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BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. EP 755
FINAL OFFER RATE REVIEW
AND
DOCKET NO. EP 665 (SUB-NO. 2)
EXPANDING ACCESS TO RATE RELIEF
AND
DOCKET NO. EP 756
MARKET DOMINANCE STREAMLINED APPROACH

REPLY STATEMENT AND COMMENTS
OF
FARMERS UNION OF MINNESOTA
FARMERS UNION OF MONTANA
FARMERS UNION OF NORTH DAKOTA
FARMERS UNION OF SOUTH DAKOTA
FARMERS UNION OF WISCONSIN

Terry C. Whiteside
Registered Practitioner
Whiteside & Associates
P.O. Box 20574
Billings, MT 59104-0574
406-245-5132
twhitesd@wtp.net
Representing Shipper Interests
Identified Above

REPLY STATEMENT AND COMMENTS

FARMERS UNION OF MINNESOTA, FARMERS UNION OF MONTANA, FARMERS UNION OF NORTH DAKOTA, FARMERS UNION OF SOUTH DAKOTA and FARMERS UNION OF WISCONSIN (Farmers Union) respectfully submits its Reply Statement and Comments in the above-styled proceedings in accordance with the Notice of Proposed Rulemaking (“NPRM”) regarding a “Final Offer Rate Review” (“FORR”) (Ex Parte No. 755), served on September 12, 2019 including also Expanding Access to Rate Relief (Ex Parte No. 665 Sub No. 2) and Market Dominance Streamlined Approach (Ex Parte No. 756). Farmers Union of MT, ND, SD, WI and MN represent over 100,000 family farmer members. This corrects the 15,000 family farmer members shown in the Opening Statement.

The Opening Comments by the various parties were interesting and informative. The STB is entering into and promoting this discussion thereby embarking on what Farmers Union believe is that most important proceedings for farm producers in the last three decades – namely a procedure for allowing Final Offer Rate Review procedures to be developed enabling small and perhaps large shippers to participate in rate and service adjudication in those market that are characterized and serviced by railroads possessing market dominance over their shipper traffic.

The USDA provided some of the best and most thoughtful analysis and suggestions in their Opening Statement. Final Offer Rate Review (FORR) can provide clear standards as suggested by the USDA.

The railroads predictably labeled the FORR procedures as ‘arbitrary’, unlawful, and without basis or merit. Yet the Board’s process herein is thoughtful, not arbitrary and provides a methodology that will, Farmers Union believes, provide an avenue for effective relief for the captive rail shippers that have not, up to now, had meaningful or economical access to rate adjudication nor relief.

A PROCEDURE WHICH WILL PRODUCE RATE RELIEF FOR THOSE HERETOFORE LEFT OUT OF THE RATE ADJUCATION PROCESS

Clearly, a procedure which produces rate relief for those who cannot economically access the current SAC, SSAC or Three Benchmark procedures, that is fair and encourages level playing field negotiations has long been sought. Farmers Union like the USDA believe that FORR process is significantly a better option than continued tinkering with 3B (Benchmark) modifications. Claims by the railroads that the FORR represents an absence of standard. The transparency recommended by the USDA will provide the basis for a strong standard.

SIMPLE FINAL OFFERS MAY SERVE TO MINIMIZE EFFECTIVENESS OF FORR

The USDA's proposed Simple Final Offers is interesting and has merit. FORR that involves complicated offers will serve to minimize the effective of implementation of FORR as a process of relief. Be mindful, that in most cases Final Offer processes result in settlement not execution of the FORR process. In your practitioner's experience in working with Canadian researchers, we found that FO procedures between shippers and carriers rarely went to fruition but were settled many times before the FO process was invoked or even during the FO case. Farmers Union concurs in the USDA's proposal for Simple Final Offer.

RAILROADS ONCE AGAIN PROVIDE HUMOR IN THIS PROCEEDING

The railroads claim that the FORR should only be invoked if both parties agree to the procedure is a bit humorous. The party with economic market dominance will agree to a small shipper's request (who has relatively no marketing leverage with the railroad in a transaction they pay for) to go to FORR? Not if you are a betting person. That has been the problem for the last 40 years since the initiation of the Stagger Rail Act – the procedures developed involving the railroads have been overly burdensome, extremely costly and most of the time require access of relevant information held only by the railroads to even initiate a case. Not long ago a fellow transportation practitioner suggested if a being from another planet came down and took a look at the rate remedies and procedures available to the U.S. railroad shippers they would probably leave shaking their head smiling in disbelief that the system could be so complicated and bewildering.

So here it is once again in this proceeding, where the Board has been working deliberatively with its Rate Reform Task Force (RRTF) staff developed a well thought out process, the railroads continue to complain to the Board that it is unworkable, will not result in relief sought, too transparent, too simple to initiate, arbitrary and finally is unlawful because it looks too much like the Canadian model without a hearing process. No where in the RR's pleadings is there an expression or a positive comment to improve or strengthen the proposed FORR process.

THE CONCEPT OF DEVELOPING 'COMPARISON' GROUP DOES NOT SERVE TO ADVANCE THE FORR STANDING BY THE SHIPPER

USDA does challenge the idea of developing 'comparison' groups. Our experience at Farmers Union has been that where a railroad has market dominance, all the rates in the area will be likewise 'market dominated' resulting in equally excessive and exploited rate levels. Thus, to require development of a comparison group of rates is not only distortive but not instructive to the Board or the adjudicator. Of course, the railroads encourage the use of comparison groups. All the rates in the surrounding captive areas are equally excessive. Farmers Union agrees with this challenge by USDA.

