

Before the Surface Transportation Board

STB Docket No. EP 334 (Sub-No. 8A)

Joint Petition for Exemption of Arbitration Rule
from Application of 49 U.S.C. § 10706 and Motion to Dismiss

Motion to Strike
by the Railway Supply Institute

ENTERED
Office of Chief Counsel
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Part of
Public Record

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The Railway Supply Institute (RSI) moves to strike from the Association of American Railroads' (AAR) Update, filed in this proceeding on November 24, 2025, any mention of RSI's compromise proposals and statements by an RSI member (the proposals and statements, collectively, the Statements). RSI made the Statements during this matter's abeyance to reach a private resolution. Including the Statements violates the Board's evidentiary rules and the Federal Rules of Evidence. AAR's use of the Statements would chill future attempts by parties to privately resolve disputes before the Board and prejudices RSI and its members for seeking the private resolution the Board facilitated by holding this proceeding in abeyance.

I. Background

The Board held this proceeding in abeyance “to facilitate resolution of the dispute among interested stakeholders, rather than through a formal Board proceeding.”¹ The dispute concerns RSI's Petition, which asks the Board to reopen this proceeding, review the approval of Rule 25 of the Code of Car Hire under 49 U.S.C. § 10706, and either condition or terminate that approval. Although AAR opposed the Petition, its Equipment Assets Committee (EAC)—which oversees Rule 25—signaled it would review Rule 25 and allow interested parties to raise their concerns. RSI and its members participated in the EAC review, making proposals and statements to reach a compromise.

¹ *Joint Petition for Exemption of Arbitration Rule from Application of 49 U.S.C. § 10706 and Motion to Dismiss (Abeyance Order)*, EP 334 (Sub-No. 8A), slip op. at 2 (STB served Apr. 9, 2025).

After the EAC review process ended, AAR filed an “Update” to advise the Board on the results. In that filing, AAR used the Statements RSI made to the EAC, and the Technical Advisory Group that the EAC formed to conduct the review (the TAG), in substantive arguments against granting RSI’s Petition.

Specifically, to dispute RSI’s position that TTX’s rates strongly evidence Rule 25’s suppression of car hire,² AAR pointed to RSI’s compromise proposals to the EAC, which excluded using TTX’s rates in calculating default rates:

In any event, the proposal submitted by GBRX on behalf of RSI to the TAG (and later the EAC) for vote did not include the addition of TTX rates to the default rate calculation. In light of the foregoing, the TAG elected not to include TTX rates in the revised default calculation.³

Similarly, to dispute RSI’s argument for effective-market car hire rates for new and existing railcars,⁴ AAR used an RSI member’s statement from the TAG discussions:

One of RSI’s members explained to the EAC that his company’s “bottom line” would not be impacted by the changes to the default rate “for decades” unless the changes were applied to all cars, including existing equipment.⁵

II. Statement of Law

The Board accepts “[a]ny evidence which is sufficiently reliable and probative” to support a decision, or that is “admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters

² (RSI Petition at 14-15.)

³ (AAR Update at 10.)

⁴ (*See* RSI Petition at 8, 9, 15-17.)

⁵ (AAR Update at 11.)

not involving trial by jury in the courts of the United States. . . .”⁶ The Board construes this general rule “liberally to secure just, speedy and inexpensive determination of the issues presented.”⁷

Federal Rule of Evidence 408 governs the admissibility of compromise offers and statements in jury and non-jury trial before federal courts. It prohibits a party from using offers of “valuable consideration in . . . attempting to compromise the claim” or “conduct or [] statement[s] made during compromise negotiations about the claim” to “prove or disprove the validity . . . of a disputed claim.”⁸

III. Argument

The Board’s evidentiary rules are “more informal than the Federal Rules of Evidence; they permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3).”⁹ But even under this liberal construction, the Board should prohibit AAR from using the Statements.

A. The Statements are inadmissible under the Board’s rules and Federal Rule of Evidence 408.

The Statements occurred during compromise negotiations and do not reflect the merits of RST’s position. Both the Board’s standards and Federal Rule of Evidence 408 render the Statements inadmissible to prove or disprove the validity

⁶ 49 C.F.R. § 1114.1.

⁷ 49 C.F.R. § 1100.3.

⁸ Fed. R. Evid. 408(a).

⁹ *Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory Order*, FD 35496, slip op. at 3 (STB served Aug.18, 2024).

of RSI's claims. The reason is clear: Parties negotiate compromises to resolve disputes, not to admit weaknesses in their positions. As the advisory committee on Rule 408 recognized, offers and statements made during compromise negotiations "may be motivated by a desire for peace rather than from any concession of weakness of position."¹⁰

RSI proposed to exclude TTX from the default-rate calculation only to facilitate a mutually agreeable resolution. These proposals did not concede the merits of its position that TTX rates are strong evidence of Rule 25's suppressive effect on car hire. In fact, RSI first suggested removing TTX rates from the default-rate calculation at a critical moment in the TAG process—after all competing proposals had been submitted and a wide gulf existed between RSI's proposal and those from opposing parties.¹¹ RSI offered this as part of a compromise package that included concessions from opposing parties, not as an admission on the merits of its position.

