

Before the Surface Transportation Board

STB Docket No. EP 765

ENTERED
Office of Proceedings
September 10, 2020
Part of
Public Record

**Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small
Rate Disputes**

Supplemental Response of Joint Shippers

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The American Chemistry Council (“ACC”), Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute, (collectively “Joint Shippers”) submit this supplemental response primarily to address the reply of the National Grain and Feed Association (NGFA) to the petition for rulemaking to establish a small rate case arbitration program that five Class I railroads (“Petitioners”) filed in Docket No. EP 765 on July 31, 2020 (the “Petition”). The Surface Transportation Board (“Board”) authorized this supplemental response in its decision served August 26, 2020, stating that it would benefit from receiving reaction to the proposed modifications that the NGFA and other parties suggested to the arbitration program in their replies to the Petition.

Joint Shippers generally support NGFA’s suggested modifications. But neither NGFA nor any other party has suggested a modification that would adequately address Joint Shippers’ main concern: Petitioners’ proposal will exempt railroads from any future Final Offer Rate Review (“FORR”) process while they participate in the arbitration program. The FORR exemption would allow railroads to force shippers to use arbitration regardless of whether they prefer FORR¹ and, combined with Petitioners’ proposed prohibition of revenue-adequacy standards in arbitration proceedings, would enable railroads to reduce their exposure to a revenue-adequacy standard.² Unless the FORR exemption is eliminated, Joint Shippers do not believe that any modifications to the Petitioners’ proposal will produce a meaningful arbitration program.

¹ Joint Shippers Reply at 4.

² *Id.* at 5.

Part I, below, explains that the Board should not consider the proposed arbitration program unless the FORR exemption is eliminated. If the FORR exemption is eliminated from the proposal, Joint Shippers would not oppose the commencement of a rulemaking to further evaluate the proposal. Part II identifies modifications to the proposal that should be part of any such rulemaking.

I. JOINT SHIPPERS OPPOSE ANY ARBITRATION PROGRAM THAT EXEMPTS RAILROAD PARTICIPANTS FROM FORR.

Petitioners' proposed exemption from FORR for any railroad that participates in the arbitration program is unacceptable to Joint Shippers. It severs access to FORR, which is intended to make rate review accessible to many shippers. It also removes any incentive to ensure the arbitration program is effective. While Joint Shippers appreciate NGFA's proposals to address these problems, which NGFA itself characterized as potentially insurmountable,³ the proposals fall short. Accordingly, so long as the FORR exemption is an essential element of the Petitioners' voluntary participation in their proposed arbitration program, the Board should not expend its resources on a rulemaking.

Under Petitioners' proposal, a railroad would be exempt from a future FORR rule while it participates in the arbitration program.⁴ No shipper could bring a FORR case against a railroad who participates in the arbitration program; the shipper would be forced to arbitrate. This raises three key concerns.

³ NGFA Reply at 2.

⁴ Petition, app. A § 1108a.3(c)(1)(i) at 4.

A. The FORR exemption would deprive many shippers of meaningful access to rate review.

The exemption would deprive many shippers of meaningful access to rate review.

FORR's purpose is to make rate review more accessible by reducing costs and increasing speed.⁵ FORR would accomplish this without restricting the use of any rate-review methodology so long as such methodology satisfies certain basic criteria.⁶ Petitioners' proposed arbitration program trims many elements of FORR that are designed to make it accessible. For example, the proposed program prohibits use of any system-wide revenue-adequacy standard, offers less prescriptive relief than what is proposed for FORR, and restricts the number of disputes that a shipper may bring. Petitioners have not identified any aspect of their arbitration program that would offset these restrictions.

B. The FORR exemption would prevent many shippers from using a revenue-adequacy standard to challenge rates.

The FORR exemption enables Petitioners to foreclose the ability of many shippers to challenge a rate using the revenue-adequacy constraint. Without access to FORR, the most accessible rate-review option for carload shippers will be Petitioners' arbitration program. Under that program, arbitrators are prohibited from considering standards based on a railroad's revenue adequacy.⁷ The Board's FORR proposal provides the only procedures that are practical for most shippers to challenge unreasonable rates. Because few shippers can endure the time and expense of existing rate-review processes, the exemption from FORR would deprive most shippers of a revenue-adequacy standard.

⁵ *Final Offer Rate Review*, EP 755, slip op. at 7 (STB served Sept. 12, 2019).

⁶ *Id.* at 10.

⁷ Petition, app. A § 1108a.9(b)(2)(ii) at 9.

