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Before the

SURFACE TRANSPORTATION BOARD

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Docket No. EP 761

HEARING ON REVENUE ADEQUACY

Docket No. EP 722

RAILROAD REVENUE ADEQUACY



WRITTEN TESTIMONY

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Samuel J. Nasca,^{1/} for and on behalf of SMART-Transportation Division-New York State Legislative Board SMART/TD-NY), pursuant to the Board's Notice served September 12, 2019, 84 Fed. Reg. 48982 (Sept. 17, 2019), in the captioned proceedings, submits this Written Testimony.

Interest of Railroad Employees

These proceedings are of concern to Samuel J. Nasca, as a representative of rail employees, members of SMART/TD, among various locals situated in New York State. The SMART/TD-NY has been an active participant in Ex Parte 722, by written comments, and at the subsequent oral hearing.^{2/}

^{1/} New York State Legislative Director for SMART-Transportation Division, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} Reply Comments, Nov. 4, 2014, (ID236974); Public Hearing, July 23, 2015, Tr. 282-86; For reference to Ex Parte 658, 25th Anniversary of the Staggers Act, see: ID214903 (Oct. 12, 2005).

Rail employees have been actively engaged in STB rail rate proceedings. Examples where employees have engaged directly in rail rate proceedings, include surcharges filed as a substitute to expedite line discontinuance/abandonments targeted to eliminate rail service to shippers and receivers, and statutory protection for employees. A leading published case involved the Cherokee-Sioux Falls line. City of Cherokee v. ICC, 641 F.2d 1220 (8th Cir. 1981), cert. den. 454 U.S. 892; City of Cherokee v. ICC, 671 F.2d 1080 (8th Cir. 1982). See also: Mississippi Public Service Commission v. ICC, 662 F.2d 314 (5th Cir. 1981); People of State of ILL v. ICC, (7th Cir. 1981).

1. Rate Reform Task Force. A group of STB employees, on April 25, 2019, issued a report containing recommendations for possible changes to the rate review methodologies and processes used by the STB. (RRTF Report).^{3/} The Board's September 12, 2019 notice in Ex Parte 761, instituting examination of the RRTF Report, is directed to recommendations regarding "revenue adequacy"(RRTF, 12-13, 32-42), the notice citing revenue adequacy in the context of determining the reasonableness of rates under 49 USC §10701(d)(2), and annually for the Board's requirement of §10704(a)(3), and long-term under the Board's Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 536 (1985). (Notice, 9/12/19, 2). 84 Fed. Reg. at 48982n.4 .

The matter of "revenue adequacy" cannot be determined apart from other associated segments of the RRTF Report, undergoing review in other ex parte proceedings, instituted virtually simultaneously on September 12, 2019, with the instant proceeding. Ex Parte 755, Final Offer Rate Review; Ex Parte 665 (Sub-No. 2); Expanding Access to Rate Relief; Ex Parte 756, Market Dominance Streamlined Approach.

^{3/} The RRTF Report was published April 29, 2019 on the STB's website, but not elsewhere.

2. Failure of Experience & Validation. The STB staff that authored the RRTF Report, are not identified in the RRTF Report, or elsewhere to our knowledge. Moreover, the RRTF Report claims to have engaged in considerable “reach out” through informal meetings with representatives of shippers, carriers, academics, practitioners, and other interested parties, including dozens of groups in Washington, DC. These STB employees are not identified, and elsewhere, their interviewed correspondents likewise are unidentified. (RRTF Report 8-11). In addition, to the Washington DC gatherings, STB employees in the RRTF group traveled to attend conferences in Chicago, IL, Westchester, NY, Seattle, WA, and Dallas, TX, said to conduct frank, off-the-record conversations. (RRTF Report 1).^{4/} These traveling STB employees and their informants are not identified. The RRTF does not mention any written memorandum. Presumably, every contact was oral and off-the-record. However, as with the nameless STB personnel who are authors of the Report, we emphasize there is not any identification as to the STB staff employees, or their informants, attending the “dozens” of private conferences and meetings in Washington DC, or the continued “off-the-record” gatherings outside Washington DC. at various locations.^{5/} Long-time STB practitioners have posed the matter of limited experience for STB employees, as have personnel in the railroad industry have implied.^{6/}

^{4/} See also: STB Press Release Nos. 19-9 & 19-10 (Sept. 12, 2019).

