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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 765

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

Digest:[1] Four Class I rail carriers petitioned to stay a specific requirement of the new small rate case arbitration program. The requirement provides that all Class I carriers must inform the Board within 20 days of the rule becoming effective whether they will participate in the new small rate case arbitration program. The Board denies the request for a stay.

Decided: January 23, 2023

On December 19, 2022, the Board adopted a final rule to establish a voluntary arbitration program for small rate disputes. Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes (Arbitration Final Rule), Docket No. EP 765 (STB served Dec. 19, 2022). The Board's decision was published in the Federal Register on January 4, 2023 (88 Federal Register 700). Under the Board's decision, the final rule is scheduled to become effective 30 days after publication in the Federal Register, which will be February 3, 2023.

The final rule establishes that unless all Class I carriers agree to voluntarily participate, the Board will not issue the notice to commence the new arbitration program, and the program will not become operable. Arbitration Final Rule, EP 765, slip op. at 7, 20. The final rule establishes a 20-day window from the effective date of the decision for the Class I carriers to submit an opt-in notice to the Board informing it whether they wish to participate in the arbitration program. Id. at 21. Pursuant to that schedule, these opt-in notices are due by February 23, 2023.

On December 29, 2022, four Class I carriers—CSX Transportation, Inc., Norfolk Southern Railway Company, Union Pacific Railroad Company, and the U.S. operating subsidiaries of Canadian National Railway Company (the Four Class I Carriers)—filed a petition for stay. They request that the Board stay what they call the "Pre-Review Opt-in Requirement"—a provision that they do not specifically define, but that appears to refer to the requirement that all of the Class I carriers decide whether to commit to the program by a date

[1] 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).

certain, defined as 20 days after the final rule becomes effective (i.e., 50 days after its publication in the Federal Register). See Arbitration Final Rule, EP 765, App. A (49 C.F.R. § 1108.22(b)(3).) In the petition, the Four Class I Carriers do not challenge the condition that the arbitration program will not become operable unless all Class I carriers agree to participate, nor do they appear to take issue with the fact that a commitment deadline exists; rather, they ask only that the Board delay that deadline until such time as any judicial appeals and petitions for reconsideration of Arbitration Final Rule have been resolved. (Pet. for Stay 2-3.) To date, two carriers have filed judicial appeals.[2] The Board has so far received no petitions for reconsideration.

On January 3, 2023, Canadian Pacific filed a letter stating that it takes no position on the merits of the stay sought by the Four Class I Carriers, that it believes that Arbitration Final Rule was "a constructive step" toward implementation of a small rate case arbitration program, and that it "sees wisdom in the Board adopting a process to create opportunities for [the rules set forth in Arbitration Final Rule] to be improved, ideally before carriers must decide whether to opt in to those rules." (CP Letter 1.) On January 4, 2022, The Kansas City Southern Railway Company filed a letter in support of the petition for stay stating that it "is concerned that granting the . . . stay request may be the only way to preserve the option for shippers and carriers to enter into a functional ADR program that will best serve all stakeholders, given that the proposed ADR program would not survive any one carrier's decision not to opt into the program as currently proposed." (KCS Letter 1.)

The American Chemistry Council, Corn Refiners Association, The National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (Coalition Associations), along with National Grain and Feed Association (NGFA), filed a reply to the stay on January 4, 2023. Coalition Associations and NGFA state that they do not object to a stay of the commitment deadline until after the Board rules on any petitions for reconsideration, but they do object to a stay pending the outcome of any judicial appeals. (Coalition Assocs./NGFA Reply 2.) They argue that the Four Class I Carriers have not satisfied the criteria for the Board to grant such a stay.

For the reasons discussed herein, the Four Class I Carriers' petition for stay is denied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In deciding a request for stay, the Board considers: (1) whether the party seeking a stay is likely to prevail on the merits, (2) whether the party seeking a stay will be irreparably harmed in the absence of a stay, (3) whether issuance of a stay

[2] On December 29, 2023, CN filed a notice of appeal of Arbitration Final Rule with the U.S. Court of Appeals for the Seventh Circuit, Case No. 22-3289. The same day, CSX filed a notice of appeal with the U.S. Court of Appeals for the Eleventh Circuit, Case No. 22-14285. By order issued and posted to both appellate dockets on January 6, 2023, the United States Judicial Panel on Multidistrict Litigation directed that these appeals be consolidated in the Seventh Circuit.

