

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 755

FINAL OFFER RATE REVIEW

POST-EX PARTE PERIOD COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

The Association of American Railroads (“AAR”) respectfully submits these comments in response to the filed summaries of ex parte meetings held pursuant to the Board’s decision on May 15, 2020.¹ In that decision the Board invited ex parte discussions to explore issues surrounding the Board’s proposed Final Offer Rate Review (“FORR”) procedure and issues surrounding the Board’s arbitration program. AAR is a trade association that represents the interests of North America’s major freight railroads, and often presents comments and testimony in Board proceedings. AAR and its freight member railroads have a strong interest in this proceeding to ensure the Board’s rate reasonableness process conforms to the law and is guided by sound economics.

As discussed below, no summary filed adequately addresses the legal defects of the Board’s FORR proposal that have been identified in the AAR opening and reply comments. These comments also underscore that shippers’ summaries indicate support for reforming the Board’s voluntary arbitration program to make it more attractive to parties to resolve rate

¹ *Final Offer Rate Review*, EP 755 (STB Served May 15, 2020) (*FORR Ex Parte Notice*).

reasonableness disputes. Finally, the comments address several suggestions from the meeting summaries that are either unsupported by the facts or that have already been addressed by the Board in separate proceedings.

DISCUSSION

A. FORR Defects Cannot Be Remedied.

As AAR has repeated throughout this proceeding, FORR as proposed by the Board is impermissible under the statute. Though some shipper interests generally claimed that the Board has authority to adopt FORR, no commenter has established the legal basis on which the Board could adopt an approach to evaluating rate reasonableness that is not authorized by, and indeed conflicts with, the Board's governing statute.² As outlined in the AAR's Opening Comments, the Board's statutory authority to adjudicate rate disputes is a multistage process dictated by the statute itself.³ First, to even consider if a rate is unreasonable, "the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies."⁴ Second, if market dominance is found, the Board "may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation."⁵ Third, section 10701(d)(1) directs that "the rate established by such carrier for such transportation must be reasonable", and the statute requires due consideration be given to the listed Long-Cannon factors in making that determination of reasonableness.⁶ In addition, the Board must

² NGFA Summary, Chairman Begeman at 2 ("NGFA also discussed the statutory authority and solid legal grounds it believes the Board has to implement FORR."); Olin Summary, Board Member Fuchs at 1 ("the Board has the authority to promulgate FORR"); Solvay Summary, Chairman Begeman at 1 ("FORR provides a practical framework to resolve rate disputes through a fair process.").

³ See AAR Opening Comments at 3-8.

⁴ 49 U.S.C. § 10707(b).

⁵ 49 U.S.C. § 10707(c).

⁶ 49 U.S.C. § 10701(d)(2).

“recogniz[e] the policy of this part that rail carriers shall earn adequate revenues” pursuant to section 10701(d)(2), and take into account the objectives of the Rail Transportation Policy under section 10101. Upon completion of these requirements and considerations in a “full hearing,” the Board has the statutory authority to “prescribe the maximum rate.”⁷ These statutory mandates cannot be satisfied in a FORR proceeding, and nothing proposed by shippers in their meetings suggests a basis to conclude otherwise.

Under the proposed procedure, the Board would not necessarily apply any of the constrained-market-pricing-based tests already established by the Board and approved by the federal courts, but instead would merely select the shipper’s or the rail carrier’s final offer. In developing the final offers, the parties may choose any methodology, including those not yet derived, to support their offer. While the Board promises that its “criteria for determining rate reasonableness of and choosing between the offers would be based on its consideration of 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”, it does not require the competing offers or methodologies incorporate such factors.⁸ Indeed, the final-offer decision-making proposal could actually prohibit the Board from carrying out its statutory duties. For example, as described in the AAR’s Opening Comments, “the Board’s approach will render it statutorily incapable of prescribing a maximum rate in the situation where the shipper’s offer is impermissibly low (i.e., when it falls below the level at which the carrier would recover 180% of its variable costs of providing the service), and the carrier’s offer is impermissibly high (i.e., when it is deemed unreasonable). In

⁷ See 49 U.S.C. § 10704(a)(1) (“[w]hen the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part ... does or will violate [Part A, Subtitle IV of Title 49], the Board may prescribe the maximum rate ... to be followed.”).

⁸ *Final Offer Rate Review*, EP 755 slip op. at 10 (STB Served Sept. 12, 2019) (NPRM).

that scenario, the Board would be unable lawfully to prescribe either of the offers as the maximum rate.”⁹ Because the Board impermissibly ties its hands on the front end, the Board removes its discretion and ability to meet the statutorily mandated process and factors for determining the maximum reasonable rate. The proposed process leaves it to the two parties to make a final offer, from which the Board may not deviate and to which the Board may not apply its own expertise.

