

Surface Transportation Board Reaffirms Its Decision to Exclude Consideration of Product & Geographic Competition in Market Dominance Determinations

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board, following judicial review, has again examined and reaffirmed its decision to exclude consideration of product and geographic competition from the market dominance analysis in railroad rate complaint proceedings.

Under the law, the Board may not review the reasonableness of a challenged rail rate unless it first finds that the railroad at issue has "market dominance." 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 market dominance statute requires the Board to look at both how high a rate is relative to the costs that the railroad incurs in providing the service and whether, from a "qualitative" perspective, there is competition for the traffic at issue. Before 1999, the Board's procedures permitted railroads to demonstrate, qualitatively, that there was no market dominance by showing competition among railroads (intramodal competition); competition from other transportation modes (intermodal transportation); or that the complaining shipper can avoid using the defendant railroad by shipping or receiving a substitute product (product competition), or by obtaining its product from a different source or shipping it to a different destination (geographic competition).

In decisions issued in December 1998 and July 1999, the Board excluded product and geographic competition as factors to be considered in market dominance proceedings, finding that the applicable law did not require consideration of those factors; that consideration of those factors unduly burdened shippers attempting to bring rate cases; and that the exclusion of those factors would not have any substantial effect on the rates that the railroads could charge in the marketplace (see Surface Transportation Board "News" releases Nos. 99-32, issued on July 2, 1999, and 98-82, issued on December 21, 1998). The railroad industry sought judicial review of the Board's decisions, and in *Association of Am. Railroads v. STB*, 237 F.3d 676 (D.C. Cir. 2001), the United States Court of Appeals for the District of Columbia Circuit (Court) remanded (returned) the matter for the Board's further consideration.

The Court rejected the railroads' claim that the law expressly requires the agency to consider product and geographic competition. It found, however, that the Board did not adequately explain how it had taken into account the Rail Transportation Policy [RTP] directive set forth in 49 U.S.C. 10101 "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

In today's decision, the Board observed that it must balance the various RTP policy directives, and that excluding product and geographic competition to make the market dominance process easier to administer would advance the policy directives to resolve disputes expeditiously [49 U.S.C. 10101(2) and (15)], and to give shippers practical access to the rate review process [49 U.S.C. 10101(6)]. At the same time, the Board found that its decision would not contravene the RTP policy directing the Board to rely on competition rather than regulation when possible, because a competitive rate is unlikely to be challenged and, even if challenged, is unlikely to be disturbed. Thus, after again considering the various policy goals of the law, the Board concluded that "the scale tilts heavily in favor of excluding product and geographic competition from consideration in rail rate cases."

Also in today's decision, the Board denied an Association of American Railroads petition requesting that the Board reopen the proceeding to further consider specific proposals for taking evidence of product and geographic competition in rail rate cases, and requesting that the Board direct shipper and railroad interests to negotiate compromise rules in this regard. The Board indicated that it had already considered and rejected such proposals, and that nothing but unwarranted uncertainty would be gained by reopening the proceeding at this time. The Board pointed out that negotiations could have taken place

before now and could take place any time in the future, but that there is no need to further delay the proceeding for that purpose.

The Board issued its decision today in *Market Dominance Determinations--Product and Geographic Competition*, STB Ex Parte No. 627. Printed copies are available for a fee by contacting **D~To-D~ Office Solutions, Room 405, 1925 K Street, NW, Washington, DC 20006, telephone (202) 466-5530**. The decision also is available for viewing and downloading via the Board's Website at <http://www.stb.dot.gov>.

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