Petitioners should not be permitted to use the FORR exemption to deprive shippers of a revenue-adequacy constraint, which has long been established as a proper rate reasonableness standard by the Board. Over 35 years ago, the Interstate Commerce Commission explained that “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 [revenue adequacy].”⁸ This constraint is especially relevant today because railroads are reaching long-term revenue adequacy, which curtails or eliminates their need for differential pricing. Moreover, ACC recently has submitted, in EP 755 and EP 761, a rate-benchmarking model that applies the revenue-adequacy constraint consistent with sound economic principles and could be readily applied in FORR proceedings. Nothing justifies this attempt to deprive shippers of a long-established revenue-adequacy constraint just as railroads are becoming revenue-adequate and viable methodologies for applying the constraint have been developed.

Also, Petitioners have failed to identify a concern that would warrant prohibiting shippers from using FORR to apply a revenue-adequacy standard. Petitioners’ only explanation for prohibiting use of a revenue-adequacy standard is that the highly-contested nature of revenue adequacy warrants full access to appeal, which is not available under arbitration.⁹ This explanation does not, however, justify preventing shippers from asserting a revenue-adequacy standard in an FORR proceeding, which would result in a Board decision that is not subject to appeal restrictions. In fact, Petitioners expressly state that “their refusal to consent to arbitrate [revenue adequacy] . . . simply means that [revenue-adequacy] cases must be decided by the

⁸ *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 535 (1985).

⁹ Petition at 27.

Board and not by an arbitrator.”¹⁰ The Board thus should reject the FORR exemption as an unjustified attempt to shield railroads that participate in arbitration from revenue-adequacy standards.

C. The FORR exemption discourages railroads from supporting measures to ensure the arbitration program is effective.

The exemption creates a disincentive for railroads to seek improvements to the arbitration program to ensure it is effective. If shippers have access to FORR, railroads must ensure that the arbitration program operates effectively and offers advantages over FORR or shippers will use FORR instead of the arbitration program. In contrast, shippers who do not have access to FORR are effectively forced to use the arbitration program regardless of how poorly it functions or whether it provides any advantages over FORR.

D. NGFA’s proposals to address the FORR exemption do not ensure that shippers will have an accessible rate-review process.

NGFA has offered three potential options to address these concerns, but none prevents shippers from being deprived of an accessible rate-review process that fully considers the railroad’s revenue adequacy. The potential options are:

- A three-year review. Under this proposal, the Board would make a binding commitment to assess the program every three years to determine whether to modify, extend, or discontinue it.
- A first-case requirement. This proposal would prohibit a shipper from using FORR only until it has arbitrated a rate dispute against the railroad.
- An opt-out. This proposal would allow railroads to voluntarily decline the FORR exemption.¹¹

¹⁰ *Id.*

¹¹ NGFA Reply at 6.

Although the three-year review would help ensure that the arbitration is working effectively, it still would leave shippers without the broader access to rate review that FORR provides and without an accessible rate-review process for applying a revenue-adequacy standard. A first-case requirement would also deprive shippers of FORR and impair their access to a revenue-adequacy standard. While the first-case requirement would provide a shipper with access to FORR after arbitrating a single dispute, many small shippers probably would not have enough qualifying captive lanes to bring multiple disputes. Finally, the voluntary opt-out does little to address the exemption. If the railroads are willing to opt out of the exemption, there is no need to propose it at all.

Joint Shippers believe that the only way to resolve their issues with the FORR exemption is to remove it from the proposed arbitration rules. Moreover, the Board should not undermine its work to create a more accessible rate-review process (i.e., FORR) and shield railroads from a revenue-adequacy standard by accepting an FORR exemption in any form. Unless the Petitioners are willing to move forward without the FORR exemption, the Board should deny the Petition.

II. IF THE FORR EXEMPTION IS ELIMINATED FROM THE ARBITRATION PROPOSAL AND THE BOARD COMMENCES A RULEMAKING TO EXPLORE ADOPTION OF THE PROPOSAL, THE BOARD SHOULD CONSIDER AND ADOPT CERTAIN MODIFICATIONS.

If the FORR exemption is eliminated from the Petitioners' arbitration proposal, Joint Shippers would not object to further consideration of the proposal subject to the modifications identified below.

