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May 15, 2017

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Office of Proceedings
May 15, 2017
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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 733, *Expediting Rate Cases*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served in the above docketed proceeding on March 31, 2017, the Association of American Railroads respectfully submits the attached comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 733

EXPEDITING RATE CASES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

In a Notice of Proposed Rulemaking (“NPRM”) served on March 31, 2017, the Surface Transportation Board (“STB” or “Board”) sought comments on proposed modification of its procedural rules used in railroad rate reasonableness proceedings. The NPRM proposals derive from the record established pursuant to an Advance Notice of Proposed Rulemaking (“ANPRM”) served on June 15, 2016 that was initiated in accordance with Section 11(c) of the Surface Transportation Board Reauthorization Act of 2015 (“Reauthorization Act”). Section 11(c) directed the Board to “initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.”¹

The Association of American Railroads (“AAR”) respectfully submits these comments as a party of record in accordance with the Board’s NPRM. The freight railroad members of the AAR account for the vast majority of North American freight railroad traffic, mileage, employees, and revenue. As such, the AAR has a strong interest in ensuring that the Board’s rate reasonableness processes do not cause unnecessary delay and expense, while facilitating analysis

¹ P.L. 114-110 (2015).

based on sound economics consistent with the national Rail Transportation Policy.² In these comments, the AAR continues its long support of efforts by the Board to limit the cost and complexity of the Stand Alone Cost (“SAC”) test as applied by the Board, while maintaining the economic principles underlying the test.³

The NPRM puts forth proposals intended to improve the rate review process and expedite rate cases based on areas of general consensus among the stakeholders that commented on the ANPRM.⁴ The NPRM proposes to create a pre-filing notice requirement in SAC cases, to change some discovery rules, and to modify some evidentiary requirements. Specifically, with regard to a proposed pre-filing period, the NPRM proposes to: (1) create a pre-filing notice requirement that a SAC complainant submit a pre-filing notice at least 70 days prior to filing its complaint that contains the rate and origin/destination pair(s) to be challenged, the commodities at issue, and a motion for protective order; (2) move mandatory mediation to the pre-complaint period; and (3) appoint a staff person to be a Board liaison to the parties to provide a point of contact to whom they can address questions or disputes. Pertaining to discovery, the NPRM proposes to: (1) require a complainant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its complaint and to require a defendant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its answer;⁵ and (2) require a certification that the party filing a motion to compel has in good faith conferred or attempted to confer with the other party to settle the dispute. With regard to

² See 49 U.S.C. § 10101(1).

³ See, e.g., AAR Comments, *Rate Guidelines – Non-Coal Proceedings*, EP 347 (Sub-No. 2) (filed Aug. 20, 1987); AAR Comments, *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2) (filed Nov. 14, 2016).

⁴ NPRM at 2.

⁵ The NPRM also proposes similar requirements for supplemental complaints and answers.

evidentiary submissions, the NPRM proposes to: (1) stagger the submission of public and highly confidential versions of filings; (2) create a standard convention for identifying confidential, highly confidential, and sensitive security information; and (3) limit briefs to 30 pages, inclusive of exhibits. In addition, the Board proposes two technical modifications in the existing regulations.⁶

In the comments below, the AAR supports the NRPM proposals as consensus-based changes that will improve Board processes and help expedite rate cases at the STB, though the important task of adjudicating those relatively few rate cases that come before the Board⁷ by estimating a competitive market outcome will remain complex. The AAR also details some additional targeted procedural improvements that do not require rule changes that could help expedite cases.

COMMENTS

I. The NPRM's Focus on Areas of Stakeholder Consensus on Procedural Issues Should Lead to Improvements in the Rate Case Process

Reply comments in the ANPRM phase of this proceeding submitted by both railroads and shippers noted the areas of consensus regarding procedural issues that could be improved.⁸ By making these fixes, the Board will eliminate some sources of delay without creating further areas of dispute between parties. Both railroad and shipper comments to the ANPRM acknowledged

⁶ Specifically, the Board proposes to amend the newly re-designated 49 C.F.R. § 1111.11(b) to apply the requirement that the parties confer to SAC complaints in addition to Simplified SAC complaints. The Board also proposes to amend 49 C.F.R. § 1130.1 to include the correct reference to the newly re-designated 49 C.F.R. § 1111.2(a).

