



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 755

FINAL OFFER RATE REVIEW

STB Docket EP 665 (Sub-No.2)

EXPANDING ACCESS TO RATE RELIEF

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**OPENING COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking served in this docket on September 12, 2019 (“NOPR”), the National Grain and Feed Association (“NGFA”) hereby files these Opening Comments on the Board’s proposed regulations that would govern a Final Offer Rate Review (“FORR”) methodology for reviewing the reasonableness of freight railroad transportation rates.

I. Identity and Interest of NGFA

Established in 1896, the NGFA consists of more than 1,100 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation’s grain, feed and processing industry. The NGFA also consists of 33 affiliated State and Regional Agribusiness

Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association and has a strategic alliance with the Pet Food Institute

II. General Background

The NGFA commends the Board for establishing a Rail Rate Reform Task Force (“Task Force”) to take a fresh look and critically evaluate the Agency’s existing rate-challenge methodologies. The Task Force produced a thought-provoking, meaningful and impactful report that accurately portrays the systemic problems and flaws with each of the STB’s existing rate-challenge methodologies and procedures, which for the most part create often-insurmountable barriers to rail customers, especially small shippers, seeking to exercise their legal right to challenge rail rates they believe are unreasonably high. The NGFA particularly was pleased that the Task Force report contained several new, innovative and intriguing concepts and recommendations – including the FORR – for improving the Agency’s current rate-challenge methodologies and procedures by establishing a more streamlined, timelier, less cumbersome and less prohibitively expensive ways for rail customers to formally challenge high rail rates. NGFA-member companies believe unreasonably higher rail rates have become more prevalent and significant given the rapid consolidation of the North American rail marketplace and the implementation of the so-called revenue-generating “precision scheduled railroad” operating model by six of the seven Class I railroads, which reinforces the importance and timeliness of the NOPR. As NGFA’s Rail Arbitration System, established in 1998, has shown, merely having realistic access to an accessible and effective forum for resolving disputes in a timely, fair and cost-effective manner can help discipline business conduct without cases ever being filed.

In its Opening and Reply Comments in Docket No. EP 665 (Sub-No. 1), the NGFA provided extensive documentation and rationale regarding the need for such an accessible and workable rail rate challenge methodology at the STB for shippers of grains, oilseeds and other agricultural commodities,

whose characteristics differ in fundamental ways from shipments of non-agricultural commodities, such as coal, ores and chemicals.¹ They bear repeating here for purposes of EP 755 and the NOPR:

- The wide geographic dispersion and largely rural locations of grain, oilseed, manufacturing, processing and export facilities given the existence of agricultural production across multiple states and regions. Agricultural producers and facilities are far more likely to be captive or potentially captive to a single rail carrier than shippers of non-agricultural commodities or products. As noted previously by the NGFA, rail is the only viable transportation mode available to many agricultural producers and shippers.² For instance, nearly all the grains and oilseeds produced in Montana, more than 70 percent of the grain and oilseeds produced in North Dakota and more than half the agricultural commodities produced in Arizona, Oklahoma and South Dakota are transported by rail.³
- Year-to-year variations in the quantity and quality of grain and oilseed production caused by the vagaries of weather and crop growing conditions (e.g., drought, flooding, excessive heat and other weather-induced aberrations that can and do affect crop yields and end-use quality characteristics dramatically). These shifts in agricultural production affect grain surplus and deficit areas, supply/demand fundamentals and commodity prices in ways that can and do significantly alter and realign grain movements between different shippers and receivers and change origin-destination pairs – not only from year-to-year, but often within a single crop year. Relatively recent weather-related examples of large variations in grain exports occurred in calendar years 2012 and 2013 following a severe drought in a large portion of primary U.S. grain-producing regions, and in 2019 as a result of delayed crop plantings caused by severe flooding. As a result of the droughts in 2012-13, grain availability to serve domestic and export markets was reduced drastically, leading to a precipitous decline in U.S. grain exports. U.S. grain exports transported by rail to U.S. ports declined from 67.4 million metric tons in 2010 to 40 million metric tons by 2013 – a 41 percent decline. The reduction in rail shipments destined for ports was especially pronounced for corn and grain sorghum shippers, which experienced declines in rail movements of 68 percent and 86 percent, respectively.
- Embargoes, import restrictions and changes in government agricultural and trade policies that influence producer planting decisions and trade flows – both in the United States and in other countries that produce and export grains, oilseeds and other agricultural commodities in world markets. A case in point is China’s decision in 2012/13 to suspend imports of U.S. corn – and instead source corn from other foreign suppliers – in response to the presence of a biotechnology-enhanced trait (Syngenta’s MIR-162 Viptera) that had been deregulated for cultivation in the United States, but had not been approved yet for

