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Washington Must Act on Much Needed Improvements to Freight Rail Policies

Daniel Elliott, III

Rail industry's complaints about recent Surface Transportation Board proposals are misplaced.

Now is the time to improve the outdated rules at the Surface Transportation Board to make a fairer economic regulatory framework and strengthen the nation's freight rail system.

For decades, the railroads have vehemently opposed any manner of change proposed by this independent regulatory body in charge of both the well-being of the rail industry and protection for its customers. What the railroads fail to mention in their torrent of op-ed pieces against change is they have monopoly power over their customers in many circumstances, and the Board serves as the only backstop to protect these customers from this monopoly power. Consequently, if the Board's rules do not work, there is nowhere else to turn.

The changes proposed by the Board are not as ominous as the railroads make them out to be. The reciprocal switching proposal is a long-needed cure to a policy that has completely failed over the last 30 years. Under reciprocal switching, an incumbent carrier transports a shipper's traffic to an interchange point, where it switches the cars over to the competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing or taking the cars from the shipper's facility to the interchange point, or vice versa. This reciprocal switching proposal allows the competing carrier to offer its own single-line rate to compete with the incumbent carrier, even when the competing carrier's lines do not reach the shipper's facility.

In 1985, the Interstate Commerce Commission, the Board's predecessor, adopted new regulations based on the reciprocal switching provision enacted in the Staggers Rail Act of 1980, which severely narrowed this remedy by requiring a rail shipper to demonstrate competitive harm to obtain this arrangement. Since the adoption of these regulations, there has not been a single case where reciprocal switching was awarded, and no cases have been filed since 1996 because of this insurmountable standard.

The railroads have cried "re-regulation" and "backdoor rate regulation" in response to the Board's reciprocal switching proposal. Both of these terms are complete misnomers when one actually looks at the statute this regulatory proposal is based on. The statute provides that "the Board may require rail carriers to enter into reciprocal switching agreements where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." If one compares this language to the language in the proposed reciprocal switching regulations, it is identical. As such, it seems to be a far cry to say this proposal is re-regulation when the Board is merely applying the statutory language verbatim. It is not only the correct application of Congress's reciprocal switching provisions, but also a fairer application, because rail shippers actually would have a chance to obtain access to competitive rail service as Congress intended when it passed the Staggers Act.

Moreover, this statute provides that "the rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement." In other words, the Board would not be asked to set the conditions and compensation unless the railroads could not reach an agreement on their own. This provision puts the most important part of the process in the control of the railroads. It is unfair to label this process as backdoor rate regulation when, in fact, it allows the customer to choose between competing service providers.

Another pending proposal before the Board would revoke various commodity exemptions that have been in place for decades. Although the railroads attempt to characterize this change as some form of re-regulation, the true effect is just to allow these commodities, like steel and cement, to be on the same playing field with nonexempt commodities. Now, if a railroad abuses its monopoly power against a rail shipper of one of these exempt commodities, it has little recourse except to file a partial exemption revocation request limited to the specific case before the Board can act. The Board is just trying to remove this burdensome, additional step and allow its regulatory process to be applied in an equal manner to all commodities. Not only is this proposal a fairer way to regulate, it still keeps matters in the hands of the railroads because without some type of abuse of their monopoly power, there would not even be a case for the Board to hear.

The railroads also complain about the revenue adequacy proceeding that is pending before the Board. Here, the Board is actually dealing with a rate case remedy that has been brought before the Board on a couple of occasions but has never run its course to a decision. This proceeding is simply trying to explore the best way to apply this rate remedy. Although the railroads claim the best way to move forward is to find a more efficient and accurate way to handle rate cases, they do not seem to want to find new ways to do so. Here, the Board is just exploring the possibility of another way to deal with rate proceedings, which have become incredibly complex and burdensome to all involved.

When these reasonable proposed reforms are viewed in a not-so-slanted light, it becomes clear that the intention of the Board is not to re-regulate the rail industry with burdensome new rules. The intention is simply to streamline the Board's operations and give the Board better tools that reflect today's economic realities so it can fulfill its congressional mandate for shippers and railroads. The rules that the Board uses currently were created when the rail industry was in dire straits and in need of protection. Now the rail industry is "revenue adequate" and vibrant. Circumstances have changed dramatically but the rules have not. As a result, there has never been a better time to review the existing regulatory scheme to evaluate its fairness and effectiveness.

Daniel Elliott, III is former Chairman of the Surface Transportation Board. He is legal counsel to the Private Railcar Food and Beverage Association, Inc.

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