

ENTERED
Office of Chief Counsel
June 17, 2026
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 790

REVIEW OF REPLIES TO REPLIES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

On May 18, 2026, the Board issued an Advance Notice of Proposed Rulemaking (“ANPRM”) seeking comments on whether it should modify its regulations or practices to allow replies-to-replies and if so, to what extent and how. The Association of American Railroads (“AAR”) submits these comments in response to the ANPRM.

Background

As the Board knows, the freight railroad members of the AAR account for the vast majority of North American freight railroad traffic, mileage, employees, and revenue. Therefore, the AAR has a strong interest in ensuring that the Board’s processes do not cause unnecessary delay and expense. The Board’s current review of its processes will serve the Rail Transportation Policy “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.”¹ Additionally, AAR has long supported efforts by the Board to limit the cost and

¹ 49 U.S.C. § 10101(2).

complexity of its processes. As such, AAR and its members participated in the series of listening sessions held by Vice Chairman Schultz regarding comprehensive reforms to Board practice. At those sessions, among other things, AAR and its members noted the need for a more consistent approach to the treatment of replies to replies (or what the ANPRM refers to as “rebuttals”).²

The Board’s rule against replies to replies predates the Board itself, as it was adopted in its current form in 1982 when the Interstate Commerce Commission revised and redesignated its procedures to bring it “into conformity with the recodified Interstate Commerce Act (49 USC 10101, et seq.); to simplify [its] regulations; and to make the regulations easier to locate and to be used by persons practicing before the Commission.”³ Since that time the agency has not consistently enforced the prohibition. For years, if a party filed a reply-to-reply, and even a reply-to-reply-to-reply, generally, the Board would allow it. Indeed, the Board would recognize its own rule to the contrary, but then let in the prohibited filing stating it was doing so “[i]n the interest of compiling a complete record...” or something similar.⁴ This practice created an incentive for parties to file reply-to-replies. Strategically, some practitioners might have even relied on the Board’s lenient standard and not presented all their information or arguments

² ANPRM at 2; see Press Release, *STB Gathers More than 100 Ideas from Practitioners to Streamline Board Processes*, (June 10, 2025), available at: <https://www.stb.gov/news-communications/latest-news/pr-25-22/> (recapping the listening sessions).

³ *Revision and Redesignation of the Rules of Practice*, EP 55 (Sub No-55) 47 Fed. Reg. 49534 (ICC served Nov. 1, 1982).

⁴ *Reporting Requirements for Positive Train Control Expenses and Investments*, EP 706, at fn 2 (STB served Feb. 10, 2011); see *North America Freight Car Ass’n, et al. v. Union Pac. RR*, NOR 42144, et al., at fn 3 (STB served Oct 5, 2017) (allowing reply to reply “in the interest of a more complete record”); *Ulster and Del. Rwy Revitalizations Corp.—Pet. For Dec. Order*, FD 36164, at 4 (STB served June 29, 2018) (allowing reply to reply “in the interest of having a more complete record”); *City of Alexandria, Va.—Petition for Declaratory Order*, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record”); *Denver & Rio Grande Ry. Historical Found. d/b/a Denver & Rio Grande R.R.—Petition for Declaratory Order*, FD 35496, at 3 (STB served Feb. 23, 2012) (denying a motion to strike a reply-to-reply “in order to allow the development of a more complete record.”).

upfront, knowing they could add such material in a later filing without consequence, thereby sandbagging the opposing party. The possibility for such gaming of the motions practice is simply not fair to the Board or those practicing before it. Furthermore, this practice created uncertainty for the opposing party. The fact that the Board would usually not rule on the motion for leave to file a reply-to-reply until the final decision, meant opposing parties felt inclined to file surrebuttals. Simply put, Board practitioners need more clarity and certainty.

Therefore, AAR suggests that the Board should allow for replies-to-replies (hereinafter “rebuttals”), as a matter of right, like federal courts do, and cabin them in a similar manner by limiting what may be included.⁵ As with the courts, this will allow the moving party to have the last word, with appropriate limitations. Revising the Board’s rules to mimic federal rules will discipline the practice of those appearing before the Board, while providing fairness and efficiency in Board proceedings. Additionally, it will be a more familiar practice given its application in federal courts.

