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SERVICE DATE – SEPTEMBER 12, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 755

FINAL OFFER RATE REVIEW

Docket No. EP 665 (Sub-No. 2)¹

EXPANDING ACCESS TO RATE RELIEF

Decided: September 11, 2019

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking; Request for Comments.

SUMMARY: The Surface Transportation Board (STB or Board) proposes a new procedure for challenging the reasonableness of railroad rates in smaller cases. In this procedure, the Board would decide a case by selecting either the complainant's or the defendant's final offer, subject to an expedited procedural schedule that adheres to firm deadlines.

DATES: Comments on the proposed rule are due by November 12, 2019. Reply comments are due by January 10, 2020.

ADDRESSES: Comments and replies in either or both dockets may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 755 and/or Docket No. EP 665 (Sub-No. 2), 395 E Street, S.W., Washington, DC 20423-0001. Comments and replies will be posted to the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: 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

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

2018, the RRTF issued a report on April 25, 2019 (RRTF Report).² 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 Report 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). The Board now proposes to build on the RRTF recommendation and establish a new rate case procedure for smaller cases, the Final Offer Rate Review (FORR) procedure.

Background

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.”³ More generally, the rail transportation policy states that, in regulating the railroad industry, it is the policy of the United States Government “to 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 Proceedings, 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 also 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.), 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

² The RRTF Report was posted on the Board’s website on April 29, 2019, and can be accessed at https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

³ Prior to the enactment of the STB Reauthorization Act, § 10704(d) began with a sentence stating that, “[w]ithin 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.” See, e.g., 49 U.S.C. § 10704(d) (2014).

removed the relief limit on the Simplified-SAC methodology, among other things. See Rate Regulation 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 Proceedings, 1 S.T.B. at 1057.⁴

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.⁵ Moreover, because a contract rate may not be

⁴ See also, e.g., Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I R.R.s., 6 S.T.B. 798, 803 & n.19 (2003) (“We have had to sacrifice some accuracy for simplicity where necessary to ensure that our rate complaint processes are accessible to shippers. . . . Towards that end, we have adopted simplified evidentiary procedures for adjudicating rate reasonableness in those cases where more sophisticated procedures are too costly or burdensome, ‘to ensure that no shipper is foreclosed from exercising its statutory right to challenge the reasonableness of rates charged on its captive traffic.’”) (quoting Non-Coal Proceedings, 1 S.T.B. at 1008); Market Dominance Determinations—Prod. & Geographic Competition, 3 S.T.B. 937, 949 (1998) (excluding product and geographic competition from consideration in market dominance determinations so as to “remove a substantial obstacle to the shippers’ ability to exercise their statutory rights.”).

⁵ See, e.g., Alliance for Rail Competition Opening Comments 22, June 26, 2014, Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1) (stating that the Three-Benchmark methodology is too costly and complex for grain shippers and producers in its current form); W. Coal Traffic League Opening Comments 74-76, Oct. 23, 2012, Rate Regulation Reforms, EP 715 (the cost and complexity of the Simplified-SAC methodology discourage its use); Oversight of the STB Reauthorization Act of 2015 Before the Subcomm. on R.R.s., Pipelines, & Hazardous Materials of the H. Comm. on Transp. & Infrastructure, 115th Cong. (2018) (letter from Chris Jahn, President, The Fertilizer Institute, submitted for the record) (due to the time and expense needed to pursue a rate case, it “does not work” for most complainants).

challenged before the Board, 49 U.S.C. § 10709(c)(1), some complainants⁶ shift from contract rates to tariff rates before bringing a rate case, and tariff rates may be higher than prior contract rates.⁷ That factor gives complainants a strong interest in having a rate case decided quickly, from start to finish.

Accordingly, the Board has continued to explore ideas to improve the accessibility of rate relief. *See, e.g., Expanding Access to Rate Relief*, EP 665 (Sub-No. 2), slip op. at 11-23. 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 Comments 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 uses a final offer procedure as part of the Three-Benchmark methodology, although it is only one part of the rate reasonableness approach as opposed to providing the overall framework, as the Board is proposing here.⁸ One of the benchmarks compares the markup paid by the challenged traffic to the average markup assessed on similar traffic. *See, e.g., Rate Regulation 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.

⁶ Paying a transportation rate is not the only way to establish standing to bring a rate case, and the Board has previously provided guidance in a policy statement for “complainants that allege indirect harm in rate complaints.” *See Rail Transp. of Grain, Rate Regulation Review*, EP 665 (Sub-No. 1) et al., slip op. at 7-8 (STB served Dec. 29, 2016).

⁷ As an example, the most recent rate proceeding involved a complainant that had been served pursuant to contracts for many years and then filed its complaint as soon as its contract expired. *See Consumers Energy Co. Complaint 4-5, Jan. 13, 2015, Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142; *see also, e.g., Occidental Chem. Corp. Comments 2-4, Oct. 23, 2012, Rate Regulation Reforms*, EP 715 (paying the tariff rate for extended periods of time while a rate case is litigated—which can add millions of dollars in costs beyond the direct costs of litigation—undermines the utility of a rate challenge, especially if the carrier requires that all rates bundled with the challenged rate also shift to tariff during the pendency of the case); *PPG Indus., Inc. Comments 3-4, Oct. 23, 2012, Rate Regulation Reforms*, EP 715 (noting the effect of bundling and stating that tariff premium could reach \$20 million per year of rate litigation). The latter two cites are simply to illustrate the need for expedited rate reasonableness procedures, and not to take a position—one way or another—on the appropriateness of rate bundling.

⁸ The Three-Benchmark methodology also includes more procedural steps and a longer timeline than the FORR procedure proposed here. *See* 49 C.F.R. § 1111.10(a)(2).

