

March 2015



## **SURFACE TRANSPORTATION BOARD REAUTHORIZATION PRINCIPLES**

CURE (Consumers United for Rail Equity) is a coalition representing freight rail shippers. Its members include several major trade associations and other entities representing mostly electric, utility, and agriculture interests.

The mission of CURE, and its successor organization (re-branding and re-structuring is currently underway), is to obtain changes in Federal law and policy that will provide all freight shippers with reliable freight rail service at competitive prices. This mission includes advocating for reauthorization of the Surface Transportation Board (STB).

### ***Enhance Efficiency of STB Functions***

#### **1. Allow Direct Communication between STB Members**

A longstanding Federal government “sunshine law,” *Government in the Sunshine Act* (P.L. 94-409), prohibits a quorum of the STB Board (currently any two members) from discussing pending matters outside of noticed meetings. The restriction prevents STB Members from discussing pending cases directly with each other and results in indirect communications via their respective staffs and associated delay.

CURE supports increasing the size of the STB to five members to address the “sunshine issue.” Alternatively, CURE recommends enactment of legislation providing a limited exception to the sunshine laws allowing appropriate discussion of pending cases.

#### **2. Study STB Staffing and Resource Requirements**

The STB’s staff and budget has remained essentially flat since its inception, 20 years ago, following the enactment of the *Interstate Commerce Commission Termination Act of 1995* (P.L. 104-88).

CURE supports an independent review by the Government Accountability Office (GAO) to determine whether the STB has adequate resources to conduct its statutory mission. CURE also suggests that the review include, at a minimum, an assessment of the length of time it takes the STB to 1) complete different types of proceedings and 2) process submitted routine data.

#### **3. Provide Arbitration as an Alternative Means to Resolve Rail Rate Challenges**

CURE recommends that the STB be given authority to require the use of binding arbitration as a quicker and less expensive approach in appropriate cases. This approach has been used successfully to resolve rail rate disputes in Canada. Binding arbitration is routinely and successfully used by many other U.S. industries including construction, automotive, and insurance.

The STB has three formal procedures for reviewing the reasonableness of railroad freight rates: (Stand-Alone Cost or “SAC” for the largest and most complicated cases, “Simplified SAC” for

simpler cases; and the “Three-Benchmark” method for the smallest cases). These formal procedures do not meet shipper needs, are costly for railroads and shippers, and are rarely used.

#### **4. Eliminate Annual Determinations of Railroad Revenue Adequacy**

One of the goals of the *Staggers Rail Act of 1980* (P.L. 96-448) was to restore financial stability to the U.S. rail system. This has been achieved, as demonstrated by the industry’s continued high levels of capital investment and shareholder returns. In passing the *Staggers Act* more than three decades ago, Congress recognized that when the rail industry’s revenues are adequate, a more careful review of railroad rates would be appropriate. The STB’s annual calculation of “revenue adequacy” for Class I carriers is no longer necessary, and may inappropriately shield railroads’ pricing power from STB scrutiny.

To provide greater balance between shippers and railroads in regulatory decisions, CURE supports elimination of the STB’s outdated revenue adequacy calculation by a Congressional finding that the railroad industry has achieved revenue adequacy.

### ***Increase Regulatory Transparency***

#### **1. Quarterly Reports on the Status of STB Complaints**

CURE supports requiring the STB to publicly issue a quarterly report detailing the status of formal and informal complaints filed with the STB. This report should be posted on the STB’s website and include, at minimum the: 1) the type of complaint; 2) key STB actions; 3) resolution; and, 4) dates of all actions.

Information on the STB’s activities is not easily obtained. For instance, the STB publishes a summary of rate cases formally filed with the agency on its website, but there is not equivalent information on service complaints. Furthermore, very little information is available about informal complaints, which appear to have been the STB’s primary vehicle for resolving service-related disputes involving BNSF, CP, and other carriers during 2014. If the STB is going to rely so heavily on this mechanism, greater information regarding its efficacy should be available.

