SURFACE TRANSPORTATION BOARD

49 CFR Parts 1011, 1108, 1115, and 1244

[Docket No. EP 765]

Joint Petition for Rulemaking To Establish a Voluntary Arbitration Program for Small Rate Disputes

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) adopts a final rule modifying its regulations to establish a voluntary arbitration program for small rate disputes.

DATES: This rule is effective February 3, 2023.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245–0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board issued a notice of proposed rulemaking on November 15, 2021, published in the **Federal Register** on November 26, 2021 (86 FR 67588), to modify its regulations to establish a voluntary arbitration program for small rate disputes. *Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes* (*Arbitration NPRM*), EP 765 (STB served Nov. 15, 2021). Under this new arbitration program, Class I rail carriers would voluntarily agree to arbitrate small rate disputes up to $4 million over a two-year relief period. As proposed, the Class I carriers that agreed to participate in this new arbitration program would do so for a five-year term, subject only to a right to withdraw from the program if there is a material change in the law, while complainants would participate on a case-by-case basis.[1] The Board's proposed voluntary arbitration program also included several other features intended to incentivize railroad and shipper participation, and to ensure that the program is fair and balanced. The new arbitration process would function alongside the existing arbitration program at 49 CFR part 1108.

In a related proceeding, the Board issued a supplemental notice of proposed rulemaking proposing a new rate case procedure for smaller cases called Final Offer Rate Review (FORR), *Final Offer Rate Rev.* (*FORR SNPRM*), EP 755 (STB served Nov. 15, 2021), which was also published in the **Federal Register** on November 26, 2021 (86 FR 67622). As part of *Arbitration NPRM,* the Board proposed that carriers that participate in the new small rate case arbitration program would be exempt from rate challenges under the process being proposed in *FORR SNPRM.* The Board issued the decisions concurrently so that it could consider the pros and cons of such an exemption and allow stakeholders to fully compare the arbitration and FORR proposals.

For the reasons discussed below, the Board adopts a final rule establishing a new arbitration program for resolution of small rate disputes. Under certain circumstances, participating carriers will be exempted from challenges under the FORR process, which are also being adopted today in a separate decision.

Background

The Board has had a voluntary arbitration process available to parties to resolve disputes since 1997. *See Arb. of Certain Disputes Subject to the Statutory Jurisdiction of the STB,* 2 S.T.B. 564 (1997). Originally, parties wishing to use this process needed to agree to arbitrate disputes on a case-by-case basis. *See id.* However, in 2013, the Board modified the arbitration procedures in *Assessment of Mediation & Arbitration Procedures,* EP 699 (STB served May 13, 2013) (revising and consolidating the Board's arbitration procedures). Among other things, the Board modified its regulations to establish a program through which a party could voluntarily agree in advance to arbitrate particular types of disputes within clearly defined liability limits. However, rate disputes were not included in this program. *Id.* at 4, 7–9.[2]

In section 13 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Public Law 114–110 § 13, 129 Stat. 2228, 2235–38, codified at 49 U.S.C. 11708, Congress required the Board to promulgate new regulations establishing a voluntary and binding arbitration process, including adding disputes involving rates to the list of arbitration-eligible matters. To fulfill the requirements of section 13, the Board adopted changes to its arbitration process in *Revisions to Arbitration Procedures* (*Revisions Final Rule*), EP 730 (STB served Sept. 30, 2016), including adding rate disputes as an arbitration-eligible matter. Three Class I carriers have opted into the Board's arbitration program for certain types of disputes (though not rate disputes).[3] However, to date, no parties have opted to utilize the Board's arbitration process.

In January 2018, the Board established the Rate Reform Task Force (RRTF), with the objective of, among other things, determining how best to provide a rate review process for small cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (RRTF Report). With respect to small rate disputes, the RRTF recommended, among other things: (1) legislation by Congress to permit mandatory arbitration of small rate disputes and (2) establishment by the Board of a new rate reasonableness decision-making process under which a shipper and railroad would each submit a ''final offer'' of what it believes a reasonable rate to be, subject to short, non-flexible deadlines, with the Board selecting one party's offer without revision. RRTF Report 14–20.

In September 2019, the Board proposed FORR as a new procedure for challenging the reasonableness of railroad rates in smaller cases. *See Final Offer Rate Rev.* (*FORR NPRM*), EP 755 (STB served Sept. 12, 2019). FORR was based on a final offer selection procedure similar to the one described by the RRTF. *FORR NPRM,* EP 755, slip op. at 7. All Class I carriers who commented in that proceeding opposed FORR on both legal and policy grounds. In its comments, CN argued that the Board should abandon consideration of FORR and suggested that the Board instead consider including within its existing arbitration program a targeted avenue for resolving smaller rate disputes. *See* CN Comments 25–27, Nov. 12, 2019, *Final Offer Rate Rev.,* EP 755; *see also* CN Reply Comments 2–3, Jan. 10, 2020, *Final Offer Rate Rev.,* EP 755.[4]

[1] In *Arbitration NPRM,* the Board generally referred to ''shippers'' when discussing parties that would initiate arbitration. However, the Board noted that parties other than shippers have standing to bring rate challenges. *See Arbitration NPRM,* EP 765, slip op. 9 n.16 (*citing Publ'n Requirements for Agri. Prods.,* EP 526 et al., slip op. at 7–8 (STB served Dec. 29, 2016). Although the Board used the term ''shipper/complainant'' in the proposed regulations, the Board has changed references to ''shipper/complainant'' to ''complainant'' in the final rule.

[2] Although rate disputes were not included on the list of matters parties could agree to arbitrate in advance, the revised regulations did permit parties to agree to arbitrate additional matters on a case-by-case basis, provided that the matters were within the Board's statutory jurisdiction to resolve and that the dispute did not require the Board to grant, deny, stay, or revoke a license or other regulatory approval or exemption, and did not involve labor protective conditions. *See Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 8–9.

[3] *See* Union Pacific Railroad Company (UP) Notice (June 21, 2013), CSX Transportation, Inc. (CSXT) Notice (June 28, 2019), and Canadian National Railway Company (CN) Notice (July 1, 2019), *Assessment of Mediation & Arb. Procs.,* EP 699.

[4] The Association of American Railroads (AAR) also called for the Board to investigate how to encourage parties to make greater use of its voluntary arbitration program in a separate proceeding. *See* AAR Comments 3, Feb. 13, 2020, *Hr'g on Revenue Adequacy,* EP 761.

The Board subsequently issued a decision in that proceeding to permit post-comment-period ex parte discussions with stakeholders regarding FORR. *See Final Offer Rate Rev.,* EP 755 (STB served May 15, 2020). Noting that its arbitration program has gone unused, the Board also expressed interest in exploring the issues raised in CN's comments, as well as whether and how its arbitration program at 49 CFR part 1108 could be modified to provide a practical and useful dispute resolution mechanism, particularly for stakeholders with smaller rate disputes. *Id.* at 2. Ex parte meetings with stakeholders occurred throughout the summer of 2020. *See Arbitration NPRM,* EP 765, slip op. at 4 (summarizing the content of the ex parte meetings).

On July 31, 2020, five of the Class I carriers—CN,[5] CSXT, The Kansas City Southern Railway Company (KCS), Norfolk Southern Corp. (NSR),[6] and UP (collectively Petitioners)—filed a petition for rulemaking, asking the Board to add a new arbitration program focused specifically on resolving small rate disputes. Their proposed arbitration program, which would function alongside the existing arbitration program at 49 CFR part 1108, included changes that the carriers argued would create a more streamlined and flexible arbitration process which, in turn, would better incentivize both railroad and shipper participation. (Pet. 3, 21–25 (summarizing carrier's key proposed changes from the existing arbitration process).) Petitioners argued that a working arbitration program for small rate disputes would provide improved accessibility to the Board's rate review relief while also serving as an approach superior to FORR in fairness, legality, and economic integrity. (*Id.* at 1.)

Several parties representing shipper interests opposed Petitioners' request for the Board to adopt a new arbitration program; instead, they urged the Board to adopt FORR. *See Arbitration NPRM,* EP 765, slip op. at 5–6 (summarizing filings in response to the petition for rulemaking). After considering the comments, the Board instituted a rulemaking proceeding to consider the petition for rulemaking on November 25, 2020, and then issued *Arbitration NPRM* setting forth the Board's arbitration proposal on November 15, 2021.

As an initial matter, in *Arbitration NPRM* the Board stated that its authority to create procedures for arbitrating rate cases derives from 49 U.S.C. 11708 and that, even though the agency already had an existing arbitration process created pursuant to that statute, there was no language in section 11708 prohibiting the Board from establishing a dual-track arbitration program. *Arbitration NPRM,* EP 765, slip op. at 10–11.

The Board stated that it decided to pursue a new arbitration program focused exclusively on small rate disputes for the following reasons. First, the Board noted that Congress required rate disputes to be included as an arbitration-eligible matter and that the agency's own long-stated policy had been to favor the resolution of disputes through the use of mediation and arbitration procedures rather than formal Board proceedings whenever possible. *Arbitration NPRM,* EP 765, slip op. at 8. As such, the Board concluded that ''it would be premature to discard the possibility of a voluntary, small rate case arbitration program without further exploring whether such an approach might be workable and the interplay of that approach with FORR.'' *Id.* Second, the Board found that a voluntary arbitration program focused on the resolution of small rate disputes could further the rail transportation policy of 49 U.S.C. 10101. *Id.* Lastly, the Board stated that if the FORR process was adopted, the rail carriers were likely to challenge it in court; by contrast, if all the Class I carriers agreed to participate in the arbitration program for five years, shippers would have a new avenue of potential rate relief with the certainty of carrier engagement. *Id.* at 9.

The Board's proposal in *Arbitration NPRM* was modeled on some, but not all, aspects of the proposal set forth in Petitioners' petition for rulemaking. The Board made modifications where it found aspects of Petitioners' proposal were unbalanced or simply not feasible, or where changes were needed to better incentivize carrier and shipper participation. *Id.* at 9–10. The Board proposed the following fundamental aspects as part of the new arbitration program in *Arbitration NPRM:*

- First, the Board decided to defer final action in the FORR docket so that it could jointly consider adoption of a small rate case arbitration program and the FORR process as avenues of regulatory relief. *Arbitration NPRM,* EP 765, slip op. at 9 (''Whether to adopt any voluntary rate review arbitration program, how such a program might interact with the process proposed in the FORR docket, and whether to adopt the proposed FORR process will be guided by the parallel consideration of both proposals.'').
- Second, the ultimate decision on whether to adopt a new arbitration program would be influenced by whether all Class I carriers agreed to participate for a term of five years. *Id.* at 9 (''[F]undamental to the Board's determination whether to enact the arbitration proposal in this docket will be a commitment of all Class I carriers to agree to arbitrate disputes submitted to the program for a term of no less than five years.'').
- Third, if the carriers chose to participate in the arbitration program, they would be exempt from having their rates challenged under the FORR process. *Id.* at 14 (''The Board will propose that any carrier that opts into the voluntary, small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.'').
- Fourth, under the carriers' agreement to participate for a five-year term, carriers would be permitted to withdraw from the program only if there is a material change in the law. *Id.* at 16 (''The Board will propose a provision allowing any party to withdraw due to a material change in the law.'') However, whether the Board included this right to withdraw would be influenced by whether there was another ''readily accessible small rate case review process [to serve] as a backstop in the event a carrier is no longer participating in the arbitration program.'' *Id.* at 11–12.

Comments in response to *Arbitration NPRM* were filed on January 14, 2022, by American Fuel & Petrochemical Manufacturers (AFPM); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); Indorama Ventures (Indorama); the Industrial Minerals Association-North America (IMA–NA); the National Grain and Feed Association (NGFA); Olin Corporation (Olin); the U.S. Department of Agriculture (USDA); the American Chemistry Council, Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively, Coalition Associations);[7]

[5] The petition lists one of the petitioners only as ''CN.'' A supplemental filing identifies this party as the ''U.S. operating subsidiaries of CN.'' Although not identified in either filing, the Board understands ''CN'' to mean Canadian National Railway Company.

[6] Although the Petition referred to Norfolk Southern Corp., a noncarrier, subsequent filings instead refer to that entity's operating affiliate, Norfolk Southern Railway Company.

[7] In prior comments submitted in this docket, these parties referred to themselves as ''Joint Shippers,'' which was the designation also used by the Board in *Arbitration NPRM.* In their comments, these groups explain that they now refer to themselves as ''Coalition Associations'' to maintain consistency with the designation they have used in

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and CSXT, KCS, NSR, UP, the U.S. operating subsidiaries of Canadian Pacific (CP), and the U.S. operating subsidiaries of CN (collectively, Joint Carriers).[8] Replies were filed on April 15, 2022, by AAR, Coalition Associations, and Joint Carriers.

For the reasons set forth below, the Board will adopt regulations implementing a new arbitration program devoted exclusively to resolving small rate disputes. In Part I, the Board explains the fundamental aspects of the new arbitration program. In Part II, the Board explains the limits on the number of arbitrations that may be brought under the new program. In Part III, the Board discusses the procedural aspects of the arbitration process. The text of the final rule is set forth below.

In this final rule, the Board will make certain modifications to its proposal in *Arbitration NPRM.* Unless specifically discussed below, any proposed regulation in *Arbitration NPRM* not discussed here was not addressed in the comments or replies and is therefore being adopted without change. Any textual changes not specifically discussed are non-substantive and designed to give the regulatory text more clarity.

As noted, in a decision being issued concurrently in *Final Offer Rate Review* (*FORR Final Rule*), EP 755 (STB served Dec. 19, 2022), the Board will also adopt the FORR process to serve as an alternative to the new arbitration program in the event that the arbitration program does not become operative because all Class I carriers have not opted in. Additionally, in the event a carrier subsequently withdraws from the program, the FORR process will apply to that carrier.

Part I—Fundamentals of the Small Rate Case Arbitration Program

For the reasons discussed below, the Board will adopt a final rule implementing a new small rate case arbitration program. However, to incentivize railroad participation in the arbitration program, the Board will allow carriers to be exempt from rate challenges under the FORR process during their participation in the arbitration program.

In addition, the Board finds that it is important that shippers across the rail network have access to the same means of rate relief. Accordingly, for the arbitration program to become operable, the Board will require that all Class I carriers agree to participate in the program. If all Class I carriers agree, the Board will issue a notice that commences the new arbitration program, allowing it to be used and initiating the FORR exemption.

Class I carriers will have a limited window—20 days from the effective date of these regulations—to decide whether to participate in the new arbitration program. If not all Class I carriers participate, the Board will not issue the notice commencing the new arbitration program, resulting in the program being inoperable, and all Class I carriers will be subject to rate challenges under the FORR process. By agreeing to participate, carriers would commit to participate in any arbitrations brought against them under this program for a five-year term.

Lastly, if the arbitration program becomes operable, the Board will allow carriers to withdraw on an individual basis during the five-year term if there is a material change in the law affecting regulation of railroad rates. The withdrawal of one or more carriers on the basis of a material change in law will not terminate the arbitration program once it has become effective but will subject the withdrawing carrier to challenges under the FORR process.

A. Comments

1. Shipper Interests

Several parties representing shipper interests argue that the Board should not adopt an arbitration program in place of adopting FORR because the new arbitration process does not accomplish the goal of making rate relief more accessible to shippers than it is under the Board's existing rate case methodologies. Similarly, several of the shipper interests claim that FORR is the superior process in terms of providing more accessibility to rate relief. As such, they argue that if the Board does adopt the arbitration program, it should eliminate the FORR exemption so that shippers have the choice of whether to bring challenges under arbitration or FORR.

Olin. Olin requests that the Board adopt the FORR proposal because the arbitration process contains mechanisms that favor railroads. (Olin Comment 1.) Olin states that if the Board does decide to adopt the new arbitration program, the Board should not allow participating rail carriers to be exempt from FORR. (*Id.* at 1–2.) Olin argues that the *Arbitration NPRM* proposal undermines all the potential value of the FORR process and that the two processes are fundamentally inconsistent with each other. (*Id.* at 2.) According to Olin, the Board has essentially proposed a new rate case process for small disputes, while simultaneously proposing to make it unavailable for use. (*Id.* at 10.) Olin also disputes that arbitration will necessarily be quicker, less expensive, more reliable, or more predictable than an adjudication before the Board because carriers will still have the ability to delay and increase costs and complexity. (*Id.* at 11.)

Coalition Associations. In their comment, Coalition Associations state that their main concern with the proposal set forth in *Arbitration NPRM* is the FORR exemption. (Coalition Ass'ns Comment 1.) They argue that the FORR exemption effectively requires shippers to arbitrate their rate claims, even though the Board does not have authority to impose such a requirement. (*Id.* at 1–2.) Coalition Associations also argue that the FORR exemption would be inconsistent with the goal of increasing access to rate review because the arbitration program includes features that make it inaccessible. (*Id.* at 2, 6–7.) Accordingly, they argue that if the Board insists on keeping the FORR exemption, it should address concerns about accessibility by making the program public, eliminating the case limits, and ensuring complainants have access to the Waybill Sample. (*Id.* at 2, 7.)

In their reply, Coalition Associations argue that the Board should adopt FORR, but if it also chooses to adopt the arbitration program, it should eliminate the FORR exemption. (Coalition Ass'ns Reply 5.) They maintain that if the new arbitration program was the best path forward for stakeholders, there would be no need to exempt participating railroads from rate challenges under FORR. (*Id.* at 5.) They argue that the new arbitration program contains both higher risks and higher costs for shippers than FORR. (*Id.*) In particular, they claim that the new arbitration program is less accessible than FORR because the program includes confidentiality requirements, case limits, discovery limits, waybill access limits, and a longer evidentiary phase. (*Id.* at 5–10.)

Coalition Associations argue that carriers will still have a strong incentive to participate in the arbitration program even if the Board eliminates these features. In particular, they argue that the non-precedential nature of arbitration decisions would be attractive to carriers. (*Id.* at 10.) They argue that a non-precedential decision "provides shippers with no certainty that they will

Final Offer Rate Review, Docket No. EP 755. (Coalition Ass'ns Comment 1 n.1.) The Board will also refer to these parties as Coalition Associations in this decision.

[8] These carriers comprise six of the existing seven Class I carriers. The other Class I carrier, BNSF, filed separate comments.

prevail in a rate challenge and, thus, little leverage in rate negotiations.'' (*Id.* at 11.) They claim that the non-precedential nature of arbitration decisions is even more valuable given that FORR decisions would be precedential and the likelihood that a railroad would receive an adverse decision under FORR is high. (*Id.*)

IMA–NA and Indorama. IMA–NA and Indorama state they would only support the new arbitration program if the Board eliminates the FORR exemption for railroads that participate in the program. (IMA–NA Comment 2, 17; Indorama Comment 2, 17.) They state that FORR is an acceptable process given that it is already used in a number of existing rail and non-rail contexts. (IMA–NA Comment 7–9; Indorama Comment 7–9.) They also urge the Board to eliminate various aspects of the new arbitration program proposed in *Arbitration NPRM* so that the new arbitration program is more in line with FORR. Specifically, they argue that the Board should eliminate the limits on the number of arbitrations, the confidentiality requirements, the non-precedential nature of arbitration decisions, and discovery limits. (IMA–NA Comment 19; Indorama Comment 19.) [9]

NGFA. NGFA supports a new arbitration program for small rate disputes but states that it does not view such a program as a substitute for the Board finalizing FORR. NGFA argues that the two processes can be structured in a way to coexist and complement one another. NGFA therefore strongly opposes the idea of adopting the new arbitration program but not FORR. (NGFA Comment 2–3.)

NGFA states that its members generally do not support an arbitration program that would eliminate the ability of a rail shipper to file a formal complaint to test the reasonableness of rail rates using any of the Board's legally available rate-reasonableness methodologies. However, NGFA states that it also favors arbitration to resolve disputes. (*Id.* at 4.) Accordingly, NGFA argues that the Board should reconsider a proposal that NGFA made in response to the initial petition for rulemaking, specifically, that the FORR exemption last only until the Board conduct its programmatic review, at which point the FORR exemption would expire. (*Id.* at 5.)

AFPM. AFPM supports adoption of the arbitration program in addition to FORR (not as an alternative), because it believes that FORR provides more promise in providing viable options for shippers to dispute small rate cases. (AFPM Comment 2.) AFPM argues that the FORR exemption is a ''non-starter.'' (*Id.* at 5.) It argues that shippers should have the option to pursue a dispute through either FORR or the new arbitration program, because railroads should not be able to limit shippers' options by simply participating in the arbitration program. (*Id.* at 2.) AFPM also notes that a FORR exemption would provide no incentive for carriers to seek improvements to a voluntary arbitration program. (*Id.* at 4.) It also argues that the FORR exemption could disadvantage shippers if one program turns out to be superior or not viable. (*Id.* at 6.)

2. USDA

USDA argues that, between the proposals for a new arbitration program and FORR, FORR is the better and more necessary of the two. However, it states that the ''differences [between the two proposals] are small relative to the benefits that would be provided by either FORR alone or'' jointly adopting both proposals. (USDA Comment 2.) USDA emphasizes the need for at least finalizing FORR because participation in a new arbitration program will not be compelling without an effective litigatory backstop. (*Id.*) Conversely, USDA states that there is little benefit in just adopting a new arbitration program by itself. (*Id.* at 3.) [10]

USDA's key concern with the *Arbitration NPRM* proposal is that it is voluntary. (*Id.*) USDA argues that private firms do not typically need the government to implement voluntary tools because they will readily take advantage of mutually beneficial opportunities and, therefore, carriers here should not be exempt from FORR. USDA argues that, under the Board's scheme, the arbitration program is not voluntary because it allows railroads to choose which process works best for them and shippers simply have to go along with it. (*Id.*) USDA argues that if FORR is finalized, there is nothing preventing shippers and railroads from engaging in their own truly voluntary arbitration process (one where both shippers and railroads have opted in). According to USDA, adoption of FORR (without the new arbitration program and a FORR exemption) would actually incentivize shippers and railroads to come up with their own arbitration process. (*Id.*)

3. Railroad Interests

The railroad interests support adoption of the arbitration program over FORR, as well as the adoption of an exemption from the FORR process for carriers that choose to participate in the arbitration program.

Joint Carriers. Joint Carriers argue that the purpose of the arbitration program should not be to provide a limitless forum for resolving any and all rate disputes, particularly since shippers can still seek resolution of their rate disputes through processes such as Three-Benchmark and Simplified Stand-Alone Cost (Simplified-SAC). (Joint Carriers Reply 2–3, 12.) Instead, Joint Carriers argue that the arbitration program should be tailored to providing a quick, cost-effective process for resolving modest rate disputes. (*Id.* at 13.) [11]

Joint Carriers also oppose the idea of eliminating the FORR exemption. They also oppose NGFA's suggestion that the FORR exemption last three years. Instead, they argue that the FORR exemption should last for as long as carriers participate in the arbitration program. (Joint Carriers Reply 15.)

BNSF. BNSF states that the new arbitration program is a far better path to addressing shipper needs than the FORR proposal. (BNSF Comment 1.)

AAR. AAR supports the ''goals and general approach'' set forth in *Arbitration NPRM;* however, it suggests some improvements. (AAR Comment 1.) AAR asserts that the Board's arbitration proposal improves the current arbitration program and will be viewed by both railroads and shippers as a more fair and viable approach to small rate disputes. (*Id.* at 3.) In particular, AAR supports the various protections the Board proposed to keep the arbitration process confidential, the ability of parties to select arbitrators not on the roster, the ability of the arbitration panel to rule on market dominance and the one-case-per-shipper limit that would prevent improper disaggregation of cases. (*Id.* at 4–6.)

AAR also disputes Olin's assertion that arbitration is not necessarily more

[9] IMA–NA and Indorama note that if the Board eliminated the FORR exemption, then these aspects of the new arbitration program would be less of a concern because shippers would have the option to choose which of the two processes they want to use. (IMA–NA Comment 19; Indorama Comment 19.)

[10] USDA argues that one of the main differences between FORR and the proposed arbitration process is in how a decision is made. Specifically, it claims that the process for deciding where to set the rate is clear in FORR but unclear in arbitration. (USDA Comment 3.) The Board addresses this concern below (*see infra* Part III.E).

[11] Joint Carriers further argue that ''distinguished economists'' who have studied these matters have concluded there is no evidence that the Board's current approaches are failing or generating excessive revenues, that the Simplified-SAC process provides an effective tool to protect captive shippers, and the reason that shippers do not often use these formal processes could be that carriers are not charging unreasonable rates to captive shippers. (Joint Carriers Reply 6–7.)

efficient than administrative litigation. (AAR Reply 10.) In response to Olin's contention that Class I railroads would use every tactic at their disposal to make arbitration difficult, AAR states that Olin does not explain why it would be improper for a carrier to exercise its constitutional right to defend itself from an accusation that it has violated federal law. (*Id.*) AAR argues that, in any event, Olin cannot seriously dispute that arbitration is widely considered a more efficient means of dispute resolution. (*Id.*) AAR argues that if Olin's concerns about railroads' ability to drive up the costs of arbitration program later materialize, the Board can address it at that time. (*Id.* at 10–11.)

AAR states that if the Board does move ahead with FORR, it should adhere to its proposed approach of allowing participating carriers to be exempt from FORR. (*Id.* at 10.)

B. Board Action

1. Adoption of the Arbitration Program, FORR, and the FORR Exemption

The Board has explained the need for a new process that makes rate relief more accessible to shippers, particularly those with small disputes. *See FORR Final Rule,* EP 755, slip op. at 3–4 (explaining that the Board has recognized that the litigation costs required to bring cases under the Board's existing rate reasonableness methodologies can quickly exceed the value of a case involving a smaller dispute); 8–10 (explaining the need for a new procedure to resolve small rate disputes in response to arguments from railroad interests that such a new procedure is unnecessary). As discussed herein, and in *FORR Final Rule,* the Board believes that both a new arbitration program focused on small rate disputes and the FORR process would be likely to achieve the Board's goal of increased access to potential rate relief, albeit through different mechanisms. Additionally, the Board finds that the arbitration program would further the rail transportation policy of 49 U.S.C. 10101 by facilitating the expeditious handling and resolution of proceedings (49 U.S.C. 10101(15)), supporting fair and expeditious regulatory decisions when regulation is required (49 U.S.C. 10101(2)), and helping to maintain reasonable rates where there is an absence of effective competition (49 U.S.C. 10101(6)).

