

248940

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
November 12, 2019
Part of
Public Record

Docket No. EP 755

FINAL OFFER RATE REVIEW

OPENING COMMENTS OF CANADIAN PACIFIC

Jeffrey J. Ellis
Cassandra P. Quach
Canadian Pacific
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
Jeff_Ellis@cpr.ca
Cassandra_Quach@cpr.ca

David F. Rifkind
Stinson LLP
1775 Pennsylvania Ave. N.W.
Suite 800
Washington, D.C. 20006
(202) 785-9100
David.Rifkind@stinson.com

Charles Webster
Canadian Pacific
11306 Franklin Ave
Franklin Park, IL 60131
Charles_Webster@cpr.ca

Counsel for Canadian Pacific

Dated: November 12, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 755

FINAL OFFER RATE REVIEW

OPENING COMMENTS OF CANADIAN PACIFIC

Canadian Pacific¹ (“CP”) submits these Opening Comments pursuant to the Board’s Notice of Proposed Rulemaking (“NPRM”) served on September 12, 2019 in the above-captioned proceeding. The NPRM proposes Final Offer Rate Review (“FORR”), a new lower cost procedure that could be used in rate reasonableness challenges in “smaller” rate cases. The Board expects that the streamlined procedures that it proposes to adopt, which are based on the final offer arbitration (“FOA”) procedures used in Canada, will reduce litigation costs. *Id.*, slip op. at 7. In CP’s first-hand experience with FOA proceedings in Canada, however, such procedures have not proven effective at reducing litigation costs in any material way, despite their touted expediency. In fact, the ultra-compressed FOA timelines, coupled with the simultaneous exchange of offers, supporting arguments and evidence create much uncertainty and thus extraneous work. FOA, like the proposed FORR procedures, also lacks a standard for decision-making resulting in briefing that is voluminous and overbroad, further contributing to the cost of litigation. This is because neither side knows which issues and arguments the other side will raise and therefore the parties tend towards over inclusivity. The combination of these

¹ Canadian Pacific is a trade name under which Canadian Pacific Railway Company and its United States subsidiaries Soo Line Railroad Company, Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. operate.

factors, CP believes, discourages small shippers from utilizing FOA. Moreover, there is no evidence that FOA produces satisfactory results. This experience strongly suggests that FORR would not achieve the STB's goal of improving accessibility to rate relief.²

A. Overview of the Canadian FOA Procedures

In Canada, shippers can challenge a rail carrier's rates and terms of service using the Final Offer Arbitration procedures.³ Those procedures are available to nearly any shipper "dissatisfied" with the rates or terms of service and with no market dominance threshold and no monetary cap on relief.⁴ *Canada Transportation Act*, § 161(1) ("CTA") ("A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods..." is entitled to initiate an FOA). A shipper can initiate an FOA by filing a complaint at the Canadian Transportation Agency ("Agency"). *Id.* at § 161(2). The shipper must provide a prefiling notice to the carrier at least five days before filing the complaint. *Id.* at § 161(3). Within ten days of service of the complaint, the parties must simultaneously exchange final offers containing rates and any conditions associated with the movement of goods. *Id.* at § 161.1(1). The Agency then has five days to refer the matter for arbitration. *Id.* at § 162(1). In a standard FOA proceeding, within 15 days of referral, the parties must exchange arbitration briefs, including all information they intend to use in support of their final offers, followed by a lightning round of interrogatories

² These concerns are in addition to concerns expressed in the comments filed by the AAR in this proceeding.

³ FOA was first introduced in Canada in 1987 under the National Transportation Act. *National Transportation Act*, Statutes of Canada 1985, c. 28 (3rd Supp), s.3. FOA procedures were modified in the Canada Transportation Act of 1996. *Canada Transportation Act*, Statutes of Canada 1996, c. 10. <https://laws-lois.justice.gc.ca/eng/acts/c-10.4/>.

⁴ There are limited categories of shippers including, for example, shippers whose rates are contained in confidential rail transportation contracts, who are not eligible to bring an FOA.

– seven days to serve and 15 days to respond. The arbitrator then holds a hearing. *Id.* at § 163(3)-(4). A written decision selecting one of the two offers is due within 60 days of the Agency’s receipt of the complaint for a standard FOA. *Id.* at § 165(2)(b). The decision shall not include reasons unless requested by all parties. *Id.* at § 165(4)-(5). Unless otherwise agreed, the decision is effective for up to two years. *Id.* at § 165(2)(c).

