

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 755

FINAL OFFER RATE REVIEW

Docket No. EP 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE RELIEF

Docket No. EP 765

**JOINT PETITION FOR A RULEMAKING TO ESTABLISH A VOLUNTARY
ARBITRATION PROGRAM FOR SMALL RATE DISPUTES**

INDUSTRIAL MINERALS ASSOCIATION-NORTH AMERICA COMMENTS

Industrial Minerals Association-North America (“IMA-NA”) respectfully submits its comments in the above-captioned proceedings in accordance with the Supplemental Notice of Proposed Rulemaking (“SNPRM”) regarding *Final Offer Rate Review* (“FORR”) and the Notice of Proposed Rulemaking in *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes* (“Arb. NPRM”), Docket No. EP 765 (STB served Nov. 15, 2021). In the SNPRM, the Surface Transportation Board (“STB” or “Board”), in response to comments received on the Notice of Proposed Rulemaking (“NPRM”), *Final Offer Rate Rev.*, EP 755 et al. (STB served Sept. 12, 2019) and to ensure parallel consideration of its proposal in

Docket No. EP 755 in the Arb. NPRM, invited parties, through the SNPRM to comment on certain modifications to the rate reasonableness procedure, FORR, proposed in the NPRM, as well as other issues contained in the SNPRM. In the Arb. NPRM, the Board also asked for comments at the same time on the voluntary arbitration program proposed in that proceeding, also seeking to ensure parallel consideration of the two proposals.

IMA-NA commends the Board for taking this action to make rate cases more accessible for it and its affiliated companies and strongly supports the implementation of FORR as quickly as possible. In addition, IMA-NA commends the Board for its consideration of the Arb. NPRM but strongly urges the Board to eliminate any exemption for railroads participating in the voluntary arbitration program from the FORR process. Because the Board would like to ensure parallel consideration of the SNPRM and the Arb. NPRM, IMA-NA hereby submits its comments in both proceedings in one filing as the intertwined nature of these proposals warrants.

IDENTITY AND INTEREST

IMA-NA is a trade association that represents companies that mine, process and sell industrial minerals throughout North America. IMA-NA represents a diverse set of member companies engaged in mining and processing of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, lithium, mica, perlite, potash, quartz, salt, soda ash, sodium bicarbonate, talc, and wollastonite, and other minerals across North America. The industrial minerals produced by IMA-NA member companies are the raw material feedstock that are incorporated into a broad range of products, including among other things, container, food products, flat and specialty glasses, paint and coatings, ceramics, and a broad range of building products. Additionally, industrial minerals are used to make foundry molds and cores, which are in turn used to make metal shapes used to manufacture automobiles, SUVs and trucks, rail cars and almost all other items that have metal castings. The demand for many of these minerals from manufacturers is global, and the continued pressure member companies are feeling from the railroads in the form of unreliable service and higher rates is making it more difficult to compete in that global market.

Industrial minerals are low margin, high volume products. Member companies are heavily dependent upon a reliable and cost-effective transportation network, especially rail, and

are major shippers with the major rails. To help highlight that, in 2014, the nonmetallic minerals, except fuels category, made up \$1.5 Billion in total freight rail premiums.

As a result, IMA-NA has a very strong interest in having an accessible rate case process and seeing one implemented as soon as possible. IMA-NA commends the Board for taking an interest in promoting policies that remove barriers to accessing regulatory protection remedies and is extremely pleased that the Board has made this new simpler rate review process a real possibility.

FORR BACKGROUND

: In January 2018, the Board established its Rate Reform Task Force (“RRTF”), with the objectives of developing recommendations to reform and streamline the Board’s rate review processes for large cases and determining how to best provide a rate review process for smaller cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (“RRTF Rep.”). Among other recommendations, the RRTF included a proposal for a final offer procedure, which it described as “an administrative approach that would take advantage of procedural limitations, rather than substantive limitations, to constrain the cost and complexity of a rate reasonableness case.” RRTF Rep. 12. Versions of a final offer process for rate review have also been recommended by the U.S. Department of Agriculture (“USDA”) and a committee of the Transportation Research Board (“TRB”).

In the NPRM, the Board proposed to build on the RRTF recommendation and establish a new rate case procedure for smaller cases, the FORR procedure. *Final Offer Rate Rev.*, EP 755 et al. (STB served Sept. 12, 2019).

The Board received numerous comments on the NPRM, including comments by IMA-NA. By decision served on May 15, 2020, to permit informal discussions with stakeholders, the Board waived the general prohibition on ex parte communications between June 1, 2020, and July 15, 2020. Meetings took place during the specified period.

