BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 765

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

Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers ("AFPM") is pleased to provide its comments to the Surface Transportation Board ("STB" or "the Board") Notice of Proposed Rulemaking ("NPRM" or the "Arbitration NRPM") entitled "Joint Petition for Rulemaking To Establish a Voluntary Arbitration Program for Small Rate Disputes."[1] While AFPM believes the concurrently considered Supplemental Notice of Proposed Rulemaking ("SNPRM" or the "STB proposal")[2] in "Final Offer Rate Review" ("FORR") provides more promise in providing additional viable options for rail shippers to dispute potential unfair small rate cases, AFPM strongly believes that the Arbitration PRM should be adopted in addition to FORR, and not as an alternative to FORR as the railroads suggest.

AFPM supports the STB's work on this issue to date, including the formation of a Rate Reform Task Force ("RRTF") in January 2018 and the April 2019 RRTF Report which lays out various recommendations to improve the rate dispute process.[3] The RRTF report suggested the STB adopt a final offer decision making process that "would draw features from the final offer arbitration ("FOA") process used in Canada but would not involve an arbitrator and would culminate in a decision by the Board." AFPM supported STB's Notice of Proposed Rulemaking ("FORR NPRM") in September 2019 outlining provisions for such a program and addressing the recommendations of the RRTF report.[4] AFPM provided extensive comments supporting that NPRM and urged the Board to expeditiously move to implement FORR to address issues in the rate dispute process.

The Board deferred final action on FORR and instead issued the FORR SNPRM concurrently with this Arbitration NPRM so that "both proposals may be considered simultaneously, including the pros and cons of adopting - either with or without modification - the voluntary arbitration rule, FORR, both proposals, or taking other action." An NPRM was opened in response to a petition filed by several railroads after the comment period for the original FORR NPRM closed. AFPM opposed a Small Rate Disputes rulemaking as the petition's proposals were unworkable and it was a "thinly-veiled procedural maneuver by the railroads to delay STB's completion or water down the FORR rulemaking, an open rulemaking with far greater potential to reduce regulatory burdens and increase the accessibility of a remedy for unreasonable rail rates."[5]

---

[1] *See 86* Fed. Reg. *67588*, "Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes." Notice of Proposed Rulemaking, Docket No. EP 765 proposed November 26, 2021, https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25169.pdf

[2] *See* 87 Fed. Reg. 67622, "Final Offer Rate Review; Expanding Access to Rate Relief." Supplemental Notice of Proposed https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25168.pdf

[3] *See "*Rate Reform Task Force, Report to the Surface Transportation Board" ("RRTF Report"). Published April 25, 2019, https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf

[4] *See* 84 Fed. Reg. 48872, "Final Offer Rate Review; Expanding Access to Rate Relief." Notice of Proposed Rulemaking, Docket No. EP 755; EP665 (Sub-No. 2) proposed September 17, 2019, https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20093.pdf

[5] *See* AFPM Comments "Joint Petition for Rulemaking to Establish an Alternate Voluntary Arbitration Program for Small Rate Disputes Docket No. EP 765; EP 765 posted September 10, 2020, https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1599769364006/301053.pdf

AFPM supports STB's looking to further the intent of Congress to improve the rate dispute process, in furtherance of its important oversight role in reviewing the impact of freight rail policies on rail shippers. While we are encouraged by the STB's movement on this issue, and thank the STB for this and related proposals, AFPM strongly urges the Board to implement FORR as a rate dispute process available to rail shippers. While we provided extensive comments on the Arbitration NPRM in these comments, AFPM strongly believes that the small rate case arbitration should only be adopted in addition to FORR, and not as an alternative to FORR as the railroads suggest.

In the ICC Termination Act of 1995 ("ICCTA"), as well as subsequently in the Surface Transportation Board Reauthorization Act of 2015 ("STB Reauthorization Act"), Congress clearly designated and reaffirmed that STB should provide multiple avenues for rail shippers to dispute potential unfair rates. To this end, rail shippers should have the option to pursue a dispute through either FORR or Voluntary Arbitration, and railroads should not be able to limit a rail shipper's dispute resolution options by "opting-out" of FORR if they choose to participate in voluntary arbitration.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. We make the products that make life better, safer and more sustainable — we make progress. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. Approximately 75% of refiners and petrochemical manufacturers are only served by a single railroad (i.e., captive) and thus have been negatively impacted by excessive freight rail rates, escalating and poorly communicated demurrage and accessorial fees, and lack of competitive rail service.[6] Further, captive shippers are more frequently subject to reduced quality and level of service (e.g., missed switches, inaccurate delivery times, and a reduction in the number of days a facility is served).