The Board has held that it may not require arbitration of rate disputes under current law,⁹ and it is not proposing to do so here; instead, *the Board* would make the determination of rate reasonableness as it does under the Board’s current options for challenging the reasonableness of rates. However, the benefits of *final offer* procedures used in other settings offer support and background for the Board’s proposal. 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 Arbitration, Its Use in Major League Baseball, & Its Potential Applicability to European Football Wage & Transfer Disputes, 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 Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining, 28 Ohio St. J. on Disp. Resol. 1, 3, 16, 23-24 (2012) (noting that fourteen 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, the Association of American Railroads’ 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).

⁹ See Arbitration—Various Matters, EP 586, slip op. at 3 n.7 (STB served Sept. 20, 2001); see also 49 U.S.C. § 10704(a)(1) (rate prescriptions require an order from the Board); 49 U.S.C. § 11704(c)(2) (reparations require an order from the Board). The Board has had a *voluntary* arbitration process in place for more than 20 years, and section 13 of the STB Reauthorization Act required adjustments to this process (including the addition of rate disputes to the types of matters eligible for arbitration), but to date parties have not agreed to arbitrate a dispute brought before the Board. See Arbitration of Certain Disputes, 2 S.T.B. 564 (1997) (adopting voluntary arbitration program); Revisions to Arbitration Procedures, EP 730 (STB served Sept. 30, 2016) (making adjustments required by STB Reauthorization Act). In addition to its recommendation for a final offer procedure that would culminate in a decision by the Board, the RRTF recommended legislation that would permit mandatory arbitration of smaller rate cases. See RRTF Report 14-15.

Finally in this regard, the Committee for a Study of Freight Rail Transportation and Regulation of the TRB (TRB Committee)¹⁰ released a report in 2015 that described the benefits of adopting “an independent arbitration process similar to the one long used for resolving rate disputes in Canada.”¹¹ In particular, the TRB Committee 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 Committee Report 211-12. According to the TRB Committee Report, adoption of such a procedure could enhance complainants’ access to rate reasonableness protections, while expediting dispute resolution and encouraging settlements. Id. at 212.

Proposed Rule. The RRTF stated that there is substantial merit to USDA’s general recommendation to improve access using procedural limitations, RRTF Report 16, and the Board agrees. USDA points out that, in addition to reducing the length and cost of litigation, “[a] limited amount of time to collect and present evidence forces parties to focus their time on only the clearest and most important evidence,” and “the decision of what evidence to use or leave out is contextualized within each case.” USDA Reply Comments 6, Dec. 19, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2).

The Board also agrees with the RRTF and USDA that a final offer approach could be an effective way to implement procedural limitations. As USDA notes, Dr. Richard L. Schmalensee, chair of the TRB Committee, recommended that the Board seek process

¹⁰ In 2005, legislation was enacted directing the Secretary of Transportation to enter into an agreement with TRB “to conduct a comprehensive study of the Nation’s railroad transportation system.” See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 9007, 119 Stat. 1144, 1925 (2005). The study was funded in 2011, H.R. Rep. No. 112-284, at 287 (2011), and the TRB Committee was formed, see Nat’l Acad. of Sciences, Eng’g, & Med., Modernizing Freight Rail Regulation (TRB Committee Report) at 12-13 (2015), <http://nap.edu/21759>.

¹¹ In a well-known process used by Canadian regulators, final offer procedures are administered by an outside arbitrator or panel of arbitrators. In Canada, a complainant may submit its rate dispute to the Canadian Transportation Agency, which refers the matter to an arbitrator or a panel of arbitrators. Canada Transp. Act, S.C. 1996, c. 10, as amended, §§ 161(1), 162(1) (Can.). The Canadian statute establishes a two-tiered structure: if the matter involves freight charges of more than \$2 million CAD (subject to an inflation adjustment), a 60-day procedure applies, and if the matter involves freight charges of \$2 million CAD or less (subject to an inflation adjustment), a 30-day procedure applies. Id. §§ 164.1, 165(2)(b). Among other things, the 60-day procedure allows the parties to direct interrogatories to one another, and the arbitrator may request written filings beyond the final offers and information initially submitted in support of final offers. See id. §§ 163(4), 164(1). In the 30-day procedure, there is no discovery, and the arbitrator may request oral presentations from the parties but may not request written submissions beyond the final offers and replies. See id. § 164.1. The arbitrator’s decision is issued within 60 days after the matter was submitted for arbitration, or 30 days if the further expedited procedure applies. Id. § 165(2)(b). Any resulting rate prescription is limited to two years, unless the parties agree to a different period. See id. § 165(2)(c).

improvements based on the final offer arbitration procedure used in Canada. See Tr. 24-25, Public Roundtable, Oct. 25, 2016 (emphasizing the importance of time limits and raising the idea that, among other things, the Board retain final authority over the outcome of a proceeding).¹² The TRB Committee Report also outlined several advantages of a final offer approach—for example, “[t]he imposition of time limits is intended to bring economy to the process and to ensure that shippers are not precluded from access to rate relief as a consequence of slow processing and high litigation costs,” and “the time limit in conjunction with the final-offer rule injects uncertainty into the process, which limits the likelihood that any one party will take an extreme position and encourages the settlement of disputes.” TRB Committee Report 138. And the Board stated in Simplified Standards that “[a] final offer procedure for determining the comparison group is in the public interest because it will encourage both parties to submit a reasonable comparison group. Any final tender that is skewed too far in one direction might well result in the selection of a more reasonable final tender presented by the opposing party.” Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18; see also U.S. Magnesium, L.L.C. v. Union Pac. R.R., NOR 42114, slip op. at 9-12 (STB served Jan. 28, 2010) (selecting one party’s comparison group as “more reasonable” while also recognizing that both parties’ submissions were imperfect).

By lowering the costs of litigating smaller rate cases, the Board expects that complainants with smaller rate cases, who otherwise might have been deterred from challenging a rate due to the cost of bringing a case under the Board’s existing rate reasonableness methodologies, would have a more accessible avenue for rate reasonableness review by the Board. The Board also expects that reduced litigation costs would make it possible for such complainants to prove meritorious cases. And, a final offer procedure may help to encourage private settlements of disputes, an outcome that was similarly suggested in the TRB Committee Report.

