

BEFORE THE
SURFACE TRANSPORTATION BOARD

304313

ENTERED
Office of Proceedings
April 15, 2022
Part of
Public Record

STB DOCKET NO. EP 755

FINAL OFFER RATE REVIEW

**REPLY SUPPLEMENTAL COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL,
THE FERTILIZER INSTITUTE,
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
THE CHLORINE INSTITUTE, AND
THE CORN REFINERS ASSOCIATION**

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The Chlorine Institute

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The American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), The National Industrial Transportation League (“League”), The Chlorine Institute, and the Corn Refiners Association (“CRA”) (collectively the “Coalition Associations”) jointly submit these Reply Supplemental Comments in response to the Supplemental Notice of Proposed Rulemaking served by the Surface Transportation Board (“Board”) in the above-captioned docket on November 15, 2021 (“SNPRM”).¹ In their supplemental opening comments, the Coalition Associations strongly supported Final Offer Rate Review (“FORR”), as modified in the SNPRM, subject to the modifications and clarifications discussed therein. These reply comments respond to the continuing claims by the Association of American Railroads (“AAR”) and individual railroads in their supplemental opening comments that FORR is unlawful, is unfair to railroads, is not limited to small cases, and does not account for revenue adequacy.

¹ *Supplemental Notice of Proposed Rulemaking*, EP 755 (served Nov. 15, 2021).

I. ADOPTION OF THE FORR IS AN APPROPRIATE EXERCISE OF THE BOARD’S STATUTORY AUTHORITY

Despite the clear language of the statute, overwhelming case law to the contrary, and the Board’s findings in the SNPRM, railroads continue to incorrectly argue that the Board’s proposed FORR process is unlawful because, among other things, the Board lacks statutory authority to adopt FORR to resolve rate disputes, the proposed FORR process violates the statute, and FORR is arbitrary and capricious.

These arguments are misplaced. This section addresses in detail each argument put forth by the railroad parties. In sum: (1) the adoption of the FORR would be well within the Board’s statutory authority to maintain “simplified and expedited methods” to determine rate reasonableness, (2) the FORR does not violate the statute because, among other things, the Board has significant leeway in devising the appropriate methodology to determine the maximum reasonable rate, and the FORR, similar to the Three Benchmark methodology, permissibly relies on the parties’ submissions to make this determination, and (3) the adoption of the FORR would not be arbitrary and capricious because the Board has adequately explained how it will determine and select an offer and these explanations sufficiently inform the regulated parties of what is required of them so they may act accordingly.

A. The Statute Unequivocally Permits the Board to Adopt FORR

AAR argues that “Congress has not authorized the Board to adjudicate rate disputes through a final-offer process.”² This argument is misplaced.

The statute clearly authorizes the Board to “maintain 1 or more simplified and expedited methods” to determine the reasonableness of challenged rail rates, and that is exactly what the

² Comments of the Association of American Railroads on the Supplemental Notice of Proposed Rulemaking at 4 (Jan. 14, 2022) (“AAR Comments”).

Board is seeking to achieve with the FORR.³ The statute does not specifically identify the “simplified and expedited methods” that the Board can or cannot adopt to resolve rate cases, and the Board is acting well within its permissible discretion to devise the best method among different “possible regulatory approaches.”⁴

Both in the NPRM and the SNPRM, the Board has adequately explained why FORR, among other alternatives, provides the most reasonable approach to achieving the Congressional mandate to maintain “simplified and expedited methods” to resolve rate disputes. Among other things, the FORR furthers the rail transportation policy goals of maintaining “reasonable rates where there is an absence of effective competition,” fostering “sound economic conditions in transportation,” and providing “for the expeditious handling and resolution of all proceedings.”⁵ In doing so, FORR ensures that the shippers’ rights to seek review of the rates by the Board are not frustrated with significant litigation costs, complexity of the cases, and duration of the processes.⁶ By adopting the FORR, the Board is ultimately fulfilling its Congressionally mandated duty to “maintain 1 or more simplified and expedited methods” to resolve rate disputes.⁷

AAR fails to provide any meaningful explanation as to why the FORR is not a reasonable exercise of this authority other than characterizing the FORR as “an arbitration technique” which is “not the way judges and agency adjudicators decide cases.”⁸ It is true that FORR is also used

³ 49 U.S.C. §10701(d)(3).

⁴ *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (1993) (“Obviously the Commission is free to make reasonable trade-offs between the quality and cost of possible regulatory approaches.”)