AFPM members have inadequate options to challenge a rate. Under the current process, challenging a rate before the STB is prohibitively expensive, time-consuming and complex, and it is especially burdensome to rail shippers. Frustrated by the current process, rail shippers rarely bring forward cases and are often forced to modify operations to their detriment because no other viable options are present. This negatively impacts the supply chain ultimately impacting not only AFPM members, but their customers and consumers. Rail carriers have no incentive to streamline the dispute process as they benefit greatly from the current costly and complex process resulting in a lack of cases brought forward.[7]

[6] The disproportionately negative impact of being a captive rail shipper has been extensively documented in several other STB dockets and hearings on rail competition, rate cases and demurrage and accessorial fees.

[7] This has been demonstrated by the railroads with their strong opposition to FORR and their efforts to exempt themselves from the FORR process if the STB adopts the railroad sponsored small rate case arbitration proposal.

While AFPM is confident the FORR can better improve the dispute resolution process for rates and promote free and open rail and energy markets, this Arbitration NPRM should only be adopted in addition to FORR, not in place of FORR. It is essential that the STB offer more, not fewer, options to resolve rate disputes in line with Congress' charge. We look forward to working with you to address these challenges.

III. BACKGROUND

In both the ICCTA and the STB Reauthorization Act, Congress clearly described and reaffirmed that the STB should provide **multiple avenues** (emphasis added) for rail shippers to dispute potential unfair rates.[8] Congress has also expressed the need for simplified and expedited methods for determining the reasonableness of challenged rail rates. As arbitration can provide rail shippers an avenue to dispute unfair rates, the Arbitration NPRM appears to be aligned with these expressions of Congressional intent.

To provide additional avenues for rail shippers to resolve disputes, the Board established arbitration procedures at 49 CFR part 1108 in 1997.[9] Initially, under these rules, parties could agree voluntarily on a case-by-case basis to arbitrate any dispute involving the payment of money or involving rates or practices related to rail transportation or services subject to the Board's statutory jurisdiction.[10] The Board established those procedures pursuant to its authority at 49 U.S.C. § 721 (now 49 U.S.C. § 1321), which generally authorizes the Board to prescribe regulations in carrying out its statutory responsibilities.[11] Subsequently, the Board has modified and updated its procedures related to mediation and arbitration, but the revised regulations did not include rate disputes as an arbitration-program-eligible matter.[12]

The STB Reauthorization Act continued to expand the Board's arbitration responsibilities. Specifically, section 13 of the STB Reauthorization Act required the Board to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints under its jurisdiction.[13] In response, the Board adjusted its procedures at 49 CFR part 1108 to add rate disputes to the matters eligible for arbitration under its arbitration program and made other changes to conform to the statute.[14] To date, three Class I carriers have opted into the Board's arbitration program for certain disputes (though not rate disputes), but unfortunately the program has never been used. This lack of use demonstrates the need to reform of the arbitration program. Reforms to expand the type of disputes that could be arbitrated, increase the level and duration of relief offered, and to expedite the arbitration process have the potential to create a more viable arbitration process.

---

[8] Public Law 104-88, 109 Stat. 803, 810 and Public Law 114-110, 129 Stat. 2228,

[9] *See Arb. of Certain Disputes Subject to the Statutory Juris. of the STB*, 62 FR 46217 (Sept. 2, 1997), 2 S.T.B. 564 (1997).

[10] *Id.* at 565.

[11] *Id.* at 582.

[12] In 2013, the Board modified its arbitration procedures in Assessment of Mediation & Arbitration Procedures, 78 FR 29071 (May 17, 2013), EP 699 (STB served May 13, 2013) (revising and consolidating the Board's arbitration procedures). Among other things, the Board established a program under which a party could voluntarily agree in advance to arbitrate particular types of disputes with clearly defined limits of liability.

[13] *See* Public Law 114-110, section 13, 129 Stat. 2228, 2235-38.

[14] *See* Revisions to Arb. Procs. (Revisions Final Rule), 81 FR 69410 (Oct. 6, 2016), EP 730, slip op. at 1-2 (STB served Sept. 30, 2016) corrected (STB served Oct. 11, 2016).

