

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 765

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

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) respectfully submits these comments in response to the Surface Transportation Board’s Notice of Proposed Rulemaking served on November 15, 2021.¹ To be clear, the individual members of AAR will express their views regarding specific aspects of the proposal in separate comments, but AAR files these comments to convey the freight rail industry’s support for the goals and general approach of the NPRM. The rules proposed by the Board and its staff could meet two long-sought and elusive goals: (1) making the Board’s small rate case process more accessible; and (2) meeting the congressional intent of establishing a voluntary rate arbitration program. The NPRM addresses some long-held concerns of the railroads regarding the use of arbitration to resolve rate reasonableness disputes. However, AAR suggests below some improvements to the proposal that AAR believes would make the procedure more attractive to all parties.

¹ *Joint Pet. for Rulemaking to Establish an Alternative Voluntary Arb. Program for Small Rate Disputes*, EP-765 (STB served Nov. 15, 2021).

I. The Board's proposal will again increase the options for parties to efficiently resolve small rate disputes.

Since its inception nearly thirty years ago, the Board has worked to develop timely, efficient, and economically sound ways to resolve small rate disputes. In the ICC Termination Act of 1995 ("ICCTA"), which created the STB, Congress required the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."² To fulfill that mandate, in 1996 the Board adopted a simplified methodology designed to determine the reasonableness of a rate using three benchmark figures.³ After ten years with no case being filed, in 2007 the Board revised the Three-Benchmark methodology and also created an additional simplified stand-alone-cost ("SAC") methodology.⁴ To further encourage the filing of cases, the Board modified the relief limits for simplified cases in 2013, increasing the relief cap of the Three-Benchmark test and removing the relief cap for Simplified SAC, among other changes.⁵

Parallel to its work on small rate cases, the Board has also endeavored to develop a workable arbitration program. The Board first adopted a voluntary arbitration program in 1997.⁶ Rate disputes were not contemplated by these rules and the program was adopted

² Pub. L. No. 104-88, 109 Stat. 803, 810.

³ *Rate Guidelines—Non-Coal Proc.*, 1 S.T.B. 1004 (1996), *pet. to reopen denied*, 2 S.T.B. 619 (1997), *appeal dismissed sub nom. Ass'n of Am. R.Rs. v. STB*, 146 F.3d 942 (D.C. Cir. 1998).

⁴ *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009).

⁵ *See Rate Regul. Reforms*, EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014).

⁶ *See Arb. of Certain Disputes Subject to the Statutory Juris. of the STB*, 2 S.T.B. 564 (1997).

under the Board's general authority to prescribe regulations to carry out its mission under now-49 U.S.C. § 1321. In 2013, the Board revised its program to allow a party to voluntarily agree in advance to arbitrate particular types of disputes with clearly defined limits of liability, however rate disputes were not included.⁷ Section 13 of the *Surface Transportation Board Reauthorization Act of 2015* ("Reauthorization Act"), required the Board to establish a voluntary and binding arbitration process specifically to allow for the resolution rail rate and practice complaints under its jurisdiction.⁸ Pursuant to the Reauthorization Act, the Board adjusted its arbitration program in 2016. However, although three Class I carriers opted into the program for some types of non-rate disputes, shippers to date have not utilized the program.⁹ AAR believes the NPRM has the potential to result in greater railroad and shipper participation.

II. The proposal improves the current arbitration program in significant respects and is likely to be viewed by both railroads and shippers as a more fair and viable approach to small rate disputes.

Several aspects of the Board's current arbitration program have deterred participation by railroads. These issues include concerns about the confidentiality of arbitration, the roster of arbitrators, the ability of arbitrators to address market dominance, and the disaggregation of claims.¹⁰ The NPRM successfully addresses these matters.

⁷ See *Assessment of Mediation & Arb. Procs.*, EP 699 (STB served May 13, 2013).

⁸ See Pub. L. No. 114-110 § 13, 129 Stat. 2228, 2235-38, codified at 49 U.S.C. § 11708.

⁹ See *Revisions to Arb. Procs.*, EP 730, at 1-2 (STB served Sept. 30, 2016) corrected (STB served Oct. 11, 2016).

¹⁰ See AAR Supplemental Comments, *Hearing on Revenue Adequacy*, EP 761, et al., at 34-36 (February 19, 2020) ("Supp. Comments").

Arbitration decisions are not confidential under the Board's existing rules. While those decisions are non-precedential, they are still published publicly on the Board's website. This is concerning, as it departs from general expectations that arbitration be private and confidential.¹¹ The NPRM rectifies this concern. The Board takes numerous steps to protect the confidentiality of decisions including on appeal. Importantly, the NPRM ensures "the arbitration process be confidential, including discovery, filings to the arbitrators, the Initial Notice and [the Office of Public Assistance, Governmental Affairs, and Compliance] confirmation letter, the Joint Notice, and confidentiality agreements concerning Waybill Sample data. By proposing to treat these materials as confidential, the Board would not publish them on its website or otherwise make them publicly available."¹² The NPRM also requires parties enter a Confidentiality Agreement and proposes a draft template.¹³ In addition, the Board will not receive arbitration decisions, except on appeal, and will only receive confidential summaries of arbitrations so it may monitor the program.¹⁴ These are appropriate protections that should address several concerns regarding issues of confidentiality.

Regarding the roster of arbitrators, AAR has previously expressed concern that the pool for the current arbitration program is much too limited. The Board's current program requires that parties select arbitrators only from those individuals on the Board's annually published roster. AAR has in the past expressed concern that if parties opt-in to the program they should

¹¹ See Supp. Comments at 35.