⁵ See 49 U.S.C. §10101(5), (6) and (15). See *also* SNPRM at 11-12.

⁶ SNPRM at 3.

⁷ 49 U.S.C. §10701(d)(3).

⁸ AAR Comments at 4.

in arbitration. This does not preclude the Board, however, from adopting “procedures that are also used by arbitrators.”⁹ AAR’s argument is predicated on the misconception that because FORR is also used by arbitrators, the Board’s adoption of the same technique must be unlawful.¹⁰ AAR fails to see, however, that the statutory mandate to adopt “simplified and expedited methods” to determine the reasonableness of rates is open-ended, and encourages the Board to innovate new methods to achieve this objective. On the contrary, there is nothing in the statute that prevents the Board from adopting FORR only because a similar technique is also used by arbitrators in completely different contexts.

B. Adoption of the FORR Would Not Conflict with the Statute

UP argues that adoption of the FORR would be inconsistent with the statute because it would “unlawfully constrain the Board from fulfilling its congressionally delegated duty to ensure that any rate it prescribes reflects its expert, substantive judgment regarding the maximum reasonable rate for the transportation at issue.”¹¹ In a similar vein, AAR argues that, by adopting the FORR, the Board would “abandon its own best judgment by confining its decisional outcomes to the two offers proposed by the parties.”¹²

Railroad interests ignore, once again, that the final offer process is not a novel approach and is presently utilized in Three Benchmark cases, which withstood judicial review in the past.¹³

⁹ SNPRM at 13.

¹⁰ AAR Comments at 5 (“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.”)

¹¹ Comments of Union Pacific Railroad Company on the Supplemental Notice of Proposed Rulemaking (Jan. 14, 2022) (“UP Comments”) at 1.

¹² AAR Comments at 5.

¹³ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, 2007 WL 2493509 (STB served Sept. 5, 2007), *aff’d sub nom. CSX Transp., Inc. v.*

In fact, the Three Benchmark itself is a “final offer methodology,”¹⁴ the same method employed by the FORR. While the railroads attempt to distinguish the FORR from the final offer methodology utilized in Three Benchmark cases,¹⁵ they overlook the contrary precedent.

In Three Benchmark cases, the Board measures the reasonableness of a rate by comparing the R/VC ratio of a challenged rate to the R/VC ratios of a comparison group, which is selected by the Board among the options submitted by the railroad and the challenging shipper.¹⁶ Similar to the FORR, the Board's selection in the Three Benchmark cases “is an “either/or” choice between the parties' final offers, with no modifications allowed.”¹⁷ As the DC Circuit explained, since “the revenue need adjustment factor is derived from static figures published annually by the Board, the Three Benchmark framework's reasonableness determination generally turns on the Board's selection of a comparison group.”¹⁸

In other words, because the Revenue Shortfall Allocation Method (“RSAM”) and RV/C>180 benchmarks are static figures, the Board’s determination of reasonableness of a rate in the Three Benchmark boils down to the selection of the comparison group with a final offer process. Hence, the Three Benchmark methodology, similar to the proposed FORR, effectively limits the Board to two outcomes based on the submission of the comparison groups by the parties.

STB, 568 F.3d 236, 386 U.S. App. D.C. 204 (D.C. Cir. 2009), vacated in part on other grounds on reh'g, 584 F.3d 1076, 388 U.S. App. D.C. 244 (D.C. Cir. 2009)

¹⁴ *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 628 F.3d 597, 600 (DC Cir. 2010).

¹⁵ AAR Comments at 9 and UP Comments at 3.

¹⁶ *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 628 F.3d 597, 600-601 (DC Cir. 2010).

¹⁷ *Id.* at 601.

¹⁸ *Id.*

UP attempts to distinguish the Three Benchmark method from the FORR by pointing to the “other relevant factors” language, which, according to UP, functions as a “safety valve” in the Three Benchmark method.¹⁹ UP, however, overstates the role of “other relevant factors” in the Three Benchmark process. As the Board noted in the SNPRM, the “other relevant factors” are rarely accepted by the Board in Three Benchmark cases and are precisely the reason why Three Benchmark cases are underutilized before the Board.²⁰

AAR argues that “FORR disables the Board from exercising its statutory duty to ‘prescribe the maximum rate’”. According to AAR, “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).”²¹ In a similar vein, UP argues that the FORR would prevent the Board from applying the statutory standard to determine the reasonableness of a rate and prescribe a maximum rate.²²

First, contrary to AAR’s contentions, the Board has explained that it “may not set the maximum reasonable rate below the level at which the carrier would recover 180% of its variable costs of providing the service.”²³ The scenario AAR posits is therefore impossible because any offer submitted by a shipper will naturally be above the 180% R/VC level.