In light of the filed comments and information received in meetings with stakeholders, the Board issued the SNPRM to invite comment on certain modifications to the rate reasonableness procedure proposed in the NPRM, as well as other issues. The Board noted that

the SNPRM also will ensure parallel consideration of the modified FORR proposal with the proposal made in *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, EP 765 (STB served Nov. 15, 2021).

SMALL RATE CASE HISTORY

In the ICC Termination Act of 1995 (“ICCTA”), Congress directed the Board to “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost [(“SAC”)] presentation is too costly, given the value of the case.” Pub. L. No. 104-88, 109 Stat. 803, 810. In the Surface Transportation Board Reauthorization Act of 2015 (“STB Reauthorization Act”), Pub. L. No. 114-110, 129 Stat. 2228, Congress revised the text of this requirement so that it currently reads: “[t]he Board shall maintain *1 or more* simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3) (emphasis added). In addition, section 11 of the STB Reauthorization Act modified 49 U.S.C. § 10704(d) to require that the Board “maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.” More generally, the rail transportation policy (“RTP”) at 49 U.S.C. § 10101 states that, in regulating the railroad industry, it is the policy of the United States Government to, among other things, “provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” 49 U.S.C. § 10101(15).

In 1996, the Board adopted a simplified methodology, known as Three-Benchmark, which determines the reasonableness of a challenged rate using three benchmark figures. *Rate Guidelines—Non-Coal Proc.*, 1 S.T.B. 1004 (1996), *pet. to reopen denied*, 2 S.T.B. 619 (1997), *appeal dismissed sub nom. Ass’n of Am. R.Rs. v. STB*, 146 F.3d 942 (D.C. Cir. 1998). A decade passed without any complainant bringing a case under that methodology. In 2007, the Board modified the Three-Benchmark methodology and created another simplified methodology, known as Simplified-SAC, which determines whether a captive shipper is being forced to cross-subsidize other parts of the railroad’s network. *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff’d sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh’g*, 584 F.3d 1076 (D.C. Cir. 2009). In 2013, the

Board increased the relief available under the Three-Benchmark methodology and removed the relief limit on the Simplified-SAC methodology, among other things. *See Rate Regul. Reforms*, EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014). *Notwithstanding the Board's efforts to improve its rate review methodologies and make them more accessible, only a few Three-Benchmark cases have ever been brought to the Board, and no complaint has been litigated to completion under the Simplified-SAC methodology.*

The Board has recognized that, for smaller disputes, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016). As the Board stated in *Simplified Standards*, "[f]or some shippers who have smaller disputes with a carrier, even [Simplified-SAC] would be too expensive, given the smaller value of their cases. These shippers must also have an avenue to pursue relief." *Simplified Standards*, EP 646 (Sub-No. 1), slip op. at 16. Along similar lines, as the Board has previously stated, simplified procedures "*enable the affected shippers to avail themselves of their statutory right to challenge rates charged on captive rail traffic regardless of the size of the complaint.*" *Non-Coal Proc.*, 1 S.T.B. at 1057 (emphasis added).

In public comments, shippers and other interested parties have repeatedly stated that the Board's current options for challenging the reasonableness of rates do not meet their need for expeditious resolution at a reasonable cost. Moreover, because a contract rate may not be challenged before the Board, 49 U.S.C. § 10709(c)(1), some complainants shift from contract rates to tariff rates before bringing a rate case, and tariff rates may be higher than prior contract rates. That factor gives complainants a strong interest in having a rate case decided quickly, from start to finish.

In addition, over the last decade, non-coal carload shippers have brought numerous SAC cases to the Board to challenge their rates. The SAC process has proven to be essentially ineffective with respect to non-coal carload shippers, and the Board became increasingly frustrated with a broken process that had seemed to have run its course for all shippers except for

coal. An example of this frustration was made quite clear in one of the SAC-carload cases during this period in a dissent in 2016 by former Chairman Begeman:

While TPI filed one of the first carload traffic rate cases to be considered under the Stand Alone Cost (SAC) rate methodology, two other parties have since filed carload rate cases, lost their cases, sought reconsideration, and lost on reconsideration. In those decisions, I expressed my doubts about the SAC process, and my particular concern over whether carload traffic rates can even be judged under SAC (see Sunbelt dissent and DuPont reconsideration dissent). I cannot argue against today's finding that "TPI has not shown the challenged rates to be unreasonable under the SAC test." It remains to be seen, however, if any carload traffic shipper could make such a showing using the SAC methodology.

Although I will not oppose the ultimate finding here despite my strong reservations about SAC, and my disagreement on the market dominance approach used in this case, I cannot agree with all of the calls made in this portion of the case.