INCREASING TRANSPARENCY IN THE FORR PROCESS WILL PROVIDE A BETTER IDEA OF ESTIMATING A SHIPPER'S CHANCES OF SUCCESS IN FORR

USDA also discusses the idea that increased transparency of the process will serve to increase more responsible behavior on the part of both the shipper and the railroads. The shippers would have a better idea for estimating their chances of success in the outcome of their cases. The railroads once again do not want any increase in transparency – preferring to keep all FORR in secret so the small shipper would not be advantaged in anyway nor understand the adjudication criteria. Remember one of the goals FORR and this Board is to have the shippers and the carriers to settle their differences without having to involve the Board. Yet to hear the railroads arguments, they do not want the shippers to even know what the standards of adjudication are even though the railroads would know in each and every case, the adjudication criteria because the railroads were parties to the process. Farmers Union concurs to increased transparency to make it a fair process.

THE BOARD SHOULD CONSIDER ONLY THE NUMBER 1 FACTOR IN DEVELOPING *PRIMA FACIE* EVIDENCE OF MARKET DOMINANCE

The Board should consider any movement or process that will result in greater simplicity. With that in mind, the USDA suggested that of the Board's proposal for six factors for providing *prima facie* evidence of market dominance only number (1) help detect Market Dominance. The question of whether 2-6 help detect Market Dominance is insightful but in a captive market they don't have much relevance if any at all. This was discussed in depth in the USDA Opening Comments. Only number one is the true measure of exercise of market dominance. It is important that the shipper and potential complainant have enough information to mount of case with a prospect of being successful. Farmers Union concurs that only factor (1) helps detect Market Dominance. The other factors may or may not be present in a given locale.

For reference the six are listed below:

1. has a revenue to variable cost ratio of 180 percent or greater,
2. exceeds 500 miles between origin and destination,
3. has no intramodal competition,
4. has no barge competition,
5. involves a complainant who has used truck for less than 10 percent of its movements, and
6. involves a complainant who has no practical build out alternative.

BOARD SHOULD DEVELOP A WEB-FORM THAT A SHIPPER COULD FILL OUT AND KNOW IMMEDIATE MARKET DOMINANCE CLASSIFICATION

The USDA also suggests that the Board could develop its own model for a competitive benchmark, similar to what shippers need to know to make use of the Board's Uniform Rail Cost System (URCS) Phase III program to estimate variable costs. The shipper and potential complainant could ascertain if they fall inside or outside that market dominance window. The idea of developing a web-form that the shipper could fill out to provide an immediate market

dominance classification has great merit and would be very helpful while serving to assist the small shippers with clarity on their potential case. Farmers Union supports this concept.

Farmers Union believe that factors 2 through 6 should be dropped and the Board should work to provide a worksheet application for factor 1 for shippers to use to ascertain potential standing. Farmers Union would not be opposed to development of 200% R/VC standard for FORR cases given that the 180% R/VC of the statutory threshold for larger rate cases challenging rates.

BOARD SHOULD REMOVE RATE RELIEF CAP IN FORR PROCEEDINGS

The Board recommends a \$4 million relief cap proposed for FORR. If the goal of the Board is to have shippers and railroads reach agreement on rate disputes, it may not serve any purpose for the Board to place relief cap limits in this proceeding. The goal would be reached whether there was a cap or not but having no cap would allow shippers to utilize FORR for negotiation of all rates – that being in the interest of the Board, shippers and carriers. Farmers Union would support higher limits, or no limit relief caps under FORR.

SUMMARY:

Farmers Union believe that FORR process is significantly a better option than continued tinkering with 3B (Benchmark) modifications.

Farmers Union concurs in the USDA's proposal for Simple Final Offer as opposed to complex Final Offer. FORR that involves complicated offers will serve to minimize the effectiveness of implementation of FORR as a process of relief.

Farmers Union supports increasing transparency in the FORR process as it will provide a better idea of estimating a shipper's chances of success in FORR.

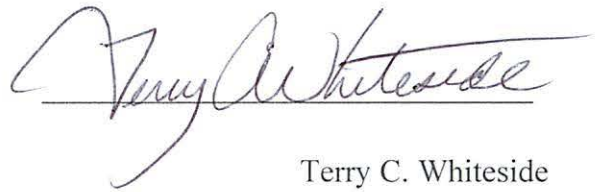
Farmers Union urges the Board to consider utilizing only the number 1 factor in developing *Prima facie* evidence of market dominance in FORR procedures.

In line with this the Farmers Union feels strongly that the Board should develop a Web-Form that a shipper could fill out and know immediate market dominance classification.

In return Farmers Union for this simplification of process, would not be opposed to development of 200% R/VC standard for FORR cases given that the 180% R/VC of the statutory threshold requires a more complex defining of market dominance and applies to larger rate challenge cases.

Dated: January 10, 2020

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Terry C. Whiteside", written over a horizontal line.

Terry C. Whiteside

Registered Practitioner
Whiteside & Associates
P.O. Box 20574
Billings, MT 59104-0574
406-245-5132
twhitesd@wtp.net