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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 765

PETITION FOR RULEMAKING

REPLY OF JOINT SHIPPERS

By their attorneys:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 765

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

REPLY OF JOINT SHIPPERS

The American Chemistry Council, Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute, (collectively “Joint Shippers”) hereby reply to the Joint Petition For Rulemaking filed by five Class I railroads (“Joint Petitioners”)¹ in the above-captioned docket on March 14, 2019 (the “Joint Petition”). The Joint Petitioners have petitioned the Surface Transportation Board (“Board”), pursuant to 5 U.S.C. § 553, to adopt their proposal for arbitration of rail rate disputes. For the reasons set forth herein, the Joint Shippers harbor significant concerns with this Petition. Because those concerns encompass elements of the proposal upon which the Joint Petitioners insist their support is predicated, granting the Petition appears to be a waste of time and resources. Instead, the Joint Shippers urge the Board to prioritize the completion of its rulemaking in Docket No. EP 755, *Final Offer Rate Review* (“EP

¹ The five Class I railroads are Canadian National Railway Company, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Corporation, and Union Pacific Railroad Company.

755”), which has far greater potential to reduce regulatory burdens and increase the accessibility of a remedy for unreasonable rail rates.

The Joint Shippers have long been supporters of adopting a meaningful process for arbitrating rail rate disputes; indeed, many of their members include arbitration as a means of dispute resolution in their rail transportation contracts. And the Joint Petitioners’ proposals have elements that are worthy of consideration. But the main impediment to such arbitration has been, and remains, the prerequisite that parties agree to participate. The conditions that the Joint Petitioners assign to their agreement seriously undermine the efficacy of their proposals. Consequently, the Joint Shippers question the value of expending the Board’s limited resources on a rulemaking proceeding when those resources could be better spent on more meaningful regulatory reforms.

Unlike all other regulatory reforms under consideration by the Board, which would have the mandate of law behind them, participation in the arbitration of rate disputes is entirely voluntary. Consequently, as the Joint Petitioners acknowledge, “[a] voluntary, private, expedited, and confidential arbitration program is only useful if a railroad has agreed to use it.”² The Joint Petitioners are committing to use their proposal “if the Program is adopted according to the terms set forth in this Petition” and subject to certain enumerated withdrawal rights.³ Those conditions undermine the potential for an efficacious arbitration process in at least three ways.

First, the Joint Petitioners’ commitment leaves little, if any, room for adopting modifications through the notice and comment rulemaking process, effectively defeating the purpose of that process. The Joint Petition includes numerous restrictions and limitations on the

² Joint Petition, p. 20.

³ Joint Petition, p. 2.

arbitration program that would require careful vetting by the Board. Although the Joint Shippers believe some elements of the Joint Petition have merit, they are troubled by other elements that would prevent them from supporting the proposal. Because the Joint Petitioners have made their participation contingent upon adoption of their proposal without any modification, a rulemaking proceeding almost certainly would waste the time and effort of the Board and stakeholders.

Second, if the Board adopts the “Final Offer Rate Review,” or “FORR,” process proposed in EP 755, that would trigger the Joint Petitioners’ asserted withdrawal rights. Those asserted withdrawal rights could not be exercised, however, if the Board exempts the Joint Petitioners from FORR so long as they continue to participate in the rate arbitration program. This is a particularly odious condition because it allows a railroad to exempt itself from the FORR process simply by opting in to the arbitration process and there would be nothing that a shipper who prefers FORR over arbitration could do about it. The Joint Petitioners’ insistence upon this condition, therefore, would engender outright opposition to their proposal from the Joint Shippers. On the other hand, if the Board removed that condition from its final rules, those rules would be useless because the Joint Petitioners would not agree to arbitrate their rate disputes even if the Board adopted every other element of their proposed program.

Third, the Joint Petitioners condition their participation in the arbitration of rate disputes on a prohibition against applying a revenue adequacy standard,⁴ despite revenue adequacy being an established standard under the constrained market pricing economic principles adopted in *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 535-36 (1985), over 35 years ago. In both EP 761, *Revenue Adequacy*, and EP 755, the American Chemistry Council has submitted the prototype for a rate dispute methodology that implements the revenue adequacy constraint. That

⁴ Joint Petition, p. 14.

methodology could be applied readily in the context of both FORR and arbitration. But the Joint Petitioners' insistence on a prohibition against arbitrating rates under a revenue adequacy standard, combined with their insistence on being exempted from FORR, would grant them sole control over their exposure to this revenue adequacy methodology because this methodology could not be used in arbitrations and, if a railroad agrees to arbitrate, it will not be subject to FORR.

The two foregoing prerequisites of the Joint Petitioners to participation in the arbitration program exposes the true motivation behind their Joint Petition. Unlike arbitration, the Joint Petitioners cannot opt out of FORR if adopted, and FORR does not prohibit the application of a revenue adequacy constraint as a standard of rate reasonableness. Plainly, concerns over the potentially imminent adoption of FORR have prompted the Joint Petitioners to dangle their participation in the arbitration of rate disputes as a carrot in exchange for being exempted from the FORR process and reducing their exposure to a revenue adequacy rate standard. The Board should not be complicit in this attempt either to neuter the FORR process even before it becomes law or to impair application of a revenue adequacy standard.

In conclusion, the Joint Shippers do not support the Joint Petition because:

- (a) the Joint Petitioners' participation in the arbitration of rate disputes is contingent upon adoption of a process in accordance with the terms of their Petition; and
- (b) the Joint Shippers cannot agree to arbitration in accordance with those terms.

Most significantly, the Joint Petitioners' insistence upon an exemption from FORR in exchange for opting into the rate dispute arbitration process would neutralize the FORR process even for shippers who prefer it over arbitration. Although the Board could modify the proposal to address these concerns, it could not compel any railroad to participate in such a modified process and the Joint Petitioners have made it clear that they would not voluntarily do so. Therefore, the Board's

rulemaking efforts would be for naught. As such, the Board should spend its limited resources on regulatory reforms that will be more meaningful and efficacious. The Joint Shippers would much prefer that such efforts be directed towards completing EP 755, *Final Offer Rate Review*; EP 761, *Revenue Adequacy*; and EP 711 (Sub No. 1), *Competitive Switching*.⁵

Respectfully submitted,



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⁵ EP 711 (Sub No. 1), *Competitive Switching*, which the Joint Shippers believe holds the greatest promise of meaningful regulatory reform that could obviate the need for many rate challenges by enhancing competition, has languished without action for over three years since the public comment process concluded, four years since issuance of a Notice of Proposed Rulemaking, and nine years since the original Petition for Rulemaking.