Accordingly, the Board proposes to establish a procedure similar to the one described by the RRTF: a final offer procedure to determine rate reasonableness for smaller cases, thereby providing faster, less costly review of claims of unreasonable railroad rates.

I. Initiating a Proceeding and Discovery

Before the process formally begins, the complainant would be required to file with the Board and serve the defendant with a notice of intent to initiate a case, at least five days in advance of filing its complaint.¹³ The proceeding would formally begin with the filing of a complaint. At the time it files its complaint, the complainant would also be required to submit

¹² A transcript of this public roundtable is available on the Board’s website at <https://www.stb.gov/stb/docs/eLibrary/InterVISTAS%20Economic%20Roundtable%20Transcript.pdf>.

¹³ The Board would appoint a Board employee to serve as a case liaison within five business days after the pre-filing notification. See Expediting Rate Cases, EP 733, slip op. at 15 (STB served Nov. 30, 2017) (explaining the role of a Board-appointed liaison in rate cases). The liaison would be appointed sooner than in cases under Three-Benchmark, Simplified-SAC, or SAC, consistent with the expedited nature of the proposed FORR procedure.

the information listed in 49 C.F.R. § 1111.2(a)(1)-(11)¹⁴ and provide to the defendant the materials described in § 1111.2(b).¹⁵ The Board would not require the defendant to file an answer to the complaint¹⁶ in cases under FORR, in light of the expedited timeline included in this procedure.

The filing of the complaint would also mark the beginning of discovery. No litigation over discovery disputes would be permitted. Instead, if a party unreasonably withholds information that the Board subsequently deems to be relevant, the Board would take that withholding into account in making its final decision.¹⁷ If a party believes that relevant information was unreasonably withheld during discovery, it could so argue in the explanation accompanying its final offer, as described further below.

Parties should not expect to receive (or produce) the volume or even necessarily the types of discovery that parties have received in SAC cases, because the proposed time limits do not provide for it. Parties would instead submit narrowly tailored, targeted discovery requests based on the information that the other side could reasonably be expected to provide in a short period of time, focusing on the key information needed to prove or defend a rate case. Parties would be expected to interpret such discovery requests liberally to require the production of readily available information (relative to the discovery deadline) that they should reasonably know to be material and responsive to the request. If a party limits its requests as described above, and the other side still does not comply, as noted above, the requesting party could argue in the explanation accompanying its final offer that relevant information was unreasonably withheld. The Board would take that unreasonable withholding of relevant information into account in choosing between the offers—for example, by giving less weight to an argument that could be undercut by the information that was withheld or by making other adverse inferences. Over time, the Board anticipates that its decisions in FORR cases would establish categories of easily producible, core information that each side could be expected to request and produce within the truncated discovery period.

¹⁴ If the defendant disagrees with the calculation of variable costs based on the complainant's inputs to the Uniform Railroad Costing System (URCS) Phase III program (see 49 C.F.R. § 1111.2(a)(1)-(9)), it could address this issue in its market dominance presentation. As is the case with market dominance determinations generally, movement-specific adjustments to URCS would not be permitted. See, e.g., Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 50-52 (STB served Oct. 30, 2006), aff'd sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

¹⁵ Section 1111.2(b) requires the complainant to “provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.”

¹⁶ The defendant would have an opportunity to file a reply to the complainant's market dominance presentation and final offer, as addressed below.

¹⁷ A similar approach is used in the Canadian final offer procedure, discussed above. See Canada Transp. Act, S.C. 1996, c. 10, as amended, § 163(5) (Can.).

Although this procedure would not necessarily require the use of data from the Board's Waybill Sample, parties would be able to seek access to waybill data pursuant to the Board's regulations at 49 C.F.R. § 1244.9.¹⁸ Up to four years of Waybill Sample data would be available—specifically, the most recent four years that can be provided as of the date of the complaint. See Waybill Data Released in Three-Benchmark Rail Rate Proceedings, EP 646 (Sub-No. 3), slip op. at 4-9 (STB served Mar. 12, 2012). A complainant would be required to submit its waybill data request pursuant to 49 C.F.R. § 1244.9(b)(4), if it chooses to make such a request, on the same day it files its notice of intent to initiate a case. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 78-80 (describing procedures for the release of Waybill Sample data to rate case litigants). A defendant would be required to submit its waybill data request pursuant to 49 C.F.R. § 1244.9(b)(4), if it chooses to make such a request, no later than one day after it is served with the complaint. The defendant would have the option of submitting its request at any time after complainant's filing of the notice of intent to initiate a case, until the deadline stated above—an option which, in effect, provides at least six days for a defendant to make a request. Based on these deadlines, the Board would process requests and provide the data no later than five business days after it receives the request for waybill data.

II. Market Dominance Inquiry

In order to adjudicate the reasonableness of a rate, the Board must first find that the defendant rail carrier has market dominance over the transportation to which the rate applies. 49 U.S.C. § 10707(c). Market dominance includes both a quantitative threshold and a qualitative analysis. Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 3 (STB served May 31, 2013). Under the proposed FORR procedure, market dominance would be evaluated separately from the parties' offers, as is the case with other rate reasonableness procedures. The Board proposes that the FORR procedure may only be used if the complainant also elects to use the streamlined market dominance approach proposed in Docket No. EP 756, Market Dominance Streamlined Approach, served concurrently with this decision. In that decision, the Board is proposing a streamlined market dominance approach for those cases in which a complainant can establish a prima facie case of market dominance by demonstrating six specified factors. See Market Dominance Streamlined Approach, EP 756, slip op. at 6-7 (STB served Sept. 12, 2019). Although the RRTF suggested that a streamlined market dominance approach may not be necessary for a final offer procedure given the time constraints that would accompany such a procedure, RRTF Report 17, the Board finds that the streamlined market dominance approach proposed in Docket No. EP 756 would complement and enhance the streamlined rate reasonableness procedure proposed here. Moreover, the expedited timelines proposed here may make it too difficult for parties to litigate a non-streamlined market dominance presentation.¹⁹ Nevertheless, because there may be merit to giving complainants the

¹⁸ The Board also intends to propose certain changes to its regulations relating to the Waybill Sample. See RRTF Report 47-49.

