

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 755

FINAL OFFER RATE REVIEW

STB Ex Parte No. 765

JOINT PETITION FOR RULEMAKING TO ESTABLISH AN ALTERNATIVE
VOLUNTARY ARBITRATION PROGRAM FOR SMALL RATE DISPUTES

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

The Association of American Railroads (“AAR”) respectfully submits these reply comments concerning the Supplemental Notice of Proposed Rulemaking (“SNPRM”), served on November 15, 2021, in which the Board offers a slightly modified version of “Final Offer Rate Review” (“FORR”), and the Board’s Notice of Proposed Rulemaking (“NPRM”) also served on November 15, 2021, in the *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*, EP 765, proceeding (“voluntary arbitration”).

These reply comments address arguments presented by other commenters on the SNPRM and focus on three main points:

- American Fuel & Petrochemical Manufacturers contends that the Board has statutory authority to adopt FORR. They are mistaken. Congress directed the Board to apply its own independent judgment in adjudicating rate disputes. By confining the possible outcomes to the two offers proposed by the parties, FORR prevents the Board from carrying out its statutory duty.
- Industrial Minerals Association-North America, Indorama Ventures, and other commenters urge the Board to increase the \$4 million cap on relief, and make certain modifications to FORR’s schedule. The Board was correct in rejecting proposals to raise the relief cap, and instead keep FORR confined to the “small” disputes the Board hopes to address. The supplemental comments provide no reason for the Board to revisit its determination on this question or on the schedule-related issues.

- The United States Department of Agriculture argues that the Board should adopt FORR even if it also adopts a voluntary arbitration program in EP 765, and Olin Corporation contends that the Board should not allow railroads to exempt themselves from FORR by opting in to the arbitration program. The Board should reject these suggestions. If the Board adopts a voluntary arbitration program for small rate disputes, there is no need for FORR. And even if the Board were inclined to adopt both proposals, it should encourage and incentivize railroads to volunteer for arbitration by allowing an exemption from FORR.

These comments also respond to several commenters' suggestions regarding the voluntary arbitration program NPRM. As AAR has maintained throughout this proceeding, FORR is an ill-advised and unlawful construct that should be withdrawn. The arbitration program currently under consideration in EP 765 is a far more promising way to make the Board's small rate case process more accessible *and* meet the congressional objective of establishing a voluntary rate arbitration program. The Board should progress the EP 765 rulemaking and withdraw FORR.

I. The Board Lacks Statutory Authority To Adopt FORR.

American Fuel & Petrochemical Manufacturers ("AFPM") strives mightily to find some indication that Congress wanted the Board to adjudicate rate cases using the same method arbitrators use to fix the salaries of major league baseball players. Its efforts fall short.

AFPM overreaches in contending that FORR is required because Congress directed the Board to "provide multiple avenues for rail shippers to dispute potential

unfair rates.” AFPM Supp. Comments at 4 (emphasis in original). The statutory language it cites says no such thing: the statute merely directs the Board to maintain “1 or more” simplified and expedited methods for determining the reasonableness of challenged rates in cases where a full Stand-Alone Cost (“SAC”) presentation is too costly. 49 U.S.C. § 10701(d)(3). Enacting FORR is unnecessary to comply with this provision. The Board has already adopted the Simplified SAC methodology, the Three-Benchmark methodology, and is poised to adopt a new voluntary arbitration program. Nothing more is needed or required by any statute.

AFPM mischaracterizes AAR’s argument that the Board lacks statutory authority to adopt FORR. AAR has *not* “argued that FORR is mandatory arbitration.” AFPM Supp. Comments at 7. Rather, the Board lacks statutory authority to adopt a decisionmaking procedure that is not in any sense an adjudication—i.e., one in which the Board abandons its statutory duty to apply its expertise and render its own independent judgment as to the maximum reasonable rate. As AFPM acknowledges, “[t]he STB has a statutory duty to apply the law in determining, based on its own best judgment, the maximum reasonable rate.” AFPM Supp. Comments at 8. Exactly right. Because FORR would prevent the Board from applying “its own best judgment” in determining the maximum reasonable rate, it is unauthorized by law.

AFPM contends that adjudicators may “rely on or adopt the parties’ submissions.” AFPM Supp. Comments at 8. But there is a vast difference between an adjudicator who determines that a proposal offered by one of the parties is the appropriate rate, and an adjudicator who confines his range of possible decisions to the two proposals the parties

happen to offer. In the latter case, outside of the rare circumstance where one party's proposal happens to be exactly the outcome the adjudicator would have landed on using his "own best judgment," AFPM Supp. Comments at 8, the adjudicator will have prevented himself from reaching what he believes to be the legally correct outcome.

