

SERVICE DATE – NOVEMBER 25, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 765

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

Digest:<sup>1</sup> The Board institutes a rulemaking proceeding to consider a proposal to establish a new, voluntary arbitration program intended to help resolve small rate disputes.

Decided: November 24, 2020

On July 31, 2020, five railroad parties—Canadian National Railway Company (CN); CSX Transportation, Inc. (CSXT); The Kansas City Southern Railway Company (KCS); Norfolk Southern Corporation; and Union Pacific Railroad Company (UP) (collectively, Petitioners)<sup>2</sup>—filed a petition for rulemaking to create a new, voluntary small rate case arbitration program, to be codified at 49 C.F.R. part 1108a, which would function alongside the Board’s existing arbitration program at 49 C.F.R. part 1108. Petitioners pledge to participate in their proposed arbitration program for a period of five years, provided the Board adopts the program according to the terms set forth in the petition, including (among other things) a right to withdraw from the program if the Board adopts the Final Offer Rate Review (FORR) process<sup>3</sup> without exempting carriers that participate in the program from the FORR process. (Pet. 2, 17.)

Replies to the petition were filed on August 20, 2020, by the National Grain and Feed Association (NGFA); Olin Corporation (Olin); the American Fuel & Petrochemical Manufacturers (AFPM); and (filing jointly) the American Chemistry Council, Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League,

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The petition lists one of the petitioners only as “CN.” In their supplemental filing, Petitioners identify this party as the “U.S. operating subsidiaries of CN.” Although not identified in either filing, the Board understands “CN” to mean Canadian National Railway Company. Another petitioner is listed as Norfolk Southern Corp., but in the supplemental filing, the party is identified as Norfolk Southern Railway Company (NSR), the operating affiliate of Norfolk Southern Corp.

<sup>3</sup> The Board proposed FORR in Final Offer Rate Review, EP 755 (STB served Sept. 12, 2019).

The Chlorine Institute, and The Fertilizer Institute (Joint Shippers). The U.S. Department of Agriculture (USDA) also filed a reply. Olin, AFPM, and the Joint Shippers generally object to the Petitioners' requested program.<sup>4</sup> While USDA and NGFA express support for commencing a rulemaking proceeding, they advocate for certain changes to the program requested by the Petitioners. (USDA Reply 1; NGFA Reply 1-2.) By decision issued on August 26, 2020, the Director of the Office of Proceedings directed Petitioners to submit a supplemental pleading responding to the replies and allowed other interested persons to respond as well.

On September 10, 2020, Petitioners submitted a supplemental filing, as did AFPM, U.S. Wheat, and the Joint Shippers. Petitioners state that they are agreeable to some modifications to their proposed program, but not to the modifications suggested by other interested parties on confidentiality, exemption from FORR, and a prohibition on revenue adequacy considerations. The shipper groups renewed their objections to Petitioners' proposed program.

The Board favors the resolution of disputes through alternative dispute resolution whenever possible, see 49 C.F.R. § 1109.1, and has also been actively working to expand access to rate relief, particularly for smaller disputes. The Rate Reform Task Force (RRTF), which the Board established in 2018 to develop recommendations for rate reform, recommended legislation that would permit mandatory arbitration of small disputes, in addition to a Board-administered final offer decision-making process,<sup>5</sup> the latter of which the Board has proposed in Docket No. EP 755. (RRTF Report 14-20.) In order for the Board to give further consideration to providing a new arbitration program under which parties would voluntarily participate to resolve rate disputes, the Board concludes that it is appropriate to institute a rulemaking proceeding to consider Petitioners' proposal.<sup>6</sup> The Board will provide an opportunity for additional public participation in a subsequent decision.

It is ordered:

1. Petitioners' request to initiate a rulemaking proceeding is granted, as discussed above.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

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<sup>4</sup> In a comment filed in Docket No. EP 755, the U.S. Wheat Associates Transportation Working Group (U.S. Wheat) also expressed "several concerns" regarding the Petitioners' requested program. See U.S. Wheat Comment 6, Aug. 12, 2020, Final Offer Rate Review, EP 755.

<sup>5</sup> The RRTF issued its report on April 25, 2019. The RRTF Report is available on the Board's website at <https://prod.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf>.

<sup>6</sup> The Board also notes the Petitioners' proposed interrelationship between their proposed arbitration program and the Board's proposal in Docket No. EP 755.