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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB DOCKET NO. EP 755

FINAL OFFER RATE REVIEW

**REPLY COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL, THE FERTILIZER INSTITUTE,
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
THE CHLORINE INSTITUTE, AND THE CORN REFINERS ASSOCIATION**

Jeffrey O. Moreno
Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4107

On behalf of:
American Chemistry Council
Corn Refiners Association
The Fertilizer Institute
The National Industrial Transportation League

Paul M. Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036
(202) 298-8100

Michael F. McBride
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 298-1800

On Behalf of:
The Chlorine Institute

January 10, 2020

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The American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), The National Industrial Transportation League (“League”), the Chlorine Institute, and the Corn Refiners Association (“CRA”) (collectively the “Coalition Associations”) jointly submit these Reply Comments in accordance with the Notice of Proposed Rulemaking served by the Surface Transportation Board (“Board”) in the above-captioned docket on September 12, 2019 (“NPRM”). This Reply responds to opening comments submitted by various rail industry interests on November 12, 2019.

I. SUMMARY OF COMMENTS.

The NPRM proposes a new procedure for challenging the reasonableness of rail rates that is based upon recommendations in a Report issued by the Board’s Rate Reform Task Force (“RRTF”) on April 25, 2019 (“RRTF Report”). The new procedures, which the Board calls “Final Offer Rate Review” or “FORR,” constitute an attempt to provide “a more accessible avenue for rate reasonableness review by the Board” in smaller cases by “providing faster, less costly review of claims of unreasonable rail rates.”¹

¹ NPRM at 7.

In their Opening Comments, the Coalition Associations noted the urgent need for an alternative approach to Stand-Alone Cost (“SAC”) to evaluate the reasonableness of rail rates and expressed general support for the FORR concept as a potential alternative. They also identified several modifications to the proposed process that are necessary to provide shippers a reasonable opportunity to obtain the information needed to satisfy the FORR criteria. These included increasing discovery to 35 days, an expedited process for resolving discovery disputes, and access to additional years of waybill data. In addition, the Coalition Associations asked that the Board not restrict FORR to cases that use the streamlined market dominance approach proposed in Docket No. EP 756, *Market Dominance Streamlined Approach*, but instead to adopt a bifurcated presentation of market dominance evidence as proposed in their opening comments in EP 756. They also sought clarification of the proposed relief cap, explained why it is necessary to increase the cap, and requested a case-by-case basis determination of whether any cap is warranted when the FORR methodology is sufficiently economically robust. The Coalition Associations presented a rate benchmarking rate-reasonableness methodology for revenue-adequate carriers that is ideally-suited for FORR cases and is economically superior to the Three Benchmark approach and comparable to SAC. Finally, they stressed the importance of a holistic approach to making rate cases more accessible that includes measures to enhance rail competition, such as reciprocal switching and bottleneck relief. In the absence of greater competition, the railroad practice of “rate bundling” will continue to restrict the ability of shippers to pursue regulatory remedies for unreasonable rates on those movements that lack effective competition.

The railroad industry, in contrast, is adamantly opposed to FORR. The Association of American Railroads (“AAR”), Canadian National Railway (“CN”), and Union Pacific Railroad

(“UP”) have filed the most detailed opposition comments and thus are the focus of this Reply. The common themes in their comments are that FORR violates the statute, is unlawfully vague, and abandons constrained market pricing (“CMP”) principles without explanation.

In Part II of this Reply, the Coalition Associations show that FORR is a proper exercise of the Board’s statutory authority to develop simplified and expedited methods for determining rate reasonableness. The Board already has adopted a final offer process in the Three Benchmark approach which the railroads fail to convincingly distinguish from FORR. The one federal district-court decision that the railroads cite as rejecting final offer decision-making is inapposite. Railroad claims that FORR violates the Congressional directive to adopt simplified methods of determining rate reasonableness and to make such determinations only after a full hearing are tortured and contrived. In fact, FORR better enables the Board to fulfill its statutory duties to ensure reasonable rates on market-dominant movements. Railroad claims to the contrary are flawed because they fail to recognize the Board’s leeway to balance its competing statutory mandates and are predicated upon a misinterpretation of the NPRM. FORR also does not relieve shippers of their burden of proof. To illustrate the foregoing arguments, the railroads posit unrealistic and absurd hypotheticals based upon mischaracterizations of the FORR process. Lastly, most of the railroad arguments are premature conjecture as to how the FORR process would play out. Such objections are more properly raised in the context of specific cases.