In April 2019, the Board released its RRTF report, which included two key recommendations. First, the report urged legislation to permit mandatory arbitration of small rate disputes and second, to have the Board establish a new rate reasonableness decision-making process under which a shipper and railroad would each submit a "final offer" of what it believes a reasonable rate to be, subject to short, non-flexible deadlines, with the Board selecting one party's offer without revision.[15] This led to the opening of Docket EP 755, in September 2019, which proposed a new procedure for challenging the reasonableness of railroad rates in smaller cases based on a final offer selection procedure (FORR) that tracked closely with the RRTF's recommendations and was supported by rail shippers.

While mandatory arbitration would require legislative action, on July 31, 2020, several railroads petitioned the Board to establish a new voluntary arbitration program for small rate cases. Even though the FORR NPRM comment period had closed, this petition linked this railroad-endorsed dispute process to FORR. The petition also asked STB to exempt railroads that participated in the small rate arbitration program from FORR. AFPM, along with other rail shippers, opposed the petition and urged the Board to not delay FORR implementation. While other rail shippers supported an option to argue small rate disputes, this was in addition to, and not in place of, FORR.

On November 25, 2020, the Board instituted this Arbitration NPRM to consider the railroads' proposal to establish a new, voluntary arbitration program for small rate disputes, while also issuing this SNPRM, to concurrently consider FORR with the Arbitration NPRM. AFPM is disappointed with the delays in implementing FORR. AFPM applauds rate dispute system reform but cautions that regulations must be crafted carefully to avoid past mistakes (such as the lack of use of current arbitration program) or diluting the benefits of FORR. The arbitration procedures in the NPRM show promise by offering additional options for rate disputes, but its voluntariness is at odds with the RRTF recommendation of mandatory arbitration. More concerning is that the railroads are advocating for opting out of FORR if they choose voluntary arbitration, which undermines FORR.

IV. AFPM COMMENTS ON THE PROPOSED RULE

AFPM has provided comments for both the Arbitration NPRM and the FORR SNPRM. FORR is a more promising way of providing relief. Therefore, small rate case arbitration should not be adopted instead of FORR. AFPM does not object to it being adopted in addition to FORR. FORR's benefits are contingent on all rail shippers being able to choose it to challenge a rate. As discussed in these comments, railroads should never be exempt from participating in FORR. In their petition, railroads suggested that an incentive for their participation would be exempting them from FORR or other types of rate challenges if they agree to participate in arbitration. AFPM strongly opposes exempting railroads from FORR, as they will have no incentive to seek improvements to a voluntary arbitration program they can easily exit.

Most importantly, an "either-or" approach to small rate disputes conflicts with the ICCTA and the STB Reauthorization Act. Congress clearly described and reaffirmed that the

[15] *See* FORR NPRM.

STB should provide multiple avenues for rail shippers to dispute potential unfair rates. AFPM offers these comments to help improve the Arbitration NPRM, organized by topic area consistent with the NPRM preamble.

A. Program Participation

In the NPRM preamble, the Board notes that § 11708 requires the Board's rate case arbitration procedures to be "voluntary" but does not specify a mechanism for participation. So, while participation cannot be mandated, the Board does propose some parameters around participation, including the ability to leave the program and the duration of a commitment to participate in the program. The Board notes the importance of all Class I railroads agreeing to participate in the arbitration program for a term of five years. Accordingly, the Board is proposing to not allow at-will participation as the railroad petitioners have proposed and will only permit term participation, with the initial term due to expire five years from the effective date of the arbitration program.

For cases in which a movement involves the participation of multiple railroads, arbitration could only be used if all carriers involved in the movement have opted in (which the Class I carriers will have already done) or consented to participate for a particular dispute (in the case of Class II or III carriers).

While AFPM previously opposed that arbitration was voluntary, we now understand that Board-sanctioned arbitration must be "voluntary" under § 11708 AFPM no longer opposes the voluntary nature but hopes that all Class I railroads will see the value in it and agree to participate. AFPM supports the Board proposal of a five-year minimum commitment, provided it is paired with the option to challenge a rate through FORR. We also support the Board's decision to not allow "at-will participation." This position strengthens the original proposals, and a five-year commitment is reasonable. That said, the voluntary nature of this program and the lack of certainty beyond the initial five-year commitment only reinforces the need for FORR to be adopted in addition to this program. Rail shippers should have multiple avenues to challenge small rate cases, not a single option picked by the railroads.

B. FORR Exemption

In their petition, the railroads have proposed an arbitration program, like that at 49 CFR part 1108. Specifically, under their proposal, by agreeing to participate programmatically (i.e., opting in) as opposed to a case-by-case basis, a carrier must arbitrate eligible cases for the duration of its participation. The railroads also claim that FORR is mandatory arbitration and thus not within STB's statutory authority. The STB effectively refutes this claim in the FORR SNPRM. Despite AFPM and other rail shippers' objections, in this NPRM, the Board proposes that any carrier that opts into the voluntary, small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.