Accordingly, both the arbitration program and the FORR process are appropriate means for improving access to rate relief for shippers with small disputes. Nonetheless, the Board has decided to pursue the implementation of the arbitration program as its first step. As the Board has said in this proceeding and others, it favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, ''whenever possible.'' *See Arbitration NPRM,* EP 765, slip op. at 8 (citing 49 CFR 1108.2(a) and *Bos. & Me. Corp.—Appl. for Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R.,* AB 1256, slip op. at 10 (STB served Oct. 12, 2018)). In addition, the fact that Congress specifically directed the Board to add rate disputes to the list of arbitrable matters and increased the potential relief available in such cases to $25 million demonstrates a congressional policy in favor of arbitration. By adopting the final rule, the Board would have an arbitration process that can be both successful in resolving small rate cases and that parties have expressed a tentative willingness to use. The Board concludes that these policy benefits make a small rate case arbitration program the better approach from which to start. As proposed in *Arbitration NPRM,* EP 765, slip op. at 11, 12, the Board will roll out the program with an initial term of five years, along with a built-in review—to be conducted after no more than three years—to allow for an updated assessment of the program's effectiveness.

The Board has considered giving complainants the ability to choose whether to challenge a rate using either arbitration or FORR, as most of the shipper interests urge. However, the Board concludes that such a structure is unlikely to lead to a successful launch of the arbitration program. Participation in arbitration must be voluntary, *see* 49 U.S.C. 11708(a), and experience has demonstrated that carriers will not choose to voluntarily arbitrate rate disputes without a significant incentive to do so. *See Arbitration NPRM,* slip op. at 3 (noting that while three carriers have opted into the Board's arbitration program, none have done so for the purpose of arbitrating rate disputes). If the Board permitted complainants to choose between arbitration and FORR at the outset, it is unlikely a carrier would agree to participate in the arbitration program at this time. Allowing carriers to be exempt from challenges under FORR would provide, in the Board's view, a proper incentive, while still creating a more accessible avenue of potential relief to shippers with small rate disputes. Therefore, the Board will allow Class I carriers the opportunity to decide whether they still desire to be subject to the arbitration program, with the modifications required by the Board, in exchange for being exempt from FORR challenges. *See infra* Part I.C.1.b (explaining that Class I carriers will have a 50-day window from the date of this decision to inform the Board whether they intend to participate in the arbitration program).

However, as explained in *Arbitration NPRM,* the Board concludes the arbitration program should only be implemented if all Class I carriers agree to participate in the program. *See infra* Part I.C.1.a (explaining the importance of Class I carriers being subject to the same rate relief procedures to ensure fairness). The Board will therefore also structure the new regulations so that the arbitration program can become operable only if the Board publishes a notice in the **Federal Register** confirming that all Class I carriers have agreed to participate. As noted, participation for Class I carriers in the arbitration program will begin with an initial term of five years, with the Board conducting a programmatic review no later than three years after start of the program. In response to comments, the Board will provide clarity as to when the five-year period begins and how the program may continue at the end of this five-year period.

The Board recognizes that it is possible that not all Class I carriers will agree to voluntarily participate in the new arbitration program, even with the incentive of an exemption from FORR. FORR will therefore serve as an available avenue of rate relief in the event that one or more of the carriers chooses not to participate in the arbitration program at the initial phase or withdraws from the program after it becomes operable. Regardless of which option the Class I carriers choose—opting into arbitration or being immediately subject to FORR—either process will provide shippers with smaller disputes a new avenue of rate relief that is more accessible than the Board's existing rate case processes.

2. Arguments That Arbitration Will Not Make Rate Relief More Accessible

One theme in the shipper interests' comments is that the arbitration process is not more accessible than the existing rate case processes and therefore should either not be adopted or be significantly modified. (*See* Olin Comment 10; Coalition Ass'ns Comment 2, 6; Coalition Ass'ns Reply 5–10; IMA–NA Comment 19; Indorama Comment 19.) The Board finds these arguments unconvincing. Rather, the Board expects that the arbitration process will provide significant benefits over formal adjudication of rate disputes, especially

where the amount in dispute is small. For the reasons described below, under the arbitration process being adopted here, complainants should be able to challenge rates more quickly than under the existing rate processes and without incurring as much expense.

a. Time Savings From Arbitrating

The procedural schedule for a Three-Benchmark case is 240 days (or eight months). *See Simplified Standards for Rail Rate Cases* (*Simplified Standards*), EP 646 (Sub-No. 1), slip op. at 23 (STB served Sept. 5, 2007). Although the schedule for an arbitration would vary, the Board estimates that the time from when an arbitration is initiated (by the filing of the initial notice of intent to arbitrate) until the arbitration panel issues its decision would be no more than 180 days (or six months).[12] That period would be less if the parties forgo the initial mediation process, which, as discussed below, the Board will allow a complainant to waive unilaterally. *See infra* Part III.A. In addition, the Board disagrees with the assertion that an appeal to the Board would be filed in all arbitrations. *See infra* Part I.B.3.

b. Cost Savings From Arbitrating

The arbitration process should also create opportunities for litigants to reduce litigation costs. First, there will be limits on the amount of discovery permitted in arbitration, which will force parties to use discovery requests only to obtain essential evidence, which in turn should limit the number of discovery disputes and save parties litigation costs. *See* RRTF Report 10 (stating that ''[d]iscovery disputes were viewed [by stakeholders] as greatly adding to the cost of litigation''). Third, the discovery limits, compressed procedural schedule (90 days unless extended), and any other procedural restrictions imposed by the arbitration panel (limits on the number or length of pleadings, or on the arguments that parties may address in their pleadings) should collectively force parties in an arbitration to present a more focused set of arguments. If a shipper believes that there are several meritorious arguments as to why the rate is unreasonably high, it may decide—because of the procedural limitations—that it would be best to limit its case to only its one or two strongest arguments. The procedural limitations will also force parties, when making these arguments, to keep their presentations concise. Fourth, the informal nature of the arbitration process should reduce litigation costs. The Board expects that various communications between the parties and the arbitration panel would be through less formal communication, such as emails or phone calls, instead of formal motions and written orders.

A key example of how the arbitration process could be less costly than the existing rate review methodologies involves the ''other relevant factors'' component of the Three-Benchmark methodology, in which defendant carriers can argue that the maximum reasonable rate should be higher or lower than the level derived using the Three-Benchmark approach. The RRTF Report noted that shippers had indicated that a concern with the Three-Benchmark methodology was the other relevant factors part of the analysis. RRTF Report 49–51. Specifically, the report stated that shippers ''confirmed that a potential complainant, faced with the prospect of having to respond to an open-ended, voluminous collection of arguments and evidence proposing 'other relevant factors'—including attorneys' and consultants' fees for reviewing and responding to these arguments and evidence—would not find the Three-Benchmark test to be 'relatively simple and inexpensive.' '' *Id.* at 51 (citing *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 22). Accordingly, the RRTF proposed imposing page limits on arguments regarding other relevant factors. Here, the arbitration process should accomplish the same end. Specifically, the procedural confines of the arbitration process (limited discovery, short procedural schedule) will prevent arguments regarding other relevant factors from becoming unwieldy. Additionally, depending on the facts of the case, the arbitration panel could impose limits on the scope of the arguments regarding other relevant factors if it finds such arguments are unlikely to be meritorious.

Some of the shipper interests point out that parties will have to pay for the cost of the arbitrators, (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12), which is an expense that does not exist in formal cases. Nevertheless, the other cost savings that arbitration will produce are intended to more than offset this added expense. Unfortunately, it is not possible to make an actual comparison of costs because there is no evidence in the record here, or any recent Board proceedings, on the cost to litigate a Three-Benchmark case, and the Board will not know the cost to arbitrate until cases are actually arbitrated.[13] However, it is clear that shippers have asserted that the existing rate processes are cost-prohibitive and the Board finds that an alternate approach with the potential to lower costs is worth pursuing.

3. Arguments That Arbitration Will Not Be as Effective as FORR

Another theme in the shipper interests' comments is that arbitration will not be as effective as FORR and, as a result, the Board either should not adopt the arbitration program or, alternatively, should eliminate the FORR exemption. (Olin Comment 2; Coalition Ass'ns Comment 5.) The Board also finds these arguments unpersuasive.

Despite the fact that FORR is a rate reasonableness adjudicatory process and arbitration is an alternative dispute resolution process, they share a number of key features. (*See* USDA Comment 2.) As in the FORR process, shippers will have broad methodological flexibility in the arbitration process to present new methodologies. The amount of relief available in both processes will also be the same. *See infra* Part III.H.

The arbitration process will also have a timeline for resolution similar to FORR. The FORR process adopted today will take 149 day or 169 days (depending on whether the streamlined market dominance approach is used), while the arbitration process will take approximately 180 days (though often less) from initiation of the process until the arbitration panel issues its decision. IMA–NA, Indorama, and AFPM argue that the arbitration process will take longer than FORR because arbitration decisions will almost always be appealed to the Board, whereas FORR decisions would be appealed directly to a court. (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12.) However, it is not at all certain that every arbitration will be appealed to the Board, given the relatively small awards available (compared to other rate reasonableness adjudicatory procedures), the fact that appeals would not be confidential, and that there are limited grounds on which parties can appeal. *See* 49 U.S.C. 11708(h).

IMA–NA, Indorama, and AFPM argue that the arbitration process could be

[12] *See infra* App. B (estimated timeline of the arbitration process).

[13] As noted below, the Board will conduct a programmatic review of the arbitration process no later than three years after the program becomes effective. *See infra* Part III.J. The Board will modify the language of the regulation that requires the agency to conduct this review to specifically explore the issue of cost savings by seeking data from parties that have brought arbitrations. *See infra* App. A (finalized 49 CFR 1108.32).

more expensive than a FORR case because the parties have to pay the costs of the arbitrator, which they would not incur in a FORR case. (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12.) The fact that parties would have to pay the arbitrators is indeed an added cost that complainants in a FORR case would not incur. But both processes are based on the same concept of creating a more streamlined, less formal process for determining rate reasonableness. Moreover, given the flexibility afforded to the arbitration panel to set arbitration-specific procedures, the parties can request procedures that reduce costs. Accordingly, the Board does not expect the costs between arbitration and FORR to be significantly different.

In Part III, the Board explains why it is adopting each of the arbitration procedures, including those that differ from FORR. In doing so, the Board has taken the comments of the parties into account and modified the regulatory text to develop an arbitration process that aims to be fair and equitable to both complainants and carriers. For example, as discussed below, *see infra* Part III.C.3.a, the Board has determined that the limits on waybill access proposed in *Arbitration NPRM* were too restrictive and has adjusted them accordingly. Given the concern from the shipper interests that the arbitration program will not be effective, the Board also commits to performing a programmatic review no later than three years after the program becomes effective. *See infra* Part III.J.

4. Arguments That Complainants' Will Lack the Ability To Choose Between Processes

Some of the shipper interests and USDA oppose the FORR exemption because they argue that complainants should have the ability to decide whether to challenge rates using arbitration or FORR. (Olin Comment 13; AFPM Comment 1–2; USDA Comment 3.) However, the Board addressed this concern in *Arbitration NPRM,* stating that ''[c]reating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would incentivize railroads to participate, and, in turn, create a means for shippers to obtain resolution through arbitration.'' *Arbitration NPRM,* EP 765, slip op. at 14. Under 49 U.S.C. 11708, arbitration is a voluntary process and, as such, the only way to obtain participation from stakeholders is if the program offers them benefits. Here, Joint Carriers and BNSF have indicated that they may be willing to participate if the Board were to exempt them from having their rates challenged under FORR. The Board concludes that such a trade-off is appropriate at this time given the Board's finding that the arbitration process here will improve access to rate relief and advance the agency's long-standing effort to encourage parties to use alternative dispute resolution processes when possible. Indeed, the Board is also making other trade-offs to incentivize participation from shippers and rejecting other features that carriers seek.

5. Arguments That Railroads Will Participate in Arbitration Without a FORR Exemption

Coalition Associations assert that carriers will have an incentive to participate in the arbitration program even without the FORR exemption citing, in particular, the fact that arbitration decisions would be non-precedential. (Coalition Ass'ns Reply 10–11.) But parties have not used the Board's existing voluntary arbitration program, notwithstanding the fact that decisions under that program would also be non-precedential. *See* 49 U.S.C. 11708(d)(5); 49 CFR 1108.10. Moreover, the carriers that first proposed the arbitration program made clear that their goal was for the program to serve as an alternative to being subject to FORR:

> The railroads discussed the reasons why they believed that voluntary arbitration would be attractive for both railroads and customers and a better alternative than other proposals that have been suggested for determining the maximum lawful rate in small rate cases. The railroads suggested that as an incentive to encourage a Class I railroad to opt into such a voluntary arbitration program, the Board could consider a waiver from other rail rate review methodologies, such as FORR or the revenue adequacy constraint.

CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 2, July 10, 2020 (filing ID 300866) *Final Offer Rate Rev.,* EP 755. Many of the shipper interests themselves have stated that Petitioners' motivation for pursuing arbitration was to secure a FORR exemption. (*See* Olin Comment 3 (''[F]ive railroads developed and proposed the EP 765 Arbitration process in July of 2020 as a shield from the possibility that the STB might adopt FORR as a rate-evaluation tool''); Coalition Ass'ns Comment 6 (''The whole point of this scheme was to cut shippers off from FORR by forcing them to arbitrate under the Petitioners' preferred process''); NGFA Comment 7 (''[T]he primary driver for the Petitioners' proposing to modify the arbitration regulations in the first place was to obtain an exemption from having the reasonableness of their rates reviewed under FORR rules and standards.'').)

In any event, the fact that arbitration decisions would be non-precedential would not by itself address Joint Carriers' concern that such decisions could be used in future rate negotiations, as complainants could still use these decisions in future rate negotiations. (*See* Joint Carriers Reply 14–15 (noting that IMA–NA and Indorama have indicated that they wish these non-precedential decisions to be public for that very reason).)

The Board finds that implementation of NGFA's suggestion that the FORR exemption last only until the agency conducts the programmatic review is unnecessary. As noted, the Board will conduct a programmatic review no later than three years after the program becomes effective, at which point the Board will consider whether the program should continue and, if so, whether any modifications should be made, including whether the FORR exemption should remain intact. Barring unforeseen difficulties, that would be the appropriate time for the Board to consider the effectiveness of the FORR exemption and other program features.

6. Other Arguments Opposing Adoption of the Arbitration Program and FORR Exemption

The shipper interests raise arguments disputing the Board's authority to establish this arbitration program and the propriety of such a program. The Board addresses these arguments below.

a. Participation in the Arbitration Program Would Be Voluntary

Olin argues the proposal in *Arbitration NPRM* is not ''voluntary'' within the meaning of 49 U.S.C. 11708(a) because FORR would no longer be an available option and the Board's other rate challenge processes have been shown to be infeasible. Olin states that shippers therefore would have to choose to use the new arbitration program (which it claims favors carriers) or pay the rate it is being charged. (Olin Comment 11–12; *see also* IMA–NA Comment 7, Indorama Comment 7 (arguing that large non-coal shippers and all small shippers have nowhere to turn if they believe their rates are unreasonable).) Similarly, Coalition Associations claim that the Board's proposal is tantamount to a ''de facto arbitration mandate,'' which the Board does not have authority to implement. (Coalition Ass'ns Comment 3–5; *see also*

AFPM Comment 4.) Specifically, Coalition Associations argue that the FORR exemption ''effectively mandates'' that shippers with small rate disputes use arbitration because there are no other formal rate review processes accessible for shippers with small disputes. (Coalition Ass'ns Comment 4–5.) They claim that Congress confirmed that the Board cannot mandate arbitration of rate disputes when it passed the STB Reauthorization Act of 2015, which required the Board to establish a ''voluntary'' arbitration process. (*Id.* at 4.) Moreover, Coalition Associations argue that the Board has itself long recognized that it cannot require arbitration of rate disputes. (*Id.*) Coalition Associations also argue that it is difficult to imagine that Congress contemplated this scenario when it directed the Board to establish a ''voluntary'' arbitration program. (*Id.* at 6.)

Joint Carriers dispute assertions that the FORR exemption is tantamount to a de facto arbitration mandate. They argue that the Board specifically rejected this argument in *Arbitration NPRM* when it found that incentivizing carrier participation by offering them an exemption from FORR would provide shippers with an important means to access potential rate relief, *i.e.,* the new arbitration program. (Joint Carriers Reply 5 (citing *Arbitration NPRM,* EP 765, slip op. at 13–14).) They also argue that shippers' ability to use the arbitration program would still be voluntary. (*Id.* at 8.) AAR also disputes Olin's assertion that the new arbitration program would be compulsory, as shippers would be able to use the arbitration program or file rate cases under the existing methodologies. (AAR Reply 11.)

The Board disagrees with assertions that the arbitration process (including an exemption from FORR for participating carriers) would not be voluntary or that it creates a mandate to arbitrate. Although the Board has raised concerns about the efficiency and practical accessibility of its existing rate case processes for instances when the amount in dispute is small relative to the cost of bringing a case, *FORR NPRM,* EP 755, slip op. at 3; *Market Dominance Streamlined Approach,* EP 756, slip op. at 4 (STB served Sept. 12, 2019), the Board has not held that those concerns make the processes fatally defective, nor has the Board disavowed the economic reasoning of those processes. Those existing processes will continue to be available after enactment of this arbitration program and may be used by shippers with smaller rate disputes. Indeed, the Board recently adopted regulations establishing a streamlined approach for pleading market dominance in rate reasonableness proceedings with the intent that it would be used in the Board's existing rate case methodologies. *See Market Dominance Streamlined Approach,* EP 756, slip op. at 33–34 (STB served Aug. 3, 2020) (finding that use of the streamlined approach should be permitted in rate cases brought under any methodology).

Accordingly, a shipper's options would not be limited to bringing an arbitration or doing nothing.[14] As has always been the case, shippers will have a number of options and will need to decide which option best suits their needs based on the size of the dispute, available resources, and many other factors. By implementing a new arbitration program (with FORR serving as one of various alternatives if carriers choose not to participate), the Board is attempting to build upon its efforts to make rate relief more accessible. The Board's final rule here is thus consistent with the statutory requirement that arbitration be voluntary.

b. The Arbitration Program Is Not Based on Improper ''Deal-Making.''

Olin regards the Board's statement that a FORR exemption would incentivize railroads to participate in the arbitration program as ''inconsistent with the interests of small shippers, and contrary to the STB's statutory duties.'' (Olin Comment 13.) It further states that ''[t]he Board should not evaluate potential regulations as though it were engaged in deal-making'' and that ''[r]ailroads should not be permitted to excuse themselves from Board regulation because a select group of railroads would prefer to be 'regulated' in a preferred manner of their own choosing.'' (*Id.* at 13, 14.) Olin argues that the Board should not need the consent of the railroad industry to allow for adoption of a regulation that Congress has required. (*Id.* at 13.)

AAR disputes Olin's contention that it is improper for the Board to try to incentivize parties to resolve their disputes through arbitration. Because the Board cannot require parties to arbitrate, AAR argues that it is entirely proper for the Board to identify ways of encouraging parties to volunteer for arbitration. AAR argues that this is not ''deal-making'' or ''trading away the FORR process,'' as Olin describes it. (AAR Reply 11.)

Olin's characterization of the agency's approach is off the mark. Because 49 U.S.C. 11708(a) requires that any arbitration process offered by the Board be voluntary, any such process by its nature will always involve creating incentives for stakeholders to participate. The Board modified the arbitration program in 2013 to try to encourage greater use of the program. *See Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 3 (STB served May 13, 2013) (''The changes to the Board's arbitration rules are intended to . . . encourage greater use of arbitration to resolve disputes before the Board by simplifying the process, identifying specific types of disputes eligible for a new arbitration program, and establishing clear limits on the amounts in controversy.''). Congress then modified the statutory arbitration requirements to try to expand the use of the arbitration process. *See* S. Rep. No. 114–52, at 7 (2015) (''To increase the efficiency of dispute resolution, S. 808 would expand existing work at the STB to encourage and provide voluntary arbitration processes.''). These efforts to make greater use of arbitration sought to create better incentives for stakeholder participation, just as the Board is doing here. So far, however, those efforts have not had the intended effect, as the current arbitration program has still gone unused for rate disputes. Accordingly, it is entirely appropriate for the Board to consider other means to incentivize stakeholder participation, including by granting carriers a FORR exemption.

c. The Board Will Oversee the Arbitration Process

Olin further states that even though it does not oppose arbitration per se, the Board ''exists as an expert governmental agency chiefly in order to resolve disputes between railroads and shippers in a public, on-the-record manner.'' (Olin Comment 10.) But the establishment of this arbitration procedure is not inconsistent with the Board's role in resolving rate disputes through the adjudicatory process. Congress has given the Board statutory authority to resolve disputes using both adjudication and arbitration. As noted above, the Board favors use of alternative dispute resolution processes wherever possible and has had an arbitration process available to stakeholders since 1997. Additionally, as the Board stated in *Arbitration NPRM,* EP 765, slip op. at 10–11, any arbitration requirements must be consistent with 49 U.S.C. 11708. The

[14] In fact, a complaint was recently filed by a shipper seeking to challenge a carrier's rate under both the Full Stand-Alone Cost (Full-SAC) and revenue adequacy constraints. *Omaha Pub. Power Dist.* v. *Union Pac. R.R.,* Docket No. NOR 42173.

Board finds that there is no conflict between that statute and the final rule being adopted here.

d. Arbitration Is Not Overly Broad

Olin argues that the language of the Board's proposed FORR exemption is unnecessarily broad. (Olin Comment 15–16.) Olin states that the carriers want a FORR exemption because they are concerned that the standard for appellate review of arbitration decisions by the Board would be limited, even in cases where the arbitration decision is based on a new methodology such as FORR. Olin argues that the more appropriate remedy would be to restrict the use of FORR solely in the context of an arbitration. (*Id.*) AAR objects to Olin's suggestion that the Board should replace the FORR exemption with a narrower prohibition on the use of final-offer processes in the arbitration program. (AAR Reply 12.)

Olin's argument (and its proposal to prohibit arbitrators from using final-offer style procedures) is based on a misunderstanding of the purpose of the FORR exemption. In *Arbitration NPRM,* the Board explained that the aim of the FORR exemption was to incentivize railroads to participate. *Arbitration NPRM,* EP 765, slip op. at 14 (''Creating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would incentivize railroads to participate, and, in turn, create a means for shippers to obtain resolution through arbitration.''). The FORR exemption was not proposed as a means to address railroad concerns about the narrow standard of appellate review. The Board addresses carrier concerns regarding the narrow standard for appeals as applied to the use of new methodologies in Part III.G, below.

e. Arbitration Is Not Intended To Avoid FORR Appeals

NGFA notes the railroads have not pledged to forgo an appeal of the decision adopting FORR if they are exempt from FORR rules. (NGFA Comment 3 n.3.) However, the purpose of the FORR exemption was not to foreclose an appeal of the FORR decision. In fact, as noted in *Arbitration NPRM,* the Board acknowledges that an appeal of the FORR decision is likely, regardless of whatever features are contained in the arbitration process. The purpose of the FORR exemption is instead to incentivize railroad participation in the arbitration program.

f. Carriers Must Arbitrate if They Choose To Participate

AFPM also argues that the RRTF advocated for mandatory arbitration, which this rule is not proposing, and that the Board should therefore adopt FORR instead of the arbitration program. (AFPM Comment 7.) However, as explained in this decision, if Class I carriers agree to participate in the new arbitration program, they are committing to do so for a five-year term with the right to withdraw only if there is a material change in law. As such, a Class I carrier that has opted into the new program could not refuse to participate in an arbitration if one is initiated against it.

C. Other Arbitration Program Fundamentals

1. Participation

a. Carrier Participation

In *Arbitration NPRM,* the Board indicated that an important factor in its decision whether to adopt a new arbitration program would be a commitment from all of the Class I carriers to agree to participate in the arbitration program for a five-year term. *Arbitration NPRM,* slip op. at 9. The Board stated that an initial commitment from all Class I carriers would promote the goal that the shippers they serve have similar access to rate review procedures and certainty of carrier engagement.[15] (*Id.*) No parties commented on this aspect of the Board's proposal.

Providing shippers with access to the same avenues of rate relief against Class I carriers is important, particularly at the start of the arbitration program. If the Board were to adopt both processes but one turned out not to function as efficiently as the Board anticipates, shippers that are required to challenge rates under that process could perceive that they will be placed at a market disadvantage. The Board has concluded that fairness is best achieved by ensuring that shippers served by Class I carriers have access to the same avenues of rate relief as the new arbitration program begins. Although narrow circumstances may result in individual carriers withdrawing from the program after its start, requiring uniformity—at least at the beginning—provides the best chance of achieving this fairness. The final rule will therefore include the requirement that all Class I carriers agree to participate for the arbitration program to become operable.[16]

As for Class II and III carriers, in *Arbitration NPRM,* the Board proposed that these carriers could participate on a case-by-case basis. *Arbitration NPRM,* EP 765, slip op. at 12.[17] The Board also proposed that for rate challenges involving multicarrier shipments, all carriers participating in the movement must have opted into the arbitration process. *Id.* at 12–13. For multicarrier movements involving only Class I carriers, both carriers will have agreed, at least initially, given that the arbitration program will only become operative if all Class I carriers opt into the program. For multicarrier shipments involving a Class II or Class III carrier, those smaller carriers could agree to participate on a case-by-case basis (though, as noted, there is nothing that would prohibit such a carrier from also agreeing to participate for the same five-year term as the Class I carriers).[18] No commenter addressed the issues of Class II and III carrier or multicarrier participation. Accordingly, the Board will include these provisions without modification as part of the final rule.

b. Carrier Opt-In Procedures

The Board proposed in *Arbitration NPRM* that the Class I carriers that decide to participate for a five-year term must file an opt-in notice under Docket No. EP 765, which would be posted on the STB's website. *Arbitration NPRM,* EP 765, slip op. at 13. *Arbitration NPRM* also included regulatory text setting the proposed procedural requirements for filing the opt-in notice. *Id.,* App. A (proposed § 1108.23(a)(1)). In particular, the Board proposed regulatory text stating that a carrier could file its opt-in notice ''at any time and [the notice] shall be effective upon receipt by the Board or at another time specified in the notice.'' *Id.,* App. A (proposed § 1108.23(a)(1)).

