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

Coalition Associations' Reply to Joint Carriers' Renewed Petition for Stay

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The American Chemistry Council, Corn Refiners Association, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League (“Coalition Associations”) file this reply to Joint Carriers’¹ Renewed Petition for Stay filed in this proceeding on February 3, 2023.

Joint Carriers justify their Renewed Petition for Stay mainly by contending that they could not anticipate the Final Rule’s² Election Condition, which specifies that the arbitration program outlined in the Final Rule (“Arbitration Program”) will not become operative unless all Class I carriers elect to participate in it by February 23, 2023. They forget, however, that they asserted in their petition for rulemaking initiating this proceeding that the “one key feature” of their arbitration proposal was an “upfront” pledge from all of them to consent to arbitrate rate reasonableness disputes for five years.³ Consistent with this assertion, the Election Condition’s deadline is undeniably critical to the success of the Arbitration Program because the Program’s chief goal is to establish an accessible rate-review process in lieu of Final Offer Rate Review (FORR). Without the deadline, carriers can wait to make their election until they find out whether their legal challenges to FORR succeed, and if they succeed, refrain from opting in, leaving shippers with nothing.

¹ Joint Carriers are Canadian National Railway, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.

² *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes (Final Rule)*, EP 765, slip op. (STB served Dec. 19, 2022).

³ Pet. for Rulemaking 20.

At bottom, Joint Carriers' contention that they could not anticipate the Election Condition, and their other contentions in their petition, fall substantially short of meriting a stay pending judicial and administrative appeal. Therefore, the Board should deny Joint Carriers' Renewed Petition for Stay.

Argument

A stay is “extraordinary relief.”⁴ When deciding whether to issue a stay, the Board considers four factors: (1) whether the party seeking a stay is likely to prevail on the merits; (2) whether the party seeking a stay will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest.⁵ The first two factors are the “most critical.”⁶ “It is not enough that the chance of success on the merits be better than negligible.”⁷ Similarly, “simply showing some possibility of irreparable injury fails to satisfy the second factor.”⁸ Here, Joint Carriers fail to meet their burden on each of the factors.

⁴ *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes (Stay Decision)*, EP 765, slip op. at 3 (STB served Jan. 24, 2023).

⁵ *Id.* at 2-3 (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

⁶ *Nken v. Holder*, 556 U.S. 418, 434 (2009).

⁷ *Id.* (cleaned up).

⁸ *Id.* (cleaned up).

I. Joint Carriers are unlikely to prevail on the merits.

Joint Carriers offer four arguments contending they will prevail on the merits in a petition for reconsideration or on judicial appeal of the Final Rule, but all are meritless.

First, Joint Carriers argue that the Election Condition⁹ violates the Administrative Procedure Act's (APA) notice requirements because the specific period the Board selected for the required advance carrier election that Joint Carriers themselves proposed is not a "logical outgrowth" of what was proposed in the Board's Notice of Proposed Rulemaking.¹⁰ But the APA does not require proposed agency rules "be subjected to multiple cycles of notice and comment until the version adopted as final is identical to the last notice of proposed rulemaking[.]"¹¹ Rather, a final rule can incorporate changes to the proposed rule if "interested parties 'should have anticipated that the change was possible.'"¹²

Here, Joint Carriers should have known that a finite election period was not only possible, but also very likely. Joint Carriers emphasized in their petition for rulemaking that a key feature of their proposed arbitration program was their upfront commitment to participate in it for a five-year term:

⁹ Joint Carriers take issue with the timing of the Election Condition, rather than the condition that all carriers must elect to opt in for the Arbitration Program to become effective. Renewed Pet. for Stay 6.

¹⁰ Renewed Pet. for Stay 5-7.

¹¹ *Brennan v. Dickson*, 45 F.4th 48, 69 (D.C. Cir. 2022).

¹² *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)).

