BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 765

JOINT PETITION FOR RULEMAKING TO ESTABLISH AN ALTERNATIVE VOLUNTARY ARBITRATION PROGRAM FOR SMALL RATE DISPUTES

Sean Finn
Olivier Chouc
CN
935 de La Gauchetière Street West
16th Floor
Montréal, QC H3B 2M9
CANADA

Kathryn Gainey
CN
Suite 500, North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004

Vanessa A. Sutherland
Thomas E. Zoeller
Hanna Chouest
NORFOLK SOUTHERN CORP.
Three Commercial Place
Norfolk, VA 23510

Nathan D. Goldman
John P. Patelli
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202

Adam J. Godderz
David C. Reeves
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121

Rhonda S. Ferguson
Craig Richardson
James B. Boles
UNION PACIFIC RAILROAD CO.
1400 Douglas Street
Omaha, NE 68179

Dated July 31, 2020

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Board has long wrestled with how to provide a simplified and expedited dispute resolution procedure for rail customers with small rate disputes. In the Act that created the Board, Congress instructed it to develop "simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."[1] Over the last three decades, the Board has responded by creating multiple new simplified, and increasingly less precise, rate review methodologies to address a purported lack of availability of the Board's rate review methodologies for smaller-valued rate cases. From the initial adoption of *Simplified Guidelines*,[2] to the creation of Simplified SAC and Three Benchmark in *Simplified Standards*,[3] to multiple rulemakings to refine these methodologies in response to stakeholder concerns,[4] the Board has worked to fulfill Congress's instructions by developing simplified methods for small rate disputes. But still the issue persists: Some shipping community stakeholders continue to complain that even the Board's simplified rate review methodologies are insufficient in terms of flexibility, cost, and speed.

While the Board has explored more changes to its formal rate review methodologies and procedures, Petitioners submit that creating a working arbitration program for small rate disputes may offer the best long-term way to resolve this recurring concern. Arbitration is fundamentally a consensual rather than coercive

---

[1] ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 809, codified at 49 U.S.C. § 10701(d)(3) (2015); *see also* STB Reauthorization Act of 2015, Pub. L. No. 114-110, § 11(a), 129 Stat. 2233 (amending statute to require Board to "maintain" one or more simplified and expedited methods for determining rate reasonableness).

[2] *See Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996).

[3] *See Simplified Standards for Rail Rate Cases*, Ex Parte 646 (Sept. 5, 2007).

[4] *See, e.g.*, *Expediting Rate Cases*, Ex Parte 730 (Nov. 30, 2017); *Rate Regulation Reforms*, Ex Parte 715 (July 18, 2013).

concept. It is forced on neither a railroad nor a rail customer, and the shipper may continue to elect to bring a rate case under one of the more expensive formal litigation procedures before the STB. Yet arbitration offers opportunities for cost savings and flexibility not possible in agency adjudications. While it is important for the Board to retain effective and economically sound methodologies for rate case litigation, and for shippers to have the ability to choose to litigate rate disputes before the Board if they wish, voluntary arbitration will likely be an attractive alternative for many shippers, particularly those with smaller rate disputes.[5] Adding an effective small case arbitration program would complete the Board's suite of rate reasonableness methods and respond to concerns some stakeholders have expressed about the availability of rate reasonableness review for smaller rate cases.

This Petition presents a proposal for a voluntary arbitration program aimed at small rate cases (the "Small Case Arbitration Program") that has been shaped significantly by productive discussions between Class I railroads and other stakeholders.[6] The Small Case Arbitration Program would be expedited, confidential, and accessible. Petitioners are five Class I railroads who are all prepared to consent to arbitrate cases under the Small Case Arbitration Program for a period of five years, if the Program is adopted according to the terms set forth in this Petition. (This consent would be subject to limited withdrawal rights if certain conditions occur, as set forth below.)

The Small Case Arbitration Program would function alongside the existing arbitration program the Board established in 49 C.F.R. Part 1108 (the "General

---

[5] *See* EP 722, Dec. 12, 2019 Hearing Tr., at 121:21-125:21; *see also* EP 722, AAR Supplemental Comments, at 34-36 (filed Feb. 13, 2020).

[6] Petitioners would welcome discussions with other stakeholders about the proposed Small Case Arbitration Program to explain how the Program would work practically and to answer any questions about the proposed Program.

Arbitration Program") to comply with 49 U.S.C. § 11708. While the Small Case Arbitration Program would mirror the General Arbitration Program in some respects, it would make certain departures from Part 1108 in the interest of a streamlined and more flexible process that would incentivize both railroad and shipper participation. Appendix A to this Petition sets forth a proposed 49 C.F.R. Part 1108a that would establish the Small Case Arbitration Program.

While some of the proposed Small Case Arbitration Program procedures differ from the requirements set forth in 49 U.S.C. § 11708, Petitioners do not propose to alter any of the provisions of the General Arbitration Program in 49 C.F.R. Part 1108, which mirror section 11708's requirements and thus fulfill Congress's purpose. The Board has broad inherent authority to craft additional arbitration procedures (authority that it used to create prior arbitration programs). Indeed, section 11708 specifically contemplates that parties to an arbitration could consent to alter most of section 11708's procedures, which parties to a small case arbitration would do by voluntarily consenting to use the program. Alternatively, the Board would be well justified in using its exemption authority to create a small case arbitration program that aligns with Congress's clear purpose to encourage alternative dispute resolution.

The advanced participation of Class I railroads, generous relief and use limits, and expedited and streamlined procedures of the Small Case Arbitration Program would create a forum for a shipper to seek rate relief in ways the shipping community has long requested. To balance these risks and incentivize railroad participation, the Small Case Arbitration Program reasonably includes key features of confidentiality, relief and use limits, and early withdrawal options for exceptional circumstances. As proposed herein, the features of the Small Case Arbitration Program would incentivize both railroads and shippers to consent to voluntarily arbitrate rate disputes under an efficient, mutually beneficial ADR program. The Small Case Arbitration Program would complete and complement the Board's existing suite of available rate review

methodologies and procedures to ensure that all shippers—small, medium, or large—have an ability to seek rate relief under the Board's jurisdiction for regulated rates.

Moreover, unlike other recent ideas that have been proposed as possible rate reasonableness methodologies for smaller rate cases —such as the Final Offer Rate Review (FORR) procedures proposed in Ex Parte 755—the Small Case Arbitration Program proposed herein is both low-cost and consistent with statutory and economic principles.

Section I discusses the history of the Board's various arbitration programs. **Section II** outlines Petitioners' proposed Small Case Arbitration Program. **Section III** explains the reasons the Board should reform its arbitration program by adopting the Small Case Arbitration Program and the features that make it an effective solution for resolving smaller rate disputes. Appendix A to this Petition sets forth proposed amendments to the Code of Federal Regulations that would implement the Small Case Arbitration Program. Appendix B is a model confidentiality agreement for use in arbitrations under the Program, and Appendix C is a model notice of appeal for a petition to review or modify an arbitral award.

I. HISTORY OF THE BOARD'S ARBITRATION PROGRAMS

As background to understanding the Board's authority to establish an alternative arbitration program for small cases and the features of the arbitration programs that the Board has previously tried, this Section reviews the arbitration programs that the Board implemented in 1997, 2013, and 2016.

A. Ex Parte 560 (1997)

The Board first adopted arbitration rules in Ex Parte 560 in 1997.[7] This first arbitration program was a binding, voluntary program recommended by the Railroad-Shipper Transportation Advisory Council (RSTAC).[8] The procedures were available to resolve "specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service that is subject to the statutory jurisdiction of the Board."[9] The source of the Board's authority for adopting its initial arbitration program was its general authority "to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate" set forth in 49 U.S.C. § 1321(a) (formerly 49 U.S.C. § 721(a)).[10]

Under the initial program, a dispute could be determined by a single arbitrator or a panel of arbitrators.[11] The arbitrator (or panel) could grant relief related to rates and services subject to the jurisdiction of the Board, including monetary damages with no cap and the prescription of reasonable rates for a period not to exceed 3 years.[12] The initial program supplied a roster of eligible arbitrators but allowed the parties to submit arbitrators not on the roster for approval by the STB Chairman.[13] To commence arbitration, a demand for arbitration had to be included in a written complaint filed with the Board, followed by an elaborate scheme of answers, and possible third-party

---

[7] *See Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, EP 560 (Sept. 2, 1997); *see also* Notice of Proposed Rulemaking, EP 560 (Mar. 26, 1997).

[8] Notice of Proposed Rulemaking, EP 560, at 3 (Mar. 26, 1997).

[9] *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, EP 560, slip op. at 1 (Sept. 2, 1997).

[10] *Id.* at 14 (see "Authority: 49 U.S.C. 721(a)" and § 1108.2(b)).

