

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

300258

Docket No. EP 755

FINAL OFFER RATE REVIEW

ENTERED
Office of Proceedings
January 10, 2020
Part of
Public Record

Docket No. EP 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE REVIEW

REPLY COMMENTS

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036
Attorney for Samuel J. Nasca

January 10, 2020



Before the
SURFACE TRANSPORTATION BOARD

Docket No. EP 755
FINAL OFFER RATE REVIEW

Docket No. EP 665 (Sub-No. 2)
EXPANDING ACCESS TO RATE REVIEW

REPLY COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), submits these reply comments in accordance with the Board's Notice of Propose Rulemaking (NPRM) , dated September 11, 2019 (served Sept. 12, 2019). 84 Fed. Reg. 48872 (Sept. 17, 2019). SMART/TD-NY filed comments on November 12, 2019, in strong opposition to the proposed rule. The final offer rate review, embracing operation of such a system in Canada, was an important subject at the intervening Transportation Forum XVI, held November 8, 2019, in Washington,DC., sponsored by the Association of

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

Transportation Law Professionals (ATLP).

At the November conference, through video exchange, there was considerable participation by Canadian personnel familiar with the process. Our assessment of the conference indicated substantial disfavor from the U.S. for any adoption or modification of the Canadian system of railroad rate dispute resolution for application in the U.S. The STB should not approve the proposed rule.^{2/}

1. The NPRM stems from Rate Reform Task Force (RRTF) report, issued April 25, 2019, which said the RRTF derived its conclusion from unidentified oral conversations conducted by unidentified STB staff members, with various unidentified shipper, carriers, academics, practitioners, and other interested parties in Washington, and throughout the nation. SMART/TD-NY had occasion to review the RRTF report, and submitted comments thereupon in connection with revenue adequacy in individual rate disputes. Ex Parte 761, Hearing on Revenue Adequacy; Ex Parte 722, Railroad Revenue Adequacy. SMART/TD-NY is highly critical of the RRTF report, and considers it to be unsound. Clearly, STB staff is not properly tuned to railroad rate resolution; indeed, with respect to railroad labor issues, the Board's predecessor in several decisions stated the agency was not sufficiently composed to deal with such matters.

2. The Board should not adopt the NPRM's proposed suggestion for final offer rate review. In the past, the agency and its predecessor looked to its practitioners, to represent small shippers in small rate cases, a course followed by other agencies, such as the FCC, FERC, FMC, CAB, among others. Indeed, it was the ICC practitioners who "saved" the agency from executive

^{2/} It is extremely helpful to note that the responses in this NPRM proceeding, from the two major Canadian rail carriers, both strongly support rejection of the final offer rate review for application in the U.S.

branch takeover in 1929. The ICC practitioners group was for many years located within the agency's headquarters building, and assisted the agency, subject to strict ethical rules.

3. The RRTF process for rate resolution appears hopelessly complicated. Once market dominance is resolved, the rate comparisons should be with actual rates, not with STB cost section determination of comparative R/VC values for other rate comparisons. The long-standing ICC rate reasonableness test has been with rate comparison. See: Shinn, Glenn L, Reasonable Freight Rates (Traffic. Service Corp., 1952). ^{3/}

4. The final offer rate review process can prove dangerous to the national rate structure for a major commodity. The final offer process gives the parties a result which may force non-parties to make adjustments elsewhere to remain competitive, absent regulatory review. Rail rates exist in a mass market, frequently with multiple sources of supply and demand. The final offer rate review could result in "gaming" and "manipulation" outside effective control.

5. Ex Parte 665 (Sub-No. 2). SMART/TD-NY has not participated in the Ex Parte 665 proceedings. However, it wishes to do so now, as to adopt and renew, as its own, the contention made by an affiliate of SMART/TD, concerning the standing of rail labor to complain of certain

^{3/} The author served for many years as attorney-examiner with the former ICC. See also: Shinn, Glenn L: Freight Rate Application (Simmons-Boardman, 1948); Ibid: Routing and Misrouting of Freight (Simmons-Boardman, 1949).

grain rates, which is understood to have carried over into Ex Parte 665 (Sub-No. 2). ^{4/} The individual was Larry R. Miller, Gen. Chmn., GO-386. In any rule revision, labor standing should be acknowledged.

Respectfully submitted,



Gordon P. MacDougall
1025 Connecticut Ave., N.W.
Washington DC 20036
Attorney for Samuel J. Nasca

January 10, 2020

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage prepaid.



Washington DC

Gordon P. MacDougall

^{4/} Ex Parte 665 (Sub-I), ID 242515 (Jan. 29, 2017), den. ID45878 (June 30, 2017),