would substantially harm other parties, and (4) whether issuance of a stay is in the public interest. See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp., FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017) (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours), 559 F.2d 841, 843 (D.C. Cir. 1977)). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Id. (citing Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). The threshold consideration in deciding whether a stay is appropriate is whether the moving party will be irreparably harmed without it. R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 3 (STB served Dec. 1, 2020). As to irreparable harm, the party seeking a stay must show that the injury claimed is "imminent, 'certain[,] and great.'" Sault Ste. Marie Bridge Co.—Acquis & Operation Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Likelihood of Success on the Merits. The Four Class I Carriers state that they intend to challenge—either through a petition for reconsideration or judicial appeal—the so-called "Pre-Review Opt-In Requirement" directing Class I carriers to inform the Board whether they will participate in the arbitration no later than 20 days after the final rule becomes effective, as opposed to a later deadline occurring after appeals and petitions for reconsideration have been resolved. (Pet. 4.) They argue that imposing a commitment deadline that occurs before the resolution of any appeals or reconsideration petitions is arbitrary and capricious because it is inconsistent with the Board's statement in Arbitration Final Rule that it "will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted." (Id. at 5 (quoting Arbitration Final Rule, EP 765, slip op. at 21).) They further argue that a pre-review commitment deadline would circumvent their rights to seek reconsideration or appeal. (Id. at 7.) The Four Class I Carriers also state that they "may" seek reconsideration of other aspects of the arbitration program, though they do not specify which ones. (Id. at 5.) Two of them have also initiated judicial review of Arbitration Final Rule but have yet to detail their arguments. (See supra n.2.)

In their reply, Coalition Associations and NGFA argue that even if there is a change on judicial appeal that would cause a Class I carrier to decide it does not want to participate in the arbitration program, they are permitted to withdraw if there is a material change to the program. (Coalition Associations/NGFA Reply 3.) They also dispute the carriers' assertion that a pre-review opt-in requirement is contrary to the Board's statement it will not require carriers to decide whether to participate before knowing the content of the final rule. (Id. at 4-5.) Coalition Associations and NGFA further argue that adoption of a pre-review opt-in requirement falls within the Board's broad statutory discretion and that the Four Class I Carriers have not identified any statute with which this provision conflicts. (Id. at 5-6.)

The Board concludes that the Four Class I Carriers have not shown that they are likely to prevail on the merits.

First, the Board cannot make the requisite finding that the Four Class I Carriers are likely to prevail on the merits because the Four Class I Carriers' petition fails even to identify any merits-based argument for why the Board or a court would make a change to the program.

Instead, the Carriers' petition presents a single argument as the basis for granting a stay of the pre-review opt-in deadline: that they are likely to prevail on the argument that Class I carriers should be allowed to wait to commit to the program until after any appeals or reconsideration petitions have been decided. But any judicial appeal or administrative petition for reconsideration based solely on the due date of the opt-in would be meaningless because there would be no reason to adjust the deadline if the arbitration program would not otherwise change. Although the petition vaguely alludes to the possibility that some party could file an appeal that raises additional issues, the petition before the Board fails to identify any such issues, much less show that those issues are likely meritorious as would be required for the Board to grant a stay.[3] Because the Four Class I Carriers have not even argued that there is some additional aspect of the program that they are likely to succeed in challenging, there is simply no reason to conclude that the program is likely to change and, thus, no reason for the Board to stay the opt-in deadline in anticipation of such changes.

Second, despite their contrary assertions, the Four Class I Carriers *do* know the content of the rule to which the opt-in requirement would apply: should they decide to opt in, they would be committing to the rules set forth in Arbitration Final Rule as published in the Federal Register on January 4, 2023. Because any successful judicial appeal of the rule would presumptively result in vacatur, see Johnson v. OPM, 783 F.3d 655, 663 (7th Cir. 2015), the prior commitment by a carrier to the vacated rule would no longer be operative. In any event, any material change to the rule (whether accomplished via appeal or reconsideration) would entitle the Four Class I Carriers to withdraw from the program under the terms of the program itself. See Arbitration Final Rule, EP 765, slip op. at 72 (proposed 49 C.F.R. § 1180.23(c)(1)). A challenge to the arbitration program that would be weighty enough to ground a successful appeal and dissuade the Four Class I Carriers from committing is very likely to be considered material. Regardless, the petition has identified no such challenge, or, indeed, any merits-based challenge at all.

For this reason, there is nothing contradictory between the Board's statement that it will not require the Class I carriers to decide whether to participate before knowing the content of the final rule and the so-called "Pre-Review Opt-In Requirement." The Board's statement was made during the pendency of the rulemaking in response to the concern articulated by railroad commenters that they would be required to state whether they would choose to participate in the arbitration program while that program was still subject to notice-and-comment.[4] But the

[3] Indeed, on January 12, 2023, CSX filed a civil statement in its Eleventh Circuit appeal. That statement lists five "issues proposed to be raised on appeal" but does not provide argument in support of CSX's positions on those issues or otherwise indicate CSX's likelihood of success. Thus, although the Board's decision on the Four Class I Carriers' stay petition is based on the record before the Board, consideration of the information in CSX's civil statement would not change the result.

