BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 755

FINAL OFFER RATE REVIEW

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

EXPANDING ACCESS TO RATE RELIEF

Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers ("AFPM") is pleased to provide its comments to the Surface Transportation Board ("STB" or "the Board") Notice of Proposed Rulemaking ("NPRM" or the "STB proposal") on "Expanding Access to Rate Review" and "Final Offer Rate Review" (FORR).[1] AFPM applauds STB's work to date, including the formation of a Rate Reform Task Force ("RRTF") in January 2018 and the April 2019 RRTF Report which lays out various recommendations to improve the rate dispute process.[2]

The RRTF report suggests STB adopt a final offer decision making process that "would draw features from the final offer arbitration ("FOA") process used in Canada but would not involve an arbitrator and would culminate in a decision by the Board." In addition, in 2015, the Transportation Research Board ("TRB") issued a report entitled *Modernizing Freight Rail Regulation* that noted that rulings "on the reasonableness of challenged rates have proved to be slow, costly, and inappropriate for many shippers' circumstances over three decades" and therefore the TRB also suggested the introduction of a process like Canada's FOA that has seen a large amount of success and been praised by both rail shippers and carriers in Canada.[3]

The STB draws heavily on recommendations in the RRTF report and the TRB report in its NPRM. The NPRM is a natural evolution in the process of implementing meaningful rate reform. We are encouraged by the STB's movement on this issue, and thank the STB for this, and related, proposals.

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[1] *See* 84 *Fed. Reg*. 48872, "Final Offer Rate Review; Expanding Access to Rate Relief." Notice of Proposed Rulemaking, Docket No. EP 755; EP665 (Sub-No. 2) proposed September 17, 2019, https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20093.pdf

[2] *See* "Rate Reform Task Force, Report to the Surface Transportation Board" ("RRTF Report"). Published April 25, 2019, https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf

[3] National Academies of Sciences, Engineering, and Medicine 2015. *Modernizing Freight Rail Regulation*. Washington, DC: The National Academies Press. https://doi.org/10.17226/21759.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics, and synthetic resins — were delivered by rail in the U.S. in 2018.[4] To that end, three principles guide AFPM's efforts around transportation and infrastructure issues impacting our members:

1. **Safety & Security** - Ensure the ability to ship feedstocks and products, safely and securely.
2. **Free & Open Markets** - Promote free and open energy markets that benefit the U.S. economy.
3. **Ability to Build & Repair** - Ensure the ability to build, use, repair, maintain and replace energy infrastructure.

Refineries and petrochemical manufacturers across the country relay on a healthy rail network as an essential part of their supply chains. Over 75% of refiners and petrochemical manufacturers are served by a single railroad (e.g., Captive) and thus have been negatively impacted by excessive freight rail rates, escalating and poorly communicated demurrage and accessorial fees, and lack of competitive rail service for too long.[5] The STB's FORR proposal, along with other concurrent proposed reforms, are a positive step toward improving how the STB addresses freight rail problems. AFPM is eager to work with the STB commissioners and their staff on modernizing and streamlining outdated regulations.

AFPM acknowledges that the STB has an important oversight role in reviewing the impact of freight rail policies on rail shippers and are encouraged STB is seeking ways to improve the rate dispute process in line with the intent of Congress. While in this document we provide comments on the FORR proposal, we encourage STB to examine any, and all, rate review improvements at its disposal. AFPM is encouraged by this proposal however we offer our comments as well an alternative to the FORR proposal. We are confident the FORR process will help improve the dispute resolution process and promote free and open rail and energy markets. We look forward to working with you to address these challenges.

