

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
September 14, 2020
Part of
Public Record

STB Ex Parte No. 756

MARKET DOMINANCE STREAMLINED APPROACH

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) hereby replies to the petition for reconsideration filed jointly by the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, National Industrial Transportation League, and The Chlorine Institute (collectively, “Petitioners”) and the supplemental petition for reconsideration filed by The Chlorine Institute.

Petitioners seek reconsideration of the final rules issued in this docket on August 3, 2020, pursuant to 49 C.F.R. § 1115.3(b) based on material error. Specifically, Petitioners seek to reverse: (1) the holding that a complainant may not submit a new rate case involving the same traffic after a decision holding that complainant has failed to establish market dominance using the streamlined approach because “precedent hold[s] that a complainant seeking to challenge the same rates at issue in a prior proceeding can do so only upon a showing of changed circumstance, new evidence, or material error”; (2) the rejection of Petitioners’ proposal for a new *a la carte* process for consideration of market dominance; (3) the establishment of the movement length threshold at 500-highway miles between the origin and destination; and (4) the inclusion of exhibits within the page limits for streamlined market dominance evidence.

But Petitioners have failed to establish material error in any of these decisions. Material error does not arise simply because the agency declined to adopt a position advocated by a party. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim. *See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, the error must be one that “would mandate a different result.” *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *Or. Int’l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R.*, FD 35160, slip op. at 2 (STB served Mar. 12, 2009); *DesertXpress Enters.—Pet. for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010). Simply because a party disagrees with the outcome in a rulemaking proceeding does not mean the agency failed to consider relevant evidence or materially erred in reaching a decision. *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Equity Capital*, EP 664 (Sub-No. 2), slip op. at 2 (STB served April 20, 2017); *Minisink Residents For Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014).

While AAR does not agree with every aspect of the final rules, the Board executed its obligation to “respond meaningfully” to “objections that on their face seem legitimate.” *See Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001). The Board was required to “weigh[] competing views, select [an outcome] with adequate support in the record, and intelligibly explain[] the reasons for making that choice.” *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 784 (2016). As explained below, the Board’s response to Petitioners’ arguments was more than adequate and did not reflect material error. Moreover,

the Board was under no obligation to adopt Petitioners' alternative proposal, which deviated in significant ways from the NPRM and was contrary to the NPRM's stated aims, namely to streamline the market dominance inquiry in appropriate cases. The petitions for reconsideration should be denied as merely a transparent attempt to get another bite at the apple, as Petitioners seek their preferred outcome to aspects of the final rule.

ARGUMENT

I. The Board Did Not Materially Err By Declining To Adopt Petitioners' New Bifurcated "A La Carte" Market Dominance Proposal.

The rules adopted in this proceeding arose from concerns that the market dominance inquiry can be a "costly and time-consuming undertaking, resulting in a significant burden on rate case litigants." Decision at 1. The NPRM described the Board's underlying reasons for its proposal: the time and cost associated with an evidentiary process that "requires the complainant to prove a negative proposition on opening—that intermodal and intramodal competition are not effective constraints on rail rates"; the fact that such expense may be particularly out of balance with the remedy being sought in smaller rate cases; and that the time and cost of the market dominance inquiry could itself be a barrier to rate relief. NPRM, EP 756, slip op. at 3-4. The Board correctly noted in the NPRM that it has the authority to streamline market dominance procedures in appropriate circumstances as long as it maintains fidelity to the Rail Transportation Policy of 49 U.S.C. § 10101 and the statutory standards of 49 U.S.C. § 10707.

Specifically, the Board proposed "a set of factors that, if they could be demonstrated by the complainant, would establish a prima facie showing of market dominance." Decision at 2. The Board reasoned that the presence of these factors would constitute "significant evidence about the status of effective competition," both intramodal and intermodal. NPRM,

EP 756, slip op. at 7. However, the Board also explained that, under the proposed streamlined approach, rail carriers would still be “permitted to refute any of the prima facie factors of the complainant’s case, or otherwise show that effective competition exists for the traffic at issue.” *Id.* at 12. The Board concluded that the proposed approach would “have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting railroads’ ability to mount a thorough defense.” Decision at 8 (citing NPRM at 7). If a complainant were not able to satisfy the prima facie factors, they remain able to proceed under the traditional market dominance analysis. In this way, the final rule preserves for complainants that pre-existing tool in their litigation strategy box.

