BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 765

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

Coalition Associations' Reply to Petition for Stay

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The American Chemistry Council, Corn Refiners Association, National Grain and Feed Association,[1] The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League ("Coalition Associations") file this reply to Joint Carriers'[2] petition for stay of the Board's decision that the final rules for the voluntary arbitration of rail rate cases adopted in the Board's December 19, 2022, decision in this proceeding ("Final Rule") will not become effective unless all Class I rail carriers volunteer to opt-in to the arbitration process (the "Arbitration Election").

Coalition Associations do not object to a stay of the Arbitration Election until 30 days after the Board decides all petitions for reconsideration of the Final Rule. But Coalition Associations oppose a stay during any judicial appeals of the Final Rule because Joint Carriers have failed to satisfy the standard for obtaining that stay. Thus, to the extent Joint Carriers are seeking a stay of the Arbitration Election during any appeal of the Final Rule, the petition for stay should be denied.

I. The Joint Carriers are not likely to prevail on judicial appeal of the Arbitration Election.

Joint Carriers contend that they satisfy the first factor of the stay standard, which is that they are likely to prevail on appeal, because the Arbitration Election would require them to make voluntary decisions regarding participation in the new arbitration program ("Program") before they know the results of judicial challenges

[1] National Grain and Feed Association is joining Coalition Associations for this reply.

[2] Joint Carriers are Canadian National Railway, CSX Transportation, Inc., Norfolk Southern Railway Co., and Union Pacific Railroad Co.

to the Final Rule. Joint Carriers are concerned that, because of such an appeal, the Program may change in a manner that would cause a carrier to change its mind about participating in the Program. But the Program's rules expressly allow carriers to withdraw from the Program if it materially changes—a provision that Joint Carriers themselves sought in this proceeding. It appears Joint Carriers, via their stay petition, now seek to change the substance of the Final Rule to give them discretion to change their voluntary election in response to **non-material** changes. This is not what the Final Rule provides, and a procedural stay petition is not an appropriate vehicle to seek such a substantive change. Further, because the Board has broad discretion to adopt the Arbitration Election, a court is unlikely to disturb the Arbitration Election regardless of Joint Carriers' purported right to appellate review. Joint Carriers thus have a low likelihood of succeeding on appeal of the Arbitration Election.

First, the Arbitration Election does not require a carrier to commit to the Program regardless of changes that may be made to the Program on appeal or otherwise. If a change occurs to the Program after a carrier opts into it, the Program's rules afford the carrier a right to withdraw. Specifically, 49 C.F.R. § 1108.25(c) states that "[a] carrier . . . participating in the Small Rate Case Arbitration Program may withdraw its consent to arbitrate . . . if . . . material change(s) are made to the Small Rate Case Arbitration Program . . . after a . . . carrier has opted into [it]."

Joint Carriers contend that this withdrawal right is insufficient because it

allows withdrawal only for changes that are material. But this withdrawal right is substantively indistinguishable from the withdrawal right that Joint Carriers proposed for changes to the Program. Joint Carriers' proposed Program rules state that "[a] carrier . . . participating in the Small Case Arbitration Program may withdraw its consent to arbitrate . . . [if] the Board makes any **material** change(s) to the Small Case Arbitration Program . . . after a . . .railroad has opted into the Small Case Arbitration Program."[3] According to Joint Carriers, this withdrawal language is necessary to "incentivize participation of . . . railroads and would respect the bargain to which [they] consented" when they opted into the Program for a five-year term.[4]

Second, Joint Carriers' contention that the Arbitration Election is arbitrary lacks merit. Their premise is that the Arbitration Election "is fundamentally inconsistent with the Board's statement that it 'will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted.'"[5] But they acknowledge that the Arbitration Election allows

[3] (Pet. for Rulemaking App. A at 3 (49 C.F.R. § 1108a.3(c)(1)(ii)) (emphasis added).) Joint Carriers explained in their Supplemental Pleading that the purpose of their proposed withdrawal right for material change "is to ensure that parties who opt into the Program, particularly those who opt in for a long-term period, have the ability to exit the Program if there are material changes to the risk-benefit balance that led them to commit to participate in the Program in the first place." (Pet'rs' Supplemental Pleading 17 n.24.)

