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(4) If the Board approves the transaction and adopts the SIP, it will require compliance with the SIP as a condition to its approval. Each applicant involved in the transaction then shall coordinate with FRA in implementing the approved SIP, including any amendments thereto. FRA has provided in its rules at 49 CFR 244.17(g) for submitting information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has agreed to advise the Board when, in its view, the integration of the applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented.

[67 FR 11607, Mar. 15, 2002, as amended at 83 FR 15078, Apr. 9, 2018]

§ 1106.5 Waiver.

The SIP requirements established by this part may be waived or modified by the Board where a railroad shows that relief is warranted or appropriate.

§ 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require a SIP in cases other than those enumerated in this part, or to adopt modified SIP requirements in individual cases, if it concludes that doing so is necessary in its proper consideration of the application or other request for authority.

PART 1107 [RESERVED]

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

Subpart A—General Arbitration Procedures

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

SOURCE: 78 FR 29079, May 17, 2013, unless otherwise noted.

Subpart A—General Arbitration Procedures

§ 1108.1 Definitions.

As used in this subpart:

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

(b) *Arbitrator Panel* means a group of three people appointed to arbitrate pursuant to this subpart. One panel member would be selected from the roster by each side to the arbitration dispute, and the parties would mutually agree to the selection of the third-lead arbitrator under the "strike" methodology described in § 1108.6(c).

(c) *Arbitration program* means the program established by the Surface Transportation Board in this subpart under which participating parties, including rail carriers and shippers, have agreed voluntarily in advance, or on a case-by-

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case basis to resolve disputes about arbitration-program-eligible matters brought before the Board using the Board's arbitration procedures.

(d) *Arbitration-program-eligible matters* are those disputes or components of disputes, that may be resolved using the Board's arbitration program and include disputes involving one or more of the following subjects: rates; Demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation.

(e) *Counterclaim* is an independent arbitration claim filed by a respondent against a complainant arising out of the same set of circumstances or is substantially related to the underlying arbitration complaint and subject to the Board's jurisdiction.

(f) *Final arbitration decision* is the unredacted decision served upon the parties 30 days after the close of the arbitration's evidentiary phase.

(g) *Interstate Commerce Act* means the Interstate Commerce Act as amended by the ICC Termination Act of 1995 and the Surface Transportation Board Reauthorization Act of 2015.

(h) *Lead arbitrator or single arbitrator* means the arbitrator selected by the strike methodology outlined in § 1108.6(c).

(i) *Monetary award cap* means a limit on awardable damages of \$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in practice disputes, unless the parties mutually agree to a lower award cap. If parties bring one or more counterclaims, such counterclaims will be subject to a separate monetary award cap.

(j) *Practice disputes* are disputes involving demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation.

(k) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

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

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

[78 FR 29079, May 17, 2013, as amended at 81 FR 69414, Oct. 6, 2016; 88 FR 729, Jan. 4, 2023]

§ 1108.2 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 section provides for the creation of a binding, voluntary arbitration program in which parties, including shippers and railroads, agree in advance to arbitrate certain types of disputes with a limit on potential liability of \$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in other disputes unless the parties mutually agree to a lower award cap. The Board's arbitration program is open to all parties eligible to bring or defend disputes before the Board.

(1) Except as discussed in paragraph (b) of this section, parties to arbitration may agree by mutual written consent to arbitrate additional matters and to a lower amount of potential liability than the monetary award cap identified in this section.

(2) Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

(b) *Limitations to the Board's arbitration program.* These procedures shall not be available:

(1) To resolve disputes involving labor protective conditions;

(2) To obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters;

(3) To prescribe for the future any conduct, rules, or results of general, industry-wide applicability;

(4) To resolve disputes that are solely between two or more rail carriers.

Parties may only use these arbitration procedures to arbitrate matters

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within the statutory jurisdiction of the Board.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69414, Oct. 6, 2016]

§ 1108.3 Participation in the Board's arbitration program.