III. BACKGROUND

In the ICC Termination Act of 1995 ("ICCTA") and Surface Transportation Board Reauthorization Act of 2015 ("STB Reauthorization Act"), Congress intended to provide

[4] Rail Traffic Data - Association of American Railroads. (2019). Retrieved from https://www.aar.org/data-center/rail-traffic-data/

[5] Escalation Consultants, "Competition at U.S. Freight Rail Stations by State." https://railvoices.org/wp-content/uploads/2012/12/US-Map.pdf. Accessed October 24, 2019.

multiple avenues for rail shippers to dispute potentially unfair rates.[6] Congress also recognized the need for simplified and expedited methods for determining the reasonableness of challenged rail rates. This proposal appears to align with Congressional intent.

In the ICCTA, the bedrock legislation that established the STB, Congress directed the STB 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."[7] In the STB Reauthorization Act,[8] Congress reaffirmed this desire.[9] In addition, section 11 of the STB Reauthorization Act modified 49 U.S.C. 10704(d) to require that the Board "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates." More generally, the rail transportation policy 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."[10]

Despite Congress's intent, a lack of a meaningful, efficient, and fair pathways to challenge an unfair rate is still an issue faced daily by AFPM member companies and other freight rail shippers. While the STB has attempted to simplify and expand access for rate reasonableness challenges (i.e., the simplified stand-alone-cost model and the three-benchmark test), the current process still does not provide a viable method for shippers to challenge an unfair rate. The lack of viability of these methods has been demonstrated by the small number of cases brought to the Board. The TRB in a 2015 report stated it best when it noted:

> The evidentiary standards and procedures used by ICC and STB for adjudicating rate disputes are slow, costly, and inappropriate to many shippers' circumstances. They prevent shippers from having equal and effective access to the law's maximum rate protections. Efforts to streamline and expedite the procedures have not overcome these deficiencies. In some respects, they have made matters worse by causing STB to become more dependent on the arbitrary cost allocations made by [Uniform Railroad Costing System] URCS. Thus, STB has moved toward replacing the inappropriate and cumbersome SAC test with procedures that offer even less predictable decision criteria and lack even that test's weak conceptual basis.[11]

AFPM is encouraged by this latest effort to reform the rate dispute system but cautions that regulations must be crafted carefully to avoid the mistakes of the past. The FORR procedure proposed in this NRPM appears to be designed to bring economies of scale to the rate review process and provide petitioners with smaller cases, who otherwise have been deterred from challenging a rate due to the cost of bringing a case under the STB's existing rate reasonableness methodologies, with a more accessible option.

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[6] Public Law 104-88, 109 Stat. 803, 810 and Public Law 114-110, 129 Stat. 2228,
[7] Public Law 104-88, 109 Stat. 803, 810.
[8] Public Law 114-110, 129 Stat. 2228,
[9] 49 U.S.C. 10701(d)(3)
[10] 49 U.S.C. 10101(15).
[11] National Academies of Sciences, Engineering, and Medicine 2015. *Modernizing Freight Rail Regulation*. Washington, DC: The National Academies Press. Page 212, https://doi.org/10.17226/21759.

Specifically, the STB proposes FORR processes be limited to cases valued below $4 million and would include a two-year limit on rate prescriptions (unless the parties agree otherwise). STB set the cap to be consistent the STB's existing methodology for smaller cases (known as Three-Benchmark). The NPRM also provides detail about the FORR process, including but not limited to types of materials required to file a claim, the timeline for the entire process, review criteria, and methodology for selection of a final offer.

Under the current process, challenging a rate before the STB is prohibitively expensive, time-consuming and complex, and it is especially burdensome to rail shippers. Frustrated by the current process, rail shippers rarely bring forward cases and are often forced to modify operations to their detriment since there are no other viable options. This results in negative impacts throughout the supply chain ultimately impacting not only AFPM members, but their suppliers, customers, and consumers. Recent SAC cases have taken an average of 5 years to complete and cost each shipper well over $5 million. Even if a shipper decides to undertake a rate review case, since 1996 there have only been 51 rate cases brought to STB, evidence of a broken process rather than fair rates. The current process places the burden of proof on the shippers to demonstrate that fees were generated as a result of railroad service failures. Rail carriers have no incentive to streamline the dispute process or proactively waive fees when they are at fault. While simplified SAC cases were designed to be more applicable and potentially a more efficient process, from 1999 through 2014, just five rate cases have been adjudicated before STB on the basis of the simplified SAC procedure. All involved chemical shippers and all led to a settlement.

