

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 765

Joint Petition for Rulemaking to Establish a Voluntary
Arbitration Program for Small Rate Disputes

Coalition Associations' Reply to Petitions for Reconsideration

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TABLE OF CONTENTS

	Page
Summary	1
Argument	3
I. The Board’s decision to allow claims involving the revenue-adequacy constraint is correct.	3
A. Congress has sanctioned the use of revenue adequacy in rate-case arbitration.....	4
B. The proposed revenue-adequacy ban would severely limit the methodological flexibility and cost effectiveness necessary for the Arbitration Program’s success.	9
C. The proposed revenue-adequacy ban would prevent shippers from bringing small claims involving the revenue-adequacy constraint to the Board.	12
II. Decisions on appeal should be precedential.....	13
III. The opt-in election period is appropriate.	17
IV. Coalition Associations support modifying the language of 49 C.F.R. § 1108.24(a)(1) to refer to regulated traffic.....	18
Conclusion	20

American Chemistry Council, Corn Refiners Association, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively, “Coalition Associations”) submit this reply to the petitions for reconsideration filed by CSX Transportation, Inc. (CSXT), and jointly by Norfolk Southern Railway Co. (NS) and Union Pacific Railroad Co. (UP), on January 24, 2023, in this proceeding.

Summary

The small rate case arbitration program (Arbitration Program) involves a delicate compromise intended to provide shippers with an accessible rate-review program to resolve small claims while exempting carriers from Final Offer Rate Review (FORR). In their petitions for reconsideration, CSXT, NS, and UP ask the Board to upset this balance by adopting several measures that undermine the Arbitration Program’s superior accessibility when compared to the Board’s pre-existing rate review processes. The Board should deny reconsideration of these matters because the petitioners have failed to “demonstrat[e] material error in the prior decision or identify[] new evidence or substantially changed circumstances that would materially affect the case.”¹

¹ *Market Dominance Streamlined Approach (Reconsideration Decision)*, EP 756, slip op. at 3 (STB served Jan. 25, 2023). Citing to *Dispute Resolution Procedures Under the Fixing America’s Surface Transportation Act of 2015*, Docket No. EP 734, at 2 (STB served Mar. 22, 2017), CSXT erroneously claims that its petition is not subject to this standard because it has sought reconsideration pursuant to 49 C.F.R. § 1110.10 instead of 1115.3. CSXT Pet. Note 1. That decision, however, does not contain any such declaration. CSXT appears to infer that conclusion from the absence of any discussion that expressly refers to material error, new evidence, or substantially changed circumstances. In that proceeding, however, the Board concluded that the petitioner had not demonstrated “that the Final Rule fails to

First, CSXT's proposed ban on claims that involve the revenue-adequacy constraint would practically eliminate the methodological flexibility that is critical to the Arbitration Program's accessibility and would guarantee costly disputes over the ban's application and the character of new methodologies. The ban also conflicts with Congress's directive that the Board establish a voluntary rate-case arbitration program under which arbitrators consider the revenue-adequacy constraint, which reflects the level of differential pricing necessary for a carrier to achieve revenue adequacy. Further, alongside the FORR exemption, the ban would effectively block shippers from bringing small claims involving the revenue-adequacy constraint before the Board, even though CSXT and the other Joint Carriers have asserted is the only appropriate tribunal to address these claims.

Second, NS and UP's proposal to make decisions on appeal non-precedential would increase the Arbitration Program's costs for shippers without providing any corresponding benefit. Allowing carriers to appeal arbitration decisions with impunity would effectively guarantee that shippers would have to incur the cost of an appeal to obtain rate relief under the Arbitration Program. Further, it does not help to reduce litigation cost and complexity because the confidential, non-precedential nature of arbitration decisions eliminates the risk that litigation decisions will create adverse precedent.

satisfy the requirements of the FAST Act...." *EP 734* 2. Reconsideration based upon a failure to satisfy statutory requirements plainly falls within the rubric of the "material error" standard.

Third, NS and UP's proposal to eliminate any opt-in election deadline would upend the bargain underlying the program by giving carriers the FORR exemption they demand while eliminating any guarantee to shippers that the Arbitration Program will be available if FORR does not survive appeal.

