

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

EXPANDING ACCESS TO RATE RELIEF

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

When the Board is considering changes to its standards and procedures for judging rate reasonableness, it has an obligation to consider those changes in the context of the governing statute, economic principles, and sound regulatory policy. Changes should not be viewed through the narrow lens of whether they will tend to benefit particular interest groups. Rather, potential changes should be judged by how well they comport with the statutory commands of Congress, market economic principles, and sound regulatory policy.

CSX Transportation, Inc.'s ("CSXT's") Opening Comments on the Advance Notice of Proposed Rulemaking¹ accorded with these principles. The record is utterly devoid of any objective data that support yet another rate reasonableness methodology. CSXT explained that any regulatory policies the Board adopts must be consistent with key statutory provisions, such as the requirement to demonstrate market dominance, and core regulatory policies such as the need for differential

¹ See Advance Notice of Proposed Rulemaking, *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2) (STB served Aug. 31, 2016) ("Congress permitted differential pricing. . .") ("ANPRM").

pricing. The Board's goal should be to adopt procedures and standards that are statutorily and economically sound, not ones that put a thumb on the scale for any particular favored interest group.

Other parties took a different approach. Some groups unabashedly renewed their advocacy for standards and procedures explicitly biased to favor grain shippers over other shippers. Others argued that the Board should "help" small shippers—not through procedural improvements—but rather through substantive changes that would let such shippers evade Congress' statutory requirement to prove market dominance as a pre-condition to government price controls. Some urged changes to arbitrarily alter the criteria for comparison group movements simply to ensure that shippers would win more cases. None of these parties agreed that the Board's proposal went far enough.

The Board's proposal in this proceeding to create a Three Benchmark variant in which the Board itself does much of the analytical work may have been borne from a desire to respond to past shipper claims that even the Three Benchmark methodology is too complicated and expensive for many shippers. This proposal is the latest in a long line of efforts the Board has taken to respond to shipper claims that rate cases are too difficult to litigate. In response to claims that the 1996 *Simplified Guidelines* were not an effective rate remedy, the Board developed a Simplified SAC methodology and a Three Benchmark methodology.² In response to shipper claims that the relief limits for the simplest Three Benchmark methodology

² See *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1) (Sept. 15, 2007).

were too low, the Board raised relief limits for Three Benchmark cases to \$1 million in the final *Simplified Standards* rule, and later all the way up to \$4 million in Ex Parte 715.³

In the ANPRM, the Board has again bent over backwards in an attempt to respond to claims that it is still too hard for shippers to bring cases. But the shippers' response to the Board's proposal makes clear that the issue was never that Three Benchmark cases are complicated to litigate, but rather that shippers want rules that will effectively guarantee them a path to lower rates.

The Board should reject these result-oriented approaches. Instead, it should be guided by three core tenets. First, any new or altered rate methodology it might consider must be economically sound and consistent with principles of differential pricing. The Board already has two less economically rigorous standards than Stand Alone Cost ("SAC") that were established in the name of accessibility. The record does not support efforts to create another one. And in no event should the Board consider any action that would undermine differential pricing.

Second, any methodology or other regulatory policy must be consistent with the statutory limitations Congress has placed on the Board's jurisdiction. In particular, Congress has put in place a legal standard that provides for government intervention in rail pricing only when it is shown that there is an absence of

³ See *Rate Regulation Reforms*, Ex Parte No. 715, at 2 (Mar. 13, 2015).

effective competition. The Board cannot establish substantive shortcuts to a market dominance determination under the guise of “procedures” or “presumptions.”⁴

Third, any methodology used by the Board must not be slanted to ensure particular outcomes. Several commenters in this matter would apparently only be satisfied with radical changes designed not to ensure that shippers have the ability to *bring* rate reasonableness claims, but rather to guarantee that the shippers will *win* such claims. The Board should firmly reject such one-sided proposals.

I. ANY NEW RATE METHODOLOGY MUST BE ECONOMICALLY SOUND.

As CSXT explained on opening, there is no evidence whatsoever that a new rate reasonableness methodology is needed.⁵ The recent InterVISTAS report confirmed the economic soundness of the existing SAC test, finding that the “Full-SAC method has stood the test of time.”⁶ Full SAC is an economically rigorous methodology that may not always be practicable for smaller cases. Under congressional direction, the Board has developed two simpler alternatives: Simplified SAC and Three Benchmark. In creating these paths to attack pricing, the Board has consistently recognized that they are “crude” and “very rough and

⁴ The Board’s regulations wrongly bar it from considering indirect competition, even though the agency has long recognized that such forces do affect the market power (or lack thereof) of a railroad. These rules should be re-examined.

⁵ See Opening Comments of CSX Transp., Inc., *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 3-5 (filed Nov. 14, 2016) (“CSXT Comments”).

