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SURFACE TRANSPORTATION BOARD REPORTS ON "RAIL ACCESS & COMPETITION" PROCEEDING; ELIMINATES PRODUCT & GEOGRAPHIC COMPETITION FROM MARKET DOMINANCE RULES; ADOPTS RULES FOR OBTAINING ALTERNATIVE RAIL SERVICE DURING PERIODS OF POOR SERVICE

Surface Transportation Board (Board) Chairman Linda J. Morgan and Vice Chairman Gus A. Owen announced that, in a letter sent today to Senators John McCain and Kay Bailey Hutchison, the Board has further reported on its "rail access and competition" proceeding. Chairman Morgan and Vice Chairman Owen also announced decisions in rulemaking proceedings arising out of the access and competition hearings. Those decisions eliminate the consideration of evidence of product and geographic competition in market dominance determinations and establish procedures for obtaining temporary alternative rail service to provide relief from service inadequacies.

The Rail Access and Competition Proceeding. The access and competition proceeding was initiated last spring in response to a request from Senators McCain and Hutchison. The Board held public informational hearings at which approximately 60 witnesses testified on April 2 and 3. At those hearings, the witnesses testified about a variety of concerns about rail service and rail regulation. As a result of those hearings, the Board directed certain private-sector discussions, and it undertook to review certain regulatory issues itself. See "Surface Transportation Board News" release No. 98-25, issued on April 17, 1998. The letter sent today to Senators McCain and Hutchison summarized the outcome of the Board's proceedings and the private-sector initiatives, and it suggested possible ways in which related issues that are still outstanding might be addressed.

The Board's Rulemakings. During the Board's informational hearings, several shippers raised concerns that it was too difficult to pursue a valid railroad rate complaint through the regulatory process, and that it was too difficult to obtain access to additional rail carriers during periods of poor service. The Board has now addressed each of these shipper concerns through rulemakings.

A. Market Dominance. Under the statute, the Board may not review the reasonableness of a challenged rail rate unless it first finds that the railroad has "market dominance" over the traffic involved. Market dominance refers to "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." The statute itself provides that a carrier is not market dominant if its rate does not return more than 180 percent of its "variable costs." In addition, the previous Board rules provided for four inquiries in assessing market dominance: whether the same commodity can be transported between the same points effectively by other railroads (intramodal competition) or non-rail transportation (intermodal competition), and whether the complaining shipper can avoid using the defendant railroad by shipping or receiving a substitute product (product competition), or by obtaining the same product from a different source or shipping the same product to a different destination (geographic competition).

In its rulemaking proceeding responding to shipper complaints, the Board eliminated the product and geographic competition tests from the market dominance standard. It found, based on many years of experience processing rate complaint cases and the record developed in this rulemaking, that consideration of these factors significantly impedes the efficient processing of the Board's rate docket. When the market dominance standard was first enacted, Congress indicated that it was to be a practical determination made without delay; more recently, Congress directed the Board to process rate cases more expeditiously. To comply with both of these legislative directives, the Board limited the evidence that would be considered to only that required by the statute, i.e., competition "for the transportation to which a rate applies."

The Board concluded that the limited impact on the rail industry from this decision is far outweighed by the chilling effect that inclusion of product and geographic competition can have on the filing of valid rate complaints by captive shippers and on the resolution of rate complaints in a timely manner. The Board observed that removing this chilling effect will

further level the playing field between railroads and shippers and should thus result in more private-sector solutions to rate disputes.

B. Temporary Relief for Poor Service. To respond to the concerns that shippers raised about service during the access and competition hearings, the Board established procedures for providing emergency and temporary relief from serious, localized railroad service problems more quickly and effectively. Under the new procedures, shippers or connecting railroads affected by the service problems of an "incumbent" carrier can seek temporary service from an alternative rail carrier.

Service can be sought in two different ways. One section of the rules (Part 1146) will apply to requests for expedited, short-term emergency relief, under the Board's broad statutory authority to direct the handling of traffic and the use of rail facilities, for not more than 270 days, when a rail carrier cannot transport the traffic offered to it in a manner that properly serves the public. The other section of the rules (Part 1147) will apply to requests under the "access" provisions of the statute under which the incumbent carrier would "switch" the traffic to another carrier, or allow another carrier to enter its terminal facilities, to address serious (but not necessarily emergency) service problems on a more fully developed record. Access under these provisions would be temporary, but would not be specifically subject to the 270-day limit. The Board explained that these new rules are designed to address immediate service problems. The Board's competitive access rules--at 49 CFR Part 1144--remain available for requests for a more permanent alternative service arrangement in response to competitive concerns.

Under the new procedures, petitioning shippers or carriers must first discuss and assess with the incumbent railroad whether adequate service can be restored within a reasonable time and, if not, explain why that is the case. Shippers seeking relief should also obtain from an alternative carrier the necessary commitment to meet the service needs. Parties seeking temporary alternative service must explain how that service can be provided safely, without degrading service to the alternative carrier's existing customers, and without unreasonably interfering with the incumbent carrier's overall ability to provide service. Because of the importance of safety concerns, parties must notify the Federal Railroad Administration and cooperate with that agency.