#### **2. Information on Revenue-to-Variable Cost (RVC) Ratios**

CURE recommends that the STB be required to publish publicly available quarterly reports, estimating the percentages of all Class I carriers’ non-exempt rates that are above 180% RVC, above 240% RVC, and above 300% RVC. The benefit of such reports is that they would provide aggregated numbers based on Waybill data for all rail traffic.

Currently, the STB only makes available aggregated information that lumps together all movements with RVC ratios exceeding 180% on an annual basis. Greater granularity would make the information more useful for benchmarking and for tracking pricing trends. More frequent publication would provide more timely information.

#### **3. Publish the STB Public Use Waybill Sample in a Timely Manner**

CURE recommends that the STB release the Public Use Waybill Sample annually in July rather than in October, as has typically been done.

This Public Use Waybill Sample does not contain cost information or any other sensitive data requiring a calculation on the part of the STB. The data generated is useful to the shipper community in helping to determine if shipper rates are reasonable, however waiting for two-year old data that is then not available until the fourth quarter of that second year, is not efficient or as helpful as the data could be.

#### **4. Remove Exclusion of Exempt Traffic from STB Oversight and Regulation**

CURE recommends that shippers of exempt movements be able to bring rail service and rate matters before the STB, participate in due process, and benefit from the limited protections offered by STB oversight as experienced by other shippers.

There are numerous products that are not allowed to bring rail service and rate issues before the STB, including but not limited to aggregates used in construction materials such as concrete and asphalt, automotive, certain foods such as some dairy, meat, and fish, and various agricultural products such as cotton and wool. [Title 49 CFR, Part 1039 – Exemptions.] This issue was studied in a previous STB proceeding, Ex Parte No. 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. After receiving comments, the STB held a public hearing three years ago on February 24, 2011. No further action has taken place to date.

Service failures, for example, have a direct impact on exempt and contract traffic, as well as common carrier traffic. Furthermore, exempt traffic that falls above the jurisdictional threshold would remain ineligible for rate relief.

### ***Reform STB Rate and Practice Challenge Procedures***

#### **1. Statutory Timelines to Expedite Rate Challenges**

CURE recommends that the STB be directed to comply with reasonable timelines for a SAC rate challenge, unless the agency extends timelines after a written request from any affected party or other entities interested in due process.

STB rate challenges are regarded as slow and expensive by shippers. For example, the STB itself estimates that Stand-Alone Cost (SAC) rate challenges can take more than three-and-a-half years to complete and cost the shipper more than \$5 million.

#### **2. Prohibit “Bundling” of Contract Rates to Allow Challenges before the STB**

While it is appropriate that the terms of rail service contracts not be brought before STB for review, CURE recommends that the particular abuse known as “bundling” be corrected. CURE supports empowering the STB to address the bundling problem and fulfill its congressional mandate to resolve such disputes.

STB is only authorized to review the reasonableness of certain non-contract (“tariff”) railroad rates. In some instances, however, a railroad will offer a shipper a full set or “bundle” of rates for a group of origin-destination pairs and refuse to quote tariff rates for any subset of those movements. This “take it or leave it” behavior effectively forces shippers to agree to the complete package of contract rates and deprives them of the ability to challenge specific rates that it believes warrants STB challenge. The U.S. Congress gave the STB this distinct jurisdiction over freight rail rates with the passage of the *Staggers Act*.

#### **3. Review STB’s Rate-Reasonableness Standards**

CURE supports requiring the STB to review its three types of rate-reasonableness reviews.

Significant concerns involve not only the cost and length of STB reviews of challenged rail rates, but also the fundamental principles on which each method is based. For instance, the: 1) SAC comparison with the hypothetical cost to build and operate a railroad is unreasonably burdensome and expensive; 2) Simplified SAC method has yet to be used for a completed STB review; and, 3) Three-Benchmark test, limits of “reasonable” rates may be inappropriately ratcheted up by comparison to rates paid by other shippers.