In Part III, the Coalition Associations rebut claims that FORR is a departure from CMP. A plain reading of the NPRM unmistakably incorporates CMP into the criteria for evaluating rate reasonableness and final offers.

In Part IV, the Coalition Associations dispute railroad assertions that the proposed relief cap in FORR cases is a departure from precedent. Those assertions are predicated upon the

erroneous assumption that FORR is a less accurate process than Three Benchmark. The Coalition Associations repeat their opening argument that, because FORR methods could be superior to existing rate reasonableness methods, the Board should maintain the flexibility to apply relief caps, or not, on a case-by-case basis. They also point out the absurdity of railroad arguments to aggregate claims for the purpose of applying relief caps and warn that an aggregation requirement would undermine the very objective of this proceeding to make rate cases more accessible.

II. FORR IS A PROPER EXERCISE OF THE BOARD'S STATUTORY AUTHORITY.

The rail industry commenters argue that Congress has not authorized the Board to adjudicate rate disputes through an FORR process, the process violates the statute, and FORR is arbitrary and capricious.² Although these are presented as independent points, they boil down to the singular claim that FORR is contrary to law. In response, the Coalition Associations demonstrate that FORR is well within the Board's broad authority to develop simplified and expedited methods for determining rate reasonableness.

A. FORR Is Consistent With The Board's Adoption of a Final-Offer Process for Three Benchmark Cases.

AAR asserts that no other agency employs a final-offer process for regulating rates.³ Adoption by other agencies, however, is not an essential predicate for the Board to adopt FORR. If it were, SAC itself would be unsupported by any such examples. Regardless, the Board's current use of a final-offer process in the Three Benchmark simplified approach is the best support for its use in FORR cases.

² AAR Comments at 8-21; CN Comments at 3-10; UP Comments at 3-11.

³ AAR Comments at 3.

Many of the same criticisms that the rail industry lobs at FORR could apply equally to the Three Benchmark approach to rate reasonableness. In particular, the Three Benchmark approach also relies on a final-offer process. Yet the rail industry commenters seem to accept Three Benchmark as an acceptable methodology.

AAR's attempt to distinguish the final-offer process in Three Benchmark cases from the FORR is to no avail. Specifically, AAR describes the final-offer procedures in FORR cases as "the very framework of the decision" in contrast to being "a small component of the overall methodology" in Three Benchmark cases.⁴ But in *Union Pac. R.R. v. STB*, 628 F.3d 597, 601 (DC Cir. 2010) ("*Union Pacific*"), the DC Circuit reached the opposite conclusion:

Since the revenue need adjustment factor is derived from static figures published annually by the Board, the Three Benchmark framework's reasonableness determination generally turns on the Board's selection of a comparison group.

Of the three benchmark measures, only the comparison group is subject to the final-offer process; the RSAM and RVC>180 benchmarks are the static figures referenced by the court, and their impact upon the comparison group's average R/VC ratio, which becomes both the measure of reasonableness and the maximum permitted rate, is formulaic.⁵ Consequently, the overall outcome of the Three Benchmark process turns almost entirely upon the final-offer process to select the comparison group.

In addition, AAR alleges that the Board cannot give due consideration to the requisite rate-reasonableness factors if it limits itself to two outcomes.⁶ But that is precisely how the Three Benchmark approach also works. As noted above, although the Three Benchmark

⁴ AAR Comments at 9.

⁵ *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1), slip op. at 21-22 (served Sept. 5, 2007) ("*Simplified Standards*").

⁶ AAR Comments at 12.

approach only uses a final-offer process to determine the comparison group, the formulaic application of the other two benchmarks to the average R/VC of the comparison group effectively limits the Board to two outcomes.

Neither is FORR as different from the existing simplified methods of determining rate reasonableness as UP portrays it. UP identifies two “critical features” of Three Benchmark cases that it contends are missing from FORR:

(1) the Board determines whether a challenged rate is reasonable by measuring it against the maximum reasonable rate calculated using the statutory criteria; and (2) if the Board finds the challenged rate is not reasonable, it allows the railroad to charge the highest rate it would find reasonable.⁷

UP contrasts that to FORR, in which it claims “the Board would not determine whether a challenged rate is reasonable by measuring it against the maximum reasonable rate calculated using the statutory criteria. Instead, the Board would apparently judge whether the challenged rate is unreasonable by somehow comparing it to the shipper’s final offer.”⁸

The FORR approach has these same “critical features” as the Three Benchmark approach. FORR applies the statutory criteria to determine which party’s final offer is the best measure of reasonableness. If the complainant’s offer is selected, that offer becomes the maximum prescribed rate and the railroad is permitted to charge up to that rate. In Three Benchmark cases, the Board chooses between the rate that results from either the shipper’s or the railroad’s final-offer comparison group as adjusted by the formulaic application of the other two benchmarks. There is no in-between. That rate is both the measure of reasonableness and the maximum permitted rate, just as it would be in an FORR case.