While this NPRM seeks to provide complainants with smaller cases a more accessible option, AFPM suggests STB cast a wider scope as the cost and complexity of bringing a case under the STB's existing rate reasonableness methodologies are not unique to just smaller cases but rather cases of all sizes. The current processes available deter most cases, large and small, from being brought forward due to the costly, time-consuming and complex nature of current remedies. Expanding the scope and relief options would be consistent with Congress's stated charge for the STB to "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates."

IV. COMMENTS ON FINAL OFFER RATE REVIEW PROPOSAL

AFPM applauds the STB for taking action to ensure the rate review process meets the intent of Congress and the STB's commitment to improving the nation's freight rail system. AFPM offers the following comments to help improve the FORR proposal. These comments focus on providing clarity on ambiguous provisions, ensuring timeliness, and seeking opportunities to provide greater access and usability of the FORR process. We conclude with an alternative tiered proposal the STB should strongly consider.

A. INITIATING A PROCEEDING & DISCOVERY

The STB proposes specific requirements to initiate a proceeding and details outlining the process of discovery. Per the NPRM, the FORR process formally begins with a complainant

filing with the STB and serving the defendant with a notice of intent to initiate a case, at least five days in advance of filing its complaint. At the time the complainant files its complaint, it would also be required to submit the general information listed in 49 CFR 1111.2(a)(1)-(11) and provide to the defendant the materials described in § 1111.2(b). The STB would not require the defendant to file an answer to the complaint, in light of the expedited timeline.

AFPM supports the proposed process to initiate the FORR including the timeline proposed, the information required (49 CFR§ § 1111.2(a)(1)-(11) and 1111.2(b)), and sequencing of events; however, we have concerns with the provisions related to discovery. The STB notes that no litigation over discovery disputes would be permitted but, if a party unreasonably withholds information that the STB subsequently deems to be relevant the STB could later take that withholding into account in making its final decision. This kick the can approach creates uncertainty that could dramatically impact the result of the proceeding.

AFPM's concern's over the potential for discovery disputes could be partially alleviated by STB enumerating the discovery elements that must be included in cases. As currently discussed in the preamble, there is a great deal of ambiguity in the appropriate level of information to provide during discovery. The STB proposed that if a party believes relevant information was unreasonably withheld during discovery, it could so argue in the explanation accompanying its final offer. To potentially punish a complainant for not providing adequate information given limited guidance on the appropriate level of information is concerning. Further, the complainant seems to be starting with an elevated risk of failure due to this ambiguity, as the STB could later hold a lack of information against the compliant, even if it was unintentional. Proving the unreasonable withholding of information would also place the STB in an unenviable position of determining that the lack of information was by design or unknowing omission. Some guidelines in a final STB action would potentially improve initial dispute resolutions using the FORR process.

Regarding the amount of information required at this stage, the STB notes that "[p]arties 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."[12] AFPM concurs that the amount of information should not approach that required for SAC cases. Given the ambiguity of what is the appropriate level of information to provide during discovery, AFPM has concerns that the amount of information provided in these cases could quickly balloon as complainants will fear not providing sufficient support will result in a denial by the Board. This would undermine the STB's desire to develop a streamlined process. Certainty is a critical component of effective streamlining.

STB continues that 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. Further, parties would be encouraged to interpret discovery requests liberally to require the production of "readily available information" (relative to the discovery deadline) that they should

[12] *See* 84 *Fed. Reg*. 48875, "Final Offer Rate Review; Expanding Access to Rate Relief." Notice of Proposed Rulemaking, Docket No. EP 755; EP665 (Sub-No. 2) proposed September 17, 2019, https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20093.pdf

"reasonably know to be material" and responsive to the request. This language is overly ambiguous and AFPM seeks clarity on what would be expected. AFPM has concerns that like previous attempts to streamline rate disputes, lack of clear guidelines of what type of materials are expected could result in a bloating of the process and therefore decreased viability.

