

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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EX PARTE 765

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

Reply of American Fuel & Petrochemical Manufacturers

INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) in accordance with 49 CFR Part 1110 is pleased to provide our response to the “Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes” (the “Joint Petition”) filed by five of the Class I rail carriers (the “Joint Petitioners”) on July 31, 2020.¹ The Joint Petitioners have petitioned the Surface Transportation Board (“STB” or the “Board”), pursuant to 5 U.S.C. § 553, to adopt their proposal for arbitration of rail rate disputes. AFPM appreciates the opportunity to participate in the informal rulemaking process and the STB’s thoughtful consideration of our concerns related to the Joint Petition and its relationship to pending action before the board, namely the “Final Offer Rate Review (FORR) Procedures” proposed in Docket No. EP 755, *Final Offer Rate Review* (“EP 755”).²

The STB has an important oversight role in reviewing the impact of freight rail policies on rail shippers and AFPM supports STB seeking ways to improve the rate dispute process in line with the intent of Congress. For the reasons set forth herein, the STB should deny the Joint Petition, which amounts to a thinly-veiled procedural maneuver to delay STB’s completion of its EP 755 rulemaking, an open rulemaking with far greater potential to reduce regulatory burdens and increase the accessibility of a remedy for unreasonable rail rates. The comment period on EP 755 closed January 10, 2020, and the Board should ensure this Joint Petition does not delay the much-needed freight rail rate relief reforms already in progress.

AFPM INTEREST IN THE JOINT PETITION

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To

¹ See EP 765 “Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes” <https://prod.stb.gov/proceedings-actions/filings/>. The five Class I railroads are Canadian National Railway Company, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Corporation, and Union Pacific Railroad Company.

² See Docket No. EP 755, “*Final Offer Rate Review*”, Published September 11, 2019 <https://www.stb.gov/decisions/ReadingRoom.nsf/51d7c65c6f78e79385256541007f0580/1d5c55a4466e4e4785258473004dc82d?OpenDocument>

produce essential goods, AFPM members rely on a safe, reliable and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics, and synthetic resins — were delivered by rail in the U.S. in 2018.³

Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. Over 75% of refiners and petrochemical manufacturers are served by a single railroad (e.g., captive) and thus continue to be negatively impacted by excessive freight rail rates, escalating, inappropriate, and poorly communicated demurrage and accessorial fees, and lack of competitive rail service for too long.⁴ As AFPM noted in our comments to EP 755, the STB's FORR proposal, along with other concurrent proposed rate relief reforms, are a positive step toward improving how the STB addresses freight rail issues.

OBJECTIONS TO JOINT PETITION

AFPM has concerns with not only the lack of adherence to formal process, but also the merits of the Joint Petition, which amounts to an attempt to disrupt the ongoing reforms in EP 755 and replace them with programs skewed in the rail carriers favor. AFPM will not discuss the merits of the petition in great detail at this time because a formal docket has not been opened. Importantly, though, the terms and proposals in Joint Petition are not at all balanced and the numerous demands levied by the Joint Petitioners undermine the proposal, specifically an actual prohibition of any future rate relief reform. The conditions that the Joint Petitioners assign to their agreement would seriously undermine the efficacy of their proposals. Overall, AFPM takes issue with the Joint Petition for the following reasons:

- The Joint Petition is procedurally flawed in that it circumvents conventional notice and comment rulemaking procedures detailed in both 49 CFR Part 1110 and the Administrative Procedures Act ("APA") and is clearly an attempt to delay, or even halt, the implementation of meaningful freight rail rate-reform included in the FORR NPRM.
- The Joint Petition demands specific concessions as a price of entry for the railroad's participation in rate relief dispute reform. These demands undermine STB's authority, with the Joint Petitioners dictating terms of their participation in this proposed rate dispute program (e.g., applicability to only specific rail carriers, duration of their participation, and clauses for rail carriers to opt-out of the program).

The Joint Petition Undermines EP 755

AFPM's primary concern with the Joint Petition is it is clearly an attempt to delay, or even halt, the implementation of meaningful freight rail rate reform. During the rulemaking

³ Rail Traffic Data - Association of American Railroads. (2019). Retrieved from <https://www.aar.org/data-center/rail-traffic-data/>

⁴ Escalation Consultants, "Competition at U.S. Freight Rail Stations by State." <https://railvoices.org/wp-content/uploads/2012/12/US-Map.pdf>. Accessed October 24, 2019.

process, AFPM along with other stakeholders (including Class I rail carriers) provided thoughtful and detailed comments and counterproposals in the allotted comment period for the STB's FORR Notice of Proposed Rulemaking ("NPRM"). The proposals contained in the Joint Petition should have been submitted during the allotted comment period for the FORR NPRM. The timely submission of the content of the Joint Petition would have permitted STB to consider the merits of that proposal alongside other relevant comments and counterproposals. This is expressly the intent of the notice and comment rulemaking process. The procedural schedule set forth in the FORR NPRM closed the comment period on January 10, 2020.⁵ Joint petitioners should have included such suggestions in their comments to the FORR docket. But they did not, and this most recent petition will only delay the Board's meaningful progress on EP 755.

