

2140-00##
September 2019
Expires 5/30/2020

**SUPPORTING STATEMENT
FOR MODIFICATION AND OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT AND 5 C.F.R. § 1320**

The Surface Transportation Board (STB or Board) is submitting this request for approval separate from the collection to which it relates (Complaints, OMB Control No. 2140-0029). This is to accommodate consideration of modifications to that collection in two simultaneous notices of proposed rulemakings (NPRM). The modification submitted here only pertains to the Market Dominance Streamlined Approach for complaints and is being treated as sequential to the modification and extension request submitted in OMB Control No. 2140-0029. While it remains couched as a modification, we are seeking separate approval for the Market Dominance Streamlined Approach here and anticipate that, once the final rules for both NPRMs are approved, this OMB control number will be merged with OMB Control No. 2140-0029, and this one will be discontinued.

A. Justification:

1. Why the collection is necessary. The Surface Transportation Board is, by statute, responsible for the economic regulation of common carrier freight railroads and certain other carriers operating in the United States. Under the Interstate Commerce Act and corresponding regulations, the Board has broad authority to hear and act upon complaints. Shippers and other persons may bring claims for damages against railroads or other carriers regulated by the Board by filing a complaint before the Board under the procedures set forth in 49 C.F.R. § 1111 for claims under 49 U.S.C. §§ 10701-10707, 11101-11103, 11701-11707 (rail), 14701-14707 (motor, water & intermediaries), and 15901-15906 (pipelines).

For example, a shipper may allege that carriers are charging unreasonable rates or that they are engaging in unreasonable practices. See 49 U.S.C §§ 10701, 10704, 11701, 14701, 15901. The content of the complaint is outlined in 49 C.F.R. § 1111(a). Upon the filing of a complaint, an adjudicatory process is initiated as in the case of claims brought in federal court. The Board's collection of information associated with these complaints enables it to meet its statutory duties by determining the reasonableness of challenged rail transportation rates is one of the Board's core functions. See 49 U.S.C. § 10101(6) (stating the rail transportation policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital").

2. Why the modification is necessary. In order to adjudicate the reasonableness of a rail rate in a complaint, the Board must first find that the defendant rail carrier has market dominance over the transportation to which the rate applies. 49 U.S.C. §§ 10701(d)(1),

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). The market dominance finding can be a significant and costly undertaking. This modification and approval request is the result of the notice of proposed rulemaking that would provide a streamlined approach for pleading market dominance in rate reasonableness proceedings. Market Dominance Streamlined Approach, EP 756 (84 Fed. Reg. 48882 (Sept. 17, 2019)) (Market Dominance NPRM). The Board expects that this streamlined approach would reduce burdens on parties, expedite proceedings, and make the Board’s rate relief procedures more accessible, especially for complainants with smaller rate disputes. It is also expected to increase the number of complaints filed.¹

The expeditious treatment of market dominance issues is integral to the Board’s ability to consider rate reasonableness cases where there is an absence of effective competition. In order to make the statutory remedies fully available to users of rail service, it is important for the Board to consider ways to streamline the presentation of market dominance evidence, particularly in smaller cases where the cost of making a market dominance presentation can outweigh the value of the case.

This modification to the market dominance showing would have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting railroads’ ability to mount a thorough defense. The Board finds that the availability of a streamlined market dominance approach would reduce unneeded burdens that could dissuade complainants from bringing meritorious cases. Moreover, reducing the time and expense associated with litigating market dominance is particularly important for smaller rate disputes. The proposed rule would also help the Board achieve the statutory requirement to ensure the expeditious handling of challenges to the reasonableness of railroad rates, 49 U.S.C. § 10704(d) (1), and further the rail transportation policies of fostering sound economic conditions in transportation and ensuring effective competition, § 10101(5), and maintaining reasonable rates where there is an absence of effective competition, § 10101(6).²

1 This request for modification is being sought separately from the modification request in Final Offer Rate Review, EP 755 et al. (84 Fed. Reg. 48872 (Sept. 17, 2019)) (FORR NPRM), which is a separate, and treated as a subsequent, NPRM affecting the same existing collection in OMB Control No. 2140-0029. As indicated in sections 12 and 15 below, this modification request incorporates modifications proposed in the FORR NPRM, which will be submitted in a related Information Collection.

2 Additionally, streamlining the market dominance inquiry would be consistent with clear Congressional directives not only in the rail transportation policy, 49 U.S.C. § 10101(15), but also in the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Pub. L. No. 114-110, 129 Stat. 2228. Section 11 of the STB Reauthorization Act modified 49 U.S.C. § 10704(d) to require that the Board “maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.” Section 11 also shortened the

3. Extent of automated information collection. Complaints may be e-filed on the Board’s website, located at www.stb.gov. With limited exceptions (as discussed in response #10), these documents are publicly available on the Board’s website.

4. Identification of duplication. The information requested does not duplicate any other information available to the Board or the public. No other federal agency has authority to adjudicate these complaints, and no other agency collects this information.