This case was filed in May 2010 and is but one example of how long the SAC rate case process can take. Therefore, it wasn't a surprise that Congress directed the Board to take actions to help expedite the SAC process in the STB Reauthorization Act of 2015. Some progress is being made. We have issued new rules to shorten rate review timelines in future SAC cases. We are also reviewing public comments that we sought at Congress's direction to assess whether procedures to expedite litigation in courts could help expedite SAC cases, in addition to other ideas to improve the SAC process.

But we need to do more than improve the Board's handling of SAC cases. Vice Chairman Miller and I are in agreement that the Board must focus its attention on finding SAC *alternatives*. Despite some economists' views that it is the "gold standard," I have yet to hear from even one rail shipper who believes the SAC methodology is a reasonable way to judge rail rates. After all, the SAC process is too costly, too time consuming, and too unpredictable.

We need to ensure that the Board's rate complaint procedures are accessible to *all* captive shippers of *all* types of commodities—whether large or small and whether shipped by unit train or carload. It may not be easy (or very fast) to ultimately develop a new approach, but it has to be a top Board priority. We finally are seeking comment on procedures that could create a new rate reasonableness methodology for use in very small disputes. We should next seek public comment on ideas for SAC alternatives, and I agree with Vice Chairman Miller that we should do so as soon as the report the Chairman commissioned in 2014 to examine alternatives for rate regulation is made public. Doing so would enable us to best fulfill the Reauthorization Act's mandate to study and report to Congress on whether there are viable alternatives to SAC. Stakeholder input is needed in this effort.

Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., NOR 42121 (STB served September 14, 2016) (dissent).

At this point in time, it is evident that large non-coal shippers and all small shippers have nowhere to turn if they believe their rates are unreasonable. Right now, there are no rate cases being actively litigated before the Board. The Board and its shipper stakeholders are now at a crossroads. Something must be done to comply with the intent of Congress to have a process in place that gives rail shippers protection from unreasonable rates when the railroad is market dominant. Accordingly, the Board has continued to explore ideas to improve the accessibility of rate relief.

For example, in *Expanding Access to Rate Relief*, Docket No. EP 665 (Sub-No. 2), the Board sought comment on procedures relying on comparison groups that could comprise a new rate reasonableness methodology for use in very small disputes. Among the comments submitted in Docket No. EP 665 (Sub-No. 2), the Board received a suggestion from USDA that the Board consider procedural limitations to streamline and expedite its rate reasonableness review as an alternative to substantive limitations. *See* USDA Reply Comment 5-6, Dec. 19, 2016, *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2). USDA specifically recommended a short procedural timeline as a means to make rate reasonableness review accessible for smaller disputes. *See id.* To implement this recommendation, USDA suggested that the Board adopt a final offer procedure whereby parties would submit market dominance and rate reasonableness evidence in a single package offer. *See id.* at 6-7.

The Board already uses a final offer procedure as part of the Three-Benchmark methodology. One of the benchmarks compares the markup paid by the challenged traffic to the average markup assessed on similar traffic. *See, e.g., Rate Regul. Reforms*, EP 715, slip op. at 11. To improve the efficiency of this part of the Three-Benchmark methodology and “enable a prompt, expedited resolution of the comparison group selection,” the Board requires each party to submit its final offer comparison group simultaneously, and the Board chooses one of those groups without modification. *See Simplified Standards*, EP 646 (Sub-No. 1), slip op. at 18. Although the Board may not require arbitration of rate disputes under current law, the benefits of final offer procedures used in other settings offer support and background for the Board’s rule

proposed here. For example, final offer procedures are used in commercial settings, including the resolution of wage disputes in Major League Baseball, and final offer arbitration is therefore sometimes referred to as “baseball arbitration.” *See, e.g., Josh Chetwynd, Play Ball? An Analysis of Final-Offer Arb., Its Use in Major League Baseball, & Its Potential Applicability to Eur. Football Wage & Transfer Disps.*, 20 Marq. Sports L. Rev. 109 (2009) (noting the final offer procedure “can lead to a win-win situation as it spurs negotiated settlement at a very high rate”); *see also* Michael Carrell & Richard Bales, *Considering Final Offer Arb. to Resolve Pub. Sector Impasses in Times of Concession Bargaining*, 28 Ohio St. J. on Disp. Resol. 1, 3, 16, 23-24 (2012) (noting that 14 states had codified some form of final offer arbitration for certain labor disputes involving public sector employees and noting that the procedure “encourages the parties to negotiate toward middle ground rather than staking out polar positions” and “encourages the parties to settle before arbitration”).

