

Comments of the Rail Customer Coalition
on
Surface Transportation Board Docket No. EP 730
Revisions to Arbitration Procedures

June 13, 2016

The Rail Customer Coalition (RCC) is pleased to provide these opening comments on the Surface Transportation Board's (STB) proposed revisions to STB arbitration procedures. The RCC is a large collection of trade associations representing a broad cross section of manufacturing, agricultural, and energy industries with operations and employees throughout the United States. Members of the coalition represent many of the largest users of freight rail that depend on the railroads to deliver reliable and affordable service in order to remain competitive in a global market. More information about the RCC and its membership can be found at www.freightrailreform.com. Individual members of the RCC may file their own comments in this proceeding.

The RCC is committed to supporting modernization and improvement of the STB so that it better meets the needs of railroads, the large and small American businesses that rely on them, and the larger public interest in effective rail transportation. The RCC supports practical reforms, including reforms being considered in this proceeding, that could make the STB operate more efficiently and effectively for all stakeholders.

This rulemaking is an important step forward in implementing the *Surface Transportation Board Reauthorization Act of 2015* and providing more workable and effective resolution of disputes between shippers and railroads. The RCC strongly supported the Act and is very interested in pursuing the legislative imperative to create a more efficient and effective arbitration. The arbitration section of this Act has been repeatedly identified by the legislation's original sponsor Senate Commerce Committee Chairman John Thune as one of the Act's most significant and important reforms. It is of paramount importance that the STB implement a system that will be better utilized than the current arbitration system.

Flexibility for Arbitrators is Essential

The RCC strongly supports the decision of Congress to allow, for the first time, the use of arbitration for rate disputes, with awardable damages of up to \$25 million. However, significant barriers for many shippers will remain even with the implementation of the legislative mandate, and the RCC is concerned that railroads will have little incentive to make the rate case process more efficient by agreeing to arbitration. Many problems such as market dominance determinations and overly burdensome rate reasonableness methodologies could still pose insurmountable obstacles for shippers who wish to have their rate disputes resolved through arbitration if not addressed carefully by the STB in this rulemaking.

The statute requires that the arbitration decision be "consistent with sound principles of rail regulation economics" and that the arbitrators "consider the Board's methodologies for setting

maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under § 10704(a)(2)).” The requirements to be consistent, “consider”, and “give due consideration”, do not require the arbitrators to emulate the Board’s existing full stand-alone cost or other existing rate methodologies. The arbitrators need to have the flexibility to modify the application of those principles and methodologies to fit the circumstances of arbitration for arbitration to be a viable alternative to litigated rate cases. The limitations of the existing approaches have been recognized by shippers, railroads, the Commissioners themselves, and Congress in enacting the legislation. Therefore, the Board should explicitly encourage arbitrators to also consider other methodologies utilized in other economic regulatory contexts, while still retaining consistency with existing principles of rail regulation economics.

Market Dominance Determinations May Dissuade Captive Shippers from Pursuing Arbitration

For rate disputes, arbitration is available only if the rail carrier has market dominance. The Board recognizes that market dominance determinations may significantly delay the arbitration process, and separating the market dominance determination from rate reasonableness analysis may also impose costs that make the arbitration process less useful.

Parties to arbitration must be able to concede market dominance in arbitration, much as they do in litigated rate cases. Parties to arbitration should also be able to agree on simpler tests on rate reasonableness, e.g., that challenged rates are unreasonable if they exceed the jurisdictional threshold. Such agreements have also been accepted in litigated rate cases. However, the Board should recognize that railroads are likely to dispute market dominance in most cases, significantly limiting cases where voluntary arbitration is a viable option.

The Board could mitigate these problems by creating a presumption of market dominance that could be rebutted by the carrier. The STB could, for example, presume market dominance if a shipper is served by a single railroad with no competitive switching, or if R/VC percentages well above 180% of variable cost suggest captivity, or if a shipper shows that its circumstances are essentially identical to those of one or more other shippers found by the Board to be subject to market. Other creative options to ensure arbitration is fully utilized may be developed.

Rail Shippers need Metrics on Utilization of Arbitration

The RCC is hopeful that changes to the arbitration system at the Board will help address overarching problems rail customers face when seeking faster, simpler, and less costly ways to challenge high rates before the STB. By specifically requiring rate cases to be arbitrated, it is clear that Congress is encouraging the Board to find more effective, efficient means and less costly means to resolve disputes between railroads and customers.

Given the voluntary nature of the new system, however, we are concerned that rail shippers may seek to utilize the system, but railroads may decline to enter into arbitration, in the expectation that meritorious rate challenges will thereby be deterred. The RCC supports creation of a system at STB to track and create a record of unsuccessful attempts by one or more shippers to enter into arbitration. If the new arbitration system is not well utilized, it is important to have a record to

understand why it is not being used, so that the STB and Congress can fully understand the issues and consider potential future changes through the regulatory or legislative process.

Conclusion

The Rail Customer Coalition commends the STB for initiating this proceeding. The Board should adopt the recommendations in these comments, and make arbitration as accessible and effective as possible by minimizing potential barriers.

Respectfully submitted,

The Rail Customer Coalition