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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 790

**ADVANCE NOTICE OF PROPOSED RULEMAKING
REVIEW OF REPLIES TO REPLIES**

**COMMENTS FROM
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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I. INTRODUCTION

The American Short Line and Regional Railroad Association (“ASLRRA”) submits these comments in response to the Surface Transportation Board’s (“STB” or “Board”) Advance Notice of Proposed Rulemaking in Docket No. EP 790 evaluating whether it should revise its rules governing “replies to replies” (“rebuttals”) in Board proceedings.¹ The Board seeks stakeholder input on how its regulations on such filings would best balance fairness, efficiency, and predictability. ASLRRA supports a balanced approach that would permit rebuttals, but limited to matters raised on reply, and required to be submitted within a certain timeframe.

Interest of the ASLRRA in this Proceeding

The ASLRRA is a national trade association representing the interests of about 600 short line and regional railroad members in legislative and regulatory matters. Short lines operate approximately 50,000 miles of track in the United States, or about 30% of the national freight network, touching in origin or destination one out of every five cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad

¹ 91 Fed. Reg. 28,520 (May 18, 2026).

network. Short lines are predominantly small businesses that rely on clear, predictable, and efficient regulatory processes at the STB. From the perspective of smaller carriers with limited legal resources, it is especially important that procedural rules provide clarity and guard against unnecessary cost and delay.

II. DISCUSSION

The Proposed Options

Rebuttals are not permitted in the STB's procedural rules per 49 CFR § 1104.13(c). However, the STB has regularly allowed rebuttals "[i]n the interest of compiling a full record." *See City of Alexandria, VA—Petition for Declaratory Ord.*, No. STB FD 35157, 2009 STB LEXIS 3, 2009 WL 381800, at *1 n. 1 (Feb. 17, 2009) ("*City of Alexandria*"). In this Docket, the Board seeks to clarify the rules surrounding this practice to ensure proceedings are fair and efficient. The Board has proposed the following options:

1. Leave 49 CFR § 1104.13 unchanged.
2. Amend 49 CFR § 1104.13 to allow for rebuttal.
3. Amend 49 CFR § 1104.13 to allow for rebuttals with limits.
4. Amend 49 CFR § 1104.13 to include other motions practices.

Commenters may also address treatment of rebuttals outside the specified options. The Board's stated goal is to "balanc[e] fairness with efficiency and predictability for all parties that appear in proceedings before the Board." *Review of Replies to Replies*, 91 FR 28520. Although the Board has established a practice of allowing rebuttals, the concern is that it results in continuous back and forth, making proceedings less efficient and potentially introducing inappropriate information. However, if the Board more strictly enforces the prohibition on rebuttals, there is the potential for a less complete record.

STB Practice

There are a variety of decisions by the STB in which rebuttals were filed with leave from the Board, often citing *City of Alexandria*, which establishes the practice of allowing rebuttals, “in the interest of compiling a full record.” *See City of Alexandria*, at *1 (granting leave to Norfolk Southern Railway Company to file a reply to a reply when the City consented as part of an agreement on document use in the federal court litigation between the parties), *see also Grafton and Upton Railroad Company—Petition for Declaratory Ord.*, FD 36696, 2023 STB LEXIS 207, at 6 (Nov. 14, 2023) (granting respondents leave to file a rebuttal challenging the validity of petitioners legal arguments and addressing reliance on an incorrect legal standard, citing *City of Alexandria*). Related to that goal, the Board has also allowed rebuttals when matters are complex and/or the timeline for discovery is limited. *See, e.g., Navajo Transitional Energy Company, LLC. v. BNSF Railway Company*, NOR 42179, 2017 STB LEXIS 218, at 2 (Dec. 5, 2017) (allowing multiple “sur-replies” from BNSF when the matter involved an inter-agency agreement and document requests from foreign entities as well as a response from NTEC in the interest of fairness).

Rebuttals have also been allowed in petitions for rulemaking, also noting the desire for a complete record. *See Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, 85 FR 86876 at n. 5 (Dec. 31, 2020) (allowing rebuttals in a rulemaking proceeding regarding procedures for determining Class I rail carrier status by revenue). The consent of opposing parties to the reply also appears here. *See Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, EP 768, 2021 STB LEXIS 278, at 3 (Nov. 22, 2021) (granting petitioners leave to file a surreply when receiving parties AAR and Union Pacific consented with conditions).

