

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Reply Comments of Coalition Associations

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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), submit these reply comments pertaining to the Notice of Proposed Rulemaking that the Board served in this proceeding on November 15, 2021 (the NPRM).

While shippers have “long requested”¹ a voluntary, fair alternative dispute resolution process for rate review that provides net benefits to all parties, the Small Rate Case Arbitration Program (Program) is not that process.

In Part I, Coalition Associations explain that the Program is not a substitute for Final Offer Rate Review (FORR). The Program contains many features that make it less accessible to shippers when compared to FORR,² including confidential treatment of arbitration decisions, case limits, discovery limits, and a longer evidentiary phase. Yet none of these features are necessary to encourage railroads to use the Program. Further, if the Board implements the Program, it also must adopt FORR otherwise railroads will have no incentive to participate.

Railroad commenters have proposed multiple adjustments to the Program that would make the Program even less accessible.

- Part II explains that Joint Carriers’ proposed ban on revenue adequacy is inconsistent with Congress’s directive that arbitrators consider revenue

¹ (See Joint Carriers Opening Comments 5.)

² In Coalition Associations’ opening comments, Coalition Associations also explained that many of the Program’s features prevent it from materially increasing accessibility compared to the Board’s existing formal review processes. (Coalition Ass’ns Opening Comments 6-7.)

adequacy. Also, alongside the Program's FORR exemption, the ban prejudices shippers by depriving them of an accessible rate-review process for bringing small claims involving revenue adequacy. And the ban is overbroad for addressing Joint Carriers' desire for the Board to adjudicate rate claims based on revenue adequacy.

- Part III explains that Joint Carriers' proposal to make decisions on appeal from the Program's arbitration decisions nonprecedential would invite costly and time-consuming appeals by railroads and, thus, discourage shippers from bringing claims.
- Part IV addresses several railroad proposals that would discourage claims. These proposals include adding a mandatory mediation period that increases the procedural schedule for arbitrations by 25%, adding a third case limit, increasing the complexity of market-dominance inquiries by requiring consideration of product and geographic competition, and eliminating methodological flexibility by requiring the use of market-based factors.

Coalition Associations thus continue to urge the Board to finalize FORR without delay and, if it chooses to adopt the Program, eliminate the FORR exemption.

I. The Program is no substitute for FORR.

Railroads claim that adopting the Program is the best path for improving access to rate review.³ Coalition Associations disagree.

If the Program was the best path forward for shippers and railroads, there would be no need to exempt participating railroads from claims under FORR.⁴ This exemption reflects that the Program contains many features that make it less accessible than FORR. Those features also are unnecessary to encourage railroad use.

In sum, to avoid squandering a historic opportunity to increase access to rate review, the Board should adopt FORR and, if it chooses also to implement the Program, eliminate the Program's FORR exemption.

A. The Program is less accessible than FORR.

Several aspects of the Program impose higher recovery risks and process costs on shippers than FORR. Thus, when compared to FORR, the Program provides a net detriment to shippers that materially reduces its accessibility.⁵

Confidentiality. The Program's confidentiality provisions provide railroads an unfair advantage in arbitrations. This makes the Program less accessible.

³ (Joint Carriers Opening Comments 5. *See* BNSF Ry. Opening Comments 1 (claiming the Program is "a far better path" than FORR).)

⁴ In their opening comments, Coalition Associations explain that this exemption contradicts Congress's plain directive that the Board establish arbitration programs that are voluntary. (Coalition Ass'ns Opening Comments 3-6.)

⁵ For this analysis, Coalition Associations do not consider the Program modifications that Joint Carriers proposed in their opening comments. As explained below, these modifications would make the Program less accessible to shippers.

A key difference between the Program and FORR is that FORR proceedings and case decisions are transparent, whereas arbitrations under the Program are completely confidential except for basic reporting of case-outcome information. As the U.S. Department of Agriculture observes,⁶ the Program’s confidentiality provisions provide railroads with an asymmetric information advantage that does not exist under FORR. Railroads will be “repeat players” in the Program and, thus, develop familiarity with the process and gain insight into the probability of potential outcomes. In contrast, shippers will essentially be in the dark about the Program’s process and likely outcomes. This disadvantage will cause shippers to view their probability of success as being lower under the Program compared to FORR.