Joint Carriers state they are concerned that the Board suggested in *Arbitration*

[15] The Board noted that rate cases filed to date indicated that complainants' rate concerns relate primarily to Class I carriers. *Arbitration NPRM,* EP 765, slip op. at 9 n.15 (citing *Final Offer Rate Rev.,* EP 755, slip op. at 16–17 (STB served Sept. 12, 2019)).

[16] Specifically, within the new regulations will be a requirement that the Board issue a written notice commencing the arbitration program. *See* App. A (49 CFR 1108.22(b)). The regulation will further provide that the Board may only issue this commencement notice if it has received opt-in notices from all of the Class I carriers. *Id.*

[17] However, the Board also noted that there was nothing in the proposed rule that would prohibit Class II and Class III carriers from also voluntarily participating for the same five-year term as Class I carriers would be required to do. *Arbitration NPRM,* EP 765, slip op. at 9 n.13.

[18] A Class II or Class III carrier may participate in a movement with a Class I carrier but not necessarily be or remain a defendant in rate disputes. *See e.g., Total Petrochemicals USA, Inc.* v. *CSXT,* NOR 42121 (STB served Jan. 21, 2011).

NPRM that the Board would not ''enact'' the arbitration proposal absent a commitment from all Class I carriers to agree to participate for a five-year term. They argue that requiring a commitment from Class I carriers prior to knowing what the final rule will entail would be inappropriate and contrary to basic principles of fairness. (Joint Carriers Comment 30–31.)

The Board reiterates that it will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted. *See Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes,* EP 765 et al., slip op. at 4 (STB served Dec. 29, 2021). To avoid confusion on this issue, the Board will amend the regulatory text to require each Class I carrier intending to participate to submit to the Board an opt-in notice within 20 days *after* the effective date of this decision. This will allow carriers a 50-day window to review the final rule and decide whether they want to voluntarily participate. As explained in the prior section, all Class I carriers must agree to participate for the arbitration program to become operable.

The Board notes that, as a result of this change, Class I carriers will have only a limited opportunity—beginning immediately after this decision is issued—to decide whether to participate in the new arbitration program. In the original petition for rulemaking, most of the Class I carriers stated that an arbitration process would provide a better means of addressing concerns about the availability of rate reasonableness review for smaller rate cases than would FORR. (Pet. 1–2; CP Letter 1.) As noted above, the Board agrees that alternative dispute resolution is generally preferrable to formal adjudication. Accordingly, the purpose of the 50-day window is to give Class I carriers the option to decide if they will voluntarily participate in the adopted arbitration program as an alternative to FORR. The duration of this window gives the carriers sufficient time to decide but also ensures that there is certainty for all stakeholders within a reasonable amount of time as to whether and when the new arbitration program will commence.

Lastly, the Board notes that it will also adopt, without modification, the procedures for Class II and III carriers to participate on case-by-case basis as proposed in *Arbitration NPRM. Arbitration NPRM,* EP 765, App. A (proposed § 1108.23(a)(4)).[19]

c. Shipper Participation and Opt-In Procedures

As proposed in *Arbitration NPRM,* the final rule will allow shippers to participate on a case-by-case basis. A shipper's participation is indicated by its submission of a copy of a written notice of its intent to arbitrate to the Class I carrier and OPAGAC. *See infra* Part III.A for additional explanation of these procedures.

2. Five-Year Term

In *Arbitration NPRM,* the Board proposed that the arbitration program would last for a period of five years. The five-year period was based on a pre-NPRM pledge from the Petitioners to participate in the arbitration program for five years if the Board adopted their proposed arbitration program without changes. *Arbitration NPRM,* EP 765, slip op. at 9. As noted above, the Board has proposed modifications to the Petitioners' proposal to ensure that the program adequately addressed the Board's policy goals and because certain aspects were not feasible. *Id.* at 9–10. However, the Board retained the five-year period. The Board also proposed that it would conduct a programmatic review of the arbitration program ''upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though not later than three years after start of the program,'' at which point the Board would decide whether the program should continue or be terminated or modified. *Arbitration NPRM,* EP 765, App. A (proposed § 1108.32).

Joint Carriers claim that there is an inconsistency in *Arbitration NPRM* regarding whether the five-year term begins on the effective date of the program or the date on which the carrier files its opt-in notice. They suggest this be clarified so that the five-year term begins on the date that the carrier opts in. (Joint Carriers Comment 29–30.) They also urge the Board to clarify what happens after the five-year term expires; specifically, that carriers remain in the arbitration program on an at-will basis (meaning that the carriers are in the program but can withdraw at any time for any reason). (*Id.* at 30.) They suggest that the Board can consider whether another opt-in notice to continue the program beyond five years is needed or appropriate when it conducts the programmatic review. (*Id.*)

NGFA notes that it appears that the FORR exemption would last beyond the initial five-year participation period (unless terminated by the Board). They argue that this could unfairly result in a scenario where the Board terminates the arbitration program after a period of years but allows carriers to continue being exempt from FORR challenges. (NGFA Comment 5.)

AFPM supports the five-year term, provided it is paired with shippers having the option to challenge a rate using FORR. It states that the voluntary nature of the arbitration program and the lack of certainty beyond the initial five-year term reinforces the need for FORR. (AFPM Comment 5.)

The Board will keep the initial participation period for the arbitration program at five years. However, given the confusion about when the five-year period begins and what happens at the end of this period, the Board will provide more specificity in the regulatory text. *See* App. A (49 CFR 1108.22(b), (c)). The regulations will now provide that the arbitration program formally commences upon a notice issued by the Board, and that such notice will only be issued if the agency receives opt-in notices from all Class I carriers. The five-year term of the arbitration program will then run from the date on which the commencement notice is issued. However, if the notice is not issued, the regulations being adopted here will not take effect and the arbitration program will therefore not begin. The FORR exemption will only commence upon the issuance of the Board's notice and will last only as long as the carrier participates in the arbitration program (*i.e.,* until the Board terminates the program, the five-year term ends and the program is not renewed, or a carrier withdraws due to a material change in the law).

In *Arbitration NPRM,* the Board did not elaborate on what happens at the end of the carriers' initial five-year period, other than to note that it would conduct a review of the proposed program no later than three years after start of the program, at which point, the Board may determine that the arbitration program will continue or that the arbitration program should be terminated or modified. *Arbitration NPRM,* EP 765, slip op. at 51. Based on the comments, the Board has decided that leaving this question unaddressed would create too much uncertainty for stakeholders. Moreover, if the program is successful, having such regulations

[19] Because this notice would be submitted by the shipper to the Class I carrier and the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), a complainant will need to coordinate with the Class II or III carrier and determine if it wishes to participate in the arbitration.

already in place for the post-five-year period may avoid the need for the Board to initiate a new proceeding. Accordingly, the Board will amend the proposed regulatory text to provide for renewal of the arbitration program at the end of the initial five-year participation period, and for every five years after that. For renewal to occur and the arbitration program to remain in effect, the Board will require all existing Class I carriers to opt into the arbitration program for another five-year term. This requirement will apply even if one or more of the carriers have withdrawn during the initial five-year participation period due to a material change in the law (as discussed below). If all carriers once again choose to participate, as indicated by the filing of opt-in notices, and the arbitration program is renewed, the Class I carriers will remain exempt from FORR.

3. Withdrawal

a. Withdrawal Will Be Permitted If There Is a Material Change in Law

The Board indicated that the carriers' ability to withdraw from the program should be narrow, as participation from all of the Class I carriers would be important to the success of the arbitration program. *Arbitration NPRM,* EP 765, slip op. at 11. Accordingly, the Board proposed that the only basis upon which a carrier could withdraw from the arbitration program would be if there is a material change in the law regarding rate reasonableness methodologies, subject to objection that would then be ruled on by the Board. *Id.* at 16–17. The Board also noted that its decision on whether to include a withdrawal right in the arbitration program would be influenced by whether there is a readily accessible small rate case review process as a backstop in the event a carrier is no longer participating in the arbitration program. The Board specifically sought comment on this issue. *Id.* at 12.

No commenter specifically addressed whether carriers' right to withdraw should be contingent on the existence of another readily accessible rate review process to serve as a backstop. In any event, the issue is now moot because the Board is adopting FORR, which would serve as an additional regulatory backstop for similar types of small rate disputes. Accordingly, the Board will allow participating carriers to withdraw from the program if there is a material change in the law.

However, the final rule will also specify that the termination or modification of any part of the FORR process, should it occur, will not be considered a change in law for which carriers can opt out. In *Arbitration NPRM,* the Board noted that it was proposing that adoption of FORR would not be considered a change in law. *Arbitration NPRM,* EP 765, slip op. at 16. Because the Board today is also adopting FORR, that proposed provision is now moot. However, the carriers have indicated that FORR will likely be the subject of legal challenges. One benefit of the new arbitration program is that it will provide complainants with more certainty that they will have a more readily accessible rate relief process available at this time. That benefit would be defeated if Class I carriers could use the outcome of a legal challenge to FORR as a basis to withdraw from the arbitration program. To be clear, by agreeing to participate in the arbitration program, Class I carriers' commitment to arbitrate for a period of five years will be enforced, regardless of any potential changes to (or elimination of) FORR based on appellate litigation or any other reason.

b. Withdrawal Period

Joint Carriers argue in their comment that the time proposed by the Board for carriers to indicate whether they intend to withdraw—10 days after an event that qualifies as a basis for withdrawal—is too short. They argue that, contrary to the Board's assertion in *Arbitration NPRM,* a decision to withdraw would not be made quickly. (Joint Carriers Comment 26.) They note there is no way of knowing how complex or lengthy such a material change could be and, therefore, a rushed decision might cause parties to withdraw who might otherwise have stayed in the program. (*Id.*) Accordingly, Joint Carriers request that the period be extended to 30 days. (*Id.* at 27.) No other parties commented on this aspect of *Arbitration NPRM.*

The Board understands Joint Carriers' concern that 10 days may be too short a time-period to properly assess the impact of a material change in law. However, carriers should generally be aware of the potential for a change in law before such changes ultimately occur. Changes would either be through a Board decision, a court decision, or passage of a new law by Congress. These are actions that stakeholders as sophisticated and well-resourced as Class I carriers would have knowledge of in a timely manner. Additionally, the status of pending arbitrations will depend on whether carriers agree to remain in the program, so it is also important that this period of uncertainty not last longer than necessary. Accordingly, the Board will extend the period for carriers to decide whether to withdraw to 20 days.

c. Rulemakings That Constitute a Change in Law

AFPM supports allowing railroads to withdraw due to a material change in the law, but it urges the Board to clarify what would constitute a material change. Specifically, it argues that the Board should identify which open rulemakings may be considered a material change. (AFPM Comment 6.) Under the language of the final rule, the right to withdraw would be triggered if there is a material change to the arbitration program itself, if there is a material change to the Board's existing rate reasonableness methodologies, or if a new rate reasonableness methodology is created. *See* App. A (49 CFR 1108.23(c).) [20] For existing rate case methodologies, a change is more likely to be considered material if it involves a core component of an existing methodology; by contrast, a mere technical or procedural change to the methodology is less likely to be considered a material change. Additionally, a new procedure will not be considered a ''new rate reasonableness methodology'' unless it newly defines one or more criteria by which a rate can be shown to be unreasonable. For example, the Board currently has pending proceedings in *Market Dominance Streamlined Approach,* Docket No. EP 756; *Report: Alternatives to URCS,* Docket No. EP 771; and *Review of Commodity, Boxcar, and TOFC/COFC Exemptions,* Docket No. EP 704 (Sub-No. 1). Although these proceedings may affect certain ancillary aspects of a rate challenge, they do not define the criteria for rate reasonableness determinations and therefore do not involve the creation of new rate reasonableness methodologies. They also do not revise a core component of an existing methodology. Accordingly, any action the Board takes in these proceedings would not be considered a material change. The Board will not speculate on whether other proceedings would give rise to material changes, given that there are

[20] Joint Carriers note that there is a drafting error in the proposed regulations (specifically, 49 CFR 1108.23(c)(1)), which states that a change in law results only from Board actions, despite the fact that the Board stated in the body of *Arbitration NPRM* that changes could result from Congressional or judicial action. (Joint Carriers Comment 26 (citing *Arbitration NPRM,* EP 765, slip op. at 16 n.31). The Board agrees that this language should be modified to broaden the scope of actions that can constitute a material change in law. By removing reference to material changes made by ''the Board,'' the language now allows for material changes as a result of Board, Congressional, or judicial action.

many different directions the Board may take in those cases.

Impact of Carrier Withdrawal on the Arbitration Program

As noted, the final rule being adopted here will require that all Class I carriers participate in the arbitration program as a prerequisite to the program becoming effective. However, the Board has decided that it will allow the arbitration program to continue if one or more carriers choose to withdraw from the program due to a material change in the law—though carriers that withdraw will lose their exemption from FORR. The Board has stated that ensuring shippers have similar access to rate review procedures is important, particularly at the outset of the program. *See supra* Part I.C.1.a. However, the likelihood that there is a material change in the law during the initial five-year period is relatively low. In any event, once the arbitration program has been established and the Board and stakeholders have some familiarity with the process, the Board will be more likely to know if the program is working as intended. Accordingly, its concerns about fairness in access to rate relief notwithstanding, the Board will allow the arbitration program to continue if one or more Class I carriers decides to withdraw based on a change in law. If there is a material change in the law that causes most of the Class I carriers to withdraw from the program, the Board can always reassess whether continuation of the program is still warranted.

Part II—Arbitration Case Limits

A. One Case per Shipper Limit

In *Arbitration NPRM,* the Board proposed that complainants be permitted to initiate only one arbitration per railroad at a time. *Arbitration NPRM,* EP 765, slip op. at 19. The Board provided several reasons for this proposed limit. First, it would prevent complainants from improperly disaggregating related rate challenges into smaller, individual claims. Second, it would ensure that no one complainant pursued so many arbitrations as to delay other complainants from pursuing arbitrations under the 25-case/12-month limit (discussed in the following section). Third, it would allow the Board and stakeholders to develop familiarity with the arbitration process gradually. The Board noted that complainants could bring arbitrations against multiple carriers simultaneously, that they could challenge multiple rates within a single arbitration (subject to the relief cap), and that the Board's existing formal rate reasonableness procedures remain available for those complainants that want to bring multiple rate challenges.

Coalition Associations argue this limit should be removed because it will foreclose shippers with multiple unreasonable rates from timely access to rate review. They note that shippers negotiate rates for multiple lanes simultaneously and that a one-case limit will force complainants to either aggregate claims (thus obtaining less relief on a per-lane basis) or pay higher rates that cannot be challenged. (Coalition Ass'ns Comments 11–12.) Coalition Associations also note that shippers that delay bringing additional rate challenges under the arbitration process will have to continue paying the higher rate during the delay. (*Id.* at 12.)

They contend that the one-case limit also creates an incentive for carriers to seek higher rate increases in negotiations when they know the complainant is engaged in a pending arbitration. (*Id.*) These concerns, they argue, are more insidious than the Board's concern about disaggregation of rate claims. (*Id.* at 13.) Coalition Associations also dispute many of the other reasons stated by the Board as to why the one-case limit is needed. (*Id.* at 13–14.)

IMA–NA and Indorama state that they also do not support the one-case-per-complainant limit. They state that this limit would constrain shippers' ability to challenge rates, given their view that the Board's other existing rate case procedures are ineffective. (IMA–NA Comment 17–18; Indorama Comment 17–18; *see also* Coalition Ass'ns Comment 14.) IMA–NA and Indorama note that there is no such limitation in the proposed FORR process. (IMA–NA Comment 17; Indorama Comment 17.) AFPM argues that the one-case limit would be yet another reason to not exempt railroads who participate in the voluntary program from FORR. (AFPM Comment 7.) It states that shippers should be able to bring multiple arbitrations so long as the lines at issue do not share facilities. (*Id.*) Like IMA–NA and Indorama, AFPM also argues that the Board's reasoning that such complainants have other avenues available to them is counter to the Board's finding that the existing mechanisms have proven unworkable. (*Id.*) AFPM proposes that if the Board adopts the one-case limit, it should allow complainants to bring subsequent rate challenges using FORR. (*Id.*)

Joint Carriers and AAR argue that the one-case-per-complainant limit is needed to prevent improper disaggregation of cases and, as the Board recognized, preventing a single shipper from using all the capacity under the 25-case/12-month limit. (Joint Carriers Reply 16–17; AAR Reply 13–14.) AAR states that several of the shipper interests admit in their comments that they want to bring multiple arbitrations concurrently against the same carrier, which could lead to improper disaggregation of cases, and so the one-case limit is necessary. (AAR Reply 13–14.)

While the one-case-per-shipper limit would prevent improper disaggregation of cases that should be brought as a single case into a number of smaller arbitrations, the Board agrees with the shipper interests that the delays it could create are equally, if not more, problematic. As Coalition Associations note, if a shipper challenging a rate through arbitration is charged additional rates that it believes are unreasonable, the shipper could not use arbitration until the initial arbitration is resolved. Once a carrier is aware of that situation, the carrier could be more aggressive in rate negotiations or even consider imposing a short-term rate increase while the arbitration is pending, especially if the carrier believes that the shipper is unlikely to use one of the available rate methodologies. Accordingly, the Board will remove the one-case per shipper limit from the final rule.

In *Arbitration NPRM,* the Board perceived that the one-case per shipper limit was needed to ensure that more shippers have the opportunity to participate in the arbitration program given the 25-case/12-month cumulative case limit the Board was also imposing. *Arbitration NPRM,* EP 765, slip op. at 19. As noted in the following section, the Board is modifying that cumulative case limit so that it is now set at 25 cases simultaneously. As a result of this modification, there is less need for the one-case limit to guard against a shipper or small group of shippers from dominating the arbitration program to the exclusion of other shippers. The Board also briefly noted in *Arbitration NPRM* that the one-case limit would allow the Board and stakeholders to develop familiarity with the arbitration process gradually. *Arbitration NPRM,* EP 765, slip op. at 19. However, the importance of that goal is outweighed by the problems that the shipper interests have explained would be created by the one-case limit.

In addition, the purpose of this rulemaking is to make rate relief more accessible to shippers with small disputes. As explained above, carriers that participate in the arbitration program will be exempt from FORR challenges during the period of

participation. If the Board were to also impose the one-case limit, shippers' improved access to rate relief would be limited to just one case at a time. The Board noted in *Arbitration NPRM* that the shippers most likely to use the arbitration process would be those that are less likely to have multiple rates they wish to challenge. In retrospect, however, the one-case limit could put those shippers that do have multiple rates that they believe are unreasonable in an unfair position. If a shipper has two rates from the same carrier that are both creating economic hardship, the shipper should not be forced to choose between arbitrating the one dispute but using a less accessible formal rate case process for the other (particularly if the amount in dispute is disproportionate to the cost of bringing a formal case).

However, the Board agrees that, without the one-case limit, there needs to be some safeguard against the possibility of complainants improperly disaggregating claims. Accordingly, as part of the final rule, the Board will mandate that a complainant may not bring separate arbitrations for traffic with the same origin-destination or shipments where facilities are shared. The Board proposed this alternative in *Arbitration NPRM. Arbitration NPRM,* EP 765, slip op. at 20. Aside from AFPM, which supported the idea, (AFPM Comment 7), no other party addressed it. The Board finds that it would serve as a sufficient means to prevent improper disaggregation. Under this restriction, an arbitration complainant could challenge a rate for traffic moving on one part of the defendant carrier's system and also challenge a rate from an entirely different part of the carrier's system. This ''shared facilities'' standard serves as a rough proxy of how a complainant would challenge separate rates in formal cases. Specifically, it is less likely that a complainant would challenge two shipments that do not share facilities as part of single rate case. Accordingly, the Board will impose this restriction in the final rule.

B. 25-Case/12-Month Case Limit

At the urging of Petitioners, the Board limited the number of arbitrations that could be brought against an individual rail carrier to 25 cases within a 12-month time period. *Arbitration NPRM,* EP 765, slip op. at 18. However, rather than allowing carriers to withdraw once this limit was reached (as Petitioners had proposed), the Board proposed that any excess arbitrations would be postponed until such time as the carrier is once again below the 25-cases within a 12-month time period limit. *Id.*[21] The Board reasoned that participation in Board-sponsored arbitration is voluntary, as required under 49 U.S.C. 11708, and because this program would be new, it is reasonable that a carrier who has agreed to participate for a term of years only be required to arbitrate a certain number of cases. *Id.*

Coalition Associations oppose the 25-case/12-month limit. They argue that, by requiring shippers to queue up to arbitrate against the carrier on a first-come/first-serve basis, shippers would incur unpredictable and costly delays. (Coalition Ass'ns Comment 15.) Coalition Associations also argue that if the arbitration process is confidential, shippers would not know if an arbitration would be postponed when they initiate the process, nor would they know how long they would have to wait until the arbitration can begin. Moreover, they argue that the shipper will have to continue paying the unreasonable rate during the delay. (*Id.*) They state that, in contrast, a carrier will know when a case would be delayed, which in turn will give the carrier an advantage in negotiations for other rates. (*Id.* at 15–16.) Coalition Associations argue that the Board's concern that carriers will be inundated with arbitrations does not justify this prejudicial impact on shippers. Additionally, they argue that the Board cites no evidence that a high number of cases is even likely, particularly since shippers have little incentive to arbitrate borderline cases. (*Id.* at 16.)

AFPM states that it supports the 25-case/12-month limit, but it suggests the Board closely monitor this cap to see if it needs to be adjusted in the future. (AFPM Comment 6.)

Joint Carriers oppose removing the 25-case/12-month limit. They argue that they do not have unlimited resources and so they will not voluntarily put themselves in a position where they could potentially be overwhelmed by too many arbitrations at one time. (Joint Carriers Reply 16.) They argue that this case limit is reasonable given that there are thousands of rail customers. (*Id.*)

As with the one-case limit, the Board agrees that the shipper interests have raised valid concerns about the delays that could be created under the 25-case/12-month limit. For example, if 25 arbitrations were brought within the first month after the program becomes effective and all the arbitrations were concluded after four months, a potential complainant whose arbitration exceeds the limit would need to wait an additional eight months before its case could proceed—even though the carrier would not be handling any pending arbitrations during this time. However, the new arbitration program entails a process that will be new and untested; as such, the Board finds that it is reasonable to limit the number of arbitrations to which rail carriers are subject until the Board and stakeholders have a practical understanding of how well the program works.

To balance both the carriers' and shippers' concerns, the Board will adopt a 25-case limit, but it will remove the 12-month component. Without the 12-month component, Class I carriers participating in the arbitration program will be subject to no more than 25 arbitration cases *simultaneously.* The Board finds that this modification should address the shipper interests' concern about the delays that the 25-case/12-month limit would create because it is unlikely that an arbitration will ever have to be placed in abeyance under the revised limit. And, even if a case has to be placed in abeyance, the delay should be minimal—the complaint would only have to wait until one of the 25 pending arbitrations is completed before its case could proceed.[22] Although not at the level they wish, the limit of no more than 25 arbitrations simultaneous should provide the carriers some protection against an excessive number of cases.

C. Joint Carriers' Proposed Simultaneous Case Limit

In the petition for rulemaking, Petitioners proposed allowing carriers to withdraw from the arbitration program if they were subject to 10 simultaneous arbitrations. The Board, however, did not propose this as a feature of the program in *Arbitration NPRM.* The Board found such an occurrence

[21] Additionally, the Board proposed that cases would only count toward the 25-case/12-month limit if the parties actually reach the arbitration phase of the process (*i.e.,* after the Joint Notice has been filed). *Arbitration NPRM,* EP 765, slip op. at 18. The Board also proposed that carriers would be responsible for monitoring the number of arbitrations that are brought and for informing OPAGAC if the limit was reached, at which point OPAGAC would confirm and notify shippers whose arbitrations must be postponed. *Id.*

[22] The Board will add language to the regulation that specifies that an arbitration is considered final for purposes of the 25-cases-simultaneously limit when the arbitration panel issues its arbitration decision, or when an arbitration is dismissed or withdrawn, including due to settlement. In other words, cases that are on appeal to the Board or to a court will not be counted toward the case limit. This is consistent with language that the Board included for the one-case limit in *Arbitration NPRM. Arbitration NPRM,* EP 765, slip op. at 19 n.36 & App. A (proposed § 1108.24(c)). In addition, the Board will remove the definition of ''Pending arbitrations'' from the list of definitions in 49 1108.21, as it will avoid any potential confusion on this issue and is otherwise not necessary.

unlikely and that the other case limits would be sufficient protection against carriers being inundated with cases. *Arbitration NPRM,* EP 765, slip op. at 18.

Joint Carriers urge the Board to reconsider including this limit in the final rule. They argue that the one-case-per-shipper and 25-cases/12-month limits do not sufficiently protect carriers from ''being overwhelmed by a high number of arbitrations, all with expedited schedules.'' (Joint Carriers Comment 27.) However, Petitioners now propose that the limit result in postponement of cases, rather than triggering a withdrawal right. (*Id.* at 27–28.)

In response, Coalition Associations argue that postponing cases above a 10-simultaneous-case limit would place shippers at a disadvantage. For one, it would increase the costs to shippers whose cases are postponed, particularly since the shipper would be paying the challenged rate while waiting for its arbitration to proceed. (Coalition Ass'ns Reply 24.) They argue that this delay would put pressure on shippers to settle claims, due to the fact that the railroad's conduct has led to multiple claims against it. (*Id.*) Coalition Associations also argue that this limitation is not necessary to encourage railroads to participate, as the arbitration program would offer other benefits to railroads. (*Id.*) Lastly, they note that there is no corresponding cap on FORR cases. (*Id.*)

The Board appreciates Joint Carriers' concern about having sufficient resources to handle simultaneous arbitrations. However, there is no limit on the number of rate cases that can be brought against a carrier, so a carrier could just as easily be subject to the same number of rate cases as arbitrations. The Board acknowledges that, because the new arbitration process should be less time-consuming and less costly than a formal rate case, shippers may bring more challenges through the arbitration process than they otherwise would through formal cases. But that would indicate that the arbitration process is providing shippers with better access to potential rate relief, which is the goal of this proceeding. In other words, if the reason carriers today are subject to very few rate cases is that the formal rate case processes are too costly to be worth pursuing, that is not a justification for protecting them from a somewhat larger number of challenges under the arbitration program as well. Finally, in the event that there are a greater number of arbitrations than the Board anticipates that create concerns about the fairness of the program, it will stand ready to take appropriate action.

