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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE RELIEF

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the schedule established by the Surface Transportation Board (“STB” or “Board”) in the Notice of Proposed Rulemaking and Request for Comments served simultaneously in this proceeding and in *Final Offer Rate Review*, EP 755 on September 12, 2019 (“FORR NPRM”), the Association of American Railroads (“AAR”) respectfully submits these reply comments.

In addition to proposing a new baseball-arbitration-style process, the FORR NPRM also included a final question regarding the disposition of EP 665 (Sub-No. 2), “including whether to close that docket.”¹ As nearly all of the FORR NPRM focused on the FORR process, the overwhelming majority of the comments filed focused on that proposal.²

¹ FORR NPRM at 17.

² AAR submitted opening comments in EP 755 that urged the Board to withdraw its proposal because FORR is not authorized by—and in fact conflicts with—the governing statutes. The AAR comments noted that Congress did not give the Board authority to adjudicate railroad rate cases by adopting the procedures that arbitrators use to decide salaries of major league baseball players. Parties are denied the requisite “full hearing” the law requires, 49 U.S.C. § 10704(a)(1), when agency adjudicators refuse to exercise their independent judgment and instead confine their decisional range to the two outcomes proposed by the litigants. Among the many arbitrary and capricious aspects of the proposal, the Board’s refusal to establish a methodology in advance, or to provide any meaningful standards for

National Grain and Feed Association (“NGFA”) submitted comments in both dockets and, with regard to EP 665 (Sub-No. 2), argued that the Board should not close the docket and “should continue to work toward issuing final rules that modify its initial proposal in response to the comments it has received from NGFA and other stakeholders, as well as the recommendations of its Task Force.”³

AAR agrees with NGFA that the Board should keep this docket open and progress a proposal that builds on the Advance Notice of Proposed Rulemaking served on August 31, 2016 (“ANPRM”) where the Board sought comment on proposals to modify its rules regarding the smallest railroad rate reasonableness complaints. That ANPRM stated that “the Board believes that the existing rate review processes present accessibility challenges for not only grain shippers, but also small shippers of any commodity.”⁴ Despite the concerns raised in the AAR comments regarding the specific proposals in the ANPRM, AAR believes there is substantial merit in the concept of a streamlined comparison group procedure for very small cases that would meet the Board’s stated goal of ensuring that small shippers have access to the rate reasonableness process at an appropriate cost.

AAR submits that the Board should address the accessibility of the rate case process for small shippers by crafting an expedited, streamlined comparison group approach for use by such shippers. The Board previously resolved the question of whether to focus on cases for small shippers or small shipments in favor of making *Simplified Standards’* procedures

how it will make reasonableness determinations, renders the proposal unconstitutionally vague and deprives railroads of fair notice as to what the Board may deem unreasonable in any particular case.

³ NGFA Comments at 11.

⁴ ANPRM at 3.

available to small cases based on the express statutory language of ICCTA that directed the agency to create expedited rate review procedures. Those processes have been established, meeting the statutory requirement. As such, the Board can limit additional streamlined procedures to both small shippers and small cases. In EP 756, BNSF proposed a simple 1,000 units-per-year small shipper screen, while still recognizing that other approaches based on revenue or market share could also work.⁵

The Board can substantially limit the possible issues in litigation for small shippers by adopting a comparison group test that has clear comparability standards, draws on an expanded waybill sample, and relies on Board staff to compile the comparison group. The Board should also eliminate cost and complexity for small shippers by linking this approach to the streamlined market dominance procedures proposed in EP 756. Thus, AAR believes a workable process would include limited discovery, aided by initial disclosures and the streamlined market dominance process proposed in EP 756 (as modified by the AAR comments), and two rounds of evidence.

AAR agrees with the Rate Reform Task Force (“RRTF”) that increasing the sampling rate of waybills will decrease the need to include contract rates in comparison groups, thus reducing the need for the Board to employ a common carrier adjustment in individual cases.⁶ But AAR submits that the Board should establish by rulemaking how and when a common carrier adjustment to contract rates will be employed in these small shipper cases, as well as the existing Three Benchmark test, rather than allowing parties to litigate the adjustment on a case-by-case basis. Increased observations would also reduce calls for the inclusion of non-

⁵ See BNSF Opening Comments, EP 756, at 10-11 (filed Nov. 12, 2019).

