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SERVICE DATE – DECEMBER 29, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 765

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

Docket No. EP 755

FINAL OFFER RATE REVIEW

Docket No. EP 665 (Sub-No. 2)¹

EXPANDING ACCESS TO RATE RELIEF

Digest:² The Board denies a request to hold Docket No. EP 765 in abeyance and require Class I rail carriers to inform the Board whether they will consent to arbitration of rate cases if arbitrators are permitted to consider revenue adequacy as proposed in the notice of proposed rulemaking in that docket. The decision also modifies the deadline for reply comments in Docket Nos. EP 765, EP 755, and EP 665 (Sub-No. 2).

Decided: December 28, 2021

On November 15, 2021, the Board issued a notice of proposed rulemaking in Docket No. EP 765 (Arbitration NPRM) proposing to modify its regulations to establish a voluntary arbitration program for small rate disputes and establishing a procedural schedule for the filing of comments and replies. On November 24, 2021, the American Chemistry Council, Corn Refiners Association, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively, Joint Shippers) filed a motion requesting that the Board hold the procedural schedule in abeyance until the rail carriers that filed the joint petition for rulemaking in Docket No. EP 765 state whether they would consent to arbitration of rate cases if arbitrators are permitted to consider revenue adequacy as proposed in the Arbitration NPRM. (Joint

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Shippers Mot. 2, EP 765.) On December 6, 2021, the rail carriers that filed the joint petition for rulemaking (Petitioners) filed their own motion seeking to extend the procedural schedule.

For the reasons discussed below, Joint Shippers' motion will be denied and Petitioners' motion will be partially denied and partially granted. The Board will also modify the procedural schedule in Final Offer Rate Review, Docket No. EP 755, and Expanding Access to Rate Relief, Docket No. EP 665 (Sub-No. 2), so that these related proceedings remain on the same procedural schedule.³

BACKGROUND

The Arbitration NPRM was issued in response to a joint petition for rulemaking (the Petition) filed by five Class I rail carriers: Canadian National Railway Company, CSX Transportation, Inc., the Kansas City Southern Railway Company, Norfolk Southern Corp.,⁴ and Union Pacific Railroad Company.⁵ The Petition proposed that the Board adopt an arbitration program, in which parties could voluntarily participate, aimed at resolving small rate cases. Under Petitioners' proposal, parties that used the proposed arbitration process would have been prohibited from presenting evidence or methodologies related to revenue adequacy and the arbitration panel would be prohibited from considering any type of system-wide revenue adequacy constraint. Petitioners pledged to participate in the arbitration program for a period of five years, provided the Board adopted the program according to the terms set forth in their Petition.

In the Arbitration NPRM, the Board proposed adopting a small rate case arbitration program, but with modifications to Petitioners' proposal. As relevant here, the Board found that Petitioners had not sufficiently justified their proposed prohibition on methodologies and evidence pertaining to revenue adequacy and therefore did not include such a prohibition in the Arbitration NPRM. Arb. NPRM, slip op. at 39-40. In particular, the Board concluded that such a prohibition would run counter to statutory requirements and other key parts of the proposed arbitration program. Id.

Concurrent with the Arbitration NPRM, the Board issued a supplemental notice of proposed rulemaking in Final Offer Rate Review (FORR SNPRM), EP 755 (STB served Nov. 15, 2021), to ensure parallel consideration of the Board's Final Offer Rate Review (FORR) and arbitration proposals. See Arb. NPRM, slip op. at 8.

³ Below, Docket No. EP 765 will be referred to as the "Arbitration docket" and Docket No. EP 755 will be referred to as the "FORR docket."

⁴ Although the Petition referred to Norfolk Southern Corp., a noncarrier, a subsequent supplement filed by Petitioners instead referred to that entity's operating affiliate, Norfolk Southern Railway Company. (Pet'rs Suppl. 2.)

⁵ On January 25, 2021, Canadian Pacific Railway Company (CP), another Class I rail carrier, filed a letter stating that it supports the effort to find a "workable, reasonable, accessible arbitration program for small rate cases, and would participate in such a pilot program." (CP Letter 1.)

As noted above, Joint Shippers subsequently filed a motion requesting that the Board hold the procedural schedule in the Arbitration docket in abeyance until Petitioners, within a reasonable time frame, inform the Board whether they would agree to arbitrate cases if arbitrators are permitted to consider revenue adequacy as proposed in the Arbitration NPRM. (Joint Shippers Mot. 1, EP 765.) Joint Shippers argue that the inclusion of a revenue adequacy prohibition was a “red line” for Petitioners; therefore, the Board “should not require itself or stakeholders to expend the substantial resources to prepare and assess comments” on the Arbitration NPRM if Petitioners continue to insist that they would participate in the small rate case arbitration program only if the program prohibits consideration of revenue adequacy. (Id. at 2.)

On December 1, 2021, the National Grain and Feed Association submitted a reply in support of Joint Shippers’ motion. On December 6, 2021, Petitioners filed a reply opposing Joint Shippers’ motion. Petitioners argue that Joint Shippers’ motion disregards the notice-and-comment process and “require[s] railroads to preemptively consent to a portion of a potential Final Rule before the Board even takes opening comments on the proposed rule.” (Pet’rs Reply 2-3, EP 765, Dec. 6, 2021.)

