

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

**Docket No. EP 765**

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**PETITION FOR RECONSIDERATION**

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## PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1110.10,<sup>1</sup> Norfolk Southern Railway Company and Union Pacific Railroad Company (collectively, “Petitioners”) seek reconsideration of five aspects of the Final Rule adopting a new voluntary arbitration program.<sup>2</sup>

The Final Rule is a culmination of years of efforts to create an effective voluntary arbitration program and a more efficient and cost-effective forum for smaller rate disputes. The Board’s existing arbitration program has never been used, despite attempts over the years to encourage greater use of arbitration for the resolution of disputes. In adopting the new arbitration program for smaller rate disputes, the Board correctly noted the many policy benefits of the program, including the “congressional policy in favor of arbitration;” the fact that the program would further the rail transportation policy of 49 U.S.C. § 10101; and the fact that it would create “a more accessible avenue of potential relief to shippers with small rate disputes.”<sup>3</sup> Indeed, the Board stated that it “expects that the arbitration

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<sup>1</sup> Under 49 C.F.R. § 1110.10, “[a]ny person may file a petition for reconsideration of the Board’s decision in a rulemaking proceeding. Petitions should be filed within 20 days of the date that the final decision is published in the Federal Register and should identify the interest of the petitioner, the specific action sought, and the arguments favoring that action.” The Final Rule was published in the Federal Register on January 4, 2023. 88 Fed. Reg. 700 (Jan. 4, 2023). It is Petitioners understanding that, because this petition is filed under § 1110.10, the page limit at 49 C.F.R. § 1115.3(d) does not apply. Should the Board conclude otherwise, Petitioners respectfully ask the Board to accept this petition notwithstanding the limit.

<sup>2</sup> See Final Rule, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Dec. 19, 2022) (“Final Rule”).

<sup>3</sup> *Id.* at 11–12.

process will provide significant benefits over formal adjudication of rate disputes, especially where the amount in dispute is small.”<sup>4</sup>

Petitioners do not agree with all aspects of the program, and are particularly concerned that the program as adopted (pending the outcome of any appeals) will permit claims based on systemwide revenue adequacy (as opposed to evidence that an individual rate is unreasonable). The Board has been presented with substantial evidence in multiple dockets that revenue adequacy as a rate constraint has been discredited, both in written comments and in the 2015 and 2019 public hearings. Indeed, a proceeding to better align the calculation methodology with congressional intent has been pending for over two years.<sup>5</sup> In light of these well-founded concerns, and the ongoing uncertainty and broad policy implications of a revenue adequacy case, Joint Carriers consistently opposed allowing arbitrators to decide cases implicating one of the most important economic and policy issues before the Board. Unfortunately, the Board rejected these arguments and (pending appeal) the program as adopted will permit claims based on revenue adequacy.<sup>6</sup> Petitioners believe that this decision is likely to adversely affect some railroads’ willingness to opt in to an otherwise promising arbitration program.

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<sup>4</sup> *Id.* at 12.

<sup>5</sup> Both Docket No. EP 722 and Docket No. EP 766 remain as pending on the Board’s quarterly regulatory report with no projected date for next action. *See Surface Transp. Bd., Report on Pending STB Regulatory Proceedings, Fourth Quarter 2022* (2022).

<sup>6</sup> Petitioners disagree both with the Board’s outcome on this issue and the Final Rule’s reasoning for allowing revenue adequacy to be litigated in arbitration proceedings, but are focusing this petition on other aspects of the Final Rule. Petitioners reserve their right to challenge the inclusion of revenue adequacy in a future appeal to federal circuit court.

Nevertheless, Petitioners agree that the arbitration program for small rate disputes is a groundbreaking new opportunity that with appropriate improvements could be a superior option for both shippers and railroads to resolve rate disputes. For this reason, Petitioners seek reconsideration of five elements of the Final Rule. Three of these elements had not been previously proposed by the Board, one is justified based on rationales not included in the Notice of Proposed Rulemaking,<sup>7</sup> and one involves an element of the rule where Petitioners do not believe that the rule reflects the Board’s intent. Specifically, the Board should: (1) provide that Board decisions on appeals from arbitrator determinations will not be precedential; (2) eliminate the requirement that Class I railroads must decide whether to sign up for the program within a “limited window”—20 days after the effective date of the rule (the “Pre-Review Opt-in Requirement”); (3) eliminate the requirement that all Class I carriers must opt in for the program to become operable (the “Participation Requirement”); (4) modify the lead arbitrator selection process; and (5) replace the reference to “regulated commodities” in 49 C.F.R. § 1108.24(a)(1) with “regulated traffic.”

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<sup>7</sup> Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 32 n.49 (STB served Nov. 15, 2021) (“NPRM”).