[4] The Board issued a decision on December 29, 2021, denying a motion filed by several shipper organizations requesting that the Board hold the procedural schedule in this proceeding in abeyance until the Class I carriers informed the Board whether they would agree to arbitrate under the program, despite the lack of a prohibition on revenue adequacy claims. Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, Docket No.

rulemaking is complete and, as explained here, no basis has even been suggested to find that the program is likely to be modified due to an appeal. Accordingly, the Four Class I Carriers and all other stakeholders know what the final rule is. The fact that the final rule is subject to the normal reconsideration and judicial review processes does not change this.

Finally, the Four Class I Carriers' argue that requiring them to decide whether to commit to the arbitration program before appeals and reconsideration petitions have concluded deprives them of their ability to appeal or seek reconsideration. But the Four Class I Carriers articulate no reason why they would not be permitted to continue their appeals of the Arbitration Final Rule once they have opted into the arbitration program and the program has become effective.

For these reasons, the Four Class I Carriers have failed to demonstrate that they are likely to succeed on the merits of any appeal or petition for reconsideration.

Irreparable Harm. The Four Class I Carriers state that a "pre-review opt-in requirement" requires that they "forfeit their reconsideration and appellate rights by opting into the arbitration program prematurely." (Pet. 8.) They also argue that setting a pre-review opt-in deadline will cause irreparable harm by rendering all of the "time, energy, and resources expended over the last two years wasted" and prevent the "time savings and cost savings" created by the arbitration program from being realized. (Id.)

Coalition Associations and NGFA argue on reply that the Four Class I Carriers are not forfeiting their right to appeal because they have not shown that they have such a right. (Coalition Assocs./NGFA Reply 6-7.) Coalition Associations and NGFA argue that, even if the carriers establish a basis on which to appeal, the carriers would not be forced to accept the changes adopted on appeal because the carriers would then have the right to withdraw due to a material change to the arbitration program. (Id. at 7.) Coalition Associations and NGFA also argue that the loss of time, energy, and resources is not an irreparable harm. They note that there was never any guarantee that the Board would adopt an arbitration program, that courts have held that the loss of monetary expenses incurred during a proceeding is not an irreparable harm, and that the loss of time and cost savings is speculative. (Id. at 7-8.)

The Board finds that the Four Class I Carriers have not shown irreparable harm. As discussed above, the Four Class I Carriers' have not articulated any reason why they would forgo their right to seek administrative or judicial appeals by choosing to participate in the arbitration program. In addition, the loss of the "time, energy, and resources" devoted to developing the arbitration program does not constitute an irreparable harm. A party that takes part in a

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EP 765 (STB served Dec. 29, 2021). The Board held that such a requirement would "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." Id. at 4. While the Board did reiterate that it "will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted" in Arbitration Final Rule, this was specifically in the context of providing a 50-day window for the Class I carriers to review the final rules and make an informed decision about whether to participate. Arbitration Final Rule, EP 765, slip op. at 21.

rulemaking proceeding runs the risk that the resources it expends may be wasted, from the party's perspective, if the agency reaches an outcome the party does not support.

The remaining alleged harms identified by the Four Class I Carriers are not causally related to the pre-review commitment deadline that they seek to stay. The identified harms are those that would allegedly accrue if the arbitration program failed to go into effect because not all Class I carriers opted into the program. But the decision whether to opt in is one that belongs to the carriers themselves and not the Board. The 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. That is because, as explained above, the terms of the arbitration program are firmly established in the final rule, no party has identified any merits-based reason why those terms are likely to change on appeal or reconsideration, and any change that might ultimately occur would very likely give the carriers a new chance to decide whether or not to participate in a modified program.

Harm to Other Parties and Public Interest. The Four Class I Carriers have also failed to establish that the balance of equities and public interest favor a stay. They argue that, absent a stay, it is possible that not all Class I carriers will opt in and, as a result, the program will not become operable, thereby depriving shippers and the public of the arbitration program's benefits. But again, even if cognizable, that alleged harm is not causally attributable to the timing of the opt-in requirement: even after this denial, carriers remain free to opt in and, for the reasons stated above, the lack of a stay should not reasonably be expected to change their calculus. If the Board were to *grant* the stay, however, the Board would be guaranteeing that the arbitration program's benefits would not come to pass during the pendency of the appeals. A stay would therefore harm shippers and the public by depriving them of the arbitration program benefits that the stay petition champions. Because a stay would harm shippers and the public with no articulable benefit to the Four Class I Carriers, these factors also weigh against a stay.