¹ NGFA Opening Comments and Evidence, pages 6-10.

² *Id.* at 10.

³ ***Study of Rural Transportation Issues***, U.S. Department of Agriculture and U.S. Department of Transportation (2010).

import by China and was detected in some U.S. shipments imported by that country. A more recent example, of course, involves the precipitous decline in U.S. soybean and other agricultural exports to China following the imposition of retaliatory tariffs in 2018-19, and the emergence of non-tariff trade barriers (e.g., sanitary and phytosanitary restrictions) by China, Vietnam, Thailand and other countries in 2018-19 that have undermined U.S. exports of soybeans and wheat.

- Changing demand from end-users of commodities based upon fluctuating customer demand for their products. Given the major role that transportation costs play in determining whether U.S. grains and oilseeds are competitively priced for export markets, access to reasonable rail freight rates is very important to soybean shippers in the northern plains states. Alternative grain supplies are available from Brazil and Argentina, as well as from U.S. shippers positioned to supply the U.S. Gulf export ports.
- The lower value of agricultural commodities on a per-unit basis compared to non-agricultural products. This factor, too, makes grain and other agricultural commodities less amenable to the Board's three other current rate methodologies – each of which is too complex, too time-consuming, too costly and ultimately unworkable for grain and oilseed shippers.
- The uniqueness and fundamental difference of agricultural rail shipments – particularly the fluctuating demand for rail service – also is explicitly underscored by the existence of auctions for freight rail equipment and the secondary market for railcars.

In addition, according to the 2015 report by the National Academy of Sciences' Transportation Research Board ("TRB Study"), grain is the largest commodity grouping within common-carrier service, accounting for about one-third of all ton-miles by tariff.⁴ Grain shippers typically do not enter into rail transportation contracts because of the previously described nature of their businesses, in which varying shipment volumes and changing origin-destination pairs and routings require more flexibility than typically allowed under contracts; indeed, the TRB Study found that only one in five ton-miles of grain shipments are moved under contract. The NGFA strongly concurred with the TRB Study statement that "[t]he continued reliance by grain shippers on common carriage, which is the only form of rail

⁴ ***Modernizing Freight Rail Regulation***. National Academies of Science Transportation Research Board (2015), page 44.

transportation that remains subject to direct regulation, has implications for STB rate and service oversight responsibilities. . . .”⁵

In addition, the TRB Study⁶, which notably was based upon industry data that preceded the implementation of PSR and the rate increases and carrier-dictated reductions in service that has followed it, the level of rate increases for small and large shipments of grain and oilseeds increased more than 80 percent and 70 percent, respectively, between 2002 and 2013,⁷ despite factors that seemingly would produce lower rates, such as: (1) reduced input costs and greater productivity of railroads; (2) increased use of railroad-supplied grain cars; and (3) larger, more consolidated shipments as unit trains became more prevalent for grains and oilseeds. The TRB Study also noted that the spikes in grain shipping rates were less likely to have been exaggerated by the expiration of low-rate legacy rail contracts, given the far greater prevalence of contracts in the coal industry.