(a) *Opt-in procedures.* Any rail carrier, shipper, or other party eligible to bring or defend disputes before the Board may at any time voluntarily choose to opt into the Board's arbitration program. Opting in may be for a particular dispute or for all potential disputes before the Board unless and until the party exercises the opt-out procedures discussed in § 1108.3(b). To opt in parties may:

(1) File a notice with the Board, under Docket No. EP 699, advising the Board of the party's intent to participate in the arbitration program. Such notice may be filed at any time and shall be effective upon receipt by the Board.

(i) Notices filed with the Board shall state which arbitration-program-eligible issue(s) the party is willing to submit to arbitration.

(ii) Notices may, at the submitting party's discretion, provide for a lower monetary award cap than the monetary award caps provided in this subpart.

(2) Participants to a proceeding, where one or both parties have not opted into the arbitration program, may by joint notice agree to submit an issue in dispute to the Board's arbitration program. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the monetary award cap that would otherwise be applicable.

(3) Parties to a dispute may jointly notify the Board that they agree to submit an eligible matter in dispute to the Board's arbitration program, where no formal proceeding has begun before the Board. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the applicable monetary award cap.

(b) *Opt-out procedures.* Any party who has elected to participate in the arbitration program may file a notice at any time under Docket No. EP 699, informing the Board of the party's decision to opt out of the program or amend the scope of its participation. The notice shall take effect 90 days after filing and shall not itself excuse the filing party from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration-program-eligible dispute associated with their opt-in notice for any matter before the Board at any time prior to the end of the 90 day period before the opt-out notice takes effect.

(c) *Public notice of arbitration program participation.* The Board shall maintain a list of participants who have opted into the arbitration program on its Web site at www.stb.gov. Those parties participating in arbitration only for a particular dispute will not be listed on the Board's Web site.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69414, Oct. 6, 2016; 83 FR 15078, Apr. 9, 2018; 88 FR 729, Jan. 4, 2023]

§ 1108.4 Use of arbitration.

(a) *Arbitration-program-eligible matters.* Matters eligible for arbitration under the Board's program are: rates; Demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation. Parties may agree in writing to arbitrate additional matters on a case-by-case basis as provided in paragraph (e) of this section.

(b) *Monetary award cap.* Arbitration claims will be subject to the arbitration program award cap of \$25,000,000, including any rate prescription, per rate dispute and \$2,000,000 per practice dispute unless:

(1) The defending party's opt-in notice provides for a lower monetary cap or;

(2) The parties agree to select a lower award cap that will govern their arbitration proceeding. The parties may change the award cap by incorporating an appropriate provision in their agreement to arbitrate.

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(3) Counterclaims will not offset against the monetary award cap of the initiating claim. A counterclaim is an independent claim and is subject to a monetary award cap of \$25,000,000, including any rate prescription, per rate dispute and \$2,000,000 per practice dispute, separate from the initiating claim, or to a lower cap agreed upon by the parties in accordance with § 1108.4(b)(2).

(c) *Assignment of arbitration-program-eligible matters.* The Board shall assign to arbitration all arbitration-program-eligible disputes where all parties to the proceeding are participants in the Board's arbitration program, or where one or more parties to the matter are participants in the Board's arbitration program, and all other parties to the proceeding request or consent to arbitration for a particular dispute.

(d) *Matters partially arbitration-program-eligible.* Where the issues in a proceeding before the Board relate in part to arbitration-program-eligible matters, only those parts of the dispute related to arbitration-program-eligible matters may be arbitrated pursuant to the arbitration program, unless the parties petition the Board in accordance with paragraph (e) of this section to include additional disputes.

(e) *Other matters.* Parties may petition the Board, on a case-by-case basis, to assign to arbitration disputes, or portions of disputes, not listed as arbitration-program-eligible matters. This may include counterclaims and affirmative defenses. Such disputes are subject to a monetary award cap of \$2,000,000 or to a lower cap agreed upon by the parties in accordance with paragraph (b)(2) of this section. The Board will not consider for arbitration types of disputes that are expressly prohibited in § 1108.2(b).