Rather than offering suggestions to improve the Board’s proposal, Petitioners sought to replace the Board’s proposal with their own, entirely new market dominance approach. Petitioners proposed a two-step, bifurcated market dominance process that would be available to all complainants in all cases.¹ This proposal would have allowed an “*a la carte*” approach to market dominance whereby complainants could satisfy some, but not all, of a list of factors. Following the submission of evidence, the Board would then make an initial determination, on a case-by-case basis, whether a complainant had satisfied 49 U.S.C. § 10707 and had established market dominance. If the Board decided that the complainant had failed to establish market dominance in this initial phase, the complainant would then get another bite at the apple and could provide more evidence or remedy defects in its original presentations through a second market dominance presentation. All this would occur before the Board reached the rate reasonableness analysis. Thus, Petitioners tried to tilt the playing field to

¹ ACC *et al.* Comments at 6-7.

establish a process that would allow complainants an unlimited amount of time to prepare their initial market dominance evidence before filing complaints, while railroads would be forced to reply under a highly-expedited schedule with tight page limits. And if complainants were unsuccessful in their initial efforts, they would get a second opportunity to remedy the deficiencies in their evidence and attempt to meet the statutory standard a second time.

The Board did not elect to adopt this convoluted and unfair process. Bifurcation of rate cases into market dominance and merits determinations could double the amount of time and effort that parties and the Board would have to place in the market dominance inquiry, the direct opposite of the Board's intention in this proceeding. As the party with access to the most information regarding competitive alternatives and the burden of proof to show market dominance, placing the determination of whether or not to proceed under streamlined processes with complainants and requiring them to keep to the litigation strategies they choose is wholly appropriate. Despite Petitioners' contention that their approach would be similar to the summary judgment process before the courts, their proposal would have the Board render a decision on market dominance after the parties had submitted both market dominance and rate reasonableness evidence. Thus, Petitioners' proposal raised issues of due process, res judicata, collateral estoppel, and issue preclusion.² Board and court precedent are clear that a complainant seeking to challenge the reasonableness of the same rates previously adjudicated can do so only upon a showing of changed circumstance, new evidence, or

² See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."); see also *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

material error. *See Burlington N. & Santa Fe Ry. v. STB*, 403 F.3d 771, 778 (D.C. Cir. 2005); *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42127, slip op. 4 (STB served Nov. 2, 2012). This has been so for over a hundred years. In *Traugott Schmidt & Sons v. Michigan Central Railroad Co.*, 23 I.C.C. 684 (1912), the ICC dismissed “as a matter of course,” a complaint because it contained identical claims by the same party whose complaint had been dismissed one year and three months earlier. *Id.* at 685. “[W]hen a matter has been once fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong.” *Id.* The straightforward application of long-standing agency precedent in the final rule cannot be material error.

The petition for reconsideration implicitly acknowledges that any other process would incentivize complainants to pursue the proposed streamlined approach in most, if not all, cases to take advantage of the two chances to show market dominance. But to preemptively refute this natural conclusion, Petitioners contend that “a complainant who unsuccessfully invokes the streamlined approach incurs the additional time and expense of subsequently having to make a non-streamlined evidentiary presentation,” thus explicitly acknowledging that its proposed process will lead to more time and expense in litigating market dominance, not less. Petition at 4.

Petitioners’ a la carte proposal was part and parcel to its bifurcated process. Declining to adopt the Petitioners’ biased bifurcated approach, there was no way that the Board could adopt an a la carte approach to market dominance factors, while maintaining the logic of the NPRM. The final rules reflect the fact that to establish market dominance, the Board must look at the whole picture of direct competitive alternatives and adopted final rules that require

a showing of each of several factors to qualify for streamlined procedures.³ The Board did not propose, and certainly could not support, a rule that elevated a single factor to serve as an indicator of the presence or absence of effective competition. Instead, the Board reasonably concluded that if all of the prima facie factors can be shown, market dominance is likely, and complainants should be able to elect to use the streamlined procedure. *See* Decision at 30-31. As such, the decision to not allow complainants to pick and choose factors a la carte, was not material error.