#### **4. Clarify STB Jurisdiction Over Unreasonable Rail Practices**

CURE recommends clarifying that the STB has authority to review unreasonable rate practices, and award reparations and other relief, independent of the bringing of an unreasonable rate case and a finding of market dominance.

Captive and so-called competitive shippers are both often subject to generally uniform charges for such matters as fuel surcharges and ancillary/accessorial services such as switching, movement of empty cars to and from maintenance facilities, introduction of new equipment, demurrage and detention, etc. Some carriers have asserted that such practices may not be challenged, or that reparations and other relief may not be obtained, unless the shipper brings a full rate case and the carrier's market dominance is established. The STB should have authority to review such practices separate from rate cases and to award appropriate relief, including reparations for unreasonable practices imposed on shippers, without regard to a demonstration of market dominance.

### ***Enhance Rail Service by Removing Barriers to Freight Rail Competition***

#### **1. Provide Competitive Switching to Shippers**

CURE supports requiring Class I railroads to provide competitive switching service to shippers, without requiring evidence of anti-competitive conduct by a rail carrier from which access is sought.

Competitive switching agreements facilitate the efficient movement of traffic between carriers and are critical to a competitive rail system. The *Staggers Act* provides STB with the authority to require competitive switching "necessary to provide competitive rail service." However under current STB policies, no applicant has succeeded in obtaining relief in a reciprocal switching case. In addition, the availability of competitive switching should not preempt STB authority to review rates. This is currently under review in the STB EP 711 proceeding, which began in July 2012. The STB held a public hearing on economic impact issues on March 25-26, 2014, but has taken no action since that time.

#### **2. Provide Rates for Service Between any Two Points on a Rail Carrier's System**

CURE recommends that the STB work to ensure that shippers have the ability to get service to and from interchange points served by multiple carriers, in order to provide effective competition among rail carriers. Further, CURE believes that a Class I rail carrier should be required to establish a rate for transportation and provide service requested by the shipper between points on that carrier's system where traffic originates, terminates, or may reasonably be interchanged (while being consistent with applicable routing protocols).

Current STB policies and precedents effectively block many shippers served by a single Class I railroad from obtaining competitive service. These STB practices include a requirement dating from 1996 that a shipper must obtain a separate contract rate for the competitive portion of the movement (which carriers are generally unwilling to provide) before the shipper can obtain and then challenge a common carrier rate for the captive portion of the movement.

#### **3. Allow Shippers to File a Rate Case before the STB if their Rate exceeds 180% of RVC**

CURE supports shippers being allowed to file a rate case before the STB if their rate is above 180% of RVC.

In order to be able to bring a rate case, shippers currently must establish not only quantitative market dominance (a rate exceeding the jurisdictional threshold of 180% of variable costs), but also qualitative market dominance. The STB has adopted a "limit price" test for qualitative market dominance that can exceed the jurisdictional threshold, creating an additional burden for shippers that could potentially otherwise benefit from this STB oversight.

**4. Clarify the Common Carrier Obligation**

CURE supports giving the STB the authority to ensure that railroads do actually compete for shipper business under the Common Carrier Obligation.

In EP 705 the STB received a significant amount of testimony indicating that when a shipper is served by only two railroads, it is common for one of the railroads to choose not to compete for that shipper's business. The Federal Energy Regulatory Commission has parallel power with respect to the electric transmission network and the interstate natural gas pipeline network that requires transmission and transportation providers to provide service on a nondiscriminatory basis, even if the customers are eligible to receive service from some other provider or have self-service options.

[Current Class I Railroads: BNSF Railway Company, Canadian Pacific Railway, Canadian National, CSX Transportation, Kansas City Southern Railway Company, Norfolk Southern Railway Company, and Union Pacific Railroad.]

CURE is a coalition representing freight rail shippers. Through a growing coalition of industries and associations, CURE is working to educate the public on the impacts to consumers from railroad practices.

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