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") Supplemental Notice of Proposed Rulemaking ("SNPRM" or the "STB proposal") on "Expanding Access to Rate Review" and "Final Offer Rate Review" (FORR).[1] AFPM applauds STB's work on the issue 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 suggested 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." AFPM was pleased with STB's decision to issue a Notice of Proposed Rulemaking ("NPRM") in September 2019 that outlined provisions for such a program and addressed the recommendations of the RRTF report.[3] AFPM provided extensive comments supporting that NPRM and urged the Board to expeditiously move forward with implementing FORR as a mechanism to address issues in the rate dispute process.[4]

The Board deferred final action on FORR and instead choose to issue this SNPRM concurrently with the small rate case arbitration NPRM[5] (the "Arbitration NRPM") so that "both proposals may be considered simultaneously, including the pros and cons of adopting - either with or without modification - the voluntary arbitration rule, FORR, both proposals, or taking other action."[6] The Arbitration NPRM was opened in response to a petition filed by railroads *after* the comment period for the original FORR NPRM closed. AFPM opposed the opening of a rulemaking related to Small Rate Disputes; not only were the proposals in the petition unworkable, but it was also a "thinly-veiled procedural maneuver by the railroads to delay STB's completion or dilute the FORR rulemaking, an open rulemaking with far greater potential to reduce regulatory burdens and increase the accessibility of a remedy for unreasonable rail rates."[7]

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[1] *See* 87 Fed. Reg. 67622, "Final Offer Rate Review; Expanding Access to Rate Relief." Supplemental Notice of Proposed Rulemaking, Docket No. EP 755; EP 665 (Sub-No. 2) proposed November 26, 2021, https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25168.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] *See* 84 Fed. Reg. 48872, "Final Offer Rate Review; Expanding Access to Rate Relief." Notice of Proposed Rulemaking, Docket No. EP 755; EP 665 (Sub-No. 2) proposed September 17, 2019, https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20093.pdf

[4] *See* AFPM Comments "Docket No. EP 755 Final Offer Rate Review and Docket No. EP 665 (Sub-No. 2) Expanding Access to Rate Relief" posted April 25, 2019, https://www.afpm.org/sites/default/files/issue_resources/AFPM%20STB%20FORR%20Comments%20FINAL.pdf

[5] *See 86 FR 67588*, "Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes." Notice of Proposed Rulemaking, Docket No. EP 765 proposed November 26, 2021, https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25169.pdf

[6] *See* FORR SNPRM, *87 Fed. Reg. 67625*

[7] *See* AFPM Comments "Joint Petition for Rulemaking to Establish an Alternate Voluntary Arbitration Program for Small Rate Disputes Docket No. EP 765" posted September 10, 2020, https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1599769364006/301053.pdf

AFPM supports STB's looking to further the intent of Congress to improve the rate dispute process, in furtherance of its important oversight role in reviewing the impact of freight rail policies on rail shippers. While we are encouraged by the STB's movement on this issue, and thank the STB for this, and related, proposals, AFPM strongly urges the Board to move forward in implementing FORR as a rate dispute process available to rail shippers. Small rate case arbitration should only be adopted in addition to FORR, and not as an alternative to FORR, as the railroads suggest.

In the ICC Termination Act of 1995 ("ICCTA"), as well as subsequently in the Surface Transportation Board Reauthorization Act of 2015 ("STB Reauthorization Act"), Congress clearly described and reaffirmed that the STB is intended to provide multiple avenues for rail shippers to dispute potential unfair rates. To this end, rail shippers should have the option to pursue a dispute through either FORR or small rate case arbitration, and railroads should not be able to limit rail shippers dispute resolution options by "opting-out" of FORR if the final rule does not meet their demands.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. We make the products that make life better, safer and more sustainable: we make progress. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. Approximately 75% of refiners and petrochemical manufacturers are only served by a single railroad (i.e., captive) and have been negatively impacted by excessive freight rail rates, escalating and poorly communicated demurrage and accessorial fees, and lack of competitive rail service.[8] Further, captive shippers are more frequently subject to reduction in the quality and level of service (e.g., missed switches, inaccurate delivery times, and a reduction in the number of days a facility is served).

AFPM members have inadequate options to challenge a rate. Under the current process, challenging a rate before the STB is prohibitively expensive, time-consuming, complex and burdensome for rail shippers with the time and resources required to challenge a rate far exceeding any potential relief offered, particularly for small rate cases. Frustrated by the current process, rail shippers rarely bring forward cases and are often forced to modify operations to their detriment because there are no other viable alternative options. This negatively impacts the supply chain ultimately impacting not only AFPM members, but their customers and consumers. Rail carriers have no incentive to streamline the dispute process because they benefit from the few cases brought under the current costly and complex process.[9]

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[8] The disproportionately negative impact of being a captive rail shipper has been extensively documented in several other STB dockets and hearings on rail competition, rate cases and demurrage and accessorial fees.
[9] This has been demonstrated by the railroads with their strong opposition to FORR and their efforts to exempt themselves from the FORR process if the STB adopts the railroad sponsored small rate case arbitration.