¹⁹ As discussed in Market Dominance Streamlined Approach, the market dominance inquiry is often a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants. For example, given the hypothetical nature of some competitive options proposed by defendant railroads in past cases, complainants essentially have to predict what a

(continued . . .)

option of choosing between streamlined and non-streamlined market dominance in FORR cases, parties may address this issue in their comments.

In a FORR case, the complainant would submit its showing as to the relevant factors identified in the Board's proposal in Docket No. EP 756 in its market dominance presentation. The defendant carrier, in its reply, could try to refute any of the prima facie factors or otherwise demonstrate that effective competition exists for the traffic at issue. At the complainant's option, further discussion of market dominance could take place during a telephonic hearing before an administrative law judge (ALJ), as described below. In the event that the complainant opts for such a hearing, both sides would be permitted to present their market dominance positions at the hearing.

III. Review Criteria for Final Offers

Following discovery, parties would simultaneously submit their market dominance presentations and final offers, and each party would also submit an analysis addressing the reasonableness of the challenged rate and support for the rate in the party's offer.²⁰ Each party's final offer should reflect what it considers to be the maximum reasonable rate. See 49 U.S.C. § 10704(a)(1). The party submitting the offer could choose how to present and support its offer, including the methodology it uses. The Board's criteria for determining rate reasonableness of and choosing between the offers²¹ would be based on its consideration of the rail transportation policy in 49 U.S.C. § 10101, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles.

Among other aspects of the rail transportation policy, the Board would take into account the policy "to allow, to the maximum extent possible, competition and the demand for services to

(. . . continued)

defendant railroad might argue regarding potential, but unused, competitive options—all without knowing precisely what constitutes a prima facie showing of an absence of effective competition. Parties' market dominance presentations in recent cases (throughout their filings) have been hundreds of pages long. See, e.g., Consumers Energy Co. v. CSX Transp., Inc., Docket No. NOR 42142 (parties' market dominance presentations alone (throughout their filings) exceeded 200 pages of narrative discussion and included multiple expert reports).

²⁰ Given the expedited timelines provided, the Board is not proposing to impose page limits at this time, beyond the 50-page limit proposed for replies in a streamlined market dominance presentation. See Market Dominance Streamlined Approach, EP 756, slip op. at 12. Consistent with the findings of the TRB Committee Report, the Board believes the expedited timelines would serve to control unnecessary submissions. Should the Board adopt this proposal, and if expedited timelines prove insufficient to control the scope of the issues presented, the Board may consider page limits either by rule or in individual proceedings at a later time.

²¹ The Board "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." Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 6.

establish reasonable rates for transportation by rail,” the policy “to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital,” and the policy “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board.” 49 U.S.C. § 10101(1), (3), (6).

Furthermore, pursuant to the Long-Cannon factors, the Board would give due consideration to (i) the carrier’s efforts to minimize traffic transported at revenues that do not contribute to going concern value, (ii) the carrier’s efforts to maximize revenues from traffic that contributes only marginally to fixed costs, and (iii) whether one commodity is paying an unreasonable share of the carrier’s overall revenues, all the while recognizing the policy that rail carriers earn adequate revenues. 49 U.S.C. § 10701(d)(2).²²

Finally, the Board would consider appropriate economic principles, and this general criterion would allow the Board to apply, among other things, the agency’s expertise and general principles developed in its rate case precedent over decades. See, e.g., R.R. Revitalization & Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (directing the ICC to “give due consideration to appropriate economic principles” in adopting new accounting system requirements relevant to its authorities); see also Non-Coal Proceedings, 1 S.T.B. at 1007 (“Our challenge is to reflect these economic and equitable principles, as best we can, in a practical, readily administrable test.”).

As with the Board’s other rate reasonableness procedures, the agency would consider the defendant railroad’s need for differential pricing to permit it to collect adequate revenues. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 73.

If a party adopts a position that is contrary to these guiding criteria, it risks the likelihood that the Board would choose the other party’s offer. In addition to the previously noted benefits of a final offer procedure with expedited time limits, most notably its bringing economy to rate cases and encouraging the parties to take reasonable positions, the Board expects that the criteria here—the rail transportation policy, the Long-Cannon factors, and appropriate economic principles—allow for the parties to submit final offers using their preferred methodologies, including revised versions of the Board’s existing rate review methodologies or new methodologies altogether. These principle-based, non-prescriptive criteria are intended to allow for innovation with respect to rate review methodologies, and the use and creation of precedent through an adversarial process simultaneously creates incentives for methodological

²² See also, e.g., Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 22 (STB served July 28, 2006) (discussing the first Long-Cannon factor); Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 18 (STB served Oct. 30, 2006) (discussing the second Long-Cannon factor); Non-Coal Proceedings, 1 S.T.B. at 1038 (discussing the third Long-Cannon factor).

improvements over time (while overall complexity is constrained by procedural limitations and reasonableness is encouraged by a final offer selection structure).²³

IV. Final Offers, Market Dominance Presentations, Replies, and ALJ Hearing

With its final offer, each party would be required to submit an analysis addressing the reasonableness of the challenged rate and support for the rate in the party's offer,²⁴ including an explanation of the methodology it used and how it complies with the criteria discussed above, as well as any necessary supporting workpapers.²⁵ Ten days after submitting market dominance presentations, rate reasonableness analyses, and final offers, the parties would simultaneously submit replies to each other's presentations. On reply, parties would not be permitted to alter their market dominance presentations, rate reasonableness analyses, or final offers but would have an opportunity to argue against the other side's submission.

