

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 765

ENTERED
Office of Proceedings
January 14, 2022
Part of
Public Record

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

Opening Comments of Coalition Associations

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Dated: January 14, 2022

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The American Chemistry Council (“ACC”), The Chlorine Institute, Corn Refiners Association, The Fertilizer Institute, and The National Industrial Transportation League (collectively, “Coalition Associations”),¹ submit these opening comments in response to the Notice of Proposed Rulemaking that the Board served in this proceeding on November 15, 2021 (the “NPRM”).

In their supplemental response to the petition for rulemaking that gave rise to this proceeding, Coalition Associations explained that their main concern with the arbitration program that Petitioners proposed was that it would exempt railroads that opt into the program from any future Final Offer Rate Review (“FORR”) process. Coalition Associations also suggested several modifications to create a more balanced program. Coalition Associations recognize and support the Board’s modifications to the arbitration program to make it more balanced and adopt many of Coalition Associations’ suggestions, especially their request that the Board permit consideration of revenue-adequacy evidence and methodologies in arbitration proceedings.

Coalition Associations main concern with the program as currently proposed—the FORR exemption—remains, however. As explained in Part I, below, this exemption would remove shippers’ access to FORR for small rate disputes

¹ These associations submitted prior comments in this proceeding as “Joint Shippers.” In the Board’s Final Offer Rate Review proceeding, they called themselves “Coalition Associations.” Because the Board has placed the FORR proceeding and this proceeding on parallel tracks and both proceedings are closely connected, the associations will refer to themselves as “Coalition Associations” moving forward in this proceeding.

involving exempt carriers, leaving shippers without any accessible formal review process for small rate disputes. This effectively requires shippers to arbitrate their rate claims, which the Board does not have authority to do. Further, as explained in Part II, the FORR exemption would be inconsistent with the Board's goal of increasing access to rate review because the arbitration program contains features that prevent it from being an accessible review process. If the Board insists on keeping the FORR exemption, it should address this accessibility issue by making the arbitration program public, eliminating the program's case limits, and ensuring that complainants have access to sufficient Waybill Sample data to facilitate use of efficient and economically valid comparative analyses. These modifications would make the program more accessible by reducing uncertainty about potential relief, reducing delay and its prejudicial impact on complainants, and reducing litigation costs.

In Part III, Coalition Associations request two clarifications concerning the arbitration program's rate cap for consistency with the clarifications they are seeking concerning the rate caps for FORR.² First, the Board should index the \$4 million rate cap so that it is the same as the current Three-Benchmark cap. Second, because the two-year prescription period is short and many carload shippers are unable to secure business that will move under a prescribed rate until months after the arbitration order, the Board should declare that complainants may select the

² Coalition Associations are making these requests in their opening comments on the Supplemental Notice of Proposed Rulemaking in Docket EP 755, *Final Offer Rate Review*, which are being filed simultaneously with these comments.

start date of the relief period, provided they provide written notice of the date; and, in the absence of the written notice, the relief period would begin on the one-year anniversary of the arbitration decision.

I. The Board does not have authority to implement the FORR exemption.

The Board has long recognized that it does not have authority to mandate arbitration. Yet a key feature of the Board’s arbitration program is the FORR exemption, which limits shippers to the arbitration program as their only real option for rate review of small disputes against carriers who opt into the program. The FORR exemption thus operates as a *de facto* arbitration mandate, which the Board has no authority to implement.

A. Congress did not give the Board discretion to mandate arbitration of rate challenges.

The plain language of the Board’s enabling statutes does not authorize the Board to require arbitration of rail rate disputes. Under 49 U.S.C. § 10704(a)(1), the Board may prescribe rates only “[w]hen *the Board* . . . decides that a rate charged or collected by a rail carrier . . . does or will violate”³ applicable rate standards. Further, 49 U.S.C. 11704(c)(2) states that, when the Board finds that a carrier owes reparations for unreasonable rates, “*the Board* shall order”⁴ the reparations. Rate prescriptions and reparations thus require an order from the Board.