Similarly, AAR’s Circular No. OT-10, “Code of Car Service Rules/Code of Car Hire Rules,” sets forth a final offer procedure for car hire arbitration, which is included in Rule 25 (the “Arbitration Rule”). *See* Circular No. OT-10, Rule 25, <https://www.railinc.com/rportal/documents/18/260773/OT-10.pdf>. The Board has described the Arbitration Rule as an “integral part” of its deregulation of car hire rates. *See Joint Pet. for Rulemaking on R.R. Car Hire Comp.*, EP 334 (Sub-No. 8) et al., slip op. at 1 (STB served Apr. 22, 1997). And as noted by the Board’s predecessor agency, the Interstate Commerce Commission (“ICC”), the Arbitration Rule “provides for negotiation and, when that is not successful, ‘baseball style’ arbitration, by which the arbitrator will select between the best final offers of the parties.” *Joint Pet. for Rulemaking on R.R. Car Hire Comp.*, 9 I.C.C.2d 80, 88 (1992).

Finally in this regard, in the TRB Report released in 2015, the TRB described the benefits of adopting “an independent arbitration process similar to the one long used for resolving rate disputes in Canada.” In particular, the TRB recommended “a final offer rule,” set on a “strict time limit,” whereby “each side offers its evidence, arguments, and possibly a changed rate or other remedy in a complete and unmodifiable form after a brief hearing.” TRB Rep. 211-12. According to the TRB Report, adoption of such a procedure could enhance complainants’ access

to rate reasonableness protections, while expediting dispute resolution and encouraging settlements. *Id.* at 212.

The RRTF agreed that a final offer process—with the decision being made by the Board rather than an arbitrator—could be an effective way to implement procedural limitations, which would improve access to rate relief. RRTF Rep. 16. Taking into account these recommendations, the Board’s NPRM proposed to adopt a FORR process with the following primary features. As proposed, FORR would allow limited discovery, with no litigation over discovery disputes; FORR could only be used if the complainant elected to use the streamlined market dominance approach proposed (and since adopted) in Docket No. EP 756, *Market Dominance Streamlined Approach*; and the procedural schedule would be brief, with a Board decision issued 135 days after the complaint is filed. *See* NPRM, EP 755 et al., slip op. at 8-10, 13-14,

Parties would simultaneously submit their market dominance presentations, final offers, analyses addressing the reasonableness of the challenged rate and support for the rate in the party’s offer, and explanations of the methodology used and how it complies with the decisional criteria set forth in the NPRM. NPRM, EP 755 et al., slip op. at 12. Parties would next submit simultaneous replies. *Id.*

The complainant would bear the burden of proof to demonstrate that (i) the defendant carrier has market dominance over the transportation to which the rate applies, and (ii) the challenged rate is unreasonable. NPRM, EP 755 et al., slip op. at 12-13; *see also* 49 U.S.C. §§ 10701(d)(1), 10704(a)(1), 11704(b); *Union Pac. R.R.—Pet. for Declaratory Ord.*, FD 35504, slip op. at 2 (STB served Oct. 10, 2014). If the Board were to find that the complainant’s market dominance presentation and rate reasonableness analysis demonstrate that the defendant carrier has market dominance over the transportation to which the rate applies and that the challenged rate is unreasonable, the Board would then choose between the parties’ final offers. In making the rate reasonableness finding and choosing between the offers, the Board would take into account the criteria specified in the NPRM: the RTP, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles. *See* NPRM, EP 755 et al., slip op. at 10-13.

The Board proposed a relief cap over 2 years of \$4 million, indexed annually using the Producer Price Index, consistent with the potential relief afforded under the Three-Benchmark methodology. *See* NPRM, EP 755 et al., slip op. at 16.

In the NPRM, the Board asked whether it should establish different levels of relief and provide supporting rationale for such alternatives. Final offer arbitration in Canada provides for two different procedural tracks. If the matter involves freight charges of \$2 million CAD or less (subject to an inflation adjustment), an expedited “summary” procedure of 30 days applies, and if the matter involves freight charges of greater than that amount, a longer procedure of only 60 days applies. *See* Canada Transp. Act, S.C. 1996, c. 10, as amended, § 164.1 (Can.). The Board stated it might consider an approach that, for example, would permit a complainant submitting a FORR complaint to use a longer procedure if it seeks relief above the \$4 million cap. As such, the Board sought comment on the advisability of such a two-tiered relief procedure in which the top tier would contain no limit on the size of the relief, in total, including both reparations and the two-year prescription period.

