

**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

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Exhibit 1: Revised Proposed Amendments to Code of Federal Regulations

Exhibit 2: Revised Proposed Amendments to Code of Federal Regulations
(blacklined from Appendix A to Joint Petition for Rulemaking)”

I. Executive Summary

Pursuant to the Board's August 26, 2020 order, Petitioners CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, and the U.S. operating subsidiaries of CN (collectively, "Petitioners") respectfully submit this supplemental pleading responding to the replies filed in response to Petitioners' Petition for Rulemaking ("Petition"). Petitioners appreciate the opportunity to submit this supplemental pleading and address both the thoughtful suggestions from parties generally supporting voluntary arbitration along the lines proposed in the Petition and the concerns expressed by parties criticizing the Petition.

A core purpose of the Petition was to break through perennial disputes about how to simplify the Board's rate reasonableness methodologies and procedures while still preserving their economic integrity. The voluntary arbitration program proposed in the Petition (the "Program") is designed to balance efficiency with economic integrity and provide shippers with an opportunity for meaningful relief for smaller rate disputes. It should not be forgotten that the first proposal of the Rate Reform Task Force was for the Board to "recommend legislation that would permit mandatory arbitration of small rate disputes."¹ The Task Force believed that an arbitration program for small cases could lead to a "positive outcome . . . for smaller cases" and identified "confidentiality" and "reduced formality" as benefits of arbitration.² The Program creates such an advantageous approach and responds to the core concerns that led the Board to create the Rate Reform Task Force.

¹ Report to the Surface Transportation Board, Rate Reform Task Force (Apr. 25, 2019) ("RRTF Report"), at 14, *available at* https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

² *Id.* at 16 & n.21; *see id.* at n.21 ("The use of an outside arbitrator can provide certain advantages, such as confidentiality of decisions, which encourages settlements or stipulations of issues, and reduced formality of the proceedings.").

Petitioners could accept several of the suggested changes to the Program made by the National Grain and Feed Association (“NGFA”), as well as the clarifications NGFA has described to address some rail customer concerns. These agreeable clarifications and changes are reflected in the text below and (to the extent necessary) in the amended Code of Federal Regulations language in Exhibit 1. However, Petitioners and NGFA disagree on a few key points that go to the core of the Program’s function, such as the need for confidentiality, the potential rate reasonableness methodologies that could be arbitrated, and the Program’s exit rights that ensure parties’ participation in the Program is indeed voluntary.

Petitioners also respond to the commenters who are more skeptical of the Program.³ Some commenters urged the Board to move forward with the Final Offer Rate Review (“FORR”) proposed rule rather than (or prior to adopting) the Program. These commenters overlook the fact that the Rate Reform Task Force rightly identified arbitration as the ideal mechanism for resolving small rate cases, and that FORR was conceived as a workaround in the event that the Board did not obtain the statutory authority to require arbitration.⁴ Unlike FORR, the Program would be lawful and economically sound—providing shippers with small rate reasonableness claims the opportunity for meaningful relief via a low-cost, quick, and fair process tethered to sound principles of rail regulation economics.

Other commenters complain that they should be able to arbitrate revenue adequacy claims. But as Petitioners have already explained, complex and controversial issues like revenue adequacy should not be litigated for the first time in small case arbitrations with limited appellate rights. Complainants are free to

³ In addition to Petitioners’ ongoing conversations with NGFA, Petitioners have engaged with several commenters on the Petition in the weeks since it was filed.

⁴ RRTF Report at 12, 14–15.

bring revenue adequacy cases to the Board, but Petitioners will not consent to arbitrate them.

In short, Petitioners believe that the proposed Program is fair and reasonable, and that it reflects an equitable compromise between the interests of railroads and shippers. Petitioners ask that the Board grant the Petition for Rulemaking and adopt the rules proposed to implement the Program.

II. NGFA's Proposed Modifications and Clarifications

Petitioners appreciate NGFA's candor in thoughtfully sharing its concerns and are grateful to the Board for the opportunity to respond in kind. Petitioners find agreeable most of NGFA's proposed modifications to the Program and requested clarifications, as described below.

A. Petitioners find many of the NGFA-proposed modifications and clarifications agreeable.

NGFA has set forth in its Reply multiple proposed modifications to the Program and requested clarifications. Petitioners have reviewed and considered them and could agree to continue to commit to the Program as originally proposed with the following modifications and clarifications, as reflected where necessary in the attached Exhibit 1.⁵

1. Petitioners could agree that arbitrators may consider "market-based factors."

NGFA suggests that arbitrators be allowed to consider "flexible market-based factors" when assessing rate reasonableness, including but not limited to those used in the BNSF/Montana arbitration program.⁶ NGFA expressly lists three market-based factors— "(1) rate levels on comparative traffic; (2) market factors for similar

⁵ Exhibit 1 to this Supplemental Pleading shows changes from the proposed Code of Federal Regulations section that was attached as Appendix A to the Petition.

⁶ Reply of the National Grain and Feed Association, Ex Parte 765 (filed Aug. 20, 2020) ("NGFA Reply"), at 12.

movements of the same commodity; and (3) overall costs of providing the rail service” — but notes that a “more comprehensive list” of market-based factors might be identified and fine-tuned during a rulemaking on the Petition.⁷ As explained in the Petition, Petitioners believe that, with certain limited exceptions, the arbitrators should be governed by the flexible statutory standard of 49 U.S.C. § 11708—namely, that the arbitration panel must “consider” the Board’s methodologies for setting maximum lawful rates, (with the exception of any type of revenue adequacy constraint or FORR process), “giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues,” and the decision must be “consistent with sound principles of rail regulation economics.” 49 USC § 11708(c)(3), (d)(1); *see* Pet. at 25, 27.

Petitioners believe that the congressional standard allows an arbitration panel to consider “market-based factors” along the lines that NGFA proposes. The standard requires arbitrators to “consider” the Board’s existing methodologies and to issue a decision that is “consistent with sound principles of rail regulation economics,” but arbitrators are free to consider other evidence presented by the parties within those statutory guidelines, so long as the evidence is not prohibited under the Program. *See* Pet. at 27, App. A §§ 1108a.7(e), 1108a.9(b). Petitioners would therefore have no objection to the Board explicitly permitting the arbitration panel to consider these market-based factors when determining maximum lawful rate in arbitrations under the Program.

2. Petitioners could agree to a shorter initial opt-in term followed by a Board assessment of the Program.

NGFA expressed concern about the Program’s FORR waiver for participating carriers and provided three alternative options for amending this aspect of the Program. *See* NGFA Reply at 5–6. As an initial matter, because the Program is designed as a new

⁷ *Id.* at 12.

avenue for small rate cases, railroads that opt into the Program should not be simultaneously subject to FORR (if FORR is finalized). And the waiver from FORR is an essential condition for Petitioners to consent to opt into the Program. However, with regard to NGFA's three options for amending the FORR waiver aspect of the Program, Petitioners would agree to the option where Petitioners' initial enrollment in the Program would decrease from five years to three years, with the Board conducting an assessment of the Program at the end of that three-year term.

3. Petitioners could agree to NGFA's proposed mediation changes.

NGFA suggests that mediation under the Program be "limited to 30 days (not 'for at least' 30 days)," with an opportunity for an extension, and that "parties be allowed to agree by mutual consent to waive mediation altogether." *Id.* at 9. Petitioners could agree with these modifications, which would further the Program's efficiency and low-cost features. While NGFA suggests that the parties could request an extension of the 30-day mediation period from the Board, *id.*, the Board would have no role in arbitrations during the mediation stage, and Petitioners do not believe that Board action would be necessary. Mediation extensions could be agreed to by the parties without need for Board involvement.

4. Petitioners do not object to NGFA's clarification on market dominance.

NGFA supports the use of the streamlined market dominance test finalized in Ex Parte 756, as well as the prohibition on arbitrators considering product and geographic competition and from applying the "limit price test" in arbitrations under the Program. *Id.* at 10. However, NGFA suggests that a shipper should also have the option to use the non-streamlined market dominance approach if it does not believe it can meet the criteria for a streamlined determination. *Id.* at 10. This same concern has been raised by other rail customer groups with which Petitioners have conversed since filing the

Petition. As this is how the streamlined market dominance test operates as adopted, Petitioners have no objection to this clarification.

5. Petitioners could agree to NGFA’s clarification regarding the one arbitration against one carrier at a time rule.

NGFA agrees with the limitation that shippers may bring one case at a time against a defendant railroad under the Program, which is designed to prevent the inappropriate disaggregation of large claims into multiple arbitrations. However, NGFA requests clarification that the end point for a “case” (*i.e.*, the point at which another arbitration could be brought against the same railroad) is a decision by the arbitral panel, not the final outcome of any appeal. *Id.* at 12. Petitioners have no objection to this requested clarification.

6. NGFA’s clarification regarding exit rights is acceptable to Petitioners.

NGFA also requests clarification that either party may “challenge the other’s contention that there has been a ‘material change’” justifying the “change in law” exit option. *Id.* at 12–13. NGFA suggests that such an appeal could be “made to either a Board-retained administrative law judge or to the STB Chairman.” *Id.* at 13. Petitioners have no objection to these clarifications.

7. NGFA’s clarifications regarding the continued availability of existing processes and the effect of railroad withdrawal from the Program are acceptable.