## ARGUMENT

### I. THE BOARD SHOULD RECONSIDER THE PRECEDENTIAL NATURE OF DECISIONS ON APPEAL.

In their petition for rulemaking, Joint Carriers had proposed regulatory language stating that non-precedential decisions, including non-precedential decisions of the Board, would be inadmissible evidence.<sup>8</sup> The NPRM excluded this language, stating that it was unclear to what “non-precedential decisions of the Board” was referring.<sup>9</sup> In their opening comments on the NPRM, the Joint Carriers asked the Board to clarify that Board decisions on appeal from arbitration proceedings will be non-precedential and binding only on the parties to the arbitration.<sup>10</sup> Joint Carriers expressed their concern that precedential Board decisions will disincentivize participation in the program and encourage high-stakes litigation tactics that arbitration is intended to avoid.<sup>11</sup>

In the Final Rule, the Board rejected the Joint Carriers’ request and justified this conclusion on a newly presented rationale. Specifically, the Board made three points: that Board decisions, even in arbitrations, have always been public and precedential; that the experience of other agencies is not relevant; and that Joint

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<sup>8</sup> Joint Carriers’ Petition for Rulemaking, *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 15 (filed July 31, 2020).

<sup>9</sup> NPRM at 32 n.49.

<sup>10</sup> Joint Carriers’ Opening Comments, *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 21–25 (filed Jan. 14, 2022) (“Joint Carriers’ Opening Comments”).

<sup>11</sup> *Id.*

Carriers' concerns were flawed. Petitioners respectfully disagree with the Board's rationale and urge the Board to reconsider.

*First*, the Final Rule stated that “Board decisions, even in arbitrations, have always been public and precedential,” citing Board decisions reviewing labor arbitration decisions.<sup>12</sup> But the labor arbitration context is unique. Disputes about the proper implementation of labor conditions are resolved through mandatory arbitration with a different standard of review.<sup>13</sup> The Board's own regulations distinguish “arbitrations authorized under part 1108” and “labor arbitration decisions,” with different standards of review for each.<sup>14</sup> And as the Board is aware, outside the labor arbitration context, which is governed by different authorities and

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<sup>12</sup> Final Rule at 51 (citing *Union Pacific Corporation—Control & Merger—Southern Pacific Rail Corp.*, Docket No. FD 32760 (Sub-No. 42) (STB served Feb. 28, 2006) (citing *Grand Trunk Western Railroad Company—Merger—Detroit & Toledo Shore Line Railroad Company—Arbitration Review*, Docket No. FD 28676 (Sub-No. 2) (STB served Feb. 26, 1996))).

<sup>13</sup> See, e.g., *Great N. Pac. & Burlington Lines, Inc.—Merger—Great N. Ry.*, Docket No. FD 21478 (Sub-No. 7), 1987 WL 97965, at \*3 (ICC decided Mar. 20, 1987) (“In *Northern Lines*, as in every proceeding involving labor protection conditions since *Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 117, 200 (1944), we have imposed mandatory arbitration as the process for resolving individuals' labor disputes arising from the labor protection conditions.”); see also *Chi. & N.W. Transp. Co.—Abandonment—Near Dubuque & Oelwein, IA*, 3 I.C.C.2d 729, 735–36 (1987) (addressing authority to review arbitration decisions and stating that agency review of mandatory arbitration decisions would be limited to recurring or otherwise significant issues of general importance regarding the interpretation of labor protective conditions), *aff'd Int'l Brotherhood of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

<sup>14</sup> 49 C.F.R. § 1115.8 (“Petitions to review arbitration decisions”); Final Rule at 82–83 (§ 1115.8); Decision, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, Docket No. EP 560, at 2 (STB served Sept. 2, 1997) (“These rules provide for arbitration of disputes that would otherwise come to the Board; they are not intended to displace existing private dispute resolution mechanisms that may be available. Nor do they provide a substitute for the longstanding labor arbitration procedures that are provided for in our standard labor protective conditions.”).

principles, there have been *no* Board decisions on review because there have been no voluntary arbitrations.

*Second*, the Final Rule stated that the experience of other agencies is not relevant. The Board’s refusal to consider the experience of other agencies is misguided. The Board has not hesitated to consider the experience of other federal agencies in other contexts, particularly when considering new processes or procedures.<sup>15</sup> The Board also states that neither § 11708(h) nor the legislative history indicate that Congress intended Board decisions in arbitration appeals to be non-precedential. That Congress did not specifically speak to this issue does not preclude the Board from determining that such decisions should be non-precedential. Even if the other agencies issue decisions “under federal laws quite distinct from the Board’s governing statute,” it does not follow that the Board cannot issue non-precedential decisions.<sup>16</sup>

*Third*, the Board dismisses Joint Carriers’ arguments about high-cost, high stakes tactics. In so doing, the Board seems to have misunderstood the argument,

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<sup>15</sup> See Decision, *Association of American Railroads—Petition for Rulemaking*, Docket No. EP 752, at 2 (STB served July 10, 2019) (stating that the Board “wishes to evaluate best practices of other agencies for conducting [cost-benefit] analyses”); Final Rule, *Ex Parte Communications in Informal Rulemaking Proceedings*, Docket No. EP 739, at 17, 19 (STB served Feb. 28, 2018) (considering practices of other agencies in revising the Board’s regulations on ex parte communications).