The Small Case Arbitration Program has one key feature that sets it apart from every other arbitration program previously adopted by the Board: a pledge from five Class I railroads to consent to arbitrate rate reasonableness disputes—unilaterally and programmatically—for a term of five years. This upfront, reliable, enduring, and voluntary participation from Class I railroads will provide shippers with an immediate opportunity to seek relief from rates that they believe to be unreasonable via a low-cost, quick, and more flexible ADR procedure.¹³

Thus, Joint Carriers’ proposal acknowledged that an upfront carrier election to arbitrate would be critical to the success of the arbitration program. This acknowledgement belies Joint Carriers’ argument that they could not anticipate an advanced election deadline.

Further, the Board’s proposed rule in this proceeding stated that securing the “initial commitment” of all Class I railroads to participate in the Arbitration Program would be “fundamental” to whether it adopts the Program.¹⁴ If Joint Carriers believed that an advanced election deadline was not important, contrary to their own proposal, they could and should have made that argument in their comments on the proposed rule.

While it strains credulity to say that Joint Carriers are surprised by the imposition of an election deadline despite the plain language of the proposed rule and their prior position that their upfront commitment to arbitrate is critical to the Arbitration Program’s success, the Board need not answer that question today. The

¹³ Pet. for Rulemaking 20.

¹⁴ *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, EP 765, slip op. at 9 (STB served Nov. 15, 2021).

Board only needs to decide whether the Joint Carriers have shown that they are likely to succeed on the merits¹⁵ As explained, Joint Carriers’ narrow and illogical argument that they are surprised about the election deadline for participating in the Arbitration Program is wholly insufficient to show that their likelihood of success on the merits is “better than negligible,”¹⁶ which is not enough to demonstrate a likelihood of success.¹⁷

Second, Joint Carriers allege that the lack of an opt-in election deadline in the Board’s prior arbitration programs somehow makes the Arbitration Program invalid. But the fact that the Board created one set of rules for past arbitration programs does not bind it to the same rules for a new and discretionary arbitration program. Moreover, Joint Carriers touted their “upfront” pledge as critical to the Arbitration Program’s success, explaining that this was a key feature that set it apart from the Board’s earlier programs, which have been underused.¹⁸ In sum, Joint Carriers are unlikely to succeed on this allegation because it is illogical and conflicts with their own arguments on the record.

Third, Joint Carriers allege there is “not a sufficient justification” for the Election Condition’s deadline.¹⁹ This ignores that the Arbitration Program reflects a

¹⁵ *Nken*, 556 U.S. at 434 (internal quotation marks omitted).

¹⁶ *Id.* (internal quotation marks omitted).

¹⁷ *See id.*

¹⁸ Pet. for Rulemaking 20.

¹⁹ Renewed Pet. for Stay 8. Joint Carriers take issue with having a deadline, rather than the condition that all carriers must opt in for the Arbitration Program to

quid pro quo under which carriers obtain an exemption from FORR in return for an arbitration program for small rate cases. This bargain is meaningless, however, if carriers can wait to opt in to the Arbitration Program until after FORR appeals are decided.²⁰ If FORR is not upheld, carriers have no reason to opt in and shippers will be left with nothing. If FORR is upheld, carriers will opt in to the Arbitration Program to avoid FORR, depriving shippers of a superior FORR program that proved legally sound. At bottom, the Board is fully justified to impose an election deadline that prevents carriers from depriving shippers of FORR without providing a reliable agreement to arbitrate rate reasonableness claims in return.

Fourth, Joint Carriers complain that the Election Condition forces them to commit to a program “prior to knowing whether and what changes to the Final Rule may occur on reconsideration and/or appeal.”²¹ But since only Joint Carriers have submitted petitions for reconsideration of the Final Rule, they almost certainly know that the Final Rule will either remain as is or be modified consistent with their petitions. Regardless, they face essentially no risk of adverse changes to the Final Rule.

Ultimately, Joint Carriers have not sufficiently shown a likelihood of success on the merits that would warrant a stay pending judicial and administrative review.

become effective. In fact, they support this allegation by citing to the portion of the Final Rule discussing the deadline, rather than carrier participation.