NGFA requests clarification that, “even under the FORR blanket waiver provision..., rail users still would have the option to pursue, in lieu of arbitration, a rate challenge against ... carriers enrolled in the ... Program utilizing one of the Board’s other three existing rate-challenge methodologies,” *i.e.*, SAC, Simplified SAC, or Three-Benchmark. *Id.* at 13. NGFA also requests clarification “that any railroad withdrawing from the rate arbitration program immediately would be subject to having its rates challenged using any of the Board’s then-available rate-challenge methodologies,

including FORR” if the Board adopts that methodology in Ex Parte 755. *Id.* at 13–14. Petitioners have no objection to either clarification.

B. Petitioners could not agree to the NGFA proposals to discard certain core features of the Program.

While many of NGFA’s proposed modifications are amenable to Petitioners, a few requested modifications would alter core features of the Program that ensure the Program’s efficiency, fairness, and economic integrity, and that encourage voluntary railroad participation. These key features incentivize Petitioners to commit to the Program and must be included in a Board-established Program to which Petitioners voluntarily consent.

1. NGFA’s non-confidentiality proposal would undercut the Program’s goal to achieve simple, streamlined decisions.

NGFA expresses reservations about the Petition’s call for confidentiality of arbitration decisions, and suggests that the Board should publicize details of each decision (including the parties, the relief awarded, and the rationale of the arbitration decision). *Id.* at 7–8. While Petitioners have proposed that certain information would be provided to the Board to allow it to monitor the Program and publish certain generalized information about it, *see* Pet. at 16, the confidentiality of individual decisions is a central feature of the Program and a key reason why Petitioners believe it could be successful where prior programs have failed.

Maintaining the confidentiality of arbitration decisions will not only incentivize parties to participate in the Program, but goes hand-in-hand with the Program’s pro-shipper features of efficiency and increased flexibility. Indeed, confidentiality is what makes these features possible. Without confidentiality, Petitioners would not be willing to submit something as complex as a rate reasonableness claim to an arbitral panel using an expedited process with extremely limited discovery and limited appellate rights. *See Iberia Credit Bureau,*

Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175–76 (5th Cir. 2004) (recognizing that “[i]f every arbitration were required to produce a publicly available, ‘precedential’ decision on par with a judicial [or agency] decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth....”); *see also* Pet. at 22–23 & n.54.

The confidentiality Petitioners propose is not a one-sided benefit to the railroads, but rather benefits the arbitration process as a whole. Petitioners appreciate the United States Department of Agriculture’s tentative support for small case arbitration. But Petitioners respectfully disagree with USDA’s assertion that only railroads stand to benefit from the confidentiality of arbitration decisions.⁸ Many shippers deal with multiple railroads and could be commercially affected by public arbitration decisions.

Moreover, the confidentiality of the arbitration process creates an environment in which railroads are willing to agree to arbitrate small rate disputes quickly and with increased flexibility—the very result shippers have been requesting, and the Board has been seeking, for years. And because confidentiality would lower the stakes of arbitrating a rate dispute, it would enable the parties to focus solely on resolving the specific rate dispute at hand, without worrying about the outcome’s effect on the marketplace. Indeed, the effect of rate cases on the marketplace is one reason that rate reasonableness cases are litigated so vigorously, on so many issues. Petitioners believe that confidentiality of arbitration decisions

⁸ *See* Letters of United States Department of Agriculture, Ex Parte 765 (filed Aug. 20, 2020) (“USDA Reply”), at 3.

will help railroads and shippers focus on a swift and amicable solution to the rate dispute at hand, without having to worry about broader implications.⁹

NGFA makes several arguments as to why arbitration decisions should be public under the Program, but they are not availing. *See* NGFA Reply at 7–8. NGFA’s argument that the Board requires arbitration decisions to be public under its Section 11708 arbitration program overlooks the fact that that arbitration program has failed to draw any participation. (And it should be noted that Section 11708 itself does not require the publication of arbitration decisions.)

NGFA’s suggestion that arbitration decisions could be treated as non-precedential does not solve the problem. The impact on the marketplace that would result from a published arbitration decision would, from a commercial perspective, be equivalent to that of a precedential decision issued by the Board. For example, if a grain shipper prevails in a rate reasonableness arbitration against a railroad and the decision is published, other grain shippers around the country may use that decision as a bargaining tool in contract negotiations with the railroad to drive down rates.¹⁰ Conversely, the many shippers who deal with multiple railroads

⁹ Olin Corporation argues that in some past rulemakings some railroads argued that arbitration decisions should be public. *See* Reply in Opposition by Olin Corporation, Ex Parte 765 (filed Aug. 20, 2020) (“Olin Corp. Reply”), at 5 (citing comments from 2001 and 2012). The value of confidentiality in arbitration is not somehow disproven because some railroads took a different view in comments on an arbitration program that proved to be unsuccessful. After thoughtfully considering these issues, Petitioners have decided to support a Program that utilizes confidentiality as a means of encouraging amicable and efficient resolution and avoiding the high-cost, high-stakes litigation tactics that naturally attach to a public, precedential process.

¹⁰ Indeed, USDA is explicit on this point: “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....” USDA Reply at 2.

would be incentivized to litigate aggressively to avoid outcomes that could affect their contractual negotiating position with other railroads.

Precisely because of those potential consequences, all railroads and many shippers would be motivated to throw the proverbial kitchen sink into the arbitration, rather than tailor the scope of litigation to the amount immediately in controversy. Petitioners believe that the Board must choose between resolving individual rate disputes quickly and effectively in non-public arbitrations, or forcing small shippers to try to reshape the market through drawn-out public battles.

Nor are NGFA's concerns about the accountability and integrity of the arbitration process a reason to make decisions public. Other features of the Program are designed to promote accountability and integrity. The most important safeguard is the arbitrator selection process, which permits each party to select its own party-selected arbitrator, object to the other side's selected arbitrator for cause, and coordinate with the opposing party on a joint list for the third arbitrator, with Board involvement if necessary to resolve impasses. Pet. at 12. This process will ensure the selection of fair and impartial panels. In addition, selected arbitrators would be required to "perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence," as also required in 49 U.S.C. § 11708(f)(2). Pet. at 12. And a party that believes the integrity of the arbitration process has been compromised despite these protections can appeal the arbitration decision to the STB on the grounds that there was "a clear abuse of arbitral authority or discretion." *Id.* at 15.

NGFA asserts that public arbitration decisions are in the public interest. But the greatest public interest is in establishing an effective program, and confidentiality is a well-recognized advantage of arbitration.¹¹ And the public

¹¹ See RRTF Report at 16 n.21.

interest in knowing that there is an arbitration program that works fairly and efficiently for all parties is satisfied by other aspects of the Program. For example, the Board will be able to monitor the Program through case summaries provided to the Board's Office of Public Assistance, Governmental Affairs, and Compliance and report to the public on the Program's use. *See* Pet. at 16. And the Board will have the opportunity to reassess the Program at the conclusion of the multi-year trial period, as suggested by NGFA.

2. Petitioners could not agree to NGFA's proposed use of the Rate Increase Constraint under the Program.

NGFA "takes no position" on the aspect of the proposal that prohibits the use of evidence of system-wide revenue adequacy. NGFA Reply at 10. Yet NGFA believes that if, in the future, the Board adopts the Rate-Increase Constraint ("RIC") proposed by the Rate Reform Task Force, that should not serve as a basis for the "change in law" exit rights under the Program and should be a standard that could be used in arbitrations under the Program. *Id.* at 10–11, 13. Petitioners are not amenable to either of these proposed modifications.

As Petitioners have explained in detail in Ex Parte 761,¹² RIC is unlawful, economically unsound, and poor public policy, as are any other forms or applications of a system-wide revenue adequacy constraint.¹³ Petitioners will not agree to arbitrate rate disputes under such theories, particularly in light of the Program's expedited schedule, limited discovery, and limited appellate rights. *See* Pet. at 14–15, 27. And there is no good reason why adoption of RIC—which has not even been embodied in a Notice of Proposed Rulemaking—should be considered anything other than a material change to the Board's rate review methodologies. The point of the Program's exit rights

¹² *See* Pet. at 14–15 n.48.

¹³ *See* Comments of AAR, *Hearing on Revenue Adequacy*, EP 761 (filed Nov. 26, 2019), at 41–52.

is that it is not fair to expect parties to consent in advance to arbitrate under rules that they do not know about. That applies to railroads signing up for multi-year terms, and it applies to shippers arbitrating individual cases. Any material change to the arbitration rules or to the Board's rate review methodologies should give parties that have consented to voluntary arbitration the opportunity to re-evaluate their consent.

3. Petitioners could not agree to NGFA's "change in law" exit rights proposal.

NGFA prefers that if a party exits the Program due to the "change in law" exit rights, pending arbitration cases without an arbitration decision should not be dismissed, *see* Pet., App. A § 1108a.3(c)(3)(ii), but, rather, "any arbitration case should be completed and a decision rendered once the appointment of the arbitration panel has been completed and the arbitration process has commenced" to prevent either party from being penalized. NGFA Reply at 13. Petitioners cannot agree to this modification, though it is not because Petitioners wish any party to be "penalized" under the change in law exit rights. Rather, the felt "penalty" would be an unavoidable side effect to the fact that a party should be allowed to withdraw its voluntary consent to arbitrate when the standards and procedures for that arbitration are materially changed. This is particularly necessary in light of the limited appellate rights under the Program.

