

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record**

EX PARTE 765

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

Supplemental Pleading of the American Fuel & Petrochemical Manufacturers

BACKGROUND

The American Fuel & Petrochemical Manufacturers (“AFPM”) is pleased to respond to the supplemental pleading “Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes” (the “Joint Petition”) filed by five of the Class I rail carriers (the “Joint Petitioners”) on July 31, 2020.¹ The Joint Petitioners have petitioned the Surface Transportation Board (“STB” or “the Board”) to adopt their proposal for arbitration of small rate disputes.² AFPM previously filed comments opposing the program as it appeared this was an effort by the Joint Petitioners to undermine vital regulatory reform implementing Final Offer Rate Review (“FORR”) Procedures proposed in Docket No. EP 755.^{3,4} We reiterate our opposition to the Joint Petition and offer the following supplemental comments.

In their reply to the Joint Petition, the National Grain and Feed Association (“NGFA”) proposed certain modifications to the joint petitioners’ proposed small rate case arbitration program. Before deciding whether to institute a rulemaking proceeding, the STB is seeking additional comments to the proposed modifications to the small rate case arbitration program suggested by NGFA. To this end, STB is opening a comment period and replies are due September 10, 2020.⁵ AFPM appreciates STB’s thoughtful consideration of our concerns related to the Joint Petition, NGFA’s response, and its relationship to pending action before the board, namely FORR.

AFPM INTEREST IN THE JOINT PETITION

AFPM is a trade association representing most U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable, and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to

¹ See EP 765 “Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes”. 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.

² Replies to the joint petition were to be filed by August 20, 2020.

³ See Docket No. EP 755, “*Final Offer Rate Review*”, Published September 11, 2019

⁴ See Comments of AFPM, STB Docket No. EP 755, Final Offer Rate Review.

⁵ See STB Decision Docket No. 765, Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, Decided August 26, 2020.

our members, as well as to manufacturers and customers downstream who depend on our products. Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. As AFPM noted in our comments to EP 755, the STB's FORR proposal, along with other concurrent proposed rate relief reforms, is a positive step toward improving how the STB addresses freight rail issues.

AFPM COMMENTS ON NATIONAL GRAIN AND FEED ASSOCIATIONS REPLY

AFPM acknowledges that the STB has an important oversight role in reviewing the impact of freight rail policies on rail shippers and encourages STB to continue seeking ways to improve the rate dispute process in line with the intent of Congress. For the reasons set forth herein, AFPM has significant concerns with the Joint Petition and to a lesser extent the NGFA's reply. We strongly believe small rate case arbitration and FORR must be kept separate.

AFPM reiterates our previous comments on EP 765 considering the NFGA response

The existence of a counterproposal from NFGA regarding small rate case arbitration does not materially impact the content of AFPM's previous comments on the Joint Petition. AFPM re-emphasizes our concerns with:

- 1) Any exemption from participation in FORR, including contingent exemptions based on participation in other rate relief programs;
- 2) The lack of participation of all Class I railroads in rate relief programs; and
- 3) The terms of rail carriers' participation in the proposed rate dispute program (*e.g.*, limited duration of their participation, and clauses for rail carriers to opt-out of the program).

These Class I railroad "demands," referenced in our previous comments, undermine STB's authority. AFPM cannot fully discuss the merits of the Joint Petition or the NGFA reply in detail given the short timeframe afforded for comments in this informal process. Should STB choose to open a formal docket on small rate case arbitration, AFPM will provide additional comments based on a more complete analysis of the proposals.

Consideration of joint petition and NFGA response should not slow progress on EP 755

AFPM understands and appreciates the Board's mandate to make fully informed decisions in the rulemaking process and urges the Board to prioritize the completion of its rulemaking in EP 755, which has far greater potential to reduce regulatory burdens and provide a meaningful remedy for unreasonable rail rates. The Board should ensure this Joint Petition and associated NGFA reply do not delay needed freight rail rate relief reform already in progress.

As stated in our reply comments to EP 765, the Joint Petition is clearly an attempt to delay, or even halt, implementation of meaningful freight rate reform. We fear that given the Board's limited staff and resources, supplemental pleadings in this docket may delay finalization of FORR. For all the above reasons, AFPM urges the Board to prioritize its' efforts on the completion of EP 755 and not allow this late filed effort to slow meaningful progress.

Should STB choose to open a docket considering small rate case arbitration it must be in addition to, and in no way linked to FORR.

AFPM is not opposed to additional rate relief programs as current programs have proven to be worthwhile in only very specific scenarios. Rail shippers require more, not fewer, avenues to challenge rates, particularly those that result in an expeditious and simplified resolution. AFPM appreciates NGFA and the Joint Petitioners' attempt to develop a compromise, but as was noted in the NGFA response the "differences are significant and perhaps insurmountable."⁶ Conflating FORR with the obviously contentious issue of small rate case arbitration will only delay both actions. Being unable to come to an agreement is indicative that a docket considering small rate case arbitration would be a lengthy process.

If STB chooses to open a docket considering small rate case arbitration it must be in addition to, and in no way linked to FORR. Considerable progress has been made on developing a FORR program. Linking FORR somehow to another rate relief program would not only delay such progress but unnecessarily complicate an already complex process. Rail shippers seek access to straightforward and simplified rate relief processes and needlessly linking the two programs together is counterproductive. History demonstrates that overly complex rate relief programs fail to find traction and rail shippers rarely use them.

Further, Class I rail carriers must be required to participate in order for a rate relief program to be effective, whether it be FORR or small rate case arbitration. STB should not permit a rail carrier to opt into, or out of, any given program based on their own interest or preference. For all the above reasons AFPM urges a complete decoupling of FORR and small rate case arbitration.

CONCLUSION

STB should deny the Joint Petition, as the "take-it-or-leave-it nature" of the Joint Petition clearly demonstrates that the five Class I rail carriers want to dictate the terms by which STB must consider rate disputes. Nothing in the NFGA reply changes AFPM's position on the Joint Petition. The Joint Petition is an attempt to delay meaningful rate dispute reform that is already in progress under Docket EP 765.

If STB wishes to consider the proposals in the Joint Petition and NFGA's reply, it should do so carefully and separately from EP 755. STB still needs to do considerable work to develop a workable small rate case arbitration program after full discussion with stakeholders. STB should not slow progress on EP 755 by considering the joint petition and NFGA reply. STB should continue to allocate resources on EP 765 as a priority when it comes to ongoing rate relief work. Should STB choose to open a docket considering small rate case arbitration, it must be separate from, and in no way linked to, FORR. Lastly, all Class I rail carriers must participate for a successful rate relief program, whether it be FORR or small rate case arbitration and as such STB should apply these programs to all Class I carriers not just those who opt-in.

Sincerely,

⁶ NGFA had lengthy but unfruitful discussions with the Joint Petitioners over the question of establishing arbitration regulations outside of FORR. See Reply of The National Grain and Feed Association, STB Docket No. EP 765.

A handwritten signature in blue ink that reads "Rob Benedict". The signature is written in a cursive, flowing style.

Rob Benedict
Senior Director, Transportation and Infrastructure
American Fuel & Petrochemical Manufacturers