations that should guide any simplification or streamlining efforts.

A. Competition is pervasive in rail markets.

BNSF serves highly complex, competitive, and fluid transportation markets where shippers make sourcing and product delivery decisions based on a variety of transportation options and in response to numerous market factors. Modal competition, including direct competition from other railroads, trucks, barges and pipelines from the origin to the destination of a particular movement, is extensive. In some cases, it is relatively straightforward to assess the existence and effectiveness of such direct modal competition and to see how these

competitive forces constrain our rates. In other cases, the source of competitive constraints is not obvious by looking simply at the rail portion of a particular movement.

Direct competition often results not just from other transportation modes competing for business traditionally moved by rail, but also from BNSF's aggressive efforts to gain market share by providing shippers with a rail transportation alternative in markets not traditionally served by rail. BNSF has been able to capture new markets through innovative service offerings, particularly unit train offerings to compete in areas traditionally served by truck, vessel, and barge and not previously served by BNSF. While the agricultural product market has historically been an area where BNSF has successfully utilized unit train efficiencies and economics to compete with truck, we now move aggregates, steel pipe, scrap metals, sheet steel, steel ingots, construction sand and gravel in unit train service. The economics of unit train service allows our customers to extend their reach and grow new markets, and allows receivers to benefit from competing supply options.

Take, for instance, our cement unit train service. Due to the regional nature of the cement market, most cement moves largely by truck. However, our cement unit train product enables BNSF to compete with truck movements in certain markets. One example is our customers that use our unit train service to access the Sioux Falls market to provide a competitive sourcing option to locally-trucked cement. Another example involves our successful efforts to use unit trains to compete with trucks for transportation of aggregate in California, a new geographic market for BNSF. Aggregates used in highway, residential and non-residential construction are readily available within truck distance in almost all areas in the United States. However, there are geographic markets where the economics of unit train rail service provide shippers with a competitive option to truck. Because unit trains can move up to 13,000

tons of aggregates at one time, shippers have the option to serve their markets with more tonnage and speed than the truck mode offers. Similarly, BNSF's low-cost, efficient unit train service has recently allowed us to enter markets previously served exclusively by barge. For example, our scrap steel unit train product provided a Kansas City shipper a competitive option to access markets in Arkansas that were being served with scrap from Houston, Texas via barge. The shipper benefited by being provided access to a new market and the receiver benefited with access to another source of scrap steel.

While the effectiveness of direct competition is apparent in many cases, there are also numerous cases where the source of competitive constraints is not obvious by looking simply at the rail portion of a particular movement. In many markets 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. For example, BNSF ships bentonite clay by rail from Wyoming to Midland, Texas, where oil and gas sector companies transload the clay into bags for furtherance by truck to oil and gas wells located in the Permian Basin of western Texas and southeastern New Mexico where it is often used in the drilling process. These rail-to-truck movements come under competitive pressure by clay originating in Mexico and moving entirely by truck to destinations in the Permian Basin. Thus, the competitive constraints on our movements cannot be assessed only by looking at the rail portion of the movement and considering direct modal alternatives to that limited segment of the through movement.

The growth of transload operations provides another example of the difficulty in assessing competitive constraints by looking only at the rail portion of a movement. In a transload operation, competition for the through movement constrains the rates that a railroad

can charge for the rail portion of the transload operation. We have recognized the power of rail-to-truck transloading to enable non-rail served customers to take advantage of BNSF's rail economics and service innovations and to access rail served plants that BNSF does not directly serve. Our transload network includes 361 facilities capable of handling multiple commodities, including steel products, aggregates, and bulk cement. On average, we add 29 transload facilities to our network every year. In 2018 alone, BNSF's steel product transload volume increased by 20%. Additionally, plastics products moving by rail car are sometimes transloaded into trucks and moved an additional 100 to 2,000 miles for delivery to meet transit time or product availability demands.

Also, shippers often choose to invest in facilities that are located exclusively on BNSF lines. That is not because BNSF has market power, but because we offer a highly competitive service. For example, BNSF's grain shuttle service has led the rail industry for over twenty years in offering efficient, low-cost rail transportation services for grain shipments. Many grain shippers have moved production of their grain to build large, efficient grain elevators located on BNSF lines, so that they can take advantage of our shuttle service. This trend goes beyond our grain transportation network, with significant increases in customers in other industries locating new facilities on BNSF rail lines to be able to use BNSF's rail service instead of trucking their product. BNSF has seen substantial growth in shipper investments on BNSF's lines for commodities such as crushed stone, construction sand, and gravel. Just in the period of 2015-2018, shippers and receivers have invested nearly \$15 billion in 450 new or expanded facilities on BNSF.

