

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 755

FINAL OFFER RATE REVIEW

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS
ON THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING**

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INTRODUCTION

The Association of American Railroads (“AAR”) respectfully submits these comments in response to the Supplemental Notice of Proposed Rulemaking (“SNPRM”), served on November 15, 2021, in which the Board offers its legal defense of “Final Offer Rate Review” (“FORR”) and makes minor modifications to its original proposal. 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 rulemaking and in ensuring that the Board’s rate reasonableness process conforms to the law and is guided by sound economics.

The SNPRM confirms that FORR would be unlawful. Congress did not authorize the Board to adopt baseball-style arbitration techniques as a means of prescribing the maximum rate a rail carrier may charge a shipper, and the Board’s approach conflicts with the governing statutes. It would also signal a radical departure from the Board’s longstanding approach of attempting to replicate market outcomes after a full hearing that gives due consideration to a host of statutorily-required factors. And the particulars of the Board’s proposal—including its “choose-your-own-methodology” approach, along with litigation deadlines so short as to be coercive—render FORR arbitrary and capricious under the Administrative Procedure Act, and unconstitutionally vague under the United States Constitution.

The Board should abandon FORR and focus instead on developing a voluntary arbitration program for small disputes. *See* EP 765, *Joint Petition for Rulemaking to*

Establish a Voluntary Arbitration Program for Small Disputes (STB served Nov. 15, 2021). The Board issued the SNPRM precisely so that it could “ensure parallel consideration” of a voluntary arbitration program alongside FORR. SNPRM at 3. Especially if the Board were to approve a new voluntary arbitration program as a way of resolving small rate disputes, there is no reason to adopt FORR—a misguided and unlawful scheme that will only generate confusion, uncertainty, dissatisfaction, and protracted litigation as the FORR construct is challenged in the federal courts.

BACKGROUND

In its September 12, 2019 Notice of Proposed Rulemaking, the Board radically departed from its longstanding historic approach to rate reasonableness determinations. The Board’s FORR proposal rejected Constrained Market Pricing—an approach that safeguards the railroads’ operating efficiency and financial health, while at the same time ensuring reasonable rates for shippers on routes that lack effective competition—in favor of the arbitration technique used to determine the salaries of professional baseball players.

Under FORR, the Board would decide whether the complainant has demonstrated market dominance based on the expedited procedures proposed in EP 756, but the Board would not apply its established rate reasonableness tests and would not independently determine the maximum rate. Rather, the Board would simply choose either the shipper’s or the railroad’s final offer. Moreover, the Board would not reveal in advance the methodology it would use to decide between the final offers. Parties could “choose” their own preferred methodology to support their offer, and could use existing

methodologies, present “revised versions of the Board’s existing rate review methodologies,” or even create “new methodologies altogether.” NPRM at 10, 11.

AAR filed comments on November 12, 2019. AAR explained that the Board lacked statutory authority to adopt FORR, and that the Board’s proposal conflicted with the governing statutes. *See* AAR Comments at 7-17. AAR also explained that the proposal was arbitrary and capricious, as well as unconstitutionally vague, because the Board would be making rate reasonableness determination based on a standard that would not be disclosed in advance. *See* AAR Comments at 17-21. Finally, AAR explained that FORR was fundamentally unfair, was not confined to “smaller cases,” and suffered from a host of additional deficiencies. *See* AAR Comments at 21-26. AAR filed reply comments on January 10, 2020, and subsequently participated in meetings with Board Members.¹

On November 12, 2021, the Board issued its SNPRM. The revised proposal is almost identical to the Board’s initial proposal. The Board adjusted several deadlines and modified the discovery procedure by abolishing adverse inferences and permitting motions to compel. Aside from those changes, the Board has adhered to its original proposal, and continues to assert that FORR is a permissible way for the Board to resolve rate disputes.

¹ AAR reaffirms and incorporates in these comments all of its prior comments and objections to the proposed rule.

DISCUSSION

I. The Board Lacks Statutory Authority To Adopt Final Offer Rate Review.

“Administrative agencies are creatures of statute [and] possess only the authority that Congress has provided.” *Nat’l Fed. Of Indep. Bus. v. OHSa*, 594 U.S. ___, ___ (Jan. 13, 2022) (per curiam) (slip op., at 5). Congress has not authorized the Board to resolve rate disputes by using baseball-style salary arbitration techniques. In fact, not only is FORR unauthorized, it conflicts with the governing statutes. Nothing in the SNPRM can cure FORR’s fundamental fatal flaws.