While the STB notes that "[o]ver 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," we believe the Board should define such items prior to issuing a final rule and going down the path of implementing the FORR process. Establishing categories of easily producible, core information should be done through this rulemaking action and not through individual challenges as STB implements the program. Terms such as "key information," "narrowly tailored, targeted," "relevant information," "reasonably be expected to provide in a short period of time," and "unreasonably withholds information," should be defined explicitly in regulation, or as an alternative, STB should clearly discuss in the preamble for the final rule or a guidance document its intentions. AFPM strongly believes some clarity prior to implementing the FORR process would avoid unnecessary complications, challenges, conflicting precedent, and ensure the process is meaningful and fair for all parties to participate.

B. MARKET DOMINANCE INQUIRY

In order to adjudicate the reasonableness of a rate, the STB must first find that the defendant rail carrier has market dominance over the transportation to which the rate applies. 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 STB 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 (*e.g.,* meeting six factors).

AFPM supports the idea of requiring the use of the streamlined market dominance when utilizing the FORR process, as this is consistent with the desire to establish a streamlined process. AFPM has also provided specific comments on the streamlined market dominance and refers the STB to our comments on Docket No. EP 756.

C. REVIEW CRITERIA FOR FINAL OFFERS

As proposed in the NPRM, 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. Each party's final offer should reflect what it considers to be the maximum reasonable rate and it is up to each party on how they want to present their offer. AFPM supports this process as proposed, as it will allow for flexibility in offer proposals and for complainants to uniquely tailor their offers to the specific details of their situation.

Regarding the selection of an offer, the STB has provided proposed criteria for determining the selected offer. Specifically, the STB criteria for determining reasonableness

would base its consideration of: the rail transportation policy in 49 U.S.C. § 10101,[13] the Long-Cannon factors in 49 U.S.C. § 10701(d)(2)[14], and "appropriate economic principles." Regarding "appropriate economic principles" the STB notes these factors would allow the Board to apply, "among other things, the agency's expertise and general principles developed in its rate case precedent over decades." STB notes 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 improvements over time

AFPM is supportive of the use of rail transportation policy in 49 U.S.C. § 10101 and the Long-Cannon factors in 49 U.S.C. § 10701(d)(2) as criteria for final offer selection. However, our members have some concern over the broad and opaque "appropriate economic principles." While we understand STB's desire to allow for innovation with respect to rate review methodologies, we request the Board provide some additional clarity and parameters around what would be considered "appropriate economic principles." Moreover, the STB has embarked upon this worthwhile endeavor to balance the scales in rate cases and repair a broken process, relying on past precedent sets up this action for failure as the rail industry has changed dramatically due to consolidations. AFPM would prefer detailing requirements in advance through the notice and comment process as opposed to relying on ad hoc decisions by the Board.

D. FINAL OFFERS, MARKET DOMINACE PRESENTATIONS, REPLIES & ALJ HEARINGS

The NPRM proposes that a final offer must include an analysis addressing the reasonableness of the challenged rate, including explanation of the methodology and how it complies with the criteria discussed above, and necessary supporting workpapers. The NPRM also proposed a specific timeline for final offers. Ten days after submitting market dominance presentations, rate reasonableness analyses, and final offers, the parties would simultaneously submit replies to each other's presentations. One week after the submission of replies, at the complainant's option, the parties would participate in a telephone hearing before an administrative law judge ("ALJ"). 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. AFPM has offered comments on alternative timelines later in section IV of this document. AFPM is opposed to efforts to provide extensions to the timelines.

