

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 765

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

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INTRODUCTION

CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, the U.S. operating subsidiaries of Canadian Pacific, and the U.S. operating subsidiaries of Canadian National Railway Company (“CN”) (collectively, “Joint Carriers”) believe the Board has proposed a voluntary arbitration program¹ (“Program” or “Proposed Program”) that, with a few reasonable adjustments, would be an effective, lawful, and economically sound forum for resolving smaller rate cases more quickly and less expensively, and without expending the Board’s limited resources. The Proposed Program has important features that will incentivize participation by both carriers and shippers—a solution that has eluded the Board for decades. In particular, features like the FORR waiver for participating carriers; the confidentiality of the arbitration process; the reasonable relief and volume limits; the withdrawal rights for a material change in law; and the ability to choose party-selected arbitrators from outside the Board’s 49 U.S.C. § 11708 roster incentivize participation by both carriers and shippers and reflect the fact that this is a *voluntary* process for smaller rate cases that should rightly have certain reasonable boundaries, given the Program’s purpose.

Yet some shipper commenters ask the Board to remove some of the key features of this *voluntary* Program and turn it into a limitless forum for resolving any and all rate disputes. The Board should reject these requests, as they would undermine the Proposed Program. The entire point of the Proposed Program is to offer an alternative forum for resolving smaller rate cases more expeditiously—it simply cannot be, and should not be, “everything to everyone.” Shippers may

¹ See Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Nov. 15, 2021) (“NPRM”).

continue to seek formal Board resolution of rate disputes through its existing simplified methodologies, Three Benchmark and Simplified-SAC.

Importantly, the STB should not let the debate regarding the controversial “revenue adequacy constraint” be the demise of an eminently workable voluntary forum for the resolution of smaller rate disputes that might otherwise be too small in value to bring before the Board via a formal proceeding. The Proposed Program should have limits that are appropriate for the nature of such a forum. And as explained further below, one of those limitations should be on the use of the so-called “revenue adequacy constraint” under *Coal Rate Guidelines*. The Board has yet to address highly contested issues related to revenue adequacy in three regulatory proceedings in which the rail industry has actively participated. Until the STB successfully clarifies the extraordinary uncertainty around this constraint, it is unsuitable for inclusion in a voluntary arbitration program.

Likewise, it would be unreasonable for the Board to force an arbitration panel to determine the validity or definition of a system-wide revenue adequacy constraint or its applicability to the regulation of rail rates. The Board is the appropriate forum for resolving these highly complex and contested revenue adequacy issues. A shipper who wants to litigate these issues can bring a rate case before the Board using *Coal Rate Guideline’s* “revenue adequacy constraint.”

Joint Carriers have made significant concessions in this proceeding to make possible a voluntary arbitration process that is attractive and fair to all parties involved. In particular, the Proposed Program offers generous relief limits; does not limit the program to small shippers but only to smaller rate disputes; ensures an expedited and low-cost process via discovery limits and deadlines; offers expansive methodological flexibility with only *one* exception—a highly disputed methodology currently pending before the Board; and allows for the use of market-based factors

and other features requested by NGFA.² After decades of failed attempts to create an effective voluntary arbitration program and decades of shippers asking for a more efficient and cost-effective forum for smaller rate disputes, the issue of revenue adequacy should not jeopardize this historic opportunity to move forward with a voluntary arbitration program for smaller rates cases that would actually work.

In Section I of these Reply Comments, Joint Carriers rebut inaccurate assertions regarding the FORR exemption and explain that the exemption is a reasonable incentive that makes possible an *additional* forum for shippers to resolve small rate cases. In Section II, Joint Carriers address comments related to revenue adequacy and explain why the so-called “revenue-adequacy constraint” is inappropriate given the purposes of the Program and the fact that the constraint’s validity is presently contested. In Section III, Joint Carriers address miscellaneous requests made by interested parties, many of which would undermine the goals of the Proposed Program.