AFPM is confident the FORR process will help improve the dispute resolution process and promote free and open rail and energy markets. FORR offers a fair, cost effective and expedited process that weighs both rail shipper and carrier interests. FORR also has been proven successful in other regions and give both parties incentives to reach a reasonable outcome. It is essential that the STB offer more, not fewer options, to resolve rate disputes in line with its charge from Congress. We look forward to working with you to address these challenges.

III. BACKGROUND

In both the ICCTA and the STB Reauthorization Act, Congress clearly described and reaffirmed that the STB should provide **multiple avenues** (emphasis added) for rail shippers to dispute potential unfair rates.[10] Congress has also expressed the need for simplified and expedited methods for determining the reasonableness of challenged rail rates. This proposal appears to be aligned with these expressions of 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."[11] In STB Reauthorization Act,[12] Congress reaffirmed its desire for a simplified and expedited model when it 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."[13]

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 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."[14]

Despite Congress's intent, rail shippers still lack a meaningful, efficient, and fair pathway to challenge an unfair rate. While the STB has made attempts to simplify and expand access for rate reasonableness challenges (*i.e.,* the simplified stand-alone-cost model and the Three-Benchmark Test), the current processes still do not provide a viable method for shippers to challenge an unfair rate. The small number of cases brought to the Board demonstrate this problem and rail shippers' testimony and comments on various dockets related to rate reform confirm it.

To meet its statutory obligations and address the ICCTA and the STB Reauthorization Act, the Board has embarked on several regulatory actions to address rate disputes, starting in 1996 with the adaptation of the "Three-Benchmark" methodology. More recently, the Board

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[10] Public Law 104-88, 109 Stat. 803, 810 and Public Law 114-110, 129 Stat. 2228.
[11] Public Law 104-88, 109 Stat. 803, 810.
[12] Public Law 114-110, 129 Stat. 2228,
[13] *See* 49 U.S.C. § 10701(d)(3)
[14] *See* 49 U.S.C. § 10101(15).

released the RRTF report in April 2019. This report recommended adopting a FOA-type process. This led to the opening of Docket EP 755 in September 2019, which proposed a new procedure for challenging the reasonableness of railroad rates in smaller cases based on a final offer selection procedure (FORR) that tracked closely with the recommendations from the RRTF and had support amongst rail shippers.

On July 31, 2020, several railroads filed a Petition, asking the Board to establish a new arbitration program for small rate cases. Ignoring that the deadline for filing comments for the FORR NPRM had passed, the railroads petition linked their proposed voluntary arbitration process to FORR. The petition sought an exemption from FORR for railroads that participated in the small rate arbitration program. AFPM, along with other rail shippers, opposed the Board commencing a rulemaking proceeding on the Petition and urged the Board to not delay the implementation of FORR. Other rail shippers supported an additional option to argue small rate disputes if it was in addition to, and not in place of, FORR.

On November 25, 2020, the Board instituted a rulemaking proceeding to consider the railroads' proposal to establish a new, voluntary arbitration program for small rate disputes (the "Arbitration NPRM") while also issuing this SNPRM, to concurrently consider FORR with the Arbitration NPRM. AFPM is disappointed with the delays in implementing FORR. AFPM applauds the effort to reform the rate dispute system but cautions that regulations must be crafted carefully to avoid the mistakes of the past or dilute the benefits of FORR. The FORR procedure proposed in this SNRPM appears to be designed to bring economy to the rate review process and provide complainants 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.

The benefits of FORR however are contingent on it being an option to all rail shippers that wish to challenge a rate. As discussed in these comments, under no circumstances should railroads be exempt from participating in FORR. In their petition, railroads suggested that an incentive for their participation would be exempting them from FORR or other types of rate challenges if they agree to participate in arbitration. AFPM strongly opposes this idea and notes that if railroads are exempt from FORR, they will have no incentive to seek improvements to the arbitration program to ensure it is effective. Most importantly, an "either-or" approach to small rate disputes clearly is misaligned with Congress's intent to provide multiple avenues for rail shippers to dispute potential unfair rates.

IV. AFPM COMENTS ON THE SNPRM

While AFPM provides comments on the FORR SNPRM and the related Arbitration NPRM, an essential element and underling tenet of both sets of comments is that the implementation of FORR must be paired with small rate case arbitration, provided the Board chooses to adopt small rate case arbitration. AFPM strongly opposes allowing railroads to opt-out of FORR if they choose to participate in voluntary arbitration. This undermines the ICCTA and the STB Reauthorization Act. Congress clearly described and reaffirmed that the STB is intended to provide <u>multiple avenues</u> for rail shippers to dispute potential unfair rates. AFPM

offers the comments to help improve the FORR proposal, organizing comments by topic area consistent with the FORR SNPRM preamble.

PART I: Purpose of the Rule

The purpose of the FORR NPRM is to satisfy the statutory requirement that, if the Board determines that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.[15] A shipper's ability to challenge a rate subject to market dominance, and vindicate its statutory right to a Board decision on rate reasonableness, is frustrated where the costs of the Board's available processes exceed the value of potential relief. AFPM members experience this suffering firsthand. AFPM questions the viability of existing rate dispute mechanisms and expresses the need for new ones, particularly for small cases.