II. Inclusion Of A 500-Highway-Mile Threshold In The Prima Facie Factors Was Not Material Error.

The Board's adoption of a 500-mile threshold as one of the prima facie factors was also supported by the record and the Board amply explained its reasoning. The AAR opening comments in this proceeding noted that the proposed 500-highway-miles threshold was a conservative estimate for use in these streamlined market dominance procedures. AAR pointed out that no mileage threshold could, in isolation, ever identify a demarcation line whereby trucks do or do not provide effective competition to rail in every circumstance. Even so, AAR noted that it was not unreasonable for the Board to use a properly calibrated mileage threshold, along with other factors, as the test for complainants' access to streamlined

³ In fact, to truly understand if there is effective competition in a given market, the Board should look at all forms of competition, both direct and indirect. The Board has steadfastly refused to consider indirect competition no matter how efficiently or minimally burdensome such an inquiry would be. *See* AAR comments at 10-12; *See also* *Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities*, EP 717 (filed Nov. 19, 2012).

procedures.⁴ Railroads supported AAR's position that a threshold of 500-highway miles is conservative with specific market share data points.⁵

Shipper groups advocated to reduce the threshold in an effort to weaken the market dominance standard without any showing that such thresholds were correlated in any way with market power. Instead of submitting market data, shippers posited that daily trips by trucks should reflect a return trip. The Board disagreed and concluded that "[b]ecause the streamlined approach is intended to be used in situations in which the lack of alternative transportation options is clear on its face, the Board finds it is better to set the threshold around the outermost point of a one-day trucking shipment to ensure that only those shippers that are more likely to be found to lack effective competition can utilize it." Decision at 16. The Board stated that it will consider commodity-specific mileage thresholds in the future. The Board also acknowledged that "technological advancements may well have competitive implications, and the Board can revisit the mileage threshold once those advancements have been more widely implemented." *Id.*

Petitioners have not demonstrated material error in this conclusion. Moreover, Petitioners will have ample opportunity "to support their arguments with more extensive data, beyond just a few examples, on shipping distances for rail versus truck for that commodity." Decision at 16. The Chlorine Institute will also have the opportunity to attempt to persuade the Board that the mileage threshold should be set at zero for its members. But those parties attempting to prevail with a lower mileage threshold must demonstrate that such a threshold is consistent with a showing that lack of effective competition "is clear on its face" and show

⁴ AAR Comments at 9.

⁵ BNSF Comments at 13; CN Comments at 4-5.

something more than traffic simply moving by rail. “For an alternative mode to provide effective competition, it need not necessarily be ‘capable of handling substantially all or even a majority of the subject traffic.’”⁶ The market dominance inquiry requires that the Board determine “whether the alternative mode places ‘considerable competitive pressures’ on the defendant railroad.”⁷

III. While AAR Also Suggested Excluding Exhibits from Page Limits, The Final Rules’ Use of Case-by-Case Waivers Is Not Material Error.

Finally, Petitioners take umbrage that their pleading was not cited in the discussion of page limits. *See* Petition at 10. But like Petitioners, AAR raised the concept of excluding exhibits from the page limits and the Board explained its decision not to do so. Specifically, AAR suggested the Board “more carefully tailor the limitations on evidence to the complexity of the case” and proposed “a 50-page limit of narrative, excluding exhibits, for a one lane case, with the limit increasing by 10 pages for each additional lane, up to a maximum of 100 pages.” AAR Comment 15. The Board considered and rejected both suggestions, explaining that with regard to “AAR’s concern that including exhibits in the 50-page would be problematic because such exhibits often include studies that approach or exceed 50 pages, the Board notes that parties can include excerpts from a study or request a waiver of the 50-page limit.” Decision at 42. AAR continues to believe its suggestion was a good one. However,

⁶ *DuPont v. CSXT*, STB Docket No. 42100, slip op. at 4 (citing *Amstar Corp. v. Great Alabama S. R.R.*, I.C.C. Docket No. 382398 (served Nov. 10, 1987)); *see also Aluminum Ass’n v. ACY R. Co.*, 367 I.C.C. 475, 484 (1983) (“[w]e reiterate that not all aluminum has to move by truck for motor carriage to exert competitive pressure on the railroads.”).

⁷ *Id.* *See also Consolidated Papers*, 7 I.C.C.2d at 337-38 (trucks provided effective intermodal competition where 55% of issue traffic moved via truck).

that belief does not mean that Board committed material error. The Petitioners do not explain why the Board's case-by-case approach is error that must be reversed.

CONCLUSION

Based on the foregoing, the Board should deny the petitions for reconsideration.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer'.

Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller (admitted in MD)
Association of American Railroads
425 Third Street, SW
Washington D.C. 20024
(202) 639-2100

*Counsel for the Association
of American Railroads*

September 14, 2020