November 12, 2019

Surface Transportation Board
Attn.: Docket No. EP 755 and EP 665 (Sub-No. 2), EP 756
395 E St., SW
Washington, DC 20423-0001

Dear Members of the Board:

On behalf of National Taxpayers Union (NTU) I am pleased to submit the following brief comments on EP 755/EP 665 (Sub-No. 2), "Final Offer Rate Review/Expanding Access to Rate Relief" and EP 756, "Market Dominance Streamlined Approach." NTU hopes to provide reply comments in additional detail that respond to other specific aspects of these rulemakings at a later date.

Introduction: The Taxpayers' Stake in STB Policy

Taxpayers have a major interest in a robust freight rail sector that allows both railroads and their customers to prosper. Railroads must have the resources to continue private investment, and customers must be able to secure affordable, market-based shipping services. Without this synergy, taxpayers will witness another decline in one of the nation's most vital infrastructure components, and ultimately, increased pressure for direct federal involvement with loans, subsidies, and other strictures. The result would be, in our view, tantamount to another Amtrak-style scheme – which currently (outside of the Northeast Corridor) benefits neither rail travel innovation nor its customers, all while surviving on taxpayer support approaching $2 billion annually. Such an outcome need not, and should not, be the fate of the freight rail sector.

NTU strongly supported the Staggers Act of 1980, which among other steps provided greater latitude for railroads and their customers to negotiate freight-hauling rates. The law was, along with airline and trucking regulatory reform, a sweeping effort to encourage infrastructure innovation. Following the Staggers Act in 1981 was legislation to provide for the sale of Conrail, a Northeast regional railroad that ran largely on tax dollars. As you know it took until 1986 to arrange for Conrail's transfer to private ownership, leading NTU's then-Chairman Jim Davidson to comment at the time, "not only is the government singularly unsuited to running a railroad, but privatization of [entities] the government has no business in – like Conrail – is a very sensible way to reduce the budget deficit." By the time Conrail's federal apron strings were cut, taxpayers had shelled out $7 billion.

Yet despite a few fits and starts, freight rail's post-federalization comeback has been widely acknowledged as one of the exemplary economic transitions away from tight government control in the modern era. Interestingly, this appeared to be a consensus view among many advocates for railroads and shippers until recently. A 2011 Cato Institute retrospective, authored by a team of analysts representing both "sides" of the railroad-shipper issue, concluded that:

> Our guardedly optimistic forecast for the railroads under the provisions of the Staggers Act turned out to be quite an understatement. … Most shippers and railroads have shared in the benefits from improved performance. Consequently, until rail rates began rising in the last few years, there has not been much political pressure for policy change. …[1]

[1] See "The Staggers Act, 30 Years Later," *Regulation*, Winter 2010-2011, https://www.cato.org/sites/cato.org/files/serials/files/regulation/2010/12/regv33n4-5.pdf.

Nonetheless, when a regulatory process goes too far in fostering adversarial conditions, reasonably satisfactory resolutions are prevented when disputes among parties arise. Such resolutions are not always possible, but ultimately should be the norm rather than the exception.

It should be noted here – more for the general public viewing these comments than for the learned members of STB – that the Board's rate review function generally covers only freight rail infrastructure where definitions of a competitive environment are not met. Of course, railroads and shippers differ on the viability of these definitions, which were originally established some 40 years ago and have been shaped by subsequent regulatory, judicial, and occasionally legislative guidance.Thus, these comments will not seek to re-litigate every argument that freight railroads and their customers have made on the question of rate regulation. Rather, we seek to offer some broad perspective on how the proposed procedures under EP 755/EP 665 and EP 756 compare with our experience in dispute resolution procedures at agencies such as the Internal Revenue Service and the Federal Trade Commission.

"Rules for Rulemakings": An Essential Consideration

Over the past several decades, NTU has advocated for dispute resolution structures in government programs that provide ease of access, transparency and neutrality of operation, careful and consistent deliberation of evidence, and outcomes that provide certainty as well as reduced costs to both parties.

