THOMPSON HINE

Transportation Update

February 2023

STB Denies Stay of Arbitration Program Opt-In Requirement; Permits Filing of New Petitions for Stay

On January 24 the Surface Transportation Board (STB) denied a petition to stay an opt-in requirement of the Small Rate Case Arbitration Program (Arbitration Program), a new program intended to increase rail shippers' access to rail transportation rate challenges.

Shortly after the STB issued a rule adopting the Arbitration Program, four Class I carriers (CSX Transportation, Inc., Norfolk Southern Railway Company, Union Pacific Railroad Company, and the U.S. operating subsidiaries of Canadian National Railway Company) filed a petition for stay. The STB has required that all Class I carriers elect to opt in to the Arbitration Program by February 23 as a prerequisite to the program becoming effective. The carriers requested that the STB postpone that deadline until any judicial appeals or petitions for reconsideration regarding the merits of the rule are resolved.

When deciding whether to issue a stay, the STB considers four factors:

- Whether the party seeking a stay is likely to prevail on the merits
- Whether the party seeking a stay will be irreparably harmed in the absence of a stay
- Whether issuing a stay would substantially harm other parties
- Whether issuing a stay is in the public interest

In this case, the STB concluded that the carriers failed to show that a stay is warranted. First, they did not identify any merits-based arguments demonstrating a likelihood of success on the merits that would result in vacating the Arbitration Program. Second, the carriers failed to establish irreparable harm because they claim that electing to opt in to the Arbitration Program would require them to forfeit their rights to appeal the rule, but they did not explain why. Also, the carriers expressed concerns about the time, energy, and resources lost in developing the Arbitration Program if any railroad opts out, but the STB found this does not constitute irreparable harm because loss of monetary expenses incurred during a rulemaking proceeding, court proceeding, or arbitration is never an irreparable harm and any alleged lost time or cost savings put toward those efforts is speculative. Further, the STB said there is no causal link between the timing of the opt-in election and the harm realized if not all Class I carriers opt in to the Arbitration Program. Finally, the STB concluded that there would be no harm to other parties or the public interest absent a stay. Rather, a stay would deprive shippers and the public of the Arbitration Program's intended benefits.

Board members Fuchs and Schultz concurred with the conclusion that a stay should not be granted but disagreed with the STB's reasoning. Fuchs expressed his view that the STB should eliminate the participation condition (requiring that all Class I carriers choose whether to participate in the Arbitration Program by February 23) and allow later opportunities to participate in the Arbitration Program. Schultz disagreed with the STB's conclusions on the third and fourth factors it considered in reaching its decision, believing that the deadline to opt in and the opt-in requirement itself were causally linked.

Also on January 24, CSX, Union Pacific, and Norfolk Southern filed petitions to reconsider certain aspects of the Arbitration Program. The STB will allow these Class I carriers to file a new petition for stay by February 3 based upon these petitions for reconsideration.

Currently, the STB's denial of the stay does not change the opt-in requirement; Class I carriers must still choose whether to opt in to the Arbitration Program by February 23 unless the STB grants a new petition for stay.

FOR MORE INFORMATION

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