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February 23, 2023

Via E-Filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Smaller Rate Disputes*, Docket No. EP 765

Dear Ms. Brown:

Grand Trunk Corporation, on behalf of the U.S. rail operating subsidiaries of Canadian National Railway Company, (collectively, “CN”) submits this letter in response to the Board’s decision served on December 19, 2022 in this docket which established a Small Rate Case Arbitration Program and set an opt-in deadline of February 23, 2023. There are multiple factors that influence CN’s decision-making when it comes to making a five-year commitment to the program. Due to the significant uncertainty surrounding many of those factors and the contours of the program, CN regretfully is unable to make an informed decision regarding participation at this time.

As context, CN was one of the original Class I carriers in this proceeding that supported and petitioned for a voluntary small rate case arbitration program. CN has long been a proponent of alternative dispute resolution both at the STB and in other contexts. CN is one of three carriers that has opted in to the arbitration of demurrage disputes.¹

There are, however, significant uncertainties about the final parameters of the Small Rate Case Arbitration Program. CN has filed a petition for review in the United States Court of Appeals for the Seventh Circuit.² Three other Class Is have filed petitions for reconsideration with the Board

¹ See CN Notice, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (dated July 1, 2019).

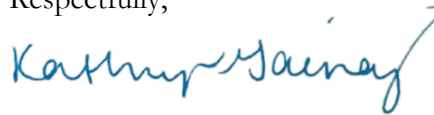
² *Grand Trunk Corp. and Illinois Central R. Co. v. STB*, No. 22-3289 (7th Cir., pet. filed Dec. 29, 2022).

raising numerous issues,³ many of which overlap with the issues CN anticipates raising on appeal (as the Board recognized in its motion to hold the appeal in abeyance (which has now been granted)).⁴ For example, the pending petitions for reconsideration detail serious concerns regarding the selection process for the lead arbitrator, the negative consequences associated with having precedential decisions on appeal, and the lawfulness of the opt-in deadline and requirement that all Class I carriers participate in order for the program to become operable. Additionally, there remains significant controversy regarding the use of system-wide revenue adequacy in general, and in particular in the context of fast-track arbitration proceedings. The petitions and reply to the petitions raise questions about the status of exempt traffic under the program. Finally, although one of the fundamental aspects of the program is an exemption from Final Offer Rate Review, that final rule has likewise been appealed and is also the subject of a petition for reconsideration.⁵

Against this multi-faceted uncertainty, carriers have been asked to decide now whether to make a five-year commitment in the Small Rate Case Arbitration Program. CN is disappointed that the Board declined to extend the opt-in deadline at this time, as the resolution of these issues will inform CN's decision on whether to opt in to the Program. CN hopes that the Board will grant a future opportunity for opt in after the resolution of reconsideration petitions and appeal, consistent with the original proposal in the Notice of Proposed Rulemaking to permit opt ins at any time. CN continues to support the use of alternative dispute resolution procedures, including arbitration, and will evaluate carefully whatever program is ultimately established after reconsideration and judicial review.

Please do not hesitate to contact me if you have any questions.

Respectfully,



Kathryn J. Gainey

cc: Service List

³ CSX Transportation, Inc.'s Petition for Reconsideration, Docket No. EP 765 (filed Jan. 24, 2023); Petition for Reconsideration of Union Pacific Railroad Company and Norfolk Southern Railway Company, Docket No. EP 765 (filed Jan. 24, 2023).

⁴ Surface Transportation Board's Unopposed Motion to Hold the Case in Abeyance, at 2, *Grand Trunk Corp. v. STB*, No. 22-3289 (7th Cir.) (filed Feb. 21, 2023); Order Granting Unopposed Motion to Hold Case in Abeyance, No. 22-3289 (7th Cir. Feb. 23, 2023).

⁵ *Union Pacific R. Co. v. STB*, No., 22-3648 (8th Cir., pet. filed Dec. 27, 2022); *Association of Amer. Railroads v. STB*, No. 23-1014 (D.C. Cir., pet. filed Jan. 18, 2023); Petition for Reconsideration of American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, The Chlorine Institute, and Corn Refiners Association, Docket No. EP 755 (filed Jan. 24, 2023).