AFPM agrees that, as described in the RRTF report, the Transportation Research Board's (TRB) "Special Report" (the "TRB report"),[16] the FORR NPRM and the FORR SNRPM, the Board has laid out more than sufficient grounds to conclude that "shippers lack meaningful access to the Board's existing rate reasonableness processes with respect to small disputes, due to the complexity, cost, and duration of those processes."[17] While some rail carriers question the need for a new procedure to resolve small rate disputes, it is abundantly clear and documented in the public record that the current mechanisms are not sufficient for rail shippers. This was reaffirmed in the STB Reauthorization Act.

While the Association of American Railroads (AAR) and other rail interests often cite the absence of complaints and cases as proof the system, as currently designed, works, that is inaccurate. The lack of small rate cases is explained instead by repeated shipper statements, both in comments and STB hearings, that the current rate relief processes are too complex, expensive and often not a viable option. AFPM agrees with the Board that AAR's logic is flawed, and its argument is circular. Absence of cases does not in any way prove rates are reasonable and the system is working. AFPM agrees with the board that "[c]ommiting to inaction based on such flawed logic would risk leaving shippers without a meaningful avenue to challenge unreasonable rates, in spite of substantial evidence of the need for such relief."[18]

BNSF Railway (BNSF) argues that the Board should limit any reforms to a specific group of small sized shippers moving modest sized shipments that are inordinately impacted by the cost and complexity of the STB's current methodologies. BNSF does not offer any clarification on this ambiguous subset of rail shippers, nor would it matter if they did as the statute's requirement is to ensure rates subject to market dominance be reasonable and applies to both large and small shippers. This also is misaligned with Congress's mandate that simplified and expedited methods exist to challenge rate reasonableness in smaller cases.

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[15] *See* 49 U.S.C. § 10701(d)(1).
[16] *See* "Transportation Research Board TRB Special Report 318: Modernizing Freight Rail Regulation", published June 10, 2015, https://www.trb.org/Publications/Blurbs/172736.aspx
[17] *Id.* Part I
[18] *Id.* Part I

Union Pacific (UP) argues that, instead of adopting FORR, the Board could accelerate Three-Benchmark cases by eliminating rebuttal, starting discovery when the complaint is filed, and committing to issue a decision in 60 days. AFPM does not believe that this would resolve issues with the Three-Benchmark cases and would prefer the additional option of FORR as opposed to a modified version of a mechanism that has not been viable for small cases. The railroads' reluctance to even consider FORR (including the Arbitration NPRM opt-out) raises concerns that rail carriers would like to simply continue the status quo and discourage rate disputes from being pursued at all.

The public record, including in the RRTF report, TRB report, as well as comments to the dockets for the FORR NPRM and reaffirmed in the preamble for the FORR SNRPM, clearly demonstrates, that the Board has laid out more than sufficient grounds and need for this rule. This rule will help to ensure reasonable rates where there is an absence of effective competition, by providing increased access to rate reasonableness determinations in small disputes.

PART II: Statutory Authority

Despite clearly outlining the Board's statutory authority to pursue simplified and expedited methods for determining the reasonableness of challenged rates in the FORR NPRM, rail interests continue to challenge STB's authority to do so and Congress's intent in the ICCTA and the STB Reauthorization Act. Railroads also claim the FORR is mandatory arbitration and thus not within the STB's authority.

Specifically, AAR claims that the FORR process proposed is a "drastic departure" from what the governing statutes intended. The Board is right that AAR is incorrect, and that Section 10701(d)(3) authorizes (and in fact, requires) the Board to maintain one 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." Section 10701(d)(3) does not expressly identify the specific methods that the Board can use for simplified and expedited rate cases, and as the Board notes, the courts have affirmed the Board's significant discretion to pursue various "possible regulatory approaches" in this area.[19] In the STB Reauthorization Act, Congress reaffirmed its desire for a simplified and expedited model when it 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."[20]

Railroad interests also argued that FORR is mandatory arbitration and thus not within the authority of the STB. More specifically, certain railroad interests also emphasize that "[f]inal-offer decision making is an arbitration technique," and contend that because the Board lacks authority from Congress to impose mandatory arbitration, it lacks authority to adopt FORR. The word "technique" here is critical. Simply because FORR utilizes a "technique" in its' decision-making structure that is often used in arbitration does not make it mandatory arbitration. If this were the case, the Board correctly notes, then the existing Three-Benchmark test could be considered mandatory arbitration as it utilizes elements of arbitration as key parts of its

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[19] *See Burlington N. R.R. v. ICC (McCarty Farms Appeal),* 985 F.2d 589, 597 (D.C. Cir. 1993).

[20] *See* 49 U.S.C. § 10701(d)(3)

adjudications. Put simply, part does not equal whole, and FORR is not mandatory arbitration. The NPRM made clear that FORR was not an arbitration proposal and that "the Board would make the determination of rate reasonableness as it does under the Board's current options for challenging the reasonableness of rates."

Lastly, Congress did not authorize mandatory arbitration, but it does authorize the development of new methods and procedures for use by the Board in evaluating rate reasonableness.[21] The absence of statutory authority for third-party arbitrators to conduct mandatory arbitration does not prohibit the Board from adopting decisional procedures also used by arbitrators. Both the NRPM and this SNRPM do just that, develop decisional procedures used by adjudicators. The Board is clearly acting within its statutory authority in adopting FORR.