While Petitioners⁷ claim that confidentiality is inherent in arbitration,⁸ this claim is dubious. The Administrative Dispute Resolution Act (ADRA),⁹ which grants federal agencies broad authority to use voluntary alternative-dispute-resolution proceedings,¹⁰ does not protect arbitration decisions from disclosure. Its confidentiality requirements only protect dispute-resolution communications.¹¹ This

⁶ (USDA Opening Comments 4.)

⁷ Petitioners are the Joint Carriers, less Canadian Pacific.

⁸ (Petition 23.)

⁹ 5 U.S.C. §§ 571-84.

¹⁰ 5 U.S.C. § 572(a).

¹¹ 5 U.S.C. § 574(a), (b) (protecting “dispute resolution communications” from disclosure, with exceptions); § 571(5) (“a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a

reflects that the confidentiality concern in alternative dispute resolution relates to confidentiality of negotiations.¹² Confidential negotiations can be critical to dispute resolution because they encourage a free exchange between parties and the arbitrator to resolve the dispute.¹³ In contrast, an arbitration decision does not reflect settlement negotiations. Instead, it reflects each party's case made in a litigation-like context where neither party has any incentive to admit any weakness or proceed with any less formality than possible given the constraints of the proceeding.

Cases cited by Petitioners do not support the Program's significant departure from the confidentiality protections that the ADRA identifies for federal agency arbitrations. These cases all relate to bargained-for arbitration provisions in commercial contracts.¹⁴ Additionally, none of these cases recognize a general proposition that parties expect arbitration to be confidential. In *Janvey v. Alguire*,

result of a dispute resolution proceeding, is not a dispute resolution communication").

¹² John E. Hartsell, *The Sounds of Silence: Promoting Alternative Dispute Resolution in Air Force Procurement by Putting Confidence into Confidentiality*, 53 A.F. L. Rev. 183, 183 (2002). The American Arbitration Association's rules for commercial arbitrations and mediation also reflect the importance of maintaining the confidentiality of negotiations. Specifically, the rules pertaining to mediation, which relies extensively on negotiation, protect communications made during mediation. Commercial Arbitration Rules and Mediation Procedures M-10 (Am. Arbitration Ass'n 2013). The arbitration rules do not contain similar protections.

¹³ Hartsell, *supra* note 12, at 184.

¹⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 (2010) (stating that the case dealt with interpretation of an arbitration clause); *Janvey v. Alguire*, 847 F.3d 231, 236 (5th Cir. 2017); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 165 (5th Cir. 2004).

847 F.3d 231 (5th Cir. 2017), the court did not mention confidentiality in its opinion. Petitioners haphazardly relied on a statement about bargained-for confidentiality in a concurring opinion issued in that case.¹⁵ In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), the court merely held that a confidentiality clause in an arbitration provision is not unconscionable, noting that “[c]onfidentiality can be desirable . . . in *some* circumstances.”¹⁶ And in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Court merely acknowledged that privacy and confidentiality applies in “many” voluntary arbitrations and, thus, interpreting an arbitration agreement to allow class arbitration, which does not permit privacy and confidentiality, could “*potentially* frustrat[e] the parties’ assumptions when they agreed to arbitrate.”¹⁷ Regardless, the plain language of the ADRA, which does not afford arbitration decisions any protection from disclosure under the Freedom of Information Act or otherwise, would not give any party to arbitration under a federal administrative program an expectation of confidentiality related to arbitration decisions.

Case Limits. As Coalition Associations explained in their opening comments, the Program’s case limits, which do not exist under FORR, significantly add to the process costs under the Program and will foreclose shippers subject to multiple unreasonable rates from timely access to rate review.

¹⁵ Petitioners failed to denote that they were not referring to the majority opinion. (Petition 23.)

¹⁶ *Iberia*, 379 F.3d at 165, 175 (emphasis added).

¹⁷ *Stolt-Nielsen*, 559 U.S. at 686 (emphasis added).

Discovery Limits. The Program limits parties to five interrogatories and 20 document requests, whereas FORR does not limit these items. Also, as Coalition Associations explained in their opening comments, the Program provides reduced access to Waybill Sample data compared to FORR.¹⁸ These differences place shippers at a disadvantage to railroads when using the Program.