Argument

I. The Board's decision to allow claims involving the revenue-adequacy constraint is correct.

The Final Rule² appropriately rejects Joint Carriers' proposal to severely limit the Arbitration Program's accessibility by banning any claim involving the revenue-adequacy constraint. First, the proposed ban is inconsistent with Congress's directives that the Board consider the revenue-adequacy constraint when deciding rate reasonableness and establish a voluntary arbitration program under which arbitrators must consider the revenue-adequacy constraint when resolving rate-reasonableness claims. Second, the ban would prohibit any methodology that uses the revenue-adequacy constraint, even as a secondary factor to establish a rate-prescription *floor* that ensures the carrier will achieve revenue adequacy. And CSXT's attempt to identify specific methodologies that fall within the ban demonstrates that it will lead to disputes over the ban's scope and the correct characterization of new methodologies that use revenue-adequacy alongside other factors to identify a maximum reasonable rate. Third, the ban operates

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).

alongside FORR to effectively block shippers from bringing small claims based even partially on revenue adequacy to the Board.

A. Congress has sanctioned the use of revenue adequacy in rate-case arbitration.

CSXT contends that the Board committed material error by allowing shippers to use methodologies involving the revenue-adequacy constraint in the Arbitration Program because, in CSXT's opinion, the revenue-adequacy constraint involves unresolved legal and policy issues that arbitrators should not address and the factors at 5 U.S.C. § 572(b) discourage arbitrating these issues.³ Congress, however, specifically directed that the Board establish an arbitration program under which arbitrators must consider the revenue-adequacy constraint, and the Final Rule is consistent with this directive. Thus, allowing methodologies that use the revenue-adequacy constraint is appropriate.

Congress has expressly authorized the Board to allow arbitrators to consider the revenue-adequacy constraint. Under 49 U.S.C. § 11708(c)(3), Congress directed the Board to establish a rate-case arbitration program under which “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)).” This directive refers to the Board’s revenue-adequacy constraint, which limits differential pricing to the extent it is unnecessary to earn

³ CSXT Pet. 19-23.

adequate revenues under the revenue-adequacy standard at 49 U.S.C.

§ 10704(a)(2).⁴ Accordingly, the Board's decision in the Final Rule to allow arbitrators to consider claims involving the revenue-adequacy constraint reflects Congress's directive that arbitrators consider revenue adequacy when deciding rate complaints.

Against this legislative backdrop, CSXT's contention that the Board failed to consider whether the factors that Congress identified at 5 U.S.C. § 572(b) counsel against arbitrating revenue-adequacy issues is without merit. Section 572(b) states that agencies shall consider not using arbitration when certain factors are present. But these factors are irrelevant here because Congress has directed the Board to establish an arbitration program under which arbitrators must consider the Board's revenue-adequacy constraint. Congress thus has already determined that arbitrating claims involving the revenue-adequacy constraint is appropriate, thereby rendering CSXT's section 572(b) objection moot.

Likewise, CSXT's claims that the standard of review and potentially limited record under the Arbitration Program could be insufficient for resolving issues involving revenue-adequacy methodologies are without merit.⁵ The Final Rule adopts an arbitration program that is generally consistent with the requirements that Congress identified for the arbitration program it mandated under 49 U.S.C.

⁴ *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 535-36 (1985) ("Our concept is simply that a railroad not use differential pricing to consistently earn, over time, a return on investment [sic] above the cost of capital."), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

⁵ CSXT Pet. 23-25.

§ 11708. In particular, the Final Rule incorporates the same standard of review, 90-day maximum evidentiary period, and nonprecedential treatment of arbitration decisions.⁶ Whatever concerns CSXT may have about these aspects of the Arbitration Program, Congress has determined that they are suitable to allow arbitrators to consider the revenue-adequacy constraint.

Setting aside that the Arbitration Program broadly satisfies the requirements of section 11708, the Arbitration Program contains multiple elements that make it appropriate for claims involving revenue adequacy.

First, the Final Rule provides an appropriate opportunity for review of arbitration decisions.⁷ Under the standard of review that the Final Rule adopts, the Board may vacate a decision that is inconsistent with sound principles of rail-regulation economics or directly contravenes statutory authority.⁸ This standard of review is sufficient to address CSXT's fundamental contentions about the revenue-adequacy constraint, which are that it is allegedly "contrary to statute" and "economically discredited."⁹

Although CSXT contends that an inadequate factual and economic record before the arbitration panel would constrain the Board's review, this does not pose a unique disadvantage for reviews of arbitration decisions involving the revenue-adequacy constraint. An inadequate factual and economic record could accompany a

⁶ *See generally* 49 U.S.C. § 11708.