³ 49 U.S.C. § 10704(a)(1) (emphasis added).

⁴ 49 U.S.C. § 11704(c)(2) (emphasis added).

Additionally, Congress recently confirmed that the Board cannot mandate arbitration of rate disputes. In the Surface Transportation Board Reauthorization Act of 2015, Congress directed the Board to establish a “voluntary” arbitration process for rail rate disputes.⁵ The Act thus dispels any notion that the Board may require arbitration of rate disputes

Consistent with its enabling statutes, the Board has long recognized that it cannot require arbitration of rate disputes. Two decades ago, it held that “[t]he Board on its own cannot mandate arbitration under the current statute.”⁶ And both the NPRM and the supplemental notice of proposed rulemaking in docket EP 755, *Final Offer Rate Review*, (“FORR SNPRM”) expressly recognize that this limitation remains in place today.⁷

B. The FORR exemption effectively mandates arbitration by shippers with small rate disputes involving railroads that qualify for the exemption.

By exempting carriers from FORR when they opt into the arbitration program,⁸ the FORR exemption effectively requires shippers to use arbitration to resolve their small rate disputes. The Board may not employ this *de facto* mandate to force shippers into arbitration by depriving them of access to the only accessible rate review methodology for small cases.

⁵ 49 U.S.C. § 11708(a).

⁶ *Arbitration—Various Matters*, EP 730, slip op. at 3 n.7 (STB served Sept. 20, 2001).

⁷ *NPRM*, EP 765, slip op. at 3, 10 (STB served Nov. 15, 2021; *FORR SNPRM*, EP 755, slip op. at 6 (STB served Nov. 15, 2021).

⁸ *NPRM*, EP 765, slip op. at 71 (to be codified at 49 C.F.R. § 1108.33).

Aside from FORR, no formal rate-review process is accessible to shippers for small disputes. The Board acknowledges this in the Supplemental Notice of Proposed Rulemaking it issued in the FORR SNPRM, when it declares that “the Board has sufficient grounds to conclude that shippers lack meaningful access to the Board’s existing rate reasonableness processes with respect to small disputes”⁹ Further, FORR’s purpose is to address this deficiency by providing a formal rate-review process that is accessible for small disputes.¹⁰

The FORR exemption, however, prevents shippers from accessing FORR for small disputes against a carrier that has opted into the arbitration program. The shipper has no choice in the matter. Consequently, if a shipper wants to seek rate review of a small dispute involving a carrier that has opted into the arbitration program, the FORR exemption requires the shipper to arbitrate its case. Although the railroad would be a voluntary participant, the shipper’s participation would be coerced by depriving the shipper of the option to use FORR.

This is no small matter. Because Petitioners—five of the seven largest freight railroads serving the United States—have committed to opt into an arbitration program that resembles their proposal, and Canadian Pacific has separately expressed its support for the Petition,¹¹ the FORR exemption will make arbitration the only rate review option for most small rate disputes. As part of their arbitration

⁹ *FORR SNPRM*, EP 755, slip op. at 10.

¹⁰ *Id.* at 9-10.

¹¹ *NPRM*, EP 765, slip op. at 6 n.12.

proposal, Petitioners pledged to consent to arbitration for an extended period if, among other things, they would be exempt from FORR. The whole point of this scheme was to cut shippers off from FORR by forcing them to arbitrate under the Petitioners' preferred process.¹² If the Board acquiesces to this plan, it will make arbitration the only viable option for shippers to bring a small rate dispute against nearly every major freight railroad. It is difficult to imagine that Congress contemplated this when it directed the Board to establish a *voluntary* arbitration program for rate disputes.

In sum, the FORR exemption would leave shippers with no real choice other than to arbitrate small rate disputes against exempt carriers. Because Congress has not authorized the Board to impose mandatory arbitration of small rate disputes, the Board lacks authority to adopt the FORR exemption.

II. If the Board insists on the FORR exemption, the arbitration program will not achieve the Board's goal of materially increasing shipper access to rate review.