Petitioners filed a separate motion, also on December 6, 2021, seeking to extend the procedural schedule in the Arbitration docket by 31 days. Petitioners argue that additional time is needed to analyze the arbitration program proposed by the Board and note that the date for activities in other Board proceedings fall around the same time that the filings in this proceeding are due. (Petitioners Mot. 1-2, EP 765.) They also state that no party would be prejudiced by an extension. Petitioners note that they would not object if the Board also chose to extend the procedural schedule in the FORR docket to keep the two proceedings’ schedules aligned. (Id. at 2.)

On December 8, 2021, Joint Shippers filed a reply to Petitioners’ motion. Joint Shippers state that, if the Board denies their motion to hold the procedural schedule in abeyance in the Arbitration docket, they do not oppose Petitioners’ request to extend the comment deadlines, even though, in their view, an extension is only necessary for the reply deadline. (Joint Shippers Reply 1-2, EP 765, Dec. 8, 2021.) Joint Shippers also state that if the extension is granted in the Arbitration docket, the Board should also extend the schedule in the FORR docket. (Id. at 2.)

DISCUSSION AND CONCLUSIONS

Joint Shippers’ Motion. In the Arbitration NPRM the Board stated that “fundamental to [its] 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 to the program for a term of no less than five years.” Arb. NPRM, slip op. at 9. As such, whether rail carriers would agree to participate in a small rate case arbitration program that does not prohibit consideration of revenue adequacy evidence or methodologies will be a key consideration in the Board’s ultimate determination in this proceeding.

However, in issuing the Arbitration NPRM, the Board understood the possibility that rail carriers may decide not to participate in the small rate arbitration program due to the

modifications proposed by the Board. Arb. NPRM, slip op. at 9-10 (“Although Petitioners have ‘reserve[d] their right’ not to participate in arbitration if any modifications are made to their proposal, . . . certain elements of Petitioners’ proposal would have made the program unbalanced or simply are not feasible.”). With respect to revenue adequacy, the Board explained that it was proposing to modify Petitioners’ proposal because such a prohibition could run counter to “the methodological flexibility afforded to arbitrators by § 11708 . . . and § 11708’s requirement that arbitrators consider the need for differential pricing to attain revenue adequacy[.]”). See Arb. NPRM, slip op. at 40. The Board explained, however, that, even with these modifications, the proposed program “still includes features that carriers should find attractive.” Id. at 10. The Board thus made clear that it wanted to give Petitioners the opportunity to assess their position in light of the Board’s reasoning and within the broader context of the Board’s Arbitration NPRM. As noted, the Board also concluded that the Arbitration NPRM should be considered concurrently with the FORR SNPRM before final action is taken in either docket. Arb. NPRM, slip op. at 8.

Joint Shippers’ motion essentially seeks to truncate the rulemaking process by requiring rail carriers to pledge whether they would participate in the proposed arbitration program based solely on the single issue of revenue adequacy before the record has been fully developed. Asking Petitioners to make the commitment sought by Joint Shippers at this stage would be premature, as Petitioners are likely still developing their position on this and other issues. (See Pet’rs Reply 4, EP 765, Dec. 6, 2021) (“Petitioners are rightfully concerned about [the revenue adequacy] aspect of the NPRM but are still evaluating the entirety of the proposed program and will present their views in the comment period, as is their right.”) In addition, even if a carrier were to take a position now on its willingness to participate in an arbitration program, the carrier’s ultimate decision could change depending on subsequent developments in the Arbitration docket and the FORR docket.

To be sure, the Board made clear that a prohibition on methodologies and evidence pertaining to revenue adequacy was not an acceptable limitation on the arbitration program. It fully expects the rail carriers to convey in their comments their position on this important feature of the NPRM. But Joint Shippers’ request that rail carriers state now whether they would agree to participate in the proposed arbitration program is premature. For this reason, the motion will be denied.

Petitioners’ Motion. Although there are many active proceedings in which filings are due or hearings are scheduled for the first quarter of 2022, the Board finds that Petitioners have not demonstrated that the existing deadline for comments would be unduly burdensome. Therefore, the Board will deny Petitioners’ motion as to the deadline for comments. However, as Joint Shippers note, replies in the Arbitration docket are due on March 15, 2022, which is the same date that the Board intends to hold a hearing in Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), a proceeding that also has industry-wide implications and an extensive record. Under the circumstances, the Board will grant Petitioners’ motion with respect to the deadline for replies. Accordingly, the Board will deny Petitioners’ motion with respect to the deadline for comments but grant it for the deadline for replies in the Arbitration docket. In addition, because the Board intends the Arbitration docket and the FORR docket to be considered in parallel, the deadline for reply comments in the FORR docket will be extended as well. For that same reason, the Board

will also extend its waiver of the general prohibition on ex parte communications in the FORR docket to March 28, 2022.

It is ordered:

1. Joint Shippers' motion to hold the procedural schedule in Docket No. EP 765 in abeyance is denied.
2. Petitioners' motion to extend the procedural schedule is granted in part and denied in part, as discussed above.
3. Reply comments in Docket Nos. EP 765, EP 755, and EP 665 (Sub-No. 2) are due by April 15, 2022.
4. The general prohibition on ex parte communications is waived regarding matters related to Docket No. EP 755 until March 28, 2022.
5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Oberman, Primus, and Schultz.