



**National Grain
and Feed Association**

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**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

**REPLY 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 Reply Comments on the Surface Transportation Board’s (“Board,” “STB” or “Agency”) 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 75 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. NGFA Reiterates its Support for, and Urges Adoption of, the FORR Concept

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 NGFA again commends the Board for establishing a Rail Rate Reform Task Force ("Task Force"), and for the Task Force's subsequent report that accurately characterized the systemic problems and flaws with each of the STB's existing rate-challenge methodologies and procedures, which create often-insurmountable barriers to rail customers, including agricultural shippers, seeking to exercise their legal right to challenge rail rates they believe are unreasonable. The record in this proceeding is replete with examples – including those submitted by NGFA – about the complexity, expense and ultimate unworkability of each of the Board's existing rate-challenge methodologies that makes it incumbent upon the Agency to develop and implement an alternative approach that is consistent with its statutory authority, direction from Congress and precedent. As such, the NGFA continues to support strongly the efforts by the Board to improve its rules for reviewing the reasonableness of railroad rates.

The NGFA further reiterates its strong support for the Board to issue final regulations implementing FORR – which meets each of the aforementioned requirements – into the agency's rules and policies as part of a suite of improvements that include the STB's related

proposals to establish a streamlined market dominance test (Docket No. EP 756), standards for incorporating railroad revenue adequacy into rate reasonableness determinations (Docket Nos. EP 761 and EP 722), and improvements to the Board's other rate reasonableness methodologies to at long last provide rail users with accessible, workable, timely and cost-effective recourse for challenging unreasonable freight rates.

III. Additional NGFA Comments on Its Proposed Changes to the Board's FORR Proposed Regulations

After reviewing and considering the comments of other parties – both rail carriers and rail shippers and receivers – in this proceeding, the NGFA offers the following additional comments regarding the changes to the FORR proposed regulations in NGFA's Opening Comments:

A. Eliminating the Proposed \$4 Million Cap on Rate Relief

The NGFA is pleased that numerous other shipper organizations and respected academics concur with its recommendation that the Board should eliminate the proposed rate cap of \$4 million (rate prescription and reparations), unless the parties agree otherwise, under the FORR methodology. *See* Public Interest Comment filed jointly by all seven members of the National Academies of Sciences' National Research Council's Transportation Research Board (Public Interest Comment) at 5; American Fuel and Petrochemical Manufacturers at 10-12; Olin Corporation at 15-16; Steel Manufacturers' Association at 11-12; and Western Coal Traffic League at 9. In cases where the potential rate relief is relatively high, and the relevant circumstances are more complicated, the NGFA continues to recommend that the Board instead adjust the procedural schedule to permit additional time for discovery and presentation of evidence.

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

In its Opening Comments, the NGFA concurred with the Board's proposal that the FORR procedure apply only if the complainant elected to utilize the streamlined market dominance approach that the Agency is proposing to adopt in EP 756. However, the NGFA does not object to the proposal of the American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, The Chlorine Institute and the Corn Refiners Association ("Coalition Associations") that the Board allow for a bifurcated market-dominance process that allows complainants that cannot avail themselves of the streamlined market-dominance process to still use the FORR process, provided that this is done as part of a separate, case-specific timeline agreed to by the parties and the Board. NGFA notes that the aforementioned National Research Council's Transportation Research Board, which in 2015 issued a 264-page report entitled ***Modernizing Freight Rail Regulation***, also states that it sees "no rationale for (the) restriction" of utilizing only the streamlined market-dominance process "if the complainants can make a showing of dominance in other ways without violating the FORR time limits...." Public Interest Comment at 4-5.

C. The Board's Proposed FORR Process and Schedule

The NGFA restates that it generally agrees with the proposed FORR process and timelines proposed by the Board, with a few substantive recommendations that are the same as contained in NGFA's Opening Comments and are replicated in Appendix A attached to these Reply Comments. These include NGFA's previous recommendations that the process would be assisted if the complainant has the option of providing the defendant railroad with notice of the data and information it intends to seek in discovery at the same time the complainant notifies the railroad of its intent to file a complaint under proposed §1111.10(a)(3)(i)(A). Further, the NGFA continues to believe 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.

