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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 765

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

COMMENTS OF BNSF RAILWAY COMPANY

I. Introduction

BNSF Railway Company (“BNSF”) respectfully submits these comments in response to the Surface Transportation Board’s November 12, 2021 Notice of Proposed Rulemaking in the above-captioned proceeding. Additionally, BNSF joins the comments filed separately by the Association of American Railroads.

BNSF has long supported the Board’s efforts to improve its rate case processes and has been an outspoken advocate of arbitration programs. BNSF believes that a Board-sponsored arbitration program can successfully address the needs of shippers, particularly those with smaller rate disputes that are less suited for the Board’s existing rate case procedures, disputes which have been a particular focus of the Board’s reform efforts. For these reasons BNSF applauds the Board’s decision to formally propose an arbitration program, which, in BNSF’s view, is a far better path to addressing those shipper needs than the Final Offer Rate Review proposal docketed at Ex Parte No. 755.

We believe that the Board’s proposal in its November 12 NPRM presents a strong framework for an industry-wide ADR program, and the changes BNSF urges herein are rooted in the experience gained from the alternative dispute resolution program jointly developed by BNSF and the Montana Grain Growers Association, and the Montana Farm Bureau Federation (“Montana ADR Program”). BNSF will continue our decade-long participation in the Montana ADR Program, and our recommendations here are important to ensure the ongoing effectiveness of that program as well as the Board’s new ADR program. It has been

BNSF's consistent position that BNSF would not pre-condition its participation in a Board-sponsored arbitration program on the exclusion of methodologies and evidence pertaining to revenue adequacy. That position has not changed. As such, subject to the comments herein, BNSF would choose to participate in the program outlined in the NPRM.

II. The Arbitration Program Should More Fully Incorporate Important Aspects of the Montana ADR Program

BNSF's positive views of arbitration are rooted in our own experience in the Montana ADR Program. As BNSF has previously discussed with the Board,¹ we believe the Montana ADR Program can serve as a model for a successful Board-sponsored arbitration program. The key elements that have made the Montana ADR Program successful are pre-defined market-based factors that serve as the standard for judging the reasonableness of the challenged rate, mandatory mediation prior to arbitration, and a panel of arbitrators with substantive experience in the markets relevant to the dispute. BNSF appreciates that the Board's NPRM includes many of the same elements present in the Montana ADR Program that BNSF is committed to preserving and strongly encourages the Board to more fully incorporate the important aspects of that program, specifically the Market-Based Factors.²

a. The Arbitration Program Should Include All of the Market-Based Factors from the Montana ADR Program and Make Their Consideration Mandatory

The Board's proposed regulations say that, in determining the lawful maximum rate, the arbitration panel must be consistent with sound principles of rail economics and must consider the Board's existing rate reasonableness methodologies, while giving due consideration for the needs of carriers to engage in differential pricing. BNSF agrees. However, the Board's proposed regulations only say that the arbitration panel *may* otherwise consider the other enumerated market-based factors. BNSF believes that making consideration of market-based factors mandatory in every arbitration process will encourage commercial settlement or, at the very least, result in a more efficient arbitration process.

¹ See BNSF Ex Parte Meeting Mem. 1–2, July 22, 2020 (Filing ID 300911)

² A description of the Montana ADR Program, including the full list of market-based factors, is available on the Montana Grain Growers Association website: https://www.mgga.org/policy/rail_adr/.

The use of market-based factors in the Montana ADR Program enables each party's commercial representatives to tie potential arbitration outcomes to the market realities they manage every day. By mitigating the need to rely upon lawyers and consultants with specialized expertise in complex STB rate case processes, using pre-defined market-based factors fosters more direct engagement between commercial representatives and encourages settlement on commercially reasonable terms, or at minimum, leads to a more informed and efficient arbitration process. Furthermore, requiring consideration of these market-based factors is consistent with the mandatory consideration of existing Board principles, which are themselves intended to reflect the market dynamics impacting the challenged rate, and will help inform the arbitrators as they interpret and apply those principles.

