

Surface Transportation Board
EP 755: Final Offer Rate Review

Ex Parte Summary: BNSF Railway July 13, 2020 Meeting with Commissioner Patrick Fuchs

STB Attendees: Commissioner Patrick Fuchs, Lisa Novins (Attorney-Advisor)

BNSF Attendees: Roger Nober (Chief Legal Officer); Jill Mulligan (General Counsel, Regulatory); Michael Smythers (Vice President, Government Affairs); and Adam Weiskittel (Associate General Counsel, Operations)

BNSF expressed appreciation for steps that the Board has taken to engage with stakeholders on improvements to the Board's regulation of rail rates, including seeking alternatives to the Board's FORR NPRM. BNSF referenced its concerns regarding FORR that are reflected in the BNSF and AAR's written submissions. BNSF's affirmative *Ex Parte* comments were addressed to alternatives to FORR that the Board should undertake, focusing on a STB-sponsored alternative dispute resolution process modeled on the innovative program that BNSF has had in place with Montana Grain Growers Association (MGGA) and the Montana Farm Bureau Federation (MFBF) since 2009.

BNSF described its belief that concerns of shippers, particularly smaller ones, that existing STB remedies can be overly expensive, complex and time-consuming could be effectively addressed through an ADR program that takes the core aspects of our Montana program—including defined market-based factors—with modifications to broaden applicability to small shippers outside the grain producer community.

BNSF provided an overview of its Montana ADR program, which involves a two-tiered structure of mediation followed by arbitration before a panel of three qualified, neutral arbitrators selected for their experience in agricultural commodity and transportation markets and the relevant market conditions. BNSF referenced a 2012 BNSF submission to the Board providing considerable detail around the Montana ADR program, which is included with this summary. BNSF stated that at the core of the Montana program is the application of pre-defined market-based factors by market-knowledgeable arbitrators in an expedited proceeding to determine whether a rate is reasonable. BNSF provided an overview of the market-based factors in the Montana program, which included:

- Absence or existence of competitive alternatives to the transportation;
- Capital requirements of the rail system used by the shipper's traffic and the revenue available to sustain the network;
- Rate levels on comparable traffic;
- Applicable market factors comparing like movements from origins to similar markets for the same commodity;

- Overall costs of providing service covered by the rate being challenged.

BNSF provided an overview of the types of evidence reflecting the market and commercial practicalities that may be relevant to the mediation discussions and to the arbitration proceeding, highlighting the more limited role for any broad data sets, including RVCs, used in existing STB proceedings. The parties discussed hypothetical examples of the market-based factors as applied in a potential arbitration.

BNSF emphasized that the inclusion of clearly defined market-based factors has multiple benefits in the Montana ADR program. BNSF stated they focus the efforts of the arbitration panel, enabling adherence to the more streamlined schedule, and increasing confidence in the process and visibility into potential outcomes for participants. BNSF also stated that, because the factors are rooted in the real-world market experience and considerations of the participants, they bring to the forefront considerations relevant to both the commodity and rail markets (including product and geographic competition), allowing commercial decisions makers at both companies to engage in the process with less reliance on outside counsel and consultants. BNSF stated the factors also serve an important role before a formal arbitration proceeding is pursued by informing the commercial conversation during the Montana program's mandatory mediation period, increasing the likelihood that a favorable resolution can be crafted between the parties' business representatives. BNSF explained that it has been our experience that disputes arising under the Montana program are resolved prior to formal arbitration, which is viewed by BNSF, MGGA and MFBF as a success of the program. Finally, if the parties do need to go to arbitration in the Montana program, BNSF noted there is an increased likelihood that the rate set is market responsive and less likely to distort the markets that the transportation is offered in. Included with this summary as an additional reference is a letter previously filed with the Board that includes additional considerable detail around the Montana ADR program and stakeholder benefits.

BNSF described how the core elements of the ag-centric Montana program could be implemented in an STB-sponsored ADR program that would apply to all regulated commodities, that included the following aspects:

- Eligibility for all shippers (including agricultural farmer/producers as in Montana program) that meet the STB's streamline market dominance test
- 30-day mediation period followed by 120-day arbitration process with limited discovery (5 RFPs; 20 interrogatories)
- Panel of three impartial arbitrators; each party appoints one and they select the third
- Panel determines maximum reasonable rate (no lower than 180 R/VC) through the application of the same market-based factors used in the Montana ADR program
- Maximum relief of \$4M over 2 years (including prospective and/or retroactive relief)
- Record and decision is confidential and non-precedential unless both parties agree
- Each party bears the expense of their arbitrator; cost of neutral covered by losing party
- Limited appeal under the Federal Arbitration Act

In addition, BNSF explained that it has given consideration around how best to reflect the important trade association role played by MGGA and MFBF in the Montana program, while still allowing for a scaled-up program that applies to all regulated commodities. BNSF believes that railroads can and should partner with interested trade associations to identify a standing set of arbitrators with commodity and transportation expertise that can be readily available for use in mediation and arbitration proceedings involving their members.