[11] *Id.* at 15 (see § 1108.4. and § 1108.6)

[12] *Id.*

[13] *Id.* (see § 1108.6(b)).

complaints and third-party answers.[14] The initial program also set forth an expedited timetable of 90 days of discovery and 30 days for decision at the close of the record.[15] The arbitration decision could be appealed to the STB within 20 days, and the STB could vacate or amend an arbitration award on narrow grounds.[16]

B. Ex Parte 699 (2013)

In 2013, the Board redesigned its arbitration program. The 2013 program permitted parties to arbitrate only certain types of disputes, which parties could consent voluntarily in advance to arbitrate.[17] Rate disputes were excluded from the list of arbitrable matters. The 2013 program set a monetary award cap of $200,000 per case.[18]

A party consenting in advance to arbitrate under the 2013 arbitration was required to opt into the program by filing a notice with the Board that delineated what types of disputes the party was willing to arbitrate, which the Board would then publish on its website.[19] Parties could also voluntarily opt into the program on a case-by-case basis.[20] Parties could opt out of the program by simply filing a notice with the Board (though a party could not opt out of an ongoing arbitration proceeding).[21] The 2013 program also required the filing of complaints and answers (including any applicable defenses or counterclaims, which would likewise be subject to the $200,000

---

[14] *Id.* at 16 (see § 1108.7).

[15] *Id.* at 17 (see § 1108.8(a)(1)).

[16] *Id.* at 17-18 (see § 1108.11).

[17] *See* Final Rule, *Assessment of Mediation and Arbitration Procedures*, EP 699 (May 13, 2013); *see also* Notice and Request for Comments, EP 699 (Aug. 20, 2010) (published at 75 Fed. Reg. 52,054); Notice of Proposed Rulemaking, EP 699 (Mar. 28, 2012).

[18] Final Rule, EP 699, at 4, 10 (May 13, 2013).

[19] *Id.* at 6.

[20] *Id.*

[21] *Id.* at 6-7.

relief cap).[22] With regard to arbitrators, the 2013 program required the use of a panel of three arbitrators, with the caveat that the parties could mutually agree to use a single neutral arbitrator instead.[23]

For the 2013 program, the Board decided to no longer maintain a general roster or list of arbitrators, but rather to provide the parties with "a list of five neutral arbitrators," "intended to be an arbitration-process expert, rather than a subject-matter expert," "to facilitate the selection of a third-neutral [or single-neutral, if the parties agreed] arbitrator."[24] The other two arbitrators would be chosen by the parties individually, without limitation and without use of any Board-maintained roster (*i.e.*, a party could choose its own employee as its party-selected arbitrator).[25] The parties could select the neutral arbitrator using a strike process and would split the cost of the neutral arbitrator while paying the cost of their selected subject-matter-expert arbitrator.[26]

The timetable for the arbitration process under the 2013 program allowed for 90 days for the evidentiary phase, and then 30 days for the decision phase.[27] The Board required the publication of the arbitration decision, redacted to protect confidential information, but the arbitration decision had no precedential value.[28]

---

[22] *Id.* at 11.

[23] *Id.* at 12.

[24] *Id.* at 14. "[T]he Board will obtain a list of potential arbitrators from professional arbitration associations such as the American Arbitration Association, Judicial Arbitration and Mediation Services (JAMS), and the Federal Mediation and Conciliation Service." *Id.*

[25] *Id.* at 12 n.69, 29.

[26] *Id.* at 14.

[27] *Id.*

[28] *Id.* at 16.

The arbitration decision could be appealed to the Board in the form of a petition to modify or vacate the arbitration award. Under the 2013 program, the Board broadened its standard of review based on stakeholder feedback to encompass instances of "a clear abuse of arbitral authority or discretion" and when the arbitral award "directly contravenes statutory authority."[29] As in the prior arbitration program, the Board's decision reviewing an arbitral decision could be appealed to federal court under the Hobbs Act (28 U.S.C. §§ 2321, 2342).[30] However, unlike the prior program, the Board gave the parties the right to appeal the arbitral award directly to a federal court, bypassing the Board, under the Federal Arbitration Act, 9 U.S.C. §§ 9-13.[31]

C. Ex Parte 730 (2016)

Most recently, in 2016, the Board amended the Ex Parte 699 arbitration program to conform to the requirements of the Surface Transportation Board Reauthorization Act of 2015, which, in 49 U.S.C. § 11708, requires the Board to "establish a voluntary and binding arbitration process to resolve rail rate and practice complaints" and sets forth specific requirements for an arbitration program created pursuant to section 11708.[32] This is the Board's current arbitration program (the General Arbitration Program).

The General Arbitration Program permits railroads voluntarily to opt into the program in advance by consenting to arbitrate at any level up to $25 million per rate dispute (including rate prescriptions, which are limited to five years) and $2 million per practice dispute. No injunctive relief is available.[33] The General Arbitration Program is

---

[29] *Id.* at 17, 31.

[30] *Id.* at 18.

[31] *Id.* at 18, 31.

[32] *See* Final Rule, *Revisions to Arbitration Procedures*, EP 730, at 1-2 (Sept. 30, 2016); *see* 49 U.S.C. § 11708.

[33] 49 C.F.R. §§ 1108.4, 1108.8

available for rate disputes only if the railroad has market dominance, either conceded or as determined by the Board under 49 U.S.C. § 10707.[34] To commence arbitration, a shipper may file a complaint according to the Board's rules under 49 C.F.R. part 1104, which requires an answer from the respondent; or, if the parties agree, the parties may file a joint notice in lieu of a formal complaint proceeding.[35]

Once the parties have indicated whether they will use a single arbitrator or a panel, the issue(s) to be arbitrated, and the monetary limit to any arbitral decision, the Board will initiate the arbitration under § 1108.7(a)[36] and provide the parties with a list of arbitrators as described in § 1108.6 from which to choose as their party-appointed arbitrators and the lead (or single) arbitrator (by strike).[37] After the parties select the arbitrator or panel, the parties must create a written arbitration agreement with the single or lead arbitrator that incorporates the Board's rules by reference.[38]

Under the General Arbitration Program, the evidentiary phase must be completed within 90 days (with extensions available upon request and arbitral approval), and, after the close of the evidentiary phase, the unredacted arbitration decision must be served on the parties within 30 days, with a redacted copy provided to the Board within 60 days for publication on the Board's website.[39] The arbitration decision "must be consistent with sound principles of rail regulation economics" and "may be guided by, but need not be bound by, agency precedent."[40] And, when

---

[34] Final Rule, EP 730, at 6; *see* 49 C.F.R. § 1108.4.

[35] 49 C.F.R. § 1008.5.

[36] The Board initiates the arbitration within 40 days after submission of a written complaint or joint notice for non-rate disputes and within 10 days for rate disputes. 49 C.F.R. § 1108.7.

[37] 49 C.F.R. §§ 1008.5, 1008.6.

[38] 49 C.F.R. § 1008.5.

[39] 49 C.F.R. § 1108.7.

[40] 49 C.F.R. §§ 1108.9, 1108.10.

determining rate disputes, the arbitrator or panel must "consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2))."[41]

A party may appeal the arbitration decision to the Board via a petition to modify or vacate the arbitral award, which the Board can review only to determine "if the decision is consistent with sound principles of rail regulation economics[;] a clear abuse of arbitral authority or discretion occurred; the decision directly contravenes statutory authority; or the award limitation was violated."[42] The Board's decision vacating or modifying an arbitration decision is reviewable under the Hobbs Act, and parties can alternatively appeal an arbitration award directly to a federal court with jurisdiction under the Federal Arbitration Act (FAA) in lieu of seeking Board review.[43] Parties seeking to enforce an arbitration decision must petition a federal court with jurisdiction under the FAA rather than petition the Board.[44]

To date, no railroad or shipper has opted into, or used, the current General Arbitration Program for rate disputes.[45]

---

[41] 49 C.F.R. § 1108.4

[42] 49 C.F.R. § 1108.11. If the decision is appealed, the lead or single arbitrator must provide the Board with an unredacted copy of the decision under seal. 49 C.F.R. § 1108.9.

[43] 49 C.F.R. § 1108.11.

[44] 49 C.F.R. § 1108.11

[45] Several railroads have opted in to arbitrate certain unreasonable practice or demurrage disputes.

II. SUMMARY OF THE PROPOSED SMALL CASE ARBITRATION PROGRAM

Application and Eligibility

The Small Case Arbitration Program would apply to rate disputes involving rates for regulated commodities not subject to a rail transportation contract.[46] Any complainant that would have standing to pursue a rate case before the Board may initiate an arbitration against a railroad that has opted into the program. The arbitration panel would be permitted to award relief up to $4 million dollars over two years, indexed for inflation annually using the CPI index and a 2020 base year. This monetary cap on relief would apply to prospective relief, reparations for past overcharges, or a combination of the two. Rate prescriptions would be limited to one year. The panel would not be permitted to prescribe a rate below 180% of variable cost as determined by unadjusted URCS.