⁷ UP Comments at 9.

⁸ *Id.* at 9-10.

UP nevertheless contends that Three Benchmark is different because its provision for submitting evidence of “other relevant factors” acts as a “safety valve that allows the Board to exercise its expertise and adjust the test’s final results.”⁹ But UP overstates the role of “other relevant factors” in the Three Benchmark process and ignores the more substantive evidence that is submitted in the final-offer phase of the FORR process. CMP principles do not govern selection of the comparison groups through the final-offer process. The formula-driven nature of the Three-Benchmark process, after final-offer selection of the comparison group, leaves no opportunity for the parties to address CMP principles at that stage of the litigation either. This deficiency prompted the Board to permit evidence of “other relevant factors,” but even then, such evidence is constrained.¹⁰ In the FORR process, by comparison, the parties are required to support their proposed rate reasonableness standards as part of the final-offer process with evidence based on the statute, precedent, and appropriate economic principles that include CMP. In other words, there is no need for a safety valve in the FORR process because that process already affords both parties an opportunity to address issues that the Three Benchmark process does not, except through evidence of “other relevant factors.”

B. Precedent Does Not Foreclose Adoption of the FORR Approach.

AAR and UP argue that FORR is contrary to law based upon a single district-court decision that struck down a final-offer process used by the U.S. Forest Service to determine the fair market value of land taken by eminent domain.¹¹ The principal rationale underlying that decision, however, was that the Forest Service decision at issue should not be governed by the

⁹ UP Comments at 6.

¹⁰ *Simplified Standards*, slip op. at 21, 76-78.

¹¹ AAR Comments at 13, *citing Stone v. U.S. Forest Service*, 2004 WL 163121 (D. Ore. July 16, 2004) (“*Stone*”); UP Comments at 6-7, *citing Stone*.

deferential standards of the Administrative Procedure Act (“APA”) because it would allow the agency to unilaterally establish the price of the property in a manner that could be set aside “only if the price . . . were so outrageously low as to be arbitrary, or the record so devoid of supporting evidence that no reasonable person could accept it as adequate to support the conclusion reached.”¹² In other words, the scales would be “always weighted against the land owner.”¹³ That is not the scenario posited by FORR where the Board, acting as an independent arbiter, must decide which of two offers is most reasonable “based on a rational application of evidence presented”¹⁴

Although the *Stone* court also concluded, secondarily, that if this action were governed by the APA, it also should be set aside because a final-offer process is not well-tailored to calculating fair market value, FORR can be distinguished from that determination too.¹⁵ In FORR, neither litigant is the agency itself, whereas the Forest Service was both the opposing party and judge in *Stone*. In addition, Congress has directed the Board to adopt a simplified and expedited method for determining rate reasonableness in the ICC Termination Act (“ICCTA”), whereas an equivalent statutory authorization was lacking in *Stone*. It is important, therefore, not to give this one district-court decision undue weight.

“[T]he Board acts at the zenith of its powers” when it comes to rate disputes.¹⁶ “There is no case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s

¹² *Stone* at *16.

¹³ *Stone* at *17.

¹⁴ *Union Pacific* at 607 (citing standard of review for the Board’s final offer selection in a Three Benchmark case).

¹⁵ *Id.* at *21-23.

¹⁶ *Burlington N. R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997).

substantive field.”¹⁷ Congress has granted the Board rate-setting authority and tasked the Board with developing expedited and simplified procedures for deciding rate cases.¹⁸ Thus, the Board’s decision to promulgate FORR falls under the Board’s exercise of its authority within its substantive field.

C. FORR Is a Proper Exercise of the Board’s Authority to Adopt a Simplified and Expedited Method to Determine Rate Reasonableness.

Congress has directed the Board “to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.”¹⁹ The Board has proposed FORR as one such method. AAR and CN, however, allege that FORR violates this statutory mandate.

