52526 SERVICE DATE – MAY 30, 2025
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 755

FINAL OFFER RATE REVIEW

Docket No. EP 665 (Sub-No. 2)[1]

EXPANDING ACCESS TO RATE RELIEF

Decided: May 29, 2025.

AGENCY: Surface Transportation Board.

ACTION: Final Rule; removal.

SUMMARY: The Surface Transportation Board (Board) is removing its final rule concerning Final Offer Rate Review because the final rule was vacated upon judicial review. The Board is also terminating the proceeding in Docket No. EP 665 (Sub-No. 2).

EFFECTIVE DATE: June 6, 2025.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at (202) 245-0391. If you require accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: In a notice of proposed rulemaking issued September 12, 2019, the Board proposed a new rate case procedure for smaller cases, known as Final Offer Rate Review (FORR). Final Offer Rate Rev., EP 755 et al. (STB served Sept. 12, 2019).[2] The Board also sought comment on whether to close a proceeding in Docket No. EP 665 (Sub-No. 2), in which the Board had sought public comment regarding potential rate reasonableness methodologies but had not proposed a rule. Id. at 17. The Board issued a supplemental notice of proposed rulemaking regarding FORR on November 15, 2021 (Nov. 2021 Decision), and adopted the final rule on December 19, 2022. Final Offer Rate Rev., EP 755 et al. (STB served Nov. 15, 2021); Final Offer Rate Rev., EP 755 et al. (STB served Dec. 19, 2022) (with Board Members Fuchs and Schultz dissenting). The final rule implemented FORR by amending 49 CFR parts 1002, 1111, 1114, and 1115. It also terminated the proceeding in Docket

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

[2] The NPRM was published in the Federal Register, 84 Fed. Reg. 48,872 (Sept. 17, 2019).

No. EP 665 (Sub-No. 2). The final rule took effect on March 6, 2023. 88 Fed. Reg. 299 (Jan. 4, 2023). On January 24, 2023, several shipper interest groups jointly filed a petition for reconsideration of several aspects of the decision, and that petition remains pending before the Board.

Petitions for judicial review of the final rule were filed in the U.S. Courts of Appeals for the Eighth Circuit and the District of Columbia Circuit and were ultimately consolidated in the Eighth Circuit. The Eighth Circuit held that the Board lacked statutory authority to prescribe rates through FORR and vacated the final rule. Union Pac. R.R. v. STB, 113 F.4th 823 (8th Cir. 2024), reh'g and reh'g en banc denied, Nos. 22-3648 & 23-1325 (8th Cir. Dec. 10, 2024).

In light of the Court's opinion, portions of 49 CFR parts 1002, 1111, 1114, and 1115 will be revised to remove the provisions that were added by the final rule in order to implement FORR. Because this action follows a final court determination vacating the final rule, the Board finds good cause to dispense with notice and comment under the Administrative Procedure Act (APA). See 5 U.S.C. 553(b)(B); EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 134-35 (D.C. Cir. 2015); On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008, EP 726, slip op. at 1 (STB served May 4, 2018). The Board is not, at this time, removing the portions of 49 CFR part 1108 that refer to FORR. Those references were added to the Board's regulations in a separate rulemaking, Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, EP 765 (STB served Dec. 19, 2022), which is currently the subject of petitions for reconsideration at the Board and litigation in the U.S. Court of Appeals for the Seventh Circuit. The Board will amend part 1108 as appropriate at a future time.

Additionally, like the FORR docket, the proceeding in Docket No. EP 665 (Sub-No. 2) will again be terminated. Although this aspect of the final rule was not the subject of any argument before the Court of Appeals or of the Eighth Circuit's opinion, the Court's judgment formally vacated the Board's entire final rule and associated decision, including the aspect of it that terminated the proceeding in Docket No. EP 665 (Sub-No. 2). Nothing in the Court's opinion suggests that the Board cannot terminate that proceeding again. In the interest of administrative efficiency, the Board will close that proceeding again, but, as stated in the supplemental notice of proposed rulemaking, the Board "may revisit some of the ideas presented there depending on future developments." Nov. 2021 Decision, EP 755 et al., slip op. at 50. Indeed, the Board is exploring additional ways to improve its processes, including for rate cases. Because terminating Docket No. EP 665 (Sub-No. 2) now repeats an action that was previously subject to notice and comment and was not substantively affected by the Court's opinion, the Board finds good cause to dispense with notice and comment under the APA with respect to that action, as well. See 5 U.S.C. 553(b)(B).

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601-612, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice

and comment are not required under the APA for this rulemaking, the requirements of the RFA do not apply.

The Congressional Review Act (CRA), as amended by the GAO Database Modernization Act of 2023, requires that the Board submit a report to the Comptroller General if the Board revokes a rule or the rule "is made ineffective for any other reason." 5 U.S.C. 801(a)(1)(D). The Board will submit such a report for FORR. Pursuant to the CRA, the Office of Information and Regulatory Affairs (OIRA) has designated this final rule/removal as non-major, as defined by 5 U.S.C. 804(2).

Executive Order 12866, as modified by Executive Order 14215, provides that OIRA will review all significant rules. OIRA has determined that this rule is not significant. This action is considered an Executive Order 14192 deregulatory action.

This rulemaking does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3521.

List of Subjects

49 CFR Part 1002

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

49 CFR Part 1111

Administrative practice and procedure, Investigations.

49 CFR Part 1114

Administrative practice and procedure.