The CTA provides a “summary process” for small rate cases, *i.e.*, matters below \$2 million (as adjusted). *Id.* at § 164.1. In a summary FOA proceeding, within 7 days of referral, the parties must exchange the arbitration brief, including all information they intend to use in support of their final offers. There is no opportunity to pose interrogatories and a hearing is not held unless the arbitrator considers it necessary, which is often not practicable given the timeline. *Id.* at § 164.1. The summary process requires a decision within just 30 days of the Agency’s receipt of the complaint. *Id.* at § 165(2)(b).

B. Few Shippers Have Opted to Bring an FOA Likely Due to Cost and Uncertainty Created by the Procedures and Lack of Standards.

Under Canadian law, FOAs are subject to confidentiality. *Id.* at § 167. Accordingly, CP is limited as to what it can share with the Board regarding its FOA experience. It is no secret, however, that few shippers avail themselves of the FOA process. In the last decade, CP has been involved in just nine FOA proceedings, of which only five primarily focused on challenging rates.⁵ Those nine proceedings involved just five shippers.

Moreover, FOA has not proven effective as a “small case” resolution mechanism. In fact, only two of the nine FOA proceedings in the past decade were advanced under the summary process. Each of the other proceedings involved a large, sophisticated, multinational company

⁵ CP has been involved in four FOAs that primarily focused on challenging the conditions associated with the movement of the traffic.

with a market capitalization that exceeded CAD \$4 billion and sought relief well in excess of the STB's proposed USD \$4 million relief cap.

The fact that FOAs are rare in Canada (at least as far as CP is aware) is particularly notable given the fact that the threshold for bringing an FOA is so low. A shipper must merely be "dissatisfied" with the terms of service and/or the rate. CTA, § 161(1) ("A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods..." is entitled to initiate an FOA). Moreover, a complainant is not required to show market dominance. Rather, the arbitrator is required merely to take into consideration the availability of "an alternative, effective, adequate, and competitive means of transporting the goods." Id. § 164(2).

There are likely two overarching reasons why FOA is infrequently used: cost and uncertainty. FOA proceedings are expensive. In CP's experience, the "streamlined" procedural schedule does little to control costs and may even engender additional costs. FOAs involve briefing of complex issues and require a substantial amount of preparation. Moreover, because briefing is simultaneous and there is no standard for decision-making for the arbitrator to apply, CP does not know what arguments the shippers will make. Consequently, CP must be overly expansive in its briefing, addressing all possible arguments that the complainant might raise. The evidentiary record in such proceedings is typically many binders thick. The fact that CP has only a short time to prepare means it must bring more resources to bear in order to defend an FOA effectively. Accordingly, CP must dedicate a large team of lawyers, experts, consultants and in-house subject matter experts as well as numerous supporting personnel.⁶ For most of CP's FOA

⁶ Typically, CP's FOA team will include 4 to 6 lawyers, 2 to 5 experts/consultants, 7-10 in-house subject matter experts/witnesses, and numerous supporting personnel.

team, the arbitration will be their sole focus for the entire two-month arbitration period. This includes nights and weekends as the timelines in the FOA procedures do not exclude weekends or statutory holidays.

CP understands that shippers' experiences are similar, with one important exception. Namely, shippers can take as long as they wish to prepare before initiating an FOA. While this head start gives the complainant an advantage, pre-filing expenses are unconstrained by a procedural schedule. Indeed, CP understands that shippers sometimes start preparing for an FOA up to a year in advance.⁷ Accordingly, the additional costs for the shippers are likely substantial.

In addition to being costly, there is a high degree of uncertainty in the outcome of the FOA proceeding. This is because there is no prescribed standard for the arbitrator to determine which offer to select. Instead, the parties litigate over what factors the arbitrator should consider in reaching a decision. In CP's experience, the lack of standards regarding, for example, the rate reasonableness determination, frustrates complainants, respondents and arbitrators alike.

In fact, shippers in Canada have expressed dissatisfaction with the FOA process and pressed the government for other avenues of relief. This includes pushing for structural reform such as Long Haul Interswitching⁸, as the supposed answer to the costly and burdensome FOA process.

⁷ The fact that the shipper has as long as it wants to prepare a case prior to filing a complaint puts the railroad at a clear and substantial disadvantage. This disadvantage is compounded by the fact that, in the proposed FORR procedure, like the FOA procedures, there is no prescribed methodology, no clearly defined standard of decision, and no clear standards as to the scope, such that the railroad could reasonably anticipate the scope and substance of a complaint.

