Before the U.S. Surface Transportation Board

STB Docket No. EP 755

Final Offer Rate Review

STB Docket No. EP 765

Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program
for Small Rate Disputes

Comments of the U.S. Department of Agriculture

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Date: January 14, 2022

Authority and Interest

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 entrust the Secretary of Agriculture with representing the interests of agricultural producers and shippers in improving transportation services and facilities. As one of many ways to accomplish this mission, the U.S. Department of Agriculture (USDA) initiates and participates in Surface Transportation Board (STB or Board) proceedings involving rates, charges, tariffs, practices, and services.

Summary

USDA appreciates the Board's consideration of improvements to its rate review processes through the proposed voluntary arbitration process in Ex Parte (EP) 765 and the supplemental Final Offer Rate Review (FORR) proposal in EP 755. The existing rate review processes are too expensive and lengthy to offer effective rate review for shippers, especially shippers with smaller cases. USDA welcomes the Board's recognition of this fact in its FORR Supplemental Notice of Proposed Rulemaking (SNPRM). In these comments, USDA expresses its belief that change is needed in railroad rate reasonableness review. While USDA sees FORR as the better (indeed, more necessary) of the two proposed procedures, it also believes that the differences between the proposed arbitration process and FORR are small compared to the differences between those proposals and existing procedures. However, USDA emphasizes the need for at least finalizing FORR. Participation in a *voluntary* arbitration process will not be compelling without an effective litigatory backstop. If both proposals are enacted, USDA expects them to significantly improve small rate case review.

Discussion

The Board recently published its *Annual Rail Rate Index Study: 1985-2019*.[1] The study illustrates the dissatisfaction with deregulation that grain shippers have expressed for years. Although rates have fallen on average, grain rates have been equal to or higher than their levels in 1985 for the past decade. Many grain shippers do pay rates above the statutory 180-percent level—some well above.[2] Of course, these facts do not mean rates are necessarily unreasonable, but they do raise questions around the fact that grain shippers have not brought a rate case to the Board in over 20 years and none under the simplified procedures.[3]

For this reason, USDA supports the Board's proposals to offer better solutions to small rate case shippers in voluntary arbitration and FORR. Both of the proposals benefit from a short timeline of less than 6 months; the use of a streamlined market dominance determination; and the methodological flexibility that should enable shippers (and railroads) to make their best case of rate unreasonableness (or reasonableness). As closely as USDA can discern, the major differences between the two proposals are in *how* to decide a case, in whether that decision is confidential, and in whether the decision is precedential. In general, USDA believes these differences are small relative to the benefits that would be provided either by FORR alone or from jointly implementing voluntary arbitration and FORR.

[1] STB, *Annual Rail Rate Index Study: 1985-2019*, December 2021, p. 3.
[2] USDA, *Supplement for Informal Discussion with STB*, Ex Parte meeting in Docket No. EP 755: Final Offer Rate Review, June 25, 2020, p. 2.
[3] STB, *Rail Rate Cases at the STB*, November 19, 2019 (retrieved December 30, 2021).

It is worth emphasizing the benefits provided by adopting FORR alone or jointly with voluntary arbitration, because USDA sees little value in the *voluntary* arbitration process by itself. In contrast, FORR is a stand-alone, workable solution. USDA understands there may be benefits to having both, but strongly believes that FORR is essential, either by itself or alongside voluntary arbitration.

The key issue with the proposed arbitration process is its voluntary nature. Private firms do not typically need the government to implement voluntary tools for them, because they will readily take advantage of mutually beneficial opportunities. For example, shippers and railroads already have voluntary arbitration over non-rate issues at the National Grain and Feed Association, but railroads refuse to arbitrate rates. As the Board mentioned, since 2016, railroads have been able to arbitrate rates at the Board, but it, too, has gone unused.[4] That is, if both shippers and railroads wanted to participate in arbitration over rates, they could readily do so now, with or without the Board's involvement. The fact that railroads will not voluntarily participate in arbitration now leaves little reason to believe they would participate in the Board's proposal unless there were an effective alternative for pursuing a rate case. Without FORR, voluntary arbitration at the Board will continue to go unused.