It is the latter quality – reducing the out-of-pocket, time-related, and economic opportunity costs of disputes – upon which both railroads and their customers seem to have some consensus. Estimates for the cost of current rate challenges for shippers vary, but some say it is above $5 million per proceeding, not including what carriers must bear for responding to these complaints in detail. Naturally, stakeholders may disagree on what the actual numbers may be, but clearly, the costs are quite considerable. And while the specifics of any approach to reduce these costs matter a great deal, exploring reform options for rate challenges is advisable.

It is unproductive for either carriers or shippers to spend more than is absolutely necessary to obtain regulatory results that are at least acceptable from the standpoint of providing timely guidance based on careful deliberation. Toward these ends we provide the following recommendations.

1) **Learn from the Failures of Voluntary Arbitration.**

When it comes to rate regulation, NTU believes that mechanisms for dispute resolution to which both parties willingly agree are preferable to a government-mandated solution. Such is the case with railroad rate arbitration. The Rate Reform Task Force's report, which helped to shape EP 755/665 and EP 756, noted that:

> Specifically, the Board has had a voluntary arbitration process in place for more than 20 years, and the [Surface Transportation] Reauthorization Act [of 2015] required adjustments to this process (including the addition of rate disputes to the types of matters eligible for arbitration), but parties have never agreed to arbitration of a dispute brought before the Board.

Why has this been the history of the process? The background STB sketches from commenting parties concerning EP 730, "Revisions to Arbitration Procedures," (September 28, 2016) provides some clues. Carriers and shippers disagreed on how the pool of arbitrators who preside over rate disputes would be chosen. They also had differing concepts of how arbitrators would be chosen from that pool for specific cases, and how the parties would file challenges to each other's designees. Another point of contention was whether market dominance could be conceded, or automatically assumed (with a rebuttal opportunity) to apply. Still more sources of disagreement were over what constituted a "rate dispute," which methodologies for setting maximum rates would be permitted, and for how long a rate prescription might remain in effect. The Board largely sorted out these questions in a straightforward manner, granting some modifications supported by carriers, others by shippers.

Yet, in our opinion the following paragraph from EP 730 ultimately proved to be voluntary arbitration's undoing:

> Several shippers suggest that the Board maintain a record of unsuccessful attempts to arbitrate disputes, so that if the arbitration system is not well utilized, the record would help the Board understand why the arbitration system is not being used. … Given that arbitration is voluntary under these rules, the Board declines to keep a record of unsuccessful attempts to arbitrate. A record of unsuccessful attempts to arbitrate would not necessarily provide useful guidance to the Board, given the wide variety of valid reasons why a party may decline to arbitrate a given dispute.

NTU believes this decision was a grave mistake. Without a systematic means of collecting information on the reluctance of parties to utilize this tool, practical improvements became impossible. As NTU pointed out in September 2017 testimony to the House Ways and Means Committee, neither the legislative nor the executive branches of the U.S. government have built a sufficient knowledge base to determine why, for example, pilot programs for alternative dispute resolution of tax controversies are in relatively low use here even as they succeed in other countries.[2] The evidence from those other countries suggests a number of predictable factors, including whether the arbitrator pool is based on certification standards not requiring government approval, and whether the arbitration ground rules permit a liberal interpretation of what is called the "facts and circumstances" of the taxpayer. Other factors, however, were a mystery to program evaluators until those evaluators actively sought to catalog them – such as availability of ADR meetings at flexible times and places.

Not every experience of tax-related ADR programs can be translated to the voluntary rate arbitration system for freight rail. Still, regardless of whether one opposes or supports the new procedures for "baseball-style arbitration" in EP 755, we would contend that EP 755 would be better informed by a thorough examination of the voluntary arbitration system that came before it.

2) Consider Alternative Tools for Developing a Common Language on Competitiveness and Other Matters.

In our experience, whenever a regulatory agency and its stakeholders embark upon a reconsideration of policy involving new information-collection processes – as EP 756 certainly does – it is often advisable to establish an ongoing dialogue at the "working" level among those who will be expected to carry out such processes on a day-to-day basis. Unlike the public comment process, which provides useful but largely prospective guidance, this ongoing dialogue more closely resembles a "feedback loop" that helps to shape and modify a regulatory change as it happens.

