

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Public Record

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

Docket No. EP 765

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**REPLY IN OPPOSITION BY
OLIN CORPORATION**

Olin Corporation (“Olin”) respectfully requests that the Surface Transportation Board (“STB” or “Board”) deny the Joint Petition of five individual railroads¹ asking the Board to institute a rulemaking proceeding to adopt new rate reasonableness arbitration rules.

PREFACE AND SUMMARY

Olin currently ships over 47,000 rail cars annually of chlor alkali products from its various North American manufacturing locations, each of which is captive to a single railroad. Because of Olin’s dependency on railroad service, rail transportation is one of the single largest costs of its production and distribution process, and the availability of reasonable regulatory protections and processes in the absence of market competition is essential for protecting Olin from unreasonable rates.

For the reasons explained below, the Board should not institute the rulemaking proceeding requested by the Petitioners which has substantial, inherent defects, and should

¹ The petitioning railroads are Canadian National Railway Company (“CN”), CSX Transportation, Inc. (“CSXT”); Kansas City Southern Railway Company (“KCS”); Norfolk Southern Railway Company (“NS”) and Union Pacific Railroad Company (“UP”) (collectively “Petitioners”).

instead proceed to finalize its Notice of Proposed Rulemaking in STB Docket No. EP 755, *Final Offer Rate Review* (“FORR”) to bring about a new streamlined final offer rate reasonableness methodology to help provide effective and efficient backstop regulatory protections for captive shippers.

Petitioners ask the Board to institute a new rulemaking proceeding and adopt their proposal without making any changes to multiple “key features,” on which Petitioners precondition their support. Olin suggests that it is not necessary to engage in any extended treatment of Petitioners’ proposal at this time. Instead, after FORR is implemented and given time to succeed, if the Board believes that new arbitration rules for rate cases are necessary, it can then consider whether to institute a new rulemaking proceeding that could *supplement* FORR, but not be based on a one-sided proposal favoring a few, select railroad stakeholders that would not create a meaningful opportunity for a balanced and efficient alternative dispute resolution (“ADR”) fair to all stakeholders.

I.

THE HISTORY OF THE BOARD’S ARBITRATION PROGRAMS REVEAL THE DIFFICULTY OF ESTABLISHING EFFECTIVE ARBITRATION PROGRAMS

Petitioners’ summarize efforts by the STB since 1997 to review and encourage the use of arbitration and other Board-sponsored alternative dispute resolution procedures as a means of resolving disputes, including in Docket No. EP 560,² Docket No. EP 699,³ and

² *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the STB*, (STB served Sept. 2, 1997).

³ *Assessment of Mediation & Arbitration Procedures*, (STB served May 13, 2013).

Docket No. EP 730.⁴ Petitioners' historic summary appears to be an attempt to justify the need for its proposal, since stakeholders have refrained from using Board-sponsored arbitration to date, despite the efforts of the Board and its predecessor, the Interstate Commerce Commission ("ICC"), to create usable and voluntary arbitration rules, including for rate cases. However, Petitioners' limited, generic description of this history is incomplete. For example, Petitioners do not address similar proceedings initiated by the ICC.⁵ They also neglect to address a major proceeding addressing arbitration, Docket No. EP 586,⁶ that sought to promote and facilitate the use of ADR and, among other things, added formal rate case procedures in Stand-Alone Cost cases (at 49 C.F.R. 1111) that a complaint include a statement that the complainant considered seeking arbitration.

In those proceedings, the Petitioners and other railroads collectively assailed the potential use and efficacy of arbitration for resolving rate disputes. The Petitioners now fail to explain how and why their position has suddenly changed. For example, in Docket No. EP 586, Petitioners and other railroads proclaimed that with arbitration, "[c]laimed expense savings for parties may prove illusory . . . since arbitration can be just as costly as

⁴ *Revisions to Arbitration Procedures*, (STB served Sept. 30, 2016).

⁵ In the early 1990s the ICC sought to encourage the use of ADR procedures whenever agreed to by the parties and where practical to do so. *See Use of Alternative Dispute Resolution Procedures in Comm'n Proceedings & Those in Which the Commission Is A Party*, 8 I.C.C.2d 657 (1992). Those rules were established at 49 C.F.R. 1109.

