Transportation Update

January 2023

STB Adopts New Processes to Make Rail Rate Relief More Accessible to Shippers

On December 19, 2022, the Surface Transportation Board (STB) adopted two new processes for shippers to challenge the reasonableness of rail rates: Final Offer Rate Review (FORR) and the Small Rate Case Arbitration Program (Arbitration Program). The STB designed these processes to increase shipper access to rate review for small cases, recognizing that its existing rate-dispute processes pose cost, complexity, and duration challenges that make them unattractive for smaller disputes. Shippers evaluating smaller rail-rate challenges may find that FORR and the Arbitration Program are cost-effective options for addressing unreasonable rail rates.

The Arbitration Program and FORR incorporate short procedural schedules and other procedural limits to reduce litigation costs and time. Rate relief available under these processes is limited to approximately $4 million over two years. As with all rate relief processes, the Arbitration Program and FORR are available to challenge rates only where the carrier has market dominance (i.e., there are no economically effective transportation alternatives).

The Arbitration Program will be available for small rate disputes only if all Class I carriers opt into it for five years by February 23. Because the Arbitration Program exempts carriers from FORR, FORR will only be available if any carrier does not opt into the Arbitration Program or withdraws from the Arbitration Program after opting in.

Final Offer Rate Review

Under FORR, the complainant and the railroad each submit an analysis of whether the challenged rate is reasonable and a “final offer” identifying a reasonable rate. If the STB decides that the challenged rate is unreasonable, it will determine the reasonable rate by selecting one of the final offers.

The process takes 164 days from complaint until STB decision; 149 days if the shipper elects to use the streamlined market-dominance approach. A shipper must file a notice of intent at least 25 days before filing its complaint, and there is a mandatory 20-day mediation period after the shipper files its notice of intent and the STB appoints a mediator.

FORR becomes effective March 6.

Arbitration Program

Under the Arbitration Program, a panel of three arbitrators determines market dominance and rate reasonableness. Two of the arbitrators are party-appointed and the third is selected by the party-appointed arbitrators or, if they cannot agree, the STB’s Office of Public Assistance, Governmental Affairs, and Compliance. Both the arbitrators and parties have broad flexibility regarding the rate-reasonableness methodology they use, and the arbitrators are not limited to choosing a single party’s evidence as they are when using FORR.

Like FORR, the Arbitration Program involves an expeditious procedural schedule. The time from the shipper's notice of intent to arbitrate until the arbitration decision would be approximately 175 days if the parties elect to also pursue mediation; approximately 140 days without mediation.

Unlike FORR, the Arbitration Program is confidential and non-precedential. Shippers thus cannot rely on past arbitration decisions as binding authority to guide arbitrators in future cases. Also, arbitration decisions are appealable to the STB, and its decisions are appealable to a court. In contrast, FORR decisions are appealable directly to a court, although the parties may also ask the STB to reconsider its decision. The standard of review on appeal is less deferential than for FORR. Further, a carrier is not required to participate in more than 25 arbitration cases simultaneously. In addition, while the Arbitration Program and FORR have the same relief cap, parties to an arbitration can agree to increase the relief cap to $25 million over a period up to five years.

The final rule adopting the Arbitration Program becomes effective on February 3. It will not become operative unless all Class I carriers opt in by February 23. If all Class I carriers opt into the Arbitration Program, it will last for a term of five years. At the end of the term, Class I carriers may renew the Arbitration Program by all opting in for another five-year term. The opt-in date may change, however, since carriers have asked the STB to postpone it while requests for reconsideration and appeals of the Arbitration Program are pending.

FOR MORE INFORMATION

For more information, please contact:

Karyn A. Booth
202.263.4108
Karyn.Booth@ThompsonHine.com

Sandra L. Brown
202.263.4101
Sandra.Brown@ThompsonHine.com

Jeff Moreno
202.263.4107
Jeff.Moreno@ThompsonHine.com

Jason D. Tutrone
202.263.4143
Jason.Tutrone@ThompsonHine.com

David E. Benz*
202.263.4116
David.Benz@ThompsonHine.com

Kerem Bilge
202.263.4104
Kerem.Bilge@ThompsonHine.com

Richard M. Couch
202.973.2736
Richard.Couch@ThompsonHine.com

**David is not admitted to practice in Illinois; he is admitted to practice only in the District of Columbia and Virginia.*