PART III: Appropriateness of the Rule

Maximum Reasonable Rate

The STB has a statutory duty to apply the law in determining, based on its own best judgment, the maximum reasonable rate. In the rate dispute context, the STB should determine the maximum amount a railroad can charge for a tariff rate. Rail interests incorrectly claim that STB is abandoning this role by outsourcing it to adjudicators. Tellingly, railroads have no issue with this when it comes to their voluntary arbitration proposal. AAR asserts that in some cases the maximum reasonable rate may be above or below the parties' final offers, whereas in others, it may fall between the final offers. It claims that, through FORR, the Board would abdicate its independent judgment to determine a maximum reasonable rate.[22]

As the board explains, the statute permits adjudicators to rely on or adopt the parties' submissions or decisional framework, which they do routinely. AAR implies that, to reach a "legally correct outcome," the Board must perform a rate analysis distinct from any party's pleadings within each case; otherwise, it somehow violates that provision within § 10704 authorizing it to establish the "maximum rate." But as is the case with FORR, the Board has established a process and a set of analytical criteria in which to exercise its judgment in individual cases.

This approach is not new or unique. The Board's Three-Benchmark test comprises a final offer process and a formula, an approach in which the Board exercises its discretion in deciding between the parties' comparison groups under a final offer structure. And while some rail interests argue the "other relevant factors" considered in the Three-Benchmark case differentiate it from FORR, it is important to note that considering "other relevant factors" is optional. In FORR, the Board would exercise its best judgment at multiple stages, including its determination of whether the challenged rate is unreasonable under the governing criteria and, if necessary, its selection of an offer.

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[21] *See* 49 U.S.C. § 10701(d)(3), 10704(d)(1).
[22] *See* AAR Comment 12

FORR is a process that achieves the Board's various statutory objectives.[23] FORR also allows the Board to exercise its judgment to develop a procedure for smaller rate cases that will best "achieve and advance the goals of the rail transportation policy ("RTP").[24] Indeed, in establishing the maximum lawful rate using a FORR process, the Board would continue to balance economic considerations together with administrative feasibility in defining a process ahead of time.

Lastly, in this SNPRM, the Board clarifies that if a FORR case reaches the final offer selection stage (i.e., the Board has found market dominance and that the challenged rate is unreasonable), the offer selected would be found to be the maximum reasonable rate. The Board also clarifies that each party's final offer must reflect what it considers to be a maximum reasonable rate. AFPM agrees with these clarifications as they address any ambiguity in the NPRM language.

Full Hearing Requirement

As provided in 49 U.S.C. § 10704(a)(1), "after a full hearing … the Board, may prescribe the maximum rate, classification, rule, or practice to be followed." AAR and other rail interests argue that the process as developed does not allow for a full hearing and unnecessarily limits the outcomes of the process. AAR argues that FORR would not satisfy the "full hearing" requirement of 49 U.S.C. § 10704(a)(1), because, according to AAR, the Board "has tied [its] hands by artificially limiting [its] decisional range to two possibilities" and has not "retained [its] full decision-making powers."[25]

AAR cites *Morgan v. United States*, 304 U.S. 1, 12 (1938), for the proposition that "Congress, in requiring a 'full hearing,' had regard to judicial standards - not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."[26] AAR contends that, just as a judge cannot reject "fundamental elements of a trial," the Board cannot "announce in advance that it will confine its decisional outcome to the parties' two proposals."[27]

In response to this citation, the Board notes (in the FORR SNPRM) that several decisions post-1938 demonstrate and clarify what a "full-hearing" means and when such a hearing is required. Specifically, a 1984 decision by the ICC rejected an argument that a "full hearing" means a formal "trial-type" hearing under sections 556 and 557 of the Administrative Procedure Act ("APA"), noting that the phrase "full hearing" is not the same as the "on the record" language that is a significant factor in deciding whether formal hearing procedures are required. Further, the ICC observed that a hearing on the record is not required, as an agency has "considerable discretion to establish appropriate procedures."[28]

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[23] *See* 49 U.S.C. §§ 10101(1)-(3), (6), (15), 10701(d)(2), (3), 10704(d)(1).
[24] *See* 49 U.S.C. § 10101
[25] *See* AAR Comment 15-16.
[26] *See* AAR Comment 15.
[27] *Id.* at 15-16; see also CN Comment 10; AAR Comment in Response to Mem. 4, Aug. 12, 2020.
[28] *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 524 (1978)

Further, the STB noted that the Supreme Court has confirmed that agencies have discretion when it comes to informal adjudication governed by specific rules. In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court upheld a Pension Benefit Guaranty Corporation ("PBGC") decision after a lower court had, among other things, found the decision arbitrary and capricious because the "PBGC's decision-making process of informal adjudication lacked adequate procedural safeguards."

The Board has established a process and a set of analytical criteria in which to exercise its judgment in individual cases. Previous decisions and cases show this in the context of rail disputes before the Board. The concerns underlying the Supreme Court's decision in *Morgan* (cited by AAR) are not present with respect to FORR, under which both parties would have ample opportunity to be heard, with two rounds of briefing. Moreover, because the Board would confine its choice to one of two proposals (only after finding the challenged rate unreasonable), the defendant would know the complainant's claim and the rate that it might face should the Board select the complainant's offer and would have an opportunity to respond to that offer. Even assuming *Morgan* survived enactment of the APA, which is not clear, FORR clearly satisfies its interpretation of a "full hearing."