The competitive forces in these examples are characterized by the STB as indirect competition, including product and geographic competition. The STB's current rules governing

market dominance procedures do not permit the submission of evidence on geographic and product competition, but those competitive forces are pervasive in rail markets and effectively constraint BNSF's rates. Geographic competition is particularly strong in agricultural markets, as BNSF has described in detail in prior proceedings. For example, John H. Miller, BNSF's Group Vice President, Industrial Products, provided a verified statement to the STB in 2014 in STB Ex Parte No. 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*, in support of BNSF's comments in that proceeding describing the pervasive geographic competition that BNSF faces in grain markets. At the time, Mr. Miller was BNSF's Group Vice President, Agricultural Products. As Mr. Miller explained in that verified statement, grain transportation has been a significant part of BNSF's business in part due to the location of BNSF's lines in the grain growing regions of the fertile northern plains and the Corn Belt.

Strong geographic competition for BNSF's grain movements comes from many different sources, starting with the fact that virtually all grain must move from the producer's origin to an elevator or end user by truck. The trucks are often owned by the farmers themselves, who can choose to bypass rail or barges altogether if rates increase beyond competitive levels. The flexibility of trucks – how far and where they can travel – makes it easy for producers to choose among a wide range of end-user options, especially in domestic grain markets. For example, corn producers can often choose between selling to ethanol plants, corn syrup producers or feed lots. If rail rates to a particular destination are too high, the producer can choose to move the product to a different destination or utilize it for a different end use. Additionally, wheat producers can choose to move wheat to local flour mills if rail prices for movement to more distant locations increase. While producers can exercise their transportation options across both

modes in response to price fluctuations, that same market pressure also serves to discipline rail rates as the cost of being out of the market for the railroad is to lose the business entirely.¹

Trucks are also a critical competitive force in grain transportation markets because they give producers the ability to choose between elevators located on different rail lines or between rail-served elevators and barge-served elevators. In many of the growing regions in the United States, rail lines of competing railroads are located within relatively short distances of one another. As a result, rail-served elevators on more than one railroad's lines are often within a comfortable distance by truck from the producer's origin. The producer must use a truck to move the grain to an elevator, so the producer has the ability to choose which elevator on which rail line offers the best option. In areas relatively near the river network, the producers have the same ability to choose whether to truck the grain to a rail-served elevator (or more than one rail-served elevators) or to a barge-served elevator. If one railroad tries to raise prices above the prevailing market level, the producer is able quite easily to shift the destination of its grain or use the prospect of shifting the destination in order to secure a more favorable rail rate.

In addition, a large volume of BNSF's grain shipments moves to export markets, including the Pacific Northwest, Mexico and the Gulf Coast. The wide range of destination options creates competitive pressure that constrains rates to market levels. If rates to a particular market destination are set too high, the producer can choose to move the product to different destinations. BNSF must account for the producer's range of destination options and the diverse competitive forces involved in each movement in setting its rates. Moreover, this year in

¹ See Verified Statement of John H. Miller, filed by BNSF on June 26, 2014 in support of its comments in STB Ex Parte No. 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*, at 13-14.

particular, BNSF been acutely attuned to export competition in these markets from non-U.S. sources and the impact of changes in international trade policies.

BNSF's reliance on market forces that are not strictly related to the rail movement of a product from Point A to Point B to set our rates makes it particularly important that the STB avoid artificially reducing rates on movements that are subject to competitive constraints. Given the range of competitive forces that determine market-based rate levels, interference by the STB in markets that are well functioning could create substantial distortions in those markets. For example, wheat moved by BNSF to Gulf Coast destinations can also move to destinations such as flour mills in the Eastern United States, California or local nearby mills. The market determines where the wheat shipments go based on fluctuating market conditions. Wider market characteristics such as crop prices, driven by international harvest supply and global consumption trends, often drive the wheat market more so than underlying rail rates. However, if the STB were to artificially lower rail rates for one option based on an overly narrow view of competition, the STB would send false and inefficient market signals that could lead to disruptions in how wheat trades and who trades it.

B. The market dominance requirement is central to the STB's rate regulation authority.

A second consideration that the STB must keep in mind in exploring changes to the market dominance procedures and standards is the central importance of market dominance in the existing regulatory scheme. The most important task for the STB in undertaking a rate reasonableness inquiry is deciding whether it is appropriate to regulate. The central tenet of the regulatory scheme established by Congress is that the STB will intervene only to address market failures and abuses of market power. The market dominance inquiry assures that the STB will not intervene where market forces are effective.

