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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINAL OFFER RATE REVIEW

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Docket No. EP 755

**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 regulation of western coal transportation rates and service. Many of WCTL’s members have successfully litigated rate cases under the maximum rate standards applicable in large rate cases.

The ICC first adopted the Board’s current large rate case standards in 1985. Since that time, the ICC struggled, and the STB has continued to struggle, to develop a

set of maximum rate standards to apply in smaller rate cases. The Board's NPRM contains the Board's most recent proposal to do so. *See* NPRM at 1 (The STB "proposes a new procedure for challenging the reasonableness of railroad rates in smaller cases.").

WCTL commends the Board for taking another look at this 30+ year old problem and for proposing a new approach – final offer rate review ("FORR") – for public comment. WCTL will carefully review the comments filed by small shippers, and their trade associations, to see if the Board's new proposal is one small shippers believe to be the answer to their decades-long search for meaningful rate review standards. For its part, WCTL has identified – based on its (and its members') experience in large coal rate cases – two issues with the Board's proposed FORR standards.

First, the Board's proposal calls for capping relief based on reductions in the defendant carrier's tariff rate. This approach appears to be one that can be gamed, just as defendant carriers gamed the percent reduction methodology in stand-alone cost ("SAC") cases until the Board abandoned the approach in 2006. The Board can eliminate the potential for defendant carrier gaming here by removing the relief cap.

Second, the Board needs to be concerned about mismatched relief methods. In a final offer case, the complainant shipper could present a case for relief using method "A," whereas the defendant carrier could use a substantially different method "B." The Board can address these mismatch concerns by adopting a rule that states, if the Board finds the shipper's method is credible and supported, it will accept the shipper's final offer methodology, regardless of the merits of the carrier's alternative methodology. This approach is consistent with the approach the Board uses in large rate cases.

I. THE BOARD'S FORR PROPOSAL

The Board describes its proposed FORR procedure as follows:

- **Notice of Intent** – “Before the process formally begins, the complainant would be required to file with the Board and serve the defendant with a notice of intent to initiate a case, at least five days in advance of filing its complaint.” NPRM at 7.
- **Appointment of a Liaison** – “The Board would appoint a Board employee to serve as a case liaison within five business days after the pre-filing notification.” *Id.* at 7 n.13.
- **Filing the Complaint** – “The proceeding would formally begin with the filing of a complaint.” *Id.* at 7 (“Day-0”). The complaint must contain 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 alternative transportation options for the challenged rail transportation (*id.* § 1111.2(a)(10)); and a statement addressing the consideration and rejection of arbitration (*id.* § 1111.2(a)(11)). The complaint must also be accompanied by a disclosure containing “all documents” the complainant relied upon in formulating its assessment of feasible transportation alternatives and in making its Uniform Rail Costing System input calculations. *Id.* § 1111.2(b); NPRM at 7-8.
- **Answer** – “The Board would not require the defendant to file an answer to the complaint” NPRM at 8.

- **Discovery** – “The filing of the complaint would also mark the beginning of discovery.” *Id.* The Board proposes that “[n]o litigation over discovery disputes would be permitted. Instead, if a party unreasonably withholds information that the Board subsequently deems to be relevant, the Board would take that withholding into account in making its final decision . . . for example, by giving less weight to an argument that could be undercut by the information that was withheld or by making other adverse inferences.” *Id.* Discovery closes on D+21, unless the Board otherwise orders. *Id.* at 23.

- **Waybill Access** – “Although this procedure would not necessarily require the use of data from the Board’s Waybill Sample, parties would be able to seek access to waybill data pursuant to the Board’s regulations at 49 C.F.R. § 1244.9.” *Id.* at 9. “Up to four years of Waybill Sample data would be available—specifically, the most recent four years that can be provided as of the date of the complaint.” *Id.* “A complainant would be required to submit its waybill data request . . . if it chooses to make such a request, on the same day it files its notice of intent to initiate a case[,]” and “[a] defendant would be required to submit its waybill data request . . . if it chooses to make such a request, no later than one day after it is served with the complaint.” *Id.*

- **Market Dominance Evidence** – “The Board proposes that the FORR procedure may only be used if the complainant also elects to use the streamlined market dominance approach proposed in Docket No. EP 756, *Market Dominance Streamlined Approach*” *Id.* The Board also proposes that following the close of discovery, the complainant shipper would present its market dominance evidence in its

opening presentation, which is due at D+35 unless the Board otherwise orders (*id.* at 23), and that the defendant carrier can address market dominance in its reply filing, which is due at D+45 unless the Board otherwise orders. *Id.* If the complainant shipper opts to seek an administrative law judge (“ALJ”) telephone hearing, which would occur at D+52 unless the Board otherwise orders (*id.*), the parties “would be permitted to present their market dominance positions at the hearing.” *Id.* at 10.¹