Petitioners note that these exit rights are available to both parties and are not likely to be exercised, as the Board has not made any material changes to its existing methods in over a decade. With the exception of the proposed FORR process (which does not trigger the "change in law" exit rights unless the Board declines to exempt carriers participating in the Program from FORR, *see* Ex. 1 § 1108a.3(c)) – the Board has no currently proposed rules that would do so. Moreover, if the Board does materially change the Program or its methodologies for determining rate reasonableness, it will not be a surprise to any party: The rulemaking requirements of the Administrative

Procedures Act will ensure that any new rate reasonableness methodologies or changes to the Program contemplated by the Board will be apparent to all well in advance.

III. The Other Commenters' Concerns Lack Merit.

The Program would add to shippers' options. It takes away no existing rate review avenue and does not limit any shipper's ability to eschew arbitration and bring challenges directly to the Board. To be sure, the Program is designed to be a true arbitration program that would foreclose the need for FORR, and railroads opting into the Program would be exempt from FORR for so long as they opt into arbitrations. But unlike FORR, the Program would be lawful and economically sound—providing shippers with smaller rate disputes opportunities for meaningful relief via a low-cost, quick, and fair process tethered to sound principles of rail regulation economics. In the Program, the Board and shippers can have confidence in a process that will avoid the pitfalls of FORR and not be subject to immediate legal challenges.

In this section, Petitioners respond to the major objections by other commenters, including the calls of some commenters to reject arbitration and instead proceed with FORR, objections to arbitrations that would not allow for revenue adequacy arguments, and certain other procedural complaints.¹⁴

1. The Program is superior to FORR.

Some commenters urge the Board to reject the Program altogether and to move forward with only FORR.¹⁵ Indeed, some suggest that Petitioners have

¹⁴ See generally USDA Reply; Olin Corp. Reply; Reply of Joint Shippers, Ex Parte 765 (filed Aug. 20, 2020) (“Joint Shippers Reply”); Reply of American Fuel & Petrochemical Manufacturers, Ex Parte 765 (filed Aug. 20, 2020) (“AFPM Reply”); U.S. Wheat Transportation Working Group Response Comments, Ex Parte 755 (filed Aug. 12, 2020) (“TWG Reply”).

¹⁵ See Joint Shippers Reply at 1–2, 6; AFPM Reply at 1, 5; Olin Corp. Reply at 1–2.

proposed the Program simply to subvert or avoid being subject to FORR.¹⁶ But the rail industry has consistently and publicly expressed its opposition to the FORR proposal, while recognizing the importance of developing a workable method for resolving shippers' rate reasonableness challenges in an expedited and cost-efficient manner. *See, e.g.,* Comments of CN, *Final Offer Rate Review*, Ex Parte 755 (filed Nov. 12, 2019), at 26 (recommending the Board solicit comments on the inclusion of “a targeted ADR avenue for small rate disputes” in its broader ADR program). And the Board itself recently concluded a series of ex parte meetings explicitly designed to explore ways in which voluntary arbitration could substitute for FORR.

The Program represents Petitioners' good-faith effort to provide a method that avoids the legal and procedural infirmities that plague the FORR proposal. Indeed, FORR itself was explicitly designed to be a substitute for the better option of an arbitration program (which the Rate Reform Task Force recognized could not be mandated by the Board). The voluntary nature of arbitration, as well as the features of efficiency, speed, low cost, flexibility, and economic integrity of the Program, make it a superior option. As such, it is reasonable for Petitioners to be exempt from FORR if they consent to participate in the Program—which solves the very problems that the Board seeks to remedy with FORR.

2. The Program is not a forum for testing out a revenue adequacy constraint.

Some interested parties wish to be able to use a revenue adequacy constraint in arbitrations under the Program and complain that the Program does not permit them to do so, as would FORR if adopted.¹⁷ It is telling that many of these commenters admit that they view FORR as a highly simplified vehicle for bringing

¹⁶ USDA Reply at 1–2; Olin Corp. Reply at 8–9; Joint Shippers Reply at 4–5; AFPM Reply at 2–3.

¹⁷ *See* USDA Reply at 2; Olin Corp. Reply at 11–12 ¶ 8; Joint Shippers Reply at 4–5.

revenue adequacy claims, in particular the econometric “benchmark method” outlined by the American Chemistry Council (ACC) in Ex Parte 755 and 761.¹⁸ As leading economists have explained, the use of any type of revenue adequacy constraint—including the ACC’s benchmark method—in rate reasonableness determinations, and particularly in highly simplified ones like FORR, would be a grave regulatory misstep.¹⁹ Yet, if the Board adopts FORR as proposed, the apparent plan of some shipper advocates is to use it to cram new revenue adequacy methodologies into a hyper accelerated process with no time for a meaningful railroad response and no opportunity for the Board to consider this novel and complex theory with the benefit of an ordinary adversarial process.²⁰

In any event, Petitioners will not agree to arbitrate rate disputes where shippers are permitted to use a revenue adequacy constraint. Such claims are extraordinarily complex and present novel issues that cannot be effectively addressed in a streamlined arbitration with limited appellate rights. For even if revenue adequacy were a lawful method of constraining rates (which it is not), the application of the concept currently is undefined, and allowing arbitrators to strike out on their own to define it risks departure from sound principles of rail transportation economics. Of course, Petitioners’ unwillingness to consent to voluntarily arbitrate revenue adequacy claims

¹⁸ See Joint Shippers Reply at 4–5; Olin Corp. Reply at 11–12; Opening Comments of the American Chemistry Council, et al., *Final Offer Rate Review*, Ex Parte 755 (filed Nov. 12, 2019); Written Testimony of the American Chemistry Council, *Hearing on Revenue Adequacy*, Ex Parte 761 (filed Nov. 26, 2019).

¹⁹ See Comments of AAR, *Hearing on Revenue Adequacy*, Ex Parte 761 (filed Nov. 26, 2019).

²⁰ See NPRM, *Final Offer Rate Review*, Ex Parte 755 (STB served Sept. 12, 2019), at 14 (allowing parties only 10 days to reply to other parties’ evidence).

does not prevent a complainant from bringing such a novel claim in a complaint filed with the Board.²¹

3. The Program proposes substantial value for rail customers even if not all Class I railroads participate.

Several interested parties voiced concerns that not all Class I railroads have signed on to the Petition or otherwise stated their support of the Program.²² Petitioners are hopeful that all Class I railroads will commit to the arbitration program if approved by the Board, because adoption of the Program with a FORR waiver for participating railroads should significantly incentivize across-the-board participation from the industry. However, the Program is valuable even if no additional railroads agree to join it. Petitioners serve a substantial majority of rail customers, and this commitment represents a meaningful improvement in litigation options for most customers.

4. The exit rights are reciprocal and only apply in limited circumstances.

As discussed in the Petition and above, the Program's exit provisions are limited and evenhanded. If a railroad consents to participate in the Program for a specified term, as Petitioners have contingently pledged,²³ exit rights for pending arbitrations are triggered only in limited circumstances: if the Board fails to exempt participating railroads from any procedures adopted in Ex Parte 755 (FORR); if there is a material change to the Program or the Board's rate reasonableness methodologies (other than the adoption of FORR); or, if the case volume against a

²¹ See, e.g., *Consumers Energy*. Petitioners reiterate that they believe that a system-wide revenue adequacy constraint is both unlawful and an antiquated form of earnings regulation that should have no place in modern rail rate regulation. See Comments of AAR, *Hearing on Revenue Adequacy*, Ex Parte 761 (filed Nov. 26, 2019), at 21–35.

²² See AFPM Reply at 4; TWG Reply at 6; Olin Corp. Reply at 8.

²³ See Pet. at 20–21.

railroad exceeds a certain threshold in a given timeframe.²⁴ And the Program would give shippers the reciprocal right to exit the Program due to a material change in law.

These exit rights are reasonable in the context of a voluntary dispute resolution program, where both railroads and shippers should be allowed to exit pending arbitrations if the rules change midstream. And, as noted above, Petitioners agree with NGFA's suggestion that either party to an arbitration should be able to "challenge the other's contention that there has been a 'material change' to the arbitration program or to the STB's existing rate-reasonableness methodologies." NGFA Reply at 12–13.

5. Olin Corporation's objections lack merit.

Olin Corporation ("Olin") raises a number of meritless objections to the proposed Program.²⁵ To the extent these objections have not been previously addressed above, Petitioners respond as follows:

First, Olin objects that certain aspects of the Program are different from the current 49 C.F.R. Part 1108 regulations (which implement that Board's 49 U.S.C. § 11708 arbitration program adopted in Ex Parte 730), and questions the Board's ability to adopt them for that reason. But the whole point of the Program is to

²⁴ Importantly, the Petition does not provide a railroad who consents to the Program for a set term the right to withdraw from the Program simply because the process is yielding unfavorable results. *Cf.* AFPM Reply at 4 (suggesting that a railroad could "cho[o]se to participate but then opt[] out when the process was not yielding a favorable result"). The exit provision based on case volume has no relation to the outcome of arbitrations. Rather, the purpose of the limited exit rights is to ensure that parties who opt into the Program, particularly those who opt in for a long-term period, have the ability to exit the Program if there are material changes to the risk-benefit balance that led them to commit to participate in the Program in the first place. *See* Pet. at 25–26. In other words, the exit rights "respect the bargain to which the parties consented." *Id.* at 26.

²⁵ *See* Olin Corp. Reply at 10–12.

create a superior arbitration process structured for smaller cases outside of the § 11708 program. The Petition explained plainly how the Program was consistent with § 11708 and—failing that—why the Board could use its exemption authority to craft a more effective small case arbitration solution. *See* Pet. at 2–3, 22, 24.