¹⁹ UP Comments at 3.

²⁰ SNPRM at 18.

²¹ AAR Comments at 11-12.

²² UP Comments at 3.

²³ SNPRM at 22.

Moreover, as occurs in stand-alone cost cases, when the evidence results in a rate below 180% R/VC, the Board prescribes a rate at the 180% level.

Further, these arguments mistakenly assume that there is an objectively reasonable maximum rate that can be calculated in the abstract. The lack of mathematical precision in ratemaking is well recognized.²⁴ As the Rate Reform Task Force observed, SAC “promotes a sense of false precision.”²⁵ Further, “[t]he pursuit of precision in rate proceedings, as in most things in life, must at some point give way to the constraints of time and expense, and it is the agency’s responsibility to mark that point.”²⁶ As observed in the SNPRM, the Board balances “economic considerations together with administrative feasibility in defining a process ahead of time.”²⁷ In exercising its authority for ratemaking, the Board is entitled to particular deference and is at the zenith of its powers.²⁸

The Board has devised the FORR in consideration of various factors, including the constraints of time and expense, to ensure that shippers can challenge unreasonable rail rates in a cost-effective and efficient manner, consistent with the statutory mandate to maintain “simplified and expedited methods for determining the reasonableness of challenged rates in which a [SAC] presentation is too costly, given the value of the case.”²⁹ The Board should, therefore, be given the deference in its adoption of the FORR, which is the result of these competing interests.

²⁴ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 534 n. 35 (1985).

²⁵ Rate Reform Task Force Report at 6 (April 25, 2019).

²⁶ *Burlington Northern & Santa Fe Ry. v. STB*, 453 F.3d 473, 482 (DC Cir. 2006).

²⁷ SNPRM at 16.

²⁸ *Burlington N. R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997).

²⁹ 49 U.S.C. §10701(d)(3).

This does not mean, however, that the maximum rates produced as a result of FORR would be inaccurate. In any rate case, the maximum rate varies depending on which method of determining rate reasonableness is used. This, by itself, does not cause FORR to violate the statute any more than it would cause any other method to do so.

C. Railroads' Reliance on *Stone v. U.S. Forest Service* is Inapposite

Further, AAR's continual reliance on *Stone v. U.S. Forest Service*, 2004 WL 1631321 (D. Ore. July 16, 2004) is inapposite.³⁰ As the Board correctly identified, this case is "readily distinguishable."³¹ In *Stone*, the court ruled that the agency's decision should not be governed by the deferential standards of the Administrative Procedure Act ("APA") because "[i]t would allow the agency to unilaterally establish the price of the property" that would be set aside only "if the price established by the agency were so outrageously low as to be arbitrary, or the record so devoid of supporting evidence that no reasonable person could accept it as adequate to support the conclusion reached."³² While it is correct that the court also opined that it would "set aside the agency's decision" under the APA standard, FORR can be easily distinguished from that finding.

In *Stone*, the agency would be acting as a party and the judge in the same proceeding, which was intended to determine the fair market value of a property that would be purchased by the government. As a litigant, therefore, the agency had no incentive to present a reasonable final offer appraisal, which is very different when the decision-maker is neutral. Contrary to the circumstances surrounding *Stone*, there is no similar conflict of interest that could cause the

³⁰ AAR Comments at 6.

³¹ SNPRM at 13.

³² *Stone v. U.S. Forest Service*, 2004 WL 1631321 at 16 (D. Ore. July 16, 2004).

Board to act unfairly in determining the reasonableness of a rate or selecting either party's offer. On the contrary, the Board would be fulfilling its statutory mandate to adopt "simplified and expedited methods for determining the reasonableness of challenged rates"³³ Based on this express authorization, the Board devised FORR to "further implement the statute's directive to create methods and procedures to determine what is reasonable."³⁴ The circumstances surrounding the court's findings in *Stone* are, therefore, not analogous and should not be given any weight in this proceeding.