Burden of Proof

STB long held that complainants bear the burden of proof in rate reasonableness proceedings. In FORR proceedings, the complainant must still meet its burden by establishing that the challenged rate is unreasonable.[29] Further, the Board has made clear with its update to the maximum reasonable rates discussed above, each party's final offer must reflect what it considers to be a maximum reasonable rate.[30] Despite STB's long held position on the burden of proof, railroads argue FORR would relieve the complainant of its burden of proof, because the Board would simply consider the burden carried if it selected the complainant's offer. This ignores that the Board must first find the existing rate unreasonable and in this determination the burden of proof is clearly on the complainant.

FORR Encourages Settlements

The FORR NPRM observed that the final offer procedure may encourage the private settlement of disputes, a major benefit.[31] AAR contends that, if FORR does encourage settlements, it will not create precedent that will guide parties in future disputes. While AAR's observation may be true, at least in part, it fails to demonstrate a fundamental problem with FORR. Further, settlements often save considerable time, money, and potential litigation for both railroads and rail shippers.

AAR argues that it is unreasonable for a railroad to face the "coercive pressure" inherent in a final offer procedure, which is what encourages settlements. AAR further asserts that the

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[29] NPRM, EP 755 et al., slip op. at 13.
[30] The Board clarifies that if a FORR case reaches the final offer selection stage (i.e., the Board has found market dominance and the challenged rate as unreasonable), the offer selected would be the maximum reasonable rate and clarifies that each party's final offer must reflect what it considers to be a maximum reasonable rate.
[31] NPRM, EP 755 et al., slip op. at 7.

risks faced by shippers and railroads are not reciprocal when it comes to rate disputes, because the Board would never prescribe a rate higher than the challenged rate. That is true, but the complaint rests with Congress since the Board's statutory mandate is to regulate railroad conduct, rather than shipper conduct.[32] By contrast, if most disputes are litigated, that would be a less favorable development, given the time and expense, even though precedent would develop more quickly. Lastly, railroads support confidentiality and nonbinding precedent regarding decisions in voluntary arbitration, which runs counter to their arguments related to FORR.

AFPM agrees with the Board that this potential flaw identified by the railroads is actually a benefit of the process. Increasing the frequency of settlements, and therefore avoiding the cost and time of litigation, would be a better outcome for parties and the Board and more in line with Congressional directives.

Canadian Final Offer Arbitration

As mentioned by AFPM and other commenters at the NPRM stage, Canada already offers a similar process to final offer arbitration. As such, many commenters referenced the success of this program in Canada as reason to pursue a similar program in the United States. Others complained Canadian process is very complex and expensive for both parties and that in Canada some of their concerns were mitigated in other ways.

Canadian National ("CN") argues that concerns regarding final offer arbitration are mitigated in Canada because the process and results are confidential and decisions are non-precedential, but that FORR lacks these features. The Board asserts that while a certain degree of confidentiality and lack of precedent could enhance the benefits of a final offer process, rate reasonableness decisions by the Board are precedential and made available to the public (with exceptions for certain confidential material).[33] The Board noted that it has weighed these considerations and, based on the record to date, concludes that FORR would provide sufficient benefit even without being confidential and non-precedential. AFPM agrees with this point and encourages the Board to move forward as proposed.

Canadian Pacific ("CP") states that Canadian final offer arbitration proceedings are complex and expensive for both parties, and that, because CP does not know what arguments shippers will make, it "must be overly expansive in its briefing, addressing all possible arguments that the complainant might raise." AFPM agrees with the Board's rebuttal statement that "Canadian final offer arbitration may be complex, but the more relevant issue here is how FORR compares to the Board's existing rate reasonableness processes. If it is sufficiently less costly than Three-Benchmark, for example, then it could still help to expand access to rate relief."[34]

PART IV: Review Criteria

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[32] *See,* e.g., 49 U.S.C. § 10704(a)(1) (authorizing the Board to prescribe a rate or practice for a carrier).
[33] *See* 5 U.S.C. § 552(a)(2)
[34] *See* FORR SNPRM 87 Fed. Reg. 67633.

Additional Information

There were considerable comments at the NPRM stage of this rulemaking regarding the criteria used to resolve rate disputes. During the NPRM, the Board stated that, in reviewing offers, it would take into account the RTP, the Long-Cannon factors[35] in 49 U.S.C. § 10701(d)(2), and appropriate economic principles. Rail shippers supported more clarity but railroads strongly opposed the proposal to rely on criteria instead of a defined economic methodology. In this SNPRM, the Board continues to propose a non-prescriptive, multi-factor test, which would apply in the rate reasonableness determination regarding the challenged rate and, if necessary, in selecting between the offers. The Board has offered the following clarifications.

Specifically, parties may submit robust comparison group approaches, cross-subsidy analyses, analyses that incorporate market-based factors, or new analyses relying on constrained market pricing ("CMP") principles. The Board further noted that it declines "to propose to determine in advance whether specific methodologies (including those identified above) would satisfy the review criteria; rather, that determination would take place in individual cases, and submitting a methodology in one of these categories would not guarantee a party's success."[36] The Board also noted that parties could seek to satisfy the review criteria with methodologies that are not listed here. The Board clarified that parties would not be expected to address every RTP factor, all of the Long-Cannon factors, or every type of appropriate economic principle.