Furthermore, the Board’s proposed procedure does not allow for the Board to hold a full hearing under section 10704, much less make a determination of what is a “reasonable maximum” under section 10707. Nothing in the meeting summaries provided by the commenters reflects a solution to those shortcomings, nor could they. With the process itself constraining the Board’s decision to two presentations, a “full hearing” requirement cannot be met as the adjudicator must retain her full decision-making powers, not artificially have her hands tied. Similarly, in a process that selects from one of two presentations, there is no Board determination of a reasonable –maximum—and certainly not one that takes full account of revenue adequacy or developed through application of the Long-Cannon factors—just a determination of what is closest to the reasonable maximum.¹⁰

While one commenter tries to dismiss these arguments by claiming “there is nothing in Title 49 that precludes the Board from applying these standards on a case-by-case basis, in a non-prescriptive manner” that is simply an incorrect interpretation and approach to statutory construction.¹¹ An administrative entity only has that authority with which Congress endows it,

⁹ See AAR Opening Comments at 16-17.

¹⁰ See *Id.* at 11-12.

¹¹ Olin Summary, Vice Chairman Oberman at 1.

so one must find the affirmative statutory authority to do something, not rely on the absence of statutory prohibitions.¹² And when Congress granted the Board authority to resolve rate reasonableness disputes, it did so with specific instructions as outlined above—instructions that cannot be followed using final-offer decision-making.

One commenter attempts to justify the implementation of FORR because “the Board (not an arbitrator) decides a case by applying the standards set forth in the Interstate Commerce Act” and that “applying a principle-based, non-prescriptive criteria on a case-by-case basis is entirely appropriate and consistent with the approach by the Board in making reasonableness determinations in other types of adjudications.”¹³ This argument misses the point. In the rate context, the elastic term “reasonable” has specific meaning.¹⁴ In addition, Congress has clarified that in judging the reasonableness of rail rates, the Board must take into account its charge to assist carriers in earning adequate revenues and other specific factors.¹⁵ Further, as outlined above, the statutory considerations required of a rate reasonableness determination cannot be properly accounted for in an either-or process of baseball-style arbitration. While the Board may endeavor to apply the standards of the Interstate Commerce Act in selecting between its two choices, it may not have the opportunity to do so, based on the binary choice presented by the parties.

¹² See AAR Opening Comments at 8-11; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)(an agency “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.”).

¹³ Olin Summary, Vice Chairman Oberman at 1.

¹⁴ See Lawrence J. Spiwak, *Ensuring Due Process at the Surface Transportation Board*, The Federalist Society Review, vol. 21, at 138-139 (2020).

¹⁵ See 49 U.S.C. § 10701(d).

Beyond the lack of statutory authority granted to the Board, the FORR proposal implicates Constitutional concerns of due process and vagueness, and is arbitrary and capricious.¹⁶ Specifically, an agency adjudicator cannot adopt decisional methods that reject fundamental elements of an agency adjudication. Failure to provide any meaningful standards renders the proposal unconstitutionally vague and deprives railroads of due process rights of fair notice as to what the Board may deem unreasonable in any particular case.¹⁷ By allowing the parties to present a brand new methodology to determine the reasonableness of the rate challenged without any notice to the defendant, there is no ability for railroads to conform their behavior *ex ante* to the regulation. Similarly, as noted previously by the AAR, a regulation must be sufficiently predictable in its application “so that those enforcing the law do not act in an arbitrary or discriminatory way,’ ... and the Board’s refusal to commit to a decision-making methodology falls far short of this standard.”¹⁸ Contrary to Olin’s claim that “there is nothing inherently arbitrary in this selection process, so long as the Board provides an explanation for its decision that comports with the requirements of the Administrative Procedure Act”¹⁹, “[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through

¹⁶ See AAR Opening Comments at 15-19.

¹⁷ See *id.* Even the USDA’s summary recognizes concern with the vagueness of the Board’s proposed process, stating “USDA believes the Board could be more explicit in their final rulemaking about the types of actions that represent a violation of those principles.” USDA Summary, Board Member Fuchs at 2.

¹⁸ AAR Opening Comments at 19 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) and *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997)).