D. FORR Provides a Full Hearing Consistent with the Statute

AAR argues that the FORR violates the statute because it does not provide parties a full hearing as required by 49 U.S.C. § 10704(a)(1).³⁵ According to AAR, the Board would be acting "as a baseball arbitrator" if it adopts the FORR, would "artificially limit [its] decisional range to the two outcomes proposed by the parties," and this would violate the judicial standards "inherent in the nature of a full hearing" requirement.³⁶ AAR mischaracterizes the FORR process to support its position that the FORR does not provide full hearing to the parties.

As noted previously, there is nothing in the statute that prevents the Board from adopting a procedure to resolve rate cases that is also utilized in arbitration proceedings. Equally important, the FORR process gives the parties a full hearing consistent with the statute.

Where formal hearing requirements of the APA are not triggered, as here, an agency has "substantial flexibility to structure its hearings it must provide."³⁷ When "the Due Process

³³ 49 U.S.C. §10701(d)(3).

³⁴ SNPRM at 14.

³⁵ AAR Comments at 10.

³⁶ *Id.* at 11.

³⁷ *R.R. Comm'n of Tex. v. United States*, 765 F.2d 221, 228 (D.C. Cir. 1985).

Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies.”³⁸ Procedural rules governing informal agency adjudications, “derived mainly from § 555 of the APA, 5 U.S.C. § 555, and the Due Process Clause, are few.”³⁹ Ultimately, FORR, an informal agency adjudication that is not subject to the standards of a formal adjudication of the APA, provides the required procedural safeguards to satisfy the APA standards for informal adjudications and the “full hearing” requirement of 49 U.S.C. § 10704(a)(1).

In the FORR process, the Board would provide the “full hearing” to the parties and AAR fails to point to any authority or circumstance that suggests otherwise. The process allows each party to review and respond to each other's reasonableness analyses, final offers, and market dominance arguments. It also involves discovery and an evidentiary hearing on market dominance. The Board determines the reasonableness of a rate and the maximum prescribed rate based on the record created through this process and based on the appropriate statutory principles. The procedural safeguards provided by the proposed FORR process are adequate to satisfy the “full hearing” requirement of the statute.

E. FORR Does Not Shift the Burden of Proof

AAR also contends that FORR conflicts with 5 U.S.C. § 556(d) because it unlawfully shifts the burden of proof. According to AAR, “the shipper need not prove anything, as reasonableness (or not) will be determined when the Board simply chooses between the two offers.”⁴⁰

³⁸ *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990).

³⁹ *Butte County v. Hogen*, 613 F.3d 190, 194 (DC Cir. 2010).

⁴⁰ AAR Comments at 12.

AAR's argument is based on a mistaken presumption that because the parties' reasonableness analysis overlaps with the selection of a final offer, the shippers are absolved from proving the unreasonableness of the rate and the prescription of the maximum reasonable rate. That is not true. In FORR, a shipper continues to bear the burden of proving that the railroad has market dominance over transportation and the challenged rate is unreasonable. Further, a shipper still needs to persuade the Board that its offer is superior to the railroad's so that it is selected as the maximum reasonable rate. While these analyses overlap with each other, this does not absolve the shippers from their burden of proving the unreasonableness of the rate and the maximum rate to be prescribed.

Indeed, this same overlap exists in the Board's other rate reasonableness methodologies where the same evidence that determines a rate to be unreasonable also determines the prescribed rate. In SAC cases, the DCF model is the final step in assessing reasonableness by determining whether and by how much the stand-alone railroad ("SARR") revenues exceed the SARR's revenue requirements (*i.e.*, costs). The only additional step required to calculate the prescribed rate is to determine how much of that excess revenue should be allocated to the challenged traffic.⁴¹ In Three-Benchmark cases, there is no additional step at all.⁴²

⁴¹ See, *e.g.*, *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), slip op. at 8 (served Oct. 30, 2006) ("[I]f the present value of the revenues from the traffic group exceeds the present value of the revenue requirements of the SARR, then the Board must decide what relief to provide to the complainant by allocating the revenue requirements of the SARR among the traffic group and over time.")

⁴² See *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1), slip op. at 21 (served Sept 5, 2007) ("If the challenged rate is above a reasonable confidence interval around the estimate of the mean for the adjusted comparison group, it will be presumed unreasonable and, absent any 'other relevant factors,' the maximum lawful rate will be prescribed at that boundary level.").

F. **FORR Is Not Arbitrary and Capricious**

AAR wrongly contends that the FORR is arbitrary and capricious because the Board allegedly intends to decide FORR cases based on a standard that it will not disclose in advance. According to AAR, railroads do not “know how the Board will determine ‘reasonableness’ in any given case.”⁴³ AAR’s argument is misplaced.