Finally, per this SNPRM, appropriate economic principles would encompass Board and ICC precedent, court precedent reviewing Board and ICC decisions, generally accepted economic theory (e.g., presented in experts' verified statements or citations to academic literature), and analogous economic regulatory materials from other tribunals, such as federal courts and agencies.

In sum, the Board continues to propose a non-prescriptive, multi-factor test, which would apply in the rate reasonableness determination regarding the challenged rate and, if necessary, in selecting between the offers. AFPM appreciates the added clarity and notes a flexible approach with some guardrails as provided is preferred to a defined economic methodology which may slow the process.

Vagueness Arguments

Citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), AAR boldly claims that FORR is unconstitutionally vague because railroads do not know in advance what the Board might find unreasonable, inasmuch as the methodology is chosen within the case. As a result, railroads argue that they will not know in advance how to conform their conduct to the demands of the law.[37] AAR also states that predictable application is necessary to prevent the adjudicator

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[35] The ICC, the predecessor to the STB, considers three factors, known as the Long-Cannon factors, to determine whether a rate exceeds a reasonable maximum level. The factors are: 1. Traffic which does not contribute to going concern value. 2. Traffic on which revenues can be increased. 3. Traffic paying an unreasonable share of revenues.
[36] *Id.* 67633
[37] *See* AAR Comment 17-19; see also CN Comment 18-19; BNSF Comment 4-5, 7-8.

from acting in an arbitrary or discriminatory way.[38] AFPM disagrees with AAR and supports the Board's position that the rulemaking process and proposed regulations are clear.

An agency must promulgate standards that are sufficiently clear to pass constitutional muster, and the Board has done so with both the NPRM and this SNRPM. Both documents include extensive preamble discussion, responses to stakeholder comments, and legal and statutory support for the proposed regulations. The Board also clearly outlines the process of review, and this SNPRM as noted above has further clarified review factors. These regulations are also supported by the extensive work of the RRTF, and the associated report issued.

AAR characterizes FORR as distinct from these other agency processes in terms of predictability, implying that the Board has given guidance on how it would reach a decision. That is false; the NPRM stated the criteria that would apply in determining rate reasonableness, and if necessary, choosing an offer. The NPRM made clear that a railroad in a FORR proceeding may use "existing rate review methodologies" to defend the challenged rate or its final offer, as well as other methodologies that follow the applicable criteria.

The SNPRM provides additional clarity. These criteria would signal to parties what rates might be found unreasonable. AAR's argument overstates the predictability of other types of litigation before the Board and understates the predictability of a FORR case. Following the Board's adoption of FORR, railroads would continue to be entitled under § 10701 to "establish any rate for transportation" over which they do not have market dominance. Where there is market dominance, railroads would also continue to be entitled to charge a rate so long as it is reasonable.

AFPM believes the Board is clear in its intention. In fact, the Board is proposing procedural rules for the adjudication of railroad rates under the precise criteria established by statute and an FORR proceeding may use "existing rate review methodologies" to defend the challenged rate or its final offer, as well as other methodologies that follow the applicable criteria. FORR's level of predictability, which is in line with unreasonable practice cases and other adjudications requiring the tribunal to weigh multiple factors, does not render it unconstitutionally vague.

Board Precedent

The ICC, the predecessor to the STB, published a set of economic principles to determine whether rates charged by a market dominant railroad challenged by shippers are unreasonable. These were the CMP principles that were published in the ICC's "Coal Rate Guidelines, Nationwide" in 1985. The CMP principles are designed to prevent "captive" shippers from paying more than is necessary for the carrier involved to earn adequate revenues, from paying for inefficient service, and from bearing the cost of facilities or services from which they derive no benefit.[39] The Board and its predecessor have long recognized the need for non-CMP principles

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[38] *See* AAR Comment 19.

[39] *See* "An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification" Project FY14-STB-157, published September 14, 2016, https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf

methods, and FORR expressly accounts for "the basic economic principles that have long guided the Board in judging the reasonableness of rates."[40]

AAR asserts that any rate reasonableness process adopted by the Board must be "tethered to" CMP, arguing that FORR deviates from "historic agency practice" that was shaped by notice and comment and judicial review. The FORR proposal arose in the context of the agency's long and difficult search for a solution for smaller rate disputes. The Board provided a reasoned explanation for this evolution in practice to appropriately address such disputes. The NPRM explained in detail the reason for its proposal, as did the SNPRM.

Given the added clarity the Board has provided on review criteria, as well as the discussion regarding Board precedent, AFPM agrees with the Board that FORR is needed as it provides a much-needed new approach well rooted in the basic economic principles that have long guided the Board. Further, AFPM appreciates the flexible approach (with guidance provided in this SNPRM), which is superior to a rigid approach with a defined economic methodology or tethering this process to CMP.

PART V: Discovery and Procedural Schedule Issues

Discovery

In the NPRM, the Board proposed to take any unreasonable withholding of relevant information into account in choosing between the offers instead of allowing litigation. Now, in the SNPRM, the Board proposes to remove the use of adverse inferences and instead adopt a process for motions to compel.

