

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. EP ~~775~~ 755
FINAL OFFER RATE REVIEW
AND

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DOCKET NO. EP 665 (SUB-NO. 2)
EXPANDING ACCESS TO RATE RELIEF
AND
DOCKET NO. EP 756
MARKET DOMINANCE STREAMLINED APPROACH

OPENING STATEMENT
OF
FARMERS UNION OF MINNESOTA
FARMERS UNION OF MONTANA
FARMERS UNION OF NORTH DAKOTA
FARMERS UNION OF SOUTH DAKOTA
FARMERS UNION OF WISCONSIN

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I. INTRODUCTION

Farmers Union of Minnesota, Farmers Union of Montana, Farmers Union of North Dakota, Farmers Union of South Dakota, and Farmers Union of Wisconsin shipper interests identified on the cover (collectively “Farmers Union, et al.”) welcome the opportunity to comment on the Board’s proposed methodology for a new procedure for challenging the reasonableness of railroad rates in smaller cases brought before the STB on rates imposed by market dominant railroads on captive rail customers. We are addressing both the Final Offer Rate Review (FORR) in Ex Parte No. 755 as well as brief comments in Ex Parte 756, Market Dominance Streamline Approach. Both of these proceedings are being heard on a parallel track and the Market Dominance Streamline Approach rules will affect the requirements in Final Offer Rate Review rules.

The Farmers Union organizations in the United States represent over 200,000 family farms and collectively the Farmers Union of MN, MT, ND, SD and WI represent over 15,000 family farms located in the northern Great Plains. Farmers Union has for over 100 years promoted the interests of family farm producers and today in the northern plains represents growers of a diverse crop landscape of Corn, Soybeans, Wheat, Barley, Peas, Lentils and specialty (called pulse) crops as well as many dairy, and ranching farm operations.

The Farmers Union Groups together with the Alliance for Rail Competition et al, also filed comments in EP 665 (Sub-No. 1), Rail Transportation of Grain, Rate Regulation Review, and those comments are incorporated herein by reference. Farmers Union has also participated with the Alliance for Rail

Competition (ARC) in many other recent STB proceedings involving captive rail customer issues.

Much of what the STB proposes in its Proposed Rulemaking in Final Offer Rate Review, herein is welcome news to the small agricultural shipper on the nation's railroads. The Farmers Union and many agricultural shipper groups have been talking about Final Offer procedures (including Final Offer Arbitration as practiced in Canadian rail rate negotiation) with this Board and Congress for many years. The Farmers Union congratulate the Board for adopting these proposed rules and providing a groundbreaking step forward in finally establishing a simplified, expedited method of determining the reasonableness of challenged rail rates for small shippers. However, the Board's proposals may still fall short of meeting the limited goal of providing an approach that will serve useful to small shippers for resolving the smallest disputes over captive rail rates. Farmers Union will provide below some suggestions for improving the Board's new approach.

I. BACKGROUND

Part of the review over the last 35 years, has been covered before, but since the Board has several new members and the Farmers Union has new participants it is appropriate that a brief discussion of historical review since the passage of the Staggers Rail Act of 1980 is prudent to provide context for the agricultural uniqueness of rail transportation in the marketing of their farm production.

The Staggers Rail Act of 1980 fundamentally changed railroad regulation, and those years, since its passage, have been good years for the railroad industry. Rail lines have been abandoned or spun off into short lines, further efficiency gains have resulted from mergers and consolidations among Class I's, and the major

railroads' financial strength has grown steadily, to the point where revenue adequacy has arguably been achieved or exceeded for BNSF, UP, and other Class I railroads.

These benefits for rail carriers, some of which have also benefited rail customers, have not been cost-free. The Staggers Act's promise that rail-to-rail competition would serve to minimize the need for regulation has been undermined by massive consolidations that have led today to a situation where 95% of rail freight is moving via the four largest Class I railroads, with BNSF and UP dominating much of the West, and NS and CSX dominating much of the East.