The TRB Study noted further that real rail rates increased more than 25 percent between 2002 (when real rates reached their low point following enactment of the Staggers Rail Act of 1980) and 2013, growing nearly twice as fast as ton-miles and far exceeding growth in railroad input costs, which in real terms rose by only 2 percent over the same period. The TRB Study found that while real rates for most commodities increased between 15 and 25 percent from 2002 to 2013, grain rail rates increased a whopping 40 percent!

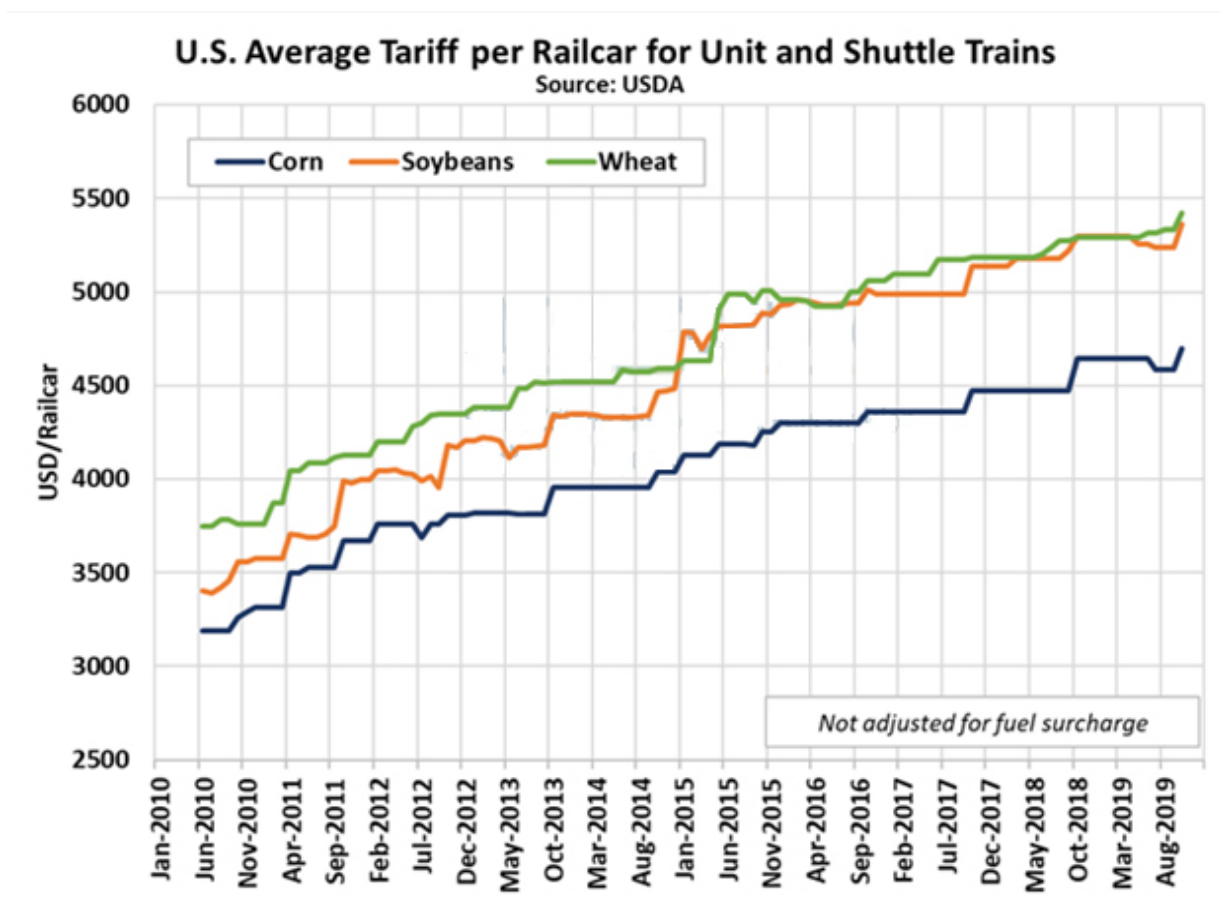
The trend of rapidly escalating freight rail rates has not abated in the years since the TRB Study was published, as demonstrated in the U.S. Department of Agriculture chart below. Importantly, the

⁵ *Id.*

⁶ *Id.* at 47-48.