The Board adequately explained in the NPRM and the SNRPM how it intends to resolve FORR cases. FORR is simply a set of “procedural rules for the adjudication of railroad rates under the precise criteria established by the statute.”⁴⁴ The Board clearly stated that it “would consider the reasonableness of rates challenged under FORR using the same statutory criteria and economic principles applied in past rate cases using other processes.”⁴⁵ Those criteria include the RTP, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles.⁴⁶

The SAC methodology adopted in *Coal Rate Guidelines – Nationwide*, 1 I.C.C. 2d 520 (1985) (1985), scarcely contained much greater detail than the Board has provided for FORR. That decision defined primary factors to be considered and commented on possible methods for quantifying them, but the details evolved over time with each case as the parties experimented with different types of evidence and ways to present it.⁴⁷

⁴³ AAR Comments at 13.

⁴⁴ SNPRM at 29.

⁴⁵ *Id.*

⁴⁶ *Id.* at 8.

⁴⁷ *Id.* at 542-43 (“In view of the many potential variables involved, we cannot prescribe a single precise mathematical formula for developing SAC. Instead, we will identify here the primary factors that must be considered in an SAC presentation and comment on some methods for quantifying them. The exact computation will be left to the parties to make in each case.”), 546 (“[W]e have not attempted to prescribe a hard and fast formula for developing and applying

AAR's claim that "[p]arties will not even know the materials they must produce in discovery" is a strawman.⁴⁸ A party must demonstrate how the information it is requesting through discovery is relevant to the applicable criteria. At the discovery stage, in what is an expeditious proceeding, a party must have a clearly defined notion of the method(s) it is considering when it seeks discovery. It would be reasonable, therefore, to require the party seeking discovery to offer some explanation of the relevance of the information it is seeking to the criteria for FORR cases.

Further, contrary to AAR's arguments, the fact that shippers can choose their own methodology does not create vagueness in the FORR process. The Board explained in the NPRM that both parties can choose how to present and support their offers, including the methodology they use.⁴⁹ However, the Board's selection of either offer will be governed by the criteria set forth by the Board.⁵⁰ If a shipper chooses a methodology that does not comport with these principles, then it bears the risk that the Board would choose the railroad's offer. It can reasonably be expected that a shipper and a railroad would not risk losing their case by submitting a methodology that is without any foundation in the Board's rate case precedent and does not incorporate the well-known principles governing rate cases resolved by other methods. In other words, it is not the shipper's chosen methodology, but the principles set forth in the

SAC. Rather, we encourage the parties in individual proceedings to develop the evidence which best presents their case.").

⁴⁸ AAR Comments at 14-15.

⁴⁹ *Notice of Proposed Rulemaking*, EP 755 (STB served Sept. 12, 2019) at 10.

⁵⁰ *Id.* at 10-11.

Board's NPRM and SNPRM that ensures that the railroads are informed about "what is required of them so they may act accordingly."⁵¹

II. **OTHER RAILROAD ARGUMENTS SHOULD BE REJECTED.**

A. **AAR's "Unfairness" Claims Are Unfounded.**

AAR's claim that "FORR requires railroads to choose their poison" is a melodramatic overstatement.⁵² The alternative "poisons" are "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."⁵³ There is no such "risk," however, if the challenged rate is reasonable and the railroad can support that result by applying a methodology that satisfies the FORR criteria. Moreover, it is incorrect to claim that a shipper could set its own price, because the shipper can only prevail if its "final offer" is superior to the railroad's. Consequently, shippers cannot take extreme positions any more than railroads can do so without increasing their risks too.

AAR's true complaint is more odious. AAR is concerned that FORR will eliminate a railroad's advantage with existing rate methodologies by setting the challenged tariff rate at a higher level than its contract rate offer. In such circumstances, the railroad reduces its risk because it knows that, even if the Board finds the tariff rate unreasonable, it still may prescribe a rate at or even above the contract offer. The shipper, however, must pay the higher tariff rate throughout the case – which can be years for SAC cases – and risk losing either the entire tariff rate premium if it loses the case or part of the premium if it prevails but at a prescribed rate that

⁵¹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

⁵² AAR Comments at 15.

