

BAKER & MILLER PLLC

242470

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037
TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ENTERED
Office of Proceedings
January 17, 2017
Part of
Public Record

Donald I. Baker
E-Mail: dbaker@bakerandmiller.com

(202) 663-7821 (Direct Dial)

January 17, 2017

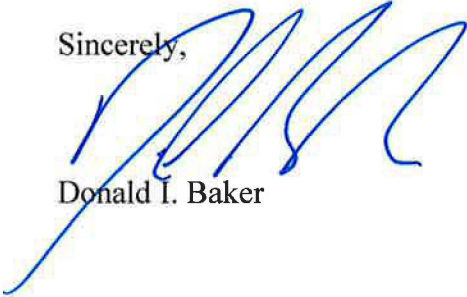
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W., Room 1034
Washington, DC 20006

Re: REVISIONS TO ARBITRATION PROCEDURES, EP 730 (SUB-NO. 1)

Dear Ms. Brown:

Please find attached my application for consideration for the Board's roster of arbitrators. As indicated in the attached information, I have a deep scholarly interest in arbitration and have been involved in cases involving arbitration and alternative dispute resolution intermittently for three decades, including arbitration cases involving railroads. If you have any additional questions, please do not hesitate to contact me by e-mail or telephone.

Sincerely,


Donald I. Baker

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EP 730 (SUB-NO. 1)

REVISIONS TO ARBITRATION PROCEDURES

**APPLICATION OF DONALD I. BAKER TO BE INCLUDED
ON SURFACE TRANSPORTATION BOARD'S ROSTER OF
ARBITRATORS**

January 17, 2017

**Donald I. Baker
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EP 730 (SUB-NO. 1)

REVISIONS TO ARBITRATION PROCEDURES

**APPLICATION OF DONALD I. BAKER TO BE INCLUDED
ON SURFACE TRANSPORTATION BOARD'S ROSTER OF
ARBITRATORS**

By decision served on December 2, 2016, the Board requested that all parties interested in being added to the Board's roster of arbitrators, submit an application for the Board's consideration by January 17, 2017.¹ The following information is in support of the application of Donald I. Baker.

Arbitrator's Name

Donald I. Baker
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Arbitration Experience and Rail Transportation Qualification

As explained herein, I am particularly well-qualified to serve on the Board's roster of Arbitrators because my arbitration experience and interest dates back thirty years; and, for the past thirteen years, I have assisted my partner, William A. Mullins, in providing antitrust, rail transportation and economic regulation advice to the firm's railroad clientele. Thus, I am not

¹ In a previous decision served on September 30, 2016, as corrected on October 11, 2016, the Board adopted rules to modify its arbitration procedures so that its regulations, set forth at 49 C.F.R. §§ 1108 and 1115.8, conform to the requirements of the Surface Transportation Reauthorization Act of 2015, Pub. L. No. 114-110 (2015) ("Act"). To comply with the requirements of the Act, the Board established rules for creating and maintaining a roster of arbitrators. See Revisions to Arbitration Procedures, EP 730, slip op. at 3-4 (STB served Oct. 11, 2016).

only qualified as an arbitrator, but I also have the in-depth railroad industry knowledge necessary to serve on the Board's roster of arbitrators as established by 49 C.F.R. § 1108.6(b).²

Early Experience With Arbitration

In 1984, I was commissioned to write a Supreme Court brief in an admiralty case (admiralty being a field in which arbitration had long been the preferred method of resolving private disputes).³ It was during that time that I developed a scholarly interest in alternative dispute resolution after realizing that arbitration had enormous practical potential for resolving technically complicated disputes with reasonable expeditious manner in fields where arbitration had not been used (e.g., federal antitrust and securities laws). Next, in 1985, the Supreme Court held for the first time that parties to a private antitrust dispute could be required to arbitrate their dispute, rather than try it before a jury in Federal Court.⁴

I first applied my scholarly interest to the real world in 1987, as lead counsel for a major banking joint venture network faced with a serious antitrust dispute over the network's right to set the fees its members could charge on ATM transactions.⁵ The parties agreed to arbitrate the dispute. The arbitration itself was complicated because it involved the attorneys establishing various trial processes (experts, etc) in the arbitration forum and selecting an arbitrator, on a very fast track schedule designed for completion in only a few months. Due to the procedural innovations in the arbitration case accomplished by those of us serving as attorneys/counselors in the case, we received a joint Special Award from the Center for Public Resources for advancements in the field of arbitration.

