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Office of Proceedings
January 14, 2022
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 755

FINAL OFFER RATE REVIEW

COMMENTS OF BNSF RAILWAY COMPANY

I. Introduction

BNSF Railway Company (“BNSF”) respectfully submits these comments in response to the Surface Transportation Board’s (“STB”) November 12, 2021 Supplemental Notice of Proposed Rulemaking in the above-captioned proceeding. The SNPRM proposes modifications to the Final Offer Rate Review (FORR) process initially proposed in the Board’s September 12, 2019 NPRM and allows for parallel consideration of the modified FORR proposal alongside the proposed Voluntary Arbitration Program for Small Rate Disputes docketed at EP 765.

BNSF strongly believes that the arbitration program proposed in EP 765 represents a better means of resolving small rate disputes for both shippers and railroads than the FORR SNPRM. BNSF has previously filed comments in this FORR proceeding explaining the principles BNSF believes should guide the Board’s development of a process for small rate disputes that can be used when the Board finds that markets are not functioning properly and how the Board’s NPRM failed to align with those principles. Chief among BNSF’s concerns was that the lack of clear standards or a prescribed methodology unfairly disadvantages railroad defendants and creates an obstacle to informed commercial negotiations that might otherwise resolve the dispute. In BNSF’s view, the Board’s SNPRM fails to remedy these core deficiencies and, with respect to the Market Dominance analysis, makes the FORR proposal worse. As such, BNSF believes the time and energy of the Board and industry stakeholders will be best spent refining the

arbitration proposal and enacting a final rule implementing that program. BNSF also joins the comments addressing the FORR SNPRM filed separately by the Association of American Railroads.

II. The Lack of Defined Standards and Methodology Remains Problematic

Without repeating points made in numerous other comments, including BNSF's initial comment, the lack of any prescribed methodology for addressing small rate disputes in the proposed rule continues to render the FORR proposal untenable. As demonstrated by the concerns raised in both shipper and railroad comments to the NPRM, the "non-prescriptive, multi-factor test" the Board proposes remains too unpredictable to provide sufficient guidance to stakeholders to conform their conduct to the law prior to litigating a disputed rate and compounds that deficiency by creating a disproportionately unfair burden upon defendant railroads during litigation itself. Although the Board correctly notes that parties raise novel issues in SAC cases that may affect the predictability of the outcome,¹ those cases were litigated under traditional SAC procedures where the parties had the ability to fully develop the administrative record and the Board had its traditional discretion to weigh the evidence and determine what the maximum reasonable rate should be. Neither of those procedural protections will be present in an FORR proceeding.

While BNSF appreciates the Board's further articulation of the review criteria and reference to other situations where the Board weighs multi-factor tests, there is a distinction between the weighing of factors in a multi-factor test and the proposal's vision of stakeholders litigating a case without knowing what the test is until reading it in the opposing party's opening brief. Parties will face the choice of seeking to exhaustively address any potential feasible methodology that could be used to analyze the challenged rate to devise arguments in the alternative or engaging in a crash effort to adequately analyze novel methodologies in the ten days parties have to file their replies—either option leading to substantial unnecessary litigation expense.

¹ SNPRM at 29-30.

In addition, as STB Members have expressed in numerous settings, the best resolutions of rate disputes are those that are reached between the parties themselves, informed by, but ultimately without the need for, formal adjudication before the Board. When the Board's process for formal adjudication has no discernible standards for the parties to weigh and the results may be rooted in strategic maneuvering by lawyers and consultants as much as an assessment of market conditions and sound economic theory, it compromises the ability for parties to have productive settlement conversations informed by the ability to weigh potential legal outcomes.

III. The Elimination of the Streamlined Market Dominance Requirement is a Step Backward

With respect to the market dominance element of the proposal, BNSF believes the Board has taken a step away from its goals by allowing complainants to use traditional long-form market dominance presentations to prove this element. As the Board and numerous shipper commenters recognized, requiring the use of streamlined market dominance is consistent with the goal of using procedural limitations to constrain the cost and complexity of small rate reasonableness cases.² Allowing complainants to elect to make a non-streamlined market dominance presentation will add unnecessary complexity to the process and additional discovery and litigation burdens that disproportionately fall upon defendant railroads. Notwithstanding the Board's statement that requests for extension of time will be strongly disfavored, nothing in the proposed rule itself bars such requests and the structural incentive that short time limits provide may likely be eroded over time as litigants present compelling needs for extension of time. Accordingly, the Board should revert to the streamlined market dominance framework contemplated in the original NPRM.

In eliminating the streamlined market dominance requirement, the Board apparently reversed its prior view in the NPRM that the "expedited timelines proposed here make it too difficult for parties to litigate a non-streamlined market dominance presentation." The Board appears to have found comfort in

² NPRM at 9; AFPM Comment at 6; NGFA Comment at 9.

the fact that the proposed revised procedural schedule set forth in the SNPRM would match the timelines in the Board's existing Three Benchmark case process. But that is cold comfort to a railroad defendant in an FORR case. The burden of responding to rate reasonableness and market dominance evidence in a Three Benchmark case is a much more straightforward task than responding to rate reasonableness and market dominance evidence in an FORR case where the shipper may pursue a novel rate reasonableness theory that will consume a disproportionate share of the railroad defendant's time and energy in preparing its responsive pleading. Requiring shippers to use the streamlined market dominance approach more appropriately balances the substantive burden on railroad defendants with timelines that stayed true to the Board's goal of establishing a faster and more efficient rate reasonableness process for small disputes.

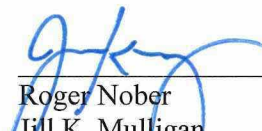
If the Board chooses to permit shippers to use non-streamlined approaches to market dominance on the basis that the short time frame is a sufficient protection against the potential for evidentiary sprawl, then it is logical and proportionate to permit evidence of product and geographic competition when a shipper elects to use a non-streamlined market dominance presentation. If a railroad can assemble and effectively present its evidence of product and geographic competition within the strict time frame contemplated by the proposed rule, then it should be no less barred from doing so than complainants are from making non-streamlined market dominance presentations. Furthermore, as a matter of fundamental fairness, if the FORR process will exist as a laboratory for complainants to pursue novel methodologies or parts of methodologies to prove the reasonableness of a rate, then railroads should be able to bring forth evidence of product and geographic competition, which are market factors that the Board has previously acknowledged may significantly impact rail rates in the real world.

IV. Conclusion

As BNSF has stated previously, BNSF understands that many rail customers feel that existing rate reasonableness procedures do not provide a realistic opportunity to obtain relief when markets fail to function properly, particularly in small cases, and understands the importance of providing a simpler, more expedited rate review process for smaller shippers. BNSF believes the Board has made great progress

toward that end with its issuance of the proposed rule for the arbitration program and encourages the further development of that program. The proposed arbitration program provides greater substantive flexibility than does the proposed FORR program while possessing better procedural safeguards against unwarranted complexity than the FORR program. BNSF believes a robust alternative dispute resolution program will ultimately render the FORR proposal unnecessary and urges the Board to complete that rulemaking before taking any further action on the FORR proposal.

Respectfully submitted,



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Dated: January 14, 2022