In Montana, BNSF handles over 90% of rail freight, making Montana the most captive large State in the US. Large areas of North Dakota and South Dakota have service available only from a single rail line. Indeed, areas of MN and WI have extensive captive areas for their movement of agricultural products.

These consolidations was not accompanied by close regulatory scrutiny. On the contrary, major railroads were allowed to use paper and other non-steel barriers to limit competition from short line railroads further isolating agricultural shippers from rail-to-rail competition. Class I consolidation proceedings preserved too little competition (and did nothing to enhance competition), and the Interstate Commerce Commission (ICC) effectively neutralized rail-to-rail competition under 49 USC 11102 in the Midtec decision and others like it.¹

The other side of the Staggers Act coin was the requirement that, where effective competition is absent, a rail rate "must be reasonable", 49 USC 107101(d)(3). As the steady decline of rail competition increased the amount of

¹ Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C. 2d 171 (1986), aff'd, Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

captive traffic, the ICC and later, the STB might have been expected to increase the effectiveness of unreasonable rate regulation. However, for over 35 years, the stand-alone cost test of Constrained Market Pricing (CMP), adopted in Coal Rate Guidelines², has been the only test of rail rate reasonableness that has actually produced significant relief for some large movement captive shippers.

Though the Constrained Market Pricing approach adopted in 1985 included “constraints” based on revenue adequacy, management inefficiency, and phasing, in addition to Stand Alone Costing (SAC), only SAC has actually constrained any number of rail rates. And while the Board has developed alternatives to SAC, they have always been too expensive to litigate by smaller shippers, too little, too late and do not yield relief/results comparable to full SAC. Simplified SAC (SSAC) and Three-Benchmark were not even available until 1996³, sixteen years after Staggers and nine years after SAC, periods during which captive non-coal captive shippers had essentially no way of obtaining relief from excessive rail rates produced by their increasing lack of access to competitive rate.

As the Board acknowledged in its August 31, 2016 Advance Notice of Proposed Rulemaking instituting this proceeding, another decade had passed with no decisions under SSAC or Three-Benchmark, and the Board belatedly realized that it had fallen short of complying with the statutory mandate to provide a methodology for “those cases in which a full stand-alone cost presentation is too costly, given the value of the case.”

² Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985). aff’d, Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

³ Rate Guidelines, Non-Coal Proceedings, 1 S.T.B. 1004 (1996). That this decision was not delayed even longer is attributable to the deadline Congress established in the ICC Termination Act of 1995, in 49 USC 10701(d)(3).

Today, there are indications that the Board appears ready to explore steps that could address the concerns of non-coal captive shippers (including agricultural shippers) as to rail rates, and the concerns of all shippers as to rail competition.⁴ We congratulate the direction the Board is now appearing to take to provide real relief for captive shippers – almost 40 years after the passage of the Staggers Rail Act of 1980. Significant improvements are possible without preventing the railroad industry’s progress toward the financial health that was also a goal of the Staggers Rail Act. However, more needs to be done. Final Offer Rate procedures is a very positive step for making available for small shippers and small shipments, potential regulatory oversight and review.

On the rail rate front, the Board has and is continuing to consider ways of streamlining SAC cases in EP 733, Expediting Rate Cases. It also continues to look for ways to expand access, EP 665 (Sub 2) – Expanding Access to Rate Relief – the instant proceeding.

As stated in previous filings by the agricultural folks including the Alliance for Rail Competition and Farmers Union, a small amount of relief is better than no relief, which is what we have now. However, the Board’s proposals need continuing improvements if it is to provide real regulatory recourse.

What the Board does not want to do is with this proceeding embrace a methodology that looks good on paper but has components that preclude small

⁴ Though the Board’s proposals in EP 711 (Sub-No. 1), Reciprocal Switching, should be implemented and strengthened, small agricultural shippers, will in many instances be unable to take advantage of new competitive remedies, due to the absence of nearby interchanges. We also note the railroad industry’s outpouring of opposition. Regulatory remedies, necessary in any case, are even more important when competitive remedies are unavailable.

shippers, (including agricultural shippers) from being able to access the potential remedy.