¹⁹ Olin Summary, Chairman Begeman at 2 (noting in addition “that due process and Administrative Procedure Act requirements are met as the parties have an opportunity to reply, and the complainant would retain the burden to establish market dominance and rate unreasonableness, subject to normal appeals.”). As the AAR explained previously, “Because the rule of law requires clear legal standards that are known in advance—rather than standards that are developed ad hoc and revealed only when the decision is announced—FORR is arbitrary and capricious under the APA, as well as unconstitutionally vague under the Due Process Clause.” AAR Opening Comments at 20-21.

subsequent less formal ‘interpretations.’”²⁰ Such would be the case here. Were the Board to finalize FORR, there would be no way to know what methodology would be applied in a FORR case, and no *post hoc* case-specific explanation could fix that flaw.

B. Shipper Meetings Confirm that Changes to the Board’s Arbitration Program Could Make It More Attractive as a Method to Resolve Rate Disputes.

In the NPRM, the Board expressed its desire to provide a “procedure to determine rate reasonableness for smaller cases, thereby providing faster, less costly review of claims of unreasonable railroad rates.”²¹ Shipper meeting summaries indicate shippers welcome such a procedure.²² A reformed arbitration program could meet the Board’s stated goals, without presenting the legal problems arising from FORR.²³ Implementing a voluntary arbitration program that incentivizes carrier participation would give all shippers access to a quick and inexpensive rate reasonableness process. Some commenters suggest that FORR and arbitration should be implemented in parallel.²⁴ However, adding an improved arbitration option does not

²⁰ *Paralyzed Veterans of Am.* at 584.

²¹ NPRM at 7.

²² See US Wheat Summary, Chairman Begeman at slide 11 (“Current options available to challenge rates are too costly, time consuming and invite railroad retaliation”); USDA Summary, Vice Chairman Oberman at 1 (“Existing processes are lengthy and expensive”); Olin Summary, Board Member Fuchs at 1 (Olin explained “stressed that obtaining reasonable rail rates was more critical than ever”); Solvay Summary, Vice Chairman Oberman at 1 (Solvay “seeks a fair process for rate review that would be cost-effective, efficient and handled within a fixed period”).

²³ See *FORR Ex Parte Notice* at 2 (“The Board wishes to explore the issues raised in CN’s comments and is interested in discussing whether, and if so, how, its arbitration program, see 49 C.F.R. part 1108, could be further modified so as to provide a practical and useful alternative dispute resolution mechanism, particularly for stakeholders with smaller rate disputes.”).

²⁴ See Letter from Jeffrey O. Moreno, on behalf of The Fertilizer Institute, to Chairman Ann D. Begeman, et al., at 1 (July 23, 2020) (“FORR and arbitration can and should be considered in parallel.”); Olin Summary, Chairman Begeman at 3 (“any further consideration of such new voluntary arbitration rules to supplement FORR could take place in a separate proceeding that would likely take considerable time and effort to resolve many complex issues.”); NGFA Summary, Chairman Begeman at 1 (“NGFA stated that it believed strongly that both an FORR and an arbitration-based approach had merit and could and should operate side-by-side to provide shippers with recourse to challenge rates they deem unreasonable and noncompetitive.”).

resolve the legal flaws in FORR. Focusing on fixing concerns with the voluntary arbitration program is a reasonable path forward to achieve the Board's stated objectives and one that does not raise the same legal challenges implementation of FORR would invite.²⁵

Many commenters expressed interest in a workable arbitration program. Solvay, which “probably wouldn’t use FORR”, explained with regard to arbitration that “it would need to see a proposal on arbitration before taking an official position, but is seeking a dispute resolution process that’s fair [which] would include things like neutral arbitrators and a structure that would include things like reasonable deadlines and access to information.”²⁶ Olin explained it “does not oppose arbitration in concept.”²⁷ NGFA explained “it believed strongly that ... an arbitration-based approach had merit.”²⁸ Even USDA noted “[it] supports private-sector solutions, such as arbitration, as a means of resolving disputes, including those over rates.”²⁹ US Wheat also noted shippers “need new and creative options to challenge rail rates.”³⁰ And, on arbitration, it “stated it would review this option.”³¹ Unlike FORR, every entity that met with the Board expressed some level of support or openness to an arbitration solution. Thus, the Board should commit its limited resources to improving the voluntary arbitration program of the Board.

²⁵ Cf. Olin Summary, Chairman Begeman at 2-3 (arguing that a number of issues existed to making arbitration useful, and therefore supporting the implementation of FORR instead).

²⁶ Solvay Summary, Chairman Begeman at 1.

²⁷ Olin Summary, Vice Chairman Oberman at 2.

²⁸ NGFA Summary, Board Member Fuchs at 1.

²⁹ USDA Summary, Board Member Fuchs at 1.