⁷ See, e.g., Coal Shippers Opening Comments at 57-58 (filed Aug. 1, 2016) (noting that the decrease in rate cases filed at the Board “fulfills one of the principle objectives the ICC emphasized when it initially adopted the Coal Rate Guidelines in 1985 – establishing a set of guidelines that would assist coal shippers and coal railroads in negotiating, rather than litigating, coal rate disputes”).

⁸ CSX Reply Comments at 2, 8-11 (filed Aug. 29, 2016); Joint Carload Shippers Reply Comments at 1-2 (filed Aug. 29, 2016).

that further substantive changes to rate case standards would run counter to this proceeding's stated goal—and the statutory impetus for this proceeding – of expediting and streamlining rate reasonableness litigation.⁹ Moreover, substantive changes to the SAC test historically have led to litigation and delay, at least in the short term. For both of these reasons, the parties agreed that substantive changes to the SAC test should be beyond the scope of this proceeding.¹⁰

Moreover, the substantive basis of the Board's tests does not need overhaul. The Board's independent consultant, InterVISTAS,¹¹ confirmed the validity of the SAC test and that shippers have sufficient simplified options to bring smaller rate disputes to the Board. The report concluded that the Board's existing SAC test “has stood the test of time as a maximum rate reasonableness methodology.”¹² Though a SAC presentation entails significant “complexity and costs of preparing and litigating a case,”¹³ this complexity flows from the economic foundations of SAC and the structure of the rail industry, not deficiencies in the test.¹⁴ As the InterVISTAS Report explains, “[b]ecause the rail industry is a network industry, when trying to determine the

⁹ See Section 11(c), Reauthorization Act; 49 U.S.C. § 10704(d)(1). See, e.g., Joint Carload Shippers Comments at 4 (filed Aug. 1, 2016) (focusing its comments on ways to reduce the “duration, cost, and complexity of SAC cases” with procedural changes).

¹⁰ See, e.g., Coal Shippers Opening Comments at 55-57. “The Board has undertaken multiple rate case related rulemakings in the last several years and “[t]he Board should give these changes a chance to work, rather than endlessly tinkering with SAC. . . .” *Id.* at 5.

¹¹ InterVISTAS, *Surface Transportation Board, An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, Project FY 14-SB-157 (Sept. 14, 2016) (“InterVISTAS Report”).

¹² InterVISTAS Report at xviii.

¹³ *Id.* at 39.

¹⁴ InterVISTAS Report at viii. See, e.g., *id.* at 129 (SAC is the only methodology “that allows shippers to avoid cross-subsidization [and] benefit from the economies of scope in the [rail] network”). Notably, the InterVISTAS Report also concludes that shippers' litigation decisions contribute to the complexity of SAC presentations. *Id.* at 44 (noting that “some of the complexity can also be attributed to the effort of the shippers to develop increasingly complex [stand-alone railroads] that maximize cross-over traffic and associated economies of scope”).

reasonableness of rates charged . . . , an accurate cost analysis is necessarily a complex undertaking.”¹⁵

The report also found that less complex methodologies are “available to shippers” of all sizes.¹⁶ If “shippers want a simpler, faster and less expensive procedure,” they can use the Simplified SAC and Three Benchmark test.¹⁷ The InterVISTAS Report states that in many cases, “there is reason to believe that [shippers] can achieve similar results to Full SAC under these less-costly alternatives These results support the choice that the STB currently offers the shipper between full SAC, Simplified SAC or Three-Benchmark, with the shipper deciding whether full SAC is worth the cost.”¹⁸ The InterVISTAS report concluded that the Three Benchmark test in particular is a cost-effective means for shippers with small claims to challenge the reasonableness of their rates.¹⁹

Accordingly, the focus of this proceeding is rightly on procedural tools to expedite rate litigation.

II. The Board Should Adopt the NPRM Proposals With Minor Modifications

The AAR supports the proposal in the NPRM to create a 70-day pre-filing period and to conduct mediation during that time. As explained in the AAR comments to the ANPRM, a pre-filing notice that identifies the rate, origin/destination lanes that would be subject to the complainant, and the commodities at issue would allow for Board-administered mediation to

¹⁵ InterVISTAS Report at 40. *See also id.* at 44 (noting that the “complexity of [SAC] is a necessary exercise for those who want to estimate an economically efficient rate for the traffic in a network industry”).