The problem with discovery limits in rate proceedings is that a shipper's need for discovery on rate reasonableness far outweighs that of a defendant. Most of the evidence bearing on rate reasonableness lies with the defendant railroad and in the Waybill Sample, and the shipper bears the burden of proof. If a shipper does not have enough discovery to meet its burden of production, it will not recover anything, **even if it has a valid claim.**

Certainly, a defendant railroad would need substantial discovery on market dominance. But this alone does not mean that a defendant is as severely impacted by discovery limits as a shipper. A defendant can lose on market dominance but still win the case. In contrast, a shipper that fails to carry its burden of production because of discovery limits cannot win.

Evidentiary Phase. The Program's longer evidentiary phase (90 days vs. 59 days under FORR)¹⁹ increases process costs.

¹⁸ (Coalition Ass'ns Opening Comments 16-19.)

¹⁹ *Final Offer Rate Review*, EP 755, slip op. at 57 (STB served Nov. 15, 2021). FORR's evidentiary phase extends to 79 days if the shipper chooses to make a non-streamlined market dominance showing. *Id.* at 58.

With a longer evidentiary phase, the Program provides parties more time than FORR to prepare their evidence. This translates into higher attorneys' fees and higher costs, generally, as parties spend more time preparing their evidence.

Additionally, even though the Program involves arbitration, parties still are likely to use the entire evidentiary period to prepare evidence. Arbitration is not the low-cost, less formal process that Joint Carriers would have the Board believe. It commonly is formal, costly, time-consuming, and subject to hardball advocacy, like litigation.²⁰ The Board thus should expect parties to prepare the best presentation they can in the time allotted.

Of course, the total time to a **decision** under the Program is 19 days shorter than under FORR. But the likelihood that this will offset the Program's longer evidentiary phase is low. The additional time involved in a FORR proceeding is time spent waiting for a decision, not time spent incurring attorneys' fees and other expenses while preparing or responding to evidence.

B. The Program features that make it less accessible than FORR are unnecessary to encourage railroad participation.

Even without the features that make it less accessible than FORR, the Program provides railroads a strong incentive to use it because it offers them, among other things, non-precedential decisions.

Joint Carriers' opening comments reveal that the risk of precedential decisions is a prime incentive for railroads to participate in the Program. They

²⁰ Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 8 (2010).

state: “One of the key features of an arbitration program is the fact that it can resolve disputes without creating precedent. **It is this very feature that promotes parties’ willingness to use arbitration . . .**”²¹

The importance of non-precedential decisions to railroads²² cannot be overstated. A precedential decision that is adverse to a railroad would provide shippers with clarity about the reasonableness of railroad rates.²³ This clarity would limit railroads’ bargaining power in rate negotiations involving captive traffic and invite challenges to rates that appear excessive based on the decision. In contrast, a non-precedential decision that is adverse to a railroad provides shippers with no certainty that they will prevail in a rate challenge and, thus, little leverage in rate negotiations.

Moreover, FORR increases the risks that precedential decisions pose to railroads. Because FORR is more accessible and provides shippers methodological flexibility, the likelihood that a railroad would receive an adverse decision under FORR is high. Additionally, the greater accessibility of FORR will enable other

²¹ (Joint Carriers Opening Comments 22 (emphasis added).)

²² Nonprecedential decisions have less importance to shippers because a shipper is much less likely than a railroad to be a repeat litigant in a rate proceeding.

²³ A decision that is favorable to a railroad provides little clarity about the reasonableness of the railroad’s rate because it merely indicates that the challenged rate was not demonstrated to be unreasonable. *E.g., Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, NOR 42130, slip op. at 4 (STB served June 20, 2014) (“Sunbelt has not demonstrated that the challenged rates will be unreasonable . . .”). It generally would not indicate the point at which rates would become unreasonable, like an unfavorable decision.

shippers to assert claims against railroads based on the decision and leverage the decision in rate negotiations.

C. FORR is necessary to encourage railroads to participate in the Program.

Adjusting the Program to ensure it provides a net benefit to shippers with small claims is not enough. Railroads have no incentive to participate in the Program unless the Board also adopts FORR.

FORR is the sole impetus for the Program. Facing the strong possibility that FORR will materially increase shipper access to rate review and survive any legal attack,²⁴ the best option for Petitioners was to offer an alternative that, as explained above, is significantly less accessible than FORR.