^{5/} There is no mention, or even suggestion, that railroad employees, or their representatives, were invited or permitted to attend the various information gatherings.

^{6/} See: Ex Parte 724 (Sub-No. 4), United States Rail Service Issues-Performance Data Reporting, McFarland, T.F. & MacDougall, G.P., Response to Ex Parte Meeting Reports, at pp. 4-6 & App. A&B (Dec. 23, 2015).(ID239782); Does STB Deserve Court Deference?-There is Suspicion As To Just How Expert the STB Really Is. (Railway Age, at 15 (Wilner, F.N.)(Aug. 2019).

To some extent, perhaps the inexperience staff situation may be owing to various changes in the background for presidential selection and confirmation of Members to the agency, formerly termed "Commissioners." The former practice of reduced dependence upon Hill staff for I.C.C. membership service might be said to stem from 1981. ^{7/}If so, this earlier change clearly now has been reversed. ^{8/}In any event, the RRTF Report is a staff document, with findings and recommendations not properly backed up, source-identified, or endorsed by the current agency Members. ^{9/} The RRTF Report is absent the usual required documentary background and other source material citations for full agency reports and recommendations. Although, at the ICC, "a vast amount of the real work must necessarily be done by the staff...it is a difficult problem to give the individual members proper recognition...It is very important that this problem be solved, but I am frank to say that its full solution has not yet been reached". ^{10/}

^{7/} See: Pound, Edward T., New York Times, Dec. 21, 1981) (William K. Ris nomination).

^{8/} The biographies of the ICC Commissioners, and the ICC's Secretaries, Thomas M. Cooley(1887) thru WWII, were published by the ICC practitioners. Miller, C.A., The Lives of the Interstate Commerce Commissioners and the Commission's Secretaries.(AICCP, June 1946, 178pp.). See also: Wilner, Frank N., Comes Now the Interstate Commerce Practitioner. (ATP, June 1993, 267pp.).

^{9/} The new STB Members appear to have much to blame for the informal staff process. EP 722, Railroad Revenue Adequacy, March 28, 2018.

^{10/} Eastman, Joseph B., A Primer on Administrative Tribunals. See: Wilson, G. Lloyd, Selected Papers and Addresses of Joseph B. Eastman 375, 377 (Simmons-Boardman, 1948).

It became understood that the three STB Members held four private meetings in May, 2019 (May 1, 3, 7, and 10), with a group of some 14 staff personnel, to discuss certain recommendations of the RRTF Report, as summarized by its General Counsel. Following joint letter from five U.S. Senators, dated May 23, 2019, and joint letter from two U.S. Senators, dated July 25, 2019, the STB Members jointly responded by letter, dated August 8, 2019, that the agency was actively considering the RRTF Report, and expects to initiate formal action through notice and comment rulemaking. These above correspondence documents, thus far, are not part of the public docket in this proceeding, but nevertheless have become available on the agency website.

3. Legislative Background. The RRTF Report seriously misstates the background for railroad freight rate regulation. A proper understanding of rate regulation, and “revenue adequacy,” did not begin with the year 1970. (RRTF Report 2-3).

Railroad rates (and motor carrier rates) historically, and until recent years, were made primarily through the conference system, well documented in many studies, books, and court decisions. Leading source materials include: Wiprud, Arne C., Justice in Transportation (Ziff-Davis, 1945); Shott, John G, The Railroad Monopoly (Public Affairs Inst., 1950); Berge, Wendell, Economic Freedom for the West (Univ.of Neb. Press, 1946); Drayton, Charles D., Transportation Under Two Masters (Nat’l Law Book, 1946) ; A major function of the ICC rate work was to serve as an appeal forum from decisions or actions, or non-actions decided by carrier participants to the conference, often termed a “rate bureau. “

The major event in 1970, the year incorrectly put forth as the beginning of “modern railroad rate regulation,” the RRTF says there were over 70 Class I (larger) railroads, in need of revitalization, seeking relief under the 4-R Act (1976) and Staggers Act (1980). (RRTF Report

