

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

ENTERED  
Office of Proceedings  
December 8, 2021  
Part of  
Public Record

**Ex Parte No. 765**

---

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

---

**REPLY OF JOINT SHIPPERS  
TO MOTION FOR EXTENSION OF TIME**

The American Chemistry Council, Corn Refiners Association, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively “Joint Shippers”) hereby reply to the “Motion for Extension of Time” filed by the Joint Petitioners<sup>1</sup> on December 8, 2021 (“Extension Motion”). In a separate filing on the same date, the Joint Petitioners also replied in opposition to the Joint Shippers’ November 24, 2021 “Motion to Hold the Procedural Schedule in Abeyance” (“Abeyance Motion”).<sup>2</sup> If the Board denies the Abeyance Motion, the Joint Shippers do not oppose the Extension Motion, provided that the Board grants the same extension in *Final Offer Rate Review*, Docket No. EP 755 (served Nov. 15, 2021).<sup>3</sup>

---

<sup>1</sup> The five Joint Petitioners are Canadian National Railway Company, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Corporation, and Union Pacific Railroad Company. In a separate filing, Canadian Pacific joined in much of the Petition. See NPRM at 6 & n. 12.

<sup>2</sup> The Joint Shippers in this Reply are the same Joint Shippers that filed the Abeyance Motion.

<sup>3</sup> The Joint Petitioners contemplate a parallel extension of time in EP 755 and have stated that they would not object. Extension Motion at 2.

From the Joint Shippers' perspective, an extension is only necessary for reply comments, but they do not oppose the requested extension for opening comments. As demonstrated in the Extension Motion, the Board has a crowded docket in the first quarter of 2022 with multiple major proceedings with overlapping deadlines.<sup>4</sup> The most noteworthy of these overlaps occurs on March 15, 2022, when the Board, in addition to reply comments in this docket, has scheduled a public hearing in *Reciprocal Switching*, Docket No. EP 711 (Sub No. 1), and reply comments in EP 755. That date follows just two weeks after Comments, Requests for Conditions, and Inconsistent Applications are due in *Can. Pac. Ry. – Control – Kan. City S.*, Docket No. FD 36500, on February 28, 2022. These deadlines require many stakeholders to prepare comments, reply comments, and hearing testimony concurrently in a major rail merger proceeding and three major rulemaking proceedings that implicate a multitude of complex issues. The proposed extensions of time would provide enough separation to facilitate a more thorough development of the records in all those proceedings.

The Joint Shippers point out that, if the Board grants their Abeyance Motion, this Extension Motion is rendered moot. Joint Shippers' Abeyance Motion, however, is motivated by the same factors driving the Joint Petitioners' Extension Motion. Specifically, EP 765 will command significant resources at the same time as these other very important Board proceedings. The Joint Shippers have long been supporters of adopting a meaningful process for arbitrating rail rate disputes; indeed, many of their members include arbitration as a form of dispute resolution in their rail transportation contracts. They have no desire, however, to expend their finite resources – especially when there are so many other important demands upon those

---

<sup>4</sup> Extension Motion, at 2 n. 3.

resources – to comment on a voluntary arbitration proposal that can never be used by anyone if the Joint Petitioners refuse to participate in it.

This is not a hypothetical prospect. As demonstrated in the Abeyance Motion, it is precisely what the Joint Petitioners repeatedly have said on the record in this proceeding, when they declared that they will not participate in an arbitration that permits the arbitrators to consider revenue adequacy.<sup>5</sup> After considering the Joint Petitioners' position on that issue, which has been extensively presented in Ex Parte Nos. 761 and 722, the Board rejected it when it proposed rules in EP 765 that allow arbitrators to consider a railroad's revenue adequacy in their rate reasonableness determinations.<sup>6</sup> The Joint Petitioners' most recent pleadings on December 6<sup>th</sup> indicate that they have not changed their position following issuance of the NPRM and that their only reason for advancing this proceeding is to get another "bite at the apple" in the hope of persuading the Board to change its position. Thus, it is eminently reasonable for the Board to hold this proceeding in abeyance until the Joint Petitioners clarify whether they still adhere to that position. However, if the Board denies the Abeyance Motion, the Joint Shippers do not oppose this Extension Motion provided the Board applies the same extensions in EP 755.<sup>7</sup>

---

<sup>5</sup> See, "Joint Petition For Rulemaking To Establish An Alternative Voluntary Arbitration Program For Small Rate Disputes," at 27 (filed July 31, 2020); "Petitioners' Supplemental Pleading," at 15 (filed Sept. 10, 2020).

<sup>6</sup> Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 38-40 (served Nov. 15, 2021) (concluding that the consideration of revenue adequacy in rate reasonableness determinations is consistent with the statute, economic theory, and over three decades of judicially sustained precedent).

<sup>7</sup> Even if the Board grants the Abeyance Motion, thereby rendering the Extension Motion moot, it should extend the date for reply comments in EP 755 for all the same reasons presented herein.

Michael F. McBride  
Van Ness Feldman LLP  
1050 Thomas Jefferson St., N.W.  
Washington, D.C. 20007  
(202) 298-1800

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno".

Jeffrey O. Moreno, Esq.  
Karyn A. Booth  
Jason D. Tutrone, Esq.  
Thompson Hine LLP  
1919 M Street, NW Suite 700  
Washington, DC 20036  
(202) 263-4107

Dated: December 8, 2021

*On behalf of the Joint Shippers*

### **Certificate of Service**

I certify that on December 8, 2021, I served a copy of the foregoing “Reply of Joint Shippers To Motion for Extension of Time” upon all Parties of Record by electronic mail.

A handwritten signature in black ink, appearing to read "Jeffrey Moreno", written in a cursive style.

Jeffrey Moreno