A. The arbitration program should allow arbitrators to consider a railroad's revenue adequacy.

The Board should remove both the prohibition against “any evidence related to the revenue adequacy of the defendant carrier”¹² or “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).”¹³ This prohibition conflicts with Congress’s directive that arbitrators consider revenue adequacy. Moreover, it cannot be remedied by NGFA’s suggestion to make available the Rate-Increase Constraint (“RIC”) that the Board’s Rate Reform Task Force outlined in its April 25, 2019 report. ACC’s proposed benchmarking model, however, would provide a meaningful revenue-adequacy constraint without implicating many of the Petitioners’ objections.

The prohibition on considering revenue-adequacy evidence or a revenue-adequacy constraint is irreconcilable with Petitioners’ assertion that their program will comply with Congress’s directive that arbitrators “giv[e] due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.”¹⁴ Revenue-adequacy evidence is essential to identify the extent to which differential pricing is necessary to ensure that a railroad earns adequate revenues. By prohibiting arbitrators from considering evidence of revenue adequacy or applying a revenue-adequacy constraint, the arbitration program prevents arbitrators from considering the railroad’s need for differential pricing. Petitioners cannot have it both ways by insisting that arbitrators consider the need for differential pricing to ensure adequate revenues while simultaneously prohibiting the presentation of revenue-adequacy evidence and application

¹² Petition, App. A, Proposed § 1108a.7(e)(2)(iii).

¹³ *Id.*, App. A, Proposed § 1108a.9(b)(2)(ii).

¹⁴ 49 U.S.C. § 11708(c)(3); Petition at 14.

of the revenue-adequacy constraint. Accordingly, the Board must allow revenue-adequacy evidence and ensure that arbitrators may consider such evidence in their determination of rate reasonableness.

NGFA's proposal that a RIC should be available to shippers under the arbitration program does not adequately address Joint Shippers' concerns with the prohibition on revenue-adequacy standards. RIC works by identifying a rate threshold above which differential pricing is not needed for a railroad to earn adequate revenues on certain categories of movements. Because RIC is merely a constraint on rate increases, a rate that far exceeds the RIC threshold would not be unreasonable even though it reflects a level of differential pricing that is unnecessary for the railroad to maintain revenue adequacy.

ACC has developed a benchmarking model that applies the revenue-adequacy constraint in a manner that does not implicate the full panoply of objections raised by the Petitioners. ACC's proposal is easy to implement and produces economically justified results that are pegged to the characteristics of individual market-dominant movements. It is not the system-wide rate cap or rate-of-return regulation that the Petitioners profess to oppose.

B. Arbitration decisions should be public.

Joint Shippers support NGFA's proposal that arbitration decisions be public, but not precedential. NGFA explained that making arbitration decisions confidential would undermine the arbitration program's accountability and integrity.¹⁵ NGFA also observed that public decisions provide an incentive for parties to settle disputes themselves.¹⁶ Joint Shippers share these observations. If arbitration decisions are kept confidential and railroads who participate in

¹⁵ NGFA Reply at 7.

¹⁶ *Id.*

arbitration are exempt from FORR, meaningful oversight is nearly impossible. Further, parties are more likely to settle cases rather than risk a publicly available negative decision, even if it does not have any precedential value.

C. Two years of rate relief should be available in any combination of reparations and a prescription.

Petitioners have proposed two years of rate relief through arbitration, but only one of those years could be prescriptive. The Joint Shippers concur in a two-year duration, but that relief should be allowed in any combination of reparations and prescription. A one-year prescription limit substantially undermines the benefit of a favorable arbitration decision.

A rate-review process that provides only one year of prescriptive relief will have little practical benefit for most carload shippers because their need for rate relief typically relates to *future* traffic. Transportation costs often are one of the, if not the, highest component in carload commodity pricing. Therefore, a shipper may not be able to win a customer's or supplier's business unless and until it prevails in a rail rate case. That business also is often awarded in 1- to 3-year contracts. Thus, a shipper may choose not to bid for business until it has certainty as to its transportation costs. In such circumstances, there would not be any reparations. And, timing of the arbitration decision can substantially reduce even the one-year prescription period.

Petitioners do not explain why prescriptive relief should be limited to one year even though the Three Benchmark simplified methodology permits four years of relief in any combination of reparations and prescription. The potentially less robust nature of arbitration already is accounted for by proposing just two years of relief. Thus, arbitration should provide two years of rate relief in any combination of reparations or prescription.

D. Shippers should be allowed to bring an additional arbitration once the original decision has been made in any pending arbitration.

