

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 765

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

**OPPOSITION TO JOINT SHIPPERS' MOTION
TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

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Dated December 6, 2021

CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, and the U.S. operating subsidiaries of Canadian National Railway Company (“CN”) (collectively, “Petitioners”) appreciate the Board’s decision to explore a voluntary arbitration program to resolve small rate disputes. The Board’s recent Notice of Proposed Rulemaking (“NPRM”)¹ moves the Board closer to its longstanding goal of developing a more effective means of resolving small rate disputes. At the same time, as with any NPRM, Petitioners and other interested parties will likely have suggestions to the proposed program.

The unprecedented Motion that the Joint Shippers have filed would do away with the valuable input the notice-and-comment process offers.² Joint Shippers claim that opening comments should be held “in abeyance” unless Petitioners consent to the arbitration panel considering “revenue adequacy.”³ The Board should deny Joint Shippers’ Motion for three reasons.

First and foremost, it turns the Administrative Procedure Act on its head to require railroads to preemptively consent to a portion of a potential Final Rule before the Board even takes opening comments on the proposed rule. The Board

¹ Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, STB Docket No. EP 765 (STB served Nov. 15, 2021) (“NPRM”).

² Motion of Joint Shippers to Hold Procedural Schedule in Abeyance, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, STB Docket No. EP 765 (filed Nov. 24, 2021) (“Motion”), at 1–2.

³ *Id.* at 2.

itself has recognized the complexities associated with the proposed arbitration program,⁴ and Petitioners are working diligently to analyze all aspects of the lengthy proposal and prepare comments. A meaningful opportunity for interested parties to comment is essential to fulfill the APA's purpose of ensuring fairness to affected parties and testing proposed regulations via exposure to diverse public comment.⁵ All interested parties have the right to comment on *all* aspects of the proposed rule.⁶ Joint Shippers are essentially asking the Board to take that right away from railroads, by requiring them to affirmatively consent to arbitration of "revenue adequacy" claims prior to any opportunity to comment on that provision of the NPRM. That request is unprecedented and unjust, and it would preclude the Board from considering comments about this aspect of the NPRM.

Second, the railroads have well-justified concerns about voluntarily agreeing to litigate a case based on a system-wide revenue-adequacy constraint in a forum where they would have limited appellate rights. The record in Ex Parte 761 & 722 presented overwhelming evidence that the so-called revenue adequacy constraint set forth in *Coal Rate Guidelines* is unlawful, not premised on sound economics, and would be terrible public policy. Indeed, numerous internationally acclaimed

⁴ Report on Pending STB Regulatory Proceedings, Third Quarter 2021, at 7; Report on Pending STB Regulatory Proceedings, Second Quarter 2021, at 9.

⁵ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

⁶ See *Am. Ass'n of Meat Processors v. Bergland*, 460 F. Supp. 279, 282 (D.D.C. 1978) ("[A] main objective of [§] 553 procedure should be, as far as practicable, to let anyone comment on all the facts and all ideas that the agency considers.") (quoting Kenneth Culp Davis, *Administrative Law of the Seventies* § 6.01-3, at 179 (1976)).

economists have testified *in unity* that a system-wide revenue adequacy constraint is economically defunct, has been abandoned by regulators in modern countries, is inappropriate for the railroad industry, and cannot resolve whether a challenged rate is, in fact, unreasonable. Petitioners are rightfully concerned about this aspect of the NPRM but are still evaluating the entirety of the proposed program and will present their views in the comment period, as is their right.

Finally, right now any rail customer can present to the STB a rate complaint based on the revenue adequacy constraint set forth in *Coal Rate Guidelines*. In that forum, the defendant railroad would retain all its legal rights to challenge the constraint before the STB—and, if necessary, before the federal courts—as an unlawful and unjustified profit transfer from railroads to the customer *not* on the basis of a specific rate actually being unreasonable but, rather, on the mere level of a railroad’s system-wide earnings premised on a flawed measurement of financial health. But Joint Shippers demand a more favorable forum. They insist the railroads all immediately consent to a potential program with limited appellate rights that has not even been adopted, let alone completed the notice-and-comment process. The Board should not accept this gambit prior to listening to and entertaining all comments from stakeholders on this issue.

For these reasons, Petitioners request that the Board deny Joint Shippers' Motion and allow all parties the opportunity to comment on all aspects of the NPRM.⁷

Respectfully submitted,

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Dated: December 6, 2021

⁷ Petitioners are simultaneously filing a request for a brief extension of time in this proceeding to ensure sufficient time to analyze the proposal and prepare thorough and complete comments.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2021, I served a copy of the foregoing Opposition to Joint Shippers' Motion to Hold Procedural Schedule in Abeyance by email on all parties on the official Service List for STB Docket No. EP 765.

/s/ Morgan B. Lindsay
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