⁶ See Rate Reform Task Force Report at 47.

defendant carrier traffic, which in any event are inappropriate for comparison groups because of the deep substantive concerns about comparing R/VC ratios among different railroads with different cost structures and traffic mix and the increase in cost and complexity associated with third-party discovery.

The EP 665 (Sub-No. 2) ANPRM proposal to establish bright-line criteria for comparability has merit; those criteria and others will aid the Board in determining the initial comparison groups and limiting litigation issues. The comparison group should include traffic that shares similar shipping characteristics as the issue traffic, as demand characteristics can be correlated with the length of haul, shipment type, and the type of commodity being shipped. The Board should develop bright line thresholds based on criteria that includes mileage of the haul, shipment type, equipment, and commodity at the seven-digit STCC code level. To the extent feasible, the comparability criteria should consider geography and density of the rail corridors at issue. The Board should explore whether data related to the North American Rail Network map, a railroad geographic information system (“GIS”) national map maintained by the Federal Railroad Administration, could be used for this purpose.

The Board should retain some form of other relevant factors for this small shipper test, but extensive evidence should not be necessary if good comparability criteria can be established. Strong comparability factors will, in effect, render the entire evidentiary presentation in this streamlined comparison group approach as an other-relevant-factors presentation. Because the Board will establish the initial comparison group at the outset of the proceeding, the parties’ presentations will be limited to explaining why the comparison group should be adjusted either by removing or adding movements or by adjusting the

resulting average R/VC ratio. Thus, depending on the comparability criteria, the Board may be able to impose strict page limits on the evidentiary submissions of the parties.

The Board can expect that streamlining the discovery and evidentiary phase of Three Benchmark case can shave 30-60 days off the time-line. Additional procedural disciplines such as page limits should limit the number of issues to be resolved by the Board, enabling a decision to be issued within 30 days of the close of the record. AAR thinks the following time frame would be reasonable.

Possible Procedural Schedule
For Small Shipper Cases

Complaint	Day 0
Complainant Initial Disclosure	Day 0
STB Production of Waybill Sample	Day 10
Mandatory Mediation Begins	Day 10
Disclosure Commences	Day 10
Answer to Complaint	Day 20
Railroad Initial Disclosure	Day 20
Mediation Period Ends	Day 30
Discovery Closes	Day 30
Opening Evidence	Day 60
Reply Evidence	Day 80
Board Decision	Day 110

Finally, AAR agrees with the ANPRM proposal limiting the expedited methodology to cases where the amount of relief is significantly less than the existing Three Benchmark cases. The Board and the courts have recognized that R/VC comparisons are “crude” and “imprecise.”⁷ The only justification for the use of R/VC comparisons at all has been their limited application through limits on relief in small cases.⁸ In this context, the RRTF report agreed with the AAR’s comments in EP 665 (Sub-No. 2) that very small rate cases should be limited to \$500,000 consistent with the best estimate of what it costs to bring a Three-Benchmark case.⁹

CONCLUSION

For the foregoing reasons, the Board should keep this docket open, progress a streamlined comparison group approach for small shippers, and issue a notice of proposed rulemaking. Adopting a streamlined comparison group approach for small shippers would not solve every problem facing the Board’s rate review process. No single proposal would. Instead, this approach would be intended to address the Board’s concern that there may be small shippers that cannot bring a case to the agency because of the cost and complexity involved in the existing tests. There are also opportunities in other contexts to address real

⁷ See, e.g., *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 52 (STB served Sept. 5, 2007); *Burlington Northern R.R. Co. v. Interstate Commerce Comm’n*, 985 F.2d 589, 595-99 (D.C. Cir. Feb. 9, 1993).

⁸ *Simplified Standards*, slip op. at 72.

⁹ As AAR has previously pointed out, \$500,000 likely overstates the cost to bring a Three Benchmark case. That estimate comes from testimony submitted in EP 715 by U.S. Magnesium that it spent less than \$500,000 to bring a Three-Benchmark complaint. As an early adopter and shipper of a toxic-by-inhalation hazard, U.S. Magnesium likely incurred expenses that later litigants will not.

and important issues in improving the Board's Stand Alone Cost and Simplified Stand Alone
Cost tests.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'K. D. Kirmayer', written over the printed name.

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