I. THE FORR EXEMPTION IS A REASONABLE INCENTIVE THAT MAKES POSSIBLE AN ADDITIONAL FORUM TO RESOLVE SMALL RATE CASES.

As the original five petitioners explained, the FORR exemption is not only a feature of the Program that incentivizes carrier participation, it also is a reasonable feature.³ Railroads that opt into the Program should not be simultaneously subject

² Joint Carriers oppose BNSF’s proposal that the market factors from its Montana arbitration program be “mandatory” in the Proposed Program. See Comments of BNSF Railway Company, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 2–3 (filed Jan. 14, 2022).

³ See Petitioners’ Supplemental Pleading, *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 4–5 (filed Sept. 10, 2020) (“Petitioners’ Supp. Pl.”).

to FORR (if FORR is finalized), as the FORR process seeks to achieve the exact same goals as the Proposed Program (albeit with significant legal, policy, and economic flaws). Yet the Coalition Associations and other shipper interests make the specious argument that the FORR exemption is a *de facto* arbitration mandate for which the Board lacks authority.⁴ This is wrong for several reasons.

First, the Board rejected this argument in the NPRM. The Board explained that while some parties “argue that a FORR exemption would allow railroads to force shippers to use arbitration regardless of whether the shippers prefer FORR,” “the Board has long favored the resolution of disputes using alternative dispute resolution whenever possible and the [Rate Reform Task Force] found that arbitration would be an important means of providing shippers with access to potential rate relief, particularly in small cases.”⁵ In other words, incentivizing carrier participating in the Proposed Program via the FORR exemption would “create a means for shippers to obtain resolution [of smaller rate cases] through arbitration”—an additional *benefit* to shippers, not a limitation.⁶

Second, the Coalition Associations claim that, without FORR, they would be “without any accessible formal review process for small rate disputes.”⁷ This is false. Shippers have access to multiple methodologies, including the Board’s more simplified formal processes for rate review. As the Board pointed out in the NPRM,

⁴ See, e.g., Opening Comments of Coalition Associations, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 3–4 (filed Jan. 14, 2022) (“Coalition Associations Comments”); Comments of Olin Corporation, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 11 (filed Jan. 14, 2022) (“Olin Comments”).

⁵ NPRM at 13–14.

⁶ *Id.* at 14.

⁷ Coalition Associations Comments at 2.

“[a] voluntary arbitration program for small rate disputes could provide *an additional option* beyond the Board’s existing formal rate reasonableness processes designed for relatively small disputes (i.e., Three-Benchmark and Simplified Stand-Alone Cost (Simplified-SAC) tests).”⁸

Further, the Coalition Associations’ claim is unsupported and contrary to existing evidence. In particular, distinguished economists who have studied pricing and market power in the freight rail industry have concluded there is “no evidence to support the notion that the [Board’s] current approach” to rate regulation (including its formal rate review processes) “is failing and generating above-competitive aggregate revenues for Class I railroads.”⁹ Rather, the evidence shows that the Board’s current rate review processes “provide[] strong protection to shippers that lack effective competition,” “can reasonably be viewed as replicating the disciplining forces of competition,” and even offer “protection [that] exceeds the protection the shippers would secure in a competitive market.”¹⁰

Importantly, experts have concluded that “[w]here the SAC constraint is too complicated and expensive, Simplified-SAC provides an effective tool to protect shippers that may lack effective transportation alternatives.”¹¹ The fact that shippers do not often use these formal processes could be the result of a variety of potential causes, including that carriers are not charging unreasonable rates to

⁸ See NPRM at 9 (emphasis added).

⁹ Reply Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Nov. 4, 2014), Reply Verified Statement of Prof. Joseph P. Kalt, Ph.D. (“Kalt Nov. 4, 2014 V.S.”) at 27.

¹⁰ Opening Comments of Norfolk Southern Railway Company, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Professor David Sappington (“Sappington Sept. 5, 2014 V.S.”) at 2, 6.

¹¹ Opening Comments of Norfolk Southern Railway Company, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Bradford Cornell at 8.

captive shippers. This conclusion, unlike shippers' anecdotal claims, is supported by evidence.¹² In fact, the data shows that the rail industry faces fierce competition and has largely passed on its efficiencies to shippers.¹³ Thus, it would make sense that there are few, if any, rate complaints brought before the Board.