¹⁶ *Id.* at 134.

¹⁷ InterVISTAS Report at 44. *See also id.* at 129 (noting that if shippers “believe that other nuances concerning their shipments need to be captured to get a more precise result,” SAC should be used).

¹⁸ InterVISTAS Report at 127-28.

¹⁹ *Id.* at 128-29.

begin earlier, potentially fostering private-sector resolution of the dispute.²⁰ The inclusion of a motion for protective order during this period should eliminate potential delay and allow for discovery to commence expeditiously upon the filing of a complaint.

The AAR also supports the proposal to appoint a staff liaison to a rate case, but notes that the Board should clarify that the staff liaison and the appointed mediator will be two separate individuals. The AAR agrees that “increased communication between the parties and the Board would expedite rate cases by reducing the number of disputes between the parties and thus the number of issues that must be decided by the Board.”²¹ In order to achieve the Board’s stated intention to “improve communication between the parties and the Board by providing the parties with a point of contact to whom they address questions or disputes,”²² the Board should consider delegating authority to that liaison by modifying its Part 1011 rules. Currently, 49 C.F.R. §1011.6 and §1011.7 delegate specific authority to individuals and offices of the Board. The Board should establish by rule that the staff liaison in a rate case has the authority to convene a technical conference and to rule on issues raised in such conferences. By doing so, the Board will facilitate negotiation among the parties and provide a clear path of oversight by the Board, subjecting the ruling to the appellate standards for interlocutory appeals under 49 C.F.R. § 1115.9(b). The AAR supports the Board’s stated intention to make greater use of technical conferences in order to promote evidentiary alignment and reduce issues in dispute.²³

Similarly, the proposed changes to the Board’s discovery rules will expedite discovery and facilitate negotiation and settlement of some issues. For example, the requirement that a

²⁰ AAR Comments at 6 (filed Aug. 1, 2016).

²¹ ANPRM at 10.

²² ANPRM at 11.

²³ See NPRM at 10.

party moving to compel must certify that it has made a good faith effort to confer should ensure that parties either resolve or narrow discovery disputes.²⁴

Likewise, staggering the submission of public and highly confidential versions of filings will aid parties in timely preparing and filing of evidence. When setting procedural schedules, the Board should take into account that a party's ability to prepare its responsive evidence depends on its inside counsel and employees receiving prompt access to all of the confidential or highly confidential evidence and argument (including exhibits and workpapers) that they are authorized to receive. Creating a standard convention for identifying and labeling confidential, highly confidential, and sensitive security information will also lead to more efficient filings.

The AAR urges that the Board make it clear that proposed protective orders should continue to include provisions that recognize parties have the right to review confidential or their own highly confidential material without prior permission from the party who has included or referenced it in filings. The practice of including such terms in Protective Orders reflects that railroads produce the majority of confidential and highly confidential information used in rate cases and that parties are entitled to see their own information and the confidential information of other parties.²⁵ Such terms can be tailored to the circumstances of individual case and expedite rate complaint proceedings by enabling a party's outside counsel to disclose information promptly to inside counsel and other employees to prepare a response.

²⁴ Such a practice would benefit discovery in any proceeding, not just rate reasonableness proceeding. Accordingly, the AAR urges the proposed sentence to be added to 49 C.F.R. § 1114.31(a) be revised as follows: ~~"In stand-alone cost and simplified standards cases, s~~[S]uch motion to compel an answer must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention." By reducing or limiting the scope of discovery disputes coming before the Board in any adjudicated proceeding, the Board's resources for resolving rate cases will be conserved.

²⁵ See Protective Orders entered in NOR 42127 *Intermountain Power v UP*, (paragraph 10) and paragraph 11 in orders entered in NOR 42130 *Sunbelt v NS*, NOR 42132 *Canexus v BNSF*, and NOR 42136 *Intermountain Power v UP*.

The AAR does not object to the proposal to limit briefs. However, the AAR suggests a limit of either 30 pages or 13,000 words, consistent with the Federal Rules of Appellate Procedure (“FRAP”).²⁶ A word-count limit would allow the Board to avoid gamesmanship regarding type fonts and margins. In adopting a limit on brief lengths, the Board should also reiterate its commitment to policing improper rebuttal evidence.²⁷ The Board should strictly enforce those rules and also relieve defendants from the brief limit when responding to improper rebuttal evidence or give defendants an opportunity to file a separate document (not subject to the brief length limit) that responds to improper rebuttal evidence.