This same line of reasoning demonstrates why railroads should not be exempt from FORR for participating in the proposed arbitration process. If FORR were finalized, there would be nothing preventing shippers and railroads from engaging in their own truly voluntary arbitration process—that is, one where *both* shippers and railroads opted in. FORR would give shippers and railroads the incentive to come up with their own arbitration process that improved upon FORR for both parties. In the current proposal, the "voluntary" arbitration process and its FORR exemption give railroads the opportunity to choose which process works best for them, and shippers simply have to go along with it. At a minimum, the Board should finalize FORR. If the Board also decides to finalize the arbitration proposal, an opt-in option for both railroads *and* shippers will be necessary in order to provide a mutually beneficial alternative to litigation.

As discussed in prior comments, USDA believes FORR offers other benefits over the proposed arbitration process. One of the main differences between FORR and the proposed arbitration process is in *how* a decision is made. Under FORR, the decision procedure is clear: the Board would use a final offer process. The Board has done an exceptional job of defending that process in the latest FORR SNPRM. Although railroads have raised many objections to FORR, they primarily focus on statutory concerns (which the Board has addressed) and the need for clarification (which the Board adequately provided). USDA is not aware of objections to the benefits of the process itself, whereby the final offer process incentivizes reasonable presentations and reasonable offers.

In contrast, *how* a decision will be made in the railroad's proposed arbitration process is unclear. It appears the Board will let the panel of arbitrators decide, but it is not clear whether the panel will (a) tend to choose a mid-point between the shipper and railroad positions; (b) make its own, independent measure of what is a reasonable rate; or (c) use some other process. The railroads repeatedly raised concerns about the uncertainty involved in the FORR process, but appear to have proposed an even more uncertain process. While FORR has methodological flexibility, the

[4] STB Decision, Docket No. EP 765: Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, November 15, 2021, p. 3.

proposed arbitration process has both methodological and procedural flexibility. USDA believes FORR is the better process not only because its decision-making process is clearer, but also because that process is designed to produce reasonable outcomes.

The final major difference between the two proposed procedures is the issue of confidentiality. USDA discussed its preference for transparency in prior comments and appreciates the Board's recognition of those concerns in its proposal. USDA understands the value in keeping the process more informal, but also appreciates the Board's proposal to provide quarterly reports that summarize elements of each case.

In addition to the benefits of transparency USDA has discussed previously, there is also the concern of asymmetric information and bias in confidentiality. Asymmetric information appears when one party in an exchange has more or better information than another party, creating an imbalance of power in the transaction. There are thousands of shippers but only seven Class I railroads. Railroads will quickly become familiar with the process and know all the details of their cases, whereas shippers will tend to go into cases completely blind. This asymmetry gives railroads a distinct competitive advantage. For this reason, USDA encourages the Board to level the playing field, seek more information in the confidential case summaries, and provide as much information as possible about the cases in the quarterly reports. USDA believes the Board should take an approach similar to that proposed in the FORR SNPRM, where the Board is required to make enough information available for public inspection. Summaries of the types of evidence or kinds of arguments made would be helpful information to shippers, who are otherwise in the dark. For instance, if a shipper won a case using a modified three-benchmark approach, that kind of methodological information could be published without creating the secondary market effects the railroads are concerned about.

Finally, the petitioning railroads stated they would not use the proposed arbitration process if revenue adequacy evidence were admissible. USDA appreciates both the Board's clarification in the EP 765 Notice of Proposed Rulemaking (NPRM) that revenue adequacy evidence would be admissible and its rationale underpinning this clarification. USDA believes the Board rightly points out that revenue adequacy evidence is already embedded in a variety of rate reasonableness considerations and that the methodological flexibility of arbitration and FORR necessitate its inclusion.

Conclusion

USDA appreciates the Board's attempts to improve its rate review processes. USDA supports the FORR SNPRM as proposed. USDA also supports the joint adoption of the FORR SNPRM and voluntary arbitration and suggests the following modifications to the arbitration NPRM: railroads should not be exempt from FORR—railroads and shippers should *both* be required to opt-in—and sufficient information about a case should be published to reduce asymmetric information. Most importantly, USDA believes FORR is necessary. It is worth remembering that EP 665 started as a grain rate review procedure. The Board's recent research shows that grain shippers have disproportionately borne the costs of deregulation. USDA believes rate review change is needed for those shippers and applauds the Board's current proposals as important steps in that direction.

Respectfully submitted,

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