⁷ *Final Rule*, slip op. at 81.

⁸ 49 C.F.R. § 1108.31(b)(1), (3).

⁹ CSXT Pet. 1.

decision involving a stand-alone cost methodology or any other methodology before an arbitration panel. The trade-offs for that possibility are the limits applicable to arbitration relief. Regardless, the factual and economic record before the arbitration panel does not prevent arbitration participants from arguing that the panel's application of a revenue-adequacy constraint is economically unsound or contrary to statute. Arguments about how an arbitration panel applied economic and legal principles to the facts of a case are permissible on appeal, unlike arguments about the factual record. Additionally, even if a party chooses to appeal an arbitration decision despite its concerns about an inadequate record, the risk of creating adverse precedent is low because the record limits an appellate decision's precedential value.¹⁰

Second, the nonprecedential and confidential nature of arbitration decisions under the Final Rule protects against arbitrators setting broadly applicable policy through arbitration decisions involving the revenue-adequacy constraint. It also reduces the risk that a factual record made under the short evidentiary period imposed by the Final Rule could have implications beyond the instant case. Stated differently, a railroad does not need to worry about adverse arbitration decisions

¹⁰ *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) (“Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.”).

involving the revenue-adequacy constraint leading to bad precedent because the decisions are nonprecedential and confidential.

Third, the revenue-adequacy constraint stands on solid legal footing. The ICC established it nearly 40 years ago in *Coal Rate Guidelines*, 1 I.C.C. 2d 520 (1985), which was affirmed on appeal.¹¹ Further, the D.C. Circuit has upheld the Board's calculation of revenue adequacy using the book value of railroad assets,¹² which railroad entities continue to relitigate in Board proceedings. And, in 2015, while the Board was examining revenue adequacy in Ex Parte 761, Congress directed the Board to establish a voluntary arbitration program under which arbitrators must consider revenue adequacy.¹³

CSXT attempts to sidestep this precedent by justifying the proposed ban on the false premise that the revenue-adequacy constraint is a cap on overall railroad earnings.¹⁴ It is not. The revenue-adequacy constraint does not and cannot limit railroad revenue from exempt traffic or traffic over which the railroad does not have market dominance because the Board does not have authority to regulate the revenue that railroads earn from this traffic. Also, the revenue-adequacy constraint

¹¹ *Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

¹² *Ass'n of Am. R.Rs. v. ICC*, 978 F.2d 737, 743 (D.C. Cir. 1992).

¹³ Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 13, 129 Stat. 2235 (codified at 49 U.S.C. § 11708).

¹⁴ CSXT Pet. 6.

limits only the degree of differential pricing.¹⁵ The revenue-adequacy constraint thus does not limit railroad earnings from rates that are set at competitive levels.

In sum, the Board's decision to allow arbitration of claims involving the revenue-adequacy constraint is consistent with Congress's directive that the Board establish an arbitration program under which arbitrators consider the revenue-adequacy constraint. Also, the Arbitration Program contains adequate mechanisms that prevent arbitration decisions from applying the revenue-adequacy constraint improperly or establishing precedent on revenue-adequacy matters.

B. The proposed revenue-adequacy ban would severely limit the methodological flexibility and cost effectiveness necessary for the Arbitration Program's success.

The Arbitration Program's sole goal is to increase access to rate review for small claims. To achieve this goal, it combines methodological flexibility with the cost benefits of an abbreviated procedural schedule. The methodology flexibility allows shippers to select a methodology that is more efficient than the methodologies that shippers must use in full Board proceedings. The abbreviated procedural schedule helps to reduce costs by encouraging parties to narrow discovery and their dispute. Together, the Arbitration Program's methodological flexibility and abbreviated procedural schedule reduce program costs in relation to

¹⁵ *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 535-36 (1985) (“[C]aptive 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.”).

available relief, making the Arbitration Program more accessible for small claims than the Board’s existing processes, which involve higher costs.