⁵³ *Id.*

exceeds the railroad's contract offer. Although shippers still will face that risk under FORR, the consequences will be mitigated by the consequences to railroads if they try to defend an extreme position by employing this historic strategy in FORR cases.

For the foregoing reasons, AAR's claims of "unfairness" and lack of "reciprocity" are simply wrong. If anything, FORR creates a more level playing field between railroads and shippers.

B. AAR's Concerns Over Relief Caps and "Disaggregation" of Small Claims Are Unfounded.

AAR complains that the \$4 million relief cap does not limit FORR to small cases because "a \$4 million dispute is not a small case" and "shippers are free to [dis]aggregate cases without limit."⁵⁴ AAR merely regurgitates prior arguments, which the SNPRM, at 44, has more than adequately addressed. Specifically, the relief cap is based upon the same cap in Three Benchmark cases, which is the Board's other small rate case option, and the Board will deal with disaggregation, if it becomes a problem, in the same manner it does in Three Benchmark cases.

The Board already has adequately dispensed with railroad arguments over the relief cap. Although AAR objects that the Three Benchmark relief cap applies over a 5 year period and the FORR cap applies over 2 years, the Board has explained that the rate prescription also applies for a shorter period, which curtails a shipper's ability to receive the full benefit of the prescription under FORR. AAR also argues that, unlike Three Benchmark, FORR's relief cap is not based on the cost of litigating the next-more-complicated method. But AAR assumes that Three Benchmark is the next-more-complicated method when, in fact, FORR is on par with Three Benchmark; it is an alternative to Three Benchmark for small cases, not a less complicated

⁵⁴ AAR Comments at 17.

method. Indeed, FORR conceivably could be more complicated than Three Benchmark, depending upon the methodologies that the parties present. Thus, it is appropriate that the FORR relief cap mirrors the Three Benchmark cap.

The Board also has dispensed with arguments over disaggregation. As the Board has properly noted in the Three Benchmark context, the mere filing of simultaneous cases by the same complainant does not automatically constitute “abuse” or “improper” disaggregation. If a railroad defendant believes that a complainant is improperly disaggregating cases, it can raise its objections in the pending case so the Board can address the specific facts of that case. AAR has offered no basis to conclude that disaggregation will be any more of a problem for FORR cases than it has been for Three Benchmark cases; nor has it demonstrated why any abuse that might occur could not be identified and addressed in individual FORR cases.

C. FORR Appropriately Accounts for Revenue Adequacy.

AAR renews its complaint that the Board does not adequately address how FORR will affect the statutory mandate to ensure revenue adequacy.⁵⁵ Specifically, AAR contends that, “[i]f 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.*”⁵⁶ The italicized phrase is key because it assumes a result that FORR does not, in fact, mandate. Under FORR, the Board does not decide whether the railroad’s offer is unreasonable, as AAR mischaracterizes it; rather, the Board decides which party’s offer is most reasonable. In making *that* decision, the Board will consider how each methodology accounts for revenue adequacy. When FORR is viewed in the correct context, the relevance of revenue adequacy is plain to see.

⁵⁵ AAR Comments at 18.

⁵⁶ *Id.* [emphasis added].

AAR also recycles an objection it made against Three Benchmark cases when first proposed by the Board in 2007, namely, “that FORR will create a coercive downward force on rates....”⁵⁷ This argument, which previously has been referred to as “ratcheting,” was soundly rejected in the context of Three Benchmark cases and should be rejected for the same reasons as to FORR. As to both Three Benchmark and FORR, the STB acknowledged this rail industry concern “in theory.” But as to Three Benchmark cases, the STB observed that “the potential for ratcheting will be severely constrained by the [relief cap]” and that, “even if every single potentially captive shipper were to seek, and obtain, the maximum relief available..., this would result in a reduction in total rail revenues by less than 2.4%.”⁵⁸ For that worst-case scenario to occur, however, the Board observed that “there would have to be an avalanche of rate cases” and, if that did occur, the Board “could reassess the advisability of this approach and hold cases in abeyance in the meantime.”⁵⁹ Needless to say, 15 years have passed without a “trickle,” much less an “avalanche,” of Three Benchmark cases. The Board can take the same approach in response to railroad “ratcheting” arguments against FORR and be well within the bounds of reasoned decision-making.

⁵⁷ *Id.*

⁵⁸ *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1), slip op. at 74 (served Sept. 5, 2007) (the STB performed its own analysis of the confidential waybill sample to calculate 2.4%).

⁵⁹ *Id.*

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