Without FORR, however, railroads are effectively immune to small rate reasonableness claims (and large claims) because, as is widely recognized, the Board's formal processes are essentially inaccessible. The Board thus should not be under any illusion that railroads will participate in the Program without a final FORR rule.

²⁴ In their Reply Supplemental Comments in EP 755, Coalition Associations explain that the Board's adoption of FORR would be consistent with the clear language of the Board's statutory authority and overwhelming case law. Reply Suppl. Comments of Coalition Ass'ns at 3, *Final Offer Rate Review*, STB Docket No. EP 755 (filed Apr. 15, 2022).

II. Joint Carriers' proposed ban on revenue-adequacy evidence is unlawful, unnecessary, and prejudicial to shippers.

A. The ban conflicts with Congress' directive that arbitrators consider revenue adequacy.

Joint Carriers have failed to reconcile their proposed ban on revenue adequacy in arbitrations under the Program with the plain language of 49 U.S.C. § 11708(c)(3), which states that “the arbitrator or panel of arbitrators, as applicable, shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).”²⁵

This Congressional directive plainly requires consideration of revenue adequacy in Board-established arbitration programs. The revenue-adequacy constraint's purpose is to identify the extent to which differential pricing is necessary to permit a railroad to collect adequate revenues pursuant to the concept of revenue adequacy defined at 49 U.S.C. 10704(a)(2).²⁶ As the Interstate Commerce Commission explained when it established the constraint, the constraint reflects that “captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs.”²⁷

²⁵ 49 U.S.C. § 11708(c)(3).

²⁶ *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 534-35 (1985).

²⁷ *Id.* at 535-36.

B. The ban prejudices shippers with small claims by depriving them of an accessible revenue-adequacy constraint.

Formal rate cases are widely recognized as all but inaccessible to shippers for small claims. Yet Joint Carriers' proposed ban on revenue-adequacy evidence in the Program would make formal cases the only option for shippers to bring a small claim asserting revenue adequacy. The impact of Joint Carriers' ploy is clear—it would effectively eliminate the revenue-adequacy constraint for small claims.

Formal rate cases are not a real option for bringing a small claim based upon revenue adequacy. Railroad opposition to the revenue-adequacy constraint and their litigation strategies in past rate cases makes clear that a shipper can expect a railroad defendant to adopt a war-of-attrition strategy that will make such cases as burdensome as a carload stand-alone-cost case. In fact, railroad opposition to the revenue-adequacy constraint has only grown fiercer as the Board has increasingly found railroads revenue adequate in its annual revenue-adequacy determinations. And the recent petition in EP 766 to modify the Board's revenue-adequacy calculation²⁸ demonstrates that the only limit on railroad opposition to the revenue-adequacy constraint is the railroad industry's creativity. Against this backdrop, what shipper with a claim that is suitable for a proceeding with a \$4 million relief cap is going to feel "free"²⁹ to bring a formal rate case before the Board?

²⁸ Petition, *Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determinations*, STB Docket No. EP 766 (filed Sept. 1, 2020).

²⁹ (Joint Carriers Opening Comments 17.)

While FORR could be a viable formal option for shippers to bring small claims asserting revenue adequacy, the Program’s “FORR exemption” slams the door shut on this option. Under the FORR exemption, a railroad that opts into the Program is exempt from having its rates challenged under FORR.³⁰ So, if a railroad opts into the Program, the proposed revenue-adequacy ban will prevent a shipper from using the Program to bring a small claim asserting revenue adequacy against the railroad, and the FORR exemption will prevent the shipper from bringing the claim under FORR. This would force the shipper into a formal rate case, which is the very problem that prompted this rulemaking.

C. Joint Carriers have not identified any issues with revenue adequacy that would caution against its use in arbitrations.

Joint Carriers assert that revenue adequacy should not be used in arbitrations because the Board has not resolved four core railroad-industry issues concerning revenue adequacy.³¹ But these issues are either based on a clear misunderstanding of the revenue-adequacy constraint, implausible economic arguments repackaged from another proceeding, or assertions that the Board addressed long ago in a decision upheld on appeal.

Joint Carriers allege that revenue adequacy is not a sign of market failure that justifies Board intervention.³² This overlooks that the revenue-adequacy constraint limits only the differential between the rates a railroad can charge non-

³⁰ *NPRM*, EP 765, slip op. at 71 (STB served Nov. 15, 2021).

³¹ (Joint Carriers Opening Comments 10.)