In the SNPRM, issued on November 25, 2020, the Board invited comment on certain modifications to the rule proposed in the NPRM and other issues. In Part I, the Board addressed comments on the purpose of the rule. In Part II, the Board addressed comments regarding its statutory authority to adopt FORR. In Part III, the Board addressed comments regarding the appropriateness of a final offer procedure. In Part IV, the Board addressed the review criteria for FORR cases. In Part V, the Board addressed discovery and procedural schedule issues, including the Board’s proposal to remove the use of adverse inferences and instead adopt a process for motions to compel discovery. The Board also proposed to include mandatory mediation in FORR cases and to extend the proposed procedural schedule to accommodate motions to compel and mandatory mediation. In Part VI, the Board addressed market dominance issues, including the Board’s proposal to require only the complainant to submit market dominance evidence on opening. The Board also proposed to allow complainants to choose between streamlined and non-streamlined market dominance approaches and extended the proposed procedural schedule in cases where the complainant selects non-streamlined market dominance. In Part VII, the

Board addressed the relief cap. Finally, in Part VIII, the Board addressed other miscellaneous issues.

STB ARBITRATION AND THE SMALL RATE CASE PROPOSAL

Also, on November 25, 2020, the Board instituted a rulemaking proceeding to consider a proposal by CN, CSXT, KCSR, NSR, and UP to establish a new, voluntary arbitration program for small rate disputes. *Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.*, EP 765 (STB served Nov. 25, 2020). In a decision, Arb. NPRM, served concurrently with the SNPRM, the Board proposes to adopt a form of such an arbitration program. Arb. NPRM, EP 765. As discussed in the Arb. NPRM, the Board deferred final action on FORR and issued the SNPRM concurrently with the Arb. NPRM so that both proposals would be considered simultaneously, including the pros and cons of adopting—either with or without modification—the voluntary arbitration rule, FORR, both proposals, or taking other action.

The Board has struggled over the years to establish a successful arbitration program. It established arbitration procedures at 49 C.F.R. part 1108 in 1997. *See Arb. of Certain Disputes Subject to the Statutory Juris. of the STB*, 2 S.T.B. 564 (1997). Under those procedures, as originally conceived, parties could agree voluntarily on a case-by-case basis to arbitrate any dispute involving the payment of money or involving rates or practices related to rail transportation or services subject to the Board’s statutory jurisdiction. *Id.* at 565. The Board established those procedures pursuant to its authority at 49 U.S.C. § 721 (now 49 U.S.C. § 1321), which generally authorizes the Board to prescribe regulations in carrying out its statutory responsibilities. *Id.* at 582.

In 2013, the Board modified its arbitration procedures in *Assessment of Mediation & Arbitration Procedures*, EP 699 (STB served May 13, 2013) (revising and consolidating the Board’s arbitration procedures). Among other things, the Board established a program under which a party could voluntarily agree in advance to arbitrate particular types of disputes with clearly defined limits of liability. *Id.* at 4. The revised regulations did not include rate disputes as an arbitration-program-eligible matter. *Id.* at 7-9.

In section 13 of the STB Reauthorization Act, Congress required the Board to promulgate regulations establishing a voluntary and binding arbitration process to resolve rail rate and practice complaints under its jurisdiction. *See* Pub. L. No. 114-110 § 13, 129 Stat. 2228, 2235-38. Section 13, which is codified at 49 U.S.C. § 11708, set forth certain requirements and procedures for the Board’s arbitration process, such as listing categories of covered disputes and imposing timelines. *Id.*

In response to section 13 of the STB Reauthorization Act, the Board further adjusted its procedures at 49 C.F.R. part 1108 to add rate disputes to the matters eligible for arbitration under its arbitration program and made other changes to conform to the requirements set forth in the statute. *See Revisions to Arb. Procs. (Revisions Final Rule)*, EP 730, slip op. at 1-2 (STB served Sept. 30, 2016) *corrected* (STB served Oct. 11, 2016). To date, three Class I carriers have opted into the Board’s arbitration program for certain types of disputes (though not rate disputes), but the program has never been used.

As noted, in January 2018, the Board established the RRTF with the objective of, among other things, determining how best to provide a rate review process for small cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019. Two key recommendations of the report were legislation to permit mandatory arbitration of small rate disputes and that the Board establish a new rate reasonableness decision-making process under which a shipper and railroad would each submit a “final offer” of what it believes a reasonable rate to be, subject to short, non-flexible deadlines, with the Board selecting one party’s offer without revision. RRTF Report 14-20.