CN contends that the Board has ignored the statutory command to create a simplified and expedited method to determine the reasonableness of a challenged rate because, although it has proposed a new “process,” the Board has not proposed the substantive standards that it would apply.²⁰ CN is engaged in a semantic game. The terms “process” and “method” are synonymous.²¹ CN merely assumes that a method requires the adoption of explicit reasonableness standards. FORR is a method for determining rate reasonableness based upon substantive parameters the Board has defined, and it is a process for presenting evidence based upon those parameters and selecting the evidence that most closely adheres to them.

¹⁷ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013).

¹⁸ 49 U.S.C. § 10701(d)(3).

¹⁹ 49 U.S.C. § 10701(d)(3).

²⁰ CN Comments at 7-8.

²¹ According to the Merriam-Webster dictionary App, a “method” is “a procedure or process for attaining an object”

AAR argues that Congress “was quite clear that the Board must look to procedures used by courts, not arbitrators,” and that courts do not use final-offer procedures.²² To support this argument, AAR quotes Section 11(c) of the Surface Transportation Board Reauthorization Act of 2015, which directed the Board to “initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.” This language, however, is not limiting. Indeed, the legislative history describing Section 11(c) states only that “the section would require the STB to initiate a proceeding to assess other procedures, including procedures common in other litigation settings, to help expedite rate cases.”²³ This language clarifies that the Congress wanted the Board to consider, at a minimum, procedures common in litigation settings but that the Board was not precluded from considering other procedures as well.

D. FORR Provides a Full Hearing Consistent with the Statute.

Both UP and CN assert that FORR violates the statute because it does not afford a “full hearing” as required by 49 U.S.C. § 10704(a)(1).²⁴ They claim that the binary nature of the final-offer process prevents the Board from affording a full hearing. This argument lacks merit.

“A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.”²⁵ In FORR, the Board has created a full opportunity for both parties to submit evidence that satisfies the defined parameters.

²² AAR Comments at 10.

²³ S. Rep. No. 114-52, at 12 (2015) (emphasis added).

²⁴ AAR Comments at 15-16; CN Comments at 8-10.

²⁵ *New England Div. Case*, 261 U.S. 184, 200 (1923).

The binary nature of the proceeding is designed to discourage extreme positions so that the evidence is more likely to present a reasonable rate. Moreover, the parties' final offers, and the supporting evidence provided, will establish both reasonableness and the maximum prescribed rate. It is unrealistic that the same evidence could support a finding of unreasonableness and justify an absurdly low final offer. If one or both parties choose to gamble by taking an extreme position, however, the party with the more reasonable evidence will prevail. Each knowingly assumes that risk when taking extreme positions and cannot blame the Board for such a result.²⁶ There is no statutory right to take an extreme position without consequence. Nor is it impermissible for the Board to take this approach. "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."²⁷

E. The FORR Approach Enables the Board to Fulfill Its Statutory Duties and Apply the Appropriate Statutory Standards.

UP makes two statutory arguments in opposition to FORR. First, it contends that FORR would prevent the Board from fulfilling its statutory duty to determine whether a rail rate is unreasonable by transforming itself "from the guardian of the public interest to a prisoner of the parties' submissions."²⁸ Second, UP argues that the mechanics of FORR would prevent the Board from applying the statutory standards.²⁹ Neither contention withstands scrutiny.

²⁶ *Union Pacific*, 628 F.3d at 607-08 (affirming the final-offer results of a Three Benchmark decision on grounds that "UP lost this high-stakes gamble...[and] UP cannot blame the Board for this result.").

²⁷ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

²⁸ UP Comments at 5.

²⁹ *Id.* at 8-11.

UP's first argument fails to recognize that the Board has some leeway to balance its competing statutory mandates. Congress has directed the Board to establish simplified and expedited methods for determining rate reasonableness when the status quo of a full stand-alone cost presentation is too costly given the value of the case. 49 U.S.C. § 10701(d)(3). In this proceeding, the Board has concluded that its previous attempts to satisfy this mandate have been ineffective and that it must do more.³⁰ The status quo thus is preventing the Board from fulfilling its role as guardian of the public interest to the extent that most captive shippers lack reasonable access to regulatory protections against unreasonable rail rates.

As the courts have made clear, the Board "is free to make reasonable trade-offs between the quality and cost of possible regulatory approaches" and its judgment is owed "great deference."³¹ The Board has weighed the pros and cons of the final-offer process and concluded that it can fulfill its statutory roles through FORR and that it can do so for a larger population of shippers. The Board continues to fulfill its guardian role by requiring parties to base their evidence upon statutory standards and economic principles and using the final-offer process to foster reasonable proposals rather than the extremes hypothesized by the rail industry. As a final safety net, the Board has mitigated the potential impact of less accuracy through limits upon the duration and amount of rate relief available through FORR. These measures constitute a careful balancing of stakeholder interests and statutory mandates as the Board seeks to be the guardian of the entire public interest, not just railroad interests.

