



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

306117

STB Docket EP 765

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

**ENTERED
Office of Proceedings
February 9, 2023
Part of
Public Record**

REPLY TO JOINT CARRIERS' RENEWED PETITION FOR STAY

The National Grain and Feed Association (“NGFA”) respectfully submits this reply in opposition to Joint Carriers’¹ Renewed Petition for Stay (“Renewed Petition”), filed in this docket on February 3, 2023. The NGFA previously joined the reply of the Coalition Associations² in opposition to the first Petition for Stay filed by the Joint Carriers on December 29, 2022. In the first Petition the Joint Carriers sought a stay of the “Opt-in Deadline” established by the final rules – currently February 23, 2023 – until final decisions are rendered on petitions for reconsideration filed and petitions for review that have now been filed in three United States Courts of Appeal. The Surface Transportation Board (“STB” or “Board”) denied the first Petition on January 24, 2023 (“Stay Decision”) without prejudice for a second request for stay to be filed

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

² The American Chemistry Council, Corn Refiners Association, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League

since the period for petitions for reconsideration had not expired.

In their Renewed Petition, the Joint Carriers make the same request for the Board to stay the Opt-in Deadline and advance several new arguments in support of their renewed request. However, for the reasons set forth below these new arguments are unavailing and Joint Carriers have still fallen far short of the rigorous standards for staying a final Board decision.

I. THE JOINT CARRIERS ARE NOT LIKELY TO PREVAIL ON THE MERITS

In the Renewed Petition the Joint Carriers argue a stay is warranted because several “merits-based arguments” against the Opt-in Deadline have been raised in pending petitions for reconsideration, and that they expect those arguments to prevail. The Joint Carriers’ primary argument is that the final rule’s requirement that all of the Class I’s must commit to participate in the Small Case Arbitration Program by February 23, 2023 for it to be operable came without adequate notice as required by the Administrative Procedures Act. Specifically, “[i]n particular, the NPRM proposed to allow a carrier to file its opt-in notice ‘at any time’ and never suggested that the Board was considering an alternative to this proposal, nor requested any comments on this particular aspect of the program.”³ However, the Board was clearly considering an alternative to giving carriers an indefinite period to decide to commit. In the November 15, 2021 Notice of Proposed Rulemaking (“NOPR”) the Board conveyed to all stakeholders that it considered participation by all Class I railroads to be condition precedent to a final rule implementing a Small Case Arbitration Program. Specifically, at Page 9 of the NOPR the Board stated (emphasis supplied):

Because the arbitration of disputes before the Board is voluntary, fundamental to the Board’s determination whether to enact the arbitration proposal in this docket will be a commitment of all Class I carriers to agree to arbitrate disputes submitted

³ Renewed Petition at 6.

to the program for a term of no less than five years. This initial commitment would promote the goal that shippers have similar access to rate review procedures. The importance of this initial commitment is amplified by the carriers' opposition to FORR and the likelihood that they would seek to challenge adoption of that process. (See Pet'rs Suppl. 13 (stating that the FORR process would be "subject to immediate legal challenges").) If all Class I carriers consent to participate in this proposed arbitration program for five years, and the Board determines to adopt the program after stakeholder consideration and input, shippers served by Class I carriers would be afforded a new avenue for potential rate relief, and with the certainty of carrier engagement.

See also, *id.* at 11(emphasis supplied) ("The Board has explained above the importance of all Class I railroads agreeing to participate in the arbitration program for a term of five years.") and (Because the participation of all Class I railroads is an important aspect of the arbitration program, the Board proposes more narrow withdrawal rights that would allow withdrawal from the program only if there is a material change in law.") Given this fundamental policy underpinning of the Arbitration Program rules, it was a logical outgrowth from the NOPR for the Board to establish a deadline in the final rules for all Class I carriers to decide whether they would commit to participate. The Joint Carriers argue that the NOPR's provision that notices to opt-in could be filed by Class I railroads "at any time" is the "inverse" of the Opt-in Deadline and a "brand new" concept that no one could have anticipated.⁴ However, in the context of the overall program and the explicit statements above, it is not credible to construe the Board's proposed language to mean it intended a Class I carrier could wait indefinitely to decide to opt-in to the arbitration program and thereby undermine a fundamental policy premise of the rule. For this reason, the notion that a deadline to commit was a "brand new" idea is not plausible. On the contrary, given the Board's adamant view that all Class I's had to commit for five years for the program to work, stakeholders should not have been surprised by the Board amending the proposed rules to establish a deadline for the

⁴ *Id.*

Class I's to declare that commitment. Consequently, statements in the Renewed Petition like "the NPRM 'nowhere even hinted that the Board might consider' taking the action it ultimately took (*i.e.*, the Opt-In Deadline) [and] there was 'no way that commenters ... could have anticipated' that the Opt-In Deadline was a potential option 'open for consideration,'"⁵ are overwrought. It is therefore unlikely that Joint Carriers will prevail on the merits of this issue.