In addition, 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. In this regard, the NGFA also concurs with the Coalition Associations that the Board should provide the option to allow for a single motion to compel discovery (aggregating all unresolved discovery disputes involving the plaintiff rail customer and the defendant railroad into a single request) under an expedited timeline. Further, we believe the Coalition Associations raise a valid point that discovery requests under FORR will apply to information needed for both rate-reasonableness and market-dominance presentations. Providing a single motion to compel discovery should have the benefit of reducing, if not eliminating, the need for the Board's proposal to take a party's unreasonable denial of discovery into account when evaluating which party's final offer to select.

D. The Board's Proposal to Provide Guidance to Smaller Entities

In its Opening Comments, the NGFA concurred with the Board's proposal that it should develop and provide guidance to smaller shippers on how to utilize the FORR procedures. NGFA further suggested that such guidance be expanded to be relevant to all shippers (not just smaller ones) beyond the topics set forth in the summary discussion on pages 10-11 of the NOPR regarding "the Rail Transportation Policy in 49 U.S.C. §10101, the Long-Cannon factors in 49 U.S.C. §10701(d)(2) and appropriate economic principles." In particular, NGFA encouraged the Board's guidance to include a more detailed discussion of the potential criteria and statutory standards the Board will expect to be addressed in the methodologies utilized in FORR cases.

One of the principal benefits and major attractions of FORR is that it allows for innovation and flexibility, thereby enabling and empowering rail shippers and receivers, as well as the defendant railroad, to develop methodologies that best illustrate their contention that a given freight rate is unreasonable or reasonable, respectively. However, so long as it can be done in a manner that does not undermine these attributes of FORR, the NGFA believes that additional guidance would be extremely useful to shippers and receivers on specific factors to be considered when developing a sound methodology to be utilized in FORR cases. This would be particularly helpful during the initial years, as both rail customers and rail carriers become acclimated to the FORR process.

E. Application of FORR Rules to Class II and III Railroad Rates

The NGFA continues to recommend that the Board apply its final regulations under FORR to Class II and Class III railroads given their substantial geographical reach and changing ownership structure, with several being sold to private equity firms. As NGFA noted in its Opening Comments, the streamlined market dominance rules would limit the number of eligible cases involving these carriers, but the rates Class II and III carriers impose affect the movement of a substantial quantity of commodities. However, as pointed out in the Opening Comments submitted by the Farmers Unions of Minnesota, Montana, North and South Dakota and Wisconsin (“Farmers Unions, et al.”), the Class I railroads set the interstate rates of joint line movements with Class II and III carriers. Farmers Unions, et al., at 10.

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

The NGFA also respectfully reaffirms its recommendation, in response to the question at page 17 of the NOPR, 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 Rate Reform 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 submitted to 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. **Benchmark Model Proposed by Coalition Associations**

As part of their Opening Comments in this proceeding, the Coalition Associations proposed a new rate methodology that purportedly “combines the rate benchmarking principles recommended by the Transportation Research Board (“TRB”) and the revenue-adequacy constraint discussed in *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 534-37 (1985).” Coalition Associations’ Opening Comments at 3. In general, the methodology would entail a two-part process. First, competitive benchmark rates for captive rail movements would be predicted using an econometric model based on “economically relevant shipment characteristics” of such movements using data, including the Board’s Confidential Costed Waybill Sample (CCWS). *Id.* at 20. The model then would apply a multiplier to the benchmark model’s predicted competitive rate designed to permit the defendant to differentially price the movement “above the competitive rate level only to the extent necessary to achieve and maintain revenue adequacy.” *Id.* As described by the Coalition Associations, the Benchmark Model is designed to be objective, and “virtually automatic,” which they assert effectively would reduce the time and expense of rate case litigation to whether the defendant had market dominance over the transportation at issue. *Id.*

The NGFA believes the concepts of the Benchmark Method and its overall purpose and goal of creating a method that is “equal to SAC,” *id.* at 24, but which is significantly less costly and time-consuming warrant consideration. In addition, the NGFA believes it is extremely important for the Board to implement the statutory requirement that a railroad’s right to differentially price its services to captive shippers must be constrained in some manner once that railroad achieves long-term revenue-adequate status, which the Benchmark Method also attempts to do. Finally, as noted previously, NGFA believes the Three-Benchmark Methodology could

be improved and be a useful methodology for testing the reasonableness of agricultural commodity rates. Indeed, the NGFA proposed its own rate-comparison group methodology with a revenue-adequacy adjustment in Docket EP 665 (Sub-No. 1) in an effort to create a more streamlined, timely and cost-effective approach for adjudicating unreasonable rail rates involving agricultural commodities. However, the NGFA shares the view of the TRB and others that the Board's current Uniform Rail Costing System (URCS), which is used to determine revenue to variable cost ratios in those methodologies, is fundamentally flawed and does not accurately represent true railroad variable costs. *See* Public Interest Comment at 2-3. Using rate benchmarking as a means of determining maximum reasonable rates avoids URCS and its current deficiencies.

