

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”) Martin Oberman, Vice Chairman

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: Martin Oberman, Vice Chairman; Ellen Erichsen, 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.

In a response to a series of questions by the Vice Chairman regarding the statutory basis for new or modified rate reasonableness procedures, AAR explained that the statute requires the Board to exercise its own judgment after a full hearing, 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. The attendees discussed how ICC and Board precedent has interpreted those provisions in the past in establishing rate reasonableness methodologies. AAR also noted that sections 10701 and 10704 explicitly reference the stand-alone cost test.

There was also discussion regarding AAR’s contention that there is uncertainty created by the FORR proposal compared with other rate reasonableness procedures, because AAR argues that in FORR the litigants do not know the governing methodology to be used in advance. AAR also argued that there are vagueness and fair notice problems arising from a decision-making process where the governing legal standard itself is not announced in advance, but revealed only when the final decision is issued.

In addition, AAR explained that in considering new procedures to consider rate reasonableness, railroads are concerned by a potential proliferation of multiple and inconsistent standards of what constitutes a maximum lawful rate. AAR stated its willingness to explore streamlining of rate case processes and reviewed recent efforts to consider whether the Board’s arbitration process could be made workable for the resolution of some rate disputes. AAR predicted several railroad members will be coming in to meet with the Board regarding their ideas.