

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. EP 765

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

U.S. WHEAT ASSOCIATES TRANSPORTATION WORKING GROUP RESPONSE

On July 31, 2020, five of the seven Class I railroads ("Railroads") filed a Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes at the Surface Transportation Board ("STB" or "Board"). Essentially, this proposal creates a voluntary arbitration program for small rail rate cases between the signatory Railroads and their shippers.

Before deciding whether to institute a rulemaking proceeding, the Board stated that it would benefit from having these Railroads' reaction to the proposed modifications to the arbitration program suggested by various shipper parties in reply to the proposal. Accordingly, the STB permitted these Railroads to submit a supplemental pleading responding to the shippers' replies no later than September 10, 2020. It also permitted other interested persons to respond to the replies by this date.

The U.S. Wheat Associates Transportation Working Group (“TWG”) respectfully submits its response in accordance with this STB decision. U.S. Wheat Associates (“USW”) is the export market development organization for the U.S. wheat industry. USW promotes the reliability, quality, and value of all six U.S. wheat classes to wheat buyers, millers, bakers, food processors and government officials in more than 100 countries around the world. Its mission is to “Develop, maintain, and expand international markets to enhance wheat’s profitability for U.S. wheat producers and its value for their customers.” Funding is made possible through checkoff dollars, goods and services from 17 state wheat commissions, and cost-share grants from the U.S. Department of Agriculture’s (“USDA”) Foreign Agricultural Service. TWG is a working group within USW that examines rail and other transportation issues on behalf of these member Commissions.

The Railroad Rate Arbitration Proposal

Only Union Pacific, Canadian National, CSX, Norfolk Southern, and Kansas City Southern signed on to the rail rate arbitration proposal submitted to the STB. BNSF and Canadian Pacific were not signatory to the filing. These signatory Railroads voluntarily agreed to join this program for five years. However, these signatory Railroads would only join if they are not required to participate in the Final Offer Rate Review (“FORR”) process as proposed by the STB in Ex Parte 755.

The arbitration process would limit cases to \$4 million over a two-year period, which are the same limits that the STB proposed in FORR. There is a right to appeal an arbitration decision to the Board. All decisions would be confidential and inadmissible in future arbitration cases.

Also, shippers could bring only one case at a time against a particular rail carrier but could challenge rates in multiple lanes in one case. A three-arbitrator panel chosen by the parties makes the decision. Parties would pay fees of their own arbitrator and split the fees of a third neutral arbitrator.

Decisions would be issued by the arbitration panel in 120 days, with 45 days for discovery. Discovery would be limited to 20 document requests, 5 interrogatories, and no depositions. Market dominance would be decided by the arbitrators using the streamlined test approved by the Board. There would also be limited access to Waybill Sample data.

The rate reasonableness determination would be based on rail regulatory economics and statutory guidelines with no constraints on how a party would bring a case, meaning a shipper does not have to follow existing rate case methodologies. The Railroads stressed that the revenue adequacy constraint would not be permitted, nor would the limit price test for market dominance.

Railroads could withdraw before the five-year period ends if the STB creates a new rate case methodology, changes this rate arbitration process, or does not exempt participating Railroads from FORR. Railroads could also withdraw if a railroad faces over 25 cases in a rolling year or more than 10 simultaneous arbitrations.

Generally, the arbitration proposal by the Railroads is very similar to FORR but presents numerous concerns to TWG. Several shippers/government department have already expressed their concerns to the Board.

Shippers' Replies to Proposals

The Joint Shippers (American Chemistry Council, Corn Refiners, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute) replied with concerns about the proposal calling it a waste of time and urging the STB to focus on FORR. Their first concern is that the proposal is voluntary and only will be used by Railroads if adopted as proposed. Therefore, a rulemaking process does little for shippers because any changes to the proposal would mean Railroads would not participate. Also, the waiver from FORR would mean shippers could not use the Board's new process because these five Railroads would be in arbitration. In addition, the proposal does not allow the use of a revenue adequacy constraint which is not acceptable to these shippers.

The National Grain and Feed Association ("NGFA") supports the proposal with modifications but urges the STB to proceed with FORR. NGFA has two major concerns with the proposal including the waiver from FORR for these participating Railroads. NGFA suggests a shorter review period of the arbitration proposal than the five years. It suggests that the first rate case by shippers should be by arbitration to see how it works, and/or Railroads should forego this waiver, as two ways to address this concern. NGFA also is opposed to the confidentiality of the decisions and states they should be public like in its arbitration process to encourage settlement. NGFA concurs with the cap unless the STB issues a different one in FORR, the procedural process, arbitration panel selection process, and streamlined market dominance (but thinks other options should be available). NGFA suggests allowing "flexible market-based standards" like in the Montana-BNSF arbitration process and clarifying that shippers can still challenge rates under existing rate case methodologies.