Contrary to shipper assertions, the Proposed Program does not allow a railroad to choose its preferred manner of being regulated. Instead, the Program

¹² See, e.g., Opening Comments of Union Pacific Railroad Company, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Professor Kevin M. Murphy ("Murphy Sept. 5, 2014 V.S.") at 41 (stating that, despite shipper complaints "claim[ing] that they lack effective competition for their traffic and have been subject to noncompetitive pricing," the evidence comparing trends in pricing of exempt and non-exempt traffic "does not support [these] claims"); Kalt Nov. 14, 2014 V.S. at 6–7 (stating that, despite shipper "claim[s] or innuendo[s]" that railroads are earning "revenue supra-adequacy ... [as] the result of increased railroad market power that has gone unchecked by the Board," "the most exhaustive and rigorous studies of the matter, commissioned by the Board itself, have repeatedly concluded that improvements in carrier financial performance under the Staggers Act have *not* been the result of enhanced exercise of market power. ... This conclusion is supported by independent academic research."); Reply Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Nov. 4, 2014), Reply Verified Statement of Professor Robert Willig at 3–4 (stating that the idea that "freight firms are permitted 'to charge near-monopoly prices to captive shippers' ... is patently false" and there is "no support for ... [the] claim that rail rates are at near monopoly levels").

¹³ See Opening Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Joseph P. Kalt ("Kalt Sept. 5, 2014 V.S.") at 6 ("Board policy has consistently recognized that rail service is subject to very potent competition in numerous markets, as railroads do confront other railroads and other modes of freight transportation across wide swaths of their systems. These rivals, as well as the flexibility of many customers in their geographic sourcing and location decisions, bring the disciplining force of competition to bear on railroads."); Sappington Sept. 5, 2014 V.S. at 12–13 ("The improved earnings have enabled railroads to reinvest more than half a trillion dollars in their operations. This investment has produced important innovations of substantial benefit to shippers and the public generally" (citation omitted)); Murphy Sept. 5, 2014 V.S. at 6–7 ("[I]ncreased profitability [of railroads] in recent years ... reflects increased, not reduced, competition and benefits for shippers, contrary to what some shippers may contend.").

opens up an additional option for shippers who already enjoy multiple processes for bringing rate cases before the Board.

Third, contrary to the Coalition Associations' argument,¹⁴ no shipper would be mandated to bring a case under the Proposed Program, which would be entirely voluntary for shippers. Just like today—when no FORR process exists—shippers remain free to choose how to bring a small rate case to the Board, and they have several available and viable options, including the Three Benchmark and Simplified-SAC processes. The Proposed Program—far from being a limitation on shippers' rights—would expand and increase their access to relief in a way they have long requested.

II. JOINT CARRIERS OPPOSE THE USE OF A SYSTEM-WIDE REVENUE ADEQUACY CONSTRAINT UNTIL THE STB HAS ADDRESSED ITS AMBIGUITIES AND LEGALITY.

In their Opening Comments on the NPRM, Joint Carriers addressed the Board's concerns with the Petition's initial proposal to ban evidence of system-wide revenue adequacy. They explained that the original five petitioners did not intend the proposed evidentiary ban to be overly broad. They also explained it was not their intent to prevent the panel from (i) giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under § 10704(a)(2)) or to sound economic approaches (such as SAC, Simplified SAC, and the Three Benchmark approach), or (ii) to unnecessarily restrict consideration of market-based factors. Joint Carriers explained they were carefully weighing the Board's concerns but had not had sufficient time to come to a consensus.¹⁵ Having had time to fully assess the Board's concerns, Joint Carriers

¹⁴ See Coalition Associations Comments at 2.

¹⁵ See Joint Carriers' Opening Comments, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 3 (filed Jan. 14, 2022) ("Joint Carriers' Opening Comments").

now set forth their positions regarding the use of revenue adequacy evidence in the Proposed Program.