One week after the submission of replies, at the complainant's option, the parties would participate in a telephone hearing before an ALJ. The purpose of this hearing would be to complete the record regarding market dominance, and the transcript of this hearing would be part of the administrative record submitted to the Board for decision. The complainant, if it chooses, may limit its written market dominance presentations to the six factors required for the prima facie showing—in that instance, at the ALJ hearing, the complainant could address any additional market dominance arguments made by the defendant. As noted above, if the complainant opts for a hearing, both sides would be permitted to present their market dominance positions at the hearing. Within four days of the evidentiary hearing, a transcript of the hearing would be entered into the docket.

V. Selection of an Offer

Pursuant to the Administrative Procedure Act, “the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). In a rate complaint proceeding, the complainant is the

²³ The Board also recognizes the expedited timelines of the proposed FORR procedure and accounts for that characteristic by setting a cap on relief, as described in Section VII of this decision.

²⁴ Since the parties' final offers should reflect what they each consider to be the maximum reasonable rate, a party's analysis regarding the reasonableness of the challenged rate would likely overlap with its support for its final offer.

²⁵ If spreadsheets are submitted, links between spreadsheets should be used to the maximum extent possible. If links are not practicable, hard-coded numbers may be used, but parties should include references to the relevant source document or method of calculation. See, e.g., Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, EP 347 (Sub-No. 3) (STB served Mar. 12, 2001); see also Consumers Energy Co. v. CSX Transp, Inc., NOR 42142 (STB served July 15, 2015) (adopting requirements for submission of evidence in that case). Under the proposed rule, if a party fails to submit documentation in a form the Board can use (for example, due to unlinked spreadsheets), that failure could contribute to rejection of that party's offer.

proponent of an order and therefore bears the burden. Accordingly, the complainant must demonstrate that (i) the defendant carrier has market dominance over the transportation to which the rate applies; and (ii) the challenged rate is unreasonable. See 49 U.S.C. §§ 10701(d)(1), 10704(a)(1), 11704(b).

If the Board finds 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 described above.²⁶ As in the final offer procedure used as part of the Three-Benchmark methodology, this would be an “either/or” selection, with no modifications by the Board. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18.²⁷ This approach would work as intended only if the parties know that the agency would not attempt to find a compromise position. Id. The incentives created by a final offer selection procedure could not be preserved if the Board retained the discretion to formulate its own “offer.” Id.²⁸

The Board would issue a decision no later than 90 days after the deadline for the parties’ replies. Petitions for reconsideration would be due five days after service of the Board’s decision; replies to petitions for reconsideration would be due 10 days after service of the Board’s decision; and the Board would issue its decision on reconsideration expeditiously after replies are filed.

VI. Proposed Timeline

The following is the proposed timeline for this procedure.

Day -5	Complainant files and serves notice of intent to initiate case
Day 0	Complainant files complaint
Day 0	Discovery begins
Day 21	Discovery ends

²⁶ The standard applying to market dominance determinations would be as described in Market Dominance Streamlined Approach, Docket No. EP 756, cited above.

²⁷ Although the RRTF envisioned the possibility of a scenario where the offers have equal merit, RRTF Report 19, in fact, it is a defining characteristic of a final offer procedure that the decision-maker must choose between the offers. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18; see also, e.g., Carrell & Bales, supra p. 5, at 12 (“the arbitrator *must* choose the more reasonable of the parties’ final proposals”) (emphasis added).

²⁸ See also Chetwynd, supra p. 5, at 111 (decision-makers’ tendency to “split the difference” creates incentives for parties to take extreme positions).

Day 35	Simultaneous filing of market dominance presentations, rate reasonableness analyses, and final offers
Day 45	Simultaneous filing of replies
Day 52	Optional telephone hearing before administrative law judge (market dominance)
Day 135	Board decision

This proposed timeline attempts to balance the need for due process—for example, allowing parties to reply to each other’s submissions—and the Board’s underlying goal of constraining the cost and complexity of rate litigation by limiting the time available. The Board specifically seeks comment on whether the proposed timeline strikes the appropriate balance.

To preserve the effects of the procedural limitations described above, requests for extensions of time would be strongly disfavored, even if both parties consented to the request. Therefore, parties would be encouraged not to spend the scarce time available under this procedure on preparing extension requests. Joint requests to allow time to negotiate a settlement, including joint requests for mediation, would be an exception and would be considered by the Board. A party would be permitted to accept the other party’s final offer at any time.

Mediation is mandatory as part of the Board’s existing rate reasonableness procedures. See 49 C.F.R. §§ 1109.4(a), 1111.10(a)(1), 1111.10(a)(2). The Board does not propose to require mediation as part of FORR because it would add time and possibly expense, but the Board would be prepared to facilitate mediation if requested by the parties. See 49 C.F.R. § 1109.2 (parties may request Board-sponsored mediation).

VII. Relief

If the Board finds that the defendant carrier has market dominance, finds the challenged rate unreasonable, and chooses the complainant’s offer (or the defendant’s offer, if it is below the challenged rate), it could award relief based on the difference between the challenged rate and the rate in that offer. The proposed procedure would be subject to a two-year limit on rate prescriptions unless the parties agree to a different limit on relief. Such a limit would be one-fifth of the 10-year limit applied in SAC cases and less than half of the five-year limit applied in Simplified-SAC and Three-Benchmark cases (see Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 6), thereby accounting for the expedited deadlines of the FORR procedure. The Board could also award relief in the form of reparations. See 49 U.S.C. § 11704(b).²⁹

²⁹ The standard reparations period reaches back to two years prior to the date of the complaint. RRTF Report 30; see also 49 U.S.C. § 11705(c) (requiring that complaint to recover

(continued . . .)