Second, Olin asserts that Petitioners seek to “undermine” and “reverse” the Board’s limit price test by prohibiting its use in the Program. Olin Corp. Reply at 10 ¶ 3. But nothing is undermined by Petitioners’ refusal to voluntarily arbitrate market dominance under a controversial theory that they oppose and that has not yet been subjected to appellate review.²⁶ Customers are free to advocate for use of the limit price test in rate cases filed with the Board.

Third, Olin objects to certain discovery and procedural limitations.²⁷ But the Program rules are designed for small cases and to be amended by the arbitrators when necessary. And Petitioners do not seek to ensure that the “[c]arrier gets the last word.” Olin Corp. Reply at 12 ¶ 9. Rather, the “format of evidence and the timing of filings would be left to the arbitral panel (which may consider the parties’ views on these matters).” Pet. at 24.

Fourth, Olin inaccurately states that the Petition requires the aggregation of separate claims and enforces the relief cap that applies to a single claim to aggregated claims. Olin Corp. Reply at 11 ¶ 7. As Petitioners have explained, this Program is for *smaller* rate cases. The one-arbitration-at-a-time requirement is

²⁶ *Cf. CSX Transp., Inc. v. STB*, 774 F.3d 25 (D.C. Cir. 2014) (dismissing interlocutory appeal challenging limit price test on grounds that Board’s order was nonfinal).

²⁷ In Petitioners’ communications with other rail customer groups, counsel for the Joint Shippers has indicated that the Joint Shippers believe that a wider array of waybill data should be provided in arbitrations. Petitioners believe the proposed waybill data production is appropriate as the baseline standard for arbitration, and, as the Petition explains, parties to an arbitration under the Program would be permitted to ask for more waybill data if needed. *See* Pet. at 13.

designed to protect railroads against the improper disaggregation of large rate claims, which would not be appropriate for the simplified and less exacting processes of the Program. As explained, rail customers are “permitted, *but not required*, to challenge rates for multiple traffic lanes in a single arbitration case.” Pet. at 11 (emphasis added).

Finally, Olin complains that arbitration decisions under the Program are “subject to two appeals (1) to the full Board and (2) to court, presenting further opportunities for delays, added expenses, and roadblocks to relief.” Olin Corp. Reply at 12 ¶ 11. It is true that an arbitration decision under the Program could be appealed to the Board, and that in theory a second appeal could be taken from that Board decision. But that would be an inherent feature of any Board arbitration program, *see, e.g.*, 49 C.F.R. § 1108.11, and the limited scope of Board review of an arbitration decision (and the even more limited scope of any federal court review under the Hobbs Act) are reasons to believe that appeals will not be a matter of course, nor will they unduly delay the finality of arbitration decisions under the Program.²⁸

²⁸ Indeed, out of the Board’s last four rate case decisions, only one was litigated to a final court of appeals decision. *See Sunbelt Chlor Alkali P’ship v. STB*, No. 16-15701, 723 F. App’x 838 (11th Cir. Jan. 26, 2018).

CONCLUSION

For the above reasons, and those set forth in the Petition, the Board should initiate a rulemaking to adopt the alternative voluntary and binding arbitration program for small rate disputes described in the Petition and as modified herein.

Respectfully submitted,

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September 10, 2020

EXHIBIT 1

Revised Proposed Amendments to Code of Federal Regulations

APPENDIX A

PROPOSED AMENDMENTS TO CODE OF FEDERAL REGULATIONS

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002 and 1115 and to add a new part 1108a to title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1115 – Appellate Procedures.

1. The authority citation for part 1115 continues to read as follows:
Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.
2. Revise § 1115.8 by removing “under part 1108” and adding “under parts 1108 and 1108a” to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

* * * * * For arbitrations authorized under parts 1108 and 1108a of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. * * *

* * * * *

3. A new part 1108a is added to read as follows:

PART 1108a – ALTERNATIVE VOLUNTARY PROGRAM FOR ARBITRATION OF FREIGHT RAIL RATE DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

Sec.

1108a.1

1108a.2

1108a.3

1008a.4

1008a.5

1008a.6

1008a.7

1008a.8

1008a.9

1008a.10

1008a.11

Authority: 49 U.S.C. § 10701(d)(3); 49 U.S.C. § 1321(a); 49 U.S.C. § 10502; 5 U.S.C. § 571, *et seq.*

§ 1108a.1 Definitions.

As used in this part:

- (1) *Arbitrator* means a single person appointed to arbitrate under this part.
- (2) *Arbitration panel* or *arbitral panel* means a group of three people appointed to arbitrate under this part.
- (3) *Small Case Arbitration Program* means the program established by the Surface Transportation Board in this part.
- (4) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in section 1108a.7(c)(2).
- (5) *Limit Price Test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 11-18 (STB served Sept. 27, 2012).
- (6) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Case Arbitration Program pursuant to section 1108a.3(a).
- (7) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in section 1108a.6.
- (8) *STB* or *Board* means the Surface Transportation Board.
- (9) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by 49 C.F.R. § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. part 1108.
- (10) *Streamlined market dominance test* means the methodology adopted by the Board in STB Docket No. Ex Parte 756, served on August 3, 2020.
- (11) *Third arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, by the STB Chairman from a list provided by the arbitrating parties, pursuant to the process described in section 1108a.6.
- (12) *Pending arbitration* means an arbitration under this part in which the arbitral panel has not yet issued the arbitration decision, including a dispute being mediated in the pre-arbitration mediation under section 1108a.5(b).
- (13) *Rate dispute* means a dispute involving whether a rail carrier's rate(s) are "reasonable," as that term is used in 49 U.S.C. § 10701(d)(1).

§ 1108a.2 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This part (Part 1108a) establishes a binding and voluntary arbitration program (the "Small Case Arbitration Program") that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Case Arbitration Program serves as an alternative to, and is separate and distinct from, the more broadly applicable arbitration program the Board has established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. Part 1108.

(2) In the Small Case Arbitration Program, parties consent to arbitrate rail rate disputes with a limit on potential liability of \$4,000,000 over two years, including any rate prescription,

and a one-year limit on rate prescriptions. No rate below 180% of variable cost as determined utilizing the unadjusted Uniform Rail Costing System shall be prescribed.

(3) The Board establishes this Small Case Arbitration Program to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate under 49 U.S.C. § 1321(a); to establish an alternative arbitration program for small shipper rate disputes pursuant to 5 U.S.C. § 571 *et seq.*; to promote the policy of 49 U.S.C. § 10101(15); and to implement 49 U.S.C. § 10701(d)(3), which requires the Board to maintain one or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.

(4) In light of the voluntary and contractual nature of arbitration under the Small Case Arbitration Program, the issues of market dominance and rate reasonableness shall be determined by the arbitral panel as set forth in section 1108a.9, and the Board's standard of review of an arbitration decision, if appealed to the Board, shall be limited as set forth in section 1108a.11(b).

(b) *Limitations to the use of the Small Case Arbitration Program.* The Small Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(c) *No limitation on other avenues of arbitration.* Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108a.3 Participating in the Small Case Arbitration Program.

(a) *Railroad opt-in procedures.* A railroad may opt into the Small Case Arbitration Program at any time.

(1) *Opt-in notice.* To opt into the Small Case Arbitration Program, a railroad may file a notice with the Board, notifying the Board of the railroad's consent to participate in the Small Case Arbitration Program. Such notice may be filed at any time and shall be effective upon receipt by the Board or at another time specified in the notice.

(2) *Option to consent to specified term.* A carrier may, but is not required to, include in its notice opting into the Small Case Arbitration Program a specified time period for which the carrier consents to opt into the Program.

(i) If a carrier opts into the Small Case Arbitration Program for a specified term, the carrier may withdraw from the Program prior to the expiration of its specified term only pursuant to subsections (c)-(d).

(ii) If a carrier opts into the Small Case Arbitration Program without specifying the term of its consent, or if a carrier's specified term of its consent has expired, that carrier participates in the Small Case Arbitration Program at will and may withdraw from the Program under subsection (e).

(3) *Public notice of railroad participants.* The Board shall maintain a list of railroads who have opted into the Small Case Arbitration Program on its website at www.stb.gov.

(b) *Shipper opt-in procedures.* A shipper may opt into the Small Case Arbitration Program at any time on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Case Arbitration Program and by filing a joint notice to OPAGAC with the participating carrier, as set forth in section 1108a.5(b).

(c) *Withdrawal for change in law.*

(1) Regardless of any specified term of consent, a carrier or shipper participating in the Small Case Arbitration Program may withdraw its consent to arbitrate under this part on the basis of the following events:

(i) the Board adopts new rate reasonableness procedures in Final Offer Rate Review, STB Docket No. Ex Parte 755, without exempting carriers participating in the Small Case Arbitration Program from those procedures;

(ii) the Board makes any material change(s) to the Small Case Arbitration Program under this part after a shipper or railroad has opted into the Small Case Arbitration Program; or

(iii) the Board makes any material change(s) to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the Small Case Arbitration Program.

(2) *Procedures for withdrawal for change in law.* A participating shipper or carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for change in law with the Board within 30 calendar days of an event that qualifies as a basis for withdrawal as set forth in subsection (c)(1).

(i) The notice of withdrawal for change in law shall state the basis or bases from subsection (c)(1) for the party's withdrawal of its consent to arbitrate under this part.