<sup>16</sup> The Board has repeatedly emphasized its broad and inherent power to manage and control its own dockets and proceedings. See, e.g., Final Rule, *Limiting Extensions of Trail Use Negotiation Periods*, Docket No. EP 749 (Sub-No. 1), et al., at 8 (STB served Dec. 4, 2019) (citing *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 636 (D.C. Cir. 1984) and *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273–74 & n.12 (D.C. Cir. 1986)).

as its discussions center on the appeal process and not the arbitration itself.<sup>17</sup> Petitioners agree that an appeal will not serve as an opportunity to make new arguments on the merits, but that is beside the point. The fact that an appeal will be precedential will motivate parties *at the arbitration stage* to leave no stone unturned in order to create a record for an appeal that can be precedent-setting. The great value of confidential arbitration is that it allows both parties to focus completely on the dispute at hand, and not any broader implications for future cases. Railroads need not worry that a compromise in one case will affect their negotiations with other shippers. Shippers need not worry that their litigation decisions in an arbitration will hamper their negotiations with other railroads or their ability to assert arguments in future cases. Both railroads and shippers thus have incentives not to litigate every issue and submit simpler presentations focused on the case at hand. But if arbitrations could ultimately lead to public, precedential Board decisions, the incentive to simplify vanishes.

An example helps illustrate the point. As the Board well knows, Petitioners and the rest of the Joint Carriers oppose inclusion of the highly controversial revenue adequacy constraint as a methodology in the arbitration program. With precedential appeal decisions, the problems associated with the inclusion of revenue adequacy claims are exacerbated. The Final Rule creates the real risk that long-pending issues about the revenue adequacy constraint will not be resolved in the

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<sup>17</sup> Final Rule at 51 (noting that the appeal will not serve as an opportunity to make new arguments).

pending regulatory proceedings or a fully briefed case before the Board, but rather in an arbitration appeal with limited appellate review. The Board itself recognized the potential outcome:

Joint Carriers also argue that the Board, not arbitrators, should be ruling on the undefined issues surrounding revenue adequacy. However, if an arbitration decision is not appealed, the decision will remain confidential and non-precedential and so would have no impact outside of the arbitration in question. On the other hand, if an arbitration decision is appealed, the Board will be able to review the arbitration panel's decision pursuant to the standard set forth in 49 U.S.C. § 11708(h), *including that the decision is consistent with sound principles of rail regulation economics*.<sup>18</sup>

As explained in opening comments, it is Petitioners' position that "system-wide revenue levels ... cannot determine the reasonableness of a rate—more specificity is required under 'sound principles of rail regulation economics.'"<sup>19</sup> The Board recognized that the most expansive arbitration appeal criteria, "and the one under which most appeals will likely be argued under," is the criterion that the decision be consistent with sound principles of rail regulation economics.<sup>20</sup> It is entirely foreseeable that any arbitration decision based on system-wide revenue levels will be appealed (whether by the railroad or the shipper), thus setting up a precedential Board decision on whether a particular use of system-wide revenue levels to determine the reasonableness of a rate is consistent with sound principles of rail regulation economics. Such a decision would be standard setting given the lack of revenue adequacy guideposts. And the underlying arbitration decision would have

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<sup>18</sup> Final Rule at 48 (emphasis added).

<sup>19</sup> Joint Carriers' Opening Comments, at 14 (citations omitted).

<sup>20</sup> Final Rule at 52.

been made on what should be a limited arbitration record developed on an accelerated timeline and with no opportunity for supplemental evidence or public comment. Moreover, the Board’s review would not be a de novo review of this issue, but rather a “limited standard of review.”<sup>21</sup> The Final Rule thus creates a scenario where, rather than encouraging simplification and streamlining of arguments, the parties would be incentivized at the arbitration stage to submit and litigate decades-worth of evidence and arguments relating to revenue adequacy. Arbitrators would be expected to resolve the complex legal and policy issues surrounding revenue adequacy in 30 days when they have been open issues on the Board’s docket for nearly 10 years.<sup>22</sup>

The Board’s decision to make party-specific arbitration appeals precedential will lead to higher-cost, higher-stakes arbitrations. The decision also creates a strong disincentive for individual railroads to opt in to the program. Petitioners respectfully request that the Board reconsider this decision.

## **II. THE BOARD SHOULD ELIMINATE THE PRE-REVIEW OPT-IN REQUIREMENT.**

In the Final Rule, the Board announced that “Class I carriers will have a limited window . . . to decide whether to participate in the new arbitration program”—20 days from the effective date of the rule.<sup>23</sup> The date by which carriers

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<sup>21</sup> *Id.* at 81 (language of § 1108.31(b & c)).

<sup>22</sup> *See* Final Rule at 76 (§ 1108.27(b)(3) (arbitration decision must be served within 30 days from close of evidence)).

<sup>23</sup> *Id.* at 7, 22; *see also id.*, Appendix A, § 1108.22(b)(3) (“Class I carriers must indicate whether they choose to voluntarily participate in the Small Rate Case Arbitration Program by twenty days after this rule becomes effective”).

must decide whether to opt in is February 23, 2023. The Board should grant rehearing and eliminate this requirement.