To protect against the improper disaggregation of large claims, shippers would be limited to bringing no more than one arbitration at a time against a particular defendant carrier. Shippers would be permitted, but not required, to challenge rates for multiple traffic lanes in a single arbitration case.

Arbitration Initiation and Mediation

A shipper wishing to bring a rate arbitration against a railroad participating in the Program would initiate a case by notifying the railroad in writing. The parties would be required to mediate the dispute for at least thirty days from the first mediation session, confidentially and without STB involvement. If mediation is unsuccessful, the parties would file a confidential joint notice with OPAGAC of their intent to arbitrate.

---

[46] If there is a dispute about whether a challenged rate was established pursuant to rail transportation contract within the meaning of 49 U.S.C. § 10709, the parties must petition the Board to resolve that dispute, which must be resolved prior to the parties filing the Joint Notice that initiates the arbitration process.

Arbitration Panel Selection

Arbitrations would be conducted by a panel of three arbitrators. Each party would select a single arbitrator. The parties would not be limited to the roster of arbitrators maintained by the Board as part of the General Arbitration Program. Once selected, the party-selected arbitrators would choose a third arbitrator from a joint list of potential third arbitrators provided by the parties.

The Board would not be involved in the selection process except in two circumstances, which Petitioners expect would be rare. First, each side would be able to object to the other side's selected arbitrator "for cause," such as a lack of impartiality, a conflict of interest, or adverse business dealings with—or actual or perceived bias or animosity towards—the objecting party. The parties would be required to confer in advance over the objections, and, if unresolved, the STB Chairman would rule on the objection in a telephonic conference within two business days. No briefing would be permitted. Second, if the two party-appointed arbitrators cannot agree on a third arbitrator, the STB Chairman would select the third arbitrator from the party-provided joint list.

If an arbitrator became incapacitated, the same process would be used to choose a replacement arbitrator—*i.e.*, for an incapacitated party-appointed arbitrator, the party that appointed the incapacitated arbitrator would choose a replacement, and for an incapacitated third arbitrator, the two party-appointed arbitrators (or, if they fail to agree, the STB Chairman) would choose a replacement from the joint list.

The parties would pay the fees of their own party-appointed arbitrator and would split the fees of the third arbitrator. The arbitrators would be required to perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence, as set forth in 49 U.S.C. § 11708(f)(2).

Procedural Schedule and Discovery

To ensure efficiency and minimize costs, the Small Case Arbitration Program sets forth an expedited schedule. Discovery would be required to be completed within 45 days of the joint notice of intent to arbitrate, and a final panel decision would be required within 120 days of the joint notice. In keeping with this schedule, discovery would be extremely limited, with only 20 written document requests, 5 interrogatories, and no depositions.

In order to facilitate the arbitration process, the Board's Office of Economics would provide the unmasked confidential Waybill Sample to each party within seven days of filing the joint notice with OPAGAC. The Office of Economics would provide only the following Waybill data: (a) most recent year data; (b) movements with R/VC ratio above 180%; (c) movements on the defendant carrier; and (d) movements with the same five-digit STCC as the challenged movements. If a party needs more data than is provided in the automatic STB Waybill Sample release, the party may seek broader release of the STB Waybill Sample pursuant to existing procedures for its release, or the defendant carrier's traffic data can be produced in discovery, subject to the normal discovery objections (e.g., relevance, burden), as one of its 20 document requests. The parties would not be required to utilize the Waybill Sample, and could agree at the outset of the case not to have the Office of Economics provide it.

Market Dominance Determination

The panel would be charged with deciding both market dominance and rate reasonableness. For determining market dominance, Petitioners tentatively propose that the arbitration panel be required to follow the streamlined market dominance test proposed in Ex Parte 756, in the form that it is finally adopted by the Board.[47] In any

[47] This tentative proposal is a placeholder pending any final rule adopted by the Board in Ex Parte 756. In evaluating the streamlined market dominance proposal in Ex Parte 756, the railroad industry expressed its support for a number of aspects of that

event, the panel would be prohibited from considering market dominance evidence that is inadmissible in Board proceedings (such as product and geographic competition), and from applying the "limit price test" used in *M&G Polymers*.

Rate Reasonableness Determination

For determining rate reasonableness, the arbitrators would follow the standards prescribed by Congress in 49 U.S.C. § 11708(c)(3) and (d)(1). Namely, the arbitrators would consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues; and they would need to ensure that their decision was consistent with sound principles of rail regulation economics. While the panel would be required to consider the Board's methodologies for rate reasonableness, consistent with section 11708(c)(3), it would not be required to follow an existing rate methodology and could base its decision on other approaches consistent with the congressional standards.

However, arbitrators would be prohibited from basing their decisions on a system-wide revenue adequacy constraint. Over the past decade, the Petitioners have raised serious legal, factual, and policy flaws with any constraint premised on the system-wide financial health of a carrier, particularly one premised on the depreciated historic book value of assets.[48] Petitioner**s** will not reiterate the numerous concerns

---

proposal, and Petitioners reiterate their support for the general concept of a streamlined market dominance methodology along the lines proposed by the Board. If the Board were to adopt the streamlined market dominance methodology as proposed by the Board, Petitioners would require that process to be used for determining market dominance under the Small Case Arbitration Program. However, if the Board adopts a final rule in Ex Parte 756 that materially deviates from what was proposed by the Board, Petitioners reserve the right to revise their proposed requirements for market dominance determinations under the Small Case Arbitration Program.

[48] *See, e.g.*, AAR Supp. Comments, *Hearing on Revenue Adequacy*, EP 761 (filed Feb. 13, 2020); Supp. Testimony of Prof. Kevin Murphy, Ph.D., *et al.*, EP 761 (filed Feb. 13, 2020); NS Supp. Comments, EP 761 (filed Feb. 13, 2020); CN Supp. Comments (filed Feb. 13, 2020); AAR Comments, EP 761 (filed Nov. 26, 2019); AAR Supp. Comments, *Railroad Revenue Adequacy*, EP 722 (filed Aug. 6, 2015); UP Supp. Comments, EP 722 (filed Aug.

raised with that antiquated, utility-style concept of rate regulation that has long since been abandoned in other industries. It bears repeating that all ADR programs are consensual, not coercive, in nature. Petitioners will not consent to having the significant policy and legal issues presented by a system-wide revenue adequacy constraint be decided in an expedited arbitration for smaller rate disputes with limited appeal rights.

Evidence

The panel would have discretion to set the schedule and prescribe the format of the parties' evidence. However, certain categories of evidence would be inadmissible and could not be submitted to the arbitration panel. In particular, evidence of product and geographic competition would be inadmissible for market dominance, and evidence about system-wide revenue adequacy (or inadequacy) would be inadmissible for rate reasonableness. Any non-precedential decisions by the STB or from prior arbitrations would also be inadmissible.

Appeal to STB

Either party could appeal the arbitration panel's decision to the STB within 20 days of the final panel decision, consistent with the current regulations at 49 C.F.R. § 1108.11. As set forth in 49 U.S.C. § 11708 and 49 C.F.R. § 1108.11, the Board's review of the arbitration decision would be limited to determining whether: (a) the decision is consistent with sound principles of rail regulation economics; (b) a clear abuse of arbitral authority or discretion occurred; (c) the decision directly contravenes statutory authority; or (d) the arbitral award limit was violated.

6, 2015); NS Letter, EP 722 (filed Aug. 6, 2015); CSX Letter, EP 722 (filed Aug. 6, 2015); AAR Reply Comments, EP 722 (filed Nov. 4, 2014); UP Reply Comments, EP 722 (filed Nov. 4, 2014); NS Reply Comments, EP 722 (filed Nov. 4, 2014); CSX Reply Comments, EP 722 (filed Nov. 4, 2014); AAR Opening Comments, EP 722 (filed Sept. 5, 2014); UP Opening Comments, EP 722 (filed Sept. 5, 2014); NS Opening Comments, EP 722 (filed Sept. 5, 2014); CSX Opening Comments, EP 722 (filed Sept. 5, 2014).

Confidentiality

Small Case Arbitrations would be confidential to the maximum extent possible. The joint notice initiating an arbitration, filed with OPAGAC, would be confidential and not publicly posted, and all arbitration proceedings, filings, and arbitral decisions would be confidential. The parties would agree to a Confidentiality Agreement along the lines set forth in Appendix B. To permit the STB to monitor the program, at the conclusion of an arbitration, the parties would submit a confidential summary to OPAGAC, and the STB could publish a quarterly report regarding the disposition of arbitrated rate disputes that would disclose only the information from the summaries. The confidential summary and quarterly report would identify only: (i) the geographic region of the movement(s) at issue; (ii) the commodities at issue; (iii) the number of days from the commencement of the arbitration proceeding to the final arbitration decision; and (iv) a high-level, generic description of the resolution (*e.g.*, settled, withdrawn, dismissed on market dominance, or challenged rates found unreasonable/reasonable).