The Board acknowledges that in *Arbitration NPRM* it stated that the existence of the one-case-per-carrier and the 25-cases/12-month limit made the need for the 10-simultaneous-case limit unnecessary, but here, the Board is discarding one of those limits and loosening the other. *Arbitration NPRM,* EP 765, slip op. at 18. However, the limit of no more than 25 arbitrations simultaneously should provide the carriers some protection against an excessive number of cases.

Part III—Arbitration Program Procedural Requirements

A. Pre-Arbitration Procedures and Timelines

As proposed by the Board, the arbitration process under the new program would begin with the shipper submitting a copy of a written notice of its intent to arbitrate (Initial Notice) to the rail carrier and OPAGAC (though OPAGAC would not be permitted to share this information outside of that office). *See Arbitration NPRM,* EP 765, slip op. at 20–21 (setting forth the proposed requirements for the Initial Notice). The parties would then have the option to mediate if both parties agreed to do so, but mediation would not be required if one or both parties choose not to mediate. The mediation period would be for 30 days and be arranged by the parties; the Board would not appoint a mediator or otherwise oversee the mediation. *See id.* at 21–22. If mediation is unsuccessful, or if the parties choose not to mediate, they would jointly submit a second notice (Joint Notice) to OPAGAC and the Office of Economics (OE) (submission to OE would allow that office to begin compiling the Waybill data that is automatically provided to the complainant). *See id.* at 22–23 (setting forth the proposed requirements for the Joint Notice). The only comments on these aspects of the Board's proposal pertained to mediation. Because no commenters addressed the Initial Notice and Joint Notice requirements, they will be included in the final rule.

NGFA and AFPM support the Board's proposed mediation provisions, with AFPM stating that it will allow parties to avoid unnecessary delays for disputes that are clearly not likely to be resolved through mediation. (NGFA Comment 8–9; AFPM Comment 8.) However, Joint Carriers argue that the Board should require brief mediation before the actual arbitration phase, unless *both* parties mutually consent to forgo it. (Joint Carriers Comment 28.) They argue that the Board's concern that mandatory mediation would discourage shippers from using the arbitration program is unlikely and, in any event, is outweighed by the minimal cost and time of mediation. (*Id.* at 29.) BNSF also argues that mediation should be mandatory before the actual arbitration phrase. It states that, in its experience, most successful arbitrations are resolved prior to the arbitration and the Board's focus on the timing of mediation unduly minimizes the potential for settlement that mediation would bring. (BNSF Comment 3–4.) AAR also urges the Board to build in a mandatory mediation period, arguing it would be consistent with the Board's stated preference for private-sector solutions. (AAR Comment 6.)

Coalition Associations take issue with Joint Carriers' insistence on mandatory mediation. They argue that it would increase costs on shippers and lengthen the procedural schedule by 25%, during which time the shipper would be subject to the challenged rate. (Coalition Ass'ns Reply 22–23.) Coalition Associations also argue that allowing parties to forgo mediation upon mutual consent is not helpful because it causes delay and, therefore, it is unlikely a railroad would ever consent to opt out. (*Id.* at 23.) Lastly, Coalition Associations note that the American Arbitration Association allows parties to opt out of mediation unilaterally and that JAMS [23] does not require mediation as a precondition to arbitration. (*Id.*)

The Board will deny the requests from rail carriers to make mediation mandatory. Although the Board requires parties to mediate under its other rate case processes, the goal of arbitration is to create a process that is particularly expeditious and less costly than existing processes. Despite carriers' assertion, the time and expense of engaging in mediation is not insignificant (particularly since it would be the parties, not the Board, providing the mediator). By not requiring mediation as part of the arbitration process, the Board will give parties the option to decide whether they want to mediate before arbitrating their rate dispute.

The Board recognizes that, although it is not requiring mediation here, it is requiring it for FORR cases. *See FORR Final Rule,* EP 755, slip op. at 25. While mediation can be a useful exercise, there is a fair degree of similarity between the mediation and arbitration processes. Accordingly, the Board concludes it is reasonable to allow parties to elect to

[23] According to the JAMS website, it ''is the world's largest private alternative dispute resolution (ADR) provider.'' *See www.jamsadr.com/about/.*

bypass mediation here and proceed directly to arbitration.

The Board notes that if a carrier genuinely believes that mediation would be beneficial, it is free to speak directly with the complainant and encourage the complainant to participate in mediation.[24] Coalition Associations briefly note that if a complainant is forced to participate in mediation, it ''increases the financial stakes for shippers without a corresponding increase for railroads.'' (Coalition Ass'ns Reply 23.) Carriers are free to agree to extend the relief period for the length of time that the parties are engaged in mediation to incentivize a shipper to participate in mediation (though not longer than the statutory maximum of five years).

B. Arbitration Panel Selection

In *Arbitration NPRM,* the Board proposed adopting the Petitioners' idea of a panel made up of two arbitrators—one appointed by each party—and a lead arbitrator chosen by the parties jointly. *Arbitration NPRM,* EP 765, slip op. at 24. For the party-appointed arbitrators, the Board proposed allowing parties to select arbitrators ''without limitation,'' including individuals not on the agency's roster. The Board noted, however, that arbitrators must perform their duties with ''diligence, good faith, and in a manner consistent with the requirements of impartiality and independence'' and proposed allowing each side to object to the other side's selection, with for-cause objections that would be ruled on by an ALJ. *Id.* at 24–25. No party commented on this aspect of the Board's proposal. Accordingly, it will be included in the final rule.

As for the lead arbitrator, the Board proposed that the two party-appointed arbitrators would make a selection from a joint list provided by the parties but, if the arbitrators are unable to agree, that they shall select from the Board's roster using the alternate-strike method (as set forth in § 1108.6(c)). The Board did not propose requiring the lead arbitrator to meet any qualification requirements (as is required for individuals wanting to be on the Board's arbitration roster), but it did request parties to comment on whether there should be such a requirement.

Both Joint Carriers and AAR object to requiring the party-appointed arbitrators to select the lead arbitrator from the Board's roster when there is disagreement. Joint Carriers argue that the roster is too small a pool, while AAR argues that selecting from the roster is problematic because it favors whichever side is more represented on the roster. (Joint Carriers Comment 20; AAR Comment 7.) Accordingly, Joint Carriers and AAR propose that an ALJ select the lead arbitrator when there is disagreement. (Joint Carriers Comment 20; AAR Comment 7.) Joint Carriers specifically propose the ALJ select from a joint list submitted by the parties, in which each party would select three arbitrators for a total of six arbitrators,[25] and that the ALJ should be guided by the qualification requirement of 49 CFR 1108.6(b). (Joint Carriers Comment 20–21.)[26] They note that relying on an ALJ would also be consistent with the process proposed by the Board for resolving disputes over party-appointed arbitrators. (*Id.* at 20.)

Coalition Associations oppose the idea of having an ALJ select the lead arbitrator from a list generated by the parties. They propose that the parties generate a list, but instead of having the ALJ select the lead arbitrator, the parties use the alternating-strike method. They argue this would allow parties to have more control over the selection of the lead arbitrator, as opposed to an ALJ who would likely be unfamiliar with the individuals on the list. (Coalition Ass'ns Reply 26–27.) Finally, AFPM argues that the lead arbitrator should meet the 49 CFR 1108.6 qualifications, particularly since the panel will have to make a determination on market dominance. (AFPM Comment 8.)

The Board will require that any individuals on the list meet the qualification requirements of 49 CFR 1108.6(b). In particular, the Board will require the lead arbitrator to be a person ''with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector,'' and that has ''training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.'' 49 CFR 1108.6(b). Such a requirement will ensure that the lead arbitrator will be able to carry out his or her responsibilities for handling evidentiary matters and that the panel will have addressed the appropriate legal criteria in reaching its decision.[27]

Commenters all oppose selecting from the Board-maintained roster in situations where parties cannot agree on a lead arbitrator. Accordingly, the Board will modify the final rule to instead allow the parties to develop a joint list. To develop the joint list, the Board will require each side to include the names of three individuals who meet the qualification requirement of 49 CFR 1108.6(b). Both sides will then be permitted to strike the names of two individuals proposed by the opposing side. The parties will then contact the Director of OPAGAC, who shall select from the two remaining names using a random selection process. The Board finds using this method of selecting the lead arbitrator would be easier and faster than relying on an ALJ or other substantive decisionmaker. While this approach has certain advantages, the Board acknowledges that selection approaches that do not rely on the roster, which commenters uniformly opposed, also have certain built-in incentives that may be disadvantageous.

C. Record-Building Procedure

1. Procedural Schedule

Under 49 U.S.C. 11708(e)(2), ''[t]he evidentiary process of the voluntary and binding arbitration process shall be completed not later than 90 days after the date on which the arbitration process is initiated unless—(A) a party requests an extension; and (B) the arbitrator or panel of arbitrators, as applicable, grants such extension request.'' The Board proposed that the arbitration program would have a 90-day evidentiary phase composed of a 45-day discovery sub-phase and a 45-day sub-phase for submission of pleadings or evidence (beginning from the formal commencement of the arbitration phase). *Arbitration NPRM,* EP 765, slip op. at 27–28. Under the Board's proposal, the arbitration panel could extend the discovery sub-phase upon request (even if only sought by one party), but such extensions would not automatically result in a corresponding extension of the ''submissions'' sub-phase (unless the parties agreed to extend the submissions

[24] The Board is modifying the language proposed in *Arbitration NPRM* relating to when mediation is initiated. In particular, the Board is deleting a sentence that stated that mediation would be ''initiated'' by the submission of the Initial Notice, as the Board intends that parties should discuss the possibility of mediation after the Initial Notice is submitted. If there is agreement to mediate, the regulations provide that the parties must schedule mediation promptly and in good faith.

[25] Joint Carriers state they would also accept a proposal that the list include more than six arbitrators, but the Board should not require fewer than six. (Joint Carriers Comment 20–21 n.41.)

[26] Under 49 CFR 1108.6(b), persons on the Board-maintained roster must be individuals ''with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector,'' and ''must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.''

[27] Joint Carriers oppose the qualification requirement of 49 CFR 1108.6(b) applying to party-appointed arbitrators. (Joint Carriers Comment 21 n.42.) The Board confirms that the qualification requirement will not apply to party-appointed arbitrators. *Compare* 49 CFR 1108.6(b) (requiring that, for the existing arbitration program, all individuals on the arbitration panel must meet the qualification requirement).

sub-phase as well). The Board stated in a footnote that its ''expectation [is] that the arbitration panel will grant such extensions only in extraordinary circumstances and should attempt to adhere to the 90-day default evidentiary period set forth in the statute to the greatest extent practicable.'' *Arbitration NPRM,* EP 765, slip op. at 28 n.44. However, that extraordinary circumstances standard was not included in the regulatory text. As for how evidence would be submitted, the Board proposed that the arbitration panel would set forth the schedule and format for the presentation of evidence, allowing for principles of due process. (*Id.*)

AAR proposes that there should be a full 45-day submission sub-phase, even if the discovery period is extended. (AAR Comment 7.) It argues that a party is equipped to weigh the benefit of seeking additional discovery against the risk that the proceeding will be extended. (*Id.* at 8.) AAR states that, because the pleadings are informed by discovery, the Board should not diminish the timeframe for submitting pleadings because of the need for additional discovery. (*Id.*)

Coalition Associations argue that the arbitration proposal has a longer evidentiary phase than the *FORR SNPRM* proposal (90 days versus 59 days). They argue that this longer schedule will increase the costs for parties in arbitration because it will give parties more time to prepare evidence, resulting in higher attorneys' fees and other costs. (Coalition Ass'ns Reply 10.) Coalition Associations also dispute the assertion by Joint Carriers that arbitration will be less formal and subject to ''hardball advocacy,'' and therefore less costly. (*Id.*) AFPM states that it does not object to the proposed procedural schedule. (AFPM Comment 10.)

Upon further consideration, the Board will modify the final rule so that it is left to the arbitration panel's discretion whether to extend the submission sub-phase upon an extension of the discovery sub-phase and, if so, for how long. The arbitration panel will be in the best position to weigh whether an extension of the discovery period warrants an extension of the submission sub-phase, based on input from the parties.[28] Such a rule is also consistent with 49 U.S.C. 11708(e)(2).

Coalition Associations' argument that the longer schedule in arbitration relative to FORR will increase costs for litigants is overstated. As described above, arbitration is an inherently efficient process. There is no certain mechanism to determine whether a particular arbitration would be more expensive than a particular proceeding under FORR. And, as discussed above, the regulations will allow parties to request, and the arbitration panel to adopt, procedures that are more efficient or less costly. In addition, the discovery limits—discussed in the following section—will require parties to streamline their litigation strategy.

2. Discovery Limits

The Board proposed that each side be allowed 20 written document requests, five interrogatories, and no depositions. However, the Board invited comment on whether the limits should be raised in cases where the non-streamlined market dominance approach is used. The Board also proposed that the lead arbitrator be responsible for managing discovery. *Arbitration NPRM,* EP 765, slip op. 28–29.

IMA–NA, Indorama, and Coalition Associations do not support limits on discovery. They argue that, because railroads generally control most of the information needed to bring a case, these limitations will have a disproportionately adverse effect on complainants. They argue that this, in turn, could deter shippers from using the arbitration program, particularly if they feel a case requires more information than it can obtain under these limited discovery procedures. They also note that there are no such discovery limitations in FORR. (IMA–NA Comment 18; Indorama Comment 18; Coalition Ass'ns Reply 9.) AFPM does not object to the discovery limits, though it notes that the proposed limits may need to be higher for cases in which the non-streamlined market dominance approach is used. (AFPM Comment 10.)

The discovery limits are a key feature of the arbitration program because they will ensure that parties streamline their requests and that the process does not become overly costly or time-consuming. Although the shipper interests argue that shippers require more discovery in rate cases than do carriers, they do not claim that the limited discovery proposed by the Board would be insufficient for purposes of obtaining the evidence needed to present a case to the arbitration panel. However, in response to the concern from the shipper interests that the discovery limits may be too restrictive, the Board will modify the final rule to allow parties to make requests for additional interrogatories and documents, which the lead arbitrator can grant for exceptional circumstances. This will allow parties to obtain additional discovery in cases where it is warranted. In addition, the limits proposed in *Arbitration NPRM* did not account for the additional discovery that may be needed when a complainant uses a non-streamlined market dominance analysis. *See Arbitration NPRM,* EP 765, slip op. at 28. Accordingly, the Board will modify the final rule so that each party receives an additional three interrogatories and three document requests if a defendant carrier does not concede market dominance and the complainant elects to use a non-streamlined market dominance analysis.

3. Waybill Data

As part of the proposed small rate case arbitration program, the Board proposed that each party automatically receive the confidential Waybill data of the defendant carrier for the preceding four years, as in Three-Benchmark cases. *Arbitration NPRM,* EP 765, slip op. at 29. In addition, the Board proposed that the released Waybill data be limited to movements at the same 5-digit STCC as the commodity at issue, but that complainants could request Waybill data beyond four years, beyond the 5-digit STCC, or for non-defendant carriers, by filing a request with the Director of OE under 49 CFR 1244.9(b)(4). *Id.* at 29–31.[29] The Board reasoned that these limits would balance the needs of parties in an arbitration against the goal of maintaining the confidentiality of the Waybill Sample. (*Id.* at 30.)

Coalition Associations argue the scope of Waybill data to be released should be expanded to include all rail carriers and commodities, as ''commodities can have comparable transportation characteristics at higher STCC levels and transportation characteristics can be similar across railroads.'' (Coalition Ass'ns Comment 18.) They also claim that the Board permits four years of Waybill data in Three-Benchmark cases without restricting the data to specific commodities. (*Id.* at 17.) Coalition Associations also note that the Board proposed no carrier or commodity

[28] The arbitration panel need not extend the submission sub-phase for the same length of time as the extension of the discovery sub-phase. For example, if the arbitration panel extends discovery by 15 days, it may decide that an extension of the submission sub-phase of only 10 days is sufficient.

[29] The Board also proposed that the Director of OE provide the data to the parties within seven days, that both parties and arbitrators must sign a confidentiality agreement before any Waybill data is released, and that the Waybill data cannot be obtained through discovery. *Arbitration NPRM,* EP 765, slip op. at 29–31.

restrictions on access to Waybill data in FORR and that there is no reason that Waybill access in arbitration should be more limited than it is for FORR. (*Id.*) Finally, they also raise a number of concerns about the process by which parties would have to seek additional Waybill data from the Director of OE. (*Id.* at 18–19.)

Joint Carriers oppose expanded access to Waybill data beyond what was proposed in *Arbitration NPRM.* They note that the process set forth in 49 CFR 1244.9(b)(4), under which complainants can still obtain access to additional data, is straightforward and such requests are typically granted promptly. (Joint Carriers Reply 18.) They further argue that the proposed limits are consistent with precedent and the highly confidential nature of the Waybill Sample. (*Id.* at 19.) Lastly, Joint Carriers argue that Coalition Associations are incorrect when they say that the FORR proposal gives complainants access to the Waybill Sample without restrictions, as the cases cited by the Board in *FORR SNPRM* limit Waybill data to that of the defendant carriers. (*Id.*)

a. Commodities

The Board will modify the final rule to allow complainants to have access to the defendant carrier's Waybill data for all movements without restriction on commodity type. The agency's practice in Three-Benchmark cases has been to provide complainants with data for all commodities.[30] The Waybill data is provided to complainants so that they can select those movements from the data set that they believe create the most appropriate comparison group, but also so they can verify the Board's RSAM and $R/VC_{>180}$ calculations. *See Waybill Data Released in Three-Benchmark Rail Rate Proceedings,* Docket No. EP 646 (Sub-No. 3), slip op. at 9 n.20 (STB served Mar. 12, 2012); *Simplified Standards for Rail Rate Cases* (*Simplified Standards*), EP 646 (Sub-No. 1), slip op. at 79 (STB served Sept. 5, 2007). Accordingly, upon further consideration, the Board sees no reason that complainants in the arbitration process should be more restricted than in Three-Benchmark cases, particularly since complainants in arbitrations may choose to perform similar types of comparison analyses. This would also align with the procedures adopted in FORR. *See FORR SNPRM,* EP 755, slip op. at 37.[31]

For the same reason, the Board will also amend the regulatory text so that the Waybill data provided to complainants is not limited only to movements with revenue to variable cost (R/VC) ratio above 180%.[32]

Non-Defendant Carriers

The Board will not expand the automatic Waybill data release requirements to include non-defendant carriers. Coalition Associations argue that access to other railroads could be needed in some rate comparison analyses. In *Arbitration NPRM,* the Board acknowledged that there could indeed be instances where such data is needed, but if so, parties could request such data from the Director of OE. The Board proposed amending its regulations at 49 CFR 1244.9(b)(4) to allow for such requests in arbitration proceedings. Allowing the Director to review such requests on an individual, case-by-case basis will provide a way for the Board to ensure that only confidential Waybill data of other carriers that is relevant to the arbitration is released.

The Board will also clarify that a defendant carrier's outside attorneys and consultants should be given access to any non-defendant carrier Waybill data that is provided to the complainant. Doing so is necessary to avoid creating informational asymmetry. Accordingly, if the Director grants a complainant's request for access to non-defendant carrier data, the Director will inform the defendant carrier so that the carrier's outside attorneys and consultants can obtain the same data, pursuant to the required confidentiality agreement and undertakings.

b. Waybill Requests

Coalition Associations argue that the process of requesting additional data is itself problematic. Under the proposal in *Arbitration NPRM,* a party seeking more Waybill data would need to have their law firm or consultant file a request that meets the requirements of 49 CFR 1244.9(b)(4), specifically, that a party:

- Demonstrate that ''[t]he STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues'' in a pending arbitration; and
- Include a request that meets the requirements of 49 CFR1244.9(e), which states that applicants must provide ''(i) A complete and detailed explanation of the purpose for which the requested data are needed[;] (ii) A description of the specific waybill data or fields actually required (including pertinent geographic areas)[; and] (iii) A detailed justification as to why the specified waybill data are needed.''

Coalition Associations argue that this process would require the complainant to litigate the merits of its methodology before it can even develop and present evidence based on that methodology; that there is no guarantee that the Director will release the data; that there are no clear standards for granting its release; that the Director's decisions are given a high standard of deference; and that the process could take a week or longer if there is an appeal to the Board, making arbitration more costly and time-consuming. (Coalition Ass'ns Comment 18–19.)

Coalition Associations' arguments are misplaced. The revised text of § 1244.9(b)(4) being adopted here sets forth clear requirements for seeking the release of Waybill data in arbitrations (and other STB proceedings): a complainant needs to demonstrate that there is reasonable need for the data relating to the methodology that it intends to use in a formal case or an arbitration and the Waybill Sample is the only source of this data. Thus, contrary to Coalition Associations' assertion, the Director would not be prejudging the complainant's methodology, but instead, merely assessing whether the data being sought is relevant to that methodology and whether the data is the only source of the information. Complainants in arbitration matters would be similarly situated to other complainants that seek confidential Waybill data in Board

[30] In the original notice of proposed rulemaking adopting the Three-Benchmark test, the Board stated that ''[u]nder our proposal here, once we find that a complainant is eligible to use the Three-Benchmark method, we would release to lawyers and consultants who have signed the necessary confidentiality agreement all movements in the most recent Waybill Sample that have the same 2-digit STCC code as the issue movement and an R/VC ratio above 180%.'' *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 32–33 (STB served July 28, 2006). However, in adopting the final rule in that proceeding, the Board did not mention this limitation or indicate that it was being adopted. *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 78–80 (STB served Sept. 5, 2007). In *Waybill Data Released in Three-Benchmark Rail Rate Proceedings,* Docket No. EP 646 (Sub-No. 3) (STB served Mar. 12, 2012), the Board, pursuant to a court remand, again considered its rules for release of Waybill data in Three-Benchmark cases but, again, there was no mention of this limitation on the scope of the Waybill data.

[31] In *FORR SNPRM,* the Board also stated that waybill access (subject to appropriate protective orders) would include the full sample, including unmasked revenue, as is allowed in Three-Benchmark cases. *FORR SNPRM,* slip op. at 37. In *Arbitration NPRM,* the Board's proposed regulation also allowed for release of unmasked Waybill data. That provision will be included as part of the final rule here.

[32] Although the Board takes no position on whether an arbitrator decision may rely on a methodology that utilizes movements below 180% R/VC, providing the data for such movements allows arbitration parties to verify the Board's RSAM and R/VC>180 calculations.

proceedings without automatic disclosure.

The Board also notes that—in contrast to ''other user'' requests under 49 1244.9(c)—under 49 CFR 1244.9(b)(4), which will be the process for requesting Waybill data for arbitrations, there are no notice-and-objection procedures. Accordingly, the Board does not expect that there would be adversarial litigation regarding the scope of an arbitration complainant's initial waybill request.

Appeals of the Director's orders may be brought to the Board pursuant to 49 CFR 1115.1.[33] As specified in 49 CFR 1115.1(c), the party appealing the Director's ruling will have 10 days to file the appeal and other parties will have 10 days to file responses. The Board will add language to the regulatory text of the arbitration program to make this clear.[34] In addition, the Board will include language that pauses the arbitration process until the Board has issued its decision ruling on the appeal.

As discussed below, *see infra* Part III.I.4, the Board finds that the Director's decision on the Waybill data request, as well as the Board's decision on any appeal of the Director's decision, will not be confidential. As such, requests for Waybill data will result in the disclosure of the existence of the arbitration and the identity of the participating parties, thus creating an exception to the Board's requirement that the arbitration process remain confidential. The Board specifically highlighted this problem in *Arbitration NPRM* and invited parties to comment on whether there were alternate means for preserving confidentiality. No party addressed this issue, and the Board has not identified any workable alternative.

4. Admissible Evidence

As proposed in *Arbitration NPRM,* EP 765, slip op. at 32, arbitration decisions will be deemed non-precedential and therefore will be inadmissible in other arbitrations.

D. Market Dominance

In *Arbitration NPRM,* the Board proposed allowing the arbitration panel to rule on the issue of market dominance as part of the arbitration process. *Arbitration NPRM,* EP 765, slip op. at 35. The Board's proposal was based on a modified interpretation of 49 U.S.C. 11708(c)(1)(C). Previously, in *Revisions to Arbitration Procedures,* Docket No. EP 730, the agency had interpreted § 11708(c)(1)(C) as requiring the Board to decide whether there was market dominance (or, alternatively, that the parties concede market dominance) before proceeding to arbitration. *See Revisions to Arb. Procs.,* EP 730, slip op. at 6–7 (STB served Sept. 30, 2016), *corrected* (STB served Oct. 11, 2016); *see also Revisions to Arb. Procs.,* EP 730, slip op. at 2–3 (STB served May 12, 2016). But after re-examining the text of that statute, as well as 49 U.S.C. 10707 (which is referenced in § 11708(c)(1)(C)), the Board concluded that the statute could be read to allow the arbitration panel to rule on market dominance (though the Board proposed also continuing to allow the carrier to concede market dominance or for the parties to jointly request that the Board make the determination).

In addition, the Board proposed that complainants in a small rate case arbitration could attempt to establish market dominance using either the streamlined [35] or non-streamlined approach. *Arbitration NPRM,* EP 765, slip op. at 36. Finally, the Board proposed that arbitrators be prohibited from considering evidence on product and geographic competition and the limit price test as part of the market dominance analysis. *Id.*

NGFA supports the ability to demonstrate market dominance using the streamlined or traditional approach, as well as the prohibitions on product and geographic competition and the limit price test. (NGFA Comment 8–9.) AFPM also supports allowing the arbitration panel to decide market dominance, but only if the lead arbitrator meets the qualification requirements of 49 CFR 1108.6. It argues that such a determination may be too complex for an arbitrator that does not have these qualifications. (AFPM Comment 11.) [36]

BNSF argues that the Board should allow consideration of product and geographic competition as part of the market dominance inquiry. (BNSF Comment 4.) It argues there is a ''significant asymmetry'' in allowing shippers to pursue novel rate methodologies yet refusing to allow carriers to present evidence of product and geographic competition and that the new arbitration program could be an ''incubator'' for more efficient ways to present evidence of product and geographic competition. (*Id.* at 4–5.) BNSF states that any concerns about evidentiary sprawl would be mitigated by the various procedural constraints (*i.e.,* discovery limits, time frames). (*Id.* at 5.) BNSF proposes, alternatively, that the Board allow product and geographic competition in cases where only the traditional market dominance approach is used. (*Id.*)

Coalition Associations oppose BNSF's request to allow carriers to present evidence of product and geographic competition as part of the market dominance inquiry. They note that the Board has previously excluded such evidence because it places a substantial burden on the agency by having to address materials outside its area of expertise. (Coalition Ass'ns Reply 25.) They also argue that BNSF has failed to explain how parties could address these complex matters in an abbreviated proceeding. (*Id.*)

No commenters addressed the Board's proposal to allow the arbitration panel to rule on market dominance. Accordingly, the Board will adopt this aspect of *Arbitration NPRM* in the final rule.