As discussed herein, in September 2019, the Board proposed a new procedure for challenging the reasonableness of railroad rates in smaller cases, FORR. *See Final Offer Rate Rev.*, EP 755 (STB served Sept. 12, 2019). In its comments, CN argued that the Board should abandon consideration of FORR and suggested that the Board instead consider including within its existing arbitration program a targeted avenue for smaller rate disputes. *See* CN Comments 25-27, Nov. 12, 2019, *Final Offer Rate Rev.*, EP 755; *see also* CN Reply Comments 2-3, Jan. 10, 2020, *Final Offer Rate Rev.*, EP 755. CN stated that such a program should include the following features: mandatory mediation, confidentiality, non-precedential decisions, more modest limits

on relief than those authorized under 49 U.S.C. § 11708, and voluntariness. *See* CN Comments 25-27, Nov. 12, 2019, *Final Offer Rate Rev.*, EP 755.

In May 2020, the Board issued a decision that allowed for post-comment period ex parte discussions with stakeholders regarding FORR. *See Final Offer Rate Rev.*, EP 755 (STB served May 15, 2020). Noting that its arbitration program has gone unused, the Board expressed interest in exploring the issues raised in CN's comments, as well as whether and how its arbitration program at 49 C.F.R. part 1108 could be modified to provide a practical and useful dispute resolution mechanism, particularly for stakeholders with smaller rate disputes. *Id.* at 2.

During ex parte discussions with the Board Members, certain petitioners in EP 765 elaborated on the potential small rate case arbitration framework outlined in CN's comments. Some carriers argued that the Board should adopt changes to its existing arbitration process, such as allowing for a more flexible arbitrator selection process and for arbitration to have greater confidentiality protections. *See* CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 8, 2020 (filing ID 300856) *Final Offer Rate Rev.*, EP 755; CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 27, 2020 (filing ID 300928) *Final Offer Rate Rev.*, EP 755. Those carriers also suggested that the Board consider, among other things, creating an incentive for carriers to arbitrate by exempting them from FORR or other types of rate challenges if they agree to participate in arbitration. *See* CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 2, July 10, 2020 (filing ID 300866) *Final Offer Rate Rev.*, EP 755. They indicated their intent to submit a proposal to the Board that could attract support from multiple stakeholders. *See* CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 21, 2020 (filing ID 300901) *Final Offer Rate Rev.*, EP 755.

In their ex parte discussions with Board Members, shipper interests generally did not oppose an arbitration process provided it is fair, though most advocated in favor of the Board adopting FORR. *See, e.g.,* Olin Ex Parte Meeting Mem. 2, July 15, 2020 (filing ID 300883) *Final Offer Rate Rev.*, EP 755; American Chemistry Council Ex Parte Meeting Mem. 3, July 17, 2020 (filing ID 300897) *Final Offer Rate Rev.*, EP 755; Solvay America Inc. Ex Parte Meeting Mem. 1, July 22, 2020 (filing ID 300916) *Final Offer Rate Rev.*, EP 755.

On July 31, 2020, Petitioners filed the petition, asking the Board to establish a new arbitration program for small rate cases, thereby resulting in the Arbitration NPRM in EP 765. As noted, the Board decided to defer final action in the FORR docket to provide for parallel consideration of the voluntary, small rate case arbitration program proposed in EP 765. The Board explained that this approach would enable the Board and stakeholders to consider a new proposal for an arbitration process simultaneously along with the proposed rulemaking in *Final Offer Rate Review*, Docket No. EP 755.

The arbitration proposal in the Arbitration NPRM requires all Class I carriers to agree to arbitrate disputes submitted to the program for a term of not less than five years. Participation in the arbitration program would exempt the carrier from FORR. Rail carriers would be allowed to withdraw from the program if there is a material change in the law to the STB's rate reasonableness methodologies. Also, the Board proposes to limit the number of cases a carrier can be subject to during a rolling 12-month period to 25. A shipper would only be allowed to bring one case at a time against a participating railroad. In addition, parties would bear the cost of their own arbitrators on the three-arbitrator panel and half of the cost of the neutral arbitrator. Moreover, the Board proposes to limit discovery to 20 written document requests, five interrogatories, and no depositions. The Board also would not permit the use of the limit price test for market dominance determinations. The Board proposes that arbitration decisions could be appealed to the Board and/or the appropriate court. The Board also proposes to keep the arbitration process and decisions confidential. In addition, decisions would be inadmissible in other arbitrations. Last, the Board would conduct a review of the program not later than three years after its start.