Joint Carriers submit that the use of a system-wide revenue adequacy constraint, including the so-called revenue adequacy constraint under *Coal Rate Guidelines*, should be excluded from the Proposed Program—*until the Board has addressed the ambiguities surrounding it.*

In their Opening Comments on the NPRM, Joint Carriers briefly summarized the core concerns the rail industry has raised in the three pending regulatory proceedings relating to the measure and use of railroad system-wide financial performance.¹⁶ Joint Carriers will not repeat them here but rather will refer the Board to that summary as well as the many submissions that have been made in Docket Nos. EP 722, 761, and 766. Needless to say, Joint Carriers continue to believe the so-called revenue adequacy constraint is economically invalid and contrary to the primarily deregulatory balance set forth in the Staggers Act and its progeny.

But for the purpose of this proceeding, the Board need not and should not address the merits of the revenue adequacy constraint. There are valid reasons for the Board to prohibit the use of such a constraint in the Proposed Program, separate and apart from how the Board may view the rail industry's position on the merits of that topic.

First, as explained on opening, the revenue adequacy constraint is undefined, and the Board has yet to address the issues raised in the three pending regulatory proceedings relating to revenue adequacy. The carriers have submitted voluminous arguments in those proceedings and believe it is unfair to ask them to voluntarily litigate a case in a forum with limited appellate rights when the Board has yet to

¹⁶ *Id.* at 10–14.

address those arguments. There are numerous unanswered questions and issues awaiting resolution, including how to properly measure revenue adequacy, what evidence would be required to make a showing under the *Coal Rate Guidelines* constraint, how it would be applied by the Board, how relief would be awarded, and whether such a constraint is even economically or legally valid. The Board, with its expertise, should address these issues in the first instance rather than asking a panel of arbitrators to grapple with them in a forum with expedited timetables.

Second, allowing litigation of the revenue adequacy constraint would undermine the goals and effectiveness of the Proposed Program, which would provide a simple and expedited process for addressing rail rate disputes. As the Board noted, the Proposed Program “would ... provide faster resolution of a controversy at a lower cost”¹⁷ But whether a carrier is revenue adequate for the purposes of a system-wide constraint would be a disputed and exhaustive inquiry requiring a tremendous amount of evidence, argument, and resources.

The only clear guidance from the agency on revenue adequacy is that the annual determinations are not dispositive and that parties can submit any competent and probative evidence of their choosing.¹⁸ The *Consumers* decision provided no guidance as to what would be relevant to such a case, which leaves potential litigants in the position of needing to be over-inclusive and arbitrators with no guidance. The debate over what is or is not a reasonable profit, and how relief would even be awarded, has no guideposts. Standard-setting cases such as

¹⁷ NPRM at 52.

¹⁸ See, e.g., *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, slip op. at 2 (STB served June 15, 2015) (stating that annual determinations are not conclusive evidence of a railroad’s financial condition in rate reasonableness proceedings and that any competent and probative evidence may be submitted) (citing *Bituminous Coal—Hiawatha, Utah, to Moapa, Nev.*, 6 I.C.C.2d 1, 7 n.24 (1989)).

these will be vigorously contested and are fundamentally inconsistent with the desire for a cost-effective and expeditious process. Without more guidance from the Board, any arbitration using the so-called revenue adequacy constraint would be anything but simple and cost-effective. Indeed, the Board has recognized in the past that cases which are “complicated or implicate significant policy or regulatory issues ... are better suited for resolution using the Board’s formal adjudicatory procedures.”¹⁹

Third, and most importantly, allowing the use of revenue adequacy as a constraint would jeopardize this endeavor. Joint Carriers have made many good-faith concessions in proposing and supporting a small rate case arbitration program. The original petitioners spent significant time in discussions with other stakeholders in developing a streamlined and flexible proposal that would incentivize both railroad and shipper participation. Throughout this proceeding, Joint Carriers have been willing to make concessions in the interest of finally seeing a workable solution to small rate disputes.²⁰ The Proposed Program has generous relief limits, expansive methodological flexibility, and is available to all shippers. There is no good reason for revenue adequacy to be the demise of this Program, particularly where shippers are currently able to file a case before the Board using the so-called revenue adequacy constraint (notwithstanding the carriers’ belief that such cases are unsound and unlawful).

Joint Carriers therefore urge the Board to reserve the use of any constraint based on revenue adequacy to formal cases filed before the Board—at least until the

¹⁹ Final Rules, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699, slip op. at 10 (STB served May 13, 2013).