⁷ *Id.* at 41.

freight rail rates depicted in this chart do not include additional fuel surcharges or accessorial charges being imposed by Class I carriers.



Yet, despite these developments, no shipper of agricultural commodities has filed a formal rate at the Board in nearly 40 years.

To address the unworkability of the Board’s current rate-challenge methodologies and procedures, the NGFA in 2014 developed and proposed a new, simplified rate-challenge methodology intended to be workable for agricultural shippers and receivers. We continue to believe NGFA’s proposal contains concepts warranting the Board’s consideration, as was recognized in the Task Force report and are referenced later in these Opening Comments.

For the aforementioned reasons, as well as those set forth in more detail herein, the NGFA continues to support strongly the efforts by the Board to improve its rules for reviewing the reasonableness

of railroad rates and to make them more workable, accessible and useful for agricultural shippers. In this regard, the NGFA supports the Board's proposal to further incorporate "final-offer" procedures into its rules and policies.

III. Comments of the NGFA on the NOPR

A. General Comments

As noted previously, the NGFA has a long history of urging the Board to undertake substantive, creative efforts to improve its rules and procedures for analyzing the reasonableness of railroad rates, and to do so in a manner that is consistent with the Board's governing statutes. The proposal to incorporate principles of final offer arbitration that have been used successfully in Canada to resolve rail rate disputes is one such potential solution that deserves serious consideration. Some of NGFA's member companies have had successful experiences with the Canadian final offer arbitration procedures, and, thus, are enthusiastic about the Board's proposal to apply similar concepts to the process for challenging unreasonable rail rates in the United States.

As an overarching comment, the NGFA believes that the proposed rate cap of \$4 million (rate prescription and reparations) would be sufficient for many grain and processed commodity shippers, as would be the NOPR's proposal that rate relief granted to successful challengers of unreasonable rates would be subject to a two-year limit on rate prescriptions (unless the parties agree to a different limit). However, this being said, the NGFA does not believe it is necessary for the Board to implement a cap on overall relief in a FORR methodology, and that complainants with larger cases should be able to utilize it. In such cases where the potential relief is relatively high, and the relevant circumstances are more complicated, the STB could adjust the procedural schedule to permit additional discovery and evidence.

In addition, the Board has stated that "it anticipates that its decisions in FORR cases would establish categories of easily producible, core information that each side could be expected to request and produce within the truncated period." NOPR at 8. This statement appears to assume (1) there will be

numerous FORR cases filed; and (2) a sufficient number of cases will be litigated to a final decision to create the desired body of precedent. However, as the NGFA has pointed out in prior Board proceedings, experience has shown that the vast majority of formal complaints other than rate cases brought before the Board under the Stand-Alone Cost methodology are settled by the parties prior to reaching the final decision stage. Typically, such settlements are confidential between the litigating parties, so no precedent is established. Moreover, as the April 25, 2019 ***Report to the Surface Transportation Board*** authored by the Task Force noted, since 1988 there have been a *total* of only 30 decisions rendered in the Canadian final offer arbitration process on which the FORR process is modeled. Consequently, the NGFA believes the actual number of decisions issued by the Board in FORR cases will be lower than the Board's current expectations in the NOPR. This argues for the Board providing as much guidance as possible in the decision accompanying the final FORR rules, including guidance to potential complainants on the type of data the Board would expect parties to include in their respective presentations.

