FR-4

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1104

[Docket No. EP 790]

Review of Replies to Replies

AGECNY: Surface Transportation Board.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Board's regulations pertaining to the filing of pleadings prohibit the filing of a reply to a reply. The Board is considering whether to modify its regulations or practices to allow replies to replies (and if so, to what extent) and seeks comments on how the Board's regulations on such filings would best promote fairness, efficiency, and predictability for all parties that appear in proceedings before the Board.

DATES: Comments are due by June 17, 2026.

ADDRESSES: Comments may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 790, 395 E Street S.W., Washington, DC 20423-0001. Comments will also be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 740-5507. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: In May 2025, as part of ongoing, comprehensive agency reform efforts, Vice Chairman Schultz and Board staff held a series of listening sessions with legal practitioners to discuss their experiences before the Board. Press Release, STB, STB Gathers More than 100 Ideas from Practitioners to Streamline Board Processes, (June 10, 2025), https://www.stb.gov/news-communications/latest-news/pr-25-22/. The sessions were an opportunity for practitioners to offer ideas on possible improvements to the agency's processes and procedures affecting litigants and parties

appearing before the agency. Dozens of attorneys participated and offered numerous ideas for process improvements. Many practitioners raised the Board's practice regarding the treatment of replies to replies and indicated a desire for a more consistent approach to such filings.

While the Board's regulations generally prohibit the filing of a reply to a reply, 49 CFR 1104.13,[1] historically the Board often has accepted them in individual cases in the interest of a complete record, see, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008). Recently, however, the Board has indicated that "the benefits from the orderly and efficient administration of cases, including reducing burden on the public and agency, justify enforcing this rule more strictly." See Sunflower State Indus. Ry.—Pet. for Declaratory Ord., FD 36714 (Sub-No. 1), slip op. at 2 n.3 (STB served Mar. 28, 2025).

Public input would assist the Board in assessing whether to modify its replies to replies (hereafter, rebuttals) regulations and/or practices or to leave the regulation unchanged. A review of federal court and other agency practices reveals various approaches to rebuttals, ranging from a strict prohibition to allowing rebuttals as of right in all motion practice.[2] The Board recognizes that there are advantages and disadvantages to both approaches and that the optimal approach may fall somewhere between or depend on the type of proceeding. On the one hand, allowing rebuttals would

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[1] The Board's regulations allow for replies to replies in certain proceedings, such as rate cases. See, e.g., 49 CFR 1111.9(a)(7) (allowing for rebuttal evidence in rate cases).

[2] See, e.g., N.D. Ga. Civ. R. 7.1(c) (allowing for replies to a responsive pleading within 14 days); D. Mass. R. 7.1(b)(3) (requiring leave of court to file a reply to an opposition filing); W.D. Mich. Civ. R. 7.2(c) (allowing for replies to a responsive brief that opposes a dispositive motion within 14 days); id. at 7.3(c) (prohibiting replies to a responsive brief that opposes a non-dispositive motion without leave of court); 47 CFR 1.45 (allowing a reply to an opposition filing filed with the Federal Communications Commission within five days).

ensure that the moving party or the party with the burden of proof has "the last word," which may promote fairness. In addition, arguments may be crystalized and ambiguities clarified in rebuttals, which could lead to better-informed Board decisions. On the other hand, rebuttals might be used inappropriately to introduce new evidence or argument that was not, but could have been, included with the proponent's opening pleadings, creating unfair surprise for litigants. Further, prohibiting rebuttals may promote efficiency by bringing the record to a close sooner and encouraging parties to include all relevant evidence and argument in their initial pleadings.

The Board seeks comments to assist it in deciding whether to develop modified regulations or practices regarding rebuttals or to leave the regulation unchanged. The Board is particularly interested in the following options:

- *Leave 49 CFR 1104.13 unchanged.* Should the Board keep its current regulation that does not allow for rebuttals? If the Board were to leave the current prohibition in place, under what standard should it consider requests for leave to file a rebuttal? Should the Board more strictly enforce its current prohibition on rebuttals?
- *Amend 49 CFR 1104.13 to allow for rebuttal.* Should the Board amend its regulation to allow rebuttal in all circumstances, or should rebuttal be limited to certain types of matters and/or motions? If the latter, in what situations should rebuttals be permitted? If a rebuttal is not allowed as of right in a particular matter or motion, under what standard should the Board consider a request to file a rebuttal?
- *Limits to rebuttal pleadings.* If the Board were to amend its regulation to allow rebuttals, should the Board limit the content of rebuttals, e.g., to address matters raised on reply? What would be an appropriate deadline for a rebuttal and should a deadline vary depending on the type of motion and/or proceeding at issue?

Should the Board impose other limits on rebuttals, e.g., word count limits? Should the Board prohibit any subsequent filings (i.e., surrebuttals), barring exceptional circumstances?

- *Other motions practice.* Should the Board amend its regulations to include a meet-and-confer requirement for some or all motions practice before the Board, e.g., for procedural motions in matters with a limited number of parties?

Commenters are not limited to addressing these questions but may offer other input on treatment of rebuttals and related motion practice issues. The Board seeks comments and suggestions that are consistent with the goal of balancing fairness with efficiency and predictability for all parties that appear in proceedings before the Board.

Because this advance notice of proposed rulemaking (ANPRM) does not impose or propose any requirements, and instead seeks comments and suggestions for the Board to consider in possibly developing a subsequent proposed rule, the requirements of the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, do not apply to this action. Nevertheless, as part of any comments submitted in response to this ANPRM, parties may include comments or information that could help the Board assess the potential impact of a subsequent regulatory action on small entities pursuant to the RFA.

Executive Order 12866, as modified by Executive Order 14215, provides that the Office of Information and Regulatory Affairs will review all significant rules. OIRA has determined that this rule is not significant under section 3(f) of Executive Order 12866.

It is ordered:

1. Comments are due on June 17, 2026.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the Federal Register.

4. This decision is effective on its date of service.

Decided: May 13, 2026.

By the Board, Board Members Fuchs, Hedlund, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

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