UP's second argument is flawed because it is based upon a misinterpretation of the NPRM. Specifically, UP expresses concern that the Board would not determine whether a rate is reasonable by measuring it against a maximum rate calculated from the statutory criteria, but

³⁰ NPRM at 2-4.

³¹ *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993).

instead would judge reasonableness by comparison to the complainant's final offer.³² But that is not a fair representation of the FORR process. The Board would judge both the reasonableness of the challenged rate and each party's final offer based upon the same three criteria: the rail transportation policies, the Long-Cannon factors, and appropriate economic principles.³³ Each party must submit evidence to show how its final offer best meets those criteria. If the complainant presents superior evidence, the challenged rate will be deemed unreasonable and the complainant's final offer will become the maximum reasonable rate. If the railroad's evidence is superior, the complainant will not have satisfied its burden of proof and the complaint will be dismissed, which is the same result that occurs in all other rail rate cases.

UP's argument is predicated upon its supposition that, when choosing the complainant's final offer, the Board is prescribing a rate below the maximum reasonable rate that the statute permits UP to charge.³⁴ But UP ignores the fact that the Board only prescribes a rate if it selects the complainant's final offer and that such rate becomes the maximum permitted rate; there is no hypothetical actual maximum against which to make the comparison that UP attempts.

Furthermore, UP erroneously assumes that there is a single true maximum reasonable rate. But ratemaking is not so precise. As the RRTF observed, SAC itself gives a false sense of precision.³⁵ Even *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 534 n. 35 (1985), concedes that CMP lacks mathematical precision and the maximum rate may vary depending upon which constraint is used. It is axiomatic, therefore, that the maximum rate also will vary

³² UP Comments at 9-10.

³³ NPRM at 13. Although the Board calls out these three criteria here, elsewhere in the NPRM it also identifies the "railroad's need for differential pricing to permit it to collect adequate revenues." *Id.* at 11.

³⁴ UP Comments at 10-11. *See also*, AAR Comments at 16-17.

³⁵ RRTF Report at 6.

depending upon which simplified method of determining rate reasonableness is used. That fact does not cause FORR to violate the statute any more than it would cause any other simplified method to do so.

F. FORR Does Not Shift the Burden of Proof.

AAR wrongly contends that FORR violates the APA by relieving shippers of their burden to prove that the challenged rate is unreasonable.”³⁶ AAR inexplicably believes that FORR absolves the shipper of proving unreasonableness because a party’s analysis of reasonableness likely would overlap with the support for its final offer. This overlap does not relieve shippers of their burden of proof.

In FORR, a shipper satisfies its burden of proof by persuading the Board that its final offer is the better representation of the three criteria identified in the NPRM for determining rate reasonableness. If a shipper and railroad present evidence of equal persuasiveness, or lack thereof, the Board will select the railroad’s evidence. Even though the Board is adopting one party’s evidence in its entirety, the shipper still must persuasively make the case that its evidence is superior to the railroad’s evidence. A shipper cannot prevail by merely undermining the railroad’s evidence and resting its case.

G. Railroads Posit Absurd Hypotheticals That Mischaracterize The FORR Process.

Railroad commenters, to illustrate their claims that FORR is contrary to the statute, disadvantages railroads, and is conceptually flawed, posit unrealistic and absurd hypotheticals based upon mischaracterizations of the FORR process.

³⁶ AAR Comments at 16.

Both UP and AAR argue incorrectly that the Board could never select a railroad's final offer.³⁷ Based upon that assertion, AAR further contends that FORR is unfair to railroads by pressuring them to reduce reasonable rates.³⁸ AAR presents a hypothetical to illustrate its point. AAR hypothesizes that a shipper makes a final offer of \$25, the railroad's offer is \$100, and \$99 is the maximum reasonable rate.³⁹ According to AAR, if the Board determines that anything up to \$99 is reasonable, the Board would have no choice but to accept the shipper's offer, granting the shipper a windfall. To avoid this windfall, AAR contends that railroads will be under pressure to submit a final offer that is below the challenged rate.