The railroads' petition included several demands dictating their participation in the voluntary arbitration program, such as requesting exemption from the FORR program. The exemption from FORR is a non-starter and has the potential to disrupt the considerable progress

the STB and its RRTF has made in developing an effective small rate dispute process that is viable. Under no circumstances would AFPM support such an exemption. If railroads are exempt from FORR, they will have no incentive to seek improvements to the arbitration program to ensure it is effective, and FORR will be effectively eliminated. Specifically, they have even less reason to support the program if their commitment is only five-years.

An either-or result will add unnecessary complexity that could disadvantage certain shippers if one program proves to be superior or not viable. In the past, rate dispute mechanisms have gone unused due to their complexity. If a rail shipper is captive to one railroad (which a majority of rail shippers are), that railroad could strategically opt to use the more burdensome program to discourage challenges. Put simply, small rate case arbitration must be in addition to FORR and not an alternative to it—Congress intended to provide multiple avenues for rail shippers to dispute potential unfair rates.

C. Withdrawal Rights

In their petition for rulemaking, the railroads proposed that a rail carrier participating in the proposed arbitration program should be permitted to withdraw before the end of their five-year commitment if: (1) the Board adopts the FORR process but does not exempt carriers participating in arbitration from that process; (2) there is a change in the law regarding rate disputes or the arbitration program; or (3) the number of arbitrations exceeds a designated limit.

Despite shippers' opposition, the Board proposes that should FORR be adopted, any carrier that opts into the voluntary small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.[16] AFPM strongly opposes this and has detailed that opposition in Section B above and throughout this document.

The Board proposed allowing any party to withdraw from the program "due to a material change in the law." The Board notes that it would be reasonable for a carrier or shipper to withdraw from the proposed program, including any pending arbitration disputes, should the Board materially change the rules of that program or one of its methodologies, which could inform the arbitrators' decision. This withdrawal right would not apply to the adoption of a FORR process. AFPM supports allowing parties to withdraw due to a material change of law. But AFPM urges the Board to clarify what would constitute a material change. Specifically, the Board should identify what open rulemaking dockets may be considered a material change. AFPM also supports allowing a shipper to challenge a railroad's reason for withdrawal, as views of what is a material change in the law are uncertain.

Further, the Board is proposing to limit the number of arbitrations that a carrier can be subject to during a rolling 12-month period. Specifically, arbitrations that would exceed a 25-cases/12-month limit would be postponed until such time as they would not exceed the 25-case/12-month limit. AFPM supports a case limit as an alternative to granting railroads withdrawal rights based on case volume.[17] Currently, there is no data to determine if the 25-

[16] For the reasons stated above, AFPM strongly opposes exempting railroads from FORR.
[17] AFPM discusses case volume in greater detail in Section IV.D.

cases/12-month limit is reasonable. As such, AFPM does not oppose this specific limit, but suggests that the Board monitor closely case volumes and adjust this level in the future.

The Board correctly proposes that withdrawal rights would not apply to the adoption of a FORR process. While the Board has long favored resolving disputes using alternative dispute resolution whenever possible and notes that the RRTF found that arbitration would be an important means of providing shippers with access to potential rate relief, particularly in small cases, it also should be noted that the RRTF advocated for mandatory arbitration, which this rule is not proposing. For this and other reasons detailed in this document FORR should be an option in addition to voluntary arbitration.

D. One-Case Limit

The Railroads' petition proposed that a shipper should not be permitted to bring more than one arbitration at a time against a participating railroad. They argue that this limitation is needed to prevent shippers from avoiding the relief cap by splitting or "disaggregating" a case into multiple cases that could be brought as a single rate challenge. In this NPRM, the Board proposed a one-case limit as part of the proposed arbitration program.

AFPM opposes the one-case limit and agrees with other rail shippers who noted that the one-case limitation is one of several reasons why proceeding with FORR is preferable. Further, this one-case limit would be yet another reason to not exempt railroads who participate in the voluntary program from FORR. This limitation would require shippers to aggregate separate claims, yet the rate cap would apply regardless of whether a shipper is challenging a single rate or multiple rates, whereas the proposed FORR process includes no such limitations. Shippers should be able to bring multiple concurrent arbitrations so long as the lines at issue do not share facilities.