DISCUSSION

The Board has taken a strong step forward in seeking to fix this broken rate case process by its FORR SNPRM in EP 755 and its small rate case arbitration proposal in EP 765. IMA-NA commends the Board for its dual efforts. Generally, IMA-NA is supportive of the SNPRM in EP 755 and the Arbitration NPRM in EP 765 with certain modifications. These actions provide rail shippers with an accessible small rate case process whether through arbitration or a formal STB proceeding that has been needed for many years.

As noted, the previous STB attempts at small rate case methodologies have gone unused for the most part since their implementation. The general rail shipper view is that these processes are not effective and not worth taking a risk to use. Consequently, rail shippers have felt that they have no remedies for unreasonable rates involving small rate cases.

A. IMA-NA Supports the FORR SNPRM But Urges the Use of a Two-Tiered Approach.

With respect to the FORR SNPRM, IMA-NA has no objections to the modifications proposed by the Board. IMA-NA fully supports the Board's discussion on the purpose of the rule, its statutory authority to adopt FORR, the appropriateness of a final offer procedure, and the review criteria. IMA-NA agrees wholeheartedly that the Board has the statutory authority to adopt this methodology and that this final offer procedure is appropriate for the reasons set forth in the Board's discussion.

In Part V, the Board addressed discovery and procedural schedule issues, including the Board's proposal to remove the use of adverse inferences and instead adopt a process for motions to compel discovery. The Board also proposed to include mandatory mediation in FORR cases and to extend the proposed procedural schedule to accommodate motions to compel and mandatory mediation. IMA-NA has no objections to these practical changes.

In Part VI, the Board addressed market dominance issues, including the Board's proposal to require only the complainant to submit market dominance evidence on opening. The Board also proposed to allow complainants to choose between streamlined and non-streamlined market dominance approaches and extended the proposed procedural schedule in cases where the complainant selects non-streamlined market dominance. Again, IMA-NA has no objections to these useful modifications.

In Part VII, the Board addressed the relief cap and maintained the \$4 million/2-year limits it proposed in the FORR NPRM. IMA-NA is disappointed that the Board did not adopt a two-tiered system with no cap and a longer procedural schedule for larger rate cases in addition to this small rate case methodology. The Board specifically asked for comments on this two-tiered relief procedure but showed little appetite to pursue it in the SNPRM. The Board stated "it would be premature to propose expanding FORR beyond its initial purpose, which is permitting access to rate reasonableness determinations for small disputes. In the future, the Board could

assess whether FORR may be appropriate for larger disputes. Should that be the case, the Board could consider adopting a two-tiered process like the one referenced in the NPRM—or other ways of expanding FORR’s application.” SNPRM, slip op. at 47.

IMA-NA strongly urges the Board to take the necessary second step forward by providing a rate case process that is accessible to small shippers and non-coal large shippers. The FORR with the \$4 million limit takes care of the small shippers’ access to rate cases; however, the Board also needs to take care of the large shippers with no access to the Board by implementing FORR without any limits with a longer procedural schedule.

The Canadian rate case model discussed in the SNPRM demonstrates that FORR will work well as a two-tiered system and will not disrupt the economic stability of the US Class I railroads. The Canadian railroads that are subject to this similar rate case process in Canada, except for the use of arbitrators as the decision makers, have flourished financially over the last decade. There can be very little dispute that the Canadian rate case final offer model that uses an even shorter timeline than the one proposed here has not adversely affected the CN and Canadian Pacific railroads’ bottom line. In addition, the TRB Report that was published by some of the most distinguished economists in the United States proposed a similar final offer model. The economic analysis by these leading economists that led to the recommendation of their final offer process provides further support for an uncapped FORR as an alternative to SAC. The Board has ample evidence that this model is effective and will not cause an onslaught of rate cases based on the history of this process in Canada, which has mainly led to a fair resolution of rates through negotiations between the parties and a reasonable number of cases being handled each year.

IMA-NA is perplexed by the Board’s statement that it “could assess whether FORR is appropriate for larger disputes.” This noncommittal stance seems counter to its request for comments on the subject in the FORR NPRM. Moreover, the Board has ample evidence from the Canadian model that this approach is effective. IMA-NA also has deep concerns that it will be extremely difficult to evaluate this expansion of FORR in the future because of the proposal for voluntary arbitration of small rate cases that would exempt the Class I carriers from FORR. In other words, nobody could use FORR for 5 years, assuming it is adopted, if this arbitration

process is also adopted as proposed with this exemption. As a result, there would be little to assess if FORR lies dormant. In addition, because the related arbitration process and decisions would be confidential, there would be difficulties in evaluating that process with a two-tiered process FORR process in mind. While the Board may be able to obtain some of this information, it is not certain how stakeholders would be able to review the arbitration process to argue for expansion of the FORR or arbitration process. Therefore, this situation with respect to rate relief through a two-tiered approach seems doomed if the Board continues down the path with an arbitration process that exempts the Class I carriers from FORR.