The Coalition Associations have presented the Benchmark Model as (1) a methodology that could be used by parties in a FORR proceeding, since the Board has given complainants broad flexibility to use any methodology they deem appropriate to present their maximum reasonable rate level; and (2) a potential Board-approved rate methodology that could be used outside the FORR realm after being formally adopted in a notice-and-comment rulemaking proceeding. As for the use of the Benchmark Model in FORR cases, the NGFA has suggested herein, as well as in its Opening Comments, that the STB should provide guidance to parties as to what methodologies or theories it might consider acceptable in FORR cases. By submitting a detailed presentation of their Benchmark Model in this proceeding and subjecting it to comments by interested parties (and also introducing it in Docket Nos. EP 761 and 722 and subjecting its primary author, Dr. Caves, to detailed questioning by Board members at the hearing held in those proceedings on December 12, 2019), the Coalition Associations have provided the Board with an ample record from which to provide at least initial feedback to industry

stakeholders on the question of whether it agrees with the Coalition Associations that the Benchmark Model “is an ideal rate reasonableness methodology for use in FORR cases.” *Id.*

The NGFA also supports the institution of a rulemaking proceeding for the Board to receive public input on the Benchmark Model and its various components. As explained by the Coalition Associations, such elements of a final rule adopting the methodology would include “a regression analysis with explanatory variables, data sources, time periods and competitive movement filters. The Board also would need to formally adopt a formula for calculating the CT¹ and determine an appropriate rate prescription duration.” *Id.* at 24. The Board should undertake such a rulemaking to determine if the Benchmark Method, as potentially modified after a public comment period, should be adopted as an approved rate methodology “that is equal to SAC,” and therefore useable in all rate cases without the need for relief limits.

V. The Arguments by Rail Carriers Urging the Board to Withdraw Its FORR Proposal Lack Merit and Should be Dismissed

In their Opening Comments on the FORR proposal, the Association of American Railroads (“AAR”) and its Class I members’ assert a hyperbole-laden contention that the proposal should be withdrawn because it allegedly violates the Board’s governing statute, is arbitrary and capricious, implicates Constitutional issues of fundamental fairness and due process, and is an abdication of the Board’s responsibility to determine maximum reasonable rates. These contentions are without merit and should be rejected.

As noted in the NGFA’s Opening Comments, the Board has ample authority to promulgate a FORR methodology to review the reasonableness of railroad rates. This authority

¹ Competitive Threshold, which the Coalition Associations describe as a “multiplier that is applied to the Benchmark Model’s predicted competitive rate to determine the appropriate degree of differential pricing consistent with the Board’s rail revenue adequacy standard.” Coalition Associations at 20.

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)(1) establishes that if the Board determines a carrier has market dominance over the transportation to which a particular rate applies, “the rate established by such carrier for such transportation must be reasonable.” 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). The FORR proposal explicitly complies with this statutory directive by requiring these factors to be accounted for in any rate methodology proposed in an FORR submittal to support a proposed rate level. NOPR at 10. Moreover, the Board’s adoption of a FORR-type methodology is amply supported by §10701(d)(3), which expressly states that “[t]he Board shall maintain one *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.” (Emphasis supplied.) 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.” The FORR is designed to implement these statutory directives, as well.

Nevertheless, the AAR and other railroad parties make a series of unfounded, speculative assertions that stretch credulity. The NGFA responds to several of them below:

A. The Board is Not Imposing Arbitration without Statutory Authority from Congress

The AAR alleges that FORR constitutes imposition of mandatory rail arbitration “without statutory authority from Congress.” AAR at 9. Nothing could be further from the truth. FORR is expressly not arbitration. As stated above, it is a product of the Board’s use of its statutory

authority and specific direction from Congress in the STB Reauthorization Act of 2015 and other statutes to implement a streamlined and functional rate-challenge methodology to enable shippers to challenge unreasonable rates where there is a lack of effective competition.