The Board correctly notes that the one-case per-carrier limit would affect the relief available to shippers (at any given time) that want to bring multiple cases against the same carrier simultaneously. Rail shippers should not be punished by this process and unfairly limited by the number of rates they may challenge. A case limitation does not change the fact that a rail shipper may face multiple unfair rates.

The Board notes those shippers that want to bring multiple cases for rates charged by the same carrier have the Board's formal rate reasonableness procedures available to them, including those designed for smaller disputes. This logic is also counter to the Board's proposal to exempt railroads from FORR as it would limit the number of "expedited" review pathways available to a shipper and force rail shippers to choose one of the existing mechanisms that have proven unworkable. As noted extensively by rail shippers in several related dockets over the past years, the formal rate reasonableness procedures the board is suggestion as an alternative are not a viable option, particularly for small cases.

If the Board institutes a case limit and suggests that other cases could be brought forward by other dispute resolution means, the Board should allow FORR to be one of those options and not exempt railroads from that process. The one-case limit per carrier and 25-case/12-month limit per carrier proposed in this NPRM is not included, nor should they be, in the FORR

SNPRM. Railroads, by being exempt from FORR, have successfully limited the number of small rate cases that rail shippers can bring against them using the streamlined processes.

E. Pre-Arbitration Procedures and Timelines

The Board proposes adopting the railroads' proposal to require shippers to provide a written notice of shippers' intent to arbitrate small rate disputes to the participating carrier, which must include information sufficient to indicate the dispute's eligibility for arbitration. The Board proposes that the shipper also submit a copy of the Initial Notice to The Office of Public Assistance, Governmental Affairs, and Compliance ("OPAGAC"). AFPM does not oppose this notification and believes the OPAGAC would be the appropriate entity to notify.

While the railroads propose requiring pre-arbitration mediation after submitting the Initial Notice—conducted outside of any Board process and directed by a party-designated mediator—cases that reach the level of arbitration have often already exhausted other methods of resolution, such as mediation. In the NPRM, the Board proposes allowing, but not requiring, parties to engage in pre-arbitration mediation if they mutually agree. The Board proposes a default 30-day mediation period as it believes this would provide sufficient time for the parties to mediate while also ensuring that the overall arbitration process progresses. If one or both parties decide not to mediate, they will proceed directly to arbitration.

Railroads propose that, if mediation is unsuccessful, the parties submit to OPAGAC a joint notice of their intent to arbitrate. In response, the Board proposes that the parties file a joint notice to arbitrate (referred to herein as the Joint Notice), which would include the basis for the Board's jurisdiction over the dispute and the basis for the parties' eligibility for small rate case arbitration.

AFPM supports this proposal. This will give rail shippers and carriers the option to pursue mediation that may facilitate a timely resolution, while also allowing them to avoid unnecessary delays for disputes that clearly are not likely resolved via mediation.

F. Arbitration Panel Selection and Commencement

In their petition, the railroads propose that arbitration under their program be conducted by a panel of three arbitrators, the selection of which would not be limited to the arbitration roster established at 49 CFR § 1108.6(b). In this NPRM, the Board agrees that permitting parties to select arbitrators who are not on the Board's arbitration roster may better incentivize parties to participate in the small rate case arbitration program. The Board invites comment on whether the 49 CFR § 1108.6(b) qualifications (or others) should be required for arbitrators under the proposed program, particularly for the lead arbitrator due to their responsibilities concerning discovery, evidence, and confidentiality.

AFPM would support non-roster arbitrators if each party has the option to pick an arbitrator. While 49 CFR § 1108.6 qualifications need not be required for all arbiters, the lead arbiter should meet those qualifications because they lead the proceeding. Section 1108.6 qualifications would also aid them in making market dominance determinations as the NPRM proposes.

The Board proposes adopting the railroads' proposal that each party would select one arbitrator, and the two party-selected arbitrators would then select the third arbitrator from a list compiled jointly by the parties. Likewise, the Board proposes adopting the petition's proposal that each party may object to the other's selected arbitrator "for cause," including, among other things, a conflict of interest or actual or perceived bias toward the objecting party. The Board additionally proposes language that specifically ties for-cause objections to the independence requirements of § 11708(f)(2) and that any for-cause objections be adjudicated by an Administrative Law Judge ("ALJ") rather than the Chairman. AFPM supports this operating structure, as it provides both parties an opportunity to ensure a fair and impartial panel as well as an opportunity to voice valid concerns regarding impartiality. Further, AFPM supports giving an ALJ the responsibility of ruling on objections, and not the Chairman.