The proposed ban directly and severely limits the methodological flexibility that is essential to the Arbitration Program’s success. As CSXT describes it, the ban “encompasses any methodology in which a railroad’s overall profitability, earnings, or revenues are used to determine whether a rate for a particular movement is unreasonably high.”¹⁶ This broad definition plainly extends to any methodology that uses revenue adequacy to identify a maximum reasonable rate, even if it also considers other factors unrelated to revenue adequacy. Few methodologies will be able to pass muster because Congress has directed that, when making rate reasonableness determinations, the Board and arbitrators must “recogniz[e] the policy . . . that rail carriers shall earn adequate revenues, as established by the Board under [49 U.S.C. § 10704(a)(2)].”¹⁷

Further, CSXT’s discussion of the application of the proposed ban demonstrates that costly disputes over the ban’s application are inevitable. For example, by mischaracterizing ACC’s Benchmark Method when attempting to explain the ban’s scope, CSXT demonstrates that the ban will result in disputes over the character of many methodologies. CSXT contends that the Benchmark Method falls within the ban by suggesting that it “would use a finding of

¹⁶ CSXT Pet. 11.

¹⁷ 49 U.S.C. § 10701(d)(2). *See* 49 U.S.C. § 11708(c)(3) (directing arbitrators to consider revenue adequacy under arbitration program that 49 U.S.C. § 11708 requires).

systemwide revenue adequacy as the single factor justifying rate reductions and use a complicated econometric formula to allocate the allegedly excess revenues to individual movements.”¹⁸ This is wrong. To justify a rate reduction, the Benchmark Method uses established principles of econometric modeling to predict a benchmark rate, which is the rate that would be expected for the challenged movement if it existed in a competitive market. It then determines an appropriate margin above that benchmark rate that is necessary to maintain the railroad’s long-term revenue adequacy, assuming that all the railroad’s other market-dominant traffic also is repriced at the rate levels that the econometric model also predicts for them (even though those rates have not been challenged and thus would not be reduced). Thus, the Benchmark Method uses revenue-adequacy as a secondary factor to *limit* the rate reductions that the competitive benchmark rate would otherwise produce.

CSXT’s proposal would ban the Benchmark Method and any other method that compares the degree of differential pricing paid by captive shipper to the level necessary to achieve revenue adequacy. This directly contradicts the statutory directive in 49 U.S.C. § 11708(c)(3) for arbitrators to give due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.

Further, CSXT’s proposed ban on revenue adequacy would ensnare other methodologies to which CSXT has not raised specific objections. For example, the Three-Benchmark test relies on revenue adequacy to establish one of three benchmarks that inform rate reasonableness. This also raises questions as to

¹⁸ CSXT Pet. 11-12.

whether a market-based factor methodology, like what National Grain and Feed Association or BNSF Railway have identified,¹⁹ falls within the ban if it has a component that ensures it produces a maximum reasonable rate that allows the carrier to achieve revenue adequacy.

Under the Final Decision, shippers using an alternative rate-reasonableness methodology must already be prepared to defend the methodology as economically sound and consistent with the statute. They should not face the additional hurdle of demonstrating that it fits CSXT's self-serving definition of what is and is not permissible under its proposed revenue-adequacy ban. Additionally, shippers will have to address the ban in the same narrow 90-day window they have for developing their evidence while having no practical ability to discern whether their chosen methodology will be permissible. The cost and risk associated with this erodes the Arbitration Program's accessibility advantages and will thus discourage shippers from using the Arbitration Program.

C. The proposed revenue-adequacy ban would prevent shippers from bringing small claims involving the revenue-adequacy constraint to the Board.

The proposed ban is a device to immunize carriers from small claims having any connection to the revenue-adequacy constraint. Both CSXT and Joint Carriers assert that the Board, not arbitrators, is the only appropriate tribunal to hear revenue-adequacy constraint claims. Yet, their proposed ban combined with the

¹⁹ BNSF Comments 2-4; Nat'l Grain & Feed Ass'n Comments Reply to Pet. for Rulemaking 11-12 (Aug. 20, 2020).

Arbitration Program's exemption from FORR would prevent shippers from bringing revenue-adequacy and related claims to the Board.

Additionally, expecting a shipper to bring small claims involving the revenue-adequacy constraint to the Board outside the arbitration process is unrealistic. A formal Board proceeding will involve greater discovery and a longer procedural schedule than the Arbitration Program. It will almost certainly involve high-cost, high-stakes litigation by railroads because it is precedential and Joint Carriers' have unequivocally opposed the revenue-adequacy constraint.²⁰ For these reasons, the cost of a formal small claim involving revenue adequacy will be high, likely higher than a Three-Benchmark case, especially when compared to the lower value of small claims. Simply put, bringing a small claim involving the revenue-adequacy constraint under the Board's formal processes is not a practical option.

