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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company offers these reply comments in response to the opening comments filed in this proceeding.

After reviewing the opening comments of other parties, Union Pacific remains willing to accept a presumption-based approach to market dominance in cases under the Three Benchmark and Simplified Stand-Alone Cost methodologies. However, we remain skeptical such an approach will prove beneficial. The opening comments confirmed our prediction that many shippers would misunderstand the risks of using the proposed approach. Many shippers and their trade associations have urged the Board to *lower* the hurdles involved in making a prima facie showing. This would increase the probability that railroads could offer evidence showing effective competition on reply, which shippers would be precluded from rebutting.¹

For example, the Institute of Scrap Recycling Industries (“ISRI”) advocates reducing the mileage threshold for trucking competition from 500 to 200 miles, even though its own survey showed its members consider trucking to be competitive with rail for distances exceeding 200 miles, and its own (limited) data show meaningful use of trucks for shipments exceeding 500

¹ See Union Pacific Comments at 6–7.

miles.² Other shippers and shipper trade associations urged similar reductions in the trucking mileage threshold, failing to recognize that a lower threshold will just produce more disputes.³ Other commenters advocated eliminating build-outs altogether as a factor to be addressed in the prima facie showing, apparently failing to understand that complainants still would be unable to establish market dominance if confronted with railroad evidence showing a practical build-out.⁴

As Union Pacific explained in our opening comments, for a streamlined approach to be useful, the Board should set the prima facie hurdles high enough to identify situations in which railroads clearly have market dominance.⁵ Otherwise, the new approach will not significantly change the nature of market dominance disputes – except to the extent that *shippers* would be precluded from offering evidence they would need to rebut evidence railroads submit on reply.⁶ Also, as Union Pacific and a few others observed, the Board could also make the proposed streamlined approach more useful and more accurate in quickly identifying where railroads

² See Comments of ISRI at 5.

³ See Opening Comments of the American Chemistry Council *et al.* (“Coalition Associations Comments”) at 12–14; Comments of American Fuel & Petrochemical Manufacturers (“AFPM Comments”) at 5; Comments of the Freight Rail Consumer Alliance at 2; Indorama Ventures Comments at 14; Comments of the National Coal Transportation Association at 3; Opening Comments of The National Grain and Feed Association at 3–4; Comments of the Portland Cement Association at 2–3.

⁴ See, e.g., AFPM Comments at 8–9; Indorama Ventures Comments at 11; Millercoors Comments at 13; Steel Manufacturers Association Comments at 11.

⁵ See Union Pacific Comments at 12.

⁶ See *Market Dominance Streamlined Approach*, EP 756 (STB served Sept. 12, 2019) (“NPRM”) at 9 (“Cases that require a review of the comparative pricing between truck and rail raise many complicated issues that do not appear to be suitable for a streamlined market dominance approach.”); *id.* at 10 (“The streamlined market dominance option would not be available when build-out alternatives are practical . . .”).

actually have market dominance by adopting screens that address geographic and product competition.⁷

Shipper comments also included proposals that would not be a logical outgrowth of the Board's Notice of Proposed Rulemaking. Most notably, the Coalition Associations proposed an "a la carte" streamlined approach⁸ and an "expedited bifurcated" process that would be available in all cases.⁹ The "a la carte" approach seems no different than what happens today in practice: shippers and railroads focus their evidence on realistic competitive alternatives. The "expedited bifurcated" approach seems designed only to provide complainants with substantial procedural advantages, because they would have an unlimited amount of time to prepare their market dominance evidence before filing complaints, while railroads would be forced to reply under a highly expedited schedule with tight page limits. Neither proposal merits further exploration.

The Coalition Associations also offer proposals for making certain *prima facie* factors "more objective."¹⁰ However, in several areas, the Coalition Associations appear to be doing more than proposing clarifications. They appear to be urging the Board to adopt presumptions for resolving factual disputes about the existence of effective competitive alternatives. For example, they say a "[a] build-out distance longer than 2 miles should be presumptively infeasible," "[a] build-out route that requires the acquisition or condemnation of developed property in residential, industrial, or commercial areas, even if less than 2 miles, should be

⁷ See Union Pacific Comments at 12; Comments of the Association of American Railroads at 10; Opening Comments of BNSF Railway Company at 11-13.

⁸ Coalition Associations Comments at 7-8.

⁹ *Id.* at 20-23.

¹⁰ *Id.* at 8-20. Union Pacific agrees with the idea of eliminating ambiguities. For example, the Board should specify whether the 10% trucking screen is measured in movements or volume.

presumptively infeasible,” and “[a] build-out route that traverses waters of the United States . . . should be presumptively infeasible even if less than 2 miles.”¹¹ Union Pacific would not object to requiring a complainant to plead one of the three specific standards to satisfy the build-out factor, rather than simply “that it has no practical build-out option.”¹² However, the mere satisfaction of a prima facie factor should not itself be sufficient where a railroad offers actual evidence that a competitive alternative provides effective competition. If the railroad does not refute the shipper’s initial presentation but offers other evidence of effective competition, and the shipper does not convincingly rebut the evidence by doing more than point to the prima facie factors, the railroad prevails on the market dominance issue. A Board decision transforming the Board’s or the Coalition Associations’ proposed prima facie factors into evidentiary presumptions would not be a logical outgrowth of the Board’s Notice.

Respectfully submitted,

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¹¹ *Id.* at 17–19.

¹² NPRM at 10.