B. Statutory Support for the FORR Proposal

Despite recent sabre rattling by the Association of American Railroads ("AAR") that "the industry" is concerned "the FORR NRPM violates the Board's governing statute, implicates Constitutional issues of fundamental fairness and due process, fails to account for either of the rulemaking's costs or benefits, and misses the Board's express policy targets,"⁸ the fact is that the Board has ample authority to promulgate a FORR methodology to review the reasonableness of railroad rates. This authority stems from 49 U.S.C. §10701, guided by the Rail Transportation Policy ("RTP") in 49 U.S.C. § 10101 and other provisions, including §10704. Section 10701(d)(l) establishes that if the Board determines a carrier has market dominance over the transportation to which a particular rate applies, "the

⁸ October 21, 2019 Letter from the Association of American Railroads to the Surface Transportation Board, filed in Docket EP 755 on October 22, 2019 at 2.

rate established by such carrier for such transportation must be reasonable.” Moreover, §10701(d)(3) expressly states that “[t]he Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” The Board, when determining rate reasonableness, also is required to give due consideration to the “Long Cannon” factors in §10701(d)(2), and to recognize the policy that railroads “shall earn adequate revenues, as established by the Board under section 10704(a)(2) of this title.” *Id.* at §10701(d)(2). Finally, the RTP requires the Board to expeditiously handle and resolve rate proceedings, 49 U.S.C. §10101(15), and §10704(d) directs the Board, in part, to “establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.” To the extent the AAR and its Class I railroad members follow through on threats to elaborate on their arguments that the FORR proposal is not legally supported in their opening comments, the NGFA will address such arguments in the reply phase of this proceeding.

C. The FORR-Proposed Rules

NGFA’s comments on other aspects of the NOPR are set forth below in these Opening Comments, accompanied by suggested changes to the proposed regulatory language (shown in tracking) in Appendix A attached hereto.

1. Use of Only Streamlined Market Dominance Test in FORR Cases

The NGFA concurs with the Board’s proposal that the FORR procedure should be used only if the complainant also elects to use the streamlined market dominance approach that the Board has proposed in Docket EP 756. NOPR at 9. Such an approach is consistent with one of the policy purposes of the FORR methodology, which is to encourage the parties to reach a commercial solution to their dispute.

2. Comments on the Board’s Proposed Process and Schedule

The NGFA generally agrees with the proposed process and timelines in the NOPR, and, therefore, recommends only a few substantive changes. For example, the NGFA believes the process could be

assisted if the Complainant had the option of providing the defendant railroad with notice of the data and information it intends to seek in discovery at the same time as the Complainant provides notice of its intent to file a complaint under proposed §1111.10(a)(3)(i)(A).

In addition, the NGFA believes the Board should insert a provision in the procedural schedule regarding when the Complainant must exercise its discretionary right to convene a hearing before an administrative law judge. Finally, while the Board proposes not to entertain motions to compel discovery under the FORR procedures, the NGFA suggests that proposed §1111.11(b)(2) be modified to require the parties to engage in good faith discussions to try and resolve any disputes that arise. *See Appendix A.*

3. Comments on the Board's Proposal to Provide Guidance to Assist Smaller Entities

The NGFA concurs with the Board's proposal that it should develop and provide guidance to smaller agricultural shippers on how to utilize the proposed FORR procedures. Such guidance should be provided by expanding on some of the topics set out in the NOPR in the decision accompanying the final rules, such as a more detailed discussion of the potential criteria and statutory standards the Board will expect to be addressed in FORR cases. This discussion would expand upon the summary discussion appearing at pages 10-11 of the NOPR. In addition, the Board also could provide such assistance in response to specific questions through its Office of Rail Customer and Public Assistance.

D. The FORR Rules Should Apply to Class II and Class III Railroad Rates

Some Class II and Class III railroads are of substantial geographic size and impose rates that affect the movement of commodities. The streamlined market dominance rules would limit the number of eligible cases involving these carriers. However, the basic fairness of the proposed standards and the simplicity and flexibility of the proposed processes are conducive to applying the FORR to Class II and Class III railroads without the burdens the Board identified in other rate-challenge methodologies. The NGFA recommends that the Board do so.