⁶ *Arbitration – Various Matters Relating to Its Use As an Effective Means of Resolving Disputes That Are Subject to the Bd.'s Jurisdiction*, EP 586 (STB served Sept. 20, 2001 and May 22, 2002) (proceeding designed to promote and facilitate use of ADR and, *inter alia*, added formal rate case procedures in Stand-Alone Cost cases (at 49 C.F.R. Pt. 1111)).

litigation,” and that arbitration “would merely be an inferior substitute for adjudicatory proceedings before the Board, an expert body established in part to conduct such proceedings.” Docket No. EP 586, AAR Initial Comments at 2 (filed Nov. 21, 2001). Over a decade later in EP 699, the Petitioners and other railroads even more firmly asserted their steadfast opposition arbitrating rate disputes:

The AAR does not support allowing arbitrators to determine the reasonableness of rates whether through reparations or prospectively. The standards for rate reasonableness either require access to confidential unmasked revenue data in the waybill sample or staff resources adequate to analyze stand-alone cost evidence. An arbitrator lacks both and therefore should not be allowed to set rates for past or future shipments. The Board has correctly concluded that arbitration should not be used for any matter that requires prospective or injunctive relief.

Docket No. EP 699, AAR Reply Comments, at 12 (filed June 18, 2012).

In the face of new rate reasonableness rules that the Board as “an expert body established in part to conduct such proceedings” has proposed be established through FORR, the Petitioners have abruptly reversed course, without explanation. Petitioners now suggest voluntary arbitration of rate disputes, in place of Board adjudication under FORR, but only in strict conformance with their proposed rules. Petitioners assert that their proposal would be superior to Board adjudication, and produce a “win-win solution for railroads, customers, and the Board.” Pet. at 28. Petitioners also insist on the adoption of a number of non-negotiable “key” elements of their proposal, described further below. For example, Petitioners now propose substantial restrictions be placed on access and use of the same confidential waybill sample data to which they previously explained was an essential component in bringing and assessing a rate challenge.

As another example, in Docket No. EP 586, Petitioner CN, in joint comments filed with Canadian Pacific Railway Company (“CP”), strongly criticized the possible establishment of confidential, non-precedential arbitral decisions. It asserted that “if arbitration decisions themselves lack precedential value, parties in each arbitration are proceeding without the benefit of the arbitration that has gone before, which is less efficient than where precedents are known and can be utilized. In such a system, the most litigious parties may have an advantage over those who resort to the process only infrequently.” Docket No. EP 586, CN and CP Initial Comments at 9 (filed Nov. 21, 2001). Later in Docket No. EP 699, the railroad industry urged that arbitral awards should have no precedential value, but still strongly advocated public decisions that they contended would “discourage extreme positions and . . . encourage voluntary settlement.” Docket No. EP 699, AAR Reply Comments, at 10 (filed June 18, 2012). However, unpublished, confidential decisions that are non-precedential are now a non-negotiable aspect of Petitioners’ proposal.

Petitioners’ selective review of the long 20+ year history of arbitration proceedings fails to describe or explain the many inconsistencies from their previous positions readily apparent in Petitioners’ proposed rules, including the fact that the Board has a fundamental responsibility as an expert agency to establish workable rate reasonableness rules and standards for use by stakeholders, which they are attempting to do through FORR. These omissions, and a more careful review of the Board’s (and the ICC’s) long history of proceedings on the subject only serve to confirm that implementing more streamlined, usable, and voluntary arbitration standards is no easy fix. Additionally, despite Petitioners’ insistence on no changes (as explained further below), many elements of the Petitioners’

proposal are complex and likely subject to significant dispute among stakeholders, including from other railroads that have not joined the Petition to date. At a minimum, even if new, balanced arbitration rules for rate disputes could eventually be adopted, they would likely take considerable time and effort to implement.

II.