III. Additional Targeted Process Improvements That Do Not Require Rule Changes Would Expedite SAC Litigation and Eliminate Unnecessary Delay

In addition to the proposals discussed above, the AAR submits that targeted process improvements would expedite rate case litigation and reduce unnecessary delay and expense. These improvements do not require specific rule changes, but can be achieved by the Board committing to processing cases more efficiently. In comments filed in EP 665 (Sub-No. 1) and in the ANPRM phase of this proceeding, the AAR noted five recommendations of The Institute for the Advancement of the American Legal System at the University of Denver (“IAALS”) to expedite the processing of civil litigation in the federal courts.²⁸ The essence of those

²⁶ See FRAP 32(a)(7).

²⁷ See, e.g., *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 100 (2003) (requiring the complainant “to present its full case-in-chief in its opening evidence”).

²⁸ Those recommendations are: (1) setting firm dates early in the pretrial process for the close of discovery, the filing of dispositive motions, and trial, and maintaining those dates except in rare and truly unusual circumstances; (2) ruling expeditiously on motions, even when the motions are denied; (3) limiting the number of extensions sought by the parties during any phase of the case; (4) working to foster a local legal culture that accepts efficient case processing as the norm, and enforcing that culture through active judicial case management; and (5) tracking the status of cases and motions through internal statistical reporting, and disseminating the results internally and externally as appropriate. See Civil Case Processing in the Federal District Courts: A 21st Century Analysis, The Institute for the Advancement of the American Legal System at the University of Denver (IAALS), at 9-10, *available at*

recommendations is a deliberate commitment to establish and enforce a timeline of actions, including timely decisions of issues that arise, to reduce delay.

In this regard, the Board has taken several steps in the right direction in recent years, including initiating this proceeding. The Board has made public the report prepared by a contractor on the Board's internal rate case process that establishes several ways the Board can improve its internal processing of cases.²⁹ For example, the report suggests a standardized approach to holding technical conferences at the outset of cases.³⁰ The report also suggests opportunities to improve adherence to procedural schedules.³¹ Consistent with these recommendations, timely disposition of pending motions would clarify issues and streamline cases. Timely application of a fair standard to dismiss a case based on a defective operating plan would eliminate protracted litigation caused by a failure within the control of the complainant.³²

Further, Acting Chairman Begeman has also indicated in an April 3, 2017 letter accompanying the Board's quarterly report to Congress on unfinished regulatory proceedings, that the Board is establishing internal target deadlines for completion of cases and will eventually make those dates public, so "stakeholders will have a better sense of when to expect a decision

[http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke Materials/Library/IAALS, Civil Case Processing in the Federal District Courts.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Civil%20Case%20Processing%20in%20the%20Federal%20District%20Courts.pdf).

²⁹ Report to Surface Transportation Board, (June 8, 2015) *available at* <https://stb.gov/stb/elibrary/InternalRate-CaseProcessing.html>.

³⁰ *Id.* at 7, 15-17.

³¹ *Id.* at 37-38.

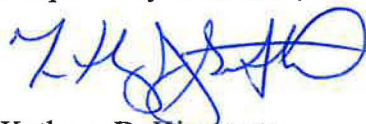
³² See Joint Carload Shippers Reply Comments at 21 (filed Aug. 29, 2016). Coal Shippers did not oppose timely disposition of motions to dismiss, only that such motions not place cases in abeyance or otherwise delay the processing of the case. Joint Coal Shippers Reply Comments at 28-29 (filed Aug. 29, 2016).

from the Board.”³³ Adoption of such internal reforms will aid in expediting rate case litigation without the need for changes to the Board’s rules.

Conclusion

As discussed above, the Board should adopt the NPRM proposals, with modest changes. In addition, some targeted process improvements at the Board will also serve to meet the Congressional goals of efficient litigation behind Section 11(c) of the Reauthorization Act.

Respectfully submitted,



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May 15, 2016

³³ See Letter from Ann D. Begeman, Acting Chairman, Surface Transportation Board to Rep. Bill Shuster, Chairman, Committee on Transportation and Infrastructure, U.S. House of Representatives (Apr. 3, 2017).