A. Congress Has Not Authorized The Board To Adopt FORR.

The Board purports to find authority for FORR in the statute empowering the Board to adjudicate reasonableness and prescribe maximum rates. The statute provides:

When 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, or that a classification, rule, or practice of that carrier, does or will violate [Part A, Subtitle IV of Title 49], the Board may prescribe the maximum rate, classification, rule, or practice to be followed.

49 U.S.C. § 10704(a)(1). Part A in turn provides that if a rail carrier has market dominance, its charged rate must be “reasonable” in light of certain specified factors and considerations. *Id.* § 10701(d)(1)-(d)(2); *id.* § 10101.

Congress has not authorized the Board to adjudicate rate disputes through a final-offer process. Final-offer decisionmaking is an arbitration technique; it is not the way judges and agency adjudicators decide cases. A judge or administrative adjudicator decides the correct outcome as required under the governing law; it does *not* decide

which party has proposed a result that comes closest to the correct outcome. Although parties may consent to final-offer decisionmaking as a way of resolving disputes, a judge or agency adjudicator cannot force it on the parties. Here, Congress has directed the Board to conduct a “full hearing” and, where market dominance and unreasonableness are established, it “may prescribe the maximum rate.” 49 U.S.C. § 10704(a)(1). The statute does *not* allow the Board to abandon its own best judgment by confining its decisional outcomes to the two offers proposed by the parties. Making a decision to resolve disputes through a final-offer process does not amount to the Board exercising its discretion and expertise in prescribing the maximum rate.

The Board notes that Congress has authorized it “to maintain one or more ‘simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [stand-alone cost] presentation is too costly, given the value of the case.’” SNPRM at 12 (quoting 49 U.S.C. § 10704(d)(3)). But the quoted authority is limited to “methods for determining the reasonableness of challenged rates”; it does not extend to *prescribing* the maximum rate, which happens only once the carrier has been found to have market dominance and the challenged rate has been found unreasonable. Moreover, even if the statute’s plain language could be twisted to encompass prescribing the maximum rate, that does not mean that *any* “simplified and expedited method” the Board could dream up is permissible. While the Board may conduct its adjudications using a streamlined procedure, it cannot adopt an approach that is not in any sense an adjudication—i.e., a proceeding in which the agency renders its own independent judgment as to the maximum reasonable rate—but is rather a

settlement-forcing arbitration technique. The Board admits that no other agency decides cases using a final-offer procedure, SNPRM at 13 n.23, further underscoring that the Board has gone awry in announcing its intent to adjudicate cases in this unprecedented and impermissible manner.

The Board's attempt to distinguish *Stone v. U.S. Forest Service*, 2004 WL 1631321 (D. Ore. July 16, 2004), falls short. There, the court rejected the Department of Agriculture's effort to adopt baseball-style arbitration, finding it unauthorized by the governing statute. The scheme in *Stone* involved competing land appraisals prepared by the government and the landowner. The Board claims that *Stone* turned on the risk the government would simply choose its own appraisal without fairly considering the landowner's. SNPRM at 14. To this end, the SNPRM quotes *Stone*'s statement that "in all probability the Forest Service would simply ignore [the landowner's] report and rely exclusively upon the report of its own appraiser." *Id.* (quoting *Stone*, 2004 WL 1631321 at *3.) But the SNPRM, in a classic example of selective excerpting, omits the very next sentence of the opinion, which reads: "In essence, this was a 'baseball-arbitration'-style procedure, in which the decisionmaker simply chooses between the two reports, even though the actual fair market value may be somewhere in between those two values." *Stone*, 2004 WL 1631321, at *3. Then, in its conclusion, the *Stone* court made abundantly clear that the flaw in the agency's scheme was *not* the danger of one-sided outcomes, but rather the lack of statutory authorization for the agency to resolve disputes through baseball-style arbitration:

I find nothing in the applicable statutes that condones the procedures utilized by the agency here The agency ostensibly sought to calculate the fair market value of Plaintiffs' property. "Baseball-style arbitration" is not a procedure well-tailored to that end. The [statute] does not command the agency to select the "better" of the two appraisals. Perhaps neither appraisal is on the mark, and fair market value is somewhere in between.

Id. at *7.