PETITIONERS' PROPOSAL TO IMPOSE A PRE-CONDITIONED, ONE-SIDED ARBITRATION PROGRAM FOR RATE DISPUTES IS UNPRECEDENTED, UNWARRANTED, AND WILL NOT PRODUCE A "WORKING ARBITRATION PROGRAM" FOR STAKEHOLDERS

The Petitioners insist that there are certain "key features" of their proposed rules that are non-negotiable, and their support for the rules, and their agreement to voluntarily arbitrate rate disputes, is expressly conditioned on the Board adopting each and every one of these key elements. These essential features include strict confidentiality of proceedings and decisions; strict monetary rate relief caps; shipper arbitration use constraints; prohibitions on evidentiary filings concerning the revenue adequacy status of the defendant railroad; prohibitions on establishment of reasonable rates based on the revenue adequacy status of the railroad; prohibitions on the use of the "limit price test" in determining railroad market dominance; and the right of railroads to withdraw and opt-out from any and all arbitrations (i) should the Board adopt any new rate case rules, including FORR, or adopt any material changes to existing rate reasonableness rules, without fully exempting participating carriers from the new rules, or (ii) if a railroad becomes subject to multiple or simultaneous arbitrations at specified levels. Petitioners blithely assert that these preconditions will somehow incent voluntary participation and create a better program that "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.” Pet. at 20.

Petitioners’ attempts to establish onerous, one-sided, and non-negotiable pre-conditions on major elements of its proposed rules, several of which appear to violate the statute (49 U.S.C. § 11908) or overturn or sidestep established precedent, appear unprecedented and provide reason enough alone to deny the Petition. For example, the Board has long been on record that revenue adequacy is an essential first constraint in limiting the extent to which railroads can price their services:

Carriers do not need greater revenues than [the Revenue Adequacy Constraint] standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues. Therefore, the logical first constraint on a carrier’s pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this “revenue adequacy” level. In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs.

Coal Rate Guidelines, 1 I.C.C.2d 520, 535-36 (1985) (footnote omitted). Notwithstanding the agency’s clear and forceful precedent that carriers with adequate revenues should not be permitted to exploit captive shippers, the general recognition that the revenue adequacy goal has been achieved by the railroads, and that the revenue adequacy constraint is “the logical first constraint on a carrier’s pricing” (*id.*), the Petitioners still insist that the Board establish, as a precondition for arbitration, that no evidence be presented relating to revenue adequacy of the defendant railroad, and the panel be precluded from basing decisions on the revenue

adequacy constraint. This effectively insulates railroads from any review or decision based on the longstanding revenue adequacy constraint.

Such preconditions are absurd. The Board should grant a request to institute a rulemaking proceeding only if the requesting party demonstrates an “adequate justification.”⁷ Petitioners present no such justification in their Petition, which does not yet even enjoy the support of all railroads. Neither Olin, nor likely any other informed shipper can or will support this or any similar proposal. The Board should not devote its time and limited resources to considering this proposal, which if adopted would actually have serious, chilling effects and discourage shippers from pursuing meritorious maximum rate relief through voluntary arbitration.

III.

THE PETITIONERS’ PROPOSAL IS A DIVERSIONARY TACTIC AND MISGUIDED EFFORT TO SUBVERT FORR

While Petitioners assert that their arbitration proposal is a “win-win” solution for stakeholders and the Board, what the proposal really amounts to is a thinly veiled initiative to strongly discourage the Board from implementing any new meaningful rate reasonableness procedures. This includes suppressing the adoption of FORR, or any material changes to existing rate reasonableness methodologies, by requiring as a precondition that the railroads participating in the arbitration program be allowed to opt out at-will from arbitration, even from ongoing arbitrations, should any such rate case changes be made by the Board. The proposed rule authorizing withdrawal from arbitration is arbitrary and makes

⁷ 49 C.F.R. § 1110.2(f).

little sense, especially since the Petitioners clearly favor their own arbitration proposal over FORR, and propose it as an alternative to FORR. The adoption of FORR or any other material changes to the STB's rate reasonableness standards should in theory incent the railroads to continue to favor arbitration of rates over litigation of rates before the Board, in order to avoid being subject to FORR. Instead, the Petitioners are attempting to use their one-sided voluntary arbitration proposal as a hammer to thwart the Board's adoption of FORR or other meaningful maximum rate relief changes. In so doing, Petitioners effectively seek to use their proposal as a means to freeze in place current standards that fail to adequately protect captive shippers.

