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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

Digest:[1] The Board denies two petitions seeking reconsideration of a decision adopting final rules that establish a streamlined approach for pleading market dominance in rate reasonableness proceedings.

Decided: January 24, 2023

On August 3, 2020, the Board adopted a final rule in this docket to establish a streamlined approach for pleading market dominance in rate reasonableness proceedings. Mkt. Dominance Streamlined Approach (Aug. 2020 Decision), EP 756 (STB served Aug. 3, 2020). On August 24, 2020, the American Chemistry Council, the Corn Refiners Association, The Fertilizer Institute, the National Industrial Transportation League, and The Chlorine Institute (collectively, the Coalition Associations) filed a petition for reconsideration. On the same day, The Chlorine Institute (CI), although it joined in the Coalition Associations' petition, submitted a separate filing that it captioned a Supplemental Petition for Reconsideration. For the reasons discussed below, the Board denies both petitions.[2]

BACKGROUND

Shippers that wish to challenge a rail carrier's rate as unreasonable must first demonstrate that the rail carrier has market dominance over the transportation to which the rate applies. 49 U.S.C. § 10707(b), (c). Market dominance is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). On September 12, 2019, the Board issued a notice of proposed rulemaking proposing a streamlined approach for parties to demonstrate market dominance in rate reasonableness proceedings. The Board stated that it expected such an approach would reduce burdens on parties, expedite proceedings, and make the Board's rate relief procedures more accessible, especially for complainants with smaller cases. Mkt. Dominance Streamlined Approach (NPRM), EP 756, slip op. at 1 (STB served Sept. 19, 2019). In the August 2020

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The Coalition Associations and CI are referred to collectively as Petitioners.

Decision, the Board issued a final rule adopting the streamlined approach, with some modifications to the NPRM proposal.

In the final rule, the Board adopted several factors that, if demonstrated by a complainant, would constitute a prima facie showing of market dominance. These prima facie factors are:

- The movement has a revenue-to-variable cost (R/VC) ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- There is no pipeline competition;
- The complainant has used truck for 10% or less of its volume (by tonnage) subject to the rate at issue over a five-year period; and
- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

Aug. 2020 Decision, EP 756, slip op. at 51. The Board also adopted corresponding procedures. In particular, the new regulations allow complainants to demonstrate that prima facie factors for lack of intramodal competition, barge competition, pipeline competition, and practical build-out alternatives have been met by submitting a verified statement from an appropriate official. Id. The new regulations also limit streamlined market dominance filings to 50 pages (including exhibits and verified statements) and allow complainants to request an evidentiary hearing conducted by an administrative law judge in lieu of a written rebuttal. Id. The regulations are codified at 49 C.F.R. § 1111.12(a)-(d).

The Board received separate petitions for reconsideration from the Coalition Associations and CI. The Coalition Associations argue that the Board committed material error regarding four aspects of its final rule adopting the streamlined approach: (1) its holding that complainants must file a new case if they cannot prove market dominance using the streamlined approach, (2) its rejection of the Coalition Associations' proposed "à la carte" approach, (3) its setting of the mileage threshold factor at 500 miles, and (4) its failure to consider a 30-page limit on filings and its treatment of the effect of electronic workpapers on this limit. CI filed a separate petition addressing the issue of the mileage threshold factor with regard to chlorine shipments.

On September 14, 2020, the Association of American Railroads (AAR) filed a reply to the petitions for reconsideration. AAR argues that Petitioners fail to demonstrate material error, but instead merely disagree with the Board's decision on these issues. (AAR Reply 2.) The National Grain and Feed Association (NGFA) also filed a reply on September 21, 2020, which indicates support for arguments made by the Coalition Associations and CI urging reconsideration of the 500-mile threshold.[3]

[3] NGFA acknowledges that its reply was filed after the due date set forth in 49 C.F.R. § 1104.13(a), but requests that the Board accept it into the record "because it will aid the Board in considering the referenced petitions for reconsideration, and its inclusion in the record will not prejudice any party of record." (NGFA Reply 1 n.1.) NGFA generally does not present any additional arguments or evidence in its reply, aside from noting that some of the arguments made

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. See New Eng. Cent. R.R.—Trackage Rts. Ord.—Pan Am S., FD 35842, slip op. at 4-6 (STB served Apr. 26, 2018). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control— Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). "Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process." Tex. Mun. Power Agency v. BNSF Ry. Co., 7 S.T.B. 803, 805 (2004) (citing Conn. Trust for Historic Pres. v. ICC, 841 F.2d 479, 484 (2d Cir. 1988)). Moreover, no matter the claimed basis for reconsideration (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); see also 49 C.F.R. § 1115.3.