BNSF is pleased that, although worded differently, the list of market-based factors enumerated in the Board's NPRM largely encompasses the Montana ADR Program's market-based factors. However, the list of factors is not complete. The enumerated list should also include consideration of the capital requirements of the rail system used by the complainant's traffic and the revenue available to sustain the network, and should state that relief would not be justified in the event a truck rate no higher (i.e., lower) than the contested rail rate is available to the complainant from origin to destination for the same commodity for the specified mileage segment. These factors have been part of the Montana ADA Program since its inception, and their inclusion will ensure the analysis more accurately reflects market realities.

b. Mediation Structured Around Market-Based Factors Should Be a Mandatory Component of the Arbitration Program

Equally important as mandating consideration of market-based factors by the arbitration panel, the Board should consider using the market-based factors as a primary framework for a mandatory pre-arbitration mediation. BNSF disagrees with the Board's proposal that mediation should not be mandatory prior to the commencement of arbitration. BNSF's experience is that the vast majority of disputes that could be resolved via arbitration are actually commercially resolved prior to the commencement of arbitration, whether in a formal mediation session or before one. To the extent parties are unable to resolve their

disputes beforehand, a mandatory mediation process that requires the consideration of real-world market-based factors gives parties a structured and predictable venue in which to escalate their commercial discussions without having to take the significant and costly step of litigating the arbitration proceeding.

BNSF understands the Board's sensitivity to concerns about adding another mandatory step before the final resolution of a dispute can be attained. However, that focus on timing unduly minimizes the potential that settlement will be achieved via mediation, even where a shipper's commencement of an arbitration proceeding takes place after substantial preliminary negotiations. Furthermore, even with a mandatory 30-day mediation period, the arbitration program will lead to the resolution of a rate dispute far quicker than the Board's existing rate case processes. Fundamentally, based on our experience, BNSF believes the Board should create more, not fewer, structured opportunities for commercial settlement of arbitrable disputes, which has been a hallmark of the Montana ADR Program.

III. The Arbitration Program Should Permit Consideration of Product and Geographic Competition

The NPRM prohibits consideration of product and geographic competition in the market dominance phase of an arbitration proceeding. The Board's approach appears to be motivated by a desire to maintain consistency with existing market dominance processes in rate cases before the Board. However, there is a significant asymmetry to permitting shippers to potentially pursue novel "revised" or "new" rate methodologies in arbitration, yet refusing to allow carriers to present evidence of product and geographic competition, which are market realities that the Board itself has long acknowledged.³ The Board's belief that its flexible approach to rate standards "should facilitate methodological innovation . . . with overall complexity constrained by an abbreviated procedural schedule and a streamlined discovery process"⁴ should also apply to evidence of product and geographic competition. The Board's arbitration program can

³ *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627, at 10 n. 49 (Dec. 21, 1998) ("We have no doubt that in certain circumstances product and geographic competition effectively limit railroad pricing, as the ICC in fact found in several cases.") (internal citations omitted).

⁴ NPRM at 38.

and should be used as an incubator for more efficient ways to present evidence of product and geographic competition.

BNSF understands the Board's concerns that allowing the consideration of evidence relating to product and geographic competition may lead to evidentiary sprawl and be unduly burdensome for the Board to analyze.⁵ However, these concerns are mitigated in the arbitration setting. A railroad's presentation of product and geographic competition will still be subject to the rule's procedural constraints with respect to limited discovery and overall time frame. Additionally, a panel of arbitrators selected by the parties themselves will likely have some experience in the markets relevant to the dispute and thus be less burdened by the presentation of such evidence.⁶ As such, the Board should allow for evidence of product and geographic competition to be considered in the arbitration program. Alternatively, the Board should at most prohibit such evidence only where the complainant has chosen to pursue the more efficient Streamlined Market Dominance approach.

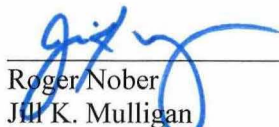
IV. Conclusion

BNSF enthusiastically supports the Board's efforts to create a workable arbitration program. Notwithstanding the opportunities for further improvement that BNSF has identified, this rulemaking is a substantial step in the right direction and represents the best opportunity to accomplish the policy goals articulated by the Board with respect to improving access to rate relief shippers with small rate disputes. Accordingly, BNSF encourages the Board to promulgate this rule, modified to incorporate the suggestions herein.

⁵ See *Market Dominance Determinations* at 11–12.

⁶ To that end, BNSF notes that the proposal in the Joint Petitioners' comments with respect to the selection of the non-party arbitrator is an important step the Board can take to ensure that rate disputes are heard by panels likely to be well versed in the commercial environment in which a rate dispute arises.

Respectfully submitted,



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