

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINAL OFFER RATE REVIEW

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Docket No. EP 755

300262

**REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

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Dated: January 10, 2020

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The Western Coal Traffic League (“WCTL”) submits these Reply Comments in response to the Surface Transportation Board’s (“STB” or “Board”) notice of proposed rulemaking served in this proceeding on September 12, 2019 (“NPRM”).

SUMMARY

WCTL submitted opening Comments (“WCTL Comments”) in this proceeding on November 12, 2019. In its Comments, WCTL stated it would carefully review the comments filed by small shipment shippers, and their trade associations, to see if they believe the Board’s Final Offer Rate Review (“FORR”) proposal is the answer to their decades-long search for meaningful rate review standards. WCTL has conducted this review, and it is clear that commenting shippers support the Board’s FORR proposal.

WCTL also proposed – based on its members’ experiences with large coal rate cases – two modifications to the Board’s FORR proposal. First, WCTL proposed that the Board address potential carrier gaming of FORR by removing the proposed rate relief caps. Many shippers filing comments agreed that the cap should be removed. WCTL also urged the Board to accept a complainant shipper’s FORR methodology, so long as it was reasonable and supported.

Railroad commenters do not dispute that the Board's current small shipment maximum rate standards are broken, but vociferously oppose the Board's adoption of FORR on grounds that the Board lacks the legal authority to promulgate FORR. WCTL doubts that the Board would have gone to all of the time and effort to propose FORR if it believed it had no authority to promulgate final FORR rules, and, in any event, the Railroads' legal contentions are meritless.

I. **SHIPPERS SUPPORT THE BOARD'S PROPOSALS**

In its opening Comments, WCTL commended the Board for taking another look at a 30+ year-old problem – finding a cost-effective, practical approach for determining the maximum reasonableness of rates in smaller rate cases. WCTL also stated it would review the comments received by shippers with smaller movements to see whether these shippers believed FORR was the answer to the decades-old problem.

The results are in. All shipper commenters who are likely to bring smaller rate cases support FORR, either in the exact form proposed by the Board, or with modest tweaks. *See* Opening Comments of the American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners Association (“Coalition Ass’ns Comments”) at 2-3; Opening Comments of the National Grain and Feed Association (“NGFA Comments”) at 7; Opening Statement of Farmers Union of Minnesota, Farmers Union of Montana, Farmers Union of North Dakota, Farmers Union of South Dakota, and Farmers Union of Wisconsin at 6, 9-10; Comments of Olin Corporation (“Olin Comments”) at 9-10; Steel Manufacturers

Association (“SMA”) Comments at 11-12; Indorama Ventures (“Indorama”) Comments at 11-12; Industrial Minerals Association – North America (“IMA-NA”) Comments at 11-12; MillerCoors Comments at 13-14; Comments From the Private Railcar Food and Beverage Association at 1-2; Growth Energy Letter Comments at 2.

FORR is also supported by the United States Department of Agriculture (“USDA”) – the agency charged with protecting the interests of agricultural product shippers throughout the nation:

USDA supports the Board’s final offer approach to rate review and appreciates the Board has heard and incorporated prior recommendations from groups like USDA USDA believes [FORR] has the potential to create a low-cost but high-value rate review process for shippers with unreasonable rates. The approach to substantially reduce procedural timelines and to provide methodological flexibility and innovation is commendable and worth trying.

USDA Comments at 3.

II. FORR RATE RELIEF SHOULD NOT BE CAPPED

In its Comments, WCTL demonstrated that the Board’s proposed \$4 million rate relief cap in FORR cases was subject to carrier gaming. WCTL Comments at 8-9. WCTL observed that carrier gaming could be eliminated if FORR rate relief was not capped, a result that would also give shippers with larger movements the option to utilize the Board’s proposed FORR procedures. *Id.* at 9.

USDA and many other shipper commenters agree with WCTL that FORR rate relief should not be capped. *See* USDA Comments at 7 (“USDA believes the Board should remove the relief cap altogether”); Olin Comments at 15-18 (observing that the

proposed rate relief cap “creates a gaming opportunity for the railroads” and “submits that the Board should remove the relief cap altogether”); NGFA Comments at 7 (“NGFA does not believe it is necessary for the Board to implement a cap on overall relief in a FORR methodology [case], and that complainants with larger cases should be able to utilize it”); SMA Comments at 1 (Board should adopt a FORR alternative “without any limits on recovery”); Indorama Comments at 1 (same); IMA-NA Comments at 1 (same).

III. THE BOARD SHOULD ACCEPT A SHIPPER’S REASONABLE FORR RATE RELIEF STANDARDS

WCTL noted in its Comments that a complainant shipper and a defendant rail carrier in a FORR case could invoke completely different maximum rate standards. WCTL Comments at 10. To address this issue, WCTL proposed that the Board accept the shipper’s approach, so long as it is reasonable. *Id.* This suggested approach is consistent with the approach the Board utilizes in large rate cases. In large rate cases, the complainant shipper has the option of selecting one of several rate “constraints” to demonstrate its entitlement to rate relief. *Id.* at 10-11.