¹² NPRM at 48.

¹³ See *Id.* at 49, Appx. B.

¹⁴ See *Id.* at 47-48.

be allowed to expand the list to include other experienced neutral arbitrators.¹⁵ The NPRM remedies this concern in part, by allowing each party to select an arbitrator they believe to be the most qualified under the circumstances, and who need not be from the Board's list. Those two party-selected arbitrators would select the third arbitrator that, again, is not constrained by the Board's annually published list. These are important changes to allow the most qualified individuals to be utilized for the arbitrations, without limiting the pool to those on the Board's list.

On the important matter of market dominance, the Board's current program does not allow the arbitration panel to make a market dominance determination. As such, the process is more lengthy and costly than is necessary and might even exceed the time and cost of bringing a rate challenge under one of the simplified approaches.¹⁶ The NPRM proposes to allow the parties to include the issue of market dominance in the arbitration process.¹⁷ This will save time and money, while also encouraging wider participation in the program.

Finally, under current rules, the Board merely states it will police, on a case-by-case basis, against the improper disaggregation of large disputes into many small cases. The current program thus does not include any reliable protection from disaggregation of a larger case into a number of smaller arbitrations.¹⁸ In the past, the Board noted it would monitor shippers to ensure they would not take a large case that is suitable for a Simplified-SAC or SAC presentation

¹⁵ See Supp. Comments at 35.

¹⁶ See *Id.* at 35.

¹⁷ NPRM at 32-35.

¹⁸ See Supp. Comments at 35-36.

and try to break it apart into dozens of Three-Benchmark cases.¹⁹ Given the nature of the arbitrations under the NPRM, however, the Board would not be able to monitor and protect against such disaggregation. Indeed, the Board may never know the shippers that file arbitrations, as it would only receive confidential summaries that do not reveal the identity of the parties. The NPRM protects against the unfair outcome of disaggregation by establishing a one-case limit per shipper at a time against the same carrier. Creating this mechanical protection against disaggregation is an important piece of the Board's proposed program.

III. Some adjustments to the NPRM proposal would ensure the final rule is fair and reasonable for all sides.

AAR's individual railroad members will comment separately on adjustments of particular interest or importance to them. However, there are certain changes which all AAR's Class I freight railroad members agree should be made, if the program is to be successful. One area where a simple change would encourage private-sector solutions would be to build in a short mandatory mediation. Mediation is often effective in resolving disputes, and just because arbitration is being contemplated does not mean mediation should be swept aside as a means of alternative dispute resolution. Building in a required, but short, mediation period is consistent with the Board's stated preference for private-sector solutions to disputes.²⁰ AAR proposes that the Board include a brief mediation period of 30 days for the parties to attempt to resolve the dispute before incurring the cost of arbitration. The Board could allow parties to

¹⁹ See *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), at 32-33 (STB served Sept. 5, 2007).

²⁰ See 49 C.F.R. § 1109.1 ("The Board favors the resolution of disputes through mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible."); see also NPRM at 21 ("The Board observes that a mediation requirement may help facilitate settlement. If a dispute can be settled through mediation, it would allow parties to avoid the expense of arbitration.").

proceed to arbitration before 30 days if they mutually agree. Indeed, the parties are in the best position to determine whether mediation could assist in resolving the dispute.

Additionally, the NPRM proposes that if there is no agreement reached on the third arbitrator, that arbitrator would be selected using the alternating strike method set forth in 49 C.F.R. § 1108.6(c) from the Board's roster. Using this method, however, could lead to gaming of the Board's arbitration list. It is unlikely that the list will be balanced with individuals with understanding of railroad and rail customer issues. The alternative strike method favors whichever group is more represented. As the third arbitrator is the lead arbitrator, it is all the more important that the selection process not be gamed. The Board expressed concern with the Chairman selecting the third arbitrator, as it did not want the Chairman to "become aware of the arbitration during its pendency."²¹ AAR suggests, therefore, that just as the Board proposes to have an ALJ rule on objections to arbitrators for cause, an unbiased third party, like an ALJ, should make the selection of the third arbitrator if agreement cannot be reached. This will ensure the integrity of the Board's arbitration processes.

Finally, the arbitration process should allow for the full 45 days for submission of pleadings, even if discovery is extended. The NPRM proposes a 90-day evidentiary phase for the arbitration, divided between a 45-day subphase for discovery and a 45-day subphase for the submission of pleadings.²² The NPRM also allows parties to mutually agree to extend discovery.²³ However, under the proposal any extension of the discovery period does not

²¹ NPRM at 25.

²² *See Id.* at 27-28.

²³ *See Id.* at 27.

automatically extend the timeframe for submission of evidence.²⁴ The Board should allow for the full 45-day submission subphase, regardless of whether a discovery subphase extension is requested. The parties will understand the impacts of a discovery subphase extension on the total timeframe for the arbitration. In addition, parties will be in the best position to weigh the positives and negatives of extending the discovery subphase. Considering that the pleadings are informed by discovery, the Board should not diminish the timeframe for submitting pleadings due to a discovery subphase extension.

CONCLUSION

All AAR's Class I freight railroad members agree that a workable voluntary arbitration program would be a helpful—indeed, potentially game-changing—addition to the menu of options currently available for resolving small rate disputes. AAR supports the Board's continuing efforts to develop a voluntary arbitration program for small rate cases.

Respectfully submitted,



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January 14, 2022

²⁴ See *Id.*