The Board declines to adopt BNSF's proposal to allow consideration of product and geographic competition as part of the market dominance analysis. Although the Board has recognized that product and geographic competition may impact competitive options, the Board does not currently consider product and geographic competition in its market dominance determinations due to the complexity such an analysis would add to the process. *See Mkt. Dominance Streamlined Approach,* EP 756, slip op. at 31–32 (STB served Aug. 3, 2020) (''The goal of the streamlined market dominance approach is to reduce the burden on parties and expedite proceedings, a goal that would not be met by reintroducing a requirement that the agency has

[33] Under this regulation, parties may appeal decisions of employees acting under authority delegated to them pursuant to 49 CFR 1011.6. The Director's authority to grant or deny access to Waybill data is set forth in 49 CFR 1011.6(e).

[34] In adjudications before the agency, if the party appealing the Director's decision wishes for the appeal to be heard prior to the final decision in the case, it would have to meet the criteria for an interlocutory appeal under 49 CFR 1115.9. *See Finch Paper LLC—Pet. for Decl. Order,* FD 35981, slip op. at 5 (STB served Jan. 11, 2017). However, under the regulations being implemented here, the Director's decision on waybill access would be handled separately from the arbitration process. Accordingly, the Board will consider the Director's decision to be immediately appealable to the Board. *See* 49 CFR 1115.1(c). For that reason, such requests should be submitted as filings with a ''WB'' docket prefix.

[35] *See Mkt. Dominance Streamlined Approach,* EP 756 (STB served Aug. 3, 2020) (adopting an approach that allows complainants to make a prima facie showing of market dominance based on an established set of factors).

[36] As noted above, the Board is in fact adopting a qualification requirement for the lead arbitrator. *See supra* Part III.B.

repeatedly found to be too burdensome as part of the non-streamlined approach.''); *Pet. of the Ass'n of Am. R.Rs. to Inst. a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Mkt. Dominance Determinations for Coal Transported to Util. Generation Facilities,* EP 717, slip op. at 9 (STB served Mar. 19, 2013) (''[A]nalyzing and adjudicating a contested allegation of indirect competition is rarely straightforward and would require a substantial amount of the Board's resources to examine matters far removed from its transportation expertise and to determine if indirect competition effectively constrains rates to reasonable levels . . . .''). As indicated in *FORR Final Rule,* consideration of whether to incorporate product and geographic competition in market dominance determinations has constituted entire rulemaking proceedings on its own,[37] and addressing it here would unduly expand the scope of this proceeding. *FORR Final Rule,* EP 755, slip op. at 26 (reserving this issue for possible future proceedings). Accordingly, the Board will adopt the regulations pertaining to market dominance without changes.

E. Rate Reasonableness Standard of Review

In *Arbitration NPRM,* the Board noted that 49 U.S.C. 11708(c)(3) requires the arbitration panel to consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing, and to ensure that its decision is consistent with sound principles of rail regulation economics. *Arbitration NPRM,* EP 765, slip op. at 37. However, Petitioners asserted, and the Board agreed, that the statute does not require the arbitration panel to *follow* any particular methodology. Accordingly, the proposed regulations were designed to allow complainants methodological flexibility to demonstrate to the arbitration panel that the rate is unreasonable. *Id.* In addition, the Board proposed adding market-based factors to the criteria upon which the arbitration panel could base its decision. *Id.* at 38.[38]

BNSF argues that some of the features of the alternative dispute resolution program it jointly developed with Montana grain interests (Montana ADR Program) should be incorporated into the Board's proposed arbitration program. Specifically, BNSF notes that the Board proposed only that market-based factors ''may'' be considered by the arbitration panel, but BNSF argues that such factors should be mandatory considerations. (BNSF Comment 2.) BNSF claims this will encourage settlements, or at least make the arbitration process more efficient, by forcing parties to rely more on commercial representatives than on lawyers and consultants. (*Id.* at 2–3.) It also argues that the market-based factors are consistent with Board principles intended to reflect market dynamics. (*Id.* at 3.)

BNSF also notes that not all of the market-based factors included in the Montana ADR Program were included in the text of the proposed regulations and suggests that they be added. These include ''consideration of the capital requirements of the rail system used by the complainant's traffic and the revenue available to sustain the network'' and ''relief would not be justified in the event a truck rate that is lower than the contested rail rate is available to the complainant from origin to destination for the same commodity for the specific mileage segment.'' (*Id.*)

Coalition Associations oppose BNSF's proposal to add more market-based factors to the decisional criteria or to make them mandatory, arguing that doing so would inhibit the shipper's ability to have flexibility in making its case and that railroads are free to rebut a shipper's evidence by presenting market-based factors. (Coalition Ass'ns Reply 25.) They also argue that the existence of a lower truck rate is not necessarily indicative that a rail carrier's rate is reasonable. (*Id.* at 26.)

In its comment, USDA argues that while the process for deciding rate reasonableness in FORR is clear, the process for arbitration is unclear. In particular, it argues that there is no explanation of whether the arbitration panel will tend to choose a mid-point between the shipper and railroad positions; create its own, independent measure of what is a reasonable rate; or use some other process. (USDA Comment 3.) USDA notes that railroads have criticized FORR for involving uncertainty; yet, USDA claims, the railroads' proposed arbitration process has even more uncertainty than FORR, which is designed to produce reasonable outcomes. (*Id.*)[39]

The Board will not make the modifications proposed by BNSF. To the extent that parties believe that market-based factors are relevant to the reasonableness of the rate, they are free to raise them, and arbitrators are free to consider them, but there is no need to make it a mandatory requirement. The proposed regulations already include a long list of criteria that the arbitration panel must consider in rendering its decision—the need for differential pricing, statutory authorities, and sound economics. These criteria entail aspects of market-based pricing, even if that concept is not specifically addressed. Indeed, differential pricing—charging shippers different rates based on demand—is a market-oriented concept. Requiring the panel to separately address market-based factors in its decision, in addition to the similar criteria it must already address, would merely add unnecessary complication.[40] For this same reason, there is no need to include the other Montana ADR Program market-based factors in the regulatory text.

In response to USDA's argument that the process for deciding rates is unclear, the Board clarifies that the arbitration program adopted here is not limited to a final offer structure. Accordingly, the arbitration panel is not required to set the rate only at an amount proposed by one of the parties. The decision of the arbitration panel must be consistent with § 11708 (and related requirements) and sufficient to survive review under 49 CFR 1108.29(b)(2). The criteria for a decision set forth in the statute and this regulation should provide the parties with a sufficient degree of certainty as to how the rate in an arbitration decision will be determined.

F. Revenue Adequacy

The Board in *Arbitration NPRM* rejected a request from Petitioners that the new arbitration program include a general prohibition on revenue

[37] *See, e.g., Mkt. Dominance Determinations—Prod. & Geographic Competition,* Docket No. EP 627; *Pet. of the Ass'n of Am. R.R.s,* Docket No. EP 717.

[38] Proposed 49 CFR 1108.29(b)(2) specifically stated that the arbitration panel may ''otherwise base its decision on the Board's existing rate review methodologies, revised versions of those methodologies, new methodologies, or market-based factors, including: rate levels on comparative traffic; market factors for similar movements of the same commodity; and overall costs of providing the rail service.'' *Arbitration NPRM,* EP 765, App. A. It also stated that the decision ''must be consistent with sound principles of rail regulation economics.'' *Id.*

[39] In support of the need for greater access to rate relief, USDA states that no grain shipper has brought a rate case in over 20 years, even though the Board's own recently published rate study shows that grain rates have been equal to or higher than their 1985 levels for the past decade, whereas rates for other commodities have fallen. (USDA Comment 2.) As noted above, *see supra* Part I.B.1, the need for greater access to rate relief, including for grain shippers, has been well-established and so the Board need not address this argument.

[40] In the regulatory text, the Board lists three specific items that can be considered market-based factors. The Board will add the phrase ''for example'' to the regulatory text so that it is clear that these are not the only market-based factors that may be considered. *See* App. A (49 CFR 1108.29(b)(2)).

adequacy evidence or methodologies. *Arbitration NPRM,* EP 765, slip op. at 38–40. The Board indicated that Petitioners had not sufficiently justified such methodological and evidentiary restrictions. *Id.* at 39. Additionally, the Board stated that Petitioners' proposed evidentiary restriction relating to revenue adequacy conflicted with § 11708(c)(3)'s requirement that arbitrators give ''due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).'' *Id.* The Board also stated that it was difficult to reconcile the methodological flexibility afforded to arbitrators under this new arbitration process with a revenue adequacy prohibition, particularly when it came to existing rate case methodologies and market-based factors that contained revenue-adequacy concepts to which Petitioners themselves did not object. *Id.* at 39–40.

1. Railroad Interests

Joint Carriers indicate that their primary concern with the new arbitration program proposed by the Board is the allowance of claims based on the revenue adequacy constraint. They argue that the Board should not let the controversy surrounding the revenue adequacy constraint be the demise of what is otherwise a workable forum for resolving rate disputes. (Joint Carriers Reply 3.) Joint Carriers intimate that they would not participate if revenue adequacy constraint claims can be arbitrated. (*Id.* at 11.) In contrast, BNSF states that it would not pre-condition its participation in the arbitration program on the exclusion of methodologies and evidence pertaining to revenue adequacy. As such, BNSF would choose to participate in the program outlined in *Arbitration NPRM.* (BNSF Comment 2.)

Joint Carriers state that they understand the concerns raised by the Board in *Arbitration NPRM* but that ''more time is needed for the industry to come to a consensus on how to resolve the Board's concerns and also incentivize carrier participation in the [arbitration program].'' (Joint Carriers Comment 7.) They further state that the Board ''should reserve the use of any so-called revenue adequacy constraint under *Coal Rate Guidelines* to formal rate cases.'' (*Id.* at 8.) They claim that the Board's concerns in *Arbitration NPRM* all involved Petitioners' proposed restriction on revenue adequacy evidence, but not the restriction on the revenue adequacy constraint, and that the Board has not justified allowing use of this ''ill-defined concept of rate regulation in an arbitration forum.'' (*Id.* at 15.) They make the following arguments for why revenue adequacy constraint claims should not be permitted in the new arbitration program.

Shippers are Not Disadvantaged. Joint Carriers argue that the proposed arbitration program—even with a prohibition on revenue adequacy constraint claims—offers shippers exactly what they have requested. Specifically, the new program offers complainants some methodological flexibility beyond Stand-Alone Cost so that disputes can be resolved more quickly and with less cost and complexity, and avoids parties having to first seek a determination from the Board on market dominance. (Joint Carriers Comment 6.) Joint Carriers also argue that a prohibition would not prejudice shippers, as they would remain free to litigate revenue adequacy constraint claims in formal rate cases. (*Id.* at 17.)

An Evidentiary Ban is Possible. In their comments, Joint Carriers also argue that they understand the Board's stated concerns in *Arbitration NPRM* about barring revenue adequacy evidence from arbitrations and claim it was not their intent to bar consideration of the need for differential pricing to permit a rail carrier to collect adequate revenues, including the Full-SAC, Simplified-SAC, and Three-Benchmark tests. They claim that a revenue adequacy evidentiary ban can be redefined to address the Board's concerns and pledge to continue to explore ways to make the ban narrower. (*Id.* at 7, 18–19.)

Unresolved Issues Should be Resolved by the Board. Joint Carriers argue that, rather than an arbitration panel, the Board, with its expertise, should be addressing the momentous, complex, and highly contested questions regarding the revenue adequacy constraint and the measure of revenue adequacy. (Joint Carriers Comment 7–9; Joint Carriers Reply 10.) Joint Carriers note that the Board itself stated in *Assessment of Mediation & Arbitration Procedures,* EP 699 (STB served May 13, 2013), that disputes implicating significant policy or regulatory issues are better suited for resolution using the Board's formal adjudicatory procedures. (*Id.* at 17.)

Unresolved Issues Would Create Complications. Joint Carriers argue that the current revenue adequacy constraint test is ''afflicted with radical uncertainty'' and arbitrators would have no idea where to begin addressing such claims, as there would be no guidance from the Board, which would make arbitration decisions arbitrary and unsound. (Joint Carriers Comment 3.) They note that the Board has not resolved the serious flaws that carriers have identified with the use of revenue adequacy claims and argue that it would be inappropriate to leave this concept to be resolved in arbitration—particularly since the arbitrations are intended to be quick and simple. (Joint Carriers Comment 9–10; Joint Carriers Reply 10.)[41] Similarly, they argue that revenue adequacy constraint claims would involve a tremendous amount of evidence, particularly since the Board has not provided guidance on the types of evidence that would be necessary in such cases. (Joint Carriers Reply 10.) Joint Carriers assert that the fact that there are three pending proceedings regarding revenue adequacy should foreclose the use of that methodology in arbitrations, particularly since it is unclear whether the Board's determinations in those proceedings would survive judicial review. (Joint Carriers Comment 15.)

Carriers in Arbitration Have Limited Appellate Rights. Joint Carriers argue that it is unfair to ask the railroads to litigate the issues of revenue adequacy in a forum with limited appellate rights, even though the railroads have asked the Board to address those arguments. (Joint Carriers Comment 17; Joint Carriers Reply 9–10.) They assert that the Board, which is the expert, should address these issues in the first instance, and that they should not be left to arbitration panels in a forum with an expedited timeframe. (Joint Carriers Reply 9–10.)

* * * * *

For these reasons, Joint Carriers request that the Board require that any claims based on the revenue adequacy constraint be filed in a formal rate case, at least until the Board has addressed the ambiguities surrounding it. (Joint Carriers Comment 8; Joint Carriers Reply 9.)[42] Alternatively, they argue the Board should first adopt the railroad

[41] Joint Carriers summarize the four general concerns with using system-wide revenue adequacy to determine rate reasonableness that they have raised in other proceedings, including *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations,* Docket No. EP 766. (Joint Carriers Comment 10–14.) The Board need not address those substantive arguments here; it will address those arguments if and when those arguments are relevant to a particular arbitration decision that is appealed to the Board.

[42] Joint Carriers acknowledge that if the Board later does adopt a methodology on how the revenue adequacy constraint should be applied, it could be used in arbitration in the same way as other Board-recognized methodologies. They state, however, that this would be considered a material change in the law and so railroads would have to consider whether to opt out of the arbitration program. (Joint Carriers Reply 12.)

industry's proposal in *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations,* Docket No. EP 766, to modernize how revenue adequacy is measured so that parties do not fight over this issue in arbitration. (Joint Carriers Comment at 15–16.)

2. Shipper Interests

NGFA and APFM both support permitting evidence and claims based on revenue adequacy to be used in arbitrations. (NGFA Comment 9; AFPM Comment 11.)

Coalition Associations object to the Joint Carriers' arguments for banning revenue adequacy evidence. Coalition Associations argue that 49 U.S.C. 11708(c)(3) contains a Congressional directive for the Board to consider revenue adequacy in Board-established arbitration programs. (Coalition Ass'ns Reply 13.) They also argue that the purpose of the revenue adequacy constraint is to identify the extent to which differential pricing is necessary to permit a carrier to collect adequate revenues pursuant to the concept of revenue adequacy defined at 49 U.S.C. 10704(a)(2). (*Id.*)

Coalition Associations also state that a ban on revenue adequacy claims in arbitration would make formal cases the only option for shippers to bring a small claim asserting revenue adequacy. They argue that, because formal rate cases are widely recognized as inaccessible to shippers with small claims, there would essentially be no revenue adequacy constraint for small claims. (*Id.* at 14.) Litigating a small dispute in a formal case is not realistic, they claim, because railroads will employ a ''war-of-attrition strategy'' to make such cases as burdensome as possible. (*Id.*) Coalition Associations state that the ban on revenue adequacy is particularly problematic when combined with the FORR exemption: if both are adopted as part of the Board's arbitration program, revenue adequacy claims would not be possible in either the arbitration program or FORR. (*Id.*) [43]

3. USDA

USDA agrees with the Board that revenue adequacy is already embedded in a variety of rate reasonableness considerations and that the methodological flexibility of the arbitration program necessitates its inclusion. (USDA Comment 4.)

4. Board Action

The Board will not modify the final rule to prohibit revenue adequacy constraint claims or evidence, as requested by Joint Carriers. In *Arbitration NPRM,* the Board expressed concern that Petitioners' proposed revenue adequacy restrictions were too broad and could therefore exclude claims and evidence that were permitted by statute or prior Board decision. *Arbitration NPRM,* EP 765, slip op. at 39–40. Specifically, the Board explained that Petitioners supported the use of the Three-Benchmark methodology in arbitration, even though one of the key pillars of that methodology is the Revenue Shortfall Allocation Method (RSAM) benchmark, which is a measure of revenue adequacy. *Id.*[44] The logical extension of Petitioners' position—proposing broad prohibitions on any use of ''revenue adequacy'' in the arbitration program—was that the Three-Benchmark methodology would be prohibited as a ''revenue adequacy'' approach.

In their comment, Joint Carriers only vaguely address the Board's concerns with a prohibition on revenue adequacy claims. They state, ''[w]ith the high level of uncertainty surrounding the use of 'revenue adequacy' in rate challenges—and the highly contentious nature of those questions—the Board should reserve the use of any so-called revenue adequacy constraint under *Coal Rate Guidelines* to formal rate cases filed before the Board.'' (Joint Carriers Comment 8.) Inherent in Joint Carriers' argument is the premise that it would be easy to separate ''so-called'' Coal Rate Guidelines revenue adequacy constraint methodologies from other new methodologies that rely on revenue adequacy to some degree. Even if one could differentiate when comparing *Coal Rate Guidelines*-based revenue adequacy claims versus other existing Board-defined methodologies, the distinction could be less clear when a complainant relies on a new methodology. One of the key features of the new arbitration program (which Petitioners supported in the petition for rulemaking) is that complainants will have methodological flexibility to demonstrate that a rate is unreasonable. This will allow complainants to develop new methodologies that, like Three-Benchmark, may contain aspects or components that are based on the concept of revenue adequacy, making them difficult to categorize. In such cases, the arbitration could turn into a debate over whether a methodology is permissible rather than on the merits of the rate itself. Restrictions on revenue adequacy methodologies could also have a chilling effect on complainants considering the use of new methodologies. In fact, parties may feel it necessary to come to the Board to first obtain a determination on whether a particular methodology is permitted before initiating the arbitration process, which would undermine the goal of methodological flexibility. Having to distinguish between permissible and impermissible categories of revenue adequacy claims and evidence would likely add more confusion and litigation expense in what is intended to be an expedited, streamlined dispute resolution process.

Joint Carriers also provide no other specific comments on how to administer a partial revenue adequacy evidentiary prohibition. They argue that the Board's concerns with revenue adequacy in *Arbitration NPRM* all relate only to their proposed evidentiary ban, not with a ban on the revenue adequacy constraint itself. They acknowledge that their originally proposed prohibition on revenue adequacy evidence was too broad, but they claim that the ban could be more narrowly tailored and indicate that they would offer thoughts on how to do so in their reply. (Joint Carriers Comment 7, 18.) However, in their reply, no additional details are given as to how they would narrow the evidentiary ban, with Joint Carriers instead continuing to urge a methodological ban on the use of any revenue adequacy constraint. In any event, even a narrow evidentiary prohibition could still interfere with a complainant's ability to rely on new methodologies.

Joint Carriers also argue that the Board, not arbitrators, should be ruling on the undefined issues surrounding revenue adequacy. However, if an arbitration decision is not appealed, the decision will remain confidential and non-precedential and so would have no impact outside of the arbitration in question. On the other hand, if an arbitration decision is appealed, the Board will be able to review the arbitration panel's decision pursuant to the standard set forth in 49 U.S.C. 11708(h), including that the decision is consistent with sound principles of rail regulation economics.

Joint Carriers argue that the carriers' appellate rights are limited under this statutorily prescribed standard of review. However, as discussed below, *infra* Part III.G, the Board expects to take

[43] Coalition Associations respond to Joint Carriers' arguments disputing the validity of the revenue adequacy constraint. (Coalition Ass'ns Reply 15–19.) As noted above, *supra* n.41, the Board here will not consider Joint Carriers' arguments and so does not address Coalition Associations' counterarguments.

[44] RSAM is ''intended to measure the average markup above variable cost that the carrier would need to charge to meet its own revenue needs,'' *i.e.,* to become revenue adequate. *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 19.

a context-specific approach to reviewing arbitration decisions, including decisions that consider a revenue adequacy methodology. A context-specific finding in a particular appeal on the criteria set forth in 49 U.S.C. 11708(h) would not, standing alone, result in the adoption of, or a material change to, a particular methodology by the Board. Indeed, Board decisions to adopt or alter rate review methodologies have been based on broader considerations than the criteria set forth in the appeals standard. As such, the carriers' concerns that the Board is foregoing its role with respect to the issues surrounding revenue adequacy, including those that pertain to the constraint under *Coal Rate Guidelines,* are misplaced.

Joint Carriers also express concern that claims based on revenue adequacy are too complex to be properly litigated within the structural confines of the arbitration process. However, the very purpose of the arbitration process is to force parties to streamline their cases to reduce this complexity. When deciding whether to initiate an arbitration based on a revenue adequacy constraint claim, a complainant will need to weigh the fact that it will be limited by the requirements of the arbitration process. Conversely, the same structural confines will force a defendant carrier to streamline its arguments in response to a revenue adequacy constraint claim.

Finally, the Board finds Joint Carriers' argument that shippers would still gain significant benefits from an arbitration program that prohibits revenue adequacy evidence and methodologies to be highly speculative. At this time, there is no reason to deprive shippers of the opportunity to try out revenue adequacy approaches that would clearly be permissible in a FORR case.

G. Appeals

Consistent with the requirements of 49 U.S.C. 11708(h), the Board proposed procedures allowing parties to appeal the arbitration panel's decision to the Board and established the standard of review the agency would apply in reviewing such decisions. *See Arbitration NPRM,* EP 765, slip op. at 43–44 (detailing procedures for appeal and the standard of review). Under that standard of review, the Board may review the arbitration decision to determine if:

(1) the decision is consistent with sound principles of rail regulation economics;

(2) a clear abuse of arbitral authority or discretion occurred;

(3) the decision directly contravenes statutory authority; or

(4) the award limitation . . . was violated.

The Board also proposed that the appellate submissions—including the arbitration decision, the petition to vacate or modify the arbitration award, and any reply—be filed under seal. *Id.* at 49. As for its decision ruling on the appeal, the Board proposed that it would be public, but that the Board would maintain confidentiality to the maximum extent possible. *Id.* at 50–51. Toward that end, the Board proposed a process allowing parties to review the Board's decision and request redactions prior to its publication. *See id.,* App. A (proposed § 1108.31(d)(2).) The Board also noted that its decisions on appeal would be precedential. *Id.* at 49.

Joint Carriers argue that Board decisions resolving appeals of arbitration decisions should be non-precedential and binding only on the parties—the same as the arbitration decision itself. (Joint Carriers Comment 21.) Joint Carriers argue that Board decisions on appeal, if made precedential, could create law and policy. This outcome, they assert, will disincentivize parties from participating and encourage the high-stakes litigation tactics that arbitration is intended to avoid, thus undermining the entire purpose for making the arbitration decisions themselves non-precedential. (*Id.* at 22–23.) [45] Joint Carriers claim that the Board has the authority to limit the precedential value of such decisions, arguing that it has previously been done by the Board and other agencies, and that such processes have been affirmed by the courts. (*Id.* at 23 n.45 (citing cases in support of assertion that the Board can designate certain decisions non-precedential).)

Additionally, Joint Carriers propose that the Board add a disclaimer to its decisions on appeal of arbitration decisions, similar to the digests the Board includes with full Board decisions, and as is done by other agencies. (*Id.* at 24.) They also suggest that if a party does introduce a non-precedential decision to the arbitration panel, the arbitration be immediately dismissed to ensure the panel is not improperly influenced. (*Id.*) Joint Carriers state that if the Board does decide to make its decisions on arbitration appeals precedential, then it should clarify that such decisions can constitute a material change in the law that allows carriers to withdraw from the arbitration program. (*Id.* at 24–25.) Joint Carriers argue that the narrow standard for review on appeal and the parties' limited appellate rights would not prevent the Board from potentially creating new law or policy through such decisions. (*Id.* at 25.)