II. Decisions on appeal should be precedential.

NS and UP's request that the Board make decisions on appeal nonprecedential would open the flood gates for railroads to challenge every adverse arbitration decision with impunity, increasing the costs of the Arbitration Program for shippers. But their reasons for this lack merit. To justify creation of a special exception to the Board's traditional practice of issuing precedential decisions, they attempt to distinguish the Board's labor arbitration practice without explaining why the difference between labor and rate arbitration warrants different precedential treatment. They also attribute the disuse of the Board's existing

²⁰ Joint Carriers Reply 9.

arbitration program to precedential Board decisions while ignoring the other features of the program that reduce its attractiveness. In addition, they point to the practice of a handful of other agencies carrying out distinct regulatory schemes without identifying any similarities between those schemes and the Board's rate regulation that would warrant the same non-precedential treatment of decisions on appeal. Finally, they assert that fear of creating adverse precedent would encourage high-cost, low-stakes litigation under the Arbitration Program, but ignore the countervailing fact that arbitration decisions would be confidential and nonprecedential.

First, the Board's decision to follow its traditional practice of treating its decisions in arbitrations as precedential is appropriate. The possibility of an adverse precedent is a risk inherent in an appeal to the Board, a risk undertaken by any party that decides to file such an appeal. NS and UP attempt to distinguish the Board's long-standing practice by noting that it has been applied in the labor context, where arbitration is mandatory and a different standard of review applies.²¹ But they fail to explain why those factors are material. Further, they observe that there have been no voluntary arbitrations outside the labor context under the Board's existing arbitration program, and leap to the conclusion that parties are refusing to arbitrate because of concern for precedential decisions on appeal.²² But this suggestion conflicts with their and the other Joint Carriers'

²¹ NS & UP Pet. 2-3.

²² *Id.*

opening comments, which assert that this lack of participation is “tied to certain features of the prior programs—most notably, a lack of flexibility with regard to arbitrator selection, a lack of confidentiality in the arbitration process, and, in the context of rate disputes, the requirement that the Board first determine market dominance.”²³ Raising this new feature on reconsideration is plainly grasping at straws. Moreover, “[t]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.”²⁴

Second, while NS and UP contend that the Board should follow a handful of other agencies that make their arbitration decisions nonprecedential, they fail to explain why. As the Board recognized in the Final Rule, these agencies maintain arbitration programs to carry out the unique statutory schemes that Congress entrusted to them.²⁵ NS and UP do not identify any similarities between the legal context of those arbitration programs and the Arbitration Program that would warrant making the Board’s arbitration decisions precedential.

Third, NS and UP’s contention that precedential appeals will lead to high-cost, high-stakes litigation tactics at the arbitration stage is misguided. According to them, precedential decisions on appeal “will motivate parties at the arbitration stage to leave no stone unturned in order to create a record for an appeal that can

²³ Joint Carriers Opening Comments 4.

²⁴ *Market Dominance Streamlined Approach (Reconsideration Decision)*, EP 756, slip op. at 3 (STB served Jan. 25, 2023).

²⁵ *Final Rule*, EP 765, slip op. at 51.

be precedent setting.”²⁶ But the confidential, nonprecedential nature of arbitration-panel decisions protects an arbitration participant that uses simpler, focused presentations from creating bad precedent. If a participant’s litigation decisions cause it to lose at the arbitration stage, it can forego appeal without the arbitration decision creating precedent or its litigation decisions becoming public.

Additionally, for arbitration participants that face an appeal after winning at the arbitration stage, the deferential standard of review reduces the risk of adverse precedent. The standard of review allows the Board to overturn an arbitration decision only if it is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion, in direct contravention of statutory authority, or in violation of the award limitation.²⁷ The clear-abuse and award-limitation standards provide almost no risk of creating bad precedent because they are highly particular to the specific arbitration at issue. The railroad-economics and statutory-authority standards also provide little risk of creating bad precedent because they target only egregious errors by the arbitration panel.

NS and UP’s example to illustrate their position overlooks these considerations. In the example, NS and UP claim that revenue-adequacy-constraint claims will be contentious and assume that parties will appeal any decision involving them, setting up a precedential Board decision.²⁸ But if a party loses the

²⁶ NS & UP Pet. 4.

²⁷ 49 C.F.R. § 1108.31(b).

²⁸ NS & UP Pet. 4-5.

arbitration and is not confident that it will win on appeal because of a limited arbitration record, the party is not going to risk a precedent-setting appeal, especially since the arbitration decision will never see the light of day.