³² (*Id.*)

competitive traffic and competitive traffic.³³ The constraint specifically addresses the market failure that exists when rate differentials on non-competitive traffic exceed the amount necessary for the railroad to achieve revenue adequacy.³⁴

Joint Carriers' support for this allegation does not help their cause. They explain that revenue adequacy regularly occurs in U.S. industries that operate in competitive environments and, thus, is not a sign of market power abuse that justifies intervention.³⁵ But the revenue-adequacy constraint would not result in Board intervention under competitive circumstances. It only calls for intervention to the extent railroads operate in **non**-competitive environments **and** charge their non-competitive traffic rates so far above competitive levels that they are unnecessary to achieve revenue adequacy.

Joint Carriers also incorrectly equate the Board's revenue-adequacy constraint with utility-style regulation.³⁶ Under utility-style regulation, "the regulator establishes maximum rates for the utility's regulated services designed to recover the utility's cost of service including a return on the utility's investment."³⁷ The utility has no flexibility to increase its rates without the regulator's approval,

³³ *Coal Rate Guidelines*, 1 I.C.C.2d at 535-36.

³⁴ *See BNSF Ry. v. STB*, 526 F.3d 770, 773-74 (D.C. Cir. 2008) (explaining that differential pricing reflects that "competitive shippers can secure alternative transportation relatively cheaply but captive shippers cannot.").

³⁵ (Joint Carriers Opening Comments 10-11.)

³⁶ (*Id.* at 11.)

³⁷ *W. Coal Traffic League—Petition for Declaratory Order*, FD 35506, slip op. at 15 (STB served July 25, 2013).

and the regulator can, on its own motion, seek to reduce the utility's rates if it is earning more than its authorized rate of return.³⁸ In contrast, the revenue-adequacy constraint limits differential pricing, but not competitive pricing.³⁹ Further, the revenue-adequacy constraint is applied to individual movements and only upon a demonstration of market dominance; it does not regulate a carrier's system-wide rate of return. The Board also cannot initiate rate review on its own,⁴⁰ and a railroad does not need Board approval of its rates.⁴¹

Joint Carriers further attack revenue adequacy by repeating a claim made by some of them in EP 766, namely, that the Board's annual revenue-adequacy measurement would be more accurate if it reflected the profitability of the median S&P 500 firm.⁴² Under this logic, half the firms in the S&P 500 would not be revenue adequate. This makes little sense, considering that Joint Carriers also assert that "[r]evenue adequacy is a widespread, normal, and expected outcome in the economy."⁴³ Regardless, as shipper interests explained in EP 766, Joint Carriers have no basis to expect this superstar level of profitability and do not need it to meet the definition of revenue adequacy that Congress enacted.

³⁸ *Id.* at 16.

³⁹ *Coal Rate Guidelines*, 1 I.C.C.2d at 535-36.

⁴⁰ 49 U.S.C. § 10704(b).

⁴¹ *W. Coal Traffic League*, FD 35506, slip op. at 17.

⁴² (Joint Carriers Opening Comments 12); Petition, *Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determinations*, STB Docket No. EP 766 (filed Sept. 1, 2020).

⁴³ (Joint Carriers Opening Comments 10.)

The other claim in EP 766 is that the Board should change its treatment of accumulated deferred taxes when calculating revenue adequacy. Joint Carriers assert that the Board's approach, which eliminates deferred taxes from the investment base, creates misleading results that assume investors do not expect a return on deferred taxes.⁴⁴ But the Board adopted its approach over 35 years ago after carefully considering various methods of treating deferred taxes, including the method that the Joint Carriers advocate.⁴⁵ Put simply, Joint Carriers have not identified any unsettled issue about accumulated deferred taxes that arbitrators would have to address.

Joint Carriers also take aim at the revenue-adequacy constraint itself, asserting that tying system-wide financial health to the reasonableness of an individual rate is impossible because reasonableness involves factors that are specific to the applicable traffic.⁴⁶ But ACC's proposed benchmarking methodology shows that this is possible by using econometrics to identify a competitive "benchmark" rate for market-dominant traffic and determining the level of differential pricing above competitive levels needed to assure system-wide revenue adequacy.⁴⁷

⁴⁴ *Id.* at 12.