USDA urges the STB to proceed with FORR. It believes an arbitration program should complement and not substitute for FORR. USDA also opposes the Railroads' removal of the revenue adequacy constraint and limit price test from use in the arbitration process. In addition, USDA believes decisions should be public. USDA does not like the 5-year period for participation and believes shippers and Railroads should evaluate arbitration use for each case and should provide feedback at some point about the process. USDA generally supports the idea of arbitration that should be examined in a proceeding but believes FORR should also be in full effect.

Olin opposes the proposal. It strongly opposes the exclusion of a revenue adequacy constraint. It also views this proposal as an attempt to freeze any changes to the rate case process and deter the use of FORR. In addition, Olin states that mandatory mediation which delays the process, market dominance decided by the arbitrator which violates 49 U.S.C. § 11708, elimination of limit price test, payment for arbitrators, limits on discovery and Waybill Sample data, limits on relief and time, limits on multiple cases, prohibition of revenue adequacy constraint, no rebuttal for shippers, confidentiality of decisions, right to appeal to STB, and opt-out right for Railroads are all significant defects in the proposal.

American Fuel & Petrochemical Manufacturers ("AFPM") objects asserting that the proposal is an attempt to comment in the FORR proceeding after the fact. AFPM views this proposal as an attempt to delay the FORR proceeding. It is also concerned that the Railroads' conditions for their participation undermines the STB's authority. In addition, AFPM has concerns that the lack of uniformity in participation by railroads will create unfair results for some shippers.

Generally, TWG has concerns similar to these shippers/government department. Its main concerns being that BNSF is not signatory to the proposal and the five-year participation period.

FORR v. Arbitration

FORR is a better option for rail shippers which is exactly why the Railroads have proposed this arbitration program. There are various aspects of the proposal that are similar to FORR. FORR is a 135-day process, so it is only slightly longer than the arbitration proposal timing. Both concepts have a \$4 million cap over two years. However, the Board asked for comments on lifting the cap entirely and lengthening the process in the FORR proceeding. If the arbitration proposal is adopted, the Railroads would be exempted from FORR keeping them removed from any increase in the cap.

While there are some significant similarities between FORR and the arbitration proposal, there are also some important differences that make FORR more favorable to wheat shippers. The FORR decisions would be public, so shippers could learn from precedent, whereas the arbitration decisions would be confidential. Also, the appeal right to the STB in the arbitration proposal would make that process longer because Railroads will probably always appeal if they lose a case. In addition, parties will have to pay for the arbitrators, making this an additional cost in these proceedings.

Moreover, TWG has a serious concern that the process would be unfair if BNSF and CP do not participate. A large amount of TWG stakeholders' rail traffic moves on BNSF. As a result, the arbitration process as proposed by these Railroads would not be useful for wheat shippers in many instances.

In addition, the arbitration proposal excludes the revenue adequacy constraint which could be a useful methodology for shippers. FORR does not exclude this constraint. Also, the arbitration proposal does not allow a shipper to bring multiple cases against one railroad at the same time. FORR does not prohibit this possibility. Therefore, FORR is much more useful to wheat shippers in the event they ever have to bring multiple cases against a railroad.

Overall, this request appears to simply be a delay tactic to drag out the FORR proceeding. This result is unacceptable and should not be permitted by the Board. The Board commendably has devised an effective, usable method for shippers to bring a rate case in FORR. It should not permit the Railroads to use this last gasp effort to bog down the regulatory process.

Second, this arbitration proposal appears to be a strategic move to stop any increase in the recovery cap in FORR. If the arbitration proposal only allows the \$4 million cap over two years, it would never make sense to raise the cap in FORR because the Railroads would all opt to participate in the arbitration process, thereby making them exempt from FORR as required in the proposal. This arbitration proposal is a transparent attempt to make sure that FORR stays a small rate case procedure. However, shippers want a large rate case process, in addition to a small rate case process, that works, as the present large rate case procedures have been found to be generally ineffective, overly complicated, and too expensive. FORR could possibly be the answer to this need if the cap is lifted.

Conclusion

There are numerous other reasons listed above that demonstrate why this arbitration proposal is not what it appears. The Railroads are simply trying to delay the process and stop

FORR from becoming an option for shippers. It appears that most shippers have figured out that this is what the Railroads are doing. While NGFA and USDA have shown more support than other shippers for the general concept of arbitration, they both urge the STB to move forward with FORR. Similarly, TWG urges the Board to finalize FORR whether or not it decides to explore this proposal. If the Board does explore the arbitration proposal, TWG has serious concerns about BNSF's absence from the signatory Railroads and the relatively short, five-year commitment by them. TWG is open to discussions with these Railroads but urges the Board to issue a final rule in FORR.

Respectfully submitted,

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