Coalition Associations oppose Joint Carriers' proposal that the Board's decisions on appeal be non-precedential for several reasons. First, they argue that if these Board decisions are non-precedential, carriers would likely appeal every adverse arbitration decision and, therefore, the cost to litigate an appeal to the Board would need to be considered an automatic expense. (Coalition Ass'ns Reply 21.) Second, Coalition Associations argue that non-precedential decisions on appeal will not discourage parties from using ''high-cost, high-stakes'' tactics during arbitration. Coalition Associations note that the appellate standard of review is focused only on fundamental issues of decisional fairness and quality, not an opportunity to relitigate the merits. (*Id.*) Third, Coalition Associations dispute the notion that precedential Board decisions will disincentivize carrier participation. (*Id.* at 22.) Coalition Associations argue that, even if the Joint Carriers were right and this is a disincentive, there are other incentives in the arbitration

[45] Joint Carriers note that the Board originally decided that Board decisions ruling on arbitration appeals would be precedential in *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board,* 2 S.T.B. 564, 577 (1997). (*See* Joint Carriers Comment 22 n.44.) They further note that this resulted in the Board changing the language of the regulatory text that was originally proposed in that proceeding from ''arbitration decisions'' to ''decisions rendered by arbitrators.'' (*Id.*) However, Joint Carriers point out that the Board then modified the language again in *Assessment of Mediation & Arbitration Procedures,* EP 699, slip op. at 31 (STB served May 13, 2013), this time changing the language back to ''arbitration decisions,'' though the Board did not discuss if a substantive change was intended. (*Id.*)

Although the Board modified the language of 49 CFR 1108.10 in *Assessment of Mediation & Arbitration Procedures,* it is clear from the context of that provision when read as a whole, and from the Board's explanations in that proceeding, that the term ''arbitration decisions'' was referring only to the decisions issued by the arbitrators (not Board decisions ruling on appeals of arbitration decisions). In the regulation, the sentence that includes the term ''arbitration decisions'' is proceeded by a sentence referring to ''[d]ecisions rendered by arbitrators pursuant to these rules . . . .'' 49 U.S.C. 1108.10. The two sentences, when read together, indicate that the term ''arbitration decisions'' in the second sentence was referring back to the subject of the first sentence, *i.e.,* ''Decisions rendered by arbitrators.'' In addition, at no point in *Assessment of Mediation & Arbitration Procedures* did the Board indicate that a change was intended. In fact, in the notice of proposed rulemaking, the Board stated the arbitration program ''would allow carriers more flexibility in resolving customer-specific disputes because resolution would be confidential and nonprecedential, *unless the arbitrator's decision is appealed.*'' *Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 3 (STB served Mar. 28, 2012) (emphasis added).

program that should encourage railroad participation. (*Id.*)

The Board rejects Joint Carriers' request to make Board decisions on appeal non-precedential. Contrary to Joint Carriers' argument, the ''disclaimer'' footnote appended to the digests in full Board decisions is not analogous to a Board decision resolving an arbitration appeal. The digest merely reflects a practice that the Board has developed for the purpose of ''increasing transparency in government and to foster public understanding of Board decisions.'' *See Pol'y Statement on Plain Language Digs. in Decisions,* EP 696, slip op. at 1–2 (STB served Sept. 2, 2010). The digest does not contain any substantive legal findings or analysis, but merely summarizes the outcome of the Board's decision. *Id.* at 2 (stating that digests ''will be analogous to the syllabus and headnotes of United States Supreme Court decisions, which are prepared for the convenience of the public, but cannot be relied upon as precedent''). By contrast, in ruling on an appeal of an arbitration decision, the Board would be issuing a decision on whether the arbitration panel's decision meets statutorily prescribed standards.

Board decisions, even in arbitrations, have always been public and precedential. *Cf., e.g., Union Pacific Corporation—Control & Merger—Southern Pacific Rail Corp.*, FD 32760 (Sub-No. 42) (STB served Feb. 28, 2006) (*citing Grand Trunk Western Railroad Company—Merger—Detroit & Toledo Shore Line Railroad Company—Arbitration Review,* FD 28676 (Sub-No. 2) (STB served Feb. 26, 1996)) (public decision in labor arbitration citing other precedential decisions in labor arbitrations). The cases cited by Joint Carriers are not relevant; they involve immigration and Medicare agencies issuing non-precedential decisions under federal laws quite distinct from the Board's governing statute.[46] Here, neither the provisions of 49 U.S.C. 11708(h) nor the legislative history indicate that Congress intended that Board decisions in arbitration appeals should not be given precedential effect.

The Board also agrees with Coalition Associations that Joint Carriers' argument about ''high-cost, high-stake tactics'' is flawed. If a carrier loses an arbitration, the appeal of that decision to the Board would not serve as an opportunity for the carrier to make new arguments on the merits of rate reasonableness. Accordingly, the arguments made by the carrier in the arbitration should be rooted in the same issues regardless of whether the Board decision on appeal is precedential or non-precedential. It is unlikely that the fact that the Board's decision on appeal of the arbitration panel's decision would be precedential would materially change the nature of the defendant carrier's arguments.

Because Board decisions on appeal of arbitration decisions would be precedential, Joint Carriers are correct that such Board decisions could, in principle, effect a material change in law. Accordingly, as requested by Joint Carriers, the Board clarifies here that a Board decision on an appeal of an arbitration decision could constitute a material change in the law for which a carrier could withdraw from the arbitration program. However, notwithstanding the fine distinctions that can be drawn between the terms ''precedential'' and ''non-precedential,'' a decision ruling on an appeal of an arbitration decision would not by default establish any type of broad precedent that dictates or affects the outcome in future arbitrations or rate cases. The Board expects to review an arbitration decision under the § 11708(h) factors based on the context of that specific arbitration. The four criteria by which the Board must review the arbitration decision are limited. The most expansive of these, and the one under which most appeals will likely be argued under, is the first criterion: that the decision is consistent with sound principles of rail regulation economics. There are multiple outcomes that an arbitration panel might reach in deciding whether a rate is reasonable that would be considered ''consistent with sound principles of railroad economics.'' Just because the Board affirms one of those possible outcomes in a particular arbitration decision as consistent with sound principles would not, by itself, create or alter a rate reasonableness methodology and therefore constitute a material change in law.

Lastly, as a procedural matter, the Board will add regulatory language stating that the parties to an appeal of an arbitration decision may attach excerpts from any materials from the underlying arbitration record that are relevant to its petition or reply. In addition, the regulatory language will provide that such materials will be treated as confidential and will not count toward the page limit for such filings. *See* App. A (49 CFR 1108.31(a)(3)).

H. Relief

The Board proposed that relief under the new arbitration program would be capped at $4 million over a two-year relief period, which could be a combination of retroactive relief (*i.e.,* reparations)[47] and prospective relief (*i.e.,* prescription). *Arbitration NPRM,* EP 765, slip op. at 41–42. The Board proposed that amount and time-period to match the relief available under the proposal in *FORR SNPRM. Id.* at 41. Additionally, the Board proposed that parties could agree to modify the rate cap in a particular dispute, though they could not exceed the cap of $25 million or a five-year relief period set forth in 49 U.S.C. 11708(g)(3). *Id.* at 43.

Coalition Associations argue in the FORR proceeding that the relief cap for that process should be adjusted to match the cap currently in use in Three-Benchmark cases; as such, they state that the relief cap for the arbitration program should correspondingly be adjusted to maintain parity between the FORR and arbitration processes. (Coalition Ass'ns Comment 19–20.) They also propose that the Board allow the two-year relief period to begin on a date set by the complainant.[48] Coalition Associations argue that many carload shippers cannot or choose not to solicit business until they have obtained a reasonable transportation rate, which would not be established until the arbitration is complete, and then it may be several more months before shippers to have an opportunity to bid on such business. (*Id.* at 20.)

[46] *See, e.g., Fogo de Chao (Holdings) Inc.* v. *U.S. Dept. of Homeland Sec.,* 769 F.3d 1127 (D.C. Cir. 2014) (reviewing non-precedential decision by the U.S. Citizenship and Immigration Services' Administrative Appeals Office regarding application of denial of a visa request pursuant to 8 U.S.C. 1184(c)(1)); *Martinez* v. *Holder,* 740 F.3d 902 (4th Cir. 2014) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of 8 U.S.C. 1231(b)(3), the Immigration and Nationality Act, and the Convention Against Torture treaty); *Arobelidze* v. *Holder,* 653 F.3d 513 (7th Cir. 2011) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of the Child Status Protection Act); *Quinchia* v. *U.S. Att'y Gen.,* 552 F.3d 1255 (11th Cir. 2008) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of the Immigration and Nationality Act); *Tangney* v. *Burwell,* 186 F. Supp. 3d 45 (D. Mass. 2016) (reviewing a non-precedential decision by the Medicare Appeals Council (within the U.S. Department of Health and Human Services) regarding Medicare Part D coverage).

[47] The standard reparations period reaches back two years prior to the date of the complaint. 49 U.S.C. 11705(c) (requiring that complaint to recover damages under 49 U.S.C. 11704(b) be filed with the Board within two years after the claim accrues).

[48] Specifically, Coalition Associations propose that the complainant would notify the defendant in writing of the date on which it wishes the two-year relief period to begin and, in the absence of written notice, the period would begin on the one-year anniversary of the arbitration decision. (Coalition Ass'ns Comment 20.)

AFPM and NGFA support the $4 million relief cap. (AFPM Comment 12; NGFA Comment 8.) However, AFPM also urges the Board to adopt a second tier of available relief in the FORR docket of ten years with no monetary limit and states that, if the Board were to do so, it should also do so for the new arbitration program. (AFPM Comment 12.)

Joint Carriers do not oppose the Coalition Associations' request that the relief cap be raised to match the current amount of relief available in Three-Benchmark cases. (Joint Carriers Reply 21.) However, Joint Carriers oppose creating a two-tiered system of relief for FORR and the arbitration program and allowing shippers to determine the date on which the relief period starts. (*Id.* at 20–21.)

The Board will keep the relief period at two years. However, the Board will increase the dollar cap on rate relief to the same amount as for Three-Benchmark cases, which today is $4,471,013.[49] This amount will also match the amount of relief available under the FORR process, ensuring that shippers will be entitled to the same amount of relief regardless of whether carriers opt to participate in the new arbitration program or to be subject to FORR challenges. For the reasons set forth in *FORR Final Rule,* the Board will also reject Coalition Associations' request that a complainant be allowed to select the date on which prospective relief begins. *FORR Final Rule,* EP 755, slip op. at 30 (finding that such an option would allow complainants to choose a relief period that is entirely disconnected from the conduct found unlawful). Additionally, the Board in that decision is rejecting AFPM's proposal to establish a second, higher tier of rate relief for the FORR process. *Id.* (stating that the purpose of FORR is to resolve small disputes). The Board finds that the argument for a second tier in the arbitration program suffers from the same issues identified in *FORR Final Rule.*

I. Confidentiality

1. The Board's Proposal

In the initial petition for rulemaking, Petitioners proposed that the new arbitration process be confidential, a significant change from the existing arbitration program. The Board agreed that confidentiality would incentivize carriers to participate in the new program and therefore proposed that all aspects of the arbitration process from initiation of the case (*i.e.,* submission of the Initial Notice) through the arbitration decision would be confidential. *Arbitration NPRM,* EP 765, slip op. at 47–49. As such, the Board proposed that none of the documents or materials relating to the arbitration—including the arbitration decision itself—would be published on the Board's website or otherwise made available to the public.

However, the Board noted that decisions from the Director of OE on requests for access to the confidential data from the Waybill Sample might be a possible exception. The Board proposed that the Director's determinations not be posted in a formal docket, *id.* at 30, but it also stated that there was uncertainty about whether the agency would be required to publish and/or release such rulings, *id.* at 48–49. Accordingly, the Board invited parties to comment on whether publication was required, as well as whether there are alternative means of preserving the confidentiality of these materials. *Id.* at 48–49.

The Board also proposed that any telephonic or virtual conference between the parties and the ALJ to resolve an objection to a party-appointed arbitrator, and rulings by the ALJ on for-cause objections, would be deemed confidential as part of the arbitration process. However, it invited parties to comment on whether such communications would constitute ''dispute resolution communications'' as defined by 5 U.S.C. 571(5), and as such would be exempt from disclosure under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. 574(j). *Id.* at 48.

Lastly, the Board determined that appeals of the arbitration decision to the Board could not be kept confidential, as Petitioners had requested. *Id.* at 49–50. As such, the Board proposed that parties must submit public versions of their appellate filings with appropriate confidential information redacted. *Id.* The Board also proposed that its decision ruling on the appeal would be public, but that the agency would attempt to keep confidential any financial or commercial information that would have an effect on the marketplace. *Id.* In particular, the Board proposed that it would be required to maintain the confidentiality of the arbitration decision to the ''maximum extent possible,'' giving particular attention to avoiding disclosure of the origin-destination pair involved in the arbitration as well as the specific relief awarded by the arbitration panel. *Id.* at 50–51. The Board included steps in the proposed regulation allowing parties an opportunity to review proposed redactions in the opposing side's filing and the Board's decision prior to posting and publication. *Id.* at 50; *id.* at App. A (proposed § 1108.31(d)(2)).

The Board provided several reasons why it proposed that the arbitration process be kept confidential to the maximum extent possible. First, if carriers were faced with the choice of formally adjudicating or arbitrating a rate dispute where the outcome would be public, carriers would be more likely to choose formal adjudication. *Id.* at 46–47. Second, public arbitrations might undermine the informal nature of the arbitration process, especially where the carrier fears that the decision would be used by shippers in other rate negotiations and disputes. *Id.* at 47. Third, keeping arbitration decisions confidential could encourage more settlements, as parties would not have to worry about the impact the settlement would have on other rate negotiations. *Id.* Lastly, the Board acknowledged that confidentiality was opposed by several of the shipper interests, but it concluded that confidentiality was a necessary trade-off to incentivize carriers to participate. *Id.*

2. Shipper Interests and USDA

The shipper interests and USDA object to this aspect of the Board's proposal on the following grounds.

Carrier Participation. Coalition Associations and NGFA dispute the notion that confidentiality will better incentivize carriers to participate in the arbitration program. Coalition Associations argue that the non-precedential nature of arbitration decisions renders most of the concerns about them being used in future rate negotiations moot. (Coalition Ass'ns Comment 8–9.) They argue that the carriers only advocate for confidentiality to gain an advantage in the arbitrations. (*Id.* at 9, 10–11.) NGFA also questions the Board's reasoning,

[49] The Board annually indexes the rate relief cap for Three-Benchmark cases using the Producer Price Index (PPI). *See Simplified Standards,* EP 646 (Sub-No. 1), slip op. 28 n.36; *see also Rate Regulation Reforms,* EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc.* v. *STB,* 754 F.3d 1056 (D.C. Cir. 2014), *aff'd* (STB served Mar. 15, 2015) (raising relief cap in Three-Benchmark cases from $1 million to $4 million). The relief cap for the arbitration program will incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for arbitration is the same as the cap for Three-Benchmark.

In various filings, the parties addressing this issue have stated that the Board should index the relief cap using the Consumer Price Index, which the Board cited as the appropriate index in the proposed regulations in *Arbitration NPRM.* However, when indexing relief caps, the Board uses the Producer Price Index. *See Rate Regulation Reforms,* EP 715, slip op. at 11–12 n.10 (STB served July 18, 2013). The Board will therefore modify the final rule accordingly. *See* App. A (49 CFR 1108.28(b)).

given that the primary driver for the Petitioners' goal for the arbitration program was to obtain an exemption from FORR. (NGFA Comment 7.)

Transparency Will Encourage Settlements. AFPM, NGFA, IMA–NA, and Indorama dispute the notion that confidentiality would create an environment for more settlements and argue that the opposite is true: transparency would encourage more settlements. NGFA states that in its experience with its own arbitration system, a public decision often provides a significant incentive for the involved parties to settle the dispute themselves, often prior to the substantive start of the arbitration process. (NGFA Comment 7.) [50] It asserts that the objective of an effective regulatory backstop is to incentivize market participants to enter into mutually acceptable arrangements, but excessive confidentiality can defeat that purpose. (*Id.* at 8.) IMA–NA and Indorama argue that the confidentiality requirement would prohibit the use of prior decisions in future arbitrations. (IMA–NA Comment 18; Indorama Comment 18.) These parties also point out that FORR decisions would be public, which they assert is another reason why FORR is preferrable to the arbitration program. (AFPM Comment 13; IMA–NA Comment 18; Indorama Comment 18; *see also* NGFA Comment 7 (arguing that this is another reason to limit the FORR exemption until such time as the Board conducts its programmatic review).)

Informal Litigation. NGFA disagrees with the idea that confidentiality will make arbitration more informal and less like litigation. It states that there is no track record or actual proof that challenging rates in an arbitration process will be any less rigorous than a case litigated under FORR. (NGFA Comment 7.) Coalition Associations argue that if arbitration decisions are non-precedential, carriers should have no disincentive to arbitrate or any reason to treat the arbitration like a formal litigation. (Coalition Ass'ns Comment 9.)

Informational Asymmetry. Coalition Associations argue that making the arbitration process confidential would create an unfair informational asymmetry because carriers will have more experience with arbitration than shippers. (Coalition Ass'ns Comment 8.) Specifically, they claim that keeping the arbitrations confidential will prevent shippers from having any idea what types of arguments have or have not been successful and give railroads an advantage when it comes to picking arbitrators. (*Id.* at 9–10; Coalition Ass'ns Reply 6.) Coalition Associations argue that this informational asymmetry increases the risk that shippers will enter into inadvisable settlements. (Coalition Ass'ns Comment 9.) They note that there would be no such informational asymmetry problem under the FORR process. (Coalition Ass'ns Reply 6.)

USDA raises the same concern about informational asymmetry. However, instead of making arbitration decisions public, USDA encourages the Board to seek more information in the confidential case summaries and provide as much information as possible in the agency's quarterly reports, including descriptions of the types of evidence or arguments that were made (including what methodologies were relied upon). (USDA Comment 4.)

ADR Act Requirements. Coalition Associations dispute the Petitioners' original assertion that confidentiality is inherent in arbitrations, given that the Alternative Dispute Resolution Act (ADR Act) does not protect arbitration decisions from disclosure; rather, the ADR Act only requires that communications made for the purposes of negotiation be confidential. Coalition Associations argue that, because an arbitration decision does not reflect communications made during the negotiations, there is no reason to keep the decision confidential. (Coalition Ass'ns Reply 6–7.) They argue that arbitration decisions ''reflect[] each party's case made in a litigation-like context where neither party has any incentive to admit any weakness or proceed with less formality.'' (*Id.* at 7.) Coalition Associations also argue that the cases cited by Petitioners in the petition for rulemaking do not support making arbitration decisions confidential. (*Id.* at 7–8.)

3. Railroad Interests

Joint Carriers and AAR oppose calls from the shipper interests to eliminate confidentiality. Joint Carriers explicitly state that they will not participate in the arbitration program unless the decisions remain confidential (to the extent permissible by law). (Joint Carriers Reply 15.) Joint Carriers also argue that making the arbitration decisions public would disincentivize settlements. (Joint Carriers Reply 14.) Similarly, AAR disputes NGFA's assertion that a public decision will incentivize dealmaking. Instead, AAR claims that the threat of a public decision—even if non-precedential—will incentivize each side to ''dig in on its position.'' (AAR Reply 12.) Joint Carriers and AAR both note that the need for confidentiality is highlighted by IMA–NA and Indorama's comments, in which those parties expressly state that they desire public arbitration decisions to use as leverage in other commercial negotiations. (Joint Carriers Reply 14–15; AAR Reply 12–13.)

4. Board Action

The Board continues to find that confidentiality is necessary to the success of the arbitration program. Accordingly, as proposed in *Arbitration NPRM,* the Board will adopt regulations that maintain confidentiality for arbitrations to the maximum extent possible.

Some of the shipper interests argue that public arbitration decisions would have benefits, including putting more pressure on the parties to reach a settlement. The Board does not dispute this argument, having already stated in *Arbitration NPRM* that ''the fact that an arbitration decision might impact other rate negotiations could be considered more of a reason to make arbitration decisions public.'' *Arbitration NPRM,* EP 765, slip op. at 47. However, that reasoning applies only in a situation where the parties are already required to participate in arbitration. Here, the arbitration process is voluntary. The benefits of making arbitration decisions public would be moot if carriers do not opt into the arbitration program to begin with.

Despite the Coalition Associations' assertions, it is likely that a public arbitration decision adverse to a railroad would be used by other shippers in future rate negotiations. The fact that arbitration decisions are non-precedential would not lessen this concern. IMA–NA and Indorama expressly state that this is their motivation in requiring that arbitration decisions be public. (IMA–NA Comment 18; Indorama Comment 18.) Similarly, AFPM states that ''transparency may lead to a change in ratemaking behavior that could lead to more reasonable rates and therefore less need for dispute resolution.'' (AFPM Comment 13.) Again, the Board does not dispute that making arbitration decisions public would have benefits; however, as it stated in *Arbitration NPRM,* sacrificing those benefits is a trade-off the Board has determined is warranted given the other positives that the arbitration program would produce.

Coalition Associations and NGFA also argue that confidentiality will not impact how vigorously carriers litigate

[50] NGFA proposes that the arbitration decision be published on the Board's website, including: the names of the parties involved, a general description of the case, the rationale and reasoning, the award (if any), and the names of the arbitrators. (NGFA Comment 7.)

in arbitration. The Board does not dispute that, in certain arbitrations, a carrier may use the same tactics that they would employ in a formal rate case. However, if a carrier is faced with two rates challenges—one seeking $2 million in relief through arbitration and one seeking $2 million in relief through a Three-Benchmark case—a carrier is more likely to vigorously defend the challenge in the Three-Benchmark case than the arbitration, given that that decision would be public and precedential. In any event, even if the shippers are correct and confidentiality has no impact on the carriers' litigation tactics, confidentiality is nonetheless warranted for other reasons.

The Board also finds that the informational asymmetry concern raised by Coalition Associations and USDA is overstated. Although complainants in arbitration would be afforded more flexibility in the arguments and methodologies they can present, those arguments and methodologies should still be based on the same fundamental principles of railroad economics underlying existing methodologies. *See* 49 U.S.C. 11708(d) (requiring that arbitration decisions ''be consistent with sound principles of rail regulation economics''). Moreover, shippers are frequently represented by the same attorneys and consultants across proceedings, particularly in rate cases. Although those attorneys and consultants would be bound by confidentiality not to disclose any information about past arbitrations, they would have familiarity with the arguments and methodologies that were successful in prior arbitrations. And, again, informational asymmetry concerns are outweighed by the benefits of having a voluntary small-rate case arbitration program in the first place, which would likely be infeasible without confidential arbitration decisions. For these same reasons, the Board will not adopt USDA's suggestion of expanding the confidential summaries to include descriptions of the types of evidence or arguments made in an arbitration.

Coalition Associations also argue that there is no expectation of confidentiality for arbitration decisions under the ADR Act.[51] Although the ADR Act, 5 U.S.C. 571(5), does state that a ''final written agreement or arbitral award reached as a result of a dispute resolution proceeding[ ] is not a dispute resolution communication''—meaning that the decision is not confidential—that requirement would apply only to documents within the Board's possession. Because the arbitration decision would not be provided to the Board (except when the decision is appealed, at which point it must be made public with redactions), the Board would not be in a position to disclose the decision. In addition, the ADR Act is not the Board's only source of authority for structuring arbitration programs. *See* 49 U.S.C. 11708. Accordingly, the Board finds that its confidentiality requirements here are not inconsistent with the ADR Act and that there are strong policy reasons in favor of making arbitration decisions confidential.

The Board notes that in *Arbitration NPRM* it proposed a provision stating that ''[w]ith the exception of the Waybill Sample provided pursuant to paragraph (g) of this section, the terms of the confidentiality agreement shall apply to all aspects of an arbitration under this part, including but not limited to discovery, party filings, and the arbitration decision.'' *Arbitration NPRM,* App. A (proposed § 1108.27(f)). To ensure there is no confusion, the Board explains that this provision requires that the confidentiality agreement include terms that prevent parties from disclosing information about the arbitration process, including an arbitration decision or settlement agreement.

As a result of this provision, the confidentiality requirements for the new arbitration process will be broader than what is provided for in the ADR Act (as noted, settlement agreements and arbitral awards are not considered confidential ''dispute resolution communications'' under the ADR Act). However, the Board concludes that parties may enter into confidentiality agreements that include provisions that are broader than the ADR Act.[52] As discussed herein, the arbitration process is voluntary; if a party refuses to be bound by the confidentiality requirements set forth for the new arbitration program, it can choose not to participate.

Finally, as noted above, the Board explained in *Arbitration NPRM* that the agency may be required to publish decisions from the Director of OE on requests for access to the confidential data from the Waybill Sample beyond the automatic release discussed above. The Board proposed not publishing these decisions but also invited parties to comment on whether publication was required, as well as whether there are alternative means of preserving the confidentiality of these materials. *Arbitration NPRM,* slip op. at 48–49. The Board also proposed that any telephonic or virtual conference between the parties and the ALJ to resolve an objection to a party-appointed arbitrator, and rulings by the ALJ on for-cause objections, would be deemed confidential as part of the arbitration process. However, it invited parties to comment on whether such communications would constitute ''dispute resolution communications'' as defined by 5 U.S.C. 571(5), and as such would be exempt from disclosure under FOIA pursuant to 5 U.S.C. 574(j). *Id.* at 48. No party addressed either of these issues.

After further considering whether decisions by the Director of OE on Waybill requests must be disclosed, the Board finds that it should err in favor of transparency. Under FOIA, ''[e]ach agency, in accordance with published rules, shall make available for public

[51] Coalition Associations do not appear to dispute that the Board's proposed requirement that arbitration decisions be kept confidential is permissible under the ADR Act. (*See* Coalition Ass'ns Reply 6 (''While Petitioners claim that confidentiality is inherent in arbitration, this claim is dubious.'' (footnotes omitted)).)

[52] *See* 5 U.S.C. 574(d)(1) (''The parties may agree to alternative confidential procedures for disclosures by a neutral.''). Although the ADR Act does not have a similar provision regarding expansions of the confidentiality requirements applicable to the parties, the legislative history and other interpretations of the ADR Act indicate that it is permitted. *See* S. Rep. No. 101–543 (1990), 1990 U.S.C.C.A.N. 3931, 1990 WL 201792 (''Such agreements and awards can be considered 'dispute resolution documents' only *when the government and other parties to the dispute explicitly agree in writing to this status,* and the law otherwise permits such documents to be kept out of the public domain.'' (emphasis added)); *see also Confidentiality in Federal Alternative Dispute Resolution Programs,* 65 FR 83,085, 83,093 (Dec. 29, 2000) (explaining that parties may agree to confidentiality protection beyond what is provided for in the ADR Act despite no clear directive under the ADR Act); Interagency Alternative Dispute Resolution Working Group Steering Committee, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators,* at 34 (2006) (''Whether parties may increase their own confidentiality obligations by written agreement is an untested point of law.'') (available at: *adr.gov/*). The Board is not aware of any case in which a court has ruled that broader restrictions are not permitted under the ADR Act.

Moreover, the Senate Committee report explained that settlement agreements and arbitral awards ''do not create reasonable expectations of confidentiality since they involve United States policy and actions.'' S. Rep. No. 101–543 (1990), 1990 U.S.C.C.A.N. 3931, 1990 WL 201792. But under 49 U.S.C. 11708(d)(5), arbitration decisions are non-precedential; as such, they do not become policy. The Board is similarly requiring that settlement agreements be kept confidential to ensure that they too do not inadvertently become policy. Board decisions ruling on appeals of arbitration decisions could be precedential and thus establish agency policy. *See supra* Part III.G. But as the Board has explained, those decisions would not be confidential. The Board's broader confidentiality restrictions are therefore consistent with the stated goals of the Senate Committee report.

inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as *orders,* made in the adjudication of cases.'' 5 U.S.C. 552(a)(2) (emphasis added). A related statutory provision defines ''order'' as ''the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.'' 5 U.S.C. 551. Given the absence of a readily apparent FOIA exemption that would apply to the Director's decision in this context, the Board concludes that the more prudent action is to publish these decisions. The Board will, however, delay publication of the Director's decision until after the arbitration has concluded, which the Board will be made aware of by the confidential summary parties must file 14 days after the arbitration has ended. *See* App. A (49 CFR 1108.29(e).)