⁴⁵ *Standards for Railroad Revenue Adequacy*, 3 I.C.C.2d 261, 269-75 (1986), *aff'd sub nom. Consol. Rail Corp. v. United States*, 855 F.2d 78, 92 (3d Cir. 1988).

⁴⁶ (Joint Carriers Opening Comments 13.)

⁴⁷ Written Testimony of ACC at 29, 32-33, *Hearing on Revenue Adequacy*, EP 761 (Nov. 26, 2019). This is essentially consistent with the principles of the stand-alone cost (SAC) constraint, which judges rates against those a hypothetical new-entrant

Joint Carriers attempt to support this assertion by citing *Burlington Northern & Santa Fe Ry. v. STB*, 453 F.3d 473 (D.C. Cir. 2006)⁴⁸ is unavailing. Although the court stated that a measure of system-wide revenue need provides “no guidance on the rates [a shipper] should be charged for the particular facilities and services [the shipper] uses,”⁴⁹ it was referring to the rates the shipper should be charged under the **stand-alone cost** constraint, which focuses upon the revenue needed to recover the costs of facilities or services from which the shipper derives a benefit.⁵⁰ This statement simply clarified that the revenue-adequacy constraint does not identify the maximum reasonable rate that a railroad can charge if the SAC constraint produces a lower rate.

D. The ban is overbroad for addressing Joint Carriers’ concern with arbitrating revenue-adequacy cases.

Joint Carriers have made clear that they want to ban revenue-adequacy evidence from the Program to ensure that revenue-adequacy cases are decided in

carrier would charge. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 528 (1985) (stating that “[a] rate level calculated by the SAC methodology represents . . . a simulated competitive price.”). The main distinguishing factor is that the SAC methodology protects the revenue adequacy of the simulated new-entrant carrier, which can be optimally efficient, rather than the defendant. In contrast, ACC’s benchmarking approach is designed to protect the revenue adequacy of the defendant carrier, which is consistent with the revenue-adequacy constraint.

⁴⁸ (Joint Carriers Opening Comments 14 n.26.)

⁴⁹ *Burlington N. & Santa Fe Ry. v. STB*, 453 F.3d 473, 481 (D.C. Cir. 2006).

⁵⁰ *Id.* (“The SAC test . . . is designed to ensure the carrier does not cross-subsidize revenue-inadequate portions of the system by charging its captive shippers more than they should have to pay for efficient rail service . . . and thereby recovering from them the costs of facilities or services from which they derive no benefit.”).

Board decisions that are subject to full appellate review.⁵¹ But as explained in Part II.B, the ban is overbroad for this purpose because it, alongside the FORR exemption, would prohibit shippers from asserting revenue adequacy in FORR cases, which would result in Board decisions subject to full appellate review.

Additionally, Joint Carriers have offered no support for preventing shippers from asserting revenue adequacy in rate cases under FORR. How could they? Joint Carriers' only selling point for their ban is their claim that the Board is "the only appropriate forum" for asserting revenue adequacy "given the Board's expertise, the precedential value of any Board decision on the matter, and the assurance of full appellate rights for defendant carriers."⁵² If that is the case, there is no reason to prevent shippers from bringing a revenue-adequacy case under FORR against a railroad that participates in the Program.

III. The Board's decisions on appeal should be precedential.

Joint Carriers' proposal to make Board decisions on appeal from arbitration decisions under the Program nonprecedential would reduce the Program's accessibility while ensuring that shippers will face appeals. It would also eliminate appeal decisions as an important check on the Program's quality. The Board should reject this proposal.

⁵¹ (Joint Carriers Opening Comments 16-17.)

⁵² *Id.* at 17. Joint Carriers' argument that the Board should decide cases involving revenue adequacy because of the precedential value of a decision is perplexing. Under the Program, a decision related to a revenue-adequacy methodology would have no precedential value.

Making appeal decisions nonprecedential would increase the Program's costs for shippers, discouraging many shipper claims. Without any risk of creating bad precedent, railroads would have little reason not to appeal adverse arbitration decisions. A shipper considering the Program would thus anticipate that it will almost certainly face a railroad appeal and incur the associated time and expense. For many shippers, especially those with lower-value claims, the appeal cost would make the Program impractical and silence their claim.