The statute is very clear on costs of arbitrators and timelines to commence arbitration. Under § 11708(f)(4), "[t]he parties shall share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs." The Board acknowledges that 49 U.S.C. § 11708(e)(1) states that "[a]n arbitrator or panel of arbitrators shall be selected not later than 14 days after the date of the Board's decision to initiate arbitration." The Board will propose that parties pay the cost for their own arbitrator, consistent with the requirements of 49 U.S.C. § 11708(f)(4) and a 14-day timeframe, which may be extended. AFPM supports this, as it is consistent with the statute.

Lastly, the Board proposes a requirement that the parties, with the help of the arbitration panel, create a written arbitration agreement. The Board has modeled this provision on the regulation from the existing arbitration process. *See* 49 CFR § 1108.5(g). AFPM supports this as well.

G. Record-Building Procedures

In this NPRM, the Board proposes a procedural schedule, consistent with § 11708, beginning with a 90-day evidentiary phase comprised of 45 days for discovery and an additional 45 days for the submission of pleadings or evidence. Although the arbitration panel may extend the "discovery sub-phase" upon request, the Board proposes that this would not automatically extend the entire evidentiary phase beyond 90 days. In other words, if the "discovery sub-phase" were extended, the "submission sub-phase" would be correspondingly shortened. However, the parties may agree to extend the entire evidentiary phase, or a party may request an extension from the arbitration panel.

Furthermore, the discovery/evidentiary phase would run from commencement of the arbitration (i.e., two business days after the arbitration panel is appointed), not from the submission of the Joint Notice to OPAGAC. This would ensure that the days needed for arbitration panel selection are not counted as part of the discovery/evidentiary phase. Accordingly, because the Board's proposed procedural schedule may not conclude within the timeline set forth in § 11708 if the parties engage in mediation (which is voluntary and must be agreed upon by both parties), the Board will require carriers and shippers that utilize the proposed small rate case arbitration process to provide their consent to extend these deadlines in

their opt-in notice and Initial Notice, respectively. AFPM has no objection to the proposed procedural schedule.

The Board proposes limiting discovery to 20 written document requests, five interrogatories, and no depositions, as the Board believes these limits would be broad enough to allow each party to obtain the information necessary to make its case to the arbitration panel, but not so broad as to place an extensive burden on the opposing party and necessitate a prolonged discovery phase. The Board also seeks input from commentors on whether broader discovery should be allowed because the Board is proposing that shippers may use a non-streamlined presentation to establish market dominance. AFPM believes these discovery limitations seem reasonable but would note that some differentiation in discovery limitations may be necessary when using a non-streamlined versus a streamlined market dominance determination, given the added complexity of the non-streamlined method.

Waybill data provides valuable and necessary information essential in rate dispute cases. The Board proposes requiring the automatic disclosure of confidential waybill data to each party to an arbitration for the preceding four years. The Board will not, however, propose that the waybill data that is automatically disclosed include commodities at the two-digit STCC level or railroads that are not parties to the arbitration. If a party desires access to the waybill sample for data regarding other years, other commodity traffic of the defendant carrier, or other carriers, the Board will propose that the party file a request pursuant to 49 CFR § 1244.9(b)(4).

AFPM believes this level of waybill data will serve as an important baseline set of data to support the dispute resolution process. We believe one year of data, as proposed by the petitioners, is far too limited as a data set. Further, seeking additional relevant data affords needed flexibility to the process.

H. Market Dominance

The railroads propose that, under the proposed program, the arbitration panel, and not STB, would determine whether the railroad has market dominance. Petitioners contend that a "significant drawback" of the existing arbitration requirements is that they require the Board to determine market dominance prior to the arbitrator considering rate reasonableness.

Under 49 U.S.C. § 11708(c)(1)(C), "with respect to rate disputes, [the Board] may make the voluntary and binding arbitration process available only to the relevant parties if the rail carrier has market dominance (as determined under § 10707)." The Board previously adopted a provision allowing parties to obtain the market dominance determination by either requesting a Board ruling on market dominance only or conceding market dominance and thereby "forgoing the need for a determination by the Board."[18] While the Board did not analyze in detail whether § 11708 permitted an arbitrator or arbitration panel to determine market dominance, the Board did state that "the Board must determine if the rail carrier has market dominance before making the arbitration process available."

[18] Revisions Final Rule, EP 730, slip op. at 6-7; see also Revisions to Arbitration Procs., 81 FR 30229 (May 16, 2016), EP 730, slip op. at 2-3 (STB served May 12, 2016).