*First*, the Board did not provide adequate notice of the Pre-Review Opt-In Requirement, and its post-hoc explanations for its need are not sufficient for purposes of the Administrative Procedure Act (“APA”). The NPRM proposed to allow a carrier to file its opt-in notice “at any time” and never suggested that it was considering a limited opt-in window.<sup>24</sup> The purpose of the APA’s requirement is to give interested parties fair notice, and the Board failed to provide that with respect to the Pre-Review Opt-In Requirement.<sup>25</sup> There is no way that commenters could have anticipated that the Board would abandon its proposed requirement that opt in could occur at any time and instead adopt its inverse—an extremely limited opt-in window.<sup>26</sup>

*Second*, the Pre-Review Opt-In Requirement is an unexplained departure from agency practice and precedent. The Board’s existing arbitration program (under the same statutory authority) allows carriers to opt in at any time.<sup>27</sup> That

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<sup>24</sup> NPRM at 61 (proposed § 1108.23(a)(1)).

<sup>25</sup> See, e.g., *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (citing *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)); see also *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019); *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1059 (11th Cir. 2008) (“A rule is deemed a logical outgrowth if interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” (internal quotation marks omitted)).

<sup>26</sup> See *Env’t Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (rejecting argument that agency had satisfied its notice-and-comment obligations by “repudiat[ing] its proposed interpretation and adopt[ing] its inverse” in the final rule).

<sup>27</sup> 49 C.F.R. § 1108.3(a) (“Any rail carrier, shipper, or other party eligible to bring or defend disputes before the Board may at any time voluntarily choose to opt in to the Board’s arbitration program”).

arbitration program was adopted in 2013, and has seen carriers opt in to arbitrate certain disputes over six years after adoption.<sup>28</sup> Indeed, carriers are still able to opt in to that program. The Board’s decision to depart from this precedent is not explained by the Final Rule.

*Third*, the Final Rule does not provide sufficient justification for the Pre-Review Opt-In Requirement. The Final Rule attempts to explain the need for this new requirement after briefly discussing Joint Carriers’ concerns about a *different* issue—namely, whether the Board expected carriers to commit to participate prior to knowing the contours of the final program. The Board explained that it was adopting the Pre-Review Opt-In Requirement “[t]o avoid confusion on this issue.”<sup>29</sup> But that explanation lacks merit. After the Board clarified in the Final Rule that it would not require such a commitment prior to knowing the contours of the final program,<sup>30</sup> there was no need for further action and no “confusion” to resolve. In any event, “[u]nder the APA . . . notice must come from the NPRM” and not from filed comments.<sup>31</sup>

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<sup>28</sup> Final Rule, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (STB served May 13, 2013); see CN Notice of Intent to Participate, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (filed July 1, 2019); CSX Transportation, Inc. Notice of Intent to Participate, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (filed June 28, 2019); Union Pacific Railroad Company Notice of Intent to Participate, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (filed June 21, 2013).

<sup>29</sup> Final Rule at 21.

<sup>30</sup> *Id.* (“The Board reiterates that it will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted.”).

<sup>31</sup> *CSX Transp., Inc.*, 584 F.3d at 1082.

Nor can the Pre-Review Opt-In Requirement be justified to “ensure[] that there is certainty for all stakeholders within a reasonable amount of time as to whether and when the new arbitration program will commence.”<sup>32</sup> No party advocated for such a limited opt-in requirement or suggested there was any uncertainty to remedy.<sup>33</sup>

*Fourth*, the opt-in window imposed—which currently requires Class I carriers to opt in by February 23, 2023—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.”<sup>34</sup> Contrary to that laudable sentiment, the Final Rule demands that Class I carriers to decide whether to participate prior to knowing whether and what changes to the Final Rule may occur on reconsideration and/or appeal—and thus requires carriers to decide whether “to commit to participate in the arbitration program before knowing the content of the final rule being adopted.”<sup>35</sup>

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<sup>32</sup> Final Rule at 22.

<sup>33</sup> See *Am. Med. Ass’n v. United States*, 887 F.2d 760, 767–68 (7th Cir. 1989) (emphasizing that a change from the proposed rule in the final rule should be a result of “the public’s reaction [that] persuades the agency that its initial regulatory suggestions were flawed” and reasoning that “numerous criticisms” of the proposed rule justified the change between final and proposed rule); *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1992) (stating that even “comments by members of the public would not in themselves constitute adequate notice,” as notice necessarily “must come from the agency”) (cleaned up).

<sup>34</sup> Final Rule at 21; see also Decision, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, et al., at 4 (STB served Dec. 29, 2021) (“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 . . .”).

<sup>35</sup> Final Rule at 21.

The Pre-Review Opt-In Requirement also effectively negates the right to agency reconsideration provided by Board regulations and appellate review provided by Congress. The Board’s regulations permit any person to “file a petition for reconsideration of the Board’s decision in a rulemaking proceeding” within 20 days of the final decision’s publication in the Federal Register.<sup>36</sup> In addition to the instant petition for reconsideration, other parties may also seek reconsideration of aspects of the Final Rule.