In the event that an arbitration decision is appealed to the STB, a party would file a notice of appeal with the STB, which would be publicly docketed. A model Notice of Appeal is attached as Appendix C. All party submissions related to the appeal would be submitted under seal, with no public versions being filed. Upon a final decision, the STB would provide the parties with a confidential copy of its final decision and provide each side five days to propose redactions. In its final decision, the STB would, to the extent feasible, maintain the confidentiality of the arbitration decision.

Withdrawal

The Small Case Arbitration Program would permit railroads to opt into the Program for a specified term by filing a notice with the Board. Shippers would opt in on a case-by-case basis by filing a joint notice of intent to arbitrate with OPAGAC. If a railroad opts into the Program for a specified term, it may withdraw its consent to

arbitrate under the Program prior to the expiration of its specified term for only two reasons: (1) change in law, or (2) case volume.

Withdrawal for change in law is a bilateral exit option available to all participants in the Small Case Arbitration program, regardless of any specified term of consent. This means that carriers who opt into the Program for a specified term, as well as participating shippers, may withdraw under the "change in law" option. This option is available only if the STB makes a material change to either the Small Case Arbitration Program or to the rate reasonableness programs that the arbitrators are to consider. Specifically, a participating carrier or shipper may withdraw its consent under this option only if:

(1) the STB adopts new rate reasonableness procedures in Ex Parte 755 (FORR) without exempting carriers participating in the Small Case Arbitration Program from those procedures[49];

(2) the STB makes any material changes to the Small Case Arbitration Program after a shipper or railroad has opted into the program; or

(3) the STB makes any material changes to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the program.

To withdraw from the Small Case Arbitration Program under this option, a carrier or shipper must file a notice of withdrawal for change in law with the Board, which would become effective upon filing. The withdrawal of consent for change in law would not affect an arbitration where the panel has issued a final decision. However, withdrawal of consent under this option (by either a shipper or railroad)

[49] Petitioners note that if the Board declines to adopt any final rules in Ex Parte 755, this withdrawal option would no longer apply.

would require the immediate dismissal of any arbitration proceeding in which the panel had not yet issued a final decision, effective upon the filing of the notice of withdrawal.

In addition, any participating carrier, whether participating at-will or for a specified time period, may withdraw from the Small Case Arbitration Program if it faces more than 25 arbitrations in a rolling 12-month period or more than 10 simultaneous arbitrations. To withdraw, the carrier must file a notice of withdrawal for case volume with the Board, which withdrawal would become effective on the filing date of the notice. Withdrawal under this option would not affect the arbitration process for disputes that have started the first mediation session of the required 30-day mediation period prior to the filing of the notice of withdrawal for case volume. The arbitration process for all other disputes would be discontinued upon the filing of the notice of withdrawal for case volume.

If a carrier is participating in the Program at-will, or if the specified term of a carrier's consent to arbitrate under the Program has expired, the carrier may withdraw its consent to arbitrate at any time and for any reason by filing a notice of at-will withdrawal with the Board, which would become effective thirty days after the filing date of the notice. Withdrawal under this option would not affect arbitrations in which the shipper has already served the carrier with its intent to arbitrate under the Small Case Arbitration Program prior to the effective date of the notice of at-will withdrawal, and those proceedings would continue to be arbitrated subject to the Small Case Arbitration rules.

III. THE BOARD SHOULD ADOPT THE SMALL CASE ARBITRATION PROGRAM.

A. The Board Has Authority to Adopt the Program.

The Small Case Arbitration Program presented in this Petition is the solution to the concerns expressed by some stakeholders that existing Board rate methodologies are not well suited for smaller cases. Both Congress and the Board have long recognized that voluntary arbitration would be an ideal way to resolve small rate disputes, and the Small Case Arbitration Program would create a mechanism for railroads and shippers to arbitrate smaller rate disputes in an expedited and evenhanded way.

The Small Case Arbitration Program proposed herein is clearly within the bounds of the Board's statutory authority. In fact, prior to the existence of 49 U.S.C. § 11708, the Board created multiple arbitration programs, including programs that could be used to resolve rate disputes, under its general authority "to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate," set forth in 49 U.S.C. § 1321.[50] The Board still maintains that authority today, and, pursuant to that authority in section 1321, it is able to create an arbitration program tailored to small rate disputes separate and distinct from 49 U.S.C. § 11708.

Indeed, federal court precedent has recognized the legality of voluntary and binding arbitration programs, noting that such programs are on sure legal footing because they reflect what is essentially a private contractual agreement between parties, all of whom have voluntarily consented to the arbitration.[51] So long as an arbitration

---

[50] *See Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, EP 560, at Appendix A (Sept. 2, 1997).

[51] *See, e.g.*, *Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 479 (1989) ("the parties to an arbitration agreement 'should be at liberty to choose the terms under which they will arbitrate[,]'" as "[a]rbitration … is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit"); *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705, 710 (7th Cir. 2019) (noting that it is a "fundamental principle that arbitration is a matter of contract");

program created by the Board is limited to deciding issues within the Board's jurisdiction to decide, as is the Small Case Arbitration Program proposed here, the specific elements of the arbitration program are legal in light of the fact that the parties would have mutually consented to them.

The Small Case Arbitration Program has one key feature that sets it apart from every other arbitration program previously adopted by the Board: a pledge from five Class I railroads to consent to arbitrate rate reasonableness disputes—unilaterally and programmatically—for a term of five years. This upfront, reliable, enduring, and voluntary participation from Class I railroads would provide shippers with an immediate opportunity to seek relief from rates that they believe to be unreasonable via a low-cost, quick, and more flexible ADR procedure. Because the Small Case Arbitration Program is a result of productive discussions between Class I railroads and other stakeholders, it includes key features that incentivize railroads and shippers alike to consent to arbitrate rate disputes under its rules. This is a major step forward in providing a forum for smaller rate disputes while maintaining the economic integrity of the outcome. A voluntary, private, expedited, and confidential arbitration program is only useful if a railroad has agreed to use it. Petitioners' valuable and advance consent to arbitrate under the Small Case Arbitration Program ensures that shippers who wish to arbitrate small disputes will have an available, reliable, and reasonable means to do so.

Petitioners' substantial commitment here—programmatic consent to participate in the Small Case Arbitration Program for half a decade—is contingent upon the adoption of other key features of the Small Case Arbitration Program—including the features of confidentiality, relief and use limits, prohibitions on the use of certain

---

Larsen v. Citibank FSB, 871 F.3d 1295, 1302 (11th Cir. 2017) ("It is well settled that 'arbitration is a creature of contract.'")

methodologies, and early withdrawal options in certain very limited circumstances. These key features ensure that railroads are incentivized to participate voluntarily in the Small Case Arbitration Program, given its risk to railroads by exposing them to increased liability, new processes, and limited appellate rights. If the Board were to adopt final rules in this proceeding that differ from what Petitioners propose, or from what Petitioners agree to during this proceeding, Petitioners reserve their right to elect whether to consent to arbitrate under the program as adopted.

B. Small Case Arbitration Permits Efficient Rate Dispute Resolution On Reasonable Terms.

The Small Case Arbitration Program is designed to build on the procedures the Board has adopted in previous arbitration regimes and optimize them for use in resolving smaller rate disputes. Five features are particularly important for creating a more streamlined and workable process: (1) delegating market dominance determinations to the arbitral panel; (2) maximizing confidentiality; (3) allowing the use of arbitrators who are not on the General Arbitration Program roster; (4) a procedural schedule that balances speed with adequate time for development of the record; and (5) rate reasonableness standards that are tied to the statute and sound economics, while allowing for a degree of flexibility in line with Congress's guidance.

First, Petitioners believe one significant drawback of the General Arbitration Program is its bifurcation of responsibility for determining market dominance and determining rate reasonableness, with the Board alone determining market dominance and arbitrators determining rate reasonableness. Bifurcation of these issues has historically been a source of delay in rate cases, even where parties have sought expedited treatment of market dominance.[52] In the context of small rate cases, having

[52] *See, e.g.*, *Total Petrochemicals & Refining USA v. CSX Transp., Inc.*, NOR 42121 (May 31, 2013) (Board took over two years to determine market dominance after bifurcation);

to put rate reasonableness on hold while the Board decides market dominance could cause a significant delay and creates a disincentive for shippers to arbitrate.