The Board finds that the Coalition Associations and CI have not demonstrated that the Board committed material error in the August 2020 Decision and therefore will deny their petitions for reconsideration. Additionally, as explained below, the Board is currently exploring approaches that could be used to adjust the mileage thresholds on a commodity-specific basis.

A. Preclusive Effect of Dismissal.

In the NPRM, the Board stated that a complainant that elects to use the streamlined market dominance approach but is unsuccessful "may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances (or other factors under 49 U.S.C. § 1322(c))." NPRM, EP 756, slip op. at 11. In their comments, Olin Corporation (Olin) and the Freight Rail Customer Alliance (FRCA) "disagree[d]" with this restriction on a complainants' ability to file a new case. (Olin Comment 9-10; FRCA Comment 3.) In response, the Board explained that agency and court precedent hold that a complainant seeking to challenge the same rates at issue as in a prior proceeding can do so only upon a showing of changed circumstance, new evidence, or material error. Aug. 2020 Decision, EP 756, slip op. at 44 (citing Burlington N. & Santa Fe Ry. v. STB,

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by the Coalition Associations and CI are also applicable to agricultural shippers. No party objected to NGFA's request. As such, the Board agrees that inclusion of the NGFA's reply will not prejudice any party and therefore, in the interest of a more complete record, accepts the reply. See Academy Express, L.L.C.—Acquisition of the Props. of Go Bus LLC and its Affiliate MCIZ, Docket No. MCF 21059, slip op. at 1 n.2 (STB served Feb. 17, 2015).

403 F.3d 771, 778 (D.C. Cir. 2005); Intermountain Power Agency v. Union Pac. R.R., NOR 42127, slip op. at 4 (STB served Nov. 2, 2012)). In light of that precedent, the Board concluded that "it is appropriate that a complainant cannot file a new complaint to challenge the same traffic where the Board has previously found no market dominance, absent a showing that one of these criteria are met." Aug. 2020 Decision, EP 756, slip op. at 44.

In their petition for reconsideration, the Coalition Associations argue that the Board committed material error by holding that "complainants must file a new case if they cannot prove market dominance using the streamlined approach." (Coal. Ass'ns Pet. 3-5.) Although they acknowledge that a complainant is prohibited from filing a new challenge to the same rates at issue in a prior proceeding, they argue that this prohibition does not apply in the context of the same proceeding. (Id. at 3.) As such, they argue that the Board should permit complainants to elect the streamlined approach, but, "[i]f the Board concludes that the complainant has not satisfied one or more of the prima facie factors, it could issue a market dominance decision with those conclusions and establish a procedural schedule for submitting non-streamlined market dominance evidence." (Id.) Specifically, they argue that the Board could require additional evidence on only those prima facie factors that have not been met, similar to the "à la carte" approach they suggested in their comments to the NPRM. (Id.) The Coalition Associations also argue that this approach would resemble the summary judgment process employed by courts to determine whether there are disputed material facts that require a full trial. (Id. at 3-4.) Lastly, they argue that complainants should not be compelled to gamble their entire case on the possibility that they might fail even a single prima facie factor, a risk that they claim will discourage most complainants from invoking the streamlined process. (Id. at 4-5.)

AAR replies that the Board's decision was "straightforward application of long-standing agency precedent" and therefore was not material error. (AAR Reply 6, Sept. 14, 2020.) AAR also claims that the Coalition Associations' two-step approach "would incentivize complainants to pursue the streamlined approach in most, if not all, cases to take advantage of the two chances to show market dominance," which would "lead to more time and expense in litigating market dominance, not less." (Id.) AAR also argues that this "proposal raised issues of due process, res judicata, collateral estoppel, and issue preclusion." (Id. at 5.)