For certain of its other options for challenging the reasonableness of rates, the Board has also previously imposed monetary caps on relief. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 27-28. Such caps apply to an award of reparations, a rate prescription, or a combination of the two. Thus, any rate prescription automatically terminates once the complainant has exhausted the relief available, and the actual length of the prescription may be less than the period set by the Board if the relief is used up in a shorter time. Under such circumstances, the complainant would be barred from bringing another complaint against the same rate for the remainder of the prescription period set by the Board. Id.; see also Rate Regulation Reforms, EP 715, slip op. at 11-12 (STB served July 18, 2013).³⁰

The Board established its prior caps based on the cost of litigating a case using the next more complicated and precise procedure: a cap on the Simplified-SAC methodology (later removed) was based on the cost to bring a SAC case, and a lower cap for the Three-Benchmark methodology was based on the cost to bring a Simplified-SAC case. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 28. In setting these limits, the Board attempted to strike a balance between providing simplified methods that permit complainants to seek protection from unreasonable rates, while encouraging use of the most precise approach feasible for the amount in dispute. Id. at 35; see also id. at 52 (explaining that this approach represents “sound regulatory policy” by balancing the impracticability of using a more complicated procedure given its cost against the impropriety of judging large disputes under what might be considered a less accurate methodology). In addition, adoption of the caps gave effect to Congress’s directive that the Board weigh the litigation cost of a SAC presentation against the value of the case when establishing a simplified and expedited method for rate reasonableness challenges. Id. at 34; see also id. at 52 (explaining that the best “method” is the “creation of separate processes for rail rate disputes of varying size”).

In keeping with 49 U.S.C. § 10701(d)(3), as well as the Board’s previously stated interest in channeling higher-value cases into appropriate procedures, there is merit in setting a cap for FORR by considering it within the framework of pre-existing rate reasonableness methodologies. Nevertheless, as described above, because FORR does not prescribe a particular methodology—nor a methodology necessarily less precise than any pre-existing procedure—the Board’s prior rationale for capping relief based on the cost of the next more complicated procedure does not necessarily or neatly apply here.

(. . . continued)

damages under 49 U.S.C. § 11704(b) be filed with the Board within two years after the claim accrues).

³⁰ After the relief is exhausted, the carrier may raise the rate, and that new rate may be challenged. However, after the relief is exhausted, if the carrier keeps the rate at the challenged level—with appropriate adjustments for inflation using the rail cost adjustment factor, adjusted for inflation and productivity (RCAF-A)—the rate may not be challenged under any of the Board’s rate reasonableness options until the two-year maximum prescription period has expired. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 28.

Accordingly, the Board proposes to establish a relief cap of \$4 million, as indexed annually using the Producer Price Index, which is consistent with the potential relief afforded under the Three-Benchmark methodology.³¹ Applying a relief cap based on the estimated cost to bring a Simplified-SAC case would further the Board’s intention that Three-Benchmark and FORR be used in the smallest cases, and applying the same \$4 million relief cap, as indexed, would provide consistency in terms of defining that category of case.

Although the proposed FORR procedure is designed to apply to smaller cases (i.e., proceedings for which the value of the case is subject to a certain relief cap), parties may wish to generally address whether the Board should establish different levels of relief and provide supporting rationale for such alternatives. As discussed above, 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 applies, and if the matter involves freight charges of greater than that amount, a longer procedure applies. See Canada Transp. Act, S.C. 1996, c. 10, as amended, § 164.1 (Can.). The Board might consider an approach that, for example, would permit a complainant submitting a FORR complaint to use the procedure described above if it seeks relief equal to or less than the \$4 million cap proposed by the Board here. But, if the complainant were to seek relief above this amount (which, under the procedure described here, would be subject only to the two-year limit on rate prescriptions), a somewhat longer procedural schedule could apply. The Board invites comment on the advisability of such a two-tiered relief procedure in which the top tier contains no limit on the size of the relief, in total, including both reparations and the two-year prescription period.

Another alternative that parties may wish to address in comments is a relief cap based on record development time and value of the case. For example, this alternative could consider the potential relief available in a SAC case, reduced proportionally by the difference in record development time between a case brought under the proposed FORR procedure and one brought under SAC. The resultant proportionally reduced amount could be the relief cap applicable to cases under the FORR procedure.

VIII. Other FORR Issues

The Board proposes that the FORR procedure would not be available to challenge purely local movements of a Class II or Class III rail carrier.³² Rate cases filed to date indicate that

³¹ The relief cap would incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for FORR is the same as the cap for Three-Benchmark.

³² Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$39,194,876 or less when adjusted for inflation using 2018 data. Class II rail carriers have annual operating revenues of less than \$250 million but in excess of \$20 million in 1991 dollars, or \$489,935,956 and \$39,194,876 respectively, when adjusted for inflation using 2018 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 C.F.R § 1201.1-1; Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served June 14, 2019).

complainants' rate concerns relate primarily to Class I carriers. As such, the Board sees no reason to apply these new rules to purely local movements of smaller carriers. See, e.g., Am. Short Line & Reg'l R.R. Ass'n Comment 4-5, Feb. 26, 2007, [Simplified Standards for Rail Rate Cases](#), EP 646 (Sub-No. 1) (describing the impacts new rate reasonableness procedures would have on small railroads in particular). However, the FORR procedure would be available in challenges where the movement involves the participation of a Class I railroad as well as a Class II or Class III railroad. See [Simplified Standards](#), EP 646 (Sub-No. 1), slip op. at 101-02 (stating that excluding combined movements would shut out a significant portion of domestic rail traffic and could create perverse routing incentives). Parties may further address in their comments the applicability of this proposed rule to purely local movements of a Class II or Class III rail carrier.

Parties may also file comments as to whether and how the Board might provide assistance to parties—particularly smaller entities—regarding how best to utilize the proposed FORR procedure.

The Board acknowledges that the FORR procedure, by requiring that the Board select one of the parties' final offers without modification, constrains its flexibility in setting a maximum lawful rate. See generally 49 U.S.C. § 10704(a) (authorizing the Board to “prescribe” a maximum rate should it find the rate charged by the carrier to be unreasonable). Also, by prohibiting litigation over discovery disputes, the FORR procedure would constrain the Board's ability to separately resolve one type of ancillary issue—although, as noted above, these issues may be raised in the explanations accompanying parties' final offers. The Board, however, concludes that these constraints would be justified by the cost and time savings it expects would be achieved through the use of the proposed procedure to challenge rate reasonableness for smaller cases, which in turn would assist the Board in maintaining reasonable rates. The existing options to challenge the reasonableness of rates (especially SAC), which allow the Board to craft individual responses to numerous issues (hundreds of issues, in some instances), are time-consuming and costly.

