Freight Rail
Customer Alliance

July 21, 2017

Rachel D. Campbell
Director, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: EP 738, Regulatory Reform Task Force

Dear Director Campbell,

The Freight Rail Customer Alliance ("FRCA"), an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers representing more than 3,500 manufacturing and agriculture companies, electric utilities, fuel suppliers, and their customers, writes to you in your capacity as the Surface Transportation Board's ("Board") Regulatory Reform Officer. FRCA asks that this letter be considered in lieu of an oral presentation at the "listening session" of the Board's Regulatory Reform Task Force scheduled for July 25, 2017.

Executive Order No. 13771 calls for a review of agency regulations and policies to identify those that create undesirable effects, such as those that eliminate jobs or inhibit job creation, have become outdated, unnecessary, or ineffective, impose costs that exceed benefits, or create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. In that regard, the Association of American Railroads ("AAR") wrote to you in a letter dated May 18, 2017, that essentially claimed that most of the major rulemaking proposals before the agency fall in the category prescribed by the Executive Order. FRCA strongly disagrees. The Board's pending proposals, modest as they are, would, in fact, improve regulation in all of the areas noted by the Executive Order. Furthermore, what the AAR seeks under the guise of regulatory reform instead amounts to abdication of the Board's fundamental responsibilities.

The Board's governing legislation directs railroads to establish reasonable rates where they have market dominance and reasonable rules and practices related to their transportation or service that is subject to the Board's regulatory jurisdiction. 49 U.S.C. § 10702 The Board's existing regulatory regime frustrates the achievement and enforcement of that statutory directive. With very limited exception, the only rate reasonableness test that has been successfully applied is the stand-alone cost (SAC) test. SAC cases are very expensive, complicated, and protracted, so much so that most shippers are unable or unwilling to seek relief. Alternatives exist on paper, but they have not been useful for shippers. Unreasonable practice cases have been, if anything, even more intractable for shippers to pursue than rate cases.

The persistence of unreasonable rates on captive traffic and unreasonable practices undermines employment and job creation by shippers across the breadth of the nation's economy, including the suppliers and consumers of manufactured goods, agricultural products, energy, and fuel represented by FRCA and its members. Dollars spent on excessive transportation costs cannot be used

to hire employees or purchase goods and services from their suppliers and vendors, who would then need to hire more employees and/or make capital purchases from their suppliers, in order to meet consumer demands. The absence of appropriate remedies and procedures eviscerates the rate and practice standards established by statute. For most shippers, the costs of seeking relief exceed the benefits that shippers can expect to receive. Most shippers lack an effective regulatory remedy. The existing regulatory regime as it exists in practice does not further, but instead interferes with the basic statutory directives. Yet, the AAR complains about the relatively modest costs supposed imposed by the façade of regulation, even as that façade serves to block other options that might be more effective, such as application of the antitrust and state law remedies.

The pending rulemakings referenced in the AAR's letter all have the potential to help foster a more reasonable balance between regulation and deregulation, notwithstanding AAR's hyperbole to the contrary.[1] For example, revocation of the class exemptions in EP 704 would not by itself cause any rates or practices to be *re*regulated. The revocation would merely allow shippers of such commodities an opportunity to seek regulatory relief. Revocation *per se* would not impose any burdens upon the carriers, *e.g.*, rates falling below the jurisdictional threshold could not be challenged, there is no longer any requirement to file tariffs, rates could still be established by price quote or contract without any filing requirement, *etc.*

Similarly, implementation and enforcement of the revenue adequacy constraint in EP 722 would provide a much-needed alternative measure of rate reasonableness. A viable alternative to SAC is especially needed for the vast bulk of captive shippers that cannot utilize the SAC constraint, particularly because of its cost. The revenue adequacy constraint is not alien to constrained market pricing. In fact, it was recognized and adopted as "the logical first constraint" on rates in the *Coal Rate Guidelines*, 1 I.C.C.2d 520, 535 (1985). The fact that the constraint has not been applied in a railroad rate case speaks urgently to the sort of regulatory reform that is truly needed.

For similar reasons, the Board should proceed with reciprocal switching proposal in EP 711 (Sub-No. 1). The Board's proposal reflects a very modest version of the approach that has been successfully adopted for numerous other regulated network industries, including electric transmission, telecommunications, and even railroads themselves in Canada and portions of the United States, such as the Conrail Shared Assets areas, with no ill effects. A prime virtue of reciprocal switching is that would

[1] The limit price test, referenced in the AAR letter at 4-5, is not the subject of a pending rulemaking. Regulatory reform oversight is a poor vehicle for initiating a "do-over" of a matter that was adopted after protracted considerable thought and review by the agency. Regulatory reform should not entail initiating yet another protracted regulatory proceeding. That said, FRCA has its own concerns about the limit price test, particularly its potential to yield a finding of no market dominance for rates below the SAC level.

allow competition to displace rate regulation, and should be embraced for that reason as an example of efficient regulatory reform.

FRCA strongly disagrees with the AAR's suggestion to limit the EP 724 performance data reporting only to network-level data. Service is ultimately local, and shippers, as well as the Board itself, should be able to know if a particular area, corridor, or type of freight is receiving deficient service. Nor should regulatory reform oversight be used as a vehicle to revisit recently completed proceedings such as EP 725 regarding the requirement to file summaries of agricultural transportation contracts.

FRCA also has misgivings regarding the AAR's proposal to loosen or modify the ex parte communications rules. Most shippers lack the resources to come to Washington to meet with Board Members and Board staff – they need to devote their resources to running their businesses, rather than meeting with an agency tasked with regulating one of their suppliers. The concern is that the AAR will be in a position to benefit from such loosening, further exacerbating an already tilted playing field. Indeed, the ex parte communications permitted before other agencies such as the Federal Communications Commission have hardly been without controversy.

With respect to preemption, the change from the status quo that the AAR seeks is less than clear. However, it should be apparent that there are limits on preemption and that not all attempts to exercise local police powers are prohibited. In fact, railroad preemption claims have been rejected in a number of recent instances, and with good cause. If there is any need for reform, it is that railroads should not rush to invoke preemption where none exists and preemption issues, which can be resolved in other forums, and should not be allowed to detract from discharge of other regulatory duties that are assigned exclusively to the Board.

In short, the Board is already engaged on a path to beneficial regulatory reform. What the railroads propose is simply the elimination of regulation for their financial benefit at the expense of rail-dependent, captive shippers. Such proposals are not properly considered under the guise of regulatory reform.

Respectfully submitted,

Ann Warner

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Freight Rail Customer Alliance