As an initial matter, the Board notes that the Coalition Associations did not propose that the Board adopt the approach that they advocate here, in which a complainant that tries, but fails, to demonstrate market dominance under the streamlined approach could try again using the non-streamlined approach in the same proceeding.[4] In fact, they did not address the preclusive effect of a Board decision finding no market dominance under the streamlined approach in response to the NPRM, despite the NPRM's explicit proposal regarding this matter. NPRM, EP 756, slip op. at 11. As the Coalition Associations point out, they did propose an "à la carte" approach, in which a complainant could use the prima facie factors from the streamlined approach to show

[4] As noted above, FRCA and Olin did argue in response to the NPRM that complainants should be permitted to file a *new* case if they fail to meet the streamlined market dominance test. Aug. 2020 Decision, EP 756, slip op. at 44 (citing Olin Comment 9-10; FRCA Comment 3). But neither they nor any other commenter proposed allowing complainants to try again in the *same* proceeding.

market dominance with regard to some modes of transportation while using the non-streamlined approach with regard to other modes. However, that approach—which the Board declined to adopt[5]—is different from the "two bites at the apple" approach that the Coalition Associations propose for the first time here on reconsideration. Coalition Associations acknowledge that the Board correctly found that precedent requires a showing of material error, changed circumstance, or new evidence before the same rate can be challenged in a new proceeding. (Coal. Ass'ns Pet. 3) (describing this conclusion as "undoubtedly true"). But the Coalition Associations argue that the Board materially erred by not then considering an alternative: allowing a complainant that fails to provide market dominance using the streamlined approach from presenting more evidence in the *same* proceeding. (Id.) However, that approach was not part of the Board's proposal in the NPRM, and no party proposed such an approach in their comments; as such, there was no reason for the Board to address such a proposal. Accordingly, the Board finds that the Coalition Associations' new "two bites at the apple" proposal is improperly raised for the first time on reconsideration. See New Eng. Cent. R.R., FD 35842, slip op. at 4-6.

Even if the Coalition Associations' argument and proposal had been properly raised, the Board would decline to adopt it. The Board intended streamlined market dominance to simplify a complainant's ability to plead market dominance in straightforward cases while still meeting its evidentiary burden. It is mechanically possible that a streamlined market dominance approach could be conceived in the way the Coalition Associations describe—as a preliminary step like summary judgment that would allow the Board to make an initial determination of whether material facts are in dispute and of whether a full evidentiary presentation is necessary. But such an approach would add an additional, time-consuming step to an already time-constrained rate proceeding: the procedural schedule would need to allow a round of pleadings addressing market dominance using the streamlined approach, followed by an intermediate decision by the Board, and then a second round of pleadings on market dominance using the non-streamlined approach (in case it is needed). Such an approach would be contrary to the goal of adopting a streamlined approach in the first place, which was to simplify the process in appropriate cases. NPRM, EP 756, slip op. at 4-5. And even if such an approach could be thought to have certain policy benefits, AAR correctly notes that it implicates complicated issues regarding res judicata and issue preclusion.

Lastly, the Coalition Associations argue that, unless the Board permits complainants that are unsuccessful in demonstrating market dominance under the streamlined approach to pursue a non-streamlined market dominance showing in the same case, complainants are unlikely to use the streamlined approach due to the risk their case will be dismissed if they are unable to satisfy just one of the prima facie factors. (Coal. Ass'ns Pet. 5.) However, the prima facie factors are intended to identify and be used only in instances where market dominance is "clear on its face," see Aug. 2020 Decision, EP 756, slip. op. at 11, 29 n.40, saving complainants in such cases from the time and expense of making a more complicated opening presentation.

[5] See Aug. 2020 Decision, EP 756, slip op. at 31. As discussed below, in this decision the Board denies reconsideration of its decision not to adopt the "à la carte" approach.

B. "À La Carte" Approach.

In the August 2020 Decision, the Board declined to adopt the "à la carte" approach proposed by the Coalition Associations, stating that the Coalition Associations had not explained what procedural rules would apply and that the Board had concerns about how this proposal would work in practice. Aug. 2020 Decision, EP 756, slip op. at 31. The Board also stated that "this approach could add complexity to the market dominance analysis, with some factors being presented under the streamlined approach and others being presented under the non-streamlined approach." Id.