II. GRAIN CUSTOMERS HAVE SPECIAL CONCERNS

Smaller captive rail customers, or customers with smaller rail rate disputes, including producers and shippers of grain and feed and other agricultural commodities, need regulatory recourse when negotiations with market dominant railroads produce no relief. In the event the carrier just says ‘no’ to negotiation of a revised rate structure and the small shipper is unable to access a defined remedy by the Board – given the costs associated with the remedy versus the potential economic gain that can be garnered through the procedure. Any captive rail customer who is put at a competitive disadvantage by excessive rail rates may not be able to survive without having access to a recourse, and such customers are especially vulnerable to abuses when smaller amounts are at issue, even though all captive customers have a legal right to protection against unreasonable rail rates. This is a point that has been made repeatedly by agricultural shippers for several decades.

As we have talked before, railroads often argue that they have no interest in losing any business, but the fact is that larger volumes of freight matter more to railroads than smaller volumes.⁵ Moreover, railroads may welcome the

⁵ In Reply Comments filed August 25, 2014 in EP 665 (Sub-No. 1), BNSF said that “Approximately 85%-90% of our wheat, corn, and soybean shipments have been made by our top 10 customers” (Reply V.S. of John H. Miller at 2), and UP said “For the period July 2013 through June 2014, UP’s top 20 grain customers accounted for more than 82% of our grain revenues” (Reply Comments at 7).

disappearance of smaller accounts if they think they will retain some or all of the same freight volumes in captive areas. For these reasons Farmers Union, understand the Board's decision to cover all small captive customer rate disputes, and not just grain rate disputes, in this proceeding. That said, the Board should recognize some special vulnerabilities of producers and shippers of agricultural commodities.

In the first place, it is well-recognized that rail rates on grain have risen significantly for many years. And while railroads have argued in the past that rising wheat, corn or soy bean prices justify rate increases (as if railroads are entitled to a percentage share of farmers' incomes), the fact is that rail rates do not go down when wheat, corn or soybean prices fall as they have in recent years.

These facts are no new. In comments filed December 22, 2008 in Ex Parte No. 280, Study of Competition in the Freight Rail Industry, agricultural shippers cited Report GAO-07-94, Freight Railroads, for GAO's finding that the routes from Billings, MT and Minot, ND to the Pacific Northwest "had the highest percentage of traffic traveling at rates over 300% R/VC of all routes examined", and that "increases in R/VC from 1985 through 2004 were driven more by increases in revenue than by changes in variable cost." GAO Report at 34-38.

For review, the Farmers Union (together with other agricultural shippers) comments also cited the November 2008 Study of Competition in the Railroad Industry and Analysis of Proposals that Might Enhance Competition, by Christensen Associates, for the finding that "rates have increased substantially in the last few years, to the point of exceeding 'revenue sufficiency'." The Christensen Report also stated "Our results suggest that grain shippers are not unjustified in viewing themselves as paying relatively high markups."

More recently, the Transportation Research Board found four years ago, in its June 10, 2015 Special Report 318, Modernizing Freight Rail Regulation, at page 41, that in the period 2002-2013, rail rates on grain and oilseeds went up 80% for smaller shipments (less than 50 cars), and 70% for larger volumes, more than for any other commodity except coal. See also the Report at page 40, finding that by 2013, rail rates for smaller volumes of grain were some 35% higher than for larger volumes of 50% or more. Regulatory remedies at the Board for too many of these customers are essentially nonexistent.

Another distinctive feature of grain shipments is that rail rates from grain elevators in Montana, North Dakota, and parts of South Dakota as well as other States to destinations in the Pacific Northwest and other destinations are billed to and paid directly by origin grain elevators, but those amounts are deducted from what the elevators pay the grain producers. Producers and farmers thus bear the rail rates even though the elevators physically pay railroad freight bills. Another way to put this is that farmers producers bear the cost of grain transportation to their markets but do not physically “pay” the railroads. And unlike most other industries, the farm producer cannot pass this cost of transportation onto to anyone else. This does not make the farm producers ‘victims’ but it does make them ‘unique’ in the railroad marketplace.

