

The STB Should Withdraw its Final Offer Rate Review (FORR) Proposal Because It Would Harm Small Shippers & Railroads Alike

FORR replaces careful deliberation about rates with a single binary decision.

The U.S. Surface Transportation Board (STB) — the economic regulator of the freight rail industry — issued a Notice of Proposed Rulemaking (NPRM) on September 11, 2019 to propose a new process for rail customers to contest the reasonableness of an individual rail rate. The proposal, Final Offer Rate Review, or FORR, significantly departs from current processes required by statute.

Historically, if — after a full hearing — the STB found the reasonableness of a challenged rate to be unlawful, it prescribed a maximum rate a railroad could charge based on established methodologies that replicate market outcomes. Under FORR, a complainant can simply propose a rate, which the STB can then choose on the sole basis that it is perceived to be relatively more reasonable than the rate proposed by the carrier.

Railroads serve shippers in a highly competitive market and set rates based on market conditions. FORR would allow rail customers to effectively set their own rates wholly independent of actual market conditions. The STB's proposal lacks standards for determining rate reasonableness, and replaces the longstanding practice of careful deliberation with a single binary decision.

FORR is for professional baseball, not railroad economics.

Final offer arbitration is best known for its use in salary arbitrations for major league baseball players and is not suited for evaluating railroad economics consistent with governing statutory provisions. In the case of baseball, final-offer arbitration involves negotiation and counter-proposals. The STB's proposal is predicated on simply choosing between two proposed rates, neither of which is necessarily the maximum reasonable rate. The STB proposal abdicates the agency's responsibility to exercise its expert judgement and does a disservice to railroads *and* shippers by eliminating regulatory predictability.

FORR would not help small shippers.

The STB argues that its proposal would provide what amounts to a “quick and dirty” option for railroad customers to bring “small” rate challenges. The proposed rule, however, does not limit the FORR route to small shippers or even small disputes. Instead, the STB proposed to cap the available relief at \$4 million per case, which large shippers are free to pursue. Nothing prevents large companies with abundant resources for litigation from bringing multiple FORR cases simultaneously.

FORR would undermine railroad's ability to invest in the nation's critical freight rail network.

Rate review without any uniform standards and divorced from market outcomes would produce natural repercussions the STB did not even consider: below market rates would undermine the industry's ability to earn the necessary revenues to invest in the privately financed rail network. Consistent spending on the rail network is closely correlated with increased safety, efficiency and reliability.

Key Takeaways

- FORR deprives railroads and shippers of their due process and statutory rights to a full hearing.
- No other federal government agency reviews regulated rates in this manner.
- The proposal is vague and relies on parties to justify proposals based on their own methodologies. The STB, as the regulator, must have a role in setting uniform policy.
- The STB failed to clearly articulate the problem it was trying to solve with FORR, narrowly tailor a proposal to solve that problem, or evaluate the costs and benefits of its proposal.