The Coalition Associations argue that the Board incorrectly concluded that the Coalition Associations did not explain the procedural rules that would apply to their "à la carte" approach. (Coal. Ass'ns Pet. 5.) Specifically, they claim that "[t]he core procedural rules for implementing the *a la carte* approach are the 'Bifurcated Market Dominance' rules in [the Coalition Associations'] proposed § 1111.12"[6] and that "[t]he Board appears to have overlooked the crucial connection in the Coalition Association comments between ['à la carte'] consideration of the prima facie factors and their proposed bifurcated procedural schedule." (Id. at 6.)[7] The Coalition Associations argue that without the "à la carte" approach, shippers that cannot meet just one of the prima facie factors would be foreclosed from using the streamlined approach. (Id. at 7.) They further claim that the "à la carte" approach would reduce evidentiary burdens for those modes where a prima facie factor can be satisfied. (Id.)

AAR replies in opposition to the Coalition Associations' position, arguing, among other things, that the "à la carte" approach would be "convoluted and unfair." (AAR Reply 3-7, Sept. 14, 2020.) AAR claims that the Board's decision not to adopt the "à la carte" approach was reasonable and therefore not material error. (Id. at 6-7.)

The Board will deny reconsideration of its decisions not to adopt the "à la carte" and the bifurcation proposals. The Board notes that certain aspects of the Coalition Associations' proposal were unclear as described in its original comment.[8] Regardless, even if the Coalition

[6] Bifurcation means dividing the rate case into separate market dominance and rate reasonableness phases. See M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 1 (STB served May 6, 2011); Total Petrochems. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 1 (STB served Apr. 5, 2011).

[7] The Coalition Associations also argue that an alternate version of the "à la carte" approach could be implemented by the Board's adoption of the two-step market dominance approach discussed in Section A. As noted, the Board has found that argument was not properly raised and, even if it had been, the Board would decline to adopt that approach.

[8] In their comment, the Coalition Associations stated that the Board should adopt a "single approach that is applicable to all rate cases to address the broader problems identified in the NPRM." (Coal. Ass'ns Comment 6.) They continued by offering a three-part proposal that included (1) the "à la carte" approach, (2) modifications to certain prima facie factors, and (3) an optional bifurcated schedule "that would be available to all complainants in all cases" and would

Associations were correct and their proposal would not necessarily result in the "à la carte" approach having to be split into two different procedural tracks to address some factors under a streamlined approach and some under a non-streamlined approach (as the Board found in the August 2020 Decision), the Board would decline to adopt the "à la carte" approach as proposed. As the Board now understands the Coalition Associations' proposal, their "à la carte" approach depends upon the Board also adopting their proposed "Bifurcated Market Dominance" rules, which would allow complainants to choose whether to proceed under a bifurcated procedural process (where the parties would submit market dominance pleadings before the pleadings on the merits of rate reasonableness) or the traditional procedural process (where the parties would submit their individual market dominance and merits pleadings in one filing). The Board declines to adopt the bifurcated approach merely to facilitate the "à la carte" approach. The proposed bifurcated approach establishes an extremely aggressive schedule—solely at the complainant's discretion—for discovery, resolution of discovery disputes, and filing of market dominance pleadings, at a time when parties also need to develop the rate reasonableness portion of their cases. Furthermore, the Board has concerns about codifying a process that would allow a complainant to unilaterally bifurcate a rate case. See Aug. 2020 Decision, EP 756, slip op. at 35 (finding that a routinized bifurcated approach was unnecessary because the Board already permits parties to request bifurcation on a case-by-case basis).[9] Deciding bifurcation on a case-by-case basis would allow the Board to consider whether bifurcation would be advantageous given the facts of a particular case and based on input from all parties. Should the Board determine, after assessing the effectiveness of the new streamlined market dominance approach, that future modifications are warranted, the Board could consider an "à la carte" type proposal at that time.

C. Mileage Threshold.

include certain procedural limits. (Id. at 6-7.) The Coalition Associations state that the Board "overlooked the crucial connection" between the "à la carte" approach and the bifurcated schedule procedures. However, the comment appeared to present the "à la carte" approach and bifurcated schedule procedures as two distinct options, not as an integrated proposal in which the feasibility of the "à la carte" approach was dependent on adoption of the proposed bifurcated schedule procedures.

[9] The Coalition Associations argue that in finding the routinized bifurcation approach unnecessary, the Board ignored "the critical elements of the proposed bifurcated schedule, including its expedited timeline, special procedures for discovery disputes, and page limits, that are designed to complement streamlined market dominance based on the prima facie factors." (Coal. Ass'ns Pet. 6). However, there was no material error in not specifically addressing each individual aspect of the bifurcated approach procedures. The Board found in the August 2020 Decision, EP 756, slip op. at 35, that a routinized bifurcated approach was unnecessary as a general matter and, as such, there was no need for the Board address the merits of each individual component of that approach.

