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500 Water Street
Jacksonville, FL 32202
Phone: (904) 366-4245
E-Mail: Nathan_Goldman@csx.com

NATHAN D. GOLDMAN
Executive Vice President &
Chief Legal Officer

February 23, 2023

By E-Filing

Martin J. Oberman, Chairman
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Board Member Robert Primus
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Karen Hedlund, Vice Chairman
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Board Member Michelle Schultz
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Board Member Patrick Fuchs
Surface Transportation Board
395 E Street SW
Washington, DC 20423

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

Dear Chairman Oberman, Vice Chairman Hedlund, Board Members Fuchs, Primus, and Schultz:

I am writing about the proposed new arbitration program for small rate disputes adopted by the Board on December 19, 2022 (“Arbitration Rule”). The Board has asked that all Class I carriers notify the Board whether they will be opting in to the program by February 23, 2023.

CSXT believes the arbitration program has the potential to form the backbone of a more accessible regime of railroad rate regulation for smaller rate disputes. We are concerned, however, about certain aspects of the Arbitration Rule as proposed by the Board. Those shortcomings have led CSXT to conclude reluctantly that it is unable to participate in the program as currently structured. CSXT accordingly is not opting in to the arbitration program at this time. CSXT hopes that revisions to the program – in particular to address concerns raised in the pending reconsideration petitions – will improve the program sufficiently to allow CSXT to join the program in the future.

CSXT supports voluntary alternative dispute resolution procedures. Indeed, CSXT is one of three railroads that has opted in to the Board's other arbitration program for demurrage matters.¹ The Arbitration Rule itself had its origin in the efforts to establish a new arbitration program initiated by CSXT and four other Class I carriers in July 2020. We engaged in productive discussions with many stakeholders and ultimately petitioned the Board to adopt a new arbitration program tailored for small rate disputes. In the joint petition, we advised that we would agree to have such disputes resolved through binding arbitration if the Board were to adopt the program that was proposed. Throughout the proceeding, CSXT and the other carriers made significant concessions in support of a workable small rate case arbitration program that would be attractive and fair to all parties involved.

The program adopted by the Board, however, makes a number of substantial changes to our proposal that, taken together, render it unacceptable as a means of ensuring that the Board's authority to regulate rates would continue to be administered in a manner consistent with Congress's statutory framework.

Most significantly, the Arbitration Rule would allow arbitrators to consider claims that a railroad's rates to a customer are too high based only or primarily on a determination that the railroad was too profitable as an entity—regardless of whether the railroad's rates to that customer are fair. Concepts of revenue adequacy and other forms of profit regulation are a bad idea legally, economically, and as a matter of public policy. It is an especially bad idea for revenue adequacy claims to be subject to individual arbitrations, where the quick timeline would make it impossible for arbitrators who don't have the benefit of the STB's expertise and resources to consider the economic and policy issues at stake. An issue this important should be carefully considered by the Board on a full record, not decided for the first time in this manner.

~~At CSXT, our goal is to deliver a superior service product for our customers. We work hard to ensure that we are charging fair rates that reflect the value of the service we provide. Our rates are constantly under competitive pressure from trucks, other railroads, water carriers, geographic and product competition, and other market forces. If a customer believes that its rate for regulated traffic is nonetheless too high, CSXT recognizes that such a customer has a legitimate right to come to the Board to seek relief.~~

But profit regulation is fundamentally and always a bad idea for every stakeholder. There is no shipper that would accept it for their own business. That's because it disrupts the incentive for a company to relentlessly improve its service product to customers. If our railroad is able to develop a better service product in order to win more market share, that is a good thing. If we are able to find a way to operate more efficiently while doing right by our customers and our employees, that is a good thing. But if regulation prevents railroads from retaining the earnings achieved from new business innovations or service improvements, then incentives to innovate and improve service will lessen substantially, and that would not be good for anyone.

¹ See CSXT Notice of Intent to Participate, *Assessment of Mediation & Arbitration Procedures*, Docket No. EP 699 (filed June 28, 2019).

The Board has been presented with letters from members of Congress and a mountain of evidence warning that regulating individual rates based on revenue adequacy is not what Congress intended, is bad economics, and is bad for the health of the rail network. Multiple economists have testified that there is no economically valid basis for determining the reasonableness of an individual rate on the basis of system-wide revenue levels. The Board also has been given evidence that its method of calculating revenue adequacy has multiple errors and does not match Congress's instruction that railroads should be permitted to earn a reasonable and economic profit—just like any other business.

Although the inclusion of revenue adequacy is the most concerning aspect of the proposed arbitration program, we also have serious concerns about certain other aspects of the Arbitration Rule, including the public and precedential nature of decisions on appeal, requirements surrounding carrier opt in, the process for selecting the lead arbitrator, and the scope of the rule with respect to regulated traffic.

We hope that the Board reconsiders the path that it has taken and re-establishes the arbitration program in a way that makes it possible for our company to join the program.

Sincerely,

A handwritten signature in blue ink that reads "Nathan Goldman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nathan Goldman