The Board finds that the publication requirement, however, does not extend to the ALJ decisions ruling on for-cause objections to party-appointed arbitrators. Although the ALJ is appointed by the Board, the ALJ would not be acting in an adjudicatory capacity but as a ''neutral.'' *See* 5 U.S.C. 571 (defining a neutral as ''an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy''). As such, the Board views the ALJ's decision as more akin to a ''dispute resolution communication'' under the ADR Act, which may be kept confidential. 5 U.S.C. 574(a). Such communications are defined as ''any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant.'' 5 U.S.C. 571. Under the regulations being adopted here, the ALJ would be asked to resolve a dispute on the very narrow question of whether the proposed arbitrator can fulfill the requirements of 49 U.S.C. 11708(f)(2). The ALJ's decision would thus be no different from the arbitrator ruling on a discovery request, which can indisputably be kept confidential as a ''dispute resolution communication.''

As noted above, the Board is aware that publication of the Director's rulings on Waybill requests will result in the disclosure of the existence of the arbitration and the identity of the participating parties prior to any arbitration appeal. As with other features of the program, carriers will need to assess this risk of disclosure when deciding whether to participate in the arbitration program.

J. Program Review

To ensure that the arbitration program is working as intended and proving effective, the Board proposed including within the regulations a requirement for the agency to conduct a programmatic review after a reasonable number of arbitrations have been conducted, though not later than three years after start of the program. *Arbitration NPRM,* EP 765, slip op. at 51. After the review, the Board would decide whether the arbitration program should be terminated or modified. The Board sought comment on how it should conduct such a review and the nature of the information it should seek to collect from those who have participated in the arbitration program, including whether it should require or request the submission of arbitration decisions as part of its review process. *Id.* at 51–52.

In its comments, NGFA urges the Board to consider feedback not just from parties that have used the arbitration program, but parties that considered using the program and elected not to do so. (NGFA Comment 6.) NGFA also encourages the Board to incorporate service data it collects from the Class I carriers into its evaluation of the arbitration program. NGFA argues this would allow the Board to determine if a carrier is retaliating against shippers that have brought arbitrations and for the Board to take action if necessary. NGFA states that this protection against potential retaliation will encourage shippers to use the arbitration program. (*Id.* at 9–10.)

AFPM suggests that, as part of the three-year review, meetings with shippers and railroads would be most beneficial. It also notes that the confidentiality provisions may make the review difficult. (AFPM Comment 14.)

The Board agrees that, as part of the programmatic review, it would be useful to obtain feedback not just from parties that actually used the program, but also from those that considered using the program but chose not to. Accordingly, the Board will modify the regulatory language to allow for feedback from all interested parties. Additionally, as noted above, a significant consideration in evaluating the success of the arbitration program will be whether the cost to arbitrate is less than the cost to litigate. The Board will therefore also specify that the cost to arbitrate will be an area of focus in the programmatic review.

As for NGFA's concern about retaliation, there is no need for shippers to wait until the programmatic review is conducted to raise such concerns with the Board. If a shipper believes it is being retaliated against for pursuing permissible regulatory relief—be it through arbitration or another process—the Board strongly encourages shippers to contact the Board's Rail Customer and Public Assistance program or file a formal complaint with the agency. That said, there is no need to require the impacts of arbitration on service to be specifically delineated as part of the programmatic review of the arbitration program. The regulation as proposed is sufficiently worded to allow the Board flexibility to consider any issues relevant to the effectiveness of the arbitration program, including service impacts.

Finally, the Board acknowledges AFPM's concern that arbitration decisions will be confidential and thus unavailable to the Board as part of its programmatic review. The Board would only have access to an arbitration decision if it has been appealed to the Board (and even then, the confidential information would be redacted) or if the parties agree to waive confidentiality. If the Board determines that it needs access to additional confidential arbitration decisions to properly conduct the programmatic review, it will consider methods of obtaining that information without breaching confidentiality, such as requesting parties to jointly and voluntarily provide redacted versions of the decisions or having a third-party review the decisions and provide an assessment.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. §§ 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the

proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In *Arbitration NPRM,* the Board certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[53] *Arbitration NPRM,* EP 765, slip op. at 52. The Board explained that the proposal imposes no new record-keeping or reporting requirements upon small railroads. *Id.* Additionally, the Board explained that the proposed rule does not circumscribe or mandate any conduct by small railroads; participation in the arbitration program proposed here is strictly voluntary. *Id.* To the extent that the rules have any impact, the Board explained that it would be to provide faster resolution of a controversy at a lower cost, especially relative to the Board's existing Full-SAC, Simplified-SAC, and Three-Benchmark tests. Although the Board is modifying the final rule as proposed in *Arbitration NPRM,* those modifications do not impact the Board's reasoning regarding the economic impact on small railroads.

In *Arbitration NPRM,* the Board also stated that the $4 million relief cap and two-year prescription period would limit a participating small railroad's total potential liability. *Id.* Although the relief cap in the final rule is being increased from $4 million as proposed in *Arbitration NPRM* to $4,471,013 (an approximately 12% increase), that modification does not materially change the Board's conclusion that the proposed rule would not have a significant economic impact upon small railroads. In *Arbitration NPRM,* the Board further explained that the purpose of the proposed rules is to create an arbitration process to resolve smaller rate disputes, but (as the agency had previously concluded) the majority of railroads involved in rate proceedings are not small entities within the meaning of the RFA. *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 33–34. Since the inception of the Board in 1996, only three of the 51 cases challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimated that there are today approximately 656 Class III rail carriers. Accordingly, even though the relief cap that small carriers would be subject to is being increased in the final rule, the potential for small carriers to be subject to a decision ordering such relief remains low.

Accordingly, the Board certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities as defined by the RFA. This decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d) about the impact of the new collection for an Arbitration Program for Small Rate Disputes (OMB Control No. 2140–0039), concerning (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimated in the NPRM that the proposed new requirements would include a total annual hourly burden of 273 hours. There were no proposed non-hourly burdens associated with this collection. No comments were received pertaining to the collection of this information under the PRA. The new collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule non-major, as defined by 5 U.S.C. 804(2).

It is ordered:

1. The Board adopts the final rule as set forth in this decision and below. Notice of the final rule will be published in the **Federal Register**.

2. The final rule is effective February 3, 2023.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

Decided: December 19, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Fuchs concurred with a separate expression. Board Member Schultz commented with a separate expression.

BOARD MEMBER FUCHS, concurring:

I agree with today's decision (*Arbitration Final Rule*) because it creates an efficient, beneficial voluntary program to resolve rate disputes, but I am concerned that the decision includes an unnecessary and potentially counterproductive condition: the new arbitration program cannot be used by any shipper or carrier if just one Class I carrier chooses not to participate. To its credit, this program includes many ideas and improvements offered by both rail carriers and shippers, and it is the product of consensus achieved through the steadfast leadership of former Chairman Begeman[54] and Chairman Oberman. The program is low cost and offers the same potential maximum rate relief as FORR, and it avoids the process flaws and legal risks created by *FORR Final Rule. See Final Offer Rate Review* (*FORR Final Rule*), EP 755 et al. (STB served Dec. 19, 2022). Today, however, the Board lowered the probability that the benefits of the arbitration program will be realized because it simultaneously finalized FORR, offered carriers an exemption from FORR as a so-called incentive to participate in the arbitration program, and set a condition that the program will take effect only if all Class I carriers opt into arbitration soon after *Arbitration Final Rule's* issuance.[55] Ideally, all carriers would participate in the new arbitration program, but *Arbitration Final Rule's* condition—when paired with FORR—may prevent the program from taking effect, thereby letting the ideal stand in the way of meaningful benefits for the public.

Though *Arbitration Final Rule* raises legitimate fairness concerns that, absent its participation condition, some shippers would have access to the program and therefore see advantages over other shippers, it fails to recognize that—in voluntary settings like this program—it is always the case that some shippers could benefit from the actions taken by one carrier and not another. Indeed, this type of outcome already

[53] For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a ''small business'' as only including those carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016).

[54] As noted in today's decision, in January 2018, the Board established its RRTF with the objective of, among other things, determining how to best provide a rate review process for smaller cases.

[55] Carriers must file a notice indicating their intent to participate in the program no later than 20 days from the effective date of today's decision. *See Arb. Final Rule,* EP 765, slip op. at 7.

happens in the private sector, under the auspices of the Board, and in *Arbitration Final Rule* itself. First, in the private sector, an individual rail carrier may offer shippers an alternative dispute resolution mechanism not available to other shippers. For example, BNSF participates in a rate dispute arbitration program in Montana, even though similarly situated shippers on other carriers have no access to such a program.[56] Second, the Board has long allowed partial industry participation in its existing arbitration program, implemented under the same statute as this new program. Notably, some Class I carriers have agreed to arbitrate matters such as demurrage, even though all Class I carriers have not similarly opted in.[57] Third, *Arbitration Final Rule* itself permits partial participation among Class I carriers because it allows the new program to continue even if a Class I carrier opts out upon a material change in law. *See Arbitration Final Rule,* EP 765, slip op. at 26. *Arbitration Final Rule's* argument that it is requiring universality among Class I carriers at the start of the program ignores that, in some circumstances, shippers may not have access to the new program if they use a Class I carrier that connects to a Class II or III carrier. *See Arbitration Final Rule,* EP 765, slip op. at 21–22, 21 nn.17–18. Implicit across these examples of partial participation is that the Board generally—and, in some circumstances, in *Arbitration Final Rule* specifically—has found that the benefits of an arbitration program for some shippers outweighs concerns that the program is not available to all shippers. I share this view and, consistent with longstanding policy,[58] I favor alternative dispute resolution wherever possible.

By pursuing its ideal of universal participation by Class I carriers, *Arbitration Final Rule* may unintentionally prevent the arbitration program from taking effect. All Class I rail carriers have previously indicated some level of willingness to participate in an arbitration program to resolve small rate disputes.[59] At the same time, however, carriers have made it clear that they think FORR is unlawful,[60] and—individually or collectively—they will almost certainly appeal *FORR Final Rule.* As a result, the participation condition, when paired with FORR, may be counterproductive because—though some carriers may opt into the new arbitration program initially—a Class I carrier may choose to forego participation in the program for strategic reasons. Such a decision by one carrier would prevent the implementation of the new arbitration program for all willing participants, and—if FORR is overturned—shippers may end up with no additional avenue for relief. The Board could have easily eliminated this dynamic by not finalizing FORR and instead simply waiting to see, in short order, whether all Class I carriers opt into the arbitration program. As an alternative that also could have allowed the program to take effect, leaving open the possibility of universal participation, *Arbitration Final Rule* could have included an annual opt-in period, providing carriers additional opportunities to opt-in after the conclusion of the likely court proceedings in FORR. *Arbitration Final Rule* finds that arbitration has advantages over FORR, and these alternatives may be welfare-improving because they would very likely increase the availability of the program.

Though the program includes features that may dissuade a carrier from participating,[61] *Arbitration Final Rule* otherwise balances the goal of broad participation with the need for a fair, workable program. That is why I have chosen to vote for the program despite my concerns about its participation condition paired with the simultaneous issuance of FORR. The program offers shippers a low-cost path to rate relief, and—as shippers have sought—it does not foreclose the development of a new or revised methodology. These features raise uncertainty and risk for carriers, but the program—unlike FORR—does not subject litigants to unduly intensified and unequal pressures. Indeed, because the program allows the arbitration panel to exercise discretion to devise welfare-enhancing remedies, and arbitration decisions are confidential and non-precedential, the program does not present the potential for significant negative consequences for our nation's rail network. As is often the case in programs intent on securing participation among groups with competing interests, *Arbitration Final Rule* adopts no party's suggestions in total, but—if parties set aside their own ideal solutions, as the Board should have here—the broader public will benefit from a more efficient approach to contentious, complex disputes.

BOARD MEMBER SCHULTZ, commenting:

The Board issued two decisions today to create two new rate review processes. The goals of both Final Offer Rate Review (FORR) in Docket No. EP 755 and the small rate case arbitration program (Arbitration) in this docket are to reduce the cost and complexity of small rate disputes. I am writing separately to underscore that in my opinion, the Board's intended goals are only met through the issuance of Arbitration. I am also writing to express my concern with one of the aspects of Arbitration—the requirement that all Class I carriers must participate for the program to become effective.

Arbitration exempts participating carriers from FORR, but Arbitration as a program is only available if all Class I carriers agree to participate. *See, e.g., Arbitration Final Rule,* EP 765, slip op. at 6–7. This means that if even one carrier decides not to sign up for Arbitration due to, for instance, the belief that FORR is unlawful and will be reversed on appeal, then Arbitration will not take effect and we will never know if it would have been successful. The Board's all-or-nothing approach ensures that not only will one of these programs not be used, but the time and energy that Board staff as well as stakeholders dedicated to advancing that program and providing multiple rounds of comments will have served no purpose. Creating two programs and using only one is not an efficient use of either the government's or stakeholders' resources.[62]

But beyond that, the requirement that all Class I carriers participate unnecessarily increases the risk that, in

[56] *See* Montana Grain Growers Association, Alternative Dispute Resolution, *https://www.mgga.org/policy/rail_adr/* (last visited Dec. 16, 2022).

[57] To date, three Class I carriers have opted into the Board's arbitration program for certain types of disputes (though not rate disputes), but the program has never been used. *See* UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), *Assessment of Mediation & Arb. Procs.,* EP 699.

[58] *See, e.g.,* 49 CFR 1108.3.

[59] (*See* Joint Carriers, Petition (filed by CSX, NS, UP, CN, and KCS); Canadian Pacific, Comment, Jan. 25, 2021 (indicating willingness to participate in a workable, reasonable, accessible arbitration program for small rates cases); BNSF, Comment, Jan. 14, 2022 (indicting willingness to participate in a workable arbitration program for small rate disputes).)

[60] *See, e.g.,* AAR Comment, Oct. 22, 2019, *Final Offer Rate Rev.,* EP 755 et al.

[61] The carriers have raised understandable concerns about the *NPRM's* approach to revenue adequacy, but they did not suggest—and the Board does not have—a clear definition and reliable process to differentiate the types of evidence and methodologies that should be included, or excluded, from the program. However, in this instance, the Board nonetheless provided guidance, including clarifying the limited applicability of the Board's appellate decisions.

[62] The Board did not need to adopt both rules simultaneously. If all carriers choose to participate in Arbitration within the next fifty days, FORR is not needed. If they do not, then the Board could adopt FORR the next day. I fear this is an instance where the threat of action would have been stronger than the action itself, as the unadopted FORR would not be subject to appeal.

the event that a single Class I carrier declines to participate in Arbitration and FORR is reversed on appeal, shippers will be left with nothing but the Board's current methodologies, which remain underutilized. The carriers have been steadfast in their opposition to FORR since the rulemaking began, and FORR is all but certain to be appealed. *See, e.g.,* Ass'n of Am. R.Rs. Letter 2, Oct. 22, 2019, *Final Offer Rate Review,* EP 755 (''The railroad industry will forcefully oppose the fundamentally flawed, arbitrary process proposed in the FORR NPRM.''). As demonstrated by my dissent from the FORR decision, I believe that the arguments against FORR may have merit and that the carriers could in fact prevail on appeal.

Although I strongly disagree with the requirement that all Class I carriers participate in order for Arbitration to take effect, I am voting to create the Arbitration program because it resolves several deficiencies inherent in FORR. If Arbitration takes effect, it will provide the opportunity for an expedited rate review process for small rate cases that permits decision makers to set maximum reasonable rates that deviate from the two submitted proposals and greatly reduces the risk of inconsistent and unpredictable rate setting across the network.

Kenyatta Clay,
Clearance Clerk.

List of Subjects

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 1108

Administrative practice and procedure, Railroads.

49 CFR Part 1115

Administrative practice and procedure.

49 CFR Part 1244

Freight, Railroads, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1011, 1108, 1115, and 1244 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

■ 1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

■ 2. Amend § 1011.7 by revising paragraph (a)(2)(xix) and adding paragraph (b)(7) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) * * *

(2) * * *

(xix) To order arbitration of program-eligible matters under the Board's regulations at 49 CFR part 1108, subpart A, or upon the mutual request of parties to a proceeding before the Board.

(b) * * *

(7) Perform any arbitration duties specifically assigned to the Office of Public Assistance, Governmental Affairs, and Compliance or its Director in 49 CFR part 1108, subpart B.

PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

■ 3. The authority citation for part 1108 continues to read as follows:

Authority: 49 U.S.C. 11708, 49 U.S.C. 1321(a), and 5 U.S.C. 571 *et seq.*

§§ 1108.1 through 1108.13 [Designated as Subpart A]

■ 4. Designate §§ 1108.1 through 1108.13 as subpart A and add a heading for subpart A to read as follows:

Subpart A—General Arbitration Procedures

§ 1108.1 [Amended]

■ 5. Amend § 1108.1 by:

■ a. Removing the word ''part'' wherever it appears and adding ''subpart'' in its place; and

■ b. In paragraphs (a) and (b), removing ''these rules'' and adding ''this subpart'' in its place.

§§ 1108.3, 1108.7, and 1108.8 [Amended]

■ 6. In addition to the amendments set forth above, in 49 CFR part 1108, remove the word ''part'' and add in its place the word ''subpart'' in the following places:

■ a. Section 1108.3(a)(1)(ii);

■ b. Section 1108.7(d); and

■ c. Section 1108.8(a).

■ 7. Add subpart B to read as follows:

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

Sec.

1108.21 Definitions.
1108.22 Statement of purpose, organization, and jurisdiction.
1108.23 Participation in the Small Rate Case Arbitration Program.
1108.24 Use of the Small Rate Case Arbitration Program.
1108.25 Arbitration initiation procedures.
1108.26 Arbitrators.
1108.27 Arbitration procedures.
1108.28 Relief.
1108.29 Decisions.
1108.30 No precedent.
1108.31 Enforcement and appeals.
1108.32 Assessment of the Small Rate Case Arbitration Program.
1108.33 Exemption from Final Offer Rate Review.

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

§ 1108.21 Definitions.

As used in this subpart:

(a) *Arbitrator* means a single person appointed to arbitrate under this subpart.

(b) *Arbitration panel* means a group of three people appointed to arbitrate under this subpart.

(c) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in § 1108.27(c)(3).

(d) *Complainant* means a party that seeks to challenge the reasonableness of a rate charged by a rail carrier using the Small Rate Case Arbitration Program, including rail shippers.

(e) *Final offer rate review* means the Final Offer Rate Review process for determining the reasonableness of railroad rates.

(f) *Lead arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, an individual selected from a list of individuals jointly developed by the parties and using the procedures to select from this list, as set forth in § 1108.26(c)(3).

(g) *Limit price test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC* v. *CSX Transp., Inc.,* NOR 42123, slip op. at 11–18 (STB served Sept. 27, 2012).

(h) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Rate Case Arbitration Program pursuant to § 1108.23(a).

(i) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in § 1108.26(b).

(j) *Rate disputes* are disputes involving the reasonableness of a rail carrier's rates.

(k) *Small Rate Case Arbitration Program* means the program established by the Surface Transportation Board in this subpart.

(l) *STB* or *Board* means the Surface Transportation Board.

(m) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. 11708 and set forth in subpart A of this part.

(n) *Streamlined market dominance test* means the methodology set forth in 49 CFR 1111.12.

§ 1108.22 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This subpart establishes a binding and voluntary arbitration program, the Small Rate Case Arbitration Program, that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Rate Case Arbitration Program serves as an alternative to, and is separate and distinct from, the broader arbitration program set forth in subpart A of this part.

(2) By participating in the Small Rate Case Arbitration Program, parties consent to arbitrate rail rate disputes subject to the limits on potential liability set forth in § 1108.28.

(3) The Small Rate Case Arbitration Program will become operative only if all Class I carriers initially commit to participate in the program. Class I carriers that participate in the program agree to arbitrate rate disputes that meet the requirements of this subpart for a term of five years from the date the program becomes effective.

(4) In the event the Small Rate Case Arbitration program becomes operative, Class I carriers that participate will be exempt from having their rates challenged under Final Offer Rate Review, pursuant to § 1108.33, as long as they remain in the program.

(b) *Establishment and Term of the Small Rate Case Arbitration Program*—(1) The regulations contained in this subpart will not become operable until the Board issues a notice in the **Federal Register** commencing the Small Rate Case Arbitration Program. A copy of the notice will also be issued in Docket No. EP 765 and will be posted on the Board's website.

(2) The Board will promptly issue the notice commencing the arbitration program upon receipt of the required opt-in notices specified in § 1108.23(a) from all existing Class I carriers. If the Board does not receive opt-in notices from all existing Class I carriers, the notice will not be issued and the regulations in this subpart will not become operable, including any exemption from FORR. The notice will establish an initial five-year term for the program, beginning from the date the notice is issued.

(3) Class I carriers must indicate whether they choose to voluntarily participate in the Small Rate Case Arbitration Program by February 23, 2023, by filing the notice specified in § 1108.23(a) with the Board.

(c) *Renewal of the Small Rate Case Arbitration Program.*—(1) Approximately 60 days before the five-year term expires, the Board will issue another notice in the **Federal Register**, requesting that all existing Class I carriers that wish to participate in the program for another 5-year period file an opt-in notice pursuant to § 1108.23(a).

(2) The Small Rate Case Arbitration Program will become operative for an additional 5-year period only if all Class I carriers again commit to participate in the program. This requirement will apply even if one or more of the Class I carriers has previously withdrawn from the program pursuant to § 1108.23(c).

(3) The Board will promptly issue a notice in the **Federal Register** renewing the Small Rate Case Arbitration Program for an additional five years upon receipt of the required opt-in notices specified in § 1108.23(a) from all existing Class I carriers. The regulations contained in this subpart will only remain operative if the Board issues such a notice. If the program is renewed, all of the regulations within this subpart shall remain in effect for the entirety of the 5-year renewal period, with the exception of § 1108.32.

(4) The Board will repeat this process to renew the arbitration program every five years for as long as the program remains in effect.

(5) At the end of any five-year period, if the arbitration program is not renewed, any pending arbitrations will continue until they are completed.

(d) *Limitations to the use of the Small Rate Case Arbitration Program.* The Small Rate Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(e) *No limitation on other avenues of arbitration.* Nothing in this subpart shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108.23 Participation in the Small Rate Case Arbitration Program.

(a) *Carrier opt-in procedures*—(1) *Opt-in notice.* To opt into the Small Rate Case Arbitration Program, a carrier must file a notice with the Board under Docket No. EP 765, notifying the Board of the carrier's consent to participate in the Small Rate Case Arbitration Program. Such notice must be filed by February 23, 2023. The notice should also include:

(i) A statement that the carrier agrees to an extension of the timelines set forth in 49 U.S.C. 11708(e) for any arbitrations initiated under this subpart; and

(ii) A statement that the carrier agrees to the appointment of arbitrators that may not be on the STB-maintained roster of arbitrator established under § 1108.6(b).

(2) *Participation for a specified term.* By opting into the Small Rate Case Arbitration Program, the carrier consents to participate in the program for the full five-year term of the program, beginning on the date the Board issues the notice commencing the program. A carrier may withdraw from the Program prior to expiration of the five-year term only pursuant to paragraph (c) of this section.

(3) *Public notice of carrier participants.* The Board shall maintain a list of carriers who have opted into the Small Rate Case Arbitration Program on its website at *www.stb.gov.*

(4) *Class II and Class III carrier participation.* Class II or Class III rail carriers may consent to use the Small Rate Case Arbitration Program to arbitrate an individual rate dispute, even if the Class II or Class III has not opted into the process under paragraph (a)(1) of this section. If a Class II or Class III carrier intends to participate for an individual rate dispute, a letter from the Class II or Class III carrier must be submitted with the notice of intent to arbitrate dispute required under § 1108.25(a). The letter must indicate that the carrier consents to participate in the Small Rate Case Arbitration Program and include the statements required under paragraphs (a)(1)(i) and (ii) of this section.

(b) *Complainant participation.* A complainant seeking to challenge the reasonableness of carrier's rate may participate in the Small Rate Case Arbitration Program on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Rate Case Arbitration Program. A complainant must inform the participating carrier by submitting a written notice of intent to

arbitrate to the participating carrier, as set forth in § 1108.25(a).

(c) *Withdrawal for change in law*—(1) *Basis for withdrawal.* A carrier or complainant participating in the Small Rate Case Arbitration Program may withdraw its consent to arbitrate under this subpart if either: material change(s) are made to the Small Rate Case Arbitration Program under this subpart after a complainant or carrier has opted into the Small Rate Case Arbitration Program; or material change(s) are made to the Board's existing rate reasonableness methodologies or a new rate reasonableness methodology is created after a complainant or carrier has opted into the Small Rate Case Arbitration Program. However, the termination or modification of the Final Offer Rate Review process will not be considered a change in law.

(2) *Procedures for withdrawal for change in law.* A participating carrier or complainant may withdraw its consent to arbitrate under this subpart by filing with the Board a notice of withdrawal for change in law within 20 days of an event that qualifies as a basis for withdrawal as set forth in paragraph (c)(1) of this section.

(i) The notice of withdrawal for change in law shall state the basis or bases under paragraph (c)(1) of this section for the party's withdrawal of its consent to arbitrate under this part. A copy of the notice must be served on any parties with which the carrier is currently engaged in arbitration. A copy of the notice will also be posted on the Board's website.

(ii) Any party may challenge the withdrawing party's withdrawal for change in law on the ground that the change is not material by filing a petition with the Board within 10 days of the filing of the notice of withdrawal being challenged. The withdrawing party may file a reply to the petition within 5 days from the filing of the petition. The petition shall be resolved by the Board within 14 days from the filing deadline for the withdrawing party's reply.

(iii) Subject to the stay provision of paragraph (c)(3)(ii) of this section, the notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law*—(i) *The Small Rate Case Arbitration Program.* If one or more Class I carriers withdraw, the program will not terminate and the regulations in this subpart will remain in effect. Carriers that withdraw from the program will no longer be subject to the exemption (set forth in § 1108.33) from rate challenges under Final Offer Rate Review.

(ii) *Arbitrations with decision.* The withdrawal of consent for change in law by either a complainant or carrier shall not affect arbitrations in which the arbitration panel has issued an arbitration decision.