In this NPRM, the Board now concludes that § 11708 allows arbitrators to determine market dominance and proposes that the arbitration panel make market dominance determinations. The Board also proposes to allow complainants in a small rate case arbitration to attempt to establish market dominance using either the streamlined or non-streamlined approach.

The Board's revised position ignores that arbitrators may not have the experience needed to determine market dominance, particularly given the Board's proposed waiver of 49 CFR § 1108.6(b) arbitrator qualifications. Market dominance determinations may be too complex for an arbitrator lacking the qualifications of 49 CFR § 1108.6(b). This reinforces the need for, at a minimum, the lead arbitrator to meet such qualifications. Absent that, the STB should determine market dominance.

I. Arbitration Decision

Under the statutory provisions of § 11708(c)(3) and (d)(1), when deciding whether a rate is reasonable, an arbitration panel must: (i) consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues; and (ii) ensure that its decision is consistent with sound principles of rail regulation economics. The railroads propose that the arbitration panel follow the standards in § 11708(c)(3) and (d)(1). They also propose prohibiting the arbitration panel from "considering any type of system-wide adequacy constraint, including the revenue adequacy constraint" and relatedly that "any evidence related to the revenue adequacy of the defendant carrier" be inadmissible.

The Board agrees with Petitioners that while § 11708(c)(3) requires that the arbitration panel "consider" the Board's existing methodologies, the statute does not require that the arbitration panel follow any particular methodology. The Board will propose the same general standards for rate reasonableness as suggested in the petition, which closely follows the language of § 11708(c)(3) and (d)(1). Specifically, the Board expects the arbitration panel to be informed by the rail transportation policy at 49 U.S.C. § 10101, to consider the Long-Cannon factors[19] at 49 U.S.C. § 10701(d)(2), and to use appropriate economic principles, as would the Board in a decision in a FORR proceeding. The Board's proposed regulations do not include a general prohibition on revenue adequacy evidence or methodologies.

AFPM supports the standards proposed by the STB and believes they provided sufficient clarity regarding which economic principles will be used in arbitration. We also support the alignment of these principles with the FORR process. AFPM strongly opposes any restrictions on revenue adequacy considerations in arbitrations under the proposed small rate case program as those considerations are incredibly consequential and relevant to the deliberations that will be but before the arbitration panel. Restriction the inclusion of revenue adequacy considerations would hamstring the panel and jeopardize the validity of their rulings. AFPM is encouraged that the Board's proposed regulations do not include a general prohibition on revenue adequacy evidence or methodologies.

[19] The ICC, the predecessor to the STB, considers three factors, known as the Long-Cannon factors, to determine whether a rate exceeds a reasonable maximum level. The factors are: 1. Traffic which does not contribute to going concern value. 2. Traffic on which revenues can be increased. 3. Traffic paying an unreasonable share of revenues.

J. Relief

In this NPRM, the Board proposes a relief cap of $4 million and a relief period of two years. An award of $4 million, covering a period of two years (applied to a combination of retroactive and prospective relief), would incentivize shippers to use the proposed program while also addressing the carriers' concern that the proposed program remains limited to only smaller rate disputes. AFPM members seek a meaningful option for expedited review that is worth the time and effort needed to prepare a case.

As stated in our FORR comments, AFPM supports a $4 million relief cap for a two-year period as proposed; however, we also support a two-tier system with a second option providing a longer duration and a higher relief cap (originally 10 years and unlimited cap). Should the STB implement FORR and consider a two-tiered system, it should consider doing the same for small rate case arbitration. AFPM also supports the Board's proposal to allow for agreement to modify the relief cap.

As discussed in section IV, subsection M of these comments, the Board is also proposing a review of the proposed small rate case arbitration program after three years to ensure that the program is working as intended and proving effective. However, by keeping voluntary arbitration details confidential, as proposed in this rule[20], the Board will have a difficult time evaluating whether a second tier at a higher relief cap over a longer time would be advisable.

K. Appeals & Enforcement

In this NPRM, the Board proposes procedures and standards for appeals of the arbitration results and enforcement actions similar to those proposed by the railroads. The Board also proposes some modifications to the carriers' proposed confidentiality provisions relating to arbitration decision appeals. Section 11708(h) allows a party to appeal an arbitration decision to the Board, and the Board does not determine the federal courts' jurisdiction to review or enforce the Board's decisions. Moreover, the bases for appeal to the Board and the courts are both narrow, a fact which, when coupled with the many other benefits that small rate case arbitration could provide, outweighs this concern about appeal rights.