That the SNPRM contains a lengthy discussion of *Stone* that plucks sentences out of context and simply *ignores* the critical language quoted above is a telling indicator that *Stone* is not, as the Board would have it, "readily distinguishable." SNPRM at 13. It is directly on point. Just as Congress did not authorize the Department of Agriculture to resolve disputes through a baseball-style arbitration technique, it has not authorized the Board to do so.

The Board denies that FORR amounts to the Board "abandoning its statutory duty to apply the law in determining, based on its own best judgment, the maximum reasonable rate." SNPRM at 15 (quotation marks omitted). The Board states that "AAR's argument ignores the fact that adjudicators routinely rely on or adopt the parties' submissions or decisional framework." *Id.* Of course they do; that is why parties file legal briefs, in hopes that the adjudicator will be persuaded by, and adopt, their views. But what adjudicators do *not* do is *bind* themselves, by regulation, to adopting the views of one of the parties—even in cases where the adjudicator himself concludes the law requires a result other than the ones the parties proposed. As the D.C. Circuit stated in a dispute between BNSF and the ICC, "no adjudicator would expect to be able to rely entirely on one side's analysis." *Burlington Northern R. Co. v. ICC*, 985 F.2d 589, 599

(D.C. Cir. 1993). The Board argues that “nothing in [*BNSF v. ICC*] stands for the proposition that the Board may not accept one party’s proffered rate where it finds it superior to the rate offered by the other party.” SNPRM at 17. But no one is arguing that the Board cannot accept one of the parties’ proffered rate; the point is that the Board cannot abdicate its statutory duty to prescribe the maximum reasonable rate by *confining* its decisional outcomes to the parties’ offers.

The Board has no persuasive response to the obvious problem posed by situations where the maximum reasonable rate falls *between* the parties’ offers. SNPRM at 16-17. The Board does not dispute that in that common situation, FORR *disables* the Board from exercising its statutory duty to “prescribe the maximum rate.” 49 U.S.C. § 10704(a)(1). Instead, the Board advances a non sequitur—that it would be making “an exercise of judgment” merely by adopting FORR as “a process that achieves the Board’s various statutory objectives.” SNPRM at 16. But this misses the point: Congress tasked the Board with prescribing the maximum reasonable rate (once the shipper establishes market dominance and the unreasonableness of the challenged rate) based on a variety of considerations, including revenue adequacy, the Long-Cannon factors, and the Rail Transportation Policy. *See* 49 U.S.C. §§ 10704(a)(2), 10701(d)(2), 10101(3). Congress did *not* specify “the litigation positions of the shipper and carrier” as relevant considerations, let alone suggest that those are the only two possibilities for the “maximum permissible rate.”

Congress plainly contemplated that the Board would bring its expertise to bear, and render its own independent judgment—informed but not controlled by the parties’

submissions—in prescribing the maximum permissible rate. By denying that it is obligated to “perform a rate analysis distinct from any party’s pleadings,” SNPRM at 17, and by asserting that it can discharge its statutory duty merely by choosing the offer that comes closest to what the Board in its own judgment would deem the maximum permissible rate, the Board disclaims the role of independent adjudicator.

The SNPRM notes that the Board uses a final offer procedure as part of the Three-Benchmark test. SNPRM at 15. But as the Board concedes, even in Three-Benchmark, the final-offer component “is only one part of the rate reasonableness approach as opposed to providing the overall framework, as the Board is proposing [in FORR].” *Id.* at 5. Likewise, the SNPRM asserts that “[t]he simple fact is that the Board’s exercise of discretion to offer FORR would not constrain its authority to prescribe a maximum rate under § 10704(a)(1).” SNPRM at 15. That is clearly wrong. By adopting FORR, the Board would be constraining its rate-setting authority by limiting itself to the two outcomes proposed by the parties.

AAR’s opening comments noted that even if final-offer procedures were an acceptable method of retrospective dispute resolution, there is no basis for using them with regard to the Board’s “legislative function” of setting rates prospectively. *See Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) (unlike backward-looking awards of reparations, prescribing a maximum rate is legislative and forward-looking). The Board offers little in response. *See* SNPRM at 17 n.30. Even if final-offer decisionmaking were a permissible way for an agency to *adjudicate* retrospective awards of reparations, it plainly is not a permissible way for an agency to

exercise its *legislative* rulemaking function. The Board has identified no authority suggesting that final-offer procedures can be used by agencies as a way of legislating or rulemaking.