In sum, this call to make decisions on appeal nonprecedential is an attempt to erode the cost advantages that the Arbitration Program affords shippers when compared to the Board's existing rate-review processes.²⁹ It gives carriers absolute freedom to appeal any decision they lose, increasing the likelihood that a shipper will face an appeal if it wins at the arbitration stage.

III. The opt-in election period is appropriate.

The Board correctly decided to specify a deadline for carrier opt-in elections.³⁰ The Arbitration Program reflects a quid pro quo under which carriers receive an exemption from FORR in return for agreeing to an arbitration program that is not subject to immediate legal challenges. An election deadline would hold Joint Carriers to this bargain, allowing them an exemption from FORR only if they elect to provide shippers access to rate review under the arbitration program *before* courts decide the pending appeals of FORR.

This bargain attempts to provide shippers with legal certainty that they will have an accessible rate-review process for smaller claims regardless of what

²⁹ “The goals of . . . the small rate case arbitration program . . . are to reduce the cost and complexity of small rate disputes.” *Final Rule*, EP 765, slip op. at 66 (Schultz, commenting).

³⁰ This Part III takes no position on the condition that Arbitration Program will not become operative unless all Class I carriers elect to opt in by the election deadline, so long as the Board makes clear that any carrier who fails to do so will be subject to FORR challenges.

happens to FORR on appeal. For carriers, it insulates them from the FORR process, which they feel suffers from various infirmities.³¹

Without an opt-in election deadline, the bargain underlying the Arbitration Program falls apart. Carriers will have no incentive to opt in to the Program until they find out whether FORR is upheld and they actually need the Arbitration Program to avoid FORR. If FORR is upheld, they have every reason to opt in so that they can avoid FORR. If FORR is not upheld, carriers will not opt in and shippers will be left with nothing.

At bottom, without an opt in election deadline, carriers get the benefit of the FORR exemption should they need it, and shippers get nothing in return. The opt-in deadline levels the playing field and incentivizes participation by ensuring that the new arbitration rules will have a 5-year opportunity to demonstrate whether they can succeed. By that time, the experience of all stakeholders should be sufficient for them to ascertain the merits of continuing to participate in the arbitration of small rate disputes.

IV. Coalition Associations support modifying the language of 49 C.F.R. § 1108.24(a)(1) to refer to regulated traffic.

Coalition Associations support modifying 49 C.F.R. § 1108.24(a)(1) by replacing “regulated commodities” with “regulated traffic.” Coalition Associations have understood that the arbitration program would apply to all regulated traffic,

³¹ Joint Carriers Suppl. Pet. 13-14; Joint Carriers Reply 5.

excluding certain commodities and equipment when subject to a valid exemption from Board regulation.

Coalition Associations also understand that the Board intended to allow use of the arbitration program by exempt traffic when the complainant can establish market dominance over a challenged movement that otherwise would be exempt under 49 C.F.R. § 1039.11. That understanding is predicated upon the fact that Section 1039.11 expressly excludes from its exemption “any movements for which a finding of market dominance has been made.”³² Thus, if a shipper can establish market dominance over a challenged movement of otherwise exempt traffic under 49 C.F.R. § 1039.11, then the exemption does not apply to the movement and the shipper can access the Board’s rate review remedies, including arbitration. In such a case, a separate petition to revoke the exemption under the statute would not be required.³³ Accordingly, when modifying 49 C.F.R. § 1108.24(a)(1) consistent with NS and UP’s request, the Board should confirm that, when arbitrators determine that market dominance over otherwise exempt traffic exists, the arbitrators likewise are qualified to determine rate reasonableness for such traffic pursuant to 49 C.F.R. § 1039.11.

³² 49 C.F.R. § 1039.11(a).

³³ Under the exemption revocation statute, “[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d).

Conclusion

For the foregoing reasons, the Board should: (a) reject CSXT's petition for reconsideration; (b) reject NS and UP's petition for reconsideration to the extent it seeks reconsideration of the Board's rejection of Joint Carrier's proposed ban on revenue-adequacy constraint claims, the Board's decision to make decisions on appeal precedential, and the Board's decision to set an opt-in election deadline; and (c) grant NS and UP's petition for reconsideration to the extent it asks the Board to modify 49 C.F.R. § 1108.24(a)(1) to refer to all regulated traffic.

Respectfully submitted,

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Dated: February 13, 2023

Certificate of Service

I hereby certify that on this February 13, 2023, a copy of the foregoing Reply to Petitions for Reconsideration was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Richard Couch
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