One technique that NTU would recommend for STB's study is the Internal Revenue Service's "Job Aid" concept. Although they can vary somewhat in their composition and operation, Job Aids are generally initiated by the IRS for either members of their own staff or the practitioner community as "how-to" guides for ensuring best practices in carrying out the intent of tax regulations. Some recent topics have included relatively arcane matters such as "Valuation of Non-Controlling Interests in Business Entities Electing to be Treated as S Corporations for Federal Tax Purposes," and "Discount for Lack of Marketability" as commonly applied in business valuation analyses.

As a more illustrative example, NTU cited the usefulness of a Job Aid compared to a full rulemaking on the issue of how valuation discounts are applied to family business shares when calculating death tax liability in November 2016 testimony at an IRS public hearing:

> [T]here are other short-term options in lieu of the proposal that would be less disruptive. Writing in the Winter 2016 edition of *Gift and Estate Tax Valuation Insights*, Weston Kirk suggested that instead of a rulemaking the IRS should consider releasing a Job Aid on the topic of family-owned interest transfers for estate tax purposes. While this does not represent official guidance, the procedure would, in the author's view, "provide clarity and understanding of the Service's stance without creating significant disputes between taxpayers, their advisers, and the Service's agents, saving the Service time and taxpayer money in attempting to pass and then properly enforce its regulations." Important technical questions, such as how the IRS would target instances where an entity holds

[2] See Testimony of National Taxpayers Union, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives, September 13, 2017, https://www.ntu.org/publications/detail/irs-reform-resolving-taxpayer-disputes.

only cash and marketable securities as opposed to an operating family business, could be discussed in a structured manner.[3]

Again, IRS Job Aids do not carry the weight of an official legal position of the tax agency, nor can they be cited as an authority in a legal proceeding. STB may or may not wish to emulate the IRS in this sense, but the value of the Job Aid as a reference tool, in keeping both the Service and taxpayers on a similar plane of understanding about complex issues, is quite important. We believe STB might find Job Aids useful not only on questions surrounding presumption of market dominance in EP 756, but also ongoing technical matters about developing standards of practice in rail and shipping economics. Job Aids can take time to work properly, but they can be worth the effort in preventing mistakes that will be costlier in the long run.

3) Form a "Rail Advocate" Communicating Concerns of All Stakeholders to the Larger Public Sector.

NTU has generally supported expedited methods for determining regulatory judgments that take place in a neutral forum, put the burden of proof on the party instigating the action, provide for evidentiary procedures utilizing transparent economic analysis, and offer an accessible, speedy route for appeal. We therefore hope to offer observations during the reply comment phase that will furnish more detail on the particular merits (and drawbacks) of the six criteria STB proposes for a complainant to establish prima facie market dominance (and therefore qualify for the streamlined ruling procedure). One criterion, however, raises an important consideration we wish to highlight now: "The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues)."

It is the "regulatory issues" portion of this sentence that interests NTU most. Clearly one point of contention among parties in a case under this new streamlined procedure would be, at what point does a "build-out alternative" indeed become impractical? One way that STB can save the parties – and itself – a great deal of wasted time and effort is to methodically explore exactly what types of regulatory issues (outside of the Board's purview) impede the efficiency of business models in the rail sector. While in the particular instance of EP 756 this might mean only the models of shippers, we believe this effort should encompass the issues that carriers face with their models as well. STB may demur over such an exercise, citing lack of resources or authority to pursue it. As we noted, however, for any attempt at reforming rate case procedures to function well, (whether through EP 756 or some other means), a modest near term investment in scoping out the regulatory problems faced by complainants and respondents would pay large dividends in the long term.

As for STB's authority in this area, we do not suggest that the Board should actively seek to modify regulatory burdens on the rail sector imposed by other agencies. Rather, STB can facilitate discussions and provide helpful expertise to other government agencies that may touch the daily activities of railroads and shippers. For example, what types of tax-law vagaries (e.g., the short line tax credit) or labor laws create uncertainty for revenue adequacy of railroads? What kinds of environmental restrictions on refineries or energy extraction operations weigh upon shippers? Are smaller shippers disproportionately affected by regulatory issues, and to what degree? Are there state or local government property tax classification systems that make carrier or customer infrastructure highly difficult to augment or relocate? STB has already conducted some of this work, or at least considered what is involved; we would recommend that the work be expanded and maintained on an ongoing basis.