Resolution of Issues in the Private Sector. The Board's letter to Senators McCain and Hutchison reported on the outcomes of several private-sector discussions that were conducted in accordance with the Board's general directive that the parties work toward private sector solutions to their problems. It pointed out that smaller and larger railroads had reached a formal agreement on ways to eliminate barriers to the ability of smaller railroads to compete. It referred to another formal agreement adopting a mandatory arbitration program to resolve certain disputes entered into between the National Grain and Feed Association and The Association of American Railroads (AAR). And it reported on the five formal meetings sponsored by the AAR to address concerns raised by some shippers at the Board's hearings that railroads had not been adequately communicating with them. In a letter to the Board describing the meetings (which were held in Chicago, IL; Houston, TX; Atlanta, GA; Newark, NJ; and Portland, OR, and all of which Chairman Morgan attended), AAR reported on the follow-up actions to be taken, including, among other things, issuance of performance reports by each of the large railroads, development of a plan for facilitating interline movements, and continuation of the outreach meetings. The Board noted that it supports the continued dialogue that the AAR letter promises, and indicated that it will be closely monitoring all of these follow-up activities.

Revenue Adequacy, Competitive Access, and Small Rate Cases. The Board pointed out that it had appropriately addressed matters of concern within the scope of the authority given to it by Congress. It noted, however, that certain legislative proposals will likely be discussed in Congress during the next session. To advance those discussions, it provided some thoughts on some of the issues as to which legislative proposals are likely.

A. Revenue Adequacy. Revenue adequacy is a statutory provision that is designed to determine railroads' financial health. The existing, judicially approved revenue adequacy measurement, which focuses on a railroad's return on investment, has for many years been a source of controversy that has polarized the transportation community. The Board found that the underlying policy objective--that the Government' s regulatory approach, among other goals, should permit

railroads to earn adequate revenues--is a laudable one that should be retained. As the revenue adequacy status of any particular railroad has little practical effect, however, the Board stated that Congress may wish to consider legislatively abolishing the requirement that the Board determine on a regular basis which railroads are revenue adequate. The Board did indicate in this regard that, in order to oversee the industry, it would need to review by some measurement how the industry is faring financially. For that reason, and because Congress may not wish to abolish the revenue adequacy provision immediately, the Board noted that some guidelines would need to remain in place.

Given its limited resources, and with its credibility on the issue under challenge by several shippers, however, the Board indicated that it is not likely to undertake a proposed rulemaking, as some shippers had suggested. Rather, the Board stated that it continues to support the idea of engaging a panel of disinterested experts, which was suggested by both shipper and railroad interests during the Board's access and competition hearings. The Board pledged to give great deference to the expert panel, and stated that if the private parties did the same, then a resolution could be achieved quickly and inexpensively.

B. Competitive Access. Competitive access refers to the ability of shippers to obtain service from railroads that do not reach their facilities over the objections of the railroad that does serve their facilities. At the Board's request, railroads and shippers discussed the competitive access rules to see if they could reach some common ground. However, the differences between the railroads and the shippers on this subject are fundamental, and they raise basic policy issues--issues concerning the appropriate role of competition, "differential pricing," and how railroads earn revenues and structure their services--that are more appropriately resolved by Congress than by an administrative agency. Moreover, the so-called "bottleneck cases," which involve issues related to competitive access, are still being reviewed in court. For those reasons, although the Board has moved aggressively to adopt new rules described above to open up access during times of poor service, the Board expressed its doubts that it will initiate administrative action to otherwise revisit the competitive access rules at this time. In this regard, the Board pointed out the complexity of the open access issue, and indicated that there is some uncertainty as to how the rail system would look under an open access system.

C. Small Rate Cases. The Board described its small rate case guidelines, which apply in cases in which its traditional rate review methodologies cannot be practicably used. It noted that the information needed to make a case under the small case guidelines, which are the only procedures that have been identified that readily address each of the concerns that the Board must consider under the statute, is readily available at reasonable cost.

Nevertheless, the Board recognized that certain shippers are concerned that, for small rate cases, anything other than a single benchmark test could unreasonably impede access to the regulatory process. It stated that, if Congress agrees, it could adopt specific small rate case standards. As an example, Congress could provide that, for certain types of cases, all rates above a specified revenue-to-variable cost ratio, or series of ratios, would be unreasonable. If the methodology were to be premised on the current regulatory system, then the specifics of such an approach--for example, the cases to which it would apply, and the level or levels at which rates might be capped-- would have to balance issues such as differential pricing and railroad revenue need against the fairness in requiring captive shippers to pay substantially higher prices than shippers with more competitive options.

Override of Railroad Collective Bargaining Agreements. Finally, the Board noted that another matter that could be presented to Congress next year is the question of limiting the authority of arbitrators subject to Board oversight to modify existing collective bargaining agreements (CBAs) in the process of implementing approved rail consolidations. The Board stated that the process has been extremely controversial since a 1991 Supreme Court decision holding that approval of a rail consolidation permits the override of CBA provisions as necessary for implementation of the consolidation. Indicating that labor representatives oppose and are understandably dissatisfied with any provision or action that permits a CBA to be overridden, the Board suggested that a change in the law could address labor's concern in this area.

The Board's letter to Senators McCain and Hutchison was issued today in STB Ex Parte No. 575, Rail Access and Competition Issues. The Board's rulemaking decisions were issued today in **STB Ex Parte No. 627**, Market Dominance Determinations--Product and Geographic Competition, and **STB Ex Parte No. 628**, Expedited Relief for Service

Inadequacies.

The Board's decisions are available on the Board's web site at **www.stb.dot.gov**.

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