³⁰ US Wheat Summary, Chairman Begeman at slide 11.

³¹ US Wheat Summary, Vice Chairman Oberman at 1.

In that vein, several commenters agreed there were ways to improve the current arbitration program to make it attractive to parties for resolving rate reasonableness disputes. As noted previously by the AAR, confidentiality of decisions is an important aspect of arbitrations. Given that arbitration is voluntary, private dispute resolution that is not an agency adjudication and not intended to be precedential, there is no need for publication of the decisions. Olin incorrectly assumes that railroads are opposed to confidentiality of decisions.³² Similarly, Olin incorrectly notes that railroads want awards made public.³³ The lack of confidentiality in the Board's current arbitration program has stymied railroad participation and is inconsistent with the private dispute resolution nature of voluntary arbitration. The Board's rule should allow for confidentiality of arbitration decisions and awards but could incorporate appropriate reporting to the Board to monitor the progress of the program.

Shippers also agree with the railroads that changes to the roster of arbitrators currently published by the Board are warranted. In its summary, Olin "stressed that the STB's arbitration roster list is very small, and the availability of truly neutral arbitrators is limited."³⁴ Similarly, USDA noted that "NGFA's [arbitration] system could work [as an example for the Board] because the process ... involves arbitrators knowledgeable in both the shipping (agricultural, in

³² See Olin Summary, Chairman Begeman at 3 ("Olin added that it also conflicts with the railroads' prior strong opposition to confidentiality in the arbitration process."); cf. AAR Supplemental Comments, *Hearing on Revenue Adequacy*, EP-761, et. al. at 34-35 ("The lack of popularity of the voluntary arbitration program may be attributed, in part, to several deterring features of the program that likely keep railroads, shippers, or both away.... First, the program is not confidential.").

³³ See Olin Summary, Chairman Begeman at 3 ("Olin also noted that the railroads have strongly urged the Board to make arbitration awards public as a means to discourage extreme positions and encourage settlement, to create incentives for arbitrators to render thoughtful, well-reasoned decisions, and to promote transparency of the arbitration process."); cf. AAR Supplemental Comments, *Hearing on Revenue Adequacy*, at 35 ("Ensuring confidentiality for the arbitration program would significantly lower the risk of agreeing to arbitrate because, whichever side wins, the other side does not have to worry about a damaging public result that they will have limited ability to appeal.").

³⁴ Olin Summary, Chairman Begeman at 3.

this case) and carrier industries.”³⁵ These positions lend support to the railroads’ suggestion that the arbitration pool be expanded. While some note the reality that the statute requires arbitrators to be selected from the Board’s list as a hurdle, it is not insurmountable.³⁶ The Board could easily expand its list of arbitrators to include more individuals or cross-reference to a list of individuals from qualified organizations, such as AAA or JAMS.³⁷ This would address concerns expressed by shippers and railroads alike.

Shippers also shared railroad concerns with market dominance issues. Olin “expressed that under 49 U.S.C. § 11708, the arbitration does not start until after the Board determines market dominance, which would delay proceedings.”³⁸ Railroads agree that Board proceedings on market dominance could delay what is intended to be a quick and efficient process.³⁹ Given the Board’s recent issuance of the streamlined market dominance standards, it could allow the arbitrators to apply those standards to determine market dominance.⁴⁰ .

Making these changes to the Board’s current arbitration program would not only address some of the hurdles to participation by the railroads, but the time and cost concerns expressed by others as well.⁴¹ These reforms would ensure an expeditious and efficient process to resolve rate

³⁵ NGFA Summary, Vice Chairman Oberman at 3.

³⁶ Olin Summary, Board Member Fuchs at 2.

³⁷ See AAR Supplemental Comments, *Hearing on Revenue Adequacy*, EP 761, et. al., at 35 (“the arbitrator pool for the arbitration program is much too limited.”).

³⁸ Olin Summary, Chairman Begeman at 2.

³⁹ See AAR Supplemental Comments, *Hearing on Revenue Adequacy*, EP 761, et. al., at 35 (“If the parties could include the issue of market dominance in the arbitration process, money and time could be saved, and parties may be more likely to opt into the arbitration program.”).

⁴⁰ If the Board believes that § 11708 would require that the Board, rather than an arbitrator, make the market dominance determination, it could explore an exemption from that requirement pursuant to its broad authority under 49 U.S.C. § 10502.

