

BEFORE THE SURFACE TRANSPORTATION BOARD

300282

STB Ex Parte No. 755

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

FINAL OFFER RATE REVIEW

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

The Association of American Railroads (“AAR”) respectfully submits these reply comments concerning the notice of proposed rulemaking, served on September 12, 2019, in which the Board proposes adopting “Final Offer Rate Review” (“FORR”). While AAR and its members agree that small shippers should have meaningful access to rate review by the Board, any process for assessing rate reasonableness must conform to the law and be guided by sound economics.

AAR’s opening comments urged the Board to withdraw its proposal because FORR is not authorized by—and in fact conflicts with—the governing statutes. Congress did not give the Board authority to adjudicate railroad rate cases by adopting the procedures that arbitrators use to decide salaries of major league baseball players. Parties are denied the requisite “full hearing” the law requires, 49 U.S.C. § 10704(a)(1), when agency adjudicators refuse to exercise their independent judgment and instead confine their decisional range to the two outcomes proposed by the litigants. Moreover, the Board’s proposal is arbitrary and capricious in many respects. Among other things, the Board’s refusal to establish a methodology in advance, or to provide any meaningful standards for how it will make reasonableness determinations, renders the proposal unconstitutionally vague and deprives railroads of fair notice as to what the Board may deem unreasonable in any particular case.

Rather than address the fundamental question of whether the Board has the statutory authority to implement FORR, many commenters urge the Board to expand the types of disputes that could be resolved through the FORR process, while other

commenters appear to view this rulemaking as an opportunity to present their own unrelated proposals that go well beyond the scope of this rulemaking. Even shipper comments supportive of the proposal recognize that FORR lacks standards and would create uncertainty as to what constitutes a reasonable rate. *See, e.g.*, ACC Comments at 2 (FORR would require “shippers to take a leap of faith”); AFPM Comments at 7 (expressing concern about relying “on ad hoc decisions by the Board”). None of the commenters’ recommendations would cure the many problems plaguing FORR. The Board should withdraw its notice of proposed rulemaking in its entirety.

DISCUSSION

A. FORR Is Not Authorized By, And In Fact Conflicts With, The Governing Statutes.

No commenter offers a persuasive defense of the Board’s statutory authority to adopt FORR. One commenter assumes that because the Board has the authority to prescribe the maximum rate (assuming it finds market dominance and that the charged rate is unreasonable), it may adopt whatever procedures it wishes in exercising that authority. *See* NGFA Comments at 8-9. Not so. As AAR established in its opening comments, the Board does *not* have the statutory authority to adopt a final-offer procedure imported from baseball arbitrations. *See* AAR Comments at 8-15. Indeed, the Board has acknowledged that it lacks the power to impose arbitration without statutory authority from Congress. *See* NPRM at 5.

Likewise, no commenter suggests that FORR is consistent with the Board’s longstanding approach of attempting to replicate market outcomes after a full hearing that

gives due consideration to a host of statutorily-mandated factors. Nor could they: FORR represents a radical departure from the economic, market-based principles that have historically guided the Board in making rate reasonableness determinations.

One commenter relies on *Board of Trade of Kansas City, Mo. v. United States*, 314 U.S. 534 (1942), in arguing that FORR is “similar” to other rate-setting processes the Board has used, in that it endorses a “non-prescriptive, multiple-factor test.” Olin Corporation Comments at 11. But that case only emphasizes how far the Board has strayed from its historic approach. There, the Court explained that “[t]he process of rate making” requires the Board (then the I.C.C.) to consider “factors that must be valued as well as weighed.” 314 U.S. at 546. Here, the Board *cannot* fairly value and weigh the many factors it must consider when it has arbitrarily limited its decisional options to the two proposals submitted by the parties. Moreover, the Court emphasized that, in a railroad rate-making case, “[a]ny solution ha[s] to rest on informed judgment” by the Board, “as illumined by the seasoned wisdom of the expert body.” *Id.* at 547. Under FORR, however, the Board will not be applying its own “informed judgment” in assessing the reasonableness of rates and selecting a maximum rate; rather, it will be doing nothing more than choosing which of the parties’ two proposals most closely approximates the result the Board would have selected if it *had* exercised its own informed judgment.