E. OFFER SELECTION

If the STB 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. As in the final offer procedure used as part

[13] *See* 49 U.S.C. § 10101, https://www.govinfo.gov/content/pkg/USCODE-2017-title49/html/USCODE-2017-title49-subtitleIV-partA-chap101-sec10101.htm
[14] *See* 49 U.S.C. § 10701(d)(2) https://codes.findlaw.com/us/title-49-transportation/49-usc-sect-10701.html

of the Three-Benchmark methodology, this would be an "either/or" selection, with no modifications by the Board. AFPM is supportive of an "either/or" offer selection.

The STB 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 STB'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. As discussed in AFPM's comments to Docket No. EP 756 we do not share STB's assertion that the burden of proof must always be on the complainant (e.g., rail shipper) and encourage STB to consider scenarios were the burden of proof is on the rail carrier. That said, AFPM is supportive of efforts to create a streamlined process and supports an aggressive, yet thorough timeline. AFPM requests STB consider compressing the 90-day STB decision timeline if possible, as currently that duration seems out of line of other expedited phases of the FORR process.

F. PROPOSED TIMELINE

According to the STB, the overall proposed timeline attempts to balance the need for due process and the Board's underlying goal of constraining the cost and complexity of rate litigation by limiting the time available. The STB specifically seeks comment on whether the proposed timeline strikes the appropriate balance.

Timing	Action
Day -5	Complainant files and serves notice of intent to initiate case
Day 0	Complainant files complaint / Discovery begins
Day 21	Discovery ends
Day 35	Simultaneous filing of market dominance presentations, rate reasonableness analyses, & final offers
Day 45	Simultaneous filing of replies
Day 52	Optional telephone hearing before administrative law judge (market dominance)
Day 135	STB decision

As stated above, AFPM believes there are opportunities to streamline the timelines further and we offer alternative deadlines in Section IV. We do ask STB considers efforts to compress the STB decision-making process, if possible. Perhaps a 30-day, 45-day, or 60-day STB review period could be considered as this is consistent with the typical time provided for rulemaking comment periods under the APA. Further, a shorter timeline would more closely align the STB proposal with the Canadian Final Offer Arbitration ("FOA") process which has proved to be successful and an agreeable process for both carriers and shippers.[15] As an alternative, AFPM supports a tiered model as detailed later in section IV of our comments which addresses alternative approaches.

[15] The Canadian FOA offers two timelines based on the amount of relief sought. For cases with a cap of $2 million the timeline is 30 days whereas for cases with no limit the timeline is 60 days. Even with a modest reduction in the STB's timeline, the FORR would still take considerably longer then the Canadian FOA.

STB also notes that requests for extensions of time would be strongly disfavored, even if both parties consented to the request. Joint requests to allow time to negotiate a settlement, including joint requests for mediation, would be an exception and should be considered by the Board. The STB does not propose to require mediation as part of FORR because it would add time and possibly expense, but the Board should be prepared to facilitate mediation if requested by the parties. AFPM supports the STB's position regarding extensions.

Lastly, the STB would permit a party to accept the other party's final offer at any time, thus ending the process. AFPM also supports this position as a way to expeditiously resolve the dispute, particularly where some compromise can be reached.

G. RELIEF

STB also proposed details regarding what type of relief will be provided. Specifically, STB proposed that awarded relief would be based on the difference between the challenged rate and the rate in the selected offer. Further, STB proposes relief 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 STB also proposes the ability to award relief in the form of reparations.

Like other options for challenging the reasonableness of rates, the STB has proposed in this case monetary caps on relief. Under current practice such caps apply to an award of reparations, a rate prescription, or a combination of the two. In cases where the FORR process is utilized, the STB 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. The STB argues 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 it is the STB's intention that the Three-Benchmark and FORR processes be used in the smallest cases, AFPM supports a higher relief cap, if there is one at all. As previously noted, the current processes deter most cases, large and small, from being brought forward due to the costly, time-consuming, and complex nature of current remedies. Further, AFPM is concerned that with a pre-determined rate cap, railroads could potentially set rates in a manner discouraging shippers from bringing cases forward from the outset.