B. FORR Conflicts With Governing Statutes.

The Board's proposal not only lacks congressional authorization, it conflicts with the governing statutes in many respects. It conflicts with the requirement that the Board give parties a "full hearing," as well as with the statutory mandate that the Board reach its own independent judgment in setting the maximum reasonable rate. *See* 49 U.S.C. §§ 10704(a)(1), 10707(c). FORR also conflicts with 5 U.S.C. § 556(d), which requires the shipper to bear the burden of proof.

1. The Board does not dispute that 49 U.S.C. § 10704(a)(1) requires it to give parties a "full hearing." Nor does the Board dispute that "Congress, in requiring a 'full hearing,' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature," *Morgan v. United States*, 304 U.S. 1, 12 (1938), and that it would violate "judicial standards" for a judge to announce that going forward he would decide all cases through baseball-style arbitration procedures. The Board attempts to distinguish *Morgan* by claiming that "[t]he concerns underlying the Supreme Court's decision . . . are not present with respect to FORR," noting that *Morgan* involved a situation where the regulated party was not given the chance to hear and rebut the agency's claims. SNPRM at 20-21. But the opportunity to confront your opponent's claims is simply one example of a "judicial standard" that applies in a "full hearing."

Morgan, 304 U.S. at 12. Another “judicial standard” is that the adjudicator will act as an adjudicator, not as a baseball arbitrator.

The Board demolishes an army of straw men. It argues that the “full hearing” requirement does not trigger the formal trial-type procedures of APA sections 556 and 557. SNPRM at 19. But no one is arguing to the contrary. Next, the Board argues that it has “flexibility” in structuring its hearings. *Id.* at 20. Again, no one is arguing to the contrary. The Board also relies on *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990), for the point that “courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.” But the right not to be forced into a baseball-style arbitration process is not a “specific procedural requirement” layered on top of existing APA procedural requirements. Rather, it is inherent in the nature of a “full hearing” that the adjudicator will make his own judgment as to the legally correct outcome, rather than artificially limit his decisional range to the two outcomes proposed by the parties. Moreover, even if FORR were not prohibited under *APA* standards for informal adjudications (and it is), the requirement that “the Board . . . prescribe the maximum rate” is enshrined in 49 U.S.C. § 10704(a)(1). Finally, forcing the parties into a final-offer scheme violates the Due Process Clause of the United States Constitution.

FORR conflicts with 49 U.S.C. § 10704(a)(1) in another respect: FORR prevents the Board from “prescrib[ing] the maximum rate” in cases 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). The Board does not appear to dispute this point. *See* SNPRM at 22. The Board agrees that a shipper who submits an offer below the 180% level would not be entitled to relief, and does not dispute that it cannot prescribe a maximum rate that is unreasonably high. *Id.* Accordingly, FORR would render the Board powerless to resolve the dispute, in violation of 49 U.S.C. § 10704(a)(1), which provides that the Board “may prescribe the maximum rate” in such a circumstance.

Moreover, under 49 U.S.C. § 10707(c), the Board is statutorily charged with determining whether a challenged rate exceeds “a reasonable maximum for that transportation.” FORR does not permit the Board to bring its own independent judgment to bear in determining what “a reasonable maximum” rate would be. It conflicts with the statute for this reason as well.

2. FORR also conflicts with 5 U.S.C. § 556(d), which provides “the proponent of a rule or order”—here, the shipper—“has the burden of proof.” That is because when the Board assesses the reasonableness of the challenged rate under FORR, the shipper need not prove anything, as reasonableness (or not) will be determined when the Board simply chooses between the two offers.

The Board resists this conclusion, asserting that the shipper carries the burden of proof with regard to the first two elements of the inquiry—proving market dominance and the unreasonableness of the challenged rate. SNPRM at 21. But the Board does not dispute that with regard to the *third* element (choosing which of the two offers is the maximum reasonable rate), FORR relieves the shipper of the burden of proof. Even

assuming that the second and third elements can be resolved separately, relieving the shipper from the burden of proof is a clear violation of the APA. Even the Board admits that “complainants bear the burden of proof in rate reasonableness proceedings.” *Id.*

II. Final Offer Rate Review Is Arbitrary And Capricious.

The Board intends to decide FORR cases based on a standard that it will not disclose in advance. That renders FORR arbitrary and capricious under the Administrative Procedure Act, and unconstitutionally vague under the United States Constitution. A regulation must inform “regulated parties . . . what is required of them so they may act accordingly,” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), yet railroads have no way of knowing in advance what the Board might deem unreasonable, because it does not know how the Board will determine “reasonableness” in any given case.