Several commenters point to the Canadian experience with final-offer arbitration. *See, e.g.*, MillerCoors Comments at 11-12. But that experience provides no support for the Board’s proposal. For one thing, Canada—unlike the United States—has enacted a

statute authorizing final-offer arbitration. For another, as explained by AAR members Canadian Pacific and CN—both of which have extensive firsthand experience with the Canadian final-offer arbitration procedures—the Canadian model has not proven to be an effective way of resolving rate disputes. *See* CP Comments at 9 (“CP’s experience with Final Offer Arbitrations in Canada is that they are costly, rife with uncertainty and rarely used.”); CN Comments at 22 (rejecting the Board’s “unsupported assumption that Canadian [Final Offer Arbitration] is a better system than the robust rate methodologies that Congress has approved.”). Moreover, the FORR proposal would import some but not all of the Canadian approach. For example, the Canadian arbitration process provides for confidentiality, whereas FORR would not be confidential and would be precedential.

B. The Various Proposals For “Improving” FORR Fail To Fix It.

The very premise of final-offer decisionmaking—that the Board will choose whichever of the two outcomes proposed by the litigants comes closest to what the Board would determine to be reasonable if it were exercising its independent judgment—is an arbitration technique fundamentally inconsistent with the role of an adjudicator in our system of government.¹ For that reason, FORR cannot be salvaged. The Board must set aside the various suggestions for “improving” its proposal and withdraw the NPRM in its entirety.

¹ As explained in our opening comments, if the Board determines that the challenged railroad rate is unreasonable (a predicate to rate relief), it cannot choose that rate, even if that rate is much closer to “reasonable” than the shipper’s proposed rate.

It is worth noting, however, that many of the proposed changes would take the Board even further afield from its stated goal of expanding rate review access for small shippers. For example, several commenters urge the Board to raise, or eliminate, the \$4 million cap on relief. *See, e.g.*, ACC Comments at 15-17; Indorama Ventures Comments at 11-12; USDA Comments at 5-6. Doing so would magnify the flaws of FORR beyond small shippers and small disputes and depart from the Board’s precedent that allowed non-Constrained Market Pricing rate standards only in limited instances consistent with the statute. *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 52-54 (STB served Sept. 5, 2007); 49 U.S.C. § 10701(d)(3). Any proposals that *do* focus on particular challenges faced by small shippers belong in EP 665 (Sub. No. 2), *Expanding Access to Rate Relief*. AAR remains committed to participating in a rulemaking targeted at improving small shipper rate cases and is submitting a proposal in that docket.

One additional comment bears note here. ACC argues that its alternative “rate benchmarking” methodology “is a strong candidate for use in the FORR process” for revenue adequate carriers. *See* ACC Comments at 3. ACC further demands that it be given greater access to waybill data for this use. *See* ACC Comments at 11-13. ACC’s proposals go well beyond the scope of this rulemaking by inviting the Board to approve, in advance, the use of a particular methodology that ACC itself recognizes would have to go through notice and comment rulemaking. *Id.* at 24. Indeed, the Board did not invite comment on potential methodologies because it expressly stated that FORR cases will not be governed by any predefined methodology.

AAR addressed the many substantive problems with ACC's approach during the December 12 and 13, 2019 hearing in EP 761, *Hearing on Revenue Adequacy*. In brief, the ACC rate benchmarking scheme would assume away all of the well understood problems associated with using a firm-wide measure of revenue adequacy as a cap on rail rates. It assumes a status of long-term revenue adequacy based on the Board's annual determination with all of the measurement errors that entails. Moreover, the rate benchmarking formula would drive all regulated rates toward marginal cost, which would ensure that any revenue adequate rail carrier not remain so. The ACC proposal raises fundamental questions as to what constitutes a competitive movement that is comparable to the issue movement and the extent of differential pricing that would be allowed. In the FORR context, railroad defendants would be afforded a mere 10 days to evaluate detailed econometric evidence, interpret the methodology presented, and wrestle with these fundamental questions. Such an outcome cannot be squared with fundamental fairness and due process.

CONCLUSION

Because Final Offer Rate Review is arbitrary, capricious, and contrary to law, the Board should withdraw its notice of proposed rulemaking.

Respectfully submitted,

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