BNSF shared its belief that a mediation and arbitration program along the lines discussed here would accomplish many of the policy goals articulated by the Board around improving access and functionality of rate review options before the STB. The parties discussed potential changes to the STB's existing arbitration regulations, given 49 U.S.C. § 11708. BNSF shared its belief that the STB has the statutory flexibility to implement this type of a program. BNSF encouraged the STB to discontinue development of the FORR proposal and move forward instead with implementing a new mediation and arbitration program with these characteristics.



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August 31, 2012

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Ms. Cynthia Brown
Chief, Section of Administration
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Office of Proceedings
August 31, 2012
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Re: STB Docket No. 699: *Assessment of Mediation and Arbitration Procedures*

Dear Ms. Brown:

This is in response to the STB's request at its August 2, 2012 hearing for comments from BNSF on questions at the hearing concerning BNSF's Montana ADR Program.

As BNSF stated in our comments, our experience has been that a successful arbitration program is one that covers a discreet, well-defined area of disputes and provides clear guidelines for neutral and qualified decision-makers to apply. During the hearing, there were several questions from the Board members regarding the Montana ADR program that BNSF developed with the Montana Grain Growers Association ("MGGA") and the Montana Farm Bureau Federation ("MFBF") (collectively, "Producer Organizations" or "ProOrgs"). These two grassroots organizations have strong connections to the Montana farming community through their grain producer members and leadership, as well as an extensive history of working with BNSF to improve our mutual understanding of agriculture and transportation issues. Our joint Montana ADR program, which capitalizes on that cooperative relationship, has the key attributes of a successful arbitration program—it provides a mechanism for neutral industry experts to take up a narrow set of disputes and apply specialized, market-based standards to resolve those disputes.

We appreciate the Board's interest in our unique program, as well as the opportunity to provide additional information about it.

Program Background

The Montana ADR program was launched by BNSF, MGGA and MFBF at the beginning of 2009. Prior to that time, BNSF had a history of informally mediating rate and service issues with the Montana ProOrgs and their members. BNSF, MGGA and MFBF identified an opportunity to build on this relationship and create a more formal mechanism for addressing rate issues with the Montana farmer community in a fair and expeditious manner. Its procedural elements include:

- The ADR program is available to all members of the Producer Organizations shipping wheat or barley in Montana where their commodity is being shipped more than 250 miles from a BNSF-served origin elevator to a BNSF-served destination. ProOrg members, who are farmer producers and not rail shippers, are empowered by the ADR program to bring challenges to the level of BNSF's rates on these qualifying movements outside the STB's rate reasonableness review process reserved for shippers.
- The ADR program includes a two-tier structure of mediation followed by arbitration. Upon identification of an eligible rate dispute, there is an initial 30-day mediation period that requires an in-person meeting between BNSF and ProOrg representatives, and the producer member if he/she wishes to attend. Any party may request that the ProOrg designate a mediator to attend the session.
- If the parties, after using their best efforts to negotiate a resolution to the dispute, are unable to reach resolution, the parties move forward to a formal arbitration where the member is represented by the ProOrg. Arbitration proceedings are held before a panel of three arbitrators selected from an existing pool of qualified arbitrators. Where the parties are unable to agree, each party selects an arbitrator from the pool and the two arbitrators in turn jointly select a third arbitrator (with a fall-back process of submitting lists until a common individual is found). At the time the program was instituted, BNSF and the ProOrgs entered into agreements with five individuals to make up the pool of potential arbitrators. The arbitrators were selected for their reputation, experience in the agricultural, marketing and transportation field and knowledge of the market conditions impacting the rail shipments covered by the program. The arbitrator agreements require that the arbitrator act fairly and impartially in reaching all decisions.
- Under the rules for arbitration, the panel has the ability to review the level of BNSF's rates on qualifying moves and require a reduction to rates in the form of reparations and lower rates for up to a year. The procedural rules of the National Grain and Feed Association provide a procedural backdrop for the proceedings. However, the Montana ADR rules provide for an expedited 120-day process with limited discovery (e.g., 5 requests for document production and 20 interrogatories, and no depositions). The rules also provide for confidential treatment of information submitted by the parties.

From a substantive standpoint, the ADR program provides arbitrators with specific, market-based factors to address in determining whether a rate is eligible for reduction, including whether competitive alternatives exist, the cost of providing the service, and the capital requirements of the rail system and revenues available to sustain the BNSF network. The ADR program also recognizes Revenue/Variable Cost floors for single car and shuttle rates that arbitrators are required to observe in establishing rate reductions. The program also contains specific instructions regarding how the parties will calculate variable costs for the purpose of the ADR proceedings, including mechanisms to address lag issues that result from using URCS.

Members of the arbitration panel are to issue a reasoned written decision that is binding on all parties. The decisions are to have no precedential effect and arbitrators are instructed not to rely on prior decisions in their deliberations. Unless the parties agree otherwise, a bulletin is prepared by the panel that discloses the identities of the parties, the involved origins and

destinations, and a high-level summary of the panel's reasoning and conclusions, including the amount of any award. Panel decisions are subject to review under the grounds for vacating, modifying or correcting an award provided for by the Federal Arbitration Act.

