

ENTERED
Office of Proceedings
January 10, 2020
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 755
STB Ex Parte No. 665 (Sub-No. 2)**

**FINAL OFFER RATE REVIEW
EXPANDING ACCESS TO RATE RELIEF**

REPLY COMMENTS OF CN

The U.S. rail operating subsidiaries of Canadian National Railway Company (collectively herein “CN”) respectfully submit these reply comments on the Notice of Proposed Rulemaking (“NPRM”) that the Board served on September 12, 2019 in the above-captioned proceedings.¹ CN’s Reply Comments address three issues. First, the Board should explore ways to improve and promote the suitability of voluntary alternative dispute resolution procedures, which, if revised, could be an effective mechanism for low-cost, efficient, and lawful resolutions of rate disputes. Second, the Board should heed the many comments on opening that explained the practical problems with the Final Offer Rate Review (“FORR”) approach proposed in the NPRM that make the proposal unworkable and problematic. Even if FORR were completely consistent with the statute, comported with constitutional due process, and could be lawfully reconciled with the Board’s precedents (none of which are true), FORR is a flawed rate mechanism that would produce arbitrary results

¹ CN also joins the reply comments of the Association of American Railroads.

without any of the mitigating features of Canadian Final Offer Arbitration (“FOA”). Third, CN addresses the call by one chemical customer in Opening Comments for the Board to consider proposing to regulate multilane private contract negotiations between a railroad and a customer. This proposal is outside the scope of the rulemaking and would be inconsistent with Congress’s removal of Board jurisdiction over rail transportation contracts.

I. THE BOARD SHOULD PURSUE VOLUNTARY ARBITRATION AND OTHER CONSENSUS REFORMS TO ITS RATE REASONABLENESS PROCEDURES.

CN understands the Board’s desire to ensure a forum is available for a small customer to challenge the reasonableness of its rates in a small case that would be a lower-cost alternative to the Board’s present rate reasonableness methodologies. However, the FORR proposal is unlawful, for reasons that CN, AAR, and other parties explained on Opening. But that does not mean that the Board is powerless to act to pursue an appropriately tailored solution to the problem the Board is trying to solve—the concern that a small customer in a small rate case may not believe that the Board’s rate reasonableness methodologies are an available forum as a practical matter. The Board has multiple options available to it that could improve small case remedies while complying both with the statutory limits Congress has imposed and with sound economic policy.

One of these improvements would be a renewed focus on Alternative Dispute Resolution (“ADR”). In its Opening Comments, CN proposed that the Board pursue

an ADR program targeted to small rate disputes.² CN suggested four guideposts for such a program: mandatory mediation prior to arbitration; confidential and non-precedential decisions; a reasonable limit on relief; and voluntariness for all parties.³ CN believes that reforms to the current arbitration procedures along these lines would encourage the use of arbitration and create a viable option for the resolution of smaller rate disputes that a small customer may want to bring.

The Board also has several lawful and reasonable options that are available for it to meaningfully improve its existing rate reasonableness procedures. While several parties asserted on Opening that the Board's current methodologies are incurably broken, that is not the case.⁴ The Stand-Alone Cost test and the simplified methodologies of Simplified SAC and Three Benchmark remain important, valid, and Congressionally approved tools for determining the reasonableness of a challenged rate over which the Board has jurisdiction. As the Board-commissioned InterVISTAS report concluded, "the STB's Full-SAC method has stood the test of time as a maximum rate reasonableness methodology and is a justifiable complaint choice in some cases. However, the less expensive Simplified SAC and Three-Benchmark approaches are available to shippers and may be a better option for shippers in many cases."⁵ Shippers have prevailed in multiple

² CN Comments at 25-27.

³ *Id.*

⁴ *See, e.g.* Industrial Minerals Association-North America Comments at 9-10; Olin Comments at 1; Coalition Associations Comments at 4.

⁵ *See, e.g.*, InterVISTAS, An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification, Project FY14-STB-157, at 134.

cases brought under existing rate reasonableness methodologies, including the most recent case.⁶ But the test for the success of rate reasonableness methodologies should not be either side's winning percentage. Instead, the Board should measure success by how closely methodologies reflect sound economics and how appropriately tailored they are to the size of the dispute. In pursuit of these goals, the Board should focus on further improving the tests that it has developed and refined over decades, not on throwing out methodologies in favor of approaches that are untethered to any of the agency's prior efforts.