As even the railroads have long acknowledged, shippers have a statutory right to go to the Board to seek rate relief, and the Board has a responsibility to establish effective rate relief rules. Congress created the STB and tasked it with carrying out the national rail transportation policy "to maintain reasonable rates where there is an absence of effective competition." 49 U.S.C. § 10101(6). That obligation is not discretionary. There is a demonstrated need for the Board to evaluate and implement new and revised rate reasonableness standards to ensure shippers have a viable method and meaningful opportunity to challenge rates. It should not support or encourage proposed rules from select stakeholders that discourage it from doing so. The Board should thus reject the Petition and in its place proceed with the adoption of FORR – balanced administration of the Act requires no less.

IV.

SPECIFIC DEFECTS IN PETITIONER'S PROPOSAL

Even assuming arguendo that there were some sound reason to seriously consider the Petitioners' arbitration proposal (and there is not), the Petitioners' proposal suffers from a number of defects that should preclude the proposal from receiving any meaningful consideration, and that instead support the adoption of FORR. Some of the most glaring defects and issues are:

1. Requires mediation before arbitration. Petitioners seek to require mediation before an arbitration, and that such mediation occur privately, confidentially, and without STB involvement. This will only serve to establish another roadblock to timely rate relief. The Board has limited mandatory mediation to SAC cases, and even the railroads have previously opposed mandatory mediation in favor of consensual mediation. The Board's rules also expressly provide that where one or more party does not consent, proceedings will not be stayed pending mediation. 49 C.F.R. § 1109.3(e). The proposed FORR rules avoid this problem by authorizing mediation only where the parties voluntarily consent to mediation, without automatic stay of proceedings, and provide for the use of professional Board staff to mediate and assist the parties in resolution.
2. Arbitrator decides market dominance. Under 49 U.S.C. § 11708, and the Board's arbitration rules under 49 C.F.R. § 1108, the arbitration does not start until after the Board determines market dominance, which would delay proceedings and add another procedural hurdle to the process not presented by FORR. Petitioners' proposal seeks to avoid this obstacle by possibly allowing for streamlined market dominance procedures, and by having the arbitrator decide market dominance issues. But that suggestion is in conflict with the statute. Petitioner's suggestion that the Board can simply ignore the statute, by using its injunctive relief authority under 49 U.S.C. § 1321 apparently to create a whole new alternative arbitration rate relief program in conflict with, but separate from the rate arbitration rules established by the Board under § 11708, is unsupported and specious. The proposed FORR rules avoid this problem by authorizing the Board to determine market dominance and rate reasonableness simultaneously in the same proceeding.
3. Eliminates the limit price test. Petitioners seek to undermine and apparently reverse through their proposal the possible use of the Board's limit price test established in 2012 for determining market dominance on grounds that the Board decision adopting the test was "highly contested" and that Petitioners should not be required to abide by

Board precedent that they did not support. The proposed FORR rules do not seek to override or avoid established precedent.