Additional Representative Examples of Arbitration Experience

In 1989, I was selected as an arbitrator in a dispute between Conrail and CSX over whether Conrail and Norfolk Southern Railway were violating the 1926 Potomac Yard Agreement when they routed some bypass traffic via an interchange at Hagerstown, MD.⁶ Resolution of this proceeding, involved examining questions of competition and public policy in the railroad industry, as well as construing the breadth of the anti-bypass provision in the Potomac Yard Agreement.

I also served as a lead counsel in at least two major international disputes that involved overlaps between arbitration and parallel federal court proceedings. One involved a question

² My office is located in Washington D.C., but I am willing to travel as necessary, so long as the parties pay all of my travel expenses.

³ Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. Cal. 1984), Cert denied Weyerhaeuser Co. v. Western Seas Shipping Co., 469 U.S. 1061 (U.S. 1984)

⁴ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

⁵ First Texas Sav. Ass'n v. Financial Interchange, 55 ANTITRUST & TRADE REG. REP. (BNA) 340 (1988).

⁶ To the best of my knowledge, there was no public report of the panel's decision.

over whether a major Japanese company had rigged prices on a product that the American company had depended on as an input.⁷ In 1994-97, I was lead counsel in a case involving a two track battle in which Coors Brewing Co. was challenging an agreement between two of its leading North American rivals as being inconsistent its licensing agreement with one of them and on antitrust grounds as well.⁸ I actively participated in the antitrust case in Denver and the non-public international arbitration in Toronto, where Coors ultimately prevailed in an unreported decision by the international panel.

Approximately three years ago, I served as an arbitrator in somewhat unusual circumstances. I was selected to serve as the sole arbitrator in resolving cost-allocation disputes (e.g., over expert witnesses' costs) under an elaborate cost-sharing agreement among counsel engaged in a major private antitrust case. To decide the recurring dispute that arose, I had to interpret memoranda and exhibits, hold short hearings via conference call, and issue an ongoing set of orders and opinions.

Alternative Dispute Resolution Articles and Appointments

I have written several articles on arbitrating complex disputes. The most comprehensive is, Arbitrating Antitrust Disputes: Opportunities and Hazards for Business Lawyers, 48 Bus. Lawyer 395-435 (1993). Additionally, I have given several speeches in the US and abroad on arbitrating antitrust disputes, looking at both practical issues and broader policy challenges.⁹ I am actively interested and involved in alternative dispute resolution processes, have served as a member of the Panel of Distinguished Neutrals (arbitrators, mediators, etc.) appointed by the Center for Public Resources ("CPR") and was also appointed by the CPR Legal Program to Develop Alternatives to Litigation. I have also been designated as an Arbitrator by the American Arbitration Association.

Summary of Transportation Experience

For the past thirteen years, I have assisted my partner, William A. Mullins, with providing advice to railroads, including The Kansas City Southern Railway Company, Norfolk Southern Railway Company, and Paducah & Louisville Railway. This advice generally focused on issues involving cooperation or conflicts regarding interchange among railroads, positive train control, fuel surcharges, TTX flat cars, terminal access issues, terminal and or merger related trackage rights, competitive issues in railroad mergers, land use and requirement contracts between railroads and shippers, cooperation over marketing between two merging carriers during

⁷ Union Carbide Corp. v. Komatsu Electric Metals, No. C-88-3852 FMS (N.D. Cal. 1988), settled without a decision.