2). There currently are 7 Class I railroads.^{11/} The RRTF Report is misleading. The agency's carrier classification has been challenged by many, including rail employees. Montana Rail Link, Inc. and Wisconsin Central, Ltd., 8 I.C.C.2d 625, 627-39 (1992). For a railroad to be a Class I railroad, its threshold annual revenue was increased from \$50 million(1978 dollars) to \$250 million (1991 dollars), and an even higher \$490 million for a 2018 reporting year,^{12/} The reduction in the number of Class I railroads is not only explained by increasing the revenue level for Class I classification, but is also due to greater degree of carrier unifications in the railroad industry. Finally, contrary to RRTF Report impression of carrier decline, railroad traffic has

^{11/} EP 552(Sub-No. 23), Railroad Revenue Adequacy-2018 Determination, at App. A&B, dated Sept. 4, 2019 (served Sept. 5, 2019) . RRTF Report, 2,11.

^{12/} EP 748, Indexing the Annual Operating Revenue of Railroads, dated June 8, 2019 (served June 14, 2019). 84 Fed. Reg. 27829. (June 14, 2019).

been on the increase since 1970. There are now 603 railroads in the U.S.^{13/} The real 1970 major event for ICC practitioners, and the rail industry, was the Penn Central bankruptcy, followed by seven connecting railroads. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).^{14/}

4. Revenue Adequacy. There is a long tradition in the evaluation of reasonableness for the individual railroad freight rate, to accord little or no attention to revenue adequacy.

It is suggested that 49 USC § 10701(d)(2) ratemaking, differs from the “revenue level set forth in §10704(a)(2). It would seem the latter is primarily concerned with the overall rate level, as in the numerous ex parte rate investigations during inflationary or recessionary economic times. This commentator recognizes the STB and its predecessor ICC may appear to have interpreted the recent statutory language differently. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 534-37 (1985). SMART/TD-NY, as part of its presentation in EP 722, and elsewhere, has drawn attention to the former ICC’s expert, Shinn, Glen L., Reasonable Freight Rates, 94-97. (Traffic Service Corp., 1952), for the rule that revenue adequacy is not a reliable measure to the reasonableness of rates on individual commodities. Exception to this general rule has arisen when a commodity moves in considerable volume, such as coal, where the rate in question may constitute a substantial portion of the total traffic available to the rail carriers involved, supra at 95. The two statutes recognize that regulatory “policy” is involved, §10701(d)(2), along with the Board’s duty to “maintain and revise” the “standards and procedures.” §10704(a)(2).

^{13/} Charles L. Banks. Financial Sustainability: How Much is Enough?, presentation at ATLTP Transportation Forum XVI, Nov. 8, 2019. Washington DC. U.S. rail revenue ton-miles rose from 764,809 million in 1970, to 1,674,784 million in 2017. (AAR, Railroad Facts, 2018).

^{14/} See: B.&O.R.Co. v. United States, 386 U.S. 372 (1967); Penn-Central Merger Cases, 389 U.S. 486 (1968).

Rail employees have a keen interest in rail stability. Differing rates can be divisive for rail employees. The classic example of different rail rates for the same commodity from the same or similar area, can be found in Mansfield, Harvey C., The Lake Cargo Coal Rate Controversy (Columbia Univ. Press, 1932).

5. Faulty Data. The RRTF Report, throughout, supports its use of R/VC comparisons to measure the ultimate reasonableness of rates. This is faulty. Freight rates are not necessarily based on costs, particularly not on the STB staff cost allocation formulae. Reasonable freight rates are evaluated upon actual rate comparisons. Shinn, Reasonable Freight Rates, supra, at Chapt. 10-11.

The STB staff's RRTF Report is particularly unfortunate and inaccurate in measuring its rail rate indices by the ton-mile. (RRTF Report, App. A, App. B). The rate data is bogus. Railroad employee organizations, and others, have considered this ton-mile rate data mere propaganda.. The alternative suggestion is that the STB, and predecessor ICC, use the BLS rail rate indicator. The STB now for a number of years has determined its annual railroad classification based on the annual average railroad freight price index developed by the Bureau of Labor Statistics, supra, 7n.12, Ex Parte 748. The STB should follow the same path for its other reports.

Respectfully submitted,


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