Similarly, the RSI member made the statement about his company's bottom line while seeking a compromise through the TAG process. AAR improperly uses this statement to rebut RSI's position that it is merely seeking a fair effective-

¹⁰ Fed. R. Evid. 408 advisory committee's note.

¹¹ AAR contends that RSI's proposal via GBRX did not include TTX rates. (AAR Update at 10.) But the proposal was silent on the matter because RSI understood the contentiousness of it. The first time that RSI expressly suggested that it would exclude TTX rates was on October 13, when the TAG met to discuss all the proposals that had been submitted. Regardless, silent concession in a compromise offer before a forum for private resolution is not a statement about the strength of the merits.

market result. This cherry-picked statement says nothing about the merits of RSI's position. Instead, it conveys a member's frustration with the TAG dynamics that produced a resolution that fails to change the status quo, continuing to deprive car owners of an opportunity to earn an effective-market return.

Additionally, no Board rule requires disclosing to the Board RSI's proposals during the EAC process or its members' statements to the TAG. In *Albemarle Corporation – Alternative Rail Service –Line of The Louisiana and North West Railroad Company*,¹² the Board declined to strike certain settlement statements because a specific regulation required a summary of settlement discussions in that type of proceeding. No similar requirement applies here.

Further, AAR's use of the Statements does not fall within Rule 408's exception. Rule 408 allows a court to admit compromise offers and statements for a purpose other than proving or disproving a claim's validity or amount, or for impeachment.¹³ But AAR does not use the Statements for such other purposes. Instead, it improperly uses them to argue the merits of the EAC resolution against RSI's claims.

RSI made the Statements to reach an acceptable resolution through the EAC process, not to comment on the merits of its Petition. Thus, the Statements are neither reliable nor probative to the dispute before the Board. The Board should strike them from AAR's Update.

¹² STB Docket No. FD 34961 (STB served Oct. 6, 2006).

¹³ Fed. R. Evid. 408(b).

B. AAR's use of the statements undermines the Board's policy favoring private resolution.

The Board held this matter in abeyance because of its policy that “favors the private resolution of disputes as an alternative to its formal processes where possible.”¹⁴ Allowing AAR to rely on statements and proposals made by RSI and its members during the EAC and TAG processes directly undermines this policy.

The express purpose of the abeyance was that “[a]llowing the EAC review to proceed first could facilitate resolution of the dispute among interested stakeholders, rather than through a formal Board proceeding.”¹⁵ Through this review, collaboration among interested parties could “produce appropriate changes to the Rule that addresses RSI's concerns.”¹⁶

For the abeyance to succeed, the EAC process required candid, good-faith discussion to encourage a private resolution.¹⁷ If parties expect their statements to be used against them, they will not engage in the open discussions needed to resolve disputes without Board intervention. Allowing AAR to use the Statements against RSI would discourage parties in all disputes from engaging in the open and candid discussions necessary for private resolution.

In sum, AAR's use of the Statements undermines the Board's policy favoring

¹⁴ *Abeyance Order*, at 2 (citing *Assessment of Mediation & Arb. Procs.*, EP 699, slip op. at 1 (STB served Aug. 20, 2010)).

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982).

private resolution. Allowing this use will chill future attempts at private resolution across the entire spectrum of disputes before the Board.

C. Allowing AAR's use of the Statements prejudices RSI.

Allowing AAR to use the Statements as evidence would significantly prejudice RSI. This result would contradict the Board's stated intent that the abeyance "would promote efficiency and not be fundamentally unfair to any party."¹⁸

RSI participated in the EAC and TAG processes in good faith, relying on the Board's express policy favoring private resolution and the well-established principle that statements made during settlement negotiations should not be used as evidence on the merits of a dispute. In fact, RSI expressly noted on the proposals AAR now uses against it that they were for compromise discussions.

Allowing AAR to use RSI's proposals and member statements against it is fundamentally unfair. It would punish RSI for doing exactly what the Board envisioned: seeking a private resolution.

IV. Conclusion

The Statements are inadmissible under the Board's evidentiary standards and Federal Rule of Evidence 408 because they arose in compromise negotiations and do not address the merits of RSI's position. Admitting this evidence would contravene established rules, undermine the Board's policy favoring private resolution, and unfairly prejudice RSI. To protect the integrity of its proceedings

¹⁸ *Abeyance Order*, at 2.

and foster candid settlement discussions, the Board must strike the Statements from the record.

Respectfully submitted,

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Dated: December 15, 2025

Certificate of Service

I certify that I have this day served copies of this petition upon all parties of record in this proceeding by e-mail.

/s/ Richard M. Couch
Richard M. Couch

Dated: December 15, 2025