AFPM is wrong in asserting that FORR "is not new or unique." AFPM Supp. Comments at 8. Neither AFPM nor the Board identifies any other agency that adjudicates disputes using a final-offer process. Although AFPM notes that Three-Benchmark uses elements of a final-offer approach, the Board itself has recognized that 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]." SNPRM at 5.

AFPM concedes that Congress provided for a "full hearing" in rate-reasonableness cases, 49 U.S.C. § 10704(a)(1), and acknowledges that the Supreme Court has held that a "full hearing" means the application of "judicial standards" of due process that would apply "in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 12 (1938). Tellingly, AFPM does not argue that a judge, consistent with judicial standards and due process, could announce at the beginning of a bench trial that he was not going to make an independent decision but simply select whichever party's position was "least wrong." Instead, AFPM makes the noncontroversial point that "agencies have discretion" in how they conduct adjudications. AFPM Supp. Comments at 10. True enough, but that discretion does not extend to forcing the parties into a baseball-

arbitration-style process when the statute guarantees regulated parties the right to a “full hearing” using judicial standards.

AFPM misunderstands FORR’s burden-of-proof problem. AFPM Supp. Comments at 10. No one is contending that FORR shifts the burden of proof on the initial determinations that the railroad has market dominance and the challenged rate is unreasonable. Rather, when the Board is deciding between the final offers, the burden of proof evaporates—the shipper need not prove anything; the Board simply chooses between the final offers. The scheme is therefore contrary to the Administrative Procedure Act’s mandate that the complainant bears the burden of proof throughout. *See* 5 U.S.C. § 556(d). AFPM has no answer to this indisputable flaw.

AFPM admits it is “true” that under FORR “the risks faced by shippers and railroads are not reciprocal,” but contends that “the complaint rests with Congress” because the Board’s statutory mandate is to regulate railroad conduct, not shipper conduct. AFPM Supp. Comments at 11. That argument makes no sense. The Board’s mandate is to regulate rates when certain preconditions are met, but it does not follow that in carrying out that mandate the Board must adopt a dispute-resolution process that places all the risk of an adverse result on the railroad and none on the shipper. Under FORR, the Board would never prescribe a rate higher than the one that is being challenged, as it is impossible to envision a railroad making a final offer that exceeds the challenged rate. *See* SNPRM at 10 (explaining that FORR is intended to “discourage extreme positions” and “facilitate settlement”).

AFPM argues that FORR is not unconstitutionally vague because the Board has identified “the criteria” that will guide its selection of the winning offer. AFPM Supp. Comments at 13. But the vagueness problem also stems from the Board’s refusal to disclose in advance the methodology it will use in evaluating the final offers in light of these criteria. AFPM’s observation that the Board will consider “existing” methodologies, as well as “other” methodologies (*id.*), underscores the problem: Anything goes, and railroads will not be able to determine how to conform their conduct to the law because they will not know in advance how the Board will go about determining whether its rate was unreasonable.

II. The Board Should Maintain The \$4 Million Relief Cap And Reject The Proposed Adjustments To FORR’s Schedule.

Several commenters urge the Board to increase or eliminate FORR’s \$4 million relief cap and make other modifications to FORR’s procedures and schedule. The Board should adhere to its prior determination to maintain the relief cap and should reject the commenters’ other proposed adjustments.

Industrial Minerals Association-North America (“IMA-NA”) and Indorama Ventures (“Indorama”) suggest that the Board adopt a two-tiered approach (namely, a \$4 million cap with a short procedural timeline, and no cap for cases with a longer timeline). *See* IMA-NA Supp. Comments at 15-17; Indorama Supp. Comments at 15-17. These arguments undercut the stated reason for adding FORR to the shippers’ quiver of rate review options. Raising the cap, or adopting a tiered approach that would allow disputes of any size to be resolved through FORR, would violate the Board’s purpose in proposing

FORR as an efficient way of resolving small disputes and would implicate the Board's concern about allowing higher relief levels for less-precise methodologies. Indeed, even with a \$4 million cap, FORR is not confined to "small" disputes. The Board was correct to reject these arguments when they were presented in comments on the NPRM. *See* SNPRM at 47 ("[I]t would be premature to propose expanding FORR beyond its initial purpose, which is permitting access to rate reasonableness determinations for small disputes"). There is no need to revisit that conclusion.

Although IMA-NA and Indorama contend that the Canadian experience with final-offer review "demonstrates that FORR will work well as a two-tiered system and will not disrupt the economic stability of the US Class I railroads," IMA-NA Supp. Comments at 16; Indorama Supp. Comments at 16, the Canadian approach does not provide a useful or analogous model. Among other things, the Canadian approach suffers from a lack of transparency. Moreover, it is expressly authorized by statute, whereas Congress has provided no such authorization here.