FORR is a concept that Class I rail carriers have vocally and strongly opposed, including in their previous comments on the FORR NPRM. Raising an alternate counterproposal eight months after the comment period has closed not only undermines the concept of meaningful notice and comment, but is clearly designed to slow progress and "move the goalpost" on this very important issue to rail shippers. Clearly, the Joint Petitioners became concerned over the potentially imminent adoption of FORR and have used this Joint petition as a mechanism to delay and undermine the current FORR proposal while negotiating rail-friendly terms and conditions for a dispute process. The STB should not be complicit in this attempt to stifle progress on the finalization of FORR.

STB's Regulations governing the EP 755 rulemaking process note "[a]ll timely comments will be considered before final action is taken on a rulemaking proposal." They also note that "[c]omments which are filed late will be considered so far as possible without incurring undue expense, delay, or prejudice to other parties." AFPM asserts the Joint Petition amounts to a comment relevant to FORR NPRM docket given the Joint Petition is predicated on barring STB from acting on FORR in the future or making "any material changes to the Small Case Arbitration Program after a shipper or railroad has opted into the [Railroad proposed Joint-Petition] program." Given this fact, STB should deny the Joint Petition. Further, we note that the submission of the Joint Petition is far from timely given eight months have passed since that comment period ended.

If STB grants this petition, AFPM fears the STB would establish a precedent where a party opposed to a given provision can effectively stall STB action by filing a related petition after the close of the comment period.⁶ AFPM believes strongly all stakeholders should have their voice heard and that includes the ability to offer comments and even counterproposals on STB proposals. But that notice and comment is governed by existing parameters in both STB regulations and the APA. Relevant counterproposals should be provided during the allotted comment period. For example, AFPM offered our own extensive counterproposal to FORR

⁵ After the closure of the comment period the Board stated that it would benefit from additional stakeholder input on the proposal and therefore exercised its discretion to waive its general prohibition on ex parte communications to permit post comment period ex parte discussions with stakeholders. That said the Joint Petition's proposals are not meant to provide additional data to support or refute the FORR proposal but rather completely undermine the proposal.

⁶ The situation here differs from other late filed comments that provide additional relevant data to a proposal or those based on grounds arising after the close of the comment period. Here there is no reason why the Joint Petitioners could not have offered these reforms during the public comment period.

during the allotted comment period. Using the rulemaking petition process as a mechanism to delay action, or stifle meaningful reform is not how the process is intended to work.

The Joint Petition Proposes an Unworkable Small Rate Dispute Program

While AFPM's objections to the Joint Petition primarily focus on the process and not the merits of the counter proposal, some aspects of the Joint Petition are particularly concerning for rail shippers and must be mentioned. Specifically, AFPM has concerns with the applicability of the proposed rate relief dispute process (*e.g.*, only five Class I rail carriers signed-on to the Joint Petition), and the myriad caveats allowing a rail carrier to simply walk away from the program whenever the rail carrier chooses.

As the Joint Petition states, the "[p]etitioners are five Class I rail carriers 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." Since only 5 of the 7 Class I rail carrier are petitioners, the petition turns its back on uniformity and would create a patchwork of inconsistent regulations. Further, the ability to "opt-out" would create a situation where the regulated stakeholder gets to choose whether or not they are subject to a specific regulation. On the other hand, rail shippers in certain regions would have no option to utilize the dispute process simply because they are captive and their sole rail carrier chose not to participate, or, even worse, chose to participate but then opted out when the process was not yielding a favorable result. Uniform standards for a rate dispute process are essential and a piecemeal adjudication regime undermines STB's authority.

In addition, the Joint Petition includes several demands that must be met for the 5 Class I rail carriers to agree to participate. These stipulations go as far as limiting what STB can and cannot do in the future related to the rate dispute process. These criteria do not appear to be suggestions for STB to consider, rather they are conditions that must be met for the rail carriers to participate. For example, these demands include prohibiting any future STB action on implementing a FORR program as well as prohibiting STB from making any modifications to the Small Case Arbitration Program that the Joint Petitioners proposed. Again, the limitations directly undermine the STB's authority and ability to provide economic oversight.

Lastly, in the Joint Petition, the Joint Petitioners only commit to participating in the voluntary small dispute process for 5 years with multiple options to withdraw with very little notice. For example, under the Joint Petition, a rail carrier can leave the program simply if they deem the number of cases is too onerous. This lack of commitment to a permanent and balanced program is not only concerning for rail shippers but severely undermines the program itself and limits the likelihood rail shippers would actually use the program – perhaps, the unstated goal of the Joint Petitioners.

CONCLUSION

The Joint Petition, the Joint Petitioners attempt to dictate to the STB the terms of their oversight and the only parameters the rail carriers will accept regarding small rate disputes. This "take-it-or-leave" negotiation tactic is certainly not unfamiliar to rail shippers but has no place in

a rulemaking process. STB must not be complicit in allowing regulated stakeholders to opt-out of STB oversight, and the parameters for participation in this regulatory program.

STB should deny this petition and move forward with finalizing FORR. The “take-it-or-leave-it nature” of the Joint Petition clearly demonstrates that the Joint Petitioners want to dictate the terms by which STB must consider rate disputes. The Joint Petition is an attempt to delay meaningful rate dispute reform that is already in progress under Docket EP 755. Should STB wish to consider the proposals in the Joint Petition further, in whole or part, it should do so only as part of the current FORR rulemaking docket and ensure this does not unnecessarily delay needed freight rail rate relief reform or progress to date on a FORR Final Rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rob Benedict".

Rob Benedict
Senior Director, Transportation & Infrastructure