In enacting the Staggers Act, Congress was responding to the inefficiencies and financial burdens of an intrusive regulatory regime. Under the prior regime, which involved extensive rate regulation among other regulatory constraints, rail carriers were struggling financially, with many rail bankruptcies, and the rail network was not serving the public with adequate or efficient service. The Staggers Act replaced that prior regime with a new regime that allowed railroads' commercial decisions to be governed by market forces to the extent possible, with regulatory intervention limited to specific instances of market power abuse. The benefits of this new regulatory approach have been enormous and widespread. But the key to these benefits is limiting regulatory intervention to instances of market power abuse. If the STB were to adopt a streamlined approach to market dominance that allowed regulatory intervention in well-functioning markets, the STB would put at risk the benefits that have been obtained by the regime adopted in the Staggers Act. Inappropriately streamlined standards would disrupt markets, create winners and losers, discourage railroad infrastructure investment, and potentially reverse the progress achieved through deregulation.

C. Given the complexity of rail markets and the importance of the market dominance inquiry, there are limits on simplification.

Deciding whether to regulate requires careful, sophisticated analysis. Moreover, given the importance of the market dominance inquiry to the regulatory scheme, the STB's market dominance inquiry must have credibility. The complexity of rail markets and the competitive forces at work in those markets, therefore, create an important limit on the extent of any simplification of market dominance procedures.

BNSF understands the STB's concern regarding the complexity of the market dominance inquiry in prior cases and the impact of such complexity on accessibility for smaller shippers to potential STB remedies. While any simplifications to the inquiry may increase accessibility, an

overly blunt instrument would have the potential to decrease the credibility of the STB's undertaking and increase the potential for significant harm to freely functioning competitive markets. The STB must properly scale and tailor any such market dominance inquiry simplifications to address the problems that the STB intends to fix.

3. Specific comments regarding the STB's streamlining proposal.

The STB's streamlining proposal would allow shippers to make a prima facie market dominance showing based on simplified factual showings. In light of the complexity and diversity of rail markets and the importance of the market dominance inquiry in the rate regulation scheme, the availability of this simplified prima facie case should be carefully limited to avoid improper interference in rail markets. If the STB intends to adopt simplification procedures in the important area of market dominance, it should include the limits that are discussed below.

A. The STB should add a "small shipper" screen.

The STB should only allow small shippers to use the streamlined approach proposed by the STB for the market dominance inquiry. Such a limitation/screen would address the concerns expressed by the STB in the NPRM by helping small shippers with limited competitive alternatives to rail. Use of a small shipper screen would also significantly reduce the risks of oversimplification, which include wide-ranging distorting effects on the marketplace.

A market dominance inquiry involving a large shipper would likely be complex and would create a larger risk that over-simplification will lead to distortions in the market. Moreover, large shippers with many shipments on BNSF's lines already have multiple ways to exercise market power and constrain the rates we charge. For example, large shippers can more easily shift their transportation purchases among different origins or destinations to resist

transportation rates that are inconsistent with the market. In addition, larger shippers often have longer term commercial relationships with their transportation suppliers and they can therefore monitor pricing and price changes more closely than small shippers and respond to price changes in commercial discussions and negotiations.

The STB could easily add the small shipper screen to the proposal without significant complexity. BNSF proposes that the STB institute a simple 1,000 units-per-year threshold, although other approaches based on revenue or market share could also work.

B. The STB should consider product and geographic competition.

Excluding product and geographic competition from the market dominance inquiry substantially increases the risk of an incorrect determination. As discussed above, product and geographic competition are deeply ingrained in U.S. transportation markets and BNSF's rates are materially constrained by these forces. The STB has repeatedly acknowledged that rail rates are in many cases constrained by indirect competition: "We have no doubt that in certain circumstances product and geographic competition effectively limit pricing, as the ICC in fact found in several cases." *Mkt. Dominance Determinations—Prod. & Geographic Competition*, 3 S.T.B. 937, 946 n. 49 (1998) ("*Mkt. Dominance*"). Other analyses of rail markets have reached the same conclusion. In a 2015 report on rate reasonableness reviews, the Transportation Research Board noted that "[a]ntitrust agencies routinely consider product and geographic competition when they define the relevant market in merger reviews." Nat'l Academy of Sciences, *Modernizing Freight Rail Regulation*, at 122 (2015). The report further notes that "[s]uch forms of competition can affect the willingness to pay for rail transportation on a route, perhaps significantly." *Id.*

In the late 1990s, based on the agency's experience in coal rate cases, the STB decided to eliminate product and geographic competition as factors in a market dominance determination, noting that consideration of such evidence often required complex analysis of non-transportation issues that were outside the expertise of the agency. *Mkt. Dominance*, 3 S.T.B. at 947. The STB also noted that a balance of policy factors favored exclusion of evidence on indirect competition. On the one hand, railroads would not likely be harmed because shippers would not have an incentive to challenge rates that are subject to indirect competition and would not likely prevail if they did bring such a case. On the other hand, shippers would likely be harmed by the complexity of indirect competition evidence if the complexity of the market dominance evidence led them not to bring cases where there was a valid concern over the level of the rate. *Id.* at 948.