Making appeal decisions nonprecedential would also jeopardize the Program's quality. The standards of review applicable to appeals from an arbitration decision limit the Board to determining if the decision is consistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion, inconsistent with statutory authority, or in violation of award limits.⁵³ These standards are narrowly focused on fundamental issues of decisional fairness and quality. Precedential appeal decisions thus have an important quality-control function under the Program.

Joint Carriers nonetheless claim that nonprecedential appeal decisions are necessary to discourage high-cost, high-stakes tactics during arbitration. But the tactics that a party chooses during arbitration have nothing to do with whether decisions on appeal are nonprecedential. Appeals are not a second bite at the apple for a party's tactical miscalculations. If a party loses because it chose not to adopt high-cost, high-stakes tactics during arbitration, no appeal is going to help it.

⁵³ 49 C.F.R. § 1108.11(b).

Joint Carriers also support their proposal by asserting that the Board's experience with its general arbitration program suggests that precedential appeal decisions will discourage use of the Program. But this argument assumes, without evidence, that no cases have been brought under the general arbitration program because Board decisions on appeal are precedential. Many reasons unconnected with precedential appeals decisions explain disuse of that program, including that railroads have had no incentive to voluntarily arbitrate a small rate case because formal rate cases have been inaccessible to shippers with small claims. Additionally, this argument assumes incorrectly that the Program does not otherwise offer a stronger incentive to arbitrate than the general arbitration program. Many differences between the Program and general arbitration program allow the Program to provide a stronger incentive to arbitrate, including the Program's lower relief cap (\$4 million over 2 years vs. \$25 million over 5 years)⁵⁴ to encourage railroad participation.

IV. Other changes to the Program that railroad commenters proposed would discourage its use.

A. Mandating mediation would substantially reduce the benefits that the arbitration program provides shippers.

Railroad proposals to require a 30-day mediation period⁵⁵ would reduce accessibility by increasing the Program's process costs for shippers in relation to

⁵⁴ Compare *NPRM*, EP 765, slip op. at 67 with 49 C.F.R. § 1108.4(b).

⁵⁵ (Ass'n of Am. R.Rs., Opening Comments 6-7; BNSF Ry. Opening Comments 3-4; Joint Carriers Opening Comments 28-29.)

FORR. They also have no basis in the arbitration rules of widely used commercial arbitration programs. Coalition Associations urge the Board to reject them.

A 30-day mediation period would lengthen the arbitration timeline under the Program by 25%, having significant financial consequences for the shipper. During this mediation period, the shipper would be subject to the challenged rate, which increases the financial stakes for shippers without a corresponding increase for railroads. This would only discourage shipper claims.

While the proposals allow parties to opt out of the mediation period by mutual agreement, this is essentially unhelpful to shippers. As explained, the shipper will incur a greater financial burden than the railroad during the mediation period because the shipper would be paying the challenged rate. Thus, the railroad would have little incentive to opt out of the mediation period.

Additionally, if a mediation requirement with a mutual opt-out would be useful, it would be a feature of widely used arbitration programs. But the commercial-arbitration procedures of the American Arbitration Association allow parties to opt out of mediation unilaterally.⁵⁶ And the rules of JAMS, which calls itself “the largest private provider of alternative dispute resolution services worldwide,”⁵⁷ do not require mediation as a precondition to arbitration.⁵⁸

⁵⁶ Commercial Arbitration Rules and Mediation Procedures R-9 (Am. Arbitration Ass’n 2013).

⁵⁷ The JAMS Foundation, Promoting and Innovating Dispute Resolution, <https://www.jamsadr.com/jamsfoundation/> (last visited Apr. 15, 2022).

⁵⁸ Comprehensive Arbitration Rules & Procedures (JAMS 2021), <https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-6>.

B. The proposed case limit would disadvantage shippers.

Joint Carriers propose postponing arbitrations against a railroad in excess of nine simultaneous arbitrations, claiming this is necessary to protect railroads from being overwhelmed with cases. But this would merely protect railroads from meritorious claims, while at the same time imposing significant costs on shippers with postponed cases. And since no formal process offers railroads this protection, foregoing it will not discourage them from using the Program. The Board should reject this proposal.

The proposal is patently unfair because it asymmetrically increases shippers' arbitration costs for meritorious claims. Shippers have a strong incentive to bring only meritorious claims under the Program because, even assuming the Program is lower cost (which it is not), a shipper would still incur significant costs to arbitrate. Postponing a shipper's claim indefinitely would only increase arbitration costs for the shipper, especially considering that the shipper would be subject to the challenged rate while its arbitration is pending. This would pressure the shipper to settle postponed claims merely because the railroad's conduct has led to multiple claims against it. In this situation, fairness dictates that the pressure to settle should be placed on the railroad by making it face all pending claims.