The inherent flaw in AAR's hypothetical is that the Board would not make a separate determination that \$99 is the maximum reasonable rate. Rather, the Board would determine which offer best reflects the three criteria for determining reasonableness and only prescribe a rate if it selects the complainant's offer as the best evidence. Because the same evidence supports both the determination of reasonableness and the maximum permitted rate, there is no way the hypothesized result could occur. In AAR's hypothetical, the railroad's offer clearly is the best evidence of reasonableness and thus the Board would not prescribe a maximum rate at all because it would not find the challenged rate unreasonable. There is no shipper windfall. Nor is there any pressure for the railroad to offer a rate below the challenged rate because the shipper cannot prove that the challenged rate is unreasonable.

UP commits the same error as the AAR when it claims that FORR creates incentives for shippers to engage in gamesmanship because "a shipper would have nothing to lose, and much to gain, by rejecting a railroad's commercial rate offer, filing a complaint, and setting its final offer

³⁷ AAR Comments at 21; UP Comments at 11-12.

³⁸ AAR Comments at 21-22.

³⁹ AAR Comments at 21.

extremely low.”⁴⁰ UP hypothesizes that “a shipper could set its final offer at \$1 per car, then focus on showing the challenged rate is \$1 above the reasonable level,” giving the Board “no choice but to prescribe the shipper’s rate, no matter how low.”⁴¹ Like AAR, UP erroneously assumes that the Board will make separate determinations of rate reasonableness and a maximum permitted rate.⁴² The parties’ final offers, and the supporting evidence provided, will establish both reasonableness and the maximum prescribed rate. It is unrealistic to posit that the same evidence addressing the same requisite criteria could support a finding of unreasonableness and justify an absurdly low final offer.

UP also argues that FORR advantages shippers because:

While railroads could not submit final offers *below* their challenged rates without conceding unreasonableness, shippers would face no comparable penalty – indeed, no penalty at all – if they end up submitting final offers *above* their last commercial offer (in an attempt to appear more reasonable before the Board). This imbalance gives shippers far greater leeway than railroads to maintain aggressive positions in commercial negotiations.⁴³

UP actually describes what railroads already do today in rate cases and could continue to do in FORR cases. Specifically, the tariff rate that shippers must challenge is nearly *always* set higher than the contract rate that a railroad offers the shipper in commercial negotiations, thereby compelling the shipper to pay an even higher rate during the pendency of the rate case than the rate the shipper rejected as unreasonable in negotiations with the railroad. Rather than creating an “imbalance” in commercial negotiations, to the extent that FORR has an impact upon commercial negotiations, it fosters greater balance.

⁴⁰ UP Comments at 15.

⁴¹ UP Comments at 15.

⁴² *Id* at 13.

⁴³ UP Comments at 14 (emphasis in original).

Furthermore, UP is simply wrong that shippers incur no penalty in FORR cases. Shippers always run the risk of having to pay the higher tariff rate during the case and if they lose the case. UP's claim that the shipper is under no duty to tender traffic at the challenged rate ignores the fact that the railroad possesses market dominance over the issue movement.⁴⁴ Therefore, if the shipper's rate challenge is unsuccessful, it either continues to pay the challenged rate or it abandons the business associated with the issue movement to a competitor. That lost business opportunity is a real cost to the shipper.

The foregoing UP arguments also are inherently inconsistent. On the one hand, UP argues that shippers have an incentive to make extremely low final offers because the Board could never accept a railroad's final offer. On the other hand, UP claims that shippers are advantaged by making final offers above their last commercial position. UP cannot have it both ways. For the reasons expressed above, UP's contradictory arguments are predicated upon gross mischaracterizations of the FORR process.

H. Railroad Claims Are Premature.

Ultimately, most of the rail industry's objections to FORR based upon the ICCTA and the APA are speculative and, thus, premature. Whether or not their objections are realized will depend upon how the Board applies FORR in actual cases. In reviewing final offer decisions from Three Benchmark cases, the D.C. Circuit has stated that it must determine whether the Board's selection of one party's evidence over the other's is "a rational application of the evidence presented."⁴⁵ Until the Board decides a case using the FORR process, this assessment cannot be made.

⁴⁴ *Id.*

⁴⁵ *Union Pacific*, 628 F. 3d at 607

In addition, to require the Board to have answers to all the railroad questions at this stage is to ignore the stated objective that FORR will foster innovation in the rate review process.⁴⁶ Exactly what the FORR produces cannot be known until actual cases are brought before the Board. Whether the Board's actions violate the ICCTA or APA can only be judged in the context of the types of evidence submitted to, and accepted by, the Board and the Board's stated rationale for concluding that one party's evidence best represents the established rate reasonableness criteria.