(ii) Any party may challenge the withdrawing party's withdrawal for change in law by filing a notice of appeal with the Board within five business days of the filing of the notice of withdrawal being challenged. The withdrawing party shall be permitted to file a reply to the notice of appeal within 14 calendar days from the filing of the notice of appeal. The appeal shall be resolved by either a Board-retained administrative law judge or the STB Chairman, at the Board's discretion, within 14 calendar days from the filing of the withdrawing party's reply. No replies to reply shall be permitted. A notice of appeal under this subsection shall stay any arbitrations without decision, as defined by subsection (c)(3)(ii) below, until the appeal is resolved.

(iii) Subject to the stay provision of subsection (c)(3)(ii), the notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law.*

(i) *Arbitrations with decision.* The withdrawal of consent for change in law by either a shipper or carrier shall not affect arbitrations in which the arbitral panel has issued an arbitration decision.

(ii) *Arbitrations without decision.* Subject to the stay provision of subsection (c)(2)(ii), the withdrawal of consent for change in law by either a shipper or carrier shall require the immediate dismissal of any pending arbitration under this part involving the withdrawing party in which the panel has not yet issued an arbitration decision.

(d) *Withdrawal for case volume.* Regardless of any specified term of consent, a carrier may withdraw its consent to arbitrate under this part if the carrier faces more than 25 arbitrations in a rolling 12-month period, or more than 10 simultaneous arbitrations.

(1) *Procedures for withdrawal for case volume.* A carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for case volume with the Board that states the basis in subsection (d) upon which the carrier is withdrawing its consent.

(2) *Effect of withdrawal for case volume.* A carrier's withdrawal of consent for case volume shall be effective on the day of its filing and shall:

(i) not affect the arbitration process for disputes under this part in which the parties have either started the first mediation session of the mediation period under 1108a.5(b), or initiated the arbitration process by the notice of intent to arbitration under 1108a.5(a) where the parties have mutually waived the mediation requirement under 1108a.5(b)(4); and

(ii) require the immediate discontinuance of the arbitration process under this part for any disputes under this part in which the parties have either not started the first mediation session of the mediation period under 1108a.5(b), or not initiated the arbitration process by the notice of intent to arbitration under 1108a.5(a) where the parties have mutually waived the mediation requirement under 1108a.5(b)(4).

(e) *At-will withdrawal.* If a carrier is participating in the Small Case Arbitration Program at-will, or if the specified term of a carrier's consent to arbitrate under the Program has expired, the carrier may withdraw from the Program at any time and for any reason by filing a notice of at-will withdrawal with the Board.

(1) A notice of at-will withdrawal shall be effective 30 calendar days from its filing date.

(2) A notice of at-will withdrawal shall not affect disputes for which a shipper has notified the participating carrier of its intent to arbitrate, as set forth in 1108a.5(a), prior to the effective date of the notice of at-will withdrawal.

§ 1108a.4 Use of arbitration.

(a) *Eligible Matters.* The arbitration program under this part may be used only for rate disputes subject to the jurisdiction of the Surface Transportation Board.

(1) Only rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this part. If the parties dispute whether a challenged rate was established pursuant to 49 U.S.C. § 10709, the parties must petition the Board to resolve that dispute, which must be resolved prior to the parties initiating arbitration process under this part.

(2) A shipper may challenge rates for multiple traffic lanes within a single arbitration under this part.

(b) *Eligible Parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits.* A shipper may bring a maximum of one arbitration at a time against a participating railroad. For purposes of this subsection, an arbitration under this part is final, and a new arbitration may be brought against the defendant carrier by the shipper, when the arbitral panel issues its arbitration decision.

(d) *Arbitration clauses.* Nothing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

§ 1108a.5 Arbitration initiation procedures.

(a) *Notice of shipper intent to arbitrate dispute.* To initiate the arbitration process under this part against a participating railroad, a shipper must notify the railroad in writing of its intent to arbitrate a dispute under this part. The notice must include a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part.

(b) *Pre-arbitration mediation.* Unless the parties waive this requirement as permitted by subsection (b)(4), prior to filing the joint notice required in subsection (c), the parties to the

dispute must engage in mediation not to exceed 30 calendar days. The parties may extend the mediation period at their discretion, but the mediation shall be outside any STB process.

(1) Mediation shall be initiated by the shipper's notice of intent to arbitrate under this part.

(2) The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) The 30-day time period begins at the start of the first mediation session.

(4) The parties may mutually consent to waive the pre-arbitration mediation requirement.

(c) *Joint Notice of Intent to Arbitrate.* To arbitrate a rate dispute under this part, the parties must file a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), indicating the parties' intent to arbitrate under the Small Case Arbitration Program.

(1) The joint notice shall set forth the following information:

(i) the basis for the Board's jurisdiction;

(ii) the basis for the parties' eligibility to use the Small Case Arbitration Program, including:

1. that the dispute being arbitrated is solely a rate dispute;

2. that the railroad has opted into the Small Case Arbitration Program;

3. that the shipper does not have any other pending arbitrations at that time against the defendant railroad;

4. that the parties have engaged in the required 30 days of mediation;

(iii) the requested relief; and

(iv) the parties' agreement to arbitrate under the rules of this part.

(2) The joint notice shall be confidential and will not be published by the Board.

(3) Unless the parties have agreed not to request the Waybill Sample pursuant to section 1108a.7(g), the parties must also serve the Joint Notice of Intent to Arbitrate on the Director of the Office of Economics, along with STCC information necessary for the Office of Economics to produce the unmasked confidential Waybill Sample.

(d) *Arbitration agreement.* The rules of this part shall be incorporated by reference into any arbitration agreement to arbitrate under the Board's Small Case Arbitration Program.

§ 1108a.6 Arbitrators.

(a) *Decision by arbitral panel.* All matters arbitrated under this part shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator.* Each side may object to the other side's selected arbitrator within two business days and only for cause. For-cause bases may include, but are not limited to, a lack of impartiality, a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with OPAGAC. The STB

Chairman shall rule on the objection in a telephonic conference within two business days, or as soon as is practicable. No briefing shall be permitted.

(iii) The Objection to Party-Appointed Arbitrator filed with OPAGAC and the telephonic conference, including the STB Chairman's ruling, shall be confidential.

(2) *Costs for party-appointed arbitrators.* Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Third arbitrator.*

(1) *Appointment.* Once appointed, the two party-appointed arbitrators shall, without delay, select the third arbitrator from a joint list of arbitrators provided by the parties.

(2) *Need for STB Chairman to select third arbitrator.* If the two party-appointed arbitrators cannot agree on a selection for the third arbitrator, the parties shall immediately file a Joint Request for Selection of Third Arbitrator with OPAGAC.

(i) The Joint Request for Selection of Third Arbitrator must include a joint list of potential arbitrators selected by the parties.

(ii) The STB Chairman shall select the third arbitrator and notify the parties of the selection within two business days, or as soon as is practicable, after the filing of the Joint Request for Selection of Third Arbitrator.

(iii) The Joint Request for Selection of Third Arbitrator and the STB Chairman's selection shall be confidential.

(3) *Third arbitrator role as lead arbitrator.* The third arbitrator shall serve as the lead arbitrator and will be responsible for ensuring that the tasks detailed in sections 1108a.7 and 1108a.9 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this part.

(4) *Costs.* The complaining shipper and the defendant carrier shall each pay one-half of the cost of the third arbitrator.

(d) *Arbitrator choice.* The parties may choose their arbitrators in all events without limitation. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in 49 CFR part 1108, § 1108.6(b).

(e) *Arbitrator incapacitation.* If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in subsection (b).

(2) If the incapacitated arbitrator was the third arbitrator, a replacement third arbitrator shall be appointed pursuant to the procedures set forth in subsection (c).

(f) *Arbitrator duties.* In an arbitration under this section, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108a.7 Arbitration procedures.

(a) *Appointment of Arbitration Panel.* Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing.

(b) *Commencement of arbitration process.* Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing.

(c) *Expedited timetables.*

(1) *Evidentiary phase timetable.* The evidentiary phase shall be completed within 45 calendar days from the commencement of the arbitration process, unless a party requests an extension and the arbitration panel grants the extension request. In no event shall the evidentiary phase last more than 90 calendar days unless all parties to the arbitration mutually agree to a longer time period.

(2) *Decision timetable.* The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108a.9(a)(2), shall be served on the parties within 120 calendar days from the commencement of the arbitration process.

(3) *Extensions to the timetables.* The arbitration panel may extend any deadlines set forth in this subsection (c) upon mutual agreement of all parties to the arbitration.

(d) *Limited discovery.* Discovery under this part shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(e) *Evidentiary guidelines.*

(1) *Principles of due process.* The arbitration panel shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the complainant shipper's case-in-chief.

(2) *Inadmissible evidence.* The following evidence shall be inadmissible in an arbitration under this part:

(i) on the issue of market dominance, any evidence that would be inadmissible before the Board;

(ii) any non-precedential decisions, including non-precedential decisions of the STB or of prior arbitrations; and

(iii) any evidence related to the revenue adequacy of the defendant carrier.

(f) *Confidentiality agreement.* All proceedings under this part shall be governed by a standard confidentiality agreement unless the parties agree otherwise. The terms of the confidentiality agreement shall apply to all aspects of the arbitration process under this part, including but not limited to discovery, the Waybill Sample provided pursuant to subsection (g), party filings, and the arbitral decision. A model confidentiality agreement is provided in Appendix B.

(g) *Waybill Sample.* The Board's Office of Economics shall provide the unmasked confidential Waybill Sample to each party to the arbitration proceeding within seven calendar days of the filing of the Joint Notice of Intent to Arbitrate. The data provided by the Office of Economics in the unmasked confidential Waybill Sample shall be limited to only the following data:

(1) most recent year;

(2) movements with R/VC ratio above 180%;

(3) movements on defendant carrier;

(4) movements with same 5 digit STCC as the challenged movements.