²⁰ See Petitioners’ Supp. Pl. at 5 (agreeing to numerous modifications suggested by the National Grain and Feed Association, such as the duration of the mediation period, the opt-in term, use of market-based factors, clarification regarding exit rights, and others).

ambiguities around revenue adequacy and the legality of any such rate constraint are resolved.

Joint Carriers recognize that at some point the Board may address the pending issues relating to revenue adequacy, and that any such decision clarifying and addressing these issues will almost certainly be appealed. While Joint Carriers maintain their fundamental opposition to a system-wide revenue adequacy constraint, it is both the controversial nature of such a constraint and the nebulous morass of vagueness around how, and over what time period, to measure revenue adequacy that renders such a constraint unsuitable for a quick voluntary arbitration process. However, Joint Carriers acknowledge that the constraint, if fully established by the Board and then affirmed by the federal courts, would become an existing methodology like Three Benchmark and Simplified-SAC that could then be more suitable for use in a quick voluntary arbitration forum.²¹

III. THE BOARD SHOULD REJECT SHIPPER REQUESTS THAT WOULD UNDERMINE THE GOALS OF THE PROPOSED PROGRAM.

The purpose of the Proposed Program is to make rate relief more accessible—not to be a forum for any and all rate cases or to offer all the benefits of a case brought formally before the Board. The Board should remain the primary forum for deciding high-value cases and cases where the complainant wishes to use the so-called revenue adequacy constraint. As noted above, the Board has recognized that cases which are “complicated or implicate significant policy or regulatory issues ... are better suited for resolution using the Board’s formal adjudicatory procedures.”²²

²¹ As with any change in law, participating carriers would have to assess the changes and decide whether to invoke the right to withdraw due to a material change in law.

²² Final Rules, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699, slip op. at 10 (STB served May 13, 2013).

The Proposed Program should be tailored to its particular purpose: offering a quick, cost-effective process for resolving modest rate disputes without bogging down the Board’s or parties’ resources. For example, requests like those made by the Industrial Minerals Association–North America (“IMA-NA”)—that the Board should remove the proposed volume limits, discovery limits, confidentiality protections, and non-precedential nature of the arbitration decision²³ are entirely inappropriate for the Proposed Program, which must necessarily have limitations to balance the Program’s less rigorous nature, expedited timeline, and limited appellate rights. Suggestions like these would increase the time and cost of litigating disputes under the Program—defeating its entire purpose; utterly disincentivize carrier participation—dooming the success of the Program; and improperly allow an arbitration panel without the Board’s expertise to have a major impact on the rail industry with its decisions—an outcome entirely unnecessary and supremely unwise. Below, Joint Carriers address specific suggestions made by commenters that would likewise undermine the goals of the Proposed Program.

A. Confidentiality to the Extent Permitted by Law Is Mandatory for the Success of the Program.

Some commenters are pressing the Board to make the arbitration decisions under the Proposed Program public.²⁴ The Board should reject these requests. Many

²³ Industrial Minerals Association-North America Comments, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 17–19 (filed Jan. 14, 2022) (“IMA-NA Comments”).

²⁴ See, e.g., Opening Comments of the National Grain and Feed Association, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 6–8 (filed Jan. 14, 2022) (“NGFA Comments”); Comments of American Fuel & Petrochemical Manufacturers, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 14 (of pdf) (filed Jan. 14, 2022) (“AFPM Comments”); IMA-NA Comments at 19; Comments of the U.S. Department of Agriculture, *Joint*

shippers want the efficiency and lower costs of a process for resolving smaller rate cases but with all the benefits of a rate case brought before the Board. These unrealistic requests, however, would incentivize more aggressive litigation, thereby increasing the time and costs to resolve a dispute and wholly undermining the Proposed Program's goals. If shippers want to pursue an avenue that results in a public decision, they remain free to bring a formal case before the Board under the Board's established methodologies.