But this balance clearly changes in the context of the STB's efforts to simplify the existing rate reasonableness methodologies and to streamline the market dominance inquiry in those simplified cases. The STB seeks regulatory changes that will encourage or facilitate rate challenges, making it easier for shippers to bring rate reasonableness cases even where rates are not unreasonably high and where indirect competition actually restrains the level of the rates. Moreover, the STB's efforts to streamline the market dominance inquiry increases the risk that the STB will interfere in markets that are well functioning.

BNSF acknowledges that in some cases the existence of indirect competition may require complex analysis that would not be consistent with simplified rate reasonableness approaches. But that is not always the case, and there are many circumstances where the existence of indirect competition can be easily demonstrated. BNSF has explained above how the growth of transload operations and the existence of multi-modal competition for the through movement often constrains rail rates, and how the prevalence of trucks in grain markets gives producers many

transportation options. In cases such as these, the existence of indirect competition is not difficult to demonstrate and does not impose an undue burden on the shipper to address or on the STB to evaluate. Moreover, procedural protections like page limits and deadlines on evidentiary submissions can prevent unnecessary complication of the proceedings.

Therefore, if the STB is going to streamline market dominance procedures, which itself creates a risk of inaccurate determinations, the STB should add “no product or geographic competition” to the factors necessary for a prima facie showing of market dominance. In order to address the STB’s concerns regarding complexity, this could be achieved through a simple device such as certification by a knowledgeable shipper business representative. The STB should also allow a railroad to submit evidence of product or geographic competition on reply.

C. The STB should not consider any distance limit less than 500 miles for any commodity.

The STB proposed a 500-highway-mile threshold as a factor to identify when trucking is not likely to provide effective competition. BNSF generally agrees with the premise underlying this approach that strong truck competition exists for such movements. But we also see 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.”² USDOT’s findings suggest that 750 highway miles may be a more appropriate threshold for the streamlined approach.

² U.S. Department of Transportation, Bureau of Transportation Statistics, *Transportation Statistics Annual Report 2018* (Washington, DC: 2018). <https://doi.org/10.21949/1502596>

In the NPRM, the STB also stated “that the 500-highway-mile threshold may be under-inclusive for certain commodities that are more difficult to move by truck,” pointing to comments submitted to the STB in 2016 by the National Grain & Feed Association that made the claim that “trucking generally becomes cost-competitive to rail only for agricultural movements of 200 miles or less.” NPRM, slip op. at 8. In fact, there is no basis at all to assume that truck competition is less strong in agricultural markets at longer distances. To the contrary, given the importance of trucks in the movement of grain, including the fact that virtually all grain must move by truck from the producer to an elevator, there is no basis to establish a lower mileage threshold for agricultural products. BNSF regularly competes with trucks over distances well over 200 miles, for example for the movement of grain products from North Central Texas to the Gulf, which involves movement distances of over 400 miles. That corridor is currently dominated by truck, but BNSF has made aggressive efforts to provide a rail market for our grain shippers for movements to the Gulf, competing head-to-head with trucks that move the grain more than 400 miles.

D. The prima facie showing should also address pipeline competition.

The STB proposed “no intramodal competition from other railroads” and “no barge competition” as two of the factors for a prima facie showing of market dominance. The STB should also add “no pipeline competition” and “no potential for pipeline buildout competition” to this list. Pipeline competition, like truck competition and barge competition, provides strong competitive constraints on BNSF’s rates. Products such as crude oil, propane, and other refined petroleum products often move by rail or pipeline.

This is illustrated by BNSF’s historical movement of unit trains of propane from the Marcellus Basin in Hanna, Ohio to Conway, Kansas. In the second quarter of 2019, the

completion of the Mariner East 2 pipeline opened an outlet to export via the East Coast at Marcus Hook, Pennsylvania, and BNSF unit trains that were previously transporting the propane to Kansas have stopped. Competitive pressure from the pipeline had a clear and direct impact on BNSF's transportation. Similarly, the ability for customers to build out to a pipeline can exert competitive pressure on rail rates. The STB acknowledged in the NPRM that railroad build-out options are relevant to this determination, and pipeline build-out options should be included for the same reasons.

E. Railroads should also be able to use an ALJ to develop the record.

The STB proposed a new delegation of authority 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. The STB would then take the record of the evidentiary hearing into consideration when reaching its conclusion on market dominance. *See* NPRM, slip op. at 12.

BNSF believes that the STB should also allow a railroad to select the ALJ path for building a factual record. If the STB believes that an ALJ can assist in the development of the record on market dominance, there is no reason that only the complainant could call for an ALJ hearing.

Respectfully submitted,



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Dated: November 12, 2019