III. FORR DOES NOT ABANDON CMP PRINCIPLES.

AAR, CN and UP all assert that FORR is an unexplained, and hence unlawful, departure from CMP principles.⁴⁷ This is a contrived argument.

The AAR and CN arguments are implicitly predicated upon the unsupported notion that only SAC, Simplified-SAC and Three Benchmark can implement CMP. UP's assertion that, because Three-Benchmark "barely adheres to CMP principles," then FORR must be a complete departure, is predicated upon the erroneous assumption that an FORR methodology necessarily will be less robust than Three Benchmark.⁴⁸ As the Coalition Associations demonstrated at pp. 23-24 of their Opening Comments, their proposed Rate Benchmarking Method, which is ideally-suited for the FORR process, is more economically robust than Three Benchmark. The FORR process has the potential to produce evidence of rate reasonableness that is superior to Three Benchmark and equal to SAC. The railroads are making premature assumptions about FORR that can only be gauged in the context of an actual FORR case.

⁴⁶ NPRM at 11.

⁴⁷ AAR Comments at 15; CN Comments at 11-14; UP Comments at 2, 6, 9-10.

⁴⁸ UP Comments at 2.

Most importantly, the NPRM plainly includes “appropriate economic principles” among the essential criteria “for determining rate reasonableness of and choosing between the offers,” and further states that “this general criterion would allow the Board to apply, among other things, the agency’s expertise and general principles developed in its rate case precedent over decades.”⁴⁹ CMP is a set of economic principles that have been the foundation of the agency’s rate case precedent since *Coal Rate Guidelines* in 1985. Hence, the Board clearly has not abandoned CMP and thus owes no explanation for doing so.

IV. THE PROPOSED RELIEF CAP IS NOT A DEPARTURE FROM PRECEDENT.

The rail commenters allege that the Board’s proposed relief cap is an unexplained departure from precedent because it is not based upon the cost of litigating a Three Benchmark case, which they contend is the next more complex and precise approach.⁵⁰ This argument misunderstands the posture of FORR relative to the Board’s other simplified approaches to determining rate reasonableness. Because the FORR process does not prescribe a standard for determining reasonableness, it cannot, and should not, automatically be pegged as a less accurate process than Three Benchmark.

The promise of FORR is that parties may base their final offers upon proposals that are at least the economic equal, if not superior, to Three Benchmark. Indeed, the Coalition Associations have proposed a rate benchmarking methodology that clearly is superior to Three Benchmark and could be the economic equivalent of SAC. In such instances, any rate cap should be no more stringent than Three Benchmark with the prospect for no rate cap at all. The Board must maintain the flexibility to waive or modify any relief cap in FORR cases based upon the methodology employed.

⁴⁹ NPRM at 10, 11.

⁵⁰ AAR Comments at 23-24; CN Comments at 14-16; UP Comments at 23-24.

In any event, the Coalition Associations have explained why a higher relief cap for FORR cases is justified at pp. 15-17 of their Opening Comments. Furthermore, the highest volume lanes subject to a challenged rate for most carload shippers may total a few hundred cars per year at most, with the average volume being much lower. According to a large ACC member, its highest volume lane is governed by a Rule 11 rate that applies to approximately 600 cars annually and its average Rule 11 lane volume is just 15 cars per year. Even the highest volume lane, which is a small fraction of the unit-train volumes in past SAC cases, would be too low to justify spending upwards of \$5 million to litigate a SAC case. Lowering the relief caps as the railroads propose would not incentivize that ACC member to use SAC, which would still be uneconomical. Rather, it would continue to leave that member without reasonable access to a regulatory remedy for unreasonable rail rates.

AAR attacks the relief cap from an additional angle. It asserts that FORR will not be constrained to small cases because there is no limit to aggregation of cases.⁵¹ AAR conjures up a hypothetical of a large chemical company that files 100 simultaneous FORR complaints for the same rate for the transportation of the same commodity for 100 different origin and destination pairs and has the potential to win \$4 million for each complaint. This hypothetical is absurd on multiple levels. First, it is unrealistic for any railroad to offer the same rate for transportation between 100 different origin-destination pairs. Second, it is equally improbable that even the largest chemical companies tender the same commodity between 100 different origin-destination pairs. The largest SAC case to date, which DuPont filed against Norfolk Southern, encompassed 26 commodities and 138 origin-destination pairs. The most lanes accounted for by any single

⁵¹ AAR Comments at 23-24.

commodity in that case was 13.⁵² Third, it is highly unrealistic that any shipper could litigate that many FORR cases simultaneously, much less on the proposed expedited procedural schedule. Finally, even assuming away the foregoing absurdities, a shipper still could justify bringing that many FORR cases on grounds that a SAC case is too expensive if there is insignificant overlap in the routes of those lanes.