Several federal agencies analyze questions of this nature within their own policy spheres. Just one example for STB's consideration is the Small Business Administration's (SBA) Office of Advocacy.

The mission of the SBA Office of Advocacy is to serve as "the independent voice for small business within the federal government, the watchdog of the Regulatory Flexibility Act, and a source of small business statistics and research. Advocacy advances the views and concerns of small business before Congress, the White House, federal agencies, federal courts, and state policymakers."

Although the Office of Advocacy was created by statute and has a significant staff, STB need not wait for a congressional appropriation to adopt some of the approaches the Office takes in fulfilling its mission. The SBA Office of Advocacy

[3] See Comments of National Taxpayers Union before the Internal Revenue Service, November 2, 2016, https://www.ntu.org/publications/detail/irs-considering-backdoor-death-tax-hike.

provides regular, detailed analysis in notice and comment situations involving other agencies (e.g., the Departments of Labor and Treasury) as well as congressional hearings. STB is familiar with these settings, but a more advanced tool that SBA has finely honed is the multijurisdictional roundtable. These in-depth discussions, hosted by the Office, bring together public and private sector leaders from every industry, agency, and level of government that might have an impact on small business. The topics they cover can range from internet connectivity, to tax filing requirements, to workplace safety. As participants in some of these roundtables, NTU can attest to the value they have in fostering a greater understanding over the interconnectedness of stakeholder interests and creating a common analytical framework for the economics of rulemakings as well as statutory guidance.[4]

Over time, STB can establish, with feedback from the public and private sectors, a similar knowledge base of the practical regulatory considerations across the spectrum of government that affect all private entities with an interest in rail's future. The results will be useful in a number of applications, from gaining a better appreciation of how STB's rulemaking interconnects with other regulations, to providing clearer rules of the road as to what should be evidential in all types of rate cases (regardless of whether they operate under current or some new kind of procedures). Here again, STB can "start small" by institutionalizing some of the practices that the SBA Office of Advocacy has developed, gradually adding capacity as experience permits and resources allow.

Conclusion: More "Rules for Rulemaking" Are Ahead

On October 9, the Trump Administration announced major changes to increase the transparency and accountability of the regulatory process for many federal agencies, through Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" and Executive Order 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication."[5]

The EOs are designed to shed light on the murky world of agency "guidance," which consists not of formal rulemaking but still results in government action being taken against individuals and businesses without notice. Now, agencies will be required to give citizens and taxpayers notice and a comment opportunity if they will be affected by new guidance and be required to offer opinions upon request on how best to comply with guidance. In addition, affected individuals and businesses will be able to request a written justification before an agency takes certain enforcement actions "of legal consequence" against them. Petition processes whereby citizens may request modification or withdrawal of guidance would also be established.

These regulatory reforms may not have a direct impact on the way STB operates with EP 755/665 and EP 756, but the Board cannot afford to ignore the trend that the EOs represent. Increasingly, federal government regulatory processes are being reshaped so that they are more accessible, better-informed by serious cost analysis, less vague, more amenable to stakeholder input and appeal, and above all less burdensome on the economy.

NTU's comments are offered as general advice for designing mechanisms that can benefit all STB rulemaking reforms, including but not solely confined to EP 755/665 and EP 756. We look forward to providing additional views on the arbitration methods, presumptive tests, statutory authority, and other matters surrounding these rules in reply comments. Until that time, we are at your service should you have any questions.

Sincerely,

Pete Sepp, President

[4] For further introductory information on Office of Advocacy activities, see https://advocacy.sba.gov/category/regulation/agency-roundtables/, https://advocacy.sba.gov/regulatory-reform/, and https://advocacy.sba.gov/category/research/economic-reports/.

[5] For text of the Executive Orders, see 84 FR 55235 and 84 FR 55239.