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

(g) *Rate disputes.* Arbitration of rate disputes will only be available to parties if the rail carrier has market dominance as determined by the Board under 49 U.S.C. 10707. In rate disputes, the arbitrator or panel of arbitrators,

as applicable, 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)).

[78 FR 29079, May 17, 2013, as amended at 81 FR 69414, Oct. 6, 2016]

§ 1108.5 Arbitration commencement procedures.

(a) *Complaint.* Except as provided in paragraph (e) of this section, arbitration under these rules shall commence with a written complaint, which shall be filed and served in accordance with Board rules contained at part 1104 of this chapter. Each complaint must contain a statement that the complainant and the respondent are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the complainant is willing to arbitrate voluntarily all or part of the dispute pursuant to the Board's arbitration procedures, and the relief requested.

(1) If the complainant desires arbitration with a single arbitrator instead of a three-member arbitration panel, the complaint must make such a request in its complaint.

(2) If the complainant is not a participant in the arbitration program, the complaint may specify the issues that the complainant is willing to arbitrate.

(3) If the complainant desires to set a lower amount of potential liability than the monetary award cap that would otherwise apply, the complaint should specify what amount of potential liability the complainant is willing to incur.

(b) *Answer to the complaint.* Any respondent must, within 20 days of the date of the filing of a complaint, answer the complaint. The answer must state whether the respondent is a participant in the Board's arbitration program, or whether the respondent is willing to arbitrate the particular dispute.

(1) If the complaint requests arbitration by a single arbitrator instead of by an arbitration panel, the answer must contain a statement consenting to arbitration by a single arbitrator or an express rejection of that request.

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(i) The respondent may also initiate a request to use a single arbitrator instead of an arbitration panel.

(ii) Absent the parties agreeing to arbitration through a single arbitrator, the Board will assign the case to arbitration by a panel of three arbitrators as provided by §1108.6(a) through (d). The party requesting the single arbitrator shall at that time provide written notice to the Board and the other parties if it continues to object to a three-member arbitration panel. Upon timely receipt of the notice, the Board shall set the case for formal adjudication by the Board.

(2) When the complaint limits the arbitrable issues, the answer must state whether the respondent agrees to those limitations or, if the respondent is already a participant in the Board's arbitration program, whether those limitations are consistent with the respondent's opt-in notice filed with the Board pursuant to §1108.3(a)(1)(i). If the answer contains an agreement to arbitrate some but not all of the arbitration-program-eligible issues in the complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis.

(3) When the complaint proposes a lower amount of potential liability, the answer must state whether the respondent agrees to that amount in lieu of the otherwise applicable monetary award cap.

(c) *Counterclaims.* In answering a complaint, the respondent may file one or more counterclaims against the complainant if such claims arise out of the same set of circumstances or are substantially related, and are subject to the Board's jurisdiction as provided in §1108.2(b). Counterclaims are subject to the assignment provisions contained in §1108.4(c)–(e). Counterclaims are subject to the monetary award cap provisions contained in §1108.4(b)(2)–(3).

(d) *Affirmative defenses.* An answer to an arbitration complaint shall contain specific admissions or denials of each factual allegation contained in the complaint, and any affirmative defenses that the respondent wishes to assert against the complainant.

(e) *Jointly-filed notice.* In lieu of a formal complaint proceeding, arbitration under these rules may commence with a jointly-filed notice by parties agreeing to submit an eligible matter in dispute to the Board's arbitration program under §1108.3(a)(3). The notice must:

(1) Contain a statement that all relevant parties are participants in the Board's arbitration program pursuant to §1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board's arbitration procedures, and the relief requested;

(2) Indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator;

(3) Indicate if the parties have agreed to a lower amount of potential liability in lieu of the otherwise applicable monetary award cap.

(f) *Arbitration initiation.* When the parties have agreed upon whether to use a single arbitrator or a panel of arbitrators, the issues(s) to be arbitrated, and the monetary limit to any arbitral decision, the Board shall initiate the arbitration under §1108.7(a) and provide a list of arbitrators as described in §1108.6.