Contrary to what these commenters claim, making the arbitration decision public would not incentivize settlement and commercial agreement so much as it would incentivize high costs and excessive litigation of disputes. Moreover, the Board has already considered these arguments and rejected them. In the NPRM, the Board explained that, given the various ways confidentiality might impact the dispute resolution process, on the whole, "keeping arbitration decisions issued under the proposed program confidential would be more likely to serve as an incentive for carriers to participate in the program," and confidentiality "should make [the Program] more accessible to parties, particularly small shippers" because it would protect the "benefits of informality," which "could be significantly undermined if the arbitration decisions were made public."²⁵

Moreover, the confidentiality of arbitration decisions is an expectation in most arbitration processes and for good reason—the confidentiality of the decision lowers the risk and thus the time and money needed to litigate the case. The need for confidentiality is underscored by the comments of IMA-NA and Indorama, which indicate that they would seek to use public arbitration decisions as leverage in other

Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, Docket No. EP 765, at 4 (filed Jan. 14, 2022).

²⁵ NPRM at 46–47.

rate negotiations.²⁶ Not only is this inappropriate, it explains why confidentiality is a reasonable protective factor to ensure the arbitration process is low-stakes and, in turn, low-cost.

Indeed, confidentiality can encourage settlement, as the Board noted, because “parties will not have to worry about the impact a settlement may have on other rate negotiations.”²⁷ And, as the Board noted, the confidentiality of the arbitration decision is a key driver of carrier participation in the Proposed Program, as well as one of the key problems with the Board’s existing arbitration process, which has gone unused. NGFA is quite mistaken when it opines that Joint Carriers are overstating how much they care about confidentiality.²⁸ The Board can be assured that Joint Carriers will not participate in the Proposed Program unless the arbitration decisions remain confidential to the extent permissible by federal law.

B. The FORR Exemption Should Apply So Long as Carriers Participate in the Program.

There is no basis whatsoever for the Board to reduce the FORR exemption to three years, as NGFA requests.²⁹ The FORR exemption should last as long as carriers voluntarily participate in the Program. Anything short of this would severely undermine carrier voluntary participation in the Program. In addition, there simply is no basis for the Board to make any determination *now* that would preemptively cut short the FORR exemption. Instead, the Board should, as it has

²⁶ IMA-NA Comments at 18; Indorama Ventures Comments, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 18 (filed Jan. 14, 2022).

²⁷ NPRM at 47.

²⁸ NGFA Comments at 7.

²⁹ NGFA Comments at 5–6.

proposed, assess the Program in the future and only *then* make any determinations about the future of the Program.³⁰

C. Case Limits Are Necessary, Reasonable, and Fair.

In the NPRM, the Board proposed two case limits: a 25-case/12-month limit and a one-case limit.³¹ The Board adopted the 25-case/12-month limit in response to the petitioning carriers' concerns about being overwhelmed with simultaneous arbitration cases. Although some shipper commenters do not object to this limit,³² the Coalition Associations ask that the Board remove it.³³ While the Coalition Associations may assume that railroads have unlimited resources, that is not so, and railroads will not voluntarily put themselves in a position where they could potentially be overwhelmed by too many arbitrations at one time. There are only seven Class I railroads and thousands of rail customers. Case limits are thus entirely reasonable and necessary for carrier participation.³⁴

With respect to the one-case limit, the Board explained that this limit would address concerns over disaggregation of rate challenges and ensure more shippers have the opportunity to participate in the arbitration program.³⁵ Because the Board cannot monitor the arbitration process in light of its confidential nature, the one-case limit is essential to protect against situations where shippers would be able to

³⁰ See NPRM at 51.

³¹ NPRM at 17–20.

³² See IMA-NA Comments at 17–18; AFPM Comments at 8–9 (of pdf).

³³ See Coalition Associations Comments at 15.

³⁴ The Coalition Associations also argue incorrectly that a shipper whose case exceeds the limit will not know how long it must wait until it is able to arbitrate its case. Coalition Associations Comments at 15–16. But the Board specifically addressed this situation, noting that OPAGAC would provide the shipper with an approximation of when the arbitration can proceed. NPRM at 21, n.38.