Under the proposed process, each party would be permitted to file a single motion to compel that aggregates all of the discovery disputes. Each party's motion to compel, if any, would have to be filed on the 10th day before the close of discovery. Each party would be permitted seven days to reply to the other party's motion to compel, but in the interest of expediting the schedule, replies to replies would not be permitted. Finally, the Board would issue a decision in 10 business days. The Board also proposes to extend the discovery period from 21 days to 35 days (otherwise, with motions to compel now permitted, parties would have to file such motions after only 11 days of discovery).

During the NPRM, AFPM asked the Board to provide more guidance as to what parties should produce in discovery in FORR cases. In response, the Board noted that the material a party seeks in discovery depends to a significant extent on the methodology it plans to present. In this SNPRM, the Board describes examples of methodologies that a party might present in a FORR case; information in support of one of these methodologies would be a type of material that parties could seek in discovery, provided that it is appropriately limited in scope and production burden, given the brief discovery period. STB provided some details on specific types of discovery elements that would be included in cases in the preamble discussion of review criteria, so AFPM could support the changes in the SNPRM.

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[40] *Id.*

Procedural Schedule

In the NPRM, the Board proposed a specific compressed timeline for the procedural schedule. In response to railroads' concerns, the Board revised their proposal by extending the discovery deadlines and adopting a motion to compel process, and by requiring a mandatory mediation period.

AAR argues that the burden of FORR's short timelines falls disproportionately on the railroads, because the complainant can take as much time as it wants to prepare its case before initiating litigation. This argument simply reflects the nature of litigation and should not be a reason not to adopt FORR. As the Board correctly notes, a plaintiff in a civil action in court controls the timing of case initiation and therefore has essentially unlimited time to prepare its case (subject to the statute of limitations), because it decides when to file a complaint. The defendant in such a case must prepare its response with limited time. This situation exists in the Board's other rate reasonableness processes as well.

The Board is however attempting to even the perceived burden by extending the discovery deadlines, adopting a motion to compel process and requiring a mandatory mediation period. And while the Board is proposing to lengthen several deadlines in the record development portion of a FORR proceeding, it is rejecting a proposal to reduce the Board's decision time from 90 days to 60 days. Below is a table detailing the NPRM and SNPRM timelines.

FORR Procedural Schedule Comparison			
NPRM Schedule	**SNPRM Schedule**		**Action**
	Streamlined Market Dominance	**Non -Streamlined Market Dominance**	
Day -5	Day -25	Day -25	Complainant serves notice of intent to initiate case. SNPRM adds mandatory mediation to this stage.
Day 0	Day 0	Day 0	Complaint filed / Discovery begins
Day 21	Day 35	Day 35	Discovery ends
Day 35	Day 49	Day 49	Simultaneous filing of market dominance presentations, rate reasonableness analyses, & final offers
Day 45	Day 59	Day 79	Simultaneous filing of replies
NA	Day 66		Complainant's letter informing the Board whether it elects an evidentiary hearing on market dominance
Day 52	Day 73		Optional telephone hearing before administrative law judge (market dominance)
Day 135	Day 149	Day 169	STB decision

AFPM is concerned that the added time on the procedural schedule undermines the goals of an expedited process. AFPM urges the Board to balance stakeholder interests while achieving the goals of an expedited process.

In the NPRM, the Board proposed to omit mandatory mediation because it would add time (and possibly expense) but stated that the Board would be prepared to facilitate mediation if requested by the parties. AFPM opposes mandatory mediation. As The National Grain and Feed Association correctly points out mandatory mediation is unnecessary in FORR cases because if a shipper reaches the point of filing a complaint, it has already reached an impasse in commercial negotiations with the railroad.

In addition, AFPM continues to support reduction in the Board's decision time from 90 days to 60 days. While the Board notes that FORR decisions are subject to the requirements of the APA, including the requirement that the agency "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," AFPM believes a 60-day period is sufficient time to satisfy the APA requirements. This is also consistent with the 60-day comment period that is typically the default timeframe to submit comments to agency rulemaking actions. Lastly, the Board has 90 days to issue decisions in major merger cases, like the one currently pending between CP and Kansas City Southern. As such, this period does not seem to be in line with an expedited procedure considering major mergers are the most complicated cases the Board has to handle in many instances.

PART VI: Market Dominance Issues

Procedural Issues

In the NPRM, the Board proposed that both complainant and defendant would be required to submit market dominance analyses as part of their simultaneous opening submissions. Since the publication of the NPRM, the Board has become concerned that doing so would require the defendant to anticipate in this opening submission what the complainant might present regarding market dominance, without even knowing whether the complainant has selected streamlined or non-streamlined market dominance. Accordingly, the Board proposes to revise the procedure so that only the complainant - as the party with the burden - is required to submit market dominance evidence on opening and the defendant would be required to address the market dominance on reply.

AFPM has concerns with the Board's approach and believes the Board's concerns about the defendant being at a disadvantage could be resolved by sticking to the original proposal to require that streamlined market dominance be used. In this instance the concerns the defendant may have about not knowing what type of information will be presented would be resolved. Further, this would result in only a modest increase in the overall timeframe from what was originally proposed in the NPRM and be consistent with the goals set forth to create a more efficient process to adjudicate smaller rate cases. If the Board decides to offer the option for either non-streamlined or streamlined market dominance, the Board could also require the complainant to provide some indication of its desired method and then both parties could submit resulting market dominance evidence on opening simultaneously.