In the NPRM, the Board proposed a 500-highway-mile threshold as a factor to identify when trucking is not likely to provide effective competition.[10] The Board reasoned that movements greater than 500 miles are not likely to have competitive trucking options, as this is approximately the length of haul that a trucking carrier could complete in one day. NPRM, EP 756, slip op. at 7 (citing Rev. of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1), slip op. at 7 n.12 (STB served Mar. 23, 2016)). However, the Board also recognized that the 500-highway-mile threshold may be underinclusive for certain commodities that are more difficult to move by truck. Id. at 8. Accordingly, the Board sought comment on whether, and if so how, the mileage threshold could be varied by commodity group(s). Id.

In response to the NPRM, several shipper interests commented that the Board should lower the mileage threshold to 250 miles because of the need for drivers to make a return trip. See Aug. 2020 Decision, EP 756, slip op. at 9. Some shipper and railroad interests also argued that the Board should establish commodity-specific mileage thresholds at other distances lower or greater than 500 miles. See id. at 13-16.

In the August 2020 Decision, the Board rejected the arguments in favor of lowering the default mileage threshold to 250 miles due to the need for a return trip. The Board found that return trips are not needed in all situations and so "it is more appropriate to use the *maximum* distance that a truck could travel" as the threshold. Id. at 10-11. The Board also recognized that several commenters had presented credible arguments that, for some commodities, trucking becomes less competitive at a distance shorter than 500 miles. However, the Board found that no commenter had presented sufficient quantitative data to support the adoption of any particular commodity-specific mileage thresholds. Id. at 13. As such, the Board stated that it planned to initiate a proceeding to further explore the adoption of various commodity-specific mileage thresholds. Id. at 14-16. The Board is currently exploring the best means of accomplishing adjustments to mileage thresholds on a commodity-specific basis.

In their petition for reconsideration, the Coalition Associations argue that the Board committed material error by "incorrectly assum[ing] that most shippers can truck their commodities without a return trip." (Coal. Ass'ns Pet. 8.) They argue that there are several circumstances that make empty return trips to the origin the norm as opposed to the exception, including the fact that many shippers must either use highly specialized truck trailers, that trailers must be washed between trips, or that drivers must return to their home base. (Id. at 8-9.) They argue that there is no basis for the Board's assumption that truck movements do not typically require an empty return trip, particularly when the equivalent rail movement would have that requirement. (Id. at 9.) The Coalition Associations argue that, if the Board decides not to lower the mileage threshold to 250 miles, it should solicit comment on these issues in the separate proceeding that will explore how to develop commodity-specific mileage thresholds. (Id. at 8.) They note, however, that it will be challenging to identify all commodities that require a roundtrip movement and, therefore, the better course is to set the mileage threshold at 250 miles for all commodities. (Id.)

[10] This prima facie factor is intended to work in tandem with a prima facie factor based on trucking volume to identify shippers that are reasonably likely to lack trucking options that provide effective competition. See Aug. 2020 Decision, EP 756, slip op. at 11.

In its petition for reconsideration, CI argues that the Board should eliminate the mileage threshold for all commodities or at least eliminate the threshold for commodities that generally move only by rail. (Chlorine Inst. Pet. 2; see also NGFA Reply 3.) CI notes that hazardous materials, in particular, move primarily by rail because it is generally the safer mode of transportation. (Chlorine Inst. Pet. 3.) CI argues that, if the Board is not willing to simply eliminate the mileage threshold, it should instead replace it with a standard that asks whether a commodity or shipment is constrained to move by rail because of a substantial investment made by the shipper in rail-related equipment or facilities. (Id. at 4; see also NGFA Reply 4 (arguing that many agricultural shippers also make investments in rail-related equipment and facilities).)

AAR replies to Petitioners that adoption of the 500-mile threshold was not material error because it was supported by the record and the Board's reasoning. (AAR Reply 7-9, Sept. 14, 2020.) AAR points out that Petitioners will have the opportunity to provide evidence supporting their arguments in the commodity-specific proceeding that the Board indicated it would open. (Id. at 9.)