- **Final Offer Evidence** – At D+35, unless the Board otherwise orders (*id.* at 23), the “parties would simultaneously submit their . . . final offers, and each party would also submit an analysis addressing the reasonableness of the challenged rate and support for the rate in the party’s offer.” *Id.* at 10. “[T]he Board is not proposing to impose page limits at this time [on final offer evidence].” *Id.* at 10 n.20. The Board offers the following general guidance on the contents of a party’s final offer evidence:

The party submitting the offer could choose how to present and support its offer, including the methodology it uses. The Board’s criteria for determining rate reasonableness of and choosing between the offers would be based on its consideration of the rail transportation policy in 49 U.S.C. § 10101, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles.

. . . .

With its final offer, each party would be required to submit an analysis addressing the reasonableness of the challenged rate and support for the rate in the party’s offer, including an explanation of the methodology it used and how it complies with the criteria discussed above, as well as any necessary supporting workpapers.

¹ The Board also states “[f]ollowing discovery, parties would simultaneously submit their market dominance presentations” *Id.* This statement appears to contemplate (or at least allow) defendant carriers to present market dominance evidence in their opening presentation.

Id. at 11-12 (footnotes omitted). Unless the Board otherwise orders, ten days after submitting opening final offer evidence (D+45), “the parties would simultaneously submit replies to each other’s presentations.” *Id.* at 12. “On reply, parties would not be permitted to alter their . . . rate reasonableness analyses, or final offers but would have an opportunity to argue against the other side’s submission.” *Id.*

- **ALJ Hearing** – One week after the submission of replies (D+52), unless the Board otherwise orders (*id.* at 23), “at complainant’s option, the parties would participate in a telephone hearing before an ALJ.” *Id.* at 12. It appears that the Board is proposing that the ALJ hearing be limited to market dominance issues. *Id.* (“The purpose of this hearing would be to complete the record regarding market dominance . . .”).

- **Board Decision** – Within ninety days of the receipt of reply evidence (D+135), unless the Board otherwise directs (*id.* at 23), the Board will issue a final merits decision. The Board states that in making this decision:

If the Board finds that the complainant’s market dominance presentation and rate reasonableness analysis demonstrate that the defendant carrier has market dominance over the transportation to which the rate applies and that the challenged rate is unreasonable, the Board would then choose between the parties’ final offers. In making the rate reasonableness finding and choosing between the offers, the Board would take into account [the rail transportation policy in 49 U.S.C. § 10101, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles]. . . . [T]his would be an “either/or” selection, with no modifications by the Board.

Id. at 13 (footnote omitted). The Board also proposes that petitions for reconsideration of a final Board decision would be due “five days after service of the Board’s decision;”

replies to these petitions would be due “10 days after service of the Board’s decision; and the Board would issue its decision on reconsideration expeditiously after replies are filed.” *Id.*

- **Relief** – The Board makes the following proposals concerning rate relief:

- “If the Board finds that the defendant carrier has market dominance, finds the challenged rate unreasonable, and chooses the complainant’s offer (or the defendant’s offer, if it is below the challenged rate), it could order relief based on the difference between the challenged rate and the rate in that offer.” *Id.* at 14.

- “The proposed procedure would be subject to a two-year limit on rate prescriptions unless the parties agree to a different limit on relief.” *Id.*

- “The Board could also award relief in the form of reparations.” *Id.*

- “[T]he Board proposes to establish a relief cap of \$4 million, as indexed annually using the Producer Price Index” *Id.* at 16. This cap appears to be based on the Board’s estimate of the “cost to bring a Simplified-SAC case [and] would further the Board’s intention that . . . FORR be used in the smallest cases” *Id.*

- “The Board invites comment on the advisability of . . . a two-tiered relief procedure in which the top tier contains no limit on the size of the relief, in total, including both reparations and the two-year prescription period.” *Id.*²

² The Board also proposes “that the FORR procedure would not be available to challenge purely local movements of a Class II or Class III rail carrier” (*id.* at 16) and states that “parties may . . . update their comments or submit new comments” in *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2) (*id.* at 17).

II. GAMING CONCERNS

The Board indicates that relief in final offer cases will come in the form of a Board order that prescribes a maximum reasonable rate, and caps the overall relief over a two-year period based (roughly) on the following formula: $[(\text{tariff rates that either were paid or would have been paid in the absence of a rate prescription} - \text{maximum prescribed rates}) \times (\text{tons shipped})] = \text{rate relief, capped at \$4 million (indexed by the Producer Price Index)}$.