Petitioners recognize that the General Arbitration Program's bifurcation of market dominance is a function of 49 U.S.C. § 11708(c)(1)(C), which instructs the Board only to make arbitration available if the railroad is determined to have market dominance. Petitioners do not believe that this language prohibits the Board from delegating the market dominance decision to the arbitral panel in a voluntary process to which all parties have consented. Nothing in the statute or Congress's intentions behind it forbids individual parties to arrange and organize the circumstances of dispute resolution between them and mutually to consent to those arrangements.

Even if the Board were to hold that section 11708(c)(1)(C) forbids the Board from delegating the market dominance decision in a §11708 arbitration, that would not preclude the Board from taking a different course in a Small Case Arbitration adopted pursuant to section 1321(a). (Indeed, the Ex Parte 560 arbitration program was adopted under section 1321(a), and it contemplated that market dominance would be delegated to the arbitrator.) Further, if the Board were convinced that section 11708(c)(1)(C) forbids it from delegating market dominance determinations in a Small Case Arbitration, it should use its authority under section 10502(a) to exempt arbitrations under the Small Case Arbitration Program from that provision. This procedural obstacle to efficient voluntary arbitration of smaller cases is not necessary to carry out the Rail Transportation Policy or to protect shippers from the abuse of market power.

Second, the Small Case Arbitration Program is designed to maximize the confidentiality of arbitrations. Petitioners believe that this is a key requirement for future arbitrations. If arbitration decisions—reached after an expedited process with

---

M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123 (Sept. 27, 2012) (Board took 16 months to determine market dominance after bifurcation).

limited appellate review—are public, they could influence the marketplace, and thus drive up the stakes for all litigants: for railroads that may have similarly situated customers, and for shippers that often move traffic over more than one railroad. Keeping the process confidential will focus the parties solely on the dispute at issue and enable them to set aside concerns about the risk of setting precedent in other cases or affecting the market expectations of other entities in the supply chain.

Nothing in section 11708 requires the Board to publish arbitration decisions, as it committed to doing in the General Arbitration Program.[53] Indeed, federal case law has recognized that there is a "'presumption of privacy and confidentiality' that applies in many bilateral arbitrations" such that upending that presumption would be a "fundamental change[]." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010); *see Janvey v. Alguire*, 847 F.3d 231, 248 (5th Cir. 2017) (explaining that "confidentiality [is] a bargained-for virtue of arbitration").[54] For the sake of increased flexibility and efficiency, and to balance the lack of procedural and substantive protections otherwise available through the Board's other rate review procedures, the Small Case Arbitration Program would require confidentiality throughout the arbitration process.

Third, the Small Case Arbitration Program would free parties to select any arbitrator to serve on the panel, regardless of whether the arbitrator is on the roster that the Board maintains as part of the General Arbitration Program. Freeing the parties to select other qualified arbitrators would allow a party to select an arbitrator with

---

[53] 49 C.F.R. § 1108.9(g).

[54] *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-76 (5th Cir. 2004) (explaining that "part of the point of arbitration is that one 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration[,]' and thus an "attack on [a] confidentiality provision is, in part, an attack on the character of arbitration itself" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

particular expertise in the market for the relevant commodity, an arbitrator with whom the party had good experience in a previous non-rate arbitration, or another qualified individual that a party believes would be qualified to arbitrate the case—regardless of whether that individual was one of the relatively small number of arbitrators on the Board's roster or not. This flexibility would remove a potential barrier to parties wishing to participate in the program.

While the Board's General Arbitration Program requires parties who wish to arbitrate to choose from a roster of arbitrators maintained by the Board, the Board does not need to require the same for the Small Case Arbitration Program. *See* 49 C.F.R. § 1108.6. In the first place, 49 U.S.C. § 11708(f)(1) explicitly allows parties to consent to use non-roster arbitrators. Railroads and shippers who opt into Small Case Arbitration would thereby be consenting to use non-roster arbitrators, if they choose. Moreover, the requirement in section 11708(f) related to selecting arbitrators from a Board-maintained roster is expressly limited to "arbitration[s] under this section."[55] That requirement would not apply to disputes arbitrated under a different arbitration program created by the Board pursuant to a different source of its authority, such as 49 U.S.C. § 1321(a) (the statutory support for the Board's initial arbitration programs) and/or by exemption from section 11708 under 49 U.S.C. § 10502.

Fourth, the procedural schedule strikes the right balance between speed and allowing adequate time for deliberate consideration. Parties would be permitted limited discovery, and relevant movements of the Waybill Sample would also be provided as a potential means to sidestep more burdensome discovery. The format of evidence and the timing of filings would be left to the arbitral panel (which may consider the parties' views on these matters). But final decisions from arbitrators would

[55] "Unless otherwise agreed by all of the parties, an arbitration under this section shall be conducted by an arbitrator or panel of arbitrators, which shall be selected from a roster, maintained by the Board…." 49 U.S.C. § 11708(f)(1) (emphasis added).

be due in 120 days (unless extended by the parties' mutual agreement), a timeline faster than any current Board methodology.

Fifth, the substantive guideposts for the Small Case Arbitration Program are the standards for rate review arbitrations that Congress adopted in 49 U.S.C. § 11708(c)(3) and (d)(1), which were designed by Congress to strike a balance between the need for economic integrity and the benefits of some flexibility in small rate review arbitrations. Under these standards, the arbitral panel must "consider" the Board's existing methodologies and its decision must accord with sound principles of railroad economics. These congressionally-approved guideposts are intended to tether the arbitration decision to sound economics while also providing the arbitral panel with some flexibility. For example, the requirement to "consider" the Board's existing methodologies does not require the arbitral panel to conform precisely to existing methodologies, but rather permits the panel to base its decision on alternative approaches so long as they are consistent with sound railroad economics.

C. The Protective Features of the Program Are Necessary Preconditions to Petitioners' Consent to Arbitrate for 5 Years.

Petitioners reemphasize that their commitment to opting into the Small Case Arbitration Program for a five-year term is contingent on the protective features of the Program (many of which equally protect participating shippers) as set forth in this Petition.

The first of these protective features is the right to early withdrawal in the event of a change in the law or governing regulations. Petitioners would be voluntarily opting into the Small Case Arbitration Program in advance for a term of five years, with certain assumptions about the risks to which they are agreeing. Likewise, when shippers opt into the Small Case Arbitration Program on a case-by-case basis, they would be consenting to arbitrate a dispute based on assumptions of the continued status quo of the regulatory environment. In light of these realities, the Board should

ensure that early withdrawal options are available in the event of exceptional circumstances that alter the regulatory landscape. Such early withdrawal options would incentivize participation of both shippers and railroads and would respect the bargain to which the parties consented.

Indeed, in agreeing to arbitrate under the Program, parties will be agreeing to limit their ability to appeal an adverse decision. The grounds for an appeal from arbitration before the Board will be substantially circumscribed and even more limited before any reviewing court. For this reason, it is essential that parties have the right to opt out of the Program if the rules change midstream, whether because the Board changes the arbitration rules, because it adopts a new and untested rate methodology (including Final Offer Rate Review) without exempting carriers participating in the Small Case Arbitration Program from it, or because it makes material changes to an existing methodology. Under the proposed rules, all parties (both shippers and railroads) will have an equal right to opt out of incomplete arbitrations in the event of such intervening events. Petitioners' consent to voluntarily arbitrate for five years is dependent upon the framework governing arbitral decisions remaining materially the same during that period, and Petitioners need an ability to exit the Program in the event the rules change in the interim.

As a second protective feature, Petitioners' five-year commitment to the Program depends upon having a right to exit in the event that a railroad is inundated with cases. If a railroad faces more than 25 arbitrations in a rolling 12-month period or more than 10 simultaneous arbitrations, it would have the right to withdraw its consent to arbitrate under the Program. (Withdrawal due to case volume would not affect disputes in which the parties have started the first mediation session of the required 30-day mediation period.) While Petitioners do not expect that arbitrations of that volume would be likely, if a railroad were faced with that number of simultaneous arbitrations, it may need to reassess its long-term commitment to the Program.

As a third protective feature, Petitioners' consent voluntarily to arbitrate smaller rate disputes does not include consent to arbitrate certain highly contested legal theories: namely, the limit price test and a system-wide revenue adequacy constraint. Each of these issues involves detailed policy and legal challenges, which are not appropriately litigated in a streamlined and expedited arbitration in which parties will have limited appellate rights. Petitioners do not and will not agree to arbitrate those issues in the Small Case Arbitration Program. Petitioners note that their refusal to consent to arbitrate these issues does not remove any shipper's ability to pursue cases on those theories if it so desires; it simply means that such cases must be decided by the Board and not by an arbitrator.