Other commenters make similar arguments. Olin Corporation speculates about the possibility of railroad "gaming," in the form of using inflated initial rates as a way of "leveraging" the rate cap. Olin Supp. Comments at 8-9. The Board was correct to dismiss this theoretical concern, and to note that the Board could address such a situation if and when it were to arise in an individual case. SNPRM at 46.

The Coalition Associations contend that a successful complainant should be allowed to unilaterally determine the date on which the two-year relief period begins. CA Supp. Comments at 10. That proposal is inconsistent with the concept of reparations,

which are inherently retrospective in nature. Moreover, it would open the door to absurd and unfair results by allowing the complainant to start the two-year period at a time when the prescribed rate is far below the market rate, and the facts and evidence that led to the Board's determination are ancient history. Allowing the complainant to start the two-year clock running "on a date to be determined solely by the complainant," CA Supp. Comments at 10, would give shippers a windfall by enforcing a prescribed rate that is disconnected from the market conditions that would be in existence at the time the rate is enforced.

The Coalition Associations also argue that "the proposed process for non-streamlined cases is seriously flawed because it eliminates any opportunity for rebuttal evidence." CA Supp. Comments at 4-9. The Board has already considered this proposal and rejected it as "disproportionate to FORR, which is intended to be simplified and expedited." SNPRM at 41 n.63. The Coalition Associations offer no persuasive reason to change course. By their own admission, their proposal would add an entire *month* to the FORR schedule. See CA Supp. Comments at 7. And their objection that complainants may need to "anticipate and address" the defendant's response (*id.* at 6) rings hollow, given that FORR requires defendants to guess at the very methodology the Board will use to decide the case. The Coalition Associations cannot seriously fault FORR as unfair to complainants.

Finally, AFPM objects to the SNPRM's inclusion of a short (20-day) mandatory mediation period, AFPM Supp. Comments at 16, but that modification makes good sense. Especially in light of the Board's stated purpose of encouraging settlements, giving the

parties the opportunity to resolve the dispute before litigation gets underway is the correct approach. AFPM also objects to the SNPRM's adjustment of the deadline for the railroad's market dominance submission (making it due as part of the reply submission rather than the opening submission). *Id.* This modification also makes sense. Railroads cannot be expected to prepare their response until they have seen the shipper's submission.

III. If The Board Adopts A Voluntary Arbitration Program, There Is No Need For FORR.

The United States Department of Agriculture ("USDA") suggests that the Board adopt both a voluntary arbitration program and FORR. USDA Supp. Comments at 3. That would be unwise and unnecessary. If the Board adopts a voluntary arbitration program, there is no need for FORR, as the Class I railroads have already stated that they will participate in the voluntary arbitration program if it is structured appropriately. At a minimum, before moving ahead with FORR, the Board should assess how the voluntary arbitration program works in practice, and if it resolves the Board's concern about providing a meaningful avenue of relief for small disputes.

USDA errs in arguing that, compared to voluntary arbitration, FORR "is the better process not only because its decision-making process is clearer, but also because that process is designed to produce reasonable outcomes." USDA Supp. Comments at 3. FORR's decisionmaking process is opaque. Indeed, the Board envisions the uncertainty surrounding the process—including the Board's refusal to disclose the methodology it will use until it announces its decision—as a critical feature of the scheme. Nor will

FORR produce reasonable outcomes. To the contrary, FORR is designed to *eliminate* reasonable outcomes, by confining the Board to each party's proposal.

Olin Corporation argues that the Board should not allow railroads to exempt themselves from FORR by opting in to the voluntary arbitration program. Olin Supp. Comments at 10-17. There is no need to address this concern if the Board declines to adopt FORR. But if the Board were to move ahead with FORR, it should adhere to its proposed approach of “[c]reating [an arbitration] program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes.” NPRM (EP 765) at 14. Olin's arguments to the contrary are meritless.

First, Olin contends that arbitration is not necessarily more efficient than administrative litigation, and speculates that “the well-funded Class I railroads” would use “every tactic at their disposal” to make arbitration difficult. Olin Supp. Comments at 12. Olin, which itself is a “well-funded” Fortune 500 company with revenues in 2020 exceeding \$5 billion, does not explain why it would be improper for railroads to exercise their constitutional right to defend themselves against accusations that they have violated federal law. In any event, Olin cannot seriously dispute that arbitration is widely considered a more efficient means of dispute resolution, and one that has been specifically endorsed by Congress as a way of resolving rate disputes. Forcing railroads into the unlawful FORR construct would undermine the entire purpose of EP 765 by denying railroads an arbitral forum in which to resolve small disputes. If Olin's speculative fears about railroads thwarting arbitration were ever to materialize, *id.* at 11,

the Board could address the issue at the time—the same approach the Board is taking with regard to Olin’s other speculative concerns. *See* Olin Supp. Comments at 8-9; SNPRM at 46.