³⁵ See NPRM at 19.

evade the \$4 million relief limit by splitting one case into multiple cases.³⁶ Despite inviting interested parties to comment on whether there might be alternative ways to deal with the issue of disaggregation, some shipper commenters have asked the Board to simply remove this case limit altogether.³⁷ This, of course, is not a solution, as it does nothing to protect against disaggregation. Moreover, the one-case limit is superior to the Board's alternative ideas that would allow two or more concurrent cases by a single shipper because, as the Board recognized, the one-case limit would ultimately allow more shippers to "have the opportunity to participate in the arbitration program."³⁸ Because the Proposed Program is not limited to smaller shippers, without a one-case limit, a few larger shippers could bring multiple cases against a single carrier, which would prevent smaller shippers from accessing the Program. This would undermine the core goal of this proposal—to offer expanded access to rate review for shippers that have claimed they cannot afford the expense of a formal rate case before the Board.

In sum, the Board should maintain the volume limits it has proposed in the NPRM and also include the modified version of the volume limit on more than ten simultaneous arbitrations at one time suggested by Joint Carriers in their Opening Comments.³⁹

D. The Board's Limitation on Automatic Access to the Confidential Waybill Sample Is Appropriate and Should Not Be Expanded.

In the NPRM, the Board proposed to allow parties to an arbitration proceeding under the Program automatic access to the unmasked confidential

³⁶ *See id.*

³⁷ *See, e.g.,* Coalition Associations Comments at 11–15; IMA-NA Comments at 19.

³⁸ NPRM at 19.

³⁹ Joint Carriers' Opening Comments at 27–28.

Waybill Sample, but with four important limitations. The data would be limited to: (1) the most recent four year; (2) movements with R/VC ratios above 180%; (3) movements on defendant carrier(s); and (4) movements with the same five-digit Standard Transportation Commodity Code as the challenged movements.⁴⁰

The Coalition Associations object to these commonsense limitations to automatic Waybill Sample access and repeat the arguments made in their supplemental response seeking broad access to the unmasked confidential Waybill Sample.⁴¹ Their request to unnecessarily expand automatic access to this highly confidential data should be rejected. There is simply no need to provide overly broad access to a dataset that has long been recognized as extremely confidential in nature.⁴²

First, it should be noted that the limitations imposed by the Board are simply for *automatic* Waybill Access disclosure. The NPRM specifically stated that parties may request additional Waybill Sample data pursuant to the access provisions at 49 C.F.R. § 1244.9(b)(4).⁴³ Notwithstanding the Coalition Associations' protestations to the contrary,⁴⁴ the standard for access under § 1244.9(b)(4) is straightforward and the Office of Economics responds promptly to those requests.

⁴⁰ NPRM at 29–31.

⁴¹ See Coalition Associations Comments at 16–19; see Supplemental Response of Joint Shippers, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 10–13 (filed Sept. 10, 2020).

⁴² See, e.g., *Procs. on Release of Data from the ICC Waybill Sample*, 4 I.C.C.2d 194, 197 (1987) (acknowledging that Waybill Sample data is commercially sensitive for both shippers and railroads); Decision No. 42, *CSX Corp., et al.—Control & Operating Leases/Exemptions—Conrail Inc.*, Docket No. FD 33388, at 6 (STB served Oct. 3, 1997).

⁴³ NPRM, at 66–67 (proposed § 1108.27(g)).

⁴⁴ Coalition Associations Comments at 18–19.

Second, the limitations are consistent with precedent and the highly confidential nature of the sample. As the Board pointed out, it has long prohibited inclusion of data from non-defendant carriers.⁴⁵ Consistent with this precedent, the Board correctly observed that “[g]iven the importance of maintaining the confidentiality of the Waybill Sample, it would be imprudent to require the release of data that may not be needed in some cases.”⁴⁶

The Coalition Associations also point to the Board’s proposal in *Final Offer Rate Review*, which the Coalition Associations describe as permitting four years of Waybill Sample data without restriction.⁴⁷ That is simply not the case. The decision in that proceeding does not specifically address the long-standing limitations on access to, for example, non-defendant carrier traffic. However, in explaining that parties could seek four years of Waybill data, that decision relies on *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, Docket No. EP 646 (Sub-No. 3), and *Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1).⁴⁸ As noted above, both of those cases confirm that Waybill access is limited to defendant carriers. Moreover, the Board in *Final Offer Rate Review* stated that it “is mindful of the need to disclose no more confidential waybill data

⁴⁵ See Decision, *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, Docket No. EP 646 (Sub-No. 3), at 1 (STB served Mar. 12, 2012); Decision, *Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1), at 80 (STB served Sept. 5, 2007); see also Advance Notice of Proposed Rulemaking, *Expanding Access to Rate Relief*, Docket No. EP 665 (Sub-No. 2), slip op. at 14–15 (STB served Aug. 31, 2016) (acknowledging prior concerns about comparisons using non-defendant carrier traffic).