The lack of cases brought before the STB under the current dispute methodologies available suggests the STB should seek to provide wide access to as many rate relief options as available. The current process is clearly prohibitively expensive, time-consuming, and complex. The lack of cases brought to the Board is not an indication of the health of the rail network and rail competition but rather a symptom of a flawed process. STB should look for all opportunities to offer alternative methodologies to a wide audience and if a rail shipper wishes to bring a larger case under the simplified process, they should be permitted to do so. Along those lines, and as

an alternative, AFPM is also supportive of the tiered approach the STB suggested that is in line with the FOA arbitration process employed in Canada. AFPM's proposal is discussed in detail in the section VI of this document.

The STB discusses another alternative where the relief cap is 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 reduced amount could be the relief cap applicable to cases under the FORR procedure. AFPM supports alternatives that would support maximum relief and therefore is not opposed to this method as an option. However, the suggested methodology may prove too complex to implement in practice. We offer other alternatives in section VI of this document.

Lastly, while STB's proposal limits remedies to only recouping monetary sums, the Board could consider ordering reciprocal switching to address competitive abuses that led to in adequate service. The Staggers Rail Act gave regulators authority to order reciprocal switching arrangements when "necessary to provide competitive rail service." As TRB noted in its 2015 study, "[o]ne possible starting point for assessing reciprocal switching on a more limited basis is to allow its use as an optional remedy for rates that have been ruled unreasonable and thus perhaps as an alternative to a prescribed rate."[16]

V. OTHER ISSUES

The STB sees no reason to apply these new rules to purely local movements of smaller carriers but seeks input on the need to expand beyond class I. AFPM does not oppose expansion of the program to all carriers, or perhaps Class II carriers; however, we note this is primarily an issue for Class I carriers. If STB believes the expansion of the program to other levels of carriers would cause delays, it should implement the expansion in phases so as to not delay immediate implementation of the broader reforms.

The STB seeks 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. AFPM believes support and assistance should be limited to guidance documents and similar materials. AFPM believes STB should focus efforts on implementing the program effectively before pursuing major efforts to supply hands-on assistance.

VI. ALTERNATIVE OPTION FOR FORR

In the RRTF report, the 2015 TRB study, and even in this NPRM, it is readily acknowledged that the Canadian FOA process has been a largely successful program. Further, a review of the operating revenue of Canadian railroads will show that even with such a process in place, the Canadian Class I railroads remain financially healthy with very low operating ratios. In addition, as the TRB report notes the FOA process has been utilized more frequently than

[16] Page 176, National Academies of Sciences, Engineering, and Medicine 2015. *Modernizing Freight Rail Regulation*. Washington, DC: The National Academies Press. https://doi.org/10.17226/21759.

similar processes in the United States (namely Simplified SAC), suggesting parties on both sides deem it useful.[17] AFPM evaluated FOA and the FORR proposal on three specific factors (overall timeline, relief duration, and relief cap) that we feel can be adjusted to provide the most meaningful impact. The table below denotes the differences between FOA and FORR as well as an alternative proposal from AFPM.

SUMMARY OF FINAL OFFER REQUIREMENTS AND PROPOSALS			
Proposal / Regulation	**Process Timeline**	**Relief Duration**	**Relief Cap**
Canada's Final Offer Arbitration[18]	30 Day	Period requested by the shipper (for up to two years).	$2 Million
	60 Day		No Limit
STB's Final Offer Rate Review	135 Day	2-Year (Unless parties agree otherwise)	$4 Million
AFPM Alternative Proposal	90 Day	2-Year	$4 Million
	120 Day	10-Year	No Limit

AFPM suggests the Board consider a tiered approach in which complainants would have the option of two pathways. The first would last 90 days and impose a relief duration of 2 years consistent with the STB proposal, and a relief cap of $4 million, also consistent with the STB proposal. The second option would increase the timeline to 120 days, increase the relief duration to 10 years, and remove the relief cap. The procedural elements that STB put forth would be could be utilized for this process (including AFPM's suggested revisions). The three major elements (overall timeline, relief duration, and relief cap) are discussed in more detail below.