Fourth, and finally, the relief limitation and disaggregation provisions of the Small Case Arbitration Program are essential to Petitioners' consent. A $4 million relief cap captures the majority of potential rate litigants.[56] Shippers with cases that they value at more than $4 million can pursue more rigorous methodologies like Stand Alone Cost or Simplified SAC, and they have no need of an expedited methodology. And the requirement that a shipper bring one arbitration against a particular railroad at a time is a reasonable mechanism for ensuring that shippers do not attempt to evade the $4 million relief limit by artfully splitting one case into multiple cases.[57]

---

[56] Petitioners note that in Ex Parte 646, the Board calculated that 45% of regulated shippers would have a maximum rate case value of less than $1 million over five years, and that 73% would have a maximum rate case value of less than $5 million over five years. *See Simplified Standards*, Ex Parte 646 (Sub-No. 1), at 35 (Sept. 5, 2007). On an annualized basis, the proposed relief for the Small Case Arbitration Program of $4 million over two years is substantially higher than the original relief caps for both Simplified SAC and Three Benchmark, which applied over five years.

[57] As the proposed rules make clear, shippers are free to maintain arbitrations against more than one railroad at a time, so long as they have only one at a time against each railroad.

CONCLUSION

Petitioners respectfully submit that the Small Case Arbitration Program is the best path forward to provide meaningful access to rate review for small rate cases. With a five-year commitment from five Class I railroads, the Small Case Arbitration Program would provide an immediately available avenue to resolve small rate disputes. No other current proposal for resolving small rate disputes can compete with this win-win-win solution for railroads, customers, and the Board.

For the above reasons, the Board should initiate a rulemaking to adopt the alternative voluntary and binding arbitration program for small rate disputes described herein.

Respectfully submitted,

/s/ Raymond A. Atkins
Raymond A. Atkins
Matthew J. Warren
Morgan B. Lindsay
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Counsel for CN, CSX Transportation, Inc., Norfolk Southern Corp., and Union Pacific Railroad Co.

/s/ Adam J. Godderz
Adam J. Godderz
David C. Reeves
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121
Counsel for The Kansas City Southern Railway Company

July 31, 2020

APPENDIX A

PROPOSED AMENDMENTS TO CODE OF FEDERAL REGULATIONS

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002 and 1115 and to add a new part 1108a to title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1115 – Appellate Procedures.

1. 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.

2. Revise § 1115.8 by adding "and part 1108a" to read as follows:

§ 1115.8 Petitions to review arbitration decisions.
* * * * * For arbitrations authorized under parts 1108 and 1108a of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. * * *

* * * * *

3. A new part 1108a is added to read as follows:

PART 1108a – ALTERNATIVE VOLUNTARY PROGRAM FOR ARBITRATION OF FREIGHT RAIL RATE DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

Sec.
1108a.1
1108a.2
1108a.3
1008a.4
1008a.5
1008a.6
1008a.7
1008a.8
1008a.9
1008a.10
1008a.11

Authority: 49 U.S.C. § 10701(d)(3); 49 U.S.C. § 1321(a); 49 U.S.C. § 10502; 5 U.S.C. § 571 *et seq*.

§ 1108a.1 Definitions.

As used in this part:

(1) *Arbitrator* means a single person appointed to arbitrate under this part.

(2) *Arbitration panel* or *arbitral panel* means a group of three people appointed to arbitrate under this part.

(3) *Small Case Arbitration Program* means the program established by the Surface Transportation Board in this part.

(4) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in section 1108a.7(c)(2).

(5) *Limit Price Test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 11-18 (STB served Sept. 27, 2012).

(6) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Case Arbitration Program pursuant to section 1108a.3(a).

(7) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in section 1108a.6.

(8) *STB* or *Board* means the Surface Transportation Board.

(9) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by 49 C.F.R. § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. part 1108.

[(10) *Streamlined market dominance test* means the methodology adopted by the Board in STB Docket No. Ex Parte 756, served on XXXX.]

(11) *Third arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, by the STB Chairman from a list provided by the arbitrating parties, pursuant to the process described in section 1108a.6.

(12) *Pending arbitration* means an arbitration under this part in which the arbitral panel has not yet issued the arbitration decision, including a dispute being mediated in the pre-arbitration 30-day mediation required under section 1108a.5.

(13) *Rate dispute* means a dispute involving whether a rail carrier's rate(s) are "reasonable," as that term is used in 49 U.S.C. § 10701(d)(1).

§ 1108a.2 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent*. The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This part (Part 1108a) establishes a binding and voluntary arbitration program (the "Small Case Arbitration Program") that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Case Arbitration Program serves as an alternative to, and is separate and distinct from, the more broadly applicable arbitration program the Board has established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. Part 1108.

(2) In the Small Case Arbitration Program, parties consent to arbitrate rail rate disputes with a limit on potential liability of $4,000,000 over two years, including any rate prescription, and a one-year limit on rate prescriptions. No rate below 180% of variable cost as determined utilizing the unadjusted Uniform Rail Costing System shall be prescribed.

(3) The Board establishes this Small Case Arbitration Program to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate under 49 U.S.C. § 1321(a); to establish an alternative arbitration program for small shipper rate disputes pursuant to 5 U.S.C. § 571 *et seq*.; to promote the policy of 49 U.S.C. § 10101(15); and to implement 49 U.S.C. § 10701(d)(3), which requires the Board to maintain one or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.

(4) In light of the voluntary and contractual nature of arbitration under the Small Case Arbitration Program, the issues of market dominance and rate reasonableness shall be determined by the arbitral panel as set forth in section 1108a.9, and the Board's standard of review of an arbitration decision, if appealed to the Board, shall be limited as set forth in section 1108a.11(b).

(b) *Limitations to the use of the Small Case Arbitration Program*. The Small Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(c) *No limitation on other avenues of arbitration.* Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108a.3 Participating in the Small Case Arbitration Program.

(a) *Railroad opt-in procedures*. A railroad may opt into the Small Case Arbitration Program at any time.

(1) *Opt-in notice*. To opt into the Small Case Arbitration Program, a railroad may file a notice with the Board, notifying the Board of the railroad's consent to participate in the Small Case Arbitration Program. Such notice may be filed at any time and shall be effective upon receipt by the Board or at another time specified in the notice.

(2) *Option to consent to specified term*. A carrier may, but is not required to, include in its notice opting into the Small Case Arbitration Program a specified time period for which the carrier consents to opt into the Program.

(i) If a carrier opts into the Small Case Arbitration Program for a specified term, the carrier may withdraw from the Program prior to the expiration of its specified term only pursuant to subsections (c)-(d).

(ii) If a carrier opts into the Small Case Arbitration Program without specifying the term of its consent, or if a carrier's specified term of its consent has expired, that carrier participates in the Small Case Arbitration Program at will and may withdraw from the Program under subsections (c)(ii) or (c)(iii)

(3) *Public notice of railroad participants*. The Board shall maintain a list of railroads who have opted into the Small Case Arbitration Program on its website at www.stb.gov.

(b) *Shipper opt-in procedures*. A shipper may opt into the Small Case Arbitration Program at any time on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Case Arbitration Program and by filing a joint notice to OPAGAC with the participating carrier, as set forth in section 1108a.5(b).

(c) *Withdrawal for change in law*.

(1) Regardless of any specified term of consent, a carrier or shipper participating in the Small Case Arbitration Program may withdraw its consent to arbitrate under this part on the basis of the following events:

(i) the Board adopts new rate reasonableness procedures in Final Offer Rate Review, STB Docket No. Ex Parte 755, without exempting carriers participating in the Small Case Arbitration Program from those procedures;

(ii) the Board makes any material change(s) to the Small Case Arbitration Program under this part after a shipper or railroad has opted into the Small Case Arbitration Program; or

(iii) the Board makes any material change(s) to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the Small Case Arbitration Program.

(2) *Procedures for withdrawal for change in law*. A participating shipper or carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for change in law with the Board within 30 calendar days of an event that qualifies as a basis for withdrawal as set forth in subsection (c)(1).

(i) The notice of withdrawal for change in law shall state the basis or bases from subsection (c)(1) for the party's withdrawal of its consent to arbitrate under this part.

(ii) The notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law*.

(i) *Arbitrations with decision*. The withdrawal of consent for change in law by either a shipper or carrier shall not affect arbitrations in which the arbitral panel has issued an arbitration decision.

(ii) *Arbitrations without decision*. The withdrawal of consent for change in law by either a shipper or carrier shall require the immediate dismissal of any pending arbitration under this part involving the withdrawing party in which the panel has not yet issued an arbitration decision.

(d) *Withdrawal for case volume*. Regardless of any specified term of consent, a carrier may withdraw its consent to arbitrate under this part if the carrier faces more than 25 arbitrations in a rolling 12-month period, or more than 10 simultaneous arbitrations.

(1) *Procedures for withdrawal for case volume*. A carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for case volume with the Board that states the basis in subsection (d) upon which the carrier is withdrawing its consent.