The Board must keep in mind that SAC grows in complexity and cost with each lane that a carload shipper must add to a SAC case because the stand-alone railroad must expand to encompass additional routes and services, which is one of the reasons why the Board is pursuing alternatives to SAC in this docket. It also is important to note that cases like DuPont's would not have challenged so many rates but for the rate bundling strategies of railroads that force complainants to challenge the rates on far more movements than they otherwise would do.⁵³ An aggregation requirement would undermine the very objective of this proceeding to make rate cases more accessible.

V. THE COALITION ASSOCIATIONS HAVE PROPOSED MODIFICATIONS TO FORR THAT MOOT RAILROAD DUE PROCESS ARGUMENTS.

AAR and UP have objected to the proposed procedural schedule and discovery process as a violation of due process.⁵⁴ The Coalition Associations raised their own concerns in their

⁵² Two commodities, sulfuric acid and titanium dioxide, each had 13 origin-destination pairs that were subject to the same NS rates for each commodity. *E.I. du Pont de Nemours and Company v. Norfolk S. Ry. Co.*, Docket NOR 42125, Opening Evidence of E.I. du Pont de Nemours and Company, at II-B-10 and 146 to 147 (filed Apr. 30, 2012). Although there were more than 13 full-route origin-destination pairs, there were just 13 distinct NS segments on these routes to which the challenged Rule 11 rates applied. Beyond those 13 NS segments, the routes extended to multiple different points on other carriers.

⁵³ Opening Comments of Coalition Associations at 25-26.

⁵⁴ AAR Comments at 2-3; UP Comments at 21-23.

opening comments and have proposed modifications that also would address some of the railroad concerns.

For example, the Coalition Associations have proposed a longer procedural schedule and included an expedited process for resolving discovery disputes.⁵⁵ The longer procedural schedule would mitigate the unfairness railroads claim from having too little time to respond to complaints that shippers determine when to file. Their proposal for bifurcating the presentation of market dominance evidence in EP 756 would further lengthen the procedural schedule. By providing for a discovery dispute process, as opposed to the NPRM proposal to foreclose motions to compel and instead draw a negative evidentiary inference from unreasonable discovery denials, all railroad complaints centered on those FORR elements are rendered moot.

UP raises a specious claim that shippers are unfairly advantaged by knowing the railroad's final offer before sharing their offer with the railroad.⁵⁶ The advantage to which UP alludes exists in any rate regulatory setting. Specifically, shippers always have a sense of the railroad's bogey for reasonableness, whether the approach is SAC, Three Benchmark or FORR, because that bogey is the challenged rate. Although the railroad will not know precisely what rate the shipper deems reasonable, that also is true for the existing rate reasonableness approaches. In all such cases, however, the railroad's commercial negotiations with the shipper does not leave it totally blind either. Both parties nevertheless will be equally situated when it comes to knowing what standard the other will develop under the FORR process to demonstrate that its bogey is best supported by the rail transportation policies, Long-Cannon factors, appropriate economic principles, and the revenue adequacy objective. Each will learn of the

⁵⁵ Coalition Association Op. Comments at 8-11.

⁵⁶ UP Comments at 21-22.

other's position upon the submission of opening evidence and each will have an equal amount of time to prepare and submit their reply to the other's position.

If anything, it is the shipper who is procedurally disadvantaged by the FORR process. Although the shipper has the burden of proof, it has no opportunity to submit rebuttal evidence to defend its opening evidence against the railroad's reply evidence. No other simplified approach to rate reasonableness denies that right to the shipper.

VI. CONCLUSION

For the reasons set forth above and in their Opening Comments, the Coalition Associations support the FORR concept. They have proposed modifications, however, to improve FORR by remedying certain deficiencies that could hinder shipper's ability to carry their burden of proof. Several of those modifications also will mitigate, if not eliminate, some of the rail industry's objections.

Respectfully submitted,

/s/ Jeffrey O. Moreno

Jeffrey O. Moreno
Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4107

On Behalf of:
American Chemistry Council
Corn Refiners Association
The Fertilizer Institute
The National Industrial Transportation League

Paul M. Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036
(202) 298-8100

Michael F. McBride
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 298-1800

On Behalf of:
The Chlorine Institute

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