B. The Board is Not Abandoning Its Assessment and Consideration of Railroad Revenue Adequacy or Rail Transportation Policy under FORR

The AAR alleges, again incorrectly, that the Board somehow is abandoning its consideration of railroad revenue adequacy and RTP under FORR. AAR at 11. To the contrary, the Board states repeatedly in its proposed FORR rules that its criteria for reviewing final offers “would be based on its consideration of the Rail Transportation Policy in 49 U.S.C. §10101 and the Long-Cannon factors in 49 U.S.C. §10701(d)(2). NOPR at 10-11. This latter provision specifically states, in pertinent part, that “[i]n determining whether a rate established by a rail carrier is reasonable for purposes of this section, *the Board shall give due consideration to . . . recognizing the policy of this part that rail carriers shall earn adequate revenues, as established by the Board under section 10704(a)(2) of this title.*” (Emphasis supplied.) See also NOPR at 11 (“As with the Board’s other rate reasonableness procedures, the agency would consider the defendant railroad’s need for differential pricing to permit it to collect adequate revenues.”). Thus, the defendant railroad’s revenue-adequate status – and the corresponding requirement to constrain its right to differentially price its customers – should be an important consideration in any FORR proceeding.

C. The Complainant is Not “Effectively Relieved” of Its Burden to Prove the Challenged Rate is Unreasonable

Again, contrary to AAR’s hyperbolic and erroneous assertion that FORR violates the Administrative Procedure Act by somehow relieving the complainant from demonstrating that the challenged rate is unreasonable...and that “the shipper need not prove anything...” (AAR at

16), FORR places the entire burden of developing an alternative methodology – or using one of the Board’s previously recognized methodologies – solely on the shipper. Presumably, if the railroads were correct in their repeated assertions that all of their rates are set in a competitive market, reasonable and above reproach, they already have performed the needed evaluation and economic analysis to justify those rates and have a significant starting advantage over the complainant.

D. The FORR is Not “Standardless” and Thereby Not “Arbitrary and Capricious”

The AAR contends that the FORR is a “standardless standard that is the very definition of arbitrary and capricious agency action, and renders FORR unconstitutionally vague.” AAR at 17. Again, the railroads exaggerate in that FORR encourages the development of methodologies that, while provided a degree of flexibility, nevertheless must conform with specific statutory criteria and well-established economic principles. These criteria are spelled out in the NOPR, and include 49 U.S.C. 10101 (1), (3), and (6), and the aforementioned Long Cannon Factors. Complainants and defendants also are required to base their respective rate offers on economic principles used by the Board in prior cases or risk having their methodology rejected. Further, contrary to the assertion of the BNSF Railway Company that FORR would create “the potential for a party to select only the favorable elements of an existing (STB codified) methodology while discarding the less favorable elements....” (BNSF at 5), the Board is not a mindless robot and would easily discern such a deficiency when issuing a decision in such a case.

The NGFA believes some of AAR’s concerns would be assuaged by the Board being transparent when issuing FORR case decisions by articulating the methodology(ies) it finds sound and acceptable, and the reasons for its assessment and decision on the final offer accepted.

In this regard, we disagree with the Public Interest Comment (at 5) that the Board should “provide in FORR decisions only enough information to make clear that it is not being arbitrary and capricious.”

The development of more specific guidance as recommended by the NGFA in these Reply Comments also will assist the Board in establishing “fenceposts” around the criteria that the Board will deem necessary in methodologies used under FORR without unduly constraining innovation.

E. FORR Will Not “Unduly Pressure Railroads to Reduce Reasonable Rates”

Perhaps most amusing and illogical is the AAR’s and other Class I railroads’ contention that FORR somehow will “stack the deck” against rail carriers and force them to “surrender their constitutional and statutory rights to defend their charged rate...(and concede their) legal right to charge the maximum reasonable rate” (AAR at 21-22) and make the board “a prisoner of the parties’ (rate) submissions” ((Union Pacific (UP) Railroad Company at 3)). Indeed, UP undercuts its own argument by subsequently stating that “a railroad would only litigate a FORR case if it believes the challenged rate is reasonable. A railroad that believed its rates were unlawful would instead offer lower rates in commercial negotiations, at which point either the parties would reach agreement before commencing any litigation, or the challenged rates would be the rates the railroad was prepared to defend.” UP Opening Comments at 13.

Again, nothing could be further from the truth. In the first place, UP’s assertion that its rate levels are open to commercial negotiations is belied by reams of shipper testimony and comments in STB proceedings informing the Board that UP and other carriers impose regular, non-negotiable rate increases on an annual, if not more frequent, basis. Moreover, if indeed UP believed a particular rate was unlawful, then why would it need commercial negotiations to

reduce it? This statement constitutes an admission that railroads know they charge rates that are unlawfully high. If the Class I railroads are correct in their repeated assertions that their current tariff freight rates are market- and competition-based, and “generally reasonable” (AAR at 24), they presumably already have conducted sufficient analyses to justify asserting in a FORR proceeding that no reduction is necessary.