(g) *Arbitration agreement.* Shortly after the panel of arbitrators or arbitrator is selected, the parties to arbitration together with the lead or single arbitrator, as applicable, 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 agreement may also contain other mutually agreed upon provisions.

(1) Any additional issues selected for arbitration by the parties, that are not outside the scope of these arbitration rules as explained in §1108.2(b), must be subject to the Board's statutory authority.

(2) These rules shall be incorporated by reference into any arbitration agreement conducted pursuant to an arbitration complaint filed with the Board.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69415, Oct. 6, 2016]

§ 1108.6 Arbitrators.

(a) *Panel of arbitrators.* Unless otherwise requested in writing pursuant to § 1108.5(a)(1) and agreed to by all parties to the arbitration, all matters arbitrated under these rules shall be resolved by a panel of three arbitrators.

(b) *Roster.* Arbitration shall be conducted by an arbitrator (or panel of arbitrators) selected, as provided herein, from a roster of persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector. Persons seeking to be included on the roster must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. The Board will establish the initial roster of arbitrators by no-objection vote. The Board may modify the roster at any time by no-objection vote to include other eligible arbitrators or remove arbitrators who are no longer available. The Board's roster will provide a brief biographical sketch of each arbitrator, including information such as background, area(s) of expertise, arbitration experience, and geographical location, as well as general contact information and fees, based on the information supplied by the arbitrator. The roster shall be published on the Board's Web site. The Board will update the roster every year. The Board will seek public comment on any modifications that should be made to the roster, including requesting the names and qualifications of new arbitrators who wish to be placed on the roster, and updates from arbitrators appearing on the roster to confirm that the biographical information on file with the Board remains accurate. Arbitrators who wish to remain on the roster must notify the Board of their continued availability.

(c) *Selecting the lead arbitrator.* If the parties cannot mutually agree on a lead arbitrator for a panel of arbitrators, the parties shall use the following process to select a lead arbitrator: First, each party will be given three peremptory strikes to remove names from the Board's roster. Then, from the remaining names on the roster, each party will submit a list of up to 10 potential arbitrators. If only one arbitrator appears on both lists, he or she

would be selected as the single or lead arbitrator. If multiple arbitrators appear on both lists, the parties would alternatively strike names of the jointly listed arbitrators until one remains, beginning with complainant. If no name appears on both lists, the parties would alternatively strike from the Board's entire roster, as amended based on the peremptory strikes. A lead arbitrator shall be selected within 14 days of the Board initiating the arbitration process.

(1) The parties are responsible for conducting their own due diligence in striking names from the arbitrator list. The final selection of a lead arbitrator is not challengeable before the Board.

(2) The lead arbitrator appointed through the strike methodology shall serve as the head of the arbitration panel and will be responsible for ensuring that the tasks detailed in §§ 1108.7 and 1108.9 are accomplished.

(d) *Party-appointed arbitrators.* The party or parties on each side of an arbitration dispute shall select one arbitrator from the roster, regardless of whether the other party struck the arbitrator's name in selecting a lead arbitrator. The party or parties on each side will appoint that side's own arbitrator within 14 days of the Board initiating the arbitration process. Parties on one side of an arbitration proceeding may not challenge the arbitrator selected by the opposing side.

(e) *Use of a single arbitrator.* Parties to arbitration may request the use of a single arbitrator. Requests for use of a single arbitrator must be included in a complaint or an answer as required in § 1108.5(a)(1), or in the joint notice filed under § 1108.5(e). Parties to both sides of an arbitration dispute must agree to the use of a single arbitrator in writing. If the single-arbitrator option is selected, and if parties cannot mutually agree on a single arbitrator, the arbitrator selection procedures outlined in paragraph (c) of this section shall apply.

(f) *Arbitrator incapacitation.* If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill

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his or her duties, a replacement arbitrator shall be promptly selected by either of the following processes:

(1) If the incapacitated arbitrator was appointed directly by a party to the arbitration, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in § 1108.6(d).