5. Effects on small business. This collection does not have a significant economic effect on a substantial number of small entities. Rate complaints are not typically filed by small shippers, or filed against small carriers. To the extent that small shippers elect to file rate complaints, the proposed FORR process would make it easier for them to do so.

6. Impact of less frequent collections. The Board is charged with adjudicating several different types of complaints. Limiting complaints by providing for less frequent collections would undermine the Board’s ability to fulfill its statutory mandate to hear complaints.

7. Special circumstances. No special circumstances apply to this collection.

8. Compliance with 5 C.F.R. § 1320.8. The Board published in the Federal Register the Market Dominance NPRM at 84 Fed. Reg. 48882 (Sept. 17, 2019), which provided for a 60-day comment period (and an additional 60-day period for reply comments) regarding this collection, with specific reference to concerns detailed in the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3).

9. Payments or gifts to respondents. The Board does not provide any payment or gift to respondents.

10. Assurance of confidentiality. The information in this collection is generally available to the public as filings on the Board’s website, located at www.stb.gov. However, some of the information collected may be protected and treated as confidential. At times, persons filing a complaint before the Board, or responding to a complaint, may wish to file commercially sensitive information. To protect such information, parties may mark documents or portions of documents as “confidential” or “highly confidential” and simultaneously file a motion for a protective order. 49 C.F.R. § 1104.14. Generally, the Board will issue a protective order (sometimes with modifications), limiting access to confidential pleadings to parties who demonstrate a need for the information, and adequately ensuring that the documents will be kept confidential. In such circumstances, a redacted public version of the document will be posted on the Board’s website in lieu of the document containing confidential information.

time for deciding large rate cases.

11. Justification for collection of sensitive information. No sensitive information of a personal nature is requested.

12. Estimation of burden hours for respondents. The following information pertains to the estimate of burden hours associated with this collection:

- (1) Number of respondents: Approximately nine.
- (2) Frequency of response: On occasion. In recent years, respondents have filed approximately four complaints per year with the Board. In FORR NPRM, the Board simultaneously issued a separate NPRM that also impacts the Board's existing collection of complaints. In that decision, the Board estimates that the proposed alternative complaint would result in the collection of approximately four additional complaints annually. The modification of the Board's existing collection for those additional complaints is noticed in the FORR NPRM and is incorporated in the burdens below. In this NPRM, based on the addition of the simplified market dominance approach, the Board anticipates that approximately five additional complaints would be filed annually, including those from Docket No. EP 755 et al. Combining the existing complaints and the additional complaints resulting from the proposed rules in Docket No. EP 755 et al. and this NPRM, the estimated number of complaints filed annually is approximately nine, as shown in Table 1 below.

Table 1

Type of Complaints	Existing Complaints	New Complaints	Total Annual Complaints
Existing Annual Complaints	4	0	4
Final Offer Complaints (from NPRM in EP 755)	0	4	4
Simplified Market Dominance (from NPRM in EP 756)	0	1	1
Totals	4	5	9

- (3) Annual hour burden per respondent and total for all respondents: 3,126 (sum of (i) estimated hours per complaint (469) x total number of estimated, existing complaints (4), and (ii) estimated hours per additional complaints (250) x total number of those complaints (5)). The annualized burden is shown in Table 2 below.

Table 2

Type of Complaints	Estimated Annual Complaints	Estimated Hours per Complaint	Total Annual Estimated Hours
Existing Annual Complaints	4	469	1,876
Final Offer Complaints (from <u>FORR NPRM</u>)	4	250	1,000
Simplified Market Dominance (from <u>Market Dominance NPRM</u>)	1	250	250
Total	---	---	3,126

For respondents, there is no Board-generated record-keeping requirement associated with this collection.

13. Other costs to respondents: The total annual costs to respondents, or the “non-hour burden” costs associated with this information collection, will consist of printing, copying, mailing and messenger costs equaling approximately \$9,748 (sum of (i) estimated non-hour burden cost per complaint (\$1,462) x total number of estimated, existing complaints (4), and (ii) estimated non-hour burden cost per additional complaint (\$780) x total number of those complaints (5)).

14. Estimated costs to the Board: There will be no cost beyond the normal labor costs for Board staff.

15. Changes in burden hours. This is an existing collection with an OMB control number, which is being adjusted to take into consideration the effects of the simplified market dominance pleadings proposed in the Market Dominance NPRM and to update the burdens and costs of all complaints filed at the Board. As noted above, this modification is in addition to the modification in the simultaneously-issued FORR NPRM, which is incorporated here as an existing collection and is being dealt with in a related Information Collection.

16. Plans for tabulation and publication: Generally, complaints are published on the Board’s website, located at www.stb.gov. However, as discussed above, when complaints contain confidential information, only a public, redacted version is published on the Board’s website. Complaints are designated as permanent records, and, accordingly, the Board retains

them for 10 years, after which they are transferred to the custody of the National Archives and Records Administration.

17. Display of expiration date for OMB approval. There is no form associated with this collection. When issued, the control number and expiration date for this collection will be published in the Federal Register.

18. Exceptions to Certification Statement. Not applicable.

B. Collections of Information Employing Statistical Methods:

Not applicable.