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Before the U.S. Surface Transportation Board

STB Ex Parte No. 699
Assessment of Mediation and Arbitration Procedures

Comments of the
U.S. Department of Agriculture

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Date: May 17, 2012

Authority and Interest

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

The ability to appeal rail rates and practices is important to agricultural shippers and producers. Agricultural producers typically receive a price for their products which is net of transportation and many are dependent upon rail transportation to move those products to international and domestic markets.

Comments

The Department of Agriculture (USDA) supports the Board's consideration of mediation and voluntary arbitration as potential lower cost alternatives for carriers and shippers to resolve disputes in a more amicable fashion than through more formal processes. A tangible benefit of a mediation or arbitration process which is perceived as fair by both parties is the likely preservation of business relationships. To this end, USDA applauds the Board for undertaking this proceeding.

From either a shipper's or carrier's perspective, whether bias actually exists within the system is irrelevant so long as it is believed to exist. Thus, if parties are to make use of the arbitration system, there must be assurances of fairness, neutrality, and openness to foster an atmosphere of trust. Creating a transparent arbitration process would signal such assurances.

Arbitration

USDA understands the potential benefits and the Board's desire to encourage greater use of its arbitration system. Agricultural shippers have a long-established, neutral, and successful arbitration system available for use in rail disputes. For those industries having an established arbitration system in place, USDA requests that the Board proactively preserve the shipper's option to have the dispute arbitrated in either venue. Without the Board's recognition and protection of existing arbitration systems, the proceeding could have the unintended result of diminishing or even discontinuing the use of a venue that agricultural shippers believe provides a fair and impartial resolution of certain rail disputes.

The proposed changes to the Board's arbitration rules are true to the spirit of providing value to both carriers and shippers through voluntary participation and simplification of the process. USDA also agrees with the Board that arbitration should be limited to matters "possessing monetary value but lacking policy significance." This will largely avoid the concern of keeping arbitration decisions consistent with past Board decisions. However, there are three characteristics of the proposed changes that do not provide maximum value to parties and may ultimately preclude greater use of the Board's arbitration process.

First, while the Board has proposed a single arbitrator because of its limited resources, it has asked for comments on approaches it could employ should parties opt for a panel of arbitrators. By allowing for a panel at the request of either party, parties would be more likely to accept arbitration as a viable solution. If the panel option is chosen, then having each party pay for one additional arbitrator would seem to be the most acceptable method to cover the additional costs. All arbitrators should be knowledgeable of the industries they represent instead of coming from legal or political backgrounds. In addition, it is important that all parties believe in the neutrality of the arbitrators maintained by the Board and the method in which they are chosen for individual cases. One method would be to have the Board choose arbitrators from a neutral source and let shippers and carriers have the option of each choosing an additional arbitrator.

Second, transparency in the arbitration process, accomplished by publishing the decisions that exclude proprietary information, would best serve the ideal of neutrality. If policy matters were arbitrated and able to affect precedent, then a confidential process may be necessary. However, given that the proposed arbitration is limited to non-policy matters and would set no precedents, an arbitration system that is transparent to the public would be in the best interest of demonstrating a commitment to neutrality. Such transparency could also have potential value in fostering an environment for improved business relationships among all players in the involved industries, and perhaps in informally communicating how changes in business practices were addressed in individual situations. In the short-run, interested parties would be less hesitant to use a system if they are able to review other arbitration decisions. Over the long-run, a system that is transparent will build trust in individual arbitrators as well as the entire process.

Third, the Board should consider including an appeals process for instances not involving a clear abuse of an arbitrator's authority or discretion. There are circumstances under which either party may wish to appeal an arbitrated decision. Without an effective avenue for appeal, the arbitration process may be avoided. One option for an appeals process would be to have a separate panel composed of more experienced arbitrators that only arbitrate appeals. This approach would make arbitration more desirable to parties while freeing the Board from becoming involved.

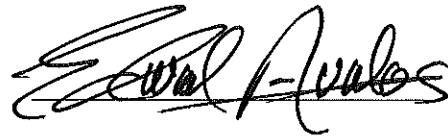
Arbitration Relief

The Board has invited comments concerning the \$200,000 cap on relief awarded through the arbitration process. The main concern with any arbitrary cap is that if set too low arbitration becomes an impracticable solution for seeking redress. Shipper groups have commented to USDA that rail related damages involving disputes subject to arbitration often exceed \$200,000. Therefore, the Board must choose a cap, if any, that reflects the true costs for which a party would seek remuneration in order to make the arbitration process practicable to the widest number of potential users.

Conclusion

All three of the points concerning arbitration address the same issue – building trust that the system will deliver an impartial decision. USDA believes that implementing these points will go a long way to foster individual parties' trust in the arbitration process, leading to an increase in arbitration as an effective method of settling differences. Nevertheless, in certain industries, such as agriculture, that already are served by an effective arbitration process, a party should continue to have the option of using that process in addition to any new process created by the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward Avalos", written in a cursive style.

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CERTIFICATE OF SERVICE

I, Bruce Blanton, certify that on this 17th day of May, 2012, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Docket Number EP 699.

A handwritten signature in blue ink, appearing to read "Bruce Blanton", is written over a horizontal line.

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