305884

ENTERED
Office of Proceedings
December 29, 2022
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 765

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

JOINT CARRIERS' PETITION FOR STAY

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December 29, 2022

The Board has been right to recognize throughout this proceeding that it is fundamentally unfair to ask railroads to commit to a five-year arbitration program with limited withdrawal rights before they know what the final program will be. In the December 19 Decision,[1] the Board created a new arbitration program for small rate disputes, and reaffirmed that it "will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted."[2] Indeed, in this proceeding the Board denied a motion that would require railroads to state their willingness to participate in arbitration program before rulemaking was concluded, in part because "the carrier's ultimate decision could change depending on subsequent developments in the Arbitration docket and the FORR docket."[3]

But the December 19 Decision has been structured in a way that contradicts these statements, by providing that Class I railroads must decide whether to sign up for five-years in the program within a "limited window"—20 days after the effective date of the rule (referred to herein as the "Pre-Review Opt-in Requirement"). This signup deadline, which depending upon Federal Register publication will be sometime in mid-February 2023, could expire before the Board has decided any reconsideration petitions and will certainly expire before courts have decided any appeals of the December 19 Decision. This Pre-Review Opt-In

[1] *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) ("December 19 Decision").

[2] *Id.* at 21.

[3] Decision, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Dec. 28, 2021), at 4.

Requirement is a new change to the final rule; the notice of proposed rulemaking proposed to allow a carrier to file its opt-in notice "at any time."[4]

There is no justification for a Pre-Review Opt-In Requirement forcing railroads to commit to the arbitration program before knowing what its final content will be, including ultimate resolution of reconsideration petitions and appeals, and this aspect of the December 19 Decision should be stayed pending resolution of reconsideration petitions and appeals.

All of the undersigned railroads support the basic goals and structure of the Arbitration Program, but they have concerns over certain aspects of the December 19 Decision. The undersigned railroads are considering filing judicial appeals or petitions for reconsideration, and other parties such as shipper associations may do so as well. Asking railroads to commit to the Arbitration Program before such petitions for reconsideration and appeals are ultimately decided—as the Pre-Review Opt-in Requirement does—would risk eviscerating railroads' rights to seek agency reconsideration and judicial appeals of final STB decisions and contradict the Board's holding that it would "not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted."[5]

For these reasons, CSX Transportation, Inc., Norfolk Southern Railway Company, Union Pacific Railroad Company, and the U.S. operating subsidiaries of Canadian National Railway Company[6] ("Joint Carriers") ask the Board to stay the

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[4] *See* Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Nov. 15, 2021), at 61 (proposed § 1108.23(a)(1)).

[5] December 19 Decision at 21.

[6] The U.S. railroad operating subsidiaries include Illinois Central Railroad Company; Wisconsin Central Ltd.; Grand Trunk Western Railroad Company; Bessemer and Lake Erie Railroad Company; Chicago, Central & Pacific Company; Cedar River Railroad Company; and The Pittsburgh & Conneaut Dock Company

December 19 Decision's requirement that Class I railroads commit to the Arbitration Program within twenty days of its effective date (the Pre-Review Opt-in Requirement), and that the Board continue such a stay until the latter of final resolution of all petitions for reconsideration and judicial appeals of the December 19 Decision. Only then will railroads know the final contours of the arbitration program and have a fair opportunity to make decisions on whether to make a five-year commitment to that program.

ARGUMENT

The Board "may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm."[7] The party seeking a stay must show that "(1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed by a stay, and (4) the public interest supports the granting of the stay."[8] Application of these factors is "not mechanical"[9]; rather, the Board should consider the factors flexibly in a balance of the equities.[10] Indeed, the "Board and the courts have issued stays, when appropriate, even where it was unlikely that petitioners would prevail on the merits" when "the other factors weigh in favor of a stay."[11]

(collectively, "CN"). The U.S. railroad operating subsidiaries report to the STB on a consolidated Class I basis under the Grand Trunk Corporation name.

[7] *Total Petrochemicals & Ref., USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121 (STB served Jan. 2, 2014), slip op. at 2; 49 U.S.C. § 1321(b)(4).

[8] *Total Petrochemicals*, Docket No. NOR 42121, slip op. at 2 (citations omitted).

[9] *Id.*

[10] *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843–44 (D.C. Cir. 1977) (necessary showing on any factor "is governed by the balance of equities as revealed through an examination of the other three factors").

[11] *New York City Econ. Dev. Corp.—Adverse Abandonment—New York Cross Harbor R.R. in Brooklyn, NY*, Docket No. AB 596, (STB served Aug. 28, 2003), slip op. at 7

Here, the Joint Carriers have satisfied each of the conditions for a stay of the Pre-Review Opt-in Requirement. Joint Carriers are likely to prevail on a challenge to the Pre-Review Opt-In Requirement, whether that be through reconsideration or on appeal. The Pre-Review Opt-In Requirement would force railroads to make commitment decisions before they know what the final arbitration program will be, thus undermining the reconsideration rights provided by Board regulations and the appellate rights provided by Congress. And a stay of the Pre-Review Opt-in Requirement is necessary to avoid irreparable harm, which will result if the Board negates the arbitration program because all seven Class I carriers have not satisfied the Pre-Review Opt-In Requirement. As explained below, the Joint Carriers each have serious concerns about opting into the arbitration program before ultimate resolution of petitions for reconsideration and appeals, which will not happen before the current Pre-Review Opt-In Requirement deadline.