(h) *Confidentiality of entire arbitration process.* The entirety of the arbitration process under this part shall be confidential.

§ 1108a.8 Relief.

(a) *Relief available.* Subject to the relief limits set forth in subsection (b), the arbitration panel under this part may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this part shall not exceed \$4 million over two years (as indexed annually for inflation using the CPI index and a 2020 base year), inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof.

(1) A rate prescription shall not exceed 1 year.

(2) A rate below 180% of variable cost, as determined by unadjusted URCS, shall not be prescribed.

(c) *Relief not available.* No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108a.9 Decisions.

(a) *Technical requirements.*

(1) *Findings of fact and conclusions of law.* The arbitration decision under this part shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement.* The unredacted arbitration decision served on the parties in accordance with section 1108a.7(c)(2) shall comply with the confidentiality agreement described in section 1108a.7(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements.* The arbitration panel under this part shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance.* Subject to 1108.7a(e)(2) above, in determining the issue of market dominance, the arbitration panel under this part shall follow, at the complainant's discretion, either the streamlined market dominance test adopted in Ex Parte 756 or the Board's non-streamlined market dominance test.

(i) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(ii) The arbitration panel shall not apply the Limit Price Test.

(2) *Maximum lawful rate.* Subject to 1108.7a(e)(2) above and subsections (b)(2)(i)-(ii) below, in determining the issue of maximum lawful rate, the arbitration panel under this part shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.

(i) *Consistent with sound principles of rail regulation economics.* The panel's decision must be consistent with sound principles of rail regulation economics.

(ii) *Prohibition on considering revenue adequacy constraint.* The panel is prohibited from 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).

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this part may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* Subject to section 1108a.11, the arbitration decision under this part, whether redacted or unredacted, shall be confidential.

(1) No copy of the arbitration decision shall be served on the Board except as is required under subsection (d).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Service in the case of an appeal.* In the event an arbitration decision is appealed to the Board pursuant to section 1108a.11, the arbitration decision shall be filed under seal and, subject to section 1108a.11, shall remain confidential on appeal.

(e) *Arbitration decisions are binding.* By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in section 1108a.11. An arbitration decision under this part shall preclude the complainant shipper(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding rates for the movements at issue in the arbitration, with the exception of appeals under section 1108a.11. This preclusion shall last until the later of: (i) two years after the Joint Notice of Intent to Arbitrate; or (ii) the expiration of the term of any prescription imposed by the arbitration decision.

(f) *Confidential summaries of arbitrations.* To permit the STB to monitor the Small Case Arbitration Program, the parties shall submit a confidential summary to OPAGAC within 14 calendar days after either receiving the arbitration decision, the dispute settles, or the dispute is withdrawn. The confidential summary itself shall not be published.

(1) *Contents of confidential summary.* The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

- (i) geographic region of the movement(s) at issue;
- (ii) commodities shipped;
- (iii) number of calendar days from the commencement of the arbitration proceeding to the arbitration decision; and
- (iv) resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable.

(2) *STB quarterly reports on Small Case Arbitration Program.* The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall disclose only the four categories of information listed in subsection (f)(1). The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall be issued as a supplement to the Board's quarterly reports of informal service complaints issued by OPAGAC.

§ 1108a.10 No Precedent.

Arbitration decisions under this part shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under the rules of this part or in any Board proceeding except an appeal of the decision under § 1108a.11.

§ 1108a.11 Enforcement and appeals.

(a) *Appeal to the Board.*

(1) *Notice of Appeal.* A party to an arbitration proceeding under this part may appeal the arbitration decision only to the Board and by filing with the Board a notice of appeal of arbitration decision, which shall be formally docketed and made public. The notice of appeal shall not disclose any information about the substance of the arbitration decision but shall set forth only the information included in the model notice of appeal provided in Appendix C.

(2) *Petition to Vacate or Modify Arbitration Decision.* The party appealing the arbitration decision shall file under seal, at the same time as the notice of appeal but separately, a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating and/or modifying the decision.

(3) *Replies.* Replies to the petition shall be filed under seal within 20 calendar days of the filing of the petition with the Board. Replies shall be subject to the page limitations of section 1115.2(d) of this chapter and the service requirements of subsection (a)(7).

(4) *Confidentiality of filings; public docket.* All submissions, with the exception of the notice of appeal, shall be filed under seal and kept confidential, but the docket shall be public.

(5) *Page limitations.* The petition shall be subject to the page limitations of section 1115.2(d) of this chapter.

(6) *Time limit.* The notice of appeal and petition to vacate or modify arbitration decision must be filed within 20 calendar days from the date on which the arbitration decision was served on the parties.

(7) *Service.* Copies of the petition shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this part shall be limited to determining only whether:

- (i) the decision is consistent with sound principles of rail regulation economics;
- (ii) a clear abuse of arbitral authority or discretion occurred;
- (iii) the decision directly contravenes statutory authority; or
- (iv) the award limitation was violated.

(c) *Relief available on appeal to the Board.* Subject to the Board's limited standard of review as set forth in subsection (b), the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in 1108a.8(b).

(d) *Confidentiality of Board's decision on appeal.* The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace.

(1) *Information protected from public disclosure.* In no event shall the following information be publicly disclosed in the Board's decision or otherwise:

- (i) the specific relief awarded by the arbitration panel, if any, or by the Board; or
- (ii) the Origin-Destination pair(s) involved in the arbitration.

(2) *Board decision affirming arbitration decision.* A Board decision that denies the petition to modify or vacate will do so in a way that maintains the complete confidentiality of the arbitration decision.

(3) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision

in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 calendar days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision.* Board decisions affirming, vacating, or modifying arbitration awards under this part are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Staying arbitration decision.* The timely filing of a petition with the Board to modify or vacate the arbitration award will not automatically stay the effect of the arbitration decision. A stay may be requested under section 1115.3(f) of this chapter.

(g) *Enforcement.* A party seeking to enforce an arbitration decision under this part must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 9-13.

EXHIBIT 2

**Revised Proposed Amendments to
Code of Federal Regulations
(blacklined from Appendix A to
Joint Petition for Rulemaking)**

APPENDIX A

PROPOSED AMENDMENTS TO CODE OF FEDERAL REGULATIONS

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002 and 1115 and to add a new part 1108a to title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1115 – Appellate Procedures.

1. The authority citation for part 1115 continues to read as follows: Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.
2. Revise § 1115.8 by removing “under part 1108” and adding “under parts 1108 and part 1108a” to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

* * * * * For arbitrations authorized under parts 1108 and 1108a of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. * * *

* * * * *

3. A new part 1108a is added to read as follows:

PART 1108a – ALTERNATIVE VOLUNTARY PROGRAM FOR ARBITRATION OF FREIGHT RAIL RATE DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

Sec.

1108a.1
1108a.2
1108a.3
1008a.4
1008a.5
1008a.6
1008a.7
1008a.8
1008a.9
1008a.10
1008a.11

Authority: 49 U.S.C. § 10701(d)(3); 49 U.S.C. § 1321(a); 49 U.S.C. § 10502; 5 U.S.C. § 571, *et seq.*

§ 1108a.1 Definitions.

As used in this part:

- (1) *Arbitrator* means a single person appointed to arbitrate under this part.
- (2) *Arbitration panel* or *arbitral panel* means a group of three people appointed to arbitrate under this part.
- (3) *Small Case Arbitration Program* means the program established by the Surface Transportation Board in this part.
- (4) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in section 1108a.7(c)(2).
- (5) *Limit Price Test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 11-18 (STB served Sept. 27, 2012).
- (6) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Case Arbitration Program pursuant to section 1108a.3(a).
- (7) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in section 1108a.6.
- (8) *STB* or *Board* means the Surface Transportation Board.
- (9) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by 49 C.F.R. § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. part 1108.
- (10) *Streamlined market dominance test* means the methodology adopted by the Board in STB Docket No. Ex Parte 756, served on ~~XXXX.~~ August 3, 2020.
- (11) *Third arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, by the STB Chairman from a list provided by the arbitrating parties, pursuant to the process described in section 1108a.6.
- (12) *Pending arbitration* means an arbitration under this part in which the arbitral panel has not yet issued the arbitration decision, including a dispute being mediated in the pre-arbitration ~~30-day mediation required~~ under section 1108a.5**(b)**.
- (13) *Rate dispute* means a dispute involving whether a rail carrier's rate(s) are "reasonable," as that term is used in 49 U.S.C. § 10701(d)(1).

§ 1108a.2 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This part (Part 1108a) establishes a binding and voluntary arbitration program (the "Small Case Arbitration Program") that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Case Arbitration Program serves as an alternative to, and is separate and distinct from, the more broadly applicable arbitration program the Board has established pursuant to 49 U.S.C. § 11708 and set forth in 49 C.F.R. Part 1108.

(2) In the Small Case Arbitration Program, parties consent to arbitrate rail rate disputes with a limit on potential liability of \$4,000,000 over two years, including any rate prescription,

and a one-year limit on rate prescriptions. No rate below 180% of variable cost as determined utilizing the unadjusted Uniform Rail Costing System shall be prescribed.

(3) The Board establishes this Small Case Arbitration Program to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate under 49 U.S.C. § 1321(a); to establish an alternative arbitration program for small shipper rate disputes pursuant to 5 U.S.C. § 571 *et seq.*; to promote the policy of 49 U.S.C. § 10101(15); and to implement 49 U.S.C. § 10701(d)(3), which requires the Board to maintain one or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.