The Board argues that FORR will generate predictable outcomes because in assessing reasonableness, the Board will “us[e] the same statutory criteria and economic principles applied in past rate cases using other processes.” SNPRM at 29. That argument is misplaced. The vagueness problems arise in large part from the fact that the Board allows shippers to choose their own methodology—either an existing one, or a new one of their own creation—that will determine the outcome of the proceeding. That the Board claims it will use the same “statutory criteria and economic principles” it has historically used does not provide predictability if the methodology used to determine how these criteria and principles are actually applied in a given case is kept under wraps until the end. Under FORR, it would be impossible for railroads to know in advance how

to conform their conduct to the law by charging a reasonable rate: the answer could be different depending on the governing methodology, which the Board will not reveal until it decides the case.

It is no answer to say that many rate cases “raise[] novel issues.” SNPRM at 29. The question here is whether the Board has provided sufficient clarity on the legal standard. There can be no dispute that it has not: the very fact that the Board will announce the “winning” standard at the end of the case by definition means that the standard cannot be known in advance. The Board contends that because it has identified “criteria” that might “signal to parties what rates might be found unreasonable,” FORR is located at an acceptable place on the “continuum of predictability with respect to litigation.” SNPRM at 31. As this discussion illustrates, even the Board’s attempted explanation of FORR is hopelessly vague. This is exactly what the D.C. Circuit had in mind when it stated that “[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’” *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

Parties will not even know the materials they must produce in discovery. Although the Board wisely jettisoned its original proposal to allow for adverse inferences if a party fails to produce requested discovery, its new proposal—to allow a single motion to compel (SNPRM at 36)—suffers from a similar flaw. The Board proposes that a party could compel discovery of material that is “relevant . . . to a methodology that the party may present in its opening submission.” *Id.* (“the material a party seeks in discovery depends to a significant extent on the methodology it plans to present”). But if

a party's methodology is ultimately rejected by the Board, there is no basis for compelling their opponent to produce discovery in service of it. Indeed, a party could propose a spurious methodology that calls for production of broad swaths of the other side's most confidential information, yet any objection could be denied as premature because the Board will remain silent until the end of the case when the winning methodology is revealed.

Finally, the NPRM contained a glaring omission: the Board ignored the Intervistas report, which focused on vagueness and lack of transparency in rejecting final-offer decisionmaking as an alternative way for the Board to decide rate disputes. *See Intervistas, An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, at 76 (2016). The Board belatedly addresses the Intervistas report in the SNPRM, but merely notes that other commentators were more supportive of a final-offer process, and concludes that "the Board is not bound to follow the recommendations of particular studies." SNPRM at 47-48. Nowhere does the Board explain *why* it believes Intervistas—which prepared its report at the Board's request—was wrong. That is not reasoned decisionmaking.

III. Final Offer Rate Review Is Fundamentally Unfair And Will Unduly Pressure Railroads To Reduce Reasonable Rates.

FORR requires the railroads to choose their poison. It forces them to either admit that their charged rate is unreasonable by submitting a lower "final offer"—or resist and run the risk that if the charged rate is found unreasonable, the shipper sets its own price for both past and future transactions.

The Board acknowledges that the risks are not reciprocal. Shippers are not faced with the same coercive pressure because they never risk paying a rate higher than the challenged rate. SNPRM at 23-24. But the Board defends its approach by contending that it has no choice because “[t]he lack of reciprocity is a result of the Board’s statutory mandate to regulate railroad conduct, rather than shipper conduct.” SNPRM at 24. That argument is mistaken because the Board’s other methods for determining rate reasonableness, such as Three-Benchmark, do not suffer from the same lack of reciprocal risks and do not exert the same coercive pressure on the railroads. Three-Benchmark allows for a wide variety of outcomes rather than the binary choice FORR creates, in which if the railroad’s challenged rate (or a lower rate) is rejected, the shipper effectively names its own rate. The SNPRM’s suggestion that shippers also face risks (such as the railroad concluding “that it has more latitude to set a higher rate,” or the possibility of estoppel in future litigation) is misplaced, as none of these risks remotely approach the severity of the risks the railroads face from an adverse outcome. SNPRM at 24.