Proposed Timelines

As expediting the rate dispute process is the fundamental goal of these final offer processes, it makes sense to review the timelines. Such a process should not be rushed. While the Canadian FOA has an incredibly fast timeline, AFPM does not feel a 30-day and 60-day timeline is feasible in the United States due to the fact that the rail network in the United States is more complex than in Canada and the fact that an independent arbitrator is not involved (like it is in Canada) and the STB staff would be responsible for reviewing the documentation associated with the dispute. Notwithstanding, we do believe that there may be opportunities to shorten the timeline.

AFPM suggests a 90-day and 125-day tiered schedule based on the duration and level of relief sought. As it currently stands the current STB proposal lasts 135 days with 90 days of this being STB review. AFPM believes a reduction of STB review time makes the most sense. Therefore, AFPM proposes reductions of 15 days and 45 days depending on which level of relief is sought (it is logical to assume the complexity of the disputes would increase with the value). This would still give the STB 75 and 45 days to review the dispute respectively. While AFPM prefers condensing the STB review, we would be open to other reasonable timelines that produce an expedient decision.

[17] Id Page 139-140
[18] *See* https://otc-cta.gc.ca/eng/arbitration-final-offer-arbitration

Relief Duration

FOA and FORR only differ slightly regarding relief duration with both settling on 2 years with the FOA providing alternatives should both parties agree. AFPM supports a 2-year relief cap as proposed when the monetary relief is $4 million; however, we also support a second option with a 10-year cap paired and an unlimited relief cap. AFPM understands STB's rationale for establishing a 2-year limit for $4 million; however, AFPM members feel that the unlimited option should be paired with a longer duration. AFPM members seek a meaningful option for expedited review that is worth the time and effort needed to prepare such a case. AFPM is eager to avoid a scenario like we have seen with the SAC model where the cost to bring a case exceeds the potential relief provided. By extending the timing of what can be recouped, we feel the FORR process becomes more useful and viable. Lastly, we believe this broadens the appeal to both manifest and unit train service as the economics related to these services varies thus the threshold at which one would choose to challenge a rate also varies.

Relief Caps

The STB proposes FORR processes be limited to a cap of $4 million and would include a two-year limit on rate prescriptions (unless the parties agree otherwise). The STB set the cap to be consistent the STB's existing methodology for smaller cases. The STB did not address its rationale for not proposing to implement an unlimited cap like FOA offers. AFPM believes that an unlimited option must be provided to avoid a scenario where, due to their market power over a captive shipper, a railroad calculates and sets rates in a manner that makes the FORR process just burdensome enough to discourage bringing forward a dispute. AFPM members have witnessed similar rate-setting behavior when a rail carrier purposely prices themselves out of a market in which they don't wish to participate. AFPM is concerned that with a predetermined rate cap, railroads could potentially set levels discouraging participation in a rate dispute. Removal of the predetermined cap level would eliminate this potential.

VII. CONCLUSION

AFPM thanks STB for its time and consideration of our comments related to the FORR process. AFPM emphasizes the essential need for a fair and competitive rail market to the energy industry and the U.S. economy. It also stresses the important role STB plays in ensuring equitable and competitive rail markets. STB should continue to pursue numerous pathways that provide rail shippers timely, yet thorough, mechanisms to adjudicate what is considered a reasonable and fair rail rate. AFPM shares STB's goal of ensuring the flow of commerce on our nation's rail system and looks forward to continued collaboration. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

Rob Benedict,
Senior Director Petrochemicals, Transportation, and Infrastructure
American Fuel & Petrochemical Manufacturers