(iii) *Arbitrations without decision.* A carrier or complainant filing a withdrawal of consent for change in law shall immediately inform the arbitration panel and opposing party. The arbitration panel shall immediately stay the arbitration. If no objection to the withdrawal of consent is filed with the Board or the Board issues a decision granting the withdrawal request, the arbitration panel shall dismiss any pending arbitration under this part, unless the change in law will not take effect until after the arbitration panel is scheduled to issue its decision pursuant to the schedule set forth in § 1108.27(c). If an objection to the withdrawal of consent is filed but the Board rejects the withdrawal upon objection, the arbitration panel shall lift the stay, the arbitration shall continue, and all procedural time limits will be tolled.

(d) *Limit on the number of arbitrations.* A carrier participating in the Small Rate Case Arbitration Program is only required to participate in 25 arbitrations simultaneously. Any arbitrations initiated by the submission of the notice of intent to arbitrate a dispute to the rail carrier (pursuant to § 1108.25(a)) that has reached this limit will be postponed until the carrier is once again below the limit.

(1) A carrier that has reached the limit shall notify the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email (to *rcpa@stb.gov*), as well as the complainant who submitted the notice of intent to arbitrate to the carrier. The Office of Public Assistance, Governmental Affairs, and Compliance shall confirm that the limitation has been reached and inform the complainant (and any other subsequent complainants) that the arbitration is being postponed, along with an approximation of when the arbitration can proceed and instructions for reactivating the arbitration once the carrier is again below the limit.

(2) For purposes of this paragraph (d), an arbitration will count toward the 25-arbitration limit only upon commencement of the first mediation session or, where one or both parties elect to forgo mediation, submission of the joint notice of intent to arbitrate to the Board under § 1108.25(c). For purposes of this paragraph (d), an arbitration under this subpart is final when the arbitration panel issues its arbitration decision, or if an arbitration is dismissed or withdrawn, including due to settlement.

§ 1108.24 Use of the Small Rate Case Arbitration Program.

(a) *Eligible matters.* The arbitration program under this subpart may be used only in the following instances:

(1) Rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this subpart. If the parties dispute whether a challenged rate was established pursuant to 49 U.S.C. 10709, the parties must petition the Board to resolve that dispute, which must be resolved before the parties initiate the arbitration process under this part.

(2) A complainant may challenge rates for multiple traffic lanes within a single arbitration under this part, subject to the relief cap in § 1108.28 for all lanes.

(3) For movements in which more than one carrier participates, arbitration under this subpart may be used only if all carriers agree to participate (pursuant to § 1108.23(a)(1) or (4)).

(b) *Eligible parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits.* A complainant may not bring separate arbitrations for shipments with the same origin-destination or shipments where facilities are shared.

(d) *Arbitration clauses.* Nothing in the Board's regulations in this part shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between complainants and carriers.

§ 1108.25 Arbitration initiation procedures.

(a) *Notice of complainant intent to arbitrate dispute.* To initiate the arbitration process under this subpart against a participating carrier, a complainant must notify the carrier in writing of its intent to arbitrate a dispute under this part. The notice must include: a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part; a statement that the complainant consents to extensions of the timelines set forth in forth in 49 U.S.C. 11708(e); and a statement that the complainant consents to the appointment of arbitrators that may not be on the STB-maintained roster of arbitrators established under § 1108.6(b). The complainant must also submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email to *rcpa@stb.gov.* Upon receipt of the notice of intent to arbitrate, the Office of Public

Assistance, Governmental Affairs, and Compliance will provide a letter to both parties confirming that the arbitration process has been initiated, and that the parties have consented to extension of the timelines set forth in 49 U.S.C. 11708(e) and the potential appointment of arbitrators not on the Board's roster. The notice and confirmation letter from the Office of Public Assistance, Governmental Affairs, and Compliance will be confidential and specific information regarding pending arbitrations, including the identity of the parties, will not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(b) *Pre-arbitration mediation.* (1) Prior to commencing arbitration, the parties to the dispute may engage in mediation if they mutually agree.

(2) Such mediation will not be conducted by the STB. The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) If the parties mutually agree to mediate, the parties must schedule mediation promptly and in good faith. The mediation period shall end 30 days after the date of the first mediation session, unless both parties agree to a different period.

(c) *Joint Notice of Intent to Arbitrate.* (1) To arbitrate a rate dispute under this subpart, the parties must submit a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance, indicating the parties' intent to arbitrate under the Small Rate Case Arbitration Program. The parties must submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email to *rcpa@stb.gov.* The joint notice must be filed not later than two business days following the date on which mediation ends or, in cases in which the parties mutually agree not to engage in mediation, two business days after the complainant submits its notice of intent to arbitrate (required by paragraph (a) of this section) to the carrier.

(2) The joint notice shall set forth the following information:

(i) The basis for the Board's jurisdiction; and

(ii) The basis for the parties' eligibility to use the Small Rate Case Arbitration Program, including: that the dispute being arbitrated is solely a rate dispute involving shipments of regulated commodities not subject to a rail transportation contract; that the carrier has opted into the Small Rate Case Arbitration Program; that the complainant has elected to use the Small Rate Case Arbitration Program for this particular rate dispute; and that the complainant does not have any other pending arbitrations at that time against the defendant carrier.

(3) The joint notice shall be confidential and will not be published on the Board's website and specific information regarding pending arbitrations, including the identity of the parties, will not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(4) Unless the parties have agreed not to request the Waybill Sample data pursuant allowed under § 1108.27(g), the parties must also submit a copy of the Joint Notice of Intent to Arbitrate to the Director of the Board's Office of Economics. Parties may submit the letter and copy of the joint notice by email to *Economic.Data@stb.gov.*

§ 1108.26 Arbitrators.

(a) *Decision by arbitration panel.* All matters arbitrated under this subpart shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator.* Each side may object to the other side's selected arbitrator within two business days and only for cause. A party may make a for-cause objection where it has reason to believe a proposed arbitrator cannot act with the good faith, impartiality, and independence required of 49 U.S.C. 11708, including due to a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with the Office of Public Assistance, Governmental Affairs, and Compliance. The Office of Public Assistance, Governmental Affairs, and Compliance shall arrange for a telephonic or virtual conference to be held before an Administrative Law Judge within two business days, or as soon as is practicable, to hear arguments regarding the objection(s). The Administrative Law Judge will provide its ruling in an order to all parties by the next business day after the telephonic or virtual conference.

(iii) The Objection to Party-Appointed Arbitrator filed with Office of Public Assistance, Governmental Affairs, and Compliance and the telephonic or virtual conference, including any ruling on the objection, shall be confidential.

(2) *Costs for party-appointed arbitrators.* Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Lead arbitrator*—(1) *Appointment.* Once appointed, the two party-appointed arbitrators shall, without delay, select a lead arbitrator from a joint list of arbitrators provided by the parties.

(2) *Qualifications.* The lead arbitrator must be a person with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector, and must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.

(3) *Disagreement selecting the lead arbitrator.* If the two party-appointed arbitrators cannot agree on a selection for the lead arbitrator, the parties will develop a joint list of potential lead arbitrators. Each side may include the names of three individuals that meet the qualification requirement of (c)(2). Both sides will then be permitted to strike the names of two individuals proposed by the opposing side. The lead arbitrator shall be selected from the two names that remain using a random selection process, which will be administrated by the Director of the Office of Public Assistance, Governmental Affairs, and Compliance.

(4) *Lead arbitrator role.* The lead arbitrator will be responsible for ensuring that the tasks detailed in §§ 1108.27 and 1108.29 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this subpart.

(5) *Costs.* The parties to the arbitration will share the cost of the lead arbitrator equally.

(d) *Arbitrator choice.* The parties may choose their arbitrators without limitation, provided that any arbitrator chosen must be able to comply with paragraph (f) of this section. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in § 1108.6(b).

(e) *Arbitrator incapacitation.* If at any time during the arbitration process an arbitrator becomes incapacitated or is

unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in paragraph (b) of this section.

(2) If the incapacitated arbitrator was the lead arbitrator, a replacement lead arbitrator shall be appointed pursuant to the procedures set forth in paragraph (c) of this section.

(f) *Arbitrator duties.* In an arbitration under this subpart, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108.27 Arbitration procedures.

(a) *Appointment of arbitration panel.* Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing. A copy of the written appointment should be submitted to the Director of the Board's Office of Economics. The Director shall promptly provide the arbitrators with the confidentiality agreements that are required under § 1244.9(b)(4) of this chapter to review confidential Waybill Sample data.

(b) *Commencement of arbitration process; arbitration agreement.* Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing. Shortly after commencement, the parties, together with the panel of arbitrators, shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The arbitration agreement shall also incorporate by reference the rules of this subpart. The agreement may also contain other mutually agreed upon provisions.

(c) *Expedited timetables*—(1) *Discovery phase.* The parties shall have 45 days from the written commencement of arbitration by the lead arbitrator to complete discovery. The arbitration panel may extend the discovery phase upon an individual party's request. If the discovery phase is extended, the arbitration panel may decide whether the evidentiary phase should also be extended and, if so, for how long.

(2) *Evidentiary phase.* The evidentiary phase consists of the 45-day discovery phase described in paragraph (c)(1) of this section and an additional 45 days for the submission of pleadings or evidence, based on the procedural schedule and using the procedures adopted by the lead arbitrator, for a total duration of 90 days. The evidentiary phase (including the discovery phase) shall begin on the written commencement of the arbitration process under paragraph (b) of this section. The arbitration panel shall have complete discretion whether to extend the procedural schedule, based on input from the parties.

(3) *Decision.* The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108.29(a)(2), shall be served on the parties within 30 days from the end of the evidentiary phase.

(d) *Limited discovery.* (1) Discovery under this subpart shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(2) Each party is permitted an additional 3 written document request and 3 interrogatories if the defendant carrier(s) does not concede market dominance and the complainant elects to use a non-streamlined market dominance analysis.

(3) Parties may request permission from the arbitration panel to seek additional written document requests and interrogatories. The arbitration panel may grant such requests for exceptional circumstances.

(e) *Evidentiary guidelines*—(1) *Principles of due process.* The lead arbitrator shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the complainant's case-in-chief.

(2) *Inadmissible evidence.* The following evidence shall be inadmissible in an arbitration under this part:

(i) On the issue of market dominance, any evidence that would be inadmissible before the Board; and

(ii) Any non-precedential decisions, including prior decisions issued by an arbitration panel.

(f) *Confidentiality agreement.* All arbitrations under this subpart shall be governed by a confidentiality agreement, unless the parties agree otherwise. With the exception of the Waybill Sample provided pursuant to paragraph (g) of this section, the terms of the confidentiality agreement shall apply to all aspects of an arbitration under this part, including but not limited to discovery, party filings, and the arbitration decision.

(g) *Waybill Sample.* (1) The Board's Office of Economics shall provide unmasked confidential Waybill Sample data to each party to the arbitration proceeding within seven days of the filing of a copy Joint Notice of Intent to Arbitrate with the Director and accompanying letter containing the relevant five-digit Standard Transportation Commodity Code information. Such data to be provided by the Office of Economics shall be limited to the most recent four years of movements on the defendant carriers.

(2) Parties may request additional Waybill Sample data from the Director of the Office of Economics pursuant to § 1244.9(b)(4) of this chapter. Parties must make such requests by submitting a formal filing (with a ''WB'' docket prefix). The decision of the Director may be appealed to the Board pursuant to § 1115.1. In the event of an appeal, the party filing the appeal shall immediately inform the other parties to the arbitration and the arbitration panel. The arbitration panel shall immediately stay the arbitration proceeding. After the Board issues a decision ruling on the appeal of the Director's decision, the arbitration panel shall lift the stay, the arbitration shall continue, and all procedural time limits will be tolled. The Director's decision (and, if necessary, the Board's decision ruling on appeal of the Director's decision) will be published as part of the separate Waybill docket, but the decision(s) will not be published until the Board receives the confidential summary the parties are required to file pursuant to § 1108.29(e).

§ 1108.28 Relief.

(a) *Relief available.* Subject to the relief limits set forth in paragraph (b) of this section, the arbitration panel under this subpart may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this subpart shall not exceed $4 million (as indexed annually for inflation using the Producer Price Index and a 2007 base year) over two years, inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof, unless otherwise agreed to by the parties. Reparations or prescriptions may not be set below 180% of variable cost, as determined by unadjusted Uniform Railroad Costing System (URCS).

(c) *Agreement to a different relief cap.* For an individual dispute, parties may agree by mutual written consent to arbitrate an amount above or below the monetary cap in paragraph (b) of this

section, up to $25 million, or for shorter or longer than two years, but no longer than 5 years. Parties must inform the Board of such agreement in the confidential summary filed at the conclusion of the arbitration, as required by § 1108.29(e)(1).

(d) *Relief not available.* No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108.29 Decisions.

(a) *Technical requirements*—(1) *Findings of fact and conclusions of law.* An arbitration decision under this subpart shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement.* The unredacted arbitration decision served on the parties in accordance with § 1108.27(c)(3) shall comply with the confidentiality agreement described in § 1108.27(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements.* The arbitration panel under this subpart shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance.* (i) The arbitration panel shall determine if the carrier whose rate is the subject of the arbitration has market dominance based on evidence submitted by the parties, unless paragraph (b)(1)(vi) of this section applies.

(ii) Subject to § 1108.27(e)(2), in determining the issue of market dominance, the arbitration panel under this subpart shall follow, at the complainant's discretion, either the streamlined market dominance test or the non-streamlined market dominance test.

(iii) The arbitration panel shall issue its decision on market dominance as part of its final arbitration decision.

(iv) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(v) The arbitration panel shall not consider evidence on the Limit Price Test when deciding market dominance.

(vi) If a carrier concedes that it possesses market dominance, the arbitration panel need not make a determination on market dominance and need only address the maximum lawful rate in the arbitration decision. Additionally, the parties may jointly request that the Board determine market dominance prior to initiating arbitration under this part.

(2) *Maximum lawful rate.* Subject to the requirements on inadmissible evidence in § 1108.27(e)(2), in determining the issue of maximum lawful rate, the arbitration panel under this subpart shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2)). The arbitration panel may otherwise base its decision on the Board's existing rate review methodologies, revised versions of those methodologies, new methodologies, or market-based factors, including, for example: rate levels on comparative traffic; market factors for similar movements of the same commodity; and overall costs of providing the rail service. The arbitration panel's decision must be consistent with sound principles of rail regulation economics.

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this subpart may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* The arbitration decision under this part, whether redacted or unredacted, shall be confidential, subject to the limitations set forth in § 1108.31(d).

(1) No copy of the arbitration decision shall be served on the Board except as is required under § 1108.31(a)(1).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Arbitration decisions are binding.* (1) By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.31.

(2) An arbitration decision under this subpart shall preclude the complainant(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding the rates for the movements at issue in the arbitration, with the exception of appeals under § 1108.31. This preclusion shall last until the later of:

(i) Two years after the Joint Notice of Intent to Arbitrate; or

(ii) The expiration of the term of any prescription imposed by the arbitration decision.

(3) The preclusion will cease if the carrier increases the rate either: after a complainant is unsuccessful in arbitration or after a complainant has been awarded a prescription and the prescription has expired.

(e) *Confidential summaries of arbitrations; quarterly reports.* To permit the STB to monitor the Small Rate Case Arbitration Program, the parties shall submit a confidential summary of the arbitration to the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) within 14 days after either the arbitration decision is issued, the dispute settles, or the dispute is withdrawn. A confidential summary must be filed for any instance in which a complainant has submitted to the participating carrier a notice of intent to arbitrate, even if the parties did not reach the arbitration phase. The confidential summary itself shall not be published. OPAGAC will provide copies of the confidential summaries to the Board Members and other appropriate Board employees.

(1) *Contents of confidential summary.* The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

(i) Geographic region of the movement(s) at issue;

(ii) Commodities shipped;

(iii) Number of calendar days from the commencement of the arbitration proceeding to the conclusion of the arbitration;

(iv) Resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable; and

(v) Any agreement to a different relief cap or period than set forth in § 1108.28(b).

(2) *STB quarterly reports on Small Rate Case Arbitration Program.* The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Rate Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall disclose only the five categories of information listed in paragraph (e)(1) of this section. The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall be posted on the Board's website.

§ 1108.30 No precedent.

Arbitration decisions under this subpart shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under this subpart or in any Board proceeding, except an appeal of the arbitration decision under § 1108.31.

§ 1108.31 Enforcement and appeals.

(a) *Appeal to the Board*—(1) *Petition to vacate or modify arbitration decision.* A party appealing the arbitration decision shall file under seal a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating or modifying the decision. The petition to vacate or modify the arbitration decision must be filed within 20 days from the date on which the arbitration decision was served on the parties. The party appealing must include both a redacted and unredacted copy of the arbitration decision. The petition shall be subject to the page limitations of § 1115.2(d) of this chapter.

(2) *Replies.* Replies to the petition shall be filed under seal within 20 days of the filing of the petition to vacate or modify with the Board. Replies shall be subject to the page limitations of § 1115.2(d) of this chapter.

(3) *Content and confidentiality of filings; public docket.* All submissions for appeals of the arbitration decision to the Board shall be filed under seal. After the party has submitted its filing to the Board under seal, the party shall prepare a public version of the filing with any information having an effect or impact on the marketplace redacted. A party may also attach to its petition or reply excerpts from any materials from the underlying arbitration record that are necessary support for its petition or reply. Such attachments will be treated as confidential and will not count toward the page limit set forth in 49 CFR 1115.2. The party will then provide the opposing party an opportunity to request further redactions. After consulting with the opposing party on redactions, the party shall file the public version with the Board for posting on its website.

(4) *Service.* Copies of the petition to vacate or modify and replies shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition to vacate or modify upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this subpart shall be limited to determining only whether:

(1) The decision is consistent with sound principles of rail regulation economics;

(2) A clear abuse of arbitral authority or discretion occurred;

(3) The decision directly contravenes statutory authority; or

(4) The award limitation was violated.

(c) *Relief available on appeal to the Board.* Subject to the Board's limited standard of review as set forth in paragraph (b) of this section, the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in § 1108.28.

(d) *Confidentiality of Board's decision on appeal*—(1) *Scope of confidentiality.* The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace, including the specific relief awarded by the arbitration panel, if any, or by the Board; or the origin-destination pair(s) involved in the arbitration.

(2) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision.* Board decisions affirming, vacating, or modifying arbitration awards under this subpart are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Appeals subject to the Federal Arbitration Act.* Nothing in this subpart shall prevent parties to arbitration from seeking judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. 9–13, in lieu of seeking Board review.

(g) *Staying arbitration decision.* The timely filing of a petition with the Board to modify or vacate the arbitration decision will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(h) *Enforcement.* A party seeking to enforce an arbitration decision under this subpart must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9–13.

§ 1108.32 Assessment of the Small Rate Case Arbitration Program.

The Board will conduct an assessment of the Small Rate Case Arbitration Program to determine if the program is providing an effective means of resolving rate disputes for small cases. The Board's assessment will occur upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though not later than three years after start of the program. In conducting this assessment, the Board will obtain feedback from relevant parties. As part of the Board's assessment, it will study the cost to arbitrate a rate dispute as compared to the cost of adjudicating a formal rate case. Depending on the outcome of such review, the Board may determine that the arbitration program will be terminated, modified, and/or extended beyond the initial 5-year period.

§ 1108.33 Exemption from Final Offer Rate Review.

Carriers that opt into the arbitration program under § 1108.23(a) will be exempt from having their rates challenged under Final Offer Rate Review if the program becomes operative. The exemption from Final Offer Rate Review will become operative upon publication of the Board's notice commencing the arbitration program required under § 1108.22(b) in the **Federal Register**. The exemption will terminate upon the effective date of the participating carrier no longer participating in the arbitration program under this part, including, due to withdrawal from the arbitration program, as set forth in § 1108.23(c) or termination of the program under the sunset-provision of § 1108.22(b). Upon termination of the exemption, parties are permitted to challenge a carrier's rate using Final Offer Rate Review.

PART 1115—APPELLATE PROCEDURES

■ 8. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

■ 9. Revise the third sentence of § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

* * * For arbitrations authorized under part 1108, subparts A and B, of this chapter, the Board's standard of

review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated.

* * * * *

PART 1244—WAYBILL ANALYSIS OF TRANSPORTATION OF PROPERTY—RAILROADS

■ 10. The authority citation for part 1244 continues to read as follows:

Authority: 49 U.S.C. 1321, 10707, 11144, 11145.

■ 11. Revise § 1244.9(b)(4) to read as follows:

§ 1244.9 Procedures for the release of waybill data.

* * * * *

(b) * * *

(4) *Transportation practitioners, consulting firms, and law firms—specific proceedings.* Transportation practitioners, consulting firms, and law firms may use data from the STB Waybill Sample in preparing verified statements to be submitted in formal proceedings before the STB and/or State Boards (Board), or in preparing documents to be submitted in arbitration matters under part 1108, subpart B, of this chapter, subject to the following requirements:

(i) The STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues in a pending formal proceeding before the Board or in arbitration matters under part 1108, subpart B, of this chapter (when seeking data beyond the automatic waybill data release under § 1108.27(g) of this chapter).

(ii) The requestor submits to the STB a written waybill request that complies with paragraph (e) of this section or is part of the automatic waybill data release under § 1108.27(g) of this chapter for use in arbitrations pursuant to part 1108, subpart B, of this chapter.

(iii) All waybill data must be returned to the STB, and the practitioner or firm must not keep any copies.

(iv) A transportation practitioner, consulting firm, or law firm must submit any evidence drawn from the STB Waybill Sample only to the Board or to an arbitration panel impaneled under part 1108, subpart B, of this chapter, unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad. Nonaggregated evidence submitted to the Board will be made part of the public record only if the Board finds that it does not reveal competitively sensitive data. However, evidence found to be sensitive may be provided to counsel or other independent representatives for other parties subject to the usual and customary protective order issued by the Board or appropriate authorized official.

(v) When waybill data is provided for use in a formal Board proceeding, a practitioner or firm must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. This agreement will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because a proceeding is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the proceeding is opened.

(vi) When waybill data is provided for use in arbitrations pursuant to part 1108, subpart B, of this chapter, the transportation practitioners, consulting firms, or law firms representing parties to the arbitration and each arbitrator must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. The agreement with practitioners and firms will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because an arbitration or appeal of an arbitration is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the arbitration or appeal is pending. The agreement with each arbitrator will allow that arbitrator to review any evidence that includes confidential waybill data in a particular arbitration matter.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

BILLING CODE 4915–01–P

APPENDIX
OVERVIEW AND TIMELINE OF THE ARBITRATION PROCESS WITH MEDIATION

Note: Items in italics are not defined in the regulations but are rough approximations. Indented items are procedural steps that may not be needed in every arbitration or that do not affect the due date of the following step.

Timeline	
Day 0 - Day 3-7	*Arbitration process initiation* 0 – Initial Notice submitted to carrier and OPAGAC *+ 3-7 days – OPAGAC sends confirmation letter*
Day 10 Day 40	*Mediation* *+ 10 – Mediation begins (unless waived)* + 30 – Mediation ends (unless extended or shortened)
Day 42 - Day 44-48 Day 49	*Arbitration phase initiation* + 2 – Parties submit Joint Notice to OPAGAC and OE *+ 4-6 – OE provides confidentiality agreements to parties* + 7 – OE provides Waybill data to parties
Day 44 - Day 46 - Day 48 - Day 50 Day 47-55 Day 49-57 - Day 53-63	*Arbitrator selection* + 2 – Parties select party-appointed arbitrators + 2 – Parties must raise objections to other side's selection + 2 – Parties confer over any objection to party-appointed arbitrators + 2 – Parties submit dispute on party appointed arbitrator to OPAGAC; OPAGAC arranges a telephonic or virtual conference (to be held within two business days, or as soon as is practicable) + 3-5 – Party-appointed arbitrators select lead arbitrator + 2 – Parties appoint arbitration panel in writing. Copy submitted to OE. *+ 4-6 – OE provides arbitrators with confidentiality agreements*
Day 51-59 - Day 55-65 Day 96-104 Day 141-149 Day 171-179	*Arbitration phase* + 2 – Lead arbitrator formally commences arbitration phase in writing (Discovery and Evidentiary phases begin) *+ 4-6 – Parties and arbitrators discuss, enter into arbitration agreement and confidentiality agreement* + 45 – Discovery phase ends (unless extended) + 45 – Evidentiary phase ends (unless extended) + 30 – Arbitration decision

OVERVIEW AND TIMELINE OF THE ARBITRATION PROCESS WITHOUT MEDIATION

Note: Items in italics are not defined in the regulations but are rough approximations. Indented items are procedural steps that may not be needed in every arbitration or that do not affect the due date of the following step.

Timeline	
	Arbitration process initiation
Day 0	0 – Initial Notice submitted to carrier and OPAGAC
- Day 3-7	+ *3-7 days – OPAGAC sends confirmation letter*
Day 4-5	+ *4-5 – Parties agree to waive mediation*
	Arbitration phase initiation
Day 6-7	+ 2 – Parties submit Joint Notice to OPAGAC and OE
- Day 10-11	+ *4-6 – OE provides confidentiality agreements to parties*
Day 13-14	+ 7 – OE provides Waybill data to parties
	Arbitrator selection
Day 8	+ 2 – Parties select party-appointed arbitrators
- Day 10	+ 2 – Parties must raise objections to other side's selection
- Day 12	+ 2 – Parties confer over any objection to party-appointed arbitrators
- Day 14	+ 2 – Parties submit dispute on party appointed arbitrator to OPAGAC; OPAGAC arranges a telephonic or virtual conference (to be held within two business days, or as soon as is practicable)
Day 11-19	+ 3-5 – Party-appointed arbitrators select lead arbitrator
Day 13-21	+ 2 – Parties appoint arbitration panel in writing. Copy submitted to OE.
- Day 17-27	+ *4-6 – OE provides arbitrators with confidentiality agreements*
	Arbitration phase
Day 15-23	+ 2 – Lead arbitrator formally commences arbitration phase in writing (Discovery and Evidentiary phases begin)
- Day 19-29	+ *4-6 – Parties and arbitrators discuss, enter into arbitration agreement*
Day 60-68	+ 45 – Discovery phase ends (unless extended)
Day 105-113	+ 45 – Evidentiary phase ends (unless extended)
Day 135-143	+ 30 – Arbitration decision

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