This fact raises issues of standing, and of representative standing, because of the possibility that a State or State Attorney General or an Association of farm producers might challenge rates on behalf of captive grain producers. Notably, 49 USC 11701(b) provides that “the Board may not dismiss a complaint made against a rail carrier ... because of the absence of direct damage to the complainant.” In its August 31, 2016 decision in this proceeding, the Board said (at n.3) that it would

address issues like standing and agricultural rate transparency in a subsequent decision.

III. RATE CAPS AND LIMITS UNDER THE PROPOSED RULES

Farmers Union agree that the FORR relief caps should be no less than the caps previously adopted for Three-Benchmark cases. Just because rules are adopted by the Board that are less complicated, there is little justification that the resulting rate prescription should provide less relief from captive rates.

IV. LIMITING FORR TO LOCAL RATES ON CLASS II AND III DOES NOT ADDRESS THE CARRIAGE THAT ORIGINATE OR TERMINATE ON CLASS II AND III RAILROADS

In many cases in the Northern Plains, the Class I railroad that the Class II and III railroads interchange with set the interstate rail rates on the joint line movements. The Class II and III are not allowed to set interstate rates. Therefore, restricting the challenge to local rates only on Class II and III railroads, simply does not address a potential dominance by the Class I on the small and agricultural movements that originate or terminate on Class II and III railroads on the Northern Plains.

V. MARKET DOMINANCE REQUIREMENTS – under Ex Parte No. 756 – Proposed Rules

The proposed rules which are integrated into FORR and which are designed to reduce the burden on parties involved in FORR proceeding proposed to establish a prima facie showing of market dominance.

- 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).

While these proposed rules are being simultaneously developed in Ex Parte No. 756 – Market Dominance Streamlined Rules under a Notice of Proposed Rule Making (NPR) – Opening Comments due today, November 12, 2019, if the Board decides to adopt after review, more complicated Proposed rule components, Farmers Union and small shippers would, in all likelihood, find any increase in burden to be onerous.

R/VC of 180% or Greater needs to be mandated to be calculated under URCS Phase III to provide a quick and most importantly simple process to establish the Cost prima facie factor. Using an alternative standard will not serve to simplify the cases for small shippers or small shipments.

The movement would exceed 500 highway miles between origin and destination requirement may prove useful in establishing relative isolation

VI. CONCLUSION

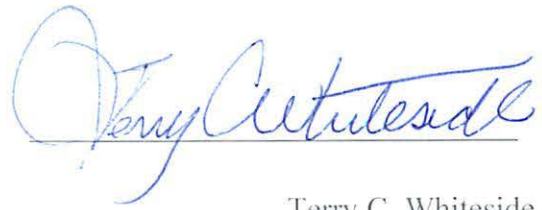
Farmers Union sees major small shipper benefits emanating from the Board's attempt to develop both a Final Offer Rate Review coupled with a simplified Market Dominance procedures. This movement by the Board is most welcome. It has been established in Canadian FO procedures over the years that the process of invoking or focus on a Final Offer procedure by a shipper in most cases results in resolution between the carrier and the shipper not continued unresolved dispute. This is a preferred outcome and the facilitation of this resolution is a result of the shipper having access to a simple FORR process.

This relief may be significant for some small ag producers (depending on how the Board elects to deal with standing and other issues), and others with the smallest rate disputes. We urge the Board not to stop with this procedure and the simplified Market Dominance rules but to continue to seek and find ways to address the small shipment and farm based agricultural shipment issues.

There is need for more reform, to address the needs of larger rate disputes. Moreover, the Board must shift its focus to captive shipper needs where railroads are exceeding adequate revenue levels. It is time that the Board address the issue of captive shippers shouldering more than their fair share of the railroad revenues. This is the reality in the West, where Farmers Union et al. operate. We therefore urge the Board to implement the changes in its current proposal recommended in these comments, and to address the continuing concerns of captive ag customers whose needs continue.

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Respectfully submitted,



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