A stay of the Pre-Review Opt-In Requirement would likewise serve the public interest and not harm other parties. The public interest is not served, and no party benefits, from the ambiguity about the viability of the arbitration program during reconsideration and appeals that this requirement creates. Indeed, all the reasons that the Board cited for the bases to create the arbitration program are cause for it to stay the self-destruct mechanism that could jeopardize the existence of the program unless railroads opt in during the limited window.

I. THE JOINT CARRIERS ARE LIKELY TO PREVAIL ON THEIR CHALLENGE TO THE PRE-REVIEW OPT-IN REQUIREMENT.

The railroads that intend to challenge the Pre-Review Opt-In Requirement are likely to succeed in that challenge, whether through reconsideration or appeal.

& n.17 (highlighting a case where the Board "stayed a rate prescription pending judicial review, notwithstanding the Board's confidence that its decision would upheld on the merits," because of the irreparable harm the railroad would suffer).

The Pre-Review Opt-In Requirement 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."[12] It would be arbitrary for the Board to say one thing while its decision does another. Moreover, the Pre-Review Opt-In Requirement undermines the ability for railroads to avail themselves of the right to appellate review provided by Congress and the right to agency reconsideration provided by Board regulations.

The December 19 Decision affords all the Class I carriers "20 days after the effective date" to file an opt-in notice to participate in the arbitration program, and "all Class I carriers must agree to participate for the arbitration program to become operable."[13] The practical effect of this requirement is that carriers have only "a 50-day window to review the December 19 Decision and decide whether they want to voluntarily participate."[14] But there is no possibility that any appeal will be decided in 50 days, and it is unlikely that reconsideration petitions will be decided by that date.

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.[15] Some of the undersigned may seek reconsideration of the Pre-Review Opt-In Requirement and other aspects of the arbitration program as adopted in the December 19 Decision. Pursuant to Board regulations, petitions for reconsideration are due 20 days after

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[12] December 19 Decision at 21.

[13] *Id.*

[14] *Id.*

[15] 49 C.F.R. § 1110.10.

Federal Register publication (thus no earlier than January 19, 2023[16]), and any replies to such petitions will be due 20 days after that.[17] It is unlikely that the Board would decide any petitions for reconsideration before its opt-in deadline in mid-February.

Congress has also provided a statutory right of appeal to any party seeking "to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board."[18] Some of the undersigned may file an appeal challenging certain portions of the December 19 Decision. And other interested parties may choose to appeal or seek reconsideration of the December 19 Decision in the coming weeks; the statutory deadline for filing petitions for review is February 17 (60 days after the December 19 Decision).

The Board acknowledges that the Pre-Review Opt-In Requirement provides "only a limited opportunity" for Class I carriers to evaluate the December 19 Decision and then asserts that the window is "sufficient time to decide" whether to participate in the new arbitration program.[19] But the 50-day window deprives the Class I carriers of the ability to make a fully informed decision based on changes that could result from the Board's resolution of any reconsideration petition or an appellate court's rulings on the December 19 Decision. Requiring the Class I carriers to opt into the arbitration program before resolution of these challenges

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[16] As of today's filing, the December 19 Decision has not been published in the Federal Register. If it were published tomorrow, December 30, the deadline for petitions for reconsideration would be January 19.

[17] *See* 49 C.F.R. § 1110.10.

[18] 28 U.S.C. § 2321; *see also* 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.").

[19] December 19 Decision at 22.

short circuits the legal rights guaranteed by the Board's regulations and prescribed by Congress.

In sum, the Joint Carriers are likely to prevail on their challenge to the Pre-Review Opt-In Requirement, whether that be through reconsideration or on appeal. It is arbitrary and capricious for an agency to require regulated entities to sign up for a program before knowing the ultimate resolution of reconsideration petitions or judicial appeals, and such a requirement would circumvent the rights to obtain judicial review of Board decisions that have been guaranteed by Congress.

II. THE JOINT CARRIERS WILL SUFFER IRREPARABLE HARM IF THE PRE-REVIEW OPT-IN REQUIREMENT IS NOT STAYED.

The Joint Carriers, together with the Board and other stakeholders, have invested substantial resources in this rulemaking and the development of a successful arbitration program for small rate disputes. The program was adopted after a two-year rulemaking process following the Joint Carriers' petition for rulemaking.[20] More importantly, the program is the culmination of years of efforts to create an effective arbitration program and a more efficient forum for smaller rate disputes.[21] If permitted to take effect, this arbitration program would advance Congress's mandate that "rate disputes . . . be included as an arbitration-eligible matter" and further the rail transportation policy of 49 U.S.C. § 10101.[22]

Absent a stay, the Pre-Review Opt-In Requirement will cause the termination of the program a mere 20 days after the final rule becomes effective,

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[20] *Id.* at 4–6.