Coalition Associations are deeply concerned that, despite the Board's proposed modifications to the Petitioners' proposed arbitration program, the program still contains several features that prevent it from achieving the Board's goal of materially increasing shipper access to rate review for small cases. These

¹² Although the Board currently has rules for arbitrating rail rate-reasonableness claims, Petitioners have not opted into that program. But faced with increased shipper access to rate review under FORR, Petitioners appear to have concluded that their best option to avoid the enhanced accessibility and other benefits that FORR provides more shippers is to propose an arbitration program that they have designed to be less accessible and beneficial than FORR.

deficiencies would be less problematic if shippers still had access to FORR, but the FORR exemption will deny shippers even the option to choose between arbitration and FORR.

The program's accessibility issues arise largely because it does not adequately address the issues that make the Board's formal review processes inaccessible for small disputes. The Board has observed that those processes (i.e., Stand-Alone Cost (SAC), Simplified-SAC, and Three-Benchmark cases) are not accessible options for shippers with small rate disputes because, under these processes, litigation costs to bring a case "can quickly exceed the value of the case,"¹³ the uncertainty of relief is high,¹⁴ and the time to obtain a decision may be excessive.¹⁵ Here, the program's confidential nature creates a high level of uncertainty about the program for shippers, even though a railroad will know the details of all arbitrations in which it is involved, which creates an unfair imbalance between shippers and railroads. The program's case limits will reduce accessibility. And the curtailed access to Waybill Sample data that facilitates efficient and reliable comparative analyses will result in more costly and lengthier arbitration proceedings. Eliminating the FORR exemption would mitigate these issues by giving shippers an opportunity to choose FORR, which is public, not subject to case limits, and provides greater access to Waybill data.

¹³ *Id.* at 3.

¹⁴ *FORR SNPRM*, EP 755, slip op. at 10.

¹⁵ *NPRM*, EP 765, slip op. at 3-4.

In the remainder of this Part II, Coalition Associations identify the program's accessibility issues in more detail and provide suggestions for addressing them should the Board retain the FORR exemption.

A. The program must not be confidential.

Although the Board expects that making arbitration decisions confidential will act as an incentive for carriers to participate in the program, the only basis for that conclusion is the Petitioners' promise not to participate unless decisions are confidential. However, making the program confidential creates a significant imbalance between carriers, which will have full knowledge of all arbitrations in which they are involved, and shippers, which will have little if any knowledge at all because they will be involved in far fewer arbitrations. Thus, the Board should be skeptical of Petitioners' claims that confidentiality is a *sine qua non*, rather than an attempt to place their thumb on the scales.

The Board has chosen to make arbitration decisions under the program confidential because it claims that this is more likely to serve as an incentive for carriers to participate in the program.¹⁶ According to the Board, if decisions are public, carriers are more likely to choose litigation, parties will be more likely to treat arbitration as formal litigation to avoid unfavorable decisions, and parties would be less inclined to settle cases because they would have to worry about the impact a settlement may have on other rate negotiations.¹⁷ The Board's logic is

¹⁶ *Id.* at 46.

¹⁷ *Id.* at 46-47.

strained. The non-precedential nature of arbitration decisions renders most of the identified concerns moot. Rather, confidentiality will create an unfair and imbalanced process that greatly favors carriers.

First, because an adverse arbitration decision has no precedential value, it is illogical to conclude that public decisions create a disincentive to arbitrate or to treat arbitration as formal litigation. The only basis to conclude otherwise is the Petitioners' self-serving declaration that confidentiality is a *sine qua non* for their participation in the arbitration program. That may be true; but the Board has a duty to closely scrutinize the motivation underlying that demand which, as discussed below, is designed to create an advantage for carriers over shippers.

Second, it is illogical to conclude that parties would be less inclined to settle cases if decisions are public when those decisions lack precedent. Parties are spurred to settlement by the risks of litigation, which exist in equal measure for confidential and public proceedings alike, except that confidentiality will tilt the scales in favor of carriers because they will have greater knowledge of those risks based on their much greater access to confidential decisions than any shipper. This also would create disadvantages for shippers because they will bear a higher risk that settlements will not reflect the strength of their claim, potentially making settlements less likely if shippers overestimate their claims.