There are fewer examples of when the STB has denied motions for leave to file replies. The Board has denied a motion if the record is already complete, and the reply adds nothing new of relevance to the proceeding. *See, e.g., California High-Speed Rail Authority—Petition for Declaratory Ord.*, FD 35861, 2014 STB LEXIS 311, at 11 (Dec. 12, 2014) (denying the Authority’s motion to file a reply when “extensive arguments” were already presented on the issue and the practice is technically prohibited by 49 CFR § 1104.13(c)). Motions for a rebuttal are also disfavored when they are beyond the twenty-day deadline for replies provided in 49 CFR § 1104.13(a). *See, e.g., Toledo, Peoria & W. Ry. v. Surface Transp. Bd.*, 462 F.3d 734, 742-743 (7th Cir. 2006) (denying a petition to reconsider an STB decision on the grounds that petitioner was denied the opportunity to reply to evidence when this would have necessitated a rebuttal, and petitioners waited over a year to file this request instead of timely motioning for leave to reply prior to the final decision).

When allowing a rebuttal in the cited examples, the STB emphasized the importance of a complete record and preferred situations where the recipient of the reply did not oppose it. This is logical as the Board wants to decide based on all available, relevant information, and it wants its proceedings to be efficient. Based on the volume of decisions in which rebuttals were allowed compared with when they were not, the record suggests that they are often helpful to STB proceedings and, with appropriate limitations, do not cause inefficiency.

Procedures of Other Federal Agencies

Several other federal agencies allow rebuttals with limitations, often on the time to file and the length of the reply and contained to matters raised in the opposition’s response. The Federal Communications Commission (“FCC”), for example, allows replies to oppositions within five days, limited to matters raised in the opposition and contained to a single pleading.

47 CFR § 1.45(c). Additionally, the Consumer Financial Protection Bureau (“CFPB”) allows replies to oppositions to dispositive motions of ten pages or less within seven days. 12 CFR § 1081.212(f). Further, the Federal Maritime Commission (“FMC”) allows rebuttals on dispositive motions within seven days but does not allow those rebuttals to raise unrelated issues, present new grounds for relief, or reargue points made in the original motion, essentially constraining the reply to addressing only the content of the response. The reply can be a maximum of 15 pages. 46 CFR § 502.70(c) and (e).

For additional detail, the FMC does not allow rebuttals to responses to non-dispositive motions except for “extraordinary circumstances.” 46 CFR § 502.71(c). In contrast to the FMC, the CFPB allows rebuttals to responses on non-dispositive motions within seven days of service of the response, limited to six pages. 12 CFR § 1081.205(d)(2) and (e). However, the CFPB also has a meet and confer requirement for all non-dispositive motions. 12 CFR 1081.205(f). Limiting the opportunity to reply on non-dispositive motions avoids bogging down the course of the proceeding, whereas allowing for rebuttals on dispositive motions ensures a complete record before a ruling on the merits.

III. ASLRRRA ADVOCATES FOR A BALANCED APPROACH

ASLRRRA is supportive of the third option proposed by the Board, that it should amend 49 CFR § 1104.13 to allow rebuttals but limited to matters raised on reply, and require that they be submitted within a certain timeframe. This is consistent with other federal agency proceedings, and it preserves procedural efficiency by avoiding superfluous additional briefing.

Rebuttals should be limited to matters raised by the opposition in their reply like the reasonable FMC practice. Additionally, rebuttals should be filed within seven days of service, as is required by both the FMC and CFPB, to ensure proceedings continue moving forward at a

reasonable pace. Although other agencies specify page limits, as there are no maximums on the length of pleadings in current STB rules, ASLRRRA does not advocate that one be created just for rebuttals. Regarding the different treatment of dispositive and non-dispositive motions, a meet and confer requirement might be reasonable for the non-dispositive motions. If parties have a dispute about scheduling or discovery, it is more efficient for them to attempt to resolve this in good faith together before seeking to file rebuttals. For dispositive motions, filing rebuttals is more favorable because the Board has demonstrated a strong interest in a complete record, which would be especially important when deciding on the merits. Finally, in the interest of efficiency, the Board should not allow surrebuttals.

* * * * *

ASLRRRA appreciates the opportunity to provide these comments and looks forward to continued engagement with the Board as this proceeding moves forward.

Respectfully submitted,



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