(2) If the incapacitated arbitrator was the lead or single arbitrator, the parties shall promptly inform the Board of the arbitrator's incapacitation and the selection procedures set forth in paragraph (c) of this section shall apply.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69415, Oct. 6, 2016]

§ 1108.7 Arbitration procedures.

(a) *Initiation.* With the exception of rate dispute arbitration proceedings, the Board shall initiate the arbitration process within 40 days after submission of a written complaint or joint notice filed under § 1108.5(e). In arbitrations involving rate disputes, the Board shall initiate the arbitration process within 10 days after the Board issues a decision determining that the rail carrier has market dominance.

(b) *Arbitration evidentiary phase timetable.* Whether the parties select a single arbitrator or a panel of three arbitrators, the lead or single 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 requirement that this evidentiary phase shall be completed within 90 days from the date on which the arbitration process is initiated, unless a party requests an extension, and the arbitrator or panel of arbitrators, as applicable, grants such extension request.

(c) *Written decision timetable.* The lead or single arbitrator will be responsible for writing the arbitration decision. The unredacted arbitration decision must be served on the parties within 30 days of completion of the evidentiary phase. A redacted copy of the arbitration decision must be served upon the Board within 60 days of the close of the evidentiary phase for publication on the Board's Web site.

(d) *Extensions to the arbitration timetable.* The Board may extend any deadlines in the arbitration timetable provided in this subpart upon agreement of all parties to the dispute.

(e) *Protective orders.* Any party, on either side of an arbitration proceeding, may request that discovery and the submission of evidence be conducted pursuant to a standard protective order agreement.

[81 FR 69416, Oct. 6, 2016, as amended at 88 FR 729, Jan. 4, 2023]

§ 1108.8 Relief.

(a) *Relief available.* An arbitrator may grant relief in the form of monetary damages or a rate prescription in rate disputes to the extent they are available under this subpart or as agreed to in writing by the parties. A rate prescription shall not exceed 5 years.

(b) *Relief not available.* No injunctive relief shall be available in Board arbitration proceedings.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69416, Oct. 6, 2016; 88 FR 729, Jan. 4, 2023]

§ 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. All arbitration decisions must be consistent with sound principles of rail regulation economics. The arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with any protective order governing the release of confidential and highly confidential information pursuant to § 1108.7(e).

(b) *Redacting arbitration decision.* The lead or single arbitrator shall also provide the parties with a draft of the decision that redacts or omits all proprietary business information and confidential information pursuant to any such requests of the parties under the arbitration agreement.

(c) *Party input.* The parties may then suggest what, if any, additional redactions they think are required to protect against the disclosure of proprietary and confidential information in the decision.

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(d) *Lead or single arbitrator authority.* The lead or single arbitrator shall retain the final authority to determine what, if any, additional redactions are appropriate to make.

(e) *Service of arbitration decision.* The lead or single arbitrator shall serve copies of the unredacted decision upon the parties in accordance with the timetable and requirements set forth in § 1108.7(c). The lead or single arbitrator shall also serve copies of the redacted decision upon the parties and the Board in accordance with the timetable and requirements set forth in § 1108.7(c). The arbitrator may serve the decision via any service method permitted by the Board's regulations.

(f) *Service in the case of an appeal.* In the event an arbitration decision is appealed to the Board, the lead or single arbitrator shall, without delay and under seal, serve upon the Board an unredacted copy of the arbitration decision.

(g) *Publication of decision.* Redacted copies of the arbitration decisions shall be published and maintained on the Board's Web site.

(h) *Arbitration decisions are binding.* By arbitrating pursuant to these procedures, each party agrees that the decision and award of the arbitrator(s) shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.11.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69416, Oct. 6, 2016]

§ 1108.10 Precedent.

Decisions rendered by arbitrators pursuant to these rules may be guided by, but need not be bound by, agency precedent. Arbitration decisions shall have no precedential value and may not be relied upon in any manner during subsequent arbitration proceedings conducted under the rules in this part.

§ 1108.11 Enforcement and appeals.