The Board finds that it did not commit material error in adopting 500 highway miles as a prima facie factor. As an initial matter, the Coalition Associations misconstrue the August 2020 Decision. The Board did not conclude, as the Coalition Associations claim, that "most" shipments do not require a return trip. Rather, the Board concluded that since *some* shippers would not need a return trip within the same day, and because the Board was trying to set the distance at a level where the lack of a competitive trucking option would be clear on its face, it was more appropriate to set the distance at the "the outermost point of a one-day trucking shipment to ensure that only those shippers that are more likely to be found to lack effective competition can utilize it." Aug. 2020 Decision, EP 756, slip op. at 11. It is certainly true that when shippers use trucks—whether for-hire trucking or a private fleet—the trucks may need to make a return trip to the origin at some point and, for some shipments, that return trip may have to be made the same day. However, no commenter provided evidence to support assertions that this is the case for most or even some shipments or for a specific commodity. Thus, based on the record before it, the Board appropriately concluded that the threshold was properly set at 500 miles given the Board's overarching goals.

The Board finds that CI also fails to show material error in the Board's decision to adopt any sort of threshold based on mileage. At several points in the August 2020 Decision, the Board pointed out that the volume threshold and mileage threshold factors, when considered in tandem, would serve as a sufficient screen to identify movements that are reasonably likely to lack effective trucking competition. Id. at 11, 13, 20, 22. Removing the consideration of either factor would reduce the Board's ability to reliably determine on a streamlined basis whether there is a lack of competitive trucking options.

CI also argues that some commodities, such as chlorine, move almost entirely by rail due to safety issues, shipper investments in rail infrastructure and equipment, or both, and claims that because of this, the length of the shipment is irrelevant. (Chlorine Inst. Pet. 3-4.) It notes that the Board's predecessor, the Interstate Commerce Commission (ICC), chose not to adopt a mileage threshold as part of the original standards for assessing market dominance in the late

1970s, instead relying on rebuttable presumptions based on a volume threshold and whether the affected shipper or consignees have made a substantial investment in rail-related equipment or facilities. (Id. at 4-6.) CI also points to the Board's decision not to consider mileage as part of the prima facie factor for barge competition as an example of the Board itself recognizing that distance is not relevant to whether an alternate mode of transportation effectively competes with rail. (Id. at 7.)

Arguments similar to the one made by CI regarding safety were made in response to the NPRM, (see Olin Comments 6-7), but the Board concluded in the August 2020 Decision that it did not have enough information to set commodity-specific thresholds and that the best course of action was to initiate a commodity-specific proceeding. The only shipper to address chlorine shipments was Olin, and it provided no data to support an alternative chlorine-specific threshold or elimination of the threshold entirely. See Aug. 2020 Decision, slip op. at 14-15. And, as noted, the Board is currently exploring approaches that could be used to adjust the mileage thresholds on a commodity-specific basis.

CI's argument that the mileage threshold should be replaced by a "substantial investment" standard is raised for the first time on reconsideration and therefore does not provide a basis to reconsider the Board's decision. See New Eng. Cent. R.R., FD 35842, slip op. at 4-6 (stating that an argument first presented on reconsideration is generally waived). In any event, the Board finds that this proposed standard would not be an appropriate prima facie factor, even if it had been properly raised. First, determining whether a shipper has made a "significant" investment could be an evidence-intensive inquiry, which would be contrary to the concept of relying on prima facie factors that should be relatively easy to demonstrate. Second, and more importantly, a shipper's significant investment in rail-related equipment and facilities would not necessarily be indicative of market dominance. Some shippers may make such investments, even if they have competitive transportation options, because, for example, they want to have greater flexibility in their supply chain.

The fact that the ICC chose to rely on a rebuttable presumption based on whether a shipper invested in rail-related equipment but not one based on mileage in its early market dominance standards also does not establish that the Board committed material error here. In its market dominance rulemaking proceeding in the late 1970s, although the ICC decided not to adopt a rebuttable presumption based on mileage, it still found that mileage was relevant to the rebuttable presumptions that were adopted and the agency expected that this information would be provided in the complainant's filing. See Special Procs. for Making Findings of Mkt. Dominance as Required by the R.R. Revitalization & Regul. Reform Act of 1976, 353 I.C.C. 875, 917-18, 939 (1976). In fact, the ICC drew the same connection between distance and truck competition as the Board did in this proceeding. See id. at 928 ("Mileage of the involved traffic or movement may indicate a market structure in which the railroads will not face effective competition. While the point at which this will take place will vary with different commodities, it is generally recognized that motor carriage cannot effectively compete with the railroads for certain commodities over long distances.") Moreover, the Board's use of a mileage threshold is quite different from the ICC's late 1970s proposal. In the ICC proposal, a movement that exceeded a certain mileage would have, by itself, established a rebuttable presumption of market

