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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 filed a second petition to stay the "opt-in" 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 program. The Board denies the request for a stay.

Decided: February 14, 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 Arb. Program for Small Rate Disputes (Arbitration Final Rule), EP 765 (STB served Dec. 19, 2022). The Board's decision was published in the Federal Register on January 4, 2023 (88 Fed. Reg. 700). Under the Board's decision, the final rule became effective on February 3, 2023.

The final rule establishes that unless all Class I carriers voluntarily agree to 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 also establishes a 20-day window from the effective date of the decision (i.e., 50 days after its publication in the Federal Register) for the Class I carriers to submit an opt-in notice to the Board informing the agency 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. If all Class I carriers opt in, they will be committed to participating in the arbitration program for a term of five years, except that any carrier may choose to withdraw if a material change is made to the program or the Board's existing rate reasonableness methodologies. Id. at 72.

On December 29, 2022, four Class I carriers—CSX Transportation, Inc. (CSX), Norfolk Southern Railway Company (NS), Union Pacific Railroad Company (UP), and the U.S. operating subsidiaries of Canadian National Railway Company (the Four Class I Carriers)—filed a petition for stay. They requested that the Board stay what they call the "Pre-Review Opt-in Requirement"—the requirement that all of the Class I carriers decide whether to commit to the

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[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).

program within 20 days after the final rule becomes effective. See Arbitration Final Rule, EP 765, App. A (49 C.F.R. § 1108.22(b)(3)).

By decision served on January 24, 2023, the Board found that the Four Class I Carriers had failed to satisfy the necessary criteria for a stay and denied the petition. Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disputes (January Stay Denial), EP 765 (STB served Jan. 24, 2023). However, the decision was without prejudice to parties filing a new petition for stay within 10 days of the filing of petitions for reconsideration. Id. at 5.

On January 24, 2023, petitions for reconsideration of Arbitration Final Rule were filed by CSX and jointly by UP and NS.[2] In its petition for reconsideration, CSX challenges the requirement in Arbitration Final Rule that railroads opting into the new arbitration program consent to arbitrate claims based on a systemwide revenue adequacy constraint. (CSX Pet. for Recon. 1.) In their petition for reconsideration, UP and NS challenge five aspects of Arbitration Final Rule: (1) the fact that Board decisions on appeals from arbitrator determinations will be precedential; (2) the requirement that Class I railroads decide whether to sign up for the program within a 20-day window after the effective date of the rule (i.e., the Pre-Review Opt-in Requirement); (3) the requirement that all Class I carriers opt in for the program to become operable; (4) the lead arbitrator selection process; and (5) the reference to "regulated commodities" instead of "regulated traffic" in 49 C.F.R. § 1108.24(a)(1). (See UP/NS Pet. for Recon. iii.)

On February 3, 2023, the Four Class I Carriers filed a new petition for stay under 49 U.S.C. § 1321(b)(4). They appear to seek a stay based on the argument that the opt-in requirement is unlawful. (Pet. for Stay 1, Feb. 3, 2023; UP/NS Pet. for Recon. 6-12.) The carriers argue that the four criteria for issuance of a stay are satisfied. (Id. at 5.) In particular, they assert that "[f]orcing a railroad to make an uninformed choice [whether to opt into the program] before the parameters of the program have been settled creates irreparable harm," either because (1) the carriers, should any of them not opt in, will not have an opportunity to opt *into* the program in the event they succeed in having it changed, or because (2) the carriers, should all of them opt in, will not have an opportunity to opt *out of* the program in the event their reconsideration petitions and appeal are denied. (See id. at 3, 11.)

On February 9, 2023, replies opposing the second petition for stay were filed by the National Grain and Feed Association and jointly by the American Chemistry Council, Corn Refiners Association, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League.

[2] CSX states in its petition for reconsideration that it fully joins the petition for reconsideration filed by UP and NS, though it is not a party to that petition. (CSX Pet. for Recon. 1 n.3.)

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 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).

The Board will deny the petition for stay. The Four Class I Carriers have failed to show they would suffer irreparable harm if a stay is not granted. See 49 U.S.C. § 1321(b)(4); Ind. Harbor Belt R.R., FD 36099 et al., slip op. at 5 (denying petition for a stay due to petitioner's failure to show irreparable harm).

