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United States Department of Agriculture

Office of the Secretary
Washington D.C. 20250

August 20, 2020

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The Honorable Ann D. Begeman
Chair
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

RE: STB Ex Parte 765, Petition for Rulemaking to Establish an Alternate Voluntary Arbitration Program for Small Rate Disputes

Dear Ms. Chairwoman:

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 entrust the Secretary of Agriculture with representing the interests of agricultural producers and shippers by working to improve transportation services and facilities. One way the U.S. Department of Agriculture (USDA) accomplishes this mission is by taking a role in proceedings and issues before the Surface Transportation Board (Board).

On Friday, July 31, 2020, five of the seven Class I railroads submitted a Joint Petition for Rulemaking to establish an alternative voluntary arbitration program for small rate disputes. USDA encourages the Board to establish a formal proceeding to further examine the proposal because an additional option for a new voluntary arbitration program for small rate disputes could be useful. At the same time, USDA urges the Board to move forward expeditiously to finalize its Final Offer Rate Review (FORR) notice of proposed rulemaking and not allow the petition to interfere with or delay that effort.

If appropriately structured, USDA supports mediation and arbitration as a means of resolving rate disputes. While it is encouraging, the proposal contained in the petition "has been shaped by productive discussions" with other stakeholders (p. 2), USDA believes the proposal can be made more effective with some modifications, which are discussed below.

First and most importantly, the proposed arbitration process should not replace or delay the establishment of FORR. Voluntary arbitration works only when both parties have an incentive to participate. Without an effective rate review mechanism to serve as a backstop, railroads have no incentive to arbitrate over rates. USDA believes FORR is the driving force behind this

petition, and we strongly encourage the Board to make a final ruling in the FORR proceeding before completing a rulemaking on the joint petition. This ruling will provide a necessary and clear backstop from which alternative dispute resolution mechanisms should be considered.

Second, USDA believes an arbitration program should complement FORR, rather than be a substitute. Shippers and railroads should both be able to opt for arbitration, and if they both agree, then formal rate review proceedings might be precluded. That is, solutions reached through arbitration should be truly voluntary. As proposed, the petition appears one sided, in that if a railroad opts in, it would be a blanket exemption and preclude all its shippers from using FORR. According to the petition, if a railroad opt-in to the program, it would have the option to withdraw if “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” (p. 17). That is, railroads would essentially be choosing for shippers whether they have access to effective rate review through FORR or not. This is not truly voluntary. We encourage the Board to solicit stakeholder comments on ideas that would preserve choice for both the shippers and railroads. A properly structured, efficient, and affordable arbitration approach could well be a preferred alternative to FORR in many circumstances.

Third, given railroads’ desire to limit the types of cases that can be decided by arbitration—such as disputes concerning “the limit price test and a system-wide revenue adequacy constraint” (p. 27)—a fully accessible FORR and truly voluntary arbitration process are even more important. With its focus on procedural rather than substantive limitations, FORR is cost effective while not limiting the kinds of cases shippers can bring. In an arbitration process, shippers and railroads should be able to make their best possible case, within the process constraints. If railroads insist on limiting the kinds of cases arbitrators can decide, then shippers must have the option of which process to use.

Fourth, USDA strongly believes any Board rate review process should be as transparent as possible to encourage adoption of good business practices across the rail industry once cases are decided. Transparency is vital and indispensable in supporting a level playing field. Consistent and fair written decisions by arbitrators who know both the agricultural and rail industries are ensured only where there is public scrutiny and transparency that provide a means for all market participants to learn from case outcomes. USDA encourages transparency, so all stakeholders are allowed to learn from a few cases. This way, the shippers could see what happened in past cases involving circumstances similar to their own, which would aid them in preparing their own cases. It might even help them engage the railroads in private negotiations that enable them to achieve a satisfactory result without having to bring a case themselves and, thereby, move the entire industry toward best practices over time.

USDA notes the railroads state that confidentiality of arbitration decisions is necessary because public decisions “could influence the marketplace and thus drive up the stakes for all litigants,” including “railroads that may have similarly situated customers and...shippers that often move traffic over more than one railroad” (p. 23). However, this statement is vague, unsupported by any data, and, therefore, highly speculative (at best) and USDA believes that it should not carry any weight with the Board. Given the vague and speculative basis for the railroads’ clear

support for confidentiality at the expense of transparency (“[arbitration] would be confidential to the maximum extent possible” (p. 16)), USDA believes the railroads’ objection to transparency stems from not wanting other shippers to obtain a better sense of how their own cases might be decided. The fact that transparency might “drive up the stakes” because railroads “may have similarly situated customers” (i.e., other customers with unreasonable rates) should be a reason for transparency, not a reason for secrecy (p. 23).

Finally, in their joint petition, the petitioners say their consent to opt-in to the arbitration program would only last for a period of 5 years if the rest of their specific conditions are met. However, USDA believes in each complaint, both the railroad and shipper should have the opportunity to decide if the arbitration process is appropriate and workable for its interests. There also should be an opportunity for a holistic review by the Board and other stakeholders to ensure the process continues to work for all parties. In order to ensure the alternative arbitration program works fairly and effectively, USDA believes a clause should be included that allows for shippers and railroads to both provide feedback after a reasonable interval. An assessment could be done after its first year and then on an annual or biennial basis.

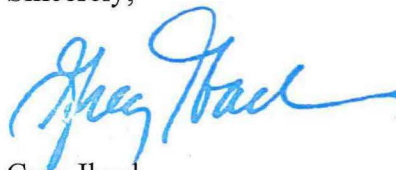
Despite the concerns discussed above, USDA supports a workable and fair arbitration process for rate review and thinks the petition offered has promise, if appropriately modified. USDA has long advocated for fair and objective arbitration and mediation processes, and if such processes were bolstered by an effective formal rate review backstop like FORR, then a new voluntary, alternative arbitration system would be an excellent addition to the Board’s rate review framework.

The petitioners rightly “welcome discussions with other stakeholders” (p. 2). It is crucial that all interested parties weigh in. For these reasons, USDA would encourage and support the Board opening a proceeding for all to examine this petition in more detail.

If you have any further questions, please have a member of your staff contact the Office of Congressional Relations at (202) 720-7095.

A similar letter has been shared with your colleagues.

Sincerely,



Greg Ibach
Under Secretary
Marketing and Regulatory Programs



United States Department of Agriculture

Office of the Secretary
Washington D.C. 20250

August 20, 2020

The Honorable Martin J. Oberman
Vice Chair
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

RE: STB Ex Parte 765, Petition for Rulemaking to Establish an Alternate Voluntary Arbitration Program for Small Rate Disputes

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no incentive to arbitrate over rates. USDA believes FORR is the driving force behind this petition, and we strongly encourage the Board to make a final ruling in the FORR proceeding before completing a rulemaking on the joint petition. This ruling will provide a necessary and clear backstop from which alternative dispute resolution mechanisms should be considered.

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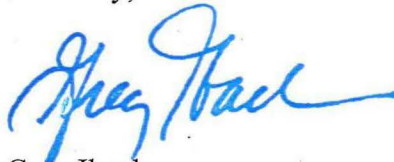
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Board Member
Surface Transportation Board
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