(4) In light of the voluntary and contractual nature of arbitration under the Small Case Arbitration Program, the issues of market dominance and rate reasonableness shall be determined by the arbitral panel as set forth in section 1108a.9, and the Board's standard of review of an arbitration decision, if appealed to the Board, shall be limited as set forth in section 1108a.11(b).

(b) *Limitations to the use of the Small Case Arbitration Program.* The Small Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(c) *No limitation on other avenues of arbitration.* Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108a.3 Participating in the Small Case Arbitration Program.

(a) *Railroad opt-in procedures.* A railroad may opt into the Small Case Arbitration Program at any time.

(1) *Opt-in notice.* To opt into the Small Case Arbitration Program, a railroad may file a notice with the Board, notifying the Board of the railroad's consent to participate in the Small Case Arbitration Program. Such notice may be filed at any time and shall be effective upon receipt by the Board or at another time specified in the notice.

(2) *Option to consent to specified term.* A carrier may, but is not required to, include in its notice opting into the Small Case Arbitration Program a specified time period for which the carrier consents to opt into the Program.

(i) If a carrier opts into the Small Case Arbitration Program for a specified term, the carrier may withdraw from the Program prior to the expiration of its specified term only pursuant to subsections (c)-(d).

(ii) If a carrier opts into the Small Case Arbitration Program without specifying the term of its consent, or if a carrier's specified term of its consent has expired, that carrier participates in the Small Case Arbitration Program at will and may withdraw from the Program under ~~subsections (c)-(d)~~ subsection (e)(ii) or (e)(iii).

(3) *Public notice of railroad participants.* The Board shall maintain a list of railroads who have opted into the Small Case Arbitration Program on its website at www.stb.gov.

(b) *Shipper opt-in procedures.* A shipper may opt into the Small Case Arbitration Program at any time on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Case Arbitration Program and by filing a joint notice to OPAGAC with the participating carrier, as set forth in section 1108a.5(b).

(c) *Withdrawal for change in law.*

(1) Regardless of any specified term of consent, a carrier or shipper participating in the Small Case Arbitration Program may withdraw its consent to arbitrate under this part on the basis of the following events:

(i) the Board adopts new rate reasonableness procedures in Final Offer Rate Review, STB Docket No. Ex Parte 755, without exempting carriers participating in the Small Case Arbitration Program from those procedures;

(ii) the Board makes any material change(s) to the Small Case Arbitration Program under this part after a shipper or railroad has opted into the Small Case Arbitration Program; or

(iii) the Board makes any material change(s) to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the Small Case Arbitration Program.

(2) *Procedures for withdrawal for change in law.* A participating shipper or carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for change in law with the Board within 30 calendar days of an event that qualifies as a basis for withdrawal as set forth in subsection (c)(1).

(i) The notice of withdrawal for change in law shall state the basis or bases from subsection (c)(1) for the party's withdrawal of its consent to arbitrate under this part.

(ii) Any party may challenge the withdrawing party's withdrawal for change in law by filing a notice of appeal with the Board within five business days of the filing of the notice of withdrawal being challenged. The withdrawing party shall be permitted to file a reply to the notice of appeal within 14 calendar days from the filing of the notice of appeal. The appeal shall be resolved by either a Board-retained administrative law judge or the STB Chairman, at the Board's discretion, within 14 calendar days from the filing of the withdrawing party's reply. No replies to reply shall be permitted. A notice of appeal under this subsection shall stay any arbitrations without decision, as defined by subsection (c)(3)(ii) below, until the appeal is resolved.

(iii) Subject to the stay provision of subsection (c)(3)(ii) The, the notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law.*

(i) *Arbitrations with decision.* The withdrawal of consent for change in law by either a shipper or carrier shall not affect arbitrations in which the arbitral panel has issued an arbitration decision.

(ii) *Arbitrations without decision.* The Subject to the stay provision of subsection (c)(2)(ii), the withdrawal of consent for change in law by either a shipper or carrier shall require the immediate dismissal of any pending arbitration under this part involving the withdrawing party in which the panel has not yet issued an arbitration decision.

(d) *Withdrawal for case volume.* Regardless of any specified term of consent, a carrier may withdraw its consent to arbitrate under this part if the carrier faces more than 25 arbitrations in a rolling 12-month period, or more than 10 simultaneous arbitrations.

(1) *Procedures for withdrawal for case volume.* A carrier may withdraw its consent to arbitrate under this part, as described in this subsection, by filing a notice of withdrawal for case volume with the Board that states the basis in subsection (d) upon which the carrier is withdrawing its consent.

(2) *Effect of withdrawal for case volume.* A carrier's withdrawal of consent for case volume shall be effective on the day of its filing and shall:

(i) not affect the arbitration process for disputes under this part in which the parties have either started the first mediation session of the 30-day mediation period required by under 1108a.5(b), or initiated the arbitration process by the notice of intent to arbitration under 1108a.5(a) where the parties have mutually waived the mediation requirement under 1108a.5(b)(4); and

(ii) require the immediate discontinuance of the arbitration process under this part for any disputes under this part in which the parties have either not started the first mediation session of the 30-day mediation period required by under 1108a.5(b), or not initiated the arbitration process by the notice of intent to arbitration under 1108a.5(a) where the parties have mutually waived the mediation requirement under 1108a.5(b)(4).

(e) *At-will withdrawal.* If a carrier is participating in the Small Case Arbitration Program at-will, or if the specified term of a carrier's consent to arbitrate under the Program has expired, the carrier may withdraw from the Program at any time and for any reason by filing a notice of at-will withdrawal with the Board.

(1) A notice of at-will withdrawal shall be effective 30 calendar days from its filing date.

(2) A notice of at-will withdrawal shall not affect disputes for which a shipper has notified the participating carrier of its intent to arbitrate, as set forth in 1108a.5(a), prior to the effective date of the notice of at-will withdrawal.

§ 1108a.4 Use of arbitration.

(a) *Eligible Matters.* The arbitration program under this part may be used only for rate disputes subject to the jurisdiction of the Surface Transportation Board.

(1) Only rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this part. If the parties dispute whether a challenged rate was established pursuant to 49 U.S.C. § 10709, the parties must petition the Board to resolve that dispute, which must be resolved prior to the parties initiating arbitration process under this part.

(2) A shipper may challenge rates for multiple traffic lanes within a single arbitration under this part.

(b) *Eligible Parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits.* A shipper may bring a maximum of one arbitration at a time against a participating railroad. For purposes of this subsection, an arbitration under this part is final, and a new arbitration may be brought against the defendant carrier by the shipper, when the arbitral panel issues its arbitration decision.

(d) *Arbitration clauses.* Nothing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

§ 1108a.5 Arbitration initiation procedures.

(a) *Notice of shipper intent to arbitrate dispute.* To initiate the arbitration process under this part against a participating railroad, a shipper must notify the railroad in writing of its intent to arbitrate a dispute under this part. The notice must include a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part.

(b) *Pre-arbitration mediation.* ~~Prior~~ Unless the parties waive this requirement as permitted by subsection (b)(4), prior to filing the joint notice required in subsection (c), the parties to the

dispute must engage in mediation not to exceed 30 calendar days of mediation. The parties may extend the mediation period at their discretion, but the mediation shall be outside any STB process.

(1) Mediation shall be initiated by the shipper's notice of intent to arbitrate under this part.

(2) The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) The 30-day time period begins at the start of the first mediation session.

(4) The parties may mutually consent to waive the pre-arbitration mediation requirement.

(c) *Joint Notice of Intent to Arbitrate.* To arbitrate a rate dispute under this part, the parties must file a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), indicating the parties' intent to arbitrate under the Small Case Arbitration Program.

(1) The joint notice shall set forth the following information:

(i) the basis for the Board's jurisdiction;

(ii) the basis for the parties' eligibility to use the Small Case Arbitration Program, including:

1. that the dispute being arbitrated is solely a rate dispute;

2. that the railroad has opted into the Small Case Arbitration Program;

3. that the shipper does not have any other pending arbitrations at that time against the defendant railroad;

4. that the parties have engaged in the required 30 days of mediation;

(iii) the requested relief; and

(iv) the parties' agreement to arbitrate under the rules of this part.

(2) The joint notice shall be confidential and will not be published by the Board.

(3) Unless the parties have agreed not to request the Waybill Sample pursuant to section 1108a.7(g), the parties must also serve the Joint Notice of Intent to Arbitrate on the Director of the Office of Economics, along with STCC information necessary for the Office of Economics to produce the unmasked confidential Waybill Sample.

(d) *Arbitration agreement.* The rules of this part shall be incorporated by reference into any arbitration agreement to arbitrate under the Board's Small Case Arbitration Program.

§ 1108a.6 Arbitrators.

(a) *Decision by arbitral panel.* All matters arbitrated under this part shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator.* Each side may object to the other side's selected arbitrator within two business days and only for cause. For-cause bases may include, but are not limited to, a lack of impartiality, a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with OPAGAC. The STB

Chairman shall rule on the objection in a telephonic conference within two business days, or as soon as is practicable. No briefing shall be permitted.

(iii) The Objection to Party-Appointed Arbitrator filed with OPAGAC and the telephonic conference, including the STB Chairman's ruling, shall be confidential.

(2) *Costs for party-appointed arbitrators.* Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Third arbitrator.*

(1) *Appointment.* Once appointed, the two party-appointed arbitrators shall, without delay, select the third arbitrator from a joint list of arbitrators provided by the parties.