Finally, the Board seeks additional comments on Docket No. EP 665 (Sub-No. 2), including whether to close that docket. There, the Board provided notice that it was considering a new methodology that would utilize a comparison group approach to determine the reasonableness of the challenged traffic's rate, like the approach utilized by the Three-Benchmark methodology but more streamlined. [Expanding Access to Rate Relief](#), EP 665 (Sub-No. 2), slip op. at 12, 15, 23. As the RRTF explained, however, the Board received a number of negative comments regarding Docket No. EP 665 (Sub-No. 2), including arguments that the methodology discussed in that docket could increase the time and cost of litigation compared to bringing a Three-Benchmark case. See, e.g., Am. Chemistry Council Opening Comments 7-9, Nov. 14, 2016, [Expanding Access to Rate Relief](#), EP 665 (Sub-No. 2).

Within the due dates for comments set forth below, parties may also update their comments or submit new comments on Docket No. EP 665 (Sub-No. 2). If parties choose to submit comments that pertain both to Docket No. EP 665 (Sub-No. 2) and to the proposal made in Docket No. EP 755, they should submit those comments in both dockets. Moreover, the Board is aware that stakeholders have worked to create additional rate reasonableness methodologies. See, e.g., Nat'l Grain & Feed Ass'n Opening Comments 27-35, June 26, 2014,

Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1); Notice of Director’s Decision, WB 17-44 (STB served Apr. 17, 2018) (granting access to Waybill Sample data for the “development, evaluation, and proposal” of new rate reasonableness alternatives).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation’s impact, and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a “significant impact on a substantial number of small entities,” § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

This proposal would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.³³ The proposal imposes no additional record-keeping by small railroads or any reporting of additional information. Nor does this proposed rule circumscribe or mandate any conduct by small railroads that is not already required by statute: the establishment of reasonable transportation rates when a carrier is found to be market dominant. Although the Board predicts that the establishment of the FORR procedure would result in the filing of several additional complaints per year, small railroads have always been subject to rate reasonableness complaints and their associated litigation costs, the latter of which the Board expects would be reduced through the use of this proposed procedure. The new procedure proposed here would exclude purely local movements of Class III carriers, affecting only movements that also involve the participation of a Class I railroad. Finally, as the Board has previously concluded, the majority of railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act. Simplified Standards, EP 646 (Sub-No. 1), slip op. at 33-34. Since the inception of the Board in 1996, only three of the 51 cases filed challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimates that there are approximately 656 Class III rail carriers. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities as defined by the RFA.

³³ For the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a “small business” as only including those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).

This decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), and Appendix B, the Board seeks comments about the revisions in the proposed rule to the currently approved collection of Complaints (OMB Control No. 2140-0029) regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board believes that the proposed procedure would provide a less burdensome alternative to other rate review options and estimates that it would, on balance, result in four additional complaints filed each year. Filing a complaint, generally, has been estimated to require an annual hour burden of 469 hours and an annual "non-hour burden" cost of \$1,462. See Supporting Statement for Modification & OMB Approval Under the Paperwork Reduction Act & 5 C.F.R. pt. 1320, OMB Control No. 2140-0029 (Jan. 2018), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=78860402>. For the reasons discussed above, filing a FORR complaint is likely to require less time and expenditure than other complaints. Accordingly, the Board estimates that this proposed procedure would entail an annual hour burden of 250 hours per complaint and an annual "non-hour burden" cost of \$780 per complaint. Accounting for the projected four additional complaints per year, this proposal would result in an additional total annual hour burden of 1,000 hours and \$3,120 of total annual "non-hour burden" cost under the PRA. The Board welcomes comment on the estimates of actual time and costs of the proposed alternative complaint, as detailed below in Appendix B. Other information pertinent to the proposed alternative complaint is also included in Appendix B. The proposed rule will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of Subjects

49 C.F.R. Part 1002

Administrative practice and procedure, Common Carriers, Freedom of information.

49 C.F.R. Part 1111

Administrative practice and procedure, Investigations.

49 C.F.R. Part 1114

Administrative practice and procedure.

49 C.F.R. Part 1115

Administrative practice and procedure.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rule will be published in the Federal Register.
2. Comments are due by November 12, 2019. Reply comments are due by January 10, 2020.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002, 1111, 1114, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by redesignating paragraphs (f)(56)(iv) through (f)(56)(vi) as (f)(56)(v) through (f)(56)(vii) and adding paragraph (f)(56)(iv) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

Type of Proceeding	Fee
* * * * *	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	\$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	\$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	\$150.
(iv) A formal complaint involving rail maximum rates filed under the Final Offer Rate Review procedure	\$150.
(v) All other formal complaints (except competitive access complaints)	\$350.
(vi) Competitive access complaints	\$150.
(vii) A request for an order compelling a rail carrier to establish a common carrier rate	\$350.

* * * * *

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 is revised to read as follows:

49 U.S.C. 10701, 10704, 11701, and 1321

4. Amend § 1111.3 by revising paragraph (c) to read as follows:

§ 1111.3 Amended and supplemental complaints.

* * * * *

(c) *Simplified Standards.* A complaint filed under Simplified-SAC or Three-Benchmark may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or stand-alone cost. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required. A complaint filed under Final Offer Rate Review may not be amended to opt for Three-Benchmark, Simplified-SAC, or stand-alone cost, and a complaint filed under Three-Benchmark, Simplified-SAC, or stand-alone cost may not be amended to opt for Final Offer Rate Review.

5. Amend § 1111.5 by revising paragraphs (a), (b), (c), and (e) to read as follows:

§ 1111.5 Answers and cross complaints.

(a) *Generally.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under Simplified-SAC or Three-Benchmark, the answer must include the defendant’s preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with Simplified-SAC or Three-Benchmark answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer must be filed with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendants.