Additionally, a 10-case limit is unnecessary to encourage railroads to participate in the Program. Railroads are in no better position under FORR, which does not have case limits. Additionally, the Program offers other important benefits that make it materially more attractive to railroads than FORR, including non-precedential arbitration decisions.

C. BNSF’s proposal to consider product and geographic competition when deciding market dominance would create excessive complexity.

BNSF proposes that the Board require arbitration panels to consider product and geographic competition when deciding market dominance, claiming that the procedural constraints under arbitration would promote efficient market-dominance presentations.⁵⁹ But this overlooks that a key reason the Board has excluded product and geographic competition from market-dominance determinations is that this evidence “had placed a substantial burden on [the Board] to address matters outside of [its] areas of expertise, requiring [it] to grapple with . . . complex non-transportation issues.”⁶⁰ Additionally, BNSF has failed to explain how the parties could effectively address such complex matters in an abbreviated proceeding. The Board thus should reject this proposal.

D. BNSF’s proposal to require use of market-based factors would undermine the Program’s methodological flexibility.

While Coalition Associations do not oppose using market-based factors in arbitration, BNSF’s proposal to make them mandatory⁶¹ makes little sense. First, one of the key (and only) Program features that encourages use by shippers is its methodological flexibility. Second, railroads are free to rebut a shipper’s evidence by presenting market-based factors. Third, BNSF’s proposed market factor that would

⁵⁹ (BNSF Ry. Opening Comments 4-5.)

⁶⁰ *Market Dominance Determinations—Product and Geographic Competition*, 5 S.T.B. 492, 493 (2001).

⁶¹ (BNSF Ry. Opening Comments 2-3.)

deprive shippers of relief if a lower truck rate is available⁶² overlooks that, because trucking is generally a higher-cost mode of transportation, a lower truck rate likely means that the railroad's rates are unreasonable. In fact, the Board has recognized that "[a] carrier possessing market power might set its rates so high that it would begin to lose business to a higher-cost alternative (such as a trucking company)."⁶³

Or, as the D.C. Circuit put it:

At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound. But the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure.⁶⁴

Coalition Associations urge the Board to reject this proposal.

E. Joint Carriers' proposal to involve an ALJ when selecting the lead arbitrator is inferior to the Board's proposal, although Coalition Association's do not oppose use of a jointly populated roster.

Joint Carriers propose that an administrative law judge (ALJ) resolve disagreements over selection of a lead arbitrator by selecting the arbitrator from a roster populated by the parties.⁶⁵ Coalition Associations do not oppose selecting the lead arbitrator from a jointly populated roster because they share Joint Carriers'

⁶² (*Id.* at 3.)

⁶³ *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, No. 42099, slip op. at 7 (STB served June 30, 2008).

⁶⁴ *Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 651 (D.C. Cir. 1984).

⁶⁵ (Joint Carriers Opening Comments 20-21.)

concerns that the roster is too small. But, to better ensure arbitrator quality and neutrality, the Board should maintain the alternating-strike selection method it has proposed.

The alternating-strike selection method is superior to ALJ selection. It is one thing for an ALJ to rule on a party's objection to the other's appointed arbitrator when the objection is limited to issues of good faith, impartiality, and independence.⁶⁶ It is another for the ALJ to select an arbitrator on its own. An ALJ will likely be unfamiliar with the arbitrators on the parties' roster and be less suited than the parties to evaluate arbitrator expertise and other attributes of arbitrator quality. In contrast, the alternative strike method will allow the parties to whittle the roster until the most mutually acceptable arbitrator remains. While this does not guarantee a neutral arbitrator, it certainly is more reliable from the parties' perspective than having an ALJ pick from a list.

V. Conclusion

For the reasons in Coalition Associations' Opening and Reply Comments, Coalition Associations urge the Board to issue a FORR rule without delay, remove the FORR exemption from the Program, and modify the Program to make it at least as accessible as FORR.

⁶⁶ *NPRM*, EP 765, slip op. at 64 (STB served Nov. 15, 2021).

Respectfully submitted,

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