(2) *Need for STB Chairman to select third arbitrator.* If the two party-appointed arbitrators cannot agree on a selection for the third arbitrator, the parties shall immediately file a Joint Request for Selection of Third Arbitrator with OPAGAC.

(i) The Joint Request for Selection of Third Arbitrator must include a joint list of potential arbitrators selected by the parties.

(ii) The STB Chairman shall select the third arbitrator and notify the parties of the selection within two business days, or as soon as is practicable, after the filing of the Joint Request for Selection of Third Arbitrator.

(iii) The Joint Request for Selection of Third Arbitrator and the STB Chairman's selection shall be confidential.

(3) *Third arbitrator role as lead arbitrator.* The third arbitrator shall serve as the lead arbitrator and will be responsible for ensuring that the tasks detailed in sections 1108a.7 and 1108a.9 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this part.

(4) *Costs.* The complaining shipper and the defendant carrier shall each pay one-half of the cost of the third arbitrator.

(d) *Arbitrator choice.* The parties may choose their arbitrators in all events without limitation. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in 49 CFR part 1108, § 1108.6(b).

(e) *Arbitrator incapacitation.* If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in subsection (b).

(2) If the incapacitated arbitrator was the third arbitrator, a replacement third arbitrator shall be appointed pursuant to the procedures set forth in subsection (c).

(f) *Arbitrator duties.* In an arbitration under this section, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108a.7 Arbitration procedures.

(a) *Appointment of Arbitration Panel.* Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing.

(b) *Commencement of arbitration process.* Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing.

(c) *Expedited timetables.*

(1) *Evidentiary phase timetable.* The evidentiary phase shall be completed within 45 calendar days from the commencement of the arbitration process, unless a party requests an extension and the arbitration panel grants the extension request. In no event shall the evidentiary phase last more than 90 calendar days unless all parties to the arbitration mutually agree to a longer time period.

(2) *Decision timetable.* The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108a.9(a)(2), shall be served on the parties within 120 calendar days from the commencement of the arbitration process.

(3) *Extensions to the timetables.* The arbitration panel may extend any deadlines set forth in this subsection (c) upon mutual agreement of all parties to the arbitration.

(d) *Limited discovery.* Discovery under this part shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(e) *Evidentiary guidelines.*

(1) *Principles of due process.* The arbitration panel shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the complainant shipper's case-in-chief.

(2) *Inadmissible evidence.* The following evidence shall be inadmissible in an arbitration under this part:

(i) on the issue of market dominance, any evidence that would be inadmissible before the Board;

(ii) any non-precedential decisions, including non-precedential decisions of the STB or of prior arbitrations; and

(iii) any evidence related to the revenue adequacy of the defendant carrier.

(f) *Confidentiality agreement.* All proceedings under this part shall be governed by a standard confidentiality agreement unless the parties agree otherwise. The terms of the confidentiality agreement shall apply to all aspects of the arbitration process under this part, including but not limited to discovery, the Waybill Sample provided pursuant to subsection (g), party filings, and the arbitral decision. A model confidentiality agreement is provided in Appendix B.

(g) *Waybill Sample.* The Board's Office of Economics shall provide the unmasked confidential Waybill Sample to each party to the arbitration proceeding within seven calendar days of the filing of the Joint Notice of Intent to Arbitrate. The data provided by the Office of Economics in the unmasked confidential Waybill Sample shall be limited to only the following data:

(1) most recent year;

(2) movements with R/VC ratio above 180%;

(3) movements on defendant carrier;

(4) movements with same 5 digit STCC as the challenged movements.

(h) *Confidentiality of entire arbitration process.* The entirety of the arbitration process under this part shall be confidential.

§ 1108a.8 Relief.

(a) *Relief available.* Subject to the relief limits set forth in subsection (b), the arbitration panel under this part may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this part shall not exceed \$4 million over two years (as indexed annually for inflation using the CPI index and a 2020 base year), inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof.

(1) A rate prescription shall not exceed 1 year.

(2) A rate below 180% of variable cost, as determined by unadjusted URCS, shall not be prescribed.

(c) *Relief not available.* No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108a.9 Decisions.

(a) *Technical requirements.*

(1) *Findings of fact and conclusions of law.* The arbitration decision under this part shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement.* The unredacted arbitration decision served on the parties in accordance with section 1108a.7(c)(2) shall comply with the confidentiality agreement described in section 1108a.7(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements.* The arbitration panel under this part shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance.* ~~In Subject to 1108.7a(e)(2) above, in~~ determining the issue of market dominance, the arbitration panel under this part shall follow ~~at the complainant's discretion, either the streamlined market dominance test adopted in Ex Parte 756} or the Board's non-streamlined market dominance test.~~

(i) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(ii) The arbitration panel shall not apply the Limit Price Test.

(2) *Maximum lawful rate.* ~~In Subject to 1108.7a(e)(2) above and subsections (b)(2)(i)-(ii) below, in~~ determining the issue of maximum lawful rate, the arbitration panel under this part shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.

(i) *Consistent with sound principles of rail regulation economics.* The panel's decision must be consistent with sound principles of rail regulation economics.

(ii) *Prohibition on considering revenue adequacy constraint.* The panel is prohibited from 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).

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this part may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* Subject to section 1108a.11, the arbitration decision under this part, whether redacted or unredacted, shall be confidential.

(1) No copy of the arbitration decision shall be served on the Board except as is required under subsection (d).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Service in the case of an appeal.* In the event an arbitration decision is appealed to the Board pursuant to section 1108a.11, the arbitration decision shall be filed under seal and, subject to section 1108a.11, shall remain confidential on appeal.

(e) *Arbitration decisions are binding.* By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in section 1108a.11. An arbitration decision under this part shall preclude the complainant shipper(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding rates for the movements at issue in the arbitration, with the exception of appeals under section 1108a.11. This preclusion shall last until the later of: (i) two years after the Joint Notice of Intent to Arbitrate; or (ii) the expiration of the term of any prescription imposed by the arbitration decision.

(f) *Confidential summaries of arbitrations.* To permit the STB to monitor the Small Case Arbitration Program, the parties shall submit a confidential summary to OPAGAC within 14 calendar days after either receiving the arbitration decision, the dispute settles, or the dispute is withdrawn. The confidential summary itself shall not be published.

(1) *Contents of confidential summary.* The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

- (i) geographic region of the movement(s) at issue;
- (ii) commodities shipped;
- (iii) number of calendar days from the commencement of the arbitration proceeding to the arbitration decision; and
- (iv) resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable.

(2) *STB quarterly reports on Small Case Arbitration Program.* The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall disclose only the four categories of information listed in subsection (f)(1). The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Case Arbitration Program shall be issued as a supplement to the Board's quarterly reports of informal service complaints issued by OPAGAC.

§ 1108a.10 No Precedent.

Arbitration decisions under this part shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under the rules of this part or in any Board proceeding except an appeal of the decision under § 1108a.11.

§ 1108a.11 Enforcement and appeals.

(a) *Appeal to the Board.*

(1) *Notice of Appeal.* A party to an arbitration proceeding under this part may appeal the arbitration decision only to the Board and by filing with the Board a notice of appeal of arbitration decision, which shall be formally docketed and made public. The notice of appeal shall not disclose any information about the substance of the arbitration decision but shall set forth only the information included in the model notice of appeal provided in Appendix C.

(2) *Petition to Vacate or Modify Arbitration Decision.* The party appealing the arbitration decision shall file under seal, at the same time as the notice of appeal but separately, a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating and/or modifying the decision.

(3) *Replies.* Replies to the petition shall be filed under seal within 20 calendar days of the filing of the petition with the Board. Replies shall be subject to the page limitations of section 1115.2(d) of this chapter and the service requirements of subsection (a)(7).

(4) *Confidentiality of filings; public docket.* All submissions, with the exception of the notice of appeal, shall be filed under seal and kept confidential, but the docket shall be public.

(5) *Page limitations.* The petition shall be subject to the page limitations of section 1115.2(d) of this chapter.

(6) *Time limit.* The notice of appeal and petition to vacate or modify arbitration decision must be filed within 20 calendar days from the date on which the arbitration decision was served on the parties.

(7) *Service.* Copies of the petition shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this part shall be limited to determining only whether:

- (i) the decision is consistent with sound principles of rail regulation economics;
- (ii) a clear abuse of arbitral authority or discretion occurred;
- (iii) the decision directly contravenes statutory authority; or
- (iv) the award limitation was violated.

(c) *Relief available on appeal to the Board.* Subject to the Board's limited standard of review as set forth in subsection (b), the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in 1108a.8(b).

(d) *Confidentiality of Board's decision on appeal.* The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace.

(1) *Information protected from public disclosure.* In no event shall the following information be publicly disclosed in the Board's decision or otherwise:

- (i) the specific relief awarded by the arbitration panel, if any, or by the Board; or
- (ii) the Origin-Destination pair(s) involved in the arbitration.

(2) *Board decision affirming arbitration decision.* A Board decision that denies the petition to modify or vacate will do so in a way that maintains the complete confidentiality of the arbitration decision.

(3) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision

in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 calendar days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision.* Board decisions affirming, vacating, or modifying arbitration awards under this part are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Staying arbitration decision.* The timely filing of a petition with the Board to modify or vacate the arbitration award will not automatically stay the effect of the arbitration decision. A stay may be requested under section 1115.3(f) of this chapter.

(g) *Enforcement.* A party seeking to enforce an arbitration decision under this part must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 9-13.