IMA-NA still urges the Board to adopt this two-tiered approach using a cap for cases with a shorter procedural timeline and no cap for cases with a longer procedural timeline. This could be a great moment in regulatory history for the STB, by providing shippers that are subject to the market dominance of the railroads with a rate case process that works, does not cost millions of dollars, and occurs in a reasonable timeframe. The Board would not be taking any risk by implementing this solution because it is a proven commodity as the Canadian model has demonstrated. Therefore, IMA-NA urges the Board to take this vital step to fix a broken system.

B. IMA-NA Also Supports the Arbitration NPRM with Modifications to Make the Proposal More Comparable to FORR.

IMA-NA again commends that Board for its efforts to bring to fruition the arbitration proposal for small rate cases in EP 765. IMA-NA agrees that informal resolution of disputes between parties is preferable to formal litigation before the Board. As a result, it is supportive of this proposal. However, as proposed, the arbitration process exempts Class I carriers from FORR for five years. This result allows carriers to operate under a less demanding approach during this period which IMA-NA cannot support. IMA-NA would be supportive of the arbitration proposal if this exemption right was removed.

As proposed, the arbitration process only allows rail shippers to bring one case at a time against an individual Class I carrier. Also, the proposal limits the number of cases that a Class I carrier (can be subject to over a rolling 12-month period to 25. There are no limits of this nature in FORR. While the 25-case limit seems less likely to be an issue, the one case limit certainly would constrain rail shippers' ability to challenge rate cases. As discussed, with ineffective

existing small rate case procedures at the Board and the proposed exemption from FORR, rail shippers would be stymied if they needed to bring more than one case against a railroad at a time.

Moreover, the proposal keeps decisions and the arbitration process confidential and prohibits the use of the decisions in future arbitrations. These requirements are not part of FORR. These severe constraints on the use of the process would limit rail shippers' ability to use these decisions in rate negotiations with railroads. Therefore, the ironic result would be that this informal process may limit informal resolution of rate cases down the road. In negotiations, railroads obviously would know that a good decision for a shipper in this small rate case arbitration process will never see the light of day and will not feel any pressure to follow its guidance.

In addition, the arbitration process places limits on the amount of discovery allowed in a case. FORR does not have these restrictions. As the Board is aware, railroads generally control most of the information that is needed to bring an effective rate case. Accordingly, these discovery limits will more adversely affect rail shippers who need this information than railroads who have most of the information at their fingertips. While IMA-NA understands that the Board is attempting to streamline the process here, these limits could deter shippers from using the process at all if they feel a case requires more information than it can obtain under these limited discovery procedures.

Also, the arbitration process could be more expensive and time consuming than FORR because of the arbitrator costs and the appeal process. While IMA-NA understands that the Board has little flexibility with regard to parties' appeal rights, it wants to point out that the possibility of having an appeal of an arbitration decision to the Board and then the appropriate court could greatly increase the amount of time needed to finalize a case and may end up taking more time than FORR. In addition, parties would have to pay their share of the cost of arbitrators which they would not have to do for FORR. The filing party would only have to pay a \$350 filing fee for the Board to decide the case. These timing and cost results seem to run counter to the Board's intent in exploring this arbitration process to make a faster and more cost-effective method for handling rate cases.

As is evident from these differences between the voluntary arbitration proposal and FORR, railroads would have less reason to worry about rate case challenges under the former. While IMA-NA understands that the Board is attempting to encourage participation in the arbitration process by making these concessions to the railroad industry, it is evident that the differences are too much to bear for rail shippers and may end up resulting in another unused small rate case process. The Board may gain the buy in of the railroads; however, this will not matter if no rail shippers bring a case. As a result, IMA-NA urges the Board to change the process by eliminating the case, confidentiality/precedent, and discovery limits to bring it more in line with FORR. Of course, if the Board removes the exemption for the Class I carriers who participate in the process, then rail shippers will have the option to choose between the two paths for small rate case resolution. This would be the ideal result and would lessen IMA-NA's concerns about these differences between these two proposals.

CONCLUSION

IMA-NA thanks the Board for its attempts to fix the rate case process in the SNPRM and the Arbitration NPRM. IMA-NA urges the Board to finalize these proposals with the suggested changes IMA-NA has made in the proceeding discussion. A two-tiered FORR without the Class I carrier exemption and an arbitration process without such important differences from FORR may allow the Board to successfully regulate in the manner Congress intended.

Respectfully submitted,

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