The problem with the Board's proposed rate relief cap is that it caps the amount of relief starting with an input that the carrier controls – the tariff rate. Simply stated, the higher the tariff rate, the faster the \$4 million cap is used up. Thus, defendant carriers can easily “game” the FORR process – and control the amount of a shipper's relief – simply by imposing high tariff rates.

For many years, the Board's SAC procedures were subject to a similar form of gaming. Under those procedures, if a shipper demonstrated it was entitled to rate relief – because the Stand-Alone Railroad (“SARR”) revenues exceeded SAC during the analysis period – the Board would use a “percent reduction” process, where all SARR traffic group members' rates (which included the complainant shipper's challenged tariff rates) were reduced by an equal percentage until SARR revenues equaled SAC during the analysis period.

Coal shippers complained that defendant carriers in SAC cases were gaming the percent reduction method by setting high initial tariff rates. The Board

eventually acknowledged this gaming problem in SAC cases; banned the continued use of percent reduction; and adopted a new SARR rate reduction method that eliminated this form of gaming. *See Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 9-15 (STB served Oct. 30, 2006) (“*Major Issues*”).

The Board has acknowledged similar concerns about carrier manipulation of its current smaller rate case procedures. *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 33 (STB served Sept 5, 2007) (“*Simplified Standards*”). In *Simplified Standards*, the Board stated it would address carrier gaming of the relief cap standards by focusing, on a case-by-case basis, on whether a carrier has “improperly sought” to impose a high tariff rate to manipulate a rate relief cap. *Id.*

In *Major Issues*, the Board considered, and wisely rejected, this “intent” approach, holding that “it is difficult, if not impossible, to divine the motives of the railroad in setting the challenged rate” (*id.* at 15) and that “[w]e firmly believe that we must remove the ‘gaming’ temptation or possibility to protect the integrity of the rate dispute resolution process.” *Id.* at 16.

Here, the Board can eliminate carrier gaming of its proposed FORR standards by removing the proposed rate relief cap. Without the cap, the prescribed maximum final offer rates would remain in effect for the duration of the prescription (including the reparations period).

III. FINAL OFFER SELECTION CONCERNS

The Board's proposed FORR procedure requires each party to "submit an analysis addressing the reasonableness of the challenged rate and support for the rate in the party's offer, including an explanation of the methodology it used" NPRM at 12 (footnote omitted). The proposal thus appears to contemplate and allow each party to support its proposed final offer using a different methodology.

As a hypothetical example, a complainant shipper might develop a methodology based on the defendant carrier's revenue adequacy status to support a final offer of, say, \$10 per ton, whereas the defendant carrier might support its final offer (or argument that the challenged rate is not unreasonable) using a methodology based on comparable rail rates that results in a final offer of \$15 per ton.

These different presentations may be akin to ships passing in the night, and the Board might find each method has merit (though they produce significantly different final offers). The Board must then decide which final offer to accept, since, as the Board explains in the NPRM, its proposed FORR procedure requires the Board to pick one of the two offers, "with no modifications [of an offer] by the Board." *Id.* at 13.

WCTL suggests that to address the parties' use of different rate methodologies, the Board should select the complainant shipper's methodology, so long as the Board finds that the methodology, and the final offer developed using that methodology, are reasonable. This approach is consistent with the approach the Board has adopted for use in large rate cases.

Under the Board's large rate case procedures, a complainant shipper may select at least one of several "constraints" on carrier pricing and prove it is entitled to relief under the selected constraint. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 534 n.35 (1985) (complainant shipper may select "which [constraint] approach to pursue"). The complainant shipper's choice is important because the maximum rate "may vary" based on the constraint selected. *Id.*³

Once a complainant shipper selects and proves its entitlement to relief under its selected constraint, a defendant carrier cannot raise a defense that it has selected another constraint; proven that the shipper is entitled to no (or lesser) relief under that constraint; and therefore demonstrated the shipper is entitled to no (or lesser) rate relief because the rate relief (or absence of relief) under the carrier's selected constraint trumps the rate relief under the constraint selected by the complainant shipper. *Id.*

Accepting the complainant shipper's methodology is also consistent with the governing burden of proof. In a maximum rate case, the complainant shipper bears the burden of proving that it is entitled to rate relief. *See* 49 U.S.C. § 10701(d)(1). It is only fair that the party with the burden of proof can select the maximum rate standard it chooses to utilize to prove its case, and that the Board accept this choice if it is reasonable and supported.

³ As a practical matter, to date, the complainant shipper's choice has been critical, since the only constraint complainant shippers have obtained any rate relief under in large rate cases is the SAC constraint.

CONCLUSION

WCTL appreciates the opportunity to present Comments in this proceeding.

Respectfully submitted,

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