Finally, making arbitration decisions confidential will be tremendously unfair to shippers. Despite the non-precedential nature of arbitration decisions, it is helpful to have some idea of the types of arguments that have or have not been

successful. After all, even arbitration has costs and burdens, and each party must decide whether those costs and burdens are justified based on the likelihood of a successful outcome and the value of the case. Because carriers ineluctably will have more experience with arbitration than shippers, over time, they will develop an understanding of potential outcomes and successful arbitration strategies that confidentiality will deny to shippers. A shipper thus will have less insight than a carrier into whether a rate offer is reasonable or whether a particular arbitration strategy is likely to be successful.

In addition, carriers will have a much broader base of experience to evaluate and select arbitrators who have experience with, and may have been favorably inclined towards, the carrier's evidence and analysis that shippers will be denied if arbitration decisions are confidential. Shippers also will have far less information on which to evaluate their choice of an arbitrator.¹⁸ The resulting imbalance will lead shippers to question the integrity and value of arbitration.

At bottom, while carriers claim that making the arbitration program confidential would provide an incentive for their participation, this incentive does not make sense given the non-precedential nature of arbitration decisions.¹⁹ It only

¹⁸ For example, shippers will lack crucial information to ensure compliance with the proposed requirement under 49 C.F.R. § 1108.26(d) that they select an arbitrator who can perform his or her duties with diligence, good faith, and adherence with requirements of impartiality and independence. They also will lack relevant information to determine whether a for-cause objection to a railroad-selected arbitrator is warranted.

¹⁹ As with all rate cases, there may be legitimate reasons to redact commercially sensitive business information from arbitration decisions, but that cannot justify redacting the entire decision.

makes sense when one considers the advantages that confidentiality will bestow on carriers. Ironically, those disadvantages will be a strong disincentive for shippers to pursue arbitration.

B. The program’s case limits must be removed.

The proposed case limits will foreclose shippers from timely rate review of many small disputes and introduce lengthy, costly, and unpredictable delays into the arbitration program. These limits are tantamount to denying rate review of small disputes because the Board also proposes to exempt those disputes from the FORR process. Additionally, these limits are not necessary to protect carriers from being inundated with claims or to increase opportunity to challenge rates. The Board thus should eliminate the limits.

1. The one-case limit will foreclose shippers subject to multiple unreasonable rates from timely access to rate review.

The one-case limit, which prevents shippers from bringing more than one case at a time against a carrier, will unfairly deprive shippers of timely access to rate review.

The shipper-based limit substantially eliminates access to rate review for shippers who are subject to multiple unreasonable rates that are not suitable for adjudication under the Board’s other rate-review processes.²⁰ This is a common

²⁰ Many shippers are likely to be subject to unreasonable rates on multiple non-overlapping traffic lanes. Existing rate-review processes are inefficient for addressing this situation and, thus, not a real option for challenging these rates. For example, under SAC and Simplified-SAC, a complainant either would have to “build” an expansive railroad that would handle the movements or bring separate

occurrence because many shippers negotiate rates for multiple lanes simultaneously. It forces these shippers either to aggregate their claims in a single arbitration or bring their claims separately in successive arbitrations. Both options are poor, and they force the shipper to make choices that would not be required in *FORR* cases. If the shipper chooses to aggregate its claims, it faces an aggregate relief cap that could severely limit the shipper's recovery. If the shipper chooses to bring successive arbitrations, it will face unreasonably high rates while it works through each arbitration sequentially.²¹

Similarly, the shipper-based limit prevents shippers who are quoted an unreasonable rate on a different movement, while already engaged in arbitration, from challenging the new rate until the arbitration concludes. Not only does this prolong payments of unreasonably high rates, but it also creates incentives for carriers to increase rates on other movements during arbitration when the shipper has no other realistic option to challenge such rate. Some gamesmanship could come into play if the second rate applies to a movement that is more valuable to both the shipper and carrier.