No other shipper commenters directly addressed the “mismatch” issue, but several emphasized that the Board should accept shipper-sponsored maximum rate relief methodologies in FORR cases. *See, e.g.,* Coalition Ass’ns Comments at 24 (“the Benchmark Method is an ideal rate reasonableness methodology for complainants to use in FORR cases”); NGFA Comments at 6 (discussing NGFA’s “new, simplified rate-challenge methodology intended to be workable for agricultural shippers and receivers”).

IV. THE RAILROADS' OPPOSITION TO FORR IS MERITLESS

The major Railroads, and their trade association, oppose the Board's adoption of FORR. *See* Opening Comments of Canadian Pacific at 2-3; Comments of CN ("CN Comments") at 1-2; Comments of CSX Transportation, Inc. at 1-2; Comments of Union Pacific Railroad Company ("UP Comments") at 1-3; Opening Comments of BNSF Railway Company ("BNSF Comments") at 1-2; Comments of Norfolk Southern Railway Company at 1, 4; Comments of the Association of American Railroads ("AAR Comments") at 1-3.

The Railroads do not dispute – because they cannot – that the Board's current maximum rate standards for smaller rate cases have not provided any meaningful rate relief to shippers. Instead, they mistakenly contend that the Board lacks the legal authority to adopt FORR.

- **Arbitration Contentions.** The Railroads argue that FORR is a form of mandatory arbitration, and that the Board lacks the statutory authority to mandate that shippers and carriers arbitrate rate disputes.¹ This argument is a red herring. Arbitration involves an agreement between contracting parties to adjudicate their dispute before one or more arbitrators.² The Board's proposed FORR procedures are not arbitration

¹ *See* AAR Comments at 8-9 ("Final-offer decisionmaking is an *arbitration* technique that arbitrators use to force settlements [F]inal-offer decisionmaking [is] part of an 'arbitration procedure'") (citation omitted); CN Comments at 6 (the "FORR proposal bears all the key hallmarks of an arbitration process").

² *See, e.g.,* 9 U.S.C. §§ 1 *et seq.* (Federal Arbitration Act); 49 C.F.R. § 1108 (STB arbitration rules).

procedures. Rather, FORR is a procedure where the Board (not an arbitrator) decides a case by applying the standards set forth in the Interstate Commerce Act (not the agreed-upon standards set forth in a contract between the parties).

- **Vagueness Contentions.** The Railroads argue that FORR is impermissibly vague.³ This argument is also incorrect. The Board’s FORR proposal sets forth the statutory standards in Title 49 that the Board will consider when determining whether a challenged rate is unreasonable. *See* NPRM at 10-12. The statute requires the Board to consider these standards, but there is nothing in Title 49 that precludes the Board from applying these standards on a case-by-case basis. Indeed, that is the approach the Board follows in many other proceedings where Congress has directed the Board to make “reasonableness” determinations.⁴

- **Evidentiary Contentions.** The Railroads argue that FORR is unlawful because the Board’s selection of one final offer over another final offer is inherently arbitrary.⁵ This argument fares no better than the Railroads’ other arguments. The Board has the statutory authority to decide maximum rate cases based on the evidence presented to it. The Board frequently exercises that authority to adopt one

³ *See* AAR Comments at 2-3 (“vagueness . . . plagues the Board’s proposal”); BNSF Comments at 5 (FORR proposal “lack[s] . . . clear standards”); CN Comments at 18 (“the proposal is unlawfully vague”) (capitalization and bolding omitted); UP Comments at 2 (“FORR . . . leaves parties with no meaningful guidance as to how the Board will resolve their disputes.”).

⁴ *See, e.g.*, 49 U.S.C. § 10702 (reasonable rail practice determinations); *id.* § 10741 (unreasonable railroad discrimination determinations).

⁵ *See* AAR Comments at 17 (“final offer rate review is arbitrary and capricious”) (capitalization and bolding omitted).

party's evidence and arguments over another's in maximum rate cases.⁶ There is nothing inherently arbitrary in this selection process, so long as the Board provides an explanation for its decision that comports with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

CONCLUSION

WCTL urges the Board to adopt final rules in this proceeding that are consistent with its Comments and Reply Comments.

Respectfully submitted,

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⁶ See, e.g., *E.I. DuPont de Nemours & Co. v. CSX Transp., Inc.*, Docket No. 42099, slip op. at 12 (STB served June 30, 2008) (selecting the complainant shipper's proposed final offer comparison group in a Three-Benchmark case); *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.*, Docket No. 42113, slip op. at 20 (STB served Nov. 2, 2011) (selecting the complainant shipper's "entire rebuttal evidence on base-year volumes as the best evidence of record" in a Stand-Alone Cost case).