dominance.[11] Here, in contrast, mileage is one of several factors that must be shown to make a prima facie case of market dominance. In any event, as noted in the August 2020 Decision, those rebuttable presumptions—including the one based on a shipper's substantial investment in rail equipment—were ultimately discarded by the ICC and replaced by different evidentiary guidelines. See Aug. 2020 Decision, EP 756, slip op. at 7 n.7 (citing Mkt. Dominance Determinations & Consideration of Prod. Competition, 365 I.C.C. 118, 120-26 (1981)).

Contrary to CI's suggestion, the Board's decision to use a mileage threshold to assess truck competition but not barge competition was not inconsistent. (Chlorine Inst. Pet. 7.) Distance is a key factor in rail-versus-truck competition, as rail carriers have natural advantages over truck in providing long-haul transportation, particularly when volumes are greater. However, the same is not universally true in rail-versus-barge competition, as barge carriers also are equipped for long-haul transportation in large volumes.[12] Put differently, distance is less of a relevant factor when considering whether there is competition between rail and barge options. Moreover, shipping by barge usually requires specific and often costly infrastructure, such as a docking facility to load and unload the barge. See Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 295 (STB served Jan. 11, 2018) (finding that shipper did not have a feasible barge option for receiving coal because it would require construction of a docking facility, which would face significant permitting challenges).

Even though the Board is denying reconsideration regarding the default mileage threshold, it continues to recognize that a 500-mile threshold may not be appropriate for all commodities, as there are likely some commodities that rarely, if ever, are transported that far by truck,[13] and that there may be some commodities that are carried in trucks that require same-day return trips. By contrast, there may be some commodities that regularly move by truck over distances greater than 500 miles. As noted, the Board intends to issue a decision that will invite parties to petition the Board to create commodity-specific mileage thresholds and provide guidance as to what evidence should be presented to the Board in support of such requests.

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[11] Specifically, the ICC proposed a rebuttable presumption showing market dominance "[w]here the distance between origin and destination exceeds 1,500 miles, except that when the involved movement occurs as a single-line movement, market dominance may be presumed where the distance exceeds 1,200 miles, providing, however, in either instance that when a rate is subject to a minimum weight, such minimum weight shall equal or exceed 20 net tons." Special Procs. for Making Findings of Mkt. Dominance, 353 I.C.C. at 934.

[12] See U.S. Dep't of Transp., Bureau of Transp. Stat., Transp. Stat. Ann. Rep. 2020 at 4-4 to 4-6 (2020) ("Trucks continue to carry the highest percentages of goods by weight and value in the United States . . . . However, railroads and inland waterways carry large volumes of bulk commodities over long distances."); id. at 4-10 ("Typically, trucks are used to haul coal over short distances, while trains and barges are used for longer hauls.").

[13] Indeed, the Board understands that chlorine does not move by truck frequently or over long distances and, therefore, there is a basis to consider lowering or eliminating the mileage threshold for that commodity. See Aug. 2020 Decision, EP 756, slip op. at 14-15.

D. Page Limits.

In the August 2020 Decision, the Board adopted its proposal to limit streamlined market dominance filings to 50 pages, inclusive of exhibits and verified statements. Aug. 2020 Decision, EP 756, slip op. at 42-43. The Board found that this limit "strikes the proper balance between narrowing the focus of the parties' arguments and providing sufficient opportunity for parties to address the substantive issues." Id. at 42. The Board noted that, to the extent parties needed to provide supporting documentation that would make the filing exceed the 50-page limit, parties can include excerpts or request a waiver of the 50-page limit. Id. In their petition for reconsideration, the Coalition Associations argue that the Board appears to have overlooked their suggestion that page limits be set at 30 pages exclusive of exhibits, as there is no mention of this suggestion in the August 2020 Decision. (Coalition Associations Pet. 10.) The Coalition Associations also argue that, for certain exhibits that parties might have to include with their filings, the entire document would have to be submitted, such as engineering analyses for buildouts, shipment lists to support the truck volume factor, and third-party documents explaining modal competition. (Id.)[14] Finally, the Coalition Associations argue that the Board failed to consider how electronic work papers would count against the page limits. (Id. at 11.)