One key reason the Board identifies for the case limit is to prevent shippers from abusing the arbitration process by disaggregating claims.²² Yet, as explained,

cases for each movement and incur high litigation costs to “build” separate railroads to handle each movement.

²¹ Shippers must endure tariff rates while the case is pending, and tariff rates typically are higher than contract rates that a carrier may otherwise make available. *FORR SNPRM*, EP 755, slip op. at 4-5.

²² *NPRM*, EP 765, slip op. at 19.

the limit allows carriers to adopt abusive pricing practices that pressure shippers to accept rates that may very well be unreasonable. These practices, which run afoul of Congress's directive that carriers establish reasonable rates (which is a directive that Congress charged the Board with enforcing), are much more insidious than claim disaggregation, which is an efficiency issue. Also, the case limit is unnecessary because the cost and burden of individual arbitrations, which adds up quickly, is an inherent disincentive to disaggregation already built into the process. Of course, if shippers retain access to FORR, this would not be an issue because the Board, as it suggests in the NPRM, would be capable of identifying and remedying problematic disaggregation.²³

The Board also claims that the case limit “would allow the Board and stakeholders to develop familiarity with the arbitration process gradually.”²⁴ But this would occur even without the limit. Because the arbitration program would be new and occur largely out of the public eye, shippers will proceed cautiously, only bringing more cases once they become comfortable with the program.²⁵

Another reason the Board provides for the case limit is to ensure that more shippers can participate in the arbitration program. This is a problem of the Board's own making, however. The Board's concern about shippers having an opportunity to participate arises only because the Board has proposed to adopt an aggregate case

²³ See *NPRM*, EP 765, slip op. at 19.

²⁴ *Id.*

²⁵ Coalition Associations anticipate that few shippers would use the program because its confidential nature makes it unpredictable.

limit that shields carriers from being subject to more than 25 arbitrations in a rolling 12-month period. As explained in the next section, this aggregate limit is inappropriate for many similar reasons.

The Board wrongly asserts that the case limit would not have much impact on shipper claims. The Board states that “shippers most likely to use the arbitration process . . . may be less likely to bring multiple cases against the same carrier” because, quoting Joint Shippers, “many small shippers probably would not have enough qualifying captive lanes to bring multiple disputes.”²⁶ This overlooks that the arbitration program is necessary to provide large shippers with access to rate review for their small disputes. And while many small shippers probably would not have enough qualifying captive lanes to bring multiple disputes, many large shippers would. As the Board recognizes in the FORR SNPRM, “leav[ing] large shippers without recourse to challenge unreasonable rates in smaller cases . . . [would] frustrate the statut[ory] reasonableness requirement”²⁷

As further support for the limit, the Board states that formal rate review processes are available. But this conflicts with the Board’s finding that these processes are inaccessible to shippers with small rate disputes. If these processes were truly available, neither this proceeding nor FORR would be necessary.

Finally, the Board states that the case limit does not prevent shippers from bringing multiple cases against different carriers. But this *non sequitur* does not

²⁶ *NPRM*, EP 765, slip op. at 19-20 (cleaned up).

²⁷ *FORR SNPRM*, EP 755, slip op. at 11.

address the problem with the limit, which is that it limits the number of cases a shipper can bring against the *same* carrier.

2. The aggregate case limit prejudices shippers by introducing unpredictable, costly delays into the program.

Turning to the aggregate case limit, which shields individual carriers from more than 25 arbitrations during a rolling 12-month period, that limit prejudices shippers by introducing unpredictable, costly, and potentially lengthy delays into the program.