Congress has also provided a statutory right of appeal of agency action.<sup>37</sup> The statutory deadline for filing petitions for review is February 17 (60 days after the Final Rule). At least two petitions for review have been filed challenging certain portions of the Final Rule, and other interested parties may choose to appeal or seek reconsideration of the Final Rule. Yet under the Final Rule, carriers would be required to opt in before the rehearing process will be completed and before the judicial review process will be completed. In so doing, the Final Rule short-circuits the legal rights guaranteed by the Board’s regulations and prescribed by Congress.

In the Board’s decision denying Joint Carriers’ request for stay without prejudice, the Board stated that “the rulemaking is complete.”<sup>38</sup> For Petitioners,

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<sup>36</sup> 49 C.F.R. § 1110.10.

<sup>37</sup> 28 U.S.C. § 2321; 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (“the text of the APA leaves little doubt that . . . ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.’ 5 U.S.C. § 702 (emphasis added).”).

<sup>38</sup> Decision, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 6 (STB served Jan. 24, 2023) (“Stay Decision”).

this rulemaking is not complete for purposes of judicial review, given this timely filed petition for reconsideration.<sup>39</sup> More generally, the parties' expectations will not be settled until completion of the rehearing process and judicial review.<sup>40</sup> A successful judicial appeal would not necessarily invalidate the entire program, but could result in changes to discrete elements of the program,<sup>41</sup> and those changes could be the difference between a carrier's choice to opt in or not.

The Stay Decision is simply incorrect when it claims that “[t]he 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.”<sup>42</sup> The Board is asking carriers to make a five-year commitment to this arbitration program. Forcing railroads to choose whether to opt in to that program before knowing the results of reconsideration or appeal affects that initial opt-in decision, and it undermines their ability to make a meaningful choice.

As it stands, the Final Rule is flawed, yet the Final Rule demands that carriers who object to the program as it is currently configured opt in now in the

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<sup>39</sup> *United Transportation Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989) (holding that agency order was not final with respect to party seeking reconsideration).

<sup>40</sup> *Cf. West Texas Utils. Co. v. BNSF Ry. Co.*, Docket No. NOR 41191 (STB served June 27, 2003) (“expectations are not settled . . . until the agency’s decision has moved through the entire administrative process and judicial review is complete”).

<sup>41</sup> *See, e.g., R.R. Consol. Procedures—Exemption for Temporary Trackage Rights*, Docket No. EP 282 (Sub-No. 20), at 2 (STB served May 17, 2004) (amending final rule on partial vacatur and remand to require labor protective conditions for the discontinuance component of temporary trackage rights authority); *see also CSX Transp., Inc.*, 584 F.3d at 1079–83 (vacating the portion of the final rule that made four years of waybill data available for comparison groups).

<sup>42</sup> Stay Decision at 6.

hopes that the Board or a reviewing court will rectify those flaws later. Given the significance of the commitment, Class I carriers should be allowed to make a fully informed decision, based on whatever changes the Board may or may not make on reconsideration or an appellate court's rulings on the Final Rule. The Final Rule's provision allowing a carrier to withdraw from the arbitration program due to a material change to that program does not alleviate these concerns.<sup>43</sup> Throughout this proceeding, Petitioners have understood the withdrawal right for material change in law to apply to changes in law that may occur after the conclusion of this rulemaking proceeding, which has not yet occurred in light of the instant petition for reconsideration and the petitions for review that have been filed. Neither the joint petition for rulemaking nor the NPRM suggested that there would be any opt-in window at all, let alone one that would require invocation of the "narrow withdrawal rights"<sup>44</sup> in the event of changes that may occur within this very rulemaking proceeding. At bottom, the Board is insisting that Class I railroads sign up for a program with several key flaws before knowing whether those flaws will be corrected.

The Board should reconsider its imposition of the Pre-Review Opt-in Requirement for the reasons stated and revert to the NPRM's proposal that carriers may opt in at any time.

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<sup>43</sup> Adjudication of whether a change in the arbitration program is material is left entirely to the discretion of the Board, and the Board offered no guidance as to what it would consider a material change to the arbitration program. Final Rule at 25, 72 (§ 1108.23(c)(2)(ii)) (providing guidance only as to what might qualify as a material change to a rate reasonableness methodology).

<sup>44</sup> NPRM at 11.

### III. THE BOARD SHOULD ELIMINATE THE REQUIREMENT THAT ALL CLASS I RAILROADS PARTICIPATE IN ORDER FOR THE PROGRAM TO BECOME EFFECTIVE.

Another new and unjustified requirement in the Final Rule is that, “for the arbitration program to become operable, the Board will require that all Class I carriers agree to participate in the program” (the “Participation Requirement”).<sup>45</sup> The Board should eliminate this requirement for multiple, independent reasons.

*First*, the Board did not provide adequate notice of the Participation Requirement. As explained above, a final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible and thus reasonably should have filed their comments on the subject during the notice-and-comment period.<sup>46</sup> Here, the NPRM proposed no regulatory language that would codify a universal Participation Requirement, nor did it make clear that the agency was contemplating such a regulatory requirement.