Option To Use Non-Streamlined Market Dominance

As mentioned above, the Board proposed that FORR could only be used if the complainant also elected to use the streamlined market dominance approach[41]. The Board itself noted that the streamlined market dominance approach "would complement and enhance the streamlined rate reasonableness procedure proposed here" and that "the expedited timelines proposed here may make it too difficult for parties to litigate a non-streamlined market dominance presentation."[42]

Based on some comments received to the NPRM, the Board now believes complainants should have the option of choosing between streamlined and non-streamlined market dominance in FORR cases. Accordingly, the Board now proposes not to limit FORR complainants to streamlined market dominance. The Board reasons that limiting FORR in this way could effectively deny access to FORR for many potential complainants - those who are unable to satisfy one or more of the streamlined factors - which is contrary to FORR's goal of improving access to rate reasonableness determinations.

While AFPM prefers the streamlined market dominance approach and the efficiencies it provides, we understand that in some scenarios there may be the preference by a complainant to use the non-streamlined approach. As such, we do not oppose giving the complainant the choice.

PART VII: Relief Cap

In the NPRM, the Board proposed to establish a relief cap of $4 million, indexed annually using the Producer Price Index, which would apply to an award of reparations, a rate prescription, or any combination of the two. This is consistent with the potential relief afforded under the Three-Benchmark methodology. The Board further proposed that any rate prescription be limited to no more than two years 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, thereby accounting for the expedited deadlines of the FORR procedure. The Board also requested comment on the advisability of a two-tiered relief procedure in which the top tier has a longer procedural schedule and no limit on the size of the relief.

After consideration of comments, in this SNPRM, the Board appears to be moving forward with a relief cap of $4 million, indexed annually using the Producer Price Index, which would apply to an award of reparations, a rate prescription, or any combination of the two. Despite comments advocating for a two-tiered system, the Board is not pursing a two-tiered process at this time.

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[41] While "Streamlined Market Dominance" was a proposal when the FORR NPRM was originally published it has since been adopted in a final rule. *See* 85 Fed. Reg. 47675, "Market Dominance Streamlined Approach", Docket EP 756, published August 6, 2020, https://www.govinfo.gov/content/pkg/FR-2020-08-06/pdf/2020-17115.pdf

[42] *See* FORR SNPRM 87 Fed. Reg. 67639.

As stated in our previous comments, AFPM supports a 2-year relief cap as proposed when the monetary relief is $4 million; however, we also support a two-tier system with a second option representing a longer duration and higher relief cap (originally 10 years and unlimited cap). AFPM members seek a meaningful option for expedited review that is worth the time and effort needed to prepare such as case. While AFPM supports FORR, the FORR process would be even more useful and viable if the Board extends the timing and increases the cap.

Also, despite the Board's reassurance they would be mindful of railroads setting rates to "game" the relief cap by setting high initial rates such that any relief cap will be quickly exhausted, we still have concerns. These concerns would be alleviated by the two-tier system. AFPM has witnessed similar rate-setting behavior when a rail carrier purposely prices itself out of a market in which it does not wish to participate.[43] AFPM is concerned that with a pre-determined rate cap, railroads could potentially game the system. Removing the pre-determined cap level would eliminate this potential.

PART VIII: Miscellaneous Issues

Short Line Applicability

In the NPRM, the Board proposed that FORR would not be available for purely local movements of a Class II or Class III rail carrier.[44] However, FORR 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.

In comments to the NPRM, AFPM stated that it does not oppose expanding FORR to smaller carriers, but if that would delay implementation, the rule should be implemented in phases. In the SNPRM, the Board notes that it will move forward as proposed and would not allow challenges to purely local movements of a Class II or Class III rail carrier. As the Board gains experience with the FORR procedure, they may, at a future date, expand FORR to purely local movements of a Class II or Class III rail carrier. Based on the record to date, however, the Board is reluctant to allow the smaller railroads to be the defendants in any initial cases under FORR.

As previously noted, AFPM does not oppose expanding FORR to smaller carriers but agrees with the Board that the initial focus should be on larger carriers. Given the STB leaves open the possible future expansion of this to Class II and III carriers, AFPM would support moving forward as proposed.

V. CONCLUSION

AFPM appreciates STB's time and consideration of our comments related to the FORR process. STB's oversight is essential for a fair and competitive rail market for the energy industry and the U.S. economy. To this end, AFPM supports the implementation of FORR as an option for rail shippers to challenge rates, paired with small rate case arbitration. AFPM strongly

[43] It could be argued this type of activity is at odds with the spirit of railroads' common carrier obligations.
[44] *See* 73 NPRM, EP 755 et al., slip op. at 16-17

opposes allowing railroads to opt out of FORR, if they choose to participate in voluntary arbitration. This undermines the ICCTA and the STB Reauthorization Act, because Congress clearly described and reaffirmed that the STB is intended to provide multiple avenues for rail shippers to dispute potential unfair rates.

The 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 the 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,
Vice President, Petrochemicals & Midstream
American Fuel & Petrochemical Manufacturers