Indeed, what FORR and other attempts undertaken by the Board at rail rate reform are attempting to address is the current “stacked deck” that *shippers* confront when it comes to challenging unreasonable rail rates. The railroads know full well that the current rate-challenge processes at the Board largely are unusable by rail customers, which empowers carriers to set rates with regulatory impunity with the assurance that there is minimal, if any, risk of having their rates challenged. Frequently, when NGFA-member shippers approach rail carriers to complain about rates they believe are excessive in the context of business discussions, they report that they are presented with a take-it-or-leave-it proposition – either pay the rate or lose the service. That posture by Class I rail carriers is increasingly prevalent given their adoption and imposition of the so-called “precision scheduled railroad” operating model and their drive to maximize revenues while driving down operating ratios.

The NGFA also finds amusing the UP’s repeated assertion that “no railroad would ever submit a final offer below the challenged rate” because doing so would be “conceding the challenged rate was unlawful,” which UP contends would cause the railroad to “forfeit any opportunity to prevail.” UP Opening Comments at 13. UP and other railroads certainly are free under the FORR process to attempt to defend the full challenged rate using whatever methodology they choose, just as a shipper would be free to submit a final offer rate that is extremely low, but which the shipper nevertheless believes can be defended. In both cases, the

party would incur the risk of its proposal being rejected.

The NGFA does not object to one aspect of the UP's Opening Comments – that is, to amend the FORR proposal to provide the Board with the discretion to notify both parties if it determines that neither the shipper nor carrier's final offer comports with statutory requirements and the provisions ultimately contained in the FORR final rules, and allow both parties to resubmit new final offers. UP at 7.

The AAR and its Class I member railroads also protest that the FORR proposal “dispenses with the mandatory mediation period that is included in all other rate complaint procedures.” AAR at 22. This protest rings hollow, considering the dearth of rate cases that have been resolved through mandatory mediation; indeed, the railroads cite no such cases. In reality, such a required mediation period is unnecessary under FORR, as shippers contemplating filing a rate challenge using this methodology for all practical purposes will engage in such conversations directly with the potential defendant railroad *ad nauseum* before going to the time and trouble of developing a suitable rate-challenge methodology and submitting an FORR case to the Board. NGFA believes that FORR would have the salutary effect of encouraging more frequent and robust discussions leading to mutually agreeable commercial solutions precisely because it would constitute a meaningful regulatory backstop in the form of an accessible, timely and cost-effective forum for resolving rate disputes – a forum that currently is sorely lacking. NGFA believes that if a shipper reaches the point of filing a rate complaint under FORR, it and the railroad party already will have reached an impasse following lengthy discussions. Adding a mandatory mediation period would only unnecessarily elongate the FORR timeline, thereby undermining one of its potential attributes.

Finally, the NGFA does need to clarify the BNSF's statement that it “has discussed at

different times with the National Grain and Feed Association's Executive Committee various concepts for expanding (its) Montana (Arbitration) approach to implement similar expert-based, market-focused ADR (alternative dispute) resolutions for its broader membership base." While indeed a *single* such discussion did occur between two BNSF executives and NGFA's Executive Committee on January 12, 2015, and was followed by an initial discussion on October 27, 2016 between two BNSF executives with a delegation representing NGFA's Rail Shipper/Receiver Committee to explore potential approaches, no follow-up discussions have been conducted with BNSF. Further, no other Class I railroad has expressed a willingness to even explore such discussions after being approached by NGFA, which NGFA attributes in large part to the current lack of an accessible and workable rate-challenge process at the STB. That reality, combined with countless other examples previously articulated by NGFA and other shipper groups during the past six-plus years, totally debunks the AAR and other Class I carriers' unfounded contention that the Board somehow is attempting to "embark on a drastic change of course...without evidence that the problem it aims to solve actually exists." AAR at 24.

VI. Conclusion

For the reasons outlined in its Opening Comments and these Reply Comments, the NGFA continues to commend and strongly support 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,

Handwritten signature of Randall C. Gordon in black ink.Handwritten signature of Thomas W. Wilbur in blue ink.

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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.

* * * * *

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.

* * * *