⁶ See InterVISTAS, *An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification*, at 134 (Sept. 14, 2016) (“InterVISTAS Report”) (“the STB’s Full-SAC method has stood the test of time as a maximum rate reasonableness methodology. . . .”); CSXT Comments at 3.

imprecise.”⁷ Indeed, InterVISTAS concluded that there was no need for the Board to further simplify the existing simplified methodologies of Simplified SAC and Three Benchmark.⁸ The Board should accept this sound advice from the independent study that it commissioned at taxpayer expense.

Any changes to the Board’s standards and procedures must respect core economic principles, such as the recognized need for railroads to engage in differential pricing.⁹ Several commenters reminded the Board of the importance of differential pricing,¹⁰ and the Board itself acknowledged in the ANPRM that differential pricing has been specifically authorized by Congress.¹¹

In contrast, proposals by the Montana Wheat and Barley Committee and National Grain and Feed Association to include traffic moving at revenue to variable cost (“R/VC”) ratios below 180% in comparison groups are directly contrary

⁷ CSXT Comments at 4 (*citing Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 73 (STB served Sept. 5, 2007) (“*Simplified Standards*”)); *see also* Comments of Norfolk S. Ry. Co., *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 9 (filed Nov. 14, 2016) (“NS Comments”).

⁸ *See* InterVISTAS Report at xvii (“Team believes that simplification of either the Three Benchmark or Simplified-SAC tests risks moving the approach further away from the bedrock CMP principles, undermine the reliability of the tests, and would not necessarily incentivize shippers to use those tests.”).

⁹ *See, e.g., Coal Rate Guidelines*, 1 I.C.C. 2d 520, 526 (1985) (“the cost structure of the railroad industry necessitates differential pricing of rail services”).

¹⁰ *See, e.g.,* NS Comments at 3-5; Comments of Union Pac. R.R. Co., *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 14 (filed Nov. 14, 2016) (“UP Comments”).

¹¹ *See* ANPRM at 2 (“Congress permitted differential pricing. . .”).

to the principles of differential pricing.¹² Indeed, the Montana Wheat and Barley Committee openly argues that the Board should be acting to constrain supposedly “excessive differential pricing.”¹³ But the Committee does not explain what “excessive differential pricing” might mean; or why differential pricing that is reasonable under the Board’s existing methodologies is “excessive” and not precisely the sort of economically reasonable pricing that Congress has endorsed.

In any case, the Board itself noted that including shipments with R/VC ratios outside the Board’s jurisdiction “may be contrary to the principle of demand-based differential pricing.”¹⁴ Incorporating traffic below the 180% R/VC level means that traffic that Congress has found is presumptively subject to effective competition (*i.e.*, R/VC_{<180} traffic) would be used to assess the reasonableness of rates that are allegedly not subject to effective competition. Such a change could also have the perverse effect of discouraging pricing below the 180% R/VC level. This would directly undermine the basic economic principle that railroads must be able to differentially price to customers with different demand elasticities if railroads are to maintain a network that best serves all of their customers.

¹² See Opening Comments of Montana Wheat and Barley Comm. et al., *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 20 (filed Nov. 14, 2016) (“MWBC Comments”). See also Opening Comments of Nat’l Grain and Feed Ass’n and Other Interested Agric. Parties, *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 14 (filed Nov. 14, 2016) (“NGFA Comments”).

¹³ MWBC Comments at 12.

¹⁴ ANPRM at 13.

II. ANY CHANGES MUST RESPECT THE STATUTORY COMMAND THAT THE BOARD NOT REGULATE RATES WITHOUT EVIDENCE OF A LACK OF EFFECTIVE COMPETITION.

Any action taken by the Board must be consistent with the statutory limitations set by Congress. But some commenters' desire to stack the deck for shippers has led them to propose measures that would circumvent the Board's statutory obligations, particularly the jurisdictional command that the Board not assess the reasonableness of any rate without a finding of railroad market dominance.

CSXT explained in its opening comments that some of the suggestions in the ANPRM may not comply with the jurisdictional command found at 49 U.S.C. § 10707. For example, using a preliminary screen for market dominance is permissible in theory, but only if it does not replace a "meaningful consideration" of market dominance.¹⁵ Moreover, discovery cannot be limited to such an extent that meaningful evidence on market dominance would not be permitted.¹⁶ Several other commenters shared CSXT's concerns about the compatibility of the ANPRM's proposals with statutory requirements.¹⁷

¹⁵ See CSXT Comments at 6.

¹⁶ *Id.* at 7. As CSXT explained in its Ex Parte 733 comments, there are certainly modifications to discovery procedures in rate reasonableness proceedings that would be appropriate. See Opening Comments of CSX Transp., Inc., *Expediting Rate Cases*, STB Ex Parte No. 733, at 20-23 (filed Aug. 1, 2016) (discussing, *inter alia*, proposals to require early filing of initial discovery requests and standardizing the time scope of discovery).