4. Requires parties to pay for arbitration and allows additional for cause objections. Petitioners seek to have the selection of arbitrators that are not included in the roster of arbitrators maintained by the Board, with party arbitrators selecting the third arbitrator, and enabling new cause objections (including for “perceived bias or animosity” or “adverse business dealings”) that are contrary to the arbitration selection procedures under 49 U.S.C. § 11708 and 49 C.F.R. § 1108. Also, under rate arbitration, the parties would be required to pay for the arbitrators. These issues are not raised by FORR, because FORR leverages the Board and its staff’s expertise and experience in adjudicating cases in making a rate reasonableness determination.
5. Limits discovery. Petitioners seek to limit discovery to 20 written document requests and five interrogatories, and severely restrict access to unmasked confidential Waybill Sample data. The railroads previously strongly supported full access and use of the Waybill Sample data as an essential component of arbitration. The Board’s proposed rules under FORR include no such Waybill Sample restrictions, and no similar limitations on discovery.
6. Limits available relief. Petitioners seek substantial rate caps and time limitations on relief that conflict with the 49 U.S.C. § 11708, which provides for rate prescriptions and damages of up to \$25,000,000, with rate prescriptions in effect for up to five years. The proposed one-year limit on rate prescriptions cuts in half the proposed two-year limit on rate prescriptions proposed under FORR.
7. Limits ability to seek relief for multiple claims. Petitioners seek to limit shippers to bringing one arbitration at a time against a defendant railroad, and require them to aggregate separate claims, with the same rate caps on relief applying on a single claim applying equally to multiple claims. The proposed FORR rules include no such limitations on bringing more than one arbitration at a time, and no similar relief caps.
8. Prohibits evidence on revenue adequacy. Petitioners seek to utilize broad standards, including that the arbitration panel “give due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues” and that decisions “shall be consistent with sound principles of rail regulation economics.” At the same time, Petitioners insist as a pre-condition that shippers be precluded from submitting evidence on the revenue adequacy status of the carrier, and the panel from basing their decision on carrier revenue adequacy. The Petitioners contend that railroads have “raised serious legal, factual, and policy flaws” with the revenue adequacy constraint and that they should not be required to abide by Board precedent establishing the constraint that they do not support. Petitioners then insist that they be allowed to assert, and the panel be allowed to decide that the rates they are charging are necessary to permit them to collect adequate revenues. The proposed FORR rules

do not seek to limit a shipper's ability to present evidence related to the revenue status of the carrier, or the panel from making a decision based on the revenue adequacy constraint, or otherwise override or avoid established precedent.

9. Carrier gets the last word. Petitioners seek to enable a defendant a fair opportunity to respond to the complainant shipper's case-in-chief, but fail to provide for shipper-rebuttal and the right to be able to close the record. The proposed FORR rules avoid this problem and extra expenses by providing for simultaneous final offer submissions, and replies including all supporting materials.
10. Requires decisions be confidential. Petitioners seek to have arbitral decisions be confidential and non-precedential. However, the Board's rules provide for publication of arbitration decisions, with appropriate redactions of confidential information. (49 C.F.R. § 1108.7(c)). Petitioners' proposal also conflicts with the railroads' prior strong opposition to confidentiality in the arbitration process. The Petitioners have previously strongly urged the Board to make arbitration awards public as a means discourage extreme positions and encourage settlement, create incentives for arbitrators to render thoughtful, well-reasoned decisions, and to promote transparency of the arbitration process. The proposed FORR rules expressly promote these goals, by allowing for publication of Board decisions.
11. Additional appeals and delays. Under the proposed arbitration rules, arbitration is subject to two appeals (1) to the full Board and (2) to court, presenting further opportunities for delays, added expenses, and roadblocks to relief with an extra layer of appeals than that provided under FORR.
12. Creates uncertainty with opt-out provisions. Under the proposed arbitration rules, defendant railroads can withdraw from arbitration if the Board adopts FORR, makes material changes to its rate reasonableness methodologies or creates new ones, or if a carrier faces multiple arbitrations. The proposed FORR rules contain no such opt-out elements, creating far more certainty in administration and implementation of rate reasonableness programs, and without chilling the possible future implementation of new meaningful rate review standards.

CONCLUSION

For the reasons stated, the Board should deny the Joint Petition and instead promptly complete FORR and implement its own workable rate dispute resolution process leveraging its own expertise. FORR is the most important reform the STB can make in the near term; it will help create a more level playing field for negotiations with the railroads.

There are many obstacles to establishing arbitration as an effective supplemental rate relief remedy to FORR before the Board. Any further consideration of such new voluntary arbitration rules as a *supplement* to FORR could take place in a separate proceeding, but that proceeding would likely take considerable time and effort to resolve many complex issues, and it should await the adoption and full implementation of FORR.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Frank Chirumbole", is written over a light gray rectangular background.

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