Although the Board sensibly proposes to require a mandatory 20-day pre-complaint mediation period and to extend the discovery period by 14 days, even as modified the proposed timeline still does not give railroads sufficient time to prepare a meaningful defense. Railroads would have a mere 49 days to review the complaint, analyze the shipper’s proposed methodology, conduct discovery, develop their own methodology if necessary, conduct a rate reasonableness analysis, and formulate and submit a final offer. They would then have 10 days to prepare their reply, including their market dominance presentation, in cases where the shipper uses the streamlined market

dominance approach. Even allowing for the possibility that a motion to compel tolls the schedule, the compressed timeframe is inadequate, unreasonable, and unfair to the railroads.

IV. Final Offer Rate Review Is Not Limited To Small Cases.

The Board intends to provide a way for shippers to bring “small cases,” but the proposed \$4 million cap on relief does not limit FORR to small cases. For one thing, a \$4 million dispute is not a small case. For another, shippers are free to aggregate cases without limit. The Board offers little justification for its arbitrary \$4 million cap, effectively conceding that “it is not based on the cost of litigating the next-more-complicated method, on which the Board relied in setting relief caps for other rate reasonableness procedures.” SNPRM at 43. Nor does the Board dispute the risk of shippers aggregating cases to circumvent the cap, noting only that “[i]f disaggregation proved to be a problem, the Board could address it” in the future. SNPRM at 44. “Don’t worry—we will deal with the problem later” is not a reasoned explanation.

Moreover, the Board still has not identified substantial evidence that the problem it claims FORR addresses—that shippers lack a meaningful avenue for obtaining relief—even exists. The Board states that “the problem is illustrated by the lack of small rate cases *combined* with repeated shipper statements that they need rate relief but find the Board’s existing processes too cumbersome and expensive.” SNPRM at 10. Whereas the absence of small rate cases is indeed evidence, it could be evidence that tariff-based rates are generally reasonable. And the Board offers no reason why it is inclined to accept at face value unsupported claims from shippers that they have meritorious rate

claims they have chosen not to bring because the Board has not established rate-relief procedures sufficiently favorable to the shippers' interests. Indeed, from the railroads' perspective, most of these claims are effectively anonymous, making it impossible for the railroads to subject these self-serving claims to scrutiny.

V. Final Offer Rate Review Is Flawed In Other Ways.

The SNPRM does not adequately address two other problems with the Board's proposal.

First, the Board does not adequately address how FORR will affect the Board's statutory mandate to ensure revenue adequacy. *See* 49 U.S.C. §§ 10101(3), 10704(a)(2). The SNPRM states that "if a party submits an analysis that fails to explain how it accounts for revenue adequacy . . . the party would be less likely to prevail," and "the opposing party could draw attention to this problem in its reply." SNPRM at 27-28. The Board's "explanation" remains inadequate. If the railroad's offer is deemed "unreasonable," it is hard to understand how revenue adequacy would even be relevant if the Board is compelled to accept the shipper's offer. Moreover, the Board admits that it "could be true" that FORR will create a coercive downward force on rates, but blithely asserts that the same would be true about "any rate reasonableness process" that results in decisions favorable to shippers. SNPRM at 25. Not so. The difference is that FORR will create a far more severe downward force on rates, given that the scheme is unfair to railroads, creates massive uncertainty, imposes risks that are not reciprocal, and will result in prescribed rates that benefit shippers and bear no relation to market outcomes.

Second, the Board has not conducted a cost/benefit analysis of its proposed rule. The Board argues that Executive Order 12866’s cost/benefit mandate is not binding on it, and contends that it has “carefully weigh[ed] the benefits and burdens associated with particular aspects of the proposed FORR approach.” SNPRM at 49. But a generalized consideration of benefits and burdens concerning “particular aspects” of FORR is no substitute for a cost/benefit analysis that evaluates the proposal as a whole. Moreover, the Board offers no explanation as to why it has chosen to disregard the Department of Transportation’s recent rulemaking guidance, which states that “[r]ulemaking *shall include* ... [a]n assessment of the potential costs and benefits of the regulatory action . . . or a reasoned determination that the expected impact is so minimal or the safety need so significant and urgent that a formal analysis of costs and benefits is not warranted.” *Policies and Procedures for Rulemakings*, at 11 (Dec. 20, 2018). For the many reasons AAR identified nearly three years ago in its March 14, 2019 petition for rulemaking, which remains pending, the Board should incorporate cost/benefit analysis into its rulemakings. *See* EP 752.

CONCLUSION

The SNPRM leaves no doubt that Final Offer Rate Review is arbitrary, capricious, and contrary to law. The Board should withdraw the proposed rule and instead pursue a voluntary alternative dispute resolution process.

Respectfully submitted.

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