

Surface Transportation Board
EP 755
Final Offer Rate Review

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Summary of Teleconference Meeting between The Association of American Railroads (“AAR”) and Surface Transportation Board (“STB”) Ann Begeman, Chairman
June 17, 2020

AAR Attendees: Thomas Dupree, Partner, Gibson Dunn; Tim Strafford, AAR Associate General Counsel & Corporate Secretary; Fred Miller, AAR Assistant General Counsel & Government Affairs Liaison

STB Attendees: Ann Begeman, Chairman; Craig Keats, General Counsel; Valerie Quinn, Attorney-Advisor; Amanda Gorski, Attorney-Advisor; Bill Brennan, Director of the Office of Economics; Rachel Campbell, Managing Director; Chris Diamond, Attorney-Advisor; Kim Hillenbrand, Transportation Industry Analyst; Adam Kress, Attorney-Advisor.

During the discussion, AAR noted that its written comments set forth its position that the final offer rate review (FORR) proposal is not authorized by, and conflicts with, the Board’s governing statute. While final offer arbitration may be a useful settlement technique for certain types of arbitration, it is not a dispute resolution means invoked by courts, nor is it a permissible framework for administrative rate setting. Specifically, the Board is required to exercise its own judgment, taking into account the statutory requirements of 49 U.S.C. §§10701, 10704, and 10707, which include consideration by the Board of the Long-Cannon factors, revenue adequacy, and a Board determination that the challenged rate exceeds a reasonable maximum, none of which can properly be addressed in a final offer proceeding. In response to a question by Chairman Begeman and a follow-up question by Mr. Keats, AAR noted that, while the Board may have discretion to simplify procedures in existing methodologies like the stand-alone cost test, FORR would impermissibly constrain the Board’s options to one of two outcomes without exercising its independent judgement.

AAR also discussed with the group the vagueness and fair notice problems arising from a decision-making process where the governing legal standard is not announced in advance, but revealed only when the final decision is issued. Chairman Begeman asked AAR to compare that uncertainty to a SAC case where parties would not know the outcome until a case is fully litigated. AAR responded that existing methodologies produce a potential range of outcomes that can be known in advance and that, in contrast, the standard for reasonableness could change in each FORR case.

AAR also explained that FORR would not ensure the use of market-driven outcomes in rate-setting. Mr. Brennan asked what if the Board, in its decision in a FORR case, used market-based outcomes to select the better of the two choices. AAR responded that the binary choice required by FORR would foreclose the ability of the Board to independently assess the market-based outcome.

In addition to discussing the legal deficiencies of the FORR proposal, AAR also reported that it understood the Board's concerns with the existing rate reasonableness framework, but there are concerns among AAR members about a proliferation of new and differing standards of reasonableness. AAR noted past efforts by railroads to propose improvements to rate case procedures, and explained that more recently members have been exploring whether changes to the Board's arbitration process could make it more attractive for voluntary participation by railroads. AAR predicted several railroad members will be coming in to meet with the Board regarding their ideas.