(a) *Petitions to modify or vacate.* A party may petition the Board to modify or vacate an arbitral award. The appeal must be filed within 20 days of service upon the Board of a final arbitration decision, and is subject to the page limitations of § 1115.2(d) of this chapter. Copies of the appeal 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 appeal upon the arbitrator(s). Replies to such appeals shall be filed within 20 days of the filing of the appeal with the Board, and shall be subject to the page limitations of § 1115.2(d) of this chapter.

(b) *Board's standard of review.* On appeal, the Board's standard of review of arbitration decisions will be narrow. The Board will review a decision to determine if the decision is consistent 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. Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

(1) Board decisions vacating or modifying arbitration decisions under the Board's standard of review are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(2) Nothing in these rules 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.

(c) *Staying arbitration decision.* The timely filing of a petition for review of the arbitral decision by the Board will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(d) *Enforcement.* Parties seeking to enforce an arbitration decision made pursuant to the Board's arbitration program must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9–13.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69416, Oct. 6, 2016]

§ 1108.12 Fees and costs.

(a) *Filing fees.* When parties use the Board's arbitration procedures to resolve a dispute, the party filing the complaint or an answer shall pay the applicable filing fee pursuant to 49 CFR part 1002.

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(b) *Costs*. The parties shall share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs.

[78 FR 29079, May 17, 2013, as amended at 81 FR 69417, Oct. 6, 2016]

§ 1108.13 Additional parties per side.

Where an arbitration complaint is filed by more than one complainant in a particular arbitration proceeding against, or is answered or counter-claimed by, more than one respondent, these arbitration rules will apply to the complainants as a group and the respondents as a group in the same manner as they will apply to individual opposing parties.

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

SOURCE: 88 FR 729, Jan. 4, 2023, unless otherwise noted.

§ 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

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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

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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 arbitra-

tion 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

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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 medi-

ator 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

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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.

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(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 administered 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

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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

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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 fac-

tors, 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.

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(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

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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

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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

§ 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 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

Sec.

1109.1 Mediation statement of purpose, organization, and jurisdiction.

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1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

1109.5 Resolution of certain disputes involving the State Sponsored Route Committee and the Northeast Corridor Commission.

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

SOURCE: 78 FR 29083, May 17, 2013, unless otherwise noted.

§ 1109.1 Mediation statement of purpose, organization, and jurisdiction.

The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. Parties may seek to resolve a dispute brought before the Board using the Board's mediation procedures. These procedures shall not be available in a regulatory proceeding to obtain the grant, denial, stay or revocation of a request for construction, abandonment, purchase, trackage rights, merg-

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er, pooling authority or exemption related to such matters. The Board may, by its own order, direct the parties to participate in mediation using the Board's mediation procedures. The Board's mediation program is open to all parties eligible to bring or defend matters before the Board.

§ 1109.2 Commencement of mediation.

(a) *Availability of mediation.* Mediation may be commenced in a dispute before the Board:

(1) Pursuant to a Board order issued in response to a written request of one or more parties to a matter;

(2) Where the Board orders mediation by its own order; or

(3) In connection with a rate complaint, as provided by §1109.4 and part 1111 of this chapter.

(b) *Requests for mediation.* Parties wishing to pursue mediation may file a request for mediation with the Board at any time following the filing of a complaint. Parties that use the Board's mediation procedures shall not be required to pay any fees other than the appropriate filing fee associated with the underlying dispute, as provided at 49 CFR 1002.2. The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where one or more parties to the underlying dispute do not consent to mediation, or where the parties seek to mediate disputes not eligible for Board-sponsored mediation, as listed in §1109.1.

§ 1109.3 Mediation procedures.

(a) *Mediation model.* The Chairman will appoint one or more Board employees trained in mediation to mediate any dispute assigned for mediation. Alternatively, the parties to a matter may agree to use a non-Board mediator if they so inform the Board within 10 days of an order assigning the dispute to mediation. If a non-Board mediator is used, the parties shall share equally the fees and/or costs of the mediator. The following restrictions apply to any mediator selected by the Board or the parties:

(1) No person serving as a mediator may thereafter serve as an advocate for a party in any other proceeding arising