²⁰ As the Board is aware, carrier parties are seeking judicial review of FORR.

²¹ *Id.*

II. Joint Carriers will not suffer irreparable harm.

Joint Carriers contend that the Election Condition will cause irreparable harm because, if the Election Condition is not satisfied, each Class I carrier will lose its opportunity to participate in the Arbitration Program regardless of whether it chose to opt into the Program or whether they would opt in based on later changes to the Program, if any. This claim is flawed for several reasons.

First, Joint Carriers cannot be irreparably harmed by any lost opportunity to participate in the Arbitration Program because they were never entitled to the program in the first place. By Joint Carriers' logic, any party that petitions for a discretionary rule would suffer irreparable harm and be entitled to a stay if they do not get exactly the rule they want. That result is not consistent with the "extraordinary relief"²² that a stay provides. Moreover, the risk of such a "lost opportunity" is inherent in the Final Rule's prerequisite of unanimous carrier elections to participate, not the timing of the election deadline—if a carrier elects to participate, it still faces a risk of the same "harm" (loss of the Arbitration Program) if another Class I carrier elects not to participate.

Second, Joint Carriers will not suffer irreparable harm if they opt-in without knowing if or how the Program may change on reconsideration or appeal. The Arbitration Program will reward carriers for opting in with an exemption from FORR. Further, since members of Joint Carriers are the only parties that have filed

²² *Stay Decision*, slip op. at 3.

petitions for reconsideration or petitions for review of the Final Rule, a change to the Arbitration Program that is adverse to carriers is highly unlikely.

Third, Joint Carriers' contention that the Board characterized the Arbitration Program as "the better approach" in comparison to FORR does not demonstrate that they will suffer irreparable harm if the deadline for the Election Condition is not changed. Joint Carriers selectively quote the Board, which described the Arbitration Program as "the better approach *from which to start*."²³ Even if the Arbitration Program were a more appropriate starting point than FORR for making rate review more accessible for smaller claims, the Arbitration Program may ultimately turn out to be the worse approach for increasing this access, especially if the Board adopts the unbalanced adjustments that carriers seek in their petitions for reconsideration.

Joint Carriers' failure to satisfy this second stay factor dooms its Renewed Petition for Stay. Because an applicant seeking a stay must satisfy the first two stay factors before the stay inquiry calls for assessing the remaining factors,²⁴ the Board's inquiry should stop here, and the Joint Carriers' stay petition should be denied.

III. A stay of the Election Condition would harm shippers and not serve the public interest.

Joint Carriers' admission that the Arbitration Program will provide benefits to shippers and the public conflicts with their contention that a stay of the Election

²³ *Final Rule*, slip op. at 11.

²⁴ *Nken*, 556 U.S. at 436.

Condition would not harm these stakeholders. A stay pending judicial review would allow carriers to delay their Arbitration Program participation election until after they know the result of the judicial appeal. In fact, the Association of American Railroads and Union Pacific Railroad have already sought judicial review of FORR, which will occur simultaneously with the judicial review of the Final Rule at issue here. This has serious consequences for shippers because, as previously explained, if FORR is upheld in its current form, carriers could wield their opt in election to deprive shippers of a legally sound FORR process, which offers greater accessibility than the Arbitration Program. If FORR is not upheld, carriers have no reason to opt in to the Arbitration Program and shippers will be left with nothing. At bottom, a stay would harm shippers and the public by allowing carriers to deprive or limit shipper access to rate review for small claims during and after the stay without providing shippers with any offsetting benefit.

IV. Conclusion

For the foregoing reasons, Carriers' Renewed Petition for Stay should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on February 9, 2023, a copy of the foregoing Coalition Associations' Reply to Joint Carriers' Renewed Petition for Stay was served by email or first-class mail on the service list for Docket No. 765.

/s/ Richard M. Couch