



Subcommittee on Railroads, Pipelines, and Hazardous Materials

of the

House Transportation and Infrastructure Committee

Hearing:

“Stakeholder Views on Surface Transportation Board Reauthorization”

Tuesday, March 8, 2022

10:00am Est

Additional Comments

Submitted on

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by

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National Industrial Transportation League

INTRODUCTION

Chairs Peter DeFazio and Donald Payne, Ranking Members Sam Graves and Rick Crawford, and Members of this Subcommittee, thank you for providing this opportunity for me, Brad Hildebrand, to submit additional comments following the March 8, 2022, hearing, “*Stakeholder Views on Surface Transportation Board Reauthorization*,” on behalf of the National Industrial Transportation League (NITL).

RECIPROCAL SWITCHING

It was troublesome that much of this congressional hearing focused on the Surface Transportation Board’s (Board or STB) reciprocal switching proposal given that the Board held a two-day public hearing on March 15 and 16, 2022 (EP 711 (Sub.-1), *Reciprocal Switching*). Further, it was disappointing that the witness testifying on behalf of the Association of American Railroads (AAR) claimed that this is a backdoor venue for shippers to force a reduction in railroad rates. The railroads are treating reciprocal switching as if it will be an existential threat to their business.

The AAR is correct that there is a process in place for shippers to request a competitive switch. However, this decades-old STB procedure does not work as it requires shippers to demonstrate anticompetitive conduct which is legally unattainable to reach. As such, shippers have not and are not bringing competitive switch requests to the Board under the current rules.

The STB proposal is about enhancing competition. It offers two new paths for shippers to request a competitive switching remedy from the Board that is 1) Practical and In the Public Interest or 2) Necessary to Provide Competitive Rail Service.

The AAR's dialogue during the hearing pointed out several misconceptions about the Board's proposal. First, the AAR wants us to believe that the operations of its entire network would be severely jeopardized because the thousands of switches that its members would be forced to make to accommodate the interchanging of traffic with a competing railroad. On the contrary, the burden of proof would rest with the requesting shippers to demonstrate there is an established working interchange between the two rail carriers. Second, the requesting shippers would have to prove that the switching request falls under one of the above-mentioned paths and the respective criteria is met. It is NITL's belief that should the proposed reciprocal switching process become a Final Rule, there would not be a wholesale move for every shipper across the country to request a new reciprocal switch – as stated in AAR's continued messaging. Under the Board's proposal, it will still be a long and costly process for shippers to pursue. Shippers would want to be certain that their request for opening-up competition to their facility would meet all of STB's criteria before they make this kind of financial commitment. Should the Board's proposal become a Final Rule, the mere fact that exists, could hopefully result in competitive service and competitive rates without shippers having to go to the Board in the first place. This competitive driver is not present under the current rule.

FINAL OFFER RATE REVIEW

I appreciate this opportunity to clarify NITL's position on the Board's proposed Final Offer Rate Review (FORR). NITL supports the FORR in EP 755, *Final Offer Rate Review* and EP 655, *Expanding Access to Rate Relief*. These rules would establish a series of procedural deadlines intended to allow the STB to issue a decision 135 days after a rate complaint is filed when dealing with cases in which the shipper seeks rate relief of \$4 million or less. The railroad

and the shipper would each be required to submit a final offer (as in baseball-style arbitration). This is only after the STB has determined that the railroad has market dominance over the shipment(s) in question. The STB would only be allowed to select one of the offers without modification. NITL encourages the Board to swiftly issue a Final Rule on its FORR proposal.

In addition, NITL opposes the Small Alternative Voluntary Arbitration proposal put forth by several Class I railroads in a July 2020 petition filed before the Board. NITL finds several objectionable elements of this proposal including 1) an exemption from FORR for five years; 2) confidentiality of the results of the arbitrator's decision; and, 3) rail carriers would have the right to withdraw from the program under certain circumstances, such as if the Board adopts a material change to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the program.

NITL views this rail carrier proposed Small Alternative Voluntary Arbitration process as NOT voluntary for shippers and was an 11th hour attempt by the railroads to further stall the STB's consideration of its FORR proposal.

COMMODITY EXEMPTIONS

NITL would like to re-affirm its request to Congress that it requires the Board to eliminate all exemptions for commodities and to do so in a streamlined, transparent process. As NITL stated in its submitted written comments, we ask Congress to encourage the STB to:

- Promptly complete its consideration of commodity exemptions in its pending proceeding, EP Docket No. 704, *Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. It is important to note,

however, that this proceeding only involves five to six commodity groups and there are many other exempt commodities for which a review is warranted.

- Interpret its revocation authority more broadly given today's far more concentrated market conditions than existed when the exemptions were adopted and the railroads' financial health.

Other options should Congress choose a different approach, would be to 1) eliminate all exemptions by a date certain unless the railroads can show that the exemption is still warranted or 2) require that all exemptions be periodically reviewed by the STB every five years.

It is important to remind Congress, that if a commodity or a class of commodities are "exempt" that means that those shippers that ship these commodities cannot seek service or rate redress or relief from the Board unless the shippers first go thru a tedious, time consuming, and costly process before the Board requesting that the exemption be revoked. In that process, the shipper is required to demonstrate before the STB that a market dominant rail carrier makes these movements. If shippers have successfully demonstrated market dominance before the Board, then the shippers can pursue informal or formal service or rate complaints or cases.

AAR is correct, and as just stated, there is already a process in place before the Board for exempted commodities to seek revocation. However, given the continued consolidation of the rail network and utilization of Precision Scheduled Railroading, exempted commodities are an answer to a problem that no longer exists.

ENHANCED STATUTORY AUTHORITY

As you continue thinking thru and developing the next STB authorization, NITL requests that Congress keeps in mind the second major commitment of the *Stagers Rail Act of 1980*:

instill railroad-to-railroad competition in the marketplace. The Board needs additional statutory authority and tools to not just facilitate railroad-to-railroad competition, but to move the pendulum closer to the middle where all stakeholders can effectively operate in a competitive environment. The burden of proof should not always be placed on the shippers to achieve a fair and balanced hearing before the Board or before Congress.

NITL believes that if carriers are deemed revenue adequate by the Board, then they should be the ones having to prove to the STB that their service performance, rates, terms, and fees are reasonable. Formal rate and fee cases need to be heard and decided within a maximum two-year period. During this this time, the Board should be allowed to put an injunction on the contested railroads' rates, terms, fees, or service practices while the case is being heard by the Board. It is simply not right that the railroads can continue to collect what shippers are asserting to be as unreasonable rates and fees. Currently, it is extremely difficult to near impossible for shippers to seek an injunction on these rates and fees. Shippers would need to prove that the railroads' action(s) would put their business into serious peril if not jeopardy. Conversely, if the Board had the statutory authority to issue an injunction, combined with a case completion time deadline, would facilitate the finalization of Board decisions.

While the STB has made some progress on considering alternate economic proposals or models to the three methods that are currently available for large shippers to pursue formal rate cases [Stand-Alone Cost (SAC), Simplified SAC, and Three Benchmark], Congress needs to provide statutory authority to the Board allowing it to shift the burden of proof from shippers to railroads. As I said in my oral remarks during the hearing, there are no new pending rate cases before the Board. This is NOT because shippers are happy with the status quo, it is because these

methods are too complex and too expensive for shippers to fight with the burden of proof on the shippers.

CONCLUSION

Thank you for your continued leadership on freight rail shipper issues and consideration of our reauthorization proposals. NITL looks forward to continuing this important dialogue.