Comments

I. The Board Should Allow Rebuttals as a Matter of Right.

The ANPRM offers various options for consideration. AAR suggests several revisions that the Board might consider to enhance fairness, clarity, and certainty in its procedures. Specifically, the Board should revise its rules to allow for a rebuttal as a matter of right—not on motion. As the Board suggests, AAR agrees that “allowing rebuttals would ensure that the

⁵ See, e.g., Fed. R. Civ. P. 12 (setting timeframes for answers and replies after a complaint is filed); Fed. R. Appellate P. 27 (allowing a motion, response, and reply to response); Fed. R. Appellate P. 28 (allowing an appellant brief, an appellee brief, and a reply brief).

moving party or the party with the burden of proof has the ‘last word,’ which may promote fairness.”⁶ This principle is well-established in practice before federal courts. The practice is also one the Board already utilizes in other contexts, such as rate cases.⁷ Therefore, AAR suggests that the rebuttal as a matter of right – not on motion for leave to file – will enhance fairness for the movants, while eliminating confusion and uncertainty.⁸

II. Rebuttals Should Be Appropriately Limited in Scope.

AAR does, however, suggest that the Board ensure the scope of rebuttals is narrow. Specifically, these rebuttals should only address arguments raised in the reply, and there should be no new arguments, evidence, or legal authority in the rebuttal that were not already raised in the original motion or the reply, similar to the practices of the federal courts.⁹ The Board should make clear in its rule the limitations it will place on rebuttals. If a rebuttal violates these limitations, the Board should enforce them by striking inappropriate information from consideration *sua sponte* or on motion by the opposing party. To avoid confusion and delay, if

⁶ ANPRM at 2.

⁷ See, e.g., 49 CFR 1111.9 (providing for rebuttal evidence in stand-alone cost cases); 49 CFR 111.10 (providing for rebuttal evidence in simplified standards cases). Other agencies and courts also utilize such practices, and the Board could consider looking at those practices. See, e.g., 47 CFR 1.45 (FCC allows for three rounds of filings: petition, opposition, and reply).

⁸ To be clear, AAR supports rebuttals as a matter of right in motions practice before the Board in such matters as abandonment and discontinuances proceedings, declaratory order proceedings, exemption proceedings, construction and operation proceedings. AAR is not suggesting allowing rebuttals in notice-and-comment rulemaking dockets. Rulemaking proceedings already allow for comments and replies from all parties at the same time. There is no need to add another round of filings, as there is no moving party per se.

⁹ See Fed. R. Appellate P. 27(a)(4) (noting that “[a] reply [to a response] must not present matters that do not relate to the response.”) ; see also *Students Against Genocide v. Dep’t of State*, 235, 257 F.3d 828, 835 (D.C. Cir. 2001)(“an argument first made in a reply brief ordinarily comes too late for our consideration,”); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 360 (7th Cir. 1987) (Posner, J., concurring) (“A reply brief is for replying, not for raising a new ground”); *Flynn v. Veazey Const. Corp.*, 310 F. Supp. 2d 186, 189 (D.D.C. 2004) (“If the movant raises arguments for the first time in his reply to the non-movant’s opposition, the [district] court will ... ignore those arguments in resolving the motion....”).

a motion to strike is filed, the Board should rule expeditiously. It should not wait until the final decision to rule, as doing so would incentivize the objecting party to file a surrebuttal for fear of the motion to strike not being granted.

Therefore, the Board should revise its rules in section 1104.13 to allow for rebuttals as a matter of right, and cabin rebuttals to addressing only those matters raised in the reply. And adopting a strict prohibition on new arguments, evidence, or legal authority in the rebuttals that are unrelated to the reply will help properly limit this new right.

III. Other Limitations are Worth Board Consideration.

The Board also requests comment on whether it should adopt other limitations on the filing of rebuttals. AAR supports considerations such as page limitations, timing for filing, and a prohibition on surrebuttal absent extraordinary circumstances and the granting of a motion for leave to file. If the Board adopts rebuttals as a matter of right, the time frame for filing should be short, as should the number of pages. Given the suggested limitations on the content of the rebuttals, the moving party should not need much time or space to make its points.

The Board, as noted in the ANPRM, should also clearly prohibit surrebuttals absent extraordinary circumstances, which the Board could develop and identify as part of this rulemaking, and the grant of a motion for leave to file such surrebuttal.¹⁰ If the Board adopts this approach, it should be careful to avoid the current unworkable circumstance from which the instant proceeding arose with practitioners ignoring the reply-to-reply prohibition. To this end, surrebuttals that are merely responsive to prior issues should not be permitted, and the

¹⁰ See ANPRM at 3.

swift, *sua sponte* striking of inappropriate surrebuttals by the Board would help discipline such practice.

Conclusion

In sum, adding an appropriately cabined right to a rebuttal will reflect a practice which is well understood by practitioners before the Board and federal courts. It also, as the Board admits, provides an opportunity for the movant to have the “last word” since the movant bears the burden of proof, without prejudicing the non-moving party.¹¹ AAR supports the Board’s efforts to improve its processes and more efficiently handle matters before it. Developing a workable rebuttal process will be just one more step toward that goal.

Respectfully submitted,



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June 17, 2026

¹¹ See ANPRM at 2.