E. The STB Should Issue Final Rules in EP 665 (Sub-No. 2) and Proposed Revisions to the Three-Benchmark Methodology

In response to the Board's question at page 17 of the NOPR, the NGFA respectfully submits that the Board should not close the docket in *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2), and should continue to work toward issuing final rules that modify its initial proposal in response to the comments it has received from NGFA and other stakeholders, as well as the recommendations of its Task Force. In particular, the NGFA notes with approval the following recommendations made by the Task Force to improve the "smallest rate cases" methodology proposal in EP 665 (Sub-No. 2):

1. Allow the traffic comparison group to include similar traffic with R/VC ratios below 180 percent, so long as they exceed the carrier's RSAM figure;
2. Set the revenue need adjustment factor at 1 when the carrier is "long-term revenue adequate," as defined by the Board;
3. Eliminate the so-called "common-carrier adjustment," which was used in a single case with virtually no evidentiary support;
4. Eliminate the "revenue-per-ton-mile screen;"
5. Eliminate the "other relevant factors" component, which has been shown to be subject to abuse and litigation gamesmanship by defendant railroads;
6. Eliminate the confidence interval; and
7. Adopt more streamlined procedural rules and timelines.

The NGFA does not agree with the Task Force's recommendation to establish a \$500,000 cap for relief for cases utilizing this methodology. This is far too low for reasons the NGFA has explained in its prior comments in that docket. However, the NGFA continues to believe that rate review methodologies that utilize a rate-comparison approach, such as the "smallest rate cases" proposal and the current Three-Benchmark Methodology (as modified by Task Force recommendations and other industry stakeholder input), can be useful and accessible, and we encourage the Board to continue its efforts in this regard.

IV. Conclusion

The NGFA commends and strongly supports the Board's proposal to implement a FORR approach to enable rail users at long last to have accessible, workable, timely and cost-effective recourse for challenging unreasonable freight rail rates. The NGFA appreciates the priority attention the Board is giving to this matter. We ask that the Board give due consideration to NGFA's comments and recommendations submitted herewith in crafting a final rule expeditiously.

Respectfully submitted,



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Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002, 1111, 1114, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by redesignating paragraphs (f)(56)(iv) through (f)(56)(vi) as (f)(56)(v) through (f)(56)(vii) and adding paragraph (f)(56)(iv) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

Type of Proceeding	Fee
* * * * *	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	\$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	\$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	\$150.
(iv) A formal complaint involving rail maximum rates filed under the Final Offer Rate Review procedure	\$150.
(v) All other formal complaints (except competitive access complaints)	\$350.
(vi) Competitive access complaints	\$150.
(vii) A request for an order compelling a rail carrier to establish a common carrier rate	\$350.

* * * * *

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 is revised to read as follows:

49 U.S.C. 10701, 10704, 11701, and 1321

4. Amend § 1111.3 by revising paragraph (c) to read as follows:

§ 1111.3 Amended and supplemental complaints.

* * * * *

(c) *Simplified Standards.* A complaint filed under Simplified-SAC or Three-Benchmark may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or stand-alone cost. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required. A complaint filed under Final Offer Rate Review may not be amended to opt for Three-Benchmark, Simplified-SAC, or stand-alone cost, and a complaint filed under Three-Benchmark, Simplified-SAC, or stand-alone cost may not be amended to opt for Final Offer Rate Review.

5. Amend § 1111.5 by revising paragraphs (a), (b), (c), and (e) to read as follows:

§ 1111.5 Answers and cross complaints

(a) *Generally.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under Simplified-SAC or Three-Benchmark, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with Simplified-SAC or Three-Benchmark answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer must be filed with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendants.

* * * * *

(e) *Failure to answer complaint.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, averments in a complaint are admitted when not denied in an answer to the complaint.