Conclusion. Coalition Associations and NGFA state that they do not oppose a stay until the Board decides all petitions for reconsideration. (Coalition Associations/NGFA Reply 2.) They argue, however, that the Four Class I Carriers have not met the standard for such a stay until the resolution of all judicial appeals. (Id.) The four criteria by which the Board determines whether to grant a stay—set forth in Holiday Tours—do not distinguish between administrative and judicial appeals. Accordingly, the Board's decision here denying the petition for stay makes no such distinction, and the Four Class I Carriers' failure to justify a stay applies equally in both contexts. This decision is without prejudice to parties to file a new petition for stay within 10 days of the filing of petitions for reconsideration.[5]

It is ordered:

1. The Four Class I Carriers' petition to stay is denied.

2. This decision is effective on its date of service.

[5] For good cause, the Board waives the requirement that petitions for stay be filed within 10 days of the service date of the action. 49 C.F.R. § 1115.3(f).

3. Section 1115.3(f) is waived to the extent necessary to allow parties to file petitions for stay within 10 days of the filing of petitions for reconsideration.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz concurred with separate expressions.

BOARD MEMBER FUCHS, concurring:

I agree that, on this record, the Four Class I Carriers do not make the necessary showing for a stay, but I write separately to express my view that the Board should nonetheless move to eliminate the participation condition[1] in its entirety and allow all industry participants additional opportunities to opt into the program following the conclusion of judicial appeals and the Board's reconsideration process.[2] Arbitration Final Rule should not have included the participation condition because it deviated from the Board's arbitration policy[3] and precedent,[4] created an internal inconsistency within the rule itself,[5] and sacrificed the benefits of the program in a heavy-handed attempt at universal participation. Clearer today than ever, the ideal of universal participation became illusory when the Board decided to pair the participation condition with Final Offer Rate Review (FORR), Final Offer Rate Review, EP 755 et al. (STB served Dec. 19, 2022) (Board Member Fuchs and Board Member Schultz dissenting). The Board unintentionally set up the arbitration program for failure and created an impediment for changes to the program on reconsideration. In denying the stay, the Board should have signaled in today's decision that it will remove the participation condition and provide additional opt-in opportunities after the February 23, 2023 deadline.[6] If the Board does not reconsider Arbitration

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[1] This term refers to the condition that the new arbitration program will take effect only if all Class I carriers opt into the program by February 23, 2023. The Four Class I Carriers refer to it as the Pre-Review Opt-in Requirement, and Coalition Associations and NGFA refer to it as the Arbitration Election.

[2] See Arb. Final Rule, EP 765, slip op. at 65 (Board Member Fuchs concurring) (suggesting that Arbitration Final Rule could have included an annual opt-in period).

[3] See 49 C.F.R. § 1108.2 (explaining that the Board favors dispute resolution through the use of mediation and arbitration procedures rather than formal Board proceedings whenever possible).

[4] See Assessment of Mediation & Arb. Procs., EP 699, slip op. at 5-7 (STB served May 13, 2013); see also Arb. Final Rule, EP 765, slip op. at 64-65 (Board Member Fuchs concurring) (noting that the Board's existing arbitration program permits partial industry participation and the rule itself permits a carrier to opt out of the program).

[5] See Arb. Final Rule, EP 765, slip op. at 65 (Board Member Fuchs concurring) (explaining that in some circumstances, shippers may not have access to the new program if they use a Class I carrier that connects to a Class II or III carrier).

[6] I note that today's decision waives the applicable regulatory deadline for filing a petition for a stay, and the carriers may pursue another such petition.

Final Rule, remove the ill-advised condition, and adopt reasonable, fair changes that promote participation, it will throw away years of work on a program that it admits is better than FORR.

BOARD MEMBER SCHULTZ, concurring:

I write separately to express my disagreement with the Board's analysis in the "Harm to Other Parties and Public Interest" section above. The Board finds that the alleged harm of all Class I carriers not opting in is not "causally attributable to the timing of the opt-in requirement." I believe this finding overlooks the fact that if even one carrier believes that they will be harmed by the timing of the opt-in requirement, all stakeholders who may have been willing to participate in the program—whether carriers or shippers—will be deprived of the opportunity to do so.

The Board fails to acknowledge that this is no ordinary rulemaking, but is instead one that tied the fates of all Class I carriers together, forcing them to act as one rather than the separate companies that they are. By requiring all Class I carriers to opt-in, it is becoming ever more likely that the Board ensured that the program will simply never go into effect. Accordingly, I concur in the result, but I respectfully disagree with the Board's reasoning.