

Surface Transportation Board
EP 755
Final Offer Rate Review

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Summary of Meeting between The Association of American Railroads (“AAR”) and Surface Transportation Board (“STB”) Patrick Fuchs, Board Member
June 18, 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: Patrick Fuchs, Board Member; Lisa Novins, Attorney Advisor

To start the discussion of final offer rate review (FORR) proposal, AAR noted that its written comments set forth its position that the proposal is not authorized by, and conflicts with, the Board’s governing statute. AAR stated that 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, AAR maintained that 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. AAR further explained that in the *Stone* case, *Stone v. U.S. Forest Service*, 2004 WL 1631321 (D. Ore. 2004), the federal district court struck down a final offer approach used by the U.S. Forest Service because it was not an adjudicatory technique authorized by Congress.

There was discussion of how the FORR proposal differs from other Board procedures that have some degree of binary, either/or decision making. AAR also explained the vagueness and fair notice problems arising from a decision-making process where, in its view, the governing legal standard is not announced in advance, but revealed only when the final decision is issued. AAR also noted that FORR seems to misapprehend the role established by Congress in rate disputes. AAR explained its view that rather than inserting the Board as a mediator between commercial actors to influence railroad pricing, Congress established the Board as an adjudicator tasked with determining if a challenged rate is unlawful in certain circumstances, and, if so, tasked it with setting the maximum reasonable rate.

In response to questions, AAR discussed steps that may make the Board’s arbitration process more attractive for use in some rate disputes. AAR explained that railroads are sensitive to any proliferation of further processes to determine reasonableness, however, understand the importance of the Board’s processes being accessible to stakeholders. AAR touched on the confidentiality of arbitration decisions, an expansion of the list of arbitrators, limits to rate relief, and the process by which market dominance is determined as areas of potential improvement.

AAR also noted that resolving these concerns in the arbitration process could address some of the same goals that the FORR proposal was meant to accomplish. AAR predicted several railroad members will be coming in to meet with the Board regarding their ideas.