49 CFR Part 1115

Administrative practice and procedure.

It is ordered:

1. Parts 1002, 1111, 1114, and 1115 are modified as set forth in the Appendix, and notice will be published in the Federal Register.

2. The proceeding in Docket No. EP 755 is terminated, and the petition for reconsideration filed by the American Chemistry Council, the Fertilizer Institute, the National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners' Association is denied as moot.

3. The proceeding in Docket No. EP 665 (Sub-No. 2) is terminated.

4. The modifications to Parts 1002, 1111, 1114, and 1115 are effective on June 6, 2025. The remainder of this decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER PRIMUS, concurring:

At the outset, I feel as though I should apologize to shippers along our national freight rail network for the actions that led to this decision. I'm sorry the Eighth Circuit took such a narrow and woefully incorrect view of the Board's authority to develop a procedure that attempted to provide much needed rate relief. I'm sorry the Board chose not to launch a full-throated appeal of the court's myopic decision which, I believe, will have a lasting impact on future rate cases. But what I'm most sorry for is the fact that shippers will continue to be relegated to the black hole that is the Board's archaic rate-relief system. A system that has proven to provide more headaches and hardships than actual rate relief.

Reluctantly, I vote for today's decision because the Eighth Circuit has ordered the vacatur of the Board's Final Offer Rate Review (FORR) rule, but I do so under extreme protest. The Board's work on FORR spanned three previous chairmen, myself included, and the resulting rule was an appropriate attempt to make the adjudication of smaller rate disputes more accessible, reasonable, and less time-consuming. The recognition that small rate cases are too expensive and too complex to be worth pursuing under existing Board processes was central to Chairman Ann Begeman's establishment of the Rate Reform Task Force (RRTF) in 2018. Under Chairman Begeman's leadership, one of the RRTF's recommendations, for a "final offer" procedure for small rate cases, was incorporated into the Board's FORR rule, which was ultimately adopted in 2022 under Chairman Martin Oberman. The Board's defense of the FORR rule, culminating in the Eighth Circuit's decision to vacate the rule, occurred while I was Chairman.

The Eighth Circuit found that the Board lacked the statutory authority to prescribe rates through FORR. In addition, although the railroads appealing the FORR rule did not brief the question, the Eighth Circuit *sua sponte* found that rate cases are formal adjudications under the Administrative Procedure Act (APA). I disagreed with both bases for the Eighth Circuit's ruling, and I supported the Board's decision to file a petition for rehearing en banc in the Eighth Circuit seeking to have that court amend its opinion to omit discussion of whether rate cases are formal adjudications. Furthermore, once the Eighth Circuit denied the Board's petition for rehearing, I believe the Board should have pursued its appeal rights further by filing a petition for a writ of certiorari with the Supreme Court. I believe all avenues of appeal should have been exhausted because the Eighth Circuit's ruling that rate cases are formal adjudications under the APA was not only unnecessary to the court's decision to vacate the FORR rule, but it has the potential to hamstring future efforts by the Board to afford all shippers with access to a viable rate review process.

Without the FORR rule, the inadequacies of the Board's existing processes for small rate disputes remain, and I look forward to working with my colleagues to find workable solutions for the industry. In this vein, I believe Congress has an important role to play, both in defining the Board's authority in rate cases more broadly and in small rate cases in particular. First, Congress should clarify that rate cases at the Board are not formal adjudications under the APA requiring formal, trial-like procedures. Second, Congress should enact legislation empowering the Board to require mandatory arbitration of small rate disputes, as doing so would allow the Board to explore implementation of another of the RRTF's recommendations for how the Board could improve adjudication of small rate cases.

Appendix

Code of Federal Regulations

For the reasons set forth in the preamble, and under the authority of 49 U.S.C. 1321(a), the Surface Transportation Board amends parts 1002, 1111, 1114, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

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

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

2. Amend § 1002.2 by revising paragraph (f)(56) to read as follows:

§ 1002.2 Filing fees.

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(f) * * *

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

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PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority for part 1111 continues to read as follows:

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

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

§ 1111.3 Amended and supplemental complaints.

* * * * *

(c) *Simplified Standards.* A complaint filed under the simplified standards may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or stand-alone cost. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required.

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

§ 1111.5 Answers and cross complaints.

(a) *Generally.* An answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under the simplified standards, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with simplified standards answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service.* An answer must be filed with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendants.

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(e) *Failure to answer complaint.* Averments in a complaint are admitted when not denied in an answer to the complaint.

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6. Amend § 1111.10 by removing paragraph (a)(3).

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

* * * * *

(b) *Stand-alone cost or simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet or otherwise discuss discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, and 7 days after the mediation period ends in simplified standards cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

8. Amend § 1111.12 by revising paragraphs (c), (d)(1), and (d)(2) read as follows:

§ 1111.12 Streamlined market dominance.

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(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it elects an evidentiary hearing in lieu of the submission of a written rebuttal on market dominance issues.

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PART 1114—EVIDENCE; DISCOVERY

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

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

10. Amend § 1114.21 by removing paragraph (a)(4).

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

§ 1114.31 Failure to respond to discovery.

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

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

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

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

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

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

* * * * *

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve

answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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PART 1115—APPELLATE PROCEDURES

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

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

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

§ 1115.3 Board actions other than initial decisions.

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(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases seeking expedited relief for service emergencies under the accelerated process at 49 CFR 1146.2, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

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