The Final Rule tries to shoehorn its newly-imposed Participation Requirement into the NPRM’s statement that “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 to the

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<sup>45</sup> Final Rule at 6, 70 (§ 1108.22(a)(3)) (“The Small Rate Case Arbitration Program will become operative only if all Class I carriers initially commit to participate in the program”). The Participation Requirement also encompasses future renewals of the program. Final Rule at 23–24, 71 (§ 1108.22(c)(2)) (after the first five-year term expires, the program “will become operative for an additional 5-year period only if all Class I carriers again commit to participate in the program. This requirement will apply even if one or more of the Class I carriers has previously withdrawn from the program . . .”).

<sup>46</sup> See *supra* notes 25 & 26.

program for a term of no less than five years.”<sup>47</sup> Despite fifteen pages of proposed regulatory text detailing, among other things, the purpose of, participation in, and use of the proposed program, there was no proposed regulatory text or any other language indicating that the Participation Requirement would be a feature of whatever program the Board enacted.<sup>48</sup> The lack of any proposed regulatory language is consistent with the NPRM’s emphasis on whether or not to *enact* a final rule establishing the program. Indeed, the NPRM described the importance of an “initial commitment” and then laid out the sequence that it contemplated: “[i]f 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 . . . .”<sup>49</sup>

It is no surprise, then, that “[n]o parties commented on this aspect of the Board’s proposal.”<sup>50</sup> There was no regulatory proposal, and therefore no adequate notice of it. Had Petitioners understood that the Board intended to adopt an arbitration program with the Participation Requirement, they (and likely others) would have commented on this issue. Instead, Joint Carriers understood the NPRM as seeking an initial commitment that would inform whether to enact the program, and for this reason *did* submit comments explaining that enactment should not

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<sup>47</sup> See NPRM at 9 (emphasis added).

<sup>48</sup> By contrast, the Final Rule includes a regulation clearly stating the Participation Requirement, *see* § 1108.22(a)(3), and a process by which the Board will render the program operable once the Participation Requirement is fulfilled, *see* § 1108.22(b)(1).

<sup>49</sup> NPRM at 9 (emphasis added).

<sup>50</sup> Final Rule at 20.

hinge on carrier commitments prior to conclusion of the notice-and-comment rulemaking process.<sup>51</sup>

*Second*, the Final Rule offers insufficient justification for the Participation Requirement. The Final Rule describes this all-or-nothing requirement as necessary in the name of fairness: “it is important that shippers across the rail network have access to the same means of rate relief.”<sup>52</sup> Yet this has never been the case, nor will it be under the Final Rule. As Member Fuchs correctly noted, “this type of outcome already happens in the private sector, under the auspices of the Board, and in [the Final Rule] itself.”<sup>53</sup>

The Board has long maintained multiple means of rate relief,<sup>54</sup> and indeed the statute contemplates that the Board will maintain alternative methodologies.<sup>55</sup> These methodologies are not equally available to all “shippers across the rail network.” For example, because the Three Benchmark methodology relies on the Waybill Sample, it cannot be used for cases against Class II and Class III carriers.<sup>56</sup>

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<sup>51</sup> Joint Carriers’ Opening Comments at 30–31.

<sup>52</sup> Final Rule at 6.

<sup>53</sup> *Id.* at 64 (Fuchs, concurring).

<sup>54</sup> See *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) (establishing constrained market pricing principles, with three main constraints and a phasing constraint); *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) (establishing Three-Benchmark approach); *Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007) (establishing simplified Stand-Alone Cost approach); Final Rule, *Revisions to Arbitration Procedures*, Docket No. EP 730 (STB served Sept. 30, 2016) (modifying procedures to allow arbitration of rate disputes).

<sup>55</sup> *Cf.* 49 U.S.C. § 10701(d)(3).

<sup>56</sup> Decision, *Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1), at 102 (STB served Sept. 5, 2007) (explaining that Three Benchmark approach is unavailable to challenge purely local movements of Class II or III carriers).

And the Board has recognized that the Stand-Alone Cost methodology is not practically available for all rate disputes, which is why the Board adopted alternative methodologies.<sup>57</sup> Indeed, there is no universal “participation requirement” under the Board’s existing arbitration program for rates and other disputes at 49 C.F.R. pt. 1108 (which was implemented under the same statutory provision as the arbitration program in this docket). The Final Rule does not explain why the Participation Requirement is necessary in this context but not under its other rate-eligible arbitration program. The notion that a single uniform rate process is necessary for “fairness” is not consistent with the Board’s longstanding procedures for both formal rate matters and arbitration matters.

More importantly, even under the Final Rule that was just adopted, not all shippers will have access to the same means of rate relief, thus directly undercutting the Board’s stated rationale. The Final Rule itself permits individual carriers to withdraw from the program in certain circumstances, thus permitting partial participation in the program. The Board, seemingly in recognition of this internal inconsistency, states that “uniformity—at least at the beginning—provides the best chance of achieving [] fairness.”<sup>58</sup> But it makes little sense to hold that uniformity is of such paramount importance that the program is not worth starting if only six Class Is initially opt in, while simultaneously holding that the program

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<sup>57</sup> See Decision, *Rail Transportation of Grain, Rate Regulation Review*, Docket No. EP 665 (Sub-No. 1), at 5 (STB served Aug. 31, 2016) (“The agency recognized that the SAC methodology adopted in Guidelines could be expensive and impractical for certain shippers.”).