[4] (Pet. for Rulemaking 25-26.)

[5] (Pet. for Stay 5.)

carriers at least 50 days to decide whether to commit to the Final Rule.[6] Simply put, the Arbitration Election allows carriers to opt in with full knowledge of the Board's final rule adopting the Program.

Third, Joint Carriers have little chance of succeeding on appeal because the Board's adoption of the Arbitration Election falls within its broad discretion under its power to establish the Program. Under 5 U.S.C. § 701(a)(2), agency actions committed to agency discretion are not reviewable.[7] Additionally, 5 U.S.C. § 581(b) establishes that "[a] decision by an agency to use or not to use a dispute resolution proceeding under [5 U.S.C. § 571 *et seq*.] shall be committed to the discretion of the agency and shall not be subject to judicial review."[8] These statutes provide agencies with broad latitude to determine when and under what circumstances to make arbitration programs available to stakeholders and shield those determinations from judicial review. Joint Carriers have not identified any statute that either

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[6] If the Board grants a stay pending resolution of petitions for reconsideration, the Arbitration Election would not operate until after any changes to the final rule.

[7] While Joint Carriers contend that they have a right to judicial review under 28 U.S.C. § 2321(a), this statute specifies the form of proceeding for judicial review of Board rules, and "it is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial review, including the traditional principle of its unavailability to the extent that . . . agency action is committed to agency discretion by law." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987).

[8] In the Petition for the Program, Joint Carriers asserted that the Board's authority for the Program arises under 5 U.S.C. § 571 *et seq*. (Pet. for Rulemaking App. A. at 3 (49 C.F.R. § 1108a.2(a)(3)).) Additionally, the final rule clarifies that the Board's authority for the program arises under 5 U.S.C. § 571 *et seq*., among other statutes. *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, EP 765, slip op. at 68 (STB served Dec. 19, 2022).

requires or prohibits the Board from adopting the Arbitration Election.[9] Also, Joint Carriers have acknowledged that the Board's adoption of the arbitration program is authorized under 5 U.S.C. § 571 *et seq*., which commits agency decisions to establish arbitration programs to agency discretion.[10] Joint Carriers thus have failed to establish that the Board's decision to adopt the Arbitration Election is reviewable at all, much less a likelihood of prevailing on the merits.

At bottom, to establish a likelihood of success on appeal, "more than a mere possibility of relief is required."[11] Joint Carriers have not met this burden.

II. The Joint Carriers will not suffer irreparable harm if the Board does not stay the Arbitration Election pending appeals.

Joint Carriers have failed to identify any irreparable harm that would occur if the Board does not stay the Arbitration Election while an appeal is pending. To satisfy the irreparable-harm factor of the stay inquiry, Joint Carriers must identify a harm that is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."[12]

Joint Carriers contend that the Arbitration Election leads to two alternative injuries depending on whether they opt in. They allege that, if they opt in, they

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[9] In the Petition for the Program, Joint Carriers explain that the Board has already satisfied its mandate under 49 U.S.C. § 11708(a) to establish an arbitration process to resolve rail rate complaints. (Pet. for Rulemaking 8.)

[10] (Pet. for Rulemaking App. A at 3 (49 C.F.R. § 1108a.2(a)(3)).)

[11] *Nken v. Holder*, 556 U.S. 418, 434 (2009).

[12] *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (emphasis removed).

must forfeit their appeal rights and they would be forced to accept changes to the Program following appeal. As a threshold matter, Part I above demonstrates that the Joint Carriers do not in fact have any right to appeal the Final Rule.

But even if a court concludes otherwise, these injuries are not certain because Joint Carriers can avoid them by opting out of the Program. Further, as explained in Part I above, Joint Carriers' claims that they would be forced to accept changes that occur to the Program on appeal conflict with the withdrawal right under the Program for material changes.

Joint Carriers alternatively allege that, if any carrier opts out, all the time, energy, and resources expended in this proceeding will have been wasted and Joint Carriers will not realize any time savings and costs savings that the Board predicted would result from the Program. But these losses do not amount to irreparable harm.