AFPM recognizes the statutory right to appeal, yet we also agree with other commentors that a railroad will probably always appeal if they lose a case. This would undermine the efficiency of this process. AFPM also agrees with other commentors that this provides an extra layer of appeals than that provided under FORR. Railroads would now have a two-step appeal process available to them in voluntary arbitration cases (to the Board and then court), which would extend the process. Railroads would only be able to appeal FORR decisions to an appellate court. In addition, as proposed, shippers would have to pay for arbitrator costs in voluntary arbitration cases, whereas in an STB case they would only have to pay the filing fee of $350. Given the drawbacks of small case rate arbitration, FORR should be an option in addition to small case rate arbitration and railroads should not be able to opt out of FORR.

---

[20] *See also* section IV subsections L of these comments.

L. Confidentiality

The railroads argue that the "entirety of the arbitration process" be confidential because if arbitration decisions are made public, they could influence the marketplace and "drive up the stakes for railroads with similarly situated customers and shippers that often move traffic over more than one railroad." They further contend confidential arbitration would focus the parties on the present dispute without the risk of setting precedent in other cases or affecting the market expectations of other entities in the supply chain.

The Board proposes that the arbitration process be confidential, including discovery, filings to the arbitrators, the Initial Notice and the OPAGAC confirmation letter, the Joint Notice, and confidentiality agreements concerning Waybill Sample data. The Board finds that confidentiality incentivizes the railroads to participate, and balances other aspects of the Board's proposed program designed to encourage shipper participation, such as affirming a standard that gives the arbitration panel flexibility in deciding what the rate should be and allowing arbitrators to consider revenue adequacy evidence. The Board proposes that parties file confidential summaries of each arbitration. The agency would issue a public quarterly report providing information contained in the confidential summaries, but which would not include the identity of the parties to the arbitration.

AFPM objects to keeping arbitration decisions confidential. AFPM agrees with USDA's comments that the petitioners' rationale for keeping decisions confidential is "vague, unsupported by any data, and, therefore, highly speculative (at best)."[21] Further, AFPM agrees that "[t]he fact that transparency might 'drive up the stakes' because railroads 'may have similarly situated customers' (i.e., other customers with unreasonable rates) should be a reason for transparency, not a reason for secrecy."[22] Importantly, transparency may lead to a change in ratemaking behavior that could lead to more reasonable rates and therefore less need for dispute resolution.

AFPM notes that in prior arbitration rulemakings, railroad interests opposed confidential arbitration decisions. The fact that FORR decisions would not be confidential is another reason why that approach is preferable to arbitration and should be an option in addition to small case rate disputes arbitration. This would balance shipper and railroad interests when it comes to confidentiality. By keeping voluntary arbitration details confidential, as proposed, the Board will have a difficult, if not impossible job of evaluating the program, as proposed in the next section.

M. Program Review

The Board proposes requiring a review of the proposed program in the future to ensure that the program works effectively as intended. Review would occur after a reasonable number of arbitrations have been conducted, though not later than three years after the program begins. AFPM does not oppose such a review but questions what a "reasonable number" of arbitration

[21] *See* USDA Reply 2.
[22] *Id.* at 3.

cases entails. Regarding the format of the review, AFPM suggests independent meetings with shippers and railroads would be most beneficial. AFPM also notes that the confidentiality provisions proposed in this NPRM may complicate such a review.

V. CONCLUSION

AFPM thanks the STB for its time and consideration of our comments related to a voluntary arbitration program for small rate disputes. Fair and competitive rail market are essential for the energy industry and the U.S. economy, in which STB plays an important role AFPM supports both voluntary arbitration and FORR as options for rail shippers to challenge rates. But railroads should not be able to opt out of FORR, if they choose to participate in voluntary arbitration. When considering the proposed provisions in this NPRM in totality along with the FORR SNPRM, the Board runs the risk of limiting, not expanding, the avenues available for rail shippers to dispute small rate cases. By granting exempting railroads from FORR if they participate in voluntary arbitration, the Board will effectively allow the railroads to dictate the rules of play and avoid and limit the review of rate disputes. This undermines the ICCTA and the STB Reauthorization Act.

Congress clearly described and reaffirmed that the STB is intended to provide multiple avenues for rail shippers to dispute unfair rates. The STB should continue to pursue numerous pathways that provide rail shippers timely, yet thorough, mechanisms to adjudicate what is considered a reasonable and fair rail rate. AFPM shares the STB's goal of ensuring the flow of commerce on our nation's rail system and looks forward to continued collaboration. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

Rob Benedict,
Vice President, Petrochemicals & Midstream
American Fuel & Petrochemical Manufacturers