⁸ Coors Brewing Co. v. Molson Brewing and Miller Brewing Co., 889 F.Supp. 1394 (D. Colo. 1995) (on antitrust jurisdiction vis-à-vis Miller), and 51 F.3d 1511 (10th Cir. 1995) (on arbitration responsibility vis-à-vis Molson).

⁹ E.g., "Arbitrating U.S. Antitrust Claims--A Challenge Likely to Involve Some Novel Issues", September 26, 2008 (Bern, Switzerland)

the pendency of the STB proceeding, possible joint ventures, and other similar railroad industry issues.

Professional Career Highlights:

- Former head in the Antitrust Division of the U.S. Department of Justice, nominated by President Gerald Ford.
- Co-founder of Baker & Miller PLLC (1995) an independent Washington firm specializing in antitrust, competition policy and international law issues that handles litigations, appeals, arbitrations, transactions and government civil and criminal investigations.
- I am the only modern member of the career Antitrust Division staff to be appointed Assistant Attorney General in Charge of the Antitrust Division. I started as a trial attorney and then became a Section Chief (1966-1971), later became Deputy Assistant Attorney General for Regulated Industries, Appeals and Foreign Commerce (1972-1975), before ultimately becoming Assistant Attorney General (1976-1977). In 1972, I was the first member of the Antitrust Division staff to receive the newly-created Attorney General's Distinguished Service Award. During this time in the government, I became a very active participant in successfully urging deregulation of US airlines, eliminating cartel pricing on stock exchanges, and in bringing the antitrust case that ultimately broke up the AT&T telephone monopoly. During my tenure at the Antitrust Division, I worked on a number of appellate cases involving challenges to decisions of the Interstate Commerce Commission.
- As an antitrust lawyer in Washington, my efforts have included all aspects of antitrust counseling; representing complainants as well as targets (or merger parties) in various government investigations; corporate internal investigations; major arbitrations; and several private antitrust cases for plaintiffs and defendants. Our firm's efforts have dealt with cartels, joint ventures, mergers, IP licensing, network disputes and international transactions. I have briefed and argued cases in the U.S. Supreme Court and several U.S. Courts of Appeal. I also represented the governments of Australia, Netherlands, Switzerland and the United Kingdom in briefing international jurisdictional issues before the US Supreme Court and Courts of Appeals.
- I am the co-author of two treatises that have been regularly reissued in the new editions—Baker & Brandel, The Law of Electronic Funds Transfer Systems and Rowley & Baker, International Mergers—The Antitrust Process. I have written articles and letters on politics, liberty issues and competition that have been published in The Financial Times, The Global Competition Review and other international publications.
- In 2011, I was one of ten individuals selected to receive the newly-created Antitrust Lifetime Achievement Award from the London-based Global Competition Review. In 2015, I was the recipient of the annually awarded Lifetime Achievement Award by the American Antitrust Institute.
- I have been a Fellow of the Aspen Institute since 2013.
- I was educated at (i) the Woodrow Wilson School, Princeton University; (ii) Corpus Christi College, University of Cambridge; and (iii) Harvard Law School.
- I served as a Professor of Law at Cornell Law School (1975-1978), where I taught courses on antitrust law, utility regulation, financial services regulation, and international

business transactions. Thereafter, I was a Washington partner of two major law firms (1978-1994), before starting Baker & Miller in 1995.

Other Relevant Information

I am a member of the following bars: Massachusetts (inactive) and District of Columbia. I am a member of the bars of the United States Court of Appeals for the sixth, ninth, and District of Columbia circuits. Lastly, I have been a member of the Bar for the U.S. Supreme Court, since 1972.

Additionally, my firm, Baker & Miller has three conference rooms available in our Washington, District of Columbia office, which could be used to conduct arbitrations.

My fees for arbitration work would normally be \$425 per hour, but they could potentially be adjusted by an agreement with the parties.

I would be happy to provide any additional information deemed necessary by the Board. Thank you for your consideration.

Sincerely,



Donald I. Baker
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

January 17, 2017