* * * * *

6. Amend § 1111.10 by adding paragraph (a)(3) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards

(a) *Procedural Schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

* * * * *

(3)(i) In cases relying upon the Final Offer Rate Review procedure:

(A) Day -5—Complainant files notice of intent to initiate case and serves notice on defendant, which notice may include the nature and type of discovery the Complainant will seek from Defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 21—Discovery closes.

(D) Day 35—Complainant and Defendant each file their evidence on market dominance filings, their respective rate reasonableness analyses, and their final offer proposing a maximum reasonable rate the Board should establish for the transportation movement at issue.

(E) Day 45—Complainant and Defendant each file their Reply evidence to the other party's opening submission and final offer proposals.

(F) Day 48 – Deadline for Complainant to request telephonic evidentiary hearing on market dominance presentations before an administrative law judge, as described in § 1111.12(e) of this chapter.

(F) Day 52—Telephonic evidentiary hearing on market dominance presentations before an administrative law judge, as described in § 1111.12(e) of this chapter, at the discretion of the ~~complainant~~ Complainant. ~~(market dominance).~~

(G) Day 135—The Board issues a decision selecting one of the parties' final offer proposals, without modification. ~~Board decision.~~

(ii) In addition, the Board will appoint a liaison within five business days after the Board receives the pre-filing notification in section (a)(3)(i)(A).

(iii) With its final offer, each party must submit an explanation of the methodology it used.

* * * * *

7. Amend § 1111.11 by revising paragraph (b) to read as follows:

§ 1111.11 Meeting to discuss procedural matters.

* * * * *

(b) *Stand-alone cost or simplified standards complaints.*

(1) In complaints challenging the reasonableness of a rail rate based on stand-alone cost, Simplified-SAC, or Three-Benchmark, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, and 7 days after the mediation period ends in Simplified-SAC or Three-Benchmark cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

(2) In complaints challenging the reasonableness of a rail rate under Final Offer Rate Review, the parties may not seek Board intervention in discovery disputes, but the parties should engage in good faith discussions to resolve ~~discuss~~ discovery matters. ~~with one another to the extent necessary.~~

PART 1114—EVIDENCE; DISCOVERY

8. The authority citation for part 1114 continues to read as follows:

5 U.S.C. 559; 49 U.S.C. 1321.

9. Amend § 1114.21 by adding paragraph (a)(4) to read as follows:

§ 1114.21 Applicability; general provisions.

(a) * * *

(4) Time periods specified in this subpart do not apply in cases under Final Offer Rate Review. Instead, parties in cases under Final Offer Rate Review should serve requests, answers to requests, objections, and other discovery-related communications within a reasonable time given the length of the discovery period.

* * * * *

10. Amend § 1114.24 by revising paragraph (h) to read as follows:

§ 1114.24 Depositions; procedures.

* * * * *

(h) *Return.* The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked “Deposition of (here insert name of witness)” and shall either personally deliver or promptly send the original and one copy of all exhibits by e-filing (provided the filing

complies with 49 CFR §1104.1(e)) or registered mail to the Office of Proceedings. A deposition to be offered in evidence must reach the Board not later than 5 days before the date it is to be so offered.

* * * * *

11. Amend § 1114.31 by revising paragraphs (a) and (d) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. Motions to compel discovery may not be filed in cases under Final Offer Rate Review.

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Motions to compel in stand-alone cost and simplified standards rate cases.* (i) Motions to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention.

(ii) In a rate case to be considered under the stand-alone cost, Simplified-SAC, or Three-Benchmark methodologies, a reply to a motion to compel must be filed with the Board within 10 days of when the motion to compel is filed.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Simplified-SAC, or Three-Benchmark, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. Such a motion may not be filed in a case under Final Offer Rate Review. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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PART 1115—APPELLATE PROCEDURES

12. The authority citation for part 1115 continues to read as follows:

5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

13. Amend § 1115.3 by revising paragraph (e) to read as follows:

§ 1115.3 Board actions other than initial decisions.

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

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