The other arguments summarized in the Renewed Petition are similarly flawed for the reasons set forth in the Coalition Associations' Reply to Petition for Stay that NGFA joined. These include that the Joint Carriers are protected from committing to the Arbitration Program regardless of changes that may be made to the program on appeal or otherwise, because they can withdraw its consent to arbitrate if material changes are made to the Program after the carrier has opted in.⁶ Also, the Joint Carriers cannot prevail on a claim that they are being required to commit to the Arbitration Program before they know the content of the final rule because they, like all other stakeholders, do know the content of the final rules adopted by the Board. The final rules gave Joint Carriers 50 days to review those rules and decide whether to commit to opt-in to the Arbitration Program. Finally, the Arbitration Program falls within the broad discretion granted to the Board by 5 U.S.C. 701(a)(2) and 5 U.S.C. §581(b).⁷

II. THE JOINT CARRIERS CANNOT SHOW IRREPARABLE HARM

For the most part, the Joint Carriers have rehashed in the Renewed Petition the unsuccessful claims of irreparable harm they made in the first Petition for Stay, and they have made no attempt to rebut the analysis and conclusions of the Board rejecting those claims. In particular, the Joint Carriers again allege that irreparable harm will occur if they choose to not opt-in to the Program

⁵ Renewed Petition at 7 (citations omitted).

⁶ Coalition Response at 3.

⁷ *Id.* at 5.

because the Program will then fail to go into effect.⁸ However, the Board has already disposed of such arguments, stating correctly that “the decision whether to opt in is one that belongs to the carriers themselves and not the Board. The fact that the opt-in deadline occurs before the completion of any appeals or reconsideration processes should not reasonably be expected to affect the carriers’ initial opt-in decision to the program as it exists.”⁹

III. A STAY OF THE OPT-IN DEADLINE PENDING RESOLUTION OF ALL PETITIONS FOR RECONSIDERATION AND ALL APPEALS WOULD CAUSE HARM TO OTHER PARTIES AND TO THE PUBLIC INTEREST

The Board rightfully pointed out in the Stay Decision that granting a stay will be harmful to other parties and the public interest because the Board would be guaranteeing that the arbitration program’s benefits would not come to pass for the pendency of the appeals. This delay would most likely be measured in years, not months. The Joint Carriers attempt to diminish this reality by claiming that their advocacy for a stay of the Opt-in Deadline is really “*in order to preserve the program and its benefits.*”¹⁰ However, if the Joint Carriers believe that the Arbitration Program “has the potential to be a long awaited, lawful, and efficient tool for resolving small rate disputes in an expedited and cost-effective manner”¹¹ – and why would they not, since Class I carriers initially proposed it? – then the Class I carriers should preserve the Arbitration Program “while its final shape is being determined”¹² by opting into the Program pending the resolution of their reconsideration petitions and judicial appeals. As the Board correctly stated, the decision to terminate the program forever is one that rests with the carriers themselves, not

⁸ Renewed Petition at 11-12.

⁹ Stay Decision at 6.

¹⁰ Renewed Petition at 12 (italics in original).

¹¹ *Id.* at 13.

¹² *Id.*

the Board or any other stakeholders.

IV. CONCLUSION

In closing, the NGFA supports the implementation of a Small Case Arbitration Program as outlined in the final rules in this proceeding, and NGFA believes the proper course of action is for the Board to decline to stay the Opt-in Deadline. The Joint Carriers have still not met the strict criteria for obtaining a stay, including the requirement that a stay not result in harm to shippers and the public. Granting the requested stay would do just that, by depriving NGFA's members and other shippers the benefits of the Arbitration Program for what could be multiple years as the appeals are briefed and decided. The Renewed Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2023, I served a copy of the foregoing document by electronic mail upon all parties of record on the official service list for Docket No. EP 765.

/ss/ Thomas W. Wilcox