Second, Olin argues that the proposed arbitration process would be compulsory on shippers. *See* Olin Supp. Comments at 11-12. Not so. Shippers would be able to pursue voluntary arbitration *or* administrative litigation using SAC, Simplified SAC, or Three-Benchmark. A railroad’s choice of arbitration over FORR does not mean the shipper has to arbitrate or else bring no case at all (which is what “compulsory arbitration” means).

Third, Olin contends that it is improper for the Board to seek to incentivize parties to resolve their disputes through arbitration. Olin Supp. Comments at 12-14. Olin is mistaken. The Supreme Court has recognized that the Federal Arbitration Act reflects “a national policy favoring arbitration,” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and Congress has specifically directed the Board to develop a voluntary arbitration program to resolve rate disputes. *See* 49 U.S.C. § 11708. Arbitration is also consistent with the Board’s stated preference for private resolutions of disputes, as well as with its obligation to manage its own docket efficiently and effectively. The Board cannot require parties to participate in arbitration, so it is entirely proper for the Board to identify ways of encouraging parties to volunteer for arbitration. By allowing railroads to exempt themselves from FORR by opting into the arbitration program, the Board is not engaged in “deal-making” or “trading away the FORR process.” *Id.* at 13, 14. Rather, the Board would be taking a compromise approach in which railroads who believe FORR is unfair,

unlawful, and coercive would be able to exempt themselves and resolve their disputes through arbitration.

Fourth, Olin argues that the Board's proposed Section 1108.33 sweeps more broadly than necessary. Olin Supp. Comments at 15-17. Not so. Allowing the railroads to exempt themselves from FORR is necessary—indeed, critical—to the success of a voluntary arbitration program. Adopting Olin's suggestion that the exemption be narrowed to prohibit only FORR decisionmaking in arbitrations would render the exemption all but valueless. If shippers could initiate FORR proceedings against railroads that volunteered for arbitration, the incentive for signing up for the arbitration program in the first place would be substantially diluted.

IV. The Board Should Adopt A Voluntary Arbitration Program and Maintain Important Protections That Encourage Participation.

AAR agrees with several aspects of the voluntary arbitration NPRM that some shipper commenters object to, specifically the one-case limit and the confidential nature of the proceedings. *See* AFPM Comments at 8-9, 14; CA Comments at 8-15; Indorama Comments at 18; IMA-NA Comments at 17-18; NGFA Comments at 7-8. As the Board noted in the NPRM, the confidentiality aspect of the voluntary arbitration program will “serve as an incentive for carriers to participate.” NPRM (EP 765) at 46. While one shipper group believes that the threat of a public decision will incentivize dealmaking, NGFA Comments at 7, the opposite effect is likely—the threat of public decisions, whether precedential or not, will incentivize each side to dig in on its position, rather than come to a resolution. This concern is amplified by two commenters that admit the true

purpose for wanting public decisions, stating the “severe [confidentiality] constraints on the use of the process would limit rail shippers’ ability to use these decisions in rate negotiations with railroads.” Indorama at 18; IMA-NA at 18. Utilizing an arbitration decision to create leverage in commercial negotiations for other commercial relationships is exactly why decisions should be confidential. It also undermines the argument that confidentiality is not needed since the decisions will not be precedential. *See* CA Comments at 9. While the Board may not use a public decision as legal precedent, it appears shipper interests seek to utilize arbitration decisions as leverage in their commercial dealings with railroads. This is entirely inappropriate. The Board should reaffirm the confidentiality of arbitrations under the NPRM to encourage participation of the carriers.

Additionally, the Board should maintain the one-case limit per shipper to protect against disaggregation. As noted in AAR’s comments, the Board appropriately built-in a protection against disaggregation, given the confidential nature of alternative dispute resolution. *See* AAR Comments 5-6. Shipper interests admit they want to bring multiple arbitrations concurrently against the same carrier, i.e., they want to disaggregate a single dispute into several arbitrations. *See* AFPM Comments at 8; CA Comments at 11-12; Indorama Comments at 17-18; IMA-NA Comments at 17-18. However, not only does the one-case limit prevent disaggregation, it also ensures that multiple shippers may utilize the program. If the Board does not protect against disaggregation, one or two large shippers could file 25 cases against a single carrier, unfairly foreclosing other shippers the opportunity to avail themselves of arbitration. The one-case limitation,

however, does not preclude a shipper from having multiple lanes considered in the arbitration, so long as the relief limit remains under the cap, nor does it preclude a shipper from filing any other rate case before the Board. If a shipper has multiple lanes with significant levels of relief, it should pursue a rate case where such relief levels are more appropriate. Voluntary arbitration is designed to resolve small disputes.

CONCLUSION

The Board should withdraw the proposed FORR rule and instead pursue the voluntary alternative dispute resolution process under consideration in EP 765.

Respectfully submitted.

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

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