(2) *Effect of withdrawal for case volume*. A carrier's withdrawal of consent for case volume shall be effective on the day of its filing and shall:

(i) not affect the arbitration process for disputes under this part in which the parties have started the first mediation session of the 30-day mediation period required by 1108a.5(b); and

(ii) require the immediate discontinuance of the arbitration process under this part for any disputes under this part in which the parties have not started the first mediation session of the 30-day mediation period required by 1108a.5(b).

(e) *At-will withdrawal*. If a carrier is participating in the Small Case Arbitration Program at-will, or if the specified term of a carrier's consent to arbitrate under the Program has expired, the carrier may withdraw from the Program at any time and for any reason by filing a notice of at-will withdrawal with the Board.

(1) A notice of at-will withdrawal shall be effective 30 calendar days from its filing date.

(2) A notice of at-will withdrawal shall not affect disputes for which a shipper has notified the participating carrier of its intent to arbitrate, as set forth in 1108a.5(a), prior to the effective date of the notice of at-will withdrawal.

§ 1108a.4 Use of arbitration.

(a) *Eligible Matters*. The arbitration program under this part may be used only for rate disputes subject to the jurisdiction of the Surface Transportation Board.

(1) Only rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this part. If the parties dispute whether a challenged rate was established pursuant to 49 U.S.C. § 10709, the parties must petition the Board to resolve that dispute, which must be resolved prior to the parties initiating arbitration process under this part.

(2) A shipper may challenge rates for multiple traffic lanes within a single arbitration under this part.

(b) *Eligible Parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits*. A shipper may bring a maximum of one arbitration at a time against a participating railroad. For purposes of this subsection, an arbitration under this part is final, and a new arbitration may be brought against the defendant carrier by the shipper, when the arbitral panel issues its arbitration decision.

(d) *Arbitration clauses*. Nothing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

§ 1108a.5 Arbitration initiation procedures.

(a) *Notice of shipper intent to arbitrate dispute*. To initiate the arbitration process under this part against a participating railroad, a shipper must notify the railroad in writing of its intent to arbitrate a dispute under this part. The notice must include a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part.

(b) *Pre-arbitration mediation*. Prior to filing the joint notice required in subsection (c), the parties to the dispute must engage in 30 calendar days of mediation. The mediation shall be outside any STB process.

(1) Mediation shall be initiated by the shipper's notice of intent to arbitrate under this part.

(2) The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) The 30-day time period begins at the start of the first mediation session.

(c) *Joint Notice of Intent to Arbitrate.* To arbitrate a rate dispute under this part, the parties must file a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), indicating the parties' intent to arbitrate under the Small Case Arbitration Program.

(1) The joint notice shall set forth the following information:

(i) the basis for the Board's jurisdiction;

(ii) the basis for the parties' eligibility to use the Small Case Arbitration Program, including:

1. that the dispute being arbitrated is solely a rate dispute;

2. that the railroad has opted into the Small Case Arbitration Program;

3. that the shipper does not have any other pending arbitrations at that time against the defendant railroad;

4. that the parties have engaged in the required 30 days of mediation;

(iii) the requested relief; and

(iv) the parties' agreement to arbitrate under the rules of this part.

(2) The joint notice shall be confidential and will not be published by the Board.

(3) Unless the parties have agreed not to request the Waybill Sample pursuant to section 1108a.7(g), the parties must also serve the Joint Notice of Intent to Arbitrate on the Director of the Office of Economics, along with STCC information necessary for the Office of Economics to produce the unmasked confidential Waybill Sample.

(d) *Arbitration agreement*. The rules of this part shall be incorporated by reference into any arbitration agreement to arbitrate under the Board's Small Case Arbitration Program.

§ 1108a.6 Arbitrators.

(a) *Decision by arbitral panel.* All matters arbitrated under this part shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators*. Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator*. Each side may object to the other side's selected arbitrator within two business days and only for cause. For-cause bases may include, but are not limited to, a lack of impartiality, a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with OPAGAC. The STB Chairman shall rule on the objection in a telephonic conference within two business days, or as soon as is practicable. No briefing shall be permitted.

(iii) The Objection to Party-Appointed Arbitrator filed with OPAGAC and the telephonic conference, including the STB Chairman's ruling, shall be confidential.

(2) *Costs for party-appointed arbitrators*. Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Third arbitrator*.

(1) *Appointment*. Once appointed, the two party-appointed arbitrators shall, without delay, select the third arbitrator from a joint list of arbitrators provided by the parties.

(2) *Need for STB Chairman to select third arbitrator*. If the two party-appointed arbitrators cannot agree on a selection for the third arbitrator, the parties shall immediately file a Joint Request for Selection of Third Arbitrator with OPAGAC.

(i) The Joint Request for Selection of Third Arbitrator must include a joint list of potential arbitrators selected by the parties.

(ii) The STB Chairman shall select the third arbitrator and notify the parties of the selection within two business days, or as soon as is practicable, after the filing of the Joint Request for Selection of Third Arbitrator.

(iii) The Joint Request for Selection of Third Arbitrator and the STB Chairman's selection shall be confidential.

(3) *Third arbitrator role as lead arbitrator*. The third arbitrator shall serve as the lead arbitrator and will be responsible for ensuring that the tasks detailed in sections 1108a.7 and 1108a.9 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each

arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this part.

(4) *Costs*. The complaining shipper and the defendant carrier shall each pay one-half of the cost of the third arbitrator.

(d) *Arbitrator choice*. The parties may choose their arbitrators in all events without limitation. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in 49 CFR part 1108, § 1108.6(b).

(e) *Arbitrator incapacitation*. If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in subsection (b).

(2) If the incapacitated arbitrator was the third arbitrator, a replacement third arbitrator shall be appointed pursuant to the procedures set forth in subsection (c).

(f) *Arbitrator duties*. In an arbitration under this section, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108a.7 Arbitration procedures.

(a) *Appointment of Arbitration Panel*. Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing.

(b) *Commencement of arbitration process*. Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing.

(c) *Expedited timetables.*

(1) *Evidentiary phase timetable*. The evidentiary phase shall be completed within 45 calendar days from the commencement of the arbitration process, unless a party requests an extension and the arbitration panel grants the extension request. In no event shall the evidentiary phase last more than 90 calendar days unless all parties to the arbitration mutually agree to a longer time period.

(2) *Decision timetable*. The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108a.9(a)(2), shall be served on the parties within 120 calendar days from the commencement of the arbitration process.

(3) *Extensions to the timetables*. The arbitration panel may extend any deadlines set forth in this subsection (c) upon mutual agreement of all parties to the arbitration.

(d) *Limited discovery*. Discovery under this part shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(e) *Evidentiary guidelines.*

(1) *Principles of due process.* The arbitration panel shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the complainant shipper's case-in-chief.

(2) *Inadmissible evidence*. The following evidence shall be inadmissible in an arbitration under this part:

(i) on the issue of market dominance, any evidence that would be inadmissible before the Board;

(ii) any non-precedential decisions, including non-precedential decisions of the STB or of prior arbitrations; and

(iii) any evidence related to the revenue adequacy of the defendant carrier.

(f) *Confidentiality agreement*. All proceedings under this part shall be governed by a standard confidentiality agreement unless the parties agree otherwise. The terms of the confidentiality agreement shall apply to all aspects of the arbitration process under this part, including but not limited to discovery, the Waybill Sample provided pursuant to subsection (g), party filings, and the arbitral decision. A model confidentiality agreement is provided in Appendix B.

(g) *Waybill Sample*. The Board's Office of Economics shall provide the unmasked confidential Waybill Sample to each party to the arbitration proceeding within seven calendar days of the filing of the Joint Notice of Intent to Arbitrate. The data provided by the Office of Economics in the unmasked confidential Waybill Sample shall be limited to only the following data:

(1) most recent year;

(2) movements with R/VC ratio above 180%;

(3) movements on defendant carrier;

(4) movements with same 5 digit STCC as the challenged movements.

(h) *Confidentiality of entire arbitration process*. The entirety of the arbitration process under this part shall be confidential.

§ 1108a.8 Relief.

(a) *Relief available.* Subject to the relief limits set forth in subsection (b), the arbitration panel under this part may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this part shall not exceed $4 million over two years (as indexed annually for inflation using the CPI index and a 2020 base year), inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof.

(1) A rate prescription shall not exceed 1 year.

(2) A rate below 180% of variable cost, as determined by unadjusted URCS, shall not be prescribed.

(c) *Relief not available*. No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108a.9 Decisions.

(a) *Technical requirements*.

(1) *Findings of fact and conclusions of law*. The arbitration decision under this part shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement*. The unredacted arbitration decision served on the parties in accordance with section 1108a.7(c)(2) shall comply with the confidentiality agreement described in section 1108a.7(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements*. The arbitration panel under this part shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance*. In determining the issue of market dominance, the arbitration panel under this part shall follow [the streamlined market dominance test adopted in Ex Parte 756].