As the Board recognized in the FORR NPRM and SNPRM, shippers have a strong interest in having a rate case decided quickly because they must endure tariff rates while the case is pending, and tariff rates typically are higher than contract rates that a carrier may otherwise make available.²⁸ Despite delay having significant financial consequences for shippers, the aggregate case limit adds potentially lengthy delay to arbitration since it is based on a rolling 12-month period and shippers must queue up to arbitrate against the carrier on a first-come, first-served basis. Making matters worse, the confidential nature of the arbitration program prevents a shipper from knowing whether its arbitration will exceed the limit and how long the shipper must wait until its turn to arbitrate. In contrast, the carrier will know this fact, which will give it an advantage in rate negotiations with

²⁸ *FORR SNPRM*, EP 755, slip op. at 4-5; *Final Offer Rate Review*, EP 755, slip op. at 3-4 (STB served Sept. 12, 2019). From the shipper's perspective, the contract rates would also be at unreasonable levels. But the Board does not have authority to review contract rates.

the shipper because it will have greater knowledge of the risks and delays the shipper will face if it chooses to arbitrate. Overall, the uncertainty and delay, coupled with the requirement that shippers pay tariff rates while a case is pending, not only places significant financial pressure on a shipper with a delayed case to accept an unreasonable rate, but it also places the shipper at a significant bargaining disadvantage to the carrier, who incurs no consequences for the delay.

The only reason the Board supplies for the per-carrier case limit—to ensure that a carrier is not inundated with arbitrations²⁹—does not justify the prejudicial impact on shippers, let alone the limit itself. While Coalition Associations do not dispute that the Board has an interest in protecting carriers from being inundated by frivolous or dubious claims, the Board cites no evidence that this is even remotely likely. Arbitration is far from costless and the potential rate relief is capped, which means that shippers have little incentive to arbitrate borderline cases. Indeed, no Board-sponsored rate arbitration has ever occurred.

C. The Board should make available four years of Waybill Sample data covering all carriers and commodities.

The Board has proposed to automatically disclose four years of confidential Waybill Sample data to the parties, but only for the same 5-digit STCC as the issue commodity and only for the defendant carrier(s).³⁰ However, the Board also has proposed a process for obtaining additional Waybill data, which will be decided

²⁹ *NPRM*, EP 765, slip op. at 18.

³⁰ *Id.* at 66.

pursuant to the standards at 49 C.F.R. § 1244.9(b)(4).³¹ The proposed scope of disclosure is unduly narrow and will lead to delays while shippers pursue a broader release of data.

The Board justifies this unduly narrow release of Waybill data on grounds that not all arbitrations will involve arguments that require such data and, thus, the importance of maintaining confidentiality of the data outweighs this speculative need.³² This supposition lacks a solid foundation. Indeed, logic dictates that some form of rail-rate comparison is likely to be a component of nearly all evidence presented in arbitrations. Furthermore, the Board permits four years of Waybill Sample data in Three-Benchmark cases without restricting the commodities³³ and it has proposed four years in FORR cases without restricting either the commodities or the carriers.³⁴ There is no rational basis to distinguish arbitration from FORR, especially when the Board simultaneously has proposed to force shippers to rely on arbitration in lieu of FORR whenever the defendant has agreed to arbitrate.

Furthermore, comparative rate analyses, similar to the Three-Benchmark method or a statistical benchmarking method, are likely to play a significant role in most arbitrations. Comparative analyses can be used by arbitration parties to assess rate reasonableness in a fast, cost-effective, and economically valid manner,

³¹ *Id.* at 57.

³² *Id.* at 30.

³³ *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, EP 646 (Sub-No. 3), slip op. at 1 (STB served Mar. 12, 2012).

³⁴ *Final Offer Rate Review*, EP 755, slip op. at 9 (STB served Sept. 12, 2019).

and thus are well-suited for an expedited arbitration process. But these analyses require data and become more reliable with more data. Nor is there any justification for restricting such analyses to the same 5-digit STCC as the issue commodity or to the same railroad because those are factors that can be accounted for in statistical analyses. Also, commodities can have comparable transportation characteristics at higher STCC levels and transportation characteristics can be similar across railroads. By restricting access to such data at the outset, the Board is pre-judging such arguments that are best considered in the context of the methodology actually proposed in an arbitration case. But the Waybill data request process essentially requires the requesting party to litigate the merits of its methodology before it even can develop and present evidence based on that methodology. Moreover, the Director of the Office of Economics, not the arbitrator or the Board, would be making that determination.