CN reiterates its support for Board efforts to improve existing methodologies, and joins in AAR's calls for the Board to refine its existing rate reasonableness tests, as both small cases and large cases would benefit from such improvements. For small cases, AAR has urged the Board to consider a procedure for very small cases based on the Three Benchmark methodology. AAR suggested a comparison group approach improved by bright-line criteria; streamlined case administration measures; a reasonable, summary screening for market dominance similar to the Board's proposal in Ex Parte 756; measures to address the current limitations of the waybill sample approach; and screening criteria that ensure that small shippers have the use of the new, more accessible process.⁷ AAR's Reply filing in Ex Parte 665 (Sub-No. 2) today further elaborates on these ideas. For large cases, AAR has called for the agency to consider smart simplification of SAC and Simplified SAC,

⁶ *Consumers Energy Co. v. CSX Transp. Inc.*, STB Docket No. 42142 (Aug. 2, 2018).

⁷ See Letter from AAR to STB, STB Ex Parte No. 755 (Oct. 21, 2019).

including by making final Board determinations on recurring issues; adopting rebuttable standardized values for certain cost categories; employing third-party experts for areas outside the Board's expertise; and adding more technical conferences.⁸

CN respectfully submits that the Board should withdraw the FORR proceeding and instead focus its efforts and resources on reforms like these, which are consistent with the long-standing rate reasonableness methodologies that the Board has developed and that courts have approved, and which directly address the Board's concerns about providing a rate reasonableness methodology suitable for a small shipper in a small case and simplifying the rate reasonableness approaches for large cases.

II. IN ADDITION TO BEING UNLAWFUL, FORR IS UNWORKABLE PUBLIC POLICY.

Opening Comments from CN and several other parties identified multiple legal flaws with FORR. CN explained that the proposal violates the Board's governing statute; offers no reasoned explanation for the departure from agency precedent; and is unlawfully vague.⁹ AAR showed that FORR is not authorized by statute and, in fact, conflicts with it.¹⁰ Union Pacific discussed why FORR would mean that the Board has abandoned its statutory responsibility to protect the public

⁸ *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Comments of the Association of American Railroads, at 80-81 (STB filed Nov. 26, 2019).

⁹ See, e.g., CN Comments at 3-22.

¹⁰ See Comments of the Association of American Railroads at 7-21.

interest, because it would be limited to positions staked out in the parties' submissions and would have no discretion in making maximum reasonable rate determinations.¹¹ Even some proponents of FORR believe the Board should set out further guidance, "such as a more detailed discussion of the potential criteria and statutory standards the Board will expect to be addressed in [FORR] cases."¹² Indeed, no commenter in support of FORR provided a meaningful explanation of how it complied with the statute and established precedents.

But even setting FORR's legal problems aside, FORR is flawed from a policy perspective and will not achieve the Board's goals. As CN explained, FORR would be worse than the FOA scheme that Canada adopted by statute.¹³ CN also explained that the Canadian FOA process has drawbacks. It both incorporates procedural unfairness (by giving complainants full control of the procedural schedule with unreasonably short time lines for railroad responses) and discourages negotiated solutions (by having no requirement for good faith mediation before FOA is initiated). But in the Canadian system, these flaws are somewhat mitigated because the proceedings are confidential and non-precedential. Those mitigating factors are not present in the FORR proposal.

Canadian Pacific's Opening Comments identified other flaws in FOA, including an observation that the compressed timelines actually serve to increase

¹¹ Comments of Union Pacific Railroad Company at 5-8.

¹² Opening Comments of The National Grain and Feed Association at 10.

¹³ CN Comments at 22-27.

costs, workload, and the volume of briefing and evidence. CP noted that FOA has “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.”¹⁴ While the highly compressed timelines of FORR may have been adopted in part because of a belief that less time will create less voluminous evidence, the actual experience in Canada is that this is not the case.

Nor is there any likelihood that FORR could spur the development of superior, innovative rate methodologies. A process in which parties have only 10 days to analyze and respond to their opponents’ proposed methodology is not one that would result in a thoughtful and reliable record that the Board could use to evaluate proposed submissions. Indeed, the American Chemistry Council (“ACC”) has suggested that its “rate benchmarking” approach would be one that could be presented by shippers under FORR.¹⁵ ACC proposed what it concedes is an entirely new methodology to determine rate reasonableness. If applied in the FORR context, a shipper could spend months—even years—developing an econometric “benchmarking” analysis and then submit it as its case-in-chief in an FORR

¹⁴ Opening Comments of Canadian Pacific at 2.