* * * * *

(e) *Failure to answer complaint.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, averments in a complaint are admitted when not denied in an answer to the complaint.

* * * * *

6. Amend § 1111.10 by adding paragraph (a)(3) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural Schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

* * * * *

(3)(i) In cases relying upon the Final Offer Rate Review procedure:

(A) Day -5—Complainant files notice of intent to initiate case and serves notice on defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 21—Discovery closes.

(D) Day 35—Market dominance filings, rate reasonableness analyses, and final offers.

(E) Day 45—Replies.

(F) Day 52—Telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, at the discretion of the complainant (market dominance).

(G) Day 135—Board decision.

(ii) In addition, the Board will appoint a liaison within five business days after the Board receives the pre-filing notification.

(iii) With its final offer, each party must submit an explanation of the methodology it used.

* * * * *

7. Amend § 1111.11 by revising paragraph (b) to read as follows:

§ 1111.11 Meeting to discuss procedural matters.

* * * * *

(b) *Stand-alone cost or simplified standards complaints.*

(1) In complaints challenging the reasonableness of a rail rate based on stand-alone cost, Simplified-SAC, or Three-Benchmark, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the complaint is filed in stand-alone

cost cases, and 7 days after the mediation period ends in Simplified-SAC or Three-Benchmark cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

(2) In complaints challenging the reasonableness of a rail rate under Final Offer Rate Review, the parties may not seek Board intervention in discovery disputes, but the parties should discuss discovery matters with one another to the extent necessary.

PART 1114—EVIDENCE; DISCOVERY

8. The authority citation for part 1114 continues to read as follows:

5 U.S.C. 559; 49 U.S.C. 1321.

9. Amend § 1114.21 by adding paragraph (a)(4) to read as follows:

§ 1114.21 Applicability; general provisions.

(a) * * *

(4) Time periods specified in this subpart do not apply in cases under Final Offer Rate Review. Instead, parties in cases under Final Offer Rate Review should serve requests, answers to requests, objections, and other discovery-related communications within a reasonable time given the length of the discovery period.

* * * * *

10. Amend § 1114.24 by revising paragraph (h) to read as follows:

§ 1114.24 Depositions; procedures.

* * * * *

(h) *Return.* The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked “Deposition of (here insert name of witness)” and shall either personally deliver or promptly send the original and one copy of all exhibits by e-filing (provided the filing complies with 49 CFR 1104.1(e)) or registered mail to the Office of Proceedings. A deposition to be offered in evidence must reach the Board not later than 5 days before the date it is to be so offered.

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11. Amend § 1114.31 by revising paragraphs (a) and (d) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to

interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. Motions to compel may not be filed in cases under Final Offer Rate Review.

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Motions to compel in stand-alone cost and simplified standards rate cases.*

(i) Motions to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention.

(ii) In a rate case to be considered under the stand-alone cost, Simplified-SAC, or Three-Benchmark methodologies, a reply to a motion to compel must be filed with the Board within 10 days of when the motion to compel is filed.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Simplified-SAC, or Three-Benchmark, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. Such a motion may not be filed in a case under Final Offer Rate Review. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

PART 1115—APPELLATE PROCEDURES

12. The authority citation for part 1115 continues to read as follows:

5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

13. Amend § 1115.3 by revising paragraph (e) to read as follows:

§ 1115.3 Board actions other than initial decisions.

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

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Appendix B
Information Collection Under the Paperwork Reduction Act

Title: Complaints under 49 C.F.R. 1111

OMB Control Number: 2140-0029

STB Form Number: None

Type of Review: Revision of a currently approved collection

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521 (PRA), the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Complaints under 49 C.F.R. part 1111, OMB Control No. 2140-0029, as further described below. The requested revision to the currently approved collection is necessitated by this Notice of Proposed Rulemaking (NPRM), which proposes to add an alternative (Final Offer Rate Review) complaint to the types of complaints collected by the Board in this information collection. All other information collected by the Board in the currently approved collection is without change from its approval.

Respondents: Affected shippers, railroads, and communities that seek redress for alleged violations related to unreasonable rates, unreasonable practices, service issues, and other statutory claims.

Number of Respondents: Eight

Frequency: On occasion. In recent years, respondents have filed approximately four complaints per year with the Board. It is anticipated that four additional complaints would be filed annually under the proposed procedure. In Market Dominance Streamlined Approach, EP 756 (STB served September 12, 2019), the Board simultaneously issued a separate NPRM that also would impact the Board's existing collection of complaints. But that decision, which expects to add an additional five complaints a year (including the four complaints estimated to be filed under Final Offer Rate Review), is being treated as separate and subsequent—for the purposes of estimation—to this NPRM's modification of the existing collection of complaints. The decision in EP 756 will include the modification here.

Total Burden Hours (annually including all respondents): 2,876 (sum of (i) estimated hours per complaint (469) x total number of estimated, existing complaints (4) and (ii) estimated hours per proposed alternative complaint (250) x total number of those complaints (4)).

Total "Non-Hour Burden" Cost (such as start-up costs and mailing costs): \$8,968 (sum of (i) estimated non-hour burden cost per complaint (\$1,462) x total number of estimated, existing complaints (4) and (ii) estimated non-hour burden cost per proposed alternative complaint (\$780) x total number of those complaints (4)).

Needs and Uses: Under the Board's regulations, persons may file complaints before the Board pursuant to 49 C.F.R. part 1111 seeking redress for alleged violations of provisions of the Interstate Commerce Act, Pub. L. No. 104-88, 109 Stat. 803 (1995). In the last few years, the most significant complaints filed at the Board allege that railroads are charging unreasonable rates or that they are engaging in unreasonable practices. See, e.g., 49 U.S.C. §§ 10701, 10704, and 11701. As described in more detail above in the NPRM, the Board is proposing to add a new procedure to provide stakeholders with a more streamlined option to challenge rate reasonableness for smaller cases. The collection by the Board of these complaints, and the agency's action in conducting proceedings and ruling on the complaints, enables the Board to meet its statutory duties.