⁴⁶ NPRM, at 30.

⁴⁷ Coalition Associations Comments at 17.

⁴⁸ Notice of Proposed Rulemaking, *Final Offer Rate Review*, Docket No. EP 755, slip op. at 9 (STB served Sept. 12, 2019) (citing Docket Nos. EP 646 (Sub-No. 1) and EP 646 (Sub-No. 3)).

than necessary.”⁴⁹ There is no indication that the proposal in that proceeding—which has not been finalized—would permit the broad and unneeded access that is sought by the Coalition Associations in this proceeding.

E. Joint Carriers Oppose Certain Shipper Requests Relating to Relief.

Shipper commenters generally support the Board’s proposal of a relief cap of \$4 million and a relief period of two years,⁵⁰ but some commenters request certain clarifications or modifications. In particular, AFPM asks that, if the Board adopts FORR with a two-tiered relief procedure, it consider doing the same in this proceeding.⁵¹ Coalition Associations request that the Proposed Program’s relief cap equal the current indexed amount of the relief cap under the Three Benchmark approach.⁵² With regard to when the relief period should start, Coalition Associations argue that the two-year relief period should begin on a date to be determined solely by the complainant or, if not chosen, then on the one-year anniversary of the arbitration decision.⁵³

Joint Carriers oppose a two-tiered relief procedure as unnecessary and inconsistent with the goal of offering a streamlined forum for modest rate disputes

⁴⁹ Supplemental Notice of Proposed Rulemaking, *Final Offer Rate Review*, Docket No. EP 755, at 37 (STB served Nov. 15, 2021) (citing *Proc. on Release of Data from the ICC Waybill Sample*, 4 I.C.C.2d 194, 197–212 (1987)). The Board also stated that “as in Three-Benchmark cases, waybill access (subject to appropriate protective orders) would include the full sample, including unmasked revenue.” *Id.* The reference to the “full sample” appears to mean the unmasked Sample, as the Board was responding to a request by the Coalition Associations for clarification regarding access to unmasked data. *Id.*

⁵⁰ See, e.g., AFPM Comments at 13 (of pdf); NGFA Comments at 8; Coalition Associations Comments at 2, 19–20.

⁵¹ AFPM Comments at 13 (of pdf).

⁵² Coalition Association Comments at 19–20.

⁵³ *Id.* at 20.

that do not justify the time and costs that accompany a formal rate case brought before the Board. Joint Carriers also oppose the Coalition Associations' request to allow shippers to unilaterally determine the date on which the relief period begins. While certain Board decisions are effective a short period after service,⁵⁴ it would be unjustified and unfair for the relief period to begin a full year—which is over *three times* longer than the procedural schedule for an entire arbitration proceeding—from the date of the arbitration decision. Finally, Joint Carriers do not oppose Coalition Associations' request that the Proposed Program's relief cap equal the current indexed amount of the Three Benchmark cap.

CONCLUSION

Joint Carriers support the Proposed Program which, with the modifications suggested herein and in their Opening Comments, would incentivize both carrier and shipper participation, finally offering an alternative dispute resolution forum for smaller rate cases that has generous relief limits, reasonable methodological flexibility, and expedited processes—something shippers have requested for decades and a forum free of the legal and economic bungles of the proposed FORR process. Joint Carriers urge the Board to move forward with a Final Rule in this proceeding with the adjustments set forth in Joint Carriers' Opening Comments to the NPRM and in this Reply. The Board is so close to offering a game-changing new forum for smaller rate disputes that is lawful, fair, expedient, and economically sound. The STB should not delay in achieving this laudable goal.

Respectfully submitted,

⁵⁴ See, e.g., 49 C.F.R. § 1121.4(e) (decision effective 30 days from service).

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