[21] *See id.* at 2–3.

[22] *Id.* at 4; *see id.* at 11 (explaining how this arbitration program would "further the rail transportation policy of 49 U.S.C. § 10101 by facilitating the expeditious handling and resolution of proceedings (49 U.S.C. § 10101(15)), supporting fair and expeditious regulatory decisions when regulation is required (49 U.S.C. § 10101(2)), and helping to maintain reasonable rates where there is an absence of effective competition (49 U.S.C. § 10101(6))").

entirely negating the years of efforts to create the program and causing irreparable harm to the Joint Carriers. The Board has "structure[d] the new regulations so that the arbitration program can become operable only if the Board publishes a notice in the Federal Register confirming that all Class I carriers have agreed to participate" by submitting "an opt-in notice within 20 days after the effective date of this decision."[23] In other words, unless the Class I carriers forfeit their reconsideration and appellate rights by opting into the arbitration program prematurely, the Board will not allow the program to "become operable."[24] This aspect of the final rule will render all of the time, energy, and resources expended over the last two years wasted. And none of the time savings and cost savings touted by the Board in the December 19 Decision will ever be realized by the Joint Carriers or any other stakeholder.[25]

In a concurrence, Member Fuchs noted that "the Board lowered the probability that the benefits of the arbitration program will be realized" because it (among other things) "set a condition that the program will take effect only if all Class I carriers opt into arbitration soon after Arbitration Final Rule's issuance."[26] Unfortunately, this harm is not merely speculative. The Joint Carriers each have serious concerns about opting into an arbitration program that may look significantly different following the ultimate resolution of petitions for reconsideration and appeals—some of which may be filed by other interested parties. As the Board knows, the arbitration program involves trade-offs for railroads, in which the benefits of the program come with due process limitations

[23] *Id.* at 12, 21 (emphasis omitted).

[24] *Id.* at 71 (§ 1108.22(b)(2)).

[25] *Id.* at 12–14.

[26] December 19 Decision at 64 (Fuchs, concurring).

such as restricted grounds for appealing arbitrator decisions. The December 19 Decision's provision allowing a carrier to withdraw from the arbitration program due to a material change to that program does not change that calculus. Adjudication of whether a change in the arbitration program is material is left entirely to the discretion of the Board,[27] and the Board offered no guidance in the December 19 Decision as to what it would consider a "material change" to the arbitration program.[28] Indeed, the Board's view is that "the likelihood that there is a material change in the law during the initial five-year period is relatively low."[29]

The Board should act to avoid this irreparable harm by staying the Pre-Review Opt-In Requirement to allow the Joint Carriers to pursue their rights secured by the Board's regulations and federal statute.

III. A STAY OF THE PRE-REVIEW OPT-IN REQUIREMENT PENDING APPEAL AND RECONSIDERATION WOULD NOT HARM SHIPPERS AND WOULD SERVE THE PUBLIC INTEREST.

A stay of the Pre-Review Opt-In Requirement would benefit all stakeholders by ensuring that the arbitration program outlined in the December 19 Decision is preserved pending appeal and reconsideration and available (as modified by the Board or a court of appeal) to all stakeholders. The arbitration program adopted by the Board in the December 19 Decision has the potential to be an efficient tool for resolving smaller rate disputes in an expedited and cost-effective manner. But by forcing the Class I carriers to opt into the arbitration program prematurely, the Board risks eliminating this new rate dispute process before any party has the opportunity to use it. As Member Schultz recognized, "in the event that a single

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[27] December 19 Decision at 72 (§ 1108.23(c)(2)(ii)).

[28] *See id.* at 25 (providing guidance only as to what might qualify as a material change to a rate reasonableness methodology).

[29] *Id.* at 26.

Class I carrier declines to participate in Arbitration and FORR is reversed on appeal, shippers will be left with nothing but the Board's current methodologies, which remain underutilized."[30] No party benefits from the unreasonably short 50-day opt-in period.

Indeed, the Board has expended substantial resources in developing this arbitration program. Yet all of those resources will have been for nothing after the 50-day window because of the Pre-Review Opt-In Requirement. The public interest is harmed when an agency is able to avoid the wasteful expenditure of public resources and declines to act. Therefore, the Board should stay the Pre-Review Opt-In Requirement to preserve the arbitration program while its final shape is being determined by agency reconsideration and judicial appeal.

CONCLUSION

For all of these reasons, the Joint Carriers respectfully request that the Board grant this Petition for Stay of the December 19 Decision's Pre-Review Opt-In Requirement.

Respectfully submitted,

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Dated: December 29, 2022

[30] December 19 Decision at 67 (Schultz, commenting).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2022, a copy of the foregoing Petition for Stay was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Raymond A. Atkins
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