In response, AAR notes that it, too, argued that the page limit should be exclusive of exhibits. (AAR Reply 9-10, Sept. 14, 2020.) However, AAR notes that the Board "considered and rejected" both AAR's and the Coalition Associations' proposals, and that the Coalition Associations fail to explain why the Board erred. (Id.)

As noted above, there is no indication in the Coalition Associations' original comment that they were proposing that the Board adopt a 30-page limit even if the Board decided to reject their bifurcated approach. The 30-page limit was presented as part of the broader proposal on a bifurcated approach[15] and, therefore, when the Board rejected that proposal on other grounds, there was no reason for the Board to consider the 30-page limit itself. Regardless, even if the Board had considered this proposal independently, it still would have adopted a 50-page limit inclusive of exhibits rather than a 30-page limit exclusive of exhibits. As explained in the August 2020 Decision, 50 pages inclusive of exhibits should be sufficient for parties to make arguments and provide supporting evidence to support their assertions. Aug. 2020 Decision, EP 756, slip op. at 42.

As the Board noted, in those instances where a party believes that it needs additional pages for exhibits, it may request an extension of the page limit. Id. The Coalition Associations argue that the need for some of these exhibits will not be known until the reply or rebuttal phase,

[14] The Coalition Associations propose that parties would be prohibited from using exhibits to present information created by the party for the litigation, such as exhibits consisting of studies, graphs, or charts, and instead would be limited to public sources or material produced in discovery. They argue that this would ensure that parties cannot "game" the narrative page limit by placing portions of their narrative in exhibits. (Coal. Ass'ns Pet. 11.)

[15] See, e.g., Coal. Ass'ns Comment, Ex. A (mentioning the 30-page limit only in the Coalition Associations' proposed rule titled "Bifurcated Market Dominance").

when there is little time for a party to seek a waiver and the Board to decide whether to grant it without delaying the procedural schedule. (Coalition Associations Pet. 10.) The Board finds this concern overstated. In particular, by the time a complainant's rebuttal is due, it should be clear from the record what market dominance issues are in dispute. Accordingly, a shipper should be able to make its argument for the need to extend the rebuttal page limit in a relatively brief motion that the Board can rule on quickly.

As for the treatment of electronic workpapers, most electronic workpapers, including spreadsheets, can be converted into printable documents. Accordingly, the number of printable pages of any electronic workpaper included as an exhibit to the market dominance pleading would be counted against the page limit.[16]

Conclusion

For the reasons provided, the Board denies the petitions for reconsideration.

It is ordered:

1. NGFA's reply is accepted.

2. The petitions for reconsideration are denied.

3. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Oberman concurred with a separate expression.

[16] The Board is aware that certain data-oriented evidence, such as electronic databases, may not be easily convertible to printable pages and, even if the evidence can be converted, it would translate to a vast number of pages. For any electronic workpapers that cannot, for whatever reason, be converted into a printable document that fits within the page limit, a party may request permission from the Board to use the document despite the page limit.

BOARD MEMBER OBERMAN, concurring:

Today's decision correctly finds that the petitions for reconsideration of the Market Dominance Streamlined Approach final rule did not satisfy the standard required under Board rules for reconsideration. However, I write separately to express my view that an "à la carte" type approach to 49 C.F.R. § 1111.12, as advocated by petitioners, is worthy of serious consideration by the Board. As it was more fully explained in the petitions for reconsideration, in my view, such an approach would likely facilitate a more efficient use of some, if not all of the benefits of the streamlined market dominance concept by a wider section of the shipper community. One can envision a shipper being able to easily establish several, but not all, of the prima facie factors. As pointed out by petitioners, an "à la carte" approach in these circumstances could be analogous to the use of partial summary judgments in civil proceedings, which have the benefit of narrowing issues and diminishing time needed for trial. But, here, where a shipper can clearly establish some but not all of the prima facie factors, the shipper would be precluded from taking advantage of any of the efficiencies offered by the streamlined approach, lest it risk losing the entire case. Allowing for an "à la carte" approach could dramatically increase the number of disputes that are able to realize some of the efficiencies from the streamlined approach outlined in § 1111.12. That said, such an approach would require the Board to redesign the process and procedures adopted in Aug. 2020 Decision and will have to await the Board's consideration of any future proposed amendment to § 1111.12.