Joint Shippers agree with NGFA's proposal to clarify that shippers may bring an additional arbitration dispute against a railroad once the arbitral panel issues its original decision in all pending arbitrations between the shipper and railroad.¹⁷ Petitioners' proposed arbitration rules prohibit shippers from bringing more than one arbitration at a time against a particular carrier.¹⁸ But they also state that a shipper may bring a new arbitration against a railroad when the arbitral panel issues its arbitration decision in the preceding arbitration between the shipper and railroad.¹⁹ Joint Shippers interpret Petitioners' proposal as allowing a new arbitration during the appeal of an arbitral panel's original decision. This interpretation would not conflict with the case limit's purpose, which is to prevent disaggregation of claims, since shippers would still be prohibited from bringing more than one case against a railroad while an arbitration decision is pending. Moreover, this interpretation would avoid penalizing the shipper for appealing an erroneous decision, a railroad's appeal of a decision, and the length of the appellate process.

E. A broader automatic release of the Waybill Sample to complainants should be required.

Petitioners' proposal correctly recognizes that the automatic release of Waybill Sample data is important to avoiding a lengthy process of requesting the data from the Board or through discovery. But the limited sample that Petitioners propose to make automatically available is insufficient to avoid broader requests for Waybill Sample data.

¹⁷ *Id.* at 12.

¹⁸ Petition, App. A § 1108a.4(c) at 5.

¹⁹ *Id.*

Under Petitioners' proposal, the Board will automatically release to each party in the arbitration proceeding the unmasked confidential Waybill Sample data that meets the following criteria: most recent year data, movements with R/VC ratio above 180%, movements on defendant carrier, and movements with the same 5-digit STCC as the challenged movements.²⁰

One year of data will not be enough in arbitration proceedings for the same reasons that it was deemed insufficient for the Three Benchmark methodology.²¹ Chief among those reasons was that "[o]ne year of data may in some cases be insufficient to provide a meaningful benchmark for comparison purposes." Indeed, even four years was not sufficient in one early Three Benchmark case, which prompted the Board to initiate a rulemaking proceeding to change how certain commodities are sampled in the waybill sample.²² In addition, four years of data is consistent with the Three Benchmark approach,²³ which is one of the existing rate review methodologies that the arbitrators must consider under the Petitioners' proposal.²⁴ Petitioners do not explain why they selected a one-year limit instead of the four-year limit that the Board proposed for FORR.²⁵ Moreover, the Board allows the release of up to four years of data in Three-Benchmark cases.²⁶ Petitioners have not explained why less data should be available in

²⁰ Petition, App. A § 1108a.7(g) at 8.

²¹ *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, EP 646 (Sub-No. 3), slip op. at 5 (served March 12, 2012) ("Waybill Data").

²² *US Magnesium, LLC v. Union Pac. R.R. Co.*, NOR 42114, slip op. at 9 n. 12 (served Jan. 28, 2010).

²³ *Waybill Data*, slip op. at 6.

²⁴ Petition, App. A, Proposed § 1108a.9(b)(2).

²⁵ *See Final Offer Rate Review*, EP 755, slip op. at 9 (STB served Sept. 12, 2019).

²⁶ *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, EP 646 (Sub-No. 3), slip op. at 4 (STB served Mar. 12, 2012),

arbitration proceedings under which parties can use methodologies similar to the Three-Benchmark methodology.

Data also should not be limited to the same 5-digit STCC as the issue commodity. For commodities like chemicals, where many commodities share similar characteristics (e.g., many are hazardous materials), having a Waybill Data at the 2-digit STCC level will provide more data for performing a comparative analysis. This will likely increase the reliability of the rate reasonableness methodology a party chooses. Moreover, Petitioners provide no justification for such a narrow release of data when similar restrictions do not exist under the Board's proposed FORR rule or for Three-Benchmark cases and the proposed rules require the arbitrators to consider the Board's existing methodologies.

Limiting the data to that of the defendant railroad also is likely to result in an insufficient release of data. This would prohibit the complainant from using a rate-reasonableness methodology that considers movements on railroads other than the defendant, and thus is inconsistent with the notion that shippers would be free to use innovative methodologies. For example, the rate benchmarking methodology that the ACC presented in EP 755 and EP 761 employs waybill data across all railroads to produce a statistically significant econometric rate analysis. Withholding this data would force shippers who use the benchmarking methodology or other methodologies that rely on a broad data analysis to seek more data from the Board or through discovery, which could delay arbitration proceedings.