(i) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(ii) The arbitration panel shall not apply the Limit Price Test.

(2) *Maximum lawful rate.* In determining the issue of maximum lawful rate, the arbitration panel under this part shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.

(i) *Consistent with sound principles of rail regulation economics*. The panel's decision must be consistent with sound principles of rail regulation economics.

(ii) *Prohibition on considering revenue adequacy constraint*. The panel is prohibited from considering any type of system-wide revenue adequacy-based constraint, including the revenue adequacy constraint described in *Coal Rate Guidelines*, 1 I.C.C.2d 520, 535 (1985).

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this part may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* Subject to section 1108a.11, the arbitration decision under this part, whether redacted or unredacted, shall be confidential.

(1) No copy of the arbitration decision shall be served on the Board except as is required under subsection (d).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Service in the case of an appeal*. In the event an arbitration decision is appealed to the Board pursuant to section 1108a.11, the arbitration decision shall be filed under seal and, subject to section 1108a.11, shall remain confidential on appeal.

(e) *Arbitration decisions are binding*. By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in section 1108a.11. An arbitration decision under this part shall preclude the complainant shipper(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding rates for the movements at issue in the arbitration, with the exception of appeals under section 1108a.11. This preclusion shall last until the later of: (i) two years after the Joint Notice of Intent to Arbitrate; or (ii) the expiration of the term of any prescription imposed by the arbitration decision.

(f) *Confidential summaries of arbitrations*. To permit the STB to monitor the Small Case Arbitration Program, the parties shall submit a confidential summary to OPAGAC within 14 calendar days after either receiving the arbitration decision, the dispute settles, or the dispute is withdrawn. The confidential summary itself shall not be published.

(1) *Contents of confidential summary*. The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

(i) geographic region of the movement(s) at issue;

(ii) commodities shipped;

(iii) number of calendar days from the commencement of the arbitration proceeding to the arbitration decision; and

(iv) resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable.

(2) *STB quarterly reports on Small Case Arbitration Program*. The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall disclose only the four categories of information listed in subsection (f)(1). The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall be issued as a supplement to the Board's quarterly reports of informal service complaints issued by OPAGAC.

§ 1108a.10 No Precedent.

Arbitration decisions under this part shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under the rules of this part or in any Board proceeding except an appeal of the decision under §1108a.11.

§ 1108a.11 Enforcement and appeals.

(a) *Appeal to the Board*.

(1) *Notice of Appeal*. A party to an arbitration proceeding under this part may appeal the arbitration decision only to the Board and by filing with the Board a notice of appeal of arbitration decision, which shall be formally docketed and made public. The notice of appeal shall not disclose any information about the substance of the arbitration decision but shall set forth only the information included in the model notice of appeal provided in Appendix C.

(2) *Petition to Vacate or Modify Arbitration Decision*. The party appealing the arbitration decision shall file under seal, at the same time as the notice of appeal but separately, a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating and/or modifying the decision.

(3) *Replies*. Replies to the petition shall be filed under seal within 20 calendar days of the filing of the petition with the Board. Replies shall be subject to the page limitations of section 1115.2(d) of this chapter and the service requirements of subsection (a)(7).

(4) *Confidentiality of filings; public docket*. All submissions, with the exception of the notice of appeal, shall be filed under seal and kept confidential, but the docket shall be public.

(5) *Page limitations*. The petition shall be subject to the page limitations of section 1115.2(d) of this chapter.

(6) *Time limit.* The notice of appeal and petition to vacate or modify arbitration decision must be filed within 20 calendar days from the date on which the arbitration decision was served on the parties.

(7) *Service*. Copies of the petition shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this part shall be limited to determining only whether:

(i) the decision is consistent with sound principles of rail regulation economics;

(ii) a clear abuse of arbitral authority or discretion occurred;

(iii) the decision directly contravenes statutory authority; or

(iv) the award limitation was violated.

(c) *Relief available on appeal to the Board*. Subject to the Board's limited standard of review as set forth in subsection (b), the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in 1108a.8(b).

(d) *Confidentiality of Board's decision on appeal*. The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace.

(1) *Information protected from public disclosure*. In no event shall the following information be publicly disclosed in the Board's decision or otherwise:

(i) the specific relief awarded by the arbitration panel, if any, or by the Board; or

(ii) the Origin-Destination pair(s) involved in the arbitration.

(2) *Board decision affirming arbitration decision*. A Board decision that denies the petition to modify or vacate will do so in a way that maintains the complete confidentiality of the arbitration decision.

(3) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 calendar days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision*. Board decisions affirming, vacating, or modifying arbitration awards under this part are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Staying arbitration decision*. The timely filing of a petition with the Board to modify or vacate the arbitration award will not automatically stay the effect of the arbitration decision. A stay may be requested under section 1115.3(f) of this chapter.

(g) *Enforcement.* A party seeking to enforce an arbitration decision under this part must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 9-13.

APPENDIX B

MODEL CONFIDENTIALITY AGREEMENT FOR ARBITRATION PROCEEDING

1. Pursuant to 49 C.F.R. § 1108a.7(i), all information, data, documents, or other material (hereinafter collectively referred to as "material") that is produced in discovery to another party to this proceeding or submitted in pleadings will be designated "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

    a. Shall be used solely for the purpose of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.

    b. May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Confidentiality Agreement, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

    c. Must be destroyed by the requesting party, its employees, counsel, and agents at the completion of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Confidentiality Agreement, including under Paragraph 10.

    d. Shall, in order to be kept confidential, be filed with the arbitral panel only in a package clearly marked on the outside "Confidential Materials Subject to Confidentiality Agreement."

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of the arbitration panel. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, provided that such outside counsel or outside consultants have been

given and have read a copy of this Confidentiality Agreement, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Confidentiality Agreement, including without limitation Paragraph 1.

3. In the event that a party produces material which should have been designated as "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the "HIGHLY CONFIDENTIAL" designation. The party who received the material without the "HIGHLY CONFIDENTIAL" designation will agree to treat the material as highly confidential, unless that party wishes to challenge that designation as set forth in Paragraph 2.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any STB or judicial review or enforcement proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "HIGHLY CONFIDENTIAL" material to the arbitral panel, the Board, or the court, as appropriate, with a written request that the arbitral panel, Board, or court: (a) restrict attendance at the hearings during discussion of such "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Confidentiality Agreement.

6. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Confidentiality Agreement, the party

so required shall notify the producing party in writing within 3 business days of the determination that such material is to be released, or within 3 business days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

7. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Confidentiality Agreement even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

8. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the "HIGHLY CONFIDENTIAL" material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a "CONFIDENTIAL" version of such filing that redacts any "HIGHLY CONFIDENTIAL" information of the filing party that cannot be viewed by the in-house personnel of the reviewing party. Such Confidential Version may be provided in a pdf or other electronic format.

9. At the conclusion of the arbitration, the parties shall make no public statements or representations about the arbitration, except for the confidential summary provided to the STB pursuant to 49 C.F.R. § 1108a.9(f).

10. If either party chooses to file a petition to modify or vacate the decision of the arbitration panel with the Surface Transportation Board, all filings in such a proceeding shall be Confidential, except the notice of appeal. Parties may designate portions of their pleadings in such a proceeding to be Highly Confidential, pursuant to the provisions of Paragraph 2.

AGREED TO:

_____

[PARTY ONE]

DATE: _____

_____

[PARTY TWO]

DATE: _____

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Confidentiality Agreement signed on _____, 2020, governing the production of confidential documents in the arbitration initiated on [DATE] between XXXX and XXXX (the "Arbitration"), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in the Arbitration or any STB or judicial review or enforcement proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Confidentiality Agreement to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Confidentiality Agreement.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

Dated:_____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Confidentiality Agreement signed on_____, 2020, in the arbitration initiated on [DATE] between XXXX and XXXX (the "Arbitration"), understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Confidentiality Agreement, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the arbitral panel, STB, or court. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Confidentiality Agreement. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

OUTSIDE [COUNSEL] [CONSULTANT]

Dated:_____

APPENDIX C

MODEL NOTICE OF APPEAL OF ARBITRATION DECISION

FINANCE DOCKET XXXXX[1]

[APPEALING PARTY]—APPEAL FROM ARBITRAL DECISION

NOTICE OF APPEAL OF ARBITRATION DECISION

Pursuant to 49 C.F.R. § 1108a.11, [APPEALING PARTY] notifies the Board that it is appealing an arbitration decision entered on [DATE] in an arbitration conducted under 49 C.F.R. Part 1108a. A Petition to Vacate or Modify the Arbitration Decision is being filed concurrently under seal.

[1] The appealing party would request that the Board assign a Finance Docket Number before filing.