<sup>58</sup> Final Rule at 20.

would continue if all but one Class I were to opt out. And as Member Fuchs points out, even at the beginning, there will be shippers who do not have access to the program because they use a Class I that connects to a Class II or III.<sup>59</sup>

The Final Rule's exclusion of Class II and III carriers further undercuts the suggestion that the Participation Requirement is needed to ensure uniformity and fairness to all shippers. The Final Rule attempts to excuse the inconsistency by asserting that "rate cases filed to date indicate that complainants' rate concerns relate primarily to Class I carriers."<sup>60</sup> The Final Rule neglects to consider that, in direct response to that statement, the Board received comments from shipper associations pointing out the infirmities of that assumption:

Although all recent rate cases have been against Class I railroads, it does not necessarily follow that there are few concerns with Class II and III rates. Rather, the dearth of cases against Class II and III railroads also is because SAC and Simplified-SAC are the only options available to challenge Class II and III railroad rates. Three-Benchmark cannot be used because Class II and III carriers do not contribute to the waybill sample that is the source of the comparable rates used in that methodology.<sup>61</sup>

*Finally*, the Participation Requirement risks negating the very benefits that the Board found warranted adoption of the program. If only one carrier decides not

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<sup>59</sup> *Id.* at 20; *id.* at 64–65 (Fuchs, concurring).

<sup>60</sup> *Id.* at 20 n.15 (citing NPRM, at 9 n.15, which cites *Final Offer Rate Rev.*, Docket No. EP 755, at 16–17 (STB served Sept. 12, 2019)).

<sup>61</sup> Opening Comments of the Coalition Associations, *Final Offer Rate Review*, Docket No. EP 755, at 18 (filed Nov. 12, 2019). Indeed, short line railroads have been named as co-defendants in some recent rate cases. See Decision, *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121 (STB served Feb. 4, 2011) (granting motion to dismiss remaining short line defendants following settlements with them); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123 (STB served Feb. 4, 2011) (granting motion to dismiss short line defendant following settlement with it).

to opt in, then the program will never take effect. As Member Schultz correctly observed, in that scenario, “the time and energy that Board staff as well as stakeholders dedicated to advancing that program and providing multiple rounds of comments will have served no purpose.”<sup>62</sup>

Given that the Board did not provide adequate notice of or justification for such a requirement, and the fact that such a requirement risks negating the “significant benefits”<sup>63</sup> of the arbitration program, the Board should eliminate the Participation Requirement, consistent with the NPRM.

#### **IV. THE BOARD SHOULD RECONSIDER THE LEAD ARBITRATOR SELECTION PROCESS.**

In the NPRM, the Board proposed that, in the event the two party-appointed arbitrators are unable to agree on the lead arbitrator, they would select the lead arbitrator from the Board’s roster using an alternate-strike method.<sup>64</sup> As the Board observed in the Final Rule, “commenters uniformly opposed” any process that relied on the Board-maintained roster.<sup>65</sup>

The Joint Carriers proposed an alternative method, under which the administrative law judge (“ALJ”) would select the lead arbitrator from a joint list submitted by the parties, while being guided by the qualification requirements of 49 C.F.R. § 1108.6(b). The Board rejected this approach and instead adopted a new process not previously proposed: each side would include the names of three

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<sup>62</sup> Final Rule at 66 (Schultz, commenting).

<sup>63</sup> *Id.* at 12.

<sup>64</sup> NPRM at 25.

<sup>65</sup> Final Rule at 34.

individuals, and then each side would be permitted to strike the names of two individuals proposed by the opposing side, after which the Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance ("OPAGAC") would select from the two remaining names using a "random selection process."<sup>66</sup>

The lead arbitrator is essential to the program. The lead arbitrator is responsible for establishing all rules necessary for each proceeding—including rules for discovery, the submission of evidence, and the treatment of confidential information—and for a variety of other tasks.<sup>67</sup> In order to instill confidence in the fairness and neutrality of the arbitration process, the parties must have confidence in the arbitration panel. Unfortunately, the Board's new lead arbitrator selection process undermines such confidence. By leaving the selection purely to chance, each side will be motivated to select candidates who are favorably inclined towards their arguments, knowing that their favorable candidates will have a 50/50 chance of being selected. There will be no incentive for each side to propose the most highly qualified, truly neutral candidates. Instead, each side will be incentivized to choose the candidates that favor their position, and whichever candidate ultimately is selected will be likely be viewed as biased. In this way, the Board's new process directly undermines the entire purpose of having a third, neutral arbitrator.

Also, unlike the process for party-appointed arbitrators, there are no for-cause objections when there are reasons to believe the lead arbitrator cannot act

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 76 (§ 1108.26(c)(4)).

impartially or has actual or perceived biases.<sup>68</sup> Despite imposing qualification requirements for the lead arbitrator,<sup>69</sup> the Final Rule adopts a process that eliminates any ability to ensure that the lead arbitrator meets these requirements. In short, the process adopted in the Final Rule will result in biased candidates while also eliminating any ability to ensure quality, expertise, and neutrality.