¹⁷ See, e.g., Comments of the Ass'n of Am. R.R.s, *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 13 (filed Nov. 14, 2016) ("[T]here is no statutory basis for the Board to shortcut the analysis of market dominance under 49 U.S.C. § 10707."); Opening Comments of BNSF Ry. Co., *Expanding Access to Rate*

Yet other commenters urge the Board to throw caution to the wind and relieve some shippers from the burden of proving market dominance in the name of providing “access.” The American Chemistry Council suggests, for example, that if a shipment passes the preliminary screen, the shipper should not be required to submit any additional market dominance evidence.¹⁸ Such a shortcut is completely irreconcilable with Congress’s decision to limit the Board’s rate reasonableness jurisdiction to rates for which there is no effective competition. The Board cannot use an automatic “screen” to sidestep the statutory command that it make a substantive determination, based on evidence, that it has jurisdiction to regulate.

III. THE BOARD SHOULD NOT MAKE RESULT-ORIENTED CHANGES TO FAVOR CERTAIN GROUPS.

Finally, any changes to rate case procedures must treat the parties to a rate reasonableness dispute fairly. Unfortunately, many commenters are not seeking fair proceedings or procedural improvements to fairly serve all stakeholders. Instead, they are advocating substantive changes to ensure guaranteed shipper wins.

The Board instituted this proceeding to address what it believed are “accessibility challenges” that could be solved by a methodology that was “more

Relief, STB Ex Parte No. 665 (Sub-No. 2), at 12 (filed Nov. 14, 2016) (“There is no legal basis or justification for applying a market dominance approach that is less rigorous than the approach already required in rate reasonableness cases.”).

¹⁸ See Comments of the Am. Chemistry Council, *Expanding Access to Rate Relief*, STB Ex Parte No. 665 (Sub-No. 2), at 5 (filed Nov. 14, 2016) (“If the Board were to treat the proposed eligibility criteria as the market dominance test, that could be the most meaningful step in its entire proposal toward making this procedure more accessible.”) (“ACC Comments”).

affordable and accessible to shippers of all commodities with small disputes.”¹⁹ But neither railroads nor shippers have come to the proposal’s support. Indeed, shipper interests have made clear that they are not interested in “accessibility” at all. They want changes that assure that shippers win more often.²⁰ Grain interests have renewed their call for special treatment, proposing the same modifications they advocated in the initial Ex Parte 665 proceeding to create a special rate methodology just for them.²¹ Other shippers propose substantive changes to comparison group movements designed to depress the R/VC_{COMP} by including contract movements, R/VC_{<180} movements, and even movements on other railroads.²² In short, rather than proposing measures that would meet the Board’s stated goals of making rate reasonableness cases more

¹⁹ ANPRM at 3.

²⁰ CSXT was the defendant in the first series of Three Benchmark cases brought before the Board. See *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099 (STB served June 30, 2008); *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42100 (STB served June 30, 2008); *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42101 (STB served June 30, 2008). Of the seven origin-destination pair movements challenged, the shipper prevailed before the Board on six movements (85%). It is hard to fathom how a winning percentage of 85% leaves the shipper community so dissatisfied.

²¹ See, e.g., NGFA Comments at 20-21 (“NGFA and other Interested Agricultural Parties respectfully urge the Board to refocus its efforts in this proceeding to go beyond the unnecessarily narrow scope of the ANPR and return to the original task of creating an appropriate, workable and reasonably accessible rate-challenge methodology that grain and other agricultural shippers can utilize to challenge railroad rates they believe are unreasonable, regardless of the size of their potential case.”).

²² See, e.g., MWBC Comments at 21 (“MWBC, et al. support the Board’s proposal (Decision at 13) to include contract traffic, even if relatively few smaller grain shipments move under contracts.”); *Id.* (“We support including non-defendant carrier rates in the comparison group.”); *Id.* at 20 (“Complainants should be allowed to argue for inclusion in the comparison group of rates with R/VCs below 180%.”).

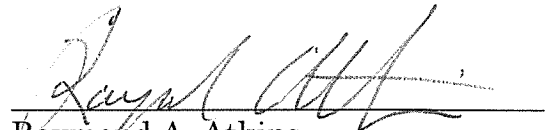
accessible and affordable, these commenters have exposed their true goal: to change the substantive outcome of rate reasonableness proceedings by making it easier for shippers to prevail. The Board should reject these result-oriented proposals.

IV. CONCLUSION.

As explained in its Opening Comments, yet another rate reasonableness methodology is simply not necessary. Neither railroads nor shippers support the proposed offered up in the ANPR. Accordingly, the Board should discontinue this proceeding.

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Respectfully submitted,

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