The rules governing release of Waybill Sample data neither guarantee release of the data nor provide any clear standard for granting its release. The rules provide that the Director of the Office of Economics will decide requests, and the Director's decisions are subject to a highly deferential standard of clear or manifest injustice.³⁵ In addition, the very process for obtaining this data could take weeks, or longer if there are appeals of the Waybill decision to the Board, eroding the time and cost advantages of the arbitration program. Based on prior experience with

³⁵ *Request for Waybill Data*, WB 20-50, slip op. at 2 (STB served June 17, 2021).

Waybill requests, Coalition Associations anticipate that carriers will routinely object to the release of additional data.

The release of Waybill data comparable to that released in Three-Benchmark and FORR cases is necessary to ensure that shippers who intend to use comparative analyses in rate cases can timely access the data necessary to facilitate a robust comparative analysis.³⁶ It also would be consistent with the Board's goal to facilitate use of innovative rate-reasonableness methodologies that are not overly complex.³⁷

III. The relief cap under the arbitration program should be adjusted consistent with adjustments that Coalition Associations have proposed for FORR.

Coalition Associations are generally in agreement with the relief cap that the Board has proposed for the arbitration program, which parallels the cap it has proposed for the FORR process. But, in their opening comments on the FORR SNPRM, Coalition Associations are seeking two clarifications concerning the amount of the relief cap and the start of the relief period applicable under FORR.³⁸ To maintain parity with the FORR relief cap, Coalition Associations propose that the Board also make these clarifications to the relief cap that applies to the arbitration program.

Without fully repeating Coalition Associations' proposal in their opening comments on the FORR SNPRM, they ask the Board to clarify that the FORR relief

³⁶ Coalition Associations do not intend that this proposal would prevent a shipper from seeking additional data where necessary.

³⁷ *NPRM*, EP 765, slip op. at 38.

³⁸ Coalition Assn's Comment 9-10, *FORR*, EP 755 (Jan. 14, 2022).

cap equals the current indexed amount of the Three-Benchmark cap. Because the Board has set the cap for the arbitration program consistent with the FORR cap, the Board should make this clarification to the arbitration program's relief cap.

Turning to the relief period, much of it may pass before many carload shippers can begin using a rate prescription, significantly eliminating the arbitration program's benefits. This occurs because many carload shippers cannot or choose not to solicit business, for understandable commercial reasons, until they have obtained a reasonable transportation rate, which will not exist under the arbitration program until an arbitration decision is issued. Once they obtain a rate prescription, many of these shippers may have to wait several more months for an opportunity to bid on business that can use the prescribed rate. These shippers thus can lose a large portion of the two-year relief period before traffic begins moving under their prescribed rates. For many shippers, this severely reduces the arbitration program's benefits in relation to its costs.

To address this issue, Coalition Associations propose that the two-year relief period begins on a date to be determined solely by the complainant; that complainant shall notify the defendant in writing of such date; and that, in the absence of written notice, the two-year relief period shall begin on the one-year anniversary of the arbitration decision.

IV. Conclusion.

For the foregoing reasons, Coalition Associations object to the FORR exemption because it will force small cases into arbitration and, when coupled with the one-case-per-shipper and 25-cases-per-railroad limits to arbitration, deprive

shippers of *any* accessible rate review process for small disputes. To address these concerns, Coalition Associations recommend that the Board eliminate the FORR exemption. If the Board does not do so, it must, at the very least, eliminate both arbitration case limits. In addition, to provide a fair and balanced arbitration process, Coalition Associations strongly urge the Board to eliminate the confidential nature of the program and grant complainants access to Waybill Sample data at the 2-digit-STCC level for all railroads on request. Coalition Associations also request that the Board (1) modify the relief cap consistent with the modification Coalition Associations are requesting for the FORR relief cap (i.e., make it the same as the current, fully indexed Three-Benchmark relief cap), and (2) declare that the two-year relief period begins on a date to be determined solely by the complainant; that complainant shall notify the defendant in writing of such date; and that, in the absence of written notice, the two-year relief period shall begin on the one-year anniversary of the arbitration decision.

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