The Board seems to acknowledge that this approach could have “certain built-in incentives that may be disadvantageous,” yet it justifies it because “this method of selecting the lead arbitrator would be easier and faster than relying on an ALJ or other substantive decisionmaker.”<sup>70</sup> But the Board provides no reason why a simple selection by an ALJ or other neutral decisionmaker between two candidates would be too laborious or time consuming. Importantly, no party raised any concerns about the speed of that process.

It is important that the process provide an opportunity for a neutral decisionmaker to ensure quality, expertise, and neutrality. Allowing a neutral decisionmaker to choose between the two remaining names would better motivate parties to select the best qualified neutral candidate, thus instilling confidence in the overall program, while also providing an important safeguard to ensure that the lead arbitrator meets the qualification requirements.

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<sup>68</sup> *Id.* at 75 (§ 1108.26(b)(1)).

<sup>69</sup> *Id.* at 76 (§ 1108.26(c)) (the lead arbitrator must be a person “with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector,” and that has “training in dispute resolution and/or experience in arbitration or other forms of dispute resolution”).

<sup>70</sup> *Id.* at 34.

With respect to the selection of the lead arbitrator, Petitioners continue to believe that an ALJ is the appropriate decisionmaker. The arbitration program already envisions use of an ALJ,<sup>71</sup> and the ALJ is undoubtedly neutral and well-equipped to evaluate candidates. Indeed, no other party raised concerns about the use of an ALJ in the context of evaluating party-selected arbitrators.<sup>72</sup>

Petitioners also believe that an ALJ would be better suited to this role than the Director of OPAGAC, given that the latter oversees the Rail Customer and Public Assistance (“RCPA”) program. RCPA facilitates informal dispute resolution processes, and is often involved in initial attempts at resolution of issues prior to formal proceedings being filed at the Board. It is possible that RCPA will have been involved in discussions pertaining to the rate dispute prior to an arbitration proceeding, especially given that the Final Rule declined to require mediation in advance of arbitration.<sup>73</sup> OPAGAC must remain an available forum for informal discussions and dispute resolution, but having the Director of OPAGAC choose the lead arbitrator could be problematic where parties had previously availed themselves of OPAGAC’s informal dispute resolution services.

For these reasons, Petitioners believe that the Board should reconsider the lead arbitrator selection process in the Final Rule and replace it with a process that requires an ALJ to make the ultimate selection in the event of disagreement.

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<sup>71</sup> Final Rule at 75 (§ 1108.26(b)(1)).

<sup>72</sup> *Cf.* AFPM Comments at 10 (supporting operating structure involving use of ALJ to rule on party-selected arbiters “to ensure a fair and impartial panel”).

<sup>73</sup> Final Rule at 32 (denying Joint Carriers’ request to require a brief mediation period as part of the program).

**V. THE BOARD SHOULD MODIFY THE LANGUAGE OF § 1108.24(A)(1) TO ELIMINATE AMBIGUITY.**

The agency has, pursuant to the mandate at 49 U.S.C. § 10502(a), exempted from regulation various types of traffic, including certain commodities and equipment.<sup>74</sup> It is a fundamental part of the statutory scheme that traffic for which an exemption has been granted is not subject to agency regulation. For this reason, traffic is considered either “regulated,” on the one hand, or “unregulated” or “exempt” on the other.<sup>75</sup>

The Final Rule at 49 C.F.R. § 1108.24(a)(1) provides that “[r]ate disputes involving shipments of regulated *commodities* not subject to a rail transportation contract are eligible to be arbitrated.”<sup>76</sup> Petitioners do not believe it was the Board’s intent to treat exempt commodities different than exempt equipment, nor was it Petitioners’ intent when Joint Carriers proposed a new rate arbitration program. Nor do Petitioners believe that the Board intended to partially revoke *sub silentio* the equipment exemptions for purposes of the arbitration program.<sup>77</sup> To avoid ambiguity created by the Final Rule, the Board should reconsider the language of § 1108.24(a)(1) and replace “regulated commodities” with “regulated traffic.”

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<sup>74</sup> See 49 C.F.R. pts. 1039 & 1090.

<sup>75</sup> See, e.g., Decision, *Rail Fuel Surcharges*, Docket No. EP 661 (Sub-No. 1), at 4 (STB served Aug. 14, 2007) (“unregulated traffic includes traffic that has been exempted under 49 U.S.C. 10502”); Notice of Proposed Rulemaking, *Waybill Sample Reporting*, Docket No. EP 385 (Sub-No. 8), at 4 (STB served Nov. 29, 2019) (discussing data collection with respect to “regulated traffic” versus “exempt traffic”).

<sup>76</sup> Final Rule at 73 (emphasis added).

<sup>77</sup> Pursuant to 49 U.S.C. § 10502(d), the Board may only revoke an exemption, either in whole or in part, if it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. The Final Rule contains no such findings for equipment exemptions.

## CONCLUSION

For the foregoing reasons, the Board should grant this petition for reconsideration and revise the Final Rule in this proceeding accordingly.

Respectfully submitted,

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Dated: January 24, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of January 2023, a copy of the foregoing Petition for Reconsideration was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Raymond A. Atkins

Raymond A. Atkins

SIDLEY AUSTIN LLP