Overly-restrictive waybill access—in the form of fewer years, tighter STCC constraints, and fewer railroads—will only increase the probability of insufficient data that must be redressed through a request for broader waybill access or discovery. Those options are unsatisfactory because they defeat the advantages of arbitration by adding to the time and expense. Joint

Shippers thus propose that the automatic release of Waybill Sample data at least include the most recent four years of data, data for movements with the same 2-digit STCC as the issue movements, and data for all railroads.

F. The requirement to use the Board’s streamlined market-dominance rules should be removed.

Joint Shippers concur with NGFA’s suggestion that arbitration should not be restricted to cases that are eligible to use the streamlined market-dominance approach adopted in Ex Parte No. 756, *Market Dominance Streamlined Approach* (served Aug. 3, 2020). That would unduly restrict access to the arbitration procedures and further exacerbate concerns over the proposed FORR exemption because a shipper who cannot satisfy the streamlined market dominance test would not have access to either arbitration or FORR. To mitigate the time and expense of arbitrating market dominance, however, the streamlined market dominance approach must allow the *a la carte* consideration of the prima facie factors, as proposed by the Coalition Associations in EP 756.²⁷

G. Flexible market-based factors should be allowed.

Joint Shippers support NGFA’s proposal to allow arbitrators to consider flexible market-based factors, including rate levels on comparative traffic, market factors for similar movements of the same commodity, and overall costs of providing the rail service. By applying the rate-review standards at 49 U.S.C. §§ 11708(c)(3) and (d)(1) to the arbitration program, Petitioners have provided arbitrators with flexibility to consider alternative methodologies that use flexible market-based factors if those methodologies are consistent with sound railroad economics. Providing arbitrators with a list of market-based factors would help arbitrators identify factors

²⁷ Coalition Ass’ns’ Opening at 6, *Market Dominance Streamlined Approach*, EP 756 (Nov. 12, 2019).

that have a sound economic basis, which could help increase the quality of decisions. Defining these factors would be a key element of a rulemaking proceeding.

H. Limits on withdrawal rights should be strengthened, and the impact of withdrawal should be reduced.

Joint Shippers support NGFA's proposals to limit railroad rights to withdraw from the arbitration program. But Joint Shippers do not believe that this alone will adequately address railroad withdrawal rights. The Board must also finalize FORR and remove the proposed FORR exemption for railroads who participate in the arbitration program.

If the Board does not finalize FORR, a railroad's withdrawal from the arbitration program will deprive its customers of a viable rate-review process and an accessible revenue-adequacy standard. No amount of withdrawal restrictions can avoid this unacceptable result.

Moreover, a shipper's withdrawal rights are meaningless unless a FORR process exists and the railroad is not exempt from it. Without access to FORR, withdrawal will deprive the shipper of the most accessible rate review options. This would make rate review inaccessible for many shippers and preclude many shippers from seeking rate relief under a revenue-adequacy standard.

Thus, to prevent railroads from being able to use withdrawal to leave shippers without access to both arbitration and to ensure shippers have meaningful withdrawal rights, the Board must adopt FORR and eliminate the FORR exemption.

I. Shippers' right to pursue any existing rate-case methodology should be made clear.

Joint Shippers support NGFA's proposal to clarify that shippers have the option to pursue a Stand-Alone Cost (SAC), simplified-SAC, or Three-Benchmark rate case regardless of whether a railroad or shipper opts into the arbitration program. Nothing should prevent shippers from

pursuing a rate challenge under an existing rate-review methodology since these methodologies would be more burdensome than an arbitration dispute.

J. It should be made clear that a railroad is subject to all of the Board's rate-review methodologies should it withdraw from the arbitration program.

Joint Shippers support NGFA's proposal to clarify that railroads who withdraw from the arbitration program would be immediately subject to rate challenges under any of the Board's rate-case methodologies, including FORR. This is a common-sense requirement that ensures the railroads cannot use withdrawal to shield them from rate challenges.

III. CONCLUSION.

Joint Shippers continue to have significant concerns about Petitioners' proposal to exempt any railroad who participates in arbitration from FORR. Not only would this block shippers from using FORR, but it would also block many shippers from obtaining rate relief under a revenue-adequacy standard. Joint Shippers, however, would not object to the Board commencing a rulemaking to evaluate an arbitration proposal that does not include an exemption from FORR so long as the rulemaking does not delay the Board's implementation of FORR. In deciding whether to expend its resources on such a proceeding, however, the Board also must consider whether the Petitioners and other railroads will voluntarily opt into any such arbitration process. If the answer is no, it makes no sense to initiate a proceeding to adopt rules that will not be used.

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