First, from the outset of the proceeding, Joint Carriers did not have any guarantee that they would obtain an arbitration program that is acceptable to them. In fact, they asserted in their petition seeking this proceeding that "their commitment to opting into the [Program] for a five-year term is contingent on the protective features of the Program . . . as set forth in [their] Petition."[13] Joint Carriers thus not only understood that they were not guaranteed their desired program, but also they were prepared to let the Program fail if their conditions were not met.

[13] (Pet. for Rulemaking 25.)

Second, the monetary expenses that parties incurred during this proceeding do not constitute irreparable harm.[14] "Where the injuries alleged are purely financial or economic, the barrier to proving irreparable injury is higher still, for it is well settled that economic loss does not, in and of itself, constitute irreparable harm."[15] In fact, "'[t]he expense and disruption of defending [oneself] in protracted adjudicatory proceedings' is not an irreparable harm."[16] This reflects that "the expense and annoyance of litigation is part of the social burden of living under government."[17] Thus, if compelled participation in a protracted adjudicatory proceeding is not irreparable harm, certainly the costs that Joint Carriers incurred through their voluntary participation in this proceeding are not irreparable harm.

Third, the Board's prediction that the Program will produce time and cost savings is speculative.

In sum, Joint Carriers can avoid the speculative harms of opting into the Program by opting out of it. Further, they have failed to identify an injury from opting out of the Program that would constitute an irreparable harm.

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[14] While other stakeholders may have incurred substantial costs to participate in this proceeding, they may prefer that the Program terminate rather than be modified to further encourage carriers to opt in.

[15] *Mexichem*, 787 F.3d at 555.

[16] *Doe Co. v. Cordray*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)).

[17] *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).

III. Joint Carriers' assessment of the harm a stay would cause shippers and its weighing of the public interest do not justify its proposed stay.

Joint Carriers' failure to establish the first two factors of the stay inquiry warrants rejection of their petition for stay without considering their position regarding the harm to shippers and the public interest. The first two factors of the stay inquiry—the chance of success on the merits and irreparable harm that might arise absent a stay—"are the most critical."[18] Only when the first two factors are satisfied does the inquiry shift to assessing the harm to other parties and weighing the public interest.[19]

Further, Joint Carriers overlook the harm a stay would cause shippers by preventing the Program from being immediately available. When Joint Carriers proposed the Program to the Board, they explained that, "[i]n the Program, the Board and shippers can have confidence in a process that will avoid the pitfalls of FORR and not be subject to **immediate** legal challenges."[20] The proposed stay would deprive shippers of these Program benefits touted by Joint Carriers.[21]

For similar reasons, a stay would not be consistent with the public interest. If

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[18] *Nken v. Holder*, 556 U.S. 418, 434 (2009).

[19] *Id.* at 435.

[20] (Pet'rs' Supplemental Pleading 13 (emphasis added).)

[21] Although a carrier may choose to opt out of the Program if the Board does not grant a stay, this would not put shippers in any worse position than if the Board grants the stay and changes to the Program on appeal cause the carrier to opt in. On one hand, shippers might find that the changes to the Program discourage its use. On the other, the Board, shippers, and carriers can pursue changes to the Program that would cause the carrier to opt in.

the public has an interest in resolving small rate disputes through arbitration, as Joint Carriers assert, that interest would be best served by requiring carriers to decide whether to opt into the Program as soon as possible. If all carriers opt in, the public will begin realizing the benefits of the Program without delay. If any carrier opts out, the Board, shippers, and carriers could begin working as soon as possible on identify any potential changes to the Program that would cause the carrier to opt in while also ensuring that shippers continue to view it as a viable pathway for addressing small rate disputes. In contrast, staying the Arbitration Election pending judicial appeal does not prevent a carrier from opting out and terminating the Program anyway when appeals are decided, which would likely take years.

IV. Conclusion.

For the foregoing reasons, Joint Carriers' petition for stay should be denied.

Respectfully submitted,

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Dated: January 4, 2023

Certificate of Service

I hereby certify that on this January 4, 2023, a copy of the foregoing Reply to Petition for Stay was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Jason D. Tutrone
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