Irreparable harm consists only of harm that the Board would be unable to remedy in the absence of a stay if the petitioners were ultimately to prevail on the merits of their challenge. By definition, harm that the Board can later remedy is not irreparable. See, e.g., Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 5 (STB served May 4, 2012) ("[W]hen adequate compensatory or other corrective relief will be available at a later date, it weighs heavily against a claim of irreparable harm."); Federal Practice & Procedure § 2948.1 (3d ed. updated Apr. 2022) ("Only when the threatened harm would impair the court's [or the agency's] ability to grant an effective remedy is there really a need for preliminary relief.").

Here, the Four Class I Carriers concede that the first of their two alleged harms is reparable. Their concern is that, if the opt-in deadline is not stayed and one or more Class I carriers chooses not to participate in the program, the carriers will not have another opportunity to enter into the program, even if the Board grants (or partially grants) their petitions for reconsideration. (See Pet. for Stay 2-3, 10-12, Feb. 3, 2023.) But the carriers acknowledge that "the Board or a court has the ability to reverse and correct" what the carriers argue is unlawful agency action. (Id.) They specifically concede that "the Board could decide on reconsideration to remove the Opt-In Deadline, which would allow carriers to join the program in the future." (Id. at 12; see also id. at 2.) Accordingly, absent a stay, if the carriers prevail on the merits of their challenge to the opt-in deadline, carriers that did not opt in by the deadline in the first instance will be able to opt in at that point. Any alleged harm related to the initial deadline would be remedied by that action, which the carriers concede is squarely within the Board's power. In other words, if the Board grants reconsideration and if the Board then decides to alter the opt-in requirement (or if, after judicial vacatur, the Board decides to adopt a version of the final rule that does not include the opt-in requirement as it currently exists), the carriers would have a renewed chance to opt into the program. Indeed, changing the opt-in requirement under

those circumstances would be a pointless exercise if the window for opting in were not extended simultaneously.

Alternatively, the Four Class I Carriers allege irreparable harm because "[a] railroad that chooses to opt into the program in hopes that it will be improved after reconsideration would be irreparably harmed if reconsideration is denied—for the railroad would thus be locked for five years into a program that it might not otherwise have joined." (Pet. for Stay 3, Feb. 3, 2023.) But an irreparable harm argument based on the premise that the requested relief is ultimately denied cannot succeed. "[I]f reconsideration is denied"—that is, if the carriers lose on the merits of their challenge to the opt-in provision (either at the Board or upon judicial review)—then the carriers will not be entitled to any remedy at all, let alone the "extraordinary remedy" of preliminary interim relief. The Board will not grant a stay to guard against a hypothetical scenario in which the carriers lose on their challenge to the opt-in requirement, which is the only issue the carriers have included in their stay petition as a basis for granting a stay.[3]

The carriers have therefore failed to demonstrate irreparable harm, and the Board will deny their petition for stay.

It is ordered:

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

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

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

BOARD MEMBER FUCHS, concurring:

While I agree with the result of today's decision, I reiterate my view that the Board should reconsider Arbitration Final Rule's opt-in requirement in its entirety.[1] The petitions for reconsideration filed in this docket raise additional issues that the Board ought to carefully evaluate to ensure a fair, workable program with broad participation.

[3] To the extent the carriers contend that they will suffer irreparable harm if they opt into the arbitration program, *prevail* on their challenge to the opt-in requirement, and still want to withdraw—a prospect that their stay request does not explicitly raise—that harm, if it is one, would also be reparable. As the Board previously explained, any change to the opt-in procedures would "very likely" be considered material and permit withdrawal under Arbitration Final Rule as it currently exists. January Stay Denial, EP 765, slip op. at 4. And even if this or other changes were not deemed "material," the Board also has the power on reconsideration to change the rule regardless to explicitly permit withdrawal.

[1] In my previous expressions in this docket, I have referred to this aspect of the rule as the "participation condition," which I view as including both the universality and timing components. I use "opt-in requirement" here for consistency with the Board's decision.

BOARD MEMBER SCHULTZ, concurring:

I concur in the result, but I am writing separately to express my continued disagreement with both the Board's decision to require all carriers to participate and the Board's decision to tie the arbitration and final offer rate review rulemakings together, both of which have needlessly increased the complexity of this proceeding. See Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, EP 765, slip op. at 8 (STB served Jan. 24, 2023) (Board Member Schultz, concurring); Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, EP 765, slip op. at 66-67 (STB served Dec. 19, 2022) (Board Member Schultz, commenting). Absent the all-carrier participation requirement, upon the Board denying the petition for stay, each of the carriers could decide for itself whether to participate in the arbitration program. Instead, whether the opt-in requirement is stayed or not, both shippers and carriers will almost certainly need to wait until the petitions for reconsideration run their course to learn whether the Board will offer another opportunity for the carriers to opt into the program.