⁴¹ See US Wheat Summary, Chairman Begeman at 1 (expressing concerns about the “time and cost” of arbitration).

disputes, without the legal complications presented by FORR. In contrast to the suggestion by some that FORR is the answer to fixing problems with arbitration, AAR proposes the Board reform its voluntary arbitration program, which is congressionally authorized and poses less risk that any new procedure will be caught up in lengthy litigation.

C. Several Comments Are Either Unsupported or Addressed in Other Proceedings.

A number of commenters make arguments that are unsupported or inappropriate in this context, including a desire that the Board “level the playing field”, raise the FORR limit on relief, and make certain market-dominance related changes.

Several commenters suggested that FORR or some simplified rate reasonableness standard was needed to “keep railroads honest” or “level the playing field.”⁴² Such statements, in addition to being unfair and offered without support, reflect a fundamental misunderstanding of the role of the Board. The Board’s role as defined by Congress is to judge the lawfulness of a challenged rate in certain circumstances. The Board’s role is not to measure and manage the respective bargaining power of shippers and railroads. The regulatory power of the Board exists for when there is a market failure in a particular instance, not so the Board can put its finger on the scales of the marketplace.

A few commenters also request that the FORR relief limit be raised or eliminated altogether.⁴³ Putting aside the fact that FORR is not authorized by statute, violates Due Process, and is arbitrary and capricious, no evidence has been provided to justify any increase in the relief

⁴² See Solvay Summary, Vice Chairman Oberman at 1 (“Solvay seeks a fair process that is available for use when necessary to keep railroads and shippers honest.”); Olin Summary, Board Member Fuchs at 1 (“[FORR] will help create a more level playing field for negotiations with the railroads.”).

⁴³ See Olin Summary, Vice Chairman Oberman at 1 (“Olin emphasized its preference that there be no dollar cap for recovery on individual lanes.”); US Wheat Summary, Chairman Begeman at 1 (“USW believed increasing the recovery cap would improve the proposal and allow greater use of FORR by wheat shippers.”).

limitation. The Board, historically, has justified relief limits based upon the precision of the rate case methodology.⁴⁴ Here, the Board explained that while the rationale may not neatly apply for FORR, as FORR lacks a governing methodology altogether, “there is merit in setting a cap for FORR by considering it within the framework of pre-existing rate reasonableness methodologies.”⁴⁵ Nothing in the summaries justifies a change to that reasoning.

USDA makes several market-dominance related suggestions beyond the scope of this proceeding. USDA suggests that “Price mark-ups represent an economically valid way to detect market dominance ... [and that the Board] could implement a revenue to variable cost (R/VC) screen at a higher threshold, where a complainant would have a presumption of market dominance.”⁴⁶ The Board rejected such suggestions in its recent decision in EP-756, explaining “an R/VC ratio above 180%, by itself does not indicate clearly whether the complainant lacks effective competition from other modes of transportation.”⁴⁷ The Board also found with regard to the benchmarking approach that “the prima facie factors that it is adopting account for various alternative modes of transportation and would be strong indicators where market dominance is reasonably likely.”⁴⁸ While these issues are outside the scope of this proceedings, the Board’s

⁴⁴ See NPRM at 15 (“The Board established its prior caps based on the cost of litigating a case using the next more complicated and precise procedure: a cap on the Simplified-SAC methodology (later removed) was based on the cost to bring a SAC case, and a lower cap for the Three-Benchmark methodology was based on the cost to bring a Simplified-SAC case. See *Simplified Standards*, EP 646 (Sub-No. 1), slip op. at 28. In setting these limits, the Board attempted to strike a balance between providing simplified methods that permit complainants to seek protection from unreasonable rates, while encouraging use of the most precise approach feasible for the amount in dispute. *Id.* at 35; see also *id.* at 52 (explaining that this approach represents “sound regulatory policy” by balancing the impracticability of using a more complicated procedure given its cost against the impropriety of judging large disputes under what might be considered a less accurate methodology).”).

⁴⁵ NPRM at 15.

⁴⁶ USDA Summary, Vice Chairman Oberman at 1-2.

⁴⁷ *Market Dominance Streamlined Approach*, EP-756 at 30 (STB served Aug. 3, 2020).

⁴⁸ *Id.*

recent finalization of a streamlined market dominance approach should ameliorate USDA's concerns.

CONCLUSION

The Final Offer Rate Review proposal is arbitrary, capricious, and contrary to law. Therefore, the Board should withdraw its notice of proposed rulemaking. AAR strongly encourages the Board to pursue appropriate reforms to its arbitration program to properly address the Board's concerns with regard to small rate cases.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer', is written over a horizontal line.

Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller Jr. (*admitted in Maryland*)
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2100

*Counsel for the Association of
American Railroads*

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