Program Costs

At the August hearing, the Board members asked specifically about the costs of arbitration under our program. A major common goal of BNSF and the ProOrgs in creating the Montana ADR Program was to offer an avenue for resolving rate disputes that was efficient and low in cost. As part of our agreements with our pool of arbitrators, each arbitrator is paid an annual retainer of \$5000, which is split between BNSF and the ProOrgs. An arbitrator is paid \$200 a day for his/her work on a specific arbitration dispute. In the first instance, BNSF pays the JAMS filing and administrative fees as well as arbitrator fees when the annual retainer is exceeded, with the ProOrg reimbursing BNSF for such fees where relief is not awarded in the proceeding. BNSF and the ProOrgs jointly agreed to a "loser pays" structure to incentivize the parties to make the most of the mediation session and discourage abuse of the process through frivolous claims.

We believe that there are several additional features that contribute to the cost effectiveness of this program for the parties involved. As described in the section above, the proceedings are streamlined, with limited discovery and an accelerated schedule for providing evidence to the arbitration panel. In addition, the parties were also mindful at the outset of providing meaningful direction to the arbitrators by providing the specific standards to be applied in a dispute. BNSF and the Montana Producer Organizations, through extensive discussion, established a list of factors that the arbitration panel members are directed to address in determining whether a freight rate was eligible for a reduction. We believe that providing these mutually agreed to standards to the arbitrators enables them to perform their role in an expeditious way and issue decisions that the parties have confidence in. We were also mindful of establishing discovery and pleading procedures that required the participants to focus on providing the information that arbitrators need to have to carry out their analysis under the prescribed standards.

Finally, the leadership of the Montana Producer Organizations has a key, ongoing role in the ADR process. The ProOrg is responsible for pursuing the claim on behalf of its member, and as part of that representation, makes an initial threshold determination of whether a member's claim has merit. It is only after the ProOrg has determined that the claim has merit that the parties will advance to mediation and arbitration. This threshold determination by the ProOrgs ensures that the resources that the parties have put towards the ADR program are being directed towards resolving legitimate disputes. Their continued participation throughout the proceedings is also intended to incentivize all parties to adopt reasonable positions and make appropriate use of the procedural options provided for in the ADR program.

Key Attributes of Our Montana ADR Program

In BNSF's opening comments submitted in this proceeding on May 17, 2012, we identified 5 key attributes that we view as essential to a successful arbitration program. BNSF believes that these are the same attributes of our voluntary Montana ADR program that make it successful in the eyes of the Producer Organizations and their members, as well as BNSF.

- **Program covers a narrow, well-defined range of disputes.** The Montana ADR program was created to address a specific subset of disputes—transportation rate level

complaints by producer members of the ProOrgs who ship wheat or barley in Montana over certain minimum distances. Focusing on a specific constituency allowed the parties to capitalize on an existing history of collaboration and establish a program geared towards the type and scope of issues relevant to those parties.

- **Program provides clear guidelines for the decision-makers to resolve the dispute.** BNSF and the ProOrgs, through careful and thoughtful deliberation, established clear standards to be addressed by the arbitrators. The program rules list specific market-based factors that the arbitration panel members are directed to address in determining whether a freight rate is eligible for a reduction.
- **Program establishes criteria for selecting decision-makers that will be neutral and qualified.** Under the Montana program, a panel of three arbitrators is selected from a pool of arbitrators that has been established jointly by BNSF and the ProOrgs prior to any specific dispute arising. The arbitrators in the pool were selected by BNSF and the ProOrgs for their reputations, experience in the agricultural, marketing and transportation field and knowledge of the market conditions impacting the rail shipments covered by the program. In addition, all arbitrators are required to act fairly and impartially in reaching their decisions.
- **Program provides for an appropriate level of confidentiality.** The Montana program rules provide for confidential treatment of information submitted by the parties. The standard procedure is for the panel to issue a bulletin describing the identities of the parties, the involved origins and destinations, and a high-level summary of the panel's reasoning and conclusions, including the amount of any award, but the panel and the participants are given flexibility in terms of protecting confidential information submitted in the proceeding.
- **Program adopts a clear and meaningful standard of review of arbitration decisions.** Under the program rules, the panel is required to provide the parties with a reasoned written decision. All panel decisions are subject to review under the grounds for vacating, modifying or correcting an award provided for by the Federal Arbitration Act

In conclusion, BNSF appreciates the Board's interest in creating an arbitration program that will be viewed as fair to all parties and that provides a meaningful and attractive method for resolving disputes in an expeditious way. We also appreciate this opportunity to discuss our Montana ADR program and the attributes that we identified as essential to the creation of a program that meets many of those same goals.

Respectfully submitted,



Richard E. Weicher
BNSF Railway

CC: Chairman Daniel R. Elliott, III
Vice Chairman Francis P. Mulvey
Commissioner Ann D. Begeman