¹⁵ Coalition Association Comments at 3.

proceeding. A railroad would have only 10 days to review the analysis and respond. Based on that record, the Board would then have to decide whether to accept the analysis, with no ability to modify it or to solicit additional information and analysis. And the Board's decision would be both public and precedential. Under this approach, a responding railroad would have no time to properly analyze and respond to an entirely new methodology. But it would also leave the Board with basically no way to conduct a meaningful analysis of the shipper's proposal. This could be a recurring problem, since FORR allows litigants to propose new and untested methodologies in every new FORR case.

In short, FORR would provide inadequate opportunity for a defendant railroad to respond to a shipper's case and no certainty regarding what methodology may apply in a particular case, would lead to arbitrary results, and thus would not promote the development of superior methodologies for the Board to fulfill its statutory directive to determine the maximum reasonable rate. The Board should close this proceeding and explore better ways to improve its long-established rate reasonableness methodologies.

III. OLIN'S RATE BUNDLING CLAIM IS FAR OUTSIDE THE SCOPE OF THE PROCEEDING.

Olin Corporation's Opening Comments argue that the Board should propose regulations against "rate bundling," which it defines to mean instances where railroads offer a global contract governing rates across all a shipper's lanes rather than individualized contracts for individual lanes. Olin claims that "bundling" prevents shippers from being able to choose to enter contracts for certain lanes

while bringing rate cases for other lanes. While Olin’s proposal is not clear, it suggests that the Board needs to begin regulating an aspect of contract negotiations—“bundling”—in some way and declaring that some undefined forms of railroad contract negotiations are unreasonable practices.¹⁶ This request is outside the scope of this proceeding,¹⁷ and it would be unlawful to consider in this proceeding.

There is nothing unreasonable or inappropriate about a railroad offering a contract to a customer that includes multiple lanes. Combining multiple lanes and rates for a single customer into a single contract is typically advantageous for both a customer and a railroad. In part this is because it reduces the transaction costs of having to negotiate multiple agreements. Moreover, it is easier for such an agreement to reflect the overall customer relationship and to consider incentives relating to volumes. Most rail customers likely negotiate similar contracts with their own customers or suppliers, and many of those contracts likely reflect incentives or discounted prices in exchange for volume commitments or other

¹⁶ Olin also asks the Board to “clarify” that railroads are required to respond to common carrier requests for individual rates for individual movements, but it is not clear what Olin means, since that is already plainly required by 49 U.S.C. § 11101(b). Olin Comments at 14. Olin cites no examples of a railroad refusing to respond to a shipper request that it quote an individual common carrier rate.

¹⁷ Rate bundling is given only a passing reference in a footnote to the NPRM, and no action related to rate bundling could conceivably be a logical outgrowth of the NPRM proposal. Moreover, Olin’s claim that this footnote recognized rate bundling to be “an important issue” is not accurate. Olin Comments at 13. On the contrary, the Board took pains to state that it does not “take a position—one way or the other—on the appropriateness of rate bundling.” NPRM at 4, n.7.

accommodations. Olin's suggestion that there is something improper about such contract negotiations leading to a different price than a public tariff with no volume commitment or certainty of shipments is at odds with this basic commercial reality.

In any event, the Board has no statutory authority to prescribe rules defining what kind of transportation contracts that railroads are allowed to offer, prescribing the appropriate number of lanes for transportation contracts, or regulating the private contract negotiations between a railroad and its customer. *See* 49 U.S.C. § 10709(c); *cf. Cross Oil Ref. & Mkt., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 33582 (Oct. 27, 1998); *AEPCO, Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113 (Apr. 23, 2009). And it certainly has no authority to compel railroads to enter contracts for whatever subset of lanes a customer wishes while quoting common carrier rates for the remainder. A railroad and its customer are free to negotiate transportation contracts on whatever terms are mutually acceptable. If they cannot agree, then shippers are entitled to be quoted common carrier rates on all regulated traffic, and they are entitled to challenge the reasonableness of a rate for movements that are within the Board's rate jurisdiction. The Board has no reason to entertain further action, and it has no legal authority to do so.

IV. CONCLUSION

For all of the reasons CN explained in its initial comments and in these Reply Comments, the Board should close this FORR proceeding in Ex Parte 755 and refocus its efforts on improving existing methodologies, developing a simplified

approach for very small cases in Ex Parte 665 (Sub-No. 2) and improving its ADR remedies.

Respectfully submitted,

/s/ Raymond A. Atkins

Kathryn J. Gainey
Counsel, US Regulatory Affairs
Canadian National Railway
601 Pennsylvania Ave, NW
Suite 500, North Building
Washington, DC 20004
(202) 347-7840
Kathryn.gainey@cn.ca

Raymond A. Atkins
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
ratkins@sidley.com

Dated: January 10, 2020