⁸ Under Long-Haul Interswitching ("LHI"), sole-served shippers who are dissatisfied with a rate and/or service can seek an order from the Agency mandating that the originating railroad interchange the traffic at the nearest interchange. LHI orders may be made for distances up to 1200 km or 50% of the total number of kilometers over which the traffic is moved by rail in Canada, whichever is greater. CTA at § 129. Canada also has regulated interswitching zones

C. FORR, which is Modeled After the FOA procedures, is Likely Also to be Unduly Expensive and Plagued by Uncertainty.

The proposed FORR, although different in several respects from FOA, would incorporate some of the features of FOA that have proven problematic in Canada. This includes a proposed “streamlined” procedural schedule. The Board proposes a 52-day schedule from filing of the Complaint to close of the evidentiary record. NPRM, slip op. at 13-14. During those 52 days, complainants must conduct discovery, file opening and reply evidence on market dominance and rate reasonableness, and participate in an oral hearing. *Id.* The shipper will have an unlimited amount of time to prepare its opening evidence, although both parties will have just fourteen days from the close of discovery to file opening evidence and just ten days to file replies. *Id.* These periods are very short given the quality and quantity of briefing necessary for the shipper to carry its burden and for the railroad to defend effectively. Because the parties must also brief market dominance, FORR is even more onerous than the already burdensome FOA proceeding. Indeed, the ten days to file a reply is a particularly short period for the defendant railroad who, until the filing of opening evidence, will likely have no knowledge of what methodology or methodologies the shipper intends to rely upon to challenge the rate. To compensate for the compressed schedule, both parties, but particularly the railroad, will need to bring to bear significant resources, including manpower in order to respond to all anticipated or possible arguments. Indeed, rather than moderating the final offers and forcing the parties to only bring the “clearest and most important evidence” that the Board anticipates, in reality, FORR remains a highly adversarial process. If the Canadian FOA experience is indicative, to defend the respective final offers in a blind winner-takes-all regime, the overwhelming tendency will be to

where interchange can be made within 30 km of origination. In either case, the Agency prescribes the rates to the interchange.

become entrenched and overbroad in all things. Thus, the anticipated cost savings from a “streamlined” procedural schedule is likely to prove elusive.

Further, like FOA, FORR would have no prescribed standard for decision. Indeed, the Board contemplates that the complaining shipper could either choose one of the existing methodologies for challenging a rate, use a version of an existing methodology, or make one up. *Id.* at 11 (the proposed procedures “allow for the parties to submit final offers using their preferred methodologies, including revised versions of the Board’s existing rate review methodologies or new methodologies altogether”). This lack of a prescribed standard both contributes to the cost of litigation and engenders substantial uncertainty.

The combination of these factors -- the compressed timeline and the simultaneous filing of market dominance presentations, rate reasonableness analyses, final offers and replies -- will create a vast amount of materials that may or may not be relevant or helpful to determining whether the STB has jurisdiction and the maximum reasonable rate. Despite the voluminous record, the likelihood that each of the parties’ briefs will address the pertinent issues will be coincidental at best. Moreover, due to the abbreviated discovery schedule, the record is likely to be incomplete. Thus, the compressed timeline may also preclude the parties from developing and presenting their best evidence.

Worse yet, neither final offer may answer the question that Congress has instructed the Board to determine -- namely, what constitutes the maximum reasonable rate. *See* 49 U.S.C. § 10707(c). But unlike the Canadian FOA, the Board must issue a reasoned decision. At best, such decisions will merely reflect a set of highly contextualized “more reasonable” final offers. Given the shortcomings of the process, FORR is unlikely to produce decisions that are based on the best and proper (not just what happens to be the better) evidence and legal arguments. The

greater risk will be that the precedent built on such an inadequate record and derived from a standardless process, will spur more litigation, not quell it.

CONCLUSION

CP's experience with Final Offer Arbitrations in Canada is that they are costly, rife with uncertainty and rarely used. FORR proposes to incorporate selected aspects of the FOA procedures that contribute to this cost and uncertainty. Consequently, FORR is likely to suffer from the same deficiencies as the FOA process. These deficiencies are in addition to those discussed in the AAR comments, which CP joins. Accordingly, CP opposes the NPRM.

Respectfully submitted,

Jeffrey J. Ellis
Cassandra P. Quach
Canadian Pacific
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
Jeff_Ellis@cpr.ca
Cassandra_Quach@cpr.ca

Charles Webster
Canadian Pacific
11306 Franklin Ave
Franklin Park, IL 60131
Charles_Webster@cpr.ca

/s/ David F. Rifkind
David F. Rifkind
Stinson LLP
1775 Pennsylvania Ave. N.W.
Suite 800
Washington, DC 20006
(202) 785-9100
David.Rifkind@stinson.com

Counsel for Canadian Pacific